























CITE BY TITLE AND SECTION

**Thus**

**89 C.J.S. Trover and Conversion § 14**

# CORPUS JURIS SECUNDUM

A COMPLETE RESTATEMENT OF THE ENTIRE  
AMERICAN LAW  
AS DEVELOPED BY  
ALL REPORTED CASES

By  
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# EXPLANATION

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THE object in view in preparing *Corpus Juris Secundum* has been twofold: First, to provide a complete encyclopedic treatment of the whole body of the law, which means that it must be based upon all the reported cases; Second, to present each title of the law in form and content most suitable as a means of practical reference for the Bench and Bar.

*Corpus Juris Secundum* is therefore a complete restatement of the entire body of American Law. The clear-cut and exhaustive propositions comprising the text are supported by all the authorities from the earliest times to date. The supporting case citations, conspicuously set out in the notes, point to all decisions handed down since the publication of *Corpus Juris*. When the searcher may wish to consult earlier authorities, a specific reference to *Corpus Juris* makes available all cases back to 1658.

Each title is preceded by a complete section analysis, greatly simplified to facilitate research. Where the scope of any section is such as to require it, a more minute analysis is found thereunder in its appropriate place within the title (see Abatement and Revival, Section 112). The convenience of this method—an innovation in encyclopedic writing—must immediately commend itself.

A concise black-letter summary, indicative of its scope, precedes the full treatment or statement of the law under each section. These introductory summaries, concise and free from interlineation of authorities, have proven of great convenience and value in legal research.

An index is found in the back of each volume covering the titles contained therein, thus providing another convenient means of ready access to the text and notes.

*Corpus Juris Secundum* is kept to date by means of annual cumulative pocket parts for each volume. This feature of supplementation which has proved so successful in modern digests and statutes conveniently, and with certainty, keeps each title constantly to date through current cases and new precedents.

*Corpus Juris Secundum* represents the combined products of the highest editorial talent and manufacturing skill. Its many excellent editorial features are fittingly accompanied by corresponding innovations and improvements in mechanical arrangement, typography, and design, which the publisher believes will commend themselves to the profession as representing a new standard in legal publications.

THE PUBLISHERS



# TABLE OF ABBREVIATIONS

## REPORTS AND TEXTBOOKS

<b>A</b>	<b>A</b>	Am.L.J.N.S.	American Law Journal New Series (Pa.)
A.2d	Atlantic Reporter	Am.L.Rec.	American Law Record (Ohio)
Abb.	Atlantic Reporter Second Series	Am.L.Reg.	American Law Register
Abb.Adm.	Abbott (U.S.)	Am.L.Reg.N.S.	American Law Register New Series
Abb.App.Dec.	Abbott's Admiralty (U.S.)	Am.Law Reg.O.S.	American Law Register Old Series
Abb.Dec.	Abbott's Appeals Decisions (N.Y.)	Am.L.Rev.	American Law Review
Abb.N.Cas.	Abbott's Decisions (N.Y.)	Am.L.T.Bankr.	American Law Times Bankruptcy Reports
Abb.Pr.	Abbott's New Cases (N.Y.)		American Law Institute, Restatement of the Law
Abb.Pr.N.S.	Abbott's Practice (N.Y.)	Am.Law Inst.	American Negligence Cases
A'Beck.Res.	Abbott's Practice New Series (N.Y.)	Am.Negl.Cas.	American Negligence Reports
Judgm.	A'Beckett's Reserved Judgments (Vict.)	Am.Negl.R.	Armstrong, Macartney & Ogilvie (Ir.)
[1917]A.O.	[1917] Appeal Cases (Can.)	A.M.&O.	American Probate
[1918]A.O.	Law Reports [1918] Appeal Cases (Eng.)	Am.Prob.N.S.	American Probate New Series
Acton	Acton (Eng.)	Am.Pr.	American Practice
Adams	Adams Reports (N.H.)	Am.R.	American Reports
Add.	Addison (Pa.)	Am.R.&Corp.	American Railroad & Corporation
Add.Eccl.	Addams' Ecclesiastical (Eng.)	Am.R.Rep.	American Railway Reports
A.&E.	Adolphus & Ellis (Eng.)	Am.S.R.	American State Reports
A.&E.Enc.L.	American & English Encyclopedia of Law	Am.St.R.D.	American Street Railway Decisions
A.&E.Enc.L.&Pr.	American & English Encyclopedia of Law & Practice	And.	Anderson (Eng.)
Aik.	Aikens (Vt.)	Andr.	Andrews (Eng.)
A.K.Marsh.	A. K. Marshall (Ky.)	Ann.Cas.	American & English Annotated Cases
Ala.	Alabama	Ann.Cas.1912A	American Annotated Cases 1912A, et seq.
Ala.App.	Alabama Appellate Court	Anstr.	Anstruther (Eng.)
Alaska	Alaska	Anth.N.P.	Anthon's Nisi Prius (N.Y.)
Alb.L.J.	Albany Law Journal	App.D.C.	Appeal Cases (D.C.)
A.L.C.	American Leading Cases	App.Cas.	Law Reports Appeal Cases (Eng.)
Alc.&N.	Alcott & Napier (Eng.)	App.Div.	Appellate Division (N.Y.)
Alc.Reg.Cas.	Alcock's Registry Cases (Eng.)	Ariz.	Arizona
Aleyn	Aleyn (Eng.)	Ark.	Arkansas
Alison Fr.	Alison's Practice (Sc.)	Ark.Just.	Arkley's Justiciary (Sc.)
Allen	Allen (Mass.)	Arn.	Arnold (Eng.)
Allen (N.B.)	Allen, New Brunswick	Arn.&H.	Arnold & Hodges (Eng.)
Alta.L.	Alberta Law	Ashm.	Ashmead (Pa.)
A.L.R.	American Law Reports	Aspin.	Aspinall's Maritime Cases (Eng.)
A.L.R.2d	American Law Reports, Second Series	Atk.	Atkyn (Eng.)
Am.Bankr.	American Bankruptcy (U.S.)	Austr.C.L.R.	Commonwealth Law Reports, Australia
Ambl.	Ambler (Eng.)	Austr.Jur.	Australian Jurist
A.M.C.	American Maritime Cases	Austr.L.T.	Australian Law Times
Am.Corp.Cas.	American Corporation Cases		
Am.Cr.	American Criminal		
Am.D.	American Decisions		
Am.&E.Corp.Cas.	American & English Corporation Cases		
Am.&E.Corp.Cas. N.S.	American & English Corporation Cases New Series		
Am.&Eng.Ency. Law	American and English Encyclopedia of Law		
Am.&E.Eq.D.	American & English Decisions in Equity		
Am.&Eng.Pat. Cas.	American and English Patent Cases		
Am.&Eng.R.R. Cas.	American and English Railroad Cases		
Am.Electr.Cas.	American Electrical Cases		
Am.&E.R.Cas.	American & English Railroad Cases		
Am.&E.R.Cas.N. S.	American & English Railroad Cases New Series		
Am.J.Int.L.	American Journal of International Law		
Am.L.J.	American Law Journal (Pa.)		
C.J.S.			
		Bacon Abr.	Bacon's Abridgment (Eng.)
		Barl.Eq.	Bailey's Equity (S.C.)
		Barl.	Bailey's Law (S.C.)
		B.&Ad.	Barnewall & Adolphus (Eng.)
		B.&Ald.	Barnewall & Alderson (Eng.)
		Baldw.	Baldwin (U.S.)
		Balf.Pr.	Balfour's Practice (Sc.)
		Ball.&B.	Ball & Beatty (Ir.)
		Bank.&Ins.R.	Bankruptcy and Insolvency Reports (Eng.)
		Bann.	Bannister (Eng.)
		Bann.&A.	Banning & Arden (U.S.)
		Barb.	Barbour (N.Y.)
		Barb.Ch.	Barbour's Chancery (N.Y.)
		B.&Arn.	Barron & Arnold (Eng.)
		Barn.	Barnardiston King's Bench (Eng.)
		Barn.Ch.	Barnardiston Chancery (Eng.)
		Barnes	Barnes' Practice Cases (Eng.)
		Barnes Notes	Barnes' Notes (Eng.)
		Batty	Batty (Ir.)
		B.&Aust.	Barron & Austin (Eng.)
		Baxt.	Baxter (Tenn.)
		Bay	Bay (S.C.)
		B.&B.	Broderip & Bingham (Eng.)
		B.C.	British Columbia

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B.&Macn.  
B.D.&O.  
Beatty  
Beav.  
Beav.&Wal.Ry.  
Cas.  
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Keble	Keble (Eng.)	L.J.Ch.	Law Journal Chancery New Series (Eng.)
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Kell	Kellway (Eng.)	L.J.C.P.	Law Journal Common Pleas New Series (Eng.)
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Kelly	Kelly (Ga.)	L.J.Exch.	Law Journal Exchequer New Series (Eng.)
Kelyng, J.	Kelyng's English Crown Cases	L.J.Exch.O.S.	Law Journal Exchequer Old Series (Eng.)
Kelyngs, W.	Kelyng's Chancery (Eng.)	L.J.K.B.	Law Journal King's Bench New Series (Eng.)
Keyes	Keyes (N.Y.)	L.J.K.B.O.S.	Law Journal King's Bench Old Series (Eng.)
K.&G.	Keane & Grant (Eng.)	L.J.M.C.	Law Journal Magistrate Cases New Series (Eng.)
Kilk.	Kilkerran's Decisions (Sc.)	L.J.M.C.O.S.	Law Journal Magistrate Cases Old Series (Eng.)
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Knapp	Knapp (Eng.)	L.J.P.D.&Adm.	Law Journal Probate Divorce & Admiralty New Series (Eng.)
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Knox	Knox (N.S.Wales)	L.J.Rep.	Law Journal Reports (Eng.)
Knox&F.	Knox & Fitzhardinge (N.S.Wales)	L.&G.Gt.Pi.	Lloyd & Gould temp. Plunket (Ir.)
Kulp	Kulp (Pa.)	L.&G.C.S.	Lloyd & Gould temp. Sugden (Ir.)
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 Palmer (Eng.)  
 Pennsylvania Record  
 Parker (Eng.)  
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 Parker's Exchequer (Eng.)  
 Parker's Insurance (Eng.)  
 Parsons' Equity Cases (Pa.)  
 Pennsylvania Superior Court  
 Patton's Appeal Cases (Sc.)  
 Patrick's Election Cases (Can.)  
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 Law Reports Probate Division (Eng.)  
 Peake & Davison (Eng.)  
 Peake's N.P. Peake's Nisi Prius (Eng.)  
 Pearce C.C. Pearce's Reports in Dearnly's (Eng.)  
 Pearson Pearson (Pa.)  
 Peck Peck (Tenn.)  
 Peckwell's Election Cases (Eng.)  
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 Penrose & Watts (Pa.)  
 Perry & Knapp Election Cases (Eng.)  
 Peters (U.S.)  
 Peters' Admiralty (U.S.)  
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 Phillips (Eng.)  
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 Philippine  
 Phillimore Ecclesiastical (Eng.)  
 Pickering (Mass.)  
 Pigott & Rodwell (Eng.)  
 Pigott's Recoveries (Eng.)  
 Pinney (Wis.)  
 Pittsburgh (Pa.)  
 Pittsburgh Legal Journal (Pa.)  
 Pittsburgh Legal Journal New Series (Pa.)  
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 Pollexfen (Eng.)  
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 Puerto Rico Federal  
 Powers' Surrogate (N.Y.)  
 Power, Rodwell & Dew's Election Cases (Eng.)  
 Precedents in Chancery (Eng.)  
 Prince Edward Island  
 Price (Eng.)  
 Price's Practice Cases (Eng.)  
 Priddle & Cole (Eng.)  
 Law Reports, Probate Division (Eng.)  
 Probate Reports (Eng.)

# TABLE OF ABBREVIATIONS

IV

Fr.Rep.  
P.Wms.  
P.U.R.  
Pyke

Practice Reports (Eng.)  
Peere-Williams (Eng.)  
Public Utilities Reports  
Pyke (Can.)

## Q

Q.B.  
[1891]Q.B.  
Q.B.D.  
Queenal.J.P.  
Queenal.L.  
Queensl.L.J.  
Que.L.  
Que.Pr.  
Que.Q.B.  
Que.Rev.Jud.  
Que.Super.  
Quincy

Queen's Bench (Adolphus & Ellis New Series) (Eng.)  
Law Reports [1891] Queen's Bench (Eng.)  
Law Reports Queen's Bench Division (Eng.)  
Queensland Justice of the Peace  
Queensland Law  
Queensland Law Journal  
Quebec Law  
Quebec Practice  
Quebec Official Reports Queen's Bench  
Quebec Revised Judicial  
Quebec Official Reports Superior Court  
Quincy (Mass.)

## R

Rand.  
Rap.Jud. Q.C.S.  
Rawle  
R.C.L.  
R.&Can.Cas.  
R.&Can.Tr.Cas.  
Redf.  
Redf.&B.  
Redf.R.Cas.  
Redf.Surr.  
Reeve Eng.L.  
Reports  
Reprint  
Rpt.t.Finch  
Rpt.t.Hard.  
Rpt.t.Holt  
Res.&Eq.Judgm.  
Rev.Crit.  
Rev.de Jur.  
Rev.de Legis.  
Rev Leg.  
Rev.Leg.N.S.  
Rev.Rep.  
R.I.  
Rice  
Rich.  
Rich.C.P.  
Ridge.  
Ridge Ap.  
Ridge.L.&S.  
Ridge.P.C.  
Ridge.t.Hardw.  
Riley  
R.M.  
R.M.Charlitt.  
Rob.  
Rob.  
Robb Pat.Cas.  
Robert.App.Cas.  
Rob.Eccl.  
Robin.App.Cas.  
Rob.Wm Adm.  
Rolle  
Rolle Abr.  
Rolle (t.Rep.  
Rom.Cas.  
Root  
Root  
Ross Lead.Cas.  
R.&R.  
Russ.

Randolph (Va.)  
Rapport's Juridiques de Quebec Cour Superieure  
Rawle (Pa.)  
Ruling Case Law  
Railway & Canal Cases (Eng.)  
Railway & Canal Traffic Cases (Eng.)  
Redfield's Surrogate (N.Y.)  
Redfield & Bigelow's Leading Cases (Eng.)  
Redfield's Railway Cases (Eng.)  
Redfield's Surrogate (N.Y.)  
Reeve's English Law Reports (Eng.)  
English Reprint  
Cases temp. Finch (Eng.)  
Lee's Reports tempore Hardwicke (Eng.)  
Reports tempore Holt (English Cases of Settlement)  
Reserved & Equity Judgments (N.S. Wales)  
Revue Critique (Can.)  
Revue de Jurisprudence (Can.)  
Revue de Legislation (Can.)  
Revue Legale (Can.)  
Revue Legale New Series (Can.)  
Revised Reports (Eng.)  
Rhode Island  
Rice (S.C.)  
Richardson (S.C.)  
Richardson's Practice Common Pleas (Eng.)  
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Ridgeway's Appeal (Ir.)  
Ridgeway, Lapp & Schoale (Ir.)  
Ridgeway's Parliament Cases (Ir.)  
Ridgeway temp. Hardwicke (Eng.)  
Riley (N.C.)  
Ryan & Moody (Eng.)  
R. M. Charlton (Ga.)  
Robinson (Ia.)  
Robinson (Va.)  
Robb's Patent Cases (U.S.)  
Robertson's Appeal Cases (Sc.)  
Robertson's Ecclesiastical (Eng.)  
Robinson's Appeal Cases (Sc.)  
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Rolle's Court Reports  
Romilly's Notes of Cases (Eng.)  
Root (Conn.)  
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Ross' Leading Cases (Eng.)  
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Russ.&O.Eq.Cas.  
Russ.Eq.Cas.  
Russ.&Gold.  
Russ.&M.  
Ry.&M.

Russell's & Chesley's Equity Cases (N.S.)  
Russell's Equity Cases (N.S.)  
Russell & Goldart, Nova Scotia  
Russell & Mylne (Eng.)  
Ryan & Moody (Eng.)

## S

Salk.  
Sandf.  
Sandf.Ch.  
Sask.L.  
Saund.  
Saund.&C.  
Sau.&Sc.  
S.Austr.L.  
Sav.  
Sawy.  
Saxt.  
Say.  
S.C.  
[1897]S.C.  
Scam.  
S.C.Eg.  
Sch.&Lef.  
Sch.Leg.Rec.  
Sch.Reg.  
[1897]S.C.(J.)  
Sc.Jur.  
S.C.L.  
Sc.L.Rep.  
Scot.L.T.  
Scott  
Scott N.R.  
Scr.L.T.  
Sc.Sess.Cas.  
S.Ct.  
S.D.  
S.F.  
S.E.2d  
Searle & Sm.  
Sel.Cas.Ch.  
Seld.  
Selden  
Selw.  
Serg.&R.  
Sess.Cas.  
Shan.  
Shaw  
Shaw & D.  
Shaw Dec.  
Shaw, Dunl.&B.  
Shaw&M.  
Sheld.  
Shep.Abr.  
Sheph.Sel.Cas.  
Shower.  
Shower.P.O.  
Sid.  
Silv.A.  
Silv.Sup.  
Sim.  
Sim.N.S.  
Sim.&St.  
Skin.  
Smale&G.  
Smith  
Smith  
Smith&B.  
Smith K.B.  
Smith Lead.Cas.  
Smith Reg.  
Sm.&M.  
Sm.&M.Ch.  
Smythe  
Sneed  
So.  
So.2d  
Sol.J.  
Som.Leg.J.  
Sp.  
Spinks  
Spinks

Salkeld (Eng.)  
Sandford's Superior Court (N.Y.)  
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Saskatchewan Law  
Saunders (Eng.)  
Saunders & Cole (Eng.)  
Sausse & Scully (Ir.)  
South Australia Law  
Saville (Eng.)  
Sawyer (U.S.)  
Saxton (N.J.)  
Sayer (Eng.)  
South Carolina  
Court of Session Cases (Sc.)  
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South Carolina Law  
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Scott (Eng.)  
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Scotch Court of Session Cases  
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South Dakota  
South Eastern Reporter  
South Eastern Reporter Second Series  
Searle & Smith (Eng.)  
Select Cases in Chancery (Eng.)  
Selden's Notes (N.Y.)  
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Shaw, Dunlop & Bell (Sc.)  
Shaw & MacLean (Sc.)  
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Shower (Eng.)  
Shower's Parliament Cases (Eng.)  
Siderfin (Eng.)  
Silvernall's Appeals (N.Y.)  
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Simons (Eng.)  
Simons New Series (Eng.)  
Simons & Stuart (Eng.)  
Skinner (Eng.)  
Smale & Giffard (Eng.)  
Smith (Ind.)  
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Smith & Batty (Ir.)  
Smith's King's Bench (Eng.)  
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Sneed (Tenn.)  
Southern Reporter  
Southern Reporter Second Series  
Solicitor's Journal (Eng.)  
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Spinks Admiralty (Eng.)  
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Spinks, P.C.  
 Spottisaw.  
 Spottisaw.Eq.  
 Sprague  
 Stair  
 Stark.  
 Stat. at L.  
 Stew.  
 Stew.  
 Stew.&P.  
 Stockt. Vice-Adm.  
 Story  
 Str.  
 Strob.  
 Stuart Vice-Adm.  
 Stu.M.&P.  
 Style  
 Sunn.  
 Susq.Leg.Chron.  
 S.W.  
 S.W.2d  
 Swab.  
 Swab.&Tr.  
 Swan  
 Swanat.

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 Stair (Sc.)  
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 Story (U.S.)  
 Strange (Eng.)  
 Strobhart (S.C.)  
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 Susquehanna Legal Chronicle (Pa.)  
 South Western Reporter  
 South Western Reporter Second Series  
 Swaby's Admiralty (Eng.)  
 Swaby & Tristram (Eng.)  
 Swan (Tenn.)  
 Swanston (Eng.)

## T

Taml.  
 Tancy  
 Tapp.  
 Taunt.  
 Taylor  
 T.B.Mon.  
 Tenn.  
 Tenn.App.  
 Tenn.Cas.  
 Tenn.Ch.  
 Tenn.Ch.A.  
 Tenn.Civ.A.  
 Terr.L.  
 Tex.  
 Tex.App.  
 Tex.A.Civ.Cas.  
 Tex.Civ.App.  
 Tex.Cr.  
 Tex.Supp.  
 Tex.Unrep.Cas.  
 Thach.Cr.  
 Thompson & C.  
 Thomps.Cas.  
 Tinw.  
 T.Jones  
 T.L.R.  
 T.M.R.  
 T.&M.  
 Toth.  
 T.R.  
 Transer.A.  
 T.Raym.  
 Trend.Const.  
 Treas.Dec.  
 Tr. & H.Pr.  
 Trint.T.  
 Trueman.Eq.Cas.  
 Tuck.Sel.Cas.  
 Tuck.Surr.  
 T.U.P.Charlt.  
 Turn.&R.  
 Tyler  
 Tyrw.  
 Tyrw.&G.

Tamlyn (Eng.)  
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 T. H. Monroe (Ky.)  
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 Unreported Tennessee Cases  
 Tennessee Chancery  
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 Texas  
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 Treadway Constitutional (S.C.)  
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 T. U. P. Charlton (Ga.)  
 Turner & Russell (Eng.)  
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 Tyrwhitt (Eng.)  
 Tyrwhitt & Granger (Eng.)

## U

U.C.  
 U.C.Ch.  
 U.C.Cham.  
 U.C.C.P.  
 U.C.E.&A.  
 U.C.K.B.

Upper Canada  
 Upper Canada Chancery  
 Upper Canada Chamber  
 Upper Canada Common Pleas  
 Upper Canada Error and Appeal  
 Upper Canada King's Bench Reports

U.C.Q.B.  
 U.C.Q.B.O.S.  
 U.S.  
 U.S.App.D.C.  
 U.S.A. Aviation Rep.  
 U.S.C.A.  
 Utah

Upper Canada Queen's Bench  
 Upper Canada Queen's Bench Old Series  
 United States  
 United States Appeal Cases (D.C.)  
 Aviation Reports (U.S.)  
 United States Code Annotated  
 Utah

## V

Va.  
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 Va.Ch.Dec.  
 Va.Dec.  
 Van Ness Prize  
 Cas.  
 Vaughn.  
 Vaux  
 Vent.  
 Vern.  
 Vern.Ch.  
 Vern.&S.  
 Ves.  
 Ves.&B.  
 Ves.Jr.  
 Ves.Jr.Supp.  
 Ves.Supp.  
 Vict.  
 Vict.L.  
 Vict.L.T.  
 Vict.Rep.  
 Vict.St.Tr.  
 Vin.Abr.  
 Virgin Islands  
 Vt.

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 Vesey Senior Supplement (Eng.)  
 Victorian  
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 Victorian Law Times  
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 Viner's Abridgment (Eng.)  
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 Vermont

## W

Walk.  
 Walk.  
 Wall.  
 Wall.C.C.O.  
 Wall.Jr.  
 Wall.Sr.  
 Wallis  
 Ware  
 Wash.  
 Wash.2d  
 Wash.  
 Wash.St.  
 Wash.C.C.  
 Wash.Co.  
 Wash.T.  
 Watts  
 Watts&S.  
 W.Bl.  
 W.C.C.  
 Webb, A.B.&W.L.  
 P.&M.  
 Web.Pat.Cas.  
 Welsh  
 Wend.  
 West  
 West.Co.L.J.  
 West.L.J.  
 West.L.Month.  
 West.L.R.  
 West.L.T.  
 West.R.  
 West t.Hardw.  
 West.Wkly.  
 [1917] West.Wkly.  
 Whart.  
 Wheat.  
 Wheel.Cr.  
 White&T.Lead.  
 Cas.Eq.  
 Whitm.Pat.Cas.  
 Wight.

Walker (Pa.)  
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 Wallace (U.S.)  
 Wallace Junior (U.S.)  
 Wallace Senior (U.S.)  
 Wallis (Ir.)  
 Ware (U.S.)  
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 Webster's Patent Cases (Eng.)  
 Welsh Registry Cases (Ir.)  
 Wendell (N.Y.)  
 West (Eng.)  
 Westmoreland County Law Journal (Pa.)  
 Western Law Journal (Oh.)  
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 White & Tudor's Leading Cases in Equity (Eng.)  
 Whitman's Patent Cases (U.S.)  
 Wightwicke (Eng.)

Wilcox	Wilcox (Pa.)	Words & Phrases	Words & Phrases
Willes	Willes (Eng.)	Wright	Wright (Oh.)
Wilm.	Wilmot's Notes (Eng.)	W.Rob.	William Robinson's Admiralty (Eng.)
Wils.	Wilson (Ind.)	Wr.Pa.	Wright (Pa.)
Wils.Ch.	Wilson's Chancery (Eng.)	W.Va.	West Virginia
Wils.C.P.	Wilson's Common Pleas (Eng.)	W.W.Harr.	W. W. Harrington (Del.)
Wils.Exch.	Wilson's Exchequer (Eng.)	W.W.&D.	Willmore, Wollaston & Davidson (Eng.)
Wils.P.C.	Wilson's Privy Council (Eng.)	W.W.&H.	Willmore, Wollaston & Hodges (Eng.)
Wils.&S.	Wilson & Shaw (Sc.)	Wyo.	Wyoming
Winch	Winch (Eng.)	Wythe	Wythe's Chancery (Va.)
Winst.	Winston (N.C.)	Wy.&W.	Wyatt & Webb (Vict.)
Wis.	Wisconsin	Wy.W.&A'Beck.	Wyatt, Webb & A'Beckett (Vict.)
W.Jones	William Jones (Eng.)		
W.Kel.	William Kelynge (Eng.)		
Wkly.L.Gaz.	Weekly Law Gazette (Oh.)		
Wkly.N.C.	Weekly Notes of Cases (Pa.)		
Wkly.Rep.	Weekly Reporter (Eng.)		
Wms.Saund.	Williams Notes to Saunders' Reports		
W.N.	Weekly Notes (Eng.)		
Wolf.&B.	Wolferstan & Bristow's Election Cases (Eng.)		
Wolf.&D.	Wolferstan & Dew's Election Cases (Eng.)		
Woll.	Wollaston (Eng.)		
Woodb.&M.	Woodbury & Minot (U.S.)		
Woods	Woods (U.S.)		
Woodw.	Woodward's Decisions (Pa.)		
Woolw.	Woolworth (U.S.)		

## Y

Yates Sel.Cas.	Yates Select Cases (N.Y.)
Y.B.	Year Book (Eng.)
Y.&C.Exch.	Young & Culler's Exchequer (Eng.)
Y.&Coll.	Young & Culler's Chancery (Eng.)
Yates	Yates (Pa.)
Yelv.	Yelverton (Eng.)
Yerg.	Yerger (Tenn.)
Y.&J.	Young & Jervis (Eng.)
York Leg.Rec.	York Legal Record (Pa.)
Young Adm.	Young's Admiralty Decisions (N.S.)
Young	Young Exchequer (Eng.)

## LAW REVIEWS AND LAW JOURNALS

A.B.A.Jour.	American Bar Association Journal	Ma.L.Rev.	Maryland Law Review
Ala.L.Rev.	Alabama Law Review	Mass.L.Q.	Massachusetts Law Quarterly
Albany L.Rev.	Albany Law Review	Mercer, Beasley	
Am.J.Int.Law	American Journal of International Law	L.Rev.	Mercer, Beasley Law Review
Am.Law S.Rev.	American Law School Review	Miami L.Q.	Miami Law Quarterly
Ark.L.Rev.	Arkansas Law Review	Mich.L.Rev.	Michigan Law Review
Aust.L.J.	Australian Law Journal	Minn.L.Rev.	Minnesota Law Review
B.U.L.Rev.	Boston University Law Review	Miss.L.J.	Mississippi Law Journal
Brooklyn L.Rev.	Brooklyn Law Review	Mo.L.Rev.	Missouri Law Review
Calif.L.Rev.	California Law Review	Montana L.Rev.	Montana Law Review
Camh.L.J.	Cambridge Law Journal	Neb.L.B.	Nebraska Law Bulletin
Chi-Kent Rev.	Chicago-Kent Review	N.J.L.J.	New Jersey Law Journal
Colum.L.Rev.	Columbia Law Review	N.J.L.Q.Rev.	New Jersey Law Review
Com.L.J.	Commercial Law Journal	N.Y.U.L.Q.Rev.	New York University Law Quarterly Review
Cornell L.Q.	Cornell Law Quarterly	Notre Dame Law	Notre Dame Lawyer
Detroit L.Rev.	Detroit Law Review	N.C.L.Rev.	North Carolina Law Review
Dick.L.Rev.	Dickinson Law Review	Okla.L.Rev.	Oklahoma Law Review
Fed.B.A.J.	Federal Bar Association Journal	Oreg.L.Rev.	Oregon Law Review
Fla.L.J.	Florida Law Journal	Phil.L.J.	Philippine Law Journal
Fordham L.Rev.	Fordham Law Review	Rocky Mt.L.Rev.	Rocky Mountain Law Review
Geo.Wash.L.Rev.	George Washington Law Review	Rutgers U.L.Rev.	Rutgers University Law Review
Geo.L.J.	Georgetown Law Journal	St. John's L.Rev.	St. John's Law Review
Harv.L.Rev.	Harvard Law Review	St. Louis L.Rev.	St. Louis Law Review (now Washington University Law Quarterly)
Ia.L.Rev.	Iowa Law Review	So.Calif.L.Rev.	Southern California Law Review
Idaho L.J.	Idaho Law Journal	Southwestern L.J.	Southwestern Law Journal
Ill.L.Rev.	Illinois Law Review	Stanford L.Rev.	Stanford Law Review
Ind.L.J.	Indiana Law Journal	Temp.L.Q.	Temple Law Quarterly
J.Am.Jud.Soc.	Journal of the American Judicature Society	Tenn.L.Rev.	Tennessee Law Review
J.Comp.Leg.	Journal of the Society of Comparative Legislation	Tex.L.Rev.	Texas Law Review
J.N.A.Referees Bank.	Journal of the National Association of Referees in Bankruptcy	Tul.L.Rev.	Tulane Law Review
J.Soc.Pub.Teach. Law	Journal of the Society of Pub. Teachers of Law	U.Chl.L.Rev.	University of Chicago Law Review
John Marshall L. Q.	The John Marshall Law Quarterly	U.Cin.L.Rev.	University of Cincinnati Law Review
Kan.City L.Rev.	Kansas City Law Review	U.Detroit L.J.	University of Detroit Law Journal
Kan.St.L.J.	Kansas State Law Journal	U.Florida L.Rev.	University of Florida Law Review
Ky.L.J.	Kentucky Law Journal	U.Kan.City L.Rev.	University of Kansas City Law Review
L.J.	Law Journal	U.Pa.L.Rev.	University of Pennsylvania Law Review
L.Lib.J.	Law Library Journal	U. of Pitts.L.Rev.	University of Pittsburgh Law Review
Law Q.Rev.	Law Quarterly Review	U.Toronto L.J.	University of Toronto Law Journal
Law Ser.Mo.Bull.	University of Missouri Bulletin, Law Series	Vanderbilt L.Rev.	Vanderbilt Law Review
Law Soc.J.	Law Society Journal	Va.L.Rev.	Virginia Law Review
Lincoln L.Rev.	Lincoln Law Review	Wash.L.Rev.	Washington Law Review
La.L.Rev.	Louisiana Law Review	Wash.U.L.Q.	Washington University Law Quarterly
Loyola L.Rev.	Loyola Law Review	Wash.& Lee L.Rev.	Washington and Lee Law Review
Marq.L.Rev.	Marquette Law Review	W.Va.L.Q.	West Virginia Law Quarterly and The Bar
		Wis.L.Rev.	Wisconsin Law Review
		Wyo.L.J.	Wyoming Law Journal
		Yale L.J.	Yale Law Journal





# LIST OF TITLES

## IN

### CORPUS JURIS SECUNDUM

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Abandonment	Associations	Colleges and Universities
Abatement and Revival	Assumpsit, Action of	Collision
Abduction	Asylums	Commerce
Abortion	Attachment	Common Lands
Absentees	Attorney and Client	Common Law
Abstracts of Title	Attorney General	Common Scold
Accession	Auctions and Auctioneers	Compositions with Creditors
Accord and Satisfaction	Audita Querela	Compounding Offenses
Account, Action on	Bail	Compromise and Settlement
Accounting	Bailments	Concealment of Birth or Death
Account Stated	Bankruptcy	Conflict of Laws
Acknowledgments	Banks and Banking	Confusion of Goods
Actions	Barratry	Conspiracy
Adjoining Landowners	Bastards	Constitutional Law
Admiralty	Beneficial Associations	Contempt
Adoption of Children	Bigamy	Continuances
Adulteration	Bills and Notes	Contracts
Adultery	Blasphemy	Contratos
Adverse Possession	Bonds	Contribution
Aerial Navigation	Boundaries	Conversion
Affidavits	Bounties	Convicts
Affray	Breach of Marriage Promise	Copyright and Literary
Agency	Breach of the Peace	Property
Agriculture	Bribery	Coroners
Aliens	Bridges	Corporations
Alteration of Instruments	Brokers	Costs
Ambassadors and Consuls	Building and Loan Associations	Counterfeiting
Amicus Curiae	Burglary	Counties
Animals	Business Trusts	Court Commissioners
Annuities	Canals	Courts
Appeal and Error	Cancellation of Instruments	Covenant, Action of
Appearances	Carriers	Covenants
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# CORPUS JURIS SECUNDUM

## VOLUME EIGHTY-NINE

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### TRIAL

This Title includes judicial examination and determination of issues in civil cases, more particularly of issues of fact by courts sitting with or without a jury; bringing cases to trial, notices of trial, notes of issue, and calendars and lists of causes for trial; course and order of proceedings at trials in general; reception of evidence, and objections thereto; arguments and conduct of counsel; relative functions of court and jury, and instructions to juries general; custody and conduct of jury; verdicts or other findings of juries; and findings and decisions by courts on trials without a jury.

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## VII. INSTRUCTIONS TO JURY

## H. CONSTRUCTION AND OPERATION

## 1. IN GENERAL

## § 427. Rules of Construction in General

In construing the language of an instruction, the court is bound to ascertain its meaning; and the instructions must be construed naturally and reasonably in the light of the language used and in the light of the facts and circumstances of the case in which they were given, so as to support the judgment if it is reasonably possible to do so.

In construing the language of an instruction, the court is bound to ascertain its meaning.<sup>1</sup> The instructions must be construed in the light of the language used,<sup>2</sup> not leaving out any words used therein or adding any words thereto,<sup>3</sup> and must be given a natural and reasonable construction<sup>4</sup> and

the plain common-sense meaning the language was evidently intended to convey,<sup>5</sup> when the words used are taken in their ordinary and popular acceptance,<sup>6</sup> and should be construed so as to support the judgment if it is reasonably possible to do so.<sup>7</sup>

Instructions must be measured by the facts and circumstances of the case in which they were given,<sup>8</sup> and, accordingly, if, when the language used is considered with respect to the theory on which the case was tried,<sup>9</sup> and in view of pleadings and the evidence,<sup>10</sup> the charge is free from error, it will

1. Cal.—Lenning v. Chiolo, 147 P. 2d 410, 63 Cal.App.2d 511.

2. Ala.—Molloy v. Mitchell, 137 So. 896, 223 Ala. 666.

N.D.—Rott v. Provident Life Ins. Co., 286 N.W. 393, 69 N.D. 335.

Construction and operation of instructions in criminal prosecutions see Criminal Law §§ 1313-1321.

3. Cal.—Lenning v. Chiolo, 147 P. 2d 410, 63 Cal.App.2d 511.

4. Cal.—Taylor v. Gordon, 227 P. 2d 64, 103 Cal.App.2d 233—Sandoval v. Southern California Enterprises, 219 P. 2d 928, 98 Cal.App.2d 240—Perbost v. San Marino Hall-School for Girls, 199 P. 2d 701, 88 Cal.App. 2d 796—Peterson v. General Geophysical Co., App., 185 P. 2d 56—Astone v. Oldfield, 155 P. 2d 398, 67 Cal.App.2d 702—Megee v. Fasulis, 150 P. 2d 281, 65 Cal.App.2d 94.

Ga.—Sheetz v. Welch, 81 S.E.2d 319, 89 Ga.App. 749.

Iowa.—In re Behrend's Will, 10 N.W. 2d 651, 233 Iowa 812—Henriott v. Main, 279 N.W. 110, 225 Iowa 20.

Mich.—Hoag v. Hyz, 63 N.W.2d 632, 339 Mich. 163.

Tex.—Broughton v. Humble Oil & Refining Co., Civ.App., 105 S.W.2d 480, error refused.

64 C.J. p 958 note 27.  
"Instructions given on a trial should be reasonably interpreted and liberally construed with a view to substantial justice."—Thomas v. Smith, 195 S.W.2d 274, 276, 302 Ky. 636.

5. Minn.—Cameron v. Evans, 62 N.W.2d 798.

64 C.J. p 958 note 28.

6. Cal.—Giles v. Happely, 267 P. 2d 1051, 123 Cal.App.2d 894—Astone v. Oldfield, 155 P. 2d 398, 67 Cal.App.2d 702.

Tex.—West v. Cashin, Civ.App., 83 S.W.2d 1001, error dismissed. 64 C.J. p 958 note 29.

Charge viewed in light of common understanding

Cal.—Barsha v. Metro-Goldwyn-Mayer, 90 P. 2d 371, 82 Cal.App.2d 556—Hayden v. Consolidated Mining & Dredging Co., 84 P. 422, 3 Cal.App. 136.

Unless word has definite technical meaning, in which case it is to be given that meaning, a word used in an instruction is ordinarily held to convey the meaning that attaches to it in usual parlance.—Mandella v. Mariano, 200 A. 478, 61 R.I. 163.

7. Cal.—Mullanix v. Basich, 155 P. 2d 130, 67 Cal.App.2d 675—Megee v. Fasulis, 150 P. 2d 281, 65 Cal.App.2d 94—Reuter v. Hill, 28 P. 2d 390, 136 Cal.App. 67.

Ind.—Van Drake v. Thomas, 38 N.E. 2d 878, 110 Ind.App. 586.

64 C.J. p 958 note 30.

8. Cal.—Adams v. American Presidential Lines, 146 P. 2d 1, 23 Cal.2d 681.

Ga.—Dawson Production Credit Ass'n v. Connelly, 8 S.E.2d 424, 61 Ga. App. 889.

Ind.—Swallow Coach Lines v. Cosgrove, 15 N.E.2d 92, 214 Ind. 532.

Mo.—Jurgens v. Thompson, 169 S.W.2d 353, 350 Mo. 814—Kimbrough v. Chervitz, App., 180 S.W.2d 772, reversed on other grounds 185 S.W.2d 461, 353 Mo. 1154.

Tex.—Thompson v. Schletze, Civ.App., 126 S.W.2d 1044.

64 C.J. p 958 note 31.

Subject matter

Language of instruction to jury must be construed with reference to subject matter which it clearly relates to or qualifies.—Tuttle v. Crawford, 63 P.2d 1128, 8 Cal.2d 126.

## Findings

(1) Correctness of charge is determined in view of finding.—Buck v. Robinson, 23 A. 2d 157, 128 Conn. 376—Green v. Stone, 185 A. 72, 121 Conn. 324—Guhring v. Gumpfer, 169 A. 189, 117 Conn. 548.

(2) The parts of charge to which exception was taken are to be considered in light of permissible findings in the case.—Gallier v. Stewart, 37 N.E.2d 125, 310 Mass. 77.

## Interpreted in light of incidents of trial

Ala.—W. U. Tel. Co. v. Gorman, 185 So. 743, 237 Ala. 146.

9. N.C.—Tillotson v. Currin, 97 S.E. 395, 176 N.C. 479.

10. Ala.—McKinney v. Birmingham Electric Co., 193 So. 139, 238 Ala. 627.

Ga.—Sovereign Camp, W. O. W. v. Ellis, 1 S.E.2d 677, 59 Ga.App. 608.

Tex.—City of Grandview v. Ingie, Civ.App., 90 S.W.2d 855, error dismissed West v. Cashin, Civ.App., 83 S.W.2d 1001, error dismissed.

Utah.—White v. Pinney, 108 P.2d 249, 99 Utah 484.

Wash.—Ross v. Johnson, 155 P.2d 486, 22 Wash.2d 275.

64 C.J. p 958 note 33—17 C.J. p 1073 note 80.

## Charge considered in light of evidence

U.S.—Ocean Accident & Guarantee Corporation v. Schachner, C.C.A.111, 70 F.2d 28.

Mass.—Mulkern v. Eastern S. S. Lines, 29 N.E.2d 919, 307 Mass. 609.

—Nelson v. Economy Grocery Stores, 25 N.E.2d 986, 305 Mass. 383.

Mo.—Hold v. Terminal R. R. Ass'n of St. Louis, 201 S.W.2d 958, 356 Mo. 412—Wright v. Ickenroth, App., 215 S.W.2d 43.

not be ground for reversal, although wrong as an abstract proposition.<sup>11</sup> The general effect of the charge, rather than a casual expression in it, must govern the interpretation or construction of it.<sup>12</sup> Since the instructions must not be subjected to analytical criticism,<sup>13</sup> a hypercritical<sup>14</sup> or artificial<sup>15</sup> construction should be avoided. They will be construed according to their essential meaning,<sup>16</sup> and refined distinctions will not be indulged in.<sup>17</sup> The literalities of language may be disregarded;<sup>18</sup> the meaning of an instruction, and not the phraseology, is the important consideration.<sup>19</sup> Where a charge is susceptible of more than one construction or meaning, it should be construed as a person of ordinary intelligence would understand it,<sup>20</sup> or as practical experience teaches that a jury, untrained in the law, would view it,<sup>21</sup> or, as the court and jury, in the exercise of ordinary common sense, evidently understood it,<sup>22</sup> and the jury will

be deemed to have interpreted the instruction in the light of common experience.<sup>23</sup> Where, however, an instruction is such that it might convey to the mind of any man of ordinary capacity an incorrect view of the law applicable to the cause, it will be erroneous.<sup>24</sup>

## § 428. Inadvertent Errors and Omissions

An instruction which states the law with substantial accuracy will not be regarded as erroneous merely because of verbal omissions which can be supplied from the context or because of slight verbal or clerical inaccuracies which are not prejudicial.

Where an instruction states the law with substantial accuracy, and is otherwise unobjectionable, it will not be regarded as erroneous merely because of verbal omissions which can be supplied from the context,<sup>25</sup> or because of slight verbal or clerical inaccuracies which are not prejudicial.<sup>26</sup>

Mont.—Gilligan v. City of Butte, 166 P.2d 797, 118 Mont. 350.

N.D.—Rott v. Provident Life Ins. Co., 286 N.W. 393, 69 N.D. 335.

Okl.—Rutherford v. Tyra, 247 P.2d 964, 207 Okl. 112—Renegar v. Bogle, 186 P.2d 820, 199 Okl. 427—Rosier v. Metropolitan Life Ins. Co., 168 P.2d 302, 197 Okl. 35—Prudential Ins. Co. of America v. Foster, 168 P.2d 295, 197 Okl. 39, 166 A.L.R. 1—Drum Standish Commission Co. v. First Nat. Bank & Trust Co. of Oklahoma City, 31 P.2d 843, 168 Okl. 400.

S.C.—Hutchinson v. City of Florence, 200 S.E. 73, 139 S.C. 123.

Va.—Carroll v. Hutchinson, 200 S.E. 644, 172 Va. 43—Lucas v. Craft, 170 S.E. 836, 161 Va. 228.

64 C.J. p 958 note 33 [c].

**Charge viewed in light of issues presented**

Mo.—Cantwell v. Cremins, 149 S.W.2d 243, 347 Mo. 836.

**Instructions considered in light of issues raised by pleadings**

Cal.—Astone v. Oldfield, 155 P.2d 398, 67 Cal.App.2d 702.

11. U.S.—Schutz v. Jordan, C.C.N.Y., 32 F. 55, affirmed 11 S.Ct. 906, 141 U.S. 213, 35 L.Ed. 705.

64 C.J. p 959 note 34.

Even though instructions may be technically incorrect from the standpoint of exact legal science and procedure, a practical consideration, such as a jury of laymen may have given, may justify a decision that they are correct.—Thomas v. Smith, 195 S.W.2d 274, 302 Ky. 636.

12. Pa.—Walters v. Western & Southern Life Ins. Co., 178 A. 499, 318 Pa. 382—Fitzpatrick v. Union Traction Co., 55 A. 1050, 206 Pa. 335

—Kyle v. Southern Electric Light & Power Co., 34 A. 323, 174 Pa. 570—Rudy v. New York Life Ins. Co., 12 A.2d 495, 139 Pa.Super. 517

—Silvano v. Metropolitan Life Ins. Co., 5 A.2d 423, 135 Pa.Super. 260.

Construction as a whole see infra §§ 430-440.

13. Cal.—Barsha v. Metro-Goldwyn-Mayer, 90 P.2d 371, 32 Cal.App.2d 556—Hayden v. Consolidated Mining & Dredging Co., 84 P. 422, 3 Cal.App. 136.

64 C.J. p 959 note 35.

"A charge to the jury is not to be critically dissected for the purpose of discovering possible inaccuracies of statement, but is to be considered rather as to its probable effect upon the jury in guiding them to a correct verdict in the case."—Amato v. Desanti, 169 A. 611, 612, 117 Conn. 512.

14. Ill.—Daubach v. Drake Hotel Co., 243 Ill.App. 298.

Or.—Storla v. Spokane, Portland & Seattle Transp. Co., 297 P. 367, 298 P. 1065, 136 Or. 315.

15. Ill.—Daubach v. Drake Hotel Co., 243 Ill.App. 298.

16. Iowa.—Galpin v. Wilson, 40 Iowa 30.

17. N.Y.—Sperry v. Union R. Co., 114 N.Y.S. 286, 129 App.Div. 594.

18. Ga.—Georgia Ry. & Power Co. v. Shaw, 149 S.E. 657, 40 Ga.App. 341.

64 C.J. p 959 note 40.

19. Neb.—Myers v. Willmeroth, 39 N.W.2d 423, 151 Neb. 712.

20. Ind.—Kingson & Co. v. King, 109 N.E. 1044, 179 Ind. 235.

64 C.J. p 959 note 41.

21. Minn.—Hill v. Northern Pac. Ry. Co., 297 N.W. 627, 210 Minn. 190.

64 C.J. p 959 note 42—17 C.J. p 1073 note 81.

**Charge considered from standpoint of effect on jury**

Conn.—Steincke v. Medalie, 90 A.2d 875, 139 Conn. 152.

**Meaning conveyed to jurors hearing it only once**

In construing charge as a whole, its adequacy in correctly setting forth controlling principles of law is to be measured by meaning it reasonably conveys to jurors who hear it only once and have no opportunity to examine it in written form.—Zurko v. Glquist, Minn., 62 N.W.2d 851.

22. Ill.—Funk v. Babbitt, 41 N.E. 166, 155 Ill. 408.

64 C.J. p 959 note 43.

Understanding of ordinary men and jurors as test of instruction generally see supra § 326.

23. W.Va.—Morris v. Parris, 157 S.E. 40, 110 W.Va. 102.

24. Ind.—Sumner v. State, 5 Blackf. 579, 36 Am.D. 561.

W.Va.—Herman v. Maddy, 49 S.E. 1009, 57 W.Va. 66.

**Instruction which admits of two different constructions, one announcing a correct rule of law and the other an incorrect one, is erroneous.**

—Rodenkirch v. Nemlich, Mo.App., 168 S.W.2d 977.

25. Tex.—Galveston, H. & S. A. Ry. Co. v. Word, Civ.App., 124 S.W. 478.

26. Conn.—Borsol v. Sparico, 106 A.2d 170, 141 Conn. 366.

Tenn.—Epstein v. Texas Bag & Burlap Co., 8 Tenn.App. 543.

64 C.J. p 959 note 47.

Cure of inaccurate instruction by other instructions see infra § 441.

64 C.J. p 959 note 48.

64 C.J. p 959 note 49.

64 C.J. p 959 note 50.

64 C.J. p 959 note 51.

64 C.J. p 959 note 52.

64 C.J. p 959 note 53.

64 C.J. p 959 note 54.

64 C.J. p 959 note 55.

64 C.J. p 959 note 56.

64 C.J. p 959 note 57.

64 C.J. p 959 note 58.

64 C.J. p 959 note 59.

64 C.J. p 959 note 60.

64 C.J. p 959 note 61.

64 C.J. p 959 note 62.

64 C.J. p 959 note 63.

64 C.J. p 959 note 64.

64 C.J. p 959 note 65.

64 C.J. p 959 note 66.

64 C.J. p 959 note 67.

64 C.J. p 959 note 68.

## § 429. Construction of Particular Instructions

The rules relating to construction of instructions have been applied in construing instructions relating to various matters.

The rules relating to construction of instructions have been applied in construing instructions relating to burden of proof,<sup>27</sup> credibility of witnesses,<sup>28</sup> damages,<sup>29</sup> duty of the jury to find a verdict under both general and special charges,<sup>30</sup> negligence,<sup>31</sup> ownership,<sup>32</sup> plea of privilege,<sup>33</sup> sufficiency of pleadings,<sup>34</sup> undue influence,<sup>35</sup> and weight of evi-

dence.<sup>36</sup> An instruction permitting a recovery under the declaration will be construed to mean as much of the declaration as was not excluded by the court.<sup>37</sup> An instruction that plaintiff is not required by law to prove all the counts of his declaration, but it is sufficient if he prove one or more of them as alleged therein by a preponderance of evidence, is not subject to an interpretation as permitting recovery if plaintiff proved one or two things in one or more of the various counts.<sup>38</sup> Particular words and phrases as used in instructions have also been construed.<sup>39</sup>

## 2. CONSTRUCTION AS A WHOLE

## § 430. In General

Provided they are consistent with each other, all instructions given in a case should be read together as a whole, each in the light of the others, and if, when

so construed, they properly state the law, they are not subject to exception.

Provided they are consistent with each other,<sup>40</sup>

27. Ala.—Fike v. Stratton, 56 So. 929, 174 Ala. 541.

28. N.J.—Lens v. Public Service Ry. Co., 151 A. 741, 98 N.J.Law 849.

29. Mo.—O'Leary v. Scullin Steel Co., 250 S.W. 55, 303 Mo. 363; Moore v. Great Atlantic & Pacific Tea Co., 92 S.W.2d 912, 230 Mo. App. 495; Koonse v. Standard Steel Works Co., 300 S.W. 531, 221 Mo. App. 1231; Mackey v. Queen City Wood Works & Lumber Co., 261 S.W. 132, 216 Mo.App. 205.

Wis.—Weber v. Wisconsin Power & Light Co., 255 N.W. 281, 215 Wis. 480.

64 C.J. p 1008 note 6.

30. Tex.—Brady v. Maddox, Civ. App., 124 S.W. 739.

31. U.S.—Ross v. Delaware & H. R. Co., C.A.N.Y., 158 F.2d 98.

Cal.—Taylor v. Gordon, 227 P.2d 64, 102 Cal.App.2d 233—Breaks v. Anderson, 313 P.2d 532, 95 Cal.App.2d 682.

Mass.—Hampson v. Larkin, 63 N.E. 2d 888, 216 Mass. 716.

Mo.—State ex rel. and to Use of Reeves v. Elman, 122 S.W.2d 885, 843 Mo. 550.

64 C.J. p 1008 note 8.

32. Mo.—Peterson v. City of St. Joseph, 156 S.W.2d 691, 348 Mo. 954—Union Nat. Bank v. Fox, App., 9 S.W.2d 1070.

33. Tex.—Uovovich v. First Nat. Bank, Civ.App., 138 S.W. 1102.

34. Ga.—Rountree & Leak v. Craig-miles, 77 S.E. 15, 12 Ga.App. 237.

35. Conn.—Dunn v. Poirot, 118 A. 33, 97 Conn. 713.

36. Ga.—Armour v. Lunsford, 15 S. E.2d 886, 193 Ga. 595.

37. Ill.—Aetitis v. Spring Valley Coal Co., 150 Ill.App. 497.

38. Ill.—Roach v. Willis Coal & Mining Co., 183 Ill.App. 577.

39. Conn.—Edgecomb v. Great Atlantic & Pacific Tea Co., 18 A.2d 364, 127 Conn. 488.

Ga.—McKemie v. McKemie, 45 S.E.2d 456, 78 Ga.App. 212.

Ill.—Winiarski v. Melkovits, 104 N.E. 2d 650, 246 Ill.App. 208.

Mo.—Quigley v. St. Louis Public Service Co., 201 S.W.2d 159.

Ohio.—Karl v. Cincinnati St. Ry. Co., 43 N.E.2d 762, 69 Ohio App. 327.

64 C.J. p 1008 note 15-99.

"And"

Ind.—Grand Trunk Western Ry. Co. v. Thrift Co., 116 N.E. 756, 759, 68 Ind.App. 198.

2 C.J. p 1342 note 84.

"Can"

Ga.—McLendon v. Bedingsfield, 38 S.E. 2d 69, 73 Ga.App. 756.

"Sole"

Mo.—Gower v. Trumbo, 181 S.W.2d 653.

40. U.S.—United Elec. Radio & Mach. Workers of America v. Oliv-  
er Corp., C.A.Iowa, 205 F.2d 376—  
Westborough Country Club v.  
Palmer, C.A.Mo., 204 F.2d 143—  
Stephenson v. Steinhauer, C.A.N.D.,  
188 F.2d 432—Columbia Lumber Co.  
v. Agostino, C.A.Alaska, 184 F.2d  
731—International Paper Co. v.  
Busby, C.A.La., 182 F.2d 790—New  
York, C. & St. L. R. Co. v. A. Fold-  
er, C.A.Mo., 174 F.2d 486, reversed on  
other grounds 70 S.Ct. 509, 339 U.S.  
96, 94 L.Ed. 683—O'Donnell v. El-  
gin, J. & E. Ry. Co., C.A.Ill., 171  
F.2d 973, reversed on other grounds  
70 S.Ct. 300, 338 U.S. 384, 94 L.Ed.  
187, 16 A.L.R.2d 646, rehearing de-  
nied 70 S.Ct. 427, 338 U.S. 945, 94  
L.Ed. 583—Goodyear Fabric Corp.  
v. Hiras, C.C.A.R.I., 169 F.2d 115—  
Terminal R. Ass'n of St. Louis v.  
Fitzjohn, C.C.A.Mo., 165 F.2d 473,  
1 A.L.R.2d 290—Terminal R. Ass'n  
of St. Louis v. Howell, C.C.A.Mo.,

165 F.2d 135—Rosenfeld v. Curtis  
Pub. Co., C.C.A.N.Y., 163 F.2d 460  
—Pacific Greyhound Lines v. Zane,  
C.C.A.Ariz., 160 F.2d 731—Sutton v.  
Public Service Interstate Transp.  
Co., C.C.A.N.Y., 157 F.2d 947, cer-  
tiorari denied 67 S.Ct. 870, 339 U.S.  
828, 91 L.Ed. 1277—Atkinson v.  
New Britain Mach. Co., C.C.A.Ill.,  
154 F.2d 895—Dyess v. W. W. Clyde  
& Co., C.C.A.Utah, 132 F.2d 973—  
Keller v. Brooklyn Bus Corp., C.C.  
A.N.Y., 128 F.2d 510—Grand Trunk  
Western R. Co. v. H. W. Nelson Co.,  
C.C.A.Mich., 118 F.2d 823, rehearing  
denied 118 F.2d 252—Kurn v. Stan-  
field, C.C.A.Mo., 111 F.2d 469—Gal-  
loway v. General Motors Accept-  
ance Corp., C.C.A.S.C., 106 F.2d 466  
—George v. Wiseman, C.C.A.Kan.,  
98 F.2d 923—Valley Shoe Corp. v.  
Stout, C.C.A.Mo., 98 F.2d 514—  
American Glycerin Co. v. Eason Oil  
Co., C.C.A.Okl., 98 F.2d 479, cer-  
tiorari denied 59 S.Ct. 107, 305 U.S.  
640, 83 L.Ed. 412, rehearing denied  
59 S.Ct. 153, 305 U.S. 672, 83 L.Ed.  
435—Metropolitan Life Ins. Co. v.  
Armstrong, C.C.A.Neb., 85 F.2d 187  
—Pryor v. Strawn, C.C.A.Neb., 73  
F.2d 595—Moran v. City of Back-  
ley, for Use of Bowen, C.C.A.W.Va.,  
67 F.2d 151—Parabough v. Balti-  
more & O. R. Co., D.C.Pa., 95 F.  
Supp. 305—Conry v. Baltimore &  
O. R. Co., D.C.Pa., 95 F.Supp. 446,  
reversed on other grounds, C.A., 195  
F.2d 120—McLeod v. Union Barge  
Line Co., D.C.Pa., 95 F.Supp. 366,  
affirmed, C.A., 189 F.2d 410—Mc-  
Fadden v. Baltimore & O. R. Co.,  
D.C.Pa., 95 F.Supp. 255—Hamilton  
v. Thurber, D.C.Minn., 56 F.Supp.  
826, reversed on other grounds, C.  
A., 151 F.2d 389—Tarter v. U. S.,  
D.C.Ky., 17 F.Supp. 691—Schutte v.  
Koerting Co. v. Fischer, D.C.Pa., 4  
F.R.D. 11.

Ala.—Florence Coca Cola Bottling Co.



all instructions given in a case should be read together as a whole, each in the light of the others,<sup>41</sup>

v. Sullivan, 65 So.2d 169, 259 Ala. 56—Western Union Tel. Co. v. Gorman, 185 So. 743, 237 Ala. 146—Sloss-Sheffield Steel & Iron Co. v. Nations, 183 So. 871, 236 Ala. 571, 119 A.L.R. 1403—Pollard v. Rogers, 173 So. 881, 234 Ala. 92—Pryor v. Limestone County, 160 So. 700, 230 Ala. 295—Bradford v. Birmingham Electric Co., 149 So. 729, 227 Ala. 285—Roberson Motor Co. v. Heath, 60 So.2d 862, 36 Ala.App. 578.

Cal.—Belletich v. Pollock, 171 P.2d 57, 75 Cal.App.2d 142—De Fries v. Market St. Ry. Co., 88 P.2d 256, 31 Cal.App.2d 463—Maggini v. West Coast Life Ins. Co., 29 P.2d 263, 136 Cal.App. 472.

Ill.—Greene v. Noonan, 23 N.E.2d 720, 872 Ill. 286.

Miss.—May v. Culpepper, 172 So. 336, 177 Miss. 811.

Mo.—Willard v. Bethurem, App. 234 S.W.2d 18—Neuhauser v. United Neighbors of Missouri, App. 150 S.W.2d 590.

N.J.—Pucci v. Weinstein, 73 A.2d 843, 8 N.J.Super. 247.

N.C.—In re West's Will, 41 S.E.2d 838, 227 N.C. 204.

64 C.J. p 960 note 52.

**Direction to read all instructions together**

Where instructions are in direct conflict on a material factor, it is not helpful that trial court instructed jury that all instructions were to be read together, since jury could not follow two wholly inconsistent divergent lines which were directly in conflict.—Gillette v. City and County of San Francisco, 107 P.2d 627, 41 Cal. App.2d 758.

41. Ala.—Casino Restaurant v. McWhorter, 46 So.2d 582, 35 Ala.App. 332—Volunteer State Life Ins. Co. v. Danley, 36 So.2d 123, 33 Ala.App. 543, certiorari denied 36 So.2d 132, 250 Ala. 702—American Discount Co. v. Wyckoff, 191 So. 790, 29 Ala. App. 82—City of Anniston v. Oliver, 185 So. 187, 28 Ala.App. 390—Ogburn v. Montague, 155 So. 633, 26 Ala.App. 166, certiorari denied 155 So. 636, 229 Ala. 78.

Ariz.—Schlecht v. Schiel, 262 P.2d 252, 76 Ariz. 214—City of Phoenix v. Harlan, 255 P.2d 609, 75 Ariz. 290—Chernov v. Sandell, 206 P.2d 348, 68 Ariz. 327—Kaufroth v. Wilbur, 185 P.2d 522, 66 Ariz. 152—Lyric Amusement Co. v. Jeffries, 160 P.2d 417, 58 Ariz. 381—Standard Oil Co. of California v. Shields, 119 P.2d 116, 58 Ariz. 239—Atchison, T. & S. F. Ry. Co. v. France, 94 P.2d 434, 54 Ariz. 140—Humphrey v. Atchison, T. & S. F. Ry. Co., 70 P.2d 319, 50 Ariz. 167—Southern Arizona Freight Lines v. Jackson, 63 P.2d 193, 48 Ariz. 509—Fox Tucson Theatres Corp. v. Lindsay, 56 P.2d

183, 47 Ariz. 388—Illinois Bankers Life Ass'n v. Theodore, 55 P.2d 806, 47 Ariz. 314—Wolff v. First Nat. Bank, 53 P.2d 1077, 47 Ariz. 97—S. A. Gerrard Co. v. Fricker, 27 P. 2d 878, 42 Ariz. 503.

Ark.—Southwestern Bell Tel. Co. v. Smith, 247 S.W.2d 16, 220 Ark. 223—Ball v. Independence County, 217 S.W.2d 913, 214 Ark. 694—Harvey v. Kirk, 168 S.W.2d 827, 205 Ark. XIX.

Cal.—Gordon v. Aztec Brewing Co., 203 P.2d 522, 33 Cal.2d 514—Polk v. City of Los Angeles, 159 P.2d 931, 26 Cal.2d 519—Lund v. Pacific Electric Ry. Co., 153 P.2d 705, 25 Cal.2d 287—Wells v. Lloyd, 132 P. 2d 471, 21 Cal.2d 462—Juchert v. California Water Service Co., 106 P.2d 886, 16 Cal.2d 500—Jensen v. Minard, App., 271 P.2d 635—Giles v. Happely, 267 P.2d 1051, 123 Cal. App.2d 894—Bates v. Newman, 264 P.2d 197, 121 Cal.App. 890—Becker v. City and County of San Francisco, 264 P.2d 133, 121 Cal.App.2d 723—In re Volen's Estate, 262 P.2d 558, 121 Cal.App.2d 161—Dick v. Schooner, 260 P.2d 965, 120 Cal. App.2d 230—Silva v. Pacific Greyhound Lines, 259 P.2d 743, 119 Cal. App.2d 284—Larson v. Holland, 257 P.2d 1014, 113 Cal.App.2d 520—Crowder v. Atchison, T. & S. F. Ry. Co., 256 P.2d 85, 117 Cal.App.2d 568—Bassett v. Crisp, 248 P.2d 171, 113 Cal.App.2d 295—Correia v. Van Camp Sea Food Co., 248 P.2d 81, 113 Cal.App.2d 71—Lloyd v. Southern Pac. Co., 245 P.2d 583, 111 Cal. App.2d 626—Trelut v. Kazarian, 243 P.2d 104, 110 Cal.App.2d 505—Sykes v. City of Los Angeles, 241 P.2d 1004, 110 Cal.App.2d 57—Bazzoli v. Nance's Sanitarium, 240 P.2d 672, 109 Cal.App.2d 232—Santman v. Smith, 234 P.2d 1036, 106 Cal.App. 2d 254—Germ v. City and County of San Francisco, 222 P.2d 122, 99 Cal.App.2d 404—Lundin v. Shumate's Pharmacy, 221 P.2d 260, 98 Cal.App.2d 817—Koon v. Sher, 220 P.2d 784, 98 Cal.App.2d 530—Robinson v. Kelly, 212 P.2d 921, 95 Cal. App.2d 320—Johnson v. Marquis, 209 P.2d 63, 93 Cal.App.2d 341—O'Connor v. City and County of San Francisco, 207 P.2d 638, 92 Cal. App.2d 626—Dennis v. Gonzales, 205 P.2d 55, 91 Cal.App.2d 203—Murray v. Southern Pac. Co., 204 P.2d 636, 91 Cal.App.2d 107—Connell v. Clark, 200 P.2d 26, 88 Cal. App.2d 941—Perbost v. San Marino Hall-School for Girls, 199 P.2d 701, 88 Cal.App.2d 796—Hoffing v. Coca-Cola Bottling Co., 197 P.2d 56, 87 Cal.App.2d 371—Lunsford v. Standard Oil Co. of Cal., 191 P.2d 82, 84 Cal.App.2d 459—Wilkerson v. Brown, 190 P.2d 958, 84 Cal.App.2d

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Pa.—Bollinger v. West Penn Power Co., 76 A.2d 214, 365 Pa. 599.—Voitasefski v. Pittsburgh Rys. Co., 69 A.2d 370, 363 Pa. 220.—Savith v. Doernste, 61 A.2d 823, 360 Pa. 415.—Bourd v. Herman, 58 A.2d 442, 359 Pa. 183.—Harmar v. Chambers, 67 A.2d 842, 358 Pa. 516.—Susser v. Wiley, 39 A.2d 616, 350 Pa. 427.—Robinson v. Philadelphia Transp. Co., 32 A.2d 26, 347 Pa. 288.—Cain v. Kohlman, 22 A.2d 667, 344 Pa. 63.—Marshall v. Erie Taxicab Co., 15 A.2d 925, 340 Pa. 241.—Masinko v. McLeary, 11 A.2d 648, 337 Pa. 35.—Cody v. Metropolitan Life Ins. Co., 5 A.2d 887, 334 Pa. 137.—Rankin v. Boyle, 195 A. 36, 328 Pa. 284.—Levchik v. Shaffer, 194 A. 923, 327 Pa. 570.—Rodgers v. Fleming, 188 A. 861, 325 Pa. 228.—Smith v. Philadelphia Transp. Co., 77 A.2d 653, 168 Pa.Super. 168.—Mort Co. v. Paul, 76 A.2d 445, 167 Pa.Super. 632.—Poulos v. Brady, 74 A.2d 694, 167 Pa.Super. 150.—Simpson v. Montgomery Ward & Co., 68 A.2d 442, 166 Pa.Super. 408, opinion adopted 75 A.2d 656, 366 Pa. 3.—Kozemchak v. Garner, 61 A.2d 375, 163 Pa.Super. 325.—D'Allura v. Perri, 10 A.2d 124, 138 Pa.Super. 261.—Brewer v. Blue Mountain Consol. Water Co., 191 A. 408, 128 Pa.Super. 553.—Zimmerman v. Houghwot, 189 A. 519, 125 Pa.Super. 319.—Cunningham v. Spangler, 186 A. 173, 123 Pa.Super. 151.—Burns v. Pittsburgh Rys. Co., 167 A. 421, 109 Pa.Super. 490.—Phillips v. Upper Darby Tp., Com.Pl., 34 Del.Co. 172.—Spiker v. General American Life Ins. Co., Com.Pl., 29 Del.Co. 302.—Turkington v. Jones, Com.Pl., 28 Del.Co. 256.—Gallagher v. Robinson, Com.Pl., 2 Fay.L.J. 232.—Weaver v. Scranton Bus Co., Com.Pl., 44 Lack.

Jur. 233.—Grabosky v. Metropolitan Life Ins. Co., Com.Pl., 7 Sch. Reg. 69.

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S.C.—Little v. Atlantic Coast Line R. Co., 46 S.E.2d 59, 211 S.C. 462.—Shockey v. Cox Circus Co., 29 S.E.2d 491, 204 S.C. 353.—Charles v. Texas Co., 18 S.E.2d 719, 199 S.C. 156.—Caines v. Marion Coca-Cola Bottling Co., 17 S.E.2d 315, 198 S.C. 204.—Poole v. Edwards, 15 S.E.2d 349, 197 S.C. 380.—Ballard v. Southern Ry. Co., 15 S.E.2d 342, 197 S.C. 258.—Hollis v. Armour & Co., 2 S.E.2d 681, 190 S.C. 170.—Dodenhoff v. Nilson Motor Express Lines, 2 S.E.2d 56, 190 S.C. 60.—Hutchinson v. City of Florence, 200 S.E. 73, 189 S.C. 123.—Montgomery v. National Convoy & Trucking Co., 195 S.E. 247, 186 S.C. 167.—Sample v. Gulf Refining Co., 191 S.E.2d 209, 183 S.C. 390.—Byus v. Dason, 182 S.E. 442, 178 S.C. 175.—Garrett Engineering Co. v. Auburn Foundry, 179 S.E. 693, 176 S.C. 59.—Koon v. Pioneer Pyramid Life Ins. Co., 178 S.E. 503, 175 S.C. 117.—Smith v. Oliver Motor Co., 177 S.E. 791, 174 S.C. 484.—Hinsdale v. Westrope, 174 S.E. 898, 173 S.C. 65.—In re Brazman's Will, 173 S.E. 623, 172 S.C. 188.—Porter-Constructors v. Dixon Motor Service Co., 172 S.E. 419, 171 S.C. 396.—McGuinn v. Aetna Life Ins. Co., 171 S.E. 795, 171 S.C. 136.—Driggers v. Southern Ry. Co., 168 S.E. 185, 169 S.C. 157.—Ford v. Atlantic Coast Line R. Co., 168 S.E. 143, 169 S.C. 41, affirmed Atlantic Coast Line R. Co. v. Ford, 53 S.Ct. 249, 287 U.S. 502, 77 L.Ed. 457.—Lawrence v. Southern Ry. Carolina Division, 167 S.E. 839, 169 S.C. 1.—Bodell v. Dixie Stores Co., 167 S.E. 834, 168 S.C. 520.

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14 Tenn.App. 211.—Memphis Power & Light Co. v. Teighman, 11 Tenn. App. 395.

Tex.—Pickens v. Harrison, 252 S.W. 2d 575, 151 Tex. 562.—Dallas Railway & Terminal Co. v. Whitcomb, 163 S.W.2d 616, 139 Tex. 467.—Red River Valley Pub. Co. v. Bridges, Civ.App., 254 S.W.2d 854, error refused no reversible error.—Nussbaum v. Anthony, Civ.App., 214 S.W.2d 688, refused no reversible error.—Traders & General Ins. Co. v. Wilder, Civ.App., 156 S.W.2d 1011, refused for want of merit.—Magnolia Petroleum Co. v. Johnson, Civ.App., 176 S.W.2d 774.—Scott v. Gardner, Civ.App., 159 S.W.2d 121, error refused.—Johnson v. Hodges, Civ.App., 121 S.W.2d 371, error dismissed.—Southern Underwriters v. Gariepy, Civ.App., 105 S.W.2d 760, error dismissed.—Broughton v. Humble Oil & Refining Co., Civ.App., 105 S.W.2d 480, error refused.—Texas Employers Ins. Ass'n v. Hamor, Civ.App., 97 S.W.2d 1041.—West v. Cashin, Civ.App., 83 S.W.2d 1001, error dismissed.—McClung Const. Co. v. Muncy, Civ.App., 65 S.W.2d 788, error dismissed.—Texas Utilities Co. v. Dear, Civ.App., 64 S.W.2d 807, error dismissed.—State v. Carpenter, Civ.App., 55 S.W.2d 119, reversed on other grounds 89 S.W.2d 194, 126 Tex. 604, rehearing denied 89 S.W.2d 979, 126 Tex. 604.—Fort Worth & R. G. Ry. Co. v. Ross, Civ.App., 54 S.W.2d 561, error refused.

Utah.—Hillyard v. Utah By-Products Co., 263 P.2d 287, 1 Utah2d 143.—Startin v. Madsen, 237 P.2d 834.—Galarowicz v. Ward, 230 P.2d 576.—Williams v. Ogden Union Ry. & Depot Co., 230 P.2d 315.—Martin v. Sheffield, 189 P.2d 127, 112 Utah 478.—Redd v. Airway Motor Coach Lines, 137 P.2d 374, 104 Utah 9.—Skerl v. Willow Creek Coal Co., 69 P.2d 502, 92 Utah 474.—Mehrer v. Child, 61 P.2d 624, 90 Utah 348.

Vt.—Ackerman v. Kogut, 84 A.2d 131, 117 Vt. 40.—Tetreault v. Campbell, 61 A.2d 691, 115 Vt. 369.—Anair v. Mutual Life Ins. Co. of N. Y., 42 A.2d 423, 114 Vt. 217, 159 A.L.R. 547.—Lancour v. Herald & Globe Ass'n, 17 A.2d 253, 111 Vt. 371, 132 A.L.R. 486.—In re Everett's Will, 166 A. 827, 105 Vt. 291.

Va.—Williams v. Blue Bird Cab Co., 52 S.E.2d 868, 189 Va. 402.—Walton v. Light, 26 S.E.2d 29, 181 Va. 609.

—Yorke v. Maynard, 3 S.E.2d 366, 173 Va. 183.—West v. L. Bromm Baking Co., 186 S.E. 291, 166 Va. 630.

Wash.—Melosevich v. Clichy, 193 P.2d 342, 30 Wash.2d 702.—Green v. Floe, 183 P.2d 771, 28 Wash.2d 630.—State v. Smith, 171 P.2d 853, 25 Wash.2d 540.—Ballard v. Yellow Cab Co., 145 P.2d 1019, 20 Wash.2d 67.—Gray v. Davidson, 130 P.2d

given at the request of either party.<sup>42</sup> Accordingly, when construed as a whole, they properly state instructions are not subject to exception where, the law,<sup>43</sup> and this is particularly true where the

341. 15 Wash.2d 257, reheard 186 P.2d 187, 15 Wash.2d 257—Dick v. Great Northern Ry. Co., 121 P.2d 966, 12 Wash.2d 364—Herndon v. City of Seattle, 118 P.2d 421, 11 Wash.2d 88—Simmons v. Kalin, 116 P.2d 840, 10 Wash.2d 409—Warren v. Hynes, 102 P.2d 691, 4 Wash.2d 128—Kuhnhausen v. Woodbeck, 97 P.2d 1099, 2 Wash.2d 338—Levine v. A. A. Owen Lumber Co., 84 P.2d 353, 136 Wash. 673—Allman Hubble Tugboat Co. v. Reliance Development Corp., 74 P.2d 985, 193 Wash. 234—Lund v. Western Union Telegraph Co., 74 P.2d 220, 192 Wash. 579—Frazee v. Western Dairy Products, 47 P.2d 1037, 182 Wash. 578—Kosko v. Craig, 32 P.2d 112, 117 Wash. 514—Elliott v. Wheelock, 30 P.2d 370, 176 Wash. 597.

W.Va.—Peck v. Bez, 40 S.E.2d 1, 129 W.Va. 247—Porterfield v. Sudduth, 185 S.E. 209, 117 W.Va. 231—Redmond v. Greater Fairmont Bakery, 171 S.E. 109, 114 W.Va. 132.

Wis.—Fischer v. Harmony Town Ins. Co., 24 N.W.2d 887, 249 Wis. 438.

Wyo.—Barber v. Sheridan Trust & Savings Bank, 78 P.2d 1101, 53 Wyo. 65.

64 C.J. p 960 note 53.

42. Fla.—Wharton v. Day, 10 So.2d 417, 151 Fla. 772.

Mo.—Motor Acceptance v. Clayton, App., 119 S.W.2d 996.

Ohio.—Deckant v. City of Cleveland, 89 N.E.2d 609, 155 Ohio St. 498.

Pa.—Coleman v. Reading Co., 29 A.2d 499, 346 Pa. 289.

64 C.J. p 964 note 54—9 C.J. p 662 note 74.

43. U.S.—International Paper Co. v. Busby, C.A.La., 182 F.2d 790—Casey v. Seas Shipping Co., C.A.N.Y., 178 F.2d 360—Carter v. Atlanta & St. A. B. Ry. Co., C.A.Ala., 170 F.2d 719, reversed on other grounds 70 S.Ct. 226, 338 U.S. 430, 94 L.Ed. 236—Pasotex Pipe Line Co. v. Murray, C.C.A.Tex., 168 F.2d 661—American Glycerin Co. v. Eason Oil Co., C.C.A.Okl., 98 F.2d 479, certiorari denied 59 S.Ct. 107, 305 U.S. 640, 83 L.Ed. 413, rehearing denied 59 S.Ct. 153, 305 U.S. 672, 83 L.Ed. 435—Shane v. Commercial Casualty Ins. Co., D.C.Pa., 48 F. Supp. 151, affirmed, C.C.A., Shane v. Barger, 132 F.2d 544.

Ala.—Roberts v. Bellow, 157 So. 216, 229 Ala. 333.

Ariz.—Ruth v. Rhodes, 185 P.2d 304, 66 Ariz. 129—Tenney v. Enkeball, 158 P.2d 519, 62 Ariz. 416—Humphrey v. Atchison, T. & S. F. Ry. Co., 70 P.2d 319, 50 Ariz. 187—Southern Arizona Freight Lines v. Jackson, 63 P.2d 193, 48 Ariz. 509.

Ark.—Roland v. Terryland, Inc., 256

S.W.2d 315, 221 Ark. 837—Southwestern Bell Tel. Co. v. Smith, 247 S.W.2d 16, 220 Ark. 223—Hearn v. East Tex. Motor Freight Lines, 241 S.W.2d 259, 219 Ark. 297—Pinker-ton v. Davis, 207 S.W.2d 742, 212 Ark. 796—Arkansas Baking Co. v. Aaron, 166 S.W.2d 14, 204 Ark. 990.

Cal.—Gordon v. Aztec Brewing Co., 203 P.2d 522, 33 Cal.2d 514—Lund v. Pacific Elec. Ry. Co., 153 P.2d 705, 25 Cal.2d 287—Westover v. City of Los Angeles, 128 P.2d 350, 20 Cal.2d 635—Arellano v. City of Burbank, 89 P.2d 113, 13 Cal.2d 248—Kraft v. Nemeth, 251 P.2d 355, 115 Cal.App.2d 50—Ideal Heating Corp. v. Royal Indem. Co., 237 P.2d 521, 107 Cal.App.2d 662—In re Hart's Estate, 236 P.2d 884, 107 Cal.App.2d 60—Block v. Snyder, 234 P.2d 52, 105 Cal.App.2d 783—Shook v. Beals, 217 P.2d 56, 96 Cal.App.2d 963, 18 A.L.R.2d 919—Caccamo v. Swanston, 212 P.2d 246, 94 Cal.App.2d 957—O'Connor v. City and County of San Francisco, 207 P.2d 638, 92 Cal.App.2d 626—Perbost v. San Marino Hall-School for Girls, 199 P.2d 701, 88 Cal.App.2d 796—Cunningham v. Coca-Cola Bottling Co. of Los Angeles, 198 P.2d 333, 87 Cal.App.2d 106—Cavagnaro v. City of Napa, 195 P.2d 25, 86 Cal. App.2d 517—Carney v. RKO Radio Pictures, 178 P.2d 482, 78 Cal.App.2d 659—McChristian v. Popkin, 171 P.2d 85, 75 Cal.App.2d 249—Goodwin v. Foley, 170 P.2d 603, 75 Cal. App.2d 195—Astone v. Oldfield, 155 P.2d 998, 67 Cal.App.2d 702—Graham v. Griffin, 151 P.2d 879, 66 Cal. App.2d 116—Florine v. Market Street Ry. Co., 149 P.2d 41, 64 Cal. App.2d 581—Wood v. Moore, 148 P.2d 91, 64 Cal.App.2d 144—Takako Inai v. Ede, 139 P.2d 76, 59 Cal.App.2d 549—In re Bucher's Estate, 132 P.2d 257, 56 Cal.App.2d 135—Stroud v. Hansen, 120 P.2d 102, 48 Cal.App.2d 556—Shields v. Oxnard Harbor Dist., 116 P.2d 121, 46 Cal. App.2d 477—Johnson v. Western Air Express Corp., 114 P.2d 688, 45 Cal.App.2d 614—Barlow v. Crome, 112 P.2d 303, 44 Cal.App.2d 356—People v. Lang Transp. Corp., 110 P.2d 464, 43 Cal.App.2d 134—Bauman v. City and County of San Francisco, 108 P.2d 989, 42 Cal.App.2d 144—Weaver v. Shell Co. of California, 94 P.2d 364, 34 Cal.App.2d 713—Martin v. Vierra, 93 P.2d 261, 34 Cal.App.2d 86—Portman v. Keegan, 87 P.2d 400, 31 Cal.App.2d 30—Smith v. Dean, 78 P.2d 448, 25 Cal.App.2d 671—Los Angeles County Flood Control Dist. v. Abbott, 76 P.2d 188, 24 Cal.App.2d 728—Holihaugh v. Kishero Ito, 69 P.2d 871, 21 Cal.App.2d 480—Dowdall v. Gilmore Oil Co., 62 P.2d 1051,

18 Cal.App.2d 1—Mayfield v. Fidelity & Casualty Co. of New York, 61 P.2d 85, 16 Cal.App.2d 611—Hamilton v. Hammond Lumber Co., 56 P.2d 1257, 13 Cal.App.2d 461—Krohn v. Patrick, 55 P.2d 301, 12 Cal.App.2d 339—Carrillo v. Helms Bakeries, 44 P.2d 604, 6 Cal.App.2d 299—Klenzendorf v. Shasta Union High School Dist., 40 P.2d 878, 4 Cal. App.2d 164—Uttley v. City of Santa Ana, 28 P.2d 377, 136 Cal.App. 23.

Conn.—Grissold v. Connecticut Co., 38 A.2d 676, 131 Conn. 248—Stein v. Nashner, 27 A.2d 801, 129 Conn. 317—C. I. T. Corporation v. Deering, 176 A. 553, 119 Conn. 347—Fitzgerald v. Savin, 174 A. 177, 119 Conn. 63.

D.C.—Cohen v. Evening Star Newspaper Co., 113 F.2d 523, 72 App.D. C. 258—Groher v. Capital Transit Co., D.C., 119 F.Supp. 100—Coleman v. Chudnow, Mun.App., 35 A.2d 925.

Fla.—Staff v. Soreno Hotel Co., 60 So. 2d 25—Martin v. Stone, 51 So.2d 33—Siegal v. Van Riper, 48 So.2d 735—Seaboard Air Line R. Co. v. Haynes, 47 So.2d 324—Eghligian v. Rice, 34 So.2d 432, 160 Fla. 278—Gaston v. Sevor, 23 So.2d 156, 156 Fla. 157—Baston v. Shelton, 13 So. 2d 453, 152 Fla. 879—Skinner v. Ochiltree, 5 So.2d 605, 148 Fla. 705, 140 A.L.R. 410—U. S. Rubber Products v. Clark, 200 So. 385, 145 Fla. 631—Dykes v. Simkins, 197 So. 327, 143 Fla. 625—Winthrop v. Carinhass, 195 So. 399, 142 Fla. 588—Greiper v. Coburn, 190 So. 902, 139 Fla. 293—Alford v. Barnett Nat. Bank of Jacksonville, 188 So. 322, 137 Fla. 564—Police & Firemen's Ins. Ass'n v. Hines, 183 So. 831, 134 Fla. 298—Warner v. Ware, 182 So. 605, 136 Fla. 466—Duval Laundry Co. v. Reif, 177 So. 726, 130 Fla. 276—McDonald v. Stone, 154 So. 327, 114 Fla. 608—Merchants' Transp. Co. v. Daniel, 149 So. 401, 109 Fla. 496.

Ga.—Smith v. Smith, 57 S.E.2d 611, 206 Ga. 461—Taintor v. Rogers, 30 S.E.2d 892, 197 Ga. 872—Guffin v. Kelly, 14 S.E.2d 50, 191 Ga. 880—Tucker v. Talmadge, 198 S.E. 726, 186 Ga. 798—Ellis v. Britt, 182 S.E. 596, 181 Ga. 44—Atlantic Coast Line R. Co. v. Layne, 77 S.E.2d 565, 88 Ga.App. 674—Barnett v. Whitley, 75 S.E.2d 667, 87 Ga.App. 860—Plaspohl v. Atlantic Coast Line R. Co., 74 S.E.2d 492, 87 Ga. App. 506—Equitable Credit Corp. v. Johnson, 72 S.E.2d 816, 86 Ga. App. 844—Hayslip v. Long, 71 S. E.2d 852, 86 Ga.App. 482—Lewis v. Duggan, 70 S.E.2d 66, 85 Ga.App. 733—Kelly v. Adams, 66 S.E.2d 144, 84 Ga.App. 450—Moffett v. Mc-

- Curry, 67 S.E.2d 807, 84 Ga.App. 853—Hotel Dempsey Co. v. Miller, 58 S.E.2d 475, 81 Ga.App. 233—Atlas Auto Finance Co. v. Atkins, 53 S.E.2d 171, 79 Ga.App. 91—Hall v. Cassell, 52 S.E.2d 639, 79 Ga.App. 7—Western & A. R. R. v. Fowler, 47 S.E.2d 874, 77 Ga.App. 206—Spaulding Lumber Co. v. Hemphill, 47 S.E.2d 514, 77 Ga.App. 1—Goldstein v. Gee, 46 S.E. 2d 763, 76 Ga.App. 637—Radney v. Levine, 42 S.E.2d 644, 75 Ga.App. 137—Louisville & N. R. Co. v. Peterson, 42 S.E.2d 171, 75 Ga.App. 11—Louisville & N. R. Co. v. Peterson, 42 S.E.2d 163, 75 Ga.App. 1—Ellison v. Aiken, 40 S.E.2d 441, 74 Ga.App. 541—Lamb v. Fedderwitz, 33 S.E.2d 893, 72 Ga.App. 406—Tennessee, A. & G. Ry. Co. v. Watts, 33 S.E.2d 736, 72 Ga.App. 377—Weathers Bros. Transfer Co. v. Jarrell, 33 S.E.2d 805, 72 Ga.App. 317—Cantrell v. Byars, 30 S.E.2d 643, 71 Ga.App. 287—Sheehan v. City Council of Augusta, 30 S.E.2d 502, 71 Ga.App. 233—Tucker v. Cummings, 24 S.E.2d 829, 69 Ga.App. 113—Pettigrew v. Williams, 23 S.E.2d 183, 68 Ga.App. 435—Gay v. Johnson, 21 S.E.2d 870, 68 Ga.App. 24—Powell v. Blackstock, 13 S.E.2d 503, 64 Ga.App. 442—Kelley v. Waters, 9 S.E.2d 194, 62 Ga.App. 455—State Highway Board v. Bridges, 3 S.E.2d 907, 60 Ga.App. 240—Poster v. Burnley, 192 S.E. 389, 56 Ga.App. 202—Brooks v. Carver, 190 S.E. 389, 55 Ga.App. 362.
- Idaho.**—Moore v. Harland, 233 P.2d 429, 71 Idaho 376.
- Ill.**—Duffy v. Cortest, 119 N.E.2d 241, 8 Ill.2d 511—Marshall v. Metropolitan Life Ins. Co., 90 N.E.2d 194, 405 Ill. 99—De Marco v. McGill, 83 N.E.2d 313, 402 Ill. 46—Hanson v. Trust Co. of Chicago, 43 N.E.2d 931, 380 Ill. 194—Crosby v. De Land Special Drainage Dist., 11 N.E.2d 937, 387 Ill. 462—Minnis v. Friend, 196 N.E. 191, 360 Ill. 328—Fisher v. Illinois Terminal R. Co., 113 N.E.2d 844, 350 Ill.App. 555—Wilke v. Moll, 86 N.E.2d 589, 338 Ill.App. 6—Kak v. Brescia, 76 N.E.2d 64, 333 Ill.App. 643—Kavanaugh v. Washburn, 50 N.E.2d 761, 320 Ill.App. 250, appeal denied 56 N.E.2d 420, 387 Ill. 204—Bobalek v. Atlass, 43 N.E.2d 584, 315 Ill.App. 614—Wiedow v. Carpenter, 34 N.E.2d 83, 310 Ill.App. 342—Edwards v. Hill-Thomas Lime & Cement Co., 32 N.E.2d 946, 309 Ill.App. 168, reversed on other grounds 37 N.E.2d 801, 378 Ill. 180—Pohl v. Fazzi, 32 N.E.2d 191, 308 Ill.App. 440—Reed v. Alton Water Co., 22 N.E.2d 395, 301 Ill.App. 219—Smith v. Illinois Power & Light Corp., 17 N.E.2d 832, 297 Ill.App. 358—Illinois Tuberculosis Ass'n v. Springfield Marine Bank, 282 Ill.App. 14.
- Ind.**—McClure v. Miller, 98 N.E.2d 493, 229 Ind. 422—Hancock Truck Lines v. Butcher, 94 N.E.2d 537, 229 Ind. 36—Riechmann v. Reasner, 61 N.E.2d 10, 221 Ind. 628—Carter v. Ethna Life Ins. Co., 27 N.E.2d 75, 217 Ind. 282—Adkins v. Ropp, 14 N.E.2d 727, 105 Ind.App. 331—Bain v. Mattmiller, 13 N.E.2d 712, 213 Ind. 549—King's Ind. Billiard Co. v. Winters, 106 N.E.2d 713, 123 Ind.App. 110—Powell v. Ellis, 105 N.E.2d 348, 122 Ind.App. 700—Public Service Co. of Ind. v. Dalbey, 85 N.E.2d 368, 119 Ind.App. 405—H. E. McGonigal, Inc. v. Etherington, 79 N.E.2d 777, 118 Ind.App. 622—Vogel v. Ridens, 44 N.E.2d 238, 112 Ind.App. 493—Ziffrin v. Bolitho, 25 N.E.2d 675, 108 Ind.App. 44—Gateway v. Lynch, 23 N.E.2d 289, 107 Ind.App. 168—Town of Frankton v. Closser, 20 N.E.2d 216, 107 Ind.App. 193—Gibson v. Johnson, 14 N.E.2d 337, 106 Ind.App. 103—Standard Oil Co. of Indiana v. Thomas, 13 N.E.2d 336, 105 Ind. App. 610—Western & Southern Indemnity Co. v. Newman, 7 N.E.2d 64, 103 Ind.App. 544—Marshall v. Temperley, 192 N.E. 106, 100 Ind. App. 131—Hoosier Lumber Co. v. Spear, 189 N.E. 638, 99 Ind.App. 532—Livingston v. Rice, 184 N.E. 583, 96 Ind.App. 176.
- Iowa.**—Fagen Elevator v. Pfister, 56 N.W.2d 577, 244 Iowa 633—Brady v. McQuown, 40 N.W.2d 25, 241 Iowa 34—In re Behrend's Will, 10 N.W.2d 651, 233 Iowa 812—Swan v. Dailey-Luce Auto Co., 265 N.W. 143, 221 Iowa 842—Slessenger v. Puth, 248 N.W. 352, 216 Iowa 916—Hoehg v. See, 246 N.W. 787, 215 Iowa 733.
- Kan.**—Giltner v. Stephens, 200 P.2d 290, 166 Kan. 172—Wooster v. National Bank of America, 32 P.2d 235, 139 Kan. 429.
- Ky.**—Brown v. Crumpton, 252 S.W.2d 670—Grey v. Davidson, 235 S.W.2d 992, 314 Ky. 545—Venters v. Watts, 215 S.W.2d 953, 308 Ky. 770—Cunningham v. Sublett's Adm'r, 208 S.W.2d 509, 306 Ky. 701—Speith v. Helm, 192 S.W.2d 376, 301 Ky. 451—Peerless Mfg. Corp. v. Mackey, 171 S.W.2d 268, 294 Ky. 221—Knight v. Silver Fleet Motor Express, 159 S.W.2d 1002, 289 Ky. 661.
- Me.**—Reed v. Central Maine Power Co., 172 A. 823, 132 Me. 476.
- Md.**—Reindollar v. Kaiser, 73 A.2d 493, 195 Md. 314—Pennsylvania R. Co. v. State, 53 A.2d 562, 188 Md. 646.
- Mich.**—Hayes v. Coleman, 61 N.W.2d 634, 338 Mich. 371—Max v. City of Detroit, 60 N.W.2d 145, 337 Mich. 674—Pallas v. Crowley-Milner & Co., 64 N.W.2d 595, 334 Mich. 282—Samuelson v. Olson Transp. Co., 36 N.W.2d 917, 324 Mich. 278—Van Dyke v. Rozneck, 36 N.W.2d 201, 324 Mich. 29—Socony Vacuum Oil Co. v. Marvin, 21 N.W.2d 841, 313 Mich. 528—Bathke v. Traverse City, 13 N.W.2d 184, 308 Mich. 1—Finkel v. Otto Misch Co., 289 N.W. 276, 291 Mich. 630—Newell v. Ritter, 256 N.W. 464, 268 Mich. 405.
- Minn.**—Barnes v. Northwest Airlines, 47 N.W.2d 180, 233 Minn. 410—Froden v. Ransenberger, 41 N.W.2d 807, 230 Minn. 366—Rampi v. Vevea, 38 N.W.2d 297, 223 Minn. 11—Murray v. Wilson, 35 N.W.2d 521, 227 Minn. 365—Donaldson v. Carstensen, 247 N.W. 522, 188 Minn. 443.
- Miss.**—West v. Majure, 34 So.2d 726—Gibson v. State, 199 So. 76—Metropolitan Life Ins. Co. v. Moss, 192 So. 343—Cox v. Dempsey, 171 So. 788, 177 Miss. 678—Durrett v. Mississippi Ry. Co., 158 So. 776, 171 Miss. 899—McKee v. Assad, 153 So. 799, 169 Miss. 496.
- Mo.**—Duffy v. Rohan, 259 S.W.2d 839—Rhinelander v. St. Louis-San Francisco Ry. Co., 257 S.W.2d 655—Winters v. Terminal R. Ass'n of St. Louis, 252 S.W.2d 380, 363 Mo. 606—Higgins v. Terminal R. Ass'n of St. Louis, 241 S.W.2d 380, 362 Mo. 264—Yenditti v. St. Louis Public Service Co., 240 S.W.2d 921, 362 Mo. 339—West v. St. Louis Public Service Co., 236 S.W.2d 308, 361 Mo. 740—Hilton v. Thompson, 227 S.W.2d 675, 360 Mo. 177—Griffith v. Gardner, 217 S.W.2d 519, 358 Mo. 859—Elines v. W. U. Tel. Co., 217 S.W.2d 482, 358 Mo. 783—Quigley v. St. Louis Public Service Co., 201 S.W.2d 169—Petty v. Kansas City Public Service Co., 198 S.W.2d 684, 355 Mo. 824—Johnson v. Davidson, 177 S.W.2d 467, 352 Mo. 843—Clark v. Powell, 175 S.W.2d 342, 351 Mo. 1121—Rishel v. Kansas City Public Service Co., 129 S.W.2d 851—Schneider v. Dubinsky Realty Co., 127 S.W.2d 691, 344 Mo. 664—Engleman v. Railway Express Agency, 100 S.W.2d 549, 340 Mo. 360—Jenkins v. Missouri State Life Ins. Co., 69 S.W.2d 666, 334 Mo. 941—Larey v. Missouri-Kansas-Texas R. Co., 64 S.W.2d 681, 333 Mo. 949—McDonald v. Kansas City Gas Co., 59 S.W.2d 37, 332 Mo. 356—Bergamo v. Engelhardt, App. 262 S.W.2d 307—Fyock v. Riales, App. 251 S.W.2d 102—Smith v. Gerhardt, App. 220 S.W.2d 85—St. Vincent's Sanitarium v. Murphy, App. 209 S.W.2d 560—Hall v. Martindale, App. 166 S.W.2d 594—*Corpus Juris cited in Keene v. City of Springfield*, App. 152 S.W.2d 220, 222—Robinson v. Kincaid, App. 142 S.W.2d 1083—Heathcock v. Wolfe, App. 136 S.W.2d 105—Usuna Mfg. Co. v. Shubert-Christy Corp., App. 132 S.W.2d 1101—Bornhoff v. City of Jefferson, App. 118 S.W.2d 93, opinion quashed in part on other grounds State ex rel. City of Jefferson v. Shain, 124 S.W.2d 1194, 344 Mo. 87



- State ex rel. State Highway Commission v. Bailey, 115 S.W.2d 17, 234 Mo.App. 168—Coker v. Arl J. Dillman & Son, App., 92 S.W.2d 945—Lyons v. St. Joseph Belt Ry. Co., 84 S.W.2d 933, 232 Mo.App. 575, certiorari quashed State ex rel. St. Joseph Belt Ry. Co. v. Shain, 108 S.W.2d 351, 341 Mo. 733—Robinson v. Chicago Great Western R. Co., App., 66 S.W.2d 180.
- Mont.—Hampton v. Commercial Credit Corp., 176 P.2d 270, 119 Mont. 476—Palmer v. Riek, 88 P.2d 16, 108 Mont. 108—Koppang v. Sevier, 75 P.2d 790, 106 Mont. 79—McGonigle v. Prudential Ins. Co. of America, 46 P.2d 687, 100 Mont. 203.
- Neb.—Benson v. Walker, 59 N.W.2d 739, 157 Neb. 436—Haight v. Nelson, 59 N.W.2d 576, 157 Neb. 641—Shiers v. Cowgill, 59 N.W.2d 407, 157 Neb. 285—Danner v. Walters, 48 N.W.2d 635, 154 Neb. 506—Mundy v. Davis, 48 N.W.2d 394, 154 Neb. 423—Trebelhorn v. Bartlett, 47 N.W.2d 374, 154 Neb. 113—O'Dell v. Goodsell, 41 N.W.2d 123, 152 Neb. 290—Bush v. James, 40 N.W.2d 667, 152 Neb. 189—In re Wahl's Estate, 39 N.W.2d 783, 151 Neb. 812—Myers v. Willmeroth, 39 N.W.2d 423, 151 Neb. 712—Pimple v. Archer Ballroom Co., 35 N.W.2d 680, 150 Neb. 681—Allen v. Massachusetts Mut. Life Ins. Co., 30 N.W.2d 885, 149 Neb. 233—Blanchard v. Lawson, 27 N.W.2d 217, 148 Neb. 299—Wright v. Cameron, 27 N.W.2d 226, 148 Neb. 292—Horky v. Schroll, 26 N.W.2d 396, 148 Neb. 96—Pruitt v. Lincoln City Lines, 22 N.W.2d 651, 147 Neb. 204—Herman v. Piretine, 21 N.W.2d 444, 146 Neb. 730—In re Golst's Estate, 18 N.W.2d 513, 146 Neb. 1—Cillian v. Equitable Life Assur. Soc., 6 N.W.2d 782, 142 Neb. 497, vacated on other grounds 10 N.W.2d 693, 143 Neb. 647, 148 A.L.R. 496—Bancroft v. Kite, 5 N.W.2d 196, 142 Neb. 178—Chambers v. Chicago, B. & Q. R. Co., 293 N.W. 338, 138 Neb. 490—Tarkington v. Northwestern Public Service Co., 292 N.W. 720, 138 Neb. 278—Fonda v. Northwestern Public Service Co., 292 N.W. 712, 138 Neb. 262—Whittaker v. Omaha & C. B. St. Ry. Co., 291 N.W. 275, 137 Neb. 800—Spangler v. Brown, 289 N.W. 839, 137 Neb. 510—Gallagher v. Law, 281 N.W. 806, 135 Neb. 381—Mackechnie v. Lyders, 279 N.W. 328, 134 Neb. 682—Holtz v. Plumer, 277 N.W. 589, 133 Neb. 878—Suhr v. Lindell, 277 N.W. 381, 133 Neb. 856—Fielding v. Publix Cars, 277 N.W. 331, 133 Neb. 818—Hemmer v. Metropolitan Life Ins. Co., 276 N.W. 153, 133 Neb. 470—Rasmussen v. Benson, 275 N.W. 674, 133 Neb. 449, 122 A.L.R. 1468, affirmed 280 N.W. 890, 135 Neb. 232, 122 A.L.R. 1475—Triplett v. Lundeen, 272 N.W. 307, 132 Neb. 434—Reinhardt v. Messen, 271 N.W. 442, 132 Neb. 207—Sprague v. Allied Mills, 261 N.W. 892, 129 Neb. 394—Vithen v. Jensen, 258 N.W. 267, 128 Neb. 188—Masonic Bldg. Corporation v. Carlson, 258 N.W. 44, 128 Neb. 108—Kovar v. Beckins, 275 N.W. 670, 133 Neb. 487—Interstate Airlines v. Arnold, 256 N.W. 513, 127 Neb. 665—Casari v. Winchester, 253 N.W. 434, 126 Neb. 463.
- Nev.—Wells, Inc., v. Shoemaker, 177 P.2d 451, 64 Nev. 57.
- N.H.—U. S. Fidelity & Guaranty Co. v. Minault, 72 A.2d 161, 96 N.H. 168—Marchand v. Public Service Co., 65 A.2d 468, 95 N.H. 422.
- N.J.—Ristan v. Frantzen, 102 A.2d 614, 14 N.J. 455—Vadurro v. Yellow Cab Co. of Camden, 77 A.2d 459, 6 N.J. 102—Ristan v. Frantzen, 87 A.2d 726, 26 N.J. Super. 225, affirmed 102 A.2d 614, 14 N.J. 455—Davis v. Gibbs, 93 A.2d 206, 23 N.J. Super. 558—Petrosino v. Public Service Coordinated Transport, 61 A.2d 746, 1 N.J. Super. 19—Kauder v. McAllister Coal Co., 40 A.2d 624, 132 N.J. Law 410—Middleton v. Public Service Coordinated Transport, 36 A.2d 393, 131 N.J. Law 322—Barbera v. John Hancock Mut. Life Ins. Co., 21 A.2d 222, 127 N.J. Law 122—Farley v. Kearson, 3 A.2d 591, 121 N.J. Law 622—Evans v. New Jersey Central Power & Light Co., 194 A. 144, 119 N.J. Law 88—Wirth v. Hudson & M. R. Co., 194 A. 143, 119 N.J. Law 25—Niles v. Phillips Express Co., 193 A. 183, 118 N.J. Law 455—Poling v. Melee, 178 A. 737, 115 N.J. Law 191—Lyon v. Fabricant, 172 A. 567, 113 N.J. Law 62—Johnson v. Central R. Co. of New Jersey, 166 A. 180, 111 N.J. Law 93.
- N.M.—Chandler v. Battenfield, 233 P.2d 1047, 55 N.M. 361—Lujan v. McCuiston, 232 P.2d 478, 55 N.M. 275.
- N.C.—Vincent v. Woody, 76 S.E.2d 356, 238 N.C. 118—Whiteman v. Seashore Transp. Co., 58 S.E.2d 752, 231 N.C. 701—Hooper v. Glenn, 53 S.E.2d 843, 230 N.C. 571—Yadkin Valley Motor Co. v. Home Ins. Co. of New York, 16 S.E.2d 847, 220 N.C. 168—Blue Bird Cab Co. v. American Fidelity & Casualty Co., 15 S.E.2d 295, 219 N.C. 788—Bullock v. Williams, 193 S.E. 170, 212 N.C. 113.
- N.D.—Froh v. Hein, 39 N.W.2d 11, 76 N.D. 701.
- Ohio.—Tanski v. White, 109 N.E.2d 319, 92 Ohio App. 411—Rhoades v. City of Cleveland, App., 100 N.E.2d 705, reversed on other grounds 105 N.E.2d 2, 157 Ohio St. 107—Morris v. Cleveland Hockey Club, App., 98 N.E.2d 49, affirmed 105 N.E.2d 419, 157 Ohio St. 225—Coleman v. New York Cent. R. Co., App., 39 N.E.2d 157—Schomer v. State ex rel. Bettman, 190 N.E. 638, 47 Ohio App. 84—DiNuzzo v. Metropolitan Life Ins. Co., 6 Ohio Supp. 28.
- Okl.—McElroy v. Frost, 268 P.2d 273—Oklahoma Natural Gas Co. v. Appel, 266 P.2d 442—St. Louis-San Francisco Ry. Co. v. Farrell, 263 P.2d 518—Smith v. Barry, 258 P.2d 165, 208 Okl. 606—Magnolia Petroleum Co. v. Sutton, 257 P.2d 307, 208 Okl. 488—Chicago, R. I. & P. R. Co. v. Hale, 254 P.2d 338, 208 Okl. 141—Oklahoma Coca-Cola Bottling Co. v. Dillard, 253 P.2d 847, 208 Okl. 126—Town of Braggs v. Slape, 250 P.2d 214, 207 Okl. 420—Oklahoma City-Ada-Atoka Ry. Co. v. Crabtree, 249 P.2d 445, 207 Okl. 327—Midland Valley R. Co. v. Lowery, 248 P.2d 1042, 207 Okl. 227—Witt v. Houston, 246 P.2d 753, 207 Okl. 25—Sanders v. C. P. Carter Const. Co., 244 P.2d 822, 206 Okl. 484—City of Blackwell v. Murdock, 244 P.2d 817, 206 Okl. 466—Grand Distributing Co. v. Adams, 244 P.2d 571, 206 Okl. 451—Greenland v. Gilliam, 241 P.2d 384, 206 Okl. 85—Dippel v. Hargrave, 240 P.2d 1070, 206 Okl. 26—Employers Cas. Co. v. Barnett, 235 P.2d 685, 205 Okl. 75—Johnson v. Short, 232 P.2d 944, 204 Okl. 656—H. A. Marr Grocery Co. v. Jones, 228 P.2d 388, 204 Okl. 183—Fletcher v. Millward, 228 P.2d 370, 204 Okl. 177—Elam v. Loyd, 204 P.2d 280, 201 Okl. 222—H. F. Wilcox Oil & Gas Co. v. Jamison, 190 P.2d 807, 199 Okl. 691—Buck v. Miller, 181 P.2d 264, 198 Okl. 617—Southwest Stone Co. v. Hughes, 177 P.2d 489, 198 Okl. 257—Skelly Oil Co. v. Funk, 174 P.2d 241, 197 Okl. 659—Oklahoma Tax Commission v. Price, 167 P.2d 873, 197 Okl. 1—Davis v. Curry, 167 P.2d 73, 196 Okl. 577—Sebranek v. Krivohlavek, 163 P.2d 530, 196 Okl. 132—Browning v. Denco Bus Lines, 162 P.2d 525, 196 Okl. 1—Feuquay v. Ecker, 157 P.2d 745, 195 Okl. 285—Henricks v. Wilson, 149 P.2d 256, 194 Okl. 212—A. & A. Cab Operating Co. v. Mooneyham, 142 P.2d 974, 193 Okl. 238—Duncan v. Flagler, 132 P.2d 939, 192 Okl. 18—Hazelrigg v. Harvey, 132 P.2d 650, 191 Okl. 648—Logan v. Jacobs, 119 P.2d 53, 189 Okl. 617—City of Tulsa v. Lewis, 117 P.2d 784, 189 Okl. 470—Grand River Dam Authority v. Bomford, 111 P.2d 182, 188 Okl. 512—Walton v. Bryan, 109 P.2d 489, 188 Okl. 358—Hartman v. Dunn, 92 P.2d 897, 186 Okl. 9—Chicago, R. I. & P. Ry. Co. v. Richerson, 94 P.2d 934, 185 Okl. 560—City of Ada v. Criswell, 94 P.2d 838, 185 Okl. 517—Jamison v. Oklahoma Power & Water Co., 90 P.2d 419, 185 Okl. 103—Labenne v. Kaufman, 89 P.2d 281, 184 Okl. 565—Seifried v. Bash, 84 P.2d 34, 183 Okl. 641—Garrett v. Haworth, 83 P.2d 822, 183 Okl. 569—Oklahoma City-Ada-Atoka Ry. Co. v. Riddle, 82 P.2d 304, 183 Okl. 318

jury are told that all instructions are to be considered as a series or as a whole.<sup>44</sup> Where, however, an instruction is complete in itself, it must stand or fall on its own language.<sup>45</sup>

### § 431. Errors and Omissions

In accordance with the rule that, where instructions considered as a whole correctly state the law, they are

sufficient, a charge may be sustained although a part of the instructions considered alone may be erroneous or misleading; and an omission to state the entire law in one instruction is not error if the omission is reasonably supplied elsewhere.

In accordance with the rule, stated supra § 430, that, where instructions considered as a whole correctly state the law, they are sufficient, a charge may be sustained although a part of the instructions con-

—Home Mut. Life Ass'n v. Hodges, 80 P.2d 278, 183 Okl. 104.—Farmers' Union Co-Op. Gin Co. v. Fairbanks, Morse & Co., 73 P.2d 1148, 181 Okl. 336.—Marathon Oil Co. v. Sanders, 71 P.2d 956, 180 Okl. 442.—National Life & Accident Ins. Co. v. Roberson, 68 P.2d 796, 180 Okl. 265.—O. K. Storage & Transfer Co. v. Hagen, 67 P.2d 796, 179 Okl. 608.—Oklahoma Gas & Electric Co. v. Busha, 66 P.2d 64, 179 Okl. 505.—Pine v. Duncan, 65 P.2d 492, 179 Okl. 336.—Gibson Co. v. Dye, 65 P.2d 407, 179 Okl. 385.—Chicago, R. I. & P. Ry. Co. v. Odom, 61 P.2d 1083, 178 Okl. 131.—Blew v. Chicago, R. I. & P. Ry. Co., 61 P.2d 128, 177 Okl. 553.—McLaughlin v. Union Transp. Co., 57 P.2d 868, 177 Okl. 115.—City of Muskogee v. Magee, 57 P.2d 262, 177 Okl. 39.—Midland Valley R. Co. v. Wattle, 54 P.2d 177, 175 Okl. 402.—Blackburn v. Martin & Mueller, 50 P.2d 627, 174 Okl. 394.—Lazzell v. Harvey, 49 P.2d 519, 174 Okl. 86.—St. Louis-San Francisco Ry. Co. v. Stuart, 47 P.2d 177, 173 Okl. 221.—Shawnee Nat. Bank v. D. S. Miser & Son, 46 P.2d 909, 171 Okl. 317.—Pharoah v. Beugler, 45 P.2d 1098, 172 Okl. 633.—Seybold v. Pierce, 44 P.2d 826, 171 Okl. 112.—Atchison, T. & S. F. Ry. Co. v. Wood & Co., 43 P.2d 727, 171 Okl. 610.—Champlin Refining Co. v. Brooks, 42 P.2d 811, 172 Okl. 124.—City of Edmond v. Billen, 42 P.2d 253, 171 Okl. 90.—Oil Reclaiming Co. v. Reagan, 37 P.2d 289, 169 Okl. 505.—Skaggs v. Gypsey Oil Co., 36 P.2d 865, 169 Okl. 209.—Mitchell v. Gibson, 36 P.2d 1, 169 Okl. 430.—Nichols v. Hanbury-Russell Supply Co., 33 P.2d 198, 168 Okl. 371.—Grayson v. Brown, 26 P.2d 204, 166 Okl. 43.—Hall & Briscoe v. Roberts, 20 P.2d 188, 163 Okl. 12.—Hall & Briscoe v. Strode, 20 P.2d 186, 163 Okl. 11.

Or.—Denton v. Arnstein, 250 P.2d 407, 197 Or. 28.—Hughes v. Gilisou, 230 P.2d 770, 191 Or. 557.—Cade v. Thompson, 225 P.2d 396, 190 Or. 242.—Boardman v. Ottinger, 88 P.2d 967, 161 Or. 202.—Hornby v. Wiper, 63 P.2d 204, 155 Or. 203.

Pa.—McDonald v. Ferrebee, 79 A.2d 232, 366 Pa. 543.—Bollinger v. West Penn Power Co., 76 A.2d 214, 365 Pa. 599.—Bourd v. Berman, 58 A.2d 442, 359 Pa. 183.—Harman v. Chambers, 57 A.2d 842, 358 Pa. 516.—

Nicola v. American Stores Co., 41 A.2d 662, 351 Pa. 404.—Robinson v. Philadelphia Transp. Co., 32 A.2d 26, 347 Pa. 288.—Masinko v. McLeary, 11 A.2d 648, 337 Pa. 355.—Yost v. West Penn Rys. Co., 9 A.2d 368, 336 Pa. 407.—Glannone v. Reala, 3 A.2d 331, 333 Pa. 21.—Casey v. Scilliano, 165 A. 1, 310 Pa. 238.—Sipowicz v. Oliveri, 102 A.2d 175, 174 Pa.Super. 549.—Vogel v. Suburban Const. Co., 20 A.2d 905, 144 Pa.Super. 588.—Rudy v. New York Life Ins. Co., 12 A.2d 495, 130 Pa.Super. 517.—Schmidt v. Campbell, 7 A.2d 546, 138 Pa.Super. 590.—Cockcroft v. Metropolitan Life Ins. Co., 3 A.2d 184, 133 Pa.Super. 598.—Capristo v. Gross, 1 A.2d 575, 133 Pa.Super. 61.—Zimmerman v. Houghwot, 189 A. 519, 125 Pa.Super. 319.—Calvey Motor Co. v. Coyner, 184 A. 281, 121 Pa.Super. 509.—Anstine v. Pennsylvania R. Co., Com.Pl., 60 Dauph. Co. 196, reversed on other grounds 20 A.2d 774, 342 Pa. 423.—Rudy v. New York Life Ins. Co. of New York City, Com.Pl., 46 Dauph. Co. 1, affirmed 12 A.2d 495, 139 Pa.Super. 517.—Fine v. Philadelphia Suburban Transp. Co., Com.Pl., 34 Del.Co. 525.—Sell v. Fahs, Com.Pl., 55 Montg. Co., 197.—O'Shaughnessy v. Kunsman, Com. Pl., 28 North.Co. 150.—Keystone Lumber Co. v. Boleski, Com.Pl., 13 Northumb.Leg.J. 332.

R.I.—De Fusco v. Laudat, 10 A.2d 346, 64 R.I. 68.

S.C.—Marks v. I. M. Pearlstone & Sons, 26 S.E.2d 835, 203 S.C. 318.—Montgomery v. National Convey & Trucking Co., 195 S.E. 247, 186 S.C. 167.

Tenn.—Miller v. Thrasher, 251 S.W. 2d 446, 36 Tenn.App. 88.—Southern Fire & Cas. Co. v. Norris, 250 S.W. 2d 785, 35 Tenn.App. 657.—Clinchfield R. Co. v. Harvey, 64 S.W.2d 513, 16 Tenn.App. 324.—City of Lawrenceburg v. Dyer, 11 Tenn. App. 493.—Tennessee R. Co. v. Kingsley, 10 Tenn.App. 637.—Tennessee Cent. Ry. Co. v. Gleaves, 2 Tenn.App. 549.—East End Tire & Oil Co. v. Mallory, 2 Tenn.App. 101.—Mauldin v. Otto Schwill & Co., 1 Tenn.App. 347.

Tex.—Wichita Transit Co. v. Sanders, Civ.App., 214 S.W.2d 810.

Utah.—Gogo v. Continental Cas. Co., 165 P.2d 882, 109 Utah 122.—Brooks v. Utah Hotel Co., 159 P.2d 127, 108

Utah 220.—Walkenhorst v. Kesler, 67 P.2d 654, 92 Utah 312.

Vt.—Gould v. Gould, 6 A.2d 24, 110 Vt. 324.—Taylor v. Mayhew, 195 A. 249, 109 Vt. 251.

Wash.—Lee & Eastes v. Continental Carriers, 265 P.2d 257.—Robbins v. Greene, 261 P.2d 83, 49 Wash.2d 315.—Myers v. West Coast Fast Freight, 256 P.2d 840, 42 Wash.2d 524.—Zackovich v. Jasmont, 200 P. 2d 742, 32 Wash.2d 73.—Rowe v. Dixon, 196 P.2d 327, 31 Wash.2d 173.—State Bank of Wilbur v. Phillips, 119 P.2d 684, 11 Wash.2d 483.—Erickson v. Barnes, 107 P.2d 348, 6 Wash.2d 251.—Nystuen v. Spokane County, 77 P.2d 1002, 194 Wash. 312.—Forquer v. Hidden, 71 P.2d 1000, 181 Wash. 638.—O'Connell v. Home Oil Co., 40 P.2d 991, 180 Wash. 461. W.Va.—Mitchell v. Virginian Ry. Co., 183 S.E. 35, 116 W.Va. 739.

Wis.—Reynolds v. Wargus, 2 N.W. 2d 842, 240 Wis. 94.  
64 C.J. p 964 note 55—9 C.J. p 662 note 74.

All that is required of charge is that, as a whole, it convey to jury a clear and correct understanding of the law; every possible opportunity for misapprehension need not be guarded against and if charge fairly lays down law of the case, it is sufficient.—Cameron v. Evans, Minn., 62 N.W.2d 793.

#### Submission of question of law

In action on life policy to recover double indemnity for accidental death, an instruction authorizing jury to find that defendant issued a policy in which plaintiff was the beneficiary and that defendant therein agreed to pay a designated sum for accidental death was not erroneous as submitting a question of law where that part of instruction was followed by everything necessary for jury to find to make a case for plaintiff.—Gilpin v. Aetna Life Ins. Co., 132 S.W.2d 686, 234 Mo.App. 566.

44. Colo.—Guardian Life Ins. Co. of America v. Kortz, 125 P.2d 640, 109 Colo. 331.

Idaho.—Swanstrom v. Bell, 186 P.2d 876, 67 Idaho 554.

Ill.—Schiro v. Cummings, 53 N.E.2d 489, 321 Ill.App. 640.  
64 C.J. p 967 note 56.

45. Wash.—Gray v. Davidson, 180 P. 2d 841, 15 Wash.2d 257, affirmed 186 P.2d 187, 15 Wash.2d 287.

sidered alone may be erroneous or misleading,<sup>46</sup> and an omission to state the entire law in one instruction is not error if the omission is reasonably

supplied elsewhere, so that the charge as a whole fully and fairly presents the law applicable to the issues.<sup>47</sup> The court in the particular case on ap-

46. U.S.—Reliance Life Ins. Co. of Pittsburgh v. Everglades Discount Corp., C.A.Fla., 204 F.2d 837—Southern Pac. Co. v. Souza, C.A. Cal., 179 F.2d 691—Grand Trunk Western R. Co. v. H. W. Nelson Co., C.C.A.Mich., 116 F.2d 823, rehearing denied 118 F.2d 252.
- Cal.—Westover v. City of Los Angeles, 128 P.2d 350, 20 Cal.2d 635—Lopez v. Knight, 263 P.2d 452, 121 Cal.App.2d 387—Erickson v. Water Land Truck Lines, 269 P.2d 484, 119 Cal.App.2d 210—Perbost v. San Marino Hall-School for Girls, 199 P.2d 701, 88 Cal.App.2d 796—Armstrong v. Allen, 171 P.2d 552, 75 Cal.App.2d 614—Meggee v. Pasulins, 150 P.2d 281, 65 Cal.App.2d 94—Blanton v. Curry, 121 P.2d 125, affirmed and supplemented 129 P.2d 1, 20 Cal.2d 793—Barsha v. Metro-Goldwyn-Mayer, 90 P.2d 371, 32 Cal.App.2d 556.
- Conn.—Danehy v. Metz, 100 A.2d 843, 140 Conn. 376—Grays v. Connecticut Co., 198 A. 259, 123 Conn. 605—Tappin v. Rider Dairy Co., 178 A. 428, 119 Conn. 591.
- Fla.—Miami Transit Co. v. Dalton, 23 So.2d 572, 156 Fla. 485.
- Ga.—Smith v. Northeast Ga. Fair Ass'n, 67 S.E.2d 836, 85 Ga.App. 32—Goldin v. Smith, 64 S.E.2d 57, 207 Ga. 734—Sovereign Camp, W. O. W. v. Ellis, 1 S.E.2d 677, 59 Ga.App. 608—Fite v. Walker, 187 S.E. 95, 183 Ga. 46.
- Hawaii.—Ciacci v. Woolley, 33 Hawaii 247.
- Idaho.—Moore v. Harland, 233 P.2d 429, 71 Idaho 376.
- Ill.—Duffy v. Cortesi, 119 N.E.2d 241, 2 Ill.2d 511—Jackson County v. Wayman, 15 N.E.2d 854, 369 Ill. 123—McMillan v. McLane, 88 N.E.2d 114, 338 Ill.App. 514—Bobalek v. Atlass, 43 N.E.2d 584, 315 Ill.App. 514—Russell v. Richardson, 24 N.E.2d 185, 302 Ill.App. 589.
- Ind.—Indianapolis Rys. v. Williams, 59 N.E.2d 586, 115 Ind.App. 383—Hough v. Miller, 44 N.E.2d 228, 112 Ind.App. 133—Van Drake v. Thomas, 88 N.E.2d 878, 110 Ind.App. 586—Huseman v. Neaman, 6 N.E.2d 723, 103 Ind.App. 238—Prudential Ins. Co. of America v. Thatcher, 4 N.E.2d 674, 104 Ind.App. 14—Curnick v. Torbert, 194 N.E. 771, 101 Ind.App. 113.
- Iowa.—Rogers v. Jefferson, 285 N.W. 701, 226 Iowa 1047—Olson v. Cushman, 276 N.W. 777, 224 Iowa 974.
- Kan.—Casper v. Common School Dist. No. 7, Sumner County, 265 P.2d 1027, 175 Kan. 551—Wing v. Mid-Continent Seeds, 225 P.2d 78, 170 Kan. 242.
- Ky.—Bartlett v. Vanover, 86 S.W.2d 1020, 260 Ky. 839.
- Minn.—Barnes v. Northwest Airlines, 47 N.W.2d 180, 233 Minn. 410.
- Miss.—Lipnick v. New York Life Ins. Co., 52 So.2d 916, 211 Miss. 833—Yorkshire Ins. Co. v. Brewer, 166 So. 361, 175 Miss. 538—McKee v. Assad, 153 So. 799, 169 Miss. 496.
- Mo.—Nelson v. Tayon, 265 S.W.2d 409—West v. St. Louis Public Service Co., 236 S.W.2d 308, 361 Mo. 740.
- Neb.—Angstadt v. Coleman, 58 N.W.2d 507, 156 Neb. 850—Pierson v. Jensen, 33 N.W.2d 462, 150 Neb. 86—Blanchard v. Lawson, 27 N.W.2d 217, 148 Neb. 299.
- N.J.—Simons v. Lee, 189 A. 360, 117 N.J.Law 370.
- N.M.—Olguin v. Thygesen, 143 P.2d 585, 47 N.M. 377.
- N.C.—Collingwood v. Winston-Salem Southbound Ry. Co., 59 S.E.2d 584, 232 N.C. 192, reversed on other grounds 62 S.E.2d 87, 232 N.C. 724.
- N.D.—Ferdner v. Northern Pac. Ry. Co., 42 N.W.2d 216, 77 N.D. 165.
- Okla.—Smith v. Barry, 258 P.2d 165, 208 Okl. 606—Oklahoma City-Adams Ry. Co. v. Crabtree, 249 P.2d 445, 207 Okl. 327—Rogers v. Lassiter, 164 P.2d 632, 196 Okl. 228—Hart v. Lewis, 103 P.2d 65, 187 Okl. 394—Cimarron Utilities Co. v. Safranko, 101 P.2d 258, 187 Okl. 86—Jamison v. Oklahoma Power & Water Co., 90 P.2d 419, 185 Okl. 103—Sooner Distributing Co. v. Langley, 80 P.2d 590, 183 Okl. 236—Helmerich & Payne v. Nunley, 54 P.2d 1088, 176 Okl. 246—Hall & Briscoe v. Roberts, 20 P.2d 188, 163 Okl. 12—Hall & Briscoe v. Strode, 20 P.2d 186, 163 Okl. 11.
- Or.—Parmentier v. Ransom, 169 P.2d 883, 179 Or. 17—Bourman v. Ottlinger, 88 P.2d 967, 161 Or. 202.
- Pa.—Rosenberg v. Walker, 50 A.2d 209, 355 Pa. 378—Snyder v. Levy Produce Co., Com.Pl., 41 Berks Co. 119—Lane v. Rodgers, Com.Pl., 51 Del.Co. 223.
- Tenn.—West Tennessee Power & Light Co. v. Hughes, 15 Tenn.App. 37—Fidelity Bond & Mortgage Co. v. American Surety Co., 14 Tenn.App. 211—Louvier v. City of Nashville, 1 Tenn.App. 401—Mauldin v. Otto Schwill & Company, 1 Tenn.App. 347.
- Tex.—Finnick Cigar Co. v. Campbell, Civ.App., 114 S.W.2d 348, affirmed 133 S.W.2d 759, 134 Tex. 250.
- Va.—Hall v. Hall, 23 S.E.2d 810, 181 Va. 87.
- Wash.—Larson v. City of Seattle, 171 P.2d 212, 25 Wash.2d 291—Herndon v. City of Seattle, 118 P.2d 421, 11 Wash.2d 88—Keithamer v. West Coast Tel. Co., 118 P.2d 173, 11 Wash.2d 24—American Products Co. v. Villwock, 109 P.2d 570, 7 Wash.2d 246, 132 A.L.R. 1010.
- 64 C.J. p. 967 note 58.
- Cure of error by other instructions see infra §§ 441-447.
47. U.S.—Terminal R. Ass'n of St. Louis v. Fitzjohn, C.C.A.Mo., 165 F.2d 473, 1 A.L.R.2d 290.
- Ark.—Roark Transp. v. Sneed, 68 S.W.2d 996, 188 Ark. 928.
- Cal.—Huyc v. Merritt, 240 P.2d 1, 108 Cal.App.2d 775—Jones v. Harris, 231 P.2d 561, 104 Cal.App.2d 347—Shook v. Beals, 217 P.2d 56, 96 Cal.App.2d 963, 18 A.L.R.2d 919—Caccamo v. Swanston, 212 P.2d 246, 94 Cal.App.2d 957—Wheeler v. Barker, 208 P.2d 68, 92 Cal.App.2d 776—McChristian v. Popkin, 171 P.2d 85, 75 Cal.App.2d 249—Dawson v. Boyd, 143 P.2d 373, 61 Cal.App.2d 471—Fietz v. Hubbard, 138 P.2d 315, 59 Cal.App.2d 124.
- Colo.—Forsythe v. McCarthy, 57 P.2d 1, 98 Colo. 399.
- Conn.—Fierberg v. Moulton, 29 A.2d 774, 129 Conn. 536—Riley v. Connecticut Co., 29 A.2d 759, 129 Conn. 554.
- Fla.—Martin v. Stone, 51 So.2d 33.
- Ga.—Haslerig v. Watson, 54 S.E.2d 413, 205 Ga. 668—West Lumber Co. v. Schnuck, 69 S.E.2d 577, 85 Ga.App. 385—Morrow v. Johnston, 63 S.E.2d 906, 85 Ga.App. 261—Moffett v. McCurry, 67 S.E.2d 807, 84 Ga.App. 853—Haywood v. Mathis, 58 S.E.2d 209, 81 Ga.App. 187—Kimberly v. Reed, 53 S.E.2d 208, 79 Ga.App. 137—Harper v. Hall, 46 S.E.2d 201, 76 Ga.App. 441.
- Idaho.—Klam v. Koppel, 118 P.2d 729, 63 Idaho 171.
- Ill.—Roy v. Chicago Motor Coach Co., 102 N.E.2d 752, 345 Ill.App. 296—Smith v. Seelbach, 84 N.E.2d 684, 336 Ill.App. 480—West v. Porritt, 48 N.E.2d 199, 318 Ill.App. 636—Cox v. Hrasaky, 47 N.E.2d 728, 318 Ill.App. 287—H. W. Faulkner & Co. v. Centralia Bottling Works, 234 Ill.App. 9—Sells v. Grand Trunk Western Ry. Co., 206 Ill.App. 45.
- Ind.—McClure v. Miller, 98 N.E.2d 498, 229 Ind. 422.
- Iowa.—Fagen Elevator v. Pfeister, 56 N.W.2d 577, 244 Iowa 633.
- Kan.—Hunter v. Greer, 22 P.2d 489, 137 Kan. 772.
- Miss.—Allen v. Gibson, 20 So.2d 479, 198 Miss. 23—Avent v. Tucker, 194 So. 596, 188 Miss. 207—McKee v. Assad, 153 So. 799, 169 Miss. 496.
- Mo.—Hines v. W. U. Tel. Co., 217 S.W.2d 482, 358 Mo. 782—Smith v. Stanolind Pipe Line Co., 189 S.W.2d 244, 354 Mo. 250—Chamberlain v.

peal must be satisfied, however, that the jury was not misled by the error in giving the instruction, to the prejudice of the complaining party,<sup>48</sup> and, where a prejudicially erroneous charge states an independent and positive rule of law, the principle of contextual interpretation does not apply.<sup>49</sup>

### § 432. — Nature of Error or Omission

Where the charge, taken as a whole, correctly states the law it will not generally be held defective because one portion thereof is argumentative, vague, confusing, involved, or unclear, or because it does not state all of a rule of law, or gives undue prominence to particular facts or theories, or is too general, too broad, or too narrow.

Where the charge, taken as a whole, correctly states the law, it will not, as a general rule, be held defective because one portion thereof is argumentative,<sup>50</sup> vague and indefinite,<sup>51</sup> confusing,<sup>52</sup> involved,<sup>53</sup> lacking in clarity,<sup>54</sup> seemingly misstates the law<sup>55</sup> or does not state all of a rule of law<sup>56</sup> with all its modifications or qualifications,<sup>57</sup> gives undue prominence to particular facts or theories,<sup>58</sup> is too general,<sup>59</sup> or too broad,<sup>60</sup> or is too narrow,<sup>61</sup> is inaccurate because of the use of a double negative,<sup>62</sup> or is objectionable because of the use of Latin words.<sup>63</sup>

Missouri—Arkansas Coach Lines, 178 S.W.2d 57, 351 Mo. 203—Perry v. Missouri-Kansas-Texas R. Co., 144 S.W.2d 332, 340 Mo. 1052—Bri-tain v. Davis, App., 198 S.W.2d 384—Daugherty v. Spuck Iron & Foundry Co., App., 175 S.W.2d 46.

Mont.—Kvia v. Feddersen, 122 P.2d 207, 113 Mont. 97.

Neb.—Shlman Bros. & Co. v. Nebraska Nat. Hotel Co., 18 N.W.2d 551, 146 Neb. 47—Gorman v. Bratka, 296 N.W. 456, 139 Neb. 84—Heineman v. Wilson, 271 N.W. 346, 132 Neb. 159—Kuhlman v. Schacht, 265 N.W. 549, 130 Neb. 511.

N.C.—Steelman v. Benfield, 46 S.E.2d 829, 228 N.C. 651.

Ohio.—Humphreys v. Madden, App. 68 N.E.2d 562—Anderson v. City Cab Co., App., 38 N.E.2d 214.

Okl.—Kemp v. Strnad, 268 P.2d 255—Magnolia Petroleum Co. v. Sutton, 257 P.2d 307, 208 Okl. 488—Johnson v. Short, 232 P.2d 944, 204 Okl. 556—West v. Clopine, 198 P.2d 742, 200 Okl. 625—Nichols v. Oklahoma City, 157 P.2d 174, 195 Okl. 305—Eagle-Picher Mining & Smelting Co. v. Drinkwine, 141 P.2d 66, 192 Okl. 662—Grand River Dam Authority v. Martin, 138 P.2d 82, 192 Okl. 614—Ingram v. Oklahoma Nat. Bank of Clinton, 56 P.2d 406, 178 Okl. 644.

Pa.—McCoy v. Fleisher Industrial Center, 50 A.2d 528, 160 Pa.Super. 236.

S.C.—Fruite v. Machen, 53 S.E.2d 866, 215 S.C. 13.

Va.—Virginia Elec. & Power Co. v. Holland, 37 S.E.2d 40, 184 Va. 893.

Wash.—Rowe v. Dixon, 196 P.2d 327, 31 Wash.2d 173—Swanson v. Webb Tractor & Equipment Co., 167 P.2d 146, 24 Wash.2d 631.

W.Va.—Kaufman v. Charleston Transit Co., 138 S.E. 617, 117 W. Va. 591.

64 C.J. p 970 note 65.  
Necessity of covering entire law in single instruction see supra § 329.

48. Conn.—Higgins v. Connecticut Light & Power Co., 30 A.2d 388, 129 Conn. 606.

Ill.—Olson v. Peter Pan Bakery, 78 N. E.2d 843, 334 Ill.App. 208.  
64 C.J. p 970 note 69.

**Total Impact or Impression on Jury**  
In construing charge as a whole, it must be scrutinized and tested from standpoint of its total impact or impression on jury, and, if as a whole, its impact gives jury erroneous conception of controlling principles of law, it cannot be defended and be found sufficient as a whole by careful analysis of technical relationships of its various provisions to each other when such relationships would not reasonably have been apparent to jury.—Zurko v. Gilquist, Minn., 62 N.W.2d 351.

### Instruction as a whole confusing

Where court at first erroneously stated the condition on which plaintiff would be entitled to a verdict but in the latter portion of the charge gave a correct instruction, and also refused a substantially correct and seasonably tendered request by way of correction, the instruction as a whole tended to the confusion of the jury, and was error.—Employers Liability Assur. Corp. v. Farquharson, 188 S.W.2d 965, 182 Tenn. 642.

49. N.C.—Allen v. Edna Cotton Mill, 150 S.E. 667, 198 N.C. 39.

50. Ga.—Scarborough v. Walton, 136 S.E. 830, 36 Ga.App. 428.

Mass.—Buckley v. Frankel, 159 N.E. 459, 262 Mass. 13.

51. Mo.—Mueller v. Schlen, 176 S.W. 2d 449, 352 Mo. 180.

Neb.—Brown v. Hyslop, 45 N.W.2d 743, 153 Neb. 669—Myers v. Willmeroth, 39 N.W.2d 423, 151 Neb. 712.

64 C.J. p 971 note 67.

62. Okl.—Essary v. Lowden, 116 P. 2d 712, 189 Okl. 257, certiorari denied 62 S.Ct. 489, 315 U.S. 798, 86 L.Ed. 1199, rehearing denied 62 S. Ct. 638, 315 U.S. 828, 86 L.Ed. 1223.  
64 C.J. p 971 note 68.

53. Conn.—Appeal of Wheeler, 100 A. 13, 91 Conn. 388.

54. Mich.—Pembor v. Marcus, 11 N. W.2d 889, 307 Mich. 279.

Mo.—Mueller v. Schlen, 176 S.W.2d 449, 352 Mo. 180—Kuba v. Nagel, App., 124 S.W.2d 597.

Okl.—Koenig v. Hubbard, 163 P.2d 556, 196 Okl. 149.  
64 C.J. p 971 note 70.

### Failure to distinguish between plaintiff as personal representative and widow of decedent

In death action by widow of deceased, where instructions as a whole clearly set forth who plaintiff was and in behalf of whom action was brought, failure of one instruction to make a clear distinction between plaintiff as personal representative of estate of deceased and as widow of deceased was harmless.—Bush v. James, 40 N.W.2d 667, 152 Neb. 189.

55. Tenn.—Power Packing Co. v. Borum, 8 Tenn.App. 162.  
64 C.J. p 971 note 71.

56. Cal.—Domjanov v. Pacific Electric Ry. Co., 153 P.2d 382, 66 Cal. App.2d 928.

Idaho.—Berland v. City of Halley, 101 P.2d 17, 61 Idaho 333.

Neb.—Schram v. Lowden, 15 N.W.2d 42, 144 Neb. 851.

Tenn.—Louvier v. City of Nashville, 1 Tenn.App. 401.

64 C.J. p 971 note 72.

57. Ark.—Arkansas Baking Co. v. Aaron, 166 S.W.2d 14, 204 Ark. 990.  
64 C.J. p 971 note 73.

58. Va.—Southern Ry. Co. v. Grubbs, 80 S.E. 749, 115 Va. 876.

64 C.J. p 971 note 74.

59. Mo.—Moffett Bros. & Andrews Commission Co. v. Kent, 5 S.W.2d 395.

60. Ind.—Powell v. Ellis, 105 N.E.2d 348, 122 Ind.App. 700.

64 C.J. p 971 note 76.

61. Ind.—Powell v. Ellis, 105 N.E.2d 348, 122 Ind.App. 700.

64 C.J. p 972 note 77.

62. Ga.—Crozier v. Goldman, 111 S. E. 666, 153 Ga. 162.

64 C.J. p 972 note 78.

63. Ind.—Indianapolis Traction & Terminal Co. v. Thornburg, 125 N. E. 57, 74 Ind.App. 642.

64 C.J. p 972 note 79.

*Improper or erroneous use of terms or phrases* in a particular portion of the charge is, as a general rule, not ground for complaint where the instructions as a whole remedy the error.<sup>64</sup> Thus, where the charge is not objectionable as a whole, ordinarily it will not be rendered fatally defective because of a stenographic error in using "insufficient" for "sufficient,"<sup>65</sup> or the inadvertent use of the word "defendant" instead of "plaintiff,"<sup>66</sup> or "plaintiff" instead of "deceased,"<sup>67</sup> or instead of the name of an infant for whom plaintiff is suing as next friend.<sup>68</sup>

## § 433. Issues and Theories of Case

If the charge as a whole is a fair and complete presentation of the issues and theories involved, error cannot, as a general rule, be predicated on a portion of the charge.

In accordance with the rules hereinbefore stated, if the charge as a whole is a fair and complete presentation of the issues and theories involved, error cannot, as a general rule, be predicated on a portion of the charge.<sup>69</sup>

64. U.S.—Colley v. Standard Oil Co. of N. J., C.C.A.S.C., 157 F.2d 1007.  
 Ala.—American Discount Co. v. Wyckoff, 191 So. 790, 29 Ala.App. 82.  
 Cal.—Pietryzk v. Dollar S. S. Lines, 88 P.2d 783, 31 Cal.App.2d 584.  
 Mayfield v. Fidelity & Casualty Co. of New York, 61 P.2d 83, 16 Cal. App.2d 611.  
 Ga.—Southern Bell Tel. & Tel. Co. v. Bailey, 57 S.E.2d 837, 81 Ga.App. 20.  
 64 C.J. p 972 note 80.  
 65. S.C.—Beaufort Truck Growers' Ass'n v. Seaboard Air Line Ry. Co., 132 S.E. 819, 134 S.C. 474.  
 66. Ga.—Central of Georgia Ry. Co. v. Hartley, 103 S.E. 259, 25 Ga.App. 110.  
 64 C.J. p 972 note 82.  
 67. Neb.—Albrecht v. Morris, 136 N. W. 48, 91 Neb. 442.  
 64 C.J. p 972 note 83.  
 68. Tex.—Pecos & N. T. Ry. Co. v. Trower, 130 S.W. 588, 61 Tex.Civ. App. 53.  
 64 C.J. p 972 note 84.  
 69. U.S.—United Elec. Radio & Mach. Workers of America v. Oliverson Corp., C.A.Iowa, 205 F.2d 376.  
 Bucher v. Krause, C.A.Ill., 200 F.2d 576, certiorari denied Krause v. Bucher, 73 S.Ct. 1141, 345 U.S. 997, 97 L.Ed. 1404, rehearing denied 74 S.Ct. 17, 346 U.S. 842, 98 L.Ed. —.  
 Newman v. Baltimore & O.R. Co., C.A.Pa., 191 F.2d 560—Kimbball Laundry Co. v. U. S., C.C.A.Neb., 166 F.2d 856, reversed on other grounds 69 S.Ct. 1434, 338 U.S. 1, 93 L.Ed. 1765, 7 A.L.R.2d 1280—Marcus Loew Booking Agency v. Princess Pat, Limited, C.C.A.Ill., 141 F.2d 152—Emanuel v. Kansas City Title & Trust Co., C.C.A.Mo., 127 F.2d 175—Lindback v. Milner, C.C.A.Pa., 70 F.2d 454—Maryland Casualty Co. v. Seay, C.C.A.Tex., 67 F.2d 819, certiorari denied 54 S.Ct. 561, 291 U.S. 685, 78 L.Ed. 1072—Shane v. Commercial Casualty Ins. Co., D.C.Pa., 48 F.Supp. 151, affirmed, C.C.A., Shane v. Barger, 132 F.2d 544—Manley v. Northumberland County, D.C.Pa., 22 F.Supp. 775.

- Ala.—John Hancock Mut. Life Ins. Co. v. Schroder, 180 So. 327, 235 Ala. 655—Pryor v. Limestone County, 160 So. 700, 230 Ala. 295—Prudential Ins. Co. v. Calvin, 148 So. 837, 227 Ala. 146—American Surety Co. of N. Y. v. Hooker, 58 So.2d 469, 36 Ala.App. 39, certiorari denied 58 So. 2d 478, 257 Ala. 238.  
 Ark.—Warren v. Merchants & Planters Bank & Trust Co., 178 S.W.2d 678, 206 Ark. 1073.  
 Cal.—Zuckerman v. Underwriters at Lloyd's, London, 267 P.2d 777, 42 Cal.2d 460—Klett v. Security Acceptance Co., 242 P.2d 873, 38 Cal.2d 770—Associated Tel. Co. v. Greenman, 244 P.2d 15, 111 Cal.App.2d 193—Kim v. Chinn, 133 P.2d 677, 56 Cal.App.2d 857—Valentine v. Provident Mut. Life Ins. Co. of Philadelphia, 55 P.2d 1243, 12 Cal. App.2d 616.  
 Colo.—Clark v. Hicks, 252 P.2d 1067, 127 Colo. 25.  
 Conn.—Shapiro & Son Const. Co. v. Battaglia, 83 A.2d 204, 138 Conn. 238—Silver v. Indemnity Ins. Co. of North America, 79 A.2d 355, 137 Conn. 525—Lemmon v. Paterson Const. Co., 75 A.2d 385, 137 Conn. 158—Blake v. Torrington Nat. Bank & Trust Co., 87 A.2d 241, 130 Conn. 707—C. I. T. Corporation v. Deering, 176 A. 553, 119 Conn. 347.  
 D.C.—Bolt v. Morgenstein, Mun.App., 81 A.2d 656.  
 Fla.—Killen v. Olson, 59 So.2d 524—Police & Firemen's Ins. Ass'n v. Hines, 183 So. 831, 134 Fla. 298.  
 Ga.—White v. Griggs, 80 S.E.2d 163, 210 Ga. 364—Pruitt v. Lynch, 67 S.E.2d 758, 208 Ga. 538—Kerce v. Bell, 65 S.E.2d 592, 208 Ga. 131—Boatright v. Smith, 65 S.E.2d 589, 208 Ga. 158—McDonald v. Wimpy, 50 S.E.2d 347, 204 Ga. 617—Patrick v. Holaday, 36 S.E.2d 769, 200 Ga. 259—Willis v. Purcell, 32 S.E.2d 392, 198 Ga. 666—Howell v. Bowden, 30 S.E.2d 887, 198 Ga. 57—Kinsey v. Avana, 26 S.E.2d 787, 198 Ga. 428—Davis v. Wright, 21 S.E. 2d 88, 194 Ga. 1—Horton v. Johnson, 15 S.E.2d 605, 192 Ga. 338—U. S. Fidelity & Guaranty Co. v. Toombs County, 1 S.E.2d 411, 187 Ga. 544—Sharp v. Autry, 199 S.E.

- 129, 188 Ga. 805—Thompson v. Harris, 182 S.E. 903, 181 Ga. 495—Harmon v. Givens, 77 S.E.2d 223, 88 Ga.App. 629—Walker v. Smith, 74 S.E.2d 374, 87 Ga.App. 517—Haylip v. Long, 71 S.E.2d 852, 86 Ga.App. 482—Buice v. Smith, 59 S.E.2d 676, 81 Ga.App. 658—Independent Life & Accident Ins. Co. v. Hopkins, 56 S.E.2d 177, 80 Ga.App. 348—Brandt v. Eckman, 52 S.E.2d 665, 79 Ga.App. 47—State Highway Board v. Coleman, 50 S.E.2d 262, 78 Ga.App. 64—Fulcher v. Fulcher, 43 S.E.2d 588, 75 Ga.App. 480—Radney v. Levine, 42 S.E.2d 644, 75 Ga.App. 137—Bethea v. Dixon, 39 S.E.2d 562, 74 Ga.App. 267—Wood v. Planzer, 37 S.E.2d 813, 73 Ga.App. 731—McCoy v. Scarborough, 37 S.E.2d 221, 73 Ga.App. 519—Bellamy v. Georgia Power Co., 27 S.E.2d 783, 70 Ga.App. 175—Exposition Cotton Mills v. Crawford, 19 S.E.2d 835, 67 Ga.App. 135—Mutual Life Ins. Co. of New York v. Rackley, 17 S.E.2d 190, 66 Ga.App. 89—Harris v. Southeastern Printers Supply Co., 2 S.E.2d 184, 59 Ga.App. 729—Southern Distributors v. Jax Ice & Cold Storage Co., 190 S.E. 198, 55 Ga.App. 335—Lewis v. Tatum, 189 S.E. 375, 55 Ga.App. 24.  
 Idaho.—Koehler v. Stenerson, 260 P. 2d 1101, 74 Idaho 281—Puget Sound Nat. Bank of Tacoma v. C. B. Lauch Const. Co., 245 P.2d 809, 73 Idaho 68—Molyneux v. Twin Falls Canal Co., 35 P.2d 551, 54 Idaho 619, 94 A.L.R. 1254.  
 Ind.—Carter v. Ethna Life Ins. Co., 27 N.E.2d 75, 217 Ind. 282—Albright v. Hughes, 26 N.E.2d 576, 107 Ind.App. 651—W. U. Tel. Co. v. Mart, 17 N.E.2d 500, 106 Ind.App. 590.  
 Iowa.—Olson v. Corporation of New Melleray, 60 N.W.2d 832—Wessman v. Sundholm, 291 N.W. 137, 228 Iowa 344.  
 Kan.—Alexander v. Wehkamp, 232 P. 2d 440, 171 Kan. 285.  
 Ky.—Hamilton v. Taylor, 249 S.W.2d 730.  
 Mass.—New England Novelty Co. v. Sandberg, 54 N.E.2d 915, 315 Mass. 739, certiorari denied 65 S.Ct. 63, 323 U.S. 740, 89 L.Ed. 593, rehear-

This rule has been applied to particular charges which, standing alone, might be objectionable as not applicable to the pleadings,<sup>70</sup> issues,<sup>71</sup> or evidence,<sup>72</sup> or because they ignore issues or theories<sup>73</sup> or defenses,<sup>74</sup> or withdraw issues<sup>75</sup> or evidence,<sup>76</sup> or because they are inartificial,<sup>77</sup> or refer to aban-

doned causes of action,<sup>78</sup> or are on issues on which no recovery could be based.<sup>79</sup> The rules have also been applied to instructions on the issue of accord and satisfaction,<sup>80</sup> compromise and settlement,<sup>81</sup> fraud,<sup>82</sup> illegality of instrument sued on,<sup>83</sup> probable cause,<sup>84</sup> self-defense,<sup>85</sup> statute of limitations,<sup>86</sup> tes-

ing denied 65 S.Ct. 128, 323 U.S. 815, 89 L.Ed. 648.

Mich.—In re Paquin's Estate, 43 N.W. 2d 858, 328 Mich. 293.

Miss.—Service Fire Ins. Co. v. Craft, 67 So.2d 874—Standard Life Ins. Co. of the South v. Foster, 49 So. 2d 891, 210 Miss. 242—State, for Use of Kelley, v. Yearwood, 37 So. 2d 174, 204 Miss. 181.

Mo.—Clark v. Powell, 175 S.W.2d 842, 351 Mo. 1121—Jacobs v. Danciger, 130 S.W.2d 583, 344 Mo. 1042, certiorari denied Danciger v. Jacobs, 60 S.Ct. 144, 308 U.S. 607, 84 L.Ed. 507—Fyock v. Riales, App., 251 S.W.2d 102—Cieslinski v. Clark, App., 223 S.W.2d 139—Luechtefeld v. Margiulus, App., 176 S.W.2d 674—Daugherty v. Spark Iron & Foundry Co., App., 175 S.W.2d 45—Brunn v. Ellfeldt Hardware & Machinist Supply Co., App., 83 S.W.2d 147.

Neb.—Calkins v. Yechout, 7 N.W.2d 715, 142 Neb. 783.

N.H.—Daniels v. Barker, 200 A. 410, 89 N.H. 416.

N.Y.—McGovern v. Weis, 39 N.Y.S.2d 115, 265 App.Div. 367, reargument denied 41 N.Y.S.2d 189, 266 App. Div. 712.

N.C.—Vincent v. Woody, 76 S.E.2d 356, 238 N.C. 118—Yadkin Valley Motor Co. v. Home Ins. Co. of New York, 18 S.E.2d 847, 220 N.C. 168—Carpenter v. Boyles, 196 S.E. 850, 213 N.C. 432—Smith v. Equitable Life Assur. Co. of U. S., 171 S.E. 346, 205 N.C. 387.

Ohio.—Tanski v. White, 109 N.E.2d 319, 82 Ohio App. 411.

Okl.—Equitable Life Assur. Soc. of U. S. v. Neale, 258 P.2d 654—Smith v. Barry, 258 P.2d 165, 208 Okl. 606—Johnson v. Short, 232 P.2d 944, 204 Okl. 656—Rosier v. Metropolitan Life Ins. Co., 168 P.2d 302, 197 Okl. 85—Davis v. Curry, 167 P.2d 73, 196 Okl. 577—Farmers' Union Co-op. Gin Co. v. Fairbanks, Morse & Co., 73 P.2d 1148, 181 Okl. 336—Indian Territory Illuminating Oil Co. v. Adams, 64 P.2d 708, 179 Okl. 129—Mitchell v. Vogeles, 256 P. 906, 125 Okl. 176.

Pa.—Angelcyk v. Angelcyk, 80 A.2d 753, 367 Pa. 381—Wainstein v. Equitable Life Assur. Co., 178 A. 502, 318 Pa. 428—Walters v. Western & Southern Life Ins. Co., 178 A. 499, 318 Pa. 382—Keller v. Porta, 94 A.2d 140, 172 Pa.Super. 651—Mort Co. v. Rudy, 76 A.2d 445, 167 Pa.Super. 632—Paul v. New York Life Ins. Co., 12 A.2d 495, 139 Pa. Super. 517—Brewer v. Blue Moun-

tain Consol. Water Co., 191 A. 408, 126 Pa.Super. 553.

R.I.—Visgilio v. Schoof, 105 A.2d 470—Smith v. Roberge, 54 A.2d 385, 73 R.I. 296—Monroe v. Belval, 167 A. 707, 53 R.I. 487.

S.C.—Cartwright v. Herald Pub. Co., 68 S.E.2d 415, 220 S.C. 492—Pelot v. Davidson-Paxon Co., 62 S.E.2d 95, 218 S.C. 189—Stanley v. Beecham, 52 S.E.2d 413, 214 S.C. 327—Porter-Constructors v. Dixon Motor Service Co., 172 S.E. 419, 171 S.C. 396.

Tenn.—Southern Fire & Cas. Co. v. Norris, 250 S.W.2d 785, 35 Tenn. App. 657—Darnell v. McNichols, 122 S.W.2d 808, 22 Tenn.App. 287.

Tex.—State v. Carpenter, Civ.App., 55 S.W.2d 219, reversed on other grounds 89 S.W.2d 194, 126 Tex. 604, rehearing denied 89 S.W.2d 978, 126 Tex. 604.

Utah.—Wilson v. Oldroyd, 267 P.2d 759, 1 Utah2d 362.

Wash.—Swanson v. Webb Tractor & Equipment Co., 167 P.2d 146, 24 Wash.2d 631.

64 C.J. p 972 note 86.

70. Ga.—Weathers Bros. Transfer Co. v. Jarrell, 33 S.E.2d 805, 72 Ga. App. 317.

Mo.—Morris v. Equitable Assur. Soc. of U. S., 102 S.W.2d 569, 340 Mo. 709.

64 C.J. p 974 note 87.

71. Mo.—Morris v. Equitable Assur. Soc. of U. S., supra.

Okl.—Oklahoma Tax Commission v. Price, 187 P.2d 873, 197 Okl. 1.

64 C.J. p 974 note 88.

72. Ga.—Fite v. McEntyre, 49 S.E. 2d 159, 77 Ga.App. 585—Weathers Bros. Transfer Co. v. Jarrell, 33 S.E.2d 805, 72 Ga.App. 317.

Mo.—Morris v. Equitable Assur. Soc. of U. S., 102 S.W.2d 569, 340 Mo. 709—Luechtefeld v. Margiulus, App., 176 S.W.2d 674—Robinson v. Kincald, App., 142 S.W.2d 1083.

64 C.J. p 974 note 89.

73. Cal.—Beni v. Abrons, 19 P.2d 523, 130 Cal.App. 206.

Ga.—Lewis v. Tatum, 189 S.E. 375, 55 Ga.App. 24.

Mo.—Morris v. Equitable Assur. Soc. of U. S., 102 S.W.2d 569, 340 Mo. 709—Daugherty v. Spark Iron & Foundry Co., App., 175 S.W.2d 45.

R.I.—Monroe v. Belval, 167 A. 707, 53 R.I. 487.

64 C.J. p 974 note 90.

74. Ark.—Natural Gas & Fuel Corporation v. Alette, 11 S.W.2d 769, 178 Ark. 461.

64 C.J. p 974 note 91.

**Failure to put proper emphasis on defense**

Where instruction, if standing alone, was objectionable on ground that it did not put proper emphasis on defendants' defense, but other instructions were given that were sufficient in statement of defendant's theory of the case, and there was no substantial error in the instruction as a whole, there was no reversible error.—Logan v. Jacobs, 119 P.2d 53, 189 Okl. 617.

75. Ga.—Bassett v. Hunter, 53 S.E. 2d 909, 205 Ga. 417.

64 C.J. p 974 note 92.

76. Cal.—In re Johnson's Estate, 252 P. 1049, 200 Cal. 299.

77. Mo.—Kegan v. Park Bank of St. Joseph, 15 S.W.2d 333, 320 Mo. 623.

78. Colo.—Wertz v. Lawrence, 195 P. 647, 69 Colo. 540.

79. Tex.—American Freehold Land Mortg. Co. of London, Limited v. Brown, 118 S.W. 1106, 54 Tex.Civ. App. 448.

80. Ariz.—Green v. Huber, 184 P.2d 662, 66 Ariz. 116.

Ga.—McEntyre v. Adams, 74 S.E.2d 737, 209 Ga. 588—Scott v. Imperial Hotel Co., 42 S.E.2d 179, 75 Ga. App. 91.

Mo.—Ellis v. Mansfield, 256 S.W. 165, 215 Mo.App. 292.

81. Mo.—Viles v. Viles, App., 190 S.W. 41.

82. Ga.—Bassett v. Hunter, 53 S.E. 2d 909, 205 Ga. 417.

Ohio.—Flynn v. Sharon Steel Corp., 60 N.E.2d 819, 142 Ohio St. 145.

Pa.—De Rosa v. Equitable Life Assur. Co. of U. S., 33 A.2d 495, 183 Pa.Super. 33.

64 C.J. p 974 note 99.

83. Ga.—Third Nat. Bank of Fitzgerald v. Baker, 91 S.E. 346, 19 Ga. App. 208.

84. Ala.—American Sur. Co. of N. Y. v. Hooker, 58 So.2d 469, 36 Ala. App. 39, certiorari denied 58 So.2d 478, 257 Ala. 238—Casino Restaurant v. McWhorter, 46 So.2d 582, 35 Ala.App. 332.

Cal.—Sandoval v. Southern Cal. Enterprises, 219 P.2d 928, 98 Cal.App. 2d 240.

Ohio.—Thomas v. F. & R. Lazarus & Co., App., 57 N.E.2d 193.

64 C.J. p 974 note 2.

85. Ala.—Fuhrman v. Wolf, 96 So. 193, 209 Ala. 291.

86. Mo.—Blackmore v. Sisson, App., 139 S.W.2d 1084.

tamentary capacity,<sup>87</sup> undue influence,<sup>88</sup> and waiver.<sup>89</sup>

The rule has been held inapplicable where a verdict is authorized on an instruction purporting to cover the whole case but which omits an essential element of the cause of action,<sup>90</sup> or which omits references to the defenses pleaded and in evidence,<sup>91</sup> or which ignores a material issue on which the evidence is in conflict.<sup>92</sup> So, where an instruction, in express and positive terms, excludes material evidence from the consideration of the jury it is controlling,<sup>93</sup> and, it has been held, there is no reconciling it with other instructions.<sup>94</sup>

## § 434. — Negligence, Contributory Negligence, and Assumption of Risk

- a. Negligence
- b. Contributory negligence
- c. Assumption of risk

### a. Negligence

Instructions on the issue of negligence are, as a general rule, sufficient if, when considered together, they fully and fairly present the case.

In accordance with the general rules hereinbefore stated, instructions on the issue of negligence are, as a general rule, sufficient if, when considered together, they fully and fairly present the issue.<sup>95</sup>

Tex.—Wrighton v. Butler, 128 S.W. 472, 60 Tex.Civ.App. 646.

87. Cal.—In re Vollen's Estate, 262 P.2d 658, 121 Cal.App.2d 161.

Ga.—Bassett v. Hunter, 53 S.E.2d 909, 205 Ga. 417—Brazil v. Roberts, 32 S.E.2d 171, 198 Ga. 477—Ellis v. Britt, 182 S.E. 596, 181 Ga. 442.

64 C.J. p 974 note 5.

88. R.I.—Deighan v. Hanaway, 14 A. 2d 811, 65 R.I. 322.

64 C.J. p 975 note 6.

89. U.S.—Marcus Loew Booking Agency v. Princess Pat, Limited, C. C.A.III, 141 F.2d 152.

Minn.—Engstrom v. Farmers & Bankers Life Ins. Co., 41 N.W.2d 422, 230 Minn. 308.

S.C.—McGuinn v. Aetna Life Ins. Co., 171 S.E. 793, 171 S.C. 135.

64 C.J. p 975 note 7.

90. Mo.—Willard v. Bethurem, App. 234 S.W.2d 18—Walker v. White, 178 S.W. 254, 192 Mo.App. 13.

91. Mo.—Usana Mfg. Co. v. Shubert-Christy Corp., App., 132 S.W.2d 1101.

92. Ark.—Hearn v. East Tex. Motor Freight Lines, 241 S.W.2d 259, 219 Ark. 297—W. C. Nabors Co. v. Ball Chevrolet Co., 146 S.W.2d 25, 201 Ark. 486—Missouri Pac. Transp. Co. v. Howard, 143 S.W.2d 538, 201 Ark. 6.

93. Idaho.—Shallis v. Florito, 240 P. 932, 41 Idaho 653.

Miss.—Waddle v. Sutherland, 126 So. 201, 156 Miss. 540.

94. Miss.—Waddle v. Sutherland, supra.

95. U.S.—Cagle v. McQueen, C.A. Tex., 200 F.2d 186, certiorari denied 74 S.Ct. 25, 346 U.S. 815, 98 L.Ed. — Dostal v. Baltimore & O. R. Co., C.A.Pa., 189 F.2d 352—Turner County, S. D. v. Miller, C.A.S.D., 170 F.2d 820, certiorari denied 69 S.Ct. 656, 336 U.S. 925, 93 L.Ed. 1087.

Dyess v. W. W. Clyde & Co., C.C.A. Utah, 132 F.2d 972—Western Produce Co. v. Polliard, C.C.A.Tex., 93 F.2d 588—Afollder v. New York, C. & St. L. R. Co., D.C.Mo., 79 F.Supp.

365, set aside on other grounds, C. A., 174 F.2d 486, reversed on other grounds 70 S.Ct. 509, 339 U.S. 96, 94 L.Ed. 683.

Ala.—Birmingham Electric Co. v. Shelton, 163 So. 633, 231 Ala. 110.

Ark.—Pinkerton v. Davis, 207 S.W.2d 742, 212 Ark. 796.

Cal.—Cope v. Davison, 180 P.2d 873, 30 Cal.2d 193, 171 A.L.R. 667—Martens v. Redi-Spuds, Inc., 247 P.2d 605, 113 Cal.App.2d 10—Bazzoli v. Nance's Sanitarium, 240 P.2d 672, 109 Cal.App.2d 232—Huyck v. Merritt, 240 P.2d 1, 108 Cal.App.2d 775.

Shook v. Beals, 217 P.2d 56, 96 Cal.App.2d 963, 8 A.L.R.2d 919—Caccamo v. Swanston, 212 P.2d 246, 94 Cal.App.2d 957—Burr v. Goss, 205 P.2d 61, 91 Cal.App.2d 351—Smith v. Deutsch, 200 P.2d 802, 89 Cal.App.2d 419—Bischell v. State, 157 P.2d 41, 68 Cal.App.2d 557—Astone v. Oldfield, 155 P.2d 398, 67 Cal.App.2d 702—Florine v. Market Street Ry. Co., 149 P.2d 41, 64 Cal. App.2d 581—McNear v. Pacific Greyhound Lines, 146 P.2d 34, 63 Cal.App.2d 11—Hollibaugh v. Kishero Ito, 69 P.2d 871, 21 Cal.App.2d 480—Nelson v. Westergaard, 19 P. 2d 867, 130 Cal.App. 79.

Conn.—Clark v. George B. Wuestefeld Co., 46 A.2d 841, 132 Conn. 653—Ingeneri v. Makris, 37 A.2d 865, 131 Conn. 77—Rode v. Adley Express Co., 33 A.2d 329, 130 Conn. 274—Stanco v. H. L. Green Co., 17 A.2d 512, 127 Conn. 422—Fierberg v. Whitcomb, 177 A. 135, 119 Conn. 390—Darrow v. Fleischner, 169 A. 197, 117 Conn. 518—Distefano v. Universal Trucking Co., 164 A. 492, 116 Conn. 249.

Fla.—Seaboard Air Line R. Co. v. Martin, 56 So.2d 509—Martin v. Stone, 51 So.2d 33—Russell v. Powell, 10 So.2d 907, 152 Fla. 102.

Ga.—Womack v. Central Ga. Gas Co., 70 S.E.2d 398, 85 Ga.App. 799—City Council of Augusta v. Hammock, 69 S.E.2d 834, 85 Ga.App. 554—Moffett v. McCurry, 67 S.E.2d 807, 84 Ga.App. 853—Atlanta & W. P. R. Co. v. Creel, 47 S.E.2d 762, 77 Ga.

App. 77—Louisville & N. R. Co. v. Patterson, 42 S.E.2d 171, 75 Ga. App. 11—Ergle v. Davidson, 29 S. E.2d 445, 70 Ga.App. 704—Richter v. Atlantic Co., 16 S.E.2d 259, 65 Ga.App. 605—Smoky Mountain Stages v. Wright, 8 S.E.2d 453, 62 Ga.App. 121—Brooks v. Carver, 190 S.E. 389, 55 Ga.App. 362—Georgia Power Co. v. Jones, 188 S.E. 566, 54 Ga.App. 578—General Oil Co. v. Crowe, 187 S.E. 221, 54 Ga.App. 139—Central of Georgia Ry. Co. v. Leonard, 176 S.E. 137, 49 Ga.App. 689.

Ill.—Ashby v. Irish, 118 N.E.2d 43, 2 Ill.App.2d 9—Town of Little Mackinaw v. Chism, 101 N.E.2d 866, 344 Ill.App. 552—Wilson v. Hobrock, 100 N.E.2d 412, 344 Ill.App. 147—De Frates v. Rowland, 93 N.E.2d 153, 341 Ill.App. 69.

Ind.—Stinebaugh v. Lucid, 7 N.E.2d 69, 103 Ind.App. 690—Gaines v. Taylor, 185 N.E. 297, 96 Ind.App. 378.

Iowa.—Ganzhorn v. Reep, 12 N.W.2d 154, 234 Iowa 495—Swan v. Dalley-Luce Auto Co., 293 N.W. 468, 228 Iowa 880.

Ky.—Davis v. McFarland, 265 S.W.2d 66—Louisville & N. R. Co. v. Bell, 125 S.W.2d 239, 276 Ky. 778—Fultz' Adm'r v. Williams, 99 S.W. 2d 803, 266 Ky. 651.

Mass.—Mulkern v. Eastern S. S. Lines, 29 N.E.2d 919, 307 Mass. 609—Forra v. Hume, 194 N.E. 301, 289 Mass. 266—Roland v. Kilroy, 184 N. E. 367, 282 Mass. 87.

Mich.—Gibson v. Traver, 44 N.W.2d 834, 328 Mich. 698—Fitzcharles v. Mayer, 277 N.W. 788, 284 Mich. 122.

Minn.—Jurgensen v. Schirmer Transp. Co., 64 N.W.2d 530—Mugenberg v. Leighton, 68 N.W.2d 533—Cohen v. Hirsch, 42 N.W.2d 51, 230 Minn. 512—Kapla v. Lehti, 30 N.W.2d 685, 221 Minn. 325—Timmerman v. March, 271 N.W. 697, 199 Minn. 376.

Miss.—Southern Beverage Co. v. Barbarin, 69 So.2d 395—Rawlings v. Royals, 58 So.2d 820, 214 Miss. 335—Gulf Transport Co. v. Allen, 46 So.2d 436, 209 Miss. 206.

Mo.—Willard v. Bethurem, App. 234 S.W.2d 18—Walker v. White, 178 S.W. 254, 192 Mo.App. 13.

Nebr.—Usana Mfg. Co. v. Shubert-Christy Corp., App., 132 S.W.2d 1101.

N.H.—Hearn v. East Tex. Motor Freight Lines, 241 S.W.2d 259, 219 Ark. 297—W. C. Nabors Co. v. Ball Chevrolet Co., 146 S.W.2d 25, 201 Ark. 486—Missouri Pac. Transp. Co. v. Howard, 143 S.W.2d 538, 201 Ark. 6.

N.J.—Shallis v. Florito, 240 P. 932, 41 Idaho 653.

N.M.—Waddle v. Sutherland, 126 So. 201, 156 Miss. 540.

N.Y.—Waddle v. Sutherland, supra.

Pa.—Cagle v. McQueen, C.A. Tex., 200 F.2d 186, certiorari denied 74 S.Ct. 25, 346 U.S. 815, 98 L.Ed. — Dostal v. Baltimore & O. R. Co., C.A.Pa., 189 F.2d 352—Turner County, S. D. v. Miller, C.A.S.D., 170 F.2d 820, certiorari denied 69 S.Ct. 656, 336 U.S. 925, 93 L.Ed. 1087.

R.I.—Deighan v. Hanaway, 14 A. 2d 811, 65 R.I. 322.

S.C.—McGuinn v. Aetna Life Ins. Co., 171 S.E. 793, 171 S.C. 135.

S.D.—Engstrom v. Farmers & Bankers Life Ins. Co., 41 N.W.2d 422, 230 Minn. 308.

Tenn.—Hearn v. East Tex. Motor Freight Lines, 241 S.W.2d 259, 219 Ark. 297—W. C. Nabors Co. v. Ball Chevrolet Co., 146 S.W.2d 25, 201 Ark. 486—Missouri Pac. Transp. Co. v. Howard, 143 S.W.2d 538, 201 Ark. 6.

Tex.—Wrighton v. Butler, 128 S.W. 472, 60 Tex.Civ.App. 646.

These rules have been applied to instructions as to the duty or degree of care owed by defendant generally,<sup>96</sup> or in case of sudden emergency,<sup>97</sup> as

to vis major,<sup>98</sup> unavoidable accident,<sup>99</sup> implied invitation,<sup>1</sup> proximate cause,<sup>2</sup> and liability of joint

- Mo.—McDill v. Terminal R. R. Ass'n of St. Louis, 268 S.W.2d 823—West v. St. Louis Public Service Co., 236 S.W.2d 308, 361 Mo. 740—Rinderknecht v. Thompson, 220 S.W.2d 69, 359 Mo. 21—Connole v. East St. Louis & S. Ry. Co., 102 S.W.2d 581, 340 Mo. 690—Oliver v. Morgan, 73 S.W.2d 993—Williams v. St. Louis Public Service Co., 73 S.W.2d 199, 335 Mo. 335—Jenkins v. Missouri State Life Ins. Co., 69 S.W.2d 666, 334 Mo. 941—Young v. Anthony, App., 241 S.W.2d 17, reversed on other grounds, Sup., 248 S.W.2d 864—Jeniecek v. Harrigan, App., 217 S.W.2d 764—Setser v. St. Louis Public Service Co., App., 209 S.W.2d 746—Sollars v. Atchison, T. & S. F. Ry. Co., App., 187 S.W.2d 513.
- Neb.—In re Johnson's Estate, 16 N.W.2d 504, 145 Neb. 333—Holtz v. Plumer, 277 N.W. 589, 133 Neb. 878.
- Nev.—Nevada Transfer & Warehouse Co. v. Peterson, 99 P.2d 633, 60 Nev. 87.
- N.H.—Calley v. Boston & Maine R. R., 33 A.2d 227, 92 N.H. 455.
- N.J.—Ristan v. Frantzen, 102 A.2d 614, 14 N.J. 455—Simons v. Lee, 189 A. 360, 117 N.J.Law 370—Lyon v. Fabricant, 172 A. 567, 113 N.J.Law 62—Rusk v. Jeffries, 164 A. 313, 110 N.J.Law 307.
- N.C.—Hodges v. Malone & Co., 70 S.E.2d 478, 235 N.C. 512—Wyatt v. Queen City Coach Co., 49 S.E.2d 650, 229 N.C. 340—Garvey v. Atlantic Greyhound Corp., 45 S.E.2d 58, 228 N.C. 166—Hobbs v. Queen City Coach Co., 34 S.E.2d 211, 225 N.C. 323—Caldwell v. Southern Ry. Co., 10 S.E.2d 680, 218 N.C. 63.
- N.D.—Reuter v. Olson, 59 N.W.2d 830—Morton v. Dakota Transfer & Storage Co., 50 N.W.2d 505, 78 N.D. 551—Skramstad v. Miller, 49 N.W.2d 652, 78 N.D. 450.
- Ohio.—Roberts v. Fargo, 113 N.E.2d 673, 93 Ohio App. 400—Sweeney v. Schneider, 53 N.E.2d 820, 73 Ohio App. 157—Booth v. Coldiron, 9 N.E.2d 161, 55 Ohio App. 144—Woodward v. Gray, 188 N.E. 304, 46 Ohio App. 177.
- Okl.—Williams v. Terbusch, 256 P.2d 434, 208 Okl. 401—Connelly v. Jennings, 252 P.2d 133, 207 Okl. 554, certiorari denied 73 S.Ct. 778, 345 U.S. 921, 97 L.Ed. 1353—Oklahoma City-Ada-Atoka Ry. Co. v. Crabtree, 249 P.2d 445, 207 Okl. 327—Johnson v. Short, 232 P.2d 944, 204 Okl. 656—H. A. Marr Grocery Co. v. Jones, 228 P.2d 388, 204 Okl. 183—Smith v. Arrow Drilling Co., 130 P.2d 95, 191 Okl. 381—Slater v. Mefford, 111 P.2d 159, 188 Okl. 525.
- Or.—Barbour v. Stahl, 18 P.2d 807, 142 Or. 20.
- Pa.—Marshall v. Erie Taxicab Co., 15 A.2d 925, 340 Pa. 241—Halderman v. Snyder, Com.Pl., 42 Berks Co. 115.
- S.C.—Hutchinson v. City of Florence, 200 S.E. 73, 189 S.C. 123.
- Tenn.—Kingslith Theatres v. Quillen, 196 S.W.2d 316, 29 Tenn.App. 248—Central Produce Co. v. General Cab Co. of Nashville, 129 S.W.2d 1117, 23 Tenn.App. 209.
- Utah.—Knight v. Utah Power & Light Co., 209 P.2d 221, 116 Utah 195.
- Vt.—Gould v. Gould, 6 A.2d 24, 110 Vt. 324.
- Va.—Sanders v. Newsome, 19 S.E.2d 883, 179 Va. 582—Barnett v. Virginia Public Service Co., 193 S.E. 538, 169 Va. 329.
- Wash.—Lee & Eastes v. Continental Carriers, 265 P.2d 257—Bradshaw v. City of Seattle, 264 P.2d 265, 43 Wash.2d 766—Buss v. Wachsmith, 70 P.2d 417, 190 Wash. 673, opinion adhered to 74 P.2d 999, 193 Wash. 600.
- W.Va.—Roush v. Johnson, 80 S.E.2d 857.
- Wis.—Mueller v. Silver Fleet Trucking Co., 37 N.W.2d 66, 254 Wis. 458.
- 64 C.J. p 975 note 13.
96. U.S.—Colley v. Standard Oil Co. of N. J., C.C.A.S.C., 157 F.2d 1007—Farbaugh v. Baltimore & O. R. Co., D.C.Pa., 96 F.Supp. 205.
- Ark.—Arkmo Lumber Co. v. Luckett, 143 S.W.2d 1107, 201 Ark. 140—Gill v. Whiteside-Hemby Drug Co., 122 S.W.2d 597, 197 Ark. 425.
- Cal.—Hayes v. Richfield Oil Corp., 240 P.2d 580, 38 Cal.2d 376—Blanton v. Curry, 129 P.2d 1, 20 Cal.2d 793—Becker v. City and County of San Francisco, 264 P.2d 133, 121 Cal. App.2d 723—Taha v. Pinegold, 184 P.2d 533, 81 Cal.App.2d 536—Carney v. RKO Radio Pictures, 178 P.2d 482, 78 Cal.App.2d 659—Sansom v. Ross-Loos Medical Group, 134 P.2d 927, 57 Cal.App.2d 549—Hollibaugh v. Kishero Ito, 69 P.2d 871, 21 Cal. App.2d 480.
- Conn.—Jager v. First Nat. Bank, 7 A.2d 919, 125 Conn. 670.
- Ga.—Moffett v. McCurry, 67 S.E.2d 807, 84 Ga.App. 853—Ergle v. Davidson, 29 S.E.2d 445, 70 Ga.App. 704—Southern Ry. Co. v. Jackson, 16 S.E.2d 147, 65 Ga.App. 316.
- Idaho.—Moore v. Harland, 233 P.2d 429, 71 Idaho 376.
- Ind.—Public Service Co. of Ind. v. Dalbey, 85 N.E.2d 368, 119 Ind.App. 405.
- Ky.—Burk Hollow Coal Co. v. Bills, 190 S.W.2d 338, 300 Ky. 735.
- Md.—Mitchell v. Dowdy, 42 A.2d 717, 184 Md. 634.
- Mich.—Seppala v. Neal, 36 N.W.2d 186, 323 Mich. 697—Bathke v. Traverse City, 13 N.W.2d 184, 308 Mich. 1.
- Minn.—Benson v. Hoenig, 37 N.W.2d 422, 228 Minn. 412.
- Miss.—Cinderella Foods, Division of Stevens Industries v. Miller, 52 So. 2d 641.
- Mo.—Mayor v. St. Louis Public Service Co., 269 S.W.2d 101.
- N.H.—Peppin v. Boston & M. R. R., 185 A. 153, 88 N.H. 145.
- N.J.—Thompson v. Barab, 16 A.2d 549, 125 N.J.Law 461, affirmed 19 A.2d 780, 126 N.J.Law 427.
- N.C.—Ratchelor v. Black, 59 S.E.2d 817, 232 N.C. 314, rehearing denied 61 S.E.2d 894, 232 N.C. 745.
- Ohio.—Eaton v. Askins, 118 N.E.2d 203, 95 Ohio App. 131.
- Okl.—Magnolia Petroleum Co. v. Sutton, 257 P.2d 307, 208 Okl. 488—City of Stilwell v. Bone, 157 P.2d 459, 195 Okl. 325.
- Or.—Rogers v. Southern Pac. Co., 227 P.2d 979, 190 Or. 643.
- Pa.—Dayen v. Penn Bus Co., 69 A.2d 151, 363 Pa. 176—Scullo v. Scholz, 188 A. 121, 324 Pa. 268.
- R.I.—R. H. Kimball, Inc. v. Rhode Island Hospital Nat. Bank, 48 A.2d 420, 72 R.I. 144.
- Tenn.—Tennessee Cent. Ry. Co. v. Dunn, 145 S.W.2d 543, 24 Tenn.App. 383.
- Wash.—Wiard v. Market Operating Corporation, 34 P.2d 875, 178 Wash. 265.
- 64 C.J. p 977 note 14.
97. Tenn.—Tevis v. Proctor & Gamble Distributing Co., 113 S.W.2d 64, 21 Tenn.App. 494.
- Va.—Williams v. Blue Bird Cab Co., 52 S.E.2d 868, 189 Va. 402.
- 64 C.J. p 977 note 15.
98. Mo.—Booker v. Southwest Missouri R. Co., 128 S.W. 1012, 144 Mo. App. 273.
99. Ga.—Howard v. Georgia Ry. & Power Co., 133 S.E. 57, 35 Ga.App. 273.
1. Conn.—Bunnell v. Waterbury Hospital, 131 A. 501, 103 Conn. 520.
2. U.S.—Kemp v. Creston Transfer Co., D.C.Iowa, 70 F.Supp. 521.
- Cal.—Martens v. Redi-Spuds, Inc., 247 P.2d 605, 113 Cal.App.2d 10—Peterson v. General Geophysical Co., App., 185 P.2d 56—Kline v. Barkett, 158 P.2d 51, 68 Cal.App.2d 765—Bramble v. McEwan, 104 P.2d 1054, 40 Cal.App.2d 400.
- Conn.—Dolan v. Growers Outlet, 26 A.2d 788, 129 Conn. 158.
- Ga.—Moffett v. McCurry, 67 S.E.2d 807, 84 Ga.App. 853—Macon Academy Music Co. v. Carter, 50 S.E.2d



tort-feasors.<sup>3</sup>

Instructions on the issue of negligence cannot be sustained, however, if when construed together, they are confusing or misleading,<sup>4</sup> or omit an essential element.<sup>5</sup>

### b. Contributory Negligence

If instructions as to contributory negligence properly

state the law when construed together, they will be held sufficient, although a portion of the charge when taken alone may be objectionable.

If instructions as to contributory negligence properly state the law, when construed together, they will be held sufficient.<sup>6</sup> This is true even though a portion of the charge when taken alone may be objectionable because it is misleading,<sup>7</sup> confusing,<sup>8</sup> uncertain,<sup>9</sup> or discriminatory;<sup>10</sup> or because it is

626, 78 Ga.App. 37—Essig v. Cheves, 44 S.E.2d 712, 75 Ga.App. 870.  
Iowa—Smithson v. Mommsen, 276 N.W. 47, 224 Iowa 307.  
Ky.—Sherron v. Watts' Adm'r, 226 S.W.2d 829, 312 Ky. 262.  
Mich.—Hoag v. Hyzy, 63 N.W.2d 632, 339 Mich. 163.  
Miss.—Harrington v. Pilkinton, 71 So.2d 884.  
N.J.—Vadurro v. Yellow Cab Co. of Camden, 77 A.2d 459, 6 N.J. 102—Melone v. Jersey Cent. Power & Light Co., 103 A.2d 615, 30 N.J. Super. 95.  
N.M.—Fowler v. Franklin, 270 P.2d 383, 58 N.M. 254.  
Okla.—Oklahoma City-Ada-Atoka Ry. Co. v. Crabtree, 249 P.2d 445, 207 Okl. 327—Midland Valley R. Co. v. Lowery, 248 P.2d 1042, 207 Okl. 227.  
64 C.J. p 977 note 19.  
2. Ark.—Tennyson v. Keef, 291 S.W. 428, 172 Ark. 877.  
Ga.—Hawkins v. Benton Rapid Exp., 62 S.E.2d 612, 82 Ga.App. 819.  
4. Cal.—Francis v. City and County of San Francisco, App., 268 P.2d 187—Milton v. Los Angeles Motor Coach Co., 128 P.2d 178, 53 Cal. App.2d 566—Gillette v. City and County of San Francisco, 107 P.2d 627, 41 Cal.App.2d 758—Bradford v. Brock, 34 P.2d 1048, 140 Cal.App. 47.  
Mass.—Gray v. Kinnear, 194 N.E. 817, 290 Mass. 81.  
Mo.—Relling v. Russell, 153 S.W.2d 6, 348 Mo. 279.  
Pa.—Miller v. Pennsylvania R. Co., 84 A.2d 200, 368 Pa. 507.  
64 C.J. p 977 note 22.  
5. Ill.—Williams v. Southern Ry. Co., 253 Ill.App. 437.  
6. Ala.—Weems v. Robbins, 9 So.2d 882, 243 Ala. 276—Pollard v. Rogers, 173 So. 881, 234 Ala. 92—Birmingham Elec. Co. v. Robinson, 33 So.2d 498, 33 Ala.App. 357.  
Ariz.—Standard Oil Co. of California v. Shields, 119 P.2d 116, 58 Ariz. 239.  
Cal.—Martens v. Redi-Spuds, Inc., 247 P.2d 605, 113 Cal.App.2d 10—Lloyd v. Southern Pac. Co., 245 P.2d 583, 111 Cal.App.2d 626—Mountain v. Wheatley, 234 P.2d 1031, 106 Cal. App.2d 333—Rolfio v. Market St. Ry. Co., 177 P.2d 753, 78 Cal.App.2d 885—Eilton v. Carey, 106 P.2d 944,

41 Cal.App.2d 375—Hoffart v. Southern Pac. Co., 92 P.2d 436, 33 Cal.App.2d 591.  
Conn.—Jacobs v. Swift & Co., 105 A.2d 658, 141 Conn. 276—Zislak v. Conetto, 79 A.2d 816, 137 Conn. 629—Dolan v. Growers Outlet, 26 A.2d 788, 129 Conn. 158—Kerlin v. Baccell, 5 A.2d 876, 125 Conn. 335.  
Fla.—Martin v. Stone, 51 So.2d 33.  
Ga.—Atlantic Coast Line R. Co. v. Layne, 77 S.E.2d 565, 88 Ga.App. 674—Eason v. Crews, 77 S.E.2d 245, 88 Ga.App. 602—Moffett v. McCurrier, 67 S.E.2d 807, 84 Ga.App. 853—Atlantic Coast Line R. Co. v. Jordan, 62 S.E.2d 650, 83 Ga.App. 60—Smith v. American Oil Co., 49 S.E. 2d 90, 77 Ga.App. 463—Chitwood v. Stoner, 4 S.E.2d 605, 60 Ga.App. 599—Maner v. Dykes, 190 S.E. 189, 55 Ga.App. 436—Gray v. Watson, 189 S.E. 616, 54 Ga.App. 885, followed in Robinson v. Watson, 189 S.E. 623, 54 Ga.App. 896.  
Ill.—Goldschmidt v. Chicago Transit Authority, 82 N.E.2d 357, 355 Ill. App. 461—Miller v. Odell, 28 N.E.2d 531, 306 Ill.App. 295.  
Ind.—Public Service Co. of Ind. v. Dalbey, 85 N.E.2d 368, 119 Ind.App. 405.  
Iowa.—Brady v. McQuown, 40 N.W. 2d 25, 241 Iowa 34—Craft v. Myers, 10 N.W.2d 84, 233 Iowa 521—Grisell v. Johnson, 294 N.W. 618, 229 Iowa 364—Tallmon v. Larson, 284 N.W. 367, 226 Iowa 564—Hanrahan v. Sprague, 263 N.W. 514, 220 Iowa 867—Engle v. Nelson, 263 N.W. 505, 220 Iowa 771—Becvar v. Batesole, 256 N.W. 297, 218 Iowa 858.  
Ky.—Smith v. Roberts, 268 S.W.2d 635—Davis v. McFarland, 265 S.W. 2d 66—Commonwealth v. Daniel, 98 S.W.2d 897, 266 Ky. 255.  
Md.—Mitchell v. Dowdy, 42 A.2d 717, 184 Md. 634.  
Mass.—Perella v. Boston Elevated Ry. Co., 28 N.E.2d 993, 306 Mass. 647.  
Mich.—Clark v. Naufel, 43 N.W.2d 839, 328 Mich. 249—Routt v. Berridge, 293 N.W. 900, 294 Mich. 668.  
Minn.—Ensor v. Duluth-Superior Transit Co., 275 N.W. 618, 201 Minn. 152.  
Mo.—Knox v. Weathers, 257 S.W.2d 912, 363 Mo. 1167—Griffith v. Gardner, 217 S.W.2d 519, 358 Mo. 869—Connole v. East St. Louis & S. Ry. Co., 102 S.W.2d 581, 340 Mo. 690—

Arky v. Kessels, App., 262 S.W.2d 357—Bergamo v. Engelhardt, App., 262 S.W.2d 307—Spencer v. Kansas City Public Service Co., App., 250 S.W.2d 187—Acker v. Kansas City, App., 104 S.W.2d 1055—Rosenblum v. Rosenblum, 96 S.W.2d 1082, 231 Mo.App. 276.  
N.Y.—Webb v. Miles, 298 N.Y.S. 884, 252 App.Div. 813, affirmed 16 N.E.2d 801, 278 N.Y. 648.  
N.C.—Batchelor v. Black, 59 S.E.2d 817, 232 N.C. 314, rehearing denied 61 S.E.2d 894, 232 N.C. 745.  
Ohio.—Eaton v. Askins, 118 N.E.2d 203, 95 Ohio App. 131—Coates v. Herron, App., 49 N.E.2d 63.  
Okla.—St. Louis-San Francisco Ry. Co. v. Farrell, 263 P.2d 518—Oklahoma City-Ada-Atoka Ry. Co. v. Crabtree, 249 P.2d 445, 207 Okl. 327—Gibson Co. v. Dye, 65 P.2d 407, 179 Okl. 385—Blew v. Chicago, E. & P. Ry. Co., 61 P.2d 258, 177 Okl. 553—Wright v. Clark, 61 P.2d 192, 177 Okl. 628—Dewitt v. Johnson, 41 P. 2d 476, 170 Okl. 625.  
Pa.—McDonald v. Ferrebee, 79 A.2d 232, 366 Pa. 543—Cain v. Kohlman, 22 A.2d 667, 344 Pa. 63—Maselli v. Stephens, 200 A. 590, 331 Pa. 491—Grutski v. Kline, Com.Pl., 61 Montg. Co. 33, affirmed in part and reversed in part on other grounds 43 A.2d 142, 352 Pa. 401.  
S.C.—Ballard v. Southern Ry. Co., 15 S.E.2d 342, 197 S.C. 288.  
Va.—Armstrong v. Rose, 196 S.E. 613, 170 Va. 190.  
Wash.—White v. Fenner, 133 P.2d 270, 16 Wash.2d 226—O'Connell v. Home Oil Co., 40 P.2d 991, 180 Wash. 461—Stewart v. Nelson, 23 P.2d 412, 173 Wash. 414, opinion adhered to 25 P.2d 1119, 173 Wash. 414.  
64 C.J. p 978 note 25.  
7. Iowa.—Thompson v. City of Sigourney, 237 N.W. 366, 212 Iowa 1348.  
64 C.J. p 978 note 26.  
8. Ga.—Jackson v. Merritt Hardware Co., 107 S.E. 394, 26 Ga.App. 747—Western & A. R. Co. v. Jarrett, 96 S.E. 17, 22 Ga.App. 313.  
9. Cal.—Froeming v. Stockton Electric R. Co., 153 P. 712, 171 Cal. 405, Ann.Cas.1918B 408.  
10. Iowa.—Thompson v. City of Sigourney, 237 N.W. 366, 212 Iowa 1348.

too broad,<sup>11</sup> or too narrow,<sup>12</sup> or is inconsistent with other instructions given;<sup>13</sup> or because it ignores the defense<sup>14</sup> or eliminates it,<sup>15</sup> imposes too low a degree of care,<sup>16</sup> omits the effect of plaintiff's knowledge of danger,<sup>17</sup> or fails to require that contributory negligence be the proximate cause.<sup>18</sup>

**Last clear chance.** In accordance with the general rules, in determining the sufficiency of a charge on the doctrine of last clear chance, the entire charge on such subject should be considered,<sup>19</sup> and it will not be held objectionable if, when so considered, it properly states the law.<sup>20</sup>

### c. Assumption of Risk

A charge on assumption of risk is sufficient if it properly states the defense when the instructions are considered as a whole.

Under the rules hereinbefore stated, a charge on assumption of risk is sufficient if it properly states the defense when the instructions are considered as a whole.<sup>21</sup>

## § 435. Evidence

A particular instruction as to the evidence, which standing alone might be defective or inaccurate, may be

sufficient when considered with other instructions correctly stating the law.

A particular instruction as to the evidence, which standing alone might be defective or inaccurate, may be sufficient when considered with other instructions correctly stating the law.<sup>22</sup> This rule has been applied where the instruction was defective as misleading,<sup>23</sup> or as authorizing the jury to ignore evidence<sup>24</sup> or rely on their own knowledge or experience in reaching a verdict.<sup>25</sup>

## § 436. — Presumptions and Burden of Proof

- a. Presumptions
- b. Burden of proof

### a. Presumptions

An instruction or a portion of an instruction as to presumptions will not be held fatally erroneous if the charge taken as a whole is sufficient, even though particular portions of the charge may be misleading.

An instruction or a portion of an instruction as to presumptions will not be held fatally erroneous if the charge taken as a whole is sufficient,<sup>26</sup> although particular portions of the charge may be objectionable as misleading.<sup>27</sup>

11. Mo.—Potterfield v. Terminal R. Ass'n of St. Louis, 5 S.W.2d 447, 319 Mo. 619, certiorari denied 49 S.Ct. 20, 278 U.S. 616, 73 L.Ed. 539.
12. Cal.—Lawrence v. Goodwill, 166 P. 751, 44 Cal.App. 446.
13. Ark.—Scullin v. Still, 192 S.W. 195, 127 Ark. 617.
14. Cal.—Watkins v. Nutting, 110 P. 2d 384, 17 Cal.2d 490.
- Conn.—Zeldwig v. City of Derby, 31 A.2d 24, 129 Conn. 493.
- N.D.—Hoffer v. Burd, 48 N.W.2d 282, 78 N.D. 278.
- 64 C.J. p 978 note 23.
15. Conn.—Hope v. Valente, 79 A. 583, 34 Conn. 248.
- 64 C.J. p 978 note 24.
16. Mo.—Hoover v. Western Coal & Mining Co., 142 S.W. 465, 160 Mo. App. 326.
17. Or.—Mathews v. City of La Grande, 299 P. 999, 126 Or. 426.
18. N.C.—Flyler v. Southern Ry. Co., 117 S.E. 297, 185 N.C. 357.
- Okl.—Haskell v. Kennedy, 1 P.2d 739, 151 Okl. 12.
19. Ariz.—Garlington v. McLaughlin, 104 P.2d 169, 54 Ariz. 87.
- Cal.—O'Connor v. City and County of San Francisco, 307 P.2d 632, 93 Cal.App.2d 626.
- Mo.—Branson v. Abernathy Furniture Co., 120 S.W.2d 562, 344 Mo. 1171.
- 64 C.J. p 978 note 23.

20. Cal.—Nix v. Woodworth, 53 P. 2d 765, 11 Cal.App.2d 322.
- Ind.—Public Utilities Co. v. Walden, 122 N.E. 591, 69 Ind.App. 623.
- Ky.—Ramsey v. Sharpley, 171 S.W. 3d 427, 294 Ky. 286.
- Mo.—Welch v. McNeely, 269 S.W.2d 871—Hillhouse v. Thompson, 243 S.W.2d 531, 362 Mo. 700—Bulkeley v. Thompson, 211 S.W.2d 83, 240 Mo.App. 558—Adams v. Thompson, App. 178 S.W.2d 779.
- N.H.—McLeod v. Caprarello, 44 A.2d 31, 95 N.H. 342.
21. U.S.—McCarthy v. Palmer, C.C. A.N.Y., 113 F.2d 721, certiorari denied Palmer v. McCarthy, 61 S.Ct. 50, 311 U.S. 690, 35 L.Ed. 438.
- Okl.—Oklahoma City-Ada-Atoka Ry. Co. v. Crabtree, 249 P.2d 445, 207 Okl. 327—H. P. Wilcox Oil & Gas Co. v. Jamison, 190 P.2d 807, 199 Okl. 691.
- 64 C.J. p 979 note 41.
22. U.S.—Travelers Indemnity Co. v. Plymouth Box & Panel Co., C.C. A.N.C., 99 F.2d 215.
- Cal.—Eliensendorf v. Shasta Union High School Dist., 40 P.2d 878, 4 Cal.App.2d 164.
- Ga.—Bagley v. Tarvin, 48 S.E.2d 704, 77 Ga.App. 365—United Motor Freight Terminals v. Driver, 44 S.E.2d 156, 75 Ga.App. 571—Scott v. Imperial Hotel Co., 42 S.E.2d 179, 75 Ga.App. 31—Benton Rapid Express v. Sammons, 10 S.E.2d 290, 62 Ga.App. 23—State Highway

- Board v. Bridges, 3 S.E.2d 907, 60 Ga.App. 240.
- Mass.—Ristuccia v. Boston Elevated Ry. Co., 126 N.E. 592, 283 Mass. 529.
- Pa.—Burns v. Pittsburgh Rys. Co., 167 A. 421, 109 Pa.Super. 490.
- S.C.—Dodenhoff v. Nilson Motor Express Lines, 2 S.E.2d 56, 190 S.C. 60.
- Tenn.—Miller v. Thrasher, 251 S.W.2d 446, 36 Tenn.App. 38.
- 64 C.J. p 979 note 42.
23. Ind.—Evansville & T. H. R. Co. v. Hoffman, 118 N.E. 151, 67 Ind. App. 571.
24. Ga.—Griffin v. Burdine, 79 S.E.2d 523, 89 Ga.App. 391.
- 64 C.J. p 979 note 45.
25. Iowa.—Wilber v. Buckingham, 123 N.W. 960, 152 Iowa 194, Ann. Cas.1913E 210.
26. U.S.—Ocean Accident & Guarantee Corporation v. Schachner, C.C. A.111., 70 F.2d 28.
- S.C.—Marks v. I. M. Pearlstone & Sons, 38 S.E.2d 235, 203 S.C. 312—Dodenhoff v. Nilson Motor Express Lines, 2 S.E.2d 56, 190 S.C. 60.
- Wyo.—Corpus Juris cited in Worth v. Worth, 49 P.2d 649, 655, 48 Wyo. 441.
- 64 C.J. p 979 note 43.
27. D.C.—Cayton v. English, 23 F.2d 745, 57 App.D.C. 324, followed in 23 F.2d 748, 57 App.D.C. 324.

*Res ipsa loquitur.* In conformity with the general rules hereinbefore stated, particular instructions presenting the doctrine of *res ipsa loquitur* have been held sufficient or not erroneous when considered with the charge as a whole.<sup>28</sup>

### b. Burden of Proof

Instructions on the burden of proof as to particular issues are usually sufficient if, when taken as a whole, they correctly state the law.

Instructions on the burden of proof as to particular issues are usually sufficient, if, when taken as a whole, they correctly state the law.<sup>29</sup> Accordingly, a particular instruction as to the burden of proof may be sufficient when taken in connection with the charge as a whole although when standing alone it might be misleading<sup>30</sup> or confusing,<sup>31</sup> or although it imposes the burden of proof on the wrong party<sup>32</sup> or places a greater burden on one of the parties than the law warrants.<sup>33</sup> A failure to charge on the burden of proof in a particular instruction is immaterial when the charge as a

whole sufficiently covers the matter.<sup>34</sup>

The instructions as to the burden of proof cannot be sustained, however, where, when considered as a whole, they are erroneous and materially prejudicial.<sup>35</sup>

### § 437. — Weight and Sufficiency

Instructions are, as a general rule, sufficient if, when considered as a whole, they correctly indicate the character of evidence necessary to establish the facts and the degree of conviction which such evidence must produce.

Instructions are, as a general rule, sufficient if, when considered as a whole, they correctly indicate the character of the evidence necessary to establish the facts and the degree of conviction which such evidence must produce.<sup>36</sup> Accordingly, a particular instruction as to the weight and sufficiency of evidence may be unobjectionable when considered with the charge as a whole although standing alone it is misleading,<sup>37</sup> loose and in-

28. Cal.—Hinds v. Wheadon, 154 P. 2d 720, 67 Cal.App.2d 456—Dieterle v. Yellow Cab Co., 128 P.2d 132, 53 Cal.App.2d 691.

Kan.—McQuinn v. Santa Fe Trail Transp. Co., 122 P.2d 787, 155 Kan. 111.

N.J.—Plant v. River Road Service Co., 68 A.2d 876, 5 N.J.Super. 290. N.C.—Collins v. Virginia Power & Electric Co., 168 S.E. 600, 204 N.C. 320.

Ohio.—Haslam v. Jackson, 40 N.E.2d 692, 68 Ohio App. 433.

Okla.—Oklahoma Gas & Electric Co. v. Busha, 66 P.2d 64, 179 Okl. 505. Utah.—Brooks v. Utah Hotel Co., 159 P.2d 127, 108 Utah 220.

64 C.J. p 979 note 52.

29. U.S.—Rosenfeld v. Curtis Pub. Co., C.C.A.N.Y., 163 F.2d 680—Bank of Edenton v. U. S., C.C.A.N.C., 152 F.2d 251—Kortz v. Guardian Life Ins. Co. of America, C.C.A.Colo., 144 F.2d 676, certiorari denied 65 S.Ct. 63, 323 U.S. 728, 89 L.Ed. 584.

Cal.—Zuckerman v. Underwriters at Lloyd's London, 267 P.2d 777, 42 Cal.2d 460.

Conn.—Dolan v. Growers Outlet, 26 A.2d 788, 129 Conn. 158.

Fla.—Greiper v. Coburn, 190 So. 902, 139 Fla. 293.

Ga.—Smith v. Burks, 79 S.E.2d 52, 89 Ga.App. 278—Milwaukee Mechan. Ins. Co. v. Davis, 52 S.E.2d 643, 79 Ga.App. 70.

Ill.—Cook v. Weyant, 105 N.E.2d 310, 346 Ill.App. 465.

Iowa.—Low v. Ford Hopkins Co., 1 N.W.2d 95, 231 Iowa 251—Rogers v. Jefferson, 275 N.W. 874, 224 Iowa 324.

Miss.—Blalock v. Magee, 38 So.2d 708, 205 Miss. 209. Mo.—Kunz v. Munzlinger, 242 S.W. 2d 536.

N.C.—Bailey v. Hayman, 17 S.E.2d 520, 220 N.C. 402.

Pa.—Hazelton Casket Co. v. Turnbach, Conn.Pl., 33 Luz.Leg.Reg. 465. R.I.—Petrarca v. McLaughlin, 62 A. 2d 877, 75 R.I. 1.

64 C.J. p 979 note 54.

30. Cal.—Cunningham v. Coca-Cola Bottling Co. of Los Angeles, 198 P.2d 337, 87 Cal.App.2d 106.

Mo.—Hieken v. Eichhorn, App., 159 S.W.2d 716.

64 C.J. p 980 note 55.

31. Ind.—Modern Woodmen of America v. Ball, 131 N.E. 539, 77 Ind.App. 388.

Tex.—Moulton v. Deloach, Civ.App., 253 S.W. 303.

32. U.S.—George v. Wiseman, C.C.A. Kan., 98 F.2d 923.

Mo.—Matthews v. Mound City Cab Co., App., 205 S.W.2d 243.

N.C.—Bullock v. Williams, 193 S.E. 170, 212 N.C. 113.

Okla.—Pennsylvania Fire Ins. Co. v. Sikes, 168 P.2d 1016, 197 Okl. 137, 166 A.L.R. 375.

64 C.J. p 980 note 57.

33. Ga.—Brown-Rogers-Dixson Co. v. Southern Ry. Co., 52 S.E.2d 702, 79 Ga.App. 449.

64 C.J. p 980 note 58.

34. Cal.—Amidon v. Hebert, 208 P. 2d 733, 93 Cal.App.2d 225.

Ill.—Illinois, Iowa Power Co. v. Guest, 18 N.E.2d 193, 370 Ill. 160.

Tex.—Vacciek v. Trojack, Civ.App., 226 S.W. 505.

35. Ind.—Kaiser v. Happel, 36 N.E. 2d 784, 219 Ind. 28.

64 C.J. p 980 note 60.

36. U.S.—Travelers Indemnity Co. v. Plymouth Box & Panel Co., C.C.A. N.C., 99 F.2d 218.

Ala.—Metropolitan Life Ins. Co. v. James, 153 So. 759, 228 Ala. 383.

Ariz.—Standard Oil Co. of California v. Shields, 119 P.2d 116, 58 Ariz. 239.

Cal.—Lemere v. Safeway Stores, 228 P.2d 296, 102 Cal.App.2d 712—McChristian v. Popkin, 171 P.2d 85, 75 Cal.App.2d 249—Mayfield v. Fidelity & Casualty Co. of New York, 61 P.2d 83, 16 Cal.App.2d 611.

Conn.—Borsoli v. Sparico, 106 A.2d 170, 141 Conn. 366.

Fla.—Lindsey v. Thomas, 190 So. 266, 138 Fla. 755.

Ga.—Elder v. Stark, 37 S.E.2d 598, 200 Ga. 452—Turner v. Hardy, 22 S. E.2d 483, 198 Ga. 626—Brazil v. Roberts, 32 S.E.2d 171, 198 Ga. 477.

Crosby v. Higgs, 182 S.E. 10, 181 Ga. 314—State Highway Board v. Bridges, 3 S.E.2d 907, 60 Ga.App. 240.

Ill.—Jackson County v. Wayman, 15 N.E.2d 854, 369 Ill. 123.

N.C.—In re Williams' Will, 1 S.E.2d 857, 215 N.C. 259.

Okla.—McDonald v. Bruhn, 126 P.2d 986, 190 Okl. 682.

Tenn.—Central Produce Co. v. General Cab Co. of Nashville, 129 S.W. 2d 1117, 23 Tenn.App. 209.

64 C.J. p 980 note 62.

37. U.S.—Baltimore & O. R. Co. v. Saunders, C.C.A.W.Va., 159 F.2d 481.

Ga.—Franklin v. First Nat. Bank, 200 S.E. 679, 137 Ga. 268.

definite,<sup>38</sup> or ambiguous;<sup>39</sup> or although it confines the jury to the testimony of witnesses and excludes the consideration of documentary evidence,<sup>40</sup> or requires a lesser<sup>41</sup> or greater<sup>42</sup> degree of proof than that required by law, or violates the rule relating to the disparity of witnesses,<sup>43</sup> or is not applicable to the case,<sup>44</sup> or permits the jury to ignore evidence,<sup>45</sup> or restricts the proof available for consideration to a party's own evidence.<sup>46</sup> The error is prejudicial, however, where the erroneous portion of the charge conflicts with a correct statement of the rule in another part of the charge resulting in confusion.<sup>47</sup>

The previous rules have been applied to instructions on circumstantial evidence,<sup>48</sup> expert testimony,<sup>49</sup> and preponderance of evidence.<sup>50</sup>

## § 438. Invasion of Province of Jury

A charge which, taken as a whole, correctly submits the issues to the jury will not be held objectionable because certain instructions, taken in their severalty, may be subject to the criticism that they invade the province of the jury.

A charge which, taken as a whole, correctly submits the issues to the jury will not be held objectionable because certain instructions, taken in their severalty, may be subject to criticism on the ground that they invade the province of the jury,<sup>51</sup> in that they amount to a peremptory direction,<sup>52</sup> or charge on the weight of the evidence in general,<sup>53</sup> assume the existence of material facts in dispute,<sup>54</sup> comment on the evidence,<sup>55</sup> express an opinion on the facts,<sup>56</sup> express or intimate the degree of credit

N.J.—Schenerman v. Manhattan Transit Co., 44 A.2d 38, 133 N.J. Law 262.

Wis.—Gosnodar v. Milwaukee Auto. Ins. Co., 24 N.W.2d 676, 249 Wis. 332, rehearing denied 35 N.W.2d 257, 249 Wis. 332.

64 C.J. p 980 note 63.

38. Mo.—Grubbs v. Kansas City Public Service Co., App., 30 S.W.2d 441, certiorari quashed 30 S.W.2d 445, 325 Mo. 505.

39. Ind.—Pennsylvania R. Co. v. Welsh, 178 N.E. 4, 93 Ind.App. 404.

40. Ga.—Hendrix v. Bank of Portal, 149 S.E. 879, 169 Ga. 264.

41. Ill.—Gilmore v. Killion, 118 N.E. 36, 281 Ill. 154.

64 C.J. p 980 note 67.

42. Cal.—In re Schlyen's Estate, 234 P.2d 211, 105 Cal.App.2d 648.

64 C.J. p 980 note 68.

43. Cal.—Foley v. Hornung, 169 P. 705, 35 Cal.App. 304.

Ill.—Smiley v. Barnes, 196 Ill.App. 530.

44. Pa.—Chitwood v. Philadelphia & R. Ry. Co., 118 A. 505, 275 Pa. 22.

45. Ga.—Brooks v. Carver, 190 S.E. 389, 55 Ga.App. 362.

64 C.J. p 980 note 71.

46. Ind.—Joseph E. Lay Co. v. Mendenhall, 102 N.E. 974, 54 Ind.App. 342.

Ohio.—MacBard Coal Co. v. Bayles, 172 N.E. 637, 35 Ohio App. 632.

47. N.C.—Askew v. Carolina Coach Co., 20 S.E.2d 286, 221 N.C. 468.

Freedom from contributory negligence

An instruction precluding recovery if the jury find from a preponderance of evidence that plaintiff was negligent was erroneous, notwithstanding other portions of charge properly instructed the jury that plaintiff must establish by preponderance of the evidence that he was not guilty of contributory negligence.

—Hersberg v. Knight, 286 N.W. 145, 289 Mich. 29.

48. Minn.—Hill v. Northern Pac. Ry. Co., 297 N.W. 637, 210 Minn. 190.

Mo.—Welch v. Thompson, 210 S.W. 2d 79, 857 Mo. 703.

Or.—Oregon Box & Mfg. Co. v. Jones Lumber Co., 244 P. 313, 117 Or. 411.

49. Iowa.—Cowley v. People's Gas & Electric Co., 187 N.W. 591, 198 Iowa 536.

Pa.—First Nat. Bank v. Fry, 144 A. 416, 294 Pa. 425.

50. Cal.—Hinds v. Wheadon, 154 P. 2d 720, 67 Cal.App.2d 456—Butcher v. Thornhill, 58 P.2d 179, 14 Cal. App.2d 149.

51. Cal.—City of Sylvania v. Miller, 79 S. E.2d 808, 210 Ga. 290—State Highway Board v. Bridges, 3 S.E.2d 907, 60 Ga.App. 240—Southern Ry. Co. v. Wilcox, 2 S.E.2d 225, 59 Ga.App. 785—Travelers Ins. Co. v. Anderson, 184 S.E. 813, 53 Ga.App. 1.

Ill.—Gleason v. Cunningham, 44 N.E. 2d 940, 316 Ill.App. 286.

Iowa.—Moran v. Kean, 280 N.W. 543, 225 Iowa 323.

Minn.—Finkel v. Otto Misch Co., 289 N.W. 776, 291 Mich. 630.

Mo.—Kunst v. Walker, App., 43 S. W.2d 886.

N.C.—In re Humphrey, 71 S.E.2d 915, 236 N.C. 142.

Ohio.—Stover v. Yoakum, App., 109 N.E.2d 877.

Tenn.—Blount County v. Perry, 7 Tenn.App. 340.

52. Cal.—Will v. Southern Pac. Co., 116 P.2d 44, 18 Cal.2d 468.

Conn.—Jacek v. Bacote, 68 A.2d 144, 135 Conn. 702.

D.C.—Danzansky v. Zimolista, 105 F. 2d 457, 70 App.D.C. 234.

Ga.—Weathers Bros. Transfer Co. v. Jarrell, 33 S.E.2d 805, 72 Ga.App. 817.

Ind.—Cushman Motor Delivery Co. v. McCabe, 36 N.E.2d 769, 219 Ind. 156.

Mo.—Scott v. First Nat. Bank, 119 S. W.2d 928, 343 Mo. 77.

Ohio.—Pfister v. City of Cleveland, App., 113 N.E.2d 368, appeal dismissed 112 N.E.2d 657, 159 Ohio St. 580.

Tenn.—Bridges v. Agee, 15 Tenn.App. 351.

64 C.J. p 981 note 77.

53. Ga.—McCoy v. Scarborough, 37 S.E.2d 231, 73 Ga.App. 519.

Minn.—Kerzie v. Rodine, 11 N.W.2d 771, 216 Minn. 44.

64 C.J. p 981 note 78.

54. S.C.—Hinsdale v. Westrose, 174 S.E. 898, 173 S.C. 68.

64 C.J. p 981 note 79.

55. Idaho.—Stearns v. Graves, 111 P.2d 882, 62 Idaho 312.

Mo.—Brinkley v. United Biscuit Co. of America, 164 S.W.2d 325, 349 Mo. 1227—State ex rel. Snider v. Shain, 137 S.W.2d 527, 345 Mo. 950—Rishel v. Kansas City Public Service Co., 129 S.W.2d 851—In re Stein's Estate, App., 177 S.W.2d 678—Hengelsberg v. Cushing, App., 61 S.W. 2d 203.

Okla.—Walton v. Bryan, 109 P.2d 489, 188 Okl. 358—Oklahoma Biltmore v. Williams, 79 P.2d 202, 182 Okl. 574.

Wash.—Zackovich v. Jasmont, 200 P. 2d 742, 33 Wash.2d 73.

64 C.J. p 981 note 80.

56. Ariz.—Fornara v. Wolpe, 226 P. 203, 25 Ariz. 383.

64 C.J. p 981 note 81.

57. Cal.—Schmidt v. Macco Const. Co., 260 P.2d 230, 119 Cal.App.2d 717.

Ga.—Boone v. Rabun, 188 S.E. 524, 183 Ga. 318—Tribble v. Smith, 71 S. E.2d 432, 86 Ga.App. 265—McFarland v. Bradley, 60 S.E.2d 498, 82 Ga.App. 223—Weathers Bros. Transfer Co. v. Jarrell, 33 S.E.2d 805, 72 Ga.App. 317.

S.C.—Snellgrove v. Life Ins. Co. of Virginia, 179 S.E. 784, 176 S.C. 178.

64 C.J. p 981 note 82.

or weight to be given to any witness' testimony,<sup>57</sup> or exclude issues from the jury.<sup>58</sup> On the other hand, where the instructions as a whole are objectionable as invading the province of the jury, they will not be sustained.<sup>59</sup>

*Credibility of witnesses.* A particular instruction as to the credibility of a witness, which, standing alone, might be objectionable, may, under the general rules already considered, be sufficient or not materially erroneous when taken in connection with the charge as a whole.<sup>60</sup>

### § 439. Damages

Where a charge, when considered as a whole, correctly states the law on the question of damages, it will

be upheld, even though particular instructions or portions of the charge when segregated may be objectionable.

Where a charge, when considered as a whole, correctly states the law on the question of damages, it will be upheld, even though particular instructions or portions of the charge when segregated may be objectionable,<sup>61</sup> as inaccurate,<sup>62</sup> misleading,<sup>63</sup> confusing,<sup>64</sup> contradictory,<sup>65</sup> ambiguous,<sup>66</sup> inconsistent,<sup>67</sup> permitting the assessment of double damages,<sup>68</sup> or as not applicable to the evidence.<sup>69</sup>

These rules have been applied to instructions as to the measure of damages generally,<sup>70</sup> permanent damages,<sup>71</sup> market value,<sup>72</sup> pain and suffering,<sup>73</sup>

57. S.D.—Citizens' State Bank v. Bailey, 195 N.W. 37, 46 S.D. 547.  
64 C.J. p 981 note 83.
58. Ga.—Mercantile Nat. Bank of Savannah v. Stein, 124 S.E. 697, 158 Ga. 894—Brook v. Cato, 42 S.E.2d 174, 75 Ga.App. 79.
59. Ala.—Louisville & N. R. Co. v. Rush, 114 So. 21, 22 Ala.App. 195.  
64 C.J. p 981 note 85.
60. Ga.—Moreland v. Haynes, 8 S.E. 2d 123, 62 Ga.App. 375.  
Idaho.—Anderson v. Ruberg, 180 P. 2d 456, 66 Idaho 417.  
64 C.J. p 981 note 86.
61. Ark.—Ball v. Independence County, 217 S.W.2d 913, 214 Ark. 694.
- Cal.—Ward v. Read, 25 P.2d 821, 219 Cal. 65—Ideal Heating Corp. v. Royal Indemnity Co., 237 P.2d 521, 107 Cal.App.2d 662.
- Del.—Pretzman v. Topkis, 3 A.2d 708, 9 W.W.Harr. 668.
- Ga.—Albany Federal Sav. & Loan Ass'n v. Henderson, 36 S.E.2d 330, 200 Ga. 79—Powell v. Jarrell, 16 S.E.2d 198, 65 Ga.App. 453—Chitwood v. Stoner, 4 S.E.2d 605, 60 Ga.App. 599—Georgia Power Co. v. Chapman, 168 S.E. 131, 46 Ga.App. 582.
- Ill.—Goldberg v. Capitol Freight Lines, 47 N.E.2d 67, 332 Ill. 283—Nickell v. Baltimore & O. R. Co., 106 N.E.2d 738, 347 Ill.App. 202—Stephens v. Weigel, 82 N.E.2d 697, 336 Ill.App. 36.
- Mass.—Ouillette v. Sheerin, 9 N.E.2d 713, 297 Mass. 536.
- Mich.—Pallas v. Crowley-Milner & Co., 54 N.W.2d 595, 334 Mich. 282—Samuelson v. Olson Transp. Co., 36 N.W.2d 917, 324 Mich. 278.
- Miss.—Standard Oil Co. v. Crane, 23 So.2d 297, 199 Miss. 69—Reliance Mfg. Co. v. Graham, 179 So. 341, 181 Miss. 549.
- Mo.—Hilton v. Thompson, 227 S.W.2d 675, 360 Mo. 177—Hill v. Landau, App., 125 S.W.2d 516.
- N.J.—Simons v. Lee, 189 A. 360, 117 N.J.Law 370.
- N.C.—Tarkington v. Rock Hill Printing & Finishing Co., 53 S.E.2d 269, 230 N.C. 354—Headen v. Bluebird Transp. Corp., 191 S.E. 331, 211 N.C. 639.
- N.D.—Haslam v. Babcock, 1 N.W.2d 335, 71 N.D. 363.
- Ohio.—Ford v. Reamsnyder, 26 Ohio Cir.Ct.N.S., 635.
- Tenn.—West Tennessee Power & Light Co. v. Hughes, 15 Tenn.App. 37.
- Tex.—Red River Valley Pub. Co., Inc. v. Bridges, Civ.App., 254 S.W.2d 854, refused no reversible error.  
64 C.J. p 982 note 89—17 C.J. p 1072 note 79, 9 1073 notes 80-84.
- Charge as a whole held erroneous for failure to limit plaintiff's recovery to damages for injuries sustained as result of defendant's wrongful acts.—Wichita Transit Co. v. Sanders, Tex.Civ.App., 214 S.W.2d 810.
62. Ga.—Mitchell County v. Hilliard, 126 S.E. 719, 159 Ga. 502.
63. Ind.—Pence v. Pence, 113 N.E. 751, 62 Ind.App. 679.  
64 C.J. p 982 note 91.
- Use of inapt terms
- Mo.—Riley v. Naylor, 16 A.2d 857, 179 Md. 1.  
64 C.J. p 982 note 92.
64. Ga.—Mitchell County v. Hilliard, 126 S.E. 719, 159 Ga. 502.
- Mo.—City of Cape Girardeau v. Hunze, 284 S.W. 471, 314 Mo. 438, 47 A.L.R. 25.
65. Mo.—City of Cape Girardeau v. Hunze, supra.
66. U.S.—Waters-Pierce Oil Co. v. Desseins, Okl., 29 S.Ct. 270, 213 U.S. 159, 53 L.Ed. 453.
67. S.C.—Westinghouse Electric & Mfg. Co. v. Glencoe Cotton Mills, 98 S.E. 123, 111 S.C. 364.  
64 C.J. p 982 note 96.
68. Ind.—Mellencamp v. Cockerham, 23 N.E.2d 599, 107 Ind.App. 393.
- Wash.—Hardin v. Olympe Portland Cement Co., 154 P. 450, 89 Wash. 320.
69. Wash.—Poston v. Western Dairy Products Co., 36 P.2d 65, 179 Wash. 73.  
64 C.J. p 982 note 98.
70. Ga.—State Highway Dept. v. Peavy, 48 S.E.2d 478, 77 Ga.App. 308—Keener v. Addis, 5 S.E.2d 695, 61 Ga.App. 40—Pollard v. Boatwright, 196 S.E. 215, 57 Ga.App. 565.
- Ind.—Chicago & Erie R. Co. v. Mone-smith, 37 N.E.2d 724, 110 Ind.App. 231.
- Iowa.—Smith v. Pine, 12 N.W.2d 236, 234 Iowa 256—Davidson v. Vast, 10 N.W.2d 12, 233 Iowa 534—Angell v. Hutchcroft, 3 N.W.2d 147, 231 Iowa 1057.
- Mo.—E. C. Robinson Lumber Co. v. Cottonseed Delinting Corp., App., 207 S.W.2d 63—Hanser v. Lerner, App., 153 S.W.2d 806.
- Okla.—Hartford Accident & Indemnity Co. v. Chaney, 131 P.2d 102, 191 Okl. 523.
- Pa.—Muzychuk to Use and Benefit of Burns v. Yellow Cab Co., 22 A.2d 670, 343 Pa. 335.  
64 C.J. p 982 note 99.
71. Ga.—Southern Ry. Co. v. Brock, 64 S.E. 1083, 132 Ga. 858.
- N.C.—Wagner v. Town of Conover, 156 S.E. 167, 200 N.C. 82.
72. Cal.—Sacramento Southern R. Co. v. Hellborn, 104 P. 979, 156 Cal. 408.
- Ga.—Albany Federal Sav. & Loan Ass'n v. Henderson, 36 S.E.2d 330, 200 Ga. 79.
- Mo.—State ex rel. State Highway Commission v. Leftwich, App., 263 S.W.2d 742.
73. Iowa.—Angell v. Hutchcroft, 3 N.W.2d 147, 231 Iowa 1057—Danner v. Cooper, 246 N.W. 223, 215 Iowa 1354.
- Pa.—McClelland v. Copeland, 50 A. 2d 221, 355 Pa. 405.  
64 C.J. p 983 note 3.

mental anguish,<sup>74</sup> loss of earning capacity,<sup>75</sup> loss of services<sup>76</sup> and companionship,<sup>77</sup> rental value,<sup>78</sup> and punitive or exemplary damages.<sup>79</sup>

On the other hand, where an instruction is given to the jury as an absolute guide in determining the damages, the rule requiring the instructions to be read together is inapplicable.<sup>80</sup>

### § 440. Definition and Application of Terms

In determining the sufficiency of a definition in a charge, the charge must be considered as a whole, and segregating one part with respect to a term and subjecting it to a meticulous analysis does not establish

error if the treatment of the term in the whole charge is sufficient adequately to guide the jury.

In determining the sufficiency of a definition in a charge, the charge must be considered as a whole, and segregating one part with respect to a term and subjecting it to a meticulous analysis does not establish error if the treatment of the term in the whole charge both by definition and application is sufficient adequately to guide the jury.<sup>81</sup> These rules have been applied to instructions defining or omitting to define condition as distinguished from cause,<sup>82</sup> contributory negligence,<sup>83</sup> embezzlement,<sup>84</sup> malice,<sup>85</sup> material fact,<sup>86</sup> negligence,<sup>87</sup> nuisance,<sup>88</sup> and proximate cause.<sup>89</sup>

## 3. CURE OF ERROR

### § 441. By Other Instructions

Generally an erroneous instruction is not cured by the mere giving of correct instructions necessarily inconsistent therewith, although if the instruction is defective merely, in that it is inaccurate, misleading, confusing, or incomplete, it may be cured by another instruction.

A correct instruction will cure the error in an-

other only where the instructions, as a series, state the law correctly,<sup>90</sup> and it is evident that no harm has been done by the erroneous instruction.<sup>91</sup> Otherwise, in order to obviate the effect thereof, the erroneous instruction must be expressly withdrawn from the jury<sup>92</sup> or the erroneous instruc-

74. Iowa.—Strayer v. O'Keefe, 210 N.W. 781, 202 Iowa 643.

75. Mass.—Murray v. Liebmann, 120 N.E. 79, 231 Mass. 7.  
64 C.J. p 983 note 5.

76. Ind.—Indianapolis & M. Rapid Transit Co. v. Reeder, 100 N.E. 101, 51 Ind.App. 533.

77. Ind.—Indianapolis & M. Rapid Transit Co. v. Reeder, supra.

78. Ill.—White v. Holden, 206 Ill. App. 567.

79. Va.—Bourne v. Richardson, 113 S.E. 893, 133 Va. 441.  
61 C.J. p 983 note 9.

80. Iowa.—McAdams v. Chicago, R. I. & P. Ry. Co., 205 N.W. 310, 200 Iowa 732.

81. Ga.—Equitable Credit Corp. v. Johnson, 72 S.E.2d 816, 86 Ga.App. 844.

Idaho.—Murphy v. Mutual Life Ins. Co. of New York, 112 P.2d 993, 62 Idaho 362.

Minn.—Boerhardt v. Kulick, 48 N.W. 2d 318, 234 Minn. 308.

Okl.—City of Altus v. Wise, 143 P.2d 128, 193 Okl. 288.

R.I.—Boettger v. Mauran, 12 A.2d 285, 64 R.I. 340.

Tex.—Westbrook v. Watts, Civ.App. 268 S.W.2d 694—Hooper v. Courtney, Civ.App., 256 S.W.2d 462—Fenner v. American Surety Co. of New York, Civ.App., 156 S.W.2d 279, error refused—Aetna Life Ins. Co. v. Allen, Civ.App., 137 S.W.2d 78.

64 C.J. p 983 note 12.

89 C.J.S.—3

82. Conn.—Salemme v. Mulloy, 121 A. 870, 99 Conn. 474.

83. Mich.—Smith v. Detroit United Ry., 119 N.W. 840, 155 Mich. 466.  
64 C.J. p 983 note 14.

84. Mo.—Goffe v. National Surety Co., 9 S.W.2d 929, 321 Mo. 140.

85. Mo.—Lehmer v. Smith, 284 S.W. 167, 220 Mo.App. 251—Waddell v. Krause, 241 S.W. 964, 210 Mo.App. 117.

Instruction held confusing, misleading, and prejudicial  
Mo.—Davenport v. Midland Bldg. Co., App., 246 S.W.2d 460.

86. Ill.—Fry v. Howard, 232 Ill.App. 295.

87. Ohio.—Morris v. Cleveland Hockey Club, 105 N.E.2d 419, 157 Ohio St. 225—Fry v. Hildreth, App., 99 N.E.2d 910.

Okl.—City of Stilwell v. Bone, 157 P. 2d 459, 195 Okl. 325.  
64 C.J. p 983 note 18.

88. Tex.—Royalty v. Strange, Civ. App., 220 S.W. 421.

89. Ark.—Gantt v. Siasell, 263 S.W. 2d 916.

Iowa.—Dennis v. Merrill, 257 N.W. 322, 218 Iowa 1259.

N.C.—Hodges v. Malone & Co., 70 S. E.2d 478, 235 N.C. 512.

Okl.—City of Stilwell v. Bone, 157 P. 2d 459, 195 Okl. 325.

Tex.—International-Great Northern R. Co. v. Pence, Civ.App., 113 S. W.2d 206, error dismissed.  
64 C.J. p 983 note 20.

90. Ill.—Nickell v. Baltimore & O. R. Co., 106 N.E.2d 738, 347 Ill.App.

202—Aldridge v. Morris, 86 N.E. 2d 143, 337 Ill.App. 360.

S.C.—Corpus Juris cited in Citizens Bank of Darlington v. McDonald, 24 S.E.2d 369, 375, 202 S.C. 244.  
64 C.J. p 983 note 21.

91. Ala.—North Carolina Mut. Life Ins. Co. v. Coleman, 26 So.2d 114, 32 Ala.App. 287, certiorari denied 26 So.2d 120, 248 Ala. 32—Ogburn v. Montague, 155 So. 633, 26 Ala. App. 166, certiorari denied 155 So. 636, 229 Ala. 78.

Ill.—Walker v. Shea-Matson Trucking Co., 101 N.E.2d 449, 344 Ill.App. 466.

Mo.—Ellyson v. Missouri Power & Light Co., App., 59 S.W.2d 714.  
64 C.J. p 984 note 22.

92. Ga.—Citizens & Southern Nat. Bank v. Kontz, 194 S.E. 536, 135 Ga. 131—Brooks v. Wofford, 77 S. E.2d 563, 88 Ga.App. 731—Taylor v. Allen, 49 S.E.2d 544, 77 Ga.App. 659—Spalding Lumber Co. v. Hemphill, 47 S.E.2d 514, 77 Ga.App. 1—Mitchell v. Evans, 20 S.E.2d 782, 67 Ga.App. 453—Securities Inv. Co. v. Jett, 1 S.E.2d 69, 59 Ga.App. 418.  
Ind.—Evans v. Evans, 96 N.E.2d 688, 121 Ind.App. 104.

N.J.—Cosgrave v. Malstrom, 23 A.2d 288, 127 N.J.Law 505—Wright v. General Ceramics Co., 197 A. 899, 120 N.J.Law 33—Erie Land & Improvement Co. v. Symtakos, 170 A. 51, 112 N.J.Law 320.

Va.—H. J. Heinz Co. v. W. B. Shafer, Inc., 49 S.E.2d 298, 183 Va. 320.

Wis.—State ex rel. Jahn v. Rydell, 27 N.W.2d 486, 250 Wis. 377—

tion must be corrected<sup>93</sup> by a qualification referring directly to it<sup>94</sup> and a mere incidental reference to the issue in another instruction,<sup>95</sup> or an implied qualification of the instruction by a later instruction,<sup>96</sup> or words carrying an inference rather than a direct statement of the correct rule,<sup>97</sup> or a statement that it is the duty of the jury to recall the evidence,<sup>98</sup> is insufficient. Accordingly, subject

to the qualification that the erroneous instruction must be on a material issue, and misleading,<sup>99</sup> it is the general rule that an erroneous instruction is not cured by the mere giving of correct instructions,<sup>1</sup> necessarily inconsistent therewith,<sup>2</sup> since, under such circumstances, it is impossible to tell which charge the jury followed.<sup>3</sup>

- O'Donnell v. Kraut, 7 N.W.2d 889, 242 Wis. 268.  
 64 C.J. p 984 note 23.
93. Ga.—Brooks v. Wofford, 77 S.E. 2d 563, 88 Ga.App. 731—Spalding Lumber Co. v. Hemphill, 47 S.E.2d 514, 77 Ga.App. 1—Mitchell v. Evans, 20 S.E.2d 782, 67 Ga.App. 453—Securities Inv. Co. v. Jett, 1 S.E.2d 69, 59 Ga.App. 418.  
 64 C.J. p 984 note 24.
94. Ga.—Smith v. Norman Motors Co., 65 S.E.2d 699, 84 Ga.App. 186—Atlantic Coast Line R. Co. v. Thomas, 64 S.E.2d 301, 83 Ga.App. 477—Spalding Lumber Co. v. Hemphill, 47 S.E.2d 514, 77 Ga.App. 1.  
 Wis.—State ex rel. Jahn v. Rydell, 27 N.W.2d 486, 250 Wis. 377—O'Donnell v. Kraut, 7 N.W.2d 889, 242 Wis. 268.  
 64 C.J. p 984 note 24.
95. Wyo.—McClintock v. Ayers, 253 P. 658, 255 P. 355, 36 Wyo. 132.
96. N.H.—Hall v. Merrimack Mut. Fire Ins. Co., 6 A.2d 172, 90 N.H. 191.
97. N.J.—Cosgrave v. Malmstrom, 23 A.2d 288, 127 N.J.Law 505.
98. Conn.—Ladd v. Burdge, 43 A.2d 752, 132 Conn. 296.
99. Ga.—Neville v. National Life & Accident Ins. Co., 135 S.E. 315, 36 Ga.App. 8.  
 Ky.—Corpus Juris cited in Stover v. Cincinnati, N. & C. Ry. Co., 67 S.W.2d 484, 485, 252 Ky. 425.
- L. Ala.—W. U. Tel. Co. v. Gorman, 185 So. 743, 237 Ala. 146.
- Ark.—Clark v. Duncan, 214 S.W.2d 493, 214 Ark. 83.
- Cal.—Wells v. Lloyd, 132 P.2d 471, 21 Cal.2d 452—Miner v. Dabney-Johnson Oil Corporation, 28 P.2d 23, 219 Cal. 580—Bolton v. Martin, App., 271 P.2d 991—Lopez v. Knight, 263 P.2d 452, 121 Cal.App. 2d 387—Bellows v. City and County of San Francisco, 234 P.2d 729, 106 Cal.App.2d 57—Goodwin v. Foley, 170 P.2d 503, 75 Cal.App.2d 195—Stevenson v. Fleming, 117 P.2d 717, 47 Cal.App.2d 225—Nance v. Fresno City Lines, 113 P.2d 244, 44 Cal.App.2d 868—Ross v. Baldwin, 112 P.2d 666, 44 Cal.App.2d 433—Spear v. Leuenberger, 112 P.2d 43, 44 Cal.App.2d 236—Akers v. Cowan, 80 P.2d 143, 26 Cal.App.2d 694.
- Colo.—Pettingell v. Moede, 271 P.2d 1038.  
 Ga.—Williford v. Swint, 188 S.E. 685, 183 Ga. 375—Potts v. R. F. C., 47 S.E.2d 178, 76 Ga.App. 796.  
 Ill.—Sigma v. Alluri, 113 N.E.2d 475, 351 Ill.App. 11.  
 Ind.—Evans v. Evans, 96 N.E.2d 688, 121 Ind.App. 104—Emge v. Sevedre, 76 N.E.2d 687, 118 Ind.App. 277—Indiana Service Corp. v. Schaefer, 199 N.E. 158, 101 Ind.App. 294.  
 Kan.—Sams v. Commercial Standard Ins. Co., 139 P.2d 859, 157 Kan. 278.  
 Ky.—Corpus Juris quoted in Stover v. Cincinnati, N. & C. Ry. Co., 67 S.W.2d 484, 485, 252 Ky. 425.  
 Mo.—Hatfield v. Thompson, 252 S.W.2d 534—Piehler v. Kansas City Public Service Co., 226 S.W.2d 681, 360 Mo. 12—Griffith v. Delico Meats Products Co., 145 S.W.2d 431, 347 Mo. 28—Evans v. Atchison, T. & S. F. Ry. Co., 131 S.W.2d 604, 345 Mo. 147—State ex rel. St. Joseph Belt Ry. Co. v. Shain, 108 S.W.2d 351, 341 Mo. 733—McDonald v. Kansas City Gas Co., 59 S.W.2d 37, 332 Mo. 356—Daams v. Flournoy, App., 119 S.W.2d 482.  
 Mont.—Skelton v. Great Northern Ry. Co., 100 P.2d 929, 110 Mont. 257.  
 N.J.—Friel v. Wildwood Ocean Pier Corp., 29 A.2d 554, 129 N.J.Law 376.  
 N.Y.—McNulty v. Sunset Warehouses, 8 N.Y.S.2d 703, 256 App.Div. 821.  
 N.C.—Godwin v. Johnson Cotton Co., 78 S.E.2d 772, 238 N.C. 627.  
 Pa.—Williamson v. McCracken, 19 Wash. 20, affirmed 199 A. 166, 330 Pa. 254.  
 Va.—Smith v. Clark, 46 S.E.2d 21, 187 Va. 181—Gary v. Artist, 43 S.E.2d 833, 186 Va. 616.  
 W.Va.—Meyn v. Dulaney-Miller Auto Co., 191 S.E. 558, 118 W.Va. 545—Liston v. Miller, 169 S.E. 398, 113 W.Va. 730.  
 64 C.J. p 984 note 27—9 C.J. p 662 note 74 [a].
2. Ark.—Ratteree v. Rhodes, 97 S.W.2d 922, 193 Ark. 159.  
 Cal.—Westberg v. Willde, 94 P.2d 590, 14 Cal.2d 360—Lowe v. Lee, 213 P.2d 767, 95 Cal.App.2d 685—Rutherford v. Standard Engineering Corp., 199 P.2d 354, 88 Cal.App. 2d 554—Goodwin v. Foley, 170 P.2d 503, 75 Cal.App.2d 195—Van Fleet v. Heyler, 125 P.2d 586, 51 Cal.App.2d 719—Akers v. Cowan, 80 P.2d 143, 26 Cal.App.2d 694.
- Cal.App.2d 719—Akers v. Cowan, 80 P.2d 143, 26 Cal.App.2d 694.  
 Colo.—Neilson v. Bowles, 236 P.2d 286, 124 Colo. 274—Denham Theatre v. Beeler, 109 P.2d 643, 107 Colo. 116.  
 Ind.—Metropolitan Life Ins. Co. v. Alterovitz, 14 N.E.2d 570, 214 Ind. 186, 117 A.L.R. 770—Gary Rys. v. Chumcoff, 96 N.E.2d 685, 122 Ind. App. 189, transfer denied 103 N.E. 2d 203, 230 Ind. 309.  
 Ky.—Corpus Juris quoted in Stover v. Cincinnati, N. & C. Ry. Co., 67 S.W.2d 484, 485, 252 Ky. 425.  
 Miss.—Wallace v. Billups, 33 So.2d 819, 203 Miss. 853—Hunt v. Sherrill, 15 So.2d 426, 195 Miss. 688.  
 Mo.—State ex rel. Powell Bros. Truck Lines v. Hostetter, 137 S.W.2d 461, 345 Mo. 915—Heuer v. John R. Thompson Co., App., 251 S.W.2d 980—Newkirk v. City of Tipton, 136 S.W.2d 147, 234 Mo.App. 920—Bouligny v. Metropolitan Life Ins. Co., App., 133 S.W.2d 1094—Lyons v. St. Joseph Belt Ry. Co., 84 S.W.2d 933, 232 Mo.App. 575.  
 Neb.—Krepick v. Interstate Transit Lines, 43 N.W.2d 609, 153 Neb. 93—Simcho v. Omaha & Council Bluffs St. Ry. Co., 35 N.W.2d 501, 150 Neb. 634—Robinson v. Union Transfer Co., 4 N.W.2d 558, 141 Neb. 574—Bohmont v. Moore, 295 N.W. 419, 138 Neb. 784, 133 A.L.R. 270, rehearing denied 297 N.W. 559, 138 Neb. 907, 133 A.L.R. 279—Bocian v. Union Pac. R. Co., 289 N.W. 372, 137 Neb. 318—Brooks v. Thayer County, 254 N.W. 413, 126 Neb. 610.  
 N.Y.—Forward Publications v. International Pictures, 98 N.Y.S.2d 139, 277 App.Div. 846.  
 N.C.—DeHart v. Jenkins, 190 S.E. 218, 211 N.C. 314.  
 Pa.—Hisak v. Lehigh Valley Transit Co., 59 A.2d 900, 360 Pa. 1.  
 Va.—Smith v. Clark, 46 S.E.2d 21, 187 Va. 181.  
 64 C.J. p 985 note 28.
3. Ala.—Montgomery City Lines v. Scott, 26 So.2d 200, 248 Ala. 27.  
 Cal.—Jentick v. Pacific Gas & Electric Co., 114 P.2d 343, 18 Cal.2d 117—Bellows v. City and County of San Francisco, 234 P.2d 729, 106 Cal.App.2d 57—Lowe v. Lee, 213 P.2d 767, 95 Cal.App.2d 685—Goodwin v. Foley, 170 P.2d 503, 75 Cal.App.2d 195—Van Fleet v. Heyler, 125 P.2d 586, 51 Cal.App.2d 719—

In accordance with these rules it has been held that a correct general charge will not cure an erroneous specific instruction,<sup>4</sup> and that a correct special charge will not cure an erroneous main charge in conflict therewith.<sup>5</sup> Neither will a correct written charge cure an erroneous oral charge,<sup>6</sup> nor will a correct oral charge cure an erroneous written instruction.<sup>7</sup> An error in an instruction will not be cured by another erroneous instruction<sup>8</sup> or by an instruction referring to an entirely different matter,<sup>9</sup> and the rule is particularly true where the subsequent instruction accentuates the error.<sup>10</sup> There can be no cure of error by reading the instructions together where none of the instructions given is sufficient to supply the defect in erroneous instructions.<sup>11</sup>

An erroneous unequivocal instruction is not cured by an equivocal explanation likely to be misunderstood,<sup>12</sup> nor can a short erroneous instruction be cured by a long complicated one.<sup>13</sup> Where, however, it appears that the correct instruction must have so preponderated in the consideration of the jury that the erroneous instruction neither contributed to, nor controlled, the verdict, the charge may be upheld.<sup>14</sup> A charge of the court, which, considered as a whole, is intemperate, cannot be neutralized by the simple warning to be careful not to do defendant an injustice.<sup>15</sup>

On the other hand or in other cases if an instruction is defective merely,<sup>16</sup> in that the instruction is

Ehrhart v. Bowling, 97 P.2d 1010, 35 Cal.App.2d 503—Akers v. Cowan, 80 P.2d 143, 35 Cal.App.2d 694. Ga.—Taylor v. Allen, 49 S.E.2d 544, 77 Ga.App. 659.

III.—Pappas v. Peoples Gas Light & Coke Co., 113 N.E.2d 585, 350 Ill. App. 541.

Ind.—Evans v. Evans, 96 N.E.2d 683, 121 Ind.App. 104—Gary Rys. v. Chumcoff, 96 N.E.2d 685, 122 Ind. App. 139, transfer denied 103 N.E.2d 203, 230 Ind. 309.

Ky.—Corpus Juris quoted in Stover v. Cincinnati, N. & C. Ry. Co., 67 S.W.2d 484, 485, 252 Ky. 425.

Mich.—Cuttie v. Concordia Mut. Fire Ins. Co., 287 N.W. 401, 290 Mich. 117.

Mo.—State ex rel. State Highway Commission v. Biobeck Inv. Co., App., 63 S.W.2d 448.

Neb.—Wilch v. Western Asphalt Paving Corporation, 245 N.W. 605, 124 Neb. 177.

N.J.—Padayao v. Severance, 184 A. 514, 116 N.J.Law 385.

Ohio.—Youngstown Municipal Ry. Co. v. Mikula, 1 N.E.2d 135, 131 Ohio St. 17—Sablack v. Glenn, App., 96 N.E.2d 417—Booksbaum v. Christian, 5 N.E.2d 177, 53 Ohio App. 384.

Pa.—Hiseak v. Lehigh Valley Transit Co., 59 A.2d 900, 360 Pa. 1—Reiter v. Reiter, 48 A.2d 66, 159 Pa.Super. 344.

64 C.J. p 986 note 29.

4. Ohio.—Deckant v. City of Cleveland, 99 N.E.2d 609, 155 Ohio St. 498—McCarthy v. Cincinnati St. Ry. Co., 94 N.E.2d 627, 88 Ohio App. 454—Rowley v. Ferguson, App., 48 N.E.2d 243.

S.C.—Gathings v. Great Atlantic & Pacific Tea Co., 167 S.E. 652, 168 S.C. 385.

Wash.—Hart v. Clapp, 54 P.2d 1012, 185 Wash. 362.

64 C.J. p 986 note 30.

5. Tex.—Ft. Worth & R. G. Ry. Co. v. Bryson & Burns, Civ.App., 195 S.W. 1165.

6. Ala.—City of Birmingham v. Latham, 182 So. 675, 230 Ala. 601—Alabama Consol. Coal & Iron Co. v. Heald, 53 So. 162, 168 Ala. 626—Vick v. Rogers, 45 So.2d 332, 35 Ala.App. 227.

7. Ala.—Atlantic Coast Line R. Co. v. Horn, App., 66 So.2d 202.

64 C.J. p 986 note 33.

8. Cal.—Finney v. Wierman, 126 P.2d 143, 53 Cal.App.2d 382.

Mo.—Lakin v. Chicago, R. I. & P. Ry. Co., 95 S.W.2d 1245, 229 Mo. App. 481.

64 C.J. p 986 note 34.

9. Mo.—Crites v. Bollinger, App., 238 S.W.2d 26.

64 C.J. p 986 note 35.

10. N.Y.—Finkelstein v. John Hancock Mut. Life Ins. Co., 286 N.Y.S. 779, 247 App.Div. 74.

64 C.J. p 986 note 36.

11. Miss.—Edward Hines Lumber Co. v. Dickinson, 125 So. 93, 155 Miss. 674.

12. Minn.—Pope v. Bowler, 238 N. W. 890, 184 Minn. 415.

13. Cal.—Stein v. Lacassie, 207 P. 886, 189 Cal. 118.

14. Cal.—Dodge v. San Diego Elec. Ry. Co., 208 P.2d 37, 92 Cal.App.2d 759—In re Bucher's Estate, 132 P. 2d 257, 56 Cal.App.2d 135—Soares v. Barson, 55 P.2d 1283, 12 Cal.App. 2d 532.

III.—Corpus Juris quoted in Rebenstorf v. Metropolitan Life Ins. Co., 19 N.E.2d 420, 427, 299 Ill.App. 71.

64 C.J. p 986 note 39.

15. Pa.—Cavlovic v. Nikolish, 83 Pa.Super. 532.

16. Ala.—American Life Ins. Co. v. Anderson, 21 So.2d 731, 246 Ala. 588.

Ark.—Hydrotex Industries v. Sharp, 208 S.W.2d 183, 212 Ark. 886—General Motors Acceptance Corporation v. Hicks, 70 S.W.2d 509, 189 Ark. 63.

Cal.—O'Connor v. City and County of San Francisco, 207 P.2d 638, 92 Cal.App.2d 626—Heller v. Mellday, 141 P.2d 447, 60 Cal.App.2d 689—Stevenson v. Fleming, 117 P.2d 717, 47 Cal.App.2d 225—Silveira v. Siegfried, 26 P.2d 666, 135 Cal.App. 213.

Conn.—Hurlburt v. Sherman, 163 A. 603, 116 Conn. 102.

Ga.—Hogg v. First Nat. Bank of West Point, 62 S.E.2d 634, 82 Ga. App. 861.

III.—Department of Public Works and Bldgs. v. Bohne, 113 N.E.2d 319, 415 Ill. 253—Rowley v. Friel, 71 N.E.2d 183, 330 Ill.App. 433—Avance v. Thompson, 51 N.E.2d 334, 320 Ill.App. 406, reversed on other grounds 55 N.E.2d 57, 387 Ill. 77, certiorari denied 85 S.Ct. 82, 323 U.S. 753, 89 L.Ed. 603—Warner Const. Co. v. Lincoln Park Com'rs, 273 Ill.App. 42.

Mich.—Ginsberg v. Myers, 183 N.W. 749, 215 Mich. 148.

Miss.—Gilmer v. Gunter, 46 So.2d 447—New Orleans & N. E. R. Co. v. Boliver, 44 So.2d 527—Glicco v. Montgomery, 33 So.2d 317—Hunt v. Sherrill, 15 So.2d 426, 195 Miss. 688.

N.M.—Board of Com'rs of Dona Ana County v. Gardner, 260 P.2d 682, 57 N.M. 478.

Ohio.—McKee v. New Idea, App., 44 N.E.2d 697—Pierce v. Isabel, App., 36 N.E.2d 64.

Okl.—Chicago, R. I. & P. Ry. Co. v. Kahl, 35 P.2d 731, 168 Okl. 578.

Pa.—Coleman v. Reading Co., 29 A. 2d 499, 346 Pa. 289—Kascak v. United Societies of Greek Catholic Religion of U. S. A., 177 A. 338, 117 Pa.Super. 423—Dystrek v. Asphalt Industries, Com.Pl., 36 Del.Co. 245.

Vt.—Proulx v. Parrow, 56 A.2d 623, 115 Vt. 232.

Va.—Tri-State Coach Corp. v. Walsh, 49 S.E.2d 363, 188 Va. 299—City of New York Ins. Co. v. Greene, 31 S.E.2d 268, 183 Va. 85.



inaccurate,<sup>17</sup> misleading,<sup>18</sup> confusing,<sup>19</sup> or incomplete,<sup>20</sup> or if it is in terms which are too general,<sup>21</sup> argumentative,<sup>22</sup> indefinite or uncertain,<sup>23</sup>

ambiguous,<sup>24</sup> or obscure,<sup>25</sup> or where it leaves room for improper inferences,<sup>26</sup> or is oral instead of in

Wash.—Lee & Eastes v. Continental Carriers, 265 P.2d 267.

64 C.J. p 986 note 41—83 C.J. p 1075 note 12.

#### Dependent on circumstances

The rule that giving of technically erroneous instruction is not prejudicial when, on considering instructions as a whole, it can fairly be said that error was cured by some other instructions, is dependent on the particular circumstances presented.—Keller v. City of Seattle, 94 P.2d 184, 200 Wash. 573.

17. Hawaii.—Ciacci v. Woolley, 33 Hawaii 247.

Kan.—Sams v. Commercial Standard Ins. Co., 139 P.2d 859, 157 Kan. 278.

64 C.J. p 987 note 42.

18. Hawaii.—Ciacci v. Woolley, 33 Hawaii 247.

Mo.—Duffy v. Rohan, 259 S.W.2d 339 —Killing v. Kansas City Public Service Co., 259 S.W.2d 391—Rohmandel v. Kansas City Public Service Co., 254 S.W.2d 585—Hatfield v. Thompson, 252 S.W.2d 534—Bolino v. Illinois Terminal R. Co., 200 S.W.2d 352, 355 Mo. 1236—Welch v. Welch, 190 S.W.2d 936, 354 Mo. 654—State ex rel. St. Joseph Belt Ry. Co. v. Shain, 108 S.W.2d 351, 341 Mo. 733—Brunk v. Hamilton-Brown Shoe Co., 66 S.W.2d 903, 334 Mo. 517—McDonald v. Kansas City Gas Co., 59 S.W.2d 37, 332 Mo. 356—Roman v. Hendricks, App., 80 S.W.2d 907.

Pa.—Atlantic Refining Co. v. Graham, 74 Pa.Dist. & Co. 433, 33 Erie Co. 78.

64 C.J. p 987 note 43.

19. Mo.—Welch v. Welch, 190 S.W.2d 936, 354 Mo. 654—Fourcade v. Kansas City, App., 107 S.W.2d 953, opinion quashed on other grounds State ex rel. Fourcade v. Shain, 119 S.W.2d 788, 342 Mo. 1190.

64 C.J. p 987 note 44.

20. U.S.—New York Life Ins. Co. v. Rogers, C.C.A. Ark., 126 F.2d 784. Cal.—Jentick v. Pacific Gas & Electric Co., 114 P.2d 343, 18 Cal.2d 117—Wilson v. Davis, 81 P.2d 971, 11 Cal.2d 761—Miner v. Dabney-Johnson Oil Corporation, 28 P.2d 23, 213 Cal. 580—Grover v. Sharp & Fellows Contracting Co., 186 P.2d 682, 82 Cal.App.2d 515—McChristian v. Popkin, 171 P.2d 85, 75 Cal. App.2d 249—Stevenson v. Fleming, 117 P.2d 717, 47 Cal.App.2d 225—Nance v. Fresno City Lines, 113 P.2d 244, 44 Cal.App.2d 888—Ross v. Baldwin, 113 P.2d 666, 44 Cal.App.2d 432—Spear v. Leuenberger, 112 P.2d 43, 44 Cal.App.2d 236

—In re Horton's Estate, 17 P.2d 184, 128 Cal.App. 249.

Hawaii.—Ciacci v. Woolley, 33 Hawaii 247.

Ill.—Mathes v. Lipe, 79 N.E.2d 874, 334 Ill.App. 621.

Ind.—Great Atlantic & Pacific Tea Co. v. Custin, 13 N.E.2d 542, 214 Ind. 54, rehearing denied 14 N.E.2d 538, 214 Ind. 54—Goldblatt Bros. v. Parish, 33 N.E.2d 835, 110 Ind.App. 368, rehearing denied 38 N.E.2d 255, 110 Ind.App. 368.

Kan.—Sams v. Commercial Standard Ins. Co., 139 P.2d 859, 157 Kan. 278.

Mo.—Griffith v. Delico Meats Products Co., 145 S.W.2d 431, 347 Mo. 28—Bowman v. Rahmoeller, 55 S.W.2d 453, 331 Mo. 368—Union Service Co. v. Lyons, App., 240 S.W.2d 153—Fitzgerald v. Metropolitan Life Ins. Co., App., 149 S.W.2d 389 —Lakin v. Chicago, R. I. & P. Ry. Co., 95 S.W.2d 1245, 229 Mo.App. 461—Grisham v. Freewald, 95 S.W.2d 349, 230 Mo.App. 1203, quashed on other grounds State ex rel. Grisham v. Allen, 124 S.W.2d 1080, 344 Mo. 66, conformed to, App., 130 S.W.2d 653—Kramer v. Lease, App., 94 S.W.2d 1090—Lyons v. St. Joseph Belt Ry. Co., 84 S.W.2d 933, 232 Mo.App. 575—McLain v. Atlas Assur. Co., Limited, of London, England, App., 67 S.W.2d 848—State ex rel. State Highway Commission v. Bioback Inv. Co., App., 63 S.W.2d 448—Ellison v. Missouri Power & Light Co., App., 59 S.W.2d 714.

Neb.—Webb v. Platte Val. Public Power & Irr. Dist., 18 N.W.2d 563, 146 Neb. 61—In re Johnson's Estate, 16 N.W.2d 504, 145 Neb. 333. Nev.—Hotels El Rancho v. Fray, 187 P.2d 568, 64 Nev. 591.

N.M.—Board of Com'rs of Dona Ana County v. Gardner, 260 P.2d 682, 57 N.M. 478.

Okl.—Slater v. Mafford, 111 P.2d 159, 188 Okl. 525.

Utah.—Ward v. Denver & R. G. W. R. Co., 85 P.2d 887, 98 Utah 564.

Va.—Smith v. Clark, 46 S.E.2d 21, 137 Va. 181—Mister v. Mister, 28 S.E.2d 152, 180 Va. 364.

W.Va.—Frazier v. Grace Hospital, 185 S.E. 415, 117 W.Va. 330—Curfman v. Monongahela West Penn Public Service Co., 166 S.E. 848, 113 W.Va. 85.

64 C.J. p 987 note 45.

21. U.S.—Clum v. Guardian Life Ins. Co., D.C.Pa., 24 F.Supp. 396, reversed on other grounds, C.C.A., Guardian Life Ins. Co. of America v. Clum, 106 F.2d 592, certiorari denied Clum v. Guardian Life Ins. Co. of America, 60 S.Ct. 592, 309 U.S. 666, 84 L.Ed. 1013.

Cal.—Skulte v. Ahern, 71 P.2d 340, 22 Cal.App.2d 460.

Fla.—Alford v. Barnett Nat. Bank of Jacksonville, 188 So. 322, 137 Fla. 664.

Mo.—Haynie v. Jones, 127 S.W.2d 105, 233 Mo.App. 948—Glader v. City of Richmond Heights, App., 121 S.W.2d 254—Lyons v. St. Joseph Belt Ry. Co., 84 S.W.2d 933, 232 Mo.App. 575—State ex rel. State Highway Commission v. Bioback Inv. Co., App., 63 S.W.2d 448—Biggers v. Genter, App., 54 S.W.2d 783.

64 C.J. p 988 note 46.

22. Ala.—Bessemer Feed Mills v. Alabama Great Southern R. Co., 116 So. 796, 217 Ala. 446.

Colo.—McCormick v. Parriott, 80 P. 1044, 83 Colo. 382.

23. Mo.—Duffy v. Rohan, 259 S.W.2d 339—Killing v. Kansas City Public Service Co., 259 S.W.2d 391—Hatfield v. Thompson, 252 S.W.2d 534—State ex rel. City of Jefferson v. Shain, 124 S.W.2d 1194, 344 Mo. 57—State ex rel. St. Joseph Belt Ry. Co. v. Shain, 108 S.W.2d 351, 341 Mo. 733—McDonald v. Kansas City Gas Co., 59 S.W.2d 37, 332 Mo. 356—Salmons v. Dun & Bradstreet, App., 153 S.W.2d 556, modified on other grounds 162 S.W.2d 245, 349 Mo. 498, 141 A.L.R. 674—Roman v. Hendricks, App., 80 S.W.2d 907.

64 C.J. p 988 note 48.

24. Cal.—Valentine v. Provident Mut. Life Ins. Co. of Philadelphia, 55 P.2d 1243, 12 Cal.App.2d 616.

Mo.—Duffy v. Rohan, 259 S.W.2d 339—Killing v. Kansas City Public Service Co., 259 S.W.2d 391—Rohmandel v. Kansas City Public Service Co., 254 S.W.2d 585—Hatfield v. Thompson, 252 S.W.2d 534—State ex rel. Powell Bros. Truck Lines v. Hostetter, 137 S.W.2d 461, 345 Mo. 915—State ex rel. City of Jefferson v. Shain, 124 S.W.2d 1194, 344 Mo. 57—State ex rel. St. Joseph Belt Ry. Co. v. Shain, 108 S.W.2d 351, 341 Mo. 733—McDonald v. Kansas City Gas Co., 59 S.W.2d 37, 332 Mo. 356—Newkirk v. City of Tipton, 186 S.W.2d 147, 284 Mo.App. 920—Roman v. Hendricks, App., 80 S.W.2d 907—State ex rel. State Highway Commission v. Bioback Inv. Co., App., 63 S.W.2d 448.

64 C.J. p 988 note 49.

25. Ill.—Latham v. Roach, 72 Ill. 179.

Neb.—Bingham v. Hartley, 62 N.W. 1089, 44 Neb. 632.

26. Ill.—Anderson v. Donaldson, 32 Ill.App. 404.

writing;<sup>27</sup> it may be cured by another instruction, although it has been held that this rule can be applied only in very plain cases entirely free from doubt.<sup>28</sup>

It has been stated that whether erroneous instructions are cured by other correct instructions is a question for the discretion of the trial court,<sup>29</sup> although where the instruction complained of is not erroneous, and, as supplemented by the other instructions, manifestly could not be misleading or confusing, the trial court is not vested with discretion to declare it so.<sup>30</sup>

*Instruction purporting to cover entire case.*

Where an instruction purports to sum up all the

facts, the proof of which will warrant a verdict for a party, the instruction must be correct, and, if erroneous or incomplete, it is not susceptible of cure by any other instructions,<sup>31</sup> unless such instruction properly refers to, and incorporates within its terms, other given instructions which properly submit such omitted elements.<sup>32</sup> A binding,<sup>33</sup> mandatory,<sup>34</sup> or peremptory<sup>35</sup> instruction, or one directing a verdict,<sup>36</sup> if erroneous or incomplete, cannot be cured by any other instructions.

Thus, where matters of affirmative defense are not incorporated in plaintiff's instruction purporting to cover the whole case, the weight of authority is that such omission cannot be cured by other instructions.<sup>37</sup> Where, however, an instruction which

27. Ark.—Josephs v. Briant, 172 S. W. 1002, 115 Ark. 538, Ann.Cas. 1916E 741.

64 C.J. p 988 note 52.

28. Mo.—Quirk v. St. Louis United Elevator Co., 28 S.W. 1080, 126 Mo. 279—Wilks v. St. Louis & S. F. R. Co., 141 S.W. 910, 159 Mo.App. 711.

29. Cal.—Conner v. Southern Pac. Co., 241 P.2d 535, 38 Cal.2d 633—Fennessey v. Pacific Gas & Electric Co., 78 P.2d 104, 10 Cal.2d 538.

30. Mo.—Nelson v. Teyon, 265 S.W. 2d 409.

31. Ind.—Harris v. Public Service Co. of Ind., 109 N.E.2d 433, 123 Ind. App. 429—Nepsha v. Wozniak, 92 N.E.2d 784, 120 Ind.App. 365—Cochran v. Wimmer, 81 N.E.2d 780, 118 Ind.App. 684.

Mo.—Banta v. Union Pac. R. Co., 242 S.W.2d 34, 362 Mo. 421—Higgins v. Terminal R. R. Ass'n of St. Louis, 241 S.W.2d 380, 362 Mo. 264—McGarvey v. City of St. Louis, 218 S.W.2d 542, 358 Mo. 940—Thompson v. St. Joseph Ry., Light, Heat & Power Co., 131 S.W.2d 574, 345 Mo. 31—State ex rel. Fourcade v. Shain, 119 S.W.2d 788, 342 Mo. 1190—McCombs v. Ellsberry, 85 S.W.2d 135, 337 Mo. 491—Jenkins v. Missouri State Life Ins. Co., 69 S.W.2d 866, 334 Mo. 941—Scott v. Missouri Ins. Co., App., 246 S.W.2d 349—Farrow v. Roderique, App., 224 S.W.2d 630—Cunningham v. Union Elec. Co. of Mo., App., 221 S.W.2d 758—Fawkes v. National Refining Co., 130 S.W.2d 684, 235 Mo.App. 433, certiorari quashed State ex rel. National Refining Co. v. Shain, 139 S.W.2d 995, 346 Mo. 224—Fourcade v. Kansas City, App., 107 S.W.2d 953, opinion quashed on other grounds State ex rel. Fourcade v. Shain, 119 S.W.2d 788, 342 Mo. 1190—Major v. Berg, App., 95 S.W.2d 861—Smalley v. Wunderlich, App., 62 S.W.2d 919.

Neb.—Lambert v. Omaha & C. B. Ry. Co., 19 N.W.2d 164, 146 Neb. 213, vacated on other grounds 21

N.W.2d 425, 146 Neb. 213—In re House's Estate, 17 N.W.2d 883, 145 Neb. 670—Sanders v. Chicago, B. & Q. R. Co., 292 N.W. 35, 138 Neb. 67.

64 C.J. p 988 note 54.

32. Mo.—Thompson v. St. Joseph Ry., Light, Heat & Power Co., 131 S.W.2d 574, 345 Mo. 31.

64 C.J. p 989 note 55.

33. Ark.—Louis B. Siegel & Co. v. Moore, 161 S.W.2d 387, 204 Ark. 50. W.Va.—Bragg v. C. I. Whitten Transfer Co., 26 S.E.2d 217, 125 W.Va. 722—Closterman v. Lubin, 167 S.E. 371, 113 W.Va. 353—Pierion v. Liming, 167 S.E. 131, 113 W.Va. 145.

34. Ill.—Palmer v. Mayer, 71 N.E.2d 822, 330 Ill.App. 619.

Ind.—Allen v. Grabert, 111 N.E.2d 477, 123 Ind.App. 649—King's Ind. Billiard Co. v. Winters, 106 N.E.2d 713, 123 Ind.App. 110—Magenheim v. State ex rel. Dalton, 90 N.E.2d 813, 120 Ind.App. 125—Chicago, I. & L. Ry. Co. v. Downey, 5 N.E.2d 656, 163 Ind.App. 672.

35. Ill.—Duffy v. Cortesi, 119 N.E.2d 241, 2 Ill.2d 511—Hanson v. Trust Co. of Chicago, 43 N.E.2d 931, 330 Ill. 194—Dixon v. Montgomery Ward & Co., 114 N.E.2d 44, 351 Ill. App. 75—Henrikson v. Knox, 111 N.E.2d 334, 350 Ill.App. 57—Dahlgren v. Holtzheimer, 109 N.E.2d 643, 348 Ill.App. 596—Tanner v. Palmer, 89 N.E.2d 861, 339 Ill.App. 377—Fechter v. Vanderwall, 89 N.E.2d 66, 339 Ill.App. 143—Kaplan v. Stevens Hotel Corp., 54 N.E.2d 645, 322 Ill.App. 697—Nordhaus v. Marek, 45 N.E.2d 993, 317 Ill.App. 351.

36. Ark.—Holmes v. Lee, 184 S.W.2d 957, 208 Ark. 114.

Ill.—Horton v. Mozin, 92 N.E.2d 671, 341 Ill.App. 66—Rigdon v. Crosby, 66 N.E.2d 190, 328 Ill.App. 399—Schmacher v. City of Naperville, 33 N.E.2d 730, 309 Ill.App. 647—Adamsen v. Magnolia, 3 N.E.2d 708, 286 Ill.App. 412.

Ind.—Dimmick v. Follis, 111 N.E.2d

488, 123 Ind.App. 701—Redd v. Indianapolis Rys., 97 N.E.2d 501, 121 Ind.App. 472—Chandler v. Kranner, 72 N.E.2d 490, 117 Ind.App. 538.

Miss.—Durrett v. Mississippiian Ry. Co., 158 So. 776, 171 Miss. 899.

Mo.—Bootee v. Kansas City Public Service Co., 183 S.W.2d 892, 353 Mo. 716—Cantley v. Missouri-Kansas-Texas R. Co., 183 S.W.2d 123, 353 Mo. 605—State ex rel. Mutual Ben. Health & Acc. Ass'n v. Hughes, 174 S.W.2d 859, 351 Mo. 1081—State ex rel. and to Use of Reeves v. Shain, 123 S.W.2d 885, 343 Mo. 550—Connole v. East St. Louis & S. Ry. Co., 102 S.W.2d 581, 340 Mo. 690—Bastus v. McCurdy, App., 266 S.W.2d 49—Daggs v. Patsons, App., 260 S.W.2d 794—Scott v. Missouri Ins. Co., App., 222 S.W.2d 549, affirmed 223 S.W.2d 660, 381 Mo. 51—La Font v. Bryant, App., 60 S.W. 2d 415.

W.Va.—Skaff v. Dodd, 44 S.E.2d 621, 130 W.Va. 540—Bragg v. C. I. Whitten Transfer Co., 26 S.E.2d 217, 125 W.Va. 722.

64 C.J. p 988 note 54 [b].

*"If you find for the plaintiff"*

Where one instruction set out elements necessary to a finding for plaintiff, instruction which immediately followed, telling jury what to take into consideration in arriving at amount of verdict, was not in effect a direction to find for plaintiff merely because it was not prefaced with words such as "if you find for the plaintiff."—St. Vincent's Sanitarium v. Murphy, Mo.App., 209 S.W.2d 560.

37. Ark.—McEachin v. Martin, 102 S.W.2d 864, 193 Ark. 787.

Va.—Davis v. Webb, 52 S.E.2d 141, 189 Va. 80.

W.Va.—Summers v. Automobile Ins. Co. of Hartford, Conn., 187 S.E. 92, 113 W.Va. 197.

64 C.J. p 989 note 56.

*In Missouri*

(1) It has been held repeatedly as an established rule that, where an instruction on behalf of plaintiff au-

merely purports to cover the whole of a party's case omits some feature which is not essential to such case, it has been held that the omission is cured by an instruction given for the other party.<sup>38</sup> Accordingly, where the issue of defendant's counterclaim<sup>39</sup> or set-off<sup>40</sup> is fully and sufficiently covered by other instructions, there is no ground for complaint. Even where an instruction purports to cover the entire case and directs a verdict, it has been held that a slight obscurity or ambiguity in the charge may be cured by other instructions.<sup>41</sup> There can be no cure of error by reading the instructions together if the same fault is common to all instructions purporting to cover the whole case.<sup>42</sup> Although it has been held that a so-called "formula" instruction, if it fails to state all the essential elements to a recovery, is not cured by other instructions,<sup>43</sup> it has also been held that the rigid rules

formerly applicable to formula instructions have been greatly modified in recent years,<sup>44</sup> and, thus, where the error or omission is fully, fairly, and correctly covered by other instructions and it is obvious that the jury was not misled, the error or omission is not prejudicial.<sup>45</sup>

## § 442. — Issues and Theories of Case in General

Instructions on the issues or theories of the case which are merely defective may be cured by correct instructions.

While erroneous instructions on the issues or theories of the case are not cured by correct instructions which are inconsistent or conflicting,<sup>46</sup> instructions which are merely defective may be cured by correct instructions.<sup>47</sup>

thorizes recovery on a finding by the jury of all the affirmative facts necessary for such recovery, omitting mention of defenses urged by defendant, such instruction is erroneous, but may be cured where such matters of defense are supplied by instructions given on behalf of defendant.—Griffith v. Delico Meats Products Co., 145 S.W.2d 431, 347 Mo. 28—Mitchell v. Wabash Ry. Co., 69 S.W.2d 286, 334 Mo. 928—Scott v. Missouri Ins. Co., App., 246 S.W.2d 349—Scott v. Missouri Ins. Co., App., 222 S.W.2d 549, affirmed 223 S.W.2d 660, 361 Mo. 51—Cunningham v. Union Elec. Co. of Mo., App., 221 S.W.2d 758—Mollman v. St. Louis Public Service Co., App., 192 S.W.2d 618—Kopp v. Moffett, 167 S.W.2d 87, 237 Mo.App. 376—Harry Cooper Supply Co. v. Gillioz, App., 107 S.W.2d 798—Arnold v. Brotherhood of Locomotive Firemen and Engineers, 101 S.W.2d 729, 231 Mo.App. 598—Stadt v. Leiwake, App., 100 S.W.2d 30—Taylor v. Kelder, 88 S.W.2d 436, 229 Mo.App. 1117—Aldridge v. Shelton's Estate, 86 S.W.2d 395—Cantley v. Plattner, 67 S.W.2d 125, 228 Mo.App. 411—64 C.J. p 989 note 56 [a] (1).

(2) The rule of the text has been recognized in other cases.—Jaquith v. Fayette R. Plumb, Inc., Mo., 254 S.W. 89.

64 C.J. p 989 note 56 [a] (2).

38. Mo.—Lansford v. Southwest Lime Co., 266 S.W.2d 564—Zurwalt v. Utilities Ins. Co., 228 S.W.2d 760, 360 Mo. 362—McGarvey v. City of St. Louis, 218 S.W.2d 542, 358 Mo. 940—Farrow v. Roderique, App., 224 S.W.2d 630.

64 C.J. p 990 note 57.

39. Mo.—Warshaw v. Lewis, App., 281 S.W. 82.

40. Neb.—Haar v. Howard, 151 N.W. 300, 97 Neb. 761.

Va.—Bardach Iron & Steel Co. v.

Charleston Port Terminals, 129 S.E. 687, 143 Va. 656.

41. Mo.—Counts v. Thompson, 222 S.W.2d 487, 359 Mo. 485—Jenkins v. Missouri State Life Ins. Co., 69 S.W.2d 666, 334 Mo. 941—Farrow v. Roderique, App., 224 S.W.2d 630—Smith v. Kansas City Public Service Co., 56 S.W.2d 838, 227 Mo.App. 675.

64 C.J. p 990 note 60.

42. Mo.—Rice v. Kansas City, App., 16 S.W.2d 659.

N.C.—McDaniel v. Atlantic Coast Line Ry., 130 S.E. 208, 190 N.C. 474.

43. Cal.—Mazzotta v. Los Angeles Ry. Corp., 153 P.2d 338, 25 Cal.2d 165—Warwick v. Manely, 104 P.2d 831, 40 Cal.App.2d 235, followed in 104 P.2d 838, 40 Cal.App.2d 812, and 104 P.2d 838, 40 Cal.App.2d 813—La Rue v. Powell, 42 P.2d 1063, 5 Cal.App.2d 439.

64 C.J. p 988 note 54 [a].

44. Cal.—Briscoe v. Pacific Elec. Ry. Co., 200 P.2d 875, 89 Cal.App.2d 439—Dodds v. Stellar, 175 P.2d 607, 77 Cal.App.2d 411—Bee v. Tungstar Corp., 151 P.2d 537, 65 Cal.App.2d 729—Dawson v. Boyd, 143 P.2d 373, 61 Cal.App.2d 471.

45. Cal.—Sandoval v. Southern Cal. Enterprises, 219 P.2d 928, 98 Cal.App.2d 240—Briscoe v. Pacific Elec. Ry. Co., 200 P.2d 875, 89 Cal.App.2d 439—Dodds v. Stellar, 175 P.2d 607, 77 Cal.App.2d 411—Bee v. Tungstar Corp., 151 P.2d 537, 65 Cal.App.2d 729—Dawson v. Boyd, 143 P.2d 373, 61 Cal.App.2d 471—Christiansen v. Hollings, 112 P.2d 723, 44 Cal.App.2d 332—Mecchi v. Lyon Van & Storage Co., 102 P.2d 422, 38 Cal.App.2d 674, hearing denied 104 P.2d 26, 38 Cal.App.2d 674—Walsh v. Maurice Mercantile, 66 P.2d 181, 20 Cal.App.2d 45—Reuter v. Hill, 28 P.2d 390, 136 Cal.App. 67.

46. U.S.—U. S. ex rel. Willoughby v. Howard, C.C.A.III, 96 F.2d 895. Ariz.—Garcia v. Sumrall, 121 P.2d 640, 58 Ariz. 526.

Cal.—Dike v. Golden State Co., App., 269 P.2d 619—Connell v. Clark, 200 P.2d 26, 88 Cal.App.2d 941—Ferguson v. Nakahara, 110 P.2d 1091, 43 Cal.App.2d 435.

Ga.—Stonecypher v. Elliott, 182 S.E. 587, 181 Ga. 438—Hamby v. Crisp, 172 S.E. 842, 48 Ga.App. 418. Ind.—Sofnas v. John Hancock Mut. Life Ins. Co., 21 N.E.2d 425, 107 Ind.App. 539.

Mich.—Kolinski v. Reichstein, 7 N.W. 2d 117, 303 Mich. 710.

Miss.—Lipnick v. New York Life Ins. Co., 52 So.2d 916, 211 Miss. 833—May v. Culpepper, 172 So. 336, 177 Miss. 811.

Mo.—Dawes v. Starrett, 82 S.W.2d 43, 336 Mo. 897—Neuhau v. United Neighbors of Missouri, App., 150 S.W.2d 590—Comfort v. Travelers Ins. Co., App., 131 S.W.2d 734—Daams v. Flournoy, App., 119 S.W. 2d 482.

Neb.—Sanderson v. Huffman, 271 N.W. 870, 132 Neb. 821.

N.C.—Morgan v. High Penn. Oil Co., 77 S.W.2d 682, 238 N.C. 185.

Pa.—Krouse v. Feldshar, 72 A.2d 140, 166 Pa.Super. 441—Silvano v. Metropolitan Life Ins. Co., 5 A.2d 423, 135 Pa.Super. 260.

S.C.—Milhous v. State Highway Dept. of South Carolina, 8 S.E.2d 852, 194 S.C. 33, 128 A.L.R. 1186.

Vt.—Farmers' Exchange v. Brown, 169 A. 906, 106 Vt. 65.

Va.—James v. Haymes, 178 S.E. 18, 163 Va. 873.

64 C.J. p 990 note 62.

47. U.S.—Theatre Enterprises v. Paramount Film Distributing Corp., C.A.Md., 201 F.2d 306, affirmed 74 S.Ct. 257, 346 U.S. 537, 98 L.Ed. —Columbia Lumber Co. v. Agostino, C.A.Alaska, 184 F.2d 731—

Thus, a correct instruction may cure the defect | in an instruction which, if standing alone, might

- Nichols v. Republic Iron & Steel Co., C.C.A. Ala., 89 F.2d 927—General Motors Corp. v. Swan Carburetor Co., C.C.A. Ohio, 88 F.2d 876, certiorari denied 58 S.Ct. 49, 302 U.S. 691, 82 L.Ed. 534, rehearing denied 58 S.Ct. 137, 302 U.S. 777, 82 L.Ed. 601—Reeke-Nash Motors Co. v. Swan Carburetor Co., C.C.A. Ohio, 88 F.2d 876, certiorari denied 58 S.Ct. 10, 302 U.S. 691, 82 L.Ed. 533—Zurich General Accident & Liability Ins. Co. v. O'Keefe, C.C.A. N.D., 64 F.2d 788, certiorari denied 54 S.Ct. 49, 280 U.S. 630, 78 L.Ed. 548.
- Ala.—Metropolitan Life Ins. Co. v. James, 153 So. 759, 238 Ala. 383.
- Ark.—Duke v. Life & Cas. Ins. Co. of Tenn., 238 S.W.2d 631, 218 Ark. 686—Robbins v. Page, 227 S.W.2d 145, 216 Ark. 627—Holimon v. Rice, 185 S.W.2d 927, 208 Ark. 279.
- Cal.—Klett v. Security Acceptance Co., 242 P.2d 873, 38 Cal.2d 770—Wells v. Lloyd, 132 P.2d 471, 21 Cal.2d 452—Schmidt v. Maccos Const. Co., 260 P.2d 230, 119 Cal. App.2d 717—Nix v. Heald, 203 P.2d 847, 90 Cal.App.2d 723—Ehrhart v. Bowling, 97 P.2d 1010, 36 Cal.App.2d 509—Behrendt v. Times-Mirror Co., 85 P.2d 945, 30 Cal.App.2d 77—Burr v. Floyd, 31 P.2d 402, 137 Cal. App. 692—Losleben v. California State Life Ins. Co., 24 P.2d 825, 133 Cal.App. 550.
- Conn.—McPheters v. Loomis, 7 A.2d 437, 125 Conn. 526.
- Fla.—Adams v. Royal Exchange Assur., 62 So.2d 591—Alford v. Barnett Nat. Bank of Jacksonville, 188 So. 322, 137 Fla. 564.
- Ga.—Harrison v. Durham, 78 S.E.2d 482, 210 Ga. 187—Singleton v. Singleton, 42 S.E.2d 737, 202 Ga. 269—Chosewood v. Byars, 41 S.E.2d 530, 201 Ga. 805—Barron v. Chamblee, 34 S.E.2d 828, 199 Ga. 591—First Nat. Bank of Birmingham v. Carmichael, 31 S.E.2d 811, 198 Ga. 309—Holcombe v. Jones, 30 S.E.2d 903, 197 Ga. 825—Sheffield v. Sheffield, 173 S.E. 121, 178 Ga. 248—Graham v. Frazier, 66 S.E.2d 77, 84 Ga.App. 458—South Side Motors v. Forsyth, 59 S.E.2d 29, 81 Ga.App. 374—Gulf Life Ins. Co. v. Bloodworth, 35 S.E.2d 662, 73 Ga.App. 102—Hall Bros. Hatchery v. Hendrix, 33 S.E.2d 70, 72 Ga.App. 137—Hardin v. Atlanta Gas Light Co., 30 S.E.2d 121, 71 Ga.App. 63—American Surety Co. v. Smallon, 194 S.E. 35, 56 Ga.App. 746—L. B. Price Mercantile Co. v. Adams, 194 S.E. 29, 56 Ga.App. 756—Hunt v. Pollard, 190 S.E. 71, 55 Ga.App. 423—Dixie Freight Lines v. Transportation, Inc., 187 S.E. 281, 53 Ga. App. 832.
- Idaho.—Caughy v. George Jensen & Sons, 258 P.2d 357, 74 Idaho 132—Swanstrom v. Bell, 186 P.2d 876, 67 Idaho 554.
- Ill.—Columbia Cas. Co. v. Edwards, 87 N.E.2d 320, 338 Ill.App. 300—Bateman v. Bateman, 85 N.E.2d 196, 337 Ill.App. 7—Carl Schiffmann Lumber Co. v. Rzepecki, 43 N.E.2d 156, 315 Ill.App. 485.
- Ind.—Griffith v. Thrall, 29 N.E.2d 345, 109 Ind.App. 141—Sun Life Assur. Co. of Canada v. Darnell, 20 N.E.2d 680, 107 Ind.App. 204—Chmielewski's Estate v. Chmielewski, 200 N.E. 747, 103 Ind.App. 20—Liggett & Meyer Tobacco Co. v. Meyer, 194 N.E. 206, 101 Ind.App. 420.
- Iowa.—Blunk v. Kuyper, 44 N.W.2d 651, 241 Iowa 1138.
- Kan.—Carter v. City of Wichita, 122 P.2d 768, 155 Kan. 60.
- Ky.—Sovereign Camp, W. O. W., v. Rajkovich, 111 S.W.2d 626, 271 Ky. 235—Dixie-Ohio Exp. Co. v. Webb, 184 S.W.2d 361, 299 Ky. 201.
- Mass.—First Nat. Bank of Boston v. Mathey, 31 N.E.2d 25, 308 Mass. 103.
- Mich.—Hanover Fire Ins. Co. of New York v. Furkas, 255 N.W. 381, 267 Mich. 14.
- Minn.—Anderson v. High, 300 N.W. 597, 211 Minn. 227—Schaefer v. New York Life Ins. Co., 276 N.W. 235, 201 Minn. 327.
- Miss.—City of Jackson v. Cook, 58 So.2d 493, 214 Miss. 201—Woodmen of the World Life Ins. Soc. v. Johnson, 16 So.2d 285, 196 Miss. 1.
- Mo.—Marvel Industries v. Boatmen's Nat. Bank of St. Louis, 239 S.W.2d 346, 362 Mo. 8—Rouchene v. Gamble Const. Co., 89 S.W.2d 58, 338 Mo. 123—Dawes v. Starrett, 82 S.W.2d 43, 336 Mo. 897—Memphis Bank & Trust Co. v. West, App. 260 S.W.2d 866—May v. Hexter, App. 226 S.W.2d 383—Boswell v. Saunders, App. 224 S.W.2d 125—Kelsey v. Rosenblum, App. 207 S.W.2d 791, refused no reversible error—Long v. Rogers, App. 185 S.W.2d 863—Belmdiek v. New York Life Ins. Co., App. 183 S.W.2d 379—Chervek v. St. Louis Public Service Co., App. 173 S.W.2d 699—Ashenford v. L. Yukon & Sons Produce Co., 172 S.W.2d 881, 237 Mo.App. 1241—Weil Clothing Co. v. National Garment Co., App. 148 S.W.2d 586—Carson v. Manor Baking Co., App. 138 S.W.2d 43—Newkirk v. City of Tipton, 135 S.W.2d 147, 234 Mo.App. 920—Huddleston v. Ozark Acceptance Corp., App. 125 S.W.2d 81—Citizens Bank of Senath v. Johnson, App., 112 S.W.2d 916—Gillie v. Missouri Ins. Co., App., 102 S.W.2d 697—Schwalbert v. Konert, 76 S.W.2d 445, 230 Mo.App. 811—Fowler v. Potomac Ins. Co. of District of Columbia, App., 73 S.W.2d 830.
- Mont.—Ahluquist v. Pinski, 185 P.2d 499, 120 Mont. 355.
- Neb.—Snyder v. Farmers Irr. Dist., 61 N.W.2d 537, 157 Neb. 771—Conley v. Hays, 45 N.W.2d 900, 153 Neb. 733—Kuhlman v. Farmers Union Co-op. Ass'n of Memphis, Neb., 42 N.W.2d 182, 152 Neb. 597—Webb v. Platte Val. Public Power & Irr. Dist., 18 N.W.2d 563, 146 Neb. 61—Meister v. Krotter, 278 N.W. 483, 134 Neb. 293.
- N.Y.—Burr v. Commercial Travelers Mut. Acc. Ass'n of America, 67 N.E.2d 248, 295 N.Y. 294, 166 A.L.R. 462.
- N.C.—Williams v. Charles Stores Co., 184 S.E. 496, 209 N.C. 591.
- N.D.—De Rochford v. Bismarck Baking Co., 296 N.W. 158, 70 N.D. 523.
- Ohio.—Davis v. Zucker, App. 106 N.E.2d 169—Board of Education of Lynchburg Local School Dist. of Highland County v. Pendleton, 75 N.E.2d 152, 80 Ohio App. 249.
- Okl.—Kemp v. Strnad, 268 P.2d 255—Jackson v. Gifford, 264 P.2d 311—Carter Oil Co. v. Johnston, 257 P.2d 817, 208 Okl. 564—Valley Loan Service v. Neal, 235 P.2d 932, 205 Okl. 94—Birchfield v. Peds, 228 P.2d 642, 204 Okl. 340—Coston v. Adams, 224 P.2d 955, 203 Okl. 605—Wilson & Co. v. Campbell, 17 P.2d 465, 195 Okl. 323—McDonald v. Bruha, 126 P.2d 958, 190 Okl. 682—Indian Territory Illuminating Oil Co. v. Adams, 64 P.2d 706, 179 Okl. 129.
- Or.—Stuart v. Occidental Life Ins. Co., 68 P.2d 1037, 156 Or. 522.
- Pa.—Simpson v. Montgomery Ward & Co., 68 A.2d 442, 165 Pa.Super. 408, opinion adopted 75 A.2d 656, 366 Pa. 3—Frace v. Mutual Life Ins. Co. of New York, 30 A.2d 380, 151 Pa.Super. 354.
- R.I.—Monacelli v. Hall, 42 A.2d 444, 71 R.I. 55.
- S.C.—Kilpatrick v. Brotherhood of R. R. Trainmen Ins. Dept., 42 S.E.2d 891, 210 S.C. 379—Jones v. Elbert, 34 S.E.2d 796, 206 S.C. 508—Porter v. Mullins, 17 S.E.2d 684, 198 S.C. 325—Garrett Engineering Co. v. Auburn Foundry, 179 S.E. 693, 176 S.C. 59—RCA Photophone v. Carroll, 177 S.E. 27, 174 S.C. 183.
- S.D.—Ejermstad v. Petroleum Carriers, 53 N.W.2d 839, 74 S.D. 406.
- Tenn.—Life & Casualty Ins. Co. of Tennessee v. City of Nashville, 137 S.W.2d 287, 175 Tenn. 658—Martin v. Wahl, 66 S.W.2d 608, 17 Tenn. App. 192—Walgreen Co. v. Walton, 64 S.W.2d 44, 16 Tenn.App. 213.
- Utah.—Gogo v. Continental Cas. Co., 155 P.2d 882, 109 Utah 122.
- Wash.—Muskatell v. City of Seattle, 116 P.2d 383, 10 Wash.2d 221—Lyle v. Ginnold, 24 P.2d 449, 174 Wash. 104.
- W.Va.—Mitchell v. Virginian Ry. Co., 183 S.E. 35, 116 W.Va. 739.

be objectionable as misleading<sup>48</sup> or incomplete.<sup>49</sup> The rule also holds where the instructions are confusing,<sup>50</sup> inconsistent,<sup>51</sup> unnecessary,<sup>52</sup> indefinite,<sup>53</sup> involved,<sup>54</sup> ambiguous,<sup>55</sup> obscure,<sup>56</sup> or argumentative,<sup>57</sup> where the instructions are inapplicable or abstract,<sup>58</sup> too broad, too general,<sup>59</sup> or too nar-

Wis.—Egan v. Travelers Ins. Co., 273 N.W. 68, 224 Wis. 596.

64 C.J. p 990 note 63.

48. Ariz.—Gillespie Land & Irrigation Co. v. Hamilton, 29 P.2d 158, 43 Ariz. 102.

Ga.—Bulce v. Smith, 59 S.E.2d 676, 81 Ga.App. 658.

Ill.—Weinstein v. Metropolitan Life Ins. Co., 60 N.E.2d 207, 389 Ill. 671.

Iowa.—Olsen v. Corporation of New Melleray, 60 N.W.2d 832.

Ky.—Beck v. Lynch, 209 S.W.2d 58, 306 Ky. 738—Brown v. Crawford, 177 S.W.2d 1, 296 Ky. 249.

Mich.—Tinkler v. Richter, 295 N.W. 201, 295 Mich. 396.

Miss.—McArdle's Estate v. City of Jackson, 61 So.2d 400, 215 Miss. 571.

Mo.—Kleinschmidt v. Bell, 183 S.W. 2d 87, 353 Mo. 516—Kaddery v. Vossbrink, 149 S.W.2d 869—Goodwin & McDowell Motor Co. v. St. Clair Auto. Finance Co., App., 253 S.W.2d 543.

Okl.—Stinchcomb v. Harris, 134 P.2d 990, 192 Okl. 184.

Pa.—Grove v. Equitable Life Assur. Soc. of U. S., 9 A.2d 723, 336 Pa. 519.

S.C.—Joseph v. Sears, Roebuck & Co., 77 S.E.2d 583, 224 S.C. 105—Powell v. A. K. Brown Motor Co., 20 S.E.2d 636, 200 S.C. 75.

Va.—Van Duyen v. Matthews, 24 S.E. 2d 442, 181 Va. 256.

Wash.—Burgin v. Universal Credit Co., 98 P.2d 291, 2 Wash.2d 364.

64 C.J. p 991 note 64.

49. U.S.—Grand Trunk Western R. Co. v. H. W. Nelson Co., C.C.A. Mich., 116 F.2d 823, rehearing denied 118 F.2d 252.

Ark.—Pacific Mut. Life Ins. Co. of California v. Jordan, 82 S.W.2d 250, 190 Ark. 941.

Cal.—Wells v. Lloyd, 132 P.2d 471, 21 Cal.2d 452—Nelson v. Marks, App., 271 P.2d 900—Lunsford v. Standard Oil Co. of Cal., 191 P.2d 82, 84 Cal.App.2d 459—Ferguson v. Nakahara, 110 P.2d 1091, 43 Cal. App.2d 435.

Ga.—Foremost Dairy Products v. Sawyer, 196 S.E. 436, 185 Ga. 702—Blanchard & Calhoun Realty Co. v. Comer, 195 S.E. 420, 185 Ga. 448.

Idaho.—Fulgham v. Getfield, 241 P.2d 824, 72 Idaho 367.

Ind.—Jones v. Kasper, 33 N.E.2d 816, 109 Ind.App. 465.

Iowa.—Kaysor v. Occidental Life Ins. Co. of California, 12 N.W.2d 582, 234 Iowa 310—Mouglin v. North Central Mut. Automobile Ins. Ass'n, 278 N.W. 336, 224 Iowa 1202.

Kan.—Flournoy v. City of Parsons, 155 P.2d 421, 159 Kan. 367.

Miss.—Odum v. Everett, 50 So.2d 550—Johns-Manville Products Corp. v. Cather, 44 So.2d 405, 208 Miss. 268.

Mo.—Wilcox v. Coons, 241 S.W.2d 907, 362 Mo. 381—Pandjiris v. Oliver Cadillac Co., 98 S.W.2d 978, 339 Mo. 726—Bowman v. Rahmoller, 55 S.W.2d 453, 331 Mo. 868—Lasley v. Ridenour, App., 265 S.W.2d 744—Wolf v. Kansas City Tire & Service Co., App., 257 S.W.2d 408—Beeler v. Miller, App., 254 S.W.2d 986—Fyock v. Riales, App., 251 S.W.2d 102—Christy v. Great Northern Life Ins. Co., 181 S.W.2d 663, 238 Mo.App. 525—Keene v. City of Springfield, App., 152 S.W.2d 220—Krug v. Mutual Life Ins. Co. of New York, 149 S.W.2d 393, 235 Mo. App. 1224—Chapman v. National Life & Accident Ins. Co., App. 144 S.W.2d 834—Trantham v. Home Ins. Co. of New York, App., 137 S.W.2d 690—Feinstein v. Glick, App., 116 S.W.2d 141—Gust v. Montgomery Ward & Co., 80 S.W.2d 286, 289 Mo.App. 371—Vernon v. Farm & Home Life Ass'n, App., 72 S.W.2d 827—Rowland v. Boston Ins. Co., 55 S.W.2d 1011, 227 Mo. App. 597.

Nev.—Lamb v. Lamb, 65 P.2d 872, 57 Nev. 421.

N.M.—Murray Hotel Co. v. Golding, 216 P.2d 364, 54 N.M. 149.

Okl.—Prusa v. Cooper, 238 P.2d 342, 205 Okl. 423.

S.C.—Porter-Constructors v. Dixon Motor Service Co., 172 S.E. 419, 171 S.C. 396.

Va.—Turpin v. Branaman, 58 S.E.2d 63, 190 Va. 818.

64 C.J. p 991 note 65.

50. Colo.—Baer Bros. Land & Cattle Co. v. Hill, 224 P.2d 944, 122 Colo. 636.

Conn.—Jager v. First Nat. Bank, 7 A.2d 919, 125 Conn. 670.

Ga.—Green v. Metropolitan Life Ins. Co., 21 S.E.2d 465, 67 Ga.App. 520.

Mo.—Gamel v. Evans, App., 107 S.W. 2d 140.

Mont.—Mellon v. Kelly, 41 P.2d 49, 99 Mont. 10.

Okl.—Stinchcomb v. Harris, 134 P.2d 990, 192 Okl. 184.

Pa.—Simpson v. Montgomery Ward & Co., 68 A.2d 442, 165 Pa.Super. 408, opinion adopted 75 A.2d 656, 366 Pa. 3.

S.C.—Joseph v. Sears, Roebuck & Co., 77 S.E.2d 583, 224 S.C. 105.

64 C.J. p 992 note 66.

51. Mo.—Collins v. Phoenix Assur. Co., Limited, of London, App., 285 S.W. 783.

52. Ky.—Reedy v. Beauchamp, 211 S.W.2d 393, 307 Ky. 409.

53. Iowa.—Todd v. Stephenson, 169 N.W. 34.

64 C.J. p 992 note 68.

54. Cal.—Loel v. Kimmierle, 9 P.2d 199, 215 Cal. 143.

Or.—Friel v. Lewis, 253 P.2d 647, 197 Or. 440.

55. Cal.—Gomez v. Scanlan, 102 P. 12, 155 Cal. 528.

Mo.—Creighton v. Missouri Pac. R. Co., 66 S.W.2d 980, 229 Mo.App. 325, certiorari denied Missouri Pac. R. Co. v. Creighton, 55 S.Ct. 70, 293 U.S. 558, 79 L.Ed. 659.

Mont.—Meister v. Farrow, 92 P.2d 753, 109 Mont. 1.

56. Mo.—Schepman v. Mutual Ben. Health & Accident Ass'n, 104 S.W. 2d 777, 231 Mo.App. 651.

64 C.J. p 992 note 71.

57. Ala.—Sloss-Sheffield Steel & Iron Co. v. Watson, 194 So. 887, 239 Ala. 416.

Ark.—Adair v. Arendt, 190 S.W. 445, 126 Ark. 246.

58. Ala.—Whitt v. Forbes, 64 So.2d 77, 258 Ala. 580—Sloss-Sheffield Steel & Iron Co. v. Watson, 194 So. 887, 239 Ala. 416.

Ark.—Hanson Motor Co. v. Young, 265 S.W.2d 501.

Cal.—Wells v. Lloyd, 132 P.2d 471, 21 Cal.2d 452.

Mo.—Page v. Wabash R. Co., App., 206 S.W.2d 691—Baker v. Aetna Cas. & Sur. Co., App., 193 S.W.2d 363—Wright v. Hummel, App., 184 S.W.2d 640—Fuldner v. Isaac T. Cook Co., App., 127 S.W.2d 726—State ex rel. State Highway Commission v. Bank of Lewis County, App., 102 S.W.2d 774—Stewart v. St. Louis Public Service Co., App., 75 S.W.2d 634—Thornton v. Union Electric Light & Power Co., 72 S.W.2d 161, 230 Mo.App. 637.

64 C.J. p 992 note 73.

59. Cal.—Westover v. City of Los Angeles, 128 P.2d 350, 20 Cal.2d 635.

Colo.—I. Cohen Sons v. Dowd, 84 P.2d 830, 103 Colo. 211.

Ill.—Sweat v. Aircraft & Diesel Equipment Corp., 81 N.E.2d 8, 335 Ill.App. 177.

Ind.—Albright v. Hughes, 26 N.E.2d 576, 107 Ind.App. 651—Hoopengardner v. Hoopengardner, 198 N.E. 795, 102 Ind.App. 172.

Mass.—Hamilburg v. Meffert, 195 N. E. 781, 290 Mass. 456.

Mo.—Wind v. Bank of Maplewood & Trust Co., App., 68 S.W.2d 332.

S.C.—Candy v. Prudential Ins. Co. of America, 26 S.E.2d 504, 203 S.C. 179.

64 C.J. p 992 note 74.

row;<sup>60</sup> where the instructions fail to state issues<sup>61</sup> or exclude or ignore issues,<sup>62</sup> evidence,<sup>63</sup> or defenses;<sup>64</sup> or where the instructions give undue prominence to particular matters,<sup>65</sup> use inapt terms,<sup>66</sup> authorize the jury to decide the law as well as the facts,<sup>67</sup> or recite or refer to the plead-

ings.<sup>68</sup>

The rule has been applied to instructions on the issue of actual, apparent, or ostensible authority;<sup>69</sup> bona fide purchaser;<sup>70</sup> disability;<sup>71</sup> duty owed by bailee;<sup>72</sup> estoppel;<sup>73</sup> fraud;<sup>74</sup> limitations;<sup>75</sup> malice;<sup>76</sup> market value;<sup>77</sup> notice;<sup>78</sup> pay-

60. Ind.—Allman v. Malsbury, 65 N. E.2d 106, 224 Ind. 177.  
Miss.—Harris v. Sims, 124 So. 325, 155 Miss. 207.

61. Ind.—Otter Creek Coal Co. v. Archer, 115 N.E. 952, 64 Ind.App. 381.

62. Ark.—Mutual Ben. Health & Acc. Ass'n v. Murphy, 193 S.W.2d 305, 209 Ark. 945.

Ga.—Daughtry v. Georgia Power Co., 6 S.E.2d 454, 61 Ga.App. 505.

Kan.—Independence State Bank of Independence v. Drohen, 58 P.2d 260, 144 Kan. 39.

Mo.—Quality Oil Co. v. Wyatt, App., 138 S.W.2d 40.

Okl.—Criterion Theatre Corp. v. Starns, 154 P.2d 92, 194 Okl. 624.

Vt.—Lancour v. Herald & Globe Ass'n, 17 A.2d 253, 111 Vt. 371, 132 A.L.R. 486.

64 C.J. p 992 note 77.

63. U.S.—Nichols v. Republic Iron & Steel Co., C.C.A.Ala., 89 F.2d 927.

Mo.—Townsend v. Boatman's Nat. Bank, 104 S.W.2d 657, 340 Mo. 550.  
64 C.J. p 992 note 78.

64. Ga.—Allen v. Bone, 43 S.E.2d 311, 202 Ga. 349—Metropolitan Life Ins. Co. v. Saul, 5 S.E.2d 214, 189 Ga. 1—Life & Casualty Ins. Co. v. Ellis, 25 S.E.2d 826, 70 Ga.App. 280—North British & Mercantile Ins. Co. v. Farnell, 185 S.E. 122, 53 Ga.App. 178.

Ill.—Illinois Tuberculosis Ass'n v. Springfield Marine Bank, 282 Ill. App. 14.

Md.—Frazer v. Ennis, 165 A. 198, 164 Md. 351.

Mo.—Evans v. Atchison, T. & S. F. Ry. Co., 131 S.W.2d 604, 345 Mo. 147—Brown v. Pennsylvania Fire Ins. Co., Philadelphia, App., 263 S.W.2d 893—Memphis Bank & Trust Co. v. West, App., 260 S.W.2d 866—Porter v. Fickenwirth, App., 217 S.W.2d 738—Abresch v. Schults, App., 216 S.W.2d 134—Husey v. Ellerman, App., 215 S.W.2d 38—Grether v. Di Franco, App., 178 S.W.2d 469—Albrecht v. Piper, App., 164 S.W.2d 106—Cantrell v. Burgess, App., 141 S.W.2d 200—Propat v. Capital Mut. Ass'n, 124 S.W.2d 515, 233 Mo.App. 612—Owens Estate v. Owens, App., 107 S.W.2d 150—Cova v. Bankers & Shippers Ins. Co. of New York, App., 100 S.W.2d 23—Bailey v. American Life & Accident Ins. Co., App., 98 S.W.2d 903—Kramer v. Lapse, App., 94 S.W.2d 1090—Zel-

kle v. St. Paul & K. C. S. L. R. Co., App., 71 S.W.2d 154.

Okl.—Hazelrigg v. Harvey, 132 P.2d 650, 191 Okl. 648—Pine v. Bradley, 101 P.2d 799, 187 Okl. 126.

Or.—Hughes v. Gilsoul, 230 P.2d 770, 191 Or. 557.

S.C.—Bosdell v. Dixie Stores Co., 167 S.E. 834, 168 S.C. 520.

64 C.J. p 992 note 79.

65. Tex.—Miller v. Campbell, Civ. App., 171 S.W.2d 521.

66. Ga.—Griner v. Lindsey, 81 S.E.2d 802, 210 Ga. 563—American Surety Co. v. Smith, 191 S.E. 137, 55 Ga. App. 633.

64 C.J. p 992 note 81.

67. Ga.—Higgins v. Trentham, 197 S.E. 862, 186 Ga. 264.

64 C.J. p 992 note 82.

68. Ga.—McCowan v. Aldred, 78 S.E.2d 66, 85 Ga.App. 788—Central Truckway System v. Harrigan, 53 S.E.2d 186, 79 Ga.App. 117—Bulce v. Citizens & Southern Nat. Bank, 31 S.E.2d 414, 71 Ga.App. 562.

Ill.—Burns v. Stouffer, 100 N.E.2d 507, 344 Ill.App. 105—Donnelly v. Pennsylvania R. Co., 97 N.E.2d 846, 342 Ill.App. 556, affirmed 105 N.E.2d 730, 412 Ill. 115, certiorari denied Pennsylvania R. Co. v. Donnelly, 73 S.Ct. 93, 344 U.S. 855, 97 L.Ed. 663.

Iowa.—Wallrich v. Wallrich, 6 N.W.2d 107, 232 Iowa 762—Forrest v. Sovereign Camp, W. O. W., 261 N.W. 802, 220 Iowa 478.

Miss.—Evans v. Jackson City Lines, 56 So.2d 80, 212 Miss. 895—Teche Lines v. Keller, 165 So. 303, 174 Miss. 527.

Neb.—Franks v. Jiridon, 20 N.W.2d 597, 146 Neb. 585.

Okl.—Carter Oil Co. v. Johnston, 257 P.2d 817, 208 Okl. 564—Kurn v. Manley, 153 P.2d 623, 194 Okl. 574—Shell Petroleum Corporation v. Wood, 32 P.2d 882, 168 Okl. 274—Shell Petroleum Corporation v. Wood, 32 P.2d 879, 168 Okl. 271.

S.C.—Barber v. Industrial Life & Health Ins. Co., 200 S.E. 102, 189 S.C. 108.

64 C.J. p 992 note 83.

69. Ark.—Barnes v. Little, 132 S.W.2d 651, 199 Ark. 34.

Cal.—House Grain Co. v. Finerman & Sons, 253 P.2d 1034, 116 Cal.App.2d 485.

Mo.—Luechtefeld v. Margious, App., 151 S.W.2d 710.

70. Ga.—McCommons-Thompson-Boswell Co. v. White, 125 S.E. 76, 33 Ga.App. 20.

71. Ark.—Missouri State Life Ins. Co. v. Case, 71 S.W.2d 199, 189 Ark. 228—Missouri State Life Ins. Co. v. Holt, 55 S.W.2d 788, 186 Ark. 672.

Ind.—Prudential Ins. Co. of America v. Martin, 196 N.E. 125, 101 Ind. App. 320.

Iowa.—Foy v. Metropolitan Life Ins. Co. of New York, 363 N.W. 14, 220 Iowa 628.

Ky.—Ætna Life Ins. Co. of Hartford, Conn., v. Castle, 67 S.W.2d 17, 252 Ky. 228.

Mo.—Burns v. Ætna Life Ins. Co., 123 S.W.2d 185, 234 Mo.App. 1207. N.C.—Leonard v. Pacific Mut. Life Ins. Co. of California, 193 S.E. 186, 212 N.C. 151.

Pa.—Frace v. Mutual Life Ins. Co. of New York, 30 A.2d 380, 151 Pa. Super. 354.

Tenn.—Metropolitan Life Ins. Co. v. Walton, 83 S.W.2d 274, 19 Tenn. App. 59.

W.Va.—Rubenstein v. Metropolitan Life Ins. Co., 190 S.E. 531, 118 W. Va. 367.

72. Ala.—Clayton v. Jordan, 96 So. 260, 209 Ala. 334.

Mo.—Carr v. Evans, 176 S.W. 298, 189 Mo.App. 282.

73. Conn.—McMahon v. Bryant Electric Co., 185 A. 181, 121 Conn. 397.

74. Ga.—Gulf Life Ins. Co. v. Le Croy, 182 S.E. 378, 181 Ga. 243.

Ind.—Curnick v. Torbert, 194 N.E. 771, 101 Ind.App. 113.

Mo.—Kramer v. Lapse, App., 94 S.W.2d 1090.

64 C.J. p 992 note 86.

75. Ala.—Forbes & Carliss v. Plummer, 73 So. 451, 198 Ala. 152.

Conn.—Apuzzo v. Hoer, 4 A.2d 424, 125 Conn. 196, 121 A.L.R. 542.

Va.—G. L. Webster Co. v. Steelman, 1 S.E.2d 306, 172 Va. 342.

76. Mo.—Jones v. Phillips Petroleum Co., 136 S.W.2d 868, 239 Mo.App. 331.

77. Okl.—Cimarron Utilities Co. v. Safranko, 101 P.2d 258, 187 Okl. 86.

78. U.S.—Eugene B. Smith & Co. v. Russek, C.A.Tex., 212 F.2d 388.

Idaho.—Consumers Credit Co. v. Manifold, 142 P.2d 150, 65 Idaho 238.

Ill.—Clark v. National Fire Ins. Co. of Pittsburgh, Pa., 171 Ill.App. 51.

Okl.—Metropolitan Life Ins. Co. v. Golden, 68 P.2d 516, 180 Okl. 164.

ment;<sup>79</sup> performance;<sup>80</sup> possession;<sup>81</sup> probable cause;<sup>82</sup> proximate cause;<sup>83</sup> release;<sup>84</sup> self-defense;<sup>85</sup> soundness of mind;<sup>86</sup> statute of frauds;<sup>87</sup> testamentary capacity;<sup>88</sup> undue influence;<sup>89</sup> waiver;<sup>90</sup> and warranty.<sup>91</sup>

### § 443. — Negligence, Contributory Negligence, and Assumption of Risk

- a. Negligence
- b. Contributory negligence
- c. Assumption of risk

79. Iowa.—Blunk v. Kuyper, 44 N.W. 2d 651, 241 Iowa 1138—Blakesburg Sav. Bank v. Blake, 223 N.W. 895, 207 Iowa 843, followed in Blakesburg Sav. Bank v. Bailey, 223 N.W. 899.
- Mo.—Schwalbert v. Konert, 76 S.W. 2d 445, 230 Mo.App. 811.
80. U.S.—Phillips & Benjamin Co. v. Ratner, C.A.N.Y., 206 F.2d 372.
- Fla.—Goodkind v. Wolkowich, 9 So. 2d 553, 151 Fla. 62.
81. Ga.—Rogers v. Manning, 38 S.E. 2d 724, 200 Ga. 844.
- S.C.—Cook v. C. I. T. Corp., 4 S.E.2d 801, 191 S.C. 440, 125 A.L.R. 306.
82. Cal.—Siffert v. McDowell, 229 P.2d 388, 103 Cal.App.2d 373—Portman v. Keegan, 87 P.2d 400, 31 Cal.App.2d 80.
- Kan.—Tucker v. Bartlett, 155 P. 1, 97 Kan. 163.
- S.C.—Byus v. Eason, 182 S.E. 442, 178 S.C. 175.
83. Colo.—Northwestern Terminal R. Co. v. Pilo, 66 P.2d 532, 100 Colo. 221.
- Mo.—Landman v. John Hancock Mut. Life Ins. Co., App., 211 S.W.2d 530—State ex rel. Payne v. Wilson, App., 207 S.W.2d 785, 64 C.J. p. 992 note 91.
84. U.S.—Callen v. Pennsylvania R. Co., C.C.A.Pa., 162 F.2d 832, affirmed 68 S.Ct. 296, 332 U.S. 625, 92 L. Ed. 242.
- Ill.—McDaniels v. Terminal R. Ass'n of St. Louis, 23 N.E.2d 785, 302 Ill. App. 332.
- Mo.—Foster v. Aetna Life Ins. Co. of Hartford, Conn., App., 169 S.W.2d 423, transferred 176 S.W.2d 482, 352 Mo. 166—Schreiber v. Central Mut. Ins. Ass'n, App., 108 S.W.2d 1052, 64 C.J. p. 992 note 92.
85. Tex.—St. Louis Southwestern Ry. Co. of Texas v. Huddleston, Civ.App., 178 S.W. 704.
86. Cal.—In re Guilbert's Estate, 188 P. 807, 46 Cal.App. 55.
- Ill.—Hockersmith v. Cox, 95 N.E.2d 464, 407 Ill. 321.
- Mo.—In re Bearden, App., 86 S.W.2d 585.
87. U.S.—Clinton Mills Co. v. Saco-

#### a. Negligence

While erroneous instructions on the issue of negligence are not cured by conflicting or inconsistent instructions correctly stating the law, instructions which are merely defective or inaccurate may be cured by other instructions.

In accordance with, and subject to, the general rules stated supra § 441, erroneous instructions on the issue of negligence are not cured by conflicting or inconsistent instructions correctly stating the law<sup>92</sup> unless it is apparent that the jury could not

- Lowell Shops, C.C.A.Mass., 3 F.2d 410.
- Mo.—Weil Clothing Co. v. National Garment Co., App., 148 S.W.2d 586.
88. Ga.—Smith v. Davis, 45 S.E.2d 609, 203 Ga. 175—Ellis v. Britt, 182 S.E. 596, 181 Ga. 442.
- Ill.—Hockersmith v. Cox, 95 N.E.2d 464, 407 Ill. 321—De Marco v. McGill, 83 N.E.2d 313, 402 Ill. 46—Ergang v. Anderson, 38 N.E.2d 26, 373 Ill. 312, 137 A.L.R. 984.
- Ind.—Powell v. Ellis, 105 N.E.2d 348, 122 Ind.App. 700—Haas v. Haas, 96 N.E.2d 116, 121 Ind.App. 335, rehearing denied 98 N.E.2d 232, 121 Ind.App. 335—Huntington v. Hamilton, 73 N.E.2d 352, 118 Ind.App. 88—Workman v. Workman, 46 N.E.2d 718, 113 Ind.App. 245—Griffin v. Thrall, 29 N.E.2d 345, 109 Ind.App. 141—Curnick v. Torbert, 194 N.E. 771, 101 Ind.App. 113.
- Iowa.—In re Telsrow's Estate, 22 N.W.2d 792, 237 Iowa 672.
- Mo.—Norris v. Bristow, 236 S.W.2d 316, 361 Mo. 691, 26 A.L.R.2d 366, 64 C.J. p. 993 note 96.
89. Conn.—Dunn v. Poirot, 118 A. 33, 97 Conn. 713.
- Iowa.—In re Behrend's Will, 10 N.W. 2d 651, 233 Iowa 812.
- Mo.—Machens v. Machens, 263 S.W. 2d 724—Norris v. Bristow, 236 S.W.2d 316, 361 Mo. 691, 26 A.L.R.2d 366.
90. Ala.—Home Ins. Co. v. Jones, 165 So. 211, 231 Ala. 484.
- Ill.—Spiers v. Union Life Ins. Co., 103 N.E.2d 165, 345 Ill.App. 351, 64 C.J. p. 993 note 98.
91. Ill.—Keller v. Flynn, 105 N.E. 2d 532, 346 Ill.App. 499.
92. U.S.—Ryan v. United Parcel Service, C.A.N.Y., 205 F.2d 362, applying New Jersey law—Zumwalt v. Gardner, C.C.A.Mo., 160 F.2d 298.
- Ala.—Johnson v. Louisville & N. R. Co., 148 So. 822, 227 Ala. 103.
- Ark.—Davis v. Self, 246 S.W.2d 426, 220 Ark. 129—Spadra Co. v. White, 66 S.W.2d 1072, 188 Ark. 568.
- Cal.—Kalash v. Los Angeles Ladder Co., 34 P.2d 481, 1 Cal.2d 229—Devaney v. Atchison, T. & S. F. Ry. Co., 27 P.2d 635, 219 Cal. 487—

- Reagh v. San Francisco Unified School Dist., 259 P.2d 43, 119 Cal. App.2d 66—Pearson v. Tide Water Associated Oil Co., App., 204 P.2d 99, reheard 223 P.2d 669, hearing dismissed—Coffey v. Slingerland, 50 P.2d 830, 9 Cal.App.2d 731—Thompson v. Dentman, 21 P.2d 1009, 131 Cal.App. 680—Smellie v. Southern Pac. Co., 18 P.2d 97, 128 Cal.App. 567, hearing denied, Sup., 19 P.2d 982, 128 Cal.App. 567.
- Colo.—Stahl v. Cooper, 190 P.2d 891, 117 Colo. 468.
- Fla.—Hall v. Holland, 47 So.2d 889.
- Ga.—Southern Grocery Stores v. Cain, 178 S.E. 128, 50 Ga.App. 629.
- Ill.—Pappas v. Peoples Gas Light & Coke Co., 113 N.E.2d 585, 350 Ill. App. 541—Luke v. Marion, 217 Ill. App. 48.
- Ind.—Redd v. Indianapolis Rys., 97 N.E.2d 501, 121 Ind.App. 472—Nepsha v. Wozniak, 92 N.E.2d 734, 120 Ind.App. 362—Chesapeake & O. Ry. Co. v. Boston, 75 N.E.2d 194, 118 Ind.App. 526, order to transfer vacated 82 N.E.2d 249, 226 Ind. 582.
- Iowa.—Keller v. Dadds, 277 N.W. 467, 224 Iowa 935—Fry v. Smith, 253 N.W. 147, 217 Iowa 1295.
- Ky.—Stover v. Cincinnati, N. & C. Ry. Co., 67 S.W.2d 484, 252 Ky. 425.
- Miss.—Bridges v. Crapps, 58 So.2d 364, 214 Miss. 126—Wallace v. Billups, 33 So.2d 819, 203 Miss. 853—Marx v. Berry, 168 So. 61, 176 Miss. 1—Chadwick v. Bush, 163 So. 823, 174 Miss. 75—New Orleans & N. E. R. Co. v. Wheat, 160 So. 607, 172 Miss. 524—Columbus & G. R. Co. v. Coleman, 160 So. 277, 172 Miss. 514—Russell v. Williams, 160 So. 628, 168 Miss. 181, suggestion of error overruled 151 So. 372, 168 Miss. 181.
- Mo.—Sauer v. Winkler, 263 S.W.2d 370—Hatfield v. Thompson, 252 S.W.2d 534—McCormick v. Kansas City, 250 S.W.2d 524—McDonnell v. St. Louis Public Service Co., 249 S.W.2d 412—Lefkowitz v. Kansas City Public Service Co., 242 S.W.2d 530—Behan v. St. Louis Public Service Co., 237 S.W.2d 105, 361 Mo. 807—Fullerton v. Kansas City, App., 236 S.W.2d 364—McCombs v. Bowen, 73 S.W.2d 300, 228 Mo.App.

have been influenced by the erroneous instructions;<sup>93</sup> but instructions which are merely defective or inaccurate may be cured by other instructions.<sup>94</sup> Accordingly, instructions which are merely defec-

754—Christner v. Chicago, R. I. & P. Ry. Co., 64 S.W.2d 752, 228 Mo App. 220.

Ohio—Pettibone v. McKinnon, 183 N. E. 786, 125 Ohio St. 605.

Okl.—Johnson v. Santa Fe Trail Transp. Co., 244 P.2d 576, 206 Okl. 455.

R.I.—Burke v. United Electric Rys. Co., 83 A.2d 88, 79 R.I. 50.

Utah—Charvoz v. Bonneville Irr. Dist., 235 P.2d 780.

Va.—Smith v. Clark, 46 S.E.2d 21, 187 Va. 181—Chesapeake & O. Ry. Co. v. Pulliam, 41 S.E.2d 54, 185 Va. 908—Gale v. Wilber, 175 S.E. 739, 163 Va. 211.

64 C.J. p 933 note 1.

93. Cal.—De Greek v. Freeman, 291 P. 854, 108 Cal.App. 645.

94. U.S.—Olsen v. Realty Hotel Corp., C.A.N.Y., 210 F.2d 785—Gibson v. Pennsylvania R. Co., C.A.Pa., 204 F.2d 924—Sanders v. Glenshaw Glass Co., C.A.Pa., 204 F.2d 436, certiorari denied 74 S.Ct. 278, 346 U.S. 916, 98 L.Ed. —Conry v. Baltimore & O. R. Co., C.A.Pa., 195 F.2d 120—Miles v. Pennsylvania R. Co., C.A.Ill., 182 F.2d 411—Kobak v. Pennsylvania R. Co., C.A.Pa., 178 F.2d 455—Gibson v. International Freight Corp., C.A.Pa., 173 F.2d 591, certiorari denied 70 S.Ct. 78, 338 U.S. 832, 94 L.Ed. 507, rehearing denied 70 S.Ct. 157, 338 U.S. 832, 94 L.Ed. 541—O'Donnell v. Elgin, J. & E. Ry. Co., C.A.Ill., 171 F.2d 973, reversed on other grounds 70 S.Ct. 200, 338 U.S. 834, 94 L.Ed. 187, 16 A.L.R.2d 645, rehearing denied 70 S.Ct. 427, 338 U.S. 945, 94 L.Ed. 583—Chesapeake & O. Ry. Co. v. Craft, C.C.A.W.Va., 162 F.2d 67—Fryor v. Strawn, C.C.A.Neb., 73 F.2d 595—Helsel v. Pennsylvania R. Co., D.C.N.Y., 84 F.Supp. 296.

Ala.—McGough Bakeries Corp. v. Reynolds, 35 So.2d 332, 250 Ala. 552.

Ark.—Anheuser-Busch, Inc. v. Southard, 84 S.W.2d 89, 191 Ark. 107.

Cal.—Brooks v. E. J. Willig Truck Transp. Co., 255 P.2d 802, 40 Cal. 2d 669—Hayes v. Richfield Oil Corp., 240 P.2d 580, 38 Cal.2d 375—L'opoley v. Hannon, 231 P.2d 484, 37 Cal.2d 159—Gordon v. Aztec Brewing Co., 203 P.2d 522, 33 Cal. 2d 514—Johnston v. Long, 181 P. 2d 645, 30 Cal.2d 54—Cope v. Davison, 180 P.2d 873, 30 Cal.2d 193, 171 A.L.R. 667—Timbrell v. Suburban Hospital, 47 P.2d 737, 4 Cal.2d 68—Commercial Union Assur. Co. v. Pacific Gas & Electric Co., 31 P.2d 793, 220 Cal. 515—Miner v. Dabney-Johnson Oil Corporation, 28 P.2d 213, 219 Cal. 580—Ward v. Head, 95 P.2d 821, 219 Cal. 65—Bates v. Newman, 264 P.2d 197, 121 Cal.App.

2d 800—Nelson v. Porterville Union High School Dist., 254 P.2d 945, 117 Cal.App.2d 96—Kettman v. Levine, 253 P.2d 102, 115 Cal.App.2d 844—Hazelett v. Miller, 252 P.2d 997, 115 Cal.App.2d 801—Abney v. City and County of San Francisco, 252 P.2d 654, 115 Cal.App.2d 506—Wilson v. Kopp, 250 P.2d 166, 114 Cal.App.2d 198—Martens v. Redi-Spuds, Inc., 247 P.2d 605, 113 Cal. App.2d 10—Taylor v. Luxor Cab Co., 246 P.2d 45, 112 Cal.App.2d 46—Trelut v. Kazarian, 243 P.2d 104, 110 Cal.App.2d 506—Faeh v. Union Oil Co. of Cal., 236 P.2d 667, 107 Cal.App.2d 163—Fedler v. Hygelund, 235 P.2d 247, 106 Cal.App.2d 480—Block v. Snyder, 234 P.2d 52, 105 Cal.App.2d 783—Connor v. Pacific Greyhound Lines, 232 P.2d 500, 104 Cal.App.2d 746—Lundin v. Shumate's Pharmacy, 221 P.2d 260, 98 Cal.App.2d 817—Fresno City Lines v. Herman, 217 P.2d 987, 97 Cal.App.2d 366—McNulty v. Southern Pac. Co., 216 P.2d 534, 96 Cal. App.2d 841—Woods v. Eltze, 212 P.2d 12, 94 Cal.App.2d 910—Johnson v. Marquis, 209 P.2d 63, 93 Cal.App.2d 341—Dodge v. San Diego Elec. Ry. Co., 208 P.2d 37, 92 Cal.App.2d 759—Perbost v. San Marino Hall-School for Girls, 199 P.2d 701, 88 Cal.App.2d 796—Root v. Pacific Greyhound Lines, 190 P. 2d 48, 84 Cal.App.2d 135—Blythe v. City and County of San Francisco, 188 P.2d 40, 83 Cal.App.2d 125—Benton v. Douglas, 187 P.2d 469, 82 Cal.App.2d 784—Carney v. RKO Radio Pictures, 178 P.2d 482, 78 Cal.App.2d 659—Dodds v. Steller, 175 P.2d 607, 77 Cal.App. 2d 411—Freeman v. Nickerson, 174 P.2d 688, 77 Cal.App.2d 40—Armstrong v. Allen, 171 P.2d 552, 75 Cal.App.2d 514—Powers v. Shelton, 169 P.2d 482, 74 Cal.App.2d 757—Maddern v. City and County of San Francisco, 169 P.2d 425, 74 Cal.App. 2d 742—Perry v. Plombo, 166 P.2d 888, 73 Cal.App.2d 569—Ellinwood v. McCoy, 47 P.2d 796, 8 Cal.App. 2d 590—Halaminsky v. Nelson, 42 P.2d 676, 5 Cal.App.2d 287—Everts v. Rosenberg, 41 P.2d 166, 4 Cal. App.2d 500—Chandler v. Benafel, 39 P.2d 892, 3 Cal.App.2d 373—Chandler v. Benafel, 39 P.2d 890, 3 Cal.App.2d 368—Walling v. Rugen, 39 P.2d 827, 3 Cal.App.2d 471—Maus v. Scavenger Protective Ass'n, 39 P.2d 209, 2 Cal.App.2d 624—Evans v. Mitchell, 38 P.2d 437, 2 Cal.App.2d 702—Hughes v. Quackenbush, 37 P.2d 99, 1 Cal.App.2d 349—Withey v. Hammond Lumber Co., 35 P.2d 1080, 140 Cal.App. 587—Hill v. Fresno County, 35 P.2d 593, 140 Cal.App. 272—Fleming v.

Flick, 35 P.2d 210, 140 Cal.App. 14—Gibson v. Easley, 32 P.2d 983, 138 Cal.App. 303—Silveira v. Siegfried, 26 P.2d 666, 135 Cal.App. 218—Moditt v. Ford Motor Co., 26 P.2d 661, 135 Cal.App. 7—Guinow v. Webster, 22 P.2d 231, 132 Cal.App. 29—Hilson v. Pacific Gas & Electric Co., 21 P.2d 662, 131 Cal.App. 427—Beni v. Abrons, 19 P.2d 523, 130 Cal.App. 206—Smellie v. Southern Pac. Co., 18 P.2d 97, 123 Cal. App. 567, hearing denied, Sup. 19 P.2d 982, 128 Cal.App. 567.

Colo.—Frazier v. Edwards, 190 P.2d 126, 117 Colo. 502.

Conn.—Danehy v. Metz, 100 A.2d 843, 140 Conn. 376—Steinbeck v. Medalie, 90 A.2d 875, 139 Conn. 152—Annunziato v. Gu-Ta, Inc., 179 A. 651, 120 Conn. 114—Caviote v. Shea, 165 A. 788, 116 Conn. 569—Barbier v. Pandiselo, 163 A. 469, 116 Conn. 48.

D.C.—Hecht Co. v. Jacobsen, 180 F. 2d 13, 86 U.S.App.D.C. 81.

Fla.—Staff v. Soreno Hotel Co., 60 So. 2d 28—Seaboard Air Line R. Co. v. Haynes, 47 So.2d 324—Florida East Coast Ry. Co. v. Anderson, 148 So. 553, 110 Fla. 290—Atlantic Coast Line R. Co. v. Lamphear, 146 So. 847, 109 Fla. 26.

Ga.—Harnon v. Givens, 77 S.E.2d 223, 88 Ga.App. 629—Wilson v. Harnell, 75 S.E.2d 436, 87 Ga.App. 793—Sammons v. Webb, 71 S.E.2d 832, 86 Ga.App. 382—Morrow v. Johnston, 68 S.E.2d 906, 85 Ga.App. 261—Moffett v. McCurry, 67 S.E.2d 807, 84 Ga.App. 853—Atlantic Coast Line R. Co. v. Thomas, 64 S.E.2d 301, 83 Ga.App. 477—Atlantic Coast Line R. Co. v. Dupriest, 59 S.E.2d 767, 81 Ga.App. 773—Central Truckway System v. Harrigan, 63 S.E.2d 186, 79 Ga.App. 117—Western & A. R. R. v. Fowler, 47 S.E.2d 874, 77 Ga.App. 206—Spalding Lumber Co. v. Hemphill, 47 S.E.2d 514, 77 Ga.App. 1—McLendon v. Bedingfield, 38 S.E.2d 496, 73 Ga.App. 756—Richter v. Atlantic Co., 16 S.E. 2d 259, 65 Ga.App. 605—Gay v. Smith, 181 S.E. 129, 51 Ga.App. 615—Atlantic Coast Line R. Co. v. McDonald, 179 S.E. 185, 50 Ga.App. 856, certiorari denied 56 S.Ct. 143, 296 U.S. 621, 80 L.Ed. 441—Hodges v. Peek, 179 S.E. 129, 50 Ga.App. 631—Harper v. Donaldson, 176 S.E. 535, 49 Ga.App. 608—Central of Georgia Ry. Co. v. Mann, 173 S.E. 180, 48 Ga.App. 668—Western & A. R. R. v. Bennett, 171 S.E. 187, 47 Ga.App. 629—Southern Ry. Co. v. Tudor, 168 S.E. 98, 46 Ga.App. 563—Ellbertson & E. R. Co. v. Campbell, 167 S.E. 215, 46 Ga.App. 293.

Idaho.—Moore v. Harland, 233 P.2d 429, 71 Idaho 376—Albrethson v.



- Carey Val. Reservoir Co., 186 P.2d 853, 67 Idaho 529—Griffin v. Clark, 42 P.2d 297, 55 Idaho 364—Willis v. Schaefer Hitchcock Co., 25 P.2d 167, 53 Idaho 367—Burns v. Getty, 24 P.2d 21, 53 Idaho 347.
- III.—Gorcynski v. Nugent, 83 N.E.2d 495, 402 Ill. 147—Harsh v. Illinois Terminal R. Co., 114 N.E.2d 901, 351 Ill.App. 272—Rouse v. New York, C. & St. L. R. Co., 110 N.E.2d 266, 349 Ill.App. 139—Cook v. Weyant, 105 N.E.2d 310, 346 Ill.App. 465—Roy v. Chicago Motor Coach Co., 102 N.E.2d 752, 345 Ill.App. 296—Levanti v. Dorris, 99 N.E.2d 398, 343 Ill.App. 355—Phillips v. Decatur Checker Cab Co., 64 N.E.2d 554, 342 Ill.App. 157—Theodosia v. Keeshin Motor Exp. Co., 92 N.E.2d 794, 341 Ill.App. 8—Loverde v. Consumers Petroleum Co., 88 N.E.2d 501, 338 Ill.App. 665—McMillan v. McLane, 88 N.E.2d 114, 338 Ill.App. 514—Wilke v. Moll, 86 N.E.2d 589, 338 Ill.App. 6—Smith v. Seelbach, 84 N.E.2d 684, 336 Ill.App. 480—Zydeck v. Chicago & N. W. Ry. Co., 77 N.E.2d 830, 333 Ill.App. 388—Kalousis v. Lasham Cartage Co., 76 N.E.2d 239, 332 Ill.App. 525—Miller v. Baltimore & O. S. W. R. Co., 70 N.E.2d 263, 330 Ill.App. 129—Meng v. Lucash, 69 N.E.2d 367, 329 Ill.App. 812—Howard v. City of Rockford, 270 Ill.App. 155.
- Ind.—McCague v. New York, C. & St. L. R. Co., 71 N.E.2d 569, 225 Ind. 83, rehearing denied 73 N.E.2d 46, 225 Ind. 83—Elgin, J. & E. Ry. Co. v. Scherer, 98 N.E.2d 368, 121 Ind.App. 477—Montgomery-Ward & Co. v. Wooley, 94 N.E.2d 677, 121 Ind.App. 60—Neuwelt v. Roush, 85 N.E.2d 506, 119 Ind.App. 481—H. E. McGonigal, Inc. v. Etherington, 79 N.E.2d 777, 118 Ind. App. 622—Walsh Baking Co. v. Southern Indiana Gas & Electric Co., 186 N.E. 341, 97 Ind.App. 285—Smith v. Mills, 185 N.E. 327, 98 Ind.App. 543—Pennsylvania R. Co. v. Boyd, 185 N.E. 160, 98 Ind.App. 439—Garner v. Morgan, 183 N.E. 916, 98 Ind.App. 461.
- Iowa.—City of Des Moines v. Barnes, 30 N.W.2d 170, 238 Iowa 1192—Engle v. Nelson, 263 N.W. 505, 220 Iowa 771—Shutes v. Weeks, 262 N. W. 518, 220 Iowa 616—Young v. Jacobsen Bros., 258 N.W. 104, 219 Iowa 483—Aseltine v. Lutterman, 254 N.W. 854, 218 Iowa 675—Slesinger v. Puth, 248 N.W. 352, 216 Iowa 916.
- Kan.—Morrison v. Kansas City Coca-Cola Bottling Co., 263 P.2d 217, 175 Kan. 212—Hendren v. Kansas City, 238 P.2d 510, 172 Kan. 56—Flaharty v. Reed, 225 P.2d 98, 170 Kan. 215—Sponable v. Thomas, 33 P.2d 721, 139 Kan. 710.
- Ky.—Henderson v. Watson, 262 S.W. 2d 811—Fitzwater v. Cincinnati, N. & C. R. Co., 234 S.W.2d 186, 314 Ky. 157—Southeastern Greyhound Lines v. Webb, 230 S.W.2d 99, 313 Ky. 71—Ballback's Adm'r v. Boland-Malone Lumber Co., 208 S.W.2d 940, 306 Ky. 647—Ken-Ten Coach Lines v. Siler, 197 S.W.2d 406, 303 Ky. 263—Maupin v. Baker, 194 S.W.2d 991, 302 Ky. 411.
- Md.—West v. Belle Isle Cab Co., 100 A.2d 17, 203 Md. 244.
- Mass.—Whalen v. Shivek, 93 N.E.2d 393, 326 Mass. 142—Sluckus v. Fraktman, 77 N.E.2d 393, 322 Mass. 379—Hall v. Shain, 197 N.E. 437, 281 Mass. 506—Partridge v. United Elastic Corporation, 192 N.E. 460, 288 Mass. 138.
- Mich.—Vandenberg v. Prosek, 56 N.W.2d 227, 335 Mich. 382—Elias v. Hess, 41 N.W.2d 884, 327 Mich. 323—Alley v. Klotz, 31 N.W.2d 816, 320 Mich. 521—Severson v. Family Creamery Co., 256 N.W. 348, 268 Mich. 348.
- Minn.—Peterson v. Lang, 68 N.W.2d 609—Swanson v. La Fontaine, 57 N.W.2d 262, 238 Minn. 460—Orchard v. Northwest Airlines, 51 N.W.2d 645, 236 Minn. 42—Squillace v. Village of Mountain Iron, 26 N.W.2d 197, 223 Minn. 8.
- Miss.—City of Laurel v. Hutto, 70 So. 2d 605—Continental Southern Lines v. Klaas, 65 So.2d 575, 217 Miss. 795, suggestion of error overruled 65 So.2d 833, 217 Miss. 795, followed in 65 So.2d 596, 217 Miss. 795, suggestion of error overruled 65 So.2d 834, 217 Miss. 795, and suggestion of error dismissed and motion to set aside denied 67 So.2d 256, 217 Miss. 795—Peerless Supply Co. v. Jeter, 65 So.2d 240—Ford v. Gray, 65 So.2d 230, 217 Miss. 882—McMinn v. Lilly, 60 So.2d 603, 215 Miss. 193—Hornsbay v. Logaras, 49 So.2d 837, 210 Miss. 512—Wilburn v. Gordon, 45 So.2d 844, 209 Miss. 27—St. Louis-San Francisco Ry. Co. v. Dyson, 43 So.2d 95, 207 Miss. 639—Green v. Maddox, 149 So. 832, 168 Miss. 171, suggestion of error overruled 151 So. 160, 168 Miss. 171, applying Louisiana law.
- Mo.—Nelson v. Tayon, 265 S.W.2d 409—Killinger v. Kansas City Public Service Co., 259 S.W.2d 391—Warren v. Kansas City, 258 S.W.2d 681—Curtis v. Atchison, T. & S. F. Ry. Co., 253 S.W.2d 789, 363 Mo. 779—Winters v. Terminal R. Ass'n of St. Louis, 252 S.W.2d 380, 363 Mo. 606—Merrick v. Bridgways, Inc., 241 S.W.2d 1015, 362 Mo. 476, applying Illinois law—Higgins v. Terminal R. R. Ass'n of St. Louis, 241 S.W.2d 380, 362 Mo. 264—Eller v. Crowell, 238 S.W.2d 310—Davis v. Kansas City Public Service Co., 233 S.W.2d 679, 361 Mo. 61—Hilton v. Thompson, 227 S.W.2d 675, 360 Mo. 177—Counts v. Thompson, 222 S.W.2d 487, 359 Mo. 485—Hines v. W. U. Tel. Co., 217 S.W.2d 482, 358 Mo. 732—Benham v. McCoy, 213 S.W.2d 914—Graham v. Thompson, 212 S.W.2d 770, 357 Mo. 1133, certiorari denied Kansas City Terminal R. Co. v. Thompson, 69 S.Ct. 166, 335 U.S. 870, 93 L.Ed. 414—Hoelzel v. Chicago, R. I. & P. Ry. Co., 85 S.W.2d 126, 337 Mo. 61—Corbett v. Terminal R. Ass'n of St. Louis, 82 S.W.2d 97, 336 Mo. 972, applying Illinois law—Jenkins v. Wabash Ry. Co., 73 S.W.2d 1002, 335 Mo. 748—Mitchell v. Wabash Ry. Co., 69 S.W.2d 286, 334 Mo. 926—Larey v. Missouri-Kansas-Texas R. Co., 64 S.W.2d 681, 333 Mo. 949—Drake v. Kansas City Public Service Co., 63 S.W.2d 75, 333 Mo. 520—James v. Ray, App. 264 S.W. 2d 26—Neely v. Kansas City Public Service Co., App. 252 S.W.2d 88—Harrison v. St. Louis Public Service Co., App. 251 S.W.2d 348—Rowe v. Kansas City Public Service Co., App. 248 S.W.2d 445—Setser v. St. Louis Public Service Co., App. 209 S.W.2d 746—Panke v. Shannon, App. 207 S.W.2d 854, reversed on other grounds 212 S.W. 2d 792, 357 Mo. 1195—Goggin v. Schoening, App. 199 S.W.2d 87—McGraw v. Montgomery, 195 S.W. 2d 309, 239 Mo. App. 239—Kerby v. Schindell, 146 S.W.2d 670, 235 Mo. App. 691—Fawkes v. National Refining Co., 130 S.W.2d 684, 235 Mo. App. 433, certiorari quashed State ex rel. National Refining Co. v. Shain, 139 S.W.2d 936, 346 Mo. 224—Greer v. St. Louis Public Service Co., App. 87 S.W.2d 240, followed in 87 S.W.2d 247—Dean v. Mocerri, App. 87 S.W.2d 218—Humphreys v. Chicago, M., St. P. & P. R. Co., App. 83 S.W.2d 586—Roman v. Hendricks, App. 80 S.W.2d 907—Burrow v. St. Louis Public Service Co., App. 79 S.W.2d 478—Millhouser v. Kansas City Public Service Co., App. 71 S.W.2d 160—Mitchell v. Poole, 68 S.W.2d 833, 229 Mo. App. 1—Sisk v. Chicago, B. & Q. R. Co., App. 67 S.W.2d 830—Pappas Pie & Baking Co. v. Stroth Bros. Delivery Co., App. 67 S.W.2d 793—Purkett v. Steele Undertaking Co., App. 63 S.W.2d 509—Smith v. Kansas City Public Service Co., 56 S.W.2d 838, 227 Mo.App. 675.
- Mont.—Rose v. Intermountain Transp. Co., 267 P.2d 122—Batchoff v. Craney, 172 P.2d 808, 119 Mont. 152—Mellon v. Kelly, 41 P.2d 49, 99 Mont. 10—Safranek v. City of Helena, 39 P.2d 644, 98 Mont. 456—Fulton v. Chouteau County Farmers' Co., 37 P.2d 1025, 98 Mont. 48.
- Neb.—O'Dell v. Goodsell, 41 N.W.2d 123, 152 Neb. 290—Plumb v. Burnham, 36 N.W.2d 612, 151 Neb. 129—Pierson v. Jensen, 38 N.W.2d 462, 150 Neb. 86—Blanchard v. Lawson, 37 N.W.2d 217, 148 Neb. 299.
- N.H.—Dimock v. Lussier, 163 A. 500, 88 N.H. 54.
- N.J.—McStay v. Praychocki, 81 A.2d

tive or inaccurate may be cured by other instructions which amplify,<sup>95</sup> supplement,<sup>96</sup> explain,<sup>97</sup> neutralize,<sup>98</sup> modify,<sup>99</sup> clarify,<sup>1</sup> limit,<sup>2</sup> or qualify<sup>3</sup>

the objectionable instruction.

Thus an instruction which is incomplete,<sup>4</sup> inac-

761. 7 N.J. 456—O'Keefe v. Ripp, 166 A. 197, 110 N.J.Law 555.
- N.C.—Atlantic Coast Line R. Co. v. McLean Trucking Co., 78 S.E.2d 159, 238 N.C. 422.
- N.D.—Reuter v. Olson, 59 N.W.2d 830—Ferdner v. Northern Pac. Ry. Co., 42 N.W.2d 216, 77 N.D. 169.
- Ohio.—Deckant v. City of Cleveland, 99 N.E.2d 609, 155 Ohio St. 498—Greenawalt v. Yuhas, 84 N.E.2d 221, 83 Ohio App. 426—Dunleavy v. De Frangia, App., 82 N.E.2d 287—Cincinnati St. Ry. Co. v. Bartsch, 198 N.E. 636, 50 Ohio App. 464—Wagner v. Gentile, 184 N.E. 246, 44 Ohio App. 24.
- Okl.—St. Louis-San Francisco Ry. Co. v. Farrell, 263 P.2d 518—Mealy-Wolfe Drilling Co. v. Lambert, 256 P.2d 818, 208 Okl. 624—Warren Petroleum Corp. v. Helms, 252 P.2d 447, 207 Okl. 699—Oklahoma Ry. Co. v. Wilson, 231 P.2d 688, 204 Okl. 488—Elam v. Loyd, 204 P.2d 230, 201 Okl. 222—H. F. Wilcox Oil & Gas Co. v. Jamison, 190 P.2d 807, 199 Okl. 691.
- Or.—Valdin v. Holte, 260 P.2d 504, 199 Or. 134—Waller v. Hill, 190 P.2d 147, 183 Or. 53—Schultz v. Hambach, 169 P.2d 882, 179 Or. 107—Monner v. Starker, 26 P.2d 1097, 145 Or. 168.
- Pa.—Gob v. Pittsburgh Rys. Co., 181 A. 489, 320 Pa. 225.
- S.C.—Durant v. Stuckey, 70 S.E.2d 473, 221 S.C. 342—Little v. Atlantic Coast Line R. Co., 46 S.E.2d 59, 211 S.C. 462.
- Tenn.—D. M. Rose & Co. v. Snyder, 266 S.W.2d 897, 185 Tenn. 499—Llewellyn v. City of Knoxville, 232 S.W.2d 568, 33 Tenn.App. 632—Carman v. Huff, 227 S.W.2d 780, 32 Tenn.App. 687—Southern Coach Lines v. Haddock, 194 S.W.2d 347, 29 Tenn.App. 132—Tennessee Coach Co. v. Young, 80 S.W.2d 107, 18 Tenn.App. 592—Union Traction Co. v. Todd, 64 S.W.2d 26, 16 Tenn.App. 200.
- Tex.—Rowland v. State, Civ.App., 55 S.W.2d 133, error dismissed.
- Utah.—Galarowicz v. Ward, 230 P.2d 576—Mitchell v. Arrowhead Freight Lines, 214 P.2d 620, 117 Utah 224—Kawaguchi v. Bennett, 189 P.2d 109, 112 Utah 442—In re Wimmer's Estate, 182 P.2d 119, 111 Utah 444.
- Va.—Atlantic Coast Line R. Co. v. Bowen, 63 S.E.2d 804, 192 Va. 162—Virginia Transit Co. v. Durham, 59 S.E.2d 58, 190 Va. 979—Washington & O. D. R. R. v. Taylor, 50 S.E.2d 416, 188 Va. 458—Dey v. Virginia Transit Co., 47 S.E.2d 552, 187 Va. 635—Cartos v. Harford Accident & Indemnity Co., 169 S.E. 584, 160 Va. 505.
- Wash.—Adkins v. City of Seattle, 258 P.2d 461, 42 Wash.2d 676—Hutton v. Martin, 252 P.2d 581, 41 Wash.2d 780—Rawlins v. Nelson, 231 P.2d 281, 38 Wash.2d 570—Hanks v. Landert, 223 P.2d 443, 37 Wash.2d 293, 30 A.L.R.2d 1012—Heber v. Puget Sound Power & Light Co., 208 P.2d 886, 34 Wash.2d 231—Harris v. Holroyd, 207 P.2d 765, 33 Wash.2d 916—Melosevich v. Cichy, 193 P.2d 342, 30 Wash.2d 702—Bissell v. Seattle Vancouver Motor Freight, 168 P.2d 390, 25 Wash.2d 68—Frazee v. Western Dairy Products, 47 P.2d 1037, 182 Wash. 578—Devereaux v. Blanchard, 26 P.2d 82, 174 Wash. 873.
- Wis.—Hatch v. Small, 23 N.W.2d 460, 249 Wis. 183, 166 A.L.R. 746, 64 C.J. p 993 note 3.
95. Ga.—Western & A. R. R. v. Hughes, 142 S.E. 185, 37 Ga.App. 771, affirmed 49 S.Ct. 231, 278 U.S. 496, 73 L.Ed. 473.
- Mich.—Peterson v. Cleary, 241 N.W. 860, 257 Mich. 640.
96. Ind.—Elgin Dairy Co. v. Shepherd, 108 N.E. 234, 183 Ind. 466.
97. U.S.—Miles v. Pennsylvania R. Co., 3 C.A.111, 182 F.2d 411.
- Cal.—Abney v. City and County of San Francisco, 252 P.2d 654, 115 Cal.App.2d 506—Taylor v. Luxor Cab Co., 246 P.2d 45, 112 Cal.App.2d 46.
- D.C.—Hecht Co. v. Jacobsen, 180 F.2d 13, 86 U.S.App.D.C. 81.
- Ill.—Casey v. City of Chicago, 189 Ill.App. 188.
- Iowa.—City of Des Moines v. Barnes, 30 N.W.2d 170, 238 Iowa 1192.
- Mass.—Sluckus v. Fraktman, 77 N.E. 2d 393, 322 Mass. 379.
- Mo.—Killinger v. Kansas City Public Service Co., 259 S.W.2d 391.
98. Cal.—McNulty v. Southern Pac. Co., 216 P.2d 534, 96 Cal.App.2d 841.
99. Ga.—Spalding Lumber Co. v. Hemphill, 47 S.E.2d 514, 77 Ga. App. 1.
- Ill.—Kancousis v. Lasham Cartage Co., 76 N.E.2d 239, 332 Ill.App. 525.
1. Cal.—Popejoy v. Hannon, 231 P.2d 484, 37 Cal.2d 159—Johnston v. Long, 181 P.2d 645, 30 Cal.2d 54—Wilson v. Kopp, 250 P.2d 166, 114 Cal.App.2d 198.
2. Ind.—Garner v. Morgan, 183 N.E. 916, 98 Ind.App. 461.
- Iowa.—Young v. Jacobsen Bros., 258 N.W. 104, 219 Iowa 483, 64 C.J. p 993 note 7.
3. Ga.—Atlantic Coast Line R. Co. v. Thomas, 64 S.E.2d 301, 83 Ga. App. 477—Spalding Lumber Co. v. Hemphill, 47 S.E.2d 514, 77 Ga. App. 1.
- Mo.—Killinger v. Kansas City Public Service Co., 259 S.W.2d 391.
- Va.—Virginia Transit Co. v. Durham, 59 S.E.2d 58, 190 Va. 979.
- 64 C.J. p 993 note 8.
4. Ala.—McGough Bakeries Corp. v. Reynolds, 35 So.2d 332, 260 Ala. 592.
- Cal.—Gordon v. Aztec Brewing Co., 203 P.2d 522, 33 Cal.2d 514—Johnston v. Long, 181 P.2d 645, 30 Cal.2d 54—Cope v. Davison, 180 P.2d 873, 30 Cal.2d 193, 171 A.L.R. 667—Commercial Union Assur. Co. v. Pacific Gas & Electric Co., 31 P.2d 793, 220 Cal. 515—Kettman v. Levine, 253 P.2d 102, 115 Cal.App.2d 844—Taylor v. Luxor Cab Co., 246 P.2d 45, 112 Cal.App.2d 46—Freeman v. Nickerson, 174 P.2d 688, 77 Cal.App.2d 40—Ellinwood v. McCoy, 47 P.2d 796, 8 Cal.App.2d 590—Withey v. Hammond Lumber Co., 35 P.2d 1080, 140 Cal.App. 587.
- Fla.—Seaboard Air Line R. Co. v. Haynes, 47 So.2d 324.
- Ga.—Central of Georgia Ry. Co. v. Mann, 173 S.E. 180, 48 Ga.App. 668.
- Ill.—Harsh v. Illinois Terminal R. Co., 114 N.E.2d 901, 351 Ill.App. 272—Roy v. Chicago Motor Coach Co., 102 N.E.2d 752, 345 Ill.App. 298—Theodosia v. Keeshin Motor Exp. Co., 92 N.E.2d 794, 341 Ill. App. 8—Love v. Consumers Petroleum Co., 88 N.E.2d 501, 338 Ill.App. 665.
- Ind.—McCague v. New York, C. & St. L. R. Co., 71 N.E.2d 569, 225 Ind. 85, rehearing denied 73 N.E.2d 49, 225 Ind. 85—Nepsha v. Wozniak, 92 N.E.2d 734, 120 Ind.App. 362—H. E. McGonigal, Inc. v. Etherington, 79 N.E.2d 777, 118 Ind.App. 622.
- Kan.—Flaharty v. Reed, 225 P.2d 98, 170 Kan. 215.
- Ky.—Henderson v. Watson, 262 S.W. 2d 811—Fitzwater v. Cincinnati N. & C. R. Co., 234 S.W.2d 186, 314 Ky. 157—Southeastern Greyhound Lines v. Webb, 230 S.W.2d 99, 313 Ky. 71.
- Mich.—Elias v. Hess, 41 N.W.2d 884, 327 Mich. 323.
- Miss.—City of Laurel v. Hutto, 70 So. 2d 605—McMinn v. Lilly, 60 So.2d 603, 215 Miss. 193—Wilburn v. Gordon, 45 So.2d 844, 209 Miss. 27.
- Mo.—Nelson v. Tayan, 265 S.W.2d 409—Purkert v. Steele Undertaking Co., App., 63 S.W.2d 509.
- Mont.—Fulton v. Chouteau County Farmers' Co., 37 P.2d 1025, 98 Mont. 48.
- Ohio.—Deckant v. City of Cleveland, 99 N.E.2d 609, 155 Ohio St. 498.
- Tenn.—Carman v. Huff, 227 S.W.2d 780, 32 Tenn.App. 687.
- Wash.—Hutton v. Martin, 252 P.2d

curate,<sup>5</sup> abstract,<sup>6</sup> misleading,<sup>7</sup> confusing,<sup>8</sup> vague,<sup>9</sup> ing,<sup>18</sup> or an instruction which is too broad<sup>14</sup> or too ambiguous,<sup>10</sup> indefinite,<sup>11</sup> obscure,<sup>12</sup> or conflict-narrow,<sup>15</sup> or an instruction which is not applicable

- 581, 41 Wash.2d 780—Hanks v. Landert, 223 P.2d 443, 37 Wash.2d 293, 30 A.L.R.2d 1012.  
64 C.J. p 994 note 9.
5. Cal.—Taylor v. Luxor Cab Co., 246 P.2d 45, 112 Cal.App.2d 46.  
Ga.—Elbertson & E. R. Co. v. Campbell, 167 S.E. 215, 46 Ga.App. 203.  
Idaho.—Burns v. Getty, 24 P.2d 31, 53 Idaho 347.  
Ky.—Fitzwater v. Cincinnati, N. & C. R. Co., 234 S.W.2d 186, 314 Ky. 157.  
Utah.—In re Wimmer's Estate, 182 P.2d 119, 111 Utah 444.
6. U.S.—Pryor v. Strawn, C.C.A.Neb., 73 F.2d 595.  
Cal.—Benton v. Douglas, 187 P.2d 469, 82 Cal.App.2d 784.  
Ind.—Montgomery-Ward & Co. v. Wooley, 94 N.E.2d 677, 121 Ind.App. 60.  
Mo.—Killinger v. Kansas City Public Service Co., 259 S.W.2d 391—Winters v. Terminal R. Ass'n of St. Louis, 252 S.W.2d 380, 363 Mo. 606 —Eller v. Crowell, 238 S.W.2d 319 —Hilton v. Thompson, 227 S.W.2d 675, 360 Mo. 177—Benham v. McCoy, 213 S.W.2d 914—Corbett v. Terminal R. Ass'n of St. Louis, 82 S.W.2d 97, 336 Mo. 972, applying Illinois law—Riner v. Riek, App., 57 S.W.2d 724.
7. Ala.—McGough Bakeries Corp. v. Reynolds, 35 So.2d 332, 250 Ala. 592.  
Cal.—Nelson v. Porterville Union High School Dist., 254 P.2d 945, 117 Cal.App.2d 96—Taylor v. Luxor Cab Co., 246 P.2d 45, 112 Cal.App.2d 46 —Trelut v. Kazarian, 243 P.2d 104, 110 Cal.App.2d 506—Lundin v. Shumate's Pharmacy, 221 P.2d 260, 98 Cal.App.2d 817—Benton v. Douglas, 187 P.2d 469, 82 Cal.App.2d 784—Halaminsky v. Nelson, 42 P.2d 676, 5 Cal.App.2d 287—Chandler v. Benafel, 39 P.2d 890, 3 Cal.App.2d 368 —Walling v. Rugen, 39 P.2d 827, 3 Cal.App.2d 471—Guinon v. Webster, 22 P.2d 231, 132 Cal.App.2d —Benf v. Abrons, 19 P.2d 523, 130 Cal.App. 206.  
Ga.—Sammons v. Webb, 71 S.E.2d 832, 86 Ga.App. 382—Atlantic Coast Line R. Co. v. Thomas, 64 S.E.2d 301, 83 Ga.App. 477—Spalding Lumber Co. v. Hemphill, 47 S.E.2d 514, 77 Ga.App. 1.  
Ill.—Phillips v. Decatur Checker Cab Co., 94 N.E.2d 554, 342 Ill.App. 157—McMillan v. McLane, 88 N.E.2d 114, 338 Ill.App. 514—Wilke v. Moll, 86 N.E.2d 589, 338 Ill.App. 6 —Meng v. Lucash, 69 N.E.2d 367, 829 Ill.App. 512.
- Ind.—Elgin, J. & E. Ry. Co. v. Scherer, 98 N.E.2d 369, 121 Ind.App. 477—H. E. McGonigal, Inc. v. Ethington, 79 N.E.2d 777, 118 Ind. App. 622.  
Iowa.—City of Des Moines v. Barnes, 30 N.W.2d 170, 238 Iowa 1192—Azeltine v. Lutterman, 254 N.W. 854, 218 Iowa 675.  
Ky.—Southeastern Greyhound Lines v. Webb, 230 S.W.2d 99, 313 Ky. 71.  
Mass.—Partridge v. United Elastic Corporation, 192 N.E. 460, 288 Mass. 138.  
Mich.—Alley v. Klotz, 31 N.W.2d 816, 320 Mich. 521.  
Mo.—Evinger v. Thompson, 265 S.W.2d 726—Nelson v. Tayon, 265 S.W.2d 409—Winters v. Terminal R. Ass'n of St. Louis, 252 S.W.2d 380, 363 Mo. 606—Hilton v. Thompson, 227 S.W.2d 675, 360 Mo. 177—Hines v. W. U. Tel. Co., 217 S.W.2d 482, 358 Mo. 782—Graham v. Thompson, 212 S.W.2d 770, 357 Mo. 1133, certiorari denied Kansas City Terminal R. Co. v. Thompson, 69 S.Ct. 166, 335 U.S. 870, 93 L.Ed. 414—Corbett v. Terminal R. Ass'n of St. Louis, 82 S.W.2d 97, 336 Mo. 972, applying Illinois law—Rowe v. Kansas City Public Service Co., App., 248 S.W.2d 445—Goggin v. Schoening, App., 199 S.W.2d 87—Burrow v. St. Louis Public Service Co., App., 79 S.W.2d 478—Smith v. Kansas City Public Service Co., 56 S.W.2d 838, 227 Mo.App. 675.  
Mont.—Batchoff v. Crane, 172 P.2d 308, 119 Mont. 152—Safransky v. City of Helena, 39 P.2d 644, 98 Mont. 456.  
Neb.—Pierson v. Jensen, 33 N.W.2d 462, 150 Neb. 86—Blanchard v. Lawson, 27 N.W.2d 217, 148 Neb. 299.  
Okla.—H. F. Wilcox Oil & Gas Co. v. Jamison, 190 P.2d 807, 199 Okl. 691.  
Tenn.—D. M. Rose & Co. v. Snyder, 206 S.W.2d 897, 185 Tenn. 499.  
Va.—Dey v. Virginia Transit Co., 47 S.E.2d 552, 187 Va. 635.  
Wash.—Adkisson v. City of Seattle, 258 P.2d 461, 42 Wash.2d 676.  
64 C.J. p 994 note 10.
8. U.S.—Gibson v. Pennsylvania R. Co., C.A.Pa., 204 F.2d 924—Sanders v. Glenshaw Glass Co., C.A.Pa., 204 F.2d 436, certiorari denied 74 S.Ct. 278, 346 U.S. 916, 98 L.Ed. — — — — — Gibson v. International Freightling Corp., C.A.Pa., 173 F.2d 591, certiorari denied 70 S.Ct. 78, 338 U.S. 832, 94 L.Ed. 507, rehearing denied 70 S.Ct. 157, 338 U.S. 882, 94 L.Ed. 541.  
Cal.—Chandler v. Benafel, 39 P.2d 890, 3 Cal.App.2d 368.
- Ga.—Atlantic Coast Line R. Co. v. Thomas, 64 S.E.2d 301, 83 Ga.App. 477.  
Ill.—Wilke v. Moll, 86 N.E.2d 589, 338 Ill.App. 6.  
Mich.—Severson v. Family Creamery Co., 256 N.W. 348, 268 Mich. 348.  
Mo.—Winters v. Terminal R. Ass'n of St. Louis, 252 S.W.2d 380, 363 Mo. 606—Hilton v. Thompson, 227 S.W.2d 675, 360 Mo. 177—Rowe v. Kansas City Public Service Co., App., 248 S.W.2d 445.  
Neb.—Pierson v. Jensen, 33 N.W.2d 462, 150 Neb. 86—Blanchard v. Lawson, 27 N.W.2d 217, 148 Neb. 299.  
Wash.—Harris v. Holroyd, 207 P.2d 765, 33 Wash.2d 915.  
64 C.J. p 994 note 11.  
9. Va.—Southern Ry. Co. v. May, 137 S.E. 493, 147 Va. 542.  
64 C.J. p 994 note 12.
10. Cal.—Wilson v. Kopp, 250 P.2d 166, 114 Cal.App.2d 198—Connor v. Pacific Greyhound Lines, 232 P.2d 500, 104 Cal.App.2d 746.  
Mich.—Daigle v. Berkowitz, 262 N.W. 552, 273 Mich. 140.  
Mo.—Evinger v. Thompson, 265 S.W.2d 726—Higgins v. Terminal R. Ass'n of St. Louis, 241 S.W.2d 380, 362 Mo. 264.  
64 C.J. p 994 note 13.
11. Mo.—Evinger v. Thompson, 265 S.W.2d 726—Higgins v. Terminal R. Ass'n of St. Louis, 241 S.W.2d 380, 362 Mo. 264—Larey v. Missouri-Kansas-Texas R. Co., 64 S.W.2d 681, 333 Mo. 949—Borowski v. Loose-Wiles Biscuit Co., App., 229 S.W. 424.
12. Mo.—Ward v. Scott County Milling Co., App., 47 S.W.2d 250.  
64 C.J. p 994 note 15.
13. U.S.—Sanders v. Glenshaw Glass Co., C.A.Pa., 204 F.2d 436, certiorari denied 74 S.Ct. 278, 346 U.S. 916, 98 L.Ed. — — — — — Ga.—Spalding Lumber Co. v. Hemphill, 47 S.E.2d 514, 77 Ga.App. 1.  
Ind.—Elgin, J. & E. Ry. Co. v. Scherer, 98 N.E.2d 369, 121 Ind.App. 477.  
Ky.—Fitzwater v. Cincinnati, N. & C. R. Co., 234 S.W.2d 186, 314 Ky. 157.  
64 C.J. p 994 note 16.
14. Mo.—Harrison v. St. Louis Public Service Co., App., 251 S.W.2d 348.  
64 C.J. p 994 note 17.
15. Ky.—Ballback's Adm'r v. Boland-Maloney Lumber Co., 208 S.W.2d 940, 306 Ky. 647.  
Wis.—Zutter v. O'Connell, 229 N.W. 74, 200 Wis. 601.

to the pleadings,<sup>16</sup> issues,<sup>17</sup> or evidence,<sup>18</sup> or an instruction which ignores or eliminates issues,<sup>19</sup> theories,<sup>20</sup> or defenses,<sup>21</sup> may be cured by other instructions.

The foregoing rules have been applied to instructions as to the duty or degree of care owed by

particular defendants,<sup>22</sup> such as store owners who are charged with negligence<sup>23</sup> or manufacturers who are charged with negligence with respect to goods manufactured by them.<sup>24</sup> Likewise, these rules have been applied to public corporations such as municipal corporations,<sup>25</sup> and have been applied to

18. Cal.—*Miner v. Dabney-Johnson Oil Corporation*, 28 P.2d 23, 219 Cal. 580.

Ga.—*Western & A. R. R. v. Fowler*, 47 S.E.2d 874, 77 Ga.App. 206. 64 C.J. p 995 note 19.

17. Ga.—*Lamon v. Perry*, 125 S.E. 907, 33 Ga.App. 248.

Ind.—*Montgomery-Ward & Co. v. Wooley*, 94 N.E.2d 677, 121 Ind. App. 60.

18. Cal.—*Hayes v. Richfield Oil Corp.*, 240 P.2d 580, 38 Cal.2d 375—*Miner v. Dabney-Johnson Oil Corporation*, 28 P.2d 23, 219 Cal. 580. Ind.—*Montgomery-Ward & Co. v. Wooley*, 94 N.E.2d 677, 121 Ind. App. 60.

Ky.—*Maupin v. Baker*, 194 S.W.2d 991, 302 Ky. 411. 64 C.J. p 995 note 21.

19. Or.—*Schultz v. Hambach*, 169 P. 2d 882, 179 Or. 107. 64 C.J. p 995 note 22.

20. Mo.—*Whiteaker v. Chicago, R. I. & P. R. Co.*, 160 S.W. 1009, 252 Mo. 438, affirmed 36 S.Ct. 152, 239 U. S. 421, 60 L.Ed. 360.

21. U.S.—*Chesapeake & O. Ry. Co. v. Craft*, C.C.A.Va., 162 F.2d 67. Cal.—*Dodds v. Stellar*, 175 P.2d 607, 77 Cal.App.2d 411.

Tenn.—*D. M. Rose & Co. v. Snyder*, 206 S.W.2d 897, 135 Tenn. 499.

64 C.J. p 995 note 24.

22. U.S.—*Olsen v. Realty Hotel Corp.*, C.A.N.Y., 210 F.2d 785—*Ryan v. United Parcel Service, C. A.N.Y.*, 205 F.2d 362, applying New Jersey law—*Gibson v. International Freight Corp.*, C.A.Pa., 173 F.2d 591, certiorari denied 70 S.Ct. 78, 338 U.S. 832, 94 L.Ed. 507, rehearing denied 70 S.Ct. 157, 338 U.S. 832, 94 L.Ed. 541.

Ala.—*Hjorne v. Louisville & N. R. Co.*, 148 So. 822, 237 Ala. 103.

Ark.—*Spadra Co. v. White*, 66 S.W.2d 1072, 188 Ark. 568.

Cal.—*Hayes v. Richfield Oil Corp.*, 240 P.2d 580, 38 Cal.2d 375—*Popejoy v. Hannon*, 231 P.2d 484, 37 Cal.2d 159—*Johnson v. Long*, 181 P.2d 645, 30 Cal.2d 54—*Timbrell v. Suburban Hospital*, 47 P.2d 737, 4 Cal. 2d 68—*Bates v. Newman*, 264 P.2d 197, 121 Cal.App.2d 800—*Block v. Snyder*, 234 P.2d 52, 105 Cal.App.2d 783—*Pearson v. Tide Water Associated Oil Co.*, App., 223 P.2d 669, hearing dismissed 204 P.2d 99—*Perbost v. San Marino Hall-School for Girls*, 199 P.2d 701, 88 Cal.App. 2d 796—*Dodds v. Stellar*, 175 P.2d

607, 77 Cal.App.2d 411—*Coffey v. Slingerland*, 50 P.2d 830, 9 Cal.App. 2d 731—*Ellinwood v. McCoy*, 47 P. 2d 796, 8 Cal.App.2d 590—*Moffitt v. Ford Motor Co.*, 26 P.2d 661, 135 Cal.App. 7—*Beni v. Abrons*, 19 P.2d 523, 130 Cal.App. 206.

Colo.—*Frazier v. Edwards*, 190 P.2d 125, 117 Colo. 502.

Conn.—*Steinbeck v. Modale*, 90 A.2d 875, 139 Conn. 152—*Annunzio v. Gu-Ta, Inc.*, 179 A. 651, 120 Conn. 114.

Fla.—*Staff v. Soreno Hotel Co.*, 60 So. 2d 28—*Hall v. Holland*, 47 So.2d 889.

Ga.—*Sammons v. Webb*, 71 S.E.2d 832, 86 Ga App. 382—*Morrow v. Johnston*, 68 S.E.2d 906, 85 Ga. App. 261—*Richter v. Atlantic Co.*, 16 S.E.2d 259, 65 Ga.App. 605.

Idaho—*Albrethson v. Carey Val. Reservoir Co.*, 186 P.2d 853, 67 Idaho 529—*Griffin v. Clark*, 42 P.2d 297, 55 Idaho 364.

Ill.—*Gorczyński v. Nugent*, 83 N.E.2d 495, 402 Ill. 147.

Iowa—*Azeltime v. Lutterman*, 254 N. W. 854, 218 Iowa 675.

Mass.—*Whalen v. Shivek*, 93 N.E.2d 393, 326 Mass. 142—*Partridge v. United Elastic Corporation*, 192 N. E. 460, 288 Mass. 138.

Mich.—*Ellas v. Hess*, 41 N.W.2d 884, 327 Mich. 323—*Dalgie v. Berkowitz*, 262 N.W. 652, 273 Mich. 140.

Minn.—*Orchard v. Northwest Airlines*, 51 N.W.2d 645, 236 Minn. 42.

Miss.—*Hornsby v. Logaras*, 49 So.2d 837, 210 Miss. 512.

Mo.—*Evinger v. Thompson*, 265 S.W. 2d 726—*Hines v. W. U. Tel. Co.*, 217 S.W.2d 482, 358 Mo. 783—*Benham v. McCoy*, 213 S.W.2d 914—*Hoelsel v. Chicago, R. I. & P. Ry. Co.*, 85 S.W.2d 126, 337 Mo. 61—*Panke v. Shannon*, App., 207 S.W.2d 854, reversed on other grounds 212 S.W. 2d 792, 357 Mo. 1195—*Mitchell v. Poole*, 68 S.W.2d 833, 229 Mo.App. 1.

Neb.—*O'Dell v. Goodsell*, 41 N.W.2d 123, 152 Neb. 290.

Okl.—*St. Louis-San Francisco Ry. Co. v. Farrell*, 263 P.2d 518—*Mealy-Wolfe Drilling Co. v. Lambert*, 256 P.2d 818, 208 Okl. 624—*Warren Petroleum Corp. v. Helms*, 252 P. 2d 447, 207 Okl. 699—*H. F. Wilcox Oil & Gas Co. v. Jamison*, 190 P.2d 807, 199 Okl. 691.

Tenn.—*D. M. Rose & Co. v. Snyder*, 206 S.W.2d 897, 135 Tenn. 499.

Utah.—*In re Wimmer's Estate*, 182 P. 2d 119, 111 Utah 444.

Va.—*Cartos v. Hartford Accident & Indemnity Co.*, 169 S.E. 594, 160 Va. 505.

Wash.—*Adkisson v. City of Seattle*, 258 P.2d 461, 42 Wash.2d 676—*Rawlins v. Nelson*, 231 P.2d 281. 38 Wash.2d 570—*Melosevich v. Cichy*, 193 P.2d 342, 30 Wash.2d 702—*Fraze v. Western Dairy Products*, 47 P.2d 1037, 182 Wash. 578.

64 C.J. p 995 note 25.

23. Cal.—*Wilson v. Kopp*, 250 P.2d 166, 114 Cal.App.2d 198—*Lundin v. Shumatis Pharmacy*, 221 P.2d 260, 98 Cal.App.2d 817.

D.C.—*Hecht Co. v. Jacobsen*, 180 F.2d 13, 86 U.S.App.D.C. 81.

Ga.—*Southern Grocery Stores v. Cain*, 179 S.E. 128, 50 Ga.App. 629.

Ind.—*Montgomery-Ward & Co. v. Wooley*, 94 N.E.2d 677, 121 Ind. App. 60—*Nepsha v. Wozniak*, 92 N.E.2d 734, 120 Ind. App. 362.

24. U.S.—*Sanders v. Glenshaw Glass Co.*, C.A.Pa., 204 F.2d 436, certiorari denied 74 S.Ct. 278, 346 U.S. 916, 98 L.Ed. —.

Ark.—*Anheuser-Busch, Inc. v. Southard*, 84 S.W.2d 89, 191 Ark. 107.

Cal.—*Gordon v. Aztec Brewing Co.*, 203 P.2d 522, 33 Cal.2d 514—*Kalaish v. Los Angeles Ladder Co.*, 34 P.2d 481, 1 Cal.2d 229.

Kan.—*Morrison v. Kansas City Coca-Cola Bottling Co.*, 263 P.2d 217, 175 Kan. 212.

25. Cal.—*Abney v. City and County of San Francisco*, 252 P.2d 654, 115 Cal.App.2d 506—*Blythe v. City and County of San Francisco*, 188 P.2d 40, 83 Cal.App.2d 125—*Madden v. City and County of San Francisco*, 169 P.2d 425, 74 Cal.App.2d 742.

Iowa.—*City of Des Moines v. Barnes*, 30 N.W.2d 170, 238 Iowa 1192.

Kan.—*Hendren v. Kansas City*, 238 P.2d 510, 172 Kan. 56.

Minn.—*Squillace v. Village of Mountain Iron*, 26 N.W.2d 197, 223 Minn. 8.

Miss.—*City of Laurel v. Hutto*, 70 So.2d 605.

Mo.—*Warren v. Kansas City*, 258 S. W.2d 681—*McCormick v. Kansas City*, 250 S.W.2d 524—*Hines v. W. U. Tel. Co.*, 217 S.W.2d 482, 358 Mo. 782—*Fullerton v. Kansas City, Mo. App.*, 236 S.W.2d 364.

Mont.—*Safransky v. City of Helena*, 39 P.2d 644, 98 Mont. 466.

Ohio.—*Deckant v. City of Cleveland*, 99 N.E.2d 609, 155 Ohio St. 498.

Tenn.—*Llewellyn v. City of Knox*

public corporations such as counties,<sup>26</sup> irrigation districts,<sup>27</sup> and school districts;<sup>28</sup> and to public service corporations such as electric power companies,<sup>29</sup> gas companies,<sup>30</sup> terminal companies,<sup>31</sup> street rail-

roads,<sup>32</sup> interurban railroads,<sup>33</sup> and railroads.<sup>34</sup> These rules have also been applied to the duty or degree of care required of owners or drivers of motor vehicles,<sup>35</sup> including the owners or drivers

- ville, 232 S.W.2d 568, 33 Tenn.App. 632.
- Wash.—Adkisson v. City of Seattle, 258 P.2d 461, 42 Wash.2d 676—Hutton v. Martin, 252 P.2d 581, 41 Wash.2d 780.
26. Cal.—Hill v. Fresno County, 35 P.2d 593, 140 Cal.App. 272.
27. Utah.—Charvoz v. Bonneville Irr. Dist., 235 P.2d 780.
28. Cal.—Reagh v. San Francisco Unified School Dist., 259 P.2d 43, 119 Cal.App.2d 65—Nelson v. Porterville Union High School Dist., 254 P.2d 945, 117 Cal.App.2d 96.
29. Cal.—Commercial Union Assur. Co. v. Pacific Gas & Electric Co., 81 P.2d 793, 220 Cal. 515.
- Wash.—Heber v. Puget Sound Power & Light Co., 208 P.2d 886, 34 Wash.2d 231.
30. Cal.—Commercial Union Assur. Co. v. Pacific Gas & Electric Co., 81 P.2d 793, 220 Cal. 515—Hilson v. Pacific Gas & Electric Co., 21 P.2d 662, 131 Cal.App. 427.
- Ill.—Pappas v. Peoples Gas Light & Coke Co., 113 N.E.2d 585, 350 Ill. App. 541.
31. Mo.—Winters v. Terminal R. Ass'n of St. Louis, 252 S.W.2d 380, 363 Mo. 608—Higgins v. Terminal R. R. Ass'n of St. Louis, 241 S.W.2d 380, 362 Mo. 264—Corbett v. Terminal R. Ass'n of St. Louis, 82 S.W.2d 97, 336 Mo. 972, applying Illinois law.
32. Ind.—Smith v. Mills, 185 N.E. 327, 98 Ind.App. 543.
- Ky.—Fitzwater v. Cincinnati, N. & C. R. Co., 234 S.W.2d 186, 314 Ky. 157.
- Mo.—Killingier v. Kansas City Public Service Co., 259 S.W.2d 391—Lefkowitz v. Kansas City Public Service Co., 242 S.W.2d 530—Davis v. Kansas City Public Service Co., 233 S.W.2d 679, 361 Mo. 61—Drake v. Kansas City Public Service Co., 63 S.W.2d 75, 333 Mo. 520—Rowe v. Kansas City Public Service Co., App., 248 S.W.2d 445—Setser v. St. Louis Public Service Co., App., 209 S.W.2d 746—Greer v. St. Louis Public Service Co., App., 87 S.W.2d 240, followed in 87 S.W.2d 247—Millhouser v. Kansas City Public Service Co., App., 71 S.W.2d 160—Smith v. Kansas City Public Service Co., 56 S.W.2d 838, 227 Mo.App. 675.
- Ohio.—Cincinnati St. Ry. Co. v. Bartsch, 198 N.E. 636, 50 Ohio App. 464.
- Pa.—Gob v. Pittsburgh Rys. Co., 181 A. 489, 320 Pa. 225.
33. Ind.—Walsh Baking Co. v.

- Southern Indiana Gas & Electric Co., 186 N.E. 341, 97 Ind.App. 285.
34. U.S.—Gibson v. Pennsylvania R. Co., C.A.Pa., 204 F.2d 924—Conry v. Baltimore & O. R. Co., C.A.Pa., 195 F.2d 120—Miles v. Pennsylvania R. Co., C.A.Ill., 182 F.2d 411—Robak v. Pennsylvania R. Co., C.A.Pa., 178 F.2d 485—O'Donnell v. Elgin, J. & E. Ry. Co., C.A.Ill., 171 F.2d 973, reversed on other grounds 70 S.Ct. 200, 338 U.S. 384, 94 L.Ed. 187, 16 A.L.R.2d 646, rehearing denied 70 S.Ct. 427, 338 U.S. 945, 94 L.Ed. 583—Thompson v. Camp, C.C.A. Tenn., 163 F.2d 396, certiorari denied 68 S.Ct. 458, 459, 333 U.S. 831, 92 L.Ed. 1116, motion sustained, C.C.A., 167 F.2d 733, certiorari denied 69 S.Ct. 48, 335 U.S. 824, 93 L.Ed. 378—Chesapeake & O. Ry. Co. v. Craft, C.C.A.W.Va., 162 F.2d 67—Zumwalt v. Gardner, C.C.A.Mo., 160 F.2d 238—Helsel v. Pennsylvania R. Co., D.C.N.Y., 84 F.Supp. 296.
- Ala.—Johnson v. Louisville & N. R. Co., 148 So. 822, 227 Ala. 103.
- Cal.—Devaney v. Atchison, T. & S. F. Ry. Co., 27 P.2d 635, 219 Cal. 487—McNulty v. Southern Pac. Co., 216 P.2d 634, 96 Cal.App.2d 841—Smellie v. Southern Pac. Co., 18 P.2d 97, 128 Cal.App. 567, hearing denied, Sup., 19 P.2d 982, 128 Cal.App. 567.
- Fla.—Seaboard Air Line R. Co. v. Haynes, 47 So.2d 324—Florida East Coast Ry. Co. v. Anderson, 148 So. 553, 110 Fla. 290—Atlantic Coast Line R. Co. v. Lamphear, 146 So. 847, 109 Fla. 25.
- Ga.—Atlantic Coast Line R. Co. v. Thomas, 64 S.E.2d 301, 83 Ga.App. 477—Atlantic Coast Line R. Co. v. Dupriest, 59 S.E.2d 767, 81 Ga.App. 773—Western & A. R. v. Fowler, 47 S.E.2d 874, 77 Ga.App. 206—Gay v. Smith, 181 S.E. 129, 61 Ga. App. 615—Atlantic Coast Line R. Co. v. McDonald, 179 S.E. 185, 50 Ga.App. 856, certiorari denied 56 S.Ct. 143, 296 U.S. 621, 80 L.Ed. 441—Central of Georgia Ry. Co. v. Mann, 173 S.E. 180, 48 Ga.App. 668—Western & A. R. v. Bennett, 171 S.E. 187, 47 Ga.App. 629—Elbertson & E. R. Co. v. Campbell, 167 S.E. 215, 46 Ga.App. 203.
- Ill.—Harsh v. Illinois Terminal R. Co., 114 N.E.2d 901, 351 Ill.App. 272—Rouse v. New York, C. & St. L. R. Co., 110 N.E.2d 266, 349 Ill.App. 139—Zydeck v. Chicago & N. W. Ry. Co., 77 N.E.2d 830, 333 Ill.App. 388—Miller v. Baltimore & O. S. W. R. Co., 70 N.E.2d 263, 330 Ill. App. 129.
- Ind.—McCague v. New York, C. &

- St. L. R. Co., 71 N.E.2d 569, 225 Ind. 83, rehearing denied 73 N.E.2d 48, 225 Ind. 83—Elgin, J. & E. Ry. Co. v. Scherer, 98 N.E.2d 369, 121 Ind.App. 477—Chesapeake & O. Ry. Co. v. Boston, 75 N.E.2d 194, 118 Ind.App. 526, order vacated 82 N.E.2d 249, 226 Ind. 582—Pennsylvania R. Co. v. Boyd, 185 N.E. 160, 98 Ind.App. 439.
- Ky.—Stover v. Cincinnati, N. & C. Ry. Co., 67 S.W.2d 484, 252 Ky. 425.
- Miss.—St. Louis-San Francisco Ry. Co. v. Dyson, 43 So.2d 95, 207 Miss. 633—New Orleans & M. E. R. Co. v. Wheat, 160 So. 607, 172 Miss. 524—Columbus & G. R. Co. v. Coleman, 160 So. 277, 172 Miss. 514.
- Mo.—Curtis v. Atchison, T. & S. F. Ry. Co., 253 S.W.2d 789, 363 Mo. 779—Hatfield v. Thompson, 252 S.W.2d 534—Hilton v. Thompson, 227 S.W.2d 675, 360 Mo. 177—Counts v. Thompson, 222 S.W.2d 487, 359 Mo. 485—Graham v. Thompson, 212 S.W.2d 770, 357 Mo. 1133, certiorari denied Kansas City Terminal R. Co. v. Thompson, 69 S.Ct. 166, 335 U.S. 870, 93 L.Ed. 414—Hoelzel v. Chicago, R. I. & P. Ry. Co., 85 S.W.2d 126, 337 Mo. 61—Jenkins v. Wabash Ry. Co., 73 S.W.2d 1002, 335 Mo. 748—Mitchell v. Wabash Ry. Co., 69 S.W.2d 286, 334 Mo. 926—Larey v. Missouri-Kansas-Texas R. Co., 64 S.W.2d 681, 333 Mo. 949—Humphreys v. Chicago, M. St. P. & P. R. Co. App., 83 S.W.2d 586—Sisk v. Chicago, B. & Q. R. Co. App., 67 S.W.2d 830—Christner v. Chicago, R. I. & P. Ry. Co., 64 S.W.2d 752, 228 Mo.App. 220.
- N.D.—Ferderer v. Northern Pac. Ry. Co., 42 N.W.2d 216, 77 N.D. 169.
- Okla.—St. Louis-San Francisco Ry. Co. v. Farrell, 263 P.2d 518.
- S.C.—Little v. Atlantic Coast Line R. Co., 46 S.E.2d 59, 211 S.C. 462.
- Tenn.—Union Traction Co. v. Todd, 64 S.W.2d 28, 16 Tenn.App. 200.
- Va.—Atlantic Coast Line R. Co. v. Bowen, 63 S.E.2d 804, 192 Va. 162—Washington & O. D. R. v. Taylor, 60 S.E.2d 415, 188 Va. 658—Chesapeake & O. Ry. Co. v. Fulham, 41 S.E.2d 54, 185 Va. 908.
35. U.S.—Colas v. Grzegorek, C.A. Ind., 207 F.2d 705—Fryor v. Strawn, C.C.A.Neb., 73 P.2d 595.
- Ala.—McGough Bakeries Corp. v. Reynolds, 35 So.2d 332, 250 Ala. 592.
- Ark.—Davis v. Self, 246 S.W.2d 426, 220 Ark. 129.
- Cal.—Brooks v. E. J. Willig Truck Transp. Co., 255 P.2d 802, 40 Cal.2d 669—Cope v. Davison, 180 P.2d 873, 30 Cal.2d 193, 171 A.L.R. 687—Miller v. Dabney-Johnson Oil Corpora-

- tion, 28 P.2d 23, 219 Cal. 580—Ward v. Read, 25 P.2d 821, 219 Cal. 61—Nelson v. Porterville Union High School Dist., 254 P.2d 945, 113 Cal. App.2d 96—Kettman v. Levine, 253 P.2d 102, 115 Cal.App.2d 844—Hagzett v. Miller, 252 P.2d 997, 115 Cal.App.2d 801—Martens v. Redispuds, Inc., 247 P.2d 605, 113 Cal. App.2d 10—Taylor v. Luxor Cab Co., 246 P.2d 45, 112 Cal.App.2d 46—Trelut v. Kazarian, 243 P.2d 104, 110 Cal.App.2d 506—Faeh v. Union Oil Co. of Cal., 236 P.2d 667, 107 Cal.App.2d 163—Fodler v. Hygelund, 235 P.2d 247, 106 Cal.App.2d 480—Connor v. Pacific Greyhound Lines, 232 P.2d 500, 104 Cal.App.2d 746—Plesno City Lines v. Herman, 217 P.2d 987, 97 Cal.App.2d 366—Woods v. Elitae, 212 P.2d 12, 94 Cal.App.2d 810—Johnson v. Marquis, 209 P.2d 63, 93 Cal.App.2d 341—Benton v. Douglas, 187 P.2d 469, 82 Cal.App.2d 784—Armstrong v. Allen, 171 P.2d 552, 75 Cal.App.2d 514—Powers v. Shelton, 169 P.2d 482, 74 Cal.App.2d 757—Perry v. Piombo, 166 P.2d 888, 73 Cal.App.2d 569—Halaminsky v. Nelson, 42 P.2d 676, 5 Cal.App.2d 287—Everts v. Rosenberg, 41 P.2d 166, 4 Cal.App.2d 500—Chandler v. Benafel, 39 P.2d 892, 3 Cal.App.2d 373—Chandler v. Benafel, 39 P.2d 890, 3 Cal.App.2d 368—Walling v. Rugen, 39 P.2d 827, 3 Cal.App.2d 471—Maus v. Scavenger Protective Ass'n, 39 P.2d 209, 2 Cal.App.2d 624—Evans v. Mitchell, 38 P.2d 437, 2 Cal.App.2d 702—Hughes v. Quackenbush, 37 P.2d 99, 1 Cal.App.2d 349—Whitely v. Hammond Lumber Co., 35 P.2d 1080, 140 Cal.App. 587—Hill v. Fresno County, 35 P.2d 593, 140 Cal.App. 272—Fleming v. Flick, 35 P.2d 210, 140 Cal.App. 14—Gibson v. Easley, 32 P.2d 983, 138 Cal.App. 803—Silveira v. Siegfried, 26 P.2d 666, 135 Cal.App. 218—Day v. Pickwick Stages System, 25 P.2d 16, 134 Cal.App. 92—Guinon v. Webster, 22 P.2d 231, 132 Cal.App. 29—Thompson v. Dentman, 21 P.2d 1009, 131 Cal.App. 680.
- Colo.—Stahl v. Cooper, 190 P.2d 891, 117 Colo. 468.
- Conn.—Cavliote v. Shea, 165 A. 788, 116 Conn. 569—Barbieri v. Pandisico, 163 A. 469, 116 Conn. 48—Danehy v. Metz, 100 A.2d 843, 140 Conn. 376.
- Ga.—Harmon v. Givens, 77 S.E.2d 223, 88 Ga.App. 629—Wilson v. Harrell, 75 S.E.2d 436, 87 Ga.App. 793—Moffett v. McCurry, 67 S.E.2d 807, 84 Ga.App. 853—Central Truckaway System v. Harrigan, 53 S.E.2d 186, 79 Ga.App. 117—Spalding Lumber Co. v. Hemphill, 47 S.E.2d 514, 77 Ga.App. 1—McLendon v. Beddingfield, 38 S.E.2d 69, 73 Ga.App. 756—Hodges v. Peek, 179 S.E. 129, 50 Ga.App. 631—Harper v. Donalson, 176 S.E. 535, 49 Ga.App. 608.
- Idaho.—Moore v. Harland, 233 P.2d 429, 71 Idaho 376—Willi v. Schaefer Hitchcock Co., 25 P.2d 167, 53 Idaho 367—Burns v. Getty, 24 P.2d 31, 53 Idaho 347.
- Ill.—Cook v. Weyant, 105 N.E.2d 310, 346 Ill.App. 465—Roy v. Chicago Motor Coach Co., 102 N.E.2d 752, 245 Ill.App. 296—Levanti v. Dorris, 99 N.E.2d 398, 343 Ill.App. 355—Phillips v. Decatur Checker Cab Co., 94 N.E.2d 554, 342 Ill.App. 157—Theodosia v. Keeshin Motor Exp. Co., 92 N.E.2d 794, 341 Ill.App. 8—McMillian v. McLane, 88 N.E.2d 114, 338 Ill.App. 514—Wilke v. Moll, 86 N.E.2d 589, 338 Ill.App. 6—Smith v. Seelbach, 84 N.E.2d 684, 336 Ill.App. 480—Kanousis v. Lasham Cartage Co., 76 N.E.2d 239, 332 Ill.App. 525—Meng v. Lucash, 69 N.E.2d 367, 329 Ill.App. 512—Luke v. Marion, 271 Ill.App. 48.
- Ind.—Neuweit v. Roush, 85 N.E.2d 506, 119 Ind.App. 481—H. E. McGonigal, Inc. v. Etherington, 79 N. E.2d 777, 118 Ind.App. 622—Garner v. Morgan, 183 N.E. 916, 98 Ind. App. 461.
- Iowa.—Engle v. Nelson, 263 N.W. 505, 220 Iowa 771—Shutes v. Weeks, 262 N.W. 118, 220 Iowa 616—Young v. Jacobsen Bros., 258 N.W. 104, 219 Iowa 483—Fry v. Smith, 253 N.W. 147, 217 Iowa 1295—Slesseger v. Puth, 248 N.W. 352, 216 Iowa 916.
- Kan.—Flaharty v. Reed, 225 P.2d 98, 170 Kan. 215—Sponable v. Thomas, 33 P.2d 721, 139 Kan. 710.
- Ky.—Henderson v. Watson, 262 S.W.2d 811—Ballback's Adm'r v. Boland—Maloney Lumber Co., 208 S.W.2d 940, 306 Ky. 647—Maupin v. Baker, 194 S.W.2d 991, 302 Ky. 411.
- Mass.—Hall v. Shain, 197 N.E. 437, 291 Mass. 506.
- Mich.—Vandenberg v. Prosek, 56 N.W.2d 227, 335 Mich. 382—Alley v. Klotz, 31 N.W.2d 816, 320 Mich. 521—Severson v. Family Creamery Co., 256 N.W. 848, 268 Mich. 348.
- Minn.—Peterson v. Lang, 58 N.W.2d 609—Swanson v. La Fontaine, 57 N.W.2d 262, 238 Minn. 460.
- Miss.—Continental Southern Lines v. Klaas, 65 So.2d 575, 217 Miss. 795, suggestion of error overruled 65 So.2d 833, 217 Miss. 795, followed in 65 So.2d 596, 217 Miss. 795, suggestion of error overruled 65 So.2d 834, 217 Miss. 795, and suggestion of error dismissed and motion to set aside denied 67 So.2d 256, 217 Miss. 795—Peerless Supply Co. v. Jeter, 65 So.2d 240—Ford v. Gray, 65 So.2d 230, 217 Miss. 882—McMinn v. Lilly, 60 So.2d 603, 215 Miss. 193—Bridges v. Crapps, 58 So.2d 364, 214 Miss. 126—American Creosote Works v. Rose Bros., 51 So.2d 220, 211 Miss. 173—Wilburn v. Gordon, 45 So.2d 844, 209 Miss. 27—Wallace v. Bil-
- lups, 33 So.2d 819, 203 Miss. 853—Marx v. Berry, 168 So. 61, 176 Miss. 1—Chadwick v. Bush, 163 So. 823, 174 Miss. 75—Russell v. Williams, 150 So. 528, 168 Miss. 181, suggestion of error overruled 181 So. 372, 168 Miss. 181—Green v. Maddox, 149 So. 882, 168 Miss. 171, suggestion of error overruled 151 So. 160, 168 Miss. 171, applying Louisiana law.
- Mo.—Nelson v. Tayon, 265 S.W.2d 409—Eller v. Crowell, 238 S.W.2d 310—Goggin v. Schoening, App., 199 S.W.2d 87—Greer v. St. Louis Public Service Co., App., 87 S.W.2d 240, followed in 87 S.W.2d 247—Dean v. Mocer, App., 87 S.W.2d 218—Roman v. Hendricks, App., 80 S.W.2d 907—Pappas Pie & Baking Co. v. Stroh Bros. Delivery Co., App., 67 S.W.2d 793—Purkett v. Steele Undertaking Co., App., 63 S.W.2d 509—Mont.—Gobel v. Rinlo, 200 P.2d 700, 122 Mont. 235—Batchoff v. Craney, 172 P.2d 308, 119 Mont. 152—Fulton v. Chouteau County Farmers' Co., 37 P.2d 1025, 98 Mont. 48.
- Neb.—Plumb v. Burnham, 36 N.W.2d 612, 151 Neb. 129—Piersen v. Jensen, 33 N.W.2d 462, 150 Neb. 86—Blanchard v. Lawson, 27 N.W.2d 217, 148 Neb. 299.
- N.H.—Dimock v. Lussier, 163 A. 500, 86 N.H. 84.
- N.J.—McStay v. Przychocki, 81 A.2d 761, 7 N.J. 456—O'Keefe v. Ripp, 166 A. 197, 110 N.J.Law 555.
- N.C.—Atlantic Coast Line R. Co. v. McLean Trucking Co., 78 S.E.2d 159, 238 N.C. 422.
- N.D.—Reuter v. Olson, 59 N.W.2d 830.
- Ohio.—Petibone v. McKinnon, 183 N.E. 786, 125 Ohio St. 606—Greenawalt v. Yuhas, 84 N.E.2d 221, 83 Ohio App. 426—Dunleavy v. De Frangia, App., 82 N.E.2d 288—Wagner v. Gentile, 184 N.E. 246, 44 Ohio App. 24.
- Okla.—Elam v. Loyd, 204 P.2d 280, 201 Okl. 222.
- Or.—Valdin v. Holteen, 260 P.2d 504, 199 Or. 134—Waller v. Hill, 190 P.2d 147, 183 Or. 53—Schultz v. Hambach, 169 P.2d 882, 179 Or. 107—Monner v. Starker, 26 P.2d 1097, 145 Or. 168.
- S.C.—Durant v. Stuckey, 70 S.E.2d 473, 221 S.C. 342.
- Tenn.—Carman v. Huff, 227 S.W.2d 780, 32 Tenn.App. 687.
- Utah.—Galarowicz v. Ward, 230 P.2d 576—Mitchell v. Arrowhead Freight Lines, 214 P.2d 620, 117 Utah 224—Kawaguchi v. Bennett, 189 P.2d 109, 112 Utah 442.
- Va.—Dey v. Virginia Transit Co., 47 S.E.2d 552, 187 Va. 635—Smith v. Clark, 46 S.E.2d 21, 187 Va. 181—Gale v. Wilber, 175 S.E. 739, 163 Va. 211.
- Wash.—Hutton v. Martin, 252 P.2d 581, 41 Wash.2d 780—Hanks v. Landert, 223 P.2d 443, 37 Wash.2d 293, 30 A.L.R.2d 1012—Harris v. Hol-

of such motor vehicles as taxicabs<sup>36</sup> and motor-buses.<sup>37</sup> Finally, these rules have been applied to instructions with respect to questions of the law

of the road,<sup>38</sup> and liability for acts of agents or employees,<sup>39</sup> as well as to questions relating to

royd, 207 P.2d 765, 33 Wash.2d 915  
—Melosevich v. Cichy, 193 P.2d  
342, 30 Wash.2d 702—Bissell v. Se-  
attle Vancouver Motor Freight, 168  
P.2d 390, 25 Wash.2d 68—Deve-  
reaux v. Blanchard, 26 P.2d 82,  
174 Wash. 673.  
Wis.—Hatch v. Smail, 23 N.W.2d 460,  
249 Wis. 183, 166 A.L.R. 746.  
36. Ark.—Davis v. Self, 246 S.W.2d  
426, 220 Ark. 129.  
Cal.—Taylor v. Luxor Cab Co., 246  
P.2d 45, 112 Cal.App.2d 46.  
Ga.—Harmon v. Givens, 77 S.E.2d  
223, 88 Ga.App. 629—Atlantic Coast  
Line R. Co. v. Thomas, 64 S.E.2d  
301, 83 Ga.App. 477.  
Ill.—Roy v. Chicago Motor Coach Co.,  
102 N.E.2d 752, 345 Ill.App. 296—  
Phillips v. Decatur Checker Cab  
Co., 94 N.E.2d 554, 342 Ill.App. 157  
—Theodosis v. Keeshin Motor Exp.  
Co., 92 N.E.2d 794, 341 Ill.App. 8.  
Md.—West v. Belle Isle Cab Co., 100  
A.2d 17, 203 Md. 244.  
Miss.—Ford v. Gray, 65 So.2d 230,  
217 Miss. 882.  
37. Cal.—Connor v. Pacific Grey-  
hound Lines, 232 P.2d 500, 104 Cal.  
App.2d 746—Dodge v. San Diego  
Elec. Ry. Co., 208 P.2d 37, 92 Cal.  
App.2d 759—Root v. Pacific Grey-  
hound Lines, 190 P.2d 48, 84 Cal.  
App.2d 135.  
Ill.—Roy v. Chicago Motor Coach Co.,  
102 N.E.2d 752, 345 Ill.App. 296.  
Ind.—Redd v. Indianapolis Rys., 97 N.  
E.2d 501, 121 Ind.App. 472.  
Ky.—Southeastern Greyhound Lines  
v. Webb, 230 S.W.2d 99, 313 Ky. 71  
—Ken-Ten Coach Lines v. Siler,  
197 S.W.2d 466, 303 Ky. 263.  
Miss.—Continental Southern Lines v.  
Klaas, 65 So.2d 575, 217 Miss. 795,  
suggestion of error overruled 65 So.  
2d 833, 217 Miss. 795, followed in  
65 So.2d 834, 217 Miss. 795, sugges-  
tion of error overruled 65 So.2d 596,  
217 Miss. 795, suggestion of error  
dismissed and motion denied 67 So.  
2d 256, 217 Miss. 795.  
Mo.—McDonnell v. St. Louis Public  
Service Co., 249 S.W.2d 412—Bea-  
han v. St. Louis Public Service Co.,  
237 S.W.2d 105, 361 Mo. 807—Neely  
v. Kansas City Public Service Co.,  
App., 252 S.W.2d 88—Harrison v.  
St. Louis Public Service Co., App.,  
251 S.W.2d 348—Buwov v. St. Lou-  
is Public Service Co., App., 79 S.W.  
2d 478.  
Mont.—Rose v. Intermountain  
Transp. Co., 267 P.2d 122.  
Ok.—Johnson v. Santa Fe Trail  
Transp. Co., 244 P.2d 576, 206 Okl.  
455—Oklahoma Ry. Co. v. Wilson,  
231 P.2d 688, 204 Okl. 488.  
R.I.—Burke v. United Electric Rys.  
Co., 83 A.2d 88, 79 R.I. 50.  
Tenn.—Southern Coach Lines v. Had-

dock, 194 S.W.2d 347, 29 Tenn.App.  
132—Tennessee Coach Co. v. Young,  
80 S.W.2d 107, 18 Tenn.App. 592.  
Va.—Virginia Transit Co. v. Durham,  
59 S.E.2d 58, 190 Va. 979—Dey v.  
Virginia Transit Co., 47 S.E.2d 552,  
187 Va. 635.  
38. U.S.—Ryan v. United Parcel  
Service, C.A.N.Y., 205 F.2d 362, ap-  
plying New Jersey law.  
Ala.—McGough Bakeries Corp. v.  
Reynolds, 35 So.2d 332, 250 Ala. 592.  
Ark.—Davis v. Self, 246 S.W.2d 426,  
220 Ark. 129.  
Cal.—Hazelett v. Miller, 252 P.2d 997,  
115 Cal.App.2d 801—Faeh v. Union  
Oil Co. of Cal., 236 P.2d 667, 107  
Cal.App.2d 163—Woods v. Eltze, 212  
P.2d 12, 94 Cal.App.2d 910—Blythe  
v. City and County of San Fran-  
cisco, 188 P.2d 40, 83 Cal.App.2d  
125—Benton v. Douglas, 187 P.2d  
469, 82 Cal.App.2d 784—Armstrong  
v. Allen, 171 P.2d 552, 75 Cal.App.2d  
514—Coffey v. Slingerland, 50 P.2d  
830, 9 Cal.App.2d 731—Everts v.  
Rosenberg, 41 P.2d 166, 4 Cal.App.  
2d 500—Evans v. Mitchell, 38 P.2d  
437, 2 Cal.App.2d 702—Hill v. Fres-  
no County, 35 P.2d 593, 140 Cal.  
App. 272—Fleming v. Flick, 35 P.2d  
210, 140 Cal.App. 14—Thompson v.  
Dentman, 21 P.2d 1009, 131 Cal.  
App. 680.  
Conn.—Daneyh v. Metz, 100 A.2d 843,  
140 Conn. 376—Barbieri v. Pandis-  
cio, 163 A. 469, 116 Conn. 48.  
Ga.—Harmon v. Givens, 77 S.E.2d 223,  
88 Ga.App. 629—Spalding Lumber  
Co. v. Hemphill, 47 S.E.2d 514, 77  
Ga.App. 1—Harper v. Donaldson, 176  
S.E. 535, 49 Ga.App. 608.  
Idaho.—Willi v. Schaefer Hitchcock  
Co., 25 P.2d 167, 53 Idaho 367.  
Ill.—Roy v. Chicago Motor Coach Co.,  
102 N.E.2d 752, 345 Ill.App. 296—  
Theodosis v. Keeshin Motor Exp.  
Co., 92 N.E.2d 794, 341 Ill.App. 8.  
Ind.—H. E. McGonigal, Inc. v. Ether-  
ington, 79 N.E.2d 777, 118 Ind.App.  
622.  
Iowa.—Engle v. Nelson, 263 N.W.  
505, 220 Iowa 771—Shutes v.  
Weeks, 262 N.W. 518, 220 Iowa 616  
—Fry v. Smith, 253 N.W. 147, 217  
Iowa 1295.  
Kan.—Sponable v. Thomas, 33 P.2d  
721, 139 Kan. 710.  
Ky.—Ballback's Adm'r v. Boland-Ma-  
loney Lumber Co., 208 S.W.2d 940,  
306 Ky. 647.  
Mich.—Vandenberg v. Prosek, 56 N.  
W.2d 227, 335 Mich. 382—Alley v.  
Klotz, 31 N.W.2d 816, 320 Mich. 521.  
Minn.—Peterson v. Lang, 58 N.W.2d  
609.  
Miss.—Continental Southern Lines v.  
Klaas, 65 So.2d 575, 217 Miss. 795,  
suggestion of error overruled 65  
So.2d 833, 217 Miss. 795, followed

in 65 So.2d 834, 217 Miss. 795, sug-  
gestion of error overruled 65 So.2d  
596, 217 Miss. 795, suggestion of  
error dismissed and motion denied  
67 So.2d 256, 217 Miss. 795—Ford  
v. Gray, 65 So.2d 230, 217 Miss. 882  
—McMinn v. Lilly, 66 So.2d 603, 215  
Miss. 193—American Creosote  
Works v. Rose Bros., 51 So.2d 200,  
211 Miss. 173—Chadwick v. Bush,  
163 So. 823, 174 Miss. 75.  
Neb.—Peake v. Omaha Cold Storage  
Co., 64 N.W.2d 470, 158 Neb. 676—  
Pierson v. Jensen, 33 N.W.2d 462,  
150 Neb. 86.  
N.D.—Reuter v. Olson, 59 N.W.2d 830,  
Ohio.—Greenawalt v. Yuhas, 84 N.E.  
2d 221, 83 Ohio App. 426.  
Or.—Valdin v. Holten, 260 P.2d 504,  
199 Or. 134—Waller v. Hill, 190 P.  
2d 147, 183 Or. 53—Schultz v. Ham-  
bach, 169 P.2d 852, 179 Or. 107.  
S.C.—Oglesby v. Rhea, 117 S.E. 303,  
124 S.C. 57.  
Tenn.—Southern Coach Lines v. Had-  
dock, 194 S.W.2d 347, 29 Tenn.App.  
132.  
Va.—Gale v. Wilber, 175 S.E. 739, 163  
Va. 211.  
39. U.S.—Ryan v. United Parcel  
Service, C.A.N.Y., 205 F.2d 362, ap-  
plying New Jersey law.  
Ala.—McGough Bakeries Corp. v.  
Reynolds, 35 So.2d 332, 250 Ala. 592  
—Johnson v. Louisville & N. R.  
Co., 143 So. 822, 227 Ala. 103.  
Ark.—Davis v. Self, 246 S.W.2d 426,  
220 Ark. 123.  
Cal.—Tumbrell v. Suburban Hospital,  
47 P.2d 737, 4 Cal.2d 68—Comm-  
ercial Union Assur. Co. v. Pacific Gas  
& Electric Co., 31 P.2d 793, 220 Cal.  
515—Miner v. Dabney-Johnson Oil  
Corporation, 28 P.2d 23, 219 Cal.  
580—Martens v. Redl-Spuds, Inc.,  
247 P.2d 605, 113 Cal.App.2d 10—  
Taylor v. Luxor Cab Co., 246 P.2d  
45, 112 Cal.App.2d 46—Trelut v.  
Kazarian, 243 P.2d 104, 110 Cal.  
App.2d 506—Faeh v. Union Oil Co.  
of Cal., 236 P.2d 667, 107 Cal.App.  
2d 163—Fiedler v. Hysgeland, 235 P.  
2d 247, 106 Cal.App.2d 480—Connor  
v. Pacific Greyhound Lines, 232  
P.2d 500, 104 Cal.App.2d 746—Per-  
ry v. Piombo, 166 P.2d 888, 73 Cal.  
App.2d 569—Coffey v. Slingerland,  
50 P.2d 830, 9 Cal.App.2d 731—  
Chandler v. Benafel, 39 P.2d 890, 3  
Cal.App.2d 368—Walling v. Rugen,  
39 P.2d 827, 3 Cal.App.2d 471—  
Maus v. Scavenger Protective  
Ass'n, 39 P.2d 209, 2 Cal.App.2d 624  
—Withey v. Hammond Lumber Co.,  
35 P.2d 1080, 140 Cal.App. 587.  
Ga.—Harmon v. Givens, 77 S.E.2d  
223, 88 Ga.App. 629—Wilson v. Har-  
rell, 75 S.E.2d 486, 87 Ga.App. 793  
—Central Truckaway System v.  
Harrigan, 53 S.E.2d 186, 79 Ga.App.

proximate cause,<sup>40</sup> and the rules have also been held | to be applicable to issues involving questions of

- 117—Spaulding Lumber Co. v. Hemphill, 47 S.E.2d 514, 77 Ga.App. 1—Hodges v. Peek, 179 S.E. 129, 50 Ga.App. 631.
- Idaho.—Willi v. Schaefer Hitchcock Co., 25 P.2d 167, 53 Idaho 367—Burns v. Getty, 24 P.2d 31, 53 Idaho 347.
- Ill.—Theodosia v. Keeshin Motor Exp. Co., 92 N.E.2d 794, 341 Ill.App. 8.
- Ind.—Elgin, J. & E. Ry. Co. v. Scherer, 98 N.E.2d 369, 121 Ind.App. 477—H. E. McGonigal, Inc. v. Etherington, 79 N.E.2d 777, 118 Ind.App. 622.
- Ky.—Henderson v. Watson, 262 S.W.2d 811—Southeastern Greyhound Lines v. Webb, 230 S.W.2d 99, 313 Ky. 71—Ballback's Adm'r v. Boland-Malone Lumber Co., 208 S.W.2d 940, 306 Ky. 647—Maupin v. Baker, 194 S.W.2d 991, 302 Ky. 411.
- Mo.—West v. Belle Isle Cab Co., 100 A.2d 17, 203 Md. 244.
- Mich.—Vandenberg v. Prosek, 56 N.W.2d 227, 335 Mich. 382—Severson v. Family Creamery Co., 256 N.W.348, 268 Mich. 348.
- Miss.—Continental Southern Lines v. Klaas, 65 So.2d 675, 217 Miss. 795, suggestion of error overruled 65 So.2d 833, 217 Miss. 795, followed in 65 So.2d 834, 217 Miss. 795, suggestion of error overruled 65 So.2d 596, 217 Miss. 795. Suggestion of error dismissed and motion denied 67 So.2d 256, 217 Miss. 795—Peerless Supply Co. v. Jeter, 65 So.2d 240—Ford v. Gray, 65 So.2d 230, 217 Miss. 882—McMinn v. Lilly, 60 So.2d 603, 215 Miss. 193—Marx v. Berry, 168 So. 61, 176 Miss. 1—Russell v. Williams, 150 So. 528, 168 Miss. 181, suggestion of error overruled 151 So. 372, 168 Miss. 181—Green v. Maddox, 149 So. 882, 168 Miss. 171, suggestion of error overruled 151 So. 160, 168 Miss. 171, applying Louisiana law.
- Mo.—Beahan v. St. Louis Public Service Co., 237 S.W.2d 106, 361 Mo. 807—Hoelzel v. Chicago, R. I. & P. Ry. Co., 85 S.W.2d 126, 337 Mo. 61—Jenkins v. Wahash Ry. Co., 73 S.W.2d 1002, 335 Mo. 748—Larey v. Missouri-Kansas-Texas R. Co., 64 S.W.2d 681, 333 Mo. 949—Rowe v. Kansas City Public Service Co., App., 248 S.W.2d 445—Panke v. Shannon, App., 207 S.W.2d 854, reversed on other grounds 212 S.W.2d 792, 357 Mo. 1195—Greer v. St. Louis Public Service Co., App., 87 S.W.2d 240, followed in 87 S.W.2d 247—Dean v. Mocerl, App., 87 S.W.2d 218—Roman v. Hendricks, App., 80 S.W.2d 907—Pappas Pie & Baking Co. v. Stroh Bros. Delivery Co., App., 67 S.W.2d 793—Christner v. Chicago, R. I. & P. Ry. Co., 64 S.W.2d 752, 228 Mo.App. 220—Purkett v. Steele Undertaking Co., App., 63 S.W.2d 509.
- Mont.—Batchoff v. Craney, 172 P.2d 308, 119 Mont. 152.
- N.J.—O'Keefe v. Ripp, 166 A. 197, 110 N.J.Law 555.
- N.C.—Atlantic Coast Line R. Co. v. McLean Trucking Co., 78 S.E.2d 150, 238 N.C. 422.
- Okl.—St. Louis-San Francisco Ry. Co. v. Farrell, 263 P.2d 518.
- Or.—Schultz v. Hambach, 169 P.2d 882, 179 Or. 107.
- Utah.—Galarowicz v. Ward, 230 P.2d 576—Mitchell v. Arrowhead Freight Lines, 214 P.2d 620, 117 Utah 224.
- Va.—Washington & O. D. R. R. v. Taylor, 50 S.E.2d 415, 188 Va. 458.
- Wash.—Hutton v. Martin, 252 P.2d 581, 41 Wash.2d 780—Bissell v. Seattle Vancouver Motor Freight, 168 P.2d 390, 25 Wash.2d 68.
- 64 C.J. p 996 note 27.
40. U.S.—Olsen v. Realty Hotel Corp., C.A.N.Y., 210 F.2d 785—O'Donnell v. Elgin, J. & E. Ry. Co., C.A.III, 171 F.2d 973, reversed on other grounds 70 S.Ct. 200, 338 U.S. 384, 94 L.Ed. 187, 16 A.L.R.2d 646, rehearing denied 70 S.Ct. 427, 338 U.S. 945, 94 L.Ed. 583.
- Ala.—McGough Bakeries Corp. v. Reynolds, 35 So.2d 332, 250 Ala. 592.
- Cal.—Kalash v. Los Angeles Ladder Co., 34 P.2d 481, 1 Cal.2d 229—Miner v. Dabney-Johnson Oil Corporation, 28 P.2d 23, 219 Cal. 580—Ward v. Read, 25 P.2d 821, 219 Cal. 65—Jates v. Newman, 264 P.2d 197, 121 Cal.App.2d 800—Kettman v. Levine, 253 P.2d 102, 115 Cal.App.2d 844—Martens v. Redi-Spuds, Inc., 247 P.2d 605, 113 Cal.App.2d 10—Taylor v. Luxor Cab Co., 246 P.2d 45, 112 Cal.App.2d 46—Root v. Pacific Greyhound Lines, 190 P.2d 48, 84 Cal.App.2d 135—Carney v. RKO Tadio Pictures, 178 P.2d 482, 78 Cal.App.2d 659—Timbrell v. Suburban Hospital, 47 P.2d 737, 4 Cal. 2d 68—Everts v. Rosenberg, 41 P.2d 166, 4 Cal.App.2d 500—Chandler v. Benafel, 39 P.2d 892, 3 Cal.App.2d 373—Maus v. Scavenger Protective Ass'n, 39 P.2d 209, 2 Cal.App.2d 624—Evans v. Mitchell, 38 P.2d 437, 2 Cal.App.2d 702—Silveira v. Siegfried, 26 P.2d 666, 135 Cal.App. 218—Day v. Pickwick Stages System, 25 P.2d 16, 134 Cal.App. 92—Smellie v. Southern Pac. Co., 18 P.2d 97, 128 Cal.App. 567, hearing denied, 97, 19 P.2d 982, 128 Cal.App. 567.
- Colo.—Stahl v. Cooper, 190 P.2d 891, 117 Colo. 468.
- Conn.—Stelnecke v. Medalle, 90 A.2d 875, 139 Conn. 152—Barbieri v. Pandiscio, 163 A. 469, 116 Conn. 48.
- Ga.—Harmon v. Givens, 77 S.E.2d 223, 88 Ga.App. 629—Sammons v. Webb, 71 S.E.2d 832, 86 Ga.App. 382—Moffett v. McCurry, 67 S.E.2d 807, 84 Ga.App. 853—Atlantic Coast Line R. Co. v. Thomas, 64 S.E.2d 301, 83 Ga.App. 477—McLendon v. Beddingfield, 38 S.E.2d 69, 73 Ga.App. 756—Central of Georgia Ry. Co. v. Mann, 173 S.E. 180, 48 Ga.App. 668—Western & A. R. R. v. Bennett, 171 S.E. 187, 47 Ga.App. 629.
- Idaho.—Burns v. Getty, 24 P.2d 31, 53 Idaho 347.
- Ill.—Rouse v. New York, C. & St. L. R. Co., 110 N.E.2d 266, 349 Ill.App. 138—Cook v. Weyant, 105 N.E.2d 310, 346 Ill.App. 465—Loverde v. Consumers Petroleum Co., 88 N.E.2d 501, 338 Ill.App. 665.
- Ind.—Nepsha v. Wozniak, 92 N.E.2d 734, 120 Ind.App. 362—Pennsylvania R. Co. v. Boyd, 185 N.E. 160, 98 Ind.App. 439.
- Iowa.—Engle v. Nelson, 263 N.W. 505, 220 Iowa 771.
- Ky.—Henderson v. Watson, 262 S.W.2d 811.
- Mich.—Vandenberg v. Prosek, 56 N.W.2d 227, 335 Mich. 382—Elias v. Iless, 41 N.W.2d 884, 327 Mich. 323.
- Minn.—Peterson v. Lang, 58 N.W.2d 609—Swanson v. La Fontaine, 57 N.W.2d 262, 238 Minn. 460.
- Miss.—Peerless Supply Co. v. Jeter, 65 So.2d 240—Ford v. Gray, 65 So.2d 230, 217 Miss. 882—McMinn v. Lilly, 60 So.2d 603, 215 Miss. 193—Wilbur v. Gordon, 45 So.2d 844, 209 Miss. 27—Wallace v. Billups, 33 So.2d 819, 203 Miss. 853—Columbus & G. R. Co. v. Coleman, 160 So. 277, 172 Miss. 514—Green v. Maddox, 149 So. 882, 168 Miss. 171, suggestion of error overruled 151 So. 160, 168 Miss. 171, applying Louisiana law.
- Mo.—Corbett v. Terminal R. Ass'n of St. Louis, 82 S.W.2d 97, 336 Mo. 972, applying Illinois law—McCombs v. Bowen, 73 S.W.2d 300, 228 Mo.App. 754.
- Mont.—Batchoff v. Craney, 172 P.2d 308, 119 Mont. 152.
- N.D.—Reuter v. Olson, 59 N.W.2d 830—Ferdner v. Northern Pac. Ry. Co., 42 N.W.2d 216, 77 N.D. 169.
- Okl.—St. Louis-San Francisco Ry. Co. v. Farrell, 263 P.2d 518—Oklahoma Ry. Co. v. Wilson, 231 P.2d 688, 204 Okl. 488—Elam v. Loyd, 204 P.2d 280, 201 Okl. 222.
- S.C.—Durant v. Stuckey, 70 S.E.2d 473, 221 S.C. 342.
- Tenn.—Llewellyn v. City of Knoxville, 232 S.W.2d 568, 33 Tenn.App. 632.
- Utah.—Mitchell v. Arrowhead Freight Lines, 214 P.2d 620, 117 Utah 224—Kawaguchi v. Bennett, 189 P.2d 109, 112 Utah 442.
- Va.—Atlantic Coast Line R. Co. v. Bowen, 63 S.E.2d 804, 192 Va. 162—Dey v. Virginia Transit Co., 47 S.E.2d 552, 187 Va. 635—Smith v. Clark, 46 S.E.2d 21, 187 Va. 181.
- Wash.—Adkisson v. City of Seattle, 258 P.2d 461, 42 Wash.2d 676—



trespass,<sup>41</sup> and unavoidable or inevitable accident.<sup>42</sup>

### b. Contributory Negligence

While an erroneous instruction on the issue of contributory negligence cannot be cured by a conflicting instruction which correctly states the law, an instruction which is merely defective or inaccurate may be cured by another instruction.

In accordance with the general rules already stated supra § 441, a correct instruction on the issue of contributory negligence will cure the error in another instruction only when the instructions,

as a series, state the law correctly.<sup>43</sup> Accordingly, an erroneous instruction on the issue of contributory negligence cannot be cured by a conflicting instruction which correctly states the law;<sup>44</sup> by an indefinite,<sup>45</sup> vague, or uncertain<sup>46</sup> instruction; by an instruction on an entirely different matter;<sup>47</sup> or by an instruction which accentuates the error.<sup>48</sup>

On the other hand, and in accordance with the rules hereinbefore stated, a particular instruction as to contributory negligence which is merely defective or inaccurate may be cured by another instruction.<sup>49</sup> This rule has been applied with

Hutton v. Martin, 252 P.2d 581, 41 Wash.2d 780—Blissell v. Seattle Vancouver Motor Freight, 168 P.2d 390, 26 Wash.2d 68—Fraser v. Western Dairy Products, 47 P.2d 1037, 182 Wash. 678.

Wis.—Hatch v. Small, 23 N.W.2d 460, 249 Wis. 183, 166 A.L.R. 746.

64 C.J. p 996 note 28.

Idaho.—Ellis v. Ashton & St. Anthony Power Co., 238 P. 517, 41 Idaho 106.

42. Cal.—Taylor v. Luxor Cab Co., 246 P.2d 46, 112 Cal.App.2d 45—Connor v. Pacific Greyhound Lines, 232 P.2d 500, 104 Cal.App.2d 745—Perboest v. San Marino Hall-School for Girls, 199 P.2d 701, 88 Cal.App.2d 796.

Miss.—Ford v. Gray, 65 So.2d 230, 217 Miss. 822.

64 C.J. p 997 note 36.

43. Mo.—Dietrich v. Missouri Iron & Metal Co., 9 S.W.2d 824, 223 Mo. App. 740.

61 C.J. p 997 note 33.

44. U.S.—Shell Pipe Line Co. v. Robinson, C.C.A.Okl., 66 F.2d 861.

Ala.—Terry v. Nelms, 54 So.2d 282, 256 Ala. 291.

Ark.—Rogers v. Crawford, 247 S.W.2d 1006, 220 Ark. 385—Missouri Pac. Transp. Co. v. Howard, 143 S.W.2d 538, 201 Ark. 6—Vaughn v. Herring, 113 S.W.2d 512, 195 Ark. 639.

Cal.—Hopper v. Bulach, 164 P.2d 483, 27 Cal.2d 431—Mortensen v. Fairbanks, 35 P.2d 1030, 1 Cal.2d 489—Kalaish v. Los Angeles Ladder Co., 34 P.2d 481, 1 Cal.2d 229—Dike v. Golden State Co., App., 269 P.2d 619—Edwards v. Twain Lumber Co., 267 P.2d 347, 123 Cal.App.2d 675—Bellows v. City and County of San Francisco, 234 P.2d 729, 106 Cal.App.2d 57—Cox v. City of Los Angeles, 223 P.2d 668, 100 Cal.App.2d 278—Pearson v. Tide Water Associated Oil Co., App., 223 P.2d 669, hearing dismissed—Haskell v. Toepfer, 134 P.2d 283, 67 Cal.App.2d 65—Angier v. Bruck, 131 P.2d 876, 56 Cal.App.2d 55—Finney v. Wierman, 126 P.2d 143, 52 Cal.App.2d 282—Ferguson v. Nakahara, 110 P.

2d 1091, 43 Cal.App.2d 435—Broun v. Blair, 60 P.2d 95, 26 Cal.App.2d 613—Scalf v. Elcher, 53 P.2d 368, 11 Cal.App.2d 44—Abelseth v. City and County of San Francisco, 19 P.2d 58, 129 Cal.App. 552.

Colo.—Hanton v. Woodhouse, 160 P.2d 998, 113 Colo. 504.

Ga.—Southern Ry. Co. v. Garland, 41 S.E.2d 925, 75 Ga. App. 98.

Ill.—Tucker v. Kallal, 112 N.E.2d 731, 350 Ill.App. 325—Olinger v. Ohlberg, 100 N.E.2d 788, 344 Ill.App. 209—Brockman v. Peoples Gas Light & Coke Co., 48 N.E.2d 802, 319 Ill.App. 115—Cassens v. Tillberg, 13 N.E.2d 644, 294 Ill.App. 168.

Ind.—Moorman Mfg. Co. v. Barker, 40 N.E.2d 348, 110 Ind.App. 648—Bonham v. Mendenhall, 188 N.E. 695, 98 Ind.App. 189.

Iowa.—Bobst v. Hoxie Truck Line, 287 N.W. 673, 221 Iowa 823.

Kan.—Graves v. National Mut. Casualty Co., 220 P.2d 180, 169 Kan. 547.

Md.—Bode v. Carroll-Independent Coal Co., 191 A. 685, 172 Md. 406.

Minn.—Johnson v. Brand Stores, 63 N.W.2d 370.

Miss.—Wilburn v. Gordon, 45 So.2d 844, 209 Miss. 27.

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Neb.—Kreppek v. Interstate Transit Lines, 48 N.W.2d 839, 154 Neb. 671—Brooks v. Thayer County, 254 N.W. 412, 126 Neb. 610.

N.H.—Mullins v. Boston & Maine Transp. Co., 20 A.2d 636, 91 N.H. 402—Muggrave v. Great Falls Mfg. Co., 169 A. 583, 86 N.H. 875.

N.M.—Crocker v. Johnston, 95 P.2d 214, 43 N.M. 469.

N.C.—Green v. Bowers, 55 S.E.2d 192, 230 N.C. 651.

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Pa.—Hisk v. Lehigh Valley Transit Co., 59 A.2d 906, 360 Pa. 1.

Utah.—Coray v. Southern Pac. Co., 223 P.2d 819.

Va.—Marks v. Ore, 45 S.E.2d 894, 187 Va. 146—Outlaw v. Pearce, 11 S.E.2d 600, 176 Va. 452.

Wash.—Seattle Taxi Cab Co. v. Texas Co., 57 P.2d 1237, 186 Wash. 363.

W.Va.—Payne v. Virginian Ry. Co., 51 S.E.2d 514, 131 W.Va. 767—Nichols v. Raleigh Wyoming Mining Co., 189 S.E. 451, 113 W.Va. 631.

64 C.J. p 997 note 34.

45. N.H.—Small v. Boston & M. R. R., 159 A. 298, 85 N.H. 330.

46. Colo.—Hanton v. Woodhouse, 160 P.2d 998, 113 Colo. 504.

N.H.—Mullins v. Boston & Maine Transp. Co., 20 A.2d 636, 91 N.H. 402.

Or.—Haynes v. Sprague, 295 P. 964, 137 Or. 23.

47. Ill.—Tucker v. Kallal, 112 N.E.2d 731, 350 Ill.App. 325.

Iowa.—McElhinney v. Knittle, 201 N.W. 586, 199 Iowa 278.

Mo.—Weishaar v. Kansas City Public Service Co., App., 128 S.W.2d 332.

48. Cal.—Mortensen v. Fairbanks, 35 P.2d 1030, 1 Cal.2d 489.

Wash.—Hines v. Neuner, 253 P.2d 945, 43 Wash.2d 116.

Wis.—Grimes v. Snell, 183 N.W. 895, 174 Wis. 557.

49. U.S.—Atchison, T. & S. F. Ry. Co. v. Seamas, C.A.Cal., 201 F.2d 140—Atlantic Coast Line R. Co. v. Burkett, C.A.Ga., 193 F.2d 941—Hazelton v. Johnson, C.C.A.Mont., 92 F.2d 866.

Ala.—Van Antwerp Realty Corp. v. Walters, 43 So.2d 537, 253 Ala. 187.

—Bahakel v. Great Southern Trucking Co., 31 So.2d 75, 249 Ala. 363—Sloss-Sheffield Steel & Iron Co. v. Williamson, 10 So.2d 19, 243 Ala. 362—Weems v. Robbins, 9 So.2d 882, 343 Ala. 376—Conner v. Foregger, 7 So.2d 858, 243 Ala. 375.

—Sloss-Sheffield Steel & Iron Co.

- v. Willingham, 199 So. 15, 29 Ala. App. 569, cause remanded on other grounds 199 So. 28, 240 Ala. 294—Moore v. Cruik, 191 So. 252, 238 Ala. 414.
- Ariz.—Tenney v. Enkeball, 158 P.2d 519, 62 Ariz. 416.
- Ark.—Hearn v. East Tex. Motor Freight Lines, 241 S.W.2d 259, 219 Ark. 297—Mathis v. Magers, 86 S.W.2d 171, 191 Ark. 373—Southwestern Bell Telephone Co. v. Balesh, 76 S.W.2d 291, 189 Ark. 1085—Johnson v. Poinsett Lumber & Mfg. Co., 59 S.W.2d 30, 187 Ark. 237.
- Cal.—Freeman v. Churchill, 183 P.2d 4, 30 Cal.2d 453—Polk v. City of Los Angeles, 159 P.2d 931, 26 Cal.2d 519—Blanton v. Curry, 129 P.2d 1, 20 Cal.2d 793—Kirschbaum v. McCarthy, 54 P.2d 8, 5 Cal.2d 191—Miner v. Dabney-Johnson Oil Corporation, 28 P.2d 23, 219 Cal. 580—Erwin v. Conroy, 253 P.2d 752, 116 Cal.App.2d 466—Kettman v. Levine, 253 P.2d 102, 115 Cal.App.2d 844—Martens v. Redi-Spuds, Inc., 247 P.2d 605, 113 Cal.App.2d 10—Block v. Snyder, 234 P.2d 52, 105 Cal.App.2d 783—Clark v. State, 222 P.2d 300, 99 Cal.App.2d 616—Koon v. Sher, 220 P.2d 784, 98 Cal.App.2d 530—Thomas v. Irvin, 216 P.2d 476, 96 Cal.App.2d 816—Long v. Standard Oil Co. of Cal., 207 P.2d 837, 92 Cal. App.2d 455—O'Connor v. City and County of San Francisco, 207 P.2d 638, 92 Cal.App.2d 626—Behneman v. International Cementers, 203 P.2d 817, 90 Cal.App.2d 580—Solen v. Singer, 201 P.2d 869, 89 Cal.App.2d 708—Anthony v. Hobbie, 193 P.2d 748, 85 Cal.App.2d 798—Carpenter v. Gibson, 181 P.2d 953, 80 Cal.App.2d 269—Dean v. Field, 175 P.2d 278, 77 Cal.App.2d 327—Larson v. King, 162 P.2d 974, 71 Cal.App.2d 421—Domjanov v. Pacific Elec. Ry. Co., 153 P.2d 382, 65 Cal.App.2d 928—Florine v. Market St. Ry. Co., 149 P.2d 41, 64 Cal.App.2d 581—Tuller v. Atchison, T. & S. F. Ry. Co., 145 P.2d 321, 62 Cal.App.2d 852—Stricklin v. Rosemeyer, 142 P.2d 953, 61 Cal.App.2d 359—Mahar v. Mackay, 132 P.2d 42, 55 Cal.App.2d 869—Cedzo v. Bergen, 128 P.2d 683, 53 Cal.App.2d 667—Williams v. Layne, 127 P.2d 582, 53 Cal.App.2d 81—Eastman v. Atchison, T. & S. F. Ry. Co., 125 P.2d 564, 51 Cal.App.2d 653—Schulman v. Los Angeles Ry. Corp., 111 P.2d 924, 44 Cal.App.2d 102—Healy v. Market St. Ry. Co., 107 P.2d 488, 41 Cal.App.2d 733—Miller v. Cranston, 106 P.2d 963, 41 Cal.App.2d 470—Box v. Van Slooten, 101 P.2d 780, 38 Cal.App.2d 554—Navarro v. Somersfield, 94 P.2d 623, 35 Cal.App.2d 35—Roddy v. American Smelting & Refining Co., 93 P.2d 841, 34 Cal.App.2d 457—Martin v. Vierra, 93 P.2d 261, 34 Cal.App.2d 86, hearing denied 94 P.2d 567, 34 Cal.App.2d 86—Guillot v. Hagman, 86 P.2d 865, 30 Cal.App.2d 582—Howard v. Clark, 84 P.2d 529, 29 Cal.App.2d 374—Thompson v. Baldwin, 80 P.2d 198, 26 Cal.App.2d 703—Burr v. Damarel, 75 P.2d 621, 24 Cal.App.2d 622—Skulte v. Ahern, 71 P.2d 840, 22 Cal.App.2d 460—Collonan v. Rosellini, 68 P.2d 367, 21 Cal.App.2d 33—Pattison v. Cavanagh, 63 P.2d 868, 18 Cal.App.2d 123, transfer denied, Sup., 64 P.2d 945, 18 Cal.App.2d 123—Lam Ong v. Pacific Motor Trucking Corp., 60 P.2d 480, 16 Cal.App.2d 274—Wilfert v. Peters, 55 P.2d 283, 12 Cal.App.2d 150—Noble v. Key System, 51 P.2d 887, 10 Cal.App.2d 132—Withrow v. Becker, 45 P.2d 235, 6 Cal.App.2d 723—Maus v. Scavenger Protective Ass'n, 39 P.2d 209, 2 Cal.App.2d 624—Harvold v. Milani, 36 P.2d 393, 1 Cal.App.2d 157—Mahoney v. Murray, 35 P.2d 612, 140 Cal.App. 206—Hellman v. Los Angeles Ry. Corporation, 28 P.2d 384, 135 Cal.App. 67—Silveira v. Siegfried, 26 P.2d 666, 135 Cal. App. 218—Busch v. Oswald, 21 P.2d 1003, 131 Cal.App. 594—Lurkin v. City of Bakersfield, 20 P.2d 788, 131 Cal.App. 21—Beuttler v. Mann, 19 P.2d 539, 130 Cal.App. 38—Hanson v. Hess, 16 P.2d 785, 128 Cal. App. 151.
- Colo.—Prentiss v. Johnston, 203 P.2d 733, 119 Colo. 370—Gallagher Transp. Co. v. Giggrey, 71 P.2d 1039, 101 Colo. 116.
- Conn.—Dokus v. Palmer, 33 A.2d 315, 130 Conn. 247—Yorker v. Girard Co., 9 A.2d 501, 126 Conn. 96—Mavrides v. Lyon, 193 A. 605, 123 Conn. 173—Lawlor v. Connecticut Co., 186 A. 491, 121 Conn. 511.
- Fla.—Shayne v. Saunders, 176 So. 495, 129 Fla. 355.
- Ga.—Wilson v. Harrell, 75 S.E.2d 436, 87 Ga.App. 793—Atlanta & W. P. R. Co. v. Gilbert, 60 S.E.2d 787, 82 Ga.App. 244—Hotel Dempsey Co. v. Miller, 58 S.E.2d 475, 81 Ga.App. 233—Christian v. Smith, 51 S.E.2d 857, 78 Ga.App. 603—Colonial Stores v. Coker, 48 S.E.2d 150, 77 Ga.App. 227—Alabama Great Southern R. Co. v. McBryar, 15 S.E.2d 563, 65 Ga.App. 153—Edwards v. Atlanta, B. & C. R. Co., 10 S.E.2d 449, 63 Ga.App. 212—Southern Ry. Co. v. De Foor, 6 S.E.2d 69, 61 Ga. App. 125—Pollard v. Kent, 200 S.E. 542, 59 Ga.App. 118—Gossett v. Kraft Phenix Cheese Corp., 198 S.E. 298, 58 Ga.App. 265—Shermer v. Crowe, 136 S.E. 224, 53 Ga.App. 418—Atlantic Coast Line R. Co. v. McDonald, 179 S.E. 185, 50 Ga.App. 856, certiorari denied 56 S.Ct. 143, 296 U.S. 621, 80 L.Ed. 441—Huckabee v. Grace, 173 S.E. 744, 48 Ga. App. 621.
- Idaho.—Pittman v. Sather, 188 P.2d 800, 68 Idaho 29—Bennett v. Deaton, 68 P.2d 895, 57 Idaho 752.
- Ill.—Lasko v. Meier, 67 N.E.2d 162, 394 Ill. 71—Sances v. D'Angelo, 86 N.E.2d 847, 338 Ill.App. 199—Wyma v. De Fay Wonder Cleaners, 77 N.E.2d 353, 333 Ill.App. 330—Kak v. Brescia, 76 N.E.2d 64, 333 Ill.App. 643—Schuster v. Jefferson Ice Co., 65 N.E.2d 239, 328 Ill.App. 124—Goad v. Phipps, 57 N.E.2d 528, 324 Ill.App. 160—Sprickerhoff v. Baltimore & O. R. Co., 55 N.E.2d 532, 323 Ill.App. 340—Moudy v. New York, C. & St. L. R. Co., 46 N.E.2d 180, 317 Ill.App. 154, reversed on other grounds 53 N.E.2d 406, 385 Ill. 446—Stivers v. Black & Co., 42 N.E.2d 349, 315 Ill.App. 38—Kavanaugh v. Parret, 34 N.E.2d 868, 310 Ill.App. 429, reversed on other grounds 40 N.E.2d 500, 379 Ill. 273—Edwards v. Hill-Thomas Lime & Cement Co., 32 N.E.2d 945, 309 Ill. App. 168, reversed on other grounds 37 N.E.2d 801, 378 Ill. 180—Doran v. Boston Store of Chicago, 30 N.E.2d 778, 307 Ill.App. 456—Shellabarger v. Nattier, 7 N.E.2d 365, 289 Ill.App. 473—Uhlis v. Old Ben Coal Corp., 281 Ill.App. 254.
- Ind.—Vanosdol v. Henderson, 22 N.E.2d 812, 216 Ind. 240—Bain v. Mattmiller, 13 N.E.2d 712, 213 Ind. 549—Evansville & O. V. Ry. Co. v. Woosley, 83 N.E.2d 355, 120 Ind.App. 570—Town of Argos v. Harley, 49 N.E.2d 552, 114 Ind.App. 290—Vogel v. Ridens, 44 N.E.2d 235, 112 Ind. App. 493—Earle v. Porter, 40 N.E.2d 381, 112 Ind.App. 71—Van Drake v. Thomas, 38 N.E.2d 878, 110 Ind. App. 586—Goldblatt Bros. v. Parish, 33 N.E.2d 835, 110 Ind.App. 368, rehearing denied 38 N.E.2d 255, 110 Ind.App. 368—Dunbar v. Demaree, 2 N.E.2d 1003, 102 Ind.App. 585—Walsh Baking Co. v. Southern Indiana Gas & Electric Co., 186 N.E. 341, 97 Ind.App. 285—Interstate Public Service Co. v. Ford, 185 N.E. 525, 95 Ind.App. 639—Lake Erie & W. R. Co. v. Howerth, 124 N.E. 687, 73 Ind.App. 454, rehearing denied 127 N.E. 804, 73 Ind.App. 454.
- Iowa.—McGreev v. Bos Freight Lines, 36 N.W.2d 374, 240 Iowa 318—Osgard v. Gregerson, 12 N.W.2d 559, 234 Iowa 325—Smith v. Pine, 12 N.W.2d 236, 234 Iowa 256—Craft v. Myers, 10 N.W.2d 94, 233 Iowa 521—Kehm v. Diltz, 270 N.W. 388, 222 Iowa 826—Swan v. Dailey-Luce Auto Co., 265 N.W. 143, 221 Iowa 842.
- Ky.—Maupin v. Baker, 194 S.W.2d 991, 302 Ky. 411—Rutherford v. Smith, 145 S.W.2d 538, 284 Ky. 592—Fleck's Adm'r v. Bell Line, 144 S.W.2d 483, 284 Ky. 288—Lindig v. Breen, 103 S.W.2d 941, 268 Ky. 153—Whitehead's Adm'r v. Peter Knopf's Sons, 90 S.W.2d 709, 262 Ky. 493—West Kentucky Transp. Co. v. Dezern, 82 S.W.2d 486, 259 Ky. 470—Louisville Ry. Co. v. Breeden, 77 S.W.2d 368, 257 Ky. 95.

respect to various defects or inaccuracies, such as | an instruction which is misleading,<sup>50</sup> confusing,<sup>51</sup>

- Me.—Illingworth v. Madden, 192 A 273, 135 Me. 159, 110 A.L.R. 1090.
- Md.—State, to Use of Creasey v. Pennsylvania R. Co., 69 A.2d 190, 190 Md. 586—Warner v. Neubert, 187 A. 829, 171 Md. 693.
- Mass.—McCullough v. Eastern Mass. St. Ry. Co., 96 N.E.2d 590, 326 Mass. 714—Sylvia v. New York, N. H. & H. R. Co., 6 N.E.2d 359, 296 Mass. 157.
- Mich.—Gibbs v. Guild, 52 N.W.2d 542, 332 Mich. 671—Ter Haar v. Steele, 47 N.W.2d 65, 330 Mich. 167—Planigan v. Harder, 256 N.W. 549, 268 Mich. 564.
- Minn.—Hird v. Johnson, 272 N.W. 168, 199 Minn. 252—Elkins v. Minneapolis St. Ry. Co., 270 N.W. 914, 199 Minn. 63—Manos v. New York Tea Co., 269 N.W. 839, 198 Minn. 347.
- Miss.—Cochran v. Peeler, 47 So.2d 806, 209 Miss. 394.
- Mo.—Lansford v. Southwest Lime Co., 266 S.W.2d 564—Warren v. Kansas City, 258 S.W.2d 681—Zesch v. Abrasive Co. of Philadelphia, 193 S.W.2d 581, 354 Mo. 1147—Johnson v. Dawidoff, 177 S.W.2d 467, 352 Mo. 343—Burneson v. Zumwalt Co., 159 S.W.2d 605, 349 Mo. 94—Behout v. Kurn, 154 S.W.2d 120, 348 Mo. 501—Kirk v. Franklin, 137 S.W.2d 512, 345 Mo. 752—Flint v. Loew's St. Louis Realty & Amusement Corp., 126 S.W.2d 193, 344 Mo. 310—King v. Rieth, 108 S.W.2d 1, 341 Mo. 467—Wollard v. Pollock, App., 263 S.W.2d 748—Newman v. St. Louis Public Service Co., App., 238 S.W.2d 43, affirmed, Sup., 244 S.W.2d 45—Lanasa v. Downey, App., 201 S.W.2d 179—Bootee v. Kansas City Public Service Co., 199 S.W.2d 59, 239 Mo. App. 1065—Jones v. Central States Oil Co., App., 170 S.W.2d 153—Ross v. Wilson, 163 S.W.2d 342, 236 Mo. App. 1178—Christman v. Reichholdt, App., 150 S.W.2d 527—Klohr v. Edwards, App., 94 S.W.2d 99.
- Mont.—Reynolds v. Trbovich, Inc., 210 P.2d 634, 123 Mont. 224—Gobel v. Rinio, 200 P.2d 700, 122 Mont. 235—Maynard v. City of Helena, 160 P.2d 484, 117 Mont. 402.
- Neb.—Krepick v. Interstate Transit Lines, 48 N.W.2d 839, 154 Neb. 671—Whittaker v. Omaha & C. B. St. Ry. Co., 291 N.W. 275, 137 Neb. 800—Whinnery v. Interstate Transit Lines, 252 N.W. 466, 126 Neb. 61.
- N.H.—Colburn v. Normand, 74 A.2d 559, 96 N.H. 250.
- N.J.—Gibson v. Pennsylvania R. Co., 82 A.2d 635, 14 N.J.Super. 425—Newbury v. American Stores Co., 180 A. 875, 115 N.J.Law 604—Andresen v. Zimmerman, 169 A. 638, 12 N.J.Misc. 87.
- N.M.—Frei v. Brownlee, 248 P.2d 671, 56 N.M. 677—Crespin v. Albuquerque Gas & Electric Co., 50 P.2d 259, 39 N.M. 473.
- N.Y.—Dumala v. Long Island R. Co., 274 N.Y.S. 871, 242 App.Div. 287.
- N.C.—Atlantic Coast Line R. Co. v. McLean Trucking Co., 78 S.E.2d 159, 238 N.C. 422—Coley v. Phillips, 31 S.E.2d 757, 224 N.C. 618.
- N.D.—Froh v. Hein, 39 N.W.2d 11, 79 N.D. 701.
- Ohio.—Sprung v. E. I. DuPont De Nemours & Co., App., 34 N.E.2d 41, appeal dismissed 23 N.E.2d 947, 136 Ohio St. 94—Ohio Oil Co. v. Liles, 6 N.E.2d 18, 54 Ohio App. 124—Gilbert v. Reardon, 188 N.E. 359, 46 Ohio App. 206.
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- Or.—Krieger v. Doolittle, 18 P.2d 1041, 142 Or. 122.
- Pa.—Rader v. Williamson, 80 A.2d 741, 367 Pa. 397—Builders Supply Co. v. McCabe, 44 A.2d 256, 353 Pa. 107.
- S.C.—Harrison v. Gallivan Const. Co., 199 S.E. 307, 188 S.C. 304.
- Tenn.—Winfree v. Coca-Cola Bottling Works, 103 S.W.2d 33, 20 Tenn.App. 615—Radnor Water Co. v. Draughon, 89 S.W.2d 186, 19 Tenn.App. 371.
- Utah.—Parker v. Bamberger, 116 P.2d 425, 100 Utah 361.
- Va.—Marks v. Ore, 45 S.E.2d 894, 187 Va. 146—Walton v. Light, 26 S.E. 2d 29, 181 Va. 609—Johnson v. Kellam, 175 S.E. 634, 162 Va. 757.
- Wash.—Myers v. West Coast Past Freight, 256 P.2d 840, 42 Wash.2d 524—Knight v. Pang, 201 P.2d 198, 32 Wash.2d 217—Green v. Moe, 183 P.2d 771, 28 Wash.2d 620—Schofield v. Northern Pac. Ry. Co., 123 P.2d 755, 13 Wash.2d 18—Carmen v. Port of Seattle, 116 P.2d 338, 10 Wash.2d 139—Kuhnhausen v. Woodbeck, 97 P.2d 1099, 2 Wash.2d 338—Girardi v. Union High School Dist., No. 1, Skagit County, 93 P.2d 298, 200 Wash. 21—Levine v. A. A. Owen Lumber Co., 84 P.2d 353, 196 Wash. 673—Nystuen v. Spokane County, 77 P.2d 1002, 194 Wash. 312—Haines v. Pinney, 18 P.2d 496, 171 Wash. 568—Sidis v. Rosaia, 17 P.2d 37, 170 Wash. 587.
- W.Va.—Webb v. Batten, 187 S.E. 325, 117 W.Va. 644.
- Wyo.—Stanolind Oil & Gas Co. v. Bunce, 62 P.2d 1237, 51 Wyo. 1, 64 C.J. p 997 note 40.
50. U.S.—Atchison, T. & S. F. Ry. Co. v. Seamas, C.A.Cal., 201 F.2d 140—Atlantic Coast Line R. Co. v. Burkett, C.A.Ga., 192 F.2d 941.
- Ala.—Bahakel v. Great Southern Trucking Co., 31 So.2d 75, 249 Ala. 363—Moore v. Cruik, 191 So. 252, 238 Ala. 414.
- Cal.—Martens v. Redi-Spuds, Inc., 247 P.2d 605, 113 Cal.App.2d 10—Block v. Snyder, 234 P.2d 52, 105 Cal.App. 2d 783—Thomas v. Irvin, 216 P.2d 476, 96 Cal.App.2d 816—Schulman v. Los Angeles Ry. Corp., 111 P.2d 924, 44 Cal.App.2d 123—Pattison v. Cavanaugh, 63 P.2d 868, 18 Cal.App.2d 123, transfer denied, Sup., 64 P.2d 945, 18 Cal.App.2d 123.
- Colo.—Gallagher Transp. Co. v. Giskey, 71 P.2d 1039, 101 Colo. 116.
- Conn.—Yorker v. Girard Co., 9 A.2d 501, 126 Conn. 96—Mavrides v. Lyon, 193 A. 605, 123 Conn. 173.
- Ga.—Hotel Dempsey Co. v. Miller, 53 S.E.2d 475, 81 Ga.App. 233.
- Ill.—Lasko v. Meier, 67 N.E.2d 162, 394 Ill. 71—Wyma v. De Fay Wonder Cleaners, 77 N.E.2d 353, 333 Ill.App. 330—Moudy v. New York, C. & St. L. R. Co., 46 N.E.2d 180, 317 Ill.App. 154, reversed on other grounds 63 N.E.2d 406, 335 Ill. 446—Kavanaugh v. Parret, 34 N.E.2d 868, 310 Ill.App. 429, reversed on other grounds 40 N.E.2d 600, 379 Ill. 273—Edwards v. Hill-Thomas Lime & Cement Co., 32 N.E.2d 945, 309 Ill.App. 168, reversed on other grounds 37 N.E.2d 801, 378 Ill. 180—Uhis v. Old Ben Coal Corp., 281 Ill.App. 254.
- Ind.—Evansville & O. V. Ry. Co. v. Woosley, 93 N.E.2d 355, 120 Ind. App. 570—Van Drake v. Thomas, 38 N.E.2d 878, 110 Ind.App. 586—Walsh Baking Co. v. Southern Indiana Gas & Electric Co., 186 N.E. 341, 97 Ind.App. 285.
- Ky.—Itogers v. Price, 160 S.W.2d 371, 290 Ky. 153.
- Md.—State, to Use of Creasey v. Pennsylvania R. Co., 59 A.2d 190, 190 Md. 586.
- Mich.—Ter Haar v. Steele, 47 N.W.2d 65, 330 Mich. 167.
- Mo.—Romandel v. Kansas City Public Service Co., 254 S.W.2d 585—Hall Motor Freight v. Montgomery, 212 S.W.2d 748, 357 Mo. 1188, 2 A.L.R. 2d 1292—Behout v. Kurn, 154 S.W.2d 120, 348 Mo. 501—Bootee v. Kansas City Public Service Co., 199 S.W.2d 59, 239 Mo. App. 1065—Klohr v. Edwards, App., 94 S.W.2d 99.
- N.C.—Coley v. Phillips, 31 S.E.2d 757, 224 N.C. 618.
- Tenn.—Winfree v. Coca-Cola Bottling Works, 103 S.W.2d 33, 20 Tenn.App. 615.
- Wash.—Curtis v. Perry, 18 P.2d 840, 171 Wash. 542—Sidis v. Rosaia, 17 P.2d 37, 170 Wash. 587.
- 64 C.J. p 998 note 41.
51. U.S.—Atchison, T. & S. F. Ry. Co. v. Seamas, C.A.Cal., 201 F.2d 140—Atlantic Coast Line R. Co. v. Burkett, C.A.Ga., 192 F.2d 941.
- Cal.—Larson v. King, 162 P.2d 974, 71 Cal.App.2d 421—Martin v. Viera, 90 P.2d 846, superseded 93 P.2d 261, 34 Cal.App.2d 86, hearing denied 94 P.2d 667, 34 Cal.App.2d 86.
- Ga.—Hotel Dempsey Co. v. Miller, 53 S.E.2d 475, 81 Ga.App. 233.

informal,<sup>52</sup> obscure,<sup>53</sup> ambiguous,<sup>54</sup> or incomplete;<sup>55</sup> an instruction which fails to define the degree of care required,<sup>56</sup> or imposes too high<sup>57</sup> or too low<sup>58</sup> a degree of care, or which is too broad,<sup>59</sup> or which ignores the defense;<sup>60</sup> or a particular in-

- Ind.—Goldblatt Bros. v. Parish, 33 N.E.2d 835, 110 Ind.App. 368, rehearing denied 38 N.E.2d 255, 110 Ind.App. 368.
- Ky.—Lindig v. Breen, 103 S.W.2d 941, 268 Ky. 153.
- Tenn.—Wintfree v. Coca-Cola Bottling Works, 103 S.W.2d 33, 20 Tenn.App. 615.
- 64 C.J. p 998 note 42.
52. U.S.—W. & A. Fletcher Co. v. Hagsman, C.C.A.N.J., 285 F. 345.
53. Cal.—Polk v. City of Los Angeles, 159 P.2d 931, 26 Cal.2d 519—Soda v. Marriott, 5 P.2d 675, 118 Cal.App. 635.
- Pa.—Builders Supply Co. v. McCabe, 44 A.2d 256, 353 Pa. 107.
54. Conn.—Dokus v. Palmer, 33 A.2d 315, 130 Conn. 247.
- Mo.—Oldham v. Standard Oil Co., App., 15 S.W.2d 899.
55. Ala.—Stoss-Sheffield Steel & Iron Co. v. Willingham, 10 So.2d 19, 243 Ala. 352—Moore v. Cruik, 191 So. 252, 238 Ala. 414.
- Ark.—Hearn v. East Tex. Motor Freight Lines, 241 S.W.2d 259, 219 Ark. 297.
- Cal.—Martens v. Redi-Spuds, Inc., 247 P.2d 605, 113 Cal.App.2d 10—Long v. Standard Oil Co. of Cal., 207 P.2d 837, 92 Cal.App.2d 455—Solen v. Singer, 201 P.2d 869, 89 Cal.App.2d 708—Blackmore v. Brennan, 110 P.2d 723, 43 Cal.App.2d 280—Healy v. Market St. Ry. Co., 107 P.2d 488, 41 Cal.App.2d 733—Murphy v. St. Claire Brewing Co., 107 P.2d 273, 41 Cal.App.2d 535—Martin v. Vieira, 93 P.2d 261, 34 Cal.App.2d 86, hearing denied 94 P.2d 567, 34 Cal.App.2d 86—Howard v. Clark, 84 P.2d 529, 29 Cal.App.2d 374—Hawkinson v. Scholz, 57 P.2d 945, 13 Cal.App.2d 687—Speidel v. Lacer, 38 P.2d 477, 2 Cal.App.2d 528—Hanson v. Hess, 16 P.2d 785, 128 Cal.App. 151.
- Conn.—Corey v. Phillips, 10 A.2d 370, 126 Conn. 246.
- Ill.—Sprickerhoff v. Baltimore & O. R. Co., 55 N.E.2d 532, 323 Ill.App. 340.
- Ind.—Vanosdol v. Henderson, 22 N.E.2d 812, 216 Ind. 240—Interstate Public Service Co. v. Ford, 185 N.E. 525, 96 Ind.App. 639.
- Iowa.—McGreene v. Bos Freight Lines, 36 N.W.2d 374, 240 Iowa 318—Smith v. Pine, 12 N.W.2d 236, 234 Iowa 256.
- Ky.—Louisville Ry. Co. v. Breeden, 77 S.W.2d 368, 257 Ky. 95.
- Mo.—State, to Use of Creasey v. Pennsylvania R. Co., 59 A.2d 190, 190 Md. 586.
- Mo.—Warren v. Kansas City, 258 S.W.2d 681—Burneson v. Zumwalt Co., 159 S.W.2d 605, 349 Mo. 94—Kick v. Franklin, 137 S.W.2d 512, 345 Mo. 752—Lanasa v. Downey App., 201 S.W.2d 179.
- Neb.—Kreppek v. Interstate Transp. Lines, 48 N.W.2d 839, 154 Neb. 671—Marks v. Oro, 45 S.E.2d 894, 187 Va. 146.
- Wash.—Levine v. A. A. Owen Lumber Co., 84 P.2d 253, 196 Wash. 673, 64 C.J. p 998 note 46.
56. Cal.—O'Connor v. City and County of San Francisco, 207 P.2d 638, 92 Cal.App.2d 626.
- Colo.—Prentiss v. Johnston, 203 P.2d 733, 119 Colo. 370.
- Ga.—Southern Grocery Stores v. Cain, 187 S.E. 250, 54 Ga.App. 48.
- Ill.—Lasko v. Meier, 67 N.E.2d 162, 394 Ill. 71—Doran v. Boston Store of Chicago, 30 N.E.2d 778, 307 Ill. App. 456.
- Iowa.—Fagen Elevator v. Pflester, 56 N.W.2d 577, 244 Iowa 633.
- Ky.—Louisville Ry. Co. v. Breeden, 77 S.W.2d 368, 257 Ky. 95.
- Mo.—Chervey v. St. Louis Public Service Co., App., 173 S.W.2d 593.
- Mont.—Aguzzaz v. Chicago, M. St. P. & Pac. Ry. Co., 65 P.2d 1155, 104 Mont. 181.
- Or.—Sherrard v. Werline, 91 P.2d 344, 162 Or. 135—Krieger v. Doolittle, 18 P.2d 1041, 142 Or. 122.
- Wash.—Carmin v. Port of Seattle, 116 P.2d 338, 10 Wash.2d 139—Howard v. Washington Water Power Co., 134 P. 927, 75 Wash. 255, 52 L.R.A., N.S., 578.
57. Ark.—Davis v. Safeway Stores, 110 S.W.2d 695, 195 Ark. 23.
- Cal.—Breaux v. Soares, 64 P.2d 146, 18 Cal.App.2d 489—Pattison v. Cavanagh, 63 P.2d 868, 18 Cal.App.2d 123, transfer denied 64 P.2d 945, 18 Cal.App.2d 123.
- Conn.—Dokus v. Palmer, 33 A.2d 315, 130 Conn. 247.
- Ill.—Gordon v. Stadelman, 202 Ill. App. 255.
- Ohio.—Gilbert v. Reardon, 188 N.E. 359, 46 Ohio App. 206.
58. Ind.—Lake Erie & W. R. Co. v. Howarth, 124 N.E. 687, 73 Ind.App. 454, rehearing denied 127 N.E. 804, 73 Ind.App. 454.
- S.C.—Harrison v. Gallivan Const. Co., 199 S.E. 307, 188 S.C. 304.
- 64 C.J. p 998 note 49.
59. Cal.—Mora v. Faville, 199 P. 17, 186 Cal. 139.
- Ind.—Lake Erie & W. R. Co. v. Howarth, 124 N.E. 687, 127 N.E. 804, 73 Ind.App. 454.
60. U.S.—Chickasha Cotton Oil Co. v. Roden, C.C.A.Okl., 66 F.2d 127.
- Ariz.—Tenney v. Enkeball, 158 P.2d 519, 62 Ariz. 416.
- Ark.—Southwestern Bell Telephone Co. v. Balesh, 76 S.W.2d 291, 189 Ark. 1085.
- Cal.—Miner v. Dabney-Johnson Oil Corporation, 23 P.2d 21, 219 Cal. 580—Pignet v. City of Santa Monica, 115 P.2d 194, 45 Cal.App.2d 766—Blackmore v. Brennan, 110 P.2d 723, 43 Cal.App.2d 280—Fernholtz v. Bisbee, 109 P.2d 371, 42 Cal.App.2d 579—Murphy v. St. Claire Brewing Co., 107 P.2d 273, 41 Cal.App.2d 535—Burr v. Damare, 75 P.2d 621, 24 Cal.App.2d 622—Ross v. Story, 53 P.2d 760, 11 Cal.App.2d 307—Angel v. Los Angeles Gas & Electric Corporation, 42 P.2d 690, 5 Cal.App.2d 270—Setsuko Nitta v. Haslam, 33 P.2d 678, 138 Cal.App. 736—Silveira v. Siegfried, 26 P.2d 666, 135 Cal.App. 218—Lufkin v. City of Bakersfield, 20 P.2d 788, 131 Cal.App. 21.
- Conn.—Heslin v. Malone, 165 A. 594, 116 Conn. 471.
- Ga.—Sylvania Central Ry. Co. v. Gay, 61 S.E.2d 587, 82 Ga.App. 486—Christian v. Smith, 51 S.E.2d 857, 78 Ga.App. 603—Southern R. Co. v. Parkman, 5 S.E.2d 655, 61 Ga.App. 62—Atlanta, B. & C. R. Co. v. Davis, 187 S.E. 148, 53 Ga.App. 814.
- Idaho.—Shepard v. Smith, 263 P.2d 985, 74 Idaho 459—Pittman v. Sather, 183 P.2d 600, 68 Idaho 29—McCooy v. Krengel, 17 P.2d 547, 52 Idaho 626.
- Ill.—Lasko v. Meier, 67 N.E.2d 162, 394 Ill. 71.
- Ind.—King v. Ransburg, 39 N.E.2d 822, 111 Ind.App. 523, rehearing denied 40 N.E.2d 999, 111 Ind.App. 523.
- Iowa.—Tallmon v. Larson, 284 N.W. 367, 226 Iowa 564.
- Mo.—Richards v. Gardner, App., 193 S.W.2d 354—Finley v. Austin, App., 132 S.W.2d 1109—Wheeler v. Breeding, App., 109 S.W.2d 1237—Rosenblum v. Rosenblum, 66 S.W.2d 1082, 231 Mo.App. 276—Martin v. Kiefer, App., 95 S.W.2d 1214—Seism v. Alexander, 93 S.W.2d 36, 230 Mo. App. 1175—Allen v. Wilkerson, App., 87 S.W.2d 1056—Fortner v. Kelly, 60 S.W.2d 642, 227 Mo.App. 933.
- Neb.—Hamilton v. Omaha & Council Bluffs St. Ry. Co., 41 N.W.2d 139, 152 Neb. 328.
- Ohio.—Boenke v. Cincinnati St. Ry. Co., 10 N.E.2d 232, 56 Ohio App. 227.
- Okl.—A. & A. Cab Operating Co. v. Mooneyham, 142 P.2d 974, 193 Okl. 238—Safe-Way Cab Service Co. of Oklahoma City v. Gadberry, 67 P. 2d 434, 180 Okl. 51.
- Or.—Sherrard v. Werline, 91 P.2d 344, 162 Or. 135—Peters v. Hock-

struction which excludes the defense<sup>61</sup> or fails to require that contributory negligence contribute proximately to the injury.<sup>62</sup>

The foregoing rules have been applied to instruc-

tions as to proximate cause,<sup>63</sup> reliance on care of others,<sup>64</sup> comparative negligence,<sup>65</sup> imputed negligence,<sup>66</sup> and the effect of infancy or other disability.<sup>67</sup>

- ley, 53 P.2d 1059, 152 Or. 434, 103 A.L.R. 1347.
- Pa.—Buchanan v. Belusko, 65 A.2d 386, 161 Pa. 465.
- S.C.—Lowie v. Dixie Stores, 174 S.E. 394, 172 S.C. 468—Lawrence v. Southern Ry.—Carolina Division. 167 S.E. 839, 169 S.C. 1.
- Tenn.—Kidd v. Kirby, 1 Tenn.App. 242.
- Va.—Marks v. Ore, 45 S.E.2d 894, 187 Va. 146—Stuart v. Coates, 42 S.E.2d 311, 186 Va. 227.
- 64 C.J. p 999 note 51.
61. Ark.—Byrd v. Galbraith, 288 S.W. 717, 172 Ark. 219.
- 64 C.J. p 999 note 52.
62. U.S.—Bass v. Dehner, C.C.A. N.M., 103 F.2d 28, certiorari denied 60 S.Ct. 100, 308 U.S. 580, 84 L.Ed. 486, rehearing denied 60 S.Ct. 136, 308 U.S. 635, 84 L.Ed. 528.
- Cal.—Block v. Snyder, 234 P.2d 52, 105 Cal.App.2d 783—Weaver v. Landis, 151 P.2d 884, 66 Cal.App.2d 34—Navarro v. Somerfeld, 94 P.2d 623, 35 Cal.App.2d 35—Howard v. Clark, 84 P.2d 529, 29 Cal.App.2d 374.
- Ind.—Cousins v. Glassburn, 24 N.E.2d 1013, 216 Ind. 431.
- Or.—Kiddle v. Schnitzer, 117 P.2d 983, 187 Or. 816.
- Tenn.—Louvier v. City of Nashville, 1 Tenn.App. 401.
- 64 C.J. p 999 note 53.
63. U.S.—Bass v. Dehner, C.C.A. N.M., 103 F.2d 28, certiorari denied 60 S.Ct. 100, 308 U.S. 580, 84 L.Ed. 486, rehearing denied 60 S.Ct. 136, 308 U.S. 635, 84 L.Ed. 528.
- Ala.—Terry v. Nelms, 54 So.2d 282, 256 Ala. 291.
- Cal.—Polk v. City of Los Angeles, 159 P.2d 931, 26 Cal.2d 619—Blanton v. Curry, 129 P.2d 1, 20 Cal.2d 793—Martens v. Redl-Spuds, Inc., 247 P.2d 605, 113 Cal.App.2d 10—Block v. Snyder, 234 P.2d 52, 105 Cal.App.2d 783—O'Connor v. City and County of San Francisco, 207 P.2d 638, 92 Cal.App.2d 626—Carpenter v. Gibson, 181 P.2d 953, 80 Cal.App.2d 269—Stricklin v. Rosemeyer, 142 P.2d 953, 61 Cal.App.2d 359—Haskell v. Toepfer, 134 P.2d 283, 57 Cal.App.2d 63—Blackmore v. Brennan, 110 P.2d 723, 43 Cal.App.2d 280—Miller v. Cranston, 106 P.2d 963, 41 Cal.App.2d 470—Navarro v. Somerfeld, 94 P.2d 623, 35 Cal.App.2d 35—Howard v. Clark, 84 P.2d 529, 29 Cal.App.2d 374—Broun v. Blair, 80 P.2d 95, 26 Cal.App.2d 613—Mahoney v. Murray, 35 P.2d 612, 140 Cal.App. 206—Hanson v. Hess, 16 P.2d 785, 128 Cal.App. 151.
- Conn.—Yorker v. Girard Co., 9 A.2d 501, 126 Conn. 96.
- Ga.—Wilson v. Harrell, 75 S.E.2d 436, 87 Ga.App. 793—Gossett v. Kraft Phenix Cheese Corp., 198 S.E. 298, 58 Ga.App. 265—Atlanta, B. & C. R. Co. v. Davis, 187 S.E. 148, 53 Ga. App. 814—Atlantic Coast Line R. Co. v. McDonald, 179 S.E. 185, 50 Ga.App. 856, certiorari denied 58 S.Ct. 143, 296 U.S. 621, 80 L.Ed. 441.
- Ill.—Sances v. D'Angelo, 86 N.E.2d 847, 338 Ill.App. 199.
- Ind.—Goldblatt Bros. v. Parish, 33 N.E.2d 835, 110 Ind.App. 368, rehearing denied 38 N.E.2d 255, 110 Ind.App. 368.
- Iowa.—Kehm v. Dilts, 270 N.W. 388, 222 Iowa 826—Bobst v. Hoxie Truck Line, 267 N.W. 673, 221 Iowa 823.
- Minn.—Garay v. Michelsen, 35 N.W. 2d 750, 227 Minn. 468.
- Miss.—Cochran v. Peeler, 47 So.2d 806, 209 Miss. 394—Wilburn v. Gordon, 45 So.2d 844, 209 Miss. 27.
- Mont.—Gobel v. Rinio, 200 P.2d 700, 122 Mont. 235.
- N.C.—Green v. Bowers, 55 S.E.2d 192, 230 N.C. 651.
- Ohio.—Youngstown Municipal Ry Co. v. Mikula, 1 N.E.2d 135, 131 Ohio St. 17.
- Utah.—Parker v. Bamberger, 116 P. 2d 425, 100 Utah 361.
- Wash.—Schofeld v. Northern Pac. Ry. Co., 123 P.2d 755, 13 Wash.2d 18—Kuhnhansen v. Woodbeck, 97 P.2d 1099, 2 Wash.2d 338—Curtis v. Perry, 18 P.2d 840, 171 Wash. 542.
- Wyo.—Stanolind Oil & Gas Co. v. Bunce, 62 P.2d 1297, 51 Wyo. 1.
- 64 C.J. p 999 note 55.
64. Cal.—De Lannoy v. Grammatikos, 14 P.2d 542, 126 Cal.App. 79.
- 64 C.J. p 999 note 56.
65. U.S.—Atlantic Coast Line R. Co. v. Burkett, C.A.Ga., 192 F.2d 941.
- Ark.—Missouri Pac. R. Co. v. Brown, 32 S.W.2d 633, 182 Ark. 722.
- Cal.—Persson v. James Griffiths & Sons, 194 P.2d 86, 85 Cal.App.2d 672.
- Ga.—Atlantic Coast Line R. Co. v. Carpenter, 38 S.E.2d 309, 73 Ga. App. 849—Ault v. Whittemore, 35 S.E.2d 526, 73 Ga.App. 10—Pollard v. Kent, 200 S.E. 542, 59 Ga.App. 118—Gossett v. Kraft Phenix Cheese Corp., 198 S.E. 298, 58 Ga. App. 265.
- Miss.—Wilburn v. Gordon, 45 So.2d 844, 209 Miss. 27.
- Neb.—Brooks v. Thayer County, 254 N.W. 413, 126 Neb. 610.
66. Ark.—Missouri Pac. Transp. Co. v. Howard, 143 S.W.2d 538, 201 Ark. 6.
- Cal.—Thomas v. Irvin, 216 P.2d 476, 96 Cal.App.2d 816—Carpenter v. Gibson, 181 P.2d 953, 80 Cal.App.2d 269—Dicken v. Southern, 138 P.2d 408, 59 Cal.App.2d 203—Cedro v. Bergen, 128 P.2d 683, 53 Cal.App.2d 667—Stevenson v. Fleming, 117 P. 2d 717, 47 Cal.App.2d 225—Navarro v. Somerfeld, 94 P.2d 623, 35 Cal. App.2d 35—Howard v. Clark, 84 P. 2d 529, 29 Cal.App.2d 374.
- Conn.—Weller v. Fish Transport Co., 192 A. 317, 123 Conn. 49.
- Ga.—Southern Ry. Co. v. Garland, 41 S.E.2d 925, 75 Ga.App. 98.
- Ill.—Tucker v. Kallal, 112 N.E.2d 731, 350 Ill.App. 325.
- Ind.—Vanosdol v. Henderson, 22 N. E.2d 812, 216 Ind. 240—Kelley v. Dickerson, 13 N.E.2d 835, 213 Ind. 624—Emge v. Sevedge, 78 N.E.2d 687, 118 Ind.App. 277—Goldblatt Bros. v. Parish, 33 N.E.2d 835, 110 Ind.App. 368, rehearing denied 38 N.E.2d 255, 110 Ind.App. 368.
- Ky.—Rutherford v. Smith, 145 S.W.2d 533, 284 Ky. 692.
- Md.—Warner v. Neubert, 187 A. 829, 171 Md. 693.
- Minn.—Olson v. Kennedy Trading Co., 272 N.W. 381, 199 Minn. 493.
- Mo.—Debout v. Kurn, 154 S.W.2d 120, 348 Mo. 501—Engleman v. Railway Exp. Agency, 100 S.W.2d 540, 340 Mo. 360—Chervak v. St. Louis Public Service Co., App., 173 S.W.2d 599—Henton v. Thompson, 156 S. W.2d 739, 236 Mo.App. 1009, certiorari quashed State ex rel. Thompson v. Shain, 163 S.W.2d 967, 349 Mo. 1075.
- N.J.—O'Keefe v. Ripp, 166 A. 197, 110 N.J.Law 555.
- Ohio—Sablack v. Glenn, App., 96 N. E.2d 417.
- Or.—Peters v. Hockley, 53 P.2d 1059, 152 Or. 434, 103 A.L.R. 1347.
- Va.—Outlaw v. Pearce, 11 S.E.2d 600, 176 Va. 458.
- 64 C.J. p 999 note 58.
67. Ala.—Conner v. Foregger, 7 So. 2d 856, 242 Ala. 275.
- Ariz.—Tenney v. Enkeball, 158 P.2d 519, 62 Ariz. 416.
- Cal.—Dike v. Golden State Co., App., 269 P.2d 619—Carpenter v. Gibson, 181 P.2d 953, 80 Cal.App.2d 269—Haskell v. Toepfer, 134 P.2d 283, 57 Cal.App.2d 63—Healy v. Market St. Ry. Co., 107 P.2d 488, 41 Cal. App.2d 733.
- Conn.—Dokus v. Palmer, 33 A.2d 315, 130 Conn. 247.
- Ga.—Christian v. Smith, 51 S.E.2d 857, 78 Ga.App. 603—Huckabee v. Grace, 173 S.E. 744, 48 Ga.App. 621.
- Ill.—Wyma v. De Fay Wonder Cleaners, 77 N.E.2d 353, 333 Ill.App. 330—Cassens v. Tillberg, 13 N.E.2d

*Last clear chance or humanitarian doctrine.* In accordance with the rules heretofore stated, a defective or inaccurate instruction on the doctrine of last clear chance or the humanitarian doctrine,<sup>68</sup> or an instruction which omits reference to the doctrine<sup>69</sup> may be cured by an instruction correctly stating the doctrine, providing the instructions as a series state the law correctly.<sup>70</sup>

### c. Assumption of Risk

As a general rule erroneous instructions ignoring or eliminating the defense of assumption of risk may be

cured by other instructions sufficiently presenting the defense.

Providing the instruction does not purport to cover the whole case, as discussed supra § 441, a particular instruction which ignores the defense of assumption of risk<sup>71</sup> or apparently eliminates the defense,<sup>72</sup> or which is defective or inaccurate,<sup>73</sup> as misleading,<sup>74</sup> confusing,<sup>75</sup> or abstract,<sup>76</sup> may, under general rules already considered, be cured by correct,<sup>77</sup> nonconflicting<sup>78</sup> instructions sufficiently presenting the defense.

- 644, 294 Ill.App. 168—Uhlis v. Old Ben Coal Corp., 281 Ill.App. 254.  
Ind.—Goldblatt Bros. v. Parish, 33 N. E.2d 835, 110 Ind.App. 368, rehearing denied 38 N.E.2d 256, 110 Ind. App. 368.  
Minn.—Bird v. Johnson, 272 N.W. 168, 199 Minn. 252.  
Mo.—Warren v. Kansas City, 258 S. W.2d 681—Bebout v. Kurn, 154 S. W.2d 120, 348 Mo. 501.  
N.J.—Andresen v. Zimmerman, 169 A. 638, 12 N.J.Misc. 87.  
N.C.—Green v. Bowers, 55 S.E.2d 192, 230 N.C. 651.  
Ohio—Michalsky v. Gaertner, 5 N.E. 2d 181, 53 Ohio App. 341.  
Tenn.—Kidd v. Kirby, 1 Tenn.App. 242.  
64 C.J. p 999 note 59.

68. Cal.—Martin v. Viera, 90 P.2d 846, superseded 93 P.2d 261, 34 Cal. App.2d 86, hearing denied 94 P.2d 567, 34 Cal.App.2d 86—De Fries v. Market St. Ry. Co., 88 P.2d 256, 31 Cal.App.2d 463—Smith v. Pacific Greyhound Corporation, 35 P.2d 169, 139 Cal.App. 696.  
Conn.—Corey v. Phillips, 10 A.2d 370, 126 Conn. 246.  
Fla.—Burns v. Freund, 49 So.2d 592.  
Ga.—Coble v. Georgia Motor Exp., 8 S.E.2d 724, 62 Ga.App. 566.  
Ky.—H. M. Williams Motor Co. v. Howard, 65 S.W.2d 688, 261 Ky. 557.  
Mo.—Romandel v. Kansas City Public Service Co., 284 S.W.2d 585—Newman v. St. Louis Public Service Co., 244 S.W.2d 45—Wright v. Osborn, 201 S.W.2d 935, 356 Mo. 382—Lankford v. Thompson, 189 S.W.2d 217, 354 Mo. 220—Johnson v. Dawidoff, 177 S.W.2d 467, 352 Mo. 342—Bebout v. Kurn, 154 S.W.2d 120, 348 Mo. 501—Conroy v. St. Joseph Ry., Light, Heat & Power Co., 134 S.W.2d 93, 345 Mo. 592—Perkins v. Terminal R. Ass'n of St. Louis, 102 S.W.2d 915, 340 Mo. 868—Hein v. Peabody Coal Co., 85 S.W.2d 604, 337 Mo. 626—Jordan v. St. Joseph Ry., Light, Heat & Power Co., 73 S.W.2d 205, 335 Mo. 319—Bootee v. Kansas City Public Service Co., 199 S.W.2d 69, 239 Mo.App. 1065—Brown v. Alton R. Co., 161 S.W.2d 727, 236 Mo.App. 26—Hart v. Kan-

- sas City Public Service Co., App., 142 S.W.2d 348—Thompson v. Wilson, App., 119 S.W.2d 848—Molkenbur v. St. Louis Public Service Co., 103 S.W.2d 560, 232 Mo.App. 256—Grisham v. Freewald, 95 S.W.2d 349, 230 Mo.App. 1203, opinion quashed on other grounds State ex rel. Grisham v. Allen, 124 S.W.2d 1080, mandate conformed to Grisham v. Freewald, App., 130 S.W.2d 653—Hinds v. Chicago, B. & Q. R. Co., App., 85 S.W.2d 165—Parsons v. Himmelsbach, App., 68 S.W.2d 841, certiorari quashed State ex rel. Himmelsbach v. Becker, 85 S. W.2d 420, 337 Mo. 341.  
64 C.J. p 999 note 61.

69. Cal.—Stein v. United Railroads of San Francisco, 113 P. 663, 169 Cal. 368.  
64 C.J. p 999 note 62.

70. Ky.—Herndon v. Waldon, 47 S. W.2d 1047, 243 Ky. 312.  
Tex.—Chicago, R. I. & G. Ry. Co. v. Wentzel, Civ.App., 214 S.W. 710.

#### Error held not cured

- Mo.—Anderson v. Prugh, 264 S.W.2d 358—Sauer v. Winkler, 263 S.W.2d 370—Stith v. St. Louis Public Service Co., 251 S.W.2d 693, 363 Mo. 442—Harrow v. Kansas City Public Service Co., 233 S.W.2d 644, 361 Mo. 42—Reiling v. Russell, 153 S. W.2d 6, 348 Mo. 279—Clifford v. Pitcairn, 131 S.W.2d 508, 345 Mo. 60—Scudder v. St. Joseph Belt Ry. Co., 92 S.W.2d 138, 338 Mo. 492—White v. Kansas City Public Service Co., 193 S.W.2d 60, 239 Mo.App. 571—Wright v. Hummel, App., 164 S.W.2d 640.

- W.Va.—Meyn v. Dulaney-Miller Auto Co., 191 S.E. 558, 118 W.Va. 545.

71. Ark.—Standard Oil Co. of La. v. Webb, 108 S.W.2d 1086, 194 Ark. 569.

- Ky.—Coburn v. North American Refrigerators Co., 174 S.W.2d 757, 295 Ky. 566.

- Utah.—Ward v. Denver & R. G. W. R. Co., 85 P.2d 837, 96 Utah 564.  
64 C.J. p 999 note 65.

#### Error held not cured

- Failure of instruction authorizing recovery to take account of defense

of assumption of risk was not cured by immediately following instruction that, while employee assumed all risks ordinarily incident to work, he did not assume risk of employer's negligence with respect to keeping place of work in reasonably safe condition unless he knew, or by ordinary care could have known, of such negligence.—McEachin v. Martin, 102 S. W.2d 884, 193 Ark. 787.

72. Ark.—Louisiana & A. Ry. Co. v. Muldrow, 27 S.W.2d 516, 181 Ark. 674.

- 64 C.J. p 999 note 66.

73. U.S.—Chickasha Cotton Oil Co. v. Roden, C.C.A.Okla., 66 F.2d 127, N.H.—Glidden v. Public Service Co. of New Hampshire, 183 A. 866, 88 N.H. 4.

- N.C.—Barton v. Atlantic Coast Line R. Co., 193 S.E. 674, 212 N.C. 256, certiorari denied Atlantic Coast Line R. Co. v. Barton, 58 S.Ct. 750, 303 U.S. 651, 82 L.Ed. 1112.  
Tenn.—Kurn v. Weaver, 161 S.W.2d 1005, 25 Tenn.App. 556.  
64 C.J. p 1000 note 67.

74. Wash.—Engelking v. City of Spokane, 110 P. 26, 59 Wash. 446, 29 L.R.A.N.S., 481.  
64 C.J. p 1000 note 68.

75. Minn.—Fries v. Chicago, R. I. & P. Ry. Co., 198 N.W. 998, 159 Minn. 328.

76. Tex.—St. Louis Southwestern Ry. Co. of Texas v. Martin, Civ. App., 161 S.W. 405.

77. U.S.—Chickasha Cotton Oil Co. v. Roden, C.C.A.Okla., 66 F.2d 127. Ark.—Standard Oil Co. of La. v. Webb, 108 S.W.2d 1086, 194 Ark. 569.

- Ky.—Coburn v. North American Refrigerators Co., 174 S.W.2d 757, 295 Ky. 566.

- Tenn.—Kurn v. Weaver, 161 S.W.2d 1005, 25 Tenn.App. 556.  
Utah.—Ward v. Denver & R. G. W. R. Co., 85 P.2d 837, 96 Utah 564.  
64 C.J. p 1000 note 72.

78. Vt.—Garfield v. Passumpsic Telephone Co., 100 A. 762, 91 Vt. 315.  
64 C.J. p 1000 note 73.

§ 444. — Evidence

- a. In general
- b. Presumptions
- c. Burden of proof
- d. Weight and sufficiency

a. In General

Instructions relating to the evidence, which are defective or inaccurate, may be cured by other instructions correctly stating the law.

Under the rules already stated supra § 441, instructions relating to the evidence, which are defective or inaccurate, may be cured by other in-

structions correctly stating the law.<sup>79</sup> Accordingly, an instruction which fails to limit the effect of evidence,<sup>80</sup> or which might authorize the jury to ignore all or part of the evidence,<sup>81</sup> may be corrected by other instructions, providing the instructions as a series correctly state the law.<sup>82</sup>

b. Presumptions

Erroneous instructions with respect to presumptions may be cured by other instructions correctly stating the law.

A particular instruction with respect to presumptions which might be objectionable as defective or inaccurate,<sup>83</sup> or which might be open to the ob-

79. U.S.—Cannery Exchange Subscribers at Warners Inter-Insurance Bureau v. North Am. Canning Co., C.A.Fla., 194 F.2d 588—Zurick v. Wehr, C.C.A.Pa., 163 F.2d 791—Woolfe v. Connecticut Mut. Life Ins. Co. of Hartford, Conn., C.C.A.Mo., 103 F.2d 417.  
Cal.—City of Los Angeles v. Cole, 170 P.2d 928, 28 Cal.2d 509—Packard v. Moore, 71 P.2d 922, 9 Cal.2d 571—Crooks v. Glens Falls Indemnity Co., App., 268 P.2d 203—Barton v. Messmore, 265 P.2d 949, 122 Cal.App.2d 818—Taha v. Vinegrold, 184 F.2d 532, 81 Cal.App.2d 536—Soares v. Barson, 55 P.2d 1283, 12 Cal.App.2d 582.  
Conn.—Marra v. Kaufman, 58 A.2d 736, 134 Conn. 622—Vivencio v. Heller, 40 A.2d 194, 131 Conn. 406.  
D.C.—Guaranty Development Co. v. Libenstein, Mun.App., 83 A.2d 669.  
Ga.—Swalm v. Barton, 77 S.E.2d 507, 210 Ga. 24—Barron v. Chamblee, 34 S.E.2d 828, 199 Ga. 591—Bagley v. Tarvin, 48 S.E.2d 704, 77 Ga.App. 365—Southern Ry. Co. v. Wilcox, 2 S.E.2d 225, 59 Ga.App. 785—Parnell v. A. W. Muse Co., 192 S.E. 556, 56 Ga.App. 213—Franklin Fire Ins. Co. v. Shahan, 167 S.E. 194, 48 Ga.App. 181.  
Idaho.—Maier v. Minidoka County Motor Co., 105 P.2d 1076, 61 Idaho 642—Judd v. Oregon Short Line R. Co., 44 P.2d 291, 55 Idaho 461.  
Ill.—Dixon v. Montgomery Ward & Co., 114 N.E.2d 44, 351 Ill.App. 75—Wilson v. Hobrock, 100 N.E.2d 412, 344 Ill.App. 147—McManaman v. Johns-Manville Products Corp., 72 N.E.2d 741, 331 Ill.App. 178, affirmed 81 N.E.2d 137, 400 Ill. 423—Cox v. Hraskey, 47 N.E.2d 728, 318 Ill.App. 287—Bunch v. McAllister, 266 Ill.App. 248.  
Ind.—Hamling v. Hildebrandt, 81 N.E.2d 603, 119 Ind.App. 22—Ailes v. Ailes, 11 N.E.2d 73, 104 Ind.App. 302.  
Iowa.—Shannon v. Gaar, 15 N.W.2d 257, 234 Iowa 1360—O'Meara v. Green Const. Co., 282 N.W. 735, 225 Iowa 1365—Malcor v. Johnson, 273 N.W. 145, 223 Iowa 644—Goben v.

Des Moines Asphalt Paving Co., 252 N.W. 262, 218 Iowa 829.  
Kan.—Stegman v. Professional & Business Men's Life Ins. Co., 252 P.2d 1074, 173 Kan. 744.  
Mass.—Schneider v. De Christopher, 16 N.E.2d 857, 301 Mass. 241.  
Mich.—Cipriano v. Mercantile Ins. Co. of America, 279 N.W. 855, 284 Mich. 346.  
Miss.—Evans v. Jackson City Lines, 56 So.2d 80, 212 Miss. 895.  
Mo.—Brown v. Payne, 264 S.W.2d 341—Rath v. Knight, 55 S.W.2d 682.  
Mont.—Farnum v. Montana-Dakota Power Co., 43 P.2d 640, 99 Mont. 217.  
Neb.—Becker v. Hasebroeck, 59 N.W.2d 560, 157 Neb. 353—Nana v. Shada, 34 N.W.2d 650, 150 Neb. 362.  
N.J.—Neighbour v. Matusavage, 25 A.2d 868, 128 N.J.Law 331.  
N.Y.—Orsolits v. H. Hyman Drum & Barrel Corp., 127 N.Y.S.2d 252, 283 App.Div. 686—Group v. Szenher, 20 N.Y.S.2d 803, 260 App.Div. 308, affirmed 31 N.E.2d 508, 284 N.Y. 741.  
Ohio.—Gilbert v. Reardon, 188 N.E. 359, 46 Ohio App. 206.  
Or.—Snyder v. Portland Traction Co., 185 P.2d 563, 182 Or. 344.  
Utah.—Ward v. Denver & R. G. W. R. Co., 85 P.2d 837, 96 Utah 564.  
Wash.—Herndon v. City of Seattle, 118 P.2d 421, 11 Wash.2d 88—Pearce v. Puget Sound Broadcasting Co., 16 P.2d 843, 170 Wash. 472.  
64 C.J. p 1000 note 76.  
80. Iowa.—Sullivan v. Herrick, 140 N.W. 359, 161 Iowa 148.  
81. Ga.—Southern Ry. Co. v. Wilcox, 2 S.E.2d 225, 59 Ga.App. 785—Parnell v. A. W. Muse Co., 192 S.E. 556, 56 Ga.App. 213—Franklin Fire Ins. Co. v. Shahan, 167 S.E. 194, 48 Ga.App. 181.  
Ohio.—Gilbert v. Reardon, 188 N.E. 359, 46 Ohio App. 206.  
64 C.J. p 1000 note 78.  
82. Ill.—Wilson v. Hobrock, 100 N.E.2d 412, 344 Ill.App. 147.  
Neb.—Bohmont v. Moore, 295 N.W. 419, 138 Neb. 784, 133 A.L.R. 270, rehearing denied 297 N.W. 559, 138 Neb. 907, 133 A.L.R. 279.

N.C.—Curlee v. Scales, 28 S.E.2d 576, 223 N.C. 788.  
Va.—Sutherland v. Sutherland, 66 S.E.2d 537, 192 Va. 764.  
64 C.J. p 1000 note 79.  
83. U.S.—Falkerson v. New York, N. H. & H. R. Co., C.A.N.Y., 188 F.2d 892, stating Connecticut law—Shanahan v. Southern Pac. Co., C. A. Cal., 188 F.2d 564—Falstaff Brewing Corp. v. Thompson, C.C.A.Neb., 101 F.2d 301, certiorari denied 59 S.Ct. 834, 307 U.S. 531, 83 L.Ed. 1514—U. S. v. Monger, C.C.A.Wyo., 70 F.2d 361.  
Cal.—Zentz v. Coca Cola Bottling Co. of Fresno, 247 P.2d 344, 39 Cal.2d 436—Blanton v. Curry, 129 P.2d 1, 20 Cal.2d 793—Speck v. Sarver, 128 P.2d 16, 20 Cal.2d 586—Gholdt v. Sartorio, 259 P.2d 62, 119 Cal.App.2d 198—Collier v. Los Angeles Ry. Co., 140 P.2d 266, 60 Cal.App.2d 169—Barsha v. Metro-Goldwyn-Mayer, 90 P.2d 371, 32 Cal.App.2d 556—Barr v. Hall, 65 P.2d 1246, 12 Cal.App.2d 489—Walters v. Du Four, 22 P.2d 259, 132 Cal.App. 72, hearing denied, Supp., 23 P.2d 1020, 132 Cal.App. 72.  
Ga.—McDonald v. Wimpy, 56 S.E.2d 524, 206 Ga. 270—Mutual Life Ins. Co. of New York v. Burton, 179 S.E. 390, 50 Ga.App. 859—Morton v. Wallace, 171 S.E. 720, 177 Ga. 856.  
Ill.—Goldstein v. Metropolitan Life Ins. Co., 57 N.E.2d 645, 324 Ill.App. 168—Stivers v. Black & Co., 42 N.E.2d 349, 315 Ill.App. 38—Anders v. Metropolitan Life Ins. Co., 40 N.E.2d 738, 314 Ill.App. 196.  
Minn.—Gross v. General Inv. Co., 259 N.W. 557, 194 Minn. 23.  
Mo.—Whistler v. Bond, App., 87 S.W.2d 237.  
N.J.—Mead v. Wiley Methodist Episcopal Church, 93 A.2d 9, 23 N.J. Super. 342.  
Ohio.—Wolf v. Hawk, 25 N.E.2d 460, 63 Ohio App. 122.  
Okla.—Prudential Ins. Co. of America v. Foster, 168 P.2d 295, 197 Okl. 39, 166 A.L.R. 1.  
Or.—Landers v. Safeway Stores, 139 P.2d 788, 172 Or. 116.

jection that it was not applicable to the pleadings,<sup>84</sup> may, under the general rules already considered, be cured by another instruction correctly stating the law, providing the instructions as a series correctly state the law<sup>85</sup> and do not leave the jury to choose between two inconsistent instructions;<sup>86</sup> but an erroneous instruction may be prejudicial to a degree where it cannot be cured or overcome by other instructions.<sup>87</sup>

The foregoing rules have been applied to instructions as to presumptions on cause of death,<sup>88</sup> negligence,<sup>89</sup> contributory negligence,<sup>90</sup> testamentary capacity,<sup>91</sup> and to various other presumptions;<sup>92</sup> and such rules have also been applied to the rebuttal of presumptions.<sup>93</sup>

*Res ipsa loquitur.* In accordance with the general rules hereinbefore stated, a defective or inaccurate instruction on the doctrine of *res ipsa loquitur* may, as a general rule, be cured by other instructions correctly stating the law,<sup>94</sup> provided the instructions as a series correctly state the law.<sup>95</sup>

### c. Burden of Proof

As a general rule erroneous instructions as to the burden of proof may be cured by correct instructions.

In accordance with the rules hereinbefore stated, a correct instruction as to the burden of proof may cure the error in a particular instruction which may be objectionable as inaccurate or defective.<sup>96</sup> Like-

Pa.—Goldberg v. Wine, 192 A. 252, 326 Pa. 355.

S.C.—Holder v. Sovereign Camp, W. O. W., 185 S.E. 547, 180 S.C. 242.

Wash.—Lundberg v. Baumgartner, 106 P.2d 566, 5 Wash.2d 619.

64 C.J. p 1000 note 80.

64 Ga.—Louisville & N. R. Co. v. Studdard, 130 S.E. 532, 34 Ga.App. 570.

85. U.S.—Falstaff Brewing Corp. v. Thompson, C.C.A.Neb., 89 F.2d 557, certiorari denied Thompson v. Falstaff Brewing Corp., 58 S.Ct. 28, 302 U.S. 709, 83 L.Ed. 547.

64 Ga.—Louisville & N. R. Co. v. Bennett, 80 S.E.2d 195, 89 Ga.App. 534.

64 C.J. p 1000 note 83.

86. U.S.—Cummings v. Pennsylvania R. Co., C.C.A.N.Y., 45 F.2d 152.

Iowa.—Hoover v. Haggard, 260 N.W. 540, 219 Iowa 1232.

Pa.—Logan, to Use of Butts, v. City of Bethlehem, 187 A. 339, 324 Pa. 7.

87. Cal.—Carlson v. Shewalter, 243 P.2d 549, 110 Cal.App.2d 555.

Neb.—Stocker v. Roach, 300 N.W. 627, 140 Neb. 551.

88. Ga.—Mutual Life Ins. Co. of New York v. Hurston, 179 S.E. 390, 60 Ga.App. 559.

Ill.—Goldstein v. Metropolitan Life Ins. Co., 57 N.E.2d 645, 324 Ill.App. 168—Anders v. Metropolitan Life Ins. Co., 40 N.E.2d 738, 314 Ill.App. 198.

Okla.—Prudential Ins. Co. of America v. Foster, 168 P.2d 295, 197 Okl. 39, 166 A.L.R. 1.

64 C.J. p 1000 note 85.

89. Cal.—Zents v. Coca Cola Bottling Co. of Fresno, 247 P.2d 344, 39 Cal. 2d 436—Collier v. Los Angeles Ry. Co., 140 P.2d 206, 60 Cal.App.2d 169.

Ill.—Stivers v. Black & Co., 42 N.E.2d 349, 315 Ill.App. 38.

Ohio.—Wolf v. Hawk, 25 N.E.2d 460, 63 Ohio App. 122.

Pa.—Logan, to Use of Butts, v. City of Bethlehem, 187 A. 339, 324 Pa. 7.

64 C.J. p 1000 note 86.

90. U.S.—Falkerson v. New York, N. H. & H. R. Co., C.A.N.Y., 188 F.2d 892, stating Connecticut law—Shanahan v. Southern Pac. Co., C.A. Cal., 188 F.2d 564.

Cal.—Speck v. Sarver, 128 P.2d 16, 20 Cal.2d 585—Goldi v. Sartorio, 259 P.2d 62, 119 Cal.App.2d 198—Barr v. Hall, 55 P.2d 1246, 12 Cal.App.2d 489.

Minn.—Gross v. General Inv. Co., 259 N.W. 557, 194 Minn. 23.

Wash.—Lundberg v. Baumgartner, 106 P.2d 566, 5 Wash.2d 619.

64 C.J. p 1000 note 87.

91. Ga.—Franklin v. First Nat. Bank, 200 S.E. 679, 187 Ga. 268.

Ind.—Alles v. Alles, 11 N.E.2d 73, 104 Ind.App. 302.

64 C.J. p 1000 note 88.

92. Contract of hiring or obligation to pay

Mo.—Whistler v. Bond, App., 87 S. W.2d 237.

93. U.S.—Morton v. Wallace, 171 S.E. 720, 177 Ga. 856.

S.C.—Holder v. Sovereign Camp, W. O. W., 185 S.E. 547, 180 S.C. 242.

94. Gift

Pa.—Goldberg v. Wine, 192 A. 252, 326 Pa. 355.

95. Knowledge of the law

Ga.—McDonald v. Wimpy, 56 S.E.2d 524, 206 Ga. 270.

96. Origin of disease

U.S.—U. S. v. Monger, C.C.A.Wyo., 70 F.2d 361.

97. Ownership

U.S.—Falstaff Brewing Corp. v. Thompson, C.C.A.Neb., 101 F.2d 301, certiorari denied 59 S.Ct. 834, 307 U.S. 631, 83 L.Ed. 1514.

98. Payment of debt

Pa.—Goldberg v. Wine, 192 A. 252, 326 Pa. 355.

99. Piracy of literary property

Cal.—Barsha v. Metro-Goldwyn-May-  
er, 90 P.2d 371, 32 Cal.App.2d 556.

100. Possession

N.J.—Mead v. Wiley Methodist Epis-

copal Church, 93 A.2d 9, 23 N.J.Super. 342.

101. That another would obey the law

Cal.—Blanton v. Curry, 129 P.2d 1, 20 Cal.2d 793.

102. Cal.—In re Nelson's Estate, 216 P. 368, 191 Cal. 280.

64 C.J. p 1000 note 89.

103. U.S.—Moreau v. Pennsylvania R. Co., C.C.A.Pa., 166 F.2d 543.

Cal.—Hardin v. San Jose City Lines, 260 P.2d 63, 41 Cal.2d 432—Zents v. Coca Cola Bottling Co. of Fresno, 247 P.2d 344, 39 Cal.2d 436—Silva v. Pacific Greyhound Lines, 259 P.2d 743, 119 Cal.App.2d 284—Mullity v. Southern Pac. Co., 316 P. 2d 534, 96 Cal.App.2d 841—Pollard v. Foster, 129 P.2d 448, 54 Cal.App. 2d 502—Irwin v. Pickwick Stages System, 25 P.2d 998, 134 Cal.App. 443.

104. Ga.—Baldwin v. Georgia Automatic Gas Co., 70 S.E.2d 105, 85 Ga.App. 767.

Ind.—Klickels v. Fein, 10 N.E.2d 297, 104 Ind.App. 606.

N.J.—Plant v. River Road Service Co., 88 A.2d 876, 5 N.J.Super. 290

—Journey v. Zawish, 167 A. 7, 11 N.J.Misc. 482.

R.I.—Chisholm v. S. S. Kresge Co., 182 A. 4, 55 R.I. 422.

64 C.J. p 1000 note 90.

95. Cal.—Zents v. Coca Cola Bottling Co. of Fresno, 247 P.2d 344, 39 Cal. 2d 436.

64 C.J. p 1001 note 91.

96. U.S.—Theatre Enterprises v. Paramount Film Distributing Corp., C.A.Md., 201 F.2d 306, affirmed 74 S.Ct. 257, 346 U.S. 537, 98 L.Ed. —Falkerson v. New York, N. H. & H. R. Co., C.A.N.Y., 188 F.2d 892, stating Connecticut law—Atkinson v. New Britain Mach. Co., C. C.A.Ill., 154 F.2d 895—Keller v. Brooklyn Bus Corp., C.C.A.N.Y., 128 F.2d 510—New York Life Ins. Co. v. Rogers, C.C.A.Ariz., 126 F.2d 784

—Compagnie Generale Transatlantique v. Tawes, C.C.A.Canal Zone.



wise, a correct instruction as to the burden of proof may cure the error in a particular instruction which may be objectionable as misleading,<sup>87</sup> or may rectify the error of another instruction which might

- 111 F.2d 92, certiorari denied 61 S. Ct. 46, 311 U.S. 678, 85 L.Ed. 437—Equitable Life Assur. Soc. of U.S. v. Salmen, C.C.A.Miss., 81 F.2d 571, certiorari denied 56 S.Ct. 749, 298 U.S. 664, 80 L.Ed. 1389.
- Ala.—Hughes v. Merchants Nat. Bank of Mobile, 53 So.2d 386, 256 Ala. 88—Alabama Great Southern R. Co. v. Moundville Motor Co., 4 So.2d 305, 241 Ala. 633—W. U. Tel. Co. v. Gorman, 185 So. 743, 237 Ala. 146—Kelly v. Hanwick, 153 So. 269, 228 Ala. 336—Texas Co. v. Williams, 152 So. 47, 228 Ala. 30—Ogburn v. Montague, 155 So. 633, 26 Ala.App. 166, certiorari denied 155 So. 636, 229 Ala. 78.
- Ark.—Albritton v. C. M. Ferguson & Son, 122 S.W.2d 620, 197 Ark. 436.
- Cal.—Popejoy v. Hannon, 231 P.2d 484, 37 Cal.2d 159—Fackard v. Moore, 71 P.2d 922, 9 Cal.2d 571—Crooks v. Glens Falls Indem. Co., App., 268 P.2d 203—Wallack v. Bass, 234 P.2d 160, 105 Cal.App.2d 638—Megee v. Fasulis, 150 P.2d 281, 65 Cal.App.2d 94—Ferguson v. Nakahara, 110 P.2d 1091, 43 Cal. App.2d 436—In re Hansen's Estate, 100 P.2d 776, 38 Cal.App.2d 99—Passarelli v. Souza, 98 P.2d 809, 37 Cal.App.2d 1—McNamara v. Emmons, 97 P.2d 503, 36 Cal.App.2d 139—Gerberich v. Southern California Edison Co., 79 P.2d 783, 26 Cal.App.2d 471—Sim v. Weeks, 45 P.2d 350, 7 Cal.App.2d 28—Mahoney v. Murray, 35 P.2d 612, 140 Cal. App. 206—Harrison v. Harter, 18 P.2d 436, 129 Cal.App. 22.
- Conn.—McPheters v. Loomis, 7 A.2d 437, 125 Conn. 526.
- Fla.—Atlantic Greyhound Lines v. Lovett, 184 So. 133, 134 Fla. 505.
- Ga.—McCullough v. Kirby, 51 S.E.2d 812, 204 Ga. 738—Wardlaw v. Wardlaw, 1 S.E.2d 24, 187 Ga. 467—Hudson v. Carmichael, 181 S.E. 853, 181 Ga. 317—Sutton v. Allen, 72 S.E.2d 921, 87 Ga.App. 25—Parsons v. Foshee, 55 S.E.2d 386, 80 Ga.App. 127—Western & A. R. R. v. Fowler, 47 S.E.2d 874, 77 Ga.App. 206—Columbian Peanut Co. v. Pope, 24 S.E.2d 710, 69 Ga.App. 26—Daughtry v. Georgia Power Co., 6 S.E.2d 464, 61 Ga.App. 505—Georgia Power Co. v. Sheats, 199 S.E. 582, 58 Ga.App. 730—Georgia Power Co. v. Jones, 188 S.E. 568, 54 Ga.App. 578—McCowen v. McCord, 175 S.E. 593, 49 Ga.App. 358.
- Ill.—Illinois Iowa Power Co. v. Rhein, 17 N.E.2d 582, 369 Ill. 584—Wilson v. Hobrock, 100 N.E.2d 412, 344 Ill.App. 147—Hoffman v. Jenard, 78 N.E.2d 322, 334 Ill.App. 74—Colky v. Metropolitan Life Ins. Co., 49 N.E.2d 830, 320 Ill.App. 120—Gray v. Richardson, 40 N.E.2d 598, 313 Ill.App. 626—Edwards v. Hill-Thomas Lime & Cement Co., 32 N.E.2d 945, 309 Ill.App. 168, reversed on other grounds 37 N.E.2d 801, 378 Ill. 180—Carroll v. Krause, 15 N.E.2d 323, 295 Ill.App. 552.
- Ind.—Craig v. Citizens Trust Co., 26 N.E.2d 1006, 217 Ind. 434—Bain v. Mattmiller, 13 N.E.2d 712, 213 Ind. 549—Vogel v. Riden, 44 N.E.2d 238, 112 Ind.App. 493—Western & Southern Life Ins. Co. v. Kerger, 36 N.E.2d 965, 111 Ind.App. 297—Kickels v. Fein, 10 N.E.2d 297, 104 Ind.App. 606—Dunbar v. Demaree, 2 N.E.2d 1003, 102 Ind.App. 585—Livingston v. Rice, 184 N.E. 583, 96 Ind.App. 176.
- Iowa.—Thordson v. McKelghan, 16 N.W.2d 607, 235 Iowa 409—Simanek v. Behel, 7 N.W.2d 792, 232 Iowa 1150—Ralney v. Riese, 257 N.W. 346, 219 Iowa 164.
- Kan.—Doyle v. City of Herington, 45 P.2d 890, 142 Kan. 169.
- Md.—Merrick v. United Rys. & Electric Co. of Baltimore City, 163 A. 816, 163 Md. 641.
- Mich.—Daugherty v. Park, 265 N.W. 499, 274 Mich. 673.
- Miss.—Harrington v. Pilkinton, 71 So. 2d 884—Guyann v. Brondum, 63 So. 2d 821, 217 Miss. 243—McArdle's Estate v. City of Jackson, 61 So. 2d 400, 215 Miss. 571—Evans v. Jackson City Lines, 56 So.2d 80, 212 Miss. 895.
- Mo.—Machens v. Machens, 263 S.W.2d 724—Pierce v. New York Cent. R. Co., 257 S.W.2d 84—Lukitsch v. St. Louis Public Service Co., 246 S.W.2d 749, 362 Mo. 1071—Raap v. Baumbach, 223 S.W.2d 472—Counts v. Thompson, 222 S.W.2d 487, 359 Mo. 455—Veitch v. Thompson, 210 S.W.2d 79, 357 Mo. 703—Duncan v. St. Louis Public Service Co., 197 S.W.2d 964, 355 Mo. 733—Dove v. Atchison, T. & S. F. Ry. Co., 163 S.W.2d 548, 349 Mo. 798—Burneson v. Zumwalt Co., 159 S.W.2d 605, 349 Mo. 94—State ex rel. State Highway Commission of Missouri v. Shain, 102 S.W.2d 666, 340 Mo. 802, mandate conformed to 113 S.W.2d 132, 232 Mo.App. 831—Heibel v. Ahrens, 55 S.W.2d 473—Ellis v. Kansas City Public Service Co., App., 203 S.W.2d 475—Long v. Rogers, App., 185 S.W.2d 863—State ex rel. State Highway Commission v. Lindley, 113 S.W.2d 132, 232 Mo. App. 831.
- Neb.—Scarborough v. Aeroservice, Inc., 53 N.W.2d 902, 155 Neb. 749, 30 A.L.R.2d 1159—Cartwright & Wilson Const. Co. v. Smith, 52 N.W.2d 274, 155 Neb. 431—Allen v. Massachusetts Mut. Life Ins. Co., 30 N.W.2d 885, 149 Neb. 233—John-
- son v. Batteen, 13 N.W.2d 625, 144 Neb. 384—Whittaker v. Omaha & C. B. St. Ry. Co., 291 N.W. 275, 137 Neb. 800.
- N.H.—Glidden v. Public Service Co. of New Hampshire, 183 A. 865, 88 N.H. 4.
- N.J.—Stout v. City of Rayonne, 194 A. 242, 15 N.J.Misc. 672, affirmed 199 A. 57, 120 N.J.Law 242.
- N.Y.—Slattery v. Heller, 293 N.Y.S. 25, 163 Misc. 713.
- N.C.—Webb v. Imperial Life Ins. Co., 3 S.E.2d 428, 216 N.C. 10.
- Ohio.—Davis v. Zucker, App., 106 N. E.2d 169—Haslem v. Jackson, 40 N. E.2d 692, 68 Ohio App. 433—Davis v. American Rolling Mills Co., 7 N.E.2d 238, 54 Ohio App. 298.
- Okl.—Jordan v. Peck, 268 P.2d 242—Prudential Ins. Co. of America v. Foster, 168 P.2d 295, 197 Okl. 38, 166 A.L.R. 1—Latson v. McCollum, 134 P.2d 130, 192 Okl. 48—Norton v. Harmon, 133 P.2d 206, 192 Okl. 36—Western States Grocery Co. v. Gillan, 83 P.2d 810, 183 Okl. 558—Blackburn v. Martin & Mueller, 50 P.2d 627, 174 Okl. 394.
- Or.—Stuart v. Occidental Life Ins. Co., 68 P.2d 1037, 156 Or. 522.
- Pa.—Nathan v. McGinley, 19 A.2d 917, 342 Pa. 12—Wright v. Straesley, 182 A. 682, 321 Pa. 1—McCracken v. Curwensville Borough, 163 A. 217, 309 Pa. 98, 86 A.L.R. 1379—Creavy v. Ritter, 52 Pa.Dist. & Co. 666, 46 Lack Jur. 109.
- R.I.—Solomon v. Shepard Co., 200 A. 993, 61 R.I. 332.
- Tenn.—Burrow v. Lewis, 142 S.W.2d 758, 24 Tenn.App. 253.
- Tex.—United Employers' Casualty Co. v. Burk, Civ.App., 140 S.W.2d 571, error dismissed.
- Utah.—Williams v. Ogden Union Ry. & Depot Co., 230 P.2d 315.
- Va.—Bryant v. Bare, 64 S.E.2d 741, 192 Va. 238—Stallard v. Atlantic Greyhound Lines, 192 S.E. 800, 169 Va. 223.
- Wash.—Choate v. Robertson, 195 P. 2d 30, 31 Wash.2d 118—American Products Co. v. Willcock, 109 P.2d 570, 7 Wash.2d 246, 132 A.L.R. 1010—Lyle v. Ginnold, 24 P.2d 449, 174 Wash. 104.
- Wis.—State ex rel. Jahn v. Rydell, 27 N.W.2d 486, 250 Wis. 377.
- Wyo.—Stanolind Oil & Gas Co. v. Bunce, 62 P.2d 1297, 51 Wyo. 1, 64 C.J. p 1001 note 93.
97. Ala.—Kelly v. Hanwick, 153 So. 269, 228 Ala. 336.
- Cal.—Crooks v. Glens Falls Indemnity Co., App., 268 P.2d 203—Wallack v. Bass, 234 P.2d 160, 105 Cal. App.2d 638—Ferguson v. Nakahara, 110 P.2d 1091, 43 Cal.App.2d 435—Passarelli v. Souza, 98 P.2d 809, 37 Cal.App.2d 1—McNamara v. Em-

be open to the objection that it is ambiguous,<sup>98</sup> or confusing,<sup>99</sup> or too broad,<sup>1</sup> or obscure or uncertain,<sup>2</sup> or inapt;<sup>3</sup> or which violates the rule against referring the jury to the pleadings,<sup>4</sup> or places the burden on the wrong party.<sup>5</sup>

These rules have been applied to instructions on

the burden of proof as to fraud,<sup>6</sup> undue influence,<sup>7</sup> testamentary capacity,<sup>8</sup> settlement,<sup>9</sup> mutual mistake,<sup>10</sup> and waiver.<sup>11</sup> These rules have also been applied to instructions on the burden of proof with respect to negligence,<sup>12</sup> and with respect to issues as to contributory negligence,<sup>13</sup> affirmative de-

- mons, 97 P.2d 503, 36 Cal.App.2d 199—Gerberich v. Southern California Edison Co., 79 P.2d 783, 26 Cal.App.2d 471.
- Fla.—Atlantic Greyhound Lines v. Lovett, 184 So. 133, 134 Fla. 505.
- Ga.—Parsons v. Foshee, 55 S.E.2d 386, 80 Ga.App. 127.
- Ill.—Edwards v. Hill-Thomas Lime & Cement Co., 32 N.E.2d 945, 309 Ill. App. 168, reversed on other grounds 37 N.E.2d 801, 378 Ill. 180.
- Ind.—Craig v. Citizens Trust Co., 26 N.E.2d 1006, 217 Ind. 434—Western & Southern Life Ins. Co. v. Kerger, 36 N.E.2d 956, 111 Ind.App. 297.
- Iowa.—Simanek v. Behel, 7 N.W.2d 792, 232 Iowa 1150.
- Mich.—Daugherty v. Park, 265 N.W. 499, 274 Mich. 673.
- Minn.—Jurgensen v. Schirmer Transp. Co., 64 N.W.2d 530.
- Miss.—McCardie's Estate v. City of Jackson, 61 So.2d 400, 215 Miss. 571.
- Mo.—Machens v. Machens, 263 S.W.2d 724—Lukitsch v. St. Louis Public Service Co., 246 S.W.2d 749, 362 Mo. 1071—Duncan v. St. Louis Public Service Co., 197 S.W.2d 964, 355 Mo. 733.
- Ohio.—Haslem v. Jackson, 40 N.E.2d 692, 68 Ohio App. 433—Davis v. American Rolling Mills Co., 7 N.E.2d 238, 54 Ohio App. 298.
- Or.—Stuart v. Occidental Life Ins. Co., 68 P.2d 1037, 156 Or. 522.
- Wash.—American Products Co. v. Villwock, 109 P.2d 570, 7 Wash.2d 246, 132 A.L.R. 1010.
- Wis.—State ex rel. Jahn v. Rydell, 27 N.W.2d 486, 250 Wis. 377.
- 64 C.J. p 1001 note 94.
98. Mo.—Dove v. Atchison, T. & S. F. Ry. Co., 163 S.W.2d 548, 349 Mo. 798—State ex rel. State Highway Commission of Missouri v. Shain, 102 S.W.2d 666, 340 Mo. 802, mandate conformed to 113 S.W.2d 132, 232 Mo.App. 831.
99. Ala.—Jefferson County Burial Soc. v. Scott, 136 So. 788, 223 Ala. 384.
- Ga.—Sutton v. Allen, 72 S.E.2d 921, 87 Ga.App. 25.
- Mo.—Lukitsch v. St. Louis Public Service Co., 246 S.W.2d 749, 362 Mo. 1071.
- Tex.—United Employers' Casualty Co. v. Burk, Civ.App., 140 S.W.2d 571, error dismissed.
- Va.—Stallard v. Atlantic Greyhound Lines, 192 S.E. 800, 169 Va. 223.
1. Cal.—Zerbe v. United Railroads of San Francisco, 205 P. 887, 56 Cal. App. 583.
2. Mo.—Dove v. Atchison, T. & S. F. Ry. Co., 163 S.W.2d 548, 349 Mo. 798.
- 64 C.J. p 1001 note 97.
3. Ga.—J. J. Williamson & Co. v. Gainesville & N. W. R. Co., 111 S.E. 444, 28 Ga.App. 364.
4. Mo.—Carpenter v. Burmeister, 273 S.W. 418, 217 Mo.App. 104—Wehlein v. Peoples, App., 241 S.W. 645.
5. U.S.—Equitable Life Assur. Soc. of U. S. v. Salmen, C.C.A.Miss., 81 F.2d 571, certiorari denied 56 S. Ct. 749, 298 U.S. 664, 80 L.Ed. 1339 Ark.—Albritton v. C. M. Ferguson & Son, 122 S.W.2d 620, 197 Ark. 436. Cal.—Meggee v. Fasulis, 150 P.2d 281, 65 Cal.App.2d 94—Gerberich v. Southern California Edison Co., 79 P.2d 783, 26 Cal.App.2d 471.
- Ill.—Edwards v. Hill-Thomas Lime & Cement Co., 32 N.E.2d 945, 309 Ill.App. 168, reversed on other grounds 37 N.E.2d 801, 378 Ill. 180.
- Ind.—Klickels v. Fein, 10 N.E.2d 297, 104 Ind.App. 606—Dunbar v. Demaree, 2 N.E.2d 1003, 102 Ind.App. 585.
- Kan.—Doyle v. City of Herington, 45 P.2d 890, 142 Kan. 169.
- Mo.—Welch v. Thompson, 210 S.W.2d 79, 357 Mo. 703.
- N.J.—Stout v. City of Bayonne, 194 A. 242, 15 N.J.Misc. 672, affirmed 199 A. 57, 120 N.J.Law 242.
- N.C.—Webb v. Imperial Life Ins. Co., 3 S.E.2d 428, 216 N.C. 10.
- Pa.—Wright v. Straessley, 182 A. 682, 321 Pa. 1.
- 64 C.J. p 1001 note 1.
6. Cal.—Meggee v. Fasulis, 150 P.2d 281, 65 Cal.App.2d 94.
- Mich.—Daugherty v. Park, 265 N.W. 499, 274 Mich. 673.
- 64 C.J. p 1001 note 2.
7. Cal.—In re Hansen's Estate, 100 P.2d 776, 38 Cal.App.2d 99.
- Mass.—Boston Safe Deposit & Trust Co. v. Bacon, 118 N.E. 906, 229 Mass. 585.
8. Cal.—In re Hansen's Estate, 100 P.2d 776, 38 Cal.App.2d 99.
- Mo.—Machens v. Machens, 263 S.W.2d 724.
- Tenn.—Burrow v. Lewis, 142 S.W.2d 758, 24 Tenn.App. 253.
- 64 C.J. p 1001 note 7.
9. Iowa.—Crandall v. Mason, 197 N. W. 454, 198 Iowa 139.
10. Tex.—Olson v. Burton, Civ.App., 141 S.W. 549.
11. Ind.—Western & Southern Life Ins. Co. v. Ross, 171 N.E. 212, 91 Ind.App. 552.
12. U.S.—Compagnie Generale Transatlantique v. Tawes, C.C.A. Canal Zone, 111 F.2d 92, certiorari denied 61 S.Ct. 46, 311 U.S. 678, 85 L.Ed. 437.
- Ala.—Alabama Great Southern R. Co. v. Moundville Motor Co., 4 So.2d 305, 241 Ala. 633—W. U. Tel. Co. v. Gorman, 185 So. 743, 237 Ala. 146.
- Cal.—Wallack v. Bass, 234 P.2d 160, 105 Cal.App.2d 638—Passarelli v. Souza, 98 P.2d 809, 37 Cal.App.2d 1—Gerberich v. Southern California Edison Co., 79 P.2d 783, 26 Cal. App.2d 471—Mahoney v. Murray, 85 P.2d 612, 140 Cal.App. 266.
- Ga.—Daugherty v. Georgia Power Co., 6 S.E.2d 454, 61 Ga.App. 505—Georgia Power Co. v. Sheets, 199 S.E. 582, 58 Ga.App. 730.
- Ind.—Bain v. Mattniller, 13 N.E.2d 712, 213 Ind. 549—Vogel v. Ridens, 44 N.E.2d 238, 112 Ind.App. 493—Klickels v. Fein, 10 N.E.2d 297, 104 Ind.App. 606.
- Iowa.—Thordson v. McKeighan, 16 N.W.2d 607, 235 Iowa 409—Simanek v. Behel, 7 N.W.2d 792, 232 Iowa 1150.
- Mo.—Lukitsch v. St. Louis Public Service Co., 246 S.W.2d 749, 362 Mo. 1071—Welch v. Thompson, 210 S.W.2d 79, 357 Mo. 703—Duncan v. St. Louis Public Service Co., 197 S.W.2d 964, 355 Mo. 733—Heibel v. Ahrens, 55 S.W.2d 473.
- Neb.—Scarborough v. Aeroservice, Inc., 53 N.W.2d 902, 155 Neb. 749, 30 A.L.R.2d 1159.
- Pa.—Wright v. Straessley, 182 A. 682, 321 Pa. 1.
- Utah.—Williams v. Ogden Union Ry. & Depot Co., 230 P.2d 315.
- Wyo.—Stanoind Oil & Gas Co. v. Bunce, 62 P.2d 1297, 51 Wyo. 1.
- 64 C.J. p 1001 note 4.
13. U.S.—Falkerson v. New York, N. H. & H. R. Co., C.A.N.Y., 188 F.2d 892, stating Connecticut law—Keller v. Brooklyn Bus Corp., C.C.A. N.Y., 128 F.2d 510.
- Ala.—Kelly v. Hanwick, 153 So. 269, 228 Ala. 336—Texas Co. v. Williams, 152 So. 47, 228 Ala. 30.
- Ark.—Albritton v. C. M. Ferguson & Son, 122 S.W.2d 620, 197 Ark. 436.
- Cal.—Packard v. Moore, 71 P.2d 922, 9 Cal.2d 571—Ferguson v. Nakahara, 110 P.2d 1091, 43 Cal.App.2d 435—Harrison v. Harter, 18 P.2d 436, 129 Cal.App. 22.

fenses,<sup>14</sup> and cause of injury.<sup>15</sup>

**Exceptions to rule.** Under the rules already stated, a correct instruction on the burden of proof will cure the error in another instruction only when the instructions, as a series, state the law correct-

ly.<sup>16</sup> Thus, an erroneous instruction as to the burden of proof cannot be cured by a conflicting instruction which correctly states the law,<sup>17</sup> by an instruction on an entirely different matter,<sup>18</sup> or by an instruction which accentuates the error,<sup>19</sup> or by a

Conn.—McPheters v. Loomis, 7 A.2d 437, 125 Conn. 326.

Ill.—Edwards v. Hill-Thomas Lime & Cement Co., 32 N.E.2d 945, 309 Ill.App. 168, reversed on other grounds 37 N.E.2d 801, 378 Ill. 180.

Ind.—Livingston v. Rice, 184 N.E. 583, 96 Ind.App. 176.

Kan.—Doyle v. City of Herington, 45 P.2d 890, 142 Kan. 169.

Mo.—Counts v. Thompson, 222 S.W. 2d 487, 359 Mo. 485—Dove v. Atchison, T. & S. F. Ry. Co., 163 S.W.2d 548, 349 Mo. 798—Burneson v. Zumwalt Co., 169 S.W.2d 605, 349 Mo. 94.

Neb.—Whittaker v. Omaha & C. B. St. Ry. Co., 291 N.W. 275, 137 Neb. 800.

Ohio.—Haslem v. Jackson, 40 N.E. 2d 692, 68 Ohio App. 433.

Okla.—Norton v. Harmon, 133 P.2d 206, 192 Okl. 36—Western States Grocery Co. v. Gillan, 83 P.2d 810, 183 Okl. 558.

Pa.—McCracken v. Curwensville Borough, 163 A. 217, 309 Pa. 98, 86 A.L.R. 1379.

Utah.—Williams v. Ogden Union Ry. & Depot Co., 230 P.2d 315.

Wash.—Choate v. Robertson, 195 P.2d 630, 31 Wash.2d 118—American Products Co. v. Villwock, 109 P.2d 570, 7 Wash.2d 246, 132 A.L.R. 1010.

Wyo.—Stanolind Oil & Gas Co. v. Bunce, 62 P.2d 1297, 51 Wyo. 1.

64 C.J. p 1001 note 5.

14. Wash.—Lyle v. Ginnold, 24 P.2d 449, 174 Wash. 104.

### 15. Proximate cause

(1) In general.

Cal.—Passarelli v. Souza, 98 P.2d 809, 37 Cal.App.2d 1—Mahoney v. Murray, 35 P.2d 612, 140 Cal.App. 206—Harrison v. Harter, 18 P.2d 436, 129 Cal.App. 22.

Ga.—Georgia Power Co. v. Sheats, 199 S.E. 582, 58 Ga.App. 730.

Ind.—Livingston v. Rice, 184 N.E. 583, 96 Ind.App. 176.

Iowa.—Rainey v. Riess, 257 N.W. 346, 219 Iowa 164.

Miss.—Harrington v. Pilkinton, 71 So.2d 884.

Neb.—Scarborough v. Aeroservice, Inc., 63 N.W.2d 902, 155 Neb. 749, 30 A.L.R.2d 1159.

(2) In action against railroad for damage to automobile resulting from grade crossing collision, giving of charge substantially in the terms of the statute, placing on railroad burden to show absence of negligence, was not reversible error for failure to point out that actionable negli-

gence must have been proximate cause of collision, where other given charges fully covered the point.—Alabama Great Southern R. Co. v. Moundville Motor Co., 4 So.2d 305, 241 Ala. 633.

(3) An instruction quoting statute making any speed in excess of twenty miles per hour in business district or thirty miles per hour in residential district prima facie evidence that such speed was unlawful was not erroneous for failure to state that burden of proving negligence as proximate cause remained on plaintiff pedestrian where that issue was fully covered by other instructions.—Vogel v. Ridens, 44 N.E.2d 238, 112 Ind.App. 493.

(4) In action for injuries sustained in truck collision, court did not commit prejudicial error in charging that plaintiff's recovery required that negligence of driver of defendant's truck must be proved to be the proximate cause of collision, in view of further instructions, as against contention that if plaintiff was a guest or passenger in truck in which he was riding and not engaged in common enterprise with driver thereof, negligence of drivers of both trucks might have concurred in proximately causing collision without barring plaintiff's recovery.—Solomon v. Shepard Co., 200 A. 993, 61 R.I. 332, applying Massachusetts law.

### Sole cause

(1) In general.

Cal.—Mahoney v. Murray, 35 P.2d 612, 140 Cal.App. 206.

Mo.—Wheeler v. Missouri Pac. R. Co., 18 S.W.2d 494, 322 Mo. 271, certiorari denied 50 S.Ct. 27, 280 U.S. 568, 74 L.Ed. 621.

(2) Instruction requiring guest to establish by preponderance of evidence that defendant motorist's negligence was "the" proximate cause of guest's injury was not erroneous as imposing on guest burden of establishing that defendant's negligence was sole cause of accident, in view of other instruction.—Rainey v. Riess, 257 N.W. 346, 219 Iowa 164.

16. S.C.—Corpus Juris quoted in Citizens Bank of Darlington v. McDonald, 24 S.E.2d 369, 375, 202 S.C. 244.

64 C.J. p 1002 note 12.

17. U.S.—Schroble v. Lehigh Valley R. Co., C.C.A.N.Y., 62 F.2d 993.

Ala.—Ripps v. Herrington, 1 So.2d 899, 241 Ala. 209—New York Life

Ins. Co. v. Jenkins, 158 So. 309, 229 Ala. 474.

Cal.—Taylor v. Pole, 107 P.2d 614, 16 Cal.2d 668—Bellows v. City and County of San Francisco, 234 P.2d 729, 106 Cal.App.2d 57—Allbritton v. Interstate Transit Lines, 87 P.2d 704, 31 Cal.App.2d 149.

Colo.—Denham Theatre v. Beeler, 109 P.2d 643, 107 Colo. 116.

Fla.—Star Fruit Co. v. Eagle Lake Growers, 33 So.2d 858, 160 Fla. 130—Great Atlantic & Pac. Tea Co. v. Dallas, 192 So. 867, 141 Fla. 206.

Ga.—Sheffield v. Sheffield, 76 S.E.2d 708, 209 Ga. 869, followed in 76 S.E. 2d 709, 209 Ga. 871—Citizens & Southern Nat. Bank v. Kontz, 194 S.E. 536, 185 Ga. 131—Atlantic Coast Line R. Co. v. Thomas, 64 S.E.2d 301, 83 Ga.App. 477—Lewis v. Warren, 179 S.E. 918, 51 Ga. App. 135.

Ill.—Darby v. Donahue, 120 N.E.2d 381, 3 Ill.App.2d 112—Wolfgram v. Bennehoff, 56 N.E.2d 649, 324 Ill. App. 16.

Iowa.—Chismore v. Marion Sav. Bank, 268 N.W. 137, 221 Iowa 1256.

Miss.—Hunt v. Sherill, 15 So.2d 426, 195 Miss. 688.

Mo.—Campbell v. Terminal R. Ass'n of St. Louis, 126 S.W.2d 915, 235 Mo.App. 56.

N.J.—Cella v. Roth, 174 A. 703, 113 N.J.Law 458.

N.Y.—Goodman v. Gilligan, 113 N.Y. S.2d 671, 260 App.Div. 767—Trump v. Associated Transp., 90 N.Y.S. 2d 154, 275 App.Div. 982.

Ohio.—Industrial Commission of Ohio v. Ripke, 196 N.E. 640, 129 Ohio St. 649.

S.C.—Corpus Juris quoted in Citizens Bank of Darlington v. McDonald, 24 S.E.2d 369, 375, 202 S.C. 244.

Wash.—Hart v. Clapp, 54 P.2d 1012, 185 Wash. 362.

Wis.—Hengston v. Estes, 51 N.W.2d 539, 260 Wis. 595—O'Donnell v. Kraut, 7 N.W.2d 889, 242 Wis. 268.

64 C.J. p 1002 note 13.

18. Ala.—New York Life Ins. Co. v. Jenkins, 158 So. 309, 229 Ala. 474.

S.C.—Corpus Juris quoted in Citizens Bank of Darlington v. McDonald, 24 S.E.2d 369, 375, 202 S.C. 244.

64 C.J. p 1002 note 14.

19. Ariz.—Martinez v. Anderson, 69 P.2d 237, 50 Ariz. 95.

S.C.—Corpus Juris quoted in Citizens Bank of Darlington v. McDonald, 24 S.E.2d 369, 375, 202 S.C. 244.

Tex.—Citizens' Garage Co. v. Wilson, Civ.App., 252 S.W. 186.

correct instruction which is nullified by an addition which reaffirms the original incorrect charge.<sup>20</sup>

### d. Weight and Sufficiency

Defective or inaccurate instructions on the weight and sufficiency of evidence may be corrected by other instructions correctly stating the law.

In accordance with the rules hereinbefore stated, instructions on the weight and sufficiency of evidence, which are defective or inaccurate, may, as a general rule, be corrected by other instructions correctly stating the law,<sup>21</sup> and this rule has been applied to instructions which, standing alone, might be objectionable as misleading,<sup>22</sup> confusing,<sup>23</sup> con-

20. U.S.—Fidelity & Casualty Co. of New York v. Driver, C.C.A.Ga., 79 F.2d 713.

21. U.S.—Theatre Enterprises v. Paramount Film Distributing Corp., C.A.Md., 201 F.2d 306, affirmed 74 S.Ct. 257, 346 U.S. 537, 98 L.Ed. —Novick v. Gouldsberry, C.A. Alaska, 173 F.2d 496—Hardware Mut. Ins. Co. of Minn. v. Jacob Hieb, Inc., C.C.A.S.D., 146 F.2d 447—Compagnie Generale Transatlantique v. Tawes, C.C.A.Can. Zone, 111 F.2d 92, certiorari denied 61 S.Ct. 46, 311 U.S. 678, 85 L.Ed. 437—Woods v. Gettelfinger, C.C.A. Ga., 108 F.2d 549.

Ala.—Hughes v. Merchants Nat. Bank of Mobile, 53 So.2d 386, 256 Ala. 88.

Ariz.—Schlecht v. Schiel, 262 P.2d 252, 76 Ariz. 214.

Ark.—Norris v. Johnson, 218 S.W.2d 720, 314 Ark. 947—Reed v. Baldwin, 92 S.W.2d 392, 192 Ark. 491—George v. George, 88 S.W.2d 71, 191 Ark. 799.

Cal.—Olson v. Standard Marine Ins. Co., 240 P.2d 379, 109 Cal.App.2d 130—Wallack v. Bass, 234 P.2d 160, 105 Cal.App.2d 638—Sandoval v. Southern Cal. Enterprises, 219 P.2d 928, 98 Cal.App.2d 240—Sheldon v. River Lines, 205 P.2d 37, 91 Cal. App.2d 478—Ferguson v. Nakahara, 110 P.2d 1091, 43 Cal.App.2d 435—McNamara v. Emmons, 97 P.2d 503, 36 Cal.App.2d 199—Brush v. Kurstin, 53 P.2d 777, 11 Cal.App.2d 258—Sim v. Weeks, 45 P.2d 350, 7 Cal.App.2d 28—Mahoney v. Murray, 35 P.2d 612, 140 Cal.App. 206.

Fla.—Atlantic Greyhound Lines v. Lovett, 184 So. 133, 134 Fla. 505.

Ga.—Estes v. Estes, 55 S.E.2d 217, 205 Ga. 814—McCullough v. Kirby, 51 S.E.2d 812, 204 Ga. 738—Smaha v. George, 24 S.E.2d 385, 195 Ga. 412—Scott v. Wimberly, 3 S.E.2d 71, 158 Ga. 148—Wardlaw v. Wardlaw, 1 S.E.2d 24, 187 Ga. 467—Hudson v. Carmichael, 181 S.E. 853, 181 Ga. 317—Western & A. R. H. v. Fowler, 47 S.E.2d 874, 77 Ga. App. 206—Southern Ry. Co. v. Wilcox, 2 S.E.2d 225, 59 Ga.App. 785—Metropolitan Life Ins. Co. v. Buger, 172 S.E. 829, 48 Ga.App. 363.

Ill.—Wilson v. Hobrock, 100 N.E.2d 412, 344 Ill.App. 147—Ridgway v. Crum, 98 N.E.2d 394, 343 Ill.App. 12—Johnson v. Luhnman, 93 N.E.2d 486, 340 Ill.App. 625—Pottel v. Demanes, 87 N.E.2d 332, 338 Ill.

App. 287—Davey v. Heim, 84 N.E. 2d 574, 336 Ill.App. 602—Frankenstein & Co. v. Adams & Austin Bldg. Corp., 60 N.E.2d 250, 325 Ill. App. 574—Kelley v. Call, 57 N.E.2d 501, 324 Ill.App. 143—Green v. Drew, 57 N.E.2d 227, 324 Ill.App. 84—Kuzminski v. Waser, 41 N.E.2d 1008, 314 Ill.App. 438—Smith v. Illinois Power & Light Corp., 17 N.E.2d 632, 297 Ill.App. 358—Runch v. McAllister, 266 Ill.App. 248.

Ind.—Craig v. Citizens Trust Co., 26 N.E.2d 1006, 217 Ind. 434—Western & Southern Life Ins. Co. v. Kerger, 36 N.E.2d 965, 111 Ind.App. 297.

Iowa.—Thordson v. McKeighan, 16 N.W.2d 607, 235 Iowa 409—Simanek v. Behel, 7 N.W.2d 792, 232 Iowa 1150—Hauser v. Boever, 279 N.W. 137, 225 Iowa 1—Rainey v. Riese, 257 N.W. 346, 219 Iowa 164.

Md.—Merrick v. United Rys. & Electric Co. of Baltimore City, 163 A. 816, 163 Md. 641.

Minn.—Erickson v. Husemoller, 253 N.W. 361, 191 Minn. 177.

Miss.—Gwynn v. Brondum, 63 So.2d 821, 217 Miss. 243—Frisby v. Grayson, 63 So.2d 96, 216 Miss. 753—Evans v. Jackson City Lines, 56 So.2d 20, 212 Miss. 895—Wright v. Illinois Cent. R. Co., 16 So.2d 381, 196 Miss. 150.

Mo.—Machens v. Machens, 263 S.W.2d 724—Lukitsch v. St. Louis Public Service Co., 246 S.W.2d 749, 362 Mo. 1071—Rasp v. Baumbach, 223 S.W.2d 472—Counts v. Thompson, 222 S.W.2d 487, 359 Mo. 485—Duncan v. St. Louis Public Service Co., 197 S.W.2d 964, 355 Mo. 733.

Mont.—Farnum v. Montana-Dakota Power Co., 43 P.2d 640, 99 Mont. 217.

Neb.—Cartwright & Wilson Const. Co. v. Smith, 52 N.W.2d 274, 155 Neb. 431—Allen v. Massachusetts Mut. Life Ins. Co., 30 N.W.2d 885, 149 Neb. 233—Johnson v. Batteen, 13 N.W.2d 625, 144 Neb. 384.

N.Y.—In re Hill's Will, 272 N.Y.S. 74, 241 App.Div. 911.

N.C.—Wellons v. Sherrin, 14 S.E.2d 426, 219 N.C. 476—Keiger v. Sprinkle, 178 S.E. 666, 207 N.C. 733.

Ohio.—Davis v. Zucker, App., 106 N.E.2d 169—Davis v. American Rolling Mills Co., 7 N.E.2d 238, 54 Ohio App. 298.

Okl.—Stanold Oil & Gas Co. v. Cartwright, 198 P.2d 737, 200 Okl. 633—Letson v. McCollom, 134 P.2d 130, 192 Okl. 48—Blackburn v. Martin

& Mueller, 50 P.2d 627, 174 Okl. 394.

Pa.—Giannone v. Reale, 3 A.2d 331, 333 Pa. 21.

Tex.—Norris Bros. v. Mattinson, Civ. App., 145 S.W.2d 204—Republic Underwriters v. Warf, Civ.App., 103 S.W.2d 871, error dismissed—Texas & P. Ry. Co. v. Gurian, Civ.App., 77 S.W.2d 274, error dismissed.

Vt.—Morris v. Wallace, 189 A. 856, 108 Vt. 541.

Va.—Reed v. Church, 8 S.E.2d 285, 175 Va. 284.

Wash.—Carmin v. Port of Seattle, 116 P.2d 338, 10 Wash.2d 139—American Products Co. v. Villwock, 109 P.2d 570, 7 Wash.2d 246, 132 A.L.R. 1010.

64 C.J. p 1002 note 17.

22. U.S.—Woods v. Gettelfinger, C.C. A.Ga., 108 F.2d 549.

Cal.—Wallack v. Bass, 234 P.2d 160, 105 Cal.App.2d 638—Ferguson v. Nakahara, 110 P.2d 1091, 43 Cal. App.2d 435—McNamara v. Emmons, 97 P.2d 503, 36 Cal.App.2d 199.

Ill.—Davey v. Heim, 84 N.E.2d 574, 336 Ill.App. 602—Green v. Drew, 57 N.E.2d 227, 324 Ill.App. 84.

Ind.—Craig v. Citizens Trust Co., 26 N.E.2d 1006, 217 Ind. App. 297.

Iowa.—Simanek v. Behel, 7 N.W.2d 792, 232 Iowa 1150.

Miss.—Frisby v. Gray, 63 So.2d 96, 216 Miss. 753—Wright v. Illinois Cent. R. Co., 16 So.2d 381, 196 Miss. 150.

Mo.—Machens v. Machens, 263 S.W.2d 724—Lukitsch v. St. Louis Public Service Co., 246 S.W.2d 749, 362 Mo. 1071—Duncan v. St. Louis Public Service Co., 197 S.W.2d 964, 355 Mo. 733.

Neb.—Allen v. Massachusetts Mut. Life Ins. Co., 30 N.W.2d 885, 149 Neb. 233.

Ohio.—Davis v. American Rolling Mills Co., 7 N.E.2d 238, 54 Ohio App. 298.

Tex.—Texas & P. Ry. Co. v. Gurian, Civ.App., 77 S.W.2d 274, error dismissed.

Wash.—American Products Co. v. Villwock, 109 P.2d 570, 7 Wash.2d 246, 132 A.L.R. 1010.

64 C.J. p 1002 note 18.

23. Ga.—Metropolitan Life Ins. Co. v. Buger, 172 S.E. 829, 48 Ga.App. 363.

Mo.—Lukitsch v. St. Louis Public

tradiatory,<sup>24</sup> or vague;<sup>25</sup> as excluding documentary evidence from the jury's consideration;<sup>26</sup> as requiring a greater<sup>27</sup> or lesser<sup>28</sup> degree of proof than is required by law; or as authorizing an inference without first finding facts on which the inference is based.<sup>29</sup>

These rules have been applied to instructions as to preponderance of evidence,<sup>30</sup> expert testimony,<sup>31</sup>

undue influence,<sup>32</sup> testimony of subscribing witnesses,<sup>33</sup> admissions,<sup>34</sup> mortality tables,<sup>35</sup> inferences from evidence,<sup>36</sup> and the duty of the jury to consider the number of witnesses.<sup>37</sup>

**Exceptions to rule.** In accordance with the rules already stated, an erroneous instruction on the weight and sufficiency of evidence will be cured by other instructions only where the instructions, as a

Service Co., 246 S.W.2d 749, 362 Mo. 1071.

Tex.—Texas & P. Ry. Co. v. Gurian, Civ.App., 77 S.W.2d 274, error dismissed.

64 C.J. p 1002 note 19.

24. Tex.—Texas & P. Ry. Co. v. Gurian, supra.

25. Tex.—Texas & P. Ry. Co. v. Gurian, supra.

26. Ga.—Jones v. McElroy, 68 S.E. 729, 134 Ga. 857, 137 Am.S.R. 276—Darden v. City of Washington, 134 S.E. 813, 35 Ga.App. 777.

27. U.S.—Theatre Enterprises v. Paramount Film Distributing Corp., C.A.Md., 201 F.2d 506, affirmed 74 S.Ct. 257, 348 U.S. 337, 98 L.Ed. —Hardware Mut. Ins. Co. of Minn. v. Jacob Hieb, Inc., C.C.A.S.D., 148 F.2d 447.

Cal.—Ferguson v. Nakahara, 110 P.2d 1091, 43 Cal.App.2d 435—Sim v. Weeks, 45 P.2d 350, 7 Cal.App.2d 25.

Iowa.—Thordson v. McKeighan, 16 N.W.2d 607, 235 Iowa 409.

Mo.—Counts v. Thompson, 222 S.W. 2d 487, 359 Mo. 485.

Neb.—Cartwright & Wilson Const. Co. v. Smith, 52 N.W.2d 274, 155 Neb. 431—Johnson v. Battean, 13 N.W. 2d 625, 144 Neb. 384.

Okl.—Blackburn v. Martin & Mueller, 50 P.2d 627, 174 Okl. 894.

64 C.J. p 1002 note 21.

28. Ga.—McCullough v. Kirby, 81 S.E.2d 812, 204 Ga. 738.

64 C.J. p 1002 note 22.

29. Mo.—Joyles v. Byrne, App., 13 S.W.2d 550.

30. U.S.—Novick v. Gouldsberry, C.A.Alaska, 173 F.2d 496—Hardware Mut. Ins. Co. of Minn. v. Jacob Hieb, Inc., C.C.A.S.D., 146 F.2d 447—Compagnie Generale Transatlantique v. Tawes, C.C.A.Canal Zone, 113 F.2d 92, certiorari denied 81 P.Ct. 46, 311 U.S. 678, 85 L.Ed. 437.

Ark.—Schlecht v. Schiel, 262 P.2d 252, 76 Ark. 214.

Ark.—Norris v. Johnson, 215 S.W.2d 720, 214 Ark. 947—Reed v. Baldwin, 93 S.W.2d 892, 192 Ark. 491—George v. George, 88 S.W.2d 71, 191 Ark. 799.

Cal.—Packard v. Moore, 71 P.2d 922, 9 Cal.2d 571—Olson v. Standard Marine Ins. Co., 240 P.2d 379, 109 Cal.App.2d 130—Wallack v. Bass,

234 P.2d 160, 105 Cal.App.2d 638—Sheldon v. River Lines, 205 P.2d 37, 91 Cal.App.2d 478—Ferguson v. Nakahara, 110 P.2d 1091, 43 Cal.App.2d 435—McNamara v. Emmons, 97 P.2d 503, 36 Cal.App.2d 199—Brush v. Kuratin, 53 P.2d 777, 11 Cal.App.2d 258—Sim v. Weeks, 45 P.2d 350, 7 Cal.App.2d 25—Mahoney v. Murray, 35 P.2d 612, 140 Cal.App. 206.

Colo.—Sams Automatic Car Coupler Co. v. League, 54 P. 642, 25 Colo. 129.

Fla.—Atlantic Greyhound Lines v. Lovett, 184 So. 133, 134 Fla. 505. Ga.—McCullough v. Kirby, 81 S.E.2d 812, 204 Ga. 738—Smaha v. George, 24 S.E.2d 385, 195 Ga. 412—Scott v. Wimberly, 3 S.E.2d 71, 188 Ga. 148—Wardlaw v. Wardlaw, 1 S.E.2d 24, 187 Ga. 467—Western & A. R. R. v. Fowler, 47 S.E.2d 874, 77 Ga. App. 206—Southern Ry. Co. v. Wilcox, 3 S.E.2d 225, 59 Ga. App. 785.

Ill.—Mount v. Dusing, 111 N.E.2d 502, 414 Ill. 861—Ridgway v. Crum, 98 N.E.2d 394, 345 Ill.App. 12—Johnson v. Luhman, 92 N.E.2d 486, 340 Ill.App. 625—Pottel v. Demanea, 87 N.E.2d 332, 338 Ill.App. 287—Davey v. Helm, 84 N.E.2d 874, 335 Ill.App. 602—Hoffman v. Jendard, 78 N.E.2d 322, 334 Ill.App. 74—Green v. Drew, 57 N.E.2d 227, 324 Ill.App. 84—Kuzminski v. Waser, 41 N.E.2d 1008, 314 Ill.App. 439—Gray v. Richardson, 40 N.E.2d 598, 313 Ill.App. 626—Smith v. Illinois Power & Light Corp., 17 N.E.2d 632, 297 Ill.App. 358—Bunch v. McAlister, 266 Ill.App. 248.

Ind.—Craig v. Citizens Trust Co., 28 N.E.2d 1008, 217 Ind. 434—Western & Southern Life Ins. Co. v. Karger, 36 N.E.2d 965, 111 Ind.App. 297.

Iowa.—Thordson v. McKeighan, 16 N.W.2d 607, 235 Iowa 409—Simanek v. Behel, 7 N.W.2d 782, 232 Iowa 1150—Hauser v. Boever, 278 N.W. 137, 225 Iowa 1—Rainey v. Riese, 267 N.W. 346, 219 Iowa 164.

Md.—Merrick v. United Rys. & Electric Co. of Baltimore City, 183 A. 816, 163 Md. 641.

Miss.—Guyann v. Brondum, 63 So.2d 821, 217 Miss. 243—Frisby v. Grayson, 63 So.2d 96, 216 Miss. 753—Evans v. Jackson City Lines, 56 So. 2d 80, 213 Miss. 895—Hunt v. Sherill, 15 So.2d 426, 195 Miss. 618.

Mo.—Machens v. Machens, 263 S.W.2d 724—Duncan v. St. Louis Public Service Co., 197 S.W.2d 964, 355 Mo. 783.

Mont.—Farnum v. Montana-Dakota Power Co., 43 P.2d 640, 99 Mont. 217.

Neb.—Cartwright & Wilson Const. Co. v. Smith, 52 N.W.2d 274, 155 Neb. 431—Allen v. Massachusetts Mut. Life Ins. Co., 30 N.W.2d 855, 149 Neb. 233.

Ohio.—Davis v. Zucker, App., 106 N.E.2d 169—Davis v. American Rolling Mills Co., 7 N.E.2d 238, 54 Ohio App. 298.

Okl.—Lattson v. McCollom, 154 P.2d 180, 152 Okl. 45—Norton v. Harmon, 133 P.2d 206, 192 Okl. 36—Blackburn v. Martin & Mueller, 50 P.2d 627, 174 Okl. 894.

Tex.—Norris Bros. v. Mattinson, Civ. App., 145 S.W.2d 204—Republic Underwriters v. Wart, Civ.App., 103 S.W.2d 871, error dismissed—Texas & P. Ry. Co. v. Gurian, Civ.App., 77 S.W.2d 274, error dismissed.

Vt.—Morris v. Wallace, 139 A. 856, 108 Vt. 541.

Va.—Reed v. Church, 8 S.E.2d 285, 175 Va. 284.

64 C.J. p 1002 note 24.

21. Iowa.—Collinson v. Cutter, 170 N.W. 420, 188 Iowa 376.

64 C.J. p 1002 note 25.

22. Colo.—Nelson v. Nelson, 146 P. 1079, 27 Colo.App. 104.

23. Mo.—Schultz v. Schultz, 293 S.W. 105, 315 Mo. 728.

24. Ga.—M. J. Webb & Co. v. Watkins, 93 S.E. 108, 30 Ga.App. 436.

25. Ala.—Louisville & N. R. Co. v. Holland, 56 So. 1001, 173 Ala. 875.

26. Cal.—Olson v. Standard Marine Ins. Co., 240 P.2d 379, 109 Cal.App. 2d 150.

Ind.—New York, C. & St. L. R. Co. v. First Trust & Savings Bank, 153 N.E. 761, 198 Ind. 376.

N.Y.—In re Hill's Will, 272 N.Y.S. 74, 241 App.Div. 911.

27. Cal.—Sheldon v. River Lines, 205 P.2d 37, 91 Cal.App.2d 478.

Ga.—Louisville & N. R. Co. v. Paschal, 160 S.E. 684, 44 Ga.App. 140.

Ill.—Ridgway v. Crum, 98 N.E.2d 394, 343 Ill.App. 12—Pottel v. Demanea, 87 N.E.2d 332, 338 Ill.App. 287—Kuzminski v. Waser, 41 N.E.2d 1008, 314 Ill.App. 432.

series, correctly state the law;<sup>38</sup> and, accordingly, an erroneous charge will not be cured by a correct but conflicting instruction.<sup>39</sup>

## § 445. — Invasion of Province of Jury

- a. In general
- b. Credibility of witnesses

### a. In General

An error in a particular instruction which, standing

alone, might be objectionable as invading the province of the jury, may be cured by another instruction correctly stating the law.

An error in a particular instruction which, standing alone, might be objectionable as invading the province of the jury may, under general rules already stated, supra § 441, be cured by another instruction,<sup>40</sup> providing the instructions as a series state the law correctly,<sup>41</sup> and do not tend to con-

38. *Tex.*—*Gulf, C. & S. F. Ry. Co. v. Houston, Civ.App.*, 45 S.W.2d 771, 64 C.J. p 1003 note 33.

39. *Cal.*—*Hobart v. Hobart Estate Co.*, 159 P.2d 958, 26 Cal.2d 412—*Rutherford v. Standard Engineering Corp.*, 199 P.2d 354, 88 Cal.App.2d 554—*Allbritton v. Interstate Transit Lines*, 87 P.2d 704, 31 Cal.App.2d 149.

*Colo.*—*Nelson v. Bowles*, 236 P.2d 286, 124 Colo. 274.

*Ga.*—*Atlantic Coast Line R. Co. v. Thomas*, 64 S.E.2d 301, 83 Ga.App. 477—*Lewis v. Warren*, 179 S.E. 818, 81 Ga.App. 135.

*Miss.*—*New Orleans & N. E. R. Co. v. Miles*, 20 So.2d 657, 177 Miss. 846—*Nowell v. Henry*, 12 So.2d 540, 194 Miss. 310—*Jackson v. Leggett*, 189 So. 180, 169 Miss. 123.

*Mo.*—*Schneider v. St. Louis Public Service Co.*, 233 S.W.2d 350—*Blackburn v. Gaydon*, App. 245 S.W.2d 181—*Hatton v. Carder Wholesale Grocery Co.*, 150 S.W.2d 1096, 235 Mo.App. 1198.

*Neb.*—*Simcho v. Omaha & Council Bluffs St. Ry. Co.*, 35 N.W.2d 501, 160 Neb. 634.

*N.J.*—*Pucci v. Weinstein*, 73 A.2d 843, 8 N.J. Super. 247.

*N.Y.*—*Goodman v. Gilligan*, 113 N.Y. 8.2d 571, 280 App.Div. 767—*Bunce v. City of New York*, 24 N.Y.S.2d 930, 261 App.Div. 838—*Kaplan v. Lieberman*, 140 N.Y.S. 1010, 80 Misc. 226.

*Wash.*—*Adjustment Dept., Olympia Credit Bureau v. Smedegard*, 241 P.2d 203, 40 Wash.2d 76.

61 C.J. p 1003 note 34.

40. *U.S.*—*Shanahan v. Southern Pac. Co.*, C.A.Cal., 188 F.2d 564—*Hupp Motor Car Corporation v. Wadsworth, C.C.A.Mich.*, 113 F.2d 827.

*Ala.*—*Abercrombie v. Martin & Hoyt Co.*, 150 So. 497, 327 Ala. 510.

*Ariz.*—*Fox Tucson Theatres Corporation v. Lindsay*, 56 P.2d 183, 47 Ariz. 388—*S. A. Gerrard Co.* v. Pricker, 27 P.2d 678, 42 Ariz. 503.

*Ark.*—*Eudora Motor Co. v. Womack*, 111 S.W.2d 530, 185 Ark. 74—*Mutual Ben. Health & Accident Ass'n v. Basham*, 87 S.W.2d 583, 191 Ark. 679.

*Cal.*—*Hardin v. San Jose City Lines*, 260 P.2d 63, 41 Cal.2d 413—*Hatfield v. Levy Bros.*, 117 P.2d 841, 18 Cal. 2d 798—*Tuttle v. Crawford*, 63 P.2d 1128, 8 Cal.2d 126—*Alvares v. Van Camp Sea Food Co.*, 248 P.2d 943, 113 Cal.App.2d 647—*Rodenberger v. Frederickson*, 244 P.2d 107, 111 Cal.App.2d 139—*Freitas v. Peerless Stages*, 239 P.2d 671, 108 Cal.App.2d 749, 33 A.L.R.2d 778—*Schmidt v. Sears*, 221 P.2d 171, 99 Cal.App.2d 204—*Stout v. Union Pac. R. Co.*, 218 P.2d 1001, 98 Cal.App.2d 99—*Balkwill v. City of Stockton*, 123 P.2d 596, 50 Cal.App.2d 661—*Fowler v. Allen*, 121 P.2d 41, 49 Cal.App.2d 214—*Hanson v. Reedley Joint Union High School Dist.*, 111 P.2d 415, 43 Cal.App.2d 643—*Hocher v. McDonnell*, 109 P.2d 426, 42 Cal.App.2d 515.

*Conn.*—*Buck v. Robinson*, 23 A.2d 157, 128 Conn. 376—*Braithwaite v. Lee*, 2 A.2d 380, 125 Conn. 10.

*Ga.*—*Kirkland v. Wheeler*, 66 S.E.2d 348, 84 Ga.App. 352—*Green v. Metropolitan Life Ins. Co.*, 21 S.E.2d 465, 87 Ga.App. 520—*American Surety Co. v. Smallon*, 194 S.E. 35, 56 Ga.App. 746—*National Sheet Metal Co. v. A. A. Highway Express*, 190 S.E. 383, 55 Ga.App. 393—*Holmes v. Baldwin*, 168 S.E. 579, 53 Ga.App. 526.

*Ill.*—*Mills v. Chicago Transit Authority*, 117 N.E.2d 481, 1 Ill.App.2d 236—*Scott v. Chicago Transit Authority*, 105 N.E.2d 928, 347 Ill.App. 76—*Curtis v. Lowe*, 87 N.E.2d 865, 388 Ill.App. 463.

*Ind.*—*Robertson Bros. Dept. Store v. Stanley*, 80 N.E.2d 809, 228 Ind. 372—*Hough v. Miller*, 44 N.E.2d 228, 112 Ind.App. 138—*Kraning v. Bixson*, 9 N.E.2d 107, 103 Ind.App. 660—*Prudential Ins. Co. of America v. Thatsler*, 4 N.E.2d 574, 104 Ind. App. 14.

*Ky.*—*Davis v. Bennett's Adm'r*, 132 S.W.2d 334, 279 Ky. 789.

*Mass.*—*Farnum v. Bankers' & Shipper's Ins. Co. of New York*, 183 N.E. 718, 281 Mass. 364.

*Mich.*—*Lemkie v. Boice*, 45 N.W.2d 288, 323 Mich. 278—*Burpee v. Lane*, 255 N.W. 484, 274 Mich. 625.

*Miss.*—*City of Natchez v. Kling*, 57 So.2d 378—*Standard Oil Co. v. Crane*, 33 So.2d 297, 199 Miss. 69.

*Mo.*—*Rhineclander v. St. Louis-San Francisco Ry. Co.*, 257 S.W.2d 455—*Janta v. St. Louis Public Service Co.*, 304 S.W.2d 698, 356 Mo. 985—

*Mueller v. Schien*, 176 S.W.2d 449, 352 Mo. 180—*Brown v. Pennsylvania Fire Ins. Co.*, Philadelphia, App. 263 S.W.2d 893—*Roth v. Roth*, App. 142 S.W.2d 818—*Phares v. Century Electric Co.*, App. 131 S.W.2d 879—*Glader v. City of Richmond Heights*, App. 121 S.W.2d 254—*Green v. Kansas City*, App. 107 S.W.2d 104—*Timmons v. Kurn*, 100 S.W.2d 952, 231 Mo.App. 421—*Schaper v. Sayman*, App. 61 S.W.2d 379—*Tibbe v. Sayman*, App. 61 S.W.2d 376—*Wilson v. Frankel*, App. 61 S.W.2d 363.

*Neb.*—*McDonald v. Wright*, 252 N.W. 411, 126 Neb. 871.

*N.H.*—*Rau v. First Nat. Stores*, 92 A. 2d 921, 97 N.H. 490.

*N.J.*—*Irvine v. Andres*, 187 A. 385, 117 N.J. Law 311.

*N.C.*—*Hoke v. Atlantic Greyhound Corp.*, 42 S.E.2d 593, 227 N.C. 412.

*Ohio.*—*Closs v. Ball*, 22 N.E.2d 141, 60 Ohio App. 513.

*Okla.*—*Stanolind Oil & Gas Co. v. Cartwright*, 198 P.2d 737, 300 Okl. 633—*City of Duncan v. Canan*, 83 P.2d 683, 183 Okl. 315—*Chicago, R. I. & P. Ry. Co. v. Odum*, 61 P.2d 1083, 178 Okl. 131—*Oklahoma City v. Jones*, 60 P.2d 617, 177 Okl. 432.

*Or.*—*Mackie v. McGraw*, 191 P.2d 403, 183 Or. 204—*Richer v. Burke*, 34 P. 2d 317, 147 Or. 465.

*Pa.*—*Haelen v. R. C. McCarty Trucking Co.*, Com.Pl., 81 Erie Co. 440.

*S.C.*—*Charles v. Texas Co.*, 18 S.E.2d 719, 199 S.C. 156—*Bayham v. State Highway Department of South Carolina*, 187 S.E. 528, 181 S.C. 435.

*Tenn.*—*White v. Selser*, App. 284 S.W. 2d 241.

*Vt.*—*Morris v. Wallace*, 189 A. 866, 108 Vt. 541.

*Va.*—*Carroll v. Hutchinson*, 200 S.E. 644, 173 Va. 43.

*Wash.*—*Boyle v. Lewis*, 193 P.2d 323, 30 Wash.2d 665—*Larson v. City of Seattle*, 171 P.2d 212, 25 Wash.2d 291—*Briggs v. United Fruit & Produce*, 119 P.2d 687, 11 Wash.2d 466.

64 C.J. p 1003 note 35.

41. *Cal.*—*Clarke v. Volpe Bros.*, 124 P.2d 377, 51 Cal.App.3d 173.

*Conn.*—*Bundy v. Capitol Nat. Bank & Trust Co.*, 199 A. 561, 124 Conn. 309.

*Ky.*—*Silver Fleet Motor Express v. Gilbert*, 165 S.W.2d 541, 291 Ky.

fuse the jury by presenting conflicting rules.<sup>42</sup> This rule has been applied to an instruction which amounts to a preemptory direction of a verdict,<sup>43</sup> or assumes facts,<sup>44</sup> or excludes issues, defenses, or evidence,<sup>45</sup> or comments on the evidence,<sup>46</sup> expresses or indicates an opinion on the facts,<sup>47</sup> or gives undue prominence to particular evidence.<sup>48</sup>

### b. Credibility of Witnesses

An erroneous instruction on the credibility of wit-

nesses that invades the province of the jury may be cured by other instructions correctly stating the law.

An instruction on the credibility of witnesses that invades the province of the jury may, under the rules already stated, be cured by a charge clearly instructing that the jury are the exclusive judges of the weight and sufficiency of the evidence,<sup>49</sup> or by an instruction otherwise stating the correct rule of law,<sup>50</sup> providing the instructions as a series

696—Newport Dairy v. Shackelford, 88 S.W.2d 940, 261 Ky. 754.

Mich.—Karl v. New York Cent. R. Co., 247 N.W. 715, 262 Mich. 457, certiorari denied 64 S.Ct. 89, 290 U.S. 669, 78 L.Ed. 578.

Mo.—Boyer v. General Oil Products, App., 78 S.W.2d 450—Counts v. Thomas, App., 63 S.W.2d 416.

R.I.—W. C. Viall Dairy v. Providence Journal Co., 89 A.2d 839, 79 R.I. 416.

64 C.J. p 1004 note 43.

42. Ark.—Holmes v. Metropolitan Life Ins. Co., 60 S.W.2d 557, 187 Ark. 388.

Cal.—Lopez v. Knight, 263 P.2d 452, 121 Cal.App.2d 387.

Conn.—Bundy v. Capitol Nat. Bank & Trust Co., 199 A. 561, 124 Conn. 309.

Mo.—Boyer v. General Oil Products, App., 78 S.W.2d 450.

64 C.J. p 1004 note 44.

43. Cal.—Tuttle v. Crawford, 63 P.2d 1128, 8 Cal.2d 126—Fowler v. Allen, 121 P.2d 41, 49 Cal.App.2d 214.

Ga.—Green v. Metropolitan Life Ins. Co., 21 S.E.2d 465, 67 Ga.App. 520—National Sheet Metal Co. v. A. A. Highway Express, 190 S.E. 383, 55 Ga.App. 393.

Ind.—Southern Indiana Gas & Electric Co. v. Stormont, 188 N.E. 313, 206 Ind. 25—Kraning v. Bloxson, 9 N.E.2d 107, 163 Ind.App. 660.

Mich.—Lerpke v. Boice, 45 N.W.2d 388, 329 Mich. 278.

Okl.—City of Duncan v. Canan, 82 P.2d 662, 183 Okl. 315.

64 C.J. p 1003 note 36.

44. Ala.—Abercrombie v. Martin & Hoyt Co., 150 So. 497, 227 Ala. 510.

Ariz.—S. A. Gerrard Co. v. Fricker, 27 P.2d 678, 42 Ariz. 503.

Cal.—Hardin v. San Jose City Lines, 260 P.2d 63, 41 Cal.2d 432—Hatfield v. Levy Bros., 117 P.2d 841, 18 Cal.2d 798—House Grain Co. v. Finerman & Sons, 253 P.2d 1034, 116 Cal.App.2d 485—Alvarez v. Van Camp Sea Food Co., 248 P.2d 943, 113 Cal.App.2d 647—Balkwill v. City of Stockton, 123 P.2d 596, 50 Cal.App.2d 661—Fowler v. Allen, 121 P.2d 41, 49 Cal.App.2d 214—Hanson v. Reedley Joint Union High School Dist., 111 P.2d 415, 43 Cal.App.2d 643—Hechler v. McDonnell, 109 P.2d 426, 42 Cal.App.2d 515.

Ill.—Mills v. Chicago Transit Authority, 117 N.E.2d 401, 1 Ill.App.2d 236—Curtis v. Lowe, 87 N.E.2d 865, 338 Ill.App. 463.

Ind.—Robertson Bros. Dept. Store v. Stanley, 90 N.E.2d 809, 228 Ind. 372—Prudential Ins. Co. of America v. Thatsher, 4 N.E.2d 574, 104 Ind.App. 14.

Ky.—Davis v. Bennett's Adm'r, 132 S.W.2d 334, 279 Ky. 799.

Mo.—Rhinelander v. St. Louis-San Francisco Ry. Co., 257 S.W.2d 655—Mueller v. Schien, 176 S.W.2d 449, 352 Mo. 180—Brown v. Pennsylvania Fire Ins. Co., Philadelphia, App., 263 S.W.2d 893—Roth v. Roth, App., 142 S.W.2d 818—Phares v. Century Electric Co., App., 131 S.W.2d 879—Blunk v. Snider, App., 129 S.W.2d 1075, quashed on other grounds State ex rel. Snider v. Shain, 137 S.W.2d 527, 345 Mo. 950—White v. Hasburgh, App., 124 S.W.2d 560—Glader v. City of Richmond Heights, App., 121 S.W.2d 254—Green v. Kansas City, App., 107 S.W.2d 104—Timmons v. Kurn, 100 S.W.2d 952, 231 Mo.App. 421—Schaper v. Sayman, App., 61 S.W.2d 379—Tibbe v. Sayman, App., 61 S.W.2d 376—Wilson v. Frankel, App., 61 S.W.2d 363—Rhoades v. Alexander, App., 57 S.W.2d 736.

Neb.—McDonald v. Wright, 252 N.W. 411, 125 Neb. 871.

Okl.—Stanford Oil & Gas Co. v. Cartwright, 195 P.2d 737, 200 Okl. 633—Chicago, R. I. & P. Ry. Co. v. Odum, 61 P.2d 1053, 178 Okl. 131—Oklahoma City v. Jones, 60 P.2d 617, 177 Okl. 432.

S.C.—Baynham v. State Highway Department of South Carolina, 187 S.E. 528, 181 S.C. 435.

Va.—Carroll v. Hutchinson, 200 S.E. 644, 172 Va. 43.

64 C.J. p 1003 note 37.

45. Mo.—Brown v. Pennsylvania Fire Ins. Co., Philadelphia, App., 263 S.W.2d 893.

64 C.J. p 1003 note 38.

46. U.S.—Shanahan v. Southern Pac. Co., C.A.Cal., 188 F.2d 564.

Ariz.—Fox Tucson Theatres Corporation v. Lindsay, 56 P.2d 183, 47 Ariz. 388.

Mass.—Sylvia v. New York, N. H. & H. R. Co., 6 N.E.2d 359, 296 Mass. 157.

Mich.—Burpee v. Lane, 265 N.W. 484, 274 Mich. 625.

N.J.—Ivins v. Andres, 187 A. 385, 117 N.J.Law 311.

Okl.—Chicago, R. I. & P. Ry. Co. v. Odum, 61 P.2d 1053, 178 Okl. 131.

Or.—Richer v. Burke, 34 P.2d 317, 147 Or. 465.

Wash.—Briggs v. United Fruit & Produce, 119 P.2d 687, 11 Wash.2d 466.

64 C.J. p 1003 note 39.

47. U.S.—Shanahan v. Southern Pac. Co., C.A.Cal., 188 F.2d 564—Hupp Motor Car Corporation v. Wadsworth, C.C.A.Mich., 113 F.2d 827.

Cal.—Hechler v. McDonnell, 109 P.2d 426, 42 Cal.App.2d 515.

Ga.—American Surety Co. v. Smalton, 194 S.E. 35, 56 Ga.App. 746—Holmes v. Baldwin, 186 S.E. 579, 53 Ga.App. 526.

Ind.—Prudential Ins. Co. of America v. Thatsher, 4 N.E.2d 574, 104 Ind. App. 14.

Mass.—Farnum v. Bankers' & Shippers' Ins. Co. of New York, 183 N.E. 718, 281 Mass. 364.

Miss.—City of Natchez v. Kling, 57 So.2d 878.

Mo.—Roth v. Roth, App., 142 S.W.2d 818.

N.J.—Ivins v. Andres, 187 A. 385, 117 N.J.Law 311.

N.C.—Hoke v. Atlantic Greyhound Corp., 42 S.E.2d 593, 227 N.C. 412.

Pa.—Haelen v. R. C. McCarty Trucking Co., Com.Pl., 31 Erie Co. 440.

S.C.—Charles v. Texas Co., 18 S.E.2d 719, 199 S.C. 156.

64 C.J. p 1004 note 40.

48. Ark.—Moore & Brown v. Rea, 288 S.W. 892, 172 Ark. 1177.

Ohio.—Closs v. Ball, 22 N.E.2d 141, 60 Ohio App. 513.

49. U.S.—Provident Life & Acc. Ins. Co. v. Eaton, C.C.A.Va., 84 F.2d 528.

Cal.—Martin v. Los Angeles Turf Club, 103 P.2d 188, 39 Cal.App.2d 338.

Conn.—Muchisky v. Korzen, 180 A. 591, 120 Conn. 686.

Ga.—Haynes v. Phillips, 26 S.E.2d 185, 69 Ga.App. 624.

Pa.—Rosenberg v. Walker, 50 A.2d 209, 355 Pa. 378.

64 C.J. p 1004 note 46.

50. Cal.—Newman v. Los Angeles Transit Lines, 262 P.2d 95, 120 Cal.

correctly state the law.<sup>51</sup>

### § 446. — Damages and Amount of Recovery

Erroneous instructions as to damages or the amount of recovery may be cured by other instructions correctly stating the law.

A particular instruction as to damages or the amount of recovery which, when standing alone, might be inaccurate or defective may, under the general rules already stated, supra § 441, be cured by other instructions correctly stating the law.<sup>52</sup> For example, the other instructions given may cure

App.2d 685—Dodge v. San Diego Elec. Ry. Co., 208 P.2d 37, 92 Cal. App.2d 759—Phillips v. Southern California Edison Co., 72 P.2d 769, 23 Cal.App.2d 222.

Ill.—Central Ill. Public Service Co. v. Lee, 98 N.E.2d 746, 409 Ill. 19—Ellguth v. Blackstone Hotel, 92 N.E.2d 502, 340 Ill.App. 587, affirmed 97 N.E.2d 290, 409 Ill. 343—Ernhart v. Elgin, J. & E. Ry. Co., 84 N.E.2d 868, 337 Ill. 56, appeal transferred 78 N.E.2d 287, 399 Ill. 512, affirmed 92 N.E.2d 98, 405 Ill. 577—Zydeck v. Chicago & N. W. Ry. Co., 77 N.E.2d 830, 333 Ill.App. 388—Kelley v. Call, 57 N.E.2d 501, 324 Ill.App. 143—Kavanaugh v. Washburn, 50 N.E.2d 761, 320 Ill.App. 250, appeal denied 50 N.E.2d 420, 387 Ill. 204—Rockwood Sprinkler Co. v. Phillips Co., 265 Ill.App. 267.

Mich.—Wilson v. Meldrum, 257 N.W. 741, 269 Mich. 523.

Tenn.—D. M. Rose & Co. v. Snyder, 206 S.W.2d 897, 185 Tenn. 499—Tennessee Coach Co. v. Young, 80 S.W.2d 107, 18 Tenn.App. 532.

64 C.J. p 1004 note 47.

61 Ga.—Hare v. Southern Ry. Co., 6 S.E.2d 65, 61 Ga.App. 159.

Mo.—Hutton v. Carder Wholesale Grocery Co., 160 S.W.2d 1096, 235 Mo.App. 1198—Zeikie v. St. Paul & K. C. S. L. R. Co., App., 71 S.W.2d 154.

64 C.J. p 1004 note 48.

82 U.S.—Robak v. Pennsylvania R. Co., C.A. Pa., 178 F.2d 485—Turner County, S. D. v. Miller, C.A.S.D., 170 F.2d 820, certiorari denied 69 S.Ct. 656, 336 U.S. 925, 93 L.Ed. 1087—Jones v. Pennsylvania R. Co., D.C. Pa., 75 F.Supp. 855, affirmed, C.C.A., 166 F.2d 299—Garrett v. Faust, D.C. Pa., 9 F.R.D. 482, vacated on other grounds, C.A., 183 F.2d 625, certiorari denied 71 S.Ct. 493, 340 U.S. 831, 95 L.Ed. 672, rehearing denied 71 S.Ct. 733, 341 U.S. 917, 95 L.Ed. 1352, rehearing denied 71 S.Ct. 801, 341 U.S. 933, 95 L.Ed. 1362.

Ala.—Van Antwerp Realty Corp. v. Walters, 43 So.2d 537, 253 Ala. 187—Lehigh Portland Cement Co. v. Donaldson, 164 So. 97, 231 Ala. 242.

Ariz.—Mandl v. City of Phoenix, 18 P.2d 271, 41 Ariz. 351.

Ark.—Coca-Cola Bottling Co. of Southwest Arkansas v. Strather, 96 S.W.2d 14, 193 Ark. 939.

Cal.—Long Beach City High School Dist. of Los Angeles County v. Stewart, 185 P.2d 555, 30 Cal.2d 763, 173 A.L.R. 249—Tuttle v. Crawford,

63 P.2d 1128, 8 Cal.2d 126—Lindemann v. San Joaquin Cotton Oil Co., 55 P.2d 870, 5 Cal.2d 480—Harris v. Security Trust & Savings Bank of San Diego, 265 P.2d 555, 122 Cal.App.2d 512—House Grain Co. v. Finerman & Sons, 253 P.2d 1034, 116 Cal.App.2d 485—Ortizman v. Van Der Waal, 249 P.2d 846, 114 Cal.App.2d 167, rehearing denied 252 P.2d 7, 114 Cal.App.2d 167—Sumrall v. Butler, 237 P.2d 831, 102 Cal.App.2d 515—McNulty v. Southern Pac. Co., 216 P.2d 534, 96 Cal. App.2d 441—Dodge v. Stellar, 175 P.2d 607, 77 Cal.App.2d 411—Mahar v. Mackay, 132 P.2d 42, 55 Cal.App.2d 869—Los Angeles County Flood Control Dist. v. Abbot, 76 P.2d 188, 24 Cal.App.2d 728—Hall v. Pacific Elec. Ry. Co., 56 P.2d 1284, 13 Cal. App.2d 456—White v. Barker Bros., 55 P.2d 248, 12 Cal.App.2d 164—Maus v. Scavenger Protective Ass'n, 39 P.2d 209, 2 Cal.App.2d 624—Evans v. Mitchell, 38 P.2d 437, 2 Cal.App.2d 702—Thompson v. Boyer, App., 21 P.2d 472.

Colo.—Dottavio v. Lohr, 222 P.2d 428, 122 Colo. 294—Sherman v. Ross, 82 P.2d 1151, 99 Colo. 354.

Conn.—Schmeltz v. Tracy, 177 E. 520, 119 Conn. 492—Fitzgerald v. Savin, 174 A. 177, 119 Conn. 63.

Fla.—Atlantic Greyhound Lines v. Lovett, 184 So. 133, 134 Fla. 505—Baggett v. Davis, 169 So. 372, 124 Fla. 701.

Ga.—Tyson v. Shoemaker, 62 S.E.2d 586, 83 Ga.App. 33, reversed on other grounds 65 S.E.2d 163, 208 Ga. 28—Western & Atlantic R. R. v. Burnett, 54 S.E.2d 357, 79 Ga.App. 530—Huell v. Southeastern States, 50 S.E.2d 745, 78 Ga.App.2d 311—Taylor v. Allen, 49 S.E.2d 544, 77 Ga.App. 659—Georgia Power Co. v. Clark, 25 S.E.2d 91, 69 Ga.App. 273—Lamb v. Landers, 21 S.E.2d 321, 67 Ga.App. 588—Pollard v. Gammon, 12 S.E.2d 624, 63 Ga.App. 852—Atlanta, B. & C. R. Co. v. Thomas, 12 S.E.2d 494, 64 Ga.App. 253—Southern Ry. Co. v. Alexander, 7 S.E.2d 747, 62 Ga.App. 57—State Highway Board v. Bridges, 3 S.E.2d 907, 60 Ga.App. 240—Southern Ry. Co. v. Lee, 200 S.E. 569, 59 Ga.App. 316—Long v. Long, 190 S. E. 434, 55 Ga.App. 449—Southern Grocery Stores v. Cain, 187 S.E. 250, 54 Ga.App. 48—Atlantic Coast Line R. Co. v. McDonald, 179 S.E. 185, 59 Ga.App. 856, certiorari denied 56 S.Ct. 143, 286 U.S. 621,

80 L.Ed. 441—Western & A. R. R. v. Bennett, 171 S.E. 187, 47 Ga. App. 629—Georgia Power Co. v. Chapman, 168 S.E. 134, 46 Ga.App. 589.

Idaho.—Vancil v. Anderson, 227 P.2d 74, 71 Idaho 95—Hootson v. City of Burley, 219 P.2d 651, 70 Idaho 369.

Ill.—Central Ill. Public Service Co. v. Lee, 98 N.E.2d 746, 409 Ill. 19—Kavanaugh v. Farret, 40 N.E.2d 600, 379 Ill. 273—Holland v. Chicago Transit Authority, 84 N.E.2d 861, 337 Ill.App. 100—Grimm v. Chicago & N. W. Ry. Co., 73 N.E.2d 920, 331 Ill.App. 601—Miller v. Baltimore & O. S. W. R. Co., 70 N.E.2d 263, 330 Ill.App. 129—Advance v. Thompson, 51 N.E.2d 334, 330 Ill.App. 406, reversed on other grounds 55 N.E.2d 57, 387 Ill. 77, certiorari denied 55 S.Ct. 82, 323 U.S. 753, 89 L.Ed. 603—Kavanaugh v. Farret, 24 N.E.2d 368, 310 Ill.App. 429, reversed on other grounds 40 N.E.2d 500, 379 Ill. 273.

Ind.—Keeshin Motor Exp. Co. v. Sowers, 48 N.E.2d 459, 221 Ind. 440—Hough v. Miller, 44 N.E.2d 228, 112 Ind.App. 138—Van Drake v. Thomas, 38 N.E.2d 878, 110 Ind. App. 588—Guardian Life Ins. Co. of America v. Barry, 32 N.E.2d 598, 109 Ind.App. 286—Dunbar v. Demaree, 2 N.E.2d 1003, 103 Ind. App. 585.

Iowa.—Lincoln v. General Cas. Co. of Wis., 55 N.W.2d 321, 248 Iowa 1280—Wilson v. Fleming, 31 N.W.2d 393, 239 Iowa 718, motion denied 32 N.W.2d 798, 239 Iowa 918—Smith v. Pine, 12 N.W.2d 236, 234 Iowa 256—Remer v. Takin Bros. Freight Lines, 297 N.W. 297, 230 Iowa 290—Yance v. Hoskins, 281 N.W. 439, 225 Iowa 1108, 118 A.L.R. 1186—Maxwell v. Iowa State Highway Commission, 271 N.W. 833, 223 Iowa 159, 118 A.L.R. 862—Hoefft v. State, 266 N.W. 571, 221 Iowa 694, 104 A.L.R. 1008—Danner v. Cooper, 246 N.W. 223, 215 Iowa 1354.

Ky.—Vogt v. Keller, 159 S.W.2d 29, 289 Ky. 486.

La.—Housing Authority of New Orleans v. Gondolfo, 24 So.2d 78, 208 La. 1055.

Me.—Reed v. Central Maine Power Co., 172 A. 823, 132 Me. 476.

Mo.—Schloss v. Silverman, 193 A. 343, 172 Md. 632.

Mich.—Winchester v. Chabot, 32 N.W.2d 358, 321 Mich. 114—Delfosse v. Bresnahan, 9 N.W.2d 866, 305



the error in an instruction which is misleading,<sup>53</sup> | confusing,<sup>54</sup> or indefinite;<sup>55</sup> an instruction which

- Mich. 621.—City of Allegan v. Vonasek, 245 N.W. 587, 261 Mich. 16.
- Minn.—Becker v. Northland Transp. Co., 274 N.W. 180, 200 Minn. 272, reheard 275 N.W. 510, 200 Minn. 272.
- Miss.—Howell v. George, 30 So.2d 603, 201 Miss. 783.
- Mo.—Counts v. Thompson, 222 S.W.2d 487, 359 Mo. 485.—Petty v. Kansas City Public Service Co., 198 S.W.2d 684, 355 Mo. 824.—Hendon v. Kurn, 174 S.W.2d 806, 351 Mo. 980, approving Arkansas law.—Sibert v. Litchfield & M. Ry. Co., 159 S.W.2d 612.—Wild v. Pitcairn, 149 S.W.2d 800, 347 Mo. 915, certiorari denied Pitcairn v. Wild, 62 S.Ct. 72, 314 U.S. 638, 86 L.Ed. 512.—Hausherr v. Kansas City Public Service Co., App., 268 S.W.2d 433.—State ex rel. State Highway Commission v. Leftwich, App., 263 S.W.2d 742.—Valley v. Kansas City Public Service Co., App., 259 S.W.2d 587.—Stevens v. Dickey, App., 222 S.W.2d 563.—McCluskey v. De Long, 198 S.W.2d 673, 239 Mo.App. 1026.—Hunt v. U. S. Fire Ins. Co. of N. Y., 193 S.W.2d 778, 239 Mo.App. 625.—Shipper v. Dr. C. M. Coe, Inc., App., 174 S.W.2d 837.—O'Hare v. Justin T. Flint Laundry & Dry Cleaning Co., App., 170 S.W.2d 95.—Hall v. Martindale, App., 166 S.W.2d 594.—Hill v. Landau, App., 125 S.W.2d 516.—Scott v. Kansas City Public Service Co., App., 115 S.W.2d 513.—State ex rel. State Highway Commission v. Lindley, 113 S.W.2d 132, 282 Mo. App. 831.—Gannaway v. Pitcairn, App., 109 S.W.2d 78.—Wurst v. American Car & Foundry Co., App., 103 S.W.2d 6.—Timmons v. Kurn, 100 S.W.2d 952, 231 Mo.App. 421.—Carroll v. Missouri Power & Light Co., 96 S.W.2d 1074, 231 Mo.App. 265.—Dunham v. Tenth St. Garage & Sales Co., App., 94 S.W.2d 1096.—Dove v. Stafford, 91 S.W.2d 161, 230 Mo.App. 241.—Lyons v. St. Joseph Belt Ry. Co., 84 S.W.2d 933, 232 Mo.App. 575, certiorari quashed State ex rel. St. Joseph Belt Ry. Co. v. Shain, 108 S.W.2d 351, 341 Mo. 733.—Mott v. Kansas City, App., 60 S.W.2d 736.—Rhoades v. Alexander, App., 57 S.W.2d 736.—Chicago, R. I. & P. Ry. Co. v. Hosman, 57 S.W.2d 434, 227 Mo.App. 659.
- Neb.—Kennedy v. Chicago, R. I. & P. Ry. Co., 56 N.W.2d 446, 156 Neb. 845.—Crescilius v. Gamble-Skogmo, Inc., 130 N.W.2d 627, 144 Neb. 394.—Vithen v. Jensen, 258 N.W. 287, 128 Neb. 188.
- N.H.—Colburn v. Normand, 74 A.2d 559, 96 N.H. 250.
- N.J.—Tischler v. West Jersey & S. R. Co., 168 A. 485, 110 N.J.Law 473.
- N.C.—Simmons v. North Carolina State Highway & Public Works Commission, 78 S.E.2d 208, 238 N.C. 532.—Yost v. Hall, 64 S.E.2d 554, 233 N.C. 463.
- Ohio.—Dietsch v. Burnside Motor Freight Lines, App., 82 N.E.2d 559.—Bana v. Pittsburgh Plate Glass Co., Columbia Chemical Division, App., 76 N.E.2d 625.—Beam v. Baltimore & O. R. Co., 68 N.E.2d 159, 77 Ohio App. 419.—Martin v. Cincinnati St. Ry. Co., 22 N.E.2d 735, 61 Ohio App. 375.
- Okl.—Southwest Stone Co. v. Hughes, 177 P.2d 489, 198 Okl. 257.—Hancock v. Myers, 176 P.2d 820, 198 Okl. 126.—All Am. Bus. Lines v. Saxon, 172 P.2d 424, 197 Okl. 395.—Wilkinson v. Grand River Dam Authority, 161 P.2d 745, 195 Okl. 678.—Grand River Dam Authority v. Martin, 138 P.2d 82, 192 Okl. 614.—K. C. Motor Co. v. Miller, 90 P.2d 433, 185 Okl. 84.—Labenne v. Kaufman, 89 P.2d 281, 184 Okl. 565.—Pine v. Duncan, 65 P.2d 492, 179 Okl. 336.
- Or.—McKay v. Pacific Bldg. Materials Co., 68 P.2d 127, 156 Or. 578.—Compton v. Hammond Lumber Co., 58 P.2d 235, 163 Or. 546, certiorari denied Hammond Lumber Co. v. Compton, 57 S.Ct. 42, 299 U.S. 578, 81 L.Ed. 426, mandate modified on other grounds Compton v. Hammond Lumber Co., 61 P.2d 1257, 154 Or. 850.
- R.I.—Grimes v. United Elec. Rys. Co., 193 A. 740, 53 R.I. 458.
- S.C.—Crozier v. Charleston & W. C. Ry. Co., 71 S.E.2d 800, 222 S.C. 121.—Charles v. Texas Co., 18 S.E.2d 719, 199 S.C. 156.
- Tenn.—White v. Seler, App., 264 S.W.2d 241.
- Tex.—Texas & N. O. R. Co. v. Coe, Civ.App., 102 S.W.2d 465, error dismissed.
- Utah.—Bruner v. McCarthy, 142 P.2d 649, 105 Utah 399, certiorari dismissed McCarthy v. Bruner, 65 S.Ct. 126, 323 U.S. 678, 39 L.Ed. 547.
- Va.—Tri-State Coach Corp. v. Walsh, 49 S.E.2d 363, 188 Va. 299.
- Wash.—Boyle v. Lewis, 193 P.2d 332, 30 Wash.2d 665.—Girardi v. Union High School Dist., No. 1, Skagit County, 93 P.2d 298, 200 Wash. 21.—Robinson v. Ebert, 39 P.2d 992, 180 Wash. 387.
- 64 C.J. p 1004 note 49.—17 C.J. p 1073 note 83.
53. Ala.—Van Antwerp Realty Corp. v. Walters, 43 So.2d 537, 253 Ala. 187.—Lehigh Portland Cement Co. v. Donaldson, 164 So. 97, 231 Ala. 242.
- Ariz.—Mandi v. City of Phoenix, 18 P.2d 271, 41 Ariz. 351.
- Cal.—Long Beach City High School Dist. of Los Angeles County v. Stewart, 185 P.2d 585, 30 Cal.2d 763, 173 A.L.R. 249.—Harris v. Security Trust & Savings Bank of San Diego, 265 P.2d 555, 122 Cal. App.2d 512.—Ortman v. Van Der Waal, 49 P.2d 846, 114 Cal.App.2d 167, hearing denied 253 P.2d 7, 114 Cal.App.2d 167.—Evans v. Mitchell, 38 P.2d 437, 2 Cal.App.2d 702.
- Ga.—Tyson v. Shoemaker, 62 S.E.2d 586, 83 Ga.App. 33, reversed on other grounds 65 S.E.2d 163, 208 Ga. 28.—Taylor v. Allen, 49 S.E.2d 544, 77 Ga.App. 659.
- Idaho.—Vancil v. Anderson, 27 P.2d 74, 71 Idaho 95.—Hooton v. City of Burley, 219 P.2d 651, 70 Idaho 369.
- Ind.—Keeshin Motor Exp. Co. v. Sowers, 48 N.E.2d 459, 221 Ind. 440.—Hough v. Miller, 44 N.E.2d 238, 112 Ind.App. 138.—Guardian Life Ins. Co. of America v. Barry, 32 N.E.2d 599, 109 Ind.App. 286.—Dunbar v. Demaree, 2 N.E.2d 1003, 102 Ind.App. 585.
- Iowa.—Lincoln v. General Cas. Co. of Wis., 55 N.W.2d 321, 243 Iowa 1280.
- Ky.—Vogt v. Keller, 159 S.W.2d 29, 289 Ky. 486.
- Md.—Schloss v. Silverman, 192 A. 343, 172 Md. 632.
- Mich.—Winchester v. Chabut, 32 N.W.2d 358, 321 Mich. 114.—City of Allegan v. Vonasek, 245 N.W. 587, 261 Mich. 16.
- Mo.—Petty v. Kansas City Public Service Co., 198 S.W.2d 684, 355 Mo. 824.—Stevens v. Dickey, App., 222 S.W.2d 563.—Hunt v. U. S. Fire Ins. Co. of N. Y., 193 S.W.2d 778, 239 Mo.App. 625.—O'Hare v. Justin T. Flint Laundry & Dry Cleaning Co., App., 170 S.W.2d 95.—Wurst v. American Car & Foundry Co., App., 103 S.W.2d 6.—Timmons v. Kurn, 100 S.W.2d 952, 231 Mo.App. 421.—Mott v. Kansas City, App., 60 S.W.2d 736.—Chicago, R. I. & P. Ry. Co. v. Hosman, 57 S.W.2d 434, 227 Mo.App. 659.
- Ohio.—Beam v. Baltimore & O. R. Co., 68 N.E.2d 159, 77 Ohio App. 419.
- Okl.—Wilkinson v. Grand River Dam Authority, 161 P.2d 745, 195 Okl. 678.
- S.C.—Crozier v. Charleston & W. C. Ry. Co., 71 S.E.2d 800, 222 S.C. 121.
- Va.—Tri-State Coach Corp. v. Walsh, 49 S.E.2d 363, 188 Va. 299.
- 64 C.J. p 1004 note 50.
54. U.S.—Robak v. Pennsylvania R. Co., C.A.Pa., 178 F.2d 485.
- Ga.—Tyson v. Shoemaker, 62 S.E.2d 586, 83 Ga.App. 33, reversed on other grounds 65 S.E.2d 163, 208 Ga. 28.
- Mo.—O'Hare v. Justin T. Flint Laundry & Dry Cleaning Co., App., 170 S.W.2d 95.
- 64 C.J. p 1004 note 51.
55. Ind.—Jackson Hill Coal & Coke Co. v. Van Hentenryck, 120 N.E. 664, 69 Ind.App. 142.

is too broad or too general,<sup>56</sup> or too narrow,<sup>57</sup> or incomplete;<sup>58</sup> an instruction which refers to the amount of plaintiff's demand;<sup>59</sup> or an instruction which is objectionable as not restricting damages to injuries,<sup>60</sup> or as permitting consideration of the pecuniary condition of plaintiff,<sup>61</sup> or which is not

applicable to the pleadings<sup>62</sup> or evidence,<sup>63</sup> or which does not limit damages to the result of the negligence claimed.<sup>64</sup>

These rules have been applied to instructions on the measure of damages generally,<sup>65</sup> and in par-

56. Ala.—Lehigh Portland Cement Co. v. Donaldson, 164 So. 97, 231 Ala. 242.

Ga.—Georgia Power Co. v. Chapman, 168 S.E. 134, 46 Ga.App. 589, 64 C.J. p 1004 note 53.

57. S.C.—Youngblood v. Southern Ry. Co., 149 S.E. 742, 152 S.C. 265, 77 A.L.R. 1419.

58. Cal.—Ritzman v. Mills, 233 P. 88, 102 Cal.App. 464.

59. Ind.—Louisville & Southern Indiana Traction Co. v. Miller, 142 N.E. 410, 82 Ind.App. 344.

Mo.—Sibert v. Litchfield & M. Ry. Co., 159 S.W.2d 612—Hall v. Martindale, App., 166 S.W.2d 594.

60. Cal.—Ward v. De Martin, 232 P. 192, 108 Cal.App. 745.

61. Cal.—Rohrer v. Leonard & Holt, 276 P. 357, 97 Cal.App. 720.

62. Ga.—Long v. Long, 190 S.E. 434, 55 Ga.App. 449.

Iowa.—Maxwell v. Iowa State Highway Commission, 271 N.W. 853, 223 Iowa 159, 118 A.L.R. 862, 64 C.J. p 1005 note 59.

63. Ala.—Van Antwerp Realty Corp. v. Walters, 43 So.2d 537, 253 Ala. 187.

Ga.—Southern Ry. Co. v. Lee, 200 S. E. 569, 59 Ga.App. 816.

Iowa.—Remer v. Takin Bros. Freight Lines, 297 N.W. 297, 230 Iowa 290 —Yancey v. Hoskins, 281 N.W. 489, 225 Iowa 1108, 118 A.L.R. 1186 —Danner v. Cooper, 248 N.W. 223, 215 Iowa 1354.

Me.—Read v. Central Maine Power Co., 172 A. 823, 132 Me. 476, 64 C.J. p 1005 note 60.

64. Cal.—Mahar v. Mackay, 132 P.2d 42, 55 Cal.App.2d 869—Maus v. Scavenger Protective Ass'n, 39 P.2d 209, 2 Cal.App.2d 624.

Ga.—Western & A. R. R. v. Bennett, 171 S.E. 187, 47 Ga.App. 629.

Ind.—Van Drake v. Thomas, 33 N.E. 2d 878, 110 Ind.App. 586.

Iowa.—Smith v. Pine, 12 N.W.2d 236, 234 Iowa 256.

Mo.—Valley v. Kansas City Public Service Co., App., 259 S.W.2d 387 —Stevens v. Dickey, App., 223 S.W. 2d 563—Shipper v. Dr. C. M. Coe, Inc., App., 174 S.W.2d 887—O'Hare v. Justin T. Flint Laundry & Dry Cleaning Co., App., 170 S.W.2d 95 —Mott v. Kansas City, App., 60 S.W.2d 736—Hilderbrand v. St. Louis-San Francisco Ry. Co., 298 S.W. 1069, 320 Mo.App. 1223.

S.C.—Croxier v. Charleston & W. C. Ry. Co., 71 S.E.2d 800, 232 S.C. 121.

Tex.—Texas & N. O. R. Co. v. Coe, Civ.App., 102 S.W.2d 465, error dismissed.

65. U.S.—Robak v. Pennsylvania R. Co., C.A.Pa., 178 F.2d 485—Turner County, S. D. v. Miller, C.A.S. D., 170 F.2d 820, certiorari denied 69 S.Ct. 656, 326 U.S. 925, 93 L. Ed. 1087.

Ala.—Van Antwerp Realty Corp. v. Walters, 43 So.2d 537, 253 Ala. 187 —Lehigh Portland Cement Co. v. Donaldson, 164 So. 97, 231 Ala. 242.

Cal.—Long Beach City High School Dist. of Los Angeles County v. Stewart, 185 P.2d 585, 30 Cal.2d 763, 173 A.L.R. 249—Tuttle v. Crawford, 63 P.2d 1128, 8 Cal.2d 126—Lindemann v. San Joaquin Cotton Oil Co., 55 P.2d 870, 5 Cal.2d 480—Harris v. Security Trust & Savings Bank of San Diego, 265 P.2d 555, 122 Cal.App.2d 512—House Grain Co. v. Finerman & Sons, 253 P.2d 1034, 116 Cal.App.2d 485—McNulty v. Southern Pac. Co., 218 P.2d 534, 98 Cal.App.2d 841—Dodd v. Stellar, 175 P.2d 607, 77 Cal.App.2d 411

—Mahar v. Mackay, 132 P.2d 42, 55 Cal.App.2d 869—Los Angeles County Flood Control Dist. v. Abbott, 76 P.2d 133, 24 Cal.App.2d 723 —White v. Barker Bros., 55 P.2d 248, 12 Cal.App.2d 164—Maus v. Scavenger Protective Ass'n, 39 P.2d 209, 2 Cal.App.2d 624—Evans v. Mitchell, 38 P.2d 437, 2 Cal.App. 2d 702—Thompson v. Boyer, App., 21 P.2d 472.

Colo.—Sherman v. Ross, 62 P.2d 1151, 99 Colo. 354.

Conn.—Schmeltz v. Tracy, 177 A. 520, 119 Conn. 492—Fitzgerald v. Savin, 174 A. 177, 119 Conn. 63.

Fla.—Atlantic Greyhound Lines v. Lovett, 184 So. 133, 184 Fla. 505—Baggett v. Davis, 169 So. 372, 124 Fla. 701.

Ga.—Tyson v. Shoemaker, 62 S.E.2d 586, 83 Ga.App. 33, reversed on other grounds 65 S.E.2d 163, 208 Ga. 28—Western & Atlantic R. R. v. Burnett, 54 S.E.2d 357, 79 Ga. App. 530—Huett v. Southeastern States, 50 S.E.2d 745, 78 Ga.App.2d 211—Taylor v. Allen, 49 S.E.2d 544, 77 Ga.App. 659—Riggs v. Watson, 47 S.E.2d 900, 77 Ga.App. 62 —Georgia Power Co. v. Clark, 25 S.E. 2d 91, 69 Ga.App. 273—Lamb v. Landers, 21 S.E.2d 321, 67 Ga.App. 588 —Pollard v. Gammon, 12 S.E.2d 824, 63 Ga.App. 852—Southern Ry. Co. v. Alexander, 7 S.E.2d 747, 62 Ga.App. 57—State Highway Board v. Bridges, 3 S.E.2d 907, 60 Ga.App.

240—Georgia Power Co. v. Chapman, 168 S.E. 134, 46 Ga.App. 589. Idaho.—Hooton v. City of Burley, 219 P.2d 651, 10 Idaho 369.

Ill.—Central Ill. Public Service Co. v. Lee, 98 N.E.2d 746, 409 Ill. 19 —Kavanaugh v. Parret, 40 N.E.2d 500, 379 Ill. 278—Miller v. Baltimore & O. S. W. R. Co., 70 N.E.2d 263, 330 Ill.App. 129.

Ind.—Guardian Life Ins. Co. of America v. Barry, 32 N.E.2d 599, 109 Ind.App. 286.

Iowa.—Wilson v. Fleming, 31 N.W. 2d 393, 239 Iowa 718, motion denied 32 N.W.2d 798, 239 Iowa 918 —Smith v. Pine, 12 N.W.2d 236, 234 Iowa 256—Remer v. Takin Bros. Freight Lines, 297 N.W. 297, 230 Iowa 290—Yancey v. Hoskins, 281 N.W. 489, 225 Iowa 1108, 118 A.L.R. 1186—Maxwell v. Iowa State Highway Commission, 271 N.W. 853, 223 Iowa 159, 118 A.L.R. 862

—Hoeft v. State, 266 N.W. 671, 221 Iowa 694, 104 A.L.R. 1005—Danner v. Cooper, 246 N.W. 223, 215 Iowa 1354.

Ky.—Vogt v. Keller, 159 S.W.2d 29, 289 Ky. 486.

La.—Housing Authority of New Orleans v. Gondolfo, 24 So.2d 78, 208 La. 1065.

Me.—Read v. Central Maine Power Co., 172 A. 823, 132 Me. 476.

Md.—Schloss v. Silverman, 192 A. 343, 172 Md. 632.

Mich.—Winchester v. Chabut, 32 N.W.2d 858, 321 Mich. 114—City of Allegan v. Vonasek, 245 N.W. 557, 261 Mich. 16.

Miss.—Howell v. George, 30 So.2d 603, 201 Miss. 783.

Mo.—Counts v. Thompson, 222 S.W. 2d 487, 359 Mo. 485—Pettit v. Kansas City Public Service Co., 198 S.W.2d 684, 355 Mo. 824—Wild v. Pitcairn, 149 S.W.2d 800, 347 Mo. 916, certiorari denied Pitcairn v. Wild, 62 S.Ct. 72, 314 U.S. 638, 86 L. Ed. 512—Jones v. Chicago, B. & Q. R. Co., 125 S.W.2d 5, 343 Mo. 1104—State ex rel. State Highway Commission v. Leftwich, App., 253 S.W. 2d 742—Valley v. Kansas City Public Service Co., App., 259 S.W.2d 387

—Hunt v. U. S. Fire Ins. Co. of N. Y., 193 S.W.2d 778, 239 Mo.App. 626—Shipper v. Dr. C. M. Coe, Inc., App., 174 S.W.2d 887—Scott v. Kansas City Public Service Co., App., 115 S.W.2d 518—State ex rel. State Highway Commission v. Lindley, 113 S.W.2d 122, 232 Mo. App. 831—Gannaway v. Pitcairn, App., 109 S.W.2d 78—Carroll v.

ticular actions and with respect to particular issues, such as damages in actions for death,<sup>66</sup> special damages,<sup>67</sup> punitive or exemplary damages,<sup>68</sup> impairment of earning capacity,<sup>69</sup> pain and suffering,<sup>70</sup>

mental suffering,<sup>71</sup> loss of services,<sup>72</sup> loss of time,<sup>73</sup> prospective damages,<sup>74</sup> increased damages due to malpractice,<sup>75</sup> life expectancy,<sup>76</sup> mitigation of dam-

- Missouri Power & Light Co. v. Clark, 96 S.W.2d 1074, 231 Mo.App. 285—Lyons v. St. Joseph Belt Ry. Co., 84 S.W.2d 933, 232 Mo.App. 575, certiorari quashed State ex rel. St. Joseph Belt Ry. Co. v. Shain, 108 S.W.2d 351, 341 Mo. 733—Mott v. Kansas City, App., 60 S.W.2d 736—Chicago, R. I. & P. Ry. Co. v. Hosman, 57 S.W.2d 434, 227 Mo. App. 659.
- Neb.—Crecelius v. Gamble-Skogmo, Inc., 13 N.W.2d 627, 144 Neb. 394—Vithen v. Jensen, 253 N.W. 267, 128 Neb. 188.
- N.J.—Tischler v. West Jersey & S. R. Co., 168 A. 485, 110 N.J.Law 473.
- N.C.—Simmons v. North Carolina State Highway & Public Works Commission, 78 S.E.2d 308, 238 N.C. 522.
- Ohio.—Dietsch v. Burnside Motor Freight Lines, App., 82 N.E.2d 559—Bana v. Pittsburgh Plate Glass Co., Columbia Chemical Division, App., 76 N.E.2d 625—Martin v. Cincinnati St. Ry. Co., 22 N.E.2d 735, 61 Ohio App. 375.
- Okl.—Hancock v. Myers, 176 P.2d 320, 198 Okl. 126—All Am. Bus Lines v. Saxon, 173 P.2d 434, 197 Okl. 395—Wilkinson v. Grand River Dam Authority, 181 P.2d 745, 195 Okl. 673—Grand River Dam Authority v. Martin, 158 P.2d 32, 192 Okl. 614—Labenne v. Kaufman, 89 P.2d 281, 184 Okl. 565—Pine v. Duncan, 65 P.2d 492, 179 Okl. 336.
- Or.—McKay v. Pacific Bldg. Materials Co., 68 P.2d 127, 156 Or. 578.
- R.I.—Grimes v. United Elec. Rys. Co., 193 A. 104, 58 R.I. 458.
- S.C.—Crozler v. Charleston & W. C. Ry. Co., 71 S.E.2d 800, 222 S.C. 121—Charles v. Texas Co., 18 S.E.2d 719, 199 S.C. 156.
- Tex.—Texas & N. O. R. Co. v. Coe, Civ.App., 102 S.W.2d 465, error dismissed.
- Utah.—Bruner v. McCarthy, 142 P.2d 649, 105 Utah 399, certiorari dismissed McCarthy v. Bruner, 65 S. Ct. 126, 323 U.S. 673, 89 L.Ed. 547.
- Va.—Tri-State Coach Corp. v. Walsh, 49 S.E.2d 363, 188 Va. 299.
- Wash.—Girardi v. Union High School Dist., No. 1, Skagit County, 93 P.2d 298, 200 Wash. 21.
- 64 C.J. p 1005 note 63.
66. Cal.—Sumrall v. Butler, 227 P.2d 881, 102 Cal.App.2d 515.
- Ga.—Southern Ry. Co. v. Lee, 300 S. E. 569, 59 Ga.App. 316—Atlantic Coast Line R. Co. v. McDonald, 179 S.E. 185, 50 Ga.App. 856, certiorari denied 56 S.Ct. 143, 296 U.S. 621, 80 L.Ed. 441—Western & A. R. R. Bennett, 171 S.E. 187, 47 Ga.App. 629.
- Ind.—Keeshin Motor Exp. Co. v. Sowers, 43 N.E.2d 459, 221 Ind. 404—Hough v. Miller, 44 N.E.2d 228, 112 Ind.App. 138.
- Mich.—Delfosse v. Bresnahan, 9 N.W.2d 866, 305 Mich. 621.
- Mo.—Sibert v. Litchfield & M. Ry. Co., 159 S.W.2d 612—Dove v. Stafford, 91 S.W.2d 161, 230 Mo.App. 241—Hinds v. Chicago, B. & Q. R. Co., App., 85 S.W.2d 165.
- N.J.—Tischler v. West Jersey & S. R. Co., 166 A. 485, 110 N.J.Law 473.
- N.C.—Yost v. Hall, 64 S.E.2d 554, 233 N.C. 463.
- Ohio.—Chowning v. Ajax Motor Service, 21 N.E.2d 1021, 60 Ohio App. 470.
- Okl.—Southwest Stone Co. v. Hughes, 177 P.2d 439, 198 Okl. 257.
- 64 C.J. p 1005 note 64.
67. Conn.—Schmaltz v. Tracy, 177 A. 520, 119 Conn. 492.
- 64 C.J. p 1005 note 65.
68. Md.—Schloss v. Silverman, 192 A. 343, 172 Md. 632.
- Mo.—Lyons v. St. Joseph Belt Ry. Co., 84 S.W.2d 933, 232 Mo.App. 575, certiorari quashed State ex rel. St. Joseph Belt Ry. Co. v. Shain, 108 S.W.2d 351, 341 Mo. 733.
- S.C.—Charles v. Texas Co., 18 S.E.2d 719, 199 S.C. 156.
- Va.—Tri-State Coach Corp. v. Walsh, 49 S.E.2d 363, 188 Va. 299.
- 64 C.J. p 1005 note 66.
69. Cal.—Lindemann v. San Joaquin Cotton Oil Co., 55 P.2d 870, 5 Cal. 2d 480—White v. Barker Bros., 55 P.2d 248, 12 Cal.App.2d 164.
- Mich.—Winchester v. Chabot, 32 N.W.2d 353, 321 Mich. 114.
- Mo.—Wild v. Pitcairn, 149 S.W.2d 800, 347 Mo. 915, certiorari denied Pitcairn v. Wild, 62 S.Ct. 72, 314 U.S. 638, 86 L.Ed. 512.
- Ohio.—Dietsch v. Burnside Motor Freight Lines, App., 82 N.E.2d 559—Martin v. Cincinnati St. Ry. Co., 22 N.E.2d 735, 61 Ohio App. 375.
- Tex.—Texas & N. O. R. Co. v. Coe, Civ.App., 102 S.W.2d 465, error dismissed.
- Utah.—Bruner v. McCarthy, 142 P.2d 649, 105 Utah 399, certiorari dismissed McCarthy v. Bruner, 65 S. Ct. 126, 323 U.S. 673, 89 L.Ed. 547.
- 64 C.J. p 1006 note 67.
70. U.S.—Robak v. Pennsylvania R. Co., C.A.Pa., 178 F.2d 485.
- Ala.—Van Antwerp Realty Corp. v. Walters, 43 So.2d 537, 253 Ala. 187.
- Fla.—Atlantic Greyhound Lines v. Lovett, 184 So. 133, 134 Fla. 505—Baggett v. Davis, 189 So. 372, 124 Fla. 701.
- Ga.—Georgia Power Co. v. Clark, 25 S.E.2d 91, 63 Ga.App. 273.
- Ill.—Kavanaugh v. Parret, 40 N.E.2d 500, 379 Ill. 273.
- Mo.—Wild v. Pitcairn, 149 S.W.2d 800, 347 Mo. 915, certiorari denied Pitcairn v. Wild, 62 S.Ct. 72, 314 U.S. 638, 86 L.Ed. 512—Shipper v. Dr. C. M. Coe, Inc., App., 174 S.W.2d 887.
- Ohio.—Dietsch v. Burnside Motor Freight Lines, App., 82 N.E.2d 559, 64 C.J. p 1006 note 68.
71. Ala.—Van Antwerp Realty Corp. v. Walters, 43 So.2d 537, 253 Ala. 187.
- Fla.—Atlantic Greyhound Lines v. Lovett, 184 So. 133, 134 Fla. 505.
- Ohio.—Dietsch v. Burnside Motor Freight Lines, App., 82 N.E.2d 559, 64 C.J. p 1006 note 69.
72. Mo.—Hauhserr v. Kansas City Public Service Co., App., 268 S.W.2d 433.
- Pa.—Samarra v. Allegheny Valley St. Ry. Co., 86 A. 237, 238 Pa. 469.
73. Cal.—Harris v. Security Trust & Savings Bank of San Diego, 265 P.2d 555, 122 Cal.App.2d 512.
- Iowa.—Danner v. Cooper, 246 N.W.223, 215 Iowa 1354.
- S.C.—Southern v. Cudahy Packing Co., 159 S.E.2, 160 S.C. 496.
74. U.S.—Turner County, S. D. v. Miller, C.A.S.D., 170 F.2d 820, certiorari denied 69 S.Ct. 656, 336 U.S. 925, 93 L.Ed. 1087.
- Colo.—Sherman v. Ross, 62 P.2d 1151, 99 Colo. 354.
- Ill.—Kavanaugh v. Parret, 40 N.E.2d 500, 379 Ill. 273.
- Iowa.—Smith v. Pine, 12 N.W.2d 236, 234 Iowa 256.
- Mo.—Wild v. Pitcairn, 149 S.W.2d 800, 347 Mo. 915, certiorari denied Pitcairn v. Wild, 62 S.Ct. 72, 314 U.S. 638, 86 L.Ed. 512.
- Neb.—Crecelius v. Gamble-Skogmo, Inc., 13 N.W.2d 627, 144 Neb. 394.
- Ohio.—Dietsch v. Burnside Motor Freight Lines, App., 82 N.E.2d 559—Martin v. Cincinnati St. Ry. Co., 22 N.E.2d 735, 61 Ohio App. 375.
- Utah.—Bruner v. McCarthy, 142 P.2d 649, 105 Utah 399, certiorari dismissed McCarthy v. Bruner, 65 S. Ct. 126, 323 U.S. 673, 89 L.Ed. 547.
- 64 C.J. p 1006 note 72.
75. Ind.—Stamets v. Wilson, 164 N. E. 300, 89 Ind.App. 403.
- Mo.—Shipper v. Dr. C. M. Coe, Inc., App., 174 S.W.2d 887.
76. Cal.—Sumrall v. Butler, 227 P.2d 881, 102 Cal.App.2d 515.
- Ga.—Atlantic Coast Line R. Co. v. McDonald, 179 S.E. 185, 50 Ga.App.

ages,<sup>77</sup> market value,<sup>78</sup> loss of profits,<sup>79</sup> and duty to minimize damages.<sup>80</sup>

**Exceptions to rule.** The error is not cured unless the instructions as a series state the law correctly,<sup>81</sup> and merely giving a correct instruction will not cure the error in an instruction with which it conflicts.<sup>82</sup>

## § 447. — Definition and Application of Terms

An instruction which is erroneous because omitting to define or apply, or which erroneously defines or applies, a particular term or phrase may be cured by other instructions correctly stating the law.

An instruction which is erroneous because omitting to define or apply,<sup>83</sup> or which erroneously de-

856, certiorari denied 56 S.Ct. 143, 296 U.S. 621, 80 L.Ed. 441.  
 Idaho.—Hooton v. City of Burley, 219 P.2d 651, 70 Idaho 369.  
 Mich.—Winchester v. Chabut, 32 N.W.2d 358, 321 Mich. 114.  
 Mo.—Dove v. Stafford, 91 S.W.2d 161, 230 Mo.App. 241.  
 N.J.—Tischler v. West Jersey & S. R. Co., 166 A. 485, 110 N.J.Law 473.  
 Or.—McKay v. Pacific Bldg. Materials Co., 68 P.2d 127, 156 Or. 578.  
 Wash.—Girardi v. Union High School Dist., No. 1, Skagit County, 93 P.2d 298, 200 Wash. 21.  
 64 C.J. p 1006 note 74.  
 77. N.Y.—Keller v. American Bottlers' Pub. Co., 125 N.Y.S. 212, 140 App.Div. 811.  
 78. Ariz.—Mandi v. City of Phoenix, 18 P.2d 271, 41 Ariz. 351.  
 Iowa.—Wilson v. Fleming, 31 N.W.2d 393, 239 Iowa 718, motion denied 32 N.W.2d 793, 239 Iowa 518—Hoeft v. State, 268 N.W. 571, 221 Iowa 694, 104 A.L.R. 1008.  
 La.—Housing Authority of New Orleans v. Gondolfo, 24 So.2d 78, 208 La. 1065.  
 Me.—Reed v. Central Maine Power Co., 172 A. 823, 132 Me. 476.  
 Mo.—State ex rel. State Highway Commission v. Leftwich, App., 263 S.W.2d 742—Chicago, R. I. & P. Ry. Co. v. Hosman, 57 S.W.2d 434, 227 Mo.App. 659.  
 Ohio.—Bana v. Pittsburgh Plate Glass Co., Columbia Chemical Division, App., 76 N.E.2d 625.  
 Okl.—Wilkerson v. Grand River Dam Authority, 161 P.2d 745, 195 Okl. 678.  
 64 C.J. p 1006 note 76.  
 79. Ill.—Gist v. Wyoming Land & Irr. Co., 208 Ill.App. 202.  
 80. Cal.—House Grain Co. v. Finerman & Sons, 253 P.2d 1034, 116 Cal.App.2d 485.  
 S.C.—Heath v. Postal Telegraph-Cable Co., 69 S.E. 283, 87 S.C. 219.  
 81. U.S.—Callen v. Pennsylvania R. Co., C.C.A.Pa., 162 F.2d 832, affirmed 68 S.Ct. 296, 332 U.S. 625, 92 L.Ed. 242.  
 Ga.—Mell v. Mell, 9 S.E.2d 756, 190 Ga. 508—Brosnan v. Long, 44 S.E. 2d 809, 75 Ga.App. 837—Southern Ry. Co. v. Alexander, 2 S.E.2d 219, 59 Ga.App. 852.  
 Ind.—L. S. Ayres & Co. v. Hicks, 41 N.E.2d 195, 220 Ind. 86—Neal v. Stafford, 18 N.E.2d 960, 106 Ind.

App. 189—Northern Indiana Public Service Co. v. Robinson, 18 N.E.2d 933, 106 Ind.App. 210.  
 Iowa.—Kohl v. Arp, 17 N.W.2d 824, 236 Iowa 31, 169 A.L.R. 1067—Desmond v. Smith, 257 N.W. 543, 219 Iowa 83.  
 Ky.—Hines v. Gibson, 264 S.W.2d 64—A. L. Dodd Trucking Service v. Ramey, 194 S.W.2d 84, 302 Ky. 116.  
 Miss.—Boston Ins. Co. v. Wade, 35 So.2d 523, 203 Miss. 469.  
 Mo.—Riss & Co. v. Wallace, 171 S.W.2d 641, 350 Mo. 1208, 151 A.L.R. 512—State ex rel. State Highway Commission v. McCann, App., 248 S.W.2d 17.  
 Neb.—Nelson v. Wlepen, 48 N.W.2d 387, 154 Neb. 458.  
 N.Y.—Kupfer v. Brooklyn Daily Eagle, 293 N.Y.S. 186, 250 App.Div. 19—Sherry v. Pennsylvania R. Co., 290 N.Y.S. 17, 248 App.Div. 439—Rella v. National City Bank of New York, 271 N.Y.S. 51, 240 App. Div. 513.  
 N.C.—Rogers v. Southeastern Const. Co., 199 S.E. 41, 214 N.C. 269—Pemberton v. City of Greensboro, 181 S.E. 258, 208 N.C. 466.  
 Pa.—Littman v. Bell Telephone Co. of Pennsylvania, 172 A. 687, 315 Pa. 370.  
 Tex.—City of Beaumont v. Wiggins, Civ.App., 138 S.W.2d 260, error dismissed, judgment correct—Burlington-Rock Island R. Co. v. Ellison, Civ.App., 134 S.W.2d 306, error refused.  
 Vt.—Wing v. Chapman, 49 Vt. 33, 64 C.J. p 1006 note 79.  
 82. Ala.—Schock v. Bear, 35 So.2d 97, 250 Ala. 529—Lehigh Portland Cement Co. v. Sharit, 173 So. 386, 234 Ala. 40.  
 Mo.—State ex rel. State Highway Commission v. McCann, App., 248 S.W.2d 17—State ex rel. State Highway Commission v. Schwer, App., 84 S.W.2d 641, followed in 84 S.W.2d 643—State ex rel. State Highway Commission v. Williams, App., 69 S.W.2d 970—State ex rel. State Highway Commission v. Bioback Inv. Co., App., 63 S.W.2d 448—State ex rel. State Highway Commission v. Sharp, App., 62 S.W.2d 928.  
 N.Y.—Bitterman v. Gluck, 9 N.Y.S.2d 1007, 256 App.Div. 336.  
 N.C.—Blaine v. Lyle, 196 S.E. 833, 213 N.C. 529.  
 64 C.J. p 1006 note 80—17 C.J. p 1073 note 84.

83. Ala.—Nauvoo Black Creek Coal Co. v. Johnson, 160 So. 242, 230 Ala. 174.  
 Conn.—Pardo v. Kaczorowski, 32 A.2d 643, 130 Conn. 182.  
 Idaho.—Jones v. Mikesh, 95 P.2d 575, 60 Idaho 680.  
 Ill.—Perry v. Nevin Hotel Co., 109 N.E.2d 810, 349 Ill.App. 22.  
 Ind.—Powell v. Ellis, 105 N.E.2d 348, 122 Ind.App. 700.  
 Iowa.—Boyle v. Bornholtz, 275 N.W. 479, 224 Iowa 90.  
 Ky.—Etna Life Ins. Co. v. Shemwell, 116 S.W.2d 328, 273 Ky. 264.  
 Miss.—City of Meridian v. King, 11 So.2d 205, 194 Miss. 162, suggestion of error overruled 11 So.2d 830, 184 Miss. 162—Curry v. Lucas, 180 So. 397, 181 Miss. 720.  
 Mo.—Maryland Cas. Co. v. Spiteaufsky, 178 S.W.2d 868, 352 Mo. 547—Taylor v. Cleveland, C. & St. L. Ry. Co., 63 S.W.2d 69, 333 Mo. 650, certiorari denied Cleveland, C. & St. L. Ry. Co. v. Taylor, 54 S.Ct. 121, 290 U.S. 685, 78 L.Ed. 590—Such v. Ni Sun Lines, 58 S.W.2d 471, 332 Mo. 469—Hoeffner v. Western Leather Clothing Co., App., 161 S.W.2d 722—Propst v. Capital Mut. Ass'n, 124 S.W.2d 515, 233 Mo. App. 612—Stewart v. St. Louis Public Service Co., App., 75 S.W.2d 634—Pritchett v. Northwestern Mut. Life Ins. Co., 73 S.W.2d 815, 228 Mo.App. 661—Porter v. Equitable Life Assur. Soc. of U.S., App., 71 S.W.2d 766.  
 Neb.—Reinhardt v. Menassen, 271 N.W. 442, 132 Neb. 207.  
 N.D.—Redahl v. Stevens, 250 N.W. 534, 64 N.D. 154.  
 Or.—Stuart v. Occidental Life Ins. Co., 68 P.2d 1037, 156 Or. 522.  
 Pa.—Nathan v. McGinley, 19 A.2d 917, 342 Pa. 12—Rudy v. New York Life Ins. Co., 12 A.2d 495, 139 Pa. Super. 517.  
 Tenn.—Mutual Life Ins. Co. of New York v. McDonald, 150 S.W.2d 715, 25 Tenn.App. 50—Goodman v. Hicks, 15 Tenn.App. 231.  
 Tex.—Texas Cities Gas Co. v. Dickens, Civ.App., 156 S.W.2d 1010, affirmed 168 S.W.2d 208, 140 Tex. 433—City of Terrell v. Howard, Civ. App., 85 S.W.2d 283, reversed on other grounds 111 S.W.2d 692, 130 Tex. 459.  
 Wash.—Girardi v. Union High School Dist. No. 1, Skagit County, 93 P.2d 298, 200 Wash. 21.

finer or applies, a particular term or phrase<sup>84</sup> may, under the general rules already considered, supra § 441, be cured by another instruction, provided the instructions as a series correctly state the law,<sup>85</sup> and do not tend to confuse the jury by inconsistent statements of the law.<sup>86</sup>

These rules have been applied to instructions defining, or omitting to define, "accommodation party,"<sup>87</sup> "account stated,"<sup>88</sup> "act of God,"<sup>89</sup> "assumption of risk,"<sup>90</sup> "contributory negligence,"<sup>91</sup> "good faith,"<sup>92</sup> "guest,"<sup>93</sup> "inevitable accident,"<sup>94</sup> "interstate commerce,"<sup>95</sup> "last clear chance,"<sup>96</sup> "libel,"<sup>97</sup> "malice" and "malicious,"<sup>98</sup> "market value,"<sup>99</sup>

W.Va.—Smith v. City of Bluefield, 55 S.E.2d 392, 132 W.Va. 38.  
64 C.J. p 1006 note 81.

94. U.S.—U. S. v. Calvey, C.C.A.Pa., 110 F.2d 327—Fidelity & Deposit Co. of Maryland v. Bates, C.C.A. Iowa, 76 F.2d 160—U. S. Potash Co. v. McNutt, C.C.A.N.M., 70 F.2d 125, costs taxed 70 F.2d 1003.

Ala.—New York Life Ins. Co. v. Jones, 17 So.2d 879, 31 Ala.App. 417, reversed on other grounds 17 So.2d 883, 245 Ala. 247.

Ark.—Missouri Pac. R. Co. v. Hunnicutt, 104 S.W.2d 1070, 193 Ark. 1128.

Cal.—Bittman v. Courington, 194 P.2d 43, 86 Cal.App.2d 213—Wilson v. Loustalot, 193 P.2d 127, 85 Cal.App.2d 816—Hill v. Nelson, 162 P.2d 927, 71 Cal.App.2d 528—Hill v. New York Life Ins. Co., 101 P.2d 752, 38 Cal.App.2d 627—Purcell v. Goldberg, 83 P.2d 578, 34 Cal.App.2d 344—O'Donnell v. Market St. Ry. Co., 86 P.2d 1077, 30 Cal.App.2d 630—Fitzpatrick v. Clark, 80 P.2d 183, 26 Cal.App.2d 710—Creamer v. Cerrato, App., 86 P.2d 1094, 1 Cal.App. 3d 441.

Colo.—Maloney v. Jussel, 241 P.2d 862, 125 Colo. 125.

Ga.—Bradley v. Thompson, 44 S.E.2d 898, 202 Ga. 785—Franklin v. First Nat. Bank, 200 S.E. 679, 187 Ga. 208—Foremost Dairy Products v. Sawyer, 196 S.E. 436, 185 Ga. 702—Scott v. Wimberly, 195 S.E. 855, 185 Ga. 561—Hatcher v. Bray, 77 S.E.2d 64, 88 Ga.App. 344—Bailey v. Atlanta Gas Light Co., 197 S.E. 911, 88 Ga.App. 78—Metropolitan Life Ins. Co. v. Pack, 176 S.E. 119, 49 Ga.App. 535.

Idaho.—Fulgham v. Gattfield, 241 P.2d 824, 72 Idaho 367.

Ill.—Sourlan v. Jones, 112 N.E.2d 920, 350 Ill.App. 365.

Ind.—Kempin v. Mardis, 111 N.E.2d 77, 123 Ind.App. 546—Huntington v. Hamilton, 73 N.E.2d 352, 118 Ind. App. 58—Marion County Const. Co. v. Kimberlin, 184 N.E. 574, 96 Ind. App. 145.

Iowa.—Johnson v. Marshall, 4 N.W.2d 389, 232 Iowa 299—Witt v. State, 272 N.W. 419, 223 Iowa 156—Dennis v. Merrill, 257 N.W. 322, 218 Iowa 1259.

Kan.—Giltner v. Stephens, 200 P.2d 290, 166 Kan. 172.

Ky.—Watkins, Inc., v. Cochran, 168 S.W.2d 351, 292 Ky. 846—Btina Life Ins. Co. of Hartford, Conn., v. Wells, 72 S.W.2d 33, 254 Ky. 650.

Mich.—In re Munro's Estate, 295 N.W. 567, 296 Mich. 80.

Minn.—Erickson v. Husemoller, 253 N.W. 361, 191 Minn. 177.

Mo.—Moritz v. Kansas City Star Co., 258 S.W.2d 583—Cruce v. Gulf. M. & O. R. Co., 238 S.W.2d 674, 361 Mo. 1135—State ex rel. State Highway Commission v. Williams, App., 263 S.W.2d 444—Gerstner v. Lithocraft Studios, Inc., App., 258 S.W.2d 250—Hussey v. Ellerman, App., 215 S.W.2d 38—Consolidated School Dist. No. 2 of Clinton County v. O'Malley, App., 125 S.W.2d 818, 343 Mo. 1187—Carl v. Ellis, App., 110 S.W.2d 805.

Neb.—Snyder v. Farmers Irr. Dist., 61 N.W.2d 557, 157 Neb. 771.

N.C.—In re Kestler's Will, 44 S.E.2d 857, 228 N.C. 215—Carroll v. Carolina Cas. Ins. Co., 42 S.E.2d 607, 227 N.C. 456—Gillis v. Great Atlantic & Pacific Tea Co., 27 S.E.2d 283, 223 N.C. 470, 150 A.L.R. 1330.

N.D.—Reuter v. Olson, 59 N.W.2d 830. Ohio.—Curlis v. Lenox Garage Co., 162 N.E.2d 213, 68 Ohio App. 255.

Or.—Whitehead v. Montgomery Ward & Co., 239 P.2d 226, 194 Or. 106—Stuart v. Occidental Life Ins. Co., 68 P.2d 1037, 156 Or. 522.

R.I.—Guadagno v. Folco, 6 A.2d 450, 62 R.I. 404.

S.C.—Byus v. Eason, 182 S.E. 442, 178 S.C. 175—Salley v. Western Mut. Fire Ins. Co., 181 S.E. 74, 177 S.C. 168.

Tenn.—Highland Coal & Lumber Co. v. Cravens, 8 Tenn.App. 419.

Tex.—Austin St. Ry. Co. v. Oldham, Civ.App., 109 S.W.2d 235, error refused—Jones v. McIlveen, Civ. App., 105 S.W.2d 503, error dismissed.

Va.—Montgomery Ward & Co. v. Nance, 182 S.E. 264, 165 Va. 363. Wash.—Sova v. First Nat. Bank of Ferndale, 138 P.2d 181, 18 Wash.2d 88—Sears v. International Brotherhood of Teamsters, Chauffeurs, Stablen and Helpers of America, Local No. 524, 112 P.2d 850, 8 Wash.2d 447.

Wis.—Fischer v. Harmony Town Ins. Co., 24 N.W.2d 687, 249 Wis. 438. 64 C.J. p 1006 note 82.

95. Ga.—Travelers Ins. Co. v. Hill, 46 S.E.2d 755, 76 Ga.App. 640—Metropolitan Life Ins. Co. v. Daniel, 5 S.E.2d 631, 61 Ga.App. 90.

Ill.—Keehn v. Braubach, 30 N.E.2d 156, 307 Ill.App. 339, applying South Dakota law.

64 C.J. p 1007 note 84.

88. Cal.—Dark v. Prudential Ins. Co. of America, 40 P.2d 906, 4 Cal.App. 2d 338.

Mich.—Sweezy v. Collins Northern Ice Co., 137 N.W. 84, 171 Mich. 75.

Mo.—Young v. Anthony, 248 S.W.2d 864.

87. Mo.—Dickherber v. Turnbull, App., 31 S.W.2d 234.

88. Mo.—Gerstner v. Lithocraft Studios, Inc., App., 258 S.W.2d 250.

89. Neb.—Snyder v. Farmers Irr. Dist., 61 N.W.2d 557, 157 Neb. 771.

90. Mo.—Moran v. Atchison, T. & S. F. Ry. Co., 48 S.W.2d 881, 330 Mo. 278, certiorari denied 53 S.Ct. 21, 287 U.S. 621, 77 L.Ed. 539.

91. Cal.—Creamer v. Cerrato, 36 P.2d 1094, 1 Cal.App.2d 441.

Conn.—Pardo v. Kaczorowski, 32 A.2d 643, 130 Conn. 182.

Kan.—Giltner v. Stephens, 200 P.2d 290, 166 Kan. 172.

N.D.—Reuter v. Olson, 59 N.W.2d 830.

Pa.—Nathan v. McGinley, 19 A.2d 917, 342 Pa. 12.

64 C.J. p 1007 note 88.

92. Mo.—Maryland Cas. Co. v. Spitcausky, 178 S.W.2d 368, 352 Mo. 547.

93. Ind.—Kempin v. Mardis, 111 N.E.2d 77, 123 Ind. 546.

94. Conn.—Brown v. Page, 119 A. 44, 98 Conn. 141.

95. Ark.—Missouri Pac. R. Co. v. Hunnicutt, 104 S.W.2d 1070, 193 Ark. 1128.

96. Tenn.—Goodman v. Hicks, 15 Tenn.App. 231.

97. Mo.—Moritz v. Kansas City Star Co., 258 S.W.2d 583.

98. Mo.—Hussey v. Ellerman, App., 215 S.W.2d 38—Hoeftner v. Western Leather Clothing Co., App., 161 S.W.2d 722—Fritchett v. Northwestern Mut. Life Ins. Co., 73 S.W.2d 815, 223 Mo.App. 661.

Va.—Montgomery Ward & Co. v. Nance, 182 S.E. 264, 165 Va. 363. 64 C.J. p 1007 note 90.

"Malice in law"

Where jury in action for alienation of affections of plaintiff's husband were fully instructed on "malice in fact" as defined by Penal Code, and other elements necessary to recovery of punitive damages, instruction giving a broad and general definition of "malice in law," if erroneous, was harmless.—Fitzpatrick v. Clark, 80 P.2d 183, 26 Cal.App.2d 710.

99. Mo.—Consolidated School Dist.

"negligence,"<sup>1</sup> "prima facie,"<sup>2</sup> "probable cause,"<sup>3</sup> "tamentary capacity,"<sup>7</sup> "totally disabled,"<sup>8</sup> "trusts,"<sup>9</sup> "proximate cause,"<sup>4</sup> "seduction,"<sup>5</sup> "slander,"<sup>6</sup> "tes- | "waiver,"<sup>10</sup> and various other terms.<sup>11</sup>

No. 2 of Clinton County v. O'Malley, 125 S.W.2d 818, 343 Mo. 1187.  
N.C.—Western Carolina Power Co. v. Hayes, 136 S.E. 353, 193 N.C. 104.

1. Miss.—City of Meridian v. King, 11 So.2d 205, 194 Miss. 162, suggestion of error overruled 11 So.2d 830, 194 Miss. 162.

Mo.—Cruce v. Gulf, M. & O. R. Co., 238 S.W.2d 674, 361 Mo. 1138—  
Szuch v. Ni Sun Lines, 58 S.W.2d 471, 332 Mo. 469—Fisher v. Duster, App., 245 S.W.2d 172—Stewart v. St. Louis Public Service Co., App., 75 S.W.2d 634.

Pa.—Nathan v. McGinley, 19 A.2d 917, 342 Pa. 12.

Tex.—Austin St. Ry. Co. v. Oldham, Civ.App., 109 S.W.2d 235, error refused.

64 C.J. p 1007 note 92.

#### Gross negligence

Ga.—Hatcher v. Bray, 77 S.E.2d 64, 88 Ga.App. 344.

Ill.—Keehn v. Braubach, 30 N.E.2d 156, 307 Ill.App. 339, applying South Dakota law.

2. Idaho.—Jones v. Mikesch, 95 P.2d 575, 60 Idaho 680.

3. Ill.—Burch v. Lockwood, 247 Ill. App. 68.

Mo.—Pritchett v. Northwestern Mut. Life Ins. Co., 73 S.W.2d 815, 228 Mo.App. 661.

N.D.—Redahl v. Stevens, 250 N.W. 534, 64 N.D. 154.

4. Ark.—Gantt v. Sissell, 263 S.W.2d 916.

Cal.—Purcell v. Goldberg, 93 P.2d 578, 34 Cal.App.2d 344.

Colo.—Maloney v. Jussel, 241 P.2d 862, 125 Colo. 125.

Ill.—Sourian v. Jones, 112 N.E.2d 920, 350 Ill.App. 365.

Iowa.—Dennis v. Merrill, 257 N.W. 322, 218 Iowa 1259.

Mo.—State ex rel. Sappington v. American Surety Co. of New York, App., 41 S.W.2d 966.

N.D.—Reuter v. Olson, 59 N.W.2d 830.

Ohio.—Curlis v. Lenox Garage Co., 40 N.E.2d 213, 68 Ohio App. 285.

#### "New and independent cause"

(1) Failure of court to mention "new and independent cause" in its definition of "proximate cause" was not error, if evidence raised issue of new and independent cause, where court defined such term in the next succeeding paragraph of his charge, and in the next succeeding paragraph defined legal terms "new" and "independent."—Jones v. McIlvene, Tex. Civ.App., 105 S.W.2d 503, error dismissed.

(2) In city fireman's action against gas company for injuries caused by explosion of natural gas escaping in-

to burning building, instruction defining new and independent cause was not objectionable because of failure to include word "omission" in view of definition by court of new and independent force in which it was stated that by such term was meant an event, since the word "event" is broad enough to include an omission.—Texas Cities Gas Co. v. Dickens, Civ. App., 156 S.W.2d 1010, affirmed 168 S.W.2d 208, 140 Tex. 433.

(3) In personal injury suit, failure to embrace term "new and independent cause" in definition of "proximate cause" was harmless, where court gave correct definition of "new and independent cause" and applied effect of definition in submitting special issue, and where only issue of "new and independent cause" was concretely submitted to jury.—City of Terrell v. Howard, Civ.App., 85 S.W.2d 283, reversed on other grounds 111 S.W.2d 692, 130 Tex. 459.

#### "Remote cause" and "mere condition"

In motorists' action for injuries resulting from intersectional collision, alleged error of trial court in failing to define terms "remote cause" and "mere condition" used in an instruction was harmless, where trial court defined "negligence" and "proximate cause," and stated necessity of proving proximate cause by a preponderance of the evidence.—Girardi v. Union High School Dist. No. 1, Skagit County, 93 P.2d 298, 200 Wash. 21.

5. R.I.—Guadagno v. Folco, 6 A.2d 450, 62 R.I. 404.

6. N.C.—Gillis v. Great Atlantic & Pacific Tea Co., 27 S.E.2d 283, 223 N.C. 470, 150 A.L.R. 1330.

7. Ga.—Franklin v. First Nat. Bank, 200 S.E. 679, 187 Ga. 268—Scott v. Wimberly, 195 S.E. 865, 185 Ga. 561.  
Ind.—Huntington v. Hamilton, 73 N.E.2d 352, 118 Ind.App. 88.

Mo.—Carl v. Ellis, App., 110 S.W.2d 805.

N.C.—In re Kestler's Will, 44 S.E.2d 867, 228 N.C. 215.

8. U.S.—U. S. v. Calver, C.C.A.Pa., 110 F.2d 327.

Ala.—New York Life Ins. Co. v. Jones, 17 So.2d 879, 31 Ala.App. 417, reversed on other grounds 17 So.2d 883, 245 Ala. 247.

Ga.—Travelers Ins. Co. v. Hill, 46 S.E.2d 755, 76 Ga.App. 640—Metropolitan Life Ins. Co. v. Daniel, 5 S.E.2d 681, 61 Ga.App. 90—Metropolitan Life Ins. Co. v. Pack, 176 S.E. 119, 49 Ga.App. 535.

Ky.—Etina Life Ins. Co. of Hartford, Conn., v. Wells, 72 S.W.2d 33, 254 Ky. 650.

Pa.—Rudy v. New York Life Ins. Co., 12 A.2d 495, 139 Pa.Super. 517.

Tenn.—Mutual Life Ins. Co. of New York v. McDonald, 150 S.W.2d 715, 25 Tenn.App. 50.

#### "Total and permanent disability"

Cal.—Hill v. New York Life Ins. Co., 101 P.2d 752, 38 Cal.App.2d 627.

Ky.—Etina Life Ins. Co. v. Shemwell, 116 S.W.2d 328, 273 Ky. 264.

Mo.—Porter v. Equitable Life Assur. Soc. of U. S., App., 71 S.W.2d 766.

9. Ga.—Bradley v. Thompson, 44 S.E.2d 898, 202 Ga. 785.

10. S.C.—Salley v. Western Mut. Fire Ins. Co., 181 S.E. 74, 177 S.C. 168.

Tex.—Renshaw v. Sullivan, Civ.App., 14 S.W.2d 919.

Wis.—Fischer v. Harmony Town Ins. Co., 44 N.W.2d 887, 249 Wis. 438.

#### "Adopted"

Ill.—Perry v. Nevins Hotel Co., 109 N.E.2d 810, 349 Ill.App. 22.

#### "And"

Ky.—Watkins, Inc., v. Cochran, 168 S.W.2d 351, 292 Ky. 846.

#### "Asphyxia and asphyxiation"

Ga.—Bailey v. Atlanta Gas Light Co., 197 S.E. 911, 58 Ga.App. 78.

#### "Contract"

U.S.—U. S. Potash Co. v. McNutt, C.C.A.N.M., 70 F.2d 126, costs taxed 70 F.2d 1003.

#### "Degree of care"

Cal.—O'Donnell v. Market St. Ry. Co., 36 P.2d 1077, 30 Cal.App.2d 630.

Neb.—Reinhardt v. Menssen, 271 N.W. 442, 132 Neb. 207.

#### "Different"

N.C.—Byus v. Eason, 182 S.E. 442, 178 S.C. 175.

#### "Exclusive control"

Mo.—Cruce v. Gulf, M. & O. R. Co., 238 S.W.2d 674, 361 Mo. 1138.

#### "Gift"

Ind.—Marion County Const. Co. v. Kimberlin, 184 N.E. 574, 98 Ind. App. 145.

#### "Illegal"

U.S.—Fidelity & Deposit Co. of Maryland v. Bates, C.C.A.Iowa, 76 F.2d 160.

#### "Just compensation"

Iowa.—Witt v. State, 272 N.W. 419, 223 Iowa 156.

#### "Material"

Ala.—Nauvoo Black Creek Coal Co. v. Johnson, 160 So. 242, 230 Ala. 174.

#### "Or nearly all"

Ga.—Foremost Dairy Products v. Sawyer, 196 S.E. 456, 158 Ga. 705.

#### "Out of repair"

W.Va.—Smith v. City of Bluefield, 55 S.E.2d 392, 132 W.Va. 38.

#### "Possessed"

Iowa.—Johnson v. Marshall, 4 N.W.2d 369, 232 Iowa 299.

## § 448. By Withdrawal or Correction

As a general rule an error in a charge is cured where the court subsequently withdraws or corrects it.

An error in a charge is, as a general rule, cured

where the court subsequently withdraws or corrects it,<sup>12</sup> even though the jury are not told that the first instruction was incorrect.<sup>13</sup> Both a withdrawal of the erroneous charge and the giving of a cor-

**"Procured"**

Minn.—*Erickson v. Husemoller*, 253 N.W. 361, 191 Minn. 177.

**"Ratified"**

Ill.—*Perry v. Nevin Hotel Co.*, 109 N.E.2d 810, 349 Ill.App. 22.

**"Reasonably"**

Iowa.—*Boyle v. Bornholtz*, 275 N.W. 479, 224 Iowa 90.

**"Requirements"**

Or.—*Pickett v. Gray, McLean & Percy*, 31 P.2d 652, 147 Or. 330.

**"Right of possession"**

Cal.—*Bittman v. Courington*, 194 P.2d 43, 86 Cal.App.2d 213.

**"Said estate"**

Mich.—*In re Munro's Estate*, 295 N.W. 567, 296 Mich. 80.

**"Solely"**

Mo.—*Frost v. Capital Mut. Ass'n*, 124 S.W.2d 615, 233 Mo.App. 612.

**"Son"**

Tenn.—*Highland Coal & Lumber Co. v. Cravens*, 8 Tenn.App. 419.

**"State law"**

Cal.—*Hill v. Nelson*, 162 P.2d 927, 71 Cal.App.2d 528.

**"Substantial"**

Ala.—*Nauvoo Black Creek Coal Co. v. Johnson*, 160 So. 242, 230 Ala. 174.

**"Tidius"**

Miss.—*Curry v. Lucas*, 180 So. 397, 181 Miss. 720.

**"Unnecessary"**

Mo.—*Taylor v. Cleveland, C. & St. L. Ry. Co.*, 63 S.W.2d 69, 333 Mo. 650, certiorari denied *Cleveland, C. & St. L. Ry. Co. v. Taylor*, 54 S.Ct. 121, 290 U.S. 685, 78 L.Ed. 590.

**"Wrongful acts"**

Conn.—*Fredericks v. Thatcher*, 102 A.2d 882, 140 Conn. 605.

12. U.S.—*Hansen v. St. Joseph Fuel Oil & Mfg. Co., C.A.Mo.*, 181 F.2d 880, certiorari denied 71 S.Ct. 89, 340 U.S. 865, 95 L.Ed. 633—*Francis v. Seas Shipping Co., C.C.A.N.Y.*, 158 F.2d 584—*Mitten Bank Securities Corporation v. Huber, C.C.A.Pa.*, 74 F.2d 297, rehearing denied 74 F.2d 299—*Mitten Bank Securities Corporation v. Jordan, C.C.A.Pa.*, 74 F.2d 298, rehearing denied 74 F.2d 299—*Chicago, B. & Q. Ry. Co. v. Kelley, C.C.A.Neb.*, 74 F.2d 80—*Corpus Juris* quoted in U. S. ex rel. *Marcus v. Hess, D.C.Pa.*, 41 F.Supp. 197, 217, reversed on other grounds 127 F.2d 233, reversed on other grounds 63 S.Ct. 379, 317 U.S. 537, 87 L.Ed. 443, rehearing denied 63 S.Ct. 756, 318 U.S. 799, 87 L.Ed. 1163—*Moyer v. Etna Life Ins. Co., D.C.Pa.*, 39 F.Supp. 725, affirmed, C.C.A., 126 F.2d 141.

Ala.—*City of Mobile v. Reeves*, 31 So. 2d 688, 249 Ala. 488—*Louisville & N. R. Co. v. Badley*, 16 So.2d 167, 245 Ala. 178—*Sovereign Camp, W. O. W. v. Sirten*, 175 So. 539, 234 Ala. 421—*Kelly v. Hanwick*, 153 So. 269, 228 Ala. 336—*Harris v. Wright*, 144 So. 834, 225 Ala. 627—*William Penn Fire Ins. Co. v. Tippett*, 44 So. 2d 23, 35 Ala.App. 103.

Ariz.—*Reah v. Juplin*, 206 P.2d 558, 68 Ariz. 335—*Western Truck Lines v. Berry*, 78 P.2d 997, 52 Ariz. 38.

Ark.—*Crain v. St. Louis-San Francisco Ry. Co.*, 176 S.W.2d 145, 206 Ark. 465.

Cal.—*Brown v. George Pepperdine Foundation*, 143 P.2d 929, 23 Cal.2d 256—*Pearson v. Tide Water Associated Oil Co., App.*, 223 P.2d 669, hearing dismissed—*Carlin v. Prickett*, 184 P.2d 945, 81 Cal.App.2d 688—*Caminetti v. Prudence Mut. Life Ins. Ass'n*, 146 P.2d 15, 62 Cal.App.2d 945—*Formosa v. Yellow Cab Co.*, 87 P.2d 716, 31 Cal.App.2d 77—*Hasty v. G. T. Marsh & Co.*, 82 P.2d 735, 28 Cal.App.2d 433.

Conn.—*Ziskin v. Connetto*, 79 A.2d 816, 137 Conn. 629.

Ga.—*Davis v. Guffey*, 27 S.E.2d 689, 196 Ga. 816—*Lubeck v. Dotson*, 15 S.E.2d 205, 192 Ga. 258—*Louisville & N. R. Co. v. Bennett*, 80 S.E.2d 195, 89 Ga.App. 534—*Sylvania Central Ry. Co. v. Gay*, 61 S.E.2d 587, 82 Ga.App. 486—*Griffin v. Brownling*, 181 S.E. 801, 51 Ga.App. 743.

Ind.—*New York Life Ins. Co. v. Skinner*, 14 N.E.2d 566, 214 Ind. 384—*Gary Rys. v. Chumcoff*, 96 N.E.2d 685, 132 Ind.App. 139, transfer denied 103 N.E.2d 203, 230 Ind. 309—*Chesapeake & O. Ry. Co. v. Boston*, 75 N.E.2d 194, 118 Ind.App. 526, order to transfer vacated 82 N.E.2d 249, 226 Ind. 582—*Lauer v. Roberts*, 192 N.E. 101, 99 Ind.App. 216.

Iowa.—*In re Roberts' Estate*, 3 N.W. 2d 161, 231 Iowa 1088—*Groshens v. Lund*, 268 N.W. 496, 222 Iowa 49.

Md.—*Nance v. Gall*, 50 A.2d 120, 187 Md. 656, modified on other grounds 51 A.2d 535, 187 Md. 656.

Mass.—*Dewitt v. Wells*, 200 N.E. 574, 294 Mass. 65.

Mich.—*Cartwright v. Grand Trunk Western R. R.*, 284 N.W. 727, 288 Mich. 316—*In re Reynolds' Estate*, 262 N.W. 649, 273 Mich. 71.

Mo.—*White v. Teague, App.*, 177 S.W. 2d 517, affirmed 182 S.W.2d 288, 353 Mo. 247.

Mont.—*Pilgeram v. Haas*, 167 P.2d 339, 118 Mont. 431.

N.J.—*Pucci v. Weinstein*, 73 A.2d 843, 8 N.J.Super. 247—*Wadell v. Public Service Co-ordinated Trans-*

port, 65 A.2d 766, 3 N.J.Super. 132—*Eichelberger v. Inter-City Transp. Co.*, 10 A.2d 267, 123 N.J. Law 595, affirmed 15 A.2d 768, 125 N.J.Law 365.

N.C.—*In re Kemp's Will*, 73 S.E.2d 906, 236 N.C. 680—*Wyatt v. Queen City Coach Co.*, 49 S.E.2d 650, 229 N.C. 340—*Bailey v. Hayman*, 22 S.E.2d 6, 222 N.C. 58.

Ohio.—*Ross v. Stricker*, 88 N.E.2d 80, 85 Ohio App. 56, reversed on other grounds 91 N.E.2d 18, 153 Ohio St. 153—*Greenawalt v. Yuhas*, 84 N.E.2d 221, 83 Ohio App. 426.

Okl.—*National Credit Co. v. Franklin*, 60 P.2d 744, 177 Okl. 417.

Or.—*Pickett v. Gray, McLean & Percy*, 31 P.2d 652, 147 Or. 330.

Pa.—*Bender v. Welsh*, 25 A.2d 182, 344 Pa. 392—*Creavy v. Ritter*, 52 Pa.Dist & Co. 666, 46 Lack.Jur. 109.

S.C.—*Durant v. George A. Rheman Co.*, 64 S.E.2d 531, 219 S.C. 250.

Tenn.—*National Life & Accident Ins. Co. v. Lynn*, 11 Tenn.App. 64.

Wash.—*Milne v. City of Seattle*, 145 P.2d 888, 20 Wash.2d 30.

64 C.J. p.1007 note 97.

**Qualification or modification**

Orally withdrawing instruction from the jury's consideration does not operate as a qualification or modification thereof, prohibited by the Practice Act.—*Devine v. Chicago*, 178 Ill.App. 39—61 C.J. p.111 note 93 [a].

**Right and duty**

(1) Trial court had duty to withdraw erroneous instruction and substitute therefor correct statement of law.—*Padayao v. Severance*, 184 A.514, 116 N.J.Law 385.

(2) The presiding justice had a right, during the trial and before case was committed to jury, as well as a duty, to correct or explain any statement he might have made.—*Kennebec Towage Co. v. State*, 52 A.2d 166, 142 Me. 327.

**Need not good practice**

Where specification of negligence given in personal injury action arising out of automobile accident did not have support in evidence, it should have been omitted rather than submitted to jury, who were thereafter advised that it need not be considered.—*Styskal v. Brickey*, 62 N.W.2d 854, 158 Neb. 208.

13. U.S.—*Corpus Juris* quoted in U. S. ex rel. *Marcus v. Hess, D.C. Pa.*, 41 F.Supp. 197, 217, reversed on other grounds 127 F.2d 233, reversed on other grounds 63 S.Ct. 379, 317 U.S. 537, 87 L.Ed. 443, rehearing denied 63 S.Ct. 756, 318 U.S. 799, 87 L.Ed. 1163.

rect charge have been held necessary to correct the error in some cases.<sup>14</sup> The withdrawal must be express<sup>15</sup> and unqualified,<sup>16</sup> and in language so ex-

plicit as to preclude the inference that the jury might have been influenced by the erroneous instruction.<sup>17</sup>

## VIII. ATTENDANCE, CUSTODY, CONDUCT, AND DELIBERATIONS OF JURY

### A. ATTENDANCE AND CUSTODY IN GENERAL

#### § 449. In General

Questions relating to the attendance, custody, conduct, and deliberations of the jury are discussed infra §§ 450-484.

Examine Pocket Parts for later cases.

#### § 450. Presence of Jury during Proceedings

It is within the discretion of the court whether or not the jury will be sent out while arguments on legal questions are in progress before the court, or at the time when another verdict is being returned by another jury in another case.

While questions of law are exclusively for the court as discussed supra § 203, and it is unnecessary that the jury be present when exceptions to the legal rulings of the court are taken or allowed,<sup>18</sup> it is largely within the discretion of the presiding judge whether or not the jury will be sent out while arguments on legal questions are in progress before

the court,<sup>19</sup> although it is said to be the safer and better practice to exclude the jury in such instances.<sup>20</sup> If it is apparent or probable that a legal discussion or argument will be prejudicial, if made in the presence of the jury, a timely request for withdrawal of the jury should be made.<sup>21</sup>

After being requested to do so, failure to remove the jury during argument on a motion for a directed verdict may be reversible error where their presence is highly prejudicial to the substantial rights of the complaining party,<sup>22</sup> and it has been said to be irregular and improper for the court to call on counsel, in the presence of the jury, to waive any legal right whatever;<sup>23</sup> and a charge that the other party has been tampering with the witnesses should not be made in the presence of the jury.<sup>24</sup> The refusal to exclude the jury at the time another verdict is being returned by another jury in another case is within the discretion of the court.<sup>25</sup>

Cal.—Tonner v. Spears-Wells Machinery Co., 14 P.2d 1051, 126 Cal. App. 763.

14. Ala.—Brothers v. Brothers, 94 So. 175, 208 Ala. 253.

15. U.S.—Moreau v. Pennsylvania R. Co., C.C.A.Pa., 166 F.2d 542.

Ga.—Louisville & N. R. Co. v. Bennett, 80 S.E.2d 195, 89 Ga.App. 534.  
—Snellings v. Rickey, 197 S.E. 44, 57 Ga.App. 836.  
64 C.J. p 1008 note 1.

#### Inconsistent Instructions

Where there are inconsistent instructions, one correct and the other incorrect, the error is not cured unless the incorrect instruction is expressly withdrawn.—Horton v. Smith, 27 A.2d 193, 128 N.J.Law 483.

16. U.S.—Seaboard Air Line R. Co. v. Bailey, C.A.Fla., 190 F.2d 812—Baer Bros. Land & Cattle Co. v. Palmer, C.C.A.Colo., 153 F.2d 278.  
N.Y.—Meyer v. Clark, 45 N.Y. 285.

17. U.S.—Seaboard Air Line R. Co. v. Bailey, C.A.Fla., 190 F.2d 812—Hansen v. St. Joseph Fuel Oil & Mfg. Co., C.A.Mo., 161 F.2d 880, certiorari denied 71 S.Ct. 89, 340 U.S. 865, 95 L.Ed. 633—Moreau v. Pennsylvania R. Co., C.C.A.Pa., 166 F.2d 542—Baer Bros. Land & Cattle Co. v. Palmer, C.C.A.Colo., 153 F.2d 278—Chicago, B. & Q. R. Co. v. Kelley, C.C.A.Neb., 74 F.2d 80.

Ala.—William Penn Fire Ins. Co. v. Tippet, 44 So.2d 23, 85 Ala.App. 103.

Cal.—Carlin v. Prickett, 184 P.2d 945, 81 Cal.App.2d 638—Formosa v. Yellow Cab Co., 87 P.2d 716, 31 Cal. App.2d 77—Aurens v. Los Angeles Ry. Corp., 65 P.2d 910, 19 Cal.App.2d 401.

Ga.—Sylvania Central Ry. Co. v. Gay, 61 S.E.2d 587, 82 Ga.App. 486—Huall v. Southeastern Stages, 50 S.E.2d 745, 78 Ga.App. 311.

Me.—Kennebec Towage Co. v. State, 52 A.2d 166, 142 Me. 227.

Mich.—Socony Vacuum Oil Co. v. Marvin, 21 N.W.2d 841, 313 Mich. 538.

N.J.—King v. Patrylow, 83 A.2d 639, 15 N.J.Super. 429.

N.Y.—Dutton v. Marcone, 58 N.Y.S.2d 1, 269 App.Div. 947—Tropp v. Equitable Life Assur. Soc. of U. S., 46 N.Y.S.2d 729, 180 Misc. 1072.

N.C.—Bailey v. Hayman, 22 S.E.2d 5, 222 N.C. 58.  
Okla.—National Credit Co. v. Franklin, 80 P.2d 744, 177 Okl. 417.

Or.—Clark v. Fazio, 230 P.2d 553, 191 Or. 522.  
64 C.J. p 1008 note 2.

18. Ohio—Salomon v. Reis, 5 Ohio Cir.Ct. 375, 3 Ohio Cir.Dec. 184.  
64 C.J. p 1009 note 4.

19. Tex.—Gulf, etc., R. Co. v. Harrison, Civ.App., 104 S.W. 399.  
64 C.J. p 1009 note 5.

#### Waiving on motion for instructed verdict

dict  
Statement of trial court that record should show defendant's motion for instructed verdict was denied, and that each side might argue the case for forty-five minutes, and query of trial court concerning whether an exception should be noted, were not objectionable on ground that it was error to rule on motions for instructed verdicts in presence of jury.—Jones v. Weaver, C.C.A.Ariz., 123 F.2d 493.

20. U.S.—Illinois Cent. R. Co. v. Griffin, Wis., 80 F. 278, 25 C.C.A. 413.

Wash.—Gilcher v. Seattle Electric Co., 144 P. 530, 82 Wash. 414.

21. Ala.—Supreme Lodge of the World Loyal Order of Moose v. Gustin, 80 So. 84, 202 Ala. 246.  
Ga.—Corker v. Sperling, 68 S.E. 557, 8 Ga.App. 100.

22. Tenn.—Pittsburg Plate Glass Co. v. Cannon, 5 Tenn.Civ.App. 51.  
64 C.J. p 1009 note 8.

23. Ga.—Terry v. Buffington, 11 Ga. 337, 56 Am.D. 423.

24. Ga.—Travelers' Ins. Co. v. Shepherd, 12 S.E. 18, 85 Ga. 751.  
64 C.J. p 1009 note 10.

25. Ill.—Neering v. Illinois Cent. R. Co., 53 N.E.2d 271, 321 Ill.App. 625.



# § 451. Officer in Charge of Jury

Where so required by statute, the jury should, during their deliberations, be placed under the charge of the proper officer of the court.

Where so required by statute, the jury should, during their deliberations, be placed under the charge of the proper officer of the court,<sup>26</sup> except where they reach their verdict without retiring,<sup>27</sup> and even then if they are left alone by the court in the court room.<sup>28</sup>

*Interested officers.* Officers who are interested in the result of the suit should not personally attend the jury during their deliberations,<sup>29</sup> and in such a case the court may appoint a special officer to attend the jury during the trial.<sup>30</sup> However, a constable who has levied on property under execution, and has been sole witness for the judgment creditor in proceedings claiming the property levied on, is not disqualified to attend the jury in such proceedings,<sup>31</sup> nor is a bailiff necessarily disqualified to act in his official capacity as custodian of the jury by reason of the fact that he testified in the case,<sup>32</sup> especially where it is not contended that all of the facts were not known until before the verdict, or that defendant suffered any injury, or that plaintiff communicated with the jury with respect to the case.<sup>33</sup>

*Oath of officer.* While the court may properly administer a special oath to the officer put in charge of the jury,<sup>34</sup> in the absence of an express statutory requirement otherwise the official oath of the officer is sufficient and no special oath need be administered.<sup>35</sup>

# § 452. Admonition to Jury in General

Admonition to the jury on separation is discussed

infra § 454, and admonitions on conduct of the jurors and others affecting them infra §§ 455-482.

Examine Pocket Parts for later cases,

# § 453. Separation of Jury

- a. Under direction or leave of court
- b. Without direction or leave of court
- c. Asking counsel whether they object to separation

## a. Under Direction or Leave of Court

- (1) Before final submission
- (2) After final submission

## (1) Before Final Submission

It is generally held that it is largely within the discretion of the court, before the case has been finally submitted, to permit the jury to separate during adjournments of the court for necessary rest and refreshments or where further consideration of the case is postponed for several days.

At early common law jurors were kept together as a body as prisoners of the court<sup>36</sup> and were not allowed to separate<sup>37</sup> until they had reached a verdict. While the court has full power to take such steps toward holding the jury together as are necessary to secure a fair trial,<sup>38</sup> it is generally held, either with<sup>39</sup> or without<sup>40</sup> statutory authorization, that it is largely within the discretion of the court, before the case has been finally submitted, to permit the jury to separate, during adjournments of the court for necessary rest and refreshments, or where further consideration of the case is postponed for several days.<sup>41</sup> The separation may be allowed without counsels' consent,<sup>42</sup> and even over objection.<sup>43</sup> Permitting several of the jurors to go to a closet outside of the court room, in custody of an

26. N.Y.—Staley v. Barhite, 2 Cal. 221, Col. & C.Cas. 394.

64 C.J. p 1009 note 12.

27. Wis.—Meyer v. Foster, 16 Wis. 294.

64 C.J. p 1009 note 13.

28. N.Y.—Douglass v. Blackman, 14 Barb. 381.

29. La.—State v. Judge Pointe Coupee Ninth Judicial Dist. Ct., 11 La. Ann. 79.

64 C.J. p 1009 note 15.

30. La.—Harbour v. Scott, 12 La. Ann. 152.

31. N.J.—Crane Co. v. Royer, 144 A. 115, 7 N.J. Misc. 49.

32. Ga.—Williams v. Barnes, 182 S. E. 897, 181 Ga. 514.

33. Ga.—Williams v. Barnes, 187 S. E. 897, 181 Ga. 514.

34. Cal.—Borcham v. Byrne, 23 P. 212, 83 Cal. 23.

35. Neb.—Borcham v. Byrne, supra —Deranleau v. Jandt, 68 N.W. 299, 37 Neb. 532.

64 C.J. p 1009 note 19.

36. N.Y.—Wilkins v. Abbey, 5 N.Y.S. 2d 826, 168 Misc. 416.

37. Ariz.—United Verde Copper Co. v. Kovacovich, 22 P.2d 1085, 42 Ariz. 159.

38. Ill.—Ogren v. Rockford Star Printing Co., 123 N.E. 587, 288 Ill. 405.

39. Tex.—San Antonio, etc., R. Co. v. Bennett, 13 S.W. 319, 76 Tex. 151.

64 C.J. p 1010 note 22.

*Implied from statute*—A trial court has implied power to permit the jury to separate before submission of the case, in view of

the statute requiring admonition if the jury is permitted to separate.

Ariz.—United Verde Copper Co. v. Kovacovich, 22 P.2d 1085, 42 Ariz. 159.

Cal.—McDowd v. Pig'n Whistle Corp., 160 P.2d 797, 26 Cal.2d 696.

40. U.S.—Palmer v. Miller, D.C.Mo., 60 F.Supp. 710.

Ga.—Western Union Tel. Co. v. Vickers, 30 S.E.2d 440, 71 Ga.App. 204.

64 C.J. p 1010 note 23.

41. Tex.—Kothman v. Faseler, Civ. App., 84 S.W. 390.

42. Ga.—Central of Georgia R. Co. v. Hall, 34 S.E. 605, 109 Ga. 387.

Tex.—Noel v. Denman, 13 S.W. 318, 76 Tex. 306.

43. Tex.—Noel v. Denman, supra—International, etc., R. Co. v. McVey, 102 S.W. 172, 46 Tex.Civ.App. 181.

officer of the court, is not improper;<sup>44</sup> and permitting two jurors to sit in another case during an adjournment has been held not an abuse of discretion where the trial of the first case was not delayed and the two cases involved no questions in common.<sup>45</sup>

## (2) After Final Submission

Although the practice of allowing the jury to separate after the case is submitted to them should not be encouraged, it has been held that the court may, on its own initiative, permit the jury to separate, and such separation is not error where no serious prejudice is shown.

Generally, after the cause has been submitted and the jury charged, the jury must be kept together in charge of a sworn officer until they agree on a verdict.<sup>46</sup> While some decisions seem to require consent, or lack of objection, by the parties,<sup>47</sup> and although the practice should not be encouraged,<sup>48</sup> it has been held either with<sup>49</sup> or without<sup>50</sup> statutory authority that the court may, on its own initiative, permit the jury to separate after the case has been submitted and before an agreement has been reached, and such separation is not error where no serious prejudice is shown. Permitting one of the jurors, after retirement and before a verdict has been agreed on, to go to another room in charge of an officer and telephone instructions to an employee will not vitiate the verdict.<sup>51</sup> If, during deliberations of the jury, one of the jurors becomes ill, he may, under the charge of the officer, be separated

from the jury and given the services of a physician,<sup>52</sup> but as soon as it becomes apparent that it will be necessary to separate one of the jurors from the others because of physical indisposition it is the proper course to instruct the jury that during the time of such separation further discussion of the case should be dispensed with.<sup>53</sup> It is in effect a discharge of the jury for failure to agree for the officer in charge, pursuant to the instructions of the court, to allow the jury to separate on their failure to agree late at night, and the jury cannot thereafter be reconvened, allowed to deliberate, and reach a verdict.<sup>54</sup>

*After agreement or verdict reached.* Although it has been held that every effort should be made to avoid the practice of permitting the jurors to seal their verdicts, and to disperse, and remain at large before the verdict is taken in open court,<sup>55</sup> the jury are generally allowed to seal a verdict and separate,<sup>56</sup> and it is usually held to be within the discretion of the court to direct that the jury, if they reach an agreement or verdict while the court is adjourned, may return a sealed verdict and separate until the court reconvenes,<sup>57</sup> especially where such a course is agreed to by the parties.<sup>58</sup> The fact that the permission is given by the court in the absence or without the consent of counsel will not vitiate the verdict if no prejudice is shown,<sup>59</sup> but there is also authority to the contrary.<sup>60</sup> Giving the jury permission to disperse if they agree during an adjournment, even without

44. S.C.—Watts v. South Bound R. Co., 38 S.E. 240, 60 S.C. 67.

45. D.C.—Cissel, Talbot & Co. v. Hayden, 41 App.D.C. 477.

46. Cal.—Atchison, T. & S. F. Ry. Co. v. Southern Pac. Co., 57 P.2d 575, 13 Cal.App.2d 505.

N.D.—James Turner & Sons v. Great Northern Ry. Co., 272 N.W. 489, 67 N.D. 347.

47. Ga.—Western Union Tel. Co. v. Vickers, 30 S.E.2d 440, 71 Ga.App. 204—Knight v. Causby, 23 S.E.2d 458, 68 Ga.App. 572.

64 C.J. p 1010 note 29.

48. Md.—Kennard v. State, 10 A.2d 710, 177 Md. 549.

49. Tex.—Union City Transfer v. Adams, Civ.App., 248 S.W.2d 256, error refused no reversible error, certiorari denied 73 S.Ct. 334, 344 U.S. 912, 97 L.Ed. 703.

64 C.J. p 1010 note 30.

### Implied from statute

A trial court has implied power to permit the jury to separate after submission of the case, in view of the statute requiring admonition if the jury are permitted to separate.

Ariz.—United Verde Copper Co. v. Kovacovich, 22 P.2d 1085, 42 Ariz. 159.

Cal.—McDowd v. Pig'n Whistle Corp., 160 P.2d 797, 26 Cal.2d 696.

50. Cal.—*Corpus Juris* cited in McDowd v. Pig'n Whistle Corp., 160 P.2d 797, 798, 26 Cal.2d 696.

D.C.—Collier v. Young, Mun.App., 94 A.2d 645.

Mass.—Commonwealth v. Della Porta, 85 N.E.2d 248, 324 Mass. 193—Enga v. Sparks, 61 N.E.2d 984, 315 Mass. 120.

Neb.—Hofrichter v. Kiewit-Condon-Cunningham, 22 N.W.2d 703, 147 Neb. 224, 164 A.L.R. 1256.

N.Y.—Porret v. City of New York, 169 N.E. 280, 282 N.Y. 208—Hand v. Hill, 8 N.Y.S.2d 564, 255 App. Div. 1016.

64 C.J. p 1010 note 31.

51. Ill.—West Chicago St. R. Co. v. Lundahl, 82 Ill.App. 553, affirmed 55 N.E. 667, 183 Ill. 284.

52. Mich.—Spencer v. Johnson, 151 N.W. 684, 185 Mich. 85.

53. Mich.—Spencer v. Johnson, supra.

54. N.Y.—Anderson v. Illinois Surety Co., 142 N.Y.S. 719, 157 App.Div. 691.

55. Pa.—Sylvester v. Pennsylvania R. Co., 53 A.2d 537, 357 Pa. 213—Eastley v. Glenn, 169 A. 438, 313 Pa. 130.

Sealed verdicts in general see *infra* § 466.

56. U.S.—California Fruit Exchange v. Henry, D.C.Pa., 89 F.Supp. 580, affirmed, C.A., 184 F.2d 517.

Pa.—Kramer v. Kister, 40 A. 1008, 187 Pa. 227—Wellitz v. Thomas, 185 A. 884, 122 Pa.Super. 438.

57. Mass.—Commonwealth v. Della Porta, 85 N.E.2d 248, 324 Mass. 193—Lawrence v. Stearns, 11 Pick. 501.

64 C.J. p 1010 note 36.

58. Ga.—Deen v. Wheeler, 67 S.E. 212, 7 Ga.App. 507.

59. Ill.—Mains v. Cosner, 62 Ill. 465. Iowa.—Walker v. Dalley, 64 N.W. 344, 87 Iowa 375.

60. Ga.—Prescott v. City Council of Augusta, 45 S.E. 431, 118 Ga. 549—Barfield v. Mullino, 33 S.E. 647, 107 Ga. 730.

the consent of counsel, and without a direction to return a sealed verdict, will not vitiate the verdict if there is no ground to suspect that the jury have been improperly tampered with or the verdict affected by intervening circumstances.<sup>61</sup>

#### b. Without Direction or Leave of Court

Separation of the jury, without authorization or consent of the court, will not vitiate the verdict if there is no prejudice shown and the verdict is not induced by improper influence exerted after the separation.

Although an unauthorized separation may constitute a contempt of court for which punishment may be imposed, as discussed in Contempt § 22, separation of the jury, without consent of the court, after they have agreed on their verdict but before it is rendered, will not vitiate the verdict so as to prevent the court from receiving it if there is no prejudice shown and the verdict is not induced by improper influence exerted after the separation.<sup>62</sup> Although it has been held otherwise,<sup>63</sup> even the fact of an unauthorized separation before an agreement has been reached will not vitiate the verdict subsequently reached and rendered where the jurors were not tampered with or their verdict affected thereby.<sup>64</sup> However, it has been held that there is gross misconduct justifying a reversal where a jury, authorized to make a sealed verdict and disperse, merely seal up a piece of paper stating that they cannot agree and then disperse.<sup>65</sup> Temporary absence of a juror from the jury room, without permission of the court, affords no ground for disturbing the verdict, when there is no misconduct on his part with respect to the cause on trial.<sup>66</sup>

#### c. Asking Counsel Whether They Object to Separation

It is not error for the court to ask counsel, in the hearing of the jury, whether there is any objection to

separation of the jury where no resulting prejudice is shown.

While it is said not to be good practice for the court to ask counsel, in the hearing of the jury, whether there is any objection to separation of the jury,<sup>67</sup> such action by the court is not error where no resulting prejudice is shown.<sup>68</sup>

#### § 454. — Admonition to Jury on Separation

Where the jurors are permitted to separate, the court should inform them as to their duties and as to the punishment for the violation thereof.

Where the jurors are permitted to separate, the court should inform them as to their duties and as to the punishment for the violation thereof,<sup>69</sup> and the jury may<sup>70</sup> and should<sup>71</sup> be admonished by the court not to hold conversations among themselves or with other persons about the case. However, such requirement is waived if the parties by consent permit the jury to separate without requesting an admonition,<sup>72</sup> and failure to admonish is not error where no prejudice could possibly have resulted therefrom.<sup>73</sup> If the jury are being retired under instructions that they may separate for a definite period if they have not reached a verdict by a given time, and they are properly admonished at the time of retirement, it is not necessary that the admonition be repeated before actual separation.<sup>74</sup> Where a juror during a prior adjournment has disobeyed the admonition of the court, and conversed with other persons, it is not error for the court, on admonishing the jury as to their conduct during a subsequent adjournment, to state that its attention had been called to the misconduct of the juror, that it was highly improper, and that it hoped it would not happen again.<sup>75</sup>

61. S.C.—Welch v. Welch, 43 S.C.L. 133.

62. N.C.—Tillett v. Norfolk Southern R. Co., 82 S.E. 866, 166 N.C. 515. 64 C.J. p 1010 note 42.

63. Ohio.—Nepling v. Messenger, 1 Ohio Supp. 46.

64. Tex.—Prescott v. Metropolitan Life Ins. Co., Civ.App., 129 S.W.2d 821, error dismissed, judgment correct.

64 C.J. p 1011 note 43.

65. Ill.—White v. Martin, 3 Ill. 69.

66. Cal.—Saltzman v. Sunset Tel. etc. Co., 58 P. 169, 125 Cal. 501. Me.—Milo v. Gardiner, 41 Me. 549.

67. Wash.—State v. Holedger, 46 P. 652, 15 Wash. 443.

68. Wash.—State v. Holedger, supra.

69. Pa.—Hostetler v. Kniseley, 185 A. 300, 322 Pa. 248.

Admonition not to form or express opinion

When issues of fact are submitted to a jury for determination, the trial judge must admonish jurors at each separation that it is their duty not to form or express an opinion thereon until case is finally submitted to them.—Rosenfield v. Vosper, 114 P. 2d 29, 45 Cal.App.2d 355.

70. Tex.—Kothman v. Faseler, Civ. App., 84 S.W. 390. 64 C.J. p 1011 note 50.

71. U.S.—Palmer v. Miller, D.C.Mo., 60 F.Supp. 710.

Ariz.—United Verde Copper Co. v. Kovacovich, 22 P.2d 1085, 42 Ariz. 159.

Ohio.—Nepling v. Messenger, 1 Ohio Supp. 46.

Pa.—Hostetler v. Kniseley, 185 A. 300, 322 Pa. 248.

64 C.J. p 1011 note 51.

72. Ind.—Crockier v. Hoffman, 48 Ind. 207.

Kan.—Fields v. Dewitt, 81 P. 467, 71 Kan. 676.

73. S.D.—Kirby v. Western Union Tel. Co., 55 N.W. 759, 4 S.D. 105, 46 Am.S.R. 765, 30 L.R.A. 612.

74. Kan.—Fields v. Dewitt, 81 P. 467, 71 Kan. 676.

75. Iowa.—Crull v. Louisa County, 151 N.W. 88, 169 Iowa 199.

## B. CONDUCT OF JURORS AND OTHERS AFFECTING THEM GENERALLY

## § 455. In General

Although misconduct of or affecting jurors does not vitiate a verdict if it is not of a substantial character and such as to be prejudicial to the complaining party, where the misconduct is prompted or participated in by an interested person or party, the verdict is usually held to be vitiated without a showing of prejudice.

"Misconduct of the jury" is a legal phrase meaning an unlawful or unauthorized act done by the jury, or any of its members, in connection with the trial,<sup>76</sup> and it does not necessarily imply an evil or corrupt motive on the part of the jury or the prevailing party.<sup>77</sup> The court should be exceedingly vigilant that there is no misconduct on the part of jurors reflecting any question on the honesty of their performance.<sup>78</sup> Any charge of misconduct of the jury must turn on the circumstances of the particular case,<sup>79</sup> and whether a mistrial should be granted because of such conduct is within the discretion of the trial court.<sup>80</sup> Mere irregularities which would subject the juror to censure will not overturn the verdict if there is no reason to suspect that the final result has been unduly influenced;<sup>81</sup>

and, although scrupulous conduct of jurors, parties, and counsel is necessary in maintaining the purity of the jury trial,<sup>82</sup> misconduct of or affecting jurors does not vitiate the verdict if it is not of a substantial character and such as to be prejudicial to the complaining party.<sup>83</sup>

In order to be effective the verdict must be free from outside influence of whatsoever kind or nature,<sup>84</sup> and where the misconduct is prompted or participated in by an interested party or person a more strict rule is applied and the verdict is usually held to be vitiated without a showing of prejudice<sup>85</sup> or motive.<sup>86</sup> Even misconduct of jurors alone will usually result in a reversal if there is a reasonable probability that it was prejudicial to the complaining party,<sup>87</sup> although some cases contain language which would require an affirmative showing of prejudice before the verdict would be vitiated.<sup>88</sup>

*Conduct of parties, relatives, or friends.* Parties,<sup>89</sup> their relatives,<sup>90</sup> and friends<sup>91</sup> must refrain from all conduct which would raise the slightest

76. Tex.—Sidran v. Western Textile Products Co. of Tex., Civ.App. 258 S.W.2d 830, reversed on other grounds Western Textile Products Co. of Tex. v. Sidran, Sup., 262 S.W.2d 942.

77. Tex.—Sidran v. Western Textile Products Co. of Tex., Civ.App. 258 S.W.2d 830, reversed on other grounds Western Textile Products Co. of Tex. v. Sidran, Sup., 262 S.W.2d 942.

78. Ill.—Miller v. Scandrett, 63 N.E. 2d 252, 326 Ill.App. 631.

79. Tex.—Maddox v. Texas Indem. Ins. Co., Civ.App. 224 S.W.2d 495, refused no reversible error.

80. D.C.—Washington Times Co. v. Bonner, 86 F.2d 836, 66 App.D.C. 280, 110 A.L.R. 393.

N.J.—Maulsbury v. Shure, 170 A. 41, 13 N.J.Misc. 137.

#### Discretion held not abused

Where acquaintance approached juror and volunteered that he knew how acquaintance and juror could make a lot of money, but juror immediately discontinued conversation and at first opportunity informed clerk of court and then trial judge, who was informed by juror that incident would not prejudice his mind against either side, refusing to declare mistrial was not abuse of discretion.—Washington Times Co. v. Bonner, 86 F.2d 836, 66 App.D.C. 280, 110 A.L.R. 393.

81. Ill.—Chicago, etc., R. Co. v. Holand, 13 N.E. 145, 122 Ill. 461.

64 C.J. p 1011 note 57.

#### Influence of jury not shown

In personal injury suit, conduct of jury or juror in laughing at fish story told by plaintiff's counsel in argument to jury did not show that jury was influenced thereby in returning verdict for plaintiff.—Southwestern Greyhound Lines v. Dickson, Civ. App., 228 S.W.2d 232, reversed on other grounds 236 S.W.2d 115, 149 Tex. 599.

82. Minn.—Brecht v. Town Board of Bergen, 235 N.W. 528, 182 Minn. 603.

83. Md.—Rent-A-Car Co. v. Globe & Rutgers Fire Ins. Co., 163 A. 702, 163 Md. 401, 86 A.L.R. 922.

Minn.—Clancy v. Daily News Corp., 277 N.W. 264, 202 Minn. 1.

64 C.J. p 1011 note 58.

#### Verdict held not result of influence

In election wherein plaintiff asserted that defendants were in possession of land as plaintiff's tenants, and defendants asserted that defendants had been continuously and uninterruptedly in open and actual adverse possession of land for fifteen years, verdict for plaintiff was not shown to be result of passion and prejudice of jury resulting from influences exerted by oil and gas lessees and their associates, who were interested in purchasing land from plaintiff.—Price v. Lightfoot Land & Mortg. Co., 151 S.W.2d 426, 286 Ky. 692.

84. N.C.—Lipscomb v. Cox, 142 S.E. 779, 195 N.C. 502.

#### Opinions of outside persons

"A verdict is supposed to be and ought to be the deliberate conclusion of the mind of each and every juror wholly uninfluenced and unimpressed by the opinions of anybody outside of the jury."—Campbell v. Chase Granite Co., 42 A. 228, 229, 92 Me. 90.

85. Ala.—Atlantic Coast Line R. Co. v. Hardwick, 193 So. 730, 239 Ala. 58.

64 C.J. p 1011 note 60.

86. Ala.—Atlantic Coast Line R. Co. v. Hardwick, supra.

87. Tex.—Whitehead v. Texas & P. Ry. Co., Civ.App., 84 S.W.2d 779, error dismissed.

Wash.—Sun Life Assur. Co. of Canada v. Cushman, 158 P.2d 101, 23 Wash.2d 930—Mathisen v. Norton, 60 P.2d 1, 187 Wash. 240.

W.Va.—Watkins v. Baltimore & O. R. Co., 43 S.E.2d 219, 130 W.Va. 268, 64 C.J. p 1012 note 61.

88. Ill.—Richardson v. Franklin, 235 Ill.App. 440.

89. Minn.—Brecht v. Town Board of Bergen, 235 N.W. 528, 182 Minn. 603, 64 C.J. p 1012 note 67.

90. Ga.—Livingston v. Wynne, 93 S.E. 877, 147 Ga. 307.

Tex.—Gulf, etc., R. Co. v. Matthews, 66 S.W. 588, 28 Tex.Civ.App. 92, rehearing granted 67 S.W. 788.

91. Tex.—Palm v. Chernowaky, 67 S.W. 165, 28 Tex.Civ.App. 405.

Vt.—McDaniels v. McDaniels, 40 Vt. 363, 94 Am.D. 408.

suspicion that they are intermeddling with the jurors improperly to influence the verdict. Nothing should be permitted, which can be prevented, which would raise even a suggestion of undue influence on a juror,<sup>92</sup> and any conduct of a party improperly to induce a jury to decide in his favor will be so dealt with by the court that he will not be permitted to retain the benefits of a verdict so obtained.<sup>93</sup> It is misconduct requiring a reversal for a party, during recess and absence of the court, to put before the jury evidence which the court has previously ruled out as inadmissible.<sup>94</sup> However, it is not ground for reversal that plaintiff in a personal injury case became prostrated during the trial, in the presence of jurors, so that the attendance of physicians in the court room was necessary, where it does not appear that the attack was simulated or the symptoms intentionally manifested.<sup>95</sup>

**Conduct of officers.** In general, the courts will not countenance or tolerate any act or conduct by court officers which might influence the conduct of any member of a jury in favor of either party in reaching conclusions in the case they are considering,<sup>96</sup> and misconduct of the officer which has a tendency to influence the jury in their deliberations will vitiate the verdict.<sup>97</sup> Where the officer having charge of the jury in a personal action takes them for a walk past the scene of the accident, such misconduct is ground for reversal, since it is in effect the introduction of further testimony after the case has been submitted to the jury.<sup>98</sup> However, it is not error that the officer in charge of a jury, investigating the scene of a railroad accident by permission of court, takes it on himself to demonstrate how far deceased might have been seen along the track by placing on the track a garment worn by deceased when injured.<sup>99</sup>

**Conduct of counsel.** As a general rule counsel

should, at all times, be solicitous to preserve not only the substance of justice, but every appearance of propriety, and they should keep away from jurors during recesses and intermissions and have no conversations with them beyond the usual salutations.<sup>1</sup> It is improper for counsel, without the knowledge or consent of the court, to give to the jury papers or other things relating to the case to be taken to the jury room,<sup>2</sup> and it has been held improper for counsel during his argument to give to the jury papers relating to the case, even though the court overrules the other party's objection thereto and the jury are required to return the papers to the court after examining them.<sup>3</sup>

**Waiver of misconduct.** Where a party agrees to discharge a juror charged with improper conduct, and to proceed with the trial with eleven jurors, he thereby waives any objection he might have made because of the conduct of such juror.<sup>4</sup> Misconduct can be waived by express agreement,<sup>5</sup> or, if the complaining party knows of the misconduct at a time when the irregularity can be cured by the trial court, a failure to object in time so that this may be done operates as a waiver of the irregularity so that it cannot thereafter be urged as a ground for vitiating the verdict, as discussed *infra* § 483.

## § 456. Taking of Notes and Memoranda by Jurors

If they do not thereby consume too much time, it is not improper for the jury to take notes of what is said, or occurs, during the trial.

If they do not thereby consume too much time, it is not improper for the jury to take notes of what is said, or occurs, during the trial,<sup>6</sup> or to make, with permission of the court, memoranda of the articles in suit and the value placed thereon by the evidence.<sup>7</sup> Counsel has no absolute right to

92. Ohio.—Taylor v. Ross, App., 78 N.E.2d 395, reversed on other grounds 88 N.E.2d 222, 150 Ohio St. 448, 10 A.L.R.2d 377.

93. Mass.—Crocker v. Crocker, 84 N.E. 476, 198 Mass. 401.

N.Y.—Turner v. Beardsley, 19 Wend. 348.

94. N.Y.—Bronk v. Binghamton R. Co., 79 N.Y.S. 577, 79 App.Div. 269.

95. N.Y.—McGloin v. Metropolitan St. R. Co., 75 N.Y.S. 593, 71 App. Div. 72.

96. Mich.—Hampton v. Van Nests' Estate, 163 N.W. 83, 196 Mich. 404. N.Y.—Matter of Vanderbilt, 111 N.Y.S. 558, 127 App.Div. 408.

97. Ga.—Obear v. Gray, 68 Ga. 182.

Ill.—Heston v. Neathammer, 54 N.E. 310, 180 Ill. 150.

98. Tex.—Texas Midland R. R. v. Brown, Com.App., 228 S.W. 915.

99. W.Va.—Bias v. Chesapeake, etc., R. Co., 33 S.E. 240, 46 W.Va. 349.

1. Cal.—Maaskant v. Matsui, 123 P. 2d 853, 50 Cal.App.2d 819.

64 C.J. p 1012 note 79.

2. Okl.—Dane v. Bennett, 152 P. 347, 51 Okl. 684.

3. Ohio.—Rowley v. Ferguson, App., 48 N.E.2d 243.

4. Tex.—Texarkana, etc., R. Co. v. Toliver, 84 S.W. 375, 37 Tex.Civ. App. 437.

5. Ky.—Louisville R. Co. v. Master-son, 96 S.W. 534, 29 Ky.L. 829.

6. Ohio.—Corpus Juris quoted in Corbin v. City of Cleveland, 57 N.E. 2d 427, 429, 74 Ohio App. 199, affirmed 56 N.E.2d 214, 144 Ohio St. 32, 154 A.L.R. 874.

64 C.J. p 1012 note 82.

### Distribution of notebooks

Error could not be predicated on refusal of trial court to allow notebooks to be passed to jurors prior to opening statement of plaintiff's counsel where trial judge, while declining to take any action on plaintiff's request to distribute notebooks at that time, further stated to jurors that they could take such notes as they desired.—Bates v. Newman, 264 P.2d 197, 121 Cal.App.2d 800.

7. Neb.—Omaha Fire Ins. Co. v. Crighton, 69 N.W. 766, 50 Neb. 314.

have the jury take notes at his dictation, and the trial court in its discretion may refuse to allow this to be done.<sup>8</sup> However, although the jurors may take notes, it is error for the court, without the request of either litigant and over their objections, to suggest that the jurors might take notes and to furnish to each juror, without such juror's request, the necessary materials therefor with instructions as to how the notes should be kept during the trial.<sup>9</sup>

### § 457. Communications, Associations, and Contacts between Jurors and Others

- a. In general
- b. Parties, their friends, and relatives
- c. Attorneys and agents of parties
- d. Witnesses
- e. Other jurors
- f. Officers
- g. Presence of others in jury room
- h. Newspaper reports or comments on case

#### a. In General

Jurors must be protected against any extraneous contact which would tend to influence the verdict, and no one should have access to the jury for any purpose save as directly ordered by the court.

Jurors must be protected against any extraneous contact which would tend to influence the verdict,<sup>10</sup>

and no one should have access to the jury for any purpose save as directly ordered by the court.<sup>11</sup> It is misconduct for a juror to discuss with others during the trial the matter under investigation,<sup>12</sup> and the court should thoroughly inform the jury as to the measure of their obligations and responsibilities of speaking to or permitting anyone to speak to them about the case on trial and that a violation of these duties will be punished,<sup>13</sup> and the court should unhesitatingly punish disobedience of these admonitions.<sup>14</sup> A juror should report to the court any conversation designed or having a tendency to influence the verdict,<sup>15</sup> and the court should take such action as in its judgment is warranted.<sup>16</sup> When a motion for a mistrial is made because of a conversation between a juror and another person, the trial court should make inquiry to determine if the motion is well founded,<sup>17</sup> and whether it should declare a mistrial because of such conversation is within the sound discretion of the trial court.<sup>18</sup>

The court may grant a mistrial because of remarks about the case made in the hearing of jurors if it believes the incident may have or probably influenced the jury to the prejudice of either party,<sup>19</sup> and the verdict will generally be set aside if jurors, while they are separated from the rest, converse with other persons about the cause,<sup>20</sup> or

Ohio.—*Corpus Juris* quoted in *Corbin v. City of Cleveland*, 57 N.E.2d 427, 429, 74 Ohio App. 199, affirmed 56 N.E.2d 214, 144 Ohio St. 32, 154 A.L.R. 874.

8. Ohio.—*Corpus Juris* quoted in *Corbin v. City of Cleveland*, 57 N.E.2d 427, 429, 74 Ohio App. 199, affirmed 56 N.E.2d 214, 144 Ohio St. 32, 154 A.L.R. 874.

Md.—*Cahill v. City of Baltimore*, 98 A. 235, 129 Md. 17.

**Request that notes be taken** by jurors should be addressed to court and communicated by court to jurors with suitable instruction, if notes are to be taken, and a request by plaintiff's counsel that jurors take notes of argument was not error, in absence of showing of prejudice resulting from request, where court cautioned jurors that, while they might take notes if they desired, they were not bound by them.—*Chicago & N. W. Ry. Co. v. Kelly*, C.C.A.Minn., 84 F.2d 569.

9. Ohio.—*Corbin v. City of Cleveland*, 57 N.E.2d 427, 74 Ohio App. 199, affirmed 56 N.E.2d 214, 144 Ohio St. 32, 154 A.L.R. 874.

10. Ohio.—*Pearl v. Jones*, 111 N.E. 2d 16, 159 Ohio St. 137.

11. N.Y.—*Kaus v. Barthold*, 10 N.Y. S.2d 734, 256 App.Div. 1033.

12. Cal.—*Kritzer v. Citron*, 224 P.2d 808, 101 Cal.App.2d 33.

Iowa.—*Glatstein v. Grund*, 51 N.W.2d 162, 243 Iowa 541.

13. Pa.—*Hostettler v. Kniseley*, 185 A. 300, 322 Pa. 248.

14. Pa.—*Hostettler v. Kniseley*, supra.

15. Ohio.—*Pearl v. Jones*, 111 N.E. 2d 16, 159 Ohio St. 137.

16. Ohio.—*Pearl v. Jones*, supra.

17. Mich.—*Litvin v. Joyce*, 44 N.W. 2d 867, 329 Mich. 56.

18. N.H.—*Brody v. Boutin*, 58 A.2d 209, 95 N.H. 103.

Ohio.—*Weaver v. Gale*, App., 91 N.E. 2d 808.

#### Discretion held not abused

(1) Where conversation between a juror and persons not members of jury, was casual, was not instigated by plaintiffs or anyone represented by, or connected with, plaintiffs, and neither plaintiffs nor anyone represented by, or connected with, plaintiffs participated in conversation, and general tenor of conversation was as favorable to defendant as to the plaintiffs, trial court did not abuse its discretion in denying defendant's motion for mistrial made because of the conversation.—*Genuario v. Finkler*, 72 A.2d 67, 136 Conn. 500.

(2) Where trial court found that statements made by juror during trial to third person were not of a character which would justify sustaining a challenge on suspicion of prejudice against or partiality for defendants, court did not abuse its discretion in refusing to declare a mistrial for the alleged misconduct.—*Weaver v. Gale*, Ohio App., 91 N.E.2d 808.

(3) When juror was approached by stranger who stated that if juror wanted to know anything about case the juror should ask stranger, who was former secretary of bank which was a party to action, and juror refused to discuss matter with stranger and did not communicate the suggestion to any other juror and was in no way influenced by suggestion, refusal to declare a mistrial was not abuse of discretion.—*First Nat. Bank in Tarpon Springs v. Bliss*, Fla., 56 So.2d 922.

19. Utah.—*Burton v. Zions Co-op. Mercantile Institution*, 249 P.2d 514.

20. N.J.—*Gall v. New Brunswick Auto Exp. Co.*, 38 A.2d 403, 131 N.J. Law 346, reversed on other grounds 40 A.2d 643, 132 N.J. Law 466.

Va.—*Yeary v. Holbrook*, 198 S.E. 441, 171 Va. 266.

64 C.J. p 1013 note 87.

hold an unexplained conversation with unknown persons which might well have been prejudicial to the complaining party.<sup>21</sup> It is absolutely essential that there be no jury tampering,<sup>22</sup> and an attempt of third persons to bribe jurors will vitiate the verdict irrespective of whether the attempt was successful.<sup>23</sup>

It has been held, however, that the verdict is not vitiated by a juror's telling a totally disinterested person, pending the trial, of the juror's views with respect to certain evidence in the case, where no efforts were made improperly to influence the juror;<sup>24</sup> and the verdict is not vitiated by conversations with third persons which have no relation to the case and no influence on the verdict<sup>25</sup> or by casual remarks made by bystanders about the case in the presence of the jury,<sup>26</sup> or the fact that a person not a juror was in the jury box and in the jury room when they retired, pending argument of a motion, his presence being due to a mistake on his part and no communications having passed between him and the jurors.<sup>27</sup>

After the cause has been submitted and the jury have been charged, the jury must be prevented from communicating with other persons until they have agreed on a verdict,<sup>28</sup> and statutes prohibiting communications to the jury are mandatory.<sup>29</sup> Further-

more, all persons other than the jurors themselves are not permitted to know the state of the jury's deliberations before the verdict is returned.<sup>30</sup>

*During intermission in deliberations* the jury are entitled to the same safeguards and protection as though they were in the jury room.<sup>31</sup>

#### b. Parties, Their Friends, and Relatives

As a general rule, the verdict will be vitiated by the fact that jurors, during the trial, have received treats, favors, or entertainment from a party, or have conversed about the case with a party, his friends, or relatives, or have had familiar associations with interested persons.

Jurors and parties should keep strictly aloof from each other.<sup>32</sup> Every precaution, by observation and admonition, should be taken to prevent association, lengthy conversations, and social contact, between a party and jurors during the trial,<sup>33</sup> and, when it is brought to the attention of the court that any person interested in the result of the cause on trial is attempting to court favor with the jurors by any sort of attention, a prompt and sufficient rebuke should be administered.<sup>34</sup> Whether a mistrial should be declared because of communications between a juror and a party or his relative is within the sound discretion of the trial court.<sup>35</sup>

21. Ga.—Robinson v. Donahoo, 25 S. E. 491, 97 Ga. 702.

22. Iowa.—Glatstein v. Grund, 51 N. W.2d 162, 243 Iowa 541.

23. Ark.—Sloan v. Hathcoat, 136 S. W.2d 1020, 199 Ark. 530.—*Corpus Juris* quoted in D. F. Jones Const. Co. v. Fooks, 136 S.W.2d 487, 489, 199 Ark. 861.

Ill.—West Chicago St. R. Co. v. Luka, 72 Ill.App. 60.

24. Iowa.—Stockwell v. Chicago, etc., R. Co., 43 Iowa 470.

25. Pa.—Rice v. Bauer, Com.Pl., 32 North.C. 48.  
64 C.J. p 1013 note 90.

#### Excused jurors

Trial court properly denied motion for a mistrial for misconduct, in that one of two jurors who had been excused from panel stated to assistant of plaintiff's attorney that he hoped defendant would lose, and that the two excused jurors were subsequently seen together with a juror hearing the case, where no prejudice was shown, and it was not shown that plaintiff's attorney or assistant had any contact with jurors hearing the case, or that either excused juror had communicated to juror trying case, any desire that defendant lose case.—*Sances v. D'Angelo*, 86 N.E. 2d 847, 338 Ill.App. 199.

26. Ky.—Louisville, etc., R. Co. v.

Davis, 71 S.W. 658, 115 Ky. 270, 24 Ky.L. 1415.

Pa.—Curry v. J. M. Willson & Sons, 152 A. 746, 301 Pa. 467.

27. Ga.—Southern R. Co. v. Brown, 54 S.E. 911, 126 Ga. 1.

28. Cal.—Atchison, T. & S. F. Ry. Co. v. Southern Pac. Co., 57 P.2d 575, 13 Cal.App.2d 505.

29. N.D.—James Turner & Sons v. Great Northern Ry. Co., 272 N.W. 489, 67 N.D. 347.

30. Tex.—Texas Emp. Ins. Ass'n v. Foreman, Civ.App., 236 S.W.2d 824, reversed on other grounds, *Foreman v. Texas Emp. Ins. Ass'n*, 241 S.W.2d 977, 150 Tex. 468, conformed to, *Texas Emp. Ins. Ass'n v. Foreman*, Civ.App., 262 S.W.2d 248.

31. Ariz.—United Verde Copper Co. v. Kovacovich, 22 P.2d 1085, 42 Ariz. 159.

Ohio.—Noble v. McAllister Dairy Farms, Inc., Com.Pl., 114 N.E.2d 540.

32. Tex.—Texas Milk Products Co. v. Birtcher, Civ.App., 138 S.W.2d 285, reversed on other grounds 157 S.W.2d 633, 138 Tex. 178.—*St. Louis Southwestern Ry. Co. of Texas v. Gilpin*, Civ.App., 73 S.W.2d 1054, error refused.

64 C.J. p 1013 note 98 [b].

33. Ohio.—Taylor v. Ross, App., 78 N.E.2d 395, reversed on other

grounds 83 N.E.2d 222, 150 Ohio St. 448, 10 A.L.R.3d 377.

#### Prevention of misconduct by admonition

The court may help prevent misconduct involving communications by warning each new group of jurors of the importance of avoiding any improper conduct with the parties.—*Harrison v. District of Columbia, D. C.Mun.App.*, 95 A.2d 332.

34. U.S.—Palmer v. Miller, D.C.Mo., 60 F.Supp. 710.

Mo.—McGraw v. O'Neil, 101 S.W. 132, 123 Mo.App. 691.

35. N.J.—Gall v. New York & New Brunswick Auto Express Co., 36 A.2d 403, 131 N.J.Law 346, reversed on other grounds, 40 A.2d 643, 132 N.J.Law 466.

#### Discretion held not abused

(1) Refusal to discharge jury because of plaintiff's conversation with juror in which plaintiff stated he knew people whom juror asked him about was not abuse of discretion.—*Winters v. Hassenbusch*, Mo.App., 89 S.W.2d 546.

(2) Where one of plaintiffs talked with one or more jurors in the corridor during a short recess, the trial judge abused his discretion in denying a motion for mistrial, even though no one had been prejudiced.—*Gall v. New York & New Brunswick*

If jurors and a party meet under circumstances from which injury to a party may be reasonably apprehended, a verdict for the party engaging in the intercourse cannot be sustained,<sup>36</sup> and as a general rule the verdict will be vitiated by the fact that jurors, during the trial, have received treats, favors, or entertainment from the successful party,<sup>37</sup> or have conversed about the case with the party,<sup>38</sup> his friends,<sup>39</sup> or relatives,<sup>40</sup> or have had familiar associations with interested persons.<sup>41</sup> It is also fatal to the verdict that the successful party, while the jury are inspecting the premises under charge of an officer, seeks, against the instructions of the court, to intrude and show the jury matters favorable to him,<sup>42</sup> and witnesses engage in arguments about the case in front of the jury as they are inspecting the premises,<sup>43</sup> or that a party, although forbidden to do so by the court, keeps up a conversation in a low tone with one of the jurors while adverse counsel is addressing the jury.<sup>44</sup>

Brief, public, and nonprejudicial conversations between jurors and parties or their relatives will not vitiate the verdict<sup>45</sup> or require that the jury be discharged,<sup>46</sup> and a mistrial is properly denied where the conversation was conceived in innocence and related to a matter entirely foreign to the

case.<sup>47</sup> Further, it has been held that, where it is shown not to have been unduly influenced, the verdict is not vitiated because a juror, pending the trial, accepts a ride to his home in the conveyance of a party who is going in the same direction,<sup>48</sup> or because the foreman of the jury lodges in the same hotel room as defendant in the case.<sup>49</sup> There is nothing improper in the jury being sent to eat, in charge of an officer, at public expense, at a hotel owned by counsel in the case, who is also related to his successful client, and owns the only hotel in town.<sup>50</sup> Although such conduct is not proper, it has been held that the verdict is not vitiated because a juror assists plaintiff down the courthouse stairs where the juror acted in good faith, and it did not appear that he had secured any damaging information by so doing.<sup>51</sup>

### c. Attorneys and Agents of Parties

As a general rule any conversations between jurors and attorneys engaged in the trial of the cause are improper, and it is misconduct which will vitiate the verdict for a juror to receive treats, entertainment, or favors from the attorney for one of the parties, or for an investigator engaged in the case to mingle with and have a conversation with a juror.

As a general rule any conversations or communications between jurors and attorneys engaged

Auto Exp. Co., 40 A.2d 643, 132 N.J. Law 466.

37. *Tex.*—*Texas Milk Products Co. v. Birtcher*, Civ.App., 138 S.W.2d 285, reversed on other grounds 157 S.W.2d 633, 138 Tex. 178—*Gulf, etc., R. Co. v. Mathews*, 66 S.W. 588, 28 Tex.Civ.App. 92, rehearing granted 67 S.W. 788.

38. *U.S.*—*Palmer v. Miller*, D.C.Mo., 60 F.Supp. 710.

Cal.—*In re Weber's Estate*, 247 P.2d 939, 113 Cal.App.2d 160.

S.C.—*Hubbard v. Rowe*, 5 S.E.2d 187, 192 S.C. 12.

Tex.—*Texas Milk Products Co. v. Birtcher*, Civ.App., 138 S.W.2d 285, reversed on other grounds 157 S.W.2d 633, 138 Tex. 178.

W.Va.—*Legg v. Jones*, 30 S.E.2d 76, 126 W.Va. 757.

64 C.J. p 1013 note 94.

**Receiving treat not misconduct under circumstances**

Where a defendant took seat at coffee shop during court recess beside juror and ordered cup of coffee and juror paid for the defendant's coffee, but defendant did not communicate with juror and did not know juror or that he intended to pay for his coffee or that he had done so until juror casually informed him of it, and juror did not know defendant had anything to do with the trial, incident did not constitute misconduct.—*Airline Motor Coaches v. Fields*, Tex.Civ.App., 180 S.W.2d 216, error refused.

**Decision made by juror prior to favor**

The fact that the offending juror has previously reached a decision in favor of the party treating him is no proof that no injury resulted where the entire jury had not yet made a final determination of the matter, and a mistrial should have been declared.—*Texas Milk Products Co. v. Birtcher*, 157 S.W.2d 633, 138 Tex. 178.

38. *U.S.*—*Palmer v. Miller*, D.C.Mo., 60 F.Supp. 710.

D.C.—*Harrison v. District of Columbia*, D.C.Mun.App., 95 A.2d 332.

N.J.—*Gall v. New York & New Brunswick Auto Exp. Co.*, 36 A.2d 403, 131 N.J. Law 346, reversed on other grounds 40 A.2d 643, 132 N.J. Law 466.

Ohio.—*Noble v. McAllister Dairy Farms, Inc.*, Com.Pl., 114 N.E.2d 540.

64 C.J. p 1013 note 95.

39. *Vt.*—*McDaniels v. McDaniels*, 40 Vt. 363, 94 Am.D. 408.

40. *Ga.*—*Livingston v. Wynne*, 93 S. E. 877, 147 Ga. 307.

41. *Minn.*—*State v. Snow*, 153 N.W. 526, 130 Minn. 206.

Tex.—*Gulf, etc., R. Co. v. Mathews*, 66 S.W. 588, 28 Tex.Civ.App. 92, rehearing granted 67 S.W. 788.

64 C.J. p 1013 note 98.

**Conversation with beneficiary of judgment**

Conversation during recess of trial between jurors and deceased's widow

who was stranger to jurors and beneficiary of judgment obtained against defendant was improper.—*City of Callettsburg v. Sutherland's Adm'r*, 57 S.W.2d 512, 247 Ky. 540.

42. *Kan.*—*Pond v. Barton*, 56 P. 139, 8 Kan.App. 601.

64 C.J. p 1013 note 99.

43. *Ala.*—*Manning v. Atlanta, B. & A. Ry. Co.*, 91 So. 446, 206 Ala. 629.

44. *N.Y.*—*Turner v. Beardsley*, 19 Wend. 348.

45. *U.S.*—*Palmer v. Miller*, D.C.Mo., 60 F.Supp. 710.

Ky.—*Bee's Old Reliable Shows v. Maupin's Adm'r*, 226 S.W.2d 23, 311 Ky. 837.

Mich.—*Horton v. Fleser*, 64 N.W.2d 605, 340 Mich. 68.

64 C.J. p 1013 note 3.

46. *Wash.*—*Vowell v. Issaquah Coal Co.*, 71 P. 725, 81 Wash. 103.

64 C.J. p 1013 note 4.

47. *Va.*—*City of New York Ins. Co. v. Greene*, 31 S.E.2d 268, 183 Va. 35.

48. *Ill.*—*Bonnett v. Glatfeldt*, 11 N. E. 260, 120 Ill. 166.

49. *Me.*—*Hardy v. Spoule*, 32 Me. 594.

50. *Ga.*—*Brinson v. Faircloth*, 7 S. E. 923, 82 Ga. 185.

51. *Tex.*—*St. Louis Southwestern Ry. Co. of Texas v. Gilpin*, Civ. App., 73 S.W.2d 1054, error refused.



in the trial of the cause are improper, since no matter what a conversation or communication may relate to, it is apt to arouse suspicion and lessen confidence.<sup>52</sup> Whether the jury should be discharged or a mistrial declared is within the discretion of the trial court.<sup>53</sup> However, counsel may, with the permission of the court, converse with a juror, whom he intends to make a witness, to ascertain what facts he can prove.<sup>54</sup> Moreover, it is generally held that the verdict will not be vitiated by temporary or casual associations or conversations between jurors and counsel which are satisfactorily explained and shown to be nonprejudicial,<sup>55</sup> or because a juror, during a recess in the trial, converses with an agent of one of the parties if the conversation is open, brief, casual, and has no reference to the case,<sup>56</sup> or because a detective, employed by one of the parties to obtain information about jurors, inquires of a juror whether the case has been decided, but ceases further conversation on being informed that it has not.<sup>57</sup> The rule,

which vitiates the verdict where jurors have received favors from interested parties, does not prevent counsel from performing a mere act of humanity for a juror,<sup>58</sup> and the verdict is not vitiated because counsel at a juror's request sends for medicine to relieve the juror from suffering.<sup>59</sup> The fact that counsel, during a period when the jury are back in court to receive further instructions, asks the court to inquire how the jury stands, to which one of the jurors gives answer, has been held not to require a vacation of the verdict.<sup>60</sup>

On the other hand, it is misconduct which will vitiate the verdict for a juror, during the progress of the trial, to go to the home of, and accept free room and board from, a person who is unfriendly to the losing party, and under obligations to the successful party, and accompanied by the attorney for the latter,<sup>61</sup> or to accept a room and board from an interested attorney,<sup>62</sup> or for the attorney of one of the parties to treat<sup>63</sup> or entertain<sup>64</sup> the jury at the suggestion of some of the jurors,<sup>65</sup> or for an

52. D.C.—Harrison v. District of Columbia, Mun.App., 95 A.2d 332.  
64 C.J. p 1014 note 8.

#### Denial of conversation

Denial of mistrial for alleged mingling and conversation with jurors by investigator for plaintiff's attorney was not error, where investigator denied conversation.—Chicago, R. I. & P. Ry. Co. v. Benson, 136 N.E. 244, 352 Ill. 195, certiorari denied 54 S.Ct. 53, 290 U.S. 636, 78 L.Ed. 553.

#### Attorney not connected with case on trial

Conversation between a juror and a young attorney who had his desk in the office of the counsel for one of the parties but was in no way associated with him or interested in the case does not constitute misconduct which would warrant setting aside of the verdict.—Cohn v. Cincinnati Traction Co., 26 Ohio Cir.Ct. N.S., 267.

#### Letters

Where juror who had written improper letter to counsel for defendant participated in deliberations and agreed to verdict for plaintiff, verdict could not be permitted to stand.—City of San Antonio v. McKenzie Const. Co., 150 S.W.2d 989, 136 Tex. 315.

#### Prevention by court of improper communications

The court may help to prevent improper communications between the juror and an attorney in the case by warning each new group of jurors of the importance of avoiding any improper contact with counsel.—Harrison v. District of Columbia, D.C. Mun.App., 95 A.2d 332.

53. Mo.—Fitzgerald v. Thompson, 184 S.W.2d 198, 238 Mo.App. 546.

N.J.—Gall v. New York & New Brunswick Auto Exp. Co., 36 A.2d 403, 131 N.J.Law 346, reversed on other grounds, 40 A.2d 643, 132 N.J. Law 468.

#### Association or conversation between attorney and friend of juror

Refusal to discharge jury because at noon recess during trial a friend of one of the jurors asked plaintiff's counsel for his card, which he gave him, was not abuse of discretion.—Davis v. Kansas City Public Service Co., 233 S.W.2d 679, 361 Mo. 81.

54. Ga.—McDowell v. Sutlive, 2 S.E. 937, 78 Ga. 142.

55. Okl.—Watts v. Elmore, 176 P. 2d 220, 198 Okl. 141.  
64 C.J. p 1014 note 10.

#### Conversation precipitated by juror

It has been held not to be misconduct if the conversation is precipitated by the question of a juror and nothing is said which could give the juror any information he did not already possess.—Maaskant v. Matsui, 123 P.2d 853, 50 Cal.App.2d 819.

#### Association or conversation held not misconduct

(1) Exchange of bantering remarks between juror and attorney in corridor adjoining court room during progress of trial when juror stated that attorney resembled a certain motion picture actor was not basis for mistrial on ground of "misconduct".—Happoldt v. Guardian Life Ins. Co. of America, 203 P.2d 55, 90 Cal.App.2d 386.

(2) Defendant's counsel was not guilty of misconduct in treating jury to lunch in absence of showing that jury knew who paid for the lunch on the day they were taken to view

the premises.—Hubbard v. Cleveland, Columbus & Cincinnati Highway, 76 N.E.2d 721, 81 Ohio App. 445.

(3) Alleged misconduct of plaintiff's attorney in talking to a juror while drinking coffee with him in coffee shop near court house during trial did not warrant declaration of mistrial, under evidence.—Watts v. Elmore, 176 P.2d 220, 198 Okl. 141.

56. Ill.—Haingrove v. Curtiss, 67 Ill. App. 448.

57. Ky.—Castleman v. Continental Car Co., 258 S.W. 658, 201 Ky. 770.

58. Nev.—Carnaghan v. Ward, 8 Nev. 30.

59. Nev.—Carnaghan v. Ward, supra.

60. Ga.—Rosenberg v. Weinstein, 85 S.E. 1042, 144 Ga. 46.

61. Tex.—Albers v. San Antonio, etc., R. Co., 81 S.W. 828, 36 Tex. Civ.App. 188.

62. W.Va.—Legg v. Jones, 30 S.E.2d 76, 126 W.Va. 757.

#### Invitation by attorney's wife

An invitation to juror by wife of one of defendant's attorneys to spend the night at such attorney's home, juror's tentative acceptance of such invitation before rendition of verdict, and his unconditional acceptance thereof after return of the verdict, constituted sufficient ground to direct mistrial or set aside verdict had matter been promptly called to attention of trial court.—Legg v. Jones, supra.

63. S.C.—Hubbard v. Rowe, 5 S.E.2d 187, 192 S.C. 12.

64. Cal.—In re Weber's Estate, 247 P.2d 938, 113 Cal.App.2d 160.

65. Or.—Sandstrom v. Oregon-Wash-

investigator or other person engaged in prosecuting a case to mingle with and have a conversation with a juror.<sup>66</sup> It has also been held that the transportation of a juror between his home and the place of the trial by a party's attorney is improper.<sup>67</sup>

**Conduct meriting punishment.** For jurors, on their discovering they are under the surveillance of a detective for one of the parties, to invite the detective into a saloon to drink intoxicating liquor with them, and talk about the case, is highly improper conduct meriting suitable punishment.<sup>68</sup>

#### d. Witnesses

The mingling by jurors in intimate social contact with prominent witnesses on whose testimony the case is to be determined is not commended, and jurors should not converse with witnesses during the course of the trial.

Jurors should not converse with witnesses during the course of the trial,<sup>69</sup> and the mingling by jurors in intimate social contact with prominent witnesses on whose testimony the case is to be determined is not commended;<sup>70</sup> but whether a mistrial should be declared because of such conduct is within the discretion of the court.<sup>71</sup> While the test of the necessity for a mistrial is whether the acts of the juror and the witness might have influenced the juror's mind or had any tendency to influence it,<sup>72</sup> and actual influence of a juror is excluded as a test,<sup>73</sup> the actual influence may be inquired into.<sup>74</sup>

Where a witness, in violation of court order and statute, makes a remark touching the case in the

hearing of the jury, while they are out inspecting the property in controversy under order of the court, the verdict will be set aside.<sup>75</sup> If harmless, a conversation between a juror and witness pending the trial will not cause the verdict to be disturbed,<sup>76</sup> even though it relates to the case.<sup>77</sup> A heated argument between witnesses about the case does not vitiate the verdict if the argument was not heard by the jury.<sup>78</sup> The fact that a juror cross-examines a witness does not show such a manifestation of prejudice as will vitiate the verdict,<sup>79</sup> and there is no error where a juror, in order to assist the court and counsel in reassuring a dull and unresponsive witness for the purpose of obtaining proper answers to questions, says to the witness, "Say, 'Yes' or 'No.' We will stand by you if he wants to lick you or anything."<sup>80</sup> Where during cross-examination of a witness a juror exclaimed, "That is immaterial and irrelevant," but the judge, the opposing counsel, and the other jurors did not hear him and the judge offered to instruct that it was improper for a juror to talk to a witness, refusal to grant a mistrial was proper.<sup>81</sup>

#### e. Other Jurors

It has been said to be improper for jurors to discuss the case between themselves prior to its submission to them. The fact that some jurors treated some of their friends on the jury is not misconduct if one of the parties is not connected with such act.

It has been said to be improper for jurors to discuss the case between themselves prior to its

ington R. & Nav. Co., 136 P. 878, 69 Or. 134, 49 L.R.A.N.S. 389.

66. Ill.—Chicago, R. I. & P. Ry. Co. v. Benson, 185 N.E. 244, 352 Ill. 195, certiorari denied 54 S.Ct. 53, 290 U.S. 636, 78 L.Ed. 553.

67. W.Va.—Mullens v. Lilly, 13 S.E. 2d 634, 123 W.Va. 182.

68. Tex.—Western Union Telegraph Co. v. Tweed, Civ.App., 138 S.W. 1155, affirmed 166 S.W. 696, 177 S.W. 957, 107 Tex. 247.

69. D.C.—Harrison v. District of Columbia, Mun.App., 95 A.2d 332. N.J.—Douglass v. Kaban, 36 A.2d 140, 22 N.J.Misc. 200.

Pa.—Salvitti v. Throppe, 21 Wash. Co. 196, affirmed 23 A.2d 445, 343 Pa. 642, 138 A.L.R. 842.

#### Prevention by court of communications

The court may help to prevent misconduct involving communications by warning each new group of jurors of the importance of avoiding any improper contact with counsel.—Harrison v. District of Columbia, D.C.Mun. App., 95 A.2d 332.

70. Utah.—Glazier v. Cram, 267 P. 188, 71 Utah 465.

71. Md.—Rent-A-Car Co. v. Globe & Rutgers Fire Ins. Co., 163 A. 702, 163 Md. 401, 86 A.L.R. 922.

#### Discretion held not abused

(1) In action on automobile fire policy, refusing to declare mistrial because of conversation between juror and witness relating to previous trials was not abuse of discretion.—Rent-A-Car Co. v. Globe & Rutgers Fire Ins. Co., 163 A. 702, 163 Md. 401, 86 A.L.R. 922.

(2) Refusal to order mistrial for defense witness' act of riding home with juror at juror's invitation after court adjourned was not abuse of discretion.—Rioux v. Portland Water Dist., 170 A. 63, 132 Me. 307.

72. Me.—Rioux v. Portland Water Dist., supra.

**Judge's belief equivalent to finding.** Judge's stated belief, with respect to witness' and juror's alleged misconduct, that juror could and would act as impartial juror, was equivalent to finding that juror's and witness' acts were not such that might have

influenced or had tendency to influence juror's mind.—Rioux v. Portland Water Dist., supra.

73. Me.—Rioux v. Portland Water Dist., supra.

74. Me.—Rioux v. Portland Water Dist., supra.

75. Ind.—Erwin v. Bulla, 29 Ind. 95, 92 Am.D. 341.

76. N.Y.—Weissman v. M. & M. Transp. Co., 79 N.Y.S.2d 335, 191 Misc. 968.

Pa.—Salvitti v. Throppe, 21 Wash. Co. 196, affirmed 23 A.2d 445, 343 Pa. 642, 138 A.L.R. 842.

64 C.J. p 1014 note 21.

77. Ill.—Chicago Junction R. Co. v. McGrath, 68 N.E. 69, 203 Ill. 511.

Ohio.—Raymond v. Hearon, 164 N.E. 644, 30 Ohio App. 184.

78. Mich.—John S. Noel Co. v. Newcomb, 154 N.W. 58, 188 Mich. 53.

79. Ill.—Chicago, M. & St. P. R. Co. v. Krueger, 17 N.E. 52, 124 Ill. 457.

80. Mich.—Williams v. Green, 166 N.W. 890, 201 Mich. 202.

81. Ga.—Von Greppe v. Barill, 75 S.E.2d 264, 87 Ga.App. 716.

submission to them<sup>82</sup> or when they are not functioning as a jury.<sup>83</sup> However, a comment by one juror to another as to what evidence that was being introduced indicated to him,<sup>84</sup> and a conversation between jurors, during recess, with respect to a map which had been admitted in evidence,<sup>85</sup> have been held not fatal to the verdict. The fact that some of the jurors treated some of their friends on the jury is not misconduct if one of the parties is not connected with such act.<sup>86</sup>

### 1. Officers

Contacts between court officers and jurors, except as authorized by the court in appropriate circumstances, are not to be countenanced.

Contacts between court officers and jurors, except as authorized by the court in appropriate circumstances, are not to be countenanced since no justification should be given for arousing suspicions as to the sanctity of jury verdicts.<sup>87</sup> Although under some statutes no sheriff or other officer may converse with the jury, or a member of the jury, after they have been sworn,<sup>88</sup> it is not misconduct if the conversation is on subjects which are entirely unrelated to the case on trial.<sup>89</sup> It has also been said

that officers having a jury in charge while they are deliberating on their verdict should never speak to them except to ask them whether they have agreed;<sup>90</sup> and the verdict will be vitiated where the officer suggests matters to the jury which will alarm or frighten them into agreement,<sup>91</sup> or remains with the jury while deliberating, talks with them about the case, and threatens to fine one juror who declines to vote without further consideration.<sup>92</sup> It is entirely proper for the foreman to consult with the officer in charge as to the possibility of obtaining further information with respect to a point on which the jury are not clear<sup>93</sup> or to suggest to the officer that the jurors desire to obtain further instruction from the court.<sup>94</sup> While improper, it is not prejudicial error that the officer in charge tells the jury that a verdict could be agreed to by five-sixths of the jury.<sup>95</sup> Although not fatal to the verdict if not prejudicial,<sup>96</sup> it is reprehensible and punishable misconduct for the jury, during the deliberations, to send the officer in charge to take the measurements of an object materially involved in the case<sup>97</sup> or to send him after books and papers involved in the case without the knowledge of court or counsel.<sup>98</sup>

82. Cal.—Smith v. Brown, 283 P. 132, 102 Cal.App. 477.

83. Tex.—Cloud v. Hutcherson, Civ. App., 175 S.W.2d 643, error refused.

84. Ky.—Higgins v. Dean Gas Engine & Foundry Co., 130 S.W. 800, 140 Ky. 44.

85. Cal.—Wilson v. California Cab Northern Pac. Ry. Co., 54 P.2d 1175, Co. App., 13 P.2d 768, 125 Cal.App. 383.

86. Mont.—Wibaux Realty Co. v. 101 Mont. 126.

87. N.Y.—Holliday v. Rockwell, 125 N.Y.S.2d 629, 282 App.Div. 983, reargument denied 127 N.Y.S.2d 808, 283 App.Div. 677.

88. Ky.—C. V. Hill & Co. v. Hadden's Grocery, 185 S.W.2d 681, 299 Ky. 419.

Attorneys employed in trial of case are not "officers", within statute forbidding officers, without leave of court, to converse with jury or any member thereof on any subject after they have been sworn, and the statute is confined to the sheriff, or other like officers having administrative duties to perform in summoning, impaneling, and caring for the jury.—C. V. Hill & Co. v. Hadden's Grocery, 185 S.W.2d 681, 299 Ky. 419.

89. Ky.—Owings v. Webb's Ex'r, 202 S.W.2d 410, 304 Ky. 748.—C. V. Hill & Co. v. Hadden's Grocery, 185 S.W.2d 681, 299 Ky. 419.

90. N.D.—James Turner & Sons v. Great Northern Ry. Co., 272 N.W. 489, 67 N.D. 347.

Tex.—Texas Emp. Ins. Ass'n v. Foreman, Civ.App., 236 S.W.2d 824, reversed on other grounds Foreman v. Texas Emp. Ins. Ass'n, 241 S.W.2d 977, 150 Tex. 468, conformed to Texas Emp. Ins. Ass'n v. Foreman, 262 S.W.2d 248.

64 C.J. p 1015 note 32.

### Conversation with court clerk during deliberations

Where colloquy occurred between court clerk and jury while jury were deliberating, without knowledge or consent of court or counsel, judgment for plaintiff in civil action for assault and rape was reversed as matter of discretion, notwithstanding clerk and jury probably intended no wrong, and information furnished by clerk to jury may have been substantially correct.—Kaus v. Barthold, 10 N.Y.S.2d 734, 256 App.Div. 1033.

91. Ala.—Alabama Fuel & Iron Co. v. Rice, 65 So. 402, 187 Ala. 468, 64 C.J. p 1015 note 33.

### Officer held not guilty of undue influence

Bailiff was not guilty of undue influence invalidating verdict, where on Friday night preceding Christmas on Sunday he informed jurors that notice to hotel was essential if jury were to spend night there, and that jury would be given fifteen minutes

to determine whether there would be verdict.—Leonard v. Hume, 41 P.2d 965, 5 Cal.App.2d 41.

92. Ill.—Heston v. Neathammer, 54 N.E. 310, 180 Ill. 150.

93. N.D.—Baird v. Stephens, 228 N.W. 212, 58 N.D. 812.

94. N.D.—Baird v. Stephens, supra.

95. Wis.—Short v. Boss, 225 N.W. 197, 198 Wis. 586.

It is grave and serious misconduct on part of a deputy sheriff to advise jurors to be governed by a majority vote in arriving at their answers.—Lee v. Galbreath, Tex.Civ.App., 234 S.W.2d 91.

96. Wis.—Ketchum v. Chicago, St. P. M. & O. Ry. Co., 136 N.W. 634, 150 Wis. 211.

97. Wis.—Ketchum v. Chicago, St. P. M. & O. Ry. Co., supra.

98. S.C.—Lott v. Macon, 33 S.C.L. 178.

### Request for picture held not misconduct

Where one of jurors on way to jury room commented on absence of pictures to deputy sheriff, and juror's request for picture was disposed of in open court and in presence of both counsel by sending picture to the jury room by the deputy sheriff, there was no improper communication with the jury on the part of the deputy sheriff.—Baumhoer v. McLaughlin, Mo.App., 205 S.W.2d 274.

### g. Presence of Others in Jury Room

It is error to permit a person not a member of the jury to be present in the jury room during their deliberations.

Not only is it error to permit a person not a member of the jury to be present in the jury room during their deliberations,<sup>99</sup> but it is improper conduct for the judge himself to enter the jury room while the jury are deliberating;<sup>1</sup> and, according to some cases, this is of itself sufficient to vitiate the verdict,<sup>2</sup> although there is also some authority to the contrary.<sup>3</sup> While it is improper for the officer in charge of the jury to remain in the jury room while they are deliberating on their verdict,<sup>4</sup> it has often been held that the mere presence of a court officer during the deliberations of the jury is not ground for setting the verdict aside if he does not interfere with, or influence, them.<sup>5</sup>

### h. Newspaper Reports or Comments on Case

Although newspapers have no right to attempt to influence the trial, the mere fact that a newspaper report of the trial has been published is not ground for discharging a jury when it is not shown that any of them have read the article.

Although it has been said that jurors should not, during the course of the trial, be permitted to

read newspapers containing comments on the issues in the case on trial,<sup>6</sup> and newspapers have no more right than any other person to attempt to influence the decision of the jury,<sup>7</sup> it is usually held that the fact that jurors have read newspaper accounts or comments, which are not of a highly damaging character or inspired by a party to the suit, does not of itself vitiate the verdict,<sup>8</sup> nor is it such misconduct as to require the trial court to withdraw or discharge the jurors from the case,<sup>9</sup> it being largely within the discretion of the court whether or not the jurors will be withdrawn or discharged.<sup>10</sup> The mere fact that a newspaper report of the trial has been published is not ground for discharging the jury when it is not shown that any of them have read the article,<sup>11</sup> especially where the counsel for the complaining party was afforded and declined the opportunity before the verdict to ascertain whether any jurors had read the article or were influenced thereby.<sup>12</sup>

It is, however, vitiating misconduct for jurors to take into the jury room, and give consideration to, a newspaper account of a previous trial designed to be prejudicial and showing that defendant carries liability insurance.<sup>13</sup> Whether or not the jury shall be warned against reading newspaper reports

99. *Tex.*—Kilgore v. Moore, 36 S. W. 317, 14 *Tex.Civ.App.* 20.

#### Inadvertent entry of party

Where a party to an action walked through jury room, before case was given to jury, but while jury was discussing case, in order to reach a toilet, and on coming back through jury room stopped and lit a cigarette, the inadvertent acts of the party were improper but did not vitiate the verdict.—*Shew v. Bailey*, *Tenn.App.*, 260 S.W.2d 362.

1. *Kan.*—Tawzer v. McAdams, 7 P. 2d 516, 134 *Kan.* 596.  
64 C.J. p 1015 note 43.

#### Use of court room for jury room

Fact that court room was used as jury room because of lack of other facilities did not give trial judge right to enter the room accompanied only by deputy sheriff, and remain closed with jury behind closed doors for two or three minutes during their deliberations in the absence and without the knowledge and consent of counsel for either side, and listen to question relative to instructed verdict.—*Freeman v. Hillman*, *Tex.Civ.App.*, 173 S.W.2d 657.

2. *N.Y.*—Gibbons v. Van Alstyne, 9 N.Y.S. 156, 56 *Hun* 639—*Benson v. Clark*, 1 Cow. 258.

3. *Iowa.*—Ayrhart v. Wilhelmy, 112 N.W. 782, 135 *Iowa* 290.

*Mich.*—Hart v. Lindley, 14 N.W. 632, 50 *Mich.* 20.

4. *Ind.*—Fitzgerald v. Goff, 99 *Ind.* 28.

5. *S.D.*—Williams v. Chicago, etc., R. Co., 78 N.W. 949, 11 *S.D.* 463.  
64 C.J. p 1015 note 46.

6. *Or.*—*Corpus Juris* quoted in *State v. Cunningham*, 144 P.2d 303, 317, 173 *Or.* 25.

*Tex.*—Burchill v. Hermesmyer, *Civ. App.*, 262 S.W. 511.

7. *Or.*—*Corpus Juris* quoted in *State v. Cunningham*, 144 P.2d 303, 317, 173 *Or.* 25.  
64 C.J. p 1015 note 50.

8. *Or.*—*Corpus Juris* quoted in *State v. Cunningham*, 144 P.2d 303, 317, 173 *Or.* 25.  
64 C.J. p 1015 note 51.

9. *Or.*—*Corpus Juris* quoted in *State v. Cunningham*, 144 P.2d 303, 317, 173 *Or.* 25.  
64 C.J. p 1016 note 52.

#### Reference to insurance in newspaper article

(1) The publication of newspaper articles stating that defendant sued for injuries sustained in automobile collision was insured, did not require withdrawal of case from jury, where some of jurors stated that they had not read articles, and jurors who had read articles stated that they would not be influenced thereby, and defend-

ant testified that he was insured and requested instruction that jury must determine rights and liability of parties without regard to insurance.—*Kelley v. Dickerson*, 13 N.E.2d 535, 213 *Ind.* 624.

(2) The mere fact that the jurors become aware of defendant's insurance from newspaper reports is not error where the court promptly warns the jury to disregard the newspaper reports.—*Hoffecker v. Jenkins*, *C.C.A.Va.*, 151 F.2d 951.

10. *Or.*—*Corpus Juris* quoted in *State v. Cunningham*, 144 P.2d 303, 317, 173 *Or.* 25.  
64 C.J. p 1016 note 53.

11. *Ill.*—*Curtis v. Lowe*, 37 N.E.2d 865, 338 *Ill.App.* 463.

*Mont.*—*Corpus Juris* cited in *Baranko v. Grenz*, 256 P.2d 1074, 1075.

*Tex.*—*Moncada v. Snyder*, 152 S.W.2d 1077, 137 *Tex.* 112.  
64 C.J. p 1016 note 54.

12. *Va.*—*United Const. Workers v. Laburnum Const. Corp.*, 75 S.E.2d 694, 194 *Va.* 872, affirmed *United Const. Workers, Affiliated with United Mine Workers v. Laburnum Const. Corp.*, 74 S.Ct. 833, 347 U.S. 658, 93 L.Ed. —.

13. *Kan.*—*Bryant v. Marshall*, 10 P. 2d 868, 135 *Kan.* 348.  
64 C.J. p 1016 note 55.

or comments<sup>14</sup> or whether or not inquiry shall be made of the jury to determine whether they have read a newspaper comment on the trial<sup>15</sup> rests largely in the discretion of the trial court. When newspaper comments or reports favorable to one party are published during the progress of the trial it is clearly proper for the trial judge to call the attention of the jury thereto, express his unqualified disapprobation of such conduct, and caution the jury not to be influenced by the publication in question.<sup>16</sup>

# § 458. Obtaining Evidence or Knowledge by Unauthorized Means

It is improper for the jury to make a private search for evidence which, although competent and not subject to being explained or rebutted by the parties, may put the jurors in possession of facts which will have a potential influence on their verdict.

Since the jury must base their verdict on evidence legally introduced on the trial of the cause, as discussed *infra* § 462, it is improper conduct for them to make a private search for evidence which, although incompetent and not subject to being explained or rebutted by the parties, may put the jurors in possession of facts which will have a potential influence on their verdict.<sup>17</sup> It is also improper for any juror to communicate to his fellow jurors anything which he may know from information obtained otherwise than through the medium of the trial.<sup>18</sup>

# § 459. — Unauthorized View or Inspection

An unauthorized view or inspection of a scene or object involved in the case by the jurors constitutes misconduct and will vitiate the verdict where it clearly ap-

pears, or is reasonably to be inferred, or there is reasonable probability that the verdict was influenced by the unauthorized view or inspection.

While the court may, in its discretion, allow the jury to view or inspect a scene or object involved in the case, as discussed *supra* § 47, an unauthorized view or inspection of the locus in quo by the jurors constitutes misconduct,<sup>19</sup> and according to many cases an unauthorized view or inspection by the jury will vitiate the verdict where it clearly appears,<sup>20</sup> or it is reasonably to be inferred,<sup>21</sup> or there is a reasonable probability that,<sup>22</sup> the verdict was influenced by the unauthorized view or inspection. Especially is the verdict vitiated where the view or examination is made, by preconcerted arrangement, in company with the friends and witnesses of the successful party without the knowledge or presence of the defeated party or his counsel.<sup>23</sup>

Although it has been stated broadly that misconduct in taking an unauthorized view or inspection will, because it has a tendency to corrupt and cast suspicion on the pure and sound administration of justice, cause the verdict to be set aside without regard to whether the misconduct has resulted in prejudice,<sup>24</sup> it has been held that the verdict will not be set aside because of an unauthorized view or inspection where it can be preserved,<sup>25</sup> or it is reasonably clear<sup>26</sup> that the verdict was not improperly influenced; and some decisions contain statements which go even further and require an affirmative showing of prejudice before the verdict will be vitiated.<sup>27</sup> It has also been held that an unauthorized view by jurors constitutes misconduct, only as to that element of the verdict affected thereby.<sup>28</sup> The refusal to declare a mistrial is not error

14. Conn.—Geraty v. Kaufman, 162 A. 33, 115 Conn. 563.  
64 C.J. p 1018 note 56.

15. Conn.—Geraty v. Kaufman, *supra*.

16. Ga.—Wynn v. City, etc., R. Co., 17 S.E. 649, 91 Ga. 344.

17. Cal.—Kritzer v. Citron, 224 P.2d 808, 101 Cal.App.2d 33—Maffeo v. Holmes, 117 P.2d 948, 47 Cal.App. 2d 292.

64 C.J. p 1015 note 70.

18. Cal.—Maffeo v. Holmes, *supra*.  
Neb.—Merritt v. Ash Grove Lime & Portland Cement Co., 285 N.W. 97, 136 Neb. 52.

Tenn.—Nash v. Mitchell, 9 Tenn.App. 134.

Tex.—Norris Bros. v. Mattinson, Civ. App., 118 S.W.2d 460, error dismissed.

19. Iowa.—Johnson v. Des Moines City Ry. Co., 207 N.W. 984, 201 Iowa 1044.

Ky.—Brock v. Smith, 268 S.W.2d 947.

Neb.—Merritt v. Ash Grove Lime & Portland Cement Co., 285 N.W. 97, 136 Neb. 52.

Tex.—Republic Ins. Co. v. Hale, 99 S.W.2d 909, 128 Tex. 616.

20. Vt.—Flanders v. Mullin, 50 A. 1055, 73 Vt. 276.

64 C.J. p 1017 note 73.

21. R.I.—Garside v. Ladd Watch Case Co., 24 A. 470, 17 R.I. 691.

Tenn.—Wade v. Ordway, 1 Baxt. 229.

64 C.J. p 1017 note 74.

22. Minn.—Pierce v. Brennan, 86 N.W. 417, 83 Minn. 422.

64 C.J. p 1017 note 75.

23. N.J.—Deacon v. Shreve, 22 N.J. Law 176.

24. Pa.—Helme v. Kingston, 8 Luz. Leg.Reg. 221.

25. N.Y.—Haight v. Elmira, 59 N.Y. S. 193, 42 App.Div. 391.

26. Neb.—Merritt v. Ash Grove Lime & Portland Cement Co., 285 N.W. 97, 136 Neb. 52.

N.Y.—Gambon v. City of New York, 274 N.Y.S. 653, 153 Misc. 401.  
64 C.J. p 1017 note 79.

Facts held not to constitute misconduct

In action for damages sustained in automobile collision, a juror's visit to scene of accident during trial did not constitute jury misconduct, in absence of showing that on such occasion he saw anything which he had not seen many times before his acceptance as juror.—Akers v. Epperson, Tex.Civ.App., 172 S.W.2d 512, certified question answered 171 S.W.2d 483, 141 Tex. 189, 156 A.L.R. 1028.

27. Ill.—Richardson v. Franklin, 235 Ill.App. 440.

Iowa.—Johnson v. Des Moines City Ry. Co., 207 N.W. 984, 201 Iowa 1044—Carbon v. City of Ottumwa, 64 N.W. 413, 95 Iowa 524.

28. Tex.—Sulser v. Caraway, Civ. App., 134 S.W.2d 426.

where there is no proof that the juror made an unauthorized inspection.<sup>29</sup>

Where an unauthorized view is taken by several jurors in good faith, and without seriously prejudicing the rights of the complaining party, the irregularity may be cured by an instruction directing the jury to disregard any facts learned by the view.<sup>30</sup> However, the irregularity is not cured by a direction of the court to have the entire jury make a view.<sup>31</sup> When the court is not in session jurors should not be permitted to examine exhibits.<sup>32</sup>

*Things not directly involved in cause.* In order for the verdict to be vitiated the inspection need not necessarily be of something directly involved in the case, but it may be of some other place or thing supposed to possess features similar to those of the place or thing involved in the cause, so that the inspection or experiment is likely to result in the formation of an opinion as to something directly involved.<sup>33</sup>

#### § 460. Other Misconduct of Jurors

- a. In general
- b. Premature formation and expression of opinion
- c. Use of refreshments and intoxicating liquors
- d. Disclosure of contents of sealed verdict
- e. Requesting voluntary action of successful party

##### a. In General

Various remarks of jurors during the trial have been held to vitiate the verdict or not to vitiate the verdict.

It has been held not to be such prejudicial misconduct as will vitiate the verdict for a juror to express a desire to view the premises involved;<sup>34</sup> to remark that he does not think counsel for one

of the parties will let him sit in the case;<sup>35</sup> to ask, on the way to the jury box, to see the injured hand of plaintiff which had previously been exhibited to the jury and the injury testified to;<sup>36</sup> to joke about injured plaintiff in a personal injury action;<sup>37</sup> to ask why defendant failed to complete work where admittedly the conditions at the place of injury resulted from the work being done;<sup>38</sup> to comment on the evidence where the court instructs the jurors not to make comments on the evidence and to disregard the comment made;<sup>39</sup> to answer in reply to questions of an attorney during his argument that they had observed the conduct and demeanor of a witness while testifying;<sup>40</sup> to state, during cross-examination of defendant's witness, in tones audible to court and jury, that he believes that defendant is trying to signal the witness what to answer;<sup>41</sup> or to ask the judge, not in the presence or hearing of any other person, whether counsel had a right to cross-examine the witness as he had, stating that it appeared to him that counsel was attempting to trap the witness and that it seemed like persecution.<sup>42</sup>

On the other hand, where the court did not rebuke the juror or caution the jury not to be prejudiced, it was held to be fatal to the verdict that a juror made a semiaudible remark "That's right," where plaintiff's counsel stated that defendant's counsel had made plaintiff's youthful witnesses cry during cross-examination by trying to make them lie.<sup>43</sup> While it is highly improper for a juror, during the examination of a witness, to give audible voice to his conclusion that the witness is lying,<sup>44</sup> the verdict will not be disturbed if it is not shown that the other jurors heard the exclamation and were influenced thereby.<sup>45</sup> It is improper for one of the jurors to place before the jury the fact that insurance is involved whatever the source of the information may have been,<sup>46</sup> and a statement by a juror which refers to the fact that defendant is

29. Okl.—S. H. Kress & Co. v. Mad-dox, 203 P.2d 706, 201 Okl. 190.

30. N.Y.—Buffalo Structural Steel Co. v. Dickinson, 90 N.Y.S. 268, 98 App.Div. 355.

31. N.Y.—Buffalo Structural Steel Co. v. Dickinson, supra.

32. Mo.—Eisenbarth v. Powell Bros. Truck Lines, 161 S.W.2d 263.

33. Vt.—Flanders v. Mullin, 50 A. 1055, 73 Vt. 275.

34. C.J. p 1017 note 88.

35. Cal.—Judd v. Letts, 111 P. 12, 158 Cal. 359, 41 L.R.A.N.S., 156.

36. Kan.—Suit v. Gibson, 189 P. 144, 106 Kan. 666.

37. Ohio.—Cleveland-Akron Bag Co. v. Jaito, 148 N.E. 82, 112 Ohio St. 506.

38. Ariz.—Schmerfeld v. Hendry, 245 P.2d 420, 74 Ariz. 159.

39. Pa.—Reese v. City of Pittsburgh, 169 A. 366, 313 Pa. 32.

40. Mo.—Ownby v. Kansas City Ry. Co., App., 228 S.W. 879.

41. Tex.—Kansas City Southern Ry. Co. v. Chandler, Civ.App., 192 S.W. 2d 304, refused no reversible error.

42. Mo.—Robb v. Bartels, App., 268 S.W. 1018.

43. Ohio.—Drock v. Great Atlantic &

Pac. Tea Co., 22 N.E.2d 547, 61 Ohio App. 291.

44. Conn.—Farrington v. Cheponis & Farnusky, 73 A. 139, 82 Conn. 258.

45. Tex.—De Leon v. Longoria, Civ. App., 4 S.W.2d 222.

46. Tex.—De Leon v. Longoria, supra.

47. Neb.—Pope v. Tapelt, 50 N.W.2d 352, 155 Neb. 10.

Question of juror as to insurance. Permitting a defendant to state that he had no insurance in reply to a juror's question, over objection of other defendants, is error.—Rojas v. Vuocolo, 177 S.W.2d 862, 142 Tex. 152.

insured is ground for the withdrawal or discharge of the jurors.<sup>47</sup> However, it is not error where the subject of insurance had been introduced on cross-examination by the complaining party, and the facts placed before the jury were to his advantage.<sup>48</sup> Whether a mistrial should be granted because of a remark by a juror is within the discretion of the court.<sup>49</sup>

### b. Premature Formation and Expression of Opinion

It is the duty of jurors not to form or express their opinion as to the merits of the cause until arguments have been had, instructions given, and the case finally submitted to them.

It is the duty of jurors not to form or express their opinion as to the merits of the cause until arguments have been had, instructions given, and the case finally submitted to them,<sup>50</sup> and where a juror expresses an opinion before the case is submitted the court should, of its own motion, discharge the juror.<sup>51</sup> Should a juror, while he is separated from the rest, during the course of the trial, talk to others and declare his already formed opinion as to the merits of the controversy, such prejudgment by the juror vitiates the verdict.<sup>52</sup> If the court has reason to believe that the jurors have expressed a determination to render a verdict in favor of one of the parties, irrespective of the facts proved, it may, before the parties have challenged them, admonish them as to their duty to decide the case fairly and impartially on the evidence.<sup>53</sup>

### c. Use of Refreshments and Intoxicating Liquors

It is not misconduct for the jury to send out for

refreshments during their deliberations, and, while the drinking of intoxicating liquors is reprehensible misconduct, it is generally held not to vitiate the verdict where the drinking is not at the expense of one of the parties and the jurors are not incapacitated from performing their duties as such.

It is not misconduct for the jury to send out for refreshments during their deliberations,<sup>54</sup> or to drink cider belonging to plaintiff which is furnished them in response to such a request where the cider was furnished without knowledge of plaintiff and the jury did not know it belonged to him.<sup>55</sup> While it is reprehensible misconduct,<sup>56</sup> even the drinking of intoxicating liquors is generally held not to vitiate the verdict where the drinking is not at the expense of one of the parties and the jurors are not incapacitated from performing their duties as such.<sup>57</sup> On the other hand, if the drinking is at the expense of the successful party,<sup>58</sup> or a juror thereby becomes so intoxicated as to be incapable of properly performing his duties,<sup>59</sup> it will vitiate the verdict. It has been held that it is error to permit a juror to use intoxicating liquors unless it is done with the permission of the court, on the prescription of a practicing physician.<sup>60</sup>

### d. Disclosure of Contents of Sealed Verdict

The disclosure of the nature of a verdict which has been agreed on but not announced or received in court will not of itself vitiate the verdict where there was no fraudulent or improper motive in making the disclosure and the losing party was not injured thereby.

While it is reprehensible conduct for a juror to disclose the nature of a verdict which has been agreed on but not announced or received in court,<sup>61</sup> this will not of itself vitiate the verdict where there was no fraudulent or improper motive in making the

7. Miss.—*Odum v. Walker*, 11 So.2d 452, 193 Miss. 862.

8. Ohio.—*Hoge v. Soissons*, 192 N.E. 860, 48 Ohio App. 221.

9. Neb.—*Pope v. Tapelt*, 50 N.W. 2d 352, 155 Neb. 10.

10. Conn.—*Bluett v. Ell Skating Club*, 48 A.2d 557, 133 Conn. 99.

**discretion held not abused**

Where a juror made a disparaging remark concerning the race to which the juror and counsel for plaintiff belonged, but trial court found that no reference had been made to the race on trial or to any person concerned therein and that nothing occurred during the trial to indicate any prejudice or bias against either counsel or litigant, denial of plaintiff's motion for a mistrial and a motion to set aside verdict was not an abuse of discretion.—*Bluett v. Ell*

*Skating Club*, 48 A.2d 557, 133 Conn. 99.

50. Cal.—*Shippy v. Peninsula Rapid Transit Co.*, 240 P. 785, 197 Cal. 290.

Mich.—*Corpus Juris* quoted in *People v. Petrilli*, 290 N.W. 358, 360, 292 Mich. 139.

51. Pa.—*Schonhardt v. City of Pittsburgh*, 16 A.2d 421, 340 Pa. 155.—*McKahan v. B. & O. R. R. Co.*, 72 A. 251, 223 Pa. 1, 16 Ann.Cas. 173.

52. Mich.—*Corpus Juris* quoted in *People v. Petrilli*, 290 N.W. 358, 360, 292 Mich. 139.

64 C.J. p 1017 note 86.

53. Mich.—*Corpus Juris* quoted in *People v. Petrilli*, 290 N.W. 358, 360, 292 Mich. 139.

Wis.—*Sickler v. LaValle*, 27 N.W. 163, 65 Wis. 572.

54. Iowa.—*Long v. Davis*, 114 N.W. 197, 136 Iowa 734.

55. Mass.—*Tripp v. Bristol County Comrs*, 2 Allen 556.

64 C.J. p 1017 note 90.

56. Neb.—*Reed v. Chicago, B. & Q. R. Co.*, 151 N.W. 936, 98 Neb. 19.

57. Mont.—*Wibaux Realty Co. v. Northern Pac. Ry. Co.*, 54 P.2d 1175, 101 Mont. 128.

64 C.J. p 1018 note 92.

58. N.Y.—*Wilson v. Abrahams*, 1 Hill 207.

S.D.—*McGillvery v. Lawrence*, 152 N.W. 698, 35 S.D. 443.

59. R.I.—*Underwood v. Old Colony St. Ry. Co.*, 76 A. 766, 31 R.I. 253, Ann.Cas.1912A 1318.

60. Idaho.—*Bernier v. Anderson*, 70 P. 1027, 8 Idaho 675.

61. Cal.—*Ingersoll v. Truebody*, 40 Cal. 603.

disclosure and the losing party was not injured thereby.<sup>62</sup>

### e. Requesting Voluntary Action of Successful Party

It is not improper for jurors to ask, in connection with their verdict, that the successful party recognize a moral obligation to his opponent.

The fact that jurors in connection with their verdict in favor of defendant file a letter or request asking defendant to recognize a moral obligation to pay plaintiff,<sup>63</sup> or to assist plaintiff's family,<sup>64</sup> is not misconduct which affects the validity of the verdict.

## § 461. Method of Determining Jurors' Conduct

The method of determining jurors' conduct rests in the discretion of the court.

## C. DELIBERATIONS AND MANNER OF ARRIVING AT VERDICT

### § 462. In General

- General considerations
- Duty to agree and heed arguments of other jurors
- Length of deliberation and necessity for retirement
- Food and rest during deliberations
- Discussion and consideration of evidence and issues submitted by instructions
- Discussion and consideration of matters not in evidence or issue generally

In determining a motion for a mistrial for the alleged misconduct of jurors, the court has discretion to decide how the jurors should be examined.<sup>65</sup> It is within the discretionary power of the court to examine a juror who, an attorney asserts, is guilty of possible misconduct,<sup>66</sup> and to refuse to permit the attorney for the person suspected of interference with the jurors to participate in the inquiry into the misconduct.<sup>67</sup> In order to determine whether there has been any prejudicial misconduct on the part of jurors the trial judge may make, from the bench, direct inquiry of the jury on this point without having the jury retire to the jury room to determine whether there has been any prejudicial misconduct,<sup>68</sup> although it is not error to have the jury make such an inquiry in the jury room.<sup>69</sup>

### g. Misrepresentations by jurors

#### a. General Considerations

The verdict of the jury should be the result of the exercise of judgment, reflection, and conscientious conviction applied to the evidence in the case, and the jury should be fair and impartial to all parties during deliberations.

Generally, the deliberations and arrival at the verdict should be a process of determining the material facts from the evidence which has been introduced,<sup>70</sup> and applying the law to such facts as

62. U.S.—*Corpus Juris* cited in California Fruit Exchange v. Henry, D.C.Pa., 89 F.Supp. 580, 588, affirmed, C.A., 184 F.2d 517.

64 C.J. p 1018 note 98.

63. Cal.—*Zolkover v. Pacific Electric Ry. Co.*, 254 P. 926, 81 Cal.App. 772.

64. Cal.—*Willey v. Alaska Packers' Ass'n*, 238 P. 1087, 73 Cal.App. 605.

65. Tex.—*S. H. Kress & Co. v. Selph*, Civ.App., 250 S.W.2d 883, error refused no reversible error.

66. U.S.—*Farish Co. v. Madison Distributing Co.*, C.C.A.N.Y., 37 F.2d 455.

67. Cal.—*Gallagher v. Municipal Court of City of Los Angeles*, 192 P.2d 905, 31 Cal.2d 784.

**Right to cross-examine witnesses**  
Attorney for person suspected of interfering with jurors had no right to cross-examine witnesses in investigation to determine whether mistrial should be declared because of such interference, but could not

be held in contempt or requesting the privilege of doing so.—*Gallagher v. Municipal Court of City of Los Angeles*, 192 P.2d 905, 31 Cal.2d 784.

68. Mass.—*Dzileglie v. Town of Westford*, 174 N.E. 495, 274 Mass. 291.

Tex.—*S. H. Kress & Co. v. Selph*, Civ. App., 250 S.W.2d 883, refused no reversible error.

64 C.J. p 1018 note 4.

69. Mass.—*Claffey v. Fenelon*, 161 N.E. 616, 263 Mass. 427.

70. Ala.—*Fuller v. Nazal*, 67 So.2d 806, 259 Ala. 598.

Mo.—*State ex rel. State Highway Commission v. Patton*, 77 S.W.2d 857, 229 Mo.App. 331.

Neb.—*Pope v. Tapelt*, 50 N.W.2d 352, 155 Neb. 10.—*McCarthy v. Pfost*, 7 N.W.2d 363, 142 Neb. 667.

N.Y.—*N. Wagman & Co. v. Schafer Motor Freight Service*, 4 N.Y.S.2d 526, 167 Misc. 681.

Tenn.—*Corpus Juris* cited in *Stone*

v. O'Neal, 90 S.W.2d 548, 552, 19 Tenn.App. 612.  
64 C.J. p 1018 note 8.

#### Jury as trier of facts

(1) Jury has duty to consider all facts and circumstances in evidence, meanwhile weighing preponderances, drawing inferences, balancing hypotheses and comparing delinquencies in light of their experiences as reasonable and honorable men.—*Tombigbee Mill & Lumber Co. v. Hollingsworth, C.C.A.Miss.*, 162 F.2d 763, certiorari denied 68 S.Ct. 165, 332 U.S. 824, 92 L.Ed. 399.

(2) In action involving collision occurring when truck overtook and passed plaintiff's automobile and struck oncoming automobile which collided with plaintiff's, jury, in determining whether he exercised ordinary care, was bound to consider distance and speeds of vehicles and legal duty not to cut in front of plaintiff's automobile within thirty feet and to be on driver's own side of



instructed by the court;<sup>71</sup> and every verdict should be the result of the exercise of judgment, reflection, and conscientious conviction on the part of the jury.<sup>72</sup> The jurors must observe the rights of both parties and be indifferent and impartial,<sup>73</sup> and immune from extraneous influence.<sup>74</sup> The jury are bound to accept and apply the principles of law governing the case before them, and they are not authorized to depart from these principles simply because they judge it necessary to accomplish justice in the particular case.<sup>75</sup> A verdict is invalid if it is arrived at by merely making a mathematical calculation rather than exercising judgment and weighing and considering the evidence,<sup>76</sup> or if it is based on some theory evolved by the jurors themselves and not supported by any evidence.<sup>77</sup> The jury should not be required to enter into their deliberations under circumstances calculated to prevent a full and fair consideration of the matters

committed to their decision;<sup>78</sup> and it is the duty of the trial court to see that their deliberations are not deflected by outside considerations.<sup>79</sup> As a general rule the deliberations of the jury are secret and the court will make no inquiry into the nature or extent of such deliberations.<sup>80</sup>

### b. Duty to Agree and Heed Arguments of Other Jurors

Generally, jurors should give due consideration to the opinions of each other in order to reach a harmonious result under the law and evidence in the case.

A jury should examine a question submitted to them with due regard to the opinions of each other, and should try to reach a harmonious result if they can do so, under the law and evidence in the case;<sup>81</sup> but this does not mean that jurors should agree to a verdict which is against their honest convictions,<sup>82</sup> or that they shall compromise, divide,

highway before reaching oncoming automobile.—*Bobat v. Hoxie Truck Line*, 267 N.W. 673, 221 Iowa 823.

(3) Juries should be afforded by courts every reasonable opportunity for properly performing their functions.—*Hand v. Hill*, 6 N.Y.S.2d 838, 187 Misc. 588, affirmed 8 N.Y.S.2d 564, 255 App.Div. 1016.

### Conduct of witness

In determining whether driver was guilty of gross negligence so as to authorize recovery by guest in automobile, jury were not required to pass separately on the various elements which entered into driver's conduct but they could view his conduct as a whole.—*Bruno v. Donahue*, 24 N.E.2d 761, 305 Mass. 30.—*Smith v. Axtman*, 6 N.E.2d 809, 288 Mass. 512.

### Misconduct during deliberations

In determining whether alleged misconduct occurred in the course of jury's deliberations and the effect of such misconduct, if established, court must consider the elements prescribed in rule of civil procedure authorizing a new trial on ground of misconduct.—*Burkett v. Slauson*, Civ. App., 235 S.W.2d 505, reversed on other grounds 237 S.W.2d 253, 150 Tex. 69.

71. Cal.—*Pisani v. Martini*, 22 P.2d 804, 132 Cal.App. 269, 64 C.J. p 1018 note 8.

72. Fla.—*Harrell v. Bishop*, 33 So. 2d 152, 160 Fla. 3.—*Allen v. Powell*, 12 So.2d 378, 152 Fla. 443.

Me.—*Chapman v. Portland Country Club*, 14 A.2d 500, 137 Me. 10.

N.J.—*Palestroni v. Jacobs*, 73 A.2d 89, 8 N.J.Super. 438, reversed on other grounds 77 A.2d 183, 10 N.J.Super. 266.

Okla.—*Gulf, C. & S. F. Ry. Co. v. Smith*, 270 P.2d 429.—*Cities Service*

*Oil Co. v. Kindt*, 190 P.2d 1007, 200 Okl. 64.

Tex.—*Kindy v. Willingham*, 209 S.W.2d 585, 146 Tex. 548, 64 C.J. p 1018 note 9.

### Appraising damage

A jury must not appraise any damage suffered by plaintiff prior to finding whether defendant is liable on the evidence.—*Newman v. Los Angeles Transit Lines*, 262 P.2d 95, 120 Cal.App.2d 685.

### All jurors to participate

A litigant whose cause has been submitted to a jury is entitled to have his cause considered and discussed by all the jurors, and is entitled to have all of them participate in the decision of every question presented.—*Ralston v. Stump*, 62 N.E.2d 293, 75 Ohio App. 375.

73. Ill.—*Wilson v. Esch*, 105 N.E.2d 313, 346 Ill.App. 466.

Miss.—*Gulf & S. I. R. Co. v. Bond*, 179 So. 355, 181 Miss. 254, modified on other grounds 181 So. 741, 181 Miss. 254.

N.Y.—*N. Wagman & Co. v. Schafer Motor Freight Service*, 4 N.Y.S.2d 536, 167 Misc. 681.

Pa.—*Sager v. Herring*, Com.Pl., 15 Som.Leg.J. 50.

### Bias, accident, or mistake

In a jury-tried negligence case, each litigant is entitled as of right to a verdict representing actual judgment of jury uninfluenced by bias, accident, or mistake.—*Chapman v. Portland Country Club*, 14 A.2d 500, 137 Me. 10.

### Favorable attitude

A litigant cannot be forced out of court merely because of juror's favorable attitude toward one of the parties in the case.—*Yellow Cab Co. of Galveston v. Word*, Tex.Civ.App., 125 S.W.2d 1050.

74. Wis.—*In re Stolen*, 216 N.W. 127, 193 Wis. 602, 55 A.L.R. 1355.

75. Tex.—*City of Waxahachie v. Harvey*, Civ.App., 255 S.W.2d 549, refused no reversible error, 64 C.J. p 1019 note 10.

Jury are not presumed to know the law, and any attempt to apply it to facts constitutes violation of their duty, in absence of instructions thereon.—*Pisani v. Martini*, 22 P.2d 804, 132 Cal.App. 269.

76. N.C.—*Daniel v. Town of Belhaven*, 126 S.E. 421, 189 N.C. 181, 64 C.J. p 1019 note 11.

Arriving at verdict by chance, compromise, or taking of average see *infra* § 472.

77. Ariz.—*Spain v. Griffith*, 25 P.2d 581, 42 Ariz. 304.

78. Ill.—*Mathews v. Mathews*, 227 Ill.App. 465.

79. U.S.—*Southern Pac. Co. v. Klinge*, C.C.A. Utah, 65 F.2d 85, certiorari denied *Klinge v. Southern Pac. Co.*, 54 S.Ct. 72, 290 U.S. 657, 78 L.Ed. 569.

80. Ga.—*Grant v. Hart*, 30 S.E.2d 271, 197 Ga. 662.

64 C.J. p 1019 note 13.

81. N.J.—*Juliano v. Abeles*, 177 A. 668, 114 N.J.Law 510.

64 C.J. p 1019 note 15.

82. Mich.—*Decker v. Schumacher*, 19 N.W.2d 468, 312 Mich. 6.

N.J.—*Juliano v. Abeles*, 177 A. 666, 114 N.J.Law 510.

64 C.J. p 1019 note 16.

### Compelling agreement

Juror cannot be compelled to agree one way or the other.—*In re Stern*, 95 A.2d 593, 11 N.J. 584.

### Reasonable concessions to opinions of fellow jurors

Jury should not go contrary to their convictions but they should

or yield for mere purpose of an agreement.<sup>83</sup> The verdict should not be a general average of views of individual jurors but a consensus of individual judgment.<sup>84</sup> The views expressed by a majority of the jury, whether that majority be large or small, are entitled to careful consideration by the minority;<sup>85</sup> but the mere fact, standing by itself, that a majority is a majority, should never lead a minority to abandon views honestly entertained on the evidence and the law.<sup>86</sup>

### c. Length of Deliberation and Necessity for Retirement

Generally, where the law does not positively prescribe the length of time a jury shall consider their verdict, they may do so within a very short time after retirement or in some cases without retiring at all.

While the verdict should be the result of sound judgment, dispassionate consideration, and conscientious reflection,<sup>87</sup> and the jury should, if necessary, deliberate patiently and long on the issues which have been submitted to them,<sup>88</sup> where the law does not positively prescribe the length of time a jury shall consider their verdict, they may render a valid verdict without retiring,<sup>89</sup> or on very brief deliberation after retiring,<sup>90</sup> especially where the evidence is not complicated,<sup>91</sup> or the facts are

clearly drawn.<sup>92</sup> The trial court may, in its discretion, cause the jury to reconsider the case if their decision is so hasty as to indicate a flippant disregard of their duties.<sup>93</sup>

If the jury report a disagreement, the judge may keep them together for further deliberation for a reasonable length of time and until he is satisfied that they have made an honest effort to agree.<sup>94</sup> How long the jury should be kept together, or what is a reasonable length of time, depends on the circumstances of each case,<sup>95</sup> and, unless there is some express statutory limitation,<sup>96</sup> may be determined by the trial court in the exercise of a sound discretion,<sup>97</sup> which will be interfered with only where there has been a clear abuse of discretion and the jury coerced.<sup>98</sup> In weighing the circumstances to determine what consideration caused a particular jury to come to a prompt decision after a further instruction by the trial judge, such appraisal proceeds according to reasonable probability.<sup>99</sup>

### d. Food and Rest during Deliberations

Where necessary to the particular case, the judge may properly see that the jurors receive food and lodgings, especially where so provided by statute.

Where the jury are confined in deliberations for a considerable length of time, the judge may proper-

properly give heed to opinions of their fellow jurors and by reasonable concessions reach a conclusion which, although not originally entertained by any of them, nevertheless may be one to which all can scrupulously adhere.—High v. Lenow, 258 S.W.2d 742, 195 Tenn. 158.

83. Mich.—Decker v. Schumacher, 19 N.W.2d 466, 312 Mich. 6. N.J.—Juliano v. Abeles, 177 A. 666, 114 N.J.Law 510. Tenn.—High v. Lenow, 258 S.W.2d 742, 195 Tenn. 158.

84. N.J.—In re Stern, 95 A.2d 593, 11 N.J. 584.

85. Minn.—Gibson v. Minneapolis, etc., R. Co., 56 N.W. 686, 65 Minn. 177, 43 Am.S.R. 482. N.H.—Ahearn v. Mann, 60 N.H. 473.

86. Ark.—J. F. McGehee & Co. v. Fuller, 277 S.W. 39, 169 Ark. 920. Hawaii.—Marks Const. Co. v. Maser, 30 Hawaii 163.

87. Ohio.—Corpus Juris quoted in Val Decker Packing Co. v. Treon, 97 N.E.2d 696, 701, 88 Ohio App. 479.

Okla.—Williams v. Pressler, 65 P. 934, 11 Okl. 122.

88. Ala.—Phoenix Ins. Co. v. Moog, 1 So. 108, 81 Ala. 335.

Ohio.—Corpus Juris quoted in Val Decker Packing Co. v. Treon, 97 N.E.2d 696, 701, 88 Ohio App. 479.

89. Ohio.—Corpus Juris quoted in Val Decker Packing Co. v. Treon, 97 N.E.2d 696, 701, 88 Ohio App. 479.

64 C.J. p 1019 note 22.

90. Ky.—Corpus Juris cited in Beach v. Commonwealth, 246 S.W.2d 587, 589. Pa.—Romonoski v. Harris, Com Pl., 20 Wash. Co. 85.

64 C.J. p 1019 note 23.

Strength and weakness of conclusions of jury were not measurable by the duration of their deliberations.—Campbell v. Campbell, 199 S.W.2d 931, 29 Tenn.App. 651.

#### Periods held not unreasonable

(1) Eight minutes.—Beach v. Commonwealth, Ky., 246 S.W.2d 587.

(2) Ten minutes.—O'Connell v. Ford, 191 A. 501, 58 R.I. 111.

(3) Three and one half hours.—United Verde Copper Co. v. Kovacovich, 22 P.2d 1085, 42 Ariz. 159.

91. R.I.—O'Connell v. Ford, 191 A. 501, 58 R.I. 111.

#### No presumption from haste

In action against owner of truck for death of pedestrian, fact that jury reached hasty verdict for defendant was not indicative that jury were misled into giving undue weight to charge that pedestrian was walking down highway, contrary to statute, since jury might have rested their verdict for defendant on ground

that defendant was not negligent, or that pedestrian was guilty of contributory negligence.—O'Connell v. Ford, supra.

92. Ky.—Beach v. Commonwealth, 246 S.W.2d 587.

93. N.C.—Urquhart v. Durham & S. C. R. Co., 72 S.E. 630, 156 N.C. 551. Ohio.—Corpus Juris quoted in Val Decker Packing Co. v. Treon, 97 N.E.2d 696, 701, 88 Ohio App. 479.

94. Pa.—Hinman v. Hinman, 128 A. 654, 283 Pa. 29.

S.C.—South Carolina Public Service Authority v. Spearwint Liquidating Co., 13 S.E.2d 605, 196 S.C. 481.

64 C.J. p 1019 note 25.

95. S.C.—Harper v. Abercrombie, 105 S.E. 749, 115 S.C. 360.

Va.—Buntin v. Danville, 24 S.E. 830, 93 Va. 200.

96. Me.—Cowan v. Umbagog Pulp Co., 39 A. 340, 91 Me. 26.

64 C.J. p 1020 note 27.

97. Mo.—Hoffman v. St. Louis Public Service Co., 255 S.W.2d 736.

64 C.J. p 1020 note 28.

98. Pa.—Hinman v. Hinman, 128 A. 654, 283 Pa. 29.

Va.—Buntin v. Danville, 24 S.E. 830, 93 Va. 200.

Urging or coercing agreement generally see infra § 481.

99. N.J.—In re Stern, 95 A.2d 593, 11 N.J. 584.

ly see that they have an opportunity to sleep in comfortable and healthy surroundings,<sup>1</sup> and see that they have meals furnished seasonably and amply to their satisfaction;<sup>2</sup> and the court may, when necessary, direct the furnishing of food, lodging, and transportation regardless of any statutory authority.<sup>3</sup> A statute providing that jurors shall not be required to continue their deliberations, without sleep and rest, beyond a specified hour, and at that hour or earlier they shall, under such safeguards as the court directs, be afforded suitable opportunity for sleep and rest for at least eight hours before again taking up their deliberations, requires more than the mere presence of beds in the jury room.<sup>4</sup> Under such a statute it is the duty of the court to inform the jurors of their statutory rights with respect to sleep and rest, since, unless such rights are understood, the jurors do not receive the benefit of the statute.<sup>5</sup>

#### e. Discussion and Consideration of Evidence and Issues Submitted by Instructions

The jury may discuss during deliberations the evi-

dence in the case and its meaning, including evidence admitted under rulings of the court although it relates to matters not pleaded.

The jury may properly hold discussions or arguments as to all questions directly involved,<sup>6</sup> and as to the evidence,<sup>7</sup> or what it tends to show;<sup>8</sup> and it is not misconduct for a juror to go further and fortify his opinion as to the evidence by arguing and showing that he has a special ability to judge such matters.<sup>9</sup> It is not misconduct, in itself, that the jury's finding was based on illogical reasons or that erroneous conclusions were drawn from the evidence,<sup>10</sup> since in the absence of overt acts of misconduct it is not permissible to probe the minds of jurors or supervise their process of reasoning.<sup>11</sup> The jury's consideration may<sup>12</sup> and should<sup>13</sup> extend to all evidence which has been introduced on a point rather than confined to only a portion thereof. Evidence which has been admitted under rulings of the court may be considered although it re-

1. Wis.—Barlow v. Foster, 136 N. W. 822, 149 Wis. 613.

Jurors' use of refreshments and liquors see supra § 460.

2. Wis.—Barlow v. Foster, supra.

3. Cal.—Hart Bros. Co. v. Los Angeles County, 82 P.2d 221, 31 Cal. App.2d Supp. 766.

4. N.H.—Kellogg v. Eastman, 162 A. 775, 86 N.H. 37.

5. N.H.—Kellogg v. Eastman, supra.

#### Failure to use accommodations

Where jury were told to cease deliberations before midnight, and jury did not again take up consideration of cases until more than eight hours later, and jury knew that sleeping accommodations were available to them, statute providing that jurors shall not be required to continue deliberations without sleep and rest later than midnight was complied with, and violation of statute was not shown by evidence that some jurors chose not to use accommodations provided but to engage in noisy play. —Caldwell v. Yeatman, 15 A.2d 252, 91 N.H. 150.

#### Time of informing jury

The statute requiring the court to provide lodging for jurors at midnight or earlier imposes a mandatory duty on the court to provide lodging at or before midnight but does not require the court to advise the jury of that fact at any particular time during its deliberations, since it is discretionary with the court whether the jury should be so informed and when such instruction

should be given.—Dunne v. Carey, 79 A.2d 842, 37 N.H. 43.

6. Iowa.—Alexander v. Crosby, 129 N.W. 959, 150 Iowa 239.

Discussion of evidence before submission of cause see supra § 457.

#### Pleadings and evidence

In automobile accident case, in determining whose negligence and what negligence proximately caused alleged injury, jury may consider allegations in petition of defendant's negligence supported by evidence, and such inferences of negligence as may be drawn from pleadings sustained by evidence against plaintiff, together with provisions of statute requiring vehicles to operate at a reasonable and safe speed.—Southern Stages v. Clements, 30 S.E.2d 429, 71 Ga.App. 169.

7. Tex.—Blaugrund v. Gish, 179 S. W.2d 266, 142 Tex. 379—Craghead v. United Transports, Civ.App., 170 S.W.2d 325—Texas & P. Ry. Co. v. Van Zandt, Civ.App., 30 S.W.2d 503, reversed on other grounds, Com. App., 44 S.W.2d 950.

8. Tex.—Tondre v. Gerloff, Civ.App., 257 S.W.2d 153, error refused no reversible error.

64 C.J. p 1020 note 38.

#### Calculations of jurors

In action against construction company and its surety for damages for construction company's alleged failure to erect building in substantial compliance with building contract, jury was not guilty of misconduct in considering calculations of two of its members, based on the blueprints and other testimony introduced be-

fore them.—H. M. Cohen Lumber & Bldg. Co. v. Panos, Tex.Civ.App., 154 S.W.2d 206, error refused.

9. Neb.—Corn Exchange Nat. Bank v. Ochlar Orchards Co., 150 N.W. 651, 97 Neb. 535.

10. Tex.—Akers v. Epperson, 171 S. W.2d 483, 141 Tex. 189, 156 A.L.R. 1023—Maddox v. Texas Indemnity Ins. Co., Civ.App., 224 S.W.2d 495, error refused no reversible error.

11. U.S.—Southern Pac. Co. v. Klinge, C.C.A. Utah, 65 F.2d 85, certiorari denied Klinge v. Southern Pac. Co., 54 S.Ct. 72, 290 U.S. 657, 78 L.Ed. 569.

Tex.—Akers v. Epperson, 171 S.W.2d 483, 141 Tex. 189, 156 A.L.R. 1023. Probing minds of jurors as to discussion of matters not in evidence see infra subdivision f of this section.

12. Tex.—Fire Ass'n of Philadelphia v. Powell, Civ.App., 188 S.W. 47. 64 C.J. p 1020 note 40.

13. Ill.—Goldberg v. Capitol Freight Lines, 41 N.E.2d 302, 314 Ill.App. 347, affirmed 47 N.E.2d 67, 332 Ill. 283.

Mass.—Loughran v. Nolan, 29 N.E.2d 737, 307 Mass. 195.

64 C.J. p 1020 note 41.

#### All evidence in case

Generally the jury is to determine the issues from all the evidence in the case, not that produced and offered exclusively by one side or the other, but from the testimony of all witnesses, the depositions, and any other items of evidence admitted at the trial.—Friedrich v. Nolan, 78 N.E.2d 59, 81 Ohio App. 288.

lates to matters not pleaded by the parties.<sup>14</sup> Where there is a conflict in the evidence, it is the jury's duty to reconcile it, if possible,<sup>15</sup> but if impossible, they may give credit to that which they think most reliable and most entitled to belief under the circumstances disclosed,<sup>16</sup> and give their decision for the party in whose favor the evidence preponderates.<sup>17</sup> The jury may also consider during their deliberations what occurred and what appeared from their observation as well as testimony given orally;<sup>18</sup> and when the true meaning of an expression used by a witness is plainly apparent from the context and the connection in which it was made, or from other pertinent circumstances which show that the words were ignorantly or improperly used and do not convey the meaning actually intended, the jury are authorized to ascribe to the words the meaning which the surroundings indicate and which the witness evidently intended them to have.<sup>19</sup>

## f. Discussion and Consideration of Matters Not in Evidence or Issue Generally

Jurors are allowed some latitude in their deliberations in their efforts and methods adopted in arriving at a verdict, and they may discuss matters which have no basis in evidence or relevancy to a point in issue where nonprejudicial; but it is misconduct, generally, for jurors to discuss matters expressly excluded by the trial court.

While the jury should consider only the evidence and the matters which have been submitted to them by the instructions of the court,<sup>20</sup> illustrations and discussions of the jurors in weighing the testimony may take a fairly wide range,<sup>21</sup> and, if they are nonprejudicial, discussions of matters which have no basis in the evidence, or relevancy to a point in issue, are not ground for reversal.<sup>22</sup> If no overt act occurs, it is not misconduct requiring a reversal that a juror of his own accord and by his own secret process of reasoning takes into consideration an improper matter,<sup>23</sup> and is thus led to agree to a verdict different from that which he would otherwise have agreed to,<sup>24</sup> since the courts cannot

14. Tex.—McGee v. Cunningham, Civ.App., 17 S.W.2d 494.

### Failure to instruct

Where jury was not instructed to disregard evidence as to damages in excess of those pleaded, jury could properly consider such evidence without an amendment of the pleadings.—Sward v. Nash, 40 N.W.2d 828, 230 Minn. 100.

15. Del.—Coughlan v. Philadelphia B. & W. R. Co., 67 A. 148, 22 Del. 242.

64 C.J. p 1020 note 43. Averaging estimates of witnesses see *infra* § 472.

16. Tex.—Maddox v. Texas Indemnity Ins. Co., Civ.App., 224 S.W.2d 495, error refused no reversible error.

64 C.J. p 1020 note 44.

### Credibility of witnesses

Jurors must pass on credibility of witnesses and weight to be given their testimony, and in discussing such matters during deliberations jurors are exercising their proper prerogative.—Scoggins v. Curtiss & Taylor, Civ.App., 219 S.W.2d 446, reversed on other grounds 219 S.W.2d 451, 148 Tex. 15.

### Self-interest of party

Where testimony that driver of family purpose automobile did not have permission to use it is not disputed by other parol testimony, jury may test credibility of witnesses by their self-interest and weigh that testimony against facts from which permission to drive may be inferred.—

Jennings v. Campbell, 6 N.W.2d 376, 142 Neb. 354.

17. Tex.—Maddox v. Texas Indemnity Ins. Co., Civ.App., 224 S.W.2d 495, error refused no reversible error.

64 C.J. p 1021 note 45.

18. Wis.—Pargeter v. Chicago & N. W. R. Co., 60 N.W.2d 81, 264 Wis. 250.

19. Ga.—Seaboard Air Line Ry. v. Peebles, 77 S.E. 12, 12 Ga.App. 206.

20. Iowa.—In re Narber's Estate, 234 N.W. 185, 211 Iowa 713.

64 C.J. p 1021 note 48.

21. Ark.—Scullin v. Vining, 191 S. W. 924, 127 Ark. 124.

46 C.J. p 150 note 35-p 158 note 30.

22. N.Y.—Public Operating Corp. v. Weingart, 13 N.Y.S.2d 182, 257 App.Div. 379.

Utah.—Gribble v. Cowley, 112 P.2d 147, 100 Utah 217.

64 C.J. p 1021 note 50.

### Prejudicial as to damage issue only

In personal injury action arising out of motor vehicle accident, where there was no evidence on question of whether plaintiff's employer would fire plaintiff after trial, tendered evidence thereon having been excluded, conduct of jurors in discussing question in jury room while considering case was improper, but such conduct was prejudicial only on damage issue and not on liability issue submitted.—East Tex. Motor Freight Lines v. Sterrett, Tex.Civ.App., 240 S.W.2d 352.

### Negroes as unworthy of belief

Jurors' expression of belief in discussion that negroes as class were unworthy of belief could not be treated as misconduct, even though most of defendant's witnesses were negroes, since credibility was a question for jury.—Dallas Ry. & Terminal Co. v. Burns, Tex.Civ.App., 60 S.W.2d 801.

23. Tex.—Molter v. Madden, Civ. App., 207 S.W.2d 984.—Texas & P. R. Co. v. Aaron, Civ.App., 19 S.W.2d 930, certiorari denied 50 S.Ct. 409, 281 U.S. 756, 74 L.Ed. 1166.

### Defendant's absence during argument

Testimony of juror that he and other jurors thought that defendant's absence during argument was due to lack of interest in his case, and so believing they rendered verdict against him, was insufficient to reflect misconduct where defendant did not allege any overt act in such respect.—Molter v. Madden, Tex.Civ. App., 207 S.W.2d 984.

### Establishing misconduct

In order to establish misconduct of a juror, there must be more to base it on than mere undisclosed thoughts and impressions of jurors, but some overt act of one or more of the jurors of sufficient importance must be set up and proved before verdict can be set aside on this ground.—Molter v. Madden, *supra*.

24. Tex.—Texas & P. R. Co. v. Aaron, Civ.App., 19 S.W.2d 930, certiorari denied 50 S.Ct. 409, 281 U.S. 756, 74 L.Ed. 1166.

undertake to probe into or supervise the jurors' process of reasoning during their deliberations.<sup>25</sup>

The verdict will be vitiated, however, if the jury discuss and consider as a basis for their findings of fact something which is not legally admitted evidence,<sup>26</sup> or if they have let their verdict be influenced by the discussion and consideration of improper matters not in issue and which cannot legally have any effect on the rights of the parties.<sup>27</sup> Thus, it has been held misconduct requiring the verdict to be set aside that the jury discussed and based their finding on a statement made by counsel in his argument;<sup>28</sup> that a juror, without making such disclosure to the trial court, disclosed to his fellows during their deliberations the fact that one of the parties had attempted improperly to influence him, and the jury attempted to impose a punishment

by rendering verdict against the party who made the attempt;<sup>29</sup> that jurors were influenced by the argument of one of their members that a verdict for plaintiff would be futile as defendant would appeal and obtain a reversal;<sup>30</sup> that the jury refused recovery to a mother for loss of services of her minor son because one of their members, during deliberations, called attention to the fact that the son had already recovered a judgment in his own right for the same injuries;<sup>31</sup> that there was a discussion of pensions where the matter of pensions was not in evidence;<sup>32</sup> or that there was a discussion of the effect of income taxes on the verdict.<sup>33</sup>

It is likewise misconduct to discuss and consider the question of attorney's fees,<sup>34</sup> or the fact that plaintiff would have to pay attorney's fees from any recovery he might be allowed,<sup>35</sup> or the fact

25. Tex.—Kelley v. Dickson, Civ. App., 200 S.W.2d 719, error refused no reversible error—Texas & P. R. Co. v. Aaron, Civ.App., 19 S.W.2d 930, certiorari denied 50 S.Ct. 409, 281 U.S. 756, 74 L.Ed. 1166.

Probing minds of jurors as to discussion of matters in evidence see supra subdivision e of this section.

26. Mo.—State ex rel. State Highway Commission v. Patton, 77 S.W.2d 857, 229 Mo.App. 331.

Tenn.—Stone v. O'Neal, 90 S.W.2d 548, 19 Tenn.App. 512—Nash v. Mitchell, 9 Tenn.App. 134.

Tex.—Hudson v. West Central Drilling Co., Civ.App., 195 S.W.2d 387, error refused no reversible error.

64 C.J. p 1021 note 54.

#### Prejudicial to one of parties

Reading by juror of a document not properly introduced in evidence is ground for mistrial if there is sufficient ground to believe that one of the parties has been prejudiced thereby.—Hinton v. Gallagher, 57 S.E.2d 131, 190 Va. 421.

#### Expressly excluded matter

Jury may not discuss testimony expressly excluded by court, and juror's statement to other jurors as to contents of telephone directory advertisement, which had been excluded from evidence, was misconduct.—Wood v. Stokes, Tex.Civ.App., 219 S.W.2d 545, error dismissed.

#### New testimony

(1) Jurors may not receive new testimony or evidence during their deliberations.

Tenn.—Nash v. Mitchell, 9 Tenn.App. 134.

Tex.—Burkett v. Slauson, 237 S.W.2d 253, 150 Tex. 69—City of Houston v. Quinones, 177 S.W.2d 259, 142 Tex. 282—Akers v. Epperson, 171 S.W.2d 483, 141 Tex. 189, 155 A.

L.R. 1028—Lincoln v. Stone, Com. App., 59 S.W.2d 100—Wood v. Stokes, Civ.App., 219 S.W.2d 545, error refused—Maryland Cas. Co. v. Morua, Civ.App., 180 S.W.2d 194, error refused—Wald Transfer & Storage Co. v. Randolph, Civ.App., 56 S.W.2d 197, error dismissed.

(2) Juror is not permitted to become a witness during deliberation of jury.—Akers v. Epperson, 171 S.W.2d 483, 141 Tex. 189, 155 A.L.R. 1028.

(3) The purpose of charge by court is that a proper guide may be given jury in reaching proper verdict, and such purpose is thwarted when juror seeks information from outside source.—Figula v. Fort Worth & D. C. Ry. Co., Tex.Civ.App., 131 S.W.2d 998, error refused.

27. N.Y.—Public Operating Corp. v. Weingart, 13 N.Y.S.2d 182, 257 App.Div. 379.

Tex.—Houston Oil Co. of Texas v. Wilson, Civ.App., 70 S.W.2d 285, error dismissed—Wald Transfer & Storage Co. v. Randolph, Civ.App., 56 S.W.2d 197, error dismissed—Texas Employers' Ins. Ass'n v. Glass, Civ.App., 2 S.W.2d 902.

64 C.J. p 1021 note 54.

28. Pa.—Bullock v. Chester & Darby Telford Road Co., 113 A. 379, 270 Pa. 295.

Tex.—Missouri, K. & T. Ry. Co. of Texas v. O'Hare, Civ.App., 39 S.W.2d 939.

29. Iowa.—In re Merrill's Estate, 211 N.W. 361, 202 Iowa 837.

30. Tex.—Stapp v. Texas & P. Ry. Co., Civ.App., 20 S.W.2d 324.

31. Tenn.—Forsythe v. Central Mfg. Co., 53 S.W. 731, 103 Tenn. 497.

32. Tex.—Hudson v. West Central Drilling Co., Civ.App., 195 S.W.2d 387, error refused no reversible error.

33. Tex.—Union Bus Lines v. Moulder, Civ.App., 180 S.W.2d 509.

34. Mo.—Counts v. Thompson, 222 S.W.2d 487, 359 Mo. 455.

Tex.—Hudson v. West Central Drilling Co., Civ.App., 195 S.W.2d 387, error refused no reversible error—Union Bus Lines v. Moulder, Civ. App., 180 S.W.2d 509—Lander v. Jordan, Civ.App., 87 S.W.2d 1109.

35. Tex.—White Cabs v. Moore, 203 S.W.2d 200, 146 Tex. 101—City of Waxahachie v. Harvey, Civ.App., 255 S.W.2d 549, refused no reversible error—Texas Elec. Ry. Co. v. Wooten, Civ.App., 173 S.W.2d 463, error refused—Texas Elec. Ry. Co. v. Swofford, Civ.App., 159 S.W.2d 338—South Plains Coaches v. Box, Civ.App., 111 S.W.2d 1151, error dismissed—Dallas Ry. & Terminal Co. v. Burns, Civ.App., 60 S.W.2d 801.

64 C.J. p 1021 note 59.

#### Extent of consideration as determining misconduct

(1) Juror's suggestion that it was improper to discuss that percentage of damages awarded would go to plaintiff's attorney as contingent fee did not remedy misconduct of jury in discussing the matter at some length.—Texas & P. Ry. Co. v. Mix, Tex.Civ.App., 193 S.W.2d 542.

(2) Statement of one of jurors to others that plaintiff would have to pay attorney's fees was not misconduct where juror was immediately admonished that jury should not discuss such matters and no further reference was made thereto, in absence of showing that verdict was influenced thereby.—International Great Northern R. Co. v. Hawthorne, Civ.App., 90 S.W.2d 895, affirmed 116 S.W.2d 1056, 131 Tex. 622, certiorari denied 59 S.Ct. 487, 308 U.S. 639, 83 L.Ed. 1040.

that defendant was protected against liability by indemnity insurance.<sup>36</sup> It is not misconduct, however, for the jurors to discuss attorney's fees<sup>37</sup> or liability insurance,<sup>38</sup> where the trial court could find that such happenings, if true, occurred after the jury had decided on their verdict. Also it is not misconduct for a juror to request that the way of voting be kept a secret as he has friends on both sides of the case.<sup>39</sup>

### g. Misrepresentations by Jurors

It is misconduct for a juror to influence improperly another juror during deliberations by misrepresentations.

It is ground for setting the verdict aside that some of the jurors have been improperly influenced in rendering their verdict by the misrepresentations of another juror,<sup>40</sup> even though such misrepresentations are innocently made.<sup>41</sup>

## § 463. Discussion and Consideration of Personal Experiences or Knowledge as to Material Matters

- a. In general
- b. General knowledge on matters of common knowledge

### a. In General

Jurors are required to base their conclusions entirely on evidence produced during the trial and they must not permit their findings to be influenced by any facts known to them personally.

Although it has been said that the ancient doctrine permitted the jurors to render their verdict on facts within their personal knowledge as well as those derived from the testimony of witnesses,<sup>42</sup> it is now well settled, as a general rule, that a verdict cannot be based on facts in the private knowledge of jurors but must be based solely on evidence regularly produced on trial,<sup>43</sup> which they cannot disregard in deference to their own independent opinions or conclusions as to matters requiring proof.<sup>44</sup> If a juror knows any particular fact ma-

36. Tenn.—*France v. Newman*, 248 S.W.2d 392, 35 Tenn.App. 486.

Tex.—*Ethridge v. Sullivan*, Civ.App., 245 S.W.2d 1016, error refused—*Gillespie v. Rossi*, Civ.App., 238 S.W.2d 547, error refused no reversible error—*Texas & P. Ry. Co. v. Mix*, Civ.App., 193 S.W.2d 542—*Union Bus Lines v. Moulder*, Civ.App., 180 S.W.2d 509—*Greer v. Rogers*, Civ.App., 131 S.W.2d 782—*South Plains Coaches v. Box*, Civ.App., 111 S.W.2d 1151, error dismissed—*Lander v. Jordan*, Civ.App., 87 S.W.2d 1109.

64 C.J. p 1021 note 60.

### Facts constituting misconduct

(1) Undisputed testimony of jurors that they discussed and considered fact that defendant was or was not protected by insurance constituted misconduct as a matter of law because they went beyond the record and discussed a matter that was not in evidence and which was irrelevant to any issues submitted to them and one that was calculated to cause injury.—*Gillespie v. Rossi*, Tex.Civ.App., 238 S.W.2d 547, error refused no reversible error.

(2) Contention that there was no misconduct from jurors' discussion of fact that statute required defendant in automobile accident case to carry liability insurance could not be sustained where evidence showed defendant was not carrier for hire.—*Gaines v. Stewart*, Tex.Civ.App., 57 S.W.2d 207.

### Facts not constituting misconduct

(1) Litigant cannot be passed out of court merely because of juror's casual mention of insurance carried

by one of parties in the case.—*Yellow Cab Co. of Galveston v. Word*, Tex.Civ.App., 125 S.W.2d 1050.

(2) Belief of jurors that defendant in a personal injury action is covered by insurance is no justification for a large verdict.—*Herzog v. Neisner Bros.*, 88 N.E.2d 744, 339 Ill.App. 148.

37. Tex.—*Texas Utilities Co. v. Dear*, Civ.App., 64 S.W.2d 807, error dismissed—*McMath Co. v. Staten*, Civ.App., 60 S.W.2d 290.

38. Tex.—*McMath Co. v. Staten*, supra.

39. Tex.—*Crosby v. Stevens*, Civ.App., 184 S.W. 705.

40. Tex.—*Pryor v. New St. Anthony Hotel Co.*, Civ.App., 146 S.W.2d 428, error refused.

64 C.J. p 1025 note 89.

41. Tex.—*Whelan v. Henderson*, Civ.App., 137 S.W.2d 150, error dismissed, judgment correct—*Stehling v. Johnston*, Civ.App., 32 S.W.2d 696.

42. Mass.—*Schmidt v. New York Union Mut. Fire Ins. Co.*, 1 Gray 52.

43. Ga.—*Shahan v. American Tel. & Tel. Co.*, 35 S.E.2d 5, 72 Ga.App. 749.

Ill.—*Wanless v. Peabody Coal Co.*, 13 N.E.2d 996, 294 Ill.App. 401.

Iowa.—*In re Murray's Estate*, 26 N.W.2d 58, 238 Iowa 112—*Hoeft v. State*, 266 N.W. 671, 221 Iowa 694, 104 A.L.R. 1008.

Mo.—*Tuttle v. Brayton*, App., 215 S.W.2d 46.

Neb.—*Scherz v. Platte Valley Public Power & Irr. Dist.*, 37 N.W.2d 721, 151 Neb. 415.

N.Y.—*Rothstein v. Monette*, 17 N.Y. 82d 389.

R.I.—*W. C. Viall Dairy v. Providence Journal Co.*, 89 A.2d 839, 79 R.I. 416.

Tex.—*Motley v. Mielsch*, 200 S.W.2d 522, 145 Tex. 557.

Wash.—*Richey & Gilbert Co. v. Northwestern Natural Gas Corp.*, 134 P.2d 444, 16 Wash.2d 631.

Wis.—*Dahl v. Harwood*, 56 N.W.2d 557, 263 Wis. 1.

64 C.J. p 1022 note 64.

Discussion and consideration of personal experiences or knowledge: As grounds for new trial see New Trial § 58.

In criminal prosecutions see Criminal Law § 1373.

### Special knowledge on particular subject

Juror who has special knowledge on a particular subject is not permitted to impart to jury his expert opinion on material matters being considered by the jury in their deliberation.—*Maryland Cas. Co. v. Hearn*, 190 S.W.2d 62, 144 Tex. 317—*Hudson v. West Central Drilling Co.*, Tex.Civ.App., 195 S.W.2d 387, error refused no reversible error.

### Independent personal investigation

Jurors must base their verdicts or decisions on evidence presented during the trial, and not on the basis of some independent personal investigation or determination of the facts outside of court.—*Provo River Water Users' Ass'n v. Carlson*, 133 P.2d 777, 103 Utah 93.

44. Tex.—*City of Waxahachie v.*

terial to the case, it is his duty to be sworn as a witness in open court and be publicly examined,<sup>45</sup> so that the testimony may go to his brethren under the sanction of an oath,<sup>46</sup> it may first be scrutinized as to its competency and relevancy,<sup>47</sup> it may be subjected to cross-examination and contradiction or explanation,<sup>48</sup> and in order that court and counsel may be informed of the evidence on which the jury are to act.<sup>49</sup> The fact that a juror or jurors have considered or discussed their personal knowledge as to material matters is improper<sup>50</sup> and constitutes misconduct<sup>51</sup> which is generally fatal to the validity of the verdict.<sup>52</sup> On the other hand it has been held that in order to be ground for reversal it must appear that the statements of a juror were of positive facts asserted to be within his knowledge rather than a mere expression of opinion;<sup>53</sup> that miscon-

duct of a juror in stating matters of his own personal knowledge will not operate to reverse if the verdict was correct;<sup>54</sup> and that, since the jurors must act to some degree on their own knowledge of the parties and the witnesses, it is not ground for reversal that a juror states things which he has heard that seriously affect the credibility of a witness.<sup>55</sup> Also, in order to be prejudicial misconduct it must relate and affect a material issue in the case.<sup>56</sup> While it is not misconduct for a juror to state during deliberations that he does not believe a witness is telling the truth and to argue with his fellow jurymen that a witness is unworthy of belief,<sup>57</sup> a statement by a juror relative to the credibility of a witness based on personal knowledge is misconduct.<sup>58</sup>

Harvey, Civ.App., 255 S.W.2d 549, error refused no reversible error. 64 C.J. p 1022 note 65.

45. Ga.—Shahan v. American Tel. & Tel. Co., 35 S.E.2d 5, 72 Ga.App. 749.

Neb.—Scherz v. Platte Valley Public Power & Irr. Dist., 37 N.W.2d 721, 151 Neb. 415.

64 C.J. p 1022 note 66.

46. Tex.—Burkett v. Slauson, 237 S.W.2d 253, 150 Tex. 69.

64 C.J. p 1022 note 67.

47. Neb.—Scherz v. Platte Valley Public Power & Irr. Dist., 37 N.W.2d 721, 151 Neb. 415.

64 C.J. p 1022 note 68.

48. Neb.—Scherz v. Platte Valley Public Power & Irr. Dist., supra.

Tex.—Burkett v. Slauson, 237 S.W.2d 253, 150 Tex. 69.—Motley v. Mielsch, 200 S.W.2d 622, 145 Tex. 557.—Panhandle & Santa Fe Ry. Co. v. Ray, Civ.App., 221 S.W.2d 936, error refused no reversible error.—Wald Transfer & Storage Co. v. Randolph, Civ.App., 56 S.W.2d 197, error dismissed.

64 C.J. p 1022 note 69.

#### Obvious unfairness

It is obviously unfair for a juror to give testimony that cannot be cross-examined, contradicted, or explained by the party against whom it is directed.—Thompson v. Goode, Tex.Civ.App., 221 S.W.2d 569, error refused no reversible error.

49. N.J.—De Gray v. New York, etc., Tel. Co., 53 A. 260, 68 N.J.Law 454. 64 C.J. p 1022 note 70.

50. Tex.—Great Western Inv. Co. v. Scott, Civ.App., 254 S.W.2d 411, error refused no reversible error.—Beaumont, S. L. & W. R. Co. v. Richmond, Civ.App., 78 S.W.2d 232, error dismissed.

#### Effect of drugs

Where the effect on testamentary capacity of morphine and demerol

given testatrix to relieve pain of cancer was the real issue in will contest, juror's statement during discussion of issue that morphine and demerol given to his father-in-law, who had suffered from cancer, did not affect his mental capacity was improper.—Burkett v. Slauson, Civ.App., 235 S.W.2d 505, reversed on other grounds 237 S.W.2d 253, 150 Tex. 69.

51. Mo.—Cook v. Kansas City, 214 S.W.2d 430, 358 Mo. 296.

Tex.—City of Houston v. Quinones, 177 S.W.2d 259, 142 Tex. 282.—Panhandle & Santa Fe Ry. Co. v. Ray, Civ.App., 221 S.W.2d 936, error refused no reversible error.

52. Tex.—Becker v. Mollenauer, Civ. App., 234 S.W.2d 690, error refused no reversible error.—Perez v. Consolidated Underwriters, Civ.App., 206 S.W.2d 162, error refused no reversible error.—Maryland Cas. Co. v. Morua, Civ.App., 180 S.W.2d 194, error refused.—Figula v. Fort Worth & D. C. Ry. Co., Civ.App., 131 S.W.2d 998, error refused.

64 C.J. p 1022 note 71.

#### Proper lookout

Statement by juror, during consideration of issue whether proper lookout had been maintained by operator of mowing machine which cut off legs of three year old child, that juror had operated mowers and knew that operator could have seen child if he had kept proper lookout, constituted injurious misconduct entitling city to new trial.—City of Houston v. Quinones, 177 S.W.2d 259, 142 Tex. 282.

53. Kan.—Hulett v. Hancock, 72 P. 224, 66 Kan. 519.

Tex.—Pure Oil Co. v. Pope, Civ.App., 75 S.W.2d 175, reversed, no opinion.

#### Estimate of speed from skid marks

Fact that juror in automobile collision case was filling station operator and mechanic, and had frequent opportunity to observe skidmarks,

did not set apart as expert his opinion from that of other persons on question of how fast a vehicle is traveling when it begins to skid, and in absence of juror's having made tests or other special observations under given conditions, his opinion as to speed just before skidding was not that of a self-appointed expert resulting in misconduct.—Akers v. Epperson, 171 S.W.2d 483, 141 Tex. 189, 156 A.L.R. 1028.

54. Iowa.—Hathaway v. Burlington, etc., R. Co., 66 N.W. 892, 97 Iowa 747.

Tex.—City of Houston v. Quinones, Civ.App., 172 S.W.2d 187, reversed on other grounds 177 S.W.2d 259, 142 Tex. 282.

55. S.C.—McKain v. Love, 20 S.C.L. 506, 27 Am.D. 401.

56. Tex.—Giles v. Flanagan, Civ. App., 123 S.W.2d 477, error dismissed, judgment correct.

**Discussion after reaching verdict** was not prejudicial misconduct.—McMath Co. v. Staten, Tex.Civ.App., 60 S.W.2d 290.

57. Tex.—Thompson v. Goode, Civ. App., 221 S.W.2d 569, error refused no reversible error.

58. Tex.—Storey v. Zuniga, Civ.App., 254 S.W.2d 415, error refused no reversible error.—Thompson v. Goode, Civ.App., 221 S.W.2d 569, error refused no reversible error.

#### Juror acquainted with party or witnesses

It is not proper for a juror who is acquainted with the litigants or their witnesses to communicate to other jurors not so acquainted facts not in the record, which are calculated to influence the verdict in a way different from what it would have been in the absence of such communication.—Elizondo v. Reagan, Tex.Com.App., 55 S.W.2d 540.

### b. General Knowledge on Matters of Common Knowledge

Matters of common knowledge and experience may be used by jurors in arriving at their verdict and in drawing inferences and reaching conclusions from the evidence.

As to matters on which men in general have a common fund of knowledge and experience the

jurors are entitled to use their own general knowledge and experience in coming to their verdict;<sup>59</sup> but they cannot use their own judgment or knowledge as to matters of which knowledge is common only in a particular business or occupation.<sup>60</sup> Common knowledge and experience may be used in drawing inferences and reaching conclusions from the facts proved.<sup>61</sup> The jurors may resort to their

59. U.S.—Jones v. Atlantic Refining Co., D.C.Pa., 55 F.Supp. 17.

Cal.—Belletich v. Pollock, 171 P.2d 57, 75 Cal.App.2d 142.

Ky.—Cary-Glendon Coal Co. v. Carmichael, 80 S.W.2d 29, 258 Ky. 411. Miss.—D. L. Fair Lumber Co. v. Weens, 16 So.2d 770, 196 Miss. 201, 151 A.L.R. 631—Harris v. Pounds, 187 So. 891, 185 Miss. 688.

N.Y.—Rothstein v. Monette, 17 N.Y. S.2d 363.

Ohio.—Eckert v. Schmitt, 190 N.E. 591, 47 Ohio App. 61.

R.I.—W. C. Viall Dairy v. Providence Journal Co., 89 A.2d 839, 79 R.I. 418.

Tex.—Gillette Motor Transport Co. v. Whitfield, 200 S.W.2d 624, 145 Tex. 571—Motley v. Mielsch, 200 S.W.2d 622, 145 Tex. 557—Kiel v. Mahan, Civ.App., 214 S.W.2d 865, error refused no reversible error—Hudson v. West Central Drilling Co., Civ. App., 195 S.W.2d 387, error refused no reversible error.

Va.—Drumwright v. Walker, 189 S. E. 310, 167 Va. 307.

Wis.—Dahl v. Harwood, 56 N.W.2d 557, 263 Wis. 1.

Wyo.—Shikany v. Salt Creek Transp. Co., 45 P.2d 645, 48 Wyo. 190.

64 C.J. p 1023 note 78.

#### Comment based on common knowledge

A juror's remark, after jury had retired, that plaintiff could have flown from one city on a certain date on June 26 so as to have been in another city on day that employment contract sued on was allegedly entered into, was no more than a statement based on common knowledge and did not constitute misconduct justifying a new trial.—Cooper Petroleum Co. v. Coghill, Tex.Civ.App., 198 S.W.2d 616.

#### Notorious and unquestioned matters

Jurors may within a limited sphere apply their general knowledge on notorious and unquestioned matters, and to that extent it is unnecessary for a party to offer evidence on the matter.—Holt v. Pariser, 54 A.2d 89, 161 Pa.Super. 315.

#### Matters held to be of common knowledge

(1) Present means of traffic over city streets.—City of New Haven v. First Nat. Bank & Trust Co., 57 A.2d 494, 134 Conn. 322.

(2) Conditions wrought by war in

determining whether repairs to truck damaged by defendant were made in reasonable time.—Holt v. Pariser, 54 A.2d 89, 161 Pa.Super. 315.

(3) Jurors' common knowledge and experiences with automobiles.—Blue Diamond Motor Bus Co. v. Hale, Tex. Civ.App., 69 S.W.2d 228, error dismissed.

(4) Mechanical effect of various steps taken in operation of automobiles.—Oliver v. Bereano, 48 N.Y.S.2d 142, 267 App.Div. 747, affirmed 60 N. E.2d 134, 293 N.Y. 931.

(5) Nature of mechanical devices in common use.—Dallas Ry. & Terminal Co. v. Horton, Tex.Civ.App., 119 S.W.2d 122, error dismissed.

(6) Life and annuity tables.—Jones v. Atlantic Refining Co., D.C. Pa., 55 F.Supp. 17.

(7) That a plastic substance is one capable of being moulded and being pressed into form, that in its use for setting tile or glass it would be employed while soft and not in rigid form, and that cement is a plastic substance which when employed for like purpose would be used in a soft form.—Eagles v. National Plate & Window Glass Co., 45 N.E.2d 402, 312 Mass. 483.

(8) Common effect on vision of one walking by the aid of artificial light in a dark or semidark place, when the light is suddenly withdrawn, and of the fact that in such case it takes time for the sight to become adjusted.—Mello v. New England Theatres, 52 N.E.2d 19, 315 Mass. 171.

(9) The fact that horses are likely to be frightened by sudden and startling noises.

Me.—State v. Maine Cent. R. Co., 29 A. 1086, 86 Me. 309.

Mo.—McCleary v. Chicago, B. & Q. R. Co., 264 S.W. 376.

(10) Other matters see 64 C.J. p 1023 note 76 [b].

#### Matters held not to be of common knowledge

(1) Value of personal services furnished a decedent over a period of years.—Belletich v. Pollock, 171 P.2d 57, 75 Cal.App.2d 142.

(2) Juror's relating of a test conducted by his employer to determine a driver's reaction time, which was unknown by other jurors with possible exception of one.—Crawford v.

Detering Co., 237 S.W.2d 615, 150 Tex. 140.

(3) Other matters see 64 C.J. p 1023 note 76 [c].

60. Mo.—Tuttle v. Brayton, App., 215 S.W.2d 46.

64 C.J. p 1024 note 77.

#### Professional services

Where services for which plaintiff seeks recovery involves professional services calling for special skill, value of which is not a matter of common knowledge, jury may not wholly disregard the evidence of value and substitute their own judgment for the evidence.—Tuttle v. Brayton, supra.

#### Consideration of testimony of experts

(1) Findings of jury, in matters outside field of general knowledge and cases wherein testimony of experts or persons particularly familiar with matters at issue is necessary, must be based on witnesses' testimony or other evidence made part of record.—Gange v. Gange, N. D., 56 N. W.2d 688.

(2) If the opinions of experts as given in evidence do not comport with jury's ideas of sound logic, the jurors have a right to say so.—Maryland Cas. Co. v. Hears, 190 S.W.2d 62, 144 Tex. 317—Motley v. Mielsch, Civ.App., 199 S.W.2d 552, reversed on other grounds 200 S.W.2d 622, 155 Tex. 557—Hudson v. West Central Drilling Co., Tex.Civ.App., 195 S.W. 2d 387, error refused no reversible error.

(3) In determining weight to be given to evidence of experts the jury should apply their general knowledge to the evidence and such opinions should not be blindly received by the jury but should control only as they are found reasonable.—Richey & Gilbert Co. v. Northwestern Natural Gas Corp., 134 P.2d 444, 16 Wash.2d 631.

61. U.S.—Larsen v. Chicago & N. W. Ry. Co., C.A.III, 171 F.2d 841—Hrabak v. Hummel, D.C.Pa., 55 F. Supp. 775, affirmed, C.C.A., 143 F.2d 594, certiorari denied 65 S.Ct. 57, 323 U.S. 724, 89 L.Ed. 582.

Ark.—Kroger Grocery & Baking Co. v. Woods, 187 S.W.2d 869, 205 Ark. 131—Missouri Pac. R. Co. v. Benham, 89 S.W.2d 928, 192 Ark. 35—Kansas City Southern Ry. Co. v. Wilson, 171 S.W. 484, 119 Ark. 133.



own general knowledge on the subject of inquiry to test the credibility of witnesses,<sup>62</sup> or to judge of the weight and force of the evidence.<sup>63</sup>

# § 464. — Knowledge Derived from View or Inspection

While in some jurisdictions the result of a juror's observation on an authorized view or inspection is evi-

dence, in others it is not so regarded but the purpose of the observation is solely to enable the jurors better to understand and apply the evidence in the case.

Under the rule prevailing in many states, the result of a juror's observation on an authorized inspection or view is evidence which may be considered, in connection with the other evidence regularly produced on trial, in making up the verdict.<sup>64</sup>

Cal.—Lang v. Barry, 161 P.2d 949, 71 Cal.App.2d 121.

Ky.—Rogers v. Price, 160 S.W.2d 371, 290 Ky. 153.

Mass.—Pearl v. William Filene's Sons Co., 58 N.E.2d 825, 317 Mass. 529—Cunningham v. Boston & M. R. R., 34 N.E.2d 697, 309 Mass. 215, certiorari denied Boston & M. R. R. v. Cunningham, 62 S.Ct. 185, 314 U.S. 682, 86 L.Ed. 546.

Minn.—Saturnini v. Rosenblum, 14 N.W.2d 108, 217 Minn. 155, 163 A.L.R. 284.

Mo.—Miller v. Hotel Savoy Co., 68 S.W.2d 929, 228 Mo.App. 463.

N.H.—Jutras v. Satters, Inc., 75 A.2d 712, 96 N.H. 360—Dowling v. L. H. Shattuck, Inc., 17 A.2d 529, 91 N.H. 234.

N.J.—Palestroni v. Jacobs, 73 A.2d 89, 8 N.J.Super. 438, reversed on other grounds 77 A.2d 183, 10 N.J.Super. 266.

Tenn.—High v. Lenow, 258 S.W.2d 742, 195 Tenn. 158.

Tex.—Arando v. Higgins, Civ.App., 220 S.W.2d 291.

Wis.—McCarty v. Weber, 60 N.W.2d 716, 265 Wis. 76—De Keuster v. Green Bay & W. R. Co., 59 N.W.2d 452, 264 Wis. 476.

Wyo.—Shikany v. Salt Creek Transp. Co., 45 P.2d 645, 48 Wyo. 130. 64 C.J. p 1024 note 78.

## Estimates of time and distance

Estimates of time and distance by witnesses are proper matters to be considered and weighed by jury in the light of common sense and experience.—DeRossett v. Malone, 239 S.W.2d 366, 34 Tenn.App. 461.

## Not restricted to facts directly proved

Jurors are not restricted to a consideration of facts directly proved but may give effect to such inferences as reasonably may be drawn from them.—McCarty v. Weber, 60 N.W.2d 716, 265 Wis. 76—De Keuster v. Green Bay & W. R. Co., 59 N.W.2d 452, 264 Wis. 476.

## Circumstantial evidence

Where circumstantial evidence is relied on, jurors may draw on their own experience to determine the proper inferences to be deduced therefrom in so far as matters within the realm of common experience are concerned.—Spolter v. Four-Wheel Brake Service Co., 222 P.2d 307, 99 Cal.App. 2d 690.

## Value and damages

(1) In estimating the value of do-

mestic services rendered by a wife and mother, jury is authorized to consider what may be the value of many services incapable of exact proof, but measured in the light of the jury's own observation and experience.

Ga.—American Fidelity & Casualty Co. v. Farmer, 48 S.E.2d 141, 77 Ga.App. 192—Pollard v. Kent, 200 S.E. 542, 59 Ga.App. 118.

Okl.—H. A. Marr Grocery Co. v. Jones, 226 P.2d 392, 203 Okl. 698—Aderhold v. Stewart, 46 P.2d 346, 172 Okl. 77.

Tex.—Martin v. Weaver, Civ.App., 161 S.W.2d 812, error refused.

(2) Jury is entitled to take into consideration their knowledge acquired in everyday affairs of life in placing value on personal services rendered.

Cal.—Burch v. Levy Bros. Box Co., 117 P.2d 435, 47 Cal.App.2d 104.

Mo.—Tuttle v. Brayton, App., 215 S.W.2d 46.

Utah.—Startin v. Madsen, 237 P.2d 834.

(3) Assessment of damages for impairment of earning capacity rests upon common knowledge of the jury or fact-finding tribunal.

U.S.—Hrabak v. Hummel, D.C.Pa., 55 F.Supp. 775, affirmed, C.C.A., 143 F.2d 594, certiorari denied 65 S.Ct. 57, 323 U.S. 724, 89 L.Ed. 582.

Mass.—Doherty v. Ruiz, 18 N.E.2d 542, 302 Mass. 145.

N.H.—Dowling v. L. H. Shattuck, Inc., 17 A.2d 529, 91 N.H. 234.

(4) In determining evidence as to value of property, the jury should apply their general knowledge to the evidence.

La.—Housing Authority of Shreveport v. Harkey, 8 So.2d 528, 200 La. 526.

Tenn.—Green v. Arnold, 150 S.W.2d 1075, 25 Tenn.App. 67.

Wash.—Richey & Gilbert Co. v. Northwestern Natural Gas Corp., 134 P.2d 444, 16 Wash.2d 631.

(5) In determining extent of loss suffered by plaintiff when defendant's cattle, which were knowingly allowed to run at large along a public highway, broke into plaintiff's fenced fields and destroyed crops, jury had a right to take into jury box with them their common sense and experience in the everyday affairs of life.—Rogers v. Stillman, Ark., 268 S.W. 2d 614.

(6) Other questions of value and damages see 64 C.J. p 1024 note 78 [a].

62. N.J.—Palestroni v. Jacobs, 73 A.2d 89, 8 N.J.Super. 438, reversed on other grounds 77 A.2d 183, 10 N.J.Super. 266.

64 C.J. p 1024 note 78.

63. U.S.—Pacific Emp. Ins. Co. v. Orren, C.C.A.Tex., 169 F.2d 1011.

Me.—Reed v. Central Maine Power Co., 172 A. 823, 132 Me. 476.

N.J.—Palestroni v. Jacobs, 73 A.2d 89, 8 N.J.Super. 438, reversed on other grounds 77 A.2d 183, 10 N.J.Super. 266.

Tex.—Maryland Casualty Co. v. Hearn, 190 S.W.2d 62, 144 Tex. 317—Traders & General Ins. Co. v. Gibbs, Civ.App., 229 S.W.2d 410, error refused no reversible error.

Wash.—Richey & Gilbert Co. v. Northwestern Natural Gas Corp., 134 P.2d 444, 16 Wash.2d 631.

64 C.J. p 1024 note 80.

64. Ariz.—Webb v. Hardin, 89 P.2d 60, 53 Ariz. 310.

Ark.—Coca-Cola Bottling Co. v. Jenkins, 82 S.W.2d 15, 190 Ark. 930.

Cal.—Neel v. Mannings, Inc., 122 P.2d 576, 19 Cal.2d 634—Rau v. Redwood City Woman's Club, 245 P.2d 12, 111 Cal.App.2d 546—White v. Walsh, 34 P.2d 276, 105 Cal.App.2d 828—Peckwith v. Lavezzola, 122 P.2d 678, 50 Cal.App.2d 211—Sassano v. Rouillard, 81 P.2d 213, 27 Cal.App. 2d 372.

Idaho.—Department of Finance of State v. Union Pac. R. Co., 104 P.2d 1110, 61 Idaho 484.

Kan.—Chicago, etc., R. Co. v. Willets, 25 P. 576, 45 Kan 110.

Me.—Reed v. Central Maine Power Co., 172 A. 823, 132 Me. 476—Shepherd v. Inhabitants of Camden, 20 A. 91, 82 Me. 535.

Mass.—Murphy v. Boston & Maine R., 65 N.E.2d 922, 319 Mass. 413—Papageorge v. Boston & Maine R., 57 N.E.2d 576, 317 Mass. 235—Keeney v. Ciborowski, 24 N.E.2d 17, 304 Mass. 371.

Neb.—Roberts v. Carlson, 8 N.W.2d 175, 142 Neb. 851—Denison v. Omaha & C. B. St. Ry. Co., 280 N.W. 905, 135 Neb. 307—Rundall v. Grace, 272 N.W. 398, 132 Neb. 490—Meister v. Krotter, 267 N.W. 161, 131 Neb. 35.

N.H.—Chouinard v. Shaw, 104 A.2d 522.

64 C.J. p 1024 note 82.

In other jurisdictions, although the jury can consider and apply the evidence in the light of the knowledge obtained by their inspection,<sup>65</sup> and they need not completely disregard everything they saw and every impression they received from their view,<sup>66</sup> the things the jurors may observe during the view or inspection cannot under any circumstances be treated as evidence, the purpose of the observation being solely to enable the jurors better to understand the situation and better to understand and apply the evidence in the case.<sup>67</sup> Even under the first view the verdict must be supported

by some evidence other than that derived by the jurors from their view;<sup>68</sup> and they cannot arbitrarily disregard the evidence regularly produced on trial and base their verdict solely on the result of their observations, if the case is not one that turns on the absence or presence of a physical fact which the jury may see for themselves, and is a case which no amount of oral testimony can affect.<sup>69</sup> Under the second view where the issue is as to a physical fact which the jurors could determine by their senses in making the view, the jurors may disregard testimony to the effect that the fact is otherwise

#### Authorized view:

In criminal cases see Criminal Law § 956.

In eminent domain proceedings see Eminent Domain § 288.

View or inspection in general see supra § 47.

#### Special kind of evidence

In land damage case, view by jury constitutes special kind of evidence.

—Reed v. Central Maine Power Co., 172 A. 823, 132 Me. 476.

#### Pleadings amended by view

If any facts were observed by jury on authorized inspection that were not well pleaded, the pleadings were amended to that extent.—Coca-Cola Bottling Co. v. Jenkins, 82 S.W.2d 15, 190 Ark. 930.

#### Physical appearance of witness

In personal injury action, where plaintiff, who had sustained permanent scar on forehead and nose, was a witness so that trial judge and jurors saw scar, what they saw was evidence to be considered in determining amount of damages.—Sassano v. Rouillard, 81 P.2d 213, 27 Cal.App.2d 372.

#### In Kentucky

(1) The rule stated in text is followed.—Republic Steel Corp. v. Adkins, 209 S.W.2d 88, 306 Ky. 729.—Kentucky Utilities Co. v. Sapp's Adm'r, 60 S.W.2d 976, 249 Ky. 406.

(2) However, it has been stated that the purpose of view is not to supply evidence, but to present physical facts so that jury may understand situation and appraise and apply evidence more intelligently.—City of Somerset v. Guffey, 58 S.W.2d 606, 248 Ky. 415.

65. Ga.—Shahan v. American Tel. & Tel. Co., 35 S.E.2d 5, 72 Ga.App. 749.

Wash.—Shumaker v. Charada Inv. Co., 49 P.2d 44, 183 Wash. 521.  
64 C.J. p 1025 note 83.

66. W.Va.—Fox v. Baltimore etc., R. Co., 12 S.E. 757, 34 W.Va. 466, 480.

67. Fla.—Dempsey-Vanderbilt Hotel v. Hulsman, 15 So.2d 903, 153 Fla. 800.

Ga.—Shahan v. American Tel. & Tel. Co., 35 S.E.2d 5, 72 Ga.App. 749.

Ill.—Geohagan v. Union Elevated R. Co., 101 N.E. 577, 258 Ill. 352.—Rich v. City of Chicago, 59 N.E. 306, 187 Ill. 396.—Boal v. City of Chicago, 23 N.E.2d 237, 301 Ill.App. 536.

Ind.—Western Ind. Gravel Co. v. Opp, 99 N.E.2d 265, 121 Ind.App. 673.

Mich.—Valenti v. Mayer, 4 N.W.2d 5, 301 Mich. 551.—Sunday v. Wolverine Service Stations, 251 N.W. 402, 265 Mich. 19.

Minn.—Ball v. Twin City Motor Bus Co., 30 N.W.2d 523, 225 Minn. 274, 9 A.L.R.2d 933.—Huyink v. Hart Publications, 2 N.W.2d 552, 212 Minn. 87.

N.J.—Bancroft Realty Co. v. Alenciewicz, 72 A.2d 360, 7 N.J.Super. 105.

Ohio.—Maggart v. Deaton, 87 N.E.2d 352, 84 Ohio App. 327.—In re Digble's Estate, App., 79 N.E.2d 159.—Lacey v. Heisey, 5 N.E.2d 699, 53 Ohio App. 451.

R.I.—Kulpa v. General Ice Cream Corp., 43 A.2d 60, 71 R.I. 168.

Utah.—Redd v. Airway Motor Coach Lines, 137 P.2d 374, 104 Utah 9.

Wash.—State v. McVeigh, 214 P.2d 165, 35 Wash.2d 493.—Portland-Seattle Auto Freight v. Jones, 131 P.2d 736, 15 Wash.2d 603.

W.Va.—Frankton v. Consolidated Bus Lines, 62 S.E.2d 126, 134 W.Va. 816.—Doman v. Baltimore & O. R. Co., 22 S.E.2d 703, 125 W.Va. 8.—Thorn v. Addison Bros. & Smith, 194 S.E. 771, 119 W.Va. 479.

Wis.—Townsend v. State, 43 N.W.2d 458, 257 Wis. 329.—Simpson v. Waukesha County, 202 N.W. 366, 185 Wis. 662.—Ohrmundt v. Spiegelhoff, 184 N.W. 692, 176 Wis. 214.—Haswell v. Reuter, 177 N.W. 8, 171 Wis. 228.—Solberg v. Robbins Lumber Co., 133 N.W. 28, 147 Wis. 259, 37 L.R.A.N.S., 790.—Groundwater v. Town of Washington, 65 N.W. 871, 92 Wis. 56.—Washburn v. Milwaukee & L.W. R. Co., 18 N.W. 328, 59 Wis. 364.  
64 C.J. p 1025 note 85.

#### View not part of trial

It is improper to permit any evi-

dence to be offered during a view of premises since act of viewing is not part of trial.—State v. McVeigh, 214 P.2d 165, 35 Wash.2d 493.

#### Duty to introduce evidence

A jury view will not serve to take from party on whom burden of proof lies duty of introducing sufficient other evidence on which jury could properly hold that party on whom burden of proof lies has sustained that burden by evidence other than jury's view.—Frankton v. Consolidated Bus Lines, 62 S.E.2d 126, 134 W.Va. 816.

#### View not reception of evidence

(1) Jury is not, strictly speaking, receiving evidence when viewing premises.—Shahan v. American Tel. & Tel. Co., 35 S.E.2d 5, 72 Ga.App. 749.

(2) In action against hotel by guest for injuries sustained while descending stairway, where hotel's witness, a tile setter, testified that broken tiles could not have been replaced without new mortar joints revealing by their color the fact that repairs had been made, and some of jurors applied that test when they viewed the premises, and from their own examination came to conclusion that witness was mistaken in his testimony denying that repairs had been made, the rules that evidence may not be taken at the view and that jury may not arrive at their verdict by personal knowledge of facts were not violated.—Dempsey-Vanderbilt Hotel v. Hulsman, 15 So.2d 903, 153 Fla. 800.

68. Kan.—Chicago, K. & W. R. Co. v. Parsons, 32 P. 1083, 51 Kan. 408.

Wis.—Haswell v. Reuter, 177 N.W. 8, 171 Wis. 228.

64 C.J. p 1025 note 86.

69. Kan.—Headington v. Central Bldg. Co., 41 P.2d 1040, 141 Kan. 338.

Ky.—Republic Steel Corp. v. Adkins, 209 S.W.2d 88, 306 Ky. 729.

Neb.—Meister v. Krotter, 267 N.W. 161, 131 Neb. 35.

64 C.J. p 1025 note 87.

#### Not substitute for evidence

Neb.—Meister v. Krotter, supra.

than they found it, even though no other witness testifies to the fact as the jury know it to be.<sup>70</sup>

#### § 465. Papers and Articles Which May Be Taken or Sent to Jury Room

- a. General rule
- b. Law books and dictionaries
- c. Verdict on former trial of same case
- d. Models and maps

##### a. General Rule

It is largely a matter in the discretion of the trial court what papers may be taken into the jury room by the jury.

As a general rule what papers may be taken by the jury into the jury room rests largely in the discretion of the trial court.<sup>71</sup> With respect to minutes and stenographer's notes of testimony, the jury may consider the testimony of witnesses only in its oral form,<sup>72</sup> and normally neither notes of testimony nor portions thereof can be sent to the jury,<sup>73</sup> and it is reversible error that the jury by mistake take with them a typewritten copy of the stenographer's notes of a party's testimony in chief, although as soon as the mistake is discovered the jury are also given a copy of the cross-examination.<sup>74</sup> However, the minutes of the testimony may be sent out with the jury when both parties consent.<sup>75</sup> On the other hand, in some jurisdictions, the matter of causing the stenographer's notes to be read and of submitting copies of the whole

or portions of them to the jury rests in the discretion of the trial judge.<sup>76</sup>

##### b. Law Books and Dictionaries

It is generally error for the jury to take law books or dictionaries with them to refer to during deliberations.

It is reversible error to permit the jury to take law books with them so that they can determine the law for themselves;<sup>77</sup> but, in the absence of a showing that the jury examined or used the reports, error cannot be predicated on the fact that reports, used by the judge in preparing his instructions, and marked by him at places where there were cases similar to the one involved, were left in the jury room during deliberations.<sup>78</sup> Where the evidence of foreign law consists of statutes or judicial opinions, the court may, in its discretion, decline to send them to the jury.<sup>79</sup> Unless it can be determined that no prejudice resulted to a party,<sup>80</sup> it generally is ground for reversal that the jury obtained and took into the jury room a dictionary which they consulted to determine the meaning of legal<sup>81</sup> or other terms,<sup>82</sup> which they do not understand.

##### c. Verdict on Former Trial of Same Case

It is improper for the jury to take with them a verdict rendered on a former trial, at least where such verdict is given consideration during deliberations.

While it is reprehensible conduct for a juror to seek to find out how the jury stood on a former trial of the case,<sup>83</sup> the taking by the jury of a

70. Wis.—American States Security Co. v. Milwaukee Northern Ry. Co., 120 N.W. 844, 139 Wis. 193—Washburn v. Milwaukee & L. R. Co., 16 N.W. 338, 59 Wis. 364.

71. Conn.—Coy v. Town of Milford, 12 A.2d 641, 126 Conn. 484.

D.C.—Murray v. U. S., 130 F.2d 442, 76 U.S.App.D.C. 179.

Mo.—Dougherty Real Estate Co. v. Gast, App. 95 S.W.2d 877.

Neb.—Langworthy v. Connelly, 15 N.W. 737, 14 Neb. 340.

Pa.—Williams v. Lumbermen's Ins. Co. of Philadelphia, 1 A.2d 658, 332 Pa. 1.

64 C.J. p 1026 note 92.

##### Who may furnish

It is the general practice that counsel making concluding argument furnish essential papers to the jury.—McCowen v. Aldred, 78 S.E.2d 66, 88 Ga.App. 788.

72. Tenn.—Crisman v. McMurray, 64 S.W. 711, 107 Tenn. 469.

73. Pa.—Zank v. West Penn Power Co., 82 A.2d 554, 163 Pa.Super. 164.

**Prior notes of testimony transcribed**  
Rule is not affected by fact that prior notes of testimony are trans-

scribed and therefore in writing.—Zank v. West Penn Power Co., supra.

##### Notes of testimony at other trial

In action for injuries received by plaintiff wife as result of an automobile collision with vehicle of defendant, sending out to jury all notes of testimony of former trial of personal injury action brought by plaintiff wife was error, and not even relevant portions of testimony could go out to jury, since such methods tended to emphasize one part of testimony above other parts.—Zank v. West Penn Power Co., supra.

74. Tenn.—Crisman v. McMurray, 64 S.W. 711, 107 Tenn. 469.

64 C.J. p 1032 note 89.

75. Minn.—Coit v. Waples, 1 Minn. 134.

76. Conn.—Coy v. Town of Milford, 12 A.2d 641, 126 Conn. 484.

77. Mo.—Harrison v. Hance, 37 Mo. 185—Barker v. Pool, 6 Mo. 260.

78. Neb.—In re Wilson's Estate, 208 N.W. 951, 114 Neb. 593.

79. Mass.—Farnum v. Pitcher, 24 N.E. 590, 151 Mass. 470.

80. Ariz.—Lane v. Mathews, 245 P.2d 1025, 74 Ariz. 201, reheard 251 P.2d 303, 75 Ariz. 1.

Ind.—Indianapolis Power & Light Co. v. Moore, 5 N.E.2d 118, 103 Ind. App. 521.

81. N.H.—Daniels v. Barker, 200 A. 410, 89 N.H. 416.

Tex.—Figula v. Fort Worth & D. C. Ry. Co., Civ.App., 131 S.W.2d 998, error refused—Norris Bros. v. Matinson, Civ.App., 118 S.W.2d 460, error dismissed.

64 C.J. p 1032 note 80.

##### Incompetent evidence

Action of officer in charge of jury in supplying jury with dictionary at their request during deliberations without consent of plaintiff vitiated verdict, since officer had no right to take the place of the court and assist the jury in any way in its consideration of the evidence and since the dictionary was incompetent evidence and its exclusion would have been required if offered as evidence during trial.—Daniels v. Barker, 200 A. 410, 89 N.H. 416.

82. N.J.—Palestroni v. Jacobs, 77 A. 2d 183, 10 N.J.Super. 266.

83. Tex.—Prewitt v. Southwestern

verdict rendered on a former trial will not result in a reversal where it is shown that the verdict was not seen by the jurors;<sup>84</sup> or that such verdict was not read by the jurors until they had agreed on their own;<sup>85</sup> or that the jury were distinctly instructed to treat it as if it did not exist, and to found their verdict on the evidence before them.<sup>86</sup> It has been held not ground for reversal that the jury were permitted to take with them the complaint on which was indorsed the verdict rendered on a former trial of the case, no objection being made thereto and it not having been done fraudulently or designedly to influence the verdict.<sup>87</sup>

#### d. Models and Maps

Models and maps used to explain testimony of witnesses may be taken to the jury room and given consideration by the jury during their deliberations.

It is generally held that the jury may be permitted to take with them models,<sup>88</sup> or maps or diagrams,<sup>89</sup> which have been used to illustrate or explain the testimony of the witnesses; but it has been said that maps or diagrams of this character, whether formally received in evidence or treated merely as illustrative of the witnesses' testimony, are to be considered only in connection with the other evidence, and are not to be taken to the jury room on final submission;<sup>90</sup> and it has been held error to permit the jury to take a map which was altered after it was admitted in evidence.<sup>91</sup> It is usually

said that the court may, in its discretion, refuse to allow papers and articles of this character to go to the jury;<sup>92</sup> but it has been held an abuse of discretion, and reversible error, for the court, without cause, to refuse to send to the jury a map or plan admitted in evidence and exhibiting the place of the accident.<sup>93</sup>

### § 466. — Papers, Documents, and Articles in Evidence

- a. In general
- b. Depositions
- c. Papers attached to depositions

#### a. In General

As a general rule the trial court may, in its discretion, permit the jury to take to the jury room writings and other tangible objects which have been admitted in evidence.

While there are some cases which hold, without qualification, that the jury should not be permitted to take with them to the jury room books, papers, or documents which have been admitted in evidence,<sup>94</sup> and others that to grant such permission is erroneous unless with the consent of the parties,<sup>95</sup> the general rule is that the trial court may, in its discretion, properly permit the jury to take with them, on retiring to consider their verdict, the writings and other tangible objects which have been admitted in evidence,<sup>96</sup> even without the consent of

Tel., etc., Co., 101 S.W. 812, 46 Tex. Civ.App. 123.

84. Ind.—Ohio, etc., R. Co. v. Hill, 34 N.E. 646, 7 Ind.App. 255.

85. Ga.—Fulton County v. Phillips, 16 S.E. 260, 91 Ga. 65—Georgia Pac. R. Co. v. Dooley, 12 S.E. 923, 86 Ga. 294, 12 L.R.A. 342.

86. Ga.—Dawson v. Briscoe, 24 S.E. 157, 97 Ga. 408.

87. Ga.—Hudson v. Hudson, 16 S.E. 349, 90 Ga. 581.

64 C.J. p 1032 note 86.

88. Wis.—Blazinski v. Perkins, 45 N.W. 947, 77 Wis. 9.

64 C.J. p 1032 note 81.

89. Neb.—Suter v. Chicago, R. I. & P. Ry. Co., 121 N.W. 113, 84 Neb. 256.

64 C.J. p 1032 note 92.

90. Iowa.—Baker v. Zimmerman, 161 N.W. 479, 179 Iowa 272.

91. Ill.—Chicago & W. I. R. Co. v. Heidenreich, 98 N.E. 567, 254 Ill. 231, Ann.Cas.1913C 266.

92. Mont.—Carman v. Montana Cent. Ry. Co., 79 P. 690, 32 Mont. 137.

64 C.J. p 1032 note 95.

93. Pa.—Chitwood v. Philadelphia & R. Ry. Co., 109 A. 645, 266 Pa. 435.

94. Tenn.—Shapple v. Graves, 9 Tenn.App. 567.

64 C.J. p 1032 note 94.

Document not affecting verdict

Where a plat was offered in evidence in order that the jury might have the scene of the accident before them, it was improper for the jury to take it to their jury room, but since the correctness of the plat was not disputed, and it could not have influenced the verdict, it would not constitute error.—Shapple v. Graves, supra.

95. Md.—Moore v. McDonald, 12 A. 117, 68 Md. 321.

64 C.J. p 1032 note 95.

96. Conn.—Ziskin v. Confietto, 79 A. 2d 816, 137 Conn. 629.

D.C.—Murray v. U. S., 130 F.2d 442, 76 U.S.App.D.C. 179—Pinn v. Lawson, 72 F.2d 742, 63 App.D.C. 370.

Ill.—Wacker-Wabash Corp. v. City of Chicago, 112 N.E.2d 903, 350 Ill. App. 343—Bartosh v. Ryan, 100 N.E.2d 330, 344 Ill.App. 214—Cooney v. Hughes, 34 N.E.2d 566, 310 Ill. App. 371.

Ky.—Commonwealth, for Use and Benefit of Eversole, v. West, 97 S.W.2d 405, 265 Ky. 550—Hermitage Land & Timber Co. v. Scott's Ex'rs, 93 S.W.2d 1, 263 Ky. 651.

Mich.—Rich v. Daily Creamery Co., 6 N.W.2d 539, 303 Mich. 344.

Mo.—Williamson v. St. Louis Public Service Co., 252 S.W.2d 295, 363 Mo. 508—Holtz v. Daniel Hamm Drayage Co., 209 S.W.2d 883, 357 Mo. 538—Dougherty Real Estate Co. v. Gast, App., 95 S.W.2d 877.

N.M.—Corpus Juris cited in State v. Lord, 84 P.2d 80, 92, 42 N.M. 638.

Pa.—Durdella v. Trenton-Philadelphia Coach Co., 37 A.2d 431, 349 Pa. 432—Quartz v. City of Pittsburgh, 16 A.2d 400, 340 Pa. 277—Brenner v. Leshner, 2 A.2d 731, 332 Pa. 522—Noreika, to Use of Petraszkas v. Pennsylvania Indemnity Corp., 5 A.2d 619, 135 Pa.Super. 474—Kerchner v. Brutsche, Com.Pl., 39 Del.Co. 158.

Tex.—Denton v. Hunt, 235 S.W.2d 212, Civ.App., error refused no reversible error—Texas Emp. Ins. Ass'n v. Crow, Civ.App., 218 S.W.2d 229, affirmed 221 S.W.2d 235, 148 Tex. 113, 16 A.L.R.2d 913.

Vt.—Barber v. Stratton, 10 A.2d 211, 111 Vt. 43.

64 C.J. p 1032 note 96.

At common law, the practice was against allowing the jury to take exhibits to the jury room, but at present trial court may in its discretion allow

the parties,<sup>97</sup> and even though they might not be directly involved in the case.<sup>98</sup> A statute, providing that "papers introduced in evidence" may be sent with the jury, simply modifies and extends the common-law rule as to exhibits containing writings, so that written exhibits may be sent to the jury whether or not under seal, and the statute in no

way restricts the common-law power of the court to send exhibits not in writing to the jury.<sup>99</sup>

Generally, unless there is a statute or rule of court providing that the jury may take with them, on retiring for deliberation, all papers which have been received or read in evidence,<sup>1</sup> and even then

exhibits to be taken to the jury.—*Eller v. Crowell*, Mo., 238 S.W.2d 310.

**Exercise of discretion held not abused**

(1) Sending to jury room all exhibits present in court.

Ill.—*Dinwiddle v. Siefkin*, 20 N.E.2d 130, 299 Ill.App. 316.

Mich.—*Rich v. Daily Creamery Co.*, 6 N.W.2d 539, 303 Mich. 344.

(2) Allowing jury to take with them in civil case criminal record of plaintiff offered to attack his credibility.—*Forcier v. Hopkins*, 110 N.E.2d 126, 329 Mass. 668.

(3) Allowing will of deceased to go to jury when only signature therein was offered in evidence.—In re *Cheney's Estate*, 274 N.W. 5, 23 Iowa 1076.

(4) Permitting decree to be taken to jury room without it having been read to jury first, since a document admitted in evidence does not have to be read to jury before it may be taken to jury room.—*Ridgway v. Crum*, 98 N.E.2d 394, 343 Ill.App. 12.

(5) In action against executor on note executed by deceased, sending to jury room of photographs of deceased's signature and of signature to note, containing markings made by handwriting expert in comparing signatures.—In re *Cheney's Estate*, 274 N.W. 5, 23 Iowa 1076.

(6) Sending out with jury, of unsigned duplicate copy of statement alleged to have been adopted by plaintiff to effect that defendants did not cause automobile accident.—*Brenner v. Leshner*, 2 A.2d 731, 332 Pa. 522.

(7) Allowing jury to take memorandum amounting to admission against interest which was read to jury and exhibited to them, notwithstanding memorandum was not marked for identification or formally introduced in evidence.—*Hilker v. Agricultural Bond & Credit Corp.*, Tex.Civ.App., 96 S.W.2d 544, error dismissed.

**Exercise of discretion held abused**

Submission to jury of complete copies of each of three newspaper articles, only portions of which referred to plaintiff, in special issues as to truth or falsity thereof in libel suit was error.—*Houston Printing Co. v. Hunter*, Civ.App., 105 S.W.2d 312, error dismissed, affirmed 106 S.W.2d 1043, 129 Tex. 652.

**Evidence introduced after charge to jury**

Where, through oversight in action for disability benefits under life pol-

icy, X-ray plates explained to jury by medical witnesses were not formally offered in evidence until after charge to jury, subsequently admitting plates and permitting them to be taken out by jury did not constitute abuse of discretion.—*Becker v. Prudential Ins. Co. of America*, 188 A. 400, 124 Pa.Super. 138.

**Erroneously admitted evidence**

(1) Permitting jury to take to jury room and consider exhibits erroneously admitted over defendants' objections was error.—*Evola Realty Co. v. Westerfield*, Ky., 251 S.W.2d 298.

(2) Photographs portraying things immaterial to any issue in case which were improperly and erroneously received in evidence should not be subject to examination by jury after they have retired to deliberate on issues submitted to them.—*Texas Emp. Ins. Ass'n v. Crow*, 221 S.W.2d 235, 148 Tex. 113, 10 A.L.R.2d 913.

97. Mich.—*Tubbs v. Dwelling-House Ins. Co.*, 48 N.W. 296, 84 Mich. 646, 64 C.J. p 1026 note 97.

98. Minn.—*Cohen v. Seashore*, 193 N.W. 1009, 159 Minn. 345.

99. Cal.—*Higgins v. Los Angeles Gas & Electric Co.*, 115 P. 313, 159 Cal. 651, 34 L.R.A., N.S., 717.

**"Papers read in evidence"**

Physician's book was not a paper read in evidence which might be carried from the bar by the jury and its refusal is not error where the so-called impeaching portion of the book was equivalent to a sworn statement impeaching a witness.—*Nordhaus v. Marek*, 45 N.E.2d 933, 317 Ill.App. 351.

1. Tex.—*Texas Emp. Ins. Ass'n v. Crow*, 221 S.W.2d 235, 148 Tex. 113, 10 A.L.R.2d 913.

64 C.J. p 1027 note 1.

**Test of admissibility** of a document that comes within category of written evidence within rule permitting jury to take written evidence with them into retirement does not turn on whether jurors can understand it.—*Texas Emp. Ins. Ass'n v. Crow*, supra.

**Refusal qualified by condition**

Refusal to allow jury to take certain evidence to jury room was error notwithstanding court qualified refusal with condition that, if jury had requested such evidence during their deliberations, it would be given to them.—*Dallas Ry. & Terminal Co. v. Durkee*, Tex.Civ.App., 193 S.W.2d 222, error refused no reversible error—

*Bankers Life Co. of Des Moines, Iowa, v. Butler*, Tex.Civ.App., 122 S.W.2d 1077.

**On motion of parties**

(1) Under rule permitting jury to take written evidence to jury room, it is mandatory on trial judge on written motion of either party to send to jury room any written instrument or evidence properly admitted during trial.—*Texas Emp. Ins. Ass'n v. Applegate*, Tex.Civ.App., 205 S.W.2d 412, error refused no reversible error.

(2) The mere absence of a request from jury to take out with the jury in their retirement photographs admitted in evidence does not justify refusal of a request from a party that photographs be sent out or, by itself, render error of such refusal, harmless.—*Dallas Ry. & Terminal Co. v. Orr*, 215 S.W.2d 862, 147 Tex. 383.

**Matters held within statute or rule**

(1) Ordinary photographs constitute written evidence within rule permitting jury to take written evidence with them into retirement.—*Texas Emp. Ins. Ass'n v. Crow*, 221 S.W.2d 235, 148 Tex. 113, 10 A.L.R.2d 913.—*Dallas Ry. & Terminal Co. v. Durkee*, Tex.Civ.App., 193 S.W.2d 222, refused no reversible error.—*Younger Bros v. Ross*, Tex.Civ.App., 151 S.W.2d 621, error dismissed.

(2) Where photographs and documentary evidence disclose facts on vital controverted issues, court should not speculate on rights of the parties and assume that no injury resulted from violation of court rule providing that jury may take with them in their retirement any written evidence except depositions of witnesses.—*Dallas Ry. & Terminal Co. v. Durkee*, Tex.Civ.App., 193 S.W.2d 222, refused no reversible error.

(3) X-ray pictures of injured employee's fractured arm, introduced in compensation proceeding constituted written evidence within rule permitting jury to take written evidence with them into retirement and could not be excluded on ground that they were technical and unintelligible to average juror.—*Texas Emp. Ins. Ass'n v. Crow*, supra.

**Matters held not within statute or rule**

(1) Excerpts from a transcript of court reporter's notes of testimony of defendant taken in another trial, introduced in evidence by plaintiff to impeach defendant, were not written evidence within rule permitting jury

according to some authorities,<sup>2</sup> the trial court may, in its discretion, refuse to permit papers or objects which have been admitted in evidence to be taken by the jury;<sup>3</sup> but there is some authority which regards the sending of a paper in evidence to the jury as a valuable right of the party offering it, the denial of which is reversible error;<sup>4</sup> and, where there is no doubt or question as to the accuracy and materiality of exhibits which have been admitted in evidence, it is an abuse of discretion for the court, without cause, to refuse to send them to the jury on being requested to do so.<sup>5</sup> Also, the court cannot properly refuse to allow the jury to take all the written evidence bearing on a given point where it allows a part of such evidence to be taken.<sup>6</sup> Although permitted to do so, the jury are not bound to take out papers in evidence.<sup>7</sup> The fact that the jury, through mistake,<sup>8</sup> or even contrary to the directions of the court,<sup>9</sup> take with them to the jury room articles which have been offered in evidence will not vitiate the verdict where it does not appear that such action was prejudicial to the party

complaining.

*Necessity that counsel be present or notified.* If there is no statute to the contrary, the court may send documents in evidence to the jury in the absence of, and without notice to, counsel.<sup>10</sup>

### b. Depositions

Generally, it is error for the court to permit the jury to take to the jury room depositions which have been read on trial.

It has been held in many jurisdictions either with,<sup>11</sup> or without,<sup>12</sup> apparent statutory basis therefor that it is error to permit the jury to take to their room depositions which have been read on trial. Within this rule are affidavits or statements which have been read in evidence as the testimony of a witness,<sup>13</sup> or which have been admitted to impeach a witness.<sup>14</sup> Statutes providing without exception that papers read or used in evidence may be taken by the jury are usually held not to abrogate the rule or authorize or require that depositions be sent out with the jury.<sup>15</sup>

to take written evidence to jury room when they retire.—*Bonds v. Lloyd*, Civ.App., 218 S.W.2d 334, error dismissed 217 S.W.2d 1000, 147 Tex. 523.

(2) Where certain checks were admitted to enable jury to determine from plaintiff's signatures thereto whether plaintiff could write, signatures were not read in evidence without statute providing that where only part of paper has been read in evidence, excluded part must be detached before jury may take paper with them.—*Price v. White Line Cab & Baggage Co.*, Tex.Civ.App., 87 S.W.2d 1103, error dismissed.

2. Cal.—*Powley v. Swensen*, 80 P. 722, 146 Cal. 471.  
64 C.J. p 1027 note 2.

3. Fla.—*Routh v. Williams*, 193 So. 71, 141 Fla. 334.

III.—*Johnson v. McKnight*, 39 N.E.2d 700, 313 Ill.App. 260.

Mass.—*Turturro v. Calder*, 29 N.E.2d 744, 307 Mass. 159.  
Mich.—*Sweeney v. Adam Groth Co.*, 257 N.W. 855, 269 Mich. 436.

Mo.—*Williamson v. St. Louis Public Service Co.*, 252 S.W.2d 295, 363 Mo. 508—*Eller v. Crowell*, 238 S.W.2d 310—*Dougherty Real Estate Co. v. Gast*, App., 95 S.W.2d 877.  
Pa.—*Williams v. Lumbermen's Ins. Co. of Philadelphia*, 1 A.2d 658, 332 Pa. 1.

64 C.J. p 1027 note 3.

### Documents of limited purposes

In cases involving attorney's fees, trial court should permit no extraneous argument to be based on documents competent only as bearing on value and extent of services perform-

ed, should carefully instruct as to limited purpose of their reception in evidence, and in exercise of sound discretion should not permit such documents to be taken to jury room.—*Elliott v. Brown*, 111 N.E.2d 169, 349 Ill.App. 428.

### Ordinance admitted in evidence

Mass.—*Turturro v. Calder*, 29 N.E.2d 744, 307 Mass. 159.

4. Ala.—*Poster v. Smith*, 16 So. 61, 104 Ala. 248.

5. Pa.—*Chitwood v. Philadelphia & R. Ry. Co.*, 109 A. 645, 266 Pa. 435—*Noreika*, to Use of Petranskas v. Pennsylvania Indemnity Corp., 5 A.2d 619, 135 Pa.Super. 474.

6. Ohio.—*Marshall v. Thomas*, 31 Ohio Cir.Ct. 363.  
64 C.J. p 1027 note 6.

7. La.—*Littlefield v. Beamis*, 5 Rob. 145.

8. Neb.—*Morris v. Miller*, 119 N.W. 453, 83 Neb. 218, 131 Am.S.R. 636, 20 L.R.A.N.S., 907, 17 Ann.Cas. 1047.

9. U.S.—*Cudahy Packing Co. v. Skoumal*, Neb., 125 F. 470, 60 C.C.A. 306.

10. Ind.T.—*Fibus v. St. Louis, etc., R. Co.*, 104 S.W. 568, 7 Ind.T. 139, 145.

11. Tex.—*Corpus Juris cited in Continental Fire & Casualty Ins. Corp. v. Drummond*, Civ.App., 220 S.W.2d 922, 929—*Harris v. Levy*, Civ.App., 217 S.W.2d 154—*England v. Pitts*, Civ.App., 56 S.W.2d 493, error dismissed.  
64 C.J. p 1027 note 12.

**Purpose of statute forbidding jury to take depositions of witnesses to jury room is that reading unduly emphasizes such testimony.**—*Butler v. Abilene Mut. Life Ins. Ass'n*, Tex. Civ.App., 108 S.W.2d 972, error dismissed.

### Statute held mandatory

Tex.—*England v. Pitts*, Civ.App., 56 S.W.2d 493, error dismissed.

### Printed chart of oral testimony not deposition

Tex.—*City of Denton v. Hunt*, Civ. App., 235 S.W.2d 212, error refused no reversible error.

### Taking of any part of deposition prohibited

Tex.—*Harris v. Levy*, Civ.App., 217 S.W.2d 154.

**Interrogatories and written answers have been held deposition within rule forbidding jury to take depositions with them on retiring for deliberation.**—*O'Mara v. Kroetch*, 16 P.2d 818, 170 Wash. 440.

12. N.M.—*Corpus Juris cited in State v. Lord*, 84 P.2d 80, 92, 42 N.M. 638.

Pa.—*Greenberg v. Ungar*, Com.Pl., 35 Luz.Leg.Reg. 289.  
64 C.J. p 1027 note 13.

13. Tex.—*Hall v. Cook*, Civ.App., 117 S.W. 449.  
64 C.J. p 1028 note 14.

14. Iowa.—*Hraha v. Maple Block Coal Co.*, 135 N.W. 406, 154 Iowa 710.

64 C.J. p 1028 note 15.

15. Ill.—*Johnson v. N. K. Fairbank Co.*, 156 Ill.App. 381.  
64 C.J. p 1028 note 16.

On the other hand, in a number of jurisdictions, it is considered proper to permit depositions to be taken out with the jury on their retirement.<sup>16</sup> Under this latter rule it is largely discretionary with the court whether or not permission will be given to take the depositions,<sup>17</sup> and especially may it exercise its discretion and refuse permission where part of the deposition, which cannot be separated from the rest without mutilation, contains incompetent evidence which has been ruled out.<sup>18</sup> Indeed, it has been held reversible error to send the jury a deposition containing inadmissible matter which is indicated only by pencil marks, although the judge instructs the jury not to consider the excluded matter.<sup>19</sup> Under some statutes the court on request of the jury for a deposition of a witness may give its recollection as to the testimony sought by the jury, or such testimony may be read by a court stenographer in the presence of, or after notice to, the parties or their counsel.<sup>20</sup> Although the propriety of sending depositions to the jury is denied, it is not reversible error to do so where it appears that no prejudice can result,<sup>21</sup> or timely objection is not made.<sup>22</sup>

### c. Papers Attached to Depositions

Papers attached to a deposition and which have the character of evidence apart from the deposition, may as a general rule, be detached and taken to the jury room.

Generally, where papers attached to a deposition have the character of evidence independent of their connection with the deposition, they may be permitted to be detached and taken to the jury room,<sup>23</sup> although the court, where no prejudice results, may, in its discretion, refuse such permission.<sup>24</sup> If the attached paper is not introduced in evidence independently, but is only in evidence as a part of the deposition, it cannot be sent to the jury if the deposition itself cannot;<sup>25</sup> and it has been held error to permit the jury to take papers detached from the deposition where the effect of such taking is to give them a wrong impression of the facts in controversy.<sup>26</sup>

### § 467. — Papers and Articles Not in Evidence

The jury should not take with them to the jury room papers and articles not in evidence.

As a general rule it is improper or error,<sup>27</sup> constituting in some cases reversible error, to permit the jury, even by mistake,<sup>28</sup> to take with them to the jury room papers or articles not properly in evidence, and which would tend to influence the verdict.<sup>29</sup> However, the verdict will not be reversed where it appears that the jurors' verdict was not prejudicially influenced by their possession of such papers<sup>30</sup> or by their having before them,

16. Ohio.—Moody v. Vickers, 72 N. E.2d 280, 79 Ohio App. 218.  
64 C.J. p 1028 note 17.

17. Ohio.—Moody v. Vickers, supra.  
64 C.J. p 1028 note 18.

#### Proper exercise of discretion

Where deposition of absent witness was introduced by agreement, but court sustained objections to part of the deposition, refusal to send deposition to jury room was proper exercise of discretion.—Moody v. Vickers, supra.

18. Ohio.—Moody v. Vickers, supra.  
64 C.J. p 1028 note 19.

19. Ala.—Lurie v. Kegan-Grace Co., 96 So. 344, 209 Ala. 339.

20. Okl.—Hill v. McQueen, 230 P. 2d 483, 204 Okl. 394, 22 A.L.R.2d 1220.

21. Wash.—Wintermute v. Standard Furniture Co., 102 P. 443, 53 Wash. 539.

64 C.J. p 1028 note 21.

22. Iowa.—Shields v. Guffey, 9 Iowa 322.

N.H.—Kent v. Tyson, 20 N.H. 121.

23. Tex.—Bankers Life Co. of Des Moines, Iowa, v. Butler, Civ.App., 122 S.W.2d 1077—Kaminski v. Kaminczak, Civ.App., 86 S.W.2d 883.

64 C.J. p 1028 note 23.

24. Minn.—Ruder v. National Council, Knights and Ladies of Security, 145 N.W. 118, 124 Minn. 431.  
64 C.J. p 1028 note 24.

25. Iowa.—Oskaloosa College v. Western Union Fuel Co., 54 N.W. 152, 57 N.W. 903, 90 Iowa 380.

26. Tex.—Chamberlain v. Pybas, 17 S.W. 50, 81 Tex. 511.

27. Okl.—Corpus Juris cited in Peoples Finance & Thrift Co. v. Ferrier, 129 P.2d 1015, 1018, 191 Okl. 364.

28. Tex.—Triangle Cab Co. v. Taylor, 192 S.W.2d 143, 144 Tex. 568.

**Computations made by counsel and used in arguments are not evidence and, if reduced to writing, except by jurors, their use in jury room is unauthorized.**—Conger v. White, 158 P. 2d 415, 69 Cal.App.2d 28.

28. N.Y.—Elliott v. Luengene, 39 N. Y.S. 850, 17 Misc. 78.  
64 C.J. p 1029 note 28.

29. N.Y.—In re Roberts' Will, 283 N.Y.S. 50, 246 App.Div. 87.—Altshuler v. Exeller Chemical Co., 46 N.Y. S.2d 28, appeal denied 47 N.Y.S.2d 118, 267 App.Div. 820.

Okl.—Peoples Finance & Thrift Co. v. Ferrier, 129 P.2d 1015, 191 Okl. 364.

64 C.J. p 1029 note 29.

**It is a salutary rule, not a mere "dictate of formalism," which requires courts to protect a verdict against any possibility of a miscarriage of justice which might result from a jury's consideration of a statement containing unproved facts.**—In re Roberts' Will, 283 N.Y.S. 50, 246 App.Div. 87.

30. Cal.—Conger v. White, 158 P.2d 415, 69 Cal.App.2d 28.

N.Y.—Altshuler v. Exeller Chemical Co., 46 N.Y.S.2d 28, appeal denied 47 N.Y.S.2d 118, 267 App.Div. 820.

Or.—Hanson v. Schrick, 85 P.2d 355, 160 Or. 397.

64 C.J. p 1029 note 30.

#### Prejudice not presumed

Inaccurate or misleading newspaper reports of trial proceedings which find their way into the hands of jurors sitting in the case may be a proper basis for declaration of a mistrial, or the award of a new trial after verdict where prejudice results, but prejudice cannot be presumed.—Eichten v. Central Minn. Co-op. Power Ass'n of Redwood County, 28 N.W. 2d 862, 224 Minn. 180.

#### "Handbook for Jurors"

Directing impaneled jurors' attention to a "Handbook for Jurors," which contained valuable information with respect to general jury system

improperly, such articles;<sup>31</sup> or counsel has failed to perform his duty to examine the documents proposed to be sent with the jury during their deliberations;<sup>32</sup> or where counsel by his action has waived any objections he may have had to the papers taken by the jury.<sup>33</sup> A statute or rule which authorizes the jury to take any written evidence with them on retiring impliedly excludes any written exhibit or illustrative writing or drawing not introduced in evidence.<sup>34</sup>

Where a portion of a book, paper, or document is excluded from evidence, the jury should not be permitted to take the paper on retirement unless something is pasted over the excluded portion,<sup>35</sup> or it is withheld from the jury in some other effectual mode,<sup>36</sup> and it has been held error to send the entire paper to the jury room with no safeguard against their examining the parts of the paper which have not been admitted in evidence, except a direction to examine only the part which has been admitted;<sup>37</sup> but the sending of the eliminated portion has been held not prejudicial error where the maker of the document was fully cross-examined with respect to it.<sup>38</sup> It is not error for the court to refuse to allow the jury to take a paper,

document,<sup>39</sup> or article<sup>40</sup> which has not been admitted in evidence.

Some cases have recognized exceptions to the general rule and hold that, if the jury are informed that such papers are not in evidence, it is not error to permit them to take a paper, which is a mere calculation, account, or estimate of what is claimed and is fully supported by the evidence,<sup>41</sup> a bill testified to as being correct,<sup>42</sup> a memorandum or document used by a witness in giving his testimony,<sup>43</sup> an index or key to evidence to enable the jury more readily to determine the matters in dispute,<sup>44</sup> or a model, map, or diagram used to explain the testimony of witnesses, as discussed supra § 465 c. If counsel for both parties consent to giving the jury papers not in evidence this cannot afterwards be urged as an objection to the verdict.<sup>45</sup>

### § 468. — Instructions

In some jurisdictions the trial court, in its discretion, may allow the jury to take instructions with them to the jury room.

In the absence of statute or absolute rule of practice, it is often held that the trial court, in its discretion, may allow,<sup>46</sup> or refuse to allow,<sup>47</sup> the jury to take the instructions with them when they

and jury's duties as citizens, etc., did not constitute error on ground that jurors trying case received instructions not signed by trial judge—*Shuford v. City of Dallas*, 190 S.W.2d 721, 144 Tex. 342.

31. *Mass.—Campbell v. Ashler*, 70 N.E.2d 302, 320 Mass. 475.  
*Tex.—Triangle Cab Co. v. Taylor*, Civ.App., 190 S.W.2d 755, affirmed 192 S.W.2d 143, 144 Tex. 568.  
 64 C.J. p 1029 note 31.

32. *Ala.—McCormick v. Badham*, 85 So. 401, 204 Ala. 2.  
*Minn.—State v. Nichols*, 13 N.W. 153, 29 Minn. 357.

33. *Cal.—Conger v. White*, 158 P.2d 415, 69 Cal.App.2d 28.

34. *Tex.—Triangle Cab Co. v. Taylor*, Civ.App., 190 S.W.2d 755, affirmed 192 S.W.2d 143, 144 Tex. 568.

35. *Tex.—Sargent v. Lawrence*, 40 S.W. 1075, 16 Tex.Civ.App. 540.

36. *Me.—Rich v. Hayes*, 54 A. 724, 97 Me. 293.

37. *Ala.—Lurie v. Kegan-Grace Co.*, 96 So. 344, 209 Ala. 339.  
 64 C.J. p 1029 note 35.

38. *Ohio.—Presti v. Cleveland Ry. Co.*, 160 N.E. 508, 26 Ohio App. 536, affirmed 161 N.E. 44, 118 Ohio St. 375, 58 A.L.R. 1186.

39. *D.C.—Pinn v. Lawson*, 72 F.2d 742, 63 App.D.C. 370.

*Ga.—Way v. Arnold*, 18 Ga. 181.

*Mass.—Chase v. Perley*, 19 N.E. 398, 148 Mass. 289.

*Pa.—Kerchner v. Brutsche*, Com.Pl., 39 Del.Co. 168.  
*Tex.—Bassmer v. Kotulek*, Civ.App., 75 S.W.2d 295.

40. *R.I.—Ashton v. Higgins*, 96 A.2d 632.

**Viewing machine for X-ray photographs**  
*R.I.—Ashton v. Higgins*, supra.

41. *Ark.—Swanson v. Johnson*, 205 S.W.2d 702, 212 Ark. 340.  
*N.Y.—Bitterman v. Gluck*, 9 N.Y.S. 2d 1007, 256 App.Div. 336.

*Pa.—Pennsylvania Co. for Insurances on Lives and Granting Annuities v. Philadelphia Elec. Co.*, 200 A. 18, 331 Pa. 125.

64 C.J. p 1029 note 38.

42. *Ind.—Waltz v. Robertson*, 7 Blackf. 499.

43. *Ala.—McCormick v. Badham*, 85 So. 401, 204 Ala. 2.  
 64 C.J. p 1030 note 40.

44. *Ala.—Washington Nat. Ins. Co. v. Partain*, 167 So. 353, 27 Ala.App. 150.

#### Specific items in books

In action by collector to recover certain sums of money paid to employer, trial court properly permitted jury to use certain index cards, prepared by collector, to enable jury to locate specific items in books in evidence, where jury was specifically

instructed that cards were not to be considered as evidence—*Washington Nat. Ins. Co. v. Partain*, supra.

45. *Mo.—Baker v. Rice*, 52 Mo. 23.

46. *Idaho.—O'Connor v. Meyer*, 154 P.2d 174, 66 Idaho 15.

*Mich.—Behrendt v. Wilcox*, 269 N.W. 155, 277 Mich. 232.

*W.Va.—Wiseman v. Ryan*, 182 S.E. 670, 116 W.Va. 525.

64 C.J. p 1030 note 44.

#### Commendable practice

It is not only permissible but commendable for trial court to permit jury to take into jury room a copy of written instructions—*Valley Nat. Bank v. Witter*, 121 P.2d 414, 58 Ariz. 491.

**Instructions are presiding judge's written address**, informing jury of law applicable to given facts constituting cause at trial, and are to be carried by jury to their room for guidance in reaching correct verdict according to law and evidence.—*Palmer v. Hygrade Water & Soda Co.*, 151 S.W.2d 548, 236 Mo.App. 247.

#### Re-reading instruction

The re-reading to jury of one of the instructions by jury foreman as urged by defendants' counsel in his argument was not error, where instruction re-read was a proper one.—*Moyer v. Dolese Bros. Co.*, 178 P.2d 270, 162 Kan. 484.

47. *Okl.—Lowenstein v. Holmes*, 135 P. 727, 40 Okl. 33.



retire to deliberate; but, while the court may allow the jury either to take all the instructions, or withhold all, it has been held reversible error for the court, even by accident, to separate the instructions and give the jury part and retain part.<sup>48</sup> According to some authority the jury should not be permitted to take the instructions,<sup>49</sup> at least, without the consent of both parties.<sup>50</sup> However, the sending of the instructions to the jury is sometimes regarded merely as an irregularity which does not require a reversal if no prejudice is shown;<sup>51</sup> and it has been held that a reversal will not be granted because the court inadvertently permitted the jury to have part of the instructions, where no prejudicial misconduct occurs and the court, on discovering the mistake, recalls the jury, takes the instructions from their possession, and instructs them to give all instructions equal weight.<sup>52</sup>

Under a statute providing that all written instructions whether given or refused, and so marked, may be taken by the jury to the jury room, it has been held that the court may,<sup>53</sup> and must on request,<sup>54</sup> permit the instructions to be taken by the jury. Although the statute provides that the court shall allow the jury to take the written instructions at the request of either party, it is not error for the court to permit the instructions to be taken at the request of jurors alone.<sup>55</sup> A provision that all written charges and instructions shall be taken by the jurors in their retirement authorizes,<sup>56</sup> and requires,<sup>57</sup> the court to send out special written instructions presented by the parties, and given to the jury on request, although the general charges of the court are oral and cannot be sent out with

the jury. Where to such a statute a proviso is added that, if either party objects to the giving of written instructions and permitting the jury to take them to their room, a different prescribed course of procedure shall be followed, the court, despite an objection to the sending of written instructions, is bound to send them to the jury if there is not also an objection to the giving of written instructions.<sup>58</sup> Failure of the jury to take instructions to the jury room has been held not error where it was the result of negligence of defendant's attorney.<sup>59</sup>

Where interlined matters in instructions are not obliterated so that the jury cannot read them, the taking of such instructions by the jury is improper.<sup>60</sup>

### § 469. — Pleadings

In some jurisdictions the court in its discretion may allow the jury to take the pleadings with them to the jury room, at least where no prejudice results thereby.

According to many cases the trial court may, in its discretion, without committing reversible error, permit the jury to take the pleadings with them to the jury room,<sup>61</sup> at least, where the court has given the proper explanations, and cautionary instructions,<sup>62</sup> or there are no prejudicial results,<sup>63</sup> or the instructions are so framed as to be meaningless to the jury without the pleadings.<sup>64</sup> Also, it is not reversible error to send the pleadings to the jury where it is done with the consent of counsel,<sup>65</sup> and, where the action involves a great number of articles which the jury cannot be expected to remember without aid, it is proper for the court to let them

48. Mont.—Hammond v. Foster, 1 P. 757, 4 Mont. 421.

64 C.J. p 1030 note 46.

49. Mich.—Hewitt v. Flint, etc., R. Co., 34 N.W. 659, 67 Mich. 61.

64 C.J. p 1030 note 47.

50. Cal.—Ferrerira v. Silvey, 176 P. 371, 38 Cal.App. 346.

Ind.—Smith v. McMillen, 19 Ind. 391.

51. Cal.—Ferrerira v. Silvey, 176 P. 371, 38 Cal.App. 346.

52. Ind.—Jones v. Austin, 59 N.E. 1082, 26 Ind.App. 399.

53. Ala.—Beard v. Ryan, 78 Ala. 37.

54. S.D.—Clark v. Welland, 227 N. W. 193, 55 S.D. 644.

64 C.J. p 1030 note 52.

55. N.C.—Galther v. Carpenter, 55 S. E. 625, 143 N.C. 240.

56. Ohio.—Harris v. Mansfield Ry., Light & Power Co., 4 Ohio App. 108, 21 Ohio Cir.Ct.N.S., 209—Foy v. Toledo Consol. St. R. Co., 10 Ohio Cir.Ct. 151, 6 Ohio Cir.Dec. 396.

57. Ohio.—Cone v. Bright, 68 N.E. 3, 68 Ohio St. 543.

58. Idaho.—Hilbert v. Spokane International Ry. Co., 116 P. 1116, 20 Idaho 54.

59. Mo.—Curtis v. Kansas City Public Service Co., App., 74 S.W.2d 255.

60. Ill.—Walters v. Ind., 48 N.E.2d 791, 319 Ill.App. 162.

**Deletion by pen**

Permitting an instruction to go to the jury bearing deletion made by the trial court with a pen is not a commendable practice.—Miller v. Mohr, 89 P.2d 807, 198 Wash. 619.

61. N.J.—Scott-Newcomb, Inc. v. Marron, 17 A.2d 611, 125 N.J.Law 628—Portley v. Hudson & M. R. Co., 172 A. 384, 113 N.J.Law 13. 64 C.J. p 1030 note 58.

**Return of service of original writ**

In libel action, permitting officer's return of service of original writ and complaint to go to jury with pleadings was not an abuse of discretion.

—Proto v. Bridgeport Herald Corp., 72 A.2d 820, 136 Conn. 557.

62. Tex.—Joy v. Liverpool, etc., Ins. Co., 74 S.W. 822, 32 Tex.Civ.App. 433.

64 C.J. p 1031 note 59.

**Omitting instruction**

The practice of permitting jury to take all the pleadings to the jury room without an instruction on the issues is not commended but where this was done appellate court could not say that jury was not apprised of the issues involved.—Continental Optical Co. v. Reed, 88 N.E.2d 55, 119 Ind.App. 643.

63. Conn.—Proto v. Bridgeport Herald Corp., 72 A.2d 820, 136 Conn. 557.

N.M.—Dollarhide v. Gunstream, 233 P.2d 1042, 55 N.M. 353.

64 C.J. p 1031 note 60.

64. Ill.—Boyczka v. Janowski, 182 Ill.App. 97.

65. Colo.—Sibley v. Wallrich, 226 P. 152, 75 Colo. 421.

take the bill of particulars containing the inventory of the articles.<sup>66</sup> However, it is often stated broadly that the jury should not be allowed to take the pleadings to the jury room,<sup>67</sup> at least where the pleadings were not introduced in evidence,<sup>68</sup> and to permit them to do so has been regarded as error where the pleadings are involved, voluminous, and technical,<sup>69</sup> or contain matters which should not be considered by the jury,<sup>70</sup> or, because of a probable misconstruction of the pleadings, the jury might render their verdict otherwise than they would render it had the pleadings not been sent.<sup>71</sup>

The fact that the pleadings contain admissions does not necessarily alter the rule that pleadings should not be taken to the jury room, since in such instances the court may point out to the jury such admissions as are relevant.<sup>72</sup> As considered supra § 301, it is the duty of the court to state the issues made by the pleadings rather than to refer the jury to the pleadings to ascertain the issues; and even courts which do not regard it as reversible error have said that the practice of sending the pleadings to the jury room is one of doubtful propriety<sup>73</sup> which is not to be commended,<sup>74</sup> and is even to be condemned as unsafe and likely to work prejudice.<sup>75</sup> Furthermore, courts, which gen-

erally recognize the right to take or send the pleadings to the jury room, make an exception in the case of pleadings, or portions thereof, which have been previously eliminated from the case by motion,<sup>76</sup> demurrer,<sup>77</sup> or otherwise.<sup>78</sup>

The trial court is under no obligation to permit the jury to take the pleadings to the jury room, and error cannot be assigned because of its refusal to do so;<sup>79</sup> nor is the jury under any duty to read the pleadings, and it is error to instruct them to do so.<sup>80</sup> A statute prohibiting pleadings which do not constitute written evidence to be taken by the jury in retirement has been held to be mandatory.<sup>81</sup>

### § 470. Experiments by Jury and Use of Magnifying Glass or Mechanical Device

Jurors cannot make experiments which would amount to a taking of evidence out of open court.

Although it has been said that the jurors cannot make experiments which invade new fields and lead to such discoveries as will amount to a taking of evidence out of open court,<sup>82</sup> it is usually held not ground for reversal that the jurors have performed experiments with exhibits or articles which they have taken to the jury room;<sup>83</sup> and it is not

68. Mich.—Trudell v. Pearl, 189 N. W. 61, 219 Mich. 514.

67. Ill.—Signa v. Alluri, 113 N.E.2d 475, 351 Ill.App. 11.

Pa.—Noreika to Use of Petranskas v. Pennsylvania Indem. Corp., Com. Pl., 39 Lack Jur. 145, reversed on other grounds 5 A.2d 619, 135 Pa. Super. 474.

64 C.J. p 1031 note 64.

68. N.M.—Dollarhide v. Gunstream, 233 P.2d 1042, 55 N.M. 353.

Utah.—Ryan v. Beaver County, 21 P. 2d 858, 82 Utah 27, 89 A.L.R. 1253.

#### Bill of particulars

Submitting to jury bill of particulars, which was not in evidence, was improper, but did not warrant setting aside verdict for plaintiffs and ordering a new trial, where it did not appear that the only statement contained in bill of particulars which was at variance with the proof could have brought about a verdict for plaintiffs which would not have been rendered but for submission of bill and jury was instructed bill was merely a statement of plaintiffs' claims and was not to be considered as evidence.—Pescara v. Hanson Chemists, 122 N.Y.S.2d 848.

69. Kan.—Shouse v. Consolidated Flour Mills Co., 277 P. 54, 128 Kan. 174, 64 A.L.R. 606.

70. Ill.—Elie v. Adams Express Co., 133 N.E. 243, 300 Ill. 840.

Tex.—Chapin v. Putnam Supply Co., 76 S.W.2d 469, 124 Tex. 247.

#### Allegations not sustained by evidence

Where complaint contained allegations which were not sustained by evidence, it was error to permit pleadings to go to jury over defendant's objection.—Dzulvelis v. Mays Fur & Ready to Wear, 18 N.Y.S.2d 106.

#### To impeach witness

Where defendant's witness whose testimony was contrary to the matter contained in defendant's amended answer was not a party to the action and did not sign or verify the amended answer, the amended answer could not have been given to the jury, who had retired to jury room for deliberations, to impeach such witness.—Rubinstein v. Sark Co., 36 N.Y.S.2d 311.

71. S.D.—Mt. Terry Min. Co. v. White, 74 N.W. 1060, 10 S.D. 620.

72. Ill.—O'Brien v. Brown, 85 N.E. 2d 685, 403 Ill. 183, certiorari denied 70 S.Ct. 76, 338 U.S. 827, 94 L.Ed. 503.

73. Minn.—Mattson v. Minnesota, etc., R. Co., 108 N.W. 517, 98 Minn. 296.

Mo.—Bluedorn v. Missouri Pac. R. Co., 25 S.W. 943, 121 Mo. 258.

74. Kan.—Shouse v. Consolidated Flour Mills Co., 277 P. 54, 128 Kan. 174, 64 A.L.R. 606.  
64 C.J. p 1031 note 70.

75. Idaho.—Walton v. Mays, 194 P. 354, 23 Idaho 339.

64 C.J. p 1031 note 71.

76. Neb.—Trumbull v. Trumbull, 98 N.W. 683, 71 Neb. 186.

77. Ill.—North Peoria v. Rogers, 98 Ill.App. 355.

N.M.—Dollarhide v. Gunstream, 233 P.2d 1042, 55 N.M. 353.

78. Iowa.—Haviland v. Farmers' Ins. Co. of Cedar Rapids, 213 N.W. 762, 204 Iowa 385.

64 C.J. p 1031 note 74.

79. Ohio.—Netzel v. Todd, 165 N.E. 47, 30 Ohio App. 800.

64 C.J. p 1032 note 75.

80. Tex.—International, etc., R. Co. v. Leak, 64 Tex. 654.

81. Tex.—Bassmer v. Kotulek, Civ. App., 75 S.W.2d 295.

82. Cal.—Higgins v. Los Angeles Gas & Electric Co., 115 P. 313, 159 Cal. 651, 34 L.R.A.N.S., 717.

Neb.—Meyer v. Omaha & Council Bluffs St. Ry. Co., 261 N.W. 841, 125 Neb. 712.

83. Tex.—Reaves v. Reaves, Civ. App., 15 S.W.2d 57.

64 C.J. p 1033 note 99.

#### Experiment in court by jurors

Where, in an action against a railroad for loss by fire, spark arresters were received in evidence, it was within the discretion of the trial court to permit experiments by the jury in court by the use of cinders,

improper for the jury to use a magnifying glass or mechanical device to aid their investigation of handwritings or exhibits which have been admitted in evidence and are properly taken into the jury room by them.<sup>84</sup>

#### § 471. Consideration and Decision of Special Interrogatories or Special Issues

Jurors are under a duty during deliberations to answer special interrogatories or issues according to the evidence and without regard to how such answers may affect the general verdict.

It is the duty of the jury to answer special interrogatories as they find the facts to be from the

evidence without regard to how the answers may affect the general verdict,<sup>85</sup> and if the jury seek to answer special interrogatories in such a manner as to carry out a previous agreement to give a general verdict in favor of a particular party, this is error or misconduct which requires a reversal;<sup>86</sup> but if the law does not prescribe the time they shall be considered, and the jurors do not purposely seek to answer the special interrogatories so that judgment will be for the party whom they wish to favor by a general verdict, but give each issue separate consideration and answer it according to the preponderance of the evidence, it is immaterial whether

not resembling cinders emitted by engines, although the spark-arresting device when put in an engine is set at an angle, so that the size and shape of the apertures were factors merely in the relative efficiency of the devices in question.—*E. T. & H. K. Ide v. Boston & M. R. R.*, 74 A. 401, 83 Vt. 66.

84. Cal.—*In re Thomas' Estate*, 101 P. 738, 135 Cal. 488.  
Ind.—*Alexander v. Blackburn*, 98 N.E. 711, 178 Ind. 66, Ann.Cas.1915B 1091.

85. Kan.—*Thornton v. Franse*, 12 P. 2d 728, 135 Kan. 782.  
Tex.—*Bauguss v. Bauguss*, Civ.App., 186 S.W.2d 384, refused without merit—*McKenzie v. Grant*, Civ. App., 93 S.W.2d 1160, error dismissed.

#### Discussing effect of answers

(1) Discussion of jury as to effect their answers to special issues would have on plaintiff's recovery was not misconduct where it appeared that no agreement was made which would accomplish any particular result, but that each issue was answered according to the law and the evidence.—*Ford v. Carpenter*, 216 S.W.2d 558, 147 Tex. 447—*Church v. Texas & Pac. Motor Transp. Co.*, Tex.Civ.App., 193 S.W.2d 994—*Goldstein Hat Mfg. Co. v. Cowen*, Tex.Civ.App., 136 S.W.2d 867.

(2) Jury should not deliberately consider the legal effect their answers may have on the rights of parties.—*Myers v. Thomas*, Civ.App., 182 S.W.2d 266, reversed on other grounds 186 S.W.2d 811, 143 Tex. 502.

(3) Discussion as to whether affirmative answers to certain special issues would conflict with affirmative answers to other special issues and nullify verdict was not misconduct.—*Blaugrund v. Gish*, Civ.App., 179 S.W.2d 257, affirmed 179 S.W.2d 266, 142 Tex. 379.

#### Discussion of ordinance

In action for injuries sustained by motorist in intersectional automobile

collision, jury was not guilty of "misconduct" in discussing purported rule or law considered to be in effect in the city regulating the traffic of automobiles on the streets before answering special issues as to motorist's contributory negligence, where evidence of such ordinance or rule was offered.—*Mecom v. De Blanc*, Tex.Civ.App., 140 S.W.2d 915, error dismissed, judgment correct.

#### Order of answering

A jury is not required to answer issues in order submitted.—*Lee v. Galbreath*, Tex.Civ.App., 234 S.W.2d 91—*Hudson v. West Central Drilling Co.*, Tex.Civ.App., 195 S.W.2d 387, error refused no reversible error.

#### Taking vote before answer

That jury, before answering special issues, took vote as to which party should prevail, was not misconduct, where there was no agreement to be bound by ballot and jurors answered issues without regard to legal effect of answers.—*Scottino v. Ledbetter*, Tex.Civ.App., 56 S.W.2d 232.

86. Tex.—*Ford v. Carpenter*, 216 S.W.2d 558, 147 Tex. 447—*Wood v. Stokes*, Civ.App., 219 S.W.2d 545, error dismissed—*Lyons v. Cope*, Civ.App., 217 S.W.2d 116—*Straffuss v. Barclay*, Civ.App., 214 S.W.2d 826, affirmed 219 S.W.2d 65, 147 Tex. 600—*Bauguss v. Bauguss*, Civ.App., 186 S.W.2d 384, refused without merit—*Myers v. Thomas*, Civ.App., 182 S.W.2d 266, reversed on other grounds 186 S.W.2d 811, 143 Tex. 502—*Blaugrund v. Gish*, Civ.App., 179 S.W.2d 257, affirmed 179 S.W.2d 266, 142 Tex. 379—*Saladiner v. Polanco*, Civ.App., 160 S.W.2d 531, error refused—*State v. Gindrat*, Civ.App., 155 S.W.2d 967—*Uselton v. Southern Underwriters*, Civ.App., 131 S.W.2d 1040, error dismissed, judgment correct.  
64 C.J. § 1033 note 8.

#### Damages

When an action for personal injuries is submitted to a jury on special

issues, it is improper for jurors to agree in advance on amount of damages to be awarded and then undertake to answer issues on liability in such way as to carry out original agreement.—*Texas Elec. Ry. Co. v. Swofford*, Tex.Civ.App., 159 S.W.2d 938.

#### Misconduct not shown

(1) In general—*Straffuss v. Barclay*, Civ.App., 214 S.W.2d 826, affirmed 219 S.W.2d 65, 147 Tex. 600—*Snow v. Harding*, Tex.Civ.App., 180 S.W.2d 965, error refused—*Patterson v. Peel*, Tex.Civ.App., 149 S.W.2d 284, error refused, certiorari denied 62 S.Ct. 297, 314 U.S. 686, 86 L.Ed. 549, rehearing denied 62 S.Ct. 411, 314 U.S. 715, 86 L.Ed. 570—*Sulser v. Caraway*, Tex.Civ.App., 134 S.W.2d 426—*Larnee v. Massachusetts Bonding & Insurance Co.*, Tex.Civ.App., 121 S.W.2d 392, error dismissed—*E. L. Martin, Inc. v. Kyser*, Tex.Civ.App., 104 S.W.2d 592, error dismissed.

(2) In jury's agreement to return answers to special issues on belief result of answers would be hung jury.—*Perotke v. City of Fort Worth*, Tex.Civ.App., 44 S.W.2d 473.

(3) Fact that sentiment expressed on straw vote of jurors and the legal effect of verdict on special issues coincided does not prove an unlawful agreement or that jurors were guided by a desire to accomplish a certain legal result.—*Buckalew v. Butcher-Arthur, Inc.*, Tex.Civ.App., 214 S.W.2d 184, refused no reversible error.

(4) Fact that jury communicated in writing to trial court that they favored defendant, but did not know how to answer a certain special issue, did not establish misconduct in absence of evidence that irrespective of the facts jury arbitrarily attempted to answer issue so as to bring about a verdict favorable to defendant, since, in absence of such proof, presumption must be indulged that jury followed instructions of court.—*Bauguss v. Bauguss*, Tex.Civ.App., 186 S.W.2d 384, refused without merit.

the jury consider the special interrogatories before or after they have agreed on a general verdict.<sup>87</sup>

Where misconduct of the jury is shown while they were considering and preparing their answers to special issues, the cause will be reversed, unless the record clearly shows that such misconduct did not influence any juror in arriving at his answers to the issues submitted,<sup>88</sup> or where such misconduct would not affect the judgment.<sup>89</sup> To induce a juror to change his answer to a material issue, on representations on the part of other jurors that it is immaterial how such issue is answered insofar as plaintiff's recovery is concerned, constitutes misconduct on the part of the jury.<sup>90</sup> Answering a special issue contrary to what the jurors believe is the fact with respect thereto, under the assumption that the answer to such issue is immaterial, is misconduct.<sup>91</sup> While it is the duty of the jury to answer each issue independently,<sup>92</sup> it is not material misconduct for the jury to fail to answer, or to give an answer contrary to the manifest weight of the evidence,<sup>93</sup> or to discuss matter not in evidence relating to a special issue,<sup>94</sup> at least where the answer to the special issue affected becomes immaterial due to other findings made by the jury in the case.<sup>95</sup> The fact that some of the jurors are ignorant of the legal effect of their answers to special issues is immaterial, since the legal effect of the answers is no concern of the jurors.<sup>96</sup>

Under a statute providing that special issues shall be answered separately, the jury must consider and determine each issue submitted to them without reference to the result of their determination on the disposition of the controversy as a whole<sup>97</sup> or on the answers to other issues.<sup>98</sup> The fact that a juror has an opinion as to which party should prevail does not make him guilty of misconduct if he considers each special issue without regard to the legal effect of the answer.<sup>99</sup>

#### § 472. Arriving at Verdict by Chance, Compromise, or Taking of Average

- a. In general
- b. Compromise verdicts
- c. Quotient verdicts or averaging estimates of jurors
- d. Averaging estimates of witnesses

##### a. In General

Generally, a verdict arrived at by chance or lot, or in any manner but through the exercise of judgment and conviction, will be set aside.

Since every verdict should be the result of the exercise of judgment, reflection, and conscientious conviction, on the part of the jury, as discussed supra § 462, and not be the result of chance or lot,<sup>1</sup> it is the general rule that a verdict arrived

87. Tex.—Fisher v. Leach, Civ.App., 221 S.W.2d 384, refused no reversible error—Uselton v. Southern Underwriters, Civ.App., 131 S.W.2d 1040, error dismissed, judgment correct—Jackson v. Connecticut General Life Ins. Co., Civ.App., 131 S.W.2d 177, error dismissed, judgment correct.

64 C.J. p 1033 note 4.

88. Tex.—City of Amarillo v. Hudleston, 152 S.W.2d 1088, 137 Tex. 226.

##### Majority vote on issues

Where jury agreed in advance to determine some of issues by majority vote, verdict was tainted with misconduct requiring new trial notwithstanding each juror assented to answers on each question in jury room and when polled in open court—Stroope v. Byrd, Tex.Civ.App., 101 S.W.2d 624—Scholz v. Handy Andy Community Stores, Tex.Civ.App., 70 S.W.2d 309.

89. Tex.—Richards v. Frick-Reid Supply Corp., Civ.App., 160 S.W.2d 282, error refused.

90. Tex.—Bradshaw v. Abrams, Com. App., 24 S.W.2d 372—P. & M. Sales Co. v. Kenmare Jewelry Mfg. Co., Civ.App., 235 S.W.2d 516—Fryor v. New St. Anthony Hotel Co., Civ.

App., 146 S.W.2d 428—Dwyer v. Southern Pacific Co., Civ.App., 141 S.W.2d 961—Harkins v. Mosley, Civ. App., 134 S.W.2d 706—Figula v. Fort Worth & D. C. Ry. Co., Civ. App., 131 S.W.2d 998—Allicorn v. Fort Worth & R. G. Ry. Co., Civ. App., 122 S.W.2d 341, error refused—Warnack v. Conner, Civ. App., 74 S.W.2d 719—Walker v. Quanah Ry. Co., Civ.App., 58 S.W.2d 4—Mann v. Cook, Civ.App., 11 S.W.2d 572.

Misconduct during deliberation as ground for new trial see New Trial § 58.

##### Invasion of province of court

Statement of a juror that certain issues were immaterial invaded law province of court and was a departure from jury's jurisdiction over facts—Trousdale v. Texas & N. O. R. Co., Tex.Civ.App., 264 S.W.2d 439, error granted.

91. Tex.—Saladiner v. Polanco, Civ. App., 160 S.W.2d 531, error refused.

92. Tex.—Andrade v. Southern Pine Lumber Co., Civ.App., 94 S.W.2d 533, reversed on other grounds Southern Pine Lumber Co. v. Andrade, 124 S.W.2d 334, 132 Tex. 372.

93. Tex.—Southern Pine Lumber Co.

v. Andrade, 124 S.W.2d 334, 132 Tex. 372.

94. Tex.—McCue v. Collins, Civ.App., 208 S.W.2d 652.

95. Tex.—McCue v. Collins, supra.

96. Tex.—Harwell v. Reed, Civ.App., 50 S.W.2d 415.

97. Tex.—Humble Oil & Refining Co. v. Owings, Civ.App., 128 S.W.2d 67—Abrams v. Bradshaw, Civ.App., 2 S.W.2d 917.

98. Tex.—Abrams v. Bradshaw, supra.

99. Tex.—Ford v. Carpenter, 216 S.W.2d 558, 147 Tex. 447—Scottino v. Ledbetter, Civ.App., 56 S.W.2d 282.

1. Tex.—Corpus Juris cited in Kindy v. Willingham, 209 S.W.2d 585, 146 Tex. 548.

##### Chance verdicts are improper

Utah.—Mitchell v. Arrowhead Freight Lines, 214 P.2d 620, 117 Utah 224.

##### "Chance" defined

The word "chance," within rule that verdict adopted by chance is invalid, is not technical, but according to its generally accepted and ordinary use, anything is said to have happened by "chance" to anyone, which was neither understandingly brought about by his act nor pre-estimated by his understanding, and juror resorts

at by chance or lot will be set aside.<sup>2</sup> The verdict is vitiated if the jurors forego the exercise of their judgment, surrender their convictions, and render the verdict pursuant to an agreement that it shall be for an amount fixed by a limited number of jurors;<sup>3</sup> an agreement to abide by the decision of a majority;<sup>4</sup> or an agreement by some of the jurors to surrender their convictions as to which party should have the verdict in consideration of an agreement by the others to sign a statement that they believe a certain party has willfully testified falsely,<sup>5</sup> or to limit the amount of damages which should be awarded to the successful party.<sup>6</sup>

While an illegal verdict reached by lot or chance may be repudiated and a subsequent valid one, founded on due and candid deliberation, be rendered,<sup>7</sup> a mere subsequent assent to a verdict illegally reached by lot will not validate the verdict where the subsequent assent is but a declaration of willingness to stand by the result of the lot.<sup>8</sup> In some

jurisdictions the rule that a verdict arrived at by chance shall be void has been adopted by statute,<sup>9</sup> and, to determine whether the verdict was or was not so arrived at, the affidavits of the individual jurors are admissible.<sup>10</sup>

### b. Compromise Verdicts

A compromise verdict which represents a surrender by some jurors of conscientious convictions on one material issue in return for relinquishment by others of like settled opinion on another issue is unconscionable and invalid.

While it is often said that the jury may, where the damages sought to be recovered are unliquidated, properly compromise or make mutual concessions as to the amount to be awarded,<sup>11</sup> the jury cannot render a valid verdict which was arrived at by way of a compromise by which some jurors surrendered their conscientious convictions as to some material issues or right of recovery in return for certain concessions by the other jurors on another issue or issues,<sup>12</sup> nor can the jurors compromise the

to "chance" whenever he adopts any method of determination, the steps and results of which are beyond his calculation and not followed or participated in by his understanding.—*Louisville & N. R. Co. v. Marshall's Adm'x*, 158 S.W.2d 137, 289 Ky. 123.

2. Ky.—*Louisville & N. R. Co. v. Marshall's Adm'x*, supra.  
64 C.J. p 1033 note 10.

**Foreman's direction to jury**, contrary to instruction, to use lot method if they could not otherwise arrive at verdict, held misconduct.—*Dallas Ry. & Terminal Co. v. Garner*, Tex. Com.App., 63 S.W.2d 542.

3. N.J.—*Ryerson v. Kitchell*, 3 N.J. Law 998.  
64 C.J. p 1033 note 11.

4. Tex.—*Kindy v. Willingham*, 209 S.W.2d 585, 146 Tex. 548.—*Stroope v. Byrd*, Civ.App., 101 S.W.2d 624.  
64 C.J. p 1034 note 12.

#### Effect of agreement

(1) The evil effect of agreement by jurors binding themselves in advance to abide by decision of majority is not relieved by jury's agreement thereafter to a slightly different verdict, if it appears previous agreement induced or entered into result.—*Kindy v. Willingham*, 209 S.W.2d 585, 146 Tex. 548.

(2) On the other hand the vice of an agreement by jurors to abide by the decision of the majority is removed where it appears that the jurors completely disregarded or abandoned the agreement and were not activated by it in the subsequent adoption of the verdict returned.—*Kindy v. Willingham*, supra.

#### Lack of antecedent agreement

Where two or three jurors refused

to vote for or against proposal to abide by decision of majority, proposal never became an antecedent agreement and did not vitiate verdicts subsequently reached by jury.—*Ollins v. Schocket*, 215 S.W.2d 18, 31 Tenn. App. 346.

#### Making known opinions prior to agreement

"Various" means several, or different, or uncertain, but does not include all or the whole, and finding that jury members had made known their positions on "various" issues before agreeing to abide by a vote of the majority indicated neither a definite commitment nor a tentative opinion on all of them, but finding impliedly excluded some of the issues.—*Kindy v. Willingham*, 209 S.W.2d 585, 146 Tex. 548.

5. Okl.—*Williams v. Pressler*, 65 P. 931, 11 Okl. 122.

6. N.Y.—*Wiegand v. Fee Bros. Co.*, 76 N.Y.S. 872, 73 App.Div. 139, 11 N.Y. Ann.Cas. 117.

7. Ind.T.—*Davis v. Pryor*, 58 S.W. 660, 3 Ind.T. 396, reversed on other grounds 112 F. 274, 50 C.C.A. 579.

64 C.J. p 1034 note 15.

8. Ky.—*Louisville & N. R. Co. v. Marshall's Adm'x*, 158 S.W.2d 137, 289 Ky. 123.

64 C.J. p 1034 note 16.

#### Jury room or open court

Action of jurors in binding themselves in advance to abide by decision of majority vitiates verdict so reached, notwithstanding that, after majority expresses its will, all of jurors assent thereto, either in jury room or in open court.—*Kindy v.*

*Willingham*, 209 S.W.2d 585, 146 Tex. 548.

9. Cal.—*Balkwill v. City of Stockton*, 123 P.2d 596, 50 Cal.App.2d 661.

11 C.J. p 280 note 25.

**The purpose of statute** which prohibits the rendering of a verdict which is the result of chance is to preserve to litigants the benefit of the independent judgment of jurors with respect to both the party who is to prevail and the amount of damages to be awarded.—*Balkwill v. City of Stockton*, supra.

10. N.D.—*Great Northern R. Co. v. Lenton*, 154 N.W. 275, 31 N.D. 555.

11 C.J. p 280 note 25.

11. Tex.—*Patterson v. Hughes*, Civ. App., 227 S.W.2d 397.—*Indemnity Ins. Co. of North America v. Williams*, Civ.App., 69 S.W.2d 519, reversed on other grounds 99 S.W.2d 905, 129 Tex. 51.  
64 C.J. p 1034 note 18.

#### Broker's commission

In an action by broker for commission for obtaining purchasers for real estate, jury could award what it considered average commission.—*Benway v. Cole*, N.H., 104 A.2d 734.

12. U.S.—*Bass v. Dehner*, D.C.N.M., 21 F.Supp. 567.

Ga.—*North British & Mercantile Ins. Co. v. Parnell*, 185 S.E. 122, 53 Ga. App. 178.

N.J.—*Jubano v. Abeles*, 177 A. 666, 114 N.J.Law 510.

Pa.—*Sager v. Herring*, Com.Pl., 15 Som.Leg.J. 50.

Tenn.—*High v. Lenow*, 258 S.W.2d 742, 195 Tenn. 158.

64 C.J. p 1034 note 19.

claims of the parties without properly deciding the material issues.<sup>13</sup> A verdict for inadequate damages where plaintiff is entitled to recover either more substantial damages or none,<sup>14</sup> or a verdict for less than the amount claimed, where the damages are fixed and liquidated and the verdict under the law and evidence must be either for the amount claimed by plaintiff or as claimed by defendant,<sup>15</sup> may generally be set aside by either party as an invalid compromise verdict; but it is only where the verdict cannot be justified on any hypothesis presented by the evidence that it will be set aside as a compromise verdict;<sup>16</sup> and, where the jury have used discretion in fixing the fair value of a thing, the verdict is not necessarily invalid as a compromise because it is for less than plaintiff sought and more than defendant claimed he should receive,<sup>17</sup> or because the verdict was for less than the amount proved.<sup>18</sup>

13. Va.—Wright v. Estep, 73 S.E.2d 371, 194 Va. 332.  
64 C.J. p 1034 note 20.

#### Grossly inadequate verdict distinguished

To consider a verdict for plaintiff a compromise, as distinguished from being grossly inadequate, requires finding that jury felt defendant was not liable or was dubious about defendant's liability, but that jury was emotionally swayed by nature and extent of injuries and special damages.—Carrouseaux v. City of New York, 127 N.Y.S.2d 761.

#### Compromise or capriciousness

(1) Verdict which is merely the result of a compromise or capriciousness on part of jury will not be allowed to stand.—Jenkins v. Gerber, 84 N.E.2d 699, 336 Ill.App. 469.

(2) Verdict returned without regard to the pleadings, evidence, contention of the parties, or charge of the court, and bearing earmarks of compromise, will be set aside as insufficient.—Vandiford v. Vandiford, 2 S.E.2d 364, 215 N.C. 461.

14. U.S.—Bass v. Dehner, D.C.N.M., 21 F.Supp. 567.

Ill.—Jenkins v. Gerber, 84 N.E.2d 699, 336 Ill.App. 469.

Minn.—Dege v. Produce Exchange Bank of St. Paul, 2 N.W.2d 423, 212 Minn. 44.

N.Y.—Van Der Harst v. Koenig, 291 N.Y.S. 952, 249 App.Div. 235.  
64 C.J. p 1034 note 21.

15. N.Y.—Steenek v. Ace Builders Supply Co., 15 N.Y.S.2d 72, 258 App. Div. 745, reargument denied 16 N.Y.S.2d 102, 258 App.Div. 796.  
64 C.J. p 1035 note 22.

16. Ill.—Selimos v. New Tom's Restaurant Co., 91 N.E.2d 909, 340 Ill. App. 417.

Mich.—Massachusetts Bonding & In-

surance Co. v. Transamerican Freight Lines, 281 N.W. 584, 286 Mich. 179.

N.Y.—Carrouseaux v. City of New York, 127 N.Y.S.2d 761.

64 C.J. p 1034 note 23.

#### Verdict held justified

(1) In general.—Clancy v. Reid-Ward Motor Co., 170 S.W.2d 161, 237 Mo.App. 1000.

(2) In automobile collision case, inadequacy of verdict for plaintiff would not justify conclusion that verdict was result of compromise or an effort to give plaintiff something from the insurance company, so as to render it improper to order new trial solely on issue of damages.—Lilly v. Boswell, 242 S.W.2d 73, 362 Mo. 444.

(3) In action for fraud, verdict which was not necessarily a compromise and amount of which was justifiable on the record should not have been set aside.—F. A. MacCluer, Inc. v. Distribuidores Industriales S. De R. L., 68 N.Y.S.2d 349, 271 App.Div. 987.

(4) Verdict finding grantor was mentally capable of executing two deeds but lacked capacity to make three others executed at later dates was not objectionable as being the result of an unwarranted compromise, where evidence referred to several different dates on which grantor allegedly became incapacitated and instructions of which no complaint was made authorized such a verdict.—Owings v. Webb's Ex'r, 202 S.W.2d 410, 304 Ky. 748.

#### Verdict held not justified

Jury foreman's query, after submission of case, as to whether an award could be made in absence of finding of negligence, required conclusion that final jury agreement on verdicts less than special damages

### c. Quotient Verdicts or Averaging Estimates of Jurors

A verdict by jurors pursuant to an agreement to abide by the amount arrived at by adding the amounts which individual jurors think the plaintiff is entitled to and dividing by the number of jurors constitutes a quotient verdict which will be set aside.

In accordance with the rule that the verdict is vitiated if it is arrived at by chance or lot, it is generally held, although there is some authority to the contrary,<sup>19</sup> that the verdict will be set aside as a quotient verdict if the jury, for the purpose of arriving at their verdict, agree that each member shall set down a sum which he thinks is right, that the aggregate will be divided by twelve, and that they will be bound by the result, whatever it may be, and the quotient returned as their verdict.<sup>20</sup> The test to be applied in determining the validity of the

proved was result of compromise between right of recovery and amount of damages.—Hurr v. Johnston, Minn., 65 N.W.2d 193.

17. Cal.—Heiman v. Market St. Ry. Co., 69 P.2d 178, 21 Cal.App.2d 311.  
Ga.—North British & Mercantile Ins. Co. v. Parnell, 185 S.E. 122, 53 Ga. App. 178.

Mich.—Massachusetts Bonding & Insurance Co. v. Transamerican Freight Lines, 281 N.W. 584, 286 Mich. 179.

N.H.—Benway v. Cole, 104 A.2d 734.

N.Y.—Newburgh Dress Co. v. Nadler & Nadler, 296 N.Y.S. 158, 251 App. Div. 330—Camp v. Camp, 279 N.Y. S. 757, 244 App.Div. 866.

Tenn.—High v. Lenow, 258 S.W.2d 742, 195 Tenn. 158.  
64 C.J. p 1035 note 24.

U.S.—Brunswick-Balke-Collender Co. v. Foster Boat Co., C.C.A.Mich., 141 F.2d 882.

18. Ky.—Heath v. Conway, 1 Bibb 398.  
64 C.J. p 1035 note 26.

20. Ariz.—Spain v. Griffith, 25 P.2d 551, 42 Ariz. 304.

Colo.—Edwards v. Quackenbush, 149 P.2d 809, 112 Colo. 337.

Fla.—Marks v. State Road Dept., 69 So.2d 771.

Ga.—Cromer & Thornton v. Underwood, 13 S.E.2d 860, 64 Ga.App. 519.

Ill.—Kelley v. Call, 57 N.E.2d 501, 324 Ill.App. 143.

Iowa.—Sheker v. Jensen, 41 N.W.2d 679, 241 Iowa 583.

Ky.—Murphy v. Cordle, 197 S.W.2d 242, 303 Ky. 229—Louisville & N. R. Co. v. Marshall's Adm'r, 158 S. W.2d 137, 143, 289 Ky. 129.

Mo.—Borgstede v. G. H. Wetterau & Sons Grocery Co., App., 116 S.W.2d 179.

verdict which is attacked as a quotient verdict is whether the jury agreed beforehand to be bound by the result reached,<sup>21</sup> since it is not the mere arriving at the average of the jurors opinions as to the amount of damage which makes the quotient verdict bad, but the vice consists in an agreement by the jurors to be bound by the result of the addition and division,<sup>22</sup> thus allowing the quotient whatever it may be to stand without subsequent reconsideration.<sup>23</sup> It is sufficient to vitiate the verdict under this rule that only the greater number of the jurors entered into such an agreement;<sup>24</sup> and, even though there is no agreement, the verdict is vitiated if

some of the jurors consider themselves bound to abide by the result of taking the average, and act accordingly.<sup>25</sup>

If, however, there is no agreement that the average estimate shall be binding, and the averaging of estimates is done merely for the purpose of arriving at a working basis which the jurors are to be free to accept or reject as they see fit, a verdict, to which the jurors subsequently agree, is binding, whether it be for a sum which is the average of the amounts fixed by the individual jurors,<sup>26</sup> or whether the verdict agreed to by the

Ohio.—*Weiker v. Union Cent. Life Ins. Co.*, 5 Ohio Supp. 294.

Tex.—*City of Waxahachie v. Harvey*, Civ.App., 255 S.W.2d 649, error refused no reversible error.

Utah.—*Ehalt v. McCarthy*, 138 P.2d 639, 104 Utah 110.

Va.—*Corpus Juris cited in Virginia Electric & Power Co. v. Marks*, 78 S.E.2d 677, 682, 195 Va. 468.

W.Va.—*Kelly v. Rainelle Coal Co.*, 64 S.E.2d 606, 135 W.Va. 594—*Miller v. Blue Ridge Transp. Co.*, 15 S.E.2d 490, 123 W.Va. 428.

64 C.J. p 1035 note 27.

#### Chance verdict

Verdict rendered pursuant to jurors' agreement to accept one-twelfth of the aggregate amount of their several estimates is invalid as obtained by resort to chance or arrived at by lot.

Cal.—*Buhl v. Wood Trucking Lines*, 144 P.2d 847, 82 Cal.App.2d 542.

Ky.—*Louisville & N. R. Co. v. Marshall's Adm'x*, 158 S.W.2d 137, 289 Ky. 129.

#### Gambling verdict

Quotient verdict is a gambling verdict, one rendered pursuant to agreement, express or implied, to abide by the result of taking the average of various amounts of recovery suggested by each juror, no juror knowing what verdict he is to render, each being free to increase or decrease it by the figures he may name.

U.S.—*U. S. v. 4,925 Acres of Land in Grant Parish, La.*, C.C.A.La. 143 F.2d 127.

Ala.—*Fortson v. Hester*, 39 So.2d 649, 252 Ala. 143—*City of Dothan v. Hardy*, 188 So. 264, 237 Ala. 603, 122 A.L.R. 637.

#### Quotient verdict distinguished from lottery verdict

In an action for wrongful death and pain and suffering of the deceased, alleged conduct of the jurors in setting down various amounts and dividing the total by 12, and apportioning the result one-third to the heir and two-thirds to the estate, gives rise only to a quotient verdict, as distinguished from a verdict by

lottery.—*Kennedy v. Griffin*, 112 S.W.2d 644, 195 Ark. 379.

#### Agreement held misconduct

Agreement by jury to be bound by quotient verdict involving several elements of damages and returning of such verdict constituted misconduct.—*Central Motor Co. v. Gallo*, Tex.Civ.App., 94 S.W.2d 821.

21. Ala.—*Fortson v. Hester*, 39 So.2d 649, 252 Ala. 143.

Kan.—*Zook v. State Highway Commission*, 131 P.2d 652, 156 Kan. 79.

#### Implied agreement

(1) In challenging verdict as a quotient verdict, it is not necessary to show that agreement of jurors to arrive at such verdict was an express agreement, but such agreement may be implied.—*Page v. Lockley*, Civ. App., 176 S.W.2d 991, reversed on other grounds 180 S.W.2d 616, 142 Tex. 594.

(2) Quotient verdict implies an agreement in advance among jurors to accept one-twelfth of the aggregate amount of their several estimates as to what the verdict should be without the assent of their judgment to such a sum as their verdict.—*Kelly v. Rainelle Coal Co.*, 64 S.E.2d 606, 135 W.Va. 594.

22. Kan.—*Morrison v. Kansas City Coca-Cola Bottling Co.*, 263 P.2d 217, 175 Kan. 212—*Foster v. City of Augusta*, 256 P.2d 121, 174 Kan. 324.

N.M.—*Board of Com'rs of Dona Ana County v. Gardner*, 260 P.2d 682, 57 N.M. 478.

S.C.—*Westbrook v. Hutchison*, 10 S.E.2d 145, 195 S.C. 101.

W.Va.—*Miller v. Blue Ridge Transp. Co.*, 15 S.E.2d 400, 123 W.Va. 428.

#### Pivotal factor

Pivotal factor of quotient verdict is agreement prior to ballot to be bound by figure thus obtained.—*Sheker v. Jensen*, 41 N.W.2d 679, 241 Iowa 583.

23. N.M.—*Board of Com'rs of Dona Ana County v. Gardner*, 260 P.2d 682, 57 N.M. 478.

24. Iowa.—*Sylvester v. Casey*, 81 N.W. 455, 110 Iowa 256.

25. Mont.—*Gordon v. Trebartham*, 34 P. 185, 13 Mont. 387, 40 Am.S.R. 452.

64 C.J. p 1036 note 29.

26. Ala.—*Corpus Juris quoted in Harris v. State*, 2 So.2d 431, 434, 241 Ala. 240.

Cal.—*Will v. Southern Pac. Co.*, 116 P.2d 44, 18 Cal.2d 468—*Baltwill v. City of Stockton*, 123 P.2d 596, 601, 50 Cal.App.2d 661.

Colo.—*Edwards v. Quackenbush*, 149 P.2d 809, 112 Colo. 337.

Fla.—*Marks v. State Road Dept.*, 69 So.2d 771.

Iowa.—*Sheker v. Jensen*, 41 N.W.2d 679, 241 Iowa 583.

Kan.—*Morrison v. Kansas City Coca-Cola Bottling Co.*, 263 P.2d 217, 175 Kan. 212—*Foster v. City of Augusta*, 256 P.2d 121, 174 Kan. 324—*Zook v. State Highway Commission*, 131 P.2d 652, 156 Kan. 79.

Ky.—*Murphy v. Cordie*, 197 S.W.2d 242, 303 Ky. 229—*Louisville & N. R. Co. v. Marshall's Adm'x*, 158 S.W.2d 137, 289 Ky. 129.

Mo.—*Borgstede v. G. H. Wetterau & Sons Grocery Co.*, App., 116 S.W.2d 179.

Neb.—*McGuire v. Thompson*, 40 N.W.2d 237, 152 Neb. 28.

N.M.—*Board of Com'rs of Dona Ana County v. Gardner*, 260 P.2d 682, 57 N.M. 478.

Ohio.—*Estridge v. Cincinnati St. Ry. Co.*, 63 N.E.2d 823, 76 Ohio App. 220—*Fike v. Goodyear Tire & Rubber Co.*, 10 N.E.2d 242, 56 Ohio App. 197.

Tenn.—*Olins v. Schocket*, 215 S.W.2d 18, 31 Tenn.App. 346—*City of Clarksville v. Deason*, 9 Tenn.App. 274.

Tex.—*Henwood v. Neal*, Civ.App., 198 S.W.2d 125—*Richards v. Frick-Reid Supply Corp.*, Civ.App., 160 S.W.2d 282, error refused.

Utah.—*Ehalt v. McCarthy*, 138 P.2d 639, 104 Utah 110.

Wash.—*Sears v. International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America*, Local No. 524, 112 P.2d 850, 8 Wash. 2d 447.

jurors is for some other amount.<sup>27</sup> When there is nothing to show the contrary, it will be presumed that there was no illegal agreement to be bound by the average of the individual estimates;<sup>28</sup> and a verdict will not be vitiated as a quotient verdict if it does not affirmatively appear that the jurors bound themselves, in advance, to arrive at a verdict in that manner,<sup>29</sup> and that they in fact did so.<sup>30</sup> If the agreement to abide by the quotient verdict is repudiated, a verdict subsequently reached as the result of proper deliberation is valid;<sup>31</sup> but the illegality of a quotient verdict cannot be cured by its subsequent adoption or ratification,<sup>32</sup> or a subsequent agreement to a slightly different verdict.<sup>33</sup>

#### D. COMMUNICATIONS BETWEEN JUDGE AND JURY AND FURTHER INSTRUCTIONS AFTER SUBMISSION

##### § 473. Communications between Judge and Jury

As a general rule all communications between the trial judge and the jury, after submission of the cause, must take place in open court and in the presence of, or after notice to, the parties or their counsel.

Communications between the trial judge and jury

if the agreement made in advance entered into or induced the result.

##### d. Averaging Estimates of Witnesses

It has been held proper, in estimating damages, for the jury to average the amounts testified to by the witnesses.

While there is some authority to the contrary,<sup>34</sup> it has been held not improper for the jury in estimating the damages to which plaintiff is entitled to average the amounts testified to by the witnesses,<sup>35</sup> but the striking of an average should not be resorted to without regard to the intelligence, capacity, and disinterestedness of the various witnesses.<sup>36</sup>

after retirement of the jury should be controlled by a high degree of circumspection.<sup>37</sup> After retirement for deliberation the jury should not be disturbed or be recalled into court, except for compelling reasons to prevent a miscarriage of justice, until they are ready to render their verdict or other-

W.Va.—Miller v. Blue Ridge Transp. Co., 15 S.E.2d 400, 123 W.Va. 428. 64 C.J. p 1036 note 30.

##### Positive consideration and deliberation shown

Where jury failed to agree on a verdict after several hours deliberation and they discussed matter of arriving at an average verdict for plaintiff, and after arriving at average jurors then discussed question of deducting from average as well as adding to it, verdict as rendered was not a quotient verdict.—Gylling v. Hinds, 222 P.2d 413, 122 Colo. 345.

27. U.S.—Armentrout v. Virginian Ry. Co., D.C.W.Va., 72 F.Supp. 997, reversed on other grounds, 166 F.2d 400, 4 A.L.R.2d 1064.

Ala.—Corpus Juris quoted in Harris v. State, 2 So.2d 431, 434, 241 Ala. 240.

Iowa.—Bailey v. Fredericksburg Produce Ass'n, 295 N.W. 122, 229 Iowa 677.

Ky.—Louisville & N. R. Co. v. Marshall's Adm'r, 158 S.W.2d 137, 289 Ky. 129.

64 C.J. p 1037 note 31.

28. Mo.—Chrum v. St. Louis Public Service Co., 242 S.W.2d 64. 64 C.J. p 1037 note 32.

29. Colo.—Harvey v. Thorpe, 253 P.2d 1062, 127 Colo. 83.

Ohio.—Readpour v. Cincinnati St. Ry. Co., 71 N.E.2d 538, 79 Ohio App. 345.

Tex.—Page v. Lockley, Civ.App., 178 S.W.2d 991, reversed on other

grounds 180 S.W.2d 816, 142 Tex. 594.

64 C.J. p 1037 note 33.

##### Evidence held not to show prior agreement

Mo.—Whitaker v. Pitcairn, 174 S.W.2d 163, 351 Mo. 848.

Ohio.—Estridge v. Cincinnati St. Ry. Co., 63 N.E.2d 823, 76 Ohio App. 220.

Tex.—Page v. Lockley, Civ.App., 178 S.W.2d 991, reversed on other grounds 180 S.W.2d 816, 142 Tex. 594.

State v. Littlefield, Civ.App., 147 S.W.2d 270, error dismissed, judgment correct.

##### Evidence held not to show quotient verdict

(1) The mere fact that verdict returned for plaintiff was one-fourth of amount sued for did not warrant conclusion that verdict was quotient verdict.—Tom Reed Gold Mines Co. v. Brady, 117 F.2d 484, 58 Ark. 44.

(2) Fact that each juror put down the amount of recovery which he thought was proper, and such amounts were added together and divided by twelve, thus obtaining an average which became the amount of the verdict rendered, did not render verdict liable to be set aside as a quotient verdict, in absence of any agreement beforehand on part of jurors to be bound by the amount which such process might produce.—Morrison v. Kansas City Coca-Cola Bottling Co., 263 P.2d 217, 175 Kan. 213.

(3) In action by husband and wife for damages sustained in collision

when rear end of their automobile was struck in intersection by truck driven by defendant's employee, fact that on piece of paper found in jury room after verdict for plaintiffs, one juror had written down 12 different amounts and added sums together and divided answer by 12 arriving at sum of four thousand one hundred twenty-five dollars, and that verdict rendered was four thousand dollars, did not show that verdict was a quotient verdict.—Caraway v. Behrendt, Tex.Civ.App., 224 S.W.2d 512.

30. Ga.—Columbus v. Ogletree, 29 S.E. 749, 102 Ga. 293.

31. Ala.—City of Dothan v. Hardy, 188 So. 264, 237 Ala. 603, 122 A.L.R. 637.

64 C.J. p 1037 note 35.

32. Wash.—United Iron Works v. Wagner, 167 P. 1107, 98 Wash. 453. 64 C.J. p 1037 note 36.

33. Ohio.—Velker v. Union Cent. Life Ins. Co., 5 Ohio Supp. 294. 64 C.J. p 1037 note 37.

34. Ill.—Illinois, etc., R. Co. v. Freeman, 71 N.E. 444, 210 Ill. 270.

35. Tex.—Richard Cocke & Co. v. New Era Gravel & Development Co., Civ.App., 168 S.W. 988. 64 C.J. p 1037 note 40.

36. Ga.—Harvey v. Boswell, 65 Ga. 550. 64 C.J. p 1037 note 41.

37. Neb.—Crecellus v. Gamble-Skogmo, Inc., 13 N.W.2d 627, 144 Neb. 394.



wise to communicate with the trial judge to report their desire for further instructions or their inability to agree on a verdict or similar matters.<sup>38</sup> According to the rule generally adopted all communications between judge and jury, after submission of the cause, must take place in open court and in the presence of, or after notice to, the parties or their counsel,<sup>39</sup> and statutes forbidding communications between the trial judge and jury except in open court have been held to be within the power of the legislature.<sup>40</sup> It is irregular for the trial

court, therefore, to communicate further with the jury without the knowledge and consent or express stipulation of the parties or their counsel.<sup>41</sup> A violation of this rule, it is often held, constitutes such misconduct as requires a reversal as a matter of law without regard to motive or whether there has been any prejudicial effect on the verdict;<sup>42</sup> but there are a number of cases which have refused reversal on the ground that the improper communication could not possibly have been prejudicial in the particular case.<sup>43</sup>

38. N.J.—J. B. Wolfe, Inc. v. Salkind, 70 A.2d 72, 3 N.J. 312, 13 A.L.R.2d 1214.

39. Ga.—McBride v. Johns, 36 S.E.2d 822, 73 Ga.App. 444.

N.J.—Leonard's of Plainfield v. Dybas, 31 A.2d 496, 130 N.J. Law 135.  
Tex.—Burkett v. Slauson, 237 S.W.2d 253, 150 Tex. 69—Lee v. Houston Elec. Co., Civ.App., 152 S.W.2d 379, affirmed Houston Elec. Co. v. Lee, 162 S.W.2d 692, 139 Tex. 166—White v. Haynes, Civ.App., 60 S.W.2d 275, error dismissed—City of Waco v. Craven, Civ.App., 54 S.W.2d 883.

64 C.J. p 1038 note 43—46 C.J. p 155 note 99.

#### Inquiries as to state of deliberation

(1) The rule that the officer in charge of a jury shall not communicate with them or permit communication with the jury except to inquire if they have agreed on the verdict precludes the judge from knowing the state of the jury's deliberations before the verdict is returned into court.—Houston Electric Co. v. McLeroy, 163 S.W.2d 1062, 139 Tex. 170—Houston Electric Co. v. Lee, 162 S.W.2d 692, 139 Tex. 166—Texas Emp. Ins. Ass'n v. Foreman, Civ.App., 236 S.W.2d 824, reversed on other grounds Foreman v. Texas Emp. Ins. Ass'n, 241 S.W.2d 977, 150 Tex. 468, conformed to Texas Emp. Ins. Ass'n v. Foreman, Civ.App., 262 S.W.2d 248—Currie v. Smith, Tex.Civ.App., 184 S.W.2d 656, error refused.

(2) Where trial court in action for injuries inquired of jury on two different occasions, after jury had retired to deliberate verdict, concerning wishes of jury concerning lunch, and inquired late in evening as to whether jury thought they could reach verdict "this evening or tonight," such communications did not constitute error as being inquiries as to state of jury's deliberations.—Union City Transfer v. Adams, Tex.Civ.App., 248 S.W.2d 256, error refused no reversible error, certiorari denied 73 S.Ct. 834, 344 U.S. 912, 97 L.Ed. 703.

#### Communication between judge and individual juror

(1) Fact that juror, leaving fellow jurors and approaching trial judge in

presence of counsel, stated jury were unable to agree and asked if case could be thrown out and was orally informed to find for plaintiff or defendants, was held reversible error.—Belser v. Achley, Tex.Civ.App., 67 S.W.2d 278.

(2) Rules of procedure providing for communication by jury with trial judge and for giving additional instructions are applicable by their terms only to communications between judge and jury as a body and not to communications between judge and a single juror.—Ross v. Texas Emp. Ins. Ass'n, Tex., 267 S.W.2d 541.

#### 40. Matter of public concern

The sacredness of right to jury trial and delicacy of any fact inquiry as to probable effect of misconduct of trial court, before judge against whom complaint is made, render matter of such public concern as to be well within legislative right to enact statute forbidding trial judge to communicate with jury except in open court.—Prescott v. Metropolitan Life Ins. Co., Tex.Civ.App., 129 S.W.2d 821, error dismissed.

#### Interpretation of statute

The statute providing that after jurors retire to deliberate, if they disagree as to the testimony, or desire to be further informed on the law, they may request officer in charge to conduct them to the court, which shall give information sought on matters of law, and also, in presence of or after notice to parties or their counsel, may state its recollection of the testimony on a disputed point, should be interpreted broadly.—Hubbuck v. City of Springfield, 26 N.E.2d 773, 63 Ohio App. 329, appeal dismissed 23 N.E.2d 949, 136 Ohio St. 124.

41. Cal.—Tice v. Pacific Elec. Ry. Co., 96 P.2d 1022, 36 Cal.App.2d 66, rehearing denied 97 P.2d 844, 36 Cal.App.2d 66.

Ga.—Gibson v. Gibson, 187 S.E. 155, 54 Ga.App. 187.

Mo.—Boyd v. Fennewell, App., 78 S.W.2d 455.

Okl.—Wilson v. Oklahoma Ry. Co., 248 P.2d 1014, 207 Okl. 204.

#### Written communications

(1) Generally.—Corie v. Thompson, 122 N.Y.S.2d 508, 282 App.Div. 810.

(2) The receipt by trial court of a written note from jury foreman during trial of case, without disclosing in open court on request of counsel the contents of the note, was improper.—McBride v. Johns, 36 S.E.2d 822, 73 Ga.App. 444.

(3) Written communication between the jury who wrote trial judge a note inquiring whether jury could fix amount of judgment and the trial judge who answered the note by writing word "yes" on bottom of note and returning it to jury room was improper.—Finkel v. Otto Misch Co., 289 N.W. 276, 291 Mich. 630.

(4) Instruction that, if jury required further instructions, request should be put in writing and given to bailiff for delivery to court was a departure from the procedure prescribed by rules and called for a communication from jury prohibited by rules.—Colls v. Price's Creameries, Tex.Civ.App., 244 S.W.2d 900, error refused no reversible error.

42. Mo.—Hartgrove v. Chicago, B. & Q. R. Co., 218 S.W.2d 557, 358 Mo. 971.

Tex.—Currie v. Smith, Civ.App., 184 S.W.2d 656, error refused—Freeman v. Hillman, Civ.App., 173 S.W.2d 657—Lee v. Houston Elec. Co., Civ. App., 152 S.W.2d 379, affirmed Houston Elec. Co. v. Lee, 162 S.W.2d 692, 139 Tex. 166—Meinecke v. Fidelity Inv. Co., Civ.App., 62 S.W.2d 623, error refused.

64 C.J. p 1048 note 44.

43. Mo.—Baumhoer v. McLaughlin, App., 205 S.W.2d 274.

Tex.—Ross v. Texas Emp. Ins. Ass'n, 267 S.W.2d 541.

64 C.J. p 1048 note 45.

Although it was technically error for trial court to return jury to courtroom for purpose of answering foreman's question in absence of counsel, such action on part of court was not prejudicial, where court in answer to question did not give any new instructions but in substance merely directed jury's attention to instructions previously given.—City of Ok-

Where there is a substantial compliance with the requirement that the jury be brought into open court for communication with the judge no reversal is required.<sup>44</sup> A mere inquiry by the jury relating to the possible findings is not misconduct,<sup>45</sup> nor are verbal statements by the court to the jury in response to a request by the jury, when made with the consent of the parties.<sup>46</sup> Furthermore, there are cases which have held that the verdict will not be set aside where the communication is a mere collateral direction, which could not influence the jury in arriving at their verdict,<sup>47</sup> such as a direction on the manner of using the papers supplied for the reception of the verdict,<sup>48</sup> a direction with respect to the form of the verdict,<sup>49</sup> a direction to the bailiff to have the jury return in the morning after release for the night,<sup>50</sup> an answer to inquiries by the jury relating to the consideration of evidence by them,<sup>51</sup> or a mere refusal to communicate.<sup>52</sup>

**Consent of counsel.** Counsel may consent to communications between court and jury not made in open court,<sup>53</sup> and, if they do so, they may not thereafter object.<sup>54</sup> Some decisions require that this consent be affirmatively and expressly given,<sup>55</sup> and these courts refuse to infer consent from mere silence.<sup>56</sup> Other decisions, however, have held that consent may be implied where counsel are present

or are informed and make no objection,<sup>57</sup> or, after making objection, counsel waive the error by failing to except to the action of the court in overruling the objection.<sup>58</sup> The judge's communications with the jury should be submitted to counsel in order to give them an opportunity to make objections thereto before they are delivered to the jury.<sup>59</sup>

#### § 474. Further Instructions and Re-Reading Instructions

A discussion of further instructions to the jury after submission of the cause and re-reading of the instructions will be found *infra* §§ 475-478.

Examine Pocket Parts for later cases.

#### § 475. — Authority and Duty to Instruct

- a. On court's own motion
- b. On request of jury
- c. On request of counsel

##### a. On Court's Own Motion

The court has discretionary power to give, on its own motion, additional instructions to the jury after they have retired to deliberate.

The court has discretionary power to give, on its own motion, additional instructions to the jury after they have retired to deliberate;<sup>60</sup> and, accord-

Iahoma City v. Collins-Dietz-Morris Co., 79 P.2d 791, 183 Okl. 264.

44. Tex.—Callahan v. Hester, Civ. App., 181 S.W.2d 294, error refused.

**Action held substantial compliance**

Action of trial judge in permitting jury standing in their room near judge to pass the charge to him, judge and jury being in close proximity and door between them standing ajar, substantially complied with requirement that when jury wished to communicate with court they should be brought into open court.—Callahan v. Hester, *supra*.

45. Tex.—Foster v. Beckman, Civ. App., 85 S.W.2d 789, error refused.

46. Tex.—F. H. Vahlsing, Inc. v. Hartford Fire Ins. Co., Civ. App., 108 S.W.2d 947, error dismissed.

47. Mass.—Whitney v. Commonwealth, 77 N.E. 516, 190 Mass. 531. 64 C.J. p 1048 note 46.

48. Mass.—Whitney v. Commonwealth, *supra*.

49. Mo.—Sullivan v. Union Electric Light & Power Co., 56 S.W.2d 97, 331 Mo. 1065.

**Necessity for all jurors to sign verdict**

Ala.—McCutchen v. Loggins, 19 So. 810, 109 Ala. 457.

50. Tex.—Prescott v. Metropolitan

Life Ins. Co., Civ. App., 129 S.W.2d 821, error dismissed.

51. **Permission to use magnifying glass**

U.S.—Throckmorton v. St. Louis-San Francisco Ry. Co., C.A.Mo., 179 F. 2d 165, certiorari denied 70 S.Ct. 797, 339 U.S. 944, 94 L.Ed. 1359.

**Answering request for exhibits**

Action of trial court in orally advising jury through bailiff that checks which jury asked for after jury started to deliberate had not been received in evidence was not error.—Hammargren v. Montgomery Ward & Co., 241 P.2d 1192, 172 Kan. 484.

52. Neb.—Creelius v. Gamble-Skogmo, Inc., 13 N.W.2d 627, 144 Neb. 394.

Ohio.—Witham v. Kroger Grocery & Baking Co., 1 N.E.2d 949, 51 Ohio App. 499.

Tex.—Compton v. Jennings Lumber Co., Civ. App., 295 S.W. 308.

53. Tex.—Texas Indemnity Ins. Co. v. Hubbard, Civ. App., 138 S.W.2d 626, error dismissed, judgment correct.—Dallas Bldg. & Loan Ass'n v. Henry, Civ. App., 98 S.W.2d 1030, error dismissed.

64 C.J. p 1048 note 50.

54. Mich.—Smoke v. Jones, 35 Mich. 409.

55. Ind.—Danes v. Pearson, 33 N.E.

976, 6 Ind.App. 465.

64 C.J. p 1048 note 52.

56. Mo.—Glenn v. Hunt, 25 S.W. 181, 120 Mo. 330.

64 C.J. p 1048 note 53.

57. Mo.—Schonwald v. F. Burkart Mfg. Co., 202 S.W.2d 7, 356 Mo. 435. Ohio.—Hubbuck v. City of Springfield, 26 N.E.2d 773, 63 Ohio App. 329, appeal dismissed 23 N.E.2d 949, 136 Ohio St. 124.

Pa.—Miller v. Stauffer, Com.Pl., 37 Berks Co. 247. 64 C.J. p 1048 note 54.

58. N.Y.—Zust v. Linthicum, 11 N.Y.S. 727, 58 N.Y.Super. 478, 19 N.Y. Civ.Proc. 370.

59. Tex.—Pfeuffer v. Haas, Civ. App., 55 S.W.2d 111, error dismissed.

60. Ohio.—Sacks v. Johnston, 63 N.E.2d 246, 76 Ohio App. 143. 64 C.J. p 1039 note 57.

**Correcting or explaining prior instructions**

(1) Court may, on its own motion, recall jury for purpose of correcting previous instructions.—Monday v. Millsaps, Tenn.App., 264 S.W.2d 6.

(2) The statute providing that, when jury after retiring ask for further instructions, no charge shall be given except on the particular point

ing to some authority, this power may be exercised, even though the jury say they do not want further instructions.<sup>61</sup> Although the jury have returned in court and announced their agreement on a verdict, the court may, in order to correct some apparent error or oversight, send them out again with further instructions before receiving the verdict.<sup>62</sup> The court is warranted in giving additional instructions to the jury when, after deliberation, they are unable to agree,<sup>63</sup> and where a defect in an improper verdict, once read, is noted by the court or timely brought to the attention of the court, it is the duty of the court to further instruct the jury before returning them for additional deliberation.<sup>64</sup>

### b. On Request of Jury

According to the rule generally adopted, the court may, at the request of the jury, give them further instructions after they have retired to deliberate, since the

interests of justice require that the jury have full understanding of the case.

According to the rule generally adopted, the court may, at the request of the jury, give them further instructions after they have retired to deliberate,<sup>65</sup> since the interests of justice require that the jury have full understanding of the case,<sup>66</sup> and the court may, without the consent of counsel, recall the jury and give additional instructions although but one jurymen requests them.<sup>67</sup> Furthermore, it has been said that the trial court has the same right to instruct the jury when it returns for further instructions after having retired as before the jury retires for the first time.<sup>68</sup> No one but the court has authority to answer the questions or requests of the jury, and it is error to permit counsel to give his construction of a charge in response to a question of the jury as to its meaning.<sup>69</sup> Under a statute requiring that requests for

on which they ask does not preclude the trial court in the exercise of sound discretion on its own motion or at the request of the parties or the jury from giving jury further instructions to correct or to explain instructions already given.—*Traders & General Ins. Co. v. Carlisle*, 161 S.W.2d 484, 138 Tex. 523, answer to certified question conformed to *Traders & General Ins. Co. v. Carlisle*, Civ. App., 162 S.W.2d 761.

### Further instructions held not abuse of discretion

The giving of further instructions to jury in will contest was not abuse of discretion, where court called jury back after jury had considered case for more than four hours without reporting, and further instructed jury and shortly thereafter jury returned verdict for defendant.—*Buck v. Robinson*, 23 A.2d 167, 128 Conn. 376.

61. *Mass.*—*Nichols v. Munsel*, 115 Mass. 567.

64 C.J. p 1039 note 58.

62. *Pa.*—*Benzinger v. Prudential Ins. Co. of America*, 176 A. 922, 317 Pa. 561.

*Tex.*—*Dallas Ry. & Terminal Co. v. Starling*, 110 S.W.2d 557, 130 Tex. 379.

64 C.J. p 1039 note 59.

63. *Conn.*—*Buck v. Robinson*, 23 A.2d 167, 128 Conn. 376.

*Fla.*—*Dehon v. Heidt*, 38 So.2d 39.

### Without formal request

The custom of giving additional instructions is employed, as a usual thing, after the jury has deliberated for some time and are unable to agree, and the court need not await a

formal request from the jury.—*Hofrichter v. Klewit-Condon-Cunningham*, 22 N.W.2d 703, 147 Neb. 224, 164 A.L.R. 1256.

### Propriety of additional instructions

The propriety of additional instruction given when jurors reported their inability to agree should be determined on the basis of general views of policy as to what is desirable advice to be given jurors who seem to be unable to come to a decision.—*Acunto v. Equitable Life Assur. Soc. of U. S.*, 60 N.Y.S.2d 101, 270 App. Div. 386.

### Unnecessary to give entire charge

The statute authorizing trial court to give the jury again the law applicable to the case when they return to the court room without having agreed does not require that the court repeat the entire charge if the jury request only some part of the charge dealing with a particular issue.—*Warmuth v. Greenberg*, Fla., 49 So.2d 793.

64. *Cal.*—*Phipps v. Superior Court in and for Alameda County*, 89 P.2d 698, 32 Cal.App.2d 371.—*Van Damme v. McGilvray Stone Co.*, 135 P. 995, 22 Cal.App. 191.

65. *Cal.*—*Muskin v. Gerun*, 116 P.2d 105, 46 Cal.App.2d 404.

*D.C.*—*Dickins v. International Broth. of Teamsters, Chauffeurs, Warehousemen & Helpers*, 171 F.2d 21, 84 U.S.App.D.C. 51.

*Pa.*—*Szabo v. Latshaw*, Com.Pl., 4 Chest.Co. 274.

*Tex.*—*Dallas Ry. & Terminal Co. v. Starling*, 110 S.W.2d 557, 130 Tex. 379.—*Texas Employers' Ins. Ass'n v. Bradford*, Civ.App., 62 S.W.2d 158 affirmed (no opinion)—*McMath*

*Co. v. Staten*, Civ.App., 60 S.W.2d 290.

64 C.J. p 1039 note 60—46 C.J. p 155 note 99.

### Discretion of trial judge

Whether or not further instructions shall be given on the request of the jury therefor rests in the discretion of the trial judge.

*R.I.*—*Personal Finance Co. of Providence v. Nichols*, 43 A.2d 315, 71 R.I. 213.

*Wis.*—*Bengston v. Estes*, 51 N.W.2d 539, 260 Wis. 595.

### Disqualified judge sitting to receive verdict

Where judge had been disqualified by affidavit of prejudice, but counsel stipulated that when trial judge returned home disqualified judge might receive verdict, proceedings involving reading of instructions given and giving of additional instruction when jury returned for further instructions during deliberations were held to disclose no error.—*Monner v. Starker*, 26 P.2d 1097, 146 Or. 168.

### Further instructions or answers held proper or not prejudicial

*Kan.*—*Phillippi v. Speer*, 103 P.2d 777, 152 Kan. 325.

*Mo.*—*Counts v. Thompson*, 222 S.W.2d 487, 359 Mo. 485.

*Tenn.*—*Meyer v. Cooper*, 6 Tenn.App. 38.

66. *Minn.*—*Shockman v. Union Transfer Co.*, 19 N.W.2d 812, 220 Minn. 334.

67. *Neb.*—*Hofrichter v. Klewit-Condon-Cunningham*, 22 N.W.2d 703, 147 Neb. 224, 164 A.L.R. 1256.

68. *Md.*—*Larkin v. Smith*, 37 A.2d 340, 183 Md. 274.

69. *Tex.*—*Missouri, etc., R. Co. v. Moore*, 105 S.W. 532, 47 Tex.Civ. App. 531.

further instructions be made through the foreman of the jury, it is error for the judge to answer the request of a juror other than the foreman.<sup>70</sup>

It has been held that it is not error to refuse to give a further instruction requested by the jury,<sup>71</sup> or to answer a question by the jury or a juror,<sup>72</sup> as where the giving of additional instructions would only serve to confuse the jury,<sup>73</sup> where the question was not concerned with substantive law,<sup>74</sup> where the jury requested an answer to a question which was in the province of the jury to answer,<sup>75</sup> or where the requested additional instruction was on an issue not presented by the pleadings or evidence.<sup>76</sup> It is not error for the court to refuse to comply with a general request further to read the law of the case which had already been read to the jury.<sup>77</sup> While the request may properly be re-

fused, where there is a statute providing that no further instructions shall be given after the argument begins,<sup>78</sup> or where the request is for an instruction which could not properly be given,<sup>79</sup> it is usually said to be the duty of the court to give such additional instructions when requested,<sup>80</sup> and a prejudicial refusal to do so has been held reversible error.<sup>81</sup>

On the other hand, the mere indication by the jury of difficulty in reaching an agreement is not a request for additional instructions,<sup>82</sup> and under a statute providing that the jury may require that they be conducted into open court where the information they seek must be given them in the presence of, or after notice to, the parties or counsel, it is not mandatory on the court to give any information that the jury may request.<sup>83</sup> A jury request for further instructions may be waived,<sup>84</sup>

70. Tex.—Humble Pipe Line Co. v.

Kincaid, Civ App., 19 S.W.2d 144.

64 C.J. p 1040 note 62.

71. Ohio.—Ellis v. Horn, 120 N.E.2d

893.

64 C.J. p 1040 note 63.

**Failure to communicate with counsel**

Where jury had been sufficiently charged and counsel were absent when the jury requested additional instructions, it was within the discretion of the trial judge to decline to give further instructions instead of sending for counsel.

U.S.—McCoy v. Gaddes, C.C.A. Pa., 88

F.2d 480.

Ill.—Moore v. Baltimore & O. C. T.

R. Co., 113 N.E.2d 481, 351 Ill.App.

22.

72. Ohio.—Witham v. Kroger Gro-

cery & Baking Co., 1 N.E.2d 949, 51

Ohio App. 499.

Tenn.—Kennedy v. Bruce, 5 Tenn.

App. 583.

64 C.J. p 1040 note 63.

**Refusal held not error**

Ohio.—Humphreys v. Madden, App.,

68 N.E.2d 562.

73. D.C.—Munsey v. Safeway Stores,

Mun.App., 65 A.2d 598.

74. **Question concerning costs**

Ohio.—Fry v. Lebold, App., 31 N.E.2d

257.

**Question relating to evidence**

(1) Where trial court admitted certain evidence pertaining to husband's notes to wife and excluded other evidence pertaining thereto, but permitted filing of the notes as evidence, court's refusal to instruct jury on whether notes had been admitted as evidence, on their inquiry, and statement to jury that some evidence had been excluded and other evidence admitted, and that jury must rely on their own recollection of the evidence, were not error.—General Contract

Purchase Corp v. Conner, 126 S.W.2d

347, 23 Tenn.App. 1.

(2) Where jury asked the court if they should consider named article in named document in rendering their verdict, even though such article was not ambiguous, court properly declined to give further instruction except that jury were exclusive judges of the facts, credibility of witnesses, and weight of testimony, since any other comment would have been on the weight to be given the evidence.—Reed v. Southern Pac. Co., Tex.Civ. App., 123 S.W.2d 392, error dismissed.

75. Conn.—Montagna v. Jewell, 175

A. 570, 119 Conn. 178.

76. D.C.—Sorvivi v. Baldi, Mun.App.,

48 A.2d 462.

Minn.—Grove v. Lyon, 300 N.W. 373,

211 Minn. 68.

77. U.S.—Phoenix Blue Diamond

Exp. v. Mendez, C.C.A. Ariz., 103 F.

2d 66, certiorari denied 60 S.Ct. 79,

308 U.S. 566, 84 L.Ed. 475.

Ala.—Lowery v. Mutual Loan Soc., 79

So. 389, 202 Ala. 51.

78. Ariz.—Southern Pac. Co. v. Wil-

son, 85 P. 401, 10 Ariz. 182.

79. Tex.—Traders & General Ins. Co.

v. Holtzclaw, Civ.App., 111 S.W.

2d 759, error dismissed.

64 C.J. p 1040 note 66.

**Request for judge's opinion properly**

**refused**

Cal.—Espinoza v. Beverly Hospital,

249 P.2d 843, 114 Cal.App.2d 232.

80. Ohio.—Sacks v. Johnston, 63 N.

E.2d 246, 76 Ohio App. 143.

Tex.—Scroggs v. Morgan, Civ.App.,

107 S.W.2d 911. Reversed on other

grounds 130 S.W.2d 283, 133 Tex.

581—Oates v. Maxcy, Civ.App., 206

S.W. 535.

64 C.J. p 1040 note 67.

**Refusal held erroneous**

Fla.—Miami Coca Cola Bottling Co. v.

Mahlo, 45 So.2d 119.

Ga.—Georgia Stages v. Miller, 19 S.

E.2d 337, 67 Ga.App. 27.

Mich.—White v. Huffmaster, 32 N.W.

2d 447, 321 Mich. 225.

N.C.—Burns v. North State Laundry,

167 S.E. 573, 204 N.C. 145.

81. Cal.—Brooks v. City of Mont-

terey, 290 P. 540, 106 Cal.App. 649.

64 C.J. p 1040 note 68.

82. Ohio.—Tanski v. White, 109 N.E.

2d 319, 92 Ohio App. 411.

**Further instructions held not re-**

**quired**

Mass.—Kinnear v. General Mills, 32

N.E.2d 263, 308 Mass. 344.

Neb.—Cox v. Greenleaf-Lied Motors,

277 N.W. 819, 134 Neb. 1.

N.D.—Ziegler v. Ford Motor Co., 272

N.W. 743, 67 N.D. 286.

83. Cal.—Cook v. Los Angeles Ry.

Corp., 81 P.2d 118, 13 Cal.2d 591.

Validity of statute forbidding com-

munication between judge and jury

except in open court see supra §

473.

**Matters covered by the statute**

Statute relating to additional in-

structions requested by jury makes it

mandatory on trial judge to give ad-

ditional information on matters of

law but discretionary as to court's

recollection of testimony on any dis-

puted point.—Tanski v. White, 109

N.E.2d 319, 92 Ohio App. 411.

**Duty to permit statement of request**

Where jury requests additional in-

struction, it is duty of trial judge to

permit jury, through their spokes-

man, to state what information is re-

quested.—Scott v. Wix, 50 N.E.2d 361,

71 Ohio App. 519.

84. Ohio.—Hubbuck v. City of

Springfield, 28 N.E.2d 773, 63 Ohio

App. 329, appeal dismissed 23 N.E.

as where the court, engaged in the trial of another case, did not immediately give the requested additional instructions and the jury announced their verdict shortly thereafter.<sup>85</sup>

### c. On Request of Counsel

Since error cannot ordinarily be assigned to the refusal of instructions unless timely requests are made, and requests are not timely if made after the jury have retired, it is generally held that, while the court may recall the jury and give them further instructions at the request of counsel, it may in its discretion refuse to do so.

Since error cannot ordinarily be assigned to the refusal of instructions unless timely requests are made, and requests are not timely if made after the jury have retired, it is generally held that, while the court may recall the jury and give them further instructions at the request of counsel,<sup>86</sup> it may in its discretion refuse to do so,<sup>87</sup> especially where the jury have already received all instructions necessary to aid them in reaching a verdict,<sup>88</sup> and no objections have been made to the instructions given,<sup>89</sup> or where the requested instruction is not supported by the evidence.<sup>90</sup> If, however, the instructions requested by counsel have previously been offered and improperly refused, error may be assigned to their refusal when the jury come into court for further instructions after retirement.<sup>91</sup> It has also been held improper for the court to refuse a request to charge the jury that they could not agree to a verdict merely to escape

disagreement, where a statement of the foreman indicated that the jurors were confused on the subject and the verdict was apparently reached by compromise.<sup>92</sup> Where the court has given additional instructions on its own motion or at the request of the jury, it is generally declared that the court should give additional, explanatory, or qualifying, instructions requested by counsel if the ends of justice so require.<sup>93</sup> This latter rule has no application if the court does not give new instructions to the jury, but the instructions originally given are simply repeated;<sup>94</sup> and, if further instructions have done no injury to the party complaining, the refusal of additional explanatory instructions requested by counsel is not ground for reversal.<sup>95</sup> Where the jury were not instructed on a necessary matter, it has been held error to refuse such an instruction submitted before the verdict is agreed on despite the initial omission by the party to request such an instruction.<sup>96</sup>

### § 476. — Restating or Re-Reading Instructions

The court may re-read the instructions to the jury either at their request, or on its own motion; and it may, in answer to a question of whether an instruction of a certain tenor has been given, state that it has.

The court may re-read the instructions to the jury either at their request,<sup>97</sup> or on its own mo-

2d 949, 136 Ohio St. 124—Defibaugh v. Ulmer, 10 N.E.2d 447, 56 Ohio App. 255.

85. Ohio.—Defibaugh v. Ulmer, *supra*.

86. N.Y.—Phillips v. New York Cent., etc., R. Co., 27 N.E. 978, 127 N.Y. 657, 3 Silv.A. 467.

64 C.J. p 1040 note 71.

Necessity for requests for instructions see *supra* § 390.

Time for making requests see *supra* § 394.

87. U.S.—Valley Shoe Corp. v. Stout, C.C.A.Mo., 98 F.2d 514.

N.M.—Lujan v. McCuiston, 232 P.2d 478, 55 N.M. 275—Laws v. Pyeatt, 52 P.2d 127, 40 N.M. 7.

Ohio.—Dietz v. Chandler, App., 56 N.E.2d 937.

Tenn.—Llewellyn v. City of Knoxville, 232 S.W.2d 568, 33 Tenn.App. 632.

64 C.J. p 1040 note 72.

#### In absence of grounds for request

In actions by motorist and guest for damages from collision of streetcar with automobile, refusal to instruct, after jury had reported their inability to agree on a verdict, that contributory negligence would not bar recovery if conduct of defendant

was wanton and willful or reckless was not erroneous, in absence of grounds for request, irrespective of the merits of the request had it been seasonably made.—Hemmer v. Tennessee Elec. Power Co., 139 S.W.2d 698, 24 Tenn.App. 42.

88. U.S.—Valley Shoe Corp. v. Stout, C.C.A.Mo., 98 F.2d 514.

Ark.—Norton v. McNutt, 17 S.W. 362, 55 Ark. 59.

#### Refusal held proper

In action for injuries resulting when foot bridge maintained by defendant city collapsed and precipitated plaintiff pedestrian into a ravine allegedly as result of negligence of city, wherein defendant contended that an automobile which crashed across foot bridge one half hour before accident was an intervening cause, trial judge did not abuse discretion in refusing to give requested instruction on concurring negligence of defendant city and of motorist, when jury had returned for clarification of other points after retiring to consider verdict.—Llewellyn v. City of Knoxville, 232 S.W.2d 568, 33 Tenn.App. 632.

89. N.M.—Lujan v. McCuiston, 232 P.2d 478, 55 N.M. 275.

90. N.Y.—Ivey v. Brooklyn Heights R. Co., 71 N.Y.S. 633, 63 App.Div. 311.

91. Ga.—Yeldell v. Shinholster, 15 Ga. 189.

92. N.Y.—Van Der Harst v. Koenig, 291 N.Y.S. 952, 249 App.Div. 235.

93. Ala.—Feibelman v. Manchester F. Assur. Co., 19 So. 540, 108 Ala. 180.

64 C.J. p 1041 note 76.

94. Ala.—Prosser v. Henderson, 11 Ala. 484.

N.H.—Harvey v. Graham, 46 N.H. 175.

95. R.I.—Keefe v. United Elec. Rys. Co., 195 A. 599, 59 R.I. 423.

Tenn.—Wade v. Ordway, 1 Baxt. 229.

96. Ky.—Partin's Adm'r v. Black Mountain Corporation, 71 S.W.2d 984, 254 Ky. 404.

97. Cal.—Musklin v. Gerun, 116 P.2d 105, 46 Cal.App.2d 404.

Minn.—Ames v. Cramer, 273 N.W. 361, 200 Minn. 92.

N.H.—Muggrave v. Great Falls Mfg. Co., 169 A. 583, 86 N.H. 375.

Tenn.—Monday v. Millsaps, App., 264 S.W.2d 6—Tallent v. Fox, 141 S.W. 2d 485, 24 Tenn.App. 96.

Wis.—Woodruff v. King, 2 N.W. 452, 47 Wis. 261.

tion;<sup>98</sup> and it may, in answer to a question of whether an instruction of a certain tenor has been given, state that it has.<sup>99</sup> Any reasonable request by the jury relating to the re-reading of instructions on a topic which is doubtful in the minds of the jury should not be willfully disregarded by the court.<sup>1</sup> Where the jury return a verdict not authorized by the instructions, re-reading of the instructions by the court preliminary to sending the jury out to return another verdict is not improper.<sup>2</sup>

It is, however, error for the court, without request therefor, to single out and reread and emphasize only one instruction,<sup>3</sup> or to have reread only one instruction when the reading of another instruction is also necessary completely to present to the jury the law covering the matter as to which they are in doubt.<sup>4</sup> Where the jury request an additional charge, the trial judge need not reread or give his entire charge, but need charge only such parts thereof as are necessary to answer the request,<sup>5</sup> and, thus an individual instruction may be

repeated where only it is requested by the jury,<sup>6</sup> although even in such a case the judge should caution the jury that all the law of the case is not contained in the particular instruction and that it covers only a particular phase of the case.<sup>7</sup>

#### § 477. — Requisites and Sufficiency of Instructions

Further instructions must contain a correct statement or exposition of the law, but a supplemental instruction is sufficient if it contains a correct statement of the law when considered in connection with the main charge, and generally, any instruction which would have been proper in the first charge may be given as a supplemental instruction.

Further instructions must contain a correct statement or exposition of the law;<sup>8</sup> but a supplemental instruction is sufficient if it contains a correct statement of the law, when considered in connection with the main charge.<sup>9</sup> Care should be taken clearly to define the scope and object of additional instructions given to the jury after submission of the cause.<sup>10</sup> The court may reread former instruc-

98. Ark.—Etna Life Ins. Co. v. Dewberry, 59 S.W.2d 607, 187 Ark. 278.

64 C.J. p 1041 note 81.

99. U.S.—Marande v. Texas, etc., R. Co., N.Y., 124 F. 42, 59 C.C.A. 562, error dismissed 25 S.Ct. 800, 197 U. S. 626, 49 L.Ed. 912.

1. Cal.—Cook v. Los Angeles Ry. Corp., 91 P.2d 118, 13 Cal.2d 591. N.Y.—Kerner v. Surface Transp. Corp. of New York, 42 N.Y.S.2d 296, 266 App.Div. 356, resettled 44 N.Y.S.2d 264, 266 App.Div. 948, affirmed 59 N.E.2d 786, 293 N.Y. 881.

2. Ind.—Warner v. Warner, 10 N.E. 2d 773, 104 Ind.App. 252.

3. U.S.—Palmer v. Miller, C.C.A.Mo., 145 F.2d 926. 64 C.J. p 1041 note 83.

4. Mich.—Gold v. Detroit United Ry., 193 N.W. 775, 232 Mich. 209.

5. Ga.—Elliott v. Floyd, 69 S.E.2d 620, 85 Ga.App. 416.

6. Ark.—St. Louis, etc., R. Co. v. Reed, 115 S.W. 150, 88 Ark. 458. 64 C.J. p 1041 note 85.

**Failure to re-read all instructions held not error**

Ark.—John Hancock Mut. Life Ins. Co. v. Magers, 132 S.W.2d 841, 199 Ark. 104.

Cal.—Olson v. Standard Marine Ins. Co., 240 P.2d 379, 109 Cal.App.2d 180.

Ga.—Elliott v. Floyd, 69 S.E.2d 620, 85 Ga.App. 416.

7. Ark.—St. Louis, etc., R. Co. v. Reed, 115 S.W. 150, 88 Ark. 458.

8. Conn.—Farguet v. De Senti, 148 A. 139, 110 Conn. 367.

64 C.J. p 1041 note 88.

**Requisites and sufficiency:**

Of further instructions in criminal cases see Criminal Law § 1376.

Of instructions generally see supra § 323-378.

**Permissive expository charge**

Where jury asked court whether it would be contradictory to answer two successive special issues "yes" and "no" respectively, answer that it would not be contradictory was a permissive expository charge and not a prohibited general charge.—Dallas Ry. & Terminal Co. v. Starling, 110 S.W.2d 557, 130 Tex. 379.

**Instructions held improper**

Cal.—Scott v. Renz, 154 P.2d 738, 67 Cal.App.2d 428.

Fla.—Paul v. Florida Cities Bus Co., 200 So. 363, 146 Fla. 97.

Okl.—Nichols v. Powell, 265 P.2d 721.

9. Conn.—Marklavicus v. L. E. Bunell Transp. Co., 175 A. 914, 119 Conn. 310.

Ga.—Elliott v. Floyd, 69 S.E.2d 620, 85 Ga.App. 416.—General Oil Co. v. Crowe, 187 S.E. 221, 54 Ga.App. 139.

—Shermer v. Crowe, 186 S.E. 224, 53 Ga.App. 418.—Veazey v. Glover, 171 S.E. 732, 47 Ga.App. 826.

Minn.—Leebens v. Baker Co., 45 N.W. 2d 791, 233 Minn. 119.

N.Y.—Wertheim v. Oriskany St. Garage, 9 N.Y.S.2d 19, 256 App.Div. 888.

Tenn.—Marion Const. Co. v. Steepleton, 14 Tenn.App. 127.

64 C.J. p 1041 note 89.

**Instructions held proper**

(1) In general.

U.S.—Herzinger v. Standard Oil Co. of Cal., C.A.Nev., 190 F.2d 695.

Minn.—Leebens v. Baker Co., 45 N.W. 2d 791, 233 Minn. 119.

Tex.—Burleson v. Morse, Civ.App., 172 S.W.2d 361, error refused.

Federal Underwriters Exchange v. Carroll, Civ.App., 130 S.W.2d 1101.

W.Va.—Carroll v. Feltty, 2 S.E.2d 521, 121 W.Va. 215, certiorari denied.

Feltty v. Carroll, 60 S.Ct. 85, 308 U.S. 571, 84 L.Ed. 479.

(2) Where jury returned and asked a question, the restatement of part of charge and the giving of an illustration not subject to reasonable criticism did not constitute error.—Tocchetti v. Cyril and Julia C. Johnson Memorial Hospital, 36 A.2d 381, 130 Conn. 623.

(3) Where jury gave affirmative answer to trial judge's question as to whether judge's statements answered jury's question, asking judge to redefine the law of negligence and accident, it was not error to fail to repeat the charge on comparative negligence.—Southeastern Greyhound Lines v. Durham, 8 S.E.2d 99, 62 Ga. App. 99.

10. Mo.—Willmott v. Corrigan Consol. St. R. Co., 17 S.W. 490, 106 Mo. 535.

**Instructions held not erroneous**

Ga.—Edwards v. Ford, 26 S.E.2d 306, 69 Ga.App. 578.

Mo.—Martin v. Lingle Refrigeration Co., 260 S.W.2d 562.

N.D.—Hutchinson v. Kinzley, 262 N. W. 251, 68 N.D. 25, 98 A.L.R. 1307.

Pa.—Pascucci v. Yori, Com.Pl., 2 Del. Co.L.J. 109, 64 York Leg.Rec. 72.

tions in connection with the supplemental instructions, or it may simply give additional instructions.<sup>11</sup> During the receipt of additional instructions statements by jurors indicating a possible misapprehension of instructions do not of themselves make the instructions erroneous.<sup>12</sup> A trial judge's repetition of language in the jury's note requesting additional instructions has been held not prejudicial as resulting in undue emphasis with respect to the note.<sup>13</sup>

Generally, any instruction which would have been proper in the first charge may be given as a supplemental instruction to a jury deliberating on a verdict.<sup>14</sup> Additional instructions should not result in the court invading the province of the jury,<sup>15</sup> nor should the instructions permit the jury to go beyond their province.<sup>16</sup> Where supplemental instructions are found necessary and are given by the court, the failure to instruct originally on the point has been held not error.<sup>17</sup> Incorrect instructions given in the original charge should be

corrected on a resubmission of the case,<sup>18</sup> and an agreement by counsel at the time of the original charge that the jury might consider the case without a correction of the charge is not binding on the resubmission.<sup>19</sup> On a rereading of particular testimony requested by the jury, a statement by the court that there were other witnesses whose testimony in some parts was in conflict with the testimony read has been held not erroneous on the ground of no clear conflict where the testimony was not all one way and the statement was construed as merely cautionary.<sup>20</sup> Additional instructions which leave an incorrect impression as to the burden of proof are improper.<sup>21</sup>

As is the case with instructions originally given, additional instructions should not ignore or exclude from the consideration of the jury material issues covered by the instructions originally given.<sup>22</sup> So also, the supplemental charge should be limited to issues on which there is proof,<sup>23</sup> or to issues which

11. Neb.—Hofrichter v. Kiewit-Condon-Cunningham, 22 N.W.2d 703, 147 Neb. 224, 164 A.L.R. 1256.  
Re-reading instructions see supra § 476.

12. Ga.—Davis v. Guffey, 27 S.E.2d 689, 196 Ga. 816.  
Mich.—Izzo v. Weiss, 259 N.W. 295, 270 Mich. 372.  
Ohio.—Glasco v. Mendelman, App., 58 N.E.2d 94, reversed on other grounds 56 N.E.2d 210, 143 Ohio St. 649.

13. Ohio.—Feher v. Motor Exp. App., 68 N.E.2d 140.

14. Neb.—Hofrichter v. Kiewit-Condon-Cunningham, 22 N.W.2d 703, 147 Neb. 224, 164 A.L.R. 1256.

15. Ga.—Veal v. Barber, 30 S.E.2d 252, 197 Ga. 555.

**Amount of damages**

The colloquy between trial judge and jurors who returned to court for an explanation of certain aspects of the case did not disclose error, where trial judge told jurors that question of damages was solely within their province and that he could not discuss matter or give any enlightenment on the subject, other than to re-read the instructions already given.—Graham v. Griffin, 151 P.2d 879, 66 Cal.App.2d 116.

**Instructions held proper**

Ga.—Southern Ry. Co. v. Taylor, 47 S.E.2d 77, 76 Ga.App. 745.

Tex.—Dallas Ry. & Terminal Co. v. Starling, 110 S.W.2d 557, 130 Tex. 379—Texas Emp. Ins. Ass'n v. Haywood, Civ.App., 266 S.W.2d 499, reversed on other grounds, Sup., 266 S.W.2d 856.

16. U.S.—Schutte & Koerting Co. v. Fischer, D.C.Pa., 4 F.R.D. 11.

**Question of costs**

Where jury considering defendants' counterclaim reported that they were all of one opinion that there should be no money awarded to defendants, court properly instructed jury that they should return a general verdict for plaintiff, and it would have been improper for court to have instructed jury that they might find a nominal verdict for defendants.—Schutte & Koerting Co. v. Fischer, supra.

**Apportionment of damages**

Where jury returned to court room after they had retired to consider the case and inquired whether jury should apportion damages between the three defendants involved in automobile collision, trial court properly instructed jury that if jury awarded damages, verdict should be that jury found for plaintiff against defendants or any combination of the defendants and assessed amount of damages at whatever amount jury determined.—Watt v. Combs, 12 So.2d 189, 244 Ala. 31, 145 A.L.R. 667, followed in 12 So.2d 197, 244 Ala. 39.

17. Conn.—Gilbert v. Lundgren Fuel Co., 69 A.2d 829, 136 Conn. 228.  
Cure of error in giving instructions see supra §§ 441-443.

18. U.S.—Broadley v. Union Ry. Co., C.C.A.Tenn., 132 F.2d 419.

19. U.S.—Broadley v. Union Ry. Co., supra.

20. U.S.—Holcombe v. Buckland, C. C.A.Va., 130 F.2d 544.  
Restating evidence and reading minutes of testimony see infra §§ 479, 480.

21. Wash.—Stanley v. Allen, 180 P. 2d 90, 27 Wash.2d 770.

22. Mich.—Wiggins v. Snow, 50 N.W. 991, 89 Mich. 476.

**Unsettled issue**

In action for wrongfully entering on lands and removing timber therefrom, where plaintiffs claimed title to part of land overlapping defendants', the larger part of overlap by virtue of adverse possession and the smaller by prior patent, and defendants claimed the larger portion by virtue of prior patent and the smaller by agreement, court's answer to questions of jury concerning how much timber had been cut on plaintiffs' land, that largest amount was on the older patent, was equivalent to saying that the senior patent settled the question, and answer that court did not consider the agreement to have settled title, were error.—Nolan v. Miniard, 195 S.W.2d 81, 302 Ky. 540.

23. Neb.—Kuhse v. Luther, 266 N.W. 66, 130 Neb. 623.

N.J.—Salvato v. New Jersey Asphalt & Paving Co., 50 A.2d 635, 135 N.J. Law 185.

**Limiting jury to issue**

Where only one question of negligence was submitted to jury in special verdict as to each party to action and that was whether at or just before collision his vehicle was being operated on wrong side of street, and jury inquired whether they could find that both plaintiff and defendant's truck driver were guilty of negligence in operating their vehicles on wrong side of street, instruction that jury would have to answer one question "yes" and one "no" was proper.—

are tendered by the pleadings,<sup>24</sup> and it has been held that after submission of the cause an additional instruction should not be given which goes so far as to be another full, complete, and different charge on any of the material questions involved in the issues of the case.<sup>25</sup> Although categorical answers may properly be given without reinstruction or elaboration,<sup>26</sup> the court may,<sup>27</sup> and should,<sup>28</sup> where it appears that more than a categorical answer is necessary to keep the issues to be decided correctly before the minds of the jury, give instructions beyond those necessary directly to answer the questions or requests of the jury; but, in answering the jury's request for further instructions, it is not necessary for the court again to charge them on all the elements in the case.<sup>29</sup>

While it is error to give an unresponsive answer to the jury's request for further instructions which tends to confuse the jury,<sup>30</sup> the court need not test the meaning of a jury's inquiry for further instructions by strict rules of construction,<sup>31</sup> but may consider and answer the question according to the meaning obviously intended.<sup>32</sup> If a further instruction adequately deals with the only material point in the case, it will be presumed that it fully

answered the jury's request for further instructions, if it is not affirmatively made to appear that the jury sought instruction on some other point.<sup>33</sup> The fact that the court misunderstands the request of the jury and gives an unresponsive answer will not be considered as an erroneous refusal to answer the request where the complaining party fails to call the attention of the court to the matter so as to give an opportunity to correct the misapprehension;<sup>34</sup> and an unresponsive answer to the jury's inquiry is not improper where the question cannot properly be answered directly without injecting into the case an issue not raised by the parties.<sup>35</sup>

*Necessity that instructions be written or made part of record.* Where instructions are required to be given in writing or made part of the record, and further instructions are given, these instructions must also be in writing,<sup>36</sup> or reported and recorded by the court stenographer,<sup>37</sup> unless, as may be done, this requirement is waived.<sup>38</sup> Statutes requiring further or additional instructions to be in writing do not apply to all statements made by the court to the jury after submission of the cause.<sup>39</sup>

Czerniakowski v. National Ice & Coal Co., 31 N.W.2d 156, 252 Wis. 112.

24. Ga.—Kerns v. Crawford, 179 S.E. 854, 51 Ga. App. 158.  
Wash.—Stanley v. Allen, 180 P.2d 90, 27 Wash.2d 770.

25. Utah.—Jenkins v. Stephens, 231 P. 112, 64 Utah 307.  
64 C.J. p 1041 note 93.

#### Material alteration

In action for injuries sustained in automobile collision, instruction, in response to request by jury, which permitted jury to answer issue as to time when brakes were first applied and also as to time of actual collision, whereas issue as originally submitted required but a single answer, was error as a material alteration in the nature of an unauthorized general charge.—Carter v. Lindeman, Tex. Civ.App., 111 S.W.2d 318.

#### Instruction held proper

Tex.—Pfeuffer v. Haas, Civ.App., 55 S.W.2d 111, error dismissed.

26. Colo.—Schlesinger v. Miller, 52 P.2d 402, 97 Colo. 583.  
N.Y.—Flagg v. Provan, 98 N.Y.S.2d 593, 277 App.Div. 207.  
R.I.—Ashton v. Higgins, 96 A.2d 632.

27. N.D.—Hutchinson v. Kinzley, 262 N.W. 251, 66 N.D. 25, 98 A.L.R. 1307.  
Ohio.—Langdon v. Cincinnati St. Ry. Co., 62 N.E.2d 380, 75 Ohio App. 482.

R.I.—Tanguay v. Warwick Chemical Co., 173 A. 540, 54 R.I. 445.  
64 C.J. p 1041 note 94.

23. Vt.—Paine & Slocum v. Hutchins, 49 Vt. 314.

29. U.S.—Valley Shoe Corp. v. Stout, C.C.A.Mo., 98 F.2d 514.  
Ohio.—Scheu v. Scheu, 64 N.E.2d 334, 77 Ohio App. 510.  
Okla.—City of Altus v. Wise, 143 P.2d 128, 193 Okl. 288.

Pa.—Backus v. Philadelphia Rapid Transit Co., 117 A. 336, 273 Pa. 588.

#### Instructions held proper

In tenant's action for damage caused by leak in store roof, where jury found that tenant had called attention to need for repairs, and asked whether landlord's agreement to repair, by which the jury plainly meant a gratuitous undertaking, constituted a contract, the judge properly answered that it did not, and it was not necessary for him to repeat former instructions, or to discuss the evidence.—Blood v. Dewey, 60 N.E.2d 347, 318 Mass. 79.

30. N.C.—Hoke v. Atlantic Greyhound Corp., 40 S.E.2d 345, 226 N.C. 692.  
Ohio.—Sorna v. Village of Maple Heights, 159 N.E. 578, 26 Ohio App. 408.

Pa.—Clanchetti v. Whitley Homes, Inc., Com.Pl., 38 Del.Co. 337, 65 York Leg.Rec. 108.

31. N.H.—Tetreault v. Gould, 138 A. 544, 83 N.H. 99.

32. N.H.—Tetreault v. Gould, supra. 64 C.J. p 1042 note 99.

33. Mich.—Herbstreit v. Beckwith, 35 Mich. 93.

34. N.Y.—Boeklen v. Hardenbergh, 60 N.Y. 8.

35. Ga.—Citizens' & Southern Bank v. Seigler, 146 S.E. 485, 167 Ga. 657.

36. Mo.—Boyd v. Pennewell, App., 78 S.W.2d 456.  
64 C.J. p 1042 note 4.

37. R.I.—Macchia v. Ducharme, 117 A. 651, 44 R.I. 418.

#### Failure to comply held error

Where written instructions had not been waived or oral instructions consented to and main charge to jury was in writing, giving further instructions orally at request of jury after retirement and not in the presence of the parties or counsel constituted error, regardless of whether counsel for both parties had agreed that further instructions might be given in their absence, particularly where record failed to disclose compliance with statutory requirement that oral instructions be taken down by court reporter and typewritten at length.—Ackerman v. Fischer, N.D., 64 N.W.2d 734.

38. Wis.—McMahon v. Eau Claire Water Works Co., 70 N.W. 829, 95 Wis. 640.

64 C.J. p 1042 note 6.

39. Okla.—Kahan v. Pure Oil Co., 98 P.2d 894, 186 Okl. 493.

64 C.J. p 1042 note 7.



*Presentment or submission to attorneys.* A statute requiring that the original instructions be submitted to counsel on both sides before being read to the jury has been held to have no application to additional instructions given after submission of the case;<sup>40</sup> but there is also authority to the contrary.<sup>41</sup> Where the additional instructions were submitted to, and approved by, the attorneys, the instructions have been held proper.<sup>42</sup>

# § 478. — Necessity That Instructions be Given in Open Court and in Presence of Counsel or Parties

In accordance with the general rule that all communications between court and jury must be in open court, additional or supplemental instructions should be so given, unless counsel agree otherwise; however, there is a split of authority as to the necessity for the presence of counsel in the court and the necessity for making an attempt to secure their presence.

In accordance with the general rule that all communications between court and jury must be in open

court, additional or supplemental instructions should be given in such manner,<sup>43</sup> unless counsel agree otherwise.<sup>44</sup> Consequently, it is generally held that, if counsel have not consented thereto, it is improper for the judge, in the absence of counsel, to go into the jury room and give further instructions,<sup>45</sup> or to send the further instructions to the jury room with another.<sup>46</sup> According to some cases, however, error in failing to give the instructions in open court is not ground for reversal if it is apparent that no prejudice resulted;<sup>47</sup> but there is clearly ground for reversal if there is any uncertainty as to the contents of instructions privately communicated to the jury.<sup>48</sup>

With respect to the necessity for the presence of counsel, the rule sustained by one line of decisions is to the effect that, if the further instructions are given in open court, it is not error to give them in the absence of counsel and without making an attempt to secure their presence.<sup>49</sup> However, in

## Where issues not defined

A verdict-urging instruction did not define the issues in the case so that it was required to be in writing, where the court simply repeated what issues the jury were required to decide as they were set forth in the written instructions, and the instruction was simply a cautionary instruction for the jury to agree if the jury could properly do so.—*In re Cocklin's Estate*, 5 N.W.2d 577, 232 Iowa 266.

## Oral instruction on maximum counsel fee

In action against railroad for injuries under Federal Employers' Liability Act, trial court properly orally answered inquiry addressed to court by jury after jury had retired to deliberate as to what the maximum fee or percentage basis allowed by the law to plaintiff's counsel was.—*Counts v. Thompson*, 222 S.W.2d 487, 359 Mo. 485.

## Admonitory instructions

An oral remark by court to jury, that they should wholly disregard the statements made to them by one who had intruded in the jury room, was not a violation of the statute requiring further instructions to the jury to be given in writing, since it was merely admonitory and a reiteration of instructions already given to determine issues solely from evidence introduced.—*Bell v. New Jersey Ins. Co.*, Tex.Civ.App., 120 S.W.2d 610.

## Advice on juror's attitude

Abstract advice by trial court after case was submitted to jury concerning proper and improper mental attitude for a juror to assume toward a matter submitted to be acted on by him which did not touch on material

matters in issue was not within purview of statute requiring all instructions to be written and submitted to counsel on each side.—*Lennox*, by *Rose v. White*, 54 S.E.2d 8, 133 W.Va. 1, 25 A.L.R.2d 437.

40. Iowa.—*Garden v. Moore*, 156 N.W. 410, 174 Iowa 376.

41. Tex.—*Thompson v. Caldwell*, Civ.App., 22 S.W.2d 720, affirmed, Com.App., 36 S.W.2d 999.

64 C.J. p 1042 note 9.

42. Ill.—*Taylor v. City of Berwyn*, 22 N.E.2d 930, 372 Ill. 124.

43. Mo.—*Boyd v. Pennell*, App., 78 S.W.2d 456.

N.J.—*Leonard's of Plainfield v. Dybas*, 31 A.2d 496, 130 N.J.Law 135.

N.Y.—*Gundersen v. All America Commerce Corp.*, 90 N.Y.S.2d 3, 275 App.Div. 572, reargument denied 92 N.Y.S.2d 310, 275 App.Div. 1035.

Wis.—*Wiedenhaupt v. Hoelzel*, 35 N.W.2d 207, 254 Wis. 39.

## Same formality as original instructions

Where additional instructions are given to a jury after the jury have deliberated for some time and are unable to agree, the jury should be brought before the court in a body, and the additional instruction should be given with the same formality as the original instructions.—*Hofrichter v. Kiewit-Condon-Cunningham*, 22 N.W.2d 703, 147 Neb. 224, 164 A.L.R. 1256.

44. N.Y.—*Gundersen v. All America Commerce Corp.*, 90 N.Y.S.2d 3, 275 App.Div. 572, reargument denied 92 N.Y.S.2d 310, 275 App.Div. 1035.

45. N.J.—*Leonard's of Plainfield v. Dybas*, 31 A.2d 496, 130 N.J.Law 135.

Tex.—*Reynolds v. Sandel*, Civ.App., 142 S.W.2d 527.

64 C.J. p 1042 note 12.

Necessity that original instructions be given in open court and in presence of counsel see supra § 525.

46. Tex.—*Meinecke v. Fidelity Inv. Co.*, Civ.App., 62 S.W.2d 623, error refused.

64 C.J. p 1042 note 13.

## Court stenographer

It was error for trial court, over objections of counsel for plaintiff, to direct court stenographer to go into jury room and read portion of charge relating to the responsibility of defendant.—*Jones v. S. T. Palay Textile Corp.*, 110 N.Y.S.2d 170, 279 App.Div. 337.

## Balliff

Action of trial judge in giving to balliff, without summoning counsel, the instructions opened to the one which jury had requested be reread to them, and in instructing balliff to tell foreman to read that instruction was highly irregular.—*Lewis v. Southern Pac. Co.*, 220 P.2d 431, 98 Cal.App.2d 358.

47. Mich.—*Corpus Juris* quoted in *Hillsdale Hi-Speed Co. v. Hicks*, 47 N.W.2d 652, 654, 330 Mich. 371.

64 C.J. p 1043 note 14.

48. Mich.—*Corpus Juris* quoted in *Hillsdale Hi-Speed Co. v. Hicks*, 47 N.W.2d 652, 654, 330 Mich. 371.

N.Y.—*Jones v. S. T. Palay Textile Corp.*, 110 N.Y.S.2d 170, 279 App. Div. 337.

Pa.—*Sommer v. Huber*, 38 A. 595, 183 Pa. 162.

49. Minn.—*Shockman v. Union Transfer Co.*, 19 N.W.2d 812, 220 Minn. 334.

a considerable number of jurisdictions it is well settled, sometimes by statute<sup>50</sup> or rule of practice,<sup>51</sup> that it is error to give further instructions in the absence of, or without notice to, the parties or their counsel.<sup>52</sup> This latter rule is usually held not to apply if a reasonable attempt has been made to notify counsel or procure their attendance,<sup>53</sup> if an attempt to procure their attendance would be impracticable,<sup>54</sup> if the right to be present is waived by counsel voluntarily absents themselves from the

place of trial,<sup>55</sup> or if it is clearly apparent that no prejudice has resulted to the complaining party.<sup>56</sup>

Statements which simply direct the jury as to the proper way to make up their verdict,<sup>57</sup> which merely urge the jury to agree,<sup>58</sup> which instruct the jury that they should answer such issues as they can agree on,<sup>59</sup> which admonish the jury to deliberate orderly,<sup>60</sup> or which merely answer the

N.H.—*Daniels v. Barker*, 200 A. 410, 89 N.H. 416.

N.J.—*Palestroni v. Jacobs*, 77 A.2d 183, 10 N.J.Super. 266—*Salvato v. New Jersey Asphalt & Paving Co.*, 50 A.2d 636, 135 N.J.Law 185—*Leonard's of Plainfield v. Dybas*, 31 A.2d 496, 130 N.J.Law 135.

N.C.—*Burns v. North State Laundry*, 167 S.E. 573, 204 N.C. 145.

Pa.—*Miller v. Stauffer, Com.Pl.*, 37 Berks Co. 247—*Gush v. Darkus, Com.Pl.*, 27 Erie Co. 1.

64 C.J. p 1043 note 16.

#### Discussion later read to counsel

Fact that court called jury from deliberations and, when asked question by juror, discussed phase of case troubling juror, in absence of litigants and counsel, was held not error, where discussion was later read to counsel.—*Silverstein v. Schneider*, 164 A. 480, 110 N.J.Law 239.

50. *Ohio*—*Toledo Edison Co. v. Tullis*, 1 N.E.2d 324, 51 Ohio App. 417. *Tex.*—*Corpus Juris* cited in *Scroggs v. Morgan*, 130 S.W.2d 283, 285, 133 Tex. 581—*Fort Worth Structural Steel Co. v. Griffin, Civ.App.*, 63 S.W.2d 887.

64 C.J. p 1043 note 17.

#### Statute held mandatory

(1) The statute providing that where information with respect to any point of law arising in a case is given to the jurors after they have retired for deliberation, such information must be given in the presence of or after notice to the parties or counsel, is mandatory.—*Ferderer v. Northern Pac. Ry. Co.*, 26 N.W.2d 236, 75 N.D. 139.

(2) Under statute pertaining to additional instructions which may be given to jury after their retirement, it is mandatory that the jury in a body should come into court and there receive from the judge further instructions and that reasonable opportunity should be afforded parties or their counsel to be present when such instructions are given.—*Scroggs v. Morgan*, 130 S.W.2d 283, 133 Tex. 581.

51. *R.I.*—*Macchia v. Ducharme*, 117 A. 61, 44 R.I. 418.

64 C.J. p 1044 note 18.

**Prior to rule it was held that sending for counsel before giving further instructions was a favor or courtesy**

and not a duty.—*Alexander Bros. v. Gardiner*, 14 R.I. 15.

52. *U.S.*—*Parfet v. Kansas City Life Ins. Co.*, C.C.A.Colo., 128 F.2d 361, certiorari denied 63 S.Ct. 50, 317 U.S. 654, 87 L.Ed. 526.

Mo.—*Boyd v. Pennewell, App.*, 78 S.W.2d 456.

N.Y.—*Gundersen v. All America Commerce Corp.*, 90 N.Y.S.2d 3, 275 App.Div. 572, reargument denied 92 N.Y.S.2d 310, 275 App.Div. 1035.

64 C.J. p 1044 note 19.

#### Good faith immaterial

An instruction during counsel's absence in answer to jury's request after retiring for deliberation that they could award plaintiff definite amounts for loss of wages and personal injuries, if damages were allowed, was erroneous, even though given in good faith.—*White v. Hasburgh, Mo.App.*, 124 S.W.2d 560.

#### Charge after separation for night

Verdict was irregular where, after sealed verdict had been ordered and jury were permitted to separate for night after they had disagreed, court further charged jury on following morning in absence of defendant and his counsel.—*Schattner v. Heriman*, 285 N.Y.S. 343, 247 App.Div. 730.

**Waiver by parties of right to be present when verdict was taken could not be construed to authorize trial judge, in absence of the parties and their counsel and without notice to them, to send instructions in writing to the jury pursuant to inquiry by them after they had retired from courtroom and while they were in jury room deliberating on their verdict.**—*Arrington v. Robertson, C.C.A. Pa.*, 114 F.2d 821.

53. *Mo.*—*McPherson v. St. Louis, etc., R. Co.*, 10 S.W. 846, 97 Mo. 253.

64 C.J. p 1044 note 20.

54. *Ala.*—*Pettus v. Louisville & N. R. Co.*, 106 So. 807, 214 Ala. 187. *N.Y.*—*Wiggins v. Downer*, 67 How. Pr. 65.

55. *U.S.*—*Arrington v. Robertson, C.C.A. Pa.*, 114 F.2d 821.

*Tex.*—*Pantazis v. Dallas Ry. & Terminal Co., Civ.App.*, 152 S.W.2d 1018, error dismissed.

64 C.J. p 1044 note 22.

#### Counsel's responsibility to be in attendance

Where jury retired and agreed on verdict for plaintiff, but returned into court to inquire whether they should themselves compute the interest, and the court after directing clerk to make a search for defendant's counsel learned that he had left the courtroom, failure to wait until presence of defendant's counsel should be obtained, before instructing jury that they should compute the interest if interest was to be allowed, was not error, since it was counsel's primary responsibility to be in attendance until the case was concluded.—*Meyer v. Dubinsky Realty Co., Mo.App.*, 133 S.W.2d 1106.

#### Delaying progress of trial

Where counsel is voluntarily absent from courtroom when jury inquires about answering questions submitted to them, he waives his right to be present, and it is not incumbent on court to delay progress of trial until counsel can be located and advised of the answers returned before instruction to answer all questions is given.—*Maryland Casualty Co. v. Gideon, Tex.Civ.App.*, 213 S.W.2d 848.

56. *Cal.*—*Lewis v. Southern Pac. Co.*, 220 P.2d 431, 98 Cal.App.2d 358. *Mo.*—*White v. Hasburgh, App.*, 124 S.W.2d 560.

64 C.J. p 1044 note 23.

57. *Colo.*—*Tilley v. Montellus Piano Co.*, 61 P. 483, 15 Colo.App. 204.

64 C.J. p 1044 note 24.

58. *N.Y.*—*Hand v. Hill*, 8 N.Y.S.2d 564, 255 App.Div. 1016.

64 C.J. p 1044 note 25.

59. *Tex.*—*Pantazis v. Dallas Ry. & Terminal Co., Civ.App.*, 162 S.W.2d 1018, error dismissed—*Varn v. Gonzales, Civ.App.*, 193 S.W. 1132.

#### Noise in jury room

Recalling jury after retirement, on hearing noise in jury room, to admonish jury that their deliberations should be orderly, was held proper, although neither litigants nor counsel were present.—*Silverstein v. Schneider*, 164 A. 480, 110 N.J.Law 239.

jury's inquiry as to whether any of the testimony of a certain witness had been stricken,<sup>61</sup> are not instructions on any point of law within the meaning

of a statute requiring instructions on any point of law to be given in the presence of, or after notice to, the parties or their counsel.

## E. RESTATING EVIDENCE AND READING MINUTES OF TESTIMONY OR ALLEGATIONS OF PLEADINGS TO JURY

### § 479. In General

It is generally held, sometimes under statutory authority, that where the jury after retirement return to the court with a request for information as to which they are in doubt, the trial court may, in its discretion, permit the jury to rehear the testimony of a witness, or have the notes or minutes of the evidence on that point read to the jury, or recapitulate the testimony.

The trial court may, in its discretion, permit the court stenographer to read excerpts from the evidence to the jury before they retire;<sup>62</sup> and where counsel for a party, in his argument to the jury, makes an erroneous assertion as to what a witness has testified to, it is error for the court to refuse opposing counsel's request to have the testimony of

that witness read to the jury.<sup>63</sup> While there is some authority to the effect that notes or minutes of the evidence cannot be read to the jury, after they have retired,<sup>64</sup> unless with the consent, or at the request, of the parties,<sup>65</sup> it is generally held, sometimes under statutory authority,<sup>66</sup> that, where the jury after retirement return to court with a request for information as to the evidence on an important point as to which they are in doubt, the trial court may, in its discretion, permit the jury to rehear the testimony of a witness,<sup>67</sup> or have the notes or minutes of the evidence on that point read to the jury,<sup>68</sup> or recapitulate the testimony,<sup>69</sup> even with-

61. Iowa.—Kenwood Lumber Co. v. Armstrong, 198 N.W. 521, 197 Iowa 1239.

62. Ala.—Landers v. Hayes, 72 So. 106, 196 Ala. 533.

63. Conn.—Carrano v. Hutt, 105 A. 323, 93 Conn. 106.

64. Colo.—Hersey v. Tully, 44 P. 854, 8 Colo.App. 110.

64 C.J. p 1045 note 30.

65. Mo.—Isreal v. Fanchon & Mar-  
co, App., 58 S.W.2d 774.

64 C.J. p 1045 note 31.  
Necessity for timely objection, and  
waiver of objections see infra §  
483.

66. Neb.—Shiers v. Cowgill, 59 N.W.  
2d 407, 157 Neb. 265.

64 C.J. p 1045 note 32.

#### Application to depositions

Under statute providing that, if disagreement arises between the jurors as to any part of the "testimony," the court may give jurors its recollection thereon or cause stenographer to read from the record after notice to parties or their counsel, quoted word includes testimony given by deposition.—Wilson v. Oklahoma Ry. Co., 248 P.2d 1014, 207 Okl. 204.

#### Statute to be interpreted broadly

The statute providing that after jurors retire to deliberate, if they disagree as to the testimony, they may request officer in charge to conduct them to the court, which shall give information sought on matters of law, and also, in presence of, or after notice to, parties or their counsel, may state its recollection of the testimony on a disputed point, should be interpreted broadly.—Hubbuck v. City of Springfield, 26 N.E.2d 773, 63

Ohio App. 329, appeal dismissed 23 N.E.2d 949, 136 Ohio St. 124.

67. Ky.—Fulton Towboat Co. v. Pen-  
dergrass, 15 Ky.L. 208.

N.Y.—Blackley v. Sheldon, 7 Johns.  
32.

68. Conn.—Coy v. Town of Milford,  
12 A.2d 641, 126 Conn. 484.

Fla.—Florida Power & Light Co. v.  
Robinson, 68 So.2d 406.

N.J.—Higgins v. Polk, 103 A.2d 1, 14  
N.J. 490.

Ohio.—Kleinhans v. American Gauge  
Co., 80 N.E.2d 626, 83 Ohio App.  
453.

Wis.—Patterson v. Phillips, 256 N.W.  
624, 216 Wis. 165.

64 C.J. p 1045 note 34.

#### Discretion

(1) Whether jury, after retirement, may, on their request, have particular portion of evidence read to them, is within discretion of trial court.—Nixon v. Shaver, 176 S.E. 849, 115 W. Va. 463.

(2) Where all parties and attorneys were present when jury requested that testimony be reviewed but record did not show that either of the parties consented or objected to the request, trial court was not required to grant the jury's request and require the reporter to read the testimony.—Small v. Wegner, Mo., 267 S.W.2d 26.

#### Practice not to be encouraged

The practice of allowing an official stenographer to read to jury his notes of the testimony of a witness, on request made by a jury which is allegedly in disagreement as to such witness' testimony, should not be encouraged.—Shiers v. Cowgill, 59 N.W. 2d 407, 157 Neb. 265.

69. Mo.—Wallrath v. Bohnenkamp,  
70 S.W. 1112, 97 Mo.App. 242.

64 C.J. p 1045 note 35.

#### Judge's recollection or transcript

(1) If the judge has a clear recollection of the testimony in dispute he may, on request of the jury, give it to them orally from the bench, the stenographer at the same time taking down what is said in shorthand, but if he does not desire or is not in a position to follow that course he should require the stenographer to furnish him with a transcript of the testimony in dispute duly certified as correct and thus he must read to the jury.—Pilgeram v. Haas, 167 P.2d 339, 118 Mont. 431.

(2) Where jury, in disagreement over testimony of a witness, requested the testimony of such witness, whether judge would recollect testimony for jury or would direct official stenographic reporter to read such testimony was matter within discretion of trial court.—Shiers v. Cowgill, 59 N.W.2d 407, 157 Neb. 265.

(3) The reading by the official reporter of testimony of a witness examined on the trial is within spirit if not within letter of statute authorizing jury to request to be taken to court where court may give its recollection as to testimony about which jury is in disagreement, since stenographic reporter's notes of the testimony are likely to be more accurate than judge's recollection of what was testified to.—Shiers v. Cowgill, supra.

(4) In action on contract, refusal to read to jury, after retirement, portion of testimony requested was held not error, where court gave instructions on its own recollection of the

out the consent of the parties.<sup>70</sup>

Testimony should not be read, however, merely because the jurors desire to have their memory refreshed.<sup>71</sup> If there is no statute requiring it to be given, the court may, in its discretion, properly refuse the jury's request for information as to the evidence,<sup>72</sup> although it has been held that a denial of a proper request for a rereading of testimony is error.<sup>73</sup>

While it is not error for the court, on its own motion, to have read the testimony of another witness on the same point after the reading of the particular testimony requested by the jury is completed,<sup>74</sup> and it is said to be the better practice to have all the evidence on a point stated,<sup>75</sup> the court, if it does not abuse its discretion, may state or have read only part of the testimony on a given point;<sup>76</sup> and it has been held that the court may have the direct testimony of the witness read, and at the same time refuse to have the testimony on cross-examination read as requested by counsel,<sup>77</sup> or may properly order the reading of the evidence discontinued when the jury announce that they have heard all they desire;<sup>78</sup> and the testimony of the witness on the point with which the jury are concerned may be read without reading the entire testi-

mony of the witness.<sup>79</sup> It has been held not an abuse of discretion for the court, where the jury, at their request and that of counsel, are brought in to hear the testimony of several witnesses read, to have the testimony of only one witness read and then state the substance of the testimony of the remaining witnesses.<sup>80</sup>

*Reading allegations of pleadings.* It is not error for the judge to read, at a juror's request, the allegations of the complaint relating to the amount of damages claimed where the judge at the same time advises the jury that such allegations are denied.<sup>81</sup>

#### § 480. Necessity for Presence of Counsel

Although there is authority to the contrary, the rule generally formulated is that evidence should be read or restated only in the presence of, or after notice to, counsel.

Although there is authority to the contrary,<sup>82</sup> the rule generally formulated, sometimes by virtue of statute,<sup>83</sup> is that the evidence should be read or restated only in the presence of, or after notice to, counsel;<sup>84</sup> and noncompliance with this rule is reversible error,<sup>85</sup> unless it is clear that a correct verdict was rendered and no prejudice resulted.<sup>86</sup>

testimony, and foreman stated this answered the jury's difficulty.—*McPeck v. Shafer*, 183 A. 80, 120 Pa.Super. 425.

70. Minn.—*Bonderson v. Hovde*, 184 N.W. 853, 150 Minn. 175.

71. Colo.—*Fairbanks. Morse & Co. v. Weeber*, 62 P.2d 368, 15 Colo.App. 268.

Mont.—*Pilgram v. Haas*, 167 P.2d 339, 118 Mont. 431.

Utah.—*Jenkins v. Stephens*, 231 P. 112, 64 Utah 307.

72. Fla.—*Florida Power & Light Co. v. Robinson*, 68 So.2d 406.

Ga.—*Metropolitan Life Ins. Co. v. Smith*, 181 S.E. 804, 51 Ga.App. 862.

Hawaii.—*Medeiros v. Udell*, 34 Hawaii 632.

N.J.—*Higgins v. Polk*, 103 A.2d 1, 14 N.J. 490.

Tex.—*Standard Supply & Hardware Co. v. Christian-Carpenter Drilling Co.*, Civ.App., 183 S.W.2d 657, error refused.

Wis.—*Patterson v. Phillips*, 256 N.W. 624, 216 Wis. 165.

64 C.J. p 1045 note 37.

73. Cal.—*James v. Key System Transit Lines*, App., 270 P.2d 116.

W.Va.—*Nixon v. Shaver*, 176 S.E. 849, 115 W.Va. 469.

#### Evident confusion of jurors

Where jurors, after deliberating for

about two hours, in an unusual accident case involving novel issues and resulting in evident uncertainty and confusion as to facts, asked to have reread plaintiff's testimony and testimony of a defendant, denial of request was error.—*Kerner v. Surface Transp. Corp. of New York*, 42 N.Y.S.2d 296, 266 App.Div. 356, resettled 44 N.Y.S.2d 264, 266 App.Div. 948, affirmed 59 N.E.2d 786, 293 N.Y. 881.

#### Failure to have reporter present

Failure to have reporter present so as to comply with jury's request to have evidence read was held error.—*Knipfer v. Shaw*, 246 N.W. 328, 210 Wis. 617, reheard 247 N.W. 320, 210 Wis. 617.

74. Vt.—*Comstock's Adm'r v. Jacobson*, 84 A. 568, 86 Vt. 182.

64 C.J. p 1045 note 38.

75. Wis.—*Byrne v. Smith*, 24 Wis. 68.

76. Wis.—*Salladay v. Dodgeville*, 55 N.W. 696, 85 Wis. 318, 20 L.R.A. 541.—*Byrne v. Smith*, 24 Wis. 68.

77. Tex.—*Texas Employers' Ins. Ass'n v. Pierce*, Civ.App., 254 S.W. 1019.

64 C.J. p 1045 note 41.

78. Cal.—*Duncan v. J. H. Corder & Son*, 62 P.2d 1387, 18 Cal.App.2d 77.

64 C.J. p 1045 note 42.

79. Tex.—*Texas & P. Ry. Co. v. Guildry*, Civ.App., 9 S.W.2d 284.—*American Nat. Bank of Wichita Falls v. Haggerton*, Civ.App., 250 S.W. 279. 64 C.J. p 1045 note 43.

80. Wis.—*Salladay v. Dodgeville*, 55 N.W. 696, 85 Wis. 318, 20 L.R.A. 541.

81. Cal.—*Lincoln v. Williams*, 6 P.2d 563, 119 Cal.App. 498.

Sending pleadings out with jury see supra § 469.

82. Mich.—*Loose v. Deerfield Tp.*, 153 N.W. 913, 187 Mich. 206.

R.I.—*Alexander Bros. v. Gardiner*, 14 R.I. 15.

83. Okl.—*Wilson v. Oklahoma Ry. Co.*, 248 P.2d 1014, 207 Okl. 204.

Utah.—*Jenkins v. Stephens*, 231 P. 112, 64 Utah 307.

84. Ga.—*Roberts v. Atlanta Consol. St. R. Co.*, 30 S.E. 966, 104 Ga. 805.

64 C.J. p 1046 note 47.

85. Mo.—*Welsh v. Metropolitan St. R. Co.*, 58 Mo.App. 528.

Neb.—*Bartell v. State*, 58 N.W. 716, 40 Neb. 232.

64 C.J. p 1046 note 48.

86. Colo.—*Slack v. Stephens*, 76 P. 741, 19 Colo.App. 538.

F. URGING OR COERCING AGREEMENT AND DISCHARGE OF JURY FOR FAILURE TO AGREE

§ 481. Urging or Coercing Agreement

- a. In general
- b. Statements or acts regarded as proper and noncoercive
- c. Coercive or improper statements or acts

a. In General

When the jury are unable to agree on a verdict, it is within the discretionary power of the trial court to urge them to make an earnest effort to agree; however, it is well settled that they must be left free to act without any real or seeming coercion on the part of the court.

When the jury are unable to agree on a verdict, it is within the discretionary power of the trial court to urge them to make an earnest effort to agree.<sup>87</sup> Especially may this be done where, from the character of the issues and the evidence, there can be little toleration of obvious and unreasonable obstruction to an agreement.<sup>88</sup> However, while the jury may be urged to agree, it is now well settled that they must be left free to act without any real or seeming coercion on the part of the court,<sup>89</sup> or to feel that should they continue to disagree, they are not to be exposed to unreasonable inconvenience or to receive the animadversion of the court.<sup>90</sup>

What amounts to improper coercion of a verdict by a trial court necessarily depends to a great extent on the facts and circumstances of the particular case and cannot be determined by any general or definite rule.<sup>91</sup> The ultimate test to determine whether verdict-urging instructions are erroneous is whether they force or help to force an agreement, or whether they merely start a new train of real deliberation ending the disagreement.<sup>92</sup> In urging the jury to agree on a verdict, the court should emphasize that it is not endeavoring to inject its ideas into the minds of the jurors and that by such instruction the court does not intend that any juror should surrender his own free will and judgment,<sup>93</sup> and these ideas should be couched in language readily understood by the ordinary lay juror.<sup>94</sup> It is universally held to be error for the court, by words or acts, to threaten or attempt to coerce the jurors for the purpose of compelling them to render a verdict,<sup>95</sup> although in early times coercive measures appear to have been resorted to in order to compel agreement.<sup>96</sup>

Coercive statements or remarks will vitiate the verdict where it appears probable that the jury were improperly influenced;<sup>97</sup> but there will be no re-

87. Ala.—Rutledge v. Brilliant Coal Co., 22 So.2d 428, 247 Ala. 40.  
N.H.—Dunne v. Carey, 79 A.2d 842, 97 N.H. 43.

N.J.—Olivo v. Strand Engineering, 105 A.2d 435, 80 N.J.Super. 544.  
N.Y.—Schrader v. Joseph H. Gertner, Jr., Inc., 126 N.Y.S.2d 521, 282 App.Div. 1064.

Tenn.—Clathorne v. Solomon, 216 S.W.2d 339, 187 Tenn. 634.  
Wis.—Levandowski v. Studey, 25 N.W.2d 59, 249 Wis. 421.

64 C.J. p 1046 note 53.

88. Mo.—Fairgrieve v. Moberly, 29 Mo.App. 141.

89. Ga.—Gaddy v. Harmon, 13 S.E.2d 357, 191 Ga. 563.—White v. Fulton, 68 Ga. 511.—Baker v. Augusta Veneer Co., 169 S.E. 254, 46 Ga. App. 768.

N.J.—In re Stern, 95 A.2d 593, 11 N.J. 584.

Okl.—Gulf, C. & S. F. Ry. Co. v. Smith, 270 P.2d 629.

S.C.—Boyd v. Maxwell, 2 S.E.2d 395, 190 S.C. 103.

A court may use reasonable methods to bring about a verdict founded on conscientious conviction, and, in a proper manner, impress on jurors their duty to render such a verdict, but the methods of the court must not take the character of a mandate, with penalties of both moral and physical

suffering for disobedience.—Welshire v. Bruaw, 200 A. 67, 331 Pa. 392.

90. Kan.—Corpus Juris quoted in Moore v. Owens, 56 P.2d 86, 143 Kan. 620.

N.Y.—Green v. Telfair, 11 How.Pr. 260.

91. Mich.—Zeitv. v. Mara, 287 N.W. 418, 290 Mich. 161.

W.Va.—Janssen v. Carolina Lumber Co., 73 S.E.2d 12.

92. Iowa.—Middle States Utilities Co. v. Incorporated Tel. Co., 271 N.W. 180, 222 Iowa 1275, 109 A.L.R. 66.

93. Iowa.—Middle States Utilities Co. v. Incorporated Tel. Co., supra.

94. Iowa.—Middle States Utility Co. v. Incorporated Tel. Co., supra.

95. Cal.—Cook v. Los Angeles Ry. Corp., 91 P.2d 118, 13 Cal.2d 591.  
Iowa.—Middle States Utilities Co. v. Incorporated Tel. Co., 271 N.W. 180, 222 Iowa 1275, 109 A.L.R. 66.

Mich.—Decker v. Schumacher, 19 N.W.2d 466, 312 Mich. 6.

64 C.J. p 1046 note 57.

A court should not unduly press a jury to agree on a verdict, and in the use of any remarks designed to impress the desirability of reaching a verdict, the court should be careful to refrain from any expression of a coercive nature, or of a nature which

might possibly mislead the jury into an erroneous method of reaching a verdict.—Gaddy v. Harmon, 13 S.E.2d 357, 191 Ga. 563.—Alabama Great Southern Ry. Co. v. Daffron, 71 S.E. 799, 136 Ga. 555.

96. N.J.—In re Stern, 95 A.2d 593, 11 N.J. 584.

N.Y.—Wilkins v. Abbey, 5 N.Y.S.2d 826, 168 Misc. 416.

At common law, the custom was to leave the jury without food until they agreed, thus starving them into submission.—Hart Bros. Co. v. Los Angeles County, 82 P.2d 221, 31 Cal. App.2d Supp. 766.

97. N.J.—In re Stern, 95 A.2d 593, 11 N.J. 584.

64 C.J. p 1047 note 59.

By subordinate officer

(1) Coercion or pressure applied on a jury by a subordinate officer of the court will invalidate the verdict where natural tendency of such misconduct is to influence the jury in their deliberations.—Wilkins v. Abbey, 5 N.Y.S.2d 826, 168 Misc. 416.

(2) A tipstaff who is in charge of jury should not, without instructions from court, ask jurors how they stand, or make any remark whatever concerning their deliberations.—Welshire v. Bruaw, 200 A. 67, 331 Pa. 392.

versal where the evidence is of such character that the court might take the case from the jury and direct a verdict.<sup>98</sup> The fact that the jury return with a verdict within a short while after being properly urged to agree by the court has no more tendency to show that something improper was said by the court than that the jury's previous inability to agree has been due to giving the case due and thorough deliberation.<sup>99</sup>

**Urging jury to hasten verdict.** If no prejudice appears probable, it is not reversible error because the court directs the jury to hasten in reaching their verdict,<sup>1</sup> although remarks and admonitions such as will unduly hasten them in arriving at a verdict are improper.<sup>2</sup>

**Time allowed to jury to deliberate.** The period of time which shall be permitted to elapse before the jury are recalled and urged to agree rests largely in the discretion of the trial court which will not be interfered with if the time allowed the jury to deliberate is not unreasonably short.<sup>3</sup> Thus, permitting a jury to deliberate for a period of time

is not improper as coercive merely because the period of deliberation is lengthy,<sup>4</sup> especially where the issues are complicated and the testimony voluminous.<sup>5</sup>

**Withdrawal of coercive remarks.** Where remarks, which might be construed as of a coercive nature, are explicitly withdrawn, there is no available error.<sup>6</sup>

#### b. Statements or Acts Regarded as Proper and Noncoercive

Many statements by the court urging agreement have been held proper, including statements as to the desirability or importance of agreement, and that it is the duty of jurors to argue with each other, listen to each other, and reconcile differences of opinion, if they can conscientiously do so.

Preliminary to urging the jury to agree the court may properly inquire of them the reasons for their failure to agree,<sup>7</sup> and ask them if there is a probability of their agreeing,<sup>8</sup> and in what proportion they are divided.<sup>9</sup> The court may properly suggest

98. U.S.—W. B. Grimes Dry-Goods Co. v. Malcolm, Ind.T., 58 F. 670, 7 C.C.A. 426, affirmed 17 S.Ct. 153, 164 U.S. 433, 41 L.Ed. 524.

99. Pa.—Szabo v. Latshaw, Com.Pl., 4 Chest.Co. 274.

S.C.—South Carolina Public Service Authority v. Spearwatt Liquidating Co., 13 S.E.2d 605, 196 S.C. 481.  
—Terry v. Richardson, 116 S.E. 273, 123 S.C. 319.

#### Verdicts held not coerced

N.Y.—Hill v. Edinger, 121 N.Y.S.2d 125, 281 App.Div. 1052.

Ohio.—Greenburg v. City of Steubenville, App., 72 N.E.2d 125.

1. Ky.—Roach v. T. J. Moss Tie Co., 71 S.W. 2, 24 Ky.L. 122.

#### Statements held not coercive

Where trial of actions for damages arising out of automobile collision was concluded on an afternoon preceding a holiday which was followed by Saturday and Sunday, the court's apparent interest in having a verdict returned that evening, as indicated by his remarks accompanied by assertion that he did not want to force a verdict and that he wanted jury to have their time and attention to it, would not justify holding that jury was coerced.—Zeitz v. Mara, 287 N.W. 418, 290 Mich. 161.

2. Cal.—Cook v. Los Angeles Ry. Corp., 91 P.2d 118, 13 Cal.2d 591.

3. Ga.—Gambo v. F. M. Dugas & Son, 89 S.E. 679, 145 Ga. 614.  
64 C.J. p 1047 note 64.

Length of deliberations generally see supra § 462.

#### Discretion not abused

Where jury in personal injury action had been in deliberation for over three and one-half hours at time judge recalled them to courtroom in presence of counsel for both parties and stated that he did not wish jurors to state how they presently stood or why, but merely to reply whether they believed if given further time they would be able to agree on verdict, and consensus was that if given further time verdict could be agreed on, interrogation of jury for such purpose and return of jury for further deliberation disclosed no abuse of discretion.—Hoffman v. St. Louis Public Service Co., Mo., 265 S.W.2d 736.

4. Ill.—Menolascino v. Superior Felt & Bedding Co., 40 N.E.2d 813, 313 Ill.App. 557.

#### Length of time held not improper or unreasonable

(1) Where case which had consumed nearly a week in trial was submitted to jury at 4:10 P. M. and jury returned its verdict at 11:45 P. M., court did not err in failing to discharge jury after inability to reach verdict or to permit jury to retire for sleep and rest, and the length of time for deliberation was held not unreasonable.—Miller v. Scandrett, 63 N.E.2d 262, 326 Ill.App. 631.

(2) In bank's action on guaranty contract executed by stockholders of

corporation indebted to bank, fact that court required jury to remain together for period of approximately forty-six hours including two nights was not abuse of discretion as against contention that the verdict was not the free and voluntary action of jury.—West Branch State Bank v. Farmers Union Exchange, 268 N.W. 155, 221 Iowa 1382.

5. Ill.—Menolascino v. Superior Felt & Bedding Co., 40 N.E.2d 813, 313 Ill.App. 557.

6. Mass.—Prince v. Lowell Electric Light Corp., 87 N.E. 558, 201 Mass. 276.

7. U.S.—St. Louis, etc., R. Co. v. Bishard, Kan., 147 F. 496, 78 C.C.A. 62.  
64 C.J. p 1047 note 66.

8. Ga.—Central R. Co. v. Neighbors, 10 S.E. 115, 83 Ga. 444.  
64 C.J. p 1047 note 67.

#### Usual practice

Usual practice is for court to ask jury collectively whether they can probably agree on verdict, looking to foreman to answer for jury.—Foreman v. Texas Emp. Ins. Ass'n, 241 S.W.2d 977, 150 Tex. 468, conformed to Texas Emp. Ins. Ass'n v. Foreman, Civ.App., 262 S.W.2d 248.

9. Ga.—Dalton Fruit & Produce Co. v. Puryear, 96 S.E. 344, 22 Ga.App. 489.  
64 C.J. p 1047 note 68.

the desirability<sup>10</sup> or importance<sup>11</sup> of the jury reaching an agreement on a verdict, and state that it will send them back to reconsider the case and see if they can reach a verdict;<sup>12</sup> and in its discretion the court may in fact send the jury back,<sup>13</sup> even repeatedly,<sup>14</sup> for additional deliberation after they have reported their inability to agree. The court may properly inform the jury what percentage of them may bring in a verdict after the prescribed deliberation.<sup>15</sup>

Statements with respect to provisions for the care and comfort of the jury for the night are

proper and not coercive.<sup>16</sup> In urging them to agree the court may properly advise the jury that, while they should not surrender any conscientious opinion founded on the evidence,<sup>17</sup> it is their duty to argue with each other, listen to each other, reconcile their differences of opinion, and reach an agreement if they can conscientiously do so;<sup>18</sup> that they should lay aside all pride of judgment;<sup>19</sup> that each juror should reexamine for himself the grounds of his opinion;<sup>20</sup> and that they should consider their differences in a spirit of fairness and candor,<sup>21</sup> with

10. Ark.—Kansas City Southern Ry. Co. v. Winter, 228 S.W.2d 1001, 217 Ark. 148.—McNew v. Wood, 163 S.W.2d 314, 204 Ark. 530.

Ga.—Baker v. Augusta Veneer Co., 169 S.E. 254, 46 Ga.App. 768  
N.J.—In re Stern, 95 A.2d 593, 11 N.J. 584.

Pa.—Moran v. Gibbs People's Service Stores, Com.Pl., 33 Luz Leg.Reg. 246.

S.C.—South Carolina Public Service Authority v. Spearwint Liquidating Co., 13 S.E.2d 605, 196 S.C. 481—Dover v. Lockhart Mills, 68 S.E. 525, 86 S.C. 229.

64 C.J. p 1047 note 69.

11. Colo.—Peterson v. Rawalt, 36 P. 2d 465, 95 Colo. 368.

12. Cal.—Pisani v. Martini, 22 P.2d 804, 132 Cal.App. 269.

D.C.—Collier v. Young, Mun.App., 94 A.2d 645.

Ga.—Crawford v. Western & A. R. R., 179 S.E. 852, 51 Ga.App. 150.  
64 C.J. p 1047 note 70.

#### Statements held proper

(1) In processioning proceedings wherein three hours after jury retired court informed of jury whether it was a question of law or fact which prevented their returning a verdict, and foreman replied that it seemed impossible that they would get together and judge remarked "I am going to let you gentlemen go out and see if you can't make a verdict." trial court did not abuse its discretion.—Davis v. Terrell, 28 S.E. 2d 590, 70 Ga.App. 478.

(2) Where automobile collision case went to jury about 4:30 P. M. and about 3:00 P. M. on following day the jury reported disagreement and requested further explanation of term "proximate cause," but the judge replied that he could give no further instructions and made same reply to similar request about 6:30 P. M., the judge did not abuse his discretion in saying to jurors, "Suppose you all go back and try for the next hour to answer the questions," and quoted words were not coercive.—Kimbriel Produce Co. v. Webster, Tex.Civ.App., 185 S.W.2d 198, error refused.

13. Okl.—Kahan v. Pure Oil Co., 98 P.2d 894, 186 Okl. 493.

#### Coercion denied

Act of trial court in urging jury to continue deliberation and telling them that some jurors stayed until midnight after foreman advised court that they were in disagreement, and that one of lady jurors was ill, was not improper as coercing a verdict, where jury had deliberated for only one hour and court specifically gave lady juror opportunity, if able, to try further deliberation but to report to court if she felt too ill to continue, and where all jurors joined in the verdict.—Potracca v. McLaughlin, 62 A. 2d 877, 75 R.I. 1.

14. Okl.—Shannon v. Nicoma Park Development Co., 54 P.2d 143, 176 Okl. 53.

15. Minn.—Ames v. Cramer, 273 N. W. 361, 200 Minn. 92.

16. Ala.—Rutledge v. Brilliant Coal Co., 22 So.2d 428, 247 Ala. 40.  
Food and rest for jurors during deliberations see supra § 462.

#### Statements held proper

(1) In death action wherein jury retired at about 11 o'clock at night and at one o'clock in the morning the court caused jury to return to the courtroom, colloquy between the court which informed jurors that they might go to bailiff's house to sleep and have breakfast and a juror who stated that the majority would rather sit up and consider the case, and action of trial court in allowing jury, which at the time stood 11 to 1 for the plaintiff, to do so, and to return verdict for plaintiff at four o'clock in the morning did not constitute error.—Atlanta, B. & C. R. Co. v. Thomas, 12 S.E.2d 494, 64 Ga.App. 253.

(2) A verdict-urging instruction that if jury should fail to arrive at verdict, jury should be taken to sleeping quarters for the night and should not attempt to communicate with outsiders, was not erroneous on ground that it was coercive and conveyed the idea that jury must agree on and return a verdict, where the jury delib-

erated five or six hours after receiving the instruction.—In re Cocklin's Estate, 5 N.W.2d 577, 232 Iowa 266.

17. Ga.—Kerns v. Crawford, 179 S.E. 854, 51 Ga.App. 158  
N.J.—In re Stern, 95 A.2d 593, 11 N.J. 584.  
64 C.J. p 1047 note 71.

18. Ga.—Arkansas Fuel Oil Co. v. Andrews Point Co., 13 S.E.2d 738, 64 Ga.App. 595.

Mich.—Cook v. Vineyard, 289 N.W. 181, 291 Mich. 375.

N.H.—Dunne v. Carey, 79 A.2d 842, 97 N.H. 43.

S.C.—South Carolina Public Service Authority v. Spearwint Liquidating Co., 13 S.E.2d 605, 196 S.C. 481—Nelson v. Atlantic Coast Line R. Co., 4 S.E.2d 273, 191 S.C. 345.  
64 C.J. p 1047 note 72.

#### Caution against obstinacy

A trial court can properly advise jury of importance of arriving at a verdict and of duty of individual jurors to hear and consider each other's arguments with open minds, rather than to prevent agreement by obstinate adherence to first impressions.—Cook v. Los Angeles Ry. Corp., 91 P.2d 118, 13 Cal.2d 591.

19. Iowa.—Armstrong v. James & Co., 136 N.W. 686, 155 Iowa 562.  
64 C.J. p 1047 note 73.

#### Statement held not coercive

A charge that, "If one man on the jury or more thinks that he knows it all, and would not yield his pride of opinion to reach a proper verdict, he is no fit man to be on the jury," and that jury must listen and weigh contentions of fellow jurors in a spirit of trying to reach a conclusion, was not erroneous as coercing the jury to reach a verdict.—Nelson v. Atlantic Coast Line R. Co., 4 S.E.2d 273, 191 S.C. 345.

20. Iowa.—Frandsen v. Chicago, etc., R. Co., 36 Iowa 372.  
64 C.J. p 1047 note 74.

21. Iowa.—Burton v. Neill, 118 N.W. 302, 140 Iowa 141, 17 Ann.Cas. 532.  
N.D.—Lathrop v. Fargo-Moorhead St. Ry. Co., 136 N.W. 88, 23 N.D. 246.

an honest desire to arrive at the truth and with the view of arriving at a verdict.<sup>22</sup>

The court may also remind the jury that they took an oath to hear and determine the issues fairly and impartially, that the jury should approach the subject without bias or sympathy, and that it is their duty to decide the case fairly on the evidence and law.<sup>23</sup> Although there are cases which display a tendency strictly to limit the extent to which such suggestions can go,<sup>24</sup> it is often held that, if the jury are cautioned that they need not surrender their conscientious convictions, it is proper for the court to advance suggestions to the effect that, if a minority differ in their views from a large number of their fellows, such difference of opinion should induce the minority to doubt the correctness of their judgment and lead them to reconsider and re-examine the basis for their judgment to determine whether or not they have been mistaken.<sup>25</sup> As reasons for agreeing the jury may properly be reminded of the expense of a disagreement to the state or county,<sup>26</sup> or to the parties,<sup>27</sup> or that the jury's services are needed in other cases.<sup>28</sup> So also, the jury may be reminded of the number of times the case has been on trial,<sup>29</sup> the length of

time consumed in the trial, or in previous trials of the same case,<sup>30</sup> the importance of the case,<sup>31</sup> that one of the parties was entitled to a verdict and that a disagreement would be a denial of justice,<sup>32</sup> the necessity for a decision of the case by some jury<sup>33</sup> and the probability of their being able to decide the case as well as any other jury.<sup>34</sup>

Records of previous juries as to agreements may properly be referred to,<sup>35</sup> and it is not error to state that there have been no mistrials since the beginning of the trial judge's administration.<sup>36</sup> It is not coercion for the court to inform the jury that their verdict must be unanimous.<sup>37</sup> An instruction that if the evidence does not show that the party having the affirmative of the issue is entitled to the verdict the jury must find against that party is not coercive or erroneous as a direction to the jury that, if as a body they could not agree on a verdict in favor of the party having the affirmative, they should all unite in a verdict for the other party.<sup>38</sup> It is not coercive to jurors, unable to reconcile conflicting testimony, for the court to state that the jury can find a verdict according to the preponderance of the evidence and that if they

22. Ky.—Covington v. Bostwick, 82 S.W. 569, 26 Ky.L. 780.  
N.C.—Warlick v. Plonk, 9 S.E. 190, 103 N.C. 81.

23. Iowa.—In re Cocklin's Estate, 5 N.W.2d 577, 232 Iowa 266.

24. N.Y.—Field v. Field, 128 N.Y.S. 2d 217, 283 App.Div. 372.  
Wis.—Mead v. City of Richland Center, 297 N.W. 419, 237 Wis. 537, 64 C.J. p 1047 note 77.

**Suggestions held to go too far**  
Iowa.—Middle States Utilities Co. v. Incorporated Tel. Co., 271 N.W. 180, 222 Iowa 1275, 109 A.L.R. 66.  
N.Y.—Acunto v. Equitable Life Assur. Soc. of U. S., 60 N.Y.S.2d 101, 270 App.Div. 386.  
W.Va.—Janssen v. Carolina Lumber Co., 73 S.E.2d 12.  
64 C.J. p 1047 note 77 [a].

25. U.S.—Railway Express Agency v. Mackay, C.A.Minn., 181 F.2d 257, 19 A.L.R.2d 1248.  
64 C.J. p 1048 note 78.

26. U.S.—Railway Exp. Agency v. Mackay, supra.  
Ga.—Roper v. Holbrook, 49 S.E.2d 558, 77 Ga.App. 686—Arkansas Fuel Oil Co. v. Andrews Point Co., 13 S.E.2d 738, 64 Ga.App. 595—Kerns v. Crawford, 179 S.E. 854, 51 Ga.App. 158.

N.H.—Musgrave v. Great Falls Mfg. Co., 169 A. 583, 86 N.H. 375.

Ohio.—Clos v. Chapman, App., 84 N.E.2d 811.  
64 C.J. p 1048 note 79.

**Necessity of statement on surrender of convictions**

It is within discretionary province of trial judge to allude to all factors making juror's agreement desirable, including expense attendant on retrial, but such instruction to jury is fundamentally deficient unless jurors are told that none should surrender his conscientious scruples or personal convictions to such end.—In re Stern, 95 A.2d 593, 11 N.J. 584.

27. D.C.—Hoagland v. Chestnut Farms Dairy, 72 F.2d 729, 63 App.D.C. 357.  
Ga.—Roper v. Holbrook, 49 S.E.2d 558, 77 Ga.App. 686—Kerns v. Crawford, 179 S.E. 854, 51 Ga.App. 158.  
N.H.—Dunne v. Carey, 79 A.2d 842, 87 N.H. 43.  
64 C.J. p 1048 note 80.

28. Ala.—Ashford v. McKee, 62 So. 879, 183 Ala. 620.  
S.C.—Dover v. Lockhart Mills, 68 S.E. 525, 86 S.C. 229.

29. Ariz.—Machomich Mercantile Co. v. Hickey, 140 P. 63, 15 Ariz. 421.  
64 C.J. p 1048 note 82.

30. Mich.—Kelly v. Emery, 42 N.W. 795, 75 Mich. 147.  
64 C.J. p 1048 note 83.

31. Ga.—Allen v. Woodson, 50 Ga. 53.

**Statement held not coercive**

In automobile accident case where jury could not agree, trial judge's statement to jury that trial judge did not like to discharge jury in such important matters was not objectionable as coercing jury to reach a verdict.—Gordon v. Samson, 293 N.W. 654, 294 Mich. 294.

32. Minn.—Converse v. Adleman, 190 N.W. 340, 153 Minn. 306.  
Wis.—Barlow v. Foster, 136 N.W. 822, 149 Wis. 613.

33. U.S.—Railway Express Agency v. Mackay, C.A.Minn., 181 F.2d 257, 19 A.L.R.2d 1248.  
Ga.—Roper v. Holbrook, 49 S.E.2d 558, 77 Ga.App. 686.  
64 C.J. p 1048 note 86.

34. U.S.—Railway Express Agency v. Mackay, C.A.Minn., 181 F.2d 257, 19 A.L.R.2d 1248.  
Ga.—Roper v. Holbrook, 49 S.E.2d 558, 77 Ga.App. 686.  
64 C.J. p 1048 note 87.

35. Conn.—Doty v. Smith, 67 A. 885, 80 Conn. 245.

36. Ga.—White v. Fulton, 68 Ga. 511.  
S.C.—Caldwell v. Duncan, 69 S.E. 660, 87 S.C. 331.

37. Mich.—Leedy v. Hoover, 125 N.W. 394, 160 Mich. 449.

38. Kan.—Karnar v. Kansas City Elevated R. Co., 109 P. 676, 82 Kan. 842.



would follow such a rule they would have no difficulty in reaching a verdict.<sup>39</sup>

### c. Coercive or Improper Statements or Acts

In telling a jury of their duty to agree, the court must be careful not unduly to impress such duty on them so that they are likely to surrender their conscientious convictions, and thus they must not be censured, ridiculed, or threatened.

Where a supplementary instruction to the jury has a natural tendency to interfere with their exercise of unfettered and unbiased judgment by means of illusory consideration or overemphasis of an extraneous factor and the response is immediate, the inference of false direction and undue influence is entirely reasonable, if not irresistible.<sup>40</sup> In telling the jury of their duty to agree, the court must be careful not unduly to impress such duty on them so that they are likely to surrender their conscientious convictions.<sup>41</sup> The jury must not be censured,<sup>42</sup> ridiculed,<sup>43</sup> or threatened with punishment or hardship<sup>44</sup> for not coming to an agreement.

39. Ga.—Southern Ry. Co. v. Taylor, 47 S.E.2d 77, 76 Ga.App. 745.

40. N.J.—In re Stern, 95 A.2d 593, 11 N.J. 584.

#### Reference to inapplicable statute

Where jury deliberated for many hours without reaching an agreement in action by minor children to cancel a deed executed by their mother to property set apart to her and them as a year's support, and thereafter the court in rather strong language urged the jury to agree on a verdict and stated that under act, which was not in effect at time of execution of deed, and which did not apply to deed, permission for such a deed must be secured from the ordinary, and jury reached a verdict within five minutes after the recharge, judgment for the children would be reversed for a new trial.—Gaddy v. Harmon, 13 S.E.2d 357, 191 Ga. 563.

41. Pa.—Miller v. Miller, 41 A. 277, 187 Pa. 572.

64 C.J. p 1049 note 93.

#### Statements held erroneous

Cal.—Cook v. Los Angeles Ry. Corp., 91 P.2d 118, 13 Cal.2d 591.

Ga.—Baker v. Augusta Veneer Co., 109 S.E. 254, 46 Ga.App. 769.

W.Va.—Lennox, by Rose v. White, 54 S.E.2d 8, 133 W.Va. 1, 25 A.L.R.2d 437.

Wis.—Perkie v. Carolina Ins. Co., 6 N.W.2d 195, 241 Wis. 378.

64 C.J. p 1049 note 93 [a].

42. Mo.—Brooks v. Barth, 71 S.W. 1098, 98 Mo.App. 89.

64 C.J. p 1049 note 94.

#### Instructions held coercive

(1) Oral instruction to deliberating jury after court had learned from

jury that they stood eleven to one, urging jury to get together and criticizing one juror for position he was taking, although such juror was not named or designated, was coercive and erroneous.—Moore v. Owens, 56 P.2d 86, 143 Kan. 620.

(2) Instruction to deliberating jury that there was little excuse for hung jury, that such situation generally arose out of personal quarrels or differences between jurors, and that it was an abomination to any court, an abhorrence to taxpayers, and a reproach on the members of the jury was coercive.—Neely v. Travelers' Ins. Co., 42 P.2d 957, 141 Kan. 691.

(3) Where jurors in automobile collision case conferred with court three times and were unable to agree and again reassembled after having had case approximately two days and stated they were still unable to agree and court told jury among other things, that they had not approached the subject with right disposition, that a person who says "you never can convince me" cannot be fit for jury service and "you have to be convinced or you can't agree," and to try again, and jury the next morning returned verdict of no cause of action, purport of court's statements was that it was juror's duty to agree.—Decker v. Schumacher, 19 N.W.2d 466, 312 Mich. 6.

43. N.Y.—Twiss v. Lehigh Valley R. Co., 70 N.Y.S. 241, 61 App.Div. 286, 10 N.Y. Ann.Cas. 88.

#### Division of jury in open court

Causing division of jury in open court so as to point out single juror disagreeing with rest was error.—

It is error for the court to suggest to the jury, as an inducement to agree, that plaintiff is a poor man,<sup>45</sup> or to go so far as to advise a verdict for one party or the other.<sup>46</sup> To minimize the importance of the case on trial, as a reason for agreeing,<sup>47</sup> or to give the jury the impression that it is immaterial whether they arrive at a right or wrong verdict, by telling them that the appellate court will correct the verdict if it is wrong,<sup>48</sup> is error. Statements to the effect that the purpose of the trial is to secure a verdict and that the labors of the court and the entire proceedings will be wasted if a verdict is not reached are coercive in nature and erroneous.<sup>49</sup> It is error for the court, in urging the jury to agree, to tell them that if they necessitated a retrial the suit must be tried on the same pleadings and evidence and that a disagreement would simply add to the burden of the successful party.<sup>50</sup>

Statements as to length of confinement. While there is authority to the contrary,<sup>51</sup> it is generally

Barry v. Maxey, 75 S.W.2d 823, 18 Tenn.App. 256.

44. Ill.—Lively v. Sexton, 35 Ill.App. 417.

64 C.J. p 1049 note 96.

45. N.H.—Chapman v. Town of Lee, 119 A. 440, 80 N.H. 484.

Instructions appealing to sympathy or prejudice generally see supra § 343.

46. Mo.—Dayton Folding Box Co. v. Danciger, 119 S.W. 997, 138 Mo.App. 17.

47. Tex.—Texas Cent. R. Co. v. Driver, Civ.App., 187 S.W. 981.

48. N.Y.—Levinson v. Zipkin, 119 N. Y.S. 680, 65 Misc. 203, followed in Fisk Rubber Co. v. Times Square Automobile Co., 119 N.Y.S. 682.

49. Tex.—Texas Midland R. R. v. Brown, Com.App., 228 S.W. 915.

50. Iowa.—Freeby v. Town of Sibley, 167 N.W. 770, 183 Iowa 827.

51. Kan.—Alcorn v. Cudahy Packing Co., 264 P. 741, 125 Kan. 493.

64 C.J. p 1050 note 5.

#### Statements held not coercive

(1) Trial court did not coerce jury into a verdict by stating that when they reached a verdict they could separate for the night and return the next morning to hear the verdict read, and in response to juror's question with respect to the eventuality that no verdict was reached by the next morning, that they should "still be there," and that after twelve hours' deliberation a five-sixths' verdict might be reached, where verdict was not returned until the afternoon of the following day.—In re Os-

considered improper for the court, in case of disagreement, to tell the jury that, if they do not agree, they will be confined for a specified length of time<sup>52</sup> or until they reach an agreement.<sup>53</sup> Improper statements of this character are sometimes held not ground for reversal,<sup>54</sup> especially if it appears that the jury were not hastened into reaching an agreement by the statement;<sup>55</sup> but there are decisions to the effect that such statements will vitiate the verdict without regard to whether the verdict was improperly influenced thereby,<sup>56</sup> and others hold that there will be a reversal where it reasonably and satisfactorily appears that the jury were influenced by the improper statements,<sup>57</sup> or where there is doubt as to whether or not the jury were influenced.<sup>58</sup>

*Threats as to, and deprivation of, food, rest, and comfort.* For the judge so arbitrarily to order the jury locked up without food until they should agree, that they might well understand from the order that they were required either to agree or to submit to indefinite confinement and starvation,<sup>59</sup> or to tell the jury that they will be confined for a specified period with only one meal a day until they agree,<sup>60</sup> or to state they can have no food except at their own expense,<sup>61</sup> or to state that if jurors did not soon agree they would suffer from discomfort or cold by reason of the heat being turned off from the building,<sup>62</sup> constitutes coercion requiring a reversal. It is not reversible error for the court to send the jury back for further deliberation after their report of a disagreement and announcement that they were "awful hungry" and would like to get off "some way or other," where on a second report of a disability to agree the jury were allowed to dine and thereafter deliberated and

agreed.<sup>63</sup> Locking a jury up under circumstances in which they might reasonably understand that they are to be confined over a long period of time unless they reach a verdict is improper,<sup>64</sup> and under a statute requiring the jury to be given a specified amount of rest during their deliberations, it is error to let the jury deliberate, without rest, late into the night and beyond the time prescribed by statute, and without telling them of their statutory rights, until some of the jurors are so tired in mind and body that they yield their views simply for the sake of a verdict;<sup>65</sup> but, in the absence of statute, the fact that the jurors are required to deliberate for a considerable length of time without opportunity for rest is not ground for reversal where the conduct of the jury is such as to indicate that they prefer to remain at work until a verdict has been reached.<sup>66</sup>

### § 482. Discharge for Failure to Agree

The length of time which the jury are to be kept together before they are finally discharged as unable to agree on a verdict rests largely in the discretion of the trial court.

The court, in its discretion, may and should require the jury to remain together and deliberate for a reasonable length of time in an effort to reach an agreement, as discussed supra § 462, but when fully satisfied that the jury cannot agree, the court has power to discharge them from the case.<sup>67</sup> The length of time which the jury are to be kept together, before they are finally discharged as unable to agree on a verdict, rests largely in the discretion of the trial judge,<sup>68</sup> who may consider the importance of the case, the expense of a retrial, and the possibility of the jury reaching

bon's Estate, 286 N.W. 306, 205 Minn. 419.

(2) Statement to jury called from deliberations that judge could not aid jury after certain time until morning was not erroneous as impliedly threatening that jury would be locked up for night unless they came to early determination.—Silverstein v. Schneider, 164 A. 480, 110 N.J.Law 239.

53. N.Y.—Twiss v. Lehigh Valley R. Co., 70 N.Y.S. 241, 61 App.Div. 286, 10 N.Y. Ann. Cas. 88.

54. C.J. p 1050 note 6.  
Length of time jury may be kept together see supra § 462.

55. Iowa.—Middle States Utilities Co. v. Incorporated Tel. Co., 271 N. W. 180, 222 Iowa 1275, 109 A.L.R. 68.

64. C.J. p 1050 note 7.

56. Tex.—Burgess v. Singer Mfg. Co., Civ.App., 30 S.W. 1110.

64. C.J. p 1050 note 8.

55. S.C.—Harper v. Abercrombie, 105 S.E. 749, 115 S.C. 360.

64. C.J. p 1050 note 9.

56. Tenn.—Chesapeake, etc., R. Co. v. Barlow, 8 S.W. 147, 86 Tenn. 537.

64. C.J. p 1050 note 10.

57. Ala.—De Jarnette v. Cox, 29 So. 618, 128 Ala. 518.

64. C.J. p 1050 note 11.

58. Tex.—North Dallas Cir. R. Co. v. McCue, Civ.App., 35 S.W. 1080.

59. Tenn.—Hancock v. Elam, 3 Baxt.

33.

Food and rest during deliberations generally see supra § 462.

60. Colo.—Fairbanks, Morse & Co. v. Weeber, 62 P. 383, 15 Colo.App. 268.

61. Ga.—Henderson v. Reynolds, 10

S.E. 734, 84 Ga. 159, 7 L.R.A. 327.—Physloc v. Shea, 75 Ga. 466.

62. Wis.—Mead v. City of Richland Center, 297 N.W. 419, 237 Wis. 537.

63. Ala.—Louisville & N. R. Co. v. Johnson, 85 So. 372, 204 Ala. 150.

64. S.C.—Rowland v. Harris, 61 S.E. 2d 397, 218 S.C. 42.

65. N.H.—Kellogg v. Eastman, 162 A. 775, 86 N.H. 37.

66. Wis.—Barlow v. Foster, 136 N. W. 822, 149 Wis. 613.

67. Me.—Richards v. Page, 14 A. 933.

68. Neb.—Hofrichter v. Kiewit-Condor-Cunningham, 22 N.W.2d 703, 147 Neb. 224, 164 A.L.R. 1256.

**Wise discretion**

Cal.—Bertolozzi v. Progressive Concrete Co., 212 P.2d 910, 95 Cal.App. 2d 332—Hughes v. Schwartz, 124

P.2d 886, 51 Cal.App.2d 362.

a verdict.<sup>69</sup> The jury should be discharged when they fail to agree on a material issue,<sup>70</sup> but their failure to agree on an immaterial issue is not ground for discharging them for inability to agree.<sup>71</sup> Under a statute providing that, if a jury return a second time without having agreed on a verdict, they shall not be sent out again without their own consent unless they shall ask from the court some further explanation of the law, a jury returning a second time after the judge has left the courtroom should be discharged,<sup>72</sup> and the court may properly consider the testimony or affidavit of the bailiff that the jury had for the second time been unable to reach a verdict.<sup>73</sup>

The power of the court to determine when the jury shall be discharged for failure to agree is judicial,<sup>74</sup> and cannot be delegated to the clerk of court.<sup>75</sup> After the jury have been discharged for

failure to agree the case is terminated with no issue determined and stands as if no trial had been had,<sup>76</sup> and it is ready for retrial immediately or at a future time as directed by the court.<sup>77</sup> The jury no longer have charge of, or power over, the case,<sup>78</sup> and they cannot thereafter reassemble and agree on a verdict.<sup>79</sup> It has been held, however, that although the jury have been ordered discharged, they may still render a verdict if they have not separated and left the court room and their discharge has not been recorded;<sup>80</sup> and where the court has directed the officer in charge to discharge the jury at a certain hour if they have not agreed by that time, the failure of the officer to observe this direction does not invalidate a verdict, accepted by the court, although agreed to after deliberations which have continued beyond the time specified for the discharge.<sup>81</sup>

## G. OBJECTIONS AND EXCEPTIONS

### § 483. Necessity; Effect of Failure to Object or Except

As a general rule, if a party obtains knowledge during the progress of the trial of acts of jurors, or acts affecting them, which he shall wish to urge as objections to the verdict, he must object at once, or as soon as the opportunity is presented, or be considered as having waived his objections.

While it has been held otherwise where miscon-

duct of the prevailing party is involved,<sup>82</sup> as a general rule, if a party obtains knowledge during the progress of the trial of acts of or affecting jurors, which he shall wish to urge as objections to the verdict, he must object at once, or as soon as the opportunity is presented, or be considered as having waived his right to object,<sup>83</sup> and the trial judge may, in his discretion, refuse to hear evidence on the charge after a verdict has been rendered.<sup>84</sup>

69. Neb.—Hofrichter v. Kiewit-Condon-Cunningham, 22 N.W.2d 703, 147 Neb. 224, 164 A.L.R. 1256.

70. Tenn.—Nashville Union Stockyards, Inc., v. Grissim, 13 Tenn. App. 115.

71. Tenn.—Nashville Union Stockyards, Inc. v. Grissim, supra.

72. S.C.—Rowland v. Harris, 61 S.E. 2d 397, 218 S.C. 42.

73. S.C.—Rowland v. Harris, supra.

74. N.Y.—Ingersoll v. Lansing, 5 N.Y.S. 288, 51 Hun 101.

75. King v. Wise, Civ.App., 1 S.W. 2d 732.

76. N.Y.—Ingersoll v. Lansing, 5 N.Y.S. 288, 51 Hun 101.

64 C.J. p 1051 note 24.

77. U.S.—City of Woodward v. Caldwell, C.C.A.Okla., 86 F.2d 567.

64 C.J. p 1051 note 25.

**Effectiveness of nunc pro tunc order**  
Where court granted one defendant's motion for directed verdict, jury disagreed, and mistrial was ordered generally, nunc pro tunc order changing order directing mistrial generally to exclude defendant whose motion for directed verdict was granted was ineffective to complete

trial.—Vitimil Milling Corporation v. Superior Court in and for Los Angeles County, 33 P.2d 1016, 1 Cal.2d 116.

77. S.D.—Brandsrud v. Beattie Steinborn Co., 50 N.W.2d 639, 74 S.D. 224, 31 A.L.R.2d 882.

78. Me.—Richards v. Page, 18 A. 289, 81 Me. 563.—Richards v. Page, 14 A. 933.

79. Me.—Richards v. Page, 18 A. 289, 81 Me. 563.

64 C.J. p 1051 note 27.

80. Pa.—Kootz v. Hammond, 62 Pa. 177.

**Jury held not discharged**

Instruction permitting jury to separate if verdict was not reached by 11 P. M. did not discharge jury from further jurisdiction in case so as to prevent direction of verdict on following morning, where jury were specifically instructed to return to court in the morning in event of disagreement.—Small v. Pennsylvania R. Co., 80 F.2d 704, 65 App.D.C. 112, certiorari denied 56 S.Ct. 669, 297 U.S. 724, 80 L.Ed. 1008.

81. Me.—Hopkins v. Sawyer, 24 A. 872, 84 Me. 321.

Mass.—Hansen v. Ludlow Mfg. Co., 44 N.E. 1091, 167 Mass. 112.

82. Ala.—George F. Craig & Co. v. Pierson Lumber Co., 53 So. 803, 169 Ala. 548.

83. Cal.—Marshall v. La Bol, App. 270 P.2d 99.

Hawaii.—Medeiros v. Udell, 34 Hawaii 632.

Ky.—Byck v. Commonwealth Life Ins. Co., 269 S.W.2d 214.

N.Y.—Appelt v. Timpona, 88 N.Y.S. 2d 43, 195 Misc. 68, reversed on other grounds 91 N.Y.S.2d 869, 275 App.Div. 1046.

Tex.—Allala v. A. N. Tandy & Sons, Civ.App., 59 S.W.2d 205, affirmed 92 S.W.2d 227, 127 Tex. 148.

64 C.J. p 1051 note 32.

Failure to object as affecting right to new trial see New Trial § 62. Waiver of objections by affirmative act see infra § 672.

**Mode of objection**

Party observing that jury have been tampered with should ask permission to withdraw announcement of ready for trial, that jury be discharged, or case continued.—Allala v. A. N. Tandy & Sons, supra.

84. Tex.—Allala v. A. N. Tandy & Sons, supra.

Thus, the failure to interpose timely objections has been held a waiver of improper communications between,<sup>85</sup> or associations with,<sup>86</sup> jurors and others; an interpreter's going into the jury room with the jury;<sup>87</sup> intoxication of a juror;<sup>88</sup> conduct of the court stenographer, in the presence of the jury, indicating bias in favor of one of the parties;<sup>89</sup> the taking of improper books, papers, or other items to the jury room;<sup>90</sup> an unauthorized view or inspection by the jury;<sup>91</sup> and discussion and consideration of improper matters during deliberation.<sup>92</sup>

So also, the rule has been applied to irregularities in having testimony of certain witnesses read to the jury where they returned to the court room during their deliberations;<sup>93</sup> the rendition of a verdict by

less than a full jury;<sup>94</sup> separation of the jury before they reached a verdict;<sup>95</sup> separation of the jury after agreement but before announcement of the verdict;<sup>96</sup> or without being admonished not to talk about the case;<sup>97</sup> the sending of instructions to the jury room after retirement instead of calling the jury into court;<sup>98</sup> and the asking of improper questions by the court of the jury,<sup>99</sup> or by a juror of a witness.<sup>1</sup> Where additional instructions have been given in the absence of parties or their counsel, exceptions may sometimes be taken after the reception of the verdict;<sup>2</sup> but there is authority to the effect that the absence of counsel when additional instructions are given does not excuse his failure to except at that time and before rendition of the verdict.<sup>3</sup> Consent to the violation of a

85. N.J.—*Silak v. Hudson & M. R. Co.*, 176 A. 674, 114 N.J.Law 428, affirmed 181 A. 68, 115 N.J.Law 504.

Tex.—*City of San Antonio v. McKenzie Const. Co.*, 150 S.W.2d 989, 136 Tex. 315.

64 C.J. p 1052 note 33  
Communications between jurors and others see supra § 457.

**Between plaintiff and jurors**  
N.M.—*Miller v. Marsh*, 201 P.2d 341, 53 N.M. 5.

**Between defendant and jurors**  
Ohio.—*Taylor v. Ross*, App., 78 N.E.2d 395, reversed on other grounds 83 N.E.2d 222, 150 Ohio St. 448, 10 A.L.R.2d 377.

Okl.—*Wagner v. McKernan*, 177 P.2d 511, 198 Okl. 425.

**Between juror and witness**  
N.J.—*Lawrence v. Tandy & Allen*, 100 A.2d 891, 14 N.J. 1.

86. Tex.—*Williams v. Phelps*, Civ. App., 171 S.W. 1100.

Wyo.—*Hanson v. Sheburne*, 153 P. 899, 23 Wyo. 445.

**Furnishing transportation for juror**  
Defendant who did not immediately object to suspected action of plaintiff in giving juror ride home in automobile containing several of plaintiff's witnesses, thereby waived such misconduct.—*Woolson v. Waite*, 286 N.Y.S. 619, 158 Misc. 764, affirmed 286 N.Y.S. 624, 247 App.Div. 855.

87. N.M.—*Vigil v. Atchison*, T. & S. F. Ry. Co., 215 P. 971, 28 N.M. 581. 64 C.J. p 1052 note 35.

88. Minn.—*Stock v. St. Paul City Ry. Co.*, 172 N.W. 122, 142 Minn. 315.

64 C.J. p 1052 note 36.

89. Ky.—*American Engineering & Construction Co. v. Crawford*, 134 S.W. 448, 142 Ky. 217.

90. Ohio.—*Corbin v. City of Cleveland*, 57 N.E.2d 427, 74 Ohio App.

199, affirmed 56 N.E.2d 214, 144 Ohio St. 32, 154 A.L.R. 874. 64 C.J. p 1052 note 38.

Papers and articles which may be taken or sent to jury room see supra § 465.

#### Item which caused injury

In suit against city for injuries pedestrian sustained by walking into iron standards which extended over sidewalk, where standards were produced at trial by plaintiff and exhibited to jury and freely testified about, although not formally tendered or introduced, alleged error in allowing jury to take standards to jury room was waived, where record disclosed that city's counsel knew before verdict that standards had been taken out by jury and made no objections and no attempt to have standards withdrawn from jury.—*Mayor, etc., of Savannah v. Kicklighter*, 189 S.E. 689, 55 Ga.App. 169.

**Notes of testimony at previous trial erroneously admitted in evidence**  
Pa.—*Zank v. West Penn Power Co.*, 82 A.2d 554, 169 Pa.Super. 164.

91. Ky.—*Jefferson Dry Goods Co. v. Blunk*, 95 S.W.2d 244, 254 Ky. 673. 64 C.J. p 1052 note 39.  
Unauthorized views or inspections generally see supra § 459.

92. Ark.—*Scullin v. Vining*, 191 S.W. 924, 127 Ark. 124.

**Juror's checking value of evidence**  
Failure of plaintiff to move for a mistrial, when alleged misconduct of juror in checking on value of evidence as to character and extent of plaintiff's injuries and reliability of witnesses who testified on such matters was drawn to counsel's attention before jury returned their verdict and statement that it was undoubtedly within approval of both counsel that jury were sent back for further deliberation, constituted waiver by plaintiff of any right later to com-

plain of such misconduct.—*Schouten v. Crawford*, 257 P.2d 88, 118 Cal.App. 2d 59.

93. Mont.—*Pilgeram v. Haas*, 167 P. 2d 339, 118 Mont. 431.

94. Iowa.—*Wilson Sewing Mach. Co. v. Bull*, 3 N.W. 564, 52 Iowa 554.

95. U.S.—*Sullivan v. Aliquippa & S. R. Co.*, D.C.Pa., 57 F.Supp. 353.

**Separation prior to returning sealed verdict**

N.Y.—*Ullman v. Tubbs*, 112 N.Y.S.2d 360, 279 App.Div. 1120, modified on other grounds *Ullman v. Freedman*, 112 N.Y.S.2d 925, 279 App.Div. 1122.

96. Ga.—*Deen v. Wheeler*, 67 S.E. 212, 7 Ga.App. 607. 64 C.J. p 1052 note 42.

97. Okl.—*Hopkins v. Settles*, 149 P. 890, 46 Okl. 801. 64 C.J. p 1052 note 43.

98. Ill.—*Jollet v. Looney*, 42 N.E. 854, 159 Ill. 471.

#### Sending instructions without request of party

Where counsel for administratrix was present and participated in proceeding, and objected to sending photographs and copy of deceased's birth certificate to jury room, but did not object to sending instructions to jury room, alleged error in sending instructions to jury room without request of either party was waived.—*Dollarhide v. Gunstream*, 233 P.2d 1042, 55 N.M. 353.

99. Iowa.—*State v. Hale*, 59 N.W. 281, 91 Iowa 367.

1. N.Y.—*Kelly v. Commonwealth Ins. Co.*, 23 N.Y.Super. 82.

2. N.Y.—*Wheeler v. Sweet*, 33 N.E. 483, 137 N.Y. 435. 64 C.J. p 1052 note 48.

3. U.S.—*Yates v. Whyel Coke Co.*, Ohio, 221 F. 603, 137 C.C.A. 327. Power to give additional instructions in absence of counsel see supra § 478.

mandatory statute by the jury cannot reasonably be implied from a mere absence of objection.<sup>4</sup>

#### § 484. Sufficiency of Objection or Exception

Where the irregularity is merely called to the attention of the court without any objection thereto, such procedure is insufficient, and it is not incumbent on the court to take action with respect thereto unless requested to do so.

Where the irregularity is merely called to the attention of the court without any objection thereto, such procedure is insufficient, and it is not incumbent on the court on its own motion to discharge the jury or to take any action with respect thereto unless requested to do so.<sup>5</sup> An exception to an instruction which states that the jury will receive the

pleadings with the instructions is a sufficient exception or objection to the act of sending the pleadings to the jury.<sup>6</sup> The fact that counsel for the complaining party simply states to the court, when counsel for the other party is handing the jury a paper to take with them, that he wants the court to understand that he is not consenting to the paper being sent, is not a sufficient exception to the sending of the paper.<sup>7</sup> The making of a motion asking for a discharge of the jury and that a mistrial be declared, immediately after the court gave an erroneous instruction to a deliberating jury, has been held sufficient to bring the matter to the attention of the trial court and to answer the purpose of a formal objection.<sup>8</sup>

### IX. VERDICT AND FINDINGS OF JURY

#### A. IN GENERAL

#### § 485. Definitions, Nature, Purposes, and Distinctions

- In general
- General verdict
- Special verdict
- Verdict subject to opinion
- Conditional verdict
- Perverse verdict
- Privy verdict
- Special issues
- Special findings

#### a. In General

A verdict is the answer of the jury concerning any matter of fact, in any cause committed to them for trial; its object is to announce to the court the judgment of the jury as to how far the facts established by the evidence conform to those which are alleged and put in issue by the pleadings.

A verdict is the answer of the jury concerning any matter of fact, in any cause committed to them for trial,<sup>9</sup> and whatever they find beyond this is

4. *Tex.*—Butler v. Abilene Mut. Life Ins. Ass'n, Civ.App., 108 S.W.2d 972, error dismissed.

5. *Ky.*—Jefferson Dry Goods Co. v. Blunk, 95 S.W.2d 244, 264 Ky. 673.

6. *Kan.*—Kansas City, etc., R. Co. v. Eagan, 67 P. 887, 64 Kan. 421.

64 C.J. p 1053 note 50.

7. *Ill.*—Wilson v. Genseal, 1 N.E. 905, 113 Ill. 403.

8. *Kan.*—Moore v. Owens, 56 P.2d 86, 143 Kan. 620.

9. *Ind.*—*Corpus Juris* cited in Limeberry v. State, 63 N.E.2d 697, 698, 223 Ind. 622.

*Tex.*—Burton v. Bondies, 2 Tex. 203, 204—Morton v. State, 3 Tex.App. 510, 513.

64 C.J. p 1053 note 53.

#### Latin derivation

The word "verdict" is derived from the Latin "veredictum," meaning a true declaration.—State v. Blue, 64 So. 411, 134 La. 561.

#### Other definitions

(1) In general.

D.C.—U. S. v. O'Neal, 10 App.Cas. 205, 236, affirmed 19 S.C. 580, 174 U.S. 1, 43 L.Ed. 873.

*Ill.*—Carlyle Water, etc., Co. v. Carlyle, 31 Ill.App. 325, 338.

*Mass.*—Fidelity & Casualty Co. of New York v. Huse & Carleton, 172 N.E. 590, 593, 272 Mass. 448, 72 A.L.R. 1143.

*Mo.*—Howser v. Chicago Great Western R. Co., 5 S.W.2d 59, 64, 319 Mo. 1015.

*N.J.*—Farrell v. Weisman, 158 A. 828, 828, 108 N.J.Law 458.

*Or.*—Snyder v. Portland Ry., Light & Power Co., 215 P. 887, 889, 107 Or. 673.

64 C.J. p 1053 note 53 [a].

(2) "The answer of the jury made on any cause, civil or criminal, committed by the court to their examination."

*La.*—State v. Blue, 64 So. 411, 133, 134 La. 561.

*Tex.*—Shaw v. State, 2 Tex.App. 487, 491.

(3) The determination of the jury on the matters of fact in issue in a cause.

*Mo.*—Arcadia Timber Co. v. Evans, 264 S.W. 810, 304 Mo. 674.

*N.Y.*—Otis v. Spencer, 8 How.P. 171, 172.

*N.D.*—Johnson v. Glaspey, 113 N.W. 602, 604, 16 N.D. 335.

(4) "The determination of the jury upon the matters of fact in issue in a cause after hearing the case, the evidence, and the charge of the court."—Shaw v. State, 2 Tex.App. 487, 491.

(5) "A finding of a jury based on and after hearing facts submitted in a trial."—Blomberg v. State Bank of Ogden, 241 P. 242, 245, 119 Kan. 691.

(6) "The opinion declared by a jury as to the truth of matters of fact submitted to them for trial."—Shaw v. State, 2 Tex.App. 487, 491.

(7) "The unanimous decision made by a jury and reported to the court."—Manufacturers Finance Acceptance Corporation v. Jones, 166 S.E. 504, 506, 203 N.C. 523—In re Sugg's Will, 140 S.E. 604, 606, 194 N.C. 638—Smith v. Paul, 45 S.E. 348, 133 N.C. 66, 69—64 C.J. p 1053 note 53 [a] (7).

(8) "The unanimous decision made by a jury and reported to the court on the matters lawfully submitted to them in the course of the trial of a cause."

impertinent and immaterial, and is to be rejected.<sup>10</sup> A verdict is the culmination of the trial,<sup>11</sup> and embodies the conclusion of the jury on the questions of fact litigated in the trial.<sup>12</sup> It is determinative of the issues of fact submitted in a trial,<sup>13</sup> its object being to announce to the court the judgment of the jury as to how far the facts established by the evidence conform to those which are alleged and put in issue by the pleadings,<sup>14</sup> and also for which party, and in what amount, to render judgment.<sup>15</sup> A verdict should express the jury's own independent conclusion from the facts and circumstances in

evidence and not be the echo of opinions of witnesses.<sup>16</sup> The facts declared by the verdict constitute the basis of the judgment,<sup>17</sup> although the verdict makes no precedent and settles nothing but the immediate controversy to which it relates,<sup>18</sup> and the next jury on precisely similar facts is at liberty to find directly the contrary.<sup>19</sup> Verdicts are general or special,<sup>20</sup> and a jury is entitled to render either a verdict for plaintiff or a verdict for defendant.<sup>21</sup>

An agreement to disagree<sup>22</sup> or a report by the jury that they are unable to agree<sup>23</sup> is not a verdict.

Colo.—Hawley v. Barker, 5 Colo. 118, 120.

Kan.—Swan v. Bevis Rock Salt Co., 119 P. 871, 872, 86 Kan. 260.

Neb.—Union Pac. Ry. Co. v. Connolly, 109 N.W. 368, 370, 77 Neb. 264.

N.J.—Farrell v. Weisman, 158 A. 826, 828, 108 N.J.Law 458.

N.Y.—French v. Seamans, 50 N.Y.S. 776, 777, 27 App.Div. 612, 614.

Okl.—Cities Service Oil Co. v. Kindt, 190 P.2d 1007, 200 Okl. 64—Williams v. Pressler, 65 P. 934, 11 Okl. 122.

(9) "The compound result of the legal instructions given to the jury by the court and of their findings of fact applied to the legal principles laid down for their guidance."—Cole v. Blue Ridge Ry. Co., 55 S.E. 126, 127, 75 S.C. 156—Lewis v. Hinson, 43 S.E. 15, 18, 84 S.C. 571—Bonhan v. Bishop, 23 S.C. 105.

(10) "The definite answer given by the jury to the court concerning the matters of fact committed to the jury for their deliberation and determination, but so long as deliberation continues, determination has not been reached."—Ralston v. Stump, 62 N.E. 2d 293, 75 Ohio App. 375.

(11) "A declaration of the truth as to issues of fact submitted to jury." N.C.—Bartlett v. Hopkins, 69 S.E.2d 236, 238, 235 N.C. 165.

Wis.—Shenners v. West Side Street R. Co., 47 N.W. 622, 623, 78 Wis. 382.

(12) The agreement which the jurors reach in their deliberations and not the written paper which is filed, if, through a clerical error or otherwise, that does not express the jurors' agreement.—Brophy v. Milwaukee Elec. Ry. & Transport Co., 30 N.W.2d 76, 261 Wis. 558—Butler v. Milfin & Linden M. Co., 113 N.W. 642, 643, 133 Wis. 343.

#### Statement of juror held not verdict

Statement of juror in response to question whether jury had agreed on a verdict that they had decided on the insurance company giving plaintiff three thousand dollars, though showing that jurors knew or assumed that defendant truck owner

carried liability insurance, did not require rejection of verdict in favor of plaintiff.—Carter v. Butler, 42 S.E. 2d 201, 186 Va. 186.

Mo.—Arcadia Timber Co. v. Evans, 284 S.W. 810, 304 Mo. 674.

N.C.—McLean v. Douglass, 28 N.C. 233, 235.

La.—State v. Blue, 64 So. 411, 134 La. 561.

N.Y.—French v. Seamans, 50 N.Y.S. 776, 27 App.Div. 612.

La.—State v. Blue, 64 So. 411, 134 La. 561.

N.Y.—French v. Seamans, 50 N.Y.S. 776, 27 App.Div. 612.

Kan.—Blomberg v. State Bank of Ogden, 241 P. 242, 245, 119 Kan. 691.

**Verdict is conclusion of fact, not of law**

D.C.—U. S. v. O'Neal, 10 App.Cas. 205, 236, affirmed 19 S.Ct. 580, 174 U.S. 1, 43 L.Ed. 873.

Ky.—Davis v. Stone, 198 S.W. 937, 172 Ky. 696.

Tex.—Darden v. Mathews, 22 Tex. 320, 325.

Iowa.—Gray v. Phillips, Morr. 430.

Ky.—Davis v. Stone, 198 S.W. 937, 172 Ky. 696.

#### Two separate aspects

A verdict consists of two separate and distinct aspects, liability and amount.—All v. John Gerber Co., 252 S.W.2d 138, 36 Tenn.App. 134—Board of Mayor and Aldermen of Covington v. Moore, 232 S.W.2d 410, 33 Tenn. App. 561.

Ala.—Hames v. Brownlee, 63 Ala. 277, 278.

Miss.—Harris v. Pounds, 187 So. 891, 185 Miss. 688.

Mo.—Spangler-Bowers v. Benton, 83 S.W.2d 170, 229 Mo.App. 919.

64 C.J. p 1053 note 56.

Verdict as essential to judgment see

Judgments § 45.

#### Equivalent to judgment

Verdict is equivalent to a judgment or final determination.—Liberty Mut. Ins. Co. v. J. R. Clark Co., Minn., 59 N.W.2d 899, applying Missouri law.

Mich.—McGinnis v. Canada Southern Bridge Co., 13 N.W. 819, 49 Mich. 468, 472.

Mich.—McGinnis v. Canada Southern Bridge Co., supra.

Cal.—Simmons v. Hamilton, 56 Cal. 493, 495.

Conn.—Day v. Webb, 28 Conn. 140.

Okl.—Teachers' Conservative Inv. Ass'n v. England, 243 P. 127, 115 Okl. 298.

"General verdict" defined see infra subdivision b of this section.

"Special verdict" defined see infra subdivision c of this section.

#### In Pennsylvania

With respect to jury trials in civil actions, the established practice admits of only three forms of verdict, general verdict, general verdict with special findings or answers to special questions of fact, and special verdict.—Fulforth v. Prudential Ins. Co. of America, 24 A.2d 749, 147 Pa.Super. 516.

N.J.—Standard Baking Co. v. Hi-Grade Coal & Fuel Co., 179 A. 308, 115 N.J.Law 265.

#### Verdict of nonsuit

Verdict of nonsuit was a nullity which should not have been received by court, since jury were only entitled to render either verdict for plaintiff or verdict for defendant.—Standard Baking Co. v. Hi-Grade Coal & Fuel Co., 179 A. 308, 115 N.J.Law 265.

Iowa.—Garden v. Moore, 156 N.W. 410, 174 Iowa 376.

N.J.—Farrell v. Weisman, 158 A. 826, 108 N.J.Law 458.

N.J.—Farrell v. Weisman, 158 A. 826, 108 N.J.Law 458.

N.Y.—Appelt v. Timpona, 88 N.Y.S. 2d 43, 195 Misc. 68, reversed on other grounds 91 N.Y.S.2d 869, 275 App. Div. 1046.

#### "Verdicts" as employed in statute

A trial on which the jury has failed to agree will not be considered as one of the "verdicts," within statute prohibiting new trial where there have been three verdicts on substantially the same evidence.—Louisville & N. R. Co. v. Daniel, 115 S.W. 804, 131 Ky. 689, dissenting opinion 115 S.

The report made by the jury on its return to the court after its deliberations have been concluded is not a verdict, but is the material from which the verdict is to be formulated unless it is improper in substance.<sup>24</sup>

A *finding* is merely a narrative of the facts claimed to have been proved on either side,<sup>25</sup> and its purpose is to present fairly any claimed errors in the charge or rulings of the court.<sup>26</sup>

*Other terms distinguished.* In the absence of a statute to the contrary,<sup>27</sup> a verdict is a decision by a jury,<sup>28</sup> and a finding by a judge is not a verdict,<sup>29</sup> but can be expressed only by an order or judgment.<sup>30</sup> The term "verdict" is often used in distinction to the answers to special questions, but is not necessarily absolutely synonymous with "general verdict."<sup>31</sup>

W. 1198, rehearing denied 119 S.W. 229, 181 Ky. 689.

24. N.Y.—Carrig v. Oakes, 20 N.Y.S. 2d 585, 173 Misc. 793, affirmed 24 N.Y.S.2d 135, 260 App.Div. 989.

25. Conn.—Castaldo v. D'Eramo, 98 A.2d 664, 140 Conn. 88—Fierberg v. Whitcomb, 177 A. 135, 119 Conn. 390—Brown v. Goodwin, 147 A. 673, 110 Conn. 217.

For purpose of review, the "findings of fact" embrace all the facts established by the evidence.—Martin v. A. L. Scott Lumber Co., 273 P. 411, 412, 127 Kan. 391.

26. Conn.—Castaldo v. D'Eramo, 98 A.2d 664, 140 Conn. 88—Fierberg v. Whitcomb, 177 A. 135, 119 Conn. 390—Brown v. Goodwin, 147 A. 673, 110 Conn. 217.

27. Or.—Scott v. Ford, 97 P. 99, 101, 52 Or. 288.

S.D.—Kelly v. Wheeler, 119 N.W. 994, 996, 22 S.D. 611—Lone Tree Ditch Co. v. Rapid City Electric, etc., Co., 93 N.W. 650, 16 S.D. 451.

28. Ala.—Corpus Juris quoted in Hancock v. Oliver, 154 So. 571, 574, 228 Ala. 548.

Kan.—Swan v. Bevis Rock Salt Co., 119 P. 871, 86 Kan. 260.

Mass.—Ashapa v. Reed, 182 N.E. 859, 280 Mass. 514—McKinley v. Warren, 105 N.E. 990, 218 Mass. 310. 64 C.J. p 1053 note 61.

#### Verdict and decision

The word "verdict" means the finding of the jury, and the word "decision" means the finding of the court, and each denotes the finding on the facts.—Heekin Can. Co. v. Porter, 46 N.E.2d 486, 221 Ind. 69—Lowrance v. Lowrance, 182 N.E. 273, 275, 95 Ind.App. 345.

29. Ala.—Corpus Juris quoted in

Hancock v. Oliver, 154 So. 571, 574, 228 Ala. 548.

Kan.—Swan v. Bevis Rock Salt Co., 119 P. 871, 86 Kan. 260. 64 C.J. p 1053 note 62.

30. Ala.—Corpus Juris quoted in Hancock v. Oliver, 154 So. 571, 574, 228 Ala. 548.

Mass.—Bearce v. Bowker, 115 Mass. 129.

31. Kan.—Swan v. Bevis Rock Salt Co., 119 P. 871, 86 Kan. 260.

32. U.S.—Schofield v. Baker, D.C. Wash., 242 F. 657, 658.

Ala.—Corpus Juris cited in Russell v. State, 165 So. 256, 258, 231 Ala. 420—Corpus Juris cited in Russell v. State, 165 So. 254, 255, 27 Ala. App. 10.

Ill.—Weinhouse v. Woodruff, 59 N.E. 2d 523, 324 Ill.App. 660.

Ky.—Equitable Life Assur. Soc. of U. S. v. Goble, 72 S.W.2d 35, 37, 254 Ky. 614—Davis v. Stone, 189 S.W. 937, 938, 172 Ky. 696.

Mont.—Corpus Juris quoted in Gilmore v. Mulvihill, 98 P.2d 335, 339, 109 Mont. 601.

Okl.—Teachers' Conservative Inv. Ass'n v. England, 243 P. 187, 138, 115 Okl. 298.

Wis.—Boneck v. Herman, 20 N.W.2d 664, 247 Wis. 592.

64 C.J. p 1053 note 64.

#### Other definitions

(1) "The composite result of the facts found by the jury and the law as given to jury in the charge."—F. W. Woolworth Co. v. Carrier, C.C. A.Md., 107 F.2d 689, 692.

"One by which a jury pronounces generally on all issues of fact submitted to it for determination."—Will v. Hughes, 238 P.2d 478, 484, 172 Kan. 45—Lord v. Hercules Powder Co., 167 P.2d 299, 301, 161 Kan. 268—Phillips v. Hartford Acc. & Indem. Co., 142 P. 2d 704, 708, 157 Kan. 581.

#### b. General Verdict

A general verdict is that by which the jury pronounce generally on all or any of the issues, either in favor of the plaintiff or in favor of the defendant.

A general verdict is that by which the jury pronounce generally on all or any of the issues, either in favor of plaintiff or in favor of defendant.<sup>32</sup> It is a finding in favor of the prevailing party of every material fact properly submitted to the consideration of the jury.<sup>33</sup> Simple responses of "yes" or "no" to issues submitted constitute general verdicts.<sup>34</sup> Separate findings on each of separate causes of action are general verdicts.<sup>35</sup> A general verdict is an indivisible entity,<sup>36</sup> and it cannot readily be separated into its component elements.<sup>37</sup> A verdict directed on specific pleas is not a general verdict even though worded as such, and even though there is no objection to the form where the record shows that it was so directed.<sup>38</sup>

(3) "A finding, by the jury, in the 'terms of the issue or issues referred to them.'—Settle v. Allison, 8 Ga. 201, 208, 52 Am.D 393.

(4) "One by which the jury pronounce at the same time on the fact and the law, either in favor of the plaintiff or the defendant."—Childs v. Carpenter, 32 A. 780, 781, 87 Me. 114, 116.

(5) The integrated final product of the jury's findings containing the facts, the law, and the application of the law to the facts.—Rowe v. Safeway Stores, 128 P.2d 293, 298, 14 Wash.2d 363.

#### Verdicts held general

Cal.—Murray v. Babb, 86 P.2d 147, 30 Cal App.2d 301.

Ga.—Poole v. McEntire, 75 S.E.2d 20, 209 Ga. 659.

N.Y.—MacIvor v. Schwartzman, 260 N.Y.S. 707, 237 App.Div. 825—Tracy v. Dolan, 65 N.Y.S. 207, 51 App.Div. 588.

33. Mont.—Corpus Juris quoted in Gilmore v. Mulvihill, 98 P.2d 335, 339, 109 Mont. 601.

64 C.J. p 1053 note 65.

34. N.C.—Porter v. Western North Carolina R. Co., 2 S.E. 581, 97 N.C. 66, 2 Am.S.R. 272.

35. Iowa.—Farmers' Savings Bank of Arispe v. Arispe Mercantile Co., 127 N.W. 1084, 1087.

64 C.J. p 1054 note 67.

36. Ark.—Home Co. v. Lammers, 254 S.W.2d 65, 221 Ark. 311—Martin v. Street Imp. Dist. No. 349, 21 S.W. 2d 430, 180 Ark. 298.

37. Wash.—Rowe v. Safeway Stores, 128 P.2d 293, 14 Wash.2d 363.

38. Ga.—Groover v. Savannah Bank & Trust Co., 3 S.E.2d 745, 60 Ga. App. 357.

### c. Special Verdict

A special verdict is one in which the jury find the facts particularly, and then submit to the court the questions of law arising on them.

A special verdict is one in which the jury find the facts particularly, and then submit to the court the questions of law arising on them.<sup>39</sup> It is a special finding by the jury on each material issue of the case,<sup>40</sup> leaving the ultimate decision of the case on those facts to the court,<sup>41</sup> with a conclusion in the alternative that if on the facts found the law is for plaintiff then the finding is for plaintiff, but if the law is for defendant then the finding is for defendant.<sup>42</sup>

Although many types of controversies are customarily submitted to the jury on a special verdict,<sup>43</sup> such verdicts were unknown and unrecognized by the common law, or by practice prior to the statute of Westminster II, St. 13 Edward I c 30, which in fact originated the special verdict as it now exists.<sup>44</sup> There also has existed another species of special verdict, as where the jury return

a general verdict for plaintiff, subject nevertheless to the opinion of the court on a special case stated by counsel on both sides, as a matter of law.<sup>45</sup> However, this proceeding, it has been said, has gone out of practice.<sup>46</sup>

The object of a special verdict is to have all questions of fact in the case finally settled by the jury,<sup>47</sup> and to find sufficient ultimate facts to enable the court, unaided by the evidence, to apply the appropriate law thereto and to render judgment,<sup>48</sup> but not to decide disputes between witnesses as to minor facts even though such minor facts are essential to establish, by inference or otherwise, the main fact.<sup>49</sup> A special verdict, although comprising many findings, is but one verdict.<sup>50</sup>

*Special findings distinguished.* The fact that a general verdict is accompanied by special findings or answers to special questions does not make the verdict a special verdict.<sup>51</sup> Where there is no general verdict, however, specific findings of the jury as to the facts are to be considered as a special ver-

39. Ala.—*Corpus Juris* cited in Russell v. State, 165 So. 256, 257, 231 Ala. 420.—*Corpus Juris* cited in Russell v. State, 165 So. 254, 255, 27 Ala.App. 10.  
Ohio.—Smith v. Pennsylvania R. Co., App., 99 N.E.2d 501.  
64 C.J. p 1054 note 68.

#### Other definitions

(1) One by which a jury finds the facts only and it so presents the findings of fact as established by the evidence that nothing remains for court to do but draw therefrom conclusions of law

Minn.—Roske v. Ilykanyics, 45 N.W. 2d 769, 232 Minn 382—Ferch v. Hiller, 295 N.W. 504, 209 Minn. 124—Cummings v. Taylor, 21 Minn. 366.

Ohio.—Weaver v. Weaver, App., 35 N.E.2d 173.

(2) "The finding of facts by a jury, as shown in its answers to questions submitted to it in writing."—Equitable Life Assur. Soc. of U. S. v. Goble, 72 S.W.2d 35, 37, 254 Ky. 614.

(3) "That by which the jury finds facts only."—Teachers' Conservative Inv. Ass'n v. England, 243 P. 137, 138, 115 Okl. 238.

40. Pa.—Fulforth v. Prudential Ins. Co. of America, 24 A.2d 749, 147 Pa.Super. 616.  
64 C.J. p 1054 note 69.

41. Pa.—Fulforth v. Prudential Ins. Co. of America, supra—Schmidt v. Campbell, 7 A.2d 554, 136 Pa.Super. 590—James v. Columbia County Agricultural, Horticultural and Mechanical Ass'n, 178 A. 326, 117 Pa.

Super. 277, reversed on other grounds 184 A. 447, 321 Pa. 465  
Wis.—Boneck v. Herman, 20 N.W.2d 664, 247 Wis 592.  
64 C.J. p 1054 note 70.

#### Similar to "case stated"

A "special verdict" is similar to a "case stated," except that facts are found by jury instead of agreed to and stated by parties, and, like a case stated, the court in pronouncing judgment cannot go beyond facts found in special verdict and infer anything not there found, and what is not found is presumed not to exist, and if facts found are not sufficient to support a judgment the case must be tried again.—Fulforth v. Prudential Ins. Co. of America, 24 A.2d 749, 147 Pa. Super. 516.

#### Action for declaratory judgment

A verdict in an action for a declaratory judgment is necessarily a special verdict since the determination of the further issues, namely the rights, status, and other legal relationship of the parties, under the facts determined by the verdict, is for the court.—Crollard v. Northern Life Ins. Co., 200 S.W.2d 375, 240 Mo.App. 355.

42. U.S.—Mumford v. Wardwell, Cal., 6 Wall. 423, 18 L.Ed. 756—Suydam v. Williamson, N.Y., 20 How. 427, 15 L.Ed. 978.  
N.Y.—In re Plate's Will, 156 N.Y.S. 999, 1002, 93 Misc. 423.

Pa.—Schmidt v. Campbell, 7 A.2d 554, 136 Pa.Super. 590—James v. Columbia County Agricultural, Horticultural & Mechanical Ass'n, 178 A. 326, 117 Pa.Super. 277, reversed on other grounds 184 A. 447, 321 Pa. 465.

#### Report of judge not special verdict

A paper containing all the evidence introduced on trial and certain offers of proof excluded by the court, and drawn up in the form of a report of the judge who presided at the trial, and signed by him and under seal, and concluding, "A verdict was then, by direction of court, taken for the plaintiffs, for the premises claimed, subject to the opinion of the court upon the questions of law, with liberty to either party to turn this case into a special verdict or bill of exceptions," was not a special verdict.—Suydam v. Williamson, N.Y., 20 How. 427, 15 L.Ed. 978.

43. U.S.—Tillman v. Great American Indemnity Co. of N. Y., C.A.Wis., 207 F.2d 588.

44. Pa.—Wallingford v. Dunlap, 14 Pa. 31.

45. Pa.—Wallingford v. Dunlap, supra.

46. Pa.—Wallingford v. Dunlap, supra.

47. N.Y.—Daley v. Brown, 60 N.E. 753, 167 N.Y. 381.

48. Ohio.—Miller v. Jackson, 107 N.E.2d 922, 92 Ohio App. 199.

49. Wis.—Baxter v. Chicago, etc., R. Co., 80 N.W. 644, 104 Wis. 307.

50. Tex.—Casey-Swasey Co. v. Manchester Fire Ins. Co., 73 S.W. 884, 32 Tex.Civ.App. 158.

51. Pa.—Simpson v. Montgomery Ward & Co., 57 A.2d 571, 162 Pa.Super. 371—Schmidt v. Campbell, 7 A.2d 554, 136 Pa.Super. 590.

64 C.J. p 1054 note 79.



dict,<sup>52</sup> or may be so considered where there is neither a general nor a special verdict.<sup>53</sup> It has been held that where interrogatories were submitted and answered which embraced and covered all the issues in the cause they might be regarded as a special verdict,<sup>54</sup> but cannot be so regarded where the interrogatories do not cover all the issues.<sup>55</sup> Although they may to some extent both subserve the same purpose,<sup>56</sup> the object of both being to secure fair and impartial answers to questions submitted, free from bias or prejudice in favor of either party or in favor of a particular result,<sup>57</sup> there is still a material difference between special verdicts and findings by responses to interrogatories.<sup>58</sup> By the former, no unconditional general verdict is ever properly rendered, but the jury find the facts only and submit the question of law arising on them to the court.<sup>59</sup> By the latter, answers pertinent to, and perhaps controlling, although not necessarily fully covering, an issue framed, are given, always in connection with a general verdict,<sup>60</sup> and an answer to a special interrogatory may respond to a single inquiry pertaining to one issue essential to the general verdict.<sup>61</sup> The purpose of the former is to furnish the basis of a judgment to be rendered, and of the latter, by eliciting a determination of material facts, to furnish the means of testing the correctness of the verdict rendered, and of ascertaining its extent.<sup>62</sup>

As employed in statutes the term "special verdict" does not necessarily mean a finding on each

material issue in the case as it did at common law,<sup>63</sup> as, for example, in a statute which authorizes demand for a special verdict on any one or more of the issues or particular questions of fact, not for the purpose of determining what judgment shall be entered, but for the purpose of determining whether the general verdict is or is not against law.<sup>64</sup> Under such a statute special verdicts and special findings are identical except as to name.<sup>65</sup>

*Answers to questions by jury in equity cases.* Where a court of equity submits part of several questions of fact to a jury, answers thereto do not constitute a special verdict.<sup>66</sup>

#### d. Verdict Subject to Opinion

In some jurisdictions the jury may bring in a verdict for either party subject to the opinion of the court on a point of law.

In some jurisdictions the jury may bring in a verdict for either party subject to the opinion of the court on a point of law.<sup>67</sup> This is a general and not a special verdict.<sup>68</sup> A verdict generally for either party, dependent on a single point of law presented to the court, is good.<sup>69</sup> The facts on which it arises must either be admitted on the record or found by the jury.<sup>70</sup> A verdict conditioned on, and subject to, the opinion of the court on a demurrer to the evidence remains conditional until the court acts on the demurrer and gives judgment or sets it aside,<sup>71</sup> and it is error to render judgment on the verdict without determining the demurrer.<sup>72</sup>

52. Pa.—Thompson v. Emerald Oil Co., 123 A. 810, 279 Pa. 321.

53. Iowa.—Bobbitt v. Van Eaton, 226 N.W. 79, 208 Iowa 404.

54. Ind.—Pea v. Pea, 35 Ind. 387.

55. S.D.—Central Land & Investment Co. v. Loiseau, 239 N.W. 487, 59 S.D. 255.

56. C.J. p 1055 note 83.

57. Conn.—Freedman v. New York N. H. & H. R. Co., 71 A. 901, 81 Conn. 601, 15 Am.S.R. 464.

Ind.—Manning v. Gasharle, 27 Ind. 399.

57. N.D.—Ferderer v. Northern Pac. Ry. Co., 42 N.W.2d 216, 77 N.D. 169.

58. Conn.—Freedman v. New York N. H. & H. R. Co., 71 A. 901, 81 Conn. 601, 15 Am.S.R. 464.

Ind.—Manning v. Gasharle, 27 Ind. 399.

59. Iowa.—Morbey v. Chicago & N. W. Ry. Co., 89 N.W. 105, 116 Iowa 84.

Minn.—Roske v. Ilykanyics, 45 N.W. 2d 769, 232 Minn. 383.

Ohio.—Dowd-Feder Co. v. Schreyer, 179 N.E. 411, 124 Ohio St. 504.

60. Conn.—Freedman v. New York N. H. & H. R. Co., 71 A. 901, 81 Conn. 601, 15 Am.S.R. 464.

Ohio.—Dowd-Feder Co. v. Schreyer, 179 N.E. 411, 124 Ohio St. 504.

61. Iowa.—Morbey v. Chicago & N. W. Ry. Co., 89 N.W. 105, 116 Iowa 84.

Minn.—Roske v. Ilykanyics, 45 N.W. 2d 769, 232 Minn. 383.

62. Minn.—Roske v. Ilykanyics, supra.

64 C.J. p 1055 note 87.

#### Sole basis of judgment

The special verdict is the sole basis of judgment and it must be complete and consistent in and with itself, without aid or intent or reference to the evidence. If it does not find all the facts essential to sustain or defeat the cause of action it will not support a judgment. On the other hand, a special finding is designed to explain and test a general verdict.—Dowd-Feder Co. v. Schreyer, 179 N.E. 411, 124 Ohio St. 504.

63. Cal.—Napa Valley Packing Co. v. San Francisco Relief & Red Cross Funds, 118 P. 469, 16 Cal.App. 461.

64. Cal.—Plyler v. Pacific Portland Cement Co., 32 P. 56, 152 Cal. 125.—Napa Valley Packing Co. v. San Francisco Relief & Red Cross Funds, 118 P. 469, 16 Cal.App. 461.

65. Cal.—Napa Valley Packing Co. v. San Francisco Relief & Red Cross Funds, supra.

66. N.Y.—Duclos v. Kelley, 89 N.E. 875, 876, 197 N.Y. 76.

67. Mass.—Goetze v. Dominick, 140 N.E. 802, 246 Mass. 310.

64 C.J. p 1055 note 92.

68. Va.—Dejarnette v. Allen, 5 Gratt.

499, 46 Va. 499.—McMichen v. Amos, 4 Rand. 134, 25 Va. 134.

69. Va.—McMichen v. Amos, supra.

70. Pa.—Watsontown Car Mfg. Co. v. Elmsport Lumber Co., 99 Pa. 605.—Witman v. Smeltzer, 16 Pa. Super. 285.

71. W.Va.—Green & Co. v. Pittsburgh, etc., R. Co., 11 W.Va. 685.

72. W.Va.—Green & Co. v. Pittsburgh, etc., R. Co., supra.

## e. Conditional Verdict

It is generally held that the jury cannot render a conditional verdict in an action at law, although it is permitted in some jurisdictions.

It is generally held that the jury cannot render a conditional verdict in an action at law.<sup>73</sup> In some jurisdictions, however, this practice is permitted.<sup>74</sup>

*Failure to comply.* Where, after a conditional verdict, plaintiff, by a motion for new trial, prevents defendant from performing the condition, such failure cannot put defendant in default.<sup>75</sup>

## f. Perverse Verdict

A perverse verdict is one rendered in disregard of the law as given to the jury by the court.

A perverse verdict is one rendered by a jury which chooses not to take the law from the judge, but acts on their own erroneous view of the law.<sup>76</sup> It is a verdict rendered in disregard of the law as given to the jury by the court;<sup>77</sup> one whereby the jury refuse to follow the directions of the judge on a point of law.<sup>78</sup> It is not necessary that the jury should have acted dishonestly or from improper motives in order to render a verdict perverse;<sup>79</sup> it is sufficient that they have disregarded the judge's instructions.<sup>80</sup> However, a verdict which is contrary to an erroneous instruction,<sup>81</sup> or which is sustained by the great preponderance of the evidence,<sup>82</sup> is not perverse.

## g. Privy Verdict

A privy verdict is one given out of court before any of the judges of the court.

A privy verdict is one given out of court, before any of the judges of the court;<sup>83</sup> that which, for the sake of being released from confinement, is given by a jury out of court to a judge;<sup>84</sup> a verdict when the judge has left or adjourned the court, and the jury, being agreed, in order to be delivered from their confinement, obtain leave to give their verdict privily to the judge out of court.<sup>85</sup> It is called "privy" because it ought to be kept secret from each of the parties until it is affirmed in court.<sup>86</sup> Such a verdict has been called a mere nullity,<sup>87</sup> since it is of no force unless affirmed by a public verdict given openly in court, wherein the jury may vary from the privy verdict.<sup>88</sup> However, if the court is adjourned to the judge's chamber, it is not privy but public.<sup>89</sup>

## h. Special Issues

The object of statutes which permit a party to have the case submitted to the jury on special issues is to enable the party to procure a finding on the facts by the jury without their having knowledge of the legal effect of such finding.

Under some statutes a party may have a case submitted to the jury on special issues, to enable the party to procure a finding on the facts by the jury without their having knowledge of the legal effect of such finding,<sup>90</sup> so as to remove from the jury any bias or prejudice in favor of or against the parties by reason of the effect of their answers.<sup>91</sup>

73. Miss.—*Davis v. Searcy*, 30 So. 823, 79 Miss. 282.

Mo.—*Cox v. Bright*, 65 Mo.App. 417.

74. Pa.—*Tull v. Lynn*, 18 Pa.Dist. 699.

64 C.J. p 1055 note 99.

75. Pa.—*Jones v. Backus*, 6 A. 335, 114 Pa. 120.

76. Wis.—*Godfrey v. Godfrey*, 108 N.W. 814, 127 Wis. 47, 61, 7 Ann.Cas. 176.

48 C.J. p 1051 note 1.

77. Wis.—*Parkes v. Lindemann*, 133 N.W. 580, 148 Wis. 89, 90.

48 C.J. p 1051 note 2.

78. Wis.—*Godfrey v. Godfrey*, 108 N.W. 814, 127 Wis. 47, 61, 7 Ann.Cas. 176.

48 C.J. p 1051 note 3.

79. Wis.—*Murphy v. Lachmund Lumber etc., Co.*, 215 N.W. 822, 823, 194 Wis. 119.

80. Wis.—*Murphy v. Lachmund Lumber etc., Co.*, 215 N.W. 822, 823, 194 Wis. 119.

81. Wis.—*Callahan v. Chicago, etc., R. Co.*, 154 N.W. 449, 161 Wis. 285.

82. Minn.—*Ayer v. Chicago, M., St.*

*P. & P. R. Co.*, 249 N.W. 581, 189 Minn. 359.

83. Wis.—*Barrett v. State*, 1 Wis. 175.

Pa.—*Commonwealth v. Heller*, 5 Phila. 123.

50 C.J. p 409 note 43.

84. Pa.—*Wellits v. Thomas*, 185 A. 864, 122 Pa.Super. 438—*Dornick v. Reichenback*, 10 Serg. & R. 84, 90.

85. Pa.—*Wellits v. Thomas*, 185 A. 864, 122 Pa.Super. 438.

50 C.J. p 409 note 46.

86. Pa.—*Commonwealth v. Heller*, 5 Phila. 123.

Wis.—*Barrett v. State*, 1 Wis. 175, 180.

50 C.J. p 409 note 47.

87. Pa.—*Wellits v. Thomas*, 185 A. 864, 122 Pa.Super. 438.

50 C.J. p 409 note 48.

88. Pa.—*Wellits v. Thomas*, supra.

48 C.J. p 409 note 49.

89. Pa.—*Wellits v. Thomas*, supra—*Dornick v. Reichenback*, 10 Serg. & R. 84, 90.

90. Tex.—*Ex parte Fisher*, 205 S.W. 2d 1000, 146 Tex. 238, affirmed Fish-

er v. Pace, 69 S.Ct. 425, 338 U.S. 155, 93 L.Ed. 569 rehearing denied 69 S.Ct. 953, 336 U.S. 928, 93 L.Ed. 1089—*McFadden v. Hobert*, 15 S.W.2d 218, 118 Tex. 214—*Gilmer v. Graham*, Com.App., 52 S.W.2d 263—*Vega v. Grieger*, Civ.App., 264 S.W.2d 498, reversed on other grounds, *Grieger v. Vega*, Sup., 271 S.W.2d 85.

91. Tex.—*Ex parte Fisher*, 205 S.W.2d 1000, 146 Tex. 238, affirmed *Fisher v. Pace*, 69 S.Ct. 425, 338 U.S. 155, 93 L.Ed. 569, rehearing denied 69 S.Ct. 953, 336 U.S. 928, 93 L.Ed. 1089—*McFadden v. Hobert*, 15 S.W.2d 218, 118 Tex. 214—*Simmmonds v. St. Louis, B. & M. Ry. Co.*, Com.App., 29 S.W.2d 385—*Vega v. Grieger*, Civ.App., 264 S.W.2d 498, reversed on other grounds, *Grieger v. Vega*, Sup., 271 S.W.2d 85—*State v. Layton*, Civ.App., 147 S.W.2d 515.

## Similar statements of purpose

The laws authorizing submission of causes on special issues were intended to have jury find, in response to pertinent questions, what the facts are in a given case and remove the

to confine the jury to its proper function as trier of the facts,<sup>92</sup> and to relieve them from the duty of directly passing on who shall prevail in the suit.<sup>93</sup> The findings of the jury on special issues are to assist the court in determining what judgment should be entered,<sup>94</sup> and it is for the court to determine the legal effect of the facts found by the jury,<sup>95</sup> and to apply the law to the facts found,<sup>96</sup> and to render such judgment thereon as the law demands.<sup>97</sup> The object also is to prevent the jury from first agreeing to give a verdict to one of the parties and then framing answers to carry out the agreement.<sup>98</sup>

### 1. Special Findings

Special findings are particular findings of individual facts.

Special findings are particular findings of individual facts,<sup>99</sup> limited to findings of fact.<sup>1</sup> The object of such a finding is to state the ultimate

facts,<sup>2</sup> and not the probative or evidentiary facts.<sup>3</sup> The true purpose of special findings of the jury is to serve as an aid in administering justice.<sup>4</sup>

*Purposes of propounding interrogatories or questions to a jury, and requiring them to make special findings thereto, in addition to their general verdict, are to bring out the various material facts and assist the jury in arriving at an intelligent verdict;<sup>5</sup> to give either party, uninfluenced by acts of the court, an answer on a controlling issue without regard to the general verdict;<sup>6</sup> to test<sup>7</sup> and explain or limit<sup>8</sup> the general verdict, and to ascertain on what grounds it rests;<sup>9</sup> to enable the court to learn the jury's view of material issues<sup>10</sup> and the jury's ability to make correct inferences from existing facts;<sup>11</sup> to enable the court to apply the law correctly and guard against any misapplication of the law by the jury;<sup>12</sup> to give the parties the opportunity to ascertain whether the jury has understood and applied the law to the proved facts;<sup>13</sup>*

apparent temptation of jurors to return a verdict "in favor of" one of the litigants.—*Fort Worth & D. C. Ry. Co. v. Kiel*, Tex. Civ. App., 195 S.W.2d 405, error refused no reversible error.

92. *Tex.—Luling Oil & Gas Co. v. Edwards*, Civ. App., 32 S.W.2d 921—*Houston & T. C. R. Co. v. Shepherd*, Civ. App., 6 S.W.2d 410, 414. 64 C.J. p 1056 note 6.

93. *Tex.—Ex parte Fisher*, 206 S.W.2d 1000, 146 Tex. 328, affirmed *Fisher v. Pace*, 69 S.Ct. 425, 336 U.S. 155, 93 L.Ed. 669, rehearing denied 69 S.Ct. 653, 336 U.S. 928, 93 L.Ed. 1089—*McFaddin v. Hebert*, 15 S.W.2d 213, 118 Tex. 314—*Vega v. Grieger*, Civ. App., 264 S.W.2d 498, error granted.

94. *Tex.—Coggin v. Coggin*, Civ. App., 204 S.W.2d 47.

95. *Tex.—Gilmer v. Graham*, Com. App., 62 S.W.2d 263.

96. *Tex.—Universal Life Ins. Co. v. Cook*, Civ. App., 188 S.W.2d 791—*Waggoner v. Davis*, Civ. App., 261 S.W. 482—*Baker v. East*, Civ. App., 197 S.W. 1123.

97. *Tex.—City of Amarillo v. Hudleston*, 152 S.W.2d 1088, 137 Tex. 226.

98. *Tex.—Simmonds v. St. Louis, B. & M. Ry. Co.*, Com. App., 29 S.W.2d 989—*State v. Layton*, Civ. App., 147 S.W.2d 515—*Harkins v. Mosley*, Civ. App., 134 S.W.2d 706.

99. *Kan.—Atchison, T. & S. F. R. Co. v. Osburn*, 100 F. 473, 474, 79 Kan. 348.

1. *Ind.—Talbot v. Talbot*, 167 N.E. 535, 91 Ind. App. 333.

2. *Ind.—Behler v. Ackley*, 89 N.E. 877, 880, 173 Ind. 173.

3. *Ind.—Behler v. Ackley*, *supra*. 64 C.J. p 1056 note 14.

4. *Kan.—Taggart v. Yellow Cab Co. of Wichita*, 131 P.2d 924, 156 Kan. 88.

5. *W.Va.—Peninsular Land Transp. & Mfg. Co. v. Franklin Ins. Co.*, 14 S.E. 237, 35 W.Va. 666.

64 C.J. p 1056 note 15.

**Determination of facts essential to result**

One of the purposes in submitting special questions to jury is to determine facts which are essential elements of result reflected in general verdict.—*Long v. Shafer*, 174 P.2d 88, 162 Kan. 21.

6. *Conn.—Belchak v. New York, N. H. & H. R. Co.*, 179 A. 95, 119 Conn. 630.

*Ohio.—Wells v. Baltimore & O. R. Co.*, App., 97 N.E.2d 75.

7. *Kan.—Long v. Shafer*, 174 P.2d 88, 162 Kan. 21—*Jones v. Southwestern Interurban Ry. Co.*, 141 P. 999, 92 Kan. 809.

*Ohio.—Insurance Co. v. Downey*, 67 N.E. 254, 68 Ohio St. 151—*Cleveland & E. Electric R. Co. v. Hawkins*, 60 N.E. 588, 64 Ohio St. 391—*Bailey v. Great Lakes Greyhound Lines of Ind.*, 16 Ohio Supp. 112—*Wells v. Baltimore & O. R. Co.*, App., 97 N.E.2d 75.

8. *Conn.—Belchak v. New York, N. H. & H. R. Co.*, 179 A. 95, 119 Conn. 630—*Bernier v. Woodstock Agricultural Society*, 92 A. 160, 88 Conn. 558, 64 C.J. p 1056 note 17.

9. *Conn.—Belchak v. New York, N. H. & H. R. Co.*, 179 A. 95, 119 Conn. 630—*Canfield Rubber Co. v. Leary & Co.*, 121 A. 283, 99 Conn. 40.

**Consideration of essential elements**

The final conclusion of a jury is expressed in the jury's general verdict, and the special findings are for the purpose of ascertaining whether the jury has considered and found the elemental ingredients which should inhere in and support the general verdict.—*Neiswender v. Board of Com'rs of Shawnee County*, 113 P.2d 115, 153 Kan. 634, opinion supplemented 120 P.2d 218, 154 Kan. 588.

*Kan.—Osburn v. Atchison T. & S. F. Railway Co.*, 90 P. 289, 75 Kan. 746. *Mich.—Hartley v. A. I. Rodd Lumber Co.*, 276 N.W. 712, 282 Mich. 652.

10. *Mich.—Mitchell v. Perkins*, 54 N.W.2d 293, 334 Mich. 192—*Holman v. Cole*, 218 N.W. 795, 242 Mich. 402—*Cole v. Boyd*, 47 Mich. 98.

**Reason for finding**

Interrogatories are for purpose of ascertaining jury's finding on a particular point of case, and not reason for that finding.—*Stewart v. Raleigh County Bank*, 2 S.E.2d 274, 121 W.Va. 181, 122 A.L.R. 161.

11. *Mich.—Mitchell v. Perkins*, 54 N.W.2d 293, 334 Mich. 192.

**Correction of erroneous inferences**

Purpose of special questions to the jury is to enable the court to correct erroneous inferences by the jury from the facts which they found to exist.—*Cole v. Boyd*, 10 N.W. 124, 47 Mich. 98.

12. *Kan.—Parkinson Sugar Co. v. Riley*, 31 P. 1090, 50 Kan. 401, 408, 34 Am.S.R. 123.

64 C.J. p 1056 note 19.

13. *Ohio.—Ellis v. Akron Transp. Co.*, 71 N.E.2d 707, 147 Ohio St. 863.

and to aid in proceedings for subsequent review.<sup>14</sup> This practice is a valuable check against the uncertainty of a general verdict.<sup>15</sup>

### § 486. Sealed Verdict

- a. What constitutes
- b. Directions as to sealing
- c. Opening

#### a. What Constitutes

Sealing a verdict means that the findings should be placed in an envelope or other inclosure and the inclosure sealed.

Sealing a verdict means that the findings should be placed in an envelope or other inclosure and the inclosure sealed,<sup>16</sup> and does not mean that the public or private seal of the jury, or any of the members thereof, should be used.<sup>17</sup> A sealed verdict has been held to have no statutory basis, but to be based on convenience and custom.<sup>18</sup> It is only an informal memorandum, not a part of the record.<sup>19</sup> Its function is to provide evidence of the status of deliberation when the jury separated, so that, when the verdict is subsequently returned in open court, there will be no question of improper conduct during the separation as long as the jury then agree to the sealed verdict.<sup>20</sup>

#### b. Directions as to Sealing

The court may direct the jury, if they should agree, to sign the verdict, place it in an envelope, and return it into open court.

The court may, without regard to the consent or objection of parties,<sup>21</sup> direct the jury, if they should agree, to sign the verdict, place it in an envelope, and return it into open court,<sup>22</sup> or may

direct the bailiff to permit the jury, on agreement, to sign and seal their verdict and return it into court the following morning,<sup>23</sup> or, on the jury's coming into court to report agreement, counsel being absent, may instruct the jury to seal their verdict and return it into court on the following day.<sup>24</sup>

#### c. Opening

While the court may, under stipulation of the parties, open a sealed verdict in the absence of the jury and if necessary reduce it to proper form, it may be opened at any time by the court, notwithstanding the parties have agreed that it shall be opened on a particular day.

While the court may, under stipulation of the parties, open a sealed verdict in the absence of the jury and if necessary reduce it to proper form,<sup>25</sup> it may be opened at any time by the court, notwithstanding the parties have agreed that it shall be opened on a particular day.<sup>26</sup> The accidental unsealing of the verdict by the foreman does not vitiate it,<sup>27</sup> nor does the fact that counsel, out of curiosity, opened it.<sup>28</sup> Where a sealed verdict is directed, it is error to receive an open verdict.<sup>29</sup> In some jurisdictions the reception of a sealed verdict in the absence of some of the jury is illegal unless consented to by the parties.<sup>30</sup> Elsewhere it is held that it is not error for the court to receive the verdict without calling the jury back into the box where the losing party does not request their recall or demand the right to poll the jury.<sup>31</sup> Also it has been held that, if one of the jurors became so sick that he could not be present in court, the judge might receive the verdict with only eleven jurors present,<sup>32</sup> or the judge might adjourn court to the juror's house and there, in the presence of all twelve jurors, receive the verdict.<sup>33</sup> If the parties con-

14. Conn.—Belchak v. New York, N. H. & H. R. Co., 179 A. 95, 119 Conn. 630.

15. Pa.—Munley v. Scranton, 4 Pa. Dist. 117.

16. Kan.—Bradley v. Rogers, 5 P. 374, 33 Kan. 120.

17. Kan.—Bradley v. Rogers, supra.

18. Minn.—Weatherhead v. Burau, 55 N.W.2d 703, 238 Minn. 134.

19. Pa.—Havranek v. City of Pittsburgh, 25 A.2d 703, 344 Pa. 375.

20. Minn.—Weatherhead v. Burau, 55 N.W.2d 703, 238 Minn. 134.

21. N.Y.—Fahey v. South Nassau Communities Hospital, 95 N.Y.S.2d 842, 197 Misc. 490, affirmed 97 N.Y.S.2d 711, 277 App.Div. 774.

64 C.J. p 1056 note 23.

22. Or.—Applegate v. Portland Gas & Coke Co., 18 P.2d 211, 142 Or. 66.

Pa.—Thompson v. Dishong, Com.Pl. 29 West.Co. 39, 61 York Leg.Rec. 12.

64 C.J. p 1056 note 24.

23. Ill.—Chicago v. Langlass, 66 Ill. 361.

24. Ind.—Leas v. Cool, 68 Ind. 166.

25. U.S.—Koon v. Phoenix Mut. Life Ins. Co., 114 U.S. 106, 26 L.Ed. 670.

26. Ill.—Pierce v. Hasbrouck, 49 Ill. 23.

27. Iowa.—Bass v. Hanson, 9 Iowa 563.

28. Ohio.—Smoots v. Foster, 16 Ohio Cir.Ct. 612, 9 Ohio Cir.Dec. 218.

29. Ill.—Chicago v. Rogers, 61 Ill. 188.

30. Mass.—Rich v. Finley, 89 N.E.2d 213, 325 Mass. 99, 12 A.L.R.2d 669. 64 C.J. p 1057 note 32.

#### After death of juror

Where verdicts were agreed on and sealed, after which jurors separated and one of them, not the foreman, died, the court erred in receiving and recording the verdicts as verdicts of a jury of twelve men.—Rich v. Finley, 89 N.E.2d 213, 325 Mass. 99, 12 A.L.R.2d 669.

31. Iowa.—Caplan v. Reynolds, 182 N.W. 841, 191 Iowa 453.

32. N.Y.—Rowe v. Queensborough Gas & Elec. Co., 11 N.Y.S.2d 922, 171 Misc. 395, affirmed Rowe v. Queensborough Gas & Elec. Co., 16 N.Y.S.2d 832, 258 App.Div. 904, reargument denied 17 N.Y.S.2d 1011, 258 App.Div. 977.

Pa.—McDonald v. West Alexander Borough, 20 Pa.Dist. 109, 37 Pa.Co. 241.

33. Pa.—King v. Faber, 51 Pa. 357—Wellits v. Thomas, 185 A. 864, 123 Pa.Super. 438.

sent, they thereby waive all exceptions because of such separation.<sup>34</sup>

### § 487. Rendition and Reception

- a. In general
- b. Affirming or publishing verdict
- c. Dissent or disagreement of jurors
- d. Inquiry as to grounds of verdict
- e. Resubmission of cause

#### a. In General

There should be a strict compliance with the prescribed forms of procedure in receiving a verdict.

There should be a strict compliance with the prescribed forms of procedure in receiving a verdict.<sup>35</sup> The rendition of a verdict is ineffectual until entered as a judgment.<sup>36</sup> The rendition of a general verdict corresponds to the filing of findings of fact.<sup>37</sup>

*Who must read verdict.* Under a statute providing that the verdict must be rendered by the foreman, and read by the clerk to the jury, the word "rendered" has been held to mean "returned,"<sup>38</sup> and it is not necessary that the foreman read the verdict.<sup>39</sup> A refusal to permit the clerk to read orally the verdict, when handed to him by the foreman of the jury, is not error.<sup>40</sup>

#### b. Affirming or Publishing Verdict

Ordinarily a verdict must be affirmed by the jury

in open court and their finding is not a verdict until so affirmed.

Ordinarily a verdict must be affirmed by the jury in open court<sup>41</sup> and their finding is not a verdict until so affirmed.<sup>42</sup> The verdict to which the jury expressly or tacitly<sup>43</sup> assent in open court as read to them is the verdict in the case.<sup>44</sup> Where it is regarded as necessary that the verdict be received and "published" in open court a verdict prior thereto is not a verdict in law.<sup>45</sup> It is regarded as "published" when handed to some person directed by the court to receive it.<sup>46</sup> If the case is withdrawn from the jury while the verdict is still in the hands of the foreman, it is withdrawn before the verdict is published.<sup>47</sup>

#### c. Dissent or Disagreement of Jurors

A juror may disagree to the verdict after it is received and on his examination on poll, or he may express his dissent when the verdict is about to be delivered.

Although after a verdict is recorded the jury cannot vary from it,<sup>48</sup> before it is recorded they may vary from the first offer of their verdict.<sup>49</sup> Accordingly, a juror may disagree to the verdict after it is received and on his examination on poll,<sup>50</sup> whether or not the verdict is sealed,<sup>51</sup> or he may express his dissent when the verdict is about to be delivered.<sup>52</sup> A sealed verdict does not become final until it is read into the record and the jurors discharged.<sup>53</sup> Until the verdict is received and

34. Iowa.—Woods v. Van Buren County, Morr. 441.

35. Pa.—Eastley v. Glenn, 169 A. 433, 434, 313 Pa. 130.

"The reception of a verdict is not a difficult task; the procedure is simple enough. Amidst the pressing activities of trial court, we recognize that slight variances from proper forms are likely to occur; but also in so important a matter as the reception of the verdict, which when received decides the issue in the case on trial, we suggest the wisdom and necessity of conforming to the letter of the prescribed forms in order to avoid complications and delay."—Eastley v. Glenn, 169 A. 433, 434, 313 Pa. 130.

36. Cal.—Phipps v. Superior Court in and for Alameda County, 89 P. 2d 698, 32 Cal.App.2d 371.

37. Cal.—Phipps v. Superior Court in and for Alameda County, supra.

38. Cal.—Kramm v. Stockton Electric R. Co., 136 P. 523, 22 Cal.App. 737.

39. Cal.—Kramm v. Stockton Electric R. Co., supra.

40. Conn.—Lentine v. McAvoy, 136 A. 76, 105 Conn. 528.

41. Neb.—Bryan v. Manchester, 197 N.W. 425, 111 Neb. 748.

64 C.J. p 1059 note 72.

42. Ala.—King v. Robinson, 59 So. 371, 5 Ala.App. 431.

64 C.J. p 1059 note 73.

43. N.Y.—Carrig v. Oakes, 20 N.Y.S. 2d 585, 173 Misc. 793, affirmed 24 N.Y.S.2d 135, 260 App.Div. 989.

44. N.Y.—Corpus Juris cited in Carrig v. Oakes, 20 N.Y.S.2d 585, 587, 173 Misc. 793, affirmed 24 N.Y.S.2d 135, 260 App.Div. 989.

64 C.J. p 1059 note 74.

45. Ga.—Irvine v. Grant, 82 S.E. 819, 15 Ga.App. 269—Handley v. McKee, 70 S.E. 94, 8 Ga.App. 570.

46. Ga.—Merchants' Bank of Macon v. Rawls, 7 Ga. 191, 50 Am.D. 394—Irvine v. Grant, 82 S.E. 819, 15 Ga. App. 269.

47. Ga.—Irvine v. Grant, supra.

48. Pa.—Eastley v. Glenn, 169 A. 433, 313 Pa. 130—Scott v. Scott, 2 A. 531, 110 Pa. 387—Rice v. Bauer, Com. Pl. 32 North Co. 48.

Testimony of jurors to sustain, impeach, or explain verdict see infra § 523.

49. Pa.—Eastley v. Glenn, 169 A. 433, 313 Pa. 130—Scott v. Scott, 2 A. 531, 110 Pa. 387.

50. D.C.—Bruce v. Chestnut Farms—Chevy Chase Dairy, 126 F.2d 224, 75 U.S.App.D.C. 192.

Mich.—Routhier v. City of Detroit, 61 N.W.2d 593, 333 Mich. 449.

N.M.—Corpus Juris cited in Stambaugh v. Hayes, 103 P.2d 640, 642, 44 N.M. 443.

Wash.—Devoni v. Department of Labor and Industries, 217 P.2d 332, 36 Wash.2d 218.

64 C.J. p 1061 note 25.

51. Minn.—Corpus Juris cited in Weatherhead v. Bureau, 55 N.W.2d 703, 705, 233 Minn. 134.

64 C.J. p 1061 note 26.

52. S.C.—Perry v. Mays, 18 S.C.L. 354.

**Sealed verdict**  
U.S.—California Fruit Exchange v. Henry, D.C.Pa., 89 F.Supp. 580, affirmed, C.A., 184 F.2d 517.

53. U.S.—California Fruit Exchange v. Henry, supra.

Pa.—Blitting v. Wolfe, Com.Pl., 61 Dauph.Co. 194.

64 C.J. p 1061 note 28.

accepted by the court,<sup>54</sup> and up to the time of its tender for acceptance,<sup>55</sup> or prior to the discharge of the jury,<sup>56</sup> it is the prerogative of any juror to change his mind and to challenge the verdict about to be rendered. Assent may be presumed, if, when the verdict is read in court, it is accepted without objection at the time,<sup>57</sup> or if assented to by the foreman without disagreement being expressed by other jurors.<sup>58</sup> Such action is final and the verdict stands as rendered.<sup>59</sup> In those jurisdictions requiring a unanimous verdict of the jury the poll of the jury must show unanimity.<sup>60</sup>

The mere fact that a juror tried to address the court, after he had assented to the verdict when polled, and the jury discharged, it not appearing that the juror wanted to attack the verdict, is not ground for a new trial.<sup>61</sup> More than one poll may be taken, where the court believes a mistake has been made<sup>62</sup> or is informed by a juror that he desires to change his vote,<sup>63</sup> and the verdict will stand if he thereafter agrees to it on its being read to him.<sup>64</sup> If the disagreement is merely as to costs, it will not invalidate the verdict,<sup>65</sup> nor will dissatisfaction with the legal effect of a verdict.<sup>66</sup> When a juror dissents the jury should be either dis-

charged or returned to their room for further deliberation.<sup>67</sup> It is error for the court to receive and record a verdict on a showing that a juror, who dissents to a sealed verdict when it is returned in court, agreed to it before the verdict was sealed and the jury separated.<sup>68</sup>

#### d. Inquiry as to Grounds of Verdict

It is generally held that the court may inquire of the jury with respect to their verdict, and the grounds on which they proceeded for the purpose of ascertaining whether the case has been properly tried, or to obtain their intention as an aid to rendering proper judgment.

Although there is some authority to the contrary,<sup>69</sup> it is generally held that the court may inquire of the jury with respect to their verdict and the grounds on which they proceeded, for the purpose of ascertaining whether the case has been properly tried,<sup>70</sup> or to obtain their intention as an aid to rendering a proper judgment,<sup>71</sup> without the consent of the parties<sup>72</sup> and in the absence and without the consent of counsel,<sup>73</sup> and the inquiry may be made after the jury have been discharged and have separated.<sup>74</sup> Neither party has the legal right to bring the jurors before the trial judge and have them orally examined.<sup>75</sup> Such a proceeding

#### Conclusiveness

Jurors are not concluded by a sealed verdict, which is only an informal memorandum, not a part of the record, and from which any of them has a right to dissent when the verdict is rendered in open court.—*Havranek v. City of Pittsburgh*, 25 A.2d 703, 344 Pa. 375.

54. Ohio.—*Ralston v. Stump*, 62 N.E. 2d 293, 75 Ohio App. 375.

Tex.—*Lee v. Galbreath*, Civ.App., 234 S.W.2d 91.

55. Tex.—*Lee v. Galbreath*, supra.

56. N.Y.—*Spleiter v. North German Lloyd S. S. Co.*, 249 N.Y.S. 358, 232 App.Div. 104.

57. Conn.—*Raymond v. Bell*, 18 Conn. 81.

N.J.—*Weir v. Lux*, 58 A.2d 550, 137 N.J.Law 361.

58. Mass.—*Newell v. Rosenberg*, 176 N.E. 616, 275 Mass. 455.  
64 C.J. p 1061 note 51.

59. Pa.—*Havranek v. City of Pittsburgh*, 25 A.2d 703, 344 Pa. 375.—*Friedman v. Ralph Brothers, Inc.*, 171 A. 900, 314 Pa. 247.

60. Pa.—*Scott v. Scott*, 2 A. 531, 110 Pa. 387.

S.C.—*Sanders v. Charleston Consol. Ry. & Lighting Co.*, 151 S.E. 438, 154 S.C. 220.  
64 C.J. p 1061 note 32.

61. Mich.—*Hughes v. Detroit, etc., R. Co.*, 44 N.W. 396, 78 Mich. 339.

62. N.C.—*Trantham v. Elk Furniture Co.*, 140 S.E. 300, 194 N.C. 615.

63. Wash.—*McFarlane v. Chicago, M. & St. P. Ry. Co.*, 224 P. 581, 129 Wash. 230.—*Rice Fisheries Co. v. Pacific Realty Co.*, 77 P. 839, 35 Wash. 535.

64. N.C.—*Lowe v. Dorsett*, 34 S.E. 442, 125 N.C. 301.

65. Wis.—*Webster v. McKinster*, 1 Pinn. 644.

66. Cal.—*Fitzpatrick v. Himmelmann*, 48 Cal. 588.

67. D.C.—*Bruce v. Chestnut Farms-Chevy Chase Dairy*, 126 F.2d 224, 75 U.S.App.D.C. 192.

#### Verdict after discharge improper

In personal injury action, where first juror when polled announced opposition to verdict for defendant but, under repeated questioning of court and counsel, stated "I now find for the defendant," and fifth juror stated that he was "for the plaintiff," and, after judge had completed the polling of the jury, a motion to declare a mistrial had been made and taken under consideration, and jury discharged, the second dissenting juror answered "for the defendant," the verdict was improperly received and recorded, requiring the award of new trial.—*Bruce v. Chestnut Farms-Chevy Chase Dairy*, supra.

68. Pa.—*Havranek v. City of Pittsburgh*, 25 A.2d 703, 344 Pa. 375.  
64 C.J. p 1061 note 39.

69. W.Va.—*Miller v. Blue Ridge Transp. Co.*, 15 S.E.2d 400, 123 W. Va. 428.

#### Polling only permissible

After verdict, a jury may be polled, but not interrogated otherwise.—*Flournoy v. Brown*, 26 So.2d 351, 200 Miss. 351.—*James v. State*, 55 Miss. 57, 30 Am.R. 498.

70. N.H.—*Caldwell v. Yeatman*, 15 A.2d 252, 91 N.H. 150.  
64 C.J. p 1061 note 40.

Method of determining jurors' misconduct see supra § 461.

71. N.J.—*Turon v. J. & L. Const. Co.*, 88 A.2d 192, 8 N.J. 543.  
64 C.J. p 1061 note 41.

#### Purpose of inquiry

Purpose of inquiry of jury as to grounds or principle on which verdict is based is to insure the recording of verdict intended to be rendered and actually rendered by the jury.—*Turon v. J. & L. Const. Co.*, supra.

72. N.J.—*Turon v. J. & L. Const. Co.*, supra.

73. Mass.—*Lawler v. Earle*, 5 Allen 22.

74. N.H.—*Dearborn v. Newhall*, 63 N.H. 301.

Vt.—*Germond's Adm'r v. Central Vermont R. Co.*, 26 A. 401, 65 Vt. 128.

75. N.H.—*Caldwell v. Yeatman*, 15 A.2d 252, 91 N.H. 150.—*Goodwin v. Blanchard*, 64 A. 22, 73 N.H. 550.

of inquiry as to the ground of the verdict is discretionary with the court,<sup>76</sup> which power should be exercised cautiously.<sup>77</sup> The exercise of this power to ascertain whether the case has been properly tried does not depend on the introduction before the court of legally competent evidence of misconduct by the jury.<sup>78</sup> It is one of the general supervisory powers of the court over the product of the jury which may be exercised by the court if justice requires, whenever the judge is of the opinion that the jury may have made some mistake or been guilty of some improper conduct which produced their verdict,<sup>79</sup> the matter in issue being whether a juror's misconduct produced the verdict and not whether a juror misbehaved during trial.<sup>80</sup>

Inquiries as to the time from which the jury computed interest,<sup>81</sup> or, where there are several counts or issues, inquiries as to on which count or issue the jury based their verdict,<sup>82</sup> or where contradictory verdicts are returned, inquiries as to which is the true verdict,<sup>83</sup> or inquiries as to whether or not fraud existed on the part of a vendor,<sup>84</sup> or as to how the jury arrived at the sum awarded in the verdict,<sup>85</sup> have been held proper, although as to the last proposition there is also authority to the contrary.<sup>86</sup> Where the verdict rendered is general in form, inquiry as to the ground of the verdict is not precluded by the direction of the judge, in the charge, to return a special verdict in the event of particular findings.<sup>87</sup> The answers

to the questions may be made a part of the record,<sup>88</sup> and will have the effect of special findings of the facts stated.<sup>89</sup> The foreman's answer to inquiries by the court, in the absence of any expression of dissent by the rest of the jurors, may be taken as the answer of the jurymen.<sup>90</sup>

The judge may decline, after the jury have separated, to make an inquiry as to their finding as to a particular fact.<sup>91</sup> A refusal to instruct the jury after their discharge to deliver to counsel the calculations on which their verdict is based is not error.<sup>92</sup> A refusal to question the jury with respect to specific elements entering into a general verdict, in the absence of a request for special findings submitted to the jury, is not error.<sup>93</sup> If the poll of the jury is conducted by counsel, a juror cannot be interrogated as to the grounds of his assent or dissent.<sup>94</sup> It is not error for the trial court to refuse to summon the jurors before it, after the verdict, to interrogate them as to whether they correctly understood the instructions.<sup>95</sup>

#### e. Resubmission of Cause

Where it appears on the coming in of the jury with a verdict that their agreement is only apparent, they should be sent out to reconsider the verdict.

Where it appears on the coming in of the jury with a verdict that their agreement is only apparent, they should be sent out to reconsider the verdict;<sup>96</sup> and, similarly, where the poll shows

76. Ga.—Snelling v. Darrell, 17 Ga. 141.

N.J.—Turon v. J. & L. Const. Co., 86 A.2d 192, 8 N.J. 543.

#### Not required to interrogate jury

In personal injury action, trial judge was not required to interrogate the jury to ascertain whether the ad damnum in the writ influenced jury in any way in arriving at amount of verdict.—Bowman v. City of Newburyport, 38 N.E.2d 682, 310 Mass. 478.

#### Discretion held not abused

Denial of defendants' motions to have jury recalled and interrogated after verdicts were returned was not an abuse of discretion, where there was no showing that alleged misbehavior by jurors produced unanimous verdicts for plaintiffs, and there was lack of indication of any effect of individual acts of misconduct on jury as a whole, and none of alleged instances of misconduct by jurors were sufficient to warrant order for new trial as a matter of law, and reports given by jurors to defendants' counsel concerning alleged misconduct were conflicting.—Caldwell v. Yeatman, 15 A.2d 252, 91 N.H. 150.

77. Me.—Walker v. Bailey, 65 Me. 354.

N.J.—Turon v. J. & L. Const. Co., 86 A.2d 192, 8 N.J. 543.

78. N.H.—Caldwell v. Yeatman, 15 A.2d 252, 91 N.H. 150.

79. N.H.—Caldwell v. Yeatman, supra.

80. N.H.—Caldwell v. Yeatman, supra—Blodgett v. Clark, 84 A. 42, 76 N.H. 435.

81. Mass.—Dorr v. Fenno, 12 Pick. 521.

82. U.S.—Rockefeller v. Wedge, Pa., 149 F. 130, 79 C.C.A. 26.  
64 C.J. p 1061 note 45.

83. Mo.—Glaves v. Old Gem Catering Co., App., 18 S.W.2d 554—Hary v. Speer, 97 S.W. 228, 120 Mo.App. 556.

84. Mass.—Newell v. Rosenberg, 176 N.E. 616, 275 Mass. 455.

85. Mass.—Purcell v. Rose, 158 N.E. 776, 261 Mass. 431.  
64 C.J. p 1062 note 48.

86. Minn.—Hoffman v. City of St. Paul, 245 N.W. 373, 187 Minn. 320.  
W.Va.—Miller v. Blue Ridge Transp. Co., 15 S.E.2d 400, 123 W.Va. 428.

87. N.J.—Turon v. J. & L. Const. Co., 86 A.2d 192, 8 N.J. 543.

88. Mass.—Spurr v. Shelburne, 131 Mass. 429.

N.J.—Turon v. J. & L. Const. Co., 86 A.2d 192, 8 N.J. 543.

89. Mass.—Spurr v. Shelburne, 131 Mass. 429.

N.J.—Turon v. J. & L. Const. Co., 86 A.2d 192, 8 N.J. 543.

90. Mass.—Burgess v. Giovannucci, 49 N.E.2d 907, 314 Mass. 252—Dzilegiel v. Westford, 174 N.E. 495, 274 Mass. 291.

N.H.—Walker v. Sawyer, 13 N.H. 191.  
N.J.—Turon v. J. & L. Const. Co., 86 A.2d 192, 8 N.J. 543.  
64 C.J. p 1062 note 51.

91. Mass.—Green v. Clay, 10 Allen 90, 87 Am.D. 622.

92. Ga.—Snelling v. Darrell, 17 Ga. 141.

64 C.J. p 1062 note 56.

93. R.I.—Gardella v. Gardella, 146 A. 621, 50 R.I. 210.

94. Ind.—Mitchell v. Parks, 26 Ind. 354.

95. Tex.—Hermann v. Schroeder, Civ.App. 175 S.W. 788.

96. N.J.—Marsaro v. Public Service

that a juror consented to the verdict merely in order to prevent a hung jury, although not satisfied that the successful party had established his case,<sup>97</sup> or that the verdict is the result of compromise,<sup>98</sup> or a quotient verdict,<sup>99</sup> or that a juror's assent is qualified,<sup>1</sup> the verdict should not be received. It has been held that a judge may, in his discretion, request a jury to reconsider their verdict,<sup>2</sup> but that he is not bound to do so at the request of counsel.<sup>3</sup>

In some jurisdictions it is held that, where a sealed verdict is returned, if the jury refuse to affirm the verdict, although they have separated, they may be sent out for further deliberation,<sup>4</sup> and the verdict thereafter rendered is valid.<sup>5</sup> Elsewhere it has been held that, where a juror dissents from a sealed verdict, the court should declare a mistrial,<sup>6</sup> and may not send the jury back to recon-

sider their verdict,<sup>7</sup> but if the court does send the jury back to reconsider their verdict, a failure of counsel to object to such proceedings will waive the error.<sup>8</sup> Where the court directs the jury to retire for further deliberation, failure of the jury to take the form of verdict for defendant or the pleadings and exhibits in the case is not error where the court had directed the jurors to take both verdicts with them.<sup>9</sup>

#### § 488. — When, Where, and by Whom Received

A verdict must be returned into open court. In the absence of statutory warrant, the court cannot authorize a person other than the clerk to receive the verdict. A verdict cannot be received and entered during a period of adjournment in the absence of agreement, or announcement by the court that the verdict would be so received, or statutory authority.

Interstate Transp. Co., 74 A.2d 328, 8 N.J.Super. 268, reversed on other grounds *Mallinauskas v. Public Service Interstate Transp. Co.*, 75 A.2d 268, 6 N.J. 269—Orwin v. Clark, 53 A.2d 345, 135 N.J.Law 542.

64 C.J. p 1062 note 60.

#### Disagreement or inconsistency

(1) Where disagreement or inconsistency becomes apparent from polling jury, court has power to send jury back to reconsider or correct the inconsistency.—*Reed v. Cook*, 103 N.Y.S.2d 539.

(2) A trial judge not only has power and authority to decline to receive jury's verdict containing conflicting findings on issues submitted, but it is his duty, on discovering such conflicts, to point them out and retire jury for further consideration of their answers to issues.—*Lowrance v. Kenworthy*, 157 S.W.2d 879, 138 Tex. 132.

#### Dissent of one-fourth of jury

(3) Statute providing that jury might be sent out for further deliberation if any juror answered in the negative when jury was polled must be construed with constitutional provision permitting three-fourths of jurors in civil cases to render verdict, and means if more than one-fourth of jurors answer in the negative.—*Lehl v. Hull*, 53 P.2d 48, 152 Or. 470, rehearing denied 54 P.2d 290, 152 Or. 470.

(4) Where jury poll disclosed that more than one-quarter of members disagreed with verdict, trial judge retained control of proceedings, and properly ordered jury to retire and again consider case.—*Van Cise v. Lencioni*, 235 P.2d 236, 108 Cal.App.2d 341.

#### Statute prohibiting third submission

Statute providing that if a jury return a second time without agreeing on a verdict they shall not be sent out again without their consent was not applicable where the jury twice returned a verdict but poll indicated lack of unanimity which resulted merely from a misunderstanding on the part of a juror as to how to evidence his assent to the verdict. The court did not err in sending the jury out a third time because there was merely an appearance of disagreement when in fact there was none.—*Wilke v. Milwaukee Electric Ry. & Light Co.*, 245 N.W. 660, 209 Wis. 618.

#### Refusal to send jury out held not error

Where result of jury poll was eight to four in favor of verdict for defendant, but statement volunteered by one juror who had given a negative answer in poll and further inquiry by court disclosed that such juror misunderstood the inquiry when polled and intended to vote for verdict, receiving the verdict as originally read and refusing to send jury out for further deliberation was not error.—*Fulton v. Huguet*, 248 P.2d 954, 113 Cal.App.2d 692.

97. Okl.—*Frick v. Reynolds*, 52 P. 391, 6 Okl. 638.

98. Mich.—*Ostrander v. Lansing*, 70 N.W. 332, 111 Mich. 693.

99. Ill.—*Roy v. Goings*, 112 Ill. 656. 64 C.J. p 1062 note 63.

1. N.Y.—*Weeks v. Hart*, 24 Hun 181. N.C.—*Owens v. Southern R. Co.*, 31 S. E. 383, 123 N.C. 183, 68 Am.S.R. 821.

2. S.C.—*Bell v. Hutchinson*, 13 S.C.L. 409.

#### Discretion not abused

Where jury foreman, in answer to question as to verdict reached, merely stated that jurors felt that both drivers were negligent, but that motorcycle driver was direct cause of accident and defendant should not be held liable, and indicated that verdict was one of no cause for action, whereupon jury was polled and one juror indicated that such verdict was not his verdict, court did not abuse its discretion in directing jurors to return to jury room for further deliberations and denying plaintiff's motion for mistrial.—*White v. Huffmaster*, 32 N.W.2d 447, 321 Mich. 225.

3. S.C.—*Bell v. Hutchinson*, 13 S.C.L. 409.

4. Minn.—*Weatherhead v. Burau*, 55 N.W.2d 703, 238 Minn. 134. Or.—*Lehl v. Hull*, 53 P.2d 48, 152 Or. 470, rehearing denied 54 P.2d 290, 152 Or. 470.

64 C.J. p 1062 note 67.

5. Wis.—*State v. Waltermath*, 156 N. W. 946, 152 Wis. 602.

64 C.J. p 1062 note 68.

6. U.S.—*Finn v. Carnegie-Illinois Steel Corp.*, D.C.Pa., 68 F.Supp. 423. Pa.—*Havranek v. City of Pittsburgh*, 35 A.2d 703, 344 Pa. 375.

64 C.J. p 1062 note 69.

7. U.S.—*Finn v. Carnegie-Illinois Steel Corp.*, D.C.Pa., 68 F.Supp. 423.

Pa.—*Havranek v. City of Pittsburgh*, 25 A.2d 703, 344 Pa. 375.—*Eastley v. Glenn*, 169 A. 433, 313 Pa. 130.—*Kramer v. Kister*, 40 A. 1008, 187 Pa. 227, 44 L.R.A. 432.

8. Pa.—*Snaman v. Donahoe's, Inc.*, 161 A. 68, 307 Pa. 282.

9. Or.—*Lehl v. Hull*, 53 P.2d 48, 152 Or. 470, rehearing denied 54 P.2d 290, 152 Or. 470.



A verdict must be returned into open<sup>10</sup> court,<sup>11</sup> and is not final until pronounced and recorded in open court,<sup>12</sup> although under some statutes it need not be returned into open court if the parties so agree.<sup>13</sup> A verdict does not become final and binding until it is approved by the trial court.<sup>14</sup>

The verdict can be delivered only to a court legally constituted to receive it.<sup>15</sup> In the absence of statutory warrant, the court cannot authorize a person other than the clerk to receive the verdict,<sup>16</sup> although the parties consent thereto.<sup>17</sup> However, in the absence of special circumstances, the mere recording of a verdict ordinarily is of clerical

rather than judicial import,<sup>18</sup> and it is often held that by consent of the parties the clerk may receive a verdict in the absence of the judge,<sup>19</sup> although such practice is an irregularity,<sup>20</sup> and is not permitted in the absence of consent.<sup>21</sup> Where the parties are present and consent to the reception of the verdict, it is not rendered illegal by the absence of the assistant judges.<sup>22</sup> According to some authority, a verdict in a case tried by one justice may be reported into court and entered in the presence of another justice,<sup>23</sup> at least where it is done without objection.<sup>24</sup> It has been held that receipt of the verdict by the clerk, although the court was present, was not irregular or harmful.<sup>25</sup>

10. Ala.—**Corpus Juris** cited in *Rasmus v. Schaffer*, 160 So. 244, 247, 230 Ala. 245.

11. *Stoewasand v. Checker Taxi Co.*, 73 N.E.2d 4, 331 Ill.App. 192. Neb.—*In re Lodge's Estate*, 243 N.W. 781, 123 Neb. 531.

12. *Ind.—Tuhe v. Eber*, 19 Ind. 126. 64 C.J. p 1057 note 46.

13. *Me.—Withe v. Rowe*, 45 Me. 571. 64 C.J. p 1057 note 47.

#### Inquiry whether jury agreed

Mere inquiry by clerk whether jury had agreed on verdict did not amount to receiving verdict, where foreman announced disagreement, but trial court retained full jurisdiction of case until verdict was received and recorded or jury discharged.—*Small v. Pennsylvania R. Co.*, 80 F.2d 704, 65 App.D.C. 112, certiorari denied 56 S.Ct. 669, 237 U.S. 724, 80 L.Ed. 1008.

13. *Ga.—Malcom Bros. v. Pollock*, 183 S.E. 917, 181 Ga. 687, answers conformed to 184 S.E. 659, 52 Ga. App. 772.

#### Consent implied

Counsel's consent to rendition of sealed verdict in judge's absence could be implied from fact that judge stated in counsel's presence that, unless there was objection, judge would go to his home in another county, and that verdict should be sealed and returned to sheriff.—*Malcom Bros. v. Pollock*, 184 S.E. 659, 52 Ga.App. 772.

14. *Conn.—Jacobs v. Street*, 110 A. 843, 95 Conn. 248, 250.

*Ga.—Brown v. Service Coach Lines*, 31 S.E.2d 236, 71 Ga.App. 437.

*Kan.—In re Lightfoot's Estate*, 182 P. 2d 887, 163 Kan. 369—*Cole v. Lloyd*, 166 P.2d 577, 161 Kan. 150—*Pugh v. City of Kansas*, 99 P.2d 862, 151 Kan. 327.

*Tex.—Lee v. Galbreath*, Civ.App., 234 S.W.2d 91.

*Va.—Lough v. Price*, 172 S.E. 269, 161 Va. 811.

#### Not a verdict

Until accepted by the court, a finding of the jury is not a verdict.—

*Schulman v. Stock*, 93 A. 531, 89 Conn. 237.

15. *N.Y.—French v. Seamans*, 50 N.Y.S. 776, 27 App.Div. 612.

16. *Tenn.—Corpus Juris* cited in *Tennessee Gas Transmission Co. v. Vineyard*, 232 S.W.2d 403, 191 Tenn. 331, 20 A.L.R.2d 279.

64 C.J. p 1057 note 48.

#### Member of bar

Where circuit judge was unavoidably detained and could not be present when jury was ready to return verdict, and a member of bar who had no judicial authority other than request of circuit judge that he receive verdict, received verdict over objection of instigator of proceedings, verdict was void as omitting an indispensable requisite of constitutional trial by jury.—*Tennessee Gas Transmission Co. v. Vineyard*, 232 S.W.2d 403, 191 Tenn. 331, 20 A.L.R.2d 279.

#### In New Jersey

(1) Under court rules governing practice every verdict must be returned to the judge in open court, and the clerk may not be authorized to receive the verdict in the absence of the judge.—*Petrosino v. Public Service Coordinated Transport*, 61 A. 2d 746, 1 N.J.Super. 19.

(2) Rule is a regulation designed to avert abortive trials in interest of administrative economy and efficiency, and is wholly beyond control of the parties.—*Turon v. J. & L. Const. Co.*, 86 A.2d 192, 8 N.J. 543.

(3) Prior to the adoption of the rule by virtue of statute the court was permitted to direct that the verdict of the jury be taken in the absence of the judge by the clerk or deputy clerk, the power of the clerk or the deputy to do so being strictly limited by the statute which did not vest him with any judicial power. The clerk's function was purely administrative and he was required to take such verdict as the jury rendered without regard to whether it was in accordance with the instructions or whether the finding could be legally

justified.—*Van Demark v. Sartorius*, 7 A.2d 168, 122 N.J.Law 503—*Jones v. Pennsylvania R. Co.*, 75 A. 907, 78 N.J. Law 571—*Trovato v. Capozzi*, 182 A. 269, 14 N.J.Misc. 24—*Francillo v. Latour*, 181 A. 698, 13 N.J.Misc. 799, affirmed 184 A. 820, 116 N.J.Law 423—*Kindervater v. Simoni*, 171 A. 143, 12 N.J.Misc. 230—64 C.J. p 1057 note 48 [a].

17. *Va.—Baltimore, etc., R. Co. v. Polly*, 14 Gratt. 447, 55 Va. 447. 64 C.J. p 1058 note 49.

18. *Pa.—Culver v. Lehigh Val. Transit Co.*, 186 A. 70, 322 Pa. 503.

19. Ala.—**Corpus Juris** cited in *Rasmus v. Schaffer*, 160 So. 244, 247, 230 Ala. 245.

*Md.—Durkee v. Murphy*, 29 A.2d 253, 181 Md. 259.

64 C.J. p 1058 note 50.

#### Consent shown

Defendant was held to have consented for clerk to receive verdict without presence of judge where, after jury retired, judge asked in loud voice if parties consented for clerk to receive verdict, whereupon plaintiff's counsel expressed assent and defendant and his counsel, who were near judge, expressed no dissent, and were present when clerk received and read verdict and expressed no dissent and made no request to have judge called.—*Rasmus v. Schaffer*, 160 So. 244, 230 Ala. 245.

20. *Md.—Durkee v. Murphy*, 29 A.2d 253, 181 Md. 259.

21. *Md.—Durkee v. Murphy*, supra.

22. *Ky.—Wathan v. Penebaker*, 8 Bibb 99.

23. *Pa.—Culver v. Lehigh Val. Transit Co.*, 186 A. 70, 322 Pa. 503—*Eastley v. Glenn*, 169 A. 433, 313 Pa. 130.

64 C.J. p 1058 note 52.

24. *Ind.—Lease v. G. & A. Truck Lines*, 90 N.E.2d 351, 120 Ind.App. 78.

25. *N.J.—Levine v. Goldstein*, 138 A. 511, 5 N.J.Misc. 841. *Pa.—Eastley v. Glenn*, 169 A. 433, 313 Pa. 130.

A verdict cannot be received and entered during a period of adjournment,<sup>26</sup> in the absence of agreement,<sup>27</sup> or announcement by the court that the verdict would be received during adjournment if the jury came to an agreement,<sup>28</sup> or statutory authority.<sup>29</sup> Under a statute providing that a final adjournment of the court shall discharge the jury, it has been held that, where a jury were directed to retire and bring in a sealed verdict, and the court thereupon adjourned for the term, the jury could not thereafter render a verdict,<sup>30</sup> but a verdict may be returned during the next term where the statute contemplates the continuance of the jury for a limited time during the ensuing term.<sup>31</sup> The taking of a recess instead of ordering an adjournment has been held to be notice to counsel and parties to remain in attendance and await the verdict of the jury.<sup>32</sup>

#### § 489. — Necessity of Presence of Party or Counsel

In the absence of a statute or rule of court to the contrary, a verdict may be received by the court in the voluntary absence of the parties, or their counsel, or both.

In accordance with the rule now generally recognized, in the absence of a statute or rule of court to the contrary, a verdict may be received by the court in the absence of the parties,<sup>33</sup> or their counsel,<sup>34</sup> or in the absence of both,<sup>35</sup> where such absence is voluntary and while the court is in regular session,<sup>36</sup> especially where they were called into court and did not respond,<sup>37</sup> or where the cause of the complaining party is without merit.<sup>38</sup>

However, it has been held that the presence of plaintiff is necessary where he has the right to submit to a nonsuit at any time before verdict,<sup>39</sup> and if, on being called, he does not answer a nonsuit may be taken against him.<sup>40</sup> At the early common law plaintiff was required to be present at the reception of the verdict to answer if it was adverse to him for the amercement to which he was liable *pro falso clamore suo*.<sup>41</sup> It is the duty of counsel to remain in the court room until the final disposition of the case<sup>42</sup> unless he is content to rely on rights afforded him in such absence.<sup>43</sup> It is no part of the judge's duty to send for counsel to be present at the return of the verdict.<sup>44</sup> A request by counsel that the deputy clerk notify him when the verdict is to be received has been held to be a mere personal arrangement between them,<sup>45</sup> and a failure of the deputy clerk to notify counsel not to affect the validity of the verdict.<sup>46</sup>

#### § 490. — Poll of Jurors

- a. Right in general
- b. Time for poll and request therefor
- c. Mode of poll

##### a. Right in General

The judge may, on request of either party, allow the jury to be polled, and in some jurisdictions it is the absolute right of either party to have the jury polled on request.

Polling the jury is a practice whereby the jurors are asked individually whether they assented, and still assent, to the verdict.<sup>47</sup> To poll a jury is to

26. Pa.—Shamokin Coal, etc., Co. v. Mitman, 3 Pa. 379.

64 C.J. p 1057 note 38.  
Rendition on Sunday see Sunday § 51.

27. Minn.—Kennedy v. Raught, 6 Minn. 235.

Va.—McMurray v. Oneal, 1 Call 246, 5 Va. 246.

28. Kan.—McCormick Harvesting Mach. Co. v. Lauber, 52 P. 577, 7 Kan.App. 730.

29. Mass.—Tim v. Rosenfeld, 47 N.E. 106, 168 Mass. 393.  
64 C.J. p 1057 note 41.

30. Colo.—Anderson v. Hulet, 36 P. 309, 4 Colo.App. 448.

31. Ill.—Weske v. Chicago Union Traction Co., 117 Ill.App. 298.  
64 C.J. p 1057 note 43.

32. Kan.—Mooney v. Olsen, 22 Kan. 69.

33. N.J.—Gould v. Magee, 3 N.J.Law 475.

34. Okl.—Kuhl v. Supreme Lodge S. K. L., 89 P. 1126, 18 Okl. 383.

64 C.J. p 1058 note 55.

##### Effort made to reach counsel

It was not error for the court to receive a verdict late at night when neither counsel for plaintiff nor defendant was present, where the court made an earnest effort to reach respective counsel, the court being continuously in session from the time the jury were sent out until verdict was taken, it being the duty of counsel to notify the trial court or the court officers where he could be reached in the event the jury reached a verdict.—Sylvester v. Pennsylvania R. Co., 53 A.2d 537, 357 Pa. 213.

35. Ga.—Ward v. Ward, 87 S.E. 17, 144 Ga. 312.

64 C.J. p 1058 note 56.

36. Kan.—Strowger v. Sample, 24 P. 425, 44 Kan. 298.

37. Ga.—Perry v. Mulligan, 58 Ga. 479.

38. Ga.—Jones v. Bullard, 52 Ga. 145.

39. N.Y.—People v. Mayor's Court of Albany, 1 Wend. 86.

40. N.C.—Graham v. Tate, 77 N.C. 120.

64 C.J. p 1058 note 61.

41. Colo.—Stiles v. Ford, 2 Colo. 128.  
N.Y.—Gale v. Hoyersadt, 1 How.Pr. 72, 7 Hill 179.

42. Mass.—Low Supply Co. v. Papacostopoulos, 187 N.E. 51, 283 Mass. 633.

64 C.J. p 1058 note 63.

43. Mass.—Low Supply Co. v. Papacostopoulos, supra—Dziagiel v. Town of Westford, 174 N.E. 495, 274 Mass. 291.

44. Conn.—Merwin v. Wheeler, 41 Conn. 14.

Wis.—Walczakowski v. Milwaukee Electric Ry. & Light Co., 147 N.W. 20, 157 Wis. 191.

45. N.C.—Barger Bros. v. Alley, 83 S.E. 612, 167 N.C. 362.

46. N.C.—Barger Bros. v. Alley, 83 S.E. 612, 167 N.C. 362.

47. N.J.—Corpus Juris quoted in Shlak v. Hudson & M. R. Co., 176

call the names of the persons who compose a jury and require each juror to declare what his verdict is, before it is recorded.<sup>48</sup> The object of polling a jury is to give juror an opportunity to declare his present judgment in open court,<sup>49</sup> and to ascertain with certainty that each juror approves of the verdict returned and that no one has been coerced or induced to agree to a verdict to which he does not actually assent.<sup>50</sup>

The judge may, on request of either party, allow the jury to be polled,<sup>51</sup> and in some jurisdictions it is the absolute right of either party to have the jury polled on request,<sup>52</sup> whether the verdict is sealed or declared by the foreman,<sup>53</sup> or whether it is special or general,<sup>54</sup> and in these jurisdictions a refusal by the court to poll the jury on request is error,<sup>55</sup> although the denial of the right has been held not to render the verdict a nullity.<sup>56</sup> The right to have the jury polled may not be refused merely because of the form of the request<sup>57</sup> or the motive which prompts it.<sup>58</sup> In other jurisdictions

it is discretionary with the court whether it will poll the jury;<sup>59</sup> and neither party may demand a poll as a matter of right;<sup>60</sup> but if there is a good reason a request by either party to test the unanimity of the jury by a poll should be allowed.<sup>61</sup> The right to poll does not exist where the verdict is directed,<sup>62</sup> and if a poll is taken, it is immaterial whether or not the jurors agree with the verdict.<sup>63</sup>

**Waiver.** The right to poll the jury may be waived either expressly, or by acts or failure to act.<sup>64</sup> The right to poll the jury is waived by a stipulation that the officer in charge of the jury may receive the verdict.<sup>65</sup> On the question whether an agreement of counsel that the jury may bring in a sealed verdict affects the right to poll, the cases are not in accord, some holding that it waives the right<sup>66</sup> and others otherwise.<sup>67</sup> Where a juror is absent at the time the sealed verdict is rendered and the jury polled, the right is waived where the attorney objects to any arrangement whereby the absent juror could be polled.<sup>68</sup> Where the bill of exceptions

A. 674, 675, 114 N.J.Law 428, affirmed 181 A. 68, 115 N.J.Law 504, 64 C.J. p 1059 note 78.

48. N.J.—**Corpus Juris** quoted in *Silak v. Hudson & M. R. Co.*, 176 A. 674, 675, 114 N.J.Law 428, affirmed 181 A. 68, 115 N.J.Law 504, 64 C.J. p 1059 note 79.

49. Ind.—*State Life Ins. Co. v. Postal*, 84 N.E. 156, 43 Ind.App. 144. N.J.—*Weir v. Luz*, 58 A.2d 550, 137 N.J.Law 361—**Corpus Juris** quoted in *Silak v. Hudson & M. R. Co.*, 176 A. 674, 675, 114 N.J.Law 428, affirmed 181 A. 68, 115 N.J.Law 504. Pa.—*Bennett v. Seltz*, Com.Pl., 54 Lanc.L.Rev. 19.

50. N.J.—*Weir v. Luz*, 58 A.2d 550, 137 N.J.Law 361—*Orwin v. Clark*, 53 A.2d 346, 135 N.J.Law 542—*Silak v. Hudson & M. R. Co.*, 176 A. 674, 114 N.J.Law 428, affirmed 181 A. 68, 115 N.J.Law 504.

N.Y.—*Reed v. Cook*, 103 N.Y.S.2d 539. Pa.—*Horn v. Rudloff*, Com.Pl., 7 Sch. Reg. 1.

Tex.—*Watchtower Mut. Life Ins. Co. v. Davis*, Civ.App., 99 S.W.2d 693—*Wells v. Lone Star S. S. Co.*, Civ. App., 1 S.W.2d 925.

51. Miss.—*Flournoy v. Brown*, 26 So. 2d 351, 200 Miss. 171. Pa.—*Bennett v. Seltz*, Com.Pl., 54 Lanc.L.Rev. 19. 64 C.J. p 1059 note 81.

52. Miss.—*James v. State*, 55 Miss. 57.

N.Y.—*Farhart v. Matuljak*, 130 N.Y.S. 2d 611, 283 App.Div. 977—*Reed v. Cook*, 103 N.Y.S.2d 539.

Tex.—*Watchtower Mut. Life Ins. Co. v. Davis*, Civ.App., 99 S.W.2d 693. 64 C.J. p 1059 note 82.

**Poll as to special findings**

Statutes directing a poll of the jury apply with equal force to special findings of fact.—*Creighton v. Kiehl*, 19 N.E.2d 653, 60 Ohio App. 86.

53. U.S.—*California Fruit Exchange v. Henry*, D.C.Pa., 89 F.Supp. 580, affirmed, C.A., 184 F.2d 517. Minn.—*Weatherhead v. Burau*, 55 N.W.2d 703, 238 Minn. 134. 64 C.J. p 1059 note 83.

**Effect of sealed verdict**

Although right to poll a jury may be a substantial right, the importance of the poll is weakened where the jurors solemnly record their verdict over their own signature.—*Rowe v. Queensborough Gas & Elec. Co.*, 11 N.Y.S.2d 922, 171 Misc. 395, affirmed *Rowe v. Queens Borough Gas & Elec. Co.*, 16 N.Y.S.2d 832, 258 App. Div. 904, reargument denied 17 N.Y.S. 2d 1011, 258 App.Div. 977.

54. Tex.—*Wells v. Lone Star S. S. Co.*, Civ.App., 1 S.W.2d 925.

55. Tex.—*Wells v. Lone Star S. S. Co.*, supra. 64 C.J. p 1059 note 85.

56. U.S.—*Humphries v. District of Columbia*, App.D.C., 19 S.Ct. 637, 174 U.S. 190, 43 L.Ed. 944.

Pa.—*Sylvester v. Pennsylvania R. Co.*, Com.Pl., 93 Pittsb.Leg.J. 155, affirmed 53 A.2d 537, 357 Pa. 213.

57. Tex.—*Wells v. Lone Star S. S. Co.*, Civ.App., 1 S.W.2d 925.

58. Tex.—*Watchtower Mut. Life Ins. Co. v. Davis*, Civ.App., 99 S.W.2d 693.

59. Colo.—*Morgan v. Gore*, 44 P.2d 918, 96 Colo. 508.

Ga.—*Peavey v. Crawford*, 15 S.E.2d 418, 192 Ga. 371—*Bell v. Hutchings*,

12 S.E. 974, 86 Ga. 562—*Pan-American Wall Paper & Paint Co. v. Tudor*, 59 S.E.2d 12, 81 Ga.App. 417—*Ludwig v. J. J. Newberry Co.*, 52 S.E.2d 485, 78 Ga.App. 871.

N.J.—*Weir v. Luz*, 58 A.2d 550, 137 N.J.Law 361—*Francillo v. Latour*, 184 A. 820, 116 N.J.Law 423. 64 C.J. p 1059 note 88.

**Discretion held not abused**

Colo.—*Morgan v. Gore*, 44 P.2d 918, 96 Colo. 508.

60. Colo.—*Morgan v. Gore*, supra—*Hindrey v. Williams*, 12 P. 436, 9 Colo. 371.

Ga.—*Peavey v. Crawford*, 15 S.E.2d 418, 192 Ga. 371.

61. Colo.—*Hindrey v. Williams*, 12 P. 436, 9 Colo. 371.

62. Cal.—*In re Sharon's Estate*, 177 P. 283, 179 Cal. 447. 64 C.J. p 1059 note 90.

63. Cal.—*Gaskill v. Pacific Electric Ry. Co.*, 159 P. 200, 30 Cal.App. 593.

64. N.Y.—*Reed v. Cook*, 103 N.Y.S. 2d 539.

65. U.S.—*Koon v. Phenix Mut. L. Ins. Co.*, Ill., 104 U.S. 106, 26 L.Ed. 670.

Ga.—*Oxburn v. Royal Ins. Co.*, 139 S.E. 99, 37 Ga.App. 86.

66. Fla.—*Whitner v. Hamlin*, 12 Fla. 18.

Iowa.—*Miller v. Mabon*, 6 Iowa 456. 64 C.J. p 1060 note 95.

67. Minn.—*Weatherhead v. Burau*, 55 N.W.2d 703, 238 Minn. 134.

68. C.J. p 1060 note 96.

69. N.Y.—*Rowe v. Queensborough Gas & Elec. Co.*, 11 N.Y.S.2d 922, 171 Misc. 395, affirmed *Rowe v. Queens Borough Gas & Elec. Co.*, 16 N.Y.S.2d 832, 258 App.Div. 904, re-

shows that the sealed verdict was opened and read by consent of counsel, they cannot object that it was read in the absence of the jury, so as to deprive them of an opportunity to poll the jury.<sup>69</sup> The right is waived when plaintiff<sup>70</sup> or his counsel<sup>71</sup> is in court when the verdict is returned and fails to request a poll. When given permission by the court to poll the jury, the refusal of counsel personally to conduct the poll is not a waiver of the right.<sup>72</sup>

#### b. Time for Poll and Request Therefor

It is too late to make a request for the poll of the jury after the verdict has been received and recorded, or after the jury have dispersed or have been discharged. A poll of the jury must be had immediately on return of the verdict in open court and before debate or discussion thereof.

It is too late to make a request for the poll of the jury after the verdict has been received and recorded,<sup>73</sup> or where the jury have dispersed after handing the verdict to the clerk,<sup>74</sup> or after the jury have been discharged.<sup>75</sup> A request that the jury be polled on their bringing in a special verdict in which the answers to interrogatories are inconsistent, before the jury further deliberate under the order of the court, is premature.<sup>76</sup>

A poll of the jury must be had immediately on return of the verdict in open court and before

debate or discussion thereof,<sup>77</sup> although it has also been held that it need not be taken when the verdict is returned,<sup>78</sup> but should be taken within a reasonable time after the request by the party and while the jury are still impaneled.<sup>79</sup> It has also been held by virtue of statute that a poll is authorized after the clerk has asked the jury if the verdict is theirs, but before the recording of the verdict.<sup>80</sup> An objection that the jury were not polled comes too late after judgment.<sup>81</sup>

#### c. Mode of Poll

- (1) Questions
- (2) Answers

##### (1) Questions

The poll must be conducted by the judge or by the clerk under his direction and in a manner authorized by law. Only questions prescribed by law may be propounded to the jury.

The poll, it has been held, must be conducted by the judge,<sup>82</sup> or by the clerk under his direction,<sup>83</sup> and it is error for the judge to permit counsel for either party to examine the jurors.<sup>84</sup> Where the jury have been polled as to a general verdict, it is discretionary with the judge whether he poll the jury as to special issues,<sup>85</sup> or they may be polled en

argument denied 17 N.Y.S.2d 1011, 258 App.Div. 977.

69. Ill.—Butterworth v. Pfeiffer, 80 Ill.App. 240.

70. U.S.—Alusa v. Lehigh Valley R. Co., D.C.N.Y., 26 F.2d 950—Corpus Juris cited in Finn v. Carnegie-Illinois Steel Corp., D.C.Pa., 68 F. Supp. 423, 428.

#### Under statute

Where plaintiffs failed to assert any right to poll jury at time when judge directed clerk, in exercise of statutory power, to receive verdict in open court in judge's absence, plaintiffs thereby waived any right to have jury polled.—Weir v. Luz, 58 A.2d 550, 137 N.J.Law 361.

71. U.S.—Alusa v. Lehigh Valley R. Co., D.C.N.Y., 26 F.2d 950—Corpus Juris cited in Finn v. Carnegie-Illinois Steel Corp., D.C.Pa., 68 F. Supp. 423, 428.

72. N.Y.—Reed v. Cook, 103 N.Y.S.2d 539.

73. Tex.—Watchtower Mut. Life Ins. Co. v. Davis, Civ.App., 99 S.W.2d 693.

74. Or.—Applegate v. Portland Gas & Coke Co., 18 P.2d 211, 142 Or. 66.

Pa.—Corpus Juris quoted in Common-

wealth v. Johnson, 59 A.2d 128, 130, 359 Pa. 287—Rice v. Bauer, Com. Pl., 32 North.Co. 48—Rice v. Bauer, Com.Pl., 32 North.Co. 47.

64 C.J. p 1060 note 1.

74. U.S.—Corpus Juris cited in Finn v. Carnegie-Illinois Steel Corp., D.C.Pa., 68 F.Supp. 423, 428. Ga.—Smith v. Mitchell, 6 Ga. 458. Pa.—Corpus Juris quoted in Commonwealth v. Johnson, 59 A.2d 128, 130, 359 Pa. 287.

75. U.S.—Corpus Juris cited in Finn v. Carnegie-Illinois Steel Corp., D.C.Pa., 68 F.Supp. 423, 428. Pa.—Corpus Juris quoted in Commonwealth v. Johnson, 59 A.2d 128, 130, 359 Pa. 287.

64 C.J. p 1060 note 3.

76. Wis.—Wightman v. Chicago, etc., R. Co., 40 N.W. 689, 73 Wis. 169, 9 Am.St.R. 778, 2 L.R.A. 185.

77. U.S.—Corpus Juris cited in Finn v. Carnegie-Illinois Steel Corp., D.C.Pa., 68 F.Supp. 423, 428.

N.C.—Lipscomb v. Cox, 142 S.E. 779, 195 N.C. 502.

78. Tex.—Watchtower Mut. Life Ins. Co. v. Davis, Civ.App., 99 S.W.2d 693.

After return of verdict  
Refusal to permit plaintiff to poll jury until after verdict was returned for defendant was not error, on ground that after a verdict has been read, a juror must necessarily agree with the verdict in order to save himself embarrassment or public disgrace, since it would be presumed that jurors polled after reading of verdict will answer truthfully.—Pan-

American Wall Paper & Paint Co. v. Tudor, 59 S.E.2d 12, 81 Ga.App. 417.

79. Tex.—Watchtower Mut. Life Ins. Co. v. Davis, Civ.App., 99 S.W.2d 693.

80. Minn.—Weatherhead v. Bureau, 55 N.W.2d 703, 238 Minn. 134.

81. U.S.—Corpus Juris cited in Finn v. Carnegie-Illinois Steel Corp., D.C.Pa., 68 F.Supp. 423, 428.

Ill.—Powell v. Feeley, 49 Ill. 143.

82. N.C.—Columbus Oil Co. v. Moore, 163 S.E. 879, 202 N.C. 708.

83. N.C.—Columbus Oil Co. v. Moore, supra.

#### In New Jersey

Where, under a statute, the court could direct the clerk to receive the verdict in the judge's absence, the clerk had no power to poll the jury.—Weir v. Luz, 58 A.2d 550, 137 N.J. Law 361—Van Demark v. Sartorius, 7 A.2d 168, 122 N.J.Law 503—Francilio v. Latour, 181 A. 698, 13 N.J.Misc. 799, affirmed 184 A. 820, 116 N.J.Law 423.

84. N.C.—Columbus Oil Co. v. Moore, 163 S.E. 879, 202 N.C. 708.

64 C.J. p 1060 note 7.

85. Ga.—Bell v. Hutchings, 12 S.E. 974, 86 Ga. 562.

N.M.—Corpus Juris cited in Stambaugh v. Hayes, 103 P.2d 640, 642, 44 N.M. 443.

masse as to special findings.<sup>86</sup>

While a party may poll the jury in the manner authorized by law,<sup>87</sup> only questions prescribed by law may be propounded to the jury.<sup>88</sup> The only proper inquiry on a poll of the jury is whether the verdict is that of each juror,<sup>89</sup> and, since it is within the discretion of the court whether the poll should be permitted, the refusal to permit other questions is not error.<sup>90</sup> The correct practice has been held to be for the clerk to call the roll and ask each juror, as his name is called, to answer for the plaintiff or for the defendant.<sup>91</sup> Where the manner in which the jury are to be polled is prescribed by statute, a refusal to poll in strict conformance with the statute is error.<sup>92</sup> A juror should be asked "Is this your verdict and do you now assent thereto?" or words to that effect,<sup>93</sup> but no objection lies to the form "Do you find for the plaintiffs or for the defendant?"<sup>94</sup> It is not error for the court to refuse to permit the question to be asked the juror "Is this your verdict and are you still satisfied with it?"<sup>95</sup> If the court in the exercise of its discretion does permit such a question to be asked, it is not error unless the rights of the party are prejudiced thereby.<sup>96</sup>

## (2) Answers

It is sufficient that the answer of each juror shows

clearly that the verdict was when signed, and is likewise at the time of polling, the verdict of such juror.

No particular form of answer is essential in the polling of a jury,<sup>97</sup> and it is sufficient that the answer of each juror clearly shows that the verdict was when signed, and is likewise at the time of polling, the verdict of such juror.<sup>98</sup> If the juror answers "It is not my verdict," no further inquiry can be made of him,<sup>99</sup> and when a juror dissents from the verdict it is improper to allow counsel to interpose and question the reasons or motive of the juror in changing his mind.<sup>1</sup> In the absence of objection at the time it is a sufficient answer for a juror to say "I assented to it," or "I agreed to it,"<sup>2</sup> or "It is my verdict as far as it goes."<sup>3</sup> A verdict is not vitiated by the fact that a juror hesitated to agree to it,<sup>4</sup> or where, in answer to the inquiry, he says it is not his verdict but he consented to it, and subsequently answers that it is his verdict,<sup>5</sup> or says he consented to it under protest,<sup>6</sup> or that he did not believe the verdict right, but agreed to it for the sake of harmony.<sup>7</sup> A verdict for defendant will be sustained notwithstanding some of the jurors answer, on interrogation, that, although they assent to the verdict, they were not fully satisfied with the result,<sup>8</sup> or that "with the lights before them, they found for the defendant."<sup>9</sup>

### Poll as to special issues held proper

In guest's action for injuries received in collision between automobile and gasoline transport truck, wherein jury returned general verdict for plaintiff, but answered affirmatively special question whether injury was unavoidable accident, request for polling of jury on special issue, was held not error.—*Farmer v. Central Mut. Ins. Co. of Chicago*, Ill., 67 F.2d 511, 145 Kan. 951.

86. *Wash.*—*Norman v. Hopper*, 80 P. 551, 38 Wash. 415.

87. *Ga.*—*Taylor v. Taylor*, 25 S.E.2d 506, 195 Ga. 711.

88. *Ga.*—*Taylor v. Taylor*, *supra*.

### Questions held improper

In divorce action, where jury foreman announced verdict in favor of plaintiff and started to say something about alimony when interrupted by court, defendant in polling jury could not question foreman as to what he intended to say concerning alimony.—*Taylor v. Taylor*, *supra*.

89. *W.Va.*—*Miller v. Blue Ridge Transp. Co.*, 15 S.E.2d 460, 123 W. Va. 428.

90. *Ga.*—*Ludwig v. J. J. Newberry Co.*, 53 S.E.2d 485, 78 Ga.App. 871.

91. *D.C.*—*Bruce v. Chestnut Farms-Chevy Chase Dairy*, 126 F.2d 224, 75 U.S.App.D.C. 192.

92. *Tex.*—*Leverett v. St. Louis, S. F. & T. Ry. Co.*, Civ.App., 266 S.W. 589.

93. *N.C.*—*Columbus Oil Co. v. Moore*, 163 S.E. 879, 202 N.C. 708, 64 C.J. p 1060 note 10.

### Poll held proper

*N.J.*—*Silak v. Hudson & M. R. Co.*, 176 A. 674, 114 N.J.Law 428, affirmed 161 A. 68, 115 N.J.Law 504.

*Pa.*—*Roberts v. Capitol Transport Co.*, Com.Pl., 60 Dauph. Co. 453.

94. *Ga.*—*Black v. Thornton*, 31 Ga. 641.

95. *Ind.*—*Bowen v. Bowen*, 74 Ind. 470.

96. *Ind.*—*State Life Ins. Co. v. Postal*, 84 N.E. 156, 43 Ind.App. 144.

97. *Ill.*—*Chicago City R. Co. v. Shreve*, 128 Ill.App. 462, affirmed 80 N.E. 1049, 226 Ill. 530.

### Help of written verdict

It is not necessary that each individual juror independently recite his findings without the help of the written verdict.—*Roberts v. Capitol Transport Co.*, Pa.Com.Pl., 60 Dauph. Co. 453.

98. *Ill.*—*Chicago City R. Co. v. Shreve*, 128 Ill.App. 462, affirmed 80 N.E. 1049, 226 Ill. 530.

*Pa.*—*Horn v. Rudloff*, Com.Pl., 7 Sch. Reg. 1.

99. *Mo.*—*Poulson v. Collier*, 18 Mo. App. 533.

1. *D.C.*—*Bruce v. Chestnut Farms-Chevy Chase Dairy*, 126 F.2d 224, 75 U.S.App.D.C. 192.

2. *N.Y.*—*Green v. Bliss*, 12 How.Pr. 428.

3. *Mo.*—*Rankin v. Harper*, 23 Mo. 579.

4. *Ga.*—*Conyers v. Kirk*, 3 S.E. 442, 78 Ga. 480.

5. *Ind.*—*Mitchell v. Parks*, 26 Ind. 354.

6. *Kan.*—*Wyley v. Bull*, 20 P. 855, 41 Kan. 206.

7. *Ark.*—*Williams v. Williams*, 166 S.W. 552, 111 Ark. 507.

### Motive immaterial

The motive, if not corrupt, which induces jurors to acquiesce in a verdict is immaterial in determining legality of verdict.—*Havranek v. City of Pittsburgh*, 25 A.2d 703, 344 Pa. 375.

8. *Ga.*—*Black v. Thornton*, 31 Ga. 641, 661.

*Pa.*—*Havranek v. City of Pittsburgh*, 25 A.2d 703, 344 Pa. 375.—*Roberts v. Capitol Transport Co.*, Com.Pl., 60 Dauph. Co. 453.

9. *Ga.*—*Black v. Thornton*, 31 Ga. 641.

64 C.J. p 1061 note 24.

## B. GENERAL VERDICT

## § 491. Propriety and Necessity

A general verdict is proper when it will ascertain the rights of the parties; and whether a general verdict should be returned is generally a matter for the discretion of the jury.

A general verdict is proper when it will ascertain and fix the rights of the parties.<sup>10</sup> The validity of a general verdict is not affected by the fact that a refusal to require special findings might have been error, where such findings are not requested.<sup>11</sup> Under a statute providing that, in a case tried by jury as of right, a general verdict must be rendered, the court cannot render a judgment on findings of particular questions of fact in the absence of a general verdict, or a waiver thereof.<sup>12</sup>

*Discretion of jury.* As a general rule,<sup>13</sup> and frequently under statutes to that effect,<sup>14</sup> the returning of a general verdict rather than a special one is a matter within the option or discretion of the jury; and this is so especially, or at least, in the absence of statutes to the contrary,<sup>15</sup> or in the absence of a judicial direction for a special verdict,<sup>16</sup> or a request for such a direction.<sup>17</sup> Where, under the statute, the form of verdict rests in the discretion of the jury, the form of the verdict to be rendered does not rest in the discretion of the trial judge,<sup>18</sup> and the parties are entitled to have the case submitted to the jury in such form that the jury can return a general verdict.<sup>19</sup>

*Waiver of right to general verdict.* Where a jury has been called but no general verdict is requested and no objection is taken to the failure of the court to so submit the cause and the issues are submitted on special interrogatories only the parties waive their right to a general verdict.<sup>20</sup>

## § 492. Preparation and Formulation

The trial judge may prepare the form of the verdict; a form submitted by the court should conform to the pleadings and evidence in the case.

Although it has been held that the furnishing of proper forms of verdict is the province and duty of the court,<sup>21</sup> it has also been held that a trial judge is not obliged to prepare forms of verdict.<sup>22</sup> The court has the power to control the form of the verdict;<sup>23</sup> and certainly the judge may prepare a form of verdict if a party is not prejudiced thereby.<sup>24</sup> If the court does not prepare the forms of verdict for the jury, it should at least give clear and specific directions and such information as will enable the jury to frame their own verdict.<sup>25</sup> The court may decline to allow the jury to frame their verdict so as to affect the interest of a stranger to the suit.<sup>26</sup> In aiding the jury in the preparation of a verdict the court should prevent the jurors from acquiring information forbidden to them.<sup>27</sup>

10. Conn.—Johnson v. Higgins, 1 A. 616, 53 Conn. 236.

**Rights of parties**

In common-law action, parties have right to verdict of jury and to have judicial view of such verdict by trial court.—Gulf Power Co. v. Rigby, 152 So. 23, 113 Fla. 739.

11. Cal.—In re Heller's Estate, 145 P. 1008, 169 Cal. 77.

Okla.—Oklahoma City v. Page, 6 P.2d 1033, 153 Okl. 285.  
Necessity and sufficiency of requests for special findings see *infra* §§ 535-540.

12. Kan.—Bell v. Coffin, 43 P. 861, 2 Kan.App. 337.—Taft v. Baker, 42 P. 502, 2 Kan.App. 600.

"Special findings of fact" were held not to authorize entry of judgment.—Hopkins v. Shull, 2 Ohio Dec. 541, 3 West.L.Month. 609.

13. Ala.—Little v. Sugg, 8 So.2d 866, 243 Ala. 196.  
Power and duty of jury as to special verdicts and related matters see *infra* §§ 526-528.

14. Cal.—Murray v. Babb, 86 P.2d 146, 147, 30 Cal.App. 301.

Minn.—Roske v. Ilykanyics, 45 N.W. 2d 769, 232 Minn. 383.

N.Y.—Sherman v. Leicht, 264 N.Y.S. 492, 238 App.Div. 271.  
28 C.J. p 317 note 45 [b].

15. Tenn.—Life & Casualty Ins. Co. v. Robertson, 6 Tenn.App. 43.

16. Tenn.—Long v. Tomlin, 125 S.W. 2d 171, 22 Tenn.App. 607.

17. Tenn.—Long v. Tomlin, *supra*.

18. Minn.—Roske v. Ilykanyics, 45 N.W.2d 769, 232 Minn. 383.

19. Minn.—Roske v. Ilykanyics, *supra*.

20. Okl.—Billingsley v. Parmenter, 73 P.2d 869, 181 Okl. 315.

21. U.S.—Hager v. Gordon, C.A. Alaska, 171 F.2d 90.

22. U.S.—Hamilton Inv. Co. v. Bollman, C.C.A.Ill., 268 F. 788, certiorari denied 41 S.Ct. 376, 255 U.S. 571, 65 L.Ed. 791.  
64 C.J. p 1062 note 76.

23. Pa.—Rau v. Manko, 17 A.2d 422, 341 Pa. 17.

24. Tex.—Missouri, K. & T. Ry. Co.

of Texas v. Burnett, Civ.App., 162 S.W. 458.

64 C.J. p 1062 note 77.

**Preparation after announcement of oral verdict**

Where jury after having deliberated for some time sent a request to trial court for forms of verdict, trial court did not err in permitting jury to announce their verdict orally and then having verdict put in proper form and foreman sign it.—Webb v. Biggers, 30 S.E.2d 69, 71 Ga.App. 90, followed in 30 S.E.2d 63, 71 Ga.App. 96.

25. Iowa.—Freeby v. Town of Sibley, 187 N.W. 770, 183 Iowa 827.

26. Ga.—Whitman v. Bolling, 47 Ga. 125.

27. Va.—Wade v. Peebles, 174 S.E. 769, 162 Va. 479.

**Conduct held not reversible error**

Conduct of the court at second trial in giving jury motion for judgment on which former verdict was written was held not reversible error, where portion containing former verdict was folded over and court instructed jury not to read inside.—Wade v. Peebles, *supra*.

If the court does submit a form of verdict to the jury the form should conform to the pleadings and evidence in the case,<sup>28</sup> and should be complete as the case requires.<sup>29</sup> Where the issues are different between plaintiff and several defendants, it is error for the court to decline to give a form of verdict whereby the jury might find for plaintiff against one defendant and in favor of the other defendants.<sup>30</sup> Where there are two separate causes of action against two defendants submitted to the jury at the same time on evidence from which conflicting inferences could be drawn as to the liability of each of the defendants, it is entirely appropriate to submit forms of verdict for the use of the jury as though the issues had been made up by separate pleadings as to each defendant.<sup>31</sup> Where the only issue in the case is the amount of recovery due plaintiff, a failure to submit a form of verdict for defendant is not error.<sup>32</sup> It has been held that the judge cannot, as the clerk of the jury, even at the request of the jury, draw up their verdict.<sup>33</sup>

A party may be permitted to prepare proper blank forms of verdict and send them to the jury for their use,<sup>34</sup> and where the jury have found for plaintiff for the amount or quantity of his claim the court may direct plaintiff's attorney to formulate the verdict.<sup>35</sup>

### § 493. — Necessity of Reducing to Writing

Whether or not a verdict must be reduced to writing depends on the statutes and practice of the particular jurisdiction.

In some jurisdictions a verdict may be oral or written, either form being sufficient.<sup>36</sup> However, according to other authority, the only verdict is that which the jury announce orally in court,<sup>37</sup> and any written paper handed in by the jury as containing their verdict is a mere nullity.<sup>38</sup> In still other jurisdictions, under statutory or constitutional provisions, the verdict must be in writing and signed by the foreman.<sup>39</sup> It has been held proper to permit the jury to return an oral verdict which is reduced to writing and signed by the foreman in the presence of the jury and the court.<sup>40</sup> A requirement that the verdict be in writing and entered on the minutes of the court has been held to apply equally to verdicts returned by the jury after deliberation and directed verdicts.<sup>41</sup> Where a verdict is directed, the better practice has been held to be to return a formal verdict in writing;<sup>42</sup> but the absence of such verdict is not fatal to the validity of the judgment.<sup>43</sup>

In the absence of a statutory requirement it is not necessary that the verdict be written on any particular piece of paper;<sup>44</sup> accordingly, a verdict

28. Wis.—Krudwig v. Koepke, 270 N. W. 79, 223 Wis. 244.

Verdict covering either of two theories

Where complaint implied that both defendants were present and personally took part in assault, and evidence admitted without objection tended to show that one of defendants, although not present, incited assault, court might have properly submitted verdict covering either theory if evidence warranted findings in its support.—Krudwig v. Koepke, *supra*.

Forms held not improper

In action for injury to pedestrian struck by automobile while view of street was obstructed by city truck, forms of verdict were held not improper on appeal by city, even though possibly subject to construction that jury could find one sum against city and different sum against driver of other car.—Jackson v. City of Malden, Mo.App., 73 S.W.2d 850.

29. Iowa.—Freeby v. Town of Sibley, 187 N.W. 770, 183 Iowa 827. 64 C.J. p 1063 note 78.

30. Iowa.—Freeby v. Town of Sibley, *supra*.

64 C.J. p 1063 note 78.

31. Ohio.—Bethel v. Taxicabs of Cincinnati, Inc., 30 Ohio N.P.N.S., 425.

32. Ill.—Davis v. Englestein, 263 Ill. App. 57.

33. La.—Gove v. Breedlove, 5 Rob. 78.

34. Tex.—Huff v. Crawford, Civ. App., 32 S.W. 592, reversed on other grounds 34 S.W. 606, 89 Tex. 214.

64 C.J. p 1063 note 81.

35. Ky.—Goebel v. Pugh, 10 S.W. 1, 88 Ky. 84, 10 Ky.L. 661.

36. Ala.—Wilson v. Federal Land Bank of New Orleans, 159 So. 493, 230 Ala. 75.—W. T. Rawleigh Co. v. Hannon, 22 So.2d 603, 33 Ala.App. 147.—Floyd v. Jackson, 164 So. 121, 26 Ala.App. 575.

Ill.—Stoewssand v. Checker Taxi Co., 73 N.E.2d 4, 331 Ill.App. 132.

64 C.J. p 1063 note 86.

37. U.S.—California Fruit Exchange v. Henry, D.C.Pa., 89 F.Supp. 580, affirmed, C.A., 184 F.2d 517.—Anderson v. Penn Hall Co., D.C.Pa., 47 F.Supp. 691.

Pa.—Havranek v. City of Pittsburgh, 35 A.2d 703, 344 Pa. 375.—Eastley v. Glenn, 169 A. 433, 313 Pa. 130.—Wellits v. Thomas, 185 A. 864, 122 Pa.Super. 438.—Thompson v. Dishong, Com.Pl., 29 West.Co. 39, 61 York Leg Rec. 12.

64 C.J. p 1063 note 87.

Reading verdict slip with prefix "hearken to your verdict as the court has recorded it," followed by oral dissent, with or without poll, by member of jury before dismissal, is not returning or recording verdict as required by law.—Eastley v. Glenn, 169 A. 433, 313 Pa. 130.

38. Pa.—Guth v. Costa, 39 Pa.Co. 428.

64 C.J. p 1063 note 88.

39. Cal.—Vitimin Milling Corporation v. Superior Court in and for Los Angeles County, 33 P.2d 1016, 1 Cal.2d 116.

64 C.J. p 1063 note 89.

40. Ga.—Knight v. Knight, 70 S.E. 2d 770, 208 Ga. 131.

41. Cal.—Vitimin Milling Corporation v. Superior Court in and for Los Angeles County, 33 P.2d 1016, 1 Cal.2d 116.

42. U.S.—Moore v. Petty, Iowa, 185 F. 668, 68 C.C.A. 306, certiorari denied 26 S.Ct. 800, 197 U.S. 623, 48 L.Ed. 911.

43. U.S.—Moore v. Petty, *supra*.

44. Ga.—Lang v. South Georgia Inv. Co., 144 S.E. 149, 38 Ga.App. 430. 64 C.J. p 1063 note 92.

need not be written on the petition,<sup>45</sup> although the court may properly direct that the verdict be entered on the petition.<sup>46</sup>

### § 494. Assent of Required Number of Jurors

The unanimous concurrence of the jurors is required for a valid verdict except in so far as statutes or constitutional provisions otherwise provide or the parties agree otherwise.

Except in so far as the rule may be affected by a statute or constitutional provision to the contrary, all the jurors must agree on the verdict,<sup>47</sup> unless the express consent of both parties be shown to the entry of judgment on a verdict assented to by less than all the jurors.<sup>48</sup> Under this rule a verdict is invalid if it is reached by agreement of the jurors to abide by a decision of less than all of their number,<sup>49</sup> which taint is not removed by the jury answering and returning with the verdict interrogatories which had been submitted to them.<sup>50</sup> Where a unanimous verdict is required, the jury, in some jurisdictions, must be unanimous in their opinion on all essential elements of recovery before a verdict of recovery can be returned;<sup>51</sup> but

there is also authority holding that unanimity in verdicts means unanimity in the result, and not in the successive steps leading to such result.<sup>52</sup> The fact that some of the jurors had misgivings as to the verdict does not invalidate it as long as they consent to the verdict.<sup>53</sup>

*Statutory or constitutional provision for less than unanimous verdict.* In some jurisdictions under statutory or constitutional provisions to that effect, it is not essential to the validity of a verdict that it have the unanimous concurrence of the jurors, it being sufficient if a specified number of jurors agree on the verdict,<sup>54</sup> provided all of them take part in the deliberations.<sup>55</sup> A statutory or constitutional provision that a unanimous verdict should not be required in civil cases has been applied to will contest proceedings,<sup>56</sup> bastardy proceedings,<sup>57</sup> cases under a Conservancy Act,<sup>58</sup> juries called by the chancellor,<sup>59</sup> and various other causes.<sup>60</sup> While condemnation proceedings have been held to be within such rules,<sup>61</sup> it has also been held that a "property taking" proceeding does not fall within the rule so that a unanimous verdict is required.<sup>62</sup> In these jurisdictions a verdict of the requisite

45. Ga.—Lang v. South Georgia Inv. Co., *supra*.

64 C.J. p 1063 note 93.

46. Ga.—McDonald v. Wimpy, 56 S. E.2d 524, 206 Ga. 270.

47. Ind.—W. T. Rawleigh Co. v. Snider, 194 N.E. 356, 207 Ind. 636.

Mass.—Rich v. Finley, 89 N.E.2d 213, 325 Mass. 99, 12 A.L.R.2d 669.

Tex.—Kindy v. Willingham, Civ.App., 205 S.W.2d 435, reversed on other grounds 209 S.W.2d 585, 146 Tex. 548.

64 C.J. p 1063 note 95.

Assent of required number of jurors to special verdict or findings see *infra* § 554.

48. Ark.—Carpenter v. Wayne, 219 S.W. 735, 143 Ark. 103.

64 C.J. p 1063 note 96.

49. Ind.—Houk v. Allen, 25 N.E. 897, 126 Ind. 568, 11 L.R.A. 705.

64 C.J. p 1063 note 97.

50. Ind.—Houk v. Allen, *supra*.

51. Kan.—Barker v. Missouri Pac. Ry. Co., 132 P. 156, 89 Kan. 573.

64 C.J. p 1063 note 99.

52. U.S.—Anderson v. Penn Hall Co., D.C.Pa., 47 F.Supp. 691.

64 C.J. p 1064 note 1.

53. Tex.—Rodriguez v. Texas Employers' Ins. Ass'n, Civ.App., 35 S.W.2d 510.

54. Cal.—Kritzer v. Citron, 224 P. 2d 808, 101 Cal.App.2d 33.

Ky.—Arnold v. Sauer, 202 S.W.2d 1001, 305 Ky. 48.

N.J.—Marsero v. Public Service In-

terstate Transp. Co., 74 A.2d 328, 8 N.J.Super. 268, reversed on other grounds Malinauskas v. Public Service Interstate Transp. Co., 78 A.2d 268, 6 N.J. 269.

Ohio.—State ex rel. Gill v. Volz, 100 N.E.2d 203, 156 Ohio St. 60.

64 C.J. p 1064 note 3.

55. N.Y.—Florzak v. Hempstead Bus Corp., 29 N.Y.S.2d 271.

*Refusal to vote either way*

Where case was tried by consent before eleven jurors, and one of jurors took part in deliberations but refused to vote either way, ten of jurors having agreed on a verdict, the verdict was a valid one.—Florzak v. Hempstead Bus Corp., *supra*.

56. Ky.—Irvine v. Greenway, 295 S.W. 445, 220 Ky. 388.

64 C.J. p 1064 note 4.

57. Ohio.—Schneider v. State, 168 N.E. 568, 33 Ohio App. 125—Kilne v. State, 151 N.E. 802, 20 Ohio App. 191—State ex rel. Cluets v. Dolan, 20 Ohio N.P.N.S., 478.

Or.—State v. Tokstad, 8 P.2d 86, 139 Or. 63.

S.D.—State v. Cummins, 229 N.W. 302, 56 S.D. 439.

Utah.—State v. McKnight, 290 P. 774, 76 Utah 514.

64 C.J. p 1064 note 5.

Statutes permitting verdict by less than all jurors in bastardy proceedings see *Bastards* § 107.

58. Ohio.—Miami Conservancy Dist. v. Bowers, 12 Ohio App. 405.

59. Mo.—Forman v. Davis, 129 S.W.

221, 229 Mo. 52—Davis v. Forman, 129 S.W. 213, 229 Mo. 27.

60. N.Y.—National Carbon Co. v. Beebe, 92 N.Y.S.2d 184, 275 App.Div. 1068.

*"Civil cases" and "civil actions"*

The term "civil cases" in constitutional amendment authorizing legislature to provide for rendition of verdict in such cases by concurrence of not less than three-fourths of jury and term "civil actions" in statute authorizing verdict in such actions by concurrence of three-fourths or more of jurors are equivalents and used interchangeably.—State ex rel. Gill v. Volz, 100 N.E.2d 203, 156 Ohio St. 60.

*Contempt proceeding; violation of injunction order*

N.Y.—National Carbon Co. v. Beebe, 92 N.Y.S.2d 184, 275 App.Div. 1068.

61. Mo.—State ex rel. State Highway Commission v. Stoddard Gin Co., Mo.App., 62 S.W.2d 940.

62. Ky.—Commonwealth v. Kelley, 236 S.W.2d 695, 314 Ky. 531.

*Action held basically "property taking" proceeding*

Where property owners brought action against State Highway Department for injury to land due to overflow of water allegedly caused by negligent management and operation of highway and culverts, action was basically for payment for taking private property for public use and not action in trespass, and therefore unanimous jury verdict was required.—Commonwealth v. Kelley, *supra*.



number of jurors is as conclusive as one by twelve,<sup>63</sup> and prejudice does not appear from the fact of its rendition by less than twelve jurors.<sup>64</sup> However, a verdict where less than the required number of jurors concur is a nullity,<sup>65</sup> which is not waived by a failure to poll the jury.<sup>66</sup> Under a statute or constitutional provision where a unanimous verdict is not required, it has been held that the requisite number of the same jurors must agree to all essential answers;<sup>67</sup> but it is not essential that the same jurors concur in all the essential answers provided the requisite number do so concur.<sup>68</sup>

A failure to instruct the jury that less than a unanimous number could agree on and return a verdict does not vitiate a verdict agreed on and returned by the required number of jurors;<sup>69</sup> and when the required number of jurors express their clear intention in the verdict the court may enter judgment thereon.<sup>70</sup> It is for the jury to say whether or not they will render less than a unanimous verdict,<sup>71</sup> and an instruction by the court that as soon as the requisite number agree they are to return the verdict is erroneous.<sup>72</sup> If the burden of proof is on one party to establish an affirmative answer, and the requisite number of jurors are not convinced that the burden has been met, the jury must return a negative answer.<sup>73</sup> A verdict unani-

mous on its face is good, although the judgment recites that three fourths of the jurors, and not all, concurred therein.<sup>74</sup> The constitutional or statutory provision providing for a verdict by not less than a specified number does not prohibit the parties to the suit from agreeing or arranging to accept a verdict concurred in by a lesser number of jurors,<sup>75</sup> since such provision is intended only to prevent compelling the parties, against their wishes, to submit to the acceptance of a verdict by a lesser number.<sup>76</sup>

*Time of deliberation as affecting number of concurring jurors.* Under a statute so providing, a verdict can be returned by less than unanimous concurrence of the members of the jury only where the jury have deliberated and considered the case for a specified period of time.<sup>77</sup> In determining whether the jury have deliberated for the requisite period, where the jury have been in retirement for a period well beyond the time proscribed by the statute, the law conclusively presumes that they have been in deliberation for the required length of time.<sup>78</sup>

*Action under Federal statute.* A unanimous verdict of the jury is not required in a case under the federal Employers' Liability Act brought in a state whose constitution and statutes permit less than the whole jury to return a verdict.<sup>79</sup>

63. Ohio.—Simpson v. Springer, 57 N.E.2d 817, 74 Ohio App. 142, affirmed 55 N.E.2d 418, 143 Ohio St. 324, 155 A.L.R. 583.  
64 C.J. p 1064 note 10.

64. Mo.—Beall v. Kansas City Rys. Co., App., 228 S.W. 834—Dawson v. Chicago, B. & Q. Ry. Co., 193 S.W. 43, 197 Mo.App. 169.

65. Mo.—Marshall v. Armstrong, 79 S.W. 1161, 105 Mo.App. 234.

Wis.—Christensen v. Petersen, 222 N.W. 231, 223 N.W. 839, 198 Wis. 222.

**Insufficient agreement on general and special verdicts**

Where eight jurors only, out of nine jurors that agreed to general verdict for plaintiff, agreed to special verdict favorable to plaintiff and necessary to validity of judgment for plaintiff, while tenth juror agreed to special verdict but not to general verdict, court properly refused to enter judgment for plaintiff and declared mistrial.—Nelson v. Superior Court in and for City and County of San Francisco, 78 P.2d 1037, 26 Cal. App.2d 118.

66. Wis.—Christensen v. Petersen, 222 N.W. 231, 223 N.W. 839, 198 Wis. 222.

67. Wis.—Fraundorf v. Schmidt, 256 N.W. 699, 216 Wis. 158.

64 C.J. p 1064 note 12.

68. N.Y.—Reed v. Cook, 103 N.Y.S. 2d 539.

Wis.—Fraundorf v. Schmidt, 256 N.W. 699, 216 Wis. 158—Will v. Chicago, M. & St. P. Ry. Co., 210 N.W. 717, 191 Wis. 247.

**Concurrence as to interrogatory**

Where answer to special interrogatory and general verdict consistent therewith in common pleas court were signed by requisite majority of jury, verdict and answer were valid, although one of nine jurors who signed answer did not sign verdict which, however, was signed by another juror who did not sign the answer.—Simpson v. Springer, 57 N.E.2d 817, 74 Ohio App. 142, affirmed 55 N.E.2d 418, 143 Ohio St. 324, 155 A.L.R. 583.

69. U.S.—Corpus Juris cited in Grand River Dam Authority v. Thompson, C.C.A.Okl., 118 F.2d 242, 244.

Miss.—Rickettes v. Drew Grocery Co., 124 So. 495, 155 Miss. 469.

70. Miss.—Rickettes v. Drew Grocery Co., supra.

64 C.J. p 1064 note 14.

71. Okl.—Curtis & Gartside Co. v. Pigg, 184 P. 1125, 39 Okl. 31.

72. Okl.—Curtis & Gartside Co. v. Pigg, supra.

64 C.J. p 1064 note 16.

73. Wis.—Stokdyk v. Schmidt, 208 N.W. 941, 190 Wis. 108, overruling Stevens v. Montfort State Bank, 198 N.W. 600, 183 Wis. 621.

74. Mo.—Reed v. Mexico, 76 S.W. 53, 101 Mo.App. 155.

75. N.Y.—Neumann v. Kurek, 22 N.Y.S.2d 950, 175 Misc. 238.

76. N.Y.—Neumann v. Kurek, supra.

77. Neb.—Cartwright & Wilson Const. Co. v. Smith, 52 N.W.2d 274, 155 Neb. 431.

78. Minn.—In re Hurlburt's Estate, 148 N.W. 51, 126 Minn. 180.  
64 C.J. p 1065 note 19.

**Time devoted to meals or sleep cannot be shown to prove they did not deliberate a sufficient length of time to authorize a verdict by five sixths of the jury.**

Minn.—In re Hurlburt's Estate, supra.

Neb.—Cartwright & Wilson Const. Co. v. Smith, 52 N.W.2d 274, 155 Neb. 431.

79. Ky.—Louisville & N. R. Co. v. Holloway's Adm'r, 181 S.W. 1126, 168 Ky. 282, affirmed 38 S.Ct. 379, 246 U.S. 525, 62 L.Ed. 867.  
64 C.J. p 1065 note 20.

## § 495. Signature

Whether the verdict is required to be signed depends on the rule in the particular jurisdiction; and whether signing must be by the foreman or by the concurring jurors depends on the governing statute.

Where a verdict is not required to be in writing, as discussed supra § 493, a verdict is not, in the absence of statute, required to be signed,<sup>80</sup> so that an error in the signing of the verdict will not render it invalid.<sup>81</sup> Where, however, signing is required it must be properly signed.<sup>82</sup> A signature by one of the jurors as foreman in behalf of himself and his fellow jurors has been held to be sufficient.<sup>83</sup> Where one of the jurors cannot sign the verdict because unable to sign his name, it is proper for the trial judge to write the juror's name and cause him to make his mark,<sup>84</sup> and an unattested mark has been held sufficient.<sup>85</sup>

In some jurisdictions it is the rule that the verdict may be signed by the foreman if all the members of the jury concur,<sup>86</sup> but if less than all concur, all the concurring members must sign,<sup>87</sup> but trivial errors or irregularities in the signing will not render an otherwise valid verdict a nullity.<sup>88</sup> Statutes requiring that the verdict be signed by the foreman,<sup>89</sup> or by the entire jury agreeing on the verdict, if the number is less than twelve,<sup>90</sup> have been held to be merely directory, so that an unsigned verdict on which a judgment has been entered is not void;<sup>91</sup> but it has also been held that

a statute requiring the foreman to sign the verdict is mandatory.<sup>92</sup> Under a statute providing that, if the verdict is returned by less than an unanimous vote of the jurors, those concurring must sign the verdict, it is not necessary that the form of the verdict be "we the undersigned jurors,"<sup>93</sup> and a verdict reading "we the jury" is sufficient, if signed by the requisite number of jurors.<sup>94</sup> Statutes or rules requiring signature of all jurors under certain circumstances have no application to a case where the cause is tried by less than the regular number of jurors by consent,<sup>95</sup> or where concurrence by less than all the jurors is agreed to by the parties.<sup>96</sup>

*Directed verdict.* Where the judge directs the verdict, the signing of a verdict under direction of the court is a mere formality, and may be followed or omitted with equal legality.<sup>97</sup>

## § 496. Certainty and Definiteness; Informality

A general verdict must contain a finding so that judgment may be pronounced on it, but no particular form is required. It must be clear, intelligible, consistent, and certain, but is sufficient if it can be made definite and certain by reference to other matter in the case.

All that is requisite in a general verdict is that it contain such finding as will enable the court to pronounce judgment on it for one party or the other;<sup>98</sup> and no particular form of verdict is required.<sup>99</sup> However, the verdict of the jury, to

80. Ala.—Floyd v. Jackson, 164 So.

121, 26 Ala.App. 575.

64 C.J. p 1065 note 23

81. Ala.—Floyd v. Jackson, supra.

82. Mo.—Brown v. Green, App., 168 S.W.2d 464.

Failure to object to lack of signature as waiver see infra § 525.

83. Ill.—Patterson v. Dempsey, 119 N.E.2d 516, 2 Ill.App.2d 291.

64 C.J. p 1065 note 24.

84. Tex.—Moore v. Woodson, 99 S.W. 116, 44 Tex.Civ.App. 503.

85. Ky.—Pugh v. Jackson, 159 S.W. 600, 154 Ky. 772.

86. Ky.—Arnold v. Sauer, 202 S.W.2d 1001, 305 Ky. 48.

87. Ky.—Arnold v. Sauer, supra.

88. Minn.—Santee v. Haggart Const. Co., 278 N.W. 520, 202 Minn. 361.

Foreman's failure to sign as "concurring juror"

Where foreman of jury signed five-sixth verdicts and his name was followed by nine jurors, as "jurors concurring," defects in form of verdicts for failure of foreman, who was in fact a concurring juror, to sign with concurring jurors did not make verdicts a nullity.—Santee v. Haggart Const. Co., supra.

89. Tex.—Schlofman v. Bear Canon Coal Co., Civ.App., 77 S.W.2d 337.

64 C.J. p 1065 note 25.

90. Tex.—Barker v. Ash, Civ.App., 194 S.W. 465.

64 C.J. p 1065 note 26.

91. Ga.—Sullivan v. Douglas Gibbons, Inc., 2 S.E.2d 89, 187 Ga. 764.

Tex.—Barker v. Weingarten Riverside Co., Civ.App., 232 S.W.2d 692.

refused no reversible error.—Patterson v. Gulf, C. & S. F. Ry. Co., Civ.App., 77 S.W.2d 1073, error dismissed.

64 C.J. p 1065 note 25 [a].

92. Ind.—Sage v. Brown, 34 Ind. 464.

La.—Dubertrand v. Laville, 8 La. 274.

93. Mo.—Shields v. Kansas City Rys. Co., 264 S.W. 890.

64 C.J. p 1065 note 28.

94. Mo.—Shields v. Kansas City Rys. Co., supra.

64 C.J. p 1065 note 29.

95. Mo.—Ritschy v. Garrels, 187 S.W. 1120, 195 Mo.App. 670.

64 C.J. p 1065 note 30.

96. Ky.—Anderson v. Corder, 112 S.W.2d 1147, 272 Ky. 158.

97. Iowa.—Marion v. Home Mut. Ins.

Ass'n of Iowa, 217 N.W. 808, 205 Iowa 1300.

64 C.J. p 1065 note 33.

Signing held unnecessary

Ill.—Johnson v. Bennett, 69 N.E.2d 899, 395 Ill. 389.

98. Ky.—Adrian v. McGillivray, 243 S.W.2d 895—Baugh v. Williams' Admr., 94 S.W.2d 830, 284 Ky. 167.

Incomplete verdict

A mistrial may be granted when verdict returned by jury is incomplete so that no final judgment can be rendered thereon.—Hoffer v. Burd, 49 N.W.2d 282, 78 N.D. 278.

Verdict merely irregular is sufficient, in absence of objection to make it more specific, where verdict shows that jury expressed its opinion on issues.—Newport Coal Co. v. Ziegler, 74 S.W.2d 551, 255 Ky. 429.

99. Ohio.—Miller v. Scott, App., 117 N.E.2d 179—Ekleberry v. Sanford, 57 N.E.2d 270, 73 Ohio App. 571.

Verdict held proper in form

A verdict "We, the jury, find the issues for the plaintiff, and do assess his damages at" which specified a certain sum and which was signed by the foreman, was in proper form.—Cannon v. S. S. Kresge Co., 116 S.W.2d 559, 233 Mo.App. 173.

serve as a basis for a judgment, should be clear, intelligible, consistent, and certain;<sup>1</sup> and it should import a definite meaning free from ambiguity and should show just what the jury intended.<sup>2</sup> Accordingly, a verdict will not generally be held invalid for mere informality if its meaning is sufficiently intelligible to be the basis of a legal judgment.<sup>3</sup> A verdict is generally held to be sufficient if it can be made definite and certain by reference to other matter in the case,<sup>4</sup> as by a reference to the pleadings,<sup>5</sup> evidence,<sup>6</sup> instructions,<sup>7</sup> or record.<sup>8</sup>

although under some authorities a verdict which can be made certain only by reference to the evidence,<sup>9</sup> or to the instructions,<sup>10</sup> is bad.

Technical accuracy is not required.<sup>11</sup> While it has been said to be the general rule that the verdict must be clear and unambiguous so that a judgment may be based on it without resorting to inference or construction,<sup>12</sup> it is also the rule that a verdict is sufficient if it may by a reasonable construction be understood and a legal judgment entered thereon.<sup>13</sup> Certainly a verdict is bad where it is so

1. Conn.—Kilduff v. Kalinowski, 71 A.2d 593, 136 Conn. 405.  
Ohio.—Miller v. Scott, App., 117 N.E.2d 179—Ekleberry v. Sanford, 67 N.E.2d 270, 73 Ohio App. 571.

**Substantial certainty** to a common and reasonable intent is essential to a valid verdict.—Powell v. Moore, 42 S.E.2d 110, 202 Ga. 62.

2. N.C.—Cody v. England, 5 S.E.2d 833, 216 N.C. 604.  
Ohio.—Miller v. Scott, App., 117 N.E.2d 179—Ekleberry v. Sanford, 67 N.E.2d 270, 73 Ohio App. 571.  
Or.—Fischer v. Howard, 271 P.2d 1059—DeLashmitt v. Journal Pub. Co., 114 P.2d 1018, 166 Or. 650, 135 A.L.R. 1175.  
S.C.—Anderson v. Aetna Casualty & Surety Co., 178 S.E. 819, 175 S.C. 254.

**The term "and/or"** has no place in verdict.—Gibson v. Central Mfrs. Mut. Ins. Co., 62 S.E.2d 320, 232 N.C. 712.

3. Ala.—Corpus Juris cited in Thigpen v. Walker, 37 So.2d 923, 927, 251 Ala. 426—Corpus Juris cited in Russell v. State, 155 So. 266, 258, 27 Ala.App. 10.  
Ark.—Reynolds v. Nutt, 230 S.W.2d 949, 217 Ark. 543.  
Cal.—Baker v. Rodriguez, 105 P.2d 1018, 41 Cal.App.2d 58.  
Conn.—Kilduff v. Kalinowski, 71 A.2d 593, 136 Conn. 405.  
Ga.—Swain v. Georgia Power & Light Co., 169 S.E. 249, 46 Ga.App. 794.  
Ill.—Weinhouse v. Woodruff, 59 N.E.2d 523, 324 Ill.App. 660.  
Ind.—Income Guaranty Co. v. Zielfinski, 21 N.E.2d 87, 107 Ind.App. 248.  
Ky.—Wheat's Adm'r v. Gray, 218 S.W.2d 400, 309 Ky. 593, 7 A.L.R.2d 1336.  
Mo.—Cochran v. Jefferson County Lumber Co., App., 132 S.W.2d 32—McMonigal v. North Kansas City Development Co., 129 S.W.2d 75, 233 Mo.App. 1040.  
N.J.—Lampert v. Mikos, 91 A.2d 577, 22 N.J. Super. 155—Rossman v. Newborn, 170 A. 230, 112 N.J. Law 261.  
Ohio.—Ekleberry v. Sanford, 67 N.E.2d 270, 73 Ohio App. 571—Waterman v. Wheeler, 5 Ohio Supp. 1.

- Tenn.—Black v. Nashville Banner Pub. Co., 141 S.W.2d 908, 24 Tenn. App. 137.  
64 C.J. p 1066 note 34.

**Verdicts held sufficiently certain or intelligible**

- Cal.—Snodgrass v. Hand, 31 P.2d 198, 220 Cal. 446.  
Fla.—Kent v. Polk Grocery Co., 179 So. 136, 131 Fla. 139.  
Ga.—Owen v. Anderson, 186 S.E. 864, 54 Ga.App. 53.  
Ill.—Chapin v. Fooge, 15 N.E.2d 943, 296 Ill.App. 96.  
Ind.—Guckenberger v. Shank, 37 N.E.2d 708, 110 Ind.App. 442.  
Ky.—Price v. Shadoan, 184 S.W.2d 237, 298 Ky. 828.  
N.Y.—Eagle v. City of New York, 8 N.Y.S.2d 704, 170 Misc. 306, affirmed 14 N.Y.S.2d 490, 257 App.Div. 1046, reargument denied 15 N.Y.S.2d 616, 258 App.Div. 731.  
Ohio.—Bradley v. Mansfield Rapid Transit, 93 N.E.2d 672, 154 Ohio St. 154.  
Tex.—Kendall v. Johnson, Civ.App., 212 S.W.2d 232—Reed v. Scoggins, Civ.App., 123 S.W.2d 457, error dismissed.  
Wash.—Sheldon v. Imhoff, 87 P.2d 103, 198 Wash. 66.  
64 C.J. p 1066 note 34 c.  
4. Ga.—Powell v. Moore, 42 S.E.2d 110, 202 Ga. 62—Harrell v. Bowman, 27 S.E.2d 50, 69 Ga.App. 881—Swain v. Georgia Power & Light Co., 169 S.E. 249, 46 Ga.App. 794.  
Ill.—Weinhouse v. Woodruff, 59 N.E.2d 523, 324 Ill.App. 660.  
Ohio.—Ekleberry v. Sanford, 67 N.E.2d 270, 73 Ohio App. 571.  
64 C.J. p 1066 note 35.  
5. Ala.—Penney v. State, 155 So. 576, 229 Ala. 36.  
Ky.—Fritz v. Roberts, 94 S.W.2d 1016, 264 Ky. 418.  
N.C.—Cody v. England, 5 S.E.2d 833, 216 N.C. 604.  
Ohio.—Miller v. Scott, App., 117 N.E.2d 179—Ekleberry v. Sanford, 67 N.E.2d 270, 73 Ohio App. 571.  
64 C.J. p 1066 note 36.  
6. Ala.—Penney v. State, 155 So. 576, 229 Ala. 36.  
N.C.—Cody v. England, 5 S.E.2d 833, 216 N.C. 604.  
N.J.—Turon v. J. & L. Const. Co., 86 A.2d 192, 8 N.J. 543—Lampert v. Mikos, 91 A.2d 577, 22 N.J. Super. 155.  
64 C.J. p 1066 note 37.

7. Ala.—Penney v. State, 155 So. 576, 229 Ala. 36.  
Cal.—Fennessey v. Pacific Gas & Elec. Co., 76 P.2d 104, 10 Cal.2d 538.  
Ky.—Fritz v. Roberts, 94 S.W.2d 1016, 264 Ky. 418—Frazier v. City of Corbin, 80 S.W.2d 595, 258 Ky. 582.  
N.C.—Cody v. England, 5 S.E.2d 833, 216 N.C. 604.  
64 C.J. p 1066 note 38 [a].  
8. Ala.—Penney v. State, 155 So. 576, 229 Ala. 36.  
Cal.—Corpus Juris cited in Fennessey v. Pacific Gas & Elec. Co., 76 P.2d 104, 106, 10 Cal.2d 538.  
Ga.—Powell v. Moore, 42 S.E.2d 110, 202 Ga. 62—Harrell v. Bowman, 27 S.E.2d 50, 69 Ga.App. 881—Owen v. Anderson, 186 S.E. 864, 54 Ga.App. 53—Swain v. Georgia Power & Light Co., 169 S.E. 249, 46 Ga.App. 794.  
Ky.—Scobee v. Donahue, 164 S.W.2d 947, 291 Ky. 374—Fritz v. Roberts, 94 S.W.2d 1016, 264 Ky. 418.  
Mo.—Baker v. Atkins, App., 258 S.W.2d 16—Corpus Juris cited in McIlvain v. Kavorinos, App., 212 S.W.2d 85, 90, affirmed in part and reversed in part on other grounds 219 S.W.2d 349, 358 Mo. 1153—McMonigal v. North Kansas City Development Co., 129 S.W.2d 75, 233 Mo.App. 1040.  
Okla.—Ex parte Hill, 221 P.2d 816, 92 Okl.Cr. 122.  
64 C.J. p 1066 note 38.  
9. Tex.—Hamill & Smith v. Ogden, Civ.App., 163 S.W.2d 725.  
64 C.J. p 1066 note 39.  
10. Ohio.—Olsen v. Eastern Auto. Forwarding Co., 26 N.E.2d 788, 63 Ohio App. 863.  
11. Ill.—Bencie v. Williams, 88 N.E.2d 258, 337 Ill.App. 414.  
12. Mo.—McIlvain v. Kavorinos, App., 212 S.W.2d 85, affirmed in part and reversed in part on other grounds 219 S.W.2d 349, 358 Mo. 1153.  
13. Ga.—Harrell v. Bowman, 27 S.E.2d 50, 69 Ga.App. 881.  
N.J.—Turon v. J. & L. Const. Co., 86 A.2d 192, 8 N.J. 543—Lampert v. Mikos, 91 A.2d 577, 22 N.J. Super. 155.

uncertain that it cannot be clearly ascertained what, if any, issues were passed on by the jury,<sup>14</sup> or where it is not certain in itself, and does not find facts from which certainty can be attained,<sup>15</sup> or which cannot be made certain without looking out of the record,<sup>16</sup> or which is otherwise so uncertain or indefinite as not to enable the court to base a legal judgment thereon.<sup>17</sup> Where the verdict does not clearly find the matter in issue, it cannot be helped by intentment<sup>18</sup> or be corrected or cured by the judgment.<sup>19</sup> The test of the validity of a verdict is whether or not it is an intelligible answer to the issue submitted to the jury,<sup>20</sup> and although the spelling, grammar, and punctuation are incorrect, if the meaning is plain the verdict will stand.<sup>21</sup>

In applying the foregoing rules it has been held that a verdict is not invalidated by such matters as the use of the word "believe" instead of "find,"<sup>22</sup> of "estimate" instead of "assess,"<sup>23</sup> of "verdict" instead of "issues,"<sup>24</sup> of "is" instead of "are,"<sup>25</sup> of "in" instead of "under,"<sup>26</sup> of "evaluating" instead of "valuing,"<sup>27</sup> or for omissions of words which are clearly supplied.<sup>28</sup> Likewise, a verdict for

plaintiff is not bad because it uses the words "contributory negligence" with respect to defendant, where the quoted words are used in a colloquial sense and there is no doubt as to the intention of the jury;<sup>29</sup> nor is a verdict improper, or the result of passion or prejudice, because it states that "we find the defendant not guilty."<sup>30</sup> So a verdict is not bad because it is written on two pieces of paper,<sup>31</sup> or states amounts in figures,<sup>32</sup> or where it is in the form of a tort verdict although the claim is in contract,<sup>33</sup> or omits the similiter after the verdict.<sup>34</sup> Further, a verdict is not bad merely because it states the reasons for the finding<sup>35</sup> or does not state the legal conclusion from the facts found.<sup>36</sup> A mere statement by the foreman of the jury in open court that the jury have agreed without stating the nature of the decision is not a verdict.<sup>37</sup> A jury's verdict against joint tort-feasors on which was written "equally responsible, each defendant" is not thereby invalidated.<sup>38</sup>

**Inconsistency.** A verdict is bad and will not support a judgment where it is inconsistent, contradictory, repugnant, or illogical.<sup>39</sup> A verdict reached

14. Ga.—Nelson Bros v. Webb, 169 S.E. 111, 178 Ga. 842.

Miss.—Corpus Juris quoted in McDougal v. State, 23 So.2d 920, 921, 199 Miss. 39.

N.C.—Edge v. North State Feldspar Corp., 193 S.E. 2, 212 N.C. 246.

Ohio.—Waterson v. Wheeler, 5 Ohio Supp. 1.

64 C.J. p 1066 note 41.

#### Verdicts held void for uncertainty

Verdict, in suit to quiet title and in ejectment, finding that plaintiff was owner of described property, followed by words "or such part or portion, if any, as you may find from the evidence plaintiff is entitled to" was void for uncertainty.—Kimberlin v. Roberts, 107 S.W.2d 24, 341 Mo. 267.

#### Failure to fill in blanks for verdict against defendant

Where jury, in trial of consolidated actions, were given blank verdict forms to fill out in each case, and returned blanks as to finding against defendant unsigned, the effect was that jury failed to return a verdict and such failure could not be construed as tantamount to a finding in favor of defendant.—Roadruck v. Schultz, 77 N.E.2d 874, 333 Ill.App. 476.

15. Miss.—Corpus Juris quoted in McDougal v. State, 23 So.2d 920, 921, 199 Miss. 39.

64 C.J. p 1067 note 42.

16. Tex.—Goggan v. Evans, 33 S.W. 891, 12 Tex.Civ.App. 256.

64 C.J. p 1067 note 43.

17. Miss.—Corpus Juris quoted in

McDougal v. State, 23 So.2d 920, 921, 199 Miss. 39.

64 C.J. p 1067 note 41.

18. Ala.—Merchants' Bank & Trust Co. v. J. A. Elliott & Son, 80 So. 624.

16 Ala.App. 620.

N.H.—Jewett v. Davis, 6 N.H. 518.

19. Ariz.—Bachford v. Kendall, 7 P. 176, 2 Ariz. 6.

Minn.—Cohues v. Finholt, 112 N.W. 12, 101 Minn. 180.

20. Miss.—Corpus Juris cited in McDougal v. State, 23 So.2d 920, 921, 199 Miss. 39.—Corpus Juris cited in Wilson v. State, 19 So.2d 475, 197 Miss. 17.

N.C.—Cody v. England, 5 S.E.2d 832, 216 N.C. 604.

R.I.—Spofford v. Rhode Island Suburban R. Co., 69 A. 2, 29 R.I. 34.

21. N.J.—Rossman v. Newbon, 170 A. 230, 112 N.J.Law 261.

64 C.J. p 1067 note 49.

22. Tex.—Patton v. Gregory, 21 Tex. 513.

23. Ala.—Roddy v. McGettrick, 49 Ala. 159.

24. Mo.—Shannon v. Kansas City Light & Power Co., 287 S.W. 1031, 315 Mo. 1136.

25. Cal.—Grover v. Morrison, 190 P. 1078, 47 Cal.App. 521.

26. Kv.—Hood v. Spitzberger, 46 S.W.2d 102, 242 Ky. 231.

27. U.S.—Snyder v. U. S., La., 5 S. Ct. 118, 112 U.S. 216, 28 L.Ed. 697.

28. Ga.—Mobley v. Belcher, 87 S.E. 470, 144 Ga. 442.

64 C.J. p 1067 note 56.

29. U.S.—Cervo v. Isbrandtsen Co., C.A.N.Y., 178 F.2d 919.

30. Ky.—Wheat's Adm'r v. Gray, 218 N.W.2d 400, 309 Ky. 593, 7 A.L.R. 2d 1336.

31. Mo.—United States Water & Steam Supply Co. v. Jacobia, 137 S.W. 906, 166 Mo.App. 597.

32. N.J.—Stout v. Hopping, 6 N.J. Law 125.

S.C.—Mayson v. Sheppard, 46 S.C.L. 254.

33. Ill.—Hubbard-Zemurray S. S. Co. v. Crescio, 179 Ill.App. 56.

34. Va.—Brewer v. Tarpley, 1 Wash. 363, 1 Va. 363.

35. Tex.—Ratliff v. Fort Worth & R. G. Ry. Co., Civ.App., 245 S.W. 83.

64 C.J. p 1067 note 61.

36. Ind.—Orr v. Miller, 98 Ind. 436.

37. Neb.—Union Pac. R. Co. v. Connolly, 109 N.W. 368, 77 Neb. 254.

64 C.J. p 1067 note 63.

38. Conn.—Oneker v. Liggett Drug Co., 197 A. 887, 124 Conn. 83.

39. Colo.—Harper v. Blas, 151 P.2d 760, 112 Colo. 518.

Ga.—Fleming v. Collins, 9 S.E.2d 157, 190 Ga. 210—Pickron v. Garrett, 35 S.E.2d 540, 73 Ga.App. 61.

N.C.—Edwards v. Hood Motor Co., 69 S.E.2d 550, 236 N.C. 269.

64 C.J. p 1067 note 45.

#### Verdicts held inconsistent

(1) In general.

Cal.—Hallinan v. Prindle, 29 P.2d 202, 220 Cal. 46.

by the jury on one issue is not affected, with respect to consistency or inconsistency between verdicts, by a verdict reached by the agreement of the parties on other issues.<sup>40</sup>

The inconsistency of verdicts as to several plaintiffs or several defendants is discussed *infra* § 500; and inconsistent counts, issues, or causes of action are considered *infra* § 503.

**Description of land.** A verdict awarding possession of land should contain a sufficient description of the land so awarded,<sup>41</sup> and a description is sufficient if it can be made certain, so that land may be identified, as by reference to monuments, maps, or other well known manner of location.<sup>42</sup>

### § 497. — Amount of Recovery in General

In actions for money judgment the jury must find the amount due, as well as the right of recovery, and must state it with sufficient certainty and definiteness.

In an action in which a money judgment is sought, the jury must,<sup>43</sup> in some instances by virtue of statutes to that effect,<sup>44</sup> find the amount due as well as the right of recovery; and a general verdict for either party does not authorize judgment for

any amount.<sup>45</sup> Accordingly, in an action in which either plaintiff or defendant is entitled to recover money from the adverse party, the verdict of the jury must assess the amount of recovery;<sup>46</sup> and a verdict for one of the parties with a finding that there was no sum due is contrary to law;<sup>47</sup> and where the jury returns a verdict for plaintiff but assesses the amount of recovery as "none," although the evidence showed beyond dispute that plaintiff suffered damages, the trial court may properly refuse to accept the verdict in that form.<sup>48</sup> It has been said that the better practice requires that the amount be stated even in a directed verdict.<sup>49</sup> So also, a general verdict for plaintiff in an action for unliquidated damages,<sup>50</sup> or where the verdict might be for either one of two sums,<sup>51</sup> will not support a judgment for any particular amount. Similarly, a verdict for "nominal damages" is insufficient as a basis for judgment, and the amount of nominal damages must be named.<sup>52</sup>

The rules as to the certainty and definiteness required in a verdict discussed *supra* § 496, apply to the finding of the amount due, and a verdict not finding such amount with sufficient definiteness to

N.Y.—*Grossman v. Triboro Coach Corp.*, 41 N.Y.S.2d 311, 266 App. Div. 746.

(2) In action by former employee against corporation for alleged conversion and breach of contract for failure to assign stock, verdict was inconsistent in that on conversion count jury found plaintiff was not owner of stock while under wording of instruction on breach of contract count jury considered plaintiff was owner.—*Osborn v. Chandeysson Elec. Co.*, Mo., 248 S.W.2d 657.

#### Verdicts held not inconsistent

(1) In general.  
 Colo.—*Carlson v. McNeill*, 162 P.2d 226, 114 Colo. 78—*Kinsell v. Stice*, 123 P.2d 397, 109 Colo. 173.  
 Ga.—*Miller v. Ray*, 65 S.E.2d 923, 84 Ga.App. 251, error transferred 64 S.E.2d 449, 208 Ga. 27.  
 Ill.—*Siniarski v. Hudson*, 87 N.E.2d 137, 338 Ill.App. 137.  
 Ind.—*Western & Southern Life Ins. Co. v. Lottes*, 64 N.E.2d 805, 116 Ind.App. 559.  
 Mass.—*United Elec. Light Co. v. Deliso Const. Co.*, 62 N.E.2d 553, 315 Mass. 313—*Universal Supply Co. v. Hildreth*, 192 N.E. 23, 287 Mass. 538, 94 A.L.R. 1389.  
 Tenn.—*Southern Bell Tel. & Tel. Co. v. Skaggs*, 241 S.W.2d 126, 34 Tenn. App. 549.

(2) In action for personal injuries and for property damage, verdict allowing compensation for property damage but denying recovery for per-

sonal injuries was not inconsistent.—*Redmond v. Jones*, Ky., 249 S.W.2d 535.

(3) In guest's action against motorist for injuries sustained in automobile accident, a finding could be made without inconsistency that injuries to guest resulted both from intoxication and willful misconduct of motorist.—*Pennix v. Winton*, 143 P.2d 940, 61 Cal.App.2d 761, hearing denied 145 P.2d 561, 61 Cal.App.2d 761.

(4) Where automobile collision cases were consolidated and jury found driver not to be negligent in cases wherein he was defendant but found driver to have contributed to his own injury in case wherein he was the plaintiff, verdicts may be reconciled under a permissive application of the doctrine of proximate cause and apart from application of the principles of intervening or insulated negligence, and were not essentially inconsistent, and court could have set the verdict aside as a matter of discretion but refusal to accept the verdict as a matter of law was error.—*Edwards v. Hood Motor Co.*, 69 S.E.2d 550, 235 N. C. 269.

40. S.C.—*Thomas v. Southern Grocery Stores*, 181 S.E. 565, 177 S.C. 411.

41. Ark.—*Thacker v. Hicks*, 224 S.W. 2d 1, 215 Ark. 898.

42. Ark.—*Thacker v. Hicks*, *supra*.

43. Mich.—*Zielinski v. Harris*, 286 N.W. 554, 289 Mich. 381.

Pa.—*Pecina v. Metropolitan Life Ins. Co.*, Com.Pl., 7 Sch.Rp. 201.  
 Tenn.—*All v. John Gerber Co.*, 252 S.W.2d 138, 36 Tenn.App. 134—*Board of Mayor and Aldermen of Covington v. Moore*, 232 S.W.2d 410, 33 Tenn.App. 561.  
 64 C.J. p 1067 note 65.

#### Jurors' competence to make calculations

Jurors are competent under certain circumstances to make calculations.—*Donnell v. Talley*, Tex.Civ.App., 104 S.W.2d 920, error dismissed by agreement.

44. Or.—*Klein v. Miller*, 77 P.2d 1103, 159 Or. 27, 116 A.L.R. 820.  
 64 C.J. p 1068 note 67.

45. Or.—*Klein v. Miller*, *supra*.  
 Tex.—*Cleddening v. Mathews*, 1 Tex.A.Civ.Cas. § 904.

Ohio.—*Ridenour v. Lile*, 114 N.E. 2d 166, 93 Ohio App. 435.

47. Ohio.—*Ridenour v. Lile*, *supra*.

48. Neb.—*Ambrozi v. Fry*, 62 N.W.2d 259, 158 Neb. 13.

49. Okl.—*Mitchell v. Fisher*, 32 P.2d 37, 168 Okl. 145.

50. Ga.—*Washington v. Calhoun*, 30 S.E. 434, 103 Ga. 675.

Ky.—*Chesapeake, etc., R. Co. v. Mad-dox*, 42 S.W. 1124, 19 Ky.L. 966.

51. Miss.—*Gilleylen v. Stewart*, 16 So. 495, 72 Miss. 262.

52. Ga.—*Sellers v. Mann*, 39 S.E. 11, 113 Ga. 643.

N.J.—*Van Houten v. Campbell*, 153 A. 391, 9 N.J.Misc. 214.

authorize a judgment to be entered thereon for any definite sum is bad and will be set aside.<sup>53</sup> However, strict technical accuracy is not required in the statement of the amount;<sup>54</sup> and it is sufficient if the amount can be ascertained by mere mathematical calculation;<sup>55</sup> and a verdict is good although the amount of recovery is stated merely by reference to the amount claimed in the petition, or can be ascertained by a reference thereto,<sup>56</sup> or by reference to the record.<sup>57</sup> A general verdict as to the amount due without setting out the findings of the jury on various items of damages is sufficient,<sup>58</sup> since the jury are not required to state how or by what method of calculation they arrived at their verdict.<sup>59</sup>

In actions for the recovery of money, the omission of the word "dollars"<sup>60</sup> or of the dollar mark<sup>61</sup> will not vitiate the verdict; nor will a verdict be set aside for manifest mistake in the statement of the amount recovered, where the amount intended to be stated is clear.<sup>62</sup> Where words and figures in

the verdict conflict as to the amount, the words will control<sup>63</sup> unless it is clear that the words are the result of a clerical error.<sup>64</sup>

*Where the amount due is not in issue, a verdict generally in favor of either party is sufficient, without assessing damages,<sup>65</sup> even under a statute requiring the jury to assess the amount of recovery, since such a provision does not apply where the amount is not in issue.<sup>66</sup>*

*Money deposited in court.* Where money is tendered and deposited in court, and if the jury find that the amount deposited is insufficient, their proper course is to return a verdict for the whole sum due.<sup>67</sup>

*Foreign exchange.* Where the value of foreign currency is involved in the determination of the amount of recovery, the verdict must take into consideration the value of the foreign exchange on the proper date.<sup>68</sup>

53. Wash.—Campbell v. Highway Const. Co., 253 P. 457, 142 Wash. 344.

64 C.J. p 1068 note 72.

#### Verdict held sufficient

Notation on verdict, in action on theft policy, that sum thereof was sum total of principal, interest, statutory penalty, and attorney fees, was held presumptive of such fact.—Koury v. Home Ins. Co. of New York, Mo.App., 57 S.W.2d 750.

#### Medical expenses in alimony suit

Verdict for permanent alimony was held void for uncertainty in so far as requiring defendant to pay total cost of operation on, and hospitalization of, plaintiff, where petition merely alleged that it would be necessary for plaintiff to undergo operation and that she would have to go to hospital.—Martin v. Martin, 189 S.E. 843, 183 Ga. 787.

54. S.C.—Fields v. Lancaster Cotton Mills, 58 S.E. 608, 77 S.C. 546, 122 Am.S.R. 593, 11 L.R.A.N.S., 822.

64 C.J. p 1068 note 73.

#### Verdicts held not invalid as uncertain or indefinite

Mo.—Zsuzch v. Bohn, App., 57 S.W.2d 695.

N.M.—Olguin v. Thygesen, 143 P.2d 585, 47 N.M. 377.

64 C.J. p 1068 note 73 [a].

55. Ind.—Income Guaranty Co. v. Ziellinski, 21 N.E.2d 87, 107 Ind. App. 248.

64 C.J. p 1068 note 74.

#### Fifty per cent of amount of claim

Where petition claimed a specified sum for damages to automobile and contained itemized statement of claim, a verdict awarding plaintiff fifty per cent of the amount of his claim without expressly specifying

the amount was not void for uncertainty, and a legal judgment could be entered thereon.—Harroll v. Bowman, 27 S.E.2d 50, 69 Ga.App. 881.

56. Utah.—Colovos v. Home Life Ins. Co. of New York, 28 P.2d 607, 83 Utah 401.

64 C.J. p 1068 note 75.

#### Amounts as offsetting each other

In suit by insured against his employer to recover total and permanent disability benefits paid to employer by insurer under life policy in amount in excess of indebtedness of insured to his employer, verdict that debts of insured and employer offset each other was not so ambiguous that no judgment could be entered thereon, even though insured's indebtedness to employer could not be demonstrated to a mathematical certainty.—Davidson v. Turner, 12 S.E.2d 308, 191 Ga. 197.

57. Minn.—Donaldson v. Carstensen, 247 N.W. 522, 188 Minn. 443.

Utah.—Colovos v. Home Life Ins. Co. of New York, 28 P.2d 607, 83 Utah 401.

64 C.J. p 1068 note 76.

58. Ky.—Scobee v. Donahue, 164 S.W.2d 947, 292 Ky. 374.

Apportionment of damages among various items or elements of damages see *infra* § 508.

59. Ky.—Scobee v. Donahue, *supra*.

60. Ky.—Ray v. Ray, 245 S.W. 287, 196 Ky. 579.

64 C.J. p 1069 note 77.

61. Ky.—Ray v. Ray, *supra*.

64 C.J. p 1069 note 78.

62. Ga.—Heinkin v. Barbrey, 40 Ga. 249.

Mo.—Stith v. J. J. Newberry Co., 79 S.W.2d 447, 336 Mo. 467—Pokojski

v. Union Electric Light & Power Co., App., 80 S.W.2d 879.

63. Ga.—Southeastern Greyhound Lines v. Fisher, 34 S.E.2d 908, 72 Ga.App. 717.

64 C.J. p 1069 note 80.

64. Mo.—Jordan v. St. Joseph Ry., Light, Heat & Power Co., 73 S.W.2d 205, 335 Mo. 319.

#### "Ten" and "10,000"

Verdict, assessing plaintiff's damages at "ten (\$10000) dollars" in action to recover \$50,000 damages for severe and permanent personal injuries, was held not so defective and uncertain as not to warrant judgment for \$10,000, especially in view of jurors' affidavits that they agreed on such amount.—Jordan v. St. Joseph Ry., Light, Heat & Power Co., 73 S.W.2d 205, 335 Mo. 319.

65. Ark.—Bell v. Old, 113 S.W. 1023, 88 Ark. 90.

64 C.J. p 1069 note 81.

#### "All or nothing" situation

N.Y.—Ploone v. Ploone, 73 N.Y.S.2d 156, 189 Misc. 84, reversed on other grounds 78 N.Y.S.2d 372, 273 App. Div. 914.

66. Mo.—Home Trust Co. v. Josephson, 95 S.W.2d 1148, 339 Mo. 170, 105 A.L.R. 1063.

64 C.J. p 1069 note 82.

67. Me.—Dresser v. Witherle, 9 Me. 111.

68. N.Y.—Panay v. Safyurtli, 127 N.Y.S.2d 84.

#### Verdict held erroneous

A verdict against Estonian bank for value in United States currency of specified number of Estonian crowns on date of deposit thereof in such bank for benefit of assignors of one obtaining verdict was erroneous,

§ 498. — Interest

If the jury allow interest, the amount allowed must be stated with certainty or must be definitely ascertainable.

If the jury allow interest, their finding must not be so ambiguous or incomplete as to render the amount or rate uncertain.<sup>69</sup> A verdict is sufficiently definite if it may be rendered certain by mere mathematical calculation<sup>70</sup> or by reference to the pleadings.<sup>71</sup> For example, a verdict finding the amount on which interest is to be calculated, and the date from which, or period for which, it is to run, is sufficiently certain,<sup>72</sup> and the computation of interest may be made by the court.<sup>73</sup> The verdict is insufficient if the date from which interest is to be calculated is not fixed, and such time cannot be determined from the record or undisputed evidence.<sup>74</sup> Where there are no specific allegations in the pleadings as to interest fixing a date from which interest could be reckoned, a verdict awarding a specific sum "with interest" is not void as uncertain,<sup>75</sup> and the "with interest" will be construed as a recovery of interest from the date of the verdict.<sup>76</sup> In a suit on an *ex contractu* obligation, the proper construction of a verdict awarding a certain sum "with interest" should be that interest is awarded from the date the obligation became due.<sup>77</sup> A verdict which gives interest from judicial demand, which date is shown by the record, is sufficiently certain.<sup>78</sup>

Where the jury render a verdict for a certain sum "and interest," although such verdict is defective, it being the duty of the jury to compute the

interest or give the grounds of computation, plaintiff may take judgment for principal alone,<sup>79</sup> and a verdict, although including interest in the damages and thus informal, may be allowed to stand.<sup>80</sup> Where the verdict for plaintiff includes principal and interest, and fails to specify separately the amount of each, a new trial should be granted, unless plaintiff renounces future interest on the judgment.<sup>81</sup> Where the verdict, in a case in which plaintiff is not entitled to interest, shows on its face that it is made up in part of interest, it cannot be sustained, as to such part, although the total amount is less than the jury could have awarded, without including any interest.<sup>82</sup> A judgment will not be reversed because the judge computed interest, instead of allowing the jury to do it, no objection having been made at the time.<sup>83</sup>

*Separate findings as to interest.* According to some authority, interest on an unliquidated claim should be included in the damages as one gross sum, and should not be stated separately,<sup>84</sup> although a verdict stating principal, interest, and total amount, although irregular in form, has been held not to be erroneous.<sup>85</sup>

§ 499. Designation of Parties

The designation of the parties in the verdict must conform to the pleadings and must be sufficiently definite to make certain of the persons intended to be designated; but informality or inaccuracy is not fatal if the intention of the jury is clear.

The verdict must conform to the pleadings with respect to the names and descriptions of the parties,<sup>86</sup> and must be sufficiently definite to make cer-

in absence of proof of conversion value of such crowns as of date of commencement of action for amount deposited, as conversion should have been made at rate prevailing on date of trial or judgment.—*Buxhoeveden v. Estonian State Bank*, 106 N.Y.S.2d 287, reversed on other grounds 112 N.Y.S.2d 785, 279 App.Div. 1089, reargument denied 113 N.Y.S.2d 773, 280 App.Div. 806.

69. Ga.—*Bulce v. McCrary*, 20 S.E. 632, 94 Ga. 418.

64 C.J. p 1069 note 84.

Statement of interest in general verdict generally see *infra* § 507.

70. U.S.—*American Lumber & Mfg. Co. v. Atlantic Mill & Lumber Co.*, C.C.A.Pa., 290 F. 632.

64 C.J. p 1069 note 85.

71. Minn.—*Trustees of Little Cedar Congregation of Adams v. Chicago, M. & St. P. Ry. Co.*, 137 N.W. 970, 119 Minn. 181.

64 C.J. p 1069 note 86.

72. Iowa.—*Wiar v. Wabash R. Co.*, 144 N.W. 703, 162 Iowa 702.

64 C.J. p 1069 note 87.

73. Tex.—*Buchanan v. Townsend*, 16 S.W. 315, 80 Tex. 534.

64 C.J. p 1069 note 88.

74. R.I.—*Lashua v. Markham*, 44 A. 804, 21 R.I. 492.

64 C.J. p 1069 note 89.

75. Ga.—*Cooper v. Bowen*, 78 S.E. 413, 140 Ga. 45.

76. Ga.—*Cooper v. Bowen*, *supra*.

77. Ga.—*Fletcher v. Stanley Electric Co.*, 67 S.E. 1033, 134 Ga. 398.

Ill.—*Erickson v. Gregory*, 275 Ill.App. 286.

Ind.—*Hart v. Gulbranson*, 187 N.E. 358, 97 Ind.App. 544.

78. U.S.—*New Orleans, etc., R. Co. v. Schneider, La.*, 60 F. 210, 8 C.C.A. 571.

La.—*Gay v. Ardry*, 14 La. 283.

79. Ill.—*Parker v. Fisher*, 39 Ill. 164.

80. Ky.—*Young v. Chandler*, 13 B. Mon. 252.

81. Ga.—*Hubbard v. McRae*, 22 S.E. 714, 95 Ga. 705.

82. N.Y.—*Denike v. Denike*, 29 N.Y. S. 320, 8 Misc. 604, affirmed 49 N.E. 1096, 165 N.Y. 671.

83. Tenn.—*Brady v. Clark*, 12 Lea 323.

84. Ga.—*Atlantic Coast Line R. Co. v. Henderson Elevator Co.*, 88 S.E. 101, 18 Ga.App. 279.

Verdict held sufficient

Verdict for death for \$12,500, with interest at seven per cent for three years and eight months, "which is \$3,208, the total amount of which is \$15,708," was held sustainable as judgment for damages in sum of \$15,708.—*Western & A. R. R. v. Michael*, 172 S.E. 66, 178 Ga. 1, appeal dismissed 54 S.Ct. 530, 291 U.S. 649, 78 L.Ed. 1044, rehearing denied 54 S.Ct. 560, 291 U.S. 654, 78 L.Ed. 1044.

85. Ga.—*Atlantic Coast Line R. Co. v. Stovall-Pace Co.*, 118 S.E. 62, 30 Ga.App. 326.

86. Ga.—*Georgia Motor Sales v. Wade*, 138 S.E. 797, 37 Ga.App. 24.

tain the person or persons against whom it is rendered.<sup>87</sup> However, an informality or inaccuracy in the naming of parties for or against whom a verdict is rendered is not fatal, if the intention of the jury is otherwise sufficiently shown,<sup>88</sup> as by reference to the pleadings,<sup>89</sup> the instructions,<sup>90</sup> or the record;<sup>91</sup> and this is so particularly where the mistake in the name or designation of a party is clearly a clerical error.<sup>92</sup> There being but one party plaintiff and one defendant, a finding of the amount due plaintiff is sufficient without a finding that it is due from defendant,<sup>93</sup> but it is not sufficient to find a verdict against a party by name without designating him as a party.<sup>94</sup>

Since, under the rules of construction, words in the plural number may be construed to include the singular, and vice versa, unless the contrary plainly appears from the context, as discussed *infra* § 521, where there are several defendants, a general ver-

dict for or against defendant, or defendants, without specifying which, the interests of defendants being identical, is sufficient as a verdict for or against all defendants,<sup>95</sup> unless liability can be attached to but one,<sup>96</sup> or the evidence is insufficient to support the verdict as to one.<sup>97</sup> Where there are several defendants, a general verdict for plaintiff is sufficient,<sup>98</sup> separate verdicts not having been demanded by defendants,<sup>99</sup> or a finding in favor of one or more of them not having been directed.<sup>1</sup>

A verdict for "plaintiffs," there being but one plaintiff,<sup>2</sup> or for "plaintiff," there being several plaintiffs,<sup>3</sup> or the same party being plaintiff in two capacities,<sup>4</sup> is sufficient, if the intention of the jury drawn from the whole verdict is plain. Moreover, the same rule applies to a verdict in a joint action, for one of two plaintiffs by name,<sup>5</sup> or where both plaintiffs claim in the same right.<sup>6</sup> However, in a proceeding brought by two plaintiffs, a verdict

Neb.—*Corpus Juris* cited in *Abrams v. Lange*, 63 N.W.2d 781, 783, 158 Neb. 512.

87. Neb.—*Corpus Juris* cited in *Abrams v. Lange*, 63 N.W.2d 781, 783, 158 Neb. 512.  
84 C.J. p 1070 note 3.

88. Conn.—*Dwyer v. Redmond*, 124 A. 7, 100 Conn. 393.  
64 C.J. p 1070 note 4.

89. Idaho.—*Trask v. Boise King Placers Co.*, 142 P. 1073, 26 Idaho 290.

64 C.J. p 1070 note 4 [a] (2).

#### Verdict for rents

In vendee's suit against vendor and third party asking, as against vendor, for specific performance and a recovery of rents and, as against third party, for cancellation of security deed executed by vendor to third party, a verdict for rents in favor of vendee against "defendant" with an allowance for improvements in favor of "defendant" was not subject to attack as failing to specify which defendant was intended.—*Shelnut v. Shelnut*, 3 S.E.2d 900, 188 Ga. 306.

90. Ky.—*Frazier v. City of Corbin*, 80 S.W.2d 595, 258 Ky. 582.

#### Verdict stating amount of money

In action for breach of a builder's contract, insertion by jury of figures one hundred seventy dollars after words "write your verdict here," included in a written charge submitted to jury wherein court instructed that should jury find for the plaintiff they should state amount of money which would reasonably compensate him was held to show that jury awarded plaintiff one hundred seventy dollars damages against defendant, as against contention that verdict failed

to designate party in whose favor jury found.—*White v. Wright*, Tex. Civ.App., 84 S.W.2d 532.

#### Designation of parties in instructions

In action for balance of tax assessment against vendor and vendees of property wherein vendees filed cross-petition against vendor, jury's verdict finding "for defendants" was held not uncertain so as to invalidate verdict against vendor where considered in connection with instruction naming vendor and wife as "plaintiffs," such designation, although incorrect, serving to point out to jury those meant to be included in each designation and directing in whose favor it should return verdict based on issue as to who assumed improvement lien.—*Frazier v. City of Corbin*, 80 S.W.2d 595, 258 Ky. 582.

91. Tex.—*William M. Rice Institute v. Freeman*, Civ.App., 145 S.W. 688.  
64 C.J. p 1070 note 4 [f].

92. Idaho.—*Trask v. Boise King Placers Co.*, 142 P. 1073, 26 Idaho 290.

64 C.J. p 1070 note 5.

93. Mo.—*Goff v. Hines*, 229 S.W. 221, 207 Mo.App. 420.  
64 C.J. p 1070 note 6.

94. Wyo.—*Great Western Ins. Co. v. Pierce*, 1 Wyo. 45.

95. Ill.—*Sparberg v. Cohen*, 38 N.E. 2d 993, 313 Ill.App. 143.

La.—*Hardie v. Allen*, App., 50 So.2d 74.

64 C.J. p 1071 note 8.

#### Liability based on respondent superior

Va.—*Cape Charles Flying Service v. Nottingham*, 47 S.E.2d 540, 187 Va. 444.

96. Mo.—*Russell Grain Co. v. Chicago*

go Great Western R. Co., 237 S.W. 195, 208 Mo.App. 485.

#### Prior dismissal as to one

Where action against husband and wife was dismissed by plaintiff as to wife, but counterclaims of both husband and wife remained in the case, verdict stating that jury found in favor of the plaintiff and assessed plaintiff's damages in certain amount, and that jury found in favor of plaintiff on counterclaims, was not objectionable, on ground that it was insufficient because it failed to name the defendant or defendants against whom it was found.—*Pleiman v. Belieu*, 227 S.W.2d 733, 360 Mo. 219.

97. Conn.—*Loomis v. Perkins*, 39 A. 797, 70 Conn. 444.

Or.—*Wilson v. Investment Co.*, 156 P. 249, 80 Or. 233.

98. Ky.—*Murray v. Cowherd*, 147 S.W. 6, 148 Ky. 591, 40 L.R.A., N.S., 617.

64 C.J. p 1071 note 11.

#### Defendants filing separate answers held within rule

Ky.—*Newport Coal Co. v. Ziegler*, 74 S.W.2d 561, 255 Ky. 429.

99. Cal.—*Winans v. Christy*, 4 Cal. 70, 60 Am.D. 597.

1. Mo.—*Hughey v. Eyesell*, 152 S.W. 434, 187 Mo.App. 563.

3. Ill.—*McGill v. Rothgeb*, 45 Ill.App. 511.

3. Tex.—*Shannon v. Jones*, 13 S.W. 477, 76 Tex. 141.

64 C.J. p 1071 note 15.

4. Tex.—*Texas, etc., R. Co. v. Watkins*, Civ.App., 26 S.W. 760, affirmed 29 S.W. 232, 88 Tex. 20.

5. Tex.—*Chicago, R. I. & T. R. Co. v. Henderson*, Civ.App., 73 S.W. 36.

6. Tex.—*Tom v. Sayers*, 64 Tex. 333.



in favor of "plaintiff" is too uncertain to warrant a judgment for the principal plaintiff alone.<sup>7</sup>

A general verdict is good as to the parties before the court, although one of the parties has not served or has not appeared,<sup>8</sup> or is dead,<sup>9</sup> or although rendered in the name of a former plaintiff who is represented by his heirs;<sup>10</sup> and on dismissal or disclaimer as to some of the defendants, a general verdict for plaintiff is valid as to the remaining parties,<sup>11</sup> as is such a verdict where there has been a substitution of parties plaintiff.<sup>12</sup> However, a verdict for plaintiffs for the entire interest or property sued for has been held to be improper where a plaintiff who died before the trial remained a party, and no new party was made.<sup>13</sup>

Where two actions are joined for purpose of trial, a verdict for defendant is a finding against both plaintiffs.<sup>14</sup>

*Set-off claimed by part of defendants.* Where there are three defendants, one of which files a counterclaim, a verdict awarding a recovery to the "counterclaimant" will be construed as a recovery in favor of the one counterclaimant.<sup>15</sup> Where there is a suit against three defendants and a claim of set-off is filed by two of them, a verdict in favor of the defendants generally for a given sum will be construed as one in favor of the defendants pleading the set-off for the amount of the verdict, and in favor of the other defendant generally.<sup>16</sup>

*Statutory form.* A statute providing that the verdict shall be in the words, "Verdict for the plaintiff," or "Verdict for the defendant," has been held to be

merely directory;<sup>17</sup> and accordingly a verdict for the "petitioner" is sufficient.<sup>18</sup>

## § 500. — Severance

Whether there should be one or separate verdicts in cases involving several parties plaintiff or defendant depends on the rule in the jurisdiction and the circumstances of the case; but in general all verdicts in cases tried together should be consistent with each other.

In certain actions against defendants jointly ordinarily there must be but one verdict,<sup>19</sup> and the entry of separate verdicts is error.<sup>20</sup> Thus, in a trial against two or more defendants jointly liable for the same tort, there should be one verdict against all the defendants.<sup>21</sup> If, under the pleadings and proof, the verdict, if any, against defendants must be joint, a verdict against "defendant" will be so understood.<sup>22</sup> However, the fact that the jury wrote separate verdicts as to each of several defendants does not render it unintelligible.<sup>23</sup>

On the other hand, separate verdicts should generally be found in cases tried together<sup>24</sup> unless there is an order of court consolidating the cases.<sup>25</sup> Where statutes authorize separate verdicts against separate defendants, such provisions are procedural only,<sup>26</sup> and in order to receive several verdicts thereunder the substantive law controlling the case must be such as to impose several separable and different respective liabilities.<sup>27</sup> A mere agreement to try two cases together does not authorize a single verdict.<sup>28</sup> However, a failure to request separate verdicts as to each case has been held to waive the right to object to a general verdict.<sup>29</sup> A

7. Va.—McClure Grocery Co. v. Watson, 139 S.E. 288, 148 Va. 601.

8. Colo.—Quimby v. Boyd, 6 P. 462, 8 Colo. 194, error dismissed 9 S.Ct. 147, 128 U.S. 488, 32 L.Ed. 502.

9. Ga.—Sanders v. Etcherson, 36 Ga. 404.

10. Tex.—Gaines v. National Exch. Bank, 64 Tex. 38.

11. Neb.—Morrissey v. Schindler, 26 N.W. 476, 18 Neb. 672, 64 C.J. p 1071 note 23.

12. Mo.—Gibson v. Swofford, 97 S.W. 1007, 122 Mo.App. 126.

13. Ga.—Fox v. Lofton, 195 S.E. 573, 185 Ga. 456.

14. Pa.—Parks v. Bishop, 145 A. 718, 296 Pa. 91.

15. Ind.—Cleveland, etc., R. Co. v. Rudy, 89 N.E. 951, 173 Ind. 181.

16. Ga.—Bishop v. Pendley Lumber Co., 82 S.E. 237, 141 Ga. 826.

17. La.—Rogge v. Cafero, 131 So. 207, 15 La.App. 565, appeal dismissed 134 So. 909, 15 La.App. 565.

18. La.—Rogge v. Cafero, supra.

19. Pa.—MacHolme v. Cochenour, 187 A. 647, 109 Pa.Super. 563.

20. Pa.—MacHolme v. Cochenour, supra.

In trespass for excessive distress brought against defendants jointly, entry of separate verdicts against landlord and officers executing warrant was held error.—MacHolme v. Cochenour, supra.

21. Cal.—Sparks v. Bernsten, 121 P. 2d 497, 19 Cal.2d 308.

22. Ind.—Kluse v. Sparks, 36 N.E. 914, 37 N.E. 1047, 10 Ind.App. 444.

23. Tex.—Lancaster v. Tudor, Civ. App., 222 S.W. 990.

24. Pa.—Slack v. Crozier, 31 Pa.Dist. & Co. 209, 26 North.Co. 150.

64 C.J. p 1074 note 60.

**Plaintiff's right as to third party defendant**

Where plaintiff has no right of action against additional defendant, but is entitled to recover from original defendant and original defendant is entitled to recover from additional

defendant, separate verdicts should be rendered accordingly, but where plaintiff also has right of action against additional defendant, verdict for plaintiff may be rendered against such defendant.—Boosel v. Agricultural Ins. Co., 180 A. 21, 118 Pa.Super. 400.

25. Ga.—Cheek v. Tripp, 105 S.E. 247, 25 Ga.App. 800.

26. Miss.—Gillespie v. Olive Branch Building & Lumber Co., 164 So. 42, 174 Miss. 154.

27. Miss.—Gillespie v. Olive Branch Building & Lumber Co., supra—Mississippi Cent. R. Co. v. Roberts, 160 So. 604, 173 Miss. 487, appeal dismissed 56 S.Ct. 107, 296 U.S. 536, 80 L.Ed. 38.

28. Ga.—Pipkin v. Garrett, 162 S.E. 645, 44 Ga.App. 616.

29. Kan.—Bee-Hive Mercantile Co. v. Insurance Co. of North America, 140 P. 854, 92 Kan. 341—Manhattan Wholesale Grocery Co. v. Westchester Fire Ins. Co., 140 P. 853, 92 Kan. 336.

jury should not be called on to render two verdicts, as to separate defendants, at different times in the same case.<sup>30</sup> In the technical procedure of the early common law it was an established principle that a joint verdict must stand or fall in its entirety.<sup>31</sup>

In general, where there are several distinct causes of action tried together, inconsistent and irreconcilable verdicts are fatally defective and should normally be set aside,<sup>32</sup> although it has also been held that where cases are consolidated for trial there is no rule that the jury must return consistent verdicts,<sup>33</sup> and that it does not follow that because two separate and distinct causes of action are tried by the same jury that the findings in one cause are binding on the jury in the other cause of action, if the facts are in dispute.<sup>34</sup> Where several actions are tried together, verdicts awarding recovery to some parties on one theory and to other parties on another theory are not fatally inconsistent,<sup>35</sup> even where all the plaintiffs seek recovery for injuries arising from the same act of defendant, where there is evidence to sustain each verdict.<sup>36</sup> However, where several causes of action are identical and are defended on the same ground, verdicts for plaintiff on one cause of action and for defendant on others are inconsistent and cannot stand.<sup>37</sup> Where two actions joined are of such a nature that recovery can be had in only one of such actions, verdicts in favor of plaintiff and against defendants in both actions are incon-

sistent.<sup>38</sup> With respect to concurrent negligence plaintiff may be awarded verdicts against both defendants.<sup>39</sup> Where defendants' liability is joint and several the verdicts may find one or more of the defendants liable and may exonerate others.<sup>40</sup> Where there are two plaintiffs claiming in joint right, the jury cannot find in favor of one and against the other,<sup>41</sup> unless the defense, such as the statute of limitations, is personal to one of the plaintiffs;<sup>42</sup> but a verdict is not void as inconsistent which awards substantial damages to two plaintiffs but under the same facts denies recovery to a third plaintiff who is entitled at most only to nominal damages.<sup>43</sup>

The validity of an inconsistent or illogical verdict generally is discussed supra § 496; and inconsistent counts, issues, or causes of action are discussed infra § 503.

**Resident and nonresident defendants.** In an action against a resident and a nonresident, it has been held that the jury cannot return a verdict against the nonresident defendant unless they also find against the resident defendant;<sup>44</sup> but under the proper evidence they may return a verdict against the resident defendant alone without returning a verdict against the nonresident defendant.<sup>45</sup>

**Failure to find as to some defendants.** Where defendants are severally liable, a verdict against one, or some, not taking into account others is good,<sup>46</sup> except in so far as the rule may be affected by statutory provision to the contrary,<sup>47</sup> under which a

30. Ill.—Lehigh Valley Transp. Co. v. Post Sugar Co., 128 Ill.App. 600, affirmed 81 NE 819, 228 Ill. 121.

31. Me.—Plante v. Canadian Nat. Rys., 23 A.2d 814, 138 Me. 215.

32. N.J.—Brendel v. Public Service Elec. & Gas Co., 101 A.2d 56, 28 N.J.Super. 500—Rich v. Central Electrotube Foundry Corp., 3 A.2d 584, 121 N.J.Law 481.

N.Y.—Thorsen v. Metzgar, 105 N.Y.S.2d 947, 278 App. Div. 421.

Pa.—Gressel v. Polish-American Ass'n, 86 Pa. Dist. & Co. 85.

33. Ark.—Brown v. Parker, 233 S.W.2d 64, 65, 217 Ark. 700.

"If such separate cases were being tried separately, by different juries, there would be no assurance of consistency in the verdicts, and no greater assurance of consistency is insisted upon when one jury tries both cases together."—Brown v. Parker, supra.

34. Ark.—Leech v. Missouri Pac. R. Co., 71 S.W.2d 467, 189 Ark. 161.

35. D.C.—Navarro v. Mayo, 154 F.2d 813, 81 U.S.App.D.C. 34.

**Actions by car owner and by passenger**

D.C.—Navarro v. Mayo, supra.

36. Tenn.—Nashville, C. & St. L. Ry. v. White, 15 S.W.2d 1, 158 Tenn. 407.

64 C.J. p 1074 note 63.

37. Kan.—Whitacre v. State Bank of Keats, 34 P.2d 569, 140 Kan. 106.

38. Ill.—Inter Ins. Exchange of Chicago Motor Club v. Andersen, 73 N.E.2d 12, 331 Ill.App. 250.

**Verdicts held inconsistent**

In insurer's action against insured for breach of subrogation contract and against alleged tort-feasor for damage to insured's automobile, verdict against insured for fraud in breaching contract with insurer by giving alleged tort-feasor a general release and verdict against alleged tort-feasor for property damage were inconsistent.—Inter Ins. Exchange of Chicago Motor Club v. Andersen, supra.

39. Mo.—Christiansen v. St. Louis Public Service Co., 62 S.W.2d 828, 333 Mo. 408.

40. U.S.—U. S. ex rel. Marcus v. Heas, D.C.Pa., 41 F.Supp. 197, reversed on other grounds, C.C.A., 127 F.2d 233, reversed on other grounds 63 S.Ct. 379, 317 U.S. 537, 87 L.Ed. 443, rehearing denied 63 S.Ct. 756, 318 U.S. 799, 87 L.Ed. 1163.

41. La.—Bailey & Wells v. Hickman, 12 La. 415.

64 C.J. p 1072 note 31.

42. Ga.—Settle v. Allison, 8 Ga. 201, 52 Am.D. 393.

43. N.J.—Brendel v. Public Service Elec. & Gas Co., 101 A.2d 56, 28 N.J.Super. 500.

64 C.J. p 1072 note 34.

44. Ga.—Minor v. Fincher, 58 S.E.2d 389, 208 Ga. 721.

45. Ga.—Minor v. Fincher, supra.

46. Neb.—Abrams v. Lange, 63 N.W.2d 781, 158 Neb. 512.

64 C.J. p 1072 note 36.

47. Mo.—Conway v. Kansas City Public Service Co., 125 S.W.2d 935, 234 Mo.App. 596, certiorari quashed State ex rel. Kansas City Public Service Co. v. Shain, 134 S.W.2d 58, 345 Mo. 543—Newdiger v. Kansas

verdict that fails to dispose of all the parties is fatally defective.<sup>48</sup> In some jurisdictions silence as to one defendant is held to raise a necessary implication of a finding in favor of, and is sufficient to, support a judgment as to the defendant not named,<sup>49</sup> particularly where the relationships of defendants to plaintiff are different,<sup>50</sup> where the defendant as to whom there is no finding in the verdict was not served,<sup>51</sup> or where the answers of the jury to special interrogatories show that such defendant was not liable.<sup>52</sup> According to other authority, a verdict against one of the defendants and silence as to the other is not a verdict in favor of the latter,<sup>53</sup> but is a failure of the jury to find on all the issues,<sup>54</sup> unless the instructions to the

jury show a meaning to the contrary;<sup>55</sup> and it has been held to be proper for the court to send the jury back to the jury room to reconsider their verdict.<sup>56</sup> A verdict in favor of one defendant, but silent as to a codefendant, is not defective when the plaintiff is entitled to a judgment by default against the codefendant.<sup>57</sup>

**Joint contract.** In actions on a joint contract there cannot be a verdict in favor of one and against other defendants,<sup>58</sup> unless on a plea of the statute of limitations,<sup>59</sup> infancy,<sup>60</sup> or bankruptcy;<sup>61</sup> and a separate verdict against each defendant in such a case is bad.<sup>62</sup> Thus, where the liability of a principal is the measure of the liability of his

City, App., 106 S.W.2d 51, affirmed 114 S.W.2d 1047, 342 Mo. 252—Spangler-Bowers v. Benton, 83 S.W.2d 170, 229 Mo.App. 919.

64 C.J. p 1072 note 37.  
48. Mo.—Newdiger v. Kansas City, App., 106 S.W.2d 51, affirmed 114 S.W.2d 1047, 342 Mo. 252.

49. Ga.—Pickron v. Garrett, 35 S.E. 2d 540, 73 Ga.App. 61.

Ind.—Pittman-Rice Coal Co. v. Hansen, 72 N.E.2d 364, 117 Ind.App. 508—Inter State Motor Freight System v. Henry, 38 N.E.2d 909, 111 Ind.App. 179—Holbrook v. Nolan, 10 N.E.2d 744, 105 Ind.App. 75.

Ky.—Tinsley's Adm'r v. Slate, 251 S.W.2d 883.

N.Y.—Hosinger & Bode v. Eleven Franklin Place, 49 N.Y.S.2d 338, 268 App.Div. 197, affirmed 62 N.E.2d 233, 294 N.Y. 790.

Ohio.—Bryant v. Schrage, 60 N.E.2d 801, 75 Ohio App. 62—Strassner v. D'Atri, 184 N.E. 255, 44 Ohio App. 36.

Wash.—Bickelhaupt v. Inland Motor Freight, 71 P.2d 403, 191 Wash. 467.

64 C.J. p 1072 note 38.

50. Tex.—Taylor v. Houston, etc., R. Co., Civ.App., 80 S.W. 260—Missouri Pac. R. Co. v. Kingsbury, Civ. App., 25 S.W. 322.

51. Ga.—Thomas v. Clarkson, 54 S.E. 77, 125 Ga. 72, 6 L.R.A.N.S. 658. N.Y.—Sternberger v. Bernheimer, 24 N.E. 311, 121 N.Y. 194.

52. Ill.—Cleveland, etc., R. Co. v. Eggmann, 71 Ill.App. 42.

Kan.—Lawson v. Robinson, 75 P. 1012, 68 Kan. 737.

53. Ariz.—Rosenzweig & Sons v. Jones, 72 P.2d 417, 50 Ariz. 302.

Cal.—State Rubbish Collectors Ass'n v. Siliznoff, 240 P.2d 282, 38 Cal.2d 330—Brokaw v. Black-Foxe Military Institute, 231 P.2d 816, 37 Cal.2d 274—Ireland-Yuba Gold Quartz Min. Co. v. Pacific Gas & Elec. Co., 116 P.2d 611, 18 Cal.2d 557—Fennessey v. Pacific Gas & Elec. Co.,

76 P.2d 104, 10 Cal.2d 538—Broome v. Kern Valley Packing Co., 44 P.2d 430, 6 Cal.App.2d 256—Keller v. Smith, 19 P.2d 541, 130 Cal.App. 128.

64 C.J. p 1072 note 42.

#### Finding as to punitive damages

Fact that, in action against employee, his corporate employer, and corporation's vice-president and general manager, for injuries received by plaintiff in altercation allegedly occurring in course of employee's employment by the other defendant, award of punitive damages, made as to the others, was not made against employee did not necessarily result in an implied finding that employee's acts were without malice.—Brown v. Scott Lumber Co., Cal.App., 269 P.2d 891.

54. Cal.—Ireland-Yuba Gold Quartz Min. Co. v. Pacific Gas & Elec. Co., 116 P.2d 611, 18 Cal.2d 557—Broome v. Kern Valley Packing Co., 44 P.2d 430, 6 Cal.App.2d 256—Lloyd v. Boulevard Express, 249 P. 837, 79 Cal.App. 406.

Neb.—Abrams v. Lange, 63 N.W.2d 781, 158 Neb. 512.

#### Setting aside of judgment not required

(1) Where recovery was sought against both principal and agent for injuries sustained because of negligent operation of automobile by agent, and verdict was only against principal, verdict against principal was not required to be set aside on ground that jury exonerated agent and that principal's liability was required to rest on doctrine of respondent superior, since verdict was tantamount to no verdict with respect to agent.—Brokaw v. Black-Foxe Military Institute, 231 P.2d 816, 37 Cal.2d 274.

(2) A judgment against an association was not required to be set aside because the verdict was silent as to the agent of the association who was allegedly the principal tort-feasor, where there was nothing to indicate

that the jury's failure to find with respect to the agent was intended as a verdict in his favor and the proceedings indicated that its failure to do so was due to inadvertence.—State Rubbish Collectors Ass'n v. Siliznoff, 240 P.2d 282, 38 Cal.2d 330.

#### Verdict held not silent as to parties

In reciprocal negligence actions by parties to automobile collision, verdict that evidence was insufficient to place blame of accident on either party, and that, therefore, jury would not render verdict for any party, was sufficient as verdict that neither party had sustained his burden of proof, and thus decided all issues in case, and was not silent as to one, or all of defendants, or issues.—Brand v. Norris, 263 P.2d 456, 121 Cal.App.2d 367.

55. Cal.—Brokaw v. Black-Foxe Military Institute, 231 P.2d 816, 37 Cal.2d 274.

#### Particular instructions held not to affect verdict

Cal.—Ireland-Yuba Gold Quartz Min. Co. v. Pacific Gas & Elec. Co., 116 P.2d 611, 18 Cal.2d 557.

56. Ind.—Federal Union Surety Co. v. Schlosser, 114 N.E. 875, 116 N.E. 759, 66 Ind. App. 199.

Pa.—Bortek v. Philadelphia Rapid Transit Co., 131 A. 856, 285 Pa. 320.

57. Ky.—Green v. May, 147 S.W. 428, 148 Ky. 783.

58. Ga.—Dond v. Harrison, 176 S.E. 374, 179 Ga. 490—Ficks v. Rome Mercantile Co., 175 S.E. 807, 49 Ga. App. 431.

59. Smith v. Mudrey, Com.Pl., 5 Sch. Reg. 391.

64 C.J. p 1072 note 46.

59. Ala.—Ivey v. Gamble, 7 Port. 545.

60. Me.—Cutts v. Gordon, 13 Me. 474, 29 Am D. 520.

Pa.—Dilworth v. Hirst, 1 Phila. 206.

61. Pa.—Dilworth v. Hirst, supra.

Vt.—Miner v. Downer, 20 Vt. 461.

62. Pa.—Day v. Brawley, 1 Pa. 429.

surety as discussed in Principal and Surety § 92, a verdict, in an action against the principal and his surety, against the surety only operates to discharge both the principal and the surety.<sup>63</sup>

*Several plaintiffs claiming in tort.* It has been held that where two plaintiffs claim damages in tort, a finding of no cause of action as to one does not necessarily make a verdict in favor of the other inconsistent;<sup>64</sup> but the rule may be otherwise in certain circumstances,<sup>65</sup> and a verdict in favor of a plaintiff whose right is derived from the other plaintiff, and a verdict against such other plaintiff, are inconsistent verdicts and should be set aside.<sup>66</sup>

#### *Consistency of verdicts as to joint tort-feasors.*

63. Ga.—Frick v. J. R. Watkins Co., 76 S.E.2d 518, 88 Ga.App. 276, reversed on other grounds J. R. Watkins Co. v. Fricks, 78 S.E.2d 2, 210 Ga. 83, opinion conformed to 79 S.E.2d 586, 89 Ga.App. 329—Frick v. Rome Mercantile Co., 175 S.E. 807, 49 Ga.App. 431.

64. Idaho.—Baldwin v. Ewing, 204 P. 2d 430, 69 Idaho 176.

Ill.—Monken v. Baltimore & O. R. Co., 95 N.E.2d 130, 342 Ill.App. 1.  
N.J.—Salmon v. Tuthill, 157 A. 848, 10 N.J.Misc. 96.

N.Y.—Massar v. Bell, 16 N.Y.S.2d 727, 258 App.Div. 924, reargument denied 17 N.Y.S.2d 1000, 258 App.Div. 966.  
Tenn.—Texas Co. v. Ingram, 64 S.W. 2d 208, 16 Tenn.App. 267.

#### **Free medical services**

Verdict for infant in action for injuries was not inconsistent with verdict for defendants on claim for medical expenses by infant's father, where the father was a physician and might not have had to pay attending physician under ethics of medical profession.—Rich v. Central Electrotype Foundry Corp., 3 A.2d 584, 121 N.J.Law 481.

65. N.Y.—Leonard v. Home Owners Loan Corp., 60 N.Y.S.2d 78, 270 App. Div. 363, 785, 867, affirmed 75 N.E. 2d 261, 297 N.Y. 103.

66. N.Y.—Keith v. Appelberg, 77 N.Y.S.2d 349.

#### **Recovery of loss from injury to wife or child**

An award to a husband or parent for medical expenses and loss of consortium or services resulting from injuries to his wife or child is inconsistent with a verdict for defendant with respect to the claim of the wife or child for such injuries.

N.H.—Calley v. Boston & Maine R. R., 32 A.2d 227, 92 N.H. 455.

N.Y.—Reilly v. Shapmar Realty Corporation, 45 N.Y.S.2d 356, 267 App. Div. 198—Zitter v. Pitkin Douglass Corp., 29 N.Y.S.2d 210.

Pa.—Yacabonis v. Gillicks, 101 A. 2d 690, 376 Pa. 247—Slack v. Crozi-

er, 31 Pa.Dist. & Co. 209, 26 North Co. 150—Elser v. Union Paving Co., Com.Pl., 36 Del.Co. 19, affirmed 74 A.2d 529, 167 Pa.Super. 62—Mahon v. Kemper, Com.Pl., 47 Lack.Jur. 63.

67. U.S.—Hamilton v. Thurber, D.C. Minn., 56 F.Supp. 826, reversed on other grounds, C.C.A., 151 F.2d 389.

Cal.—Pease v. San Diego Unified School District, 128 P.2d 621, 54 Cal. App.2d 20.

Fla.—Dr. P. Phillips & Sons v. Kilgore, 12 So.2d 465, 152 Fla. 578—Home Ins. Co. of New York v. Handley, 162 So. 516, 120 Fla. 226.  
Ga.—Hawkins v. Benton Rapid Exp., 62 S.E.2d 612, 82 Ga.App. 819—Joyce v. City of Dalton, 36 S.E.2d 104, 73 Ga.App. 209.

Ill.—Lasko v. Meier, 67 N.E.2d 162, 394 Ill. 71—Pearlman v. W. O. King Lumber Co., 23 N.E.2d 826, 302 Ill. App. 190.

Ky.—Wilburn v. Simons, 196 S.W.2d 356, 302 Ky. 752.

Me.—Candage v. Belanger, 57 A.2d 145, 143 Me. 165—Plante v. Canadian Nat. Rys., 23 A.2d 814, 138 Me. 215.

Miss.—White's Lumber & Supply Co. v. Collins, 192 So. 312, 186 Miss. 659.

Mo.—Hardwick v. Kansas City Gas Co., 195 S.W.2d 504, 355 Mo. 100, 166 A.L.R. 556—Stith v. J. J. Newberry Co., 79 S.W.2d 447, 336 Mo. 467—McCamley v. Union Electric Light & Power Co., App. 85 S.W.2d 200.

Mont.—Bowman v. Lewis, 102 P.2d 1, 110 Mont. 435.

N.J.—Louis Kamm, Inc., v. Flink, 175 A. 62, 113 N.J.Law 582, 99 A.L. R. 1.

N.M.—Miranda v. Halama-Enderstein Co., 18 P.2d 1019, 37 N.M. 87.

N.Y.—Reed v. Cook, 103 N.Y.S.2d 539 Okl.—Kurn v. Manley, 153 P.2d 623, 194 Okl. 574.

Pa.—McBurney v. Wilt, 60 Pa.Dist. & Co. 645, 95 Pittsb.Leg.J. 413.  
S.C.—Chapman-Storm Lumber Corp.

v. Minnesota-South Carolina Land & Timber Co., 190 S.E. 117, 183 S. C. 81.

Tenn.—William White & Co. v. Lichter, 64 S.W.2d 542, 16 Tenn.App. 375.

Utah.—Erickson v. Walgreen Drug Co., 232 P.2d 210, 31 A.L.R.2d 177.  
Wash.—Fletcher v. Sunel, 143 P.2d 538, 19 Wash.2d 596.  
64 C.J. p 1073 note 61.

#### **Dismissal or direction of verdict as to some defendants**

If plaintiff sues more than one joint tort-feasor in the same action, he may, after a favorable verdict against all, dismiss the action as to one and take judgment against the others alone; and court may direct a verdict in favor of one tort-feasor and let the case against the other go to the jury, which may thereupon return a verdict against the other tort-feasor.—Chmielewski v. Marich, 119 N.E.2d 247, 2 Ill.2d 568.

68. Ala.—City of Birmingham v. Wood, 197 So. 885, 240 Ala. 138—Great Atlantic & Pacific Tea Co. v. Traylor, 195 So. 724, 239 Ala. 497—Prudential Ins. Co. of America v. Zeldner, 171 So. 634, 233 Ala. 328.

Cal.—Timbrell v. Suburban Hospital, 47 P.2d 737, 4 Cal.2d 68—Waltemath v. Western States Realty Co., 50 P.2d 451, 9 Cal.App.2d 583.

Ga.—Adams v. Webb, 32 S.E.2d 922, 72 Ga.App. 66.

Ind.—Town of Argos v. Harley, 49 N. E.2d 552, 114 Ind.App. 290.

N.Y.—Sapara v. A. La Sala & Bros., 44 N.Y.S.2d 274, 266 App.Div. 972.  
Tex.—City of Waco v. Criswell, Civ. App. 141 S.W.2d 1046.

69. Ind.—Lower v. Franks, 14 N.E. 885, 17 N.E. 630, 115 Ind. 334.

70. Iowa.—Shelberg v. Jones, 151 N. W. 1066, 170 Iowa 19.

71. Conn.—Fabrizi v. Golub, 55 A.2d 625, 134 Conn. 89.

Ill.—Stefan v. Elgin, J. & E. R. Co., 120 N.E.2d 52, 2 Ill.App.2d 300.  
N.Y.—Thorsen v. Metzgar, 105 N.Y. S.2d 947, 278 App.Div. 421—Chap-

elsewhere the exemption of one defendant from liability by a verdict in favor of another is said to be limited to the cases in which the doctrine of respondeat superior applies;<sup>72</sup> but in any event, where one joint tort-feasor is the sole agency through which the tort is committed, a verdict in favor of that tort-feasor will discharge all others whose liability derives therefrom.<sup>73</sup> However, in some instances it has been held that, even though the verdict is inconsistent in that one defendant is found liable and another not, that is no reason for depriving plaintiff of whatever relief he actually was awarded;<sup>74</sup> and this rule has been applied even in the case of liability based on the doctrine of respondeat superior.<sup>75</sup> In an action for negligence against several defendants, if the allegations and evidence relate wholly to the negligence of a third

person not sued, who was at the time acting for all the defendants jointly, and no direct act on the part of either of the defendants is shown, a verdict for one defendant and against others is inconsistent.<sup>76</sup> A verdict in favor of some of the defendants and against the others, based on conflicting evidence, which is the same as to all defendants, cannot be permitted to stand.<sup>77</sup>

## § 501. Responsiveness to Issues and Evidence

It is a well-settled rule that the verdict must respond to the issues as raised by the pleadings and the whole evidence, and must dispose of all disputed issues in the case.

With respect to responsiveness, it is a well-settled rule that the verdict must respond to the issues,<sup>78</sup> as raised by the pleadings<sup>79</sup> as well as to

man v. Long Island Daily Press Pub. Co., 11 N.Y.S.2d 583, 256 App. Div. 1073.

64 C.J. p 1073 note 54.

### Verdicts held inconsistent

N.Y.—Pomplilio v. McGeary, 129 N.Y.S.2d 13, 283 App.Div. 826—Becker v. Slingerland, 126 N.Y.S.2d 425, 283 App.Div. 1106.

Pa.—Nelson v. Duquesne Light Co., 13 A.2d 299, 338 Pa. 37, 128 A.L.R. 1257.

### Verdicts held not inconsistent

Ind.—Lee Bros. v. Jones, 54 N.E.2d 108, 114 Ind.App. 688.

N.Y.—Perry v. American Bible Soc., 90 N.Y.S.2d 584, 275 App.Div. 914, affirmed 95 N.E.2d 54, 301 N.Y. 703—Kaplan v. City of New York, 56 N.Y.S.2d 924, 269 App.Div. 856—Reynolds v. Patrick, 97 N.Y.S.2d 126, 198 Misc. 201—Lax v. Ajax Transp. Co., 86 N.Y.S.2d 217.

72. Ga.—Southern Ry. Co. v. Garland, 47 S.E.2d 93, 76 Ga.App. 729.  
Kan.—Rogers v. City of Coffeyville, 147 P. 816, 95 Kan. 171.

73. Ky.—Graefenhahn v. Rakestraw, 130 S.W.2d 66, 279 Ky. 228.  
Md.—Barone v. Winebrenner, 55 A.2d 505, 189 Md. 142.

Mo.—Blasiny v. Albert Wenzilck Real Estate Co., 138 S.W.2d 721, 235 Mo.App. 526.

Pa.—Kopka v. Bell Tel. Co. of Pa., 81 A.2d 232, 371 Pa. 444.

S.C.—Chapman-Storm Lumber Corp. v. Minnesota-South Carolina Land & Timber Co., 190 S.E. 117, 183 S.C. 31—National Bank of Honesda v. Thomas J. Barrett, Jr. & Co., 174 S.E. 581, 173 S.C. 1.

Va.—Virginia State Fair Ass'n v. Burton, 28 S.E.2d 716, 182 Va. 355. Effect of verdict against master only see Master and Servant § 619 b. Exemption of one joint wrongdoer as exoneration of other see Torts § 39.

74. Ill.—Welter v. Bowman Dairy Co., 47 N.E.2d 739, 318 Ill.App. 305.

Verdict as to scire facias defendant. A plaintiff, after he had established the merits of his case against original defendant, should not be deprived of his judgment against original defendant because verdict obtained by original defendant against additional scire facias defendants was inconsistent and was a nullity because scire facias was not issued within the time allowed by court rule.—Timlin v. City of Scranton, 12 A.2d 501, 139 Pa.Super. 508.

75. Miss.—Gulf Refining Co. v. Myrick, 71 So.2d 217.

76. Neb.—Torsha v. Nebraska Machine Plow Co., 143 N.W. 453, 94 Neb. 612.

77. N.Y.—Caperna v. Williams-Bauer Corp., 53 N.Y.S.2d 295, 184 Misc. 192.

64 C.J. p 1073 note 57.

78. U.S.—U. S. v. Certain Lands in Town of Highlands, D.C.N.Y., 47 F.Supp. 934.

Ala.—Millican v. Mintz, 68 So.2d 702, 260 Ala. 22—Penney v. State, 155 So. 576, 229 Ala. 36—Ramer v. Fletcher, 29 Ala. 470—Weems v. State, 139 So. 571, 24 Ala.App. 590.  
Ga.—Patterson v. Fountain, 4 S.E.2d 38, 188 Ga. 473.

Ill.—Corpus Juris cited in Anderson v. Krancic, 68 N.E.2d 315, 318, 328 Ill.App. 364.

Mo.—McMonigal v. North Kansas City Development Co., 129 S.W.2d 75, 233 Mo.App. 1040.

N.C.—Cody v. England, 5 S.E.2d 832, 216 N.C. 604.

N.Y.—Beebe v. Central Plaza Hall, 100 N.Y.S.2d 24, 277 App.Div. 355.

Ohio.—Waterman v. Wheeler, 5 Ohio Supp. 1.

Okl.—Shamblin v. Shamblin, 241 P.2d 941, 206 Okl. 133.

64 C.J. p 1074 note 65.

### Verdicts held responsive as to issues

Ky.—Baugh v. Williams' Adm'r, 94 S.W.2d 330, 264 Ky. 167.

Md.—Coulter v. Western Theological Seminary, 29 Md. 69.

Mo.—Cochran v. Jefferson County Lumber Co., App., 132 S.W.2d 32.

64 C.J. p 1074 note 65 [a].

### Verdicts held not responsive as to issues

Cal.—Meinke v. Oakland Garage, 79 P.2d 91, 11 Cal.2d 255.

Mich.—White v. Huffmaster, 32 N.W. 2d 447, 321 Mich. 225.

Mo.—National Cash Register Co. v. Kay, 93 S.W.2d 260, 230 Mo.App. 1046.

64 C.J. p 1074 note 65 [b].

79. U.S.—U. S. v. Certain Lands in Town of Highlands, D.C.N.Y., 47 F.Supp. 934.

Ga.—Patterson v. Fountain, 4 S.E.2d 38, 188 Ga. 473.

Iowa.—Slessenger v. Puth, 248 N.W. 352, 216 Iowa 916.

Mo.—Albrecht v. Piper, App., 164 S.W.2d 105—National Cash Register Co. v. Kay, 93 S.W.2d 260, 230 Mo. App. 1046.

N.J.—Gunter v. Morey Larue Laundry Co., 29 A.2d 713, 129 N.J.Law 345, affirmed 33 A.2d 893, 130 N.J. Law 557.

Ohio.—Ekleberry v. Sanford, 57 N.E. 2d 270, 73 Ohio App. 571.

Tenn.—Redding v. Barker, 230 S.W. 2d 202, 33 Tenn.App. 132.

Tex.—Coats v. Stewart, Civ.App., 135 S.W.2d 1026—Karr v. Cockerham, Civ.App., 71 S.W.2d 905, error dismissed.

W.Va.—Lawson v. West Virginia Newspaper Pub. Co., 29 S.E.2d 3, 126 W.Va. 470.

64 C.J. p 1075 note 66.

### Verdict held in accordance with pleadings

Ga.—Wayne v. Bagby, 178 S.E. 731, 180 Ga. 299.

such issues as may be established by the whole<sup>80</sup> evidence.<sup>81</sup> Thus the verdict must dispose of all the disputed issues in the case.<sup>82</sup> However, it is not necessary that the verdict be in the words of the issue,<sup>83</sup> or technically embrace all the issues,<sup>84</sup> and it is sufficient if in sense or legal effect it substantially responds to the pleadings and covers the issues.<sup>85</sup> Thus, it cannot be objected to a verdict that it is too broad if every essential matter put in issue is concluded by it;<sup>86</sup> nor is it an objection that it contains surplusage.<sup>87</sup> Under some statutes, if the verdict is not responsive to the issues submitted to the jury, the court may call their attention thereto and send them back for further deliberation.<sup>88</sup>

The jury need not find on an issue as to which there is no evidence<sup>89</sup> or which is established by

uncontroverted evidence;<sup>90</sup> or dispose of matters not within the issues made by the pleadings,<sup>91</sup> or find on issues which have been removed from the controversy by the admissions of the parties.<sup>92</sup> So also, a verdict which does not determine the issue in accordance with the undisputed contention of either party,<sup>93</sup> or which contradicts facts admitted by the pleadings,<sup>94</sup> or is contrary to the undisputed evidence,<sup>95</sup> or improperly considers an issue which has been withdrawn,<sup>96</sup> is erroneous. A verdict which finds that a party is entitled to something which is not claimed in the pleadings is not responsive to the issues.<sup>97</sup> A verdict based on, or pursuant to evidence tending to support, a different theory from that presented in the pleadings cannot stand.<sup>98</sup> However, it has been held that rea-

Ky.—Howard v. Risnor, 174 S.W.2d 404, 295 Ky. 320.  
64 C.J. p 1075 note 66 [b].

**Support by amended declaration**  
Mich.—King v. Herfurth, 11 N.W.2d 198, 306 Mich. 444.

#### Sufficiency of pleadings

When verdict is tendered by jury, question of sufficiency of pleadings to support verdict is presented to trial court.—Haberly v. Farmers' Mut. Fire Relief Ass'n, 294 P. 534, 135 Or. 32.

80. Ala.—Southern Ry. Co. v. Gantt, 98 So. 192, 210 Ala. 383.

Okl.—Hart Grocery Co. v. Hunt, 52 P. 66, 176 Okl. 32.—Sturm v. American Bank & Trust Co. of Ardmore, 44 P.2d 974, 172 Okl. 294.

81. U.S.—U. S. v. Certain Lands in Town of Highlands, D.C.N.Y., 47 F. Supp. 934.

Ala.—Millican v. Mintz, 68 So.2d 702, 260 Ala. 22.

Colo.—Harrison Const. Co. v. Nissen, 199 P.2d 886, 119 Colo. 42.

Ga.—Southern Stages v. Brown, 46 S.E.2d 765, 76 Ga.App. 694.

Iowa.—Smith v. Standard Oil Co., 255 N.W. 674, 218 Iowa 709.

N.H.—Gelinus v. J. J. Newberry Co., 8 A.2d 753, 90 N.H. 812.

N.J.—Panko v. Flintkote Co., 80 A. 2d 302, 7 N.J. 55.

Or.—Callander v. Brown, 178 P.2d 922, 181 Or. 279.

Pa.—Haney v. Bobish, 33 A.2d 268, 153 Pa.Super. 191.—Martin v. Prudential Ins. Co. of America, Com. Pl., 33 Luz.Leg.Reg. 257.

S.C.—Mishoe v. Atlantic Coast Line R. Co., 197 S.E. 97, 186 S.C. 402.

64 C.J. p 1075 note 68—9 C.J. p 125 note 38.

**Verdict held supported by proof**  
Ky.—Howard v. Risnor, 174 S.W.2d 404, 295 Ky. 320.

Mich.—King v. Herfurth, 11 N.W.2d 198, 306 Mich. 444.

**Support for all charges**  
Mo.—Carlisle v. Tilghmon, 159 S.W. 2d 663.

**Legal evidence properly before jury**  
N.J.—Palestroni v. Jacobs, 77 A.2d 183, 10 N.J.Super. 266.

82. Mo.—Newdiger v. Kansas City, App., 106 S.W.2d 51, affirmed 114 S.W.2d 1047, 342 Mo. 252.

Tex.—Southern Pine Lumber Co. v. Whiteman, Civ.App., 104 S.W.2d 635, error dismissed.

**Consolidated cases**  
W.Va.—Vaughan v. Oates, 37 S.E.2d 479, 128 W.Va. 554.

83. Ill.—Illinois Cent. R. Co. v. Reardon, 41 N.E. 871, 157 Ill. 372.  
64 C.J. p 1075 note 73.

84. La.—Anderson v. Dinn, 17 La. 168.

85. Mo.—McMonigal v. North Kansas City Development Co., 129 S.W. 2d 75, 233 Mo.App. 1040.  
64 C.J. p 1075 note 75.

86. Ala.—McRae v. Colclough, 2 Ala. 74.

87. Ala.—Lassiter v. Thompson, 6 So. 33, 85 Ala. 223.

64 C.J. p 1075 note 77.

88. Tex.—Ft. Worth, etc., R. Co. v. Mackney, 18 S.W. 949, 83 Tex. 410.

89. Mo.—Gillespie v. Terminal R. Ass'n of St. Louis, App., 204 S.W. 2d 598.

64 C.J. p 1075 note 69.

90. Mont.—Consolidated Gold & Sapphire Mining Co. v. Struthers, 111 P. 152, 41 Mont. 565.

91. Ga.—Price v. Bell, 15 S.E. 810, 88 Ga. 740.

64 C.J. p 1075 note 71.

92. Mont.—Consolidated Gold & Sapphire Mining Co. v. Struthers, 111 P. 152, 41 Mont. 565.

93. Fla.—Goodno v. South Florida Farms Co., 116 So. 23, 95 Fla. 90.

94. S.C.—Lorick & Lowrance v. Julius H. Walker & Co., 150 S.E. 789, 153 S.C. 309.

64 C.J. p 1075 note 79.

95. Ga.—Savannah River Lumber Co. v. Strickland, 121 S.E. 696, 31 Ga. App. 704.

96. Ill.—Compass Sales Corp. v. National Mineral Co., 53 N.E.2d 319, 321 Ill.App. 522, error dismissed 57 N.E.2d 888, 388 Ill. 281.

#### Quantum meruit

Where plaintiff originally submitted an additional issue seeking recovery on a quantum meruit, which issue was subsequently withdrawn, and defendant, though denying existence of a contract, admitted that plaintiff had performed some services, a verdict for plaintiff for less than amount sought indicated that jury improperly considered issue seeking recovery on a quantum meruit.—Compass Sales Corp. v. National Mineral Co., supra.

97. Mo.—Lanowah Inv. Co. v. John Hancock Mut. Life Ins. Co., 162 S.W.2d 307, 236 Mo.App. 1062.

N.C.—Featherstone v. Glenn, 35 S.E. 2d 243, 225 N.C. 404.

W.Va.—Cline v. Evans, 31 S.E.2d 681, 127 W.Va. 113.

64 C.J. p 1075 note 81.

#### Verdict held not violative of rule

Where amount of verdict indicated jury had accepted plaintiff's contention as to amount due on notes after giving defendant credit for amount due him from plaintiff on other notes, verdict did not show on its face that it was based on written memorandum signed by the parties showing balance due plaintiff instead of on the notes.—Koenig v. Hubbard, 163 P.2d 536, 196 Okl. 149.

98. Ill.—Corpus Juris cited in Anderson v. Krancic, 66 N.E.2d 316, 318, 328 Ill.App. 364.

Kan.—Uhl v. Phillips Petroleum Co., 190 P.2d 849, 164 Kan. 401.

Tex.—Coffield v. Sorrells, Civ.App., 183 S.W.2d 223, affirmed 187 S.W.2d 980, 144 Tex. 31.

64 C.J. p 1075 note 82.

sonable inferences drawn from the evidence are proper bases for a verdict.<sup>99</sup> The same rules will be applied in equitable as in legal actions to determine the sufficiency of the verdict.<sup>1</sup>

*Absence of proof of cause of action.* A verdict for defendant is required when the cause of action laid is not proved, since a verdict founded on any other evidence is not responsive to the issues raised by the pleadings.<sup>2</sup>

*Issue misunderstood.* A verdict will be set aside when it is apparent from its form that the jury misapprehended the issue.<sup>3</sup>

*Absence of issue.* The verdict of a jury without a legal issue to try is a nullity.<sup>4</sup>

*Amount of recovery.* The amount of recovery awarded by the verdict must be responsive to, and in conformity with, the issues as presented by the pleadings and evidence.<sup>5</sup> A verdict which is not the result of a compromise is responsive to the issues, although it does not find an amount due either in accordance with the claims of plaintiff or defendant.<sup>6</sup> Where the issue of punitive damages is not submitted to the jury, only actual damages are recoverable.<sup>7</sup> The mere fact that the verdict in an action for false representations inducing a sales

contract equalled the price paid does not, as a matter of law, show that the jury ignored all other items concerned in the case.<sup>8</sup> In an action by a partnership where the parties are not claiming as individuals, an award in the verdict in both capacities is erroneous.<sup>9</sup> A verdict for the reasonable value of services rendered is unauthorized under pleadings and proof of services under an express contract;<sup>10</sup> and where a cause of action is based on an express contract, and the answer simply denies the making of any contract, an award for a sum other than the sum provided for in the express contract alleged will be not responsive to the issues.<sup>11</sup> Where several items of damages are alleged, a verdict specifying the damages to which plaintiff is entitled has been held to be a verdict in favor of defendant on the other items alleged.<sup>12</sup> A disparity between the amounts allowed for various items of damage claimed will not render the verdict improper unless it indicates perversity on the part of the jury.<sup>13</sup>

*Counterclaim or set-off.* A verdict failing to dispose of cross pleas,<sup>14</sup> or a counterclaim,<sup>15</sup> or plea of reconvention,<sup>16</sup> or a cross complaint<sup>17</sup> is fatally defective as not disposing of the issues, at least where there is nothing to show that such omission

#### Cause of death

N.Y.—Morgan v. Indemnity Ins. Co. of North America, 88 N.Y.S.2d 835, 195 Misc. 53, reversed on other grounds 93 N.Y.S.2d 16, 276 App. Div. 123, reversed on other grounds 99 N.E.2d 228, 302 N.Y. 435, motion denied 100 N.E.2d 192, 302 N.Y. 340.

#### Theory held not necessarily different

Statement of jury's foreman, when jury rendered a general verdict for plaintiff, that defendant was negligent in not having proper supervision at revolving door in which plaintiff was injured, did not show that jury arrived at its verdict on an erroneous theory, since defect in braking device of door might create such a hazard that reasonable care would call for supervision of traffic through door until defect was remedied.—Raga v. S. S. Kresge Co., 84 N.Y.S.2d 776, 274 App.Div. 966.

99. Conn.—Cadwell v. Watson, 60 A.2d 168, 134 Conn. 640.

#### Inferences held reasonable

Plaintiffs' claims of proof that defendant's taxicab driver was primarily engaged in defendant's business in pushing a stalled automobile and had created an unusual hazard while so engaged, were justifiable under the evidence in personal injury action, even though both defendant and taxicab driver testified that defendant

had forbidden driver to use the taxicab to push automobiles.—Cadwell v. Watson, supra.

1. Tex.—Wells v. Barnett, 7 Tex. 584.

2. Ga.—Garrett v. Louisville & N. R. Co., 72 S.E.2d 550, 86 Ga.App. 806.—Livsey v. Georgia Ry. & Electric Co., 91 S.E. 1074, 19 Ga.App. 687.

3. N.Y.—Eastern Rolling Mills Co. v. Hercules Steel Corporation, 197 N.Y.S. 628.

4. W.Va.—Jenkins v. Spittler, 199 S. E. 368, 120 W.Va. 514.  
64 C.J. p 1075 note 86.

5. Okl.—Riedt v. Winters Drug Co., 128 P.2d 1008, 191 Okl. 264.

#### Verdicts held proper

Mo.—Salmons v. Dun & Bradstreet, 162 S.W.2d 245, 349 Mo. 498, 141 A.L.R. 674.—McMonigal v. North Kansas City Development Co., 129 S.W.2d 75, 233 Mo.App. 1040.  
Tenn.—Third Nat. Bank v. American Equitable Ins. Co. of New York, 178 S.W.2d 915, 27 Tenn.App. 243.

6. Mo.—Peppas v. H. Ehrlich & Sons Mfg. Co., 71 S.W.2d 821, 228 Mo. App. 556.  
64 C.J. p 1075 note 88.

Arriving at verdict by chance, compromise, or taking of average see supra § 472.

#### Verdict held not contrary to pleadings

Cal.—Casaretto v. DeLucchi, 174 P.2d 328, 76 Cal.App.2d 800.

7. Miss.—Gulf. M. & N. R. Co. v. Graham, 117 So. 881, 163 Miss. 72.

8. Conn.—Kornblau v. McDermant, 98 A. 587, 90 Conn. 624.

9. Kan.—McGarr v. E. V. Schnoor Cigar Co., 266 P. 73, 125 Kan. 760.

10. N.Y.—Beldner v. Schendler Realty Co., 220 N.Y.S. 465, 220 App.Div. 17.

11. Mo.—Bigham v. Schneider, App., 157 S.W.2d 547.

12. Ala.—Simonetti v. Carlton, 82 So. 553, 17 Ala.App. 105.

13. Wis.—Bent v. Jonet, 252 N.W. 290, 213 Wis. 635.

#### Awards held not to indicate perversity

Wis.—Bent v. Jonet, supra.

14. Tex.—Ft. Worth Belt Ry. Co. v. Perryman, Civ.App., 158 S.W. 1181.  
64 C.J. p 1076 note 94.

15. Conn.—Greco v. Keenan, 161 A. 100, 115 Conn. 704.  
64 C.J. p 1076 note 95.

16. Tex.—Knox City Milling Co. v. Farmers' State Bank of Knox City, Civ.App., 141 S.W. 134.

17. Tex.—Browne v. Fechner, Civ. App., 159 S.W. 461.  
64 C.J. p 1076 note 97.

was intentional rather than inadvertent.<sup>18</sup> Where no set-off is pleaded a verdict in favor of defendant for a certain sum cannot stand.<sup>19</sup> Where the verdict is a finding "neither for the plaintiff nor the defendant," it has been held sufficiently to pass on the issues in the primary suit and on the counterclaim.<sup>20</sup>

**Conformity to instructions.** A verdict may be sufficiently responsive to, and may dispose of, the issues under the law and the facts of the case although it does not follow the instructions given by the court.<sup>21</sup> Where an instruction directs a verdict for either party on a hypothesized statement of facts, the jury must find all the facts hypothesized to exist before finding a verdict thereunder.<sup>22</sup>

## § 502. Several Counts or Issues

A general verdict on two or more issues is good where it appears that all issues are determined by the verdict, but not otherwise; and where separate issues are set up by separate causes of action or by separate pleas all such issues should be disposed of by the verdict.

A general verdict on two or more issues is good where the finding necessarily shows that the subject matter of all the issues was determined by the verdict;<sup>23</sup> and where several issues are left to the jury, if one found by them necessarily negatives others which they have failed to find, the judgment will stand.<sup>24</sup> A verdict capable of a construction in which it may be understood as comprehending all the issues is good.<sup>25</sup> A statute providing that a

general verdict, although it may not in terms answer every issue joined, is nevertheless held to embrace every issue, unless exception is taken at the term at which the verdict is rendered, is not limited to the effect of a general verdict on two or more counts,<sup>26</sup> but includes a general verdict on every issue joined whether the issue is joined by plea to the declaration, or by replication to an affirmative plea and joinder of issue thereon, or otherwise.<sup>27</sup>

**Separate counts.** A general verdict is not objectionable, where the petition, although containing two or more counts, states substantially only one cause of action,<sup>28</sup> or where the several counts relate to the same transaction,<sup>29</sup> or where plaintiff might have included all that the petition sets up in one count instead of two,<sup>30</sup> and a recovery on either count would bar a suit on the other count.<sup>31</sup> Where there are two counts in a declaration, and evidence given on both and a general charge by the court on the facts applying to each count, a general verdict on both counts is not erroneous.<sup>32</sup> Where a verdict for plaintiff states the items on which the jury found, defendant is not prejudiced by the failure of the jury to specify in the verdict the counts on which the verdict was based.<sup>33</sup> Where the jury finds for plaintiff on both of two independent paragraphs of the complaint, the judgment will not be reversed for error in the finding on the second paragraph if that on the first paragraph is proper, and the paragraph is sufficient to support the recovery.<sup>34</sup>

18. Tex.—Browne v. Fechner, Civ. App., 159 S.W. 461.

**Verdict held not unauthorized**

Ga.—Cauthorn Motor Co. v. Wheeler, 176 S.E. 683, 49 Ga.App. 582.

**Verdict held to dispose of counterclaim**

Mo.—Ragsdale v. Young, App., 215 S.W.2d 514.

19. Pa.—Glass v. Blair, 4 Pa. 136—Ransing v. Bender, 3 Lanc.L.Rev. 193.

20. Ky.—Fritz v. Roberts, 94 S.W.2d 1016, 264 Ky. 418.

21. Mo.—Commercial Nat. Bank of Kansas City, Kan. v. White, 254 S.W.2d 606.

22. Ala.—Tennessee Coal, Iron & R. Co. v. Barker, 60 So. 486, 6 Ala.App. 413.

23. Ga.—Owen v. Anderson, 156 S.E. 864, 54 Ga.App. 53.

Mich.—Hazard v. Great Central Transport Corporation, 258 N.W. 210, 270 Mich. 60.

N.Y.—O'Hara v. Derschug, 272 N.Y. S. 189, 241 App.Div. 513.

Va.—Northern Va. Power Co. v. Bailey, 73 S.E.2d 425, 194 Va. 464, 64 C.J. p 1076 note 1.

24. Tex.—Levy v. Dunken Realty Co., Civ.App., 178 S.W. 984, 179 S.W. 679.

64 C.J. p 1076 note 2.

25. Mass.—Porter v. Rummary, 10 Mass. 64.

26. Tenn.—Summers v. Bond-Chadwell Co., 145 S.W.2d 7, 24 Tenn.App. 357.

27. Tenn.—Summers v. Bond-Chadwell Co., supra.

28. Mo.—Rossen v. Rice, 87 S.W.2d 213, 230 Mo.App. 109.

N.M.—Armijo v. National Surety Corp., 268 P.2d 339.

Okla.—Magnolia Petroleum Co. v. Norvell, 240 P.2d 80, 205 Okl. 645.

64 C.J. p 1076 note 4.

**Identical counts**

Ga.—Rowland v. Elkin, 69 S.E.2d 388, 85 Ga.App. 301.

**Counts held to state separate causes of action**

Mich.—Swift v. Applebone, 23 Mich. 252.

3 C.J. p 113 note 13 [a].

29. Wis.—Cooper v. Chicago & N.W. Ry. Co., 145 N.W. 203, 155 Wis. 614, 64 C.J. p 1076 note 5.

**Separate verdicts held not required**

Ala.—U. S. Fidelity & Guaranty Co. v. Miller, 179 So. 239, 235 Ala. 340.

—Bridwell v. Brotherhood of Railroad Trainmen, 150 So. 338, 227 Ala. 443.

Mass.—John A. Frye Shoe Co. v. Williams, 46 N.E.2d 1, 312 Mass. 656.

30. Mo.—Leu v. St. Louis Transit Co., 85 S.W. 137, 110 Mo.App. 458—Taylor v. Springfield, 61 Mo.App. 263.

31. Mo.—Silcox v. McKinney, 64 Mo. App. 330—Akers v. Ray County Sav. Bank, 63 Mo.App. 316.

32. N.C.—Morehead v. Brown, 51 N.C. 367.

W.Va.—Humphrey v. Virginian Ry. Co., 54 S.E.2d 204, 132 W.Va. 250.

33. Cal.—**Corpus Juris cited in** Oakes v. Baker, 192 P.2d 460, 461, 85 Cal.App.2d 168.

Ill.—Donk Bros. Coal, etc., Co. v. Stroetter, 82 N.E. 260, 229 Ill. 134.

34. Ind.—Baltimore, etc., R. Co. v. Roberts, 67 N.E. 530, 161 Ind. 1.



*Distinct causes of action.* Generally, where the petition or complaint sets up several different and distinct causes of action, the jury should find a separate verdict as to each cause,<sup>35</sup> or designate the cause of action on which the verdict is rendered,<sup>36</sup> at least where they are pleaded in the alternative.<sup>37</sup> However, the rule is not universal,<sup>38</sup> and it is held that a general verdict by the jury without stating on which of several causes of action the verdict was rendered is not reversible error,<sup>39</sup> particularly a verdict in damages substantially responsive to all the issues,<sup>40</sup> or where at the trial all the counts but the one found on were ignored,<sup>41</sup> or withdrawn from the consideration of the jury by instruction,<sup>42</sup> or where the jury were instructed that they must find for plaintiff as to the existence of each cause of action before any damages could be assessed thereon,<sup>43</sup> or where the extent of defendant's liability under each of several counts in the petition is undisputed, if he is liable at all,<sup>44</sup> or when the causes of action were stated in a single count.<sup>45</sup> If a general verdict for one party virtually answers and negatives all the issues, it is sufficient.<sup>46</sup> It has been held that a general verdict, in the absence of a showing to the

contrary, may be applied to all causes of action,<sup>47</sup> and may be sustained if one of such causes is tried without error,<sup>48</sup> although it has been held to the contrary by other authorities that there must be no error as to any of the causes.<sup>49</sup>

*Verdict for and against plaintiff on separate counts.* A verdict may be for defendant on one count and for plaintiff on other counts;<sup>50</sup> and where the jury specify the counts on which a finding for plaintiff is based it is in effect a finding for defendant on all other counts.<sup>51</sup> However, such implied finding is not a finding against the truth of the facts alleged so as to invalidate a verdict based on many of the same facts under another count.<sup>52</sup> A party can have but one recovery where all counts relate to the same transaction;<sup>53</sup> consequently a verdict for plaintiff on one of the counts and a denial of recovery on the others based on the same transaction is not error.<sup>54</sup>

*Receipt of separate verdicts.* If a special verdict on each issue is desired it should be demanded.<sup>55</sup> It is not error for the court to receive separate verdicts on separate counts;<sup>56</sup> and a statute authorizing the joining of separate causes of action in one action carries with it, without an express

35. Ky.—*Corpus Juris* cited in Long's Exrs v. Bischoff, 127 S.W. 2d 851, 856, 277 Ky. 842.

Mo.—*State v. Duille*, 45 Mo. 269—Howard v. Clark, 43 Mo. 344—Rosen v. Rice, 87 S.W.2d 213, 230 Mo. App. 109.

N.Y.—*Brown v. Great Atlantic & Pacific Tea Co.*, 89 N.Y.S.2d 247, 275 App.Div. 304.

Okl.—*Shamblin v. Shamblin*, 241 P.2d 941, 206 Okl. 133—*Magnolia Petroleum Co. v. Norvell*, 240 P.2d 80, 205 Okl. 645—*Bunch v. Perkins*, 180 P.2d 664, 198 Okl. 517—*Davon Oil Co. v. Steele*, 98 P.2d 618, 186 Okl. 380. Pa.—*Fisher v. Diehl*, 40 A.2d 912, 156 Pa.Super. 476.

64 C.J. p 1077 note 11.

*Particular claims held separate causes of action.* Colo.—*Staten v. Famularo*, 253 P. 1066, 81 Colo. 121.

N.Y.—*Slater v. State*, 82 N.Y.S.2d 313, 192 Misc. 826, appeal dismissed 93 N.Y.S.2d 712, 276 App.Div. 824.

36. Conn.—*Freedman v. New York*, N. H. & H. R. Co., 71 A. 901, 81 Conn. 601, 15 Ann.Cas. 464.

37. Ohio.—*Womack v. Hollon*, App., 102 N.E.2d 26.

38. Ariz.—*American Surety Co. of New York v. Hatch*, 206 P. 1075, 24 Ariz. 66.

64 C.J. p 1077 note 13.

*Discretionary with trial judge*

Requiring, or refusing to require, jury to return separate general ver-

dicts, is within trial judge's discretion.—*Breslin v. Blair*, 60 S.W.2d 337, 249 Ky. 178.

39. Ga.—*Atlantic Coast Line R. Co. v. Singletary*, 55 S.E.2d 827, 80 Ga. App. 297.

64 C.J. p 1077 note 14.

*Discretion of court*

Where complaint pleaded six causes of action, trial court might have submitted case to jury for a separate verdict on each cause of action but was not required to do so.—*Sunset Oil Co. v. Vertner*, 208 P.2d 906, 34 Wash.2d 268.

40. Va.—*Hansbrough v. Neal*, 27 S. E. 593, 94 Va. 722.

64 C.J. p 1077 note 15.

41. Mo.—*Dougherty v. St. Louis, etc., R. Co.*, 62 Mo. 554.

64 C.J. p 1077 note 16.

42. Mo.—*Mitchell v. St. Louis, etc., R. Co.*, 92 S.W. 111, 116 Mo.App. 81.

43. Wis.—*Pfister v. Milwaukee Free Press Co.*, 121 N.W. 938, 139 Wis. 627.

44. Okl.—*Midland Valley R. Co. v. Hardesty*, 134 P. 400, 38 Okl. 559.

45. Mo.—*Slack v. Whitney*, App., 231 S.W. 1060.

46. Okl.—*Shamblin v. Shamblin*, 241 P.2d 941, 206 Okl. 133.

47. N.J.—*Harper, etc., Co. v. Mountain Water Co.*, 56 A. 297, 65 N.J. Eq. 479.

Pa.—*Connecticut General Life Ins. Co. v. McMurdy*, 89 Pa. 363.

48. Ohio.—*Knisely v. Community Traction Co.*, 180 N.E. 654, 125 Ohio St. 131—*Remix v. Sisler*, 156 N.E. 240, 24 Ohio App. 162.

49. Colo.—*Staten v. Famularo*, 253 P. 1066, 81 Colo. 121.

Ill.—*Pittsburgh, C. & St. L. Ry. Co. v. Gage*, 121 N.E. 582, 286 Ill. 213.

50. Ark.—*Hanger v. Dodge*, 24 Ark. 205.

Iowa.—*Miller v. Brown*, 42 N.W. 561. Count in tort and count in contract Mass.—*Higgin v. Gilchrist Co.*, 17 N.E.2d 160, 301 Mass. 386.

51. Ala.—*Central of Georgia Ry. Co. v. Corbitt*, 118 So. 755, 218 Ala. 410. 64 C.J. p 1077 note 25.

52. Mo.—*Moore v. St. Joseph & G. I. Ry. Co.*, 188 S.W. 1035, 288 Mo. 31, affirmed 37 S.Ct. 278, 243 U.S. 311, 61 L.Ed. 741.

53. Mo.—*Third Nat. Bank of St. Louis v. St. Charles Savings Bank*, 149 S.W. 495, 244 Mo. 554.

54. Mo.—*Third Nat. Bank of St. Louis v. St. Charles Savings Bank*, supra.

55. Me.—*McMullen v. Corkum*, 54 A.2d 753, 143 Me. 47. 64 C.J. p 1078 note 29.

56. Mo.—*Lynch v. Western Union Telegraph Co.*, 18 S.W.2d 535, 224 Mo.App. 50.

provision or rule of court, authority for the court to direct that separate verdicts be returned.<sup>57</sup>

*Valid and invalid verdicts in consolidated cases.* Where several cases are consolidated for trial simply as a time-saving device to preclude a series of separate trials based on the same general facts, even though certain verdicts are incomplete or improper, that fact alone will not vitiate the others.<sup>58</sup>

*Single or separate pleas.* A general verdict is an answer to all the counts of a declaration where the general issue was pleaded to all;<sup>59</sup> but a verdict on the general issue only is erroneous where the general issue and special pleas are pleaded.<sup>60</sup> Where defendant interposes several pleas to a single count, or to several counts founded on the same transaction, a general verdict for plaintiff is a finding against defendant on all the issues and is sufficient.<sup>61</sup> A special verdict for plaintiff on one of such issues, ignoring the others, is bad,<sup>62</sup> unless it is a necessary conclusion from the record that the jury considered all the issues and found them against defendant.<sup>63</sup> Under some statutes a verdict in defendant's favor should show on which of the several pleas it was rendered;<sup>64</sup> and under such a statute it has been held that plaintiff may invoke this requirement at any time before the verdict has been finally received and the jury dispersed.<sup>65</sup> A requirement that a verdict for a defendant who relies on separate defenses state on which of the defenses it is based does not apply if the defenses are admissible under mere denials, but it is applicable if the defenses are or should be specially pleaded.<sup>66</sup>

*Pleas in bar and in abatement.* Where there are pleas in abatement and in bar, a general verdict is sufficient if the finding is in favor of the same party as to both sets of pleas;<sup>67</sup> otherwise the verdict should be a special finding separately as to each.<sup>68</sup> When a case is tried on both a plea in abatement and a plea in bar, the jury, in the event of finding for defendant, should indicate the issue on which they found,<sup>69</sup> although it has been held that where the issues are tried together a general finding for plaintiff is to be construed as a finding against all the pleas.<sup>70</sup>

*Plea of venue.* The jury should be required to make a separate finding on a plea of venue.<sup>71</sup>

### § 503. — Defective, Immaterial, or Inconsistent Counts or Issues

It is frequently, although not universally, held that where a general verdict is given on several counts the verdict will be sustained if any one or more of the counts are good. Whether a general verdict on inconsistent counts or defenses or immaterial counts will be sustained depends on the circumstances of the particular case.

In some jurisdictions in the absence of statute a general verdict cannot be sustained where there are two counts in the petition stating separate causes of action, one good and one bad, and the court has erroneously submitted the bad count as well as the good one to the consideration of the jury,<sup>72</sup> particularly where the erroneous counts have been submitted to the jury over protest by demurrer,<sup>73</sup> unless the evidence adduced at the trial is applicable only to the good counts,<sup>74</sup> although where there is but one cause of action stated in

57. Mich.—Lewis v. Bricker, 209 N. W. 332, 235 Mich. 656.

58. N.J.—Paolercio v. Wright, 67 A. 2d 168, 2 N.J. 412.

#### Assent of required number of jurors

Where bus passenger injured in collision between bus and automobile sued the bus company, its driver, and the motorist charging each defendant individually with negligence, charging the company and its driver jointly with negligence, and all three defendants jointly, and first poll of the jury found the company and driver negligent, passenger was entitled to entry of verdict in his favor regardless of fact that poll also showed that requisite number of jurors had not reached agreement with respect to liability of the motorist on other counts of the complaint in which he was joined as defendant.—Malinauskas v. Public Service Interstate Transp. Co., 78 A.2d 268, 6 N. J. 269.

59. Ill.—Parker v. Fisher, 39 Ill. 164.

60. Ohio.—Powell v. Harter, 5 Ohio 269.

61. Pa.—Tibbs v. Brown, 2 Grant 39.

62. Ga.—Wells v. Daniel, 15 S.E. 463, 89 Ga. 330.

63. C.J. p 1078 note 34.

64. Minn.—Armstrong v. Hinds, 9 Minn. 356.

65. C.J. p 1078 note 35.

66. R.I.—Carroll v. Graham, 8 R.I. 242.

67. Ga.—Ventress v. Rosser, 73 Ga. 534.

68. C.J. p 1078 note 37.

69. Ga.—D. T. Crockett & Co. v. B. A. Garrard & Co., 61 S.E. 552, 4 Ga. App. 360.

70. Conn.—Knight Realty Co. v. Caserta, 10 A.2d 597, 126 Conn. 162.

71. Ill.—Hawkins v. Albright, 70 Ill. 87.

72. C.J. p 1078 note 39.

73. Ill.—Hawkins v. Albright, supra.

69. Ala.—Milbra v. Sloss-Sheffield Steel & Iron Co., 62 So. 176, 182 Ala. 622, 46 L.R.A.N.S., 274.

70. Ga.—Southern Ry. Co. v. Murphy, 70 S.E. 972, 9 Ga.App. 190.

71. Tex.—Merchants', etc., Oil Co. v. Burrow, Civ.App., 69 S.W. 435.

72. D.C.—North American Graphite Corp. v. Allan, 184 F.2d 387, 87 U. S.App.D.C. 154.

N.Y.—Hansen v. New York City Housing Authority, 68 N.Y.S.2d 71, 271 App.Div. 986—Tumbarello v. City of New York, 55 N.Y.S.2d 393, 269 App.Div. 847—Chapman v. Breakford, 87 N.Y.S.2d 72, 193 Misc. 762.

74. C.J. p 1079 note 55.

73. Va.—Chesapeake & O. Ry. Co. v. Melton, 67 S.E. 346, 110 Va. 728.

74. N.H.—Small v. Rogers, 46 N.H. 176.

Pa.—Goodman v. Gay, 15 Pa. 188, 53 Am.D. 589.

separate counts if there is one good count in the petition a general verdict will be upheld.<sup>75</sup>

On the other hand, it is the rule in other jurisdictions, either under, or apart from, or without reference to, statutes so providing, that where a general verdict is given on several counts such verdict will be referred to the good count or counts and will be permitted to stand if any one or more of the counts are good;<sup>76</sup> and if defendant wishes to question the sufficiency of any of the counts, he should request separate verdicts on each count.<sup>77</sup> Under such a statute, where the declaration consists of a special count and the common counts, a general verdict will not be set aside because the special count fails to disclose a cause of action.<sup>78</sup> Such a statute, however, will not apply where the court gives an instruction on the bad counts which would authorize a verdict on such counts,<sup>79</sup> or where a good and a defective cause of action are so commingled that it is impossible to tell for which

alleged injury the jury found the verdict.<sup>80</sup> In any event, a general verdict cannot be sustained where there are some bad counts and the special findings are that plaintiff has sustained each count.<sup>81</sup> It has been held in some of such jurisdictions that where a general verdict is rendered in an action charging ordinary negligence and also malice or willful and wanton misconduct the verdict is presumed based on, and must be sustained by, the count charging malice or willfulness.<sup>82</sup>

A statute providing that an entire verdict given on several counts shall not be set aside if any one or more of the counts are good, has been held to be imperative<sup>83</sup> and universal in its scope,<sup>84</sup> applying also to an inquisition of damages, taken on default.<sup>85</sup>

*Sum awarded on valid and invalid causes.* A verdict showing that recovery was allowed on both causes of action contained in the petition, one of which is insufficient, without stating how much was

75. Mo.—Campbell v. King, 32 Mo. App. 38.

76. Ala.—White v. Jackson, 62 So.2d 477, 36 Ala.App. 643—Trammell v. Robinson, 37 So.2d 142, 34 Ala.App. 91.

Cal.—Coombs v. Minor, 141 P.2d 491, 60 Cal.App.2d 645—Hall v. Dekker, 115 P.2d 15, 45 Cal.App.2d 783—Martin v. Los Angeles Turf Club, 103 P.2d 188, 39 Cal.App.2d 338—McMahon v. Schindler, 102 P.2d 378, 38 Cal.App.2d 642—Mitchell v. Towne, 87 P.2d 908, 31 Cal.App.2d 259—Hume v. Fresno Irr. Dist., 69 P.2d 483, 21 Cal.App.2d 348.

Conn.—Keeler v. General Products, 75 A.2d 486, 137 Conn. 247—McGuire v. Hartford Buick Co., 40 A.2d 269, 131 Conn. 417.

Fla.—Ferguson v. Gangwer, 192 So. 196, 140 Fla. 704.

Ill.—Hylak v. Marcal, Inc., 80 N.E.2d 411, 335 Ill.App. 48—Woods v. Lawndale Theatre Corp., 24 N.E.2d 193, 302 Ill.App. 570.

Mass.—Donahue v. Dal, Inc., 50 N.E.2d 207, 314 Mass. 460—John A. Frye Shoe Co. v. Williams, 46 N.E.2d 1, 312 Mass. 656—Kelly v. Citizens Finance Co. of Lowell, 28 N.E.2d 1005, 306 Mass. 531, 130 A.L.R. 890. Miss.—Mississippi Cent. R. Co. v. Aultman, 160 So. 737, 173 Miss. 622, appeal dismissed 56 S.Ct. 108, 296 U.S. 537, 80 L.Ed. 382.

N.C.—Gossett v. Metropolitan Life Ins. Co., 179 S.E. 438, 208 N.C. 152. Ohio.—Ohio Exchange for Educational Films Co. v. P. & R. Amusement Co., 186 N.E. 746, 45 Ohio App. 10.

Tenn.—Schumpert v. Moore, 149 S.W.2d 471, 24 Tenn.App. 695—Reading v. Hatcher, 14 Tenn.App. 561—Sledge & Norfleet v. Bondurant,

5 Tenn.App. 319—American Trust & Banking Co. v. Fairbanks, 5 Tenn. App. 296

W.Va.—Gilkerson v. Baltimore & O. R. Co., 41 S.E.2d 188, 129 W.Va. 649.

64 C.J. p 1079 notes 60, 67-69. General verdict as sufficient if one count, issue, or theory is supported by evidence see *infra* § 505.

Presumption that verdict is based on good count see Appeal and Error § 1562 g.

#### "Two-issue rule"

Ohio.—Will v. McCoy, 20 N.E.2d 371, 135 Ohio St. 241—Alexander v. Hair, App., 38 N.E.2d 601—Rickabaugh v. Youngstown Municipal Ry. Co., 9 N.E.2d 900, 55 Ohio App. 431.

One charge of negligence is sufficient to sustain a verdict against defendant.—Kinser v. Riss & Co., C.A. III, 177 F.2d 316—Larsen v. Chicago & N. W. Ry. Co., C.A.III, 171 F.2d 841—Miller v. Advance Transp. Co., C.C.A.III, 126 F.2d 442, certiorari denied Advance Transp. Co. v. Miller, 63 S.Ct. 32, 317 U.S. 641, 87 L.Ed. 516.

#### Allowance as ground for appeal

However, it was held that where complaint alleged three different grounds of negligence as basis of recovery for death of plaintiff's intestate, jury's general verdict for plaintiff did not prevent defendant from taking advantage of error as to one of such grounds on appeal.—Falzone v. Gruner, 45 A.2d 153, 132 Conn. 415.

77. Conn.—Zilman v. Whitley, 147 A. 370, 110 Conn. 108.

64 C.J. p 1079 note 70.

78. Ill.—Gebbie v. Mooney, 12 N.E. 472, 121 Ill. 255.

79. Tenn.—Corpus Juris quoted in Summers v. Bond-Chadwell Co., 145 S.W.2d 7, 18, 24 Tenn.App. 357. 64 C.J. p 1079 note 65

"This principle does not extend so far as to support a verdict that may have been rendered erroneously under incorrect instructions as to one of the counts merely because the same verdict might have been rendered rightly under another count."—Kelly v. Citizens Finance Co. of Lowell, 28 N.E.2d 1005, 1007, 306 Mass. 531, 130 A.L.R. 890.

80. Ill.—Ottawa Gaslight, etc., Co. v. Thompson, 39 Ill. 598. Mass.—Fillmore v. Johnson, 109 N.E. 153, 221 Mass. 406.

81. Ala.—Patton v. Tidwell, 87 So. 624, 17 Ala.App. 663. Neb.—Greenwood v. Cobbe, 46 N.W. 711, 30 Neb. 579.

82. Ill.—Trumbo v. Chicago, B. & Q. R. Co., 59 N.E.2d 92, 389 Ill. 213—Ashton v. Sweeney, 112 N.E.2d 183, 350 Ill.App. 135—Countryman v. Sullivan, 100 N.E.2d 799, 344 Ill. App. 371—Monroe v. Averkamp, 90 N.E.2d 563, 339 Ill.App. 578.

83. Ill.—Peoria Marine & Fire Ins. Co. v. Whitehill, 25 Ill. 466.

84. Ill.—Peoria Marine & Fire Ins. Co. v. Whitehill, *supra*.

#### May be invoked by defendant or plaintiff

Ill.—Goldschmidt v. Chicago Transit Authority, 82 N.E.2d 357, 335 Ill. App. 461.

Tenn.—Sledge & Norfleet v. Bondurant, 5 Tenn.App. 319.

85. Ill.—Anderson v. Semple, 7 Ill. 455.

allowed on the insufficient cause of action, will be set aside.<sup>86</sup> Similarly, where recovery is sought for the loss or destruction of two items and the action is invalid as to one and the verdict is in a gross sum for both, the award cannot be segregated and held to be valid as to one item.<sup>87</sup>

**Inconsistent counts.** Where two counts are inconsistent, a general verdict for plaintiff will be set aside,<sup>88</sup> as will be also a verdict inconsistent with either of the two issues in an action;<sup>89</sup> but a special verdict on one of the counts will support a judgment where the two counts are inconsistent only in stating the nature and origin of plaintiff's rights.<sup>90</sup> Where the declaration contains counts on contract and quantum meruit, a verdict may be returned on either count;<sup>91</sup> but it has been held that if both were proved the contract count would control.<sup>92</sup> Although counts of a declaration for the same cause of action are inconsistent, if no motion to elect is made, a general verdict for plaintiff will stand if the evidence supports either count.<sup>93</sup>

**Inconsistent defenses.** A general verdict for defendant will not be set aside because of inconsistent issues set up in defense, the verdict necessarily deciding one issue in his favor,<sup>94</sup> at least where there is no error in the instructions as to such defenses.<sup>95</sup>

**Immaterial issue.** A verdict founded wholly on an immaterial issue will be set aside;<sup>96</sup> but where issue is taken on several pleas, some of which are material and others immaterial, the verdict will stand<sup>97</sup> unless the evidence sustains only the immaterial issue, in which case, if there are other issues,

defendant has been held to be not entitled to a general verdict.<sup>98</sup>

**Instructions.** Where there is an erroneous charge as to one count, it must appear affirmatively that the general verdict was not based on that count, or the verdict will be set aside.<sup>99</sup> However, it has also been held that where the trial court gave an affirmative charge on a specific count of the complaint the verdict for plaintiff must be treated as responding to that charge.<sup>1</sup>

## § 504. — Counterclaim, Set-Off, and Payment

Where a set-off or a counterclaim is pleaded, ordinarily only one verdict is required; it should state the finding of the jury on the counterclaim unless such finding is obvious.

Where a set-off or a counterclaim is pleaded, it becomes a part of a single controversy between the parties and only one verdict is required according to the facts.<sup>2</sup> However, the rendition of separate verdicts, one on plaintiff's petition and the other on defendant's cross complaint or counterclaim, does not of itself disclose error.<sup>3</sup> Ordinarily, the verdict should state a finding of the jury on the cause of action under the allegations of the petition and also on the counterclaim;<sup>4</sup> but, where a finding on plaintiff's cause of action is necessarily decisive of the whole case, a general verdict is sufficient even though it makes no mention of the counterclaim.<sup>5</sup> Similarly, where the allegations of a complaint and those of a counterclaim are of such a nature that the finding rendered for defendant on the counterclaim necessarily involves a finding against plain-

86. Neb.—Hunt v. Chicago, B. & Q.

R. Co., 146 N.W. 986, 95 Neb. 746.

87. Cal.—Stockwell v. Equitable Fire & Marine Ins. Co. of Providence, R. I., 25 P.2d 873, 134 Cal.App. 534.

88. Mich.—Beverly v. Richards, 238 N.W. 270, 255 Mich. 508.

Wis.—Schofield v. Miltimore, 42 N.W. 212, 74 Wis. 194.

**Verdict as to one only permissible**

Kan.—Huggins v. Kansas Power & Light Co., 187 P.2d 491, 164 Kan. 27.

Mass.—Moskow v. Smith, 60 N.E.2d 373, 318 Mass. 76.

N.M.—Armijo v. National Surety Corp., 268 P.2d 339.

89. Colo.—Burns-Moore Min., etc., Co. v. Watson, 101 P. 335, 45 Colo. 91.

90. Conn.—Spencer v. New York, etc., R. Co., 25 A. 350, 62 Conn. 242.

91. Mich.—Nyman v. B. S. Chapin, Inc., 238 N.W. 195, 255 Mich. 442.

92. Iowa.—Halstead v. Rohret, 235 N.W. 293, 212 Iowa 837.

93. Mass.—Commercial Wharf Corporation v. City of Boston, 94 N.E. 895, 208 Mass. 482.

94. Cal.—In re Hellier's Estate, 145 P. 1008, 169 Cal. 77.

64 C.J. p 1079 note 50.

95. Conn.—Meglio v. Comeau, 79 A. 2d 187, 137 Conn. 551.

96. Tenn.—Corpus Juris quoted in Summers v. Bond-Chadwell Co., 145 S.W.2d 7, 17, 24 Tenn.App. 357.

64 C.J. p 1079 note 51.

97. Tenn.—Corpus Juris quoted in Summers v. Bond-Chadwell Co., 145 S.W.2d 7, 17, 24 Tenn.App. 357.

64 C.J. p 1079 note 52.

98. Tenn.—Corpus Juris quoted in Summers v. Bond-Chadwell Co., 145 S.W.2d 7, 17, 24 Tenn.App. 357.

64 C.J. p 1079 note 53.

99. Tex.—Panhandle & S. F. Ry. Co. v. Tladiate, Civ.App., 199 S.W. 347, affirmed, Com.App., 228 S.W. 133, 16 A.L.R. 1264.

1. Ala.—Peoples Furniture Co. v. Wilson, 173 So. 85, 233 Ala. 578.

2. Mo.—Brandtjen & Kluge v. Hunter, 145 S.W.2d 1009, 235 Mo.App. 909.

**Statute as to cross action**

In action for damages resulting from a collision between plaintiff's automobile and defendant's truck, defendant's claim for damages to, and for loss of use of, truck arising out of same collision is not a set-off or counterclaim but is in the nature of a cross action and as a result of which only one verdict can be rendered, although jury considers two distinct claims.—Nash v. Raun, D.C. Pa., 67 F.Supp. 212.

3. Colo.—White Automobile Co. v. Kamp, 203 P. 679, 70 Colo. 586.

Mo.—Hales v. Ralnes, 130 S.W. 425, 146 Mo.App. 282.

4. Mo.—Staples v. Dent, App. 220 S.W.2d 791.—Humphries v. Shipp, 194 S.W.2d 693, 238 Mo.App. 985.

5. Mo.—Staples v. Dent, App. 220 S.W.2d 791.

tiff on the complaint, an express finding on the complaint is unnecessary.<sup>6</sup> A verdict "for defendant" is sufficient, as to form, to defeat plaintiff's claim,<sup>7</sup> but is not sufficient as a basis of a decree in favor of defendant on a cross bill.<sup>8</sup> Where the amount claimed in the counterclaim is in excess of that claimed by plaintiff, a verdict "for the defendant" without granting damages on the counterclaim is not repugnant.<sup>9</sup> Where the parties stipulate that if the jury find for defendant their verdict shall be for a certain amount on a counterclaim interposed by him, a verdict for defendant for such amount covers both causes of action.<sup>10</sup>

In some jurisdictions where there is a set-off or counterclaim, the verdict need not name the amounts found due plaintiff and defendant respectively, but only the difference;<sup>11</sup> elsewhere it has been held that the verdict should show affirmatively the amounts of the respective findings.<sup>12</sup> A finding that the amounts due plaintiff and defendant on their respective claims were equal is sufficiently specific as to the amounts due each.<sup>13</sup> While it has been held that a general finding for defendant is not to be construed as a finding that the amounts were equal,<sup>14</sup> it has also been held that a general verdict for defendant, where a counterclaim has been set up, means prima facie that defendant's counterclaim equally offsets plaintiff's claim;<sup>15</sup> but it is the better practice to have the jury declare in their verdict that the counterclaim offsets plaintiff's claim, and then render a verdict for defendant.<sup>16</sup> If the jury find specially on the cause of action and the counterclaim, the verdict must show clearly in whose favor the balance rests and the

amount thereof.<sup>17</sup>

An allowance of one item of a counterclaim sufficiently shows that the jury considered and determined the claim in its entirety and denied all other items.<sup>18</sup> Where the whole record shows that the counterclaim was considered the verdict should be regarded as responsive to the issues, although it does not mention the counterclaim by name.<sup>19</sup> A verdict stating that the offset of defendant was not considered cannot be construed as a denial of defendant's offset.<sup>20</sup> A finding of no cause of action as to defendant's counterclaim does not affect the validity of a verdict for defendant on plaintiff's claim.<sup>21</sup>

*General issue or denial with set-off or counterclaim.* Where there is a notice of set-off under the general issue, a finding that plaintiff is indebted to defendant in a stated amount is good, since by necessary inference it is a verdict for defendant.<sup>22</sup> Conversely, in such a case a general verdict for plaintiff is a valid finding by the jury, the set-off being in effect a part of the issue.<sup>23</sup> On a general denial and counterclaim pleaded, a general verdict for plaintiff is sufficient to dispose of both issues.<sup>24</sup> Where the verdict was for plaintiff, it has been held to be immaterial that defendant's plea of recoupment was intended as a counterclaim for an affirmative judgment rather than a mere defense.<sup>25</sup>

*Inconsistent findings.* The finding for plaintiff on his complaint and for defendant on his counterclaim must be consistent;<sup>26</sup> and a verdict granting recovery for defendant on a defense and counterclaim which are inconsistent cannot stand,<sup>27</sup> although

6. Ind.—Beers v. Flock, 28 N.E. 1011, 2 Ind.App. 567.

Mo.—Cosgrove v. Stange, 183 S.W. 691, 194 Mo.App. 14.

7. N.Y.—Phillips v. Lewis, 42 N.Y. S. 707, 12 App.Div. 460.

84 C.J. p 1080 note 81.

8. Tex.—Anderson v. Webb, 44 Tex. 147.

9. N.J.—Henry R. Isenberg Co. v. Kent, 147 A. 815, 7 N.J.Misc. 1089, 64 C.J. p 1080 note 83.

10. Mo.—Taylor v. Short, 38 Mo. App. 21.

11. Okl.—Main v. Levine, 118 P.2d 252, 189 Okl. 554.

64 C.J. p 1080 note 73.

12. Neb.—Horse Shoe Lake Drainage Dist. v. Fred M. Crane Co., 199 N. W. 526, 112 Neb. 323.

64 C.J. p 1080 note 74.

13. Mo.—Lauderdale v. King, 109 S. W. 852, 130 Mo.App. 236.

64 C.J. p 1080 note 75.

14. Mo.—Diamond v. McVey, App., 239 S.W. 562.

15. Pa.—Pennsylvania Co. for Insurances on Lives and Granting Annuities v. Lynch, 162 A. 157, 308 Pa. 23.

16. Pa.—Pennsylvania Co. for Insurances on Lives and Granting Annuities v. Lynch, supra.

17. N.C.—Kornegay v. Kornegay, 13 S.E. 770, 109 N.C. 188.

64 C.J. p 1080 note 78.

18. Tex.—Curtis v. McGown, Civ.App., 149 S.W. 803.

19. Mo.—United Iron Works v. Twin City Ice & Creamery Co., 295 S.W. 109, 317 Mo. 125.

**Verdict finding in favor of plaintiff and fixing his damages plainly showed intention to find against the defendant and was not subject to criticism that it did not refer to defendant's counterclaim.**—Otey v. Blessing, 197 S.E. 409, 170 Va. 542.

20. Tex.—Pitts v. Cypress Shingle & Lumber Co., Civ.App., 158 S.W. 799.

21. N.J.—C. A. Lippincott & Bro. v. Matazzo, 150 A. 216, 8 N.J.Misc. 330.

64 C.J. p 1080 note 89.

22. Ala.—Pledger v. Glover, 2 Port. 174.

23. Ky.—Harris v. Tiffany, 8 B.Mon. 225.

24. Neb.—Guthrie v. Brown, 60 N.W. 839, 42 Neb. 652.

64 C.J. p 1081 note 92.

25. Md.—Petite v. Homes, Inc., 41 A.2d 71, 184 Md. 377.

26. Ga.—Gillespie v. Gregory, 198 S. E. 806, 55 Ga.App. 465.

Ill.—Baumgartner v. Montavon, 276 Ill.App. 498.

Ohio.—Miller v. Scott, App., 117 N.E. 2d 179.

Utah.—Baker v. Holland Furnace Co.,

81 P.2d 1114, 95 Utah 396.

64 C.J. p 1081 note 95.

27. Mo.—Carney v. Eubanks, App.,

31 S.W.2d 552.

64 C.J. p 1081 note 93.

plaintiff failed to move for an election at the proper time.<sup>28</sup> Accordingly, where a finding in favor of plaintiff or of defendant's counterclaim would necessarily include a finding against the other, a verdict against plaintiff on his petition and against defendant on his counterclaim is not authorized.<sup>29</sup> It has been held that there is nothing necessarily inconsistent in a verdict for plaintiff together with an award to defendant on his plea of recoupment.<sup>30</sup>

*Several defendants.* Where but one of two defendants sets up a counterclaim, a verdict for both defendants for the excess of the one defendant's separate counterclaim is erroneous.<sup>31</sup> In an action by several plaintiffs against several defendants, who file counterclaims, a verdict following an instruction, to which no objection was made by the parties, that if the jury find that neither party is entitled to recover, the verdict should be for defendants, a general verdict for defendants is sufficient to dispose of all the issues.<sup>32</sup>

*In reconvention* the verdict should pronounce on the respective rights or actions of both parties;<sup>33</sup> but where the claim in reconvention grows out of the very matter on which plaintiff's right of action is based, and a verdict in favor of one is a verdict against the other, separate verdicts are not necessary.<sup>34</sup>

*On a plea of payment* a general verdict may be found for plaintiff for the amount found due after deducting all payments admitted or proved;<sup>35</sup> and in assumption, on a plea of nonassumpsit and payment, a finding that defendant did assume and promise, without any express finding as to the plea of payment, is a good verdict;<sup>36</sup> but where there were pleas of payment and set-off a finding simply

that defendant had not paid is not sufficiently responsive and will be set aside.<sup>37</sup>

*Cross claims as between defendants.* Under a statute providing that a controversy between defendants shall not delay a judgment to which plaintiff is entitled, where plaintiff has established his case against two or more defendants a verdict for plaintiff is not impaired by the failure of the jury to render a verdict on a cross claim by one defendant against another.<sup>38</sup>

## § 505. — Applicability and Sufficiency of Evidence

It is commonly held that where several counts, issues, or theories are submitted to the jury the general verdict will stand if the evidence on one count, issue, or theory is sufficient to sustain the verdict.

In some jurisdictions where a case is submitted on a declaration containing several counts<sup>39</sup> or causes of action,<sup>40</sup> or on several issues<sup>41</sup> or theories,<sup>42</sup> a general verdict for plaintiff cannot be sustained where all such counts, issues, or theories are not supported by the evidence; but where all of the counts, causes of action, or theories are supported by the evidence the jury can return a general verdict in a lump sum without designating how much was found on each count.<sup>43</sup> However, it is more commonly held that, in the absence of a request for an instruction that the jury bring in a separate verdict on each count,<sup>44</sup> or motion for a directed verdict on each count,<sup>45</sup> where several counts, issues, or theories are tried and submitted to the jury, the general verdict will stand if the evidence on one count, issue, or theory is sufficient to sustain the verdict,<sup>46</sup> unless when separate and distinct

28. Mo.—Carney v. Eubanks, *supra*.

29. Mo.—Commercial Nat. Bank of Kansas City, Kan. v. White, 254 S. W.2d 605.

30. N.H.—Hunt v. Goodimate Co., 55 A.2d 76, 94 N.H. 421.

31. Md.—Cohen v. Karp, 122 A. 524, 143 Md. 208.

32. Ark.—Graves v. Jewel Tea Co., 23 S.W.2d 972, 180 Ark. 980.

33. La.—Morgan v. Driggs, 17 La. 176.

64 C.J. p 1081 note 98.

34. La.—Kelly v. Caldwell, 4 La. 38.

35. Md.—Rohr v. Anderson, 51 Md. 205.

36. Miss.—Chewning v. Cox, 2 Miss. 130.

N.Y.—Hanna v. Mills, 21 Wend. 90, 34 Am.D. 216.

37. Tenn.—Anderson v. Anderson, 4 Havw. 255.

38. N.Y.—West v. City of New York, 280 N.Y.S. 229, 155 Misc. 688.

39. Ga.—Flint Explosive Co. v. Edwards, 71 S.E.2d 747, 86 Ga.App. 404.—Rowland v. Gardner, 53 S.E.2d 198, 79 Ga.App. 153.

N.Y.—Lichtenstein v. Belknap, 165 N.Y.S. 936, 100 Misc. 468.

Verdict contrary to, or not sustained by, evidence as grounds for new trial see New Trial §§ 69-77.

40. Ga.—Flint Explosive Co. v. Edwards, 71 S.E.2d 747, 86 Ga.App. 404.

64 C.J. p 1081 note 8.

41. Minn.—Gamradt v. Du Bois, 223 N.W. 296, 176 Minn. 312.

64 C.J. p 1081 note 7.

42. Ga.—Flint Explosive Co. v. Edwards, 71 S.E.2d 747, 86 Ga.App. 404.

64 C.J. p 1081 note 8.

43. Ga.—Rowland v. Gardner, 53 S.E.2d 198, 79 Ga.App. 153.

44. Conn.—Theron Ford Co. v. Dudley, 133 A. 746, 104 Conn. 519.

45. Mass.—Gates v. Boston & M. R. R., 151 N.E. 320, 255 Mass. 297.

64 C.J. p 1081 note 10.

*Sufficiency of evidence as to each count*

Where defendant moves for a directed verdict on each of several counts of declaration and a general verdict is rendered for plaintiff, such verdict can be sustained only if the evidence is sufficient to support a verdict for plaintiff on each count.—Dillon v. Barnard, 101 N.E.2d 345, 328 Mass. 53.

46. U.S.—Cross v. Ryan, C.C.A.III., 124 F.2d 883, certiorari denied Ryan v. Cross, 62 S.Ct. 1269, 316 U.S. 682, 86 L.Ed. 1755.—Firemen's Ins. Co. v. Pollett, C.C.A.III., 72 F.2d 48, cer-

causes of action different in kind are not alleged in the different counts.<sup>47</sup>

The rule has been held to apply both where the issues are alleged in one count and where the issues are made the subject of separate counts.<sup>48</sup> Under the same reasoning, where a complaint contains two paragraphs substantially alleging the same cause of action, a verdict for plaintiff will stand if one of the paragraphs is established.<sup>49</sup> It has been further held that, where an action is based on the alleged violation of several statutes, a general verdict for plaintiff will be sustained if it appears that any one of the statutes was violated.<sup>50</sup> A general verdict on a petition containing two counts, on only one of which evidence was introduced, will be presumed to be based on that count.<sup>51</sup>

*Finding for defendant.* Although there is authority to the contrary,<sup>52</sup> a general finding for defendant will usually be sustained if the evidence is sufficient

to support any of the defenses,<sup>53</sup> but not if error is committed in the admission of evidence on any issue.<sup>54</sup>

*Submission of issues in conjunctive or disjunctive.* Where an instruction is drawn in the conjunctive, and the jury finds for plaintiff, it is enough if only one of the grounds of recovery is actually supported by substantial evidence,<sup>55</sup> since, in purporting to find for plaintiff on all the grounds hypothesized, the jury necessarily find for him on the ground which has support in the evidence;<sup>56</sup> but where an instruction submits several issues in the disjunctive or alternative, and the jury do not indicate on which one of the issues submitted they base their verdict, there must be evidence to sustain each of the issues submitted.<sup>57</sup>

*Eliminated issue.* The evidence must sustain the counts submitted to the jury;<sup>58</sup> and a verdict can-

toriori denied 55 8.Ct. 209, 293 U.S. 618, 79 L.Ed. 706.

Ala.—*Corpus Juris* cited in *Southeastern Greyhound Lines v. Callahan*, 13 So.2d 660, 662, 244 Ala. 449.

Cal.—*Roberts v. Del Monte Properties Co.*, 243 P.2d 914, 111 Cal.App.2d 69.—*Moss v. Coca Cola Bottling Co.*, 229 P.2d 802, 103 Cal.App.2d 380.—*Wells v. Brown*, 217 P.2d 995, 97 Cal.App.2d 361.—*McNulty v. Southern Pac. Co.*, 216 P.2d 534, 96 Cal.App.2d 841.—*Hall v. Dekker*, 115 P.2d 15, 45 Cal.App.2d 783.—*King v. Schumacher*, 89 P.2d 466, 32 Cal.App.2d 172, certiorari denied *Schumacher v. King*, 60 S.Ct. 123, 308 U.S. 593, 84 L.Ed. 496.—*Hume v. Fresno Irr. Dist.*, 69 P.2d 483, 21 Cal.App.2d 348.—*Walton v. Southern Pac. Co.*, 48 P.2d 108, 8 Cal.App.2d 290, certiorari denied *Southern Pac. Co. v. Walton*, 56 S.Ct. 308, 296 U.S. 647, 80 L.Ed. 461, rehearing denied 56 S.Ct. 380, 296 U.S. 665, 80 L.Ed. 474.

Conn.—*Lucas v. South Norwalk Trust Co.*, 184 A. 157, 121 Conn. 201.

Ill.—*Ferrell v. Livingston*, 101 N.E. 2d 599, 344 Ill.App. 488.—*Halbert v. Springfield Motor Boat Club*, 97 N.E.2d 592, 342 Ill.App. 686.—*Holland v. Chicago Transit Authority*, 84 N.E.2d 861, 337 Ill.App. 100.—*Goldschmidt v. Chicago Transit Authority*, 82 N.E.2d 357, 335 Ill.App. 461.—*Jensen v. Baltimore & O. R. Co.*, 69 N.E.2d 740, 330 Ill.App. 134.—*Budds v. Keshin Motor Exp. Co.*, 61 N.E.2d 579, 326 Ill.App. 59.—*Moore v. Young*, 46 N.E.2d 852, 317 Ill.App. 474.—*Price v. Bailey*, 265 Ill.App. 358.

R.I.—*Pelletier Const. Co. v. Trullis*, 37 A.2d 369, 70 R.I. 121.

64 C.J. p 1081 note 11.

Presumption in favor of verdict see Appeal and Error § 1562 g.

Under a statute providing that if any of the counts in a declaration are good, a verdict for entire damages shall be applied to such good counts, a general verdict will be good if one count in the declaration is sustained by evidence.—*Tennessee Cent. Ry. Co. v. Umenstetter*, 291 S.W. 452, 155 Tenn. 235.—*White v. Seiler*, App. 264 S.W.2d 241.—*Monday v. Millsaps, App.*, 264 S.W.2d 6.—*Central Truckaway System v. Waltner*, 253 S.W.2d 985, 36 Tenn.App. 202.—*Wesco Paving Co. v. Nash*, 245 S.W.2d 782, 35 Tenn.App. 409.—*McConnell v. Jones*, 228 S.W.2d 117, 33 Tenn.App. 14.—*Taylor v. Cobble*, 187 S.W.2d 648, 28 Tenn.App. 167.—*Tallent v. Fox*, 141 S.W.2d 485, 24 Tenn.App. 96.—*Central Produce Co. v. General Cab Co. of Nashville*, 129 S.W.2d 1117, 23 Tenn.App. 209.—*Wilson v. Moody*, 123 S.W.2d 828, 22 Tenn.App. 356.—*Allen v. Melton*, 89 S.W.2d 219, 20 Tenn.App. 387.—*Sledge & Norflet v. Bondurant*, 5 Tenn.App. 319.

47. Ill.—*O'Neill v. Blair*, 261 Ill.App. 470.—*Grinstaff v. New York Central R. R.*, 253 Ill.App. 589.

#### Breach of contract

Where petition in different counts alleges breach of the same contract, in different manners, a general verdict is sustainable if either count is supported by evidence.—*Williams v. Smith*, 31 S.E.2d 873, 71 Ga.App. 632.

#### Negligence and willful and wanton conduct

In an action to recover damages for death caused by being struck by an automobile, where the declaration charges both general negligence and willful and wanton injury and there is no evidence to sustain the latter

count, a general verdict cannot stand.—*Broadbent v. Kagey*, 275 Ill.App. 623.

48. Cal.—*King v. Schumacher*, 89 P.2d 466, 32 Cal.App.2d 172, certiorari denied *Schumacher v. King*, 60 S.Ct. 123, 308 U.S. 593, 84 L.Ed. 496.

49. Ind.—*Ohio Finance Co. v. Berry*, 37 N.E.2d 2, 219 Ind. 94.—*Geriot v. Swartz*, 7 N.E.2d 960, 212 Ind. 292.—*Clarke Auto Co. v. Reynolds*, 88 N.E.2d 775, 119 Ind.App. 586.—*Anthouls v. Patinotis*, 27 N.E.2d 375, 108 Ind.App. 130.—*Ayshire Coal Co. v. West*, 125 N.E. 84, 72 Ind.App. 699.

50. Cal.—*Edgington v. Southern Pac. Co.*, 55 P.2d 553, 12 Cal.App.2d 200. Tenn.—*Powers v. L. & N. R. Co.*, 194 S.W.2d 241, 183 Tenn. 526.

51. Iowa.—*Bays v. Herring*, 1 N.W. 558, 61 Iowa 286. 64 C.J. p 1082 note 14.

52. Me.—*Blumenthal v. Serota*, 155 A. 40, 130 Me. 263. N.Y.—*Cohen v. Jaffe*, 218 N.Y.S. 135, 218 App.Div. 259.

53. R.I.—*McSoley v. Hogan*, 40 A.2d 599, 70 R.I. 470. 64 C.J. p 1082 note 17.

54. U.S.—*Maryland v. Baldwin*, Md., 5 S.Ct. 278, 112 U.S. 490, 28 L.Ed. 622.

55. Mo.—*Monsour v. Excelsior Tobacco Co.*, App., 115 S.W.2d 219, affirmed, Sup., 144 S.W.2d 62.

56. Mo.—*Monsour v. Excelsior Tobacco Co.*, supra.

57. Mo.—*Wolf v. Kansas City Tire & Service Co.*, App., 257 S.W.2d 408.—*Martin v. Springfield City Water Co.*, App., 128 S.W.2d 674.

58. Ala.—*Choate v. Alabama Great*

not be sustained by evidence supporting counts in the declaration which were eliminated before the case went to the jury.<sup>59</sup>

**Collateral issue.** In the absence of a motion to withdraw collateral issues from the jury, a verdict is justified by sufficient proof of one issue and proof of collateral issues is unnecessary.<sup>60</sup>

### § 506. Amount of Recovery

The verdict should not be for an amount greater than the declaration claims or the evidence shows, nor should it be for less than the amount admittedly due; and a verdict granting a recovery unwarranted by any theory of the case is improper.

A verdict for an amount greater than the declaration claims<sup>61</sup> or, conversely, which is set up by way of counterclaim,<sup>62</sup> is erroneous, but not necessarily void,<sup>63</sup> although it may be set aside unless plaintiff consents to a reduction of the verdict to the amount claimed,<sup>64</sup> unless the excess is slight, when it may be referred to interest.<sup>65</sup> Likewise, a verdict for more than the evidence shows the damage to be is erroneous,<sup>66</sup> unless the excess can be attributed to interest.<sup>67</sup>

A verdict for more than the amount demanded in the complaint is proper where there is also a prayer for a right in future installments, part of which have become due since the filing of the complaint.<sup>68</sup> A verdict which exceeds the amount of damages alleged in the complaint is not invalid

where it appears that during the trial the parties stipulated that the court might permit plaintiff to amend his complaint to conform to the proof with respect to the damage,<sup>69</sup> especially where it is apparent that the case was tried on the theory that plaintiff might recover any amount of damage actually proved to have been sustained by him.<sup>70</sup> A verdict is not excessive which includes an item omitted by inadvertence in the instructions, such item not being thereby abandoned.<sup>71</sup> A verdict for an amount as actual damages and an additional amount for future expenses has been held not too indefinite to be capable of enforcement;<sup>72</sup> and even though objectionable as to the additional amount the error is cured by remission of the additional sum objected to.<sup>73</sup> Where a petition names two different sums a verdict for one of such sums will be regarded as valid and consistent with the petition, since where a petition is ambiguous and capable of two constructions and no demurrer is taken, that construction of the petition will be adopted which supports the verdict.<sup>74</sup>

**Insufficient recovery.** Where the only issue under the pleadings and evidence is whether a party is to recover a specified sum or nothing, a verdict for less than that amount is improper and will be set aside;<sup>75</sup> and this is especially so where the parties acquiesce in an instruction to that effect.<sup>76</sup> A verdict for a less amount than that acknowledged to

Southern R. Co., 54 So 507, 170 Ala. 590.

59. Ala.—Choate v. Alabama Great Southern R. Co., supra.

60. N.H.—Watkins v. Boston & M R. R., 138 A. 315, 83 N.H. 10.

61. Cal.—Redwing v. Moneravie, 21 P.2d 986, 131 Cal.App. 569. Me.—Jeffery v. Sheehan, 194 A. 543, 135 Me. 246.

R.I.—Dimon v. O'Connor, 106 A.2d 509.

64 C.J. p 1082 note 22. Certainty, definiteness, and formality of verdict with respect to amount of recovery see supra § 497.

#### Plaintiff's estimates as not binding

In action for injuries sustained in automobile collision, where plaintiff in bill of particulars named estimated sum for loss of earning capacity, mental and physical pain and suffering, and effect of injuries on plaintiff's health, and amount of verdict exceeded total of such sums, estimated sums were not binding on jury or court so as to require reduction of verdict.—Yeary v. Holbrook, 198 S.E. 441, 171 Va. 266.

62. Mont.—Murray v. Haldorn, 168 P. 38, 54 Mont. 125.

64 C.J. p 1082 note 23.

63. Ga.—Lang v. South Georgia Inv. Co., 144 S.E. 149, 38 Ga.App. 430.

64 C.J. p 1082 note 24.

64. N.Y.—Herrman v. Leland, 148 N. Y.S. 643, 163 App.Div. 515, affirmed 116 N.E. 865, 221 N.Y. 143.

64 C.J. p 1082 note 25.

65. Okl.—Nolan v. Clift, 221 P. 430, 87 Okl. 100.

64 C.J. p 1082 note 26.

66. Miss.—State Life Ins. Co. of Indianapolis, Ind., v. Hardy, 195 So. 708, 189 Miss. 266.

N.Y.—Bond Street Knitters v. Peninsula Nat. Bank, 42 N.Y.S.2d 744, 266 App.Div. 503.

64 C.J. p 1082 note 27.

#### Maximum verdict under instructions

Fact that verdict was for the exact amount specified in instructions as the maximum that could be returned demonstrated that award included items which should have been withdrawn from jury's consideration because not supported by competent evidence and showed that verdict was excessive.—Nesbitt v. City of Butte, 163 P.2d 251, 118 Mont. 84.

67. Cal.—Manuel v. Callistoga Vineyard Co., 61 P.2d 1204, 17 Cal.App.2d 377.

Ill.—Scheldecker v. Westgate, 164 Ill. App. 389.

68. Ariz.—Cadle v. Helfrich, 286 P. 186, 36 Ariz. 390.

69. Cal.—Parmenter v. McDougall, 156 P. 460, 172 Cal. 306.

70. Cal.—Parmenter v. McDougall, supra.

71. Mo.—Barnes-Crosby Co. of Missouri v. T. M. Sayman Products Co., App., 27 S.W.2d 709.

72. Ga.—Hinesley v. Anderson, 43 S. E.2d 736, 75 Ga.App. 394.

73. Ga.—Hinesley v. Anderson, supra.

74. Ga.—Halliburton v. Collier, 43 S. E.2d 339, 75 Ga.App. 316.

75. Fla.—Harrell v. Bishop, 33 So.2d 152, 160 Fla. 3.

Mo.—Cap-Keystone Printing Co. v. Tallman Co., App., 180 S.W.2d 802. N.Y.—Mazzeo v. Berkeley Motor Sales, 53 N.Y.S.2d 501, 183 Misc. 628.

64 C.J. p 1082 note 33.

76. N.Y.—Cordiano Can Co. v. Odosin Corp., 32 N.Y.S.2d 396.



be due in the pleading is erroneous;<sup>77</sup> but an admission by defendant that he owed "something like" a certain sum has been held not to render a verdict for a smaller amount void.<sup>78</sup> A verdict for less than the agreed amount, if plaintiff is to recover anything, is not erroneous when it appears on trial that the sum agreed on was too large due to a mistake in calculation.<sup>79</sup> Where the declaration is in two counts, a verdict for less than the ad damnum of the writ, but larger than the total in either count, is not erroneous.<sup>80</sup> Where, according to the issues, if the verdict is for defendant he is also entitled to recover on his counterclaim, a verdict for defendant without granting recovery on the counterclaim will be set aside.<sup>81</sup> It has been held that the fact that the amount of the verdict represented arithmetically the aggregate of some only of the items of plaintiff's claimed damage does not warrant setting the verdict aside,<sup>82</sup> since, in the absence of specific findings as to the items of damage, the verdict must be deemed to represent plaintiff's damages as fixed by the jury.<sup>83</sup>

*Unwarranted or inconsistent recoveries.* A verdict granting a recovery unwarranted by any theory of the case is improper and will be set aside.<sup>84</sup> A jury will not be permitted to depart from a fixed standard or scale by which the damages should be calculated;<sup>85</sup> but where no such standard is applicable, and the damages depend to some extent on the opinion of the jury, a verdict for less than the amount claimed is not improper.<sup>86</sup> Where the court directs a verdict for one of two amounts, a verdict for a third amount cannot stand.<sup>87</sup> In the

absence of statute, a jury cannot return a verdict for plaintiff on one item of alleged damage, and for defendant on another and distinct item of damage, where both items are referable to the same cause of action.<sup>88</sup> Where the expenses incurred by reason of injuries were allowed to the wife the same expenses could not be recovered or awarded to the husband.<sup>89</sup> A verdict in a personal injury action awarding recovery of damages for loss of time, past, present, and future, and also awarding damages for permanent bodily disability, has been held not erroneous as an award of "double damages."<sup>90</sup>

*Award of punitive damages only.* A verdict of a jury awarding no compensatory damages but only punitive damages is defective and will not be permitted to stand,<sup>91</sup> since, as considered in Damages § 118, actual damages are a prerequisite to the recovery of exemplary or punitive damages. Moreover, since in such case the jury by finding the issues in plaintiff's favor necessarily found that some actual damages, at least nominal, had been suffered, the court is required to send the jury back with instructions to correct their verdict.<sup>92</sup>

*Conflicting or unconflicting evidence.* Where the evidence is conflicting as to the amount due, if any, the jury may return a verdict for the amount they find to be due,<sup>93</sup> and are not bound to award the amount claimed in the pleadings, or nothing.<sup>94</sup> However, where the evidence would authorize a verdict for the amount claimed by plaintiff or for the sum admittedly due by defendant, a verdict for some other sum has been held to be not sustain-

77. Colo.—White Automobile Co. v. Kamp, 203 P. 679, 70 Colo. 586.

78. Ga.—Citizens' Nat. Bank of Danville, Ky., v. Fender, 94 S.E. 90, 21 Ga.App. 229.  
64 C.J. p 1083 note 35.

79. N.Y.—Bove v. Croton Falls Const. Co., 142 N.Y.S. 531, 81 Misc. 241.

80. Mass.—Warren v. Boston Nat. Bank, 147 N.E. 887, 252 Mass. 523.

81. N.Y.—McNulty v. Kuser, 145 N.Y.S. 953.

82. N.Y.—Newburgh Transfer & Storage Co. v. Pure Oil Co., 20 N.Y.S.2d 141, 259 App.Div. 910, affirmed 30 N.E.2d 601, 284 N.Y. 293.

83. N.Y.—Newburgh Transfer & Storage Co. v. Pure Oil Co., supra.

84. Colo.—Lynch v. Kuhlmann Inv. Co., 25 P.2d 744, 93 Colo. 274.  
Conn.—Brunetto v. Royal Exchange Assur. Co., 13 A.2d 138, 126 Conn. 569.

La.—Holland v. Gross, App., 195 So. 813.

Okl.—Riedt v. Winters Drug Co., 128 P.2d 1008, 191 Okl. 264.

Or.—Hall v. Cornett, 240 P.2d 231, 193 Or. 634.

Wis.—Malliet v. Super Products Co., 259 N.W. 106, 218 Wis. 145.  
64 C.J. p 1083 note 39.

85. Me.—Dyer v. Barnes, 145 A. 741, 128 Me. 131.

Wyo.—Corpus Juris cited in Shikany v. Salt Creek Transp. Co., 45 P.2d 645, 652, 48 Wyo. 190.

86. U.S.—Hamilton v. Thurber, D.C. Minn., 56 F.Supp. 826, reversed on other grounds, C.C.A., 151 F.2d 389.

Mo.—Dyer v. Barnes, supra—Wilson v. Buchanan County, 298 S.W. 842, 318 Mo. 64.

N.J.—Harrison v. Garlitti, 197 A. 377, 120 N.J.Law 64.

Wyo.—Corpus Juris cited in Shikany v. Salt Creek Transp. Co., 45 P.2d 645, 652, 48 Wyo. 190.

Conditional sale contract

Verdict for less than amount due on conditional sale contract was held

not perverse in conversion action against conditional buyer.—Pennig v. Schmitz, 249 N.W. 39, 189 Minn. 262.

87. Minn.—Willett v. Seerup, 186 N.W. 225, 151 Minn. 105.

88. Mass.—Jannetti v. National Fire Ins. Co. of Hartford, Conn., 178 N.E. 640, 277 Mass. 372.

89. Pa.—Stevens v. Frank, 30 A.2d 161, 151 Pa.Super. 222.

90. Iowa.—Bachelder v. Woodside, 9 N.W.2d 464, 233 Iowa 967.

91. Cal.—Haydel v. Morton, 48 P.2d 709, 8 Cal.App.2d 730.

Mo.—Hall v. Martindale, App., 166 S.W.2d 594.

Ohio.—Richard v. Hunter, 85 N.E.2d 109, 151 Ohio St. 185.

92. Mo.—Hall v. Martindale, App., 166 S.W.2d 594.

93. Ariz.—Gregg v. Demund, 206 P.2d 172, 24 Ariz. 4.

64 C.J. p 1083 note 44.

94. Okl.—Cole v. Harvey, 198 P.2d 199, 200 Okl. 564.

64 C.J. p 1083 note 45.

able.<sup>95</sup> Where there is no conflict in the evidence as to the amount recoverable by plaintiff, defendant having neither testified nor denied plaintiff's proof, the verdict is bound to be for the amount so shown.<sup>96</sup>

*Joint torts.* Where several defendants are sued jointly in tort, the recovery is limited to the damages resulting from the combined acts of all.<sup>97</sup>

*Doubt of jury as to liability.* Once the jury has determined liability, the fact that they were doubtful as to their correctness in this respect has no bearing on the question of damages assessed.<sup>98</sup>

*Instruction limiting special damages.* A verdict for the total amount claimed in the petition is not rendered erroneous by an instruction limiting the amount of special damages, where the verdict does not separate special and compensatory damages and there is nothing to show how the damages were allocated by the jury.<sup>99</sup>

## § 507. — Interest

A separate finding of interest is not necessary in a verdict including interest. The effect of verdicts with respect to interest depends on the intention of the jury as expressed in the verdicts.

A separate finding of interest is not necessary in a verdict including interest.<sup>1</sup> In a verdict awarding a certain sum "with interest" it must be certain that the jury intended past interest to be included before the court is justified in adding such amount, otherwise past interest will be deemed to be included in the award.<sup>2</sup> A verdict for a certain sum "and interest included" has been held to mean that interest from the date of maturity should be added,<sup>3</sup> and not to mean that interest up to the

date of trial was included.<sup>4</sup> A verdict for the full amount of plaintiff's claim on a quantum meruit claim should be construed as including interest from the date of the demand for payment thereof.<sup>5</sup> A verdict awarding damages plus interest on an unliquidated claim with a liquidated set-off plus interest has been held to show that if the past interest was not included in the liquidated amount it was not included in the other.<sup>6</sup> An award of interest by the jury, where the complaint and evidence warrant it, is proper, although the matter was not referred to in the instructions given by the court.<sup>7</sup> Statutes with respect to the addition of interest in a verdict govern a trial occurring after the statute became operative, although not in force when the action was brought.<sup>8</sup>

*Failure to allow interest.* A failure to allow interest on the excess of plaintiff's account over defendant's account is not error when the interest due on defendant's account exceeded that on plaintiff's account.<sup>9</sup> Moreover, the failure to include interest by mistake or oversight will not render a verdict improper as perverse.<sup>10</sup>

*Rate of interest.* Where the court is to calculate the interest due, the rate of interest is to be whatever the law, or the agreement of the parties, has established.<sup>11</sup>

*Simple or compound interest.* Whether the verdict should allow simple or compound interest will depend on the facts and circumstances of the particular case.<sup>12</sup>

*Waiver of interest.* A verdict assessing damages at a specified sum plus legal interest will be considered merely as a verdict for the amount named,

95. Colo.—Rocky Mountain Fuel Co. v. Belk, 21 P.2d 186, 92 Colo. 404.

96. Mont.—Miller v. Emerson, 186 P. 2d 220, 120 Mont. 380.

97. Ohio.—Fisher v. Tryon, 15 Ohio Cir.Ct. 641, 8 Ohio Cir.Dec. 556. 64 C.J. p 1083 note 46.

98. Tex.—Laney v. Hardy, Civ.App. 265 S.W.2d 609.

99. Ky.—Commonwealth v. Webb, 216 S.W.2d 893, 308 Ky. 93.

1. Mo.—McMonigal v. North Kansas City Development Co., 129 S.W.2d 75, 233 Mo.App. 1040—Mueller v. National Hay & Milling Co., App. 243 S.W. 420.

N.Y.—First International Pictures v. F. C. Pictures Corp., 27 N.Y.S.2d 516, 262 App.Div. 21—Gottesman v. Havana Importing Co., 72 N.Y.S.2d 428.

Certainty, definiteness, and formality of verdict with respect to interest see supra § 498.

2. Iowa.—Hunter v. Empire State Surety Co., 140 N.W. 194, 159 Iowa 114.

64 C.J. p 1083 note 48.

3. Tex.—Mutual Life Ins. Co. of New York v. Hodnette, Civ.App. 147 S.W. 615.

4. Tex.—Mutual Life Ins. Co. of New York v. Hodnette, supra.

5. N.Y.—Fleming v. Jacob, 103 N.Y. S. 209, 57 Misc. 372.

6. Iowa.—Reinertson v. Struthers, 207 N.W. 247, 201 Iowa 1186.

7. Mo.—Biederman v. Interstate Trust & Banking Co., 154 S.W. 843, 172 Mo.App. 1.

64 C.J. p 1084 note 58.

8. Mass.—Fidelity & Casualty Co. of New York v. Huse & Carleton, 173 N.E. 590, 273 Mass. 448, 72 A.L. R. 1143.

9. Ga.—Donelsonville Chevrolet Co.

v. Dickenson, 153 S.E. 106, 41 Ga. App. 392.

10. Minn.—Newberg v. Conley, 252 N.W. 221, 190 Minn. 459.

11. La.—Overton v. Gervais, 5 Mart., N.S., 682.

12. Mont.—Mercer v. Mercer, 180 P. 2d 248, 120 Mont. 182.

*Compound interest held allowable*  
Where each of notes sued on, which were copied into complaint, contained provision authorizing unpaid interest to be added to principal which in turn should bear interest, and complaint did not ask for either simple interest or compound interest but asked for judgment for principal sum together with interest thereon, verdict allowing compound interest pursuant to terms of the notes was not erroneous on ground that simple interest only was recoverable under the pleadings.—Mercer v. Mercer, supra.

where plaintiff has waived the question of interest.<sup>13</sup>

### § 508. — Apportionment of Damages

Subject to some exceptions, damages should not be apportioned among joint tort-feasors, although a verdict so doing is generally not void; nor should damages be apportioned among the various elements of damages.

While in some instances in some jurisdictions, under or apart or without reference to statute to that effect, such as the Uniform Contribution Among Tortfeasors Act, the jury may in the proper circumstances appraise the conduct of each of the

joint tort-feasors and fix and apportion the relative liability of each,<sup>14</sup> the general and common-law rule is that in the absence of a statute to the contrary, damages cannot be apportioned among joint tort-feasors by a verdict,<sup>15</sup> since the sole inquiry open is what damages plaintiff has sustained, not who ought to pay them.<sup>16</sup> Discrimination according to the relative enormity of the acts of each is not permitted.<sup>17</sup>

A several verdict against defendants alleged to be joint tort-feasors is not error as to a defendant who filed a separate plea,<sup>18</sup> since this is responsive

13. Colo.—Southern Surety Co. v. Peterson, 281 P. 746, 86 Colo. 350.

14. U.S.—Salsa v. Lilla, C.C.A.Mass., 76 F.2d 380.

Ark.—Rawls v. Tansil, 255 S.W.2d 973, 221 Ark. 699—Shultz v. Young, 169 S.W.2d 648, 205 Ark. 533.

Ky.—McCulloch's Adm'r v. Abell's Adm'r, 115 S.W.2d 386, 272 Ky. 756.

#### Applicability of rule

The rule requiring allocation of damages is applicable where damage is caused by the several and independent negligent acts of two or more parties, so that it may be found that act of each resulted in some injury and that consequences of their acts are separable.—Mohatt v. Olson, 21 N.W.2d 516, 146 Neb. 764—Faught v. Dawson County Irr. Co., 19 N.W.2d 358, 146 Neb. 274.

#### Prerequisite negligence stated

Ordinarily, negligence of both parties to action for resulting damages must be found to have contributed to injury sustained by plaintiff as proximate cause or causes thereof before damages may be apportioned according to negligence attributable to each party.—Trammell v. Matthews, 72 S.E.2d 132, 86 Ga.App. 661.

#### Evidence sufficient to warrant submission

Where there was sufficient evidence before jury in action by truck driver for damages of five hundred fifty-four dollars and ninety-three cents against three motorists who forced truck into ditch, to permit jury to appraise the conduct of each motorist and to undertake, as fairly as practicable, to fix the responsibility of each motorist under the Uniform Contribution Among Tort-feasors Act, jury had right to find that two motorists were liable for two hundred dollars each and one motorist for one hundred fifty-four dollars and ninety-three cents, even though there was no instruction authorizing apportionment of damages, and even though two of the motorists were allegedly execution proof.—Little v. Miles, 212 S.W.2d 935, 213 Ark. 725.

#### Statute limited to trespassers

The statute providing that, where several trespassers are sued jointly, jury may in their verdict specify particular damages to be recovered of each, has no application to personal injury suits.—Eldson v. Maddox, 24 S.E.2d 895, 195 Ga. 641—Gazaway v. Nicholson, 9 S.E.2d 154, 190 Ga. 345—General Oil Co. v. Crowe, 187 S.E. 221, 54 Ga.App. 139—Shermer v. Crowe, 186 S.E. 224, 53 Ga.App. 418.

15. U.S.—Detroit City Gas Co. v. Syme, C.C.A.Mich., 109 F.2d 366. Ala.—Corpus Juris cited in Bell v. Riley Bus Lines, 57 So.2d 612, 615, 257 Ala. 120—Bull v. Albright, 47 So.2d 266, 254 Ala. 23—Watt v. Combs, 12 So.2d 189, 244 Ala. 31, 145 A.L.R. 667, followed in 12 So.2d 197, 244 Ala. 39—City of Tuscaloosa v. Fair, 167 So. 276, 232 Ala. 129—Davis v. Orum, 40 So.2d 442, 34 Ala.App. 387, certiorari denied 40 So.2d 444, 252 Ala. 218.

Cal.—Aynes v. Winans, 200 P.2d 533, 33 Cal.2d 206—Sparks v. Berntsen, 121 P.2d 497, 19 Cal.2d 308—Ingram v. City of Gridley, 224 P.2d 798, 100 Cal.App.2d 815—Aitken v. White, 208 P.2d 788, 93 Cal.App.2d 134—Weddie v. Loges, 125 P.2d 914, 52 Cal.App.2d 116—Oldham v. Aetna Ins. Co., 61 P.2d 503, 17 Cal.App.2d 144.

Ga.—McCarthy v. Combs, 50 S.E.2d 805, 78 Ga.App. 426.

Ill.—Aldridge v. Fox, 108 N.E.2d 139, 348 Ill.App. 96—Curtis v. Lowe, 87 N.E.2d 865, 338 Ill.App. 463.

Iowa.—Drake v. Keelling, 299 N.W. 919, 230 Iowa 1038.

Kan.—Fitzgerald v. Thompson, 204 P.2d 756, 167 Kan. 87.

Minn.—Bakken v. Lewis, 26 N.W.2d 478, 223 Minn. 329.

Miss.—Southland Broadcasting Co. v. Tracy, 50 So.2d 672, 210 Miss. 826.

Mont.—Corpus Juris cited in Bowman v. Lewis, 102 P.2d 1, 3, 110 Mont. 435.

N.J.—Waldner v. Manahan, 29 A.2d 395, 21 N.J.Misc. 1.

N.D.—McCurdy v. Hughes, 248 N.W. 512, 63 N.D. 435.

Okl.—Delaney v. Morris, 145 P.2d 936,

193 Okl. 589—Whitney v. Tuttle, 62 P.2d 508, 178 Okl. 170, 108 A.L.R. 789.

Pa.—Ferne v. Chadderton, 69 A.2d 104, 363 Pa. 191—American Oil Co. v. Reifer, Co., 85 Pittsb.Leg.J. 750.

Tenn.—Norris v. Richards, 246 S.W. 2d 51, 193 Tenn. 450.

Tex.—Mendoza v. Singer Sewing Mach. Co., 84 S.W.2d 715, 125 Tex. 639—Ostertter v. Board, Civ.App., 91 S.W.2d 750, error dismissed.

Vt.—Mooney v. McCarthy, 181 A. 117, 107 Vt. 425.

W.Va.—Corpus Juris quoted in New River & Pocahontas Consol. Coal Co. v. Eary, 174 S.E. 573, 574, 575, 115 W.Va. 46.

64 C.J. p 1084 note 57.

#### Statutes held not to affect rule

(1) The comparative negligence statute does not change rule that where several defendants are shown to be liable as joint tort-feasors, the jury shall assess damages against all of them jointly in one amount.—Gazaway v. Nicholson, 9 S.E.2d 154, 190 Ga. 345.

(2) The statute providing that more than one judgment may be rendered in the same cause does not permit any jury to apportion damages between joint tort-feasors.—Stoewsand v. Checker Taxi Co., 73 N.E.2d 4, 331 Ill.App. 192.

#### Same damages against each

Where joint tort-feasors are named as defendants in a single action, the damages assessed against each must be the same.—Stacy v. Goff, Minn., 62 N.W.2d 920.

16. Mass.—Halsey v. Woodruff, 9 Pick. 555.

W.Va.—Corpus Juris quoted in New River & Pocahontas Consol. Coal Co. v. Eary, 174 S.E. 573, 574, 575, 115 W.Va. 46.

17. W.Va.—Corpus Juris quoted in New River & Pocahontas Consol. Coal Co. v. Eary, 174 S.E. 573, 574, 575, 115 W.Va. 46. 64 C.J. p 1085 note 59.

18. U.S.—Hooks v. Vet, Ga., 192 F. 314, 113 C.C.A. 526.

to his separate plea.<sup>19</sup> So also, a verdict for unequal amounts against several defendants under a complaint charging separate and distinct assaults and batteries is proper as responsive to the pleadings.<sup>20</sup> In fact, in the case of the several liabilities of a number of persons a single-sum verdict may be held to be improper and erroneous.<sup>21</sup> However, even in the case of separate actions tried together, it has been held to be improper and beyond the scope of the duties of the jury for the jury to bring in separate verdicts and apportion damages where the jury were not instructed to do so.<sup>22</sup>

**Cure or correction of apportioned verdict.** With respect to the effect of verdicts attempting to apportion damages in violation of the general rule stated above, it has been said that there are four distinct lines of authority.<sup>23</sup> One line holds that the verdict should be set aside and a new trial granted,<sup>24</sup> and that a verdict against joint defendants for a total sum and apportioning that sum between defendants will not sustain a joint judgment against both defendants for the total sum.<sup>25</sup> Other authority holds that the verdict is not void but merely defective in form, and that the defect is curable.<sup>26</sup> Accordingly, the attempted apportionment may be disregarded as surplusage as discussed infra § 509, and defendant permitted to take judg-

ment against all defendants for the total damages awarded.<sup>27</sup> A third line of authority holds that plaintiff may elect his best damages, that is, the highest amount awarded against any defendant, and enter judgment therefor against all defendants found liable,<sup>28</sup> on the ground that where no punitive damages are claimed plaintiff is entitled to a joint verdict for what the most culpable ought to pay.<sup>29</sup> The final line of authority holds that plaintiff may elect which of the defendants he will take judgment against, dismiss as to the others, and have his judgment against the selected one for the amount awarded against him.<sup>30</sup> It has also been held that the judge may question the jury as to a verdict apparently apportioning damages and, on finding that the jury intended a joint verdict for the total amount, enter judgment for that sum;<sup>31</sup> or under certain conditions the verdict may be corrected by the jury itself.<sup>32</sup>

**Pro rata division of award.** A verdict for plaintiff in a stated amount against a number of defendants "share and share alike" has been held invalid as a several verdict as to each defendant for a pro rata part of the amount stated;<sup>33</sup> and the court may order the jury to reconsider such "split verdict" and return a proper verdict.<sup>34</sup> However, it is not improper to submit verdicts in the same amounts as to each of the defendants where separate forms of

19. U.S.—*Hooks v. Vet.* supra.

20. N.J.—*Mancino v. Sampaolo*, 4 A.2d 792, 122 N.J.Law 321.

21. Mich.—*Rodgers v. Canfield*, 262 N.W. 409, 272 Mich. 562.

**Malpractice of several physicians**

Where jury in action against physicians for malpractice rendered verdict of four thousand dollars against first, and two thousand dollars against second, subsequent verdict of six thousand dollars against both, rendered after reconsideration of verdict under instruction that, if both physicians were found guilty of negligence, verdict in one sum against both should be rendered, was erroneous, since second physician was compelled to respond in damages for malpractice in which first verdict indicated he did not participate.—*Rodgers v. Canfield*, supra.

22. N.Y.—*Kinsey v. William Spencer & Son Corp.*, 300 N.Y.S. 391, 165 Misc. 143, affirmed 8 N.Y.S.2d 529, 255 App.Div. 995, affirmed 22 N.E.2d 168, 281 N.Y. 601.

23. Tenn.—*Nashville Ry. & Light Co. v. Trawick*, 99 S.W. 695, 118 Tenn. 273, 10 L.R.A.N.S. 191.

Vt.—*Mooney v. McCarthy*, 181 A. 117, 107 Vt. 425.

24. Vt.—*Mooney v. McCarthy*, supra.

25. Mich.—*Rathbone v. Detroit United Ry.*, 154 N.W. 143, 187 Mich. 586.

64 C.J. p 1085 note 65.

26. Ind.—*Lake Erie & W. R. Co. v. Halleck*, 136 N.E. 39, 78 Ind.App. 495.

Okl.—*Schuman v. Chatman*, 86 P.2d 615, 184 Okl. 224.

27. Ind.—*Lake Erie & W. R. Co. v. Halleck*, 136 N.E. 39, 78 Ind.App. 495.

28. N.Y.—*Beal v. Finch*, 11 N.Y. 128, 9 How Fr. 385.

64 C.J. p 1085 note 60.

29. Pa.—*Huddleston v. West Bellevue*, 2 A. 200, 111 Pa. 110.

30. Minn.—*Warren v. Westrup*, 46 N.W. 347, 44 Minn. 237.

31. Cal.—*Kerrison v. Unger*, 27 P.2d 927, 135 Cal.App. 607.

64 C.J. p 1085 note 62.

**Verdict held not finding of remote negligence**

In action for injuries resulting from contact with high tension power line, fact that jury first awarded forty thousand dollars damages against independent contractor under whose supervision line was located and maintained and only twenty thousand dollars against owner of premises and after further instructions returned a verdict for sixty

thousand dollars against both, showed that jury fixed plaintiff's damages at sixty thousand dollars and felt that owner was not guilty of as much negligence as contractor but did not show that jury found owner guilty only of remote negligence which would not support a verdict.—*International Harvester Co. v. Sartin*, 222 S.W.2d 854, 32 Tenn.App. 425.

32. Miss.—*Southland Broadcasting Co. v. Tracy*, 50 So.2d 572, 210 Miss. 836.

**Acceptance of second verdict only**

In personal injury action, where trial judge went home after jury retired and left the clerk to receive the verdict, and the jury returned a verdict assessing a certain sum against corporate defendant and certain sum against individual defendant, but clerk did not receive verdict and foreman of jury read another verdict assessing a total sum of damages against both defendants, and the clerk received this second verdict, and each member of jury assented to second verdict, there was no error.—*Southland Broadcasting Co. v. Tracy*, supra.

33. Ga.—*McCarthy v. Combs*, 50 S.E. 2d 805, 78 Ga.App. 426.

34. W.Va.—*Brewer v. Appalachian Constructors, Inc.*, 76 S.E.2d 916.

verdicts were submitted by the court to the jury under agreement with counsel.<sup>35</sup>

*Employer-employee relationship of defendants.* The general rule against verdicts apportioning damages among tort-feasors has been held to be particularly applicable where defendants stand in the relationship of employer and employee;<sup>36</sup> and even where, under the circumstances of the particular case, apportionment of damages is permitted a larger verdict cannot be found against the employer than against the employee where the wrongful act was done by the employee.<sup>37</sup> However, such apportionment of damages, even with larger damages against the employer, is permissible where the tort could have been committed by the employer through another employee,<sup>38</sup> or where the employee in the case was not the sole perpetrator on the part of the employer of the wrong complained of.<sup>39</sup> It has also been held, where the rule allowing plaintiff to elect which award he will take prevails, that the larger verdict, whether found against the employer or the employee, might be permitted to stand, at plaintiff's election.<sup>40</sup>

*Apportionment of damages among various items or elements.* Except as the rule may vary with respect to punitive or exemplary damages as discussed below, it is not required that the various elements or items of damages be separately stated in the

jury verdict together with the amount allowed for each;<sup>41</sup> and where the matter is one for the trial judge's discretion his refusal to require the verdict to specify the various elements of the award has been held not to be an abuse of discretion.<sup>42</sup> In fact it has been held that the jury do not have the right to make a segregation of the amount of general damages in the absence of an instruction that they submit a special verdict.<sup>43</sup> Accordingly, in an action for damages to property and for personal injuries, an award of a gross amount of damages in a general verdict is proper, and a segregation of the amounts awarded for personal injuries and for damages to property is not necessary;<sup>44</sup> but it has been held that a verdict stating the total amount awarded and allocating such sum as between personal injuries and expenses is not necessarily improper.<sup>45</sup>

*Separation of exemplary and compensatory damages.* It has been held that the general rule against apportioning or separating damages among defendants does not apply to exemplary damages, which may be properly apportioned by the jury,<sup>46</sup> either according to the relative culpability among the defendants<sup>47</sup> or their relative financial conditions.<sup>48</sup> It has also been held that in a proper case a verdict may be rendered allowing a recovery against all defendants for compensatory damages and a further amount against some as exemplary damages.<sup>49</sup>

35. Ala.—Davis v. Orum, 40 So.2d 442, 34 Ala.App. 387, certiorari denied 40 So.2d 444, 252 Ala. 218.

36. Cal.—Broward v. Scott Lumber Co., App., 269 P.2d 891.  
Pa.—Ferne v. Chadderton, 69 A.2d 104, 383 Pa. 191.

37. Pa.—Ferne v. Chadderton, supra.

38. C.—Thomas v. Southern Grocery Stores, 181 S.E. 565, 177 S.C. 411.

**Verdict held informal and properly refused**

Mo.—Conway v. Kansas City Public Service Co., 125 S.W.2d 935, 234 Mo.App. 596, certiorari quashed State ex rel. Kansas City Public Service Co. v. Shain, 134 S.W.2d 58, 345 Mo. 543.

38. S.C.—Mullikin v. Southern Bleachery & Print Works, 192 S.E. 665, 184 S.C. 449.

39. S.C.—Thomas v. Southern Grocery Stores, 181 S.E. 565, 177 S.C. 411.

40. Ill.—Aldridge v. Fox, 108 N.E.2d 139, 348 Ill.App. 96.

N.Y.—Kinsey v. William Spencer & Son Corp., 300 N.Y.S. 391, 165 Misc. 143, affirmed 8 N.Y.S.2d 529, 255 App.Div. 995, affirmed 22 N.E.2d 168, 281 N.Y. 601.

41. Fla.—Dania Lumber & Supply Co. v. Senter, 152 So. 2, 113 Fla. 332.

Ill.—Schultz v. Gilbert, 20 N.E.2d 884, 300 Ill.App. 417.—Stone's Beauty Shops v. Morrison Service Ass'n, 1 N.E.2d 816, 285 Ill.App. 163.

Ky.—Scobee v. Donahue, 164 S.W.2d 947, 291 Ky. 374.

Mo.—Chariton River Drainage Dist. v. Waddill, App., 254 S.W.2d 991.  
Thorn v. Cross, App., 201 S.W.2d 492.

**Failure held not to show improper award**

Failure to make separate assessment of damages as to eye injury and aggravation of goiter was held not to show jury improperly awarded some damages for aggravation of goiter.—Wilke v. Milwaukee Electric Ry. & Light Co., 245 N.W. 660, 209 Wis. 618.

42. N.H.—Putnam v. Bowman, 195 A. 865, 89 N.H. 200.

43. Wash.—Kagele v. Frederick, 261 P.2d 699, 43 Wash.2d 410.

**Splitting damages between tort and contract counts**

In actions against contractor for alleged fraud and for breach of contract, jury's splitting of liability between counts alleging fraud and

count alleging breach of contract for purpose of determining amount of damages was error.—Shell v. Schmidt, Cal.App., 272 P.2d 82.

44. Mo.—Ragsdale v. Young, App., 215 S.W.2d 514.

N.J.—Sullivan v. Aetna Casualty & Surety Co., 190 A. 72, 14 N.J.Misc. 890, judgment of nonsuit affirmed 179 A. 32, 115 N.J.Law 263.

Okla.—Wood Oil Co. v. Endicott, 234 P.2d 371, 205 Okl. 59.  
42 C.J. p 1300 note 82.

45. Tenn.—Kennedy v. Bruce, 5 Tenn.App. 583.

46. Mont.—Bowman v. Lewis, 102 P.2d 1, 110 Mont. 435.—Edquest v. Tripp & Dragstedt Co., 19 P.2d 637, 93 Mont. 446.

N.D.—McCurdy v. Hughes, 248 N.W. 512, 63 N.D. 435.

47. Cal.—Broward v. Scott Lumber Co., App., 269 P.2d 891.

Mont.—Edquest v. Tripp & Dragstedt Co., 19 P.2d 637, 93 Mont. 446.

N.D.—McCurdy v. Hughes, 248 N.W. 512, 63 N.D. 435.

48. Mont.—Edquest v. Tripp & Dragstedt Co., 19 P.2d 637, 93 Mont. 446.

49. Ohio.—Mauk v. Brundage, 67 N.E. 152, 68 Ohio St. 89, 62 L.R.A. 477.—Cahill v. Fidelity & Casualty Co., 175 N.E. 39, 37 Ohio App. 444.

However, it has also been held that where some of defendants in a single suit are liable only for compensatory damages a recovery cannot be had for a greater amount, and the injured party in one and the same verdict cannot obtain compensatory damages against some of the parties and punitive damages against the others.<sup>50</sup> Certainly, where all of defendants were actuated by malice, all will be liable for both actual and exemplary damages.<sup>51</sup> Apart from statute it has been held to be the better practice to separate compensatory damages from any exemplary, punitive, or vindictive damages assessed as punishment,<sup>52</sup> and that the jury should be instructed to bring in such a verdict,<sup>53</sup> so that each amount can be reviewed without disturbing the other.<sup>54</sup> However, it has been held that where the plaintiff's right to compensatory damages has been clearly established the fact that the jury failed to assess the actual damages separately will not warrant invalidating such verdict.<sup>55</sup> Moreover, under some circumstances, in the absence of a statute to the contrary, where both actual and punitive damages are recoverable a general verdict without separation of the kinds of damages is sufficient,<sup>56</sup> at least in the absence of a request for an instruction distinguishing between actual and punitive damages or requiring a different form of verdict.<sup>57</sup> Where compensatory or punitive damages can be awarded as to one of two defendants but not as to the other, an award of damages as to both which is not characterized as either compensatory or punitive damages renders the verdict uncertain and insufficient.<sup>58</sup>

**Apportionment among plaintiffs.** Under a statute requiring the jury to apportion damages among plaintiffs, it has been held that failure of the jury so to apportion the damages, when not prejudicial to defendant, is no ground for reversal as error to defendant,<sup>59</sup> and that if the total amount of damages awarded in a death action is not excessive defendant cannot complain that the amounts awarded to the different plaintiffs in the apportionment of the damages are excessive.<sup>60</sup> Apart from statute it has been held proper to send back to the jury for reconsideration and for separate findings a verdict finding a lump sum for several plaintiffs;<sup>61</sup> but it has also been held that plaintiffs are not entitled to have their separate awards segregated, at least not for the purpose of determining costs.<sup>62</sup>

**Apportionment as to cause of damage.** If the evidence shows concurring causes producing an aggregate loss, and it appears that defendant was not responsible for one or more causes producing a substantial part of the loss, the jury cannot arbitrarily apportion a part of the proved damages to the causes for which defendant is responsible.<sup>63</sup>

## § 509. Surplusage

Surplusage in a verdict may be disregarded by the court and judgment rendered independent of the unnecessary matter.

As a general rule matter contained in a verdict which is immaterial or not responsive to the issues may be rejected as surplusage,<sup>64</sup> and disregarded by

50. Ill.—Curtis v. Lowe, 87 N.E.2d 865, 338 Ill.App. 463.

Pa.—Reby v. Whalen, 179 A. 879, 119 Pa.Super. 476.

64 C.J. p 1085 note 66.

51. Iowa.—Reizenstein v. Clark, 73 N.W. 588, 104 Iowa 287.

Mo.—Chariton River Drainage Dist. v. Waddill, App., 254 S.W.2d 991 —Dye v. Loewer, App., 94 S.W.2d 948.

52. W.Va.—Show v. Mount Vernon Farm Dairy Products, 23 S.E.2d 68, 125 W.Va. 116.

53. Pa.—Shumaker v. Hankey, 45 A. 2d 910, 158 Pa.Super. 602.

54. Pa.—Bergen v. Lit Bros., 45 A. 2d 373, 158 Pa.Super. 469, affirmed 47 A.2d 671, 354 Pa. 535.

55. Mont.—Fauver v. Wilkoske, 211 P.2d 420, 123 Mont. 228, 17 A.L.R. 2d 518.

56. Idaho.—Crystal Dome Oil & Gas Co. v. Savic, 6 P.2d 155, 51 Idaho 409.

Ky.—Mullins v. Mutter, 151 S.W.2d 1047, 287 Ky. 164.

Nev.—Building Trades Council of Reno v. Thompson, 334 P.2d 581, 68 Nev. 384, 32 A.L.R.2d 324.

**Against one defendant**

Okl.—J. S. Hoffman, Inc., v. Palmer, 47 P.2d 88, 173 Okl. 249.

57. N.M.—Jones v. Citizens Bank of Clovis, 265 P.2d 366, 58 N.M. 48.

Okl.—Pine v. Duncan, 65 P.2d 492, 179 Okl. 336—J. S. Hoffman, Inc., v. Palmer, 47 P.2d 88, 173 Okl. 249.

58. Mo.—Conway v. Kansas City Public Service Co., 125 S.W.2d 935, 234 Mo.App. 596, certiorari quashed State ex rel. Kansas City Public Service Co. v. Shain, 134 S.W.2d 58, 345 Mo. 543.

59. Tex.—Jefferson, etc., R. Co. v. Woods, Civ.App., 64 S.W. 830.

60. Tex.—Missouri, etc., R. Co. v. McDuffey, 109 S.W. 1104, 50 Tex. Civ.App. 202.

61. N.J.—Picariello v. Linares & Rescigno Bank, 21 A.2d 343, 127 N.J.Law 63, affirmed 23 A.2d 398, 127 N.J.Law 565.

**Action by husband and wife**

N.J.—Picariello v. Linares & Rescigno Bank, supra.

62. Cal.—Thomas v. Smith, 38 P. 2d 827, 2 Cal.App.2d 701.

63. Minn.—Knowlton v. Chicago & N. W. Ry. Co., 131 N.W. 858, 115 Minn. 71.

64. Colo.—Boynnton v. Fox Denver Theaters, 214 P.2d 793, 121 Colo. 227, 24 A.L.R.2d 235—Morgan v. Gore, 44 P.2d 918, 96 Colo. 508. D.C.—Courembis v. Weinstein, Mun. App., 93 A.2d 89.

Ga.—City of Sylvania v. Miller, 79 S. E.2d 808, 210 Ga. 290.

Kan.—Hall v. McClure, 212 P. 875, 112 Kan. 752, 30 A.L.R. 782.

Mo.—Berryman v. People's Motorbus Co. of St. Louis, 54 S.W.2d 747, 228 Mo.App. 1032, certiorari quashed State ex rel. St. Louis Public Service Co. v. Becker, 66 S.W.2d 141, 334 Mo. 115.

Tenn.—Long v. Tomlin, 125 S.W.2d 171, 22 Tenn.App. 607.

Va.—Northern Va. Power Co. v. Bailey, 73 S.E.2d 425, 194 Va. 464.

the court in entering judgment thereon.<sup>65</sup> Thus, if the verdict finds the issue and something more, the latter part of the finding will be rejected as surplusage, and judgment rendered independent of the unnecessary matter, where there is nothing to show that the jury reasoned falsely.<sup>66</sup> It is not fatal that the verdict is not technically accurate if the court can see how it should be corrected after rejecting the surplusage.<sup>67</sup>

Among other matters which it has been held may be disregarded as surplusage are a caption to the verdict naming the parties;<sup>68</sup> an award of punitive damages where only actual damages are re-

coverable;<sup>69</sup> the portion of a verdict relating to exemplary damages, where such portion did not have the required three-fourths favorable vote;<sup>70</sup> an unwarranted apportionment of damages among plaintiffs;<sup>71</sup> an apportionment of damages between defendants;<sup>72</sup> an award of costs, as considered in Costs § 264 a, of attorney's fees,<sup>73</sup> or of interest;<sup>74</sup> a declaration that the recovery is to be "in gold;"<sup>75</sup> a declaration with respect to payment of the amount awarded in a lump sum or in installments;<sup>76</sup> a finding for defendant with the addition of the words "not guilty;"<sup>77</sup> in a trial in a city court, a stipulation that a note be "properly canceled" which is beyond the jurisdiction of that court;<sup>78</sup> and a find-

Wash.—Rowe v. Safeway Stores, 128 P.2d 293, 14 Wash.2d 363.

64 C.J. p 1085 note 71.

Construction and operation of:

General verdicts see infra § 521.

Special verdicts see infra §§ 569-571.

**Unnecessary matter** appearing in a verdict will be regarded as surplusage.—Brewer v. Appalachian Constructors, Inc., W.Va., 76 S.E.2d 916

**Duty to eliminate**

Where jury returned verdict for defendant "by reason of the fact that both the defendant and plaintiff were negligent," the quoted phrase was surplusage which the trial court should have directed to be eliminated.—Christensen v. Hennepin Transp. Co., 10 N.W.2d 406, 215 Minn. 394, 147 A.L.R. 945.

65. U.S.—Prudential Ins. Co. of America v. Faulkner, C.C.A. Utah, 68 F.2d 676, 94 A.L.R. 1160.

Colo.—Boynott v. Fox Denver Theaters, 214 P.2d 793, 121 Colo. 227, 24 A.L.R.2d 235—Morgan v. Gore, 44 P.2d 918, 96 Colo. 508.

D.C.—Coudrembis v. Weinstein, Mun. App., 93 A.2d 89.

Ga.—Morrison v. Smith, 67 S.E.2d 577, 208 Ga. 521—Patterson v. Fountain, 4 S.E.2d 38, 188 Ga. 473.

Mo.—Berryman v. People's Motorbus Co. of St. Louis, 54 S.W.2d 747, 228 Mo.App. 1032, certiorari quashed State ex rel. St. Louis Public Service Co. v. Becker, 66 S.W.2d 141, 334 Mo. 115.

R.I.—Gillis v. Melone, 11 A.2d 442, 64 R.I. 173.

W.Va.—State ex rel. Rufus v. Easley, 40 S.E.2d 827, 129 W.Va. 410.

**Refusal to return jury to jury room** was not error.—City of Sylvania v. Miller, 79 S.E.2d 808, 210 Ga. 290.

**Nonconflicting language**

Language voluntarily included by a jury in a general verdict, which is not in conflict with a valid general verdict, may be disregarded as surplusage.—Keating v. Zumwalt, 206 P.2d 10, 91 Cal.App.2d 845.

66. Cal.—Keating v. Zumwalt, supra. Colo.—Morkan v. Gore, 44 P.2d 918, 96 Colo. 508.

D.C.—Coudrembis v. Weinstein, Mun. App., 93 A.2d 89.

Ga.—Fleming v. Collins, 9 S.E.2d 157, 190 Ga. 210—Patterson v. Fountain, 4 S.E.2d 38, 188 Ga. 473. Kan.—Hall v. McClure, 212 P. 875, 112 Kan. 752, 30 A.L.R. 782.

Ky.—Foley's Adm'r v. Witt, 172 S.W.2d 81, 294 Ky. 498.

Miss.—Meridian City Lines v. Baker, 39 So 2d 541, 206 Miss. 58, 8 A.L.R. 2d 854

Mo.—Kimberlin v. Roberts, 107 S.W.2d 24, 341 Mo. 267.

N.Y.—Carrig v. Oakes, 20 N.Y.S.2d 585, 173 Misc. 793, affirmed 24 N.Y. S.2d 135, 260 App.Div. 989.

W.Va.—Brewer v. Appalachian Constructors, Inc., 76 S.E.2d 916.

64 C.J. p 1085 note 72.

Conformity of judgment with verdict see Judgments §§ 55-58.

**Explanations or comments** in a written verdict are no part of the verdict of the jury but are mere surplusage.—Anderson v. Penn Hall Co., D.C.Pa., 47 F.Supp. 691.

**Informal language** injected into a general verdict by a jury may be of such a character as to render it fatally vague, ambiguous, or contradictory, but, where the intent of the jury is clearly indicated and the verdict is otherwise sufficient, the informal portion should be disregarded as surplusage.—Rowe v. Safeway Stores, 128 P.2d 293, 14 Wash.2d 363.

**Erroneous term for amount awarded** In action on express contract based on undisputed sale price and percentage of commission, the use of the term "damages" in the verdict would be deemed surplusage.—McMonigal v. North Kansas City Development Co., 129 S.W.2d 75, 233 Mo.App. 1040.

67. Mass.—Ashton v. Touhey, 131 Mass. 26.

68. Ind.—Rogers v. Overton, 87 Ind. 410.

69. Or.—Martin v. Cambas, 293 P. 601, 134 Or. 257.

70. Cal.—Kirby v. Adcock, 253 P.2d 700, 116 Cal.App.2d 570.

71. U.S.—Pennsylvania R. Co. v. Logansport Loan & Trust Co., C.C.A. Ind., 29 F.2d 1.

Tex.—Guilf, C & S. F. Ry. Co. v. Carpenter, Civ.App., 201 S.W. 270, certiorari denied 39 S.Ct. 492, 260 U.S. 641, 63 L.Ed. 1185.

72. Cal.—Weddle v. Loges, 125 P.2d 914, 52 Cal.App.2d 115.

Colo.—Morgan v. Gore, 44 P.2d 918, 96 Colo. 508.

Me.—Atherton v. Crandemire, 33 A. 2d 303, 140 Me. 28—Currier v. Swan, 63 Me. 323.

Minn.—Bakken v. Lewis, 26 N.W.2d 478, 223 Minn. 329.

Miss.—Meridian City Lines v. Baker, 39 So.2d 541, 206 Miss. 58, 8 A.L.R. 2d 854.

Mo.—State ex rel. St. Louis Public Service Co. v. Becker, 66 S.W.2d 141, 334 Mo. 115.

N.Y.—Kalmanson v. Callahan, 95 N.Y. S.2d 289, 276 App.Div. 983—Wands v. City of Schenectady, 156 N.Y.S. 860, 171 App.Div. 94—Carrig v. Oakes, 20 N.Y.S.2d 585, 173 Misc. 793. Affirmed 24 N.Y.S.2d 135, 260 App.Div. 989—Schoat v. Marriott, 194 N.Y.S. 849, 119 Misc. 92.

64 C.J. p 1086 note 78.

Right to apportion damages between defendants see supra § 508.

73. Mo.—Roman v. King, App., 268 S.W. 414.

74. Mo.—Ranney v. Bader, 48 Mo. 539—Bredel v. Parker-Russell Min. & Mfg. Co., App., 21 S.W.2d 932.

**Where plaintiff waived interest**

D.C.—Coudrembis v. Weinstein, Mun. App., 93 A.2d 89.

75. Ala.—Chambers v. Walker, 42 Ala. 445.

76. U.S.—Prudential Ins. Co. of America v. Faulkner, C.C.A. Utah, 68 F.2d 676, 94 A.L.R. 1160.

77. Kan.—Hanson v. Kendt, 146 P. 1190, 94 Kan. 310.

64 C.J. p 1086 note 83.

78. Ga.—Davis & Co. v. Preston, 76 S.E. 766, 12 Ga.App. 65.

ing against a stranger to the record for part of the recovery.<sup>79</sup> Recommendations appended to a verdict otherwise properly deciding the issues of the case may be disregarded as surplusage,<sup>80</sup> as for example, a recommendation appended to the verdict that plaintiff donate the amount recovered to the Red Cross,<sup>81</sup> or that defendants recognize a moral obligation to compensate plaintiff,<sup>82</sup> or that defendant assist plaintiff's family,<sup>83</sup> or that one of defendant's employees be censured.<sup>84</sup>

A verdict will not be invalidated merely because the jury, through their foreman, after the rendition of the verdict expressed their opinion as to the merits of the case, where such opinion is not at variance with the verdict;<sup>85</sup> or, where the cause is submitted to the jury on special issues alone, because they returned a general verdict therewith,<sup>86</sup> or totaled the amount due after finding separately on each cause of action;<sup>87</sup> or because the jury segre-

gated the various items of damage after finding the total general damages.<sup>88</sup> As much of the verdict as relates to facts admitted by the pleadings may be stricken.<sup>89</sup>

Superadded words may be disregarded as surplusage only when they are meaningless.<sup>90</sup> Findings of fact germane to the issues may not be disregarded as surplusage.<sup>91</sup> No part of the verdict, no matter how erroneous on its face, which is essential to make the finding responsive to the issues can be disregarded as surplusage,<sup>92</sup> nor can part of the verdict be disregarded if the verdict is ambiguous.<sup>93</sup>

### § 510. Disregard of Instructions

The instructions to the jury, whether or not erroneous, constitute the law of the case, and the jury are required to follow them in making up their verdict.

Proper instructions to the jury constitute the law of the case, and the jury are bound to follow them in making up their verdict,<sup>94</sup> to the exclusion

79. Miss.—Louisville & N. R. Co. v. King, 80 So. 490, 119 Miss. 79.

80. Ga.—City of Savannah v. Miller, 79 S.E.2d 808, 210 Ga. 290—Morrisson v. Smith, 67 S.E.2d 577, 208 Ga. 521.

#### Matters beyond province of jury

When a verdict states finding of jury and fixes rights of parties in civil cases, recommendations to the court pertaining to matters beyond province of jury, and solely within province of the court, are mere surplusage.—Hall v. Commonwealth, 143 S.W.2d 495, 283 Ky. 778.

81. Minn.—Robyn v. White, 189 N.W. 577, 153 Minn. 76.

82. Cal.—Zolkover v. Pacific Electric Ry. Co., 254 P. 926, 81 Cal.App. 772.

83. Cal.—Willey v. Alaska Packers' Ass'n, 238 P. 1087, 73 Cal.App. 605.

84. N.Y.—Rettig v. John E. Moore Co., 154 N.Y.S. 124, 90 Misc. 664.

85. La.—Wallis v. Bazet, 34 La.Ann. 131.

N.Y.—Raga v. S. S. Kresge Co., 84 N.Y.S.2d 776, 274 App.Div. 966.

86. Tex.—Dunlap v. Raywood Rice Canal, etc. Co., 95 S.W. 43, 43 Tex. Civ.App. 269.

64 C.J. p 1086 note 91.

87. Neb.—Miller v. Drainage Dist. No. 1 in Richardson County, 199 N.W. 28, 112 Neb. 206.

Tex.—Kansas City, M. & O. Ry. Co. of Texas v. Treadwell & Wilkison, Civ.App., 164 S.W. 1089.

88. Wash.—Kagele v. Frederick, 261 P.2d 699, 43 Wash.2d 410.

89. Minn.—Coit v. Waples, 1 Minn. 134.

90. Ga.—Fraser v. Jarrett, 112 S.E. 487, 153 Ga. 441.

64 C.J. p 1086 note 94.

#### Double verdict

Ill.—Baumgartner v. Montavon, 276 Ill.App. 498.

#### Creditors' claims

Provision in verdict that year's support awarded by appraisers to widow and minor children out of decedent's estate was subject to claims of creditors was held not surplusage, since creditors were not necessarily given a superior lien on decedent's property to lien of year's support.—Marks v. Steinberg, 190 S.E. 808, 55 Ga.App. 561.

91. Ga.—Fleming v. Collins, 9 S.E.2d 157, 190 Ga. 210.

92. Fla.—Henry v. Cockcroft, 80 So. 313, 76 Fla. 532.

Miss.—McNairy v. Gathings, 57 Miss. 215.

93. Mich.—Richardson v. Noble, 107 N.W. 274, 143 Mich. 546.  
N.Y.—Donahue v. Wippert, 28 N.Y.S. 495, 7 Misc. 506.

94. Ala.—State ex rel. Hardegree, 53 So.2d 599, 256 Ala. 18—Piedmont Fire Ins. Co. v. Tierce, 17 So.2d 133, 245 Ala. 415—Franklin Fire Ins. Co. v. Slaton, 200 So. 564, 240 Ala. 560—City of Anniston v. Oliver, 185 So. 187, 28 Ala.App. 390.  
Ariz.—Youngkin v. Maurer, 243 P.2d 780, 74 Ariz. 67—Valley Nat. Bank v. Witter, 121 P.2d 414, 58 Ariz. 491.

Colo.—Harrison Const. Co. v. Nissen, 199 P.2d 886, 119 Colo. 42.

Conn.—Decker v. Roberts, 22 A.2d 541, 126 Conn. 478.

D.C.—Courcumbis v. Weinstein, Mun. App. 93 A.2d 89.

Idaho.—McNichols v. J. R. Simplot Co., 262 P.2d 1012, 74 Idaho 321.

Ind.—Belleville Lumber & Supply Co.

v. Chamberlin, 84 N.E.2d 60, 120 Ind.App. 12.

Iowa.—Hall v. City of West Des Moines, 62 N.W.2d 734—In re Stevens' Estate, 272 N.W. 426, 223 Iowa 369.

Ky.—Davis v. McFarland, 265 S.W.2d 66—Daniels v. Central Truckaway System, 253 S.W.2d 1—Betzing v. Wynn, 248 S.W.2d 727—Wall v. Van Meter, 223 S.W.2d 734, 311 Ky. 198, 20 A.L.R.2d 272—Parris' Adm'r v. Molter, 65 S.W.2d 52, 251 Ky. 432—Louisville Water Co. v. Bowers, 64 S.W.2d 444, 251 Ky. 71—Franklin County v. Bailey, 63 S.W.2d 622, 250 Ky. 528.

Minn.—Katzmarek v. Weber Brokerage Co., 8 N.W.2d 822, 214 Minn. 580.

Mo.—Radabaugh v. Williford, 116 S.W.2d 118, 342 Mo. 528.

Mont.—McDonald v. Peters, 272 P.2d 731—Metcalfe v. Barnard-Curtiss Co., 180 P.2d 263, 120 Mont. 50—Bowman v. Lewis, 102 P.2d 1, 110 Mont. 435—Ingman v. Hewitt, 86 P.2d 653, 107 Mont. 267—Tiddy v. City of Butte, 65 P.2d 605, 104 Mont. 202—Cowden v. Crippen, 53 P.2d 98, 101 Mont. 187—Hageman v. Arnold, 254 P. 1070, 79 Mont. 91.

N.J.—Panko v. Flintkote Co., 80 A.2d 302, 7 N.J. 55—Palestroni v. Jacobs, 77 A.2d 183, 10 N.J.Super. 266—In re Collins' Will, 15 N.E.2d 98, 18 N.J.Misc. 492.

N.Y.—Douglas v. Manfree Realty Corp., 33 N.Y.S.2d 423, 263 App.Div. 998—McKelvey v. Delaware, L. & W. R. Co., 300 N.Y.S. 1263, 253 App.Div. 109—Oatka Cemetery Ass'n v. Cazeau, 275 N.Y.S. 355, 242 App.Div. 415—Corey v. Smith & Pollock, 43 N.Y.S.2d 250, 181 Misc. 331, affirmed 47 N.Y.S.2d 601, 267



of any extraneous matter or conditions,<sup>95</sup> and regardless of what the members of the jury may believe the law should be.<sup>96</sup> It is their duty to take the law as given in the instructions and apply it to the evidence as adduced on the trial, and make their verdict accordingly.<sup>97</sup> A verdict which does not follow the instructions is contrary to law,<sup>98</sup> and the court may refuse to receive it,<sup>99</sup> or it may be set aside.<sup>1</sup> This rule has been held limited to instructions of such character as are plain and unambiguous and leave no room for confusion or misunderstanding on the part of the jury, and hence it has been held that a jury cannot be placed in the

position of ignoring or violating the instructions where the charges given at defendant's request were somewhat inconsistent with the rulings of the trial court on the pleadings and with parts of the oral charge.<sup>2</sup> However, it has also been held that, where it clearly appears that the jury did not comprehend the charge, and brought in its verdict on an erroneous view of law, the verdict will be set aside.<sup>3</sup>

Since the instructions should be considered as a whole, as discussed supra §§ 430-440, the jury must take the whole charge as the law of the case.<sup>4</sup>

App.Div. 911—Applebaum v. Applebaum, 84 N.Y.S.2d 505.  
N.C.—Brown v. Vestal, 55 S.E.2d 797, 231 N.C. 56.

Okl.—Sturm v. American Bank & Trust Co. of Ardmore, 44 P.2d 974, 172 Okl. 294.

R.I.—Medhurst v. McCrohan, 200 A. 532, 61 R.I. 150.

S.C.—Mishoe v. Atlantic Coast Line R. Co., 197 S.E. 97, 186 S.C. 402.

Tex.—Whelan v. Henderson, Civ.App., 137 S.W.2d 150, error dismissed, judgment correct—Indemnity Ins. Co. of North America v. Williams, Civ.App., 69 S.W.2d 619, reversed on other grounds 99 S.W.2d 905, 125 Tex. 51.

W.Va.—Jacoue v. Pietrantoni, 77 S. E.2d 884.  
64 C.J. p 1086 note 98.

Effect of jury's failure to return verdict directed see supra § 262.

Jury's disregard of instructions as ground for:

New trial see New Trial § 63.

Reversal where verdict correct see Appeal and Error § 1905.

#### Effect of objection

Where plaintiff excepted to instruction given at defendant's request, instruction became the law of the case for purpose of that trial only.—Klimaszewski v. Herrick, 32 N.Y.S.2d 441, 263 App.Div. 235.

95. N.Y.—Corey v. Smith & Pollock, 43 N.Y.S.2d 250, 181 Misc. 331, affirmed 47 N.Y.S.2d 601, 267 App. Div. 911.

96. Ariz.—Youngkin v. Maurer, 243 P.2d 780, 74 Ariz. 67.

Okl.—Hart Grocery Co. v. Hunt, 52 P.2d 66, 175 Okl. 32.

97. Ala.—Strickland v. Helms, App., 72 So.2d 122.

Ga.—Gilleland v. Welch, 38 S.E.2d 598, 200 Ga. 789.

N.Y.—Applebaum v. Applebaum, 84 N.Y.S.2d 505.

In reaching a general verdict, the jury take the law from the instructions of the court and apply that law to the facts as they find them to be in formulating their final conclusion.—Tucker Freight Lines v. Gross, 33 N.E.2d 553, 109 Ind.App. 454.

98. Ky.—Botzing v. Wynn, 248 S.W.2d 727—Wall v. Van Meter, 223 S.W.2d 734, 311 Ky. 198, 20 A.L.R.2d 272—Louisville Water Co. v. Bowlers, 64 S.W.2d 444, 251 Ky. 71—Cooper v. Girdler, 39 S.W.2d 1009, 239 Ky. 565.

N.Y.—Douglas v. Manfree Realty Corp., 33 N.Y.S.2d 423, 263 App. Div. 998—Mercato v. Hygrade Food Products Corp., 24 N.Y.S.2d 729, 261 App.Div. 829.

64 C.J. p 1087 note 1 [b].

99. Okl.—West v. Abney, 219 P.2d 624, 203 Okl. 227.

64 C.J. p 1087 note 99.

#### Duty of court

It is one of the functions of the court to see that verdicts are returned in accordance with its instructions.—West v. Abney, supra.

1. Ala.—White v. State ex rel. Hardegree, 53 So.2d 599, 256 Ala. 18—Piedmont Fire Ins. Co. v. Tierce, 17 So.2d 133, 245 Ala. 415—Franklin Fire Ins. Co. v. Slaton, 200 So. 564, 240 Ala. 560.

Mont.—Bowman v. Lewis, 102 P.2d 1, 110 Mont. 435.

N.Y.—Corey v. Smith & Pollock, 43 N.Y.S.2d 250, 181 Misc. 331, affirmed 47 N.Y.S.2d 601, 267 App. Div. 911—Applebaum v. Applebaum, 84 N.Y.S.2d 505.

64 C.J. p 1087 note 1.

#### Ultior consideration controlling

In order to constitute a "perverse verdict," there must be something to warrant finding that considerations ulterior to reasonably fair application of judgment of jury to evidence, under instruction by court, have controlled the jury.—Brown v. Montgomery Ward & Co., 267 N.W. 292, 221 Wis. 628.

#### Verdicts held contrary to charge

(1) Generally.

Ariz.—Youngkin v. Maurer, 243 P.2d 780, 74 Ariz. 67.

Colo.—Harrison Const. Co. v. Nissen, 199 P.2d 888, 119 Colo. 42.

Iowa.—In re Stevens' Estate, 272 N.W. 426, 223 Iowa 369.

Ky.—Daniels v. Central Truckaway System, 253 S.W.2d 1.

N.Y.—Mercato v. Hygrade Food Products Corp., 24 N.Y.S.2d 729, 261 App.Div. 829.

Or.—Columbia Digger Sand & Gravel Co. v. Ross Island Sand & Gravel Co., 25 P.2d 911, 145 Or. 96.

Tex.—Whelan v. Henderson, Civ.App., 137 S.W.2d 150, error dismissed, judgment correct.

64 C.J. p 1087 note 1 [a].

(2) Verdict of no cause of action as to all parties, in suits by owner-operator of automobile and invited passengers for injuries sustained in collision with another automobile, which were consolidated for trial with a separate suit by the owner and driver of the second automobile.—Leland v. Henderson, 16 A.2d 621, 18 N.J.Misc. 702.

(3) Verdict for wife suing for personal injuries and verdict of no cause of action as to claim of husband, with respect to husband's outlays for assistance in house.—Ruby v. Quotidian, 183 A. 910, 14 N.J.Misc. 227.

(4) Verdict attributing portion of the negligence causing collision to motorist who was driving on proper side of highway.—Schworer v. Einberger, 286 N.W. 14, 232 Wis. 210.

2. Ala.—Alabama Power Co. v. Stringfellow, 153 So. 629, 228 Ala. 422.

3. N.Y.—Adams v. Kline, 119 N.Y.S. 280.

Court is not bound to receive a verdict based on an obvious misapprehension of instructions.—West v. Abney, 219 F.2d 624, 203 Okl. 227.

4. Iowa.—Hall v. Great American Ins. Co. of New York, 252 N.W. 763, 217 Iowa 1005.

It is not for jury to select one part of the charge to the exclusion of another, or to decide whether one part cures or qualifies another, without being instructed so to do by the judge.—Morrison v. Dickey, 46 S.E. 863, 119 Ga. 698—Savannah, F. & W. Ry. Co. v. Hatcher, 45 S.E. 239, 118 Ga. 278—Potts v. R. F. C., 47 S.E.2d 178, 76 Ga.App. 796—Western & A. R. Co. v. Sellers, 83 S.E. 445, 15 Ga.App. 369.

Consequently, a verdict which does not disregard an instruction when interpreted with the entire charge will not be set aside because it appears inconsistent with an isolated or detached expression, clause, or paragraph.<sup>5</sup> A verdict is not contrary to the instructions where there is evidence on which under the instructions given the jury is authorized to find the verdict returned,<sup>6</sup> notwithstanding the judge expressed dissatisfaction at the method of proof when he submitted the issue.<sup>7</sup> A general verdict for plaintiff for much less than the amount of relief demanded on an unliquidated claim does not necessarily show that the jury did not follow the in-

structions.<sup>8</sup>

**Incorrect instructions.** In some jurisdictions the jury must follow the instructions whether the instructions did or did not correctly state the law,<sup>9</sup> particularly where the evidence is undisputed.<sup>10</sup> Under this rule, a verdict cannot be supported on a theory of law contrary to that on which the case was submitted to the jury.<sup>11</sup> Elsewhere, it has been held that the mere fact that the jury disregarded an incorrect instruction is not a ground for reversing a judgment thereon,<sup>12</sup> particularly where the verdict is plainly justified by the evidence,<sup>13</sup> and it is

#### Instructions construed

In action for personal injuries wherein only two instructions were given for plaintiff, second instruction, to assess damages for designated items if jury found for plaintiff under the evidence and first instruction and if they found that plaintiff was in exercise of ordinary care, did not authorize jury to ignore defendant's instructions.—*McNatt v. Wabash Ry. Co.*, 108 S.W.2d 33, 341 Mo. 516.

#### Issues made by pleadings

Jury must obey part of charge defining issues made by pleadings, as well as instructions declaring law applicable to evidence submitted.—*Ryan v. Beaver County*, 21 P.2d 858, 82 Utah 27, 89 A.L.R. 1253.

5. Ky.—*Speth v. Helm*, 192 S.W.2d 376, 301 Ky. 451.

Neb.—*Prediger v. Lincoln Traction Co.*, 149 N.W. 775, 97 Neb. 315.

6. Ky.—*Hilsenrad v. Bowling*, 166 S.W.2d 847, 292 Ky. 368.  
64 C.J. p 1087 note 4.

#### Experience of jury

A finding of strict compliance with instructions may be predicated on jury's experience and length of service.—*McDonald v. Elkins*, 187 A. 725, 88 N.H. 249.

#### Verdicts held not contrary to instructions

(1) Generally.  
U.S.—*Telluride Power Co. v. Williams*, C.A.Utah, 172 F.2d 673.

Ala.—*Clark v. Farmer*, 159 So. 47, 229 Ala. 596—*Strickland v. Helms*, 72 So.2d 122.

Iowa.—*Laudner v. James*, 266 N.W. 15, 221 Iowa 863.

Kan.—*Smith v. Kansas City*, 146 P.2d 660, 158 Kan. 213.

Ky.—*Davis v. McFarland*, 265 S.W.2d 66—*Betzling v. Wynn*, 248 S.W.2d 727—*Speth v. Helm*, 192 S.W.2d 376, 301 Ky. 451—*Hilsenrad v. Bowling*, 166 S.W.2d 847, 292 Ky. 368—*Louisville Water Co. v. Bowlers*, 64 S.W.2d 444, 251 Ky. 71.

Minn.—*Katzmarek v. Weber Brokerage Co.*, 8 N.W.2d 822, 214 Minn. 580.

Mont.—*Cash v. Knapp*, 113 P.2d 343, 112 Mont. 101—*Tiddy v. City of Butte*, 65 P.2d 605, 104 Mont. 202.  
Neb.—*Pyle v. Bradley*, 269 P.2d 842.  
Okla.—*Stanley v. Sweet*, 214 P.2d 906, 202 Okl. 448—*Drummond v. Corbin*, 77 P.2d 692, 182 Okl. 338.

Tex.—*Bankers Standard Life Ins. Co. v. Atwood*, Civ.App., 205 S.W.2d 74.

Utah.—*Erickson v. Walgreen Drug Co.*, 232 P.2d 210, 31 A.L.R.2d 177.  
64 C.J. p 1087 note 4 [b].

(2) In action for conversion of personal property, under instructions which refer to defendants plurally and not also singularly, a verdict holding only part of the defendants responsible for damages was not contrary to the instructions.—*Bowman v. Lewis*, 102 P.2d 1, 110 Mont. 435.

(3) Where, in suit to rescind sale of land on ground that vendor was incompetent, the jury was instructed to decide with respect to vendor's competency, verdict for plaintiff could not be set aside and directed for defendants on ground that jury ignored instructions, since that ground would be pertinent only to motion for new trial, which had been denied.—*Simon v. Williams*, 232 P.2d 181, 123 Colo. 505.

7. S.C.—*Roddey Automobile Co. v. Keenan*, 86 S.E. 23, 101 S.C. 507.

8. Utah.—*Hunter v. Wm. M. Roy-lance Co.*, 143 P. 140, 45 Utah 135.

9. Ala.—*White v. State ex rel. Har-degree*, 53 So.2d 599, 256 Ala. 18—*Franklin Fire Ins. Co. v. Slaton*, 200 So. 564, 240 Ala. 560.

Iowa.—*In re Stevens' Estate*, 272 N.W. 426, 223 Iowa 369.

Ky.—*Davis v. McFarland*, 265 S.W.2d 66—*Wall v. Van Meter*, 223 S.W.2d 734, 311 Ky. 198, 20 A.L.R.2d 272—*Franklin County v. Bailey*, 63 S.W.2d 622, 250 Ky. 528.

Minn.—*Katzmarek v. Weber Brokerage Co.*, 8 N.W.2d 822, 214 Minn. 580.

Mont.—*McDonald v. Peters*, 272 P.2d 731—*Metcalfe v. Barnard-Curtis Co.*, 180 P.2d 263, 120 Mont. 50—*Ingman v. Hewitt*, 86 P.2d 653, 107

Mont. 267—*Hageman v. Arnold*, 254 P. 1070, 79 Mont. 91.

S.C.—*Mishoe v. Atlantic Coast Line R. Co.*, 197 S.E. 97, 186 S.C. 402.

64 C.J. p 1088 note 7.  
Jury's disregard of erroneous instruction as:

Ground for reversal where verdict correct see Appeal and Error § 1905.

Harmless error see Appeal and Error § 1778 a, 1784 a.

Verdict contrary to law as ground for new trial see New Trial § 68.

#### Remedy

The injured party's remedy is by appeal.—*Piedmont Fire Ins. Co. v. Tierce*, 17 So.2d 133, 245 Ala. 415.

10. Iowa.—*Dutton v. Wabash, etc. R. Co.*, 23 N.W. 739, 66 Iowa 352.

11. Mo.—*Fink v. Kansas City Southern Ry. Co.*, 143 S.W. 568, 161 Mo. App. 314.  
64 C.J. p 1088 note 9.

12. Miss.—*Walker v. Dickerson*, 184 So. 438, 183 Miss. 642.  
64 C.J. p 1088 note 10.

13. Va.—*Collins v. George*, 46 S.E. 684, 102 Va. 509.  
64 C.J. p 1088 note 11.

#### In Rhode Island

(1) The fact that the jury disregarded an erroneous instruction has been held not a ground for vitiating the judgment, provided they found a verdict which was justified by the evidence.—*Butler v. Rhode Island Co.*, R.I., 68 A. 425.

(2) It has also been held, in an assumption action where the declaration contained a count on express contract and also a quantum meruit count, the evidence tended to support the quantum meruit count only, and the court charged that if the implied contract were proved the full amount sought could not be recovered, that a verdict for the full amount sought could not be supported, since the charge, even though erroneous, was the law of the case and binding on the jury.—*Medhurst v. McCrohan*, 200 A. 532, 61 R.I. 150.

manifest to the appellate court that justice has been done.<sup>14</sup>

*Failure to object to instruction.* An instruction given without objection, whether right or wrong,<sup>15</sup> has been held to become the law of the case and the jury are bound by it.<sup>16</sup>

*Immaterial disregard of instructions.* It has been held not to be error to disregard an instruction to state in the verdict on which of several counts the verdict is based,<sup>17</sup> and a verdict will not be set aside because it is contrary to instructions which were inapplicable<sup>18</sup> or conflicting,<sup>19</sup> or because the charge as a whole shows that the instruction disregarded was inadvertently given,<sup>20</sup> or where under all the circumstances it is more reasonable to assume that the jury forgot the instruction rather than that they purposely disobeyed it,<sup>21</sup> or where the disregard was merely technical.<sup>22</sup> The fact that a verdict is against the evidence and instructions is no ground for reversal where the evidence and instructions relate altogether to an issue not made by the pleadings.<sup>23</sup>

*Instructions as to damages.* If correct instructions are given as to the elements or measure of damage, or the amount of recovery, the jury are required to follow them and are restricted thereto,<sup>24</sup> and a departure therefrom constitutes error;<sup>25</sup> and the rule has been held applicable even though the charge is erroneous,<sup>26</sup> or even though an instruction propounds an improper measure of damages to which the parties assented or to which they did not object.<sup>27</sup> Disregard by the jury of an instruction as to the amount of recovery has been held to be cured by a remittitur.<sup>28</sup>

### § 511. Amendment or Correction by Jury

The jury have the right and the power to correct or change their verdict at any time before it has been finally recorded and they have been discharged.

Although a party litigant has a substantial right in a verdict obtained in his favor,<sup>29</sup> a manifest mistake in a verdict may be corrected by proper procedure;<sup>30</sup> and as a general rule the jury have the right<sup>31</sup> and the power<sup>32</sup> to correct or change their verdict at any time before it has been finally recorded and the jury have been discharged from

14. Wash.—Bancroft v. Godwin, 83 P. 189, 41 Wash 253.

15. Mont.—Western Montana Nat. Bank v. Home Ins. Co. of New York, 241 P. 611, 75 Mont. 16.

Or.—Columbia Digger Sand & Gravel Co. v. Ross Island Sand & Gravel Co., 25 P.2d 911, 145 Or. 96.

16. Mont.—Wood v. Jaeger, 272 P. 2d 725—Western Montana Nat. Bank v. Home Ins. Co. of New York, 241 P. 611, 75 Mont. 16.

Or.—Columbia Digger Sand & Gravel Co. v. Ross Island Sand & Gravel Co., 25 P.2d 911, 145 Or. 96—Tou Velle v. Farm Bureau Co-op. Exch., 229 P. 83, 1103, 112 Or. 476.

64 C.J. p 1088 note 13.

Effect of failure to object or except generally see supra §§ 425-426.

17. Tex.—Arnold v. Penn, 32 S.W. 353, 11 Tex.Civ.App. 325.

18. Mont.—Baleweck v. Maxwell, 74 P. 64, 29 Mont. 31.

Va.—Smith v. Tate, 82 Va. 657.

19. Mont.—Shippler v. Potomac Copper Co., 220 P. 1097, 69 Mont. 86.

64 C.J. p 1089 note 16.

20. Ala.—Birmingham Amusement Co. v. Norris, 112 So. 633, 216 Ala. 138, 53 A.L.R. 840.

21. Wis.—Hart v. Godkin, 100 N.W. 1057, 122 Wis. 646.

22. Wash.—Wallerich v. Puget Sound Warehouse Co., 80 P. 763, 38 Wash. 501.

23. Iowa.—Scott v. Morse, 6 N.W. 68, 7 N.W. 15, 54 Iowa 732.

24. Ind.—Belleville Lumber & Supply Co. v. Chamberlin, 84 N.E.2d 60, 120 Ind.App. 12.

Iowa.—Hall v. City of West Des Moines, 62 N.W.2d 734.

Ky.—Wall v. Van Meter, 223 S.W.2d 734, 311 Ky. 198, 20 A.L.R.2d 272.

Or.—Tou Velle v. Farm Bureau Co-op. Exch., 229 P. 83, 1103, 112 Or. 476.

R.I.—Medhurst v. McCrohan, 200 A. 532, 61 R.I. 150.

64 C.J. p 1089 notes 22, 23.

25. Ill.—Browder v. Beckman, 275 Ill.App. 193.

Or.—Tou Velle v. Farm Bureau Co-op. Exch., 229 P. 83, 1103, 112 Or. 476.

R.I.—Medhurst v. McCrohan, 200 A. 532, 61 R.I. 150.

64 C.J. p 1089 note 24.

*Departure from instructions as to damages held shown*

Ind.—Pearl Creamery Co. of Napanee v. Montpelier Creamery Co., 101 N.E.2d 709, 123 Ind.App. 401.

Ky.—Hines v. Gibson, 264 S.W.2d 64—Wall v. Van Meter, 223 S.W.2d 734, 311 Ky. 198, 20 A.L.R.2d 272.

26. R.I.—Medhurst v. McCrohan, 200 A. 532, 61 R.I. 150.

27. Ala.—Lee v. Gidley, 40 So.2d 80, 252 Ala. 156.

28. Ill.—Robison v. Bailey, 113 Ill. App. 123.

Remittitur as cure of error see Appeal and Error § 1869.

29. N.C.—Edwards v. Hood Motor Co., 69 S.E.2d 550, 235 N.C. 269.

30. Wash.—Hamilton v. Snyder, 48 P.2d 245, 182 Wash. 688.

31. Ark.—Saxon v. Foster, 65 S.W. 425, 69 Ark. 626.

N.Y.—Savko v. Brooklyn & Queens Transit Corp., Mun Ct., 1 N.Y.S.2d 489, 166 Misc. 84—McGrath v. Bagley, 68 N.Y.S.2d 605, reversed on other grounds 76 N.Y.S.2d 298, 273 App.Div. 822.

Amendment and correction of special interrogatories and findings see infra § 549.

Right of plaintiff to take nonsuit after jury have been sent back to correct defect in verdict see Dismissal and Nonsuit § 22.

32. Ga.—Monroe v. Alden, 7 S.E.2d 424, 61 Ga.App. 829.

Idaho.—Baldwin v. Ewing, 204 P.2d 430, 69 Idaho 176.

N.J.—Corpus Juris cited in Picariello v. Linares & Rescigno Bank, 21 A. 2d 343, 345, 127 N.J.Law 63.

N.Y.—Savko v. Brooklyn & Queens Transit Corp., 1 N.Y.S.2d 489, 166 Misc. 84—McGrath v. Bagley, 68 N.Y.S.2d 605, reversed on other grounds 76 N.Y.S.2d 298, 273 App. Div. 822.

Tenn.—Corpus Juris cited in Trevathan v. Lynch, 113 S.W.2d 416, 417, 21 Tenn.App. 549.

64 C.J. p 1089 note 28.

*Oral verdict of a jury rendered in open court is controlling and can be upheld even though in conflict with a written verdict handed in by them at the same time.*—Dives v. Wise, 18 Pa.Dist. & Co. 411, 25 Berks Co. 97.

the case. In a proper case the court may accept successive verdicts.<sup>33</sup>

## § 512. — Under Advice, Direction, or Sanction of Court

As a general rule, sometimes by virtue of statute, the trial court has power, and it is usually considered its duty, to require the jury to reconsider and amend or

change their verdict where it is defective or improper, either in form or in substance.

It is usually held, sometimes by virtue of statute,<sup>34</sup> that the trial court has power to require the jury to reconsider and amend or change their verdict where it is defective or improper,<sup>35</sup> and that this rule applies where the verdict is informal or defective in form<sup>36</sup> or defective in substance;<sup>37</sup>

33. N.M.—Holloway v. Evans, 238 P. 2d 457, 55 N.M. 601.

34. Cal.—Sparks v. Berntsen, 121 P. 2d 497, 19 Cal.2d 308—Brand v. Norris, 263 P.2d 466, 121 Cal.App.2d 367.

Conn.—Gillette v. Schroeder, 54 A.2d 498, 133 Conn. 682—Marini v. Wynn, 20 A.2d 400, 128 Conn. 53—Daniels v. F. & W. Grand 5, 10, and 25 Cent Store, 121 A. 804, 99 Conn. 415.

Ga.—Monroe v. Alden, 7 S.E.2d 424, 61 Ga.App. 829.

Idaho.—Baldwin v. Ewing, 204 P.2d 430, 69 Idaho 176.

Or.—Printing Industry of Portland v. Banks, 46 P.2d 596, 150 Or. 554.

Wash.—Haney v. Chatham, 111 P.2d 1003, 8 Wash.2d 310.

64 C.J. p 1089 note 30.

Resubmission of cause see supra § 487.

35. Ala.—City of Tuscaloosa v. Fair, 167 So. 276, 232 Ala. 129—Butler v. Walton, 56 So.2d 369, 36 Ala.App. 319, certiorari denied 56 So.2d 379, 257 Ala. 714.

Cal.—Sparks v. Berntsen, 121 P.2d 497, 19 Cal.2d 308—Phillips v. Superior Court in and for Alameda County, 89 P.2d 698, 32 Cal.App.2d 371.

Colo.—Hollenbeck & Reeves v. Peterson, 172 P.2d 678, 115 Colo. 301.

Ga.—Fried v. Fried, 69 S.E.2d 862, 208 Ga. 861—Lowery v. Morton, 36 S.E.2d 661, 200 Ga. 227.

Idaho.—Corpus Juris cited in Baldwin v. Ewing, 204 P.2d 430, 432, 69 Idaho 176.

Kan.—Traders State Bank of Glen Elder v. Wooster, 154 P.2d 1017, 159 Kan. 337.

Miss.—Mississippi Cent. R. Co. v. Roberts, 160 So. 604, 173 Miss. 487, appeal dismissed 56 S.Ct. 107, 296 U.S. 536, 80 L.Ed. 38.

Mo.—Cable v. Metropolitan Life Ins. Co., 128 S.W.2d 1123, 233 Mo.App. 1093.

N.Y.—White v. Hussey, 76 N.Y.S.2d 924, 191 Misc. 193—Carrig v. Oakes, 20 N.Y.S.2d 585, 173 Misc. 793, affirmed 24 N.Y.S.2d 135, 260 App.Div. 989—Miller v. City of Syracuse, 101 N.Y.S.2d 346—McGrath v. Bagley, 68 N.Y.S.2d 605, reversed on other grounds 76 N.Y.S.2d 298, 273 App. Div. 822.

N.C.—Baird v. Ball, 168 S.E. 667, 204 N.C. 469.

Ohio.—Bicker v. Schmidlapp, 30 Ohio N.P., N.S., 483.

Pa.—Douglas v. Kulp, Com Pl., 28 Del. Co. 349.

Tenn.—Trevathan v. Lynch, 113 S.W. 2d 416, 21 Tenn. App. 549.

Tex.—Barker v. Weingarten Riverside Co., Civ.App., 232 S.W.2d 692, refused no reversible error.

Wis.—Husting v. Dietzen, 272 N.W. 851, 224 Wis. 639.

### Proper procedure

Cal.—Brown v. Regan, 75 P.2d 1063, 10 Cal.2d 519.

Idaho.—Baldwin v. Ewing, 204 P.2d 430, 69 Idaho 176.

36. Ala.—Johnson v. Louisville & N. R. Co., 198 So. 350, 240 Ala. 219—City of Tuscaloosa v. Fair, 167 So. 276, 232 Ala. 129—Butler v. Walton, 56 So.2d 369, 36 Ala.App. 319, certiorari denied 56 So.2d 379, 257 Ala. 714.

Cal.—Sparks v. Berntsen, 121 P.2d 497, 19 Cal.2d 308—Brown v. Regan, 75 P.2d 1063, 10 Cal.2d 519.

Colo.—Blain v. Yockey, 184 P.2d 1015, 117 Colo. 29.

Idaho.—Baldwin v. Ewing, 204 P.2d 430, 69 Idaho 176.

Kan.—Traders State Bank of Glen Elder v. Wooster, 154 P.2d 1017, 159 Kan. 337.

Miss.—Universal C. I. T. Credit Corp. v. Turner, 56 So.2d 800.

Mo.—Cable v. Metropolitan Life Ins. Co., 128 S.W.2d 1123, 233 Mo.App. 1093—Conway v. Kansas City Public Service Co., 125 S.W.2d 935, 234 Mo.App. 596, certiorari quashed State ex rel. Kansas City Public Service Co. v. Shain, 134 S.W.2d 58, 345 Mo. 543.

N.J.—Picariello v. Linares & Rescigno Bank, 21 A.2d 343, 127 N.J. Law 63.

N.Y.—White v. Hussey, 76 N.Y.S.2d 924, 191 Misc. 193—Picone v. Picone, 73 N.Y.S.2d 156, 189 Misc. 84, reversed on other grounds 76 N.Y.S.2d 372, 273 App.Div. 914—Savko v. Brooklyn & Queens Transit Corp., 1 N.Y.S.2d 489, 166 Misc. 84—Miller v. City of Syracuse, 101 N.Y.S.2d 346—McGrath v. Bagley, 68 N.Y.S.2d 605, reversed on other grounds 76 N.Y.S.2d 298, 273 App. Div. 822.

N.C.—Baird v. Ball, 168 S.E. 667, 204 N.C. 469.

Ohio.—Ekleberry v. Sanford, 57 N.E. 2d 270, 73 Ohio App. 671—Landon v. Holzberger, 183 N.E. 446, 43 Ohio App. 434—Bicker v. Schmidlapp, 30 Ohio N.P., N.S., 483.

Or.—Printing Industry of Portland v. Banks, 46 P.2d 596, 150 Or. 554. Pa.—Needleman v. Lloyd, 55 Pa. Dist. & Co. 581—Devlin v. Kreuger, Com Pl., 86 Pittsb. Lex. J. 57.

Tenn.—Corpus Juris cited in Trevathan v. Lynch, 113 S.W.2d 416, 417, 21 Tenn. App. 549.

Tex.—Barker v. Weingarten Riverside Co., Civ.App., 232 S.W.2d 692, refused no reversible error. 64 C.J. p 1090 note 31.

### Verdict improperly announced or recorded

N.Y.—Savko v. Brooklyn & Queens Transit Corp., 1 N.Y.S.2d 489, 166 Misc. 84.

### Verdicts held proper to amend

(1) In negligence action, verdict containing the words "not guilty."—Wise v. Coleman, 230 S.W.2d 870, 360 Mo. 829.

(2) Verdict for plaintiff in stated amount and separate verdict for defendant in stated amount on his counterclaim, where the trial judge had told the jury they could find but one verdict.—Baranko v. Grenz, Mont., 256 P.2d 1074.

37. Ala.—W. T. Rawleigh Co. v. Hannon, 22 So.2d 603, 32 Ala.App. 147.

Colo.—Blain v. Yockey, 184 P.2d 1015, 117 Colo. 29.

Conn.—Marini v. Wynn, 20 A.2d 400, 128 Conn. 53.

Ga.—Monroe v. Alden, 7 S.E.2d 424, 61 Ga.App. 829.

N.Y.—White v. Hussey, 76 N.Y.S.2d 924, 191 Misc. 193—Savko v. Brooklyn & Queens Transit Corp., 1 N.Y.S.2d 489, 166 Misc. 84—Miller v. City of Syracuse, 101 N.Y.S.2d 346, 64 C.J. p 1090 note 32.

### In Ohio

(1) It has been held that a jury should have every reasonable opportunity, before their verdict is put on record and before they are discharged and their relation to the case as jurors has ceased, to alter their verdict in form or substance to conform it to their intention.—Ekleberry v. Sanford, 57 N.E.2d 270, 73 Ohio App. 571.

(2) In an earlier case, however, it was held that a verdict returned by jury could not be changed except as to form.—Landon v. Holzberger, 183 N.E. 446, 43 Ohio App. 434.

and it is usually considered the duty of the court to exercise this power to have the verdict amended or corrected.<sup>38</sup> However, it is error for the judge to send the jury back to reconsider its verdict where he believes it is the result of passion, prejudice, partiality, or mistake.<sup>39</sup> In a proper case the court may require the jury to correct or amend their verdict whether or not requested to do so,<sup>40</sup> and with or without the consent of counsel,<sup>41</sup> and even over the objection of counsel.<sup>42</sup>

The power of the court to require the jury to reconsider their verdict is not limited to a case where the verdict is so unreasonable that, if accepted, it would have to be set aside as against the evidence.<sup>43</sup> The jury may be directed to reconsider and amend or change their verdict where it is imperfect;<sup>44</sup> ambiguous, indefinite, or uncertain;<sup>45</sup> insensible or incomprehensible;<sup>46</sup> inconsistent or conflicting;<sup>47</sup> incomplete;<sup>48</sup> or where it is otherwise

38. Cal.—Sparks v. Berntsen, 121 P. 2d 497, 19 Cal.2d 308—Brown v. Regan, 75 P.2d 1063, 10 Cal.2d 519—Hallinan v. Prindle, 29 P.2d 202, 220 Cal. 46.

Colo.—Blain v. Yockey, 184 P.2d 1015, 117 Colo. 29.

Ga.—Lowery v. Morton, 36 S.E.2d 661, 200 Ga. 227.

N.J.—Corpus Juris cited in Picariello v. Linares & Rescigno Bank, 21 A.2d 343, 345, 127 N.J.Law 63.

N.Y.—Thorsen v. Metzgar, 105 N.Y.S.2d 947, 278 App.Div. 421—Miller v. City of Syracuse, 101 N.Y.S.2d 346—McGrath v. Bagley, 68 N.Y.S.2d 605, reversed on other grounds 76 N.Y.S.2d 298, 273 App.Div. 822.

Ohio—Eidenour v. Lile, 114 N.E.2d 156, 93 Ohio App. 435.

W.Va.—Brewer v. Appalachian Constructors, Inc., 76 S.E.2d 916.

64 C.J. p 1090 note 33.

#### Reading of verdict

Where jury returns verdict containing a patent ambiguity or defect, it is duty of court at time verdict is read to call jury's attention to such ambiguity or defect so that jury itself may correct its verdict before it is received and judgment entered thereon.—Kalmann v. Kalmann Bros., Mo.App., 182 S.W.2d 458.

**Normal proceeding** when jury render insufficiently formulated verdict is formal correction by jury under advice of court.—Brand v. Norris, 263 P.2d 456, 121 Cal.App.2d 367.

#### Duty to scrutinize

It is the duty of the presiding judge, before accepting a verdict, to scrutinize its form and substance to prevent insufficient or inconsistent findings from becoming a record of the court.—Edwards v. Hood Motor Co., 69 S.E.2d 550, 235 N.C. 269.

#### Court control salutary

The control of the court over the verdict of the jury is limited but salutary, and a mere expression of opinion by the trial court that the verdict is too large or too small may conduce to a desirable result.—Gillette v. Schroeder, 54 A.2d 498, 133 Conn. 682.

39. N.J.—Elvin v. Public Service Coordinated Transp., 67 A.2d 889, 4 N.J.Super. 491.

#### Compromise verdict

Where court refuses to accept verdict because it believes it to be a compromise verdict, it in effect finds that the verdict is the result of passion, prejudice, partiality or mistake, and it is error for it to instruct the jury to reconsider the verdict.—Elvin v. Public Service Coordinated Transp., supra.

40. Tenn.—Trevathan v. Lynch, 113 S.W.2d 416, 21 Tenn.App. 549.

41. Colo.—Blain v. Yockey, 184 P. 2d 1015, 117 Colo. 29.

Okl.—West v. Abney, 219 P.2d 624, 203 Okl. 227.

Tenn.—Trevathan v. Lynch, 113 S.W. 2d 416, 21 Tenn.App. 549.

42. Colo.—Blain v. Yockey, 184 P.2d 1015, 117 Colo. 29.

43. Conn.—Gillette v. Schroeder, 54 A.2d 498, 133 Conn. 682—Ryan v. Scanlon, 168 A. 17, 117 Conn. 428.

44. N.Y.—Savko v. Brooklyn & Queens Transit Corp., 1 N.Y.S.2d 489, 166 Misc. 84.

45. Cal.—Sparks v. Berntsen, 121 P. 2d 497, 19 Cal.2d 308.

Ga.—Lowery v. Morton, 36 S.E.2d 661, 200 Ga. 227.

Idaho—Corpus Juris cited in Baldwin v. Ewing, 204 P.2d 430, 432, 69 Idaho 176.

N.Y.—Rush v. Jagels "A Fuel Corp.", 35 N.Y.S.2d 861, 264 App.Div. 535.

N.C.—Edwards v. Hood Motor Co., 69 S.E.2d 550, 235 N.C. 269—Baird v. Ball, 168 S.E. 667, 204 N.C. 469.

Okl.—Keener v. Tully, 263 P.2d 513—Fletcher v. Allen, 157 P.2d 462, 195 Okl. 307.

Pa.—Pillivilla v. Township of Plains, Com Pl., 34 Luz.L.Reg. 29, reversed on other grounds Pillivilla v. Plains Tp., 14 A.2d 557, 140 Pa.Super. 661.

64 C.J. p 1092 note 46.

#### Duty to request

If verdict is ambiguous, party adversely affected should request a more formal and certain verdict, and then, if trial judge has any doubts on the subject, he may send jury out to correct verdict.—Fernandez v. Consolidated Fisheries, Inc., 255 P. 2d 863, 117 Cal.App.2d 254.

**Proper procedure** where the verdict returned is uncertain and needs support as to its meaning is to have jury return to their room and further

deliberate on a proper form of verdict.—Schaller v. Chapman, Ohio App., 66 N.E.2d 266.

**Verdict held not ambiguous**  
Ohio.—Schaller v. Chapman, supra.

46. Cal.—Mish v. Brockus, 218 P.2d 849, 97 Cal.App.2d 770.

Colo.—Blain v. Yockey, 184 P.2d 1015, 117 Colo. 29.

Tenn.—Trevathan v. Lynch, 113 S.W. 2d 416, 21 Tenn.App. 549.

47. Cal.—Mish v. Brockus, 218 P.2d 849, 97 Cal.App.2d 770—Johnson v. Marquis, 209 P.2d 63, 93 Cal.App. 2d 341.

Mich.—Jakubiec v. Hasty, 59 N.W.2d 385, 337 Mich. 205.

N.Y.—Thorsen v. Metzgar, 105 N.Y.S. 2d 947, 278 App.Div. 421—Reilly v. Shaparm Realty Corp., 45 N.Y.S.2d 356, 267 App.Div. 198.

N.C.—Edwards v. Hood Motor Co., 69 S.E.2d 550, 235 N.C. 269—Baird v. Ball, 168 S.E. 667, 204 N.C. 469.

Pa.—Phillips v. Upper Darby Tp., Com.Pl., 34 Del.Co. 172.

Tenn.—Trevathan v. Lynch, 113 S.W. 2d 416, 21 Tenn.App. 549.

Tex.—Barker v. Weingarten Riverside Co. Civ.App., 232 S.W.2d 692, refused no reversible error—Superior Ins. Co. v. Owens, Civ.App., 218 S.W.2d 517, error refused no reversible error—Traders & General Ins. Co. v. Holtzclaw, Civ.App., 111 S.W.2d 759, error dismissed—James A. Dick Co. v. Yanez, Civ.App., 55 S.W.2d 600, error refused.

Wash.—Haney v. Cheatham, 111 P.2d 1003, 8 Wash.2d 310.

Wis.—Husting v. Dietzen, 272 N.W. 851, 224 Wis. 639.

**Verdict held not inconsistent**

N.C.—Butler v. Gantt, 18 S.E.2d 119, 220 N.C. 711.

**Reconsideration of verdict held erroneous**

N.Y.—Newburgh Transfer & Storage Co. v. Pure Oil Co., 30 N.E.2d 601, 284 N.Y. 293.

48. N.Y.—Picone v. Picone, 73 N.Y. S.2d 156, 189 Misc. 84, reversed on other grounds 78 N.Y.S.2d 372, 273 App.Div. 914—McGrath v. Bagley, 68 N.Y.S.2d 605, reversed on other grounds 76 N.Y.S.2d 298, 273 App.Div. 822.

Okl.—Keener v. Tully, 263 P.2d 513.

defective, as where it is illegal;<sup>49</sup> repugnant;<sup>50</sup> not in accordance with the evidence;<sup>51</sup> or where there is manifest error in the verdict.<sup>52</sup> Also they may be required to reconsider and amend or change their verdict where it does not properly designate the party for or against whom the jury have decided;<sup>53</sup> where a joint verdict for plaintiffs, instead of a separate verdict for each plaintiff, is returned;<sup>54</sup> where the verdict makes no finding as to one of the defendants;<sup>55</sup> where it does not conform to the instructions<sup>56</sup> or where it appears that the jury misunderstood the instructions;<sup>57</sup> where it does not respond to, or clearly cover, the issues;<sup>58</sup>

where a general verdict for defendant fails to specify on which of several pleas it is based;<sup>59</sup> where there is no verdict corresponding with special findings on a particular issue;<sup>60</sup> or where the verdict does not correctly express the actual agreement or true finding of the jury.<sup>61</sup>

In still other instances it has been held proper to require the jury to reconsider and amend or change their verdict where it is excessive;<sup>62</sup> incorrectly states the amount of recovery;<sup>63</sup> awards punitive or exemplary damages without awarding actual or compensatory damages;<sup>64</sup> improperly

Tenn.—Trevathan v. Lynch, 113 S.W. 2d 416, 21 Tenn.App. 549.

49. Pa.—Phillips v. Upper Darby Tp., Com.Pl., 34 Del.Co. 172.

50. Colo.—Blain v. Yockey, 184 P.2d 1015, 117 Colo. 29.

Tenn.—Trevathan v. Lynch, 113 S.W. 2d 416, 21 Tenn.App. 549.

51. Conn.—Gillette v. Schroeder, 54 A.2d 498, 133 Conn. 682.

54 C.J. p 1092 note 48.

**Insufficient evidence as to special damages**

Cal.—Megee v. Fasulis, 150 P.2d 281, 65 Cal.App.2d 94.

**In Ohio**

In a case, in which it was held that a verdict could not be changed except as to form, a verdict manifestly against the weight of the evidence was held not ground for order that jury return to jury room to reconsider case, vacate verdict, and return new one.—Landon v. Holzberger, 183 N.E. 446, 43 Ohio App. 434.

52. Kan.—Traders State Bank of Glen Elder v. Wooster, 154 P.2d 1017, 159 Kan. 337.

N.Y.—Savko v. Brooklyn & Queens Transit Corp., 1 N.Y.S.2d 489, 166 Misc. 84.

53. Ala.—Johnson v. Louisville & N. R. Co., 198 So. 350, 240 Ala. 219. Colo.—Calnon v. Sorel, 119 P.2d 616, 108 Colo. 467.

Ky.—Louisville & N. R. Co. v. Farney, 172 S.W.2d 556, 295 Ky. 8. Pa.—Fullerton v. Motor Exp., Inc., 100 A.2d 73, 375 Pa. 173—Needleman v. Lloyd, 55 Pa.Dist. & Co. 581.

**Negligence of all parties**

Where jury returned a verdict for plaintiff on his complaint against defendants and assessed his recovery "at none," and it was certain that the jurors were unanimous in their opinion that all parties involved were guilty of negligence and that therefore none was entitled to a favorable verdict, it was proper for trial court to direct jury to return to jury room and return a proper verdict.—Blain v. Yockey, 184 P.2d 1015, 117 Colo. 29.

**Correction held sufficient**

Where jury, who had been instructed to return separate verdicts, returned verdict against only one of two defendants, the verdict was adequately corrected by verdict denying recovery against the other defendant after direction to jury to retire and find a verdict either for or against him.—Tinsley's Adm'r v. Slate, Ky., 251 S.W.2d 838.

**Particular verdicts corrected**

(1) In negligence action where jury returned verdict for plaintiff in sum of "no dollars and no cents" instead of verdict for defendant.—Daniels v. Celeste, 21 N.E.2d 1, 303 Mass. 148, 128 A.L.R. 682.

(2) Where jury returned two verdicts, one for each party in equal amounts, instead of a verdict for defendant, as required by statute where the demand of defendant equals the claim of plaintiff.—Butler v. Walton, 56 So.2d 369, 36 Ala.App. 819, certiorari denied 56 So.2d 379, 257 Ala. 714.

54. N.J.—Picariello v. Linares & Rescigno Bank, 21 A.2d 343, 127 N.J. Law 63.

55. Pa.—Anstine v. Pennsylvania R. Co., 20 A.2d 774, 342 Pa. 423.

56. Colo.—Blain v. Yockey, 184 P.2d 1015, 117 Colo. 29.

Conn.—Gillette v. Schroeder, 54 A.2d 498, 133 Conn. 682.

Okl.—West v. Abney, 219 P.2d 624, 203 Okl. 227.

Pa.—Horn v. Rudloff, Com.Pl., 7 Sch. Reg. 1.

54 C.J. p 1091 note 35. Disregard of instructions see supra § 510.

57. Ark.—Clift v. Jordan, 178 S.W.2d 1009, 207 Ark. 66.

58. Colo.—Blain v. Yockey, 184 P.2d 1015, 117 Colo. 29.

Idaho.—Baldwin v. Ewing, 204 P.2d 430, 69 Idaho 176.

N.C.—Baird v. Ball, 168 S.E. 667, 204 N.C. 469.

Tenn.—Corpus Juris cited in Trevathan v. Lynch, 113 S.W.2d 416, 21 Tenn.App. 549.

Tex.—Barker v. Weingarten Riverside Co., Civ.App., 232 S.W.2d 692, refused no reversible error. 64 C.J. p 1091 note 34.

**Defective in substance**

If a verdict fails to respond affirmatively or by necessary implication to the framed issues, it presents the vice of being defective in substance.—W. T. Rawleigh Co. v. Hannan, 22 So.2d 603, 32 Ala.App. 147.

**Issues not determined**

Cal.—Fennesse v. Pacific Gas & Elec. Co., 76 P.2d 104, 10 Cal.2d 538.

**Issues not submitted**

In action to recover realty, where the only issue submitted to jury was title to the property, but jury's verdict attempted to determine question of liability for taxes and other claims, trial court properly declined to accept the verdict with direction to return a proper verdict.—Lowery v. Morton, 36 S.E.2d 661, 200 Ga. 227.

59. Ga.—Penn Mut. Life Ins. Co. v. Childs, 7 S.E.2d 907, 189 Ga. 835.

60. Kan.—Traders State Bank of Glen Elder v. Wooster, 154 P.2d 1017, 159 Kan. 337.

61. Ga.—Monroe v. Alden, 7 S.E.2d 424, 61 Ga.App. 829.

N.C.—Bundy v. Sutton, 177 S.E. 420, 207 N.C. 422.

62. Conn.—Gillette v. Schroeder, 54 A.2d 498, 133 Conn. 682.

64 C.J. p 1092 note 44.

63. Cal.—Sparks v. Berntsen, 121 P. 2d 497, 19 Cal.2d 308.

64 C.J. p 1092 note 45.

64. Mo.—Dawson v. Metropolitan St. Ry. Co., 138 S.W. 665, 157 Mo.App. 642.

N.J.—Money v. Etter, 72 A.2d 409, 8 N.J.Super. 371.

**Reconsideration by jury required**

Where jury returned verdict for punitive damages only, trial judge should have rejected verdict and told jury that their finding was contrary to instructions and should have instructed them more fully and directed them to deliberate further, and action of trial judge in directing jury foreman to strike "as punitive damages

awards costs<sup>65</sup> or attorney's fees;<sup>66</sup> fixes the recovery in an amount unsupported by any evidence;<sup>67</sup> seeks to apportion the damages between joint defendants;<sup>68</sup> does not assess the amount of recovery where it should have been assessed,<sup>69</sup> or does not award adequate damages;<sup>70</sup> does not compute<sup>71</sup> or include<sup>72</sup> interest, or specify the date from which it shall be allowed;<sup>73</sup> or seeks to compel defendant to do a specific act when only damages can be awarded.<sup>74</sup> However, in some jurisdictions it is held that when the verdict of a jury is in proper form, is duly signed by their foreman, and represents the final agreement of the jury, it should be received and entered by the trial court, and not sent back for amendment or further consideration, even though it was reached on incorrect grounds.<sup>75</sup>

It has been held that when the jurors are sent back to amend their verdict, they may alter it in substance and bring in an entirely new verdict, as well as correct a mistake in form or make plain an ambiguity.<sup>76</sup> The denial of an oral request, made

after the verdict is returned, that the jury be required to retire to the jury room and itemize the verdict is not improper.<sup>77</sup> A substitute judge, who by stipulation of the parties is authorized to receive a sealed verdict and take all action necessary in connection with the reception, may not in effect direct a verdict by instructing the jury to reform their verdict in a particular way.<sup>78</sup>

#### *Effect of reconsideration or change of verdict.*

Where the jury have been sent back to correct a verdict which has not become final and the jury, on reconsidering, are unable to agree on a verdict, and are, therefore, discharged, the original defective verdict cannot be accepted and treated as the verdict of the jury;<sup>79</sup> and after the court has permitted the jury to retire and return a changed verdict it is error for the court to reject this verdict and enter judgment on the verdict first returned,<sup>80</sup> since the verdict subsequently returned may properly be accepted and used as the basis for judicial action,<sup>81</sup> unless the second verdict is in

only" from verdict was error.—Zedd v. Jenkins, 74 S.E.2d 791, 134 Va. 704.

65. Okl.—Jantzen v. Emanuel German Baptist Church, 112 P. 1127, 27 Okl. 473, Ann.Cas.1912C 659.

64 C.J. p 1092 note 41.

66. Cal.—Prager v. Isreal, 98 P.2d 729, 15 Cal.2d 89.

#### **Increase of amount**

A correction by striking the award of attorney's fees and increasing the amount of the verdict has been held valid.—Prager v. Isreal, supra.

67. Kan.—Schreiner v. Rothgarn, 92 P.2d 59, 150 Kan. 325.

68. Ala.—City of Tuscaloosa v. Fair, 167 So. 276, 232 Ala. 129.

Cal.—Sparks v. Berntsen, 121 P.2d 497, 19 Cal.2d 308.—Aitken v. White, 208 P.2d 788, 93 Cal.App.2d 134.

Minn.—Cullen v. City of Minneapolis, 275 N.W. 414, 201 Minn. 102.

Miss.—Gillespie v. Olive Branch Building & Lumber Co., 164 So. 42, 174 Miss. 154.—Mississippi Cent. R. Co. v. Roberts, 160 So. 604, 173 Miss. 487, appeal dismissed 56 S.Ct. 107, 296 U.S. 536, 80 L.Ed. 38.

Mo.—Conway v. Kansas City Public Service Co., 125 S.W.2d 935, 234 Mo.App. 596, certiorari quashed State ex rel. Kansas City Public Service Co. v. Shain, 134 S.W.2d 68, 345 Mo. 543.

N.Y.—White v. Hussey, 76 N.Y.S.2d 924, 191 Misc. 193.

Okl.—West v. Ahney, 219 P.2d 624, 203 Okl. 227.—Whitney v. Tuttle, 62 P.2d 608, 178 Okl. 170, 108 A.L.R. 789.

W.Va.—Brewer v. Appalachian Constructors, Inc., 76 S.E.2d 916.

64 C.J. p 1092 note 47.

#### **Best method of curing error**

Tenn.—Norris v. Richards, 246 S.W. 2d 81, 193 Tenn. 450.

69. Ga.—Bane v. Faircloth, 182 S.E. 400, 52 Ga.App. 23.

Mass.—Jurek v. Giovannucci, 49 N.E.2d 907, 314 Mass. 252.

N.M.—Johnson v. Mercantile Ins. Co. of America, 133 P.2d 708, 47 N.M. 47.

N.Y.—McGrath v. Bagley, 68 N.Y.S.2d 605, reversed on other grounds 76 N.Y.S.2d 298, 273 App.Div. 822.

Ohio.—Ridenour v. Lile, 114 N.E.2d 166, 93 Ohio App. 435.

Okl.—Keener v. Tully, 263 P.2d 513.

Or.—Printing Industry of Portland v. Banks, 46 P.2d 596, 150 Or. 554.

64 C.J. p 1091 note 39.

70. Conn.—Marini v. Wynn, 20 A.2d 400, 128 Conn. 53.—Ryan v. Scanlon, 163 A. 17, 117 Conn. 428.—Barbieri v. Pandiselo, 163 A. 469, 116 Conn. 48.

Vt.—Goldberg v. Gintoff, 20 A.2d 114, 112 Vt. 43.

64 C.J. p 1092 note 40.

71. Ohio.—Ekleberry v. Sanford, 67 N.E.2d 270, 73 Ohio App. 571.

64 C.J. p 1091 note 36.

72. Tenn.—Knights of Pythias v. Allen, 58 S.W. 241, 104 Tenn. 623.

64 C.J. p 1091 note 37.

73. Okl.—Fletcher v. Allen, 157 P. 2d 452, 195 Okl. 307.

64 C.J. p 1091 note 38.

74. Mich.—McCormick v. Hawkins, 135 N.W. 1066, 169 Mich. 641.

75. W.Va.—State ex rel. Rufus v. Easley, 40 S.E.2d 827, 129 W.Va. 410.

#### **Duty of court**

After verdict is received, trial court should promptly discharge jury from further consideration, and should refrain from any comment to jury relating to any issue involved, character or nature of evidence, and should not instruct jury with respect to any such matters or direct jury to return to their room to consider case further for purpose of returning different verdict.—State ex rel. Rufus v. Easley, supra.

There may not be two successive verdicts, one of not guilty and the other of guilty, as to same defendant by same jury on single trial of case.—State ex rel. Rufus v. Easley, supra.

76. Colo.—Plain v. Yockey, 184 P. 2d 1015, 117 Colo. 29.

N.Y.—White v. Hussey, 76 N.Y.S.2d 924, 191 Misc. 193.—Savko v. Brooklyn & Queens Transit Corp., 1 N.Y. S.2d 489, 166 Misc. 84.

77. Okl.—Main v. Levine, 118 P.2d 252, 189 Okl. 564.

78. N.Y.—Covalesski v. Thomas, 242 N.Y.S. 174, 229 App.Div. 413.

79. Wash.—Blino v. Veenhuizen, 250 P. 450, 141 Wash. 18, 49 A.L.R. 1297.

80. S.C.—Joiner v. Bevier, 152 S.E. 652, 155 S.C. 340.

Tenn.—George v. Belk, 49 S.W. 748, 101 Tenn. 625.

81. Ga.—Seaboard Air Line Ry. v. Randolph, 71 S.E. 887, 136 Ga. 605. Miss.—Morris v. Robinson Bros. Motor Co., 110 So. 683, 144 Miss. 861.

some manner defective.<sup>82</sup> If the first verdict is entirely correct and proper, but the trial court rejects and has the jury render a second verdict in accordance with an erroneous instruction as to the law, the appellate court, on holding the second verdict erroneous, cannot accept and act on the verdict the jury first attempted to return.<sup>83</sup>

**Presence of counsel.** The court may direct the jury to amend or correct their verdict even though counsel are absent from the courtroom at the time.<sup>84</sup>

**Instructions.** Where the court requires the jury to reconsider and amend or change the verdict, it

is proper for the court to inform them why they are so returned,<sup>85</sup> and they should be sent out under appropriate and, if necessary, additional instructions.<sup>86</sup> However, care should be taken by the trial judge to avoid any influence on the deliberations of the jury as to matters exclusively within their province,<sup>87</sup> and the court may not tell the jury what their verdict shall be.<sup>88</sup> Where the verdict is sufficient as to substance but incorrect as to form, it is error for the court to direct the jury to correct the verdict in such a manner as to cause them to believe it was incorrect in substance as well as in form, and hence to return a substantially different

82. Ky.—Flux v. Button, 181 S.W. 174,

167 Ky. 621.

64 C.J. p 1092 note 53.

83. Mass.—Roberts v. Rockbottom Co., 7 Metc. 46.

84. Mass.—Burgess v. Giovannucci, 49 N.E.2d 907, 314 Mass. 252.—Daniels v. Celeste, 21 N.E.2d 1, 303 Mass. 148, 128 A.L.R. 682.

64 C.J. p 1092 note 55.

85. Conn.—Ryan v. Scanlon, 168 A. 17, 117 Conn. 428.—Daniels v. F. & W. Grand 5, 10, and 25 cent Store, 121 A. 804, 99 Conn. 415.

Pa.—Phillips v. Upper Darby Tp. Com.Pl., 34 Del.Co. 172.

W.Va.—Brewer v. Appalachian Constructors, Inc., 76 S.E.2d 916.

86. Ala.—W. T. Rawleigh Co. v. Hannon, 22 So.2d 603, 32 Ala.App. 147.

87. Ga.—Fried v. Fried, 69 S.E.2d 862, 208 Ga. 861.—Lowery v. Morton, 36 S.E. 2d 661, 200 Ga. 227.

N.C.—Edwards v. Hood Motor Co., 69 S.E.2d 550, 235 N.C. 269.

Ohio.—Schaller v. Chapman, App., 66 N.E.2d 266.

Pa.—Anstine v. Pennsylvania R. Co., 20 A.2d 774, 342 Pa. 423.

Tenn.—Norris v. Richards, 246 S.W. 2d 81, 193 Tenn. 450.

Wash.—Haney v. Cheatham, 111 P. 2d 1003, 8 Wash.2d 310.

64 C.J. p 1090 note 31.

#### Request

Court could give jury returning conflicting answers to special issues further instruction without request from jury therefor.—James A. Dick Co. v. Yanez, Tex.Civ.App., 65 S.W.2d 600, error refused.

#### Misunderstood instructions

If the jury misunderstood their instructions, it is proper to permit the jury further to consider their verdict after the instructions have been explained.—Clift v. Jordan, 178 S.W.2d 1009, 207 Ark. 66.

#### Oral statements

Oral statements by court to jury after jury returned informal verdict did not constitute error, where statements were repeated in instructions given to jury as to verdict.—Conway

v. Kansas City Public Service Co., 125 S.W.2d 935, 234 Mo.App. 596, certiorari quashed State ex rel. Kansas City Public Service Co. v. Shain, 134 S.W.2d 58, 345 Mo. 543.

**Failure further to instruct** was not error where the jury understood the true situation and returned proper verdicts.—Willett v. Bradas & Greens, 142 S.W.2d 139, 283 Ky. 525.

#### Law of case

In replevin for cattle, instruction, after verdict was returned, to raise damages for depreciation of cattle a specified amount above that found by the jury was improper, since original instruction at conclusion of trial that such damages were for jury's determination, not objected to by plaintiff, constituted law of case on issue of damages.—Irish v. Elkins, 38 P.2d 657, 38 N.M. 113.

#### Instructions held erroneous

(1) Instruction which in effect told the jury to award a sum in excess of specified amount.—Fichter Steel Corp. v. P. T. Cox Const. Co., 42 N. Y.S.2d 225, 266 App.Div. 347.

(2) Where jury's first verdict for plaintiff assessed his damage at "nothing," court's oral statement to jury to "return to your room and find a verdict for something."—Weaver v. Grenada Bank, 179 So. 564, 180 Miss. 876.

#### Instructions held not erroneous

Conn.—Ryan v. Scanlon, 168 A. 17, 117 Conn. 428.

Mo.—Conway v. Kansas City Public Service Co., 125 S.W.2d 935, 234 Mo.App. 596, certiorari quashed State ex rel. Kansas City Public Service Co. v. Shain, 134 S.W.2d 58, 345 Mo. 543.

Tex.—Traders & General Ins. Co. v. Holtzclaw, Civ.App., 111 S.W.2d 759, error dismissed.

W.Va.—Brewer v. Appalachian Constructors, Inc., 76 S.E.2d 916.

87. Pa.—Van Buren v. Eberhard, 104 A.2d 98, 377 Pa. 22.

#### Repeated reference to item of damage

In action for damages, where jury returned defective verdict, and court,

in questioning them about items included in verdict, referred seven times to item of pain and suffering, repeated references to pain and suffering had effect prejudicial to defendants, and warranted grant of new trial, limited to issue of amount of damages.—Van Buren v. Eberhard, supra.

88. N.C.—Edwards v. Hood Motor Co., 69 S.E.2d 550, 235 N.C. 269.

Pa.—Douglas v. Kulp, Com.Pl., 28 Del.Co. 349.

64 C.J. p 1092 note 40 [a].

#### Instructions held proper

Trial judge's statement that he would let jury retire to reconcile verdict before accepting it was held not to indicate what the verdict should be.—Baird v. Ball, 168 S.E. 667, 204 N.C. 469.

#### Might to return same verdict

(1) The extent to which a trial court shall instruct a jury as to their right to persist in a verdict after reconsideration depends on the circumstances of each case. Where there may be a reasonable difference of opinion, the court should be careful not to give the impression to the jury that they must return a different verdict and should make it clear to them that it is their right to persist in that first returned.—Barbieri v. Pandisio, 163 A. 469, 116 Conn. 48.

(2) On the other hand, if the verdict first returned is so clearly unreasonable that the trial court would be bound to set it aside, the jury have failed to perform their duty and the court would be justified in pointing that out to them; and in such case the trial court is not under an obligation expressly to instruct the jury that after reconsideration they may return the same verdict, but it does its full duty if it leaves it open to them to do so.—Barbieri v. Pandisio, supra.

(3) Instruction held not to preclude jury from bringing in second verdict in the same amount as the first.—Goldberg v. Gintoff, 20 A.2d 114, 113 Vt. 42—64 C.J. p 1092 note 40 [a] (3), (4).



verdict.<sup>89</sup> Where the jury are required to reconsider their verdict on the question of the adequacy of the damages awarded, the court may assume from the first verdict that the jury have finally settled the issue of liability and confine its instructions solely to the question of adequacy of the damages awarded.<sup>90</sup>

### § 513. — After Sealing or Recording of Verdict and Discharge or Separation of Jury

In general a jury may amend and correct their verdict, or be ordered so to do by the court, at the time it is returned or announced in open court and before it has been received and recorded and the jury discharged from the case; but after the verdict has been received and the jury discharged it cannot ordinarily be amended and corrected.

In general a jury may amend and correct their verdict, or be ordered so to do by the court, at the

time it is returned or announced in open court and before it has been received and recorded and the jury discharged from the case,<sup>91</sup> or at any time until the verdict has been received and recorded or filed,<sup>92</sup> or after the return of the verdict and before the dispersal of the jury.<sup>93</sup> On the other hand, although it has been held, without apparent qualification, that the jury may be recalled to amend or correct the verdict after they have been discharged, and separated, and the verdict recorded,<sup>94</sup> it is the general rule that, after the verdict has been received and the jury discharged,<sup>95</sup> or after the verdict has been received and recorded,<sup>96</sup> or the jury have otherwise lost all power to act with reference to the case,<sup>97</sup> they cannot amend or change the verdict; nor is it within the power of the court thereafter to recall them and direct them to alter or amend their verdict.<sup>98</sup> However, a dis-

89. Mich.—McTaggart v. Kurys, 29 N.W.2d 114, 318 Mich. 627.

90. Conn.—Marini v. Wynn, 20 A.2d 400, 128 Conn. 53.

91. Ala.—City of Tuscaloosa v. Fair, 167 So. 276, 232 Ala. 129—Butler v. Walton, 56 So.2d 369, 36 Ala.App. 319, certiorari denied 56 So.2d 379, 257 Ala. 714.

Cal.—Sparks v. Bernsten, 121 P.2d 497, 19 Cal.2d 808—Mogee v. Pasulha, 150 P.2d 231, 65 Cal.App.2d 94.

Mo.—Cable v. Metropolitan Life Ins. Co., 128 S.W.2d 1123, 233 Mo.App. 1093.

Mont.—Fauver v. Wilkoske, 211 P.2d 420, 123 Mont. 228, 17 A.L.R.2d 518.

N.Y.—Savko v. Brooklyn & Queens Transit Corp., Mun.Ct., 1 N.Y.S.2d 489, 166 Misc. 84.

N.C.—Baird v. Ball, 168 S.E. 667, 204 N.C. 469.

Ohio.—Blicker v. Schmidlapp, 30 Ohio N.P.N.S., 483.

64 C.J. p 1090 note 31.

After jury has been polled  
Cal.—Sparks v. Bernsten, 121 P.2d 497, 19 Cal.2d 808.

Trial court retains entire control of proceedings up to time jury is finally discharged from further consideration of case.—Brown v. Regan, 76 P.2d 1063, 10 Cal.2d 519.

#### Motion

When the verdict is merely informal or indefinite but not as clear as may be desired, complaining party should enter motion to have jury extend or reform verdict before jury is discharged, otherwise question will be deemed to have been waived.—Fritz v. Roberts, 94 S.W.2d 1016, 264 Ky. 418.

92. Idaho.—Baldwin v. Ewing, 204 P.2d 430, 69 Idaho 174.

Pa.—Horn v. Rudloff, Com.Pl., 7 Sch. Reg. 1.

Wash.—Haney v. Cheatham, 111 P.2d 1003, 8 Wash.2d 310.

93. Ga.—Manry v. First Nat. Bank of Barnesville, 23 S.E.2d 662, 195 Ga. 163—Monroe v. Alden, 7 S.E.2d 424, 61 Ga.App. 829.

94. N.H.—Dearborn v. Newhall, 63 N.H. 301.

95. U.S.—Finn v. Carnegie-Illinois Steel Corp., D.C.Pa., 68 F.Supp. 423. N.Y.—Savko v. Brooklyn & Queens Transit Corp., Mun.Ct., 1 N.Y.S.2d 489, 166 Misc. 84.

Ohio.—Ekleberry v. Sanford, 57 N.E. 2d 270, 73 Ohio App. 571.

Pa.—Schulkind v. Dropkin, Com.Pl., 7 Sch.Reg. 17.

Wis.—Brophy v. Milwaukee Elec. Ry. & Transport Co., 30 N.W.2d 76, 251 Wis. 558.

64 C.J. p 1093 note 68.

#### Import and intent of verdict

Where jury had published their verdict and dispersed and the court on the following day reassembled the jury and questioned them as to intent of their verdict, expressions of the jury could not add to or change import and intent of the verdict and could not modify unequivocal finding in favor of two of defendants.—Ryner v. Duke, 53 S.E.2d 362, 205 Ga. 280.

#### Recording and discharge

(1) Fact that verdict has been announced and entered in minutes of the clerk is not that recording which makes announcement and clerical act the fixed and unalterable verdict of the jury.—Savko v. Brooklyn & Queens Transit Corp., 1 N.Y.S.2d 489, 166 Misc. 84.

(2) A verdict is not finished or perfected by the mere entry, but

clerk of court further puts query "Gentlemen of the jury, is that your verdict?" and, if there is no dissent, clerk concludes "So say you all" and, no question being made by court or parties, jurors are discharged, and then verdict becomes fixed legal fact.—Savko v. Brooklyn & Queens Transit Corp., supra.

#### Remedy

After case has been submitted to the jury and a verdict has been rendered, accepted, and filed at the direction of the trial court and the jury discharged from the case, the only way to reach the verdict, if insufficient and not covering the issues submitted, or if it is against the law, is by a timely and proper motion for a new trial based on such grounds.—Fauver v. Wilkoske, 211 P.2d 420, 123 Mont. 228, 17 A.L.R.2d 518.

96. Idaho.—Baldwin v. Ewing, 204 P.2d 430, 69 Idaho 174.

97. Kan.—Bradley v. Rogers, 5 P. 374, 33 Kan. 120.

Miss.—West v. West, etc., R. Co., 61 Miss. 556.

98. N.Y.—International-Madison Bank & Trust Co. v. Silverman, 251 N.Y. S. 884, 234 App.Div. 619—Savko v. Brooklyn & Queens Transit Corp., 1 N.Y.S.2d 489, 166 Misc. 84. 64 C.J. p 1094 note 70.

#### Where jury reported orally

N.Y.—Picone v. Picone, 73 N.Y.S.2d 158, 189 Misc. 84, reversed on other grounds 73 N.Y.S.2d 372, 273 App.Div. 914.

#### Form or substance

Where jury has been discharged, trial court cannot recall them for correction of a defect in form of their verdict or in a matter of substance.—Ekleberry v. Sanford, 57 N.E.2d 270, 73 Ohio App. 571.

charge a short time previous has been held not to prevent the court from recalling the jury before they have completely dispersed or separated and having them amend the verdict as to formal matters<sup>99</sup> or matters as to which there is no dispute,<sup>1</sup> or designate which of two incompatible and contradictory forms of verdict express their true finding.<sup>2</sup> Also, after discharge the court may require the jury to amend and correct their verdict where the sole purpose of the amendment is to have the verdict dispose of an issue as to which the court has previously directed a verdict in favor of one party,<sup>3</sup> or where the verdict, as orally pronounced and recorded, is correct both in form and substance and the jury are reassembled after discharge simply to correct a formal defect in their written return.<sup>4</sup>

It has been held in a number of jurisdictions that a previous separation of the jury will not deprive them of their power to amend or change the verdict as to matters of form,<sup>5</sup> and the court may, after separation, reassemble the jury and direct them to make such an amendment or change.<sup>6</sup> According to some authorities even changes in substance can be made if the separation is not too long and it does not appear that the jurors were subjected to outside influences in the meantime;<sup>7</sup> but, where they have been dismissed and separated and such time has elapsed that an opportunity has been afforded for them to be influenced by conversation with the parties or others, they may not

be recalled and required to correct or amend their verdict.<sup>8</sup>

**Sealed verdict.** It has been held that, even though the jury seal their verdict and then separate, they retain the power to amend and change their verdict until it is recorded and they are discharged from the case;<sup>9</sup> and until that time the court may direct them to amend or change their verdict as to formal or clerical matters,<sup>10</sup> and, in some jurisdictions, also in matters of substance.<sup>11</sup> However, in other jurisdictions, particularly where the sealing is equivalent to a rendition and recording of the verdict<sup>12</sup> where the jury have returned a sealed verdict and have separated, they may not be permitted thereafter to amend or change their verdict in matters of substance,<sup>13</sup> at least where they have been so long separated as to have had ample opportunity to mingle indiscriminately with the public.<sup>14</sup> After the jury have returned a sealed verdict and have been discharged from the case and separated, the trial court is without power to reassemble them and have them reconsider an alleged ambiguous verdict, or to bring in a new verdict.<sup>15</sup>

## § 514. — Place of Making Amendment or Change

Amendments to, or changes in, the verdict, particularly as to matters of form, may be made by the jury in open court; but it is proper for the jury to retire to amend or change the verdict, and in some jurisdictions

### Misunderstanding of jurors

Statements by two jurors after jury had reported orally and had been duly discharged that they voted for plaintiff through misunderstanding as to what they should do, or that they did not understand what verdict was proper if plaintiff failed to meet his burden of proof, were insufficient as basis for a reconvening of jury.—Picone v. Picone, 73 N.Y.S. 2d 166, 189 Misc. 84, reversed on other grounds 78 N.Y.S.2d 372, 273 App.Div. 914.

99. Ky.—Ray v. Ray, 245 S.W. 287, 196 Ky. 579.  
64 C.J. p 1093 note 64.

1. Colo.—Fearnley v. Fearnley, 98 P. 819, 44 Colo. 417.

2. Mo.—Keyes v. Chicago, B. & Q. R. Co., 31 S.W.2d 50, 326 Mo. 236.

3. Md.—Harris v. Hipsley, 89 A. 852, 122 Md. 418.

4. Pa.—Rottmund v. Pennsylvania R. Co., 74 A. 341, 225 Pa. 410.

5. Ky.—Ray v. Ray, 245 S.W. 287, 196 Ky. 579.

64 C.J. p 1093 note 56.

6. Ga.—Mitchell v. Langley, 85 S.E.

1050, 143 Ga. 827, L.R.A.1916C 1134, Ann.Cas.1917A 469.  
64 C.J. p 1093 note 57.

7. N.C.—Baird v. Ball, 168 S.E. 687, 204 N.C. 469.

64 C.J. p 1093 note 58.

**Jury separated but still in court**  
N.C.—Baird v. Ball, supra.

8. Vt.—Kennedy v. Stocker, 70 A.2d 587, 116 Vt. 98.

9. Pa.—West Penn. Rys. Co. v. Umbel, Com.Pl., 8 Fay.L.J. 231—Bennett v. Seitz, Com.Pl., 54 Lanc.L. Rev. 19—Horn v. Rudloff, Com.Pl., 7 Sch.Reg. 1—Thompson v. Dishong, Com.Pl., 29 West.L.J. 39, 61 York 12.  
64 C.J. p 1093 note 59.

10. Pa.—Kramer v. Klister, 40 A. 1008, 187 Pa. 227, 44 L.R.A. 432.  
64 C.J. p 1093 note 60.

### Verdict intended

Fact that jury, after agreeing on sealed verdict, separated until following morning, when verdict was presented to court, did not deprive court of jurisdiction to ascertain by inquiry of jury whether verdict returned was the verdict intended and, if not, court could have sent jury out

to agree on what was intended.—Smith v. Snowden Tp., 34 A.2d 616, 348 Pa. 187.

11. N.Y.—Snyder v. Bopp, 268 N.Y. S. 269, 240 App.Div. 989, affirmed 191 N.E. 572, 264 N.Y. 576, reargument denied 191 N.E. 619, 264 N.Y. 670.

64 C.J. p 1093 note 61.

**Order for reconsideration held proper**  
N.Y.—Snyder v. Bopp, supra.

12. Iowa.—Matthys v. Donelson, 160 N.W. 944, 179 Iowa 1111.

63 C.J. p 1093 note 62.

13. Pa.—Kramer v. Klister, 40 A. 1008, 187 Pa. 227, 44 L.R.A. 432.

**Returning higher verdict**  
Pa.—Mayerski v. Pinkney, 48 Pa.Dist. & Co. 274, 6 Fay.L.J. 162.

14. Pa.—Beecher v. Newcomer, 46 Pa.Super. 44.

**Second verdict in favor of other party**  
Pa.—Beecher v. Newcomer, supra.

15. N.Y.—Eagle v. City of New York, 8 N.Y.S.2d 704, 170 Misc. 306, affirmed 14 N.Y.S.2d 490, 257 App. Div. 1046, reargument denied 15 N.Y.S.2d 616, 258 App.Div. 781.

they should retire where the change or amendment directed by the court relates to a matter of substance.

Amendments to, or changes in, the verdict, made by the jury in open court, have been held not improper,<sup>16</sup> particularly amendments to, or changes of, form.<sup>17</sup> The jury, however, may properly retire to amend or change the verdict,<sup>18</sup> and it has been held that if a change or amendment directed by the court relates to a matter of substance, the proper course is to have the jury retire for further deliberations, with proper instructions.<sup>19</sup>

## § 515. Amendment or Correction by Court

Generally, the court has the power to put a mani-

festly irregular or defective verdict in such form as to make it conform to the intention of the jury, and carry their findings into effect, where the intention can be ascertained with certainty.

While the court has no power to look into the evidence and revise or amend the verdict as to a finding of fact,<sup>20</sup> or in any manner to invade the province of the jury by substituting or adding the conclusion or verdict of the court as to a substantial or material matter,<sup>21</sup> there are numerous cases to the effect that the court has the power to put a manifestly irregular or defective verdict in such form as to make it conform to the intention of the jury, and carry their findings into effect, where the intention can be ascertained with certainty,<sup>22</sup>

16. Ga.—Manry v. First Nat. Bank of Barnesville, 23 S.E.2d 662, 195 Ga. 163.

N.Y.—McGrath v. Bagley, 68 N.Y.S.2d 605, reversed on other grounds 76 N.Y.S.2d 298, 273 App.Div. 822. Okl.—Keener v. Tully, 263 P.2d 513, 64 C.J. p 1094 note 74.

Necessity that jury retire to deliberate on original verdict see supra § 482.

17. N.C.—Baird v. Ball, 168 S.E. 667, 204 N.C. 469.

Tex.—Barker v. Weingarten Riverside Co., Civ.App., 232 S.W.2d 692, refused no reversible error.

18. S.C.—Lorick & Lowrance v. Julius H. Walker & Co., 150 S.E. 739, 153 S.C. 309.

64 C.J. p 1094 note 73.

19. Va.—Zedd v. Jenkins, 74 S.E.2d 791, 194 Va. 704.

64 C.J. p 1094 note 75.

### Direction to retire proper

(1) If jurors fail to find material issue, or findings are indefinite or inconsistent, judge may direct them to retire and bring in proper verdict. N.C.—Baird v. Ball, 168 S.E. 667, 204 N.C. 469.

Tex.—Barker v. Weingarten Riverside Co., Civ.App., 232 S.W.2d 692, refused no reversible error.

(2) Where jury returns verdict which is incomplete or ambiguous, court should direct them to return to jury room for further deliberation. —Keener v. Tully, Okl., 263 P.2d 513.

20. N.C.—Isley v. Virginia Bridge, etc. Co., 55 S.E. 416, 143 N.C. 51, 64 C.J. p 1094 note 77.

21. Ala.—Powers v. Williams, 42 So. 2d 58, 34 Ala.App. 579.—W. T. Rawleigh Co. v. Hannon, 22 So.2d 603, 32 Ala.App. 147.

Ga.—Davis v. Wright, 21 S.E.2d 88, 194 Ga. 1.

Ill.—Roadruck v. Schultz, 77 N.E.2d 874, 333 Ill.App. 476.

Kan.—Corpus Juris cited in Robinson v. Davis, 174 P.2d 111, 113, 162 Kan. 44.

Md.—Davis v. Board of Education of

Anne Arundel County, 176 A. 878, 168 Md. 74.

N.J.—Smith v. Phoenix Indemnity Co., 197 A. 15, 119 N.J.Law 522—Standard Baking Co. v. Hi-Grade Coal & Fuel Co., 179 A. 308, 115 N.J.Law 265.—Berko v. Public Service Coordinated Transport, 175 A. 364, 114 N.J.Law 39.—Rossman v. Newborn, 170 A. 230, 112 N.J.Law 261.—White v. Public Service Coordinated Transport, 31 A.2d 791, 21 N.J.Misc. 337.—Trovato v. Capozzi, 182 A. 269, 14 N.J.Misc. 24.

N.C.—Edwards v. Upchurch, 193 S.E. 19, 212 N.C. 249.—Bundy v. Sutton, 177 S.E. 420, 207 N.C. 422.

Pa.—Van Buren v. Eberhard, 104 A. 2d 98, 377 Pa. 22.—Cummings v. Ventura, 101 A.2d 166, 174 Pa.Super. 429.—Patrycia v. Rutkowski, 72 Pa.Dist. & Co. 371, 37 Del.Co. 294.—Patriello v. Butt, Com.Pl., 80 Erie Co. 23.—Glerke v. Graham, Com.Pl., 29 Erie Co. 362.—Ohlson v. Lamoreaux, Com.Pl., 33 Del.Co. 251. S.C.—Stone & Clamp, General Contractors v. Holmes, 60 S.E.2d 231, 217 S.C. 203.—Anderson v. Aetna Casualty & Surety Co., 178 S.E. 819, 175 S.C. 254.

Utah.—Wolfe v. White, 225 P.2d 729. Va.—Zedd v. Jenkins, 74 S.E.2d 791, 194 Va. 704.

64 C.J. p 1094 note 78.

### Blank form verdict

Where rights of plaintiffs in consolidated actions rested on same set of facts and jury returned a verdict for one plaintiff but with respect to second plaintiff merely returned unsigned the blank form verdict, such blank form was not a "verdict of the jury" so as to permit amendment by court to reflect intent of jury that second plaintiff recover.—Roadruck v. Schultz, 77 N.E.2d 874, 333 Ill.App. 476.

22. U.S.—Corpus Juris cited in U. S. v. Hess, D.C.Pa., 41 F.Supp. 197, 215. Ala.—Wilson v. Federal Land Bank of New Orleans, 159 So. 493, 230 Ala. 75.—W. T. Rawleigh Co. v. Hannon, 22 So.2d 603, 32 Ala.App. 147.

D.C.—Freid v. McGrath, 135 F.2d 833, 77 U.S.App.D.C. 385.

Ga.—Davis v. Wright, 21 S.E.2d 88, 194 Ga. 1.

Ill.—Roadruck v. Schultz, 77 N.E.2d 874, 333 Ill.App. 476.—Colky v. Metropolitan Life Ins. Co., 49 N.E.2d 830, 320 Ill.App. 120.

La.—Hardie v. Allen, App., 50 So.2d 74.

Md.—Davis v. Board of Education of Anne Arundel County, 176 A. 878, 168 Md. 74.

Mich.—Standard Oil Co. v. Gosner, 49 N.W.2d 45, 331 Mich. 29.—In re Sorter's Estate, 22 N.W.2d 767, 314 Mich. 483, 164 A.L.R. 955.

Miss.—Harris v. Pounds, 187 So. 891, 185 Miss. 688.

Mo.—Riley v. St. Louis Public Services Co., App., 245 S.W.2d 666.

N.J.—Rillo v. Eastern Carrier Corp., 40 A.2d 570, 132 N.J.Law 414.—Ipp v. Braver Bros. Silk Co., 33 A.2d 862, 130 N.J.Law 491.—Smith v. Phoenix Indemnity Co., 197 A. 15, 119 N.J.Law 522.—Berko v. Public Service Coordinated Transport, 175 A. 364, 114 N.J.Law 39.—Rossman v. Newborn, 170 A. 230, 112 N.J.Law 261.—White v. Public Service Coordinated Transport, 31 A.2d 791, 21 N.J.Misc. 337.—Trovato v. Capozzi, 182 A. 269, 14 N.J.Misc. 24.

N.M.—Sanchez v. Securities Acceptance Corp., 260 P.2d 703, 57 N.M. 512.

N.Y.—Panay v. Safyurtliu, 127 N.Y.S. 2d 84.

N.C.—Bundy v. Sutton, 177 S.E. 420, 207 N.C. 422.

Pa.—Bitting v. Wolfe, 82 A.2d 21, 368 Pa. 167.—Wadatz v. Teormina, 52 A.2d 220, 356 Pa. 461.—Maize v. Atlantic Refining Co., 41 A.2d 850, 352 Pa. 51, 160 A.L.R. 449.—East Broad Top Transit Co. v. Flood, 192 A. 401, 326 Pa. 353.—Reppert v. White Star Lines, 186 A. 788, 323 Pa. 346, 106 A.L.R. 413.—Tibbets v. Prudential Ins. Co. of America, 169 A. 382, 313 Pa. 310.—Stevens v. Frank, 30 A.2d 161, 151 Pa.Super. 222.—Jones v. Stiffner, 8 A.2d 455, 137 Pa.Super. 133.—Schmidt v. Campbell, 7 A.2d

from statements of the jurors themselves,<sup>23</sup> the notes of the trial judge,<sup>24</sup> data given in the verdict,<sup>25</sup> or any other clear and satisfactory evidence appearing in the record or the minutes of the trial;<sup>26</sup> but the court cannot properly modify or reform the verdict to effectuate the intention of the jury where there is no certain and unmistakable data by which the court can determine that intention.<sup>27</sup>

Where the court has directed a verdict of a certain tenor, but the verdict returned by the jury does not conform to the direction or intention of the court, it is usually held that the court can amend the verdict to make it conform.<sup>28</sup> The court may strike from the verdict portions thereof which purport to deal with matters outside the province of the jury,<sup>29</sup> unless the omission of the stricken portion will give the rest of the verdict an entirely different effect from that which the jury probably intended.<sup>30</sup> It has been held that if there is no formal or clerical error, and the verdict is one apparently intended by the jury, although in disregard of the instructions, the court cannot substitute its verdict for that of the jury to make it con-

form to the instructions,<sup>31</sup> and the action of the court in correcting a verdict returned in disregard of instructions should be undertaken with great caution;<sup>32</sup> but there is authority to the effect that the court may amend the verdict to make it conform to the instructions,<sup>33</sup> especially where the jury consent.<sup>34</sup> The verdict of a jury based on an erroneous instruction cannot be corrected by the court.<sup>35</sup>

The trial court has great discretion in amending verdicts,<sup>36</sup> and where the court has power to amend the verdict, the particular mode of doing it is discretionary.<sup>37</sup> Where the jury's intention is ascertainable, the court may sometimes correct matters of substance to make the verdict conform to the jury's intention.<sup>38</sup> Where the evidence on an essential element of the case is uncontradicted, it has been held that the court may correct the verdict so as to conform to such uncontradicted evidence.<sup>39</sup> Under a statute so providing, the court has no power to correct or alter the verdict of the jury without the assent of the jurors before their discharge.<sup>40</sup>

*Judge or court who may amend or correct.* Under a statute giving a successor the same power and au-

554, 136 Pa.Super. 590—Emblem Oil Co. v. Taylor, 179 A. 773, 118 Pa. Super. 259—Becker v. Stern, 176 A. 771, 116 Pa.Super. 399—Ellenberg v. Rose, 18 Pa.Dist. & Co. 337—Bitting v. Wolfe, Com.Pl., 61 Dauph. Co. 184—Reynolds v. McCarty, Com.Pl., 28 Del. Co. 485—Lynch's Estate v. Letterman, Com. Pl., 29 Erie Co. 52—Puritan Rubber Mfg. Co. v. Erie Foundry Co., Com. Pl., 24 Erie Co. 86, 56 York Leg. Rec. 89—Venorick v. Revetta, Com. Pl., 5 Fay L.J. 165, reversed on other grounds 33 A.2d 555, 152 Pa.Super. 465—Felffer v. Harrison Const. Co., Com.Pl., 2 Lebanon 352—Boyle v. Weber, Com.Pl., 33 Luz.Leg.Reg. 87—Bausewine v. Strassburger, Com.Pl., 60 Montg. Co. 115—Morris v. P. H. Butler Co., Com.Pl., 97 Pittsb.Leg.J. 292—Goldenson v. O'Brien, Com.Pl., 97 Pittsb.Leg.J. 259—Pecina v. Metropolitan Life Ins. Co., Com.Pl., 7 Sch.Reg. 201—Deardorff v. Metzler, Com.Pl., 53 York Leg.Rec. 17.

Tenn.—Tennessee Cent. Ry. Co. v. Scarbrough, 9 Tenn.App. 295.  
Tex.—Burchfield v. Tanner, 178 S.W. 2d 681, 142 Tex. 404.  
Utah.—Moulton v. Staats, 27 P.2d 455, 83 Utah 197.  
Va.—Zedd v. Jenkins, 74 S.E.2d 791, 194 Va. 704—Corpus Juris quoted in Remine v. Whited, 21 S.E.2d 743, 747, 180 Va. 1.

W.Va.—State ex rel. Rufus v. Easley, 40 S.E.2d 827, 129 W.Va. 410.  
64 C.J. p 1095 note 78.

#### Showing reason for amendment

A plaintiff moving to amend the verdict has burden of showing that verdict should for some good reason be amended.—First International Pictures v. F. C. Pictures Corp., 27 N.Y.S.2d 816, 262 App.Div. 21.

23. Mich.—In re Sorter's Estate, 22 N.W.2d 767, 314 Mich. 488, 164 A.L.R. 985.

Va.—Corpus Juris quoted in Remine v. Whited, 21 S.E.2d 743, 747, 180 Va. 1.

64 C.J. p 1095 note 80.

24. Ill.—Western Springs Park Dist. v. Lawrence, 175 N.E. 579, 343 Ill. 392.

64 C.J. p 1095 note 81.

25. U.S.—Miller v. Steele, Ohio, 153 F. 714, 82 C.C.A. 672.

26. Ala.—Powers v. Williams, 42 So. 2d 58, 34 Ala.App. 579.

Va.—Corpus Juris quoted in Remine v. Whited, 21 S.E.2d 743, 747, 180 Va. 1.

64 C.J. p 1095 note 83.

27. N.J.—Robb v. John Hickey, Inc., 20 A.2d 707, 19 N.J.Misc. 455.

N.Y.—First International Pictures v. F. C. Pictures Corp., 27 N.Y.S.2d 816, 262 App.Div. 21.

64 C.J. p 1095 note 84.

28. Me.—American Fisheries Co. v. Sanborn, 119 A. 803, 122 Me. 561.

64 C.J. p 1095 note 85.

29. Ga.—Haley v. Covington, 92 S.E. 297, 19 Ga.App. 782.

64 C.J. p 1095 note 86.

30. N.D.—Watne v. Rue, 197 N.W. 766, 50 N.D. 551.

64 C.J. p 1095 note 87.

31. Iowa.—Reuber v. Negles, 126 N.W. 966, 147 Iowa 734.

64 C.J. p 1095 note 88.

32. Okl.—West v. Abney, 219 P.2d 624, 203 Okl. 227.

33. Ky.—Pope-Cawood Lumber & Supply Co. v. Dean, 198 S.W.2d 227, 303 Ky. 537.

64 C.J. p 1095 note 89.

34. Tex.—Malcolm v. Sims-Thompson Motor Car Co., Civ.App., 164 S.W. 924—Hilburn v. Harrell, Civ. App., 29 S.W. 925.

35. S.C.—Smith v. Benefit Ass'n of Ry. Employees, 179 S.E. 324, 175 S.C. 347.

36. Pa.—Jones v. Stiffer, 8 A.2d 455, 137 Pa.Super. 133—Emblem Oil Co. v. Taylor, 179 A. 773, 118 Pa.Super. 259—Zarko v. Kramer, 177 A. 478, 117 Pa.Super. 443—Boyle v. Weber, Com.Pl., 33 Luz.Leg.Reg. 87.

37. Vt.—Kennedy v. Stocker, 70 A. 2d 587, 116 Vt. 98.

38. Mich.—Standard Oil Co. v. Gonser, 49 N.W.2d 45, 331 Mich. 29—In re Sorter's Estate, 22 N.W.2d 767, 314 Mich. 488, 164 A.L.R. 985.

39. Ohio.—Reitenour v. McClain, App., 57 N.E.2d 78.

40. Ohio.—Ekleberry v. Sanford, 57 N.E.2d 276, 73 Ohio App. 571.

thority in the premises as his predecessor the verdict may be amended by a judge who succeeds to the one who tried the case and before whom the verdict was rendered;<sup>41</sup> but it has been said that after a verdict has been recorded and the jury discharged a motion to amend the verdict should be made to the court before which the case was tried.<sup>42</sup> There are cases which contain the implication that amendment or correction of the verdict is solely the function of the trial court;<sup>43</sup> but it has been held within the power of the appellate court to correct defects in form.<sup>44</sup>

# § 516. — Time of Amendment or Correction

As a general rule the court cannot make an amendment or correction as to a matter of substance after the verdict has been recorded and the jury discharged.

While it has been held that a verdict may be

amended with respect both to matters of form and substance during the term,<sup>45</sup> as a general rule the court cannot make an amendment or correction as to a matter of substance after the verdict has been recorded and the jury discharged;<sup>46</sup> but the discharge of the jury does not deprive the court of its power to amend or correct with respect to clerical errors or formal matters,<sup>47</sup> and this may be exercised even at a term subsequent to that in which the verdict was rendered,<sup>48</sup> although it has been held that the power to amend is exhausted after the term ends.<sup>49</sup> It is the better practice to mould the verdict before the jury is discharged,<sup>50</sup> although it may be done later when the meaning is clear;<sup>51</sup> and the power of the courts to amend is not confined to corrections made at the time the verdict is rendered.<sup>52</sup> However, it is only in exceptional cases that the court may, after recordation of the verdict and discharge of the jury, mould or amend

41. N.J.—*Franchino v. Overseer of Poor of City of Orange*, 136 A. 736, 103 N.J.Law 300, affirmed 140 A. 919, 104 N.J.Law 435.

42. N.Y.—*Dean v. City of New York*, 51 N.Y.S. 586, 29 App.Div. 350, 5 N.Y.Ann.Cas. 351, 27 N.Y.Civ.Proc. 816.

43. N.J.—*Mancino v. Sampaolo*, 4 A.2d 792, 122 N.J.Law 321, 64 C.J. p 1097 note 93.

44. U.S.—*Dextone Co. v. Building Trades Council of Westchester County*, C.C.A.N.Y., 60 F.2d 47.

45. Or.—*Abraham v. Mack*, 273 P. 711, 278 P. 972, 130 Or. 32.

46. U.S.—*U. S. v. 340 Acres of Land in Richmond County*, D.C.Ga., 54 F. Supp. 457.

Ala.—*W. T. Rawleigh Co. v. Hannon*, 22 So.2d 603, 32 Ala.App. 147.

Colo.—*Harrison Const. Co. v. Nissen*, 199 P.2d 886, 119 Colo. 42.

Ga.—*Fried v. Fried*, 69 S.E.2d 862, 208 Ga. 861—*Harlan v. Ellis*, 32 S. E.2d 389, 198 Ga. 678—*McGahee v. Samuels*, 7 S.E.2d 611, 61 Ga.App. 773.

Ky.—*Pope-Cawood Lumber & Supply Co. v. Dean*, 198 S.W.2d 227, 303 Ky. 537—*Louisville & N. R. Co. v. Farney*, 172 S.W.2d 656, 295 Ky. 8.

Mo.—*Kaimann v. Kaimann Bros.*, App., 182 S.W.2d 458—*Berryman v. People's Motorbus Co. of St. Louis*, 54 S.W.2d 747, 228 Mo.App. 1032, certiorari quashed State ex rel. St. Louis Public Service Co. v. Becker, 66 S.W.2d 141, 334 Mo. 115.

Neb.—*Schnell v. United Hall Ins. Co.*, 18 N.W.2d 112, 145 Neb. 768—*Corpus Juris* quoted in *Swygert v. Platte Val. Public Power & Irr. Dist.*, 274 N.W. 492, 494, 133 Neb. 194.

N.Y.—*Picone v. Picone*, 73 N.Y.S.2d 156, 189 Misc. 84, reversed on other grounds 78 N.Y.S.2d 372, 273 App. Div. 914—*Savko v. Brooklyn & Queens Transit Corp.*, 1 N.Y.S.2d 489, 166 Misc. 84.

Ohio.—*Ekleberry v. Sanford*, 57 N.E. 2d 270, 73 Ohio App. 571.

Okl.—*State Finance Service v. Mullins*, 147 P.2d 159, 193 Okl. 688.

Pa.—*Malze v. Atlantic Refining Co.*, 41 A.2d 850, 352 Pa. 51, 160 A.L.R. 449, 352 Pa. 51—*Ottwell v. Baldwin*, 59 Pa.Dist. & Co. 510—*Adams v. City of New Kensington*, Com.Pl., 35 West.Co. 177, modified on other grounds 97 A.2d 354, 374 Pa. 104.

Tex.—*Burchfield v. Tanner*, 178 S.W. 2d 681, 142 Tex. 404.

64 C.J. p 1097 note 95.

## Jury held not discharged

Where it was stipulated that verdict might be rendered in absence of judge, and on return of verdict to clerk of court jurors were permitted to leave courtroom without being requested to return, but about two hours later were called back to courtroom to explain their verdict, jury had not been discharged prior to giving explanation, and therefore, in view of fact that result of jury's deliberation clearly appeared, no prejudice to unsuccessful litigant's right to fair trial resulted when judge recalled jury on next term day and entered judgment in accordance with their reiterated explanation of their verdict, notwithstanding apparent irregularities incident to rendering and receipt of jury's verdict.—*Standard Oil Co. v. Gonsler*, 49 N.W.2d 45, 331 Mich. 29.

47. U.S.—*U. S. v. 340 Acres of Land in Richmond County*, D.C.Ga., 54 F. Supp. 457.

Colo.—*Harrison Const. Co. v. Nissen*, 199 P.2d 886, 119 Colo. 42.

Ill.—*Roadruck v. Schultz*, 77 N.E.2d 874, 333 Ill.App. 476.

Mo.—*Kaimann v. Kaimann Bros.*, App., 182 S.W.2d 458—*Boudreau v. Myers*, App., 54 S.W.2d 998—*Berryman v. People's Motorbus Co. of St. Louis*, 54 S.W.2d 747, 228 Mo.App. 1032, certiorari quashed State ex rel. St. Louis Public Service Co. v. Becker, 66 S.W.2d 141, 334 Mo. 115.

Neb.—*Corpus Juris* quoted in *Swygert v. Platte Val. Public Power & Irr. Dist.*, 274 N.W. 492, 494, 133 Neb. 194.

S.C.—*Anderson v. Aetna Casualty & Surety Co.*, 178 S.E. 819, 175 S.C. 254.

64 C.J. p 1097 note 96.

During term at which verdict is rendered, court has practically absolute power over the verdict, unless influenced by a mistake of law.—*American Trust Co. v. Bloom*, 146 S.E. 249, 148 S.C. 386.

48. Neb.—*Corpus Juris* quoted in *Swygert v. Platte Val. Public Power & Irr. Dist.*, 274 N.W. 492, 494, 133 Neb. 194.

N.J.—*Berko v. Public Service Coordinated Transport*, 175 A. 364, 114 N. J.Law 39.

64 C.J. p 1097 note 97.

49. N.Y.—*Appleton v. Nye*, 269 N.Y. S. 132, 241 App.Div. 648.

64 C.J. p 1097 note 97 [a].

50. Pa.—*Carroll v. Kirk*, 19 A.2d 584, 144 Pa.Super. 211.

51. Pa.—*Carroll v. Kirk*, *supra*.

52. Pa.—*Cohn v. Schauer*, 8 A. 421, 115 Pa. 178—*Cummings v. Ventura*, 101 A.2d 166, 174 Pa.Super. 429—*Zarko v. Kramer*, 177 A. 478, 117 Pa.Super. 443—*Pecina v. Metropolitan Life Ins. Co.*, Com.Pl., 7 Sch. Reg. 201.

the verdict,<sup>53</sup> and such power is rarely, if ever, exercised, unless to make the corrected verdict conform to the obvious intention of the jury.<sup>54</sup> A directed verdict may be amended to conform to the intention of the court even after it has been recorded, judgment rendered, and the time for appeal has expired.<sup>55</sup> An error in the verdict which is merely a perpetuation of an error previously made in the pleadings cannot be corrected after the expiration of the time within which the pleadings can be amended, since this would destroy the conformity between the pleadings and the verdict.<sup>56</sup>

### § 517. — Amendment or Correction as to Particular Matters

- a. Designation of parties
- b. Several counts or issues
- c. Amount of recovery, interest, and attorney's fees

#### a. Designation of Parties

The court may amend a verdict to correct a mere clerical error in the designation of the parties, at least where the intention of the jury is clear.

Where it is uncertain which of several defendants the verdict was intended to be against, the court cannot correct the substance of the verdict by adding the name of a defendant shown to be liable under the evidence;<sup>57</sup> nor can the court amend a verdict for joint plaintiffs by striking the name of one of them and remitting one half the verdict,<sup>58</sup> or reform a joint verdict against several defendants by limiting it to a particular defendant;<sup>59</sup> but where all the parties understand that the case is being tried against several defendants, and it is clear that the verdict was intended to be against all defendants, but through clerical error

and inadvertence the written verdict names only one defendant the court may amend the verdict to conform to the facts.<sup>60</sup> If the jury have returned two incompatible verdicts, one which designates plaintiff as the victor and the other defendant, the court may recall the jury and on ascertaining that they intended to find for a particular party may record the verdict as for that party.<sup>61</sup> Where it is undisputed that plaintiff is entitled to recover the amount claimed, subject only to the deduction of the amount established by defendant on his set-off, and the jury return a verdict for defendant for a specified sum on his set-off, without making a finding for plaintiff, the court may correct the verdict to make it one for plaintiff for the difference between the amount found for defendant on his set-off and the amount to which plaintiff was otherwise entitled.<sup>62</sup> Under a statute requiring separate verdicts for plaintiffs, where the jury return a single verdict the court may mould the verdict in accordance with the undisputed proof so as to prevent injustice.<sup>63</sup>

Where a verdict is against one or some of the defendants with no finding as to a codefendant, if the intention of the jury is clear the court may amend the verdict so as to include a specific finding for the codefendant.<sup>64</sup> The court may delete a verdict of two of three defendants, where it is manifestly right,<sup>65</sup> and such action does not impair the verdict as to the remaining and responsible defendant.<sup>66</sup> Where a joint verdict against several defendants is improper, such verdict may be amended to consist of separate verdicts against each defendant for the full amount of the joint verdict.<sup>67</sup> The court may refuse to amend a verdict against one defendant so as to include a verdict for a

53. Pa.—Malze v. Atlantic Refining Co., 41 A.2d 850, 352 Pa. 51, 160 A.L.R. 449—Gaspero v. Gentile, 160 A.2d 754, 160 Pa.Super. 276.

54. Pa.—Gaspero v. Gentile, supra.

55. Minn.—Schloas v. George E. Lennon, 144 N.W. 148, 123 Minn. 420.

56. Ga.—Georgia Motor Sales Co. v. Wade, 138 S.E. 797, 37 Ga.App. 24.

57. Ala.—Merchants' Bank & Trust Co. v. J. A. Elliott & Son, 80 So. 624, 16 Ala.App. 620.

58. Ind.T.—Brooks v. Collier, 58 S.W. 559, 3 Ind.T. 465.

59. N.Y.—Carpenter v. Shelden, 7 N.Y.Super. 77.

60. N.J.—Rillo v. Eastern Carrier Corp., 49 A.2d 570, 132 N.J.Law 414.

Pa.—Peiffer v. Harrison Const. Co., Com.Pl., 3 Lebanon 352.

64 C.J. p 1098 note 5.

61. Mo.—Keyes v. Chicago, B. & Q. R. Co., 31 S.W.2d 50, 326 Mo. 236.

64 C.J. p 1098 note 8.

62. N.Y.—Tenenbaum v. Cohen, 165 N.Y.S. 825, 100 Misc. 360.

63. Pa.—Zarko v. Kramer, 177 A. 478, 117 Pa.Super. 443.

64. Pa.—Wadatz v. Taormina, 52 A.2d 220, 356 Pa. 481—Reppert v. White Star Lines, 186 A. 788, 323 Pa. 346, 106 A.L.R. 413.

Corporate and individual defendants

(1) Where jury return verdict for plaintiff against corporate defendants but not against individual defendants, court may correct error in improperly recording verdict in favor of individual defendants.—Rush v. Jagels

"A Fuel Corp.", 35 N.Y.S.2d 861, 364 App.Div. 535.

(2) In tort action against corporate defendant and two individual defendants, verdict for plaintiff against corporate defendant but not against individual defendants was not final with respect to individual defendants, where plaintiff's counsel at time of rendition of verdict was in doubt as to finding of jury with respect to individual defendants, and requested trial court to determine jury's intention.—Rush v. Jagels "A Fuel Corp.", supra.

65. Va.—Sheckler v. Anderson, 29 S.E.2d 867, 182 Va. 701.

66. Va.—Sheckler v. Anderson, supra.

67. Pa.—McBurney v. Wilt, 60 Pa. Dist. & Co. 645, 95 Pittsb.Leg.J. 413.

codefendant.<sup>68</sup> Where plaintiff brings an action against defendant individually and as a fiduciary, but voluntarily dismisses as to defendant individually, a verdict will not be amended to enter judgment on the verdict against defendant individually.<sup>69</sup> It has been held that if the verdict plainly and unequivocally designates the party in whose favor it is rendered the court cannot change it into a verdict for the other party because the jury by mistake designated the party other than the one for whom they intended to render the verdict;<sup>70</sup> but where the jury first state that they find for plaintiff and then proceed to assess "defendant's" damages at a certain sum, it being apparent that the jury intended to assess plaintiff's damages, the court may correct the verdict by substituting the word "plaintiff's" for "defendant's."<sup>71</sup>

#### b. Several Counts or Issues

If a general verdict is returned in an action involving several counts the verdict may be altered so as to apply to any one count supported by the evidence, or on which it is ascertained that the jury intended to base their verdict.

If a general verdict is returned in an action involving several counts the verdict may be altered so as to apply to any one count supported by the evidence,<sup>72</sup> or on which it is ascertained that the jury intended to base their verdict.<sup>73</sup> If one of several counts is bad the verdict cannot be amended to apply to the good count only,<sup>74</sup> and there can be no amendment if it appears that there was any evidence exclusively applicable to a bad count.<sup>75</sup> The verdict may not be amended to apply to one of several inconsistent counts where the evidence, although such as to warrant a verdict on the count to which it is sought to be applied, is equally applicable to all counts.<sup>76</sup>

A verdict expressly based on several counts cannot be limited by the court to a particular count.<sup>77</sup> Where one of the issues in the case is defendant's right to recover on a counterclaim and the jury return a general verdict for plaintiff, with no express finding as to the counterclaim, the court may amend the verdict to show that the jury found against defendant on his counterclaim either where the jury inform the court they intended so to find,<sup>78</sup> or where the jury have been instructed that if plaintiff should recover defendant could not recover on his counterclaim.<sup>79</sup> Where certain issues are tried by the court and others by the jury the court may amend the verdict of the jury to include the findings of the court on the issues tried before it.<sup>80</sup>

#### c. Amount of Recovery, Interest, and Attorney's Fees

- (1) In general
- (2) Increasing amount of recovery
- (3) Reduction of amount of recovery

##### (1) In General

Generally, where the jury have failed to insert in the verdict the amount of recovery, and it is impossible definitely to ascertain the amount intended to be allowed, the court cannot fix the amount of recovery; but clerical or formal errors in the statement as to the amount of recovery may be corrected.

As a general rule, where the jury have failed to insert in the verdict the amount of recovery, and it is impossible definitely to ascertain the amount intended to be allowed, the court cannot fix and insert the amount of recovery;<sup>81</sup> but it has been held that, where there is no dispute as to the amount of recovery,<sup>82</sup> or it is so indicated by the pleadings and evidence that it can be clearly and certainly ascertained by what is simply a process

68. Pa.—Nelson v. Philadelphia Rapid Transit Co., 170 A. 269, 314 Pa. 27.

69. Ill.—Fulton v. Yondorf, 58 N.E. 2d 640, 324 Ill.App. 463.

70. Me.—Little v. Larrabee, 2 Me. 37, 11 Am.D. 43.

71. Ill.—T. Wilce Co. v. Royal Indemnity Co., 124 N.E. 635, 289 Ill. 383.

72. N.C.—Smith v. Norman, 13 N.C. 486.

64 C.J. p 1098 note 11.

73. Mass.—Fallon v. Clifton Mfg. Co., 93 N.E. 800, 207 Mass. 491.

64 C.J. p 1098 note 12.

74. U.S.—Fenwick v. Grimes, D.C., 8 F.Cas.No.4,733, 5 Cranch C.C. 439.

75. N.Y.—Postley v. Mott, 3 Den. 353.

76. N.Y.—Lusk v. Hastings, 19 Wend. 627.

77. N.Y.—Carpenter v. Shelden, 7 N.Y.Super. 77.

78. Tex.—W. R. Case & Sons Cutlery Co. v. Folsom, Civ.App., 170 S.W. 1066.

79. N.J.—Samuel v. Christiansen, 158 A. 479, 10 N.J.Misc. 223.

80. Utah.—Allen v. J. G. McDonald Chocolate Co., 218 P. 971, 62 Utah 273.

81. N.J.—Henry R. Isenberg Co. v. Kent, 147 A. 815, 7 N.J.Misc. 1089.

64 C.J. p 1098 note 22.

##### Life expectancy

Where jury in death action did not find what deceased's life expectancy

was, and the parties never agreed that the court should find such facts, the court could not constitutionally find such facts and then apply discount formula.—Thibeault v. Brown, 29 A.2d 461, 92 N.H. 235.

82. Ariz.—Ward v. Johnson, 232 P.2d 960, 72 Ariz. 213.

Ky.—Baugh v. Williams' Adm'r, 94 S.W.2d 330, 264 Ky. 167.

N.Y.—Jacob & Emil Leitner, Inc. v. Scalzo, 22 N.Y.S.2d 910, affirmed 26 N.Y.S.2d 572.

Okl.—Mitchell v. Fisher, 32 P.2d 37, 168 Okl. 145.

Pa.—Miller v. Engelsberger, Com.Pl., 26 Erie Co. 332.—Puritan Rubber Mfg. Co. v. Erie Foundry Co., Com.Pl., 24 Erie Co. 86, 56 York Leg. Rec. 89.

64 C.J. p 1098 note 23.

of mathematical calculation,<sup>83</sup> a verdict for plaintiff which does not give the amount of recovery may be corrected by an insertion of the amount, even after the jury have been discharged.<sup>84</sup> Clerical or formal errors in the statement as to the amount of recovery may be corrected, and the verdict put in such form as properly to express the intention of the jury, where the intention of the jury with respect thereto is clearly ascertainable.<sup>85</sup>

**Correction of apportionment or failure to apportion damages.** If the intention of the jury is clear but they have improperly sought to apportion damages between joint defendants the court, on determining what the jury intended as the total amount of plaintiff's damages, may correct the verdict by making it a joint one against each defendant for the full amount of damages assessed.<sup>86</sup> Where an instruction is given not to apportion damages, a verdict failing to apportion damages cannot be impeached.<sup>87</sup>

**Apportionment or itemization of amount.** Where, on a trial of right of property in specified articles, the jury return a verdict in gross for all the articles the court cannot amend the verdict by assessing the value of each article separately.<sup>88</sup>

## (2) Increasing Amount of Recovery

As a general rule where the determination of the amount of recovery is exclusively within the province of the jury the court has no power to amend the verdict by increasing the amount found by the jury.

As a general rule where the determination of the amount of recovery is exclusively within the province of the jury the court has no power to amend the verdict by increasing the amount found by the jury;<sup>89</sup> and it has even been held that a verdict for less than the amount required by the instructions cannot be amended by making an increase to what the jury were instructed to find;<sup>90</sup> but there are other cases holding that where the court has<sup>91</sup> or could have<sup>92</sup> instructed a verdict for a certain sum, or where the undisputed evidence shows that the prevailing party is entitled to at least a certain sum,<sup>93</sup> or where the determination of the proper amount is simply a matter of mathematical calculation based on the undisputed facts,<sup>94</sup> and the jury return an inadequate verdict for a lesser sum the court may amend the verdict by increasing the amount of recovery to the proper sum.

**Addition of interest.** The court may,<sup>95</sup> and

83. Colo.—Gylling v. Hinds, 222 P.

2d 413, 122 Colo. 345.

N.J.—Ipp v. Braver Bros. Silk Co.,

33 A.2d 862, 130 N.J. Law 491.

Wash.—Richey & Gilbert Co. v.

Northwestern Natural Gas Corp.,

134 P.2d 444, 16 Wash.2d 631.

64 C.J. p 1099 note 24.

84. Iowa.—P. M. Lattner Mfg. Co. v.

Higgins, 195 N.W. 746, 196 Iowa

920.

85. N.J.—Dewar v. Ruehle, 59 A.2d

827, 137 N.J. Law 304.

Pa.—Wille v. London Guarantee &

Acc. Co., 49 Pa. Dist. & Co. 93, 32

Del. Co. 18—Schade v. Engel, Com.

Pl., 19 Erie Co. 510.

Va.—Atlantic Greyhound Corp. v.

Shelton, 36 S.E.2d 625, 184 Va.

684.

64 C.J. p 1099 note 26.

**Computation of interest**

Neb.—Burtis v. Chicago, B. & Q. R.

Co., 247 N.W. 42, 124 Neb. 534.

**Separation of principal from interest**

Ga.—Parnell v. A. W. Muse Co., 192

S.E. 556, 56 Ga. App. 213.

64 C.J. p 1099 note 26 [c].

86. D.C.—Freid v. McGrath, 135 F.

2d 833, 77 U.S. App. D.C. 385.

N.Y.—Kinsey v. William Spencer &

Son Corp., 300 N.Y.S. 391, 165 Misc.

143, affirmed 8 N.Y.S.2d 529, 255

App. Div. 995, affirmed 22 N.E.2d 168,

281 N.Y. 601.

Pa.—Emblem Oil Co. v. Taylor, 179

A. 773, 118 Pa. Super. 259.

64 C.J. p 1099 note 27.

87. N.J.—Ray v. Yellow Cab, 147 A.

589, 7 N.J. Misc. 324.

88. Miss.—Walker v. Sinking Fund

Com'rs, 9 Miss. 372.

89. U.S.—Harris v. Maryland Cas-

ualty Co., D.C.Pa., 2 F. Supp. 188.

Ala.—W. T. Rawleigh Co. v. Hannon,

22 So.2d 603, 32 Ala. App. 147.

Ga.—Davis v. Wright, 21 S.E.2d 88,

194 Ga. 1.

Ill.—Koltz v. Jahaaske, 38 N.E.2d

973, 312 Ill. App. 623.

Kan.—Robinson v. Davis, 174 P.2d

111, 162 Kan. 44.

Neb.—Corpus Juris quoted in Schnell

v. United Hall Ins. Co., 18 N.W.2d

112, 115, 145 Neb. 768.

N.Y.—Maddaus v. New York Law

School, 96 N.Y.S.2d 349, 276 App.

Div. 1099, reargument and appeal

denied 97 N.Y.S.2d 398, 277 App.

Div. 783.

N.D.—Corpus Juris cited in Bormann

v. Beckman, 19 N.W.2d 456, 457,

73 N.D. 720.

Okla.—Hale v. Landrith, 201 P.2d 914,

201 Okl. 107.

Pa.—Gaspero v. Gentile, 50 A.2d 754,

160 Pa. Super. 276—Ellenberger v.

Rose, 18 Pa. Dist. & Co. 337.

S.D.—State v. Hammerquist, 293 N.

W. 539, 67 S.D. 417.

Wash.—O'Brien v. Puget Sound Ply-

wood, 165 P.2d 86, 23 Wash.2d 917.

Wis.—Dekeyser v. Milwaukee Auto.

Ins. Co., 295 N.W. 755, 236 Wis.

419.

Wyo.—Corpus Juris quoted in Phelps

v. Woodward Const. Co., 204 P.2d

179, 190, 66 Wyo. 33.

64 C.J. p 1099 note 29.

90. Iowa.—Reuber v. Negles, 126 N.

W. 966, 147 Iowa 734.

64 C.J. p 1098 note 30.

91. Minn.—Mouat v. Wells, 79 N.W.

499, 76 Minn. 438.

64 C.J. p 1099 note 31.

92. Pa.—Schwarz v. Bank of Pitts-

burgh Nat. Ass'n, 129 A. 52, 283

Pa. 200.

Wis.—Schweitzer v. Connor, 14 N.W.

922, 67 Wis. 177.

93. Minn.—Jaenisch v. Vigen, 297

N.W. 29, 209 Minn. 543.

64 C.J. p 1100 note 33.

94. Okla.—Hale v. Landrith, 201 P.2d

914, 201 Okl. 107.

Wis.—Webster Mfg. Co. v. Mon-

tréal River Lumber Co., 150 N.W.

409, 159 Wis. 456.

U.S.—Stentor Elec. Mfg. Co. v.

Klaxon Co., C.C.A. Del., 125 F.2d

820, certiorari denied Klaxon Co.

v. Stentor Elec. Mfg. Co., 62 S.Ct.

1284, 316 U.S. 685, 86 L.Ed. 1757—

Jones v. Foster, C.C.A. Va., 70 F.

2d 200, certiorari denied 55 S.Ct.

70, 293 U.S. 558, 79 L.Ed. 659—

Ocean Accident & Guarantee Cor-

poration v. Schachner, C.C.A. Ill.,

70 F.2d 28.

Ill.—Lyons v. Metropolitan Life Ins.

Co., 43 N.E.2d 187, 315 Ill. App. 451.

Ky.—Corpus Juris cited in Edwards

v. Equitable Life Assur. Soc. of U.



should,<sup>96</sup> amend the verdict by computing and adding interest where it is clear that interest should be included and the court has sufficient data on hand to make the computation of the interest a matter of mere mathematical calculation. On the other hand, the court cannot add interest if it does not have sufficient data from which it can be calculated with certainty,<sup>97</sup> if there is a possibility that the jury have already allowed interest in the amount of recovery fixed in the verdict,<sup>98</sup> if the court failed to instruct the jury to allow interest,<sup>99</sup> if there is, under the pleadings and the evidence, a question of

fact for the jury as to whether or not interest has previously been paid,<sup>1</sup> or if there is nothing to show that the jury intended to allow interest where its allowance is a matter for their determination;<sup>2</sup> and there are cases to the effect that the addition of interest is a substantial change which cannot be made after the verdict has been received and the jury discharged,<sup>3</sup> or after the expiration of the term.<sup>4</sup> It has been held that a failure to calculate interest is a defect in form which the court may correct with the consent of the jury under a statute so providing.<sup>5</sup>

S., 177 S.W.2d 574, 579, 296 Ky. 448.

Minn.—Olson v. Myrland, 264 N.W. 129, 195 Minn. 626.

Mo.—State ex rel. Witte Hardware Co. v. McElhinney, 100 S.W.2d 36, 231 Mo.App. 860.

Mont.—W. J. Lake & Co. v. Montana Horse Products Co., 97 P.2d 590, 109 Mont. 434.

N.H.—Lamontagne v. Canadian Nat. Ry. Co., 79 A.2d 835, 97 N.H. 6.

N.J.—Schwartz v. Eisner, 166 A. 729, 111 N.J.Law 132, affirmed 170 A. 615, 112 N.J.Law 383.

N.Y.—Mayaguez Drug Co. v. Globe & Rutgers Fire Ins. Co. of New York, 183 N.E. 523, 260 N.Y. 356, motion denied 184 N.E. 95, 260 N.Y. 567, reargument and motion denied 184 N.E. 144, 260 N.Y. 681.

**Corpus Juris cited in First International Pictures v. F. C. Pictures Corp.**, 27 N.Y.S.2d 816, 818, 262 App. Div. 21—Greater New York Coal & Oil Corp. v. Philadelphia & Reading Coal & Iron Co., 299 N.Y.S. 988, 252 App.Div. 883, affirmed 94 N.E.2d 801, 278 N.Y. 270—Lechoke Corp. v. Plastoid Corp., 83 N.Y.S. 2d 672, 193 Misc. 208, affirmed 94 N.Y.S.2d 672, 276 App.Div. 903, reargument and appeal denied 95 N.Y.S.2d 905, 276 App.Div. 1012—Pawtucket Mut. Fire Ins. Co. v. Keehn, 37 N.Y.S.2d 256, 179 Misc. 551—American Castype Corp. v. Niles-Bement-Pond Co., 29 N.Y.S. 2d 888, 177 Misc. 13, reversed on other grounds 42 N.Y.S.2d 638, 266 App.Div. 57, reargument denied 44 N.Y.S.2d 263, 266 App.Div. 949—Demms v. Blanchard, 270 N.Y.S. 700, 150 Misc. 867—Huxley-Westfried Corp. v. New York Foreign Trade Zone Operators, 121 N.Y.S. 2d 792.

N.D.—**Corpus Juris cited in Jacobson v. Mutual Benefit Health & Accident Ass'n**, 296 N.W. 545, 559, 70 N.D. 566.

Okl.—Independent School Dist. No. 65, Wagoner County v. Stafford 257 P.2d 1092, 208 Okl. 542—**Corpus Juris cited in Fletcher v. Allen**, 157 P.2d 452, 453, 195 Okl. 307.

Or.—Printing Industry of Portland v. Banks, 46 P.2d 596, 150 Or. 554.

Pa.—Seaboard Const. Co. v. Curtis, 54 Pa.Dist. & Co. 1—Perkins v. Hacker, 34 Pa.Dist. & Co. 619, 32 Luz.Leg.Reg. 81—Louch v. Longnecker, Com.Pl., 28 Erie Co. 208—Boyle v. Weber, Com.Pl., 33 Luz.Leg.Reg. 87.

Tenn.—Temples v. Prudential Ins. Co. of America, 79 S.W.2d 608, 18 Tenn. App. 506.

Tex.—Texas & N. O. R. Co. v. Dingfelder & Balish, 133 S.W.2d 967, 134 Tex. 156—Kramer v. Wilson, Civ.App., 226 S.W.2d 675, refused no reversible error—Joy v. Peacock, Civ.App., 131 S.W.2d 1012, set aside on other grounds Peacock v. Joy, 153 S.W.2d 440, 137 Tex. 387—Davis v. Rush, Civ.App., 288 S.W. 504, 64 C.J. p 1100 note 36.

96. Ariz.—Southwest Mines Development Co. v. Martignone, 64 P.2d 1031, 49 Ariz. 88.

Ky.—**Corpus Juris cited in Edwards v. Equitable Life Assur. Soc. of U. S.**, 177 S.W.2d 574, 579, 296 Ky. 448.

Neb.—Bank of Axtell v. Johnson, 249 N.W. 302, 125 Neb. 154.

N.Y.—Greater New York Coal & Oil Corp. v. Philadelphia & Reading Coal & Iron Co., 15 N.E.2d 801, 278 N.Y. 270—**Corpus Juris cited in First International Pictures v. F. C. Pictures Corp.**, 27 N.Y.S.2d 816, 818, 262 App.Div. 21—McLaughlin v. Brinckerhoff, 226 N.Y.S. 623, 222 App.Div. 458—Riha v. Baber, 42 N.Y.S.2d 346, 179 Misc. 755—Tedesco v. Genova, 235 N.Y.S. 739, 134 Misc. 222—Fels v. Continental Container Corp., 47 N.Y.S.2d 33—Mathis v. Matthews, 39 N.Y.S.2d 242—Mulroy v. Sessions, 38 N.Y.S.2d 853.

N.D.—Bormann v. Beckman, 19 N.W. 2d 455, 73 N.D. 720.

Okl.—**Corpus Juris cited in Fletcher v. Allen**, 157 P.2d 452, 453, 195 Okl. 307.

64 C.J. p 1100 note 37.

Under statute

Where action for water damage to plaintiff's merchandise was submitted to jury solely on theory of defendant's negligence, statute directing the addition of interest to verdict in causes of action based on breach

of contract was inapplicable and did not authorize addition of interest to verdict.—Kaplrow v. Prior, 51 N.Y.S. 2d 355.

97. Kan.—Schreiner v. Rothgarn, 92 P.2d 59, 150 Kan. 325.

N.Y.—Burger v. Levitt, 49 N.Y.S.2d 348, 267 App.Div. 1038—Gottesman v. Havana Importing Co., 72 N.Y.S. 2d 426—Roberts v. Larsen, 29 N.Y.S.2d 311, appeal dismissed 28 N.Y.S.2d 715, 262 App.Div. 764, motion dismissed 39 N.E.2d 280, 287 N.Y. 652—Babino v. Martineau, 21 N.Y.S.2d 448.

Ohio.—Stark v. McConnell, 8 Ohio Sup. 23.

Pa.—Tibbets v. Prudential Ins. Co. of America, 169 A. 382, 313 Pa. 310—Patrio v. Butt, Com.Pl., 30 Erie Co. 23.

64 C.J. p 1100 note 38.

98. N.Y.—**Corpus Juris cited in First International Pictures v. F. C. Pictures Corp.**, 27 N.Y.S.2d 816, 818, 262 App.Div. 21—American Castype Corp. v. Niles-Bement-Pond Co., 29 N.Y.S.2d 888, 177 Misc. 13, reversed on other grounds 42 N.Y.S.2d 638, 266 App.Div. 57, reargument denied 44 N.Y.S.2d 263, 266 App.Div. 949—Gottesman v. Havana Importing Co., 72 N.Y.S.2d 426—Kaplrow v. Prior, 51 N.Y.S.2d 355.

64 C.J. p 1100 note 39.

99. Pa.—Tibbets v. Prudential Ins. Co. of America, 169 A. 382, 313 Pa. 310.

1. D.C.—Metzger v. Metzger, 35 App. D.C. 389.

2. Kan.—Schreiner v. Rothgarn, 92 P.2d 59, 150 Kan. 325.

64 C.J. p 1100 note 41.

3. Mo.—Laughlin v. Boatmen's Nat. Bank of St. Louis, 189 S.W.2d 974, 354 Mo. 467.

Or.—Printing Industry of Portland v. Banks, 46 P.2d 596, 150 Or. 554.

64 C.J. p 1100 note 42.

4. N.Y.—Rintel v. Dairymen's League Co-op. Ass'n, 34 N.Y.S.2d 348, 178 Misc. 348.

5. Kan.—Lowe v. Neu, 194 P. 313, 108 Kan. 93.

*Addition of attorney's fees.* Where in a suit on a promissory note, which contains a promise to pay attorneys' fees but does not specify the amount thereof, the jury return a verdict for principal and interest but fail to include attorney's fees the court cannot amend the verdict by fixing and adding the amount of the attorney's fees;<sup>6</sup> but the court may,<sup>7</sup> and should,<sup>8</sup> assess and add attorneys' fees where it is clear that plaintiff is entitled to them and the amount can be readily determined from data given in the note and in the verdict.

### (3) Reduction of Amount of Recovery

The general rule is that where the verdict, because of inadvertent mistake, or error in calculation, exceeds the amount claimed or proved the court may, with the consent or acquiescence of the prevailing party, reduce the verdict to the proper amount.

Generally the court has power to reduce a verdict,<sup>9</sup> as where the verdict exceeds the amount claimed<sup>10</sup> or is occasioned by a mere error in addition;<sup>11</sup> and while it has been held that an excessive verdict may not be reduced where the excessiveness is due to the lack of evidence to sustain the finding of the jury rather than inadvertence, error of law, misapprehension of facts, or errors of computation,<sup>12</sup> other cases have permitted a reduction of the amount of recovery where it is excessive in view of the evidence.<sup>13</sup> An amount improperly allowed as interest may be deducted.<sup>14</sup> While the prevailing party cannot obtain an entirely new and different verdict under the guise of an

amendment simply because the ultimate effect would be to reduce the amount given by the jury in their verdict,<sup>15</sup> it is quite generally held that where the verdict, because of inadvertent mistake, or error in calculation, exceeds the amount claimed or proved the court may, with the consent<sup>16</sup> or acquiescence<sup>17</sup> of the prevailing party reduce the verdict to the proper amount. In a number of cases where only the defeated party was complaining, lack of consent or acquiescence of the prevailing party has been held not to render improper the deduction of manifest and determinable excesses.<sup>18</sup>

It is often stated quite broadly that the court may reduce an excessive verdict due to an obvious error in calculation without the consent of the prevailing party where the matter is susceptible of accurate mathematical calculation and involves no consideration of, or opinion on, the evidence,<sup>19</sup> and some cases have sustained reductions to the amount claimed in the pleadings without the consent of the prevailing party;<sup>20</sup> but it is the general rule that where the damages are unliquidated the court cannot, without the consent or acquiescence of the prevailing party, invade the province of the jury by reducing the amount of the verdict.<sup>21</sup> Where the proper amount is apparent, the trial court, in some jurisdictions, may correct the verdict by striking off the excess.<sup>22</sup> Where, from the itemization of damages, it is apparent that a double recovery has been allowed, the duplicated elements may be stricken.<sup>23</sup>

Ohio.—Crawford v. Kellermier, 175 N.E. 600, 123 Ohio St. 404.

6. Okl.—Getman v. Hayhow, 229 P. 559, 103 Okl. 161.

Va.—Atkinson v. Neblett, 132 S.E. 326, 144 Va. 220.

7. Wash.—Yakima Nat. Bank v. Knipe, 33 P. 834, 6 Wash. 348.

8. Okl.—Cunningham v. Spencer, 239 P. 444, 111 Okl. 217.—Continental Gin Co. v. Sullivan, 150 P. 209, 48 Okl. 332.

9. Ill.—Colky v. Metropolitan Life Ins. Co., 49 N.E.2d 830, 320 Ill.App. 120.

Mich.—Bos v. Gaudio, 255 N.W. 349, 267 Mich. 517.

Pa.—Gaspero v. Gentile, 50 A.2d 754, 160 Pa.Super. 276.—McGrane v. Hitchcock, Com.Pl., 3 Chester Co. L.R. 149.—Burke v. Commonwealth, Com.Pl., 94 Pittsb.Leg.J. 833.

The proper way to cure an excessive verdict is to reduce it on motion to that effect or grant a new trial.—Noakes v. Lattavo, 37 A.2d 711, 349 Pa. 463.

10. Tex.—Dennison v. Gilmore, Civ. App., 71 S.W.2d 542, error dis-

missed.—Southwestern Gas & Electric Co. v. Hutchins, Civ.App., 68 S.W.2d 1085, error dismissed.

11. Ga.—Price v. Rimes Bros., Inc., 94 S.E. 817, 21 Ga.App. 580.

Ill.—Sparks v. Rayburn, 190 Ill.App. 438.

12. Kan.—Ft. Scott, etc., R. Co. v. Kinney, 53 P. 880, 7 Kan.App. 650.

13. Kan.—Barker v. Kansas City, M. & O. Ry. Co., 129 P. 1151, 88 Kan. 767, 43 L.R.A.N.S., 1121.—Wichita & C. Ry. v. Gibb, 27 P. 991, 47 Kan. 274.

Mo.—State ex rel. and to Use of Scarborough v. Earley, 219 S.W. 2d 879, 240 Mo.App. 868.

Ohio.—Chester Park Co. v. Schulte, 166 N.E. 186, 120 Ohio St. 273.

Wis.—Schulz v. General Cas. Co., 288 N.W. 803, 233 Wis. 118.

14. Neb.—Swygert v. Platte Valley Power & Irr. Dist., 274 N.W. 492, 133 Neb. 194.

15. Ga.—Cornelia Wholesale Grocery Co. v. Hogsd Bros., 85 S.E. 101, 142 Ga. 367.

16. Ala.—W. T. Rawleigh Co. v. Hannon, 22 So.2d 603, 82 Ala.App. 147.

Mont.—Mosher v. Sanford-Evans Co., 216 P. 811, 68 Mont. 64, 84 C.J. p. 1101 note 52.

17. N.C.—Cohoon v. Cooper, 118 S.E. 834, 186 N.C. 26.

18. Kan.—Schlesener v. Mott, 190 P. 745, 107 Kan. 41, 64 C.J. p. 1101 note 54.

19. Ohio.—Chester Park Co. v. Schulte, 166 N.E. 186, 120 Ohio St. 273, 64 C.J. p. 1101 note 55.

20. Iowa.—Newbury v. Getchel, etc., Lumber, etc., Co., 69 N.W. 743, 100 Iowa 441, 62 Am.S.R. 582.

Pa.—Bentz v. Johnson, 21 Pa.Dist. 1068.

21. N.C.—Isley v. Virginia Bridge, etc., Co., 55 S.E. 416, 143 N.C. 51, 64 C.J. p. 1101 note 57.

22. Mo.—Federal Cold Storage Co. v. Pupillo, 139 S.W.2d 996, 346 Mo. 136.

17 C.J. p. 1085 note 25.

23. Wis.—Archer v. Milwaukee Auto Engine, etc., Co., 129 N.W. 598, 144 Wis. 476.

17 C.J. p. 1085 note 26.

After the discharge of the jury it has been held that the court cannot reduce the amount of recovery.<sup>24</sup> Where the evidence sustains the award made by the jury the verdict should not be reduced.<sup>25</sup>

*Excess on one count or item.* Where the suit is based on two causes of action and the verdict allows plaintiff more than he asked for on his first cause of action, but fixes the recovery on the second cause at considerably less than could have been allowed, the court is without power to amend by making a general verdict for the total of the two sums, which the evidence would have justified on both causes of action, but the amount allowed on the first cause of action must be reduced to the amount claimed by plaintiff.<sup>26</sup>

*Inconsistent reduction.* Where the basis on which the court reduces the amount of the verdict would legally require that the entire verdict be set aside, the inconsistency of the court in reducing the verdict in part and leaving the other part to stand requires a reversal.<sup>27</sup>

# § 518. Amendment or Correction by Attorneys and Others

Formal defects in the verdict may be amended or corrected by the attorneys under the direction of the court.

Formal defects in the verdict may be amended or corrected by the attorneys under the direction of the court.<sup>28</sup> A defective verdict cannot be corrected by the reporter, in his report of the case, stating the finding of the jury in such a way as to eliminate the defect.<sup>29</sup> A court clerk cannot amend or correct a verdict,<sup>30</sup> and cannot, without the

knowledge of the court or the party adversely affected, and after the trial has terminated, alter or change the verdict as recorded in a material respect;<sup>31</sup> but where by statute the jury have nothing to do with the interest, but it is to be added by the clerk, the clerk may add the interest although the jury in making up their award in fact included interest.<sup>32</sup>

# § 519. Venire De Novo or Venire Facias De Novo

The terms "venire de novo" or "venire facias de novo" are now used interchangeably in practice to denote the submission of the case to another jury for a new trial.

A "venire facias de novo," commonly termed a "venire de novo," is a second "venire" to summon another jury for a new trial.<sup>33</sup> The terms "venire de novo" or "venire facias de novo" are now used interchangeably in practice to denote the submission of the case to another jury for a new trial.<sup>34</sup> Venire de novo was one of the early common law remedies for obtaining a reexamination of the facts tried by the jury,<sup>35</sup> which antedated motions for a new trial.<sup>36</sup> Venire de novo can be used only where the defect in the verdict appears on the face of the record,<sup>37</sup> and it embraces an improper or unauthorized verdict.<sup>38</sup> Also, venire de novo can be used only where there is a defective verdict,<sup>39</sup> and it cannot be based on the refusal of the court to have the jury return a special verdict,<sup>40</sup> or its allowance of an amendment of the complaint to conform to the evidence.<sup>41</sup>

There is proper ground for a venire de novo if the verdict is so defective on its face that a judgment cannot be rendered thereon,<sup>42</sup> if the court

24. Mo.—Butler v. Equitable Life Assur. Soc. of U. S., 93 S.W.2d 1019, 233 Mo.App. 94.

Utah.—Wolfe v. White, 225 P.2d 729.

25. N.Y.—Russo v. Rycroft, 83 N.Y.S. 2d 924, 274 App.Div. 960.

26. N.Y.—Hoffer v. Hooven-Owens-Rentschler Co., 182 N.Y.S. 632, 192 App.Div. 138.

64 C.J. p 1101 note 58.

27. Kan.—Rominger v. Parrish's Estate, 227 P. 544, 116 Kan. 640.

28. Ga.—Herndon v. Sime, 67 S.E. 835, 7 Ga.App. 675.

Tex.—Washington v. Denton First Nat. Bank, 64 Tex. 4.

29. Cal.—Stewart v. Taylor, 8 P. 605, 68 Cal. 5.

30. N.J.—Petrosino v. Public Service Coordinated Transport, 61 A.2d 746, 1 N.J.Super. 19—Berko v. Public Service Coordinated Transport, 175 A. 364, 114 N.J.Law 39.

Pa.—Puritan Rubber Mfg. Co. v. Erie

Foundry Co., Com.Pl., 24 Erie Co 86, 56 York Leg Rec. 89.

31. N.Y.—DeLafield v. J. K. Armsby Co., 109 N.Y.S. 314, 124 App.Div. 621.

32. N.Y.—Manning v. Port, 91 N.Y. 664.

33. Ind.—Bosseker v. Cramer, 18 Ind. 44, 46.

34. Ala.—Sewall v. Glidden, 1 Ala. 52.

64 C.J. p 1102 notes 65-67.

Meaning of phrase "venire de novo"

well known

Ind.—Johnson v. Hosford, 10 N.E. 407, 110 Ind. 572, rehearing denied 12 N.E. 522, 110 Ind. 572.

35. U.S.—Burns Bros. v. Cook Coal Co., C.C.A.N.J., 42 F.2d 109.

Fla.—Fayter v. Shore, 153 So. 511, 114 Fla. 115.

36. Fla.—Fayter v. Shore, supra.

64 C.J. p 1102 note 69.

37. Fla.—Fayter v. Shore, supra.

Ind.—Waterbury v. Miller, 41 N.E.

383, 13 Ind.App. 197.

64 C.J. p 1102 note 72.

38. Fla.—Fayter v. Shore, 153 So. 511, 114 Fla. 115.

Better practice

When only point raised is legal inconclusiveness or insufficiency of verdict, motion for venire de novo is better practice.—Fayter v. Shore, supra.

39. Ind.—Sanford Tool, etc., Co. v. Mullen, 27 N.E. 448, 1 Ind.App. 204.

40. Ind.—Sanford Tool, etc., Co. v. Mullen, supra.

41. Ind.—Sanford Tool, etc., Co. v. Mullen, supra.

42. Ind.—Central Union Telephone Co. v. Pehring, 45 N.E. 64, 146 Ind. 189—In re Lowe's Estate, 70 N.E.2d 187, 117 Ind.App. 554—Clevenger v. Kern, 197 N.E. 731, 100

makes a ruling accepting a verdict defective in form,<sup>43</sup> or if the verdict fails to find on all the issues between plaintiff and defendant,<sup>44</sup> although as to the latter a distinction is judicially recognized between general verdicts and special verdicts or findings.<sup>45</sup> A venire de novo is granted when the verdict is imperfect by reason of some uncertainty or ambiguity,<sup>46</sup> or for failure to assess damages.<sup>47</sup> It is usually held that venire de novo will not lie if the verdict finds on all the issues and is not so defective that judgment cannot be rendered on it,<sup>48</sup> although the verdict is formally somewhat insufficient,<sup>49</sup> or contains unnecessary and immaterial matters which may be rejected as surplusage.<sup>50</sup> A motion for a venire de novo is properly overruled where the verdict is not subject to the claimed imperfections or defects.<sup>51</sup>

**Contents and construction of motion.** A motion for a venire de novo must sufficiently set forth or disclose the grounds on which it is made.<sup>52</sup> Although a motion is termed by the movant as a motion in arrest of judgment it will be treated and considered as a motion for a venire de novo where it is directed to the verdict alone, and the remedy sought is unmistakably that which can only be had by a motion for a venire de novo.<sup>53</sup>

**Time for making motion.** While a venire de novo

may be granted at any time before final judgment,<sup>54</sup> a motion made after the time is too late and will be overruled;<sup>55</sup> but although a judgment has been rendered against one defendant a motion for a venire de novo, which seeks relief as to other defendants, is timely if filed before the judgment is rendered for the other defendants, which judgment is the final judgment in the cause.<sup>56</sup>

## § 520. Entry and Record

Before a verdict is complete, it must be accepted by the court for record. The record of a verdict in case of clerical mistake may be amended to conform to the verdict as rendered.

Before a verdict is complete, it must be accepted by the court for record.<sup>57</sup> When a verdict by a jury is returned in open court and received by the court, it should be filed.<sup>58</sup> It is irregular to record a verdict before it has been declared by the foreman, or, if sealed, read by the clerk.<sup>59</sup> The court should record the verdict as it is rendered by the jury,<sup>60</sup> since the recorded verdict is the only verdict to be considered,<sup>61</sup> and the only one that can be looked to by the appellate court.<sup>62</sup> It is the verdict as recorded which constitutes the actual verdict in the case on which the judgment of the court is based.<sup>63</sup> The court has authority to enter on the record a directed verdict in the absence of one or all of the

Ind.App. 581.—Waterbury v. Miller, 41 N.E. 383, 13 Ind.App. 197. 64 C.J. p 1102 note 73.

### Joint tort-feasors

In action against several joint tort-feasors, verdict for plaintiff which is silent as to one of the joint tort-feasors is not defective so as to be subject to motion for venire de novo.—Inter State Motor Freight System v. Henry, 38 N.E.2d 909, 111 Ind.App. 179.—Alexandria Mining & Exploring Co. v. Painter, 28 N.E. 113, 1 Ind.App. 887.

43. Ind.—Perley v. Schmidt Cut Stone Co., 95 N.E. 616, 48 Ind.App. 344.

44. Ind.—Bosseker v. Cramer, 18 Ind. 44.—Clevenger v. Kern, 197 N. E. 731, 100 Ind.App. 581.

N.Y.—279679 Certificate Holders Protective Corp. v. Spler Co., 21 N.Y. S.2d 814, 174 Misc. 553.

64 C.J. p 1102 note 75.

45. Ind.—Maxwell v. Wright, 67 N. E. 267, 160 Ind. 515.

64 C.J. p 1102 note 76.

46. Ind.—Maxwell v. Wright, supra.—Sheeks v. State, 60 N.E. 142, 156 Ind. 508.—Bosseker v. Cramer, 18 Ind. 44.

47. Ind.—Maxwell v. Wright, 67 N. E. 267, 160 Ind. 515.—Bosseker v. Cramer, 18 Ind. 44.

48. Ind.—Kelley v. Bell, 88 N.E. 58,

172 Ind. 590.

64 C.J. p 1103 note 79.

49. Ind.—Town of Hobart v. Casbon, 142 N.E. 138, 81 Ind.App. 24.—Thurman v. Miller, 98 N.E. 379, 50 Ind. App. 372.

50. Ind.—Kelley v. Bell, 88 N.E. 58, 172 Ind. 590.

51. Ind.—Phillips v. Gammon, 124 N.E. 699, 188 Ind. 497.

52. Ga.—Brown v. Marbut-Williams Lumber Co., 123 S.E. 899, 32 Ga. App. 519.

64 C.J. p 1103 note 84.

53. Ind.—Phillips v. Gammon, 124 N.E. 699, 188 Ind. 497.

54. Ind.—Burkhart v. Simms, 60 N. E.2d 141, 115 Ind.App. 576.—Bruce v. Hubbell, 123 N.E. 418, 70 Ind. App. 237.

55. Ind.—Burkhart v. Simms, 60 N. E.2d 141, 115 Ind.App. 576.

64 C.J. p 1103 note 87.

No question on appeal

Where motion for venire de novo was not filed until after rendition of final judgment, assignments of error relative to overruling of motions for venire de novo presented no question on appeal.—Burkhart v. Simms, supra.

56. Ind.—Bruce v. Hubbell, 123 N.E. 418, 70 Ind.App. 237.

57. N.C.—Edwards v. Hood Motor Co., 69 S.E.2d 550, 235 N.C. 269.—Baird v. Ball, 168 S.E. 667, 204 N.C. 469.

Pa.—West Penn Rys. Co. v. Umbel, Com.Pl., 8 Fay.L.J. 231.

64 C.J. p 1103 note 89.

Approval of verdict by court as essential to entry of judgment thereon see Judgments § 45.

58. Ind.—Income Guaranty Co. v. Zielenka, 21 N.E.2d 87, 107 Ind. App. 248.

59. Cal.—Blum v. Fats, 20 Cal. 69.

60. Cal.—Moody v. McDonald, 4 Cal. 297.

61. Ill.—Garrett v. John V. Farwell Co., 102 Ill.App. 31, reversed on other grounds 65 N.E. 361, 199 Ill. 436.

64 C.J. p 1103 note 92.

62. Miss.—Corpus Juris cited in Delta Chevrolet Co. v. Wald, 51 So.2d 443, 444, 211 Miss. 256.—Corpus Juris cited in Burton v. Atkins, 24 So.2d 355, 199 Miss. 275.

64 C.J. p 1103 note 96.

63. N.Y.—Carrig v. Oakes, 20 N.Y. S.2d 555, 173 Misc. 793, affirmed 24 N.Y.S.2d 135, 260 App.Div. 989.

jurors after it announces such direction in the presence of all the jurors.<sup>64</sup> The form of the verdict as recorded must control in case of variance between it and the written verdict brought into court by the jury.<sup>65</sup> It is not necessary that the record of entry of a verdict should show that the jury were sworn.<sup>66</sup> A verdict which the court refuses to receive because of defects is not entitled to be filed under a statute relating to the filing of verdicts.<sup>67</sup> A verdict is not invalid because entered on the wrong paper,<sup>68</sup> although under some statutes the verdict must be entered in the minutes of the court.<sup>69</sup>

*Entry nunc pro tunc.* The court may enter a verdict nunc pro tunc at any time during the term at which it was rendered.<sup>70</sup>

*Amendment or correction of record.* The record of a verdict in case of clerical mistake may be amended to conform to the verdict as rendered,<sup>71</sup> although the term has expired,<sup>72</sup> and the court may, after the expiration of the term, direct the recording of a verdict which was not recorded when returned.<sup>73</sup> Where, in order to arrive at the intention of the jury in their verdict, it is necessary to consider the evidence which has not been made

a part of the record, the court may require the record to be completed by bill of exceptions or bill of evidence.<sup>74</sup>

## § 521. Construction and Operation

- a. In general
- b. Construction in connection with record and proceedings
- c. Issues and facts determined by general verdict
- d. Conclusiveness
- e. Particular verdicts

### a. In General

Verdicts are to be construed liberally and reasonably with a view to sustaining the verdict and effectuating the intention of the jury if possible.

General verdicts are to be given a reasonable interpretation,<sup>75</sup> are to have every reasonable presumption or intendment made in their support,<sup>76</sup> and are to be construed liberally<sup>77</sup> and reasonably,<sup>78</sup> with a view to sustaining the verdict and effectuating the intention of the jury if possible. The jury's intent must be ascertained and given effect if consistent with legal principles.<sup>79</sup> There must, however, be

64. Mich.—Cashaw v. Great Lakes Greyhound Lines, 49 N.W.2d 183, 331 Mich. 291.

65. Or.—Grammer v. Wiggins-Meyer S. S. Co., 270 P. 759, 126 Or. 64 C.J. p 1103 note 94.

66. Miss.—Waddell v. Magee, 53 Miss. 687.

67. Wash.—Hooper v. Corliss, 261 P. 645, 146 Wash. 50.

68. Ga.—Liverpool & London & Globe Ins. Co. v. People's Bank of Mansfield, 85 S.E. 114, 143 Ga. 365.

69. Cal.—Vittimin Milling Corporation v. Superior Court in and for Los Angeles County, 33 P.2d 1016, 1 Cal.2d 116.

70. Ill.—O'Keefe v. Kellogg, 53 Ill. 347.

71. Mich.—Forsythe v. Washtenaw Circuit Judge, 147 N.W. 549, 180 Mich. 633, L.R.A.1915A 706. 64 C.J. p 1104 note 2.

72. Mich.—Reynolds v. Cavanagh, 102 N.W. 986, 139 Mich. 387.

N.C.—Freeman v. Morris, 44 N.C. 287.

73. Ill.—Gross v. Sloan, 58 Ill.App. 302.

74. Ky.—Pittsburg, etc., R. Co. v. Darlington, 111 S.W. 360, 129 Ky. 266, 33 Ky.L. 818.

75. Ga.—Carithers v. Carithers, 43 S.E.2d 503, 202 Ga. 596—Parks v. Parks, 80 S.E.2d 837, 89 Ga.App. 725.

N.J.—Turon v. J. & L. Const. Co., 86 A.2d 192, 8 N.J. 543—Lampert v. Mikos, 91 A.2d 577, 22 N.J.Super. 155.

Ohio.—Baldwin v. Baldwin, App., 47 N.E.2d 792.

64 C.J. p 1085 note 71, p 1104 note 7.

76. Cal.—Weddle v. Loges, 125 P.2d 914, 52 Cal.App.2d 115.

Ga.—Parks v. Parks, 80 S.E.2d 837, 89 Ga.App. 725—Pickron v. Garrett, 35 S.E.2d 540, 73 Ga.App. 61.

Ind.—Oliver v. Coffman, 45 N.E.2d 351, 112 Ind.App. 507—Conrad v. Parks, 44 N.E.2d 503, 112 Ind.App. 301—Inter State Motor Freight System v. Henry, 38 N.E.2d 909, 111 Ind.App. 179.

Mo.—McIlvain v. Kavorinos, App., 212 S.W.2d 85, reversed on other grounds 219 S.W.2d 349, 358 Mo. 1163.

N.J.—Malinauskas v. Public Service Interstate Transp. Co., 78 A.2d 268, 6 N.J. 269—Dewar v. Ruehle, 59 A.2d 827, 137 N.J.Law 304—Rossman v. Newbon, 170 A. 230, 112 N.J.Law 261.

Ohio.—Hamilton v. City of Cleveland, 110 N.E.2d 50, 93 Ohio App. 93.

64 C.J. p 1104 note 8.

77. Minn.—Chevalier v. Rogers, 41 N.W.2d 872, 230 Minn. 540.

N.J.—Malinauskas v. Public Service Interstate Transp. Co., 78 A.2d 268, 6 N.J. 269—Dewar v. Ruehle, 59 A.2d 827, 137 N.J.Law 304—Ross-

man v. Newbon, 170 A. 230, 112 N. J.Law 261.

Ohio.—Waterman v. Wheeler, 5 Ohio Supp. 1.

Wash.—Wright v. Safeway Stores, 109 P.2d 542, 7 Wash.2d 341, 135 A.L.R. 1367—Bickelhaupt v. Inland Motor Freight, 71 P.2d 403, 191 Wash. 467.

64 C.J. p 1104 note 9.

78. Ga.—Parks v. Parks, 80 S.E.2d 837, 89 Ga.App. 725.

Ill.—Weinhouse v. Woodruff, 59 N.E. 2d 523, 324 Ill.App. 660.

Ind.—Conrad v. Parks, 44 N.E.2d 503, 112 Ind.App. 301.

Mont.—Fauver v. Wilkoske, 211 P.2d 420, 123 Mont. 228, 17 A.L.R.2d 518—Gilmore v. Mulvihill, 98 P.2d 335, 109 Mont. 601.

Ohio.—Baldwin v. Baldwin, App., 47 N.E.2d 792.

64 C.J. p 1104 note 10.

79. Fla.—Atlantic Coast Line R. Co. v. Price, 46 So.2d 481.

Ill.—Eckel v. Koleff, 117 N.E.2d 400, 1 Ill.App.2d 221.

Kan.—Schumock v. Meerian, 259 P. 2d 173, 175 Kan. 8.

Ky.—Buren v. Louisville Ry. Co., 165 S.W.2d 352, 291 Ky. 641.

N.J.—Malinauskas v. Public Service Interstate Transp. Co., 78 A.2d 268, 6 N.J. 269.

Okl.—Oklahoma Farm Mortg. Co. v. Cesar, 62 P.2d 1269, 178 Okl. 451.

a reasonable basis on which to find what the jury did intend,<sup>80</sup> and a court must refrain from any encroachment on the exclusive function of the jury by imputing to a verdict a meaning which it is doubtful that the jury intended to impart.<sup>81</sup>

If possible, a construction will be given to the verdict which will make it effective rather than void,<sup>82</sup> and verdicts are not to be avoided unless of necessity.<sup>83</sup> A verdict must be construed to avoid a conflict, if it is reasonably susceptible to that construction.<sup>84</sup> Verdicts are not to be technically construed,<sup>85</sup> and are not to be strictly construed as are pleadings.<sup>86</sup> Where a crudely drawn and imperfect verdict is read to the jury according to the interpretation by the trial court thereof, and this is adopted by them as a true reading of their verdict, the trial court may properly accept this interpretation as the true verdict.<sup>87</sup>

The trial court has a right to construe the verdict,<sup>88</sup> as a question of law,<sup>89</sup> and such right continues regardless of the lapse of any time to the period within which it would be necessary to interpret the verdict.<sup>90</sup> In the absence of a motion by one of the litigants, or a request by the clerk, the trial court is not called on to construe the verdict immediately with a view to the entry of judg-

ment.<sup>91</sup> A verdict speaks as of the date of trial.<sup>92</sup>

**Lien.** Where a statute so provides, when a verdict is rendered, it becomes a lien on the realty situated within the county of the party against whom it is rendered.<sup>93</sup>

**Use of singular or plural.** Under the general rules of construction, words in the plural number may be construed to include the singular, and vice versa, unless an intention to the contrary plainly appears from the context.<sup>94</sup>

#### b. Construction in Connection with Record and Proceedings

Where the verdict is plain and unmistakable in its terms and legal effect, the jury's intent must be determined from the verdict itself; but, where the intention of the jury is not clearly apparent from the verdict itself, the verdict is to be construed in connection with the record and proceedings.

Where the verdict is plain and unmistakable in its terms and legal effect the jury's intent must be determined from the verdict itself;<sup>95</sup> but, where the intention of the jury is not clearly apparent from the verdict itself, it is a settled rule of construction that the verdict is to be construed in connection with the admitted facts,<sup>96</sup> the jury's answers to interrogatories,<sup>97</sup> and the pleadings.<sup>98</sup> It is also to be construed in connection with all the evidence which has

Wash.—Wright v. Safeway Stores, 109 P.2d 542, 7 Wash.2d 341, 135 A.L.R. 1367.

#### Intent held correctly interpreted

Ill.—Bencie v. Williams, 86 N.E.2d 258, 337 Ill.App. 414.

80. Ill.—Bencie v. Williams, supra.

81. N.J.—Lampert v. Mikos, 91 A.2d 577, 22 N.J.Super. 155.

82. Colo.—Boynton v. Fox Denver Theaters, 214 P.2d 793, 121 Colo. 227, 24 A.L.R.2d 235.

Ga.—Calhoun v. Babcock Bros. Lump. Co., 33 S.E.2d 430, 199 Ga. 171—Parks v. Parks, 80 S.E.2d 837, 89 Ga.App. 725—Rowland v. Gardner, 53 S.E.2d 198, 79 Ga.App. 153—Pickron v. Garrett, 35 S.E.2d 540, 73 Ga.App. 61—Beaver v. Magid, 192 S.E. 497, 56 Ga.App. 272.

Kan.—Schwab v. Nordstrom, 27 P.2d 242, 138 Kan. 497.

Mo.—Corpus Juris cited in McIlvain v. Kavorinos, App., 212 S.W.2d 85, 89, affirmed in part and reversed in part on other grounds 219 S.W.2d 349, 358 Mo. 1153.

Tenn.—Bankhead v. Hall, 238 S.W.2d 522, 34 Tenn.App. 412.

Tex.—Beaumont, Sour Lake & Western R. Co. v. Cluck, Civ.App., 95 S.W.2d 1033, error dismissed.

Va.—Cape Charles Flying Service v. Nottingham, 47 S.E.2d 540, 187 Va. 444.

64 C.J. p 1066 note 40.

83. Ga.—Parks v. Parks, 80 S.E.2d 837, 89 Ga.App. 725.

N.J.—Malinauskas v. Public Service Interstate Transp. Co., 78 A.2d 268, 6 N.J. 269—Rossman v. Newbon, 170 A. 230, 112 N.J.Law 261.

84. Tex.—Beaumont, Sour Lake & Western R. Co. v. Cluck, Civ.App., 95 S.W.2d 1033, error dismissed.

85. Mont.—Fauver v. Wilkoske, 211 P.2d 420, 123 Mont. 228, 17 A.L.R.2d 518—Gilmore v. Mulvihill, 98 P.2d 335, 109 Mont. 601.

86. Ill.—Bencie v. Williams, 86 N.E.2d 258, 337 Ill.App. 414—Weinhouse v. Woodruff, 59 N.E.2d 523, 324 Ill. App. 660.

Ohio.—Waterman v. Wheeler, 5 Ohio Supp. 1.

Wash.—Wright v. Safeway Stores, 109 P.2d 542, 7 Wash.2d 341, 135 A.L.R. 1367.

87. Ala.—Stinson v. M. F. Patterson & Son, 102 So. 912, 212 Ala. 469.

88. Cal.—Phipps v. Superior Court in and for Alameda County, 89 P.2d 698, 32 Cal.App.2d 371.

89. Tex.—Walker v. Houston Fire & Casualty Ins. Co., Civ.App., 254 S.W.2d 429, reversed on other grounds Houston Fire & Casualty Ins. Co. v. Walker, Sup., 260 S.W.2d 600.

90. Cal.—Phipps v. Superior Court in and for Alameda County, 89 P.2d 698, 32 Cal.App.2d 371.

91. Cal.—Phipps v. Superior Court in and for Alameda County, supra.

92. N.C.—Yancey v. North Carolina State Highway & Public Works Commission, 22 S.E.2d 256, 222 N.C. 106.

93. Pa.—Davis v. Commonwealth Trust Co., 7 A.2d 3, 335 Pa. 387—Davis v. Commonwealth Trust Co., Com.Pl., 46 Dauph. Co. 419. Judgment lien see Judgments §§ 454–511.

94. La.—Hardie v. Allen, App., 50 So.2d 74.

95. Ga.—Ryner v. Duke, 53 S.E.2d 352, 205 Ga. 280—Turner v. Shackelford, 145 S.E. 913, 39 Ga.App. 49.

96. N.C.—Stewart v. Wyrick, 45 S.E.2d 764, 228 N.C. 429—Jernigan v. Jernigan, 37 S.E.2d 493, 226 N.C. 204.

64 C.J. p 1105 note 13.

97. Ark.—Leech v. Missouri Pac. R. Co., 71 S.W.2d 467, 189 Ark. 161. 64 C.J. p 1105 note 14.

98. U.S.—Lilly v. Grand Trunk Western R. Co., Ill., 63 S.Ct. 247, 317 U.S. 481, 87 L.Ed. 411—U. S. Fidelity & Guaranty Co. v. Church, D.C.Cal., 107 F.Supp. 683.

Ala.—Leiseger v. Boike, App., 73 So. 2d 390.

Cal.—Snodgrass v. Hand, 81 P.2d 198, 220 Cal. 446—Fernandez v. Consolidated Fisheries, Inc., 255 P.2d 863, 117 Cal.App.2d 254.

been admitted by the court,<sup>99</sup> the charge or instructions of the court,<sup>1</sup> and with other parts of the record<sup>2</sup> or proceedings.<sup>3</sup> Where the verdict varies from the issues in a substantial manner, it will not be aided by intendment or reference to extrinsic facts.<sup>4</sup>

### c. Issues and Facts Determined by Verdict

A general verdict includes a finding of every material,

necessary, and issuable fact submitted to the jury in favor of the prevailing party.

As a general rule, if it is not inconsistent with special findings, a general verdict includes a finding of every material, necessary, and issuable fact submitted to the jury in favor of the prevailing party;<sup>5</sup> but such a verdict establishes nothing with respect to matters or issues not submitted to the jury by the

Ga.—Carawan v. Carawan, 46 S.E.2d 588, 203 Ga. 325—Carithers v. Carithers, 43 S.E.2d 503, 202 Ga. 596—Powell v. Moore, 42 S.E.2d 110, 202 Ga. 62—Story v. Howell, 70 S.E.2d 29, 85 Ga.App. 661—Swain v. Georgia Power & Light Co., 169 S.E. 249, 46 Ga.App. 794.

Mont.—Gilmore v. Mulvihill, 98 P.2d 335, 109 Mont. 601.

N.J.—Turon v. J. & L. Const. Co., 86 A.2d 192, 8 N.J. 543.

N.C.—Harris v. Burgess, 75 S.E.2d 248, 237 N.C. 430—White v. Price, 75 S.E.2d 244, 237 N.C. 347—Stewart v. Wyrick, 45 S.E.2d 764, 228 N.C. 429—Jernigan v. Jernigan, 37 S.E.2d 493, 226 N.C. 204—Jackson v. Maryland Cas. Co., 193 S.E. 703, 212 N.C. 546—Bundy v. Sutton, 177 S.E. 420, 207 N.C. 422.

R.I.—Gillis v. Melone, 11 A.2d 442, 64 R.I. 173.

Tex.—Traders & General Ins. Co. v. Wilder, Civ.App., 186 S.W.2d 1011, refused for want of merit.

64 C.J. p 1105 note 15.

99. U.S.—U. S. Fidelity & Guaranty Co. v. Church, D.C.Cal., 107 F.Supp. 683.

Cal.—Snodgrass v. Hand, 31 P.2d 198, 220 Cal. 446—Fernandez v. Consolidated Fisheries, Inc., 255 P.2d 863, 117 Cal.App.2d 254—Sunseri v. Dime Taxi Corp., 135 P.2d 654, 57 Cal.App.2d 926.

Ga.—Carawan v. Carawan, 46 S.E.2d 588, 203 Ga. 325—Carithers v. Carithers, 43 S.E.2d 503, 202 Ga. 596—Powell v. Moore, 42 S.E.2d 110, 202 Ga. 62—Story v. Howell, 70 S.E.2d 29, 85 Ga.App. 661—Swain v. Georgia Power & Light Co., 169 S.E. 249, 46 Ga.App. 794.

Mont.—Fauver v. Wilkoske, 211 P.2d 420, 123 Mont. 228, 17 A.L.R.2d 518—Gilmore v. Mulvihill, 98 P.2d 335, 109 Mont. 601.

N.C.—Harris v. Burgess, 75 S.E.2d 248, 237 N.C. 430—White v. Price, 75 S.E.2d 244, 237 N.C. 347—Stewart v. Wyrick, 45 S.E.2d 764, 228 N.C. 429—Jernigan v. Jernigan, 37 S.E.2d 493, 226 N.C. 204—Jackson v. Maryland Casualty Co., 193 S.E. 703, 212 N.C. 546—Bundy v. Sutton, 177 S.E. 420, 207 N.C. 422.

Fa.—Brown v. Ambridge Yellow Cab Co., 97 A.2d 377, 374 Pa. 208.

Tex.—Traders & General Ins. Co. v. Wilder, Civ.App., 186 S.W.2d 1011,

refused for want of merit—Gossler v. Lipper, Civ.App., 93 S.W.2d 1175, 64 C.J. p 1105 note 16.

1. U.S.—U. S. Fidelity & Guaranty Co. v. Church, D.C.Cal., 107 F.Supp. 683.

Cal.—Snodgrass v. Hand, 31 P.2d 198, 220 Cal. 446—Fernandez v. Consolidated Fisheries, Inc., 255 P.2d 863, 117 Cal.App.2d 254.

Conn.—Trepanier v. Huijter, 54 A.2d 275, 134 Conn. 24.

Ga.—Powell v. Moore, 42 S.E.2d 110, 202 Ga. 62—Swain v. Georgia Power & Light Co., 169 S.E. 249, 46 Ga. App. 794.

Mont.—Fauver v. Wilkoske, 211 P.2d 420, 123 Mont. 228, 17 A.L.R.2d 518—Gilmore v. Mulvihill, 98 P.2d 335, 109 Mont. 601.

N.J.—Turon v. J. & L. Const. Co., 86 A.2d 192, 8 N.J. 543—Lampert v. Mikos, 91 A.2d 577, 22 N.J.Super. 155.

N.C.—Harris v. Burgess, 75 S.E.2d 248, 237 N.C. 430—White v. Price, 75 S.E.2d 244, 237 N.C. 347—Stewart v. Wyrick, 45 S.E.2d 764, 228 N.C. 429—Jernigan v. Jernigan, 37 S.E.2d 493, 226 N.C. 204—Bundy v. Sutton, 177 S.E. 420, 207 N.C. 422.

Ohio.—Estridge v. Cincinnati St. Ry. Co., 63 N.E.2d 823, 76 Ohio App. 220—Dow Drug Co. v. Nieman, 13 N.E.2d 130, 57 Ohio App. 190.

R.I.—Gillis v. Melone, 11 A.2d 442, 64 R.I. 173.

64 C.J. p 1105 note 17.

2. Ill.—Bencie v. Williams, 86 N.E.2d 258, 337 Ill.App. 414.

Ky.—Frazier v. City of Corbin, 80 S.W.2d 595, 258 Ky. 582.

Mo.—See v. Wabash R. Co., 259 S.W.2d 828.

Mont.—Gilmore v. Mulvihill, 98 P.2d 335, 109 Mont. 601.

Pa.—Carroll v. Kirk, 19 A.2d 584, 144 Pa.Super. 211.

Tex.—Rountree Motor Co. v. Smith Motor Co., Civ.App., 109 S.W.2d 296, error dismissed.

W.Va.—Toler v. Cassinelli, 41 S.E.2d 672, 129 W.Va. 591.

64 C.J. p 1106 note 18.

3. Ga.—Parks v. Parks, 80 S.E.2d 837, 89 Ga.App. 725.

Or.—Gray v. Hammond Lumber Co., 232 P. 637, 233 P. 561, 113 Or. 570.

4. Ala.—Penney v. State, 155 So. 576, 229 Ala. 36—Hearn v. United States

Cast Iron Pipe & Foundry Co., 118 So. 365, 217 Ala. 352.

5. Cal.—Rather v. City and County of San Francisco, 184 P.2d 727, 81 Cal.App.2d 625—Shields v. Oxnard Harbor Dist., 116 P.2d 121, 46 Cal. App.2d 477—Corpus Juris quoted in Murray v. Babb, 86 P.2d 146, 147, 30 Cal.App.2d 301.

D.C.—Dickins v. International Broth. of Teamsters, Chauffeurs, Warehousemen & Helpers, 171 F.2d 21, 84 U.S.App.D.C. 51.

Ga.—Owen v. S. P. Richards Paper Co., 3 S.E.2d 660, 188 Ga. 258.

Ill.—Weinhouse v. Woodruff, 59 N.E.2d 523, 324 Ill.App. 660.

Ind.—Republic Creosoting Co. v. Hiatt, 8 N.E.2d 981, 212 Ind. 432—Scoopmire v. Tadfing, 52 N.E.2d 723, 114 Ind.App. 419—Oliver v. Coffman, 45 N.E.2d 351, 112 Ind. App. 507—Inter State Motor Freight System v. Henry, 38 N.E.2d 909, 111 Ind.App. 179—Crane Co. v. Newman, 37 N.E.2d 732, 111 Ind.App. 273.

Kan.—Johnson-Sampson Const. Co. v. Casterline Grain & Seed, Inc., 252 P.2d 893, 173 Kan. 763—Rasmussen v. Trehear, 224 P.2d 1010, 170 Kan. 184—Federal Deposit Ins. Corp. v. Cloonan, 222 P.2d 553, 169 Kan. 735—Vukas v. Quivira, Inc., 201 P.2d 685, 166 Kan. 439—Giltner v. Stephens, 200 P.2d 290, 166 Kan. 172—Schuette v. Ross, 190 P.2d 198, 164 Kan. 432—Dinsmoor v. Hill, 187 P.2d 338, 164 Kan. 12—Lord v. Hercules Powder Co., 167 P.2d 299, 161 Kan. 268—Schroeder v. Nelson, 139 P.2d 868, 157 Kan. 320—Marshall v. Home Mut. Ins. Co., 119 P.2d 529, 154 Kan. 488—Marley v. Wichita Transp. Corp., 96 P.2d 877, 160 Kan. 818—Darrington v. Campbell, 94 P.2d 305, 150 Kan. 407—Fisher v. Central Surety & Ins. Corp., 86 P.2d 583, 149 Kan. 38.

Ky.—Toms v. Holmes, 171 S.W.2d 245, 294 Ky. 233.

Mass.—Dalton v. Post Pub. Co., 105 N.E.2d 385, 328 Mass. 595.

Mont.—Gilmore v. Mulvihill, 98 P.2d 335, 109 Mont. 601.

N.J.—Ambrose v. Indemnity Ins. Co. of North America, 12 A.2d 693, 124 N.J.Law 438.

Ohio.—Richard v. Hunter, 85 N.E.2d 109, 151 Ohio St. 185—Swoboda v. Brown, 196 N.E. 274, 129 Ohio St. 512.

instructions of the court<sup>6</sup> or involved in the pleadings;<sup>7</sup> and a verdict for less than is alleged or proved by the prevailing party cannot be considered as establishing the truth of the testimony of his witnesses,<sup>8</sup> or the allegations of his pleadings,<sup>9</sup> with respect to the amount of recovery.

### d. Conclusiveness

Generally, the verdict of the jury, if not set aside in some legal way, is conclusive on the parties as to the facts found on conflicting and sufficient evidence.

It is a general rule that the verdict of the jury, if not set aside in some legal way, is conclusive on the parties as to the facts found on conflicting and sufficient evidence,<sup>10</sup> and the court will not inquire into them;<sup>11</sup> but the verdict is not conclusive as to issues of fact not submitted to the jury under the instructions of the court.<sup>12</sup>

### e. Particular Verdicts

- (1) In general
- (2) In favor of plaintiff
- (3) In favor of defendant

#### (1) In General

A verdict rendered by consent of the parties, and which covers the whole scope of the litigation, is a verdict binding on the parties as to the merits.

A verdict rendered by consent of the parties, and which covers the whole scope of the litigation, is a verdict binding on the parties as to the mer-

its;<sup>13</sup> and on such a verdict it will be assumed that everything that could have legally been found for the party in whose favor the verdict was taken has been so found.<sup>14</sup> A verdict by consent is deemed at least as favorable to the prevailing party on the facts in issue as would be a verdict found on a submission;<sup>15</sup> but where there are agreed special findings as well as an agreed verdict the verdict may be controlled by the findings.<sup>16</sup> Where the jury return a verdict for plaintiff, and a verdict for each defendant, all of which verdicts provide for no damages but assess part of the costs to the party in whose favor the verdict is returned, the verdicts constitute a finding that none of the parties have made out a case.<sup>17</sup> In a negligence action, a verdict of no cause of action indicates that defendant's negligence was not proved,<sup>18</sup> or that contributory negligence of plaintiff barring recovery was established.<sup>19</sup> A verdict of no cause of action against plaintiff does not impliedly embrace an affirmative finding for defendant on a counterclaim.<sup>20</sup>

#### (2) In Favor of Plaintiff

A general verdict for the plaintiff is a finding in his favor on all the issues joined or necessary to sustain the cause of action.

A general verdict for plaintiff is a finding in his favor on all the issues joined or necessary to sustain the cause of action,<sup>21</sup> or on all the averments

Okl.—Garrison v. Bonham, 251 P.2d 790, 207 Okl. 599—Shamblin v. Shamblin, 241 P.2d 941, 206 Okl. 133—J. R. Watkins Co. v. Chapman, 172 P.2d 768, 195 Okl. 466—Anderson v. Hill, 164 P.2d 623, 196 Okl. 304—Van Horn v. Van Horn, 141 P.2d 1006, 193 Okl. 182—Sturm v. American Bank & Trust Co. of Ardmore, 44 P.2d 974, 172 Okl. 294. R.I.—R. H. Kimball, Inc. v. Rhode Island Hospital Nat. Bank, 48 A.2d 420, 72 R.I. 144. 64 C.J. p 1106 note 21.

#### Under statutes

(1) The purpose of statute providing that a general verdict shall be held to embrace every issue joined in a suit is to require the application of general verdict in favor of defendant to such defensive plea of defendant as is supported by evidence, even though there are other pleas not so supported.—Hammons v. Walker Hauling Co., Tenn., 263 S.W.2d 753.

(2) Under statute so providing, a general verdict embraces not only the counts in a declaration but every issue joined.—Stewart v. Parker, 232 S.W.2d 67, 33 Tenn.App. 316.

6. Okl.—Colby v. Dodson, 267 P. 618, 131 Okl. 77. 64 C.J. p 1107 note 22.

7. Ill.—Lucas v. Gansler, 167 N.E. 23, 335 Ill. 274. Va.—Leterman v. Charlottesville Lumber Co., 67 S.E. 281, 110 Va. 769.

8. Mass.—Cerrato v. Miller, 163 N. E. 251, 264 Mass. 533. 64 C.J. p 1107 note 24.

9. Cal.—Lady v. Ruppe, 298 P. 859, 113 Cal.App. 606.

10. N.Y.—Jackson v. Jackson, 7 N.Y. S.2d 407, 255 App.Div. 812.

N.D.—Corpus Juris cited in Zimmerman v. Kitzan, 43 N.W.2d 822, 826, 77 N.D. 477.

64 C.J. p 1107 note 27.

11. N.J.—Drummond v. Romme, 1 N. J.Law 75.

12. Tex.—Bailey v. Willeke, Civ. App., 185 S.W.2d 456, affirmed 189 S.W.2d 477, 144 Tex. 157. 64 C.J. p 1107 note 29.

13. Ga.—Webster v. Dundee Mortg., etc., Co., 20 S.E. 310, 93 Ga. 278.

14. N.H.—Hill v. Pine River Bank, 45 N.H. 300.

15. N.Y.—Sharp v. Whipple, 16 N.Y. Super. 474.

16. N.Y.—Sharp v. Whipple, supra.

17. Kan.—Schwab v. Nordstrom, 27 P.2d 242, 138 Kan. 497.

18. N.J.—Opdyke v. Halbach, 7 A.2d 635, 123 N.J.Law 123.

19. N.J.—Opdyke v. Halbach, supra.

20. N.J.—Lampert v. Mikos, 91 A.2d 577, 22 N.J.Super. 155.

21. Ind.—Brown v. Greenwood, 60 N.E.2d 152, 116 Ind.App. 112—Crane Co. v. Newman, 37 N.E.2d 732, 111 Ind.App. 273—Chicago & E. I. Ry. Co. v. Gilbert, 194 N.E. 188, 100 Ind.App. 365—Martin County Bank v. Hoffman, 192 N.E. 840, 99 Ind. App. 458—Illinois Pipe Line Co. v. Coffman, 188 N.E. 217, 98 Ind.App. 419—Hill v. Boggs, 185 N.E. 300, 98 Ind.App. 506.

Kan.—Snedker v. Derby Oil Co., 192 P.2d 135, 164 Kan. 640. Ky.—Powell v. Jones, 171 S.W.2d 994, 294 Ky. 386.

Me.—McMullen v. Corkum, 54 A.2d 753, 143 Me. 47.

Mich.—Francis v. Scheper, 40 N.W.2d 214, 326 Mich. 441.

Minn.—Jenkins v. Jenkins, 19 N.W.2d 389, 220 Minn. 216.

Mo.—Polk v. Missouri-Kansas-Texas R. Co., 111 S.W.2d 138, 341 Mo. 1213, 114 A.L.R. 873.

N.M.—Kirkpatrick v. McMillan, 187 P.2d 772, 49 N.M. 100.

N.Y.—Eisenbach v. Gimbel Bros., 24 N.E.2d 131, 281 N.Y. 474, motion



of the complaint material to recovery,<sup>22</sup> although it does not necessarily find that plaintiff is entitled to recover the amount alleged to be due,<sup>23</sup> and does not impute a finding not essential to recovery.<sup>24</sup> A verdict for plaintiff, although for a nominal or inadequate sum, must be regarded as finding for plaintiff on the issues of liability and right of recovery and cannot be considered as in legal effect a verdict for defendant,<sup>25</sup> although it has been held that a verdict in favor of plaintiff for a nominal sum, when the jury know that plaintiff sustained damages in excess of such sum, is a verdict for defendant,<sup>26</sup> and that a verdict in favor of plaintiff, failing to give any compensatory or punitive damages, is a verdict for defendant.<sup>27</sup> In an action against two defendants, where a verdict is directed for one defendant on one count but not on the other, a verdict for plaintiff is against one defendant on one count and against both defendants on the other.<sup>28</sup>

A general verdict for plaintiff which does not specify against whom it is found will, where relief has been asked against several defendants, be construed as a verdict against all defendants;<sup>29</sup> but

if the verdict specifies one or more defendants, and makes no mention of the other defendant or defendants, it will usually be construed as a verdict in favor of the defendant or defendants not mentioned.<sup>30</sup> A verdict for plaintiff, which specifies that it is based on one of several counts in the declaration, is in effect a finding for defendant on the other counts not specified;<sup>31</sup> but a general verdict which makes no specification cannot be construed to have been based on only one of two grounds of negligence invoked by plaintiff.<sup>32</sup> Where the only issue is as to plaintiff's right as to a certain property a verdict that "We, the jury, find the right of property to be in the plaintiff," is equivalent to the simple finding of a general verdict in favor of plaintiff.<sup>33</sup>

In actions for personal injuries a general verdict for plaintiff is deemed to cover compensation for every element of damage embraced within the pleadings and proof.<sup>34</sup> Where such issue is submitted to the jury,<sup>35</sup> in a negligence action, a verdict for plaintiff is a finding that plaintiff was free from contributory negligence,<sup>36</sup> that he did not assume the risk,<sup>37</sup> that one or more of the acts

denied 21 N.E.2d 199, 280 N.Y. 690.  
—Simson v. Commercial Travelers Mut. Accident Ass'n of America, 32 N.Y.S.2d 615, 263 App.Div. 297, affirmed 45 N.E.2d 457, 289 N.Y. 700.—Van Ness v. Jackson, 20 N.Y.S.2d 440, 259 App.Div. 1019, motion denied 29 N.E.2d 665, 284 N.Y. 590, reversed on other grounds 33 N.E.2d 240, 285 N.Y. 554, reargument denied 28 N.Y.S.2d 713, 261 App.Div. 911.  
Okl.—Phelps v. Malone, 142 P.2d 849, 35 Okl. 239.—Chicago, R. I. & P. Ry. Co. v. Richerson, 94 P.2d 934, 185 Okl. 560.

#### Issues presented by set-off or counterclaim

A general verdict for plaintiff finds against defendant on issues presented by a set-off or counterclaim.

Ark.—Slatton v. Hill, 251 S.W.2d 123, 220 Ark. 858.  
Ind.—Grand Rapids Motor Exp. v. Crosbie, 69 N.E.2d 247, 117 Ind.App. 360.  
Iowa.—Slabaugh v. Eldon Miller, Inc., 55 N.W.2d 528, 244 Iowa 29.—Smith v. Pine, 12 N.W.2d 236, 234 Iowa 256.  
Mich.—Stewart v. Eghigian, 20 N.W.2d 777, 312 Mich. 699.  
64 C.J. p 1106 note 21 [a].

22. Cal.—Skoglund v. Moore, Dry-Dock Co., 53 P.2d 1001, 11 Cal.App. 2d 287.  
Ind.—Township of Haddon School of Sullivan County v. Willis, 199 N.E. 251, 209 Ind. 356.

23. Ind.—Township of Haddon School of Sullivan County v. Willis, supra.

24. Ark.—Missouri Pac. R. Co. v. Hancock, 113 S.W.2d 489, 195 Ark. 414.

25. Kan.—Cincinnati Discount Co. v. Asher, 166 P. 476, 101 Kan. 253.  
64 C.J. p 1107 note 35.

26. Wash.—Haney v. Cheatham, 111 P.2d 1003, 8 Wash.2d 310.

27. Or.—Fischer v. Howard, 271 P. 2d 1059.

28. Tenn.—Bankhead v. Hall, 238 S. W.2d 622, 34 Tenn.App. 412.

29. Ill.—Sparberg v. Cohen, 38 N.E. 2d 993, 313 Ill.App. 143.  
64 C.J. p 1107 note 38.

30. N.Y.—Salkin v. City of New York, 105 N.Y.S.2d 113, 278 App. Div. 956.—Thibodeau v. Gerosa Haulage & Warehouse Corporation, 300 N.Y.S. 686, 252 App.Div. 615, affirmed 16 N.E.2d 98, 278 N.Y. 551.  
64 C.J. p 1107 note 39.

31. Ala.—Darby v. Fuller, 159 So. 275, 26 Ala.App. 324.  
Ind.—Isley v. Isley, 56 N.E.2d 513, 115 Ind.App. 69.  
64 C.J. p 1108 note 40.

32. N.Y.—Lo Galbo v. Columbia Casualty Co., 255 N.Y.S. 602, 234 App. Div. 510.

33. Fla.—General Motors Acceptance Corporation v. Judge of Circuit Court, Eleventh Judicial Circuit in and for Dade County, 136 So. 621, 102 Fla. 924.

34. N.Y.—Brooks v. Rochester R. Co., 50 N.E. 945, 156 N.Y. 244.

35. U.S.—Grand Trunk Western R. Co. v. Collins, C.C.A.Mich., 65 F.2d 875.

36. U.S.—Grand Trunk Western R. Co. v. Collins, supra.

Cal.—Sassano v. Rouillard, 81 P.2d 213, 27 Cal.App.2d 372.  
Ind.—American Carloading Corp. v. Gary Trust & Sav. Bank, 25 N.E.2d 777, 216 Ind. 649.—McKinnon v. Parrill, 38 N.E.2d 1008, 111 Ind.App. 343.—Pumphrey v. Tennessee, 1 N. E.2d 301, 102 Ind.App. 113.—New York Cent. R. Co. v. De Leury, 192 N.E. 125, 100 Ind.App. 140.

Iowa.—Hansen v. Nelson, 39 N.W.2d 292, 240 Iowa 1298.

Pa.—Davies v. Kilman, 56 A.2d 316, 162 Pa.Super. 82.

Kan.—Lord v. Hercules Powder Co., 167 P.2d 299, 161 Kan. 268.

N.Y.—Elfeld v. Burkham Auto Renting Co., 87 N.E.2d 285, 299 N.Y. 336, 13 A.L.R.2d 370.

Pa.—Olson v. Swain, 60 A.2d 548, 163 Pa.Super. 101.—McCormick Transp. Co. v. Philadelphia Transp. Co., 55 A.2d 771, 161 Pa.Super. 533.—Balzer v. Reith, 54 A.2d 64, 161 Pa.Super. 187.—Gabel v. 1528 Walnut St. Bldg. Corp., 50 A.2d 751, 160 Pa.Super. 218.—Brown v. McNamara, 50 A.2d 748, 160 Pa.Super. 206.—Bowser v. Kuhn, 49 A.2d 852, 160 Pa.Super. 31.—Weismiller v. Farrell, 34 A.2d 45, 153 Pa.Super. 366.

37. Ind.—McKinnon v. Parrill, 38 N. E.2d 1008, 111 Ind.App. 344.

charged in the complaint were the proximate cause of the injury,<sup>38</sup> and that defendant was negligent.<sup>39</sup> Where, in an action on a contract, the jury return a verdict for plaintiff for less than the contract price, this has been held to establish a finding that plaintiff did not fully perform the contract;<sup>40</sup> but there is also authority to the contrary.<sup>41</sup>

Where the verdict for plaintiff in an action by plaintiff and another is silent as to such coplaintiff, it is presumed that the coplaintiff suffered no damage, where the court charged that such coplaintiff was entitled to damages, if any, if defendant was negligent.<sup>42</sup>

Where because of ambiguity in the verdict it is doubtful which of two sums was intended to be awarded as damages it will be presumed that the lesser amount was the one intended.<sup>43</sup> Where a verdict is against one defendant for one amount and against the other defendant for a like amount, it has been held that the verdict should be construed as being for that amount against both defendants.<sup>44</sup>

### (3) In Favor of Defendant

A general verdict in favor of the defendant is a finding of every material, necessary, and issuable fact submitted to the jury in his favor.

A general verdict in favor of defendant is a finding of every material, necessary, and issuable fact submitted to the jury in his favor,<sup>45</sup> and in

a negligence action, that such defendant was not negligent,<sup>46</sup> although it has been held that a general verdict for defendant implies a finding of negligence against both parties,<sup>47</sup> and that a finding that one defendant is not liable is not conclusive on the question of plaintiff's contributory negligence.<sup>48</sup> A verdict against several defendants is not determinative of the question of liability as between themselves where such liability was not submitted to the jury.<sup>49</sup> In an action against several defendants, a verdict in favor of one defendant can be construed solely as a verdict against the other and not against both.<sup>50</sup>

Where defendants plead a set-off and counterclaim to a cause of action, a verdict that the jury finds in favor of defendants on the issues joined does not constitute a finding on the counterclaim.<sup>51</sup> Where defendant has set up a counterclaim, the prima facie meaning of a general verdict for defendant is that defendant's counterclaim equally offsets plaintiff's claim;<sup>52</sup> and the same construction is given to a verdict which contains one finding in favor of defendant in the main action and another finding in favor of the original plaintiff or defendant on the counterclaim.<sup>53</sup> If defendant's counterclaim is for an amount in excess of plaintiff's claim a verdict for defendant for a certain sum is a finding that defendant's claim exceeds plaintiff's by that sum.<sup>54</sup> It has been held that, if there is a verdict for plaintiff on his claim, a ver-

38. Ind.—New York Cent. R. Co. v. De Leury, 192 N.E. 125, 100 Ind. App. 140.

39. Cal.—Huyck v. Merritt, 240 P.2d 1, 108 Cal.App.2d 775—Sassano v. Rouillard, 81 P.2d 213, 27 Cal.App. 2d 372—Lamb v. Belt Casualty Co., 40 P.2d 311, 3 Cal.App.2d 624.

Ga.—Brown v. Service Coach Lines, 31 S.E.2d 236, 71 Ga.App. 437.

Ind.—American Carloading Corp. v. Gary Trust & Sav. Bank, 25 N.E.2d 777, 216 Ind. 649.

Iowa.—Slabaugh v. Eldon Miller, Inc., 55 N.W.2d 528, 244 Iowa 29.

Kan.—Lord v. Hercules Powder Co., 167 P.2d 299, 161 Kan. 268.

Mich.—Francis v. Scheper, 40 N.W.2d 214, 326 Mich. 441.

Ohio.—Glabaugh v. Bonding & Ins. Co. v. Dingle-Clark Co., 52 N.E.2d 340, 142 Ohio St. 346.

Pa.—Davies v. Klinman, 56 A.2d 316, 162 Pa.Super. 82—Bowser v. Kuhn, 49 A.2d 852, 160 Pa.Super. 31—Weismiller v. Farrell, 34 A.2d 45, 153 Pa.Super. 366—Walborn v. Epley, 24 A.2d 668, 148 Pa.Super. 417.

40. N.Y.—Meriden Gravure Co. v. Bedell, 251 N.Y.S. 369, 232 App.Div. 454.

44 C.J. p 1107 note 36.

41. Wash.—Meador v. Northwestern Gas & Electric Co., 103 P. 1107, 55 Wash. 47.

42. N.J.—Rossman v. Newbon, 170 A. 230, 112 N.J.Law 261.

43. Ill.—Chicago, etc., R. Co. v. Flinn, 84 Ill.App. 383.

44. Cal.—Bradford v. Brock, 34 P. 2d 1048, 140 Cal.App. 47.

45. Cal.—Davenport v. Stratton, 141 P.2d 713, reheard 149 P.2d 4, 24 Cal.2d 232—Jonas v. Los Angeles Ry. Corp., 136 P.2d 39, 57 Cal.App. 2d 824.

Ga.—Southwest Georgia Development Co. v. Griffin, 143 S.E. 784, 38 Ga. App. 276.

Ill.—Weinhouse v. Woodruff, 59 N.E. 2d 523, 324 Ill.App. 660.

Mass.—Papageorge v. Boston & M. R. R., 57 N.E.2d 576, 317 Mass. 235. Mich.—Ellas v. Hess, 41 N.W.2d 884, 327 Mich. 323.

Mo.—Gulnn Inv. Co. v. Farmers Elevator Co., App. 156 S.W.2d 62. N.H.—Cooley v. Public Service Co., 10 A.2d 673, 90 N.H. 460.

Or.—Irwin v. Ashurst, 74 P.2d 1127, 155 Or. 61.

Tenn.—Banks v. Southern Potteries, 204 S.W.2d 382, 30 Tenn.App. 199.

Wash.—Carroll v. Union Pac. R. Co., 146 P.2d 813, 20 Wash.2d 191.

46. Ohio.—Kihlken v. Barber, 196 N. E. 164, 129 Ohio St. 485.

Pa.—Strausburger v. Meckes, 59 A.2d 108, 359 Pa. 532.

47. Cal.—Murray v. Babb, 85 P.2d 146, 30 Cal.App.2d 801.

48. Conn.—McNamara v. Connecticut Railway & Lighting Co., 9 A.2d 720, 126 Conn. 127.

49. N.Y.—Good Neighbor Federation v. Pathe Industries, 114 N.Y.S.2d 365, 202 Misc. 951, affirmed 120 N. Y.S.2d 925, 281 App.Div. 968.

50. Ga.—Ryner v. Duke, 53 S.E.2d 362, 205 Ga. 280.

51. Mo.—Villmer v. Household Plastics Co., 250 S.W.2d 964.

52. Wyo.—Corpus Juris cited in Hein v. Marcante, 113 P.2d 940, 948, 57 Wyo. 81.

64 C.J. p 1108 note 45.

53. Ark.—Sledge & Norfleet Co. v. Mann, 266 S.W. 264, 166 Ark. 368. 64 C.J. p 1108 note 46.

54. W.Va.—West Virginia Pulp & Paper Co. v. Whitmore, 109 S.E. 722, 89 W.Va. 622.

dict for defendant for nominal damages on his counterclaim may be regarded as in effect a finding for plaintiff on the counterclaim.<sup>55</sup> Where there is admittedly a certain sum due plaintiff, a verdict "in favor of the defendant" will be construed as denying recovery only as to the excess over the amount admitted to be due;<sup>56</sup> and if a plea of set-off contains an admission of liability on the main cause of action a verdict, which is limited to a finding for defendant on his set-off, will be considered as, in legal effect, a finding for plaintiff on his cause of action and for defendant on his counterclaim.<sup>57</sup>

## § 522. Evidence Affecting Verdict

Affidavits and other testimony of jurors and third persons to sustain, impeach, or explain a verdict are discussed infra §§ 523, 524.

Examine Pocket Parts for later cases.

55. Mo.—Union House Furnishing Co. v. McGrath, App., 39 S.W.2d 445.
56. Penn.—Stagg v. Broadway Garage Co., 286 P. 415, 87 Mont. 254.
57. Ala.—May Hosiery Mills v. Munford Cotton Mills, 87 So. 674, 205 Ala. 27.
58. Ariz.—Corpus Juris cited in Wilson v. Wiggins, 94 P.2d 870, 872, 54 Ariz. 240.
- Cal.—Brand v. Norris, 263 P.2d 456, 121 Cal.App.2d 367—Fernandez v. Consolidated Fisheries, Inc., 255 P.2d 863, 117 Cal.App.2d 254—Blair v. Williams, 240 P.2d 1043, 109 Cal.App.2d 516—Murphy v. Lake County, 234 P.2d 712, 106 Cal.App.2d 61—Mish v. Brockus, 218 P.2d 849, 97 Cal.App.2d 770.
- Colo.—Morris v. Redak, 234 P.2d 908, 121 Colo. 27.
- Fla.—Astor Elec. Service v. Cabrera, 62 So.2d 759.
- Ga.—Saunders v. Sasser, 71 S.E.2d 709, 86 Ga.App. 499.
- Idaho.—Hall v. Johnson, 214 P.2d 467, 70 Idaho 190—Evans v. Davidson, 77 P.2d 661, 58 Idaho 600—Evans v. Davidson, 67 P.2d 83, 67 Idaho 548.
- Ill.—See Pospisil v. Hajicek, 190 Ill. App. 638.
- Mass.—Shears v. Metropolitan Transit Authority, 86 N.E.2d 437, 324 Mass. 358.
- Minn.—Cullen v. City of Minneapolis, 275 N.W. 414, 201 Minn. 102.
- Mo.—Chrum v. St. Louis Public Service Co., 242 S.W.2d 54—Jordan v. St. Joseph Ry., Light, Heat & Power Co., 73 S.W.2d 205, 335 Mo. 319.
- N.Y.—Capital Cab Corp. v. Anderson, 85 N.Y.S.2d 767, 194 Misc. 21.

- Ohio.—Ornstein v. Chesapeake & O. R. Co., 36 N.E.2d 521, appeal dismissed Chesapeake & O. R. Co. v. Ornstein, 13 N.E.2d 909, 133 Ohio St. 385.
- Pa.—Rice v. Bauer, Com.Pl., 32 North Co. 48—Rice v. Bauer, Com.Pl., 32 North Co. 47.
- S.C.—Caines v. Marion Coca Cola Bottling Co., 14 S.E.2d 10, 196 S.C. 502.
- Tenn.—Davidson v. Burger, 259 S.W.2d 541, 36 Tenn.App. 486—Meegal v. Memphis St. Ry. Co., 238 S.W.2d 519, 34 Tenn.App. 403, 20 A.L.R.2d 286—Fields v. Gordon, 233 S.W.2d 320, 33 Tenn.App. 465—Williamson v. Howell, 13 Tenn.App. 506.
- Tex.—Burchfield v. Tanner, 178 S.W.2d 681, 142 Tex. 404—Willrodt v. Union City Transfer, Civ.App., 258 S.W.2d 443, error refused no reversible error—J. M. English Truck Line, Inc. v. Fritsch, Civ.App., 255 S.W.2d 597, error refused no reversible error—Pantazis v. Dallas Ry. & Terminal Co., Civ.App., 162 S.W.2d 1018, error dismissed—Turner v. Big Lake Oil Co., Civ.App., 62 S.W.2d 491, affirmed 96 S.W.2d 221, 128 Tex. 155.
- Utah.—Gribble v. Cowley, 112 P.2d 147, 100 Utah 217.
- Wash.—Kelly v. Carroll, 219 P.2d 79, 36 Wash.2d 482, 19 A.L.R.2d 1174, certiorari denied Carroll v. Kelly, 71 S.Ct. 208, 340 U.S. 892, 95 L.Ed. 646.
- W.Va.—Miller v. Blue Ridge Transp. Co., 15 S.E.2d 400, 123 W.Va. 428.
- 64 C.J. p 1108 note 52.

Because of public policy, a juror is not permitted to impeach his own verdict or to testify to his own mis-

## § 523. — Affidavits and Testimony of Jurors to Sustain, Impeach, or Explain

Jurors will not be heard to impeach a verdict duly rendered by them and recorded, and their affidavits introduced for such purpose will be disregarded, although such affidavits are admissible to show that the verdict, by reason of mistake, does not embody the true finding of the jury.

Jurors will not be heard to impeach a verdict duly rendered by them and recorded, and their affidavits introduced for such purpose will be disregarded.<sup>58</sup> Thus, in the absence of a statute to the contrary,<sup>59</sup> jurors cannot impeach their verdict by affidavits or testimony that the verdict was the result of misapprehension<sup>60</sup> or mistake of fact,<sup>61</sup> or was arrived at by lot, or by averaging estimates;<sup>62</sup> or to disclose the incompetency or misconduct of their fellow jurors;<sup>63</sup> or to show what improper methods they employed to arrive at the verdict;<sup>64</sup> or what items were allowed or disallowed in computing the amount of the verdict;<sup>65</sup> or that they did not understand the effect of their verdict;<sup>66</sup> or that,

conduct.—U. S. v. 120,000 Acres of Land, D.C.Tex., 52 F.Supp. 212.

### 59. Determination by chance

- Under some statutes jurors are made competent to show that their verdict was determined by chance.
- Cal.—Fernandez v. Consolidated Fisheries, Inc., 255 P.2d 863, 117 Cal.App.2d 254—Blair v. Williams, 240 P.2d 1043, 109 Cal.App.2d 516—Mish v. Brockus, 218 P.2d 849, 97 Cal.App.2d 770.
- Idaho.—Hall v. Johnson, 214 P.2d 467, 70 Idaho 190.
- 64 C.J. p 1108 note 52 [d].
60. Minn.—Holland v. Sheehan, 119 N.W. 217, 106 Minn 545.
- 64 C.J. p 1109 note 53.
61. Tex.—Crosby v. Stevens, Civ. App., 184 S.W. 705.
62. Mo.—Chrum v. St. Louis Public Service Co., 242 S.W.2d 54.
- Wis.—Jackowska-Peterson v. D. Reik & Sons Co., 2 N.W.2d 873, 240 Wis. 197.
- 64 C.J. p 1109 note 55.
63. Ga.—Bryan v. Moncrief Furnace Co., 142 S.E. 700, 38 Ga.App. 107, reversed on other grounds 149 S.E. 183, 168 Ga. 825, conformed to 149 S.E. 424, 40 Ga.App. 239.
- Cal.—Higgins v. Los Angeles Gas & Electric Co., 115 P. 313, 159 Cal. 651, 34 L.R.A.N.S., 717.
- 64 C.J. p 1109 note 57.
65. Fla.—Astor Elec. Service v. Cabrera, 62 So.2d 759.
- Wash.—Russell v. City of Grandview, 236 P.2d 1061, 39 Wash.2d 551.
- 64 C.J. p 1109 note 58.
66. Ark.—Reiff v. Interstate Business Men's Accident Ass'n of Des

had the juror known of certain evidence, he would not have rendered the same verdict,<sup>67</sup> or that improper matters were considered by the jury.<sup>68</sup>

On the other hand, affidavits of jurors are admissible to show that the verdict, as received and entered of record, by reason of a mistake does not embody the true finding of the jury,<sup>69</sup> or to correct an erroneous statement of the verdict to the court or entry by its clerk,<sup>70</sup> or to remove an ambiguity,<sup>71</sup> or, where a sealed verdict is returned without specifying the amount of the recovery, to show what they intended to be understood as their verdict.<sup>72</sup> Where in fact no agreement was reached by the jurors, resulting in the absence of any verdict whatsoever, affidavits by the jurors are competent for the purpose of showing want of assent to the verdict.<sup>73</sup> Jurors are competent witnesses for the proof of extraneous facts which may have influenced their conduct,<sup>74</sup> as, for example, coercion on the part of the bailiff,<sup>75</sup> or matters which took place outside the court;<sup>76</sup> but what took place while the jury were kept in the custody of the officer of the court for the purpose of deliberation is not matter outside of court.<sup>77</sup>

While it has been held that affidavits or unsworn statements may not be used to sustain the jury's verdict,<sup>78</sup> it has also been held that affidavits or evidence of jurors is admissible when made in support of<sup>79</sup> or to explain a verdict, as, for instance, by showing whether interest was computed

on plaintiff's claim.<sup>80</sup> Informal explanations by the jury can be used to confirm the correctness of the understanding of the court with respect to the verdict.<sup>81</sup>

*Verdict defective on its face.* A verdict evincing on its face a misunderstanding on the part of the jury is self-impeached,<sup>82</sup> and it is permissible to let in the testimony of the jurors themselves in confirmation of their misunderstanding.<sup>83</sup>

*Less than unanimous jury required.* Where, under statutory or constitutional provision, a verdict may be returned by less than a unanimous vote of the jury, the verdict cannot be impeached by any one of the twelve jurors on the jury.<sup>84</sup>

## § 524. — Affidavits and Testimony of Third Persons

The affidavits and testimony of third persons are not sufficient to overcome the verdict.

Affidavits of officers in charge of the jury which show the violation on their part of their sworn duties,<sup>85</sup> or affidavits of third persons on information and belief that a verdict was arrived at by chance, the verdict having been affirmed by each juror on poll,<sup>86</sup> or affidavits or testimony of others setting forth the hearsay statements of jurors,<sup>87</sup> are not sufficient to overcome the verdict. Parol evidence is admissible to show a mistake in the verdict of a jury.<sup>88</sup>

Molnes, Iowa, 192 S.W. 216, 127 Ark 254.

67. *Tex.—Texas Employers' Ins. Ass'n v. Eubanks*, Civ.App., 294 S.W. 905.

68. *Ark.—Burns v. Vaughn*, 224 S.W.2d 365, 216 Ark. 128, 12 A.L.R. 2d 433.

64 C.J. p 1109 note 61.

69. *D.C.—Freid v. McGrath*, 135 F.2d 833, 77 U.S.App.D.C. 385.

Vt.—*Kennedy v. Stocker*, 70 A.2d 587, 116 Vt. 98.

64 C.J. p 1109 note 62.

*Mistake in location of decimal point* Vt.—*Kennedy v. Stocker*, 70 A.2d 587, 116 Vt. 98.

70. *Iowa.—Carlson v. Adix*, 123 N.W. 321, 144 Iowa 653, Ann.Cas.1912A 1204.

64 C.J. p 1109 note 63.

71. *Mo.—Brickell v. Fleming*, 281 S.W. 951.

64 C.J. p 1109 note 64.

72. *N.Y.—Hodgkins v. Mead*, 5 N.Y.S. 433, 16 N.Y.Civ.Proc. 434, affirmed 23 N.E. 559, 119 N.Y. 166, 18 N.Y.Civ.Proc. 218.

73. *Mich.—Routhier v. City of Detroit*, 61 N.W.2d 593, 338 Mich. 449.

*Only when jurors have agreed to the verdict* are they estopped from impeaching the verdict, and hence affidavits that they never assented to the verdict are admissible.—*Routhier v. City of Detroit*, supra.

74. *U.S.—U. S. v. 120,000 Acres of Land*, D.C.Tex., 52 F.Supp. 212. *Ala.—Alabama Fuel & Iron Co. v. Rice*, 65 So. 402, 187 Ala. 458.

75. *Ala.—Alabama Fuel & Iron Co. v. Rice*, supra.

76. *Minn.—In re Hurlbut's Estate*, 148 N.W. 51, 126 Minn. 180.

77. *Minn.—In re Hurlbut's Estate*, supra.

78. *N.Y.—Capitol Cab Corp. v. Anderson*, 85 N.Y.S.2d 767, 194 Misc. 21.

79. *Mo.—Chrum v. St. Louis Public Service Co.*, 242 S.W.2d 64—*Jordan v. St. Joseph Ry., Light, Heat & Power Co.*, 73 S.W.2d 205, 335 Mo. 319.

64 C.J. p 1110 note 70.

*Evidence held to sustain verdict* Tex.—*Munoz v. Bollack Store*, Civ. App., 238 S.W.2d 275, error dismissed.

### Little weight given to declarations

Where acts of misconduct by jury are proved, declarations of jurors that they were not affected by the wrongful conduct ordinarily have little weight.—*Saladiner v. Polanco*, Tex.Civ.App., 160 S.W.2d 531, error refused.

90. *Iowa.—Swalls v. Cissna*, 17 N.W. 39, 61 Iowa 693.

81. *Cal.—Brand v. Norris*, 263 P.2d 456, 121 Cal.App.2d 367.

82. *Ohio.—Cady-Iverson Shoe Co. v. Chicowicz*, 24 Ohio Cir.Ct., N.S., 53.

83. *Ohio.—Cady-Iverson Shoe Co. v. Chicowicz*, supra.

84. *Miss.—Ulmer v. Pistole*, 76 So. 522, 115 Miss. 485.

85. *N.Y.—Green v. Bliss*, 12 How. Pr. 428.

86. *Ill.—Pekin v. Winkel*, 77 Ill. 56.

87. *Ill.—Klofski v. Railroad Supply Co.*, 85 N.E. 274, 235 Ill. 146—*See Fospisil v. Hajlcek*, 190 Ill.App. 638.

N.H.—*Blodgett v. Park*, 84 A. 42, 76 N.H. 435, Ann.Cas.1913B 853.

88. *S.C.—Cohen v. Dubose*, 5 S.C.Eg. 102, 14 Am.D. 709.

## § 525. Objections and Exceptions

An error or defect in the form of a verdict is waived by the failure to make timely objections, and an objection to a verdict must specify the particulars in which the defect lies.

An error or defect in the form of a verdict is waived by the failure to make timely objections.<sup>89</sup> Objection to irregularity or informality in a verdict must be taken at its rendition or time of return,<sup>90</sup> at the term at which the verdict is returned,<sup>91</sup> and before the jury are discharged,<sup>92</sup> otherwise the objection will be deemed to have been waived. For

example, a failure to object at the time of rendition of a verdict to the want of signature,<sup>93</sup> or an improper signature,<sup>94</sup> or the addition of interest to the amount of the verdict,<sup>95</sup> or the giving of a lump sum verdict,<sup>96</sup> or error in the amount of a verdict with respect to interest,<sup>97</sup> or return of a general verdict when a special verdict is requested,<sup>98</sup> or a single verdict on two causes of action,<sup>99</sup> or rendition of separate verdicts as to defendants,<sup>1</sup> or a general verdict on separate causes of action,<sup>2</sup> or the irregularity in recording a verdict before it is announced,<sup>3</sup> is deemed a waiver of the ir-

89. U.S.—Union Elec. Light & Power Co. v. Snyder Estate Co., D.C. Mo., 15 F.Supp. 379.

Cal.—Stanford v. Richmond Chase Co., 272 P.2d 764—Brokaw v. Black-Foxe Military Institute, 231 P.2d 816, 37 Cal.2d 274—Brand v. Norris, 263 P.2d 456, 121 Cal.App.2d 367.

Fla.—Higbee v. Dorigo, 66 So.2d 684. Idaho.—Pilkington v. Belson, 168 P.2d 815, 66 Idaho 724.

Okl.—State Finance Service v. Mul-lins, 147 P.2d 159, 193 Okl. 689—Ford v. Hall, 50 P.2d 291, 174 Okl. 100.

## Action of court

If counsel was afforded opportunity to be present when verdict was returned, and to examine verdict before jury were discharged, but failed to challenge a regularity or clarity of phraseology of verdict, court will go no further than to construe the verdict, that is, to determine its meaning.—Fischer v. Howard, Or., 271 P.2d 1059.

90. Cal.—Brown v. Regan, 75 P.2d 1063, 10 Cal.2d 519.

Fla.—Atlantic Coast Line R. Co. v. Price, 46 So.2d 481.

Idaho.—Corpus Juris cited in Baldwin v. Ewing, 204 P.2d 430, 432, 69 Idaho 176.

Mass.—Peaver v. Railway Exp. Agency, 85 N.E.2d 322, 324 Mass. 165—Low Supply Co. v. Pappacostopoulos, 187 N.E. 51, 283 Mass. 633.

Mo.—Jordan v. St. Joseph Ry., Light, Heat & Power Co., 73 S.W.2d 205, 335 Mo. 319—Cable v. Metropolitan Life Ins. Co., 128 S.W.2d 1123, 233 Mo.App. 1093.

Neb.—In re Kajewski's Estate, 279 N.W. 185, 134 Neb. 485.

Okl.—Bunch v. Perkins, 180 P.2d 664, 198 Okl. 517—Mainard v. Fowler, 42 P.2d 878, 171 Okl. 582.

Pa.—Landis v. Conestoga Transp. Co., Com.Pl., 48 Lanc.Rev. 481, 11 Som. Leg.J. 302, affirmed 36 A.2d 465, 349 Pa. 97—Kuhn v. Conestoga Transp. Co., Com.Pl., 48 Lanc.Rev. 491, affirmed Landis v. Conestoga Transp. Co., 36 A.2d 465, 349 Pa. 97.

S.C.—Limehouse v. Southern Ry. Co., 58 S.E.2d 685, 216 S.C. 424.

Wis.—Swanson v. Maryland Cas. Co., 63 N.W.2d 743, 266 Wis. 357.

Wyo.—Corpus Juris cited in Hein v. Marcante, 113 P.2d 940, 949, 57 Wyo. 81.

64 C.J. p 1110 note 79.

## Codefendants

(1) Where verdict was returned in favor of plaintiff against only one driver and employer for death of plaintiff's decedent without mentioning other driver or employer, and all parties assumed that verdict was in favor of driver and employer not mentioned, and plaintiff's attorney did not object to form of verdict or ask that jury reconsider or clarify verdict, but moved to set aside verdict as contrary to the law and the evidence, plaintiff accepted verdict as rendered and could not thereafter question it with respect to form.—Hart v. National Casket Co., 293 N.Y. S. 155, 161 Misc. 728.

(2) A failure to object to the form of verdict does not constitute a waiver of a substantial claim of insufficiency of the evidence to support the verdict against one of several defendants.—Stanford v. Richmond Chase Co., Cal., 272 P.2d 764.

(3) Where jury returned verdict against only one of two defendants who answered separately and were silent as to the other, plaintiffs, by not requesting trial court to instruct jury to retire and make their finding with respect to other defendant, merely waived the objection in so far as it might have been effectual as an attack on the verdict returned, and plaintiffs were not estopped to object to jury's failure to find against one of defendants.—Ireland-Yuba Gold Quartz Mining Co. v. Pacific Gas & Elec. Co., 116 P.2d 611, 18 Cal.2d 557.

(4) Defendant by not objecting to reception of verdict because of its failure to fix status of codefendants, either by motion to amend or mold verdict, waives his rights.—East Broad Top Transit Company v. Flood, 192 A. 401, 326 Pa. 353—Murphy v. Wolverine Express, 38 A.2d 511, 155 Pa.Super. 125.

91. Mass.—Pease v. Whitney, 4 Mass. 507.

92. Ark.—Reynolds v. Nutt, 230 S.W.2d 949, 217 Ark. 543.

Cal.—Kirby v. Adcock, 253 P.2d 700, 116 Cal.App.2d 570—Lenning v. Chilo, 147 P.2d 410, 63 Cal.App.2d 511—Murray v. Babb, 86 P.2d 146, 30 Cal.App.2d 301—Mitchell v. Stringer, 23 P.2d 765, 133 Cal.App. 207.

Kan.—Corpus Juris cited in Banbery v. Lewis, 244 P.2d 202, 210, 173 Kan. 59.

Okl.—Bunch v. Perkins, 180 P.2d 664, 198 Okl. 517—Schuman v. Chatman, 86 P.2d 615, 184 Okl. 224.

Or.—Fischer v. Howard, 271 P.2d 1059.

S.C.—Corpus Juris cited in Hollis v. Armour & Co., 2 S.E.2d 681, 685, 190 S.C. 170.

Va.—Northern Va. Power Co. v. Bailey, 73 S.E.2d 425, 194 Va. 464. 64 C.J. p 1110 note 81.

93. Ark.—Rucker v. Cox, 138 S.W.2d 778, 200 Ark. 247. 64 C.J. p 1110 note 82.

94. Ky.—Old 76 Distillery Co. v. Morris, 28 S.W.2d 474, 234 Ky. 389. 64 C.J. p 1110 note 83.

95. N.Y.—Rheinfeldt v. Dahman, 43 N.Y.S. 281, 19 Misc. 162.

Pa.—Yatesko v. Sovereign Camp, W.O.W., 35 Luz.Leg.Reg. 19.

96. Okl.—Schuman v. Chatman, 86 P.2d 615, 184 Okl. 224—J. S. Hoffman, Inc. v. Palmer, 47 P.2d 88, 173 Okl. 249.

97. Neb.—Nichols, etc., Co. v. Steinkraus, 119 N.W. 23, 83 Neb. 1.

98. Ga.—Livingston v. Taylor, 63 S.E. 694, 132 Ga. 1.

99. N.Y.—Helman v. Markoff, 8 N.Y.S.2d 448, 255 App.Div. 991, affirmed 20 N.E.2d 1012, 280 N.Y. 641.

1. Neb.—Olmosted v. Noll, 117 N.W. 102, 82 Neb. 147.

2. Conn.—Sheeler v. City of Waterbury, 82 A.2d 359, 138 Conn. 111. Okl.—Shamblin v. Shamblin, 241 P.2d 941, 208 Okl. 133—Stakis v. Dimitroff, 6 P.2d 1053, 154 Okl. 9.

3. Cal.—Blum v. Pate, 20 Cal. 69.

regularity. A failure to object to a verdict which does not dispose of all issues as to all the parties is a waiver of the defect.<sup>4</sup> Where defendant consents to an additur by the court to the verdict, he cannot thereafter object thereto.<sup>5</sup> Under some circumstances a failure to object to the absence of the jury when a sealed verdict is opened is a waiver of the right to poll the jury.<sup>6</sup>

The objection of irregularity should be taken by motion to set aside on that ground,<sup>7</sup> or by other procedure provided by statute,<sup>8</sup> and comes too late on a motion for a new trial,<sup>9</sup> or on appeal.<sup>10</sup> A party who is not injured thereby may not complain of the uncertainty of the verdict or of defects therein;<sup>11</sup> but there is authority holding that plaintiff can complain of a verdict granting an insufficient recovery, unwarranted by any theory of the case.<sup>12</sup> Where, under the charge, no recovery was authorized against each of several defendants, save for their own negligence, one defendant may not complain of a finding in favor of a codefendant.<sup>13</sup> Under a statute requiring separate verdicts in the event of joinder of husband and wife in suit, where a lump sum verdict is rendered, such defect is not waived by a failure to object thereto.<sup>14</sup>

*Form of verdict given by judge.* Objections to the form of verdict furnished the jury by the judge must be interposed at the time.<sup>15</sup>

*Apportionment of damages.* Where plaintiff acquiesces in a verdict which improperly apportions

the amount for which each joint tort-feasor is liable instead of finding one amount against both defendants, he may not complain that satisfaction of a judgment entered thereon against one defendant satisfies the judgment against the other.<sup>16</sup>

*Improper joint verdict.* A failure to object to an improper joint verdict for damages against defendants severally liable does not waive the error,<sup>17</sup> but it has been held that, in an action to recover land, where persons whose possessions are separate are joined as defendants, a failure to object to a joint verdict waives the error.<sup>18</sup>

*Objections to separation of jury.* A failure to object to an improper assembly of the jury to make an amendment in the verdict waives the error.<sup>19</sup> Objections that the jury have separated after submission of the cause to them and before reaching a verdict must be made at the first opportunity.<sup>20</sup>

*Invalid verdict.* Failure to object to an invalid verdict will not preclude a party from subsequently attacking it.<sup>21</sup> A failure to poll the jury is not a waiver of the defect in a verdict showing on its face that the required number of jurors did not assent thereto.<sup>22</sup>

*Failure to object to evidence of jurors.* The proposition that the evidence of a juror will not be received to impeach his verdict is founded on the assumption that the opposing party objected to

4. Cal.—Portman v. Keegan, 87 P.2d 400, 31 Cal.App.2d 30—Broome v. Kern Valley Packing Co., 44 P.2d 430, 6 Cal.App.2d 256.  
64 C.J. p 1111 note 90.

#### Issues included in verdict

(1) If all issues are not determined by a verdict, but no objection is made thereto, the verdict stands as to issues included therein, but as to remaining issues the matter is set at large and further proceedings should be had in trial court to adjudicate such issues.—Ireland-Yuba Gold Quartz Mining Co. v. Pacific Gas & Elec. Co., 116 P.2d 611, 18 Cal.2d 557.

(2) Where verdict indicated that only issues adjudicated were those raised by cross complaint and answer thereto, plaintiffs who waived error committed with respect to its form did not waive right to have issues raised on complaint subsequently submitted for an adjudication.—Portman v. Keegan, 87 P.2d 400, 31 Cal.App.2d 30.

5. Del.—Rudnick v. Jacobs, 197 A. 381, 9 W.W.Harr. 169.

6. Ill.—Wilcox v. International Har-

vester Co. of America, 116 N.E. 151, 278 Ill. 465.  
64 C.J. p 1111 note 91.

7. N.Y.—Schappner v. Second Ave. R. Co., 55 Barb. 497.

#### 8. Correction by jury

Failure of counsel to employ procedure under statute providing that if verdict is informal or insufficient, it may be corrected by jury under advice of the court, or jury may be again sent out, constitutes a waiver on part of counsel of all objections, which could have been made because of irregularity, informality, or ambiguity in verdict.—Fischer v. Howard, Or., 271 P.2d 1059.

9. Or.—Fischer v. Howard, supra.  
64 C.J. p 1111 note 93.

10. Cal.—Johnson v. Visher, 31 P. 106, 96 Cal. 310.

Okl.—Kuhl v. Supreme Lodge S. K. & L., 89 P. 1126, 18 Okl. 383.

11. Mich.—Moffet v. Sebastian, 112 N.W. 1120, 149 Mich. 451.  
64 C.J. p 1111 note 95.

12. Colo.—Burns-Moore Min., etc., Co. v. Watson, 101 P. 325, 45 Colo. 91.

13. Tex.—Southern Kansas R. Co. v. Yarbrough, 109 S.W. 390, 49 Tex. Civ.App. 407.

14. Pa.—Nunemaker v. New Alexandria Bus Co., 88 A.2d 697, 371 Pa. 28.

15. Okl.—Brown v. Tull, 164 P. 785, 65 Okl. 119.  
64 C.J. p 1111 note 98.

16. N.Y.—Foy v. Barry, 144 N.Y.S. 971, 159 App.Div. 749.

17. Tex.—Panhandle & S. F. Ry. Co. v. Clarendon Grain Co., Civ.App., 215 S.W. 866.

18. Cal.—Hicks v. Coleman, 25 Cal. 122, 85 Am.D. 103.

19. N.M.—Murry v. Belmore, 154 P. 705, 21 N.M. 313.  
64 C.J. p 1111 note 4.

20. S.C.—Clyde v. Southern Public Utilities Co., 96 S.E. 116, 109 S.C. 290.

64 C.J. p 1111 note 5.

21. Pa.—Helfstein v. Milikovsky, 39 Pa.Dist. & Co. 258.  
64 C.J. p 1111 note 6.

22. Wis.—Christensen v. Petersen, 222 N.W. 231, 223 N.W. 839, 198 Wis. 222.

its introduction.<sup>23</sup> If the evidence of a juror is permitted by the opposite party to be introduced without objection, he waives all right to complain,<sup>24</sup> although there is also authority to the contrary.<sup>25</sup>

**Correction or reformation of verdict.** A party claiming that a verdict should be clarified and reformed should make the request before the jury are discharged,<sup>26</sup> and if no objection is interposed as to the form of the verdict until after the jury have been discharged, the court may refuse to construe or correct it.<sup>27</sup>

**Sufficiency and scope of objection.** An objection to a verdict must specify the particulars in which the defect lies.<sup>28</sup> Thus, an objection that the verdict exceeds the ad damnum is not raised by an objection that the verdict is excessive.<sup>29</sup> An exception that the verdict is contrary to law,<sup>30</sup> to instructions,<sup>31</sup> or to the evidence<sup>32</sup> is too vague and general, and will not be considered; but an objection that the verdict is not sustained by the evidence is sufficient if it designates some particular material fact and avers that such fact is not sustained by the evidence.<sup>33</sup>

## C. SPECIAL VERDICTS, FINDINGS, AND INTERROGATORIES

### § 526. Power and Duty of Jury

The power and duty of the jury with respect to special verdicts and special interrogatories or findings are discussed infra §§ 527-528.

Examine Pocket Parts for later cases.

### § 527. — As to Special Verdict

At common law, and under statutes which are merely declaratory thereof, the jury in a civil action may in their discretion, return a special verdict; but in some jurisdictions this discretionary power of the jury is limited by statute to actions for the recovery of money or specific property.

At common law, and under statutes which are merely declaratory thereof,<sup>34</sup> the jury in a civil

action may, in their discretion, return a general verdict, or they may return a special verdict;<sup>35</sup> and in the exercise of this discretion they may decline to find other than a general verdict.<sup>36</sup> In some jurisdictions this discretionary power of the jury is limited by statute to actions for the recovery of money or specific property;<sup>37</sup> but, subject to such limitation as to the nature of the action, it is within the discretion of the jury to return a special verdict.<sup>38</sup> Although a special finding may accompany a general verdict, as discussed infra § 528, in the absence of statutory provision the making of a special verdict is not dependent on the jury's first returning a general verdict;<sup>39</sup> on the other hand,

23. Mo.—Milburn v. Robison, 110 S. W. 598, 132 Mo.App. 198.

24. Mo.—Thorn v. Cross, App. 201 S.W.2d 492—Milburn v. Robison, 110 S.W. 598, 132 Mo.App. 198.

25. Utah—Ogden, L. & I. Ry. Co. v. Jones, 168 P. 548, 51 Utah 62.

26. S.C.—Rhame v. City of Sumter, 101 S.E. 832, 113 S.C. 151.

27. S.C.—Rhame v. City of Sumter, supra.

28. N.D.—F. Mayer Boot & Shoe Co. v. Ferguson, 126 N.W. 110, 19 N.D. 496.

64 C.J. p 1112 note 13.

29. Ill.—Prairie State Loan, etc., Assoc. v. Gorrie, 47 N.E. 739, 167 Ill. 414.

64 C.J. p 1112 note 14.

30. Ky.—Jones v. Wocher, 13 S.W. 911, 90 Ky. 230, 12 Ky.L. 105.

64 C.J. p 1112 note 15.

31. Ark.—Britt v. Aylett, 11 Ark. 475, 52 Am.D. 282.

Ga.—Chambers v. Walker, 6 S.E. 165, 80 Ga. 642.

32. Tenn.—Cherokee Packet Co. v. Hilson, 31 S.W. 737, 95 Tenn. 1.

64 C.J. p 1112 note 17.

33. Idaho.—Bernier v. Anderson, 70 P. 1027, 8 Idaho 675.

34. Tenn.—Life & Casualty Ins. Co. v. Robertson, 6 Tenn. App. 43.

Vt.—Corpus Juris cited in Wilson v. Dyer, 75 A.2d 677, 681, 116 Vt. 342.

64 C.J. p 1112 note 21.

35. Ala.—Little v. Sugg, 8 So.2d 866, 243 Ala. 196.

Iowa.—Shadboit, etc., Iron Co. v. Camp, 45 N.W. 1062, 80 Iowa 539.

Minn.—Roske v. Ilykanyics, 45 N.W. 2d 769, 232 Minn. 383.

Tenn.—Long v. Tomlin, 125 S.W.2d 171, 22 Tenn. App. 607—Life & Casualty Ins. Co. v. Robertson, 6 Tenn. App. 43.

Vt.—Corpus Juris cited in Wilson v. Dyer, 75 A.2d 677, 681, 116 Vt. 342.

64 C.J. p 1112 note 23.

Propriety and necessity of general verdicts generally see supra § 491.

**Special verdict required**

(1) Where the judgment and execution are, under the statute, required to be in a special mode because of the particular circumstances of the case, the facts must be found specially for the protection of the garnishee.—Hills v. Smith, 19 N. H. 381—28 C.J. p 318 note 46.

(2) On an appeal to a county court from the decision and findings of the commissioner of industries in workmen's compensation case, the answers of the jury to questions submitted to it by the court must be taken by special verdict.—Pitts v. Howe Scale Co., 1 A.2d 695, 110 Vt. 27.

36. Tenn.—Louisville & N. R. Co. v. Frakes, 11 Tenn. App. 593—Life & Casualty Ins. Co. v. Robertson, 6 Tenn. App. 43.

64 C.J. p 1112 note 24.

37. Cal.—Murray v. Babb, 86 P.2d 146, 30 Cal. App. 301.

N.Y.—Sherman v. Leicht, 264 N.Y.S. 492, 238 App. Div. 271.

S.C.—Eaves v. Progressive Fire Ins. Co., 60 S.E.2d 687, 217 S.C. 365.

Tenn.—Life & Casualty Ins. Co. v. Robertson, 6 Tenn. App. 43.

38. Cal.—Murray v. Babb, 86 P.2d 146, 30 Cal. App. 301.

Minn.—Roske v. Ilykanyics, 45 N.W. 2d 769, 232 Minn. 383.

N.Y.—Sherman v. Leicht, 264 N.Y.S. 492, 238 App. Div. 271.

S.C.—Eaves v. Progressive Fire Ins. Co., 60 S.E.2d 687, 217 S.C. 365.

64 C.J. p 1112 note 26.

39. Iowa.—Bobbitt v. Van Eaton, 226 N.W. 79, 208 Iowa 404.

as a general rule the jury should not render both a general verdict and a special verdict at the same time and in the same action,<sup>40</sup> and if both are returned by the jury the general verdict must be disregarded.<sup>41</sup>

A general verdict is improper in a case submitted for a special verdict<sup>42</sup> or where a special verdict covers all of the issues of the cause;<sup>43</sup> but where a special finding is on a part only of the material facts a general verdict must be returned.<sup>44</sup> The rendition of a general verdict, however, in addition to a special verdict is not error where they are not inconsistent<sup>45</sup> or where the general verdict is merely a correct conclusion of law from the special findings.<sup>46</sup> Where a jury return a special verdict which covers all of the issues in the case, the failure of the court to submit the case to the jury for a general verdict is not improper.<sup>47</sup> Where the jury are not required to render a special verdict, their unauthorized action in so doing can give no efficacy to the gratuitous findings contained in the verdict.<sup>48</sup>

In some jurisdictions only general verdicts are authorized<sup>49</sup> and special verdicts have been abolished by statute<sup>50</sup> or are not authorized by reason of the repeal of the statute by which they were formerly authorized.<sup>51</sup>

### § 528. — As to Special Interrogatories or Findings Accompanying General Verdict

In some jurisdictions the jury may be required to re-

turn in connection with a general verdict special findings or answers to special interrogatories on material questions of fact, on which verdict and findings the court may render judgment, and such findings must be so required on the request of either party to the action.

Under the practice or constitutional or statutory provisions in some jurisdictions a jury cannot be required to return special findings in connection with a general verdict;<sup>52</sup> but, although special findings are not essential to a general verdict,<sup>53</sup> it is generally the practice, which in many states has been incorporated into statutes, under which, at the request of parties, the jury may express an opinion distinct from their verdict,<sup>54</sup> and may be required to return, in connection with a general verdict, special findings or answers to special interrogatories on material questions of fact,<sup>55</sup> on which verdict and findings the court may render judgment,<sup>56</sup> and such findings must be so required on the request of either party to the action.<sup>57</sup> However, such special interrogatories may be submitted or special findings required only in connection with a general verdict,<sup>58</sup> and the court cannot, in the absence of a general verdict, render judgment on findings in answer to interrogatories<sup>59</sup> unless the conduct of the parties has been such as to justify the presumption that they have waived a general verdict.<sup>60</sup> Where special interrogatories have been submitted and not withdrawn, the jury should be required to answer them with the taking of their verdict and before its acceptance.<sup>61</sup> Special findings accompanying a verdict rendered on direction of the court are immaterial.<sup>62</sup> It has been

40. Ohio.—Kautz v. McFerlin, App., 43 N.E.2d 629.

Tex.—Texas & N. O. R. Co. v. Crow, 123 S.W.2d 649, 132 Tex. 465.  
64 C.J. p 1112 note 29.

41. Ind.—Louisville, etc., R. Co. v. Balch, 4 N.E. 288, 105 Ind. 93.

42. Tex.—Gillmer v. Graham, Com. App., 52 S.W.2d 263—O'Farrell v. O'Farrell, 119 S.W. 899, 56 Tex. Civ.App. 81.

43. Ind.—Bower v. Bower, 45 N.E. 595, 146 Ind. 393.

44. Ind.—Bower v. Bower, supra.

45. Wis.—Ault v. Wheeler, etc., Mfg. Co., 11 N.W. 545, 54 Wis. 300.

46. Wis.—Hoppe v. Chicago, etc., R. Co., 21 N.W. 227, 61 Wis. 357.

47. Minn.—Roske v. Ilykanyics, 45 N.W.2d 769, 232 Minn. 383.

48. N.Y.—McLoughlin v. Arlon Motors, 43 N.Y.S.2d 227, 180 Misc. 419.

49. Miss.—Flournoy v. Brown, 26 So. 2d 351, 200 Miss. 171.

50. Ind.—Earl Park State Bank v.

Lowmon, 161 N.E. 675, 92 Ind.App. 26.

64 C.J. p 1113 note 36.

51. Ky.—Bishop v. Newman's Ex'r, 182 S.W. 165, 168 Ky. 238.

52. Pa.—Culver v. Lehigh Valley Transit Co., 186 A. 70, 322 Pa. 503.  
64 C.J. p 1113 note 33.

53. N.Y.—Murray v. New York L. Ins. Co., 96 N.Y. 614, 48 Am.R. 658.

64 C.J. p 1113 note 39.

54. U.S.—Hartshorn v. Wright, N. J., 11 F.Cas.No.6,169, Pet.C.C. 64.

55. N.D.—Oakland v. Nelson, 149 N. W. 337, 28 N.D. 466.  
64 C.J. p 1113 note 42.

56. Idaho.—Menasha Woodware Co. v. Spokane International Ry. Co., 115 P. 22, 19 Idaho 586.

57. Ky.—Modern Woodmen of America v. Neeley, 111 S.W. 282, 33 Ky. L. 758.  
64 C.J. p 1113 note 44.

58. Nev.—Harris v. Harris, 153 P.2d 904, 62 Nev. 473.

64 C.J. p 1113 note 45.

59. Nev.—Harris v. Harris, supra.  
64 C.J. p 1113 note 46.

#### Judgment roll

It being beyond province of jury to make findings of fact where they return a special verdict and not a general verdict, such findings had no place in the case and trial court could not adopt such findings in its decree, which is part of judgment roll and therefore such findings formed no part of judgment roll.—Harris v. Harris, supra.

Where court in effect denies jury right to return general verdict, it is error to direct that special findings only are to be returned as to the issues.—Shadbolt, etc., Iron Co. v. Camp, 45 N.W. 1062, 80 Iowa 539.

60. Ind.—Crassen v. Swoveland, 22 Ind. 427.

61. Conn.—Longstean v. Owen McCaffrey's Sons, 111 A. 788, 95 Conn. 486.

64 C.J. p 1113 note 48.

62. Kan.—Missouri, etc., R. Co. v. L. A. Watkins Merchandise Co., 92 P. 1102, 76 Kan. 813.



held that, in connection with a general verdict, the jury may not find on special factual issues except at the direction of the court in answer to questions framed by the court and submitted to the jury in writing.<sup>63</sup>

## § 529. Power and Duty of Court

- a. As to special verdict
- b. As to special findings or interrogatories

### a. As to Special Verdict

- (1) In general
- (2) Propriety and manner of submission

#### (1) In General

Under the common-law rule and statutes authorizing a jury in their discretion to find either a general or special verdict, the trial court has no power to direct or control the jury as to whether or not they will return either a general or a special verdict; but in many jur-

isdictions the trial court is vested with discretionary power to submit the case on all or any of the issues and direct the jury to return special verdicts on such issues.

Under the common-law rule and statutes authorizing a jury in their discretion to find either a general or special verdict, the trial court has no power to direct or control the jury as to whether or not they will return either a general or a special verdict;<sup>64</sup> but in many jurisdictions, either by statutes, which have been held valid,<sup>65</sup> or by practice or rules of court, where the evidence authorizes the submission of the case to the jury, the trial court is vested with discretionary power to submit the case on all or any of the issues and direct the jury to return special verdicts on such issues,<sup>66</sup> and it may make such submission either of its own motion, without the request of either party<sup>67</sup> or it may do so at the request of either party,<sup>68</sup> and on such request should submit each separate issue of fact to the jury.<sup>69</sup> Under some statutes, in the absence

63. Wash.—Rowe v. Safeway Stores, 128 P.2d 293, 14 Wash.2d 363.

64. Ala.—Little v. Sugg, 8 So.2d 866, 243 Ala. 196—All States Life Ins. Co. v. Jaudon, 162 So. 668, 230 Ala. 593.

N.Y.—Sherman v. Leicht, 264 N.Y.S. 492, 238 App.Div. 271.

64 C.J. p 1113 note 52.

**Preparation by trial court of verdicts responsive to several issues,** which jury were instructed they could use if they saw fit to do so, did not indicate to jury which form of verdict they should use or that they should return a special verdict rather than a general verdict.—Spry v. Pruitt, 54 So.2d 701, 256 Ala. 341.

#### **Recommendation of verdict by court**

Under the practice in some jurisdictions the trial court may recommend a special verdict, but the jury are not bound to follow such recommendations.—Lincoln Tower Corp. v. Dunhall's-Florida, Inc., Fla., 61 So. 2d 474.

#### **Direction held not requirement to find special verdict**

Directing jury to state in their verdict on which of several separate counts of declaration at law they find for successful plaintiff is not improper as requiring jury to find special verdict, where related but severable single causes of action are joined and sued on in separate counts of one declaration.—Beckwith v. Bailey, 161 So. 576, 119 Fla. 316.

65. Ind.—Udell v. Citizens St. R. Co., 52 N.E. 799, 152 Ind. 607, 71 Am.S.R. 336.

Tex.—Padgett v. Hines, Civ.App., 192 S.W. 1122.

66. U.S.—Continental Casualty Co. v. Yerra, D.C.Mass., 16 F.2d 473.

Ark.—Sturgis v. Wylie, 120 S.W.2d 571, 196 Ark. 970.

Mich.—Rich v. Daily Creamery Co., 6 N.W.2d 539, 303 Mich. 344.

Mont.—Hatch v. National Surety Corporation, 72 P.2d 107, 105 Mont. 245.

N.H.—Adams v. Severance, 41 A.2d 233, 93 N.H. 289.

N.C.—Denmark v. Atlantic, etc., R. Co., 107 N.C. 185, 12 S.E. 54.

Pa.—Byers v. Ward, 84 A.2d 307, 368 Pa. 416—Simpson v. Montgomery Ward & Co., 46 A.2d 674, 354 Pa. 87—Altman v. Standard Refrigerator Co., 173 A. 411, 315 Pa. 465—Simpson v. Montgomery Ward & Co., 57 A.2d 571, 162 Pa.Super. 371.

S.C.—In re Nightingale's Estate, 139 S.E. 890, 182 S.C. 627—Barton v. Southern Ry. Co., 171 S.E. 5, 171 S. C. 46, certiorari denied Southern Ry. Co. v. Barton, 54 S.Ct. 51, 290 U.S. 632, 78 L.Ed. 550.

Tenn.—Greyhound Lines, Inc., v. Patterson, 14 Tenn.App. 652—Louisville & N. R. Co. v. Frakes, 11 Tenn. App. 593—Life & Casualty Ins. Co. v. Robertson, 6 Tenn.App. 43.

Tex.—Milwaukee Mechanics' Ins. Co. v. Frosch, Civ.App., 139 S.W. 600.

Utah.—Cooper v. Evans, 262 P.2d 278, 1 Utah 2d 68.

64 C.J. p 1114 note 55.

**Direction to jury to find special verdict held not abuse of discretion**

Mich.—Rich v. Daily Creamery Co., 6 N.W.2d 539, 303 Mich. 344.

**Where general instructions on law are required for an understanding by jury of their duties and functions, the case is not one for submission under statute on special issues.**—Texas & N. O. R. Co. v. Crow, 123 S.W.2d 649, 132 Tex. 465.

#### **Wrongful death action**

The practice of requiring special verdicts in wrongful death actions should be encouraged.—Sinclair Refining Co. v. Henderson, 122 S.W.2d 580, 197 Ark. 319.

#### **Plea of privilege**

The same rules apply to the submission of special issues to jury on a plea of privilege as would apply in a trial on the merits, except that the issues are confined to the venue facts.—Williams v. Hemphill County, Tex.Civ.App., 254 S.W.2d 839.

#### **Failure to submit case on general verdict held not error**

Wis.—Stellmacher v. Wisco Hardware Co., 48 N.W.2d 492, 259 Wis. 310.

#### **Absence of error**

Ordinarily there can be no error in submitting an issue to jury.—Fidelity & Cas. Co. of New York v. Maryland Cas. Co., Tex.Civ.App., 151 S.W. 2d 230.

67. Mich.—Rich v. Daily Creamery Co., 6 N.W.2d 539, 303 Mich. 344.

Wis.—Honore v. Ludwig, 247 N.W. 335, 211 Wis. 354.

64 C.J. p 1114 note 56.

68. Mich.—Rich v. Daily Creamery Co., 6 N.W.2d 539, 303 Mich. 344.

Tex.—Ellerd v. Campfield, Civ.App., 161 S.W. 392.

#### **Inconsistent issues**

Where there are several inconsistent issues, it is not necessary for the trial court to grant a party's request to require the jury to render a special verdict unless so required by statute.—Little v. Sugg, 8 So.2d 866, 243 Ala. 196.

69. Ohio.—Gendler v. Cleveland Ry. Co., 18 Ohio App. 48.

of a request by either party for a special verdict, the court has no alternative other than to instruct the jury to return a verdict for plaintiff or for defendant.<sup>70</sup>

A statutory provision, however, that the court, on request of either party, shall submit the cause on special issues raised by the pleadings and evidence is regarded as mandatory, and requires the court, on such request being made, to submit such issues for special verdicts,<sup>71</sup> and a refusal to grant a proper and timely request on a material issue constitutes error<sup>72</sup> unless the nature of the case is such that it cannot be determined on special issues,<sup>73</sup> and the trial court may exercise its discretion as to whether the case is of such nature, subject to review as to whether the case can be so determined.<sup>74</sup> It has also been held that the case should be so submitted where there are material issues of fact, whether or not such submission is requested,<sup>75</sup> and that, even after the jury have agreed on a general verdict, the court may recall them to reconsider the case and find a special verdict.<sup>76</sup>

*Submission not special charge.* Submitting or refusing to submit special issues of fact raised by the evidence is not the giving or refusing of special

charges, and is not controlled by the rules applicable thereto.<sup>77</sup>

## (2) Propriety and Manner of Submission

A submission of special issues or verdicts is proper where a general verdict would be uncertain and lead to further litigation; and in submitting special issues it is proper for the court to request the jury to find the facts, leaving the judgment to the court, notwithstanding the jury might be able to determine the probable effect of their answers on the judgment.

In particular instances it is proper for the court to require the jury to return special verdicts.<sup>78</sup> A submission of special issues or verdicts is proper where a general verdict would be uncertain and lead to further litigation,<sup>79</sup> and the case should be so submitted where the issues are complicated and such as are likely to confuse the jury,<sup>80</sup> as where there are numerous and distinct items of account involved.<sup>81</sup> The court is not justified in refusing to submit the case on special issues because at the same time requests are made for the giving of special charges,<sup>82</sup> or because, when the case was so submitted on a previous trial, the jury had disagreed, owing to the involved character of the issues.<sup>83</sup>

On the other hand, the court may refuse to submit the case on special issues where it would be

70. Ga.—Gibson v. Gibson, 49 S.E.2d 877, 204 Ga. 437.

71. Ohio.—Cincinnati St. Ry. Co. v. Blackburn, 186 N.E. 826, 45 Ohio App. 153.

Wis.—Honore v. Ludwig, 247 N.W. 335, 211 Wis. 354.

64 C.J. p 1114 note 59.

### Statute held mandatory

Statute relating to submission of issues to jury is mandatory and trial judge, either of his own motion or at suggestion of counsel, must submit such issues as are necessary to settle the material controversies arising on the pleadings.—Wheeler v. Wheeler, 80 S.E.2d 755, 239 N.C. 646.—Stanback v. Haywood, 184 S.E. 831, 209 N.C. 798.

72. Tex.—Missouri-Kan.-Tex. R. Co. of Texas v. Rockwall County Levee Improvement Dist. No. 3, 297 S.W. 206, 117 Tex. 34.

64 C.J. p 1115 note 60.

73. Tex.—Casualty Underwriters v. Flores, Civ.App., 125 S.W.2d 371, error dismissed, judgment correct.—Holden v. Gibbons, Civ.App., 101 S.W.2d 837, error dismissed.—Texas Employers Ins. Ass'n v. McNorton, Civ.App., 92 S.W.2d 562, error dismissed 122 S.W.2d 1043, 132 Tex. 168.

64 C.J. p 1115 note 61.

74. Tex.—Carter v. Haynes, Civ. App., 269 S.W. 216.—Buckholts

State Bank v. Graf, Civ.App., 200 S.W. 853.

75. Tex.—Missouri-Kan.-Tex. R. Co. of Texas v. Rockwall County Levee Improvement Dist. No. 3, 297 S.W. 206, 117 Tex. 34.

64 C.J. p 1115 note 63.

76. N.Y.—Hodgson v. Preferred Acc. Ins. Co., 189 N.Y.S. 28, 182 App.Div. 381.

77. Tex.—Kansas City, M. & O. Ry. Co. v. Odom, Civ.App., 185 S.W. 626.

78. Use of special verdict held proper

(1) In general.

Mont.—Smith v. Armstrong, 198 P.2d 795, 121 Mont. 377.

N.Y.—Bitterman v. Gluck, 9 N.Y.S.2d 1007, 256 App.Div. 336.

(2) In lessor's action for rent due under lease of machine, wherein lessee filed counterclaim for damages caused by breach of warranties, court properly required special verdicts on amounts due for rentals and other charges and on counterclaim.—Jaeger Mach. Co. v. Mirau, 289 N.W. 51, 208 Minn. 468.

Refusal to order jury to return special verdict held error

Tex.—Lubbock Bus Co. v. Pearson, Civ.App., 366 S.W.2d 439, refused no reversible error.—Texas Emp. Ass'n v. Ferguson, Civ.App., 196 S.W.2d 677.

79. S.C.—Armitage v. Seaboard Air Line Ry. Co., 164 S.E. 169, 166 S.C. 21.

Special verdict is not necessary in any case unless the issues are so set up that a general verdict may not be conclusive of the entire controversy or may not be sufficiently informative to give full effect to legal requirements.—Little v. Sugg, 8 So.2d 866, 243 Ala. 196.

### Conditional submission

Court did not err in not requiring jury to answer special issue where terms of submission required no answer thereto in case of negative answer to preceding issue, and jury gave such negative answer.—Sanders v. Lowmire, Civ.App., 73 S.W.2d 148, reversed on other grounds Lowmire v. Sanders, 103 S.W.2d 739, 129 Tex. 563, reheard 106 S.W.2d 266, 129 Tex. 563.

80. Vt.—Corpus Juris cited in Wilson v. Dyer, 75 A.2d 677, 681, 116 Vt. 342.

64 C.J. p 1115 note 67.

81. Ky.—Crescent State Co. v. Brown, 205 S.W. 937, 181 Ky. 787.

82. Tex.—Gordon Jones Const. Co. v. Lopez, Civ.App., 173 S.W. 987.

83. Tex.—Gordon Jones Const. Co. v. Lopez, supra.

justified in peremptorily instructing to find for one party;<sup>84</sup> or where a general verdict will meet the requirements of the case,<sup>85</sup> as where the issues are not complicated<sup>86</sup> or there is only one material issue in the case;<sup>87</sup> or where the case is one in which either party is entitled to a general verdict,<sup>88</sup> unless the right to a general verdict is waived;<sup>89</sup> or where the request for such submission is not made at the proper time,<sup>90</sup> or is covered by other issues submitted.<sup>91</sup>

**Manner of submission.** In submitting special issues it is proper for the court to request the jury to find the facts, leaving the judgment to the court,<sup>92</sup> notwithstanding the jury might be able to determine the probable effect of their answers on the judgment.<sup>93</sup> It is also proper for the court to give all necessary definitions and explanations,<sup>94</sup> but not to charge generally on the law of the case, as discussed supra § 372, although a waiver of a general charge is not essential in order to authorize the submission of the case on special issues;<sup>95</sup> nor should such a submission be accompanied by a peremptory instruction, regardless of the answers to the special issues.<sup>96</sup>

**Submission only on special, not general, issue.** A special issue or verdict should be submitted only when the case is submitted on special issues;<sup>97</sup> and, since the jury cannot return both a general and a special verdict, the case should not be submitted for both a general and special verdict, or in part general and in part special,<sup>98</sup> and, where the cause is submitted on special issues, it is improper for the

court to authorize or require a general verdict<sup>99</sup> or to accept a general verdict.<sup>1</sup> It has been held, however, that it is not error to permit a general verdict where the special verdict has disposed of all the controverted issues,<sup>2</sup> and that the submission of special issues, decided in favor of one party, and a general verdict for such party is not ground for reversal, where the judgment is sustained by the general finding.<sup>3</sup>

Where a statute requires the jury to return a general verdict the court cannot instruct them not to return such a verdict,<sup>4</sup> and the submission of special questions is not a waiver of the right to such a verdict.<sup>5</sup> In some jurisdictions the court, in an action for money in which there are disputed questions of fact, cannot, after reserving decision on a motion for nonsuit, call for a special verdict on a single fact question and thereafter direct a general verdict on the facts.<sup>6</sup>

#### b. As to Special Findings or Interrogatories

- (1) In general
- (2) Propriety or duty of submission

##### (1) In General

Ordinarily it is within the discretion of the trial court either to submit or to refuse to submit to the jury special findings or special interrogatories, to be returned or answered in connection with a general verdict.

It is a well-settled rule, which in some jurisdictions is made the subject of rules of court or constitutional or statutory provisions, that ordinarily it is within the discretion of the trial court either to

84. Tex.—Banks v. Mixon, Civ.App., 179 S.W. 690.

85. Ark.—Sturgis v. Wylie, 120 S. W.2d 571, 196 Ark. 970. Mont.—McDonald v. Klenke, 157 P. 175, 52 Mont. 142.

86. Idaho.—De Lamater v. Little, 182 P. 853, 32 Idaho 358.

87. Tex.—Halle v. Johnson, 133 S.W. 1088, 63 Tex.Civ.App. 199.

88. C.J. p 1115 note 74.

89. Minn.—Blod v. Barnard, 133 N. W. 795, 116 Minn. 307.

90. Minn.—Blod v. Barnard, supra. 64 C.J. p 1115 note 76.

91. Wis.—Callahan v. Chicago & N. W. Ry. Co., 184 N.W. 449, 161 Wis. 288—Woteshek v. Neumann, 138 N. W. 1000, 161 Wis. 365.

92. U.S.—Erie R. Co. v. Downs, N. Y., 250 F. 415, 162 C.C.A. 485, certiorari denied 38 S.Ct. 583, 247 U. S. 522, 62 L.Ed. 1247.

93. C.J. p 1116 note 78.

94. Tex.—Schaff v. Copass, Civ.App., 282 S.W. 234.

95. C.J. p 1116 note 80.

96. N.D.—Sullivan v. Minneapolis, St. P. & S. S. Ry. Co., 213 N.W. 841, 55 N.D. 353.

97. Tex.—Texas & N. O. R. Co. v. Crow, 123 S.W.2d 649, 132 Tex. 465—Watkins v. Hines, Civ.App., 214 S.W. 663.

98. Tex.—York v. Hilger, Civ.App., 84 S.W. 1117.

99. Tex.—South Chester Tube Co. v. Texhoma Oil & Refining Co., Civ. App., 264 S.W. 108, error dismissed, Com.App., 287 S.W. 1111—Pryor v. Scott, Civ.App., 200 S.W. 909.

1. Mont.—Prosser v. Montana Cent. R. Co., 43 F. 81, 17 Mont. 372, 30 L.R.A. 814.

2. Tex.—Pearce v. Heyman, Civ.App., 158 S.W. 242.

3. Tex.—Bernard v. Crowell, Civ. App., 46 S.W.2d 329.

4. C.J. p 1116 note 88.

5. Tex.—Walker v. Rogers, Civ. App., 10 S.W.2d 763.

6. C.J. p 1116 note 89.

1. Tex.—Patterson & Roberts v. Quanah, A. & P. Ry. Co., Civ.App., 195 S.W. 1163.

2. Wis.—Cooper v. Pennsylvania Ins. Co., 71 N.W. 606, 96 Wis. 362.

3. Tex.—Hedlin v. Burns, 8 S.W. 48, 70 Tex. 347.

4. Kan.—Washington Nat. Bank v. Woodrum, 62 P. 672, 62 Kan. 867.

5. Kan.—Washington Nat. Bank v. Woodrum, supra.

6. N.Y.—Bergman v. Scottish Union & National Ins. Co., 190 N.E. 409, 264 N.Y. 205.

**Direction of general verdict held error**

Direction of general verdict for defendant in action on fire policy, on basis of answers of jury to special questions submitted by court on reserving its decision on motion for directed verdict made at end of case, was held error.—Bergman v. Scottish Union & National Ins. Co., supra.

submit or to refuse to submit to the jury special findings or special interrogatories, to be returned or answered in connection with a general verdict.<sup>7</sup> It has been held that a special interrogatory may be propounded by the court as a part of its gen-

eral charge<sup>8</sup> or that it may be submitted after the general verdict has been received.<sup>9</sup> A submission of special interrogatories or findings may be made by the court of its own motion, without the consent or request of either party;<sup>10</sup> and even over the

7. U.S.—Buckley v. Southwestern Nat. Bank, C.C.A.Pa., 88 F.2d 263. Ariz.—Powell v. Langford, 119 P.2d 230, 58 Ariz. 281. Ark.—Missouri Pac. Transp. Co. v. Parker, 140 S.W.2d 997, 200 Ark. 620, certiorari denied 61 S.Ct. 133, 311 U.S. 696, 85 L.Ed. 450—Sinclair Refining Co. v. Henderson, 122 S.W.2d 580, 197 Ark. 313. Cal.—House Grain Co. v. Finerman & Sons, 253 P.2d 1034, 116 Cal.App.2d 486—Salas v. Whittington, 174 P.2d 886, 77 Cal.App.2d 90—Lloyd v. Kleefsch, 120 P.2d 97, 48 Cal. App.2d 408—King v. Schumacher, 89 P.2d 466, 32 Cal.App.2d 172, certiorari denied Schumacher v. King, 60 S.Ct. 123, 308 U.S. 593, 84 L.Ed. 496—Jolley v. Clemens, 82 P.2d 51, 28 Cal.App.2d 55—Mayfield v. Fidelity & Cas. Co. of New York, 61 P.2d 82, 16 Cal.App.2d 611—Walton v. Southern Pac. Co., 48 P.2d 108, 8 Cal.App.2d 290, certiorari denied Southern Pac. Co. v. Walton, 56 S.Ct. 308, 296 U.S. 647, 80 L.Ed. 461, rehearing denied 56 S.Ct. 380, 296 U.S. 665, 80 L.Ed. 474—Hughes v. Quackenbush, 37 P.2d 99, 1 Cal. App.2d 349—Boomer v. Muir, App. 24 P.2d 570—Alvernaz v. H. P. Garin Co., 16 P.2d 683, 127 Cal.App. 681. Colo.—Brown v. Maier, 38 P.2d 905, 96 Colo. 1—Denver Tramway Corporation v. Kuttner, 35 P.2d 852, 95 Colo. 312. Conn.—Finance Discount Corp. v. Hurwitz, 88 A.2d 335, 138 Conn. 636—Sheeler v. City of Waterbury, 82 A.2d 359, 138 Conn. 111—Ballou v. Jewett City Sav. Bank, 24 A.2d 260, 128 Conn. 527—Morgan v. Marcheseault, 169 A. 609, 117 Conn. 607. Fla.—Beckwith v. Bailey, 161 So. 576, 119 Fla. 316. Ill.—Cripe v. Pevely Dairy Co., 275 Ill.App. 231, certiorari denied Pevely Dairy Co. v. Cripe, 55 S.Ct. 115, 293 U.S. 598, 79 L.Ed. 691. Ind.—Oakton Telephone Co. v. Miller, 194 N.E. 741, 101 Ind.App. 408, followed in Bruceville Telephone Co. v. Miller, 194 N.E. 775, 101 Ind. App. 701, and Freelandville Telephone Co. v. Miller, 194 N.E. 775, 101 Ind.App. 701. Iowa.—Smith v. Pella, 53 N.W. 226, 86 Iowa 236. Kan.—Finke v. Lemle, 252 P.2d 869, 173 Kan. 792. Mass.—Hinckley v. Capital Motor Transp. Co., 72 N.E.2d 419, 321 Mass. 174—Copithorn v. Boston & M. R. R., 17 N.E.2d 713, 301 Mass. 510—Cozzo v. Atlantic Refining

Co., 12 N.E.2d 744, 299 Mass. 260—Palumbo v. Di Mare, 12 N.E.2d 741, 299 Mass. 212—Stone v. Orth Chevrolet Co., 187 N.E. 910, 284 Mass. 525—Graves v. Washington Mar. Ins. Co., 12 Allen 391. Minn.—Roske v. Ilykanyics, 45 N.W.2d 769, 232 Minn. 383—Halos v. Nachbar, 265 N.W. 26, 196 Minn. 387. Neb.—Masonic Bldg. Corporation v. Carlsen, 258 N.W. 44, 128 Neb. 108. N.H.—Putnam v. Bowman, 195 A. 865, 89 N.H. 200. N.M.—Crocker v. Johnston, 95 P.2d 214, 43 N.M. 469—Larsen v. Bliss, 91 P.2d 811, 817, 43 N.M. 265. N.D.—Schnoor v. Meinecke, 40 N.W.2d 803, 77 N.D. 96—International Shoe Co. v. Hawkinson, 18 N.W.2d 761, 73 N.D. 677. Okl.—Coston v. Adams, 224 P.2d 955, 203 Okl. 605—Sun Oil Co. v. Hoke, 169 P.2d 753, 197 Okl. 261—Anthony v. Colvin, 130 P.2d 819, 191 Okl. 476, dissenting opinion 145 P.2d 384—C. R. Anthony Co. v. Stroud, 114 P.2d 177, 189 Okl. 104—Kirk v. Leeman, 22 P.2d 382, 163 Okl. 236. Pa.—Hutchinson v. Pennsylvania R. Co., 105 A.2d 356, 378 Pa. 24—Feigenbaum v. Prudential Ins. Co. of America, 19 A.2d 542, 144 Pa.Super. 412—Dignan v. York-Buffalo Motor Express, Com.Pl., 13 Northumb.Leg. J. 381. Wash.—Brown v. Intercoastal Fisheries, 207 P.2d 1206, 34 Wash.2d 48—Salo v. Nelson, 156 P.2d 664, 22 Wash.2d 525. W.Va.—Spence v. Browning Motor Freight Lines, Inc., 77 S.E.2d 806—Daugherty v. Baltimore & O. R. Co., 64 S.E.2d 231, 135 W.Va. 688—Tennessee Gas Transmission Co. v. Fox, 58 S.E.2d 584, 134 W.Va. 106—Davis v. Fugh, 57 S.E.2d 9, 133 W.Va. 569. Wis.—Singer Mfg. Co. v. Sammons, 5 N.W. 788, 49 Wis. 316. Wyo.—Northwest States Utilities Co. v. Brouillette, 65 P.2d 223, 51 Wyo. 132, rehearing denied 69 P.2d 623, 51 Wyo. 132. 64 C.J. p 1116 note 96. Consolidated cases Md.—Wright v. Baker, 79 A.2d 159, 197 Md. 315. Refusal to submit special interrogatories held not abuse of discretion Cal.—House Grain Co. v. Finerman & Sons, 253 P.2d 1034, 116 Cal.App.2d 485—Salas v. Whittington, 174 P.2d 886, 77 Cal.App.2d 90—Lloyd v. Kleefsch, 120 P.2d 97, 48 Cal. App.2d 408—King v. Schumacher, 89 P.2d 466, 32 Cal.App.2d 172, cer-

tiorari denied Schumacher v. King, 60 S.Ct. 123, 308 U.S. 593, 84 L.Ed. 496—Jolley v. Clemens, 82 P.2d 51, 28 Cal.App.2d 55—Mayfield v. Fidelity & Cas. Co. of New York, 61 P.2d 82, 16 Cal.App.2d 611. Colo.—Brown v. Maier, 38 P.2d 905, 96 Colo. 1. Ill.—Cripe v. Pevely Dairy Co., 275 Ill.App. 231, certiorari denied Pevely Dairy Co. v. Cripe, 55 S.Ct. 115, 293 U.S. 598, 79 L.Ed. 691. Minn.—Halos v. Nachbar, 265 N.W. 26, 196 Minn. 387. Neb.—Masonic Bldg. Corporation v. Carlsen, 258 N.W. 44, 128 Neb. 108. N.H.—Putnam v. Bowman, 195 A. 865, 89 N.H. 200. Okl.—Sun Oil Co. v. Hoke, 169 P.2d 753, 197 Okl. 261—Kirk v. Leeman, 22 P.2d 382, 163 Okl. 236. W.Va.—Spence v. Browning Motor Freight Lines, Inc., 77 S.E.2d 806.

#### Useful purpose

Special findings can serve a useful purpose when the circumstances of case require such findings.—Fullerton v. Motor Exp., Inc., 100 A.2d 73, 375 Pa. 173.

Special findings have their use where case involves number of different parties standing in different relationships to matter in issue or where conflict on material issue of fact is absolute.—Brown v. Ambridge Yellow Cab Co., 97 A.2d 377, 374 Pa. 208.

In action to recover money only, court is not authorized to require jury to make special findings.—Sherman v. Leicht, 264 N.Y.S. 492, 238 App.Div. 271.

Where jury find general verdict, court may instruct it to find also specially on questions of fact stated in writing.—Sherman v. Leicht, supra.

8. Ohio.—Varner v. Eppley, 182 N.E. 496, 125 Ohio St. 526.

9. Kan.—Grand Lodge K. P. of Kansas v. Central States Fire Ins. Co., 15 P.2d 466, 136 Kan. 342.

10. Mich.—Vukich v. City of Detroit, Dept. of St. Ry., 28 N.W.2d 894, 318 Mich. 615.

64 C.J. p 1117 note 99.

In order to avoid error resulting from misunderstanding by the jury of the instructions or from erroneous application of the law by the jury, the trial court may submit interrogatories to the jury to discover what facts the jury found from the evidence, so that the court may apply the law to the facts so found.—

objection of either or both parties;<sup>11</sup> or where special interrogatories have been requested by the parties the court may submit additional interrogatories of its own motion.<sup>12</sup>

*As to direction of verdict.* Special interrogatories may be submitted in connection with the direction of a verdict,<sup>13</sup> and, if the evidence is conflicting, even though both parties move for a directed verdict,<sup>14</sup> and where the answers of the jury to special questions establish all the essentials of plaintiff's cause of action a general verdict may be directed for him.<sup>15</sup> A verdict may not be directed on the basis of the jurors' answers to special questions unless such answers dispose of all issues material to the case.<sup>16</sup>

## (2) Propriety or Duty of Submission

In the absence of a statute to the contrary, the court may exercise its discretion with respect to submitting or refusing to submit special findings or interrogatories requested by either party; but under some statutes it is the duty of the court, on request, to require special findings or to submit properly framed special interrogatories on the issues.

Tucker Freight Lines v. Gross, 33 N.E.2d 353, 109 Ind.App. 454.

11. Conn.—Freedman v. New York, etc., R. Co., 71 A. 901, 81 Conn. 601, 15 Ann.Cas. 464.

64 C.J. p 1118 note 1.

12. Ill.—Norton v. Volzke, 41 N.E. 1085, 158 Ill. 402, 49 Am.S.R. 167.

13. Mass.—Hurnanen v. Nicksa, 117 N.E. 325, 228 Mass. 346.

14. Mont.—Hollingsworth v. Ruckman, 232 P. 130, 72 Mont. 147.

15. Mass.—Stryker v. Stone, 116 N.E. 551, 227 Mass. 253.

16. Mass.—Copthorn v. Boston & M. R. R., 17 N.E.2d 713, 301 Mass. 510—Palumbo v. Di Mare, 12 N.E.2d 741, 299 Mass. 212—Stone v. Orth Chevrolet Co., 137 N.E. 910, 284 Mass. 525.

*Direction of verdict held proper.*  
Mass.—Stone v. Orth Chevrolet Co., supra.

17. Idaho.—Yearsley v. City of Pocatello, 210 P.2d 795, 69 Idaho 500.  
Mo.—Crollard v. Northern Life Ins. Co., 200 S.W.2d 375, 240 Mo.App. 855.

N.M.—Corpus Juris cited in Larsen v. Bliss, 91 P.2d 811, 817, 43 N.M. 265.

64 C.J. p 1118 note 6.

Prejudicial effect of error in submission or refusal to submit special interrogatories see Appeal and Error § 1762.

*Statute held not to change rule*

Statute providing for submission of special interrogatories to jury, although seeming to be mandatory in

form of expression, has not changed general rule giving trial court discretionary power in submission of special interrogatories.—Larsen v. Bliss, 91 P.2d 811, 43 N.M. 265.

## Practice

(1) Practice of submitting question to jury is of long standing and does not depend on statute.—Burgess v. Giovannucci, 49 N.E.2d 907, 314 Mass. 252.

(2) Practice in at least one jurisdiction is to ask for general verdict based on all defenses made, after instructing jury as to nature of defenses and their applicability, and not to submit special issues in form of interrogatories.—Clemmer's Adm'r v. Jefferson Standard Life Ins. Co., D.C. Va., 9 F.Supp. 115, reversed on other grounds, C.C.A., Jefferson Standard Life Ins. Co. v. Clemmer, 79 F.2d 724, 103 A.L.R. 171.

## 18. Use of interrogatories held proper

Conn.—Brunetto v. Royal Exchange Assur. Co., 13 A.2d 138, 126 Conn. 569.

N.D.—Schnoor v. Melnecke, 40 N.W.2d 803, 77 N.D. 96.

Okl.—American Nat. Bank of Wetumka v. Hightower, 87 P.2d 311, 184 Okl. 294—Edwards v. Rutland Sav. Bank, 75 P.2d 1152, 181 Okl. 643.

Pa.—Schmidt v. Campbell, 7 A.2d 554, 136 Pa.Super. 590.

## Commendable procedure

Submitting questions to jury for special findings is commendable procedure where tort-feasor denies that accident caused death.—Goodall v. Hess, 173 A. 693, 315 Pa. 289.

In the absence of a statute to the contrary, the court may exercise its discretion with respect to submitting or refusing to submit special findings or interrogatories requested by either party.<sup>17</sup> In particular instances questions should be submitted to the jury in the form of a special interrogatory or special finding.<sup>18</sup> A refusal to submit particular interrogatories does not constitute error where they are, in substance, embraced within other interrogatories submitted,<sup>19</sup> or are likely to confuse and mislead the jurors,<sup>20</sup> or do not relate to ultimate facts, as discussed *infra* § 532, or which concern only simple questions of fact necessarily involved in the general verdict,<sup>21</sup> or where the issues are few<sup>22</sup> and uncomplicated,<sup>23</sup> and it is apparent that special findings will not aid the jury in arriving at a correct conclusion.<sup>24</sup>

Similarly, the court cannot submit to the jury a question wholly within the province of the court<sup>25</sup> or by interrogatories take the opinion of the jury on matters of law.<sup>26</sup> While it has been held that no litigant may demand submission of special

19. Kan.—Missouri Pac. R. Co. v. Reynolds, 1 P. 150, 31 Kan. 132.

20. Cal.—Ellet v. Los Altos Country Club Properties, 264 P. 270, 38 Cal.App. 740.

64 C.J. p 1118 note 10.

21. Ark.—Altman-Rodgers Co. v. Rogers, 48 S.W.2d 239, 185 Ark. 561.

64 C.J. p 1118 note 12.

22. W.Va.—Spence v. Browning Motor Freight Lines, Inc., 77 S.E.2d 806—Daugherty v. Baltimore & O. R. Co., 64 S.E.2d 231, 135 W.Va. 688—Tennessee Gas Transmission Co. v. Fox, 58 S.E.2d 584, 134 W.Va. 106—Davis v. Pugh, 57 S.E.2d 9, 133 W.Va. 569—Bartlett v. Mitchell, 168 S.E. 662, 113 W.Va. 465.

23. W.Va.—Spence v. Browning Motor Freight Lines, Inc., 77 S.E.2d 806—Daugherty v. Baltimore & O. R. Co., 64 S.E.2d 231, 135 W.Va. 688—Tennessee Gas Transmission Co. v. Fox, 58 S.E.2d 584, 134 W.Va. 106—Davis v. Pugh, 57 S.E.2d 9, 133 W.Va. 569—Bartlett v. Mitchell, 168 S.E. 662, 113 W.Va. 465.

64 C.J. p 1118 note 13.

24. W.Va.—Spence v. Browning Motor Freight Lines, Inc., 77 S.E.2d 806—Tennessee Gas Transmission Co. v. Fox, 58 S.E.2d 584, 134 W.Va. 106—Lovett v. Lisagor, 130 S.E. 125, 100 W.Va. 154.

25. Ind.—Erie Crawford Oil Co. v. Meeks, 81 N.E. 518, 40 Ind.App. 156.

26. Ind.—Erie Crawford Oil Co. v. Meeks, supra.

interrogatories as a matter of right,<sup>27</sup> there is authority to the effect that it is not a mere matter of discretion, but is the duty of the court to submit special interrogatories which are necessary to protect the requesting party from the implications of a general verdict,<sup>28</sup> as where reliance is placed on separate and distinct grounds of action or defense<sup>29</sup> or where the interrogatories requested are controlling questions in the case.<sup>30</sup> It has been said that in a case involving a claim to equitable relief the better practice is to submit appropriate issues to the jury and to grant proper relief on their findings.<sup>31</sup>

A statutory provision that the court, on request of either party, shall instruct the jury, if they render a general verdict, to find specially on particular questions of fact, when they are proper and pertinent to the issues, is regarded as mandatory,<sup>32</sup> provided the questions require answers establishing probative facts from which an ultimate material fact may be inferred as a matter of law,<sup>33</sup> and under similar statutory provisions it is the duty of the court, on such a request, to require special findings or to submit properly framed special interrogatories on such issues,<sup>34</sup> although a refusal to do so is not error where, in view of the charge and the evidence, the jury fully understand and pass on the question.<sup>35</sup>

In order to justify the practice whereby a trial court preliminarily submits certain questions of fact to the jury and, after receiving their answers, directs a general verdict on facts found, the parties should formally agree to that method of submission, and a general verdict should be rendered in addition to answers to questions submitted.<sup>36</sup> Where the trial court submits special questions of fact to the jury and, instead of directing a verdict based on the jury's special findings, by agreement of parties makes its own findings based on answers of the jury and subsequently enters judgment on those findings, such procedure, while not recommended, is sufficiently near to sanctioned practice to warrant sustaining judgments.<sup>37</sup>

### § 530. Rights of Parties as to Submission of Different Theories

In submitting a case on special issues, each party is entitled to have his theory of the case, and the facts constituting the cause of action, on the one hand, and matters pleaded in defense, on the other, affirmatively submitted for the determination of the jury.

In submitting a case on special issues, each party is entitled to have his theory of the case, and the facts constituting the cause of action, on the one hand, and matters pleaded in defense, on the other, affirmatively submitted for the determination of the jury,<sup>38</sup> and it has been held that, where plaintiff

27. *Ariz.*—Powell v. Langford, 119 P. 2d 230, 58 Ariz. 281.

28. *Conn.*—Sheeler v. City of Waterbury, 82 A.2d 359, 138 Conn. 111; *Pentino v. Gallo*, 140 A. 105, 107 Conn. 242.

29. *Conn.*—Sheeler v. City of Waterbury, 82 A.2d 359, 138 Conn. 111; *Decker v. Roberts*, 8 A.2d 855, 125 Conn. 150.  
64 C.J. p 1119 note 18.

#### Preferable method

Where a complaint is divided into counts and a general verdict is returned, it will be presumed, if the charge and all rulings are correct on any count, that damages were assessed as to that count, and verdict will be sustained and therefore preferable method for defendant to follow as a protection against such an implication is to request trial court to obtain a separate verdict on each count, although use of interrogatories is approved.—*Sheeler v. City of Waterbury*, 82 A.2d 359, 138 Conn. 111.

30. *Pa.*—*Abraham Fur Co. v. Cameron*, 145 A. 578, 295 Pa. 408.

31. *Conn.*—*Gest v. Gest*, 167 A. 909, 117 Conn. 289.

32. *Ohio.*—*Chevalier v. Lakewood Housing Co.*, App., 83 N.E.2d 667

—*Humphreys v. Madden*, App., 68 N.E.2d 562.

64 C.J. p 1119 note 20.

33. *Ohio.*—*Mellon v. Weber*, 152 N. E. 753, 115 Ohio St. 91—*Chevalier v. Lakewood Housing Co.*, App., 83 N.E.2d 667.

34. *Ind.*—*Tate v. West*, 94 N.E.2d 371, 120 Ind.App. 519—*McKinnon v. Parrill*, 38 N.E.2d 1008, 111 Ind. App. 343.

*Iowa.*—*Porter v. Decker*, 270 N.W. 897, 222 Iowa 1109.  
*Kan.*—*Finke v. Lemie*, 252 P.2d 869, 173 Kan. 792—*Waterbury v. Ries & Co.*, 219 P.2d 673, 189 Kan. 271.  
*Mich.*—*Hoekzema v. Van Haften*, 31 N.W.2d 841, 320 Mich. 683.

*Ohio.*—*Chevalier v. Lakewood Housing Co.*, App., 83 N.E.2d 667—*Humphreys v. Madden*, App., 68 N.E.2d 562.

64 C.J. p 1119 note 22.

#### Where answers to interrogatories might be inconsistent

If interrogatories are presented which a party has a right to have submitted and the answers to which might be inconsistent with the general verdict, the court must submit them to the jury for answer in the event a general verdict is returned.—*Smith v. Cushman Motor Delivery Co.*, 6 N.E.2d 594, 54 Ohio App. 99.

35. *U.S.*—*Blakely v. Greene*, C.C.A. W.Va., 24 F.2d 676.

36. *Pa.*—*Fulforth v. Prudential Ins. Co. of America*, 24 A.2d 749, 147 Pa. Super. 516.

37. *Pa.*—*Fulforth v. Prudential Ins. Co. of America*, supra.

38. *Tex.*—*Blanton v. E. & L. Transport Co.*, 207 S.W.2d 368, 146 Tex. 877—*Schuhmacher Co. v. Holcomb*, 177 S.W.2d 951, 142 Tex. 332—*Walgreen-Texas Co. v. Shivers*, 154 S.W.2d 625, 137 Tex. 493—*Montgomery v. Gay*, Civ.App., 212 S.W.2d 941—*City of Winters v. Bethune*, Civ.App., 111 S.W.2d 797, error dismissed—*Snyder v. Magnolia Petroleum Co.*, Civ.App., 107 S.W.2d 603, error dismissed—*Maryland Casualty Co. v. McGill*, Civ.App., 69 S.W.2d 158.

64 C.J. p 1119 note 25.

#### Issues submitted unconditionally

In case submitted to jury for special verdict on special issues, each party has right to have issues, on matters which such party has duty of establishing in order to maintain his action or defense, submitted affirmatively and unconditionally.—*Snyder v. Magnolia Petroleum Co.*, Tex.Civ.App., 107 S.W.2d 603, error dismissed.

makes a formal request for submission of the case on special issues, it is imperative on the court to submit all issues made by the pleadings and evidence,<sup>39</sup> and that, where the material issue of one litigant is presented in one form, his adversary is entitled to have the same issue presented conversely.<sup>40</sup> Defendant, for example, is entitled to have each independent defense which has been pleaded and is supported by the evidence affirmatively submitted;<sup>41</sup> but he is not entitled to the submission of any affirmative defense which he does not plead.<sup>42</sup>

Defendant has the right to demand the direct

submission of his defense as raised by the evidence according to the state thereof before, and not after, it is interpreted by the jury.<sup>43</sup> The question of the right of a defendant to have an affirmative defense submitted must not be determined from the viewpoint of conditions as they appear after the verdict is returned, but from the viewpoint of what the jury might have found if the issue had been submitted to them.<sup>44</sup> A fortiori, the conditions existing when the charge was given and not after the verdict determine whether there was error in refusing to submit a requested special issue to the jury.<sup>45</sup> Where the jury are asked to find a par-

#### Cases submitted on general charges

The rule that defendant is entitled to an affirmative presentation of his defenses applies both in cases submitted on general charges and in cases submitted on special issues.—*Dallas Ry. & Terminal Co. v. Ector*, 116 S.W.2d 683, 131 Tex. 505.

#### Independent defense

Defendant may invoke rule requiring submission of special issues on all ultimate issues only where he pleads facts which, if true, would constitute an independent defense, not where only effect of the issue sought to be submitted is to negative an issue submitted in the main charge.—*Cross v. White*, Civ.App., 112 S.W.2d 502, affirmed 132 S.W.2d 580, 134 Tex. 91.

#### Inconsistent theories

Plaintiff may have submitted to the jury inconsistent theories or grounds of recovery.—*International-Great Northern R. Co. v. Acker*, Tex. Civ.App., 128 S.W.2d 506, error dismissed, judgment correct.

#### Defendant's right held not preserved

Defendant's right to affirmative submission of each group of facts pleaded and relied on as defense is not preserved by submitting plaintiff's issues and giving general charge directing how to answer such issues in event jury entertains certain views with respect to defenses.—*Maryland Casualty Co. v. McGill*, Tex.Civ.App., 69 S.W.2d 158.

39. *Tex.—Commonwealth Casualty Co. v. Holyfield*, Civ.App., 264 S.W. 157.

40. *Tex.—United Employers Casualty Co. v. Hudson*, Civ.App., 152 S.W.2d 451.

64 C.J. p 1120 note 27.

41. *Tex.—Solsgaard v. Texas & N. O. R. Co.*, 229 S.W.2d 777, 149 Tex. 151.—*Dixie Motor Coach Corporation v. Galvan*, 88 S.W.2d 433, 126 Tex. 109.—*Langham v. Talbott*, Civ.App., 211 S.W.2d 987, refused no reversible error.—*Rosenthal v. City of Dallas*, Civ.App., 211 S.W.2d 279, refused no reversible error.—*Dallas*

*Railway & Terminal Co. v. Stewart*, Civ.App., 128 S.W.2d 443.—*City of Winters v. Bethune*, Civ.App., 111 S.W.2d 797, error dismissed.—*San Jacinto Trust Co. v. Goodwin*, Civ.App., 88 S.W.2d 525.

64 C.J. p 1120 note 28.

#### Jury's findings on other issues

(1) A defendant is entitled to an affirmative submission of any fact pleaded by him and supported by material evidence, which, if found true, would exculpate him from liability, and he may not be deprived of this right through an adverse finding on some other issue, the answer to which would render him liable.—*Kuykendall v. Doose*, Tex.Civ.App., 260 S.W.2d 435, error refused no reversible error.

(2) In order to accord fair trial, each party's theories, raised by evidence, must be directly submitted to jury, and such right cannot be lost or defeated by juries' findings on other issues, which indirectly negative favorable finding on issue not submitted, but raised by evidence.—*Montgomery v. Gay*, Tex.Civ.App., 212 S.W.2d 941.—*Gifford-Hill & Co. v. Jones*, Tex.Civ.App., 99 S.W.2d 656.

(3) Defendant has right to have affirmative defensive issues submitted to, and passed on by, jury, even though juries' answers thereto may conflict with their answers to other issues.—*Montgomery v. Gay*, Tex.Civ.App., 212 S.W.2d 941.

42. *Tex.—City of Winters v. Bethune*, Civ.App., 111 S.W.2d 797, error dismissed.

64 C.J. p 1120 note 29.

#### General denial

(1) Under certain procedural rules in Texas, under a general denial a defendant is not entitled to submission of affirmative issues on inconsistent theories if they are raised only by general denial and not by affirmative pleadings on his part.—*Texas Emp. Ins. Ass'n v. Tate*, Tex.Civ.App., 214 S.W.2d 877.—*Kerrville Bus Co., Inc. v. Williams*, Tex.Civ.App., 208 S.W.2d 262.—*Associated Employers Lloyds v. Aiken*, Tex.Civ.

App., 201 S.W.2d 856.—*Columbia Casualty Co. v. Combs*, Tex.Civ.App., 188 S.W.2d 1015.—*Traders & General Ins. Co. v. Wilder*, Tex.Civ.App., 186 S.W.2d 1011.—*Hamill & Smith v. Parr*, Tex.Civ.App., 173 S.W.2d 725.

(2) Under rule providing that a party shall not be entitled to an affirmative submission of any issue in his behalf where such issue was raised only by a general denial and not by an affirmative written plea on his part, issues relating to defenses by way of rebuttal or by way of avoidance are regarded as affirmative issues.—*Salley v. Black, Sivals & Bryson*, Tex.Civ.App., 225 S.W.2d 426, error dismissed.

(3) In earlier cases it was said that defendant's right to affirmative submission of proper issues was not limited to those defensive issues which were affirmatively pleaded and that a defendant's general denial was sufficient to require the submission of any defensive issue raised by the evidence.—*McClung Const. Co. v. Muncy*, Tex.Civ.App., 65 S.W.2d 786, error dismissed.—*Galveston, H. & S. A. Ry. Co. v. Wilson*, Tex.Civ.App., 214 S.W. 773.

43. *Tex.—Gulf, C. & S. F. Ry. Co. v. Irick*, Civ.App., 116 S.W.2d 1099, error dismissed.

44. *Tex.—Dixie Motor Coach Corporation v. Galvan*, 86 S.W.2d 633, 126 Tex. 109.—*Dallas Railway & Terminal Co. v. Stewart*, Civ.App., 128 S.W.2d 443.

45. *Tex.—Schuhmacher Co. v. Holcomb*, 177 S.W.2d 951, 142 Tex. 332.—*Sunset Motor Lines v. Blasingame*, Civ.App., 245 S.W.2d 288, error dismissed.—*Jefferson County Drainage Dist. No. 7 v. Hebert*, Civ.App., 244 S.W.2d 535, error refused no reversible error.—*Southwestern Greyhound Lines v. Dickson*, Civ.App., 219 S.W.2d 592.

Right to a defensive issue is determinable on the basis of evidence prior to the verdict.—*Sam v. Sullivan*, Tex.Civ.App., 189 S.W.2d 69, refused for want of merit.

ticular fact without being informed as to its relevancy to the claim of either party, their conflicting claims need not be affirmatively submitted to the jury.<sup>46</sup>

### § 531. Questions or Issues to Be Submitted

#### a. In general

#### b. Application of rules

#### a. In General

As a general rule, the special issues should submit to the jury all the controverted material issues or questions of fact, and those only, that are properly raised by the pleading and supported by the evidence. Special

interrogatories are proper and should be submitted to the jury when, and only when, they relate to material issues of fact as made by the pleadings and are supported by the evidence.

Generally speaking, where the case is one which is tried on special issues or special verdicts, the issues to be submitted are the special issues that are ordinarily submitted in a cause of that nature,<sup>47</sup> unless the parties specially agree on other issues.<sup>48</sup> As a general rule, sometimes embodied in statute, the special issues should submit to the jury all the controverted material issues or questions of fact that are properly raised by the pleading and supported by the evidence,<sup>49</sup> and it is es-

46. Tex.—Hoover v. Hamilton, Civ. App., 14 S.W.2d 935.  
64 C.J. p 1120 note 30.

47. Tex.—Eversole v. Thelmer, Civ. App., 256 S.W.2d 927—Zurich General Accident & Liability Ins. Co. v. Johnson, 202 S.W.2d 258, affirmed 205 S.W.2d 353, 146 Tex. 232.  
64 C.J. p 1120 note 32.

#### "Special issue"

In connection with jury trials, the term "special issue" has been held to mean separate and distinct questions of fact germane and material to the cause of action, or causes of action, on which the plaintiff relies for recovery and the defendant as a defense.—Ormsby v. Ratcliffe, 1 S.W.2d 1084, 117 Tex. 242.

48. N.C.—Westfeldt v. Adams, 74 S.E. 1041, 159 N.C. 409.

49. Iowa.—Olinger v. Tiefenthaler, 285 N.W. 137, 226 Iowa 847.  
Mich.—Palajich v. Ford Motor Co., 255 N.W. 219, 267 Mich. 418.

N.C.—Wheeler v. Wheeler, 80 S.E.2d 755, 239 N.C. 646—Dillard v. Brown, 64 S.E.2d 843, 233 N.C. 551—Turnage v. McLawhon, 61 S.E.2d 336, 232 N.C. 515—Crouse v. Vernon, 59 S.E.2d 185, 232 N.C. 24—Griffin v. United Services Life Ins. Co., 36 S.E.2d 225, 225 N.C. 684—Carland v. Allison, 19 S.E.2d 245, 221 N.C. 120.

Tenn.—Louisville & N. R. Co. v. Frakes, 11 Tenn.App. 593—Life & Casualty Ins. Co. v. Robertson, 6 Tenn.App. 43.

Tex.—Texas General Indemnity Co. v. Scott, 253 S.W.2d 651—Edwards v. Gifford, 155 S.W.2d 788, 137 Tex. 559—New Nueces Hotel Co. v. Sorenson, 76 S.W.2d 488, 124 Tex. 175—El Paso Electric Co. v. Hedrick Com.App., 80 S.W.2d 761—Martin v. Texas & N. O. Ry. Co., Civ.App., 267 S.W.2d 581, error refused no reversible error—Dallas Ry. & Terminal Co. v. Straughan, Civ.App., 254 S.W.2d 882—Western Wood Products Co. v. Box, Civ.App., 248 S.W.2d 974—Hubbell v. Donaldson, Civ.App., 243 S.W.2d 867—Schoenberg v. Forrest, Civ.App., 228 S.W.

2d 556, refused no reversible error—Texas Emp. Ins. Ass'n v. Locke, Civ.App., 224 S.W.2d 756, refused no reversible error—Texas & N. O. R. Co. v. Solgaard, Civ.App., 223 S.W.2d 665, reversed on other grounds 229 S.W.2d 777, 149 Tex. 181—Gulf, C. & S. F. Ry. Co. v. Jones, Civ.App., 221 S.W.2d 1010, error refused no reversible error—Southwestern Greyhound Lines v. Dickson, Civ.App., 219 S.W.2d 592—Kiel v. Mahan, Civ.App., 214 S.W.2d 865, refused no reversible error—Manzer v. Barnes, Civ.App., 213 S.W.2d 464, motion granted 218 S.W.2d 1015—Fort Worth & D. C. Ry. Co. v. Capchar, Civ.App., 210 S.W.2d 839, refused no reversible error—City of Dallas v. Milum, Civ. App., 200 S.W.2d 833, refused no reversible error—Lewis v. Texas & N. O. R. Co., Civ.App., 199 S.W.2d 185, error refused no reversible error—Gillette Motor Transp. Co. v. Whitfield, Civ.App., 197 S.W.2d 157, affirmed 200 S.W.2d 624, 145 Tex. 571—Texas Emp. Ins. Ass'n v. Wright, Civ.App., 196 S.W.2d 837, error refused no reversible error—Merriman v. Lary, Civ.App., 196 S.W.2d 652—Safety Casualty Co. v. Teets, Civ.App., 195 S.W.2d 789, error refused no reversible error—Gulf, C. & S. F. Ry. Co. v. Bouchillon, Civ.App., 186 S.W.2d 1006, refused for want of merit—City of Fort Worth v. Lee, Civ.App., 182 S.W.2d 831, affirmed 186 S.W.2d 964, 143 Tex. 551, 159 A.L.R. 125—Maryland Casualty Co. v. Davis, Civ.App., 181 S.W.2d 107—Weldon v. Quait, Civ.App., 175 S.W.2d 969—Renchle v. John Hancock Mut. Life Ins. Co., Civ.App., 174 S.W.2d 87—Texas & N. O. R. Co. v. Wood, Civ.App., 166 S.W.2d 141—Texas Life Ins. Co. v. Goldberg, Civ.App., 165 S.W.2d 790, 167 S.W.2d 270—Richards v. Frick-Reid Supply Corp., Civ.App., 160 S.W.2d 232, error refused—Day v. Grayson County State Bank, Civ. App., 153 S.W.2d 599—Pittman v. Stephens, Civ.App., 153 S.W.2d 314, error refused—Ross v. Cook, Civ.

App., 151 S.W.2d 854, error refused—Felton v. Davenport, Civ. App., 148 S.W.2d 988, error dismissed, judgment correct—Southern Underwriters v. Blair, Civ.App., 144 S.W.2d 641—Federal Underwriters Exchange v. Hightower, Civ. App., 142 S.W.2d 963, error dismissed, judgment correct—Barnes v. Guthals, Civ.App., 137 S.W.2d 883—Duncan Coffee Co. v. Chiles, Civ.App., 136 S.W.2d 923—Federal Underwriters Exchange v. Bickham, Civ.App., 136 S.W.2d 880, affirmed 157 S.W.2d 356, 188 Tex. 128—Texas Employers Ins. Ass'n v. Watkins, Civ.App., 135 S.W.2d 296—Fort Worth & Denver City Ry. Co. v. Bozeman, Civ.App., 135 S.W.2d 275, error dismissed, judgment correct—Texas Employers Ins. Ass'n v. Ebers, Civ.App., 134 S.W.2d 797, error dismissed, judgment correct—Workmen's Loan & Finance Co. v. Dunn, Civ.App., 134 S.W.2d 370—Dallas Railway & Terminal Co. v. Stewart, Civ.App., 128 S.W.2d 443—Humble Oil & Refining Co. v. Owings, Civ.App., 128 S.W.2d 67—Owl Taxi Service v. Saluda, Civ.App., 122 S.W.2d 225, error dismissed—Larson v. Whitten, Civ.App., 111 S.W.2d 786, error dismissed—Hanover Fire Ins. Co. v. Slaughter, Civ.App., 111 S.W.2d 362—Forrest v. Faust, Civ. App., 110 S.W.2d 147, error dismissed—McClelland v. Mounger, Civ.App., 107 S.W.2d 901, error dismissed by agreement—Texas Employers Ins. Ass'n v. Arnold, Civ. App., 105 S.W.2d 686—Berley v. Bauer, Civ.App., 99 S.W.2d 641, error dismissed—Tarver v. Valance, Civ.App., 97 S.W.2d 748—Traders & General Ins. Co. v. Blancett, Civ.App., 96 S.W.2d 420, error dismissed—Allen v. Denk, Civ.App., 87 S.W.2d 303—Williams v. Rodockery, Civ.App., 84 S.W.2d 556—Maryland Casualty Co. v. Bryant, Civ. App., 84 S.W.2d 492, error dismissed—Hampton Co. v. Joyce, Civ. App., 80 S.W.2d 1066—Singer Iron & Steel Co. v. Republic Iron & Metal Co., Civ.App., 80 S.W.2d 1037



sentential to this rule that there be sufficient evidence to sustain the pleading which raises the issue.<sup>50</sup> A failure or refusal to submit such an issue, if prejudicial to one of the parties, constitutes error.<sup>51</sup> In determining whether an issue is supported by the pleadings the court must consider allegations in the pleadings of both parties,<sup>52</sup> and may supply omissions in the pleadings of one party by allegations in the pleadings of the other.<sup>53</sup> Where a case is submitted on special issues, any group of facts, sufficient to establish the cause of action or defense, based on proper pleadings and evidence should be submitted,<sup>54</sup> where a finding on the grouped facts would be determinative of the ultimate issue to which they relate, and would control the judgment to be entered as to that issue;<sup>55</sup> but this rule does not permit the framing of an issue requiring an answer to mere evidentiary facts tending to prove or disprove the ultimate issue to which they relate.<sup>56</sup>

The determination of what issues shall be submitted is left largely to the discretion of the trial court.<sup>57</sup> The special issues submitted should be such as will afford a fair opportunity to each party to develop his case,<sup>58</sup> make easy the elucidation of the facts to the jury,<sup>59</sup> and dispose of the matters in controversy without leaving anything to conjecture,<sup>60</sup> and to which the answers will be sufficient to support a judgment.<sup>61</sup> The court need not permit or require the jury to answer all the issues submitted.<sup>62</sup> It has been held that the court cannot submit a part of the facts to the jury, and, itself, determine the remainder without a waiver by the parties of a verdict by the jury;<sup>63</sup> it cannot ignore vital issues and then find such issues against the party pleading them.<sup>64</sup>

Special interrogatories are proper and should be submitted to the jury on request when, and only when, they relate to material issues of fact as made by the pleadings and supported by the

—Patterson v. Gulf, C. & S. F. Ry. Co., Civ.App., 77 S.W.2d 1073, error dismissed—Meinen v. Muesse, Civ.App., 72 S.W.2d 931—Karr v. Cockerham, Civ.App., 71 S.W.2d 905, error dismissed—Ferguson Seed Farms v. Fort Worth & D. S. F. Ry. Co., Civ.App., 69 S.W.2d 223—Dodds & Wedegartner v. Reed, Civ.App., 69 S.W.2d 166, error dismissed—Ullrich v. Schramm, Civ.App., 64 S.W.2d 1041—City Ice Delivery Co. v. Suggs, Civ.App., 60 S.W.2d 538, error refused.  
27 C.J. p 846 note 82—64 C.J. p 1122 notes 48, 49—71 C.J. p 1348 notes 54, 55.

#### Damages

(1) A cause of action or defense should not be submitted on the issue as to damages merely, where objection is made.—Gaskins v. Mitchell, 139 S.E. 435, 194 N.C. 275—64 C.J. p 1138 note 38.

(2) The issue as to damages should be left to embrace that subject alone.—Carter v. Gill, 84 S.E. 802, 168 N.C. 507, rehearing denied 89 S.E. 28, 171 N.C. 775.

(3) Under such circumstances a separate issue should be submitted as to the cause of action or defense.—Carter v. McGill, supra—64 C.J. p 1138 note 40.

(4) Special issues and interrogatories as to damages generally see infra § 534.

#### New matter alleged in answer

The rule that material matters alleged on the one side and denied on the other should be submitted in the form of issues to jury applies to new matter alleged in the answer.—Grif-

fin v. United Services Life Ins. Co., 36 S.E.2d 225, 225 N.C. 684.

#### Parties' consent

Where all of the issues in the case were not submitted to the jury for their special finding, but the parties consented that no other issues should be submitted to the jury, there was no error.—Life & Casualty Ins. Co. v. Robertson, 8 Tenn.App. 43.

50. Tex.—City of Houston v. Scanlan, 37 S.W.2d 718, 120 Tex. 264, 64 C.J. p 1122 note 50.

51. Kan.—American Cent. Ins. Co. v. Hathaway, 23 P. 428, 43 Kan. 399.

Tex.—Northwest Motors v. Mulrhead, Civ.App., 68 S.W.2d 242, 64 C.J. p 1123 note 51.

52. Tex.—Mattiza v. Lachs, Civ.App., 204 S.W.2d 848, 64 C.J. p 1123 note 52.

53. Tex.—Ormsby v. Ratcliffe, Com. App., 36 S.W.2d 1005.

54. Tex.—H. L. Butler & Son v. Walpole, Civ.App., 239 S.W.2d 453, refused no reversible error—Fort Worth Properties Corporation v. Bahan, Civ.App., 68 S.W.2d 228, 64 C.J. p 1123 note 54.

55. Tex.—Texas Livestock Marketing Ass'n v. Rogers, Civ.App., 244 S.W.2d 859, error refused no reversible error—Norris v. White, Civ. App., 154 S.W.2d 319, error refused—Anderson Bros. v. Parker Const. Co., Civ.App., 254 S.W. 642.

56. Tex.—Anderson Bros. v. Parker Const. Co., supra. Submission of evidentiary issue in general see infra § 532.

57. N.C.—Griffin v. United Services Life Ins. Co., 36 S.E.2d 225, 225 N.C. 684—Stanback v. Haywood, 184 S.E. 831, 209 N.C. 798—Gasque v. City of Asheville, 178 S.E. 848, 207 N.C. 821—Grier v. Weldon, 172 S. E. 200, 200 N.C. 575—Hunt v. Eure, 127 S.E. 593, 159 N.C. 482.

Tex.—Dallas Ry. & Terminal Co. v. Straughan, Civ.App., 254 S.W.2d 882—H. E. Butt Grocery Co. v. Johnson, Civ.App., 228 S.W.2d 501, refused no reversible error.

64 C.J. p 577 note 83 [a].

Power and duty of the court as to: Framing issues generally see infra § 541 et seq.

Submitting issues generally see supra § 548.

58. N.C.—Greene v. Greene, 9 S.E.2d 413, 217 N.C. 649, 64 C.J. p 1121 note 38.

Rights of parties as to different theories see supra § 530.

59. N.C.—Hunt v. Eure, 127 S.E. 593, 159 N.C. 482—In re Herring's Will, 67 S.E. 570, 152 N.C. 258.

60. N.C.—Perry v. White, 116 S.E. 84, 185 N.C. 79, 64 C.J. p 1121 note 40.

61. N.C.—McKenzie v. McKenzie, 69 S.E. 134, 153 N.C. 242, 64 C.J. p 1121 note 41.

62. Tex.—Western Indemnity Co. v. Corder, Civ.App., 249 S.W. 316, 64 C.J. p 1121 note 42.

63. U.S.—Hodges v. Easton, Wis., 1 S.Ct. 307, 106 U.S. 408, 27 L.Ed. 169, 64 C.J. p 1121 note 43.

64. Tex.—Donigan v. Polacek, Civ. App., 5 S.W.2d 792, 64 C.J. p 1121 note 44.

evidence.<sup>65</sup> In the absence of a statute or rule of procedure to the contrary,<sup>66</sup> the court is ordinarily not required to submit special interrogatories because of the mere asking,<sup>67</sup> but has some discretion in determining whether a proposed question should be submitted to the jury.<sup>68</sup> Whether a request for a special finding should be granted has been held to depend on the particular facts and not on any general rule to be applied blindly.<sup>69</sup> The interrogatories should be such as can be fairly and intelligently answered from the testimony,<sup>70</sup> and call for answers which may be controlling of the main issue,<sup>71</sup> or which would be decisive of the case or of some claim involved therein,<sup>72</sup> and

inconsistent with a general verdict that might be returned.<sup>73</sup> It is not essential that special findings shall cover all the points in issue,<sup>74</sup> or that each question submitted shall cover all the issues in the case.<sup>75</sup> Where a reasonable number of special questions fairly covering the vital questions raised by the pleadings are requested, the court should submit them all, and not select a few to the exclusion of the others.<sup>76</sup>

*Special issues or interrogatories unnecessary or improper in general.* A special issue or interrogatory should not be submitted to the jury where it presents an issue not raised by the pleadings or supported by the evidence;<sup>77</sup> where the special

65. Iowa.—Day v. Mt. Pleasant, 30 N.W. 853, 70 Iowa 193.  
Kan.—Gates v. Western Casualty & Sur. Co., 112 P.2d 106, 153 Kan. 469.  
Ohio.—Salley v. Wagner, 105 N.E.2d 878, 90 Ohio App. 295.  
R.I.—Connolly v. Seftman, 9 A.2d 866, 64 R.I. 29—Currie v. Nathanson, 190 A. 22, 57 R.I. 351.  
64 C.J. p 1127 notes 68, 69.

#### Workmen's compensation

Under a statute providing for submission to a jury of any question of fact on appeal from an award of the commission a party is entitled merely to have special issues submitted as to the ultimate facts so that the court may determine whether the finding of the commission shall be confirmed, reversed, or modified.—Schiller v. Baltimore & O. R. Co., 112 A. 272, 137 Md. 235.

#### At least ten special questions

A defendant has the right to request and have submitted at least ten special questions, if the questions requested are on any material controverted facts and if they are of the type that the jury can answer from the evidence.—Flinke v. Lemle, 252 P.2d 869, 173 Kan. 792—Collin v. DeCoursey Cream Co., 178 P.2d 690, 162 Kan. 683.

67. Iowa.—Johnson v. Denison, 173 N.W. 46, 186 Iowa 949.

68. Kan.—Flinke v. Lemle, 252 P.2d 869, 173 Kan. 792.

Pa.—Sebastianelli v. Prudential Ins. Co. of America, 12 A.2d 113, 337 Pa. 466—Feigenbaum v. Prudential Ins. Co. of America, 19 A.2d 542, 144 Pa.Super. 412.

69. R.I.—Connolly v. Seftman, 9 A.2d 866, 64 R.I. 29.

70. N.M.—Corpus Juris quoted in Larsen v. Bliss, 91 P.2d 811, 816, 43 N.M. 265.

64 C.J. p 1128 note 73.

71. Ill.—Goodman v. Chicago, B. & Q. R. Co., 7 N.E.2d 393, 239 Ill.App. 320, certiorari denied Chicago, B. & Q. R. Co. v. Goodman, 58 S.Ct. 610, 303 U.S. 640, 82 L.Ed. 1100.

Mich.—Peplinski v. Kleinke, 299 N.W. 818, 239 Mich. 86—Behrendt v. Wilcox, 269 N.W. 155, 277 Mich. 232.

N.M.—Corpus Juris quoted in Larsen v. Bliss, 91 P.2d 811, 816, 43 N.M. 265.

64 C.J. p 1128 note 74.

72. N.M.—Corpus Juris quoted in Larsen v. Bliss, 91 P.2d 811, 816, 43 N.M. 265.

64 C.J. p 1128 note 75.

73. Ill.—Tucker v. Kallal, 112 N.E.2d 731, 350 Ill.App. 325.

Ind.—Oaktown Telephone Co. v. Miller, 194 N.E. 741, 101 Ind.App. 108, followed in Bruceville Telephone Co. v. Miller, 194 N.E. 775, 101 Ind. App. 701, and Freelandville Telephone Co. v. Miller, 194 N.E. 775, 101 Ind.App. 701.

N.M.—Corpus Juris quoted in Larsen v. Bliss, 91 P.2d 811, 816, 43 N.M. 265.

Ohio.—Perry v. Baskey, 107 N.E.2d 328, 158 Ohio St. 151.

64 C.J. p 1128 note 76.

*Purpose of statute dealing with interrogatories is to elicit from the jury such special findings on particular questions of fact as will test the correctness of the general verdict if the general verdict is returned.*

—Bradley v. Mansfield Rapid Transit, 93 N.E.2d 672, 154 Ohio St. 164—Anderson v. S. E. Johnson Co., 80 N.E.2d 767, 150 Ohio St. 169—Bredenbeck v. Hollywood Cartage Co., 110 N.E.2d 152, 92 Ohio App. 265—Wheeling & L. E. Ry. Co. v. Hollywood Cartage Co., 93 N.E.2d 708, 86 Ohio App. 613—Hollywood Cartage Co. v. Wheeling & L. E. Ry. Co., 88 N.E.2d 278, 85 Ohio App. 182—Scott v. Cismadi, 74 N.E.2d 563, 80 Ohio App. 39.

74. Ill.—Sweeney v. Northwestern Mut. Life Ins. Co., 251 Ill.App. 1.

N.D.—Oakland v. Nelson, 149 N.W. 337, 28 N.D. 456.

75. Ill.—Sweeney v. Northwestern Mut. Life Ins. Co., 251 Ill.App. 1.  
64 C.J. p 1129 note 81.

76. Kan.—Coblentz v. Puttler, 125 P. 30, 87 Kan. 719, 42 L.R.A.N.S., 298.

77. Ind.—Oaktown Telephone Co. v. Miller, 194 N.E. 741, 101 Ind.App. 108, followed in Bruceville Telephone Co. v. Miller, 194 N.E. 775, 101 Ind.App. 701, and Freelandville Telephone Co. v. Miller, 194 N.E. 775, 101 Ind.App. 701.

Kan.—In re Erwin's Estate, 228 P.2d 739, 170 Kan. 728—Long v. Shafer, 188 P.2d 646, 164 Kan. 211.

Ky.—Huber & Huber v. Noe's Adm'x, 68 S.W.2d 406, 252 Ky. 779.

Mich.—Corfield v. Douglas Houghton Hotel Co., 37 N.W.2d 169, 324 Mich. 459—Hartley v. A. I. Rodd Lumber Co., 276 N.W. 712, 282 Mich. 652.

Minn.—Hall v. Gillis, 246 N.W. 466, 188 Minn. 20.

Neb.—State v. Cheyenne County, 60 N.W.2d 593, 157 Neb. 533—Meicher v. Murphy, 81 N.W.2d 411, 149 Neb. 541—In re Witte's Estate, 16 N.W.2d 203, 145 Neb. 295, rehearing denied 17 N.W.2d 477, 145 Neb. 295.

N.M.—Federal Land Bank of Wichita v. Beck, 121 P.2d 147, 46 N.M. 87.

N.C.—Cathay v. Shope, 78 S.E.2d 135, 238 N.C. 345—Lumber Mut. Casualty Ins. Co. of N. Y. v. Wells, 39 S.E.2d 741, 226 N.C. 574—L. P.

Ellis Motor Co. v. Belcher, 189 S. E. 708, 204 N.C. 769—Norfleet v. Hall, 169 S.E. 142, 204 N.C. 573.

Tex.—Erlisman v. Thompson, 167 S.W.2d 731, 140 Tex. 361—Collier v. Bankston-Hall Motors, Civ.App.

267 S.W.2d 898—First Nat. Bank of McGregor v. Collins, Civ.App.

266 S.W.2d 506, error refused no reversible error—Minchen v. First Nat. Bank of Alpine, Civ.App.

263 S.W.2d 601, error refused no reversible error—Alvey v. Goforth, Civ.App.

263 S.W.2d 313, reversed on other grounds Goforth v. Alvey, Sup.

271 S.W.2d 404—Union Central Life Ins. Co. v. Boulware, Civ. App.

238 S.W.2d 722—Thompson v. Gibbs, Civ.App.

238 S.W.2d 213, cause remanded 240 S.W.2d 287, 150 Tex.

315—Hill v. Davis, Civ.App.

issue or interrogatory is not relevant to the issues of fact raised by the pleadings and evidence;<sup>78</sup> where it seeks or is designed to submit matters not cognizable by the jury;<sup>79</sup> where it relates to im-

227 S.W.2d 381, refused no reversible error—Thomason v. Burch, Civ. App., 223 S.W.2d 320, refused no reversible error—Texas Associates v. Joe Bland Const. Co., Civ.App., 222 S.W.2d 413, refused no reversible error—Gulf, C. & S. F. Ry. Co. v. Jones, Civ.App., 221 S.W.2d 1010, error refused no reversible error—Miguez v. Miguez, Civ.App., 221 S.W.2d 293—Southwestern Greyhound lines v. Dickson, Civ.App., 219 S.W.2d 592—Chesshir v. Nail, Civ.App., 218 S.W.2d 248, refused no reversible error—Wichita Transit Co. v. Sanders, Civ.App., 214 S.W.2d 810—Green v. Likon, Civ. App., 190 S.W.2d 742, refused no reversible error—Attichery v. Henwood, Civ.App., 177 S.W.2d 95, error refused—Hamill & Smith v. Parr, Civ.App., 173 S.W.2d 725—Ellzey v. Allen, Civ.App., 172 S.W.2d 703, error dismissed—Phillips v. Stanolind Oil & Gas Co., Civ.App., 170 S.W.2d 802, error refused—Phillips Petroleum Co. v. Capps, Civ.App., 170 S.W.2d 522, error refused—Lone Star Gas Co. v. Lazara, Civ.App., 152 S.W.2d 824—Nunn v. Daly, Civ.App., 150 S.W.2d 834, error dismissed, judgment correct—Horne Motors v. Latimer, Civ.App., 148 S.W.2d 1000, error dismissed, judgment correct—Maryland Cas. Co. v. Abbott, Civ. App., 148 S.W.2d 465, error dismissed, judgment correct—Iloppkins v. Robertson, Civ.App., 138 S.W.2d 810, error refused—National Mut. Casualty Co. v. Lowery, Civ. App., 135 S.W.2d 1044, affirmed 148 S.W.2d 1089, 136 Tex. 188—Texas Employers Ins. Ass'n v. Pierson, Civ.App., 135 S.W.2d 550—Long v. Metcalf, Civ.App., 134 S.W.2d 485, error dismissed, judgment correct—Edmondson v. Carroll, Civ.App., 134 S.W.2d 378, error dismissed, judgment correct—Texas Fire & Casualty Underwriters v. Blair, Civ.App., 130 S.W.2d 409, error dismissed, judgment correct—Federal Underwriters Exchange v. Bullard, Civ.App., 128 S.W.2d 126—Sleeper v. Stratton, Civ.App., 122 S.W.2d 1091, error dismissed—Cawthon v. Cochell, Civ.App., 121 S.W.2d 414, error dismissed—Wells v. Ford, Civ.App., 118 S.W.2d 420, error dismissed—S. Blickman, Inc., v. Chilton, Civ.App., 114 S.W.2d 646—City of Winters v. Bethune, Civ. App., 111 S.W.2d 797, error dismissed—Alamo Downs, Inc., v. Briggs, Civ.App., 106 S.W.2d 733, error dismissed—Dorsey v. Temple, Civ.App., 103 S.W.2d 987, error dismissed—Texas Employers Ins. Ass'n v. Phelan, Civ.App., 103 S.W.2d 863—Johnson v. Hemsell, Civ.

App., 93 S.W.2d 476—Fort Worth & Denver City Ry. Co. v. Motley, Civ. App., 87 S.W.2d 551, error dismissed—Ley v. Patton, Civ.App., 81 S.W.2d 1087, error dismissed—Crawford v. Kennedy, Civ.App., 76 S.W.2d 543, error dismissed—Associated Indemnity Corporation v. Baker, Civ.App., 76 S.W.2d 153, error dismissed—Texas Employers' Ins. Ass'n v. Moyers, Civ.App., 69 S.W.2d 777, error dismissed—Conger v. Drissel, Civ.App., 69 S.W.2d 164—Gant v. Washington, Civ. App., 63 S.W.2d 732, error dismissed—Missouri-Kansas-Texas R. Co. of Texas v. Salaman, Civ.App., 58 S.W.2d 1026, error dismissed. Wis.—Northern Assur. Co. v. City of Milwaukee, 277 N.W. 149, 227 Wis. 124—Reed v. Madison, 56 N. W. 182, 85 Wis. 667.  
64 C.J. p 1130 notes 88, 90—71 C.J. p 1348 note 61.

# **Issue must be raised by both pleadings and evidence**

Tex.—Harvey v. Crockett Drilling Co., Civ.App., 242 S.W.2d 952—Thompson v. Gibbs, Civ.App., 238 S.W.2d 213, cause remanded 240 S.W.2d 287, 150 Tex. 315—Texas Indemnity Ins. Co. v. Desherlia, Civ. App., 237 S.W.2d 715—Safety Cas. Co. v. Teets, Civ.App., 195 S.W.2d 769, error refused no reversible error—Ellzey v. Allen, Civ.App., 172 S.W.2d 703, error dismissed—Wilkins v. Abercrombie, Civ.App., 162 S.W.2d 445—Martin v. Weaver, Civ. App., 161 S.W.2d 812—A. B. C. Storage & Moving Co. v. Herron, Civ. App., 138 S.W.2d 211, error dismissed, judgment correct—Pryor v. Le Sage, Civ.App., 133 S.W.2d 308, affirmed Le Sage v. Pryor, 154 S.W.2d 446, 137 Tex. 455—McCluskey v. Keathley, Civ.App., 111 S.W.2d 1199, error dismissed.

## **Question of law**

The question of whether there is any evidence to support a special issue is a question of law to be determined by the court, and in the absence of any evidence to support a finding the special issue should not be submitted.—Panhandle & S. F. Ry. Co. v. Wiggins, Tex.Civ.App., 161 S.W.2d 501, error refused.

## **Quantum of proof**

(1) The exact quantum of proof to raise or establish an issue is not capable of exact determination, but must be determined by human opinion guided and controlled by well-known legal principles.—Coats v. Stewart, Tex.Civ.App., 135 S.W.2d 1026, error dismissed, judgment correct.

(2) Quantum of proof required to entitle a plaintiff to have issue sub-

mitted to jury is proof of such facts and circumstances as, taken together with all reasonable inferences therefrom, constitute some evidence of probative force of their existence.—Ford v. Panhandle & Santa Fe Ry. Co., 252 S.W.2d 561, 151 Tex. 581.

(3) Testimony must be sufficient to warrant a reasonable belief in existence of fact inquired about, and evidence which creates merely a surmise is insufficient to require submission of an issue.—Texas City Terminal Ry. Co. v. McLeomore, Tex.Civ. App., 225 S.W.2d 1007, refused no reversible error.

(4) Evidence should be more than purely speculative and when its probative force is so weak that it only raises a mere surmise or suspicion, the evidence is not, in legal contemplation, "any evidence."—Federal Underwriters Exchange v. Bullard, Tex.Civ.App., 128 S.W.2d 126.

## **Evidence contrary to preponderance of evidence**

(1) If there is any evidence of probative force or value raising affirmative of a material issue in a trial, such evidence supports submission of a special issue thereon in charge of court, even though answer in affirmative thereto by jury will have to be set aside and a new trial granted because against the great weight and preponderance of other evidence thereon.—Alvey v. Goforth, Tex.Civ. App., 263 S.W.2d 313, reversed on other grounds Goforth v. Alvey, Sup., 271 S.W.2d 404.

(2) Refusal to submit issue was held not error, where affirmative finding would not have been supported by evidence.—Ley v. Patton, Tex.Civ. App., 81 S.W.2d 1087, error dismissed.

Excluded evidence held insufficient, prima facie, to require submission of issue.—Anchor v. Wichita County Water Improvement Dist. No. 2, 68 S.W.2d 657, 123 Tex. 105.

## **Withdrawn count**

An interrogatory which applied to entire complaint although first count had been withdrawn from jury's consideration was objectionable.—Radline Fuel Co. v. Rawlins, 36 N.E.2d 710, 377 Ill. 376.

78. Tex.—Lawson v. First Nat. Bank of Rotan, Civ.App., 150 S.W.2d 279, error dismissed, judgment correct—Lem Smith & Co. v. Sweatt, Civ. App., 72 S.W.2d 313.

Utah.—Beck v. Dutchman Coalition Mines Co., 269 P.2d 867, 2 Utah 2d 104.

64 C.J. p 1129 note 84—26 C.J. p 568 note 1.

79. Md.—Schiller v. Baltimore & O. R. Co., 112 A. 272, 137 Md. 235.

material or noncontrolling matters,<sup>80</sup> that is, where the determination one way or the other would not serve any useful or important purpose in deciding any issue in the case;<sup>81</sup> where, in case of an interrogatory, the answer thereto, if contrary to the general verdict, would not be conclusive;<sup>82</sup> and the answer thereto would not affect any judgment to be rendered;<sup>83</sup> or where it does not call for findings of fact which would determine any issue in the case.<sup>84</sup> It has been held that where the pleadings are defective and evidence is introduced on all matters in controversy, it is not error to submit questions which respond to issues made by the evidence.<sup>85</sup> A refusal is not made error by the fact that the question refused was approved by the attorneys for the opposing parties.<sup>86</sup>

The court may properly refuse to submit a special issue or interrogatory which is speculative<sup>87</sup>

or highly technical;<sup>88</sup> which calls for a mere matter of opinion, without asking as to the facts on which such opinion may rest,<sup>89</sup> or is based on a contract provision which is incapable of performance;<sup>90</sup> or which calls for a statement showing on which paragraph or count of the petition the verdict is based,<sup>91</sup> or for the mere cross-examination of the jury as to the mental processes by which they arrive at the conclusions of fact,<sup>92</sup> or to test the good faith of the jury.<sup>93</sup>

*Questions of law or mixed law and fact.* Issues or questions submitted to a jury must be confined to matters of fact, without embodying questions of law,<sup>94</sup> and, therefore, a special issue or interrogatory is improper, and may be refused submission, where it embodies or calls for a question or conclusion of law,<sup>95</sup> as where it requires the construc-

80. Ind.—McKinnon v. Parrill, 38 N. E.2d 1008, 111 Ind.App. 343.

Kan.—Alexander v. Wehkamp, 232 P. 2d 440, 171 Kan. 285.

Md.—Schiller v. Baltimore & O. R. Co., 112 A. 272, 137 Md. 235.

Mich.—Corfeld v. Douglas Houghton Hotel Co., 37 N.W.2d 169, 324 Mich. 459—Behrendt v. Wilcox, 269 N.W. 155, 27 Mich. 232.

N.C.—Handley Motor Co. v. Wood, 75 S.E.2d 312, 237 N.C. 318.

R.I.—Connolly v. Seftman, 9 A.2d 866, 64 R.I. 29—Currie v. Nathanson, 190 A. 22, 57 R.I. 351.

S.C.—Adams v. Adams, 66 S.E.2d 809, 220 S.C. 131.

Tex.—Liberty Mut. Ins. Co. v. Taylor, Civ.App., 244 S.W.2d 350—Sample v. Richardson, Civ.App., 195 S.W.2d 843, error refused no reversible error—San Augustine Independent School Dist. v. Freelove, Civ.App., 195 S.W.2d 175, error refused no reversible error—Phillips v. Stanolind Oil & Gas Co., Civ.App., 170 S.W.2d 802, error refused—Sinclair Refining Co. v. Costin, Civ.App., 116 S.W.2d 894—Holden v. Gibbons, Civ.App., 101 S.W.2d 837, error dismissed—Roemer v. Coffer, Civ.App., 98 S.W.2d 275.

W.Va.—Glikerson v. Baltimore & O. R. Co., 51 S.E.2d 767, 132 W.Va. 133—Bartlett v. Mitchell, 168 S.E. 662, 113 W.Va. 465.

64 C.J. p 1121 note 43, p 1128 note 78, p 1129 note 85—43 C.J. p 1316 note 16.

81. Tex.—H. E. Butt Grocery Co. v. Johnson, Civ.App., 226 S.W.2d 501, refused no reversible error.

64 C.J. p 1130 note 86.

82. W.Va.—Bartlett v. Mitchell, 168 S.E. 662, 113 W.Va. 465—Griffith v. American Coal Co. of Allegheny County, 88 S.E. 595, 78 W.Va. 34.

64 C.J. p 1128 note 78.

83. Kan.—Abell v. Atchison, T. & S. F. Ry. Co., 222 P. 91, 115 Kan. 132.

64 C.J. p 1121 note 44.

84. Iowa—Goben v. McGee, 196 N. W. 1005—Jones v. Ford, 134 N.W. 569, 154 Iowa 549, 38 L.R.A.N.S., 177.

64 C.J. p 1128 note 77.

85. Kan.—West v. Miller, 232 P. 869, 117 Kan. 665.

64 C.J. p 1131 note 91.

86. Ga.—Augusta Bonded Public Warehouse Co. v. Georgia R. Bank, 142 S.E. 559, 166 Ga. 105.

87. Tex.—St. Louis B. & M. Ry. Co. v. Watkins, Civ.App., 245 S.W. 794.

64 C.J. p 1131 note 92.

88. Kan.—Doty v. Crystal Ice & Fuel Co., 253 P. 611, 122 Kan. 653.

89. Mich.—Corfeld v. Douglas Houghton Hotel Co., 37 N.W.2d 169, 324 Mich. 459.

W.Va.—Bartlett v. Mitchell, 168 S.E. 662, 113 W.Va. 465.

64 C.J. p 1131 note 95.

90. Tex.—Totten v. Houghton, Civ. App., 2 S.W.2d 530.

91. Ill.—Wibel v. Illinois Cent. R. Co., 155 Ill.App. 349.

64 C.J. p 1131 note 97.

92. Kan.—Sluss v. Brown-Crummer Inv. Co., 53 P.2d 900, 143 Kan. 14, opinion adhered to 64 P.2d 23, 145 Kan. 12.

Ohio.—Village of Orrville v. Goch-nauer, 183 N.E. 391, 43 Ohio App. 422.

64 C.J. p 1132 note 98.

*Evidence accepted or rejected*

Submission of interrogatories to jury for purpose of furnishing basis for conclusion that jury gave credence to certain evidence and refused it to other evidence is not justified.

—Scott v. Cismadi, 74 N.E.2d 563, 80 Ohio App. 39.

93. Tex.—Kirby Lumber Co. v. Youngblood, Civ.App., 192 S.W. 1106.

64 C.J. p 1132 note 99.

94. Ill.—Smith v. Solger, 47 N.E.2d 356, 317 Ill.App. 656.

Ind.—McKinnon v. Parrill, 38 N.E.2d 1008, 111 Ind.App. 343.

Tex.—Franzetti v. Franzetti, Civ. App., 120 S.W.2d 123—Ramirez v. Salinas, Civ.App., 90 S.W.2d 891, error dismissed 117 S.W.2d 58, 131 Tex. 537.

64 C.J. p 1134 note 13.

95. Ill.—Smith v. Solger, 47 N.E.2d 356, 317 Ill.App. 656.

Ind.—Louisville & N. R. Co. v. Rev-lett, 65 N.E.2d 731, 224 Ind. 313—Drewrys Limited, U. S. A. v. Crippen, 44 N.E.2d 1006, 113 Ind.App. 120.

Kan.—Jones v. Kansas City, 66 P.2d 579, 145 Kan. 591.

Md.—Bethlehem Steel Co. v. Ziegenfuss, 49 A.2d 793, 187 Md. 283.

N.C.—Cheshire v. First Presbyterian Church of Raleigh, 33 S.E.2d 866, 225 N.C. 165.

Ohio.—Baltimore & O. R. Co. v. Mc-Teer, 9 N.E.2d 627, 55 Ohio App. 217.

R.I.—Boettger v. Mauran, 12 A.2d 285, 64 R.I. 340.

Tex.—Cole v. Waite, 246 S.W.2d 849, 151 Tex. 175—Benoit v. Wilson, Civ.App., 258 S.W.2d 134, error refused no reversible error—City of Dallas v. Rosenthal, Civ.App., 239 S.W.2d 636, refused no reversible error—Newton v. Gardner, Civ.App., 225 S.W.2d 598, refused no reversible error—Amend v. Sealy & Smith Foundation for John Sealy Hospital, Civ.App., 219 S.W.2d 549, refused no reversible error—Texas Emp. Ins. Ass'n v. Tanner, Civ.

tion or interpretation of a written instrument;<sup>96</sup> or where it involves mixed questions of law and fact,<sup>97</sup> except as issues of law and fact are necessarily intermingled.<sup>98</sup>

### b. Application of Rules

The rules with respect to the submission of special issues and interrogatories have been applied in a great

variety of actions and with respect to many different issues.

The rules discussed supra subdivision a of this section and infra §§ 532, 533, with respect to the submission of special issues and interrogatories, have been applied in a great variety of actions and with respect to many different issues.<sup>99</sup> In an ac-

App., 218 S.W.2d 277, refused no reversible error—Grobosky v. Russell, Civ.App., 216 S.W.2d 1005, refused no reversible error—Woodson v. Floyd, Civ.App., 195 S.W.2d 601, error refused no reversible error—Baker Hotel of Dallas v. Rogers, Civ.App., 157 S.W.2d 940, error refused 160 S.W.2d 522, 138 Tex. 398—Cartledge v. Billalba, Civ.App., 154 S.W.2d 219, error refused—Burton-Lingo Co. v. Morton, Civ.App., 126 S.W.2d 727, affirmed Morton v. Burton-Lingo Co., 150 S.W.2d 239, 136 Tex. 263—Myers v. Crenshaw, Civ.App., 116 S.W.2d 1125, affirmed 137 S.W.2d 7, 134 Tex. 500—Texas & N. O. R. Co. v. Dingfelder & Balish, Civ.App., 114 S.W.2d 656, affirmed 133 S.W.2d 967, 134 Tex. 156—Royal Oak State Co. v. Groce, Civ.App., 113 S.W.2d 315, error dismissed—Houston Printing Co. v. Hunter, Civ.App., 105 S.W.2d 312, error dismissed, affirmed 105 S.W.2d 1043, 129 Tex. 652—Yuclek v. Taylor, Civ.App., 63 S.W.2d 893—Herd v. Wade, Civ.App., 63 S.W.2d 253, error refused—Indemnity Ins. Co. of North America v. Garsee, Civ.App., 54 S.W.2d 817.

64 C.J. p 1135 note 14.

**Questions held not questions of law** Tex.—Amend v. Sealy & Smith Foundation for John Sealy Hospital, Civ. App., 219 S.W.2d 549, refused no reversible error—Safety Cas. Co. v. Link, Civ.App., 209 S.W.2d 391, refused no reversible error—Erming v. Daniel, Civ.App., 185 S.W.2d 148, refused for want of merit—Richards v. Frick-Reid Supply Corp., Civ.App., 160 S.W.2d 282, error refused—Ferguson v. Mellinbrook, Civ.App., 134 S.W.2d 680, error dismissed, judgment correct—East Texas Oil Refining Co. v. Mabae Consol. Corp., Civ.App., 103 S.W.2d 795, appeal dismissed 127 S.W.2d 445, 133 Tex. 300—Home Ins. Co. of New York v. Young, Civ. App., 97 S.W.2d 360, error dismissed—Stillman v. Hirsch, Civ.App., 84 S.W.2d 501, affirmed 99 S.W.2d 270, 125 Tex. 359—Singer Iron & Steel Co. v. Republic Iron & Metal Co., Civ.App., 80 S.W.2d 1087—World Oil Co. v. Hicks, Civ.App., 75 S.W.2d 905, certified questions answered, 103 S.W.2d 962, 129 Tex. 297.

64 C.J. p 1135 note 14 [b].

96. Tex.—Schoenberg v. Forrest,

Civ.App., 228 S.W.2d 556, refused no reversible error—Tucker v. Dougherty Roofing Co., Civ.App., 137 S.W.2d 884, error dismissed, judgment correct—Supreme Forest Woodmen Circle v. Bryant, Civ. App., 109 S.W.2d 1091.

64 C.J. p 1135 note 15.

97. U.S.—Carpenter v. Baltimore & O. R. Co., C.C.A.Ohio, 109 F.2d 375. Ind.—Bence v. Denbo, 183 N.E. 326, 98 Ind.App. 52.

Iowa.—Corpus Juris cited in Ipsen v. Ruess, Iowa, 41 N.W.2d 658, 663, 241 Iowa 730.

Ohio.—Salley v. Wagner, 105 N.E.2d 378, 90 Ohio App. 285.

Tex.—Fowler v. Huhta, 161 S.W.2d 478, 138 Tex. 636—Coursen v. Goodloe, Civ.App., 267 S.W.2d 259—Schoenberg v. Forrest, Civ.App., 228 S.W.2d 556, refused no reversible error—Duvall v. Eck, Civ.App., 226 S.W.2d 650—Walton v. Smulcer, Civ.App., 222 S.W.2d 918—Amend v. Sealy & Smith Foundation for John Sealy Hospital, Civ.App., 219 S.W.2d 549, refused no reversible error—Jones v. Winter, Civ.App., 215 S.W.2d 654, refused no reversible error—National Life & Accident Ins. Co. v. Hanna, Civ.App., 195 S.W.2d 733, error refused no reversible error—Myers v. Minnick, Civ.App., 187 S.W.2d 941—Smith County Oil & Gas Co. v. Humble Oil & Refining Co., Civ.App., 112 S.W.2d 220, error dismissed—Dallas County Fresh Water Supply Dist. No. 7 v. Mercantile Securities Corp., Civ. App., 110 S.W.2d 187, error dismissed—Texas Employers Ins. Ass'n v. Johnson, Civ.App., 89 S.W.2d 1112, error dismissed—Smith v. Petroleum Casualty Co., Civ.App., 72 S.W.2d 640, error refused—Commercial Union Assur. Co., Limited, of London, England, v. Everidge, Civ. App., 72 S.W.2d 311—First State Bank of Seminole v. Dillard, Civ. App., 71 S.W.2d 407—Reliance Ins. Co. of Philadelphia v. Nichols, Civ. App., 56 S.W.2d 479—Continental Supply Co. v. Forrest E. Gilmore Co. of Texas, Civ.App., 55 S.W.2d 422, error dismissed.

64 C.J. p 1135 note 16.

**Legal meaning of term** If a word or phrase in special interrogatory calls on the jury to use only the common use or dictionary definition to ascertain its meaning, the interrogatory asks for a mere

finding of fact, but if the questionable word or phrase requires from the court an instruction concerning its legal meaning, the interrogatory asks for a conclusion of mixed law and fact, and the interrogatory is improper.—Tucker Freight Lines v. Gross, 33 N.E.2d 553, 109 Ind.App. 454.

### Issues held not mixed question

N.C.—Thompson v. Davis, 28 S.E.2d 556, 223 N.C. 792.

Tex.—S. H. Kress & Co. v. Selph, Civ.App., 250 S.W.2d 833, error refused no reversible error—Werner v. Brehm, Civ.App., 216 S.W.2d 991, refused no reversible error—Wells v. Ward, Civ.App., 207 S.W.2d 698, refused no reversible error—Texas & P. Ry. Co. v. Duncan, Civ.App., 193 S.W.2d 431—Texas & N. O. R. Co. v. Wood, Civ.App., 166 S.W.2d 141—Germann v. Kaufmann's Inc., Civ.App., 155 S.W.2d 969, error refused—Federal Underwriters Exchange v. McDaniel, Civ.App., 140 S.W.2d 975, error dismissed judgment correct—City of Waco v. Fenner, Civ.App., 132 S.W.2d 636, error refused—McFadden Publications v. Wilson, Civ.App., 121 S.W.2d 430, error refused—Karr v. Cockerham, Civ.App., 107 S.W.2d 719, error dismissed—Traders & General Ins. Co. v. Rhodabarger, Civ.App., 93 S.W.2d 1180, error dismissed—Desdemona Gasoline Co. of Texas v. Garrett, Civ.App., 90 S.W.2d 636, error dismissed.

64 C.J. p 1135 note 16 [a].

98. Ohio.—Krull v. Industrial Commission, 39 N.E.2d 883, 68 Ohio App. 203.

64 C.J. p 1135 note 17.

99. Md.—Schleisner Co. v. Birchett, 95 A.2d 494, 202 Md. 360.

N.C.—Wheeler v. Wheeler, 80 S.E.2d 755, 239 N.C. 646—Caddell v. Caddell, 73 S.E.2d 923, 236 N.C. 686—McCullen v. Durham, 50 S.E.2d 511, 229 N.C. 418—Edwards v. Whitehead, 199 S.E. 388, 214 N.C. 838.

Ohio.—Bradley v. Mansfield Rapid Transit, 93 N.E.2d 672, 154 Ohio St. 154.

Tex.—Eaton v. R. B. George Investments, Inc., 260 S.W.2d 587—Socony-Vacuum Oil Co. v. Aderhold, 240 S.W.2d 751, 150 Tex. 292—City of Houston v. Lurie, 224 S.W.2d 871, 148 Tex. 391, 14 A.L.R.2d 61—American Sur. Co. of New York v. Fenner, 135 S.W.2d 256, 133 Tex.

tion for negligence it is proper to request the jury to find what defendant's acts of negligence were,<sup>1</sup> particularly where he is charged with more than one specific act of negligence, either of which, if proved,

would sustain a recovery;<sup>2</sup> and it has been held that, where specific acts of negligence are pleaded, the issue as to negligence must be confined to such acts.<sup>3</sup>

27—Dreeben v. Sidor, Civ.App., 254 S.W.2d 908, refused no reversible error—Western Wood Products Co. v. Box, Civ.App., 248 S.W.2d 974—Grimes v. Bosque County, Civ.App., 240 S.W.2d 511, refused no reversible error—Salley v. Black, Sivalis & Bryson, Civ.App., 225 S.W.2d 426, error dismissed—Burlington-Rock Island R. Co. v. Newsom, Civ.App., 219 S.W.2d 129—Superior Ins. Co. v. Owens, Civ.App., 218 S.W.2d 517—Greenspun v. Greenspun, Civ.App., 211 S.W.2d 977, refused no reversible error—Rosenthal v. City of Dallas, Civ.App., 211 S.W.2d 279, refused no reversible error—Lone Star Bldg. & Loan Ass'n v. Larcade, Civ.App., 211 S.W.2d 257, refused no reversible error—Hargrove v. Koepke, Civ.App., 210 S.W.2d 434—Barnett v. Barnett, Civ.App., 206 S.W.2d 273—Zurich General Accident & Liability Ins. Co. v. Johnson, Civ.App., 202 S.W.2d 258, affirmed 205 S.W.2d 353, 146 Tex. 232—Kolacny v. Felech, Civ.App., 201 S.W.2d 257—Patton v. Carter, Civ.App., 197 S.W.2d 168—Rawls v. Holt, Civ.App., 193 S.W.2d 536, error refused no reversible error—Milburn v. Athans, Civ.App., 190 S.W.2d 388, error dismissed—Rains v. Mercantile Nat. Bank at Dallas, Civ.App., 188 S.W.2d 798, affirmed 191 S.W.2d 850, 144 Tex. 466—Super-Colo Southwest Co. v. Green & Romans, Civ.App., 185 S.W.2d 749—National Life & Accident Ins. Co. v. Ellis, Civ.App., 185 S.W.2d 122, refused for want of merit—Phillips v. Stanolind Oil & Gas Co., Civ.App., 170 S.W.2d 802, error refused—Cooper v. Cooper, Civ.App., 168 S.W.2d 686—Langley v. Norris, Civ.App., 167 S.W.2d 603, affirmed 173 S.W.2d 454, 141 Tex. 405, 148 A.L.R. 555—McWhorter v. Humphreys, Civ.App., 161 S.W.2d 304, error refused—Texas Elec. Service Co. v. Moxley, Civ.App., 157 S.W.2d 726—Browning v. Graves, Civ.App., 152 S.W.2d 515, error refused—Traders & General Ins. Co. v. Richardson, Civ.App., 144 S.W.2d 420, error dismissed, judgment correct—Sloan v. Newton, Civ.App., 134 S.W.2d 697—Petroleum Casualty Co. v. Schooley, Civ.App., 131 S.W.2d 291, error dismissed, judgment correct—Texas Fire & Casualty Underwriters v. Blair, Civ.App., 180 S.W.2d 409, error dismissed, judgment correct—Federal Underwriters Exchange v. Arnold, Civ.App., 127 S.W.2d 972, error dismissed, judgment correct—Jefferson Standard Life Ins. Co. v. Curtman, Civ.App., 127 S.W.2d 567, er-

ror dismissed—Jones-O'Brien, Inc. v. Loyd, Civ.App., 125 S.W.2d 684, error dismissed—Allcorn v. Fort Worth & R. G. Ry. Co., Civ.App., 122 S.W.2d 341, error refused—Gulf, C. & S. F. Ry. Co. v. Irick, Civ.App., 116 S.W.2d 1099, error dismissed—Cross v. White, Civ.App., 112 S.W.2d 502, affirmed 132 S.W.2d 580, 134 Tex. 91—Hanover Fire Ins. Co. v. Slaughter, Civ.App., 111 S.W.2d 362—Texas Co. v. Wyllie, Civ.App., 105 S.W.2d 438, error dismissed—Holden v. Gibbons, Civ.App., 101 S.W.2d 837, error dismissed—Union Central Life Ins. Co. v. Williams, Civ.App., 99 S.W.2d 319—Goetze v. Baumgart, Civ.App., 92 S.W.2d 1047—Shambaugh v. Anderson, Civ.App., 92 S.W.2d 530, error dismissed—Traders & General Ins. Co. v. Copeland, Civ.App., 84 S.W.2d 813—Dow v. American Liberty Oil Co., Civ.App., 83 S.W.2d 401, error refused—Texas Employers Ins. Ass'n v. Van Pelt, Civ.App., 83 S.W.2d 392—Baylor University v. Chester Sav. Bank, Civ.App., 82 S.W.2d 738, error refused—Deckner v. Barrett, Civ.App., 81 S.W.2d 719, error dismissed—Wright v. State, Civ.App., 80 S.W.2d 1015, error dismissed—Vilbig Bros. v. City of Dallas, Civ.App., 80 S.W.2d 784, affirmed 91 S.W.2d 336, 127 Tex. 563, rehearing denied 96 S.W.2d 229, 127 Tex. 563—Owensby v. Morris, Civ.App., 79 S.W.2d 934—Associated Indemnity Corporation v. Baker, Civ.App., 76 S.W.2d 163, error dismissed—Benge v. Foster, Civ.App., 74 S.W.2d 542, error refused—Texas Employers' Ins. Ass'n v. Jones, Civ.App., 70 S.W.2d 1014, error dismissed—Texas Employers' Ins. Ass'n v. Eaton, Civ.App., 69 S.W.2d 569, error dismissed—J. L. Brooks Undertaking Co. v. West, Civ.App., 67 S.W.2d 1068—McClung Const. Co. v. Muncy, Civ.App., 65 S.W.2d 786, error dismissed—City of Abilene v. Luhn, Civ.App., 65 S.W.2d 370, error dismissed—Rincon v. Berg Co., Civ.App., 60 S.W.2d 811, error dismissed—Jenkins v. Vaughn, Civ.App., 60 S.W.2d 532. Wis.—Culver v. Webb, 12 N.W.2d 731, 244 Wis. 478—Paulsen v. Gundersen, 260 N.W. 448, 218 Wis. 578—Palucak v. Jones, 245 N.W. 656, 209 Wis. 640.

64 C.J. p 1123 note 57.

1. Kan.—Parker v. Missouri Pac. Ry. Co., 132 P. 156, 89 Kan. 573.

64 C.J. p 1128 note 71.

2. Ohio.—Masters v. New York Cent. R. Co., 70 N.E.2d 898, 147 Ohio St.

293, certiorari denied 67 S.Ct. 1519, 331 U.S. 836, 91 L.Ed. 1848, rehearing denied 68 S.Ct. 33, 332 U.S. 786, 92 L.Ed. 369—Davison v. Flowers, 174 N.E. 137, 123 Ohio St. 89.

3. Tex.—Erisman v. Thompson, 187 S.W.2d 731, 140 Tex. 361—Fort Worth & Denver City Ry. Co. v. Burton, Civ.App., 158 S.W.2d 601, error dismissed—Panhandle & S. F. Ry. Co. v. Villarreal, Civ.App., 153 S.W.2d 350—Texas Fire & Casualty Underwriters v. Blair, Civ.App., 130 S.W.2d 409, error dismissed, judgment correct—S. Blickman, Inc. v. Chilton, Civ.App., 114 S.W.2d 646—Texas Utilities Co. v. West, Civ.App., 95 S.W.2d 717, error dismissed.

#### General and specific allegations

(1) Ordinarily, general averments of negligence or contributory negligence are limited and controlled by various acts specified, and special issues should be restricted to such specific acts of negligence alleged and proved.—Clary v. Morgan Motor Co., Tex.Civ.App., 246 S.W.2d 936.

(2) Usually, it is not proper to submit issues as to negligence in general terms, especially over the objection of the opposite party, in cases where specific acts of negligence are pleaded and relied on.—Clary v. Morgan Motor Co., supra—Fort Worth & Denver City Ry. Co. v. Burton, Tex.Civ.App., 158 S.W.2d 601, error dismissed.

#### Contributory negligence

(1) Issues must be confined to the particular contributory negligence pleaded.—Clowe & Cowan v. Morgan, Tex.Civ.App., 153 S.W.2d 863, error refused.

(2) A general plea of contributory negligence not excepted to is sufficient to warrant submission of issue either generally or in such respective groups of issues as may be made by evidence, if submission is requested, and this rule is not changed or abrogated by rules of civil procedure requiring defense of contributory negligence to be set forth affirmatively by party seeking to rely thereon.—Coleman v. Texas & Pac. Ry. Co., Tex.Civ.App., 241 S.W.2d 308, error refused.

#### Specific acts raised by pleadings and evidence

Special issues on either negligence or contributory negligence should be restricted to the specific acts of negligence raised by the pleadings and evidence.—St. Louis Southwestern R.

Particular special issues or interrogatories have been held to be properly submitted or erroneously refused under the facts and pleadings of the particular case in actions involving contracts,<sup>4</sup> as well as

insurance contracts,<sup>5</sup> and employment contracts and claims for personal services;<sup>6</sup> actions involving brokers and claims for commissions;<sup>7</sup> actions involving sales,<sup>8</sup> trusts,<sup>9</sup> actions involving deeds,<sup>10</sup>

Co. of Texas v. Daniel, Tex.Civ.App., 151 S.W.2d 877.

4. N.C.—Allison v. Steele, 17 S.E.2d 339, 1220 N.C. 318.

Tex.—Cross v. White, 132 S.W.2d 580, 134 Tex. 91—Copeland v. Bennett, Civ.App., 243 S.W.2d 264—Manzer v. Barnes, Civ.App., 213 S.W.2d 464, motion granted 216 S.W.2d 1015—Gourley v. Iverson Tool Co., Civ.App., 188 S.W.2d 728, refused for want of merit—Bute v. Holland, Civ.App., 155 S.W.2d 69, error refused—Alexander v. Stock Yards Nat. Bank of Fort Worth, Civ.App., 154 S.W.2d 997, error refused—Louisiana Progress Oil v. McDaniel, Civ.App., 154 S.W.2d 965, error refused—Peters Bros. v. Charles F. Williams Co., Civ.App., 154 S.W.2d 667—Cage v. Nueces County, Civ.App., 149 S.W.2d 190, error dismissed—Marvin Drug Co. v. Couch, Civ.App., 134 S.W.2d 356, error dismissed, judgment correct—Strack v. Strong, Civ.App., 114 S.W.2d 313, error dismissed—Gifford-Hill & Co. v. Jones, Civ.App., 99 S.W.2d 656—Byrne v. Brown, Civ.App., 94 S.W.2d 199—Chambers v. Riggs, Civ.App., 86 S.W.2d 518, error dismissed—Dunning v. Badger, Civ.App., 74 S.W.2d 151, error dismissed—Parks v. Hines, Civ.App., 68 S.W.2d 364, affirmed Hines v. Parks, 96 S.W.2d 970, 128 Tex. 289—National Newspaper Enterprises v. Chitwood, Civ.App., 68 S.W.2d 264, error dismissed—Clevenger v. Carl B. King Drilling Co., Civ.App., 62 S.W.2d 1001, error dismissed—Wis.—Ernst v. Ernst, 49 N.W.2d 427, 259 Wis. 495.

64 C.J. p 1123 note 57 [a].

5. Mo.—Huddleston v. Manhattan Fire & Marine Ins. Co., 148 S.W.2d 74, 235 Mo.App. 776.

N.C.—Davis v. St. Paul Mercury & Indem. Co., 40 S.E.2d 609, 227 N.C. 80, 169 A.L.R. 220—Hicks v. Home Sec. Life Ins. Co., 39 S.E.2d 914, 226 N.C. 614—Abrams v. Metropolitan Life Ins. Co., 27 S.E.2d 148, 223 N.C. 500, rehearing denied 29 S.E.2d 130, 224 N.C. 1.

Pa.—First Nat. Bank v. Newark Fire Ins. Co., 180 A. 163, 118 Pa.Super. 582.

Tex.—Alamo Cas. Co. v. Stephens, Civ.App., 259 S.W.2d 729, error refused no reversible error—American Casualty & Life Co. v. Mason, Civ.App., 244 S.W.2d 691, error refused no reversible error—Lincoln County Mut. Fire Ins. Co. v. Smith, Civ.App., 232 S.W.2d 637, refused no reversible error—St. Louis Fire & Marine Ins. Co. v. Silverman, Civ.

App., 221 S.W.2d 862—American Nat. Ins. Co. v. Fox, Civ.App., 184 S.W.2d 937, error refused—Hanover Fire Ins. Co. v. Glenn, Civ.App., 153 S.W.2d 993—Jackson v. Connecticut General Life Ins. Co., Civ.App., 131 S.W.2d 177, error dismissed, judgment correct—Aetna Casualty & Surety Co. v. Tobolowsky, Civ.App., 120 S.W.2d 460, error dismissed—Gulf States Security Life Ins. Co. v. Edwards, Civ.App., 109 S.W.2d 1125, error dismissed—Supreme Forest Woodmen Circle v. Bryant, Civ.App., 109 S.W.2d 1091—Southern Underwriters v. Shipman, Civ.App., 97 S.W.2d 370, error dismissed—American Nat. Ins. Co. v. Briggs, Civ.App., 90 S.W.2d 602, error dismissed—Metropolitan Life Ins. Co. v. Pribble, Civ.App., 82 S.W.2d 414—Massachusetts Bonding & Insurance Co. v. Cannon, Civ.App., 81 S.W.2d 293—Metropolitan Life Ins. Co. v. Funderburk, Civ.App., 81 S.W.2d 132, error dismissed—Murray Co. v. Gilbert, Civ.App., 80 S.W.2d 805—Straka v. Farmers' Mut. Protective Ass'n of Texas, Civ.App., 79 S.W.2d 883, error refused—Washington Nat. Ins. Co. v. Bumbrey, Civ.App., 78 S.W.2d 667—St. Paul Fire & Marine Ins. Co. v. Westmoreland, Civ.App., 77 S.W.2d 265, affirmed 105 S.W.2d 203, 130 Tex. 65—Dorsey Life Ass'n v. Sitton, Civ.App., 76 S.W.2d 550—Aetna Casualty & Surety Co. v. Tobolowsky, Civ.App., 73 S.W.2d 556, error dismissed—J. L. Brooks Undertaking Co. v. West, Civ.App., 67 S.W.2d 1066—Phoenix Ins. Co. of London v. Stobaugh, Civ.App., 62 S.W.2d 678, modified on other grounds Phoenix Assur. Co. of London v. Stobaugh, 94 S.W.2d 428, 127 Tex. 308—Transcontinental Ins. Co. of New York v. Frazier, Civ.App., 60 S.W.2d 268—Home Ins. Co. v. Ketchey, Civ.App., 45 S.W.2d 350.

Wis.—Swenson v. Kansas City Life Ins. Co., 17 N.W.2d 584, 246 Wis. 432—Schmidt v. Prudential Ins. Co. of America, 292 N.W. 447, 235 Wis. 503.

26 C.J. p 567 note 96—33 C.J. p 142 note 67—37 C.J. p 655 note 2.

6. Ind.—Meeker v. Decker, 10 N.E.2d 416, 104 Ind.App. 594.

Iowa.—In re McKeon's Estate, 289 N.W. 915, 227 Iowa 1050.

Tex.—Elliott-Greer Office Supply Co. v. Martin, 86 S.W.2d 635, 126 Tex. 112—Montgomery v. Gay, Civ.App., 222 S.W.2d 922, error dismissed—Cradlock v. McAfee, Civ.App., 151 S.W.2d 936—Felton v. Davenport, Civ.App., 148 S.W.2d 98, error dis-

missed, judgment correct—Parks v. Kelley, Civ.App., 147 S.W.2d 821—Peachtree Oil Co. v. Shorter, Civ.App., 129 S.W.2d 391—Babb v. Mill-Po Clothes, Civ.App., 117 S.W.2d 873—City of Kirbyville v. Thackwell, Civ.App., 108 S.W.2d 226, error dismissed—Dunning v. Badger, Civ.App., 74 S.W.2d 151, error dismissed—Meinen v. Muesse, Civ.App., 72 S.W.2d 931—Panhandle & S. F. Ry. Co. v. Wilson, Civ.App., 55 S.W.2d 216.

7. Kan.—Bailey v. McLeod, 56 P.2d 460, 143 Kan. 638.

Tex.—Latham v. Coleman, Civ.App., 134 S.W.2d 703—Phoenix Refining Co. v. Muller, Civ.App., 109 S.W.2d 766, error dismissed—Adams v. Stanley, Civ.App., 83 S.W.2d 729, error dismissed—Beck v. Beck, Civ.App., 77 S.W.2d 910.

8. N.C.—Stokes v. Edwards, 52 S.E.2d 797, 280 N.C. 306.

Tex.—Western Auto Supply Co. v. Clark, Civ.App., 253 S.W.2d 929—Richards v. Frick-Reid Supply Corporation, Civ.App., 160 S.W.2d 282, error refused—Holt v. Manley, Civ.App., 146 S.W.2d 773—C. V. Hill & Co. v. Frick, Civ.App., 135 S.W.2d 582, error dismissed, judgment correct—Texas Creosoting Co. v. Sims, Civ.App., 81 S.W.2d 556, error refused—Scott v. McWilliams, Civ.App., 60 S.W.2d 491, error dismissed.

Wis.—F. H. Bresler Co. v. Bauer, 248 N.W. 788, 212 Wis. 386, rehearing denied 250 N.W. 8, 212 Wis. 386.

9. N.C.—Wilmington Furniture Co. v. Cole, 178 S.E. 579, 207 N.C. 840, 847.

Tex.—Brown v. O'Meara, Civ.App., 206 S.W.2d 122, error refused no reversible error—Posey v. Varnell, Civ.App., 60 S.W.2d 1067, error dismissed.

10. Ga.—Wood v. Claxton, 35 S.E.2d 455, 199 Ga. 809—Georgia Chemical Works v. Malcolm, 197 S.E. 763, 186 Ga. 275.

Tex.—Eversole v. Theimer, Civ.App., 256 S.W.2d 927—Jacobs v. Chandler, Civ.App., 248 S.W.2d 825—Asberry v. Fields, Civ.App., 242 S.W.2d 241, error refused—Jinks v. Whitaker, Civ.App., 195 S.W.2d 814, error refused no reversible error 199 S.W.2d 85, 145 Tex. 318—W. T. Rawleigh Co. v. Cowan, Civ.App., 152 S.W.2d 796—Tipton v. Tipton, Civ.App., 140 S.W.2d 865, error dismissed, judgment correct—Clements v. Williams, Civ.App., 128 S.W.2d 103—Loving County v. Higginbotham, Civ.App., 115 S.W.2d 1110, error dismissed—Lott v. Van

as well as actions involving wills,<sup>11</sup> notes,<sup>12</sup> mortgages and deeds of trust,<sup>13</sup> and leases;<sup>14</sup> and actions involving adoption,<sup>15</sup> attorneys' fees,<sup>16</sup> partnerships,<sup>17</sup> agency,<sup>18</sup> trade unions,<sup>19</sup> assignments,<sup>20</sup> royalties,<sup>21</sup> easements,<sup>22</sup> homesteads,<sup>23</sup> and fraudulent conveyances.<sup>24</sup>

Particular special issues and interrogatories have also been held proper or erroneously refused in actions for assault,<sup>25</sup> conversion,<sup>26</sup> false imprisonment,<sup>27</sup> libel and slander,<sup>28</sup> malicious prosecution,<sup>29</sup> replevin,<sup>30</sup> trespass to try title,<sup>31</sup> trover,<sup>32</sup> unlawful arrest,<sup>33</sup> workmen's compensation,<sup>34</sup> and wrongful

- Zandt, Civ.App., 107 S.W.2d 761—Keels v. Metzler, Civ.App., 94 S.W.2d 799, error dismissed—Parks v. Hines, Civ.App., 68 S.W.2d 364, affirmed Hines v. Parks, 96 S.W.2d 970, 128 Tex. 289—Crawford v. Kennedy, Civ.App., 76 S.W.2d 543, error dismissed.
11. Tex.—Pullen v. Russ, Civ.App., 226 S.W.2d 876, refused no reversible error.
12. N.C.—Grier v. Weldon, 172 S.E. 200, 205 N.C. 575.
- Tex.—Anglin v. Cisco Mortg. Loan Co., 141 S.W.2d 935, 135 Tex. 188—Western Auto Supply Co. v. Clark, Civ.App., 253 S.W.2d 929—Cartwright v. Platt, Civ.App., 244 S.W.2d 523—Somerville v. Smith, Civ.App., 200 S.W.2d 242—Corona Petroleum Co. v. Jameson, Civ.App., 146 S.W.2d 512, error dismissed, judgment correct—First State Bank of Denton v. Smoot-Curtis Co., Civ.App., 121 S.W.2d 667, error dismissed—Bledsoe v. Pritchard, Civ.App., 107 S.W.2d 742—First Nat. Bank v. Phillips, Civ.App., 101 S.W.2d 319, error dismissed—U. S. Investment Corporation v. Chandler, Civ.App., 80 S.W.2d 1029, error refused—First Nat. Bank v. Crocker, Civ.App., 80 S.W.2d 442—Griffin v. Cawthon, Civ.App., 77 S.W.2d 700, error refused—Wischkaemper v. Massey, Civ.App., 70 S.W.2d 771—Miers v. Del Rio Bank & Trust Co., Civ.App., 67 S.W.2d 1071, error dismissed—Willson v. Manasco, Civ.App., 63 S.W.2d 910.
13. Tex.—Richards v. Frick-Reid Supply Corporation, Civ.App., 160 S.W.2d 282, error refused—Union Central Life Ins. Co. v. Roach, Civ.App., 106 S.W.2d 374, error dismissed—Gulf Refining Co. v. Smith, Civ.App., 81 S.W.2d 155—Ulrich v. Schramm, Civ.App., 64 S.W.2d 1041.
14. Tex.—Steinke v. Schmid, Civ.App., 223 S.W.2d 955—Adams v. Corder, Civ.App., 205 S.W.2d 608—Anderson v. Poulos, Civ.App., 197 S.W.2d 521, error refused no reversible error—Gay v. Alma Petroleum Corporation, Civ.App., 79 S.W.2d 874.
15. Tex.—Parten v. Wilson, Civ.App., 243 S.W.2d 198, refused no reversible error—Treme v. Thomas, Civ.App., 161 S.W.2d 124.
16. Tex.—Union Central Life Ins. Co. v. Boulware, Civ.App., 238 S.W.2d 722.
17. Tex.—Blivins v. Proctor, 80 S.W.2d 307, 125 Tex. 137—Meier v. Murphy, Civ.App., 207 S.W.2d 947, refused no reversible error—Shaw v. Porter, Civ.App., 190 S.W.2d 396, refused for want of merit.
18. Tex.—Kinsey v. Dutton, Civ.App., 160 S.W.2d 1025, error dismissed.
19. Ohio.—Pfoh v. Whitney, App., 62 N.E.2d 744.
20. Tex.—Bute v. Holland, Civ.App., 155 S.W.2d 69, error refused—Gifford-Hill & Co. v. Jones, Civ.App., 99 S.W.2d 656.
21. Tex.—Saltmount Oil Corp. v. Imperial Crown Royalty Corp., Civ.App., 98 S.W.2d 418, error dismissed.
22. Utah.—Griffiths v. Archibald, 272 P.2d 586, 2 Utah 2d 293.
23. Tex.—Stevenson v. Wilson, Civ.App., 206 S.W.2d 613, error refused no reversible error.
24. Tex.—Hoerster v. Wilke, Civ.App., 140 S.W.2d 952, affirmed 158 S.W.2d 288, 138 Tex. 263—Karr v. Cockerham, Civ.App., 107 S.W.2d 719, error dismissed—Texas Nat. Bank of Beaumont v. Angelo, Civ.App., 102 S.W.2d 314, error dismissed.
25. Ill.—Patterson v. Dempsey, 119 N.E.2d 616, 2 Ill.App.2d 291.
- N.C.—Reese v. Clark, 175 S.E. 115, 206 N.C. 718.
- Tex.—Forrest v. Faust, Civ.App., 110 S.W.2d 147, error dismissed—Alamo Downs, Inc. v. Briggs, Civ.App., 106 S.W.2d 733, error dismissed.
26. Tex.—Lawson v. First Nat. Bank of Iotian, Civ.App., 150 S.W.2d 279, error dismissed, judgment correct—Security State Bank of Tahoka v. Spinnler, Civ.App., 78 S.W.2d 275—Security State Bank v. Spinnler, Civ.App., 65 S.W.2d 128, error dismissed.
27. Ohio.—Salley v. Wagner, 105 N.E.2d 878, 90 Ohio App. 295.
28. Tex.—Fitzjarrald v. Panhandle Pub. Co., 228 S.W.2d 499, 149 Tex. 87—Bell Pub. Co. v. Garrett Engineering Co., 170 S.W.2d 197, 141 Tex. 51—Korkmas v. Turner, Civ.App., 261 S.W.2d 425—Norris v. White, Civ.App., 154 S.W.2d 319, error refused—Lozano Newspapers v. Alvarez, Civ.App., 104 S.W.2d 573, error dismissed—Cyrus W. Scott Mfg. Co. v. Millis, Civ.App., 67 S.W.2d 885, error dismissed.
29. Pa.—Simpson v. Montgomery Ward & Co., 68 A.2d 442, 165 Pa. Super. 408, opinion adopted 75 A.2d 656, 366 Pa. 3.
30. Utah.—Kunz v. Nelson, 100 P.2d 217, 98 Utah 421.
31. Tex.—Harris v. Wood County Cotton Oil Co., Civ.App., 222 S.W.2d 331, refused no reversible error—Whelan v. Henderson, Civ.App., 137 S.W.2d 150, error dismissed, judgment correct—Reed v. Scoggins, Civ.App., 123 S.W.2d 457, error dismissed—Cude v. Vaughn, Civ.App., 111 S.W.2d 1155—W. T. Carter & Bro v. Rhoden, Civ.App., 72 S.W.2d 620, error dismissed.
32. Tex.—Bolton v. Stewart, Civ.App., 191 S.W.2d 798.
33. Tex.—Central Motor Co. v. Roberson, Civ.App., 154 S.W.2d 180, affirmed Burton v. Roberson, 164 S.W.2d 524, 139 Tex. 562, 143 A.L.R. 1.
34. Md.—Bethlehem Steel Co. v. Ziegenfuss, 49 A.2d 793, 187 Md. 283.
- Tex.—Le Beau v. Highway Ins. Underwriters, 187 S.W.2d 73, 143 Tex. 589—Maryland Cas. Co. v. Brown, 115 S.W.2d 394, 131 Tex. 404—Guzman v. Maryland Cas. Co., 107 S.W.2d 359, 130 Tex. 62—Texas Indemnity Ins. Co. v. Thibodeaux, 106 S.W.2d 268, 129 Tex. 655—Texas Employers' Ins. Ass'n v. Arnold, 88 S.W.2d 473, 126 Tex. 466—Traders & General Ins. Co. v. Ross, Civ.App., 263 S.W.2d 673, error refused—Gulf Cas. Co. v. Hughes, Civ.App., 230 S.W.2d 293—Pacific Employers Ins. Co. v. Gage, Civ.App., 199 S.W.2d 537, error refused no reversible error—Texas Emp. Ins. Ass'n v. Wright, Civ.App., 196 S.W.2d 837, error refused no reversible error—Maryland Cas. Co. v. Hearn, Civ.App., 188 S.W.2d 282, affirmed 190 S.W.2d 62, 144 Tex. 317—Maryland Cas. Co. v. Davis, Civ.App., 181 S.W.2d 107—Zurich General Acc. & Liability Ins. Co. v. Chancey, Civ.App., 166 S.W.2d 966, error refused—Maryland Cas. Co. v. Stewart, Civ.App., 164 S.W.2d 800, error refused—Texas State Highway Department v. Butler, Civ.App., 158 S.W.2d 878, error refused—Maryland Cas. Co. v. Abbott, Civ.App., 148 S.W.2d 465, error dismissed, judgment correct—Southern Underwriters v. Mowery, Civ.App., 147 S.W.2d 834, error dismissed, judgment correct—Maryland Cas. Co. v. Landry, Civ.App., 147 S.W.2d 290, error dismissed, judgment correct—Southern Under-



attachment;<sup>35</sup> in actions for injury to property<sup>36</sup> or for personal injuries;<sup>37</sup> in actions against a carrier for injury to goods;<sup>38</sup> in actions against employers for injuries to their employees;<sup>39</sup> in actions against railroads for injuries to passen-

gers,<sup>40</sup> employees,<sup>41</sup> motorists,<sup>42</sup> or pedestrians;<sup>43</sup> in actions against a street railroad or bus for injuries to passengers<sup>44</sup> or pedestrians;<sup>45</sup> in actions for injuries caused by motor vehicles<sup>46</sup> in actions for injuries to motorists,<sup>47</sup> injuries to cy-

writers v. Dykes, Civ.App., 145 S.W.2d 1105—Southern Underwriters v. Blair, Civ.App., 144 S.W.2d 641—Traders & General Ins. Co. v. Jenkins, Civ.App., 141 S.W.2d 312—Maryland Cas. Co. v. Jackson, Civ.App., 139 S.W.2d 631, error dismissed, judgment correct—Traders & General Ins. Co. v. Lockwood, Civ.App., 138 S.W.2d 589, error dismissed, judgment correct—Federal Underwriters Exchange v. Bullard, Civ.App., 128 S.W.2d 126—Traders & General Ins. Co. v. Marrable, Civ.App., 126 S.W.2d 746, error dismissed—Gulf Casualty Co. v. Archer, Civ.App., 118 S.W.2d 976, error dismissed—Traders & General Ins. Co. v. Burns, Civ.App., 118 S.W.2d 391—Maryland Casualty Co. v. Crosby, Civ.App., 117 S.W.2d 524, error dismissed—Wilson v. Standard Accident Ins. Co., Civ.App., 115 S.W.2d 453, error dismissed—Federal Underwriters Exchange v. Riggsby, Civ.App., 114 S.W.2d 354—Western Casualty Co. v. Lapco, Civ.App., 108 S.W.2d 740, error dismissed—Southern Underwriters v. Stubblefield, Civ.App., 108 S.W.2d 567—Gulf Casualty Co. v. Fields, Civ.App., 107 S.W.2d 661, error dismissed—Consolidated Casualty Ins. Co. v. Fortenberry, Civ.App., 103 S.W.2d 1049, error refused—Traders & General Ins. Co. v. Hunter, Civ.App., 95 S.W.2d 158, error dismissed—Texas Employers Ins. Ass'n v. Johnson, Civ.App., 89 S.W.2d 1112, error dismissed—Liberty Mut. Ins. Co. v. Boggs, Civ.App., 66 S.W.2d 787, error dismissed.

71 C.J. p 1348 notes 54, 55.

35. Tex.—Gossott v. Jones, Civ.App., 123 S.W.2d 724.

36. Kan.—Gardenhire v. Sinclair-Prairie Oil Co., 44 P.2d 280, 141 Kan. 865.

37. Tex.—Hall v. Medical Bldg. of Houston, 251 S.W.2d 497, 151 Tex. 425—Texas Livestock Marketing Ass'n v. Rogers, Civ.App., 244 S.W.2d 859, error refused no reversible error—Rumbo v. Nixon, Civ.App., 241 S.W.2d 983—City of Dallas v. Hutchins, Civ.App., 226 S.W.2d 155, refused no reversible error—Ohlen v. Hagar, Civ.App., 212 S.W.2d 253, refused no reversible error—Gillette Motor Transp. Co. v. Whitfield, Civ.App., 197 S.W.2d 157, affirmed 200 S.W.2d 624, 145 Tex. 571—Balque v. Green, Civ.App., 193 S.W.2d 705, error refused no reversible error—Browning v. Graves, Civ.App., 153 S.W.2d 515, error refused—Traders & General Ins. Co.

v. Seogin, Civ.App., 146 S.W.2d 1014, error dismissed, judgment correct—Snelling v. Harper, Civ.App., 137 S.W.2d 222, error dismissed, judgment correct—Stallcup v. United Gas Public Service Co., Civ.App., 119 S.W.2d 574, error dismissed—South Plains Coaches v. Box, Civ.App., 111 S.W.2d 1151, error dismissed—The Fair, Inc., v. Prelsach, Civ.App., 77 S.W.2d 725—Texas & N. O. R. Co. v. Kveton, Civ.App., 75 S.W.2d 118, error dismissed. Wash.—Shandrow v. City of Tacoma, P.2d 733, 192 Wash. 329.

W.Va.—Agsten v. Lemma, 193 S.E. 545, 119 W.Va. 330.

38. Tex.—Boring v. Chicago, R. I. & P. R. Co., Civ.App., 208 S.W.2d 416—Texas & N. O. R. Co. v. Lide, Civ.App., 117 S.W.2d 479—Railway Express Agency v. McCarrick, Civ.App., 69 S.W.2d 803.

39. Mass.—Cozzo v. Atlantic Refining Co., 12 N.E.2d 744, 299 Mass. 260.

Tex.—Socony-Vacuum Oil Co. v. Aderhold, 240 S.W.2d 751, 150 Tex. 292—Hopson v. Gulf Oil Corp., 237 S.W.2d 352, 150 Tex. 1—Grandstaff v. Mercer, Civ.App., 214 S.W.2d 133, refused no reversible error—Butts v. Weaver, Civ.App., 145 S.W.2d 251, error dismissed, judgment correct—Ford Motor Co. v. Whitt, Civ.App., 81 S.W.2d 1032, error refused.

40. Wis.—Wegner v. Chicago & N. W. Ry. Co., 55 N.W.2d 420, 262 Wis. 402.

41. Mo.—Prince v. Kansas City Southern Ry. Co., 229 S.W.2d 568, 360 Mo. 580.

Tex.—Panhandle & Santa Fe Ry. Co. v. Dean, Civ.App., 269 S.W.2d 439—Texas & P. Ry. Co. v. Mix, Civ.App., 193 S.W.2d 542—Kansas City Southern Ry. Co. v. Chandler, Civ.App., 192 S.W.2d 304, refused no reversible error—Texas & N. O. R. Co. v. Warden, Civ.App., 107 S.W.2d 451, error dismissed—Texas & N. O. R. Co. v. McGinnis, Civ.App., 81 S.W.2d 200, affirmed 109 S.W.2d 160, 130 Tex. 338.

42. Tex.—Fort Worth & D. Ry. Co. v. Barlow, Civ.App., 263 S.W.2d 278, error refused no reversible error—International-Great Northern R. Co. v. Acker, Civ.App., 128 S.W.2d 506, error dismissed, judgment correct—St. Louis, S. F. & T. Ry. Co. v. Williams, Civ.App., 104 S.W.2d 103, error dismissed.

43. Tex.—Texas & N. O. R. Co. v. Daft, Civ.App., 120 S.W.2d 481.

44. Ohio.—Bradley v. Mansfield Rap-

id Transit, 93 N.E.2d 673, 154 Ohio St. 154.

Tex.—Texas Bus Lines v. Anderson, Civ.App., 233 S.W.2d 961, refused no reversible error—Airline Motor Coaches v. Howell, Civ.App., 195 S.W.2d 713, error refused no reversible error—Austin St. Ry. Co. v. Oldham, Civ.App., 109 S.W.2d 235, error refused.

45. Tex.—Wichita Transit Co. v. Sanders, Civ.App., 214 S.W.2d 810.

46. Ill.—Leonard v. Stone, 45 N.E.2d 620, 381 Ill. 423—Weinrob v. Heintz, 104 N.E.2d 534, 346 Ill.App. 30.

Mich.—Wallace v. Skrzvcki, 61 N.W.2d 106, 338 Mich. 165.

Tex.—Russell Const. Co. v. Ponder, 186 S.W.2d 233, 143 Tex. 412—Collins v. Smith, 175 S.W.2d 407, 142 Tex. 36—Coleman County Elec. Coop. v. Agnew, Civ.App., 265 S.W.2d 911, error granted—Blasberg v. Cockerell, Civ.App., 254 S.W.2d 1012.

Wis.—Eich v. Brennan, 270 N.W.47, 223 Wis. 174.

47. Cal.—Bennett v. Chandler, 126 P.2d 173, 350 Cal.App.2d 255.

Kan.—In re Erwin's Estate, 228 P.2d 739, 170 Kan. 728.

Ohio.—Bobbitt v. Maher Beverage Co., 89 N.E.2d 683, 152 Ohio St. 246.

Pa.—Freedman v. Dalton, 25 A.2d 175, 344 Pa. 212.

Tex.—Pharr v. Coldeway, Civ.App., 256 S.W.2d 917—Romo v. San Antonio Transit Co., Civ.App., 236 S.W.2d 205, error refused no reversible error—Tripp v. Watson, Civ.App., 235 S.W.2d 677, error refused no reversible error—Anderson v. Broome, Civ.App., 233 S.W.2d 901—Pressler v. Moody, Civ.App., 233 S.W.2d 165—Chesshire v. Nall, Civ.App., 218 S.W.2d 248, refused no reversible error—McGregor Milling & Grain Co. v. Waren, Civ.App., 175 S.W.2d 476, error refused—Mercer v. Evans, Civ.App., 173 S.W.2d 206—Lackey v. Moffett, Civ.App., 172 S.W.2d 715—Texas Steel Co. v. Rockholt, Civ.App., 142 S.W.2d 842, error refused—Spears Dairy v. Davis, Civ.App., 124 S.W.2d 159—O. K. Theater Corp. v. Rehmeyer, Civ.App., 115 S.W.2d 985, error dismissed—Southern Motor Lines v. Creamer, Civ.App., 113 S.W.2d 624, error dismissed—Southland Greyhound Lines v. Richards, Civ.App., 77 S.W.2d 272, error dismissed.

Wis.—Leikness v. Prochaska, 63 N.W.2d 723, 266 Wis. 437—Johnson v. Sipe, 56 N.W.2d 852, 263 Wis. 191

clists,<sup>48</sup> or injuries to pedestrians;<sup>49</sup> and in actions under price control statutes.<sup>50</sup>

Likewise, special issues and interrogatories have been held properly submitted or erroneously refused on the issues of abandonment,<sup>51</sup> adverse posses-

sion,<sup>52</sup> assumed risk,<sup>53</sup> attractive nuisance,<sup>54</sup> boundaries,<sup>55</sup> comparative negligence,<sup>56</sup> contributing cause,<sup>57</sup> custom,<sup>58</sup> discovered peril,<sup>59</sup> domicile,<sup>60</sup> duress,<sup>61</sup> estoppel,<sup>62</sup> fraud,<sup>63</sup> imputed negligence,<sup>64</sup> independent intervening cause,<sup>65</sup> knowledge and notice,<sup>66</sup> limitations,<sup>67</sup> lookout,<sup>68</sup> malice,<sup>69</sup> as well as

—Wenzel v. Werch, 39 N.W.2d 721, 256 Wis. 47—Hegge v. Hartford Accident & Indem. Co., 35 N.W.2d 215, 284 Wis. 145—Callaway v. Kryzen, 279 N.W. 702, 228 Wis. 53.

48. Tex.—Starnes v. Muncy, Civ. App., 213 S.W.2d 755—Ramming v. Halstead, Civ.App., 77 S.W.2d 920, error dismissed.

49. Ohio.—Sparks v. Sims, App., 92 N.E.2d 428.

Tex.—Chapman v. Evans, Civ.App., 186 S.W.2d 827, refused for want of merit—Huey & Philip Hardware Co. v. McNeil, Civ.App., 111 S.W.2d 1205, error dismissed—Jones v. McIlvaine, Civ.App., 105 S.W.2d 503, error dismissed—Texas Electric Service Co. v. Kinkade, Civ. App., 84 S.W.2d 567, error dismissed.

Wis.—Cook v. Wisconsin Tel. Co., 56 N.W.2d 494, 263 Wis. 56.

50. Tex.—Price v. Nichols, Civ.App., 218 S.W.2d 283.

51. Tex.—Seastrunk v. Walker, Civ. App., 156 S.W.2d 996, error refused—Adams v. Stanley, Civ.App., 88 S.W.2d 729, error dismissed—Fort Worth Properties Corporation v. Bahan, Civ.App., 68 S.W.2d 228.

52. Tex.—Pearson v. Doherty, 183 S.W.2d 453, 143 Tex. 64—Parr v. Ratisseau, Civ.App., 236 S.W.2d 503, error refused no reversible error—Kouri v. Kelton, Civ.App., 178 S.W.2d 712—Clayton v. Reamer, Civ.App., 153 S.W.2d 1020, error refused—Ramirez v. Acker, Civ.App., 124 S.W.2d 905, affirmed 128 S.W.2d 1054, 134 Tex. 647—Webb v. Davant, Civ.App., 113 S.W.2d 926—Reed v. Magnolia Petroleum Co., Civ.App., 67 S.W.2d 359, error dismissed.

53. Tex.—Fox v. Gulf, C. & S. F. Ry. Co., Civ.App., 80 S.W.2d 1072, error dismissed.

Wis.—School v. Milwaukee Automobile Ins. Co., 291 N.W. 311, 234 Wis. 332.

64 C.J. p 1126 note 62.

64. Tex.—Natorium Laundry Co. v. Saylor, Civ.App., 131 S.W.2d 790, error dismissed, judgment correct.

55. Tex.—Swearingen v. Brown, Civ. App., 195 S.W.2d 724, error refused no reversible error—Humble Oil & Refining Co. v. Owings, Civ.App., 128 S.W.2d 67—Sydney v. Magnolia Petroleum Co., Civ.App., 107 S.W.2d 603, error dismissed.

56. Wis.—Callaway v. Kryzen, 279 N.W. 702, 228 Wis. 53.

57. Tex.—State v. Schlick, 179 S.W. 2d 246, 142 Tex. 410—Texas Employers Ins. Ass'n v. Griffs, Civ. App., 141 S.W.2d 687—Traders & General Ins. Co. v. Watson, Civ. App., 131 S.W.2d 1103, error dismissed, judgment correct—Traders & General Ins. Co. v. Milliken, Civ. App., 87 S.W.2d 503—Texas Indemnity Ins. Co. v. Perdue, Civ.App., 64 S.W.2d 386, error refused.

58. Tex.—Texas & N. O. R. Co. v. Owens, Civ.App., 54 S.W.2d 848, error refused.

59. Tex.—Crawford v. Detering Co., 237 S.W.2d 615, 150 Tex. 140—Texas & N. O. R. Co. v. Grace, 188 S.W.2d 378, 144 Tex. 71—Texas & N. O. R. Co. v. Foster, Civ.App., 266 S.W.2d 206, error refused no reversible error—Sunset Motor Lines v. Blasingame, Civ.App., 245 S.W.2d 288, error dismissed—Andrews v. Daniel, Civ.App., 240 S.W.2d 1018, error dismissed—Bayshore Bus Lines v. Cooper, Civ.App., 223 S.W.2d 77, refused no reversible error—Pryor v. Bunch, Civ.App., 201 S.W.2d 617, error refused—Texas Elec. Ry. Co. v. Wooten, Civ.App., 173 S.W.2d 463, error refused—International-Great Northern Ry. Co. v. Acker, Civ.App., 128 S.W.2d 506, error dismissed, judgment correct—South Texas Coaches v. Woodard, Civ.App., 123 S.W.2d 395—International-Great Northern Ry. Co. v. Pence, Civ.App., 113 S.W.2d 206, error dismissed—Shannon v. Horn, Civ.App., 92 S.W.2d 1090, error dismissed—Southwestern Bell Telephone Co. v. Ferria, Civ.App., 89 S.W.2d 229, error dismissed, 64 C.J. p 1126 note 61.

60. Tex.—Hough v. Grapotte, 90 S.W.2d 1090, 127 Tex. 144.

61. Tex.—Goodrum v. State, Civ. App., 158 S.W.2d 81, error refused.

62. Tex.—Kinsey v. Dutton, Civ. App., 100 S.W.2d 1025, error dismissed—Coleman v. Moore, Civ. App., 87 S.W.2d 300.

63. N.C.—J. B. Colt Co. v. Barber, 170 S.E. 663, 205 N.C. 170. R.I.—Currie v. Nathanson, 190 A. 22, 57 R.I. 351.

Tex.—Passero v. Loew, Civ.App., 259 S.W.2d 909, error refused no reversible error—Klindworth v. O'Connor, Civ.App., 240 S.W.2d 470, refused no reversible error—McClung Const. Co. v. Muncy, Civ.

App., 65 S.W.2d 786, error dismissed.

64. Tex.—Hicks v. Brown, Civ.App., 128 S.W.2d 884, modified on other grounds 151 S.W.2d 790, 136 Tex. 399.

65. Tex.—Bryant v. Banner Dairies, Inc., Civ.App., 255 S.W.2d 271, refused no reversible error—Blasberg v. Cockerell, Civ.App., 254 S.W.2d 1012—Garner v. Prescott, Civ.App., 234 S.W.2d 704—Fort Worth & Denver City Ry. Co. v. Walters, Civ. App., 154 S.W.2d 177, error refused—Tarver v. Vallance, Civ.App., 97 S.W.2d 748.

66. Kan.—Jelf v. Cottonwood Falls Gas Co., 160 P.2d 270, 160 Kan. 112.

N.C.—La Vecchia v. North Carolina Joint Stock Land Bank of Durham, 9 S.E.2d 489, 218 N.C. 85.

Tex.—Colorado County v. J. M. English Truck Line, Civ.App., 265 S.W.2d 865, error refused no reversible error—Minchen v. First Nat. Bank of Alpine, Civ.App., 263 S.W.2d 601, error refused no reversible error—Southwest Stone Co. v. Symons, Civ.App., 237 S.W.2d 380, error refused no reversible error—Kirkland v. Mission Pipe & Supply Co., Civ. App., 182 S.W.2d 854, error refused—Fort Worth & D. C. Ry. Co. v. Hambright, Civ.App., 130 S.W.2d 436, error dismissed, judgment correct—Hom-Ond Food Stores v. Voigt, Civ.App., 115 S.W.2d 981, error dismissed.

Wash.—Easton v. Chaffee, 132 P.2d 1006, 16 Wash.2d 183.

Wis.—Hoar v. Rasmussen, 282 N.W. 652, 229 Wis. 509.

67. Tex.—Reeves v. Fonville, Civ. App., 267 S.W.2d 238—Kurtz v. Robinson, Civ.App., 256 S.W.2d 1003—Texas Employers' Ins. Ass'n v. Jones, Civ.App., 70 S.W.2d 1014, error dismissed—Halsey v. Humble Oil & Refining Co., Civ.App., 66 S.W.2d 1082, error dismissed.

68. Tex.—Wenski v. Kabitzke, Civ. App., 257 S.W.2d 153—Gonzales v. Orsak, Civ.App., 205 S.W.2d 793—Herndon v. Halliburton Oil Well Cementing Co., Civ.App., 154 S.W.2d 163, error refused—Texas & N. O. R. Co. v. Brook, Civ.App., 127 S.W.2d 599, error dismissed, judgment correct—McMath Co. v. Station, Civ.App., 60 S.W.2d 290.

69. Tex.—Central Motor Co. v. Roberson, Civ.App., 154 S.W.2d 180, affirmed Burton v. Roberson, 164 S.

in other cases on the issues of marriage,<sup>70</sup> mistake,<sup>71</sup> mental capacity,<sup>72</sup> nuisance,<sup>73</sup> payment,<sup>74</sup> release,<sup>75</sup> speed,<sup>76</sup> title to land,<sup>77</sup> undue influence,<sup>78</sup> value,<sup>79</sup> violation of statute or ordinance,<sup>80</sup> wanton or willful misconduct,<sup>81</sup> and warnings and signals.<sup>82</sup>

Furthermore, special issues and interrogatories have been held properly submitted or erroneously refused on an issue of whether defendant, under the circumstances, was negligent;<sup>83</sup> whether plaintiff was

W.2d 524, 139 Tex. 562, 143 A.L.R. 1—Houston Printing Co. v. Hunter, Civ.App., 105 S.W.2d 312, error dismissed. Affirmed 106 S.W.2d 1043, 129 Tex. 652.

70. Tex.—Walker v. Jean Laftite Hotel Corp., Civ.App., 94 S.W.2d 504, error dismissed.

71. N.C.—Lewis v. Pate, 181 S.E. 623, 208 N.C. 512.

Tex.—Hughes v. Belman, Civ.App., 200 S.W.2d 431.

72. Tex.—Kilndworth v. O'Connor, Civ.App., 240 S.W.2d 470, refused no reversible error—Joy v. Joy, Civ. App., 156 S.W.2d 547, error refused.

73. Conn.—Orlo v. Connecticut Co., 21 A.2d 402, 128 Conn. 231.

Tex.—Rosenthal v. City of Dallas, Civ.App., 211 S.W.2d 279, refused no reversible error—City of Dublin v. Hicks, Civ.App., 120 S.W.2d 872.

74. Tex.—Pioneer Bldg. & Loan Ass'n v. Compton, Civ.App., 138 S.W.2d 884.

75. N.Y.—Campbell v. Muncie, 285 N.Y.S. 848, 247 App.Div. 758.

Kan.—Lamb v. Liberty Life Ins. Co., 282 P. 699, 129 Kan. 234.

Tex.—Texas & P. Ry. Co. v. Mix, Civ. App., 193 S.W.2d 542—Green v. Ligon, Civ.App., 190 S.W.2d 742, refused no reversible error—Chapman v. Evans, Civ.App., 186 S.W.2d 827, refused for want of merit—City of Fort Worth v. Lee, Civ. App., 182 S.W.2d 831, affirmed 186 S.W.2d 954, 143 Tex. 551, 159 A.L.R. 125—McGregor Milling & Grain Co. v. Warren, Civ.App., 175 S.W.2d 476, error refused—Texas & N. O. R. Co. v. Brook, Civ.App., 127 S.W.2d 599, error dismissed, judgment correct—Vincent v. Johnson, Civ.App., 117 S.W.2d 135, error dismissed—Austin St. Ry. Co. v. Oldham, Civ.App., 109 S.W.2d 235, error refused—McClelland v. Mounger, Civ.App., 107 S.W.2d 901, error dismissed by agreement—Southland Greyhound Lines v. Richards, Civ.App., 77 S.W.2d 272, error dismissed.

77. Tex.—Seneqar v. La Vaughan, Civ.App., 230 S.W.2d 311, error refused no reversible error—Humble Oil & Refining Co. v. Owings, Civ. App., 128 S.W.2d 67.

78. Tex.—Beckham v. Mayes, Civ. App., 229 S.W.2d 636.

79. Tex.—Minchen v. First Nat. Bank of Alpine, Civ.App., 263 S.W.2d 601, error refused no reversible error.

80. Tex.—Fisher v. Leach, Civ.App.,

221 S.W.2d 384, refused no reversible error—Little Rock Furniture Mfg. Co. v. Dunn, Civ.App., 218 S.W.2d 527, Error granted, affirmed 222 S.W.2d 985, 148 Tex. 197—Hulsey v. Patterson, Civ.App., 121 S.W.2d 509.

81. Ill.—Jones v. Phillips, 110 N.E.2d 758, 349 Ill.App. 393—Granlie v. Valha, 37 N.E.2d 931, 312 Ill.App. 131.

Ohio.—Oyster v. Kuhn, 32 N.E.2d 80, 65 Ohio App. 533.

64 C.J. p 1125 note 60.

82. Tex.—Cree v. Miller, Civ.App., 255 S.W.2d 565, refused no reversible error—Texas Livestock Marketing Ass'n v. Rogers, Civ.App., 244 S.W.2d 859, error refused no reversible error—Gulf, C. & S. F. Ry. Co. v. Picard, Civ.App., 147 S.W.2d 303, error dismissed, judgment correct—Wichita Falls & Southern R. Co. v. Anderson, Civ. App., 144 S.W.2d 441, error dismissed, judgment correct—Fleming's Fraternal Undertaking Co. v. Quarrels, Civ.App., 116 S.W.2d 1160—City of Amarillo v. Rust, Civ. App., 64 S.W.2d 821—Texas-Louisiana Power Co. v. Webster, Civ.App., 59 S.W.2d 902, affirmed 91 S.W.2d 302, 127 Tex. 126.

Wis.—Yanisch v. American Fidelity & Cas. Co., 44 N.W.2d 267, 257 Wis. 462.

83. Kan.—Morrison v. Hawkeye Cas. Co., 212 P.2d 633, 168 Kan. 303.

N.C.—Fleming v. Carolina Power & Light Co., 61 S.E.2d 364, 232 N.C. 457.

N.Y.—Regan v. Eight Twenty Fifth Corp., 38 N.E.2d 489, 287 N.Y. 179.

Ohio.—Bradley v. Mansfield Rapid Transit, 93 N.E.2d 672, 154 Ohio St. 154—Scott v. Cismadi, 74 N.E.2d 563, 80 Ohio App. 39—Collins v. Zimmerman, App., 57 N.E.2d 245—Dixie Wholesale Grocery v. Baltimore & Ohio Warehouse Co., 28 N.E.2d 694, 64 Ohio App. 241.

Tex.—Panhandle & Santa Fe Ry. Co. v. Dean, Civ.App., 269 S.W.2d 439—Haynes B. Ownby Drilling Co. v. McClure, Civ.App., 264 S.W.2d 204, error refused no reversible error—Pharr v. Coldeway, Civ.App., 256 S.W.2d 917—Ragsdale v. Lindsey, Civ.App., 254 S.W.2d 843, refused no reversible error—Hall v. Medical Bldg. of Houston, Civ.App., 251 S.W.2d 497—Texas Livestock Marketing Ass'n v. Rogers, Civ.App., 244 S.W.2d 859, error refused no reversible error—Rumbo v. Nixon, Civ.App., 241 S.W.2d 983—Frozen Foods Exp. v. Odum, Civ.App., 229

S.W.2d 92, refused no reversible error—City of Dallas v. Hutchins, Civ.App., 226 S.W.2d 155, refused no reversible error—Beaumont Coca Cola Bottling Co. v. Guillot, 222 S.W.2d 141, refused no reversible error—Parker v. Bains, Civ.App., 194 S.W.2d 569, refused no reversible error—Texas & P. Ry. Co. v. Mix, Civ.App., 193 S.W.2d 542—Bonham Coca Cola Bottling Co. v. Jennings, Civ.App., 181 S.W.2d 97, error denied 184 S.W.2d 821, 143 Tex. 327—Service Refining Co. v. Hutcherson, Civ.App., 179 S.W.2d 772, error refused—Collins v. Smith, Civ.App., 170 S.W.2d 562, affirmed 175 S.W.2d 407, 142 Tex. 36—Thompson v. Erisman, Civ. App., 157 S.W.2d 439, affirmed Erisman v. Thompson, 167 S.W.2d 731, 140 Tex. 361—Dallas Ry. & Terminal Co. v. Young, Civ.App., 155 S.W.2d 414, error refused—Herndon v. Halliburton Oil Well Cementing Co., Civ.App., 154 S.W.2d 153, error refused—Browning v. Graves, Civ. App., 152 S.W.2d 515, error refused—Butts v. Weaver, Civ.App., 145 S.W.2d 251, error dismissed, judgment correct—Wilson v. Barbour, Civ.App., 135 S.W.2d 169, error dismissed—Gulf, C. & S. F. Ry. Co. v. Sklar, Civ.App., 134 S.W.2d 771, error dismissed—Long v. Metcalf, Civ.App., 134 S.W.2d 485, error dismissed, judgment correct—State v. Lindley, Civ.App., 133 S.W.2d 802, error dismissed, judgment correct—Standard Paving Co. v. Pyle, Civ.App., 131 S.W.2d 200—Spears Dairy v. Davis, Civ.App., 124 S.W.2d 159—Texas & P. Ry. Co. v. Heathington, Civ.App., 115 S.W.2d 495—S. Blickman, Inc. v. Chilton, Civ.App., 114 S.W.2d 646—Coca Cola Bottling Co. v. Heckman, Civ.App., 113 S.W.2d 201—Echols v. Duke, Civ.App., 102 S.W.2d 483, error dismissed—Coca-Cola Bottling Co. of Fort Worth v. Smith, Civ.App., 97 S.W.2d 761—Dallas Railway & Terminal Co. v. Price, Civ.App., 94 S.W.2d 884, affirmed 114 S.W.2d 859, 131 Tex. 319—Blondeau v. Sommer, Civ.App., 99 S.W.2d 668—Sindclair-Prairie Oil Co. v. Beadle, Civ.App., 89 S.W.2d 426, error dismissed—Benge v. Foster, Civ.App., 74 S.W.2d 542, error refused—Belzung v. Owl Taxi, Civ. App., 70 S.W.2d 288, error dismissed—S. H. Kress & Co. v. Jennings, Civ.App., 64 S.W.2d 1074, error dismissed—Kling v. City of Austin, Civ.App., 62 S.W.2d 639—City Ice Delivery Co. v. Suggs, Civ.

guilty of contributory negligence;<sup>84</sup> whether the injury;<sup>85</sup> and in other cases on an issue as to negligence alleged was the proximate cause of the whether or not the injury was the result of an un-

- App., 60 S.W.2d 538, error refused—McMath Co. v. Staten, Civ.App., 60 S.W.2d 290—Texas-Louisiana Power Co. v. Webster, Civ.App., 59 S.W.2d 902, affirmed 91 S.W.2d 302, 127 Tex. 126.
- Wis.—Wisconsin Tel. Co. v. Matson, 41 N.W.2d 268, 256 Wis. 304—Rebholz v. Wettengel, 248 N.W. 109, 211 Wis. 285.
- 64 C.J. p 1124 note 58—43 C.J. p 1316 note 13 [a].
84. Ill.—Tucker v. Kallal, 112 N.E. 2d 731, 350 Ill.App. 325—Jones v. Phillips, 110 N.E.2d 758, 349 Ill. App. 393.
- Kan.—Mitchell v. Foran, 53 P.2d 490, 142 Kan. 191.
- Ky.—Mahlin's Adm'r v. McClellan, 131 S.W.2d 478, 279 Ky. 595.
- Ohio.—Horwitz v. Eurove, 193 N.E. 644, 129 Ohio St. 8, 96 A.L.R. 782—Chevalier v. Lakewood Housing Co., App., 83 N.E.2d 667.
- Pa.—Kline v. Ranken, 79 Pa.Dist. & Co. 260, 67 Montg Co. 281, 65 York Leg.Rec. 121.
- Tex.—Schuhmacher Co. v. Holcomb, 177 S.W.2d 351, 142 Tex. 332—Walsh v. Dallas Railway & Terminal Co., 167 S.W.2d 1018, 140 Tex. 385—Walgreen-Texas Co. v. Shivers, 154 S.W.2d 625, 137 Tex. 493—Coleman County Elec. Co-op. v. Agnew, Civ.App., 265 S.W.2d 911, error granted—Blasberg v. Cockerell, Civ.App., 254 S.W.2d 1012—Coleman v. Texas & Pac. Ry. Co., Civ.App., 241 S.W.2d 308, error refused—Buss v. Shepherd, Civ.App., 240 S.W.2d 382, refused no reversible error—Southwestern Greyhound Lines v. Dickson, Civ.App., 219 S.W.2d 592—Langham v. Talbott, Civ.App., 211 S.W.2d 987, refused no reversible error—Benson v. Missouri, K. & T. R. Co., Civ.App., 200 S.W.2d 233, error refused no reversible error, certiorari denied 68 S.Ct. 206, 332 U.S. 830, 92 L.Ed. 403—Hicks v. Frost, Civ.App., 195 S.W.2d 606, error refused no reversible error—Wichita Val. Ry. Co. v. Bright, Civ.App., 184 S.W.2d 856—City of Fort Worth v. Lee, Civ.App., 182 S.W.2d 831, affirmed 186 S.W.2d 954, 143 Tex. 551, 159 A.L.R. 125—Wm. Cameron & Co. v. Thompson, Civ.App., 175 S.W.2d 307, error refused—Valley Film Service v. Cruz, Civ.App., 173 S.W.2d 952, error refused—Wright v. Carey, Civ.App., 169 S.W.2d 749—Modica v. Howard, Civ.App., 161 S.W.2d 1093—St. Louis Southwestern R. Co. of Texas v. Daniel, Civ.App., 161 S.W.2d 877—Texas & N. O. R. Co. v. Young, Civ.App., 148 S.W. 2d 229—Hernandez v. Almendarez, Civ.App., 137 S.W.2d 1059—Gillette Motor Transport v. Fine, Civ.App., 131 S.W.2d 817, error dismissed, judgment correct—English v. Blackwood, Civ.App., 128 S.W.2d 895, error dismissed, judgment correct—Hicks v. Brown, Civ.App., 128 S.W.2d 884, modified on other grounds 151 S.W.2d 790, 136 Tex. 399—Monte Carlo Distributing Co. v. Rosas, Civ.App., 127 S.W.2d 334, error dismissed, judgment correct—Swift & Co. v. McElroy, Civ. App., 126 S.W.2d 1040—Owl Taxi Service v. Saludis, Civ.App., 122 S.W.2d 225, error dismissed—O. K. Theater Corp. v. Rehmyer, Civ. App., 115 S.W.2d 985, error dismissed—Townsend v. Young, Civ. App., 114 S.W.2d 296—Texas & N. O. R. Co. v. Stonecipher, Civ.App., 113 S.W.2d 264—McMillian v. Sims, Civ.App., 112 S.W.2d 793, error dismissed—McLaughlin v. Southern Pac. Co., Civ.App., 99 S.W.2d 380, error dismissed—City of Brownwood v. Anderson, Civ.App., 92 S.W.2d 325—Daniel v. Kosminsky, Civ.App., 85 S.W.2d 840, error dismissed—Texas Public Service Co. v. Laughhead, Civ.App., 73 S.W.2d 925, error refused—Lancaster v. Texas & N. O. R. Co., Civ.App., 72 S.W.2d 326—Mahone v. Bowman, Civ.App., 70 S.W.2d 823, error dismissed—Torres v. Dishman, Civ. App., 69 S.W.2d 501, error dismissed—City of Amarillo v. Rust, Civ.App., 64 S.W.2d 821—Texas & P. R. Co. v. Price, Civ.App., 61 S.W.2d 185, reversed (no opinion)—City Ice Delivery Co. v. Suggs, Civ. App., 60 S.W.2d 538, error refused—Spears Dairy v. Bohrer, Civ.App., 54 S.W.2d 872, error dismissed.
- Utah—Cooper v. Evans, 262 P.2d 278, 1 Utah 2d 68.
- Wis.—Lembke v. Farmers Mut. Automobile Ins. Co., 11 N.W.2d 169, 243 Wis. 531, rehearing denied 12 N.W. 2d 18, 243 Wis. 531—Hunter v. Sirianni Candy Co., 288 N.W. 766, 233 Wis. 130.
- 64 C.J. p 1125 note 59.
85. Cal.—Harrison v. Gamatero, 126 P.2d 904, 52 Cal.App.2d 178.
- Kan.—Haney v. Canfield, 106 P.2d 662, 152 Kan. 597.
- Md.—Bethlehem Steel Co. v. Ziegenfuss, 49 A.2d 793, 187 Md. 283.
- N.Y.—Regan v. Eight Twenty Fifth Corp., 38 N.E.2d 489, 287 N.Y. 179.
- N.C.—Eledge v. Carolina Power & Light Co., 55 S.E.2d 179, 230 N.C. 584, rehearing denied 57 S.E.2d 306, 231 N.C. 737.
- Tex.—Texas General Indem. Co. v. Scott, 253 S.W.2d 651—Pickens v. Harrison, 252 S.W.2d 675, 151 Tex. 562—Little Rock Furniture Mfg. Co. v. Dunn, 222 S.W.2d 955, 148 Tex. 197—Williamson v. Texas Indemnity Ins. Co., 90 S.W.2d 1088, 127 Tex. 71—Sproles v. Rosen, 84 S.W.2d 1001, 126 Tex. 51—Armour & Co. v. Tomlin, Com.App., 60 S.W.2d 204—Texas & N. O. R. Co. v. Pool, Civ.App., 263 S.W.2d 582—S. H. Kress & Co. v. Selph, Civ. App., 250 S.W.2d 883, refused no reversible error—Ditta v. Pogue, Civ. App., 249 S.W.2d 938—G. I. Surplus v. Renfro, Civ.App., 246 S.W.2d 293, error refused no reversible error—Western Cotton Oil Co. v. Mayes, Civ.App., 245 S.W.2d 280—Texas Livestock Marketing Ass'n v. Rogers, Civ.App., 244 S.W.2d 859, error refused no reversible error—Rumbo v. Nixon, Civ.App., 241 S.W.2d 983—Jessee Produce Co. v. Ewing, Civ. App., 213 S.W.2d 750—Pope v. Jackson, Civ.App., 211 S.W.2d 958, affirmed Austin Road Co. v. Pope, 216 S.W.2d 563, 147 Tex. 430—Gillette Motor Transport Co. v. Whitfield, Civ. App., 197 S.W.2d 157, affirmed 200 S.W.2d 624, 145 Tex. 571—Airline Motor Coaches v. Howell, Civ.App., 195 S.W.2d 713, error refused no reversible error—Simmons v. Perkins, Civ.App., 193 S.W.2d 737—Maryland Cas. Co. v. Davis, Civ.App., 181 S.W.2d 107—Lackey v. Moffett, Civ. App., 172 S.W.2d 715—Dodd v. Burkett, Civ.App., 160 S.W.2d 1018, error refused—United Employers Casualty Co. v. Curry, Civ.App., 152 S.W.2d 862—Southern Underwriters v. Grimes, Civ.App., 148 S.W.2d 1058, error dismissed, judgment correct—Butts v. Weaver, Civ.App., 145 S.W.2d 251, error dismissed, judgment correct—Texas Employers Ins. Ass'n v. Griffiths, Civ.App., 141 S.W.2d 687—Southern Underwriters v. Boswell, Civ.App., 141 S.W.2d 442, affirmed 158 S.W.2d 280, 138 Tex. 255—Gillette Motor Transport v. Fine, Civ.App., 131 S.W.2d 817, error dismissed, judgment correct—Maryland Casualty Co. v. Abbott, Civ.App., 131 S.W.2d 171, error dismissed, judgment correct—Texas & N. O. R. Co. v. Brook, Civ.App., 127 S.W.2d 599, error dismissed, judgment correct—Vincent v. Johnson, Civ.App., 117 S.W.2d 135, error dismissed—Fleming's Fraternal Undertaking Co. v. Quarrels, Civ.App., 116 S.W.2d 1160—Bowie Sewerage Co. v. Chandler, Civ.App., 116 S.W.2d 839—O. K. Theater Corp. v. Rehmyer, Civ. App., 115 S.W.2d 985, error dismissed—Southern Motor Lines v. Creamer, Civ.App., 113 S.W.2d 624, error dismissed—Dallas Railway & Terminal Co. v. Redman, Civ.App., 113 S.W.2d 262—City of Corpus Christi v. McMurray, Civ.App., 109 S.W.2d 366—Fidelity & Cas. Co. of New York v. Van Arsdale, Civ.App., 108 S.W.2d 550, error dismissed—

avoidable accident.<sup>86</sup>

On the other hand, the submission of particular special issues and interrogatories has been held to

be error or properly refused under the facts and pleading of the particular case in actions involving contracts,<sup>87</sup> such as insurance contracts,<sup>88</sup> and em-

Coca-Cola Bottling Co. of Fort Worth v. Smith, Civ.App., 97 S.W.2d 761—Pure Oil Co. v. Pope, Civ. App., 75 S.W.2d 175, reversed (no opinion)—Continental Casualty Co. v. McKinnon, Civ.App., 87 S.W.2d 548—Texas Employers' Ins. Ass'n v. Hilderbrandt, Civ.App., 80 S.W.2d 1031, reversed (no opinion)—Harsha v. Renfro Drug Co., Civ. App., 77 S.W.2d 584—Pullman Co. v. Berkman, Civ.App., 70 S.W.2d 839—U. S. Fidelity & Guaranty Co. v. Baker, Civ.App., 65 S.W.2d 844—McMath Co. v. Staten, Civ.App., 60 S.W.2d 290.

Wis.—Lembke v. Farmers Mut. Automobile Ins. Co., 11 N.W.2d 169, 243 Wis. 531, rehearing denied 12 N.W.2d 18, 243 Wis. 531.

64 C.J. p 1127 notes 64-66.

86. U.S.—Luper Transp. Co. v. Barnes, C.A.Tex., 170 F.2d 880.  
Tex.—Airlane Motor Coaches v. Fields, 166 S.W.2d 917, 140 Tex. 221—Dixie Motor Coach Corporation v. Galvan, 88 S.W.2d 633, 126 Tex. 109—Green v. Texas & P. Ry. Co., 81 S.W.2d 669, 125 Tex. 168—New Nueces Hotel Co. v. Sorenson, 75 S.W.2d 488, 124 Tex. 175—Kuykendall v. Doose, Civ.App., 260 S.W.2d 435, error refused no reversible error—Blasberg v. Cockerell, Civ.App., 254 S.W.2d 1012—W. U. Tel. Co. v. Hinson, Civ.App., 222 S.W.2d 636, refused no reversible error—Cheshier v. Nail, Civ.App., 218 S.W.2d 248, refused no reversible error—Wichita Transit Co. v. Sanders, Civ.App., 214 S.W.2d 816—Airlane Motor Coaches v. Howell, Civ.App., 195 S.W.2d 713, error refused no reversible error—Schumacher Co. v. Holcomb, Civ.App., 174 S.W.2d 637, affirmed 177 S.W.2d 951, 142 Tex. 332—Valley Film Service v. Cruz, Civ.App., 173 S.W.2d 952, error refused—Texas State Highway Department v. Butler, Civ.App., 158 S.W.2d 878, error refused—McLellan Stores Co. v. Lindsey, Civ.App., 157 S.W.2d 1013, error refused—St. Louis Southwestern Ry. Co. of Texas v. Barr, Civ.App., 148 S.W.2d 924, error dismissed, judgment correct—Dallas Railway & Terminal Co. v. Goss, Civ.App., 144 S.W.2d 591—Texas Steel Co. v. Rockholt, Civ. App., 142 S.W.2d 842, error refused—Independent Eastern Torpedo Co. v. Carter, Civ.App., 131 S.W.2d 125—White v. Akers, Civ.App., 125 S.W.2d 388—Spories Motor Freight Lines v. Juge, Civ.App., 123 S.W.2d 919, error dismissed, judgment correct—Fleming's Fraternal Undertaking Co. v. Quarrels, Civ.App.,

116 S.W.2d 1160—Dallas Railway & Terminal Co. v. Brown, Civ.App., 97 S.W.2d 335, error refused—Roadway Express v. Gaston, Civ. App., 91 S.W.2d 883, error dismissed—Panhandle & S. F. Ry. Co. v. Napier, Civ.App., 90 S.W.2d 926, error dismissed—Indemnity Ins. Co. of North America v. Bailey, Civ. App., 50 S.W.2d 484.

64 C.J. p 1126 note 63.

87. Cal.—Nix v. Heald, 203 P.2d 847, 80 Cal.App.2d 723.  
Tex.—Bennett v. McKrell, 144 S.W.2d 242, 135 Tex. 557—Cross v. White, 132 S.W.2d 580, 134 Tex. 91—Campbell v. Hart, Civ.App., 256 S.W.2d 255, refused no reversible error—Mims v. Hearon, Civ.App., 248 S.W.2d 754—South Tex. Water Co. v. Bieri, Civ.App., 247 S.W.2d 268, error refused no reversible error—McBride v. Ponder, Civ.App., 242 S.W.2d 253, refused no reversible error—Brandtjen & Kluge v. Hughes, Civ.App., 236 S.W.2d 180, error refused no reversible error—Kramer v. Wilson, Civ.App., 226 S.W.2d 675, refused no reversible error—Montgomery v. Gray, Civ. App., 212 S.W.2d 941—Associated Emp. Lloyds v. Alken, Civ.App., 201 S.W.2d 856, refused no reversible error—San Augustine Independent School Dist. v. Freelove, Civ.App., 195 S.W.2d 175, error refused no reversible error—Reed v. Markland, Civ.App., 173 S.W.2d 346, error refused—Ellzey v. Allen, Civ.App., 172 S.W.2d 703, error dismissed—Spies v. Price, Civ.App., 159 S.W.2d 137—De Walt v. Universal Film Exchanges, Civ.App., 132 S.W.2d 421, error dismissed, judgment correct—Bradley v. Howell, Civ. App., 126 S.W.2d 547, error dismissed, judgment correct—Parker v. Cameron, Civ. App., 125 S.W.2d 353, error refused—City of Kirbyville v. Thackwell, Civ.App., 108 S.W.2d 226, error dismissed—Stillman v. Hirsch, Civ.App., 84 S.W.2d 501, affirmed 99 S.W.2d 270, 128 Tex. 359—Metro-Goldwyn-Mayer Distributing Corporation v. Cocke, Civ. App., 66 S.W.2d 489—Silbert v. Ketton, Civ.App., 66 S.W.2d 246.  
Wis.—Felton v. Cherkasky, 290 N.W. 591, 234 Wis. 223.

64 C.J. p 1123 note 57 [b].

88. Neb.—Banks v. Metropolitan Life Ins. Co., 8 N.W.2d 185, 142 Neb. 823.  
N.M.—Rallis v. Connecticut Fire Ins. Co., 120 P.2d 736, 46 N.M. 77.  
N.Y.—Whitehead v. Mutual Life Ins. Co. of New York, 37 N.Y.S.2d 261, 264 App.Div. 647.

Oho.—Garber v. Chrysler Corp., App., 50 N.E.2d 416.

Pa.—Sebastianelli v. Prudential Ins. Co. of America, 12 A.2d 113, 337 Pa. 466.

Tex.—Pennell v. United Ins. Co., 243 S.W.2d 572, 150 Tex. 541—St. Paul Fire & Marine Ins. Co. v. Westmoreland, 105 S.W.2d 203, 130 Tex. 65—American Cas. & Life Co. v. Mason, Civ.App., 244 S.W.2d 691, error refused no reversible error—Lincoln County Mut. Fire Ins. Co. v. Gooley, Civ.App., 240 S.W.2d 402—Home Ins. Co. of N. Y. v. Dacus, Civ.App., 239 S.W.2d 182—National Sec. Life & Cas. Co. v. Benham, Civ.App., 233 S.W.2d 334, refused no reversible error—Lincoln County Mut. Fire Ins. Co. v. Smith, Civ.App., 232 S.W.2d 637, refused no reversible error—United Bankers Mut. Life Ins. Co. v. Clemons, Civ.App., 232 S.W.2d 622, refused no reversible error—Ama-Gray Oil Co. v. Marshall, Civ.App., 212 S.W.2d 960—National Life & Acc. Ins. Co. v. Hanna, Civ.App., 195 S.W.2d 733, error refused no reversible error—North British & Mercantile Ins. Co. v. Arnold, Civ.App., 171 S.W.2d 215—Pardee v. Universal Life Ins. Co., Civ.App., 170 S.W.2d 852—Griffin v. Southland Life Ins. Co., Civ.App., 153 S.W.2d 722—National Liberty Ins. Co. v. Herring Nat. Bank of Vernon, Civ.App., 135 S.W.2d 219, error dismissed, judgment correct—American Nat. Ins. Co. v. Points, Civ.App., 131 S.W.2d 983, error dismissed, judgment correct—Jackson v. Connecticut General Life Ins. Co., Civ.App., 131 S.W.2d 177, error dismissed, judgment correct—Butler v. Abilene Mut. Life Ins. Ass'n, Civ.App., 130 S.W.2d 1061, error dismissed, judgment correct—Jefferson Standard Life Ins. Co. v. Curfman, Civ.App., 127 S.W.2d 567, error dismissed—National Aid Life Ass'n v. Alexander, Civ.App., 113 S.W.2d 272—Gulf States Security Life Ins. Co. v. Edwards, Civ.App., 109 S.W.2d 1125, error dismissed—Sovereign Camp, W. O. W., v. De Martinez, Civ.App., 103 S.W.2d 995, affirmed 126 S.W.2d 12, 132 Tex. 585—Southern Underwriters v. Shipman, Civ. App., 97 S.W.2d 370, error dismissed—Metropolitan Life Ins. Co. v. Greene, Civ.App., 93 S.W.2d 1241—American Nat. Ins. Co. v. Valencia, Civ.App., 91 S.W.2d 832, error dismissed—Transcontinental Ins. Co. of New York v. Greenwood, Civ. App., 90 S.W.2d 1114—Connecticut General Life Ins. Co. v. Turner, Civ.App., 84 S.W.2d 248—Straka v. Farmers' Mut. Protective Ass'n of

ployment contracts and claims for personal services;<sup>89</sup> in actions involving brokers and claims for commissions;<sup>90</sup> in actions involving sales,<sup>91</sup> trusts,<sup>92</sup> deeds,<sup>93</sup> notes,<sup>94</sup> mortgages and deeds of trust,<sup>95</sup> and leases;<sup>96</sup> and in actions involving agency,<sup>97</sup> easements,<sup>98</sup> freight charges,<sup>99</sup> homesteads,<sup>1</sup> min-

Texas, Civ.App., 79 S.W.2d 883, error refused—Dorsey Life Ass'n v. Stitton, Civ.App., 76 S.W.2d 550—Mercury Fire Ins. Co. v. Dunaway, Civ.App., 74 S.W.2d 418, error refused—National Mut. Accident Ins. Co. v. Hicks, Civ.App., 65 S.W.2d 805, reversed (no opinion)—Home Ben. Ass'n v. Briggs, Civ.App., 61 S.W.2d 867—Transcontinental Ins. Co. of New York v. Frazier, Civ.App., 60 S.W.2d 268—Commercial Casualty Ins. Co. v. Hamrick, Civ.App., 60 S.W.2d 247, affirmed 94 S.W.2d 121, 127 Tex. 403—Robert & St. John Motor Co. v. Bains, Civ.App., 67 S.W.2d 872.

Wis.—Schmidt v. Prudential Ins. Co. of America, 292 N.W. 447, 235 Wis. 503.

33 C.J. p 142 note 67—26 C.J. p 567 note 96.

89. N.C.—Lister v. Lister, 24 S.E.2d 342, 222 N.C. 555.

Tex.—Texas Associates v. Joe Bland Const. Co., 222 S.W.2d 413, refused no reversible error—Sample v. Richardson, Civ.App., 195 S.W.2d 843, error refused no reversible error—Clay Drilling Co. v. Furman, Civ.App., 150 S.W.2d 869—Tebav v. Morrison, Civ.App., 139 S.W.2d 226, error dismissed—City of Kirbyville v. Thackwell, Civ.App., 108 S.W.2d 226, error dismissed—McFaddin v. Trahan, Civ.App., 80 S.W.2d 429—Panhandle & S. F. Ry. Co. v. Wilson, Civ.App., 55 S.W.2d 216—McKinney v. Smith, Civ.App., 271 S.W. 247.

90. D.C.—Slater v. Berlin, Mun.App., 94 A.2d 38.

N.C.—Cathey v. Shope, 78 S.E.2d 135, 238 N.C. 345.

Tex.—Miller v. Watson, Civ.App., 257 S.W.2d 839, error refused no reversible error—Jones v. Torrance, Civ.App., 141 S.W.2d 1007, error dismissed—Phoenix Refining Co. v. Muller, Civ.App., 109 S.W.2d 766, error dismissed—Southern Alkali Corp. v. Dismukes, Civ.App., 104 S.W.2d 185, error dismissed—Allison v. Whelless, Civ.App., 84 S.W.2d 529, error dismissed—Owensby v. Morris, Civ.App., 79 S.W.2d 934—E. A. Pierce & Co. v. Aronoff, Civ.App., 60 S.W.2d 796, error dismissed—Willey v. Smith, Civ.App., 55 S.W.2d 879.

91. Kan.—Chapman v. Ticehurst, 110 P.2d 785, 153 Kan. 310.

N.C.—M. & J. Finance Corp. v. Rinehardt, 5 S.E.2d 138, 216 N.C. 380.

Tex.—Davenport v. Harry Payne Motors, Inc., Civ.App., 256 S.W.2d 245—Smulcer v. Rogers, Civ.App., 256

S.W.2d 120, refused no reversible error—Lone Star Olds Cadillac Co. v. Vinson, Civ.App., 168 S.W.2d 673, error refused—Kahn v. Ilitzky, Civ.App., 107 S.W.2d 1015, error dismissed—Bruce v. Thomas, Civ.App., 106 S.W.2d 806—Gulf States Utilities Co. v. Mitchell, Civ.App., 104 S.W.2d 652—Stroud v. Winerich Motor Co., Civ.App., 91 S.W.2d 1169, error dismissed—Interstate Trust & Banking Co. v. West Texas Utilities Co., Civ.App., 88 S.W.2d 1110—Hunter v. B. E. Porter, Inc., Civ.App., 81 S.W.2d 774—Plainview Cotton Oil Co. v. Thomas, Civ.App., 81 S.W.2d 560—Dorsey v. Holcomb, Civ.App., 78 S.W.2d 1014, error dismissed—Kinney v. Pearce, Civ.App., 65 S.W.2d 502—Fenner, Beane & Ungerleider v. Donosky, Civ.App., 62 S.W.2d 269, error dismissed.

92. Tex.—Eaton v. Husted, 172 S.W.2d 493, 141 Tex. 349.

93. Ga.—Georgia Chemical Works v. Malcolm, 197 S.E. 763, 186 Ga. 275. N.C.—Fenherstone v. Glenn, 35 S.E.2d 213, 225 N.C. 404.

Tex.—Mitchell v. Mills, Civ.App., 264 S.W.2d 749, error refused no reversible error—D. T. Carroll Corp. v. Carroll, Civ.App., 256 S.W.2d 429, error refused no reversible error—McLain v. Class, Civ.App., 204 S.W.2d 668, error refused no reversible error—Groseloclose v. Johnston, Civ.App., 184 S.W.2d 548—Wright v. Matthews, Civ.App., 144 S.W.2d 367, error dismissed, judgment correct—Bowden v. Jones, Civ.App., 135 S.W.2d 624, error dismissed, judgment correct—Clements v. Williams, Civ.App., 128 S.W.2d 103.

94. N.C.—Queen v. DeHart, 184 S.E.7, 209 N.C. 414.

Tex.—Rust v. Rust, 117 S.W.2d 59, 131 Tex. 532—Prichard v. Bickley, Civ.App., 176 S.W.2d 614, error refused—Hester & Wise v. Chinn, Civ.App., 162 S.W.2d 450—Hickox v. Hickox, Civ.App., 151 S.W.2d 913—Edwards v. McCorkle, Civ.App., 148 S.W.2d 888—Clements v. Williams, Civ.App., 146 S.W.2d 215, error dismissed, 147 S.W.2d 769, 136 Tex. 97—Robertson v. Connecticut General Life Ins. Co., Civ.App., 140 S.W.2d 936—Mossier Acceptance Co. v. Alexander, Civ.App., 137 S.W.2d 815, error dismissed—Commerce Farm Credit Co. v. Ramp, Civ.App., 116 S.W.2d 1144, affirmed Commerce Trust Co. v. Ramp, 138 S.W.2d 531, 135 Tex. 84—Bledsoe v. Pritchard, Civ.App., 107 S.W.2d 742—Groves v. National Loan &

Inv. Co. of Detroit, Mich., Civ.App., 102 S.W.2d 508—Stillman v. Hirsch, Civ.App., 84 S.W.2d 501, affirmed 99 S.W.2d 270, 128 Tex. 359—Griffin v. Cawthon, Civ.App., 77 S.W.2d 700, error refused—Farmers' & Merchants' Nat. Bank of Abilene v. Hall, Civ.App., 70 S.W.2d 834—Turner v. Montgomery, Civ.App., 67 S.W.2d 637—First Nat. Bank v. Chandler, Civ.App., 58 S.W.2d 1056, error dismissed.

Wash.—Salvo v. Nelson, 156 P.2d 664, 22 Wash.2d 525.

95. Tex.—Brown v. Federal Land Bank of Houston, Civ.App., 180 S.W.2d 647, error refused—Lang v. Harwood, Civ.App., 145 S.W.2d 945—Pioneer Bldg. Loan Ass'n v. Compton, Civ.App., 138 S.W.2d 884—Hamshire v. De Villeneuve, Civ.App., 135 S.W.2d 871—Jones v. Gibbs, Civ.App., 103 S.W.2d 1011, affirmed 130 S.W.2d 265, 133 Tex. 627, motion overruled 131 S.W.2d 957, 133 Tex. 627—Le Master v. Farrington, Civ.App., 103 S.W.2d 189, error dismissed—Holden v. Gibbons, Civ.App., 101 S.W.2d 837, error dismissed—Humphreys v. Standard Savings & Loan Ass'n, Civ.App., 80 S.W.2d 438, error refused.

96. Ariz.—Lane v. Mathews, 251 P.2d 303, 75 Ariz. 1.

N.C.—Walker v. McLaurin, 40 S.E.2d 455, 227 N.C. 53.

Tex.—McKemie v. Waldrop, Civ.App., 190 S.W.2d 384—Winn v. Warner, Civ.App., 172 S.W.2d 526, error refused—Walton v. Steffens, Civ.App., 170 S.W.2d 534, error refused—Hutchins v. Humble Oil & Refining Co., Civ.App., 161 S.W.2d 571, error refused—Bute v. Holland, Civ.App., 155 S.W.2d 69, error refused—Drolinger v. Holliday, Civ.App., 117 S.W.2d 562—Reed v. James, Civ.App., 113 S.W.2d 580, error dismissed—Sammons v. Hodges, Civ.App., 95 S.W.2d 734.

97. Tex.—Cross v. White, Civ.App., 112 S.W.2d 502, affirmed 132 S.W.2d 580, 134 Tex. 91—Gulf Refining Co. v. Shirley, Civ.App., 99 S.W.2d 613, error dismissed.

98. Tex.—Smith v. Shuler, Civ.App., 258 S.W.2d 158.

99. Tex.—Reed v. Southern Pac. Co., Civ.App., 123 S.W.2d 292, error dismissed.

1. Tex.—Hamshire v. De Villeneuve, Civ.App., 135 S.W.2d 871—Holden v. Gibbons, Civ.App., 101 S.W.2d 837, error dismissed.

ing claims,<sup>2</sup> partnership,<sup>3</sup> royalties,<sup>4</sup> taxes,<sup>5</sup> and trade unions.<sup>6</sup>

Particular special issues and interrogatories have also been held erroneous or properly refused in actions for alienation of affections,<sup>7</sup> assault,<sup>8</sup> con-

version,<sup>9</sup> ejectment,<sup>10</sup> eminent domain,<sup>11</sup> false imprisonment,<sup>12</sup> libel and slander,<sup>13</sup> malpractice,<sup>14</sup> specific performance,<sup>15</sup> trespass to try title,<sup>16</sup> unlawful arrest,<sup>17</sup> wrongful attachment,<sup>18</sup> and workmen's compensation.<sup>19</sup> Further, particular special

2. Ariz.—Platt v. Bagg, 269 P.2d 715, 77 Ariz. 214.

3. Tex.—Phillips v. Burns, 252 S.W.2d 927, 151 Tex. 614—Gourley v. Iverson Tool Co., Civ.App., 186 S.W.2d 726, refused for want of merit—Coats v. Stewart, Civ.App., 135 S.W.2d 1026, error dismissed, judgment correct—Federal Underwriters Exchange v. Coker, Civ.App., 116 S.W.2d 922, error dismissed—Terrell v. Wainwright, Civ.App., 87 S.W.2d 1114, error dismissed.

4. Tex.—Saltmount Oil Corp. v. Imperial Crown Royalty Corp., Civ.App., 98 S.W.2d 418, error dismissed.

5. Tex.—Doneghy v. State, Civ.App., 240 S.W.2d 331.

6. Ohio.—Pfah v. Whitney, App., 62 N.E.2d 744.

7. Wis.—Paulson v. Scott, 50 N.W.2d 376, 260 Wis. 141, 31 A.L.R.2d 766.

8. Tex.—Thompson v. Hodges, Civ.App., 237 S.W.2d 757, error refused no reversible error—Missouri-Kansas-Texas R. Co. of Texas v. Salsman, Civ.App., 58 S.W.2d 1026, error dismissed.

9. Tex.—Kirkland v. Mission Pipe & Supply Co., Civ.App., 182 S.W.2d 854, error refused—Oil Country Pipe & Supply Co. v. Carter, Civ.App., 143 S.W.2d 831, error dismissed, judgment correct—Myatt v. Elliott, Civ.App., 143 S.W.2d 205, error dismissed, judgment correct—Lewis v. Gamble, Civ.App., 113 S.W.2d 659—Home Furniture Co. v. Hawkins, Civ.App., 84 S.W.2d 830, error dismissed—McDorman v. Goodell, Civ.App., 69 S.W.2d 428.

10. N.C.—Lee v. Rhodes, 52 S.E.2d 674, 230 N.C. 190.

11. Ill.—Chicago North Shore St. R. Co. v. Payne, 61 N.E. 467, 192 Ill. 239.

20 C.J. p 1214 notes 17, 18.

12. Ohio.—Salley v. Wagner, 105 N.E.2d 878, 90 Ohio App. 295.

Tex.—Walton v. West Texas Utilities Co., Civ.App., 161 S.W.2d 518, error refused.

13. Tex.—Korkmas v. Turner, Civ.App., 251 S.W.2d 425—Houston Printing Co. v. Hunter, Civ.App., 105 S.W.2d 312, error dismissed, affirmed 106 S.W.2d 1043, 129 Tex. 652.

14. Or.—King v. Ditto, 19 P.2d 1100, 142 Or. 207.

15. Tex.—Spire v. Price, Civ.App., 159 S.W.2d 137.

16. Tex.—Williams v. Ballard, Civ.App., 256 S.W.2d 978—Benjamin State Bank v. Reed, Civ.App., 139 S.W.2d 172—Buckner v. Eubank, Civ.App., 131 S.W.2d 1099—Jones-O'Brien, Inc. v. Loyd, Civ.App., 125 S.W.2d 684, error dismissed—Schmoker v. Waelder, Civ.App., 115 S.W.2d 1134—Dorsey v. Temple, Civ.App., 103 S.W.2d 987, error dismissed—Shaffer v. Brown, Civ.App., 59 S.W.2d 854.

17. Tex.—Central Motor Co. v. Roberson, Civ.App., 154 S.W.2d 180, affirmed Burton v. Roberson, 164 S.W.2d 524, 139 Tex. 562, 143 A.L.R. 1.

18. Tex.—Sigmond Rothschild Co. v. Moore, Civ.App., 166 S.W.2d 744, error refused.

19. Md.—Greenwald, Inc. v. Powdermaker, 183 A. 601, 170 Md. 173—Dembeck v. Bethlehem Shipbuilding Corporation, 170 A. 158, 166 Md. 21. Ohio.—Carr v. Marion Masonic Temple Co., 64 N.E.2d 138, 76 Ohio App. 287.

Tex.—Texas Emp. Ins. Ass'n v. Frankum, 220 S.W.2d 449, 148 Tex. 95—Williamson v. Texas Indem. Ins. Co., 90 S.W.2d 1088, 127 Tex. 71—Commercial Standard Ins. Co. v. Noack, Com.App., 62 S.W.2d 72—Texas Employers' Ins. Ass'n v. Ethredge, Civ.App., 263 S.W.2d 816, error granted—Texas Emp. Ins. Ass'n v. Rodriguez, Civ.App., 263 S.W.2d 174, error refused no reversible error—Texas General Indem. Co. v. McNeill, Civ.App., 261 S.W.2d 378—Traders & Gen. Ins. Co. v. Frozen Food Exp., Civ.App., 255 S.W.2d 378, refused no reversible error—Texas Emp. Ins. Ass'n v. Mincey, Civ.App., 255 S.W.2d 262, refused no reversible error—Texas Emp. Ins. Ass'n v. Agan, Civ.App., 252 S.W.2d 743—Texas Emp. Ins. Ass'n v. Hicks, Civ.App., 237 S.W.2d 699, error refused no reversible error—Gulf Cas. Co. v. Hughes, Civ.App., 230 S.W.2d 293—Traveler's Ins. Co. of Hartford, Conn. v. Hobbs, Civ.App., 222 S.W.2d 168—Aetna Cas. & Sur. Co. v. Isensee, Civ.App., 211 S.W.2d 613, refused no reversible error—Texas Emp. Ins. Ass'n v. Wright, Civ.App., 196 S.W.2d 837—Consolidated Underwriters v. Foxworth, Civ.App., 196 S.W.2d 87, error granted—Associated Emp. Loyds v. Groce, Civ.App., 194 S.W.2d 103, refused no reversible error—Associated Indem. Corp. v. Billberg, Civ.App., 172 S.W.2d 157—Texas Employers' Ins.

Ass'n v. Tucker, Civ.App., 165 S.W.2d 780, error refused—Postal Mut. Indem. Co. v. Penn, Civ.App., 165 S.W.2d 495, error refused—Traders & General Ins. Co. v. Carlisle, Civ.App., 162 S.W.2d 751—Southern Underwriters v. Lewis, Civ.App., 150 S.W.2d 162—Maryland Cas. Co. v. Abbott, Civ.App., 148 S.W.2d 465, error dismissed, judgment correct—United Employers Cas. Co. v. Barker, Civ.App., 148 S.W.2d 260—Southern Underwriters v. Dykes, Civ.App., 145 S.W.2d 1105—Southern Underwriters v. Blair, Civ.App., 144 S.W.2d 641—Federal Underwriters Exchange v. McDaniel, Civ.App., 140 S.W.2d 979, error dismissed, judgment correct—Consolidated Underwriters v. Adams, Civ.App., 140 S.W.2d 221, error dismissed, judgment correct—American Mut. Liability Ins. Co. v. Wedgeworth, Civ.App., 140 S.W.2d 213, error dismissed, judgment correct—Southern Underwriters v. Cooper, Civ.App., 138 S.W.2d 563, error dismissed, judgment correct—Southern Underwriters v. Jones, Civ.App., 137 S.W.2d 52, error dismissed, judgment correct—Southern Underwriters v. Weddle, Civ.App., 118 S.W.2d 1005, error dismissed by agreement—Maryland Cas. Co. v. Crosby, Civ.App., 117 S.W.2d 524, error dismissed—Federal Underwriters Exchange v. Wheeler, Civ.App., 108 S.W.2d 922, error dismissed—Western Cas. Co. v. Lapco, Civ.App., 108 S.W.2d 740, error dismissed—Fidelity & Cas. Co. of New York v. Van Arsdale, Civ.App., 108 S.W.2d 550, error dismissed—Traders & General Ins. Co. v. Mills, Civ.App., 108 S.W.2d 219, error dismissed—Consolidated Underwriters v. Lee, Civ.App., 107 S.W.2d 482, error dismissed—Maryland Cas. Co. v. Lopez, Civ.App., 104 S.W.2d 526, error dismissed—Southern Underwriters v. Shipman, Civ.App., 97 S.W.2d 370, error dismissed—Traders & General Ins. Co. v. Wright, Civ.App., 95 S.W.2d 753, affirmed Wright v. Traders & General Ins. Co., 123 S.W.2d 314, 132 Tex. 172—Traders & General Ins. Co. v. Hunter, Civ.App., 95 S.W.2d 158, error dismissed—Associated Indemnity Corporation v. Baker, Civ.App., 76 S.W.2d 153, error dismissed—Texas Employers' Ins. Ass'n v. Fulkens, Civ.App., 75 S.W.2d 320, error refused—Fidelity & Casualty Co. of New York v. Branton, Civ.App., 70 S.W.2d 780, error dismissed—New Amsterdam Casualty

issues and interrogatories have been held erroneous or properly refused in probate<sup>20</sup> and garnishment<sup>21</sup> proceedings; in actions for injury to property<sup>22</sup> or for personal injuries;<sup>23</sup> in actions against a carrier for injury to goods;<sup>24</sup> in actions against warehousemen;<sup>25</sup> in actions against a hotel by a guest;<sup>26</sup> in actions against employers for injuries to their employees;<sup>27</sup> in actions against railroads for injuries to employees<sup>28</sup> or motorists;<sup>29</sup> in ac-

tions against a street railroad or bus for injuries to passengers,<sup>30</sup> motorists,<sup>31</sup> or pedestrians;<sup>32</sup> in actions for injuries caused by motor vehicles<sup>33</sup> to motorists<sup>34</sup> or pedestrians;<sup>35</sup> and in actions under price control statutes.<sup>36</sup>

Likewise, special issues and interrogatories have been held erroneous or properly refused on the issues of abandonment,<sup>37</sup> adverse possession,<sup>38</sup> bound-

Co. v. Chamness, Civ.App., 63 S.W.2d 1058, error refused—Texas Employers' Ins. Ass'n v. Jenkins, Civ.App., 63 S.W.2d 563—Bankers Lloyds v. Andress, Civ.App., 55 S.W.2d 896.

20. Tex.—Goldman v. Campbell, Civ.App., 249 S.W.2d 633, refused no reversible error.

21. Tex.—Century Lloyds v. Barnett, Civ.App., 259 S.W.2d 768, error refused.

22. Tex.—Erlisman v. Thompson, 167 S.W.2d 731, 140 Tex. 361—Lubbock Bus Co. v. Pearson, Civ.App., 266 S.W.2d 439, refused no reversible error—Jefferson County Drainage Dist. No. 7 v. Hebert, Civ.App., 244 S.W.2d 635, error refused no reversible error—Gray County Gas Co. v. Oldham, Civ.App., 238 S.W.2d 596—Salley v. Black, Sivalva & Bryson, Civ.App., 226 S.W.2d 426, error dismissed—Crain v. West Tex. Utilities Co., Civ.App., 218 S.W.2d 512, error refused no reversible error—Zephyr Oil Co. v. Cockburn, Civ.App., 215 S.W.2d 647, refused no reversible error—Panhandle & S. F. Ry. Co. v. Wiggins, Civ.App., 161 S.W.2d 501, error refused.

23. Tex.—S. H. Kress & Co. v. Selph, Civ.App., 250 S.W.2d 883, error refused no reversible error—Southern Underwriters v. Dykes, Civ.App., 145 S.W.2d 1105—Swift & Co. v. McElroy, Civ.App., 126 S.W.2d 1040. Wyo.—Northwest States Utilities Co. v. Brouillette, 65 P.2d 223, 51 Wyo. 132, rehearing denied 69 P.2d 623, 51 Wyo. 132.

24. Tex.—Thompson v. Gibbs, 238 S.W.2d 213, cause remanded 240 S.W.2d 287, 150 Tex. 315—Rogers v. Crespi & Co., Civ.App., 269 S.W.2d 928—Texas & N. O. R. Co. v. Stumberg, Civ.App., 115 S.W.2d 1126—Amberson v. Paramount Famous Lasky Corporation, Civ.App., 59 S.W.2d 875.

25. Tex.—Mims v. Hearn, Civ.App., 248 S.W.2d 754.

26. Tex.—Erway-Canton Apartments v. Hatterick, Civ.App., 239 S.W.2d 150, refused no reversible error—Dallas Hotel Co. v. Raitman, Civ.App., 59 S.W.2d 943.

27. Ind.—McKinnon v. Parrill, 38 N.E.2d 1008, 111 Ind.App. 343.

Tex.—Gulf Casualty Co. v. Tucker, Civ.App., 201 S.W.2d 81—Aldridge v. General Mills, Civ.App., 188 S.W.2d 407—Fort Worth & Denver City Ry. Co. v. Burton, Civ.App., 158 S.W.2d 601, error dismissed—Texas Employers' Ins. Ass'n v. Pugh, Civ.App., 57 S.W.2d 248, error dismissed—Hartford Accident & Indemnity Co. v. Frye, Civ.App., 55 S.W.2d 1092, error dismissed.

28. Ill.—Worthen v. Thompson, 98 N.E.2d 142, 343 Ill.App. 62.

Tex.—Texas & P. Ry. Co. v. Mix, Civ.App., 193 S.W.2d 642.

29. Ohio.—Croke v. Chesapeake & O. Ry. Co., 93 N.E.2d 811, 86 Ohio App. 483.

Tex.—Finto v. Texas & N. O. R. Co., Civ.App., 265 S.W.2d 606—Dupree v. Burlington-Rock Island R. Co., Civ.App., 251 S.W.2d 559, error refused—St. Louis, S. F. & T. Ry. Co. v. Williams, Civ.App., 104 S.W.2d 103, error dismissed.

Wis.—Lang v. Chicago & N. W. Ry. Co., 46 N.W.2d 844, 258 Wis. 610.

30. Tex.—Dallas Ry. & Terminal Co. v. Reddy, Civ.App., 254 S.W.2d 795—Texas Bus Lines v. Anderson, Civ.App., 233 S.W.2d 961, refused no reversible error—Kerrville Bus Co. v. Williams, Civ.App., 206 S.W.2d 262, error refused no reversible error—Garza v. San Antonio Transit Co., Civ.App., 180 S.W.2d 1006, error refused—Panhandle Stages v. Aston, Civ.App., 171 S.W.2d 911, error refused.

31. Kan.—DeGraw v. Kansas City & Leavenworth Transp. Co., 225 P.2d 527, 170 Kan. 713.

Tex.—Lubbock Bus Co. v. Pearson, Civ.App., 266 S.W.2d 439, refused no reversible error.

32. Tex.—Young v. Dallas Railway & Terminal Co., Civ.App., 136 S.W.2d 915, error dismissed, judgment correct.

33. Kan.—Hudson v. Yellow Cab & Baggage Co., 64 P.2d 43, 145 Kan. 66.

N.C.—Roberts v. Hill, 82 S.E.2d 373, 240 N.C. 373.

Tex.—Coca-Cola Bottling Co. v. Krueger, Civ.App., 239 S.W.2d 669.

34. Ill.—Dever v. Bowers, 94 N.E.2d 518, 341 Ill.App. 444.

Iowa.—Marts v. John, 85 N.W.2d 844, 140 Iowa 130.

Ohio.—Anderson v. S. E. Johnson Co., 80 N.E.2d 757, 150 Ohio St. 169.

Tex.—Wenski v. Kabitzke, Civ.App., 257 S.W.2d 153—Dallas Ry. & Terminal Co. v. Straughan, Civ.App., 254 S.W.2d 882, refused no reversible error—Andrews v. Daniel, Civ.App., 240 S.W.2d 1018, error dismissed—Lackey v. Moffett, Civ.App., 172 S.W.2d 715—Brandon v. Schroeder, Civ.App., 149 S.W.2d 140—Ortiz v. Echols, Civ.App., 131 S.W.2d 142, error dismissed, judgment correct—Johnson v. Smith, Civ.App., 116 S.W.2d 812, error dismissed—Williams v. Long, Civ.App., 106 S.W.2d 378, error dismissed—Commercial Standard Ins. Co. v. Shudde, Civ.App., 76 S.W.2d 561, affirmed (no opinion).

Wis.—Driggs Transfer Co. v. Farmers Mut. Auto. Ins. Co., 61 N.W.2d 305, 265 Wis. 369—Ernst v. Karlman, 8 N.W.2d 280, 242 Wis. 516—Peterson v. Jansen, 295 N.W. 30, 236 Wis. 292—Manitowoc Trust Co. v. Bourli, 265 N.W. 572, 220 Wis. 627.

35. Colo.—Lambrecht v. Archibald, 203 P.2d 897, 119 Colo. 356.

Tex.—Moody v. Clark, Civ.App., 266 S.W.2d 907—Hernandez v. Almenarez, Civ.App., 137 S.W.2d 1059—Texas Electric Service Co. v. Kinkead, Civ.App., 84 S.W.2d 567, error dismissed—Wichita Coca Cola Bottling Co. v. Levine, Civ.App., 68 S.W.2d 310, error refused.

Wis.—Ninneman v. Schwede, 46 N.W.2d 230, 258 Wis. 408—Hagen v. Thompson, 29 N.W.2d 515, 251 Wis. 484.

36. Tex.—Martin v. Burcham, Civ.App., 203 S.W.2d 807.

37. Tex.—City of Anson v. Arnett, Civ.App., 250 S.W.2d 450, refused no reversible error—Catching v. Bogart, Civ.App., 138 S.W.2d 245, error refused—Pearson v. Black, Civ.App., 120 S.W.2d 1075—Sammons v. Hodges, Civ.App., 95 S.W.2d 734.

38. Idaho.—Woll v. Costella, 85 P.2d 679, 59 Idaho 569.

Tex.—Hankamer v. Sumrall, Civ.App., 257 S.W.2d 827, error refused no reversible error—Hunt v. McCain, Civ.App., 73 S.W.2d 564, error dismissed—Reed v. Magnolia Petroleum Co., Civ.App., 57 S.W.2d 859, error dismissed.



aries,<sup>39</sup> consent,<sup>40</sup> consideration,<sup>41</sup> custom,<sup>42</sup> dedication,<sup>43</sup> duress,<sup>44</sup> estoppel,<sup>45</sup> fraud,<sup>46</sup> joint enterprise,<sup>47</sup> knowledge or notice,<sup>48</sup> limitations,<sup>49</sup> malice,<sup>50</sup> marriage,<sup>51</sup> mistake,<sup>52</sup> nuisance,<sup>53</sup> payment,<sup>54</sup> release,<sup>55</sup> title to land,<sup>56</sup> and waiver.<sup>57</sup>

Further, special issues and interrogatories have been held erroneous or properly refused on issues of assumed risk,<sup>58</sup> comparative negligence,<sup>59</sup> contributing cause,<sup>60</sup> discovered peril or last clear chance,<sup>61</sup> as well as on issues of independent inter-

39. Tex.—Snyder v. Magnolia Petroleum Co., Civ.App., 107 S.W.2d 603, error dismissed.

40. Iowa.—Allbaugh v. Ashby, 284 N.W. 816, 226 Iowa 574.

41. N.C.—Carland v. Allison, 19 S.E.2d 245, 221 N.C. 120.

Tex.—Langley v. Norris, Civ.App., 187 S.W.2d 603, affirmed 173 S.W.2d 454, 141 Tex. 405, 148 A.L.R. 555.—Parks v. Hines, Civ.App., 68 S.W.2d 364, affirmed Hines v. Parks, 96 S.W.2d 970, 128 Tex. 289.

42. Tex.—Jones v. Gibbs, Civ.App., 103 S.W.2d 1011, affirmed 130 S.W.2d 265, 133 Tex. 627, motion overruled 131 S.W.2d 957, 133 Tex. 627.

43. Tex.—Oak Park Cemetery v. Donaldson, Civ.App., 148 S.W.2d 994, error dismissed, judgment correct.

44. Tex.—Metro-Goldwyn-Mayer Distributing Corporation v. Cooke, Civ.App., 56 S.W.2d 489.

45. Tex.—Reed v. James, Civ.App., 113 S.W.2d 580, error dismissed.—Davenport v. Taylor County Tuberculosis Ass'n, Civ.App., 72 S.W.2d 407.

46. N.C.—Chormley v. Hyatt, 181 S.E.2d 205, 208 N.C. 478, 108 A.L.R. 618.

Tex.—Gillam v. Baker, Civ.App., 195 S.W.2d 826, error dismissed.—Gilstrap v. Imperial Oil Corporation, Civ.App., 168 S.W.2d 306.—Small v. Dally, Civ.App., 72 S.W.2d 663, error dismissed.—U. S. Fidelity & Guaranty Co. v. McCollum, Civ.App., 70 S.W.2d 751.—Shaffer v. Brown, Civ.App., 59 S.W.2d 854.

47. Ohio.—Watt v. Feuerlicht, App., 41 N.E.2d 719.

Tex.—Horne Motors v. Latimer, Civ.App., 148 S.W.2d 1000, error dismissed, judgment correct.—Pryor v. Le Sage, Civ.App., 133 S.W.2d 308, affirmed Le Sage v. Pryor, 154 S.W.2d 445, 137 Tex. 455.

48. Tex.—Texas & N. O. R. Co. v. Sturgeon, 177 S.W.2d 264, 142 Tex. 222.—Johnican v. Tomasino, Civ.App., 248 S.W.2d 207.—Gray County Gas Co. v. Oldham, Civ.App., 238 S.W.2d 596.—F. W. Woolworth Co. v. Ellison, Civ.App., 232 S.W.2d 857.—McCrary's Stores Corp. v. Murphy, Civ.App., 164 S.W.2d 735, error refused.—Texas Cities Gas Co. v. Dickens, Civ.App., 156 S.W.2d 1010, affirmed 168 S.W.2d 208, 140 Tex. 433.—Gulf Refining Co. v. Nabers, Civ.App., 134 S.W.2d 843.—Gulf, C. & S. F. Ry. Co. v. Sklar, Civ.App., 134 S.W.2d 771, error dismissed.—City of Waco v. Witt, Civ.App., 126

S.W.2d 1002.—Safeway Stores of Texas v. Rutherford, Civ.App., 101 S.W.2d 1055, affirmed 111 S.W.2d 688, 130 Tex. 465.—Humphreys v. Standard Savings & Loan Ass'n, Civ.App., 80 S.W.2d 438, error refused.—The Fair, Inc. v. Preisch, Civ.App., 77 S.W.2d 725.

49. Tex.—Hankamer v. Sumrall, Civ.App., 257 S.W.2d 827, error refused no reversible error.—Hooper v. Courtney, Civ.App., 256 S.W.2d 462.—Gilstap v. Imperial Oil Corporation, Civ.App., 168 S.W.2d 300.—Finney v. Finney, Civ.App., 164 S.W.2d 263, error refused.—Benjamin State Bank v. Reed, Civ.App., 139 S.W.2d 172.—Citizens' Nat. Bank of Lubbock v. Adams, Civ.App., 67 S.W.2d 421, error dismissed.

50. Ill.—Racine Fuel Co. v. Rawlins, 36 N.E.2d 710, 377 Ill. 375.

Tex.—Central Motor Co. v. Roberson, Civ.App., 154 S.W.2d 180, affirmed Burton v. Roberson, 164 S.W.2d 524, 139 Tex. 562, 143 A.L.R. 1.

Wis.—Paulson v. Scott, 50 N.W.2d 376, 260 Wis. 141, 31 A.L.R.2d 706.

51. Tex.—Consolidated Underwriters v. Taylor, Civ.App., 197 S.W.2d 216, error refused no reversible error.

52. N.C.—Jefferson v. Southern Land Sales Corp., 16 S.E.2d 462, 220 N.C. 76.

Tex.—Walton v. Steffens, Civ.App., 170 S.W.2d 534, error refused.

53. Tex.—City of Tyler v. House, Civ.App., 64 S.W.2d 1007.

54. Tex.—Cartledge v. Billalba, Civ.App., 154 S.W.2d 210, error refused.

55. Tex.—Traveler's Ins. Co. of Hartford, Conn. v. Hobbs, Civ.App., 222 S.W.2d 168.—Gulf States Security Life Ins. Co. v. Edwards, Civ.App., 109 S.W.2d 1125, error dismissed.

56. Tex.—Jones v. Gibbs, Civ.App., 103 S.W.2d 1011, affirmed 130 S.W.2d 265, 133 Tex. 627, motion overruled 131 S.W.2d 957, 133 Tex. 627.

57. Tex.—Faubian v. Busch, Civ.App., 240 S.W.2d 361, refused no reversible error.—White v. Christie, Civ.App., 224 S.W.2d 717.

58. Tex.—Beaumont, S. L. & W. Ry. Co. v. Schmidt, 72 S.W.2d 899, 123 Tex. 580.—Buchanan v. Lang, Civ.App., 247 S.W.2d 445, refused no reversible error.—Marsh v. Williams, Civ.App., 154 S.W.2d 201, error refused.—Herndon v. Halliburton Oil Well Cementing Co., Civ.App., 154 S.W.2d 163, error refused.—Portilla Drilling Co. v. Miller, Civ.App., 144 S.W.2d 938, error dismissed, judg-

ment correct.—City of Wichita Falls v. Lewis, Civ.App., 68 S.W.2d 388, error dismissed.

54 C.J. p 1126 note 62.

59. Wis.—Ready v. Hafeman, 300 N.W. 480, 239 Wis. 1.

60. Ill.—Goodman v. Chicago, B. & Q. R. Co., 7 N.E.2d 393, 289 Ill. App. 320, certiorari denied Chicago, B. & Q. R. Co. v. Goodman, 58 S.Ct. 610, 303 U.S. 640, 82 L.Ed. 1100.

Tex.—American Emp. Ins. Co. v. Climer, Civ.App., 220 S.W.2d 697.—Maryland Casualty Co. v. Romero, Civ.App., 146 S.W.2d 1098, error dismissed, judgment correct.—Southern Underwriters v. Grimes, Civ.App., 146 S.W.2d 1058, error dismissed, judgment correct.—Southern Underwriters v. Cooper, Civ.App., 138 S.W.2d 563, error dismissed, judgment correct.—Texas Coca-Cola Bottling Co. v. Lovejoy, Civ.App., 138 S.W.2d 254, error refused.—Dillingham v. Currie, Civ.App., 92 S.W.2d 1122, error dismissed.—Yellow Cab Corporation v. Halford, Civ.App., 91 S.W.2d 801, error dismissed.—Texas Indemnity Co. v. McNew, Civ.App., 90 S.W.2d 1115, error dismissed.—Security Mut. Casualty Co. v. Bolton, Civ.App., 84 S.W.2d 552.

61. N.C.—Ingram v. Smoky Mountain Stages, 35 S.E.2d 337, 225 N.C. 444.—Reep v. Southern Ry. Co., 186 S.E. 318, 210 N.C. 285.

Tex.—Sisti v. Thompson, 229 S.W.2d 610, 149 Tex. 139.—Schuhmacher Co. v. Posey, 215 S.W.2d 880, 147 Tex. 392.—Texas & N. O. R. Co. v. Krausoff, 191 S.W.2d 1, 144 Tex. 436.—Texas & N. O. R. Co. v. Grace, 138 S.W.2d 378, 144 Tex. 71.—Dupree v. Burlington-Rock Island R. Co., Civ.App., 251 S.W.2d 559, error refused.—Ditta v. Pogue, Civ.App., 249 S.W.2d 938.—Kennedy v. Wichita Production Co., Civ.App., 242 S.W.2d 261, refused no reversible error.—Rabe v. Lee, Civ.App., 239 S.W.2d 846.—Hawkins v. Houston Transit Co., Civ.App., 227 S.W.2d 604, refused no reversible error.—Blasdel v. Port Terminal R. Ass'n, Civ.App., 227 S.W.2d 248, error refused.—Thompson v. Sisti, Civ.App., 224 S.W.2d 500, affirmed Sisti v. Thompson, 229 S.W.2d 610, 149 Tex. 139.—Texas & N. O. R. Co. v. Grace, Civ.App., 204 S.W.2d 857.—Elder v. Panhandle Stages Shuttle Service, Civ.App., 189 S.W.2d 762, affirmed 193 S.W.2d 170, 144 Tex. 638.—Kimbriel Produce Co. v. Mayo, Civ.App., 180 S.W.2d 504, error refused.—Phoenix Refining Co. v. Morgan,

vening cause,<sup>63</sup> lookout,<sup>63</sup> speed,<sup>64</sup> sudden emergency,<sup>65</sup> violation of statute or ordinance,<sup>66</sup> warnings and signals,<sup>67</sup> and willful or wanton misconduct.<sup>68</sup>

Finally, special issues and interrogatories have been held erroneous or properly refused on issues of whether defendant was, under the circumstances, negligent;<sup>69</sup> whether plaintiff was guilty of con-

Civ.App., 178 S.W.2d 176, error refused—Martin v. Weaver, Civ.App., 161 S.W.2d 812, error refused—Young v. Dallas Railway & Terminal Co., Civ.App., 136 S.W.2d 915, error dismissed, judgment correct—Barber v. Anderson, Civ.App., 127 S.W.2d 358, error dismissed, judgment correct—Malone v. City of Plainview, Civ.App., 137 S.W.2d 201, error dismissed—Aulry v. Dallas Railway & Terminal Co., Civ.App., 98 S.W.2d 264, error dismissed—Allen v. Denk, Civ.App., 87 S.W.2d 308.

64 C.J. p 1126 note 61.

65. Tex.—Dallas Ry. & Terminal Co. v. Bailey, 250 S.W.2d 179, 151 Tex. 359—Ynafrán v. Burkhardt, Civ.App., 247 S.W.2d 907, refused no reversible error—Mercer v. Evans, Civ.App., 175 S.W.2d 206—Dallas Railway & Terminal Co. v. Goss, Civ.App., 144 S.W.2d 591—Hemell v. Summers, Civ.App., 138 S.W.2d 865—Weatherhead v. Vavithis, Civ.App., 135 S.W.2d 1008—Consolidated Underwriters v. Christal, Civ.App., 135 S.W.2d 127, error refused—Younger Bros. v. Power, Civ.App., 118 S.W.2d 954, error dismissed—Jones v. McIlveen, Civ.App., 106 S.W.2d 503, error dismissed—Crim v. Hunter, Civ.App., 97 S.W.2d 979, error dismissed.

66. Ohio.—Croke v. Chesapeake & O. Ry. Co., 93 N.E.2d 811, 86 Ohio App. 488.

Tex.—Schumacher Co. v. Shooter, 124 S.W.2d 857, 132 Tex. 560—Lee v. Galbreath, Civ.App., 234 S.W.2d 91—Panhandle & Santa Fe Ry. Co. v. Ray, Civ.App., 221 S.W.2d 936, error refused no reversible error—Harrison v. Southwest Coaches, Civ.App., 207 S.W.2d 159—English Freight Co. v. Preston, Civ.App., 203 S.W.2d 657, refused no reversible error—Attebery v. Hanwood, Civ.App., 177 S.W.2d 95, error refused—Valley Film Service v. Cruz, Civ.App., 173 S.W.2d 952, error refused—Graham v. Gatewood, Civ.App., 166 S.W.2d 768, error refused—Le Sage v. Smith, Civ.App., 145 S.W.2d 308, error dismissed, judgment correct—Texas & P. Ry. Co. v. Heathington, Civ.App., 115 S.W.2d 495.

Wis.—Culver v. Webb, 12 N.W.2d 731, 244 Wis. 478.

66. Neb.—Meicher v. Murphy, 51 N.W.2d 411, 149 Neb. 641.

Ohio.—A. Macaluso Fruit Co. v. Commercial Motor Freight, App., 57 N.E.2d 692.

Tex.—Andrews v. Daniel, Civ.App., 240 S.W.2d 1018, error dismissed—

Anderson v. Broome, Civ.App., 233 S.W.2d 901—Grasn v. Ligon, Civ.App., 190 S.W.2d 742, refused no reversible error—City of Fort Worth v. Lee, Civ.App., 183 S.W.2d 831, affirmed 186 S.W.2d 954, 143 Tex. 551, 159 A.L.R. 125—Norris Bros. v. Mattinson, Civ.App., 118 S.W.2d 460, error dismissed—Johnson v. Smither, Civ.App., 116 S.W.2d 812, error dismissed—McClelland v. Moulger, Civ.App., 107 S.W.2d 901, error dismissed by agreement—Southwestern Bell Tel. Co. v. Ferris, Civ.App., 89 S.W.2d 229, error dismissed.

Wis.—Stats v. Pohl, 62 N.W.2d 556, 286 Wis. 23, rehearing denied 63 N.W.2d 711, 288 Wis. 23—Derge v. Carter, 22 N.W.2d 505, 248 Wis. 500—Maurer v. Fesing, 290 N.W. 191, 233 Wis. 565.

67. Tex.—Goolsbee v. Texas & N. O. R. Co., 243 S.W.2d 386, 150 Tex. 528—San v. Sullivan, Civ.App., 189 S.W.2d 69, refused for want of merit.

68. Kan.—Long v. Shafer, 188 P.2d 646, 164 Kan. 211.

Ohio.—Giglio v. Lasita, 55 N.E.2d 666, 73 Ohio App. 207.

Tex.—Blaugrund v. Gish, 179 S.W.2d 266, 143 Tex. 379—Chapman v. Evans, Civ.App., 186 S.W.2d 827, refused for want of merit.

67. Tex.—Lee v. Galbreath, Civ.App., 234 S.W.2d 91—Lundberg v. Missouri-Kansas-Texas R. Co. of Tex., Civ.App., 232 S.W.2d 379, refused no reversible error—Panhandle & Santa Fe Ry. Co. v. Ray, Civ.App., 221 S.W.2d 936—Airline Motor Coaches v. Cleveland, Civ.App., 199 S.W.2d 847, error refused no reversible error—Lackey v. Moffett, Civ.App., 172 S.W.2d 715.

68. Conn.—Decker v. Roberts, 12 A.2d 541, 126 Conn. 478.

Ill.—Racine Fuel Co. v. Rawlins, 86 N.E.2d 710, 377 Ill. 375—Walsh v. Gaxin, 45 N.E.2d 95, 316 Ill.App. 311—Paul v. Garman, 24 N.E.2d 884, 310 Ill.App. 447—Price v. Bailey, 265 Ill.App. 355.

N.C.—Turner v. Lips, 188 S.E. 108, 210 N.C. 627.

Pa.—Sankay v. Young, 88 A.2d 94, 370 Pa. 339.

64 C.J. p 1126 note 60.

69. Idaho.—Yearsley v. City of Pocatello, 210 P.2d 795, 69 Idaho 500.

Mich.—Schults v. Sollitt Const. Co., 295 N.W. 585, 296 Mich. 125.

N.M.—Larsen v. Blinn, 91 P.2d 811, 43 N.M. 365.

N.C.—Etheridge v. Atlantic Coast Line R. Co., 175 S.E. 124, 206 N.C. 657.

Ohio.—Scott v. Ciamadl, 74 N.E.2d 568, 80 Ohio App. 89.

R.I.—Connolly v. Seftman, 9 A.2d 866, 64 R.I. 29.

Tex.—Smith v. Hanger, 236 S.W.2d 425, 148 Tex. 455, 20 A.L.R.2d 553—City of Fort Worth v. Lee, 186 S.W.2d 954, 143 Tex. 551, 159 A.L.R. 125—Lowry v. Anderson-Berney Bldg. Co., 161 S.W.2d 459, 139 Tex. 29—Railway Exp. Agency v. Spain, Civ.App., 249 S.W.2d 644, appeal dismissed, Sup., 155 S.W.2d 509—Ynafrán v. Burkhardt, Civ.App., 247 S.W.2d 907, refused no reversible error—Crain v. West Tex. Utilities Co., Civ.App., 218 S.W.2d 512, error refused no reversible error—Texas & P. Ry. Co. v. Mix, Civ.App., 193 S.W.2d 542—Gillette Motor Transport Co. v. Whitfield, Civ.App., 186 S.W.2d 90, refused for want of merit—City of Fort Worth v. Lee, Civ.App., 183 S.W.2d 831, affirmed 186 S.W.2d 954, 143 Tex. 551—Cox v. Shannon, Civ.App., 141 S.W.2d 412, error dismissed, judgment correct—Texas Public Utilities Corp. v. Martin, Civ.App., 136 S.W.2d 839—Swift & Co. v. McIlroy, Civ.App., 126 S.W.2d 1040—Johnson v. Smith, Civ.App., 116 S.W.2d 812, error dismissed—Texas & P. Ry. Co. v. Heathington, Civ.App., 115 S.W.2d 495—S. Bickman, Inc. v. Chilton, Civ.App., 114 S.W.2d 646—McCluskey v. Keathley, Civ.App., 111 S.W.2d 1193, error dismissed—F. H. Vahlsing, Inc. v. Hartford Fire Ins. Co., Civ.App., 103 S.W.2d 947, error dismissed—Safeway Stores of Texas v. Rutherford, Civ.App., 101 S.W.2d 1056, affirmed 111 S.W.2d 688, 130 Tex. 465—Texas & N. O. R. Co. v. Harris, Civ.App., 101 S.W.2d 640, error dismissed—Dolabite-Levy Co. v. Phillips, Civ.App., 99 S.W.2d 688, error dismissed—Southland Greyhound Lines v. King, Civ.App., 77 S.W.2d 251, error dismissed—Benge v. Foster, Civ.App., 74 S.W.2d 548, error refused—S. H. Kress & Co. v. Jennings, Civ.App., 64 S.W.2d 1074, error dismissed—Rincon v. Berg Co., Civ.App., 60 S.W.2d 811, error dismissed—Wichita County Water Improvement Dist. No. 1 v. Pearce, Civ.App., 59 S.W.2d 183—Schwartz v. Sprinkle, Civ.App., 55 S.W.2d 590.

Wis.—Yanisch v. American Fidelity & Cas. Co., 44 N.W.2d 367, 257 Wis. 462.

64 C.J. p 1126 note 53.

Imputed negligence

Tex.—Garner v. Prescott, Civ.App., 234 S.W.2d 704—Terrill Wells Health Resort v. Severoid, Civ.App., 95 S.W.2d 526—Texas-Louisiana

tributory negligence;<sup>70</sup> whether the negligence | charged was the proximate cause of the injury;<sup>71</sup>

Power Co. v. Webster, Civ.App., 59 S.W.2d 902, affirmed 91 S.W.2d 302, 127 Tex. 126—Carson v. Texas Pipe Line Co., Civ.App., 59 S.W.2d 328, error dismissed.  
Wis.—Wendt v. Finch, 292 N.W. 890, 235 Wis. 290.

70. U.S.—Carpenter v. Baltimore & O. R. Co., C.C.A.Ohio, 109 F.2d 375. Colo.—Lambrecht v. Archibald, 203 P.2d 897, 119 Colo. 356.

Ill.—Ernhart v. Elgin, J. & E. Ry. Co., 84 N.E.2d 868, 337 Ill.App. 56, reheard 92 N.E.2d 96, 405 Ill. 577—Curl v. City of Chicago, 71 N.E.2d 103, 330 Ill.App. 331.

Iowa.—Tobin v. Van Orsdel, 45 N.W.2d 239, 241 Iowa 1331.

Minn.—Hall v. Gillis, 246 N.W. 466, 188 Minn. 20.

N.C.—Revan v. Carter, 186 S.E. 321, 210 N.C. 291.

R.I.—Connolly v. Seitman, 9 A.2d 866, 64 R.I. 23.

Tex.—Texas & N. O. R. Co. v. Solgaard, 238 S.W.2d 186, 150 Tex. 94—City of Fort Worth v. Lee, 186 S.W.2d 954, 143 Tex. 551, 159 A.L.R. 125—Schumacher Co. v. Shoofer, 124 S.W.2d 857, 132 Tex. 560—Garcia v. Moncada, 94 S.W.2d 123, 127 Tex. 453—Sproles v. Rosen, 84 S.W.2d 1001, 126 Tex. 51—Beaumont, S. L. & W. Ry. Co. v. Schmidt, 72 S.W.2d 899, 123 Tex. 580—McCarthy Oil & Gas Corp. v. Cunningham, Civ.App., 255 S.W.2d 368, refused no reversible error—Texas & N. O. R. Co. v. Solgaard, Civ.App., 236 S.W.2d 673, error refused 238 S.W.2d 186, 150 Tex. 94—Anderson v. Broome, Civ.App., 233 S.W.2d 901—Texas City Terminal Ry. Co. v. McLemore, Civ.App., 225 S.W.2d 1007, refused no reversible error—W. U. Tel. Co. v. Hinson, Civ.App., 222 S.W.2d 636, error refused no reversible error—Panhandle & Santa Fe Ry. Co. v. Ilay, Civ.App., 221 S.W.2d 936, error refused no reversible error—Chesshir v. Nail, Civ.App., 218 S.W.2d 248, refused no reversible error—Talley Transfer Co. v. Cones, Civ.App., 216 S.W.2d 604, refused no reversible error—Kiel v. Mahan, Civ.App., 214 S.W.2d 865, refused no reversible error—Good v. Born, Civ.App., 197 S.W.2d 589, error refused no reversible error—Dallas Ry. & Terminal Co. v. Graham, Civ.App., 185 S.W.2d 180—City of Fort Worth v. Lee, Civ.App., 182 S.W.2d 831, affirmed 186 S.W.2d 954, 143 Tex. 551, 159 A.L.R. 125—Valley Film Service v. Cruz, Civ.App., 173 S.W.2d 952, error refused—McCrory's Stores Corporation v. Murphy, Civ.App., 164 S.W.2d 735, error refused—Jennison v. Darnielle, Civ.App., 146 S.W.2d 788, error dismissed—Long v. Metcalf, Civ.App., 134 S.W.2d 455, error dismissed, judgment correct—Bond

v. Smith, Civ.App., 130 S.W.2d 864, error dismissed, judgment correct—Monte Carlo Distributing Co. v. Rosas, Civ.App., 127 S.W.2d 334, error dismissed, judgment correct—Swift & Co. v. McElroy, Civ.App., 126 S.W.2d 1040—Traders & General Ins. Co. v. Boysen, Civ.App., 123 S.W.2d 1016, error dismissed, judgment correct—Texas & N. O. R. Co. v. Daft, Civ.App., 120 S.W.2d 481—Ciseco & N. E. Ry. Co. v. McCharen, Civ.App., 118 S.W.2d 844—City of Winters v. Bethune, Civ.App., 111 S.W.2d 797, error dismissed—E. L. Martin, Inc. v. Kyser, Civ.App., 104 S.W.2d 592, error dismissed—Crim v. Hunter, Civ.App., 97 S.W.2d 979, error dismissed—Continental Oil Co. v. Barnes, Civ.App., 97 S.W.2d 494, error refused—Desdemona Gasoline Co. of Texas v. Garrett, Civ.App., 90 S.W.2d 636, error dismissed—City of Wichita Falls v. Phillips, Civ.App., 87 S.W.2d 544, error dismissed—Williams v. Rodocker, Civ.App., 84 S.W.2d 556—Jackson v. Amador, Civ.App., 75 S.W.2d 892, error dismissed—Pure Oil Co. v. Pope, Civ.App., 75 S.W.2d 175, reversed (no opinion)—McDaniel Bros. v. Wilson, Civ.App., 70 S.W.2d 618, error refused—Texas-Louisiana Power Co. v. Daniels, Civ.App., 61 S.W.2d 179, affirmed 91 S.W.2d 302, 127 Tex. 126.

Wis.—McAleavy v. Lowe, 49 N.W.2d 487, 259 Wis. 463—Brandt v. Matson, 41 N.W.2d 272, 256 Wis. 314—Eberdt v. Muller, 2 N.W.2d 367, 240 Wis. 341, rehearing denied 3 N.W.2d 763, 240 Wis. 341.  
64 C.J. p 1125 note 59.

71. Tex.—Spratling v. Butler, 240 S.W.2d 1016, 150 Tex. 369—International-Great Northern R. Co. v. Hawthorne, 116 S.W.2d 1056, 131 Tex. 622, certiorari denied 59 S.Ct. 487, 306 U.S. 639, 83 L.Ed. 1040—Kenney v. La Grone, 93 S.W.2d 397, 127 Tex. 539—Dixie Motor Coach Corporation v. Galvan, 86 S.W.2d 633, 126 Tex. 109—Phoenix Refining Co. v. Tips, 81 S.W.2d 60, 125 Tex. 69—Beaumont, S. L. & W. Ry. Co. v. Schmidt, 72 S.W.2d 899, 123 Tex. 580—Federal Underwriters Exchange v. Harwell, Com App., 167 S.W.2d 460, error refused—Armour & Co. v. Tomlin, Com App., 60 S.W.2d 204—Pharr v. Coldeway, Civ.App., 256 S.W.2d 917—Dallas Ry. & Terminal Co. v. Straughan, Civ.App., 254 S.W.2d 882—Galveston-Houston Brokerly v. Naylor, Civ.App., 249 S.W.2d 262, error refused no reversible error—Sunset Motor Lines v. Blasingame, Civ.App., 245 S.W.2d 288, error dismissed—Collis v. Price's Creameries, Civ.App., 244 S.W.2d 900, error refused no reversible error—Jefferson County Drainage Dist. No. 7 v. Hebert, Civ.App.,

244 S.W.2d 535, error refused no reversible error—Kuemmel v. Vradenburg, Civ.App., 239 S.W.2d 869, refused no reversible error—Thompson v. Hodges, Civ.App., 237 S.W.2d 757, error refused no reversible error—Panhandle & Santa Fe Ry. Co. v. Ray, Civ.App., 221 S.W.2d 936, error refused no reversible error—Pacific Indem. Co. v. Arline, Civ.App., 218 S.W.2d 681, error granted—Associated Emp. Lloyds v. Zellerbach, Civ.App., 208 S.W.2d 136—Ricks v. Smith, Civ.App., 204 S.W.2d 12, refused no reversible error—National Life & Acc. Ins. Co. v. Hanna, Civ.App., 195 S.W.2d 733, error refused no reversible error—Federal Underwriters Exchange v. Sandel, Civ.App., 166 S.W.2d 147, error refused—McCrory's Stores Corp. v. Murphy, Civ.App., 164 S.W.2d 735, error refused—Heard & Heard v. Kuhnert, Civ.App., 156 S.W.2d 817—Hartford Accident & Indemnity Co. v. Vick, Civ.App., 155 S.W.2d 664—Hemsel v. Summers, Civ.App., 153 S.W.2d 305—Traders & General Ins. Co. v. Belcher, Civ.App., 152 S.W.2d 525—Brandon v. Schroeder, Civ.App., 149 S.W.2d 140—Maryland Casualty Co. v. Abbott, Civ.App., 148 S.W.2d 465, error dismissed, judgment correct—United Employers Casualty Co. v. Marr, Civ.App., 144 S.W.2d 973, error dismissed, judgment correct—Texas Indemnity Ins. Co. v. Godsey, Civ.App., 143 S.W.2d 639, error refused—North East Texas Motor Lines v. Hodges, Civ.App., 141 S.W.2d 386, affirmed 158 S.W.2d 487, 138 Tex. 280—Hemsel v. Summers, Civ.App., 138 S.W.2d 865—Texas Coca-Cola Bottling Co. v. Lovejoy, Civ.App., 138 S.W.2d 254, error refused—Southern Underwriters v. Stubblefield, Civ.App., 130 S.W.2d 385—Southern Underwriters v. Parker, Civ.App., 129 S.W.2d 758, error refused—Hicks v. Brown, Civ.App., 128 S.W.2d 884, modified on other grounds 151 S.W.2d 790, 136 Tex. 399—Traders & General Ins. Co. v. Boysen, Civ.App., 123 S.W.2d 1016, error dismissed, judgment correct—Willis v. Smith, Civ.App., 120 S.W.2d 899, error dismissed—American General Ins. Co. v. Webster, Civ.App., 118 S.W.2d 1082, error dismissed—Wells v. Ford, Civ.App., 118 S.W.2d 420, error dismissed—Vincent v. Johnson, Civ.App., 117 S.W.2d 135, error dismissed—Coca Cola Bottling Co. v. Heckman, Civ.App., 113 S.W.2d 201—Southern Underwriters v. Sanders, Civ.App., 110 S.W.2d 1258, error dismissed—City of Pampa v. Long, Civ.App., 110 S.W.2d 1001—Williams v. Long, Civ.App., 106 S.W.2d 378, error dismissed—Jones v. McIlvene, Civ.App., 105 S.W.2d 503, error dismissed—

and whether the injury was the result of an unavoidable accident.<sup>73</sup>

### § 532. — As to Ultimate or Evidentiary Facts

A special issue or special interrogatory should call for

the determination of an ultimate fact and not for the determination of evidentiary matters.

A special issue or special interrogatory should relate to, and call for, only the determination of some ultimate fact involved in the cause, and essential to the right of action or matter of defense;<sup>73</sup> and if it does so it is not error for the

Yesser v. Dodson, Civ.App., 104 S.W.2d 95, error dismissed—Tennessee Dairies v. Seibenhausen, Civ.App., 99 S.W.2d 323, error dismissed—Traders & General Ins. Co. v. Herrndon, Civ.App., 95 S.W.2d 540, error dismissed—Roadway Express v. Gaston, Civ.App., 91 S.W.2d 883, error dismissed—Southland Greyhound Lines v. King, Civ.App., 77 S.W.2d 281, error dismissed—Associated Indemnity Corporation v. Baker, Civ.App., 76 S.W.2d 153, error dismissed—Indemnity Ins. Co. of North America v. Weeks, Civ.App., 75 S.W.2d 925—Texas Employers' Ins. Ass'n v. Horn, Civ.App., 75 S.W.2d 801—Texas Employers' Ins. Ass'n v. Bradford, Civ.App., 62 S.W.2d 158, affirmed (no opinion)—Texas & P. Ry. Co. v. Perkins, Civ.App., 284 S.W. 683.

64 C.J. p 1137 note 64.

72a. Tex.—Shuford v. City of Dallas, 190 S.W.2d 721, 144 Tex. 345—Collins v. Smith, 175 S.W.2d 407, 142 Tex. 36—Ynsfran v. Burkhardt, Civ.App., 247 S.W.2d 907, refused no reversible error—Coca-Cola Bottling Co. v. Krueger, Civ.App., 239 S.W.2d 669—Reddick v. Longacre, Civ.App., 228 S.W.2d 264, refused no reversible error—W. U. Tel. Co. v. Hinson, Civ.App., 222 S.W.2d 636, refused no reversible error—Chenshry v. Nail, Civ.App., 218 S.W.2d 248, refused no reversible error—Kiel v. Mahan, Civ.App., 214 S.W.2d 865, refused no reversible error—Nussbaum v. Anthony, Civ.App., 214 S.W.2d 686, refused no reversible error—Good v. Born, Civ.App., 197 S.W.2d 589, error refused no reversible error—Schuhmacher Co. v. Holcomb, Civ.App., 174 S.W.2d 637, affirmed 177 S.W.2d 951, 142 Tex. 332—Panhandle Stages v. Anton, Civ.App., 171 S.W.2d 911, error refused—Great Atlantic & Pacific Tea Co. v. Garner, Civ.App., 170 S.W.2d 502, error refused—City of Coleman v. Smith, Civ.App., 168 S.W.2d 836—Texas State Highway Department v. Butler, Civ.App., 158 S.W.2d 878, error refused—Texas & Pac. Ry. Co. v. Cassidy, Civ.App., 148 S.W.2d 471, error dismissed, judgment correct—City of Corpus Christi v. McMurrey, Civ.App., 145 S.W.2d 684, error dismissed, judgment correct—Dulaney Inv. Co. v. Wood, Civ.App., 142 S.W.2d 378, error dismissed, judgment correct—Bogrus Motor Co. v. Standridge, Civ.App., 138 S.W.2d 643, error dismissed,

judgment correct—Consolidated Underwriters v. Christal, Civ.App., 135 S.W.2d 127, error refused—Demister Mill Mfg. Co. v. Wiley, Civ.App., 131 S.W.2d 257, error dismissed, judgment correct—Schuhmacher Co. v. Rahn, Civ.App., 78 S.W.2d 205, error dismissed—Leonard Bros v. Newton, Civ.App., 71 S.W.2d 613, error dismissed 101 S.W.2d 233, 129 Tex. 1—Tarver v. Vallance, Civ.App., 97 S.W.2d 748—Gulf States Utilities Co. v. Wuenschel, Civ.App., 72 S.W.2d 682, error dismissed—Texas & P. Ry. Co. v. Short, Civ.App., 62 S.W.2d 985, error refused—Southland Greyhound Lines v. Dennison, Civ.App., 62 S.W.2d 500, error dismissed—Texas-Louisiana Power Co. v. Webster, Civ.App., 69 S.W.2d 902, affirmed 91 S.W.2d 302, 127 Tex. 126—Orange & N. W. Ry. Co. v. Harris, Civ.App., 57 S.W.2d 931, 59 S.W.2d 217, reversed on other grounds 89 S.W.2d 973, 127 Tex. 13.

64 C.J. p 1126 note 63.

73a. U.S.—Carpenter v. Baltimore & O. R. Co., C.C.A.Ohio, 199 F.2d 375.

Iowa.—Tobin v. Van Orsdol, 45 N.W.2d 239, 241 Iowa 1331—Olinger v. Tiefenthaler, 285 N.W. 137, 226 Iowa 847.

Kan.—B. F. McLean Inv. Co. v. City of Wichita, 268 P.2d 958, 176 Kan. 566.

Ohio.—Perry v. Baakey, 107 N.E.2d 328, 158 Ohio St. 151—Bradley v. Mansfield Rapid Transit, 93 N.E.2d 672, 164 Ohio St. 154—Solonics v. Republic Steel Corp., 53 N.E.2d 815, 142 Ohio St. 567—Miljak v. Boyle, 112 N.E.2d 240, 93 Ohio App. 169—Bredenbeck v. Hollywood Cartage Co., 110 N.E.2d 152, 92 Ohio App. 285—Sparks v. Sims, App., 92 N.E.2d 428—Clos v. Chapman, App., 34 N.E.2d 811—Bailey v. Great Lakes Greyhound Lines of Ind., 16 Ohio Supp. 112—Bloser v. Cincinnati Club, Com.Pl., 71 N.E.2d 138.

Or.—Vale v. State Industrial Acc. Commission, 85 P.2d 958, 160 Or. 589.

Pa.—Simpson v. Montgomery Ward & Co., 57 A.2d 571, 162 Pa.Super. 371. Tex.—Wichita Falls & Oklahoma Ry. Co. v. Pepper, 135 S.W.2d 79, 134 Tex. 340—Hough v. Grapotto, 90 S.W.2d 1080, 137 Tex. 144—Texas Emp. Ins. Ass'n v. Henthorn, Civ.App., 340 S.W.2d 393, refused no reversible error—Thomason v. Burch,

Civ.App., 223 S.W.2d 320, refused no reversible error—Lurie v. City of Houston, Civ.App., 220 S.W.2d 320, reversed on other grounds City of Houston v. Lurie, 224 S.W.2d 871, 148 Tex. 391, 14 A.L.R.2d 61—Coggin v. Coggin, Civ.App., 204 S.W.2d 47—Mitcham v. Mitcham, Civ.App., 202 S.W.2d 947—Lewis v. Texas & N. O. R. Co., Civ.App., 199 S.W.2d 185, error refused no reversible error—Sample v. Richardson, Civ.App., 195 S.W.2d 843, error refused no reversible error—A. B. C. Storage & Moving Co. v. Herron, Civ.App., 138 S.W.2d 211, error dismissed, judgment correct—Reed v. James, Civ.App., 113 S.W.2d 580, error dismissed—Panhandle & S. F. Ry. Co. v. Friend, Civ.App., 91 S.W.2d 922—International-Great Northern R. Co. v. Hawthorne, Civ.App., 90 S.W.2d 895, affirmed 116 S.W.2d 1056, 131 Tex. 622, certiorari denied 59 S.Ct. 487, 396 U.S. 639, 83 L.Ed. 1040—Bush v. Gaffney, Civ.App., 84 S.W.2d 759—Northern Texas Traction Co. v. Bruce, Civ.App., 77 S.W.2d 889, error dismissed—Dr. Pepper Bottling Co. v. Rainholdt, Civ.App., 68 S.W.2d 496, reversed on other grounds Schraeder v. Rainholdt, 97 S.W.2d 679, 128 Tex. 269.

Wis.—Papenfus v. Shell Oil Co., 85 N.W.2d 920, 254 Wis. 233—Ernst v. Karlman, 8 N.W.2d 280, 242 Wis. 516.

64 C.J. p 1132 note 2.

Special interrogatory may refer to one or more ultimate facts or issues.

Iowa.—Olinger v. Tiefenthaler, 285 N.W. 137, 226 Iowa 847.

Ultimate facts

(1) "Ultimate facts" lie in area between evidence and conclusion of law.—Scott v. Cismadi, 74 N.E.2d 563, 80 Ohio App. 39.

(2) An "ultimate issue" of fact to be submitted to a jury is one to which the law directly attaches in applying a rule or principle of law, which is potentially necessary to a disposition of case.—Northern Texas Traction Co. v. Bruce, Tex.Civ.App., 77 S.W.2d 889, error dismissed.

(3) An "ultimate fact" is one essential to the right of action or matter of defense.—Wichita Falls & Oklahoma Ry. Co. v. Pepper, 135 S.W.2d 79, 134 Tex. 340—Dreeben v. Sidor, Tex.Civ.App., 354 S.W.2d 908, refused no reversible error.

court to submit it and it is error for the court to refuse to submit it.<sup>74</sup> Every material conflict in the evidence,<sup>75</sup> or every fact tending to establish or disprove the main issues of liability or nonliability<sup>76</sup> need not be submitted. A special issue or interrogatory is improper and may be refused where it does not call for the determination of some ultimate fact,<sup>77</sup> as where it relates to subordinate facts to be considered in deciding ultimate facts, and necessarily embraced in the finding of, and merely in-

cidental to, the ultimate issue,<sup>78</sup> or where it is designed merely to recapitulate the evidence rather than to determine the facts proved by the evidence.<sup>79</sup>

**Evidentiary facts.** As a corollary to the rule that a special issue or interrogatory must relate to an ultimate fact, a special issue or interrogatory is improper, and may properly be refused submission, where it relates to, or calls for, merely an evidentiary fact,<sup>80</sup> unless an ultimate fact may be inferred

(4) "Ultimate facts" are logical results of proofs or evidence and are conclusions of facts, and final resulting effect reached by processes of logical reasoning from evidentiary facts; an "ultimate fact" may be result of inference drawn from more than one evidentiary fact.—*Scott v. Cismadi*, 74 N.E.2d 563, 80 Ohio App. 38.

(5) An "ultimate fact" is one which can reasonably be inferred from the facts found without applying to the facts any legal principle or measuring them by any legal standard.—*Tucker Freight Lines v. Gross*, 33 N.E.2d 353, 109 Ind.App. 454.

(6) Determination of what constitutes an "ultimate issue" to be submitted to jury involves proper legal analysis of controversy.—*Dreesen v. Sidor*, Tex.Civ.App., 254 S.W.2d 908, refused no reversible error.

(7) Each group of facts pleaded by party, which, standing alone, would, if proved, constitute a complete defense to suit, presents an "ultimate issue".—*Northern Texas Traction Co. v. Bruce*, Tex.Civ.App., 77 S.W.2d 889, error dismissed.

#### Synonymous terms

The terms "ultimate issues," "ultimate facts," "essential facts," "essential issues," and "controlling issues" are frequently used synonymously with respect to necessity for submission.—*Wichita Falls & Oklahoma Ry. Co. v. Pepper*, 135 S.W.2d 79, 134 Tex. 360.—*Dreesen v. Sidor*, Tex.Civ.App., 254 S.W.2d 908, refused no reversible error.

74. Iowa.—*Ipsen v. Ruess*, 41 N.W. 2d 658, 241 Iowa 730.

Tex.—*Minyard v. Kennedy*, Civ.App., 241 S.W.2d 767, refused no reversible error.—*Lone Star Bldg. & Loan Ass'n v. Larcade*, Civ.App., 211 S.W. 2d 257, refused no reversible error.—*Corpus Juris* cited in *Wright v. State*, Civ.App., 80 S.W.2d 1015, 1018, error dismissed.

64 C.J. p 1132 note 3.

75. Tex.—*Hoover v. Hamilton*, Civ. App., 24 S.W.2d 935.

76. Tex.—*St. Louis, B. & M. Ry. Co. v. Jenkins*, Civ.App., 173 S. W. 984.

Wis.—*Meldenbauer v. Pewaukee*, 156 N.W. 144, 162 Wis. 326.

64 C.J. p 1132 note 37.

77. Iowa.—*Flattery v. Goodie*, 38 N.W.2d 685, 240 Iowa 978.—*Martins v. John*, 85 N.W.2d 844, 240 Iowa 180.

Kan.—*Finke v. Lamle*, 253 P.2d 869, 173 Kan. 792.—*Alexander v. Weh-kamp*, 232 P.2d 440, 171 Kan. 285.—*Sluss v. Brown-Crummer Inv. Co.*, 53 P.2d 900, 143 Kan. 14, opinion adhered to 64 P.2d 23, 145 Kan. 12.

Ohio.—*MacDonald v. State ex rel. Fulton*, 191 N.E. 837, 47 Ohio App. 223.—*Village of Orrville v. Goch-nauer*, 183 N.E. 391, 43 Ohio App. 422.

Tex.—*Great American Indemnity Co. v. Sama*, 176 S.W.2d 312, 142 Tex. 121.—*Wichita Falls & Oklahoma Ry. Co. v. Pepper*, 135 S.W.2d 79, 134 Tex. 360.—*City of Panhandle v. Byrd*, 106 S.W.2d 660, 130 Tex. 96.—*Brown v. Federal Land Bank of Houston*, Civ.App., 180 S.W.2d 647.—*Texas Indemnity Ins. Co. v. Gudsey*, Civ.App., 143 S.W.2d 639, error refused.

64 C.J. p 1132 note 4.—71 C.J. p 1348 note 60.

78. Ohio.—*Clos v. Chapman*, App., 34 N.E.2d 811.

Tex.—*Texas Emp. Ins. Ass'n v. Henthorn*, Civ.App., 240 S.W.2d 392, 64 C.J. p 1133 note 5.

79. Kan.—*Doty v. Crystal Ice & Fuel Co.*, 263 P. 611, 123 Kan. 653.

80. Ill.—*Rouse v. New York, C. & St. L. R. Co.*, 110 N.E.2d 266, 340 Ill. App. 139.—*Johnson v. Country Life Ins. Co.*, 1 N.E.2d 779, 284 Ill.App. 603.—*Thiel v. Material Service Corp.*, 233 Ill.App. 46, affirmed 5 N.E.2d 38, 364 Ill. 539.—*Schluraff v. Shore Line Motor Coach Co.*, 269 Ill.App. 569.

Ohio.—*McFadden v. Thomas*, 96 N.E. 2d 254, 154 Ohio St. 405.—*Solanics v. Republic Steel Corp.*, 53 N.E.2d 815, 142 Ohio St. 567.—*Reed v. Pearl Assur. Co.*, 80 N.E.2d 232, 82 Ohio App. 293.—*Carle v. Courtwright*, 40 N.E.2d 421, 69 Ohio App. 69, rehearing denied 43 N.E.2d 296, 69 Ohio App. 69.—*Clos v. Chapman*, App., 34 N.E.2d 811.—*Pettitt v. Cooper*, 34 N.E.2d 289, 63 Ohio App. 377.—*Baltimore & O. R. Co. v. Mc-*

*Teer*, 9 N.E.2d 627, 55 Ohio App. 217.

Pa.—*Shipley v. City of Pittsburgh*, 184 A. 671, 321 Pa. 494.

Tex.—*Bell Pub. Co. v. Garrett En-gineering Co.*, 170 S.W.2d 197, 141 Tex. 51.—*Scott v. Gardner*, 156 S.W.2d 513, 137 Tex. 623, 141 A.L.R. 50.—*Colbert v. Dallas Joint Stock Land Bank*, 150 S.W.2d 771, 136 Tex. 269.—*American Sur. Co. of New York v. Fenner*, 125 S.W.2d 258, 133 Tex. 37.—*Dunn v. Second Nat. Bank*, 113 S.W.2d 165, 131 Tex. 198, 115 A.L.R. 730.—*Shuffield v. Taylor*, 83 S.W.2d 955, 105 Tex. 601.—*Wright v. State*, 80 S.W.2d 1015, error dismissed.—*Hankamer v. Sumrall*, Civ.App., 257 S.W.2d 827, error refused no reversible error.—*Dreesen v. Sidor*, Civ.App., 254 S.W.2d 908, refused no reversible error.—*Dallas Ry. & Terminal Co. v. Straughan*, Civ.App., 254 S.W.2d 882.—*Citizens Bridge Co. v. Guerra*, Civ.App., 248 S.W.2d 538, affirmed in part and reversed in part, on other grounds, Sup., 258 S.W.2d 64.—*Buchanan v. Lang*, Civ. App., 247 S.W.2d 445, refused no reversible error.—*Gooch v. Davidson*, Civ.App., 245 S.W.2d 989.—*Texas Emp. Ins. Ass'n v. Henthorn*, Civ.App., 240 S.W.2d 392, refused no reversible error.—*Liberty Mut. Ins. Co. v. Hughes*, Civ.App., 238 S.W.2d 803, refused no reversible error.—*Garner v. Prescott*, Civ.App., 234 S.W.2d 704.—*H. E. Butt Gro-cery Co. v. Johnson*, Civ.App., 226 S.W.2d 501, refused no reversible error.—*Glass v. Upton*, Civ.App., 226 S.W.2d 344.—*Texas Emp. Ins. Ass'n v. Brumbaugh*, Civ.App., 224 S.W.2d 761, refused no reversible error.—*Soap Corp. of America v. Ballis*, Civ.App., 223 S.W.2d 957, refused no reversible error.—*Cheesahr v. Nail*, Civ.App., 218 S.W.2d 248, refused no reversible error.—*Nuss-baum v. Anthony*, Civ.App., 214 S.W.2d 686, refused no reversible error.—*Whitten v. Dethloff*, Civ.App., 214 S.W.2d 480.—*Langham v. Tal-bott*, Civ.App., 211 S.W.2d 987, refused no reversible error.—*Morgan v. Young*, Civ.App., 203 S.W.2d 437, refused no reversible error.—*San Augustine Independent School Dist. v. Freelove*, Civ.App., 195 S.W.2d

therefrom as a matter of law,<sup>81</sup> or unless the evidentiary matters as established in the course of the proceedings necessarily control the ultimate issues of fact.<sup>82</sup> It has been held that the trial court has a wide discretion under various circumstances in allowing interrogatories with respect to subordinate facts as distinguished from ultimate conclusions.<sup>83</sup>

### § 533. — Admitted or Uncontroverted Facts

Special issues and interrogatories as to matters which are not in dispute should not be submitted to the jury.

Only controverted questions of fact should be submitted to the jury,<sup>84</sup> and the court may properly refuse to submit special issues or questions as to facts which are not disputed,<sup>85</sup> or are admitted or

175, error refused no reversible error—*Dakan v. Humphreys*, Civ.App., 190 S.W.2d 371—*Myers v. Minnick*, Civ.App., 187 S.W.2d 941—*Phillips v. Stanolind Oil & Gas Co.*, Civ.App., 170 S.W.2d 802, error refused—*Phillips Petroleum Co. v. Capps*, Civ.App., 170 S.W.2d 522, error refused—*Federal Underwriters Exchange v. Morton*, Civ.App., 167 S.W.2d 287, error refused—*Maryland Cas. Co. v. Stewart*, Civ.App., 164 S.W.2d 800, error refused—*Bridwell v. Bernard*, Civ.App., 159 S.W.2d 981, error refused—*Marsh v. Williams*, Civ.App., 154 S.W.2d 201, error refused—*Pittman v. Stephens*, Civ.App., 153 S.W.2d 314, error refused—*Feden Iron & Steel Co. v. Claflin*, Civ.App., 146 S.W.2d 1062, error dismissed, judgment correct—*Federal Underwriters Exchange v. McDaniel*, Civ.App., 146 S.W.2d 979, error dismissed, judgment correct—*Benjamin State Bank v. Reed*, Civ.App., 139 S.W.2d 172—*Coats v. Stewart*, Civ.App., 135 S.W.2d 1026, error dismissed, judgment correct—*Hamshire v. De Villeneuve*, Civ.App., 135 S.W.2d 571—*Eathay v. Sherman*, Civ.App., 135 S.W.2d 174, error dismissed, judgment correct—*Chauncey v. Gambill*, Civ.App., 126 S.W.2d 775, error dismissed, judgment correct—*Lehman v. Barry*, Civ.App., 126 S.W.2d 499, error dismissed, judgment correct—*Jones-O'Brien, Inc. v. Loyd*, Civ.App., 125 S.W.2d 684, error dismissed—*Geistmann v. Schkade*, Civ.App., 121 S.W.2d 494—*Cross v. White*, Civ.App., 112 S.W.2d 502, affirmed 132 S.W.2d 580, 134 Tex. 91—*City of Winters v. Bethune*, Civ.App., 111 S.W.2d 797, error dismissed—*Maryland Cas. Co. v. Wilson*, Civ.App., 108 S.W.2d 260, error dismissed—*Bruce v. Thomas*, Civ.App., 106 S.W.2d 806—*Union Central Life Ins. Co. v. Roach*, Civ.App., 106 S.W.2d 374, error dismissed—*Texas & N. O. R. Co. v. Coe*, Civ.App., 102 S.W.2d 465, error dismissed—*Union Central Life Ins. Co. v. Williams*, Civ.App., 99 S.W.2d 319—*Roeser v. Coffey*, Civ.App., 98 S.W.2d 275—*Texas & N. O. R. Co. v. Neill*, Civ.App., 97 S.W.2d 279, error refused 100 S.W.2d 348, 128 Tex. 580, certiorari dismissed 58 S.Ct. 118, 302 U.S. 645, 82 L.Ed. 501, rehearing denied 58 S.Ct. 258,

302 U.S. 778, 82 L.Ed. 602—*Stroud v. Winerich Motor Co.*, Civ.App., 91 S.W.2d 1169, error dismissed—*Northcutt v. Magnolia Petroleum Co.*, Civ.App., 90 S.W.2d 632, error refused—*Corpus Juris cited in Wright v. State*, Civ.App., 80 S.W.2d 1015, 1019, error dismissed—*Texas & P. Ry. Co. v. Hesterly*, Civ.App., 79 S.W.2d 909, error dismissed—*Ramming v. Halstead*, Civ.App., 77 S.W.2d 920, error dismissed—*Falls County v. Young*, Civ.App., 77 S.W.2d 912, error dismissed—*Seasums v. Citizens' Nat. Bank*, Civ.App., 72 S.W.2d 403—*Texas Employers' Ins. Ass'n v. Eaton*, Civ.App., 69 S.W.2d 569, error dismissed—*Conger v. Driessel*, Civ.App., 69 S.W.2d 164—*Bookhout v. McGeorge*, Civ.App., 65 S.W.2d 512, error dismissed—*Texas Co. v. Berterton*, Civ.App., 66 S.W.2d 663, reversed on other grounds 88 S.W.2d 1039, 126 Tex. 359—*Texas & P. Ry. Co. v. Phillips*, Civ.App., 66 S.W.2d 210, error dismissed—*Fort Worth & R. G. Ry. Co. v. Ross*, Civ.App., 64 S.W.2d 561, error refused—*Wis. Treptau v. Behrens Spa*, 20 N.W.2d 108, 247 Wis. 438, 64 C.J. p 1133 note 8—26 C.J. p 568 note 2.

#### Special issues held not objectionable as being evidentiary

Kan.—*Jelf v. Cottonwood Falls Gas Co.*, 178 P.2d 992, 162 Kan. 713.  
Ohio.—*Bailey v. Great Lakes Greyhound Lines of Ind.*, 16 Ohio Supp. 112.  
Tex.—*Texas & N. O. R. Co. v. McGinnis*, 109 S.W.2d 160, 130 Tex. 338—*Henwood v. Gary*, Civ.App., 196 S.W.2d 958, error refused no reversible error—*Universal Life & Accident Ins. Co. v. Shaw*, Civ.App., 173 S.W.2d 501, error refused—*Western Gulf Petroleum Corp. v. Frazier Jelke & Co.*, Civ.App., 163 S.W.2d 860, error refused—*Norris v. White*, Civ.App., 154 S.W.2d 819, error refused—*Barrera v. Duval County Ranch Co.*, Civ.App., 135 S.W.2d 518, error refused—*Ferguson v. Mellinbruck*, Civ.App., 134 S.W.2d 680, error dismissed, judgment correct—*Sinclair Refining Co. v. Costin*, Civ.App., 116 S.W.2d 894—*Johnson v. Smither*, Civ.App., 116 S.W.2d 812, error dismissed—*Cuniff v. Bernard Corp.*, Civ.App., 94 S.

W.2d 577, error refused—*Texas & N. O. R. Co. v. Rittmann*, Civ.App., 87 S.W.2d 745, error dismissed—*Emerson v. Park*, Civ.App., 84 S.W.2d 1100, error dismissed—*Ford Motor Co. v. Whitt*, Civ.App., 81 S.W.2d 1032, error refused—*Texas & N. O. R. Co. v. Kvaton*, Civ.App., 75 S.W.2d 118, error dismissed—*White v. Haynes*, Civ.App., 60 S.W.2d 275, error dismissed, 64 C.J. p 1133 note 8 [c].  
81. Ohio.—*Kennard v. Palmer*, 53 N.E.2d 908, 143 Ohio St. 1—*Scott v. Cismadi*, 74 N.E.2d 563, 80 Ohio App. 39.  
64 C.J. p 1134 note 10.  
82. Ill.—*Leonard v. Stone*, 45 N.E.2d 620, 381 Ill. 343.  
Ind.—*Lyon v. Aetna Life Ins. Co.*, 44 N.E.2d 186, 112 Ind.App. 573, 64 C.J. p 1134 note 11.  
83. Conn.—*Meglio v. Comeau*, 79 A.2d 187, 137 Conn. 551.  
84. Tex.—*Jackson v. Cooper*, Civ.App., 151 S.W.2d 951, error dismissed, judgment correct—*Floyd v. Fidelity Union Casualty Co.*, Civ.App., 13 S.W.2d 909, reversed on other grounds, Com.App., 24 S.W.2d 363, rehearing denied, Com.App., 39 S.W.2d 1091, 54 C.J. p 577 note 84.  
85. Ga.—*Manry v. Stephens*, 9 S.E.2d 58, 190 Ga. 305.  
Iowa.—*Foy v. Metropolitan Life Ins. Co. of New York*, 263 N.W. 14, 220 Iowa 628.  
Mich.—*Hartley v. A. I. Rodd Lumber Co.*, 276 N.W. 712, 282 Mich. 652.  
N.C.—*Rose v. Bank of Wadesboro*, 9 S.E.2d 2, 217 N.C. 600—*Clark v. Dill*, 181 S.E. 281, 208 N.C. 421.  
Ohio.—*Sparks v. Sims*, App., 92 N.E.2d 428.  
R.I.—*Connolly v. Seftman*, 9 A.2d 866, 64 R.I. 29.  
Tex.—*Smith v. Henger*, 226 S.W.2d 425, 148 Tex. 456, 20 A.L.R.2d 853—*Southern Underwriters v. Wheeler*, 123 S.W.2d 340, 132 Tex. 350—*Oriental Oil Co. v. Brown*, 106 S.W.2d 136, 130 Tex. 240—*Minchen v. First Nat. Bank of Alpine*, Civ.App., 263 S.W.2d 601, error refused no reversible error—*Dozier v. Jarman*, Civ.App., 254 S.W.2d 569—*Jefferson County Drainage Dist. No. 7 v. Hebert*, Civ.App., 244 S.W.2d 535, error refused no reversible ar

conceded by the adverse party,<sup>86</sup> or admitted by the pleadings.<sup>87</sup> It is also proper to refuse to submit, or error to submit, a special issue or question which is established by undisputed evidence,<sup>88</sup> or

ror—Coca-Cola Bottling Co. v. Krueger, Civ.App., 239 S.W.2d 669—Beauchamp v. Beauchamp, Civ. App., 239 S.W.2d 191, refused no reversible error—Texas Associates v. Joe Bland Const. Co., Civ.App., 222 S.W.2d 413, refused no reversible error—Guffey v. Collier, Civ. App., 203 S.W.2d 812—Renchie v. John Hancock Mut. Life Ins. Co., Civ.App., 174 S.W.2d 87—Frierson v. Modern Mut. Health & Acc. Ins. Co., Civ.App., 172 S.W.2d 389, error refused—Woodmen of the World Life Ins. Soc. v. Armstrong, Civ.App., 170 S.W.2d 526, error refused—Matson v. Federal Farm Mortg. Corp., Civ.App., 151 S.W.2d 636—Kerr v. Clark, Civ.App., 148 S.W.2d 880—Brown v. Kirksey, Civ. App., 145 S.W.2d 217—Southern Underwriters v. Boswell, Civ.App., 141 S.W.2d 442, affirmed 158 S.W.2d 280, 138 Tex. 255—Federal Underwriters Exchange v. Ener, Civ.App., 126 S.W.2d 769, error dismissed, judgment correct—Traders & General Ins. Co. v. Patterson, Civ.App., 123 S.W.2d 766, error dismissed—First State Bank of Denton v. Smoot-Curtis Co., Civ.App., 121 S.W.2d 667, error dismissed—Geismann v. Schkade, Civ.App., 121 S.W.2d 494—Republic Ins. Co. v. Dickson, Civ.App., 110 S.W.2d 642, error dismissed—Southern Underwriters v. Wheeler, Civ.App., 108 S.W.2d 846, reversed on other grounds 123 S.W.2d 340, 132 Tex. 350—Franz v. Lusk, Civ.App., 107 S.W.2d 479, error dismissed—Bruce v. Thomas, Civ.App., 106 S.W.2d 806—Metropolitan Life Ins. Co. v. Ray, Civ.App., 105 S.W.2d 377—Yates v. Home Bldg. & Loan Co., Civ.App., 103 S.W.2d 1081—Fidelity & Cas. Co. of New York v. Ener, Civ.App., 97 S.W.2d 267—Terrell Wells Health Resort v. Severeld, Civ.App., 95 S.W.2d 526—Lewis v. Connecticut General Life Ins. Co., Civ.App., 94 S.W.2d 499, error refused—Taylor-Link Oil Co. v. Anderson, Civ.App., 92 S.W.2d 499, error dismissed—Newton v. McCarrick, Civ.App., 75 S.W.2d 472, error dismissed—Sessums v. Citizens' Nat. Bank, Civ.App., 73 S.W.2d 403—Fidelity & Casualty Co. of New York v. Branton, Civ.App., 70 S.W.2d 780, error dismissed—Citizens' Nat. Bank of Lubbock v. Adams, Civ.App., 67 S.W.2d 421, error dismissed—Grayburg Oil Co. v. Bothager Motor Co., Civ.App., 67 S.W.2d 404—Oklahoma Wheat Pool Elevator Corporation v. Sylvester, Civ. App., 65 S.W.2d 398—Diamond Steel Highway Sign Co. v. Latham, Civ.App., 60 S.W.2d 1055—E. A. Pierce & Co. v. Aronoff, Civ.App.,

60 S.W.2d 796, error dismissed—Baldridge v. Klein, Civ.App., 56 S.W.2d 897, reversed (no opinion)—Johnston v. Andrade, Civ.App., 54 S.W.2d 1029, error refused. Wis.—Balzer v. Caldwell, 263 N.W. 705, 220 Wis. 270—E. L. Chester Co. v. Wisconsin Power & Light Co., 247 N.W. 861, 211 Wis. 158. 64 C.J. p 1135 note 18. 86. Kan.—Fidelity Sav. State Bank v. Grimes, 131 P.2d 894, 156 Kan. 55. Okl.—Farmers & Bankers Life Ins. Co. v. Lemon, 228 P.2d 634, 204 Okl. 218. Tex.—Ynsfran v. Burkhart, Civ.App., 247 S.W.2d 907, refused no reversible error—Bilbrey v. Gentile, Civ. App., 107 S.W.2d 597, error dismissed. 64 C.J. p 1136 note 19. 87. N.C.—Poole v. Poole, 187 S.E. 777, 210 N.C. 536. Tex.—Southern Underwriters v. Tullios, 151 S.W.2d 789, 136 Tex. 408—Perez v. Consolidated Underwriters, Civ.App., 206 S.W.2d 162, error refused no reversible error. 64 C.J. p 1136 note 20. 88. Kan.—Alexander v. Wehkamp, 232 P.2d 440, 171 Kan. 285—Colin v. DeCoursey Cream Co., 178 P.2d 690, 162 Kan. 683. N.M.—*Corpus Juris* cited in Larsen v. Bliss, 91 P.2d 811, 816, 43 N.M. 265. Tenn.—Life & Casualty Ins. Co. v. Robertson, 6 Tenn.App. 43. Tex.—Socony-Vacuum Oil Co. v. Aderhold, 240 S.W.2d 751, 150 Tex. 292—Bennett v. McKrell, 144 S.W.2d 242, 135 Tex. 567—Greenwood v. Senter, Com.App., 61 S.W.2d 812—Dozier v. Jarman, Civ.App., 254 S.W.2d 569—Cotterly v. Muirhead, Civ.App., 244 S.W.2d 920, error refused no reversible error—Balcomb v. Vasquez, Civ.App., 241 S.W.2d 650, refused no reversible error—Vineyard v. Harvey, Civ.App., 231 S.W.2d 921, error dismissed—Gulf, C. & S. F. Ry. Co. v. Jones, Civ. App., 221 S.W.2d 1010, error refused no reversible error—General American Life Ins. Co. v. Martinez, Civ.App., 149 S.W.2d 637, error dismissed, judgment correct—United Employers Cas. Co. v. Barker, Civ. App., 148 S.W.2d 260—Montgomery v. Cunningham, Civ.App., 137 S.W.2d 818, error refused—Traders & General Ins. Co. v. Towns, Civ.App., 130 S.W.2d 445, error dismissed, judgment correct—Federal Underwriters Exchange v. Bullard, Civ.App., 128 S.W.2d 126—Swift & Co. v. McElroy, Civ.App., 126 S.W.2d 1040—City of Winters v. Bethune, Civ.App., 111 S.W.2d 797, error dismissed—St. Paul Fire & Marine Ins. Co. v. Westmoreland, Civ.

App., 77 S.W.2d 265, affirmed 105 S.W.2d 203, 130 Tex. 65—Southern Old Line Life Ins. Co. v. Mims, Civ. App., 101 S.W.2d 396, error dismissed—Roadway Express v. Gaston, Civ.App., 91 S.W.2d 883, error dismissed—Lisenbee v. Wichita Falls Building & Loan Ass'n, Civ. App., 82 S.W.2d 688, error refused—Traders' & General Ins. Co. v. Nunley, Civ.App., 80 S.W.2d 383, error refused—Wells v. Henderson, Civ.App., 78 S.W.2d 683, error refused—Barnes v. Archer, Civ.App., 77 S.W.2d 883—Indemnity Ins. Co. of North America v. Weeks, Civ. App., 75 S.W.2d 925—Gersdorf-Sloan Ambulance Service v. Kenty, Civ.App., 75 S.W.2d 903, error dismissed—Texas Employers' Ins. Ass'n v. Burnett, Civ.App., 72 S.W.2d 952, error dismissed—Fidelity & Casualty Co. of New York v. Branton, Civ.App., 70 S.W.2d 780, error dismissed—Parks v. Hines, Civ.App., 68 S.W.2d 364, affirmed 128 Tex. 289—Citizens' Nat. Bank of Lubbock v. Adams, Civ. App., 67 S.W.2d 421, error dismissed—McClung Const. Co. v. Muncy, Civ.App., 65 S.W.2d 786, error dismissed—Oklahoma Wheat Pool Elevator Corporation v. Sylvester, Civ. App., 65 S.W.2d 398—Phoenix Ins. Co. of London v. Stobaugh, Civ. App., 62 S.W.2d 678, modified on other grounds Phoenix Assur. Co. of London v. Stobaugh, 41 S.W.2d 428, 127 Tex. 308—Daniels v. Starnes, Civ.App., 61 S.W.2d 548, error dismissed—Gaines v. Stewart, Civ.App., 57 S.W.2d 207. 64 C.J. p 1136 note 21.

#### Interested witness

(1) A material fact which is dependent on testimony of interested witness alone should be submitted to jury.—Larson v. Whitten, Tex.Civ. App., 111 S.W.2d 736, error dismissed—Cude v. Vaughn, Tex.Civ.App., 111 S.W.2d 1155—Etna Casualty & Surety Co. v. Tobolowsky, Civ.App., 73 S.W.2d 556, error dismissed.

(2) Where testimony of an interested party stands uncontradicted, no circumstances appear reflecting on its verity, nothing appears to cause reasonable minds to doubt truth of facts stated, and such testimony is corroborated by other substantial testimony, question of witness' credibility need not be submitted to jury.—Longhorn Trucks v. Bailes, Tex. Civ.App., 225 S.W.2d 642, mandamus overruled—United Employers Cas. Co. v. Barker, Tex.Civ.App., 148 S.W.2d 260—Coats v. Stewart, Tex.Civ. App., 135 S.W.2d 1026, error dismissed, judgment correct—General Motors Acceptance Corp. v. Boyd,

on which the evidence is conclusive and could be answered only one way,<sup>89</sup> as where it is conclusively established as a matter of law.<sup>90</sup> Such questions may be answered by the court instead of submitting them to the jury, before delivering them to the jury,<sup>91</sup> and a motion should be made, asking it to pronounce judgment on such facts.<sup>92</sup> A recital of the undisputed facts by the court in questions to the jury is not improper, as invading the province of the jury,<sup>93</sup> nor is it error for the court to include such facts in a special verdict, and direct the answers to be made thereto.<sup>94</sup> However, the court cannot refuse to submit interrogatories on the ground that the parties have agreed on the facts unless such agreement is made matter of record.<sup>95</sup>

### § 534. — As to Damages or Amount of Recovery

The general rules with respect to the submission of special issues or interrogatories apply with respect to the question of damages and the amount of recovery.

The general rules, discussed supra §§ 531-533, that where a case is submitted on special issues or interrogatories, the ultimate issues raised by the pleadings and evidence, and only such, are to be submitted have been applied with respect to damages and the amount of recovery.<sup>96</sup> An undisputed or admitted issue with respect to damages should not be submitted by a special issue or interrogatory,<sup>97</sup> nor should a matter of mere calculation be sub-

Tex.Civ.App., 120 S.W.2d 484—Fidelity & Casualty Co. of New York v. Branton, Civ.App., 70 S.W.2d 780, error dismissed.

89. Kan.—Long v. Shafer, 188 P.2d 646, 164 Kan. 211.

Tex.—International-Great Northern R. Co. v. Hawthorne, 116 S.W.2d 1056, 131 Tex. 622, certiorari denied 59 S.Ct. 487, 806 U.S. 639, 83 L.Ed. 1040—National Sec. Life & Cas. Co. v. Benham, Civ.App., 253 S.W.2d 334, refused no reversible error—Vineyard v. Harvey, Civ. App., 231 S.W.2d 921, error dismissed—City of Austin v. Johnson, Civ.App., 195 S.W.2d 222, error refused no reversible error—Benefit Ass'n of Ry. Emp. v. O'Gorman, Civ.App., 195 S.W.2d 215, error refused no reversible error—Oil Country Pipe & Supply Co. v. Carter, Civ.App., 143 S.W.2d 831, error dismissed, judgment correct—Reeves v. Tittle, Civ.App., 129 S.W.2d 364, error refused—Malone v. City of Plainview, Civ.App., 127 S.W.2d 201, error dismissed—Hartford Accident & Indemnity Co. v. Clark, Civ.App., 126 S.W.2d 799, error dismissed, judgment correct—Anderson v. Hutto, Civ.App., 126 S.W.2d 709, error refused—General Life Ins. Co. v. Potter, Civ.App., 124 S.W.2d 409—City of Dublin v. Hicks, Civ.App., 120 S.W.2d 872—Columbus Mut. Life Ins. Co. v. Oldham, Civ.App., 115 S.W.2d 694, error dismissed—Traders & General Ins. Co. v. O'Quinn, Civ.App., 111 S.W.2d 859, error refused—Supreme Forest Woodmen Circle v. Hornsby, Civ.App., 107 S.W.2d 393—Jefferson Standard Life Ins. Co. v. Lindsey, Civ.App., 94 S.W.2d 549, error dismissed—Williams v. Rodocker, Civ. App., 84 S.W.2d 556—Traders & General Ins. Co. v. Lincecum, Civ. App., 81 S.W.2d 549, reversed 107 S.W.2d 585, 130 Tex. 220—Traders & General Ins. Co. v. Line, Civ.App., 70 S.W.2d 787, error dismissed.

Wash.—Gakovich v. Department of Labor and Industries, 184 P.2d 830, 29 Wash.2d 1.

64 C.J. p 1136 note 22.

Submission held proper; evidence held not conclusive

Tex.—Safeway Stores of Texas v. Webb, Civ.App., 164 S.W.2d 868, error refused—Texas & N. O. R. Co. v. Daft, Civ.App., 120 S.W.2d 481.

90. Tex.—Jessee Produce Co. v. Ewing, Civ.App., 213 S.W.2d 750—Oil Country Pipe & Supply Co. v. Carter, Civ.App., 143 S.W.2d 831, error dismissed, judgment correct—Foster v. Woodward, Civ.App., 134 S.W.2d 417, error refused—St. Louis B. & M. Ry. Co. v. Zumora, Civ.App., 110 S.W.2d 1242—Crow v. Southwestern Transp. Co., Civ.App., 73 S.W.2d 607, error refused.

64 C.J. p 1137 note 22.

91. Wis.—Murphy v. Interlake Pulp & Paper Co., 155 N.W. 925, 162 Wis. 139.

64 C.J. p 1137 note 24.

92. Tex.—Lasater v. Lopez, Civ. App., 202 S.W. 1039, affirmed 217 S. W. 373, 110 Tex. 179.

93. Wis.—Meldenbauer v. Town of Pewaukee, 156 N.W. 144, 162 Wis. 326.

94. Cal.—Cary v. Los Angeles Ry. Co., 108 P. 682, 157 Cal. 599, 27 L. R.A.N.S. 764, 21 Ann.Cas. 1329. Wis.—Baumann v. C. Reiss Coal Co., 95 N.W. 139, 119 Wis. 330.

95. Mich.—Duffee v. Abbott, 15 N. W. 559, 50 Mich. 479—Harbaugh v. People, 33 Mich. 241.

96. Cal.—James v. Haley, 297 P. 920, 212 Cal. 142—Aspe v. Pirrelli, 266 P. 276, 204 Cal. 9—Tabler v. Harlin, 288 P. 823, 106 Cal.App. 74.

N.C.—Roth v. Greensboro News Co., 6 S.E.2d 882, 217 N.C. 13.

Tex.—Dallas Ry. & Terminal Co. v. Ector, 116 S.W.2d 683, 131 Tex. 505

—Texas Employers' Ins. Ass'n v. Arnold, 88 S.W.2d 473, 126 Tex. 466—General Ins. Corp. v. Hughes, Civ.App., 193 S.W.2d 230—Traders & General Ins. Co. v. Wilder, Civ. App., 186 S.W.2d 1011—Martin v. Weaver, Civ.App., 161 S.W.2d 812—Federal Underwriters Exchange v. Harwell, Civ.App., 157 S.W.2d 460, error refused—Southern Underwriters v. Blair, Civ.App., 144 S.W.2d 641—Federal Underwriters Exchange v. Popnoe, Civ.App., 140 S.W.2d 484, error dismissed—Commercial Standard Ins. Co. v. Davis, Civ.App., 135 S.W.2d 794, error dismissed, 137 S.W.2d 1, 134 Tex. 487—Wright Titus, Inc. v. Swafford, Civ.App., 133 S.W.2d 287, error dismissed, judgment correct—Southern Underwriters v. Thomas, Civ. App., 131 S.W.2d 409, error dismissed, judgment correct—Traders & General Ins. Co. v. Peterson, Civ. App., 87 S.W.2d 822, error dismissed—Southwestern Bell Telephone Co. v. Burris, Civ.App., 48 S.W.2d 542.

64 C.J. p 1137 notes 32, 33.

97. N.C.—Rose v. Bank of Wadesboro, 9 S.E.2d 2, 217 N.C. 600.

Tex.—United Employers Casualty Co. v. Marr, Civ.App., 144 S.W.2d 973, error dismissed, judgment correct—Associated Indemnity Corporation v. McGrew, Civ.App., 142 S.W.2d 567, affirmed 160 S.W.2d 912, 138 Tex. 568—Federal Underwriters Exchange v. Riggsby, Civ.App., 130 S.W.2d 1105, error dismissed—Safety Casualty Co. v. McGee, Civ.App., 93 S.W.2d 519, affirmed 127 S.W.2d 176, 133 Tex. 231, 121 A.L.R. 1283—Traders & General Ins. Co. v. Garry, Civ.App., 118 S.W.2d 340, affirmed 143 S.W.2d 370, 135 Tex. 290—Enterprise Co. v. Taylor, Civ. App., 112 S.W.2d 1103—Southern Underwriters v. Kelly, Civ.App., 110 S.W.2d 153, error dismissed—Fidelity & Casualty Co. of New York



mitted.<sup>18</sup> Where damages, if recoverable at all, are recoverable as a whole and not for aggregate or distinct items, special issues or interrogatories as to the items or elements of damage are improper and should be refused,<sup>19</sup> but the submission of separate issues as to each item of damage separately alleged and proved is proper;<sup>1</sup> and where plaintiff has suffered separate and distinct injuries it is error to submit the issue of damages as a unit and proper to submit them separately.<sup>2</sup> Special interrogatories and issues as to the items or elements of damage must not be in such form as to permit a double recovery;<sup>3</sup> and, where the circumstances of the case are such that successive suits have been or may be brought for injury to the same subject matter, the court may submit the case on special issues and have the different items of

damages distinctly passed on, so that there will be no danger of a subsequent recovery for the same damage.<sup>4</sup> Special issues, or particular questions of fact, calling for answers affecting exemplary or punitive damages, may be submitted to the jury in a tort action, regardless of whether such damages may or may not properly be allowed or are within the complaint, where the issues thus presented are otherwise material.<sup>5</sup> In a suit for temporary damages, an issue for permanent damages need not be submitted.<sup>6</sup>

Under the facts and circumstances of the case, particular special issues and interrogatories have been held proper or erroneously refused as to damages and the amount of recovery,<sup>7</sup> such as issues and interrogatories with respect to the elements of

v. Branton, Civ.App., 70 S.W.2d 780, error dismissed.

Special issues as to admitted or uncontroverted facts generally see supra § 533.

98. Tex.—Baldwin v. Drew, Civ.App., 195 S.W. 636, reversed on other grounds, Com.App., 244 S.W. 987, 64 C.J. p 1138 note 37.

99. Tex.—Federal Underwriters Exchange v. Popnoe, Civ.App., 140 S.W.2d 484, error dismissed—City of Dublin v. Hicks, Civ.App., 120 S.W.2d 372—Merchants Bldg. Corporation v. Adler, Civ.App., 110 S.W.2d 978, error dismissed—Bull-Stewart Equipment Co. v. Sperra, Civ.App., 109 S.W.2d 784, error dismissed.  
64 C.J. p 1137 notes 36—17 C.J. p 1062 note 98.

1. Mich.—Ault v. Kuiper, 271 N.W. 520, 279 Mich. 1.

2. Tex.—Texas Employers Ins. Ass'n v. Pierson, Civ.App., 135 S.W.2d 550—Rutherford & Harding v. Sharpe, Civ.App., 16 S.W.2d 855.

3. N.Y.—Bogardus v. U. S. Fidelity & Guaranty Co., 58 N.Y.S.2d 217, 289 App.Div. 618, motion denied 60 N.Y.S.2d 270, 270 App.Div. 801.

Tex.—Neyland v. Adams, Civ.App., 140 S.W.2d 233, error dismissed, judgment correct—Texas Power & Light Co. v. Casey, Civ.App., 138 S.W.2d 594, error dismissed, judgment correct.

Itemization of damages in verdict see infra § 551.

Personal injuries and property damage

Separate issues should be submitted as to personal injuries and property damage.—Dalby v. Lyle, Tex. Civ.App., 105 S.W.2d 764.

5. Tex.—State v. Carpenter, 39 S.W.2d 970, 136 Tex. 604—Internation

al-Great Northern R. Co. v. King, Com.App., 41 S.W.2d 234—State v. Lindley, Civ.App., 133 S.W.2d 802—International-Great Northern R. Co. v. Acker, Civ.App., 128 S.W.2d 506, error dismissed, judgment correct.

Issues held proper

Tex.—Beaumont Iron Works Co. v. Martin, Civ.App., 190 S.W.2d 491—Leyendecker v. Harlow, Civ.App., 189 S.W.2d 706—Tyreco Refining Co. v. Cook, Civ.App., 149 S.W.2d 136, error dismissed, judgment correct—Spores Motor Freight Lines v. Juge, Civ.App., 125 S.W.2d 919, error dismissed, judgment correct—Foster v. Beckman, Civ.App., 85 S.W.2d 789, error refused—McMath Co. v. Staten, Civ.App., 60 S.W.2d 290—Farmers' & Mechanics' Nat. Bank v. Marshall, Civ.App., 4 S.W.2d 165, error dismissed.

4. Tex.—Texas, etc., R. Co. v. Padgett, Civ.App., 36 S.W. 800.

5. Cal.—Martin v. Sutter, 212 P. 60, 50 Cal.App. 8.

6. N.C.—Harmon v. Town of Bessemer City, 158 S.E. 355, 200 N.C. 680.

7. N.C.—Edwards v. Whitehead, 199 S.E. 333, 214 N.C. 533.

Tex.—Haynes B. Ownby Drilling Co. v. McClure, Civ.App., 264 S.W.2d 204—Hill & Hill Truck Line v. Van Schoubroek, Civ.App., 233 S.W.2d 167—Nussbaum v. Anthony, Civ.App., 214 S.W.2d 686—Houston Transit Co. v. Zimmerman, Civ.App., 200 S.W.2d 848—McGregor Milling & Grain Co. v. Warren, Civ.App., 175 S.W.2d 476, error refused—City of Waco v. Thralls, Civ.App., 173 S.W.2d 142, error refused—Great American Indemnity Co. v. Bams, Civ.App., 170 S.W.2d 564—

Reavis v. Taylor, Civ.App., 162 S.W.2d 1030, error refused—Federal Underwriters Exchange v. Harwell, Civ.App., 157 S.W.2d 460, error refused—Tunstall v. Pelton, Civ.App., 155 S.W.2d 653, error refused—Kirkpatrick v. Neal, Civ.App., 153 S.W.2d 519—Edens-Birch Lumber Co. v. Wood, Civ.App., 139 S.W.2d 881, error dismissed, judgment correct—Maryland Casualty Co. v. Landry, Civ.App., 129 S.W.2d 755, error dismissed, judgment correct—Moseley v. Fikes, Civ.App., 126 S.W.2d 589, affirmed 151 S.W.2d 302, 136 Tex. 385—Traders & General Ins. Co. v. Patterson, Civ.App., 123 S.W.2d 766, error dismissed—Pearson v. Black, Civ.App., 120 S.W.2d 1075—Gulf Casualty Co. v. Bostick, Civ.App., 118 S.W.2d 915, error dismissed—Texas & P. Ry. Co. v. Smith, Civ.App., 115 S.W.2d 1233, error dismissed—Coca Cola Bottling Co. v. Heckman, Civ.App., 113 S.W.2d 301—City of Pampa v. Long, Civ.App., 110 S.W.2d 1001—Traders & General Ins. Co. v. Dwyer, Civ.App., 104 S.W.2d 63—Traders & General Ins. Co. v. Rhodabarger, Civ.App., 93 S.W.2d 1180, error dismissed—Beckner v. Barrett, Civ.App., 81 S.W.2d 719, error dismissed—Maryland Casualty Co. v. Dickson, Civ.App., 80 S.W.2d 800, error dismissed—Wilson v. Modica, Civ.App., 80 S.W.2d 411—Wutke v. Yoltan, Civ.App., 71 S.W.2d 549, error refused—Wichita County Water Improvement Dist. No. 1 v. Pearce, Civ.App., 59 S.W.2d 133—Texas & N. O. R. Co. v. Kveton, Civ.App., 48 S.W.2d 523—Belt v. McGahee, Civ.App., 3 S.W.2d 407—Texas Electric Ry. v. Shelton, Civ.App., 286 S.W. 526—Houston Belt & Terminal Ry. Co. v. Scheppelman, Civ.App., 303 S.W. 167, affirmed, Com.App., 235 S.W. 308.

Vt.—Bailey v. Central Vermont Ry., 35 A.2d 345, 113 Vt. 431.

damages,<sup>8</sup> mitigation of damages,<sup>9</sup> punitive damages,<sup>10</sup> the fact<sup>11</sup> and extent<sup>12</sup> of injury, the measure of recovery,<sup>13</sup> and have been held proper or erroneously refused as to the extent of disability,<sup>14</sup> the

8. Tex.—Dallas Ry. & Terminal Co. v. Ector, 116 S.W.2d 683, 131 Tex. 505—Cree v. Miller, Civ.App., 255 S.W.2d 565—Morales v. Roddy, Civ.App., 250 S.W.2d 225—Houston Transit Co. v. Zimmerman, Civ.App., 200 S.W.2d 848—A. B. C. Storage & Moving Co. v. Herron, Civ.App., 138 S.W.2d 211, error dismissed, judgment correct—Dunigan Tool & Supply Co. v. Whipple, Civ.App., 136 S.W.2d 947, error dismissed, judgment correct—City of Dublin v. Hicks, Civ.App., 120 S.W.2d 872—Alamo Downs, Inc. v. Briggs, Civ.App., 106 S.W.2d 733, error dismissed—City of Beaumont v. Dougherty, Civ.App., 298 S.W. 631, affirmed, Com.App., 9 S.W.2d 1030.

9. Tex.—National Mut. Casualty Co. v. Lowery, Civ.App., 135 S.W.2d 1044, affirmed 148 S.W.2d 1089, 136 Tex. 188—Travelers Ins. Co. v. Mote, Civ.App., 116 S.W.2d 427, error dismissed—Gulf Pipe Line Co. v. Watson, Civ.App., 8 S.W.2d 957, 64 C.J. p 1137 note 34.

10. N.C.—Binder v. General Motors Acceptance Corporation, 23 S.E.2d 894, 222 N.C. 512—Hairston v. Atlantic Greyhound Corporation, 18 S.E.2d 166, 220 N.C. 642—Roth v. Greensboro News Co., 6 S.E.2d 882, 217 N.C. 13.

Tex.—Schute v. Morris, Civ.App., 201 S.W.2d 144—Wright Titus, Inc. v. Swafford, Civ.App., 133 S.W.2d 287, error dismissed, judgment correct—De George v. Rodgers—De Long Hotel Co., Civ.App., 126 S.W.2d 79, error dismissed—Baker Co. v. Turpin, Civ.App., 53 S.W.2d 154, error dismissed—Chronister Lumber Co. v. Williams, Civ.App., 28 S.W.2d 844.

64 C.J. p 1138 note 43.

11. Tex.—Consolidated Underwriters v. Langley, 170 S.W.2d 463, 141 Tex. 78—Southern Underwriters v. Hoswell, 158 S.W.2d 280, 138 Tex. 255—Fort Worth Elevators Co. v. Russell, 70 S.W.2d 397, 123 Tex. 128—Haynes B. Ownby Drilling Co. v. McClure, Civ.App., 264 S.W.2d 204, error refused no reversible error—Hill & Hill Truck Line v. Van Schoubroek, Civ.App., 233 S.W.2d 187—Employers' Liability Assur. Corp. v. Young, Civ.App., 203 S.W.2d 822—Industrial Indemnity Exchange v. Ratcliff, Civ.App., 138 S.W.2d 613, error dismissed, judgment correct—Texas Employers Ins. Ass'n v. Pierson, Civ.App., 135 S.W.2d 550—Federal Underwriters Exchange v. Bullard, Civ.App., 128 S.W.2d 126—City of Dublin v. Hicks, Civ.App., 120 S.W.2d 872—Brashear v. Martin-Wilder Co., Civ.App., 102 S.W.2d 302—Traders &

General Ins. Co. v. Offield, Civ.App., 105 S.W.2d 359, error dismissed—Magnolia Petroleum Co. v. Dunn, Civ.App., 72 S.W.2d 387, error dismissed—International-Great Northern R. Co. v. Groff, Civ.App., 58 S.W.2d 1050—Continental Oil Co. v. Berry, Civ.App., 62 S.W.2d 953, error refused.

12. Tex.—Texas Emp. Ins. Ass'n v. Portley, Civ.App., 258 S.W.2d 380—Trinity Universal Ins. Co. v. Hargrove, Civ.App., 256 S.W.2d 966, reversed on other grounds Hargrove v. Trinity Universal Ins. Co., Sup. 256 S.W.2d 73—Burlington-Rock Island R. Co. v. Newsom, Civ.App., 219 S.W.2d 129—Great Am. Indem. Co. v. Kingsbery, Civ.App., 201 S.W.2d 611, refused no reversible error—Employees Lloyds v. Schott, Civ.App., 183 S.W.2d 262—United Employers Casualty Co. v. Stewart, Civ.App., 157 S.W.2d 178, error refused—Postal Mut. Indemnity Co. v. James, Civ.App., 154 S.W.2d 148, error refused—Texas Indemnity Ins. Co. v. Godsey, Civ.App., 143 S.W.2d 639, error refused—Industrial Indemnity Exchange v. Ratcliff, Civ.App., 138 S.W.2d 613, error dismissed, judgment correct—Texas Employers Ins. Ass'n v. Thrash, Civ.App., 136 S.W.2d 905, error dismissed, judgment correct—Standard Paving Co. v. Pyle, Civ.App., 131 S.W.2d 200.

13. Tex.—Stanley v. Lieb, Civ.App., 243 S.W.2d 227—Schoenberg v. Forrest, Civ.App., 228 S.W.2d 556—Scott v. Doggett, Civ.App., 226 S.W.2d 183, refused no reversible error—Herzstein v. Bonner, Civ.App., 215 S.W.2d 661—Airline Motor Coaches v. Howell, Civ.App., 195 S.W.2d 713—Airline Motor Coaches v. Fields, Civ.App., 159 S.W.2d 187, reversed on other grounds 166 S.W.2d 917, 140 Tex. 252—Houston Oxygen Co. v. Davis, Civ.App., 145 S.W.2d 300, reversed on other grounds 161 S.W.2d 474, 139 Tex. 1, 140 A.L.R. 868—Kadane v. Clark, Civ.App., 134 S.W.2d 448, reversed on other grounds 143 S.W.2d 197, 135 Tex. 496—City of Pampa v. Long, Civ.App., 110 S.W.2d 1001—Sweet v. Tarrant County, Civ.App., 108 S.W.2d 700, error dismissed—St. Louis Southwestern Ry. Co. of Texas v. Hill Bros., Civ.App., 80 S.W.2d 432—Wutke v. Yoltan, Civ.App., 71 S.W.2d 549, error refused—Fidelity & Guaranty Fire Corporation v. Ormand, Civ.App., 62 S.W.2d 675, error dismissed—Singer Sewing Mach. Co. v. Mendoza, Civ.App., 62 S.W.2d 656, modified on other grounds Mendoza v. Singer Sewing Mach. Co., 84 S.W.2d 715, 125 Tex. 639.

14. Md.—Bethlehem Steel Co. v. Mayo, 177 A. 910, 168 Md. 410. Tex.—Clowe & Cowan v. Morgan, Civ.App., 153 S.W.2d 863—United Employers Casualty Co. v. Knight, Civ.App., 139 S.W.2d 618, error dismissed, judgment correct—Superior Lloyds of America v. Foxworth, Civ.App., 178 S.W.2d 724.

#### Permanent disability

Md.—Dembeck v. Bethlehem Shipbuilding Corporation, 170 A. 158, 166 Md. 21. Tex.—Texas State Highway Department v. Reeves, Civ.App., 161 S.W.2d 357, error refused—Texas Employers Ins. Ass'n v. Griffs, Civ.App., 141 S.W.2d 687—Federal Underwriters Exchange v. Popnoe, Civ.App., 140 S.W.2d 484, error dismissed—Southern Underwriters v. Stubblefield, Civ.App., 130 S.W.2d 385—Texas Indemnity Ins. Co. v. Briggs, Civ.App., 128 S.W.2d 861, error dismissed, judgment correct—Traders & General Ins. Co. v. Durbin, Civ.App., 119 S.W.2d 595, error dismissed—Texas Employers' Ins. Ass'n v. Tabor, Civ.App., 274 S.W. 309, affirmed, Com.App., 238 S.W. 779—Gulf Pipe Line Co. v. Hurst, Civ.App., 230 S.W. 1024.

#### Temporary disability

Md.—Dembeck v. Bethlehem Shipbuilding Corporation, 170 A. 158, 166 Md. 21. Tex.—Federal Underwriters Exchange v. Read, 158 S.W.2d 767, 138 Tex. 271—Texas Emp. Ins. Ass'n v. Harkey, Civ.App., 208 S.W.2d 915, affirmed 208 S.W.2d 919, 146 Tex. 504—Texas Emp. Ins. Ass'n v. Goines, Civ.App., 202 S.W.2d 487—Zurich General Acc. & Liability Ins. Co. v. Johnson, Civ.App., 202 S.W.2d 258—Maryland Casualty Co. v. Romero, Civ.App., 146 S.W.2d 1096, error dismissed, judgment correct—United Employers' Casualty Co. v. Burk, Civ.App., 140 S.W.2d 571, error dismissed—Texas Employers' Ins. Ass'n v. Humphrey, Civ.App., 140 S.W.2d 313, error refused.

#### Total disability

Tex.—Maryland Casualty Co. v. Gunter, Civ.App., 167 S.W.2d 545—Western Casualty Co. v. DeLeon, Civ.App., 148 S.W.2d 446, error dismissed, judgment correct—Maryland Casualty Co. v. Landry, Civ.App., 147 S.W.2d 290, error dismissed, judgment correct—United Employers' Casualty Co. v. Burk, Civ.App., 140 S.W.2d 571, error dismissed—Industrial Indemnity Exchange v. Ratcliff, Civ.App., 138 S.W.2d 613, error dismissed, judgment correct—Traders & General Ins. Co. v. Ray, Civ.App., 128 S.W.2d 80, error dismissed, judgment

reasonable value of property taken or destroyed,<sup>15</sup> diminution in value of property injured,<sup>16</sup> the cost of repairs,<sup>17</sup> diminution of earning capacity,<sup>18</sup> value of services,<sup>19</sup> loss of earnings,<sup>20</sup> loss of profits,<sup>21</sup>

pain and suffering,<sup>22</sup> disfigurement,<sup>23</sup> medical expenses,<sup>24</sup> and facts involved in the computation of workmen's compensation benefits.<sup>25</sup>

correct—Fidelity & Casualty Co. of New York v. Ener, Civ.App., 97 S.W.2d 267—Maryland Casualty Co. v. Bryant, Civ.App., 84 S.W.2d 492, error dismissed—Traders & General Ins. Co. v. Low, Civ.App., 74 S.W.2d 122, error refused—Texas Indemnity Ins. Co. v. Wilson, Civ.App., 281 S.W. 289.

#### Partial disability

Tex.—Employers Reinsurance Corp. v. Jones, Civ.App., 195 S.W.2d 810, error refused no reversible error—Hartford Accident & Indemnity Co. v. Harris, Civ.App., 152 S.W.2d 857—Texas Employers Ins. Ass'n v. Reed, Civ.App., 150 S.W.2d 858—Associated Indemnity Corporation v. McGraw, Civ.App., 142 S.W.2d 567, affirmed 160 S.W.2d 912, 138 Tex. 583—Southern Underwriters v. Boswell, Civ.App., 141 S.W.2d 442, affirmed 158 S.W.2d 280, 138 Tex. 256—Traders & General Ins. Co. v. Lincozum, Civ.App., 126 S.W.2d 692—Traders & General Ins. Co. v. Burns, Civ.App., 118 S.W.2d 391—Traders & General Ins. Co. v. Milliken, Civ.App., 110 S.W.2d 108—Traders & General Ins. Co. v. Wright, Civ.App., 95 S.W.2d 753, affirmed Wright v. Traders & General Ins. Co., 123 S.W.2d 314, 132 Tex. 172—Traders & General Ins. Co. v. Patton, Civ.App., 92 S.W.2d 1083—Texas Indemnity Ins. Co. v. Allison, Civ.App., 75 S.W.2d 999—Texas Employers' Ins. Ass'n v. Kelly, Civ.App., 71 S.W.2d 901, error dismissed.

15. Tex.—Cromble & Co. v. Employers' Fire Ins. Co. of Boston, Mass., Civ.App., 250 S.W.2d 472, refused no reversible error—Scott v. Doggett, Civ.App., 226 S.W.2d 183, refused no reversible error—Galveston, H. & S. A. Ry. Co. v. Potter Floral & Confectionery Co., Civ.App., 5 S.W.2d 839, reversed on other grounds, Com.App., 18 S.W.2d 1114 and followed in Galveston, H. & S. A. Ry. Co. v. Hawkins, Civ.App., 18 S.W.2d 1118.

16. Tex.—Cree v. Miller, Civ.App., 255 S.W.2d 565—Premier Petroleum Co. v. Box, Civ.App., 255 S.W.2d 298—Houston Transit Co. v. Goldston, Civ.App., 217 S.W.2d 436—Winn v. Warner, Civ.App., 172 S.W.2d 528, error refused—Seismic Explorations v. Dobray, Civ.App., 169 S.W.2d 739—Reavis v. Taylor, Civ.App., 162 S.W.2d 1030, error refused—Horton v. Schultz, Civ.App., 148 S.W.2d 252—Panhandle & S. F. Ry. Co. v. Montgomery, Civ.App., 140 S.W.2d 241—Thompson v. Schletze, Civ.App., 126 S.W.2d 1044

—Gray v. Adolph, Civ.App., 117 S.W.2d 122, error refused—Community Public Service Co. v. Gray, Civ.App., 107 S.W.2d 495—Brashear v. Martin-Wilder Co., Civ.App., 102 S.W.2d 302—Wilson v. Modica, Civ.App., 80 S.W.2d 411—McDaniel Bros. v. Wilson, Civ.App., 70 S.W.2d 618, error refused—Sikes v. Rulfs, Civ.App., 67 S.W.2d 405—Herrin Transfer & Warehouse Co. v. Carter Produce Co., Civ.App., 50 S.W.2d 458—Abilene & S. Ry. Co. v. Herman, Civ.App., 47 S.W.2d 915, error dismissed—Stedman Fruit Co. v. Smith, Civ.App., 45 S.W.2d 804—Plains Drilling Co. v. Christy, Civ.App., 25 S.W.2d 276.

17. Tex.—Poulos v. Pulaski, Civ.App., 130 S.W.2d 1075, error dismissed—White v. Akers, Civ.App., 125 S.W.2d 388—Naylor v. Hardy, Civ.App., 122 S.W.2d 708.

18. Tex.—Arando v. Higgins, Civ.App., 220 S.W.2d 291, refused no reversible error—Dallas Ry. & Terminal Co. v. Walsh, Civ.App., 217 S.W.2d 127, refused no reversible error—Mercer v. Evans, Civ.App., 173 S.W.2d 206—Burgess v. Warren, Civ.App., 149 S.W.2d 1006—United Employers Casualty Co. v. Knight, Civ.App., 139 S.W.2d 613, error dismissed, judgment correct—Dempster Mill Mfg. Co. v. Wiley, Civ.App., 131 S.W.2d 257, error dismissed, judgment correct—Jackson-Strickland Transp. Co. v. Seyler, Civ.App., 123 S.W.2d 928, error dismissed—Wells v. Ford, Civ.App., 118 S.W.2d 420, error dismissed—Travelers Ins. Co. v. Mote, Civ.App., 116 S.W.2d 427, error dismissed—Bull-Stewart Equipment Co. v. Myers, Civ.App., 102 S.W.2d 241, error dismissed.

19. Tex.—Kadane v. Clark, Civ.App., 134 S.W.2d 448, reversed on other grounds 143 S.W.2d 197, 135 Tex. 496—Guinn v. Coates, Civ.App., 67 S.W.2d 621—Gray v. Cheatham, Civ.App., 52 S.W.2d 762.

20. Tex.—Jones v. Scott, Civ.App., 266 S.W.2d 534, refused no reversible error—Stayton v. Contreras, Civ.App., 150 S.W.2d 342—Smith v. Tripiett, Civ.App., 83 S.W.2d 1104.

21. Tex.—Kleber v. Pacific Ave. Garage, Civ.App., 70 S.W.2d 812, error dismissed.

22. Tex.—Southwestern Freight Lines v. McConnell, Civ.App., 269 S.W.2d 427—Karam v. Garcia, Civ.App., 267 S.W.2d 890—Kuemmel v. Vradenburg, Civ.App., 239 S.W.2d 869—City of Dallas v. Brown, Civ.App., 150 S.W.2d 129, error dismissed—

Wells v. Ford, Civ.App., 118 S.W.2d 420, error dismissed—Hess v. Millisap, Civ.App., 72 S.W.2d 923—Jacobs v. Goings, Civ.App., 3 S.W.2d 535, error dismissed—Wendock v. Denham, Civ.App., 299 S.W. 301.

23. Tex.—Southwestern Bell Telephone Co. v. Ferris, Civ.App., 89 S.W.2d 229, error dismissed.

24. Tex.—Hobbs v. Slayton, Civ.App., 265 S.W.2d 838—Hopson v. Gulf Oil Corp., Civ.App., 237 S.W.2d 323, reversed in part on other grounds 237 S.W.2d 352, 150 Tex. 1—Phillips Petroleum Co. v. Capps, Civ.App., 170 S.W.2d 522, error refused—Edens-Birch Lumber Co. v. Wood, Civ.App., 139 S.W.2d 881, error dismissed, judgment correct—Austin St. Ry. Co. v. Oldham, Civ.App., 109 S.W.2d 235, error refused—Texas & P. Ry. Co. v. Gurian, Civ.App., 77 S.W.2d 274, error dismissed.

Utah.—Spendlove v. Shewchuck, 209 P.2d 247, 116 Utah 248.  
Wis.—O'Donnell v. Kraut, 7 N.W.2d 889, 242 Wis. 268.

25. Tex.—Texas Emp. Ins. Ass'n v. Spivey, Civ.App., 231 S.W.2d 760—Continental Fire & Cas. Ins. Corp. v. Drummond, Civ.App., 220 S.W.2d 922—American Surety Co. of New York v. Ritchie, Civ.App., 182 S.W.2d 501, error refused—Postal Mut. Indemnity Co. v. Penn, Civ.App., 166 S.W.2d 495, error refused—Traders & General Ins. Co. v. Richardson, Civ.App., 144 S.W.2d 420, error dismissed, judgment correct—Southern Underwriters v. Boswell, Civ.App., 141 S.W.2d 442, affirmed 158 S.W.2d 280, 138 Tex. 255—Southern Underwriters v. Cooper, Civ.App., 138 S.W.2d 568, error dismissed, judgment correct—Service Mut. Ins. Co. of Texas v. White, Civ.App., 138 S.W.2d 273, error refused—Texas Indemnity Ins. Co. v. Stevens, Civ.App., 135 S.W.2d 272, error dismissed, judgment correct—Federal Underwriters Exchange v. Walker, Civ.App., 134 S.W.2d 388, error dismissed—Travelers Ins. Co. v. Noble, Civ.App., 129 S.W.2d 778, error dismissed, judgment correct—National Indemnity Underwriters of America v. Blevins, Civ.App., 129 S.W.2d 734—Texas Employers Ins. Ass'n v. Hitt, Civ.App., 125 S.W.2d 323—Traders & General Ins. Co. v. Boysen, Civ.App., 123 S.W.2d 1016, error dismissed, judgment correct—Traders & General Ins. Co. v. Durbin, Civ.App., 119 S.W.2d 595, error dismissed—Federal Under-

On the other hand, on the facts and circumstances of the case, particular special issues and interrogatories have been held to be improper or properly refused as to damages and the amount of recovery,<sup>28</sup> such as issues and special interrogatories

with respect to punitive damages,<sup>27</sup> the fact<sup>28</sup> and extent<sup>29</sup> of injury, the measure of recovery,<sup>30</sup> the elements of damages,<sup>31</sup> mitigation of damages,<sup>32</sup> the extent of disability,<sup>33</sup> the reasonable value of

writers Exchange v. Crow, Civ. App., 118 S.W.2d 1073, error dismissed—Traders & General Ins. Co. v. Burns, Civ.App., 118 S.W.2d 391—Consolidated Underwriters v. Lee, Civ.App., 107 S.W.2d 482, error dismissed—Traders & General Ins. Co. v. Chancellor, Civ.App., 105 S.W.2d 720—Southern Underwriters v. Shipman, Civ.App., 97 S.W.2d 370, error dismissed—Traders & General Ins. Co. v. Blaneett, Civ. App., 96 S.W.2d 420, error dismissed—Traders & General Ins. Co. v. Watkins, Civ.App., 94 S.W.2d 843, reversed—Traders & General Ins. Co. v. Rhodabarger, Civ.App., 93 S.W.2d 1180, error dismissed—Continental Casualty Co. v. McKinnon, Civ.App., 87 S.W.2d 648—Texas Employers' Ins. Ass'n v. Hilderbrandt, Civ.App., 80 S.W.2d 1031, reversed (no opinion)—Maryland Casualty Co. v. Dicken, Civ.App., 80 S.W.2d 800, error dismissed—Associated Indemnity Corporation v. Baker, Civ.App., 76 S.W.2d 153, error dismissed—Indemnity Ins. Co. of North America v. Weeks, Civ.App., 75 S.W.2d 925—Liberty Mut. Ins. Co. v. Boggs, Civ.App., 66 S.W.2d 787, error dismissed—Traders & General Ins. Co. v. Williams, Civ.App., 66 S.W.2d 780.

26. Ky.—Cartwright v. C. I. T. Corporation, 70 S.W.2d 388, 253 Ky. 690.

N.C.—Burris v. Creech, 17 S.E.2d 123, 220 N.C. 302.

Ohio.—Village of Orrville v. Goch-nauer, 183 N.E. 391, 43 Ohio App. 422.

Tex.—Abbott v. Andrews, Com.App., 45 S.W.2d 568—Bryant v. Stohn, Civ.App., 260 S.W.2d 77, error refused no reversible error—Premier Petroleum Co. v. Box, Civ.App., 255 S.W.2d 298—Morales v. Roddy, Civ. App., 250 S.W.2d 225—Fisher v. Coastal Transport Co., Civ.App., 230 S.W.2d 522—Lumbermen's Mut. Casualty Co. v. Zinn, Civ.App., 220 S.W.2d 906—Beaumont Iron Works Co. v. Martin, Civ.App., 190 S.W.2d 491—Mercer v. Evans, Civ.App., 173 S.W.2d 206—Great American Indemnity Co. v. Sams, Civ.App., 170 S.W.2d 564—Commercial Standard Ins. Co. v. Brock, Civ.App., 167 S.W.2d 281—Trentman v. Whiteside, Civ.App., 163 S.W.2d 418, affirmed 170 S.W.2d 195, 141 Tex. 46—Traders & General Ins. Co. v. Carlisle, Civ.App., 162 S.W.2d 751—Stayton v. Contreras, Civ.App., 160 S.W.2d 342—William Cameron Co. v. Downing, Civ.App., 147 S.W.

2d 963—Travelers Ins. Co. v. Key, Civ.App., 146 S.W.2d 813—Eliot v. Maney & Alley, Civ.App., 134 S.W.2d 754—Community Natural Gas Co. v. Lane, Civ.App., 133 S.W.2d 200, error dismissed Lane v. Community Natural Gas Co., 134 S.W.2d 1058, 134 Tex. 255—Gossett v. Jones, Civ.App., 123 S.W.2d 724—Pearson v. Black, Civ.App., 120 S.W.2d 1075—Hyne v. Brown, Civ. App., 94 S.W.2d 199—Associated Indemnity Corporation v. Baker, Civ.App., 76 S.W.2d 153, error dismissed—Kleber v. Pacific Ave. Garage, Civ.App., 70 S.W.2d 812, error dismissed—Powell Salt Water Co. v. Bigham, Civ.App., 69 S.W.2d 768—Ward v. Gee, Civ.App., 61 S.W.2d 555, error dismissed—Wichita County Water Improvement Dist. No. 1 v. Pearce, Civ.App., 69 S.W.2d 183—Texas & N. O. R. Co. v. Robinson, Civ.App., 67 S.W.2d 938—Associated Employers' Reciprocal v. Brown, Civ.App., 56 S.W.2d 483, error dismissed—Texas & P. Ry. Co. v. Boaz, Civ.App., 22 S.W.2d 492.

Wash.—Cady v. Department of Labor and Industries, 162 P.2d 813, 23 Wash.2d 851.

64 C.J. p 1137 note 35.

27. Ohio.—Edwards v. Automobile Finance Co. of Pennsylvania, 25 N. E.2d 851, 63 Ohio App. 193.

S.C.—Jenkins v. Pilot Life Ins. Co., 197 S.E. 28, 186 S.C. 518.

Tex.—Alamo Boiler & Mach. Works v. Phillips, Civ.App., 215 S.W.2d 933—Sinclair Refining Co. v. Costin, Civ.App., 116 S.W.2d 894—Bankers' Mortg. Co. v. Baxter, Civ. App., 66 S.W.2d 408.

Wis.—Wedel v. Klien, 232 N.W. 606, 229 Wis. 419.

#### Attorney's fee

Tex.—Texas Public Utilities Corporation v. Edwards, Civ.App., 99 S.W.2d 420, error dismissed.

28. Tex.—Maryland Casualty Co. v. Jackson, Civ.App., 139 S.W.2d 631, error dismissed, judgment correct.

29. Tex.—Texas Emp. Ins. Ass'n v. Potter, Civ.App., 231 S.W.2d 679—Commercial Standard Ins. Co. v. Brock, Civ.App., 167 S.W.2d 281—Southern Underwriters v. Wright, Civ.App., 142 S.W.2d 297—Federal Underwriters Exchange v. Simpson, Civ.App., 137 S.W.2d 132—Southern Underwriters v. West, Civ.App., 126 S.W.2d 510, error refused—Texas & P. Ry. Co. v. Dickey, Civ.App., 70 S.W.2d 614, error refused.

30. Tex.—Rosenfield v. White, Civ.

App., 267 S.W.2d 598—Texas, N. M. & Okl. Coaches, Inc. v. Hill, Civ.App., 266 S.W.2d 412, error granted—Mercer v. Evans, Civ. App., 173 S.W.2d 206—State v. Littlefield, Civ.App., 147 S.W.2d 270, error dismissed, judgment correct—Yellow Cab Co. v. Underwood, Civ.App., 144 S.W.2d 291, error dismissed, judgment correct—Ellis v. Lewis, Civ.App., 142 S.W.2d 294—City of Trinity v. McPhail, Civ. App., 131 S.W.2d 803—Standard Paving Co. v. Pyle, Civ.App., 131 S.W.2d 200—Eagle Furniture Stores v. Jones, Civ.App., 110 S.W.2d 610—Stewart v. Baker, Civ.App., 108 S.W.2d 946—Vetter v. Nicholson, Civ.App., 106 S.W.2d 1064—Town of Merkel v. Patterson, Civ.App., 66 S.W.2d 941, error refused—Texas & P. Ry. Co. v. Boaz, Civ.App., 22 S.W.2d 492—Chicago, R. I. & G. Ry. Co. v. Hammond, Civ.App., 236 S.W. 483.

31. Tex.—Beaumont City Lines v. Mahoney, Civ.App., 143 S.W.2d 982, error dismissed—Texas Consolidated Theatres v. Slaughter, Civ.App., 143 S.W.2d 659, error dismissed—Texas & P. Ry. Co. v. Phillips, Civ. App., 66 S.W.2d 210, error dismissed—Dallas Ry. & Terminal Co. v. Boland, Civ.App., 53 S.W.2d 158.

32. Tex.—Travelers Ins. Co. v. Mote, Civ.App., 116 S.W.2d 427, error dismissed—Federal Underwriters Exchange v. Cost, Civ.App., 115 S.W.2d 706, affirmed 123 S.W. 332, 132 Tex. 299—Texas Employers Ins. Ass'n v. Phelan, Civ.App., 103 S. W.2d 863—Chisos Mining Co. v. Llanaz, Civ.App., 298 S.W. 642.

33. Tex.—American Motorists Ins. Co. v. Black, Civ.App., 253 S.W.2d 678.

#### Partial disability

U.S.—Associated Indemnity Corp. v. Potts, C.C.A.Tex., 164 F.2d 1002.

Tex.—Associated Indemnity Corporation v. McGrew, 160 S.W.2d 912, 138 Tex. 583—Texas Emp. Ins. Ass'n v. Wells, Civ.App., 207 S.W.2d 693—United Employers Casualty Co. v. Stewart, Civ.App., 157 S.W.2d 178, error refused—United Employers Casualty Co. v. Bezdek, Civ.App., 146 S.W.2d 473, error dismissed by agreement—Southern Underwriters v. Wright, Civ.App., 142 S. W.2d 297—Service Mut. Ins. Co. of Texas v. White, Civ.App., 138 S.W. 2d 273, error refused—Traders & General Ins. Co. v. Patterson, Civ. App., 123 S.W.2d 766, error dismissed—Traders & General Ins. Co.

property taken or destroyed,<sup>34</sup> diminution in value of property injured,<sup>35</sup> the cost of repairs,<sup>36</sup> diminution of earning capacity,<sup>37</sup> pain and suffering,<sup>38</sup> medical expenses,<sup>39</sup> and facts involved in the computation of workmen's compensation benefits.<sup>40</sup>

**Interest.** Where the necessary and controverted fact issues are submitted to, and found by, the jury, it is not necessary to submit the fact of interest as damages, where no additional or controverted facts are to be found on which it should be based or calculated.<sup>41</sup>

### § 535. Requests for Special Verdict or Findings

The necessity and sufficiency of requests for special verdicts or findings are discussed infra § 536; the time for presenting such requests, infra § 537, and the submission of interrogatories or issues to opposing counsel, infra § 538. The refusal of such requests by the courts where the questions have already been submitted or are included in, or

equivalent to, a general verdict is considered infra §§ 539-540.

Examine Pocket Parts for later cases.

### § 536. — Necessity and Sufficiency of Request

- a. In general
- b. Special issues

#### a. In General

Except where a statute makes it mandatory to submit a cause for special verdict or special findings, a party desiring a special verdict or answers to special interrogatories must request the submission of such interrogatories or the finding of a special verdict.

Except where a statute makes it mandatory to submit a cause for a special verdict or special findings, a party desiring a special verdict or answers to special interrogatories must request the submission of such interrogatories or the finding of a special verdict,<sup>42</sup> and he may not complain of a failure

v. Tillman, Civ.App., 119 S.W.2d 142, error dismissed—Traders & General Ins. Co. v. Peterson, Civ. App., 87 S.W.2d 322, error dismissed—Traders & General Ins. Co. v. Babb, Civ.App., 83 S.W.2d 778—Texas Indemnity Ins. Co. v. Perdus, Civ.App., 64 S.W.2d 386, error refused.

#### Permanent disability

U.S.—American Fire & Cas. Co. v. Jackson, C.A.La., 187 F.2d 379. Tex.—Commercial Standard Ins. Co. v. Brock, Civ.App., 167 S.W.2d 281—Traders & General Ins. Co. v. Jenkins, Civ.App., 144 S.W.2d 350—Texas Employers' Ins. Ass'n v. Hilderbrandt, Civ.App., 80 S.W.2d 1031, reversed (no opinion).

#### Temporary disability

U.S.—Associated Indem. Corp. v. Potts, 164 F.2d 1002. Tex.—Associated Indemnity Corporation v. McGrew, 160 S.W.2d 912, 138 Tex. 583—Columbia Cas. Co. v. Combs, Civ.App., 188 S.W.2d 1015—Traders & General Ins. Co. v. Wilder, Civ.App., 186 S.W.2d 1011—Casualty Reciprocal Exchange v. Baloney, Civ.App., 167 S.W.2d 209, error refused—United Employers Casualty Co. v. Stewart, Civ.App., 157 S.W.2d 178, error refused—Maryland Casualty Co. v. Abbott, Civ.App., 148 S.W.2d 465, error dismissed, judgment correct—Traders & General Ins. Co. v. Blacett, Civ. App., 96 S.W.2d 420, error dismissed.

#### Total disability

Tex.—Texas Emp. Ins. Ass'n v. Wright, Civ.App., 196 S.W.2d 837—Texas Employers Ins. Ass'n v. Ebers, Civ.App., 134 S.W.2d 797, error

dismissed, judgment correct—Traders & General Ins. Co. v. Marrable, Civ.App., 126 S.W.2d 746, error dismissed—Travelers Ins. Co. v. Mote, Civ.App., 116 S.W.2d 427, error dismissed.

34. Tex.—Universal Credit Co. v. Cole, Civ.App., 146 S.W.2d 222—Eliot v. Maney & Alley, Civ.App., 134 S.W.2d 754—City of Trinity v. McPhail, Civ.App., 131 S.W.2d 803—St. Louis Southwestern Ry. Co. of Texas v. Hill Bros., Civ.App., 80 S.W.2d 432—Wilson v. Modica, Civ. App., 80 S.W.2d 411—Western Oil Fields Corporation v. Nowlin, Civ. App., 288 S.W. 554.

35. Tex.—Lone Star Gas Co. v. Hollifield, Civ.App., 150 S.W.2d 282—Tinney v. Williams, Civ.App., 144 S.W.2d 344—St. Louis Southwestern Ry. Co. of Texas v. Hill Bros., Civ.App., 80 S.W.2d 432.

36. Tex.—Victory Truck Lines v. Brooks, Civ.App., 218 S.W.2d 899.

37. Tex.—Martin v. Weaver, Civ. App., 161 S.W.2d 812—South Plains Coaches v. Behringer, Civ.App., 32 S.W.2d 859, error dismissed.

38. Tex.—Standard Paying Co. v. Fyle, Civ.App., 131 S.W.2d 200—Traders & General Ins. Co. v. Marrable, Civ.App., 126 S.W.2d 746, error dismissed—Gulf, C. & S. F. Ry. Co. v. Houston, Civ.App., 45 S.W.2d 771.

39. Tex.—Panhandle & S. F. Ry. Co. v. Villarreal, Civ.App., 153 S.W.2d 350—Crazy Water Co. v. Cook, Civ. App., 140 S.W.2d 878, error refused.

40. Tex.—Pacific Emp. Ins. Co. v. Brasher, Civ.App., 234 S.W.2d 698, error refused no reversible error

—Associated Emp. Lloyds v. Zellerbach, Civ.App., 208 S.W.2d 136—Traders & General Ins. Co. v. Yarbrough, Civ.App., 181 S.W.2d 305—Traders & General Ins. Co. v. Jenkins, Civ.App., 144 S.W.2d 350—Associated Indemnity Corporation v. McGrew, Civ.App., 142 S.W.2d 567, affirmed 160 S.W.2d 912, 138 Tex. 583—Federal Underwriters Exchange v. Popcoe, Civ.App., 140 S.W.2d 484, error dismissed—Federal Underwriters Exchange v. Bulhard, Civ.App., 128 S.W.2d 126—Jones v. Fann, Civ.App., 119 S.W.2d 735—Traders & General Ins. Co. v. Rhodabarger, Civ.App., 93 S.W.2d 1180, error dismissed—Texas Employers' Ins. Ass'n v. Van Pelt, Civ. App., 68 S.W.2d 614—Texas Employers' Ins. Ass'n v. Ray, Civ.App., 68 S.W.2d 290, error refused.

41. Tex.—Texas & N. O. R. Co. v. Dingfelder & Balish, 133 S.W.2d 967, 134 Tex. 156—Ewing v. Wm. L. Foley, Inc., 280 S.W. 498, 115 Tex. 223, 44 A.L.R. 621—Kramer v. Wilson, Civ.App., 226 S.W.2d 675, refused no reversible error—Texas Power & Light Co. v. Doering Hotel Co., Civ.App., 147 S.W.2d 897, affirmed 162 S.W.2d 938, 139 Tex. 351—Davis v. Morris, Civ.App., 82 S.W.2d 255, error refused.

42. Idaho.—Pilkington v. Belson, 168 P.2d 815, 66 Idaho 724. N.M.—Irick v. Elkins, 28 P.2d 657, 38 N.M. 113.

64 C.J. p. 1138 note 49. Power and duty of court to submit special verdict or interrogatories on its own motion see supra § 529. Requests for instructions in general see supra §§ 390-412.

to take a special verdict or to have interrogatories answered where he has made no request therefor.<sup>43</sup> Similarly, where the court submits questions calling for a special verdict or special findings, a party desiring other and further questions to be propounded should suggest them to the court,<sup>44</sup> and a party desiring to have questions elucidated or explained should request that it be done.<sup>45</sup> A party may, without himself submitting special interrogatories, adopt as his own those submitted by the adverse party, and join in the request that they be answered.<sup>46</sup>

The request must be unconditional,<sup>47</sup> except where a statute provides otherwise.<sup>48</sup> Whether a request may be oral or written depends on statutory provisions,<sup>49</sup> and under some statutes so providing the request must be in writing<sup>50</sup> or be entered on the minutes of the court.<sup>51</sup>

Special findings should be requested separately.<sup>52</sup> Although it has been held that where interrogatories are requested in such manner that they may be separately submitted or refused, and some are proper and some improper to be given, it is the duty of the court to go through the request and eliminate the questions which are not proper to be submitted,<sup>53</sup> and that where a requested interrogatory is

slightly defective, the court, instead of refusing to submit it, should lend its assistance to counsel in putting the interrogatory into proper form.<sup>54</sup> It has also been held that interrogatories not requested separately or independently of each other may be refused if any are improper,<sup>55</sup> and interrogatories dependent on other interrogatories which the court has properly refused to submit should likewise be refused.<sup>56</sup>

A request that if the jury find a verdict for plaintiff they shall state the facts on which it rests is not a proper request either for a special verdict or for special interrogatories.<sup>57</sup> Under various statutes or rules providing that any controverted matter of fact omitted from a special verdict and not brought to the attention of the court by a request shall be deemed determined by the court in conformity with its judgment, and that the failure to request a finding by the jury on such matter shall be deemed a waiver of a jury trial pro tanto and a consent that such matter be determined by the court, failure to request the submission of questions of fact constitutes a waiver of the right to have the jury pass thereon,<sup>58</sup> and authorizes a finding by the court,<sup>59</sup> so that findings by the court as to matters on which no special verdict has been

#### Form of submission

Court need not submit interrogatories in the form in which they are requested, if they are substantially and intelligibly submitted in other forms.—*Palmer v. Schultz*, 120 N.W. 348, 138 Wis. 455—43 C.J. p 1316 note 14.

43. U.S.—*U. S. Fidelity & Guaranty Co. v. Darber*, C.C.A.Mich., 70 F.2d 220.

N.C.—*Stokes v. Edwards*, 52 S.E.2d 797, 230 N.C. 306—*Ammons v. Fisher*, 182 S.E. 479, 208 N.C. 712. 64 C.J. p 1138 note 50.

44. Wis.—*Thoma v. Class Mineral Fume Health Bath Co.*, 12 N.W.2d 29, 244 Wis. 347. 64 C.J. p 1139 note 51.

45. Wis.—*Sullivan v. Minneapolis, St. P. & S. M. Ry. Co.*, 167 N.W. 311, 167 Wis. 518. Necessity of request for explanatory instructions in general see *supra* § 393.

46. Kan.—*Saunders v. Atchison, T. & S. F. Ry. Co.*, 119 P. 552, 86 Kan. 56.

47. Ind.—*Noble v. Enos*, 19 Ind. 72.

48. Ohio.—*Clos v. Chapman*, App., 34 N.E.2d 811. 64 C.J. p 1139 note 55.

**Discretionary submission by court**  
Submission of special interrogatories on defendant's request, al-

though request contained no condition that questions be answered only in case general verdict should be rendered was not an abuse of discretion, where there was a general verdict returned, and it did not appear that any objection was made to granting of special interrogatories on ground that request did not contain such condition, or exceptions noted to action of trial court in submitting them.—*Weaver v. Liberty Cabs*, Ohio App., 33 N.E.2d 853.

#### 49. Special verdict

Demand that special verdict be rendered need not be in any particular form, and demand alone is sufficient.—*Sparks v. Sims*, Ohio App., 92 N.E.2d 428.

50. Ill.—*Pittsburg, etc., R. Co. v. Smith*, 69 N.E. 873, 207 Ill. 486. 64 C.J. p 1139 note 57.

**Special findings on general verdict**  
Ohio.—*Kautz v. McFerlin*, App., 43 N.E.2d 629.

51. Mont.—*Gans, etc., Inv. Co. v. Sanford*, 88 P. 955, 35 Mont. 235.

52. Ill.—*Pressley v. Bloomington & Normal Ry. & Light Co.*, 111 N.E. 511, 271 Ill. 622.

53. Kan.—*Jones v. Southwestern Interurban Ry. Co.*, 141 P. 999, 92 Kan. 809.

54. Conn.—*Ziman v. Whitley*, 147 A. 370, 110 Conn. 108.

55. Ohio.—*Schieve v. Silver, App.*, 75 N.E.2d 104—*Ford Motor Co. v. Dillon*, 200 N.E. 525, 51 Ohio App. 278—*MacDonald v. State ex rel. Fulton*, 191 N.E. 837, 47 Ohio App. 223—*Klein v. Goldstein*, 14 Ohio Cir.Ct.N.S., 586, 29 Ohio Cir.Dec. 534.

56. Ind.—*McKinnon v. Parrill*, 38 N.E.2d 1008, 111 Ind.App. 343. Wis.—*Pier v. Chicago, M. & St. P. Ry. Co.*, 68 N.W. 464, 94 Wis. 357.

57. Conn.—*Beattie v. McMullen, Weand & McDermott*, 74 A. 767, 82 Conn. 484.

58. Md.—*Lichtenberg v. Joyce*, 39 A.2d 789, 183 Md. 689. Ohio.—*Weaver v. Weaver, App.*, 35 N.E.2d 173.

Wis.—*Widness v. Central States Fire Ins. Co.*, 47 N.W.2d 879, 259 Wis. 159—*Jansen v. Herkert*, 23 N.W.2d 503, 249 Wis. 124. 64 C.J. p 1139 note 67.

59. Md.—*Lichtenberg v. Joyce*, 39 A.2d 789, 183 Md. 689. Mich.—*Pajalich v. Ford Motor Co.*, 255 N.W. 219, 267 Mich. 418—*Sullivan v. Bennett*, 246 N.W. 90, 261 Mich. 232, 87 A.L.R. 791. Ohio.—*Weaver v. Weaver, App.*, 35 N.E.2d 173.

Wis.—*Gist v. Johnson-Carey Co.*, 147 N.W. 1079, 158 Wis. 188, Ann.Cas. 1916E 460.

asked are binding on the parties,<sup>60</sup> and such matters must be considered settled in favor of the party in whose judgment is rendered.<sup>61</sup> The fact that a request is defective or too general does not operate as a waiver, under such statute, where the request is sufficient to call the controverted matter to the attention of the court,<sup>62</sup> and it becomes the duty of the court to frame and propound the correct question.<sup>63</sup>

A stipulation that there is only one question, specifying it, for the jury is a sufficient request that it be submitted.<sup>64</sup> It has been held that a request for the submission of particular questions is not a sufficient request for a special verdict on the whole case.<sup>65</sup> The failure to give a requested interrogatory is tantamount to a refusal to give it.<sup>66</sup>

### b. Special Issues

Under the practice of submitting causes to the jury on special issues alone, an issue not submitted and for the submission of which no request is made must ordinarily be deemed to have been waived.

Where the practice obtains of submitting causes to the jury on special issues alone, under a statute or rule providing that the court shall, on request of either party, and may without such request, submit the case on special issues, which shall be separately submitted so as to be answered separately by the jury, and that when a case is submitted on special issues it shall be the duty of the court to submit all the issues made by the pleadings and evidence, but that failure to submit any issue shall not be ground for reversal unless submission thereof has been requested by the party complaining of the judgment, and that on appeal an issue not submitted and not requested by a party shall be deemed as found by the court in such manner as to support the judgment if there is evidence to sustain such a finding as discussed in Appeal and Error § 1562 c (2), all the issues in the case should be covered,<sup>67</sup> and unless the error is fundamental,<sup>68</sup> an issue not submitted and for the submission of which no request is made must ordinarily be deemed to have been waived,<sup>69</sup> where two or more distinct

60. Wis.—Conway v. Providence Washington Ins. Co. of Providence, R. I., 230 N.W. 630, 261 Wis. 502.

61. Wis.—Guse v. Power & Mining Machinery Co., 139 N.W. 195, 151 Wis. 400.

#### Finding after verdict

Where there was no request made for submission to jury of issue of adverse possession, and there was such conflict of evidence on that issue that it did not admit holding as matter of law that there was adverse possession, defendant was not entitled to have the court find these issues in defendant's favor, on motion made after verdict for plaintiffs.—Becker v. Highway Trailer Co., 3 N.W.2d 725, 240 Wis. 490.

62. Wis.—Pettrick v. Gridley Dairy Co., 232 N.W. 595, 202 Wis. 289.

63. Wis.—Wawrzyniakowski v. Hoffman & Billings Mfg. Co., 131 N.W. 429, 146 Wis. 153.

64. Wis.—Richmond v. Cretens, 185 N.W. 247, 175 Wis. 297.

65. Wis.—Fenelon v. Butts, 10 N.W. 501, 53 Wis. 344.

66. Wash.—Whitaker v. G. B. & S. Mill, Inc., 152 P.2d 719, 21 Wash.2d 625.

67. Tex.—Wilson v. Hagins, 295 S.W. 922, 116 Tex. 538.

68. Tex.—Texas Employers' Ins. Ass'n v. Hilderbrandt, Civ.App., 62 S.W.2d 209.

69. Tex.—Pickens v. Harrison, 252 S.W.2d 575, 151 Tex. 562—Socony-Vacuum Oil Co. v. Aderhold, 240 S.W.2d 751, 150 Tex. 292—Clark v. National Life & Acc. Ins. Co., 200

S.W.2d 820, 145 Tex. 575—Johnson v. Miller, 177 S.W.2d 249, 142 Tex. 228—Nealand v. Brown, 170 S.W.2d 207, 141 Tex. 253, modified on other grounds 172 S.W.2d 99, 141 Tex. 253—Ortiz Oil Co. v. Geyer, 159 S.W.2d 494, 138 Tex. 373—Wichita Falls & Oklahoma Ry. Co. v. Pepper, 135 S.W.2d 79, 134 Tex. 360—Wichita Falls & S. R. Co. v. Holbrook, 78 S.W.2d 938, 125 Tex. 184, certiorari denied 56 S.Ct. 139, 298 U.S. 139, 80 L.Ed. 439—Ford v. Hackel, 77 S.W.2d 1043, 124 Tex. 402—Perkins v. Nevill, Com.App., 58 S.W.2d 50—McCormick v. King, Civ.App., 268 S.W.2d 552—Green Machinery Co. v. Green, Civ.App., 266 S.W.2d 279—Haynes B. Ownby Drilling Co. v. McClure, Civ.App., 264 S.W.2d 204, error refused no reversible error—Hicks v. Matthews, Civ.App., 261 S.W.2d 207, reversed on other grounds, Sup., 266 S.W.2d 846—Texas Housing Co. v. Harrell, Civ.App., 257 S.W.2d 484—D. T. Carroll Corp. v. Carroll, Civ.App., 256 S.W.2d 429, error refused no reversible error—Anderson Furniture Co. v. Roden, Civ.App., 255 S.W.2d 345, refused no reversible error—Culligan v. Wootton, Civ.App., 254 S.W.2d 155—Harris v. Allstate Ins. Co., Civ.App., 249 S.W.2d 669, error refused—Daniel v. Watson, Civ.App., 249 S.W.2d 281—Jacobs v. Chandler, Civ.App., 248 S.W.2d 825—Government Personnel Mut. Life Ins. Co. v. Wear, Civ.App., 247 S.W.2d 284, modified on other grounds 251 S.W.2d 525, 151 Tex. 454—Craft v. Hahn, Civ.App., 246 S.W.2d 897, error refused no reversible error—Goodwin v. Southtex Land Sales,

Civ.App., 243 S.W.2d 721, error refused no reversible error—Humbo v. Nixon, Civ.App., 241 S.W.2d 983—Butler v. Employers Cas. Co., Civ.App., 241 S.W.2d 964, refused no reversible error—Lincoln County Mut. Fire Ins. Co. v. Goolsby, Civ.App., 240 S.W.2d 402—Utilities National Gas Corp. v. Hill, Civ.App., 239 S.W.2d 431, refused no reversible error—Brown v. Tucuman, Civ.App., 239 S.W.2d 156, refused no reversible error—Mutual Fire & Auto. Ins. Co. v. Muckelroy, Civ.App., 236 S.W.2d 555—Craddock v. Humble Oil & Refining Co., Civ.App., 234 S.W.2d 137, refused no reversible error—Dennis v. Galbreth, Civ.App., 228 S.W.2d 579—Bradley v. McKinzie, Civ.App., 226 S.W.2d 458—Panhandle Pub. Co. v. Fitzjarrald, Civ.App., 223 S.W.2d 635, reversed on other grounds Fitzjarrald v. Panhandle Pub. Co., 228 S.W.2d 498, 149 Tex. 87—Morrison v. Swalm, Civ.App., 220 S.W.2d 493, refused no reversible error—Pacific Fire Ins. Co. v. Smith, Civ.App., 219 S.W.2d 710—Oliver v. Corzelius, Civ.App., 215 S.W.2d 231, affirmed in part, reversed in part, on other grounds 220 S.W.2d 632, 148 Tex. 76—Best v. Best, Civ.App., 214 S.W.2d 806—West Am. Ins. Co. v. First State Bank of Rio Vista, Civ.App., 213 S.W.2d 298—Grantham v. Anderson, Civ.App., 211 S.W.2d 275—Warren v. Fort Worth & D. C. Ry. Co., Civ.App., 208 S.W.2d 569, refused no reversible error—Blaine v. Blaine, Civ.App., 207 S.W.2d 989—Outhier v. Parker, Civ.App., 207 S.W.2d 237, reversed on other grounds 209 S.W.2d 759, 146 Tex. 595—Bankers

Standard Life Ins. Co. v. Atwood, Civ.App., 205 S.W.2d 74—Dockstad v. Brown, Civ.App., 204 S.W.2d 352, error refused no reversible error—Morgan v. Young, Civ.App., 203 S.W.2d 837, refused no reversible error—Thomas v. Pioneer Motors, Civ.App., 203 S.W.2d 325, reversed on other grounds 206 S.W.2d 591, 146 Tex. 299—Baker v. Mays & Mays, Civ.App., 199 S.W.2d 279, error dismissed—Reed v. Beheler, Civ.App., 198 S.W.2d 625—Bolton v. Stewart, Civ.App., 191 S.W.2d 798—Adcock v. Schweizer, Civ.App., 190 S.W.2d 705, reversed on other grounds 194 S.W.2d 549, 145 Tex. 64—Johnson Aircrafts v. Wilborn, Civ.App., 190 S.W.2d 428, refused for want of merit—Davis v. Webster, Civ.App., 190 S.W.2d 367, refused for want of merit—Dallas Ry. & Terminal Co. v. Menefee, Civ.App., 190 S.W.2d 150—Barlick v. Gillette, Civ.App., 187 S.W.2d 683, refused for want of merit—Traders & General Ins. Co. v. Wilder, Civ.App., 186 S.W.2d 1011, refused for want of merit—Gourley v. Iverson Tool Co., Civ.App., 186 S.W.2d 726, refused for want of merit—Ward v. Strickland, Civ.App., 177 S.W.2d 79, error refused—Page v. Lockley, Civ.App., 176 S.W.2d 991, reversed on other grounds 180 S.W.2d 616, 142 Tex. 594—Ferguson v. Parker, Civ.App., 176 S.W.2d 768, error refused—Harris v. Harris, Civ.App., 174 S.W.2d 996—Thomas v. Billingsley, Civ.App., 173 S.W.2d 199, error refused—Rodriguez v. Higginbotham-Bailey-Logan Co., Civ.App., 172 S.W.2d 991, error refused—Evans v. Renfro, Civ.App., 170 S.W.2d 636, error refused—Small v. Brooks, Civ.App., 163 S.W.2d 236, error refused—De Puy v. Lone Star Dredging Co., Civ.App., 162 S.W.2d 161, error refused—Keller v. Downey, Civ.App., 161 S.W.2d 803, affirmed Humble Oil & Refining Co. v. Downey, 183 S.W.2d 426, 143 Tex. 171—McWhorter v. Humphreys, Civ.App., 161 S.W.2d 304, error refused—Garcia v. Garza, Civ.App., 161 S.W.2d 297—Blair v. Smylie, Civ.App., 155 S.W.2d 958, error refused—State v. Indio Cattle Co., Civ.App., 154 S.W.2d 308, error refused—Smith v. Lynn, Civ.App., 152 S.W.2d 838—Williams v. Finley, Civ.App., 152 S.W.2d 468, error dismissed—Livingston v. Turner, Civ.App., 152 S.W.2d 444—Boatman v. C. S. Hamilton Motor Co., Civ.App., 152 S.W.2d 390—Hickox v. Hickox, Civ.App., 151 S.W.2d 913—Great Southern Life Ins. Co. v. Paddy, Civ.App., 151 S.W.2d 346, reversed on other grounds 162 S.W.2d 652, 139 Tex. 245—Smith v. Bowen, Civ.App., 151 S.W.2d 326—Thomas v. Fitts-Smith Dry Goods Co., Civ.App., 151 S.W.2d 243—Michels v. Crouch, Civ.App., 150 S.W.2d 111,

error dismissed, judgment correct—Maryland Casualty Co. v. Abbott, Civ.App., 148 S.W.2d 465, error dismissed, judgment correct—Southern Underwriters v. Mowery, Civ.App., 147 S.W.2d 834, error dismissed, judgment correct—United Employers Casualty Co. v. Bezdek, Civ.App., 146 S.W.2d 473, error dismissed by agreement—Rodriguez v. Higginbotham-Bailey-Logan Co., Civ.App., 144 S.W.2d 993, reversed on other grounds 160 S.W.2d 234, 138 Tex. 476—Raynes v. Germany, Civ.App., 144 S.W.2d 981—Texas & N. O. R. Co. v. Lide, Civ.App., 144 S.W.2d 685, error dismissed—Oil Country Pipe & Supply Co. v. Carter, Civ.App., 143 S.W.2d 831, error dismissed, judgment correct—Texas Compensation Ins. Co. v. Zachry, Civ.App., 143 S.W.2d 801, error dismissed, judgment correct—Cox v. Shannon, Civ.App., 141 S.W.2d 412, error dismissed, judgment correct—Hoerster v. Wilke, Civ.App., 140 S.W.2d 952, affirmed 158 S.W.2d 288, 138 Tex. 263—Moore County Carbon Co. v. Whitten, Civ.App., 140 S.W.2d 880, error dismissed, judgment correct—Maryland Casualty Co. v. Jackson, Civ.App., 139 S.W.2d 631, error dismissed, judgment correct—Hyde v. English, Civ.App., 139 S.W.2d 628, error dismissed—Benjamin State Bank v. Reed, Civ.App., 139 S.W.2d 172—Allbritton v. Madling's Drug Stores, Civ.App., 138 S.W.2d 901—Alagado v. Coca Cola Bottling Co., Civ.App., 135 S.W.2d 1056, error dismissed, judgment correct—Zurich General Accident & Liability Ins. Co. v. Lee, Civ.App., 135 S.W.2d 505—Wright Titus, Inc. v. Swafford, Civ.App., 133 S.W.2d 287—Smith v. Briggs, Civ.App., 131 S.W.2d 319, error dismissed, judgment correct—Paddock v. Beeler, Civ.App., 130 S.W.2d 886—Moncada v. Snyder, Civ.App., 129 S.W.2d 817, affirmed 152 S.W.2d 1077, 137 Tex. 112—Calhoun v. Grant, Civ.App., 129 S.W.2d 752—Federal Underwriters Exchange v. Arnold, Civ.App., 127 S.W.2d 972, error dismissed, judgment correct—Jones v. State Fair of Texas, Civ.App., 127 S.W.2d 948, error dismissed, judgment correct—Jefferson Standard Life Ins. Co. v. Curfman, Civ.App., 127 S.W.2d 567, error dismissed—Federal Underwriters Exchange v. Ener, Civ.App., 126 S.W.2d 769, error dismissed, judgment correct—Evers v. Langerhans, Civ.App., 122 S.W.2d 208—Riddle v. Lanier, Civ.App., 121 S.W.2d 655, reversed on other grounds 145 S.W.2d 1094, 136 Tex. 130—Texas Centennial Central Exposition v. Ahlfinger, Civ.App., 120 S.W.2d 893, error dismissed—Roe v. Best, Civ.App., 120 S.W.2d 819—Lowry v. Etna Life Ins. Co., Civ.App., 120 S.W.2d 505, error dismissed—Texas Gause Mills v. Goatley, Civ.App.,

119 S.W.2d 887, error dismissed—Press v. Davis, Civ.App., 118 S.W.2d 982, modified on other grounds Quinn v. Press, 140 S.W.2d 438, 135 Tex. 60, 128 A.L.R. 757—Nolte v. Olmos Dinner Club, Civ.App., 118 S.W.2d 841, error dismissed—Colorado Life Co. v. Teague, Civ.App., 117 S.W.2d 849, error dismissed—Huffington v. Doughtie, Civ.App., 113 S.W.2d 343—Southern Home Bldg. Co. v. Wimblish, Civ.App., 112 S.W.2d 211—Texas Pacific Coal & Oil Co. v. Bridges, Civ.App., 110 S.W.2d 1248, error dismissed—Bewley Mills v. First Nat. Bank, Civ.App., 110 S.W.2d 201, error dismissed—Ward v. Casner, Civ.App., 108 S.W.2d 772, error dismissed—National Life & Accident Ins. Co. of Nashville, Tenn. v. Jackson, Civ.App., 108 S.W.2d 738, error dismissed—City of Kirbyville v. Thackwell, Civ.App., 108 S.W.2d 228, error dismissed—Gulf Cas. Co. v. Fleida, Civ.App., 107 S.W.2d 661, error dismissed—Pittsburg Pipe & Supply Co. v. Federal Machine & Supply Co., Civ.App., 107 S.W.2d 637—Williamson v. Patterson, Civ.App., 106 S.W.2d 753, error dismissed—Union Central Life Ins. Co. v. Roach, Civ.App., 105 S.W.2d 874, error dismissed—Allen v. Allen, Civ.App., 105 S.W.2d 712, error refused—Dalby v. Lyle, Civ.App., 105 S.W.2d 764—Traders & General Ins. Co. v. Chancellor, Civ.App., 105 S.W.2d 720, error dismissed—Johnston v. Winn, Civ.App., 105 S.W.2d 398, error dismissed—Donnell v. Talley, Civ.App., 104 S.W.2d 920, error dismissed by agreement—Texas State Bank & Trust Co. v. St. John, Civ.App., 103 S.W.2d 1104, error dismissed—Collier v. Rives, Civ.App., 103 S.W.2d 830—Groves v. National Loan & Inv. Co. of Detroit, Mich., Civ.App., 102 S.W.2d 508—Maxwell v. Campbell, Civ.App., 102 S.W.2d 471—West Texas Utilities Co. v. Ellis, Civ.App., 102 S.W.2d 234, reversed on other grounds 126 S.W.2d 13, 133 Tex. 104—Federal Mortg. Co. v. Davis, Civ.App., 100 S.W.2d 717, affirmed Davis v. Federal Mortg. Co., 111 S.W.2d 1066, 131 Tex. 46—Dallas Joint Stock Land Bank v. Gore, Civ.App., 100 S.W.2d 396, error dismissed—Mitchell v. Heard, Civ.App., 98 S.W.2d 832—Christopher v. City of El Paso, Civ.App., 98 S.W.2d 394, error dismissed—Dallas Joint Stock Land Bank of Dallas v. Colbert, Civ.App., 98 S.W.2d 239, reversed on other grounds Colbert v. Dallas Joint Stock Land Bank of Dallas, 102 S.W.2d 1031, 129 Tex. 235—Williams v. Safety Cas. Co., Civ.App., 97 S.W.2d 728, reversed on other grounds 102 S.W.2d 178, 129 Tex. 154—Trimble v. Stephenville State Bank, Civ.App., 96 S.W.2d 733—Duff v. Roesser & Pendleton, Civ.App., 96 S.W.2d



grounds of liability or defense are pleaded,<sup>70</sup> and no finding may be made, or judgment rendered, by the court on an independent ground of recovery or defense which is not submitted and for the submission of which the parties have made no request,<sup>71</sup> except where the issue is uncontroverted, in which

682—Campbell Lumber Co. v. Cortasa, Civ.App., 94 S.W.2d 1202, error dismissed—Jefferson Standard Life Ins. Co. v. Lindsey, Civ.App., 94 S.W.2d 549, error dismissed—Lowe v. Masterson, Civ.App., 94 S.W.2d 532—Patton v. Powell, Civ.App., 93 S.W.2d 800, error dismissed—Williams v. Adams, Civ.App., 91 S.W.2d 951—Yellow Cab Corporation v. Halford, Civ.App., 91 S.W.2d 801, error dismissed—St. Louis Southwestern Ry. Co. of Texas v. Lawrence, Civ.App., 91 S.W.2d 434—Northcutt v. Magnolia Petroleum Co., Civ.App., 90 S.W.2d 632, error refused—Texas Employers' Ins. Ass'n v. Watkins, Civ.App., 90 S.W.2d 622, error dismissed Watkins v. Texas Employers' Ins. Ass'n, 110 S.W.2d 1163, 130 Tex. 383—Shary v. Helmick, Civ.App., 90 S.W.2d 302, error dismissed—Fest v. Williams, Civ.App., 89 S.W.2d 1072—Miller v. Fenner, Beane & Ungerleider, Civ. App., 89 S.W.2d 506, error dismissed—Rust v. Rust, Civ.App., 88 S.W.2d 787, modified on other ground 117 S.W.2d 59, 131 Tex. 532—Santa Fe Grain Co. v. Minneapolis-Moline Power Implement Co., Civ.App., 86 S.W.2d 835, error dismissed—Maryland Casualty Co. v. Bryant, Civ. App., 84 S.W.2d 492, error dismissed—Ringling Bros. and Barnum & Bailey Combined Shows v. Wilkinson, Civ.App., 83 S.W.2d 705—Wall v. Irick, Civ.App., 83 S.W.2d 394—Baldwin v. Stamford State Bank, Civ.App., 82 S.W.2d 701, error refused—Wichita Valley Ry. Co. v. Fite, Civ.App., 78 S.W.2d 714—National Aid Life Ass'n v. Murphy, Civ.App., 78 S.W.2d 223, error dismissed—Caprito v. Weaver, Civ. App., 77 S.W.2d 595—Buford v. Southwestern Life Ins. Co., Civ. App., 77 S.W.2d 818—Beard & Stone Electric Co. v. Baker, Civ.App., 77 S.W.2d 262—Citizens' Nat. Bank of Abilene v. Overstreet, Civ.App., 77 S.W.2d 250, error refused—Texas Life Ins. Co. v. Plunkett, Civ.App., 75 S.W.2d 815—Levy v. Rogers, Civ. App., 75 S.W.2d 304, error dismissed—Marx v. Leverkus, Civ.App., 73 S.W.2d 949, error dismissed—Crow v. Southwestern Transp. Co., Civ.App., 73 S.W.2d 607, error refused—National Mut. Ben. Ass'n v. Butler, Civ.App., 72 S.W.2d 659, error dismissed—Karr v. Cockerham, Civ.App., 71 S.W.2d 905, error dismissed—Bryson v. Karslake, Civ. App., 71 S.W.2d 614, error dismissed—Meador v. Wagner, Civ.App., 70 S.W.2d 794, error dismissed—Baggett v. Texas Employers' Ins. Ass'n, Civ.App., 70 S.W.2d 469, error refused—McColl v. Hardin ex rel.

State, Civ.App., 70 S.W.2d 327—Commercial Standard Ins. Co. v. Harper, Civ.App., 69 S.W.2d 820, reversed on other grounds 103 S.W.2d 143, 129 Tex. 249, 110 A.L.R. 529—Uhlmann Grain Co. of Texas v. Wilson, Civ.App., 68 S.W.2d 281, error dismissed—Billington v. National Standard Life Ins. Co., Civ.App., 68 S.W.2d 239—Fort Worth Properties Corporation v. Bahan, Civ.App., 68 S.W.2d 228—Senter v. Dixie Motor Coach Corporation, Civ.App., 67 S.W.2d 345, rehearing denied 68 S.W.2d 1117, affirmed 97 S.W.2d 945, 128 Tex. 389—Garrison v. Garrison, Civ. App., 66 S.W.2d 451, error dismissed—McClung Const. Co. v. Muncy, Civ.App., 65 S.W.2d 786, error dismissed—Knight v. Moore, Civ.App., 65 S.W.2d 446, modified on other grounds Moore v. Knight, 94 S.W.2d 1137, 127 Tex. 610—Gulf, C. & S. F. Ry. Co. v. Carson, Civ.App., 63 S.W.2d 1096—Nu-Enamel Paint Co. v. Davis, Civ.App., 63 S.W.2d 861, error dismissed—Turner v. Big Lake Oil Co., Civ.App., 62 S.W.2d 491, affirmed 96 S.W.2d 221, 128 Tex. 155—Texas Employers' Ins. Ass'n v. Bradford, Civ.App., 62 S.W.2d 158, affirmed (no opinion)—Richardson v. City Nat. Bank of Olney, Civ. App., 61 S.W.2d 137, error dismissed—Rincon v. Berg Co., Civ.App., 60 S.W.2d 811, error dismissed—Texas Employers' Ins. Ass'n v. Edwards, Civ.App., 59 S.W.2d 885—Davis v. Jarnigan, Civ.App., 59 S.W.2d 281, error dismissed—Kirby v. Fitzgerald, Civ.App., 57 S.W.2d 362, affirmed 89 S.W.2d 408, 126 Tex. 411—Turner v. Cochran, Civ.App., 57 S.W.2d 305, error dismissed—Jones v. Gallery, Civ.App., 57 S.W.2d 268, error refused—Himes v. Himes, Civ. App., 55 S.W.2d 181—Welch v. U. S. Fidelity & Guaranty Co., Civ.App., 54 S.W.2d 1041, error dismissed—Stuard v. Vick, Civ.App., 9 S.W.2d 494.

64 C.J. p 1140 note 77.

#### Limitation

Waiver only applies to particular trial involved.—Hicks v. Matthews, Tex., 266 S.W.2d 846.

#### Exception

Where special issue inquired of jury in compensation case whether claimant had incurred doctor and hospital bills as direct result of injuries in suit, if compensation carrier desired to take advantage of omission in subsequently submitted special issue which inquired as to amount of reasonable and necessary doctor bills, if any, but made no mention of hospital bills, it was incumbent on carrier to except to such omission.—

Texas Emp. Ins. Ass'n v. Allgood, Tex. Civ.App., 252 S.W.2d 589.

#### Waiver not shown

(1) In suit to recover half of attorney's fee collected by defendant, where plaintiff based his right on two contracts, the fact that plaintiff did not request submission to jury of any issues inquiring about the later of the two contracts, did not constitute a waiver of such plea, where reasonable implications were to the contrary.—Wilson v. Melugin, Tex.Civ. App., 198 S.W.2d 140, error refused no reversible error.

(2) Where special issues submitted substantially embodied essential facts of a litigant's theory, it could not be said that there was a waiver of such theory.—Neyland v. Brown, 170 S.W.2d 207, 141 Tex. 253, modified on other grounds 172 S.W.2d 89, 141 Tex. 253.

(3) In compensation suit tried on special issues, where injury allegedly sustained by employee was to his right wrist, failure of employee to request submission of any issue as to whether the injury had extended to or involved other portions of his body, did not constitute a waiver of such ground of recovery.—Maryland Casualty Co. v. Landry, Tex.Civ.App., 147 S.W.2d 290, error dismissed, judgment correct.

(4) In suit by husband and wife to join female defendant from molesting plaintiffs, plaintiffs did not waive their right to recover by failure to submit to jury the controlling issue of recovery.—Hunt v. Hudgins, Tex. Civ.App., 168 S.W.2d 703.

70. Tex.—Carlton v. Adams, Civ. App., 54 S.W.2d 1073, error refused—Dalton Adding Machine Sales Co. v. Wicks & Co., Civ.App., 283 S.W. 642.

64 C.J. p 1140 note 77.

71. Tex.—Austin v. Austin, 182 S.W.2d 355, 143 Tex. 29—Hall v. Rawls, 171 S.W.2d 324, 141 Tex. 235—Wichita Falls & Oklahoma Ry. Co. v. Pepper, 135 S.W.2d 79, 134 Tex. 360—Lincoln County Mut. Fire Ins. Co. v. Goolsby, Civ.App., 240 S.W.2d 402—International Broth. of Boiler Makers v. Rodriguez, Civ. App., 193 S.W.2d 835, error dismissed—Garcia v. Garza, Civ.App., 161 S.W.2d 297—Texas Employers' Ins. Ass'n v. Reed, Civ.App., 150 S.W.2d 858, error dismissed, judgment correct—Robertson v. Snodgrass, Civ. App., 137 S.W.2d 146—Willingham v. Thompson, Civ.App., 133 S.W.2d 833—Traders & General Ins. Co. v. Watson, Civ.App., 131 S.W.2d 1103, error dismissed, judgment correct—Texas Centennial Central Exposition v. Ahlfinger, Civ.App., 120 S.

case a failure to request its submission does not constitute a waiver thereof,<sup>72</sup> and except that failure to request the submission of an issue does not waive it where an exception to the plea by which it was raised has been sustained.<sup>73</sup> The court may, and should, however, make findings on incidental or supplemental issues not extending to an independent ground of recovery or defense, where such issues have not been submitted to the jury and no request has been made for their submission,<sup>74</sup> provided the issues have not been abandoned by agreement of the parties;<sup>75</sup> but a submission or request for the

submission of an issue to the jury precludes a finding thereon by the judge,<sup>76</sup> and an issue submitted only in part, or defectively submitted, is not waived.<sup>77</sup>

Thus, a party in order to avoid a waiver of a controlling issue on which his right of recovery or defense depends has the duty of establishing such right of recovery or defense as a matter of law, or of obtaining the submission of such controlling issue on which his right of recovery of defense depends,<sup>78</sup> but no waiver can be imputed to the

W.2d 893, error dismissed—Johnston v. Winn, Civ.App., 105 S.W.2d 398, error dismissed—Sanders v. O'Connor, Civ.App., 98 S.W.2d 401, error dismissed—Marx v. Leverkuhn, Civ.App., 73 S.W.2d 949, error dismissed—Karr v. Cockerham, Civ. App., 71 S.W.2d 905, error dismissed—New Amsterdam Casualty Co. v. Channessa, Civ.App., 63 S.W.2d 1058, error refused—Texas Employers' Ins. Ass'n v. Edwards, Civ. App., 59 S.W.2d 885—Chicago Fire & Marine Ins. Co. v. Harkness, Civ. App., 58 S.W.2d 171.  
64 C.J. p 1141 note 79.

#### Agency

Jury's finding that lender's agent had knowledge that land was homestead could not be considered in determining question whether borrowers were estopped to claim homestead character of land, where issue of agency was not submitted to jury.—Dallas Joint Stock Land Bank v. Gore, Tex.Civ.App., 100 S.W.2d 396, error dismissed.

72. Tex.—Humble Oil & Refining Co. v. Trapp, Civ.App., 194 S.W.2d 781, error refused—Consolidated Underwriters v. Strahand, Civ.App., 96 S.W.2d 114, error dismissed—Lowe v. Masterson, Civ.App., 94 S.W.2d 552—Whittington v. Glazier, Civ. App., 81 S.W.2d 543, error refused.  
64 C.J. p 1141 note 80.

Propriety of submitting issue as to uncontroverted facts see *supra* § 533.

#### Issue conclusively established as matter of law

Tex.—Pettit v. Klink, 254 S.W.2d 769—Straffus v. Barclay, 219 S.W.2d 65, 147 Tex. 600—Continental Nat. Bank of Fort Worth v. Conner, Civ. App., 214 S.W.2d 928, 147 Tex. 218—McLendon v. Comer, Civ.App., 200 S.W.2d 427, refused no reversible error—Carille v. Peery, Civ.App., 151 S.W.2d 343—Travelers Ins. Co. v. Barker, Civ.App., 96 S.W.2d 559.  
64 C.J. p 1141 note 80 [a].

#### Where verdict is directed

Tex.—Dunagan v. Bushy, 263 S.W.2d 148—City of Breckenridge v. Stoker, Civ.App., 264 S.W.2d 511, error refused no reversible error.

73. Tex.—Estate of Graham v. Stewart, Civ.App., 15 S.W.2d 72.

74. Tex.—Lindley v. Franklin Fire Ins. Co., 152 S.W.2d 1109, 137 Tex. 196—Wichita Falls & Oklahoma Ry. Co. v. Pepper, 135 S.W.2d 79, 134 Tex. 360—Groendyke Transport Co. v. Dye, Civ.App., 259 S.W.2d 747, error dismissed by agreement—Brown v. Tieman, Civ.App., 239 S.W.2d 156, refused no reversible error—Jordan v. Collier, Civ.App., 223 S.W.2d 544, refused no reversible error—A A Air Conditioning & Mfg. Corp. of Tex. v. Barr, Civ. App., 186 S.W.2d 825, error refused—Rodriguez v. Higginbotham-Bailey-Logan Co., Civ.App., 172 S.W.2d 931, error refused—Willard v. Whitaker, Civ.App., 153 S.W.2d 878, error refused—Texas Co. v. Freer, Civ.App., 151 S.W.2d 907, error dismissed, judgment correct—Texas Employers Ins. Ass'n v. Reed, Civ. App., 150 S.W.2d 858, error dismissed, judgment correct—Floyd County v. Clements, Civ.App., 150 S.W.2d 447, error dismissed, judgment correct—Rodriguez v. Higginbotham-Bailey-Logan Co., Civ.App., 144 S.W.2d 983, reversed on other grounds 160 S.W.2d 234, 138 Tex. 476—Cox v. Shannon, Civ.App., 141 S.W.2d 412, error dismissed, judgment correct—Moore County Carbon Co. v. Whitten, Civ.App., 140 S.W.2d 880, error dismissed, judgment correct—Ronsley v. City of Fort Worth, Civ.App., 140 S.W.2d 257, error dismissed, judgment correct—Gulf Cas. Co. v. Archer, Civ. App., 118 S.W.2d 976, error dismissed—Federal Underwriters Exchange v. Cost, Civ.App., 115 S.W.2d 706, affirmed 123 S.W.2d 322, 132 Tex. 299—Gay v. Crow, Civ.App., 111 S.W.2d 782, error dismissed—Traders & General Ins. Co. v. Wimberly, Civ.App., 85 S.W.2d 343, error dismissed—Bush v. Gaffney, Civ.App., 84 S.W.2d 759.  
64 C.J. p 1141 note 82.

#### Subsidiary issue or omitted essential factual element

Rule that party waives issue by not submitting it or requesting its submission does not apply to subsidiary

issue or omitted essential factual element making up complete issue.—Dannenbauer v. Messerer's Estate, Tex.Civ.App., 62 S.W.2d 235, error refused.

75. Tex.—Dalton Adding Mach. Sales Co. v. Valley Motor Co., Civ.App., 299 S.W. 923.

76. Tex.—Garcia v. Zamora, Com. App., 13 S.W.2d 78.  
64 C.J. p 1141 note 84.

77. Tex.—Wichita Falls & Oklahoma Ry. Co. v. Pepper, 135 S.W.2d 79, 134 Tex. 360—North v. Atlas Brick Co., Com.App., 13 S.W.2d 59, motion granted in part, 16 S.W.2d 519—Citizens Hotel Co. v. Foley, Civ. App., 131 S.W.2d 402, error dismissed, judgment correct.

78. Tex.—Little Rock Furniture Mfg. Co. v. Dunn, 222 S.W.2d 985, 148 Tex. 197—Dallas Joint Stock Land Bank of Dallas v. Harrison, 156 S.W.2d 963, 138 Tex. 84—Nixon v. Hirsch, 156 S.W.2d 533, 134 Tex. 415—Dallas Ry. & Terminal Co. v. Rector, 116 S.W.2d 683, 131 Tex. 505—Sevine v. Heissner, Civ. App., 262 S.W.2d 218, error refused no reversible error—Phipps v. Evans, Civ.App., 255 S.W.2d 893, reversed on other grounds, Evans v. Phipps, Sup., 259 S.W.2d 723—Texas Emp. Ins. Ass'n v. Allgood, Civ. App., 252 S.W.2d 589—Craft v. Hahn, Civ.App., 246 S.W.2d 897, error refused no reversible error—Schoenberg v. Forrest, Civ.App., 228 S.W.2d 556, refused no reversible error—Neel v. Maurice, Civ.App., 223 S.W.2d 690—W. U. Tel. Co. v. Hinson, Civ.App., 222 S.W.2d 636, error refused no reversible error—Morgan v. Young, Civ.App., 203 S.W.2d 837, refused no reversible error—Employers Reinsurance Corp. v. Jones, Civ.App., 195 S.W.2d 810, error refused no reversible error—Texas Employers' Ins. Ass'n v. Tucker, Civ.App., 185 S.W.2d 780, error refused—Norris v. White, Civ. App., 154 S.W.2d 319, error refused—State v. Indio Cattle Co., Civ. App., 154 S.W.2d 308, error refused—Texas Employers Ins. Ass'n v. Hevolow, Civ.App., 136 S.W.2d 931, error dismissed, judgment correct

other party for such failure,<sup>79</sup> since it is not incumbent on either party to request the submission of special issues on which his adversary's right of recovery or defense depends,<sup>80</sup> and an objection by a party to an issue as submitted by the court for the other party is sufficient, and deprives the court of authority to find either expressly or by implication on the issue, without a tender by the objecting party of a special issue.<sup>81</sup>

Requested special issues are designed either to correct an error in an issue submitted by the main charge or to supply an omission therein.<sup>82</sup> While it has been held that a request is sufficient where it is in writing and in such form as to advise the court that the applicant desires to have the jury, rather than the judge, decide the issue incorporated in the request,<sup>83</sup> and that it is sufficient to make an

objection to the charge or issues submitted by the court, specifically pointing out a failure to submit a particular issue,<sup>84</sup> or to request the court to prepare and submit a proper issue,<sup>85</sup> without accompanying such objection or request with the tender of a prepared special issue, especially where there is affirmative and positive error in the issues submitted,<sup>86</sup> a mere objection to the issues given or to the omission of an issue, without accompanying such objection with the tender of special omitted issue, is not sufficient as a proper request for the submission of an omitted issue,<sup>87</sup> although where an issue or definition is given, an objection to the form of the issue or definition given is sufficient to require the court to submit the issue or definition in the proper form, without a requested special issue for the same purpose.<sup>88</sup> Thus, where the court fails

—Travelers Ins. Co. v. Noble, Civ. App., 129 S.W.2d 778, error dismissed, judgment correct—Traders & General Ins. Co. v. Weatherford, Civ.App., 124 S.W.2d 423, error dismissed—Judgment correct—Wilson v. Standard Acc. Ins. Co., Civ.App., 115 S.W.2d 453, error dismissed—Gay v. Crow, Civ.App., 111 S.W.2d 782, error dismissed—Donnell v. Talley, Civ.App., 104 S.W.2d 920, error dismissed by agreement—Collier v. Ries, Civ.App., 103 S.W.2d 830—Dallas Railway & Terminal Co. v. Ector, Civ.App., 91 S.W.2d 954, reversed 116 S.W.2d 653, 131 Tex. 505—Buford v. Southwestern Life Ins. Co., Civ.App., 77 S.W.2d 318—Fisk Tire Co. v. Blackburn Tire Co., Civ.App., 60 S.W.2d 838, error dismissed.

79. Tex.—Wichita Falls & Oklahoma Ry. Co. v. Pepper, 135 S.W.2d 79, 134 Tex. 360—Lincoln County Mut. Fire Ins. Co. v. Goolsby, Civ.App., 240 S.W.2d 402—Rodriguez v. Higginbotham-Bailey-Logan Co., Civ.App., 144 S.W.2d 993, reversed on other grounds 160 S.W.2d 234, 138 Tex. 476—Consolidated Underwriters v. Christal, Civ.App., 135 S.W.2d 127, error refused—Traders & General Ins. Co. v. Watson, Civ.App., 131 S.W.2d 1103, error dismissed, judgment correct—Notte v. Olmos Dinner Club, Civ.App., 118 S.W.2d 841, error dismissed—Marx v. Leverkus, Civ.App., 73 S.W.2d 949, error dismissed.

80. Tex.—McCormick v. King, Civ. App., 268 S.W.2d 552—Texas & N. O. Ry. Co. v. Barham, Civ.App., 204 S.W.2d 205—Green v. Ligon, Civ. App., 190 S.W.2d 742, refused no reversible error—Dakan v. Humphreys, Civ.App., 190 S.W.2d 371—Rodriguez v. Higginbotham-Bailey-Logan Co., Civ.App., 172 S.W.2d 991,

error refused—Imperial Life Ins. Co. v. Thornton, Civ.App., 138 S.W.2d 295, error dismissed—Miller v. Fenner, Beane & Ungerleider, Civ. App., 89 S.W.2d 506, error dismissed—Texas Utilities Co. v. Dear, Civ.App., 64 S.W.2d 807, error dismissed.

64 C.J. p 1141 note 86.

#### Refusal of issue presenting adversary's case not error

In suit to require administrator to inventory a tractor and automobile as part of estate, where administrator did not request issue presenting his defense that there had been a completed gift, refusal to give issue relating thereto requested by plaintiff was not error in view of fact that plaintiff's theory had been presented in other issues.—Wells v. Ward, Civ. App., 207 S.W.2d 698, refused no reversible error.

81. Tex.—El Paso Electric Co. v. Collins, Com.App., 23 S.W.2d 295, rehearing denied 25 S.W.2d 807, 64 C.J. p 1141 note 87.

82. Tex.—Employers' Liability Assur. Corporation v. Sims, Civ.App., 67 S.W.2d 445, error refused.

83. Tex.—Foster v. Attilr, Com.App., 215 S.W. 955, 64 C.J. p 1142 note 88.

84. Tex.—Travelers Ins. Co. v. Glacomo, Civ.App., 99 S.W.2d 632, 64 C.J. p 1142 note 89.

85. Tex.—Morrison v. Antwine, Civ. App., 51 S.W.2d 820—Gordon Jones Const. Co. v. Lopez, Civ.App., 172 S.W. 987.

86. Tex.—Travelers Ins. Co. v. Maldonado, Civ.App., 89 S.W.2d 300.

87. Tex.—Southern Underwriters v. West, Civ.App., 152 S.W.2d 933, error refused—United Employers Cas.

Co. v. Knight, Civ.App., 139 S.W.2d 613, error dismissed, judgment correct—Bowden v. Jones, Civ.App., 135 S.W.2d 624, error dismissed, judgment correct—Southern Underwriters v. Sanders, Civ.App., 110 S.W.2d 1258, error dismissed—City of Kirbyville v. Thackwell, Civ. App., 108 S.W.2d 226, error dismissed—Wichita Valley Ry. Co. v. Minor, Civ.App., 100 S.W.2d 1071—Harris v. Thornton's Department Store, Civ.App., 94 S.W.2d 849—Miller v. Fenner, Beane & Ungerleider, Civ.App., 89 S.W.2d 506, error dismissed.

#### Exception to issue

In motorcyclist's action for injuries sustained when taxicab struck motorcycle, defendant's exception that word "mission" used in special issue inquiring whether the driver was operating the taxicab on a "mission" for, and in behalf of, defendant at time of accident did not amount to a request that issue of scope of employment be submitted.—Broadus v. Long, 138 S.W.2d 1057, 135 Tex. 353.

#### Request for charge

It has been held that a request for a charge on a particular issue is not equivalent to a request for the submission of that issue to the jury.—St. Louis Southwestern Ry. Co. of Texas v. Preston, Com.App., 228 S.W. 928.

88. Tex.—Dallas Ry. & Terminal Co. v. Ector, 116 S.W.2d 683, 131 Tex. 505—H. W. Broadus Co. v. Blinkley, 88 S.W.2d 1040, 126 Tex. 374—Fireman's Ins. Co. of Newark, N. J. v. Weatherman, Civ.App., 193 S.W.2d 247, refused no reversible error—McClellan v. Krebs, Civ.App., 183 S.W.2d 758, error refused—Wichita Coca Cola Bottling Co. v. Levine, 68 S.W.2d 310, error refused.

to submit an issue, the party complaining of the omission has the duty to object to such action and, in addition, to prepare and submit an issue covering the matter,<sup>89</sup> in writing,<sup>90</sup> which must be tendered in substantially correct form, or in such form that it may properly be given,<sup>91</sup> and in such form that the court can make its action a matter of record by indorsement thereon.<sup>92</sup>

Special issues should be requested separately,<sup>93</sup> and where two or more issues are requested en masse or on the same paper and in the same request,<sup>94</sup> or in such shape that one could not be submitted without submitting all of them,<sup>95</sup> all should be refused if any is not proper to be submitted. Where a party requests several special issues, each of which is dependent on the preceding one, the

89. Tex.—Texas & N. O. R. Co. v. Barham, Civ.App., 204 S.W.2d 205  
—Dean v. Safety Cas. Co., Civ.App., 190 S.W.2d 750, refused for want of merit—United Employers Cas. Co. v. Knight, Civ.App., 139 S.W.2d 613, error dismissed, judgment correct—Dunigan Tool & Supply Co. v. Whipple, Civ.App., 136 S.W.2d 947, error dismissed, judgment correct—Edwards v. Gifford, Civ.App., 132 S.W.2d 155, affirmed 155 S.W.2d 786, 137 Tex. 559—Federal Underwriters Exchange v. Eber, Civ.App., 126 S.W.2d 769, error dismissed, judgment correct—Traders & General Ins. Co. v. Burns, Civ.App., 118 S.W.2d 391—American Nat. Ins. Co. v. Massengale, Civ.App., 105 S.W.2d 373—Wichita Valley Ry. Co. v. Minor, Civ.App., 100 S.W.2d 1071—Miller v. Fenner, Beane & Ungerleider, Civ.App., 89 S.W.2d 506, error dismissed—Ferguson Seed Farms v. Fort Worth & D. S. P. Ry. Co., Civ.App., 69 S.W.2d 232.

#### Unconditional request

Compensation insurer was not required to make specific request for unconditional submission of whether claimant's incapacity was temporary. In order to obtain such submission.—Texas Fire & Casualty Underwriters v. Watson, Tex.Civ.App., 126 S.W.2d 436, error refused.

90. Tex.—Texas & N. O. R. Co. v. Barham, Civ.App., 204 S.W.2d 205  
—Texas Milk Products Co. v. Birtcher, Civ.App., 138 S.W.2d 285, reversed on other grounds 157 S.W.2d 633, 138 Tex. 178—Edmondson v. Carroll, Civ.App., 134 S.W.2d 378.

#### Written request as dissent

It is only by a written request that a party puts on record his dissent from the action of the trial court and his insistence on the right to have the jury rather than the judge, decide the point at issue.—Wichita Falls & Oklahoma Ry. Co. v. Pepper, 135 S.W.2d 79, 134 Tex. 360—Moore v. Pierson, 94 S.W. 1182, 100 Tex. 113—Clowe & Cown v. Morgan, Civ.App., 153 S.W.2d 863, error refused.

91. Tex.—Hill v. Davis, Civ.App., 227 S.W.2d 381, refused no reversible error—Talley Transfer Co. v. Cones, Civ.App., 216 S.W.2d 604, refused no reversible error—Thomas v. Billingsley, Civ.App., 173 S.W.2d 199, error refused—American Cas. Co. v. Jones, Civ.App., 146 S.W.2d 423—

- Kaiser v. Newsom, Civ.App., 108 S.W.2d 755, error dismissed—Groves v. National Loan & Investment Co. of Detroit, Mich., Civ.App., 102 S.W.2d 508.

#### Substantially correct form

Under Rules of Civil Procedure, an issue must be tendered in substantially correct form, and such requirement does not mean that it must be absolutely correct nor does it mean that one that is merely sufficient to call the matter to attention of trial court will suffice, but rather it means one that in substance and in the main is correct and that is not affirmatively incorrect.—Modica v. Howard, Tex. Civ.App., 161 S.W.2d 1093.

#### Failure on refusal to submit held improper and erroneous

- Tex.—Dallas Ry. & Terminal Co. v. Black, 267 S.W.2d 416—Merriman v. Lary, Civ.App., 196 S.W.2d 652—Modica v. Howard, Civ.App., 161 S.W.2d 1093—St. Louis Southwestern Ry. Co. of Texas v. Daniel, Civ.App., 161 S.W.2d 877.

#### Failure or refusal to submit held proper and not erroneous

- Tex.—Solgaard v. Texas & N. O. Ry. Co., 229 S.W.2d 777, 149 Tex. 181—Finto v. Texas & N. O. R. Co., Civ.App., 265 S.W.2d 606—Charles v. Cole, Civ.App., 257 S.W.2d 460—Hubbell v. Donaldson, Civ.App., 243 S.W.2d 867—Pacific Emp. Ins. Co. v. Brasher, Civ.App., 234 S.W.2d 698, error refused no reversible error—Pacific Indem. Co. v. Arline, Civ.App., 213 S.W.2d 691, error granted—Rojas v. Vuocolo, Civ.App., 177 S.W.2d 957, reversed on other grounds 177 S.W.2d 962, 142 Tex. 153—Zepeda v. Moore, Civ.App., 153 S.W.2d 212, error dismissed—Edmondson v. Carroll, Civ.App., 134 S.W.2d 378, error dismissed, judgment correct—Miller v. Fenner, Beane & Ungerleider, Civ.App., 89 S.W.2d 506, error dismissed.

92. Tex.—Benjamin State Bank v. Reed, Civ.App., 139 S.W.2d 172—Traders & General Ins. Co. v. Ray, Civ.App., 128 S.W.2d 80, error dismissed, judgment correct—Cisno & N. E. Ry. Co. v. McCharen, Civ.App., 118 S.W.2d 844—Texas Coca Cola Bottling Co. v. Lovejoy, Civ.App., 112 S.W.2d 203, error dismissed—Moore v. Rice, Civ.App., 110 S.W.2d 973—Harris v. Thornton's Department Store, Civ.App., 94 S.W.2d 849

- Miller v. Fenner, Beane & Ungerleider, Civ.App., 89 S.W.2d 506, error dismissed—St. Louis Southwestern Ry. Co. of Texas v. Hill Bros., Civ.App., 80 S.W.2d 432.

93. Tex.—Sunset Motor Lines v. Blasingame, Civ.App., 245 S.W.2d 288, error dismissed—Smirl v. Globe Laboratories, Civ.App., 190 S.W.2d 574, refused for want of merit.

64 C.J. p 1139 note 59.

#### Form permitting action on each request

Under requirement that special issues be submitted "separately," requested special issues should be tendered in such form that each may separately be given, refused, or modified and given, without reference to action of court on the others.—Walton v. West Texas Utilities Co., Tex.Civ.App., 161 S.W.2d 518, error refused.

94. Tex.—Edwards v. Gifford, 155 S.W.2d 786, 137 Tex. 559—Texas General Indem. Co. v. McNeill, Civ.App., 261 S.W.2d 378—Gulf, C. & S. F. Ry. Co. v. Jones, Civ.App., 221 S.W.2d 1010, error refused no reversible error—Smirl v. Globe Laboratories, Civ.App., 190 S.W.2d 574, refused for want of merit—Dakan v. Humphreys, Civ.App., 190 S.W.2d 371—National Fire Ins. Co. of Hartford, Conn., v. Green, Civ.App., 162 S.W.2d 1006—Willard v. Whitaker, Civ.App., 153 S.W.2d 878, error refused—Scott v. Molter, Civ.App., 149 S.W.2d 642—Texas Power & Light Co. v. Doering Hotel Co., Civ.App., 147 S.W.2d 897, affirmed 162 S.W.2d 938, 139 Tex. 351—Geistmann v. Schkade, Civ.App., 121 S.W.2d 494—Moore v. Rice, Civ.App., 110 S.W.2d 973—Bewley Mills v. First Nat. Bank, Civ.App., 110 S.W.2d 201, error dismissed—Southern Underwriters v. Kelly, Civ.App., 110 S.W.2d 153, error dismissed—Terrell Wells Health Resort v. Severeid, Civ.App., 95 S.W.2d 526—Seessums v. Citizens' Nat. Bank, Civ.App., 72 S.W.2d 403.

64 C.J. p 1139 note 60.

#### Under agreement

Requested issues may be presented in bloc under proper agreements of counsel with consent of court.—Hines v. Massachusetts Mut. Life Ins. Co., Tex.Civ.App., 174 S.W.2d 94.

95. Tex.—Messimer v. Echols, Civ. App., 194 S.W. 1171.

court should submit or refuse them as an entirety,<sup>96</sup> and, hence, a special issue dependent on another special issue which the court has properly refused should likewise be refused.<sup>97</sup>

Furthermore, while the court may modify and correct a requested issue before submitting it,<sup>98</sup> and while it has been held that even though a special issue as requested to be submitted is defective or incorrect, if it is sufficient to call the attention of the court to an issue in the case the duty devolves on the court to make a correct submission of such issue,<sup>99</sup> in general the court is under no obligation to reform or modify an erroneous or defective requested issue,<sup>1</sup> at least where the issues have already been adequately presented to the jury,<sup>2</sup> and such a request may ordinarily be refused,<sup>3</sup> although the fact that an issue as requested imposes an excessive burden on the requesting party is no ground for refusing it.<sup>4</sup>

### § 537. — Time for Presenting Requests and Interrogatories

Except as fixed or restricted by statute, the time for filing requests for special findings is largely in the discretion of the trial court.

Except as fixed or restricted by statute,<sup>5</sup> the time for filing requests for special findings is largely in the discretion of the trial court,<sup>6</sup> which may prescribe and enforce a reasonable rule<sup>7</sup> or order<sup>8</sup> with respect thereto, and may modify or waive such rule or order in its discretion, provided such discretion is not abused to the palpable injury of a party;<sup>9</sup> but a request should not be submitted at such a state of the trial as to work surprise or be manifestly unfair to the other side.<sup>10</sup> A request may be presented before the issues are closed,<sup>11</sup> and before argument is begun,<sup>12</sup> even after arguments on requested instructions,<sup>13</sup> or before the general charge to the jury has been begun.<sup>14</sup> It need not be received after argument has been com-

96. Tex.—Missouri—Kansas—Texas Ry. Co. of Texas v. Cunningham, 28 S.W.2d 343, 118 Tex. 607.

64 C.J. p 1139 note 62.

97. Tex.—Mitchell v. Mills, Civ.App., 264 S.W.2d 749, error refused no reversible error.

98. Tex.—Texas & P. Ry. Co. v. Gillette, Civ.App., 100 S.W.2d 170, error dismissed.

99. Tex.—Texas Power & Light Co. v. Culwell, Com.App., 34 S.W.2d 820, modified on other grounds 37 S.W.2d 123—Mellen v. Muesse, Civ.App., 72 S.W.2d 931.

64 C.J. p 1142 note 92.

1. Tex.—Armour & Co. v. Tomlin, Com.App., 60 S.W.2d 204—American Cas. Co. v. Jones, Civ.App., 146 S.W.2d 423.

64 C.J. p 1142 note 93.

#### Necessity of request

Where defendant did not request court to submit defenses in correct form if he found the requested issues were not correct as written, court was not under duty to submit issues in proper form.—Gillette Motor Transport v. Fine, Tex.Civ.App., 131 S.W.2d 817, error dismissed, judgment correct.

2. Tex.—Kansas City, M. & O. Ry. Co. v. Perry, Civ.App., 296 S.W. 683, reversed on other grounds, Com. App., 6 S.W.2d 111.

3. Tex.—Jordan v. Morten Inv. Co., 90 S.W.2d 241, 127 Tex. 37—Minchen v. First Nat. Bank of Alpine, Civ. App., 263 S.W.2d 601, error refused no reversible error—Havens v. Guetersloh, Civ.App., 255 S.W.2d 233, refused no reversible error—Federal Underwriters Exchange v.

Tubbe, Civ.App., 193 S.W.2d 563, refused no reversible error—Brandon v. Schroeder, Civ.App., 149 S.W.2d 140—Horne Motors v. Latimer, Civ.App., 148 S.W.2d 1000, error dismissed, judgment correct—Lubbock Hotel Co. v. Lubbock Independent School Dist., Civ.App., 85 S.W.2d 776.

64 C.J. p 1142 note 95.

Requests not conforming to issues of case see infra § 544.

4. Tex.—Estes v. Davis, Civ.App., 28 S.W.2d 566, affirmed, Com.App., 44 S.W.2d 952.

#### 5. Special verdicts

(1) Refusal to grant defendant's request for a special verdict was not an abuse of discretion, where defendant's request was not made before defendant introduced testimony.—Rozina v. Nemeth, 27 N.W.2d 886, 251 Wis. 62, mandate vacated on other grounds 28 N.W.2d 885, 251 Wis. 62.

(2) Other decisions with respect to special verdicts see 64 C.J. p 1142 note 98 [a].

Requested special issues are framed after the main charge has been prepared and examined by counsel.—Employers' Liability Assur. Corporation v. Sims, Tex.Civ.App., 67 S.W.2d 445, error refused.

#### Under Workmen's Compensation Act

It has been held that the proper practice in cases under the Workmen's Compensation Act is to frame and present the questions of fact to the trial court so that they may be passed on by the court before the jury is sworn.—Central Const. Corporation v. Harrison, 112 A. 627, 137 Md. 256.

Time for submission of:

Interrogatories or issues to jury see infra § 548.

Proposed interrogatories or issues to opposing counsel see infra § 538.

6. Ohio.—Bletz v. Chandler, App., 56 N.E.2d 937.

64 C.J. p 1142 note 99.

7. Kan.—Webb v. Boulanger, 229 P. 754, 116 Kan. 711.

64 C.J. p 1142 note 1.

8. Tex.—McConkey v. McConkey, Civ.App., 187 S.W. 1100.

64 C.J. p 1142 note 2.

9. Mich.—Janunas v. Metropolitan Life Ins. Co., 214 N.W. 117, 239 Mich. 150.

64 C.J. p 1142 note 3.

10. W.Va.—Peninsular Land Transp., etc., Co. v. Franklin Ins. Co., 14 S. E. 237, 35 W.Va. 666.

11. Ind.—Sherman v. Hogland, 73 Ind. 472.

12. Conn.—Meglio v. Comeau, 79 A. 2d 187, 137 Conn. 551—Keeler v. General Products, 75 A.2d 486, 137 Conn. 247.

Ind.—Tate v. West, 94 N.E.2d 371, 120 Ind.App. 519.

64 C.J. p 1143 note 6.

13. Ind.—Lowman v. Sheets, 24 N.E. 351, 124 Ind. 416, 7 L.R.A. 784—Sandford Tool, etc., Co. v. Mullen, 27 N.E. 448, 1 Ind.App. 204.

14. Tex.—Carter v. Haynes, Civ. App., 269 S.W. 216—Foster v. Attilr, Civ.App., 181 S.W. 520, reversed on other grounds, Com.App., 215 S.W. 955.

menced<sup>15</sup> or closed,<sup>16</sup> after the court has intimated the character of the instructions it will give,<sup>17</sup> or after the general charge has been prepared,<sup>18</sup> begun,<sup>19</sup> or given,<sup>20</sup> or after the jury have retired,<sup>21</sup> and it is within the discretion of the court whether it will entertain a request for additional findings after the jury have brought in findings on questions originally submitted to it.<sup>22</sup> It is too late to submit requests for special findings after general verdict,<sup>23</sup> after verdict directed,<sup>24</sup> or after the discharge of the jury.<sup>25</sup> Requests for special findings are premature if made before any evidence has been introduced in the cause.<sup>26</sup> Exception to the refusal of the court to submit special interrogatories must show when the interrogatories were presented to the court.<sup>27</sup>

*Allowing time to prepare requests.* The court should allow counsel a reasonable time in which to prepare interrogatories or issues which he desires to have submitted,<sup>28</sup> the length of such time ordinarily being within the discretion of the court.<sup>29</sup>

### § 538. — Submission of Interrogatories or Issues to Counsel

The submission of proposed interrogatories or issues to opposing counsel depends on statutory provisions.

Where so provided by statute, special interrogatories or issues desired by a party to be submitted

to the jury must first be submitted to counsel for the adverse party,<sup>30</sup> before arguments are begun under some statutory provisions,<sup>31</sup> or under others within a reasonable time after the charge is given to counsel for examination,<sup>32</sup> and if not so submitted may properly be refused by the court;<sup>33</sup> but in the absence of statute requiring it such submission to opposing counsel is not necessary,<sup>34</sup> although it has been said to be the better practice, in order that opportunity may be given to examine the interrogatories or issues and make any proper objection thereto.<sup>35</sup> According to some authorities, the court is not bound to submit to counsel or the parties special interrogatories proposed to be given on its own motion, where such submission is not required by statute;<sup>36</sup> but there is also authority to the contrary.<sup>37</sup>

### § 539. — Questions Already Submitted

As a general rule, the submission to the jury of a requested special interrogatory or issue may properly be refused by the court where the substance thereof, or as much of it as is proper and appropriate, is covered by an interrogatory or issue already submitted.

As a general rule, the submission to the jury of a requested special interrogatory or issue may properly be refused by the court where the substance thereof, or as much of it as is proper and appropriate, is covered by an interrogatory or issue

15. Ill.—Allen v. Byers, 117 N.E.2d 799, 1 Ill.App.2d 422—Burton v. Doss, 3 N.E.2d 168, 285 Ill.App. 600. 64 C.J. p 1143 note 9.

16. Wis.—Engsborg v. Hein, 60 N. W.2d 714, 265 Wis. 58. 64 C.J. p 1143 note 10.

17. Ind.—Ohio, etc., R. Co. v. Wrape, 30 N.E. 428, 4 Ind.App. 100. Va.—McWilliams v. Smith, 1 Call 123, 5 Va. 128.

18. Tex.—Fred Mercer Dry Goods Co. v. Fikes, Civ.App., 191 S.W. 1178.

19. Mich.—Neeley v. Stratton, 151 N. W. 1045, 185 Mich. 409.

20. Ohio.—Bobbitt v. Maher Beverage Co., 89 N.E.2d 583, 152 Ohio St. 246—*Corpus Juris* cited in Kennard v. Palmer, 53 N.E.2d 908, 912, 143 Ohio St. 1. 64 C.J. p 1143 note 14.

21. *Interrogatories*  
Where after retiring jury returned to courtroom and asked for additional instructions on particular point, court did not abuse discretion in refusing to submit interrogatories and amended interrogatories.—Dietz v. Chandler, Ohio App., 56 N.E.2d 937.

22. Kan.—Parr v. Young, 246 P. 181, 121 Kan. 47.

23. Conn.—Keeler v. General Products, 75 A.2d 486, 137 Conn. 247, 64 C.J. p 1143 note 16.

*Questions submitted by adversary unanswered*

Where party does not adopt questions submitted by adversary, he may not exercise this privilege after verdict against him has been received and questions are returned unanswered, nor is he entitled as matter of right to insist that questions submitted be answered, but matter rests in the discretion of trial court.—Davisson, by Wilson v. Martin K. Eby Const. Co., 241 P.2d 689, 172 Kan. 411—Saunders v. Atchison, T. & S. F. Ry. Co., 119 P. 552, 86 Kan. 58.

24. N.Y.—Robbins v. Springfield, F. & M. Ins. Co., 29 N.Y.S. 513, 79 Hun 117, affirmed 44 N.E. 159, 149 N.Y. 477.

25. Kan.—Smyser v. Fair, 85 P. 408, 73 Kan. 773.

26. Va.—Woodward v. Woodson, 6 Munf. 227, 20 Va. 227.

27. Ind.—American F. Ins. Co. v. Sisk, 36 N.E. 659, 9 Ind.App. 305.

28. Tex.—Burton v. Williams, Civ. App., 195 S.W.2d 245, error refused no reversible error—Varn v. Moeller, Civ.App., 216 S.W. 234.

29. Tex.—Varn v. Moeller, supra.

*Refusal held not abuse of discretion*  
Tex.—Burton v. Williams, Civ.App., 195 S.W.2d 245, error refused no reversible error.

30. Ill.—Rachne Fuel Co. v. Rawlins, 36 N.E.2d 710, 377 Ill. 375—Price v. Bailey, 265 Ill.App. 358. 64 C.J. p 1143 note 24.

31. Ill.—Ogilby v. Schmauss, 52 N. E.2d 293, 321 Ill.App. 161.

64 C.J. p 1143 note 25.  
Time for presenting request to court see supra § 537.

32. Tex.—Laurel Oil Co. v. Stockton, Civ.App., 281 S.W. 1106.

33. Tex.—Gelstmann v. Schkade, Civ.App., 121 S.W.2d 494—Southern Motor Lines v. Creamer, Civ. App., 113 S.W.2d 624, error dismissed—Walker v. Jean LaFette Hotel Corp., Civ.App., 94 S.W.2d 504, error dismissed. 64 C.J. p 1143 note 27.

34. Ind.—Sherfey v. Evansville & T. H. R. Co., 23 N.E. 273, 121 Ind. 427.

35. Ind.—Sherfey v. Evansville & T. H. R. Co., supra.

36. Iowa.—Miles v. Schunk, 117 N. W. 971, 139 Iowa 563. 64 C.J. p 1143 note 30.

37. Ill.—Chicago City R. Co. v. Jordan, 74 N.E. 452, 215 Ill. 390. 64 C.J. p 1143 note 31.

already submitted,<sup>38</sup> and this is true even though | the interrogatory or special issue requested is in a

38. U.S.—United Gas Public Service Co. v. State of Texas, Tex., 58 S.Ct. 483, 303 U.S. 123, 625, 82 L.Ed. 702 —Cain v. Bowlby, C.C.A.N.M., 114 F.2d 819, certiorari denied 61 S.Ct. 319, 311 U.S. 710, 85 L.Ed. 462.

Cal.—Hughes v. Quackenbush, 37 P. 2d 99, 1 Cal.App.2d 349.

Ill.—Clarke v. Storchak, 52 N.E.2d 229, 384 Ill. 564, appeal dismissed 64 S.Ct. 1270, 322 U.S. 713, 88 L.Ed. 1555—Chandler v. Chicago Transit Authority, 86 N.E.2d 289, 337 Ill. App. 656—Goldberg v. Capitol Freight Lines, 41 N.E.2d 302, 314 Ill.App. 347, affirmed 47 N.E.2d 67, 382 Ill. 283.

Kan.—Long v. Shafer, 188 P.2d 646, 164 Kan. 211—Jelf v. Cottonwood Falls Gas Co., 160 P.2d 170, 160 Kan. 112—Sams v. Commercial Standard Ins. Co., 139 P.2d 859, 157 Kan. 278—Alliston v. Shell Petroleum Corp., 55 P.2d 396, 143 Kan. 327 —Damitz v. Christian, 21 P.2d 324, 137 Kan. 562.

N.C.—Miller v. McConnell, 36 S.E.2d 722, 226 N.C. 28—Steele v. Cox, 36 S.E.2d 288, 225 N.C. 726—LaVecchia v. North Carolina Joint Stock Land Bank of Durham, 9 S.E.2d 489, 218 N.C. 35—Saleem v. Abeyonulis, 9 S.E.2d 399, 217 N.C. 644—Hill v. Young, 6 S.E.2d 820, 217 N.C. 114—Union Central Life Ins. Co. v. Gordon, 182 S.E. 496, 208 N.C. 723—Gasque v. City of Asheville, 178 S.E. 848, 207 N.C. 821.

Ohio—Baltimore & O. R. Co. v. McTeer, 9 N.E.2d 627, 55 Ohio App. 217.

Tex.—Goolsbee v. Texas & N. O. R. Co., 243 S.W.2d 386, 150 Tex. 528—Solgaard v. Texas & N. O. R. Co., 229 S.W.2d 777, 149 Tex. 181—Little Rock Furniture Mfg. Co. v. Dunn, 222 S.W.2d 985, 148 Tex. 197—Triangle Cab Co. v. Taylor, 192 S.W. 2d 143, 144 Tex. 568—City of Fort Worth v. Lee, 186 S.W.2d 954, 143 Tex. 551, 159 A.L.R. 125—Lockley v. Page, 180 S.W.2d 616, 142 Tex. 594—Blaugrund v. Gish, 179 S.W.2d 266, 142 Tex. 379—Schummacher Co. v. Holcomb, 177 S.W.2d 951, 142 Tex. 332—Texas & N. O. R. Co. v. Sturgeon, 177 S.W.2d 264, 142 Tex. 222—Great American Indem. Co. v. Sams, 176 S.W.2d 312, 142 Tex. 121—Southern Underwriters v. Schoolcraft, 158 S.W.2d 991, 138 Tex. 323—Northeast Texas Motor Lines v. Hodges, 158 S.W.2d 487, 138 Tex. 280—Southern Underwriters v. Wheeler, 123 S.W.2d 340, 132 Tex. 350—Texas & New Orleans R. Co. v. Neill, 100 S.W.2d 348, 128 Tex. 580, certiorari dismissed 58 S.Ct. 118, 302 U.S. 645, 82 L.Ed. 501, rehearing denied 58 S.Ct. 268, 302 U.S. 778, 82 L.Ed. 602—Jordan v. Morten Inv. Co., 90 S.W.2d 241, 127 Tex. 37—Fullingim v. Dunaway,

Civ.App., 267 S.W.2d 483—Jones v. Scott, Civ.App., 266 S.W.2d 534, refused no reversible error—Glimmer v. Griffin, Civ.App., 265 S.W.2d 252, error refused no reversible error—Siratt v. Worth Const. Co., Civ. App., 263 S.W.2d 842, error granted—Minchen v. First Nat. Bank of Alpine, Civ.App., 263 S.W.2d 601, error refused no reversible error—Texas General Indem. Co. v. McNeill, Civ.App., 261 S.W.2d 378—Rowan & Hope v. Valadez, Civ.App., 258 S.W.2d 395, error refused no reversible error—Texas Housing Co. v. Harrell, Civ.App., 257 S.W.2d 484—Cree v. Miller, Civ.App., 255 S.W. 2d 565, refused no reversible error—S. H. Kress & Co. v. Selph, Civ. App., 250 S.W.2d 883, error refused no reversible error—Pickens v. Harrison, Civ.App., 246 S.W.2d 316, affirmed 252 S.W.2d 575, 151 Tex. 562—Sunset Motor Lines v. Blasinsgame, Civ.App., 245 S.W.2d 288, error dismissed—Jefferson County Drainage Dist. No. 7 v. Hebert, Civ.App., 244 S.W.2d 535, error refused no reversible error—Liberty Mut. Ins. Co. v. Taylor, Civ.App., 244 S.W.2d 350—McBride v. Ponder, Civ.App., 242 S.W.2d 253, refused no reversible error—Rice v. Schiller, Civ.App., 241 S.W.2d 330, affirmed in part Schiller v. Rice, 246 S.W.2d 607, 151 Tex. 116—Beauchamp v. Beauchamp, Civ.App., 239 S.W.2d 191, refused no reversible error—Thompson v. Hodges, Civ. App., 237 S.W.2d 757, error refused no reversible error—Pressler v. Moody, Civ.App., 233 S.W.2d 165—Traders & General Ins. Co. v. Glibbs, Civ.App., 229 S.W.2d 410, refused no reversible error—Pullen v. Russ, Civ.App., 226 S.W.2d 876, refused no reversible error—Dallas Ry. & Terminal Co. v. Strickland Transp. Co., Civ.App., 225 S.W.2d 901—Soap Corp. of America v. Ballis, Civ.App., 223 S.W.2d 957, refused no reversible error—Texas Associates v. Joe Bland Const. Co., Civ.App., 222 S.W. 2d 413, refused no reversible error—Employer's Cas. Co. v. Smith, Civ. App., 221 S.W.2d 322, error refused no reversible error—Lumbermen's Mut. Cas. Co. v. Zinn, Civ.App., 220 S.W.2d 906, error refused—American Emp. Ins. Co. v. Clumer, Civ. App., 220 S.W.2d 697—Browning v. Nestling, Civ.App., 219 S.W.2d 712, refused no reversible error—Southwestern Greyhound Lines v. Dickson, Civ.App., 219 S.W.2d 592—Meadlake Foods v. Estes, Civ.App., 218 S.W.2d 862, error refused 219 S.W.2d 441, 148 Tex. 13—Superior Ins. Co. v. Owens, Civ.App., 218 S.W.2d 517, error refused no reversible error—Stroble v. Tearl, Civ. App., 217 S.W.2d 448, reversed on other grounds 221 S.W.2d 566, 148

Tex. 146—Humble Oil & Refining Co. v. Martin, Civ.App., 216 S.W.2d 251, affirmed in part, reversed in part, on other grounds 222 S.W.2d 995, 148 Tex. 175—Pacific Indem. Co. v. Airline, Civ.App., 213 S.W.2d 691, error granted—Piedmont Fire Ins. Co. v. Dunlap, Civ.App., 212 S.W. 2d 996, refused no reversible error—Dallas Ry. & Terminal Co. v. Orr, Civ.App., 210 S.W.2d 863, affirmed 215 S.W.2d 862, 147 Tex. 383—Hickman v. Cooper, Civ.App., 210 S.W.2d 858, refused no reversible error—Texas Emp. Ins. Ass'n v. Harkey, Civ.App., 208 S.W.2d 915, affirmed 208 S.W.2d 919, 146 Tex. 504—Dallas Ry. & Terminal Co. v. Guthrie, Civ.App., 206 S.W.2d 638, reversed on other grounds 210 S.W. 2d 550, 146 Tex. 585—Globe Aircraft Corp. v. Thompson, Civ.App., 203 S.W.2d 856—Dallas Ry. & Terminal Co. v. Bishop, Civ.App., 203 S.W.2d 651, refused no reversible error—Associated Emp. Lloyds v. Aiken, Civ.App., 201 S.W.2d 856, refused no reversible error—Gulf Casualty Co. v. Tucker, Civ.App., 201 S.W.2d 81—Airline Motor Coaches v. Owens, Civ.App., 199 S.W.2d 802, refused no reversible error—Barron v. James, Civ.App., 198 S.W.2d 245, reversed on other grounds 198 S.W.2d 256, 145 Tex. 283—Consolidated Underwriters v. Fuxworth, Civ.App., 196 S.W.2d 87, error granted—Safety Cas. Co. v. Teets, Civ.App., 195 S.W. 2d 769, error refused no reversible error—National Life & Acc. Ins. Co. v. Hanna, Civ.App., 195 S.W.2d 733, error refused no reversible error—Greenspun v. Greenspun, Civ. App., 194 S.W.2d 134, affirmed 198 S.W.2d 82, 145 Tex. 374—Associated Emp. Lloyds v. Groce, Civ.App., 194 S.W.2d 103, error refused no reversible error—Kansas City Southern Ry. Co. v. Chandler, Civ.App., 192 S.W.2d 304, refused no reversible error—Triangle Cab Co. v. Taylor, Civ.App., 190 S.W.2d 755, affirmed 192 S.W.2d 143, 144 Tex. 568—Folse v. Monroe, Civ.App., 190 S.W.2d 604, refused for want of merit—Safety Cas. Co. v. O'Try, Civ.App., 187 S.W. 2d 578, refused for want of merit—Dallas Ry. & Terminal Co. v. Graham, Civ.App., 185 S.W.2d 180—City of Fort Worth v. Lee, Civ.App., 182 S.W.2d 831, affirmed 182 S.W.2d 954, 143 Tex. 551—Bohn Bros. v. Turner, Civ.App., 182 S.W.2d 419, error refused—Rainwater v. McGrew, Civ.App., 181 S.W.2d 103, error refused—Karger v. Rio Grande Valley Citrus Exchange, Civ.App., 179 S.W.2d 816, error refused—Superior Lloyds of America v. Foxworth, Civ.App., 178 S.W.2d 724, error refused—Hamill & Smith v. Parr, Civ.App., 173 S.W.2d 725—Robinson v. Gunter Hotel Corp.,

Civ.App., 173 S.W.2d 318, error refused—Thomas v. Billingsley, Civ. App., 173 S.W.2d 199, error refused—Lackey v. Moffett, Civ.App., 172 S.W.2d 715—Associated Indemnity Corp. v. Billberg, Civ.App., 172 S.W.2d 157—Strong v. Aetna Cas. & Sur. Co., Civ.App., 170 S.W.2d 786—Dressen v. Citizens State Bank, Civ.App., 165 S.W.2d 120, error refused—Eaton v. Husted, Civ.App., 163 S.W.2d 439, affirmed 172 S.W.2d 493, 141 Tex. 349—Henwood v. Richardson, Civ.App., 163 S.W.2d 256, error refused—Traders & General Ins. Co. v. Hill, Civ.App., 161 S.W.2d 1101—Texas State Highway Department v. Butler, Civ.App., 158 S.W.2d 878, error refused—City of Austin v. Howard, Civ.App., 158 S.W.2d 556, error refused—Germann v. Kaufman's, Inc., Civ.App., 155 S.W.2d 969, error refused—Peters Bros. v. Charles F. Williams Co., Civ.App., 154 S.W.2d 667—International Brotherhood of Boilermakers, Iron Shipbuilders & Helpers of America v. Huval, Civ.App., 154 S.W.2d 223, affirmed in part and reversed in part on other grounds 156 S.W.2d 107, 140 Tex. 21—Herndon v. Halliburton Oil Well Cementing Co., Civ.App., 154 S.W.2d 163, error refused—Postal Mut. Indem. Co. v. James, Civ.App., 154 S.W.2d 148, error refused—Clayton v. Reamer, Civ.App., 153 S.W.2d 1020, error refused—Willard v. Whitaker, Civ. App., 153 S.W.2d 878, error refused—Zepeda v. Moore, Civ.App., 153 S.W.2d 212, error dismissed—Kincheloe v. Kincheloe, Civ.App., 152 S.W.2d 851, error refused—Traders & General Ins. Co. v. Bolcher, Civ. App., 152 S.W.2d 525, error refused—Skelly Oil Co. v. Johnston, Civ. App., 151 S.W.2d 863, error refused—Ross v. Cook, Civ. App., 151 S.W.2d 854, error refused—Lawson v. First Nat. Bank of Rotan, Civ.App., 150 S.W.2d 279, error dismissed, judgment correct—Texas Indem. Ins. Co. v. Springfield, Civ.App., 149 S.W.2d 270, error dismissed, judgment correct—Maryland Cas. Co. v. Abbott, Civ.App., 148 S.W.2d 465, error dismissed, judgment correct—Gulf, C. & S. F. Ry. Co. v. Picard, Civ.App., 147 S.W.2d 303, error dismissed, judgment correct—Maryland Casualty Co. v. Landry, Civ. App., 147 S.W.2d 290, error dismissed, judgment correct—Peden Iron & Steel Co. v. Claffin, Civ.App., 146 S.W.2d 1062, error dismissed, judgment correct—Southern Underwriters v. Grimes, Civ.App., 146 S.W.2d 1058, error dismissed, judgment correct—State Nat. Bank of Houston v. Woodfin, Civ.App., 146 S.W.2d 284, error refused—Federal Underwriters Exchange v. Price, Civ.App., 145 S.W.2d 951, error dismissed, judgment correct—Brown v. Kirksey, Civ.App., 145 S.W.2d 217

—Dallas Railway & Terminal Co. v. Latham, Civ.App., 143 S.W.2d 824, error dismissed, judgment correct—Texas Indemnity Ins. Co. v. Godsey, Civ.App., 143 S.W.2d 639, error refused—Texas Indem. Ins. Co. v. Smith, Civ.App., 143 S.W.2d 448—Southern Underwriters v. Weldon, Civ.App., 142 S.W.2d 574—Dulaney Inv. Co. v. Wood, Civ.App., 142 S.W.2d 379, error dismissed, judgment correct—North East Texas Motor Lines v. Hodges, Civ.App., 141 S.W.2d 386, affirmed 158 S.W.2d 487, 138 Tex. 280—Panhandle & S. F. Ry. Co. v. Montgomery, Civ.App., 140 S.W.2d 241—Consolidated Underwriters v. Adams, Civ.App., 140 S.W.2d 221, error dismissed, judgment correct—Maryland Casualty Co. v. Jackson, Civ.App., 139 S.W.2d 631, error dismissed, judgment correct—Gillette Motor Transport v. Lucas, Civ.App., 138 S.W.2d 887, error dismissed, judgment correct—Hemsel v. Summers, Civ.App., 138 S.W.2d 865—Industrial Indemnity Exchange v. Ratcliff, Civ.App., 138 S.W.2d 613, error dismissed, judgment correct—Southern Underwriters v. Cooper, Civ.App., 138 S.W.2d 563, error dismissed, judgment correct—Hopkins v. Robertson, Civ. App., 138 S.W.2d 310, error refused—A. B. C. Storage & Moving Co. v. Herron, Civ.App., 138 S.W.2d 211, error dismissed, judgment correct—Etna Life Ins. Co. v. Allen, Civ. App., 137 S.W.2d 78—Goldstein Hat Mfg. Co. v. Cowen, Civ.App., 136 S.W.2d 867—Consolidated Underwriters v. Christal, Civ.App., 135 S.W.2d 127, error refused—Texas Employers Ins. Ass'n v. Ebers, Civ. App., 134 S.W.2d 797, error dismissed, judgment correct—Elliot v. Maney & Alley, Civ.App., 134 S.W.2d 754—Wright Titus, Inc., v. Swafford, Civ.App., 133 S.W.2d 287—W. O. W. Life Ins. Soc. v. Dickson, Civ.App., 133 S.W.2d 243, error dismissed, judgment correct—Edwards v. Gifford, Civ.App., 132 S.W.2d 155, affirmed 155 S.W.2d 786, 137 Tex. 559—Maryland Casualty Co. v. Abbott, Civ.App., 131 S.W.2d 171, error dismissed, judgment correct—Matthews v. McLen, Civ.App., 131 S.W.2d 24—Sullivan v. Trammell, Civ.App., 130 S.W.2d 310, error dismissed, judgment correct—Travelers Ins. Co. v. Noble, Civ.App., 129 S.W.2d 778, error dismissed, judgment correct—Jackson v. Edmondson, Civ.App., 129 S.W.2d 369, reversed on other grounds 151 S.W.2d 794, 136 Tex. 405—Reeves v. Tittle, Civ.App., 129 S.W.2d 364, error refused—Hickman v. Sullivan, Civ. App., 128 S.W.2d 467, error dismissed, judgment correct—Rivers v. Westbrook, Civ.App., 126 S.W.2d 46, error refused—Burlington-Rock Island R. Co. v. Davis, Civ.App., 123 S.W.2d 1002, error dismissed, judg-

ment correct—Giles v. Flanagan, Civ.App., 123 S.W.2d 477, error dismissed, judgment correct—Allcorn v. Fort Worth & R. G. Ry. Co., Civ. App., 122 S.W.2d 341, error refused—Phenix Refining Co. v. Kilgore Nat. Bank, Civ.App., 121 S.W.2d 636, affirmed 143 S.W.2d 925, 136 Tex. 439—Geistmann v. Schkade, Civ.App., 121 S.W.2d 494—Baker v. Corse, Civ.App., 120 S.W.2d 817, error dismissed—Clisco & N. E. Ry. Co. v. McCharen, Civ.App., 118 S.W.2d 844—Wells v. Ford, Civ.App., 118 S.W.2d 420, error dismissed—Gray v. Adolph, Civ.App., 117 S.W.2d 122, error refused—Hom-Ond Food Stores v. Voigt, Civ.App., 115 S.W.2d 981, error dismissed—Guaranty Bank & Trust Co. v. Hamacher, Civ.App., 112 S.W.2d 343—City of Winters v. Bethune, Civ.App., 111 S.W.2d 797, error dismissed—Forrest v. Faust, Civ.App., 110 S.W.2d 147—National Indemnity Underwriters of America v. Cherry, Civ. App., 110 S.W.2d 115—Phenix Refining Co. v. Muller, Civ. App., 109 S.W.2d 766, error dismissed—Texas Coca-Cola Bottling Co. v. Wimberley, Civ.App., 108 S.W.2d 860, error dismissed—Alamo Downs, Inc., v. Briggs, Civ.App., 106 S.W.2d 733, error dismissed—Lozano Newspapers v. Alvarez, Civ. App., 104 S.W.2d 573, error dismissed—Dayle L. Smith Oil Co. v. Griffin, Civ.App., 104 S.W.2d 167, error dismissed—Cox v. City of Fort Worth, Civ.App., 102 S.W.2d 504, error dismissed—Hale v. Herring, Civ.App., 102 S.W.2d 468—Safe-way Stores of Texas v. Rutherford, Civ.App., 101 S.W.2d 1055, affirmed 111 S.W.2d 688, 130 Tex. 465—South Texas Coaches v. Eastland, Civ.App., 101 S.W.2d 878, error dismissed—Holden v. Gibbons, Civ. App., 101 S.W.2d 837, error dismissed—Tennessee Dairies v. Seibenhause, Civ.App., 99 S.W.2d 323, error dismissed—International-Great Northern R. R. v. Lowry, Civ.App., 98 S.W.2d 383, reversed on other grounds International-Great Northern R. Co. v. Lowry, 121 S.W.2d 585, 132 Tex. 272—Consolidated Underwriters v. Strahand, Civ.App., 96 S.W.2d 114, error dismissed—Traders & General Ins. Co. v. Wright, Civ.App., 95 S.W.2d 753, affirmed Wright v. Traders & General Ins. Co., 123 S.W.2d 314, 132 Tex. 173—Traders & General Ins. Co. v. Herndon, Civ.App., 95 S.W.2d 540, error dismissed—Traders & General Ins. Co. v. Watkins, Civ.App., 94 S.W.2d 843, reversed without opinion—Seinsheimer v. Burkhardt, Civ.App., 93 S.W.2d 1231, modified on other grounds 122 S.W.2d 1063, 132 Tex. 336—Continental Ins. Co. of New York v. Guerson, Civ.App., 93 S.W.2d 591, error dismissed—Williams v. Creighton, Civ.App., 93 S.W.2d 195—Traders & General Ins. Co. v.



different form or verbiage,<sup>39</sup> since, in order to / avoid confusion, an issue or question should be sub-

Patton, Civ.App., 92 S.W.2d 1088—Hill v. Lester, Civ.App., 91 S.W.2d 1162, error dismissed—Maryland Cas. Co. v. Hill, Civ.App., 91 S.W.2d 391, error dismissed—J. S. Curtiss & Co. v. White, Civ.App., 90 S.W.2d 1095, error dismissed by agreement—International - Great Northern R. Co. v. Hawthorne, Civ.App., 90 S.W.2d 895, affirmed 116 S.W.2d 1056, 131 Tex. 622, certiorari denied 59 S.Ct. 487, 306 U.S. 639, 83 L.Ed. 1040—Southwestern Bell Tel. Co. v. Ferris, Civ.App., 89 S.W.2d 229, error dismissed—Traders & General Ins. Co. v. Ross, Civ.App., 88 S.W.2d 543, reversed on other grounds 117 S.W.2d 423, 131 Tex. 562—Yellow Cab Co. v. Treadwell, Civ.App., 87 S.W.2d 276, error dismissed—Atlas Life Ins. Co. v. Standifer, Civ.App., 86 S.W.2d 852, error dismissed—Home Furniture Co. v. Hawkins, Civ.App., 84 S.W.2d 830, error dismissed—Williams v. Rodocker, Civ.App., 84 S.W.2d 556—Smith v. Triplett, Civ.App., 83 S.W.2d 1104—Kansas City Life Ins. Co. v. Fisher, Civ.App., 83 S.W.2d 1063, error dismissed—Tilley v. Kangerga, Civ.App., 83 S.W.2d 787, error refused—Utz v. Sanders, Civ.App., 81 S.W.2d 243—Southland Greyhound Lines v. King, Civ.App., 81 S.W.2d 121, error dismissed—First Nat. Bank v. Crocker, Civ.App., 80 S.W.2d 442—Oriental Oil Co. v. Brown, Civ.App., 80 S.W.2d 378, reversed on other grounds 106 S.W.2d 136, 130 Tex. 240—Wells v. Henderson, Civ.App., 78 S.W.2d 683, error refused—Southland Greyhound Lines v. King, Civ.App., 77 S.W.2d 261, error dismissed—Western Casualty Co. v. Ratliff, Civ.App., 76 S.W.2d 185—Pols v. Langford, Civ.App., 75 S.W.2d 971, error refused—Levy v. Rogers, Civ.App., 75 S.W.2d 304, error dismissed—Texas Employers' Ins. Ass'n v. Burnett, Civ.App., 72 S.W.2d 952, error dismissed—Hess v. Millsap, Civ.App., 72 S.W.2d 923—Illinois Bankers' Life Assur. Co. v. Byrd, Civ.App., 69 S.W.2d 517—Texas Employers' Ins. Ass'n v. White, Civ.App., 68 S.W.2d 511, error dismissed—Corbett-Arthur Inv. Co. v. Blair, Civ.App., 68 S.W.2d 271, error dismissed—Halsey v. Humble Oil & Refining Co., Civ.App., 66 S.W.2d 1082, error dismissed—Texas Employers' Ins. Ass'n v. Arnold, Civ.App., 62 S.W.2d 609, reversed on other grounds 92 S.W.2d 1019, 127 Tex. 245—Chicago, R. I. & G. Ry. Co. v. Vinson, Civ.App., 61 S.W.2d 532, error dismissed—Texas & P. R. Co. v. Price, Civ.App., 61 S.W.2d 195, reversed without opinion—City Ice Delivery Co. v. Suggs, Civ.App., 60 S.W.2d 538, error refused—Texas & P. Ry. Co. v. Foster, Civ.App.,

58 S.W.2d 557, error dismissed—Indemnity Ins. Co. of North America v. Sparra, Civ.App., 57 S.W.2d 892—Baldridge v. Klein, 56 S.W.2d 897, reversed without opinion—Texas Co. v. Betterton, Civ.App., 56 S.W.2d 663, reversed on other grounds 88 S.W.2d 1039, 126 Tex. 359—Texas & P. Ry. Co. v. Phillips, Civ.App., 56 S.W.2d 210, error dismissed—Smith v. Kendrick, Civ.App., 55 S.W.2d 598, error dismissed—Farmers' Nat. Bank v. Dublin Nat. Bank, Civ.App., 55 S.W.2d 567, reversed on other grounds Oats v. Dublin Nat. Bank, 90 S.W.2d 824, 127 Tex. 2—Fort Worth & R. G. R. Co. v. Ross, Civ.App., 54 S.W.2d 561. Wis.—Roeske v. Schmitt, 64 N.W.2d 394, 266 Wis. 557—Brophy v. Milwaukee Elec. Ry. & Transport Co., 30 N.W.2d 76, 251 Wis. 558—Koepeke v. Miller, 6 N.W.2d 670, 241 Wis. 501—Thurs Box Co. v. Marathon County, 289 N.W. 691, 233 Wis. 387—Mantowoc Trust Co. v. Bouril, 265 N.W. 572, 220 Wis. 627—Hoffman v. Regling, 258 N.W. 347, 117 Wis. 66. 64 C.J. p 1144 note 32—71 C.J. p 1348 notes 64, 65.

#### Evidentiary facts

Questions calling merely for evidentiary facts supporting the principal issues submitted were properly refused—El Paso Electric Co. v. Leeper, Tex.Civ.App., 42 S.W.2d 863—Gaertner v. Stolle, Tex.Civ.App., 238 S.W. 252.

#### Conditional submission

Where court has already submitted an issue, even though it is submitted conditionally on the way a preceding issue is to be answered, and it is submitted at request of a party or without his objection, he cannot require court to submit identical issue again, although such issue does not contain the condition—Uptmor v. Janes, Tex.Civ.App., 210 S.W.2d 235, refused no reversible error.

#### Emergency

The issue of emergency is covered by issues submitted concerning primary negligence and discovered peril.—Reddick v. Longacre, Tex.Civ.App., 228 S.W.2d 264, refused no reversible error—Younger Bros. v. Ross, Tex.Civ.App., 151 S.W.2d 621, error dismissed.

#### Unavoidable accident

Tex.—Wheeler v. Glazer, 153 S.W.2d 449, 137 Tex. 341, 140 A.L.R. 1301. 64 C.J. p 1144 note 32 [b].

#### Sole cause and proximate cause

(1) In action for injuries to passenger in bus which overturned, where defendant was not entitled to have both the issue of sole cause as submitted to jury, and issue of sole proximate cause as requested by it, defendant not having objected to giving

the former could not complain of refusal to give latter.—Airline Motor Coaches v. Owens, Tex.Civ.App., 199 S.W.2d 802, refused no reversible error.

(2) "Proximate cause" is broader and more comprehensive than "sole cause," and more proof and a greater burden of evidence is required to prove that an act of negligence was the "sole cause" than to show that it was a "proximate cause," and it is not error to refuse to submit question of sole proximate cause as to such matters where the same question is submitted as the proximate cause of the injury.—Hemseil v. Summers, Tex.Civ.App., 138 S.W.2d 865.

#### New and independent cause

(1) Where unavoidable accident is submitted there is no need to submit new and independent cause, unless the particular facts which constitute each are different and are separately pleaded.—Texas, N. M. & Okl. Coaches v. Williams, Tex.Civ.App., 191 S.W.2d 66, refused for want of merit—Dallas Railway & Terminal Co. v. Little, Tex.Civ.App., 109 S.W.2d 289, error dismissed.

(2) In suit arising out of automobile collision in a fog, there was no error in refusal to submit issue inquiring whether fog was not a new and independent cause of accident, where that issue was covered by submission of issue of unavoidable accident and issue inquiring whether fog was sole proximate cause of collision.—Younger Bros. v. Ross, Tex.Civ.App., 151 S.W.2d 621, error dismissed.

39. Tex.—Guzman v. Maryland Cas. Co., 107 S.W.2d 356, 130 Tex. 62—Liberty Mut. Ins. Co. v. Taylor, Civ.App., 244 S.W.2d 350—Buss v. Shepherd, Civ.App., 240 S.W.2d 382, refused no reversible error—Texas Emp. Ins. Ass'n v. Foreman, Civ.App., 236 S.W.2d 824—Employer's Cas. Co. v. Smith, Civ.App., 221 S.W.2d 322, error refused no reversible error—Gillette Motor Transp. Co. v. Whitfield, Civ.App., 197 S.W.2d 157, affirmed 200 S.W.2d 624, 145 Tex. 571—Associated Emp. Lloyds v. Groce, Civ.App., 194 S.W.2d 103, error refused no reversible error—Union Bus Lines v. Moulder, Civ.App., 180 S.W.2d 509—Industrial Indem. Exchange v. Southard, Civ.App., 147 S.W.2d 939, reversed on other grounds 160 S.W.2d 905, 138 Tex. 531—Traders & General Ins. Co. v. Scogin, Civ.App., 146 S.W.2d 1014, error dismissed, judgment correct—State Nat. Bank of Houston v. Woodfin, Civ.App., 146 S.W.2d 284, error refused—Texas Indem. Ins. Co. v. Smith, Civ.App., 143 S.W.2d 448—Southern Underwriters v. Weldon, Civ.App., 142 S.W.2d 574—Jefferson Standard Life Ins. Co. v.

mitted but once.<sup>40</sup>

Thus, it is ordinarily proper to refuse issues which are merely the negative or opposite of issues already submitted,<sup>41</sup> and while each party is entitled to have his theory of the case, and the facts constituting the cause of action, on the one hand, and matter pleaded in defense, on the other, affirmatively submitted, as discussed supra § 530, a party is not entitled to a complete duplication in the submission of special issues which present solely a positive and negative phase of the same ques-

tion.<sup>42</sup> On the other hand, in cases involving converse issues, both should be submitted even though partial duplication may result,<sup>43</sup> and the fact that the affirmative submission of plaintiff's case, or findings on other issues submitted, by necessary implication negative a defensive issue does not affect defendant's right to have the issue affirmatively submitted.<sup>44</sup> Furthermore, where an issue is given the court is not required to give another which presents merely another phase or different shade of that issue,<sup>45</sup> although whether it presents only

Curfman, Civ.App., 127 S.W.2d 567, error dismissed—City of Waco v. Thompson, Civ.App., 127 S.W.2d 223, error dismissed, judgment correct—Allcorn v. Fort Worth & R. G. Ry. Co., Civ.App., 122 S.W.2d 341, error refused—Willis v. Smith, Civ.App., 120 S.W.2d 899, error dismissed—Arkansas Louisiana Gas Co. v. Max, Civ.App., 118 S.W.2d 383, error dismissed—Texas Coca-Cola Bottling Co. v. Wimberley, Civ.App., 108 S.W.2d 860, error dismissed—Weinert v. Cooper, Civ.App., 107 S.W.2d 593, error dismissed—Safe-way Stores of Texas v. Rutherford, Civ.App., 101 S.W.2d 1055, affirmed 111 S.W.2d 688, 130 Tex. 465—Williams v. Rodocker, Civ.App., 84 S.W.2d 556—Ford Motor Co. v. Whitl, Civ.App., 81 S.W.2d 1032, error refused—Maryland Casualty Co. v. Guzman, Civ.App., 79 S.W.2d 330, reversed on other grounds Guzman v. Maryland Casualty Co., 107 S.W.2d 356, 130 Tex. 62—Northern Texas Traction Co. v. Bruce, Civ.App., 77 S.W.2d 889, error dismissed—Texas Employers' Ins. Ass'n v. Horn, Civ.App., 75 S.W.2d 301, 64 C.J. p 1145 note 33.

40. Tex.—Northeast Texas Motor Lines v. Hodges, 158 S.W.2d 487, 138 Tex. 280—Belzung v. Owl Taxi, Civ.App., 70 S.W.2d 288, error dismissed—Galveston, H. & S. A. Ry. Co. v. Rodriguez, Civ.App., 281 S.W. 259.

#### Absence of objection

(1) The court is not required to submit an issue more than once and hence where no objection was raised to the manner in which the court proposed to submit the issues, refusal to again submit them as requested was not error—Edmondson v. Carroll, Tex.Civ.App., 134 S.W.2d 378, error dismissed, judgment correct.

(2) Refusal to give requested issues, which were but different forms of issues submitted without objection, was not error—Blue Bonnet Life Ins. Co. v. Conaway, Tex.Civ.App., 183 S.W.2d 1015.

(3) Where trial court gave allegedly erroneous special issue, but no objection was made thereto, it was not error for court to refuse to give in

addition to that special issue a requested special issue on the same subject, even though correct—City of Denton v. Hunt, Tex.Civ.App., 235 S.W.2d 212, error refused no reversible error—Shultz v. Dallas Power & Light Co., Tex.Civ.App., 147 S.W.2d 814, error dismissed, judgment correct—St. Louis Southwestern Ry. Co. of Texas v. Hill Bros., Tex.Civ.App., 80 S.W.2d 432.

(4) In compensation proceeding where trial court submitted issue of lump sum settlement under both issues of hardship and injustice, trial court did not err in refusing to submit defendant's requested issue on the same point containing the statutory word "manifest" omitted from the special issues given in view of fact that the omission was not called to attention of trial court—Texas State Highway Department v. Reeves, Tex.Civ.App., 161 S.W.2d 357, error refused.

#### Duplication or multiplication of issues

(1) Two submissions of the same issue to jury are never required.—Pickens v. Harrison, 252 S.W.2d 575, 151 Tex. 562—Little Rock Furniture Mfg. Co. v. Dunn, 222 S.W.2d 985, 148 Tex. 197—Pacific Emp. Ins. Co. v. Brasher, Tex.Civ.App., 234 S.W.2d 698, error refused no reversible error—Morton v. Jasper, Tex.Civ.App., 167 S.W.2d 541, error refused.

(2) A party is not entitled to submission of two or more issues relating to same ground of recovery or matter of defense.—Liberty Mut. Ins. Co. v. Taylor, Tex.Civ.App., 244 S.W.2d 350—Employer's Cas. Co. v. Smith, Tex.Civ.App., 221 S.W.2d 322, error refused no reversible error—Zepeda v. Moore, Tex.Civ.App., 153 S.W.2d 212, error dismissed—State Nat. Bank of Houston v. Woodfin, Tex.Civ.App., 146 S.W.2d 284, error refused—Texas Indem. Ins. Co. v. Smith, Tex.Civ.App., 143 S.W.2d 448—Consolidated Underwriters v. Christal, Tex.Civ.App., 135 S.W.2d 127, error refused—Forrest v. Faust, Tex.Civ.App., 110 S.W.2d 147, error dismissed.

41. Iowa.—Geagley v. City of Bedford, 16 N.W.2d 252, 235 Iowa 555, Tex.—Ross v. Texas Emp. Ins. Ass'n,

267 S.W.2d 541—Pacific Emp. Ins. Co. v. Brasher, Civ.App., 234 S.W.2d 698, error refused no reversible error—Newlin v. Smith, Civ.App., 142 S.W.2d 610, reversed on other grounds 150 S.W.2d 233, 136 Tex. 260—Wilson v. Barbour, Civ.App., 135 S.W.2d 169, error dismissed—Hicks v. Brown, Civ.App., 128 S.W.2d 884, modified on other grounds 151 S.W.2d 790, 136 Tex. 399.

64 C.J. p 1145 note 35.

42. Tex.—Workmen's Loan & Finance Co. v. Dunn, Civ.App., 134 S.W.2d 370—Gulf States Security Life Ins. Co. v. Edwards, Civ.App., 109 S.W.2d 1125, error dismissed—Texas Employers' Ins. Ass'n v. Moyers, Civ.App., 69 S.W.2d 777, error dismissed.

43. Tex.—Workmen's Loan & Finance Co. v. Dunn, Civ.App., 134 S.W.2d 370.

44. Tex.—Traders & General Ins. Co. v. Linneum, Civ.App., 126 S.W.2d 692—Texas & N. O. R. Co. v. Daft, Civ.App., 120 S.W.2d 481—Cooper Co. v. Warwick, Civ.App., 120 S.W.2d 128—Weinert v. Cooper, Civ.App., 107 S.W.2d 593, error dismissed—Traders & General Ins. Co. v. Shanks, Civ.App., 83 S.W.2d 781, error refused.

#### General denial

Where trial court submitted special issues on all points of contributory negligence affirmatively pleaded by store owner, store owner was not entitled to submission of special issue inquiring if customer's manner in attempting to descend stairs was the sole proximate cause of fall, because of general denial, since a general denial does not put in issue additional issues of contributory negligence not affirmatively pleaded.—McCrorry's Stores Corp. v. Murphy, Tex. Civ.App., 164 S.W.2d 735, error refused.

45. Tex.—Smith and Conklin Bros. v. Griffith, 268 S.W.2d 124—City of Fort Worth v. Lee, 186 S.W.2d 954, 143 Tex. 551, 159 A.L.R. 125—Jones v. Scott, Civ.App., 266 S.W.2d 534, refused no reversible error—Gulf, C. & S. F. Ry. Co. v. Jones, Civ.App., 221 S.W.2d 1010, error re-

another phase or different shade of the issue given must be determined under the peculiar facts of each case.<sup>46</sup> In order to justify a refusal, an interrogatory or issue requested must have been covered fully by another or others given,<sup>47</sup> and a special issue should be submitted where answers to other issues submitted would not necessarily answer it.<sup>48</sup> It has been held to be improper to refuse to submit an issue requiring a more specific answer than any submitted will call for,<sup>49</sup> except that where a general question on a particular issue has been submitted at the request of a party, a further request by him for a more specific question on the same issue may properly be refused.<sup>50</sup>

### § 540. — Questions Included in, or Equivalent to, General Verdict

Questions included in, or equivalent to, a general verdict need not be submitted by the court to the jury.

The court in the trial of a case need not submit to the jury for special findings questions which will necessarily be disposed of by the general ver-

dict,<sup>51</sup> or a special interrogatory the answer to which would be decisive of the whole case and equivalent to a general or special verdict.<sup>52</sup>

### § 541. Preparation and Form of Interrogatories or Issues

- a. In general
- b. Affirmative or negative form
- c. Conditional submission

#### a. In General

In the absence of statute providing otherwise, special interrogatories or issues for submission to the jury need not be in any particular form, it being sufficient if they substantially present issues and, when answered, determine rights of the parties; and the form of questions and manner of propounding them are largely in the discretion of the trial court.

In the absence of statute otherwise providing, special interrogatories or issues for submission to the jury need not be in any particular form, it being sufficient if they substantially present issues and, when answered, determine rights of the parties.<sup>53</sup> Generally, it is the duty of the trial court

fused no reversible error—Gonzales v. Orsak, Civ.App., 205 S.W.2d 793.

46. Tex.—City of Fort Worth v. Lee, 186 S.W.2d 954, 143 Tex. 551, 159 A.L.R. 125—Gonzales v. Orsak, Civ. App., 205 S.W.2d 793.

#### Submission held proper

Tex.—Schuhmacher Co. v. Holcomb, 177 S.W.2d 951, 142 Tex. 332—Romo v. San Antonio Transit Co., Civ. App., 236 S.W.2d 205, error refused no reversible error—Texas Indemnity Ins. Co. v. Arant, Civ.App., 171 S.W.2d 915, error refused—Bennett v. Carey, Civ.App., 99 S.W.2d 1105, error dismissed.

47. Ind.—Clegg v. Waterbury, 88 Ind. 21.

Tex.—St. Louis, S. F. & T. Ry. Co. v. Taylor, Com.App., 291 S.W. 216. 64 C.J. p 1146 note 38.

#### 48. Refusal held erroneous

(1) In general.  
Md.—Bethlehem Steel Co. v. Ziegenfuss, 49 A.2d 793, 187 Md. 283.

Tex.—Workmen's Loan & Finance Co. v. Dunn, Civ.App., 134 S.W.2d 370 —Bowie Sewerage Co. v. Chandler, Civ.App., 116 S.W.2d 839—Bibby v. Bibby, Civ.App., 114 S.W.2d 284, error dismissed.

Wash.—Cady v. Department of Labor and Industries, 162 P.2d 813, 23 Wash.2d 851.

71 C.J. p 1348 note 53.

(2) With respect to issue of proper lookout in negligence case.—City of Fort Worth v. Lee, 186 S.W.2d 954, 143 Tex. 551, 159 A.L.R. 125—Gonzales v. Orsak, Tex.Civ.App., 205 S.W.2d 793—Fort Worth & Denver City Ry. Co. v. Bozeman, Tex.Civ.App., 135 S.

W.2d 275, error dismissed, judgment correct

(3) With respect to issue of unavoidable accident.—Wichita Transit Co. v. Sanders, Tex.Civ.App., 214 S.W.2d 810.

49. Kan.—American Cent. Ins. Co. v. Hathaway, 23 P. 428, 43 Kan. 399. 64 C.J. p 1146 note 39.

50. Tex.—Baker v. Sparks, Civ.App., 234 S.W. 1109.

51. N.M.—Corpus Juris quoted in Crocker v. Johnston, 95 P.2d 214, 222, 43 N.M. 469. 64 C.J. p 1146 note 41.

#### Reason for rule

General verdict is a complete answer to such question.—Central Const. Corporation v. Harrison, 112 A. 627, 137 Md. 256.

52. Iowa.—Bank of Bushnell v. Buck Bros., 142 N.W. 1004, 161 Iowa 362. N.M.—Corpus Juris quoted in Crocker v. Johnston, 95 P.2d 214, 222, 43 N.M. 469

W.Va.—Bartlett v. Mitchell, 168 S.E. 662, 113 W.Va. 465. 64 C.J. p 1146 note 42.

53. N.C.—O'Brian v. O'Brian, 79 S. E.2d 252, 239 N.C. 101—Griffin v. United Services Life Ins. Co., 36 S. E.2d 225, 226 N.C. 684.

Tex.—City of Corpus Christi v. McMurray, Civ.App., 145 S.W.2d 664, error dismissed, judgment correct. 64 C.J. p 1146 note 43.

**Suggestion made by supreme court** from time to time that one form of special issue is less objectionable than another, or that one form is preferable to another, is not to be

taken as implying that such form is exclusive or that a prior suggested form is erroneous, but the form of special issues used in ascertaining essential facts in compensation proceedings is limited only to extent that they should be so framed as to secure substantial justice without prejudice to parties.—Traders & General Ins. Co. v. Jenkins, 141 S.W.2d 312, 135 Tex. 232, answers conformed to, Civ.App., 144 S.W.2d 350.

#### Rules as to instructions

Rules as to what instruction should contain are not applicable to a special interrogatory.—Johnson v. Luffman, 78 N.E.2d 107, 333 Ill.App. 418.

#### Questionnaire

A special verdict, granted on plaintiff's request, may be proposed to jury in form of questionnaire.—Globe Indem. Co. v. Schmitt, 63 N.E.2d 169, 76 Ohio App. 35.

#### Answer

Where issue is submitted in improper form, jury's answer to question is immaterial.—Kasch v. Anton, Tex.Civ.App., 81 S.W.2d 1097.

#### Particular language construed

Tex.—Hicks v. Matthews, 266 S.W. 2d 846—Consolidated Underwriters v. Foxworth, Civ.App., 196 S.W.2d 87, error granted—Redmon v. Caple, Civ.App., 159 S.W.2d 210, error refused—Traders & General Ins. Co. v. Ray, Civ.App., 128 S.W.2d 80, error dismissed, judgment correct—Safety Cas. Co. v. Walls, Civ. App., 117 S.W.2d 879, error dismissed—International-Great Northern R. Co. v. Pence, Civ.App., 113 S.W.2d 206, error dismissed.

to supervise the form of special questions to the jury, so as to make them pertinent to the issues and the testimony,<sup>54</sup> and requested interrogatories or issues may or should be refused if they are not presented in proper physical form.<sup>55</sup> The form of questions and manner of propounding them are largely in the discretion of the trial judge,<sup>56</sup> that is, the form of special issues employed in submitting a case to the jury must depend in some measure on the peculiar pleadings and evidence and the practical difficulties facing the trial judge in ascertaining through the special issues the essential facts,<sup>57</sup> and the measure of his discretion in so

doing is limited only to the extent that its exercise does not operate to the prejudice of the parties.<sup>58</sup> Statutory requirements must, however, be observed.<sup>59</sup>

Each interrogatory should be plain and direct,<sup>60</sup> should call for a finding as to a single fact,<sup>61</sup> and should be so framed that the answer, whether affirmative or negative, will be conclusive of the fact,<sup>62</sup> and, in connection with any other findings, will form the basis for a judgment,<sup>63</sup> or, in the case of special interrogatories, serve to limit or explain the general verdict.<sup>64</sup> A question submitted

54. Kan.—B. F. McLean Inv. Co. v. City of Wichita, 268 P.2d 956, 176 Kan. 55—Powell v. Kansas Yellow Cab Co., 131 P.2d 686, 156 Kan. 150, opinion supplemented 133 P.2d 755, 156 Kan. 406.

55. Tex.—Guif, C. & S. F. Ry. Co. v. Jones, Civ.App., 221 S.W.2d 1010, error refused no reversible error—Groves v. National Loan & Investment Co. of Detroit, Mich., Civ. App., 102 S.W.2d 508  
64 C.J. p 1149 note 64.

56. N.C.—Steele v. Cox, 36 S.E.2d 288, 225 N.C. 726—Griffin v. United Services Life Ins. Co., 36 S.E.2d 225, 225 N.C. 684

Tex.—Hancock v. Sammons, Civ.App., 257 S.W.2d 252, error refused no reversible error—City of Corpus Christi v. McMurrey, Civ.App., 145 S.W.2d 664, error dismissed, judgment correct—Strack v. Strong, Civ. App., 114 S.W.2d 313, error dismissed.

Wis.—Garcia v. Chicago & N. W. Ry. Co., 42 N.W.2d 288, 256 Wis. 633—Williams v. Williams, 246 N.W. 322, 210 Wis. 304.

64 C.J. p 1146 note 44.  
Manner of submission of issues as discretionary see *infra* § 548.

#### Restrictions

Form of issues submitted to jury is within judge's sound discretion, subject to restrictions that they must be fact issues raised by pleadings, and that parties shall have opportunity to present any view of law arising from evidence.—J. B. Colt Co. v. Barber, 170 S.E. 663, 205 N.C. 170.

57. Tex.—Wright v. Traders & General Ins. Co., 123 S.W.2d 314, 132 Tex. 172—Henwood v. Gary, Civ. App., 196 S.W.2d 958, error refused, no reversible error—McAllister v. City of Frost, Civ.App., 62 S.W.2d 232.

58. Tex.—Wright v. Traders & General Ins. Co., 123 S.W.2d 314, 132 Tex. 172.

59. Ill.—Keys v. North, 271 Ill.App. 119.

Mich.—Hoekzema v. Van Haften, 31 N.W.2d 841, 320 Mich. 683.

#### Single short sentences

Special questions which were not in conformity with statutory requirements that they be each in single short sentences readily answered by yes or no should not have been submitted.—Hoekzema v. Van Haften, *supra*.

**Jury cannot be required by an improper interrogatory to do that which is not contemplated by statute authorizing submission of interrogatories on particular questions of fact within the issues—White v. Shireliff Industries, Inc., Ind.App., 112 N.E.2d 888.**

60. Ohio.—Scott v. Cismadi, 74 N.E.2d 563, 80 Ohio App. 39.

Tex.—Turner v. Texas Co., 159 S.W.2d 112, 138 Tex. 380—Associated Emp. Lloyds v. Burns, Civ.App., 197 S.W.2d 584—Wichita Falls & S. R. Co. v. Lindley, Civ.App., 143 S.W.2d 428, error dismissed, judgment correct.

Wis.—Carlson v. Strasser, 2 N.W.2d 233, 239 Wis. 531.

64 C.J. p 1147 note 45.

#### Simple answers

The court properly refused to submit requested special findings which would not have resulted in simple answers by the jury.—Bertinelli v. Galoni, 200 A. 58, 331 Pa. 73, 118 A.L.R. 398.

61. Ind.—White v. Shireliff Industries, Inc., App., 112 N.E.2d 888.

Ohio—Ello v. Akron Transp. Co., 71 N.E.2d 707, 147 Ohio St. 363—Scott v. Cismadi, 74 N.E.2d 563, 80 Ohio App. 39.

Tex.—Horn-Ord Food Stores v. Voigt, Civ.App., 115 S.W.2d 981, error dismissed.

Wis.—Carlson v. Strasser, 2 N.W.2d 233, 239 Wis. 531.

64 C.J. p 1147 note 46.  
Questions embracing more than one matter of fact see *infra* § 545.

62. Md.—Miller v. James McGraw Co., 42 A.2d 237, 184 Md. 529.

Mich.—Farr v. Haggerty, 263 N.W. 739, 273 Mich. 547.

Ohio—Ello v. Akron Transp. Co., 71 N.E.2d 707, 147 Ohio St. 363.

Tex.—Lurie v. City of Houston, Civ. App., 220 S.W.2d 320, reversed on other grounds City of Houston v. Lurie, 224 S.W.2d 871, 148 Tex. 391, 14 A.L.R.2d 61.

64 C.J. p 1147 note 47.

63. U.S.—Carpenter v. Baltimore & O. R. Co., C.C.A.Ohio, 109 F.2d 375, N.C.—Turnage v. McLawhorn, 61 S.E.2d 336, 232 N.C. 515.

Tex.—Wright v. Traders & General Ins. Co., 123 S.W.2d 314, 132 Tex. 172—Associated Emp. Lloyds v. Burns, Civ.App., 197 S.W.2d 584.

64 C.J. p 1147 note 48.

#### Conformity to pleadings

Issues should be submitted in such form that when judgment is rendered conformable to verdict, it will clearly appear judgment also conforms to pleadings.—Jones-O'Brien, Inc. v. Lloyd, Tex.Civ.App., 106 S.W.2d 1069, error dismissed.

#### Consistency with verdict

A special interrogatory which is so restricted as to time and fact that an answer thereto favorable to party presenting it would not be inconsistent with a general verdict for his adversary may be refused.—Kennard v. Palmer, 53 N.E.2d 908, 143 Ohio St. 1.

#### Ultimate facts

In submitting a special verdict, questions must be so framed that jury can find ultimate facts, and those findings should inform trial court and reveal all essential facts necessary to enable the court to enter the correct judgment protecting the rights of all.—Carlson v. Strasser, 2 N.W.2d 233, 239 Wis. 531.

#### Special issues held to support judgment

Tex.—Paddock v. Beeler, Civ.App., 130 S.W.2d 886—Traders & General Ins. Co. v. Towns, Civ.App., 130 S.W.2d 445, error dismissed, judgment correct.

64. Conn.—Freedman v. New York, N. H. & H. R. Co., 71 A. 901, 81 Conn. 801, 15 Ann.Cas. 464.

should, therefore, be specific rather than general,<sup>65</sup> and such as to direct the jury's attention to a concrete question of fact for determination,<sup>66</sup> and

should be clear and concise, so that the jury can give a direct answer thereto.<sup>67</sup>

65. U.S.—Carpenter v. Baltimore & O. R. Co., C.C.A.Ohio, 109 F.2d 375, 84 N.E.2d 69.

Tex.—Roosth & Genecov Production Co. v. White, 262 S.W.2d 99—Employers' Liability Assur. Corp. v. Young, 203 S.W.2d 822—Benoit v. Wilson, Civ.App., 258 S.W.2d 134, error refused no reversible error—Garner v. Prescott, Civ.App., 234 S.W.2d 704—Schoenberg v. Forrest, Civ.App., 228 S.W.2d 556, refused no reversible error—Jax Beer Co. v. Schaeffer, Civ.App., 173 S.W.2d 285, error refused—McLellan Stores Co. v. Lindsey, Civ.App., 157 S.W.2d 1013, error refused—Feden Iron & Steel Co. v. Claflin, Civ.App., 146 S.W.2d 1062, error dismissed, judgment correct—Southern Underwriters v. Stone, Civ.App., 144 S.W.2d 339—Southern Underwriters v. Thomas, Civ.App., 131 S.W.2d 409, error dismissed, judgment correct—Texas Indemnity Ins. Co. v. Williamson, Civ.App., 109 S.W.2d 322, error dismissed—Traders & General Ins. Co. v. Offield, Civ.App., 105 S.W.2d 359, error dismissed—E. L. Martin, Inc. v. Kyser, Civ.App., 104 S.W.2d 592, error dismissed—Reed v. James, Civ.App., 91 S.W.2d 946—St. Louis Southwestern Ry. Co. of Texas v. Lawrence, Civ.App., 91 S.W.2d 434—City of Panhandle v. Byrd, Civ.App., 77 S.W.2d 904, reversed on other grounds 106 S.W.2d 660, 130 Tex. 96—Fort Worth & D. C. Ry. Co. v. Rowe, Civ.App., 69 S.W.2d 169—McCauley v. McElroy, Civ.App., 199 S.W. 317, error refused.

64 C.J. p 1147 note 50.

#### Concealment of facts

Charges and submission of issues, general in nature, portraying the whole of plaintiff's pleadings, so as to conceal under a mass of generalities the facts relied on for recovery, are improper.—Missouri-Kansas-Texas R. Co. of Tex. v. Roberts, Tex.Civ.App., 225 S.W.2d 198, refused no reversible error, certiorari denied 71 S.Ct. 54, 340 U.S. 832, 95 L.Ed. 611, rehearing denied 71 S.Ct. 193, 340 U.S. 885, 95 L.Ed. 643.

#### False statements and representations

An issue of false statements and representations should not be submitted in general terms, but substance of statement or representation should be submitted, asking jury if particular statement or representation was made, whether it was true or false, and whether it was relied on in doing the act or thing pleaded as induced by it.—Finney v. Finney, Tex. Civ.App., 164 S.W.2d 263, error refused.

#### Special issues held not objectionable

Tex.—Cree v. Miller, Civ.App., 255 S.W.2d 565, refused no reversible error—Texas Emp. Ins. Ass'n v. Harkey, Civ.App., 208 S.W.2d 915, affirmed 208 S.W.2d 919, 146 Tex. 504—Associated Emp. Lloyds v. Groce, Civ.App., 194 S.W.2d 103, refused no reversible error—Texas & P. Ry. Co. v. Duncan, Civ.App., 193 S.W.2d 431—Associated Employers Lloyds v. Dorsey, Civ.App., 183 S.W.2d 999, error refused—Maryland Casualty Co. v. Gunter, Civ.App., 167 S.W.2d 545—Postal Mut. Indemnity Co. v. James, Civ.App., 154 S.W.2d 148, error refused—Traders & General Ins. Co. v. Wright, Civ.App., 144 S.W.2d 626, error refused—Texas Employers Ins. Ass'n v. Fowler, Civ.App., 140 S.W.2d 545, error refused—Industrial Indemnity Exchange v. Ratcliff, Civ.App., 138 S.W.2d 613, error dismissed, judgment correct—Southern Underwriters v. Thomas, Civ.App., 131 S.W.2d 409, error dismissed, judgment correct—Federal Underwriters Exchange v. Carroll, Civ.App., 130 S.W.2d 1101—Southern Underwriters v. Parker, Civ.App., 129 S.W.2d 738, error refused—Cumif v. Bernard Corp., Civ.App., 94 S.W.2d 577, error refused.

#### Questions as to negligence

(1) It is improper to submit negligence in general terms over the objection of the opposite party where specific acts of negligence are pleaded and relied on.

Ohio.—Wheeling & L. E. Ry. Co. v. Hollywood Cartage Co., 93 N.E.2d 708, 86 Ohio App. 513.

Tex.—International-Great Northern R. Co. v. Hawthorne, 116 S.W.2d 1056, 131 Tex. 622, certiorari denied 59 S.Ct. 487, 306 U.S. 639, 83 L.Ed. 1040—McDonald v. Joske's of Tex., Civ.App., 268 S.W.2d 475—Missouri-Kansas-Texas R. Co. of Tex. v. Roberts, Civ.App., 225 S.W.2d 198, refused no reversible error, certiorari denied 71 S.Ct. 54, 340 U.S. 832, 95 L.Ed. 611, rehearing denied 71 S.Ct. 193, 340 U.S. 885, 95 L.Ed. 643.

64 C.J. p 1147 note 50 [a].

(2) Where acts of negligence, together with proximate cause, as charged against defendant were submitted to jury, and all were found in favor of plaintiffs, and thereafter issue was submitted whether jury found that terror of one of plaintiffs was proximately caused by negligence, if any, of defendant's agent in operating automobile, trial court did not err in failing to resubmit specific acts of negligence as elements of special issue.—Foster v. Wood-

ward, Tex.Civ.App., 134 S.W.2d 417, error refused.

(3) Issues held not erroneous as too general.—International-Great Northern R. Co. v. Hawthorne, 116 S.W.2d 1056, 131 Tex. 622, certiorari denied 59 S.Ct. 487, 306 U.S. 639, 83 L.Ed. 1040—S. H. Kress & Co. v. Selph, Tex.Civ.App., 250 S.W.2d 883, refused no reversible error—Texas & P. Ry. Co. v. Duncan, Tex.Civ.App., 193 S.W.2d 431—Clark-Daniel's v. Deathe, Tex.Civ.App., 131 S.W.2d 1091, error refused—Vincent v. Johnson, Tex.Civ.App., 117 S.W.2d 135, error dismissed—Texas Coca-Cola Bottling Co. v. Wimberley, Tex.Civ.App., 108 S.W.2d 860, error dismissed—International-Great Northern R. Co. v. Hawthorne, Civ.App., 90 S.W.2d 895, affirmed 116 S.W.2d 1056, 131 Tex. 622, certiorari denied 59 S.Ct. 487, 306 U.S. 639, 83 L.Ed. 1040.

66. Tex.—El Paso Electric Co. v. Hedrick, Com.App., 60 S.W.2d 761—Advance Aluminum Castings Corp. v. Schuikins, Civ.App., 267 S.W.2d 174—Schoenberg v. Forrest, Civ.App., 228 S.W.2d 556, refused no reversible error—Gillette Motor Transport Co. v. Whitfield, Civ. App., 186 S.W.2d 90, refused for want of merit—Southern Pine Lumber Co. v. Whiteman, Civ.App., 104 S.W.2d 635, error dismissed—Maryland Casualty Co. v. Merchant, Civ. App., 81 S.W.2d 794—New Amsterdam Casualty Co. v. Chamness, Civ. App., 63 S.W.2d 1058, error refused.

64 C.J. p 1147 note 61.

#### Conclusion

Refusal of requested special question was not error, where the question called for a conclusion as distinct from a finding of fact.

Kan.—Long v. Shafer, 188 F.2d 646, 164 Kan. 211.

Ohio.—Michael v. Saul, App., 42 N.E.2d 219.

67. Md.—Miller v. James McGraw Co., 42 A.2d 237, 184 Md. 529.

Ohio.—Ello v. Akron Transp. Co., 71 N.E.2d 707, 147 Ohio St. 363—Scott v. Cismadi, 74 N.E.2d 563, 80 Ohio App. 39.

Tex.—Denbow v. Standard Acc. Ins. Co., 186 S.W.2d 236, 143 Tex. 455—Associated Indemnity Corp. v. Billberg, Civ.App., 172 S.W.2d 157—Yellow Cab & Transfer Corp. v. Warren Co., Civ.App., 148 S.W.2d 209.

64 C.J. p 1148 note 52.

#### Meaning

The issues should be couched in words of clear and certain meaning.—Gibson v. Central Mfrs. Mut. Ins. Co., 62 S.E.2d 320, 232 N.C. 712.

Questions should not be submitted which are mis- | leading or confusing,<sup>68</sup> or indefinite,<sup>69</sup> nor should

### Impossibility of answer

A jury should not be required to answer a question impossible to be answered from the evidence.—*Walker v. Colgate-Palmolive-Peet Co.*, 139 P. 2d 167, 187 Kan. 170.

### Interdependent interrogatories

Refusal to submit requested interrogatories to jury was proper, where one interrogatory could not be answered without answering all the interrogatories, and some of the interrogatories could not be answered by a lay jury intelligently or with any degree of certainty as to correctness of answer.—*Speece v. Industrial Commission*, Ohio App., 70 N.E.2d 387.

### Nature of injury

In suit to set aside workmen's compensation decision, nature of injury described in testimony should be incorporated in issue in at least a general way so that jury may not become confused as to specific matter and incorporate in verdict recovery for item of injury or damage not supported by testimony.—*Texas Employers Ins. Ass'n v. Pierson*, Tex.Civ.App., 135 S.W.2d 550.

### Preferable practice

In action involving allegedly fraudulent representations, use of word "represented" rather than word "stated" in submitting special issues is the preferable practice.—*Shaddock v. Grapette Co.*, Tex.Civ.App., 259 S.W.2d 231.

### Speculation as to facts

In compensation suit, special issue whether manifest hardship and injustice would otherwise result if lump-sum settlement were denied claimant was not subject to criticism that jury were permitted to speculate concerning facts which might constitute basis for lump-sum settlement.—*Traders & General Ins. Co. v. Boyesen*, Tex.Civ.App., 123 S.W.2d 1016, error dismissed, judgment correct.

68. Ark.—*John M. Parker & Son v. Godsey*, 115 S.W.2d 276, 195 Ark. 854.

Minn.—*Reliance Engineers Co. v. Flaherty*, 300 N.W. 603, 211 Minn. 233.

Ohio.—*Solanics v. Republic Steel Corp.*, 53 N.E.2d 815, 142 Ohio St. 567.—*Holmes v. Employers' Liability Assur. Corp. Limited*, of London, England, 43 N.E.2d 746, 70 Ohio App. 239.—*Hartscock v. George*, 17 N.E.2d 667, 59 Ohio App. 249.

R.I.—*Boettger v. Mauran*, 12 A.2d 285, 64 R.I. 340.

Tex.—*International-Great Northern R. Co. v. King*, Com.App., 41 S.W.2d 234.—*H. Kress & Co. v. Selph*, Civ.App., 250 S.W.2d 883, error refused no reversible error.—*Pullen v. Russ*, Civ.App., 226 S.W.2d 876, refused no reversible error.—*Rolas v. Vuocolo*, Civ.App., 177 S.W.2d 957,

reversed on other grounds 177 S.W.2d 962, 142 Tex. 152.—*City of Big Spring v. Fletcher*, Civ.App., 156 S.W.2d 316.—*Federal Underwriters Exchange v. Skinner*, Civ.App., 146 S.W.2d 325, error dismissed, judgment correct.—*Lower Rio Grande Valley Mid-Winter Fair Ass'n v. Nunstedt*, Civ.App., 132 S.W.2d 601.—*Ibanez v. State*, Civ.App., 118 S.W.2d 406.—*City of Pampa v. Long*, Civ.App., 110 S.W.2d 1001.—*Groves v. National Loan & Investment Co. of Detroit*, Mich., Civ.App., 102 S.W.2d 508.—*Lee v. Wilson*, 91 S.W.2d 461, error refused.—*Beckner v. Barrett*, Civ.App., 81 S.W.2d 719, error dismissed.—*McClung Const. Co. v. Muncy*, Civ.App., 65 S.W.2d 786, error dismissed.

Wis.—*Johnston v. Eschrich*, 57 N.W.2d 396, 263 Wis. 254.—*Georgeson v. Nielsen*, 252 N.W. 576, 214 Wis 191, 64 C.J. p 1148 note 53.—71 C.J. p 1348 note 59.

The test of whether an issue is misleading or confusing is whether there is reasonable doubt of the clearness or understandableness of the issue by the jury.—*McClelland v. Moulger*, Tex.Civ.App., 107 S.W.2d 901, error dismissed by agreement.

### Redundancy

In workman's compensation suit, the use of the word "producing" in special issue inquiring of jury whether claimant's injury was a "producing cause" of claimant's condition of incapacity created a redundancy.—*Safety Cas. Co. v. Walls*, Tex.Civ.App., 117 S.W.2d 879, error dismissed.

### Two propositions

The embodiment in one issue of two propositions, as to which jury might give different responses, is misleading.—*Edge v. North State Felspar Corp.*, 193 S.E. 2, 212 N.C. 246.

### Questions held not objectionable

(1) In general.

R.I.—*Chase v. U. S. Fidelity & Guaranty Co.*, 53 A.2d 708, 73 R.I. 51.  
Tex.—*Cree v. Miller*, Civ.App., 255 S.W.2d 565, refused no reversible error.—*Buss v. Shepherd*, Civ.App., 240 S.W.2d 382, refused no reversible error.—*Southwest Stone Co. v. Symons*, Civ.App., 237 S.W.2d 380, error refused no reversible error.—*Parr v. Ratisseau*, 236 S.W.2d 503, error refused no reversible error.—*Pullen v. Russ*, Civ.App., 226 S.W.2d 876, refused no reversible error.—*City of Dallas v. Hutchins*, Civ.App., 226 S.W.2d 155, refused no reversible error.—*Herzstein v. Bonner*, Civ.App., 215 S.W.2d 661, refused no reversible error.—*A. B. Lewis Co. v. Jackson*, Civ.App., 199 S.W.2d 553, refused no reversible error.—*Texas & N. O. R. Co. v. Wood*, Civ.App., 166 S.W.2d 141.—*Texaco Country Club v. Wade*, Civ.

App., 163 S.W.2d 219.—*Doornbos v. Looney*, Civ.App., 159 S.W.2d 155, error refused.—*McDaniel v. Willis*, Civ.App., 157 S.W.2d 672, error refused.—*Arrendell v. Wells*, Civ.App., 149 S.W.2d 307, error dismissed, judgment correct.—*Gulf, C. & S. F. Ry. Co. v. Picard*, Civ.App., 147 S.W.2d 303, error dismissed, judgment correct.—*Southern Underwriters v. Grimes*, Civ.App., 146 S.W.2d 1058, error dismissed, judgment correct.—*Houston Oxygen Co. v. Davis*, Civ.App., 146 S.W.2d 300, affirmed 161 S.W.2d 474, 139 Tex. 1, 140 A.L.R. 868.—*Industrial Indemnity Exchange v. Ratcliff*, Civ.App., 138 S.W.2d 613, error dismissed, judgment correct.—*Southern Underwriters v. Jones*, Civ.App., 137 S.W.2d 52, error dismissed, judgment correct.—*Walgreen Texas Co. v. Shivers*, Civ.App., 131 S.W.2d 650, reversed on other grounds 154 S.W.2d 625, 137 Tex. 493.—*Gifford-Hill & Co. v. Jones*, Civ.App., 99 S.W.2d 556.—*Beard & Stone Electric Co. v. Baker*, Civ.App., 77 S.W.2d 262.—*Fidelity & Casualty Co. of New York v. Branton*, Civ.App., 70 S.W.2d 780, error dismissed.—*Gray v. Cheatham*, Civ.App., 70 S.W.2d 248, error refused.—*City of Amarillo v. Rust*, Civ.App., 64 S.W.2d 821.—*England v. Pitts*, Civ.App., 56 S.W.2d 493, error dismissed.—*Indemnity Ins. Co. of North America v. Bailey*, Civ.App., 50 S.W.2d 484.  
Wash.—*Darling v. Department of Labor and Industries*, 108 P.2d 1034, 6 Wash.2d 651.

(2) Where from the instructions the jury could not fail to understand that the material question is whether the conveyance was fraudulent, a special interrogatory is not erroneous in using the word "defeating" instead of "defrauding."—*Nevada First Nat. Bank v. Fenn*, 39 N.W. 278, 75 Iowa 221.

69. Tex.—*Buchanan v. Lang*, Civ. App., 247 S.W.2d 445, refused no reversible error.—*City of Austin v. Howard*, Civ.App., 158 S.W.2d 556, error refused.—*American Cas. Co. v. Jones*, Civ.App., 146 S.W.2d 423.—*Southern Underwriters v. Wright*, Civ.App., 142 S.W.2d 297.—*Goldstein Hat Mfg. Co. v. Cowen*, Civ.App., 136 S.W.2d 867.—*Cas. Underwriters v. Lemons*, Civ.App., 114 S.W.2d 333.—*Parks v. Hines*, Civ.App., 68 S.W.2d 364, affirmed *Hines v. Parks*, 96 S.W.2d 970, 128 Tex. 289, 64 C.J. p 1148 note 54.

### Special issues held not objectionable

(1) In general.—*S. H. Kress & Co. v. Selph*, Tex.Civ.App., 250 S.W.2d 883, error refused no reversible error.—*Le Sage v. Smith*, Tex.Civ.App., 146 S.W.2d 308, error dismissed, judgment correct.—*Traders & General Ins.*

questions be submitted which are vague,<sup>70</sup> or obscure;<sup>71</sup> nor is it proper to submit interrogatories or special issues which are unintelligible,<sup>72</sup> argumentative,<sup>73</sup> or ambiguous.<sup>74</sup> Also, it is not proper to submit to the jury questions which are technically bad,<sup>75</sup> questions which do not present the matter in controversy,<sup>76</sup> or questions based on the assumption

that the jury will disregard the instructions.<sup>77</sup> A litigant is not entitled to have two issues submitted which are opposites one to the other,<sup>78</sup> and it is not ordinarily proper to submit questions which invite contradictory answers,<sup>79</sup> or tend to entrap the jury,<sup>80</sup> or which will result in apparently con-

Co. v. Wright, Tex. Civ. App., 144 S.W. 2d 626, error refused—Mid-Kansas Oil & Gas Co. v. Burton, Tex. Civ. App., 87 S.W.2d 338, error dismissed.

(2) In workmen's compensation suits.—Southern Underwriters v. Grimes, Tex. Civ. App., 146 S.W.2d 1058, error dismissed, judgment correct—Southern Underwriters v. Erwin, Tex. Civ. App., 134 S.W.2d 720, error granted.

70. Tex.—Southern Underwriters v. Wright, Civ. App., 142 S.W.2d 297—Cas. Underwriters v. Lemons, Civ. App., 114 S.W.2d 333—Crow v. Monroe, Civ. App., 273 S.W. 886.

**Special issues held not objectionable**  
Tex.—S. H. Kress & Co. v. Selph, Civ. App., 250 S.W.2d 883, refused no reversible error—National Auto. & Cas. Ins. Co. v. Layman, Civ. App., 248 S.W.2d 933—Postal Mut. Indemnity Co. v. James, Civ. App., 154 S.W.2d 148, error refused—Southern Underwriters v. Grimes, Civ. App., 146 S.W.2d 1058, error dismissed, judgment correct—Le Sage v. Smith, Civ. App., 148 S.W.2d 308, error dismissed, judgment correct—Traders & General Ins. Co. v. Wright, Civ. App., 144 S.W.2d 626, error refused.

71. Tex.—Gulf, C. & S. F. Ry. Co. v. Jones, Civ. App., 221 S.W.2d 1010, error refused no reversible error. 64 C.J. p 1149 note 56.

#### Issues held not erroneous

Issues which were correctly framed in accordance with contentions of the parties on the only material issues in the lawsuit and which were in plain and simple terms and capable of being understood by any person of average intelligence were not error as being too technical or as being framed so as to make an answer less easy.—Clark v. Hefley, 238 S.W.2d 513, 34 Tenn. App. 389.

72. Tex.—McClelland v. Mounger, Civ. App., 107 S.W.2d 901, error dismissed by agreement—Groves v. National Loan & Investment Co. of Detroit, Mich., Civ. App., 102 S.W. 2d 508.

64 C.J. p 1149 note 57.

**Use of term "canned advertising"** in special issue was not erroneous as being unintelligible and without meaning.—Norm Co. v. City Drug Stores, Tex. Civ. App., 59 S.W.2d 270.

73. Mich.—Corfield v. Douglas Houghton Hotel Co., 37 N.W.2d 169, 324 Mich. 459.

Tex.—Buchanan v. Lang, Civ. App., 247 S.W.2d 445, refused no reversible error.

64 C.J. p 1149 note 58.

#### Questions held not objectionable

Tex.—Socony-Vacuum Oil Co. v. Adershold, 240 S.W.2d 751, 150 Tex. 292—Service Finance Corp. v. Singleton, Civ. App., 155 S.W.2d 955, reversed on other grounds 166 S.W.2d 98, 140 Tex. 86—Abshier v. Reavis, Civ. App., 54 S.W.2d 1102, error refused.

74. Ill.—Darwin v. Chicago Transit Authority, 90 N.E.2d 924, 340 Ill. App. 223—Schluraff v. Shore Line Motor Coach Co., 269 Ill. App. 569, Mich.—Farr v. Haggerty, 263 N.W. 739, 273 Mich. 547.

N.C.—Gibson v. Central Mfrs. Mut. Ins. Co., 62 S.E.2d 320, 232 N.C. 712. Tex.—Buchanan v. Lang, Civ. App., 247 S.W.2d 445, refused no reversible error—Walker v. Texas & N. O. R. Co., Civ. App., 150 S.W.2d 853, error dismissed, judgment correct—Groves v. National Loan & Investment Co. of Detroit, Mich., Civ. App., 102 S.W.2d 508—McClung Const. Co. v. Muncy, Civ. App., 65 S.W.2d 786, error dismissed—Texas Electric Service Co. v. Anderson, Civ. App., 55 S.W.2d 142, error dismissed.

64 C.J. p 1149 note 59.

#### Use of expression

The expression "yielding the right of way" should be used in questions of a special verdict and in instructing jury only in the statutory sense.—Smith v. Superior & Duluth Transfer Co., 10 N.W.2d 153, 243 Wis. 292, rehearing denied 11 N.W.2d 95, 243 Wis. 292.

#### General agreement as to meaning

In workmen's compensation case, an issue as to what percentage of "maximum" permanent partial disability claimant had suffered was objectionable because of its ambiguity, but where it was shown that there was general agreement as to the meaning of the words actually used, error was not prejudicial.—Miller v. James McGraw Co., 42 A.2d 237, 184 Md. 529.

#### Special issues held not subject to objection

Tex.—Hancock v. Sammons, Civ. App., 267 S.W.2d 252, error refused no reversible error—Lyons v. Pullin, Civ. App., 197 S.W.2d 494, error refused no reversible error—Internation-

ational Broth. of Boiler Makers v. Rodriguez, Civ. App., 193 S.W.2d 835, error dismissed—MacFadden Publications v. Wilson, Civ. App., 121 S.W.2d 430, error refused—Texas Employers' Ins. Ass'n v. Elliott, Civ. App., 67 S.W.2d 898, error dismissed.

75. Md.—R. N. McCulloch & Co. v. Restivo, 136 A. 54, 152 Md. 60.

76. N.M.—Crocker v. Johnston, 95 P.2d 214, 43 N.M. 469.

Tex.—Minchen v. First Nat. Bank of Alpine, Civ. App., 263 S.W.2d 601, error refused no reversible error—Phillips Petroleum Co. v. Capps, Civ. App., 170 S.W.2d 522, error refused—Consolidated Underwriters v. Dunn, Civ. App., 155 S.W.2d 431, error dismissed by agreement. 64 C.J. p 1149 note 62.

#### Immaterial fact

Special question was improperly submitted where it called for a finding on an immaterial fact.—Walker v. Coigate-Palmolive-Peet Co., 139 P.2d 157, 157 Kan. 170.

#### Issue involved held presented

Tex.—Deace v. Stribling, Civ. App., 165 S.W.2d 517—Ford Motor Co. v. Whitl, Civ. App., 81 S.W.2d 1032, error refused—Texas-Louisiana Power Co. v. Webster, Civ. App., 59 S.W.2d 902, affirmed 91 S.W.2d 302, 127 Tex. 126.

77. Tex.—Davis v. Kennedy, Civ. App., 245 S.W. 259.

64 C.J. p 1149 note 63.

78. Tex.—Wright v. Traders & General Ins. Co., 123 S.W.2d 314, 132 Tex. 172.

79. Tex.—Jones v. Torrance, Civ. App., 141 S.W.2d 1007, error dismissed.

64 C.J. p 1149 note 65.

#### Inconsistent questions

Where the questions submitted to the jury fully covered the ultimate issues of fact involved in plaintiff's cause of action, trial court properly refused to submit inconsistent questions requested by defendants going to matters of defense, since such inconsistent questions would have been cross-examination of the jury, which is not permissible.—Levandowski v. Studey, 25 N.W.2d 59, 249 Wis. 421.

80. Kan.—Hutchens v. McClure, 269 P.2d 473, 176 Kan. 43—B. F. McLean Inv. Co. v. City of Wichita, 268 P.2d 956, 176 Kan. 55—Eldridge v. Kansas City Public Service Co., 267

flicting findings,<sup>81</sup> or which tend to place an erroneous interpretation on other questions submitted.<sup>82</sup> Moreover, the trial court should not submit questions or special issues which amount to a peremptory charge,<sup>83</sup> which unduly emphasize or give undue prominence to particular matters or evidence,<sup>84</sup> or which are substantially repetitions

of, or covered by, others submitted;<sup>85</sup> but a single issue may be submitted in more than one form, to meet different phases of the evidence.<sup>86</sup>

An interrogatory or issue must be correctly framed with respect to the law applicable to the matter involved therein,<sup>87</sup> but where the court cor-

P.2d 923, 175 Kan. 879—Jones v. Southwestern Interurban Ry. Co., 141 P. 999, 92 Kan. 809.

81. Tex.—Humble Oil & Refining Co. v. McLean, Com.App., 280 S.W. 557.

**The unconditional submission of a special issue conflicting with issues submitted without objections is improper.**—International-Great Northern R. Co. v. Acker, Tex.Civ.App., 128 S.W.2d 506, error dismissed, judgment correct.

#### Verdict for plaintiff

In summary ejectment action, tendered issue whether defendant was plaintiff's tenant, and if so, did he hold over after expiration of tenancy, was properly refused, since either affirmative or negative answer would require verdict for plaintiff.—Stadium v. Harvell, 179 S.E. 448, 208 N.C. 103.

82. Kan.—Rickel v. Atwood Equity Co-op. Exch., 215 P. 1015, 113 Kan. 592.

83. Tex.—Texas Employers' Ins. Ass'n v. Fricker, Civ.App., 16 S.W.2d 390.

64 C.J. p 1149 note 69.

84. Tex.—Phillips v. Stanolind Oil & Gas Co., Civ.App., 170 S.W.2d 802, error refused.—Clay Drilling Co. v. Furman, Civ.App., 150 S.W.2d 869.

64 C.J. p 1149 note 70

#### Questions held not objectionable

(1) In general.—Thompson v. Brown, Tex.Civ.App., 222 S.W.2d 442.—Dallas Ry. & Terminal Co. v. Menefee, Tex.Civ.App., 190 S.W.2d 150.—McGregor Milling & Grain Co. v. Warren, Tex.Civ.App., 175 S.W.2d 476, error refused.—Southern Transp. Co. v. Adams, Tex.Civ.App., 141 S.W.2d 739, error dismissed, judgment correct.—Tipton v. Tipton, Tex.Civ.App., 140 S.W.2d 865, error dismissed, judgment correct.—Hicks v. Brown, Civ.App., 128 S.W.2d 884, modified on other grounds 151 S.W.2d 790, 136 Tex. 399.—Abshire v. Reavis, Tex.Civ.App., 54 S.W.2d 1102, error refused.

(2) In compensation proceeding, issue of total incapacity and permanent character thereof requiring findings based on the preponderance of the evidence did not give undue prominence to the issue of injury or of partial incapacity.—Texas State Highway Department v. Reeves, Tex.Civ.App., 161 S.W.2d 357, error refused.

(3) In compensation proceeding where claimant alleged injuries to head, chest, and shoulders, court did

not err in submitting separate issues whether claimant sustained injuries to each his head, chest, and shoulders, as against contention that court thereby unduly emphasized claimant's contentions.—Traders & General Ins. Co. v. Burns, Tex.Civ.App., 118 S.W.2d 391.

85. Tex.—Minchen v. First Nat Bank of Alpine, Civ.App., 263 S.W.2d 601, error refused no reversible error.—Bridwell v. Bernard, Civ.App., 159 S.W.2d 981, error refused.—City of Austin v. Howard, Civ.App., 158 S.W.2d 556, error refused.—Ellis v. Lewis, Civ.App., 142 S.W.2d 294.—Cisco & N. E. Ry. Co. v. McCharen, Civ.App., 118 S.W.2d 844.—Panhandle & S. F. Ry. Co. v. Friend, Civ.App., 91 S.W.2d 922.—Fort Worth Properties Corporation v. Bahan, Civ.App., 68 S.W.2d 228.

64 C.J. p 1149 note 72.

#### Affirmative and negative submission

(1) Trial court was not required affirmatively and negatively to submit the same special issue.—Koss v. Texas Emp. Ins. Ass'n, Tex., 267 S.W.2d 641.—Dreeben v. Sidor, Tex.Civ.App., 254 S.W.2d 908, refused no reversible error.—F. W. Woolworth Co. v. Ellison, Tex.Civ.App., 232 S.W.2d 857.

(2) It was not error to refuse employer's requested special issue as to whether injury was received while employee was doing act outside the course of his employment, where it was merely negative of instruction already given.—Anchor Cas. Co. v. Patterson, Tex.Civ.App., 239 S.W.2d 941, refused no reversible error.

#### Distinct acts of negligence

An issue of whether motorist was negligent in failing to exercise ordinary care in returning to right side of highway to avoid collision does not resubmit issue of whether motorist was negligent in driving on left-hand side of highway, since such constitutes an act of negligence separate and distinct from driving on left side.—McClelland v. Mounker, Tex.Civ.App., 107 S.W.2d 901, error dismissed by agreement.

86. Tex.—Texas & N. O. Ry. Co. v. Martin, Civ.App., 32 S.W.2d 363.—Blakesley v. Kircher, Civ.App., 26 S.W.2d 1091, reversed on other grounds, Com.App., 41 S.W.2d 53.

87. Md.—East Coast Freight Lines v. Mayor and City Council of Bal-

timore, 58 A.2d 290, 190 Md. 256, 2 A.L.R.2d 386.

N.Y.—Fromer v. Glamour-Wear Mfg. Co., 95 N.Y.S.2d 302, 276 App.Div. 420.

Tex.—Norton v. Caster, 81 S.W.2d 487, 125 Tex. 48—Minchen v. First Nat. Bank of Alpine, Civ.App., 263 S.W.2d 601, error refused no reversible error.—American Surety Co. of New York v. Ritchie, Civ.App., 182 S.W.2d 501, error refused.—Southern Transp. Co. v. Adams, Civ.App., 141 S.W.2d 739, error dismissed, judgment correct.—Federal Underwriters Exchange v. McDaniel, Civ.App., 140 S.W.2d 979, error dismissed, judgment correct.—Hicks v. Brown, Civ.App., 128 S.W.2d 884, modified on other grounds 151 S.W.2d 790, 136 Tex. 399.—White v. Akers, Civ.App., 125 S.W.2d 388.—Lone Star Gas Co. v. Eckel, Civ.App., 110 S.W.2d 936.—Barrier v. Brinkman, Civ.App., 80 S.W.2d 365, affirmed 109 S.W.2d 462, 130 Tex. 350.—American Ins. Co. of Newark, N. J., v. Gregory, Civ.App., 77 S.W.2d 716.—Sanders v. Lowmire, Civ.App., 73 S.W.2d 148, reversed on other grounds Lowmire v. Sanders, 103 S.W.2d 739, 129 Tex. 563.—Torres v. Dishman, Civ.App., 69 S.W.2d 501, error dismissed.—U. S. Fidelity & Guaranty Co. v. Lindsey, Civ.App., 66 S.W.2d 419, error dismissed.—Willson v. Manasco, Civ.App., 63 S.W.2d 910.—Williams v. National Bank of Commerce, Civ.App., 62 S.W.2d 1108, reversed on other grounds National Bank of Commerce v. Williams, 84 S.W.2d 691, 125 Tex. 619.—Northern Texas Traction Co. v. Wright, Civ.App., 62 S.W.2d 624.

Wis.—E. L. Chester Co. v. Wisconsin Power & Light Co., 247 N.W. 861, 211 Wis. 158.—Quinn v. Hartmann, 246 N.W. 587, 210 Wis. 551.

64 C.J. p 1149 note 74.

#### Erroneous proposition

It is error to submit to a jury an interrogatory based on an erroneous proposition of law.—McFadden v. Thomas, 96 N.E.2d 254, 154 Ohio St. 405.—Bredenbeck v. Hollywood Cartage Co., 110 N.E.2d 152, 92 Ohio App. 265.

#### Assuming duty where none exists

A question assuming an absolute duty on the part of a party, where no such duty exists, or assuming a broader duty than that resting on the



rectly instructs the jury as to a matter of law each question need not specifically embody such matter.<sup>88</sup> Where a statutory liability is involved, statutory terms should be used in submitting questions to the jury.<sup>89</sup> So when negligence is predicated on failure to comply with some statutory rule of conduct or on the violation of a penal statute, the issue of whether the statute has been complied with or violated should be submitted in the language of the statute.<sup>90</sup> On the other hand, while a question reproducing the language of the statute which de-

fines fraud, in asking whether fraud was committed, is not improper,<sup>91</sup> ordinarily, in such circumstances, it is not necessary that the language of the statute be used, and it is better that it not be used if the substance of the matter can better or more simply be covered in other language.<sup>92</sup>

It is generally required that an interrogatory or special issue be complete<sup>93</sup> and take into account all the elements necessary or proper to a determination of the question.<sup>94</sup> So also, the question or

party, is improper and should not be given.

Mich.—*Vukich v. City of Detroit*, Dept. of St. Rys., 28 N.W.2d 894, 318 Mich. 515.

Tex.—*Gulf, C. & S. F. Ry. Co. v. Picard*, Civ.App., 147 S.W.2d 303, error dismissed, judgment correct—*Hornby Heavy Hardware Co. v. Prichard*, Civ.App., 119 S.W.2d 410, error dismissed—*Texas Electric Service Co. v. Kinkad*, Civ.App., 84 S.W.2d 567, error dismissed.

64 C.J. p 1149 note 74 [b].

#### Damages

(1) In action for wrongful attachment and conversion of stock of groceries, special issues properly separated the actual damages from exemplary damages and did not result in an award of double recovery by plaintiff.—*Coastal Transport Co. v. Fisher*, Tex.Civ.App., 225 S.W.2d 995.

(2) Special issue on what damages would compensate plaintiff for injuries, with instruction that jury should consider loss sustained up to time of trial and what he would probably suffer in future and physical pain and mental anguish, if any, that he had undergone and would in reasonable probability suffer in future, was not erroneous as allowing double recovery.—*Arlrine Motor Coaches v. Bennett*, Civ.App., 184 S.W.2d 524, reversed on other grounds 187 S.W.2d 982, 144 Tex. 36.

**Special issues held not objectionable**  
N.C.—*Industrial Discount Corporation v. Radecky*, 170 S.E. 640, 205 N.C. 163.

Tex.—*Solgaard v. Texas & N. O. R. Co.*, 229 S.W.2d 777, 149 Tex. 181—*Haynes B. Ownby Drilling Co. v. McClure*, Civ.App., 264 S.W.2d 204, error refused no reversible error—*Nussbaum v. Anthony*, Civ.App., 214 S.W.2d 686, refused no reversible error—*Pope v. Jackson*, Civ.App., 211 S.W.2d 958, affirmed *Austin Road Co. v. Pope*, 216 S.W.2d 563, 147 Tex. 430—*Dallas Ry. & Terminal Co. v. Orr*, Civ.App., 210 S.W.2d 863, affirmed 215 S.W.2d 862, 147 Tex. 383—*McCown v. Jennings*, Civ.App., 209 S.W.2d 408—*Fort Worth & D. C. Ry. Co. v. Kiel*, Civ.App., 185 S.W.2d 144, reversed on other grounds 187 S.W.2d 371, 143

Tex. 601—*City of Fort Worth v. Lee*, Civ.App., 182 S.W.2d 831, affirmed 186 S.W.2d 954, 143 Tex. 551, 159 A.L.R. 125—*Consolidated Underwriters v. Pruitt*, Civ.App., 180 S.W.2d 461, error refused—*City of Waco v. Teague*, Civ.App., 168 S.W.2d 521—*International Brotherhood of Boilermakers Iron Shipbuilders & Helpers of America v. Huval*, Civ.App., 154 S.W.2d 233, affirmed in part and reversed in part on other grounds 166 S.W.2d 107, 140 Tex. 21—*Kadane v. Clark*, Civ.App., 134 S.W.2d 448, reversed on other grounds 143 S.W.2d 197, 135 Tex. 496—*Coca Cola Bottling Co. v. Heckman*, Civ.App., 113 S.W.2d 201—*Kansas City Life Ins. Co. v. Fisher*, Civ.App., 83 S.W.2d 1068, error dismissed—*Royal Indemnity Co. v. Neely*, Civ.App., 80 S.W.2d 478—*Buford v. Southwestern Life Ins. Co.*, Civ.App., 77 S.W.2d 318—*Southland Greyhound Lines v. King*, Civ.App., 77 S.W.2d 281, error dismissed—*Davenport v. Texas & N. O. R. Co.*, Civ.App., 72 S.W.2d 933—*Western Telephone Corporation of Texas v. McCann*, Civ.App., 69 S.W.2d 465, reversed on other grounds 99 S.W.2d 895, 128 Tex. 582—*Quannah, A. & P. Ry. Co. v. Eblen*, Civ.App., 55 S.W.2d 1060, error refused.

88. Tex.—*Hough v. Grapotte*, Civ.App., 59 S.W.2d 886, affirmed 90 S.W.2d 1090, 127 Tex. 144.

64 C.J. p 1150 note 78.

89. Wis.—*Morley v. City of Reedsburg*, 248 N.W. 431, 211 Wis. 504.

#### Producing cause of incapacity

In compensation proceeding, issues concerning personal injury as producing cause of incapacity should be submitted in language which, when answered, will conform as nearly as possible to the language of the statute.—*Traders & General Ins. Co. v. Turner*, Tex.Civ.App., 149 S.W.2d 593.

90. Tex.—*Swann v. Wheeler*, 86 S.W.2d 735, 126 Tex. 167.

91. Wis.—*Jensen v. Wisconsin Cent. Ry. Co.*, 128 N.W. 982, 145 Wis. 326.

92. Tex.—*Rick v. Farrell*, Civ.App., 266 S.W. 522.

93. Tex.—*Groves v. National Loan*

& Investment Co. of Detroit, Mich., Civ.App., 102 S.W.2d 508.

94. U.S.—*American Smelting & Refining Co. v. Maloy*, C.A.Tex., 198 F.2d 206, rehearing denied 199 F.2d 52.

III.—*Tucker v. Kallal*, 112 N.E.2d 731, 350 Ill. App. 825.

Mass.—*Copthorn v. Boston & M. R. R.*, 17 N.E.2d 718, 301 Mass. 510. N.H.—*Saloshin v. Houle*, 164 A. 767, 86 N.H. 132.

Tex.—*East Texas Theaters v. Swink*, 177 S.W.2d 195, 142 Tex. 268—*Texas & N. O. R. Co. v. Crow*, 123 S.W.2d 649, 132 Tex. 465—*Collier v. Bankston-Hall Motors*, Civ.App., 267 S.W.2d 898—*S. H. Kress & Co. v. Selph*, Civ.App., 250 S.W.2d 883, error refused no reversible error—*Kennedy v. Wichita Production Co.*, Civ.App., 242 S.W.2d 261, refused no reversible error—*Tippett v. Woolley*, Civ.App., 230 S.W.2d 283—*Outlier v. Parker*, Civ.App., 207 S.W.2d 237, reversed on other grounds 209 S.W.2d 759, 145 Tex. 595—*Gillette Motor Transport Co. v. Whitfield*, Civ.App., 186 S.W.2d 90, refused for want of merit—*Great Atlantic & Pacific Tea Co. v. Garner*, Civ.App., 170 S.W.2d 502, error refused—*Walton v. West Texas Utilities Co.*, Civ.App., 161 S.W.2d 518, error refused—*Dallas Railway & Terminal Co. v. Bishop*, Civ.App., 153 S.W.2d 298—*Hickox v. Hickox*, Civ.App., 151 S.W.2d 913—*City of Corpus Christi v. McMurrey*, Civ.App., 145 S.W.2d 664, error dismissed, judgment correct—*Border State Life Ins. Co. v. Noble*, Civ.App., 138 S.W.2d 119, error dismissed, judgment correct—*Texas Employers Ins. Ass'n v. Thrash*, Civ.App., 136 S.W.2d 905, error dismissed, judgment correct—*Texas & P. Ry. Co. v. Heathington*, Civ.App., 115 S.W.2d 495—*Louisiana, A. & T. Ry. Co. v. De Vance*, Civ.App., 114 S.W.2d 922, error dismissed—*Gulf States Utilities Co. v. Dillon*, Civ.App., 112 S.W.2d 752—*Rudolph v. Hanes*, Civ.App., 111 S.W.2d 1189—*Cantu v. South Texas Transp. Co.*, Civ.App., 110 S.W.2d 995—*Western Cas. Co. v. Lapco*, Civ.App., 108 S.W.2d 740, error dismissed—*Groves v. National Loan & Investment Co.*

special issue submitted must not allow the jury to take into account facts not proper to be considered in answering it,<sup>95</sup> or, on the other hand, confine them to a consideration of part of the pertinent and proper evidence, to the exclusion of other such evidence.<sup>96</sup> However, a particular element of right or liability need not be explicitly included where it

is necessarily involved in the language used,<sup>97</sup> and it is not necessary that the question be qualified or restricted to particular circumstances where no other circumstances are in evidence.<sup>98</sup> Special issues should not be framed in a manner that the jury might know therefrom what the effect of their answer would be on the judgment to be rendered.<sup>99</sup>

of Detroit, Mich., Civ.App., 102 S.W.2d 508—Gulf States Utilities Co. v. Wooldridge, Civ.App., 90 S.W.2d 325—Texas Electric Service Co. v. Kinkead, Civ.App., 84 S.W.2d 567, error dismissed—Texas & N. O. R. Co. v. McGinnis, Civ.App., 81 S.W.2d 200, affirmed 109 S.W.2d 160, 130 Tex. 338—Singer Iron & Steel Co. v. Republic Iron & Metal Co., Civ.App., 80 S.W.2d 1037—Texas & P. Ry. Co. v. Hesterly, Civ.App., 79 S.W.2d 909, error dismissed—Fort Worth & D. C. Ry. Co. v. Rowe, Civ.App., 69 S.W.2d 169—Gulf Casualty Co. v. Taylor, Civ.App., 67 S.W.2d 415, error dismissed—U. S. Fidelity & Guaranty Co. v. Lindsey, Civ.App., 66 S.W.2d 419, error dismissed.

Wis.—Vogel v. Vetting, 60 N.W.2d 399, 265 Wis. 19—Swenson v. Kansas City Life Ins. Co., 17 N.W.2d 584, 246 Wis. 432—Culver v. Webb, 12 N.W.2d 311, 244 Wis. 478—Carlson v. Strasser, 2 N.W.2d 233, 239 Wis. 531—Rehrer v. Mandernack, 291 N.W. 758, 234 Wis. 568.

64 C.J. p 1150 note 75.

#### Negligence

(1) The trial court must include in an issue of negligence every essential fact necessary to constitute negligence.—Wells v. Ford, Tex.Civ.App., 118 S.W.2d 420, error dismissed.

(2) In submitting an issue as to negligence of a child in personal injury action, it is permissible to refer to age, intelligence, and experience of the child.—Davis v. Shafer, Tex. Civ.App., 222 S.W.2d 145, refused no reversible error.

#### Special issues held not erroneous

(1) In general.—Texas & N. O. R. Co. v. Krasoff, 191 S.W.2d 1, 144 Tex. 436—Texas Emp. Ins. Ass'n v. Talmadge, Tex.Civ.App., 256 S.W.2d 945, error refused no reversible error—Southwest Stone Co. v. Symons, Tex. Civ.App., 237 S.W.2d 380, error refused no reversible error—Pacific Emp. Ins. Co. v. Brasher, Tex.Civ.App., 234 S.W.2d 698, error refused no reversible error—Frint v. Tate, Tex. Civ.App., 162 S.W.2d 737—Cook v. Hutto, Civ.App., 151 S.W.2d 642, reversed on other grounds Hutto v. Cook, 164 S.W.2d 513, 139 Tex. 571—Missouri-Kansas-Texas R. Co. of Texas v. McKinney, Civ.App., 126 S.W.2d 789, affirmed Missouri, K. & T. R. Co. of Texas v. McKinney, 145 S.W.2d 1081, 136 Tex. 76—Burlington-Rock Island R. Co. v. Davis, Tex.Civ.App.,

123 S.W.2d 1002, error dismissed, judgment correct—International-Great Northern R. Co. v. Pence, Tex. Civ.App., 113 S.W.2d 206, error dismissed—Duff v. Roeser & Pendleton, Tex.Civ.App., 96 S.W.2d 682.

(2) In suit in trespass to try title, special issue submitting question of adverse possession was not improper as omitting element of continuousness.—Reed v. Magnolia Petroleum Co., Tex.Civ.App., 57 S.W.2d 359, error dismissed.

(3) An issue whether jury found from a preponderance of the evidence that collision was not caused by an "unavoidable accident" sufficiently included the element of causation with respect to negligence.—Glazer v. Wheeler, Civ.App., 130 S.W.2d 353, reversed on other grounds Wheeler v. Glazer, 153 S.W.2d 449, 137 Tex. 341, 140 A.L.R. 1301.

(4) In compensation proceedings, it is sufficient for trial court to submit an issue as to whether employee sustained accidental injury to his body on occasion in question, without necessity of setting out various injuries mentioned in pleadings.—Texas Emp. Ins. Ass'n v. Talmadge, Tex. Civ.App., 256 S.W.2d 945, error refused no reversible error.

95. Tex.—Martin v. Traders & General Ins. Co., Civ.App., 258 S.W.2d 142, error refused no reversible error—Highway Ins. Underwriters v. Lufkin-Beaumont Motor Coaches, Civ.App., 215 S.W.2d 904, refused no reversible error—Southern Underwriters v. Wright, Civ.App., 142 S.W.2d 297—Edmondson v. Carroll, Civ.App., 134 S.W.2d 378, error dismissed, judgment correct.

64 C.J. p 1150 note 76.

#### Damages

Special issue inquiring of jury what sum of money, if any, would fairly and reasonably compensate plaintiff for his injuries, if any, "directly and proximately caused by the collision in question," taking into consideration the enumerated elements of damage and none other, was not subject to objection that it did not limit the damages of plaintiff to those directly and proximately caused by defendants' negligence.—Grocers Supply Co. v. Stuckey, Tex.Civ.App., 152 S.W.2d 911.

The trial court is not warranted in assuming that jury will consider matters not in evidence in answering is-

ssues submitted.—Southern Underwriters v. Thomas, Tex.Civ.App., 131 S.W.2d 409, error dismissed, judgment correct.

#### Special issues held not erroneous

Tex.—McClellan v. Krebs, Civ.App., 183 S.W.2d 758, error refused—Reed v. Southern Pac. Co., Civ.App., 123 S.W.2d 392, error dismissed—Galveston, H. & S. A. Ry. Co. v. Waldo, Civ.App., 77 S.W.2d 326, error dismissed.

96. Tex.—Biers v. Fort Worth Lloyds, Civ.App., 219 S.W.2d 493, refused no reversible error—City of Fort Worth v. Lee, Civ.App., 182 S.W.2d 831, affirmed 186 S.W.2d 954, 143 Tex. 551, 159 A.L.R. 125—Rockford Life Ins. Co. v. Tachdeli, Civ. App., 61 S.W.2d 536, error refused.

64 C.J. p 1150 note 77.

#### Evidence applied to issues

Trial court, in submitting special issues, should frame questions to secure consideration of the evidence applied to the issues framed by pleadings and supported by evidence.—Thoresen v. Grything, 59 N.W.2d 682, 264 Wis. 487.

97. Tex.—Rust v. Page, Civ.App., 52 S.W.2d 937.

64 C.J. p 1151 note 80.

98. Cal.—Ruppel v. United Railroads of San Francisco, 101 P. 803, 10 Cal. App. 313.

64 C.J. p 1151 note 81.

99. Tex.—Texas & P. Ry. Co. v. Heathington, Civ.App., 115 S.W.2d 495—Finck Cigar Co. v. Campbell, Civ.App., 114 S.W.2d 348, affirmed 133 S.W.2d 759, 134 Tex. 250—Continental Oil Co. v. Barnes, Civ.App., 97 S.W.2d 494, error refused.

Wis.—Zombkowski v. Wisconsin River Power Co., 64 N.W.2d 236, 267 Wis. 77.

#### Special issues held not erroneous

Tex.—Travelers Ins. Co. v. Mote, Civ. App., 116 S.W.2d 427, error dismissed—Finck Cigar Co. v. Campbell, Civ.App., 114 S.W.2d 348, affirmed 133 S.W.2d 759, 134 Tex. 250.

#### Conditional submission

(1) The conditional submission of a special issue was not objectionable on ground that issue informed jury of effect of their answer to previous special issue, although preceding the conditionally submitted issue jury was instructed that they would answer such issue only if they answered previous issue in affirmative.—Grieger v. Vega, Tex., 271 S.W.2d 85—

Ordinarily a question or special issue should not be phrased in the alternative,<sup>1</sup> but submitting different issues in the alternative is not error where there is substantial evidence to support each alternative.<sup>2</sup> It is not improper to submit the theory of one party separate from that of the other.<sup>3</sup>

Interrogatories or issues are ordinarily sufficient where they fairly submit material questions in the

case,<sup>4</sup> and the mere fact that a question might be more aptly drawn or its form improved does not make it erroneous.<sup>5</sup> In other words, the test of the sufficiency of special issues is whether they cover all pertinent evidence and fairly apply it,<sup>6</sup> and they will be upheld when they present proper inquiries as to all determinative facts in dispute and afford the parties the opportunity to introduce and fairly apply all pertinent evidence.<sup>7</sup> If the issues

**Texas Emp. Ins. Ass'n v. Lee**, Tex. Civ.App., 284 S.W.2d 902, reversed on other grounds, Supp., 258 S.W.2d 569—**Montgomery v. Gay**, Tex. Civ.App., 212 S.W.2d 941—**Rhone v. Fox**, Tex. Civ.App., 142 S.W.2d 542, error dismissed.

(2) In workmen's compensation proceeding, wherein special issue required jury to find how many weeks of total incapacity, if any, employee sustained or would sustain by reason of injury suffered, only if jury should find in response to another special issue that such incapacity was temporary, it was proper for trial court to make first special issue corollary to, and dependent on, answer to second special issue, as against contention that jury was thereby advised of legal effect of their answers.—**United Employers Casualty Co. v. Oden**, Tex. Civ.App., 150 S.W.2d 114.

(3) Property of conditional submission see *infra* subdivision c of this section.

1. **Tex.—Texas Employers' Ins. Ass'n v. Galloway**, Civ.App., 40 S.W.2d 973.  
84 C.J. p 1149 note 60.

2. **Mo.—Cross v. Fletcher**, App., 216 S.W.2d 101.

#### Alternative defenses

The fact that issue of unavoidable accident in automobile collision case was based on same alleged acts of negligence as was issue of sole proximate cause did not preclude court from submitting both issues on theory that where two issues are raised by same pleadings or evidence court may properly submit either issue, but not both, since a party may urge alternative and even inconsistent defenses.—**Schuhmacher Co. v. Holcomb**, 177 S.W.2d 951, 142 Tex. 332.

#### Partial incapacity

Where employee's main contention was that he had suffered total permanent incapacity, and he requested compensation for incapacity of less serious nature only in alternative, and insurance carrier's answer to such contentions was simply general denial, submitting issues with respect to partial incapacity only in alternative was proper.—**Texas Employers Ins. Ass'n v. McNorton**, Civ.App., 92 S.W.2d 582, error dismissed 122 S.W.2d 1043, 132 Tex. 188.

3. **Tex.—Simpson v. Fulcher**, Civ. App., 45 S.W.2d 1012.

4. **Ill.—Johnson v. Luhman**, 78 N.E.2d 107, 333 Ill.App. 418.  
**Iowa.—In re McKeon's Estate**, 289 N.W. 915, 227 Iowa 1050.

**N.C.—Cherry v. Andrews**, 56 S.E.2d 703, 231 N.C. 261—**Pake v. Morris**, 53 S.E.2d 300, 230 N.C. 424—**Miller v. McConnell**, 36 S.E.2d 722, 226 N.C. 28.

**Ohio.—Carney v. Dayton Power & Light Co.**, App., 67 N.E.2d 120.

**Pa.—Harrison v. Metropolitan Life Ins. Co.**, 79 A.2d 115, 168 Pa.Super. 474.

**Tex.—Minchen v. First Nat. Bank of Alpine**, Civ.App., 263 S.W.2d 601, error refused no reversible error—**Ervay-Canton Apartments v. Hatterick**, Civ.App., 239 S.W.2d 150, refused no reversible error—**United Gas Pipe Line Co. v. Smith**, Civ. App., 232 S.W.2d 756—**Liberty Mut. Ins. Co. v. Murphy**, Civ.App., 205 S.W.2d 398—**Foise v. Monroe**, Civ. App., 180 S.W.2d 604, refused for want of merit—**Blue Bonnet Life Ins. Co. v. Connaway**, Civ.App., 133 S.W.2d 1016—**Payne v. Nichols**, Civ. App., 176 S.W.2d 961, error refused—**H. M. Cohen Lumber & Building Co. v. Panos**, Civ.App., 154 S.W.2d 206, error refused—**Hyde v. English**, Civ.App., 139 S.W.2d 628, error dismissed—**Thompson v. Schletze**, Civ.App., 128 S.W.2d 1044—**Wilson v. Riley**, Civ.App., 122 S.W.2d 692—**Brotherhood of Locomotive Firemen and Engineers v. Greene**, Civ.App., 122 S.W.2d 656, error dismissed—**City of Kirbyville v. Smith**, Civ.App., 104 S.W.2d 564—**North British & Mercantile Ins. Co. v. Stringer**, Civ.App., 93 S.W.2d 806, error dismissed—**Mid-Kansas Oil & Gas Co. v. Burton**, Civ.App., 87 S.W.2d 338, error dismissed—**Bush v. Gaffney**, Civ.App., 84 S.W.2d 759—**Federal Crude Oil Co. v. Yount-Lee Oil Co.**, Civ.App., 73 S.W.2d 969, error dismissed and certiorari denied 55 S.Ct. 655, 295 U.S. 741, 79 L.Ed. 1687—**Sanders v. Stinnette**, Civ.App., 73 S.W.2d 637, error refused—**Dennison v. Gilmore**, Civ. App., 71 S.W.2d 542, error dismissed—**Elford v. Word**, Civ.App., 66 S.W.2d 410.

64 C.J. p 1151 note 83.

#### Other statements of rule

(1) Issues presenting to jury proper inquiries as to all essential matters or determinative facts in dispute are sufficient.—**Green v. Inter-Ocean Casualty Co. of Cincinnati, Ohio**, 187 S.E. 38, 203 N.C. 767.

(2) Issues, arising on pleadings, sufficient to enable parties to present to jury their respective contentions as to law and facts, and sufficient, when considered in connection with admissions of parties in pleadings and at trial, to support judgment, are not exceptionable.—**Furr v. Trull**, 171 S.E. 641, 205 N.C. 417.

#### Language of policy provision

In suit for total loss of bananas damaged by refrigerating ammonia, under policy covering cost of replacement of material lost as result of explosion, submission of the issue of damages in almost the exact language of the policy provision was proper.—**Cromble & Co. v. Employers' Fire Ins. Co. of Boston, Mass.**, Tex. Civ.App., 250 S.W.2d 472, refused no reversible error.

5. **Wis.—Honore v. Ludwig**, 247 N.W. 335, 211 Wis. 354.  
64 C.J. p 1151 note 84.

6. **N.C.—Grier v. Weldon**, 172 S.E. 200, 205 N.C. 575.  
**Tex.—Texas General Indem. Co. v. Scott**, 253 S.W.2d 651.  
64 C.J. p 1151 note 85.

#### Fairness and intelligibility

A special issue submission should be fair to the parties and readily understandable by jury.—**Thompson v. Sisti**, Civ.App., 234 S.W.2d 600, affirmed **Sisti v. Thompson**, 229 S.W.2d 610, 149 Tex. 189.

#### Particular set of questions

Use of or failure to use particular set of questions to jury is not error, if ultimate fact questions are so stated that legal and proper judgment may be entered by court.—**Honore v. Ludwig**, 247 N.W. 335, 211 Wis. 354.

7. **N.C.—Cherry v. Andrews**, 56 S.E.2d 703, 231 N.C. 261—**Miller v. McConnell**, 36 S.E.2d 722, 226 N.C. 28—**Steele v. Cox**, 36 S.E.2d 288, 226 N.C. 726—**Lister v. Lister**, 24 S.E.2d 342, 222 N.C. 555—**Oliver v. Oliver**, 13 S.E.2d 549, 219 N.C. 299.

#### Full presentation of controversy

In action to recover for services rendered intestate, issues as to whether

submitted by the court are sufficient in form and substance to present all phases of the controversy, there is no ground for exception to the issues.<sup>8</sup> In the application of the foregoing rules, particular

interrogatories or special issues have been held proper and sufficient in form,<sup>9</sup> as in negligence actions generally,<sup>10</sup> tort actions against municipalities,<sup>11</sup> and workmen's compensation suits;<sup>12</sup> but

er plaintiff and intestate entered into contract, intestate breached contract, and plaintiff rendered services to intestate in good faith relying on contract and as to amount, if any, plaintiff was entitled to recover, fully presented controversy.—Price v. Askins, 194 S.E. 284, 212 N.C. 583.

8. N.C.—Price v. Askins, *supra*.

9. Ariz.—Parker v. Gentry, 185 P.2d 767, 66 Ariz. 183.

111.—Bernard v. Metropolitan Life Ins. Co., 45 N.E.2d 518, 316 Ill.App. 655.

N.C.—Baushar v. Willis, 185 S.E. 444, 210 N.C. 52—Jernigan v. Jernigan, 178 S.E. 587, 207 N.C. 831.

Pa.—Schmidt v. Campbell, 7 A.2d 554, 136 Pa.Super. 590.

Tex.—Texas & N. O. R. Co. v. Krasoff, 191 S.W.2d 1, 144 Tex. 436—Hancock v. Sammons, Civ.App. 267 S.W.2d 252, error refused no reversible error—Alamo Cas. Co. v. Rizk, Civ.App., 263 S.W.2d 190, error refused no reversible error—Brown v. Brown, Civ.App., 256 S.W.2d 143, refused no reversible error—Dean v. Safety Cas. Co., Civ.App., 190 S.W.2d 750, refused for want of merit—Dempster Mill Mfg. Co. v. Wiley, Civ.App., 131 S.W.2d 257, error dismissed, judgment correct—Hickman v. Sullivan, Civ.App., 128 S.W.2d 457, error dismissed, judgment correct.

Wis.—Pierner v. Mann, 25 N.W.2d 83, 249 Wis. 469—Stuart v. Winnie, 258 N.W. 611, 217 Wis. 298—Hoffman v. Regling, 258 N.W. 347, 117 Wis. 66.

10. Ohio.—Johnson v. Gernon, 107 N.E.2d 377, 91 Ohio App. 529.

Tex.—Mason v. Yellow Cab & Baggage Co., 269 S.W.2d 329—Texas & N. O. R. Co. v. Krasoff, 191 S.W.2d 1, 144 Tex. 436—Thurman v. Chandler, 81 S.W.2d 489, 125 Tex. 34—Jarbet Co. v. Hengst, Civ.App., 260 S.W.2d 88—S. H. Kress & Co. v. Selph, Civ.App., 250 S.W.2d 883, error refused no reversible error—Thornton v. Morgan, Civ.App., 245 S.W.2d 379—Southwest Stone Co. v. Symons, Civ.App., 237 S.W.2d 380, error refused no reversible error—Farmers' Gin Co-op. Ass'n v. Mitchell, Civ.App., 233 S.W.2d 948—Gulf, Colorado & Santa Fe Ry. Co. v. Smart, Civ.App., 222 S.W.2d 161, refused no reversible error—Benson v. Missouri, K. & T. R. Co., Civ.App., 200 S.W.2d 233, error refused no reversible error—Good v. Born, Civ.App., Civ.App., 197 S.W.2d 589, error refused no reversible error—Gillette Motor Transp. Co. v. Whitfield, Civ.App., 197 S.W.2d 157, affirmed 200 S.W.2d 624, 145 Tex.

571—Dallas Ry. & Terminal Co. v. Menefee, Civ.App., 190 S.W.2d 150—City of Coleman v. Kenley, Civ. App., 168 S.W.2d 926—Graham v. Dallas Railway & Terminal Co., Civ.App., 165 S.W.2d 1002, error refused—Doornbos v. Looney, Civ. App., 159 S.W.2d 155, error refused—Texas Cities Gas Co. v. Dickens, Civ.App., 156 S.W.2d 1010, affirmed 168 S.W.2d 208, 140 Tex. 433—Justiss v. Naquin, Civ.App., 137 S.W.2d 72, error dismissed, judgment correct—International-Great Northern R. Co. v. Acker, Civ.App., 128 S.W.2d 506, error dismissed, judgment correct—El Paso Electric Co. v. Barker, Civ.App., 116 S.W.2d 433, reversed on other grounds 137 S.W.2d 17, 134 Tex. 496—Kimbrow v. Fort Worth & D. C. R. Co., Civ. App., 86 S.W.2d 78, affirmed Fort Worth & D. C. Ry. Co. v. Kimbrow, 112 S.W.2d 712, 131 Tex. 117—Ford Motor Co. v. Whitt, Civ.App., 81 S.W.2d 1032, error refused—Renfro Drug Co. v. Jackson, Civ.App., 81 S.W.2d 101, error dismissed—Keas v. Fox Transferr Co., Civ.App., 77 S.W.2d 551—McMath Co. v. Staten, Civ.App., 60 S.W.2d 290—England v. Pitts, Civ.App., 56 S.W.2d 493, error dismissed.

Wis.—Yanisch v. American Fidelity & Cas. Co., 44 N.W.2d 267, 257 Wis. 462—Garcia v. Chicago & N. W. Ry. Co., 42 N.W.2d 288, 256 Wis. 633—Schworer v. Binberger, 286 N.W. 14, 232 Wis. 210—Jackson v. Robert L. Reisinger & Co., 263 N.W. 641, 219 Wis. 535—Campbell v. Spaeth, 250 N.W. 394, 213 Wis. 162—Leonard v. Bottomley, 245 N.W. 849, 210 Wis. 411, followed in 245 N.W. 852, 210 Wis. 420, and 264 N.W. 853, 210 Wis. 421.

#### Acts of negligence

In personal injury action, an interrogatory requiring jury, if they find defendant guilty of negligence, to specify his acts of negligence, is proper, and jury's failure or inability to find existence of claimed act of negligence is equivalent to finding on such claim against party having burden of establishing it.—Mills v. City of Cleveland, Ohio App., 117 N.E.2d 471.

In automobile collision case, question of defendant's negligence may be submitted to jury by inquiring whether defendant failed to use ordinary care in such respects as evidence may indicate, followed by instruction defining ordinary care.—Hoffman v. Regling, 258 N.W. 347, 117 Wis. 66.

#### Speed

Question to jury as to whether de-

fendant in action for injuries to one riding in automobile driven by him failed to exercise ordinary care not to increase danger assumed by plaintiff with respect to speed was held not to render verdict, exonerating defendant in such respect, fatally defective as making it impossible to determine whether jury concluded that he was not driving at excessive speed or that plaintiff assumed risk thereof.—Arch-er v. Chicago, M., St. P. & P. Ry. Co., 255 N.W. 67, 215 Wis. 509, 95 A.L.R. 851.

#### Damages

(1) In personal injury action, court should have submitted plaintiff's requested special issue, "In the event that the plaintiff should be entitled to recover, at what sum should his damages be assessed?" instead of issue given reading, "What sum would reasonably compensate the plaintiff for his loss and injury which was directly produced by the dereliction of train in question?"—Braun v. Minneapolis, St. P. & S. M. Ry. Co., 172 N.W. 743, 170 Wis. 10.

(2) Use of phrase "and so forth," in issue as to damages in personal injury action, was held error—City of Beaumont v. Dougherty, Tex.Civ.App., 298 S.W. 631, affirmed, Com.App., 9 S.W.2d 1030.

11. Tex.—City of Dallas v. Hutchins, Civ.App., 226 S.W.2d 155, refused no reversible error—City of Waco v. Thralls, Civ.App., 172 S.W.2d 142, error refused—City of Grandview v. Ingle, Civ.App., 90 S.W.2d 855, error dismissed.

43 C.J. p. 1316 note 12.

12. Tex.—Texas General Indem. Co. v. McNell, Civ.App., 261 S.W.2d 378—Lumbermen's Mut. Cas. Co. v. Zinn, Civ.App., 220 S.W.2d 906—Texas Emp. Ins. Ass'n v. Tanner, Civ.App., 218 S.W.2d 277, refused no reversible error—Texas Emp. Ins. Ass'n v. Fletcher, Civ.App., 214 S.W.2d 873, refused no reversible error—Aetna Cas. & Sur. Co. v. Isen-see, Civ.App., 211 S.W.2d 613, refused no reversible error—Associated Employers Lloyds v. Wiggins, Civ.App., 208 S.W.2d 705, refused no reversible error—Lewis v. Texas Emp. Ins. Ass'n, Civ.App., 197 S.W.2d 187, error refused no reversible error—Aetna Cas. & Sur. Co. v. Davis, Civ.App., 196 S.W.2d 35—Federal Underwriters Exchange v. Rat-ler, Civ.App., 192 S.W.2d 942, refused no reversible error—Traders & General Ins. Co. v. Wilder, Civ. App., 186 S.W.2d 1011—Traders & General Ins. Co. v. Yarbrough, Civ. App., 181 S.W.2d 305—Southern Un-

other particular interrogatories or special issues have been held to be defective in form.<sup>13</sup>

*Burden of proof.* It has been held to be prefer-

able that each question or special issue incorporate the matter of burden of proof,<sup>14</sup> that is, questions submitted to the jury should be so framed as to

derwriters v. West, Civ.App., 152 S.W.2d 933—Traders & General Ins. Co. v. Belcher, Civ.App., 152 S.W.2d 525—Maryland Casualty Co. v. Abbott, Civ.App., 148 S.W.2d 465, error dismissed, judgment correct—Federal Underwriters Exchange v. Popnoe, Civ.App., 140 S.W.2d 484, error dismissed—Traders & General Ins. Co. v. Stakes, Civ.App., 131 S.W.2d 270, error refused—Federal Underwriters Exchange v. Rigsby, Civ.App., 130 S.W.2d 1105, error dismissed—Traders & General Ins. Co. v. Ray, Civ.App., 128 S.W.2d 80, error dismissed, judgment correct—Federal Underwriters Exchange v. Arnold, Civ.App., 127 S.W.2d 972, error dismissed, judgment correct—Southern Underwriters v. Thompson, Civ.App., 127 S.W.2d 389, error dismissed—Texas Employers Ins. Ass'n v. Hitt, Civ.App., 125 S.W.2d 323—Traders & General Ins. Co. v. Weatherford, Civ.App., 124 S.W.2d 423, error dismissed, judgment correct—Traders & General Ins. Co. v. Patterson, Civ.App., 123 S.W.2d 766, error dismissed—Texas Employers Ins. Ass'n v. Wright, Civ.App., 118 S.W.2d 433, error dismissed—Travelers Ins. Co. v. Mote, Civ.App., 118 S.W.2d 427, error dismissed—Southern Underwriters v. Kelly, Civ.App., 110 S.W.2d 153, error dismissed—Consolidated Underwriters v. Lee, Civ.App., 107 S.W.2d 482, error dismissed—Texas Employers' Ins. Ass'n v. Rowell, Civ.App., 104 S.W.2d 613—Texas Employers Ins. Ass'n v. Little, Civ.App., 96 S.W.2d 677, error dismissed—Traders & General Ins. Co. v. Wimberly, Civ.App., 85 S.W.2d 343, error dismissed—Texas Employers' Ins. Ass'n v. Cheek, Civ.App., 63 S.W.2d 1103, error dismissed.

#### Injuries and cause

(1) In workmen's compensation case, trial court should, by one or more appropriate issues, require jury to find whether employee sustained such accidental personal injuries, if any, as may be properly raised by pleadings and evidence, and, if jury should find by one or more appropriate issues that employee sustained such injuries, jury should then be required to find in a corresponding and corollary issue or separate issues as to whether the found injuries naturally resulted in, or was producing cause of, the incapacity complained of.—United Employers Casualty Co. v. Oden, Tex.Civ.App., 150 S.W.2d 114.

(2) Where employee in workman's compensation suit relies on a general injury, there is no need for special issue to describe injuries set forth in

petition or for jury to find either separately or collectively that employee sustained either one or all of the injuries, but it is sufficient that jury find that employee sustained an accidental injury to his body.—Southern Underwriters v. Boswell, 158 S.W.2d 280, 138 Tex. 255.

#### Questions submitted in disjunctive

Special issues submitting disjunctive questions whether compensation claimant's incapacity was total or only partial, and whether plaintiff's incapacity had changed for better or for worse, were authorized by Civil Procedure Rule.—Commercial Standard Ins. Co. v. Brock, Tex.Civ.App., 167 S.W.2d 281.

#### Lump-sum award

(1) Special issues inquiring whether jury found that injustice and manifest hardship would result to compensation claimant if lump sum were denied him in the event of the granting of a compensation award were proper in form and were supported by the evidence.—Maryland Casualty Co. v. Abbott, Tex.Civ.App., 148 S.W.2d 465, error dismissed, judgment correct.

(2) Issue of lump-sum payment was not erroneous because of use of phrase "instead of a lump sum."—Employers' Liability Assur. Corporation v. Sims, Tex.Civ.App., 67 S.W.2d 445, error refused.

#### Facts submitted by charge

In compensation suit defended on ground of failure to file claim with Industrial Accident Board within six months from date of injury, requested issue whether employee prior to certain date had begun to doubt physician's statement that employee would recover from his injury, was properly refused, where issue was a mere negative submission of affirmative facts submitted by charge.—Federal Underwriters Exchange v. McDaniel, Tex.Civ.App., 140 S.W.2d 979, error dismissed, judgment correct.

13. N.M.—Crocker v. Johnston, 95 P.2d 214, 43 N.M. 469.

Tex.—Barron v. James, Civ.App., 198 S.W.2d 245, reversed on other grounds 198 S.W.2d 256, 145 Tex. 283.

43 C.J. p 1316 note 17.

14. Tex.—Phoenix Assur. Co. of London v. Stolbaugh, 94 S.W.2d 428, 127 Tex. 308—Phoenix Refining Co. v. Tips, 81 S.W.2d 60, 125 Tex. 69—Minchen v. First Nat. Bank of Alpine, Civ.App., 263 S.W.2d 601, error refused no reversible error—Villareal v. Reza, Civ.App., 236 S.W.2d 239—Hines v. Massachusetts Mut. Life Ins. Co., Civ.App., 174 S.W.2d

94—Texas Long Leaf Lumber Co. v. White, Civ.App., 148 S.W.2d 238—Erwin v. White, Civ.App., 139 S.W.2d 236—Edmonson v. Carroll, Civ.App., 134 S.W.2d 378, error dismissed, judgment correct—W. O. W. Life Ins. Soc. v. Dickson, Civ.App., 133 S.W.2d 243, error dismissed, judgment correct—Lower Rio Grande Valley Mid-Winter Fair Ass'n v. Nunstedt, Civ.App., 132 S.W.2d 601—Federal Underwriters Exchange v. Bobbitt, Civ.App., 125 S.W.2d 1084—Texas & P. Ry. Co. v. Heathington, Civ.App., 115 S.W.2d 495—Groves v. National Loan & Investment Co. of Detroit, Mich., Civ.App., 102 S.W.2d 508—McFaddin v. Hebert, Civ.App., 100 S.W.2d 140, reversed on other grounds Hebert v. McFaddin, 104 S.W.2d 475, 129 Tex. 499, rehearing denied 105 S.W.2d 650, 129 Tex. 499—Dusdemon Gasoline Co. of Texas v. Garrett, Civ.App., 90 S.W.2d 636, error dismissed—Home Benev. Soc. v. Reed, Civ.App., 81 S.W.2d 153.

64 C.J. p 1150 note 79.

#### Sufficiency of general charge

(1) Right of litigant to have jury properly instructed on burden of proof is valuable, and is not sufficiently protected by general charge that questions propounded to jury must be answered on preponderance of evidence.—Maryland Cas. Co. v. Howie, Tex.Civ.App., 94 S.W.2d 220, error dismissed.

(2) It has been held, however, that failure to embody instruction on preponderance of evidence in special issues was not error, where general instructions relating to preponderance of evidence sufficiently protected appellant's rights.—Dennison v. Gilmore, Tex.Civ.App., 71 S.W.2d 542, error dismissed.

#### Form

(1) It has been said that the proper method of submitting a question to the jury is to include the element of burden of proof, by asking, "Do you find from the preponderance of the evidence that," etc., so framing the question on each issue of fact as to place the burden of proof where it properly belongs.—City of Waco v. Diamond, Tex.Com.App., 65 S.W.2d 272—Traders & General Ins. Co. v. Jenkins, Tex.Civ.App., 144 S.W.2d 350—Texas Steel Co. v. Rockholt, Tex.Civ.App., 142 S.W.2d 842, error refused—Traders & General Ins. Co. v. Lockwood, Tex.Civ.App., 138 S.W.2d 589, error dismissed, judgment correct—Federal Underwriters Exchange v. Bickham, Tex.Civ.App., 136 S.W.2d 880, affirmed 157 S.W.2d 356, 138 Tex. 123—Texas Fire & Cas. Underwriters

put the burden of proof on the party on whom it rightly rests,<sup>15</sup> and a special issue is improper where it places the burden of proof on the wrong party<sup>16</sup> or imposes too great a burden of proof.<sup>17</sup> However, a special issue which properly and sufficiently places the burden of proof will not be held er-

v. Blair, Civ.App., 130 S.W.2d 409, error dismissed, judgment correct—Travelers Ins. Co. v. Noble, Tex.Civ.App., 129 S.W.2d 778, error dismissed, judgment correct—Texas Employers Ins. Ass'n v. Hitt, Tex.Civ.App., 125 S.W.2d 323—General Life Ins. Co. v. Potter, Tex.Civ.App., 124 S.W.2d 409—Owl Taxi Service v. Saludis, Tex.Civ.App., 122 S.W.2d 225, error dismissed—Texas Employers' Ins. Ass'n v. Hilderbrandt, Tex.Civ.App., 80 S.W.2d 1031, reversed (no opinion)—Hancock v. Teague, Tex.Civ.App., 77 S.W.2d 772.  
64 C.J. p 1150 note 79 [a].

(2) Special issue directing jury to answer issues "Yes" or "No" as they found facts to be did not destroy instruction to find fact from preponderance of evidence.—Fidelity & Casualty Co. of New York v. Branton, Tex. Civ.App., 70 S.W.2d 780, error dismissed.

15. Tex.—Traders & General Ins. Co. v. Jenkins, 141 S.W.2d 312, 135 Tex. 232—Texas & N. O. R. Co. v. Crow, 123 S.W.2d 649, 132 Tex. 466—Hutchens v. State, Com.App., 63 S.W.2d 1011, motion granted 74 S.W.2d 976—Hawkins v. Collier, Civ.App., 235 S.W.2d 628—Hodges v. Alford, Civ.App., 194 S.W.2d 293—Fort Worth & Denver City Ry. Co. v. Burton, Civ.App., 158 S.W.2d 601, error dismissed—United Employers Casualty Co. v. Thornton, Civ.App., 151 S.W.2d 920, error refused—Edmonson v. Carroll, Civ.App., 134 S.W.2d 378, error dismissed, judgment correct—Republic Underwriters v. Meyer, Civ.App., 127 S.W.2d 538, reversed on other grounds Shoemaker v. Meyer, 152 S.W.2d 741, 137 Tex. 97—Traders & General Ins. Co. v. Marrable, Civ.App., 126 S.W.2d 746—Marosis v. Nira, Civ.App., 125 S.W.2d 404, error dismissed, judgment correct—St. Louis Southwestern Ry. Co. of Texas v. Lawrence, Civ.App., 120 S.W.2d 906, error refused—Gulf States Utilities Co. v. Dillon, Civ.App., 112 S.W.2d 752—City of Winters v. Bethune, Civ.App., 111 S.W.2d 797—Forrest v. Faust, Civ.App., 110 S.W.2d 147, error dismissed—Jones-O'Brien, Inc., v. Lloyd, Civ.App., 106 S.W.2d 1069, error dismissed—Terrell Wells Health Resort v. Severeid, Civ.App., 95 S.W.2d 526—Miller v. Hooper, Civ.App., 94 S.W.2d 230—Maryland Cas. Co. v. Howie, Civ.App., 94 S.W.2d 220, error dismissed—Southern Life & Health Ins. Co. v. Ramirez, Civ.App., 93 S.W.2d 234—Baker v. Campbell, Civ.App., 81 S.W.2d 728, error dismissed—Gulf States Utilities Co. v. Moore, Civ.App., 73 S.W.

2d 941, reversed on other grounds 106 S.W.2d 256, 129 Tex. 604.  
64 C.J. p 1149 note 74 [a].

#### Party pleading the affirmative

Court should so frame issues as definitely to place the burden of proof on party pleading the affirmative of the question included in issue.—Fidelity & Cas. Co. of New York v. Van Arsdale, Tex.Civ.App., 108 S.W.2d 550, error dismissed.

16. Tex.—Hicks v. Brown, 151 S.W.2d 790, 136 Tex. 339—Thurman v. Chandler, 81 S.W.2d 489, 125 Tex. 34—Mitchell v. Mills, Civ.App., 264 S.W.2d 749, error refused no reversible error—Gulf Oil Corp. v. Vestal, Civ.App., 231 S.W.2d 523, affirmed Vestal v. Gulf Oil Corp., 235 S.W.2d 440, 149 Tex. 487—Dallas Ry. & Terminal Co. v. Tucker, Civ.App., 207 S.W.2d 937—English Freight Co. v. Preston, Civ.App., 203 S.W.2d 657, refused no reversible error—Texas Employers' Ins. Ass'n v. Neely, Civ.App., 189 S.W.2d 628—Dodd v. Burkett, Civ.App., 160 S.W.2d 1016, error refused—Traders & General Ins. Co. v. Richardson, Civ.App., 144 S.W.2d 420, error dismissed, judgment correct—Southern Underwriters v. Stone, Civ.App., 144 S.W.2d 339—St. Louis Southwestern Ry. Co. of Texas v. Jones, Civ.App., 138 S.W.2d 577—Whelan v. Henderson, Civ.App., 137 S.W.2d 150, error dismissed, judgment correct—Federal Underwriters Exchange v. Arnold, Civ.App., 127 S.W.2d 972, error dismissed, judgment correct—White v. Akers, Civ.App., 125 S.W.2d 388—Aetna Cas. & Sur. Co. v. Tobolowsky, Civ.App., 120 S.W.2d 460, error dismissed—Universal Life & Accident Ins. Co. v. Johnson, Civ.App., 120 S.W.2d 314, error dismissed—Traders & General Ins. Co. v. Garry, Civ.App., 118 S.W.2d 340, affirmed 143 S.W.2d 370, 135 Tex. 290—S. Blickekan, Inc., v. Chilton, Civ.App., 114 S.W.2d 646—McClelland v. Mounger, Civ.App., 107 S.W.2d 901, error dismissed by agreement—Jones-O'Brien, Inc., v. Lloyd, Civ.App., 106 S.W.2d 1069, error dismissed—Washington Nat. Ins. Co. v. Chavez, Civ.App., 106 S.W.2d 761, error dismissed—Texas & P. Ry. Co. v. Gillette, Civ.App., 100 S.W.2d 170, error dismissed—Travelers Ins. Co. v. Giacomino, Civ.App., 99 S.W.2d 632—Texas Employers Ins. Ass'n v. Allen, Civ.App., 93 S.W.2d 431—Travelers Ins. Co. v. Maldonado, Civ.App., 89 S.W.2d 300—Traders & General Ins. Co. v. Copeland, Civ.App., 84 S.W.2d 813—Consolidated Underwriters v. Strahand,

Civ.App., 82 S.W.2d 1058, error dismissed—Texas Employers' Ins. Ass'n v. Van Pelt, Civ.App., 68 S.W.2d 514—Texas Employers' Ins. Ass'n v. White, Civ.App., 68 S.W.2d 511, error dismissed—Liberty Mut. Ins. Co. v. Borks, Civ.App., 66 S.W.2d 787, error dismissed—City of Dallas v. Firestone Tire & Rubber Co., Civ.App., 66 S.W.2d 729, error refused—Eastern Texas Electric Co. v. Petrasek, Civ.App., 62 S.W.2d 626.

#### Negative answer

If direction to jury to answer issues "yes" or "no" had effect of informing jury that a negative answer to issues could not be made unless negative was shown by preponderance of the evidence, direction constituted error.—Southern Pine Lumber Co. v. King, 161 S.W.2d 483, 138 Tex. 473—Stevenson v. Wilson, Tex.Civ.App., 130 S.W.2d 317, error refused.

#### Affirmative defenses

Under statute placing on compensation claimant the burden of proof to establish the negative of all affirmative defenses raised by pleadings and evidence, the submission of special issues requiring jury to determine from a preponderance of the evidence whether or not defendant had established its affirmative defenses that claimant was at time of injury in the employ of both the company insured by defendant and another company jointly, and that claimant's incapacity was due to a disease rather than injury, was erroneous, as it placed the burden of proof on defendant.—Southern Underwriters v. Waddell, Tex.Civ.App., 144 S.W.2d 637.

17. Tex.—Korkmas v. Turner, Civ. App., 251 S.W.2d 425—Gillette Motor Transport Co. v. Whitfield, Civ. App., 186 S.W.2d 90, refused for want of merit.

#### Beyond preponderance

Issues of fact are resolved from a preponderance of the evidence and special issues requiring a higher degree of proof may not be submitted to a jury.—Sanders v. Harder, 227 S.W.2d 206, 148 Tex. 593—Andrews v. Dewberry, Tex.Civ.App., 242 S.W.2d 685, error refused no reversible error.

#### Issue held not erroneous as imposing excessive burden of proof

Tex.—Gooch v. Davidson, Civ.App., 245 S.W.2d 989—Elmore v. Peavy, Civ.App., 143 S.W.2d 983—Federal Underwriters Exchange v. McDaniel, Civ.App., 140 S.W.2d 979, error dismissed, judgment correct.

roneous in this respect,<sup>18</sup> as in cases involving claims for workmen's compensation.<sup>19</sup>

*Form of inquiry.* It has been held proper to sub-

mit an interrogatory or issue in the form of a question whether the jurors find and believe a particular matter;<sup>20</sup> but, according to the authorities on the

18. *Tex.—Snyder v. Johnson*, Civ. App., 256 S.W.2d 898, error refused no reversible error—*Cree v. Miller*, Civ. App., 255 S.W.2d 565, refused no reversible error—*S. H. Kress & Co. v. Selph*, Civ. App., 250 S.W.2d 883, refused no reversible error—*Andrews v. Daniel*, Civ. App., 240 S.W.2d 1018, error dismissed—*Hughes v. Belman*, Civ. App., 239 S.W.2d 717, refused no reversible error—*Vineyard v. Harvey*, Civ. App., 231 S.W.2d 921, error dismissed—*Pullen v. Russ*, Civ. App., 226 S.W.2d 876, refused no reversible error—*Goree v. Hansen*, Civ. App., 214 S.W.2d 824—*J. H. Robinson Truck Lines v. Ragan*, Civ. App., 204 S.W.2d 662—*City of Coleman v. Kenley*, Civ. App., 168 S.W.2d 926—*Heldenfels v. Montgomery*, Civ. App., 157 S.W.2d 998, error dismissed—*Dallas Railway & Terminal Co. v. Bishop*, Civ. App., 153 S.W.2d 298—*Arendell v. Wells*, Civ. App., 149 S.W.2d 307, error dismissed, judgment correct—*United Employers Cas. Co. v. Bezdek*, Civ. App., 146 S.W.2d 473, error dismissed—*Hyde v. English*, Civ. App., 139 S.W.2d 628, error granted—*Southern Underwriters v. Jones*, Civ. App., 137 S.W.2d 52, error dismissed, judgment correct—*Allen v. Creighton*, Civ. App., 131 S.W.2d 47, error refused—*Elichtitz v. Allen*, Civ. App., 131 S.W.2d 43, error dismissed, judgment correct—*Jackson v. Edmondson*, Civ. App., 129 S.W.2d 369, reversed on other grounds 151 S.W.2d 794, 136 Tex. 406—*Thompson v. Schietze*, Civ. App., 126 S.W.2d 1044—*Wachholder v. Kitchens*, Civ. App., 126 S.W.2d 519—*Sherwin-Williams Co. of Texas v. Delahoussaye*, Civ. App., 124 S.W.2d 870, error dismissed—*Sproules Motor Freight Lines v. Juge*, Civ. App., 123 S.W.2d 919, error dismissed, judgment correct—*Willis v. Smith*, Civ. App., 120 S.W.2d 899, error dismissed—*Beard v. Beard*, Civ. App., 113 S.W.2d 678, error dismissed—*Southern Underwriters v. Sanders*, Civ. App., 110 S.W.2d 1258, error dismissed—*Fidelity & Cas. Co. of New York v. McLaughlin*, Civ. App., 106 S.W.2d 815, affirmed 135 S.W.2d 955, 134 Tex. 613—*Southern Alkali Corp. v. Disbukes*, Civ. App., 104 S.W.2d 185, error dismissed—*Hale v. Herring*, Civ. App., 102 S.W.2d 468—*Lamb v. Collins*, Civ. App., 93 S.W.2d 490—*Porter v. Robinson*, Civ. App., 93 S.W.2d 477—*Connecticut General Life Ins. Co. v. Banderbee*, Civ. App., 82 S.W.2d 764—*City of Wichita Falls v. Crummer*, Civ. App., 71 S.W.2d 583, error dismissed—*Fidelity & Casualty Co. of New York v. Bran-*

*ton*, Civ. App., 70 S.W.2d 780, error dismissed—*Texas Employers' Ins. Ass'n v. Moyers*, Civ. App., 69 S.W.2d 777, error dismissed—*E. A. Pierce & Co. v. Aronoff*, Civ. App., 60 S.W.2d 796, error dismissed.

19. *Tex.—Southern Underwriters v. Boswell*, 158 S.W.2d 280, 138 Tex. 255—*Texas Emp. Ins. Ass'n v. Henthorn*, Civ. App., 240 S.W.2d 392—*Texas Indem. Ins. Co. v. Pool*, Civ. App., 207 S.W.2d 1004, refused no reversible error—*Texas Emp. Ins. Ass'n v. Mallard*, Civ. App., 192 S.W.2d 302, error refused no reversible error—*Iacific Indem. Co. v. Blesatt*, Civ. App., 191 S.W.2d 904, error refused no reversible error—*Texas Employers' Ins. Ass'n v. Drayton*, Civ. App., 173 S.W.2d 782, error refused—*Commercial Standard Ins. Co. v. Brock*, Civ. App., 167 S.W.2d 281—*Postal Mut. Indemnity Co. v. Ellis*, Civ. App., 161 S.W.2d 1114—*Traders & General Ins. Co. v. Belcher*, Civ. App., 152 S.W.2d 525—*Federal Underwriters Exchange v. Stricklin*, Civ. App., 151 S.W.2d 612, error dismissed, judgment correct—*Imperial Underwriters v. Dillard*, Civ. App., 146 S.W.2d 1105, error refused—*Southern Underwriters v. Grimes*, Civ. App., 146 S.W.2d 1058, error dismissed, judgment correct—*Federal Underwriters Exchange v. Skinner*, Civ. App., 146 S.W.2d 325, error dismissed, judgment correct—*Traders & General Ins. Co. v. Maxwell*, Civ. App., 142 S.W.2d 685, error dismissed, judgment correct—*Southern Underwriters v. Weldon*, Civ. App., 142 S.W.2d 574—*Southern Underwriters v. Boswell*, Civ. App., 141 S.W.2d 442, affirmed 158 S.W.2d 280, 138 Tex. 255—*Federal Underwriters Exchange v. McDaniel*, Civ. App., 140 S.W.2d 979, error dismissed, judgment correct—*United Employers' Casualty Co. v. Burk*, Civ. App., 140 S.W.2d 571, error dismissed—*Southern Underwriters v. Cooper*, Civ. App., 138 S.W.2d 563, error dismissed, judgment correct—*Southern Underwriters v. Erwin*, Civ. App., 134 S.W.2d 720, error granted—*Traders & General Ins. Co. v. Stakes*, Civ. App., 131 S.W.2d 270, error refused—*Travelers Ins. Co. v. Johnson*, Civ. App., 131 S.W.2d 242, error dismissed, judgment correct—*Traders & General Ins. Co. v. Jaques*, Civ. App., 131 S.W.2d 133, error dismissed, judgment correct—*Federal Underwriters Exchange v. Carroll*, Civ. App., 130 S.W.2d 1101—*Texas Fire & Casualty Underwriters v. Blair*, Civ. App., 130 S.W.2d 409, error dismissed, judgment correct—*National*

*Indemnity Underwriters of America v. Blevins*, Civ. App., 129 S.W.2d 734—*Traders & General Ins. Co. v. Ray*, Civ. App., 128 S.W.2d 80, error dismissed, judgment correct—*Traders & General Ins. Co. v. Linceum*, Civ. App., 126 S.W.2d 692, error dismissed—*Traders & General Ins. Co. v. Porter*, Civ. App., 124 S.W.2d 900, error refused—*Traders & General Ins. Co. v. Garry*, Civ. App., 118 S.W.2d 340, affirmed 143 S.W.2d 370, 135 Tex. 290—*Texas Employers' Ins. Ass'n v. Clack*, Civ. App., 112 S.W.2d 526, affirmed 132 S.W.2d 399, 134 Tex. 151—*Traders & General Ins. Co. v. Slusser*, Civ. App., 110 S.W.2d 598, error dismissed—*National Indemnity Underwriters of America v. Cherry*, Civ. App., 110 S.W.2d 115—*Traders & General Ins. Co. v. Offield*, Civ. App., 105 S.W.2d 359, error dismissed—*Fidelity & Casualty Co. of New York v. Branton*, Civ. App., 70 S.W.2d 780, error refused.

#### Particular forms of submission held not erroneous

(1) Issues propounding questions to be answered from preponderance of evidence were not erroneous because concluding with statement that, "You will answer 'yes' or 'no,' as you find the facts to be."—*Traders & General Ins. Co. v. Huntsman*, Tex. Civ. App., 125 S.W.2d 431, error dismissed, judgment correct—*Willis v. Smith*, Tex. Civ. App., 120 S.W.2d 899, error dismissed—*Traders & General Ins. Co. v. Burns*, Tex. Civ. App., 118 S.W.2d 391.

(2) In the submission of special issues commencing "Do you find from a preponderance of the evidence," instructing jury to answer "he did not" or "he did," rather than "yes" or "no," in order to avoid confusion present when burden of proof rests on the one asserting a negative, was not erroneous as shifting burden of proof.—*McDaniel v. Willis*, Tex. Civ. App., 157 S.W.2d 672, error refused.

(3) Special issue in compensation proceeding whether injury, if any, that claimant received was caused by claimant's willful intention and attempt unlawfully to injure a fellow employee, was not erroneous on ground that it imposed burden of proof on insurance carrier and employer, where concluding line of issue provided that a negative answer to issue required a preponderance of the evidence.—*Associated Emp. Lloyds v. Groce*, Tex. Civ. App., 194 S.W.2d 103, refused no reversible error.

20. *Tex.—Texas Employers' Ins. Ass'n v. Sloan*, Civ. App., 36 S.W.2d 319.

proposition, such form is not exclusive,<sup>21</sup> and a question is not improper because asking whether the jurors believe, instead of whether they find, the matter.<sup>22</sup> It is improper to state an issue in the form of a direction to the jury to find whether a certain fact existed, rather than to ask them whether they so find.<sup>23</sup>

*Use of technical or comprehensive terms.* It is better practice to submit the specific issues of fact involved in a particular right or defense than to use a technical or comprehensive term,<sup>24</sup> although the latter is not necessarily improper.<sup>25</sup> The definition of a term used in a special issue should be as complete as the fact issues require.<sup>26</sup>

*Reference to pleadings.* A question should be complete in itself, without necessitating reference to the pleadings;<sup>27</sup> but an interrogatory is not objectionable because referring to "the defendants" instead of mentioning them by name.<sup>28</sup> In other words, the better practice is to frame the issues

to avoid reference to the pleadings,<sup>29</sup> but not every reference to the pleadings is erroneous.<sup>30</sup>

*Mistakes and irregularities.* A mere clerical error in a special issue as submitted does not vitiate it where the meaning is plain;<sup>31</sup> and the inclusion in a question of mere surplusage,<sup>32</sup> or the use of a plural instead of a singular word,<sup>33</sup> is not objectionable where the jury cannot be misled thereby; nor is the use of two terms, alternatively or disjunctively, for the same concept objectionable where there is no controversy as to the matter referred to.<sup>34</sup> An irregularity or mistake is fatal, however, where the substance or effect of the question is thereby changed.<sup>35</sup>

#### b. Affirmative or Negative Form

Interrogatories or special issues should be submitted to the jury in the affirmative, if possible, but in some circumstances they will not be held defective or confusing because submitted in a negative manner.

Interrogatories or special issues should be submitted to the jury in the affirmative, if possible,<sup>36</sup>

21. Tex.—Texas Employers' Ins. Ass'n v. Sloan, *supra*.

22. Tex.—Ineeda Laundry v. Newton, Civ.App., 33 S.W.2d 208.

23. Tex.—Morgan v. Maunders, Civ. App., 37 S.W.2d 791.

24. Wis.—Jensen v. Wisconsin Cent. Ry. Co., 128 N.W. 982, 145 Wis. 326.

64 C.J. p 1151 note 92.

25. Tex.—Blair & Hughes v. A. I. Root Co. of Texas, Civ.App., 22 S.W.2d 502.

64 C.J. p 1151 note 93.

26. Tex.—Pacific Indem. Co. v. Arline, Civ.App., 213 S.W.2d 691, error granted.

#### Term defined in another issue

In compensation suit, failure to define term "substantially the whole of the year" in submitting special issue relating to claim under provision of compensation act for determination of amount of compensation from average wage if employee has been employed in same employment for one year was not error, where term was correctly defined in submitting another special issue.—Southern Underwriters v. Garlepy, Tex.Civ.App., 105 S.W.2d 760, error dismissed.

#### "Malice"

Interrogatories which asked the jury to say whether malice was the gist of the action without explaining to the jury what the language of the interrogatories meant were objectionable.—Racine Fuel Co. v. Rawlins, 36 N.E.2d 710, 377 Ill. 375.

#### "Temporary"

In compensation proceeding, special issue on whether workman's total in-

capacity was temporary only was not erroneous for failure to define "temporary."—Traders & General Ins. Co. v. Turner, Tex.Civ.App., 149 S.W.2d 593.

27. Tex.—Southern Pine Lumber Co. v. Whiteman, Civ.App., 104 S.W.2d 635, error dismissed.

64 C.J. p 1152 note 94.

#### Injury

In compensation suit, words "as alleged in his petition" should properly have been eliminated from special issue inquiring whether employee sustained "an accidental personal injury or injuries as alleged in his petition."—Texas Emp. Ins. Ass'n v. Harkey, Civ.App., 208 S.W.2d 915, affirmed 208 S.W.2d 919, 146 Tex. 504.

28. Tex.—Frick-Reid Supply Corporation v. Meers, Civ.App., 52 S.W.2d 115.

29. Tex.—Texas Employers' Ins. Ass'n v. Ebers, Civ.App., 134 S.W.2d 797, error dismissed, judgment correct.—Traders & General Ins. Co. v. Watson, Civ.App., 131 S.W.2d 1103, error dismissed, judgment correct.—Traders & General Ins. Co. v. Weatherford, Civ.App., 124 S.W.2d 423, error dismissed, judgment correct.—Pearson v. Black, Civ. App., 120 S.W.2d 1075.—Traders & General Ins. Co. v. Garry, Civ.App., 118 S.W.2d 340, affirmed 143 S.W.2d 370, 135 Tex. 290.—Texas Employers' Ins. Ass'n v. Burnett, Civ.App., 72 S.W.2d 952, error dismissed.

30. Tex.—Traders & General Ins. Co. v. Garry, Civ.App., 118 S.W.2d 340, affirmed 143 S.W.2d 370, 135 Tex. 290.—Southern Underwriters v. Sanders, Civ.App., 110 S.W.2d 1258, er-

ror dismissed.—Texas Employers' Ins. Ass'n v. Burnett, Civ.App., 72 S.W.2d 952, error dismissed.

31. Ga.—Douglas v. McCurdy, 115 S.E. 658, 154 Ga. 814.

Tex.—Ft. Worth & D. C. Ry. Co. v. Anderson, Civ.App., 194 S.W. 847.

32. Tex.—Gaither v. Gaither, Civ. App., 14 S.W.2d 285, modified on other grounds, Com.App., 25 S.W.2d 299.—Atchison, T. & S. F. Ry. Co. v. Francis, Civ.App., 227 S.W. 342, affirmed 253 S.W. 819, 113 Tex. 202, 30 A.L.R. 114.

33. N.Y.—Huscher v. New York & Queens Electric Light & Power Co., 139 N.Y.S. 537, affirmed 143 N.Y.S. 639, 158 App.Div. 422.

Tex.—Texas Employers' Ins. Ass'n v. Russell, Civ.App., 16 S.W.2d 321.

34. Tex.—Horton v. Benson, Civ. App., 266 S.W. 213, affirmed, Com. App., 277 S.W. 1050.

Wis.—Bell v. Milwaukee Electric Ry. & Light Co., 172 N.W. 791, 169 Wis. 408.

35. Wis.—Brown v. Milwaukee Electric Ry. & Light Co., 133 N.W. 589, 148 Wis. 98.

64 C.J. p 1152 note 1.

Where issue was improperly framed court had no right to assume that a properly framed issue would also have been answered in the same way.—Texas & N. O. R. Co. v. Krasoff, Civ.App., 186 S.W.2d 289, reversed on other grounds 191 S.W.2d 1, 144 Tex. 436.

36. Tex.—Denbow v. Standard Acc. Ins. Co., 186 S.W.2d 236, 143 Tex. 455.—Federal Underwriters Exchange v. Hightower, Civ.App., 142 S.W.2d 963, error dismissed, judg-



and ordinarily negative questions should not be submitted.<sup>37</sup> In some circumstances, however, a special issue will not be held defective or confusing because submitted in a negative manner.<sup>38</sup> Where the case permits defendant to prove an affirmative defense under a general denial and the testimony raises such affirmative defense, defendant is entitled to an affirmative submission of the defense;<sup>39</sup> but

if the evidence offered tends only to negative the cause of action presented, the issue on which such action depends should be submitted affirmatively,<sup>40</sup> although the negation of such issue should not be affirmatively submitted.<sup>41</sup> Good practice requires the elimination of a double negative in the submission of an issue to the jury,<sup>42</sup> but the submission of an issue in a form containing a double negative

ment correct.—Southern Underwriters v. Stubbiefield, Civ.App., 198 S.W.2d 557.

#### Discretion

In suit by claimant to set aside compensation award in favor of insurance carrier, where trial judge is confronted with question of whether issue of partial incapacity should be submitted in affirmative or negative form, he should in his discretion employ the form of issue the answer to which can be made the basis of a judgment and at the same time serve the diverse purposes of both parties, and his discretion is controlling if neither party suffers denial of substantial right.—Wright v. Traders & General Ins. Co., 123 S.W.2d 314, 132 Tex. 172.

#### Interrogatories held not erroneous

(1) In general.—Southern Underwriters v. Mowery, Tex.Civ.App., 147 S.W.2d 834, error dismissed, judgment correct.—Geistmann v. Schkade, Tex.Civ.App., 121 S.W.2d 494.—Traders & General Ins. Co. v. Snow, Tex.Civ.App., 114 S.W.2d 682, error dismissed.

(2) In action for injuries sustained in an automobile collision, special issue whether automobile in which plaintiff was riding was on the "wrong" side of the road at the time of the collision was not objectionable on the ground that it was submitted in the negative rather than in the positive form, since plaintiff had burden of showing what was the sole proximate cause of his injuries and jury found it was exclusively due to the act of the driver of his automobile in driving on the left side of the road.—Parker v. Jakovich, Tex.Civ.App., 115 S.W.2d 790, error dismissed.

37. Kan.—Mid-Continent Tire Mfg. Co. v. Motor Equipment Co., 298 P. 659, 111 Kan. 719.

Tex.—McWhorter v. Scales & Duval, Civ.App., 297 S.W. 894.

#### Defense

In action against employer for injuries sustained in automobile collision, issue submitting employer's defense in form whether employee, during his journey, did not form and act on any intention to set aside employer's business and go on some other mission not related to his employment fairly submitted employer's defense to jury, although negatively, since submission in affirmative language would have wrongfully placed

burden of proof on employer.—Ford Motor Co. v. Whitt, Tex.Civ.App., 81 S.W.2d 1032, error refused.

#### Incapacity

(1) Where trial court submitted every element of total, permanent incapacity of employee, insurer's requested issue of whether employee's incapacity was temporary was properly refused as a negative submission of issue of employee's permanent incapacity.—Federal Underwriters Exchange v. Read, Tex.Civ.App., 142 S.W.2d 440, error granted.

(2) In suit by claimant to set aside compensation award in favor of insurance carrier, where evidence raised issues of both total and partial incapacity, court was not required to submit issue of partial incapacity negatively as well as affirmatively.—Wright v. Traders & General Ins. Co., 123 S.W.2d 314, 132 Tex. 172.

38. Tex.—Driver v. Worth Const. Co., Civ.App., 284 S.W.2d 174, error granted.—Hale v. Herring, Civ.App., 102 S.W.2d 468.

#### Unavoidable accident

(1) Where plaintiff in action for injuries or death has burden of proving that injury was not the result of an unavoidable accident, jury should be instructed that in the event their finding is in the affirmative the form of the answer should be, "It was not an unavoidable accident," and, otherwise, the answer should be "No."—Gulf, C. & S. F. Ry. Co. v. Guin, 116 S.W.2d 693, 131 Tex. 548, 116 A.L.R. 795.—Marosis v. Nira, Tex.Civ.App., 125 S.W.2d 404, error dismissed, judgment correct.

(2) Where special issue is whether injuries were "not" result of unavoidable accident, better practice is to instruct jury to answer that it was, or was not, unavoidable accident rather than "yes" or "no."—Three States Telephone Co. v. Kirkwood, Tex.Civ.App., 61 S.W.2d 588.

(3) Submission of special issue in form "Do you find from a preponderance of the evidence, if any, that the death of" employee "was not the result of an unavoidable accident as to the defendant" employer? "Answer 'It was the result of an unavoidable accident' or 'It was not the result of an unavoidable accident'" was not erroneous.—Missouri-Kansas-Texas R. Co. of Texas v. McKinney, Civ.App., 126 S.W.2d 789, af-

firmed Missouri. K. & T. R. Co. of Texas v. McKinney, 145 S.W.2d 1081, 186 Tex. 75.

(4) However special issue whether automobile collision was not an unavoidable accident, to be answered it was not an unavoidable accident or it was an avoidable accident, constituted reversible error as restricting jury to an affirmative answer.—Page v. Rogers, Tex.Civ.App., 142 S.W.2d 716.

#### Work during year

In action to recover compensation for employee's death, trial court did not err in submitting to jury, at plaintiffs' request, issue in negative form as to whether they found that deceased did not work substantially whole of year immediately preceding date of his death in same employment as on such date.—Traders & General Ins. Co. v. Yarbrough, Tex.Civ.App., 181 S.W.2d 305.

#### Preponderance of evidence

Submission of negative issues followed by request to answer "It was" or "It was not" was not erroneous as negating the right of a complaining party to have the question answered from a preponderance of the evidence.—Texas Employers Ins. Ass'n v. Watkins, Tex.Civ.App., 135 S.W.2d 296.

39. Tex.—Texas Employers Ins. Ass'n v. Ebers, Civ.App., 134 S.W.2d 797, error dismissed, judgment correct.—Traders & General Ins. Co. v. Ofield, Civ.App., 105 S.W.2d 359, error dismissed.

40. Tex.—Texas Employers Ins. Ass'n v. Ebers, Civ.App., 134 S.W.2d 797, error dismissed, judgment correct.—Traders & General Ins. Co. v. Ofield, Civ.App., 105 S.W.2d 359, error dismissed.—Texas Indemnity Ins. Co. v. Perdue, Civ.App., 64 S.W.2d 386, error refused.

41. Tex.—Texas Employers Ins. Ass'n v. Ebers, Civ.App., 134 S.W.2d 797, error dismissed, judgment correct.—Traders & General Ins. Co. v. Ofield, Civ.App., 105 S.W.2d 359, error dismissed.—Texas Indemnity Ins. Co. v. Perdue, Civ.App., 64 S.W.2d 386, error refused.

42. Tex.—Southland Life Ins. Co. v. Barrett, Civ.App., 172 S.W.2d 997, error refused.

Purpose of special issue as to whether automobile guest was guilty

and requiring a single affirmative word to indicate a negative answer has been held not erroneous as confusing the jury where the question only required careful consideration and not expert knowledge or more than average intelligence.<sup>43</sup>

### c. Conditional Submission

The trial court may, in a proper case, conditionally submit interrogatories or special issues, that is, it may submit an issue to be answered only in the event that a preceding issue is answered in a certain manner.

The trial court may, in a proper case, conditionally submit interrogatories or special issues, that is, it may submit an issue to be answered only in the

event that a preceding issue is answered in a certain manner.<sup>44</sup> In other words where one or more issues are completely determinative of the kind of judgment to be rendered, the court may direct the jury to answer other issues only if they find such completely determinative issues in a certain way.<sup>45</sup> Generally, a conditional submission is proper where it presents a component part of plaintiff's cause of action, or a component part of a defense under a general denial, or a component part of an affirmative defense.<sup>46</sup> In some circumstances, however, a special issue may or must be submitted unconditional<sup>47</sup> and a conditional submission is erroneous where

of contributory negligence in failing to warn driver not to operate automobile so as not to lose control was destroyed by use of "not" second time.—*McWilliams v. Halley*, Tex.Civ.App., 95 S.W.2d 985, error dismissed.

43. *Tex.—Gulf, C. & S. F. Ry. Co. v. Glun*, 116 S.W.2d 693, 131 Tex. 548, 116 A.L.R. 795.

44. *Tex.—Westinghouse Elec. Corp. v. Pierce*, 271 S.W.2d 422—*Hopson v. Gulf Oil Corp.*, 237 S.W.2d 362, 150 Tex. 1—*Pharr v. Coldeaway*, Civ.App., 256 S.W.2d 917—*Texas Emp. Ins. Ass'n v. Christian*, Civ.App., 239 S.W.2d 900, error refused—*Southwestern Greyhound Lines v. Dickson*, Civ.App., 219 S.W.2d 592—*Texas Emp. Ins. Ass'n v. Tate*, Civ.App., 214 S.W.2d 877—*Texas & P. Ry. Co. v. Mix*, Civ.App., 193 S.W.2d 642—*Dakan v. Humphreys*, Civ.App., 190 S.W.2d 371—*Maryland Cas. Co. v. Hears*, Civ.App., 188 S.W.2d 262, affirmed 190 S.W.2d 62, 144 Tex. 317—*Traders & General Ins. Co. v. Little*, Civ.App., 188 S.W.2d 786, refused for want of merit—*McClellan v. Krebs*, Civ.App., 183 S.W.2d 758, error refused—*Federal Underwriters Exchange v. Hightower*, Civ.App., 142 S.W.2d 963, error dismissed, judgment correct—*Bowen Motor Coaches v. Young*, Civ.App., 138 S.W.2d 145—*International-Great Northern R. Co. v. Acker*, Civ.App., 128 S.W.2d 506, error dismissed, judgment correct—*Ulmer v. City of El Paso*, Civ.App., 115 S.W.2d 1151, error dismissed.

Wis.—*Egan v. Preferred Accident Ins. Co. of New York*, 269 N.W. 657, 223 Wis. 129, 107 A.L.R. 1107.

Propriety of conditional submission as informing jury of effect of their answers see *supra* subdivision a of this section.

### Practice commanded

The submission of issues the answers to which are conditioned on how others are answered is commanded, since such procedure is conducive to a speedy determination of the rights of litigants.—*Kadane v.*

*Clark*, Civ.App., 134 S.W.2d 448, reversed on other grounds 143 S.W.2d 197, 135 Tex. 496.

**Form of submitting special issues.** "If you have answered 'yes' to question No. — and 'yes' to question No. —, only in that event, then do you find \* \* \*," was not improper.—*Roadway Express v. Gaston*, Tex.Civ.App., 91 S.W.2d 883, error dismissed.

### Negligence

(1) Issue of negligence may be conditioned on issue inquiring as to defendant's actual or constructive knowledge of a condition.—*Hopson v. Gulf Oil Corp.*, Civ.App., 237 S.W.2d 323, reversed in part on other grounds 237 S.W.2d 352, 150 Tex. 1.

(2) Where a plaintiff alleges a cause of action based on ordinary negligence and one of defendants or his insurer asserts that another defendant was guilty of gross negligence, question of defendants' negligence should be submitted to jury in the alternative accompanied by proper instructions requiring answer to questions with respect to ordinary negligence only if questions with respect to gross negligence are answered negatively.—*Wedel v. Klein*, 282 N.W. 606, 229 Wis. 419.

(3) In action for injuries sustained by motorman of electric train against railroad, fact that court submitted to jury issue of sole proximate cause of collision conditionally on a negative answer to preceding issues of discovered peril without submitting issue of primary negligence of railroad was not misleading in view of rule authorizing conditional submission of special issues where motorman was negligent as matter of law.—*Hunter v. Texas Elec. Ry. Co.*, Tex.Civ.App., 194 S.W.2d 281, affirmed 68 S.Ct. 203, 332 U.S. 827, 92 L.Ed. 402.

### Lump-sum payment

In workmen's compensation suit, submission of issue of lump-sum payment only on condition that jury answered special issue with respect to total incapacity in affirmative was not improper.—*Texas Indem. Ins. Co.*

*v. Dunn*, Tex.Civ.App., 221 S.W.2d 922—*Federal Underwriters Exchange v. Harwell*, Tex.Civ.App., 157 S.W.2d 460, error refused.

### Submission held conditional

The words "if any" in special issue inquiring what percentage, "if any" of employee's incapacity, "if any" was due to previous injury, imported "condition," and the issue, while not in exact form in which conditional issues are usually submitted, was in effect a conditional submission.—*Highway Ins. Underwriters v. Stephens*, Tex.Civ.App., 208 S.W.2d 677.

### Submission held not conditional

The use of the word "only" in submission of issue whether plaintiff had not sustained, and would not sustain only partial incapacity as result of injury did not make the submission "conditional."—*Traders & General Ins. Co. v. Scogin*, Tex.Civ.App., 146 S.W.2d 1014, error dismissed, judgment correct.

45. *Tex.—Montgomery v. Gay*, Civ.App., 212 S.W.2d 941—*Harris v. Thornton's Department Store*, Civ.App., 94 S.W.2d 849.

46. *Tex.—Southern Underwriters v. Erwin*, Civ.App., 134 S.W.2d 720, error granted.

47. *Tex.—Southwest Stone Co. v. Symons*, Civ.App., 237 S.W.2d 380, error refused no reversible error.

### Amount of recovery

Where the amount of recovery, if any, is submitted, there is no necessity for a conditional submission of the issue, thereby hazarding the danger of apprising the jury of the effect of their answer on a previous question.—*Kadane v. Clark*, Civ.App., 134 S.W.2d 448, reversed on other grounds 143 S.W.2d 197, 135 Tex. 496.

In action on open account for cleaning and cementing oil well, submission to jury of issue whether plaintiff agreed to do work for stipulated amount, not exceeding maximum sum claimed by defendant, if jury answered in negative previous special issue whether defendant

it conditions an entire cause of action, or an entire defense which directly contradicts plaintiff's cause of action, or an entire affirmative defense.<sup>48</sup> Accordingly, the conditional submission of an issue to the jury is not ordinarily proper when it deprives defendant of the right to the affirmative submission of the main defensive issue in rebuttal of plaintiff's claim, a right which cannot be defeated by findings on other issues that indirectly negative a finding in defendant's favor on such defensive issue;<sup>49</sup> but this is not the rule when findings on other issues necessarily negative the defensive issue or where the evidence is insufficient to raise the defensive issue.<sup>50</sup>

agreed to pay plaintiff by the hour, was erroneous as denying jury right to answer affirmative defense raised by conditionally submitted issue, in view of affirmative answer to previous issue.—*Montgomery v. Gay*, Tex. Civ.App., 212 S.W.2d 941.

**In workman's compensation suits**

**Tex.**—Underwriters v. Samanie, 155 S.W.2d 359, 137 Tex. 531—Wright v. Traders & General Ins. Co., 123 S.W.2d 314, 132 Tex. 172—*Texas Indemnity Ins. Co. v. Thibodeaux*, 106 S.W.2d 268, 129 Tex. 656—*Texas Emp. Ins. Ass'n v. Patterson*, Civ. App., 192 S.W.2d 255—*Patterson v. Texas Employers' Ins. Ass'n*, Civ. App., 188 S.W.2d 778—*Traders & General Ins. Co. v. Scogin*, Civ.App., 146 S.W.2d 1014, error dismissed, judgment correct—*Federal Underwriters Exchange v. Hightower*, Civ.App., 142 S.W.2d 963, error dismissed, judgment correct—*Service Mut. Ins. Co. of Texas v. White*, Civ.App., 138 S.W.2d 273, error refused—*Republic Underwriters v. Lewis*, Civ.App., 106 S.W.2d 1113.

**48. Tex.**—*Southern Underwriters v. Erwin*, Civ.App., 134 S.W.2d 720, error granted.

**49. Tex.**—*Montgomery v. Gay*, Civ. App., 212 S.W.2d 941.

**50. Tex.**—*Montgomery v. Gay*, supra.

**51. Tex.**—*Federal Underwriters Exchange v. Lynch*, 168 S.W.2d 653, 140 Tex. 516—*Southern Underwriters v. Samanie*, 155 S.W.2d 359, 137 Tex. 531—*Wright v. Traders & General Ins. Co.*, 123 S.W.2d 314, 132 Tex. 172—*Texas Indemnity Ins. Co. v. Thibodeaux*, 106 S.W.2d 268, 129 Tex. 656—*Traders & General Ins. Co. v. Diebel*, Civ.App., 188 S.W.2d 411, refused for want of merit—*United Employers Casualty Co. v. Thornton*, Civ.App., 151 S.W.2d 920, error refused—*Long v. Safety Casualty Co.*, Civ.App., 128 S.W.2d 92, reversed on other grounds 152 S.W.2d 1102, 137 Tex. 209—*Traders & General Ins. Co. v. Lincecum*, Civ.App., 126 S.W.2d

Ordinarily, in a workman's compensation suit wherein the pleadings and evidence raise the issues of both total and partial incapacity, defendant has the right to the unconditional submission of issues relating to partial incapacity, and the submission of such issues on condition that questions as to total and permanent incapacity be answered in the negative is improper.<sup>51</sup> Likewise, an issue as to the duration of total incapacity should ordinarily be submitted unconditionally.<sup>52</sup> In some circumstances, however, under the pleading and evidence adduced, the conditional submission of particular issues as to total and partial incapacity and duration thereof has been held not erroneous.<sup>53</sup>

**692**—*Texas Employers' Ins. Ass'n v. Cloud*, Civ.App., 120 S.W.2d 903, error dismissed—*Traders & General Ins. Co. v. Wright*, Civ.App., 95 S.W.2d 753, affirmed *Wright v. Traders & General Ins. Co.*, 123 S.W.2d 314, 132 Tex. 172—*Traders & General Ins. Co. v. Hunter*, Civ.App., 95 S.W.2d 158, error dismissed—*Traders & General Ins. Co. v. Wimberly*, Civ.App., 85 S.W.2d 343, error dismissed—*Traders & General Ins. Co. v. Shanks*, Civ.App., 83 S.W.2d 781, error refused.

**Before the rule was settled**, there was some authority to the contrary.—*Liberty Mut. Ins. Co. v. McDaniel*, Tex.Civ.App., 102 S.W.2d 493.

**Secondary issues**

(1) Where court had submitted unconditionally primary issue of whether workman's compensation claimant was totally or partially incapacitated, court did not err in also submitting unconditionally secondary issues concerning partial incapacity, "if any."—*Hartford Accident & Indemnity Co. v. Harris*, Tex.Civ.App., 152 S.W.2d 857, error dismissed.

(2) Where court had submitted unconditionally primary issue concerning whether compensation claimant was partially disabled after total disability ceased, submission of secondary issues concerning whether partial disability, if any, was permanent or temporary, conditioned on answer to previous issue, constituted reversible error in case in which jury found partial disability.—*Southern Underwriters v. Wheeler*, 123 S.W.2d 340, 132 Tex. 350.

**52. Tex.**—*Federal Underwriters Exchange v. Read*, 158 S.W.2d 767, 138 Tex. 271—*Texas Fire & Casualty Underwriters v. Watson*, Civ.App., 126 S.W.2d 496, error refused—*Texas Indemnity Ins. Co. v. Head*, Civ. App., 89 S.W.2d 283, error dismissed—*Traders & General Ins. Co. v. Wimberly*, Civ.App., 85 S.W.2d 343, error dismissed.

**Submission held unconditional**

(1) Special issue whether jury

found from a preponderance of the evidence that total incapacity of compensation claimant was not and would not be only temporary was an "affirmative and unconditional submission" of the issue of total incapacity.—*Traders & General Ins. Co. v. Scogin*, Tex.Civ.App., 146 S.W.2d 1014, error dismissed, judgment correct.

(2) In compensation proceeding, a special issue inquiring for what period of time, if any, of such total incapacity, if any, jury found from a preponderance of evidence was sustained by employee from and after beginning date, if any, and directing that jury answer question with word "permanent" or by stating number of weeks, if any, or with word "none," was not objectionable as a conditional submission of issue.—*Southern Underwriters v. Cooper*, Tex.Civ.App., 138 S.W.2d 563, error dismissed, judgment correct.

**53. Tex.**—*Texas Emp. Ins. Ass'n v. Tate*, Civ.App., 214 S.W.2d 877—*Texas Emp. Ins. Ass'n v. Reid*, Civ. App., 209 S.W.2d 1016—*Texas Employers' Ins. Ass'n v. Cooper*, Civ. App., 194 S.W.2d 819—*Federal Underwriters Exchange v. Morton*, Civ.App., 167 S.W.2d 267—*United Employers Casualty Co. v. Lee*, Civ. App., 146 S.W.2d 320, error granted—*Industrial Indemnity Exchange v. Ratcliff*, Civ.App., 138 S.W.2d 613, error dismissed, judgment correct—*Southern Underwriters v. Erwin*, Civ.App., 134 S.W.2d 720, error granted—*Traders & General Ins. Co. v. Stakes*, Civ.App., 131 S.W.2d 270, error refused—*Federal Underwriters Exchange v. Ener*, Civ.App., 126 S.W.2d 769, error dismissed, judgment correct—*Traders & General Ins. Co. v. Huntsman*, Civ. App., 125 S.W.2d 431, error dismissed, judgment correct—*Zurich General Accident & Liability Ins. Co. v. Moss*, Civ.App., 118 S.W.2d 410, error dismissed—*Republic Underwriters v. Brown*, Civ.App., 117 S.W.2d 157, error dismissed—*Consol-*

## § 542. — By Whom Prepared

Special interrogatories are ordinarily to be prepared by counsel for the party desiring their submission, but the court is not obliged to require interrogatories to be answered in the form prepared by counsel, and may submit questions in language varying from that of the request.

Special interrogatories desired to be submitted to the jury are ordinarily to be prepared by counsel for the party desiring such submission.<sup>54</sup> According to some authority, if a request for a special finding is submitted at all, it should be in the form requested by counsel, where that accords with the evidence,<sup>55</sup> but it has also been held that the court is not obliged to require interrogatories to be answered in the form prepared by counsel,<sup>56</sup> and may submit questions in language varying from that of the request.<sup>57</sup> So a party cannot complain because a particular issue was not submitted to the jury in the form tendered by him.<sup>58</sup> Where re-

quested interrogatories are numerous, and some are not proper to be given, the court after striking the improper questions may direct counsel to rearrange or recopy the others.<sup>59</sup>

## § 543. — Number of Interrogatories

The number of special interrogatories or issues to be submitted to the jury rests largely in the discretion of the court, but such number of questions should be submitted as is necessary to cover each issuable fact.

The number of special interrogatories or issues to be submitted to the jury rests largely in the discretion of the court.<sup>60</sup> The questions submitted should not unnecessarily be so numerous as to confuse the jury,<sup>61</sup> or to consume the time of the jury and court to no proper purpose,<sup>62</sup> or, in the case of special interrogatories, to amount to a cross-examination of the jury on their verdict,<sup>63</sup> and questions should not be multiplied for an ulterior purpose.<sup>64</sup>

Idated Underwriters v. Lee, Civ. App., 107 S.W.2d 482, error dismissed—Texas Employers Ins. Ass'n v. Arnold, Civ.App., 105 S.W.2d 686 —Traders & General Ins. Co. v. Offield, Civ.App., 105 S.W.2d 359, error dismissed—Texas Employers' Ins. Ass'n v. Hilderbrandt, Civ. App., 80 S.W.2d 1031, reversed (no opinion).

**Grounds of recovery**

Where compensation claimant sought to recover only for total permanent disability and insurance carrier answered only by a general denial, trial court did not err in submitting issue of temporary incapacity conditioned on a negative answer to issue pertaining to total and permanent incapacity, since issue conditionally submitted constituted grounds of recovery rather than grounds of defense, and failure of court to submit it at all could be of no concern to insurance carrier.—Federal Underwriters Exchange v. Woods, Tex.Civ.App., 140 S.W.2d 285, error granted.

**Alternative pleading**

Where claimant in workmen's compensation case alleged that injury to his eye resulted in total permanent loss of vision thereof and, in alternative, that it resulted in partial permanent loss of such vision, compensation insurer which answered such allegations by general denial and did not further plead affirmatively that partial incapacity followed that of temporary total incapacity was not entitled to the unconditional submission of independent issues inquiring as to duration of either temporary total or partial incapacity.—Employers' Reinsurance Corporation v. Brantley, Tex.Civ.App., 173 S.W.2d 233, error refused.

54. Ind.—Allen v. Davison, 16 Ind. 416.

55. Tex.—Traders & General Ins. Co. v. Yarbrough, Civ.App., 181 S.W.2d 305.

56. Mich.—Mead v. Randall, 69 N. W. 506, 111 Mich. 268.

57. Ind.—Allen v. Davison, 16 Ind. 416.

58. Tex.—Girard Fire & Marine Ins. Co. v. Mallard, Civ.App., 13 S.W.2d 395.

59. N.C.—United Services Life Ins. Co., 36 S.E.2d 225, 225 N.C. 684.

60. Kan.—Jones v. Southwestern Interurban Ry. Co., 141 P. 999, 92 Kan. 809.

61. Ariz.—Stewart v. Schnepf, 158 P.2d 529, 62 Ariz. 440.

62. N.M.—Crocker v. Johnston, 95 P.2d 214, 43 N.M. 469.

63. N.C.—United Services Life Ins. Co., 36 S.E.2d 225, 225 N.C. 684.

64. R.I.—Connolly v. Seftman, 9 A.2d 866, 64 R.I. 29.

65. C.J. p 1152 note 9.

**Restrictions**

Number of issues submitted to jury are within judge's sound discretion, subject to restrictions that they must be fact issues raised by pleadings, and that parties shall have opportunity to present any view of law arising from evidence.—J. B. Colt Co. v. Barber, 170 S.E. 663, 205 N.C. 170.

**Statutory limitation**

(1) Under statute providing that no party shall be entitled as matter of right to request more than ten special questions, where court submitted thirteen out of fifteen questions requested by defendants, refusal to submit the other two questions was not an abuse of discretion.—Morrison v. Hawkeye Casualty Co., 212 P.2d 633, 168 Kan. 303.

(2) Refusal to submit questions requested by plaintiff was held not error, in view of statutory limitation, where ten of eighteen questions submitted were requested by plaintiff.—Hamilton v. Lanoue, 67 P.2d 574, 145 Kan. 768.

**Advisory answers**

In administrator's action to quiet title wherein defendants filed cross complaint for specific performance of intestate's oral agreement to convey realty, refusal to give additional interrogatories requested by administrator was not error, where jury's answers to interrogatories given were advisory only.—Stewart v. Schnepf, 158 P.2d 529, 62 Ariz. 440.

61. Ind.—Vanosdol v. Henderson, 22 N.E.2d 812, 216 Ind. 240.

62. N.M.—Crocker v. Johnston, 95 P.2d 214, 43 N.M. 469.

63. R.I.—Connolly v. Seftman, 9 A.2d 866, 64 R.I. 29.

64. C.J. p 1152 note 10.

65. Kan.—Jones v. Southwestern Interurban Ry. Co., 141 P. 999, 92 Kan. 809.

66. N.M.—Crocker v. Johnston, 95 P.2d 214, 43 N.M. 469.

**Questions involved in general verdict**

The trial court should in its discretion limit as far as may be the number of special findings submitted to jury under statute, in order that such questions as are necessarily involved in the general verdict may be excluded as far as possible from the special findings.—Connolly v. Seftman, 9 A.2d 866, 64 R.I. 29.

63. Iowa.—Clinkovitch v. Thistle Coal Co., 121 N.W. 1036, 143 Iowa 595.

64. N.M.—Crocker v. Johnston, 95 P.2d 214, 43 N.M. 469.

65. Kan.—Jones v. Southwestern In-

However, the mere fact that numerous questions are requested or submitted does not necessarily show their impropriety, since more findings are required to develop the essential facts in a lengthy and involved case than in simpler ones.<sup>65</sup> In submitting a case on special issues, such number of questions should be submitted as is necessary to cover each issuable fact.<sup>66</sup> So a single issue,<sup>67</sup> or a small number of issues,<sup>68</sup> is ordinarily sufficient where each party's contentions, and the whole case, are fully and amply presented thereby; but where a cause involves two or more elements, to which different principles of law are respectively applicable, it is better practice to submit more than one issue.<sup>69</sup>

terurban Ry. Co., 141 P. 999, 92 Kan. 809.

65. Kan.—Jones v. Southwestern Interurban Ry. Co., 141 P. 999, 92 Kan. 809.

#### Discretion not abused

In action for injuries sustained in automobile collision at intersection, court did not abuse its discretion in submitting to jury more than ten special questions, some of which contained several subdivisions, in absence of any affirmative showing of prejudice.—Earhart v. Tretbar, 80 P.2d 4, 148 Kan. 42.

66. N.C.—Griffin v. United Services Life Ins. Co., 36 S.E.2d 225, 225 N.C. 684.

Wis.—Jensen v. Wisconsin Cent. Ry. Co., 128 N.W. 982, 145 Wis. 326.

#### Fundamental facts

In action for malicious prosecution, questions submitted to jury to establish facts on which probable cause may be decided by the court should be limited to fundamental facts and they should be as few in number as the evidence in case will permit.—Simpson v. Montgomery Ward & Co., 57 A.2d 571, 162 Pa.Super. 371.

#### Amount of recovery

Submission to jury of single issue as to how much, if anything, plaintiff may recover is erroneous, where other issues are raised by pleadings.—J. B. Colt Co. v. Barber, 170 S.E. 663, 205 N.C. 170.

#### Single defense

In holder's action on note wherein maker claimed that he was to receive shares of stock and membership in a hunting club to be organized by payee and another, maker was not entitled to have such defense submitted to jury three times merely because in his pleadings maker had pleaded such defense as constituting want of consideration, a failure of consideration, and fraud and misrepresentation in procurement of the note

by payee.—Ross v. Cook, Tex.Civ. App., 151 S.W.2d 854, error refused.

67. N.C.—Waters v. Waters, 155 S.E. 564, 199 N.C. 667.

68. Wis.—Hamus v. Weber, 226 N.W. 392, 199 Wis. 320.

69. N.C.—Western Carolina Power Co. v. Hayes, 136 S.E. 353, 193 N.C. 104.

#### Corollary issues

In suit to recover damages for fraudulent misrepresentations inducing plaintiff to purchase oil royalty acreage from defendant, submission to jury of issues as to defendant's representations of recoverable value of oil under land purchased and prices per acre for which royalty involved was selling without submitting corollary issues on measure of damage fixed by statute as difference between value of property as represented and its actual value as delivered at time of sale contract was insufficient, even though jury might conceivably have arrived at same result under such manner of presentation.—Bryant v. Stohn, Tex.Civ.App., 260 S.W.2d 77, error refused no reversible error.

70. Tex.—Traders' & General Ins. Co. v. Low, Civ.App., 74 S.W.2d 122, error refused.

64 C.J. p 1152 note 20.

#### Accidental injury

In employee's suit against workmen's compensation insurance carrier, special issue submitting question whether jury found from preponderance of evidence that plaintiff sustained accidental personal injury as alleged in his petition should be framed in such language as would confine jury to consideration of allegations that were supported by evidence.—Southern Underwriters v. Thompson, Tex.Civ.App., 127 S.W.2d 389, error dismissed.

#### Determination of objection

Question whether special issue is too broad and for that reason might

## § 544. — Conformity to Issues

Special interrogatories or special issues submitted to the jury for a finding should be so framed as neither to narrow nor enlarge the issues presented by the pleadings and evidence, but they should be cast in such manner as to conform and be confined to such issues.

Under the general rule discussed supra § 531, that there should be submitted to the jury all the controverted material issues or questions of fact, and those only, that are properly raised by the pleadings and supported by the evidence, special interrogatories or special issues submitted to the jury for a finding should be so framed as neither to narrow nor enlarge the issues presented by the pleadings and evidence,<sup>70</sup> but they should be cast in such a manner as to conform and be confined to such issues.<sup>71</sup> This rule has been applied with

result in violation of rule that recovery cannot be allowed on a cause of action alleged but not proved, or on one proved but not alleged, by a judgment being rendered on verdict returned in response thereto, generally must be determined from pleadings, evidence, and charge as a whole.—Southern Underwriters v. Mowery, Tex.Civ.App., 147 S.W.2d 834, error dismissed, judgment correct.

71. N.C.—Brown v. Daniel, 13 S.E. 2d 623, 219 N.C. 349.

Tex.—Erlisman v. Thompson, 167 S.W.2d 731, 140 Tex. 361—Hughes v. Belman, Civ.App., 200 S.W.2d 431—Traders & General Ins. Co. v. Hill, Civ.App., 161 S.W.2d 1101—Southern Underwriters v. Blair, Civ. App., 144 S.W.2d 641—Southern Underwriters v. Stone, Civ.App., 144 S.W.2d 339—Texas Employers Ins. Ass'n v. Watkins, Civ.App., 135 S.W.2d 296—Texas Employers Ins. Ass'n v. Ebers, Civ.App., 134 S.W.2d 797, error dismissed, judgment correct—Southern Underwriters v. West, Civ.App., 126 S.W.2d 510, error refused—Maryland Casualty Co. v. Crosby, Civ.App., 117 S.W.2d 524, error dismissed—Casualty Underwriters v. Lemons, Civ.App., 114 S.W.2d 333—Southern Pine Lumber Co. v. Whiteman, Civ.App., 104 S.W.2d 635, error dismissed—Security Mut. Casualty Co. v. Bolton, Civ. App., 84 S.W.2d 552—Connecticut General Life Ins. Co. v. Banderbee, Civ.App., 82 S.W.2d 764—Southwestern Bell Telephone Co. v. Burris, Civ.App., 68 S.W.2d 542—Texas Electric Service Co. v. Anderson, Civ.App., 55 S.W.2d 142, error dismissed.

64 C.J. p 1153 note 21.

#### Damages or injury

(1) Where pleadings in slander of title suit showed that suit was for value of plaintiff's leasehold estate and not for value of overriding royalty, submission of damage issue in

respect to questions as to negligence,<sup>72</sup> unavoidable accident,<sup>73</sup> the agency of one person for another,<sup>74</sup> the execution of a contract,<sup>75</sup> and breach of warranty.<sup>76</sup> Questions need not be in the identical language of the pleadings, as long as the substance of the issues is covered,<sup>77</sup> and the special issue is confined to the facts pleaded;<sup>78</sup> but ordinarily a question may follow the language of the pleadings,<sup>79</sup> and it has been held better practice to do so.<sup>80</sup> Special issues are not objectionable as being without support in the pleadings, where the principal difference between the pleadings and the issues is that the issues are so framed as better to set forth the ultimate facts sought to be established.<sup>81</sup>

such form that recovery was permitted for some value of both was error.—Winn v. Warner, Tex. Civ. App., 172 S.W.2d 526, error refused.

(2) In compensation suit, issue requiring jury to find from preponderance of evidence whether employee sustained injury on designated date was too broad and issue should have been submitted to cover injuries actually pleaded and sustained by proof.—Federal Underwriters Exchange v. Arnold, Tex. Civ. App., 127 S.W.2d 972, error dismissed, judgment correct.

**Special issues held not objectionable** Ga.—Rainey v. Moon, 2 S.E.2d 405, 187 Ga. 712.

Tex.—San Antonio Hermann Sons Home Ass'n v. Harvey, Civ. App., 256 S.W.2d 906, error refused no reversible error—Liberty Mut. Ins. Co. v. Taylor, Civ. App., 244 S.W.2d 350—Texas Emp. Ins. Ass'n v. Reid, Civ. App., 209 S.W.2d 1016—Texas Emp. Ins. Ass'n v. Harkey, Civ. App., 208 S.W.2d 915, affirmed 208 S.W.2d 919, 146 Tex. 504—Baker v. Mays & Mays, Civ. App., 199 S.W.2d 279, error dismissed—Dallas Ry. & Terminal Co. v. Whitcomb, Civ. App., 153 S.W.2d 527, affirmed 163 S.W.2d 616, 139 Tex. 467—Maryland Cas. Co. v. Abbott, Civ. App., 148 S.W.2d 465, error dismissed, judgment correct—Southern Underwriters v. Thomas, Civ. App., 131 S.W.2d 409, error dismissed, judgment correct—Galveston, H. & S. A. Ry. Co. v. Waldo, Civ. App., 77 S.W.2d 326, error dismissed—Beard & Stone Electric Co. v. Baker, Civ. App., 77 S.W.2d 262.

72. Ohio.—Clos v. Chapman, App., 34 N.E.2d 811.

Tex.—Scott v. Gardner, 156 S.W.2d 513, 137 Tex. 628, 141 A.L.R. 50—Yellow Cab & Baggage Co. v. Mason, Civ. App., 266 S.W.2d 463, reversed on other grounds Mason v. Yellow Cab & Baggage Co., Sup., 269 S.W.2d 329—Gulf States Utilities Co. v. Mitchell, Civ. App., 104 S.W.2d 652—E. L. Martin, Inc. v.

Kyser, Civ. App., 104 S.W.2d 592, error dismissed—Wichita County Water Improvement Dist. No. 1 v. Pearce, Civ. App., 59 S.W.2d 183, 64 C.J. p 1153 note 22.

#### Contributory negligence

Mich.—Corfeld v. Douglas Houghton Hotel Co., 37 N.W.2d 169, 324 Mich. 459.

Ohio.—Kleaver v. Reid Bros. Exp., 86 N.E.2d 608, 151 Ohio St. 467—May v. Szwed, 39 N.E.2d 680, 68 Ohio App. 459.

Wis.—Williams v. Williams, 246 N.W. 322, 210 Wis. 304, 64 C.J. p 1153 note 23.

#### General propositions of law

Although it cannot be urged that in any situation involving negligence one can avoid the obligation of exercising ordinary care for his own safety and for the protection of others, it is not proper to present general propositions of law, which in themselves may be sound, in special interrogatories unless there is some specification which limits them to the issues immediately at hand and permits their application in the light of the rights and obligation of the parties.—Keller v. City Ry. Co., Ohio App., 84 N.E.2d 69.

73. Tex.—Galveston, H. & S. A. Ry. Co. v. Cook, Civ. App., 214 S.W. 539.

74. Tex.—National Life & Accident Ins. Co. v. Leal, Civ. App., 36 S.W. 2d 324.

64 C.J. p 1153 note 25.

75. Tex.—Gilmer v. Graham, Com. App., 52 S.W.2d 263.

76. Tex.—Sivalls Motor Co. v. Chastain, Civ. App., 5 S.W.2d 185.

Wis.—Richmond v. Cretens, 185 N.W. 247, 175 Wis. 297.

77. Tex.—Texas Steel Co. v. Rockholt, Civ. App., 142 S.W.2d 842, error refused.

64 C.J. p 1151 note 86.

#### Substantial conformity

The only requirement is that a special issue be substantially within the

### § 545. — Interrogatories Covering More than One Matter of Fact

Independent issues of fact may or should be separately submitted, and an interrogatory or issue is objectionable where it is duplicitous or multifarious, in combining two or more fact issues in one question; but the grouping of interdependent facts in a single question or issue, as distinguished from the grouping of ultimate issues, is permissible.

Under the general rule discussed supra § 541 that each special interrogatory or special issue must call for a finding on a single question of fact, independent issues of fact may or should be separately submitted,<sup>82</sup> and an interrogatory or issue is objectionable where it is duplicitous or multifarious, in com-

pleading and not literally in the language of the pleading.—Herndon v. Halliburton Oil Well Cementing Co., Tex. Civ. App., 154 S.W.2d 163, error refused.

78. Tex.—Graham v. Gatewood, Civ. App., 166 S.W.2d 768, error refused—Jones v. McIlvene, Civ. App., 105 S.W.2d 503, error dismissed.

79. Tex.—Gray County Gas Co. v. Oldham, Civ. App., 238 S.W.2d 596—Phoenix Refining Co. v. Kilgore Nat. Bank, Civ. App., 121 S.W.2d 636, affirmed 143 S.W.2d 925, 135 Tex. 439.

64 C.J. p 1151 note 87.

80. Tex.—Jones v. McIlvene, Civ. App., 105 S.W.2d 503, error dismissed.

#### Negligence cases

Generally, special issues submitted by court in negligence cases should follow language of pleadings.—City of Amarillo v. Rust, Tex. Civ. App., 64 S.W.2d 821.

In compensation proceeding, special issue as to whether workman sustained injury on a certain date should have been submitted in the manner alleged in the petition.—Texas Employers Ins. Ass'n v. Watkins, Tex. Civ. App., 135 S.W.2d 296.

81. Tex.—Texas Steel Co. v. Rockholt, Civ. App., 142 S.W.2d 842, error refused.

82. Ind.—White v. Shircliff Industries, Inc., App., 112 N.E.2d 888.

Ohio.—Scott v. Cismadi, 74 N.E.2d 563, 80 Ohio App. 39.

Tex.—Fitzjarrald v. Panhandle Pub. Co., 228 S.W.2d 499, 149 Tex. 87—Hicks v. Brown, 151 S.W.2d 790, 136 Tex. 399—Texas General Indemnity Co. v. McNeill, Civ. App., 261 S.W.2d 378—Thompson v. Brown, Civ. App., 222 S.W.2d 442—Wooten v. Crosby County, Civ. App., 219 S.W.2d 553, error refused—Downs v. McCampbell, Civ. App., 203 S.W.2d 302—Bonham Coca Cola Bottling Co. v. Jennings, Civ. App., 181 S.W.2d 97, error denied 184 S.

binging two or more fact issues in one question,<sup>83</sup> or intermingling in the same question two or more

W.2d 821, 143 Tex. 327—Workmen's Loan & Finance Co. v. Dunn, Civ. App., 134 S.W.2d 370—Sinclair Nav. Co. v. Kremlick, Civ.App., 129 S.W.2d 758—Charbonneau v. Hupaylo, Civ.App., 100 S.W.2d 745—Howard v. Howard, Civ.App., 102 S.W.2d 473, error refused—Kasch v. Anton, Civ.App., 81 S.W.2d 1097—City of Panhandle v. Byrd, Civ.App., 77 S.W.2d 904, reversed on other grounds, Com.App., 106 S.W.2d 660—Texas & P. R. Co. v. Price, Civ. App., 61 S.W.2d 195, reversed (no opinion)—Texas & P. Ry. Co. v. Phillips, Civ.App., 56 S.W.2d 210, error dismissed.

Wis.—Callaway v. Kryzen, 279 N.W. 702, 228 Wis. 53—Georgeson v. Nielsen, 252 N.W. 576, 214 Wis. 191.

64 C.J. p 1153 note 29.

**Trial court has duty to submit to the jury separately, without any commingling, each independent, determinative, controverted issue of fact raised by the pleadings and the evidence, which could constitute a basis for judgment against defendant.**—Thompson v. Erisman, Civ.App., 157 S.W.2d 439, affirmed Erisman v. Thompson, 167 S.W.2d 731, 140 Tex. 381.

#### Ultimate fact or issue

(1) Only one ultimate issue may be submitted in single special issue.—Texas Emp. Ins. Ass'n v. Eubanks, Civ.App., 240 S.W.2d 811, reversed on other grounds Eubanks v. Texas Emp. Ins. Ass'n, 246 S.W.2d 467, 151 Tex. 67.

(2) Question to be answered "yes" or "no" is "multifarious" which submits to jury more than one ultimate, independent, determinative fact.—Gulf States Utilities Co. v. Woodriddle, Tex.Civ.App., 90 S.W.2d 325.

#### Unaloes interdependent

Requested issues must be submitted separately, unless issues are wholly interdependent.—Bewley Mills v. First Nat. Bank, Tex.Civ.App., 110 S.W.2d 201, error dismissed.

#### Grouping issues so as to call for general verdict

Where a cause is to be submitted to the jury on special issues, it is improper for the court to group the facts and special issues in such manner as to call for a general verdict.—Workmen's Loan & Finance Co. v. Dunn, Tex.Civ.App., 134 S.W.2d 370—64 C.J. p 1153 note 29 [a].

#### Limitation title

In determining whether a party has acquired limitation title to a tract of realty by adverse possession for statutory period, splitting of issues along geographic lines should not be required, unless it is demonstrated that failure to do so will create confusion either in deliberation or in answers.—Parr v. Ratisseau, Tex.Civ.

App., 236 S.W.2d 503, error refused no reversible error.

#### Negligence

(1) In action for injuries sustained in drinking from bottle of carbonated beverage containing glass, submission of issues of negligence in one general question would be reversible error.—Texas Coca-Cola Bottling Co. v. Wimberley, Tex.Civ.App., 108 S.W.2d 860, error dismissed.

(2) Proximate cause is essential part of plaintiff's cause of action for negligence and must be affirmatively submitted to jury as independent fact, even though act charged constitutes negligence as matter of law.—Echols v. Duke, Tex.Civ.App., 102 S.W.2d 483, error dismissed.

(3) In action against a railroad for the loss of turkeys which were run over by a train, the question of the negligence of the railroad and the proximate cause of that negligence should not be embraced in the inquiry as to the amount of damages.—Texas & P. Ry. Co. v. Heathington, Tex. Civ.App., 115 S.W.2d 495.

(4) Where plaintiff relies on the doctrine of discovered peril, each of the elements of the doctrine should be submitted to jury separately as special issues.—Turner v. Texas Co., 159 S.W.2d 112, 138 Tex. 380.

#### Submission of particular matters as separate issues sustained

Tex.—Turner v. Texas Co., 159 S.W.2d 112, 138 Tex. 380—Texas Employers Ins. Ass'n v. Hamor, Civ. App., 97 S.W.2d 1041.

83. Ind.—White v. Shircliff Industries, Inc., App., 112 N.E.2d 888—McKinnon v. Parrill, 38 N.E.2d 1008, 111 Ind.App. 343—Central Indiana Ry. Co. v. Mitchell, 199 N.E. 439, 102 Ind.App. 121.

Mich.—Corfeld v. Douglas Houghton Hotel Co., 37 N.W.2d 169, 324 Mich. 459.

Tex.—Empire Gas & Fuel Co. v. Muegge, 143 S.W.2d 763, 135 Tex. 520—Texas Emp. Ins. Ass'n v. Eubanks, Civ.App., 240 S.W.2d 811, reversed on other grounds Eubanks v. Texas Emp. Ins. Ass'n, 246 S.W.2d 467, 151 Tex. 67—Schoenberg v. Forrest, Civ.App., 228 S.W.2d 556, refused no reversible error—Wooten v. Crosby County, Civ.App., 219 S.W.2d 553, error refused—Uptmor v. Janes, Civ.App., 210 S.W.2d 235, refused no reversible error—Associated Indemnity Corp. v. Billberg, Civ.App., 172 S.W.2d 157—Pappas v. Wright, Civ.App., 171 S.W.2d 536—Walton v. West Texas Utilities Co., Civ.App., 161 S.W.2d 518, error refused—City of Austin v. Howard, Civ.App., 158 S.W.2d 556, error refused—Clay Drilling Co. v. Furman, Civ.App., 150 S.W.2d 869—Texas & Pac. Ry. Co. v. Cassaday,

Civ.App., 148 S.W.2d 471, error dismissed, judgment correct—Page v. Rogers, Civ.App., 142 S.W.2d 716—Sinclair Nav. Co. v. Kremlick, Civ. App., 129 S.W.2d 758—Sinclair Refining Co. v. Costin, Civ.App., 116 S.W.2d 894—Louisiana, A. & T. Ry. Co. v. De Vance, Civ.App., 114 S.W.2d 922, error dismissed—Jones-O'Brien, Inc. v. Loyd, Civ.App., 106 S.W.2d 1069, error dismissed—Holden v. Gibbons, Civ.App., 101 S.W.2d 837, error dismissed—Charbonneau v. Hupaylo, Civ.App., 100 S.W.2d 745—Gulf States Utilities Co. v. Woodriddle, Civ.App., 90 S.W.2d 325—Texas Employers Ins. Ass'n v. Jones, Civ.App., 70 S.W.2d 1014, error dismissed—W. J. Williams, Inc. v. Cummings, Civ.App., 65 S.W.2d 379—Baldrige v. Klein, Civ.App., 56 S.W.2d 897, reversed (no opinion).

Wis.—Vlasak v. Gifford, 21 N.W.2d 648, 248 Wis. 328—Corpus Juris cited in Martin v. Ebert, 13 N.W.2d 907, 910, 245 Wis. 341, 152 A.L.R. 1142—Devine v. Bischel, 254 N.W. 521, 215 Wis. 331.

64 C.J. p 1153 note 30—43 C.J. p 1316 note 12 [a].

#### Liberal construction of statute

Statute condemning multifarious questions must be liberally construed to effect statutory purpose to enable losing party to know with certainty the facts found by jury which constitute basis of judgment against him.—Gulf States Utilities Co. v. Woodriddle, Tex.Civ.App., 90 S.W.2d 325.

#### Possible different answers

Special issue propounding two questions one of which could be answered no and the other yes was multifarious and duplicitous and was therefore an improper issue to be submitted to jury.—Buss v. Shepherd, Tex.Civ. App., 240 S.W.2d 382, refused no reversible error.

#### Questions or special issues held duplications or multifarious

(1) In general.

Tex.—Empire Gas & Fuel Co. v. Muegge, 143 S.W.2d 763, 135 Tex. 520—Buss v. Shepherd, Civ.App., 240 S.W.2d 382, refused no reversible error—Faubian v. Busch, Civ. App., 240 S.W.2d 361, refused no reversible error—Schoenberg v. Forrest, Civ.App., 228 S.W.2d 556, refused no reversible error—Bradshaw v. McDonald, Civ.App., 211 S.W.2d 797, affirmed 216 S.W.2d 972, 147 Tex. 455—Gillette Motor Transport Co. v. Whitfield, Civ.App., 186 S.W.2d 90, refused for want of merit—Bonham Coca Cola Bottling Co. v. Jennings, Civ.App., 181 S.W.2d 37, error denied 184 S.W.2d 821, 143 Tex. 327—Associated Indem. Corp. v. Billberg, Civ.App., 172 S.W.2d 157—Pappas v. Wright, Civ.App., 171

issues of fact.<sup>84</sup> Where, however, all branches but one of an apparently multifarious question relate to uncontroverted facts,<sup>85</sup> or facts as to which separate

findings are called for by preceding interrogatories,<sup>86</sup> no objection lies, and a question merely presenting two phases of the same claim or de-

S.W.2d 536—Trentman v. Whiteside, Civ.App., 163 S.W.2d 418, affirmed 170 S.W.2d 195, 141 Tex. 48—Zepeda v. Moore, Civ.App., 153 S.W.2d 212, error dismissed—United Employers Casualty Co. v. Hudson, Civ.App., 152 S.W.2d 451—Clay Drilling Co. v. Furman, Civ.App., 150 S.W.2d 869—Home Ins. Co. v. Fouche, Civ.App., 149 S.W.2d 977—Southland Life Ins. Co. v. White, Civ.App., 149 S.W.2d 218—Texas & Pac. Ry. Co. v. Cassaday, Civ.App., 148 S.W.2d 471, error dismissed, judgment correct—Southern Underwriters v. Mowery, Civ.App., 147 S.W.2d 834, error dismissed, judgment correct—Rudco Oil & Gas Co. v. Lemasters, Civ.App., 146 S.W.2d 806, error dismissed, judgment correct—Traders & General Ins. Co. v. Richardson, Civ.App., 144 S.W.2d 420, error dismissed, judgment correct—Tinney v. Williams, Civ.App., 144 S.W.2d 344—Southern Underwriters v. Boswell, Civ.App., 141 S.W.2d 442, affirmed 158 S.W.2d 280, 138 Tex. 255—North East Texas Motor Lines v. Hodges, Civ.App., 141 S.W.2d 386, affirmed 158 S.W.2d 487, 138 Tex. 280—C. V. Hill & Co. v. Fricke, Civ.App., 135 S.W.2d 582, error dismissed, judgment correct—Lower Rio Grande Valley Mid-Winter Fair Ass'n v. Nunstedt, Civ.App., 132 S.W.2d 601—Traders & General Ins. Co. v. Shelton, Civ.App., 130 S.W.2d 903—Sherwin-Williams Co. of Texas v. Delahoussaye, Civ.App., 124 S.W.2d 870, error dismissed—Traders & General Ins. Co. v. Boysen, Civ.App., 123 S.W.2d 1016, error dismissed, judgment correct—Tucker Oil Co. v. Matthews, Civ.App., 119 S.W.2d 606—Hornsbey Heavy Hardware Co. v. Pritchard, Civ.App., 119 S.W.2d 410, error dismissed—Sinclair Refining Co. v. Costin, Civ.App., 116 S.W.2d 894—Texas & P. Ry. Co. v. Heathington, Civ.App., 115 S.W.2d 495—Louisiana, A. & T. Ry. Co. v. De Vance, Civ.App., 114 S.W.2d 922, error dismissed—McCluskey v. Keathley, Civ.App., 111 S.W.2d 1199, error dismissed—Jacobsen v. Brown, Civ.App., 105 S.W.2d 1108, error dismissed—Theobalt v. Wiemann, Civ.App., 104 S.W.2d 589, error dismissed—Howard v. Howard, Civ.App., 102 S.W.2d 473, error refused—Hall v. Weaver, Civ.App., 101 S.W.2d 1035, error dismissed—Charbonneau v. Hupaylo, Civ.App., 100 S.W.2d 745—Ferguson Seed Farmers v. Fort Worth & D.-S. P. Ry. Co., Civ.App., 100 S.W.2d 177, error dismissed—Texas Pipe Line Co. v. Sheffield, Civ.App., 99 S.W.2d 684—American Nat. Ins. Co. v. Points, Civ.App., 98 S.W.2d 1009,

error dismissed—Traders & General Ins. Co. v. Childers, Civ.App., 95 S.W.2d 461, error dismissed—Stock v. Kaiser, Civ.App., 93 S.W.2d 225—Shannon v. Horn, Civ.App., 92 S.W.2d 1090, error dismissed—American Nat. Ins. Co. v. Briggs, Civ.App., 90 S.W.2d 602, error dismissed—Gulf States Utilities Co. v. Woolbridge, Civ.App., 90 S.W.2d 325—McCombs v. Red, Civ.App., 86 S.W.2d 648, error dismissed—McKenzie Const. Co. v. Chanowsky, Civ.App., 86 S.W.2d 480, error refused—Traders & General Ins. Co. v. Copeland, Civ.App., 84 S.W.2d 813—Brotherhood of Railroad Trainmen v. Wood, Civ.App., 79 S.W.2d 665, error dismissed—Indemnity Ins. Co. of North America v. Weeks, Civ.App., 75 S.W.2d 925—Metropolitan Life Ins. Co. v. Greene, Civ.App., 75 S.W.2d 703—San Antonio Amusement Co. v. Easterling, Civ.App., 71 S.W.2d 350, error dismissed—Ed S. Hughes Co. v. Clark Bros. Co., Civ.App., 63 S.W.2d 230—Hornsbey v. Hornsbey, Civ.App., 60 S.W.2d 489, reversed on other grounds 93 S.W.2d 379, 127 Tex. 474.

Wis.—Vlasak v. Gifford, 21 N.W.2d 643, 248 Wis. 328.  
64 C.J. p 1153 note 30 [c].

(2) Issue submitting whether plaintiff was guilty of contributory negligence in falling, "if he did," to keep proper lookout as he approached intersection after seeing truck.—Kasch v. Anton, Tex.Civ.App., 81 S.W.2d 1097.

(3) Special issue whether negligence of railway was proximate cause of death to one cow and injury to other cattle.—St. Louis Southwestern Ry. Co. of Texas v. Hill Bros., Tex. Civ.App., 80 S.W.2d 432.

(4) Special question seeking to ascertain not only what caused death of minor bicyclist but also what brought it about.—Morrison v. Hawkeye Casualty Co., 212 P.2d 633, 168 Kan. 303.

(5) Issue whether plaintiff was "ready," willing, and able to pay for oil and gas lease, an alleged contract for which he was seeking to specifically enforce.—Bradley v. Howell, Tex.Civ.App., 128 S.W.2d 547, error dismissed, judgment correct.

84. Tex.—Clasco & N. E. Ry. Co. v. McCharen, Civ.App., 118 S.W.2d 844—St. Louis Southwestern Ry. Co. of Texas v. Hill Bros., Civ.App., 80 S.W.2d 432—Illinois Bankers' Life Assur. Co. v. Byrd, Civ.App., 69 S.W.2d 517—Rockford Life Ins. Co. v. Tschiedel, Civ.App., 61 S.W.2d 536, error refused.

64 C.J. p 1155 note 31.

#### Conjunctive

When special question asked jury puts more than one question conjunctively and answer thereto is in negative, verdict is fatally defective because of impossibility of knowing whether all of jury found in negative on each question included.—Vlasak v. Gifford, 21 N.W.2d 643, 248 Wis. 328.

#### Contributory negligence

Generally, submitting contributory negligence as one issue would be error, since negligence of plaintiff is not a defense unless it is a proximate cause of the injury.—Clasco & N. E. Ry. Co. v. McCharen, Tex.Civ.App., 118 S.W.2d 844.

85. Tex.—Page v. Hancock, Civ.App., 200 S.W.2d 421, error refused no reversible error—Rivers v. Westbrook, Civ.App., 126 S.W.2d 46, error refused—Texas Coca-Cola Bottling Co. v. Kubena, Civ.App., 109 S.W.2d 1098—Alamo Downs, Inc. v. Briggs, Civ.App., 108 S.W.2d 733—Jackson v. Amador, Civ.App., 75 S.W.2d 892, error dismissed—Lloyds Casualty Co. of New York v. Grillitt, Civ.App., 64 S.W.2d 1005, error refused.

Wis.—Catlin v. Schroeder, 253 N.W. 187, 214 Wis. 419.

64 C.J. p 1155 note 32.

#### One controversial fact

A special issue is not duplicitous if it includes only one controversial fact.—Alamo Downs, Inc. v. Briggs, Tex. Civ.App., 106 S.W.2d 733, error dismissed.

#### Acceptance of delivery

Special issue as to whether plaintiff was ready, able, and willing to accept delivery of, and to pay for, tractor and equipment which he bought, if any, was not duplicitous, where it was undisputed that plaintiff was able to pay for tractor, and only issuable matter was as to whether he was ready and willing to complete the purchase.—Page v. Hancock, Tex.Civ.App., 200 S.W.2d 421, error refused no reversible error.

#### Boundary dispute

Submitting special issue in boundary dispute as to which of three designated lines was true boundary was not erroneous as submitting more than one fact issue, where only one boundary was disputed and trial court would have found for complaining party had jury selected line contended for by such party.—Mid-Kansas Oil & Gas Co. v. Burton, Tex.Civ.App., 87 S.W.2d 338, error dismissed.

86. Tex.—Texas & N. O. R. Co. v. Owens, Civ.App., 54 S.W.2d 448, error refused.

64 C.J. p 1155 note 33.



fense, both of which must be answered in the affirmative or negative, as the case may be, in order to establish it, is not objectionable as embracing two matters.<sup>87</sup>

The grouping of facts in a single question or issue, as distinguished from the grouping of ultimate issues, is permissible,<sup>88</sup> and where a question as framed necessitates a finding on an incidental or subordinate fact in order to answer it, no objection can be grounded on a failure to submit a separate

question as to such fact.<sup>89</sup> The grouping, vel non, of items constituting a single ultimate fact issue goes to the manner and form of submitting the special issues and falls within the discretionary duties of the trial judge.<sup>90</sup> A single issue of fact, although consisting of or involving two or more elements, should be submitted as a whole and not in parts,<sup>91</sup> although the contrary mode of submission has been held not to be reversible error;<sup>92</sup> and questions should not be submitted which inquire as to the same issue in different forms.<sup>93</sup>

87. S.C.—Kirby v. Kelly, 73 S.E. 780, 90 S.C. 378.

Tex.—Missouri, K. & T. R. Co. of Texas v. Long, Civ.App., 23 S.W.2d 401.

#### Warning signal

In action against truck owner for injuries sustained by brakeman in collision between truck and train, wherein truck owner alleged that railroad failed to station a flagman or watchman at crossing, and in a separate paragraph alleged that railroad failed to provide an automatic warning signal at crossing, trial court did not err in combining in same issue, railroad's failure to place a flagman at crossing and failure to provide an automatic warning.—Gillette Motor Transp. Co. v. Whitfield, Civ.App., 197 S.W.2d 157, affirmed 200 S.W.2d 624, 145 Tex. 571.

88. Tex.—Mims v. Hearon, Civ.App., 248 S.W.2d 754.—Texas General Indemnity Co. v. Scott, Civ.App., 246 S.W.2d 228, error refused no reversible error.—Gray County Gas Co. v. Oldham, Civ.App., 238 S.W.2d 596.—Stricklin v. Southwest Reserve Life Ins. Co., Civ.App., 234 S.W.2d 439, error refused.—Rainwater v. McGrew, Civ.App., 181 S.W.2d 103, error refused.—Davis v. Dowden, Civ.App., 136 S.W.2d 900, error dismissed, judgment correct.—Rivers v. Westbrook, Civ.App., 126 S.W.2d 46, error refused.—Atkins v. Dodds, Civ.App., 121 S.W.2d 1010, error dismissed by agreement.—Wells v. Ford, Civ.App., 118 S.W.2d 420, error dismissed.—Empire Gas & Fuel Co. v. Muegge, Civ.App., 116 S.W.2d 758, reversed on other grounds 143 S.W.2d 783, 135 Tex. 520.—Consolidated Casualty Ins. Co. v. Fortenberry, Civ.App., 103 S.W.2d 1049, error refused.—Rotge v. Dunlap, Civ.App., 91 S.W.2d 905, error dismissed by agreement.—E. A. Pierce & Co. v. Aronoff, Civ.App., 60 S.W.2d 796, error dismissed.—Austin v. De George, Civ.App., 55 S.W.2d 585, error dismissed.

#### Subsidiary facts

(1) Where one ultimate issue embraces a number of subsidiary facts, inclusion in special issue of the several facts is not improper, and a spe-

cial issue so framed is not duplicious.—Howell v. Howell, 210 S.W.2d 978, 147 Tex. 14.—Jones v. Scott, Civ.App., 266 S.W.2d 534, refused no reversible error.—Pullen v. Russ, Tex. Civ.App., 226 S.W.2d 876, refused no reversible error.—Connell v. Provident Life & Accident Ins. Co., Civ.App., 219 S.W.2d 835, reversed on other grounds 224 S.W.2d 194, 148 Tex. 311.

(2) Where a group of facts are relied upon to make up the ultimate issue, it is not only permissible, but often indispensable to group them and present them in a single inquiry, to enable court to ascertain if the ultimate end sought has been established.—Traders & General Ins. Co. v. Turner, Tex.Civ.App., 149 S.W.2d 593, error dismissed, judgment correct.

#### Component parts

Where issue is composed of several component parts or where it is necessary to limit, describe, or modify issue, rule against duplicity or multifariousness is not violated.—Texas Employers' Ins. Ass'n v. Rowell, Tex.Civ.App., 104 S.W.2d 613.—Texas Employers' Ins. Ass'n v. Jones, Tex.Civ.App., 70 S.W.2d 1014, error dismissed.

89. Tex.—Johnson v. Weed, Civ.App., 52 S.W.2d 917.

90. Tex.—Mims v. Hearon, Civ.App., 248 S.W.2d 754.—Luling Oil & Gas Co. v. Edwards, Civ.App., 32 S.W.2d 921.

91. Tex.—Traders & General Ins. Co. v. Boyd, Civ.App., 146 S.W.2d 488, error dismissed, judgment correct. 64 C.J. p 1156 note 43.

#### Express or implied consent

In action for conversion of cattle covered by mortgage prohibiting sale, court need not submit separately questions whether mortgagee gave express or implied consent to sale.—Daggett v. Corn, Tex.Civ.App., 54 S.W.2d 1098, error refused.

#### Occupancy during different periods

In action to recover tract of land, where defendants supported their claim of title thereto under ten-year statute of limitations by evidence of

their use and enjoyment of land for continuous period of at least forty-seven years, without interruption or admission of title in another, court erred in submitting to jury three issues as to whether defendants had title by reason of occupancy and claim for ten years during three different periods specified, instead of submitting question in single issue as to any ten-year period before filing of suit.—Pinchback v. Hockless, 158 S.W.2d 997, 138 Tex. 305.

#### Issues held not erroneous

N.M.—Armijo v. National Surety Corp., 263 P.2d 339.  
Tex.—William Cameron Co. v. Downing, Civ.App., 147 S.W.2d 963.—Bennett v. McKrell, Civ.App., 125 S.W.2d 701, modified on other grounds 144 S.W.2d 242, 135 Tex. 557.

92. Tex.—Texas Electric Ry. Co. v. Texas Employers' Ins. Ass'n, Civ.App., 9 S.W.2d 185.

93. Tex.—Traders & General Ins. Co. v. Scogin, Civ.App., 146 S.W.2d 1014, error dismissed, judgment correct.—Fort Worth & D. C. Ry. Co. v. Hambricht, Civ.App., 130 S.W.2d 436, error dismissed, judgment correct.

64 C.J. p 1156 note 46.

Undue repetition of special issues should not be tolerated.—Tripp v. Watson, Tex.Civ.App., 235 S.W.2d 677, error refused no reversible error.

#### Undue emphasis

The submission of the same issues in legal effect more than once is error, in view of the undue emphasis that may thereby be given to the single issue in the consideration of the jury.—Dallas Railway & Terminal Co. v. Bishop, Tex.Civ.App., 153 S.W.2d 298.

#### Cause of death

In compensation case, defense that death resulted from natural causes and not accident should not be split up by submitting one issue inquiring whether death was due to natural causes and another inquiring whether death was caused by accident.—Le Beau v. Highway Ins. Underwriters, 187 S.W.2d 73, 143 Tex. 589.

Each pleaded group of facts comprising a cause of action or defense may or should be presented as a separate issue;<sup>84</sup> and questions splitting up causes of action or defenses should not be submitted.<sup>85</sup> Thus where more than one ground of negligence,<sup>86</sup> fraud,<sup>87</sup> or other tort liability,<sup>88</sup> or of contract liability,<sup>89</sup> is involved in an action, it is not proper to submit the question generally, but each ground

should be separately submitted. However, where there is but one ground of negligence, the submission of more than one question based thereon may be objectionable as an improper repetition of plaintiff's theory,<sup>1</sup> and the fact that acts of two or more persons are involved does not require the submission of separate questions;<sup>2</sup> and where only a single contract is involved the fact that it was

84. Tex.—American General Ins. Co. v. Jones, Civ.App., 250 S.W.2d 663, reversed on other grounds, Sup., 258 S.W.2d 502—Graham v. Gatewood, Civ.App., 166 S.W.2d 768, error refused.

Wis.—Guderyon v. Wisconsin Tel. Co., 2 N.W.2d 242, 240 Wis. 215—Archer v. Chicago, M., St. P. & P. Ry. Co., 255 N.W. 67, 215 Wis. 509, 95 A.L.R. 851.

84 C.J. p 1155 note 35.

#### Improper emphasis

It is proper to group facts constituting ground of recovery or defense relied on, but improper to emphasize each separate fact constituting the group by submitting separate issues thereon.—Hunter v. B. E. Porter, Inc., Tex.Civ.App., 81 S.W.2d 774.

#### Theories or grounds of recovery

(1) Where plaintiff pleads two theories of recovery and evidence introduced is sufficient on both theories, trial court is required to submit separately ultimate controlling issues affecting each theory and to secure findings which will afford a basis for judgment to be entered by court.—Texas General Indemnity Co. v. Scott, Tex., 253 S.W.2d 651.

(2) Where alleged cause of action consists of more than one ground of recovery, issues constituting elements in different grounds of recovery may not be combined and submitted as single issue over timely objection that it is duplicative and multifarious.—Rudco Oil & Gas Co. v. Lemasters, Tex.Civ.App., 146 S.W.2d 806, error dismissed, judgment correct.

#### One act of negligence

An issue grouping a series of facts as constituting one act of negligence is not objectionable as being multifarious, since the jury only may relate the several acts and from their relation determine whether they constitute negligence.—Wells v. Ford, Tex.Civ.App., 118 S.W.2d 430, error dismissed.

Overlapping issues of ultimate facts which relate to the same thing may not be considered as cumulative by jury in comparing negligence of the parties, but jury must be properly instructed to that effect when questions which are but cumulative as to such an ultimate issue are submitted.—Saley v. Hardware Mat. Co., 18 N.W.2d 843, 246 Wis. 447—

Guderyon v. Wisconsin Tel. Co., 2 N.W.2d 242, 240 Wis. 215.

#### Permanent or temporary disability

In action for workmen's compensation no error was committed in submitting issues of permanent and temporary disability disjunctively in the same question.—Texas Elmp. Ins. Ass'n v. Tate, Tex.Civ.App., 214 S.W.2d 877.

#### Personal injuries and damages

In action for personal injuries and damages sustained in automobile collision, separate issues should have been submitted as to amount of damages sustained by each injured person, and another issue as to amount of damage to automobile.—Bransford v. Pageway Coaches, 104 S.W.2d 471, 129 Tex. 327.

95. N.C.—Hoke v. Atlantic Greyhound Corp., 38 S.E.2d 105, 228 N.C. 332.

84 C.J. p 1155 note 45.

#### Exclusion of entire defense

In negligence cases the court must, in submitting separate defensive facts for the defendant, so frame the issue as to include the entire defense as alleged and limit the defense to the facts so alleged.—Graham v. Gatewood, Tex.Civ.App., 166 S.W.2d 768, error refused.

#### Submission held not erroneous

Tex.—Collins v. Hall, Civ.App., 161 S.W.2d 311, error refused.

96. Tex.—Roosth & Genscov Production Co. v. White, Sup., 302 S.W.2d 99—Williams v. Hemphill County, Civ.App., 254 S.W.2d 339—Connor v. Heard & Heard, Civ.App., 243 S.W.2d 205, refused no reversible error—Blythe County Line Independent School Dist. v. Garrett, Civ.App., 233 S.W.2d 348—Fisher v. Leach, Civ.App., 221 S.W.2d 384, refused no reversible error—Texas & N. O. R. Co. v. Barham, Civ.App., 204 S.W.2d 205—Clark-Daniel's v. Deathe, Civ.App., 131 S.W.2d 1091, error refused—Gulf States Utilities Co. v. Dillon, Civ.App., 112 S.W.2d 752.

Wis.—Devine v. Blachel, 254 N.W. 521, 215 Wis. 331—Georgeson v. Nielsen, 353 N.W. 576, 214 Wis. 191.

84 C.J. p 1146 note 36.

#### Limitation of rule

The requirement, that alleged specific acts of negligence be separately and distinctly submitted, is to pre-

vent confusion of the jury, and it is not necessary, if jury could not have been misled or confused.—Wilkinson v. Gordon, Tex.Civ.App., 123 S.W.2d 961, error dismissed.

#### Different statutory requirements

In action for injuries sustained in collision between automobile and truck, wherein plaintiff pleaded and offered evidence to prove violation of each of three sections of the Penal Code requiring that vehicle be driven on right-hand side of highway, requiring driver to give signal before turning, and requiring each of vehicles proceeding in opposite directions to give the other one-half of the road, it was not erroneous to submit issue on each section.—Brown Express v. Henderson, Tex.Civ.App., 143 S.W.2d 585, error dismissed, judgment correct.

Several separate acts claimed to be sole proximate cause of injury should not be submitted in one issue.—Hicks v. Brown, 151 S.W.2d 790, 136 Tex. 399.

97. N.C.—Furst & Thomas v. Merritt, 130 S.E. 40, 190 N.C. 397.

98. Tex.—Phoenix Furniture Co. v. McCracken, Civ.App., 3 S.W.2d 545.

No libel action by county attorney against publisher of newspaper article stating that certain persons had told reporters of living in terror of county attorney, that sheriff's officers and county attorney paid almost nightly visits to part of town where those persons lived, and that county attorney had fired several shots to frighten certain person, publisher had right to have jury pass on each statement separately, and to have jury determine whether privileged statements were published with malice, and whether statements libelous per se were true or false.—Fitzjarrald v. Panhandle Pub. Co., 228 S.W.2d 489, 149 Tex. 87.

99. Tex.—Stewart v. Vannatta, Civ. App., 31 S.W.2d 684—Osgae Oil & Gas Co. v. Caulk, Civ.App., 243 S.W. 551.

1. Tex.—Lone Star Gas Co. v. Ballard, Civ.App., 138 S.W.2d 632, error refused.

2. Iowa.—Seagel v. Chicago, M. & St. P. Ry. Co., 49 N.W. 990, 83 Iowa 380—Jeffrey v. Keokuk & D. M. R. Co., 9 N.W. 884, 56 Iowa 546.

made with two or more persons does not necessitate the submission of separate questions as to each.<sup>3</sup> So it is improper for the court to submit issues as made by the general allegation of negligence and also the specific allegations of negligence, thereby duplicating in effect the same issues.<sup>4</sup>

Where damages are sought for injury to land and crops, it is not necessary to submit issues as to damages to the land and crops separately,<sup>5</sup> although it may be desirable to do so in order prop-

erly to present the questions involved.<sup>6</sup> Where separate grounds of negligence are submitted by separate questions, the matters of proximate cause, reasonable anticipation, and contributory negligence should be similarly subdivided, and not be submitted in the form of a single or entire question.<sup>7</sup>

In accordance with the foregoing rules, particular questions or special issues have been held not objectionable as duplicitous or multifarious,<sup>8</sup> and such adjudication has been made in actions involving

#### Negligence of two motorists

In action for death of pedestrian who was struck by one motorist and then run over by another motorist, submission of issue as to whether pedestrian's death was caused by motorists' negligence, and if so by which motorist, was not error as against contention that negligence of each motorist should have been submitted in separate issues.—*Lewis v. Hunter*, 193 S.E. 814, 212 N.C. 604.

3. *Tex.*—*Crenshaw v. Chambers*, Civ. App., 283 S.W. 1095.

4. *Tex.*—*Dallas Railway & Terminal Co. v. Bishop*, Civ. App., 153 S.W.2d 298.

5. *N.C.*—*Perry v. Norfolk Southern R. Co.*, 87 S.E. 948, 171 N.C. 38.—*Ridley v. Railroad*, 32 S.E. 379, 124 N.C. 37.

6. *N.C.*—*Perry v. Norfolk Southern R. Co.*, 87 S.E. 948, 171 N.C. 38.

7. *Wis.*—*Waters v. Markham*, 235 N.W. 797, 204 Wis. 332.  
64 C.J. p 1157 note 49.

#### Proximate cause

In automobile guest's action against owner of truck with which host collided, refusal to submit, following last of special issues inquiring whether host was negligent in certain particulars, one special issue inquiring whether such negligence of host was sole proximate cause of plaintiff's damage, instead of following each of special issues inquiring whether host was negligent in certain particular with another special issue inquiring whether particular negligence inquired about was sole proximate cause of plaintiff's damage, was not error.—*Sproule v. Rosen*, 54 S.W.2d 1001, 126 Tex. 51.

8. *Tex.*—*Eubanks v. Texas Emp. Ins. Ass'n*, 246 S.W.2d 467.—*Fischer v. Rio Tiro Co.*, *Com.App.*, 65 S.W.2d 751.—*Union Central Life Ins. Co. v. Boulware*, Civ. App., 238 S.W.2d 722.—*Stricklin v. Southwest Reserve Life Ins. Co.*, Civ. App., 234 S.W.2d 439, error refused.—*Pullen v. Russ*, Civ. App., 226 S.W.2d 876, refused no reversible error.—*Connell v. Provident Life & Accident Ins. Co.*, Civ. App., 219 S.W.2d 835, reversed on other grounds 224 S.W.2d 194, 148 Tex. 311.—*Smith v. Lit-*

*tle*, Civ. App., 217 S.W.2d 881, refused no reversible error.—*Ellison v. Larson*, Civ. App., 217 S.W.2d 416, reversed on other grounds 217 S.W.2d 420, 147 Tex. 465.—*Langham's Estate v. Levy*, Civ. App., 198 S.W.2d 747, error refused no reversible error.—*Universal Life & Accident Ins. Co. v. Shaw*, Civ. App., 173 S.W.2d 501, error refused.—*Packard-Dallas, Inc. v. Carle*, Civ. App., 163 S.W.2d 735, error refused.—*Norris v. White*, Civ. App., 154 S.W.2d 319, error refused.—*International Brotherhood of Rollermakers, Iron Shipbuilders & Helpers of America v. Huval*, Civ. App., 154 S.W.2d 233, affirmed in part and reversed in part on other grounds 166 S.W.2d 107, 140 Tex. 21.—*Browning v. Graves*, Civ. App., 152 S.W.2d 515, error refused.—*Texas Power & Light Co. v. Doering Hotel Co.*, Civ. App., 147 S.W.2d 897, affirmed 162 S.W.2d 938, 139 Tex. 351.—*Service Mut. Ins. Co. of Texas v. Territo*, Civ. App., 147 S.W.2d 846.—*United Employers Casualty Co. v. Lee*, Civ. App., 146 S.W.2d 320, error dismissed, judgment correct.—*Tipton v. Tipton*, Civ. App., 140 S.W.2d 865, error dismissed, judgment correct.—*Peerless Oil & Gas Co. v. Teas*, Civ. App., 138 S.W.2d 637, affirmed 158 S.W.2d 758, 138 Tex. 301.—*Southern Underwriters v. Jones*, Civ. App., 137 S.W.2d 52, error dismissed, judgment correct.—*Davis v. Dowlen*, Civ. App., 136 S.W.2d 900, error dismissed, judgment correct.—*Joy v. Peacock*, Civ. App., 131 S.W.2d 1012, set aside on other grounds *Peacock v. Joy*, 153 S.W.2d 440, 137 Tex. 387.—*Atkins v. Dodds*, Civ. App., 121 S.W.2d 1010, error dismissed by agreement.—*Gelstmann v. Schkade*, Civ. App., 121 S.W.2d 494.—*Vincent v. Johnson*, Civ. App., 117 S.W.2d 135, error dismissed.—*Cross v. White*, Civ. App., 112 S.W.2d 502, affirmed 132 S.W.2d 580, 134 Tex. 91.—*Fairbanks, Morse & Co. v. Carsey*, Civ. App., 109 S.W.2d 985, error dismissed.—*Alamo Downs, Inc. v. Briggs*, Civ. App., 106 S.W.2d 733, error dismissed.—*Consolidated Casualty Ins. Co. v. Fortenberry*, Civ. App., 103 S.W.2d 1049.—*Hale v. Herring*, Civ. App., 102 S.W.2d 468.—*Keels v. Metzler*, Civ.

*App.*, 94 S.W.2d 799, error dismissed.—*Rotge v. Dunlap*, Civ. App., 91 S.W.2d 905, error dismissed by agreement.—*Jasper County Lumber Co. of Texas v. Smith*, Civ. App., 91 S.W.2d 834, error dismissed.—*Connecticut General Life Ins. Co. v. Banderbee*, Civ. App., 82 S.W.2d 764.—*Hunter v. B. E. Porter, Inc.*, Civ. App., 81 S.W.2d 774.—*Pure Oil Co. v. Pope*, Civ. App., 75 S.W.2d 175, reversed (no opinion).—*Panhandle & S. F. Ry. Co. v. Brown*, Civ. App., 74 S.W.2d 531, error dismissed.—*Dunning v. Badger*, Civ. App., 74 S.W.2d 151, error dismissed.—*Sanders v. Stinnette*, Civ. App., 73 S.W.2d 637, error refused.—*Dennison v. Gilmore*, Civ. App., 71 S.W.2d 542, error dismissed.—*Goodrich v. First Nat. Bank*, Civ. App., 70 S.W.2d 609, error refused.—*James v. Hada*, Civ. App., 66 S.W.2d 365, error dismissed.—*E. A. Pierce & Co. v. Aronoff*, Civ. App., 60 S.W.2d 796, error dismissed.—*White v. Haynes*, Civ. App., 60 S.W.2d 275, error dismissed.—*Powell v. Rockow*, Civ. App., 58 S.W.2d 536, reversed on other grounds 92 S.W.2d 437, 127 Tex. 209.—*Reed v. Magnolia Petroleum Co.*, Civ. App., 57 S.W.2d 359, error dismissed.  
64 C.J. p 1153 note 30 [d].

#### Uncontradicted evidence

Submission of single question to jury containing two issues was not erroneous, where uncontradicted evidence required that each of issues be answered in affirmative.—*Kansas City Life Ins. Co. v. Fisher*, *Tex. Civ. App.*, 83 S.W.2d 1063, error dismissed.

#### Immaterial matter

There is no duplicity where single element issue is presented, even though there is combined within it immaterial matter such as an evidentiary issue.—*E. A. Pierce & Co. v. Aronoff*, *Tex. Civ. App.*, 60 S.W.2d 796, error dismissed.

#### Efficient cause and procuring cause

In action to recover a sales commission, submitting "efficient cause" and "procuring cause" in same question asking whether jury found that plaintiff was the efficient and procuring cause of the sale did not render question multifarious, where in its charge the court defined efficient

negligence generally,<sup>9</sup> and in workmen's compensation suits.<sup>10</sup>

cause and procuring cause, not as independent acts, but as descriptive of the very act which produced the result.—*Phoenix Refining Co. v. Muller*, Tex.Civ.App., 109 S.W.2d 766, error dismissed.

9. *Tex.—Jones v. Scott*, Civ.App., 266 S.W.2d 534, refused no reversible error.—*Driver v. Worth Const. Co.*, Civ.App., 264 S.W.2d 174, error granted.—*Texas Livestock Marketing Ass'n v. Rogers*, Civ.App., 244 S.W.2d 859, error refused no reversible error.—*Gray County Gas Co. v. Oldham*, Civ.App., 238 S.W.2d 596.—*Gillette Motor Transp. Co. v. Whitfield*, Civ.App., 197 S.W.2d 157, affirmed 200 S.W.2d 624, 145 Tex. 571.—*Texas & P. Ry. Co. v. Duncan*, Civ.App., 193 S.W.2d 431.—*Lackey v. Moffett*, Civ.App., 172 S.W.2d 716.—*Morton v. Jasper*, Civ.App., 167 S.W.2d 541, error refused.—*Texaco Country Club v. Wade*, Civ.App., 163 S.W.2d 219.—*Doornbos v. Looney*, Civ.App., 159 S.W.2d 155, error refused.—*Texas Cities Gas Co. v. Dickens*, Civ.App., 156 S.W.2d 1010, affirmed 168 S.W.2d 208, 140 Tex. 433.—*Southwestern Bell Telephone Co. v. Humphries*, Civ.App., 147 S.W.2d 971, error dismissed, judgment correct.—*Dulaney Inv. Co. v. Wood*, Civ.App., 142 S.W.2d 379, error dismissed, judgment correct.—*Goldstein Hat Mfg. Co. v. Cowen*, Civ.App., 136 S.W.2d 867.—*Poster v. Woodward*, Civ.App., 134 S.W.2d 417, error refused.—*City of Waco v. Fenter*, Civ.App., 132 S.W.2d 636, error refused.—*Wells v. Ford*, Civ.App., 118 S.W.2d 420, error dismissed.—*Vincent v. Johnson*, Civ.App., 117 S.W.2d 136, error dismissed.—*J. S. Abercrombie Co. v. Delcomyn*, Civ.App., 116 S.W.2d 1105, reversed on other grounds 135 S.W.2d 978, 134 Tex. 490.—*City of Winters v. Bethune*, Civ.App., 111 S.W.2d 797, error dismissed.—*Bull-Stewart Equipment Co. v. Sparra*, Civ.App., 109 S.W.2d 784, error dismissed.—*Amberson v. Woodul*, Civ.App., 108 S.W.2d 852, error dismissed.—*E. L. Martin, Inc. v. Kyser*, Civ.App., 104 S.W.2d 592, error dismissed.—*Echols v. Duke*, Civ.App., 102 S.W.2d 483, error dismissed.—*Gulf States Utilities Co. v. Woodridge*, Civ.App., 90 S.W.2d 325.—*Texas & N. O. Ry. Co. v. Rittmann*, Civ.App., 87 S.W.2d 745, error dismissed.—*Ford Motor Co. v. Whitl*, Civ.App., 81 S.W.2d 1032, error refused.—*Jackson v. Amador*, Civ.App., 75 S.W.2d 892, error dismissed.—*Pure Oil Co. v. Pope*, Civ.App., 75 S.W.2d 175, reversed (no opinion).—*Fanhandle & S. F. Ry. Co. v. Brown*, Civ.App., 74 S.W.2d 531, error dismissed.—*Gulf States Utilities Co. v. Wuenscher*, Civ.App., 72 S.W.2d 682, error dismissed.

ed.—*Western Telephone Corporation of Texas v. McCann*, Civ.App., 69 S.W.2d 465, reversed on other grounds 99 S.W.2d 895, 128 Tex. 582.—*Austin v. De George*, Civ.App., 55 S.W.2d 585, error dismissed. 64 C.J. p 1153 note 30 [d].

#### Combining of constituent elements

In automobile collision case, submission of issues embodying disputed fact elements as to whether lookout was kept, whether automobiles were under control, and if plaintiff and defendant were negligent in such particulars was not objectionable as duplicitous, where only combining was merely that of constituent elements going to make up ultimate issue of negligence.—*Levy v. Rogers*, Tex.Civ.App., 75 S.W.2d 304, error dismissed.

#### Damages

In motorist's action for injuries sustained in collision between automobile and motor propelled handcar at public road crossing, submission as one issue the amount of motorist's damages for pain, suffering and loss of earning capacity was not error as against contention that such elements of damage should have been submitted separately.—*Alcorn v. Fort Worth & R. G. Ry. Co.*, Tex.Civ.App., 122 S.W.2d 341, error refused.

#### Discovered peril

(1) Where plaintiff relies on the doctrine of discovered peril, the submission in one issue of the second element of the doctrine is not objectionable as being multifarious or as an improper grouping of two issues, and such submission imposes no undue burden on plaintiff and gives defendant no cause for complaint.—*Turner v. Texas Co.*, 159 S.W.2d 112, 138 Tex. 380.

(2) In automobile collision case, issue submitting question of discovered peril was not erroneous as submitting in form of general charge all the several elements of discovered peril, where several elements of discovered peril were so related and interdependent that elements should be connected into one to form ultimate issue.—*Leap v. Brazier*, Tex.Civ.App., 93 S.W.2d 1213, modified on other grounds, Com.App., 121 S.W.2d 334.

(3) Special issue submitting discovered peril in railroad crossing collision was not multifarious because submitting conjunctively discovery and realization by defendant's engineer of deceased's position of peril, or because explaining the use of the means at engineer's command to avoid injuring deceased.—*Burlington-Rock Island R. Co. v. Davis*, Tex.Civ.App., 123 S.W.2d 1002, error dismissed, judgment correct.

#### Unavoidable accident

In action for injuries to passenger in defendant's bus, colliding with trailer of approaching truck just after passing rear of laundry truck turning to right off highway in front of bus, definition of unavoidable accident in charge as unexpected happening of event not proximately caused by bus driver's negligence was not objectionable on ground that defendant was entitled to submission of two such issues as between bus driver and both lumber truck driver and laundry truck driver separately.—*Airline Motor Coaches v. Fields*, 188 S.W.2d 917, 146 Tex. 221.

10. *Tex.—Eubanks v. Texas Emp. Ins. Ass'n*, 248 S.W.2d 467, 151 Tex. 67.—*Traders & General Ins. Co. v. Carlile*, 161 S.W.2d 484, 138 Tex. 473.—*Southern Underwriters v. Schoolcraft*, 158 S.W.2d 991, 138 Tex. 323.—*Texas Emp. Ins. Ass'n v. Mincey*, Civ.App., 255 S.W.2d 262, refused no reversible error.—*Texas General Indemnity Co. v. Scott*, Civ.App., 246 S.W.2d 228, error refused no reversible error.—*American Cas. & Life Co. v. McCuiston*, Civ.App., 202 S.W.2d 474, refused no reversible error.—*Maryland Casualty Co. v. Gunter*, Civ.App., 167 S.W.2d 645.—*Hartford Accident & Indemnity Co. v. Harris*, Civ.App., 152 S.W.2d 857.—*Traders & General Ins. Co. v. Belcher*, Civ.App., 152 S.W.2d 525.—*Traders & General Ins. Co. v. Turner*, Civ.App., 149 S.W.2d 593.—*Maryland Casualty Co. v. Romero*, Civ.App., 146 S.W.2d 1098, error dismissed, judgment correct.—*United Employers Casualty Co. v. Lee*, Civ.App., 146 S.W.2d 320, error granted.—*Traders & General Ins. Co. v. Wright*, Civ.App., 144 S.W.2d 626, error refused.—*Maryland Casualty Co. v. Foote*, Civ.App., 139 S.W.2d 602, error refused.—*Southern Underwriters v. Schoolcraft*, Civ.App., 139 S.W.2d 330, modified on other grounds 158 S.W.2d 991, 138 Tex. 323.—*United Employers Casualty Co. v. Knight*, Civ.App., 139 S.W.2d 613, error dismissed, judgment correct.—*Southern Underwriters v. Jones*, Civ.App., 137 S.W.2d 52, error dismissed, judgment correct.—*Federal Underwriters Exchange v. Blockham*, Civ.App., 136 S.W.2d 880, affirmed 157 S.W.2d 356, 138 Tex. 128.—*Texas Employers Ins. Ass'n v. Watkins*, Civ.App., 135 S.W.2d 296.—*Southern Underwriters v. Stubblefield*, Civ.App., 130 S.W.2d 385.—*Traders & General Ins. Co. v. Boyesen*, Civ.App., 123 S.W.2d 1016, error dismissed, judgment correct.—*Traders & General Ins. Co. v. Patterson*, Civ.App., 123 S.W.2d 766, error dismissed.—*Traders & General Ins. Co. v. Garry*, Civ.App., 118 S.

## § 546. — Interrogatories Assuming Facts or on Weight of Evidence

A special interrogatory or special issue should not be so framed as to include or embody an assumption of any controverted or unadmitted fact, or as to amount to any indication of the opinion of the court on the facts or the weight or sufficiency of the evidence.

As a general rule, a special interrogatory or special issue should not be so framed as to include or

embody an assumption of any controverted or unadmitted fact,<sup>11</sup> or as to embody a suggestion of the existence of any facts of which no evidence has been introduced;<sup>12</sup> and questions presented for special findings, which assume as true material facts in issue and not admitted, are improper and properly excluded.<sup>13</sup> Accordingly, particular interrogatories or special issues have been held objectionable as assuming disputed facts,<sup>14</sup> such as

W.2d 240, reversed on other grounds 143 S.W.2d 197, 135 Tex. Civ.App., 129 S.W.2d 778, error dismissed, judgment correct—Federal Underwriters Exchange v. Ener, Civ.App., 126 S.W.2d 769, error dismissed, judgment correct—Maryland Casualty Co. v. Crosby, Civ. App., 117 S.W.2d 524, error dismissed—Traders & General Ins. Co. v. Snow, Civ.App., 114 S.W.2d 682, error dismissed—Texas Employers' Ins. Ass'n v. Clark, Civ.App., 112 S.W.2d 526, affirmed 132 S.W.2d 399, 134 Tex. 151—Traders & General Ins. Co. v. Baker, Civ.App., 111 S.W.2d 837, error dismissed—Texas Employers' Ins. Ass'n v. Rowell, Civ.App., 104 S.W.2d 613—Consolidated Casualty Ins. Co. v. Fortenberry, Civ.App., 103 S.W.2d 1049, error refused—Republic Underwriters v. Warf, Civ.App., 103 S.W.2d 871, error dismissed—Traders & General Ins. Co. v. Blacett, Civ. App., 96 S.W.2d 420, error dismissed—Traders & General Ins. Co. v. Wright, Civ.App., 95 S.W.2d 753, affirmed Wright v. Traders & General Ins. Co., 123 S.W.2d 314, 132 Tex. 172—Texas & P. Ry. Co. v. Gurian, Civ.App., 77 S.W.2d 274, error dismissed—Texas Employers' Ins. Ass'n v. Jones, Civ.App., 70 S.W.2d 1014, error dismissed—Traders & General Ins. Co. v. Line, Civ.App., 70 S.W.2d 787, error dismissed—Fidelity & Casualty Co. of New York v. Branton, Civ.App., 70 S.W.2d 780, error dismissed—Texas Employers' Ins. Ass'n v. Pearson, Civ.App., 67 S.W.2d 630, error dismissed—Texas Cities Gas Co. v. Ellis, Civ.App., 63 S.W.2d 717—Berwald v. Turner, Civ.App., 62 S.W.2d 112, error refused.  
64 C.J. p 1153 note 30 [d].

### Separate injuries

Where evidence in compensation proceeding indicated that two separate injuries to the same organ contributed to producing disease which caused disability, the two injuries together constituted the final ultimate issue and it was therefore proper to group the fact issues, necessary to make up the ultimate issue, in a single inquiry.—Traders & General Ins. Co. v. Turner, Tex.Civ.App., 149 S.W.2d 593, error dismissed, judgment correct.

11. Iowa.—Corpus Juris cited in Tobin v. Van Orsdol, 45 N.W.2d 239, 244, 241 Iowa 1331.  
Ind.—McKinnon v. Parrill, 38 N.E.2d 1008, 111 Ind.App. 343.  
Ohio.—Bradley v. Mansfield Rapid Transit, 93 N.E.2d 672, 154 Ohio St. 154—Wells v. Baltimore & O. R. Co., App., 97 N.E.2d 75.  
Tex.—Gooch v. Davidson, Civ.App., 245 S.W.2d 989—Houston Transit Co. v. Goldston, Civ.App., 217 S.W.2d 435—Payne v. Price, Civ.App., 203 S.W.2d 544, refused on reversible error—Southern Underwriters v. Waddell, Civ.App., 144 S.W.2d 637—Tinney v. Williams, Civ.App., 144 S.W.2d 344—Goldstein Hat Mfg. Co. v. Cowen, Civ.App., 136 S.W.2d 867—Sinclair Nav. Co. v. Krennick, Civ.App., 129 S.W.2d 758—Lone Star Gas Co. v. Eckel, Civ.App., 110 S.W.2d 936—Eagle Furniture Stores v. Jones, Civ.App., 110 S.W.2d 610—Karr v. Cockerham, Civ.App., 107 S.W.2d 719, error dismissed—Lone Star Ice Co. v. Everett, Civ.App., 77 S.W.2d 256—Cannaday v. Martin, Civ.App., 69 S.W.2d 434, error dismissed.  
64 C.J. p 1157 note 50.

12. Tex.—Hines v. Whiteman, Civ. App., 228 S.W. 979.  
64 C.J. p 1158 note 57.

13. Kan.—B. F. McLean Inv. Co. v. City of Wichita, 268 P.2d 956, 176 Kan. 55.

Ohio.—Bradley v. Mansfield Rapid Transit, 93 N.E.2d 672, 154 Ohio St. 154.

Tex.—Kirk v. Marshall, Civ.App., 247 S.W.2d 454—Meadlake Foods v. Estes, Civ.App., 218 S.W.2d 862, error refused 219 S.W.2d 441, 148 Tex. 13—Cartledge v. Billaluba, Civ. App., 154 S.W.2d 219, error refused—Goldstein Hat Mfg. Co. v. Cowen, Civ.App., 136 S.W.2d 867—Mallet Land & Cattle Co. v. State, Civ. App., 84 S.W.2d 260, reversed on other grounds State v. Mallet Land & Cattle Co., 88 S.W.2d 471, 126 Tex. 392—Texas Employers' Ins. Ass'n v. Van Pelt, Civ.App., 83 S.W.2d 392—Plainview Cotton Oil Co. v. Thomas, Civ.App., 81 S.W.2d 560—San Antonio Amusement Co. v. Easterling, Civ.App., 71 S.W.2d 350, error dismissed—Liberty Mut. Ins. Co. v. Boggs, Civ.App., 66 S.W.2d 787, error dismissed—S. H. Kress & Co. v. Jennings, Civ.App., 64 S.

W.2d 1074, error dismissed—Turner v. Cochran, Civ.App., 57 S.W.2d 305, error dismissed—San Antonio Public Service Co. v. Smith, Civ.App., 57 S.W.2d 179, error dismissed—Texas Co. v. Betterton, Civ.App., 56 S.W.2d 663, reversed on other grounds 88 S.W.2d 1039, 126 Tex. 359—Texas Electric Service Co. v. Anderson, Civ.App., 55 S.W.2d 142, error dismissed.  
64 C.J. p 1137 note 30.

### Correct wording

Special issue assuming disputed fact was not "in substantially correct wording" required by rules, and hence error could not be predicated on failure to submit it.—Bradford v. Magnolia Pipe Line Co., Tex.Civ.App., 262 S.W.2d 242.

14. Tex.—Turner v. Texas Co., 159 S.W.2d 112, 138 Tex. 380—Fort Worth & D. Ry. Co. v. Barlow, Civ. App., 263 S.W.2d 278, error refused on reversible error—Bradshaw v. McDonald, Civ.App., 211 S.W.2d 797, affirmed 216 S.W.2d 972, 147 Tex. 455—Banker v. McLaughlin, Civ. App., 200 S.W.2d 699, affirmed 208 S.W.2d 843, 146 Tex. 434, 8 A.L.R. 2d 1231—Bonham Coca Cola Bottling Co. v. Jennings, Civ.App., 181 S.W.2d 97, error denied 184 S.W.2d 821, 143 Tex. 327—Associated Indem. Corp. v. Billberg, Civ.App., 172 S.W.2d 157—Cartledge v. Billaluba, Civ.App., 154 S.W.2d 219, error refused—Beaumont City Lines v. Humphrey, Civ.App., 149 S.W.2d 256—Peden Iron & Steel Co. v. Claflin, Civ.App., 146 S.W.2d 1062, error dismissed, judgment correct—Jones-O'Brien, Inc. v. Loyd, Civ. App., 125 S.W.2d 684, error dismissed—Atkins v. Dodds, Civ.App., 121 S.W.2d 1010, error dismissed by agreement—Monarch Fire Ins. Co. v. Redmon, Civ.App., 109 S.W.2d 177—Karr v. Cockerham, Civ.App., 107 S.W.2d 719, error dismissed—American Nat. Ins. Co. v. Masengale, Civ.App., 105 S.W.2d 373—Ferguson Seed Farms v. Fort Worth & D-S. P. Ry. Co., Civ.App., 100 S.W.2d 177, error dismissed—Wilson v. Modica, Civ.App., 80 S.W.2d 411.  
64 C.J. p 1157 note 50 [a].

### In workmen's compensation suits

(1) In general.—Johnson v. Zurich General Accident & Liability Ins.

negligence,<sup>15</sup> the incurrence of an injury,<sup>16</sup> the disability or incapacity of a person,<sup>17</sup> the existence of a contract,<sup>18</sup> the making of particular statements or representations,<sup>19</sup> or the agency of one person

for another;<sup>20</sup> but other particular interrogatories or special issues have been held not objectionable as assuming disputed facts.<sup>21</sup>

Where a fact is indisputable,<sup>22</sup> or is conclusively

Co., 205 S.W.2d 853, 146 Tex. 232—Southern Underwriters v. West, Tex. Civ.App., 162 S.W.2d 933—Texas Employers' Ins. Ass'n v. Humphrey, Tex. Civ.App., 140 S.W.2d 313, error refused—Texas Reciprocal Ins. Ass'n v. Smith, Tex.Civ.App., 68 S.W.2d 295.

(2) In compensation case, question as to what number of weeks employee's total incapacity for work would exist, which was not predicated on answer to any preceding issue, was error as assuming that employee had suffered total incapacity.—Indemnity Ins. Co. of North America v. Weeks, Tex.Civ.App., 75 S.W.2d 925.

15. Iowa.—Tobin v. Van Orsdel, 45 N.W.2d 239, 241 Iowa 1331.  
Tex.—McClellan Stores Co. v. Lindsey, Civ.App., 157 S.W.2d 1013, error refused—Tucker v. Newth, Civ. App., 167 S.W.2d 1010, error refused—White v. Akers, Civ.App., 125 S.W.2d 388—Hornsbey v. Houston Elec. Co., Civ.App., 125 S.W.2d 846. Error dismissed, judgment correct—Tucker Oil Co. v. Matthews, Civ.App., 119 S.W.2d 606—Hornsbey Heavy Hardware Co. v. Prichard, Civ.App., 119 S.W.2d 410, error dismissed—McCluskey v. Keathley, Civ.App., 111 S.W.2d 1199, error dismissed—Desdemona Gasoline Co. of Texas v. Garrett, Civ. App., 90 S.W.2d 636, error dismissed—Texas Utilities Co. v. West, Civ.App., 59 S.W.2d 459, error refused—Carson v. Texas Pipe Line Co., Civ.App., 59 S.W.2d 328, error dismissed—Texas & N. O. R. Co. v. Robinson, Civ.App., 57 S.W.2d 938.  
Wis.—Foemmel v. Mueller, 38 N.W.2d 510, 255 Wis. 277—Maas v. W. R. Arthur & Co., 2 N.W.2d 238, 239 Wis. 581.

64 C.J. p 1157 note 51.

#### Contributory negligence

Tex.—Texas & P. Ry. Co. v. Gillette, Civ.App., 100 S.W.2d 170, error dismissed.

18. Tex.—Zurich General Accident & Liability Ins. Co. v. Young, Civ. App., 202 S.W.2d 338, refused no reversible error—Sinclair Nav. Co. v. Kremlick, Civ.App., 129 S.W.2d 758—Texas Employers Ins. Ass'n v. Van Pelt, Civ.App., 83 S.W.2d 392.

64 C.J. p 1158 note 52.

17. Tex.—Texas Employers Ins. Ass'n v. Ebers, Civ.App., 134 S.W.2d 797, error dismissed, judgment correct.

64 C.J. p 1158 note 53.

18. Tex.—Gooch v. Davidson, Civ. App., 245 S.W.2d 988—Bradshaw v. McDonald, Civ.App., 211 S.W.2d 797,

affirmed 216 S.W.2d 972, 147 Tex. 455.

64 C.J. p 1158 note 54.

19. Tex.—Gulf, C. & S. F. Ry. Co. v. Houston, Civ.App., 45 S.W.2d 771—Anders v. California State Life Ins. Co., Civ.App., 214 S.W. 497.

20. Tex.—Bradshaw v. McDonald, 216 S.W.2d 972, 147 Tex. 455—Central Motor Co. v. Robertson, Civ. App., 154 S.W.2d 180, affirmed Burton v. Robertson, 164 S.W.2d 524, 139 Tex. 562, 143 A.L.R. 1—Theis v. Curtis, Civ.App., 33 S.W.2d 754.

21. Ill.—Lindroth v. Walgreen Co., 87 N.E.2d 307, 338 Ill.App. 364, affirmed 94 N.E.2d 847, 407 Ill. 121.  
Tex.—Krottinger v. Marchand, Civ. App., 252 S.W.2d 217—Meadolake Foods v. Estes, Civ.App., 213 S.W.2d 862, error refused 219 S.W.2d 441, 148 Tex. 13—Ellison v. Larson, Civ.App., 217 S.W.2d 418, reversed on other grounds 217 S.W.2d 420, 147 Tex. 465—Straffus v. Barclay, Civ.App., 214 S.W.2d 826, affirmed 219 S.W.2d 68, 147 Tex. 600—Associated Emp. Lloyds v. Aiken, Civ. App., 201 S.W.2d 856, refused no reversible error—Houston Transit Co. v. Zimmerman, Civ.App., 200 S.W.2d 845—Maryland Casualty Co. v. Hearn, Civ.App., 188 S.W.2d 262, affirmed 190 S.W.2d 62, 144 Tex. 317—Collins v. Hall, Civ.App., 161 S.W.2d 311, error refused—Western Union Tel. Co. v. Homer, Civ.App., 157 S.W.2d 659, affirmed 166 S.W.2d 684, 140 Tex. 193—Tunstall v. Pelton, Civ.App., 155 S.W.2d 653, error refused—Horne Motors v. Latimer, Civ.App., 148 S.W.2d 1000, error dismissed, judgment correct—Imperial Underwriters v. Dillard, Civ.App., 146 S.W.2d 1105, error refused—Rhône v. Fox, Civ.App., 142 S.W.2d 642, error dismissed—Industrial Indemnity Exchange v. Ratcliff, Civ.App., 138 S.W.2d 613, error dismissed, judgment correct—Federal Underwriters Exchange v. Bickham, Civ.App., 136 S.W.2d 880, affirmed 157 S.W.2d 856, 138 Tex. 128—General American Life Ins. Co. v. Gant, Civ.App., 119 S.W.2d 693, error dismissed—El Paso Electric Co. v. Barker, Civ.App., 116 S.W.2d 433, reversed on other grounds 137 S.W.2d 17, 134 Tex. 496—Dallas Joint Stock Land Bank of Dallas v. Britton, Civ.App., 114 S.W.2d 907, reversed on other grounds Dallas Joint Stock Land Bank of Dallas v. Britton, 135 S.W.2d 981, 134 Tex. 529—City of Winters v. Bethune, Civ.App., 111 S.W.2d 797, error dismissed—Rountree Motor Co. v.

Smith Motor Co., Civ.App., 109 S.W.2d 296, error dismissed—McClelland v. Moulger, Civ.App., 107 S.W.2d 901, error dismissed by agreement—City of Kirbyville v. Smith, Civ.App., 104 S.W.2d 564—Hall v. Weaver, Civ.App., 101 S.W.2d 1035, error dismissed—Texas & N. O. Ry. Co. v. Crow, Civ.App., 101 S.W.2d 274, reversed on other grounds 123 S.W.2d 649, 132 Tex. 465—Joy v. Craig, Civ.App., 94 S.W.2d 524, error dismissed—Pure Oil Co. v. Pope, Civ.App., 75 S.W.2d 175, reversed (no opinion)—Texas & N. O. R. Co. v. Kveton, Civ.App., 75 S.W.2d 118, error dismissed—Davenport v. Taylor County Tuberculosis Ass'n, Civ. App., 72 S.W.2d 407—Mahone v. Bowman, Civ.App., 70 S.W.2d 233, error dismissed.

Wis.—E. L. Chester Co. v. Wisconsin Power & Light Co., 247 N.W. 861, 211 Wis. 158.

64 C.J. p 1157 notes 50 [b], 51 [b].

#### In workmen's compensation suits

Tex.—Southern Underwriters v. Schoolcraft, 158 S.W.2d 991, 138 Tex. 323—Russell v. Great American Indemnity Co., 94 S.W.2d 409, 127 Tex. 458—Texas Emp. Ins. Ass'n v. Pillow, Civ.App., 268 S.W.2d 716—Pacific Indemnity Co. v. Blessitt, Civ.App., 191 S.W.2d 904, error refused no reversible error—Maryland Casualty Co. v. Romero, Civ.App., 148 S.W.2d 1096, error dismissed, judgment correct—Traders & General Ins. Co. v. Jenkins, Civ. App., 144 S.W.2d 350—Texas Employers' Ins. Ass'n v. Rowell, Civ. App., 104 S.W.2d 613—Traders & General Ins. Co. v. Milliken, Civ. App., 87 S.W.2d 503—Maryland Casualty Co. v. Bryant, Civ.App., 84 S.W.2d 492, error dismissed—Dunning v. Badger, Civ.App., 74 S.W.2d 151, error dismissed—Fidelity & Casualty Co. of New York v. Branton, Civ.App., 70 S.W.2d 780, error dismissed.

22. Cal.—Spear v. United Railroads of San Francisco, 117 P. 956, 16 Cal. App. 637.

Tex.—Williams v. Fuerstenberg, Civ. App., 12 S.W.2d 812, reversed on other grounds, Com.App., 23 S.W.2d 305.

Where both parties pleaded the fact which it was alleged was assumed by special issue to exist, and evidence was introduced establishing the fact, there could be no error in assuming that the fact so pleaded existed.—Natorium Laundry Co. v. Saylor, Tex.Civ.App., 181 S.W.2d 790, error dismissed, judgment correct.

shown,<sup>23</sup> or the evidence thereof is undisputed,<sup>24</sup> or where the fact follows as matter of law from facts established,<sup>25</sup> the existence of such fact may be assumed in framing an interrogatory or issue. Also, it is not improper to assume particular facts on the express condition that the jury shall find such facts in response to other interrogatories,<sup>26</sup> and a question is not objectionable where it conditionally assumes a fact, as where the mention there-

of is qualified by the word "alleged,"<sup>27</sup> or by "any" or "if any,"<sup>28</sup> or where it is otherwise so framed as to require a finding of the existence of such fact before answering the question.<sup>29</sup>

*Interrogatories on weight of evidence.* It is generally held that a special interrogatory or special issue should not be so framed as to amount to any indication of the opinion of the court on the facts or the weight or sufficiency of the evidence.<sup>30</sup> Ac-

23. Tex.—Beaumont City Lines v. Williams, Civ.App., 221 S.W.2d 560, error refused no reversible error—Butts v. Weaver, Civ.App., 145 S.W.2d 251, error dismissed, judgment correct—Tebay v. Morrison, Civ.App., 139 S.W.2d 226, error dismissed—Hall v. Weaver, Civ.App., 101 S.W.2d 1035, error dismissed—Traders' & General Ins. Co. v. Line, Civ.App., 70 S.W.2d 787, error dismissed—Golden v. Wilder, Civ. App., 4 S.W.2d 140.

#### Countervailing evidence

Evidence conclusively established accidental injury to employee, so as to justify assumption thereof by trial court in special issue submitted to jury, even though there was evidence raising slight possibility that employee's incapacity was due to occupational disease.—Texas Emp. Ins. Ass'n v. McKay, Civ.App., 205 S.W.2d 833, affirmed 210 S.W.2d 147, 146 Tex. 569.

24. Tex.—Cree v. Miller, Civ.App., 255 S.W.2d 565, refused no reversible error—Bryant v. Banner Dairies, Inc., Civ.App., 255 S.W.2d 271, refused no reversible error—Liberty Mut. Ins. Co. v. Taylor, Civ.App., 244 S.W.2d 850—Cornett v. Hardy, Civ.App., 241 S.W.2d 186—Andrews v. Daniel, Civ.App., 240 S.W.2d 1018, error dismissed—Hughes v. Belman, Civ.App., 239 S.W.2d 717, refused no reversible error—Texas Emp. Ins. Ass'n v. McKay, Civ. App., 205 S.W.2d 833, affirmed 210 S.W.2d 147, 146 Tex. 569—Younger Bros. v. Ross, Civ.App., 151 S.W.2d 621, error dismissed—Ames v. Herrington, Civ.App., 139 S.W.2d 183, error dismissed, judgment correct—Traders' & General Ins. Co. v. Tillman, Civ.App., 119 S.W.2d 142, error dismissed—Marvel Wells, Inc. v. Seelig, Civ.App., 115 S.W.2d 1011—Lozano Newspapers v. Alvarez, Civ.App., 104 S.W.2d 573, error dismissed—Associated Indemnity Corporation v. Baker, Civ.App., 76 S.W.2d 153, error dismissed—Federal Crude Oil Co. v. Yount-Lee Oil Co., Civ.App., 73 S.W.2d 969, error dismissed and certiorari denied 55 S.Ct. 655, 295 U.S. 741, 79 L.Ed. 1687—Traders' & General Ins. Co. v. Line, Civ.App., 70 S.W.2d 787, error dismissed—Ed S. Hughes Co. v. Clark Bros. Co., Civ.App., 63

S.W.2d 230—Texas Electric Service Co. v. Anderson, Civ.App., 55 S.W.2d 142, error dismissed.

64 C.J. p 1159 note 61.

#### Established facts

Trial court in framing an issue may assume existence of facts established by uncontradicted evidence or by admission.—Traders' & General Ins. Co. v. Patterson, Tex.Civ.App., 123 S.W.2d 766, error dismissed.

#### Sustaining of injuries

Issue on proximate cause was not erroneous on ground that it assumed that one of plaintiffs sustained injuries, where, under undisputed evidence, that plaintiff did suffer injuries in form and manner pleaded, and only point at issue was extent of those injuries.—Foster v. Woodward, Tex.Civ.App., 134 S.W.2d 417, error refused.

25. Tex.—Barron v. James, Civ.App., 198 S.W.2d 245, reversed on other grounds 198 S.W.2d 256, 145 Tex. 283.

64 C.J. p 1159 note 62.

26. Mo.—Cross v. Fletcher, App., 216 S.W.2d 101.

Tex.—American Water Co. v. Bunge, Civ.App., 213 S.W.2d 93, refused no reversible error—Standard Paving Co. v. Pyle, Civ.App., 131 S.W.2d 200—International-Great Northern R. Co. v. Acker, Civ.App., 128 S.W.2d 506, error dismissed, judgment correct—Traders' & General Ins. Co. v. Tillman, Civ.App., 119 S.W.2d 142, error dismissed—McClelland v. Moulter, Civ.App., 107 S.W.2d 901, error dismissed by agreement—Border State Life Ins. Co. v. Monk, Civ.App., 103 S.W.2d 825, error dismissed—Gulf States Utilities Co. v. Woodridge, Civ.App., 90 S.W.2d 325—Owen v. King, Civ.App., 84 S.W.2d 743, reversed on other grounds Com.App., 111 S.W.2d 685, 114 L.R. 859—Panhandle & S. F. Ry. Co. v. Brown, Civ.App., 74 S.W.2d 531, error dismissed.

64 C.J. p 1159 note 63.

#### Collisions

Question of special verdict inquiring whether driver of automobile which collided with rear of manure spreader on which plaintiff was riding was negligent with respect to suddenly reducing speed immediately before another automobile collided

with rear of defendant's automobile should have been prefaced by statement that it was to be answered only if jury found in response to another question that second automobile collided with rear of defendant's automobile before it collided with spreader.—Papenfus v. Shell Oil Co., 35 N.W.2d 920, 254 Wis. 233.

27. Tex.—Western Union Telegraph Co. v. Scarborough, Civ.App., 44 S.W.2d 751.

28. Tex.—Krottinger v. Marchand, Civ.App., 252 S.W.2d 217—Hughes v. Belman, Civ.App., 239 S.W.2d 717, refused no reversible error—Texas Employers' Ins. Ass'n v. Clack, Civ. App., 112 S.W.2d 526, affirmed 132 S.W.2d 399, 134 Tex. 151—McClung Const. Co. v. Muncy, Civ.App., 65 S.W.2d 786, error dismissed.

64 C.J. p 1159 note 65.

29. Tex.—Lancaster v. Browder, Civ. App., 243 S.W. 625, affirmed, Com. App., 256 S.W. 905.

64 C.J. p 1159 note 66.

#### Answer to preceding issue

An issue is not on the weight of the evidence because it assumes the existence of a certain fact, when such fact is found by the jury to exist in the answer to the preceding issue.—Pharr v. Coldeway, Tex.Civ.App., 256 S.W.2d 917—Natastorium Laundry Co. v. Saylor, Tex.Civ.App., 131 S.W.2d 790, error dismissed, judgment correct.

30. Tex.—Consolidated Underwriters v. Langley, 170 S.W.2d 463, 141 Tex. 78—Davis v. Clark, 105 S.W.2d 190, 129 Tex. 520—Fort Worth & D. Ry. Co. v. Barlow, Civ.App., 263 S.W.2d 278—Cole v. Waite, Civ.App., 242 S.W.2d 936, affirmed 246 S.W.2d 849, 151 Tex. 175—Zurich General Accident & Liability Ins. Co. v. Johnson, Civ.App., 202 S.W.2d 258, affirmed 205 S.W.2d 353, 146 Tex. 232—Hodges v. Alford, Civ. App., 194 S.W.2d 293—Franzetti v. Franzetti, Civ.App., 174 S.W.2d 65—Associated Indemnity Corp. v. Billberg, Civ.App., 172 S.W.2d 157—Tucker v. Newth, Civ.App., 157 S.W.2d 1010, error refused—Clowe & Cowan v. Morgan, Civ.App., 163 S.W.2d 863, error refused—Beaumont City Lines v. Humphrey, Civ. App., 149 S.W.2d 256—Traders' & General Ins. Co. v. Richardson, Civ.



cordingly, particular questions or issues have been held improper on this ground,<sup>81</sup> although other particular questions or issues have been held not objectionable in this respect,<sup>82</sup> as in negligence actions

App., 144 S.W.2d 420, error dismissed, judgment correct—Hemsel v. Summers, Civ.App., 138 S.W.2d 865—Whelan v. Henderson, Civ. App., 137 S.W.2d 150, error dismissed, judgment correct—Traders & General Ins. Co. v. Boysen, Civ. App., 123 S.W.2d 1016, error dismissed, judgment correct—Atkins v. Dodds, Civ.App., 121 S.W.2d 1010, error dismissed by agreement—Applewhite v. Sessions, Civ.App., 114 S.W.2d 289—Gulf States Utilities Co. v. Dillon, Civ.App., 112 S.W.2d 752—American Nat. Ins. Co. v. Massengale, Civ.App., 105 S.W.2d 373—International-Great Northern R. R. v. Lowry, Civ.App., 98 S.W.2d 383, reversed on other grounds International-Great Northern R. Co. v. Lowry, 121 S.W.2d 585, 132 Tex. 272—Shannon v. Horn, Civ. App., 92 S.W.2d 1090, error dismissed—Gulf States Utilities Co. v. Woodridge, Civ.App., 90 S.W.2d 325—Texas Employers Ins. Ass'n v. Van Felt, Civ.App., 83 S.W.2d 392—Texas & P. Ry. Co. v. Gurian, Civ.App., 77 S.W.2d 274, error dismissed—Pure Oil Co. v. Pope, Civ. App., 75 S.W.2d 175, reversed (no opinion)—Ed S. Hughes Co. v. Clark Bros. Co., Civ.App., 63 S.W.2d 230—Texas Reciprocal Ins. Ass'n v. Smith, Civ.App., 68 S.W.2d 296—Texas Utilities Co. v. West, Civ. App., 69 S.W.2d 469, error refused—San Antonio Public Service Co. v. Smith, Civ.App., 57 S.W.2d 179, error dismissed—Texas Co. v. Berterton, Civ.App., 56 S.W.2d 663, reversed on other grounds 88 S.W.2d 1039, 126 Tex. 359—Texas & P. Ry. Co. v. Phillips, Civ.App., 56 S.W.2d 210, error dismissed—Mrs. Baird's Bakery v. Davis, Civ.App., 54 S.W.2d 1031.

64 C.J. p 1158 note 58.

#### Usurpation of jury function

Interrogatory of special issue which is so worded as to indicate any opinion of trial judge as to verity of fact inquired about is error as usurpation of exclusive jury function and if wording be such as is reasonably calculated to have such effect and there is reasonable doubt whether it did have such effect, matter is reversed against issue.—Davis v. Clark, 105 S.W.2d 190, 129 Tex. 520—Ross & Sensibaugh v. McLelland, Tex.Civ. App., 262 S.W.2d 205, error refused no reversible error.

31. Tex.—Johnson v. Zurich General Accident & Liability Ins. Co., 205 S.W.2d 353, 146 Tex. 232—Fort Worth & D. Ry. Co. v. Barlow, Civ. App., 263 S.W.2d 278, error refused no reversible error—Hodges v. Alford, Civ.App., 194 S.W.2d 293—American Surety Co. of New York

v. Ritchie, Civ.App., 182 S.W.2d 501, error refused—Associated Indemnity Corp. v. Billberg, Civ.App., 172 S.W.2d 157—Trentman v. Whiteside, Civ.App., 163 S.W.2d 418, affirmed 170 S.W.2d 195, 141 Tex. 46—Tucker v. Newth, Civ.App., 157 S.W.2d 1010, error refused—Beaumont City Lines v. Humphrey, Civ. App., 149 S.W.2d 256—Maryland Casualty Co. v. Abbott, Civ.App., 148 S.W.2d 465, error dismissed, judgment correct—Traders & General Ins. Co. v. Richardson, Civ. App., 144 S.W.2d 420, error dismissed, judgment correct—Hemsel v. Summers, Civ.App., 138 S.W.2d 865—McCluskey v. Keathley, Civ. App., 111 S.W.2d 1199, error dismissed—Community Public Service Co. v. Gray, Civ.App., 107 S.W.2d 495.

64 C.J. p 1158 note 58 [b].

32. Ill.—Bernard v. Metropolitan Life Ins. Co., 45 N.E.2d 518, 316 Ill. App. 655.  
Tex.—Hankamer v. Sumrall, Civ.App., 257 S.W.2d 827, error refused no reversible error—Mims v. Hearon, Civ.App., 248 S.W.2d 754—Pullen v. Ruess, Civ.App., 226 S.W.2d 876, refused no reversible error—Duvall v. Eck, Civ.App., 226 S.W.2d 650—Meadolake Foods v. Estes, Civ.App., 218 S.W.2d 862, error refused 219 S.W.2d 441, 148 Tex. 13—Smith v. Little, Civ.App., 217 S.W.2d 881, refused no reversible error—Ellison v. Larson, Civ.App., 217 S.W.2d 416, reversed on other grounds 217 S.W.2d 420, 147 Tex. 465—Zephyr Oil Co. v. Cockburn, Civ.App., 215 S.W.2d 647, refused no reversible error—McCown v. Jennings, Civ. App., 209 S.W.2d 408—Associated Emp. Lloyds v. Aiken, Civ.App., 201 S.W.2d 856, refused no reversible error—Langham's Estate v. Levy, Civ.App., 198 S.W.2d 747, error refused no reversible error—Bolton v. Stewart, Civ.App., 191 S.W.2d 798—Maryland Cas. Co. v. Hears, Civ. App., 188 S.W.2d 262, affirmed 190 S.W.2d 62, 144 Tex. 317—Universal Life & Acc. Ins. Co. v. Shaw, Civ. App., 178 S.W.2d 501, error refused—Service Finance Corp. v. Singleton, Civ.App., 155 S.W.2d 955, reversed on other grounds 166 S.W.2d 98, 140 Tex. 86—Craddock v. McAfee, Civ.App., 151 S.W.2d 938—Younger Bros. v. Ross, Civ.App., 151 S.W.2d 621, error dismissed—Imperial Underwriters v. Dillard, Civ. App., 146 S.W.2d 1105, error refused—State Nat. Bank of Houston v. Woodfin, Civ.App., 146 S.W.2d 234, error refused—Barrera v. Duval County Ranch Co., Civ.App., 135 S.W.2d 518, error refused—Parker v. Jones, Civ.App., 130 S.W.2d 1072—

General American Life Ins. Co. v. Gant, Civ.App., 119 S.W.2d 693, error dismissed—Sinclair Refining Co. v. Costin, Civ.App., 116 S.W.2d 894—Phoenix Refining Co. v. Muller, Civ.App., 109 S.W.2d 766, error dismissed—Rountree Motor Co. v. Smith Motor Co., Civ.App., 109 S.W.2d 296, error dismissed—Alamo Downs, Inc. v. Briggs, Civ.App., 106 S.W.2d 733, error dismissed—City of Kirbyville v. Smith, Civ. App., 104 S.W.2d 564—Mid-Kansas Oil & Gas Co. v. Burton, Civ.App., 87 S.W.2d 338, error dismissed—Owen v. King, Civ.App., 84 S.W.2d 743, reversed on other grounds Com.App., 111 S.W.2d 695, 114 A.L.R. 853—Ley v. Patton, Civ.App., 81 S.W.2d 1087, error dismissed—Hunter v. B. E. Porter, Inc., Civ. App., 81 S.W.2d 774—Beard & Stone Electric Co. v. Baker, Civ.App., 77 S.W.2d 262—Dunning v. Badger, Civ.App., 74 S.W.2d 151, error dismissed—Dennison v. Gilmore, Civ. App., 71 S.W.2d 542, error dismissed—Goodrich v. First Nat. Bank, Civ.App., 70 S.W.2d 609, error refused—James v. Hada, Civ.App., 66 S.W.2d 365, error dismissed—McClung Const. Co. v. Muncy, Civ. App., 65 S.W.2d 786, error dismissed—E. A. Pierce & Co. v. Aronoff, Civ.App., 60 S.W.2d 796, error dismissed—White v. Haynes, Civ.App., 60 S.W.2d 275, error dismissed—Abshier v. Reavis, Civ.App., 54 S.W.2d 1102, error refused.

64 C.J. p 1158 note 58 [c].

#### Not erroneous

(1) Submission of special issues to jury prefaced with "if so, do you find," following special issues requiring "yes" or "no" answer.—Commercial Standard Ins. Co. v. Shudde, Tex. Civ.App., 76 S.W.2d 561, affirmed (no opinion).

(2) Special issues relating to amount of recovery.—Thompson v. Denham, Tex.Civ.App., 250 S.W.2d 460—Industrial Indemnity Exchange v. Ratcliff, Tex.Civ.App., 138 S.W.2d 613, error dismissed, judgment correct—Wachholder v. Kitchens, Tex.Civ. App., 126 S.W.2d 519—Spears Dairy v. Davis, Tex.Civ.App., 124 S.W.2d 159—Texas Mexican Ry. Co. v. Bell, Tex. Civ.App., 110 S.W.2d 199, error dismissed—Texas & P. Ry. Co. v. Gurian, Tex.Civ.App., 77 S.W.2d 274, error dismissed.

(3) Where jury in action for slander of title resulting in loss of gas lease, found that defendant was actuated by malice and that he acted in bad faith, special issue as to amount of punitive damages was not improper on ground that it assumed that jury would and should assess



generally,<sup>33</sup> or in workmen's compensation suits.<sup>34</sup>

### § 547. — Leading and Suggestive Interrogatories

It is improper to submit a question in such form that it suggests the answer desired, but it is not a valid objection that a question is leading in the sense that it may be answered "yes" or "no."

punitive damages.—Winn v. Warner, Tex.Civ.App., 199 S.W.2d 560.

33. Tex.—Walgreen-Texas Co. v. Shivers, 154 S.W.2d 625, 137 Tex. 493—Marek v. Southern Enterprises of Texas, 99 S.W.2d 594, 128 Tex. 377, mandate conformed to Southern Enterprises v. Marek, Civ.App., 101 S.W.2d 591—Pharr v. Coldeway, Civ.App., 256 S.W.2d 917—San Antonio Hermann Sons Home Ass'n v. Harvey, Civ.App., 256 S.W.2d 906, error refused no reversible error—Cornett v. Hardy, Civ.App., 241 S.W.2d 186—City of Dallas v. Hutchins, Civ.App., 224 S.W.2d 155, refused no reversible error—Beaumont City Lines v. Williams, Civ.App., 221 S.W.2d 560, error refused no reversible error—Boring v. Chicago, R. I. & P. R. Co., Civ.App., 208 S.W.2d 416—Gillette Motor Transp. Co. v. Whitfield, Civ.App., 197 S.W.2d 157, affirmed 200 S.W.2d 624, 145 Tex. 571—Bigelow v. Rupp, Civ.App., 192 S.W.2d 791, refused no reversible error—Dallas Ry. & Terminal Co. v. Menefee, Civ.App., 190 S.W.2d 150—City of Fort Worth v. Lee, Civ. App., 182 S.W.2d 831, affirmed 186 S.W.2d 954, 143 Tex. 551, 159 A.L. R. 125—Evans v. Jeffrey, Civ.App., 181 S.W.2d 709—McGregor Milling & Grain Co. v. Warren, Civ.App., 175 S.W.2d 476, error refused—Saladiner v. Polanco, Civ.App., 160 S.W.2d 531, error refused—Doornbos v. Looney, Civ.App., 159 S.W.2d 155, error refused—Le Sage v. Smith, Civ.App., 145 S.W.2d 308, error dismissed, judgment correct—Yellow Cab Co. v. Underwood, Civ.App., 144 S.W.2d 291, error dismissed, judgment correct—Elmore v. Peavy, Civ.App., 143 S.W.2d 983—Rhône v. Fox, Civ.App., 142 S.W.2d 542, error dismissed—Gillette Motor Transport v. Fine, Civ.App., 131 S.W.2d 817, error dismissed, judgment correct—Gross v. Dallas Railway & Terminal Co., Civ.App., 131 S.W.2d 113, error dismissed, judgment correct—Burlington-Rock Island R. Co. v. Davis, Civ.App., 123 S.W.2d 1002, error dismissed, judgment correct—El Paso Electric Co. v. Barker, Civ.App., 116 S.W.2d 433, reversed on other grounds 137 S.W.2d 17, 134 Tex. 496—Hom-Ond Food Stores v. Voight, Civ.App., 115 S.W.2d 981, error dismissed—Austin St. Ry. Co. v. Oldham, Civ. App., 109 S.W.2d 235, error refused—McClelland v. Mounger, Civ.App.,

107 S.W.2d 901, error dismissed by agreement—Joy v. Craig, Civ.App., 94 S.W.2d 524, error dismissed—Gulf States Utilities Co. v. Wool-dridge, Civ.App., 90 S.W.2d 325—Ford Motor Co. v. Whitt, Civ.App., 81 S.W.2d 1032, error refused—Galveston, H. & S. A. Ry. Co. v. Waldo, Civ.App., 77 S.W.2d 326, error dismissed—San Antonio Amusement Co. v. Easterling, Civ.App., 71 S.W.2d 350, error dismissed—Pan-handle & S. F. Ry. Co. v. Miller, Civ. App., 64 S.W.2d 1076, error dismissed—City of Waco v. Killen, Civ.App., 59 S.W.2d 940, error dismissed—Texas-Louisiana Power Co. v. Webster, Civ.App., 59 S.W.2d 902, affirmed 91 S.W.2d 302, 127 Tex. 126.

Wis.—Parr v. Douglas, 34 N.W.2d 229, 253 Wis. 311—Guth v. Fisher, 251 N.W. 223, 213 Wis. 323.

34. Tex.—Eubanks v. Texas Emp. Ins. Ass'n, 246 S.W.2d 467, 151 Tex. 87—Southern Underwriters v. Schoolcraft, 158 S.W.2d 991, 138 Tex. 323—Brown v. Brown, Civ. App., 256 S.W.2d 143, refused no reversible error—Pacific Indemnity Co. v. Blessitt, Civ.App., 191 S.W.2d 904, error refused no reversible error—Columbia Cas. Co. v. Combs, Civ.App., 188 S.W.2d 1015—Maryland Casualty Co. v. Harkes, Civ. App., 188 S.W.2d 262, affirmed 190 S.W.2d 62, 144 Tex. 317—Traders & General Ins. Co. v. Yarbrough, Civ.App., 181 S.W.2d 305—Maryland Casualty Co. v. Gunter, Civ. App., 167 S.W.2d 545—Federal Underwriters Exchange v. Sandel, Civ. App., 166 S.W.2d 147, error refused—Hartford Accident & Indemnity Co. v. Harris, Civ.App., 152 S.W.2d 857—Traders & General Ins. Co. v. Belcher, Civ.App., 153 S.W.2d 525—Maryland Cas. Co. v. Abbott, Civ.App., 148 S.W.2d 465, error dismissed, judgment correct—Imperial Underwriters v. Dillard, Civ.App., 146 S.W.2d 1105, error refused—Maryland Casualty Co. v. Romero, Civ.App., 146 S.W.2d 1096, error dismissed, judgment correct—Traders & General Ins. Co. v. Jenkins, Civ.App., 144 S.W.2d 350—Federal Underwriters Exchange v. McDaniel, Civ.App., 140 S.W.2d 979, error dismissed, judgment correct—Federal Underwriters Exchange v. Bickham, Civ.App., 138 S.W.2d 880, affirmed 157 S.W.2d 356, 138 Tex. 128—Southern Underwriters v.

It is not a valid objection to a special interrogatory or special issue submitted to the jury that it is leading, in the sense that it may be answered "yes" or "no,"<sup>35</sup> or even that it is so framed that it must be answered in such fashion;<sup>36</sup> but it is improper to submit a question in such form that it suggests the answer desired,<sup>37</sup> and so such a form of inquiry as

Erwin, Civ.App., 134 S.W.2d 720, error granted—National Indemnity Underwriters of America v. Blevins, Civ.App., 129 S.W.2d 734—Traders & General Ins. Co. v. Tillman, Civ. App., 119 S.W.2d 142, error dismissed—Maryland Casualty Co. v. Crosby, Civ.App., 117 S.W.2d 524, error dismissed—Maryland Casualty Co. v. Wilson, Civ.App., 108 S.W.2d 260, error dismissed—Texas Employers' Ins. Ass'n v. Rowell, Civ. App., 104 S.W.2d 613—Consolidated Underwriters v. Strahan, Civ.App., 96 S.W.2d 114, error dismissed—Traders & General Ins. Co. v. Line, Civ.App., 70 S.W.2d 787, error dismissed—Fidelity & Casualty Co. of New York v. Branton, Civ.App., 70 S.W.2d 780, error dismissed—American Fidelity & Casualty Co. v. Bradley, Civ.App., 70 S.W.2d 645, error dismissed—Torres v. Dishman, Civ.App., 69 S.W.2d 501, error dismissed—Lloyds Casualty Co. of New York v. Grillet, Civ.App., 64 S.W.2d 1005, error refused—Employers' Liability Assur. Corporation v. Sims, Civ.App., 67 S.W.2d 445, error refused.

#### Error held not prejudicial

Error, if any, in the wording of special issue, which allegedly constituted a comment on the weight of the evidence in that jury was thereby told that employee suing for compensation suffered a partial incapacity to work as the result of a hernia, was not prejudicial to employer's insurance carrier, where jury found that employee did not suffer a partial incapacity, but suffered total incapacity, since verdict must be construed as a whole.—Hartford Accident & Indemnity Co. v. Harris, Tex.Civ.App., 152 S.W.2d 857.

35. Tex.—D. Sullivan & Co. v. Ramsey, Civ.App., 155 S.W. 580.

64 C.J. p 1159 note 67.

36. Colo.—Denver, etc., R. Co. v. Sipes, 55 P. 1093, 26 Colo. 17. Tex.—International & G. N. Ry. Co. v. Logan, Civ.App., 184 S.W. 301.

37. Ohio.—Bradley v. Mansfield Rapid Transit, 93 N.E.2d 672, 154 Ohio St. 154—Ello v. Akron Transp. Co., 71 N.E.2d 707, 147 Ohio St. 363.

64 C.J. p 1159 note 69.

#### Special issues held not erroneous

(1) In general.—Maryland Casualty Co. v. Abbott, Tex.Civ.App., 148 S.W.2d 465, error dismissed, judgment correct—Southland Grayhound Lines

"Is it not a fact," or the like, is objectionable and should not be employed.<sup>38</sup>

### § 548. Submission of Interrogatories

The particular manner in which special issues are presented to the jury is largely discretionary with the trial court.

The particular manner in which special issues are presented to the jury is largely discretionary with the trial court.<sup>39</sup> It has been held that the preferable practice in submitting special issues to the jury is to submit all issues made by the pleadings and the evidence as issues submitted by the trial court, and not as issues submitted on request of either party,<sup>40</sup> but in some circumstances it is not improper for the court to state that the issues were given at defendant's request.<sup>41</sup> It is not proper for the court to submit written special interrogatories to the jury in a sealed envelope, with directions not to open it until they have agreed on a general verdict, since the consideration of the interrogatories may assist the jury in arriving at a just verdict.<sup>42</sup>

*Time for submission.* It has been held that, where by statute it is contemplated that instructions to the jury shall be given before the argument, proper practice dictates a like rule with respect to special

interrogatories,<sup>43</sup> but it has also been held that the submission of a special issue after commencement of argument is not necessarily improper.<sup>44</sup> It has further been held that interrogatories should be submitted along with the instructions to the jury,<sup>45</sup> but in proper circumstances, the court may submit defendant's requested special issues after reading its main charge to the jury.<sup>46</sup>

*Order of questions.* In the absence of statute or court rule, there is no principle of law as to the order in which segregated issues or interrogatories shall be presented to the jury for their findings,<sup>47</sup> the matter being one for the trial court to determine,<sup>48</sup> and the order or sequence in which questions are submitted is ordinarily immaterial.<sup>49</sup> It is usually preferable, however, that a question as to the amount of damages be submitted after or at the end of other questions, rather than in their midst.<sup>50</sup> Where an action for injuries sustained is submitted to the jury on issues of discovered peril and unavoidable accident, the issue of unavoidable accident should be submitted first instead of last.<sup>51</sup>

*Grouping or numbering questions.* Interrogatories should not be submitted or numbered in sets,

v. Richards, Tex.Civ.App., 77 S.W.2d 272, error dismissed—Jackson v. Amador, Tex.Civ.App., 75 S.W.2d 892, error dismissed.

(2) Submitting groups of questions on issues of negligence and of contributory negligence and on such issues charging jury if they answered preceding question "yes" and only in that event, to answer following question was not improper on ground that such manner of submitting issues was equivalent to telling jury the effect of their answers and constituted a guide to jury as to how to answer issues.—Gray v. Adolph, Tex. Civ.App., 117 S.W.2d 122, error refused.

38. Kan.—Mid Continent Tire Mfg. Co. v. Motor Equipment Co., 208 P. 659, 111 Kan. 719.  
64 C.J. p 1160 note 70.

39. Tex.—Franzetti v. Franzetti, Civ. App., 120 S.W.2d 128—Strack v. Strong, Civ.App., 114 S.W.2d 313, error dismissed—Reed v. James, Civ.App., 113 S.W.2d 580, error dismissed.

Instructions in connection with submission of interrogatories:  
As to duties of jury generally see supra § 297.  
Necessity see supra § 317.  
Sufficiency see supra § 372.

#### Clarity

Where interrogatories are submit-

ted in such manner that the jury do not understand their duty with respect to answering, their answers cannot be used to support a general verdict.—Morrison v. Stepp's Beauticians, Inc., 115 N.E.2d 888, 95 Ohio App. 1.

40. Tex.—Texas & N. O. R. Co. v. Wood, Civ.App., 166 S.W.2d 141.

41. Tex.—Younger Bros. v. Power, Civ.App., 118 S.W.2d 954, error dismissed.

42. Ind.—Wabash R. Co. v. Gretzinger, 104 N.E. 69, 182 Ind. 155.

43. W.Va.—Proudfoot v. Pocahontas Transp. Co., 132 S.E. 746, 100 W. Va. 733.  
64 C.J. p 1160 note 75.

44. Tex.—Texas State Highway Department v. Reeves, Civ.App., 161 S.W.2d 357, error refused.

#### Rule of civil procedure

In compensation proceeding, rule of civil procedure requiring trial judge to read to jury his charge and all requested instructions, special issues, definitions, and explanatory instructions before the argument is begun was required to be construed in light of the letter of transmittal of the rules asking for a liberal interpretation thereof; such rule did not announce a principle of substantive law.—Texas State Highway Depart-

ment v. Reeves, Tex.Civ.App., 161 S.W.2d 357, error refused.

45. W.Va.—Stewart v. Raleigh County Bank, 2 S.E.2d 274, 121 W.Va. 181, 122 A.L.R. 181.

46. Tex.—Younger Bros. v. Power, Civ.App., 118 S.W.2d 954, error dismissed—Employers' Liability Assur. Corporation v. Sims, Civ.App., 67 S.W.2d 445, error refused.

47. Tex.—Traders & Gen. Ins. Co. v. Frozen Food Exp., Civ.App., 255 S.W.2d 378, refused no reversible error.

64 C.J. p 1160 note 76.

48. Tex.—Green v. Emen, Civ.App., 270 S.W. 929.

49. Wis.—Hamus v. Weber, 226 N. W. 392, 199 Wis. 320.

50. Wis.—Lolzo v. Conforti, 240 N. W. 790, 207 Wis. 129.

#### Conditional questions

Special issues were properly submitted where court first submitted issues of negligence and contributory negligence, and then submitted questions on damages conditioned on answers to preceding issues.—Commercial Standard Ins. Co. v. Caster, Civ.App., 59 S.W.2d 931, reversed on other grounds Norton v. Caster, 81 S.W.2d 487, 125 Tex. 48.

51. Tex.—Dallas Railway & Terminal Co. v. Redman, Civ.App., 113 S.W.2d 262.

but submitted as an entirety and numbered consecutively from first to last.<sup>52</sup>

### § 549. Amendment or Modification of Interrogatories

The court may in a proper case amend interrogatories or special findings submitted.

The court may in a proper case amend interrogatories or special findings submitted.<sup>53</sup> Thus the court may amend or modify interrogatories so as to make them relate to ultimate instead of evidentiary facts,<sup>54</sup> or make them proper in form<sup>55</sup> or pertinent to the issues,<sup>56</sup> or to correspond with the facts involved.<sup>57</sup> The court may prepare others in its discretion, where those submitted are not adequate or in proper form.<sup>58</sup>

### § 550. Withdrawal of Interrogatories

Where requested interrogatories are pertinent and material, the court cannot, over the objection of the party at whose instance they were submitted, withdraw them from the jury; but where it is discretionary with the court to submit a special interrogatory the court has the discretion to withdraw it before it is answered.

Where requested interrogatories submitted are pertinent and material, it has been held that the court cannot, over the objection of the party at whose instance they were submitted, withdraw them from the jury,<sup>59</sup> particularly after the jury have deliberated on them.<sup>60</sup> Where the right of recovery is based on the answers to the interrogatories, the

court may not withdraw the questions, although the jury cannot agree on the answers thereto,<sup>61</sup> nor can it after general verdict permit the withdrawal of special questions at the instance of the party who submitted them and over the objection of the opposite party.<sup>62</sup> Where it is discretionary with the court to submit a special interrogatory, the court has the discretion to withdraw it before it is answered,<sup>63</sup> which action will not be interfered with on appeal in the absence of abuse, as considered in Appeal and Error § 1615.

If the court inadvertently submits questions which, on mature deliberation, it concludes are improper, it has the inherent power to withdraw such questions.<sup>64</sup> An interrogatory which does not serve the purpose and functions of interrogatories may, at any time before answer, be withdrawn.<sup>65</sup> The court may withdraw a question embracing an evidentiary fact,<sup>66</sup> or one, the answer to which would not be controlling of the general verdict,<sup>67</sup> or may withdraw questions, the answers to which are embodied in other findings.<sup>68</sup> Under certain circumstances the court may conditionally withdraw an issue from consideration by the jury.<sup>69</sup>

*What amounts to withdrawal.* Receiving a general verdict without requiring an answer to a special interrogatory is equivalent to the withdrawal of the question.<sup>70</sup> The rule does not apply where the question is answered, although not in proper form.<sup>71</sup>

52. Ind.—Earl Park State Bank v. Lowmon, 161 N.E. 675, 92 Ind.App. 25.

53. Md.—Greenwald, Inc. v. Powder-maker, 183 A. 601, 170 Md. 173. Mass.—Capano v. Melchionno, 7 N.E. 2d 593, 297 Mass. 1.

54. Pa.—Simpson v. Montgomery Ward & Co., 68 A.2d 442, 165 Pa.Super. 408, opinion adopted 75 A.2d 656, 366 Pa. 3.

55. 64 C.J. p 1160 note 83. Amendment or correction of answers to interrogatories or special verdicts see *infra* § 567.

56. Refusal to make question more specific held not erroneous. Tex.—Craghead v. United Transports. Civ.App., 170 S.W.2d 325.

57. Ill.—Terre Haute, etc., R. Co. v. Voelker, 22 N.E. 20, 129 Ill. 540—Chicago, etc., Co. v. Dunleavy, 22 N.E. 15, 129 Ill. 132.

58. Ind.—Maxwell v. Boyne, 36 Ind. 120. Wis.—Neumeister v. Goddard, 113 N. W. 733, 133 Wis. 405.

59. Ill.—Frink v. Amstadt, 201 Ill. App. 419. 64 C.J. p 1160 note 86.

57. Ind.—Taylor v. Wootan, 27 N.E. 502, 1 Ind.App. 188, 50 Am.S.R. 200.

58. Iowa.—Wilson v. Onstott, 96 N. W. 779, 121 Iowa 263. 64 C.J. p 1160 note 88. Failure to answer interrogatories see *infra* § 556.

Harmless or prejudicial error see Appeal and Error § 1762.

59. Ind.—Summers v. Greathouse, 87 Ind. 205—Otter Creek Block Coal Co. v. Rancey, 34 Ind. 329.

60. W.Va.—McKelvey v. Chesapeake, etc., R. Co., 14 S.E. 261, 35 W.Va. 500.

64 C.J. p 1161 note 92.

61. Ark.—Sun Mut. Ins. Co. v. Dudley, 45 S.W. 539, 65 Ark. 240. Minn.—Ermantraut v. Providence Washington Ins. Co., 70 N.W. 572, 67 Minn. 451.

62. Ind.—Dusterberg v. State, 17 N. E. 624, 116 Ind. 144.

63. Mont.—Poor v. Madison River Power Co., 108 P. 645, 41 Mont. 236.

64 C.J. p 1161 note 96.

**Withdrawal held not erroneous**  
Kan.—Fitts v. Badger Lumber & Coal Co., 68 P.2d 631, 146 Kan. 56. Tex.—Antone v. Stiles, Civ.App., 177 S.W.2d 246.

64. Ind.—Continental L. Ins. Co. v. Young, 15 N.E. 220, 113 Ind. 159, 3 Am S.R. 630.

64 C.J. p 1161 note 98.

65. Conn.—Longstean v. Owen McCaffrey's Sons, 111 A. 788, 95 Conn. 486.

66. Wash.—Robinson v. Silver Lake Ry. & Lumber Co., 299 P. 356, 163 Wash. 31.

Wis.—Matthews v. Town of Sigel, 139 N.W. 721, 152 Wis. 123.

67. Mich.—Wavle v. Michigan United Rys. Co., 135 N.W. 914, 170 Mich. 81.

68. Kan.—Smith v. Wilson, 48 P. 436, 5 Kan.App. 379.

69. Tex.—Traders & General Ins. Co. v. Blancett, Civ.App., 96 S.W.2d 420, error dismissed.

70. Okl.—La Fayette v. Bass, 252 P. 1101, 122 Okl. 182.

64 C.J. p 1161 note 7.

71. Kan.—Smart v. Mayer, 175 P. 159, 103 Kan. 366.

*Effect of withdrawal.* The effect of the withdrawal of questions is the same as though the court had refused to submit them in the first instance.<sup>72</sup>

## § 551. Sufficiency of Verdict or Findings

- a. Special verdicts
- b. Special issues
- c. Special findings

### a. Special Verdicts

In order to sustain a judgment rendered thereon, a special verdict must be sufficient and, as a general rule, it must find all facts essential to judgment and necessary to entitle the party having the burden of proof to recover.

In order to sustain a judgment rendered thereon a special verdict must be sufficient.<sup>73</sup> As a general rule, sometimes by reason of statute,<sup>74</sup> a special verdict must find all facts essential to judgment and necessary to entitle the party having the burden of proof to recover,<sup>75</sup> or at least the material facts which are in dispute.<sup>76</sup> Nothing must remain for the court to do but to draw conclusions of law.<sup>77</sup> The rule that a special verdict must find all the

facts essential to judgment applies even though the evidence is undisputed;<sup>78</sup> but it is not necessary that a special verdict should find facts set out in the pleadings.<sup>79</sup> If a finding is based on conflicting evidence, the court is not justified in setting it aside.<sup>80</sup> The reasons impelling the jury to reach a finding need not be stated.<sup>81</sup>

A special verdict must be complete in itself,<sup>82</sup> and cannot, as discussed infra § 557, be aided by intendment or extrinsic facts, although appearing of record, and unless the material issues are embraced in a special finding, it may not be regarded as a special verdict, as considered supra § 485. Where the moving party is not the one on whom the burden rests, his right to be awarded judgment does not alone depend on the presence of material facts, but he may be entitled to judgment by reason of the absence of some essential fact which it was incumbent on his adversary to establish.<sup>83</sup> All the issues need not be found in a special verdict,<sup>84</sup> but it is sufficient if facts sufficient to constitute a cause of action, if within the allegations, are found.<sup>85</sup>

72. Idaho.—Watkins v. Mountain Home Co-operative Irr. Co., 197 P. 247, 33 Idaho 623.

64 C.J. p 1161 note 9.

73. N.C.—Turnage v. McLawhon, 61 S.E.2d 336, 232 N.C. 615—Western N. C. Conference v. Talley, 47 S.E.2d 467, 229 N.C. 1—Griffin v. United Services Life Ins. Co., 36 S.E.2d 225, 225 N.C. 684.

64 C.J. p 1161 note 11—37 C.J. p 655 note 3—33 C.J. p 142 note 68—26 C.J. p 568 note 97.

### Verdicts or findings held sufficient

U.S.—Buckley v. Southwestern Nat. Bank, C.C.A. Pa., 88 F.2d 263.

Ga.—Oconee Mfg. Co. v. Citizens' & Southern Nat. Bank, 178 S.E. 643, 180 Ga. 215.

Ind.—Jennie J. Jones Exposition v. Terry, 63 N.E.2d 159, 116 Ind.App. 189.

Kan.—Stevens v. Jones, 215 P.2d 653, 168 Kan. 583—Ferguson v. Kansas City Public Service Co., 156 P.2d 869, 159 Kan. 520.

Ohio.—Sparks v. Sims, App., 92 N.E. 2d 428.

Tenn.—Long v. Tomlin, 125 S.W.2d 171, 22 Tenn.App. 607.

Wis.—Topham v. Casey, 55 N.W.2d 892, 262 Wis. 580—Augustin v. Milwaukee Elec. Ry. & Transport Co., 49 N.W.2d 730, 259 Wis. 625—Tatreau v. Buecher, 40 N.W.2d 509, 256 Wis. 252—Yanggen v. Wisconsin Mich. Power Co., 4 N.W.2d 130, 241 Wis. 27—Baird v. Edmonds, 276 N.W. 306, 226 Wis. 209—Honore v. Ludwig, 247 N.W. 335, 211 Wis. 354.

64 C.J. p 1161 note 11 [a]—30 C.J. p 1148 note 2.

### Verdicts or findings held insufficient

Kan.—Ferguson v. Kansas City Public Service Co., 156 P.2d 869, 159 Kan. 520—Kennedy v. Wagner, 27 P.2d 214, 138 Kan. 541.

Mo.—Williams v. Thompson, App., 166 S.W.2d 785.

N.Y.—Fromer v. Glamour-Wear Mfg. Co., 95 N.Y.S.2d 302, 276 App.Div. 420.

N.C.—Davis v. St. Paul Mercury & Indem. Co., 40 S.E.2d 609, 227 N.C. 80, 169 A.L.R. 220.

Ohio.—Landon v. Lee Motors, Inc., 118 N.E.2d 147, 161 Ohio St. 82—Looker v. Martin, App., 104 N.E.2d 698—Weaver v. Weaver, App., 35 N.E.2d 173.

74. N.Y.—Elsemann v. Swan, 19 N.Y. Super. 668—Williams v. Willis, 7 Abb.Pr. 90.

75. Nev.—Corpus Juris cited in Harris v. Harris, 159 P.2d 575, 578, 62 Nev. 473.

N.C.—Turner v. McLawhon, 61 S.E. 2d 336, 232 N.C. 515.

Ohio.—Smith v. Pennsylvania R. Co., App., 99 N.E.2d 501—Looker v. Martin, App., 104 N.E.2d 698.

Pa.—Simpson v. Montgomery Ward & Co., 67 A.2d 571, 162 Pa.Super. 371.

Wis.—Braun v. Baudhuin, 9 N.W.2d 596, 243 Wis. 107—Carlson v. Strasser, 2 N.W.2d 233, 239 Wis. 531.

64 C.J. p 1161 note 14—33 C.J. p 143 note 72—26 C.J. p 568 note 5. Ultimate and evidentiary facts and conclusions see infra § 553.

Evidence of facts need not be found.—Teegarden v. Lewis, 40 N.E.

1047, 44 N.E. 9, 145 Ind. 98—28 C.J. p 684 note 59.

76. Ga.—Owen v. S. P. Richards Paper Co., 3 S.E.2d 660, 188 Ga. 258. 64 C.J. p 1162 note 15.

77. Nev.—Corpus Juris cited in Harris v. Harris, 159 P.2d 575, 578, 62 Nev. 473.

N.Y.—Fromer v. Glamour-Wear Mfg. Co., 95 N.Y.S.2d 302, 276 App.Div. 420.

N.D.—Sonnesyn v. Akin, 104 N.W. 1028, 1031, 14 N.D. 248.

Ohio.—Smith v. Pennsylvania R. Co., App., 99 N.E.2d 501—Weaver v. Weaver, App., 35 N.E.2d 173. 64 C.J. p 1162 note 16.

78. S.D.—Bartow v. Northern Assur. Co., 72 N.W. 86, 10 S.D. 132.

79. Ind.—Evans v. Queen Ins. Co., 31 N.E. 843, 5 Ind.App. 198. 26 C.J. p 569 note 8.

80. Wis.—Thorne v. Aetna Ins. Co., 78 N.W. 920, 102 Wis. 593. 26 C.J. p 569 note 9.

81. Kan.—In re Neils' Estate, 225 P. 2d 110, 170 Kan. 254.

82. Ohio.—Landon v. Lee Motors, Inc., 118 N.E.2d 147, 161 Ohio St. 82.

64 C.J. p 1162 note 19.

83. Ind.—Wabash R. Co. v. Ray, 51 N.E. 920, 152 Ind. 892.

84. Ohio.—Smith v. Pennsylvania R. Co., App., 99 N.E.2d 501. 64 C.J. p 1162 note 22.

85. Ind.—Fairmont Union Joint-Stock Agricultural Ass'n v. Downey, 45 N.E. 696, 146 Ind. 503.

A special verdict need not contain facts admitted by the pleadings,<sup>86</sup> but facts admitted by stipulation should, it has been held, be incorporated in the verdict.<sup>87</sup> A special verdict failing to find the amount of damages has been held insufficient,<sup>88</sup> but a verdict finding such facts as leave nothing for the court to do except to make a mathematical calculation is sufficient where a money judgment only is sought.<sup>89</sup>

**Form of verdict.** It is not necessary that a special verdict be in any particular form,<sup>90</sup> but the verdict is sufficient if it be good in substance,<sup>91</sup> considered in the light of the facts of the case,<sup>92</sup> although unskillfully framed.<sup>93</sup> A special verdict may be in narrative form,<sup>94</sup> or in the form of answers to questions submitted.<sup>95</sup> The response of the foreman to an interrogation of the court, although assented to by the other jurors, is not a special verdict.<sup>96</sup> Although it has been held that it is the right and duty of counsel to prepare a form of special verdict,<sup>97</sup> the jury may make alterations therein or frame a special verdict themselves.<sup>98</sup>

**Admitted or uncontroverted facts.** According to some decisions undisputed facts should be incorporated in a special verdict.<sup>99</sup> In some jurisdictions, however, the rule that a special verdict must find all the facts essential to recovery is satisfied if all the facts essential to a recovery, which are controverted by evidence on the trial, are specially found in the verdict<sup>1</sup> without a finding of material facts which are established by the un-

disputed evidence.<sup>2</sup> Facts not proved at the trial need not be stated.<sup>3</sup>

**Itemization of damages.** Except under statutory provisions requiring an itemization or special classification of damages,<sup>4</sup> a general verdict is sufficient.<sup>5</sup> Where recovery is sought for various elements or items of damages constituting separate causes of action, a verdict for a lump sum is erroneous.<sup>6</sup> The fact that the jury assess the amounts found for various items of damage separately is not in any event erroneous.<sup>7</sup> When different parties have each a distinct cause of action, covered by the same judgment, separate assessments should be made.<sup>8</sup> If by consent two distinct cases between the same parties are submitted to the same jury the assessment should be made according to the evidence in each case.<sup>9</sup>

**Special damages.** In an action for personal injuries a general verdict for plaintiff is a prerequisite to entry of a verdict for special damages.<sup>10</sup> Thus a verdict for plaintiff which assesses damages in the exact amount of the special damages claimed, proved, and submitted constitutes a verdict for special and not general damages which should be set aside for misconduct of the jury.<sup>11</sup>

**Actual and exemplary damages.** Where both actual and exemplary damages are recoverable, the jury in some jurisdictions are required to specify in their verdict the amounts found for each,<sup>12</sup> but in others there need be no segregation of damages

Or.—Oregon Home Builders v. Montgomery Inv. Co., 184 P. 487, 94 Or. 349.

86. Wis.—Ward v. Busack, 1 N.W. 107, 46 Wis. 407.

64 C.J. p 1163 note 46.

87. Ill.—Carlson v. Avery Co., 196 Ill.App. 262.

88. Ohio.—Noseda v. Delmul, 176 N.E. 571, 123 Ohio St. 647, 76 A.L.R. 1133.

64 C.J. p 1163 note 31.

89. Ind.—Hoppes v. Chapin, 43 N.E. 1014, 15 Ind.App. 258.

64 C.J. p 1163 note 32.

90. Ind.—Helwig v. Beckner, 46 N.E. 644, 48 N.E. 788, 149 Ind. 131.

64 C.J. p 1163 note 33.

91. Pa.—Fenn v. Blanchard, 2 Yeates 543.

92. Wis.—Ferguson v. Truax, 118 N.W. 251, 136 Wis. 637.

93. Wis.—Larson v. Foss, 118 N.W. 804, 137 Wis. 304.

64 C.J. p 1163 note 35.

94. Ohio.—Dowd-Feder Co. v. Schreyer, 179 N.E. 411, 124 Ohio St. 504—Sparks v. Sims, App., 92 N.E.2d 428.

**Failure to submit requested special verdict seeking return in narrative form, was not error where jury was instructed that they need not use any of special forms submitted but that they might write their own, and jury returned verdict in narrative form.**—Sparks v. Sims, supra.

95. Ohio.—Dowd-Feder Co. v. Schreyer, 179 N.E. 411, 124 Ohio St. 504.

96. N.H.—Upton v. Conway Lumber Co., 128 A. 802, 81 N.H. 489—Tierney v. Granite Works, 106 A. 481, 79 N.H. 166.

97. Ind.—Pittsburgh, etc., R. Co. v. Ruby, 38 Ind. 294, 10 Am.R. 111.

64 C.J. p 1163 note 5.

98. Ind.—Hopkins v. Stanley, 43 Ind. 553—Pittsburgh, etc., R. Co. v. Ruby, 38 Ind. 294, 10 Am.R. 111.

99. U.S.—Hodges v. Easton, Wis., 1 S.Ct. 307, 106 U.S. 408, 27 L.Ed. 169.

64 C.J. p 1163 note 41.

Duty to submit see supra § 533.

1. Wis.—Murphy v. Well, 61 N.W. 315, 89 Wis. 146—Stringham v. Cook, 44 N.W. 777, 75 Wis. 589.

2. Tex.—Oil Country Pipe & Supply

Co. v. Carter, Civ.App., 143 S.W.2d 831, error dismissed, judgment correct—Panhandle & S. F. Ry. Co. v. Burt, Civ.App., 71 S.W.2d 390, 64 C.J. p 1163 note 44.

3. Ind.—Jones v. Baird, 76 Ind. 164.

4. N.C.—Bryant v. Glidden, 36 Me. 36—Goodson v. Mullen, 92 N.C. 207.

5. Tex.—Scott v. Shine, Civ.App., 194 S.W. 964.

17 C.J. p 1083 note 92.

6. Mo.—McMurray v. St. Louis, etc., R. Co., 125 S.W. 751, 225 Mo. 272, 17 C.J. p 1083 note 96.

7. Kan.—Atchison, etc., R. Co. v. Lee, 54 P. 4, 8 Kan.App. 24.

17 C.J. p 1083 note 97.

8. Md.—Forrester v. Sisco, 49 Md. 586.

9. Fla.—Miller v. Hoc, 1 Fla. 189.

10. Or.—Snyder v. Amermann, 243 P. 2d 1082, 194 Or. 675.

11. Or.—Snyder v. Amermann, supra.

12. S.D.—Woodring v. Winner Nat. Bank of Winner, 227 N.W. 438, 56 S.D. 43.

17 C.J. p 1183 note 1.

where there has been no request for such segregation.<sup>13</sup> It has been held to be discretionary with the court to require the jury to separate the findings as to actual and exemplary damages,<sup>14</sup> and in at least one jurisdiction compensatory and exemplary damages are given, if at all, in a lump sum, and not separately.<sup>15</sup> Where the jury are instructed that if they award both compensatory and punitive damages they should state the amount of each, a verdict for one amount only will be regarded as a verdict for compensatory damages.<sup>16</sup>

Where, in a case permitting an award of both actual and exemplary damages, a question is submitted requiring the jury to state the amount of actual damages sustained by plaintiff, such question must be answered in such a manner as to show

that the jury as a whole agreed on some amount as actual damages and as exemplary damages.<sup>17</sup> While the allowance of exemplary damages without a finding by the jury of actual damages is a departure from the general rule,<sup>18</sup> a verdict which shows on its face that it is a finding for exemplary damages only is construed to be a finding not only for exemplary damages but also for actual damages that are merely nominal, and therefore not so substantial as to require expression in the verdict.<sup>19</sup>

### b. Special Issues

In a trial on special issues there must be a finding on every issue necessary to support the judgment so that no fact issue is left for the court to determine.

In a trial on special issues there must be a finding on every issue necessary to support the judgment,<sup>20</sup>

13. Cal.—Turner v. Whittel, 38 P.2d 835, 2 Cal.App.2d 585—Prentice v. Zumwalt, 13 P.2d 379, 124 Cal.App. 646.

Tex.—Belo v. Wren, 63 Tex. 686—Shook v. Peters, 59 Tex. 393.

14. Iowa.—Martens v. Martens, 164 N.W. 645, 184 Iowa 89.

15. Minn.—Muenkel v. Muenkel, 173 N.W. 184, 143 Minn. 29.

16. D.C.—Washington Times Co. v. Murray, 299 F. 903, 55 App.D.C. 32.

17. Kan.—Clark v. Weir, 14 P. 533, 87 Kan. 98.

17 C.J. p 1083 note 7.

18. S.C.—Cook v. Atlantic Coast Line R. Co., 190 S.E. 923, 183 S.C. 279.

19. S.C.—Cook v. Atlantic Coast Line R. Co., supra—Lott v. Western Union Telegraph Co., 119 S.E. 870, 127 S.C. 238—Bethes v. Western Union Tel. Co., 81 S.E. 675, 97 S.C. 385.

### Recovery of punitive damages held precluded

S.C.—Cook v. Atlantic Coast Line R. Co., 190 S.E. 923, 183 S.C. 279.

20. Tex.—Lewis v. Texas Emp. Ins. Ass'n, 246 S.W.2d 599, 151 Tex. 95—Blanton v. E. & L. Transport Co., 207 S.W.2d 368, 146 Tex. 377—Texas Employers' Ins. Ass'n v. Frankum, 201 S.W.2d 800, 145 Tex. 658—Fanhall & S. F. Ry. Co. v. Sutton, 81 S.W.2d 1005, 126 Tex. 401—North v. Atlas Brick Co., 13 S.W.2d 59, motion to retax costs granted in part North v. Atlas Brick Co., Com. App., 16 S.W.2d 519—Rawls v. Holt, Civ.App., 193 S.W.2d 536, error refused no reversible error—Rodriguez v. Higginbotham-Bailey-Logan Co., Civ.App., 144 S.W.2d 993, reversed on other grounds 160 S.W.2d 234, 138 Tex. 476—Harrison v. Harrison, Civ.App., 100 S.W.2d 780—Wagstaff v. North British & Mercantile Ins. Co., Civ.App., 88 S.W.2d 550, error dismissed.

64 C.J. p 1162 note 25.

There are no priorities in issues, and if an issue is proper, the answer is as essential to the verdict as is the answer to any other issue in the case.—Townsend v. Young, Tex.Civ. App., 114 S.W.2d 296.

### Findings held sufficient

Tex.—Eubanks v. Texas Emp. Ins. Ass'n, 246 S.W.2d 467, 151 Tex. 67—Mathis v. State, Civ.App., 258 S.W.2d 200, error refused no reversible error—Coca-Cola Bottling Co. v. Krueger, Civ.App., 239 S.W.2d 669—Southwest Stone Co. v. Symons, Civ.App., 237 S.W.2d 380, error refused no reversible error—Barker v. Weingarten Riverside Co., Civ.App., 232 S.W.2d 692, refused no reversible error—McCullom v. McClain, Civ.App., 227 S.W.2d 333—Superior Ins. Co. v. Owens, Civ. App., 218 S.W.2d 517—Texas Employers' Ins. Ass'n v. Cooper, Civ. App., 194 S.W.2d 819—Employees Loyds v. Schott, Civ.App., 183 S.W.2d 262—Owens v. Row, Civ.App., 178 S.W.2d 144—Federal Underwriters Exchange v. Arnold, Civ.App., 173 S.W.2d 912—Forster v. Polis, Civ.App., 169 S.W.2d 216, error refused—Maryland Casualty Co. v. Gunter, Civ.App., 167 S.W.2d 545—Morton v. Jasper, Civ.App., 167 S.W.2d 541, error refused—Held Bros. v. Smiley, Civ.App., 166 S.W.2d 181, error refused—Woodmen of the World Life Ins. Soc. v. Brown, Civ.App., 164 S.W.2d 190—Bailey v. Walker, Civ.App., 163 S.W.2d 864, error refused—Warren v. Schawe, Civ.App., 163 S.W.2d 415, error refused—Texas Indemnity Ins. Co. v. Bush, Civ.App., 163 S.W.2d 224, error refused—Hartford Accident & Indemnity Co. v. Vick, Civ.App., 155 S.W.2d 664—Brandon v. Schroeder, Civ.App., 149 S.W.2d 140—Chance v. Warlick, Civ.App., 145 S.W.2d 283, error dismissed, judgment correct—Texas Compensation Ins. Co. v. Zachry, Civ.App.,

143 S.W.2d 801, error dismissed, judgment correct—Texas Indem. Ins. Co. v. Smith, Civ.App., 143 S.W.2d 448—Texas Indem. Ins. Co. v. Staggs, Civ.App., 138 S.W.2d 174, conforming to answers to certified questions 134 S.W.2d 1026, 134 Tex. 318, error dismissed by agreement—Carle Oil Co. v. Owens, Civ.App., 134 S.W.2d 411—Gulf, C. & S. F. Ry. Co. v. Seydler, Civ.App., 132 S.W.2d 453—Texas Employers Ins. Ass'n v. Miller, Civ.App., 130 S.W.2d 898, error granted—Texas Indemnity Ins. Co. v. Briggs, Civ. App., 128 S.W.2d 861, error dismissed, judgment correct—Schaufer v. Price, Civ.App., 124 S.W.2d 840, error refused—Thompson v. Crim, Civ.App., 103 S.W.2d 665, affirmed 126 S.W.2d 18, 132 Tex. 586—McFaddin v. Herbert, Civ.App., 100 S.W.2d 140, reversed on other grounds Hebert v. McFaddin, 104 S.W.2d 475, 129 Tex. 499, rehearing denied 105 S.W.2d 650, 129 Tex. 499—Kimbrow v. Fort Worth & D. C. R. Co., Civ.App., 86 S.W.2d 78, affirmed Fort Worth & D. C. Ry. Co. v. Kimbrow, Com.App., 112 S.W.2d 712—Lloyds America v. Payne, Civ.App., 85 S.W.2d 794—Spann v. Trumpf, Civ.App., 83 S.W.2d 1043—Davis v. Jarrigan, Civ. App., 59 S.W.2d 281, error dismissed.

64 C.J. p 1162 note 25 [a].

### Findings held insufficient

U.S.—Texas Compensation Ins. Co. v. Heard, C.C.A.Tex., 93 F.2d 548. Tex.—Alpine Tel. Corp. v. McCall, 184 S.W.2d 830, 143 Tex. 335—Consolidated Underwriters v. Langley, 170 S.W.2d 463, 141 Tex. 78—Houston, E. & W. T. Ry. Co. v. Browder, Com.App., 238 S.W. 154—Williams v. City of New York Ins. Co., Civ. App., 210 S.W.2d 219, error refused, no reversible error—National Life & Acc. Ins. Co. v. Ellis, Civ.App., 185 S.W.2d 122, refused for want of

so that no fact issue is left for the determination of the court.<sup>21</sup> When a case is submitted on special issues, it is the duty of the jury to answer each special issue distinctly and separately,<sup>22</sup> and without regard to the effect of their finding on the judgment,<sup>23</sup> and without regard to the relation of any answer to the other issues submitted,<sup>24</sup> the principal object being to have the jury find the facts and the trial court render such judgment as the law demands.<sup>25</sup> A finding is not essential as to matters not submitted.<sup>26</sup> The form of answers to special issues is immaterial as long as the jury's meaning is clear.<sup>27</sup>

### c. Special Findings

It is the duty of the jury to answer special questions as they find the facts to be from the evidence without regard to how their answers may affect the general verdict.

It is the duty of the jury to answer special questions as they find the facts to be from the evidence without regard to how their answers may affect the general verdict,<sup>28</sup> and they may not return divided

answers<sup>29</sup> or report how they stood if unable to agree.<sup>30</sup> A jury will not be required to answer special questions submitted where no evidence is introduced on which answers could be given.<sup>31</sup> A direct answer should be given to each special question submitted, where the question is so framed that it will admit of a direct answer.<sup>32</sup> It is not necessary that the answers of the jury to interrogatories framed by defendant should affirmatively establish plaintiff's cause of action.<sup>33</sup> Answers to special interrogatories, like a general verdict, must be announced in open court.<sup>34</sup> Where the special findings show that the jury found for plaintiff on a sufficient paragraph of the complaint, the fact that they also found for plaintiff on an insufficient paragraph does not vitiate the verdict.<sup>35</sup> If a general verdict is in writing and signed, it is immaterial that the answer to a special interrogatory is not in writing at the time, and it may afterward be received, as it is to be inferred that they agreed on an answer to the question before arriving at a verdict.<sup>36</sup>

merit—*Warren v. Premier Oil Refining Co. of Texas*, Civ.App., 173 S. W.2d 287, error refused—*White's Auto Stores v. Boaz*, Civ.App., 168 S.W.2d 942, reversed on other grounds 172 S.W.2d 481, 141 Tex. 366—*Mortgage Land & Inv. Co. v. Spears*, Civ.App., 162 S.W.2d 1015, error refused—*Coffield v. Cox*, Civ. App., 162 S.W.2d 741—*Texas Employers Ins. Ass'n v. Schaffer*, Civ. App., 161 S.W.2d 328, error refused—*City of Vernon v. Low*, Civ.App., 158 S.W.2d 867—*Vaughn v. Gulf Ins. Co.*, Civ.App., 151 S.W.2d 227—*Yellow Cab & Transfer Corp. v. Warren Co.*, Civ.App., 148 S.W.2d 209—*Jones-O'Brien, Inc. v. Loyd*, Civ.App., 106 S.W.2d 1069, error dismissed—*Harrison v. Harrison*, Civ.App., 100 S.W.2d 780—*Dallas Bldg. & Loan Ass'n v. Henry*, Civ. App., 98 S.W.2d 1030, error dismissed.

21. *Tex.*—*Luling Oil & Gas Co. v. Edwards*, Civ.App., 32 S.W.2d 921.

22. *Tex.*—*McKelvey v. Chisholm*, Civ.App., 184 S.W.2d 508—*State v. Layton*, Civ.App., 147 S.W.2d 515—*Harkins v. Mosley*, Civ.App., 134 S.W.2d 706—*Continental Oil Co. v. Barnes*, Civ.App., 97 S.W.2d 494, error refused—*Scotlino v. Ledbetter*, Civ.App., 56 S.W.2d 282.

64 C.J. p 1163 note 27.

### Unconditional issue

Where answer to special issue was not made conditional on an answer to prior special issue, an answer

thereto was essential to warrant judgment.—*Traders & General Ins. Co. v. Davis*, Civ.App., 209 S.W.2d 963, refused no reversible error.

23. *Tex.*—*City of Amarillo v. Hudleston*, 152 S.W.2d 1088, 137 Tex. 226—*McKelvey v. Chisholm*, Civ. App., 184 S.W.2d 508—*State v. Layton*, Civ.App., 147 S.W.2d 515—*Harkins v. Mosley*, Civ.App., 134 S.W.2d 706—*Figula v. Fort Worth & D. C. Ry. Co.*, Civ.App., 131 S.W.2d 998, error refused—*Southern Underwriters v. Thompson*, Civ.App., 127 S.W.2d 389, error dismissed—*Continental Oil Co. v. Barnes*, Civ. App., 97 S.W.2d 494, error refused—*Scotlino v. Ledbetter*, Civ.App., 56 S.W.2d 282.

64 C.J. p 1163 note 28.  
Discussion by jurors of effect of answers as misconduct see supra § 471.

24. *Tex.*—*City of Amarillo v. Hudleston*, 152 S.W.2d 1088, 137 Tex. 226—*McKelvey v. Chisholm*, Civ. App., 184 S.W.2d 508.

25. *Tex.*—*McKelvey v. Chisholm*, supra.

26. *Tex.*—*City of San Antonio v. Marshall & Co.*, Civ.App., 85 S.W. 315.

### Immaterial finding

A finding in answer to a question on which no issue was submitted is immaterial.—*Oliver v. Corzeliuss*, Civ. App., 215 S.W.2d 231, affirmed in part reversed in part on other grounds 220 S.W.2d 632, 148 Tex. 76.

27. *Tex.*—*Moore v. Moore*, 3 S.W. 285, 67 Tex. 297—*Penn v. Briscoe County*, Civ.App., 162 S.W. 916.

28. *Kan.*—*Thornton v. Franse*, 12 P. 2d 728, 135 Kan. 782.  
64 C.J. p 1163 note 49.

29. *Mich.*—*Tober v. Pere Marquette R. Co.*, 177 N.W. 385, 210 Mich. 129.

30. *Mich.*—*Tober v. Pere Marquette R. Co.*, supra.

31. *Kan.*—*Ft. Scott, etc., R. Co. v. Karracker*, 26 P. 1027, 46 Kan. 511.  
*Tex.*—*Fanhandle & S. F. Ry. Co. v. Burt*, Civ.App., 71 S.W.2d 390.

32. *Ind.*—*Salem-Bedford Stone Co. v. Hill*, 59 N.E. 97, 26 Ind.App. 543.  
*Okl.*—*Winfield Nat. Bank v. McWilliams*, 60 P. 229, 9 Okl. 493.

Failure to use categorical answer "no" was not improper, since jury could not be held to strict rule as to use of language.—*Duncan v. Branson*, 110 P.2d 789, 153 Kan. 344.

33. *Ind.*—*Inland Steel Co. v. Smith*, 75 N.E. 862, 39 Ind.App. 636, affirmed 80 N.E. 538, 168 Ind. 245.

34. *Ill.*—*Egmann v. East St. Louis Connecting R. Co.*, 65 Ill.App. 345, affirmed 48 N.E. 981, 170 Ill. 538, 62 Am.S.R. 400.

*R.I.*—*Rose v. Harvey*, 30 A. 459, 18 R.I. 527.

35. *Ind.*—*Pittsburgh, etc., R. Co. v. Sudhoff*, App., 88 N.E. 702, affirmed 90 N.E. 467, 173 Ind. 314.

36. *Mass.*—*Spencer v. Williams*, 35 N.E. 88, 160 Mass. 17.

## § 552. — Definiteness and Certainty

- a. Special verdicts
- b. Special findings

## a. Special Verdicts

A finding in a special verdict or on special issues must be certain, definite, clear, unambiguous, and intelligible.

A finding in a special verdict or on special issues must be certain,<sup>37</sup> definite,<sup>38</sup> clear,<sup>39</sup> unambiguous,<sup>40</sup> and intelligible.<sup>41</sup> Great certainty is required to enable the court to pronounce finally on the issues, and, applying the law to the facts, to render the proper judgment.<sup>42</sup> A special verdict which is too uncertain to be the basis of a valid judgment is void.<sup>43</sup> Where a verdict is uncertain by reason of inconsistent findings, it cannot be cured by disregarding the uncertain portions, although the verdict is sufficient without them.<sup>44</sup> Certainty is not necessary as

to immaterial facts.<sup>45</sup> The facts need not be found with greater minuteness in the verdict than they are stated in the pleadings.<sup>46</sup> Answers to material questions expressing only the inclination of the minds of the jury are not sufficient.<sup>47</sup> Such findings in a special verdict as "unable to say"<sup>48</sup> or "we think not" in answer to an interrogatory,<sup>49</sup> "on or about,"<sup>50</sup> and "approximately,"<sup>51</sup> have been held insufficient.

## b. Special Findings

Answers to material interrogatories propounded must be certain, definite, and unequivocal.

Answers to material interrogatories propounded must be certain,<sup>52</sup> definite,<sup>53</sup> and unequivocal.<sup>54</sup> Where the jury give answers from which it cannot be determined whether they accord or conflict with the general verdict, the verdict is bad.<sup>55</sup> Such answers to a pertinent question have been held in-

37. N.C.—Edge v. North State Field-spar Corp., 193 S.E. 2, 212 N.C. 246.

Tex.—Parr v. Ratisseau, Civ.App., 236 S.W.2d 503, error refused no reversible error—Latham v. Coleman, Civ.App., 134 S.W.2d 703—Southern Underwriters v. Garlepy, Civ.App., 105 S.W.2d 760, error dismissed.

64 C.J. p 1164 note 60—33 C.J. p 143 note 70—26 C.J. p 568 note 3.

General verdict see supra § 496. In pleading see Pleading § 40.

## Answer held certain

Tex.—Chauncey v. Gambill, Civ.App., 126 S.W.2d 775, error dismissed, judgment correct.

38. Pa.—Simpson v. Montgomery Ward & Co., 57 A.2d 571, 162 Pa. Super. 31.

Tenn.—Long v. Tomlin, 125 S.W.2d 171, 22 Tenn.App. 607.

Tex.—Panhandle & S. F. Ry. Co. v. Montgomery, Civ.App., 140 S.W.2d 241—Moore v. Rice, Civ.App., 110 S.W.2d 973—Gulf States Security Life Ins. Co. v. Edwards, Civ.App., 109 S.W.2d 1125, error dismissed.

Wis.—Schumacher v. Wolf, 20 N.W.2d 579, 247 Wis. 607.

64 C.J. p 1164 note 61.

## Findings or answers held definite

Tex.—Chauncey v. Gambill, Civ.App., 126 S.W.2d 775, error dismissed, judgment correct—Rountree Motor Co. v. Smith Motor Co., Civ.App., 109 S.W.2d 296, error dismissed.

64 C.J. p 1164 note 61 [a].

39. Ohio.—Dowd-Feder Co. v. Schreyer, 179 N.E. 411, 124 Ohio St. 594—Looker v. Martin, App., 104 N.E.2d 698.

Pa.—Simpson v. Montgomery Ward & Co., 57 A.2d 571, 162 Pa. Super. 371.

40. Tex.—Northern Texas Traction Co. v. Armour & Co., 288 S.W. 145, 116 Tex. 176.

64 C.J. p 1164 note 63.

## Findings held ambiguous

Tex.—Wright v. Carey, Civ.App., 169 S.W.2d 749.

64 C.J. p 1164 note 63 [a].

## Findings held unambiguous

Tex.—Beaumont, Sour Lake & Western R. Co. v. Cluck, Civ.App., 95 S.W.2d 1033, error dismissed.

64 C.J. p 1164 note 63 [b].

Court may not speculate as to what jury intended by ambiguous finding.—Wright v. Carey, Tex.Civ.App., 169 S.W.2d 749.

41. Ohio.—Weinberg v. Schaller, 171 N.E. 346, 34 Ohio App. 464.

64 C.J. p 1164 note 64.

42. Mo.—E. & H. Brick Co. v. St. Louis & S. F. Ry. Co., 21 Mo.App. 648.

Wash.—State v. Hanna, 151 P. 83, 1087, 87 Wash. 29.

43. Ga.—Burke v. Schwarzwelms, 113 S.E. 16, 153 Ga. 761.

44. Ind.—Becknell v. Hosier, 37 N.E. 580, 10 Ind.App. 5.

45. Ind.—Alexandria Min., etc., Co. v. Irish, 44 N.E. 680, 16 Ind.App. 534.

46. Kan.—Sturgis First Nat. Bank v. Peck, 8 Kan. 660.

47. Ind.—Hopkins v. Stanley, 43 Ind. 553.

64 C.J. p 1164 note 70.

48. Tex.—Goggan v. Wells Fargo & Co. Express, Civ.App., 227 S.W. 246.

49. Ind.—Hopkins v. Stanley, 43 Ind. 553.

50. Tex.—American Law Book Co. v. Dykes, Civ.App., 278 S.W. 247.

51. Tex.—Texas Employers' Ins. Ass'n v. Fitzgerald, Civ.App., 292 S.W. 925, reversed on other grounds, Com.App., 296 S.W. 509.

52. Ind.—Central Indiana Ry. Co. v. Mitchell, 199 N.E. 439, 101 Ind.App. 121.

64 C.J. p 1164 note 76—33 C.J. p 143 note 70—26 C.J. p 568 note 3.

## Answers held sufficient

Kan.—Duncan v. Branson, 110 P.2d 789, 153 Kan. 344.

## Finding must be in plain language

Mo.—Osborn v. Chanedysson Elec. Co., 248 S.W.2d 657.

53. Kan.—Long v. Shafer, 174 P.2d 88, 162 Kan. 21.

Pa.—Simpson v. Montgomery Ward & Co., 57 A.2d 571, 162 Pa. Super. 31.

64 C.J. p 1165 note 77.

## Answers held definite or specific

Kan.—Rainman v. National Mut. Cas. Co., 133 P.2d 145, 156 Kan. 294—Moses v. Missouri Pac. R. Co., 26 P.2d 259, 138 Kan. 347.

Mass.—Nelson v. Economy Grocery Stores, 25 N.E.2d 986, 305 Mass. 383.

64 C.J. p 1165 note 77 [a].

## Where conclusion held not detailed finding

Kan.—Schroeder v. Nelson, 139 P.2d 868, 157 Kan. 320.

54. Wis.—Davis v. Farmington, 42 Wis. 425.

55. Iowa.—Flisk v. Chicago, etc., R. Co., 38 N.W. 132, 74 Iowa 424.

Me.—Withee v. Rowe, 45 Me. 671.



sufficient as "don't know,"<sup>56</sup> "can't say definitely,"<sup>57</sup> and similar answers.<sup>58</sup> Such answers have been held sufficient as "We, the jury believe,"<sup>59</sup> or "have reason to believe."<sup>60</sup> An answer "we think" has been held sufficient<sup>61</sup> and has also been held insufficient.<sup>62</sup> An answer otherwise certain is not rendered uncertain because it is preceded by the phrase "in our judgment."<sup>63</sup>

**No evidence.** Where there is no evidence on a point covered by a special interrogatory propounded to the jury, they may so answer.<sup>64</sup>

**Insufficient evidence.** If there is not sufficient evidence to sustain a finding in favor of the party affirming the subject matter of the interrogatory, the answer should be "no"<sup>65</sup> rather than "not sufficient evidence."<sup>66</sup>

### § 553. — Ultimate and Evidentiary Facts and Conclusions

#### a. In general

b. Matters which are matters of evidence, fact, or conclusions

#### a. In General

As a general rule the ultimate facts in controversy, and not the evidence to prove them, must be found by a special verdict, or special finding, or in a case submitted on special issues.

As a general rule, sometimes by reason of statute, the ultimate facts in controversy and not the evidence to prove them must be found by a special verdict<sup>67</sup> or special finding,<sup>68</sup> or in a case submitted on special issues.<sup>69</sup> The jury need not find evidentiary facts in a special verdict<sup>70</sup> or in a case submitted on special issues.<sup>71</sup> However, where evidentiary facts stated are such that but one inference can be drawn therefrom, the absence of the statement of the ultimate fact in a special verdict<sup>72</sup> or special finding<sup>73</sup> will not prevent the court from drawing the inevitable inference. When evidentiary facts leave room for difference of reasonable opinion, the party having the burden of proof must fail.<sup>74</sup>

If an inferential fact and evidentiary fact are one and the same thing, it must go into the special verdict.<sup>75</sup> When facts are close to the line dividing the inferential facts from the evidentiary facts, the only safe plan is to put them into the special verdict;<sup>76</sup> if the court should conclude that they are evidential no harm results, whereas, if the court should believe that they are inferential facts their absence might be fatal.<sup>77</sup> The inclusion of evidence will not render the verdict defective if ultimate facts are found which warrant a judgment.<sup>78</sup> A special verdict finding what the law has made con-

56. Wash.—Minor v. Stevens, 118 P. 313, 65 Wash. 423, 42 L.R.A.N.S., 1173.

64 C.J. p 1165 note 80.

Construction of "don't know" see infra § 559.

57. Ind.—Peters v. Lane, 55 Ind. 391.

58. Kan.—Phillips v. Commercial Nat. Bank, 239 P. 984, 119 Kan. 339.

64 C.J. p 1165 note 82.

59. Mo.—McGuire v. Missouri Pac. R. Co., 23 Mo.App. 325—E. & H. Brick Co. v. St. Louis & S. F. Ry. Co., 21 Mo.App. 648.

60. Iowa.—Martin v. Central Iowa R. Co., 13 N.W. 424, 59 Iowa 411.

61. Iowa.—Martin v. Central Iowa R. Co., supra.

62. W. Va.—Runyan v. Kanawha Water & Light Co., 71 S.E. 259, 68 W. Va. 609, 35 L.R.A.N.S., 430.

63. Ind.—Peters v. Lane, 55 Ind. 391.

64. Ind.—Louisville, etc., R. Co. v. Thompson, 8 N.E. 18, 9 N.E. 357, 107 Ind. 442, 57 Am.R. 120.

64 C.J. p 1165 note 88.

65. Ind.—Union Traction Co. v. Howard, App., 87 N.E. 1103, reversed on other grounds 90 N.E. 764, 173 Ind. 335.

Iowa.—Fisk v. Chicago, etc., R. Co., 38 N.W. 132, 74 Iowa 424.

66. Ind.—Union Traction Co. v. Howard, App., 87 N.E. 1103, reversed on other grounds 90 N.E. 764, 173 Ind. 335.

64 C.J. p 1165 note 90.

67. Ind.—Long v. Archer, 46 N.E.2d 818, 221 Ind. 186.

Mo.—Evans v. Wall, App., 199 S.W. 2d 908.

Ohio.—Smith v. Pennsylvania R. Co., App., 99 N.E.2d 501.

64 C.J. p 1165 note 93—33 C.J. p 143 note 73—26 C.J. p 569 note 7.

Questions to be submitted see supra § 532.

68. Idaho.—Baldwin v. Ewing, 204 P.2d 430, 69 Idaho 176.

64 C.J. p 1165 note 94.

**The answers to be returned** are those whose legal effect may be, when considered with the other facts found, to show whether the general verdict resulted from an erroneous application of law.—Gearhart v. Columbus Ry. Power & Light Co., 29 N.E.2d 621, 65 Ohio App. 225.

69. Tex.—Yanowski v. Fort Worth Transit Co., Civ.App., 204 S.W.2d 1001, error refused no reversible error—Employers Cas. Co. v. Hicks Rubber Co., Civ.App., 160 S.W.2d 96, error granted—Paddock v. Beeler, Civ.App., 130 S.W.2d 886.

64 C.J. p 1165 note 95.

**Findings on evidentiary issues held immaterial.**

Tex.—McElwraith v. City of McGregor, Civ.App., 58 S.W.2d 851, error dismissed.

70. Ohio.—Landon v. Lee Motors, Inc., 118 N.E.2d 147, 161 Ohio St. 82.

64 C.J. p 1165 note 96.

71. Tex.—Timms v. Echols, Civ.App., 50 S.W.2d 454.

72. Ind.—Mayer v. C. R. Lesh Paper Co., 90 N.E. 651, 45 Ind.App. 250.

64 C.J. p 1165 note 98.

73. Ill.—Chicago & N. W. Ry. Co. v. Dunleavy, 22 N.E. 15, 129 Ill. 132.

64 C.J. p 1165 note 99.

74. Ind.—Mayer v. C. R. Lesh Paper Co., 90 N.E. 651, 45 Ind.App. 250.

75. Ind.—Louisville, etc., R. Co. v. Miller, 37 N.E. 343, 141 Ind. 533.

64 C.J. p 1165 note 2.

76. Ind.—Indianapolis & Southern Motor Exp. v. Public Service Commission, 112 N.E.2d 864.

64 C.J. p 1165 note 3.

77. Ind.—Louisville, etc., R. Co. v. Miller, 37 N.E. 343, 141 Ind. 533.

78. Tex.—Mathis v. State, Civ.App., 258 S.W.2d 200, error refused no reversible error.

64 C.J. p 1165 note 5.

clusive evidence of a fact is tantamount to a finding of such fact.<sup>79</sup>

**Conclusions.** As a general rule, sometimes by reason of statute, the ultimate facts and not conclusions of law must be found by a special verdict,<sup>80</sup> special finding,<sup>81</sup> or in a case tried on special issues.<sup>82</sup> A special verdict which presents no other question than the relevancy of testimony adduced on trial is irregular.<sup>83</sup> A special verdict need not state conclusions of law,<sup>84</sup> and, where stated, they will be disregarded either in a special verdict<sup>85</sup> or special finding.<sup>86</sup> Conclusions of law do not impair a special verdict if, after eliminating them, there still remain sufficient inferential and ultimate facts, within the issues, on which the judgment can rest.<sup>87</sup> The findings of a jury which are conclusions of fact or of fact and law are improper;<sup>88</sup> but the inclusion of such improper matter does not invalidate the findings on matters properly submitted to the jury.<sup>89</sup>

#### b. Matters Which Are Matters of Evidence, Fact, or Conclusions

It is difficult to distinguish ultimate facts, evidentiary facts, and conclusions. An evidentiary fact is one which furnishes evidence of the existence of some other fact, while an ultimate fact is the final resulting effect

reached by processes of legal reasoning from the evidentiary facts.

It is difficult to distinguish ultimate facts, evidentiary facts, and conclusions.<sup>90</sup> An evidentiary fact is one which furnishes evidence of the existence of some other fact,<sup>91</sup> while an ultimate fact is the final resulting effect reached by processes of legal reasoning from the evidentiary facts.<sup>92</sup> An inferential fact is an inference or conclusion from the evidentiary facts.<sup>93</sup> A finding in a special verdict that a note was paid is a finding of fact.<sup>94</sup> Where the issue is whether a party had sufficient mental capacity to make a gift inter vivos, a finding that the donor was of unsound mind is a conclusion of law.<sup>95</sup> The existence of usury is a conclusion of law from the facts found.<sup>96</sup> A finding that acts were done with a certain intent is a finding of fact.<sup>97</sup> Miscellaneous instances where a finding has been held to be or not to be a conclusion of law have been determined by the courts.<sup>98</sup>

**Conversion.** A finding in a special verdict that a party converted property<sup>99</sup> or money<sup>1</sup> is a conclusion of law.

**Negligence.** A finding of negligence in a special verdict<sup>2</sup> or finding<sup>3</sup> is a conclusion of law. A finding of contributory negligence or freedom therefrom in a special verdict is a conclusion of law.<sup>4</sup>

79. Ky.—John v. Bates, Litt.Sel.Cas. 106.

80. Ohio.—Landon v. Lee Motors, Inc., 118 N.E.2d 147, 161 Ohio St. 82.

64 C.J. p 1166 note 8.

81. Ohio.—Croke v. Chesapeake & O. Ry. Co., 93 N.E.2d 811, 86 Ohio App. 483.

64 C.J. p 1166 note 9.

82. Tex.—Harbin v. City of Beaumont, Civ.App., 146 S.W.2d 297, error dismissed, judgment correct. 64 C.J. p 1166 note 10.

83. N.Y.—Welland Canal Co. v. Hathaway, 8 Wend. 480, 24 Am.D. 51.

84. Ind.—Tien v. Louisville, etc., R. Co., 44 N.E. 45, 15 Ind.App. 304.

85. Ohio.—Miller v. Jackson, 107 N.E.2d 922, 92 Ohio App. 189. 64 C.J. p 1166 note 13.

86. Ind.—Chicago, I. & L. Ry. Co. v. Wilfong, 90 N.E. 307, 173 Ind. 308.—Lake Erie & W. R. Co. v. Reed, 103 N.E. 127, 57 Ind.App. 65.

87. Ohio.—Smith v. Pennsylvania R. Co., App., 99 N.E.2d 501.—Sparks v. Sims, App., 92 N.E.2d 428.—Haacke v. Lease, App., 41 N.E.2d 590. 64 C.J. p 1166 note 15.

88. Ohio.—Michael v. Saul, App., 42 N.E.2d 219.—Haacke v. Lease, App., 41 N.E.2d 590.

89. Ohio.—Haacke v. Lease, supra.

90. Ind.—Webb v. Rhodes, 61 N.E. 735, 28 Ind.App. 393.

Or.—Oregon Home Builders v. Montgomery Inv. Co., 184 P. 487, 94 Or. 349.

91. Or.—Oregon Home Builders v. Montgomery Inv. Co., supra. 64 C.J. p 1166 note 18.

92. Or.—Oregon Home Builders v. Montgomery Inv. Co., supra.

93. Ind.—Louisville, etc., R. Co. v. Miller, 37 N.E. 343, 141 Ind. 533.

94. Ind.—Wiperman v. Hardy, 46 N.E. 537, 17 Ind.App. 142. Payment as question of fact generally see Payment § 125.

95. Ind.—Teegarden v. Lewis, 40 N.E. 1047, 44 N.E. 9, 145 Ind. 98.

96. Va.—Brummel v. Enders, 18 Gratt. 873, 59 Va. 873. 64 C.J. p 1166 note 27.

97. Ind.—Belshaw v. Chittwood, 40 N.E. 908, 141 Ind. 377.

98. **Conclusions of Law**

Ohio.—Michael v. Saul, App., 42 N.E. 2d 219.

Tex.—Oats v. Dublin Nat. Bank, 90 S.W.2d 824, 127 Tex. 2. 64 C.J. p 1166 note 29 [a].

**Findings of Fact**

Kan.—White v. Toombs, 192 P.2d 174, 164 Kan. 635.—Jelf v. Cottonwood

Falls Gas Co., 178 P.2d 992, 162 Kan. 713.—Godfrey v. Kansas City Public Service Co., 88 P.2d 1037, 149 Kan. 592.

Ohio.—Hubbard v. Cleveland, Columbus & Cincinnati Highway, 76 N.E. 2d 721, 81 Ohio App. 445.

Tex.—Neyland v. Brown, 170 S.W.2d 207, 141 Tex. 253, modified on other grounds 172 S.W.2d 89, 141 Tex. 253.—Snodgrass v. Robertson, Civ. App., 167 S.W.2d 534, error refused. 64 C.J. p 1166 note 29 [b].

99. Ind.—Louisville, etc., R. Co. v. Balch, 4 N.E. 288, 105 Ind. 92.

1. Ind.—Teegarden v. Lewis, 40 N.E. 1047, 44 N.E. 9, 145 Ind. 98.

2. Ind.—Chicago, etc., R. Co. v. Burger, 24 N.E. 931, 124 Ind. 275. 64 C.J. p 1167 note 34.

Negligence as question of law generally see Negligence § 252.

3. Idaho.—Geddes v. Davis, 210 P. 584, 36 Idaho 201.

64 C.J. p 1167 note 35.

4. Kan.—Harrison v. Travelers Mut. Cas. Co., 134 P.2d 681, 156 Kan. 492.

64 C.J. p 1167 note 37. Contributory negligence as question of law generally see Negligence § 254.

### § 554. — Assent of Required Number of Jurors

According to some decisions answers to special interrogatories accompanying a general verdict must be unanimous; but in some jurisdictions, by statute, answers by a number less than the entire jury suffice.

According to some decisions, answers to special interrogatories accompanying a general verdict must be unanimous.<sup>5</sup> In some jurisdictions, by statute, a number less than the entire jury may answer special interrogatories.<sup>6</sup> Where a number less than the entire jury may answer special interrogatories, an answer by the required number is considered the answer or verdict of the entire jury,<sup>7</sup> and not merely the answer of the required number.<sup>8</sup> Consequently, where less than the required number answers an interrogatory, the answer cannot be regarded as the answer of the jury.<sup>9</sup>

Where a special verdict is returned, each answer must be made by the same individual jurors if required by statute.<sup>10</sup> Where this rule applies it has been held that at least ten, and the same ten, of the jury must agree on all questions essential to

support the judgment entered on their verdict,<sup>11</sup> and if it is so agreed it is not necessary that all the questions submitted by the verdict be agreed to by the same ten jurors.<sup>12</sup> Thus, three or more jurors may disagree with respect to questions not essential to judgment because immaterial or because rendered immaterial by the answers found to other questions by all or ten agreed jurors.<sup>13</sup>

### § 555. — Authentication or Signature of Findings

There must be a compliance with statutory requirements with respect to the authentication or signing of special findings.

Where the statute requires that the general verdict be signed by the jury as a whole or by the foreman, as discussed supra § 495, or requires that special findings be signed,<sup>14</sup> answers to interrogatories are not effective for any purpose where they are not signed as required<sup>15</sup> and are not read to the jury by the clerk as their verdict.<sup>16</sup> Although the statute does not require a signature to each answer, such is the better practice.<sup>17</sup> The fact that

5. Ill.—Knudson v. Wacker & Birk Brewing & Malting Co., 182 Ill.App. 296—Reagan v. Borgeson, 173 Ill. App. 100.  
General verdict see supra § 494.

6. Ohio—Garber v. Chrysler Corp., App., 50 N.E.2d 416—Creighton v. Klehl, 19 N.E.2d 653, 60 Ohio App. 86.  
Wis.—Scipior v. Shea, 31 N.W.2d 199, 252 Wis. 185.  
64 C.J. p 1167 note 40.

7. Ohio—Simpson v. Springer, 57 N.E.2d 817, 74 Ohio App. 142, affirmed 55 N.E.2d 418, 143 Ohio St. 324, 155 A.L.R. 583.

Wis.—Augustin v. Milwaukee Elec. Ry. & Transport Co., 49 N.W.2d 730, 259 Wis. 625.

**Verdict and answer held valid**  
Ohio—Simpson v. Springer, 57 N.E.2d 817, 74 Ohio App. 142, affirmed 55 N.E.2d 418, 143 Ohio St. 324, 155 A.L.R. 583.

8. Ohio—Simpson v. Springer, supra.

9. Ohio—May v. Szwed, 39 N.E.2d 630, 68 Ohio App. 459.

**General verdict not to be received or journalized**

Where three-fourths or more of jury are unable to agree on answers to properly submitted interrogatories, trial court should not receive and journalize a general verdict returned by three-fourths or more of the jury.—Bailey v. Great Lakes Greyhound Lines of Ind., 16 Ohio Supp. 112.

**General verdict held ineffective to support judgment**

Where only eight members of jury of twelve signed special findings of fact submitted by interrogatories which were material to the issues in case and plaintiff objected to entry of general verdict for defendant before discharge of jury, general verdict was ineffective to support a judgment for defendant.—Bailey v. Great Lakes Greyhound Lines of Ind., supra.

10. Wis.—Scipior v. Shea, 31 N.W.2d 199, 252 Wis. 185—Stylow v. Milwaukee Electric Railway & Transport Co., 5 N.W.2d 750, 241 Wis. 211.  
64 C.J. p 1167 note 41.

**Correction of verdict held not erroneous**

Where verdict as first returned showed the same two jurors dissenting from answers to first six questions, and answer to seventh question relating to damages showed only one of the two jurors dissenting and showed another as also dissenting, and trial judge after examining verdict but before receiving it re-read instruction that at least ten, and the same ten jurors must agree, and jury then retired and later returned verdict corrected to show the same two jurors dissenting from answers to all questions, the correction of the verdict was not error.—Levandowski v. Studey, 25 N.W.2d 59, 249 Wis. 421.

**In action brought by coplaintiffs failure of five-sixths of jurors to concur in essential findings in relation to automobile driver's right to**

recover for injuries sustained in automobile collision did not affect right of wife to recover amount assessed as her damages for pain and suffering resulting from same collision.—Haase v. Employers Mut. Liability Ins. Co., 27 N.W.2d 468, 250 Wis. 422.

11. Wis.—Scipior v. Shea, 31 N.W.2d 199, 252 Wis. 185.

**Comparative negligence**  
Wis.—Scipior v. Shea, 31 N.W.2d 199, 252 Wis. 185.

**Causal negligence**  
Wis.—Scipior v. Shea, supra.

**Verdict held fatally defective**  
Wis.—Scipior v. Shea, supra.

**Verdict held sufficient**  
Wis.—Augustin v. Milwaukee Elec. Ry. & Transport Co., 49 N.W.2d 730, 259 Wis. 625.

12. Wis.—Scipior v. Shea, 31 N.W.2d 199, 252 Wis. 185.

13. Wis.—Scipior v. Shea, supra.

**Verdict held valid**  
Wis.—Garlock v. Chicago, M., St. P. & P. R. Co., 31 N.W.2d 582, 252 Wis. 269.

14. Ohio—Bailey v. Great Lakes Greyhound Lines of Ind., 16 Ohio Supp. 112.

15. Ohio—Bailey v. Great Lakes Greyhound Lines of Ind., supra.  
64 C.J. p 1167 note 44.

16. R.I.—Rose v. Harvey, 30 A. 459, 18 R.I. 527.

17. Ind.—Louisville, etc., R. Co. v. Kemper, 53 N.E. 931, 153 Ind. 618—Sage v. Brown, 34 Ind. 464.

the foreman fails to sign until after the jury are discharged is not an error affecting any substantial right of the party complaining.<sup>18</sup> Where the foreman signs the general verdict as foreman, his failure in signing the interrogatories to use the title of foreman is immaterial.<sup>19</sup> Where the verdict contains a number of findings, the fact that the foreman signs each of them does not vitiate the verdict.<sup>20</sup> The general verdict is not necessarily vitiated by the failure of the foreman to sign written answers of the jury to special interrogatories submitted to them.<sup>21</sup>

**Special verdict.** Where required by statute, a special verdict must be signed by the foreman.<sup>22</sup> Under a statute requiring a special verdict to be signed by the foreman, the signature of the foreman at the end of the interrogatories and answers is sufficient,<sup>23</sup> without his signature following the answer to each question.<sup>24</sup> Under some statutes where interrogatories are submitted for a special verdict the interrogatories and answers thereto completed and signed by jurors on the front page are not invalidated as a special verdict by the jurors'

failure to sign again following each answer or at the end of the list.<sup>25</sup>

## § 556. Failure to Answer Interrogatories or Find Issues

- a. In general
- b. Special questions with general verdict

### a. In General

It is the duty of the jury to find the special issues submitted, and where they fail to find on all the material issues submitted to them their verdict is incomplete, and except as may be otherwise provided by statute it will not support a judgment.

It is the duty of the jury to find the special issues submitted, as discussed supra § 551, and, where the jury fail to find on all the material issues submitted to them, their verdict is incomplete<sup>26</sup> or defective,<sup>27</sup> and except as may be otherwise provided by statute it will not support a judgment,<sup>28</sup> since the court cannot make such finding itself,<sup>29</sup> unless the evidence on the issue is without dispute and subject only to one answer,<sup>30</sup> nor can it substitute its

18. Ohio.—Cincinnati v. Johnson, 28 Ohio Cir.Ct. 377, affirmed 81 N.E. 1182, 76 Ohio St. 567.

19. Ind.—Norwich Union F. Ins. Soc. v. Gorton, 24 N.E. 984, 124 Ind. 217.

20. Mo.—Selbert v. Allen, 61 Mo. 482.

21. Mo.—Menne v. Neumeister, 25 Mo.App. 300.

22. Cal.—In re Keithley's Estate, 66 P. 5, 134 Cal. 9.

64 C.J. p 1167 note 52.

23. Cal.—In re Riley's Estate, 274 P. 351, 206 Cal. 286.  
64 C.J. p 1167 note 53.

24. Cal.—In re Riley's Estate, supra.

25. Ohio.—Dowd-Feder Co. v. Schreyer, 179 N.E. 411, 124 Ohio St. 504.

26. Wis.—Missinkie v. McMurdo, 83 N.W. 758, 107 Wis. 578.

64 C.J. p 1168 note 58—27 C.J. p 846 note 86.

**Jury cannot ignore special issues** submitted by court and return general verdict in violation of charge of the court.—Andrade v. Southern Pine Lumber Co., Civ.App., 94 S.W.2d 583, reversed on other grounds Southern Pine Lumber Co. v. Andrade, 124 S.W.2d 334, 132 Tex. 372.

**Answering issue favorable to plaintiff** will not obviate necessity of requiring an answer to an issue pertaining to defendant's rights.—Humble Oil & Refining Co. v. Owings, Tex. Civ.App., 128 S.W.2d 67.

**Effect of failure on other findings**  
Failure to answer special issues inquiring whether sheep sold were in-

fectured with yellow liver and whether such infection rendered the sheep unsuitable for breeding purposes nullified finding in response to preceding special issue that the sheep sold were suitable for breeding purposes.—Rawls v. Holt, Tex.Civ.App., 193 S.W.2d 536, error refused no reversible error.

27. Ind.—Line v. State, 30 N.E. 703, 131 Ind. 468—Holman v. Elliott, 65 Ind. 78.

28. Tex.—Le Beau v. Highway Ins. Underwriters, 187 S.W.2d 73, 143 Tex. 589—Panhandle & S. F. Ry. Co. v. Sutton, 81 S.W.2d 1005, 125 Tex. 401—Kirkpatrick v. Gayle, Civ. App., 265 S.W.2d 185—Cox v. Clay, Civ.App., 237 S.W.2d 798, error refused, no reversible error—Rawls v. Holt, Civ.App., 193 S.W.2d 536, error refused, no reversible error—Dotson v. Braswell, Civ.App., 172 S.W.2d 985, error refused—Nolan v. Smith, Civ.App., 166 S.W.2d 750, error refused—Jones v. State Fair of Texas, Civ.App., 127 S.W.2d 948, error dismissed, judgment correct—Traders & General Ins. Co. v. Daniel, Civ.App., 114 S.W.2d 336—Shellhammer v. Caruthers, Civ.App., 99 S.W.2d 1054, error dismissed—Dallas Railway & Terminal Co. v. Brown, Civ.App., 97 S.W.2d 335, error refused—Traders & General Ins. Co. v. Patton, Civ.App., 92 S.W.2d 1033, error dismissed—Massachusetts Bonding & Insurance Co. v. Dallas Steam Laundry & Dye Works, Civ.App., 85 S.W.2d 937, error refused—Texas Employers' Ins. Ass'n v. Horn, Civ.App., 75 S.W.2d

301—Copeland v. Brannan, Civ. App., 70 S.W.2d 680, error dismissed—Baggett v. Texas Employers' Ins. Ass'n, Civ.App., 70 S.W.2d 469, error refused.

64 C.J. p 1168 note 60.

**Disagreement on issue as finding thereon** see infra § 559.  
**Silence as negative finding** see infra § 559.

29. Tex.—Yanowski v. Fort Worth Transit Co., Civ.App., 204 S.W.2d 1001, error refused, no reversible error—Rawls v. Holt, Civ.App., 193 S.W.2d 536, error refused, no reversible error—Nolan v. Smith, Civ. App., 166 S.W.2d 750, error refused—Southern Underwriters v. Buxton, Civ.App., 136 S.W.2d 264—Golston v. Bartlett, Civ.App., 112 S.W.2d 1077, error dismissed—Shellhammer v. Caruthers, Civ.App., 99 S.W.2d 1054, error dismissed—Wagstaff v. North British & Mercantile Ins. Co., Civ.App., 88 S.W.2d 550, error dismissed—Copeland v. Brannan, Civ.App., 70 S.W.2d 680, error dismissed.

64 C.J. p 1168 note 61.

30. Tex.—First Nat. Bank of Schulenburg v. Winkler, Civ.App., 146 S.W.2d 201, affirmed First Nat. Bank of Schulenburg v. Winkler, 161 S.W.2d 1053, 139 Tex. 131—Southern Underwriters v. Buxton, Civ.App., 136 S.W.2d 264.

**Judgment without verdict**

Where, in any jury case, material issues necessary to support a judgment are established conclusively by the evidence, or there is no evidence

findings on an independent ground which has not been urged<sup>31</sup> or dismiss the case on a ground that has been waived by defendant;<sup>32</sup> and, where the jury are unable to answer the issues properly, a mistrial should be ordered.<sup>33</sup> Under a statute so providing, however, the trial court has authority to make findings as to supplementary facts or issues fairly referable to the issues submitted where the jury have found on the submitted issues.<sup>34</sup>

The fact that some of the issues go unanswered does not necessarily render a verdict void or insufficient to support the judgment where the issues which are answered decide the merits of the case and warrant and support the judgment,<sup>35</sup> since when the jury answer some questions submitted, but fail to agree on others, the question as to whether the answers made are sufficient to enable the court to render any judgment is within the discretion of the trial court.<sup>36</sup> Further, a failure to answer one spe-

cial finding is not fatal where the matter is covered by other answers,<sup>37</sup> but where the answer to other special issues does not cover a particular issue the latter should be answered.<sup>38</sup>

A statute which authorizes the court to enter judgment in the absence of a finding by the jury on special issues has been held valid.<sup>39</sup> A statute providing that whenever any special verdict shall be submitted, and there is omitted therefrom some essential controverted matter, such matter shall be deemed determined by the court in conformity with its judgment is applicable to controverted matters omitted by the jury from a special verdict covering the issues raised in the action submitted,<sup>40</sup> which matter, under the statute, is deemed determined by the court in conformity with its judgment;<sup>41</sup> but such a statute has no application to matters not embraced in the issues litigated at the trial.<sup>42</sup>

to raise a fact question thereon, court may render judgment without any verdict on such issues.—Nolan v. Smith, Tex.Civ.App., 166 S.W.2d 750, error refused—Traders & General Ins. Co. v. Weatherford, Tex.Civ.App., 124 S.W.2d 423, error dismissed, judgment correct.

31. Tex.—Ratcliffe v. Ormsby, Civ. App., 293 S.W. 930.

32. Tex.—Ratcliffe v. Ormsby, supra.

33. Tex.—Blanton v. E. & L. Transport Co., 207 S.W.2d 368, 146 Tex. 377—Powers v. Standard Acc. Ins. Co., 191 S.W.2d 7, 144 Tex. 415—Montgomery Ward & Co. v. Newman, Civ.App., 181 S.W.2d 613—Nolan v. Smith, Civ.App., 166 S.W.2d 750, error refused—Owings v. Porter, Civ.App., 150 S.W.2d 141, error dismissed, judgment correct—Traders & General Ins. Co. v. Daniel, Civ.App., 114 S.W.2d 336—Wagstaff v. North British & Mercantile Ins. Co., Civ.App., 88 S.W.2d 550, error dismissed—Copeland v. Brannan, Civ.App., 70 S.W.2d 660, error dismissed.

64 C.J. p 1168 note 84.

Disagreement as finding see infra § 559.

#### Discretion of court

In suit to set aside two deeds to mineral interest, wherein one of defendants filed a cross action in trespass to try title and jury did not answer all special issues propounded to it, trial judge acted within his discretion in ordering a mistrial.—Firestone v. Hall, Tex.Civ.App., 143 S.W.2d 797.

34. Tex.—Westcliff Co. v. Wall, Civ. App., 261 S.W.2d 450, reversed on

other grounds, Sup., 267 S.W.2d 544—Rawls v. Holt, Civ.App., 193 S.W.2d 536, error refused no reversible error.

35. D.C.—Henderson v. Allison, Mun. App., 44 A.2d 220.

Ga.—Peagler v. Huey, 188 S.E. 906, 183 Ga. 677.

Ohio.—Hubbard v. Cleveland, Columbus & Cincinnati Highway, 76 N.E. 2d 721, 81 Ohio App. 445.

Tex.—Commercial Standard Ins. Co. v. Noack, Com.App., 62 S.W.2d 72—Davis v. Texas Emp. Ins. Ass'n Civ.App., 257 S.W.2d 755—Ward v. Houseman, Civ.App., 240 S.W.2d 456, error refused—F. W. Woolworth Co. v. Ellison, Civ.App., 232 S.W.2d 857—Kramer v. Wilson, Civ. App., 226 S.W.2d 675, refused no reversible error—Pacific Fire Ins. Co. v. Smith, Civ.App., 219 S.W.2d 710—Texas Emp. Ins. Ass'n v. Derrick, Civ.App., 207 S.W.2d 199—Texas Emp. Ins. Ass'n v. Dickerson, Civ.App., 194 S.W.2d 148, refused no reversible error—Grindstaff v. Mather, Civ.App., 186 S.W.2d 364, refused for want of merit—Texas Life Ins. Co. v. Goldberg, Civ.App., 184 S.W.2d 333—Williams v. Patterson, Civ.App., 170 S.W.2d 269—Lamb v. Isley, Civ.App., 143 S.W.2d 202, error refused—Edmondson v. Carroll, Civ.App., 134 S.W.2d 378, error dismissed, judgment correct—Carnley v. Kelley, Civ. App., 130 S.W.2d 910—International-Great Northern R. Co. v. Acker, Civ.App., 128 S.W.2d 506, error dismissed, judgment correct—Sun Oil Co. v. Smith, Civ.App., 113 S.W.2d 683, error dismissed—Federal Underwriters Exchange v. Wheeler, Civ.App., 108 S.W.2d 922, error dis-

missed—Coons v. Lain, Civ.App., 188 S.W. 951.  
Immaterial issues generally see infra § 558.

36. Tex.—Phœbus v. Connellee, Civ. App., 228 S.W. 982.  
Sufficiency of answers generally see supra § 551.

37. N.H.—Wadleigh v. Howson, 189 A. 865, 88 N.H. 365.  
Tex.—Lamm v. Driskell, Civ.App., 58 S.W.2d 149.  
64 C.J. p 1168 note 67.

38. Tex.—Norwich Union Indemnity Co. v. Wilson, Civ.App., 17 S.W.2d 68—Gardenhire v. Gardenhire, Civ. App., 172 S.W. 726.

#### Finding on one issue not answer to other issues

Finding in response to special issue that sheep sold were suitable for breeding purposes could not serve as answer to other special issues inquiring whether the sheep were infected with yellow fever and whether such infection rendered the sheep unsuitable for breeding purposes, since such issues submitted material factual elements of issue of breach of implied warranty as ground of liability for damages suffered by buyers as result of sale of the sheep.—Rawls v. Holt, Tex.Civ.App., 193 S.W.2d 536, error refused no reversible error.

39. Tex.—Featherstone v. Brown, Civ.App., 88 S.W. 470.

40. Wis.—Gulland v. Northern Coal & Dock Co., 132 N.W. 755, 147 Wis. 391.

41. Wis.—Langer v. Finch, 152 N.W. 416, 160 Wis. 668.

42. Wis.—Gulland v. Northern Coal & Dock Co., 132 N.W. 755, 147 Wis. 391.

## b. Special Questions with General Verdict

It is the duty of the jury to answer, and of the court to require them to answer,<sup>44</sup> all material questions submitted, even where the submission of such questions is within the discretion of the court.

It is the duty of the jury to answer,<sup>45</sup> and of the court to require them to answer,<sup>44</sup> all material questions submitted, even where the submission of such questions is within the discretion of the court,<sup>45</sup> although as to the duty of the court to require answer there is also authority to the contrary.<sup>46</sup> So it seems generally to be held that judgment cannot ordinarily be rendered on a general verdict where the jury fail to answer special material interrogatories.<sup>47</sup> As a general rule, however, a general verdict which disposes of all the issues is sufficient to support a judgment, although some of the specific questions which are submitted to the jury are returned unanswered, particularly where no objection is made at the time of the return of the verdict, or until after the jury have been discharged.<sup>48</sup> Similarly, error cannot be predicated on the failure of the jury to answer special interrogatories which the court did not call on them to answer,<sup>49</sup> where neither party requested an answer,<sup>50</sup> where the question is too general to require an answer,<sup>51</sup> where the question would not have tested the general verdict,<sup>52</sup> or where there is no evidence to authorize an answer.<sup>53</sup>

A failure to answer a special question is not

fatal where another finding is made decisive of the whole case,<sup>54</sup> or where the question is answered by the general verdict,<sup>55</sup> or by the answers to other special questions.<sup>56</sup> The failure to answer questions, where the general verdict can be supported on other facts,<sup>57</sup> or where answers to such questions favorable to the party against whom judgment is rendered would not necessarily render the judgment erroneous,<sup>58</sup> will not be fatal; and, where the special findings do not embrace all issues, and those returned are not necessarily inconsistent with the general verdict, the fact that the incomplete findings are adverse to the successful party will not prevent a judgment in his favor if the issues and facts included in the general verdict, and on which no special findings are made, are sufficient to warrant a recovery.<sup>59</sup> If the jury cannot agree on the answers the court should refuse to accept a general verdict if it cannot stand without proof of the facts submitted.<sup>60</sup> Moreover, where two questions of fact are submitted with instructions as to the legal effect thereof and the jury return only a general verdict, judgment cannot be rendered thereon unless the evidence will warrant the jury in finding for the successful party as to both questions submitted.<sup>61</sup> Under a statute providing that, where a special finding of fact is inconsistent with the general verdict, the former controls, if a finding in defendant's favor on a special interrogatory would not be inconsistent with a general verdict for

43. Kan.—Lamb v. Liberty Life Ins. Co., 295 P. 698, 132 Kan. 383.  
64 C.J. p 1169 note 73.

44. Cal.—O'Connell v. United Railroads of San Francisco, 124 P. 1022, 19 Cal.App. 36.  
64 C.J. p 1169 note 74.  
Returning jury to make proper answers see *infra* § 560.

**Answer held sufficient**  
Kan.—Sluss v. Brown-Crummer Inv. Co., 53 P.2d 900, 143 Kan. 14, opinion adhered to 64 P.2d 23, 145 Kan. 12.

45. Cal.—O'Connell v. United Railroads of San Francisco, 124 P. 1022, 19 Cal.App. 36.

46. Wash.—Ackerson v. Hama Hama Logging Co., 4 P.2d 638, 164 Wash. 671.

64 C.J. p 1169 note 76.

**Refusal to insist on jury's compliance** with instruction to make special finding stating what jury found negligence to consist of was held not error; so-called special finding not being really special finding, where there was only one possible basis of liability submitted.—Culver v. Lehigh Valley Transit Co., 186 A. 70, 322 Pa. 503.

47. Ohio.—Garber v. Chrysler Corp., App. 50 N.E.2d 416.  
64 C.J. p 1169 note 77.

48. Neb.—Faulkner v. Meyers, 6 Neb. 414.

49. Ind.—Fleming v. Potter, 14 Ind. 486.

Ohio.—Smith v. Cushman Motor Delivery Co., 6 N.E.2d 594, 54 Ohio App. 99.

50. Mass.—Cronin v. Holyoke, 38 N. E. 445, 162 Mass. 257.

51. Ind.—Ft. Wayne v. Patterson, 58 N.E. 747, 25 Ind.App. 547.

52. Ohio.—Wylie v. King, 18 Ohio Cir.Ct.N.S., 304.

Immaterial questions see *infra* § 558.

53. Kan.—Meek v. Wheeler, Kelly & Hogny Inv. Co., 251 P. 184, 122 Kan. 69.

Ohio.—Smith v. Cushman Motor Delivery Co., 6 N.E.2d 594, 54 Ohio App. 99.  
Conformity of finding with evidence generally see *infra* § 561.

54. Minn.—Tew v. Webster, 114 N.W. 647, 103 Minn. 110.  
64 C.J. p 1169 note 83.

55. Iowa.—Mulvaney v. Burroughs, 132 N.W. 873, 152 Iowa 439.  
64 C.J. p 1169 note 84.

56. Ohio.—Jolley v. Martin Bros. Box Co., 99 N.E.2d 672, 89 Ohio App. 372.  
64 C.J. p 1169 note 85.

57. Cal.—O'Connell v. United Railroads of San Francisco, 124 P. 1022, 19 Cal.App. 36.  
N.C.—Ellis v. Wellons, 29 S.E.2d 884, 224 N.C. 269.

58. Ind.—Taylor v. Wootan, 27 N.E. 502, 1 Ind.App. 188, 50 Am.S.R. 200.  
64 C.J. p 1169 note 87.

59. Kan.—Morrow v. Bonebrake, 115 P. 585, 84 Kan. 724, 34 L.R.A.N.S., 1147.

60. Cal.—O'Connell v. United Railroads of San Francisco, 124 P. 1022, 19 Cal.App. 36.  
Effect of disagreement generally see *infra* § 559.

61. N.Y.—Eagan v. Commercial Trust Co. of New York, 148 N.Y.S. 651, 163 App.Div. 604, affirmed 119 N.E. 1040, 223 N.Y. 530.

plaintiff a failure to find on such interrogatory cannot control the verdict.<sup>62</sup>

§ 557. — Aid by Inference, Intendment, or Extrinsic Facts

A special verdict must be complete in itself and cannot be aided by intendment or by extrinsic facts appearing on the record.

A special verdict must be complete in itself and cannot be aided by intendment<sup>63</sup> or by extrinsic facts<sup>64</sup> appearing on the record.<sup>65</sup> Furthermore, the court may not ordinarily consider evidence outside of the finding of the jury.<sup>66</sup> Likewise, special findings accompanying a general verdict are not to be aided by inferences<sup>67</sup> or intendments.<sup>68</sup>

§ 558. — Immaterial or Inconclusive Facts or Issues

The jury need not find on immaterial or uncontroverted issues, or on other issues where those made are decisive of the whole case.

The jury need not find on immaterial issues.<sup>69</sup>

Thus, they need not answer a question or issue the answer to which has been rendered immaterial either by answers to other questions<sup>70</sup> or by reason of the fact that no evidence was introduced in its support,<sup>71</sup> or where the issue relates more to a question of law than to one of fact.<sup>72</sup> It is immaterial that the jury fail to make other findings where those made are decisive of the case.<sup>73</sup> Since only disputed issues of fact are required to be found by the jury,<sup>74</sup> they need not answer an issue where the evidence relating thereto is uncontroverted.<sup>75</sup> The court is authorized to disregard an unanswered issue where it is only evidentiary in character.<sup>76</sup> Interrogatories presented by defendant which state that they are to be answered if a verdict is given for plaintiff need not be answered on the return of a verdict for defendant.<sup>77</sup> Where, without objection, the court instructs the jury that if they answer the one question in the affirmative then they should answer another, and the jury answers the first in the negative it is unnecessary for them to answer the second.<sup>78</sup>

62. Nev.—Weck v. Reno Traction Co., 149 P. 65, 38 Nev. 285. Findings inconsistent with general verdict generally see infra § 563.

63. Ohio.—Landon v. Lee Motors, Inc., 118 N.E.2d 147, 161 Ohio St. 82.

64 C.J. p 1170 note 94.

64. Or.—Turner v. Cyrus, 179 P. 279, 91 Or. 462.

64 C.J. p 1170 note 95.

65. Pa.—Vansyckel v. Stewart, 77 Pa. 124.

64 C.J. p 1170 note 96.

66. Tex.—Stephenson v. Chappell, 33 S.W. 880, 36 S.W. 482, 12 Tex.Civ. App. 296.

64 C.J. p 1170 note 97.

Undisputed facts see supra § 551.

67. Ind.—Marion Light & Heating Co. v. Vermillion, 99 N.E. 55, 51 Ind.App. 677—Lake Erie & W. R. Co. v. Parrish, 93 N.E. 450, 46 Ind. App. 577.

68. Ind.—Garretson v. Garretson, 88 N.E. 642, 43 Ind.App. 688.

69. Tex.—Vanover v. Henwood, 150 S.W.2d 785, 136 Tex. 348—Packard-Dallas, Inc., v. Carle, Civ.App., 163 S.W.2d 735, error refused—Jones v. State Fair of Texas, Civ.App., 127 S.W.2d 948, error dismissed, judgment correct—W. T. Rawleigh Co. v. Sims, Civ.App., 108 S.W.2d 332—Baldwin v. Stamford State Bank, Civ.App., 82 S.W.2d 701, error refused—Citizens' Nat. Bank of Abilene v. Overstreet, Civ.App., 77 S.W.2d 250, error refused—Schoenfeld v. De Puy, Civ.App., 58 S.W.

2d 574, error dismissed—Chicago Fire & Marine Ins. Co. v. Foley, Civ.App., 58 S.W.2d 174.

64 C.J. p 1170 note 1.

70. Kan.—Farnsworth v. Township of Delaware, 51 P.2d 59, 142 Kan. 503.

Tenn.—General Contract Purchase Corp. v. Conner, 126 S.W.2d 347, 23 Tenn.App. 1.

Tex.—Farmer v. Denton, Civ.App., 231 S.W.2d 908—Texas Emp. Ins. Ass'n v. Derrick, Civ.App., 207 S.W.2d 199, refused no reversible error—Blanton v. E. & L. Transport Co., Civ.App., 203 S.W.2d 312, reversed on other grounds 207 S.W.2d 368, 146 Tex. 377—Traders & General Ins. Co. v. Little, Civ.App., 188 S.W.2d 786, refused for want of merit—Chapman v. Evans, Civ.App., 186 S.W.2d 827, refused for want of merit—Garza v. San Antonio Transit Co., Civ.App., 180 S.W.2d 1006, error refused—Levine v. Robertson, Civ.App., 154 S.W.2d 911—Western Casualty Co. v. DeLeon, Civ.App., 148 S.W.2d 446, error dismissed, judgment correct—Carnley v. Kelly, Civ.App., 130 S.W.2d 910—Jones v. State Fair of Texas, Civ.App., 127 S.W.2d 948, error dismissed, judgment correct—Willis v. Smith, Civ.App., 120 S.W.2d 899, error dismissed—Southern Underwriters v. Weddle, Civ.App., 118 S.W.2d 1008, error dismissed by agreement—Patterson v. Gulf, C. & S. F. Ry. Co., Civ.App., 77 S.W.2d 1073, error dismissed—Texas Employers' Ins. Ass'n v. Bradford, Civ.App., 62 S.W.2d 158, affirmed (no opinion).

Wis.—Knauf v. Diamond Cartage Co., 275 N.W. 903, 226 Wis. 111.

64 C.J. p 1170 note 2.

71. Tex.—Hanover Fire Ins. Co. v. Nash, Civ.App., 67 S.W.2d 452, error refused

64 C.J. p 1170 note 3.

72. Tex.—Jenkins v. Tanner, Civ. App., 166 S.W.2d 167.

73. Tex.—Texas Employers' Ins. Ass'n v. Downing, Civ.App., 218 S.W. 112.

64 C.J. p 1170 note 4.

74. Tex.—Woods v. Osborn, Civ. App., 113 S.W.2d 636.

75. Tex.—Jenkins v. Tanner, Civ. App., 166 S.W.2d 167—Wiley v. Powell, Civ.App., 164 S.W.2d 242, reversed on other grounds Powell v. Wiley, 170 S.W.2d 470, 141 Tex. 74—Taylor-Link Oil Co. v. Anderson, Civ.App., 92 S.W.2d 499, error dismissed.

Finding on interest sued for as damages was not required where amount sued for was uncontroverted and determination of interest required mere mathematical calculation.—Taylor-Link Oil Co. v. Anderson, Tex. Civ.App., 92 S.W.2d 499, error dismissed.

76. Tex.—Joiner v. Joiner, Civ.App., 87 S.W.2d 903, reversed on other grounds, Com.App., 112 S.W.2d 1049.

64 C.J. p 1170 note 5.

77. Conn.—Freedman v. New York, N. H. & H. R. Co., 71 A. 901, 81 Conn. 601, 15 Ann.Cas. 464.

78. Tex.—S. H. Kress & Co. v. Sulph. Civ.App., 250 S.W.2d 883, error refused no reversible error—Texas Life Ins. Co. v. Hatch, Civ.App.,

### § 559. — Adverse or Negative Findings, or Disagreement

Where special findings fail to find a fact in issue, such silence will be regarded as equivalent to an express finding against the party having the burden of proof on such issue; but the failure of the jury to find on material issues is not tantamount to an adverse finding against the unsuccessful party on issues not included.

Where special findings fail to find a fact in issue, such silence will be regarded as equivalent to an express finding against the party having the burden of proof on such issue;<sup>79</sup> however, the failure of the jury to find on material issues is not tantamount to an adverse finding against the unsuccessful party on issues not included.<sup>80</sup> Furthermore, in some jurisdictions, equivocal answers are held to be equivalent to findings against the party whose case needs the support of the facts involved.<sup>81</sup> A finding that a certain fact probably does not exist,<sup>82</sup> or that the weight of the evidence justifies the jury in answering "no,"<sup>83</sup> sufficiently finds that the facts do not exist. An answer of "no evidence" to an interrogatory is a finding against the party having the burden of proof as to the proposition stated in such question.<sup>84</sup>

While it has been held that the answer "do not know" constitutes a finding against the party having the burden of proof as to the matter involved,<sup>85</sup> unless there is a presumption in his favor which

must be overcome by evidence,<sup>86</sup> and that a finding "can't answer" is in legal effect a denial of the existence of the matter contained in the interrogatory, operating against the party whose case needs its support,<sup>87</sup> it has also been held that the answers "do not know,"<sup>88</sup> or "not known,"<sup>89</sup> or "unable to determine,"<sup>90</sup> are ordinarily equivalent to no answer at all. A special finding of the precise acts or omissions constituting negligence is equivalent to a finding against plaintiff as to all other acts of negligence alleged or which might properly be proved.<sup>91</sup>

**Disagreement.** While failure to agree on an answer to a special interrogatory has been held equivalent to a finding against the party having the burden of proof,<sup>92</sup> it has been held that a failure of the jury to agree on special questions leaves those issues undetermined<sup>93</sup> and is equivalent to a failure to answer the questions,<sup>94</sup> hence it does not amount to a finding thereon in the negative.<sup>95</sup> So, while it has been said that where the jury cannot agree on answers to the special interrogatories, or some material parts thereof, there is no verdict,<sup>96</sup> since, where the special verdict is the premise and the general verdict the conclusion, it is improper to permit the jury to state that they cannot agree on a special verdict and yet allow them to return a general verdict,<sup>97</sup> it has also been held that where the jury fail to agree on an interrogatory

167 S.W.2d 602, error refused—*Scott v. Scott*, Civ.App., 116 S.W.2d 1163—*Northcutt v. Magnolia Petroleum Co.*, Civ.App., 90 S.W.2d 632, error refused—*Sanders v. Lowrimore*, Civ.App., 73 S.W.2d 148—*McKelvy v. Gugenheim*, Civ.App., 208 S.W. 757.

79. Iowa.—*Weede v. Briar*, 5 N.W.2d 157, 232 Iowa 972.

Minn.—*Chevalier v. Rogers*, 41 N.W.2d 872, 230 Minn. 540.

Ohio.—*Masters v. New York Cent. R. Co.*, 70 N.E.2d 898, 147 Ohio St. 293, certiorari denied 67 S.Ct. 1519, 331 U.S. 836, 91 L.Ed. 1848, rehearing denied 68 S.Ct. 33, 332 U.S. 786, 92 L.Ed. 369—*Mills v. City of Cleveland*, App., 117 N.E.2d 471—*Salley v. Wagner*, 105 N.E.2d 878, 90 Ohio App. 295—*Jolley v. Martin Bros. Box Co.*, 99 N.E.2d 672, 89 Ohio App. 372—*Smith v. Pennsylvania R. Co.*, App., 99 N.E.2d 501—*Kirchner v. New York Central System*, 94 N.E.2d 283, 87 Ohio App. 165—*Casanova v. Wagner*, 88 N.E.2d 312, 85 Ohio App. 278—*May v. Szwed*, 39 N.E.2d 630, 68 Ohio App. 459.

Wis.—*Wanke v. Kreul*, 275 N.W. 361, 225 Wis. 618.

64 C.J. p 1171 note 8.

Necessity of finding of ultimate facts on all issues see supra § 553.

80. Ohio.—*Wills v. Anchor Cartage & Storage Co.*, 176 N.E. 680, 38 Ohio App. 358.

64 C.J. p 1171 note 9.

81. Kan.—*Schaefer v. Arkansas Valley Interurban Ry. Co.*, 179 P. 323, 104 Kan. 394, rehearing denied 181 P. 118, 104 Kan. 740.

64 C.J. p 1171 note 10.

Requirement of definiteness and certainty generally see supra § 552.

82. Ohio.—*Davis v. Guarnieri*, 15 N.E. 350, 45 Ohio St. 470, 4 Am.S.R. 548.

83. Ind.—*Mutual Ben. Life Ins. Co. v. Cannon*, 48 Ind. 264.

84. Ind.—*Vanosdol v. Henderson*, 22 N.E.2d 812, 216 Ind. 240.

64 C.J. p 1171 note 13.

85. Kan.—*Smith v. Bush*, 169 P. 217, 102 Kan. 150.

64 C.J. p 1171 note 14.

86. Kan.—*Sams v. Commercial Standard Ins. Co.*, 139 P.2d 859, 157 Kan. 278.

87. Ohio.—*Cincinnati v. Ryan*, 13 Ohio Cir.Ct.N.S., 513, 84 Ohio Cir. Ct. 421.

88. Ind.—*Perry, etc., Stone Co. v. Wilson*, 67 N.E. 133, 160 Ind. 435.

64 C.J. p 1171 note 16.

89. Tex.—*Bargna v. Bargna*, Civ. App., 127 S.W. 1156.

90. Cal.—*Larsen v. Leonardt*, 96 P. 395, 8 Cal.App. 226.

91. Kan.—*Uhl v. Phillips Petroleum Co.*, 190 P.2d 349, 164 Kan. 401.

64 C.J. p 1171 note 19.

92. Minn.—*In re Boese's Estate*, 7 N.W.2d 355, 213 Minn. 440.

Ohio.—*Smith v. Cushman Motor Delivery Co.*, 6 N.E.2d 594, 54 Ohio App. 99.

93. Mass.—*Fitzgerald v. Young*, 113 N.E. 777, 225 Mass. 116.

94. Iowa.—*Hardin v. Branner*, 25 Iowa 264.

Okl.—*La Fayette v. Bass*, 252 P. 1101, 122 Okl. 182.

Mistrial for failure to agree on special issues see supra § 556.

95. Mass.—*Fitzgerald v. Young*, 113 N.E. 777, 225 Mass. 116.

96. Ind.—*S. W. Little Coal Co. v. O'Brien*, 113 N.E. 465, 114 N.E. 96, 63 Ind.App. 504.

97. S.C.—*Palmetto Fertilizer Co. v. Columbia, N. & L. Ry. Co.*, 83 S.E. 36, 99 S.C. 187.

64 C.J. p 1171 note 24.



and return a general verdict, the effect of the failure is to eliminate the matter embraced in the interrogatory, at least as far as it is sought to make it a substantive ground for recovery;<sup>98</sup> but where several grounds of recovery are alleged and an interrogatory goes only to one, the general verdict will stand notwithstanding a failure to agree on an answer to the interrogatory.<sup>99</sup>

Where the jury disagree as to one special question although answering another question which in different language submits the same matter the answer will not support a judgment.<sup>1</sup> The jury will not be held to have agreed on interrogatories unless the agreement is arrived at in a regular manner.<sup>2</sup> Where there is no disagreement it is improper for the court to set a verdict aside on the ground that the jury practically disagreed.<sup>3</sup> The court may make findings on all material fact issues on which the jury cannot agree, if the parties waive trial by jury.<sup>4</sup>

# § 560. — Returning Jury to Make Proper Answers

If the jury fail to answer special interrogatories or to find on material issues the court must require them

to return to the jury room and answer or find on them properly, at least, where it is a prerequisite, on the request or motion of the party desiring such action.

If the jury fail to answer special interrogatories<sup>5</sup> or to find on material issues<sup>6</sup> the court must require them to return to the jury room and answer or find on them properly, at least, where it is a prerequisite, on the request or motion of the party desiring such action.<sup>7</sup> However, where there is no evidence to authorize an answer,<sup>8</sup> or where the matter involved in the question is merely evidentiary,<sup>9</sup> or where the question is fully covered by answers to other interrogatories,<sup>10</sup> or where the intention of the jury is plain,<sup>11</sup> as where the answer shows the basis of the verdict and the party entitled to recover,<sup>12</sup> the court need not require the jury to make a more definite or specific answer. Thus, where a fact, if found, is immaterial, it is not error to refuse to require a jury to make more specific answer to an interrogatory as to the existence of that fact.<sup>13</sup>

It has been both affirmed<sup>14</sup> and denied<sup>15</sup> that the court should send the jury back to answer an interrogatory which they say they are unable to answer. The party having the burden of proof on

98. Or.—*Russell v. Oregon R. & Nav. Co.*, 102 P. 619, 54 Or. 128.

99. Ill.—*Ryan v. Chicago & N. W. Ry. Co.*, 51 N.E.2d 74, 320 Ill.App. 361.

64 C.J. p 1172 note 26.

1. Tex.—*Denison v. Brown*, Civ.App., 172 S.W. 725.

64 C.J. p 1172 note 27.

2. Conn.—*Longest v. Owen McCaffrey's Sons*, 111 A. 788, 95 Conn. 486.

64 C.J. p 1172 note 28.

3. N.Y.—*Sutherland v. Murray*, 155 N.Y.S. 957, 170 App.Div. 340, 16 Mills 32.

4. Tex.—*First Nat. Bank in Graham v. Corbin*, Civ.App., 163 S.W.2d 979, error refused.

**Trial court has authority to withdraw case from jury and render a judgment, in the absence of a verdict on which a judgment could have been rendered, where circumstances are such that an instructed verdict could have been given.**—*First Nat. Bank in Graham v. Corbin*, Tex.Civ.App., 163 S.W.2d 979, error refused.

5. Ind.—*British-American Assur. Co. v. Wilson*, 31 N.E. 938, 132 Ind. 278.

64 C.J. p 1172 note 31.

Resubmission for amendment or correction generally see infra § 567.

6. Tex.—*Traders & General Ins. Co. v. Davis*, Civ.App., 209 S.W.2d 963, refused no reversible error—Fed-

eral Underwriters Exchange v. Craighead, Civ.App., 168 S.W.2d 699, error refused—*Nolan v. Smith*, Civ.App., 166 S.W.2d 750, error refused—*Southern Underwriters v. Mowery*, Civ.App., 147 S.W.2d 834, error dismissed, judgment correct—*Traders & General Ins. Co. v. Daniel*, Civ.App., 114 S.W.2d 336—*Traders & General Ins. Co. v. Nunley*, Civ.App., 80 S.W.2d 383, error refused. 64 C.J. p 1172 note 32.

**Court correctly accepted verdict from which jury eliminated issues respecting employee's partial incapacity after retiring with supplemental instruction to reconcile their previous findings of total and partial incapacity, as basis for judgment.**—*Traders & General Ins. Co. v. Nunley*, Tex Civ.App., 80 S.W.2d 383, error refused.

## Oral instructions

Trial court could orally instruct jury to return to their room and answer unanswered interrogatory.—*Traders & General Ins. Co. v. Boyd*, Tex.Civ.App., 146 S.W.2d 488, error dismissed, judgment correct.

## Instruction held proper

Trial court, being advised by foreman that it was the opinion of all jurors that they could not reach a unanimous decision on specified special issue, properly instructed jury to answer such questions as they were able to agree upon by unanimous vote and to leave unanswered those questions upon which they could not so agree regardless of

whether failure to answer such issue would bar recovery by plaintiff. —*Colls v. Price's Creameries*, Tex. Civ.App., 244 S.W.2d 900, error refused no reversible error.

7. Kan.—*Long v. Shafer*, 174 P.2d 88, 162 Kan. 21.

Wis.—*Singerhouse v. Minnesota Farmers Mut. Casualty Ins. Co.*, 41 N.W.2d 204, 256 Wis. 352—*Scipior v. Shea*, 31 N.W.2d 199, 252 Wis. 185.

64 C.J. p 1172 note 33.

8. Ind.—*Vanosdol v. Henderson*, 22 N.E.2d 812, 216 Ind. 240—*Chicago & Erie R. Co. v. Patterson*, 34 N.E. 2d 960, 110 Ind.App. 94.

Kan.—*Meek v. Wheeler, Kelly & Hagney Inv. Co.*, 251 P. 184, 122 Kan. 69.

9. Ohio.—*Pullman Co. v. Washington*, 10 Ohio Cir.Ct.N.S., 105.

64 C.J. p 1172 note 35.

10. Ind.—*Indianapolis St. R. Co. v. Taylor*, 80 N.E. 436, 39 Ind.App. 592.

11. Kan.—*Green v. Tower*, 30 P. 468, 49 Kan. 802.

12. Kan.—*Schoen v. Arkansas Valley Gas Co.*, 263 P. 1079, 125 Kan. 206.

13. Ind.—*Indianapolis v. Keeley*, 79 N.E. 499, 167 Ind. 616.

14. Kan.—*Leavenworth, etc. R. Co. v. Jacobs*, 17 P. 791, 39 Kan. 204. 64 C.J. p 1172 note 40.

15. Iowa.—*Grannis v. Chicago, etc., R. Co.*, 46 N.W. 1067, 81 Iowa 444. 64 C.J. p 1172 note 41.

the matter involved may, on timely application, have the jury answering "do not know" to a question sent back for a direct response<sup>16</sup> unless the question is immaterial<sup>17</sup> or, it has been held, unless the evidence on the matter is conflicting.<sup>18</sup> Where the question is material a refusal by the court to send the jury back for a definite answer may constitute reversible error.<sup>19</sup> Where, in sending the jury back for more definite answers the court, without indicating its opinion as to which answer they should make, tells them that they may answer the question "yes" or "no" it does not thereby invade the province of the jury,<sup>20</sup> and there is no error in refusing a second request that the jury be required to make a more definite answer where they had once been retired for that purpose and had returned with a statement that they had answered to the best of their ability.<sup>21</sup>

*Separation of jury.* Where special interrogatories are submitted to a jury and they return a general verdict without answering them they may be sent back to find on them even where they have returned a sealed verdict and have been allowed to separate.<sup>22</sup>

## § 561. Responsiveness to, and Conformity with, Pleadings and Evidence

Findings or answers by the jury must be responsive

to the questions submitted, and must be responsive to, and supported by, the pleadings and evidence.

Answers by the jury must respond to the questions submitted to them.<sup>23</sup> However, substantial responsiveness is sufficient.<sup>24</sup> Answers which do not respond to the questions or issues submitted do not determine such questions or issues,<sup>25</sup> and will not support a general verdict or a judgment,<sup>26</sup> and it is improper for the jury to return a clearly evasive answer.<sup>27</sup> However, the inaptitude of an answer to a question is not necessarily a conflict with the general verdict,<sup>28</sup> and an unresponsive answer, not inconsistent with other special findings and not in conflict with the general verdict, is not a good ground for setting the general verdict aside.<sup>29</sup> An answer will not fail for lack of responsiveness to the question due to its uncertainty if it is rendered certain by the jury's answers to other questions.<sup>30</sup> Where answers are responsive to the interrogatories submitted they will not be disregarded because not such as anticipated owing to the defective form of the interrogatories.<sup>31</sup> Where the jury were instructed to find the value of timber at the time it was cut and their answer finding the value is in the present rather than the past tense it is not erroneous and misleading as finding the present value of the timber.<sup>32</sup>

*Conformity with pleadings and evidence.* Findings must be responsive to the pleadings,<sup>33</sup> and the

16. Kan.—Priest v. Kansas City Life Ins. Co., 227 P. 538, 116 Kan. 421, rehearing denied 230 P. 529, 117 Kan. 1.

17. Kan.—Farmers' Elevator Co. of Bennington v. Markley, 249 P. 678, 121 Kan. 665.

18. Kan.—Hunley v. Union Ins. Co., 249 P. 685, 121 Kan. 674.  
64 C.J. p 1172 note 44.

19. Kan.—Priest v. Kansas City Life Ins. Co., 227 P. 538, 116 Kan. 421, rehearing denied 230 P. 529, 117 Kan. 1.

64 C.J. p 1173 note 45.

20. Kan.—Altoona State Bank v. Hart, 108 P. 818, 82 Kan. 398.

21. Kan.—Cockerill Zinc Co. v. Streets, 101 P. 475, 79 Kan. 306.

22. Ill.—Chicago, etc., R. Co. v. Rell-ly, 75 Ill.App. 125.

Neb.—In re Wilson's Estate, 208 N. W. 961, 114 Neb. 593.  
Separation of jury generally see supra § 453.  
Separation after sealing verdict see supra § 513.

23. Kan.—Froge v. Kansas City Public Service Co., 175 P.2d 112, 162 Kan. 209.

Tex.—Texas Emp. Ins. Ass'n v. Frankum, 201 S.W.2d 800, 145 Tex. 668—McCall v. Alpine Tel. Corp., Civ.App., 183 S.W.2d 205, affirmed 184 S.W.2d 830, 143 Tex. 335.  
64 C.J. p 1173 note 50.

24. Tex.—Gulf, C. & S. F. R. Co. v. Baker, Civ.App., 218 S.W. 7.  
64 C.J. p 1173 note 51.

Answers held sufficiently responsive to questions or issues

Kan.—Froge v. Kansas City Public Service Co., 175 P.2d 112, 162 Kan. 209.  
Ohio—Ello v. Akron Transp. Co., 71 N.E.2d 707, 147 Ohio St. 363.

Tex.—Bell Pub. Co. v. Garrett Engineering Co., 170 S.W.2d 197, 141 Tex. 51.

64 C.J. p 1173 notes 50 [a], 51 a.

25. Tex.—Texas Emp. Ins. Ass'n v. Frankum, 201 S.W.2d 800.

26. Ind.—Hines v. Drager, 130 N.E. 554, 76 Ind.App. 624.  
64 C.J. p 1173 note 52.

An answer to an unsubmitted issue cannot be the foundation of a judgment.—McCall v. Alpine Tel. Corp., Civ.App., 183 S.W.2d 205, affirmed 184 S.W.2d 830, 143 Tex. 335.

27. Kan.—Anders v. Atchison, T. &

S. F. Ry. Co., 137 P. 966, 91 Kan. 378.

28. Kan.—Grubb v. Sargent, 230 P. 1043, 117 Kan. 233.  
Findings inconsistent with general verdict generally see infra § 563.

29. Kan.—Grubb v. Sargent, supra.

30. Tex.—St. Louis, S. F. & T. Ry. Co. v. Wall, Civ.App., 165 S.W. 527.  
64 C.J. p 1173 note 56.

Construction together or as whole generally see supra § 570.

31. Ind.—National Motor Vehicle Co. v. Kellum, 109 N.E. 196, 184 Ind. 457.

32. Mo.—Fry v. T. J. Moss Tie Co., 35 S.W.2d 962, 225 Mo.App. 389.

33. Ind.—Farmers' Mut. F. Ins. Co. v. Jackman, 73 N.E. 730, 35 Ind. App. 1.

Tex.—New Nueces Hotel Co. v. Sorenson, 76 S.W.2d 488, 124 Tex. 175.—Farmers' State Bank of Haskell v. Stoker, Civ.App., 70 S.W.2d 259.  
64 C.J. p 1174 note 59—33 C.J. p 143 note 71.

Findings responsive to party's own pleadings furnish only basis on which party can recover.—New Nueces Hotel Co. v. Sorenson, 76 S.W.2d 488, 124 Tex. 175.

findings must, likewise, be supported by the pleadings.<sup>34</sup> A judgment cannot be founded on findings not responsive to the issues made by the pleadings,<sup>35</sup> unless supported by evidence to the admission of which no objection was made.<sup>36</sup> The

court will properly disregard special findings of a jury which are unsupported by the pleadings,<sup>37</sup> and portions of findings that are not responsive thereto may be stricken.<sup>38</sup> The findings of the jury must also correspond to,<sup>39</sup> and be sustained by,<sup>40</sup> the evi-

**Findings held to be responsive to pleadings**

Kan.—Coryell v. Edens, 150 P.2d 341, 158 Kan. 771—Rainman v. National Mut. Cas. Co., 133 P.2d 145, 156 Kan. 294—Duncan v. Branson, 110 P.2d 789, 153 Kan. 344—Jacobs v. Hobson, 79 P.2d 861, 148 Kan. 107—Moorhouse v. Robbins, 64 P.2d 5, 145 Kan. 157.

64 C.J. p 1174 note 59 [al].

**Findings not in conflict with pleadings**

Ohio.—Welch v. Rollman & Sons Co., 44 N.E.2d 726, 70 Ohio App. 515. 64 C.J. p 1174 note [c].

**Answer considered explanatory of proper findings**

In action by truck driver for injuries sustained when struck on left side by overtaking bus as truck made left turn at intersection, where petition did not allege attempt of bus to pass in wrong lane as a ground of negligence, jury's answer finding negligence with respect to attempt to pass in wrong lane was not erroneous when considered as explanatory of other parts of the answer constituting a proper finding of negligence under issues raised.—Gabel v. Hanby, 193 P.2d 239, 165 Kan. 116.

34. Kan.—Olsburg State Bank v. Anderson, 142 P.2d 712, 157 Kan. 463—Bilsky v. Central Surety & Insurance Corporation, 96 P.2d 691, 150 Kan. 858.

Tex.—Ware v. Poindexter Furniture & Carpet Co., 117 S.W.2d 420, 131 Tex. 568—Hodges v. Nix, Civ.App., 225 S.W.2d 576, refused no reversible error—Providence Wash. Ins. Co. v. Cooper, Civ.App., 223 S.W.2d 329, error refused no reversible error—Wiley v. Powell, Civ.App., 164 S.W.2d 242, reversed on other grounds Powell v. Wiley, 170 S.W.2d 470, 141 Tex. 74—Fort Worth & Denver City Ry. Co. v. Burton, Civ.App., 158 S.W.2d 601, error dismissed—Texas & Pac. Ry. Co. v. Cassaday, Civ.App., 148 S.W.2d 471, error dismissed, judgment correct—Chance v. Warlick, Civ.App., 145 S.W.2d 283, error dismissed, judgment correct—Birdville Independent School Dist. v. Deen, Civ.App., 141 S.W.2d 680, affirmed Deen v. Birdville Independent School Dist., 159 S.W.2d 111, 138 Tex. 339—Burton-Lingo Co. v. Morton, Civ.App., 126 S.W.2d 727, affirmed Morton v. Burton-Lingo Co., 150 S.W.2d 239, 136 Tex. 263—Sleeper v. Stratton, Civ.App., 122 S.W.2d 1091, error dismissed—Grimes v. Bowman, Civ.App., 122 S.W.2d 361—Michels v.

Crouch, Civ.App., 122 S.W.2d 211—Rogers v. Cook, Civ.App., 115 S.W.2d 1148, error dismissed—Lewis v. Gamble, Civ.App., 113 S.W.2d 659—Thibodeaux v. Boyt, Civ.App., 55 S.W.2d 117, error dismissed.

Wis.—Ludwig v. Wisconsin Power & Light Co., 8 N.W.2d 272, 242 Wis. 434.

64 C.J. p 1174 note 60.

**A general verdict will not be sustained by an answer to a special question which states a fact or representation not alleged in petition—**Olsburg State Bank v. Anderson, 142 P.2d 712, 157 Kan. 463.

35. Tex.—Ware v. Poindexter Furniture & Carpet Co., 117 S.W.2d 420, 131 Tex. 568—Hodges v. Nix, Civ.App., 225 S.W.2d 576, refused no reversible error—Chance v. Warlick, Civ.App., 145 S.W.2d 283, error dismissed, judgment correct—Birdville Independent School Dist. v. Deen, Civ.App., 141 S.W.2d 680, affirmed Deen v. Birdville Independent School Dist., 159 S.W.2d 111, 138 Tex. 339—Grimes v. Bowman, Civ.App., 122 S.W.2d 361—Lewis v. Gamble, Civ.App., 113 S.W.2d 659.

64 C.J. p 1174 note 61.

36. Minn.—Abbott v. Morrisette, 48 N.W. 416, 46 Minn. 10.

37. Tex.—Burton-Lingo Co. v. Morton, Civ.App., 126 S.W.2d 727, affirmed Morton v. Burton-Lingo Co., 150 S.W.2d 239, 136 Tex. 263—Rogers v. Cook, Civ.App., 115 S.W.2d 1148, error dismissed—Central Sur. & Ins. Corp. v. McCowan, Civ.App., 93 S.W.2d 472, error dismissed—Dendy v. Cockerham, Civ.App., 82 S.W.2d 756.

64 C.J. p 1174 note 63.

**Notwithstanding evidence having direct reference to special issues submitted without support in pleadings, the jury's findings on such issues could not be considered.**—Wiley v. Powell, Civ.App., 164 S.W.2d 242, reversed on other grounds Powell v. Wiley, 170 S.W.2d 470, 141 Tex. 74.

**Unsupported findings are immaterial.**—Tex.—Chance v. Warlick, Civ.App., 145 S.W.2d 283, error dismissed, judgment correct.

**Action not warranted by statute**

While under statute court upon proper motion and notice may render judgment in disregard of an issue "that has no support in the evidence" such action is not warranted by statute solely upon ground of lack of pleadings to tender the issue.—Wright v. McCoy, Tex.Civ.App., 110 S.W.2d 223.

**Question presentable on motion for new trial**

The question whether answers to interrogatories are in irreconcilable conflict with, and not supported by, complaint cannot be presented by motion for judgment on answers to interrogatories, but such question is properly presentable under motion for new trial.—Indianapolis Rys. v. Boyer, 26 N.E.2d 62, 108 Ind.App. 161.

38. Cal.—San Jose v. Freyschlag, 56 Cal. 8.

39. Ind.—Superior Meat Products v. Holloway, 48 N.E.2d 83, 113 Ind. App. 320—Farmers' Mut. F. Ins. Co. v. Jackman, 73 N.E. 730, 35 Ind.App. 1.

64 C.J. p 1174 note 65—33 C.J. p 143 note 71.

40. U.S.—Anchor Cas. Co. v. McGowan, C.C.A.Tex., 168 F.2d 323. Kan.—Olsburg State Bank v. Anderson, 142 P.2d 712, 157 Kan. 463—Walls v. Consolidated Gas Utilities Corp., 96 P.2d 656, 150 Kan. 919. N.Y.—De Long v. Massachusetts Fire & Marine Ins. Co., 262 N.Y.S. 165, 233 App.Div. 760.

Ohio.—Masters v. New York Cent. R. Co., 70 N.E.2d 898, 147 Ohio St. 293, certiorari denied 67 S.Ct. 1519, 331 U.S. 836, 91 L.Ed. 1848, rehearing denied 68 S.Ct. 33, 332 U.S. 786, 92 L.Ed. 369.

Tex.—Turner v. Texas Co., 159 S.W.2d 112, 138 Tex. 380—Great American Ins. Co. v. D. W. Ray & Son, Com.App., 15 S.W.2d 223, rehearing denied 17 S.W.2d 779—Alvey v. Goforth, Civ.App., 263 S.W.2d 313, error granted—Hopson v. Gulf Oil Corp., Civ.App., 237 S.W.2d 323, reversed in part on other grounds 237 S.W.2d 352, 150 Tex. 1—Smith v. Morgan, Civ.App., 235 S.W.2d 938, error dismissed—Craddock v. Humble Oil & Refining Co., Civ.App., 234 S.W.2d 137, error refused no reversible error—Yanowski v. Fort Worth Transit Co., Civ.App., 204 S.W.2d 1001, error refused no reversible error—Texas Employers' Ins. Ass'n v. Cooper, Civ.App., 194 S.W.2d 819—Myers v. Minnick, Civ.App., 187 S.W.2d 941—Fort Worth & D. C. Ry. Co. v. Larson, Civ.App., 169 S.W.2d 260—Wiley v. Powell, Civ.App., 164 S.W.2d 242, reversed on other grounds Powell v. Wiley, 170 S.W.2d 470, 141 Tex. 74—State v. Layton, Civ.App., 147 S.W.2d 515—National Debutene Corp. v. Smith, Civ.App., 132 S.W.2d 429, error dismissed, judgment correct—Burton-Lingo Co. v. Morton, Civ.App., 126 S.W.2d 727, affirmed Morton v. Bur-

dence. An answer or finding contrary to the evidence may properly be set aside,<sup>41</sup> and a finding by the jury on an issue not presented or supported by the evidence may be disregarded;<sup>42</sup> and a general verdict on special verdicts any one of which

is unsupported by evidence cannot stand.<sup>43</sup> Where, however, it is not contended that the general verdict is unsupported by evidence it will not be disturbed on the ground that answers to special interrogatories, not in conflict therewith, are unsupported

ton-Lingo Co., 150 S.W.2d 239, 136 Tex. 263—General Life Ins. Co. v. Potter, Civ.App., 124 S.W.2d 409—Sleeper v. Stratton, Civ.App., 122 S.W.2d 1091, error dismissed—Michels v. Crouch, Civ.App., 122 S.W.2d 211—Gossett v. Stubblefield, Civ.App., 121 S.W.2d 665—Wright v. McCoy, Civ.App., 110 S.W.2d 223—National Indem. Underwriters of America v. Cherry, Civ.App., 110 S.W.2d 115—Harrison v. Harrison, Civ.App., 100 S.W.2d 780—Reed v. James, Civ.App., 91 S.W.2d 946—Osterloh v. San Antonio Public Service Co., Civ.App., 77 S.W.2d 290, error dismissed—Brotherhood of Locomotive Firemen and Engineers v. Hall, Civ.App., 64 S.W.2d 1044.

64 C.J. p 1174 note 66.

If an issue is submitted under belief that there was evidence to support it, but court subsequently becomes convinced that there was no evidence, and his attention is called to it upon motion for new trial, court must set aside the issue and its answer and thereafter disregard them in entering judgment.—Pryor v. Le Sage, Civ.App., 133 S.W.2d 308, affirmed Le Sage v. Pryor, 154 S.W.2d 446, 137 Tex. 455.

Incompetent testimony cannot form basis of fact finding.—McCure v. May, Tex.Civ.App., 217 S.W.2d 44, error dismissed—General Life Ins. Co. v. Potter, Civ.App., 124 S.W.2d 409.

Disbelief of testimony gives no excuse for a baseless finding of fact to the contrary.  
Kan.—Gabel v. Hanby, 193 P.2d 239, 165 Kan. 116.  
Mass.—Laddaw v. Vose, 164 N.E. 388, 265 Mass. 500.

#### Special findings held supported by evidence

(1) Generally.  
U.S.—Anchor Cas. Co. v. McGowan, C.C.A.Tex., 168 F.2d 323.  
Kan.—In re Erwin's Estate, 228 P.2d 739, 170 Kan. 728—Frogge v. Kansas City Public Service Co., 175 P.2d 112, 162 Kan. 209—Williams v. Kansas City Public Service Co., 78 P.2d 41, 147 Kan. 537.  
Tex.—Smith v. Henger, 226 S.W.2d 425—Mohan v. Safeway Stores of Tex., Civ.App., 237 S.W.2d 813—Bridgeman v. Jefferson Amusement Co., Civ.App., 207 S.W.2d 138, refused no reversible error—Traders & General Ins. Co. v. Wilder, Civ.App., 186 S.W.2d 1011—Wright v. Carey, Civ.App., 169 S.W.2d 749—Reavis v. Taylor, Civ.App., 162

S.W.2d 1030, error refused—Buelin v. Smith, Civ.App., 294 S.W. 317, reversed on other grounds, Com. App., Bulin v. Smith, 1 S.W.2d 591.

(2) Where the matter in issue is the value of professional services, the fact that all the expert testimony offered in the case places a higher value on the services than that found by the jury does not render the jury's finding without support in the evidence, since it is peculiarly within the province of the jury to weigh opinion evidence and the judgment of experts, even when not contradicted, is not conclusive.—Gulnn v. Coates, Tex.Civ.App., 67 S.W.2d 621.

Notwithstanding plaintiff's testimony was only evidence as to value of mule killed by defendant, jury's finding that value of mule was substantially less than that testified to by plaintiff was not so unsupported by evidence as to permit court to disregard it, since jury could have been influenced by plaintiff's interest in suit and their own knowledge of subject.—Simmonds v. St. Louis, B. & M. Ry. Co., 91 S.W.2d 332, 127 Tex. 28.

41. Tex.—Edmiston v. Texas & N. O. R. Co., 138 S.W.2d 526, 135 Tex. 67—National Life & Acc. Ins. Co. v. Patterson, Civ.App., 94 S.W.2d 189, error dismissed.

64 C.J. p 1174 note 67.

#### Conflicting evidence

Courts are without authority to set aside jury verdicts based on conflicting evidence.—Volkmer v. Curlee, Tex.Civ.App., 261 S.W.2d 870, error refused no reversible error—Yanowski v. Fort Worth Transit Co., Tex. Civ.App., 204 S.W.2d 1001, refused no reversible error.

#### Motion

(1) Where jury's answer to a special question was not supported by the evidence, a motion to strike it out should be sustained.—Walls v. Consolidated Gas Utilities Corp., 96 P.2d 656, 150 Kan. 919.

(2) Under a statute in effect so providing the court was without authority to set aside a material finding without a proper motion after due notice.—National Indem. Underwriters of America v. Cherry, Tex.Civ.App., 110 S.W.2d 115.

(3) A motion to set aside verdict as being against the weight of the evidence is addressed to the trial judge's discretion.—McBride v. Williams, 23 S.E.2d 49, 222 N.C. 755.

42. Kan.—Alliston v. Shell Petroleum Corp., 55 P.2d 898, 143 Kan. 327.

Tex.—Texas & Pac. Ry. Co. v. Day, 197 S.W.2d 332, 145 Tex. 277—Aetna Cas. & Sur. Co. v. Davis, Civ.App., 196 S.W.2d 35—Food Machinery Corp. v. Moon, Civ.App., 165 S.W.2d 773—Hunsley Paint Mfg. Co. v. Gray, Civ.App., 165 S.W.2d 486, error dismissed—Burton-Lingo Co. v. Morton, Civ.App., 126 S.W.2d 727, affirmed Morton v. Burton-Lingo Co., 150 S.W.2d 239, 136 Tex. 263—Central Sur. & Ins. Corp. v. McCowan, Civ.App., 93 S.W.2d 472, error dismissed—Baldwin v. Motor Inv. Co., Civ.App., 89 S.W.2d 1076—Dendy v. Cockerham, Civ.App., 82 S.W.2d 756—Gulf Production Co. v. Perry, Civ.App., 51 S.W.2d 1107.

#### Statute permitting court to disregard

(1) Statute permitting court to disregard any special-issue jury finding that has no support in the evidence was intended to simplify procedure by permitting trial court to disregard jury's finding on an issue which should not have been submitted at all because of want of evidence sufficient to raise issue or warrant its submission, and was not intended to authorize trial court to assume truthfulness of unsupported testimony of party to suit, or to give conclusive effect to opinion evidence instead of leaving such matter for jury.—Simmonds v. St. Louis, B. & M. Ry. Co., 91 S.W.2d 332, 127 Tex. 28.

(2) A finding may be disregarded only when there is no evidence to support finding, or finding is so contrary to overwhelming preponderance of evidence as to be clearly wrong.—Volkmer v. Curlee, Tex.Civ.App., 261 S.W.2d 870, error refused no reversible error.

(3) Where the question presented by the established facts is one of law and the special issues relating thereto should never have been submitted to the jury a motion to disregard the findings of the jury on such issues may and should be granted.—American General Ins. Co. v. Williams, Civ. App., 222 S.W.2d 907, reversed on other grounds 227 S.W.2d 788, 149 Tex. 1.

(4) A motion to disregard made under such statute must be directed to the objectionable special issues and point out the reasons why they should be disregarded.—Jinks v. Whitaker, Civ.App., 195 S.W.2d 814, error refused no reversible error, 198 S.W.2d 85, 145 Tex. 318.

43. Cal.—Richmond Dredging Co. v. Atchison, T. & S. F. Ry. Co., 160 P. 862, 31 Cal.App. 399.

by the evidence.<sup>44</sup> It has been held that the alleged absence of evidence to support answers adverse to a party's contention on special issues as to which he has the burden of proof does not constitute error, since the answers merely indicate that party did not discharge his burden.<sup>45</sup>

### § 562. Inconsistent Findings in General

Special answers or findings must be consistent with each other and if they are irreconcilably inconsistent,

as a general rule, they destroy each other to the extent of the conflict, but it is the duty of the court to attempt to reconcile them if it can reasonably be done.

Answers to special interrogatories or findings in a special verdict must be consistent with each other.<sup>46</sup> Where findings or answers to special interrogatories on material issues are utterly and irreconcilably inconsistent with, or repugnant to, each other, they neutralize, nullify, or destroy each other;<sup>47</sup> they may and must be disregarded,<sup>48</sup> and

44. Ind.—Aufferhelde v. Rohr, 118 N.E. 823, 187 Ind. 205—Chicago & E. R. Co. v. Mitchell, 110 N.E. 680, 184 Ind. 588.

45. Tex.—Finck Cigar Co. v. Campbell, Civ.App., 114 S.W.2d 348, affirmed 133 S.W.2d 759, 134 Tex. 250.

46. Cal.—Tulare County Power Co. v. Pacific Surety Co., 185 P. 399, 43 Cal.App. 315.

Kan.—McCoy v. Weber, 212 P.2d 281, 168 Kan. 241—Packer v. Fairmont Creamery Co., 146 P.2d 401, 158 Kan. 191—McGuire v. McGuire, 103 P.2d 884, 152 Kan. 237.

Wis.—Flich v. Mulholland, 4 N.W. 527, 48 Wis. 310.

64 C.J. p. 1175 note 72.  
Inconsistent findings and conclusions in trial by court see infra § 636.

A statute authorizing judgment on special findings where they are inconsistent with the general verdict implies that such special findings must be consistent with each other.—McCoy v. Weber, 212 P.2d 281, 168 Kan. 241—Packer v. Fairmont Creamery Co., 146 P.2d 401, 158 Kan. 191.

Special findings or verdicts held conflicting, inconsistent, or self-contradictory

Ohio.—Fishback v. Norman, 69 N.E. 2d 159, 78 Ohio App. 129.

Pa.—Hoxworth v. Otten, Com.Pl., 12 Monroe L.R. 3.

Tex.—Meadlake Foods v. Estes, 218 S.W.2d 862, error refused 219 S.W.2d 441, 148 Tex. 13—Gruy v. Reiter Foster Oil Corp., Civ.App., 150 S.W.2d 842—Stanley v. Martin Wagon Co., Civ.App., 39 S.W.2d 127, error refused—Connecticut General Life Ins. Co. v. Horner, Civ.App., 21 S.W.2d 45, error dismissed—Southern Surety Co. v. Solomon, Civ.App., 4 S.W.2d 599.

64 C.J. p. 1175 note 72 [b].

Special findings or verdicts held not conflicting, inconsistent, or self-contradictory

U.S.—Connecticut Fire Ins. Co. of Hartford, Conn., v. Hurst, C.C.A. Mo., 11 F.2d 254.

Ga.—Monroe Mercantile Co. v. Arnold, 34 S.E. 176, 105 Ga. 449.

Iowa.—McClure v. Great Western Acc. Assoc., 118 N.W. 269, 141 Iowa 350.

Kan.—In re Edwin's Estate, 228 P.2d 739, 170 Kan. 728—Lee v. Gas Serv-

ice Co., 201 P.2d 1023, 166 Kan. 285

—Waldner v. Metropolitan Life Ins. Co., 87 P.2d 515, 149 Kan. 287.

Mass.—Hartmann v. Boston Herald-Traveler Corp., 80 N.E.2d 16, 223 Mass. 56.

N.C.—Pender v. North State Life Ins. Co., 79 S.E. 293, 163 N.C. 98.

Pa.—McMeekin v. Prudential Life Ins. Co. of America, 36 A.2d 430, 348 Pa. 568—Lilley v. Dietz, Com.Pl., 52 Lanc. L. Rev. 341.

Tex.—Traders & General Ins. Co. v. Ross, 117 S.W.2d 423, 131 Tex. 562—Driver v. Worth Const. Co., Civ. App., 264 S.W.2d 174, error granted—De Borde v. Bryan, Civ.App., 253 S.W.2d 63, refused no reversible error—Consolidated Underwriters v. Taylor, Civ.App., 197 S.W.2d 216, error refused no reversible error—Johnson Aircrafts v. Eichholtz, Civ. App., 194 S.W.2d 815, refused no reversible error—Traders & General Ins. Co. v. Wilder, Civ.App., 186 S.W.2d 1011, refused for want of merit—Gourley v. Iverson Tool Co., Civ. App., 186 S.W.2d 726, refused for want of merit—Leonard v. Young, Civ.App., 186 S.W.2d 81—Magnolia Petroleum Co. v. Johnson, Civ.App., 176 S.W.2d 774—Border State Life Ins. Co. v. Noble, Civ.App., 138 S.W.2d 119, error dismissed, judgment correct—Texas Prudential Ins. Co. v. Padgett, Civ.App., 120 S.W.2d 927—Robertson v. Buck X-Ograph Co., Civ.App., 114 S.W.2d 308—Maniatis v. Texas Mut. Life Ins. Co., Civ.App., 90 S.W.2d 936—Hicks v. Dunlap, Civ.App., 59 S.W.2d 884, error dismissed—Velasquez v. International-Great Northern Ry. Co., Civ.App., 36 S.W.2d 1070—American Auto. Ins. Co. v. Fox, Civ.App., 218 S.W. 92.

Wis.—Wiesman v. American Ins. Co., 199 N.W. 55, 184 Wis. 523, amendment of mandate and opinion denied Wiesman v. American Ins. Co. of Newark, N. J., 200 N.W. 304, 184 Wis. 523—Fernhaber v. Stein, 195 N.W. 906, 182 Wis. 61.

64 C.J. p. 1175 note 72 [c]—33 C.J. p. 143 note 74 [a].

47. Ind.—Drewrys Limited, U. S. A. v. Crippen, 44 N.E.2d 1006, 113 Ind. App. 120—Junior Toy Corporation v. Novak, 21 N.E.2d 446, 107 Ind. App. 427—Standard Oil Co. of In-

diana v. Thomas, 13 N.E.2d 336, 105 Ind.App. 610.

Ohio.—Larrissay v. Norwalk Truck Lines, 98 N.E.2d 419, 155 Ohio St. 207—Klever v. Reid Bros. Exp., 86 N.E.2d 608, 151 Ohio St. 467—Fishback v. Norman, 69 N.E.2d 159, 78 Ohio App. 129.

Tex.—Fidelity & Casualty Co. of New York v. McLaughlin, 135 S.W.2d 955, 134 Tex. 613—Hancock v. Sammons, Civ.App., 267 S.W.2d 252—Airline Motor Coaches v. Guidry, Civ.App., 241 S.W.2d 203, error refused no reversible error—Simmons v. Perkins, Civ.App., 193 S.W.2d 737—McCall v. Alpine Tel. Corp., Civ. App., 183 S.W.2d 205, affirmed 184 S.W.2d 830, 143 Tex. 358—Fort Worth & D. C. Ry. Co. v. Welch, Civ.App., 154 S.W.2d 898—Houston Natural Gas Co. v. Kluck, Civ.App., 154 S.W.2d 604, affirmed 163 S.W.2d 618, 139 Tex. 491—Niebuhr v. Behringer, Civ.App., 123 S.W.2d 733, error dismissed, judgment correct—Le Master v. Farrington, Civ. App., 103 S.W.2d 189, error dismissed—Howard v. Howard, Civ. App., 102 S.W.2d 473, error refused—Mays v. Smith, Civ.App., 96 S.W.2d 1342, error dismissed—Ed S. Hughes Co. v. Clark Bros. Co., Civ. App., 63 S.W.2d 230.

64 C.J. p. 1175 note 73.

There is no priority of findings, either in degree or importance, and where two findings with respect to a material fact are such that both cannot be true, neither can stand.—Pearson v. Doherty, 183 S.W.2d 453, 143 Tex. 64—Airline Motor Coaches v. Guidry, Tex.Civ.App., 241 S.W.2d 203, error refused no reversible error—Anding v. Queener, Tex.Civ.App., 138 S.W.2d 126, error dismissed, judgment correct—Ford Rent Co. v. Hughes, Tex.Civ.App., 90 S.W.2d 290.

48. Ohio.—Larrissay v. Norwalk Truck Lines, 98 N.E.2d 419, 155 Ohio St. 207—Klever v. Reid Bros. Exp., 86 N.E.2d 608, 151 Ohio St. 467.

Or.—Whelpley v. Frye, 263 P.2d 295, 199 Or. 530.

Tex.—Southern Underwriters v. Garlepy, Civ.App., 105 S.W.2d 760, error dismissed.

64 C.J. p. 1175 note 74.

the trial court may take such further action as the ends of justice require.<sup>49</sup> The court may set them aside,<sup>50</sup> declare a mistrial,<sup>51</sup> and order a new trial,

as discussed in New Trial § 66 b, or return them to the jury for further consideration;<sup>52</sup> and they alone cannot be made the basis of a judgment, as

**Verdict should not be received when it contains conflicting material findings.**—Blaugrund v. Gish, Civ.App., 179 S.W.2d 257, affirmed 179 S.W.2d 266, 142 Tex. 379.

**Trial court could not choose on which findings it would rest judgment.**—Service Mut. Ins. Co. of Texas v. Moaning, Tex.Civ.App., 129 S.W.2d 341.

49. Tex.—Traders & General Ins. Co. v. Carlisle, 161 S.W.2d 484, 138 Tex. 523, answer to certified question conformed to, Civ.App., Traders & General Ins. Co. v. Carlisle, 162 S.W.2d 751.

50. Tex.—Radford v. Automobile Underwriters of America, Com.App., 299 S.W. 852—Kennedy v. Texas Employers Ins. Ass'n, Civ.App., 169 S.W.2d 784, error refused—Long v. Safety Cas. Co., Civ.App., 128 S.W.2d 92, reversed on other grounds Safety Cas. Co. v. Long, 152 S.W.2d 1102, 137 Tex. 209—Sinclair-Prairie Oil Co. v. Beadle, Civ.App., 89 S.W.2d 426, error dismissed. Wis.—Earl v. Napp, 261 N.W. 400, 218 Wis. 433.

64 C.J. p 1175 note 75.

**One answer may not be set aside merely because it is inconsistent with the answer to another special question.**—Giltner v. Stephens, 200 P.2d 280, 166 Kan. 172.

51. Tex.—Porter v. Polis, Civ.App., 169 S.W.2d 216, error refused—Graham v. Dallas Railway & Terminal Co., Civ.App., 165 S.W.2d 1002, error refused—Texas & N. O. R. Co. v. Young, Civ.App., 148 S.W.2d 229—Crysel v. A. W. Fabra Auto Supply Co., Civ.App., 145 S.W.2d 293—Beard & Stone Electric Co. v. Shofner, Civ.App., 56 S.W.2d 931.

**Ordinarily, a direct conflict in the jury's answers to special issues requires the court to declare a mistrial.**—Traders' & General Ins. Co. v. Emmert, Tex.Civ.App., 76 S.W.2d 208, error refused.

**Where findings both establish and defeat cause of action, a mistrial should be declared.**—Joiner v. Joiner, Tex.Civ.App., 87 S.W.2d 903, reversed on other grounds, Com.App., 112 S.W.2d 1049.

#### Conflict tantamount to mistrial

Where there is an irreconcilable conflict in findings, and verdict is conflicting on material issues, it is tantamount to a "mistrial."—King v. Hill, Civ.App., 167 S.W.2d 628, affirmed 172 S.W.2d 238, 141 Tex. 294—Edson v. Perry-Poley Funeral Home, Tex.Civ.App., 132 S.W.2d 282. Error dismissed, judgment correct.

**Findings held not so inconsistent as to require a mistrial or make the action of court in not declaring a mistrial erroneous.**—Redmon v. Caple, Tex.Civ.App., 159 S.W.2d 210, error refused—American General Ins. Co. v. Bell, Tex.Civ.App., 116 S.W.2d 877.

52. Tex.—Traders & General Ins. Co. v. Carlisle, 161 S.W.2d 484, 138 Tex. 523, answer to certified question conformed to Traders & General Ins. Co. v. Carlisle, Civ.App., 162 S.W.2d 751—A. B. C. Stores v. Taylor, 148 S.W.2d 392, 136 Tex. 89—Meadlake Foods v. Estes, Civ.App., 218 S.W.2d 862, error refused 219 S.W.2d 441, 148 Tex. 13—Texas Emp. Ins. Ass'n v. Wells, Civ.App., 207 S.W.2d 693, refused no reversible error—Traders & General Ins. Co. v. Collins, Civ.App., 179 S.W.2d 525, error refused—Blaugrund v. Gish, Civ.App., 179 S.W.2d 257, affirmed 179 S.W.2d 266, 142 Tex. 379—Wichita Valley R. Co. v. Durrett, Civ.App., 174 S.W.2d 329, error refused—Pantazis v. Dallas Ry. & Terminal Co., Civ.App., 162 S.W.2d 1018, error dismissed—Willard v. Whitaker, Civ.App., 153 S.W.2d 878, error refused—United Employers Casualty Co. v. Summerour, Civ.App., 151 S.W.2d 247, error dismissed, judgment correct—Federal Underwriters Exchange v. Green, Civ.App., 150 S.W.2d 98, error dismissed, judgment correct—Texas & N. O. R. Co. v. Young, Civ.App., 148 S.W.2d 229—Southern Underwriters v. Mowery, Civ.App., 147 S.W.2d 834, error dismissed, judgment correct—Dulaney Inv. Co. v. Wood, Civ.App., 142 S.W.2d 379, error dismissed, judgment correct—Workmen's Loan & Finance Co. v. Dunn, Civ.App., 134 S.W.2d 370—Standard Paving Co. v. Pyle, Civ.App., 131 S.W.2d 200—Shell Petroleum Corp. v. Liberty Gravel & Sand Co., Civ.App., 128 S.W.2d 471—Southern Underwriters v. Kelly, Civ.App., 110 S.W.2d 153, error dismissed—Maryland Cas. Co. v. Brown, Civ.App., 110 S.W.2d 130, reversed on other grounds 115 S.W.2d 394, 131 Tex. 404.

64 C.J. p 1175 note 76.

#### After new trial

Where jury's verdict is in irreconcilable conflict on ultimate fact issues controlling disposition, no judgment can be entered thereon, but court must set aside verdict and grant new trial, on which, if such conflict again results, it is duty of court to call jury's attention thereto and send them back for further deliberation.—Kennedy v. Texas Employers Ins. Ass'n, Tex.Civ.App., 169 S.W.2d 784, error refused.

#### Rules of procedure; writing and other requirements

(1) Action of trial court in orally calling to jury's attention the conflict in their answers to special issues rendering the entry of any judgment thereon impossible, and retiring jury for further deliberation, did not constitute "instructions" required to be in writing.—Pantazis v. Dallas Ry. & Terminal Co., Tex.Civ.App., 162 S.W.2d 1018, error dismissed.

(2) However, under a rule of procedure having the force and effect of a statute and providing that if a verdict contains conflicting findings, the court shall call the jury's attention thereto in writing, an oral charge calling the jury's attention to a conflict and urging further consideration with a view to reconciliation is error.—Standard Acc. Ins. Co. v. Denbow, Tex.Civ.App., 183 S.W.2d 680, affirmed 186 S.W.2d 236, 143 Tex. 455—Consolidated Underwriters v. Ruff, Tex.Civ.App., 164 S.W.2d 550, error refused.

(3) Such rule is no more than a crystallizing into a rule form of what the courts have established as permissible in such contingency.—Traders & General Ins. Co. v. Carlisle, 161 S.W.2d 484, 138 Tex. 523, answer to certified question conformed to, Civ.App., Traders & General Ins. Co. v. Carlisle, 162 S.W.2d 751.

(4) Under the rule the court may call attention only to the conflicts, and a charge purporting to tell the jury why the answers are conflicting constitutes reversible error, and so where jury returned conflicting answers and trial court informed jury that the answers were conflicting and why they were conflicting, and jury finally reconciled all answers and brought in a verdict, there was reversible error.—Fort Worth & Denver City Ry. Co. v. Walters, Tex.Civ.App., 154 S.W.2d 177, error refused.

(5) Trial court should advise jury of the conflict without indicating or permitting counsel to do so that it would be to the interest of one of the parties to have a certain issue answered in a certain way.—Pantazis v. Dallas Ry. & Terminal Co., Tex.Civ.App., 162 S.W.2d 1018, error dismissed.

(6) Evidence held not to sustain contention that trial court, in retiring jury for further deliberation because of irreconcilable conflict in their answers to issues submitted, committed the error of telling jury their answers were wrong, or coerced jury into agreeing upon and returning into court its final verdict.—Pantazis v. Dallas Ry. & Terminal Co., Tex.

discussed in Judgments § 55 b. The defect is one which cannot be waived by the parties.<sup>53</sup>

While answers or findings which conflict with each other may require the setting aside of the special verdict in which they are contained,<sup>54</sup> they have no effect on and do not control, overcome, or override a general verdict<sup>55</sup> which will stand if otherwise special findings sufficient to support the gen-

eral verdict are not in conflict with it.<sup>56</sup> In any event, conflicting findings destroy each other only to the extent of the conflict,<sup>57</sup> and, if what remains is sufficient to support a judgment, the conflicting findings are immaterial.<sup>58</sup> The fact that two answers or findings are somewhat inconsistent is not always fatal,<sup>59</sup> as where they are reconcilable,<sup>60</sup> one is material and the other is im-

Civ.App., 162 S.W.2d 1018, error dismissed.

(7) Written instruction prepared by trial court in presence of counsel for both sides without exception thereto, calling attention of jury to conflict in findings, duly read to the jury, was held not an illegal comment by the court, but instead a proper compliance with rules.—*Traders & General Ins. Co. v. Collins*, Tex.Civ.App., 179 S.W.2d 526, error refused.

**Trial judge acted within his discretion in pointing out conflict in answers of jury to special issues and sending jury back with instructions to further deliberate with a view to removing or reconciling conflict.**—*Maryland Cas. Co. v. Brown*, Civ.App., 110 S.W.2d 130, reversed on other grounds 115 S.W.2d 394, 131 Tex. 404.

#### Repeated reconsideration

(1) In repeatedly sending jury back for further deliberations when jury presented inconsistent verdicts trial court did not abuse its discretion, it being within discretion of court to send jury back as often as necessary to the end of obtaining a coherent verdict that would support a judgment and thus avoid the necessity of declaring a mistrial.—*Dallas Ry. & Terminal Co. v. Horton*, Tex.Civ.App., 119 S.W.2d 122, error dismissed.

(2) So, the return of jury to jury room three times in order to eliminate conflicts in their answers to special issues was not error, where trial court did not disclose to jury the effect of their answers.—*Hartford Acc. & Indem. Co. v. Clark*, Tex.Civ.App., 126 S.W.2d 799, error dismissed, judgment correct.

**A litigant should not be deprived of his right to a submission to jury of his grounds of defense simply because conflicting answers may be given by jury.**—*Texas & N. O. Ry. Co. v. Young*, Tex.Civ.App., 148 S.W.2d 229.

53. Tex.—*Siratt v. Worth Const. Co.*, Civ.App., 263 S.W.2d 842, error granted.

54. Tex.—*Radford v. Automobile Underwriters of America*, Com. App., 299 S.W. 852—*Long v. Safety Cas. Co.*, Civ.App., 128 S.W.2d 92, reversed on other grounds *Safety Cas. Co. v. Long*, 152 S.W.2d 1102, 137 Tex. 209.

64 C.J. p 1176 note 78.

55. Ind.—*Junior Toy Corporation v. Novak*, 21 N.E.2d 445, 107 Ind.App. 427—*Standard Oil Co. of Indiana v. Thomas*, 13 N.E.2d 336, 105 Ind.App. 610.

Iowa.—*Corpus Juris* cited in *Tobin v. Van Orsdol*, 45 N.W.2d 239, 244, 241 Iowa 1331.

Mich.—*Izzo v. Weiss*, 259 N.W. 295, 270 Mich. 372.

Or.—*Whelpley v. Frye*, 268 P.2d 295, 199 Or. 530.

64 C.J. p 1176 note 79.

56. Ind.—*Indianapolis St. R. Co. v. Taylor*, 80 N.E. 436, 39 Ind.App. 592.

64 C.J. p 1176 note 80.

Consistency or inconsistency of special findings and general verdict generally see *infra* § 563.

57. Tex.—*Fidelity & Casualty Co. of New York v. McLaughlin*, 135 S.W.2d 955, 134 Tex. 613—*Gilcrease v. Hartford Acc. & Indem. Co.*, Civ.App., 252 S.W.2d 715.

58. Tex.—*Duplant v. Martin*, Civ.App., 266 S.W.2d 179, error dismissed—*Gilcrease v. Hartford Acc. & Indem. Co.*, Civ.App., 252 S.W.2d 715—*Gaines v. Lee*, Civ.App., 175 S.W.2d 728, error refused—*Border State Life Ins. Co. v. Noble*, Civ.App., 138 S.W.2d 119, error dismissed, judgment correct—*Allen v. Texas & N. O. Ry. Co.*, Civ.App., 70 S.W.2d 758, error dismissed.

**If there remains at least one finding supporting the judgment which is not in conflict with any other, the existence of an irreconcilable conflict between certain findings is immaterial.**—*Gilcrease v. Hartford Acc. & Indem. Co.*, Tex.Civ.App., 252 S.W.2d 715—*Aranda v. Texas & N. O. Ry. Co.*, Tex.Civ.App., 140 S.W.2d 236, error dismissed, judgment correct.

#### Controlling issue

(1) Inconsistency or conflict in jury findings will not prevent rendition of final judgment where there is finding free from conflict on a controlling issue.—*Ford Rent Co. v. Hughes*, Tex.Civ.App., 90 S.W.2d 290.

(2) Where conflict of findings on special issues is not on a controlling issue, it may be reasonably reconciled with all other issues as found by jury.—*Traders & General Ins. Co. v. Milliken*, Tex.Civ.App., 110 S.W.2d 108.

(3) Where a finding is made upon an issue which determines a cause, other issues bearing upon the same cause become immaterial, and the fact that other findings are made not in any way inconsistent with the findings which dispose of the case is of no consequence.—*In re Anderson's Estate*, 85 P.2d 212, 29 Cal.App.2d 637.

(4) So, affirmative findings that no negligent acts of defendant railroad company proximately caused death of plaintiffs' decedent were sufficient to support judgment for defendant, notwithstanding conflicting findings on issues as to deceased's contributory negligence.—*Allen v. Texas & N. O. Ry. Co.*, Tex.Civ.App., 70 S.W.2d 758, error dismissed.

59. Tex.—*Schneider v. Delavan*, Civ.App., 118 S.W.2d 823. Error dismissed.—*Northwestern Fire & Marine Ins. Co. v. Alfred*, Civ.App., 19 S.W.2d 916, error dismissed.

64 C.J. p 1176 note 81.

60. N.Y.—*Sherman v. Millard*, 259 N.Y.S. 415, 144 Misc. 748.

Tex.—*State v. Hale*, 146 S.W.2d 731, 13 Tex. 29—*Traders & General Ins. Co. v. Ross*, 117 S.W.2d 422, 131 Tex. 562—*Lewis v. Texas Emp. Ins. Ass'n*, Civ.App., 197 S.W.2d 187, error refused no reversible error—*Leonard v. Young*, Civ.App., 186 S.W.2d 81—*Walker v. Houston Elec. Co.*, Civ.App., 155 S.W.2d 973, error refused—*Fort Worth & D. C. Ry. Co. v. Welch*, Civ.App., 154 S.W.2d 896—*Aranda v. Texas & N. O. Ry. Co.*, Civ.App., 140 S.W.2d 236, error dismissed, judgment correct—*Lewis v. Martin*, Civ.App., 120 S.W.2d 910, error refused—*Batey v. Greenwood Floral Co.*, Civ.App., 113 S.W.2d 647—*Howard v. Howard*, Civ.App., 102 S.W.2d 473, error refused—*Yarbrough v. Dallas Ry. & Terminal Co.*, Civ.App., 67 S.W.2d 1093, reversed on other grounds 97 S.W.2d 169, 128 Tex. 445.

**Conflicts or contradictions which are apparent rather than real may be disregarded.**—*Texas Indem. Ins. Co. v. Staggs*, 134 S.W.2d 1026, 134 Tex. 318, answers to certified questions conformed to, Civ.App., 138 S.W.2d 174—*Chicago, R. I. & G. Ry. Co. v. Zumwalt*, Tex.Com.App., 239 S.W. 912.

material,<sup>61</sup> or both would support precisely the same judgment in favor of the same party.<sup>62</sup> In some instances, one of two repugnant answers or findings will be given effect and the other will be disregarded,<sup>63</sup> as where one is supported by evidence and the other is not,<sup>64</sup> one is on an issue properly submitted and the other is on an issue which should not have been submitted,<sup>65</sup> one is a finding of fact and the other is a conclusion of law,<sup>66</sup> one is specific

and the other is general,<sup>67</sup> one is definite and the other is duplicitous or ambiguous,<sup>68</sup> or one is a positive finding of a material fact which is conclusive of the controversy and the other is merely incidental.<sup>69</sup> Mere inconsistencies of jury's findings are not enough to render such findings in conflict with each other.<sup>70</sup> Two findings will be considered in conflict only when they oppose each other and the opposition is such that both cannot be

61. Tex.—Texas Indem. Ins. Co. v. Staggs, 134 S.W.2d 1026, 134 Tex. 318, answers to certified questions conformed to, Civ.App., 138 S.W.2d 174—Erwin v. Welborn, Civ. App., 207 S.W.2d 124, error refused no reversible error—Long v. Safety Cas. Co., Civ.App., 128 S.W.2d 92, reversed on other grounds Safety Cas. Co. v. Long, 152 S.W.2d 1102, 137 Tex. 209—Allen v. Texas & N. O. R. Co., Civ.App., 70 S.W.2d 758, error dismissed.

Wis.—Rosholt v. Worden—Allen Co., 144 N.W. 650, 156 Wis. 168.

#### Finding not immaterial

Where jury made irreconcilable findings, one finding could not be disregarded as immaterial so as to authorize entry of judgment for plaintiff, even if the trial judge could properly have refused the issue.—Cox v. Ekstrom, Tex.Civ.App., 163 S.W.2d 845, error refused.

#### Findings not on "ultimate" or "material" issues

In trespass to try title suit, wherein plaintiff claimed that deed from plaintiff to defendants was forged, but jury found that deed was duly executed, special issues on whether plaintiff claimed the land adversely to defendants after execution of the deed or agreed with defendants to live upon the land upon certain conditions, which did not embrace all statutory elements of adverse possession, and if answered consistently would not support judgment for either party grounded upon limitation title, were not "ultimate" or "material" issues on any limitation title, and hence inconsistency in findings thereon did not preclude judgment for defendants, where definitions of legal terms used in such issues were not requested or given.—Hogg v. Smith, Tex.Civ.App., 157 S.W.2d 165, error refused.

62. N.C.—Sterne v. Benbow, 66 S.E. 445, 151 N.C. 460—McCaskill v. Currie, 113 N.C. 316.

63. Tex.—American General Ins. Co. v. Williams, Civ.App., 222 S.W.2d 907, reversed on other grounds 227 S.W.2d 788, 149 Tex. 1.

64. Tex.—Neely v. Woolley, Civ.App., 154 S.W.2d 973—Long v. Safety Cas. Co., Civ.App., 128 S.W.2d 92,

reversed on other grounds Safety Cas. Co. v. Long, 152 S.W.2d 1102, 137 Tex. 209.

64 C.J. p 1176 note 86.

65. Tex.—American General Ins. Co. v. Williams, Civ.App., 222 S.W.2d 907, reversed on other grounds 227 S.W.2d 788, 149 Tex. 1.

66. Cal.—Bank of Anderson v. Home Ins. Co. of New York, 111 P. 507, 14 Cal.App. 208.

64 C.J. p 1176 note 87.

Finding which amounts to nothing more than a conclusion, if contradicted by detailed finding of ultimate facts, must yield thereto.—Krey v. Schmidt, 240 P.2d 163, 172 Kan. 319—Hultberg v. Phillippi, 220 P.2d 208, 169 Kan. 610.

Specific findings as to what parties agreed, rather than label given to agreement either by jury or by the parties themselves, would control legal consequences of their acts and would determine their respective rights and liabilities.—Leonard v. Young, Tex.Civ.App., 186 S.W.2d 81.

67. Kan.—Krey v. Schmidt, 240 P.2d 163, 172 Kan. 319—Hultberg v. Phillippi, 220 P.2d 208, 169 Kan. 610—Smith v. Atchison, T. & S. F. Ry. Co., 66 P.2d 562, 145 Kan. 615. Tex.—Boyd v. Texas & N. O. R. Co., Civ.App., 218 S.W.2d 534, error refused no reversible error—Leonard v. Young, Civ.App., 186 S.W.2d 81—Walker v. Houston Elec. Co., Civ.App., 155 S.W.2d 973, error refused—Fort Worth & D. C. Ry. Co. v. Welch, Civ.App., 154 S.W.2d 896—State Nat. Bank of Houston v. Woodfin, Civ.App., 146 S.W.2d 284, error refused—Aranda v. Texas & N. O. R. Co., Civ.App., 140 S.W.2d 236, error dismissed, judgment correct—Howard v. Howard, Civ. App., 102 S.W.2d 473, error refused—Peeler v. Smith, Civ.App., 18 S.W.2d 938, affirmed, Com.App., 29 S.W.2d 975.

Wis.—Trastek v. Dahlem, 262 N.W. 609, 219 Wis. 249.

Conflict between general verdict and special findings see *infra* §§ 563, 564.

General findings in the nature of conclusions, if contradicted by special or detailed findings, cannot prevail but are controlled by, and must

yield to, such detailed findings of ultimate facts—Harrison v. Travelers Mut. Cas. Co., 134 P.2d 681, 156 Kan. 492—Fisher v. Wichita Transp. Corp., 134 P.2d 393, 156 Kan. 500—Eldredge v. Sargent, 96 P.2d 870, 150 Kan. 824.

68. Tex.—Fort Worth & D. C. Ry. Co. v. Welch, Civ.App., 154 S.W.2d 896—Howard v. Howard, Civ.App., 102 S.W.2d 473, error refused.

69. N.D.—Boulger v. Northern Pac. Ry., 171 N.W. 632, 41 N.D. 316. Tex.—City of Amarillo v. Huddleston, 152 S.W.2d 1088, 137 Tex. 226.

#### Facts not essential to judgment

Conflict between facts admitted or as to which there is no issue, and findings by jury of facts not essential to rendition of judgment, cannot destroy or affect validity of verdict, where material facts have been found sufficient to support and require entry of judgment.—Southland-Greyhound Lines v. Richardson, 36 S.W.2d 731, 126 Tex. 118—Monte Carlo Distributing Co. v. Rosas, Tex.Civ.App., 127 S.W.2d 334, error dismissed, judgment correct.

#### Findings on ultimate facts controlling

A finding on ultimate facts will control those on merely evidentiary issues.—Bueche v. Elckenroht, Tex. Civ.App., 220 S.W.2d 911—Boyd v. Texas & N. O. R. Co., Tex.Civ.App., 218 S.W.2d 534, error refused no reversible error—Leonard v. Young, Civ.App., 186 S.W.2d 81—Hogg v. Smith, Civ.App., 157 S.W.2d 165, error refused—Walker v. Houston Elec. Co., Civ.App., 155 S.W.2d 973, error refused—State Nat. Bank of Houston v. Woodfin, Civ.App., 146 S.W.2d 284, error refused—Aranda v. Texas & N. O. R. Co., Civ.App., 140 S.W.2d 236, error dismissed, judgment correct.

Where jury found no negligence, the issues of damages were out of the case, and hence findings on issues submitted to ascertain items of damage, in event that jury found negligence under the negligence issue, were not in irreconcilable conflict with findings on other issues in case.—Shell Oil Co. v. Dennison, Tex.Civ. App., 132 S.W.2d 609, error refused.

70. Tex.—Schneider v. Delavan, Civ. App., 118 S.W.2d 823, error dismissed.



true.<sup>71</sup> It has been held that the test to be applied in determining whether two findings are in irreconcilable conflict is whether taking one finding alone a judgment should be entered in favor of plaintiff and taking the other finding alone a judgment should be rendered for defendant.<sup>72</sup>

Presumptions and intendments will not be indulged to establish a contradiction,<sup>73</sup> the presumption being always to the contrary,<sup>74</sup> and it is the duty of the court to reconcile or harmonize the special findings or answers to special interrogatories with each other if it can reasonably be done<sup>75</sup> with-

71. Tex.—Hancock v. Sammons, Civ. App., 267 S.W.2d 252, error refused no reversible error—Maddox v. Ellison, Civ.App., 240 S.W.2d 398—Shaw v. Porter, Civ.App., 190 S.W.2d 396, refused for want of merit—Porter v. Polis, Civ.App., 169 S.W.2d 216, error refused—Graham v. Dallas Railway & Terminal Co., Civ.App., 165 S.W.2d 1002, error refused—Getzwiller v. Ferguson, Civ.App., 145 S.W.2d 913—Anding v. Queener, Civ.App., 138 S.W.2d 126, error dismissed, judgment correct—Ford Rent Co. v. Hughes, Civ.App., 90 S.W.2d 290.

72. Tex.—Jordan v. Collier, Civ.App., 223 S.W.2d 644, refused no reversible error—Goss v. Longview Hilton Hotel Co., Civ.App., 183 S.W.2d 998—Fort Worth & D. C. Ry. Co. v. Welch, Civ.App., 154 S.W.2d 896—Big Six Oil Co. v. West, Civ.App., 136 S.W.2d 950, error dismissed, judgment correct—Chaffin v. Drane, Civ.App., 131 S.W.2d 672—Howard v. Howard, Civ.App., 102 S.W.2d 473, error refused.

A material conflict in findings follows determination that one answer, standing alone, supports plaintiff's recovery, while another answer, standing alone, supports opposite judgment.—Lewis v. Texas Emp. Ins. Ass'n, Tex.Civ.App., 197 S.W.2d 187, error refused no reversible error.

73. U.S.—Corpus Juris quoted in Bass v. Dehner, C.C.A.N.M., 103 F.2d 28, 34, certiorari denied 60 S.Ct. 100, 308 U.S. 580, 84 L.Ed. 486, rehearing denied 60 S.Ct. 136, 308 U.S. 635, 84 L.Ed. 528.

Ind.—New York, etc., R. Co. v. Hamlin, 79 N.E. 1040, 83 N.E. 843, 170 Ind. 20, 10 L.R.A., N.S., 881, 15 Ann. Cas. 988.

Tex.—Pruitt v. General Ins. Corp., Civ.App., 265 S.W.2d 908, error refused no reversible error—Driver v. Worth Const. Co., Civ.App., 264 S.W.2d 174, error granted—Luck v. Buffalo Lakes, Civ.App., 144 S.W.2d 672, error dismissed, judgment correct—Gross v. Dallas Ry. & Terminal Co., Civ.App., 131 S.W.2d 113, error dismissed, judgment correct.

74. Tex.—Pruitt v. General Ins. Corp., Civ.App., 265 S.W.2d 908, error refused no reversible error—Driver v. Worth Const. Co., Civ.App., 264 S.W.2d 174, error granted—Royal Crown Bottling Co. v. Smith, Civ.App., 254 S.W.2d 225—Luck v. Buffalo Lakes, Civ.App., 144

S.W.2d 672, error dismissed, judgment correct.

75. U.S.—Corpus Juris quoted in Bass v. Dehner, C.C.A.N.M., 103 F.2d 28, 34, certiorari denied 60 S.Ct. 100, 308 U.S. 580, 84 L.Ed. 486, rehearing denied 60 S.Ct. 136, 308 U.S. 635, 84 L.Ed. 528.

Kan.—McCracken v. Stewart, 223 P.2d 963, 170 Kan. 129—Hultberg v. Philippi, 220 P.2d 208, 169 Kan. 611—Beltz v. Hereford, 220 P.2d 135, 169 Kan. 556—Leonard v. Kansas City Public Service Co., 204 P.2d 760, 167 Kan. 51—Underhill v. Motes, 165 P.2d 218, 160 Kan. 679—Davis v. Kansas Elec. Power Co., 152 P.2d 806, 159 Kan. 97—Sams v. Commercial Standard Ins. Co., 139 P.2d 859, 157 Kan. 278—Montague v. Burgerhoff, 102 P.2d 1031, 152 Kan. 124—Smith v. Atchison, T. & S. F. Ry. Co., 66 P.2d 562, 145 Kan. 615—House v. Wichita Gas Co., 20 P.2d 479, 137 Kan. 332.

N.M.—Turner v. New Brunswick Fire Ins. Co. of New Brunswick, N. J., 112 P.2d 511, 45 N.M. 126.

Ohio—Larrisey v. Norwalk Truck Lines, 98 N.E.2d 419, 155 Ohio St. 207—Klever v. Reid Bros. Exp., 86 N.E.2d 608, 151 Ohio St. 467.

Tex.—Perkins v. Mitchell, 268 S.W.2d 907—Ford v. Carpenter, 216 S.W.2d 558, 147 Tex. 447—Yarbrough v. Dallas Railway & Terminal Co., 97 S.W.2d 169, 128 Tex. 445—Hancock v. Sammons, Civ.App., 267 S.W.2d 252—Pruitt v. General Ins. Corp., Civ.App., 265 S.W.2d 908, error refused no reversible error—Driver v. Worth Const. Co., Civ.App., 264 S.W.2d 174, error granted—Mossler Acceptance Co. v. Robinson, Civ.App., 255 S.W.2d 914, refused no reversible error—Royal Crown Bottling Co. v. Smith, Civ.App., 254 S.W.2d 225—Parker v. Texas & P. Ry. Co., Civ.App., 246 S.W.2d 950—Rice v. Schiller, Civ.App., 241 S.W.2d 330, affirmed in part Schiller v. Rice, 246 S.W.2d 607, 151 Tex. 116—Tucker v. Slovacek, Civ.App., 234 S.W.2d 254, error refused no reversible error—Todd v. La Grone, Civ.App., 234 S.W.2d 99, refused no reversible error—Bueche v. Eickenroht, Civ.App., 220 S.W.2d 911—Fredericksburg Hospital & Clinic v. Springall, Civ.App., 220 S.W.2d 692—Boyd v. Texas & N. O. R. Co., Civ.App., 218 S.W.2d 534, error refused no reversible error—Kindy v. Willingham, Civ.App., 205 S.W.2d 435, reversed

on other grounds 209 S.W.2d 585, 146 Tex. 548—Lewis v. Smith, Civ.App., 198 S.W.2d 598, error dismissed—Lewis v. Texas Emp. Ins. Ass'n, Civ.App., 197 S.W.2d 187, error refused no reversible error—Johnson Air Crafts v. Eichholtz, Civ.App., 194 S.W.2d 815, refused no reversible error—Traders & General Ins. Co. v. Wilder, Civ.App., 186 S.W.2d 1011, refused for want of merit—Leonard v. Young, Civ.App., 186 S.W.2d 81—Fort Worth & D. C. Ry. Co. v. Kiel, Civ.App., 185 S.W.2d 144, reversed on other grounds 187 S.W.2d 371, 143 Tex. 601—Goss v. Longview Hilton Hotel Co., Civ.App., 183 S.W.2d 998—Menece v. Gulf, C. & S. F. Ry. Co., Civ.App., 181 S.W.2d 287, error refused—Porter v. Polis, Civ.App., 169 S.W.2d 216, error refused—Snodgrass v. Robertson, Civ.App., 167 S.W.2d 534, error refused—Walker v. Houston Elec. Co., Civ.App., 155 S.W.2d 973, error refused—Fort Worth & D. C. Ry. Co. v. Welch, Civ.App., 154 S.W.2d 896—Silberstein v. Radio Cap Co., Civ.App., 153 S.W.2d 278—Josey v. Maryland Cas. Co., Civ.App., 153 S.W.2d 259, error refused—Hartford Acc. & Indem. Co. v. Harris, Civ.App., 152 S.W.2d 857, error dismissed—Holt v. International Great Northern R. Co., Civ.App., 152 S.W.2d 472—Gruy v. Reiter Foster Oil Corp., Civ.App., 150 S.W.2d 842—Harris v. New Amsterdam Casualty Co., Civ.App., 150 S.W.2d 431, error dismissed, judgment correct—Jackson v. McCrary, Civ.App., 148 S.W.2d 942, error refused—Southern Underwriters v. Mowery, Civ.App., 147 S.W.2d 834, error dismissed, judgment correct—State Nat. Bank of Houston v. Woodfin, Civ.App., 146 S.W.2d 284, error refused—Luck v. Buffalo Lakes, Civ.App., 144 S.W.2d 672, error dismissed, judgment correct—Federal Underwriters Exchange v. Popnoe, Civ.App., 140 S.W.2d 454, error dismissed—Aranda v. Texas & N. O. R. Co., Civ.App., 140 S.W.2d 236, error dismissed, judgment correct—Shell Oil Co. v. Dennison, Civ.App., 132 S.W.2d 609, error refused—Rasbury v. Hale, Civ.App., 131 S.W.2d 334, error dismissed, judgment correct—Gross v. Dallas Ry. & Terminal Co., Civ.App., 131 S.W.2d 113, error dismissed, judgment correct—Tunnell v. Van School Dist. No. 53, Civ.App., 129 S.W.2d 825, error dismissed, judg-

out violating established rules of construction.<sup>76</sup> For the purpose of possible reconciliation, apparent conflicts should be examined in the light of the facts of the particular case, the pleadings and the evidence, the manner in which the issues were submitted, and in view of other findings when considered as a whole.<sup>77</sup> However, in giving effect to contradictory findings the court cannot resort to conjecture,<sup>78</sup> and it should not strain a point to harmonize the various answers for the purpose of making them as a whole inconsistent with the general verdict.<sup>79</sup>

### § 563. Findings Inconsistent with General Verdict

#### a. In general

#### b. Requisites of special findings

ment correct—*Friske v. Graham*, Civ.App., 128 S.W.2d 139—*Lewis v. Martin*, Civ.App., 120 S.W.2d 910, error refused—*Schneider v. Delavan*, Civ.App., 118 S.W.2d 823, error dismissed—*Rogers v. Cook*, Civ.App., 115 S.W.2d 1148, error dismissed—*Batey v. Greenwood Floral Co.*, Civ.App., 113 S.W.2d 647—*Howard v. Howard*, Civ.App., 102 S.W.2d 473, error refused—*Texas & P. Ry. Co. v. Gillette*, Civ.App., 100 S.W.2d 170, error dismissed—*McClwrath v. City of McGregor*, Civ.App., 58 S.W.2d 851, error dismissed—*Texas & P. Ry. Co. v. Foster*, Civ.App., 58 S.W.2d 557, error dismissed.

64 C.J. p 1176 note 91.

**Trial judge in the proper exercise of his discretion** should decide seeming inconsistency in answers of jury to interrogatories or question as to what constituted true verdict of jury—*Henderson v. Allison*, D.C. Mun.App., 44 A.2d 220.

76. *Tex.—Hancock v. Sammons*, Civ.App., 287 S.W.2d 252—*Fredericksburg Hospital & Clinic v. Springall*, Civ.App., 220 S.W.2d 692.

Construction of answers or findings generally see *infra* § 569.

77. *Tex.—Perkins v. Mitchell*, 268 S.W.2d 907—*Ford v. Carpenter*, 216 S.W.2d 568, 147 Tex. 447—*Yarborough v. Dallas Railway & Terminal Co.*, 97 S.W.2d 169, 128 Tex. 445—*Pruitt v. General Ins. Corp.*, Civ.App., 265 S.W.2d 908, error refused no reversible error—*Boyd v. Texas & N. O. R. Co.*, Civ.App., 218 S.W.2d 534, error refused no reversible error—*Traders & General Ins. Co. v. Wilder*, Civ.App., 186 S.W.2d 1011, refused for want of merit—*Fort Worth & D. C. Ry. Co. v. Kiel*, Civ.App., 185 S.W.2d 144, reversed on other grounds 187 S.W.2d 371, 143 Tex. 601—*Goss v. Longview Hilton Hotel Co.*, Civ.

App., 183 S.W.2d 998—*Porter v. Pollis*, Civ.App., 169 S.W.2d 216, error refused—*Walker v. Houston Elec. Co.*, Civ.App., 158 S.W.2d 973, error refused—*Harris v. New Amsterdam Casualty Co.*, Civ.App., 150 S.W.2d 431, error dismissed, judgment correct—*Jackson v. McCrary*, Civ.App., 148 S.W.2d 942, error refused—*Aranda v. Texas & N. O. R. Co.*, Civ.App., 140 S.W.2d 236, error dismissed, judgment correct—*Shell Oil Co. v. Dennison*, Civ.App., 132 S.W.2d 609, error refused—*Rasbury v. Hale*, Civ.App., 131 S.W.2d 334, error dismissed, judgment correct—*Batey v. Greenwood Floral Co.*, Civ.App., 113 S.W.2d 647—*Yarborough v. Dallas Ry. & Terminal Co.*, Civ.App., 67 S.W.2d 1093, reversed on other grounds 97 S.W.2d 169, 128 Tex. 445.

Construction of findings together or as a whole generally see *infra* § 570.

**All the issues must be construed together as a whole**, where there appears to be a conflict in findings of fact on special issues, and if, when so construed, they admit of more than one reasonable construction, trial court has power to apply the reasonable construction which it deems proper—*Hartford Acc. & Indem. Co. v. Harris*, Tex.Civ.App., 152 S.W.2d 857, error dismissed—*Texas & P. Ry. Co. v. Gillette*, Tex.Civ.App., 100 S.W.2d 170, error dismissed.

**All findings must be considered and construed together with a view of harmonizing them.**

*Kan.—Beitz v. Hereford*, 220 P.2d 135, 169 Kan. 556—*Sams v. Commercial Standard Ins. Co.*, 139 P.2d 859, 157 Kan. 278.

*Tex.—Texas & P. Ry. Co. v. Foster*, Civ.App., 58 S.W.2d 557, error dismissed.

**Entire charge and all of verdict must be considered in determining**

#### a. In General

As a general rule special findings or answers which are absolutely irreconcilable with the general verdict control the general verdict and a judgment may and must be rendered according to the special findings or answers, unless the jury are instructed to reconsider and this course is permissible, or the court in its discretion directs a new trial.

Special findings or answers may not be set aside merely because they are inconsistent with the general verdict.<sup>80</sup> On the contrary, although there is authority for the view that a special finding or verdict is merely advisory and cannot control a general verdict,<sup>81</sup> as a general rule special findings or answers to special interrogatories which are so inconsistent with, and antagonistic to, the general verdict as to be absolutely irreconcilable with it control the general verdict,<sup>82</sup> and, under the con-

whether a conflict exists in answers to special issues.—*Little Rock Furniture Mfg. Co. v. Dunn*, 222 S.W.2d 985, 148 Tex. 197.

78. *Tex.—Maryland Cas. Co. v. Howle*, Civ.App., 94 S.W.2d 220, error dismissed.

79. *Kan.—Missouri Pac. R. Co. v. Holley*, 1 P. 130, 554, 30 Kan. 465, 474.

Determination of consistency or inconsistency of special findings and general verdict generally see *infra* § 564.

80. *Kan.—Giltner v. Stephens*, 200 P.2d 290, 166 Kan. 172—*Craig v. Sturgeon*, 98 P.2d 139, 151 Kan. 208.

**Answers in harmony with general verdict**

Where answers to special questions returned by jury are sustained by evidence and are in harmony with general verdict, overruling motion to set aside answers to special questions is proper.—*Pankey v. Wyandotte Cab, Inc.*, 254 P.2d 305, 174 Kan. 17.

81. *Pa.—Greiner v. Commonwealth*, 6 A.2d 67, 334 Pa. 299.

82. *Ill.—Stefan v. Elgin, J. & E. R. Co.*, 120 N.E.2d 52, 2 Ill.App.2d 300—*Revis v. Thompson*, 66 N.E.2d 527, 328 Ill.App. 588.

*Ind.—Republic Creosoting Co. v. Hiatt*, 8 N.E.2d 951, 212 Ind. 432—*Tribune-Star Pub. Co. v. Fortwendle*, App., 115 N.E.2d 215, rehearing denied 116 N.E.2d 548—*Bence v. Denbo*, 183 N.E. 326, 98 Ind.App. 52—*Creech v. Hubbard*, 156 N.E. 176, 86 Ind.App. 75. *Kan.—Metzinger v. Subera*, 266 P.2d 287, 176 Kan. 542—*Franklin v. Kansas City Public Service Co.*, 265 P.2d 1031, 175 Kan. 626—*In re Erwin's Estate*, 228 P.2d 739, 170 Kan. 728—*McCoy v. Webber*, 212 P.2d 281, 168 Kan. 241—*Fralick v. Kansas City Public Service Co.*, 211 P.

trolling decisions on the question, a judgment may and must be rendered according to the answers or special findings notwithstanding the general verdict,<sup>83</sup> unless the jury are instructed to reconsider

2d 443, 168 Kan. 134—Gabel v. Hanby, 193 P.2d 239, 165 Kan. 116—Glenn v. Montgomery Ward & Co., 163 P.2d 427, 160 Kan. 488—Sowers v. Wells, 114 P.2d 828, 154 Kan. 134—Smith v. Quivira Land Co., 113 P.2d 1077, 153 Kan. 794—Strimble v. O. K. Warehouse Co., 98 P.2d 169, 151 Kan. 98—Craig v. Sturgeon, 98 P.2d 139, 151 Kan. 208—Smith v. Atchison, T. & S. F. Ry. Co., 66 P.2d 562, 145 Kan. 615—Hiler v. Cameron, 59 P.2d 30, 144 Kan. 296—Kiser v. Phillips Pipe Line Co., 41 P.2d 1010, 141 Kan. 333—**Corpus Juris** cited in Green v. Hutson, 32 P.2d 490, 493, 139 Kan. 475—Lindenstruth v. Leveque, 23 P.2d 486, 138 Kan. 93—Tuer v. Wayland, 283 P. 661, 129 Kan. 458—Curry v. Wichita R. & Light Co., 278 P. 749, 128 Kan. 637—Simpson State Bank v. Downey, 275 P. 153, 127 Kan. 828—Ogg v. Ogg, 260 P. 647, 124 Kan. 443.  
Minn.—Beaton v. Duluth, W. & P. Ry. Co., 191 N.W. 44, 153 Minn. 505, certiorari denied 43 S.Ct. 521, 262 U.S. 744, 67 L.Ed. 1211—Maceman v. Equitable Life Assurance Society of United States, 72 N.W. 111, 59 Minn. 285.  
Mont.—Osmundson v. Moore Mercantile Co., 228 P. 215, 70 Mont. 455.  
Ohio—Fox v. Conway, 13 N.E.2d 124, 133 Ohio St. 273—Townley v. Union Fork & Hoe Co., 22 N.E.2d 211, 60 Ohio App. 544, appeal dismissed 19 N.E.2d 511, 135 Ohio St. 96—Youngstown & S. Ry. Co. v. Prigosin, 4 N.E.2d 599, 53 Ohio App. 189—Steele v. Baltimore & O. R. Co., 15 Ohio App. 266.  
Okla.—Queen Ins. Co. of America v. Baker, 50 P.2d 371, 174 Okl. 273.  
Tex.—**Corpus Juris** cited in Smith v. Morgan, Civ.App., 235 S.W.2d 938, 943—Benson v. Missouri, K. & T. R. Co., Civ.App., 200 S.W.2d 233, error refused no reversible error, certiorari denied 68 S.Ct. 206, 332 U.S. 830, 92 L.Ed. 403—New St. Anthony Hotel Co. v. Pryor, Civ. App., 132 S.W.2d 620, error refused.  
Wash.—Gilmartin v. Stevens Inv. Co., 261 P.2d 73, 43 Wash.2d 289, opinion adhered to on rehearing 266 P. 2d 800, 43 Wash.2d 289—Aman v. City of Tacoma, 16 P.2d 601, 170 Wash. 296.  
64 C.J. p 1177 note 95—42 C.J. p 1303 note 47, p 1287 note 15 [a] (1)—37 C.J. p 655 notes 7, 8—33 C.J. p 143 notes 75, 76, 80 [b] (1)—26 C.J. p 569 note 10—1 C.J. p 515 note 75.  
**Under statute expressly so providing**  
Kan.—Davis v. Kansas Elec. Power Co., 152 P.2d 806, 159 Kan. 97—Rasing v. Heazler, 142 P.2d 832, 157 Kan. 516—Walker v. Colgate-

Palmolive-Peet Co., 139 P.2d 157, 157 Kan. 170—Sayeg v. Kansas Gas & Elec. Co., 131 P.2d 648, 156 Kan. 65—Ruff v. Farley Machine Works Co., 99 P.2d 789, 151 Kan. 349.  
Mich.—Hartley v. A. I. Rodd Lumber Co., 276 N.W. 712, 282 Mich. 652.  
Ohio—Kiever v. Reid Bros. Exp., 86 N.E.2d 608, 151 Ohio St. 467—Bredenbeck v. Hollywood Cartage Co., 110 N.E.2d 152, 92 Ohio App. 265—Salley v. Wagner, 105 N.E. 2d 878, 90 Ohio App. 295.  
64 C.J. p 1177 note 95 [a].

#### Statute implying answers controlling

A statute providing that if any answer to special interrogatories is inconsistent with the general verdict, the court may order judgment appropriate to the answers notwithstanding the verdict or send the jury back for further deliberation necessarily implies that the question submitted is controlling.—Ipsen v. Ruess, 41 N.W.2d 658, 241 Iowa 730.

#### General finding as mere legal conclusion

Where special findings conflict with general findings in an action submitted on special issues, general finding is treated as a mere legal conclusion, effect of which is destroyed by the adverse finding of controlling fact upon which conclusion rests.—Harbin v. City of Beaumont, Tex. Civ.App., 146 S.W.2d 297, error dismissed, judgment correct.

**Anything in jury's special findings so opposed to its general conclusions as to show that latter could not have been found on record without contradicting special findings requires that such conclusions be disregarded**—Hartley v. A. I. Rodd Lumber Co., 276 N.W. 712, 282 Mich. 652.

#### Reply construed as special verdict

Jury's affirmative answer to query in form of instruction to state whether verdict for defendant in action on fire insurance policy was based solely on ground that appraisement of loss was not had for reason attributable to plaintiff or his appraiser was special verdict controlling general verdict for defendant.—Jacobs v. Norwich Union Fire Ins. Soc., 40 P. 2d 899, 4 Cal.App.2d 1.

**The fact that special questions do not support a general verdict is no ground for setting the general verdict aside, since it is only when the answers to special questions are inconsistent with the general verdict that such relief may be had.**—Frakes v. Travelers Mut. Cas. Co., 84 P.2d 871, 148 Kan. 637.

83. Conn.—Gesauldi v. Connecticut Co., 41 A.2d 771, 131 Conn. 622.

Ill.—Revis v. Thompson, 66 N.E.2d 527, 328 Ill.App. 588.

Ind.—Crech v. Hubbard, 156 N.E. 176, 86 Ind.App. 75.

Iowa—Ipsen v. Ruess, 41 N.W.2d 658, 241 Iowa 730.

Kan.—Metzinger v. Subera, 266 P.2d 287, 175 Kan. 542—Franklin v. Kansas City Public Service Co., 265 P. 2d 1031, 175 Kan. 626—Frallack v. Kansas City Public Service Co., 211 P.2d 443, 168 Kan. 134—Giltner v. Stephens, 200 P.2d 290, 166 Kan. 172—Glenn v. Montgomery Ward & Co., 163 P.2d 427, 160 Kan. 488—Sowers v. Wells, 114 P.2d 828, 154 Kan. 134—Smith v. Quivira Land Co., 113 P.2d 1077, 153 Kan. 794—Jilka v. National Mut. Cas. Co. of Tulsa, 106 P.2d 655, 152 Kan. 597—Strimble v. O. K. Warehouse Co., 98 P. 2d 169, 151 Kan. 98—Craig v. Sturgeon, 98 P.2d 139, 151 Kan. 208—Marley v. Wichita Transp. Corp., 96 P.2d 877, 150 Kan. 615—Smith v. Atchison, T. & S. F. Ry. Co., 66 P.2d 562, 145 Kan. 615—Hiler v. Cameron, 59 P.2d 30, 144 Kan. 296—Kiser v. Phillips Pipe Line Co., 41 P.2d 1010, 141 Kan. 333—Balandran v. Compton, 41 P.2d 720, 141 Kan. 321—Tuer v. Wayland, 283 P. 661, 129 Kan. 458—Curry v. Wichita R. & Light Co., 278 P. 749, 128 Kan. 537—Simpson State Bank v. Downey, 275 P. 153, 127 Kan. 828.  
Minn.—Beaton v. Duluth, W. & P. Ry. Co., 191 N.W. 44, 153 Minn. 505, certiorari denied 43 S.Ct. 521, 262 U.S. 744, 67 L.Ed. 1211.

Ohio—Bredenbeck v. Hollywood Cartage Co., 110 N.E.2d 152, 92 Ohio App. 265—Youngstown & S. Ry. Co. v. Prigosin, 4 N.E.2d 599, 53 Ohio App. 189—Glutz v. Armsey, 32 Ohio N.P.N.S., 119.

Okla.—Gawf v. Gawf, 240 P.2d 1095, 206 Okl. 73—First Nat. Bank & Trust Co. of Tulsa v. Mitchell, 127 P.2d 825, 191 Okl. 206—Mason v. McNeal, 100 P.2d 451, 187 Okl. 31—Queen Ins. Co. of America v. Baker, 50 P.2d 371, 174 Okl. 273.  
64 C.J. p 1178 note 96—37 C.J. p 655 notes 7, 8—33 C.J. p 143 note 76—26 C.J. p 569 notes 10, 13—1 C.J. p 515 note 75.

**Judgment not obstante verdicto:**  
When and for whom granted generally see Judgments § 60.  
Distinguished from judgment on special findings against general verdict see Judgments § 60 e.

#### Other answers favoring general verdict

Where answer to interrogatory excludes every conclusion authorizing recovery by party who has general verdict, judgment should be entered on such answer, even if other answers given by jury on other points

the case and this course is permissible,<sup>84</sup> or the court in the exercise of its discretion directs a new trial.<sup>85</sup> On the other hand the general verdict will stand<sup>86</sup> and judgment in conformity therewith should be rendered, as discussed in Judgments § 55, where it and a special verdict, special findings or answers to questions or interrogatories are con-

sistent or can be reconciled. Furthermore, the general verdict may stand even though there is some apparent inconsistency between it and the special findings.<sup>87</sup>

The general verdict will stand unless it and the special findings or answers to interrogatories are clearly and absolutely irreconcilable<sup>88</sup> so that both

favor party relying on general verdict.—Tribune-Star Pub. Co. v. Fortwendle, Ind.App., 115 N.E.2d 215, rehearing denied 116 N.E.2d 548.

Where general verdict was for a lesser amount than total damages indicated in special findings, court properly based its judgment on special findings.—Kirkpatrick v. McMillan, 157 P.2d 772, 49 N.M. 100.

Where general verdict is rendered on erroneous instructions submitting an improper issue, party in whose favor special verdict is rendered on decisive issue in case is entitled to judgment thereon notwithstanding general verdict.—Shaffner v. Price, 250 N.W. 703, 53 S.D. 456, 98 A.L.R. 689.

Volunteered general verdict was properly ignored and judgment on special findings inconsistent therewith was properly rendered.—Campbell v. Johnson, Tex.Civ.App., 284 S.W. 261, affirmed, Com.App., 290 S.W. 526.

#### Approval of special findings

Where special findings establish facts barring plaintiff's recovery, the granting of a new trial must be viewed as an inadvertence, and judgment for defendant is authorized if the trial court approves such findings, but a ruling that the special findings are supported by the evidence accompanied by a refusal to enter judgment thereon and the granting of a new trial is tantamount to a disapproval of the special findings, and without the requisite approval of the trial court judgment cannot be ordered on the special findings.—Lapo v. Naillieux, 29 P.2d 1093, 139 Kan. 23.

64. Iowa.—Ipsen v. Ruess, 41 N.W.2d 658, 241 Iowa 730.  
64 C.J. p 1178 note 97.

65. Conn.—Gesauldi v. Connecticut Co., 41 A.2d 771, 131 Conn. 622.  
Okl.—First Nat. Bank & Trust Co. of Tulsa v. Mitchell, 137 P.2d 825, 191 Okl. 206.

Pa.—Hartman v. Prudential Ins. Co. of America, Com.Pl., 35 Berks Co. 205, 57 York Leg.Rec. 161.

Inconsistency between special findings and general verdict as ground for new trial generally see New Trial § 66 b.

#### Judgment unjust

Where special findings or answers to interrogatories are such as to war-

rant entry of judgment contrary to general verdict, trial court may nevertheless, in its discretion, direct a new trial instead of entry of judgment, if in its opinion it would be unjust to party against whom judgment was entered to foreclose him from any further opportunity to establish his right to recover, either upon original or amended pleadings; and trial court in refusing to render judgment contrary to general verdict, although special findings or answers to interrogatories seem to entitle party against whom general verdict was found to such judgment, may make a finding showing reasons for such exercise of discretion.—Gesauldi v. Connecticut Co., 41 A.2d 771, 131 Conn. 622.

66. Kan.—Mullich v. Graham Ship By Truck Co., 174 P.2d 98, 162 Kan. 61.—Taggart v. Yellow Cab Co. of Wichita, 131 P.2d 934, 156 Kan. 88.—Neiswender v. Board of Com'rs of Shawnee County, 113 P.2d 115, 153 Kan. 634, opinion supplemented on other grounds 120 P.2d 218, 154 Kan. 588.—Chapman v. Ticehurst, 110 P.2d 786, 153 Kan. 310.—Torpey v. Kansas City Public Service Co., 89 P.2d 898, 149 Kan. 735.—Witt v. Roper, 88 P.2d 549, 149 Kan. 184.—Cooper v. Kansas City Public Service Co., 73 P.2d 1092, 146 Kan. 961.

Ohio.—McNees v. Cincinnati St. Ry. Co., 89 N.E.2d 128, 152 Ohio St. 269.—Hamilton v. City of Cleveland, 110 N.E.2d 50, 93 Ohio App. 93.—Reed v. Pearl Assur. Co., 80 N.E.2d 232, 83 Ohio App. 288.—Robertson v. City Produce & Commission Co., 70 N.E.2d 778, 78 Ohio App. 471.

Pa.—Bixler v. Metropolitan Life Ins. Co., Com.Pl., 14 Northumb.Leg.J. 378.

64 C.J. p 1178 note 98.

Answers held to support general verdict

Ind.—Western & Southern Life Ins. Co. v. Spencer, 179 N.E. 794, 95 Ind. App. 281.

37 C.J. p 655 note 4 [b] (1).

37. Cal.—Spear v. United Railroads of San Francisco, 117 P. 956, 16 Cal.App. 437.

Kan.—Tuggle v. Cathers, 254 P.2d 807, 174 Kan. 132.—Cain v. Steely, 252 P.2d 909, 173 Kan. 864.—Mehl v. Carter, 237 P.2d 240, 171 Kan. 597.

Possible inconsistencies between special findings and a general verdict are insufficient to set aside the general verdict.—Wingert v. Mouse, 255 P.2d 1007, 174 Kan. 239.—Johnson-Sampson Const. Co. v. Casterline Grain & Seed, Inc., 252 P.2d 893, 173 Kan. 763.

68. U.S.—Bass v. Dehner, C.C.A.N.M., 103 F.2d 28, certiorari denied 60 S.Ct. 100, 308 U.S. 580, 84 L.Ed. 486, rehearing denied 60 S.Ct. 136, 308 U.S. 635, 84 L.Ed. 538.

Cal.—Lowen v. Finnilla, 102 P.2d 530, 15 Cal.2d 502.

Ill.—Weinrob v. Heinta, 104 N.E.2d 534, 346 Ill.App. 30.

Ind.—Township of Haddon School of Sullivan County v. Willis, 139 N.E. 251, 309 Ind. 356.—Neuwelt v. Roush, 85 N.E.2d 508, 119 Ind.App. 481.—Southern Ry. Co. v. Ingle, 69 N.E.2d 746, 117 Ind.App. 239.—Brown v. Greenwood, 60 N.E.2d 152, 116 Ind.App. 112.—Drewrys Limited, U.S. v. A. v. Crippen, 44 N.E.2d 1006, 118 Ind.App. 120.—Shubert v. Thompson, 32 N.E.2d 120, 109 Ind. App. 34.—Indianaapolis Water Co. v. Schoenemann, 20 N.E.2d 671, 107 Ind.App. 308.—Standard Oil Co. of Indiana v. Thomas, 13 N.E.2d 386, 105 Ind.App. 610.—Armstrong v. Binzer, 199 N.E. 863, 102 Ind.App. 497.—Kelly v. New York C. & St. L. R. Co., 199 N.E. 453, 102 Ind. App. 178.—Chicago & E. I. Ry. Co. v. Gilbert, 194 N.E. 186, 100 Ind. App. 365.—Thompson v. F. W. Woolworth Co., 192 N.E. 893, 100 Ind. App. 386.—Hauch v. Fritch, 189 N.E. 639, 99 Ind.App. 65.—Burroughs v. Southern Colonization Co., 173 N.E. 716, 96 Ind.App. 93.

Iowa.—Tobin v. Van Orsdel, 45 N.W.2d 229, 241 Iowa 1351.—Gorpus Jazis cited in Fischer v. Hawkeye Stages, 37 N.W.2d 284, 286, 240 Iowa 1203.

Kan.—Osborn v. Wheat Growers' Mut. Hall Ins. Co., 253 P.2d 214, 175 Kan. 235.—Simeon v. Schroeder, 227 P.2d 153, 170 Kan. 471.—Graves v. National Mut. Cas. Co., 202 P.2d 180, 169 Kan. 547.—Jelf v. Cottonwood Falls Gas Co., 178 P.2d 992, 162 Kan. 715.—Underhill v. Moses, 165 P.2d 218, 160 Kan. 679.—Rasing v. Healsler, 142 P.2d 832, 167 Kan. 516.—Sams v. Commercial Standard Ins. Co., 139 P.2d 859, 157 Kan. 278.—Walker v. Colgate-Palmolive-Pest Co., 139 P.2d 157, 157 Kan. 170.—Neiswender v. Board of

cannot stand.<sup>89</sup> Under this rule special findings are so inconsistent with the general verdict as to overcome and control it when, and only when, they, as a matter of law, authorize and require a judgment different from that which the verdict will authorize.<sup>90</sup> In order to be in irreconcilable conflict with the general verdict, the special answers or

findings must exclude every reasonable theory, hypothesis, or conclusion which would authorize the verdict,<sup>91</sup> and the conflict must be incapable, or beyond the possibility, of removal by any supposable or conceivable evidence legitimately admissible under the issues.<sup>92</sup>

Comrs of Shawnee County, 113 P. 2d 115, 183 Kan. 634, opinion supplemented on other grounds 120 P.2d 218, 154 Kan. 588—Chapman v. Tieshurst, 110 P.2d 785, 153 Kan. 810—Kirsch v. Federal Life Ins. Co., 87 P.2d 591, 149 Kan. 309—Smith v. Kagey, 73 P.2d 56, 146 Kan. 563—Howard v. Hartford Accident & Indemnity Co. of Hartford, Conn., 32 P.2d 231, 139 Kan. 403 N.M.—Crockett v. Johnston, 95 P.2d 214, 48 N.M. 469.  
Ohio.—Ohio Fuel Gas Co. v. Ringler, 185 N.E. 583, 126 Ohio St. 409—Hamilton v. City of Cleveland, 110 N.E.2d 80, 93 Ohio App. 93—Wells v. Baltimore & O. R. Co., App., 97 N.E.2d 75—Reed v. Pearl Assur. Co., 80 N.E.2d 232, 83 Ohio App. 293—Smith v. Pennsylvania R. Co., App., 40 N.E.2d 445—Gearhart v. Columbus Ry. Power & Light Co., 39 N.E.2d 621, 65 Ohio App. 235, 64 C.J. p 1178 note 2.

#### Application of statute

Before the statute providing that, when a special finding of facts is inconsistent with the general verdict, the former shall control the latter, and court may give judgment accordingly, is applicable, there must exist such an inconsistency between the special finding and the general verdict that they are irreconcilable.—Welch v. Rollman & Sons Co., 44 N.E. 2d 736, 70 Ohio App. 515.

#### Findings or answers held not inconsistent with general verdict

Ind.—Mutual Ben. Health & Accident Ass'n v. Keiser, 14 N.E.2d 707, 214 Ind. 473, 122 A.L.R. 370—Grand Rapids Motor Exp. v. Crosbie, 69 N.E.2d 247, 117 Ind.App. 360—Standard Life Ins. Co. v. Grigsby, 140 N.E. 457, 80 Ind.App. 231—United Automobile Ins. Ass'n of Indianapolis v. Henderson, 139 N.E. 480, 81 Ind.App. 231—Majestic Life Assur. Co. v. Tuttle, 107 N.E. 22, 58 Ind.App. 98—U. S. Health, etc., Ins. Co. v. Clark, 33 N.E. 760, 41 Ind.App. 345.

Kan.—In re Erwin's Estate, 228 P. 2d 739, 170 Kan. 728—Simeon v. Schroeder, 227 P.2d 153, 170 Kan. 471—Jelf v. Cottonwood Falls Gas Co., 178 P.2d 992, 162 Kan. 713—Montague v. Burgerhoff, 103 P.2d 1031, 153 Kan. 124—Waldner v. Metropolitan Life Ins. Co., 87 P. 2d 515, 149 Kan. 287—Wilbourne v. Prudential Ins. Co. of America, 64 P.2d 417, 145 Kan. 482—Zimmerman

v. Kansas City Public Service Co., 286 P. 689, 130 Kan. 328—Finigan v. Ship by Truck Co., 283 P. 485, 129 Kan. 577—Leaher v. Carbon Coal Co., 272 P. 155, 127 Kan. 34—Drovers & Merchants' Bank v. Williamson, 246 P. 676, 121 Kan. 301, motion denied 260 P. 302, 121 Kan. 776.

Mass.—Shea v. Manhattan Life Ins. Co., 112 N.E. 631, 224 Mass. 112. Mich.—Peplinski v. Kieinke, 299 N. W. 818, 299 Mich. 86.

Minn.—Robbins v. New York Life Ins. Co., 262 N.W. 210, 195 Minn. 295, modified on other grounds 262 N.W. 873, 195 Minn. 205.

Ohio.—Smith v. Pennsylvania R. Co., App., 40 N.E.2d 445.

Pa.—Sebastianelli v. Prudential Ins. Co. of America, 12 A.2d 113, 37 Pa. 468.

Tex.—Fidelity Union Fire Ins. Co. v. Mitchell, Civ.App., 249 S.W. 536.

Wash.—Houston v. New York Life Ins. Co., 292 P. 445, 159 Wash. 162—Mercier v. Travelers' Ins. Co., 64 P. 158, 24 Wash. 147.

64 C.J. p 1177 note 95 [b]—37 C.J. p 555 note 4 [b] (2)—33 C.J. p 143 note 76 [a]—26 C.J. p 589 note 10 [a]—1 C.J. p 514 note 69.

Special finding held not necessarily inconsistent with general verdict

Ohio.—Robertson v. City Produce & Commission Co., 70 N.E.2d 778, 78 Ohio App. 471—Holmes v. Employers' Liability Assur. Corporation, Limited, of London, England, 43 N.E.2d 746, 70 Ohio App. 239.

28 C.J. p 317 note 45 [a].

69. Cal.—Lowen v. Finnilla, 103 P. 2d 520, 15 Cal.2d 502.

Ind.—Township of Haddon School of Sullivan County v. Willis, 199 N.E. 261, 209 Ind. 356.

Kan.—Walker v. Colgate-Palmolive-Peet Co., 139 P.2d 167, 167 Kan. 170.

Ohio.—Gearhart v. Columbus Ry. Power & Light Co., 29 N.E.2d 621, 65 Ohio App. 225.

64 C.J. p 1179 note 3.

90. Cal.—Lowen v. Finnilla, 103 P. 2d 520, 15 Cal.2d 502—Hudgins v. Standard Oil Co. of California, 28 P.2d 433, 136 Cal.App. 44.

Conn.—Gesauldi v. Connecticut Co., 41 A.2d 771, 131 Conn. 622—Belchak v. New York N. H. & H. R. Co., 179 A. 95, 119 Conn. 630.

Kan.—Wingert v. Mouse, 265 P.2d 1097, 174 Kan. 239—Tuggle v. Cathers, 254 P.2d 807, 174 Kan. 123—

Cain v. Steely, 252 P.2d 908, 173 Kan. 866—Johnson-Sampson Const. Co. v. Casterline Grain & Seed, Inc., 253 P.2d 898, 173 Kan. 763—Mehl v. Carter, 237 P.2d 240, 171 Kan. 597—Lord v. Hercules Powder Co., 167 P.2d 399, 161 Kan. 368—Underhill v. Motes, 165 P.2d 218, 160 Kan. 678—Witt v. Roper, 88 P.2d 549, 149 Kan. 184—Smith v. Kagey, 73 P.2d 56, 146 Kan. 563—Howard v. Hartford Accident & Indemnity Co. of Hartford, Conn., 32 P.2d 231, 139 Kan. 403.

Ohio.—McNees v. Cincinnati St. Ry. Co., 89 N.E.2d 135, 152 Ohio St. 269.

Wis.—Trastek v. Dahlem, 262 N.W. 809, 219 Wis. 249.

64 C.J. p 1177 note 94.

91. Ind.—New York Cent. R. Co. v. Thompson, 21 N.E.2d 625, 215 Ind. 653—Mutual Benefit Health & Acc. Ass'n v. Keiser, 14 N.E.2d 707, 214 Ind. 473, 122 A.L.R. 370.

Ohio.—Wells v. Baltimore & O. R. Co., App., 97 N.E.2d 75.

Wis.—Trastek v. Dahlem, 262 N.W. 809, 219 Wis. 249.

64 C.J. p 1179 note 4—42 C.J. p 1287 note 15 [a] (2).

If on any count or paragraph of the complaint the general verdict can be made to stand consistently with the special findings or answers, the general verdict will stand.

Ind.—Cleveland C. & St. L. R. Co. v. Berry, 53 N.E. 415, 152 Ind. 807—Inter State Motor Freight System v. Henry, 38 N.E.2d 909, 111 Ind.App. 179—W. McMillen & Son v. Hall, Adm'x, 109 N.E. 434, 59 Ind.App. 545.

Iowa.—Jammison v. Gray, 29 Iowa 537.

92. Cal.—Lowen v. Finnilla, 103 P. 2d 520, 15 Cal.2d 502.

Ind.—L. S. Ayres & Co. v. Hicks, 40 N.E.2d 334, 220 Ind. 86, rehearing denied 41 N.E.2d 195, 356, 220 Ind. 86—New York Cent. R. Co. v. Thompson, 21 N.E.2d 625, 215 Ind. 652—Township of Haddon School of Sullivan County v. Willis, 199 N.E. 261, 209 Ind. 356—Tribune-Star Pub. Co. v. Fortwendt, App., 115 N.E.2d 215, rehearing denied 116 N.E.2d 548—Tate v. West, 64 N.E. 2d 371, 120 Ind.App. 513—Norwalk Truck Line Co. v. Kostka, 88 N.E. 2d 635, 120 Ind.App. 383—Norwalk Truck Line Co. v. Kostka, 88 N.E. 2d 799, 130 Ind.App. 383, rehearing denied 89 N.E.2d 635, 130 Ind.App.

## b. Requisites of Special Findings

Special findings, in order to control the general verdict and authorize a judgment notwithstanding such verdict, must be consistent with each other and clear and definite in their meaning, and not only be on a material point or issue, but also cover every material issue, and in all other ways be sufficient to authorize a judgment thereon, when taken together with the facts admitted by the pleadings.

In order to control the general verdict and au-

thorize a judgment notwithstanding such verdict, special findings must be consistent with each other,<sup>83</sup> and clear and definite in their meaning,<sup>84</sup> and not only be on a material point or issue,<sup>85</sup> but also cover every material issue,<sup>86</sup> establish all ultimate facts,<sup>87</sup> and in all other ways be sufficient to authorize a judgment thereon,<sup>88</sup> when taken together with the facts admitted by the pleadings;<sup>89</sup> and evidence may not be resorted to in aid of the

383—*Neuwelt v. Roush*, 85 N.E.2d 506, 119 Ind.App. 481—*Southern Ry. Co. v. Ingle*, 69 N.E.2d 746, 117 Ind.App. 229—*Grand Rapids Motor Exp. v. Crosbie*, 69 N.E.2d 247, 117 Ind.App. 360—*Brown v. Greenwood*, 60 N.E.2d 152, 116 Ind.App. 112—*Oliver v. Coffman*, 45 N.E.2d 351, 112 Ind.App. 507—*Pennsylvania R. Co. v. Stillabower*, 39 N.E.2d 465, 110 Ind.App. 458—*Inter State Motor Freight System v. Henry*, 33 N.E.2d 909, 111 Ind.App. 179—*Weiss v. Wakefield*, 38 N.E.2d 351, 111 Ind.App. 106—*Tucker Freight Lines v. Gross*, 33 N.E.2d 353, 109 Ind.App. 454—*Indianapolis Water Co. v. Schoenemann*, 20 N.E.2d 671, 107 Ind.App. 308—*Standard Oil Co. of Indiana v. Thomas*, 13 N.E.2d 336, 105 Ind.App. 610—*Armstrong v. Binzer*, 199 N.E. 863, 102 Ind.App. 497—*Kelly v. New York, C. & St. L. R. Co.*, 199 N.E. 453, 102 Ind.App. 175.

**Iowa.—Corpus Juris cited in** *Fischer v. Hawkeye Stages*, 37 N.W.2d 284, 287, 240 Iowa 1203.

64 C.J. p 1180 note 5.

**Affirmative showing on face of record**

An irreconcilable conflict between answers to interrogatories and general verdict, which will authorize judgment for one party notwithstanding general verdict for the other, arises only when on the face of the record it is affirmatively shown that there is no possibility that there could have been any other evidence admissible under the issues to sustain the verdict of the jury.—*Southern Ry. Co. v. Ingle*, 69 N.E.2d 746, 117 Ind.App. 229—*Brown v. Greenwood*, 60 N.E.2d 152, 116 Ind.App. 112.

93. Ind.—*Drawrys Limited, U. S. A. v. Crippen* 44 N.E.2d 1006, 113 Ind.App. 120—*Chicago & Erie R. Co. v. Patterson*, 34 N.E.2d 960, 110 Ind.App. 94—*Standard Oil Co. of Indiana v. Thomas*, 13 N.E.2d 336, 105 Ind.App. 610.

Kan.—*Metzinger v. Subera*, 266 P.2d 287, 175 Kan. 542—*Franklin v. Kansas City Public Service Co.*, 265 P.2d 1031, 175 Kan. 626—*In re Erwin's Estate*, 228 P.2d 739, 170 Kan. 728—*McCoy v. Weber*, 212 P.2d 281, 168 Kan. 241—*Frallick v. Kansas City Public Service Co.*, 211 P.2d 443, 168 Kan. 134—*Giltner*

*v. Stephens*, 200 P.2d 290, 166 Kan. 172—*Nelwender v. Board of Com'rs of Shawnee County*, 113 P.2d 115, 153 Kan. 634, opinion supplemented on other grounds 120 P.2d 218, 154 Kan. 588—*McGuire v. McGuire*, 103 P.2d 884, 152 Kan. 237.

Or.—*Whelpley v. Frye*, 263 P.2d 295, 199 Or. 530.

Pa.—*Brown v. Ambridge Yellow Cab Co.*, 97 A.2d 377, 374 Pa. 208.

Wis.—*Stache v. St. Paul F. & M. Ins. Co.*, 5 N.W. 36, 49 Wis. 89, 35 Am.R. 772.

64 C.J. p 1180 note 6—33 C.J. p 143 note 77.

Inconsistent findings in general see supra § 562.

**Findings held not inconsistent with each other**

Kan.—*Jeil v. Cottonwood Falls Gas Co.*, 178 P.2d 902, 162 Kan. 713—*Chapman v. Ticehurst*, 110 P.2d 785, 153 Kan. 310.

Tex.—*Boyd v. Texas & N. O. R. Co.*, Civ.App., 218 S.W.2d 534, error refused no reversible error.

94. Ohio.—*Townley v. Union Fork & Hoe Co.*, 22 N.E.2d 211, 60 Ohio App. 544, appeal dismissed 19 N.E.2d 511, 135 Ohio St. 86.

Or.—*Whelpley v. Frye*, 263 P.2d 295, 199 Or. 530.

Wis.—*Stache v. St. Paul F. & M. Ins. Co.*, 5 N.W. 36, 49 Wis. 89, 35 Am.R. 772.

64 C.J. p 1180 note 6 [a]—33 C.J. p 143 note 77.

**Court does not have to accept vague and inconclusive special findings as against definite general verdict, since special findings are only advisory.**—*Brown v. Ambridge Yellow Cab Co.*, 97 A.2d 377, 374 Pa. 208.

95. Ind.—*Standard Oil Co. of Indiana v. Thomas*, 13 N.E.2d 336, 105 Ind.App. 610.

N.M.—*Kiker v. Bank Sav. Life Ins. Co.*, 23 P.2d 366, 37 N.M. 846.

64 C.J. p 1180 note 7.

**An unresponsive answer to interrogatory concerning length of train was not ground for setting aside general verdict, where there was no dispute concerning approximate length of train, and such answer could not have entered into deliberation of jury, or rendition of general verdict.**—*New York Cent. R. Co. v. Thompson*, 21 N.E.2d 625, 215 Ind. 652.

96. Tex.—*Butler v. Abilene Mut. Life Ins. Ass'n*, Civ.App., 130 S.W.2d 1061. Error dismissed, judgment correct.

64 C.J. p 1181 note 8—37 C.J. p 655 note 9.

97. Neb.—*Sohler v. Christensen*, 39 N.W.2d 837, 151 Neb. 843—*In re Kerr's Estate*, 222 N.W. 63, 117 Neb. 630.

98. Iowa.—*Corpus Juris* cited in *Fischer v. Hawkeye Stages*, 37 N.W.2d 284, 287, 240 Iowa 1203.

Kan.—*Metzinger v. Subera*, 266 P.2d 287, 175 Kan. 542—*Franklin v. Kansas City Public Service Co.*, 265 P.2d 1031, 175 Kan. 626—*Frallick v. Kansas City Public Service Co.*, 211 P.2d 443, 168 Kan. 134—*Giltner v. Stephens*, 200 P.2d 290, 166 Kan. 172—*Jilka v. National Mut. Cas. Co. of Tulsa*, 106 P.2d 695, 152 Kan. 537—*Craig v. Sturgeon*, 98 P.2d 139, 151 Kan. 208—*Marley v. Wichita Transp. Corp.*, 96 P.2d 877, 150 Kan. 815—*Witt v. Roper*, 86 P.2d 649, 149 Kan. 184.

64 C.J. p 1181 note 10—37 C.J. p 655 note 9.

**Question calling for conclusion of law**

Defendant's special interrogatory whether there was any negligence of plaintiff that proximately contributed to cause automobile collision did not call for a special finding on a particular question of fact, but improperly called for a combined finding of fact and a conclusion of law, and hence jury's affirmative answer to interrogatory did not require court to enter judgment for defendant notwithstanding general verdict for plaintiff, on ground of inconsistency between general verdict and answer to special interrogatory.—*Felder v. Fugh*, 81 N.E.2d 639, 84 Ohio App. 271.

**Setting aside of special finding because not supported by evidence, did not bar recovery by plaintiff, where other special findings supported recovery.**—*Witt v. Roper*, 86 P.2d 649, 149 Kan. 184.

99. Iowa.—*Corpus Juris* cited in *Fischer v. Hawkeye Stages*, 37 N.W.2d 284, 287, 240 Iowa 1203.

64 C.J. p 1181 note 11.

special findings as against the general verdict.<sup>1</sup> A finding on a defective interrogatory does not overrule a general verdict.<sup>2</sup> While it has been held that the fact that the jury's special findings are inconsistent with one another is not necessarily fatal to the general verdict,<sup>3</sup> the question being whether the special findings, when considered as a whole, are so inconsistent with the general verdict that they cannot be reconciled with it,<sup>4</sup> it has also been held that, where the special findings are inconsistent with each other, some being consistent with the general verdict and others inconsistent therewith, no judgment can properly be entered either on the general verdict or on the special findings,<sup>5</sup> but a new trial should be ordered.<sup>6</sup>

1. Iowa.—Flecher v. Hawkeye Stages, 37 N.W.2d 284, 240 Iowa 1203.
2. W.Va.—Runyan v. Kanawha Water & Light Co., 71 S.E. 259, 68 W. Va. 609, 35 L.R.A.N.S., 430.
- 64 C.J. p 1181 note 12.
3. Kan.—Neiswender v. Board of Com'rs of Shawnee County, 113 P. 2d 115, 153 Kan. 634, opinion supplemented on other grounds 120 P. 2d 218, 154 Kan. 588—Osburn v. Atchison, T. & S. F. Railway Co., 90 P. 289, 75 Kan. 746.
4. Kan.—Neiswender v. Board of Com'rs of Shawnee County, 113 P. 2d 115, 153 Kan. 634, opinion supplemented on other grounds 120 P. 2d 218, 154 Kan. 588—Osburn v. Atchison, T. & S. F. Railway Co., 90 P. 289, 75 Kan. 746.
5. Kan.—McGuire v. McGuire, 103 P. 2d 884, 152 Kan. 237.
6. Kan.—In re Erwin's Estate, 228 P. 2d 739, 170 Kan. 728—McCoy v. Weber, 212 P. 2d 281, 168 Kan. 241.
7. U.S.—Bass v. Dehner, C.C.A.N.M., 103 F.2d 28, certiorari denied 60 S.Ct. 100, 308 U.S. 580, 84 L.Ed. 486, rehearing denied 60 S.Ct. 136, 308 U.S. 635, 84 L.Ed. 528.
- Cal.—Lowen v. Pinnilla, 102 P.2d 520, 15 Cal.2d 502—Davis v. Stulman, 164 P.2d 787, 72 Cal.App.2d 255.
- Ill.—Jacobs v. Illinois Terminal Co., 262 Ill.App. 481.
- Ind.—Republic Creosoting Co. v. Hiatt, 8 N.E.2d 981, 212 Ind. 432—Standard Oil Co. of Indiana v. Thomas, 18 N.E.2d 336, 105 Ind. App. 610.
- Kan.—Metzinger v. Subera, 266 P.2d 287, 175 Kan. 542—Franklin v. Kansas City Public Service Co., 265 P. 2d 1031, 175 Kan. 626—Tuggle v. Cathers, 254 P.2d 807, 174 Kan. 122—Cain v. Stealy, 252 P.2d 909, 173 Kan. 866—Johnson-Sampson Const.

- Co. v. Casterline Grain & Seed, Inc., 252 P.2d 893, 173 Kan. 763—Dryden v. Kansas City Public Service Co., 238 P.2d 501, 172 Kan. 31—In re Erwin's Estate, 228 P.2d 739, 170 Kan. 728—McCracken v. Stewart, 223 P.2d 963, 170 Kan. 129—Hultberg v. Phillips, 220 P.2d 208, 169 Kan. 610—Graves v. National Mut. Cas. Co., 220 P.2d 180, 169 Kan. 547—Fralick v. Kansas City Public Service Co., 211 P.2d 443, 168 Kan. 134—Hill v. Leichter, 211 P.2d 433, 168 Kan. 85—Leonard v. Kansas City Public Service Co., 204 P.2d 760, 167 Kan. 51—Lee v. Gas Service Co., 201 P.2d 1023, 166 Kan. 285—Giltner v. Stephens, 200 P.2d 290, 166 Kan. 172—Gabel v. Hanby, 193 P.2d 239, 165 Kan. 116—Jelf v. Cottonwood Falls Gas Co., 178 P.2d 992, 162 Kan. 713—Long v. Shafer, 174 P.2d 88, 162 Kan. 21—Underhill v. Motes, 165 P.2d 218, 160 Kan. 679—Isle v. Kaw Transport Co., 152 P.2d 827, 159 Kan. 110—Davis v. Kansas Elec. Power Co., 152 P.2d 806, 159 Kan. 97—Corryell v. Edens, 150 P.2d 341, 158 Kan. 771—Mahan v. Kansas City Public Service Co., 146 P.2d 383, 158 Kan. 206—Rasing v. Heazler, 142 P.2d 832, 157 Kan. 616—Schroeder v. Nelson, 139 P.2d 868, 157 Kan. 320—Sams v. Commercial Standard Ins. Co., 139 P.2d 859, 157 Kan. 278—Walker v. Colgate-Palmolive-Peet Co., 139 P.2d 157, 157 Kan. 170—Motor Equipment Co. v. McLaughlin, 133 P.2d 149, 156 Kan. 285—Taggart v. Yellow Cab Co. of Wichita, 131 P.2d 924, 156 Kan. 88—Jilka v. National Mut. Cas. Co. of Tulsa, 106 P.2d 665, 152 Kan. 637—Haney v. Canfield, 106 P.2d 662, 152 Kan. 697—Montague v. Burgerhoff, 102 P.2d 1031, 152 Kan. 124—Ruff v. Farley Machine Works Co., 99 P.2d 789, 151

## § 564. — Determination of Consistency or Inconsistency

- a. Construction and presumptions
- b. Matters considered generally
- c. Remedies and proceedings to determine

### a. Construction and Presumptions

Special findings should, if reasonably possible, be so construed as to harmonize them with the general verdict, and no presumption will be indulged in favor of inconsistency, nor will any inference, presumption, or intention be indulged in their aid as against the general verdict; but every presumption, intention, and inference in favor of the general verdict which may be drawn from any evidence admissible under the pleadings will be indulged.

Special findings should, if reasonably possible, be so construed as to harmonize them with the general verdict.<sup>7</sup> No presumption will be indulged in favor

- Kan. 349—Marley v. Wichita Transp. Corp., 96 P.2d 877, 150 Kan. 818—Claggett v. Phillips Petroleum Co., 92 P.2d 52, 150 Kan. 191—Waldner v. Metropolitan Life Ins. Co., 87 P.2d 515, 149 Kan. 287—Cooper v. Kansas City Public Service Co., 73 P.2d 1092, 146 Kan. 961—Billings v. City of Wichita, 62 P.2d 869, 144 Kan. 742—Sponsable v. Thomas, 33 P.2d 729, 139 Kan. 725—Howard v. Hartford Accident & Indemnity Co. of Hartford, Conn., 32 P.2d 231, 139 Kan. 403—Leinbach v. Pickwick Greyhound Lines, 23 P. 2d 449, 138 Kan. 50, 92 A.L.R. 1—Leshner v. Carbon Coal Co., 272 P. 155, 127 Kan. 34—Hawthorne v. Travelers' Protective Ass'n of America, 210 P. 1086, 112 Kan. 356, 29 A.L.R. 494.
- N.M.—Turner v. New Brunswick Fire Ins. Co. of New Brunswick, N.J., 112 P.2d 511, 45 N.M. 126.
- Ohio.—Klever v. Reid Bros. Exp., 86 N.E.2d 608, 151 Ohio St. 457—Hamilton v. City of Cleveland, 110 N. E.2d 50, 93 Ohio App. 93—Wells v. Baltimore & O. R. Co., App., 97 N. E.2d 75—Robertson v. City Produce & Commission Co., 70 N.E.2d 778, 78 Ohio App. 471—Gearhart v. Columbus Ry., Power & Light Co., 29 N.E.2d 621, 65 Ohio App. 225.
- Tex.—Texas Employers' Ins. Ass'n v. White, Civ.App., 97 S.W.2d 960, error granted.
- 64 C.J. p 1181 note 14.
- Special findings:
- Construction of, generally see infra § 569.
- Harmonizing of, with each other see supra § 562.
- The reason for construing special findings so as to harmonize them with the general verdict, if possible, is that every reasonable presumption must be indulged in favor of the general verdict.—Sams v. Commercial

of inconsistency,<sup>8</sup> nor will any inference, presumption, or intendment be indulged in aid of special findings or answers to special interrogatories as against the general verdict;<sup>9</sup> but every reasonable presumption, intendment, and inference in favor of the general verdict<sup>10</sup> which may be drawn from any evidence admissible under the pleadings<sup>11</sup> will be indulged.

### b. Matters Considered Generally

As a general rule in determining whether special

findings or answers are so inconsistent with the general verdict as to authorize or require judgment on the former notwithstanding the latter, the court will consider only the verdict, answers or findings, and the pleadings or issues formed thereby, and ordinarily will not weigh or consider the evidence actually introduced.

In determining whether special findings or answers to interrogatories are so inconsistent with the general verdict as to authorize or require judgment on the former notwithstanding the latter, as a general rule the court will consider only the verdict, the answers or findings, and the pleadings or

Standard Ins. Co., 139 P.2d 859, 157 Kan. 278.—Waldner v. Metropolitan Life Ins. Co., 87 P.2d 515, 149 Kan. 287.

Where one interpretation harmonizes special findings with the general verdict, and another interpretation shows the two to be inconsistent, the interpretation which shows the two to be harmonious will be adopted.—Johnson-Sampson Const. Co. v. Casterline Grain & Seed, Inc., 252 P.2d 893, 173 Kan. 763.—Dryden v. Kansas City Public Service Co., 238 P.2d 501, 172 Kan. 81.—Lee v. Gas Service Co., 201 P.2d 1023, 166 Kan. 285.—Gabel v. Hanby, 193 P.2d 239, 165 Kan. 116.—Long v. Shafer, 174 P.2d 88, 162 Kan. 21.—Isle v. Kaw Transport Co., 152 P.2d 827, 159 Kan. 110.—Taggart v. Yellow Cab Co. of Wichita, 131 P.2d 924, 156 Kan. 88.—Dick's Transfer Co. v. Miller, 119 P.2d 454, 154 Kan. 574.—Claggett v. Phillips Petroleum Co., 92 P.2d 52, 150 Kan. 191.—Billings v. City of Wichita, 62 P.2d 869, 144 Kan. 74.—84 C.J. p 1181 note 14 [b].

8. U.S.—Bass v. Dehner, C.C.A.N.M., 103 F.2d 28, certiorari denied 60 S. Ct. 100, 308 U.S. 880, 84 L.Ed. 486, rehearing denied 60 S.Ct. 136, 308 U.S. 635, 84 L.Ed. 528.

S.D.—Benedict v. Carter State Bank of Carter, 222 N.W. 500, 54 S.D. 14.

Court will not strain a point to discover an inconsistency between a general verdict and a special finding of jury which would render special finding controlling if irreconcilable with general verdict.

Iowa.—Fischer v. Hawkeye Stages, 37 N.W.2d 284, 240 Iowa 1203.

Kan.—Haney v. Canfield, 106 P.2d 662, 152 Kan. 597.

9. Ind.—Tribune-Star Pub. Co. v. Fortwendle, App., 115 N.E.2d 215, rehearing denied 116 N.E.2d 548.—Grand Rapids Motor Exp. v. Crosbie, 69 N.E.2d 247, 117 Ind.App. 360.—Standard Oil Co. of Indiana v. Thomas, 13 N.E.2d 336, 105 Ind.App. 610.—New York, C. & St. L. Ry. Co. v. White, 192 N.E. 846, 99 Ind.App. 454.

Iowa.—Tobin v. Van Orsdol, 45 N.W. 2d 239, 241 Iowa 1331.—Corpus Juris cited in Fischer v. Hawkeye Stages, 37 N.W.2d 284, 287, 240 Iowa 1203.

Kan.—Osborn v. Wheat Growers' Mut. Hail Ins. Co., 263 P.2d 214, 175 Kan. 235.—Johnson-Sampson Const. Co. v. Casterline Grain & Seed, Inc., 252 P.2d 893, 173 Kan. 763.—In re Erwin's Estate, 228 P.2d 739, 170 Kan. 728.—Jelf v. Cottonwood Falls Gas Co., 178 P.2d 992, 162 Kan. 713.—Long v. Shafer, 174 P.2d 88, 162 Kan. 21.—Underhill v. Motes, 165 P.2d 218, 160 Kan. 679.—Schroeder v. Nelson, 139 P.2d 868, 157 Kan. 320.—Walker v. Colgate-Palmolive-Peet Co., 139 P.2d 157, 157 Kan. 170.—Dick's Transfer Co. v. Miller, 119 P.2d 454, 154 Kan. 574.—Morrow v. Bonebrake, 115 P.2d 585, 84 Kan. 724, 34 L.R.A.N.S., 1147.—Jilka v. National Mut. Cas. Co. of Tulsa, 106 P.2d 655, 152 Kan. 537.—Craig v. Sturgeon, 98 P.2d 139, 151 Kan. 208.—Marley v. Wichita Transp. Corp., 96 P.2d 877, 150 Kan. 818.

84 C.J. p 1181 note 16.

#### Strict construction

(1) As against a general verdict the answers of the jury to interrogatories must be strictly construed and cannot be broadened by inference.—Neuwelt v. Roush, 85 N.E.2d 506, 119 Ind.App. 481.

(2) Construction of special findings in general see *infra* § 569.

10. Ark.—Hobbs Western Co. v. Craig, 192 S.W.2d 116, 209 Ark. 630.

Cal.—Lowen v. Finnilla, 102 P.2d 520, 15 Cal.2d 502.

Ind.—Tribune-Star Pub. Co. v. Fortwendle, App., 115 N.E.2d 215, rehearing denied 116 N.E.2d 548.—Grand Rapids Motor Exp. v. Crosbie, 69 N.E.2d 247, 117 Ind.App. 360.—Oliver v. Coffman, 45 N.E.2d 351, 112 Ind.App. 507.—Drewrys Limited, U. S. A. v. Crippen, 44 N.E.2d 1006, 113 Ind.App. 120.—Inter State Motor Freight System v. Henry, 38 N.E.2d 909, 111 Ind.App. 179.—Shubert v. Thompson, 32 N.E.2d 120, 109 Ind.App. 34.—Standard Oil Co. of Indiana v. Thomas, 13 N.E.2d 336, 105 Ind.App. 610.—Chicago & E. I. Ry. Co. v. Gilbert, 194 N.E. 186, 100 Ind.App. 365.—Merchants' Reserve Life Ins. Co. v. Richardson, 118 N.E. 576, 66 Ind.App. 567.

Iowa.—Tobin v. Van Orsdol, 45 N.W.

2d 239, 241 Iowa 1331.—Corpus Juris cited in Fischer v. Hawkeye Stages, 37 N.W.2d 284, 287, 240 Iowa 1203.

Kan.—Osborn v. Wheat Growers' Mut. Hail Ins. Co., 263 P.2d 214, 175 Kan. 235.—Johnson-Sampson Const. Co. v. Casterline Grain & Seed, Inc., 252 P.2d 893, 173 Kan. 763.—Jelf v. Cottonwood Falls Gas Co., 178 P.2d 992, 162 Kan. 713.—Underhill v. Motes, 165 P.2d 218, 160 Kan. 679.—Corryell v. Edens, 150 P.2d 341, 158 Kan. 771.—Sams v. Commercial Standard Ins. Co., 139 P.2d 859, 157 Kan. 278.—Waldner v. Metropolitan Life Ins. Co., 87 P.2d 515, 149 Kan. 287.

Tex.—Townsend v. Young, Civ.App., 114 S.W.2d 296.

84 C.J. p 1182 note 17.

A general verdict imports a finding on all issues in case not inconsistent with special findings.—Franklin v. Kansas City Public Service Co., 265 P.2d 1031, 175 Kan. 626.—Tuggle v. Cathers, 254 P.2d 807, 174 Kan. 122.—Cain v. Steely, 252 P.2d 909, 173 Kan. 866.—Sheeley Baking Co. v. Suddarth, 241 P.2d 496, 172 Kan. 533.—Krey v. Schmidt, 240 P.2d 153, 172 Kan. 319.—Giltner v. Stephens, 200 P.2d 290, 166 Kan. 172.—Gabel v. Hanby, 193 P.2d 239, 165 Kan. 116.—Schroeder v. Nelson, 139 P.2d 868, 157 Kan. 320.—Jilka v. National Mut. Cas. Co. of Tulsa, 106 P.2d 655, 152 Kan. 537.—Craig v. Sturgeon, 98 P.2d 139, 151 Kan. 208.—Marley v. Wichita Transp. Corp., 96 P.2d 877, 150 Kan. 818.

Unless answers to interrogatories affirmatively show that all facts necessary to entitle plaintiff to recover do not exist, general verdict is in a sense a finding of all such facts.—Chicago & Erie R. Co. v. Patterson, 34 N.E.2d 960, 110 Ind.App. 94.

11. Ind.—Cleveland, C. & St. L. Ry. Co. v. Markle, 119 N.E. 371, 187 Ind. 553.—Merchants' Reserve Life Ins. Co. v. Richardson, 118 N.E. 576, 66 Ind.App. 567.

The court will assume the existence of any evidence that might properly have been introduced under the issues.—L. S. Ayres & Co. v. Hicks, 40 N.E.2d 334, rehearing denied 41 N.E.2d 195, 356, 220 Ind. 86.—Neuwelt v. Roush, 85 N.E.2d 506, 119 Ind.App. 481.—84 C.J. p 1182 note 18 [a].



issues formed thereby.<sup>12</sup> Ordinarily, the court will not weigh the evidence,<sup>13</sup> and, indeed, will not consider the evidence actually introduced.<sup>14</sup> However, it has been held that the special findings may be viewed and interpreted in the light of the testimony,<sup>15</sup> and that the court will consider, in aid of the general verdict, all the material facts which were provable under the issues<sup>16</sup> and will presume that they were proved, as discussed supra subdivision a of this section. No regard will be paid to answers of the jury with respect to matters not submitted to them<sup>17</sup> or improperly submitted,<sup>18</sup> to immaterial matters,<sup>19</sup> or to mere conclusions.<sup>20</sup>

### c. Remedies and Proceedings to Determine

Where the special findings or answers are irreconcilably inconsistent with the general verdict, a motion for

judgment on the special findings or answers, notwithstanding the general verdict, is the proper procedure. Such a motion must be seasonably made by the party to whom the general verdict is adverse, and it admits or concedes, for the purpose thereof, that the findings or answers are sustained by the evidence.

Where the special findings or answers to special interrogatories are so inconsistent with, and antagonistic to, the general verdict as to be absolutely irreconcilable with it so that a judgment may and must be rendered according to the answers or special findings notwithstanding the general verdict, as discussed supra § 563, a motion for judgment on the special findings or answers, notwithstanding the general verdict, is the proper procedure.<sup>21</sup> The motion may be made by and only by the party to whom the general verdict is adverse.<sup>22</sup> Such mo-

12. Cal.—*Corpus Juris* cited in *Lowen v. Finnilla*, 102 P.2d 520, 15 Cal.2d 502.

Conn.—*Belchak v. New York, N. H. & H. R. Co.*, 179 A. 95, 119 Conn. 630.

Ind.—*L. S. Ayres & Co. v. Hicks*, 40 N.E.2d 334, rehearing denied 41 N.E.2d 195, 356, 220 Ind. 86—*Township of Haddon School of Sullivan County v. Willis*, 199 N.E. 251, 209 Ind. 356—*Neuwelt v. Roush*, 85 N.E.2d 506, 119 Ind.App. 481—*Oliver v. Coffman*, 45 N.E.2d 351, 112 Ind.App. 507—*Inter State Motor Freight System v. Henry*, 38 N.E.2d 909, 111 Ind.App. 179.

Kan.—*Dye v. Rule*, 28 P.2d 758, 138 Kan. 508.

Ohio.—*Hamilton v. City of Cleveland*, 110 N.E.2d 50, 93 Ohio App. 93—*Robertson v. City Produce & Commission Co.*, 70 N.E.2d 778, 78 Ohio App. 471—*Smith v. Pennsylvania R. Co.*, App. 40 N.E.2d 445—*Gearhart v. Columbus Ry. Power & Light Co.*, 29 N.E.2d 621, 65 Ohio App. 225.

64 C.J. p 1182 note 19.

All interrogatories and answers thereto must be considered in determining whether answers to interrogatories are in irreconcilable conflict with general verdict.—*Drewrys Limited, U. S. A. v. Crippen*, 44 N.E.2d 1006, 113 Ind.App. 120—*Standard Oil Co. of Indiana v. Thomas*, 13 N.E.2d 336, 105 Ind.App. 610.

Special findings considered as whole  
Kan.—*Jeff v. Cottonwood Falls Gas Co.*, 178 P.2d 992, 162 Kan. 713—*Billings v. City of Wichita*, 62 P.2d 869, 144 Kan. 742.

Ohio.—*Reed v. Pearl Assur. Co.*, 80 N.E.2d 232, 82 Ohio App. 293.

13. Ohio.—*McNees v. Cincinnati St. Ry. Co.*, 89 N.E.2d 138, 152 Ohio St. 269—*Hamilton v. City of Cleveland*, 110 N.E.2d 50, 93 Ohio App. 93.

14. Conn.—*Belchak v. New York, N.*

*H. & H. R. Co.*, 179 A. 95, 119 Conn. 630.

Ind.—*L. S. Ayres & Co. v. Hicks*, 40 N.E.2d 334, rehearing denied 41 N.E.2d 195, 356, 220 Ind. 86—*Township of Haddon School of Sullivan County v. Willis*, 199 N.E. 251, 209 Ind. 356—*Neuwelt v. Roush*, 85 N.E.2d 506, 119 Ind.App. 481—*Indianapolis Water Co. v. Schoenemann*, 20 N.E.2d 671, 107 Ind.App. 308.

Ohio.—*Fox v. Conway*, 13 N.E.2d 124, 133 Ohio St. 273—*Robertson v. City Produce & Commission Co.*, 70 N.E.2d 778, 78 Ohio App. 471—*Welch v. Rollman & Sons Co.*, 44 N.E.2d 726, 70 Ohio App. 615—*Gearhart v. Columbus Ry. Power & Light Co.*, 29 N.E.2d 621, 65 Ohio App. 225.

64 C.J. p 1182 note 20—19 C.J. p 1210 note 26 [c] (2).

Transcript and abstract of testimony are not important in determining whether answers to special questions so conflict with verdict that it cannot stand.—*Dye v. Rule*, 28 P.2d 758, 138 Kan. 508.

15. Kan.—*Schroeder v. Nelson*, 139 P.2d 868, 157 Kan. 320—*Walker v. Colgate-Palmolive-Peet Co.*, 139 P.2d 157, 157 Kan. 170—*Craig v. Sturgeon*, 98 P.2d 139, 151 Kan. 208—*Marley v. Wichita Transp. Corp.*, 96 P.2d 877, 150 Kan. 818—*Armour Packing Co. v. Howe*, 75 P. 1014, 68 Kan. 663.

16. Ind.—*L. S. Ayres & Co. v. Hicks*, 40 N.E.2d 334, rehearing denied 41 N.E.2d 195, 356, 220 Ind. 86—*Township of Haddon School of Sullivan County v. Willis*, 199 N.E. 251, 209 Ind. 356—*Neuwelt v. Roush*, 85 N.E.2d 506, 119 Ind.App. 481—*Standard Oil Co. of Indiana v. Thomas*, 13 N.E.2d 336, 105 Ind.App. 610.

64 C.J. p 1182 note 21.

17. Kan.—*Balandran v. Compton*, 41 P.2d 720, 141 Kan. 321.

Wis.—*McGehee v. Gaar*, 100 N.W. 1072, 122 Wis. 630.

18. Ind.—*White v. Shirliff Indus-*

*tries, Inc.*, App., 112 N.E.2d 888—*Tucker Freight Lines v. Gross*, 33 N.E.2d 353, 109 Ind.App. 454.

Ohio.—*Reed v. Pearl Assur. Co.*, 80 N.E.2d 232, 82 Ohio App. 293.

Findings on matters improperly submitted as surplusage see infra § 565.

19. Tex.—*Pritchard v. Burnside*, Civ.App., 158 S.W.2d 586, affirmed *Pritchard v. Burnside*, 167 S.W.2d 159, 140 Tex. 232.

64 C.J. p 1182 note 24.

Any finding on issue which is not controlling may be disregarded by trial court, even though no motion is made for judgment notwithstanding verdict.—*Bewley Mills v. First Nat. Bank, Tex.Civ.App.*, 110 S.W.2d 201, error dismissed.

20. Ind.—*Tucker Freight Lines v. Gross*, 33 N.E.2d 353, 109 Ind.App. 454.

64 C.J. p 1183 note 25.

Conclusion and ultimate facts distinguished

If in answering an interrogatory, the jury is required not only to consider the facts, but also to apply some legal principle to such facts, or to measure them by some standard fixed by law in order to reach the conclusion required by the answer, the answer which results is a "legal conclusion" and not an "ultimate fact," and must be disregarded in ruling on motion for judgment on the answers to the interrogatories, notwithstanding general verdict.—*Tucker Freight Lines v. Gross*, supra.

21. Kan.—*Armourdale State Bank v. Homeland Ins. Co. of America*, 5 P.2d 786, 134 Kan. 245.

46 C.J. p 166 note 17.

22. Ind.—*Brown v. Searle*, 3 N.E. 871, 104 Ind. 218.

Ohio.—*Davis v. Turner*, 68 N.E. 819, 69 Ohio St. 101.

64 C.J. p 1178 note 96 [a] (9)—46 C.

J. p 166 note 17.

tion must be seasonably made.<sup>23</sup> If timely made, the motion is sufficient to preserve the question for future consideration of the court,<sup>24</sup> and it is not waived by the subsequent filing, within the time limited by statute, of a motion for a new trial.<sup>25</sup> The motion may be sufficient, although informal in some respects.<sup>26</sup> It admits or concedes, for the purpose thereof, that the findings or answers are sustained by evidence,<sup>27</sup> although such admission or concession does not bind the trial court.<sup>28</sup> When the motion is made after a motion to set aside the special findings or answers has been sustained in part, the court can consider only those special findings and answers which it has permitted to stand.<sup>29</sup>

23. Ind.—Sullivan & O'Brien v. Kennedy, 25 N.E.2d 267, 107 Ind.App. 457.

A motion made after the court has rendered judgment on the verdict is too late.—Sullivan & O'Brien v. Kennedy, supra.

24. Kan.—Armourdale State Bank v. Homeland Ins. Co. of America, 5 P. 2d 786, 134 Kan. 245.

25. Kan.—Hurt v. Stout, 181 P. 623, 105 Kan. 64.

**Ruling after ruling on new trial**  
Procedure followed by trial court in ruling on defendant's motion for judgment notwithstanding the general verdict, after having overruled defendant's motion for new trial, was not erroneous when rulings were made during the same term.—Rasing v. Healer, 142 P.2d 832, 157 Kan. 516.

26. Ind.—Chicago, I. & L. Ry. Co. v. Smith, 129 N.E. 49, 74 Ind.App. 336.

27. Kan.—Wingert v. Mouse, 255 P. 2d 1007, 174 Kan. 239—Tuggle v. Cathers, 254 P.2d 807, 174 Kan. 122—Stegman v. Professional & Business Men's Life Ins. Co., 252 P.2d 1074, 173 Kan. 744—Cain v. Steely, 252 P.2d 909, 173 Kan. 866—Bannery v. Lewis, 244 P.2d 202, 173 Kan. 59—Mehl v. Carter, 237 P.2d 240, 171 Kan. 597—Hubbard v. Allen, 215 P.2d 647, 168 Kan. 696—Brittain v. Wichita Forwarding Co., 211 P.2d 77, 168 Kan. 145—Lee v. Gas Service Co., 201 P.2d 1023, 166 Kan. 285—Long v. Shafer, 174 P.2d 88, 162 Kan. 21—Lord v. Hercules Powder Co., 167 P.2d 299, 161 Kan. 268—Riffel v. Dieter, 157 P.2d 831, 159 Kan. 628—Coryell v. Edens, 150 P.2d 341, 158 Kan. 771—Rasing v. Healer, 142 P.2d 832, 157 Kan. 516—Schroeder v. Nelson, 139 P.2d 868, 157 Kan. 320—Harshaw v. Kansas City Public Service Co., 139 P.2d 141, 157 Kan. 95—Taggart v. Yellow Cab Co. of Wichita, 131 P.2d 924, 156 Kan. 88—Sayeg v. Kansas

Gas & Elec. Co., 131 P.2d 648, 156 Kan. 65—Chapman v. Ticehurst, 110 P.2d 786, 153 Kan. 310—Montague v. Burgerhoff, 102 P.2d 1031, 152 Kan. 124—Eldredge v. Sargent, 86 P.2d 870, 150 Kan. 824—Webb v. City of Oswego, 86 P.2d 553, 149 Kan. 156—Witt v. Roper, 86 P.2d 549, 149 Kan. 184.

64 C.J. p 1178 note 96 [a] (6).

**Affirmation on part of moving party**  
Party's motion for judgment in his favor on verdict of jury constitutes an affirmation on his part that the findings of the jury are supported by the evidence.—Jones Fine Bread Co. v. Cook, Tex.Civ.App., 154 S.W.2d 889.  
28. Kan.—Witt v. Roper, 86 P.2d 549, 149 Kan. 184.  
29. Kan.—Walker v. Colgate-Palmolive-Peet Co., 139 P.2d 157, 157 Kan. 170.

30. Pa.—Rice v. Bauer, Com.Pl., 32 North.Co. 47.  
Vt.—Bailey v. Central Vermont Ry., 35 A.2d 365, 113 Vt. 439.

31. U.S.—Hartford Acc. & Indem. Co. v. Murphy, C.C.A.Tex., 158 F.2d 506.  
Ohio.—Miller v. Jackson, 107 N.E.2d 922, 92 Ohio App. 199.

64 C.J. p 1183 note 27.

32. Ind.—Indianapolis & Southern Motor Exp. v. Public Service Commission, 112 N.E.2d 864.

**If evidentiary facts are included in findings, no harm is done since evidentiary facts are mere surplusage.**—Indianapolis & Southern Motor Exp. v. Public Service Commission, supra.  
33. Tex.—Rhodes v. Livesay, Civ. App., 245 S.W. 738.

34. Ind.—White v. Shireliff Industries, Inc., App., 112 N.E.2d 888.  
Tex.—Alvey v. Goforth, Civ.App., 263 S.W.2d 313, reversed on other grounds Goforth v. Alvey, Sup., 271 S.W.2d 404—Jones v. Winter, Civ. App., 215 S.W.2d 654, error refused no reversible error—Elizey v. Allen, Civ.App., 172 S.W.2d 703, error dismissed—Consolidated Underwriters

## § 565. Surplusage

It is proper to disregard as surplusage certain matters contained in a special verdict or findings, such as conclusions of law, or findings of immaterial facts or on immaterial questions or issues.

It is proper to disregard as surplusage certain matters contained in a special verdict or in special findings or answers to interrogatories,<sup>30</sup> such as conclusions of law,<sup>31</sup> evidentiary facts,<sup>32</sup> a memorandum preceding the answers,<sup>33</sup> findings on, or answers to, issues or interrogatories improperly submitted,<sup>34</sup> a finding on a matter not submitted to the jury,<sup>35</sup> findings of matters outside the issues,<sup>36</sup> or findings of immaterial facts or on immaterial questions or issues.<sup>37</sup> Also, it has been held that a gen-

v. Vargas, Civ.App., 113 S.W.2d 922, error dismissed.  
64 C.J. p 1183 note 29.

**Question calling for more than one fact**

Interrogatories, each of which called for more than a single issuable fact were improperly submitted to jury and such interrogatories and the answers thereto must be treated as surplusage.—White v. Shireliff Industries, Inc., Ind.App., 112 N.E.2d 888.

**Cumulative issues**

In action for balance due for labor, in which trial court submitted issues whether plaintiff worked, whether defendant advanced him supplies, and whether plaintiff killed defendant's dog, additional issues submitting question of defendant's indebtedness and amount thereof, if objectionable, were merely cumulative and could be disregarded as surplusage.—Weatherby v. Guerrero, Tex.Civ.App., 82 S.W. 2d 1059.

35. Tex.—American Citizens' Labor & Protective Institution v. Bandy, Civ.App., 2 S.W.2d 977.

**Conclusion of law on matter not submitted**

In action to revise an award under Workmen's Compensation Law, where no issue regarding lump-sum award was submitted to jury, its report on the subject was a conclusion of law and not a finding of fact and would be regarded as surplusage.—Hartford Acc. & Indem. Co. v. Murphy, C.C.A. Tex., 158 F.2d 506.

36. Neb.—Hallett v. Ransom, 150 N. W. 1017, 97 Neb. 643.

37. Tex.—Mathis v. State, Civ.App., 253 S.W.2d 200, error refused no reversible error—Schneider v. Delavan, Civ.App., 118 S.W.2d 823, error dismissed.

37. Tex.—Schiller v. Rice, 246 S.W. 2d 607, 151 Tex. 116—American Mut. Liability Ins. Co. v. Parker, 191 S. W.2d 844, 144 Tex. 453—Mathis v. State, Civ.App., 258 S.W.2d 200, error refused no reversible error—Hill v. Leschber, Civ.App., 235 S.W.

eral verdict may be ignored where, without any instructions from the court, it was returned with answers to questions submitted.<sup>38</sup>

### § 566. Defects and Errors

A special verdict or finding containing a substantial defect or error is unavailable as a basis for judgment, but the fact that a particular special finding is defective or erroneous is not fatal where there are other proper and sufficient findings or there is a sufficient general verdict on which judgment may be based.

A special verdict or finding containing a substantial defect or error is unavailable as a basis for judgment.<sup>39</sup> However, the fact that a particular special finding is defective, improper, or erroneous is not fatal where there are other proper and sufficient findings<sup>40</sup> or there is a sufficient general verdict<sup>41</sup> on which the judgment may be based; but it is otherwise where judgment is rendered on an answer or finding which is ambiguous,<sup>42</sup> contrary to the instructions,<sup>43</sup> or so defective as to an im-

portant matter as not to authorize judgment thereon;<sup>44</sup> and the trial court is without power to disregard a finding on a material issue because it is defective in some particular.<sup>45</sup>

### § 567. Amendment or Correction

- a. In general
- b. Resubmission to jury

#### a. In General

The jury may change their special verdict, findings, or answers at any time before they are received; but, while the court may, on proper grounds, set aside a special verdict, finding, or answer, ordinarily, it may not reverse or change the findings of the jury, make additional or independent findings, unless the finding is contrary to the undisputed credible evidence or without support in the evidence so as to make the matter one of law, although the court may remedy defects which are clearly clerical or formal.

The jury may change their special verdict, findings, or answers at any time before they are received.<sup>46</sup> However, the oral reply of two jurors,

- 2d 238—American General Ins. Co. v. Williams, Civ.App., 222 S.W.2d 907, reversed on other grounds 227 S.W.2d 788, 149 Tex. 1—Jones v. Winter, Civ.App., 215 S.W.2d 654, error refused no reversible error—Brown v. O'Meara, Civ.App., 206 S.W.2d 122, error refused no reversible error—J. Weingarten, Inc. v. Carlisle, Civ.App., 172 S.W.2d 170, error refused—Southern Underwriters v. Mowery, Civ.App., 147 S.W.2d 834, error dismissed, judgment correct—Travelers Ins. Co. v. Noble, Civ.App., 129 S.W.2d 778, error dismissed, judgment correct—Schneider v. Delavan, Civ.App., 118 S.W.2d 823, error dismissed—Camden Fire Ins. Ass'n v. Carroll, Civ.App., 102 S.W.2d 1067, error dismissed—Miller v. Fenner, Beane & Ungerleider, Civ.App., 89 S.W.2d 506, error dismissed—Morris v. Jackson's Model Laundry, Civ.App., 81 S.W.2d 798, error refused.
- Wis.—Augustin v. Milwaukee Elec. Ry. & Transport Co., 49 N.W.2d 730, 259 Wis. 625.
- 64 C.J. p 1183 note 32.

A finding not required may be rejected as surplusage.—State v. Moses, 18 S.C. 366.

#### Answers immaterial under prior answers

Where jury answers one issue, or subdivision of an issue, and later answers other issues or subdivisions of issues, the answers to which are not called for by reason of particular answers made to preceding issue, or its subdivision, answers to the subsequent issues become immaterial.—Erwin v. Welborn, Tex.Civ.App., 207 S.W.2d 124, error refused no reversible error.

#### Findings held not immaterial

Tex.—J. Weingarten, Inc. v. Carlisle, Civ.App., 172 S.W.2d 170, error refused.

Where evidence was insufficient to support jury's answers to special issues, trial court could disregard such answers as being immaterial.—Texas Steel Co. v. Rockholt, Tex.Civ.App., 142 S.W.2d 842, error refused.

If as a matter of law defendant is free of negligence and jury has exonerated him but has also attributed to him some degree of causal negligence in their comparison of negligence, court should strike answer to question on comparison as surplusage.—Statz v. Pohl, 62 N.W.2d 556, 266 Wis. 23, rehearing denied 63 N.W.2d 711, 266 Wis. 23.

38. Tex.—Aycock v. Paraffine Oil Co., Civ.App., 210 S.W. 851.

39. Tex.—Rudolph v. Hanes, Civ. App., 111 S.W.2d 1189.

Amendment or correction see *infra* § 567.

Objections and waiver thereof see *infra* § 572.

#### Unanimous mistake

Answer which was result of unanimous mistake of jury was unavailable as basis for judgment.—Burchfield v. Tanner, Civ.App., 175 S.W.2d 756, reversed on other grounds 178 S.W.2d 681, 142 Tex. 404.

Answer in which "defendants" instead of word "plaintiffs" was used furnished no basis for a judgment for plaintiffs.—Rudolph v. Hanes, Tex. Civ.App., 111 S.W.2d 1189.

40. Cal.—Parsons v. Lühr, 270 P. 443, 205 Cal. 193.

64 C.J. p 1183 note 35.

41. Mass.—McManus v. Thing, 88 N. E. 442, 202 Mass. 11.

Pa.—Commonwealth v. Pfromm, 100 A. 276, 255 Pa. 485.

#### Failure to sign answer

Where there were issues other than negligence upon which jury was warranted in returning verdict for defendant, fact that one of jurors who signed general verdict for defendant did not sign negative answer to interrogatory as to whether defendant was negligent did not vitiate general verdict.—Simpson v. Springer, 55 N.E.2d 418, 143 Ohio St. 324, 155 A.L.R. 583.

42. N.C.—Wood v. Jones, 151 S.E. 732, 198 N.C. 356.

43. Kan.—Roome v. Sonora Petroleum Co., 208 P. 255, 111 Kan. 633.

44. Wis.—Schendel v. Chicago & N. W. Ry. Co., 133 N.W. 830, 147 Wis. 441.

45. Tex.—Driskill Hotel Co. v. Anderson, Civ.App., 19 S.W.2d 216.

Disregarding as surplusage matters contained in special verdict, findings, or answers generally and immaterial matters specifically see *supra* § 565.

46. Colo.—Saterlee v. Saterlee, 64 P. 189, 28 Colo. 290.

Wis.—Willette v. Rhineland Paper Co., 130 N.W. 853, 145 Wis. 537.

#### Correction of clerk's reading

Where clerk, in reading answers of jury to issues, read ambiguous answer to one issue and jury foreman said clerk had not read such answer correctly, and judge directed clerk to read further and clerk, after changing answer as read, finished reading of verdict, and jury said that answers read by clerk were jury's answers, and defendant did not object to and

other than the foreman, is ineffective to modify formal written answers of the jury.<sup>47</sup>

**By party.** A part of a finding of fact by a jury is not subject to a so-called remittitur by a party.<sup>48</sup>

**By court.** The court may, on proper grounds, set aside a special verdict, answer, or finding<sup>49</sup> when to do so does not affect the import of the answers or findings on other issues,<sup>50</sup> and it may grant a new trial because of irregularities and defects in the

verdict or findings, as discussed in New Trial §§ 63-67. Ordinarily, however, the court may not reverse<sup>51</sup> or change<sup>52</sup> the answers or findings of the jury, make additional<sup>53</sup> or independent<sup>54</sup> findings, or substitute its own answers or findings for those of the jury,<sup>55</sup> or at least it may not, without the consent or over the objection of the parties, change or amend a special verdict, answer or finding in matters of substance,<sup>56</sup> depending on the weight and

did not request poll of jury as authorized by court rule, action of court was not erroneous.—Great Atlantic & Pac. Tea Co. v. Garner, Tex.Civ.App., 170 S.W.2d 502, error refused.

47. Mass.—Burke v. Hodge, 97 N.E. 310, 211 Mass. 156, Ann.Cas.1913B 321.

48. Tex.—Gulf, C. & S. F. Ry. Co. v. Russell, Civ.App., 27 S.W.2d 608.

49. Kan.—Knox v. El Dorado Nat. Bank, 21 P.2d 353, 137 Kan. 500.

Wis.—Lelsch v. Tigerton Lumber Co., 27 N.W.2d 367, 250 Wis. 463.—Earl v. Napp, 261 N.W. 400, 218 Wis. 433.

54 C.J. p 1183 note 44. Setting aside verdict as infringement of right of trial by jury see Juries § 128 b.

**Grounds for setting aside and sufficiency thereof**

(1) A finding may not be set aside where proper grounds therefor do not exist.

Kan.—White v. Toombs, 192 P.2d 174, 164 Kan. 635.—Sams v. Commercial Standard Ins. Co., 139 P.2d 859, 157 Kan. 278.

Mass.—Wallace v. Ludwig, 198 N.E. 159, 292 Mass. 251.

Tex.—Kendall v. Johnson, Civ.App., 212 S.W.2d 232.

(2) However, a finding not sustained by the evidence may be stricken on such ground.

U.S.—Anchor Cas. Co. v. McGowan, C.C.A.Tex., 168 F.2d 322.

Ill.—Paul v. Garman, 24 N.E.2d 884, 310 Ill.App. 447.

Kan.—Slaton v. Union Elec. Ry. Co., 145 P.2d 456, 158 Kan. 132.

Tex.—Texas & P. Ry. Co. v. Day, 197 S.W.2d 332, 145 Tex. 277.

Wis.—Straub v. Schadeberg, 10 N.W. 2d 146, 243 Wis. 257, 147 A.L.R. 476.—Zoellner v. Kaiser, 296 N.W. 611, 237 Wis. 299.

(3) A finding may also be stricken as immaterial.—McCaffrey v. Minneapolis, St. P. & S. M. Ry. Co., 267 N.W. 326, 222 Wis. 311, mandate modified on other grounds 268 N.W. 872, 223 Wis. 311.

(4) In common-law damage actions where jury returns verdict for plaintiff and answers special questions, and defendant moves to set aside answers to some questions, on ground that they are not sustained by the

evidence, trial court must use its independent judgment and set aside such answers as it finds were not sustained by the evidence, and on such motion court is authorized to pass upon the credibility of witnesses and the weight to be given their testimony, and answers should be interpreted from the viewpoint that jury was finding specific facts from evidence, without considering principles of law.—Walker v. Colgate-Palmolive-Peet Co., 139 P.2d 157, 157 Kan. 170.

(5) If the evidence is sufficient to sustain the finding, the court cannot set it aside on the ground of the insufficiency of the evidence to sustain the finding.

Kan.—Federal Deposit Ins. Corp. v. Cloonan, 222 P.2d 553, 169 Kan. 735. Mass.—Wallace v. Ludwig, 198 N.E. 159, 292 Mass. 251.

(6) So, the court cannot set aside the jury's findings, if the evidence is sufficient to go to the jury.—Lutsenberger v. Milwaukee Elec. Ry. & Light Co., 271 N.W. 409, 234 Wis. 44.

(7) It has been declared that it is not enough that evidence, contrary to jury's finding, preponderates or has greater convincing power.—Bohner v. Great Atlantic & Pacific Tea Co., 248 N.W. 421, 211 Wis. 501.

(8) However, there is some authority for the view that a finding against the manifest weight of the evidence may be set aside.—Paul v. Garman, 24 N.E.2d 884, 310 Ill.App. 447.

**Effect of setting aside**

Where trial court, on motion, set aside jury's answers to special questions, such questions stood as though no answers had been made, or as though the questions had not been submitted.—Walker v. Colgate-Palmolive-Peet Co., 139 P.2d 157, 157 Kan. 170.

50. N.C.—Lee v. Rhodes, 52 S.E.2d 674, 230 N.C. 190.

51. N.C.—Sitterson v. Sitterson, 131 S.E. 641, 191 N.C. 319.

54 C.J. p 1183 note 46.

**On motion to set aside jury's answers to special questions, trial court was not authorized to make findings amounting to answers contrary to those made by jury.**—Walker v. Col-

gate-Palmolive-Peet Co., 139 P.2d 157, 157 Kan. 170.

52. Ill.—Gill v. Lewin, 53 N.E.2d 336, 321 Ill.App. 632.

N.C.—Lee v. Rhodes, 52 S.E.2d 674, 230 N.C. 190.

Pa.—Hartman v. Prudential Ins. Co. of America, Com.Pl., 35 Berks Co. 205, 57 York Leg.Rec. 161.

Tenn.—Tennessee R. Co. v. Kingale, 10 Tenn.App. 637.

Tex.—Jones Fine Bread Co. v. Cook, Civ.App., 154 S.W.2d 889.

Wis.—Myers v. Ihde, 22 N.W.2d 603, 248 Wis. 604.—Gumm v. Koepke, 278 N.W. 447, 227 Wis. 635.—Schmidt v. Leary, 252 N.W. 151, 213 Wis. 587.

54 C.J. p 1183 note 47.

**Infringement of right to jury trial by:**

Re-examination or review of facts tried by jury see Juries § 132. Change of jury's findings see Juries § 129.

**Trial judge may not remove an irreconcilable repugnancy in verdict by vacating a part thereof, at least where it constitutes an amendment of the verdict.**—Lee v. Rhodes, 52 S.E.2d 674, 230 N.C. 190.

53. Tex.—Ward v. Strickland, Civ. App., 177 S.W.2d 79, error refused.

54 C.J. p 1183 note 48.

**Questions unanswered by jury see supra §§ 550-560.**

54. Tex.—Steinberg v. Morgan, Civ. App., 300 S.W. 253.

54 C.J. p 1183 note 49.

55. N.C.—Page Supply Co. v. Horton, 17 S.E.2d 493, 230 N.C. 373.

Tex.—Jones Fine Bread Co. v. Cook, Civ.App., 154 S.W.2d 889.—Hanover Fire Ins. Co. v. Slaughter, Civ.App., 111 S.W.2d 362.

Wis.—Jensen v. Jensen, 278 N.W. 632, 225 Wis. 77.—Walk v. Boudheim, 271 N.W. 27, 223 Wis. 614.—McCaffrey v. Minneapolis, St. P. & S. M. Ry. Co., 267 N.W. 326, 223 Wis. 311, mandate modified on other grounds 268 N.W. 872, 223 Wis. 311.

—Earl v. Napp, 261 N.W. 400, 218 Wis. 433.

54 C.J. p 1183 note 50.

56. Wis.—Lofgren v. Preferred Acc. Ins. Co., 41 N.W.2d 599, 256 Wis. 492.—Myers v. Ihde, 22 N.W.2d 603, 248 Wis. 604.

54 C.J. p 1183 note 51.

sufficiency of the evidence,<sup>57</sup> unless the finding is contrary to the undisputed credible evidence or without support in the evidence so as to make the matter one of law,<sup>58</sup> or there are inconsistencies and con-

**Mistake in jury's interpretation of evidence, court's charge, or legal effect of answers to special issues submitted may not be corrected.**—Burchfield v. Tanner, 178 S.W.2d 681, 142 Tex. 404.

**Court cannot substitute "personal injuries" or "temporary disability" for "permanent injuries" found by jury.**—Lofgren v. Preferred Acc. Ins. Co., 41 N.W.2d 599, 256 Wis. 492.

57. Wis.—Thorpe v. Landsaw, 35 N.W.2d 307, 254 Wis. 1, followed in Wigchers v. Landsaw, 35 N.W.2d 457, 254 Wis. 1.—Gumm v. Koepke, 278 N.W. 447, 227 Wis. 635.  
64 C.J. p 1183 note 52.

#### **Sufficiency of evidence to sustain findings**

(1) If there is some or any credible evidence to sustain the jury's findings, the trial court is not permitted to change them.—Kemps v. Wendt, 30 N.W.2d 89, 251 Wis. 603.—Olson v. Elliott, 14 N.W.2d 1, 245 Wis. 279, rehearing denied 15 N.W.2d 37, 245 Wis. 279.—Stelzner v. Boehme, 285 N.W. 776, 231 Wis. 332.—Burant v. Studzinski, 282 N.W. 3, 230 Wis. 455, mandate modified on other grounds 282 N.W. 128, 230 Wis. 455.—Schlecker v. Krier, 261 N.W. 413, 218 Wis. 376.—Sandeen v. Willow River Power Co., 252 N.W. 706, 214 Wis. 166.—Bohner v. Great Atlantic & Pacific Tea Co., 248 N.W. 421, 211 Wis. 501.—Steubing v. L. G. Arnold, Inc., 246 N.W. 554, 210 Wis. 513.

(2) As more fully stated, if there is any credible evidence which in any reasonable view fairly admits of an inference that supports the jury's findings, the trial court may not change the jury's findings.—Rieschl v. Wisconsin Michigan Power Co., 294 N.W. 621, 226 Wis. 116.—Elkey v. Elkey, 290 N.W. 627, 284 Wis. 149, motion denied 292 N.W. 300, 234 Wis. 149.—Homerding v. Pospyschalla, 280 N.W. 409, 228 Wis. 606.—Gumm v. Koepke, 278 N.W. 447, 227 Wis. 635.—Duss v. Friess, 273 N.W. 547, 225 Wis. 406.

(3) The rule applies notwithstanding attempt by litigant in whose favor judgment on special verdict would be rendered to evade answering questions fully.—Schlecker v. Krier, 261 N.W. 413, 218 Wis. 376.

(4) The evidence in a variety of cases has been held sufficient to sustain the findings of the jury, precluding change by the court.

Tex.—Robertson v. Snodgrass, Civ. App., 137 S.W.2d 146.  
Wis.—Netzer v. Belonkia, 34 N.W.2d 680, 253 Wis. 489.—Hall v. Walton, 33 N.W.2d 314, 253 Wis. 138.—Mahoney v. Thill, 6 N.W.2d 239, 241

Wis. 359.—Burton v. Brown, 263 N.W. 573, 219 Wis. 520.

#### **Evidence presenting jury question**

(1) Where the evidence presents a question for the jury on a particular issue, the court may not change the jury's finding on such issue.—Myers v. Ihde, 22 N.W.2d 603, 248 Wis. 604.—Lutzenberger v. Milwaukee Elec. Ry. & Light Co., 271 N.W. 409, 224 Wis. 44.—Earl v. Napp, 261 N.W. 400, 218 Wis. 433.—Buckley v. Brooks, 258 N.W. 614, 217 Wis. 287.

(2) If evidence is conflicting or if inferences to be drawn from the credible evidence are doubtful and uncertain, and there is any credible evidence, which under any reasonable view will support or admit of an inference either for or against the claim or contention of any party, then the rule that the proper inference to be drawn therefrom is a question for the jury, should be firmly adhered to, and court should not assume to answer such question by substituting another answer after the verdict is returned.—Schoenberg v. Berger, 42 N.W.2d 466, 257 Wis. 100.—Rieschl v. Wisconsin Michigan Power Co., 294 N.W. 621, 226 Wis. 116.—Webster v. Krembs, 282 N.W. 564, 230 Wis. 252.—Jensen v. Jensen, 279 N.W. 628, 228 Wis. 77.—Walk v. Boudheim, 271 N.W. 27, 223 Wis. 514.—McCaffrey v. Minneapolis, St. P. & S. M. Ry. Co., 267 N.W. 326, 222 Wis. 311, mandate modified on other grounds 268 N.W. 872, 222 Wis. 311.—Heaney v. Chicago & N. W. Ry. Co., 252 N.W. 173, 213 Wis. 670.

#### **Finding against preponderance of evidence**

(1) Fact that trial court considered jury's finding against the preponderance of the evidence would not warrant changing the finding.—Webster v. Krembs, 282 N.W. 564, 230 Wis. 252.—Bohner v. Great Atlantic & Pacific Tea Co., 248 N.W. 421, 211 Wis. 501.

(2) Even though the finding is considered against the clear preponderance of the evidence, the court is not required to change the finding.—Thorpe v. Landsaw, 35 N.W.2d 307, 254 Wis. 1, followed in Wigchers v. Landsaw, 35 N.W.2d 457, 254 Wis. 1.

58. U.S.—Gary v. Consolidated Forwarding Co., C.C.A.Wis., 115 F.2d 632.

Tex.—Beckner v. Barrett, Civ.App., 81 S.W.2d 719, error dismissed.  
Wis.—Statz v. Pohl, 63 N.W.2d 711, 266 Wis. 23.—Costello v. Schult, 61 N.W.2d 296, 265 Wis. 243.—Rude v. Lehman, 67 N.W.2d 393, 263 Wis. 362.—Strnad v. Co-operative Ins. Mutual, 40 N.W.2d 552, 256 Wis. 261.—Thorpe v. Landsaw, 35 N.W.2d 307, 254 Wis. 1, followed in Wig-

chers v. Landsaw, 35 N.W.2d 457, 254 Wis. 1.—Uren v. Purity Dairy Co., 32 N.W.2d 615, 252 Wis. 446, rehearing denied 33 N.W.2d 213, 252 Wis. 446.—Baars v. Benda, 23 N.W.2d 477, 249 Wis. 65.—Saley v. Hardware Mut. Cas. Co., 18 N.W.2d 342, 246 Wis. 647.—Post v. Thomas, 3 N.W.2d 344, 240 Wis. 519.—Fay v. City of Green Bay, 1 N.W.2d 767, 240 Wis. 36.—Borkenhagen v. Baertschl, 300 N.W. 742, 239 Wis. 21.—Ready v. Hafeman, 300 N.W. 480, 239 Wis. 1.—Raddant v. Labutke, 289 N.W. 659, 233 Wis. 361.—Pelouquin v. Hibner, 285 N.W. 380, 231 Wis. 77.—Martinson v. Polk County, 279 N.W. 61, 227 Wis. 447.—Grasser v. Anderson, 273 N.W. 63, 224 Wis. 654.—Maltby v. Thiel, 272 N.W. 848, 224 Wis. 648.

64 C.J. p 1184 note 53.

#### **Duty of trial court to change**

(1) The trial court has a duty to change special findings of the jury not supported by the evidence.—Lurie v. Nickel, 289 N.W. 686, 233 Wis. 420.—Baird v. Edmonds, 276 N.W. 306, 226 Wis. 209.

(2) However, failure of the court to change the jury's finding on an issue not submitted has been held to be immaterial.—Brennan v. Chicago, M. St. P. & P. R. Co., 265 N.W. 207, 220 Wis. 316.

**Where plaintiff is entitled to recover as matter of law, irrespective of jury's answer to certain issues, judgment will not be upset because judge struck out answer to issues and substituted answer of his own.**—Bundy v. Sutton, 177 S.E. 420, 207 N.C. 422.

#### **Finding "incredible"**

Evidence of motorist who survived collision with automobile of deceased that deceased had invaded his side of the highway was in such direct conflict with the established physical facts that it was "incredible" and where there was no other evidence to support the finding of the jury that deceased was negligent, trial court should have granted the motion to change answers to questions to jury to deny a recovery to the surviving motorist.—Strnad v. Co-operative Ins. Mutual, 40 N.W.2d 552, 256 Wis. 261.

#### **Apportionment of negligence**

(1) While courts are reluctant to change jury's determination on apportionment of negligence, they do so where court considers as a matter of law, that plaintiff's negligence is as great as that of defendant, but where jury has not so apportioned the negligence.

U.S.—Cherney v. Holmes, C.A.Wis., 185 F.2d 718.  
Wis.—Post v. Thomas, 3 N.W.2d 344, 240 Wis. 519.

flucts in material respects in the jury's answers or findings.<sup>59</sup> However, where the intention of the jury is clear, the court may amend a special verdict or finding so as to remedy or correct a defect or error which is manifestly clerical or formal or the result of mistake or inadvertence;<sup>60</sup> it may compute and insert, during the term at which the special verdict is returned, the amount of damages to which plaintiff is entitled under the verdict;<sup>61</sup> and it may make findings on an issue not submitted, and not requested to be submitted, to the jury.<sup>62</sup>

*Procedure and manner of setting aside, amending, and correcting.* Statutes governing the manner of correcting a defective verdict must be observed.<sup>63</sup> The trial court cannot set aside a special verdict or finding summarily,<sup>64</sup> but can only do so on strict compliance with all of the conditions required.<sup>65</sup> Where proper grounds therefor exist, the court may amend or correct the special verdict or findings of

the jury on proper motion by the party affected.<sup>66</sup> A statute limiting the time for filing a motion to set aside a verdict and grant a new trial does not limit the time within which the court may in a proper case substitute its findings for those of the jury.<sup>67</sup>

### b. Resubmission to Jury

In some instances issues, questions, or interrogatories may be resubmitted and the jury sent out again under apt instructions to remedy or correct defects or errors in their original answers, findings, or verdict, but the authority to adopt this procedure is very limited, and it should not be adopted where there is no reason therefor.

In some instances issues, questions, or interrogatories may be resubmitted and the jury sent out again under apt instructions to remedy or correct defects or errors in their original answers, findings, or verdict.<sup>68</sup> This is true where the special verdict is informal;<sup>69</sup> the jury have not answered certain questions or interrogatories, as discussed supra § 560; or where they have given answers

(2) The evidence in a number of cases has been held to authorize or require changing the jury's answer or finding on the apportionment of negligence.—*Carr v. Chicago & N. W. R. Co.*, 43 N.W.2d 461, 257 Wis. 315.—*Schlewitz v. London & Lancashire Indem. Co. of America*, 38 N.W.2d 700, 255 Wis. 296.—*Carley v. Jewett*, 34 N.W.2d 779, 253 Wis. 650.—*Lurie v. Nickel*, 289 N.W. 686, 233 Wis. 420.—*Huehner v. Fischer*, 288 N.W. 254, 232 Wis. 600.—*Bodden v. John H. Dettler Coffee Co.*, 261 N.W. 209, 218 Wis. 451.

(3) However, where jury found both parties causally negligent in designated respects and proportion of negligence attributable to plaintiff to be a certain per cent, action of trial court in changing jury's answers so as to find plaintiff causally negligent contrary to jury's answer, and increasing proportion of negligence attributable to plaintiff has been held erroneous where jury was not properly instructed as to the manner in which to determine the amount of causal negligence attributable to each party.—*Volkman v. Fidelity & Cas. Co. of N. Y.*, 22 N.W.2d 660, 248 Wis. 615.

59. Wis.—*Brown v. Erb*, 46 N.W.2d 329, 258 Wis. 444.  
Inconsistent findings generally see supra § 562.

Findings inconsistent with general verdict see supra §§ 563, 564.

60. U.S.—*Continental Cas. Co. v. Little, C.C.A.Tex.*, 152 F.2d 728.

Wis.—*Kuecker v. Paasch*, 51 N.W.2d 516, 260 Wis. 520.  
64 C.J. p 1184 note 54.

**Jury's unanimous mistake in nature of clerical error in announcing or**

transcribing verdict may be corrected.—*Burchfield v. Tanner*, 178 S.W.2d 681, 142 Tex. 404.

61. Ind.—*Ellison v. Branstrator*, 54 N.E. 433, 153 Ind. 146.  
64 C.J. p 1184 note 55.

62. Tex.—*Garrett v. Dodson*, Civ. App., 139 S.W. 675.  
64 C.J. p 1184 note 56.

63. **Statute held applicable to special findings**

Statutes relating to poll of jury and further deliberation and with manner of correcting defective verdict apply with equal force to special findings of fact.—*Creighton v. Klehl*, 19 N.E.2d 653, 60 Ohio App. 86.

64. Tex.—*St. Louis, B. & M. Ry. Co. v. Huff*, 66 S.W.2d 373.

65. Tex.—*St. Louis, B. & M. Ry. Co. v. Huff*, supra.

66. **Due consideration of motion**

Where there were inconsistencies and conflicts in material respects in jury's answers to special interrogatories, there was occasion for due consideration and an appropriate and timely judicial determination by trial court of issues raised by plaintiff's motion for changes in jury's answers.—*Brown v. Erb*, 46 N.W.2d 329, 258 Wis. 444.

**Amendment of motion**

Denial of defendants' application for permission to amend motions after verdict for purpose of requesting court to change answers to certain questions of special verdict was discretionary, where original motions after verdict and memorandum decision of trial court plainly indicated that matters sought to be raised by defendants had been fully considered

and disposed of.—*Potter v. Potter*, 272 N.W. 34, 224 Wis. 251.

67. Wis.—*Webster v. Krembs*, 282 N.W. 564, 230 Wis. 252.

68. N.M.—*Stambaugh v. Hayes*, 103 P.2d 640, 44 N.M. 443.  
N.C.—*Livingston v. Livingston*, 197 S.E. 597, 213 N.C. 797.  
Ohio—*Corpus Juris quoted in Ello v. Akron Transp. Co.*, 71 N.E.2d 707, 711, 147 Ohio St. 363.

Tex.—*Traders & General Ins. Co. v. Carlile*, 161 S.W.2d 484, 138 Tex. 523, answer to certified question conformed to *Traders & General Ins. Co. v. Carlisle*, Civ.App., 162 S.W.2d 751.—*Texas Emp. Ins. Ass'n v. Wells*, Civ.App., 207 S.W.2d 693, refused no reversible error.—*Traders & General Ins. Co. v. Collins*, Civ.App., 179 S.W.2d 525, error refused.

64 C.J. p 1184 note 59.  
Ordering new trial of part of issues see New Trial § 11.

**Rule against additional instructions not violated**

Oral statement of court in response to question by foreman as to whether jury might change its answers to other issues than those relating to conflict pointed out in written instructions, to effect that it would be permissible for them to change the answer to any of the issues they might desire to change, did not give jury any additional instructions on law of the case in violation of rules.—*Traders & General Ins. Co. v. Collins*, supra.

69. Tex.—*Hirsch v. Jones*, Civ.App., 42 S.W. 604.  
64 C.J. p 1184 note 60.

which are insufficient,<sup>70</sup> incomplete,<sup>71</sup> incorrect,<sup>72</sup> improper,<sup>73</sup> irregular,<sup>74</sup> evasive,<sup>75</sup> indefinite, uncertain,<sup>76</sup> or not sufficiently clear,<sup>77</sup> contradictory,<sup>78</sup> show a misconception of the questions,<sup>79</sup> or are unresponsive.<sup>80</sup> However, the authority to adopt this procedure is very limited;<sup>81</sup> it should not be adopted where there is no reason therefor;<sup>82</sup> and the jury should not be allowed or required to reverse their findings on vital issues of fact<sup>83</sup> depending on the evidence.<sup>84</sup> In some cases a reconsideration of the answer to one issue may necessitate the

reconsideration of the answer to another issue.<sup>85</sup>

*Clerk of court* is without authority to direct the jury to retire and reconsider the case.<sup>86</sup>

*Motion.* The court may, either on the motion of a party<sup>87</sup> or on its own motion,<sup>88</sup> resubmit interrogatories to remedy or correct defects in the original answers, findings, or verdict.

*Before or after separation or discharge of jury.* Where a resubmission of interrogatories is proper, it may be made before the jury have separated<sup>89</sup>

70. Ga.—Bailey v. Williams, 118 S.E. 354, 155 Ga. 806.  
Ind.—Bowman v. Phillips, 47 Ind. 341.

71. Kan.—Snyder v. Eriksen, 198 P. 1080, 109 Kan. 314.  
64 C.J. p 1184 note 63.

72. **Answer mistakenly written contrary to agreed answer**  
N.M.—Stambaugh v. Hayes, 103 P.2d 640, 44 N.M. 443.

73. Ind.—Bowman v. Phillips, 47 Ind. 341.  
Kan.—Atchison, etc., R. Co. v. Cone, 15 P. 499, 37 Kan. 567.

74. Ind.—Bowman v. Phillips, 47 Ind. 341.

75. Kan.—Stewart v. Henningsen Produce Co., 129 P. 181, 88 Kan. 521, 50 L.R.A.N.S., 111, Ann.Cas. 1914B 701.

64 C.J. p 1184 note 66.

76. Kan.—Harshaw v. Kansas City Public Service Co., 139 P.2d 141, 157 Kan. 95.

N.C.—Queen v. DeHart, 184 S.E. 7, 209 N.C. 414.

Tex.—Traders & General Ins. Co. v. Davis, Civ.App., 209 S.W.2d 963, refused no reversible error.

64 C.J. p 1184 note 68.

**Question not required; discretion of court**

Question of fact, not requested by either party, was not required to be submitted to jury, and it was within discretion of court whether to send jury back to make answer more definite and certain, or to receive and accept answer to special question, or dispense therewith.—Ramsay Oil Co. v. Burbage, 46 P.2d 538, 172 Okl. 573.

77. Kan.—McPheeters v. Birk, 30 P. 127, 48 Kan. 784.

78. Tex.—Mayo v. Ft. Worth & D. C. Ry. Co., Civ.App., 234 S.W. 937, 64 C.J. p 1184 note 69.

Resubmission where answers or findings are conflicting with:  
Each other see supra § 562.

General verdict see supra §§ 563, 564.

79. Kan.—Farmer v. Central Mut. Ins. Co. of Chicago, Ill., 67 P.2d 511, 145 Kan. 951.

64 C.J. p 1184 note 71.

**Answers not called for by instructions**

Where jury answered several questions which verdict directed them to answer only in case of affirmative answer to another question which jury answered in negative, court's sending jury back after calling attention to form of verdict and instructing jury to read verdict and see whether any correction was desired held not error.—Jackson v. Robert L. Reisinger & Co., 263 N.W. 641, 219 Wis. 535.

**After one juror during polling of jury** stated that he did not exactly understand question submitting special issue, action of court in allowing jury to retire and return a corrected answer held not error.—Farmer v. Central Mut. Ins. Co. of Chicago, Ill., 67 P.2d 511, 145 Kan. 951.

80. Kan.—Grubb v. Sargent, 230 P. 1043, 117 Kan. 233.  
64 C.J. p 1184 note 67.

81. Ohio.—**Corpus Juris** quoted in Elio v. Akron Transp. Co., 71 N.E. 2d 707, 711, 147 Ohio St. 363.  
Tex.—Hughes-Buile Co. v. Vasquez, Civ.App., 202 S.W. 525.

82. N.C.—Alston v. Alston, 126 S.E. 737, 189 N.C. 299.

Ohio.—**Corpus Juris** quoted in Elio v. Akron Transp. Co., 71 N.E.2d 707, 711, 147 Ohio St. 363.

64 C.J. p 1184 note 73.

**Retest obtainable from answer**

(1) A trial court has no authority to require a jury to revise or reframe their answer to an interrogatory where the intention of the jury may be obtained from the answer given, since such answers are to be construed liberally.—Bradley v. Mansfield Rapid Transit, 93 N.E.2d 672, 154 Ohio St. 154.—Elio v. Akron Transp. Co., 71 N.E.2d 707, 147 Ohio St. 363.

(2) So, where a jury returns a general verdict for one of the parties and answers to special interrogatories submitted to it, and where such answers, although inconsistent with the general verdict, when liberally construed, show the intention of the jury, it is error for trial court to authorize jury to revise or reframe their answers or to indicate to the

jury the answers to be returned.—Bradley v. Mansfield Rapid Transit, supra.

83. Ohio.—**Corpus Juris** quoted in Elio v. Akron Transp. Co., 71 N.E. 2d 707, 711, 147 Ohio St. 363.

Tex.—Hughes-Buile Co. v. Vasquez, Civ.App., 202 S.W. 525.

**New verdict not permitted**

Where there has been a mistake in an answer to an issue, so that it does not express the actual agreement of the jury, judge may allow them to correct it, but it must be the correction of verdict rendered, and not the rendering of a new verdict simply because the jury were not satisfied with what they had done.—Livingston v. Livingston, 197 S.E. 597, 213 N.C. 797.

84. Ind.—Jackson County v. Nichols, 88 N.E. 526, 139 Ind. 611.  
64 C.J. p 1185 note 75.

85. N.C.—Wood v. Wood, 120 S.E. 194, 186 N.C. 559.

**Issues not resubmitted held not to affect issues resubmitted.**—Texas Emp. Ins. Ass'n v. Wells, Tex.Civ. App., 207 S.W.2d 693, refused no reversible error.

86. N.C.—Cullifer v. Atlantic Coast Line R. Co., 84 S.E. 400, 168 N.C. 309.

87. Ind.—Indiana Union Traction Co. v. Swafford, 100 N.E. 840, 179 Ind. 279.

64 C.J. p 1185 note 78.

88. Kan.—Snyder v. Eriksen, 198 P. 1080, 109 Kan. 314.

Tex.—Traders & General Ins. Co. v. Carlisle, 161 S.W.2d 484, 138 Tex. 523, answer to certified question conformed to Traders & General Ins. Co. v. Carlisle, Civ.App., 162 S.W.2d 761.

**Court in permitting jury, at their request, to retire and correct mistakenly written affirmative answer to interrogatory which they had agreed to answer in negative did not err.**—Stambaugh v. Hayes, 103 P.2d 640, 44 N.M. 443.

89. Ind.—Metropolitan Life Ins. Co. v. Johnson, 94 N.E. 785, 49 Ind. App. 233.

or even after they have separated,<sup>90</sup> provided nothing has occurred between their separation and re-assembling to disturb their impartiality and fair-mindedness.<sup>91</sup> It has been held that a resubmission may not be made after the jury have been finally discharged and released from their oaths;<sup>92</sup> but it has also been held otherwise where the discharge was almost instantly recalled and the sole purpose of the resubmission is to require the jury to reduce to writing the answers or special verdict on which they have previously agreed.<sup>93</sup>

### § 568. Venire de Novo

At common law a venire de novo is sometimes granted after a special verdict, but always for some cause apparent on the record, as where the special verdict is imperfect by reason of some uncertainty or ambiguity or by finding less than the whole matter put in issue, and the common-law rules may be rendered inapplicable by reason of statutory provisions.

At common law a venire de novo is sometimes granted after special verdict,<sup>94</sup> but always for some cause apparent on the record,<sup>95</sup> as where the special verdict is imperfect by reason of some uncertainty or ambiguity,<sup>96</sup> or by finding less than the whole matter put in issue,<sup>97</sup> or by not assessing damages,<sup>98</sup> or where by reason of some other unamendable defect, judgment cannot be entered.<sup>99</sup> A motion for a venire de novo cannot be based on the refusal of the trial court to allow the complaint

to be amended to conform to the evidence,<sup>1</sup> or the refusal to direct a special verdict,<sup>2</sup> and it has been held that the fact that a challenge to the array is improperly denied will not of itself entitle a party to a venire de novo.<sup>3</sup> Indeed, it has been held that a venire de novo may properly be granted only where there is some defect in the special verdict or finding itself,<sup>4</sup> and it has been declared that the office of a motion for a venire de novo is to test the sufficiency of the special finding to sustain the conclusions of law, or of the special verdict to sustain a judgment,<sup>5</sup> and not to determine whether or not the findings are within the issues.<sup>6</sup> The common-law rule authorizing a venire de novo where less than the whole matter put in issue is found may be rendered inapplicable by reason of statutory provisions under which the failure to find expressly on an issue is equivalent to a negative finding,<sup>7</sup> and thereunder if mistakes have been made by finding less than all the matters in issue, or in finding facts to exist that were not proved, the remedy is not by venire de novo,<sup>8</sup> but by motion for a new trial, as discussed in New Trial § 64. Where, however, a special verdict or finding shows that the evidentiary facts, and not the ultimate facts, have been found, and it appears that such evidentiary facts are sufficient to establish the ultimate facts alleged in the complaint it has been held that a venire de novo should be ordered.<sup>9</sup>

90. Iowa.—Roberts v. Roberts, 59 N.

W. 25, 91 Iowa 228.

64 C.J. p 1185 note 83.

91. N.H.—Winslow v. Smith, 65 A.

108, 74 N.H. 65.

64 C.J. p 1185 note 84.

92. Mont.—Poor v. Madison River

Power Co., 108 P. 646, 41 Mont. 236.

N.C.—Livingston v. Livingston, 197

S.E. 597, 213 N.C. 797.

Action of court amounting to setting aside verdict

Where jury answered "yes" to the submitted issue thinking such answer was in favor of defendants, but the answer found for plaintiff, jury was discharged, and when court shortly thereafter was informed of jury's misunderstanding, jury members were recalled and their answer changed to "no" and judgment was entered on the jury's second answer. action of court amounted merely to setting aside the verdict and granting a new trial.—Livingston v. Livingston, supra.

93. N.Y.—Ripley v. Fraser, 134 N.Y.

S. 259, 149 App.Div. 399, rearrg-

ment denied 135 N.Y.S. 1139, 151

App.Div. 896.

94. Ala.—Sewall v. Glidden, 1 Ala.

52.

Pa.—Butcher v. Metts, 1 Miles 233.

95. Ala.—Sewall v. Glidden, 1 Ala.

52.

Pa.—Butcher v. Metts, 1 Miles 233.

96. Ind.—Maxwell v. Wright, 67 N.E.

267, 160 Ind. 515—Bossek v.

Cramer, 18 Ind. 44.

64 C.J. p 1185 note 89.

Findings held sufficiently certain,

definite, and consistent to support

judgment and to require overruling

motion for venire de novo.—In re

Lowe's Estate, 70 N.E.2d 187, 117

Ind.App. 554.

97. Ind.—Maxwell v. Wright, 67 N.E.

267, 160 Ind. 515—Bossek v.

Cramer, 18 Ind. 44.

46 C.J. p 163 note 90 [§] (1).

Where it appears from the face of

the verdict that the jury ought to

have found other facts, a venire de

novo will be granted.—Sewall v. Glid-

den, 1 Ala. 52.

98. Ind.—Maxwell v. Wright, 67 N.E.

267, 160 Ind. 515—Bossek v.

Cramer, 18 Ind. 44.

99. N.J.—Albro Clem Elevator Co.

v. Director General of Railroads,

112 A. 885, 95 N.J.Law 342.

Unless the verdict is so defective

that no judgment can be entered, a

motion for a venire de novo is not

well taken.—Hauschild v. Roth, 104

N.E. 11, 181 Ind. 18.

1. Ind.—Sanford Tool & Fork Co. v.

Mullen, 27 N.E. 448, 1 Ind.App. 204.

2. Ind.—Sanford Tool & Fork Co. v.

Mullen, supra.

3. N.C.—Reed v. Madison County,

195 S.E. 620, 213 N.C. 145.

In absence of showing of prejudice,

the fact that a challenge to the ar-

ray is improperly denied does not en-

title a party to a venire de novo, es-

pecially where no member of original

panel served and jury was composed

of talesmen.—Reed v. Madison Coun-

ty, supra.

4. Ind.—Sanford Tool & Fork Co. v.

Mullen, 27 N.E. 448, 1 Ind.App. 204.

5. Ind.—Sheeks v. State, 60 N.E. 142,

156 Ind. 508.

6. Ind.—Sheeks v. State, supra.

7. Ind.—Maxwell v. Wright, 67 N.E.

267, 160 Ind. 515.

8. Ind.—Kerfoot v. Kessener, 84 N.

E.2d 190, 227 Ind. 58—Maxwell v.

Wright, 67 N.E. 267, 160 Ind. 515—

In re Lowe's Estate, 70 N.E.2d 187,

117 Ind.App. 554.

46 C.J. p 163 note 90 [§] (2).

9. Ind.—Maxwell v. Wright, 67 N.E.

267, 160 Ind. 515.



## § 569. Construction and Operation

- a. In general
- b. In connection with other matters

## a. In General

Special verdicts, findings, or answers to interrogatories are to be construed liberally with a view to ascertaining the intention of the jury, and the clear, natural, and necessary meaning of the language used will govern.

Special verdicts, findings or answers to interrogatories are generally to be construed liberally<sup>10</sup> with a view to ascertaining the intention of the jury,<sup>11</sup> however unskillfully such meaning may be expressed;<sup>12</sup> but, as discussed supra § 564, no inference, presumption, or intendment will be in-

dulged in aid of special findings or answers to special interrogatories as against the general verdict. Substance, rather than form, is to be considered;<sup>13</sup> and the clear,<sup>14</sup> natural<sup>15</sup> and necessary meaning of the language used will govern;<sup>16</sup> but where more than one reasonable construction is possible, the trial court may adopt the one it deems proper<sup>17</sup> and most cogent.<sup>18</sup> It must be borne in mind that the jury may employ a term in its common, rather than its technically correct, sense;<sup>19</sup> and the findings should be held to have the meaning that the average juror would understand them to have.<sup>20</sup>

While a finding of a certain matter includes all

10. Cal.—Davis v. Stulman, 184 P. 2d 787, 72 Cal.App.2d 255.

Kan.—Henderson v. Deckert, 182 P. 2d 88, 180 Kan. 386—Coryell v. Edens, 150 P.2d 341, 158 Kan. 771.

Wis.—Voight v. Milwaukee County, 149 N.W. 392, 158 Wis. 666.

84 C.J. § 1185 note 91.

Harmonizing special findings see supra § 562.

Courts look with favor on the findings of the jury.—Liberty Mut. Ins. Co. v. Murphy, Tex.Civ.App., 208 S.W.2d 898.

11. Kan.—Sheeley Baking Co. v. Sudarth, 241 P.2d 496, 172 Kan. 633—Morrison v. Hawkeye Cas. Co., 212 P.2d 633, 168 Kan. 303—Baker v. Western Cas. & Sur. Co., 190 P.2d 850, 164 Kan. 376—Corpus Juris cited in Coryell v. Edens, 150 P.2d 341, 158 Kan. 771—Corpus Juris cited in Mahan v. Kansas City Public Service Co., 146 P.2d 383, 385, 158 Kan. 206.

28 C.J. § 568 note 98—33 C.J. § 143 note 49—37 C.J. § 655 note 4—84 C.J. § 1185 note 92.

## Findings construed

Ind.—New York Cent. R. Co. v. De Leury, 192 N.E. 125, 100 Ind.App. 140.

Kan.—Davison, by Wilson v. Martin K. Eby Const. Co., 241 P.2d 639, 173 Kan. 411—Baker v. Western Cas. & Sur. Co., 190 P.2d 850, 164 Kan. 376.

Tex.—Traders & General Ins. Co. v. Davis, Civ.App., 142 S.W.2d 826, error dismissed, judgment correct—Long v. Metcalf, Civ.App., 134 S.W.2d 485, error dismissed, judgment correct—Texas Employers Ins. Ass'n v. Hitt, Civ.App., 125 S.W.2d 923—Traders & General Ins. Co. v. Patterson, Civ.App., 123 S.W.2d 766, error dismissed—Berwald v. Turner, Civ.App., 52 S.W. 2d 112, error refused.

12. Kan.—Morrison v. Hawkeye Cas. Co., 212 P.2d 633, 168 Kan. 303—

Coryell v. Edens, 150 P.2d 341, 158 Kan. 771.

13. Wis.—Milwaukee Trust Co. v. City of Milwaukee, 138 N.W. 707, 181 Wis. 224.

Wicety in use of terms is not required of the jury in answering interrogatories as long as the court is able to gather the jury's intent from its answer.—Ello v. Akron Transp. Co., 71 N.E.2d 707, 147 Ohio St. 362.

14. Tex.—Rice v. Thompson, Civ. App., 239 S.W.2d 137, refused no reversible error.

84 C.J. § 1185 note 94.

15. Kan.—First Nat. Bank v. Hardman, 131 P. 602, 89 Kan. 212.

Tex.—Union Automobile Ins. Co. v. Puryear, Civ.App., 18 S.W.2d 441.

Answer to question in negative form  
The answer of "No" by the jury to the question, "Do you find" that plaintiff "did not understand" that he accepted certain sum as full and final settlement of all claims growing out of automobile collision, was a finding that plaintiff did understand terms of settlement agreement.—Traweck v. Magnolia Gas Products Co., Tex.Civ.App., 110 S.W.2d 592, error dismissed.

## Findings construed

Kan.—Hawthorne v. Travelers' Protective Ass'n of America, 210 P. 1096, 113 Kan. 356, 29 A.L.R. 494.

16. Tex.—Reese v. Reese, Civ.App., 289 S.W. 1023.

## Concurrent causes

Where finding was of concurrent negligence, each a proximate cause of the accident, one could not be held remote and the other the direct producing cause.—El Paso City Lines v. Prieto, Tex.Civ.App., 191 S.W.2d 59.

17. Tex.—Tucker v. Slovacek, Civ. App., 234 S.W.2d 254, error refused no reversible error—Lewis v. Texas Emp. Ass'n, Civ.App., 197 S.W.2d 187, error refused no reversible er-

ror—Snodgrass v. Robertson, Civ. App., 167 S.W.2d 534, error refused—Holt v. International-Great Northern R. Co., Civ.App., 152 S.W.2d 472—Shell Oil Co. v. Demmler, Civ.App., 122 S.W.2d 609, error refused—Gross v. Dallas Ry. & Terminal Co., Civ.App., 121 S.W.2d 113, error dismissed, judgment correct—Texas Indemnity Ins. Co. v. Bridges, Civ.App., 52 S.W.2d 1075, error refused.

84 C.J. § 1185 note 97.

## Construction of "commenced"

Jury's special finding that insured under group life and disability policy was totally and permanently disabled as of date of trial, and that such total permanent disability "commenced" in January, 1933, meant that disability became total and permanent in January, 1933, so as to entitle insured to disability benefits as of that date, as against contention that word "commenced" did not mean that insured was totally and permanently disabled in January, 1933.—Connecticut General Life Ins. Co. v. Dent, Tex.Civ.App., 84 S.W.2d 250, error dismissed.

18. Tex.—National Liberty Ins. Co. v. Herring Nat. Bank of Vernon, Civ.App., 135 S.W.2d 219, error dismissed, judgment correct—Dallas Nat. Bank v. Passale-Gaubert Co., Civ.App., 35 S.W.2d 221.

## Reasonable and sensible interpretation

Tex.—Tealri v. Gober, Civ.App., 257 S.W.2d 782, error dismissed—Townsend v. Young, Civ.App., 114 S.W.2d 298.

19. Kan.—Jones v. City of Kingman, 165 P. 1099, 101 Kan. 625.  
Tex.—Texas Indem. Ins. Co. v. Staggs, 134 S.W.2d 1036, 164 Tex. 318, answers to certified questions conformed to, Civ.App., 128 S.W. 2d 174.

20. Tex.—Willis & Conner v. Turner, Civ.App., 25 S.W.2d 642.

of the essential elements thereof,<sup>21</sup> and a particular answer may be held equivalent to,<sup>22</sup> or an implied,<sup>23</sup> finding of a certain matter, an answer or finding

will not be enlarged by construction beyond what is stated therein expressly or by necessary implication.<sup>24</sup>

21. *Tex.—Hancock v. Moore, Civ. App., 137 S.W.2d 46, affirmed 146 S.W.2d 369, 135 Tex. 619.*  
64 C.J. p 1186 note 2.

#### Presumption

A special finding that grantee paid money as consideration for deed merely established presumption that grantee accepted deed.—*Bibby v. Bibby, Tex.Civ.App., 114 S.W.2d 284, error dismissed.*

Where only one special issue was submitted to jury upon affirmative defense, it must be given effect and its answer given effect, if under rules of law it is possible to do so, though issue contained mixed question of law and fact which could have been more clearly separated.—*Hancock v. Sammons, Tex.Civ.App., 267 S.W.2d 252, error refused no reversible error.*

22. *Mass.—Edwards v. Willey, 105 N.E. 986, 218 Mass. 363.*  
64 C.J. p 1186 note 3.

#### "None"

(1) Finding that plaintiff is entitled to recover "none" is finding for defendant in fact and law.—*Baldwin v. Ewing, 204 P.2d 430, 69 Idaho 178.*

(2) Answer "none" to a question as to what amount, if any, for commissions on profits of a certain company is included in the verdict is equivalent to a finding that plaintiff is not entitled to any damages for profits arising from that source.—*Edwards v. Willey, 105 N.E. 986, 218 Mass. 363.*

#### Particular findings construed

(1) In general.

*Kan.—Rosedale Securities Co. v. Home Ins. Co. of New York, 243 P. 1023, 120 Kan. 415.*

*Tex.—Texas & N. O. R. Co. v. Krasoft, 191 S.W.2d 1, 144 Tex. 436—Sproules v. Rosen, 84 S.W.2d 1001, 126 Tex. 51—Willis v. Smith, Civ.App., 120 S.W.2d 892, error dismissed—City of Kirbyville v. Smith, Civ.App., 104 S.W.2d 964—Texas & N. O. R. Co. v. McGinnis, Civ.App., 81 S.W.2d 209, affirmed, Com.App., 109 S.W.2d 180.*

(2) Finding that plaintiff and defendant corporation made employment contract sued on was necessarily a finding that person or persons acting for defendant corporation in making the contract had authority to act for it.—*Cooper Petroleum Co. v. Coghill, Civ.App., 198 S.W.2d 616.*

(3) Finding that acts of negligence of operatives of train and truck driver were proximate causes of collision constituted a finding that such acts were proximate causes of decedent's

death.—*Missouri-Kansas-Texas R. Co. of Texas v. McKinney, Civ.App., 126 S.W.2d 789, affirmed 145 S.W.2d 1081, 136 Tex. 75.*

23. *Tex.—Schuhmacher Co. v. Holcomb, 177 S.W.2d 951, 142 Tex. 332—McCue v. Collins, Civ.App., 208 S.W.2d 652—Panhandle & S. F. Ry. Co. v. Montgomery, Civ.App., 140 S.W.2d 241—Federal Underwriters Exchange v. Carroll, Civ.App., 180 S.W.2d 1101—Allen v. Hall, Civ. App., 52 S.W.2d 661.*

#### Inferential finding for defendant

Where the jury by special finding eliminates all grounds on which plaintiff could recover, it inferentially finds for defendant.—*Croke v. Chesapeake & O. Ry. Co., 93 N.E.2d 811, 86 Ohio App. 483.*

#### Particular implications drawn from findings

*Mass.—Sellew v. Tuttle's Millinery, 66 N.E.2d 26, 319 Mass. 365.*

*Minn.—Hlubeck v. Beeler, 9 N.W.2d 252, 214 Minn. 484.*

*Okla.—Dierks Lumber & Coal Co. v. Williams, 134 P.2d 140, 192 Okl. 71.*

*Tex.—Driver v. Worth Const. Co., Civ.App., 264 S.W.2d 174, error granted—Dickens v. Dickens, Civ. App., 262 S.W.2d 795, error refused no reversible error—Balcomb v. Vasquez, Civ.App., 241 S.W.2d 650, refused no reversible error—Levine v. Robertson, Civ.App., 154 S.W.2d 911—Oil Country Pipe & Supply Co. v. Carter, Civ.App., 143 S.W.2d 831, error dismissed, judgment correct—Beaumont, Sour Lake & Western R. Co. v. Cluck, Civ.App., 95 S.W.2d 1033, error dismissed.*

24. *Cal.—Luckett v. La Tour, 9 P.2d 886, 122 Cal.App. 271.*

*Ind.—Tribune-Star Pub. Co. v. Fortwendle, 115 N.E.2d 215, rehearing denied 116 N.E.2d 548.*

*Kan.—Isle v. Kaw Transport Co., 152 P.2d 827, 159 Kan. 110—Schroeder v. Nelson, 139 P.2d 868, 157 Kan. 320.*

*Pa.—Simpson v. Montgomery Ward & Co., 57 A.2d 571, 162 Pa.Super. 371.*

*Tex.—Rogers v. Osborn, 261 S.W.2d 311—Texas Indem. Ins. Co. v. Stagg, 134 S.W.2d 1026, 134 Tex. 318, answers to certified questions conformed to, Civ.App., 138 S.W.2d 174—Sun Oil Co. v. Bennett, 84 S.W.2d 447, 125 Tex. 540—City of Tyler v. Kelly, Civ.App., 211 S.W.2d 768—Employers Reinsurance Corp. v. Jones, Civ.App., 195 S.W.2d 810, error refused no reversible error—Brown v. Neyland, Civ.App., 161 S.W.2d 832, affirmed in part and reversed in part on other grounds*

*Neyland v. Brown, 170 S.W.2d 207, 141 Tex. 253, reheard 173 S.W.2d 89, 141 Tex. 253—Latham v. Coleman, Civ.App., 134 S.W.2d 703—W. O. W. Life Ins. Soc. v. Dickson, Civ.App., 133 S.W.2d 243, error dismissed, judgment correct—Golston v. Bartlett, Civ.App., 112 S.W.2d 1077, error dismissed—Baggett v. Texas Employers' Ins. Ass'n, Civ.App., 70 S.W.2d 469, error refused.*

64 C.J. p 1186 note 5.

#### Particular findings or answers construed

(1) In general.

*Ind.—Neuwelt v. Roush, 85 N.E.2d 506, 119 Ind.App. 481—Merchants' Reserve Life Ins. Co. v. Richardson, 118 N.E. 578, 66 Ind.App. 567.*  
*Kan.—Blackburn v. Security Ben. Ass'n, 86 P.2d 536, 149 Kan. 89.*  
*Mass.—Gabbett v. Connecticut General Life Ins. Co., 21 N.E.2d 950, 303 Mass. 433.*

*Minn.—Darlan v. McGrath, 10 N.W.2d 403, 215 Minn. 389.*

*Mo.—Brewer v. Rowe, 252 S.W.2d 372, 363 Mo. 592.*

*Ohio.—Hollywood Cartage Co. v. Wheeling & L. E. Ry. Co., 88 N.E.2d 278, 85 Ohio App. 182.*

*Pa.—Simpson v. Montgomery Ward & Co., 57 A.2d 442, 165 Pa.Super. 408, opinion adopted 75 A.2d 656, 366 Pa. 3.*

*Tex.—Sun Oil Co. v. Bennett, 84 S.W.2d 447, 125 Tex. 540—Morris v. Texas & N. O. R. Co., Civ.App., 269 S.W.2d 586—Hill v. Lechler, Civ.App., 235 S.W.2d 236—Kidd v. Young, Civ.App., 185 S.W.2d 173, reversed on other grounds 190 S.W.2d 65, 144 Tex. 322—Smallwood v. Farr, Civ.App., 174 S.W.2d 610, error refused—Brown v. Neyland, Civ.App., 161 S.W.2d 833, affirmed in part and reversed in part on other grounds Neyland v. Brown, 170 S.W.2d 207, 141 Tex. 253, reheard 173 S.W.2d 89, 141 Tex. 253—Randolph v. Citizens Nat. Bank of Lubbock, Civ.App., 141 S.W.2d 1030, error dismissed, judgment correct—Callihan v. White, Civ.App., 139 S.W.2d 129—Goldstein Hat Mfg. Co. v. Cowen, Civ.App., 138 S.W.2d 867—Howard v. Howard, Civ.App., 102 S.W.2d 478, error refused.*

*Wis.—Andrew v. Brecker, 282 N.W. 609, 229 Wis. 526—E. L. Chester Co. v. Wisconsin Power & Light Co., 247 N.W. 861, 211 Wis. 158.*

(2) Where some of the well-known essential elements of estoppel were not embraced within special issues submitted to jury, special findings could not create an estoppel as a matter of law on ground that issue was tried out by consent of parties.—

**Hypothetical statement.** A matter is not found as a substantive fact where it is stated in a special verdict merely as a hypothesis on which a conclusion of the jury is based.<sup>25</sup>

**Expression of doubt** of the existence of a fact is not tantamount to a finding of the existence of the fact.<sup>26</sup>

"We don't know" or other similar answer is equivalent to "no"<sup>27</sup> or to a finding that the party on whom the burden of proof rests has failed in his proof,<sup>28</sup> unless the failure of proof is offset by a presumption.<sup>29</sup> In at least one jurisdiction, however, such an answer is considered as really amount-

ing to nothing,<sup>30</sup> although an answer of "no evidence" by the jury to a special interrogatory amounts to a finding against the party having the burden of proving the facts inquired about,<sup>31</sup> and such answers have been upheld as good against objections that they are evasive and improper.<sup>32</sup>

**Construction against party.** A special verdict will be construed most strongly against the party on whom rests the burden of proof,<sup>33</sup> and a special finding received without objection is construed most strongly against the party in whose favor it is found.<sup>34</sup> Where an interrogatory is ambiguous and susceptible of two different meanings it must be construed against the party drawing it.<sup>35</sup>

Lewis v. Smith, Tex.Civ.App., 198 S.W.2d 598, error dismissed.

#### Findings on issues submitted

(1) A finding on issues submitted is not a finding on issues not submitted.—Stato v. Schick, 179 S.W.2d 246, 142 Tex. 410—Schuhmacher Co. v. Holcomb, 177 S.W.2d 951, 142 Tex. 332.—Blasberg v. Cockerell, Tex.Civ.App., 254 S.W.2d 1012—Yanowski v. Fort Worth Transit Co., Tex.Civ.App., 204 S.W.2d 1001, error refused no reversible error—Alagood v. Coca Cola Bottling Co., Civ.App., 135 S.W.2d 1056, error dismissed, judgment correct—Long v. Metcalf, Civ.App., 134 S.W.2d 465, error dismissed, judgment correct.

(2) A litigant's right to affirmative presentation of his theory of case is not determinable by what the jury may have found in response to other special issues, although it is claimed that by findings thereon jury in effect found on the issue not submitted.—Patterson v. Texas Employers' Ins. Ass'n, Civ.App., 138 S.W.2d 778, affirmed 192 S.W.2d 255, 144 Tex. 573.

25. Tex.—Postal Telegraph Cable Co. v. Dalkins, Com.App., 44 S.W. 2d 933.

26. Kan.—Brittain v. Wichita Forwarding Co., 211 P.2d 77, 168 Kan. 145—Steele v. Sovereign Camp, W. O. W., 222 P. 76, 115 Kan. 159.

#### Lights

In action for death of motorist who ran into rear of parked truck at night, on ground that truck was not lighted, jury's answer to special question inquiring whether lights were burning on back of truck at time of collision, that it was "doubtful" was required to be interpreted as a finding that the lights were burning.—Brittain v. Wichita Forwarding Co., 211 P.2d 77, 168 Kan. 145.

27. Kan.—Stratton v. Atchison, T. & S. F. Ry. Co., 236 P. 831, 118 Kan. 673—Sheerer v. Kanavel, 187 P. 658, 106 Kan. 220.

Sufficiency of answer to interrogatories see supra § 551.

28. Kan.—Davis v. Kansas Elec. Power Co., 152 P.2d 806, 159 Kan. 97—Haley v. Kansas City Public Service Co., 119 P.2d 449, 154 Kan. 477—Sawhill v. Casualty Reciprocal Exchange, 107 P.2d 770, 152 Kan. 735—Darrington v. Campbell, 94 P.2d 305, 150 Kan. 407—Schwab v. Nordstrom, 27 P.2d 242, 138 Kan. 497.

Utah—Warner v. U. S. Mutual Acc. Assoc., 32 P. 696, 8 Utah 431.

64 C.J. p 1186 note 9.

#### Answers construed

(1) In action for personal injuries and property damage allegedly resulting from explosion of natural gas in plaintiff's basement, jury's answer "not to our knowledge" to question whether defendant had any notice of escape or leakage of gas from its main prior and subsequent to certain dates established merely that there was no evidence that defendant made any test between such dates to determine extent of leaking gas and was not a finding that gas ceased to leak from main as soon as certain test was completed.—Davis v. Kansas Elec. Power Co., 152 P.2d 806, 159 Kan. 97.

(2) In action for death of automobile guest by plaintiff suing as widow and coher of guest, plaintiff was not entitled to recover where jury answered "No knowledge" to special question as to whether guest had been divorced from wife to whom he had been previously married, since such answer was equivalent to finding that there had been no divorce.—Darrington v. Campbell, 94 P.2d 305, 150 Kan. 407.

29. Kan.—Sams v. Commercial Standard Ins. Co., 139 P.2d 859, 157 Kan. 278.

**Presumption of due care by decedent**  
In action for wrongful death in automobile collision where there was no

evidence requiring a different answer than "don't know" to a special question as to whether decedent slackened speed, and no evidence to overcome presumption that decedent was exercising due care for his own safety, finding could not be construed as finding that decedent did not slacken speed.—Sams v. Commercial Standard Ins. Co., supra.

30. Ind.—Cleveland, C. & St. L. Ry. Co. v. Hayes, 79 N.E. 448, 167 Ind. 454.

64 C.J. p 1186 note 10.

31. Ind.—Vanosdol v. Henderson, 22 N.E.2d 812, 216 Ind. 240—Chicago & Erie R. Co. v. Patterson, 34 N.E. 2d 960, 110 Ind. App. 94.

#### In death action

In action under Federal Employers' Liability Act for death of engineer in collision of trains, answers of "No evidence" to interrogatories inquiring whether semaphores displayed yellow and red lights when engineer approached semaphores amounted to finding that signals were not against engineer.—Chicago & Erie R. Co. v. Patterson, supra.

32. Ind.—Superior Meat Products v. Holloway, 48 N.E.2d 83, 113 Ind. App. 320.

Kan.—Sawhill v. Casualty Reciprocal Exchange, 107 P.2d 770, 152 Kan. 735.

33. Ind.—New York Cent. R. Co. v. De Leury, 192 N.E. 125, 100 Ind. App. 140.

Kan.—Brittain v. Wichita Forwarding Co., 211 P.2d 77, 168 Kan. 145. 64 C.J. p 1185 note 11.

34. Or.—Forest Products Co. v. Dant & Russell, 244 P. 631, 117 Or. 637.

64 C.J. p 1186 note 12.

35. Mich.—Izzo v. Weiss, 259 N.W. 295, 270 Mich. 372—Burke v. Bay City Tractor & Electric Co., 110 N. W. 524, 147 Mich. 172.

Ohio.—Klever v. Reid Bros. Exp., 86 N.E.2d 608, 151 Ohio St. 467.

### b. In Connection with Other Matters

A special verdict, finding, or answer must be construed in the light of the surrounding circumstances, and in connection with the pleadings, instructions, issues or questions submitted, and the evidence.

A special verdict, finding, or answer must be construed in the light of the surrounding circumstances.<sup>36</sup> It is to be construed in the light of, and in connection with, the pleadings,<sup>37</sup> instructions,<sup>38</sup> the issue or question submitted,<sup>39</sup> and, except in some jurisdictions,<sup>40</sup> the evidence.<sup>41</sup> Where the

finding or verdict is ambiguous, the court may examine the record to ascertain the intention of the jury.<sup>42</sup>

### § 570. — Construction Together or as Whole

A special verdict, finding, or answer is to be construed as a whole, and, where there are two or more answers or findings, they are to be construed together.

A special verdict, finding, or answer is to be construed as a whole,<sup>43</sup> and, where there are two or

36. Tex.—Pickrell v. Imperial Petroleum Co., Civ.App., 231 S.W. 412.

37. Tex.—Tucker v. Slovacek, Civ. App., 234 S.W.2d 254, error refused no reversible error—Boyd v. Texas & N. O. R. Co., Civ.App., 218 S.W.2d 534, error refused no reversible error—Reed v. Markland, Civ.App., 173 S.W.2d 346, error refused—Walker v. Houston Elec. Co., Civ. App., 155 S.W.2d 973, error refused—State Nat. Bank of Houston v. Woodfin, Civ.App., 146 S.W.2d 284, error refused—Townsend v. Young, Civ.App., 114 S.W.2d 298—Batey v. Greenwood Floral Co., Civ.App., 113 S.W.2d 647—Yarbrough v. Dallas Ry. & Terminal Co., Civ.App., 67 S.W.2d 169, reversed on other grounds 97 S.W.2d 169, 128 Tex. 445—Stinson v. Boulevard Undertaking Co., Civ.App., 91 S.W.2d 1172—Stroud v. Winerich Motor Co., Civ.App., 91 S.W.2d 1169, error dismissed—American Nat. Ins. Co. v. Walker, Civ.App., 81 S.W.2d 1061—Elliott v. Langham, Civ.App., 80 S.W.2d 287—McElwath v. City of McGregor, Civ.App., 58 S.W.2d 851, error dismissed—Vincent v. Bell, Civ.App., 22 S.W.2d 753, error dismissed.

64 C.J. p 1187 note 17.

38. Tex.—Rogers v. Osborn, 261 S.W. 2d 311—Minyard v. Kennedy, Civ. App., 241 S.W.2d 767, refused no reversible error—American Cas. & Life Co. v. McCulliston, Civ.App., 202 S.W.2d 474, refused no reversible error—Seony-Vacuum Oil Co. v. Premeaux, Civ.App., 187 S.W.2d 690, affirmed in part and reversed in part on other grounds 192 S.W. 2d 138, 144 Tex. 558—Reed v. Markland, Civ.App., 173 S.W.2d 346, error refused—Moore v. Rice, Civ. App., 110 S.W.2d 973.

Wis.—Catin v. Schroeder, 253 N.W. 187, 214 Wis. 419.

64 C.J. p 1187 note 18.

#### Map

In suit involving boundary dispute, maps, by being referred to in charge, became part of charge, and verdict on special issue must be construed in connection therewith.—Still v. Barton, Tex.Civ.App., 76 S.W.2d 783, error dismissed.

39. Tex.—State v. Hale, 146 S.W.2d 731, 136 Tex. 29—Walker v. Houston Elec. Co., Civ.App., 155 S.W.2d 973, error refused—State Nat. Bank of Houston v. Woodfin, Civ.App., 146 S.W.2d 284, error refused—Traders & General Ins. Co. v. Ross, Civ.App., 88 S.W.2d 543, reversed on other grounds 117 S.W.2d 423, 131 Tex. 562—Batey v. Greenwood Floral Co., Civ.App., 113 S.W.2d 647—Moore v. Rice, Civ.App., 110 S.W.2d 973.

64 C.J. p 1187 note 19.

#### Construction of Issues

In order to give effect to the jury findings which are responsive to the issues, the court will adopt a construction of the issues which will be in consonance with the findings.—McKain v. Haynes, Tex.Civ.App., 203 S.W.2d 970.

40. Ind.—U. S. Cement Co. v. Whitted, 90 N.E. 481, 46 Ind.App. 105.

41. Kan.—In re Erwin's Estate, 228 P.2d 739, 170 Kan. 728.

Tex.—Rice v. Thompson, Civ.App., 239 S.W.2d 137, refused no reversible error—Tucker v. Slovacek, Civ. App., 234 S.W.2d 254, error refused no reversible error—Boyd v. Texas & N. O. R. Co., Civ.App., 218 S.W. 2d 534, error refused no reversible error—Reed v. Markland, Civ. App., 173 S.W.2d 346, error refused—Walker v. Houston Elec. Co., Civ. App., 155 S.W.2d 973, error refused—State Nat. Bank of Houston v. Woodfin, Civ.App., 146 S.W.2d 284, error refused—American Mut. Liability Ins. Co. v. Wedgeworth, Civ. App., 140 S.W.2d 213, error dismissed, judgment correct—Lincoln v. Bennett, Civ.App., 135 S.W.2d 632, modified on other grounds 156 S.W. 2d 504, 138 Tex. 56—Traders & General Ins. Co. v. Ross, Civ.App., 88 S.W.2d 543, reversed on other grounds 117 S.W.2d 423, 131 Tex. 562—Batey v. Greenwood Floral Co., Civ.App., 113 S.W.2d 647—Townsend v. Young, Civ.App., 114 S.W.2d 298—Yarbrough v. Dallas Ry. & Terminal Co., Civ.App., 67 S.W.2d 169, reversed on other grounds 97 S.W.2d 169, 128 Tex. 445—Campbell Lumber Co. v. Cor-

tassa, Civ.App., 94 S.W.2d 1202, error dismissed—Daugherty v. Chicago, R. I. & G. Ry. Co., Civ.App., 94 S.W.2d 587, error dismissed—Stinson v. Boulevard Undertaking Co., Civ.App., 91 S.W.2d 1172—Stroud v. Winerich Motor Co., Civ. App., 91 S.W.2d 1169, error dismissed—American Nat. Ins. Co. v. Walker, Civ.App., 81 S.W.2d 1061—Elliott v. Langham, Civ.App., 80 S.W.2d 287—McElwath v. City of McGregor, Civ.App., 58 S.W.2d 851, error dismissed—Vincent v. Bell, Civ.App., 22 S.W.2d 753, error dismissed.

64 C.J. p 1187 note 21.

#### Where evidence establishes facts

(1) Where jury made affirmative findings in answering certain issues, but findings were not of significance since evidence conclusively established facts to be true, questions became matters of law.—Faubian v. Busch, Tex.Civ.App., 240 S.W.2d 861, refused no reversible error.

(2) Issues established by undisputed evidence are available in support of the judgment, the same as issues established by the jury's verdict.—Woods v. Osborn, Tex.Civ.App., 113 S.W.2d 636.

42. Tex.—Vincent v. Bell, Civ.App., 22 S.W.2d 753—Gibson v. Dickson, Civ.App., 178 S.W. 44.

#### Proper basis for judgment

Where the findings on special issues are ambiguous court may examine not only the issues submitted but also the pleadings and the evidence in order to arrive at their proper interpretation, and such verdict so construed constitutes the proper basis for a judgment.—State v. Hale, 146 S.W.2d 731, 136 Tex. 29.

#### Making own findings

In action to recover salary claimed to be due and to obtain reinstatement to position of night policeman, where both sides moved for directed verdict, special verdict that plaintiff did not, with full knowledge of facts, refuse to resume his duties as policeman, was ambiguous and under record court was bound to make its own findings of fact.—Schoonover v. City of Viroqua, 14 N.W.2d 9, 245 Wis. 239.

43. Kan.—Underhill v. Motes, 165 P.

more answers or findings, the court is not permitted to isolate one and ignore the others,<sup>44</sup> but they are to be construed together.<sup>45</sup> Also, all the special issues submitted to the jury for answers must be considered together as a whole.<sup>46</sup>

### § 571. — Conclusiveness and Effect

A special finding by the jury is binding on, and may not be ignored by, the court, provided it is relevant and material to the issues, is warranted by the evidence, does not contain an unwarranted conclusion of law, and has not been set aside on proper grounds.

A special finding by the jury is binding on, and

2d 218, 160 Kan. 679—Walker v Colgate-Palmolive-Peet Co., 139 P 2d 157, 157 Kan. 170—Cole v. Shel Petroleum Corp., 86 P.2d 740, 149 Kan. 25.

Ohio—Wells v. Baltimore & O. R. Co., App., 87 N.E.2d 76.

Tex.—Texas Emp. Ins. Ass'n v. McKay, 210 S.W.2d 147, 146 Tex. 569

—Texas Indem. Ins. Co. v. Staggs, 134 S.W.2d 1026, 134 Tex. 318, answers to certified questions conformed to, Civ.App., 138 S.W.2d 174

—Hill v. Leeschber, Civ.App., 235 S.W.2d 236—Lewis v. Texas Emp. Ins. Ass'n, Civ.App., 197 S.W.2d 187, error refused no reversible error—Snodgrass v. Robertson, Civ. App., 167 S.W.2d 534, error refused

—Walker v. Houston Elec. Co., Civ. App., 155 S.W.2d 973, error refused

—Southern Underwriters v. Mowery, Civ.App., 147 S.W.2d 834, error dismissed, judgment correct—State Nat. Bank of Houston v. Woodfin, Civ.App., 146 S.W.2d 284, error refused—Texas Employers Ins. Ass'n v. Thrash, Civ.App., 136 S.W.2d 905, error dismissed, judgment correct—Traders & General Ins. Co. v. Ross, Civ.App., 88 S.W.2d 543, reversed on other grounds 117 S.W.2d 423, 131 Tex. 562—Batey v. Greenwood Floral Co., Civ.App., 113 S.W.2d 647—Texas Employers' Ins. Ass'n v. White, Civ.App., 97 S.W.2d 960, error granted—Maniatis v. Texas Mut. Life Ins. Co., Civ.App., 90 S.W.2d 936—Yarbrough v. Dallas Ry. & Terminal Co., Civ.App., 67 S.W.2d 1093, reversed on other grounds 97 S.W.2d 169, 128 Tex. 445—Merritt v. King, Civ.App., 66 S.W.2d 464, error refused.

64 C.J. p 1186 note 13.

44. Kan.—Cain v. Steely, 252 P.2d 909, 173 Kan. 866—In re Erwin's Estate, 228 P.2d 739, 170 Kan. 728

—Lee v. Gas Service Co., 201 P.2d 1023, 166 Kan. 285—Harshaw v. Kansas City Public Service Co., 119 P.2d 459, 154 Kan. 481—Dick's Transfer Co. v. Miller, 119 P.2d 454, 154 Kan. 574—Jordan v. Austin Securities Co., 51 P.2d 38, 142 Kan. 631.

45. Cal.—Davis v. Stulman, 164 P. 2d 787, 72 Cal.App.2d 255—San Joaquin & Kings River Canal & Irr. Co. v. Egenhoff, 141 P.2d 939, 61 Cal.App.2d 82.

Kan.—Henderson v. Talbott, 266 P.2d 273, 175 Kan. 615—Tuglie v. Cathers, 254 P.2d 807, 174 Kan. 122—Cain v. Steely, 252 P.2d 909, 173

Kan. 866—Dryden v. Kansas City Public Service Co., 238 P.2d 501, 172 Kan. 31—In re Erwin's Estate, 228 P.2d 739, 170 Kan. 728—Bietz v. Hereford, 220 P.2d 135, 169 Kan. 556—Lee v. Gas Service Co., 201 P.2d 1023, 166 Kan. 285—Gabel v. Hanby, 193 P.2d 239, 165 Kan. 116

—Isle v. Kaw Transport Co., 152 P.2d 827, 169 Kan. 110—Harshaw v. Kansas City Public Service Co., 119 P.2d 459, 154 Kan. 481—Dick's Transfer Co. v. Miller, 119 P.2d 454, 154 Kan. 574—Jacobs v. Hobson, 79 P.2d 861, 148 Kan. 107—Jordan v. Austin Securities Co., 51 P.2d 38, 142 Kan. 631.

Mass.—Copithorn v. Boston & M. R. R., 17 N.E.2d 713, 301 Mass. 510.

Tex.—Tucker v. Slovacek, Civ.App., 234 S.W.2d 254, error refused no reversible error—Boyd v. Texas & N. O. R. Co., Civ.App., 218 S.W.2d 534, error refused no reversible error—Gannaway v. Lundstrom, Civ.App., 204 S.W.2d 999—Walker v. Houston Elec. Co., Civ.App., 155 S.W.2d 973, error refused—Southern Underwriters v. Mowery, Civ. App., 147 S.W.2d 834, error dismissed, judgment correct—State Nat. Bank of Houston v. Woodfin, Civ.App., 146 S.W.2d 284, error refused—Federal Underwriters Exchange v. Popnos, Civ.App., 140 S.W.2d 484, error granted—Tunnell v. Van School Dist. No. 53, Civ.App., 129 S.W.2d 825, error dismissed, judgment correct—Batey v. Greenwood Floral Co., Civ.App., 113 S.W.2d 647—Daugherty v. Chicago, R. I. & G. Ry. Co., Civ.App., 94 S.W.2d 587, error dismissed—Merritt v. King, Civ.App., 66 S.W.2d 464, error refused.

64 C.J. p 1186 note 14.

Harmonizing special findings with each other see *supra* § 562.

Every finding of equal importance

In construing a verdict, every finding is of equal importance, and when rightly interpreted, one cannot be varied by correct interpretation of another finding of equal dignity.—Hancock v. Sammons, Tex.Civ.App., 267 S.W.2d 252, error refused no reversible error.

46. Mass.—Thurlow v. Welch, 25 N. E.2d 478, 305 Mass. 220.

Tex.—Texas Indem. Ins. Co. v. Staggs, 134 S.W.2d 1026, 134 Tex. 318, answers to certified questions conformed to, Civ.App., 138 S.W.2d 174—Service Refining Co. v. Hutcherson, Civ.App., 179 S.W.2d 772, error refused—Arrendell v. Wells, Civ.App., 149 S.W.2d 307, error dismissed, judgment correct—Le Sage v. Smith, Civ.App., 145 S.W.2d 308, error dismissed, judgment correct—Southern Underwriters v. Boswell, Civ.App., 141 S.W.2d 442, affirmed 158 S.W.2d 280, 138 Tex. 256—Texas Employers Ins. Ass'n v. Fowler, Civ.App., 140 S.W.2d 545, error refused—Texas Employers Ins. Ass'n v. Thrash, Civ.App., 136 S.W.2d 905, error dismissed, judgment correct—Gross v. Dallas Ry. & Terminal Co., Civ.App., 131 S.W.2d 113, error dismissed, judgment correct—Shell Oil Co. v. Dennison, Civ.App., 132 S.W.2d 609, error refused—Broadus v. Long, Civ.App., 125 S.W.2d 340, affirmed 138 S.W.2d 1057, 135 Tex. 353—Galveston Theatres v. Larsen, Civ. App., 124 S.W.2d 936—Burlington-Rock Island R. Co. v. Davis, Civ. App., 123 S.W.2d 1002, error dismissed, judgment correct—Texas Coca-Cola Bottling Co. v. Wimberley, Civ.App., 108 S.W.2d 860—Maryland Cas. Co. v. Swanson, Civ. App., 91 S.W.2d 843, error dismissed—West v. Cashin, Civ.App., 83 S.W.2d 1001, error dismissed—Texas Indemnity Ins. Co. v. Bridges, Civ.App., 52 S.W.2d 1075, error refused.

64 C.J. p 1186 note 15.

Consideration together of issues and answers thereto see *infra* § 569.

Error in issue held not cured by other issue

(1) In general.—Gordon v. McIntosh, Tex.Civ.App., 54 S.W.2d 177.

(2) Where the rule that a special issue should not assume the existence of any material fact is violated, fact that the assumed fact has been separately submitted does not correct the error, unless the submission was conditional, since the parties are entitled to have issues submitted to the jury without any suggestion or assumption as to the truth of the facts involved.—Sinclair Nav. Co. v. Kremlick, Tex.Civ.App., 129 S.W.2d 758.

(3) Submission of issue of abandonment of the homestead under instruction that incorrectly defined abandonment was not rendered harmless by the fact that affirmative submission of the plaintiffs' case by necessary implication negated the defensive issue of abandonment.—Cooper Co. v. Warwick, Tex.Civ.App., 120 S.W.2d 128.

may not be ignored or disregarded by, the court,<sup>47</sup> provided it is relevant and material to the issues,<sup>48</sup> is warranted by the evidence,<sup>49</sup> does not contain an unwarranted conclusion of law<sup>50</sup> and has not been

set aside on proper grounds.<sup>51</sup> An answer to a special issue is conclusive on all issues covered by it.<sup>52</sup> Where only part of the issues has been submitted to the jury and the remainder is to be deter-

47. Tex.—Scarborough v. Travelers Ins. Co., Civ.App., 189 S.W.2d 10.  
64 C.J. p 1187 note 24—26 C.J. p 568 note 88.  
Amendment or correction see supra § 567.

#### In absence of motion

It has been held to be beyond the authority of the trial court to disregard the jury's fact finding on the theory that it was not supported by the evidence where no motion for judgment non obstante verdicto was made.—Christopherson v. Whittlesey, Tex.Civ.App., 197 S.W.2d 384, error refused no reversible error.

48. Ohio.—Blosser v. Cincinnati Club, Com.Pl., 71 N.E.2d 138.  
R.I.—Keenan v. John Hancock Mut. Life Ins. Co. of Boston, Mass., 146 A. 401, 50 R.I. 158.

Tex.—Tucker v. Slovacek, Civ.App., 234 S.W.2d 284, error refused no reversible error.—Guilf, C. & S. F. Ry. Co. v. Seydler, Civ.App., 132 S.W.2d 453.—Camden Fire Ins. Ass'n v. Brown, Civ.App., 109 S.W.2d 280, error dismissed.—Pacific Mut. Life Ins. Co. of California v. Hale, Civ.App., 267 S.W. 232.—Pledger v. Business Men's Acc. Ass'n of Texas, Civ.App., 197 S.W. 889, reheard 198 S.W. 810, reversed on other grounds, Com.App., 228 S.W. 110.

Vt.—Union Twist Drill Co. v. Harvey, 37 A.2d 389, 123 Vt. 493.

Wis.—Wanke v. Kreul, 275 N.W. 361, 226 Wis. 618.

64 C.J. p 1187 note 25.

Disregarding immaterial findings as surplusage see supra § 565.

#### Absence of defense on merits

In suit on note, to foreclose deed of trust lien, and in nature of bill of review attacking dismissal for failure to prosecute a prior suit for similar relief, jury's finding, in response to special issues, that plaintiff had not been diligent in prosecuting the prior suit or in learning of the dismissal, was not controlling and did not require judgment for defendant or preclude judgment for plaintiff when there was no defense on the merits.—Clark v. Sayre Oil Co., Tex.Civ.App., 204 S.W.2d 141, error refused no reversible error.

#### Answer to preceding interrogatory

An answer to an interrogatory which depends upon an affirmative answer to a preceding interrogatory should be disregarded where the preceding interrogatory is answered in the negative.—White v. Shircliff Industries, Inc., Ind.App., 112 N.E.2d 888.

#### Discovered peril

(1) Where the jury finds issue of

discovered peril in favor of injured party, the issues of primary negligence and contributory negligence become immaterial.—Montgomery v. Houston Elec. Co., 144 S.W.2d 251, 135 Tex. 538.—Kimbly v. Comet Motor Freight Lines, Tex.Civ.App., 169 S.W.2d 760.—International-Great Northern R. Co. v. Acker, Tex.Civ.App., 128 S.W.2d 508, error dismissed, judgment correct.—Dallas Ry. & T. Co. v. Bankston, Tex.Civ.App., 51 S.W.2d 304.

(2) Liability under doctrine of "discovered peril" involves an independent ground of recovery based on negligence, and unless discovered peril involves an independent ground of recovery the questions concerning primary negligence and contributory negligence could never be rendered immaterial by findings on issues of discovered peril.—Dallas Ry. & Terminal Co. v. Bishop, Tex.Civ.App., 153 S.W.2d 298.

(3) In an action involving co-defendants, findings of discovered peril against one does not render issue of primary negligence immaterial with respect to the other defendant where the peril was not discovered by him.—Missouri, K. & T. R. Co. of Texas v. McKinnay, 145 S.W.2d 1081, 136 Tex. 75.

#### Issues under pleadings

Finding could not be disregarded on ground that the condition in contract was not pleaded where party was entitled to have such issue submitted under general denial.—Brown v. Neyland, Civ.App., 161 S.W.2d 833, affirmed in part and reversed in part on other grounds Neyland v. Brown, 170 S.W.2d 207, 141 Tex. 253, reheard 172 S.W.2d 89, 141 Tex. 253.

49. Ariz.—In re Morrison's Estate, 103 P.2d 669, 65 Ariz. 504.

Tex.—Harris v. New Amsterdam Casualty Co., Civ.App., 150 S.W.2d 431.—Texas Employers Ins. Ass'n v. Warren, Civ.App., 149 S.W.2d 182, error refused.

64 C.J. p 1187 note 26.

#### Where evidence conflicting

Where evidence on issue was conflicting, jury's finding thereon was conclusive.—Kummerlen v. Pustilnik, 45 A.2d 27, 853 Pa. 827.

50. Tex.—Gowan v. Reimera, Civ.App., 220 S.W.2d 331, error refused no reversible error.—Porter v. Liberty Film Lines, Civ.App., 127 S.W.2d 480, reversed on other grounds Liberty Film Lines v. Porter, 146 S.W.2d 982, 136 Tex. 49.

64 C.J. p 1187 note 27.

#### Findings held questions of law

Kan.—Rasing v. Healer, 142 P.2d 832, 157 Kan. 516.

Tex.—Reagan v. Guardian Life Ins. Co., 166 S.W.2d 909, 140 Tex. 105.—Burnett v. Mar-Text Realization Corp., Civ.App., 250 S.W.2d 612, error refused no reversible error.

51. Idaho.—Corpus Juris cited in Nuquist v. Bauscher, 227 P.2d 83, 86, 71 Idaho 89.

Setting aside or amending special verdict, answer, or finding see supra § 567.

52. D.C.—Ross v. Brainerd, Mun. App., 54 A.2d 859.

Mass.—Cozzo v. Atlantic Refining Co., 12 N.E.2d 744, 299 Mass. 260.

Mich.—Finch v. W. R. Roach Co., 1 N.W.2d 46, 299 Mich. 703.

Tex.—Neyland v. Brown, 170 S.W.2d 207, 141 Tex. 253, modified on other grounds 172 S.W.2d 89, 141 Tex. 253.—Superior Ins. Co. v. Owens, Civ.App., 218 S.W.2d 517.—Bernard River Land Development Co. v. Sweeney, Civ.App., 216 S.W.2d 597, error refused no reversible error.—Rawls v. Holt, Civ.App., 193 S.W.2d 536, error refused no reversible error.—El Paso City Lines v. Prieto, Civ.App., 191 S.W.2d 59.—Southern Underwriters v. Mowery, Civ.App., 147 S.W.2d 834, error dismissed, judgment correct.—Scanlan v. Continental Inv. Co., Civ.App., 142 S.W.2d 432, error dismissed, judgment correct.—Stobaugh v. Phoenix Assur. Co., Limited, of London, Civ. App., 121 S.W.2d 1044.

For purpose of ruling on motion for judgment on special findings and pleadings, all the answers are admitted to be true.—Beitz v. Hereford, 220 P.2d 135, 169 Kan. 556.

#### Issues not covered

(1) A finding on an issue does not require the court to disregard evidence not covered by that issue.—Younger Bros. v. Ross, Tex.Civ.App., 151 S.W.2d 621, error dismissed.

(2) Finding of jury against plaintiff as to one issue does not require rejection of plaintiff's evidence in toto or vitiate verdict found in his favor as to other matters.—Smith v. Turnipseed, 160 S.E. 877, 44 Ga.App. 220.

(3) A finding on a motorist's high and dangerous rate of speed is not necessarily conclusive of the question of whether motorist had his automobile under proper control.—Blaugrund v. Glash, Civ.App., 179 S.W.2d 257, affirmed 179 S.W.2d 266, 142 Tex. 378.

mined by the court, a special verdict does not necessarily dispose of the case.<sup>53</sup> It is the recorded verdict which controls;<sup>54</sup> a special verdict not received by the court and forming no part of the record is not evidence of any fact found by it,<sup>55</sup> and cannot be used by the court for any purpose.<sup>56</sup>

**On parties.** A special finding or answer is conclusive, as between the parties, as to the facts found,<sup>57</sup> where they are supported by the evidence,<sup>58</sup> are material to the issues,<sup>59</sup> and have not been set aside.<sup>60</sup> It is binding on a party, at whose instance or with whose consent, the question was sub-

mitted to the jury,<sup>61</sup> as well as a party who has agreed to be bound,<sup>62</sup> and the party against whom the finding was made, where he has not taken proper steps to have it set aside.<sup>63</sup>

In at least one jurisdiction, where several acts are treated as grounds for the action a special finding by the jury of a particular act or acts of which defendant is guilty absolves defendant from all other acts so charged,<sup>64</sup> unless the findings construed as a whole compel a conclusion to the contrary,<sup>65</sup> and this rule has been applied to findings on grounds of defense.<sup>66</sup>

53. Minn.—Carlson v. Kroeger, 186 N.W. 705, 151 Minn. 343.

54. Ill.—Dahlgren v. Israel, 204 Ill. App. 340.

**Answers as given**

Verdict must rest on answer to interrogatories as given.—Jolley v. Martin Bros. Box Co., 99 N.E.2d 672, 89 Ohio App. 372.

55. U.S.—U. S. v. Addison, D.C., 6 Wall. 291, 18 L. Ed. 919.

56. Conn.—Jacobs v. Street, 110 A. 843, 95 Conn. 248.

57. Ill.—Woodruff v. New York Mut. Life Ins. Co., 229 Ill.App. 213.  
Tex.—Neyland v. Brown, 170 S.W.2d 207, 141 Tex. 253, modified on other grounds 172 S.W.2d 89, 141 Tex. 253.—Menefee v. Gulf, C. & S. F. Ry. Co., Civ.App., 181 S.W.2d 287, error refused.—Smith v. Briggs, Civ.App., 131 S.W.2d 319, error dismissed, judgment correct.

64 C.J. p 1188 note 33.

**Person not party**

Jury's finding that bus passenger's release of claim for damages for injuries was void did not bind defendant's insurer not party to suit.—South Plains Coaches v. Behringer, Tex.Civ.App., 4 S.W.2d 1003, affirmed Behringer v. South Plains Coaches, Com.App., 13 S.W.2d 334.

58. Ill.—Woodruff v. New York Mut. Life Ins. Co., 229 Ill.App. 213.  
Mich.—Pinch v. W. R. Roach Co., 1 N.W.2d 46, 299 Mich. 703.

Tex.—Tennyson v. Green, Civ.App., 217 S.W.2d 179, error refused on reversible error.—Smith v. Briggs, Civ.App., 131 S.W.2d 319, error dismissed, judgment correct.

**Evidence of probative force**

Finding of jury supported by evidence of probative force is binding on parties.—Commercial Standard Ins. Co. v. Gruver, Tex.Civ.App., 217 S.W.2d 95, error dismissed.

59. Tex.—American Surety Co. v. Whitehead, Com.App., 45 S.W.2d 958.

60. Tex.—Four Brotherhood Oil Co. v. Kelley, Civ.App., 235 S.W. 604. 64 C.J. p 1188 note 33.

**Equal dignity**

Fact findings of a jury are of equal dignity until set aside on proper attack.—Christopherson v. Whittlesey, Tex.Civ.App., 197 S.W.2d 384, error refused on reversible error.

61. Wis.—St. Paul Second Nat. Bank v. Larson, 60 N.W. 499, 80 Wis. 469.

64 C.J. p 1188 note 34.

**Party consenting to answer**

Where buyer admitted receipt of road forms purchased from sellers and admitted the purchase price he agreed to pay and permitted such matter to be embodied in first issue of sellers' action for balance due on price and consented that issue be answered in affirmative, nothing else appearing, sellers, on facts established in that issue, were prima facie entitled to recover purchase price.—Price v. Goodman, 37 S.E.2d 592, 226 N.C. 223.

62. U.S.—Patton v. Caldwell, Pa., 1 Dall. 419, 1 L. Ed. 204.

63. Ill.—Ideal Electric Co. v. Penn Mut. Life Ins. Co., 189 Ill.App. 331. 64 C.J. p 1188 note 36.

**Failure to question finding**

Where husband in written motion for a new trial of divorce suit did not question special finding of jury that husband had been guilty of extreme and repeated cruelty towards wife as charged in complaint, he was conclusively bound by such findings.—Blair v. Blair, 93 N.E.2d 95, 341 Ill. App. 93.

64. Kan.—Giltner v. Stephens, 200 P. 2d 290, 166 Kan. 172.—Lechleitner v. Cummings, 163 P.2d 423, 160 Kan. 453.—Isle v. Kaw Transport Co., 152 P.2d 827, 159 Kan. 110.—Packer v. Fairmont Creamery Co., 146 P.2d 401, 158 Kan. 191.—Slaton v. Union Elec. Ry. Co., 146 P.2d 456, 158 Kan. 132.—Rasing v. Healer, 142 P.2d 832, 157 Kan. 516.—Haley v. Kansas City Public Service Co., 119 P.2d 449, 154 Kan. 477.—Duncan v. Branson, 110 P.2d 789, 153 Kan. 344.—Shepard v. Thompson, 109 P. 2d 126, 153 Kan. 68.—Jilka v. National Mut. Cas. Co. of Tulsa, 106 P.2d 665.—Eldredge v. Sargent, 96

P.2d 870, 150 Kan. 824.—Bilsly v. Central Surety & Ins. Corp., 96 P. 2d 691, 150 Kan. 858.—Walls v. Consolidated Gas Utilities Corp., 96 P. 2d 656, 150 Kan. 919.—Jones v. Atchison, T. & S. F. Ry. Co., 85 P.2d 15, 148 Kan. 686.

**Specific acts of negligence**

Where question put to jury asked for specification of each and every act of negligence of which they find the defendant guilty, and answer was no warning signs of any kind, such answer did not absolve defendant from all other grounds of negligence pleaded where negligence found by answer to that question was pleaded in petition.—Soden v. Bennett, 244 P. 2d 1204, 173 Kan. 142.

65. Kan.—Cole v. Shell Petroleum Corp., 86 P.2d 740, 149 Kan. 25.

**On all of special findings**

Where all of jury's special findings were open to the interpretation that jury meant that taxicab driver in ample time, could have seen automobile approaching intersection, had he looked, to enable him to stop taxicab before collision, and that it constituted negligence for taxicab driver to enter intersection without having looked, one special finding that taxicab company's negligence consisted of taxicab driver's failure to use the highest degree of care and skill on entering intersection did not establish that taxicab company was not guilty of negligence.—Taggart v. Yellow Cab Co. of Wichita, 131 P.2d 924, 156 Kan. 88.

**Other grounds fairly included**

The fact that in answering a special question submitted to it regarding alleged negligence states one ground thereof does not preclude reliance on another ground alleged in the petition and fairly included in the answers to the other questions submitted.—Dick's Transfer Co. v. Miller, 119 P.2d 454, 154 Kan. 574.

**66. Defense of fraudulent representations**

Where fraudulent representations were relied upon as a defense in suit on note, finding as to a specific fraudulent representation had legal effect

*On jury.* Jurors will not be allowed to impeach their special verdict or findings.<sup>67</sup>

*As general or special verdict.* Findings of fact in answer to special interrogatories which determine and cover all the material ultimate facts may together constitute and be treated as a special verdict.<sup>68</sup> A general finding in favor of defendant is a finding of each issuable fact necessary to sustain the general judgment.<sup>69</sup> The court cannot treat, as a general verdict, a verdict that shows that the jury did not intend it as such;<sup>70</sup> but a finding covering all the issues may be treated as a general verdict,<sup>71</sup> particularly where the law authorizes on-

ly a general verdict.<sup>72</sup> Separate general findings on separate causes of action are general verdicts.<sup>73</sup>

## § 572. Objections and Waiver Thereof

Objections to issues, questions, or interrogatories submitted to the jury for answers or findings are waived or not available unless made in a proper manner at a seasonable time; also, objections to the jury's answers or failure to answer are waived when not properly and seasonably made.

Objections to issues, questions, or interrogatories submitted to the jury for answers or findings are waived or not available unless made<sup>74</sup> in a proper manner<sup>75</sup> and are waived or not available unless

of acquitting person alleged to have made such fraudulent representations of every other charge of misrepresentation alleged in answer.—*Olsburg State Bank v. Anderson*, 142 P.2d 712, 157 Kan. 463.

67. N.C.—*McCabe Lumber Co. v. Beaufort County Lumber Co.*, 121 S.E. 755, 187 N.C. 417.

64 C.J. p 1188 note 37.

68. Iowa.—*Farmers' Savings Bank of Arispe v. Arispe Mercantile Co.*, 127 N.W. 1084.

69. Okl.—*Neims v. Newton*, 185 P. 2d 202, 199 Okl. 241.

70. Wis.—*Kelley v. Chicago, etc., R. Co.*, 9 N.W. 816, 63 Wis. 74.

64 C.J. p 1188 note 39.

71. Minn.—*Kath v. Kath*, 55 N.W.2d 691, 238 Minn. 120.

### Direction of verdict held proper

Mass.—*Newton Const. Co. v. West & South Water Supply Dist. of Action*, 93 N.E.2d 457, 326 Mass. 171.

72. Ind.—*Kelley v. Bell*, 88 N.E. 53, 172 Ind. 590.

73. Iowa.—*Farmers' Savings Bank of Arispe v. Arispe Mercantile Co.*, 127 N.W. 1084.

74. Ariz.—*Parker v. Gentry*, 185 P.2d 767, 66 Ariz. 189.

75. Colo.—*Westing v. Mariatt*, 238 P.2d 193, 124 Colo. 355.

N.C.—*Lea v. Bridgeman*, 46 S.E.2d 555, 228 N.C. 565.

Tex.—*Smith v. Henger*, 226 S.W.2d 425, 148 Tex. 456, 20 A.L.R.2d 853.—*Fort Worth & R. G. Ry. Co. v. Pickens*, 162 S.W.2d 691, 139 Tex. 181.—*Swann v. Wheeler*, 86 S.W.2d 735, 126 Tex. 167.—*Hancock v. Sammons*, Civ.App., 267 S.W.2d 252, error refused no reversible error.—*Pacific Emp. Ins. Co. v. Brasher*, Civ.App., 234 S.W.2d 698, error refused no reversible error.—*Anderson v. Broome*, Civ.App., 233 S.W.2d 901.—*Gonzales v. Orsak*, Civ.App., 205 S.W.2d 793.—*Rawls v. Holt*, Civ.App., 193 S.W.2d 536, error refused no reversible error.—*Dakan v. Humphreys*, Civ.App., 190 S.W.2d 371.—*Harris v. Harris*, Civ.App., 174 S.W.2d 996.—*Blair v. Smy-*

*lie*, Civ.App., 155 S.W.2d 958, error refused.—*Bowman v. Grimes*, Civ.App., 155 S.W.2d 420, error refused.—*Cage Bros. v. Whiteman*, Civ.App., 153 S.W.2d 727, reversed on other grounds 163 S.W.2d 638, 139 Tex. 522.—*Smith v. Young*, Civ.App., 147 S.W.2d 859.—*Industrial Indem. Exchange v. Ratcliff*, Civ.App., 138 S.W.2d 613, error dismissed, judgment correct.—*Edmondson v. Carroll*, Civ.App., 134 S.W.2d 378, error dismissed, judgment correct.—*Traders & General Ins. Co. v. Snow*, Civ.App., 114 S.W.2d 682, error dismissed.—*Campbell Lumber Co. v. Cortasa*, Civ.App., 94 S.W.2d 1202, error dismissed.—*Ditmar v. Beckham*, Civ.App., 86 S.W.2d 801, error dismissed.—*Bettis v. Bettis*, Civ.App., 83 S.W.2d 1076.—*Dallas Railway & Terminal Co. v. Harris*, Civ.App., 81 S.W.2d 716.—*Belzung v. Owl Taxi*, Civ.App., 70 S.W.2d 288, error dismissed.

Wis.—*Basill v. Fay*, 64 N.W.2d 826, 267 Wis. 265.—*Swanson v. Maryland Cas. Co.*, 63 N.W.2d 743, 266 Wis. 357.—*Briggs Transfer Co. v. Farmers Mut. Auto. Ins. Co.*, 61 N.W.2d 305, 265 Wis. 369.—*Johnson v. Sipe*, 56 N.W.2d 852, 263 Wis. 191.

64 C.J. p 1188 note 43.

Objections made first time on appeal see *Appeal and Error* §§ 309, 332, 335, 382.

### Objections held waived

(1) Where no objection was made by counsel for defendant at time of oral arguments wherein plaintiff's counsel mentioned special interrogatories to jury, or when the instructions were read, on ground that the interrogatories were not submitted to counsel before argument as required by statute, presumption of regularity of proceedings, aided by the conduct of counsel for defendant, negated a breach of the statute.—*Racine Fuel Co. v. Rawlins*, 36 N.E.2d 710, 377 Ill. 375.

(2) Failure to object to conditional submission of special issues constitutes a waiver.—*Colls v. Price's Creameries*, Tex.Civ.App., 244 S.W.2d 900, error refused no reversible error

—*Ralcomb v. Vasquez*, Civ.App., 241 S.W.2d 650, refused no reversible error.—*Whiteside v. Tackett*, Civ.App., 229 S.W.2d 908, error dismissed.

(3) Where special issue may not have been as broad as plaintiff's testimony but plaintiff did not object to sufficiency of issue to submit the question, any variance between issue and proof was immaterial.—*Morgan v. Young*, Tex.Civ.App., 203 S.W.2d 837, error refused no reversible error.

(4) Ordinarily a special issue so framed as to assume a fact, and which is not objected to on that account, is binding on the parties that the fact assumed to be true is true.—*Neinast v. Hill*, Tex.Civ.App., 206 S.W.2d 625.

(5) Where special issue as to value of crops at time of sale was submitted and party made no objection and did not request submission of an issue as to value of crops after sale and when they had matured, party waived any issue concerning value of crops at time of maturity.—*Rest v. Best*, Tex.Civ.App., 214 S.W.2d 806.

(6) Error, if any, in submitting to jury a question of defendant's negligence, not pleaded by plaintiff in personal injury suit, was waived by defendant, in absence of objection by him to such submission.—*Lind v. Lund*, 63 N.W.2d 313, 266 Wis. 232.

75. Tex.—*Gowan v. Reimers*, Civ.App., 220 S.W.2d 331, refused no reversible error.—*Traders & General Ins. Co. v. Yarbrough*, Civ.App., 181 S.W.2d 305, error refused.—*Safeway Stores of Texas v. Webb*, Civ.App., 164 S.W.2d 868, error refused.—*Bowman v. Grimes*, Civ.App., 155 S.W.2d 420, error refused.

64 C.J. p 1188 note 44.

### Necessity of constructive objection

Parties seeking to define, condition, or limit elements of an issue, when not indicated in statement of issue as submitted by trial court, must point out the omission by constructive objection.—*Bowman v. Grimes*, Tex.Civ.App., 155 S.W.2d 420, error refused.



made at a seasonable time.<sup>76</sup> The objection | forth the defect relied on.<sup>79</sup> In order to be avail-  
must be sufficiently clear<sup>77</sup> and specific,<sup>78</sup> and set | able, the objections must be made at least before

#### Objections and exceptions held sufficient

Tex.—Fort Worth & D. Ry. Co. v. Barlow, Civ.App., 263 S.W.2d 278, error refused no reversible error.—St. Louis Southwestern Ry. Co. of Tex. v. United Transports, Civ. App., 282 S.W.2d 241, error dismissed.—Texas Employers' Ins. Ass'n v. Neely, Civ.App., 189 S.W.2d 626.—Owl Taxi Service v. Saludis, Civ.App., 122 S.W.2d 225, error dismissed.—City of Brownwood v. Anderson, Civ.App., 92 S.W.2d 325, 64 C.J. p 1188 note 44 [a].

#### Objections held insufficient

(1) In general.—Eastland Oil Co. v. Fenoglio, Tex.Civ.App., 192 S.W.2d 1092, error dismissed.—64 C.J. p 1188 note 44 [b].

(2) Failure of trial court properly to state the issue is not reached by a request for the submission of a special interrogatory or instruction.—Southern Pine Lumber Co. v. Whitman, Tex.Civ.App., 104 S.W.2d 635, error dismissed.—Belzong v. Owl Taxi, Tex.Civ.App., 70 S.W.2d 288, error dismissed.

76. Tex.—Casas v. Knorbin, Civ.App., 218 S.W.2d 289.—Thomas v. Billingsley, Civ.App., 173 S.W.2d 199, error refused.—Phillips Petroleum Co. v. Capps, Civ.App., 170 S.W.2d 522, error refused.—Safeway Stores of Texas v. Webb, Civ.App., 164 S.W.2d 868, error refused.—Connor v. Buford, Civ.App., 142 S.W.2d 592, error dismissed, judgment correct, 64 C.J. p 1188 note 45.

77. Tex.—McMahan v. Musgrave, Civ.App., 229 S.W.2d 894, error dismissed.—Schoenberg v. Forrest, Civ. App., 228 S.W.2d 556, refused no reversible error.—City of Panhandle v. Byrd, Civ.App., 77 S.W.2d 904, reversed on other grounds, Com. App., 106 S.W.2d 660.

#### Application of rules of procedure

If court submits a controlling issue of recovery or defense relied upon by the opposite party or attempts to give a definition or explanatory charge even though unsatisfactory and incorrect, parties are within the civil procedure rule relating to objections and the only duty required of the party is to except to the issue in language sufficiently clear to call the attention of the court to such error.—Lurie v. City of Houston, Civ.App., 220 S.W.2d 320, reversed on other grounds City of Houston v. Lurie, 224 S.W.2d 871, 148 Tex. 391, 14 A.L.R.2d 61.—Texas & N. O. R. Co. v. Barham, Tex.Civ.App., 204 S.W.2d 205.

#### Objections held insufficient

(1) In general.—Southwest Stone Co. v. Symons, Tex.Civ.App., 237 S.

W.2d 380, error refused no reversible error.—McDonald v. Cartwright, Tex. Civ.App., 72 S.W.2d 337, error dismissed.

(2) Objections which did not point out distinctly the matter to which objections were made and grounds therefor.—McMahan v. Musgrave, Tex.Civ.App., 229 S.W.2d 894, error dismissed.

(3) Objection to special issue as immaterial and irrelevant in that it presented no issue on proper measure of damages or damages pleaded and not properly placing burden on plaintiff to prove nature and extent of damages.—U. S. Pipe & Foundry Co. v. City of Waco, 108 S.W.2d 432, 130 Tex. 126, certiorari denied 58 S. Ct. 266, 302 U.S. 749, 82 L.Ed. 579.

78. Tex.—Mathis v. State, Civ.App., 258 S.W.2d 200, error refused no reversible error.—Hopson v. Gulf Oil Corp., Civ.App., 237 S.W.2d 323, reversed in part on other grounds 237 S.W.2d 352, 150 Tex. 1.—Texas Emp. Ins. Ass'n v. Harkey, Civ. App., 208 S.W.2d 915, affirmed 208 S.W.2d 919, 146 Tex. 504.—Hartford Accident & Indemnity Co. v. Harris, Civ.App., 152 S.W.2d 857.—Southern Underwriters v. Stubblefield, Civ.App., 130 S.W.2d 385.—Texas Coca Cola Bottling Co. v. Lovejoy, Civ.App., 112 S.W.2d 203, error dismissed.

#### Objections held sufficiently specific

Tex.—Texas Employers Ins. Ass'n v. Allen, Civ.App., 93 S.W.2d 481.—Panhandle & S. F. Ry. Co. v. Friend, Civ.App., 91 S.W.2d 922.

#### Objections held too general

Tex.—Anderson v. Broome, Civ.App., 233 S.W.2d 901.—Texas State Highway Dept. v. Reeves, Civ.App., 161 S.W.2d 357, error refused.—Hartford Acc & Indem. Co. v. Vick, Civ. App., 155 S.W.2d 664.—Hartford Accident & Indemnity Co. v. Harris, Civ.App., 152 S.W.2d 857.—Wise v. City of Abilene, Civ.App., 141 S.W.2d 400, error dismissed, judgment correct.—South Texas Coaches v. Woodard, Civ.App., 123 S.W.2d 395.—Southern Underwriters v. Kelly, Civ.App., 110 S.W.2d 153, error dismissed.—Texas Coca-Cola Bottling Co. v. Wimberley, Civ.App., 108 S.W.2d 860, error dismissed.—Donnell v. Talley, Civ.App., 104 S.W.2d 920, error dismissed by agreement.—Panhandle & S. F. Ry. Co. v. Friend, Civ.App., 91 S.W.2d 922.—Associated Indemnity Corporation v. Baker, Civ.App., 76 S.W.2d 153, error dismissed.—Texas & P. Ry. Co. v. Dickey, Civ.App., 70 S.W.2d 614, error refused.

79. Tex.—Anchor Cas. Co. v. Chia, Civ.App., 255 S.W.2d 815, refused no

reversible error.—McMahan v. Musgrave, Civ.App., 229 S.W.2d 894, error dismissed.—Texas & N. O. R. Co. v. Barham, Civ.App., 204 S.W.2d 205.—Southern Underwriters v. Jones, Civ.App., 137 S.W.2d 62, error dismissed, judgment correct.

#### Purpose of objection

The primary purpose of an objection to a charge is to call the attention of the trial court to its insufficiency or incorrectness and to give the court an opportunity properly to submit such issues to the jury, and the manner in which it is done is of secondary importance, provided the defects in the charge are adequately brought to the attention of the court in time and in such manner that it can correct the error.—Owl Taxi Service v. Saludis, Tex. Civ.App., 122 S.W.2d 225, error dismissed.

#### Objections held sufficient

Tex.—Pappas v. Wright, Civ.App., 171 S.W.2d 536.—Ibanez v. State, Civ. App., 118 S.W.2d 405.

#### Objections held insufficient

(1) In general.—Southwest Stone Co. v. Symons, Tex.Civ.App., 237 S.W.2d 380, error refused no reversible error.—Gulf, C. & S. F. Ry. Co. v. Bouchillon, Tex.Civ.App., 186 S.W.2d 1006, refused without merit.—Southern Underwriters v. Boswell, Civ. App., 141 S.W.2d 442, affirmed 158 S.W.2d 280, 138 Tex. 255.—Traders & General Ins. Co. v. Ray, Civ.App., 128 S.W.2d 80, error dismissed, judgment correct.

(2) Objection that special question to jury was ambiguous did not raise objection that question allegedly called for a conclusion of law.—Jelf v. Cottonwood Falls Gas Co., 178 P.2d 992, 162 Kan. 713.

(3) Statement that an issue is too broad does not direct attention of court to question whether an issue is multifarious.—Mathis v. State, Tex. Civ.App., 258 S.W.2d 200, error refused no reversible error.

(4) Objection that special issue, without being coupled with other issues not included in charge, could not form basis of judgment, and that essential elements were left out of charge with respect to such issue, but which did not point out what elements were omitted or what other issues were necessary to establish liability, was insufficient to reach the alleged defect.—Cree v. Miller, Tex. Civ.App., 255 S.W.2d 565, refused no reversible error.

(5) If form of submission of defensive issue was not fundamentally erroneous and issue itself palpably erroneous, objection to its submission, which failed to demonstrate na-

the questions or interrogatories are answered by the jury;<sup>80</sup> and it is frequently held that they must be made at or before the submission of the issues, questions, or interrogatories to the jury.<sup>81</sup>

The failure to object to the submission of an immaterial issue cannot convert a finding on such an issue into a material finding,<sup>82</sup> nor can the failure to object to issues involving questions of law empower the jury to decide such questions.<sup>83</sup> A party may object, in a proper manner, to the submission of the issues to the jury in such a way as does not require, or will prevent, answers to essential elements of his case.<sup>84</sup> Where no objections are made to the form of submission of a certain issue, a refusal by the court to submit the same issue in different, although more correct, form

is not error.<sup>85</sup> Where the issues submitted are incompletely stated or improperly combined, in the absence of a proper objection pointing out to the court such defects, a verdict based thereon is as effective as if the issues were correctly submitted.<sup>86</sup> In jurisdictions where exceptions are required, if proper issues are not submitted to the jury after they have been submitted to the court, an exception should be reserved to the failure of the court to submit them.<sup>87</sup> So, also, exceptions should be taken to the submission to the jury of special issues objected to,<sup>88</sup> but the exceptions must be sufficient distinctly to point out the defects urged.<sup>89</sup>

Objections to the jury's answers or failure to answer are waived when not made<sup>90</sup> in proper man-

ture of error inhibitive of issue or prejudice likely to be resultant from its submission, was insufficient.—*Driver v. Worth Const. Co.*, Tex.Civ. App., 264 S.W.2d 174, error granted.

80. Ill.—*Weinrob v. Heintz*, 104 N.E. 2d 534, 346 Ill.App. 30.

64 C.J. p 1188 note 46.

#### Speculation on favorable answers

A litigant has not been permitted to speculate on his chances for a favorable answer to interrogatories and then raise objections which should have been raised in due time.—*Weinrob v. Heintz*, supra.

81. Ill.—*Weinrob v. Heintz*, supra.

Tex.—*Collis v. Price's Creameries*, Civ.App., 244 S.W.2d 900, error refused no reversible error.—*Traders & General Ins. Co. v. Davis*, Civ. App., 209 S.W.2d 963, refused no reversible error.—*Hayes v. Nichols*, Civ.App., 203 S.W.2d 274.

64 C.J. p 1188 note 47.

#### Objections after jury's retirement

(1) Objection made to submission of interrogatories after jury had retired to deliberate upon their verdict was not timely.—*Minninger v. New York Cent. R. R.*, 109 N.E.2d 104, 123 Ind.App. 338.

(2) However, where the trial court made certain remarks concerning some of the interrogatories which constituted a passing upon the credibility of witnesses and weight of the testimony, objections thereto made by plaintiff's attorney immediately after jury had retired to deliberate were timely.—*Minninger v. New York Cent. R. R.*, supra.

82. Tex.—*Pacific Emp. Ins. Co. v. Barnett*, Civ.App., 230 S.W.2d 331, refused no reversible error.

83. Tex.—*Royal Oak Stave Co. v. Groce*, Civ.App., 113 S.W.2d 315, error dismissed.

84. Tex.—*Texas & N. O. R. Co. v. Sturgeon*, Civ.App., 177 S.W.2d 340,

reversed on other grounds 177 S.W.2d 264, 142 Tex. 222.

#### Essential elements of defense

It is incumbent on a party asserting an affirmative defense to see that the jury answers all essential elements of the defense in his favor, or to object to the submission of the case to the jury in such manner that an answer on an essential element will be prevented.—*Little Rock Furniture Mfg. Co. v. Dunn*, 222 S.W.2d 985, 148 Tex. 197.

85. Tex.—*Loving County v. Higginbotham*, Civ.App., 115 S.W.2d 1110, error dismissed.

86. Tex.—*Frozen Foods Exp. v. Odom*, Civ.App., 229 S.W.2d 92, refused no reversible error.—*Traders & General Ins. Co. v. Blacett*, Civ. App., 96 S.W.2d 420, error dismissed.—*Duff v. Roesser & Pendleton*, Civ.App., 96 S.W.2d 682.

#### Duty to object

While statute requires trial court to submit special issues separately and to define legal terms, it does not relieve party complaining from duty of making proper objections to charge so as to enable trial court to correct charge, if erroneous.—*Rivers v. Westbrook*, Tex.Civ.App., 126 S.W.2d 46, error refused.

87. Tex.—*Schoenberg v. Forrest*, Civ. App., 228 S.W.2d 556, refused no reversible error.

88. Tex.—*Frozen Foods Exp. v. Odom*, Civ.App., 229 S.W.2d 92, refused no reversible error.—*Smiri v. Globe Laboratories*, Civ.App., 190 S.W.2d 574, refused without merit.—*Barrick v. Gillette*, Civ.App., 187 S.W.2d 683, refused without merit.

89. Tex.—*Panhandle & S. F. Ry. Co. v. Brown*, Civ.App., 74 S.W.2d 531, error dismissed.

#### Exception held sufficient

Tex.—*Joy v. Craig*, Civ.App., 81 S.W.2d 261.

#### Exception held insufficient

(1) Exceptions to special issues on ground that they amounted to submission of a general charge were not sufficient distinctly to point out, as required by rule of procedure, objection that charge failed to submit specific acts of negligence alleged.—*Frozen Foods Exp. v. Odom*, Tex.Civ. App., 229 S.W.2d 92, refused no reversible error.

(2) Exception stating that issue does not state ultimate issue, but not specifying distinction sought to be made in reviewing court, was insufficient.—*Fort Worth Structural Steel Co. v. Griffin*, Tex.Civ.App., 63 S.W.2d 887.

90. Ohio.—*Cresighton v. Klehl*, 19 N.E.2d 653, 60 Ohio App. 86.

Tex.—*Fort Worth & R. G. Ry. Co. v. Pickens*, 162 S.W.2d 691, 139 Tex. 181.—*Pacific Emp. Ins. Co. v. Brasher*, Civ.App., 234 S.W.2d 698, error refused no reversible error.—*Little Rock Furniture Mfg. Co. v. Dunn*, Civ.App., 218 S.W.2d 527, affirmed 222 S.W.2d 985, 148 Tex. 197.—*Rawls v. Holt*, Civ.App., 193 S.W.2d 536, error refused no reversible error.—*St. Louis Southwestern Ry. Co. of Texas v. Lawrence*, Civ.App., 91 S.W.2d 434.

Wis.—*Vlaasak v. Gifford*, 31 N.W.2d 648, 248 Wis. 328.

64 C.J. p 1188 note 48.

#### Misconstruction of issue by jury

Where special issue was framed in negative and jury's answers to other issues indicated that jury misconstrued inquiry in giving answer adverse to plaintiff but plaintiff made no complaint concerning the matter and also misconstrued effect of inquiry and answer, plaintiff was bound by such answer.—*Southland Life Ins. Co. v. Barrett*, Tex.Civ.App., 172 S.W.2d 997, error refused.

ner<sup>91</sup> before the jury are discharged<sup>92</sup> or, according to some authorities, on the rendition of the verdict.<sup>93</sup> While objections made for the first time on a motion for new trial are usually of no avail,<sup>94</sup> where the jury findings on special issues do not have support in evidence a motion to set aside and disregard such findings is proper.<sup>95</sup> Failure to make a motion to have the jury sent back for answers or better answers may operate as a waiver.<sup>96</sup>

The absence of a general verdict is waived when not objected to at the time the trial court announces that only special issues will be submitted<sup>97</sup> or at the time the special findings are returned.<sup>98</sup> However, where there is no general verdict, a special verdict may be attacked at any time for failure to pass on all material and controverted questions.<sup>99</sup>

*Matters other than failure to object.* A party

may preclude himself from objecting to a special issue, verdict, finding, or answer by requesting,<sup>1</sup> or consenting to,<sup>2</sup> it, or moving for judgment thereon.<sup>3</sup> However, the fact that a party requests submission of a special question does not deprive him of the privilege thereafter of urging a particular construction or significance thereof;<sup>4</sup> the consent of a party that the jury may return an affirmative answer to one of the questions submitted is not an acquiescence in the sufficiency of the special verdict;<sup>5</sup> and failure of a party to tender a proper charge is not a waiver of the right to object to the manner in which an issue is submitted.<sup>6</sup>

### § 573. Filing

Interrogatories and answers thereto should be filed as a part of the verdict.

Interrogatories and answers thereto should be filed as a part of the verdict.<sup>7</sup>

91. Tex.—Hankamer v. Roberts Undertaking Co., Civ.App., 139 S.W.2d 865, error dismissed 141 S.W.2d 587, 135 Tex. 189.

#### Objections held proper

Where issues submitted to jury were predicated on inadmissible evidence, objections that they were not supported by any proper evidence were good and jury's answers must be disregarded.—Patton v. Crews, Tex.Civ.App., 284 S.W.2d 467, error refused no reversible error.

#### Deficiency supplied

If special issue submitted in suit in trespass to try title for the title and possession of land, inquiring as to whether line as surveyed by specified person was true boundary line between parties, was not sufficient upon which to base judgment for plaintiffs, in absence of exception or objection thereto, the deficiency in finding of jury in favor of plaintiff on such issue would be supplied by a presumed finding of court in such manner as to support the judgment for plaintiffs where there was evidence to support such finding.—Dotson v. Allen, Tex.Civ.App., 259 S.W.2d 343, error refused no reversible error.

92. Ind.—Indianapolis Rys. v. Boyd, 53 N.E.2d 762, 222 Ind. 481, rehearing denied 54 N.E.2d 272, 222 Ind. 481.

Ohio.—Smith v. Cushman Motor Delivery Co., 6 N.E.2d 594, 54 Ohio App. 99.

Tex.—Davis v. Texas Emp. Ins. Ass'n, Civ.App., 257 S.W.2d 755, 64 C.J. p 1188 note 49.

93. N.C.—Grove v. Baker, 94 S.E. 528, 174 N.C. 745.

94. Ill.—Weinrob v. Heintz, 104 N.E.2d 534, 346 Ill.App. 30.

Tex.—Postal Mut. Indemnity Co. v.

Penn. Civ.App., 165 S.W.2d 495, error refused.

95. Tex.—North v. Atlas Brick Co., Com.App., 13 S.W.2d 59, motion granted in part, 16 S.W.2d 519.—Groendyke Transport Co. v. Dye, Civ.App., 259 S.W.2d 747, error dismissed by agreement.—Traders & General Ins. Co. v. Heath, Civ.App., 197 S.W.2d 130, error refused no reversible error.—Fidelity & Cas. Co. of New York v. Maryland Cas. Co., Civ.App., 151 S.W.2d 230.

Special verdicts or findings, contrary to, or not sustained by, the evidence, as grounds for new trial see New Trial § 73.

#### Statute interpreted

(1) In statute providing that a claim that the evidence was insufficient to warrant the submission of an issue may be complained of for the first time after verdict, the word "insufficient" is not used in the factual sense of insufficiency to support a finding which the jury has made.—Myers v. Crenshaw, 137 S.W.2d 7, 134 Tex. 500.

(2) Statute providing that a claim that evidence was insufficient to warrant submission of issue may be complained of for first time after verdict required more than blanket objection that there were no controverted issues of fact and therefore none should have been submitted.—Traders & General Ins. Co. v. Blancett, Tex. Civ.App., 96 S.W.2d 420, error dismissed.

**Motion for entry of judgment held tantamount to motion to disregard findings.**—Traders & General Ins. Co. v. Heath, Tex.Civ.App., 197 S.W.2d 130, error refused no reversible error.

96. Kan.—Davis v. Kansas Elec. Power Co., 152 P.2d 806, 159 Kan. 97, 64 C.J. p 1189 note 51.

#### Objection waived

In absence of objection or request by plaintiff that jury be required to continue deliberation until interrogatory was answered by all jurors joining in general verdict, fact that only eight of nine jurors who concurred in and returned general verdict for defendant joined in answer to special interrogatory did not vitiate general verdict so returned and received by court.—Simpson v. Springer, 55 N.E.2d 418, 143 Ohio St. 324, 155 A.L.R. 583.

97. Cal.—H. W. Smith, Inc. v. Swenson, 286 P. 1050, 105 Cal.App. 60, 64 C.J. p 1189 note 52.

98. Iowa.—National Horse Importing Co. v. Novak, 64 N.W. 616, 95 Iowa 596.

99. Minn.—Crich v. Williamsburg City Fire Ins. Co., 48 N.W. 198, 45 Minn. 441.

64 C.J. p 1189 note 54.

1. Neb.—Bloomfield v. Plinn, 121 N.W. 716, 84 Neb. 472, 64 C.J. p 1189 note 55.

2. Tex.—Rawls v. Holt, Civ.App., 193 S.W.2d 536, error refused no reversible error.

64 C.J. p 1189 note 56.

3. Ind.—Kessler v. Citizens' St. R. Co., 50 N.E. 891, 20 Ind.App. 427.—Seybold v. Terre Haute, etc., R. Co., 46 N.E. 1054, 18 Ind.App. 367.

4. Kan.—Dyer v. Keith, 14 P.2d 644, 136 Kan. 216.

5. Pa.—Standard Sewing Mach. Co. v. Royal Ins. Co., 51 A. 354, 201 Pa. 645.

6. Tex.—El Paso Electric Co. v. Portillo, Civ.App., 37 S.W.2d 219.

7. Conn.—Longstean v. Owen McCaffrey's Sons, 111 A. 788, 95 Conn.

## X. TRIAL BY COURT

## A. HEARING AND DETERMINATION OF CAUSE

## § 574. In General

When a case is tried without a jury the judge occupies a dual position; he is the magistrate required to lay down correctly the guiding principle of law and he is also the tribunal compelled to determine what the facts are.

Trial of a law case to the court without the intervention of a jury, it has been said, is tantamount to the trial of a chancery case.<sup>8</sup> When a case is tried without a jury the judge occupies a dual position; he is the magistrate required to lay down correctly the guiding principle of law, and he is also the tribunal compelled to determine what the facts are.<sup>9</sup> Where the case is tried by the court without a jury, the court occupies the same relation to the facts in the case that a jury would have if the case had been tried by a jury,<sup>10</sup> and the court is governed by the same legal principles as in trial by jury.<sup>11</sup> The powers of the judge remain the same as before, namely, to make rulings on questions of law,<sup>12</sup> and to exercise his discretion in allowing, disallowing, or limiting costs.<sup>13</sup> However, the court has no other or additional powers in such case except such as belong to the judge and the jury in an ordinary case.<sup>14</sup> There must be a strict com-

pliance with statutes with respect to trials by the court without a jury.<sup>15</sup>

Except for those matters of which the court may take judicial notice, the deliberations of the trial judge are limited to the record made before him,<sup>16</sup> and the determinative facts on which the rights of the party must be made to rest must be found from admissions made by parties, facts agreed on, stipulations entered into and noted at the hearing, and evidence offered in open court after all parties have been given full opportunity to be heard.<sup>17</sup> Recourse may not be had to records, files, evidence, or data not thus presented to the court for consideration.<sup>18</sup> A determination can be made without a hearing only in cases where the facts are not disputed,<sup>19</sup> and the hearing must be founded on the pleadings.<sup>20</sup> When an indisputable fact appears on a hearing which makes necessary or proper the making of a certain order or the imposing of a certain condition, the court has the discretion to make the order or condition at once without waiting for counsel to conclude,<sup>21</sup> and it may, during the trial, correct erroneous rulings to which objection has been made where no rule of procedure is thereby violated.<sup>22</sup> So it may, in the exercise of its

486—Bernier v. Woodstock Agri. Society, 92 A. 160, 88 Conn. 558.

8. Ohio—Euclid Arcade Bldg. Co. v. H. A. Stahl Co., 121 N.E. 820, 99 Ohio St. 47.

Right to waive jury trial in civil cases see Juries § 85.

**At Special Term**

A trial before a judge without a jury at Special Term does not differ, as a matter of substance, from a trial on the law side of the court before a judge without a jury.—Braunhut v. Rein, 268 N.Y.S. 665, 241 App.Div. 622.

9. Ga.—Shifflett v. Anchor Rome Mills, 50 S.E.2d 853, 78 Ga.App. 428.

Hawaii—Territory v. Fujiwara, 33 Hawaii 428.

Mass.—John Hetherington & Sons v. William Firth Co., 95 N.E. 961, 210 Mass. 8.

Mich.—Corpus Juris cited in Hilliker v. Jewel Oil & Gas Co., 270 N.W. 158, 159, 277 Mich. 615.

N.Y.—Belkin v. Playdium, Inc., 87 N.Y.S.2d 813, 194 Misc. 950.

Ohio—Berwald Stewart Co. v. Creston Co., App., 53 N.E.2d 205.

Utah—Colemere v. Layton, 22 P.2d 218, 82 Utah 142.

**Power not limited to deciding facts correctly**

The power of a trial court in a non-jury case to decide doubtful issues of fact is not limited to deciding them correctly.—Skelly Oil Co. v. Holloway, C.A.Mo., 171 F.2d 670.

10. Cal.—Martin v. Martin, 179 P.2d 655, 79 Cal.App.2d 409.

Mich.—Reedy v. Goodin, 281 N.W. 377, 285 Mich. 614—Corpus Juris cited in Hilliker v. Jewel Oil & Gas Co., 270 N.W. 158, 159, 277 Mich. 615.

64 C.J. p 1189 note 65.

A judgment entered by judge before whom parties voluntarily go to trial after waiving jury is as conclusive as though rendered on jury's verdict.—Cassels v. Ideal Farms Drainage Dist., 23 So.2d 247, 156 Fla. 152.

11. Pa.—Cockcroft v. Metropolitan Life Ins. Co., 189 A. 687, 125 Pa.Super. 293.

**Existence of question of fact**

Where case was heard by court without jury, manner of determining whether there was a question of fact to be determined was same as though there had been a jury.—Reedy v. Goodin, 281 N.W. 377, 285 Mich. 614.

**When case "submitted"**

Case is not "submitted" to court sitting without jury, until all that is

necessary to decision is before court, and court has taken matter under advisement.—McCarthy v. Employers' Fire Ins. Co., 37 P.2d 579, 97 Mont. 540, 97 A.L.R. 292.

12. Mich.—Corpus Juris cited in Hilliker v. Jewel Oil & Gas Co., 270 N.W. 158, 159, 277 Mich. 615.

N.H.—Fowler v. Towle, 49 N.H. 507, 64 C.J. p 1189 note 66.

13. N.H.—Fowler v. Towle, supra.

14. N.H.—Fowler v. Towle, supra.

15. Pa.—Meitner v. Scarborough, 184 A. 81, 321 Pa. 212.

16. Ill.—Albert v. Albert, 92 N.E.2d 491, 340 Ill.App. 582.

17. N.C.—Biddix v. Rex Mills Inc., 75 S.E.2d 777, 237 N.C. 660.

18. N.C.—Biddix v. Rex Mills Inc., supra.

19. N.Y.—In re Schrier's Estate, 260 N.Y.S. 610, 145 Misc. 593, motion denied 263 N.Y.S. 539, 147 Misc. 539.

20. Ill.—Continental Ill. Nat. Bank & Trust Co. of Chicago v. Sever, 65 N.E.2d 385, 393 Ill. 81.

21. Nev.—Boyce v. Goldfield Third Chance Mining Co., 133 P. 397, 86 Nev. 53.

22. La.—Succession of Suarez, 59 So. 216, 121 La. 500.

discretion, set aside the submission of a case for judgment in order to permit the placing of an answer on file.<sup>23</sup>

*Attorney representing adverse interests.* An attorney may not represent the adverse interests of opposing litigants in a cause of action, as discussed in Attorney and Client § 47, so that in a nonjury trial a finding by the trial judge cannot be sustained where the attorney has represented such adverse interests.<sup>24</sup>

*Trial without issue.* In actions tried by the court without a jury, a trial without an issue is erroneous and determines nothing,<sup>25</sup> and the judgment binds neither party.<sup>26</sup>

*Submission before setting case for trial.* Submission of a suit to annul a marriage on the ground that defendant had fraudulently represented that she had been divorced from a former husband is not premature, where the wife admitted that she had not been divorced from a previous husband, although the case had not been set for trial.<sup>27</sup>

*Changing theory of case.* After a case has been tried and submitted on one theory, the court will not permit resubmission on an entirely different theory against the other party's objection.<sup>28</sup>

*Inviting other judge to sit in case.* It is error for the court to invite another judge, who had not

heard the testimony, to sit with him during the argument of a case, and to consult with such judge with respect to it.<sup>29</sup>

## § 575. Use of General or Personal Knowledge

Where the cause is tried without a jury, the trial judge cannot, in deciding issues of fact, act on his special individual knowledge as to matters which are not of common knowledge.

Where a cause is tried by a court without a jury, the trial judge has the right to draw on the knowledge he possesses in common with the generality of mankind to the same extent that a jury could,<sup>30</sup> but he cannot, in deciding the issues of fact, act on his special individual knowledge as to matters which are not of common knowledge.<sup>31</sup> The personal knowledge of the judge who tries the case cannot meet the requirements of the law that proof of necessary facts shall be made.<sup>32</sup> However, in particular cases it has been held that the judge may utilize his personal knowledge,<sup>33</sup> especially where the evidence is conflicting.<sup>34</sup>

*Reference to books and publications.* A court may refer to encyclopedias, dictionaries, and scientific publications for the purpose of refreshing recollection or for material which will assist in the clarification or interpretation of evidence.<sup>35</sup>

23. Ky.—Kice v. Dugan, 137 S.W. 240, 143 Ky. 676.

24. Pa.—Bossler v. Wilson, 65 Pa. Dist. & Co. 164.

25. Ind.—Carson v. Earlywine, 10 Ind. 423.

64 C.J. p 1189 note 72.

26. Ind.—Wilbridge v. Case, 2 Ind. 36.

27. Ky.—Robinson v. Robinson, 179 S.W. 436, 166 Ky. 485.

28. Cal.—Cushing v. Levi, 3 P.2d 958, 117 Cal.App. 94.

29. Nev.—Schwartz v. Stock, 65 P. 351, 26 Nev. 123.

30. Cal.—Johnson v. Snyder, 221 P. 2d 164, 99 Cal.App.2d 86.

Va.—Drumwright v. Walker, 189 S.E. 310, 167 Va. 307.

64 C.J. p 1190 note 77.

31. U.S.—Holland Banking Co. v. Continental Nat. Bank of Jackson County, Kansas City, Mo., D.C.Mo., 9 F.Supp. 988.

Ariz.—Utah Const. Co. v. Berg, 205 P.2d 367, 68 Ariz. 285.

Conn.—Kovacs v. Szentes, 33 A.2d 124, 150 Conn. 229.

Fla.—Cassels v. Ideal Farms Drainage Dist., 23 So.2d 247, 156 Fla. 152.

—New York Life Ins. Co. v. Tedder, 153 So. 145, 113 Fla. 649.

Ky.—Smith v. Henson, 182 S.W.2d 666, 298 Ky. 182.

Neb.—Mills v. Paynter, 1 Neb. 440, 447.

N.Y.—Central Hanover Bank & Trust Co. v. Elsner, 11 N.E.2d 561, 276 N.Y. 121.

—Application of Palmer, 87 N.Y.S.2d 655, 275 App.Div. 5, reversed on other grounds Palmer v. Spaulding, 87 N.E.2d 301, 299 N.Y. 368.

N.D.—Gange v. Gange, 56 N.W.2d 688.

Ohio.—Strain v. Isaacs, 18 N.E.2d 816, 59 Ohio App. 495.

Okl.—Kansas, O. & G. Ry. Co. v. Smith, 32 P.2d 302, 168 Okl. 190.

Pa.—Appeal of Ritter, 24 A.2d 470, 147 Pa.Super. 235.

Utah.—Provo River Water Users' Ass'n v. Carlson, 133 P.2d 777, 103 Utah 93.

64 C.J. p 1190 note 78.

### Matters not in record

It is error to rest a decision on matters not appearing in the record.

—Second Reformed Church v. Board of Adjustment of Borough of Freehold, 104 A.2d 703, 30 N.J.Super. 338.

### Records in another case

A court cannot take judicial notice of its own records in a case other than that before it, even though trial judge knows or remembers contents

thereof.—Bodeneck v. Cater's Motor Freight System, 86 F.2d 766, 198 Wash. 21.

32. Ky.—Smith v. Henson, 182 S.W. 2d 666, 298 Ky. 182.

Ohio.—Strain v. Isaacs, 18 N.E.2d 816, 59 Ohio App. 495.

64 C.J. p 1190 note 78.

33. Ky.—Cary-Glendon Coal Co. v. Carmichael, 80 S.W.2d 29, 258 Ky. 411.

### On matters not in controversy

U.S.—Fleming v. Peoples Packing Co., D.C.Okl., 42 F.Supp. 868, reversed on other grounds, C.C.A., Walling v. Peoples Packing Co., 132 F.2d 236, certiorari denied 63 S.Ct. 831, 318 U.S. 774, 87 L.Ed. 1144.

### Determination of reasonableness of charges against trust

Where a trust is administered under control and supervision of court, court has right to take into consideration, in determining reasonableness of charges against trust, knowledge gained during period of administration.—U. S. Nat. Bank of Omaha v. Alexander, 1 N.W.2d 920, 140 Neb. 784.

34. Okl.—H. F. Wilcox Oil & Gas Co. v. Johnson, 86 P.2d 51, 184 Okl. 198.

35. Ariz.—Utah Const. Co. v. Berg, 205 P.2d 367, 68 Ariz. 285.

## § 576. Hearing Argument of Counsel

Where the case is tried to the court, it has very generally been held that the matter of permitting argument is within the sound discretion of the court.

Although it has been held that counsel may not be deprived of the right to argue the case to the court,<sup>36</sup> where the case is tried to the court it has very generally been held that the matter of permitting argument is within the sound discretion of the court,<sup>37</sup> but it has been said that, where there is room for argument, it would be the better practice to permit it.<sup>38</sup> There is no abuse of discretion in refusing to listen to argument of counsel where the court is satisfied as to the evidence and the law applicable to the matter in issue,<sup>39</sup> or where no controverted question of fact is involved, but only the construction and determination of the scope and effect of a plain, unambiguous statute.<sup>40</sup> A party may waive his right to object to a failure to hear arguments,<sup>41</sup> and where a party fails to present requests for findings, as he is authorized to do by a court rule, he waives any objection for refusal of the trial judge to hear argument of counsel at the close of the hearing.<sup>42</sup> Where argument is permitted, the extent to which it should go is largely in the discretion of the court.<sup>43</sup> Argument to the court is not objectionable merely because it would

have been so if it had been directed to a jury.<sup>44</sup> A referee should decline to record unprofessional statements of counsel and scandalous objections.<sup>45</sup>

**Reargument.** A referee may allow a reargument before making his report,<sup>46</sup> but not thereafter.<sup>47</sup>

**Briefs.** A court will refuse to consider a brief submitted by mail from an attorney in another county where no local appearance has been entered and where it is an unwritten rule of the court not to permit cases to be submitted on briefs but to insist on argument.<sup>48</sup> A referee has power to enlarge the time for the submission of briefs to him in the same manner as he would have the power to postpone the oral argument of the cause on the day fixed.<sup>49</sup> Where, at trial, it was agreed that briefs of parties would cover certain questions, but the party who filed the first brief failed to concern himself with such questions, the briefs will be treated as abandoned.<sup>50</sup>

## § 577. Remarks and Conduct of Judge

Where a trial judge sits as a trier of facts his conduct is subject to the same rules as would apply to the jury if the case had been tried by a jury.

Where a trial judge sits as a trier of facts his conduct is subject to the same rules as would apply

36. N.J.—Aladdin Oil Burner Corp. v. Morton, 187 A. 350, 117 N.J.Law 260.

Right to argue case to jury see *supra* § 164.

**Effect of informality of procedure**

Informality of procedure permissible in district court proceedings does not comprehend deprivation of party's right to present analysis of evidence and inference claimed to be deducible therefrom to trier of the facts.—Aladdin Oil Burner Corp. v. Morton, 187 A. 350, 117 N.J.Law 260.

37. Cal.—Oil Workers Intern. Union, CIO v. Superior Court, Contra Costa County, 230 P.2d 71, 103 Cal.App.2d 512—Gunn v. Superior Court in and for Lake County, 173 P.2d 328, 76 Cal.App.2d 203—Larson v. Blue & White Cab Co., 75 P.2d 612, 24 Cal. App.2d 576.

Okl.—Crescent Oil Co. v. Brumley, 37 P.2d 593, 169 Okl. 462.

64 C.J. p 1190 note 81.

**Argument on propriety of granting injunction**

Permitting counsel for respondents to argue propriety of grant of injunction was held not error, notwithstanding respondents had made no answer to petition for injunction.—Hardison v. Fulford, 184 S.E. 317, 181 Ga. 710.

**Discretion held not abused**

Cal.—Larson v. Blue & White Cab Co., 75 P.2d 612, 24 Cal.App.2d 576.

**Argument held irrelevant**

U.S.—Dunn v. Wilson & Co., D.C.Del., 61 F.Supp. 655.

38. Cal.—Center v. Kelton, 129 P. 360, 20 Cal.App. 611.

39. Okl.—Crescent Oil Co. v. Brumley, 37 P.2d 593, 169 Okl. 462—Barnes v. Benham, 75 P. 1130, 13 Okl. 582.

40. Okl.—Godfrey v. Wright, 56 P. 1051, 8 Okl. 151.

**Refusal to present argument after judgment vacated**

In contempt proceeding, where court did not become aware that plaintiff was insisting on argument of case until date set for approval of bill of exceptions, and court then offered to vacate judgment and permit argument from both sides, but plaintiff's counsel refused, right to present argument was waived.—Madison v. Montgomery, 56 S.E.2d 292, 206 Ga. 199.

42. Mich.—Nelson v. Stewart, 140 N. W. 544, 174 Mich. 127.  
64 C.J. p 1190 note 85.

43. Cal.—Nicholson v. Nicholson, 163 P. 219, 174 Cal. 391—Gunn v. Superior Court in and for Lake County, 173 P.2d 328, 76 Cal.App.2d 203

—Larson v. Blue & White Cab Co., 75 P.2d 612, 24 Cal.App.2d 576.

N.J.—Aladdin Oil Burner Corp. v. Morton, 187 A. 350, 117 N.J.Law 260.

**Permitting particular argument held not error**

Where plaintiff insisted on arguing failure of consideration as well as illegality of contract as grounds for recovery of money paid under contract, trial court did not err in permitting defendant to argue his defense on the merits as though there were no claim that contract was void.—Carolin Mfg. Corp. v. George S. May, Inc., 20 N.W.2d 283, 312 Mich. 487.

44. Tex.—Houston, E. & W. T. Ry. Co. v. Chambers, Civ.App., 279 S.W. 290.

45. Mich.—Rae v. Rae, 18 N.W. 551, 53 Mich. 40.

46. N.Y.—Litch v. Brotherson, 16 Abb.Pr. 384, 25 How.Pr. 407.

47. N.Y.—Craig v. Craig, 21 N.Y.S. 241, 66 Hun 452.  
53 C.J. p 738 note 83.

48. Pa.—Gramatan Nat. Bank & Trust Co. v. Catrone, 64 Pa.Dist. & Co. 295, 40 Luz.Leg.Reg. 223.

49. N.Y.—Morrison v. Lawrence, 2 How.Pr.N.S., 72.

50. N.J.—Hoy v. Meyers, 41 A.2d 14, 23 N.J.Misc. 56.

to the jury if the case had been tried by a jury.<sup>51</sup> Every trial judge should listen, hear, and from the evidence determine the issues raised by the pleadings,<sup>52</sup> and his manner should not be such as to prevent a full presentation of all the relevant evidence.<sup>53</sup> He should not prejudge the issues,<sup>54</sup> but should keep an open mind until all the evidence is presented to him,<sup>55</sup> and he is bound to refrain from forming an opinion on issues of fact until case is finally submitted to him.<sup>56</sup> Thus a statement of the court before plaintiff's counsel had opportunity to cross-examine one defendant, that he was satisfied that defendants were not liable, has been held error.<sup>57</sup>

While the trial judge should maintain orderly procedure,<sup>58</sup> he is not a mere functionary whose sole purpose is to preserve order and lend ceremonial dignity to the proceedings.<sup>59</sup> He has the right and the duty, within reasonable limits, to bring out the facts in the case before him clearly, so that important functions of his office may be fairly and justly performed.<sup>60</sup> However, the trial judge should be patient with litigant and counsel, and be not only fair but appear to be fair and sympathetic toward any litigant or witness attempting to impress the merits of his cause or the sincerity of his testimony,<sup>61</sup> and it is improper for him to adopt

a belligerent attitude toward either party or to take the conduct of the trial out of the hands of the attorney.<sup>62</sup> Since it is the duty of counsel to refrain from encumbering the record with incompetent, immaterial, or irrelevant testimony, the trial judge during the trial may indicate his views when the attorneys are so doing.<sup>63</sup> While it is error if a statement of the judge shows that he has misconceived the law,<sup>64</sup> it is not improper, as prejudging the case, for the judge to announce during the progress of the trial the essential legal principles involved,<sup>65</sup> or to express his opinion on the merits of the litigation.<sup>66</sup> Severe criticism of plaintiff's testimony as a witness in his own behalf as being unsatisfactory cannot be held misconduct where the judge allowed part of plaintiff's claim, which had been disallowed in its entirety by a referee.<sup>67</sup> Oral comments by the trial judge, in deciding the case, on the informality of a transaction by which, it was claimed, without any written transfer a father made a gift to his son of a note for a large amount executed by the son and secured by a mortgage, do not show that the judge believed the evidence insufficient in law to support a gift or that his finding against a gift was based on an erroneous view of the law.<sup>68</sup> The trial judge may inquire of counsel as to the issues made in the case.<sup>69</sup>

51. Cal.—Martin v. Martin, 179 P.2d 655, 79 Cal.App.2d 409.

52. Cal.—Chalfin v. Chalfin, 263 P.2d 16, 121 Cal.App.2d 229.

53. Cal.—Shapiro v. Shapiro, App., 153 P.2d 62.

54. Cal.—Webber v. Webber, 199 P.2d 934, 33 Cal.2d 153—Shippey v. Shippey, 136 P.2d 86, 58 Cal.App.2d 174—Rosenfield v. Vosper, 114 P.2d 29, 45 Cal.App.2d 365.

Statements held not objectionable as showing bias or as prejudging case

Cal.—McClure, on Behalf of Caruthers v. Donovan, 205 P.2d 17, 33 Cal.2d 717—Dietlin v. General American Life Ins. Co., 49 P.2d 590, 4 Cal.2d 336—Babcock v. Berkson, 264 P.2d 155, 121 Cal.App.2d 710—Summers v. Parker, 259 P.2d 59, 119 Cal.App.2d 214—Valentine v. Ratner, 233 P.2d 667, 105 Cal.App.2d 358—Singleton v. Singleton, 157 P.2d 886, 68 Cal.App.2d 681—Vaden v. Holmes, 103 P.2d 1002, 39 Cal.App.2d 580.

Iowa.—Dahl v. Allen, 53 N.W.2d 759, 243 Iowa 808.

Utah.—Beagley v. U. S. Gypsum Co., 209 P.2d 750, 116 Utah 337.

Wis.—Milwaukee County v. H. Neidner & Co., 263 N.W. 468, 220 Wis. 185, mandate withdrawn and motion for rehearing denied 265 N.W. 226,

220 Wis. 185, motion denied 266 N.W. 238, 220 Wis. 185.

55. Cal.—Webber v. Webber, 199 P.2d 934, 33 Cal.2d 153—Chalfin v. Chalfin, 263 P.2d 16, 121 Cal.App.2d 229—Shippey v. Shippey, 136 P.2d 86, 58 Cal.App.2d 174—Rosenfield v. Vosper, 114 P.2d 29, 45 Cal.App.2d 365.

Trial court held not prejudiced or biased

Cal.—Adams v. Adams, 248 P.2d 784, 113 Cal.App.2d 654—Lentz v. Hartman, 111 P.2d 404, 43 Cal.App.2d 609.

56. Cal.—Martin v. Martin, 179 P.2d 655, 79 Cal.App.2d 409—Shippey v. Shippey, 136 P.2d 86, 58 Cal.App.2d 174—Rosenfield v. Vosper, 114 P.2d 29, 45 Cal.App.2d 365.

57. N.Y.—Hartenstein v. Bindsell, 164 N.Y.S. 102.

58. Cal.—Chalfin v. Chalfin, 263 P.2d 16, 121 Cal.App.2d 229.

59. Cal.—Martin v. Martin, 179 P.2d 655, 79 Cal.App.2d 409.

60. Cal.—Gantner v. Gantner, 246 P.2d 923, 39 Cal.2d 272—In re Estate of Du Pont, 140 P.2d 866, 60 Cal.App.2d 276.

61. Cal.—Chalfin v. Chalfin, 263 P.2d 16, 121 Cal.App.2d 229.

62. Mo.—Bova v. Bova, App., 135 S.W.2d 384.

63. N.D.—Druey v. Baldwin, 172 N.W. 663, 182 N.W. 700, 41 N.D. 473.

64. R.I.—Bond & Goodwin v. Weiner, 167 A. 159, 53 R.I. 407.

65. Cal.—City of Petaluma v. Hughes, 174 P. 336, 37 Cal.App. 473.

66 C.J. p 1190 note 89.

Statement of reasons for rulings on evidence

Trial judge in passing on questions of law with respect to admissibility of evidence, motions to strike, etc., may properly announce reasons on which he predicates his rulings, although by so doing he necessarily expresses an opinion on evidence already introduced, since such expressions are not expressions on ultimate facts to be found but are mere expressions of tentative opinions for benefit and guidance of counsel.—Ries v. Reinard, 117 P.2d 386, 47 Cal.App.2d 116.

66. Cal.—Morel v. Simonian, 284 P. 694, 103 Cal.App. 490.

67. Cal.—Irer v. Gawn, 277 P. 1053, 99 Cal.App. 17.

68. Wis.—Hilton v. Rahr, 155 N.W. 116, 161 Wis. 619.

69. Tenn.—Johnson v. Trammell, 15 Tenn.App. 607.

**Encouragement of settlement.** Efforts on the part of the trial judge to encourage settlement out of court ordinarily are to be commended,<sup>70</sup> although such efforts should never be so directed as to compel either litigant to make a forced settlement.<sup>71</sup>

### § 578. Submission of Cause on Case Stated

The parties to an action may submit it to the court on a case stated, which is a method of presenting a case for a decision on its merits by which the parties agree on all the material ultimate facts on which the rights of the parties are to be determined by law.

The parties to an action may submit it to the court on a case stated,<sup>72</sup> which is a method of presenting a case for a decision on its merits by which the parties agree on all the material ultimate facts on which the rights of the parties are to be determined by law.<sup>73</sup> It is essential to a case

stated that there be a pending action to support it; if there is no action there can be no judgment.<sup>74</sup> When properly drawn, it is like an issue developed by special pleading, and it presents in a single point, or in a series of points, beyond which the court cannot go, the very matter that is up for judgment.<sup>75</sup> It is in the nature of a special verdict,<sup>76</sup> and it should contain a clear statement of the facts agreed on which give rise to the question presented for decision, and nothing should be left to inference.<sup>77</sup> It is essential to a case stated that all the material facts be agreed on and set forth in the statement so that the court may have nothing to do but pronounce the law arising out of them,<sup>78</sup> and whatever is not distinctly and expressly agreed on, and set forth as admitted, must be taken not to exist,<sup>79</sup> or is presumed kept out of the case stated

70. Cal.—Empire Steel Bldg. Co. v. Harvey Mach. Co., 265 P.2d 32, 122 Cal.App.2d 411—Rosenfield v. Vosper, 114 P.2d 29, 45 Cal.App.2d 365.

71. Cal.—Empire Steel Bldg. Co. v. Harvey Mach. Co., 265 P.2d 32, 122 Cal.App.2d 411—Rosenfield v. Vosper, 114 P.2d 29, 45 Cal.App.2d 365.

#### Efforts held proper

Action of trial judge in suggesting a compromise before plaintiff had rested its case did not establish that defendant was deprived of a fair trial because trial court had prejudged the case where trial proceeded and defendant's case was fully presented.—Empire Steel Bldg. Co. v. Harvey Mach. Co., 265 P.2d 32, 122 Cal.App.2d 411.

#### Duty of judge and attorney

The dignity and power of federal judge and of attorney in court are equal within sphere of their respective duties, and judge must not compel agreement by arbitrary use of his power and attorney must not meekly submit to judge's suggestion, though suggestion be strongly urged.—Brooks v. Great Atlantic & Pac. Tea Co., C.C.A.Cal., 92 F.2d 794.

72. Mass.—Kennedy v. B. A. Gardetto, Inc., 27 N.E.2d 957, 306 Mass. 212, 129 A.L.R. 453.

#### Purpose of a case stated

A case stated is resorted to for convenience and to save expense of a trial and its purpose being, not to make evidence for a jury, but to supersede the action of a jury, by imparting to facts ascertained by consent the judicial certainty requisite to enable the court to pass on the law, and render judgment on the whole.—Russell v. School Dist. of Westtown, Pa. Com. Pl., 4 Chest. Co. 453.

#### Report of an auditor

The report of an auditor whose findings of fact are to be final constitutes a case stated.—Kennedy v.

B. A. Gardetto, Inc., 27 N.E.2d 957, 306 Mass. 212, 129 A.L.R. 453.

73. Mass.—Kennedy v. B. A. Gardetto, Inc., supra.

Pa.—Mowrer v. Poirier & McLane Corp., Com.Pl., 46 Berks Co. 85.

#### Distinguished from trial without jury

The distinction between a case stated and a trial without jury is that in the former case the parties submit an agreed statement of facts for the judgment of the court, subject to appeal if that right has been reserved, whereas in the latter case admitted facts are submitted for the decision of the court subject to exceptions and their review by the court before any judgment is entered.—Aufrecht v. Smoyer Brass Products, 70 Pa. Dist. & Co. 205.

74. Pa.—Smith v. Eline, 4 Pa. Dist. 490—Bedford Lodge I. O. O. F. No. 202, v. Lentz, 20 Pa. Co. 269—Hazleton City v. Benjamin, Com.Pl., 43 Luz. Leg. Reg. 244.

Matters in abatement will not be considered on a case stated.—Libbey v. Hodgdon, 9 N.H. 394—Morse v. Calley, 5 N.H. 222.

75. Pa.—Mutchler v. City of Easton, 23 A. 1109, 148 Pa. 441—Philadelphia & R. R. Co. v. Waterman, 54 Pa. 337.

64 C.J. p 1191 note 98.

76. Pa.—Lloyd v. Fendick, 80 A. 529, 231 Pa. 367—Loux & Son v. Fox, 53 A. 190, 171 Pa. 68—Kelly v. Urban, 7 A.2d 12, 136 Pa. Super. 20—Russell v. School Dist. of Westtown, Com.Pl., 4 Chest. Co. 453—Diehl v. Ihrie, 3 Whart. 143.

77. Pa.—Kelly v. Urban, 7 A.2d 12, 136 Pa. Super. 20—Morse v. Chessman, 86 Pa. Super. 256—Russell v. School Dist. of Westtown, Com.Pl., 4 Chest. Co. 453.

64 C.J. p 1191 note 99.

#### Inference unwarranted

In action on a case stated by receiver of foreign insolvent bank against domestic stockholder for double liability, inference that bank was organized under prior state constitution, creating doubt as to double liability, was unwarranted where stipulation contained nothing to show that bank was incorporated before adoption of present state constitution imposing double liability.—Lawhead v. Craig, 172 A. 104, 318 Pa. 49.

78. Mo.—Gage v. Gates, 62 Mo. 412. Pa.—Morse v. Chessman, 86 Pa. Super. 256—Bertram v. Petrovsky, 49 Pa. Super. 426—Williamsport v. Lycoming County, 34 Pa. Super. 221—Mohnton Building & Loan Ass'n v. Musser, 21 Pa. Dist. & Co. 100, 28 Berks Co. 119—Mowrer v. Poirier & McLane Corp., Com.Pl., 46 Berks Co. 85—Howell v. Kline, Com.Pl., 29 North. Co. 221.

The law of another state is a material fact which must be embodied in the case stated unless the parties avail themselves of the provisions of the Uniform Judicial Notice of Foreign Law Act.—Howell v. Kline, Pa. Com.Pl., 29 North. Co. 221.

#### Proceeding not sustained as case stated

Proceeding whereby jury was discharged, judgment entered for defendant, and cause submitted to court on plaintiffs' motion for judgment non obstante verdicto for final determination on evidence which had been received or that should be received later could not be sustained as case stated, where facts were not agreed on, a necessary essential of a case stated.—Hagy v. Sharp, 177 A. 578, 117 Pa. Super. 187.

79. Pa.—Lawrence County v. Horner, 126 A. 783, 281 Pa. 336—Commonwealth v. Megargee Bros., 118 A. 541, 275 Pa. 12—Welch v. Oregon,



for sufficient reason.<sup>80</sup> On the other hand, under statutory authority, the court may draw inferences<sup>81</sup> unless the parties expressly agree that no inferences shall be drawn.<sup>82</sup> A case stated in which there is one essential fact in dispute should be quashed.<sup>83</sup> It must disclose all the facts necessary to enable the court to render an intelligent judgment,<sup>84</sup> and it will be sufficient if it complies with this requirement.<sup>85</sup>

In deciding the case the court is confined to the specific facts stated.<sup>86</sup> It is error to base a judgment on facts not appearing therein,<sup>87</sup> and the court may decide only questions expressly raised therein or in any amendment thereto agreed on by the parties and permitted by the court.<sup>88</sup> On a case stated, all questions of pleadings<sup>89</sup> and forms of procedure<sup>90</sup> are waived, and the only question open is whether plaintiff can recover in any form of action.<sup>91</sup> Where a case heard on an agreed statement of facts constitutes a case stated, requests for

rulings have no standing,<sup>92</sup> and it is the duty of the judge to order the correct judgment on the agreed facts.<sup>93</sup> If the conscience of the trial judge leads him to the conclusion that the case stated ought to be discharged and the action stand for trial to the end that justice might be done, he has the power to take this course.<sup>94</sup> However, the mere inartificiality in the drawing of the case stated is not sufficient ground to set it aside.<sup>95</sup>

**Construction.** It has been held that, when a construction of a contract, annexed to the agreed statement of facts, is averred, the court may look into and construe the contract, and is not bound by the construction as averred in the case stated,<sup>96</sup> and where a case stated provides that all of the averments of the complaint and new matter are admitted for the purpose of submitting the issue, all portions of a lease attached as an exhibit are incorporated as part of the case stated, even though they are not otherwise set forth.<sup>97</sup> Where a statute re-

79 Pa.Super. 138.—Dunkle v. Perry County, 41 Pa.Dist. & Co. 80.—Shoener v. Schuykill County, 18 Pa.Dist. & Co. 379, 31 Sch.Leg.Rec. 83, affirmed 163 A. 319, 107 Pa.Super. 114.

64 C.J. p 1191 note 1—60 C.J. p 685 note 58.

80. Pa.—Mutchler v. City of Easton, 23 A. 1109, 148 Pa. 441.  
60 C.J. p 685 note 57.

81. Mass.—Coral Gables v. Granara, 189 N.E. 604, 285 Mass. 565.

**Drawing of inference held not necessary**

Where record of case stated recited that it contained all material ultimate facts on which rights of parties were to be determined, drawing of inferences from such facts was unnecessary.—Tapper v. Boston Penny Sav. Bank, 2 N.E.2d 198, 294 Mass. 335.

82. Mass.—Petros v. Superintendent and Inspector of Buildings of City of Lynn, 28 N.E.2d 233, 306 Mass. 368, 128 A.L.R. 1210.—Coral Gables v. Granara, 189 N.E. 604, 285 Mass. 565.

83. Pa.—Ford v. Buchanan, 2 A. 339, 111 Pa. 31.—Howell v. Kline, Com. Pl., 29 North.Co. 221.

84. Okl.—Corpus Juris cited in Stone v. Ritzinger, 213 P.2d 467, 469, 202 Okl. 306.

Pa.—Kelly v. Urban, 7 A.2d 12, 136 Pa.Super. 20.—Gilberton Coal Co. v. Felty, 52 Pa.Dist. & Co. 62, 10 Sch. Reg. 147.—Yowa v. Polish Union of U. S. A., Com.Pl., 39 Luz.Leg. Reg. 86.—Howell v. Kline, Com.Pl., 29 North.Co. 221.  
64 C.J. p 1191 note 3.

85. Pa.—Lloyd v. Fendick, 80 A. 529,

231 Pa. 367.—Cselouch v. Sarliti, Com.Pl., 52 Lack.Jur. 185.  
64 C.J. p 1191 note 4.

86. Pa.—City of Philadelphia v. Burk, 135 A. 635, 288 Pa. 383.—Schuykill County v. Shoener, 55 A. 791, 205 Pa. 592.—Kelly v. Urban, 7 A.2d 12, 136 Pa.Super. 20.—Dunkle v. Perry County, 41 Pa. Dist. & Co. 80.—Shoener v. Schuykill County, 18 Pa.Dist. & Co. 379, 31 Sch.Leg.Rec. 83, affirmed 163 A. 319, 107 Pa.Super. 114.—Miller v. City of Reading, Com.Pl., 43 Berks Co. 181.

**Restating facts in different form**

In case stated, court had no power to restate the facts in different form and find facts not set forth in the case stated, and its judgment must be set aside when based on such restated facts.—Kelly v. Urban, 7 A.2d 12, 136 Pa.Super. 20.

**Incompetent proof**

A party cannot agree on a case stated which admits a certain fact, and then insist that the proof of the fact is not competent, as that it was not in writing.—Swatara R. Co. v. Brune, 6 Gill, Md., 41.

87. Pa.—Lloyd v. Fendick, 80 A. 529, 231 Pa. 367.—Kelly v. Urban, 7 A. 2d 12, 136 Pa.Super. 20.

88. Pa.—Emhardt v. Wilson, 20 Pa. Dist. & Co. 608.

**Statement of facts held not conclusively binding on parties**

Pa.—Cook v. Shrauder, 25 Pa. 312.  
**Amendment over objection of party**  
Pa.—Miller v. City of Reading, Com. Pl., 43 Berks Co. 170.

89. Mass.—Union Old Lowell Nat. Bank v. Paine, 61 N.E.2d 666, 318 Mass. 313.—Markus v. Boston Edi-

son Co., 56 N.E.2d 910, 317 Mass. 1.—G. E. Lothrop Theatres Co. v. Edison Electric Illuminating Co. of Boston, 195 N.E. 305, 290 Mass. 189.—Nowell v. Equitable Trust Co., 144 N.E. 749, 249 Mass. 585.

90. Mass.—Kennedy v. B. A. Gardetto, Inc., 27 N.E.2d 957, 306 Mass. 212, 129 A.L.R. 453.

91. Mass.—Union Old Lowell Nat. Bank v. Paine, 61 N.E.2d 666, 318 Mass. 313.—G. E. Lothrop Theatres Co. v. Edison Electric Illuminating Co. of Boston, 195 N.E. 305, 290 Mass. 189.

92. Mass.—Associates Discount Corp. v. Gillineau, 78 N.E.2d 192, 322 Mass. 490.—Redden v. Ramsey, 34 N.E.2d 648, 309 Mass. 225.—D'Olimpio v. Jancoterino, 23 N.E.2d 162, 304 Mass. 200.—Antoun v. Commonwealth, 20 N.E.2d 423, 303 Mass. 80.—Howland v. Stowe, 194 N.E. 888, 290 Mass. 142.

93. Mass.—Associates Discount Corp. v. Gillineau, 78 N.E.2d 192, 322 Mass. 490.—Calissie v. City of Cambridge, 58 N.E.2d 169, 317 Mass. 346.—Redden v. Ramsey, 34 N.E.2d 648, 309 Mass. 225.—D'Olimpio v. Jancoterino, 23 N.E.2d 162, 304 Mass. 200.

94. Mass.—Paper Trucking Co. v. Russo, 183 N.E. 149, 281 Mass. 209.

95. Pa.—Morgan v. Mercer County, 8 Pa.Super. 96, 42 Wkly.N.C. 636.

96. Pa.—Commonwealth v. Banker Bros. Co., 38 Pa.Super. 101, affirmed 32 S.Ct. 38, 222 U.S. 210, 56 L.Ed. 168.

60 C.J. p 685 note 53.

97. Pa.—Seltzer v. Mitchell, 71 Pa. Dist. & Co. 96.

quires a demand to be made a certain length of time before the commencement of a suit against a city, an agreement in a case stated, that a demand was made, will be understood to be such a demand as was required by the statute.<sup>98</sup>

*Submission of cause on stipulation or agreed statement.* The validity of stipulations by litigants as to agreed statements of facts on which to submit their case to the court for decision is discussed in Stipulations § 10, and the construction, operation, and effect thereof in Stipulations § 25.

### § 579. Submission of Special Issues to Jury

Particular matters with respect to the submission of special issues to the jury are discussed infra §§ 580-587.

Examine Pocket Parts for later cases.

### § 580. — Power to Submit Issues and Discretion of Court

#### a. In general

b. Discretion as to whether issues shall be submitted

98. Mass.—Jennison v. Roxbury, 9 Gray 32.

99. Cal.—Olson v. Foster, 109 P.2d 388, 42 Cal.App.2d 493—Lawrence v. Ducommun, 58 P.2d 407, 14 Cal. App.2d 396.

Conn.—Lombardi v. Laudati, 200 A. 1019, 124 Conn. 569.

Ga.—Everette v. Mahaffey, 69 S.E. 2d 769, 208 Ga. 775—Metropolitan Life Ins. Co. v. Saul, 5 S.E.2d 214, 189 Ga. 1.

Idaho.—Metz v. Hawkins, 133 P.2d 721, 64 Idaho 386.

Minn.—Georgopolis v. George, 54 N.W.2d 137, 237 Minn. 176.

Mo.—Huegel v. Kimber, 224 S.W.2d 959, 369 Mo. 938.

N.Y.—Cantor v. Sachs, 276 N.Y.S. 324, 164 Misc. 429—Pandofo v. Gaeta, 73 N.Y.S.2d 549.

Ohio.—Flynn v. Sharon Steel Corp., 50 N.E.2d 319, 142 Ohio St. 145.

Okl.—Majors v. Majors, 263 P.2d 1012—Ball v. Fleishman, 83 P.2d 870, 183 Okl. 634—Lee v. Terrell, 40 P.2d 10, 170 Okl. 310—Mid-Continent Life Ins. Co. v. Sharrock, 20 P.2d 164, 162 Okl. 127.

S.C.—Evans v. Anderson, 175 S.E. 527, 178 S.C. 291.

64 C.J. p 1191 note 9.

Submission of issues to a jury, and direction of an action at law in equity actions generally see Equity §§ 495-512.

**Action at law included in equity suit**  
If in a suit in equity a cause of action at law is included for which a court of equity could not properly

give relief, court can submit such matter to a jury.—Alaska Rural Rehabilitation Corp. v. Pippel, 9 Alaska 500.

#### Resort to interrogatories essential

Resort to interrogatories to jury was essential for determination by jury of equitable issues contained in cross complaint seeking specific performance of an agreement to convey realty in ejectment action.—Barber v. Baldwin, 67 A.2d 1, 135 Conn. 558.

#### Conditional submission

In equity cases, court may in its discretion grant a trial by jury on such conditions as it may see fit to impose.—In re Cazauring's Estate, 170 P.2d 694, 75 Cal.App.2d 217.

**Issues of fact arising in actions for reformation** have been submitted under the general provisions of codes providing for trial of issues by jury.—Giles v. Latimer, 137 P. 113, 40 Okl. 301.

#### In New Jersey

(1) By virtue of rules of the supreme court all issues of fact not triable of right by jury shall be decided by the court without a jury.—Asbestos Fibres, Inc. v. Martin Laboratories, Inc., 98 A.2d 395, 12 N.J. 233—O'Neill v. Vreeland, 77 A.2d 899, 6 N.J. 158—Steiner v. Stein, 66 A.2d 719, 2 N.J. 367.

(2) Thus, where an equitable issue is before the court it should be decided by the court alone, even though other issues are involved in the case which were triable as of right by a

#### a. In General

In actions of an equitable nature, and in other actions in which the parties are not entitled to a jury trial as a matter of right, it is very generally held that the court may, on the application of either party, or on its own motion, submit issues of fact involved in the case to a jury.

In actions of an equitable nature, and in other actions in which the parties are not entitled to a jury trial as a matter of right, it is very generally held that the court may, on the application of either party, or on its own motion, submit issues of fact involved in the case to a jury.<sup>99</sup> The purpose of submitting specific interrogatories to the jury in equitable actions is to assist the court in finding the facts.<sup>1</sup> The court may submit the issues of fact without the request<sup>2</sup> or consent<sup>3</sup> of either party, and the submission of issues to the jury in the absence of a party or his counsel is not prejudicial error, especially where the answer is immaterial.<sup>4</sup> No constitutional right of parties to a trial by the court in an equitable action is violated by submission of issues to the jury<sup>5</sup> inasmuch as the jury's verdict is merely advisory.<sup>6</sup> However, the court, as trier of the facts, cannot delegate its duty to a

jury.—Volker v. Connecticut Fire Ins. Co., 78 A.2d 290, 11 N.J.Super. 225.

(3) Before proceeding with trial in the Law Division, court must be put on notice by pleadings and pretrial order that an equitable claim or defense is involved, because in such case rule comes into play under which court alone is required to decide all issues of fact not triable by a jury.—Volker v. Connecticut Fire Ins. Co., 78 A.2d 290, 11 N.J.Super. 225.

(4) However, this rule requiring trial by the court alone is subject to a provision of the rules that the court may try with an advisory jury any issue of fact not triable of right by a jury.—Asbestos Fibres, Inc. v. Martin Laboratories, Inc., 98 A.2d 395, 12 N.J. 233—O'Neill v. Vreeland, 77 A.2d 899, 6 N.J. 158—Steiner v. Stein, 66 A.2d 719, 2 N.J. 367.

1. Idaho.—Nuquist v. Bauscher, 227 P.2d 83, 71 Idaho 89—Rees v. Gorham, 164 P. 88, 30 Idaho 207.

2. Ga.—Everette v. Mahaffey, 69 N.E.2d 769, 208 Ga. 775—Elder v. Stark, 37 S.E.2d 598, 200 Ga. 452. 64 C.J. p 1192 note 10.

3. Minn.—Messersall v. Dreyer, 189 N.W. 446, 152 Minn. 471. 64 C.J. p 1192 note 11.

4. Ky.—Urban v. Lansing's Adm'r 39 S.W.2d 219, 239 Ky. 218.

5. N.J.—O'Neill v. Vreeland, 77 A.2d 899, 6 N.J. 158.

6. S.D.—Steuerwald v. Steuerwald, 218 N.W. 597, 52 S.D. 448.

jury except as provided by law,<sup>7</sup> and under a statute making it mandatory for the court to decide issues of fact where the parties have waived a jury trial the court cannot frame special issues for a trial by jury without the consent of the parties who have waived trial by jury; if counsel deems a case an improper one for submission of special issues, he should call the attention of the court to the fact at the time the charge is delivered.<sup>8</sup>

*In special proceedings.* In special proceedings founded on a statute and unknown to the common law, if the statute does not provide for a jury trial, the court is without power to submit issues arising therein to a jury over the objection of one of the parties.<sup>9</sup>

7. N.Y.—*Tobin v. Shwitzer*, 295 N.Y.S. 590, 162 Misc. 747.

8. Ga.—*Metropolitan Life Ins. Co. v. Saul*, 5 S.E.2d 214, 189 Ga. 1—*McWhorter v. Ford*, 83 S.E. 134, 142 Ga. 554.

9. Utah.—*Corpus Juris* cited in *Application of Peterson*, 66 P.2d 1195, 1198, 92 Utah 212.  
64 C.J. p 1192 note 14.

10. Colo.—*Moore v. Burrill*, 105 P.2d 1084, 106 Colo. 413.

11.—*Chandler Society v. Shenk*, 79 N.E.2d 757, 334 Ill.App. 373.

Ind.—*Daugherty v. Daugherty*, 75 N.E.2d 427, 118 Ind.App. 141.

Kan.—*Granel v. Wakefield*, 242 P.2d 1075, 172 Kan. 685.

Ky.—*Alt v. Burt*, 242 S.W.2d 974 Minn.—*Georgopolis v. George*, 54 N.W.2d 137, 237 Minn. 176.

Mont.—*Golden Rod Min. Co. v. Bukovich*, 82 P.2d 316, 108 Mont. 569.

N.Y.—*Scherer v. Scherer*, 121 N.Y.S.2d 810—*Pandolfo v. Gaeta*, 73 N.Y.S.2d 549.

N.D.—*Corpus Juris* quoted in *Zimmerman v. Kitzan*, 43 N.W.2d 822, 827, 77 N.D. 477.

Okl.—*Bert Whites, Inc., v. Motor Mfg. Co.*, 77 P.2d 698, 182 Okl. 384.

Pa.—*Horn v. Devling*, 178 A. 284, 315 Pa. 495.

S.C.—*Greenwood Lumber Co. v. Cromer*, 82 S.E.2d 527—*Holly Hill Lumber Co. v. McCoy*, 23 S.E.2d 372, 201 S.C. 427.

64 C.J. p 1192 note 16.

**Discretion should be sparingly exercised**

The discretion of the court in an equitable action to submit legal questions to the jury should be sparingly exercised in view of difficulty of differentiating between two cases and providing adequate treatment for each in record on appeal.—*Lombardi v. Laudati*, 200 A. 1019, 124 Conn. 569.

#### In Arizona

(1) In trial of equity cases where jury has been demanded, court may

#### b. Discretion as to Whether Issues Shall Be Submitted

In equitable actions or other actions in which a jury trial is not a matter of right it is solely within the discretion of the court whether or not it shall submit issues of fact to the jury.

While, as already shown supra, subdivision a of this section, the court may submit issues of fact to the jury, in equitable actions or other actions in which a jury trial is not a matter of right, it is very generally held that it is solely a matter within its discretion whether or not it shall do so,<sup>10</sup> unless it is provided otherwise by organic law or statute,<sup>11</sup> and the submission to a jury will not be set aside except for clear abuse.<sup>12</sup> Even after a

not withdraw from jury the determination of questions involving controverted facts.—*Lane v. Mathews*, 251 P.2d 303, 75 Ariz. 1—*Haynie v. Taylor*, 213 P.2d 684, 69 Ariz. 339—*Greer v. Goessling*, 97 P.2d 218, 54 Ariz. 488.

(2) In an equity case, when there is no controverted issue of fact, court may discharge the jury and render judgment in accordance with facts as shown by the evidence.—*Brooks v. Brooks*, 132 P.2d 431, 60 Ariz. 119—*Greer v. Goessling*, 97 P.2d 218, 54 Ariz. 488.

(3) Either party to any litigation in the superior court is entitled as a matter of right to a jury trial, and this rule applies in equity as well as in law cases.—*Stukey v. Stephens*, 295 P. 973, 37 Ariz. 514.

(4) In an ordinary equitable proceeding, the submission of interrogatories is discretionary with the court.—*Sanders v. Sanders*, 79 P.2d 523, 52 Ariz. 156.

11. N.D.—*Corpus Juris* quoted in *Zimmerman v. Kitzan*, 43 N.W.2d 822, 827, 77 N.D. 477.

64 C.J. p 1193 note 17.

#### Annulment action

Rule relating to settlement of issues for trial by jury in the discretion of the court is inapplicable to an annulment action where a party may have a jury trial as a matter of right.—*Jackson v. Jackson*, 7 N.Y.S.2d 407, 255 App.Div. 812—*Sefranka v. Sefranka*, 74 N.Y.S.2d 616, 190 Misc. 639.

#### Effect of waiver of jury trial

Where statute makes it mandatory on the court to decide issues of fact where the parties have waived a jury trial, the court no longer has discretion whether or not to submit issues of fact to the jury but is without power to direct jury trial.—*Toohey v. Brooklyn & Queens Transit Corp.*, 290 N.Y.S. 487, 248 App.Div. 894—*Tobin v. Shwitzer*, 295 N.Y.S. 590, 162 Misc. 747.

#### In Kentucky

(1) Where cause of action is purely equitable, but there is fact issue, on which determination of equitable issue depends, parties are not entitled to jury trial as matter of right and chancellor may or may not, in his discretion, obtain jury's advisory aid on fact question.—*Alt v. Burt*, Ky. 242 S.W.2d 974—*Merritt v. Palmer*, 158 S.W.2d 163, 289 Ky. 141—64 C.J. p 1193 note 17 [b].

(2) On the other hand, in an equitable action where a distinct legal issue is involved, either party has a right to have such issue decided by a jury when application therefor is seasonably made.—*Castleman v. Continental Can Co.*, 258 S.W. 658, 201 Ky. 770—*Bell v. Duncan*, 245 S.W. 141, 196 Ky. 574—*Scott v. Kirtley*, 179 S.W. 825, 166 Ky. 727—*Proctor v. Tubbs*, 179 S.W. 620, 166 Ky. 677—*Barton v. Barton's Adm'r*, 134 S.W. 902, 142 Ky. 487—64 C.J. p 1193 note [b] (3).

(3) An issue of non est factum is purely a question of fact, to be tried by jury as a legal issue.—*Truitt v. Truitt's Adm'r*, 162 S.W.2d 31, 290 Ky. 632, 140 A.L.R. 1127—*Logan v. Doniphan*, 25 Ky. 251.

(4) It is provided by statute that issues of fact in ordinary actions, except for injuries to person or character, shall be tried by the court, unless a jury trial is demanded by a party.—*Kavineus v. Maglia*, 94 S.W.2d 675, 264 Ky. 276.

12. Pa.—*Horn v. Devling*, 178 A. 284, 315 Pa. 495.

#### Discretion held not abused

(1) In general.—*Alt v. Burt*, Ky., 242 S.W.2d 974—*Schlachter v. Henderson's Adm'r*, 83 S.W.2d 491, 259 Ky. 759.

Minn.—*Georgopolis v. George*, 54 N.W.2d 137, 237 Minn. 176.

S.C.—*Holly Hill Lumber Co. v. McCoy*, 23 S.E.2d 372, 201 S.C. 427—*Momeier v. John McAllister, Inc.*, 8 S.E.2d 606, 190 S.C. 529.

jury have been called, it may refuse to submit issues to the jury if it is then of the opinion that such submission is unnecessary,<sup>13</sup> it may discharge the jury at the close of the evidence,<sup>14</sup> or at any other stage of the proceedings,<sup>15</sup> and make its own findings,<sup>16</sup> or render such judgment as the facts warrant;<sup>17</sup> or it may withdraw issues submitted to a jury before they have been determined and itself determine the issues,<sup>18</sup> or determine the case on an issue not submitted to the jury.<sup>19</sup>

**Rules governing discretion.** It is the duty of the court to try the issues involved unless convinced that it should do otherwise.<sup>20</sup> It should exercise discrimination and submit questions to a jury only where it appears that needed information may be more certainly gained through a jury.<sup>21</sup> Unless the trial of issues of fact by a jury is essential to the proper administration of justice it is proper to decline to direct issues of fact to be tried by a jury in view of the burdened condition of the jury calendar.<sup>22</sup>

## § 581. — Notice of, or Motion for, Submission

Notice of, or motions for, submission of issues to a jury should state the questions which it is desired be submitted, and should be seasonably made.

(2) Where suit to quiet title to deceased's property on ground that plaintiff was his common-law wife was essentially equitable, court did not abuse its discretion in refusing to grant defendants a jury trial.—*Cooper v. Cooper*, 76 P.2d 867, 147 Kan. 256.

### Trial without jury held proper

Where trial court denies motion for trial by jury in suit in equity, on ground that parties are not entitled to trial by jury as a matter of right, it is entirely proper that case be tried by trial court alone.—*Rabin v. Greiner*, 48 P.2d 696, 4 Cal.2d 255.—*Daniels v. Baldwin*, 262 P.2d 351, 115 Cal. App.2d 487.

13. N.D.—*Corpus Juris* quoted in *Zimmerman v. Kitzan*, 43 N.W.2d 822, 827, 77 N.D. 477.  
64 C.J. p 1193 note 18.

14. N.D.—*Corpus Juris* quoted in *Zimmerman v. Kitzan*, 43 N.W.2d 822, 827, 77 N.D. 477.  
Colo.—*Rosenbaum v. Buchheit*, 215 P. 131, 73 Colo. 260.

15. N.D.—*Corpus Juris* quoted in *Zimmerman v. Kitzan*, 43 N.W.2d 822, 827, 77 N.D. 477.  
64 C.J. p 1193 note 20.

16. Colo.—*Rosenbaum v. Buchheit*, 215 P. 131, 73 Colo. 260.  
N.D.—*Corpus Juris* quoted in *Zim-*

*merman v. Kitzan*, 43 N.W.2d 822, 827, 77 N.D. 477.

17. N.D.—*Corpus Juris* quoted in *Zimmerman v. Kitzan*, 43 N.W.2d 822, 827, 77 N.D. 477.  
Wash.—*Lindblom v. Johnston*, 158 P. 972, 92 Wash. 171.

18. Del.—*In re Harmon's Will*, 95 A. 2d 47.

N.D.—*Corpus Juris* quoted in *Zimmerman v. Kitzan*, 43 N.W.2d 822, 827, 77 N.D. 477.

S.C.—*Jefferson Standard Life Ins. Co. v. Boddie*, 23 S.E.2d 817, 202 S.C. 1.—*Momeier v. John McAllister, Inc.*, 3 S.E.2d 606, 190 S.C. 529.—*Johnstone v. Matthews*, 191 S.E. 223, 183 S.C. 360.

64 C.J. p 1193 note 23.

19. N.D.—*Corpus Juris* quoted in *Zimmerman v. Kitzan*, 43 N.W.2d 822, 827, 77 N.D. 477.  
64 C.J. p 1193 note 24.

20. Minn.—*Westberg v. Wilson*, 241 N.W. 315, 185 Minn. 307.—*Messersall v. Dreyer*, 139 N.W. 446, 152 Minn. 471.

Pa.—*Mussman v. Mussman*, Com.Pl., 62 Lanc.L.Rev. 303.

21. Ind.—*Pence v. Garrison*, 93 Ind. 345.

22. N.Y.—*Scherer v. Scherer*, 121 N.Y.S.2d 810.—*Pandolfo v. Gaeta*, 73 N.Y.S.2d 549.

64 C.J. p 1193 note 27.

Notice of,<sup>23</sup> or motions for,<sup>24</sup> submission of issues to a jury should state the questions which it is desired be submitted, and if this requirement is not complied with, no complaint can be made of the refusal to submit issues.<sup>25</sup> A failure to insist on a motion made in an equitable proceeding may constitute a waiver thereof.<sup>26</sup> A motion for a rehearing of the motion for jury issues has no standing as a matter of right,<sup>27</sup> but where the court in its discretion grants it the court is bound to hear it through.<sup>28</sup> Plaintiff is not prevented from moving to frame issues for a jury because previous and similar litigation had been brought against defendant, where plaintiff has not been shown to have knowledge of, or responsibility for, the other litigation.<sup>29</sup>

**Time for making.** Where the time for making the motion is prescribed by rules of practice, it will be denied if not made within the time so prescribed unless some special reason for the delay is shown to exist.<sup>30</sup> Independently of rules of practice or statutory regulation, these motions must be seasonably made; if not, they are properly denied,<sup>31</sup> although the party moving is, by statute, entitled to have the issues submitted to a jury.<sup>32</sup> On failure to make the motion seasonably, the right is considered waived.<sup>33</sup> It has been held that a motion

23. Conn.—*Nowski v. Siedlecki*, 75 A. 135, 83 Conn. 109.

24. Ky.—*Patton v. Catlettsburg Nat. Bank*, 255 S.W. 690, 200 Ky. 775.

25. Ky.—*Patton v. Catlettsburg Nat. Bank*, *supra*.

26. Ky.—*Commercial Credit Co. v. Suter*, 202 S.W.2d 416, 305 Ky. 151.

27. Mass.—*Union Trust Co. of Springfield v. Kittredge*, 11 N.E.2d 435, 298 Mass. 515.—*In re McNeill's Estate*, 140 N.E. 922, 246 Mass. 250.

28. Mass.—*Union Trust Co. of Springfield v. Kittredge*, 11 N.E.2d 435, 298 Mass. 515.—*Union Trust Co. of Springfield v. Magenis*, 165 N.E. 496, 266 Mass. 363.

29. N.Y.—*Cantor v. Sachs*, 276 N.Y. S. 324, 154 Misc. 429.

30. N.Y.—*Auerbach v. Chase Nat. Bank of City of New York*, 296 N.Y.S. 487, 261 App.Div. 543.—*Manhattan Life Ins. Co. v. Hammerstein Opera Co.*, 167 N.Y.S. 884, 101 Misc. 608, affirmed 171 N.Y.S. 678, 184 App.Div. 440.

64 C.J. p 1194 note 31.

31. Ky.—*W. D. Harris & Co. v. Lewis*, 32 S.W.2d 401, 235 Ky. 810.

64 C.J. p 1194 note 32.

32. Ky.—*Board v. Dorris*, 181 S.W. 1098, 168 Ky. 195.

33. Ky.—*Board v. Dorris*, *supra*.

64 C.J. p 1194 note 34.

is too late when made after the court has rendered judgment determining all the issues in the case,<sup>34</sup> after submission of the cause to the court,<sup>35</sup> after the evidence is entirely made up by depositions,<sup>36</sup> after final submission of the cause to the court, and after argument by counsel, especially where the complaining party had expressly agreed that the court might enter judgment on the whole case,<sup>37</sup> and after a commissioner's report in a case where the action was referred to a commissioner.<sup>38</sup> It has also been held that there is no abuse of discretion in refusing a motion to frame issues noticed before the term but not called up until after jurors were dismissed.<sup>39</sup>

*Service.* Service of notice of issues must be in conformity with statutory requirements.<sup>40</sup>

### § 582. — What Issues Will Be Submitted

Subject to statutory requirements, it is wholly within the discretion of the court as to what issues of fact should be submitted to a jury.

Within limitations imposed by organic law or statute,<sup>41</sup> it is wholly within the discretion of the

court as to what issues of fact should be submitted,<sup>42</sup> and error lies only in abuse of discretion.<sup>43</sup> In its discretion the court may submit such interrogatories as it deems will be helpful in the making of the ultimate decision,<sup>44</sup> and it may submit all<sup>45</sup> or a part of the issues,<sup>46</sup> or a single issue<sup>47</sup> to the jury, although in an equity action the better practice is to submit to the jury all such issues of fact as the jury may properly try.<sup>48</sup> It may submit both legal and equitable issues to the jury,<sup>49</sup> and it is not error to refuse to separate the law from the equitable issues and try the former to the jury and the latter to a court.<sup>50</sup> However, where a complaint or petition may and does contain two distinct causes of action, the one equitable for reformation of an instrument and the other legal for relief on or under the instrument as reformed, it has been held that it is irregular to submit to the jury all the legal and equitable defenses together.<sup>51</sup>

The court may submit such questions of fact as are controverted<sup>52</sup> or such as it desires to be advised

34. Ky.—Hartford Fire Ins. Co. v. Haas, 9 S.W. 720, 87 Ky. 531, 10 Ky.L. 573.

35. Ky.—Board v. Dorris, 181 S.W. 1098, 168 Ky. 195.

36. Ky.—R. E. Jones & Co. v. Northern Assur. Co., Limited, of London, England, 207 S.W. 459, 182 Ky. 701.

37. Ky.—Prospect v. Louisville & N. R. Co., 233 S.W. 736, 192 Ky. 330.

38. Ky.—W. D. Harris & Co. v. Lewis, 32 S.W.2d 401, 235 Ky. 810—Patton v. Catlettsburg Nat. Bank, 255 S.W. 690, 200 Ky. 775.

39. S.C.—Osteen v. Bultman, 73 S.E. 874, 90 S.C. 452.

40. S.C.—Burn v. Nock, 157 S.E. 623, 159 S.C. 435.

64 C.J. p 1194 note 41.

41. Questions and issues required to be submitted.

Under the statute authorizing a special verdict in an equity case it is necessary for the judge to propound only such questions and such main issues as will enable him, from the answers thereto, the admitted facts, and the pleadings and the principles of law and equity, to decree on the entire case and to adjudicate the rights of the parties.—Allen v. Allen, 31 S.E.2d 483, 198 Ga. 249.

42. Conn.—Finnegan v. La Fontaine, 191 A. 337, 122 Conn. 561—Kornblau v. McDermant, 98 A. 587, 90 Conn. 624.

Kan.—Grannell v. Wakefield, 242 P. 2d 1075, 172 Kan. 685.

N.D.—Zimmerman v. Kitzan, 43 N.W. 2d 822, 77 N.D. 477.

64 C.J. p 1194 note 43.

Submission of question of misfeasance.

(1) Separation for jury trial, through framed issues, of questions of misfeasance, where incidental to other questions properly triable by a court, is not favored.—Cantor v. Sachs, 276 N.Y.S. 324, 154 Misc. 429.—Wilkey Corporation v. Goldman Sachs Trading Corporation, 276 N.Y.S. 994, 153 Misc. 909.

(2) Where separation of negligence and bad faith from other issues in stockholders' action against officers of corporation for breach of trust would necessitate two trials before different justices, and would make it impossible to consider case as a whole and might impair efficiency of each tribunal, motion to frame negligence and bad faith issues for jury, was denied, especially since justice to whom case, undivided, fell for trial could refer questions to jury for advice.—Wilkey Corporation v. Goldman Sachs Trading Corporation, 276 N.Y.S. 994, 153 Misc. 909.

(3) Stockholder, in suit against officers and directors of corporation for breach of trust by conspiring to defraud investors, was held not entitled to have issues framed for jury as to fraud and negligence.—Cantor v. Sachs, 276 N.Y.S. 324, 154 Misc. 429.

43. Kan.—Grannell v. Wakefield, 242 P.2d 1075, 172 Kan. 685.

44. Conn.—Finnegan v. La Fontaine, 191 A. 337, 122 Conn. 561.

Interrogatories on subordinate facts.

Trial court may properly refuse to submit interrogatories which concern subordinate facts which would not be controlling in determining the ultimate question on trial.—Finnegan v. La Fontaine, 191 A. 337, 122 Conn. 561—Miller v. Connecticut Co., 152 A. 879, 112 Conn. 476—Ford v. Dubiskie & Co., Inc., 136 A. 550, 105 Conn. 572—Callahan v. Jursek, 124 A. 31, 100 Conn. 490.

45. Conn.—Roy v. Moore, 82 A. 233, 85 Conn. 159, 168.

64 C.J. p 1194 note 44.

46. Kan.—Grannell v. Wakefield, 242 P.2d 1075, 172 Kan. 685.

64 C.J. p 1194 note 45.

47. Ga.—Shellman Banking Co. v. Oliver, 184 S.E. 707, 182 Ga. 63.

64 C.J. p 1194 note 46.

One or more.

N.Y.—Pandolfo v. Gaeta, 73 N.Y.S. 2d 549.

48. Conn.—Finnegan v. La Fontaine, 191 A. 337, 122 Conn. 561—Gest v. Gest, 187 A. 909, 117 Conn. 289.

49. S.C.—McLain v. Allen, 79 S.E. 1, 95 S.C. 152.

50. Neb.—Rath v. Willgus, 195 N.W. 115, 110 Neb. 810.

51. Cal.—Lestrade v. Barth, 19 Cal. 660.

52. Okl.—Parker v. Hamilton, 184 P. 65, 49 Okl. 693.

on,<sup>53</sup> and refuse to submit others.<sup>54</sup> Issues are properly submitted to a jury where there is substantial conflict in the evidence.<sup>55</sup> Issues presenting a question of law<sup>56</sup> or calling for a conclusion of law<sup>57</sup> should not be submitted to a jury; and issues should not be submitted to a jury where they are immaterial to a determination of the case<sup>58</sup> where there is no evidence to support them,<sup>59</sup> where, under the evidence, but one conclusion could be drawn,<sup>60</sup> where, although evidence is offered which, standing alone, would call for the intervention of a jury, the complaint is fatally defective, or on admitted undisputed evidence the action is barred by limitation or laches,<sup>61</sup> where they are included within other issues submitted to the jury,<sup>62</sup> or where the complicated and numerous items in dispute made it a case for the court to determine, because a jury could not intelligently dispose of it.<sup>63</sup> So, where various issues made by counterclaims involve the same issues, it is improper to direct a jury trial as to a part only of the issues, since the same issues should not be tried both by the court and by the jury.<sup>64</sup> Where the submission of issues raised by counterclaim and reply is asked, issues raised by the denials of the allegations of the complaint should not be given.<sup>65</sup>

## § 583. — Framing and Settlement of Issues

The court must frame, or cause to be framed, such question or questions of fact as are desired to be tried by a jury.

The court must frame, or cause to be framed, such question or questions of fact as are desired to be tried by a jury.<sup>66</sup> Issues of fact may be prepared either by the court, or by counsel under the direction of the court, or prepared by counsel and submitted to the court for approval.<sup>67</sup> It is the duty of counsel to aid the trial court in determining what issues should be submitted to the jury,<sup>68</sup> and it has been held that, where the court directs counsel to prepare such issues, it is their duty to make a bona fide effort to comply.<sup>69</sup> The court may properly frame the questions in the form which it prefers rather than in the forms proposed by counsel if the essential substance of the proposed questions is distinctly and intelligibly expressed in those allowed by the court,<sup>70</sup> and where the issues as proposed to the court in the motion for submission are defective in form the opposing party may not object thereto since the defect can easily be corrected in the order for the proposed issues.<sup>71</sup>

The issues to be tried should be plainly and distinctly stated,<sup>72</sup> and each should be confined to

53. *Okl.—Parker v. Hamilton, supra*.  
Oklahoma Trust Co. v. Stein, 136 P. 746, 39 Okl. 756.

54. *Minn.—Reid v. Minneapolis & R. R. Co.*, 228 N.W. 548, 179 Minn. 110.

64 C.J. p 1194 note 51.

55. *Ariz.—Pawley v. First Nat. Bank*, 256 P. 507, 32 Ariz. 135.

Pa.—*Horton v. Horton*, Com.Pl. 32 Erie Co. 48—*Land Title Bank & Trust Co. v. H. & S. Auto Sales Co.*, Com.Pl. 1 Lycoming 67.

56. *Md.—Vickers v. Starcher*, 2 A. 2d 678, 175 Md. 522—*Dronenburg v. Harris*, 71 A. 81, 108 Md. 597.

64 C.J. p 1194 note 53.

57. *Ariz.—Corbett v. Kingan*, 146 P. 922, 16 Ariz. 440.

64 C.J. p 1194 note 54.

58. *Conn.—Welbrot v. Levenberg*, 118 A. 911, 913, 98 Conn. 217.

64 C.J. p 1195 note 55.

**Refusal to submit interrogatory held error**

In suit for breach of written lease, wherein defendants counterclaimed for reformation, trial court, which submitted to jury, on proper interrogatories, issue as to whether defendants had established ground for reformation of written agreement, committed error in refusing to submit requested interrogatories raising cru-

cial issue as to whether written agreement, as signed by parties, was in fact true agreement which parties had originally intended.—*Lane v. Mathews*, 251 P.2d 303, 75 Ariz. 1.

59. *Ariz.—Pawley v. First Nat. Bank*, 256 P. 507, 32 Ariz. 135.

Ky.—*Manis v. Goodlette*, 199 S.W.2d 738, 304 Ky. 23.

**Refusal to submit question not error**

In wife's suit to compel husband as trustee to account to her for certain moneys belonging to her as part of her separate estate, part of which being proceeds of insurance policy on the life of her father under which she was beneficiary, it was not error to refuse to submit question whether husband had paid the premiums on the policy where there was neither averment nor proof that husband paid them under any contractual agreement with wife.—*Allen v. Allen*, 31 S.E.2d 483, 198 Ga. 269.

60. *Ky.—South v. Truesdale*, 28 S.W.2d 519, 233 Ky. 682.

61. *N.C.—Marshall v. Hammock*, 142 S.E. 776, 195 N.C. 498.

62. *Ariz.—Pawley v. First Nat. Bank*, 256 P. 507, 32 Ariz. 135.

Ky.—*Brown v. Fidelity Mut. Life Ins. Co.*, 247 S.W. 47, 197 Ky. 430.

63. *Ky.—Cheatham v. Harmon*, 206

S.W. 16, 182 Ky. 35—*Garvey v. Garvey*, 161 S.W. 528, 156 Ky. 664.

64. *N.Y.—Charles M. Gray Marble & Slate Co. v. Earlington Realty Corporation*, 196 N.Y.S. 408, 203 App.Div. 88.

65. *N.Y.—Lord Electric Co. v. Oak Realty Co.*, 178 N.Y.S. 709, 189 App. Div. 481.

66. *N.Y.—Hammond v. Morgan*, 4 N. E. 328, 101 N.Y. 179.

Pa.—*Maxwell v. Snyder*, Com.Pl., 4 Monroe L.R. 73.

64 C.J. p 1195 note 63.

**Where no real issue of fact was presented, plaintiff's motion to frame issues for trial would be denied.**—*Brookwood Parks v. Jackson*, 21 N.Y. S.2d 173, reversed on other grounds 26 N.Y.S.2d 127, 261 App.Div. 410.

67. *Mo.—Randolph v. St. Joseph Gas Co.*, 203 S.W. 642, 199 Mo.App. 425.

64 C.J. p 1195 note 64.

68. *Ga.—Howard v. Lee*, 69 S.E.2d 263, 208 Ga. 735.

69. *Mo.—Randolph v. St. Joseph Gas Co.*, 203 S.W. 642, 199 Mo.App. 425.

70. *Conn.—Welbrot v. Levenberg*, 118 A. 911, 98 Conn. 217.

71. *N.Y.—Sefranka v. Sefranka*, 74 N.Y.S.2d 516, 190 Misc. 539.

72. *Okl.—Apache State Bank v. Daniels*, 121 P. 237, 32 Okl. 121, 40

a single question of fact,<sup>73</sup> and the jury should be advised by the issues submitted of the contentions of both parties.<sup>74</sup> After submitting several questions for rendition of a verdict, submitting the question whether the jury intended to find for plaintiff in a particular amount is not an intimation by the court which tends to influence the jury in plaintiff's favor.<sup>75</sup> When an issue is directed to try the right to money in court, the court should indicate who are to be the parties plaintiff and defendant, and the cause put in form by filing a declaration, plea, and joinder in issue.<sup>76</sup> Where the questions propounded by the court substantially cover the issues, if counsel desire a fuller submission or submission in different form they should request it.<sup>77</sup> Under some statutes where fact issues are framed for jury trial in an equity case, the issues do not survive the term at which they are framed unless continued by special order,<sup>78</sup> and where a cause is continued to a subsequent term and tried by another judge he is not bound by the issues made by the judge before whom the cause originated, and may make another order of submission.<sup>79</sup>

*Time of framing and settling.* In some jurisdictions it has been held a proper exercise of discretion for the court to withhold the framing and settlement of the issues to be submitted to the jury until after the evidence is heard.<sup>80</sup> The judge has power to submit the issues to the jury at all times

and until the very close of the trial of the cause,<sup>81</sup> and it is not necessary that the issues be framed and settled before the evidence is heard,<sup>82</sup> although this may be done if the court sees fit to do so.<sup>83</sup> In at least one jurisdiction it has been held that, while it would be better practice to settle and submit issues before the trial is commenced,<sup>84</sup> the court on its motion may submit issues after commencement of the trial when not restrained by positive law;<sup>85</sup> and it is not prohibited from so doing by a rule of court requiring parties to a cause to submit issues before commencement of the trial, since such rule does not pretend to prescribe the practice where the court itself feels the need of the aid of the jury.<sup>86</sup>

#### § 584. — Submission of Case for General Verdict

As a general rule in equitable actions involving issues of fact it is erroneous to submit the whole case to the jury with directions to return a general verdict.

Although there is authority to the contrary,<sup>87</sup> it is ordinarily held that in equitable actions involving issues of fact it is erroneous to submit the whole case to the jury with directions to return a general verdict; only the issue or issues of fact involved in the case should be submitted to the jury,<sup>88</sup> and they should be directed to make specific findings of fact on the issues so submitted.<sup>89</sup> However, such a submission of the general issue to the jury and re-

L.R.A.N.S., 901, Ann.Cas.1914A 520.

64 C.J. p 1195 note 67.

**Wording of interrogatory held erroneous**

Minn.—Employers Mut. Cas. Co. v. Chicago, St. P. M. & O. Ry. Co., 50 N.W.2d 689, 235 Minn. 304.

73. Ariz.—Pawley v. First Nat. Bank, 256 P. 507, 32 Ariz. 135.

Cal.—Phoenix Water Co. v. Fletcher, 23 Cal. 481.

74. Ky.—Stirman v. Crabtree, 122 S. W. 194.

75. Ga.—Allen v. Allen, 31 S.E.2d 483, 198 Ga. 269.

76. Pa.—Muhlenberg v. Brock, 25 Pa. 517.

64 C.J. p 1195 note 70.

77. Ga.—Metropolitan Life Ins. Co. v. Saul, 5 S.E.2d 214, 189 Ga. 1.—Ohear v. Gray, 68 Ga. 182—Greer v. Willis, 67 Ga. 43.

**Failure to submit allegations held not error**

Failure to submit to jury in suit for reformation of contract defendants' allegations that they denied charges of fraud raised by pleadings

and evidence of petitioner was not error in absence of request that such allegations be submitted.—Howard v. Lee, 69 S.E.2d 263, 208 Ga. 735.

78. S.C.—Momeier v. John McAlister, Inc., 3 S.E.2d 606, 190 S.C. 529.—Montague v. Best, 43 S.E. 963, 65 S. C. 455, 458.

79. S.C.—Jefferson Standard Life Ins. Co. v. Boddie, 23 S.E.2d 817, 202 S.C. 1.—Momeier v. John McAlister, Inc., 3 S.E.2d 606, 190 S.C. 529.—Carmichael v. Carmichael, 96 S.E. 526, 110 S.C. 357.

64 C.J. p 1195 note 71.

80. Mo.—Forman v. Davis, 129 S.W. 221, 229 Mo. 52.

64 C.J. p 1195 note 72.

81. N.Y.—Cantor v. Sachs, 276 N.Y. S. 324, 154 Misc. 429.

82. Mont.—Kranp v. Central Federal Fire Ins. Co., 287 P. 217, 87 Mont. 345.

64 C.J. p 1195 note 73.

83. Mo.—Forman v. Davis, 129 S. W. 221, 229 Mo. 52.—Davis v. Forman, 129 S.W. 213, 229 Mo. 27.

84. Minn.—Johnson v. Holmes, 170 N.W. 709, 142 Minn. 54.—Nesland

v. Eddy, 154 N.W. 661, 131 Minn. 62.

85. Minn.—Johnson v. Holmes, 170 N.W. 709, 142 Minn. 54.—Nesland v. Eddy, 154 N.W. 661, 131 Minn. 62.

86. Minn.—Johnson v. Holmes, 170 N.W. 709, 142 Minn. 54.

87. Kan.—Hixon v. George, 18 Kan. 253.

64 C.J. p 1196 note 78.

88. Ky.—Phillips v. Phillips, 171 S. W.2d 458, 294 Ky. 323.

64 C.J. p 1196 note 79.

**Purpose of statute providing for special verdict**

The primary object of statute providing for a special verdict if requested by either party is to simplify complicated equity cases so that jury may intelligently settle controlling issues by making answer to specific questions, and it is not purpose of statute to keep jury ignorant of legal effect of their answer to questions submitted.—Grant v. Hart, 30 S.E.2d 271, 197 Ga. 662.

89. Ky.—Fornash v. Antrobus, 199 S.W. 781, 178 Ky. 621.

64 C.J. p 1196 note 80.

fusal to submit special interrogatories, while it may be an irregularity,<sup>90</sup> is not necessarily prejudicial.<sup>91</sup>

### § 585. — Trial in General

Where the framing of issues for a jury is discretionary and where no statute or rule of the court provides otherwise, the referring court may control to great extent the conduct of the trial.

Where the framing of issues for a jury is discretionary and where no statute or rule of the court provides otherwise, the referring court may control to a great extent the conduct of the trial.<sup>92</sup> The trial of a case of equitable cognizance is governed for the most part by the same rules as in an action at law.<sup>93</sup> Where judge exercises both common-law and chancery jurisdiction in the same court at the same time, and has the right to make the issue at law and immediately call a jury to try it, it is unnecessary to follow some of the rules which prevail under the system of separate courts of chancery and common-law jurisdiction, and in practice some of such rules are disregarded.<sup>94</sup> When a complaint or petition may and does contain two distinct causes of action, the one equitable and the other legal, the court may try the equitable cause of action first and the legal cause afterward,<sup>95</sup> and although this has been held to be the correct practice,<sup>96</sup> it has also been held that trial of such causes of action before a judge and jury may be at the same time.<sup>97</sup> If the action proceeds to trial by jury, without the equitable cause being specially ordered to be so tried, there is no submission of that cause to the jury, even though the parties did not object.<sup>98</sup>

All of the evidence submitted to the court on is-

suces which it submits to the jury must be presented to the jury,<sup>99</sup> in order that they may answer the interrogatories submitted to them<sup>1</sup> and advise the court intelligently.<sup>2</sup> The parties are entitled to introduce oral testimony where the common-law issues have been transferred from chancery and submitted to a jury.<sup>3</sup> Inasmuch as the verdict is merely advisory, any irregularities in the formation of the jury are immaterial.<sup>4</sup> Keeping the jury together and requiring them to continue their consideration of facts for several days is not an abuse of discretion.<sup>5</sup>

### § 586. — Instructions

Neither party has the right to ask the court to instruct the jury, and error cannot be predicated on a refusal to give instructions or on the instructions given.

Since the court is not in any manner controlled by the verdict of the jury, which is purely advisory, neither party has the right to ask the court to instruct the jury,<sup>6</sup> and error cannot be predicated on refusal to give instructions.<sup>7</sup> So, also, for the same reason, the instructions given should not be measured by the strict standards that would apply if the verdict were controlling,<sup>8</sup> and error cannot be predicated on instructions given,<sup>9</sup> although erroneous.<sup>10</sup>

### § 587. — Verdict

- a. Form, requisites, and sufficiency
- b. Operation and effect

#### a. Form, Requisites, and Sufficiency

The verdict must be sufficient in fact and in law for the basis of a judgment of the court finally settling and adjudicating the rights of the parties.

90. Mont.—Hoskins v. Scottish Union & Nat. Ins. Co., 195 P. 837, 59 Mont. 50.

91. Mont.—Arnold v. Genzberger, 31 P.2d 296, 98 Mont. 358—Hoskins v. Scottish Union & Nat. Ins. Co., 195 P. 837, 59 Mont. 50.

92. Del.—In re Harmon's Will, Supper, 95 A.2d 47.

93. Tex.—Ward v. Strickland, Civ. App., 177 S.W.2d 79, error refused.

94. Ill.—Lewark v. Dodd, 123 N.E. 260, 288 Ill. 80.

95. Ind.—Daugherty v. Daugherty, 75 N.E.2d 427, 118 Ind.App. 141.

96. Wis.—Cameron v. White, 43 N.W. 155, 74 Wis. 425, 5 L.R.A. 493. 53 C.J. p 1046 note 83.

97. Ind.—Daugherty v. Daugherty, 75 N.E.2d 427, 118 Ind.App. 141. 53 C.J. p 1046 note 85.

98. Wis.—Harrison v. Juneau Bank, 17 Wis. 350.

53 C.J. p 1047 note 87.

99. Ariz.—Security Trust & Savings Bank v. McClure, 241 P. 515, 29 Ariz. 472.

1. Ariz.—Ainsworth v. National Bank of Arizona, 266 P. 8, 33 Ariz. 466.

2. Ariz.—Security Trust & Savings Bank v. McClure, 241 P. 515, 29 Ariz. 472.

3. Ky.—Blackburn v. Beverly, 114 S.W.2d 98, 272 Ky. 346—Morawick v. Martinek's Guardian, 107 S.W. 759, 32 Ky.L. 971.

4. Cal.—In re Moore, 13 P. 880, 72 Cal. 335.

5. Kan.—Taylor v. Holyfield, 180 P. 208, 104 Kan. 587.

6. Nev.—Johnston v. Rosaaschi, 194 P. 1063, 44 Nev. 386.

64 C.J. p 1196 note 87.

7. Kan.—Minch v. Winters, 253 P. 578, 122 Kan. 533.

64 C.J. p 1196 note 88.

#### Matters outside issues submitted

Refusal to charge the jury on matters outside of the issues submitted to them, such as equitable issues being tried by the court and questions not covered by the interrogatories in the form in which they were submitted, is not error.—Lombardi v. Laudati, 200 A. 1019, 124 Conn. 569.

8. Ky.—Schlachter v. Henderson's Adm'r, 83 S.W.2d 491, 259 Ky. 759.

9. Okl.—Costello v. Sims, 233 P. 449, 106 Okl. 94. 64 C.J. p 1196 note 89.

10. Cal.—In re Moore's Estate, 13 P. 880, 72 Cal. 335.

64 C.J. p 1196 note 90.

#### Instructions held proper

Ga.—Grant v. Hart, 30 S.E.2d 271, 197 Ga. 662.

Mo.—New York Life Ins. Co. v. Feinberg, 229 S.W.2d 531.



The verdict must be sufficient in fact and in law for the basis of a judgment of the court finally settling and adjudicating the rights of the parties.<sup>11</sup> It should cover all the issues submitted<sup>12</sup> unless some of the issues are eliminated by consent of the parties;<sup>13</sup> and the court may properly refuse to accept a verdict which does not conform to this requirement.<sup>14</sup> A general verdict is improper and should not be received,<sup>15</sup> and no judgment should be entered on it.<sup>16</sup> Where several issues are submitted, they should be answered separately,<sup>17</sup> a practice which, it has been said, greatly aids both court and jury in the proper adjudication of the rights of the parties.<sup>18</sup>

**Certification.** Under some statutes, where the issues in a case which has been placed on the special term calendar and noticed for trial are sent to the trial term, to be tried by a jury, a verdict rendered on the issues, whether framed by the trial court or by the special term, must be certified by the clerk of the trial term to the special term.<sup>19</sup>

#### b. Operation and Effect

- (1) Where trial of issues by jury not matter of right

- (2) Where trial of issues by jury matter of right  
(3) Judgment

- (1) Where Trial of Issues by Jury Not Matter of Right  
(a) In general  
(b) Adoption, modification, rejection, or setting aside  
(c) Necessity for, and effect of, adoption

#### (a) In General

In equitable actions and in other actions in which the parties are not entitled as a matter of right to have issues of fact submitted to the jury, it has almost uniformly been held that the verdict or findings of a jury on special issues of fact submitted to them for their determination are not binding on the court, but are advisory only.

In equitable actions and in other actions in which the parties are not entitled as a matter of right to have issues of fact submitted to the jury, it has almost<sup>20</sup> uniformly been held that the verdict or findings of a jury on special issues of fact submitted to them for their determination are not binding on the court, but are advisory only.<sup>21</sup> While

11. *Ariz.*—Corbett v. Kingan, 146 P. 922, 16 Ariz. 440.

#### Verdict held proper

Verdict finding in favor of plaintiff in suit for specific performance of option contract to sell land and reciting that defendant should make to plaintiff a good and sufficient title to premises described in designated exhibits was a sufficient compliance with agreements between counsel, that jury might report findings into court and counsel would put verdict in legal form, leaving court to mould decree for specific performance in accordance with such findings.—*Silverman v. Alday*, 38 S.E.2d 419, 200 Ga. 711.

12. *Ga.*—Methvin Mining & Investment Co. v. Matthews, 93 S.E. 894, 147 Ga. 321.

64 C.J. p. 1196 note 92.

13. *Ga.*—Methvin Mining & Investment Co. v. Matthews, *supra*.

14. *Mo.*—*Randolph v. St. Joseph Gas Co.*, App., 250 S.W. 642.

15. *Nev.*—*Strattan v. Raine*, 197 P. 694, 200 P. 533, 45 Nev. 10.

64 C.J. p. 1196 note 95.

16. *Cal.*—*Learned v. Castle*, 7 P. 34, 87 Cal. 41.

17. *Ky.*—*Bannon v. P. Bannon Sewer Pipe Co.*, 119 S.W. 1170, 124 S.W. 843, 136 Ky. 556.

64 C.J. p. 1197 note 97.

18. *Ga.*—*Carter v. Lipsey*, 70 Ga. 417.

19. *N.Y.*—*Southack v. Central*

*Trust Co.*, 70 N.Y.S. 1122, 62 App. Div. 260.

#### 20. In Minnesota

(1) Jury verdict on specific questions of fact submitted to jury in equity action is as binding on court as general verdict in legal action.—*Sorlie v. Thomas*, 51 N.W.2d 592, 235 Minn. 509—*Employers Mut. Cas. Co. v. Chicago, St. P., M. & O. Ry. Co.*, 50 N.W.2d 689, 235 Minn. 304—*In re Ydstie's Estate*, 263 N.W. 447, 195 Minn. 501—64 C.J. p. 1197 note 1 [a] (1).

(2) The verdict is final and determinative and remains so unless vacated.—*Dose v. Insurance Co. of the State of Pennsylvania*, 287 N.W. 866, 206 Minn. 114—64 C.J. p. 1197 note 1 [a] (2).

(3) It is subject to the same rules as to setting verdict aside for insufficiency of evidence as a general verdict.—*In re Ydstie's Estate*, *supra*—64 C.J. p. 1197 note 1 [a] (3).

(4) It is not to be nullified by so halving what is essentially a single issue that, although a jury may decide one half, the court may then decide the other half contrariwise and defeat the verdict.—*First Nat. Bank of Lakefield v. Quevli*, 234 N.W. 318, 182 Minn. 238.

21. *U.S.*—*Starns v. Humphries*, C.A. Alaska, 189 F.2d 357.

Alaska.—*Pratt v. United Alaska Mining Co.*, 1 Alaska 95.

Ariz.—*Lane v. Mathews*, 251 P.2d 303,

75 Ariz. 1—*Kubby v. Hammond*, 198 P.2d 134, 68 Ariz. 17—*Parker v. Gentry*, 154 P.2d 517, 62 Ariz. 115—*Greer v. Goessling*, 97 P.2d 218, 54 Ariz. 488—*Barth Mercantile Co. v. Jaramillo*, 51 P.2d 252, 46 Ariz. 365, reheard 59 P.2d 328, 48 Ariz. 94. Cal.—*In re Kreher's Estate*, 238 P.2d 150, 107 Cal.App.2d 831—*In re Casaurang's Estate*, 170 P.2d 694, 75 Cal.App.2d 217—*Olson v. Foster*, 109 P.2d 388, 42 Cal.App.2d 408. Colo.—*Sanders v. Gomez*, 255 P.2d 972, 127 Colo. 291—*Moore v. Burritt*, 105 P.2d 1084, 106 Colo. 413. Idaho.—*Fredricksen v. Fullmer*, 258 P.2d 1155, 74 Idaho 164—*Anderson v. Whipple*, 227 P.2d 351, 71 Idaho 112—*Nugust v. Bauscher*, 227 P.2d 83, 71 Idaho 89—*Johnson v. Brown*, 144 P.2d 198, 65 Idaho 359.

Ill.—*Mount v. Dusing*, 111 N.E.2d 502, 414 Ill. 361—*Fisher v. Buegal*, 46 N.E.2d 380, 382 Ill. 42—*Oswald v. Newbanks*, 168 N.E. 340, 336 Ill. 490—*Biggerstaff v. Biggerstaff*, 54 N.E. 333, 180 Ill. 407—*Erneser v. Hudek*, 48 N.E. 673, 169 Ill. 494—*Guld v. Hull*, 20 N.E. 665, 127 Ill. 623—*Shipman v. Moseley*, 49 N.E. 2d 662, 319 Ill.App. 443.

Kan.—*Grannell v. Wakefield*, 242 P.2d 1075, 172 Kan. 685—*Ross v. Ross*, 31 P.2d 718, 139 Kan. 316—*Bell v. Skinner*, 239 P. 965, 119 Kan. 286.

Ky.—*Wood v. Wood*, 264 S.W.2d 260—*Alt v. Burt*, 242 S.W.2d 974—*Poff v. Richardson*, 227 S.W.2d 175, 312 Ky. 237—*McWhorter v. Ballou*, 221

by some statutes it is made the duty of the court to listen to the advice of the jury, whether or not it is followed,<sup>22</sup> and while it has been variously stated that the findings of the jury are "entitled to receive grave consideration,"<sup>23</sup> or that they are entitled to "weight"<sup>24</sup> or "great weight,"<sup>25</sup> or to

"some weight,"<sup>26</sup> with the court, the findings are not of controlling significance,<sup>27</sup> and it is the duty of the court to consider all the evidence<sup>28</sup> and ultimately to determine for itself all the questions of fact<sup>29</sup> as well as of law,<sup>30</sup> and render a decision which must be the result of the judgment of the

S.W.2d 667, 310 Ky. 764—Owings v. Webb's Ex'r, 202 S.W.2d 410, 304 Ky. 748—Sells v. Hurley, 191 S.W.2d 212, 301 Ky. 198—Phillips v. Phillips, 171 S.W.2d 458, 294 Ky. 323—Denker v. Denker, 162 S.W.2d 555, 290 Ky. 735—Truitt v. Truitt's Adm'r, 162 S.W.2d 31, 290 Ky. 632, 140 A.L.R. 1127—Merritt v. Palmer, 158 S.W.2d 163, 289 Ky. 141—Lawrence v. First State Bank of Dry Ridge, 132 S.W.2d 60, 279 Ky. 775—Strong v. Whicker, 117 S.W.2d 1017, 274 Ky. 10—Schlachter v. Henderson's Adm'r, 83 S.W.2d 491, 259 Ky. 759.

Mo.—Huegel v. Kimber, 224 S.W.2d 959, 359 Mo. 958—Duffy v. Barnhart Store Co., 202 S.W.2d 520—Shaw v. Butler, 78 S.W.2d 420.

Mont.—Vesel v. Polich Trading Co., 28 P.2d 558, 98 Mont. 118.

Neb.—In re Warner's Estate, 288 N.W. 39, 137 Neb. 25.

Nev.—Muggrave v. Casey, 235 P.2d 729, 68 Nev. 471.

N.Y.—Kutun v. Kranz, 83 N.Y.S.2d 837, 274 App.Div. 365, appeal denied 85 N.Y.S.2d 329, 274 App.Div. 1076, affirmed 86 N.E.2d 178, 299 N.Y. 615—Levy v. Niklad, 18 N.Y.S.2d 105, 259 App.Div. 54, reargument denied 19 N.Y.S.2d 771, 259 App.Div. 818—In re Pollak's Estate, 55 N.Y.S.2d 614, 183 Misc. 910—People ex rel. Flannery v. Worthing, 81 N.Y.S.2d 79, 177 Misc. 545—Scherer v. Scherer, 121 N.Y.S.2d 810—Pandolfo v. Gaeta, 73 N.Y.S.2d 549.

N.D.—Corpus Juris quoted in Zimmerman v. Kitzan, 43 N.W.2d 822, 826, 77 N.D. 477.

Ohio.—Flynn v. Sharon Steel Corp., 50 N.E.2d 319, 142 Ohio St. 145.

Okl.—Majors v. Majors, 263 P.2d 1012—Collmer v. Collmer, 246 P.2d 350, 206 Okl. 661—Warren v. Howell, 232 P.2d 934, 204 Okl. 674—Jenkins v. Abercrombie, 228 P.2d 657, 204 Okl. 213—Mattingly v. Sisler, 175 P.2d 796, 193 Okl. 107—Luke v. Patterson, 139 P.2d 175, 192 Okl. 631, 148 A.L.R. 679—Ward v. Ward, 119 P.2d 64, 189 Okl. 609—Chiles v. De Lana, 103 P.2d 63, 187 Okl. 415—White v. Morrow, 100 P.2d 872, 187 Okl. 72—Cline v. McKee, 98 P.2d 25, 186 Okl. 366—Maynard v. Husted, 90 P.2d 30, 185 Okl. 20—Clark v. Ellison, 71 P.2d 609, 180 Okl. 630—Stafford v. McDougal, 42 P.2d 520, 171 Okl. 106—Lee v. Terrell, 40 P.2d 10, 170 Okl. 310—Mid-Continent Life Ins. Co. v. Sharrock, 20 P.2d 154, 162 Okl. 127.

Pa.—Goldstein v. Harding, Com.Pl., 14 Beaver 186.  
S.D.—Bruns v. Light, 54 N.W.2d 99, 74 S.D. 418.

Wash.—Benedict v. Hendrickson, 143 P.2d 326, 19 Wash.2d 452—Miller v. O'Brien, 137 P.2d 525, 17 Wash. 2d 753—Goodwin v. Gillingham, 117 P.2d 959, 10 Wash.2d 656—Jackson v. Gardner, 84 P.2d 992, 197 Wash. 276—Carew, Shaw & Bernasconi v. General Cas. Co. of America, 65 P.2d 689, 189 Wash. 329.

Wis.—Schneider v. Fromm Laboratories, 53 N.W.2d 737, 262 Wis. 2. In re Acme Brass & Metal Works, 272 N.W. 356, 225 Wis. 74.

64 C.J. p 1197 note 2.

#### Issue cognizable both at law and in equity

Even if issue involved in suit in equity is one cognizable both at law and in equity, nevertheless verdict of jury would not be binding on chancellor.—Transylvania University v. McDonald's Ex'r, 126 S.W.2d 1117, 277 Ky. 608.

#### Effect of statute

(1) Under provisions of statute as to the force of the verdict jury's findings on fact issues framed for jury trial under the same statute in equity case are conclusive, if supported by any evidence, and presiding judge can only affirm verdict or set it aside and order new trial, but he may have jury make findings on issues for his aid and enlightenment in determining judgment to be rendered, since such right is independent of the statute, and when he does, he is not bound to accept jury's verdict in deciding on judgment.—Momeier v. John McAllister, Inc., 3 S.E.2d 606, 190 S.C. 529—Johnstone v. Matthews, 191 S.E. 223, 183 S.C. 360.

(2) Statutory amendment including, within equitable suits in which jury is only advisory, suits to foreclose mortgages and other liens, was intended to be applicable to an action to recover money claimed to be owing on a contract, if foreclosure of a mortgage or other lien to secure payment thereof is also sought.—Petty v. Clark, 192 P.2d 589, 113 Utah 205.

22. Ariz.—Greer v. Goessling, 97 P.2d 218, 54 Ariz. 488—Stukey v. Stephens, 295 P. 973, 37 Ariz. 514.  
64 C.J. p 1198 note 3.

23. N.D.—Peckhan v. Van Bergen, 80 N.W. 759, 81, 8 N.D. 595.

24. Idaho.—Fredricksen v. Fullmer, 258 P.2d 1155, 74 Idaho 64.

25. Ind.—Reddick v. Keesling, 28 N.E. 316, 319, 129 Ind. 128.  
S.C.—Peake v. Peake, 17 S.C. 421.

26. Ky.—Glenn v. Crescent Coal Co., 140 S.W. 43, 145 Ky. 137, 37 L.R.A., N.S., 197.

27. Kan.—Grannell v. Wakefield, 242 P.2d 1075, 172 Kan. 685—Minch v. Winters, 263 P. 578, 122 Kan. 542.

28. N.D.—Corpus Juris quoted in Zimmerman v. Kitzan, 43 N.W.2d 822, 827, 77 N.D. 477.  
Okl.—Costello v. Sims, 233 P. 449, 106 Okl. 94.

29. Mo.—Duffy v. Barnhart Store Co., App., 202 S.W.2d 520.

N.Y.—In re Pollak's Estate, 55 N.Y.S.2d 614, 183 Misc. 910.

N.D.—Corpus Juris quoted in Zimmerman v. Kitzan, 43 N.W.2d 822, 827, 77 N.D. 477.

Okl.—Majors v. Majors, 263 P.2d 1012—Collmer v. Collmer, 246 P.2d 350, 206 Okl. 661—Warren v. Howell, 232 P.2d 934, 204 Okl. 674—Jenkins v. Abercrombie, 228 P.2d 657, 204 Okl. 213—Mattingly v. Sisler, 175 P.2d 796, 193 Okl. 107—Chiles v. De Lana, 103 P.2d 63, 187 Okl. 415—White v. Morrow, 100 P.2d 872, 187 Okl. 72—Cline v. McKee, 98 P.2d 25, 186 Okl. 366—Maynard v. Husted, 90 P.2d 30, 185 Okl. 20—Ball v. Fleshman, 83 P.2d 870, 183 Okl. 634—Bert Whiteles, Inc. v. Motor Mortg. Co., 77 P.2d 698, 182 Okl. 384—Fast v. Gilbert, 57 P.2d 846, 177 Okl. 132—Mid-Continent Life Ins. Co. v. Sharrock, 20 P.2d 154, 162 Okl. 127.

64 C.J. p 1198 note 8.

30. N.D.—Corpus Juris quoted in Zimmerman v. Kitzan, 43 N.W.2d 822, 827, 77 N.D. 477.

Okl.—Majors v. Majors, 263 P.2d 1012—Collmer v. Collmer, 246 P.2d 350, 206 Okl. 661—Warren v. Howell, 232 P.2d 934, 204 Okl. 674—Jenkins v. Abercrombie, 228 P.2d 657, 204 Okl. 213—Mattingly v. Sisler, 175 P.2d 796, 193 Okl. 107—Chiles v. De Lana, 103 P.2d 63, 187 Okl. 415—White v. Morrow, 100 P.2d 872, 187 Okl. 72—Cline v. McKee, 98 P.2d 25, 186 Okl. 366—Maynard v. Husted, 90 P.2d 30, 185 Okl. 20—Bert Whiteles, Inc. v. Motor Mortg. Co., 77 P.2d 698, 182 Okl. 384—Ball v. Fleshman, 83 P.2d 870, 183 Okl. 634—Mid-Continent Life Ins. Co. v. Sharrock, 20 P.2d 154, 162 Okl. 127.

64 C.J. p 1198 note 9.

court,<sup>31</sup> the findings or verdict at most being only evidence for the information of the court.<sup>32</sup> The mind to be convinced is, after all, the mind not of the jury, but of the court.<sup>33</sup>

(b) Adoption, Modification, Rejection, or Setting Aside

Where the verdict of the jury is merely advisory, the court may adopt the verdict or findings in whole or in part, or modify them, or disregard them altogether.

Where the verdict of the jury is merely advisory, the court may adopt the verdict or findings in whole or in part,<sup>34</sup> or modify them,<sup>35</sup> or disregard them altogether.<sup>36</sup> If the court, for any reason, is dissatisfied with the verdict or findings, it may set them aside and order a new trial.<sup>37</sup> However, it is not bound to order a new trial,<sup>38</sup> or a mistrial,<sup>39</sup> since the verdict of a jury is merely advisory,<sup>40</sup> but may make findings of its own<sup>41</sup> according to its own judgment<sup>42</sup> and enter a judgment in accordance

31. N.D.—Corpus Juris quoted in Zimmerman v. Kitzan, 43 N.W.2d 822, 827, 77 N.D. 477.  
64 C.J. p 1198 note 10.

32. N.D.—Corpus Juris quoted in Zimmerman v. Kitzan, 43 N.W.2d 822, 827, 77 N.D. 477.  
64 C.J. p 1198 note 11.

33. N.D.—Corpus Juris quoted in Zimmerman v. Kitzan, supra—Emery v. First Nat. Bank, 156 N.W. 105, 32 N.D. 575.

34. Alaska.—Pratt v. United Alaska Mining Co., 1 Alaska 95.  
Cal.—In re Kreher's Estate, 238 P.2d 150, 107 Cal.App.2d 831.  
Idaho.—Anderson v. Whipple, 227 P.2d 351, 71 Idaho 112.

Ill.—Shipman v. Moseley, 49 N.E.2d 662, 319 Ill.App.443.

Kan.—Grannell v. Wakefield, 242 P.2d 1075, 172 Kan. 685.

Ky.—Sells v. Hurley, 191 S.W.2d 212, 301 Ky. 199.

Mo.—Huegel v. Kimber, 224 S.W.2d 959, 359 Mo. 938.

Mont.—Golden Rod Min. Co. v. Bukvich, 92 P.2d 816, 108 Mont. 569—Yellowstone National Bank v. McCullough, 154 P. 919, 51 Mont. 590.

N.Y.—McClave v. Gibb, 52 N.E. 156, 157 N.Y. 413—Rubin v. Dairymen's League Co-op. Ass'n, 18 N.Y.S.2d 466, 259 App.Div. 23, affirmed 29 N.E.2d 458, 284 N.Y. 32, reargument denied 31 N.E.2d 927, 284 N.Y. 816—People ex rel. Flannery v. Worthing, 31 N.Y.S.2d 79, 177 Misc. 645.

N.D.—Corpus Juris quoted in Zimmerman v. Kitzan, 43 N.W.2d 822, 827, 77 N.D. 477.

Okl.—Chiles v. De Lana, 103 P.2d 63, 187 Okl. 415—Cline v. McKee, 98 P.2d 25, 186 Okl. 366—Ball v. Fleishman, 83 P.2d 870, 183 Okl. 634—Bert White's, Inc. v. Motor Mortg. Co., 77 P.2d 698, 182 Okl. 384—Fast v. Gilbert, 57 P.2d 846, 177 Okl. 132—Mid-Continent Life Ins. Co. v. Sharrock, 20 P.2d 154, 162 Okl. 127.

Wash.—Jackson v. Gardner, 84 P.2d 992, 197 Wash. 276.

Wis.—Schneider v. Fromm Laboratories, 53 N.W.2d 737, 262 Wis. 2.  
64 C.J. p 1199 note 13.

35. N.Y.—McClave v. Gibb, 52 N.E. 156, 157 N.Y. 413—People ex rel. Flannery v. Worthing, 31 N.Y.S.2d 79, 177 Misc. 645.

N.D.—Corpus Juris quoted in Zimmerman v. Kitzan, 43 N.W.2d 822, 827, 77 N.D. 477.

Pa.—Goldstein v. Harding, Com.Pl., 14 Beaver 186  
64 C.J. p 1199 note 14.

36. Ariz.—Lane v. Mathews, 251 P.2d 303, 75 Ariz. 1.

Cal.—In re Kreher's Estate, 238 P.2d 150, 107 Cal.App.2d 831

Idaho.—Nuquist v. Bauscher, 227 P.2d 83, 71 Idaho 89—Rees v. Gorham, 164 P. 88, 30 Idaho 207.

Kan.—Grannell v. Wakefield, 242 P.2d 1075, 172 Kan. 685.

Ky.—Poff v. Richardson, 227 S.W.2d 175, 312 Ky. 237—McWhorter v. Bailou, 221 S.W.2d 667, 310 Ky. 764—Sells v. Hurley, 191 S.W.2d 212, 301 Ky. 199—Phillips v. Phillips, 171 S.W.2d 458, 294 Ky. 313.

—Lawrence v. First State Bank of Dry Ridge, 132 S.W.2d 60, 279 Ky. 775.

Mo.—Huegel v. Kimber, 224 S.W.2d 959, 359 Mo. 938.

N.Y.—McClave v. Gibb, 52 N.E. 156, 157 N.Y. 413—Rubin v. Dairymen's League Co-op. Ass'n, 18 N.Y.S.2d 466, 259 App.Div. 23, affirmed 29 N.E.2d 458, 284 N.Y. 32, rehearing denied 31 N.E.2d 927, 284 N.Y. 816

—Levy v. Niklad, 18 N.Y.S.2d 105, 259 App.Div. 54, reargument denied 19 N.Y.S.2d 771, 259 App.Div. 818

—People ex rel. Flannery v. Worthing, 31 N.Y.S.2d 79, 177 Misc. 645.

N.D.—Corpus Juris quoted in Zimmerman v. Kitzan, 43 N.W.2d 822, 827, 77 N.D. 477.

Okl.—Luke v. Patterson, 139 P.2d 175, 192 Okl. 631, 148 A.L.R. 679—Chiles v. De Lana, 103 P.2d 63, 187 Okl. 415—Cline v. McKee, 98 P.2d 25, 186 Okl. 366—Tobin v. O'Breiter, 85 P. 1121, 16 Okl. 500—Ball v. Fleishman, 83 P.2d 870, 183 Okl. 634—Bert White's, Inc. v. Motor Mortg. Co., 77 P.2d 698, 182 Okl. 384—Fast v. Gilbert, 57 P.2d 846, 177 Okl. 132—Mid-Continent Life Ins. Co. v. Sharrock, 20 P.2d 154, 162 Okl. 127.

Wash.—Jackson v. Gardner, 84 P.2d 992, 197 Wash. 276.

Wis.—In re Acme Brass & Metal Works, 272 N.W. 356, 225 Wis. 74.  
64 C.J. p 1199 note 15.

37. U.S.—(American) Lumbermen's Mut. Cas. Co. of Illinois v. Timms & Howard, C.C.A.N.Y., 108 F.2d 497.

N.Y.—Consolidated Laundries Corporation v. Roth, 270 N.Y.S. 881, 241 App.Div. 48.

N.D.—Corpus Juris quoted in Zimmerman v. Kitzan, 43 N.W.2d 822, 827, 77 N.D. 477.

Pa.—Goldstein v. Harding, Com.Pl., 14 Beaver 186  
64 C.J. p 1199 note 16.

38. N.D.—Corpus Juris quoted in Zimmerman v. Kitzan, 43 N.W.2d 822, 827, 77 N.D. 477.

S.C.—Whetstone v. Dreher, 136 S.E. 209, 138 S.C. 169.

40. N.D.—Corpus Juris quoted in Zimmerman v. Kitzan, 43 N.W.2d 822, 827, 77 N.D. 477.

Wis.—In re Keenan's Will, 176 N.W. 877, 171 Wis. 94.

41. Alaska.—Pratt v. United Alaska Mining Co., 1 Alaska 95.

Idaho.—Nuquist v. Bauscher, 227 P.2d 83, 71 Idaho 89.

Kan.—Grannell v. Wakefield, 242 P.2d 1075, 172 Kan. 685.

Ky.—Merritt v. Palmer, 158 S.W.2d 163, 289 Ky. 141—Lawrence v. First State Bank of Dry Ridge, 132 S.W.2d 60, 279 Ky. 775

N.Y.—McClave v. Gibb, 52 N.E. 156, 157 N.Y. 413—Levy v. Niklad, 18 N.Y.S.2d 105, 259 App.Div. 54, reargument denied 19 N.Y.S.2d 771, 259 App.Div. 818—People ex rel. Flannery v. Worthing, 31 N.Y.S.2d 79, 177 Misc. 645.

N.D.—Corpus Juris quoted in Zimmerman v. Kitzan, 43 N.W.2d 822, 827, 77 N.D. 477.

Okl.—Luke v. Patterson, 139 P.2d 175, 192 Okl. 631, 148 A.L.R. 679.

Wis.—In re Acme Brass & Metal Works, 272 N.W. 356, 225 Wis. 74—Gavahan v. Shorewood, 228 N.W. 497, 200 Wis. 429—Baumbach v. v. Hobkirk, 80 N.W. 740, 104 Wis. 488.

64 C.J. p 1199 note 20.

Finding by court held justified

Mont.—Vesel v. Polich Trading Co., 28 P.2d 858, 96 Mont. 118.

42. N.Y.—Learned v. Tillotson, 97 N.Y. 1, 49 Am.R. 508.

with its own determination,<sup>43</sup> as though the trial had taken place without a jury,<sup>44</sup> or, what is an equivalent, it may direct a particular verdict on the facts as being in accord with its own conclusions.<sup>45</sup>

### (c) Necessity for, and Effect of, Adoption

Before a verdict or findings can become effective or be made the basis of a judgment, they must be approved or adopted by the court in some unmistakable manner.

Before a verdict or findings can become effective,<sup>46</sup> or be made the basis of a judgment,<sup>47</sup> they must be approved or adopted by the court in some unmistakable manner.<sup>48</sup> Until adopted, the verdict is not proof of the facts found thereby,<sup>49</sup> but only of the fact that it was rendered.<sup>50</sup> If, however, the verdict or findings are adopted by the court, they become its findings or verdict,<sup>51</sup> to the extent to which the issues made by the pleadings are covered.<sup>52</sup> When adopted, a verdict has the conclusive effect of a final adjudication.<sup>53</sup>

### (2) Where Trial of Issues by Jury Matter of Right

Where, notwithstanding the equitable nature of the action, the parties are entitled to a jury trial of specific legal issues of fact or of all the issues of fact in the case, the verdict is not merely advisory but is binding on the court and the parties.

Where, notwithstanding the equitable nature of an action, the parties are by positive provision of organic law or statute entitled to a jury trial of specific legal issues of fact therein designated,<sup>54</sup> or of all the issues<sup>55</sup> of fact in the case, the verdict is not merely advisory, unless the right to a jury is waived,<sup>56</sup> but is binding on the court and the parties, having the same force and effect as verdicts in ordinary jury trials,<sup>57</sup> and it cannot be set aside unless it is palpably against the weight of the evidence,<sup>58</sup> or for some other reason authorized by law and the facts.<sup>59</sup> However, the court will have the right to set aside the verdict if it considers it contrary to the weight of evidence.<sup>60</sup>

In most jurisdictions, where organic or statutory provisions of the character under consideration are in force, the verdict is given this effect only in cases where legal issues are submitted to the jury,<sup>61</sup> although in at least one jurisdiction the verdict would seem to be conclusive irrespective of whether the issues submitted were legal or equitable.<sup>62</sup>

### (3) Judgment

The judgment must be based on the findings of the court rather than on the jury verdict.

The judgment must be based on the findings of

N.D.—*Corpus Juris* quoted in Zimmerman v. Kitzan, 43 N.W.2d 822, 827, 77 N.D. 477.

43. Ky.—Phillips v. Phillips, 171 S.W.2d 458, 294 Ky. 323.

N.D.—*Corpus Juris* quoted in Zimmerman v. Kitzan, 43 N.W.2d 822, 827, 77 N.D. 477.

Pa.—Goldstein v. Harding, Com.Pl., 14 Beaver 186.

Wis.—In re Acme Brass & Metal Works, 272 N.W. 356, 225 Wis. 74—Gavahan v. Shorewood, 228 N.W. 497, 200 Wis. 429—Baumbach Co. v. Hobkirk, 80 N.W. 740, 104 Wis. 488.

64 C.J. p 1199 note 22.

#### Setting verdict aside

On trial of a feigned issue in chancery, chancellor may set verdict aside and enter such a decree as in his judgment equity demands, or if his conscience is satisfied from the evidence as to where the equities lie, he may enter a decree without setting aside the verdict.—Shipman v. Mosley, 49 N.E.2d 662, 319 Ill.App. 443.

64. N.D.—*Corpus Juris* quoted in Zimmerman v. Kitzan, 43 N.W.2d 822, 827, 77 N.D. 477.

64 C.J. p 1199 note 23.

45. Cal.—Galvin v. Palmer, 45 P. 172, 113 Cal. 46.

Vt.—In re Peck's Estate, 88 A. 568, 87 Vt. 194.

46. R.I.—Dyson v. Rhode Island Co., 57 A. 771, 25 R.I. 600, 65 L.R.A. 236.

47. Cal.—Bradley Co. v. Bradley, 173 P. 1009, 37 Cal.App. 270.

N.Y.—Vermilyea v. Palmer, 52 N.Y. 471.

48. Cal.—Bradley Co. v. Bradley, 173 P. 1009, 37 Cal.App. 270.

49. Nev.—Duffy v. Moran, 12 Nev. 94.

50. Nev.—Duffy v. Moran, supra.

51. Ariz.—Kubby v. Hammond, 198 P.2d 134, 68 Ariz. 17.

Kan.—Grannell v. Wakefield, 242 P. 2d 1075, 172 Kan. 685.

64 C.J. p 1199 note 30.

52. Cal.—Warring v. Freeear, 28 P. 115, 64 Cal. 54.

Colo.—Wilson v. Ward, 56 P. 573, 26 Colo. 39.

53. Cal.—Clink v. Thurston, 47 Cal. 21.

54. N.Y.—People ex rel. Flannery v. Worthing, 31 N.Y.S.2d 79, 177 Misc. 545.

Utah.—Petty v. Clark, 129 P.2d 568, 102 Utah 186.

64 C.J. p 1200 note 33.

55. N.Y.—Mellen v. Mellen, 21 N.Y. Civ.Proc. 301.

64 C.J. p 1200 note 34.

56. Okl.—Clark v. Ellison, 71 P.2d 609, 180 Okl. 630.

57. Ky.—Truitt v. Truitt's Adm'r, 162 S.W.2d 31, 290 Ky. 632, 140 A.L.R. 1127—Transylvania University v. McDonald's Ex'r, 126 S.W.2d 1117, 277 Ky. 698—Campbell v. Christwell, 102 S.W.2d 359, 267 Ky. 593.

S.C.—Standard Warehouse Co. v. Atlantic Coast Line R. Co., 71 S.E.2d 893, 222 S.C. 93.

64 C.J. p 1200 note 36.

#### Action presenting equitable defense

A jury verdict in an action presenting an equitable defense, sustainable only if plaintiff had no cause of action at law, was not advisory, but was binding on trial court.—Fleming v. Buerkli, 293 P. 462, 169 Wash. 450—46 C.J. p 163 note 90 [g] (6).

58. Ky.—Louisville & N. R. Co. v. Tuttle, 203 S.W. 308, 180 Ky. 559.

64 C.J. p 1200 note 37.

59. Ky.—Elkhorn Land & Improvement Co. v. Wallace, 24 S.W.2d 560, 232 Ky. 741.

60. N.C.—Whitted v. Fuquay, 37 S.E. 141, 127 N.C. 68.

61. Cal.—Ito v. Watanabe, 3 P.2d 799, 213 Cal. 487.

64 C.J. p 1200 note 40.

62. N.C.—Whitted v. Fuquay, 37 S.E. 141, 127 N.C. 68.

the court rather than on the jury verdict,<sup>63</sup> and it is well settled that it is error to render judgment simply on the verdict of a jury which is merely advisory.<sup>64</sup> The judgment must be the result of the conclusions of the judge both on the law<sup>65</sup> and the facts.<sup>66</sup> The verdict does not relieve the court of the necessity of entering legal conclusions,<sup>67</sup> or of making findings of fact as a basis for the judgment,<sup>68</sup> especially where only part of the material issues made by the pleadings is submitted by the jury;<sup>69</sup> and this is so whether or not either party specifically demand findings.<sup>70</sup> Where a verdict covers only one phase of the issues of fact, the court is authorized to render judgment on the issues not covered.<sup>71</sup>

### § 588. View or Inspection

#### a. Power or duty to make

#### b. Purpose for which view or inspection permissible

#### c. Method of making d. Objections and exceptions

#### a. Power or Duty to Make

On a trial of a cause by the court sitting without a jury, it is generally held that the court has a discretionary power to inspect material objects or to view premises in dispute or premises where facts material to the cause have occurred.

On a trial of a cause by the court without a jury, it has very generally been held that the judge trying the case may, in the exercise of his discretion, inspect material objects, or view premises in dispute or premises where facts material to the cause have occurred;<sup>72</sup> but it also has been held that a court is in error if it resorts to a view to enlighten itself as to material facts of a case.<sup>73</sup> While this power has sometimes been expressly conferred by statute,<sup>74</sup> no statutory authority is necessary to the exercise thereof.<sup>75</sup> The power may be exercised on the request of either or both parties.<sup>76</sup> In some jurisdictions it has been held that the trial judge

63. Nev.—*Musgrave v. Casey*, 235 P.2d 729, 68 Nev. 471.

64. U.S.—*Starns v. Humphries*, C.A. Alaska, 189 F.2d 357.

N.D.—*Corpus Juris* quoted in *Zimmerman v. Kitzan*, 43 N.W.2d 822, 827, 77 N.D. 477.

Wash.—*Miller v. O'Brien*, 137 P.2d 525, 17 Wash.2d 783, 64 C.J. p 1200 note 42.

65. N.D.—*Corpus Juris* quoted in *Zimmerman v. Kitzan*, 43 N.W.2d 822, 77 N.D. 477.

64 C.J. p 1200 note 44.

66. N.D.—*Corpus Juris* quoted in *Zimmerman v. Kitzan*, 43 N.W.2d 822, 827, 77 N.D. 477.

64 C.J. p 1200 note 45.

67. U.S.—*Starns v. Humphries*, C.A. Alaska, 189 F.2d 357.

68. U.S.—*Starns v. Humphries*, supra.

Cal.—*In re Kreher's Estate*, 238 P.2d 150, 107 Cal.App.2d 831.

Idaho.—*Anderson v. Whipple*, 227 P.2d 351, 71 Idaho 112.

N.D.—*Corpus Juris* quoted in *Zimmerman v. Kitzan*, 43 N.W.2d 822, 827, 77 N.D. 477.

64 C.J. p 1200 note 46.

69. Cal.—*Sanders v. Simich*, 2 P. 741, 65 Cal. 50.

N.D.—*Corpus Juris* quoted in *Zimmerman v. Kitzan*, 43 N.W.2d 822, 827, 77 N.D. 477.

70. Cal.—*Haight v. Tryon*, 44 P. 318, 112 Cal. 4.

N.D.—*Corpus Juris* quoted in *Zimmerman v. Kitzan*, 43 N.W.2d 822, 827, 77 N.D. 477.

71. Ky.—*McWhorter v. Ballou*, 221 B.W.2d 667, 310 Ky. 764.

72. Ala.—*Fuller v. Blackwell*, 21 So. 2d 617, 246 Ala. 476.

Conn.—*Greenberg v. City of Waterbury*, 167 A. 83, 117 Conn. 67.

Iowa.—*Huffman v. Hill*, 65 N.W.2d 205—*Corpus Juris* cited in *Hampson v. Burrell*, 17 N.W.2d 110, 117, 236 Iowa 79.

Mich.—*Hering v. City of Royal Oak*, 40 N.W.2d 133, 326 Mich. 232—*Mettetal v. Hall*, 284 N.W. 698, 288 Mich. 200.

Mo.—*Corpus Juris* cited in *State ex inf. McKiltrick ex rel. Chambers v. Jones*, 185 S.W.2d 17, 22, 353 Mo. 900.

Neb.—*Birdwood Irr. Dist. v. Brodbeck*, 29 N.W.2d 621, 148 Neb. 824—*Devore v. Board of Equalization*, 13 N.W.2d 461, 144 Neb. 351—*Carter v. Parsons*, 286 N.W. 696, 136 Neb. 515.

Ohio.—*Kirkland v. Archbold*, App., 113 N.E.2d 496—*Peltier v. Smith*, 65 N.E.2d 117, 78 Ohio App. 171.

Pa.—*Cowan v. Bunting Glider Co.*, 49 A.2d 270, 159 Pa.Super. 573.

64 C.J. p 1200 note 50.

View by jury:

In:

Criminal cases see *Criminal Law* § 986.

Eminent domain proceedings see *Eminent Domain* § 435.

Power to grant and mode of conducting see *supra* § 47.

Unauthorized view and inspection see *supra* § 459.

View by court held not error

Ky.—*Wilcox v. Lee*, 94 S.W.2d 294, 264 Ky. 65.

Mich.—*Toussaint v. Conta*, 290 N.W. 830, 292 Mich. 366.

Ohio.—*In re Digbie's Estate*, App., 79 N.E.2d 159.

73. Tex.—*Conner v. Parker*, Civ.App., 181 S.W.2d 873.

74. Canal Zone.—*Arosemena v. Parcedes*, 2 Canal Zone 41.

Statute relating to view by court sitting with jury is not confined to jury cases and to courts which sit with juries.—*Madden v. Boston Elevated Ry.*, 188 N.E. 234, 284 Mass. 490.

75. Ala.—*Watt v. Lee*, 191 So. 628, 238 Ala. 451.

Mass.—*Berlandi v. Commonwealth*, 50 N.E.2d 210, 314 Mass. 424—*Madden v. Boston Elevated Ry.*, 188 N.E. 234, 284 Mass. 490.

Mich.—*Corpus Juris* cited in *Valentine v. Malone*, 257 N.W. 900, 269 Mich. 619.

Neb.—*Corpus Juris* cited in *Carter v. Parsons*, 286 N.W. 696, 698, 136 Neb. 515.

S.D.—*Mason v. Braught*, 146 N.W. 687, 33 S.D. 559.

Action of court held not error

Although statute authorizing a view of premises by a jury where, in the opinion of the court, it is proper for the jury to have a view of the property involved, does not specifically provide that courts may have a like privilege of examining the property, action of trial court in viewing premises was not error.—*Taxpayers League of Wayne County v. Wightman*, 296 N.W. 886, 139 Neb. 212.

76. Iowa.—*Melson v. Ormsby*, 151 N.W. 817, 169 Iowa 522, 64 C.J. p 1201 note 53.

may exercise the power on his own motion,<sup>77</sup> but in other jurisdictions the rule is that there is no authorization for a view without the knowledge and consent of the parties.<sup>78</sup> In the absence of statute providing otherwise,<sup>79</sup> it is entirely within the discretion of the court as to whether or not it will view the premises,<sup>80</sup> and it may refuse a request to do so,<sup>81</sup> even after the court has stated that it intended to inspect the premises, if the party asking the inspection is given a sufficient opportunity to supply any deficiency in the evidence that he might have allowed to exist by reason of his belief that the court was going to make such inspection.<sup>82</sup> It has been held that a view would be unwarranted where the trial court is making a ruling on a demurrer.<sup>83</sup>

*View outside of jurisdiction.* It has been stated that the power to inform itself by a view, outside the territory of its jurisdiction, is inherent in a court at common law.<sup>84</sup> Taking of a view in another state by the court as the trier of the facts, to acquire material information obtainable by inspection only, is not so far beyond the jurisdiction of the court as to render all subsequent proceedings, including judgment therein, void, but, if an irregularity in the trial, it is obviated by the consent of the parties or the absence of their objection thereto.<sup>85</sup>

#### b. Purpose for Which View or Inspection Permissible

A view or inspection is permissible for the purpose of enabling the court to understand the evidence and properly to apply it, but the authorities are in conflict as to whether or not the facts ascertained on the view can be considered as evidence or have the effect of supplying evidence.

A view or inspection of the character under consideration is permissible for the purpose of enabling the court properly to understand the evidence,<sup>86</sup> and properly to apply it.<sup>87</sup> A view may be considered as bearing on the credibility of the witnesses who appeared at the trial.<sup>88</sup> It cannot be considered as evidence or have the effect of supplying evidence independent of, or in addition to, that taken in the course of the trial,<sup>89</sup> or supplant evi-

77. Cal.—Noble v. Kertz & Sons Feed & Fuel Co., 164 P.2d 257, 72 Cal.App.2d 153.

Neb.—Lippincott v. Lippincott, 13 N.W.2d 721, 144 Neb. 486—Carter v. Parsons, 288 N.W. 696, 136 Neb. 515.

64 C.J. p 1201 note 54.

78. Colo.—Denver Omnibus & Cab Co. v. J. R. Ward Auction Co., 107 P. 1073, 47 Colo. 446.

Ga.—Atlantic & B. Ry. Co. v. Mayor, etc., of City of Cordele, 54 S.E. 155, 125 Ga. 373.

N.Y.—Anderson v. Leblang, 211 N.Y.S. 612, 125 Misc. 820.

Ohio.—Webster v. Pullman Co., 200 N.E. 188, 51 Ohio App. 131, error dismissed Pullman Co. v. Webster, 200 N.E. 194, 130 Ohio St. 409, dismissed 5 N.E.2d 498, 132 Ohio St. 197, certiorari denied 57 S.Ct. 940, 301 U.S. 706, 81 L.Ed. 1360.

#### Notice

With respect to right to view scene of accident when judge is tribunal of facts, he may do that which he might properly permit jury to do, subject to similar limitations as to notice and opportunity of parties to be present.—Greenberg v. City of Waterbury, 167 A. 83, 117 Conn. 67.

*View without consent held improper* N.Y.—Need v. Di Leva, 56 N.Y.S.2d 209, 269 App.Div. 873, affirmed 66 N.E.2d 174, 295 N.Y. 768.

79. S.C.—Parrott v. Barrett, 62 S.E. 241, 81 S.C. 255.

80. Ala.—Mutual Service Funeral Homes v. Fehler, 58 So.2d 770, 257 Ala. 354.

Wash.—Graham v. New York Life Ins. Co., 47 P.2d 1029, 182 Wash. 612.

64 C.J. p 1201 note 56.

*Discretion must not be abused* Neb.—Carter v. Parsons, 286 N.W. 696, 136 Neb. 515.

*Taking of view held not mandatory* N.H.—State v. Cote, 58 A.2d 749, 95 N.H. 108.

Wash.—Forbus v. Knight, 163 P.2d 822, 24 Wash.2d 297.

*Failure to view held not error* Conn.—Chatkin v. Talarski, 193 A. 611, 123 Conn. 187.

81. Wash.—Forbus v. Knight, 163 P.2d 822, 24 Wash.2d 297.

64 C.J. p 1201 note 57.

*Refusal to view held not error* Cal.—Crawford v. Senegram, 46 P.2d 173, 7 Cal.App.2d 449.

Wash.—Graham v. New York Life Insurance Co., 47 P.2d 1029, 182 Wash. 612.

82. Cal.—Urton v. Ousdal, 257 P. 584, 84 Cal.App. 221.

83. Cal.—Dake v. Smith, 234 P.2d 1022, 105 Cal.App.2d 898.

84. Mass.—Madden v. Boston Elevated Ry., 188 N.E. 234, 284 Mass. 490.

85. N.H.—Carpenter v. Carpenter, 101 A. 628, 78 N.H. 440, L.R.A. 1917F 974.

86. Cal.—Noble v. Kertz & Sons Feed & Fuel Co., 164 P.2d 257, 72 Cal.App.2d 153.

Fla.—Atlantic Coast Line R. Co. v. Hendry, 150 So. 598, 112 Fla. 391.

Ky.—Fitzhugh v. Louisville & N. R. Co., 189 S.W.2d 592, 300 Ky. 509

—Owings v. Tabott, 90 S.W.2d 723, 262 Ky. 550.

N.J.—Bancroft Realty Co. v. Alencowicz, 72 A.2d 360, 7 N.J.Super. 105 Or.—Jack v. Hunt, 265 P.2d 251, 200 Or. 263.

Pa.—Union Nat. Bank of Pittsburgh v. Crump, 37 A.2d 733, 349 Pa. 333 —Union Nat. Bank v. Crump, 82 Pittsb.Leg.J. 361, affirmed 37 A.2d 733, 349 Pa. 339.

R.I.—Rietzel v. Cary, 19 A.2d 760.

87 R.I. 418, opinion adhered to 21 A.2d 5, 67 R.I. 101.

64 C.J. p 1201 note 60.

87. Idaho.—Uhrig v. Coffin, 240 P.2d 480, 72 Idaho 271.

Ky.—Corpus Juris cited in Fitzhugh v. Louisville & N. R. Co., 189 S.W.2d 592, 300 Ky. 509—Owings v. Tabott, 90 S.W.2d 723, 262 Ky. 550.

Neb.—Independent Stock Farm v. Stevens, 259 N.W. 647, 128 Neb. 619.

64 C.J. p 1201 note 61.

88. Ark.—Mitcham v. Temple, 223 S.W.2d 817, 215 Ark. 850.

Pa.—Warrick v. Zoning Board of Adjustment, 77 Pa.Dist. & Co. 396.

89. Fla.—Atlantic Coast Line R. Co. v. Hendry, 150 So. 598, 112 Fla. 391.

Idaho.—Uhrig v. Coffin, 240 P.2d 480, 72 Idaho 271.

Ky.—Owings v. Tabott, 90 S.W.2d 723, 262 Ky. 550.

Mich.—Corpus Juris cited in Valentine v. Malone, 257 N.W. 900, 904, 905, 269 Mich. 619, 97 A.L.R. 326.

Or.—Jack v. Hunt, 265 P.2d 251, 200 Or. 263.

dence adduced,<sup>90</sup> or meet the requirement that proof of necessary facts be made.<sup>91</sup> On the other hand, it has been held in some jurisdictions that the facts ascertained by a view are to be considered as in evidence and given due weight in reaching a conclusion irrespective of consent of the parties,<sup>92</sup> or where the parties have notice of, or have consented to, the view.<sup>93</sup>

There are some decisions in which the view has

been held to be a source of independent evidence where consent appears, or lack of consent does not appear, on the face of the opinion,<sup>94</sup> and there are decisions where consent or notice does appear but the necessity therefor is not indicated in the determination that the facts ascertained are to be considered as in evidence.<sup>95</sup> In at least one jurisdiction the rule is that such evidence, gained with the consent of the parties, may be used alone or with other evidence to support findings of fact;<sup>96</sup> but

R.I.—Rietzel v. Cary, 19 A.2d 760, 67 R.I. 418, opinion adhered to 21 A.2d 5, 67 R.I. 101.

Utah.—Weber Basin Water Conservancy Dist. v. Moore, 272 P.2d 176, 2 Utah 2d 254.

64 C.J. p 1201 note 62.

#### Judgment held erroneous

In proceeding instituted by dissenting owners of shares in a corporation to determine the fair value thereof, where the principal asset of the corporation was a building which had been sold by defendant corporation, record disclosing that the trial judge disregarded all the testimony bearing on the value of the building and based his judgment solely upon his own view of the premises showed error.—O'Connell v. California Ave. Bldg. Corp., 68 N.E.2d 543, 329 Ill. App. 327.

90. Ky.—Owings v. Tabott, 90 S.W. 2d 723, 262 Ky. 550.

Pa.—Cowan v. Hunting Glider Co., 49 A.2d 270, 159 Pa.Super. 573.—Warrick v. Zoning Board of Adjustment, Com.Pl., 77 Pa.Dist. & Co. 398.

91. Colo.—Zambakian v. Leson, 246 P. 268, 79 Colo. 350.

92. Neb.—Mader v. Mettenbrink, 65 N.W.2d 334, 159 Neb. 118.—Hehne v. Starr, 64 N.W.2d 68, 158 Neb. 575.—Lackaff v. Bogue, 62 N.W.2d 889, 158 Neb. 174.—Jack v. Teekarden, 37 N.W.2d 387, 151 Neb. 309.—Probert v. Grint, 28 N.W.2d 548, 148 Neb. 666.—Columbian Steel Tank Co. v. Vosalka, 17 N.W.2d 488, 145 Neb. 541.—Carter v. Parsons, 286 N.W. 696, 136 Neb. 515.

#### Effect of view by court

(1) A view by a judge on a trial of a cause by the court without a jury is entitled to the same effect as a view by a jury on a trial of a cause by the jury.—Birdwood Irr. Dist. v. Brodbeck, 29 N.W.2d 621, 148 Neb. 824.—Carter v. Parsons, 286 N.W. 696, 136 Neb. 515.

(2) A judge in making his observation at the locus in quo takes into account the facts there disclosed, together with the evidence taken on trial of case, and the two together form the basis of his determination of the issues involved.—Birdwood

Irr. Dist. v. Brodbeck, 29 N.W.2d 621, 148 Neb. 824.

93. Cal.—McCarthy v. City of Manhattan Beach, 264 P.2d 932, 41 Cal. 2d 879.—Gibson Properties Co. v. City of Oakland, 83 P.2d 942, 12 Cal. 2d 291.—Sparling v. Housman, 214 P.2d 837, 96 Cal.App.2d 159.—Wheeler v. Gregg, 203 P.2d 37, 90 Cal.App.2d 348.—Safeway Stores v. City Council of City of San Mateo, 194 P.2d 720, 86 Cal.App.2d 277.—Gularte v. Martins, 151 P.2d 570, 65 Cal.App.2d 817.

Canal Zone.—Arosemena v. Paredes, 2 Canal Zone 41.

N.Y.—Alaimo v. Ange, 240 N.Y.S. 445, 228 App.Div. 872.

#### Absence of consent

Where it appears that the judge's personal visitation of the area in question was made an integral part of his judgment, without the consent of the parties or their counsel, the judgment will be reversed, with direction that the case be heard on the evidence which may be introduced, unless visitation by the judge as part of the proceedings is had with the consent of both parties.—Brown v. Transcontinental Gas Pipe Line Corp., 82 S.E.2d 12, 210 Ga. 580, followed in 82 S.E.2d 10, 210 Ga. 586.—Atlantic & Birmingham Ry. Co. v. City of Cordele, 54 S.E. 155, 125 Ga. 373.

94. Cal.—Owsley v. Hamner, 227 P. 2d 263, 36 Cal.2d 710, 24 A.L.R.2d 112.—Universal Sales Corp. v. California Press Mfg. Co., 128 P.2d 665, 20 Cal.2d 751.—Gates v. McKinnon, 114 P.2d 576, 18 Cal.2d 179.—Cutting v. Vaughn, 187 P. 19, 182 Cal. 161.—Stegner v. Bahr & Ledoyen, Inc., App. 272 P.2d 106.—Formosa Corp. v. Rogers, 239 P.2d 88, 108 Cal. App.2d 397.—In re Sullivan's Estate, 195 P.2d 894, 86 Cal.App. 890.—Chapman v. Sky L'onda Mut. Water Co., 159 P.2d 988, 69 Cal.App. 2d 667.—Griffin v. Northridge, 153 P.2d 800, 67 Cal.App.2d 69.—Gastine v. Ewing, 150 P.2d 266, 65 Cal.App. 2d 131.—Cornell v. Hearst Sunial Corp., 131 P.2d 404, 55 Cal.App.2d 708.—Peckwith v. Lavezola, 122 P. 2d 678, 50 Cal.App.2d 211.—Mitchell v. City of Santa Barbara, 120 P. 2d 131, 48 Cal.App.2d 568.—Lee v. Dawson, 112 P.2d 683, 44 Cal.App.

2d 362.—Pohl v. Anderson, 56 P.2d 992, 13 Cal.App.2d 241.—Gray v. Magee, 24 P.2d 948, 133 Cal.App. 653.—Fendley v. City of Anaheim, 294 P. 769, 110 Cal.App. 731.—Wright v. Locomobile Co. of America, 167 P. 407, 33 Cal.App. 694. Mass.—Keeney v. Ciborowski, 24 N.E. 2d 17, 304 Mass. 371.

95. U.S.—Wall v. U. S. Mining Co., C.C.Utah, 232 F. 613.

Cal.—Otey v. Carmel Sanitary Dist., 26 P.2d 308, 219 Cal. 210.—Preston v. Culbertson, 58 Cal. 198.—White v. Walsh, 234 P.2d 276, 105 Cal. App.2d 828.—Herbold v. Hardy, 231 P.2d 910, 104 Cal.App.2d 417.—Sindell v. Smutz, 222 P.2d 903, 100 Cal. App.2d 10.—Orchard v. Cecil F. White Ranches, 217 P.2d 143, 97 Cal. App.2d 35.—People v. Oliver, 195 P.2d 926, 86 Cal.App.2d 885.—Rowland v. City of Pomona, 186 P.2d 447, 82 Cal.App.2d 622.—Chatterton v. Boone, 185 P.2d 610, 81 Cal.App. 2d 943.—Smith v. Metzger, 172 P.2d 889, 76 Cal.App.2d 277.—Wood v. Davidson, 145 P.2d 659, 62 Cal. App.2d 885.—Brucker v. Loe Yim, 55 P.2d 564, 12 Cal.App.2d 38.—Wade v. Thorsen, 43 P.2d 592, 5 Cal.App.2d 706.—Vaughan v. Tulare County, 205 P. 21, 56 Cal.App. 261.—Hutton v. Gregg, 88 P. 592, 4 Cal. App. 537.

Conn.—Albright v. MacDonald, 183 A. 389, 121 Conn. 88.—Greenberg v. City of Waterbury, 167 A. 85, 117 Conn. 67.—Lunny v. Pepe, 155 A. 552, 116 Conn. 684.—G. F. Heublein, Inc. v. Second Nat. Bank, 160 A. 898, 115 Conn. 168.—Hurlbut v. Bussemly, 126 A. 273, 101 Conn. 406.—McGar v. Borough of Bristol, 42 A. 1000, 71 Conn. 652.

#### Right to disregard evidence

Trial judge, who was trier of facts, was not required to accept evidence favorable to plaintiff rather than on-the-spot factual picture obtained by judge in his own personal inspection of the area involved.—Lauder v. Wright Inv. Co., Cal.App., 271 P.2d 970.

96. Cal.—McCarthy v. City of Manhattan Beach, 264 P.2d 932, 41 Cal. 2d 879.—Orchard v. Cecil F. White Ranches, 217 P.2d 143, 97 Cal.App. 2d 35.—Sparling v. Housman, 214 P.2d 837, 96 Cal.App.2d 159—

in a case not properly the subject of judicial notice a view without the consent of the parties cannot provide independent evidence on a controverted issue so as to support alone a finding otherwise not supported by other evidence,<sup>97</sup> and, in fact, contrary to the evidence introduced.<sup>98</sup> A judgment based on evidence derived from a view made without the consent of the parties has been held erroneous.<sup>99</sup> It has been held that even though a view supplies independent evidence trial courts are not justified in disregarding other evidence on the trial and that when a verdict, based solely or partly on a view, is not supported by the other evidence, it cannot stand.<sup>1</sup> Where a judgment is based on evidence it will be sustained.<sup>2</sup> Irrespective of the evidentiary status of findings of fact based on a view made by a court, it has been held that where a view is taken with the consent of the parties, it adds to the advisory weight of the findings of the court.<sup>3</sup> Impressions made on the judge by his own inspection of premises are entitled to little, if any, weight in a matter involving special knowledge and experience and as to which experts differ,<sup>4</sup> and do not dispense with proof of matters requiring expert skill and knowledge.<sup>5</sup> It has further been held that a judgment cannot be sustained where a finding is based on inspection alone, unsupported by other

evidence, where there is a necessity for proof as to matters requiring expert skill and knowledge.<sup>6</sup> Where a chancellor who, without consent or knowledge of the parties, viewed premises involved in litigation and ordered a survey of the property to be made and thereafter based his decree on the impressions he gained from the view and the survey made, it has been held that the overruling of a motion to permit plaintiff to interrogate the surveyor with respect to the survey he made is error.<sup>7</sup>

### c. Method of Making

The manner of taking and the extent of a view are largely discretionary.

The manner of taking and the extent of a view are largely discretionary.<sup>8</sup> A court should exercise the power to view with caution.<sup>9</sup> It has been stated that the trial judge should first be satisfied that conditions at the time he views the premises are substantially the same as they were at the time of the occurrence involved in the action,<sup>10</sup> and he should also be satisfied that a personal inspection by him will be fair to all parties concerned and is reasonably necessary to do justice between them.<sup>11</sup> The inspection or view as a matter of judicial propriety should be in the presence of the parties, or their attorneys, or they should be given an op-

Wheeler v. Gregg, 203 P.2d 37, 90 Cal.App.2d 348—Noble v. Kertz & Sons Feed & Fuel Co., 164 P.2d 257, 72 Cal.App.2d 153.

97. Cal.—Noble v. Kertz & Sons Feed & Fuel Co., supra.

#### Consent held absent

The trial judge's statements that he intended to visit scene of automobile and truck collision, and failure of plaintiff's counsel to object to such visit, did not constitute stipulation that trial judge could visit premises for purpose of taking evidence, as required to render his observations independent evidence sufficient to support his fact findings based thereon.—Noble v. Kertz & Sons Feed & Fuel Co., supra.

98. Cal.—Noble v. Kertz & Sons Feed & Fuel Co., supra.

99. S.C.—Ralph v. Southern Ry. Co., 158 S.E. 409, 160 S.C. 229.

Wash.—Elston v. McGlauffin, 140 P. 396, 79 Wash. 355.

1. Canal Zone.—Espinoza v. Carbone, 2 Canal Zone 164.

2. Va.—Good v. Pettitrew, 183 S.E. 217, 165 Va. 526.

Wash.—Anderson v. Kurrell, 182 P. 2d 1, 28 Wash.2d 227.

3. Wyo.—Jacoby v. Town of City of Gillette, 114 P.2d 505, 62 Wyo. 487, 169 A.L.R. 502, rehearing denied

177 P.2d 204, 62 Wyo. 487.—Davis-Robinson v. Patee, 57 P.2d 681, 49 Wyo. 470.

Weight given to facts ascertained from view made by trial court on appeal see Appeal and Error § 1656, page 687, note 83.

4. U.S.—Wall v. U. S. Mining Co., C.C.Utah, 232 F. 613.

Neb.—Carter v. Parson, 286 N.W. 696, 136 Neb. 515—Independent Stock Farm v. Stevens, 269 N.W. 647, 128 Neb. 619.

5. Conn.—G. F. Heublein, Inc. v. Second Nat. Bank, 160 A. 898, 115 Conn. 168.

64 C.J. p 1202 note 66.

6. Conn.—G. F. Heublein, Inc. v. Second Nat. Bank, supra.

7. Miss.—Wisdom v. Stegall, 70 So 2d 43.

8. N.H.—State v. Cote, 58 A.2d 749, 95 N.H. 108.

Taking of view held not to disclose error

(1) Where court sitting without a jury took a view of premises with consent of parties as result of dispute as to whether structure and equipment thereon were new, and court determined the issue by discrediting testimony of plaintiff's witness and accepting testimony of defendants, taking and use of the view

disclosed no error.—Bancroft Realty Co. v. Alencowicz, 72 A.2d 380, 7 N.J.Super. 105.

(2) In action predicated on nuisance resulting from operation of concrete mixing plant, failure of trial judge to examine interior of plaintiff's house and defendant's office when he visited defendant's premises was not error, absent request therefor.—Naylor v. C. W. Blakeslee & Sons, 167 A. 548, 117 Conn. 241.

(3) In action based upon Labor Code for injuries sustained by painter when he fell from defective ladder while working on defendant's property, the testing of ladder from which painter fell by trial judge at building where trial was conducted, rather than on premises where painter fell, was not error.—Daniels v. Johnson, 101 P.2d 707, 38 Cal.App.2d 619.

#### Conduct of trial

It was improper to conduct the proceedings while moving from place to place in the building which was the subject of the trial.—Kirkland v. Archbold, Ohio App., 113 N.E.2d 496.

9. Conn.—Greenberg v. City of Waterbury, 167 A. 83, 117 Conn. 67.

10. Conn.—Greenberg v. City of Waterbury, supra.

11. Conn.—Greenberg v. City of Waterbury, supra.



portunity to be present,<sup>12</sup> but the failure to do so does not necessarily constitute an abuse of discretion.<sup>13</sup> The inspection should be "reduced to form."<sup>14</sup> Although a statute requires the presence of the secretary or stenographer of the judge at the view, the absence of the secretary or stenographer does not invalidate the view, in the absence of objection, exception, or prejudice shown.<sup>15</sup>

*Change in condition of premises.* A party who has knowledge of a change in the condition of the premises brought about by the adverse party before an inspection by the presiding judge under an agreement requiring him to view the premises must ask for a continuance to enable him to restore the property to the condition it was in before it was interfered with by the adverse party; and where he fails to do so, and permits the judge to view the premises, he cannot have the findings set aside.<sup>16</sup>

#### d. Objections and Exceptions

Objections to actions taken during a view must be made at the time of the occurrence.

A party desiring to question the validity or effect of any action taken during a view by a trial judge has a duty to object at the time of the occurrence and save an exception thereto,<sup>17</sup> and cannot after a decision has been rendered raise the question for the first time.<sup>18</sup>

#### § 589. Reception of Evidence

The introduction of evidence at the trial of a cause before the court without a jury is governed by statutes, rules, and principles relating to trials in general, but the same rigid rules as to the admission of evidence are not enforced as in trials before a jury.

In actions tried by the court without a jury, the trial judge is not a mere umpire, limited in his powers concerning the scope of the evidence introduced merely to keeping score between the contending parties, but exercises a comprehensive control as to the evidence.<sup>19</sup> The introduction of evidence at the trial of a case before a judge without a jury is governed by statutes, rules, and principles relating to trials in general,<sup>20</sup> but the same rigid rules as to the admission of evidence are not enforced as in trials before a jury.<sup>21</sup> The admission or exclusion of proffered evidence is ordinarily a matter resting in the sound discretion of the court.<sup>22</sup> Where the court rejects competent evidence with the statement that the party offering it would be given a chance to offer it later, it is proper for the court to consider the evidence, although no formal offer is thereafter made.<sup>23</sup> When the admissibility of an item of evidence is dependent on the submission of preliminary proof, the reception of such dependent evidence in face of the fact that the preliminary proof has not been submitted constitutes error.<sup>24</sup> Where the trial court restored a cross complaint which was previously stricken and later ordered judgment for plaintiff, it has been held

12. Ala.—*Corpus Juris* cited in *Watt v. Lee*, 191 So. 628, 238 Ala. 451.

Neb.—*Lippincott v. Lippincott*, 13 N.W.2d 721, 144 Neb. 486—*Carter v. Parsons*, 286 N.W. 696, 136 Neb. 515.

64 C.J. p 1202 note 68.

**View without presence of parties or counsel held not error**

In suit to enjoin waste, where counsel expressed a desire that chancellor view premises either in company with counsel or alone, chancellor did not err in choosing to view premises without counsel being present.—*Wise v. Potomac Nat. Bank*, 65 N.E.2d 767, 393 Ill. 357, appeal transferred 63 N.E.2d 531, 327 Ill. App. 203.

13. Neb.—*Lippincott v. Lippincott*, 13 N.W.2d 721, 144 Neb. 486—*Carter v. Parsons*, 286 N.W. 696, 136 Neb. 515.

14. Puerto Rico.—*Martinez v. Rodriguez*, 26 Puerto Rico 5.

15. Puerto Rico.—*Clausells v. Ramirez*, 19 Puerto Rico 817.

16. Colo.—*Brown v. Colorado & W. Development Co.*, 107 P. 258, 47 Colo. 294.

17. Mass.—*Madden v. Boston Elevated Ry.*, 188 N.E. 234, 284 Mass. 490.

18. Mass.—*Madden v. Boston Elevated Ry.*, supra.

19. Wash.—*Ankeny v. Pomeroy Grain Growers*, 15 P.2d 264, 170 Wash. 1.

Admission or exclusion of evidence: As ground for reversal see *Appeal and Error* §§ 1728, 1746.

In actions tried by jury see supra §§ 55-156.

In equity see *Equity* §§ 489-490.

20. Pa.—*Stewart v. Prudential Ins. Co. of America*, 24 A.2d 83, 147 Pa.Super. 296.

21. Ga.—*Lockridge-Rogers Lumber Co. v. Lord*, 54 S.E.2d 914, 80 Ga. App. 37.

Ky.—*Rosenblatt v. Clements*, 236 S.W.2d 261, 314 Ky. 450—*Chamberlain v. National Life & Accident Ins. Co.*, 76 S.W.2d 628, 256 Ky. 548.

Minn.—*Pump-It, Inc. v. Alexander*, 42 N.W.2d 337, 230 Minn. 564.

Mo.—*Johnson v. Johnson*, App. 24 S.W.2d 184—*Welsenborn v. Rutledge*, 121 S.W.2d 309, 233 Mo.App. 464—*Gregar v. Broadway Auto Laundry*,

App. 83 S.W.2d 142—*Nevill v. Wahl*, 65 S.W.2d 123, 228 Mo.App. 49—*Heart of America Lumber Co. v. Wyatt Lumber Co.*, 59 S.W.2d 800, 227 Mo.App. 794—*U. S. Fidelity & Guaranty Co. v. Goodson*, 54 S.W.2d 754, 227 Mo.App. 456.

N.C.—*Board of Managers of James Walker Memorial Hospital of Wilmington v. City of Wilmington*, 74 S.E.2d 749, 237 N.C. 179—*Corpus Juris* cited in *Cameron v. Cameron*, 61 S.E.2d 913, 915, 232 N.C. 686.

Pa.—*Jameson v. Jameson*, 80 Pa.Super. 254—*Clark v. Clark*, 17 Pa. Dist. & Co. 500.

64 C.J. p 1202 note 74.

**Reading of deposition**

Cal.—*Paulin v. Paulin*, 102 P.2d 809, 39 Cal.App.2d 180.

22. Conn.—*Chouinard v. Zoning Commission of Town of East Hartford*, 97 A.2d 562, 139 Conn. 728.

Okl.—*First State Bank of Noble v. McKiddy*, 240 P.2d 1103, 206 Okl. 57—*Reynolds v. Reynolds*, 137 P.2d 914, 192 Okl. 564.

23. Mo.—*Webster v. Bear*, 125 S.W. 815, 141 Mo.App. 531.

24. Or.—*Menefee v. Blits*, 179 P.2d 550, 181 Or. 100.

that defendant is estopped to claim the right to introduce evidence in support of his cross complaint where no request to introduce such evidence was made after the cross complaint was restored.<sup>25</sup>

*Stipulations; agreed and uncontradicted statements of fact.* When there is no controversy concerning facts stated by counsel,<sup>26</sup> or when from the discussion on both sides material facts not in dispute are elucidated,<sup>27</sup> the court may take these facts as agreed for the purpose of the trial and decide the case accordingly.<sup>28</sup> Such facts stand in the place of evidence.<sup>29</sup> Statements to a trial judge made by authorized counsel, intended to be representative of the facts which they expect to develop, may be considered by the trial judge as the equivalent of evidence.<sup>30</sup>

*Introduction of documentary evidence.* When a document is received in evidence before a judge sitting without a jury it is not necessary that it shall be read in open court in its entirety.<sup>31</sup> If the adverse counsel desires any omitted portion to be read to the judge, it is counsel's duty either to read it or to call the attention of the court to the omitted portion.<sup>32</sup> Where it is necessary to show the court considerable background to establish the materiality of documentary evidence, technical niceties with respect to admitting parts only of correspondence need not be followed.<sup>33</sup>

*Separation and exclusion of witnesses and parties.* Where parties in interest who are not parties to the record have been deemed to be exempt from the operation of a statutory rule prohibiting the exclusion of parties to an action, it has been held that the exclusion of an intervening party at an interlocutory hearing was not error.<sup>34</sup>

*Taking oral testimony.* A court may not receive

any ex parte oral communications outside of court and use them as factors in arriving at a decision.<sup>35</sup> Communications as to facts on the merits of any litigated case may be presented only by sworn witnesses<sup>36</sup> or by agreement of counsel.<sup>37</sup> Under some statutes on any issue of fact which arises on the pleadings in an equitable action, unless the issue is transferred to a common-law docket, proof shall be taken by depositions, unless the judge enters an order providing that the evidence shall be heard in the same manner as testimony in ordinary actions, the hearing of evidence orally in an equity case is improper unless there has been a previous order directing that it be so presented.<sup>38</sup>

*Opinion evidence.* When a case is tried to the court, the extent to which expert testimony may be received rests largely in its discretion.<sup>39</sup>

*Offer of proof.* Where offers of proof include some incompetent evidence, the trial court is not required to separate the incompetent from the competent.<sup>40</sup>

*Provisional or conditional admission.* In an action where the trial is not to a jury, the trial judge can admit any evidence offered and reserve decision on what legal effect he shall give to it until he decides the case,<sup>41</sup> but evidence which is clearly incompetent should not be received subject to objection,<sup>42</sup> especially where the objection is to the competency of a witness to testify to transactions with a deceased person.<sup>43</sup> Where a court admitted an exhibit in evidence subject to such consideration as the court might think it entitled to, and later, in his oral decision, the trial judge stated that he did not give much weight to the exhibit, it has been held that such action is not a rejection of the exhibit as evidence.<sup>44</sup> The admission of certain incompetent allegations has been held not to constitute error

25. Cal.—Sanders v. Magill, 70 P. 2d 159, 9 Cal.2d 145.  
Right to introduce evidence in jury trial see *supra* § 55.

26. Mass.—Harper v. Harper, 106 N. E.2d 439, 329 Mass. 85—Kane v. School Committee of Woburn, 59 N.E.2d 10, 317 Mass. 436—Dwyer v. Dwyer, 131 N.E. 328, 239 Mass. 138.  
27. Mass.—Dwyer v. Dwyer, *supra*.

28. Mass.—Kane v. School Committee of Woburn, 59 N.E.2d 10, 317 Mass. 436—Dwyer v. Dwyer, 131 N.E. 328, 239 Mass. 138.  
29. Mass.—Harper v. Harper, 106 N.E.2d 439, 329 Mass. 85—Kane v. School Committee of Woburn, 59 N.E.2d 10, 317 Mass. 436—Dwyer v. Dwyer, 131 N.E. 328, 239 Mass. 138.

30. Ohio.—Hull v. Hull, App., 115 N.E.2d 465.  
31. Cal.—Deary v. Shields, 129 P.2d 935, 54 Cal.App.2d 795.  
32. Cal.—Deary v. Shields, *supra*.  
33. Utah.—In re Blodgett's Estate, 70 P.2d 742, 93 Utah 1.  
34. Ga.—Bandy v. Taylor Iron Works & Supply Co., 170 S.E. 368, 177 Ga. 455.  
35. Miss.—Wisdom v. Stegall, 70 So. 2d 43—Hester v. Bishop, 10 So.2d 350, 193 Miss. 449.  
36. Miss.—Wisdom v. Stegall, 70 So. 2d 43—Hester v. Bishop, 10 So. 2d 350, 193 Miss. 449.  
37. Miss.—Wisdom v. Stegall, 70 So. 2d 43—Hester v. Bishop, 10 So. 2d 350, 193 Miss. 449.  
38. Ky.—Boyles v. Walker, 234 S.W. 2d 497, 314 Ky. 120—Gribben v. Gribben, 11 S.W.2d 998, 227 Ky. 96.  
39. Ohio.—Wabash R. Co. v. Dofance, 40 N.E. 89, 52 Ohio St. 262, affirmed 17 S.Ct. 748, 167 U.S. 88, 42 L.Ed. 87.  
40. C.J. p 1207 note 43.  
41. Okl.—City of Lawton v. Sherman Mach. & Iron Works, 77 P.2d 567, 132 Okl. 254.  
42. U.S.—McComb v. McCormack, C. C.A.Tex., 159 F.2d 219.  
43. Wis.—Hagan v. McDermott, 115 N.W. 138, 134 Wis. 490, 557.  
44. C.J. p 1208 note 79.  
45. Wis.—Nelson v. Newman's Estate, 236 N.W. 556, 205 Wis. 91.  
46. Wash.—Daley v. Albeck, 249 P. 2d 234, 41 Wash.2d 945.

where the court, acting without a jury, admitted it only "for whatever light it may throw upon the question of law in the case."<sup>45</sup>

*Effect of admission of evidence.* Once evidence has been admitted the trial court, as the trier of fact and law, is bound to consider it, as far as it is admissible, for all purposes for which such evidence was offered and claimed.<sup>46</sup> A court is without authority to consider evidence in determining any questions on which it was not offered.<sup>47</sup> No rule of law requires the court to consider immaterial and incompetent evidence, although admitted in the case;<sup>48</sup> on the contrary, it may<sup>49</sup> and should<sup>50</sup> be disregarded by the court and it will be presumed that the court, in determining the case, will consider only such evidence as is competent and relevant.<sup>51</sup> It has been held that in no event is the court justified in subsequently eliminating evidence, that was admitted over objection, due to a statutory provision that the record at the close of the trial determines the right of the court to enter judgment non obstante veredicto.<sup>52</sup>

*Exclusion of improper evidence.* Since the rules of exclusion in the law of evidence as applied in a court of law are largely a result of the jury system, the purpose of which is to keep from the jury all irrelevant and collateral matters which might tend to confuse them or mislead them from a consideration of the real question involved, when an action is to the court sitting without a jury the

rules of exclusion are less strictly enforced,<sup>53</sup> the assumption being that the court will not be confused or misled by that which is irrelevant and inconclusive.<sup>54</sup> It is the better practice to admit all evidence not clearly inadmissible,<sup>55</sup> or tending merely to burden the record,<sup>56</sup> even though the court may afterward exclude it,<sup>57</sup> to the end that any difference of opinion between the trial and appellate courts with respect to it may not necessitate the delay and expense of a new trial.<sup>58</sup>

*Existence of insurance.* Where a reference to insurance has been made and grounds for admissibility therefor, as discussed supra § 53, are not present, the admission of such evidence is error,<sup>59</sup> but it is not necessarily fatal, as discussed in Appeal and Error § 1709. In a personal injury action where counsel was permitted to introduce testimony relating to defendants' insurer, it has been held that in view of the fact that under an ordinance defendant was required to carry insurance and the case was tried to the court and not to a jury, the court did not commit error in admitting such testimony.<sup>60</sup>

*Propounding questions to witness.* The court may propound questions to the witnesses if, in its opinion, the questions asked by counsel for the respective parties are not eliciting all the pertinent facts proper to be considered in determining the issues.<sup>61</sup>

45. Ga.—Breedon v. Breedon, 44 S. E.2d 667, 202 Ga. 740.

46. Conn.—Giamattell v. Di Cerbo, 62 A.2d 519, 135 Conn. 159—State v. Suffield & Thompsonville Bridge Co., 74 A. 775, 82 Conn. 460—Rowell v. Stamford Street Ry. Co., 30 A. 131, 64 Conn. 376.

47. Ind.—Trook v. Crouch, 137 N.E. 773, 82 Ind.App. 308.

48. Ill.—Radtko v. People, 171 Ill. App. 462.

49. Ky.—Tritt v. Tritt's Adm'r, 162 S.W.2d 31, 290 Ky. 632, 140 A. L.R. 1127.

Okl.—First State Bank of Noble v. McKiddy, 240 P.2d 1103, 206 Okl. 57.

Tex.—Foster v. Buchele, Civ.App., 213 S.W.2d 738, refused no reversible error.

W.Va.—Farley v. Farley, 68 S.E.2d 353.

#### Method not commended

The method of trial whereby trial judge sitting without jury disregards evidence improperly admitted is not to be commended.—Holcombe v. Hopkins, 49 N.E.2d 722, 314 Mass. 113.

50. Colo.—Lego v. Olson, 136 P.2d 277, 110 Colo. 508.

64 C.J. p 1203 note 76.

51. Ohio.—Swigart v. Swigart, App., 115 N.E.2d 871.

Okl.—First State Bank of Noble v. McKiddy, 240 P.2d 1103, 206 Okl. 57. 64 C.J. p 1203 note 77.

52. Pa.—Squire v. Merchants' Warehouse Co., 196 A. 915, 130 Pa.Super. 8.

53. Mo.—Laumeier v. Gehner, 19 S. W. 82, 110 Mo. 122—Nevill v. Wahl, 65 S.W.2d 123, 228 Mo.App. 49. N.C.—Board of Managers of James Walker Memorial Hospital of Wilmington v. City of Wilmington, 74 S.E.2d 749, 237 N.C. 179.

Utah.—Ogden Iron Works v. Industrial Commission, 132 P.2d 376, 102 Utah 492.

64 C.J. p 1203 note 74.

54. Utah.—Ogden Iron Works v. Industrial Commission, supra.

55. Ill.—Agnell v. Illinois Bell Tel. Co., 109 N.E.2d 398, 348 Ill.App. 503.

64 C.J. p 1203 note 81.

#### Common-law proceedings

In common-law proceedings tried to court doubtful evidence should be

admitted and whatever doubt trial court has of its probative value should be indicated for record—Agnell v. Illinois Bell Tel. Co., supra.

56. Mo.—Barrie v. United Rys. Co. of St. Louis, 119 S.W. 1020, 138 Mo. App. 557.

57. Mo.—Powell v. Adams, 12 S.W. 295, 98 Mo. 598.

#### Exclusion held not error

In actions to recover realty under tax titles where court, sitting without jury, allowed amendment of document neither dated nor signed by collector, introduced as return of tax sales, later ruling that document did not comply with statute and could not be amended, and that there was no evidence of a return, was not error.—City of Old Town v. Robbins, 186 A. 663, 134 Me. 285.

58. Ill.—Agnell v. Illinois Bell Tel. Co., 109 N.E.2d 398, 348 Ill.App. 503.

64 C.J. p 1203 note 84.

59. Cal.—Nason v. Leth-Nissen, 185 P.2d 880, 82 Cal.App.2d 70.

60. Ohio.—Shadwick v. Hills, 69 N.E. 2d 197, 79 Ohio App. 143.

61. Wash.—Ankeny v. Pomeroy

*Entry of judgment without hearing evidence.* Entry of judgment on issues of fact raised by the pleadings in a trial before the court without hearing evidence is erroneous.<sup>62</sup>

### § 590. — Order of Proof

A court trying a cause without a jury has a broad discretion with respect to the order of proof.

It is the duty of the court to determine the order of proof.<sup>63</sup> The court trying a cause without a jury has a broad discretion with respect to the order of admitting testimony.<sup>64</sup>

### § 591. — Reopening Case

- a. In general
- b. Application
- c. Notice and hearing

Grain Growers, 15 P.2d 264, 170 Wash. 1.

62. Ill.—Thompson v. Malmin, 204 Ill.App. 374.  
Ohio.—Rea v. Forman, 24 N.E.2d 295, 65 Ohio App. 385.

*Entry of judgment held not erroneous.*

Where court permitted complaint to be amended to conform to evidence adduced on trial and restored defendant's cross-complaint which was previously stricken and ordered judgment for plaintiff on amended complaint, defendant was not denied trial of cross-complaint, where allegations of cross-complaint followed substantially allegations of defendant's affirmative answer on which witnesses fully testified and no claim was made by defendant that he had evidence in support of cross-complaint which had not been introduced on trial in support of issues raised by answer.—Sanders v. Magill, 70 P.2d 159, 9 Cal.2d 145.

63. Cal.—Butler v. Stratton, 213 P.2d 43, 95 Cal.App.2d 22.

64. Ill.—People ex rel. Boos v. St. Louis, I. M. & S. Ry. Co., 115 N.E. 854, 278 Ill. 25.  
Wash.—Blodgett v. Lowe, 167 P.2d 997, 24 Wash.2d 931.  
64 C.J. p 1203 note 88.

#### Greater latitude

In the exercise of the discretionary power relating to the order of introduction of evidence, greater latitude should be allowed where the case is tried by a court without a jury than when there is a jury trial.—Havill v. Darch, 52 N.E.2d 64, 320 Ill.App. 667.

#### Discretion held not abused

(1) In general.  
Cal.—Butler v. Stratton, 213 P.2d 43, 95 Cal.App.2d 22.

Ind.—Bulen v. Pendleton Banking Co., 78 N.E.2d 449, 118 Ind.App. 217.

(2) Permitting plaintiff in action for seduction to give rebuttal testimony clearing up doubts arising from vagueness of her previous testimony was not abuse of discretion, in absence of jury.—Clark v. Roan, 247 N.W. 722, 263 Mich. 478.

65. Cal.—Jackson v. Thompson, 118 P.2d 31, 47 Cal.App.2d 405.

Ill.—Havill v. Darch, 52 N.E.2d 64, 320 Ill.App. 667.

N.Y.—Chernotti v. State, 88 N.Y.S.2d 879, 194 Misc. 899.

Pa.—Stollatis v. Forney, Com.Pl., 28 Erie Co. 326.

S.C.—Brownlee v. Miller, 37 S.E.2d 658, 208 S.C. 252.

Right in equity see Equity §§ 489, 492.

#### Duty of court

The trial court has the duty to reopen whenever the ends of justice can be advanced thereby.—Green v. Pullen, 173 P.2d 458, 115 Colo. 344.

#### Securing of justice

The trial judge has right to reopen case to permit production of further evidence by either side, if ends of justice so require in his opinion.—Call v. Cloverland Dairy Products Co., La.App., 21 So.2d 166.

66. Cal.—Roraback v. Roraback, 101 P.2d 772, 38 Cal.App.2d 592.

Iowa.—Jones v. Thompson, 38 N.W.2d 672, 240 Iowa 1024.

#### Construction of statute

Statute authorizing reopening of case for further proceedings and introduction of additional evidence should be liberally construed to achieve purpose it was designed to accomplish.—Shimpones v. Stickney, 28 P.2d 673, 219 Cal. 637.—Gardner v. Rich Mfg. Co., 158 P.2d 23, 68 Cal.

d. Circumstances authorizing allowance or denial of application

e. Stage of trial at which case may be reopened

#### a. In General

It is within the sound discretion of the court trying a cause without a jury as to whether or not it will permit the case to be reopened for the purpose of the introduction of additional evidence.

The right of a trial court to reopen a case for the introduction of evidence is generally recognized at law,<sup>65</sup> and the power, in some jurisdictions, is expressly conferred by statute or rules of court.<sup>66</sup> As in case of trials of actions to a jury, as discussed supra § 104, it is within the sound discretion of the court trying a case without a jury as to whether or not it will allow the case to be reopened for the purpose of introducing other evidence,<sup>67</sup> or for

App.2d 725.—Roraback v. Roraback, 101 P.2d 772, 38 Cal.App.2d 592.

#### Statute held to be directory

The statute relating to admission of additional testimony to supply an omission to aid administration of justice is directory.—Southland Life Ins. Co. v. Greenwald, Civ.App., 143 S.W.2d 648, affirmed 159 S.W.2d 854, 138 Tex. 450.

#### Court deemed to have proceeded under statute

Where plaintiffs filed notice of intention to move for new trial and notice of motion to set aside judgment, and court reopened cases in order that plaintiffs might introduce further evidence, and court thereafter decided cases for plaintiffs, and entered new findings, conclusions of law, and judgments, court would be deemed to have proceeded under statute authorizing reopening of case for introduction of additional evidence.—Gardner v. Rich Mfg. Co., 158 P.2d 23, 68 Cal.App.2d 725.

67. Ala.—Paley v. Tayloe, 159 So. 886, 230 Ala. 131.

Ark.—Smith v. Smith, 195 S.W.2d 45, 210 Ark. 251.

Cal.—Koppelman v. Helkes, 245 P.2d 54, 111 Cal.App.2d 475.—Axe v. Los Angeles County, 230 P.2d 781, 98 Cal.App.2d 578.—Kalliterna v. Wright, 213 P.2d 32, 94 Cal.App.2d 926.—Winkler v. Winkler, 139 P.2d 43, 54 Cal.App.2d 398.—Gelberg v. Consolo, 125 P.2d 74, 51 Cal.App.2d 518.—Crawford v. Senegram, 46 P.2d 173, 17 Cal.App.2d 449.

Colo.—Green v. Pullen, 173 P.2d 458, 115 Colo. 344.

Ga.—Hartford Acc. & Indem. Co. v. Garland, 59 S.E.2d 560, 21 Ga.App. 667.

Ill.—Cienki v. Rusanak, 75 N.E.2d 372, 398 Ill. 77.—Wise v. Potomac Nat. Bank, 65 N.E.2d 767, 393 Ill. 357—

any other purpose consonant with justice,<sup>68</sup> in order to show the exact facts;<sup>69</sup> and this discretion is not subject to review unless there has been an abuse thereof, as discussed in Appeal and Error § 1606. The discretion will<sup>70</sup> or should be liberally exercised<sup>71</sup> in behalf of allowing the whole case to be presented.<sup>72</sup> A request to reopen should not be refused except for the most cogent reasons.<sup>73</sup> The court may, on its own motion, order a further hearing to gain additional evidence,<sup>74</sup> and it has been stated that if a court has jurisdiction over a cause to be exercised in its discretion on petition of the parties in interest, there is such jurisdiction as empowers it to reopen the proceeding on its own motion when such action appears to it to be necessary.<sup>75</sup> The granting of time for filing written briefs after there has been made a formal entry of "cause submitted" amounts to a reopening of the case.<sup>76</sup>

## B. Application

An application to reopen the case must be supported by affidavit or other evidence justifying the failure to offer the evidence at the proper time during the trial.

A petition and affidavit, filed by plaintiff after the court orally announced a decision adverse to plaintiff, alleging that one of the witnesses for defendant had testified mistakenly or falsely, and asking for a new trial, is in effect an application to reopen the case for further testimony.<sup>77</sup> The application must be supported by affidavit or other evidence justifying the failure to offer the evidence during the trial.<sup>78</sup> A motion to reopen the case is sufficient if it contains averments which show that the reopening is necessary to the ends of justice,<sup>79</sup> and comes within the provisions of a statute authorizing such procedure.<sup>80</sup>

People ex rel. Boos v. St. Louis, I. M. & S. Ry. Co., 115 N.E. 854, 278 Ill. 25—Havill v. Darch, 52 N.E.2d 64, 320 Ill.App. 667.  
Ind.—Dickerson v. Dickerson, 10 N.E.2d 424, 104 Ind.App. 686, affirmed 11 N.E.2d 514, affirmed 104 Ind.App. 686—Dope v. Ballinger, 7 N.E.2d 638, 103 Ind.App. 329.  
Iowa.—Mealey v. Scott, 48 N.W.2d 262, 242 Iowa 787—Dobler v. Bawden, 25 N.W.2d 866, 238 Iowa 76.  
Ky.—Daniel v. Powell, 189 S.W.2d 715, 304 Ky. 52.  
La.—Walker v. Joyner, App., 45 So.2d 113—Ellis v. Blanchard, App. 45 So.2d 100—Rutz v. Trocchiano, App., 38 So.2d 184—Hudson v. American Mut. Liability Co., App., 14 So.2d 489—Richey v. Swink, App., 4 So.2d 749—Hornshy v. Rives, App., 2 So.2d 532—Hill v. Taylor, App., 174 So. 196—Lamp-ton Reid & Co. v. Fortenberry, App., 168 So. 36, rehearing denied 168 So. 711—Vaughan v. Canik, App., 152 So. 364, followed in 152 So. 368.  
Mich.—Kogowski v. Kogowski, 29 N.W.2d 851, 319 Mich. 511.  
Minn.—In re Schumacher's Estate, 39 N.W.2d 604, 229 Minn. 382.  
Mo.—State ex inf. McKittick ex rel. Chambers v. Jones, 185 S.W.2d 17, 353 Mo. 900.  
Mont.—Nadeau v. Texas Co., 69 P.2d 586, 104 Mont. 558.  
Nev.—Zasucha v. Allen, 51 P.2d 1029, 56 Nev. 339.  
N.M.—Hittson v. Chicago, R. I. & P. Ry. Co., 86 P.2d 1037, 43 N.M. 122.  
N.Y.—Braman v. Westaway, 59 N.Y.S.2d 509.  
Ohio.—In re Ruhl's Estate, App., 43 N.E.2d 760.  
Okl.—Fry v. Long Bell Lumber Co., 167 P.2d 654, 196 Okl. 670—Deems v. Milligan, 64 P.2d 701, 179 Okl. 25.

Pa.—Barrows v. Allum, 66 A.2d 66, 361 Pa. 624—Thomas v. Waters, 38 A.2d 237, 350 Pa. 214.  
R.I.—Goggin v. Goggin, 195 A. 593, 59 R.I. 343.  
Tex.—Binford v. Snyder, 189 S.W.2d 471, 144 Tex. 134—Bolyard v. Toronto Pipe Line Co., Civ.App., 120 S.W.2d 960, error dismissed.  
Utah.—Bowen v. Olson, 268 P.2d 983, 2 Utah 2d 12.  
Wash.—Hoff v. Lester, 200 P.2d 515, 31 Wash.2d 937—Zulauf v. Carton, 192 P.2d 328, 30 Wash.2d 425—Turpen v. Johnson, 176 P.2d 495, 26 Wash.2d 716—Strong v. Sunset Copper Co., 114 P.2d 526, 9 Wash.2d 214, 135 A.L.R. 423—McHugh v. Rosala, 51 P.2d 616, 184 Wash. 463, 64 C.J. p 1204 note 90.  
**Offer to supply missing proof**  
Where trial court in its opinion stated that no award could be made for a certain loss unless plaintiff promptly supplied the missing proof, court should have granted plaintiff's application to supply such proof.—Deverman v. Stevens Builders, Inc., 106 A.2d 557, 81 N.J.Super. 347.  
68. Miss.—American Holist & Derrick Co. v. Lynn, 148 So. 351, 167 Miss. 93.  
64 C.J. p 1204 note 91.  
**Proof in support of judgment**  
Whether a court on motion should reopen case to admit some formal proof in support of judgment rests in sound discretion of trial court.—Hernberg v. Tipton, C.C.A.Ill., 133 F.2d 67.  
69. Miss.—American Holist & Derrick Co. v. Lynn, 148 So. 351, 167 Miss. 93.  
70. Utah.—Wasatch Oil Refining Co. v. Wade, 63 P.2d 1070, 92 Utah 50.

71. Iowa.—Dobler v. Bawden, 25 N.W.2d 866, 238 Iowa 76.  
72. Utah.—Wasatch Oil Refining Co. v. Wade, 63 P.2d 1070, 92 Utah 50.  
73. Ill.—People ex rel. Boos v. St. Louis, I. M. & S. Ry. Co., 115 N.E. 854, 278 Ill. 25.  
74. Cal.—Hohn v. Pauly, 106 P. 266, 11 Cal.App. 724.  
D.C.—Walsh v. Schafer, Mun.App., 61 A.2d 716.  
Mich.—Bankers Trust Co. of Detroit v. Foto, 4 N.W.2d 54, 301 Mich. 676.  
N.M.—Security State Bank v. Clovis Mill & Elevator Co., 68 P.2d 918, 41 N.M. 341.  
S.C.—Brownlee v. Miller, 37 S.E.2d 658, 208 S.C. 252.  
75. U.S.—Sprague v. Woll, C.C.A.Ill., 122 F.2d 128, certiorari denied 62 S.Ct. 131, 314 U.S. 669, 86 L.Ed. 535.  
76. Iowa.—Thompson v. Schalk, 292 N.W. 851, 228 Iowa 706.  
77. Wash.—Ross v. Fisher Co., 268 P. 883, 148 Wash. 274.  
78. Cal.—In re Brady's Estate, 213 P.2d 125, 95 Cal.App.2d 511.  
79. La.—Vaughan v. Canik, App., 152 So. 364, followed in 152 So. 368.  
**Motion held sufficient**  
An affidavit for reopening of a cause for additional evidence because of absence of a party, where it alleges facts showing that absence was unavoidable, that presence of party was necessary, and that he had a meritorious defense, is a sufficient showing on which to grant motion to reopen.—Zulauf v. Carton, 192 P.2d 328, 30 Wash.2d 425.  
80. La.—Vaughan v. Canik, App., 152 So. 364, followed in 152 So. 368.

## c. Notice and Hearing

There is authority to the effect that a case cannot be reopened without formal notice to the party or parties whose rights are to be affected. Once the case is properly reopened, the proceedings thereafter held are a regular part of the formal trial.

After a case has been submitted, the court cannot, on its own motion and without a hearing, reopen the case and take further testimony without formal notice to the party or parties whose rights are to be affected,<sup>81</sup> so that they may be present and cross-examine the witnesses called.<sup>82</sup> Where the local statute requires notice in civil proceedings to be in writing, a verbal notice will be insufficient.<sup>83</sup> Where plaintiff, on application to reopen, submitted proof in the form of a letter addressed to the court without supplying a copy of it or any advice thereon to defendants' attorneys, it has been stated that such is not a form of practice which should be either countenanced or indulged in.<sup>84</sup> If a case is reopened on plaintiff's motion, there is no abuse of discretion if defendant is given five days in which to meet the additional testimony.<sup>85</sup> Where the case is reopened, the proceedings on the hearing are as much a part of the trial as if the question on which evidence is offered had been raised and the evidence concerning it had been given before the case was originally closed.<sup>86</sup> Evidence not bearing on the inquiry for which a case is reopened may be excluded by the court,<sup>87</sup> but it is improper to exclude evidence which would show the exact facts and attain the ends of justice.<sup>88</sup>

*Waiver.* It has been stated that any technical defects in the procedure of reopening a trial may be deemed waived by the acquiescence of the parties.<sup>89</sup>

## d. Circumstances Authorising Allowance or Denial of Application

Various circumstances have been held to authorize allowance or denial of an application to reopen the case.

In order to justify the granting of an application to reopen the case, it must clearly appear that the applicant has used every effort within his means to procure the evidence before trial,<sup>90</sup> and if there is doubt on the subject, it is resolved against the applicant.<sup>91</sup> An application to reopen a case may properly be granted to permit the reception of evidence which counsel, from inadvertence, had failed to offer,<sup>92</sup> and to permit the reception of newly discovered evidence,<sup>93</sup> the opposite party being given an opportunity to rebut the evidence,<sup>94</sup> if it is shown to the court that if such evidence had been in the possession of the movant and submitted to the court at the trial or hearing a determination other than the one arrived at would have resulted;<sup>95</sup> and it is erroneous to refuse to reopen a case for the admission of newly discovered evidence where there had been no lack of diligence to secure it.<sup>96</sup> So, also, the application may properly be granted where counsel misunderstood a ruling of court on testimony that had been offered with respect to where the burden of proof rested;<sup>97</sup> where the court, after submission of the case, decided that material and necessary evidence admitted over objection was incompetent;<sup>98</sup> where the evidence adduced failed to "throw any substantial light" on the issues;<sup>99</sup> where the evidence produced on reopening is undisputed and carries no mark or badge of suspicion;<sup>1</sup> where the parties have agreed that either might submit additional evidence;<sup>2</sup> where there is no objection to the admissibility of the evidence

81. Minn.—Stein v. Roeller, 68 N.W. 1087, 66 Minn. 283.  
64 C.J. p 1205 note 94.

82. Ill.—Hurd v. Lill, 26 Ill. 497.

83. Minn.—Stein v. Roeller, 68 N.W. 1087, 66 Minn. 283.

84. N.Y.—Molinari v. Wiley, 82 N.Y.S.2d 876, affirmed 79 N.Y.S.2d 917, 274 App.Div. 1021, and Barnds v. Wiley, 79 N.Y.S.2d 917, 274 App.Div. 1017.

85. Iowa.—Burke v. Burke, 119 N.W. 129, 142 Iowa 206.

86. N.Y.—Maybeck v. New York Municipal Ry. Corporation, 171 N.Y.S. 848, 104 Misc. 330, affirmed 178 N.Y.S. 910, 188 App.Div. 982.  
64 C.J. p 1205 note 98.

87. Mich.—In re Norton's Estate, 135 N.W. 253, 163 Mich. 531.

88. Miss.—American Holst & Derrick Co. v. Lynn, 148 So. 351, 167 Miss. 93.

89. N.Y.—Chemott v. State, 88 N.Y.S.2d 879, 194 Misc. 899.

90. La.—Richey v. Swink, App. 4 So. 2d 749.

91. La.—Richey v. Swink, *supra*.

92. Iowa.—Mealey v. Scott, 48 N.W. 2d 262, 242 Iowa 787.

Minn.—Mattfeld v. Nester, 32 N.W. 2d 291, 226 Minn. 106, 3 A.L.R.2d 909.

Wash.—Commercial Waterway Dist. No. 1 of King County v. King County, 94 P.2d 491, 200 Wash. 538.

64 C.J. p 1205 note 99.

93. La.—Lampton Reid & Co. v. Fortenberry, App., 168 So. 36, rehearing denied 168 So. 711.

N.Y.—Andrews v. Andrews, 58 N.Y.S.2d 20, 185 Misc. 970.  
64 C.J. p 1205 note 1.

94. Wash.—Lueders v. Town of Tenino, 95 P. 1089, 49 Wash. 621.

95. N.Y.—Andrews v. Andrews, 58 N.Y.S.2d 20, 185 Misc. 970.

96. Cal.—Metropolis Trust & Savings Bank v. Monnier, 147 P. 265, 169 Cal. 592.

La.—Vaughan v. Canik, App. 152 So. 364, followed in 152 So. 368.

97. Wash.—Tollefson v. Solle, 242 P. 1103, 137 Wash. 468.

98. U.S.—Paine v. St. Paul Union Stockyards Co., C.C.A. Minn., 28 F. 2d 463, modified on other grounds 35 F.2d 624.  
64 C.J. p 1205 note 5.

99. N.H.—Aetna Life Ins. Co. v. Chandler, 193 A. 233, 87 N.H. 95.

1. Miss.—American Holst & Derrick Co. v. Lynn, 148 So. 351, 167 Miss. 93.

2. Mo.—Haake v. Union Bank & Trust Co., App., 64 S.W.2d 459.

on the proceedings to reopen<sup>3</sup> and there is no surprise or prejudice to the rights of the adverse party;<sup>4</sup> where there has been an omission under a misapprehension of law to introduce evidence on an issue on which the right to recovery depends;<sup>5</sup> where the rights of defendant will not, in any manner, be affected by the course pursued, except that it permits plaintiff to produce evidence material to the issues involved;<sup>6</sup> and where objection was first made after the close of the case that plaintiff had failed to make proof of certain formal facts essential to his right of recovery.<sup>7</sup>

The court may also reopen a case to allow the re-introduction of a copy of an instrument theretofore excluded because of improper authentication,<sup>8</sup> or to permit the interposing of the statute of limitations as a defense and the receiving of evidence in support thereof.<sup>9</sup> Where the record is, in the opinion of the court, incomplete for want of available evidence proper to be received, the admission of which would render the court better able to do justice between the parties, it may direct the tak-

ing of further testimony or the reopening of the case for that purpose.<sup>10</sup> Where an unexpected inference of fraud is drawn from the evidence adduced on the trial, the trial court should reopen the case to the end that all the evidence available which would have thrown any light on the issue of fraud may be laid before the court to enable the person stigmatized by the fraud to meet squarely the evidence from which the inference was drawn.<sup>11</sup>

On the other hand, it is proper to refuse to reopen a case where no good excuse is shown for not presenting the evidence sought to be introduced at the proper time;<sup>12</sup> where the request is unaccompanied by a specific offer of proof;<sup>13</sup> where the movant had knowledge or sufficient notice of the need for, and existence of, such evidence and an opportunity to present it at the proper time during the trial;<sup>14</sup> where such evidence is merely cumulative,<sup>15</sup> incompetent,<sup>16</sup> immaterial,<sup>17</sup> or irrelevant,<sup>18</sup> or would be conflicting,<sup>19</sup> and would not affect the result;<sup>20</sup> where it is in direct contradiction of the

3. U.S.—Hernberg v. Tipton, C.C.A. Ill., 133 F.2d 67.

4. U.S.—Hernberg v. Tipton, supra.

5. W.Va.—Wholesale Coal Co. v. Price Hill Colliery Co., 128 S.E. 313, 98 W.Va. 438.

6. Cal.—In re Hunsicker, 223 P. 411, 65 Cal.App. 114.

7. Miss.—American Holst & Derrick Co. v. Lynn, 148 So. 351, 167 Miss. 93.

Wash.—Dietz v. Bartell, 207 P. 663, 120 Wash. 443.

8. La.—Bollinger v. Williams Bros., App., 134 So. 356.

9. Wash.—Turpen v. Johnson, 175 P.2d 495, 26 Wash.2d 716.

10. D.C.—Walsh v. Schafer, Mun. App., 61 A.2d 716.

N.M.—Security State Bank v. Clovis Mill & Elevator Co., 68 P.2d 918, 41 N.M. 341.

Wash.—Ankeny v. Pomeroy Grain Growers, 15 P.2d 264, 170 Wash. 1.

11. Cal.—Shimpones v. Stickney, 28 P.2d 673, 219 Cal. 637.

12. Cal.—Keppelman v. Helkes, 245 P.2d 54, 111 Cal.App.2d 475—Valentine v. Ratner, 233 P.2d 667, 105 Cal.App.2d 358—Hanson v. Wells Van & Storage Co., 223 P.2d 509, 100 Cal.App.2d 332—Willet & Crane v. City of Palos Verdes Estates, 216 P.2d 85, 96 Cal.App.2d 757—Butler v. Stratton, 212 P.2d 43, 95 Cal.App.2d 23—Kan v. Tsang, 203 P.2d 86, 90 Cal.App.2d 638—Anglo California Nat. Bank of San Francisco v. Kidd, 137 P.2d 460, 58 Cal. App.2d 651—Bard v. Kent, 95 P.2d 957, 35 Cal.App.2d 484.

Conn.—McPartland v. Beaumart, Inc., 200 A. 1018, 124 Conn. 539.

Ill.—McLaughlin v. Pickrel, 46 N. E.2d 368, 381 Ill. 574.

Kan.—Michner v. Ford, 98 P. 273, 78 Kan. 837.

Ky.—Morris v. Thomas, 220 S.W.2d 958, 310 Ky. 501.

La.—Richey v. Swink, App., 4 So.2d 749.

Pa.—Thomas v. Waters, 38 A.2d 237, 350 Pa. 214.

64 C.J. p 1205 note 11.

**Litigants must produce evidence** available to them during course of the regular trial and cannot compel trial judge to reopen the case after submission to permit its production.—Hanson v. Wells Van & Storage Co., 223 P.2d 509, 100 Cal. App.2d 332.

13. Cal.—Mullia v. Mayer, 17 P.2d 705, 217 Cal. 209.

14. U.S.—Wolfe v. Phillips, C.A.Okl., 172 F.2d 481, certiorari denied 69 S.Ct. 941, 336 U.S. 968, 93 L.Ed. 1119.

Cal.—Vangel v. Vangel, 254 P.2d 919, 116 Cal.App.2d 615—Axe v. Los Angeles County, 220 P.2d 781, 98 Cal.App.2d 578—Weber v. Marine Cooks' & Stewards' Ass'n of Pacific Coast, 208 P.2d 1009, 93 Cal.App.2d 327.

Conn.—McPartland v. Beaumart, Inc., 200 A. 1018, 124 Conn. 539.

Ky.—Simms v. Veach, 209 S.W.2d 732, 307 Ky. 146.

La.—Richmond v. New York Life Ins. Co., App., 45 So.2d 111—Strickland v. Globe Indem. Co., App., 42 So.2d 334—Cooper v. Garrett, App.,

6 So.2d 209, followed in Veronie v. Garrett, 6 So.2d 215.

Minn.—Kitzman v. Postler & Kruger Co., 283 N.W. 542, 204 Minn. 348.

N.Y.—Mollinari v. Wiley, 82 N.Y.S.2d 876, affirmed 79 N.Y.S.2d 917, 274 App Div. 1021, and Barnds v. Wiley, 79 N.Y.S.2d 917, 274 App Div. 1017.

N.D.—Charon v. Windlingland, 4 N. W.2d 645, 72 N.D. 70.

Vt.—Turner v. Bragg, 55 A.2d 268, 115 Vt. 196.

Va.—Toler v. Yellow Cab Co. of Virginia, 18 S.E.2d 250, 179 Va. 38.

Wash.—Johnson v. Owen, 52 P.2d 302, 184 Wash. 660.

15. Cal.—Willet & Crane v. City of Palos Verdes Estates, 216 P.2d 85, 96 Cal.App.2d 757—Bard v. Kent, 95 P.2d 957, 35 Cal.App.2d 484.

Ill.—McLaughlin v. Pickrel, 46 N. E.2d 368, 381 Ill. 574.

R.I.—Goggin v. Goggin, 195 A. 593, 59 R.I. 343.

64 C.J. p 1205 note 12.

16. Mo.—Ford-Davis Mfg. Co. v. Maggee, App., 233 S.W. 267.

64 C.J. p 1205 note 13.

17. Cal.—San Mateo Planing Mill Co. v. Davenport Realty Co., 24 P. 2d 787, 218 Cal. 702.

Mich.—Bruso v. Pinquet, 33 N.W.2d 100, 321 Mich. 630.

Wash.—Schrock v. Gillingham, 219 P. 2d 92, 36 Wash.2d 419.

64 C.J. p 1205 note 14.

18. Cal.—Willet & Crane v. City of Palos Verdes Estates, 216 P.2d 85, 96 Cal.App.2d 757.

19. Cal.—Beaudreau v. Allen, 227 P. 2d 896, 102 Cal.App.2d 552.

20. Cal.—Beaudreau v. Allen, supra

allegations of the moving party's petition and of positive testimony of such party and his witnesses;<sup>21</sup> where the parties produced conflicting affidavits concerning the motion;<sup>22</sup> where the moving party seeks to introduce evidence for the purpose of retrying the case on a new theory;<sup>23</sup> where, at the conclusion of plaintiff's testimony, motion was made to dismiss by defendant, and plaintiff then had opportunity to introduce additional evidence and the case was then fully argued;<sup>24</sup> where dispositions sought to be introduced were taken without authority;<sup>25</sup> where proper diligence was not used in making the motion to reopen the case;<sup>26</sup> where the request is to submit proof on an issue which had previously been decided against the movant in another action;<sup>27</sup> where the court has previously permitted the movant to reopen the case at which time all available pertinent evidence should have been introduced;<sup>28</sup> where the movant seeks to raise a question not raised at the trial and to introduce evidence thereon the effect of which would be to alter the amount of the judgment rendered, which amount had been stipulated by the parties;<sup>29</sup> or where the evidence sought to be produced had been supplied by stipulation.<sup>30</sup>

It is proper to refuse to reopen a case to admit evidence of a custom where the movant failed to plead the custom on the trial as he was required to do under the rules of evidence.<sup>31</sup> A motion to reopen may properly be denied where it is not necessary to a just decision in the case that the movant make the proof offered.<sup>32</sup> Where the court after trial allowed an amendment of the complaint to show an oral modification of the contract in suit,

its refusal to allow defendant to introduce evidence in rebuttal of evidence given at the trial on the point and objected to by defendant on the ground that it was not within the issues has been held to be error.<sup>33</sup> Where a contract was so ambiguous as to require explanation, parol evidence should have been admitted, even after the submission of the case.<sup>34</sup> It is error to deny a motion to reopen to permit a party to meet an issue which was improperly raised by the court.<sup>35</sup> Where defendant relied on redelivery of goods to one of plaintiff's employees to reduce the amount sued for, asserting that such employee signed a receipt, and such employee as a witness denied receiving the goods, and gave specimens of his handwriting for comparison, and defendant proved that plaintiff's former employee recalled seeing defendant's employee at plaintiff's place of business, and the court, on deciding for defendant, remarked on plaintiff's failure to produce such former employee, it has been held error to deny plaintiff permission to reopen the case and prove the signatures of all of his employees, to show that none of them signed the receipt.<sup>36</sup>

It is error to refuse to reopen a case where the granting of the motion will cause no delay and the proffered testimony supplies omitted evidence which is clearly necessary to the due administration of justice.<sup>37</sup> If the court has excluded exhibits under the best evidence rule, the case may thereafter be opened on application to permit the party offering such exhibits to introduce the evidence which would have satisfied the rule.<sup>38</sup> It has been held that if the court, at the conclusion of plaintiffs'

—Willett & Crane v. City of Palos Verdes Estates, 216 P.2d 85, 96 Cal.App.2d 757.

Conn.—Person v. Auto Finance Co. v. Bove, 66 A.2d 126, 135 Conn. 461.  
Ky.—Simms v. Veach, 209 S.W.2d 732, 307 Ky. 146.  
La.—Richey v. Swink, App., 4 So.2d 749.

Mich.—E. Clemens Horst Co. v. Grand Rapids Brewing Co., 273 N.W. 388, 280 Mich. 49.

Mont.—Nadeau v. Texas Co., 69 P.2d 586, 104 Mont. 558.

Wash.—McHugh v. Rosala, 51 P.2d 616, 184 Wash. 463.  
64 C.J. p. 1206 note 15.

Where there is nothing to be gained by reopening

Cal.—Federated Income Properties v. Hart, 191 P.2d 59, 84 Cal.App.2d 663.

Utah.—Needham v. First Nat. Bank, 85 P.2d 785, 96 Utah 432.

21. La.—Rowe v. Smith, 106 So. 657,

160 La. 12.—Cooper v. Garrett, App., 6 So.2d 209, followed in Veronie v. Garrett, 6 So.2d 215.

22. Cal.—Gandolfo v. Gandolfo, 228 P. 960, 66 Cal. App. 728.—Sage Land & Improvement Co. v. McCowen, 157 P. 244, 30 Cal.App. 126.

23. Pa.—Jackson v. Conneautville Borough School Dist., 125 A. 310, 280 Pa. 601.—Fell v. Pitts, 106 A. 574, 263 Pa. 314.

24. Iowa.—Buck v. Bender, 159 N. W. 990.

25. Ark.—Western Clay Drainage Dist. v. Day, 210 S.W. 338, 138 Ark. 181.

26. Wash.—Schrock v. Gillingham, 219 P.2d 92, 36 Wash.2d 419.  
64 C.J. p. 1206 note 21.

27. Idaho.—Metzker v. Lowther, 204 P.2d 1025, 69 Idaho 155.

28. Okl.—Fry v. Long Bell Lumber Co., 167 P.2d 654, 196 Okl. 670.

29. Conn.—Millic v. Ferrara, 48 A. 2d 562, 133 Conn. 141.

30. Cal.—Laine v. Weddell, 173 P. 2d 567, 76 Cal.App.2d 610.

31. Cal.—Tharp v. San Joaquin Cotton Oil Co., 82 P.2d 21, 27 Cal.App. 2d 554.

Establishment of customs see Customs and Usages § 32.

32. La.—Regional Agr. Credit Corp. v. Elston, Prince & McDade, App., 183 So. 91.

33. Ind.—McClure v. Anderson, 108 N.E. 757, 58 Ind.App. 615.

34. Ark.—Wood v. Kelsey, 119 S.W. 258, 90 Ark. 272.

35. Iowa.—Jones v. Thompson, 38 N.W.2d 672, 240 Iowa 1024.

36. N.Y.—Liberty Lace & Netting Works v. Goetz, 184 N.Y.S. 470.

37. Tex.—Stinson v. King, Civ.App., 83 S.W.2d 398, error dismissed.

38. Ill.—Corzine v. Keith, 51 N.E.2d 538, 384 Ill. 435.



proof, doubts that plaintiff has established defendant's connection with the cause of action, it should grant plaintiffs' motion to reopen at that time.<sup>39</sup> In a suit brought to have a conveyance set aside on the ground of failure of consideration, it has been held that it is error to deny a motion to reopen the case where it is alleged that since the decision, but before judgment was signed, facts occurred which constitute ground for annulment of the contract.<sup>40</sup> In various other circumstances the propriety of the allowance<sup>41</sup> or denial<sup>42</sup> of an application to reopen a case has been adjudicated.

### e. Stage of Trial at Which Case May Be Reopened

The allowance of an application to reopen the case has been granted at various stages of a trial.

In actions tried by the court without a jury, it has been variously held that it is within the discretionary powers of a court to reopen the case for the admission of further evidence after plaintiff has rested;<sup>43</sup> after both parties have rested;<sup>44</sup> after testimony on the main question is closed;<sup>45</sup> after the close of all the evidence;<sup>46</sup> before closing of

39. Mich.—Irwin v. Meese, 38 N.W. 2d 867, 325 Mich. 344.

40. La.—Lafeld v. Balzrette, App., 21 So.2d 156.

#### 41. Discretion held not abused

Ariz.—Julian v. Carpenter, 176 P.2d 693, 65 Ariz. 157.

Cal.—Bell v. Towns, 213 P.2d 73, 95 Cal.App.2d 398—Kaltner v. Wright, 212 P.2d 32, 94 Cal.App.2d 926—Gardner v. Rich Mfg. Co., 158 P.2d 23, 68 Cal.App.2d 725—Gelberg v. Consolo, 125 P.2d 74, 51 Cal.App.2d 516—Farmer v. Orme, 21 P.2d 977, 131 Cal.App. 628.

Colo.—Green v. Pullen, 173 P.2d 458, 115 Colo. 344.

Iowa.—Union Bank & Trust Co. of Stanwood v. Willey, 24 N.W.2d 796, 237 Iowa 1250—Keplinger v. Barer, 15 N.W.2d 284, 234 Iowa 1135.

La.—Ruiz v. Trochiano, App., 38 So. 2d 184—Sarver v. Barksdale, App., 24 So.2d 649—Hornby v. Rives, App., 2 So.2d 532.

Mich.—Grand Trunk Western R. Co. v. Mount Clemens Sugar Co., 269 N.W. 208, 277 Mich. 366, certiorari denied Mount Clemens Sugar Co. v. Grand Trunk Western R. Co., 57 S.Ct. 514, 300 U.S. 670, 81 L.Ed. 877.

Nev.—Zasucha v. Allen, 51 P.2d 1029, 56 Nev. 339.

#### Discretion held abused

La.—Home Ins. Co. of N. Y. v. I. R. & G. Co., App., 43 So.2d 504, N.J.—Carlo v. Okonite-Callender Cable Co., 64 A.2d 895, 2 N.J.Super. 122, affirmed 69 A.2d 734, 3 N.J. 253.

N.Y.—Leewood Hills, Inc., v. New Rochelle Water Co., 7 N.Y.S.2d 823, 255 App.Div. 883, appeal dismissed 24 N.E.2d 979, 282 N.Y. 648.

Tex.—McGee v. Stark, Civ.App., 127 S.W.2d 589, error dismissed, judgment correct.

Wash.—Zulauf v. Carton, 192 P.2d 328, 30 Wash.2d 425.

#### 42. Discretion held not abused

Ark.—State v. Midland Val. R. Co., 122 S.W.2d 173, 197 Ark. 243.

Cal.—Boswell v. Mount Jupiter Mut. Water Co., 217 P.2d 980, 97 Cal.App.

2d 437—Mazzenga v. Rosso, 197 P. 2d 770, 87 Cal.App.2d 790.

Fla.—Joyner v. Williams, 23 So.2d 853, 156 Fla. 615.

Ill.—Dean Milk Co. v. City of Elgin, 90 N.E.2d 112, 405 Ill. 204—Clenki v. Rusnak, 75 N.E.2d 372, 393 Ill. 77—Kautt v. Se. Breny, 96 N.E.2d 651, 342 Ill.App. 322—U. S. Gypsum Co. v. Faroll, 15 N.E.2d 888, 296 Ill.App. 47.

Iowa.—Alleman v. White, 293 N.W. 658, 230 Iowa 526.

La.—Littin v. Stephens, 175 So. 619, 187 La. 918—Walker v. Joyner, App., 45 So.2d 113.

Mich.—Kogowski v. Kogowski, 29 N.W.2d 851, 219 Mich. 511.

Mo.—Bickel v. Argyle Inv. Co., 121 S.W.2d 803, 343 Mo. 456.

Utah.—Tuft v. Brotherson, 150 P.2d 384, 106 Utah 499.

Wash.—Gorrien v. Jamison, 200 P.2d 488, 32 Wash.2d 1—Weaver v. Blochberger, 199 P.2d 589, 31 Wash. 2d 877—Winston v. Bacon, 111 P. 2d 764, 8 Wash.2d 216.

Wis.—Dorner v. Doherty, 267 N.W. 46, 222 Wis. 101.

43. Colo.—Green v. Pullen, 173 P. 2d 458, 115 Colo. 344.

Ill.—Burgener v. Lippold, 128 Ill. App. 590.

Neb.—Filley v. Mancuso, 20 N.W.2d 318, 146 Neb. 493.

S.D.—Security Nat. Bank of Alexandria v. Kerkhoff, 230 N.W. 759, 57 S.D. 70.

#### Order equivalent to permission to reopen

Where plaintiff had rested, order passing case over from Tuesday until Friday to allow plaintiff to procure additional witnesses was equivalent to permission to plaintiff to reopen case and that he might bring witnesses from distance.—American Holst & Derrick Co. v. Lynn, 148 So. 351, 167 Miss. 93.

44. Cal.—Willett & Crane v. City of Palos Verdes Estates, 216 P.2d 85, 96 Cal.App.2d 757.

N.D.—Charon v. Windigland, 4 N.W. 2d 645, 72 N.D. 70.

Tex.—Binford v. Snyder, 189 S.W.2d 471, 144 Tex. 134.

Wash.—Commercial Waterway Dist. No. 1 of King County v. King County, 94 P.2d 491, 200 Wash. 538.

45. Fla.—Joyner v. Williams, 23 So. 2d 853, 156 Fla. 615.

46. Ark.—Hickingsbotham v. Industrial Finance Corp., 91 S.W.2d 1023, 192 Ark. 429.

Cal.—San Mateo Planing Mill Co. v. Davenport Realty Co., 24 P.2d 787, 218 Cal. 702.

Fla.—Joyner v. Williams, 23 So.2d 853, 156 Fla. 615.

Mass.—Kerr v. Palmieri, 91 N.E.2d 754, 325 Mass. 554—Town of Hopkinton v. B. F. Sturtevant Co., 189 N.E. 107, 285 Mass. 272.

Mo.—Bickel v. Argyle Inv. Co., 121 S.W.2d 803, 343 Mo. 456—Harlan v. Blume, App., 190 S.W.2d 273.

N.H.—Ricker v. Mathews, 53 A.2d 196, 94 N.H. 313, 171 A.L.R. 296—Snook v. City of Portsmouth, 10 A.2d 654, 90 N.H. 441—Etna Life Ins. Co. v. Chandler, 193 A. 233, 89 N.H. 95.

Okla.—Ellis v. Boggs, 104 P.2d 244, 187 Okl. 544.

64 C.J. p 1206 note 26.

#### After proofs have been closed

(1) On trial of cause by court, the introduction of evidence after the proofs have been closed rests within the discretion of the court.—People v. Cole, 81 N.E. 7, 227 Ill. 59—People v. Wiemers, 80 N.E. 45, 225 Ill. 17.

(2) Since the statute requiring decision within sixty days from time proofs are closed is directory and not mandatory, it did not foreclose trial judge from taking further proofs after expiration of sixty days.—Bankers Trust Co. of Detroit v. Foto, 4 N.W.2d 64, 301 Mich. 676.

#### Discretion held not abused

Ark.—Hickingsbotham v. Industrial Finance Corp., 91 S.W.2d 1023, 192 Ark. 429.

La.—Lampton Reid & Co. v. Fortenberry, App., 168 So. 36, rehearing denied 168 So. 711.

Okla.—Ellis v. Boggs, 104 P.2d 244, 187 Okl. 544.

argument;<sup>47</sup> after closing of argument;<sup>48</sup> unless otherwise provided by statute;<sup>49</sup> before final submission of the case;<sup>50</sup> after final submission of the case;<sup>51</sup> but there is authority to the contrary of this last proposition;<sup>52</sup> after the case has been taken under advisement;<sup>53</sup> after motion for new trial and in arrest of judgment has been overruled;<sup>54</sup> before findings of fact and conclusions of law have been made;<sup>55</sup> after making<sup>56</sup> or announcing<sup>57</sup> findings of fact; before decision;<sup>58</sup> after an-

nouncement of decision;<sup>59</sup> before final judgment;<sup>60</sup> after the making of a minute order directing judgment;<sup>61</sup> and, according to some decisions, even after final judgment,<sup>62</sup> although a refusal to reopen the case after final judgment is not erroneous.<sup>63</sup>

## § 592. — Objections and Exceptions and Rulings Thereon

In some jurisdictions, under certain circumstances, it has been held that parties may object to the admission

47. Ariz.—Julian v. Carpenter, 176 P.2d 693, 65 Ariz. 157.

Cal.—Willett & Crane v. City of Palos Verdes Estates, 216 P.2d 85, 96 Cal.App.2d 757.  
64 C.J. p 1206 note 27.

48. Tex.—Southland Life Ins. Co. v. Greenwade, Civ.App., 143 S.W.2d 648, affirmed 159 S.W.2d 854, 138 Tex. 450.  
64 C.J. p 1206 note 28.

49. Ala.—Ex parte Alabama Marble Co., 113 So. 240, 216 Ala. 272.  
64 C.J. p 1206 note 29.

50. Ala.—Cefalu v. Dearborn & Warfield, 49 So. 1030, 162 Ala. 105.

51. Ark.—State v. Midland Val. R. Co., 122 S.W.2d 173, 197 Ark. 243.  
Cal.—Litvinuk v. Litvinuk, 162 P.2d 8, 27 Cal.2d 38—Farmer v. Orme, 21 P.2d 977, 131 Cal.App. 628.

Iowa.—Union Bank & Trust Co. of Stanwood v. Willey, 24 N.W.2d 796, 237 Iowa 1250.

Pa.—Stewart v. Shenandoah Life Ins. Co., 20 A.2d 246, 144 Pa.Super. 549.  
Utah.—Wasatch Oil Refining Co. v. Wade, 63 P.2d 1070, 92 Utah 50.

Wash.—Haveman v. Beulow, 217 P.2d 313, 36 Wash.2d 185.  
64 C.J. p 1206 note 31.

52. Iowa.—Dunn v. Wolf, 47 N.W. 887, 81 Iowa 688.  
64 C.J. p 1206 note 32.

53. Ill.—Dean Milk Co. v. City of Elgin, 90 N.E.2d 112, 405 Ill. 204—Corzine v. Keith, 51 N.E.2d 538, 384 Ill. 435—People ex rel. Boos v. St. Louis, I. M. & S. Ry. Co., 115 N.E. 854, 278 Ill. 25—Havill v. Darch, 52 N.E.2d 64, 320 Ill.App. 667.

Mo.—Haake v. Union Bank & Trust Co., App., 54 S.W.2d 459.  
Mont.—Nadeau v. Texas Co., 69 P.2d 586, 104 Mont. 588.

Utah.—Turft v. Brotherson, 150 P.2d 884, 106 Utah 499.  
64 C.J. p 1206 note 33.

54. Ind.—Maynard v. Shorb, 85 Ind. 501.

55. Wash.—McHugh v. Rossaia, 51 P.2d 616, 184 Wash. 463.  
64 C.J. p 1207 note 35.

56. Mass.—Lariviere v. Boucher, 8 N.E.2d 853, 297 Mass. 27.  
64 C.J. p 1207 note 36.

57. Iowa.—Corpus Juris cited in Mealey v. Scott, 48 N.W.2d 262, 242 Iowa 787.

Utah.—Wasatch Oil Refining Co. v. Wade, 63 P.2d 1070, 92 Utah 50.  
64 C.J. p 1207 note 37.

58. Cal.—Gelberg v. Consolo, 125 P.2d 74, 51 Cal.App.2d 518.

La.—Call v. Cloverland Dairy Products Co., App., 21 So.2d 166.  
N.Y.—Leeewood Hills, Inc. v. New Rochelle Water Co., 7 N.Y.S.2d 823, 255 App.Div. 883, appeal dismissed 24 N.E.2d 978, 282 N.Y. 648.

59. Cal.—Vangel v. Vangel, 254 P.2d 919, 116 Cal.App.2d 615.

Tex.—Stinson v. King, Civ.App., 83 S.W.2d 398, error dismissed.

Utah.—Wasatch Oil Refining Co. v. Wade, 63 P.2d 1070, 92 Utah 50.

Wash.—Turpen v. Johnson, 175 P.2d 495, 26 Wash.2d 716—McHugh v. Rossaia, 51 P.2d 616, 184 Wash. 463.

Wis.—Dorner v. Doherty, 267 N.W. 46, 222 Wis. 101.  
64 C.J. p 1207 note 39.

### After rendition of a memorandum decision

(1) After announcement of tentative decision.—Simpson v. Sisters of Charity of the House of Providence, 182 P. 937, 108 Wash. 82.

(2) The reopening of a case after the trial court had rendered its memorandum decision in an attempt to get the effect of expert testimony into the record was within the discretion of the trial court.—Winston v. Bacon, 111 P.2d 764, 8 Wash.2d 216.

60. Cal.—Weber v. Marine Cooks' & Stewards' Ass'n of Pacific Coast, 208 P.2d 1009, 93 Cal.App.2d 327—Bard v. Kent, 95 P.2d 957, 35 Cal.App.2d 434.  
64 C.J. p 1207 note 40.

61. Cal.—Litvinuk v. Litvinuk, 162 P.2d 8, 27 Cal.2d 38—Bazet v. Nugget Bar Placers, 296 P. 616, 211 Cal. 607—Carr v. International Indemnity Co., 209 P. 83, 58 Cal.App. 614.

After memorandum opinion filed  
Cal.—Bell v. Towns, 213 P.2d 73, 95 Cal.App.2d 398.

Jurisdiction held not lost  
Failure to act on motion to reopen case for introduction of further evidence within 60 days after opinion or-

dering judgment had been filed did not deprive trial court of jurisdiction to grant motion, since it was not a motion for new trial and judgment had not been signed.—Bell v. Town, 213 P.2d 73, 95 Cal.App.2d 398.

62. U.S.—Hernberg v. Tipton, C.C.A. III., 133 F.2d 67.

Conn.—McPartland v. Beaumart, Inc., 200 A. 1018, 124 Conn. 539.

Ill.—Kautt v. Se Breny, 96 N.E.2d 651, 342 Ill.App. 322.

Utah.—Wasatch Oil Refining Co. v. Wade, 63 P.2d 1070, 92 Utah 50.

64 C.J. p 1207 note 41.

After judgment has been announced  
Okla.—Deems v. Milligan, 64 P.2d 701, 179 Okl. 25.

### Effect of statute

(1) The statutory provision for reopening proceeding for the introduction of additional evidence has the same effect as if the case had been reopened after submission thereof before findings had been filed or judgment rendered, and enlarges power of trial court for purpose of minimizing both expense and delay to litigants in those cases wherein trial court may entertain a doubt in any particular cause as to propriety of judgment entered by it.—Roraback v. Roraback, 101 P.2d 772, 38 Cal.App.2d 592.

(2) Fact that court erroneously attempted to accomplish the result of reopening case for additional evidence by granting motions under provision for vacating judgments did not render its action ineffective.—Gardner v. Rich Mfg. Co., 158 P.2d 23, 68 Cal.App.2d 725.

(3) Where trial court in setting aside findings of fact, conclusions of law and judgments was acting under statute authorizing reopening of case for additional evidence, it was duty of court, after receiving additional evidence, to make new findings of fact, conclusions of law, and order such judgment as each case in its entirety required.—Gardner v. Rich Mfg. Co., supra.

63. Ark.—Arkansas Game & Fish Commission v. Storthz, 29 S.W.2d 294, 181 Ark. 1089.

Ky.—Home Ins. Co. of New York v. Stroud, 50 S.W.2d 934, 244 Ky. 315.

of evidence and must take exceptions to rulings admitting or excluding evidence in order to avail themselves of error in such rulings made by a court sitting without a jury; but in other jurisdictions, under certain circumstances, it has been held that parties may not object to the admission of evidence or take exceptions to such rulings, or that an objection or exception is not necessary in a case tried without a jury.

In many jurisdictions it has been held, in actions tried without a jury, either that the parties have the right to object and except to the rulings admitting evidence,<sup>64</sup> or that objections<sup>65</sup> and exceptions<sup>66</sup> to the rulings of the court admitting or excluding evidence are necessary in order to entitle the parties to avail themselves of error in such rulings. An objection to the introduction of evidence must be made in apt time.<sup>67</sup> The objections must be made and exceptions taken at the time the evidence is offered,<sup>68</sup> otherwise they will be considered as having been waived.<sup>69</sup> Also, in order to be available, the objections<sup>70</sup> and exceptions<sup>71</sup> must be specific and not general, and all objections to the competency of evidence except the one stated are waived.<sup>72</sup> It has been held, however, that objections to evidence once taken and overruled need not be repeated when subsequent similar testimony is offered.<sup>73</sup>

On the other hand, although the exclusion of proper evidence in actions tried by the court without a jury has been held to be the subject of a bill of exceptions,<sup>74</sup> the admission of improper evidence has been held not to be the subject of a bill of exceptions.<sup>75</sup> It has similarly been held that the question of admissibility of evidence on the ground of relevancy cannot be raised in a case tried without a jury,<sup>76</sup> and that objection to the admission of evidence is not necessary in a case

where a jury trial has been waived.<sup>77</sup> A court may, however, properly enter on the record that evidence supposed to be improperly admitted was objected to, in order to show that it was not received by consent;<sup>78</sup> and while a formal bill of exceptions is not required to bring a supposed error of this character to the notice of the reviewing court, it may be done in that form if the court thinks proper to adopt it.<sup>79</sup> In at least one jurisdiction, in actions at law tried by the court without a jury, a party may except to the admission or rejection of evidence,<sup>80</sup> and it is necessary for him to make objections to the admissibility of evidence at the proper time if he desires to receive a ruling thereon;<sup>81</sup> but in actions triable in equity, it is not the practice to rule on the admission and exclusion of evidence,<sup>82</sup> and the court may not exclude offered evidence,<sup>83</sup> but must note objections to improper evidence, and such evidence will be disregarded on appeal.<sup>84</sup> In still other jurisdictions, where the action is referred to the determination of the presiding justice, exceptions do not lie to his rulings admitting or excluding evidence, unless such right is reserved by the parties,<sup>85</sup> and if during the progress of a trial evidence is admitted against the objections of one of the parties, and subsequently the cause is left to the determination of the presiding judge, such objections must be considered as waived.<sup>86</sup>

*Ruling or order.* Where proper objections are made, it is the duty of the court to rule on the evidence offered.<sup>87</sup> It has been held that the court should not postpone rulings on objections to evidence where objections are made,<sup>88</sup> but there is authority holding that rulings on objections can be

64. N.H.—*Freeman v. Pacific Mills*, 151 A. 707, 84 N.H. 383.  
64 C.J. p 1207 note 46.  
Savings questions for review see Appeal and Error § 331.

65. Wis.—*Maxcy v. Peavey*, 190 N.W. 84, 178 Wis. 401.  
64 C.J. p 1207 note 47.

66. Mo.—*Tremain v. Dyott*, 142 S.W. 760, 161 Mo.App. 217.  
64 C.J. p 1207 note 48.

67. Cal.—*Kalliterna v. Wright*, 212 P.2d 32, 94 Cal.App.2d 926.

68. Mo.—*Einstein v. Holladay-Klotz Land & Lumber Co.*, 94 S.W. 296, 118 Mo.App. 184.  
64 C.J. p 1207 note 49.

69. Pa.—*In re Gerker's Estate*, 8 Pa. Co. 583.

70. Mo.—*Taylor v. Cayce*, 10 S.W. 832, 97 Mo. 242.  
64 C.J. p 1207 note 51.

71. Mo.—*Harrison v. Bartlett*, 51 Mo. 178.

64 C.J. p 1207 note 52.

72. Nev.—*Jones v. Gammans*, 11 Nev. 249.

73. Wis.—*Maxcy v. Peavey*, 190 N.W. 84, 178 Wis. 401.

74. U.S.—*Arthurs v. Hart*, La., 17 How. 6, 15 L.Ed. 30.  
64 C.J. p 1208 note 57.

75. U.S.—*U. S. v. King*, La., 7 How. 833, 12 L.Ed. 934.  
64 C.J. p 1208 note 58.

76. Neb.—*Enyeart v. Davis*, 22 N.W. 449, 17 Neb. 228.  
64 C.J. p 1208 note 59.

77. Tenn.—*Selby's Adm'r v. Brinkley*, 17 S.W. 479.

78. U.S.—*U. S. v. King*, La., 7 How. 833, 12 L.Ed. 934.

79. U.S.—*U. S. v. King*, supra.

80. Iowa.—*Williams v. Soutter*, 7 Iowa 435.

81. Iowa.—*Gaar, Scott & Co. v. Nichols*, 88 N.W. 382, 115 Iowa 223.

82. Iowa.—*Bechly v. Central Nat. Fire Ins. Co.*, 191 N.W. 980, 195 Iowa 177.  
64 C.J. p 1208 note 65.

83. Iowa.—*Rankin v. Schiereck*, 147 N.W. 180, 166 Iowa 10.

84. Iowa.—*Rankin v. Schiereck*, supra.

85. Me.—*Frank v. Majett*, 42 A. 238, 92 Me. 77.  
64 C.J. p 1208 note 68.

86. Me.—*Hersey v. Verrill*, 39 Me. 271.

87. N.D.—*People's State Bank of Hillsboro v. Steenson*, 190 N.W. 74, 49 N.D. 100.  
64 C.J. p 1207 note 55.

88. Mo.—*Smoot v. Bankers' Life Ass'n*, 120 S.W. 719, 138 Mo.App. 438.

reserved.<sup>89</sup> Where the court is permitted to reserve its rulings on objections, the failure to rule does not imply that the objection is sustained.<sup>90</sup>

**Evidence admitted without objection.** Evidence which is admitted without objection is properly before the court,<sup>91</sup> and may be considered by the trial judge.<sup>92</sup>

**Effect of ruling.** Where a motion to strike has been properly granted it is the duty of the court completely to disregard the evidence stricken.<sup>93</sup>

## § 593. Rulings on Weight and Sufficiency of Evidence

### a. In general

### b. Determination of credibility of witnesses and weight due testimony

### a. In General

In a nonjury trial the judge is the trier of facts and it is his duty to weigh the evidence in the same manner as a jury would.

Where a factual question is involved, the dispute must be settled by the weight of the evidence.<sup>94</sup> In a nonjury trial the judge is the trier of facts and it is his duty to decide the issues of fact on the evidence,<sup>95</sup> and the court is not bound to adopt a party's contention as to the weight of the evidence.<sup>96</sup> On the contrary, it is the right and duty of the court to weigh the evidence,<sup>97</sup> to determine its weight<sup>98</sup> and sufficiency<sup>99</sup> in the same manner as a jury in its province would,<sup>1</sup> and to draw infer-

89. Miss.—Warren v. State, 164 So. 234, 174 Miss. 63.

N.J.—Seitz v. Seitz, 64 A.2d 87, 1 N.J. Super. 234.

#### Discretion of court

Where a court is sitting without a jury, it is within its discretion to receive evidence objected to and reserve its ruling on such objection.—Taylor v. Coyce, 10 S.W. 832, 97 Mo. 242.—Kerr v. Prudential Ins. Co., Mo App. 194 S.W.2d 706.—Williams v. Schneider, Mo App. 1 S.W.2d 232.

90. Iowa.—In re Coleman's Estate, 28 N.W.2d 500, 238 Iowa 768.

91. Cal.—Willoughby v. Southern Pac. Co., 188 P.2d 816, 83 Cal.App.2d 414.

#### Reception of letter

The reception of a letter sent to court, after submission of the cause for decision, at the request of the trial judge to which request no objection was made was not an irregularity on the part of the court.—Wilson v. Sampson, 205 P.2d 753, 81 Cal.App. 2d 453.

92. Mass.—Lariviere v. Lariviere, 24 N.E.2d 659, 304 Mass. 627.

93. Cal.—Ziegler v. Reuze, 184 P.2d 494, 27 Cal.2d 389.

94. Tenn.—Frumin v. May, 251 S.W. 2d 314, 36 Tenn.App. 32.

95. Cal.—Bank of America Nat. Trust & Sav. Ass'n v. Greenbach, 219 P.2d 814, 93 Cal.App.2d 320.

Ga.—Estes v. Estes, 14 S.E.2d 681, 192 Ga. 94.

Kan.—Wetzel v. Hattrup, 255 P.2d 687, 174 Kan. 844.

N.C.—Turnage Co. v. Morton, 81 S.E. 2d 135, 240 N.C. 94.

Okl.—Bert Whitels, Inc. v. Motor Mortg. Co., 77 P.2d 698, 182 Okl. 384.

Tex.—Moser v. McLeomore, Civ.App. 266 S.W.2d 255.—Bolyard v. Toronto Pipe Line Co., Civ.App., 120 S.W.2d 960, error dismissed.

Wis.—Schmidtkofer v. Industrial Commission, 61 N.W.2d 862, 265 Wis. 535.

#### Finding held not one of law

In jury-waived action at law for wrongful death, where court denied the defendant's motion for judgment at close of plaintiff's evidence and refused to rule upon same motion at close of all the evidence, and decided the case on the facts by findings of facts, conclusion of law, and final judgment, such determination was not a holding as matter of law that defendant was not reckless.—Davis v. Knight, 35 N.W.2d 23, 239 Iowa 1338.

#### Preponderance of evidence

The court sitting without jury must determine facts from preponderance of the evidence.—Bachman v. Order of United Commercial Travellers of America, D.C.Fla., 50 F.Supp. 87.

96. Mass.—Hooper v. Cuneo, 116 N.E. 237, 227 Mass. 37.

#### Rejection of contention held proper

In action by pedestrian for injuries sustained when struck by automobile as he was attempting to cross highway, trial judge properly disregarded theory, based solely on location of pedestrian's body on highway after being struck and law of physics, as to pedestrian's position in highway at time he was struck and to have based his conclusion on pedestrian's testimony supported by two witnesses and contradicted only by motorist.—Wall v. Aetna Casualty & Surety Co., La.App., 167 So. 903.

97. U.S.—Bachman v. Order of United Commercial Travellers of America, D.C.Fla., 50 F.Supp. 87.

Ariz.—Craig v. De Berge, 193 P.2d 442, 67 Ariz. 168.

Cal.—In re Wieling's Estate, 230 P.2d 808, 87 Cal.2d 106.—Lord v. Henderson, 234 P.2d 197, 165 Cal.App.

2d 426, appeal dismissed 72 S.Ct. 551, 342 U.S. 937, 96 L.Ed. 697.—Hinsaw v. Hopkins, 99 P.2d 283, 87 Cal.App.2d 330.—English v. English, 24 P.2d 369, 133 Cal.App. 408.—La Liberty v. La Liberty, 16 P.2d 681, 127 Cal.App. 669.

Ind.—Linton-Summit Coal Co. v. Hutchison, 111 N.E.2d 819.

Mich.—Allen v. Currier Lumber Co., 61 N.W.2d 138, 387 Mich. 696.

Mo.—Burrow v. Birran, App., 201 S.W.2d 186.

N.M.—Hudgens v. Caraway, 235 P.2d 140, 55 N.M. 458.

Ohio.—Crown v. Buckeye Union Cas. Co., App., 104 N.E.2d 46.

Okl.—First State Bank of Nobel v. McKiddy, 240 P.2d 1103, 206 Okl. 67.

Tex.—Corn v. First Texas Joint Stock Land Bank of Houston, Civ.App., 131 S.W.2d 752, error refused. 64 C.J. p 1208 note 71.

#### Weight and value

The weight and value of evidence are exclusively for trial judge in a nonjury case.—Walter L. Lacy Co. v. National Finance Corporation, Mo. App., 79 S.W.2d 1078.

98. Cal.—Weiss v. First Sav. Bank of Colusa, 82 P.2d 45, 28 Cal.App. 2d 140, rehearing denied 83 P.2d 35, 28 Cal.App.2d 140.—English v. English, 24 P.2d 369, 133 Cal.App. 408.

99. Cal.—Weiss v. First Sav. Bank of Colusa, 82 P.2d 45, 28 Cal.App. 2d 140, rehearing denied 83 P.2d 35, 28 Cal.App.2d 140.—English v. English, 24 P.2d 369, 133 Cal.App. 408.—La Liberty v. La Liberty, 16 P.2d 681, 127 Cal.App. 669.

1. Hawaii.—Territory v. Fujiwara, 33 Hawaii 428.

Mo.—Brantjen & Kluge v. Burd & Fletcher Co., 192 S.W.2d 651, 239 Mo.App. 268.

Tex.—Corn v. First Texas Joint Stock Land Bank of Houston, Civ.App.

ences<sup>2</sup> and reasonable deductions<sup>3</sup> therefrom. Whether an inference shall be drawn, in any given case, is a question of fact for the trial court where there is no jury.<sup>4</sup>

The court must consider all the competent evidence before it.<sup>5</sup> The trial judge should weigh the evidence as a whole, giving it such probative force as in his opinion it is entitled to.<sup>6</sup> Evidence which would be admissible in chief when admitted by the court on rebuttal should be considered by it and

given the same weight as any other evidence.<sup>7</sup>

It is the right and duty of the court to weigh and pass on conflicting evidence,<sup>8</sup> to determine its sufficiency and probative effect,<sup>9</sup> and it cannot escape responsibility by a mere statement that its mind is confused or unsettled.<sup>10</sup> It should try to harmonize the evidence,<sup>11</sup> and to reconcile apparent contradictions and inconsistencies, if reasonably possible,<sup>12</sup> and, if this is not possible, to accept that which appears to be worthy of credit.<sup>13</sup> The judge may

181 S.W.2d 752, error refused—Western Shoe Co. v. Amarillo Nat. Bank, Civ.App., 42 S.W.2d 469. 64 C.J. p 1208 note 72.

2. Cal.—In re Barrow's Estate, 80 P.2d 1006, 27 Cal.App.2d 402—Nelson v. Sweitzer, 71 P.2d 85, 22 Cal. App.2d 382.

Mass.—Goldberg v. Federman, 121 N. E. 416, 231 Mass. 443.

Mich.—Detroit Trust Co. v. Hartwick, 270 N.W. 249, 278 Mich. 139.

N.Y.—Edey v. Segar, 174 N.Y.S. 700, 105 Misc. 682, reversed on other grounds 133 N.Y.S. 313, 193 App. Div. 578.

R.I.—Main Realty Co. v. Blackstone Valley Gas & Electric Co., 193 A. 78, 59 R.I. 39, 112 A.L.R. 744.

64 C.J. p 1208 note 73.

**Where different inferences can be drawn from evidence**

Ala.—Goldfield v. Brewbaker Motors 54 So.2d 797, 36 Ala.App. 152, certiorari denied 54 So.2d 800, 256 Ala. 383.

Tex.—Davis v. Haasdorf, Civ.App. 207 S.W.2d 424.

3. Fla.—King v. Griner, 60 So.2d 177.

4. Cal.—Hennelly v. Bank of America Nat. Trust & Sav. Ass'n, 228 P.2d 79, 102 Cal.App.2d 754.

5. Cal.—Howard v. General Petroleum Corp., 238 P.2d 145, 108 Cal. App.2d 25.

Conn.—Giamattai v. Di Cerbo, 62 A. 2d 519, 135 Conn. 159.

64 C.J. p 1209 note 74.

#### Incompetent evidence

On trial to court of an equitable action incompetent and irrelevant evidence is disregarded and the action decided upon the material and competent evidence in the case.—State ex rel. Halvorson v. Simpson, 49 N.W.2d 790, 78 N.D. 440.

#### Testimony of adverse witness

Uncontradicted testimony of defendants called by plaintiff as adverse witnesses could be considered by court in ruling on defendants' challenge to sufficiency of plaintiff's evidence.—Hair v. Old Nat. Ins. Agency, 51 P.2d 398, 184 Wash. 477.

6. Tex.—Wilmons v. Hubble, Civ. App., 153 S.W.2d 228, error refused—Bolyard v. Toronto Pipe Line Co.,

Civ.App., 120 S.W.2d 960, error dismissed.

7. Tex.—Barnett v. Elliott, Civ.App., 160 S.W. 671.

8. U.S.—The Seandbee, C.C.A.Ohio, 102 F.2d 577.

Cal.—O'Banion v. Borba, 195 P.2d 10, 32 Cal.2d 145—Welch v. Alcott, 193 P. 626, 185 Cal. 731—Bittsekas v. Parechian, 226 P. 974, 67 Cal.App. 148.

Colo.—Lampton v. McIntosh, 225 P. 2d 54, 123 Colo. 34.

Minn.—Endereson v. Kelehan, 82 N. W.2d 286, 226 Minn. 163.

Mont.—O'Connell v. Haggerty, 258 P.2d 578—Weakley v. Cook, 249 P. 2d 928.

N.J.—Spalt v. Eaton, 192 A. 576, 118 N.J.Law 327.

S.D.—Reinschmidt v. Hirsch, 275 N. W. 356, 65 S.D. 498.

64 C.J. p 1209 note 76.

**Where there is any dispute in the evidence** it is a right of a party to have the court pass on the credibility of the testimony.—Pentecost v. Hudson, 252 P.2d 511, 57 N.M. 7.

9. Colo.—Lampton v. McIntosh, 225 P.2d 54, 123 Colo. 34.

10. U.S.—Decoss v. Turner & Blanchard, Inc., C.C.A.N.Y., 15 F.2d 258.

11. Cal.—Nellis v. Massey, 239 P.2d 509, 108 Cal.App.2d 724—Batemen v. Long, 233 P.2d 19, 105 Cal.App. 2d 173.

La.—Fogelman v. Interurban Transp. Co., 187 So. 73, 192 La. 115—Fridge v. Talbert, 158 So. 209, 180 La. 937. Mass.—Hosken, Inc. v. Hingham Management Corp., 105 N.E.2d 232, 323 Mass. 588.

Tex.—Sewell v. Chambers, Civ.App., 209 S.W.2d 863—Wilmons v. Hubble, Civ.App., 153 S.W.2d 228, error refused—Bolyard v. Toronto Pipe Line Co., Civ.App., 120 S.W.2d 960, error dismissed.

Wyo.—Adamson v. Rasmussen, 57 P. 2d 108, 49 Wyo. 480.

64 C.J. p 1209 note 78.

12. Ark.—Sledge v. Cordell, 283 S. W.2d 77.

Cal.—Criset v. Sorci, 251 P.2d 383, 115 Cal.App.2d 76—Sidney v. Martin Iron Works, 233 P.2d 128, 105 Cal. App.2d 295—Smythe v. Schacht, 209

P.2d 114, 93 Cal.App.2d 315—Connell v. Crawford, 268 P. 948, 92 Cal. App. 715—Brandt v. Krogh, 111 P. 275, 14 Cal.App. 39—Lindley v. Blumberg, 93 P. 894, 7 Cal.App. 140. La.—Fridge v. Talbert, 158 So. 209, 180 La. 937.

Tex.—Patterson v. Farmers' Royalty Holdings Co., Civ.App., 79 S.W.2d 917.

64 C.J. p 1209 note 79.

#### Creation of conflict in testimony

Where a credible witness, with apparently adequate opportunity for observation, testifies to an occurrence, mere testimony of other witnesses that they were not cognizant of the occurrence, where opportunities of latter witnesses for observation are not stated, or where it affirmatively appears that their situation was such that they probably would not have observed the event if it had occurred, or where their opportunities were not co-extensive with those of witness who testifies positively to the occurrence, is not sufficient to create a conflict in the testimony.—Graham v. Leek, 144 P.2d 475, 65 Idaho 279.

#### Part of testimony disregarded

After a court has discarded testimony which in its opinion is unworthy of credence, the court then has a duty to attempt to reconcile whatever conflict in the testimony remains.—Fishman v. Silva, 2 P.2d 473, 116 Cal.App. 1.

13. U.S.—The Seandbee, C.C.A.Ohio, 102 F.2d 577.

Cal.—Robinson v. Hoolton, 2 P.2d 344, 213 Cal. 370—Ong v. Cole, 188 P. 812, 46 Cal.App. 63.

La.—Brown v. International Paper Co., 58 So.2d 557—Fogelman v. Interurban Transp. Co., 187 So. 73, 192 La. 115—Fridge v. Talbert, 158 So. 209, 180 La. 937. N.Y.—Lazarus v. Spencer, 61 N.Y.S. 78, 29 Misc. 767.

Tex.—Miller v. Himebaugh, Civ.App., 153 S.W. 338.

**Where the evidence presented is conflicting and irreconcilable**, the trial justice must weigh the evidence, consider the credibility of the witnesses, and determine what weight he should attach to their respective testimony.—Breard v. Ouimette, 81 A. 2d 693, 78 R.I. 304.

base his finding and verdict "on the absolute verities of the case as established before him."<sup>14</sup> Where the evidence is conflicting, the judge cannot rule that plaintiff is not entitled to recover,<sup>15</sup> and a motion for such a ruling is premature.<sup>16</sup> In these circumstances, whether plaintiff should recover is a question not of law, but of fact, to be determined on a weighing of all the evidence.<sup>17</sup> In determining the weight and credibility of the evidence produced by a party, the court has a right to consider the failure of the party to call available witnesses and to produce other available evidence.<sup>18</sup> A judge sitting as a jury must accept proofs presented by the evidence adduced with the same conclusive effect they would have on a jury.<sup>19</sup>

#### Questioning sufficiency of evidence. An objection

##### Rules of probability

Where there is direct conflict, court in its analysis of evidence in passing on question of fact must be governed by rules of probability.—*Sweek v. Bennett*, 290 F. 747, 138 Or. 388.

14. Mo.—*Tipton v. Christopher*, 118 S.W. 1125, 1126, 135 Mo.App. 619.

15. Mass.—*Patterson v. Ciborowski*, 179 N.E. 161, 277 Mass. 260.—*Downey v. Levenson*, 142 N.E. 85, 247 Mass. 358.

16. Vt.—*Conn Boston Co. v. Griswold*, 157 A. 57, 104 Vt. 39.

17. Mass.—*Patterson v. Ciborowski*, 179 N.E. 161, 277 Mass. 260.

Vt.—*Conn Boston Co. v. Griswold*, 157 A. 57, 104 Vt. 39.

18. Cal.—*Shapiro v. Equitable Life Assur. Soc. of U. S.*, 172 P.2d 725, 76 Cal.App.2d 75.

19. N.J.—*Eustace v. Metropolitan Sav. Bank & Trust Co.*, 181 A. 60, 115 N.J.Law 541.

20. N.H.—*A. C. Erieman Co. v. Laconia Furniture Co.*, 177 A. 409, 87 N.H. 483.

21. Cal.—*Palmer v. Palmer*, 226 P. 2d 618, 101 Cal.App.2d 819.

22. R.I.—*Baccari v. W. T. Grant Co.*, 58 A.2d 552, 73 R.I. 376.—*Enos v. Industrial Trust Co.*, 4 A.2d 915, 62 R.I. 268.

23. R.I.—*Baccari v. W. T. Grant Co.*, 58 A.2d 552, 73 R.I. 376.—*Enos v. Industrial Trust Co.*, 4 A.2d 915, 62 R.I. 268.

24. U.S.—*General Electric Co. v. Parr Electric Co.*, D.C.N.Y., 21 F. Supp. 471, modified on other grounds, C.C.A., 98 F.2d 60, reheard 98 F.2d 827.

Ark.—*Collins v. McCoy*, 236 S.W.2d 24 443, 218 Ark. 231.

Cal.—*Perske v. Perske*, App., 271 P.2d 528.—*Jud Whitehead Heater Co. v. Obler*, 245 P.2d 608, 111 Cal.App.2d 861.—*Fallert v. Hamilton*, 240 P.2d 1807, 109 Cal.App.2d 399.

—*In re Durham's Estate*, 238 P.2d 1061, 108 Cal.App.2d 154.—*In re Durham's Estate*, 238 P.2d 1057, 108 Cal.App.2d 148.—*Van Der Most v. Workman*, 236 P.2d 842, 107 Cal.App.2d 274.—*La Jolla Casa de Manana v. Hopkins*, 219 P.2d 871, 98 Cal.App.2d 339.—*People v. One 1941 Chrysler Tudor Engine No. C 80 8808*, 162 P.2d 653, 71 Cal.App.2d 312.—*Hinsaw v. Hopkins*, 99 P.2d 283, 37 Cal.App.2d 230.—*Weiss v. First Sav. Bank of Colusa*, 82 F.2d 45, 28 Cal.App.2d 140, rehearing denied 83 P.2d 35, 28 Cal.App.2d 140.—*English v. English*, 24 P. 2d 369, 132 Cal.App. 408.—*La Liberty v. La Liberty*, 16 P.2d 581, 127 Cal.App. 669.

Colo.—*Julius Hyman & Co. v. Velsicol Corp.*, 233 P.2d 977, 123 Colo. 563, certiorari denied 72 S.Ct. 113, 342 U.S. 870, 96 L.Ed. 654, rehearing denied 72 S.Ct. 199, 342 U.S. 895, 96 L.Ed. 671.—*Lampton v. McIntosh*, 225 P.2d 54, 123 Colo. 84.

Conn.—*Armstrong v. Watrous*, 82 A. 2d 800, 138 Conn. 127.—*Doris v. McFarland*, 156 A. 58, 113 Conn. 610.—*Finlay v. Swirsky*, 181 A. 420, 103 Conn. 624.

D.C.—*Janifer v. Werner*, Mun.App., 78 A.2d 669, reversed on other grounds 196 F.2d 244, 90 U.S.App. C. 406.—*Soresi v. Repetti*, Mun.App., 78 A.2d 585.

Fla.—*Read v. Frizzell*, 60 So.2d 172.

Ill.—*Kane v. Dunn*, 118 N.E.2d 66, 2 Ill.App.2d 50.—*Goldborough v. McDavie*, 110 N.E.2d 875, 349 Ill. App. 466.—*Grigg v. Grigg*, 94 N.E. 2d 555, 341 Ill.App. 477.—*Union Central Life Ins. Co. v. Weber*, 2 N.E.2d 748, 285 Ill.App. 568.

Ind.—*Board of Com's of Lake County v. Hayhurst*, 199 N.E. 258, 209 Ind. 416.

Iowa.—*Carlson v. Bankers Trust Co.*, 50 N.W.2d 1, 242 Iowa 1207.

Kan.—*Stoskopf v. Stoskopf*, 245 P. 2d 1180, 173 Kan. 244.

Ky.—*Adkins v. Meade*, 246 S.W.2d 980.—*Glass v. Bryant*, 194 S.W.2d 890, 302 Ky. 236.

La.—*Delachoussaye v. Lasalle*, App., 158 So. 698.

Mass.—*McGray v. Hornblower*, 10 N.E.2d 501, 298 Mass. 334, appeal dismissed.—*Hornblower v. McGray*, 58 S.Ct. 362, 302 U.S. 656, 82 L. Ed. 506, rehearing denied 58 S.Ct. 408, 302 U.S. 780, 82 L.Ed. 603.

Mich.—*In re Oversmith's Estate*, 84 N.W.2d 678, 340 Mich. 104.—*Allen v. Currier Lumber Co.*, 61 N.W.2d 198, 337 Mich. 696.—*W. T. Rawleigh Co. v. Bowen*, 13 N.W.2d 230, 393 Mich. 122.—*Corpus Juris cited in Reedy v. Goodin*, 281 N.W. 377, 285 Mich. 614.—*Edwards v. Nelson*, 16 N.W. 261, 61 Mich. 121.

Mo.—*Noble v. Missouri Ins. Co.*, 204 S.W.2d 446.—*Endler v. State Bank & Trust Co. of Wellston*, 180 S. W.2d 596, 352 Mo. 981.—*Burroughs v. Lasswell*, App., 108 S.W.2d 705.—*North Side Finance Co. v. Sparr*, App., 78 S.W.2d 892.

Mont.—*Gervais v. Rolfe*, 187 P. 899, 57 Mont. 209.

N.J.—*Blue Goose Auto Service v. Blue Goose Super Service Station*, 160 A. 835, 110 N.J.Eq. 438, reversed on other grounds 160 A. 816, 110 N.J.Eq. 547.—*Mayerston v. Mayerson*, 151 A. 855, 107 N.J.Eq. 63.—*Keller v. Linssenmyer*, 139 A. 23, 101 N.J.Eq. 664.—*Riehl v. Riehl*, 137 A. 787, 101 N.J.Eq. 15.

N.M.—*Hudgens v. Caraway*, 235 P. 2d 140, 55 N.M. 468.

N.Y.—*Neptune Meter Co. v. Long Island Water Meter Repair Co.*, 39 N.Y.S.2d 325, 179 Misc. 445.—*Edey v. Segar*, 174 N.Y.S. 700, 105 Misc. 682, reversed on other grounds 183 N.Y.S. 313, 192 App.Div. 578.

Ohio.—*Cross v. Ledford*, 120 N.E.2d 118, 161 Ohio St. 469.—*Claim of Kincade*, 119 N.E.2d 314, 95 Ohio App. 329.—*In re Byers' Estate*, App., 102 N.E.2d 721, second case.—*In re*

to the sufficiency of the evidence is waived unless taken before the case is submitted to the court.<sup>20</sup>

*Presumptions of fact.* In a case tried without a jury, it is for the court to determine whether or not the evidence against a presumption of fact is sufficient to overthrow it.<sup>21</sup>

#### b. Determination of Credibility of Witnesses and Weight Due Testimony

It is the province of the court to determine the credibility of the witnesses and the weight to be given to their testimony.

Questions with respect to the credibility of witnesses<sup>22</sup> or the weight of evidence<sup>23</sup> are questions of fact and not of law. It is the province of the court to determine the credibility of the witnesses,<sup>24</sup>

and the weight to be attached to their testimony<sup>25</sup> and the inferences to be drawn therefrom,<sup>26</sup> in exactly the same sense that the jury should do in the trial of a case.<sup>27</sup> The fact that witnesses have

not been impeached by attacks on their reputations for truth and veracity does not deprive a trial judge of the right to give his estimate of the weight of the evidence produced.<sup>28</sup>

Mayforth's Guardianship, 1 Ohio Supp. 87.

Okl.—Givens v. Western Paving Co., 261 P.2d 450—Levine v. Teal, 145 P.2d 386, 193 Okl. 495—Lowe v. Hickory, 55 P.2d 769, 176 Okl. 426.

Pa.—In re Adoption of Noone, 103 A.2d 729, 376 Pa. 437—In re Archer's Estate, 70 A.2d 857, 363 Pa. 534—Stiegelmann v. Ackman, 41 A.2d 679, 351 Pa. 592—Commonwealth ex rel. Howard v. Claudy, 102 A.2d 486, 175 Pa.Super. 1. Stewart v. Shenandoah Life Ins. Co., 20 A.2d 246, 144 Pa.Super. 549, S.D.—Reinschmidt v. Hirsch, 275 N. W. 356, 65 S.D. 498.

Tex.—Harrell v. Sunlyan Co., 97 S.W. 2d 686, 128 Tex. 460.

Tex.—Alamo Motor Lines v. Moreland, Civ.App., 269 S.W.2d 858—Hallum v. Pinkerton, Civ.App., 267 S.W.2d 921—Moser v. McElmore, Civ.App., 266 S.W. 253—Mercantile Nat. Bank at Dallas v. McCullough Tool Co., Civ.App., 250 S.W. 2d 870, reversed on other grounds, Sup., 259 S.W.2d 724—Alamo Cas. Co. v. Laird, Civ.App., 229 S.W.2d 214, refused no reversible error—Wilmons v. Hubble, Civ.App., 153 S.W.2d 228, error refused—Central Motor Co. v. Roberson, Civ.App., 139 S.W.2d 287—Worth Finance Co. v. Charlie Hillard Motor Co., Civ.App., 131 S.W.2d 416—Walker County Lumber Co. v. Sweet, Civ. App., 40 S.W.2d 226, error dismissed.

Vt.—State v. O'Connell, 99 A.2d 705, 118 Vt. 65.

Va.—Nicholson v. Shockey, 64 S.E. 2d 813, 192 Va. 270.

Wyo.—Eblen v. Eblen, 234 P.2d 434, 68 Wyo. 353—Coomas v. Transcontinental Garage, 230 P.2d 748, 68 Wyo. 99—Haywood v. Kukuchka, 95 P.2d 71, 55 Wyo. 41—In re Conroy's Estate, 211 P. 96, 29 Wyo. 62, 64 C.J. p 1209 note 85.

**In an action of purely equitable cognizance,** it is for trial court to determine credibility of witnesses and the weight and value to be given to their testimony, and the trial court may accept circumstantial evidence on the one side and reject positive testimony on the same point on the other side.—Blagg v. Rutledge, 251 P.2d 196, 207 Okl. 559.

#### Interest of witness

Witnesses' interest in outcome of litigation is for consideration of trier of facts.—In re Hudson's Guardianship, 20 N.W.2d 330, 220 Minn. 493.

**Positive and uncontradicted testimony**

The credibility of positive and un-

contradicted testimony of interested parties is for trial court.—Hillier v. Howard, Tex.Civ.App., 131 S.W.2d 1002, error refused.

Where the court saw and heard the witnesses in the suits, it had the authority to give credence to the witnesses as it saw fit.—Civic Ass'n of Wyoming v. Railway Motor Fuels, 116 P.2d 236, 57 Wyo. 213.

25. Ark.—Bridges v. Shapleigh Hardware Co., 57 S.W.2d 405, 186 Ark. 993—Akins v. Heiden, 7 S.W. 2d 18, 177 Ark. 392.

Cal.—In re Durham's Estate, 238 P. 2d 1061, 108 Cal.App.2d 154—Fallert v. Hamilton, 240 P.2d 1007, 109 Cal.App.2d 399—Van Der Most v. Workman, 236 P.2d 842, 107 Cal. App.2d 274.

Colo.—Julius Hyman & Co. v. Velsicol Corp., 233 P.2d 977, 123 Colo. 563, certiorari denied 72 S.Ct. 113, 342 U.S. 870, 96 L.Ed. 654, rehearing denied 72 S.Ct. 199, 342 U.S. 895, 96 L.Ed. 671.

Ill.—Kane v. Dunn, 118 N.E.2d 66, 2 Ill.App.2d 60—Goldsborough v. McDavitt, 110 N.E.2d 875, 349 Ill. App. 466—Grigg v. Grigg, 94 N.E. 2d 555, 341 Ill.App. 477.

Ind.—Board of Com'rs of Lake County v. Hayhurst, 199 N.E. 258, 209 Ind. 416—Mellen v. Knotts, App., 119 N.E.2d 20.

Mich.—Saginaw Furniture Shops, Inc. v. Wolverine Finishes Corp., 59 N.W.2d 16, 336 Mich. 606—Egkebeen v. Red Top Cab Co. of Grand Rapids, 54 N.W.2d 726, 334 Mich. 490—W. T. Rawleigh Co. v. Bowen, 13 N.W.2d 230, 308 Mich. 129—Eagan v. Edwards, 293 N.W. 641, 294 Mich. 260—Vannett v. Michigan Public Service Co., 286 N.W. 216, 289 Mich. 212—Corpus Juris cited in Ready v. Goodin, 281 N.W. 377, 379, 285 Mich. 614.

Mo.—Noble v. Missouri Ins. Co., 204 S.W.2d 446—Burrow v. Birran, Mo. App., 201 S.W.2d 186—Burroughs v. Lasswell, App., 108 S.W.2d 705 N.Y.—Ossann v. Sears, Roebuck & Co., 129 N.Y.S.2d 325, 205 Misc. 33.

Ohio.—Cross v. Ledford, 120 N.E.2d 118, 161 Ohio St. 469.

Okl.—Givens v. Western Paving Co., 261 P.2d 450—Lowe v. Hickory, 55 P.2d 769, 176 Okl. 426.

Pa.—In re Adoption of Noone, 103 A.2d 729, 376 Pa. 437—Stiegelmann v. Ackman, 41 A.2d 679, 351 Pa. 592. Tex.—Mercantile Nat. Bank at Dallas v. McCullough Tool Co., Civ App., 250 S.W.2d 870, reversed on other grounds, Sup., 259 S.W.2d 724—Wilmons v. Hubble, Civ.App.,

153 S.W.2d 228, error refused—Central Motor Co. v. Roberson, Civ. App., 139 S.W.2d 287—Worth Finance Co. v. Charlie Hillard Motor Co., Civ.App., 131 S.W.2d 416—Fidelity & Deposit Co. of Maryland v. First Nat. Bank, Civ.App., 113 S.W.2d 622, error dismissed—Wilkinson v. Owens, Civ.App., 72 S.W.2d 330—Walker County Lumber Co. v. Sweet, Civ.App., 40 S.W. 2d 226, error dismissed.

Vt.—State v. O'Connell, 99 A.2d 705, 118 Vt. 65.

Va.—Nicholson v. Shockey, 64 S.E. 2d 813, 192 Va. 270.

Wis.—Rosen v. Ihler, 64 N.W.2d 845, 267 Wis. 220, 64 C.J. p 1209 note 86.

#### Testimony of adversary

The court is authorized to weigh the testimony of a party who has been called as a witness by his adversary.—Gaugh v. Gaugh, 11 S.W. 2d 729, 321 Mo. 414, followed in Seehorn v. Gaugh, 11 S.W.2d 750, 321 Mo. 456—Black v. Epstein, 120 S.W. 754, 221 Mo. 286.

#### Determination of damages

In determining damages for injuries, trial judge is not required to place construction on testimony most unfavorable to plaintiff.—Grissell v. Quaglia, 248 N.W. 902, 263 Mich. 569.

26. Cal.—Fallert v. Hamilton, 240 P.2d 1007, 109 Cal.App.2d 399—Neillis v. Massey, 239 P.2d 509, 106 Cal.App.2d 724—Van Der Most v. Workman, 236 P.2d 842, 107 Cal. App.2d 274.

Colo.—Julius Hyman & Co. v. Velsicol Corp., 233 P.2d 977, 123 Colo. 563, certiorari denied 72 S.Ct. 113, 342 U.S. 870, 96 L.Ed. 654, rehearing denied 72 S.Ct. 199, 342 U.S. 895, 96 L.Ed. 671.

Ind.—Board of Com'rs of Lake County v. Hayhurst, 199 N.E. 258, 209 Ind. 416.

27. Fla.—Read v. Frizzell, 60 So.2d 172.

Mo.—Eaton v. Cates, 175 S.W. 950.

Tex.—Menefee v. National Aid Life Ass'n, Civ.App., 161 S.W.2d 508, error refused—Wilmons v. Hubble, Civ.App., 153 S.W.2d 228, error refused—Worth Finance Co. v. Charlie Hillard Motor Co., Civ.App., 131 S.W.2d 416.

Courts will judge facts as other men of discernment, exercising sound and sober judgment on circumstances proved before them.—Burger v. Burger, Md., 104 A.2d 923.

28. Ky.—Dyche v. Scoville, 109 S.W. 2d 581, 270 Ky. 196.

The province of a court in a trial without a jury is to weigh the testimony as a whole.<sup>29</sup> In appraising the testimony and determining what the facts are, the court should consider all the testimony and all circumstances surrounding the parties.<sup>30</sup> A court cannot accept as true that which the indisputable evidence demonstrates is false.<sup>31</sup> It is not required to believe the evidence of one side or the other,<sup>32</sup> and is not bound to accept as true the testi-

mony of a witness;<sup>33</sup> nor is it required to receive and accept blindly the testimony of parties to a suit.<sup>34</sup> The court has a greater discretion in exercising its judgment as to the credibility of a witness who is a party to the cause, from the fact of his interest, than as to one whose interest is not involved.<sup>35</sup> The court is at liberty to believe<sup>36</sup> or to disbelieve<sup>37</sup> any witness or witnesses, and is

29. Cal.—Robinson v. Hoalton, 2 P. 2d 344, 213 Cal. 370.

#### Duty of court

Court trying a case must weigh and consider all testimony.—Fishman v. Silva, 2 P.2d 473, 116 Cal.App. 1.

30. U.S.—Williams v. Oklahoma Tire & Supply Co., D.C.Ark., 85 F.Supp. 260, reversed on other grounds, C. A., 181 F.2d 875.

31. Colo.—Winterberg v. Thomas, 246 P.2d 1058, 126 Colo. 60.

Pa.—Lessig v. Reading Transit & Light Co., 113 A. 381, 270 Pa. 299.

32. Mo.—Republic Nat. Bank of St. Louis v. Interstate Producing Corporation, 282 S.W. 1033, 221 Mo. App. 568.

#### Testimony of equal probative force

Where the circumstances of a case did not give the testimony of one side greater probative force than that of the other side, the trial judge was justified in accepting the testimony of the complainant.—Brooks v. Mitchell, 181 A. 261, 163 Md. 1, 84 A.L.R. 547.

33. Cal.—Nielsen v. McKenna, 67 P. 2d 1044, 8 Cal.2d 690.—Mitchell v. Dunn, 294 P. 386, 211 Cal. 129.—In re Jacobs' Estate, 76 P.2d 128, 24 Cal.App.2d 649.—Gallichotte v. California Mut. Building & Loan Ass'n, 74 P.2d 73, 23 Cal.App.2d 570, opinion supplemented 74 P.2d 535. Conn.—Eastern Sportswear Co. v. S. Augstein & Co., 106 A.2d 476, 141 Conn. 420.

Mass.—Morello v. Levakis, 200 N.E. 271, 293 Mass. 450.—New York Cent. R. Co. v. Stoneman, 127 N.E. 506, 236 Mass. 81.

Minn.—Grover v. Bach, 84 N.W. 908, 82 Minn. 299.—Second Nat. Bank of Winona v. Donald, 58 N.W. 269, 56 Minn. 491.—Anderson v. Lilljengren, 52 N.W. 219, 50 Minn. 8.

Pa.—In re Archer's Estate, 70 A.2d 857, 363 Pa. 354.—Commonwealth ex rel. Howard v. Claudy, 102 A.2d 486, 175 Pa.Super. 1.—In re Election Contest of Sokach, Com.Pl., 32 Luz. Leg.Reg. 353.

#### Adversary called as witness

Court was not bound to accept contradictory and evasive testimony of defendant called by plaintiff as his own witness.—Gaugh v. Gaugh, 11 S.W.2d 729, 321 Mo. 414, followed in

Seehorn v. Gaugh, 11 S.W.2d 750, 321 Mo. 456.

**A trial judge need not accept witnesses' literal statements as true if they contain improbabilities, or if reasonable grounds exist for concluding that they are not wholly true.**—Dyche v. Scoville, 109 S.W.2d 581, 270 Ky. 196.

#### Testimony given under oath

A court is not bound to accept the testimony of a witness merely because it has been given under oath.—Zibbell v. Southern Pac. Co., 116 P. 573, 160 Cal. 237.

34. Ark.—Walker v. Streeter, 87 S.W.2d 43, 191 Ark. 604.

Mass.—Worcester Bank & Trust Co. v. Holbrook, 191 N.E. 425, 287 Mass. 228.—Karlberg v. Frank, 184 N.E. 387, 282 Mass. 94.—Boston Morris Plan Co. v. Repetto, 168 N.E. 183, 269 Mass. 72.—Levy v. Radkay, 123 N.E. 97, 233 Mass. 29.

Mo.—Stith v. St. Louis Public Service Co., 251 S.W.2d 693, 363 Mo. 442, 34 A.L.R.2d 972.

Tex.—Gorin v. Moss, Civ.App., 138 S.W.2d 612.

35. Ga.—Hinchcliffe v. Pinson, 74 S.E.2d 497, 87 Ga.App. 526.

36. Ark.—Warren & S. R. R. Co. v. Wilson, 50 S.W.2d 976, 185 Ark. 1063.

Cal.—McIntosh v. Funge, 292 P. 960, 210 Cal. 592, 74 A.L.R. 420.—In re Durham's Estate, 238 P.2d 1061, 108 Cal.App.2d 154.—Sidney v. Martin Iron Works, 233 P.2d 128, 105 Cal.App.2d 295.—Blurrun v. Elizalde, 242 P. 109, 75 Cal.App. 44.—Lew U. Fon v. Chambers, 228 P. 865, 68 Cal. App. 244.

La.—Fleming v. Singletary, 8 La.App. 417.

Mo.—H. B. McCray Lumber Co. v. Standard Const. Co., App., 285 S.W. 104.

Tex.—Upton v. Dolsby, Civ.App., 119 S.W.2d 571, error dismissed.—Elliot v. Dodson, Civ.App., 297 S.W. 520.

#### Corroborated contradictory testimony

Trial court could believe plaintiff's testimony on first trial of case, even though his contradictory testimony on second trial was corroborated.—Platt v. Platt, 294 P. 73, 110 Cal.App. 327.

**Where both witnesses apparently attempted to tell a straight-forward story on the witness stand concerning accident, but one of the witnesses was a 14 year old girl who was apparently much excited at the time of the accident and the other witness was an experienced man of mature years who was evidently cool during the accident, the court accepted the man's testimony as more reliable and credible.**—Lumbermen's Mut. Casualty Co. v. McIver, D.C.Cal., 27 F.Supp. 702, affirmed, C.C.A., Lumbermen's Mut. Casualty Co. v. McIver, 110 F.2d 323, certiorari denied Lumbermen's Mut. Casualty Co. v. McIver, 61 S.Ct. 8, 311 U.S. 655, 85 L.Ed. 413.

#### Witnesses soiled with perjury

Facts may be ascertained even from witnesses whose lips are soiled with needless perjury.—Smith v. Gasper, 230 N.W. 20, 56 S.D. 592.

37. U.S.—Quock Ting v. U. S. Cal., 11 S.Ct. 733, 140 U.S. 417, 35 L.Ed. 501.—Maners v. Ahlfeldt, C.C.A. Ark., 69 F.2d 938.—Ariasi v. Orient Ins. Co., C.C.A.Cal., 50 F.2d 548.—Cline v. U. S., C.C.A.Mo., 20 F.2d 494.

Cal.—Vierra v. Perelra, 86 P.2d 816, 12 Cal.2d 629.—In re Durham's Estate, 238 P.2d 1061, 108 Cal.App. 2d 154.—Sidney v. Martin Iron Works, 233 P.2d 128, 105 Cal.App. 2d 295.—Specht v. O'Reilly, 33 P. 2d 877, 139 Cal.App. 175.—Lew U. Fon v. Chambers, 228 P. 865, 68 Cal.App. 244.

Conn.—Searle v. Gerent, 159 A. 892, 114 Conn. 671.—Siller v. Philip, 141 A. 872, 107 Conn. 612.—Finlay v. Swirsky, 131 A. 420, 103 Conn. 624. Mo.—Allen v. Fidelity-Phenix Ins. Co. of New York, 285 S.W. 781, 221 Mo.App. 764.—H. B. McCray Lumber Co. v. Standard Const. Co., App., 285 S.W. 104.

Tex.—Bolyard v. Toronto Pipe Line Co., Civ.App., 120 S.W.2d 960, error dismissed.—Upton v. Dolsby, Civ. App., 119 S.W.2d 571, error dismissed.—Mueller v. Bobbitt, Civ. App., 41 S.W.2d 466.

Wyo.—In re Conroy's Estate, 211 P. 96, 29 Wyo. 62.

64 C.J. p. 1209 note 89.

#### Testimony of adversary

Rule that party calling adversary cannot question credibility does not



at liberty to believe or disbelieve all<sup>38</sup> or any part of a witness' testimony.<sup>39</sup> In passing on the testimony as a whole, the court can disregard incompetent testimony and base its judgment solely on testimony it deems competent.<sup>40</sup> The court is at liberty to accord testimony a construction different from that asserted by a party,<sup>41</sup> and it may

disbelieve all evidence presented in behalf of a party,<sup>42</sup> and is not required to give credit to any evidence tending to prove facts essential to the plaintiff's right of recovery.<sup>43</sup>

Like a jury,<sup>44</sup> the court may disregard any testimony not considered worthy of belief,<sup>45</sup> although

prevent court from reaching conclusion contrary to such testimony.—*Monroe County Sav. Bank & Trust Co. v. Klorer*, 249 Ill.App. 576.

#### Interested witnesses

Judge in trial without jury need not believe deeply interested witnesses.—*Maurer v. Toledo Logging Co.*, 1 P.2d 896, 163 Wash. 563.

#### Contradicting witnesses

Trial judge may accept credible testimony of one witness over testimony of number of contradicting witnesses.—*The Reno*, C.C.A.N.Y., 51 F.2d 968.

32. *Mo.—North Side Finance Co. v. Sparr*, App., 78 S.W.2d 892.

N.J.—*Blue Goose Auto Service v. Blue Goose Super Service Station*, 160 A. 836, 110 N.J.Eq. 438, reversed on other grounds 160 A. 316, 110 N.J.Eq. 547.—*Keller v. Linsenmyer*, 139 A. 33, 101 N.J.Eq. 664.

39. *U.S.—Lowenstein v. Reikes*, C.C.A.N.Y., 60 F.2d 933, certiorari denied *Reikes v. Lowenstein*, 53 S. Ct. 815, 287 U.S. 669, 77 L.Ed. 577.

Ark.—*Warren & S. R. R. Co. v. Wilson*, 50 S.W.2d 976, 185 Ark. 1053.

Cal.—*Industrial Indem. Co. v. Industrial Acc. Commission*, 252 P. 2d 649, 115 Cal.App.2d 684.—*In re Durham's Estate*, 238 P.2d 1061, 108 Cal.App.2d 154.—*Moore v. McDonald*, 9 P.2d 556, 122 Cal.App. 61.—*Connell v. Crawford*, 268 P. 948, 92 Cal.App. 715.—*Schenck v. Rountree*, 265 P. 971, 90 Cal.App. 443.—*Miles v. Zadow*, 262 P. 396, 87 Cal.App. 406.—*Lew U. Fon v. Chambers*, 228 P. 865, 68 Cal.App. 244.—*Brandt v. Krogh*, 111 P. 275, 14 Cal.App. 39.—*Lindley v. Blumberg*, 93 P. 894, 7 Cal.App. 140.

Conn.—*Nocera v. La Mattina*, 145 A. 271, 109 Conn. 589.—*Roberti v. Barbieri*, 186 A. 85, 105 Conn. 539.

La.—*Santos v. Duvic*, 133 So. 399, 16 La.App. 105.

Mass.—*Hosken, Inc. v. Hingham Management Corp.*, 105 N.E.2d 232, 328 Mass. 588.—*Fitch v. Ingalls*, 170 N.E. 833, 271 Mass. 121.—*Doon v. Felton*, 89 N.E. 539, 203 Mass. 267.

Mo.—*North Side Finance Co. v. Sparr*, App., 78 S.W.2d 892.—*Republic Nat. Bank of St. Louis v. Interstate Producing Corporation*, 282 S.W. 1033, 212 Mo.App. 568.

Mont.—*Bitter Root Creamery Co. v. Muntzer*, 300 P. 251, 90 Mont. 77.

N.J.—*Blue Goose Auto Service v. Blue Goose Super Service Station*, 160 A. 836, 110 N.J.Eq. 438, re-

versed on other grounds 160 A. 316, 110 N.J.Eq. 547.—*Keller v. Linsenmyer*, 139 A. 33, 101 N.J.Eq. 664.

Tex.—*Walker County Lumber Co. v. Sweet*, Civ.App., 40 S.W.2d 225, error dismissed.

Wash.—*Butler v. Ringrose*, 15 P.2d 1117, 170 Wash. 211.

If court believes and accepts portion of the testimony of a witness, it may disbelieve the remainder or have a reasonable doubt as to its effect.—*Industrial Indem. Co. v. Industrial Acc. Commission*, 252 P.2d 649, 115 Cal.App.2d 684.

#### Inconsistent statements

(1) If an individual witness makes two statements which are inconsistent with each other, both are for consideration, and it is for the court to decide which is to be accepted as true.—*Barlione Sons Const. Co. v. Reynolds*, 199 A. 259, 109 Vt. 436.—*Piper v. Oakland Motor Co.*, 109 A. 311, 94 Vt. 211.

(2) This is true only when it is reasonable to have it so and when opposing inferences can reasonably be drawn therefrom.—*Barlione Sons Const. Co. v. Reynolds*, supra.—*Piper v. Oakland Motor Co.*, supra.

(3) When one statement is plainly a correction of the other, and there is nothing to throw doubt upon it as such, it is the plain duty of the court to accept the correction and to disregard the statement as originally made.—*Bardwell v. Commercial Union Assur. Co.*, 163 A. 633, 105 Vt. 106, followed in *Bardwell v. Continental Ins. Co.*, 163 A. 639, 105 Vt. 121, *Bardwell v. Fire Ass'n of Philadelphia*, 163 A. 639, 105 Vt. 122, *Bardwell v. Home Ins. Co.*, 163 A. 639, 105 Vt. 123, *Bardwell v. Insurance Co. of North America*, 163 A. 640, 105 Vt. 124, *Bardwell v. National Fire Ins. Co.*, 163 A. 640, 105 Vt. 125, *Bardwell v. Pennsylvania Fire Ins. Co.*, 163 A. 640, 105 Vt. 126, and *Bardwell v. Phoenix Ins. Co.*, 163 A. 640, 105 Vt. 127.—*Piper v. Oakland Motor Co.*, supra.

(4) Fact that witness makes contradictory statements does not require court to disregard his entire evidence, especially when material facts are corroborated.—*Bitter Root Creamery Co. v. Muntzer*, 300 P. 251, 90 Mont. 77.

The trial judge properly gave little weight to testimony of witness who

was some 300 feet or more from scene of automobile accident who undertook to tell how it happened, where it was obvious that he was not in a position to see just how accident happened and was not expecting anything to happen.—*Wilcox v. B. Olmde & Sons Co., La.App.*, 162 So. 149.

40. *Tex.—Shepherd v. Woodson Lumber Co.*, Civ.App., 43 S.W.2d 581.

41. *Conn.—Rinaldi v. Prudential Ins. Co. of America*, 172 A. 777, 118 Conn. 419.—*Searle v. Gerent*, 169 A. 892, 114 Conn. 671.

42. *Mass.—Jefferson v. Cox*, 141 N. E. 493, 246 Mass. 495.

43. *Mass.—Engel v. Checker Taxi Co.*, 176 N.E. 179, 275 Mass. 471.

44. *Mo.—Thompson v. Royal Neighbors of America*, 133 S.W. 146, 154 Mo.App. 109.

45. *U.S.—Quock Ting v. U. S.*, Cal., 11 S.Ct. 733, 140 U.S. 417, 35 L. Ed. 501.—*American Casualty Co. of Reading, Pa. v. Windham, C.C.A. Ga.*, 107 F.2d 88, certiorari denied 60 S.Ct. 714, 309 U.S. 674, 34 L.Ed. 1019.—*In re Baumhauser, D.C.Ala.*, 279 F. 966.

Cal.—*Tretheway v. Tretheway*, 104 P.2d 1033, 16 Cal.2d 133.—*In re Durham's Estate*, 238 P.2d 1061, 108 Cal.App.2d 154.—*Greenfield v. Sudden Lumber Co.*, 64 P.2d 1007, 18 Cal.App.2d 709.—*Colmar v. Pinckard*, 39 P.2d 262, 3 Cal.App.2d 213.—*Briggs v. Cameron*, 295 P. 847, 111 Cal.App. 189.

Ill.—*Hadley v. White*, 11 N.E.2d 813, 367 Ill. 406.

La.—*Penton v. Fisher*, App., 155 So. 35, followed in *Entrevia v. Fisher*, 155 So. 41 and *Nettles v. Fisher*, 155 So. 41.

Minn.—*Second Nat. Bank of Winona v. Donald*, 58 N.W. 269, 56 Minn. 491.

Tex.—*Harrell v. Sunlyon Co.*, 97 S.W. 2d 686, 128 Tex. 460.—*Gorin v. Moss*, Civ.App., 138 S.W.2d 612, 64 C.J. p 1209 note 82.

#### Positive testimony

A court may reject the most positive testimony.—*Blankman v. Vallejo*, 15 Cal. 638.—*Tornquist v. Johnson*, 13 P.2d 405, 124 Cal.App. 634.

#### Testimony of a party

(1) Court may disregard testimony of party to suit.—*Head v. Scurr*, Tex. Civ.App., 8 S.W.2d 818, error dismissed.

it has not been contradicted,<sup>46</sup> where the evidence contains improbabilities and contradictions which, alone or in connection with other circumstances in evidence, furnish reasonable grounds for concluding that it is false;<sup>47</sup> where such testimony is so surrounded by elements of uncertainty, improbability, and fraud as to justify disbelief;<sup>48</sup> where it appears that the witness might have been inaccurate or mistaken;<sup>49</sup> where the testimony appears to be inherently improbable or lacking in credit<sup>50</sup> or is made to appear so by the testimony of other witnesses;<sup>51</sup> or where the testimony is contrary to physical facts, or is inherently impossible, or the inferences deducible therefrom are so opposed to all reasonable probability as to be manifestly false.<sup>52</sup> The rule is especially applicable where the testimony is based on assumptions and evidence proved to be without sufficient foundation in fact.<sup>53</sup> It has been held that a party's evidence should be discredited as a matter of law and dis-

regarded where, without reasonable explanation, he testifies to facts materially different from his testimony in another action, and the change was clearly made to meet the exigencies of the pending action.<sup>54</sup> The finding of the court will not be disturbed or set aside unless it is apparent that the court misunderstood or disregarded material evidence introduced on the trial,<sup>55</sup> or unless it clearly appears that the conclusion of the court was based on caprice or without any reasonable foundation,<sup>56</sup> or the discretion of the court was otherwise abused.<sup>57</sup>

Where the testimony in a case is reasonable and undisputed, the judicial duty is to act on it,<sup>58</sup> and there is no authority to refuse to do so.<sup>59</sup> The credibility of interested witnesses must be determined as a question of fact,<sup>60</sup> and a judge, like a jury, cannot arbitrarily discredit a witness and disregard his testimony because of his interest in the

(2) Testimony of interested party, without any material corroborative circumstances, could be disregarded.—Smith v. Grand High Court of Jericho of Texas, Tex.Civ.App., 31 S.W. 2d 192.

#### Estimate of speed

Trial judge need not accept estimate of speed by motorist involved in accident, but may infer from length of skid marks and force of impact that motorist's actual speed exceeded such estimate.—Linde v. Ehmick, 61 P.2d 338, 16 Cal.App.2d 676.

#### Grounds for rejecting testimony held absent

Fact that witnesses on second trial contradicted testimony which on first trial they did not dispute was not ground for rejecting witnesses' testimony.—Mendelson v. Roland, 256 P. 544, 69 Utah 507.

46. U.S.—Quock Ting v. U. S., Cal., 11 S.Ct. 733, 140 U.S. 417, 35 L.Ed. 501.—Cline v. U. S., C.C.A.Mo., 20 F.2d 494.—In re Baumhauer, D.C. Ala., 179 F. 966.

Cal.—Blankman v. Vallejo, 15 Cal. 638.—Tornquist v. Johnson, 13 P. 2d 405, 124 Cal.App. 634.

Conn.—Esposito v. City of New Haven, 82 A.2d 806, 138 Conn. 130.

Mass.—Hosken, Inc., v. Hingham Management Corp., 105 N.E.2d 232, 328 Mass. 588.

Minn.—Grover v. Bach, 84 N.W. 909, 82 Minn. 299.—Second Nat. Bank of Winona v. Donald, 58 N.W. 269, 56 Minn. 491.

N.Y.—Corpus Juris cited in Solomon v. Solomon, 75 N.Y.S.2d 225, 230, 191 Misc. 80.—Corpus Juris cited in Department of Welfare v. Cassandro, 66 N.Y.S.2d 263, 266.—Corpus Juris cited in Anonymous v. Anonymous, 22 N.Y.S.2d 432, 437.

Pa.—In re Archer's Estate, 70 A.2d 857, 363 Pa. 354.—Commonwealth ex rel. Howard v. Claudy, 102 A.2d 486, 175 Pa.Super. 1.

64 C.J. p 1210 note 93.

#### Interested witnesses

Trier of facts is not ordinarily bound by uncontradicted testimony of interested witness, unless such testimony is clear, direct, positive and free from contradiction, inconsistencies and suspicions.—Wafer v. Edwards, Tex.Civ.App., 248 S.W.2d 320.

47. Cal.—Belser v. American Trust Co., 13 P.2d 951, 125 Cal.App. 344. Ind.—Wm. P. Jungclauss Co. v. Rattl, 118 N.E. 966, 67 Ind.App. 84.

Minn.—Nelson v. Bullard, 194 N.W. 308, 155 Minn. 419.—Grover v. Bach, 84 N.W. 909, 82 Minn. 299.—Second Nat. Bank of Winona v. Donald, 58 N.W. 269, 55 Minn. 491.—Anderson v. Liljengren, 52 N.W. 219, 50 Minn. 8.

#### Rejection of testimony held not arbitrary

In action on check given by patient to nurse, inconsistencies in testimony of witness as to who wrote date on check, and as to how many checks were given nurse, together with appearance of check, which did not correspond to witness' story as to how it was written, justified court in not accepting testimony at its face value.—Rogers v. Burnham, 35 P.2d 329, 140 Cal.App. 336.

48. U.S.—Quock Ting v. U. S., Cal., 11 S.Ct. 733, 140 U.S. 417, 35 L.Ed. 501.—Maners v. Ahlfeldt, C.C.A. Ark., 59 F.2d 938.—In re Baumhauer, D.C.Ala., 179 F. 966. Cal.—Tretheway v. Tretheway, 104 P.2d 1033, 16 Cal.2d 133.

49. Mass.—Hosken, Inc. v. Hingham Management Corp., 105 N.E.2d 232, 328 Mass. 588.

50. Iowa.—Brunskill v. Wallace, 276 N.W. 598, 224 Iowa 629.

51. Iowa.—Brunskill v. Wallace, supra.

52. Mo.—Tate v. Western Union Telegraph Co., 96 S.W.2d 964, 339 Mo. 262.—Sexton v. Metropolitan St. R. Co., 149 S.W. 21, 245 Mo. 272.—Dickinson v. Abernathy Furniture Co., 96 S.W.2d 1086, 231 Mo. App. 303.—Roseman v. United Rys. Co., App., 261 S.W. 104.—Dunphy v. St. Joseph Stockyards Co., 95 S.W. 301, 118 Mo.App. 522.

#### Positive contradiction

When the testimony of a witness is positively contradicted by the physical facts, a court cannot give credit to it.—U. S. v. McGill, C.C.A. Ark., 56 F.2d 522.—Walsh v. U. S., D.C.Minn., 24 F.Supp. 877, appeal dismissed, C.C.A. U. S. v. Walsh, 106 F.2d 1021.

53. Pa.—In re Sparks' Estate, 196 A. 48, 328 Pa. 384.

54. Neb.—Faulhaber v. Roberts Dairy Co., 34 N.W.2d 571, 147 Neb. 631.

55. Ill.—Loudon v. Mullins, 52 Ill. App. 410.

56. Okl.—Lowe v. Hickory, 55 P.2d 769, 176 Okl. 426.

57. Conn.—Armstrong v. Watrous, 82 A.2d 800, 138 Conn. 127.

58. Miss.—Holmes v. Holmes, 123 So. 865, 154 Miss. 713.

59. Miss.—Holmes v. Holmes, supra.

60. N.Y.—In re Sebring, 264 N.Y.S. 379, 238 App.Div. 251.

case.<sup>61</sup> In the absence of all contradictory evidence and any inherent improbability in the testimony, a court cannot arbitrarily reject the testimony of a witness whose testimony appears credible,<sup>62</sup> or arbitrarily disregard the unimpeached testimony of a single witness,<sup>63</sup> but must consider such testimony in arriving at a conclusion.<sup>64</sup> The positive testimony of an otherwise unimpeached witness can be disregarded only when its improbability or inconsistency furnishes a reasonable ground for doing so,<sup>65</sup> and this improbability or inconsistency must appear from facts and circumstances disclosed by the evidence in the case.<sup>66</sup> Where evidence of an interested witness is corroborated by a disinterested witness, a rejection of that evidence amounts to an arbitrary action by the court.<sup>67</sup> Likewise, where testimony is not inherently incredible nor improbable and is in a large part corroborated by other evidence, a court is fully justified in giving credit to it.<sup>68</sup>

The fact that a witness was impeached is merely a circumstance to be considered by the trial court in determining his credibility.<sup>69</sup> In weighing the testimony of a witness a court has the right to take into consideration the manner in which he testified,<sup>70</sup> his interest in the suit,<sup>71</sup> and the fact that on direct examination his memory was clear and his answers positive while on cross-examination concerning the same matters his memory was poor.<sup>72</sup>

*Presumptions.* A disputable presumption is not overcome by positive testimony of an interested witness to the contrary,<sup>73</sup> and in such circumstances a question of fact is raised which must be decided by the court.<sup>74</sup>

## § 594. — Demurrer to Evidence

- a. Right to demur
- b. Operation and effect
- c. Motions equivalent to demurrers to evidence
- d. In equitable actions

### a. Right to Demur

The right to demur to the evidence in actions tried by the court has been recognized in some jurisdictions.

In a number of jurisdictions the right to demur to the evidence in actions tried by the court without a jury has been recognized,<sup>75</sup> although it has been said that the court may, in its discretion, decline to pass on a demurrer to the evidence.<sup>76</sup> This right, it has been said, exists independently of any express statutory authority therefor.<sup>77</sup>

*Necessity.* In at least one jurisdiction it has been stated that there is never any purpose in urging a demurrer to the evidence where the trial is before the court without a jury,<sup>78</sup> since where the court is exercising both judicial functions and the functions of the jury the defendant is, without demur-

61. Tex.—Panhandle & S. F. Ry. Co. v. Wilson, Civ.App., 135 S.W. 2d 1062, error dismissed—Western Shoe Co. v. Amarillo Nat. Bank, Civ.App., 42 S.W.2d 469.

62. U.S.—Ariasi v. Orient Ins. Co., C.C.A.Cal., 50 F.2d 548—In re Baumhauer, D.C.Ala., 179 F. 966. La.—Nelson v. Louisiana Ry. & Nav. Co., 3 La.App. 428. Tex.—Clark v. McGrath, Civ.App., 22 S.W. 527.

63. Cal.—Rogers v. Burnham, 35 P. 2d 829, 140 Cal.App. 336—Hynes v. White, 190 P. 636, 47 Cal.App. 542. N.Y.—Moran v. McLarty, 75 N.Y. 25.

64. Utah.—Utah Commercial & Savings Bank v. Fox, 140 P. 660, 44 Utah 323.

65. Minn.—Nelson v. Bullard, 194 N.W. 308, 155 Minn. 419—Second Nat. Bank of Winona v. Donald, 59 N.W. 269, 56 Minn. 491—Anderson v. Liljengren, 52 N.W. 219, 50 Minn. 3.

66. Minn.—Nelson v. Bullard, 194 N.W. 308, 155 Minn. 419—Second Nat. Bank of Winona v. Donald, 59 N.W. 269, 56 Minn. 491.

67. Ariz.—Ratley v. Industrial Commission, 248 P.2d 997, 74 Ariz. 347—In re Gary's Estate, 211 P.2d 815, 69 Ariz. 228.

68. Cal.—In re Berry's Estate, 233 P. 330, 195 Cal. 354.

69. Tex.—Walker County Lumber Co. v. Sweet, Civ.App., 40 S.W.2d 225, error dismissed.

70. U.S.—Quock Ting v. U. S. Cal., 11 S.Ct. 733, 140 U.S. 417, 35 L.Ed. 501.

Cal.—Shapiro v. Equitable Life Assur. Soc. of U. S., 172 P.2d 725, 76 Cal.App.2d 75.

Okl.—Levine v. Teal, 145 P.2d 886, 193 Okl. 495.

### Extent of consideration

In determining weight of testimony, court need only consider witnesses' type, demeanor, bias, and other ordinary incidentals, in absence of conscious falsification, and may consider probabilities of situation.—New Jersey Zinc Co. v. Singmaster, D.C. N.Y., 4 F.Supp. 967, modified on other grounds, C.C.A., 71 F.2d 277, certiorari denied Singmaster v. New Jersey Zinc Co., 55 S.Ct. 106, 293 U.S. 591, 79 L.Ed. 685.

71. Cal.—Moore v. Hoar, 81 P.2d 226, 27 Cal.App.2d 269.

72. Cal.—Shapiro v. Equitable Life Assur. Soc. of U. S., 172 P.2d 725, 76 Cal.App.2d 75.

73. Mont.—Lewis v. Bowman, 121 P. 2d 162, 113 Mont. 68—McLaughlin v. Corcoran, 69 P.2d 597, 104 Mont. 590.

74. Mont.—Lewis v. Bowman, 121 P. 2d 162, 113 Mont. 68—McLaughlin v. Corcoran, 69 P.2d 597, 104 Mont. 590.

75. Mich.—Hilliker v. Jewel Oil & Gas Co., 270 N.W. 158, 277 Mich. 615.

64 C.J. p 1210 note 97. In trials before jury see supra §§ 225-237.

76. Okl.—Fish v. Sims, 141 P. 980, 42 Okl. 535—Lyon v. Lyon, 134 P. 650, 39 Okl. 111.

77. Okl.—McMurrrough v. Alberty, 215 P. 193, 90 Okl. 4. 64 C.J. p 1210 note 99.

78. Tex.—Lorino v. Crawford Packing Co., Civ.App., 169 S.W.2d 265, affirmed 175 S.W.2d 410, 143 Tex. 51.

ring to the evidence, entitled to the judgment of the judge on the evidence.<sup>79</sup>

**On agreed statement of facts.** Where a case is tried on an agreed statement of facts, a demurrer to the evidence is improper.<sup>80</sup> In these circumstances the only proper and correct practice is to invoke the judgment of the court as to law on the facts thus agreed on.<sup>81</sup>

### b. Operation and Effect

A demurrer to the evidence in actions tried by the court without a jury, as in actions tried by a jury, presents for consideration only a question of law, and such demurrer is subject to the rules governing demurrers to the evidence in actions tried with a jury.

A demurrer to the evidence in actions tried by the court without a jury, as in actions tried by a jury, presents for consideration only a question of law,<sup>82</sup> and such demurrer is subject to the rules governing demurrers to the evidence in actions tried with a jury.<sup>83</sup> Accordingly, the evidence is to be viewed in the light most favorable to plaintiff,<sup>84</sup> giving him the benefit of every reasonable inference.<sup>85</sup> The court cannot weigh conflicting evi-

dence, but must consider as true all portions of the evidence which tend to prove the allegation in the petition,<sup>86</sup> and reject all evidence unfavorable to him;<sup>87</sup> or, as otherwise expressed, the truth of all the evidence favorable to plaintiff is admitted by the demurrer,<sup>88</sup> subject to the limitation that the admission is for the purpose of the demurrer only.<sup>89</sup> If the demurrer is overruled and no further evidence is offered by either party, it does not follow as a matter of course that judgment should go for the party whose evidence was demurred to.<sup>90</sup> In rendering judgment the court has authority and it is its duty to weigh such evidence,<sup>91</sup> pass on the credibility of witnesses,<sup>92</sup> and render such judgment as the court finds to be proper.<sup>93</sup>

In at least one jurisdiction, in contradiction of the principles heretofore stated, the rule is that in actions of legal cognizance tried to the court without a jury, the court occupies the position of the jury and must necessarily weigh the evidence, pass on the credibility of the witnesses, and determine the rights of the parties;<sup>94</sup> and a demurrer to the evidence has the legal effect of a motion for judgment<sup>95</sup> or a motion for a nonsuit.<sup>96</sup> In weighing

79. Tex.—Lorino v. Crawford Packing Co., supra.

80. Tenn.—Bridgeport Wooden-Ware Mfg. Co. v. Louisville & N. R. Co., 53 S.W. 739, 103 Tenn. 490.

81. Tenn.—Bridgeport v. Wooden-Ware Mfg. Co. v. Louisville & N. R. Co., supra.

82. Okl.—McMurrrough v. Alberty, 215 P. 193, 90 Okl. 4.

Tex.—Corpus Juris quoted in Donaldson v. Oak Park Cemetery, Civ. App., 110 S.W.2d 119, 121.

Demurrer to the evidence in jury trials see supra § 231.

**Defendant's motion, at close of evidence,** in action tried by court without jury, praying that court enter verdict for defendant, raised only question whether, as matter of law, on all evidence, finding for plaintiff was permissible.—Menici v. Orton Crane & Shovel Co., 189 N.E. 839, 285 Mass. 499.

83. Tex.—Donaldson v. Oak Park Cemetery, Civ. App., 110 S.W.2d 119, 64 C.J. p 1210 note 6.

84. U.S.—Smith v. Russell, C.C.A. Ark., 76 F.2d 91, certiorari denied 56 S.Ct. 135, 296 U.S. 614, 80 L. Ed. 436.

Tex.—Donaldson v. Oak Park Cemetery, Civ. App., 110 S.W.2d 119, 64 C.J. p 1210 note 7.

85. U.S.—Smith v. Russell, C.C.A. Ark., 76 F.2d 91, certiorari denied 56 S.Ct. 135, 296 U.S. 614, 80 L. Ed. 436.

Tex.—Donaldson v. Oak Park Cemetery, Civ. App., 110 S.W.2d 119, 64 C.J. p 1211 note 8.

86. N.M.—Dunlap v. Albuquerque Nat. Bank, 247 P.2d 981, 56 N.M. 638.

Okl.—Hollis v. Hollis, 172 P.2d 999, 197 Okl. 524.

Tex.—Corpus Juris quoted in Donaldson v. Oak Park Cemetery, Civ. App., 110 S.W.2d 119, 121.

64 C.J. p 1211 note 9.

87. Kan.—Caeman v. Van Harke, 6 P. 620, 33 Kan. 333.

Okl.—Hollis v. Hollis, 172 P.2d 999, 197 Okl. 524.

Tex.—Donaldson v. Oak Park Cemetery, Civ. App., 110 S.W.2d 119.

88. N.M.—Sanchez v. Torres, 298 P. 408, 35 N.M. 383.

Tex.—Donaldson v. Oak Park Cemetery, Civ. App., 110 S.W.2d 119, 64 C.J. p 1211 note 11.

Mo.—Grams v. Novinger, App., 231 S.W. 265.

Tex.—Donaldson v. Oak Park Cemetery, Civ. App., 110 S.W.2d 119.

90. Kan.—In re Towne's Estate, 239 P.2d 824, 172 Kan. 246.

91. Kan.—In re Towne's Estate, supra.

92. Kan.—In re Towne's Estate, supra.

Determination of credibility of witnesses and weight due testimony generally see supra § 593.

93. Kan.—In re Towne's Estate, supra.

94. Okl.—Brown v. Turner, 173 P.2d 449, 197 Okl. 569.—Beman v. Kinser, 126 P.2d 690, 190 Okl. 647.—Corpus Juris cited in Looney v. Bruin Oil Corp., 122 P.2d 1007, 1008, 190 Okl. 266.—Barron v. Chicasaske, 143 P.2d 376, 189 Okl. 35.—Evans v. Raper, 93 P.2d 754, 185 Okl. 426.—Benjamin Collitz & Co. v. Davis, 62 P.2d 67, 177 Okl. 607.—Universal Life Ins. Co. v. Berry, 57 P.2d 879, 177 Okl. 92.

64 C.J. p 1211 note 6 [a], 9 [b].

**Court cannot peremptorily direct verdict**

In jury waived case, court cannot peremptorily direct a verdict if substantial evidence has been presented.—State ex rel. State Social Sec. Commission v. Butler's Estate, 181 S.W. 2d 768, 363 Mo. 14.

95. Okl.—Benke v. Stepp, 184 P.2d 615, 199 Okl. 119.—Barron v. Chicasaske, 143 P.2d 376, 189 Okl. 35.—Evans v. Raper, 93 P.2d 754, 185 Okl. 426.—Universal Life Ins. Co. v. Berry, 57 P.2d 879, 177 Okl. 92.—Luster v. First Nat. Bank in Oklahoma City, 239 P. 128, 111 Okl. 168.

**Treated as motion**

A demurrer to the evidence is treated as a motion for judgment.—G. A. Nichols Bldg. Co. v. Fowler, 172 P.2d 636, 197 Okl. 476.—Beman v. Kinser, 126 P.2d 690, 190 Okl. 647.—Looney v. Bruin Oil Corp., 122 P.2d 1007, 190 Okl. 266.

96. Okl.—Benke v. Stepp, 184 P.2d 615, 199 Okl. 119.—Barron v. Chicasaske, 143 P.2d 376, 189 Okl. 35.—

the evidence and passing on the credibility of the witness, in passing on a demurrer to the evidence, the court may not disregard the positive testimony of witnesses which is uncontradicted and unimpeached either by positive testimony or by circumstantial evidence, and which is not inherently improbable when taken in connection with the facts and circumstances established.<sup>97</sup>

A demurrer to the evidence cannot be sustained if there is any substantial evidence in support of plaintiff's petition,<sup>98</sup> but will be sustained where there is no issue of fact presented by the trial court,<sup>99</sup> or where there is no evidence offered to establish any material fact required to be proved.<sup>1</sup> It is the duty of the court to rule against plaintiff on a motion for judgment only if his evidence when considered fails to make a prima facie case,<sup>2</sup> or where under no tenable theory of law is plaintiff entitled to recover.<sup>3</sup> There is no specific formula or method the trial court must follow to show that

it passed on a demurrer,<sup>4</sup> but any fact, properly in the record, showing or clearly indicating how or that the court did as a matter of fact rule on the demurrer will suffice.<sup>5</sup>

### c. Motions Equivalent to Demurrers to Evidence

Certain motions are deemed to be equivalent to demurrers to the evidence, and the rules applicable to a demurrer to the evidence are applicable to an equivalent motion.

A motion at the close of the evidence "that the court find issues for the defendant,"<sup>6</sup> or a motion for judgment at the close of the adversary's testimony calling for a declaration of law by the court,<sup>7</sup> or a motion for nonsuit, or dismissal,<sup>8</sup> or a motion for a directed verdict,<sup>9</sup> is in effect a demurrer to the evidence. These motions admit all the facts proved by, and all reasonable inferences from, the evidence,<sup>10</sup> and everything to the contrary is disregarded.<sup>11</sup> They do not authorize

Evans v. Raper, 93 P.2d 754, 185 Okl. 428—Universal Life Ins. Co. v. Berry, 57 P.2d 879, 177 Okl. 92.

97. Okl.—G. A. Nichols Bldg. Co. v. Fowler, 172 P.2d 636, 197 Okl. 476. Weight and sufficiency of uncontroverted evidence generally see Evidence § 1033.

Disregarding testimony held improper

Okl.—G. A. Nichols Bldg. Co. v. Fowler, supra.

98. Mo.—Davis v. Kroyden, 60 Mo. App. 441.

N.M.—In re Garcia's Estate, 107 P.2d 866, 45 N.M. 8.

Okl.—Schott v. Glen-Dial, Inc., 107 P.2d 803, 188 Okl. 201.

Tex.—Donaldson v. Oak Park Cemetery, Civ.App., 110 S.W.2d 119.

64 C.J. p 1211 note 14.

#### Duty to decide on merits

Where there was substantial evidence, trial court should not have sustained demurrer to evidence, but had duty to weigh the evidence and decide case on its merits.—State ex rel. State Social Sec. Commission v. Butler's Estate, 181 S.W.2d 768, 353 Mo. 14.

99. Okl.—Skien v. Junction Oil & Gas Co., 193 P. 988, 80 Okl. 41. Tex.—Donaldson v. Oak Park Cemetery, Civ.App., 110 S.W.2d 119.

1. Okl.—Skien v. Junction Oil & Gas Co., 193 P. 988, 80 Okl. 41. Tex.—Donaldson v. Oak Park Cemetery Civ.App., 110 S.W.2d 119.

2. Ark.—McCool v. Jones, 252 S.W. 2d 80, 221 Ark. 123—Werbe v. Holt, 229 S.W.2d 225, 217 Ark. 198.

#### Ruling held erroneous

N.Y.—Schultes v. Katz, 81 N.Y.S.2d 471.

#### Ruling held not erroneous

Wyo.—Peterson v. Johnson, 28 P.2d 487, 46 Wyo. 473, 91 A.L.R. 723.

3. U.S.—Smith v. Russell, C.C.A. Ark., 76 F.2d 91, certiorari denied 56 S.Ct. 135, 296 U.S. 614, 80 L. Ed. 436.

4. Mo.—State ex rel. State Social Sec. Commission v. Butler's Estate, 181 S.W.2d 768, 353 Mo. 14.

5. Mo.—State ex rel. State Social Sec. Commission v. Butler's Estate, supra.

6. Ill.—Crerar v. Daniels, 70 N.E. 569, 209 Ill. 296.

7. U.S.—Smith v. Russell, C.C.A. Ark., 76 F.2d 91, certiorari denied 56 S.Ct. 135, 296 U.S. 614, 80 L.Ed. 436.

Ohio.—Pesta v. Ruf, App., 48 N.E.2d 876.

Tex.—Donaldson v. Oak Park Cemetery, Civ.App., 110 S.W.2d 119.

64 C.J. p 1211 note 18.

#### Judge may entertain

In a nonjury case, the judge may entertain a motion for judgment at the close of plaintiff's case.—Donaldson v. Oak Park Cemetery, supra.

#### Effect of motion for judgment

(1) A motion for judgment calls for a declaration of law on the question whether there is substantial evidence to support a judgment for the adversary.—Ostic v. Mackmiller, 207 P.2d 1008, 53 N.M. 319—Douglass v. Mutual Ben. Health & Acc. Ass'n, 76 P.2d 453, 42 N.M. 190—Union Bank v. Mandeville, 183 P. 394, 25 N.M. 387.

(2) A motion for judgment does not call for findings of fact from the evidence introduced in the case.—Union Bank v. Mandeville, supra.

#### Motion for finding and judgment

A motion for finding and judgment has the same effect as demurrer to the evidence and presents the single question whether plaintiff's evidence, considering as proved all facts which evidence legitimately tends to prove, establishes plaintiff's case as laid.—Smith v. Switzer, 186 N.E. 764, 205 Ind. 404.

8. N.M.—Merchants Bank v. Dunn, 70 P.2d 760, 41 N.M. 432—Mansfield v. Reserve Oil Co., 29 P.2d 491, 38 N.M. 187.

64 C.J. p 1211 note 19.

9. Ind.—State v. Moser, 53 N.E.2d 893, 222 Ind. 354.

Mich.—Hilliker v. Jewel Oil & Gas Co., 27 N.W. 158, 277 Mich. 615.

10. Ark.—McCool v. Jones, 252 S.W.2d 80, 221 Ark. 123—Werbe v. Holt, 229 S.W.2d 225, 217 Ark. 198.

Ill.—Reinhardt v. Security Ins. Co. of New Haven, Conn., 38 N.E.2d 810, 812 Ill.App. 1.

Ind.—Corpus Juris cited in State v. Moser, 53 N.E.2d 893, 222 Ind. 354. Kan.—Ripper v. City of Canton, 199 P.2d 815, 166 Kan. 185.

N.M.—Ostic v. Mackmiller, 207 P.2d 1008, 53 N.M. 319—Douglass v. Mutual Ben. Health & Acc. Ass'n, 76 P.2d 453, 42 N.M. 190—Merchants Bank v. Dunn, 70 P.2d 760, 41 N.M. 432—Mansfield v. Reserve Oil Co., 29 P.2d 491, 38 N.M. 187—Union Bank v. Mandeville, 183 P. 394, 25 N.M. 387.

11. N.M.—Ostic v. Mackmiller, 207 P.2d 1008, 53 N.M. 319—Mansfield v. Reserve Oil Co., 29 P.2d 491, 38 N.M. 187.

the court to weigh the evidence,<sup>12</sup> and should be overruled if, assuming the truth of all the facts proved and all legal inferences that can be drawn from the evidence, it can be said that plaintiff made out a prima facie case.<sup>13</sup> It has also been held that a peremptory declaration of law,<sup>14</sup> or the giving of instructions by the court before which the action is tried to the effect that on the evidence plaintiff cannot recover,<sup>15</sup> is equivalent to a demurrer to the evidence, and cannot be considered as a conclusion of law or finding of fact, and admits all the facts the evidence tends to prove and every inference that can be reasonably drawn therefrom.<sup>16</sup> A declaration of law in the nature of a demurrer to plaintiff's evidence should be refused when the trial is by a court, the same as if the trial were by a jury, if there was any evidence competent and legally sufficient to sustain plaintiff's case,<sup>17</sup> or if the evidence would warrant a submission of the case to a jury.<sup>18</sup> It has similarly been held that an instruction in the nature of a demurrer to the evidence should not be given where the evidence is conflicting.<sup>19</sup> A prayer that "under the pleadings and evidence" there "has been introduced no evidence legally sufficient to entitle the plaintiff to recover, and therefore the verdict must be for the defendant," while insufficient as a variance prayer, may be treated as a demurrer to the evidence, when so intended.<sup>20</sup>

It has been held that the demurrant hazards

nothing on the result of his motion.<sup>21</sup> If his motion is denied, he takes up right where he left off, opens his case, and puts in his evidence.<sup>22</sup> On the other hand it has also been recognized that the risk to defendant, if he is wrong in demurring to the evidence, is that he will have judgment rendered against him.<sup>23</sup>

**Effect of ruling.** A judgment on a motion for a judgment, which is equivalent to a demurrer to the evidence, constitutes a judgment that the party against whom the judgment is entered is not entitled, as a matter of law, to recover,<sup>24</sup> or, in other words, that no issue of fact was made by the evidence.<sup>25</sup>

#### d. In Equitable Actions

In some jurisdictions a demurrer to the evidence in equitable actions is recognized.

The decisions are not in harmony on the question whether a demurrer to the evidence is admissible in equitable actions or should be confined to actions at law where a jury is waived. In some jurisdictions a demurrer to the evidence in equitable actions is recognized.<sup>26</sup> On entertaining a demurrer, or other motions treated as demurrers, the court cannot weigh conflicting evidence but must consider as true every portion of the evidence tending to prove the case of the party resisting the demurrer.<sup>27</sup> Demurrant, therefore, admits as true

12. N.M.—*Merchants Bank v. Dunn*, 70 P.2d 760, 41 N.M. 432—*Union Bank v. Mandeville*, 183 P. 394, 25 N.M. 387.

13. N.M.—*Union Bank v. Mandeville*, supra.

While it is not a demurrer to the evidence, a motion to find for defendant presents question as to whether or not evidence introduced by plaintiff, assuming it to be true, and considering as proved all facts which evidence proves or by legitimate inference tends to prove, establishes plaintiff's case as laid.—*Spanler v. Spanler*, 96 N.E.2d 348, 120 Ind.App. 700.

14. Mo.—*Central States Savings & Loan Ass'n v. U. S. Fidelity & Guaranty Co.*, 66 S.W.2d 550, 334 Mo. 580—*Fruit Supply Co. v. Chicago, B. & Q. R. Co.*, App., 119 S.W.2d 1010.

64 C.J. p 1211 note 23.

15. Mo.—*Rosenbaum v. Gilliam*, 74 S.W. 507, 101 Mo.App. 128.

16. Mo.—*Central States Savings & Loan Ass'n v. U. S. Fidelity & Guaranty Co.*, 66 S.W.2d 550, 334 Mo. 580—*Butler County v. Boat-*

*men's Bank*, 44 S.W. 1047, 143 Mo. 13.

17. Mo.—*Locke v. Warden*, App., 162 S.W.2d 642.

64 C.J. p 1211 note 26.

18. Mo.—*Outcalt Advertising Co. v. Mack*, App., 259 S.W. 511.

19. Mo.—*Blanks v. Dunnermann*, 67 Mo.App. 591, overruling *Hess v. Clark*, 11 Mo.App. 492.

20. Md.—*Fidelity & Deposit Co. of Maryland v. Beneficial Loan Ass'n of Newark, N. J.*, 137 A. 902, 153 Md. 188—*Askin v. Moulton*, 131 A. 82, 149 Md. 140.

21. N.M.—*Merchants Bank v. Dunn*, 70 P.2d 760, 41 N.M. 432.

22. N.M.—*Merchants Bank v. Dunn*, supra.

23. **Obsolete practice**

In the case in which the text rule was recognized it was stated that a demurrer to evidence had become practically obsolete in practice in state.—*Lorino v. Crawford Packing Co.*, Civ.App., 169 S.W.2d 235, affirmed 175 S.W.2d 410, 142 Tex. 51.

24. Tex.—*Donaldson v. Oak Park Cemetery*, Civ.App., 110 S.W.2d 119.

25. Tex.—*Donaldson v. Oak Park Cemetery*, supra.

26. Ark.—*Peoples Mut. Hospital Ass'n v. Bennett*, 265 S.W.2d 703—*McCool v. Jones*, 252 S.W.2d 80, 221 Ark. 123—*Werbe v. Holt*, 229 S.W.2d 225, 217 Ark. 198—*Kyle v. Zellner*, 220 S.W.2d 806, 215 Ark. 349—*Kelley v. Northern Ohio Co.*, 196 S.W.2d 235, 210 Ark. 355. Neb.—*Peterson v. Massey*, 63 N.W.2d 912, 155 Neb. 829.

64 C.J. p 1210 note 1 [b].

**Motion to dismiss**

A motion to dismiss is in effect a demurrer to the evidence.—*Foynter v. Williams*, 237 S.W.2d 903, 218 Ark. 570.

27. Ark.—*Peoples Mut. Hospital Ass'n v. Bennett*, 265 S.W.2d 703—*Laws v. Melton*, 253 S.W.2d 986, 221 Ark. 466—*McCool v. Jones*, 252 S.W.2d 80, 221 Ark. 123.

Kan.—*Wolf v. Washer*, 4 P. 1036, 32 Kan. 533.

**Motion to dismiss**

On considering a motion to dismiss as a demurrer to the evidence, the court must accept as true all portions of the testimony and all reasonable inferences flowing therefrom which tend to prove plaintiff's

all of his adversary's evidence<sup>28</sup> tending to support material allegations of the complaint<sup>29</sup> and reasonable inferences<sup>30</sup> and every conclusion which may be reasonably drawn therefrom,<sup>31</sup> thus ignoring, in the adversary's favor, conflicts in testimony.<sup>32</sup> It is the duty of the court to rule against the party challenged only if his evidence fails to make a prima facie case.<sup>33</sup> If the demurrer is sustained the case is ready for judgment.<sup>34</sup> It has been held that demurrant can test the sufficiency of his adversary's evidence without resting or presenting his own case,<sup>35</sup> and without risk of penalizing himself.<sup>36</sup> Under this rule movant or demurrant suffers no prejudice if his motion or demurrer is overruled;<sup>37</sup> he may still meet the case on the merits,<sup>38</sup> and it has been stated that if the demurrer is overruled or erroneously sustained, both parties are entitled to be placed in the same position as they were in before the error occurred.<sup>39</sup>

There are jurisdictions in which a demurrer to the evidence in equitable actions is not recognized,<sup>40</sup> even though it was formerly recognized.<sup>41</sup> It has been held that a demurrer to the evidence in an equitable action has no effect except to rest the case and submit it to the chancellor for decision on the merits.<sup>42</sup> In at least one jurisdiction where the demurrer is not recognized the motion is treated as a motion for judgment,<sup>43</sup> and in considering such

motion the proof favorable to demurrant is not to be disregarded as in a law case,<sup>44</sup> but, on the contrary, it is the duty of the court to weigh the evidence, both favorable and unfavorable to the challenged party and render judgment thereon,<sup>45</sup> rather than merely determine whether the challenged party has established a prima facie case as is done in actions at law.<sup>46</sup>

# § 595. — Dismissal or Nonsuit

- a. Power to grant
- b. Form and requisites of motion
- c. Stage of trial at which motion made
- d. Operation and effect of motion
- e. When granted or refused
- f. Determination and disposition of motion
- g. Objections and exceptions

## a. Power to Grant

In some jurisdictions a motion for nonsuit or dismissal at the close of the plaintiff's evidence is permissible practice in actions at law tried before a court without a jury, and, in some jurisdictions, motions for dismissal or nonsuit are authorized in equitable actions.

In a number of jurisdictions a motion for nonsuit or dismissal at the close of plaintiff's evidence is permissible practice in actions at law tried before a court without a jury.<sup>47</sup> On the other hand, un-

case, and disregard all conflicts which tend to weaken or disprove it. This is only for the purpose of the ruling on the motion.—In re Garcia's Estate, 107 P.2d 866, 45 N.M. 8.

28. Neb.—Peterson v. Massey, 53 N.W.2d 912, 155 Neb. 829.

29. N.M.—Paulos v. Janetakos, 72 P.2d 1, 41 N.M. 534.

30. N.M.—Paulos v. Janetakos, supra.

31. Neb.—Peterson v. Massey, 53 N.W.2d 912, 155 Neb. 829.

32. N.M.—Paulos v. Janetakos, 72 P.2d 1, 41 N.M. 534.

33. Ark.—Peoples Mut. Hospital Ass'n v. Bennett, 265 S.W.2d 703—Laws v. Melton, 253 S.W.2d 966, 221 Ark. 466—McCool v. Jones, 252 S.W.2d 90, 221 Ark. 123.

34. Neb.—Peterson v. Massey, 53 N.W.2d 912, 155 Neb. 829.

35. Neb.—Peterson v. Massey, supra.

36. Neb.—Peterson v. Massey, supra.

37. N.M.—Paulos v. Janetakos, 72 P.2d 1, 41 N.M. 534.

38. N.M.—Paulos v. Janetakos, supra.

39. Neb.—Peterson v. Massey, 53 N.W.2d 912, 155 Neb. 829.

40. Ill.—Van Amburg v. Reynolds, 23 N.E.2d 694, 372 Ill. 317.

Mo.—Sloan v. Dunlap, 194 S.W.2d 32, 354 Mo. 1211—Gould v. City of Illinois, App., 108 S.W.2d 418.

Okl.—Gilliam v. Hall, 186 P.2d 652, 199 Okl. 383—Hollis v. Hollis, 172 P.2d 999, 197 Okl. 524—Davis v. Wallace, 37 P.2d 602, 169 Okl. 497, 64 C.J. p. 1210 note 1 [a], [c] (2)—(4), [d] (1).

41. Mo.—Anthony v. Kennard Bldg. Co., 87 S.W. 921, 188 Mo. 704, 64 C.J. p. 1210 note 1 [c] (1).

42. Mo.—Sloan v. Dunlap, 194 S.W.2d 32, 354 Mo. 1211—Fullerton v. Fullerton, 132 S.W.2d 968, 345 Mo. 216.

43. Okl.—Modern Woodmen of America, Camp No. 6967 v. Tulsa Modern Woodmen Bldg. Ass'n, 264 P.2d 999—Jones v. Tauffest, 243 P.2d 1003, 206 Okl. 380—Lovelady v. Loughridge, 228 P.2d 358, 204 Okl. 186—Cooper v. Gerner, 217 P.2d 823, 203 Okl. 18—Hollis v. Hollis, 172 P.2d 999, 197 Okl. 524—Biggs v. Federal Land Bank of Wichita, 95 P.2d 902, 186 Okl. 99—Beverly Hills Nat. Bank & Trust Co. v. Martin, 91 P.2d 94, 185 Okl. 254—Lincoln v. Tidewater Oil Co., 58 P.2d 320, 177 Okl. 270—Davis v. Wallace, 37 P.2d 602, 169 Okl. 497.

Denial of motion held not error Okl.—Keenan v. Clark, 211 P.2d 260, 202 Okl. 143.

44. Okl.—Beverly Hills Nat. Bank & Trust Co. v. Martin, 91 P.2d 94, 185 Okl. 254.

45. Okl.—Modern Woodmen of America, Camp No. 6967 v. Tulsa Modern Woodmen Bldg. Ass'n, 264 P.2d 999—Lovelady v. Loughridge, 228 P.2d 358, 204 Okl. 186—Cooper v. Gerner, 217 P.2d 823, 203 Okl. 18—Hollis v. Hollis, 172 P.2d 999, 197 Okl. 524—Biggs v. Federal Land Bank of Wichita, 95 P.2d 902, 186 Okl. 99—Beverly Hills Nat. Bank & Trust Co. v. Martin, 91 P.2d 94, 185 Okl. 254—Lincoln v. Tidewater Oil Co., 58 P.2d 320, 177 Okl. 270—Davis v. Wallace, 37 P.2d 602, 169 Okl. 497.

46. Okl.—Biggs v. Federal Land Bank of Wichita, 95 P.2d 902, 186 Okl. 99.

47. Colo.—Gottesleben v. Luckenbach, 231 P.2d 958, 123 Colo. 429, Conn.—Crowell v. Palmer, 58 A.2d 729, 134 Conn. 502.

Ill.—Reiter v. Illinois Nat. Casualty Co., 73 N.E.2d 412, 397 Ill. 141, certiorari denied Reiter v. Palmer,

der certain circumstances, in some jurisdictions because of local legislation a nonsuit has been held not to be proper in an action at law tried before the court without a jury.<sup>48</sup>

**Equitable actions.** The practice in some jurisdictions, particularly where authorized by statute or rule of court, is to permit motions for dismissal or nonsuit in actions of an equitable character.<sup>49</sup> In at least one jurisdiction where involuntary dismissal is permitted in equitable actions, it has been stated that the practice is not to be commended and

is a perilous procedure.<sup>50</sup> In at least one other jurisdiction it was held that, although the case is one of equitable cognizance, if there was no substantial evidence to authorize a recovery, it was the duty of the court to grant a motion for nonsuit for insufficiency of the evidence,<sup>51</sup> but it was said that "it would have been much more satisfactory had the court tried the case on the merits and made findings and a decree, instead of disposing of it as was done."<sup>52</sup> On the other hand, in some jurisdictions it is held that a motion for nonsuit<sup>53</sup> or for

68 S.Ct. 100, 332 U.S. 731, 92 L. Ed. 373.

N.J.—Ucci v. Ucci, 69 A.2d 891, 6 N.J.Super. 61.

Ohio.—Welge v. Welge, 94 N.E.2d 210, 87 Ohio App. 95.

64 C.J. p 1212 note 32.

In actions tried by jury see supra, §§ 238-248.

Voluntary dismissal or nonsuit see Dismissal and Nonsuit §§ 17, 18, 20, 22.

48. Wis.—Sliter v. Carpenter, 102 N. W. 27, 123 Wis. 578.

64 C.J. p 1212 note 33.

#### In Pennsylvania

(1) If there has been a formal reference of the cause by the parties to the court without a jury under the provisions of the Act prescribing practice in trials of civil cases at law without a jury, Act of April 22, 1874, P.L. 109, § 1, 12 P.S. § 688, a nonsuit would be improper. —Malone v. Marano, 192 A. 254, 326 Pa. 316—Commonwealth v. Provident Trust Co., Com.Pl., 92 Pittsb.Leg.J. 348, 58 York Leg.Rec. 101—64 C.J. p 1212 note 33 [a].

(2) If the parties informally refer the case to the court without a jury, a nonsuit may be proper. —Malone v. Marano, 192 A. 254, 326 Pa. 316.

(3) The Act of June 25, 1937, P.L. 2090, § 2, repealed § 1 of P.L. 109, Act of April 22, 1874, insofar as it relates to trials by court without a jury in the courts of common pleas of Philadelphia County, and in such cases, while the practice of granting nonsuits is not to be commended, the trial judge may in his discretion enter a nonsuit.—Pennsylvania R. Co. v. J. Jacob Shannon & Co., 70 A.2d 321, 363 Pa. 438—Gaines v. Philadelphia Transportation Co., 59 A.2d 916, 359 Pa. 610.

(4) In actions at law heard by a judge without a jury in Philadelphia County, the judge may enter a nonsuit if in his opinion plaintiff's evidence is insufficient in law to maintain the action, that is, only where the determining factors are so clearly established that reasonable men

could not differ as to the finality of their evidentiary import.—Pennsylvania R. Co. v. J. Jacob Shannon & Co., supra—Gaines v. Philadelphia Transp. Co., supra.

(5) In such actions in Philadelphia County, where facts constituting an affirmative defense are admitted by plaintiff or established by uncontradicted testimony in plaintiff's case with such conclusiveness as to exclude the reasonable possibility of an inference otherwise, a nonsuit is proper.—Pennsylvania R. Co. v. J. Jacob Shannon & Co., supra.

(6) In case tried in Philadelphia County, when considering whether a nonsuit has been properly entered, plaintiff is entitled to the benefit of every reasonable inference of fact deducible from the evidence.—Pennsylvania R. Co. v. J. Jacob Shannon & Co., supra.

49. Ill.—Reiter v. Illinois Nat. Cas. Co., 73 N.E.2d 412, 397 Ill. 141, certiorari denied Reiter v. Palmer, 98 S.Ct. 100, 332 U.S. 791, 92 L. Ed. 373.

Iowa.—Amdor v. Cooney, 43 N.W.2d 136, 241 Iowa 777.

Mo.—Rigg v. Hart, 255 S.W.2d 778, Neb.—Paul v. McGahan, 42 N.W. 172, 152 Neb. 578.

N.J.—Ucci v. Ucci, 69 A.2d 891, 6 N.J.Super. 61.

64 C.J. p 1212 notes 34, 35.

#### Dismissal of jury

Insofar as action was one in equity, trial court could dismiss jury at end of introduction of evidence for failure of plaintiffs to make out a case.—Constantine v. City of Sunnyvale, 204 P.2d 922, 91 Cal.App.2d 278.

#### Former practice

Prior to an amendment of the Civil Practice Act, a motion to dismiss at the close of plaintiff's case in an equitable action was not recognized. —Fewkes v. Borah, 35 N.E.2d 69, 376 Ill. 696—Magnolia Petroleum Co. v. West, 30 N.E.2d 24, 374 Ill. 516, 136 A.L.R. 372.

50. Iowa.—Amdor v. Cooney, 43 N.W. 2d 136, 241 Iowa 777—Dee v. Collins, 15 N.W.2d 883, 235 Iowa 22

—Pickler v. Lanphere, 227 N.W. 826, 209 Iowa 910.

64 C.J. p 1212 note 35 [a] (1).

51. Utah.—Burningham v. Burke, 245 P. 977, 67 Utah 90, 46 A.L.R. 466.

52. Utah.—Burningham v. Burke, supra.

53. Mont.—Arnold v. Genzberger, 31 P.2d 296, 96 Mont. 358.

S.C.—Jefferson Standard Life Ins. Co. v. Boddie, 23 S.E.2d 817, 202 S.C. 1—Commercial & Savings Bank v. Ward, 143 S.E. 546, 146 S.C. 77—Broom v. Helms, 65 S.E. 602, 83 S.C. 447—Southern Ry. v. Beaudrot, 41 S.E. 299, 63 S.C. 266—Gileath v. Furman, 35 S.E. 516, 57 S.C. 289—Barnes v. Rodgers, 31 S.E. 518, 57 S.C. 289—McClenaghan v. McEachern, 25 S.E. 296, 47 S.C. 446—Woolfolk v. Graniteville Mfg. Co., 22 S.C. 332.

64 C.J. p 1212 note 38.

**Reason for rule**

(1) In cases brought to trial before a jury, the presiding judge rules upon the questions of law and the jury determines the issues of fact. The object of the nonsuit is to withdraw the case from the jury upon a question of law to be decided by the presiding judge. It is the dual nature of the trial that gives rise to the practice of making a motion for nonsuit. There is no necessity for resorting to this practice in chancery cases, as the questions of law and issues of fact are to be determined by the same person except in certain cases.—Jefferson Standard Life Ins. Co. v. Boddie, 23 S.E.2d 817, 202 S.C. 1—64 C.J. p 1212 note 39 [a].

(2) One of the controlling reasons given by the courts against the granting of nonsuits in equity cases is that such practice may not have the effect of a final judgment as to the rights of the parties, and the same question may afterward arise when plaintiff is able to supply the testimony which was lacking, and thus prolong litigation. An order of nonsuit is not conclusive of the issues.—Jefferson Standard Life Ins. Co. v. Boddie, supra.



dismissal<sup>54</sup> for want of evidence to sustain the cause of action, which is the equivalent of a motion for nonsuit,<sup>55</sup> is not permissible practice in actions in equity, such a motion being allowed only in strictly legal actions,<sup>56</sup> unless by virtue of statutory authority such practice is authorized.<sup>57</sup>

### b. Form and Requisites of Motion

No particular form of words is necessary in making a motion for dismissal or nonsuit.

No particular form of words is necessary in making a motion for dismissal or nonsuit. A motion to dismiss at the conclusion of the evidence, although not based on any stated reasons, will be treated as raising the question of the sufficiency of the evidence to justify a verdict for plaintiff.<sup>58</sup> A motion for nonsuit which sufficiently shows that there was presented for consideration by the court the absence of any evidence to establish liability on the part of defendant is sufficient and will not be held objectionable merely because the word "proof," instead of the word "evidence," was used in making the motion.<sup>59</sup>

### c. Stage of Trial at Which Motion Made

The stage of the trial at which a motion for nonsuit or dismissal can be made is governed by the local rules of procedure.

A motion for a nonsuit in a case tried without a jury cannot be entertained after the trial court has announced its findings and declared its decision of the case.<sup>60</sup> An "opinion" is not equivalent to a "decision," and, although the court in a case tried

without a jury expressed an opinion indicating that it intended to render a decision in favor of defendants, plaintiff would not be precluded thereby from having a nonsuit.<sup>61</sup> However, in at least one jurisdiction, a motion made before the court has filed written findings of fact with the clerk of the court is inopportune.<sup>62</sup>

### d. Operation and Effect of Motion

- (1) In actions at law
- (2) In equitable actions

#### (1) In Actions at Law

A motion for nonsuit or dismissal, or equivalent motions, present for consideration of the court a question of law only, which is the legal sufficiency of the evidence to sustain a judgment against the movant.

In most jurisdictions, where a motion for nonsuit<sup>63</sup> or dismissal<sup>64</sup> is held permissible in actions tried by the court without a jury, the motion is considered equivalent to a motion for a directed verdict in a jury trial<sup>65</sup> or a demurrer to the evidence,<sup>66</sup> and presents for consideration of the court a question of law only, which is the legal sufficiency of the evidence to sustain a judgment against the party making the motion,<sup>67</sup> or, in other words, whether there is any competent evidence legally sufficient to make a prima facie case on behalf of movant's adversary.<sup>68</sup> It has generally been held that the rules governing the motion are the same when the trial is to the court as on a trial to the jury,<sup>69</sup> and in at least one jurisdiction the same rules apply to a motion for dismissal as apply to a motion for

54. Mo.—Cunningham v. Kinnerk, 74 S.W.2d 1107, 230 Mo.App. 749.

55. Mont.—Hoplin v. Lang, 241 P. 636, 74 Mont. 558.

S.C.—Garner v. Garner, 52 S.E. 194, 72 S.C. 437.

56. Mont.—Stevens v. Trafton, 93 P. 810, 36 Mont. 620.

S.C.—Garner v. Garner, 52 S.E. 194, 72 S.C. 437, 5 Ann.Cas. 210.

57. S.C.—Jefferson Standard Life Ins. Co. v. Boddie, 23 S.E.2d 817, 202 S.C. 1.—Garner v. Garner, 52 S.E. 194, 72 S.C. 437, 5 Ann.Cas. 210.

58. U.S.—Wynne v. Fries, C.C.A. Ohio, 50 F.2d 761.

59. Cal.—Roberts v. Prisk, 284 P. 984, 103 Cal.App. 599.

60. Ill.—Kelly v. Chicago City Ry. Co., 202 Ill.App. 239.

61. Tex.—Kidd v. McCracken, 150 S.W. 885, 105 Tex. 383.

62. Vt.—Sparrow v. Climonetti, 53 A. 2d 875, 115 Vt. 292.—Levin v. Rouillie, 2 A.2d 196, 110 Vt. 126.

63. Cal.—Blurrun v. Elizalde, 242 P. 109, 76 Cal.App. 44.

64 C.J. p 1213 note 45.

64. Ill.—Helm v. Illinois Commercial Men's Ass'n, 117 N.E. 63, 279 Ill. 570.

65. Iowa.—Brown v. Schmitz, 22 N. W.2d 340, 237 Iowa 418.

66. Ill.—Anderson v. Board of Education of School Dist. No. 91, 61 N.E.2d 562, 390 Ill. 412.—Pierce v. Reeve, 28 N.E.2d 819, 306 Ill.App. 400.

64 C.J. p 1213 note 47.

#### Replaced demurrer

A motion to dismiss in a nonjury case took the place of the demurrer to the evidence under the practice prior to the effective date of the new code.—Shafer v. Hatfield, 223 S.W.2d 396, 359 Mo. 673.

**Motion for finding and judgment** for defendant has same effect as motion for nonsuit, and presents single question whether plaintiff's evidence, considering as proved all facts which evidence legitimately tends to

prove, establishes plaintiff's case as laid.—Smith v. Switzer, 186 N.E. 764, 205 Ind. 404.

67. U.S.—Maryland Casualty Co. v. Jones, Cal., 49 S.Ct. 484, 279 U.S. 792, 73 L.Ed. 960.

Ill.—Anderson v. Board of Education of School Dist. No. 91, 61 N.E.2d 562, 390 Ill. 412.—Helm v. Illinois Commercial Men's Ass'n, 117 N.E. 63, 279 Ill. 570.—Pierce v. Reeve, 28 N.E.2d 819, 306 Ill.App. 400.

68. Conn.—Ace-High Dresses v. J. C. Trucking Co., 191 A. 536, 122 Conn. 578, 112 A.L.R. 86.

Idaho.—In re Lundens' Estate, 263 P. 2d 1002, 74 Idaho 448.

69. Conn.—Crowell v. Palmer, 58 A. 2d 729, 134 Conn. 502.—Ace-High Dresses v. J. C. Trucking Co., 191 A. 536, 122 Conn. 578, 112 A.L.R. 86.

N.J.—Spahn v. Mandell, 167 A. 663, 111 N.J.Law 144.

Or.—Corpus Juris cited in In re Herdman's Estate, 119 P.2d 277, 116 Or. 527.

64 C.J. p 1213 note 49.

a directed verdict for defendant at the close of plaintiff's case.<sup>70</sup>

On such a motion the court cannot consider the weight of the evidence,<sup>71</sup> but only whether there is evidence legally sufficient to be submitted to the court sitting as a jury.<sup>72</sup> The evidence must be viewed in the light most favorable to plaintiff.<sup>73</sup> The truth of plaintiff's evidence is admitted,<sup>74</sup> whether properly or improperly received,<sup>75</sup> and also every inference of fact that can be legitimately drawn therefrom.<sup>76</sup> The credibility of plaintiff's witnesses cannot be considered,<sup>77</sup> and conflicting evidence will be disregarded.<sup>78</sup> If the motion is denied, and defendant does not desire to introduce any evidence and desires the court to take the case on the evidence of plaintiff and weigh it and make a finding of the facts and render judgment

accordingly, he should plainly so inform the court.<sup>79</sup> The court may then weigh the evidence, determine the question of preponderance thereof, and enter judgment accordingly.<sup>80</sup>

A limitation of the foregoing principles has been recognized where, on motion for a nonsuit or dismissal at the close of plaintiff's evidence, both parties rest; in these circumstances it has been held that the court may weigh the evidence and determine the facts and decide the case on the merits.<sup>81</sup> In some jurisdictions in contradiction of the principles heretofore stated, it has been held without qualification that, on motion for nonsuit or dismissal, or equivalent motions, at the close of plaintiff's evidence, the court may weigh the facts on the preponderance of the evidence and render judgment on the merits,<sup>82</sup> but the court cannot assume facts

70. D.C.—*Rieffer v. Hollingsworth*, Mun.App., 52 A.2d 632.  
Directing verdict, in general, see infra § 596.

71. Ill.—*Pierce v. Reeve*, 28 N.E.2d 819, 806 Ill.App. 400.  
N.J.—*Spahn v. Mandell*, 167 A. 663, 111 N.J.Law 144.  
64 C.J. p 1213 note 50.

#### In Ohio

(1) On motion by defendant for judgment at close of evidence of plaintiff, court does not determine weight of evidence but whether there is any evidence as to which reasonable minds might differ.—*Eggers v. Industrial Commission*, 104 N.E.2d 681, 157 Ohio St. 70.

(2) Motion for judgment at close of plaintiff's evidence in trial to court without jury raises question of weight of evidence as well as question of absence of any evidence.—*Welge v. Welge*, 94 N.E.2d 210, 87 Ohio App. 95.—*Sizemore v. Belser*, 74 N.E.2d 560, 80 Ohio App. 332.—*Berwald Stewart Co. v. Creston Co.*, App., 53 N.E.2d 205.—*Wilcke v. Smith*, Mun., 68 N.E.2d 886.

72. Ohio.—*Eggers v. Industrial Commission*, 104 N.E.2d 681, 157 Ohio St. 70.  
Md.—*Chenoweth v. Hoey*, 108 A. 478, 185 Md. 97.

73. Cal.—*Singleton v. Singleton*, 157 P.2d 886, 68 Cal.App.2d 681.  
Idaho.—*Corpus Juris cited in In re Lunders' Estate*, 263 P.2d 1002, 74 Idaho 448.

Mo.—*Shafer v. Hatfield*, 223 S.W.2d 396, 359 Mo. 673.  
N.J.—*Elowitz v. Winarsky*, 167 A. 679, 11 N.J.Misc. 639.

N.C.—*Harrison v. Brown*, 24 S.E.2d 470, 222 N.C. 610.  
Ohio.—*Eggers v. Industrial Commission*, 104 N.E.2d 681, 157 Ohio St. 70.

64 C.J. p 1213 note 52.

74. Cal.—*Singleton v. Singleton*, 157 P.2d 886, 68 Cal.App.2d 681.  
Conn.—*Ace-High Dresses v. J. C. Trucking Co.*, 191 A. 536, 122 Conn. 678, 112 A.L.R. 86.  
Idaho.—*In re Lunders' Estate*, 263 P.2d 1002, 74 Idaho 448.

N.J.—*Elowitz v. Winarsky*, 167 A. 679, 11 N.J.Misc. 639.  
N.M.—*Dunlap v. Albuquerque Nat. Bank*, 247 P.2d 981, 56 N.M. 638.  
Ohio.—*Kelly v. Ruberg*, 8 Ohio Supp. 53.

Or.—*In re Herdman's Estate*, 119 P. 2d 277, 116 Or. 527.  
64 C.J. p 1213 note 53.

75. Cal.—*Burrin v. Elizalde*, 242 P. 109, 75 Cal.App. 44.

76. Conn.—*Crowell v. Palmer*, 58 A. 2d 729, 134 Conn. 502.—*Ace-High Dresses v. J. C. Trucking Co.*, 191 A. 536, 122 Conn. 678, 112 A.L.R. 86.

Idaho.—*In re Lunders' Estate*, 263 P.2d 1002, 74 Idaho 448.

Mo.—*Shafer v. Hatfield*, 223 S.W.2d 396, 359 Mo. 673.

N.J.—*Elowitz v. Winarsky*, 167 A. 679, 11 N.J.Misc. 639.

Or.—*In re Herdman's Estate*, 119 P. 2d 277, 116 Or. 527.  
64 C.J. p 1213 note 55.

Where primary fact which must be found to support a judgment must rest on inference court need not draw such inference unless it is only possible reasonable inference.—*Winegar v. Shm Olson, Inc.*, Utah, 252 P.2d 205.

77. Conn.—*Fentino v. Pappas*, 113 A. 451, 96 Conn. 230.

78. Cal.—*Singleton v. Singleton*, 157 P.2d 886, 68 Cal.App.2d 681.  
64 C.J. p 1213 note 57.

79. Ill.—*Helm v. Illinois Commercial Men's Ass'n*, 117 N.E. 63, 279 Ill. 570.—*Pierce v. Reeve*, 28 N.E.2d 819, 806 Ill.App. 400.

80. Ill.—*Helm v. Illinois Commercial*

*Men's Ass'n*, 117 N.E. 63, 279 Ill. 570.—*Pierce v. Reeve*, 28 N.E.2d 819, 806 Ill.App. 400.

81. N.Y.—*Deeley v. Heintz*, 62 N.E. 158, 169 N.Y. 129.  
64 C.J. p 1213 note 58.

82. U.S.—*Day-Gormley Co. v. National City Bank of New York*, C.C. A.N.Y., 89 F.2d 703, certiorari denied *Day-Gormley Leather Co. v. National City Bank of New York*, 58 S.Ct. 39, 302 U.S. 719, 82 L.Ed. 555.

Ariz.—*Stuart v. Castro*, 261 P.2d 871, 76 Ariz. 147.—*Morgan v. Bruce*, 259 P.2d 558, 76 Ariz. 121.—*Chadwick v. Larsen*, 254 P.2d 1020, 75 Ariz. 207.  
Wash.—*Weaver v. Windust*, 80 P.2d 766, 195 Wash. 240.  
64 C.J. p 1213 note 59.

**Dismissal by court was to be taken as on merits** where it was granted without any statement that it was without prejudice.—*Day-Gormley Co. v. National City Bank of New York*, C.C.A.N.Y., 89 F.2d 703, certiorari denied *Day-Gormley Leather Co. v. National City Bank of New York*, 58 S.Ct. 39, 302 U.S. 719, 82 L.Ed. 555.

#### Rebuttal evidence

Where defendants, after having examined one witness before plaintiff's case had been completed, moved at close of plaintiff's case to dismiss complaint on ground that plaintiff had failed to establish cause of action, trial court improperly granted motion after considering evidence offered on behalf of defendant, since that ruling constituted a decision on merits without affording plaintiff opportunity to introduce evidence in rebuttal.—*Levine v. Charlow*, 5 N.Y.S.2d 954, 254 App.Div. 416.

#### In Colorado

(1) It is province and duty of trial court to weigh conflicting evidence on fact issue and determine preponderance thereof in passing on motion for

not supported by evidence.<sup>88</sup>

## (2) In Equitable Actions

A motion for nonsuit or dismissal in an equitable action affords a proper means of determining the sufficiency of the evidence to establish a prima facie case for the adverse party.

A motion to dismiss in an equitable action affords a proper means of determining the sufficiency of plaintiff's evidence to make a prima facie case.<sup>84</sup> In jurisdictions where a motion for nonsuit or dismissal is considered permissible in equitable actions, as discussed supra subdivision a of this section, it has been held that defendant can test the sufficiency of plaintiff's evidence without resting or presenting his own case,<sup>85</sup> and that defendant, for the purpose of the motion, admits every fact which the evidence proves, or tends to prove, as well as the facts which may naturally and rationally be inferred from the facts proved.<sup>86</sup> The court in passing on the motion should<sup>87</sup> or is required<sup>88</sup> to consider the evidence of the adverse party in the most favorable light. In other jurisdictions, where a motion for nonsuit or dismissal is considered permissible in equitable actions, it has been held that, on motion for nonsuit or dismissal at the close of plaintiff's case in an equitable action, the court may decide that evidence offered by plaintiff and

received by the court without ruling on objections interposed is inadmissible and cannot be considered in determining the issues,<sup>89</sup> and that defendant, by moving for judgment at the close of plaintiff's evidence, may thereby rest his case,<sup>90</sup> and the court may weigh the facts on the preponderance of evidence and render judgment on the merits,<sup>91</sup> but it has also been held that by making a motion to dismiss at the close of plaintiff's evidence defendant does not waive his right to offer evidence.<sup>92</sup> It has further been held that on a motion for nonsuit and dismissal made at the close of plaintiff's evidence in a chancery case, it is the duty of the court first to determine whether there is evidence tending to prove each element of the case essential to a recovery by plaintiff,<sup>93</sup> and, second, if he finds there is evidence to prove each essential element, to weigh the evidence and then determine whether a recovery by plaintiff is sustained by a preponderance of the evidence on each essential element,<sup>94</sup> and that the uncontradicted testimony of a defendant called by plaintiff for cross-examination must be deemed true<sup>95</sup> in the absence of any testimony or circumstance from which a contrary inference can be drawn.<sup>96</sup>

In jurisdictions, where a motion for nonsuit or dismissal is not considered proper practice in equi-

nonsuit and dismissal of action.—*Nelson v. Schuman*, 131 P.2d 823, 110 Colo. 157.

(2) Where plaintiff called defendants under statute for cross-examination, defendants moved for nonsuit at close of plaintiff's case, and stated, at close of argument by plaintiff's counsel, that they had examined witnesses when they were called for cross-examination and had no further testimony to offer, case was before trial court for decision on its merits.—*Isom v. Isom*, 74 P.2d 1245, 101 Colo. 532.

83. Wash.—*Weaver v. Windust*, 80 P. 2d 766, 195 Wash. 240.

84. Neb.—*Innslee v. City of Bridgeport*, 45 N.W.2d 590, 153 Neb. 559.—*Paul v. McGahan*, 42 N.W.2d 172, 152 Neb. 578.

85. Neb.—*Peterson v. Massey*, 53 N. W.2d 912, 155 Neb. 829.

86. U.S.—*Cook v. Klonos, Alaska*, 164 F. 529, 94 C.C.A. 124, modified on other grounds 168 F. 700, 94 C.C.A. 144.

Ill.—*Fewkes v. Borah*, 35 N.E.2d 69, 376 Ill. 596.

Neb.—*Paul v. McGahan*, 57 N.W.2d 283, 156 Neb. 656.—*Peterson v. Massey*, 53 N.W.2d 912, 155 Neb. 829.—*Rosebud Lumber & Coal Co. v. Holms*, 52 N.W.2d 313, 155 Neb. 459, rehearing denied 53 N.W.2d

82, 155 Neb. 688.—*Paul v. McGahan*, 42 N.W.2d 172, 152 Neb. 578.

87. Ill.—*Fewkes v. Borah*, 35 N.E.2d 69, 376 Ill. 596.—*Middleton v. Middleton*, 90 N.E.2d 248, 339 Ill.App. 448.

88. Ark.—*Missouri Pac. R. Co. v. United Brick & Clay Wkrs. Union*, 238 S.W.2d 945, 218 Ark. 707.

89. Iowa.—*Henninger v. McGuire*, 125 N.W. 180, 146 Iowa 270.

## 90. In Iowa

(1) "The motion to dismiss and for judgment is without statutory recognition, and was of no greater significance than an announcement on the part of appellees that they rested their case at the close of plaintiff's testimony."—*Bridges v. Sania*, 202 N.W. 558, 559, 202 Iowa 310.—*Vogt v. Vogt*, 227 N.W. 107, 208 Iowa 1329.—*Murphy v. Hahn*, 223 N.W. 756, 759, 209 Iowa 938.

(2) "This being an equitable action, the making of the motion by defendant is tantamount to an announcement by him that he rests his case."—*Haggins v. Derby*, 229 N.W. 257, 258, 209 Iowa 938.

(3) "At the conclusion of plaintiff's evidence in the court below, the defendant moved to dismiss. He thereby chose to rest his case on plaintiff's evidence . . ."—*Hirtz v. Koppes*, 234 N.W. 854, 855, 212 Iowa 536.

(4) "Although the application of Rule 216 is conclusive on this question, we may add that we find no decision of this court holding that the mere making at the close of plaintiff's evidence a motion to dismiss amounts to a resting of the defendant's case

"It must be admitted there is language in some of our opinions which might be so construed. But in each of those cases, the motion to dismiss was sustained, or the defendant expressly rested his case, or stood on his motion and refused to offer evidence."—*Dee v. Collins*, 15 N.W.2d 883, 887, 235 Iowa 22.

91. Mo.—*Creek v. Union Nat. Bank* in *Kansas City*, 266 S.W.2d 737.—*Rigg v. Hart*, 255 S.W.2d 778. Wash.—*Graff v. Gensel*, 234 P.2d 884, 39 Wash.2d 131.—*O'Nelle v. Ternas*, 73 P. 692, 32 Wash. 558.

92. Ill.—*Reiter v. Illinois Nat. Cas. Co.*, 73 N.E.2d 412, 397 Ill. 141, certiorari denied, *Reiter v. Palmer*, 68 S.Ct. 100, 332 U.S. 791, 92 L.Ed. 373. Iowa.—*Dee v. Collins*, 15 N.W.2d 883, 235 Iowa 22.

93. Ohio.—*Good v. Robinson*, 88 N. E.2d 200, 85 Ohio App. 91.

94. Ohio.—*Good v. Robinson*, supra.

95. Ohio.—*Good v. Robinson*, supra.

96. Ohio.—*Good v. Robinson*, supra.

table actions, similar conclusions as to the effect of the motion have been reached, and it has been held that, in a suit in equity, the proper practice on a motion to dismiss at the close of plaintiff's evidence is to make findings and render judgment on the merits, not, as in a suit at law, to enter judgment of compulsory nonsuit;<sup>97</sup> and it has also been held that the effect of the motion is to submit the entire controversy for final judgment.<sup>98</sup> The entire evidence of plaintiff and defendant, it has been said, is to be received, so that on appeal the supreme court may direct the entry of final judgment;<sup>99</sup> and plaintiff is not entitled, as he would be on a motion for nonsuit in an action at law, to have any inference drawn in his favor from the evidence which may reasonably be drawn therefrom;<sup>1</sup> but the whole of the evidence is submitted to the court for final judgment,<sup>2</sup> and if it furnishes ground for different inferences, the finding of the court thereon will not be disturbed unless the evidence preponderates against it.<sup>3</sup>

### e. When Granted or Refused

In a trial by the court without a jury, the granting or refusal of a motion for nonsuit or dismissal is dependent on the sufficiency of the evidence to satisfy the local requirements relating to such motions.

The right to grant a nonsuit is to be sparingly exercised,<sup>4</sup> and, where a case is close, the preferable course is to deny a motion for nonsuit.<sup>5</sup> A motion for nonsuit or dismissal should be sustained where the evidence is insufficient to support a judgment for plaintiff,<sup>6</sup> where there is no evidence on which a decision in plaintiff's favor could be sustained,<sup>7</sup> where there is no evidence, or but a scintilla of evidence, tending to prove the facts neces-

sary to sustain the cause of action,<sup>8</sup> or where at the close of plaintiff's evidence the court finds that there is no evidence worthy of being submitted to a jury if the case were being tried before a jury.<sup>9</sup> A motion to dismiss made by defendant at the close of plaintiff's case may be sustained if, in the opinion of the court, plaintiff's case has not been made out by a preponderance of the evidence.<sup>10</sup> If the court in a chancery case, after first determining whether there is evidence tending to prove each element essential to a recovery by plaintiff, finds such evidence is absent, it is the duty of the court to sustain a motion for nonsuit and dismissal;<sup>11</sup> if the court finds such evidence to be present but thereafter, after weighing the evidence, finds that a recovery by plaintiff is not sustained by a preponderance of the evidence on each essential element of the case, it is the duty of the court to sustain the motion.<sup>12</sup>

On the other hand, it has been variously stated that a motion for a nonsuit is properly refused where the evidence, although conflicting, is sufficient to support a judgment for plaintiff;<sup>13</sup> where the evidence, and the inferences reasonably arising therefrom, are legally sufficient to prove the material allegations of the declaration;<sup>14</sup> where the evidence, and the inferences reasonably arising therefrom, will support a verdict for plaintiff;<sup>15</sup> where the evidence justifies findings for plaintiff;<sup>16</sup> where substantial evidence is produced by plaintiff in support of his cause;<sup>17</sup> where there is evidence sufficient to go to a jury<sup>18</sup> or to support a verdict for plaintiff;<sup>19</sup> if the case had been tried by a jury;<sup>20</sup> where there is sufficient evidence to make a prima facie case for plaintiff;<sup>21</sup> where the

97. Wis.—Spuhr v. Kolb, 86 N.W. 562, 111 Wis. 119.—Dietz v. City of Neenah, 64 N.W. 299, 65 N.W. 500, 91 Wis. 422.

98. Mont.—School Dist. No. 2 of Silver Bow County v. Richards, 205 P. 206, 62 Mont. 141.—Streichler v. Murray, 92 P. 36, 36 Mont. 45.

99. Mont.—August v. Burns, 255 P. 737, 79 Mont. 198.  
64 C.J. p 1214 note 71.

1. Mont.—Streichler v. Murray, 92 P. 36, 36 Mont. 45.

2. Mont.—Streichler v. Murray, supra.

3. Mont.—Streichler v. Murray, supra.

4. Conn.—Crowell v. Palmer, 58 A.2d 729, 134 Conn. 502.

5. Conn.—Crowell v. Palmer, supra.

6. Cal.—Hensley v. Hensley, 183 P. 445, 178 Cal. 284.  
64 C.J. p 1214 note 75.

7. Cal.—Eulenberg v. Torley's Inc., 133 P.2d 15, 56 Cal.App.2d 653.  
Minn.—A. Y. McDonald Mfg. Co. v. Newtons, 244 N.W. 806, 127 Minn. 237.

8. Ill.—Helm v. Illinois Commercial Men's Ass'n, 117 N.E. 63, 279 Ill. 570.—Pierce v. Reeve, 28 N.E.2d 819, 306 Ill.App. 400.

9. Ohio.—Eggers v. Industrial Commission, 104 N.E.2d 681, 157 Ohio St. 70.

10. Colo.—Gottesleben v. Luckenbach, 231 P.2d 958, 123 Colo. 429.—Niernberg, by Niernberg v. Gavin, 224 P.2d 215, 123 Colo. 1.—Peters v. Peters, 215 P. 128, 73 Colo. 271.  
Ohio.—Young v. W. B. Hutton & Co., App., 31 N.E.2d 728.

11. Ohio.—Good v. Robinson, 88 N.E. 2d 200, 85 Ohio App. 91.

12. Ohio.—Good v. Robinson, supra.

13. U.S.—Bunker Hill & Sullivan Mining & Concentrating Co. v. Pol-

ak, C.C.A. Idaho, 7 F.2d 583, certiorari denied 64 S.Ct. 106, 269 U.S. 581, 70 L.Ed. 423.

14. N.J.—Weston Electrical Instrument Co. v. Benecke, 82 A. 878, 82 N.J.Law 445, Ann.Cas.1913D 11.

15. N.J.—Weston Electrical Instrument Co. v. Benecke, supra.

16. Minn.—Carpenter v. Gantzer, 204 N.W. 550, 164 Minn. 105.

17. N.M.—Rutherford v. James, 270 P. 794, 33 N.M. 44, 53 A.L.R. 237.

18. Conn.—Foskett & Bishop Co. v. Swayne, 38 A. 893, 70 Conn. 74.

19. R.I.—Clark v. Summerfield Co., 111 A. 577, 43 R.I. 828.  
64 C.J. p 1214 note 83.

20. Cal.—Freese v. Hibernia Sav., etc., Soc., 73 P. 172, 139 Cal. 392.

21. Conn.—Crowell v. Palmer, 58 A. 2d 729, 134 Conn. 502.  
64 C.J. p 1215 note 85.

22. Cal.—Ingao v. Karsten, 211 P.2d 41, 94 Cal.App.2d 517.

evidence is sufficient either to sustain or defeat plaintiff's case;<sup>22</sup> where there is evidence tending to support the cause of action alleged;<sup>23</sup> where there is more than a scintilla of evidence to meet plaintiff's demand;<sup>24</sup> where there is substantial evidence, more than a mere scintilla, sufficient to support a finding and judgment for plaintiff, even though there be also evidence sufficient to support a finding and judgment for defendant;<sup>25</sup> where the motion fails to eliminate items of plaintiff's claim as to which defendant admits liability;<sup>26</sup> where there is some competent, substantial evidence to support every issue needed to make a case, if the evidence on all these issues is credible;<sup>27</sup> where there is sufficient evidence to support a decree against defendant;<sup>28</sup> or where there is any evidence, although contradicted, clearly tending to prove all the ultimate facts to authorize a recovery for plaintiff;<sup>29</sup> unless there is also uncontradicted evidence in the record that establishes an affirmative defense for defendant.<sup>30</sup>

It has been held that the rule in actions tried by a jury that a motion to dismiss is in the nature of a demurrer to the evidence, and should not be sustained unless the evidence is insufficient to support a verdict if it had been tried by a jury, has no application to cases tried without a jury.<sup>31</sup> Also, it has been held error to grant a nonsuit because the court did not credit the testimony of the principal witness for plaintiff, since the court in passing on the motion is bound to regard the truth of the evidence introduced by plaintiff in support of the complaint as admitted.<sup>32</sup> For obvious reasons the motion should be refused where, if well taken, it goes only to the measure of damages and not to the right of action.<sup>33</sup> So it has been held in some jurisdictions that a motion for nonsuit should be

refused where the evidence introduced by plaintiff is conflicting<sup>34</sup> or where there is a disputed material question of fact which on a jury trial the court would have been required to submit to the jury,<sup>35</sup> or where the granting of a nonsuit must depend in any appreciable degree on the credibility of witnesses.<sup>36</sup> It has also been held that, if plaintiff, in a law case tried to the court without a jury, at the close of his case has offered no evidence on a material fact required to be proved, or has offered evidence overcoming any prima facie case made by him, defendant's motion, at the close of plaintiff's evidence, to find in favor of defendant, may properly be granted, and the litigation terminated.<sup>37</sup>

Where the court is required to make findings on the material factual issues, as discussed *infra* § 610 et seq. and where issues of fact are presented on complete evidence, the granting of a nonsuit is improper unless justified by some rule of law under which it is unnecessary to decide the issues of fact.<sup>38</sup> Where a statute makes it the duty of the court to give its decision in writing, and state facts found and conclusions of law separately, it has been uniformly held that the court is without power to dismiss a case without such findings, on the ground that plaintiff has failed to establish a cause of action, except where the evidence adduced for plaintiff as a matter of law would not have justified a finding in his favor.<sup>39</sup> A failure to grant a motion for nonsuit after the court has announced at the close of plaintiff's case that judgment would be entered in favor of defendant has been held not to constitute error.<sup>40</sup>

*On motion of court.* A nonsuit should not be granted on the motion of the court where the evi-

Neb.—Rosebud Lumber & Coal Co. v. Holms, 52 N.W.2d 313, 155 Neb. 459, rehearing denied 53 N.W.2d 82, 155 Neb. 688—Paul v. McGahan, 42 N.W.2d 172, 152 Neb. 578.

22. N.J.—Moebius v. Williams, 87 A. 73, 84 N.J.Law 540.

23. Mass.—Magillo v. Lane, 167 N.E. 228, 268 Mass. 135.  
64 C.J. p 1215 note 88.

24. Hawaii.—Leong Chung v. Hee, 29 Hawaii 18.

25. Hawaii.—Chun Quon v. Doong, 29 Hawaii 539—Shoening v. Miner, 22 Hawaii 196.

26. N.J.—McMahon v. American Ry. Express Co., 141 A. 566, 8 N.J.Misc. 468, affirmed 141 A. 566, 105 N.J. Law 494.

27. Utah.—Winegar v. Slim Olson, Inc., 252 P.2d 205.

28. N.M.—Lea County Fair Ass'n v. Elkan, 197 P.2d 228, 52 N.M. 250.

29. Ill.—Helm v. Illinois Commercial Men's Ass'n, 117 N.E. 63, 279 Ill. 570—Pierce v. Reeve, 28 N.E.2d 819, 306 Ill.App. 400.

30. Ill.—Helm v. Illinois Commercial Men's Ass'n, 117 N.E. 63, 279 Ill. 570—Pierce v. Reeve, 28 N.E.2d 819, 306 Ill.App. 400.

31. Iowa.—Hayward v. Jackman, 64 N.W. 667, 96 Iowa 77.

32. Conn.—Pentino v. Pappas, 113 A. 451, 96 Conn. 230.

33. N.J.—Vieldi v. Koch, 82 A. 929, 82 N.J.Law 752.

34. Hawaii.—Chun Quon v. Doong, 29 Hawaii 539—Lalooha v. Wolters, 21 Hawaii 304.

35. N.Y.—Place v. Hayward, 23 N.E. 25, 117 N.Y. 487.

36. Conn.—Crowell v. Palmer, 58 A. 2d 729, 134 Conn. 502.

37. Ohio.—Kroger v. Clark, 2 N.E.2d 623, 52 Ohio App. 33.  
64 C.J. p 1214 note 61.

38. Cal.—Howard v. General Petroleum Corp., 238 P.2d 145, 108 Cal. App.2d 25.

**Granting of motion held improper**  
Cal.—Howard v. General Petroleum Corp., *supra*.

39. Minn.—Herrick v. Barnes, 81 N. W. 526, 78 Minn. 475, 476.  
64 C.J. p 1215 note 96.

40. Fla.—Gulf Coast Title Co. v. Walters, 168 So. 537, 124 Fla. 134, rehearing granted 170 So. 130, 125 Fla. 427.

dence is such as to entitle defendant to a final judgment.<sup>41</sup>

### 1. Determination and Disposition of Motion

- (1) In actions at law
- (2) In equitable actions

#### (1) In Actions at Law

Where a motion for nonsuit or dismissal is sustained, judgment for the movant necessarily follows, but this is not necessarily an adjudication of the issues of fact.

Where a motion for nonsuit or dismissal is sustained, judgment for defendant necessarily follows,<sup>42</sup> but the sustaining of the motion is not an adjudication of the issues of fact.<sup>43</sup> At least where the court is not authorized to weigh the evidence on such a motion, as discussed supra subdivision d of this section, the court has power only to dismiss the complaint without prejudice to a new action,<sup>44</sup> and cannot render final judgment for defendant.<sup>45</sup> The fact that a nonsuit is denied does not disclose that plaintiff has established a prima facie case.<sup>46</sup> If the motion is denied, the court in effect by that decision announces that plaintiff is entitled to have a finding on the question of fact, and should at once proceed to determine the preponderance of the evidence, unless further evidence is introduced, and render judgment accordingly.<sup>47</sup> and it is not requisite that either party should ask the court to decide the question of fact after overruling the motion.<sup>48</sup> If the motion is denied and defendant has not rested his case, he is entitled to proceed with the trial and the making of his defense<sup>49</sup> and it is error for the

court, under such circumstances, to refuse to hear further evidence and to render a judgment for plaintiff.<sup>50</sup> Where defendant moved for judgment at the close of plaintiff's case on the ground of an affirmative defense, but did not inform the court that he did not elect to offer evidence or had closed his case and desired that the court pass on questions of fact in the record, and there was sufficient evidence in the record to sustain plaintiff's case and to justify denial of defendant's motion, it has been held that the motion should be denied and defendant required to offer evidence of his defense in order that the court might, at the close of all the evidence, determine the question whether on the facts appearing in the record the affirmative defense had been proved.<sup>51</sup> If the motion is denied and defendant elects to offer no evidence, the decision is made on plaintiff's evidence.<sup>52</sup> If the trial court erroneously allows the motion and, on appeal, the order is reversed, on remand of the cause to the trial court for further proceedings, defendant may proceed to adduce evidence in support of his defense.<sup>53</sup>

#### (2) In Equitable Actions

If, in an equitable action, the court is authorized to weigh the evidence on a motion for dismissal or nonsuit, the granting of such motions at the close of the plaintiff's evidence operates as an adjudication on the merits.

In jurisdictions where the court is authorized, in equitable actions, to weigh the evidence on a motion to dismiss and render judgment on the merits, as discussed supra subdivision d (2) of this section,

41. N.J.—Settel v. Public Service Ry. Co., 109 A. 363, 94 N.J.Law 137.

42. Ill.—Reiter v. Illinois Nat. Cas. Co., 73 N.E.2d 412, 397 Ill. 141, certiorari denied, Reiter v. Palmer, 68 S.Ct. 100, 332 U.S. 791, 92 L.Ed. 373 —John Deere Plow Co. of Moline v. Carmer, 182 N.E. 762, 350 Ill. 104 —Helm v. Illinois Commercial Men's Ass'n, 117 N.E. 63, 279 Ill. 570 —Pierce v. Reeve, 28 N.E.2d 819, 306 Ill.App. 400.

43. Ill.—Anderson v. Board of Education of School Dist. No. 91, 61 N.E.2d 552, 390 Ill. 412 —John Deere Plow Co. of Moline v. Carmer, 182 N.E. 762, 350 Ill. 104 —Helm v. Illinois Commercial Men's Ass'n, 117 N.E. 63, 279 Ill. 570.

#### Merely a nonsuit

A ruling disposing of an action on a motion to dismiss is merely a nonsuit and not a decision on the merits. —Johnson v. Duncan, 90 N.Y.S. 660, 98 App.Div. 322 —Schlessinger v. Jud, 70 N.Y.S. 616, 61 App.Div. 453 —Beninato v. Hedges, 180 N.Y.S. 745 —Wurtzel v. Provident Loan Society of

New York, 132 N.Y.S. 334 —Globe Lithographing Co. v. Blumberg, 92 N.Y.S. 768.

#### Motion made at close of all the evidence

A judgment rendered at the close of all the evidence, while apparently allowed in response to a motion to dismiss, was held to be, for all practical purposes, a final judgment on the merits of the case. —Saylor v. Hamilton, 185 P. 465, 67 Colo. 481.

44. N.Y.—Wurtzel v. Provident Loan Society of New York, 132 N.Y.S. 334.

64 C.J. p 1215 note 1.

45. N.Y.—Wurtzel v. Provident Loan Society of New York, supra.

46. Cal.—Blodgett v. Walker Scott Corp., 221 P.2d 325, 99 Cal.App.2d 251.

47. Ill.—Helm v. Illinois Commercial Men's Ass'n, 117 N.E. 63, 279 Ill. 570 —Pierce v. Reeve, 28 N.E.2d 819, 306 Ill.App. 400.

48. Ill.—Helm v. Illinois Commercial Men's Ass'n, 117 N.E. 63, 279 Ill.

570 —Pierce v. Reeve, 28 N.E.2d 819, 306 Ill.App. 400.

49. Ill.—Reiter v. Illinois Nat. Cas. Co., 73 N.E.2d 412, 397 Ill. 141, certiorari denied, Reiter v. Palmer, 68 S.Ct. 100, 332 U.S. 791, 92 L.Ed. 373 —Pierce v. Reeve, 28 N.E.2d 819, 306 Ill.App. 400.

N.J.—Ucci v. Ucci, 69 A.2d 891, 6 N.J. Super. 61.

64 C.J. p 1215 notes 4, 5.

50. Neb.—Adams v. Seeley, 142 N.W. 541, 94 Neb. 243.

51. Ill.—Pierce v. Reeve, 28 N.E.2d 819, 306 Ill.App. 400.

52. Ill.—Reiter v. Illinois Nat. Cas. Co., 73 N.E.2d 412, 397 Ill. 141, certiorari denied, Reiter v. Palmer, 68 S.Ct. 100, 332 U.S. 791, 92 L.Ed. 373.

53. Ill.—Reiter v. Illinois Nat. Cas. Co., 73 N.E.2d 412, 397 Ill. 141, certiorari denied, Reiter v. Palmer, 68 S.Ct. 100, 332 U.S. 791, 92 L.Ed. 373 —John Deere Plow Co. of Moline v. Carmer, 182 N.E. 762, 350 Ill. 104.

the dismissal of an action at the close of plaintiff's evidence operates as an adjudication on the merits.<sup>54</sup> If the motion is allowed the case is decided in favor of defendant,<sup>55</sup> but if the motion is overruled, defendant may offer testimony in support of his defense.<sup>56</sup> Where the motion is denied and defendant elects to offer no evidence, the decision is made on plaintiff's evidence.<sup>57</sup> If the trial court erroneously allows the motion and, on appeal, the order is reversed, on remand of the cause to the trial court for further proceedings, defendant may proceed to adduce evidence in support of his defense.<sup>58</sup>

*Stage of trial at which ruling can be made.* Ordinarily, a trial court may not terminate a trial by judgment before both parties have completely submitted their cases and rested, but an exception to the rule applies in cases where it appears from one party's evidence that no judgment in his favor would be proper.<sup>59</sup> On a motion to dismiss made at the close of plaintiff's case, it has been held that the court may rule on the motion at that time or reserve its decision, direct defendant to proceed with his case, and rule on the motion at any later stage of the case prior to the close of all the evidence.<sup>60</sup>

54. Iowa.—Amdor v. Cooney, 43 N.W. 2d 136, 241 Iowa 777.

55. Ill.—Reiter v. Illinois Nat. Cas. Co., 73 N.E.2d 412, 397 Ill. 141, certiorari denied, Reiter v. Palmer, 68 S.Ct. 100, 332 U.S. 791, 92 L.Ed. 373.

—Johnson v. Johnson, 45 N.E.2d 625, 381 Ill. 362.—Havill v. Darch, 52 N.E.2d 64, 320 Ill.App. 667.

Waiver or withdrawal of motion, generally, see *infra* § 667.

#### Testimony in defense

If defendant receives a favorable ruling on his motion he precludes himself from offering testimony on his defense.

Iowa.—Amdor v. Cooney, 43 N.W.2d 136, 241 Iowa 777.—Dee v. Collins, 15 N.W.2d 883, 235 Iowa 22.

Mont.—Feeley v. Feeley, 231 P. 908, 72 Mont. 84.

56. Ill.—Reiter v. Illinois Nat. Cas. Co., 73 N.E.2d 412, 397 Ill. 141, certiorari denied, Reiter v. Palmer, 68 S.Ct. 100, 332 U.S. 791, 92 L.Ed. 373.

Iowa.—Dee v. Collins, 15 N.W.2d 883, 235 Iowa 22.

Mont.—Feeley v. Feeley, 231 P. 908, 72 Mont. 84.

N.J.—Ucci v. Ucci, 69 A.2d 891, 6 N.J. Super. 61.

#### Former practice

(1) Prior to an amendment of the Civil Practice Act, a motion to dismiss made at the close of plaintiff's evidence had the effect of submitting the cause to the chancellor on the merits and defendant thereby waived

the right to offer evidence in support of his defense.—Magnolia Petroleum Co. v. West, 30 N.E.2d 24, 374 Ill. 516, 136 A.L.R. 372.

(2) The amendment of Civil Practice Act giving defendant right to present his evidence in equity proceeding, where his motion for a favorable finding at close of plaintiff's evidence is denied, was enacted to give a defendant the same rights in equity he has long had in a proceeding at law.—People ex rel. Reiter v. Lupe, 89 N.E.2d 824, 405 Ill. 66.

57. Ill.—Reiter v. Illinois Nat. Cas. Co., 73 N.E.2d 412, 397 Ill. 141, certiorari denied, Reiter v. Palmer, 68 S.Ct. 100, 332 U.S. 791, 92 L.Ed. 373.

#### Final hearing

If defendant rests his case on a motion to dismiss, he is to be regarded as having submitted the case for a final hearing on plaintiff's evidence.—Shepard v. Shepard, 186 S.W.2d 472, 353 Mo. 1057.—Hoynes v. Hoynes, Mo. App., 218 S.W.2d 823.

58. Neb.—Peterson v. Massey, 58 N.W.2d 912, 155 Neb. 829.

#### In Illinois

(1) In a Supreme Court decision it was stated that an amendment to the Civil Practice Act did not change the old equity rule, as to the right of a party to introduce evidence after receiving a favorable ruling on his motion to dismiss, in so far as it concerned proceedings in the reviewing

#### g. Objections and Exceptions

If a party desires to avail himself of error in overruling a motion to set aside a nonsuit, he must except when the ruling is made.

If a party desires to avail himself of error in overruling a motion to set aside a nonsuit, he must except when the motion is overruled.<sup>61</sup> The omission to do so is not cured by a general exception when a motion in arrest of judgment is overruled.<sup>62</sup> Exceptions must be saved to each specific ruling as it occurs during the progress of the cause.<sup>63</sup>

#### § 596. — Directing Verdict

- a. In general
- b. Operation and effect
- c. When granted or refused

##### a. In General

In some jurisdictions a motion to direct a verdict is considered not applicable to a trial without a jury, but there are jurisdictions where such motions or equivalent motions are permitted in nonjury actions.

In some jurisdictions it is stated without qualification that a motion to direct a verdict is not applica-

ble.—Kanaske v. Clark, 57 N.E.2d 890, 388 Ill. 357.

(2) In a subsequent Supreme Court decision wherein the amendment to the Civil Practice Act was construed, the court laid down the text rule stated above and held that Kanaske v. Clark, *supra*, created an erroneous impression.—Reiter v. Illinois Nat. Cas. Co., 73 N.E.2d 412, 397 Ill. 141, certiorari denied Reiter v. Palmer, 68 S.Ct. 100, 332 U.S. 791, 92 L.Ed. 373.

59. Mont.—State ex rel. McConnell v. District Court of Seventeenth Judicial Dist., 182 P.2d 846, 120 Mont. 253.

60. N.J.—Ucci v. Ucci, 69 A.2d 891, 6 N.J. Super. 61.

#### Effect of defendant's evidence

The only effect that fact that part of defendant's case had been put in before granting of defendant's motion to dismiss complaint had on decision of the motion was that plaintiff was entitled not only to benefit of his proofs, but also to benefit of any evidence put in by defendant which supplied any deficiency in plaintiff's proofs.—Ucci v. Ucci, *supra*.

61. Mo.—City of St. Joseph v. Ensworth, 65 Mo. 628. Saving questions for review see Appeal and Error § 299.

62. Mo.—City of St. Joseph v. Ensworth, *supra*.

63. Mo.—City of St. Joseph v. Ensworth, *supra*.

ble to a trial without a jury,<sup>64</sup> one of the reasons assigned being that "a verdict in law signifies the final action taken by a jury and nothing else."<sup>65</sup> It has been similarly stated that it is not error to overrule a motion for a directed verdict in an action at law tried by the court without a jury, "if for no other reason than there was no jury to be directed."<sup>66</sup> In other jurisdictions it has been held that, in actions at law tried by the court without a jury, a motion for a directed verdict,<sup>67</sup> or for a peremptory instruction in the nature of a directed verdict,<sup>68</sup> or for a declaration of law that defendant is entitled to judgment,<sup>69</sup> may be made on such trial, and such motion is governed by the same principles of law and attested by the same consideration as would be applicable to such a motion if a jury were present.<sup>70</sup> It has been held that an intelligible or proper request to a judge sitting without a jury would be a request for a ruling of law that on all the evidence plaintiff is not entitled to recover,<sup>71</sup> or a motion for a finding for movant,<sup>72</sup> or a motion for a judgment for movant,<sup>73</sup> or a motion for a finding and judgment.<sup>74</sup>

*In equity.* In at least one jurisdiction it has been

held that a motion for a directed verdict after the introduction of plaintiff's evidence is not permissible in an action in equity,<sup>75</sup> but it has also been held that the court may draw a verdict in an equitable action, although the evidence is conflicting, and enter judgment on its own finding.<sup>76</sup> Where it is permissible in an equitable action to move for a decree at the close of a litigant's evidence, it has been held that the making of such a motion is closely analogous to the situation in an action at law where there has been a motion to exclude the evidence and direct a verdict.<sup>77</sup>

*Form and requisites of motion.* A motion for a directed verdict based on matters of variance is defective as a variance prayer if the motion does not specifically point out wherein the variance relied on lies.<sup>78</sup>

*Stage of trial at which motion is made.* A motion for judgment inopportune made is properly denied.<sup>79</sup> The proper practice in jury-waived cases has been held to be to present a motion for judgment at the close of the evidence and before the case is submitted to the trial judge for decision.<sup>80</sup>

64. D.C.—Petty v. Rowe, Mun.App., 91 A.2d 331—Taylor v. United Broadcasting Co., Mun.App., 61 A.2d 480.

N.J.—Aitken v. John Hancock Mut. Life Ins. Co., 6 A.2d 133, 122 N.J. Law 436, reversed on other grounds 10 A.2d 745, 124 N.J. Law 58—River Park Homes Corp. v. Hammond, 1 A.2d 16, 120 N.J. Law 519, affirmed 5 A.2d 697, 122 N.J. Law 466.

Tenn.—McMurray v. Arcady Farmers Milling Co., 6 Tenn.App. 289, 64 C.J. p 1216 note 13.

Direction of verdict in actions tried by jury see supra §§ 249-265.

65. Mass.—Ashapa v. Reed, 182 N.E. 859, 280 Mass. 514.

66. Iowa.—Pressley v. Stone, 239 N.W. 567, 214 Iowa 449, 64 C.J. p 1216 note 15.

67. Mo.—Pearl v. Interstate Securities Co. App., 198 S.W.2d 857, reversed on other grounds 206 S.W.2d 975, 357 Mo. 160, 64 C.J. p 1216 note 16.

#### Motion for judgment

Where case was tried before magistrate without a jury, defendant's motion for directed verdict was, in effect, a motion for judgment in defendant's favor.—Gilland v. Peter's Dry Cleaning Co., 11 S.E.2d 857, 195 S.C. 417.

#### Motion for verdict

The granting by a court trying case without jury of defendant's motion for verdict at conclusion of plaintiff's evidence is legal equivalent of granting a motion for an instructed verdict

where trial was before court and jury.—Lorino v. Crawford Packing Co., Civ.App., 169 S.W.2d 235, affirmed 175 S.W.2d 410, 142 Tex. 51.

68. Mo.—Citizens' Bank of New Franklin v. Gaines, App., 278 S.W. 784.

69. Mo.—Bank of Pocahontas v. Miller, 223 S.W. 908.

70. Mo.—Central States Savings & Loan Ass'n v. U. S. Fidelity & Guaranty Co., 66 S.W.2d 550, 334 Mo. 580.

64 C.J. p 1216 note 19. Declarations of law, generally see infra § 597.

71. Mass.—Ashapa v. Reed, 182 N.E. 859, 280 Mass. 514.

#### Improper motions treated as request for ruling of law

(1) Motion for directed verdict.—Staples v. Collins, 73 N.E.2d 729, 321 Mass. 443.

(2) Motion that "upon all the evidence as a matter of law the demandant has failed to sustain" his case.—U. S. Fidelity & Guaranty Co. v. Sheehan, 32 N.E.2d 261, 308 Mass. 321.

72. D.C.—Taylor v. United Broadcasting Co., Mun.App., 61 A.2d 480.—Merriam v. Sugrue, Mun.App., 41 A.2d 166.

Mass.—Ashapa v. Reed, 182 N.E. 859, 280 Mass. 514.

Motion that court enter verdict for defendant was treated as a motion for a finding.—Menici v. Orton Crane & Shovel Co., 189 N.E. 839, 285 Mass. 499.

#### Peremptory finding

When properly and timely made, oral motions for peremptory findings have the same force and effect as written motions. It is not necessary that the motion specifically state reasons therefor and why there was a failure of proof on the part of the opposing party.—Ellis v. Auch, Ind. App., 118 N.E.2d 809.

73. N.J.—Disabled American Veterans of World War, Dept. of Rehabilitation, v. Malone, 26 A.2d 68, 128 N.J. Law 300.

74. Ill.—Terrell v. Tool Equipment Sales Co., 67 N.E.2d 298, 329 Ill. App. 183.

75. Iowa.—Pickler v. Lanphere, 227 N.W. 528, 209 Iowa 910.

76. Colo.—Continental Trust Co. v. Knight, 147 P. 1091, 27 Colo.App. 257.

77. W.Va.—Boyle v. Beltzhoover, 196 S.E. 503, 119 W.Va. 626.

78. Md.—National Real Estate Development Corporation v. La Vale Water Co., 173 A. 52, 167 Md. 191.

#### Motion held sufficient

Md.—Piper v. Wells, 2 A.2d 28, 175 Md. 326.

79. Vt.—Roberge v. Town of Troy, 163 A. 770, 105 Vt. 134.

#### Denial of motion held proper

Vt.—Levin v. Rouille, 2 A.2d 196, 110 Vt. 126—Reed v. Whitham, 181 A. 129, 107 Vt. 482.

80. U.S.—Columbian Nat. Life Ins.



## b. Operation and Effect

A motion for a directed verdict or other equivalent motions made at the close of the plaintiff's case raises a question of law as to the sufficiency of the evidence to sustain a verdict against the party making the motion.

A motion for a directed verdict, or other motions equivalent to a motion for a directed verdict, made at the close of plaintiff's case raises a question of law<sup>81</sup> as to the sufficiency of the evidence to sustain a verdict against the party making the motion,<sup>82</sup> or whether there is any evidence fairly tending to prove the allegations of plaintiff's declaration.<sup>83</sup> It is the duty of the court to base its decision on the status of the proofs and pleadings at the time the motion is made.<sup>84</sup> Where the motion is made at

the close of plaintiff's case, the court in considering the motion cannot consider the weight of the evidence or its credibility,<sup>85</sup> and may test the evidence only for legal sufficiency.<sup>86</sup> The court has the right to consider all the facts.<sup>87</sup> All of the adverse party's evidence,<sup>88</sup> or all testimony in support of his pleadings,<sup>89</sup> must be accepted as true, even though it is contradicted.<sup>90</sup> The challenged party's evidence is to be viewed in a light most favorable to him<sup>91</sup> together with all reasonable inferences to be drawn therefrom,<sup>92</sup> even though such evidence is contradicted in every particular by opposing evidence in the case.<sup>93</sup> The court, however, may weigh the evidence, determine the question of the preponderance thereof, and enter judgment ac-

Co. v. Griffith, C.C.A.Mo., 73 F.2d 244.

81. Ill.—Kovac v. Ducharme, 118 N.E.2d 629, 2 Ill.App.2d 80—Nofree v. Leonard, 63 N.E.2d 653, 327 Ill.App. 143.

Kan.—Kasper v. Miller, 156 P.2d 550, 159 Kan. 488.

N.J.—DeVinney v. Prudential Ins. Co. of America, 25 A.2d 254, 128 N.J.Law 270.

## Request for rulings of law

If at the conclusion of all the evidence in a case tried to the court without a jury, there are questions of law to be decided, they should be raised by request for rulings of law and not under the guise of a motion for a directed verdict.—Taylor v. United Broadcasting Co., D.C.Mun. App., 61 A.2d 480—Zis v. Herman, D.C.Mun.App., 39 A.2d 65.

**Plaintiff's motion for judgment on all evidence**, in a case tried without a jury, is the equivalent of a motion for a directed verdict and raises question of law whether findings support judgment and whether findings are supported by evidence.—Massachusetts Protective Ass'n v. U. S., C.C.A.Mass., 114 F.2d 304.

92. Ill.—Gubbins v. Glabman, 215 Ill.App. 43.

## Conclusions of law disregarded

On a motion for judgment on ground of plaintiff's failure to reply to an allegation in the answer, an allegation which is a conclusion of law can be disregarded in ruling on the motion.—Lindbloom Auto Parts Co. v. Liberty Foundries Co., 48 N.E.2d 430, 318 Ill.App. 645.

93. Ill.—Terrell v. Tool Equipment Sales Co., 67 N.E.2d 298, 329 Ill.App. 183.

84. Mich.—Stolt v. Shalagian, 40 N.W.2d 212, 326 Mich. 435.

85. D.C.—Taylor v. United Broadcasting Co., Mun.App., 61 A.2d 480—Carow v. Bishop, Mun.App., 50 A.2d 598—Merriam v. Sugrue, Mun.App., 41 A.2d 166.

N.J.—Tanelan v. Meghrigian, 99 A.2d 207, 27 N.J.Super. 177.

## Motion construed

In action, based on common law and statutory liability, defendants' motion, made to court sitting without jury at close of plaintiff's case, that defendant was "asking for a finding for defendants" did not clearly indicate that defendants intended trial court to weigh the evidence, rather than to pass solely on question of law.—Kovac v. Ducharme, 118 N.E.2d 629, 2 Ill.App.2d 80.

86. D.C.—Taylor v. United Broadcasting Co., Mun.App., 61 A.2d 480—Garrett v. Jamison, Mun.App., 50 A.2d 602—Carow v. Bishop, Mun.App., 50 A.2d 598—Merriam v. Sugrue, Mun.App., 41 A.2d 166.

87. Iowa.—John Beno Co. v. Perrin, 266 N.W. 539, 221 Iowa 716.

88. D.C.—Carow v. Bishop, Mun.App., 50 A.2d 598—Merriam v. Sugrue, Mun.App., 41 A.2d 166.

Kan.—Kasper v. Miller, 156 P.2d 550, 159 Kan. 488.

N.J.—DeVinney v. Prudential Ins. Co. of America, 25 A.2d 254, 128 N.J.Law 270.

W.Va.—Boyle v. Beltzhoover, 196 S.E. 503, 119 W.Va. 626.

89. Md.—Brocato v. Serio, 196 A. 125, 173 Md. 374.

N.J.—Tanelan v. Meghrigian, 99 A.2d 207, 27 N.J.Super. 177.

N.M.—Dunlap v. Albuquerque Nat. Bank, 247 P.2d 981, 66 N.M. 638.

Tex.—Burkhardt v. Harris, Civ.App., 200 S.W.2d 445.

90. N.M.—Dunlap v. Albuquerque Nat. Bank, 247 P.2d 981, 66 N.M. 638.

91. D.C.—Petty v. Rowe, Mun.App., 91 A.2d 331—Taylor v. United Broadcasting Co., Mun.App., 61 A.2d 480—Merriam v. Sugrue, Mun.App., 41 A.2d 166.

Ill.—Terrell v. Tool Equipment Sales Co., 67 N.E.2d 298, 329 Ill.App. 183.

Tex.—Burkhardt v. Harris, Civ.App., 200 S.W.2d 445.

## Rules that control

(1) A motion for a finding for defendant at close of plaintiff's evidence in a nonjury case is governed by the same rules as control a motion for directed verdict in a jury case.—Carow v. Bishop, D.C.Mun.App., 50 A.2d 598.

(2) In passing on motion for finding and judgment in defendant's favor at close of plaintiff's evidence in case tried by court without jury, trial judge is bound by rules, governing on motion to direct verdict for defendant.—Terrell v. Tool Equipment Sales Co., 67 N.E.2d 298, 329 Ill.App. 183.

92. D.C.—Taylor v. United Broadcasting Co., Mun.App., 61 A.2d 480—Carow v. Bishop, Mun.App., 50 A.2d 598—Merriam v. Sugrue, Mun.App., 41 A.2d 166.

Ill.—Terrell v. Tool Equipment Sales Co., 67 N.E.2d 298, 329 Ill.App. 183.

Iowa.—John Beno Co. v. Perrin, 266 N.W. 539, 221 Iowa 716.

Md.—Brocato v. Serio, 196 A. 125, 173 Md. 374.

N.J.—Tanelan v. Meghrigian, 99 A.2d 207, 27 N.J.Super. 177—DeVinney v. Prudential Ins. Co. of America, 25 A.2d 254, 128 N.J.Law 270.

W.Va.—Boyle v. Beltzhoover, 196 S.E. 503, 119 W.Va. 626.

## Proof by direct testimony unnecessary

In a trial to court without a jury, plaintiff on defendant's motion for judgment at the close of plaintiff's evidence need not prove essential material facts by direct testimony but they may be inferentially established.—Burkhardt v. Harris, Tex.Civ.App., 200 S.W.2d 445.

93. Md.—Brocato v. Serio, 196 A. 125, 173 Md. 374.

## Contradictory evidence disregarded

Ill.—Terrell v. Tool Equipment Sales Co., 67 N.E.2d 298, 329 Ill.App. 183.

cordingly, if defendant plainly informs the court that such is his desire.<sup>94</sup> When both parties move for judgment at the conclusion of the trial, they thereby concede that there are no disputed facts in the case.<sup>95</sup> Where a jury has been waived and all the evidence submitted, it is the duty of the court to determine the issues of law and fact, and the submission of a motion for judgment on issues of law and fact do not in any way change or affect the duty of the court in this respect.<sup>96</sup>

**Right to present evidence.** Where defendant at the conclusion of plaintiff's evidence moves for a finding in his favor and does not, in the motion, reserve the right, in the event the motion is overruled, to introduce his evidence, he has been held not to be precluded from presenting his evidence if he timely requests the right to do so after his motion is overruled.<sup>97</sup>

### c. When Granted or Refused

In order to justify a motion for a directed verdict, or similar motion, the evidence must be free from doubt.

In order to justify a directed verdict in a trial by the court, the facts must not only be undisputed, but the inferences from those facts must be so clear that fair-minded men should not differ about them.<sup>98</sup> A verdict should be directed where the evi-

dence is free from doubt and suspicion and only one verdict can be rendered.<sup>99</sup> If either one of two inferences may fairly and reasonably be deduced from admitted or uncontradicted facts, there remains in the case a question of fact to be determined by the trial judge,<sup>1</sup> and where the evidence raises a fact issue between the parties a direction of the verdict cannot be granted.<sup>2</sup> The granting of the motion is improper,<sup>3</sup> and the motion is properly refused,<sup>4</sup> if a directed verdict would have been improper had the case been tried by a jury. It has been held that the giving of a peremptory instruction for defendant is error where the evidence is sufficient to make out a prima facie case for plaintiff;<sup>5</sup> and that a determination of the case on all the evidence, which is tantamount to a direction of a verdict for defendant, is erroneous, where the evidence and the reasonable inferences are legally sufficient to substantiate plaintiff's claim.<sup>6</sup> A motion for judgment is properly denied where a finding for the adverse party is warranted.<sup>7</sup> Where there is no evidence on which a judgment could be found, a motion for judgment cannot be sustained.<sup>8</sup> Whether a court has erred in denying or granting a motion for judgment made at the close of the evidence is to be determined by ascertaining whether there is substantial evidence fairly tending to establish every element of the opposing party's cause.<sup>9</sup>

94. Ill.—Gubbins v. Glabman, 215 Ill. App. 43.

95. U.S.—La Grotta v. U. S., C.C.A. Neb., 77 F.2d 673, 103 A.L.R. 527, certiorari denied Quigley v. U. S., 56 S.Ct. 152, 296 U.S. 629, 80 L.Ed. 447.

96. Ohio.—Bracale v. Monumental Life Ins. Co., App., 37 N.E.2d 437.

97. Ind.—Smith v. Markun, App., 119 N.E.2d 899.

98. N.J.—Elowitz v. Winarsky, 167 A. 679, 11 N.J.Misc. 639.

99. Iowa.—Swift v. Petersen, 37 N. W.2d 258, 240 Iowa 715.  
Mass.—Thall v. Berkowitz, 163 N.E. 876, 265 Mass. 335.  
Mo.—Citizens' Bank of New Franklin v. Gaines, App., 278 S.W. 784.

### Adjudication of no evidence

In a trial without a jury, "the direction of a verdict for defendant," while technically anomalous, is in effect an adjudication that there is no evidence to support plaintiff's claim.—Miller v. Balfour, 49 A.2d 303, 134 N.J.Law 546.

### Stipulated facts

Where counsel for both parties agreed to a stipulation of fact and further agreed for the court to determine the issue as a matter of law based only on the pleadings and the

stipulation and to direct a verdict for the party entitled thereto, it was held that, under the facts as stipulated, it was not error to direct a verdict in favor of plaintiff.—Kilby v. Sawtell, 46 S.E.2d 117, 203 Ga. 256.

Where plaintiff did not make out his case, due to lack of proof, court was required to grant a motion for a directed verdict.

Ill.—Ashmore v. Wolf, 64 N.E.2d 215, 327 Ill.App. 413.

Mich.—In re Miller's Estate, 2 N.W. 2d 888, 300 Mich. 703—Michigan Aero Club v. Shelley, 278 N.W. 121, 283 Mich. 401.

1. Cal.—Mah See v. North American Acc. Ins. Co., 213 P. 42, 190 Cal. 421, 26 A.L.R. 123—Chichester v. Mason, 111 P.2d 362, 43 Cal.App.2d 577.

Where fact that conflicting inferences may be drawn from evidence does not establish that there is nothing for jury, or trial court sitting without jury, but mere guesses and conjectures.—West Coast Life Ins. Co. v. Crawford, 138 P.2d 384, 58 Cal.App.2d 771.

2. N.J.—Elowitz v. Winarsky, 167 A. 679, 11 N.J.Misc. 639.

3. Mo.—Crossett v. Ferrill, 108 S.W. 52, 209 Mo. 704.

64 C.J. p 1216 note 23.

4. N.J.—DeVinney v. Prudential Ins. Co. of America, 25 A.2d 254, 128 N. J.Law 270.

5. Mo.—Crossett v. Ferrill, 108 S.W. 52, 209 Mo. 704.

6. N.J.—Higgins v. Goerke Kirch Co., 106 A. 394, 92 N.J.Law 424.

7. Mass.—List Finance Corp. v. Sherry, 11 N.E.2d 442, 298 Mass. 533.

Vt.—Brooks v. Holmes, 35 A.2d 374, 113 Vt. 456.

8. U.S.—U. S. v. Bertelsen & Petersen Engineering Co., C.C.A.Mass., 95 F.2d 867, reheard 98 F.2d 132, affirmed 59 S.Ct. 541, 306 U.S. 276, 83 L.Ed. 647.

9. U.S.—U. S. v. Jefferson Electric Mfg. Co., Ct.Cl., 54 S.Ct. 443, 291 U.S. 386, 78 L.Ed. 859—American Chain Co. v. Eaton, Ct.Cl., 54 S.Ct. 443, 291 U.S. 386, 78 L.Ed. 859—Routzahn v. Willard Storage Battery Co., Ct.Cl., 54 S.Ct. 443, 291 U.S. 386, 78 L.Ed. 859.

### Denial held proper

U.S.—U. S. v. Jefferson Electric Mfg. Co., Ct.Cl., 54 S.Ct. 443, 291 U.S. 386, 78 L.Ed. 859—American Chain Co. v. Eaton, Ct.Cl., 54 S.Ct. 443, 291 U.S. 386, 78 L.Ed. 859—Routzahn v. Willard Storage Battery Co., Ct.Cl., 54 S.Ct. 443, 291 U.S. 386, 78 L.Ed. 859.

If there is any evidence to support the challenged party's case the movant must be put to his proof,<sup>10</sup> and it is error, under such circumstances, to grant the motion.<sup>11</sup> A motion made at the conclusion of the trial by defendant can be granted only because of utter failure of proof on behalf of plaintiff on the issue involved.<sup>12</sup> A motion for a directed verdict made after the close of all the evidence based on the uncontradicted evidence of plaintiff alone is erroneous for the reason that it would eliminate from the consideration of the court, sitting as a jury, the evidence which has already been adduced by defendant, and such motion is properly refused.<sup>13</sup>

**Reservation of decision.** It has been held that a statute authorizing a trial court to reserve decision on a motion for a directed verdict and to submit the case to the jury does not apply to a case tried by the court without a jury.<sup>14</sup>

### § 597. Declarations of Law

The rules governing declarations of law in cases

tried by the court without a jury are considered infra §§ 598-601.

Examine Pocket Parts for later cases.

### § 598. — Necessity, Nature, and Purpose

In a proper case, either party has the right to have the judge declare the theory of the law by which he is governed in reaching his conclusions.

In equity cases, it is not proper practice for courts to give instructions on the law, and a refusal to give requested instructions is not error.<sup>15</sup> In actions at law tried to the court, however, either party has the right to have the judge declare the theory of the law by which he is governed in reaching his conclusions.<sup>16</sup> The fact that the verdict is to be rendered by the court sitting as a jury, it has been said, does not impair the right of either party to a correct statement of the principles by which the decision of the issues of fact should be controlled;<sup>17</sup> these principles are enunciated by so-called declarations of law<sup>18</sup> which are analogous to instructions to the jury,<sup>19</sup> and binding on the court sitting as a

10. D.C.—Petty v. Rowe, Mun.App., 91 A.2d 331.

11. N.J.—Miller v. Balfour, 49 A.2d 303, 134 N.J.Law 546.  
Tex.—Burkhardt v. Harris, Civ.App., 200 S.W.2d 445.

12. N.J.—DeVinney v. Prudential Ins. Co. of America, 25 A.2d 254, 128 N.J.Law 270.

13. Md.—Brocato v. Serio, 196 A. 125, 173 Md. 374.

14. Mich.—Carolin Mfg. Corp. v. George S. May, Inc., 20 N.W.2d 283, 312 Mich. 487.

15. Mass.—Di Massa v. Great Am. Novelty Co., 49 N.E.2d 120, 314 Mass. 1—Klefbeck v. Dous, 19 N.E.2d 308, 302 Mass. 383—Restighini v. Hanagan, 18 N.E.2d 1007, 302 Mass. 151—Graustein v. Dolan, 185 N.E. 489, 282 Mass. 579.

Mo.—New York Life Ins. Co. v. Feinberg, 229 S.W.2d 531—Mays v. Jackson, 145 S.W.2d 392, 346 Mo. 1224—De Mayo v. Cantley, App., 141 S.W.2d 248—Coon v. Stanley, 94 S.W.2d 96, 230 Mo.App. 524—Moller-Vandenboom Lumber Co. v. Boudreau, App., 65 S.W.2d 141.  
64 C.J. p 1216 note 32.

16. D.C.—Eggleton v. Vaughn, Mun. App., 45 A.2d 362—Zis v. Herman, Mun.App., 39 A.2d 65.

Mass.—Biggs v. Densmore, 80 N.E.2d 38, 323 Mass. 106—Roney's Case, 56 N.E.2d 859, 316 Mass. 732—Liberal v. Town of Framingham, 53 N.E.2d 561, 315 Mass. 538—Rummel v. Peters, 61 N.E.2d 57, 314 Mass. 504—Perry v. Hanover, 50 N.E.2d 41,

314 Mass. 167—Campanale v. General Ice Cream Corp., 49 N.E.2d 1018, 314 Mass. 387—Memishian v. Phipps, 42 N.E.2d 277, 311 Mass. 521—Sredu v. Kessel, 38 N.E.2d 932, 310 Mass. 588—Relezarian's Case, 31 N.E.2d 4, 307 Mass. 557—Home Sav. Bank v. Savransky, 30 N.E.2d 881, 307 Mass. 601—Blanchi v. Denholm & McKay Co., 19 N.E.2d 697, 302 Mass. 469, 121 A.L.R. 460—Cameron v. Buckley, 13 N.E.2d 37, 299 Mass. 432—Adamaitis v. Metropolitan Life Ins. Co., 3 N.E.2d 833, 295 Mass. 215—Povey v. Colonial Beacon Oil Co., 200 N.E. 891, 294 Mass. 86.

N.H.—Black v. Fiandaca, 93 A.2d 663, 98 N.H. 33.

R.I.—Muscente v. R. S. Brine Transp. Co., 196 A. 259, 59 R.I. 482.

64 C.J. p 1217 note 33.

#### Right to trial by jury

Under some statutes the presentation of propositions of law is proper only where the parties to a cause are entitled to trial by jury, and by agreement have submitted it to the court for trial without a jury.—Lipman v. Goebel, 192 N.E. 203, 357 Ill. 315, certiorari denied 55 S.Ct. 508, 294 U.S. 712, 79 L.Ed. 1246—64 C.J. p 1217 note 33 [a].

#### Requests relating to demurrer

The trial judge was not required to give reasons for his decision in passing on demurrer to the declaration, and hence requests for rulings, considered as relating to the demurrer, had no legal standing so as to be reviewable on report of fact findings.—Everett v. Town of Canton, 21 N.E.2d 269, 303 Mass. 166.

#### Rulings held not to import special findings of fact

Rulings which were statements on general principles applicable to particular case did not import special findings of fact, contrary to statement in report that the court made no finding or memorandum of facts found.—Memishian v. Phipps, 42 N.E.2d 277, 311 Mass. 521.

#### Single disconnected fact

A trial judge cannot be compelled to give a ruling on the effect of a single disconnected fact.

Me.—People's Sav. Bank v. Chesley, 26 A.2d 632, 138 Me. 353.  
Mass.—H. C. Dusenberry, Inc. v. Import Drug Co., 149 N.E. 118, 253 Mass. 368.

#### In Missouri

(1) Under the new code, declarations of law in form of instructions are no longer necessary in nonjury trials and cannot be made the basis of allegations of error on appeal.—Landers v. Thompson, 205 S.W.2d 544, 358 Mo. 163.

(2) In earlier cases the rule as stated in the text was applied.—Swanson, Inc. v. Central Surety & Ins. Corp., 121 S.W.2d 783, 343 Mo. 350—Painter v. Prudential Ins. Co. of America, 71 S.W.2d 483, 228 Mo. App. 576—64 C.J. p 1217 note 33.

17. Md.—Baltimore & O. R. Co. v. Jones & Laughlin Steel Co., 114 A. 730, 138 Md. 604.

Mo.—Cunningham v. Snow, 82 Mo. 587.

18. Mo.—Butler County v. Boatmen's Bank, 44 S.W. 1047, 143 Mo. 13.

19. Mo.—Butler County v. Boatmen's Bank, supra.

jury,<sup>20</sup> and it must follow them in making a decision.<sup>21</sup> Declarations of law are, however, unnecessary where the cause is disposed of without a trial,<sup>22</sup> where there is no dispute about the facts,<sup>23</sup> or where the ruling of the court itself showed the principles of law which the court applied to the facts.<sup>24</sup>

Declarations of law should generally conform in form and substance to the rules established for instructions given to juries,<sup>25</sup> and they should be framed in like manner as on trial before a jury.<sup>26</sup> It has been held, however, that the same nicety in declarations of law is not required as in instructions to the jury,<sup>27</sup> and that if the declarations of law as applied to the evidence show a correct theory, it is immaterial whether they are, in some respects, technically incorrect.<sup>28</sup> The trial court hearing the case without a jury is not required to instruct itself as it might the jury on the effect of the evidence in the case,<sup>29</sup> and it does not pass on abstract propositions which it may or may not consider con-

trolling merely for the purpose of instructing itself in law.<sup>30</sup>

**Purpose.** The purpose of declarations of law is to show, for the information of the appellate court, the theory of law on which the trial court disposed of the case.<sup>31</sup> In no other way can it be ascertained on what theory of law the court determined the cause.<sup>32</sup>

## § 599. — Form, Requisites, and Sufficiency in General

- a. In general
- b. Assumption of facts
- c. Limiting to propositions of law

### a. In General

Declarations of law must be proper, and they must state correct principles of law.

Declarations of law should not be too general,<sup>33</sup> confusing or misleading<sup>34</sup>; nor should any such

20. Mass.—Biggs v. Densmore, 80 N.E.2d 38, 323 Mass. 106.—Sreda v. Kessel, 38 N.E.2d 932, 310 Mass. 588.—Home Sav. Bank v. Savransky, 30 N.E.2d 881, 307 Mass. 601.—Blanchi v. Denholm & McKay Co., 19 N.E.2d 697, 302 Mass. 469, 121 A.L.R. 460.—Adamaitis v. Metropolitan Life Ins. Co., 3 N.E.2d 833, 295 Mass. 215.

64 C.J. p 1217 note 37.

21. Mass.—Biggs v. Densmore, 80 N.E.2d 38, 323 Mass. 106.—Sreda v. Kessel, 38 N.E.2d 932, 310 Mass. 588.—Blanchi v. Denholm & McKay Co., 19 N.E.2d 697, 302 Mass. 469, 121 A.L.R. 460.—Adamaitis v. Metropolitan Life Ins. Co., 3 N.E.2d 833, 295 Mass. 215.—Banks v. Farr, 95 N.E. 841, 209 Mass. 339.

22. Ill.—Rhodes v. Rhodes, 115 Ill. App. 335.

23. Mo.—Price v. Gordon, 147 S.W. 2d 609, 347 Mo. 354.

24. Ill.—Boyle v. Boyle, 247 Ill.App. 554.—Sleph v. Grossman, 192 Ill. App. 67.

25. Md.—Hambleton & Co. v. Union Nat. Bank of Pittsburgh, 157 A. 404, 161 Md. 318.

64 C.J. p 1218 note 43.

26. Ill.—Crerar v. Daniels, 70 N.E. 569, 209 Ill. 296.

64 C.J. p 1218 note 44.

27. Mo.—Buck v. McMinn, 300 S.W. 497.

64 C.J. p 1218 note 45.

28. Mo.—Falvey v. Hicks, 286 S.W. 385, 315 Mo. 442.

64 C.J. p 1218 note 46.

29. N.H.—Boiduc v. Somersworth Shoe Co., 89 A.2d 538, 97 N.H. 360.

30. N.H.—Black v. Flandaca, 93 A. 2d 663, 98 N.H. 33.

31. Ill.—Tarjan, for Use of Lefkow, v. National Surety Co., 268 Ill.App. 232.

Mass.—Hogan v. Coleman, 96 N.E.2d 864, 326 Mass. 770.—Biggs v. Densmore, 80 N.E.2d 38, 323 Mass. 106.—Roney's Case, 56 N.E.2d 859, 316 Mass. 732.—Brodeur v. Seymour, 53 N.E.2d 666, 315 Mass. 527.—Cournoyer v. City of Holyoke, 51 N.E.2d 248, 314 Mass. 604.—Campanale v. General Ice Cream Corp., 49 N.E.2d 1018, 314 Mass. 387.—Memishian v. Phipps, 42 N.E.2d 277, 311 Mass. 521.—Sreda v. Kessel, 38 N.E.2d 932, 310 Mass. 588.—Home Sav. Bank v. Savransky, 30 N.E.2d 881, 307 Mass. 601.—Blanchi v. Denholm & McKay Co., 19 N.E.2d 697, 302 Mass. 469, 121 A.L.R. 460.—Cameron v. Buckley, 13 N.E.2d 37, 299 Mass. 432.—Adamaitis v. Metropolitan Life Ins. Co., 3 N.E.2d 833, 295 Mass. 215.—Povey v. Colonial Beacon Oil Co., 200 N.E. 891, 294 Mass. 86.—Graustein v. Dolan, 185 N.E. 489, 282 Mass. 579.

Mo.—Corpus Juris quoted in State v. Sargent, App., 256 S.W.2d 265, 272.

R.I.—Muscente v. R. S. Brine Transp. Co., 196 A. 259, 59 R.I. 482.

64 C.J. p 1217 note 41.

### Similar statements of purpose

(1) In action tried by court without jury, the purpose of ruling on question of law whether evidence warranted a finding, or special finding making such ruling immaterial is to show whether general finding is vitiated by error of law.—Perry v. Hanover, 50 N.E.2d 41, 314 Mass. 187.

(2) In action for injuries, plaintiff

properly requested a ruling as to whether evidence warranted a finding in his favor since, without such ruling, neither plaintiff nor appellate court could discover whether general finding for defendant was based on failure to find facts essential to recovery or an unexpressed ruling of law that evidence did not warrant a finding for plaintiff.—Strong v. Haverhill Elec. Co., 13 N.E.2d 39, 299 Mass. 455.

32. Mo.—Cunningham v. Snow, 82 Mo. 587.—Corpus Juris quoted in State v. Sargent, App., 256 S.W.2d 265, 272.

33. Mass.—Norton v. Boston Elevated Ry. Co., 57 N.E.2d 534, 317 Mass. 145.—Merchants' Co-op. Bank v. Pasqualucci, 194 N.E. 85, 289 Mass. 339.

64 C.J. p 1218 note 47.

34. Md.—Hambleton & Co. v. Union Nat. Bank of Pittsburgh, 157 A. 404, 161 Md. 318.

Mass.—Czerwinka v. Town of Saugus, 55 N.E.2d 1, 316 Mass. 152.—List Finance Corp. v. Sherry, 11 N.E. 2d 442, 298 Mass. 533.—McKenna v. Andreassi, 197 N.E. 879, 292 Mass. 213.

### English language

Propositions of law submitted by counsel in a case tried without a jury cannot be considered when not in the English language.—Tarjan, for Use of Lefkow, v. National Surety Co., 268 Ill.App. 232.

### "And/or"

(1) Propositions of law submitted by counsel to the court in a case tried without a jury should not contain the symbol "and/or."—Tarjan,

declarations of law be either inaccurate,<sup>35</sup> or meaningless.<sup>36</sup> They must state correct principles of law,<sup>37</sup> applicable and limited to the issues made by the pleadings and evidence, as discussed infra § 600, and principles of law only should be stated, as considered infra subdivision c of this section.

### b. Assumption of Facts

Declarations of law which assume the existence of facts in dispute are erroneous, and a request for such declarations is properly refused.

Declarations of law which assume the existence of facts in dispute are erroneous,<sup>38</sup> although the existence of the facts is contradicted by slight evidence only,<sup>39</sup> and a request for such declarations is properly refused.<sup>40</sup> Declarations of law are likewise erroneous where they assume the existence of facts which there is no evidence to support,<sup>41</sup> or which the evidence shows do not exist.<sup>42</sup> It has been held that there is no error in refusing a request for declarations of law based on assumed facts which the judge was not required to find even on uncontradicted evidence.<sup>43</sup>

*Hypothesizing evidence.* As in the case of is-

for Use of Lefkow, v. National Surety Co., supra.

(2) A declaration of law barring recovery of "total and permanent disability" benefits of group life policy if insured could do certain farm work "and/or" could perform other work unrelated to insured's life work as common laborer was properly refused, in view of confusing use of "and/or."—Fogues v. Metropolitan Life Ins. Co., Mo.App., 107 S.W.2d 144.

### Held objectionable

In action on accident policy insuring against death by "accidental means," a declaration of law that "accidental means" meant "any event happening which under the circumstances is unintended, involuntary or unexpected to the person to whom it happened; the happening of an event without the concurrence of the will or design of the person by whose agency it was caused," was objectionable for failure to distinguish between "means" and "result."—Pope v. Business Men's Assur. Co. of America, 131 S.W.2d 887, 235 Mo. App. 263.

35. Mass.—Perry v. Hanover, 50 N. E.2d 41, 314 Mass. 167.

36. Mo.—New Madrid County v. Hunter, App., 181 S.W. 592.  
64 C.J. p 1218 note 49.

37. Mass.—Lawrence v. O'Neill, 58 N.E.2d 140, 317 Mass. 393.—Dellamano v. Francis, 33 N.E.2d 327, 308 Mass. 502.—List Finance Corp.

v. Sherry, 11 N.E.2d 442, 298 Mass. 533.

Mo.—Del Commune v. Bussen, App., 179 S.W.2d 744.—Fisher v. Lape, App., 176 S.W.2d 871.—Bixler v. Special Road Dist. No. 1, Newton County, 156 S.W.2d 950, 236 Mo.App. 336.

64 C.J. p 1218 note 50.

38. Ill.—In re Swift's Estate, 267 Ill. App. 224.

Mass.—Loftus v. Lauf, 108 N.E.2d 633, 329 Mass. 374.—Bartley v. Phillips, 57 N.E.2d 26, 317 Mass. 35.—Liberatore v. Town of Framingham, 53 N.E.2d 561, 315 Mass. 636.—Basky v. Hansen, 40 N.E.2d 12, 311 Mass. 14.—Gibbons v. Denoncourt, 9 N.E.2d 633, 297 Mass. 448.—Freeman v. Crowell & Thurlow, 6 N.E.2d 835, 296 Mass. 514.—Karlsberg v. Frank, 184 N.E. 387, 282 Mass. 94.

Mo.—Conley v. Crown Coach Co., 159 S.W.2d 281, 348 Mo. 1243.  
64 C.J. p 1219 note 69.

39. Mass.—Evans v. Middlesex County, 95 N.E. 897, 209 Mass. 474.

40. Md.—Rowan v. State, to Use of Grove, 191 A. 244, 172 Md. 190.  
Mass.—Bartley v. Phillips, 57 N.E.2d 26, 317 Mass. 35.—Basky v. Hansen, 40 N.E.2d 12, 311 Mass. 14.—Gibbons v. Denoncourt, 9 N.E.2d 633, 297 Mass. 448.—Freeman v. Crowell & Thurlow, 6 N.E.2d 835, 296 Mass. 514.

Mo.—Conley v. Crown Coach Co., 159 S.W.2d 281, 348 Mo. 1243.  
64 C.J. p 1220 note 71.

issues of fact tried by a jury, as discussed supra § 382, where the evidence is conflicting, the declarations of law must be predicated on hypothetical statements of the contested facts,<sup>44</sup> and a declaration of law that plaintiff is entitled to recover is erroneous, where the facts are in dispute.<sup>45</sup>

### c. Limiting to Propositions of Law

Declarations of law should state, and are limited to, propositions of law.

Declarations of law should state propositions of law only;<sup>46</sup> and declarations of law which are simply requests to make specific findings of fact involved in the consideration of the case,<sup>47</sup> or which present mixed questions of law and fact,<sup>48</sup> should be refused.

## § 600. — Applicability to Pleadings and Evidence

Declarations of law should not be given where they are not applicable to the issues made by the pleadings, or to the facts in evidence.

Declarations of law must be confined to the issues presented by the pleadings and evidence, and

41. Md.—Turner v. Egan, 81 A. 877, 116 Md. 35.

64 C.J. p 1220 note 72.

42. Mo.—Worley v. Hicks, 61 S.W. 818, 161 Mo. 340.

43. Mass.—Stein v. Almeder, 148 N.E. 441, 253 Mass. 200.

44. Mass.—Liberatore v. Town of Framingham, 53 N.E.2d 561, 315 Mass. 636.

64 C.J. p 1220 note 76.

45. Mo.—Patterson v. Kansas City, Ft. S. & M. R. Co., 47 Mo.App. 570.

46. Ill.—Cramer v. Daniels, 70 N.E. 569, 209 Ill. 296.

64 C.J. p 1220 note 78.

47. Mass.—Daniel v. Jardin, 70 N.E. 2d 801, 320 Mass. 764.—Hurley v. Ormsten, 42 N.E.2d 273, 311 Mass. 477.—Conley v. Morash, 30 N.E.2d 224, 307 Mass. 430.—Murphy v. Kelley, 19 N.E.2d 538, 303 Mass. 390.—Cameron v. Buckley, 13 N.E.2d 37, 299 Mass. 432.—Dolham v. Peterson, 9 N.E.2d 406, 297 Mass. 479.—Freeman v. Crowell & Thurlow, 6 N.E.2d 835, 296 Mass. 514.—Kraetz v. Lipofsky, 200 N.E. 865, 294 Mass. 80.—Conroy v. Allston Storage Warehouse, 197 N.E. 454, 292 Mass. 133.

Mo.—Brown v. Wilson, App., 131 S.W.2d 848, quashed on other grounds State ex rel. Brown v. Hughes, 137 S.W.2d 544, 345 Mo. 958.  
64 C.J. p 1220 note 79.

48. Ill.—Illinois Cent. R. Co. v. Seitz, 73 N.E. 585, 214 Ill. 350, 105 Am. S.R. 108.

64 C.J. p 1220 note 80.

should not be given by the court on its own motion or on request of the parties where they are not applicable to the issues made by the pleadings,<sup>49</sup> or to the facts in evidence,<sup>50</sup> although, as considered infra § 601, if declarations of law state correct principles and there is substantial evidence on which to base them, it is not only proper to give them, but the refusal thereof is error, unless they are covered by other declarations given.

While it has been held that no finding of facts by the court prior to the verdict can affect the right of either party to have the court rule on the legal principles involved,<sup>51</sup> generally it has been held that declarations of law which have been held inapplicable to, inconsistent with, or contradictory of, facts found by the court are immaterial and improper and should not be given,<sup>52</sup> although announce-

49. Md.—Rowan v. State, to Use of Grove, 191 A. 244, 172 Md. 190.  
Mass.—Loftus v. Lauf, 108 N.E.2d 533, 329 Mass. 374—Rathgeber v. Kelley, 13 N.E.2d 1, 299 Mass. 444.  
Mo.—Sager v. State Highway Commission, App., 125 S.W.2d 89.  
64 C.J. p 1218 note 60.

50. Ill.—In re Swift's Estate, 267 Ill.App. 224.

Mass.—Greenberg v. Shoppers' Garage, 105 N.E.2d 839, 329 Mass. 31—Chem-Lac Products v. Gerome, 99 N.E.2d 61, 327 Mass. 394—Annapole v. Carver, 98 N.E.2d 613, 327 Mass. 344—Casey v. Gallagher, 96 N.E.2d 709, 326 Mass. 746—Wasserman v. Caledonian-American Ins. Co., 95 N.E.2d 547, 326 Mass. 518—Madden v. Berman, 88 N.E.2d 630, 324 Mass. 699—Durgin v. Allen, 85 N.E.2d 208, 324 Mass. 157—Godfrey v. Caswell, 73 N.E.2d 402, 321 Mass. 161—Hooper v. Kennedy, 70 N.E.2d 629, 320 Mass. 576—Norton v. Boston Elevated Ry. Co., 57 N.E.2d 534, 317 Mass. 145—Bartley v. Phillips, 57 N.E.2d 26, 317 Mass. 85—John T. D. Blackburn, Inc. v. Livermore, 56 N.E.2d 593, 317 Mass. 20—Niagara Fire Ins. Co. v. Lowell Trucking Corp., 56 N.E.2d 28, 316 Mass. 652—Sikora v. Hogan, 51 N.E.2d 970, 315 Mass. 66—Haverhill Hardware & Plumbing Supply Co. v. Fellsay Motor Mart, 51 N.E.2d 963, 315 Mass. 81—Counover v. City of Holyoke, 51 N.E.2d 248, 314 Mass. 604—Perry v. Hanover, 50 N.E.2d 41, 314 Mass. 167—Deitrick v. Siegel, 48 N.E.2d 698, 313 Mass. 612—Knight, Allen & Clark v. Farren, 47 N.E.2d 949, 313 Mass. 405—Hairenk Ass'n v. City of Boston, 47 N.E.2d 9, 313 Mass. 274—Modern Finance Co. v. Martin, 42 N.E.2d 533, 311 Mass. 509—Memishian v. Phillips, 42 N.E.2d 277, 311 Mass. 521—Hurley v. Ormstein, 42 N.E.2d 273, 311 Mass. 477—Bern v. Boston Consol. Gas Co., 39 N.E.2d 578, 310 Mass. 651—In re Harris, 34 N.E.2d 504, 309 Mass. 180, 135 A.L.R. 969—Dellamano v. Francis, 83 N.E.2d 327, 308 Mass. 502—American Garment Co. v. Taylor, 33 N.E.2d 296, 308 Mass. 527, 135 A.L.R. 453—Matloff v. City of Chelsea, 31 N.E.2d 518, 308 Mass. 134—Spence, Bryson, Inc. v. China Products Co., 30 N.E.2d 885, 308 Mass. 51—Home Sav. Bank v. Sav-

ransky, 30 N.E.2d 881, 307 Mass. 601—Milmore v. Landau, 30 N.E.2d 834, 307 Mass. 589—Norfolk County Trust Co. v. Green, 24 N.E.2d 12, 304 Mass. 406—Parke v. Morin, 22 N.E.2d 603, 304 Mass. 35—Crafts v. McCobb, 21 N.E.2d 226, 303 Mass. 172—Blanchi v. Denholm & McKay Co., 19 N.E.2d 697, 302 Mass. 469, 121 A.L.R. 460—O'Neill v. McDonald, 16 N.E.2d 866, 301 Mass. 256—Zani v. Garrison Hall, 14 N.E.2d 118, 300 Mass. 128—Cameron v. Buckley, 13 N.E.2d 327, 299 Mass. 432—Brand v. Suburban Land Co., 12 N.E.2d 737, 299 Mass. 336—Gibbons v. Denoncourt, 9 N.E.2d 633, 297 Mass. 448—DeDonati v. Boston Elevated Ry. Co., 9 N.E.2d 381, 297 Mass. 523—Freeman v. Crowell & Thurlow, 6 N.E.2d 835, 296 Mass. 514—Halnan v. New England Tel. & Tel. Co., 5 N.E.2d 209, 296 Mass. 219—Herman v. Sadolf, 2 N.E.2d 201, 294 Mass. 358—Everett v. Inhabitants of Town of Canton, 199 N.E. 482, 293 Mass. 182—McKenna v. Andreassis, 197 N.E. 879, 292 Mass. 213—Pemberton Square Operating Co. v. Lydon, 197 N.E. 514, 292 Mass. 63—Wrobel v. General Accident, Fire & Life Assur. Corporation, 192 N.E. 498, 288 Mass. 206—First Nat. Bank v. Sheridan, 189 N.E. 71, 285 Mass. 338—Caruso v. Shalit, 184 N.E. 460, 282 Mass. 196.

Mo.—Del Commune v. Bussen, App., 179 S.W.2d 744—Fisher v. Lape, App., 176 S.W.2d 871—Jones v. Prudential Ins. Co. of America, App., 158 S.W.2d 209—Sager v. State Highway Commission, App., 125 S.W.2d 89.

64 C.J. p 1218 note 61.

51. Md.—Alexander v. Capital Paint Co., 111 A. 140, 136 Md. 658.

52. D.C.—Simpkins v. Brooks, Mun. App., 49 A.2d 549.

Ill.—In re Swift's Estate, 267 Ill. App. 224.

Me.—People's Sav. Bank v. Chesley, 26 A.2d 632, 138 Me. 353.

Mass.—Loftus v. Lauf, 108 N.E.2d 533, 329 Mass. 374—Greenberg v. Shoppers' Garage, 105 N.E.2d 839, 329 Mass. 31—Bryer v. P. S. Thorsen Co., 100 N.E.2d 684, 327 Mass. 684—Chem-Lac Products v. Gerome, 99 N.E.2d 61, 327 Mass. 394—Annapole v. Carver, 98 N.E.

2d 613, 327 Mass. 344—Wasserman v. Caledonian-American Ins. Co., 95 N.E.2d 547, 326 Mass. 518—Connell v. Maynard, 76 N.E.2d 642, 322 Mass. 245—Daniel v. Jardin, 70 N.E.2d 801, 320 Mass. 764—Arthur A. Johnson Corp. v. Commonwealth, 60 N.E.2d 364, 318 Mass. 88—Norton v. Boston Elevated Ry. Co., 57 N.E.2d 534, 317 Mass. 145—Bartley v. Phillips, 57 N.E.2d 26, 317 Mass. 85—Hoffman v. City of Chelsea, 52 N.E.2d 7, 315 Mass. 54—Haverhill Hardware & Plumbing Supply Co. v. Fellsay Motor Mart, 51 N.E.2d 963, 315 Mass. 81—Van Valkenburg v. Slowick, 51 N.E.2d 434, 314 Mass. 763—Counover v. City of Holyoke, 51 N.E.2d 248, 314 Mass. 604—Perry v. Hanover, 50 N.E.2d 41, 314 Mass. 167—Deitrick v. Siegel, 48 N.E.2d 698, 313 Mass. 612—Knight, Allen & Clark v. Farren, 47 N.E.2d 949, 313 Mass. 405—Hairenk Ass'n v. City of Boston, 47 N.E.2d 9, 313 Mass. 274—Memishian v. Phillips, 42 N.E.2d 277, 311 Mass. 521—Kelley v. American Sugar Refining Co., 42 N.E.2d 592, 311 Mass. 617—Bartro v. Watertown Square Theatre, 34 N.E.2d 696, 309 Mass. 223—Dellamano v. Francis, 83 N.E.2d 327, 308 Mass. 502—American Garment Co. v. Taylor, 33 N.E.2d 296, 308 Mass. 527, 135 A.L.R. 453—Spence, Bryson, Inc. v. China Products Co., 30 N.E.2d 885, 308 Mass. 51—Home Sav. Bank v. Savransky, 30 N.E.2d 881, 307 Mass. 601—Carando v. Springfield Cold Storage Co., 29 N.E.2d 697, 307 Mass. 99—Parke v. Morin, 22 N.E.2d 603, 304 Mass. 35—Murphy v. Shinberg, 22 N.E.2d 597, 304 Mass. 1—Georgopoulos v. Georgopoulos, 21 N.E.2d 267, 303 Mass. 231—Friedman v. Berthiaume, 21 N.E.2d 261, 303 Mass. 159—Cameron v. Buckley, 13 N.E.2d 37, 299 Mass. 432—Rathgeber v. Kelley, 13 N.E.2d 1, 299 Mass. 444—Brand v. Suburban Land Co., 12 N.E.2d 737, 299 Mass. 336—List Finance Corp. v. Sherry, 11 N.E.2d 442, 298 Mass. 533—Gibbons v. Denoncourt, 9 N.E.2d 633, 297 Mass. 448—Doiham v. Peterson, 9 N.E.2d 406, 297 Mass. 479—DeDonati v. Boston Elevated Ry. Co., 9 N.E.2d 381, 297 Mass. 523—Freeman v. Crowell & Thurlow, 6 N.E.2d 835, 296 Mass.

ing a correct principle of law.<sup>53</sup>

*Ignoring or excluding evidence.* Declarations of law which ignore or exclude from consideration evidence which is material to the issues involved are erroneous and are properly refused.<sup>54</sup>

*Ignoring issues, theories, or defenses.* Declarations of law which ignore or exclude from consideration issues, theories, or defenses which there is evidence to support are erroneous and are properly refused.<sup>55</sup> A declaration of law, however, is not erroneous for failure to submit an issue as to which there is no evidence.<sup>56</sup>

## § 601. — Requests

- a. In general
- b. Time for making
- c. Withdrawal
- d. Allowance or refusal
- e. Modification and correction

### a. In General

A party who desires declarations of law must make a request therefor, but no requests for rulings are necessary where a case is heard on an agreed statement of facts.

A party who desires declarations of law must make a request therefor,<sup>57</sup> although his failure to

514—*Halnan v. New England Tel. & Tel. Co.*, 5 N.E.2d 209, 296 Mass. 219—*McGreevey v. Charlestown Five Cents Sav. Bank*, 2 N.E.2d 543, 294 Mass. 480—*Everett v. Inhabitants of Town of Canton*, 199 N.E. 482, 293 Mass. 182—*Ember-ton Square Operating Co. v. Lydon*, 197 N.E. 514, 292 Mass. 63—*Conroy v. Allston Storage Warehouse*, 197 N.E. 454, 292 Mass. 133—*Faine Furniture Co. v. Acme Transfer & Storage Co.*, 195 N.E. 302, 290 Mass. 195—*First Nat. Bank v. Sheridan*, 189 N.E. 71, 255 Mass. 338—*Parina v. Vittl*, 186 N.E. 236, 282 Mass. 532—*Crownshield Shipbuilding Co. v. Jackson*, 186 N.E. 87, 283 Mass. 21—*Belkus v. City of Brockton*, 184 N.E. 812, 282 Mass. 285—*Caruso v. Shalit*, 184 N.E. 460, 282 Mass. 196.

Mo.—*Brown v. Wilson*, 155 S.W.2d 176, 348 Mo. 658—*Jones v. Prudential Ins. Co. of America*, App., 158 S.W.2d 209—*Brown v. Wilson*, App., 131 S.W.2d 848, quashed on other grounds State ex rel. *Brown v. Hughes*, 137 S.W.2d 544, 345 Mo. 958.

64 C.J. p 1219 note 64.

### Unreported facts

(1) Practice of denying requests for rulings because they are not applicable on unreported facts found by trial judge is improper—*Freeman v. Crowell & Thurlow*, 6 N.E.2d 835, 296 Mass. 514.

(2) The practice of a judge who, in denying requests for rulings, on the ground that they are inapplicable to the facts which he has found, does not make it clear what facts he did find, is improper—*Orcutt v. Sigouin*, 22 N.E.2d 15, 302 Mass. 373.

53. Me.—*People's Sav. Bank v. Chesley*, 26 A.2d 632, 138 Me. 353. 64 C.J. p 1219 note 65.

54. Ill.—*In re Swift's Estate*, 267 Ill.App. 224.

Mass.—*Greenberg v. Shoppers' Garage*, 105 N.E.2d 839, 329 Mass. 31—*Casey v. Gallagher*, 96 N.E.2d 709, 326 Mass. 746—*Madden v.*

*Berman*, 88 N.E.2d 630, 324 Mass. 699—*Godfrey v. Caswell*, 72 N.E.2d 402, 321 Mass. 161—*Arthur A. Johnson Corp. v. Commonwealth*, 60 N.E.2d 364, 318 Mass. 88—*Norton v. Boston Elevated Ry. Co.*, 57 N.E.2d 534, 317 Mass. 145—*Bartley v. Phillips*, 57 N.E.2d 26, 317 Mass. 35—*Niagara Fire Ins. Co. v. Lowell Trucking Corp.*, 56 N.E.2d 28, 316 Mass. 652—*New England Novelty Co. v. Sandberg*, 54 N.E.2d 915, 315 Mass. 739, certiorari denied 55 S.Ct. 63, 323 U.S. 740, 89 L.Ed. 593, rehearing denied 65 S.Ct. 128, 323 U.S. 815, 89 L.Ed. 148—*Perry v. Hanover*, 60 N.E.2d 41, 314 Mass. 167—*Knight, Allen & Clark v. Farren*, 47 N.E.2d 949, 313 Mass. 405—*Halrenik Ass'n v. City of Boston*, 47 N.E.2d 9, 313 Mass. 274—*Bern v. Boston Consol. Gas Co.*, 39 N.E.2d 576, 310 Mass. 651—*Crafts v. McCobb*, 21 N.E.2d 226, 303 Mass. 172—*Blanchi v. Denholm & McKay Co.*, 19 N.E.2d 697, 302 Mass. 469, 121 A.L.R. 460—*McDonald v. MacNell*, 15 N.E.2d 460, 300 Mass. 350—*Zani v. Garrison Hall*, 14 N.E.2d 118, 300 Mass. 128—*Cameron v. Buckley*, 13 N.E.2d 37, 299 Mass. 432—*Gibbons v. Denoncourt*, 9 N.E.2d 633, 297 Mass. 448—*Freeman v. Crowell & Thurlow*, 6 N.E.2d 835, 296 Mass. 514—*Halnan v. New England Tel. & Tel. Co.*, 5 N.E.2d 209, 296 Mass. 219—*Werner v. Eggleston Amusement Co.*, 199 N.E. 306, 293 Mass. 83—*Caruso v. Shalit*, 184 N.E. 460, 282 Mass. 196—*Karlsberg v. Frank*, 184 N.E. 387, 282 Mass. 94. Mo.—*Pogue v. Metropolitan Life Ins. Co.*, App., 107 S.W.2d 144. 64 C.J. p 1219 note 66.

55. Mass.—*Loftus v. Lauf*, 108 N.E.2d 533, 329 Mass. 374—*Bartley v. Phillips*, 57 N.E.2d 26, 317 Mass. 35—*Bern v. Boston Consol. Gas Co.*, 39 N.E.2d 576, 310 Mass. 651—*Herman v. Sadolf*, 2 N.E.2d 201, 294 Mass. 358.

Mo.—*Brown v. Wilson*, 155 S.W.2d 176, 348 Mo. 658—*Brown v. Wilson*, App., 131 S.W.2d 848, quashed on other grounds State ex rel.

*Brown v. Hughes*, 137 S.W.2d 544, 345 Mo. 958.

64 C.J. p 1219 note 67.

56. Md.—*Buehner v. Sehlhorst*, 132 A. 70, 149 Md. 471.

57. U.S.—*Century Indem. Co. v. Nelson*, C.C.A.Cal., 90 F.2d 644, reversed on other grounds 58 S.Ct. 531, 303 U.S. 213, 82 L.Ed. 755, mandate conformed to, C.C.A., 96 F.2d 679, rehearing denied 98 F.2d 903.

Mass.—*Wasserman v. Caledonian-American Ins. Co.*, 95 N.E.2d 547, 325 Mass. 518—*Boston Note Brokerage Co. v. Pilgrim Trust Co.*, 61 N.E.2d 113, 318 Mass. 224—*Perry v. Hanover*, 60 N.E.2d 41, 314 Mass. 167—*Campanale v. General Ice Cream Corp.*, 49 N.E.2d 1018, 314 Mass. 387—*Memishian v. Phipps*, 42 N.E.2d 277, 311 Mass. 521—*Forbes v. Gordon & Gerber*, 9 N.E.2d 416, 298 Mass. 91. 64 C.J. p 1220 note 81.

### Kind requests for rulings

(1) Requested rulings, which were predicated on the law and evidence, constitute requests for rulings though entitled "a motion."—*Treasurer and Receiver General v. Tremont Storage Warehouse*, 6 N.E.2d 838, 296 Mass. 531.

(2) *Passengers'* requests that operation of automobile at speed of 60 to 70 miles an hour constituted willful, wanton, and reckless conduct and gross negligence would be assumed to have been requests for rulings of law, and to present questions whether conclusions stated therein were required as a matter of law, notwithstanding requests appeared to be for findings of fact and as such were not required to be given.—*Kohutynski v. Kohutynski*, 5 N.E.2d 345, 296 Mass. 74.

### Motion to dismiss

Where a so-called plea in abatement was in substance a motion to dismiss founded solely on the state of the record, no request by plaintiff for a ruling was required, and the judge properly treated its

make such request will not, in the absence of statute providing otherwise, preclude the court from entering judgment in his favor.<sup>58</sup> It has been held that, where defendant did not ask or present any special declarations for the court to pass on, a general declaration of law drawn by the court from the facts was sufficient.<sup>59</sup> In a trial without a jury, a judge is not required to correct or perfect a request for a ruling, but he may deal with it as presented, since a request is a unit and may be dealt with as such.<sup>60</sup> The mere presentation of a request for a ruling does not necessarily raise a question of law,<sup>61</sup> and the fact that a request is under a general heading, "requests for rulings," does not transform the request into a request for a ruling of law where its form imports that it is directed to a finding of fact.<sup>62</sup> The rule that a trial judge cannot be compelled to give rulings of law on the effect of a single disconnected fact cannot be avoided by multiplying requests until they cover the several material facts involved in the decision of the case.<sup>63</sup>

**Oral or written argument.** The law which the parties consider applicable may generally be brought to the attention of the court, sitting without a jury, by oral or written argument.<sup>64</sup>

action sustaining the plea as a "ruling."—*Tobin v. Downey*, 39 N.E.2d 757, 310 Mass. 721.

**Effect of requested ruling held not impaired**

In action against operator of public garage for loss of furs stolen from plaintiff's automobile while in storage with defendant overnight, effect of requested ruling that the evidence did not warrant a finding that attention of defendant or its servants was called to storage of furs inside closed automobile was not impaired by trial judge's additional comment that attention of defendant's agent was called to fact that automobile contained valuable merchandise.—*Greenberg v. Shoppers' Garage*, 105 N.E.2d 839, 329 Mass. 81.

**"Decision" of land court**

On question ordinarily arising on a "decision" of land court, whether ultimate order or determination is correct in law in facts stated, requests for rulings have no standing since the question is fully open on appeal without them.—*Harrington v. Joyce*, 55 N.E.2d 30, 316 Mass. 187.

**Word "justified," as used in request for ruling that court is justified in vacating judgment obtained by default through negligence or mistake of petitioner's former attorney, means a decision reached on adequate reasons sufficiently supported by**

credible evidence when weighed by unprejudiced mind guided by common sense and by correct rules of law.—*Kravetz v. Lipofsky*, 200 N.E. 865, 294 Mass. 80.

55. Ill.—*Bergewisch v. U. S. Packing Co.*, 108 Ill.App. 38.

59. Mo.—*C. A. Burton Machinery Co. v. National Surety Co.*, App. 182 S.W. 801.

60. Mass.—*Liberatore v. Town of Framingham*, 53 N.E.2d 561, 315 Mass. 538.—*Ryerson v. Fall River Philanthropic Burial Soc.*, 52 N.E.2d 688, 315 Mass. 244.—*Memishian v. Phipps*, 42 N.E.2d 277, 311 Mass. 521.

61. Mass.—*Henry L. Sawyer Co. v. Boyajian*, 10 N.E.2d 471, 298 Mass. 415.

62. Mass.—*Perry v. Hanover*, 50 N.E.2d 41, 314 Mass. 167.—*Howard v. Malden Sav. Bank*, 15 N.E.2d 233, 300 Mass. 208.—*Gibbons v. Denoncourt*, 9 N.E.2d 633, 297 Mass. 448.—*Pascucci v. A. G. Tomasello & Son*, 200 N.E. 367, 293 Mass. 552.—*Castano v. Leone*, 180 N.E. 312, 278 Mass. 429.

**Request that on all of evidence plaintiff was entitled to recover was not a request for a ruling that the evidence warranted a finding for the plaintiff.**—*Howard v. Malden Sav. Bank*, 15 N.E.2d 233, 300 Mass. 208.

**"Case stated."** In a case heard on an agreed statement of facts, which constituted a "case stated," requests for rulings have been held to amount only to argument on agreed facts.<sup>65</sup> Where a case is heard on an agreed statement of facts, which constitute a "case stated," there is no need for requests for rulings of law.<sup>66</sup>

**Purpose.** The purpose of a request for a declaration of law in an action tried to a judge sitting without a jury is to require the trial judge in his strictly judicial capacity to instruct himself as the fact-finding tribunal with respect to the relevant law in order to make sure that his general finding is not the result of an erroneous view of the law.<sup>67</sup>

**Stating points in which variance claimed to exist.** Under a statute providing that the question of variance between pleadings and proof shall not be considered as having been raised by any prayer or instruction unless it states specifically the points wherein it is claimed that a variance exists, if the theory on which a requested declaration is based is that there can be no recovery because of a variance between the pleadings and proof, the request should specifically designate the point at which the

**Request that trial judge "find as a fact and rule" that injury was caused by the concurrent causes of the force used by defendant and the resistance of plaintiff, and that plaintiff was entitled to recover nominal damages only, was primarily a request for a fact finding.**—*Gosselin v. Silver*, 17 N.E.2d 706, 301 Mass. 481.

63. Me.—*People's Sav. Bank v. Chesley*, 26 A.D. 632, 133 Me. 353.

Mass.—*I. C. Dusenberry, Inc. v. Import Drug Co.*, 149 N.E. 118, 253 Mass. 368.

64. N.H.—*Black v. Flandaca*, 93 A.2d 663, 98 N.H. 33.

65. Mass.—*D'Olimpio v. Jancoterino*, 23 N.E.2d 162, 304 Mass. 200.

66. Mass.—*Associates Discount Corp. v. Gillineau*, 78 N.E.2d 192, 322 Mass. 490.—*Redden v. Ramsey*, 34 N.E.2d 648, 309 Mass. 225.—*D'Olimpio v. Jancoterino*, 23 N.E.2d 162, 304 Mass. 200.

**Auditor's report**

Where facts were determined by auditor's report which amounted to "case stated," requests for rulings are useless and should be ignored.—*Old Mill Point Club v. Paine*, 33 N.E.2d 267, 308 Mass. 505.—*Pittsley v. Allen*, 7 N.E.2d 442, 297 Mass. 83.

67. Mass.—*Norton v. Boston Elevated Ry. Co.*, 57 N.E.2d 534, 317 Mass. 145.



variance exists, or the court cannot consider the objection.<sup>68</sup>

### b. Time for Making

Requests for declarations of law must be seasonably made.

In order to entitle a party to declarations of law, requests therefor must be seasonably made; if not so made, they may, and ordinarily should, be refused,<sup>69</sup> except in cases where the delay in making the request is due to inadvertence or misapprehension on the part of counsel.<sup>70</sup> On the other hand, if proper requests are seasonably presented<sup>71</sup> it is error to refuse them, the duty imposed on courts to pass on requests for declarations of law being mandatory when they are presented in time.<sup>72</sup> Requests are not made in time and should be refused when presented on the hearing of a motion for a new trial,<sup>73</sup> or when presented after judgment,<sup>74</sup> since the court is without power to grant permission to submit declarations of law after judgment.<sup>75</sup> It has been held that requests for declarations of law are not made in time and are properly refused when presented after announcement by the court of its finding of facts,<sup>76</sup> or decision,<sup>77</sup> in the absence of any showing of surprise.<sup>78</sup>

On the other hand, if the time for presenting the request is not fixed by statute or rule of court, it has been held that it is error to refuse a request

made at any time before a final decision.<sup>79</sup> It has also been held, however, that requests must be presented before the cause is submitted to the court and are properly refused if this is not done where it is provided by statute that when the evidence is concluded and before the case is argued and submitted to the court sitting as a jury, either party may move the court to give instructions on any point of law arising in the cause.<sup>80</sup>

### c. Withdrawal

The trial court may permit a party to withdraw his propositions of law, even after the court has announced its findings in the case.

It is not error in the trial court to permit a party to withdraw his propositions of law,<sup>81</sup> even after the court has announced its findings in the case.<sup>82</sup> As long as the court and the party presenting the propositions are content with this course, no one else can complain,<sup>83</sup> and if the adverse party desires to raise the same questions and have them passed on by the court, he should present them himself.<sup>84</sup>

### d. Allowance or Refusal

Where declarations of law state correct principles, and there is substantial evidence on which to base them, it is not only proper to give them, but the refusal thereof has been held to constitute error.

Where declarations of law state correct principles, and there is substantial evidence on which to base them,<sup>85</sup> and they are seasonably made, as discussed

69. Md.—Rullman v. Rullman, 129 A. 7, 148 Md. 140.  
64 C.J. p 1220 note 86.  
69. Mass.—Lynch v. City of Boston, 48 N.E.2d 26, 313 Mass. 478.  
N.H.—Sisters of Mercy v. Town of Hooksett, 42 A.2d 222, 93 N.H. 301.  
64 C.J. p 1220 note 87.  
70. Ill.—Mann v. Learned, 63 N.E. 178, 195 Ill. 502.  
Mo.—Morehouse v. Ware, 78 Mo. 100.  
71. Ill.—Mann v. Learned, 63 N.E. 178, 195 Ill. 502.  
64 C.J. p 1221 note 89.  
72. Ill.—Alexander County Savings Bank v. Murray, 224 Ill.App. 559.  
73. Ill.—Loudon v. Mullins, 52 Ill. App. 410.  
74. U.S.—McPherson v. Cement Gun Co., C.C.A.Okl., 59 F.2d 889.  
64 C.J. p 1221 note 93.  
75. Ill.—Mann v. Learned, 63 N.E. 178, 195 Ill. 502.  
76. Ill.—Carlyle Water, Light & Power Co. v. City of Carlyle, 31 Ill.App. 325, affirmed 29 N.E. 556, 140 Ill. 446.  
Mo.—City of Kirkwood v. Byrne, 125 S.W. 810, 146 Mo.App. 481.

77. Ill.—Allmann v. Lumsden, 42 N.E. 797, 159 Ill. 219.  
64 C.J. p 1221 note 96.  
78. Mo.—Morehouse v. Ware, 78 Mo. 100.  
79. Ill.—Mann v. Learned, 63 N.E. 178, 195 Ill. 502—Western Valve Co. v. Wells, 127 Ill.App. 655.  
80. Mo.—Watson v. Race, 46 Mo. App. 546.  
64 C.J. p 1221 note 99.  
81. Ill.—Highway Com'rs v. Kline, 96 Ill.App. 318.  
Mass.—Bangs v. Farr, 95 N.E. 841, 209 Mass. 339.  
82. Ill.—Highway Com'rs v. Kline, 96 Ill.App. 318.  
83. Mass.—Bangs v. Farr, 95 N.E. 841, 209 Mass. 339.  
84. Ill.—Highway Com'rs v. Kline, 96 Ill.App. 318.  
Mass.—Bangs v. Farr, 95 N.E. 841, 209 Mass. 339.  
85. Mass.—Connell v. Maynard, 76 N.E.2d 642, 322 Mass. 245—Lawrence v. O'Neill, 58 N.E.2d 140, 317 Mass. 393—Stewart v. Morgan, 55 N.E.2d 2, 316 Mass. 164—Ryerson v. Fall River Philanthropic Burial Soc., 52 N.E.2d 688, 315 Mass. 244—Hoffman v. City of

Chelsea, 52 N.E.2d 7, 315 Mass. 54—Lyons v. Hennessey, 50 N.E.2d 93, 314 Mass. 359—Champlin v. Jackson, 48 N.E.2d 46, 313 Mass. 487—Dangelo v. Farina, 39 N.E.2d 754, 310 Mass. 758—Bern v. Boston Consol. Gas Co., 39 N.E.2d 576, 310 Mass. 651—Home Sav. Bank v. Savransky, 30 N.E.2d 881, 307 Mass. 601—Marquis v. Messler, 22 N.E.2d 473, 303 Mass. 553—Sherman v. Sidman, 14 N.E.2d 145, 300 Mass. 102—Gibbons v. Denoncourt, 9 N.E.2d 633, 297 Mass. 448—Forbes v. Gordon & Gerber, 9 N.E.2d 416, 298 Mass. 91.  
Mo.—Central States Savings & Loan Ass'n v. U. S. Fidelity & Guaranty Co., 66 S.W.2d 550, 334 Mo. 580—*Corpus Juris* cited in State v. Sargent, App., 256 S.W.2d 265, 273.  
N.H.—Etna Life Ins. Co. v. Chandler, 193 A. 233, 89 N.H. 95.  
64 C.J. p 1221 note 6.

### Specified grounds

Where defendant requested ruling that upon all the law and the evidence a finding for defendant was warranted, specifying grounds therefor, if defendant is entitled to the ruling on any of the specified grounds, it is immaterial whether other grounds were insufficient.—

supra subdivision b of this section, it is not only proper to give them, but the refusal thereof is error,<sup>86</sup> unless they are covered by other declarations given,<sup>87</sup> because by their refusal it becomes apparent that the court misunderstood or misapplied the law.<sup>88</sup> It will be sufficient, however, if the court

gives all the requested declarations of law that are material; nothing more is necessary.<sup>89</sup> Where the declarations of law are erroneous or unnecessary, requests for such declarations are properly refused.<sup>90</sup> Requests for declarations of law rendered nugatory by amendments of the declaration after

**Ryerson v. Fall River Philanthropic Burial Soc.**, 52 N.E.2d 688, 315 Mass. 244.

#### Finding

(1) Granting a request that the evidence was sufficient to warrant the court in finding for the defendant was not inconsistent with finding for the plaintiff.—**Wood v. Spedoni**, 104 N.E.2d 491, 328 Mass. 483.

(2) In action for personal injuries, a ruling that evidence warrants a finding for plaintiff does not preclude judge from finding for defendant on the evidence.—**Strong v. Haverhill Elec. Co.**, 13 N.E.2d 39, 299 Mass. 455.

(3) Where a general finding for defendant follows judge's refusal of plaintiff's requested ruling that evidence warrants a finding for plaintiff, general finding is deemed the result of a ruling that evidence does not warrant a finding for plaintiff.—**Strong v. Haverhill Elec. Co.**, supra.

(4) Refusal of defendant's request for a directed finding was equivalent to a ruling that the evidence warranted a finding for plaintiff.—**Irving v. Bonjorno**, 99 N.E.2d 643, 327 Mass. 518.

**88. Ark.**—**Peoples Nat. Bank v. Cohn**, 110 S.W.2d 42, 194 Ark. 1098. **Mass.**—**Silver v. New York Cent. R. Co.**, 105 N.E.2d 923, 329 Mass. 14.—**Connell v. Maynard**, 76 N.E.2d 642, 322 Mass. 245.—**Godfrey v. Caswell**, 72 N.E.2d 402, 321 Mass. 161.—**L. Grossman Sons, Inc. v. Rudderham**, 67 N.E.2d 406, 319 Mass. 698.—**Lawrence v. O'Neill**, 58 N.E.2d 140, 317 Mass. 393.—**Stewart v. Morgan**, 55 N.E.2d 2, 315 Mass. 164.—**Liberators v. Town of Framingham**, 53 N.E.2d 561, 315 Mass. 538.—**Ryerson v. Fall River Philanthropic Burial Soc.**, 52 N.E.2d 688, 315 Mass. 244.—**Hoffman v. City of Chelsea**, 52 N.E.2d 7, 315 Mass. 54.—**Lyons v. Hennessey**, 50 N.E.2d 93, 314 Mass. 359.—**Champlin v. Jackson**, 48 N.E.2d 46, 313 Mass. 487.—**Hurley v. Ornateen**, 42 N.E.2d 273, 311 Mass. 477.—**Dangelo v. Farina**, 39 N.E.2d 754, 310 Mass. 758.—**Bern v. Boston Consol. Gas Co.**, 39 N.E.2d 576, 310 Mass. 651.—**Home Sav. Bank v. Savransky**, 30 N.E.2d 831, 307 Mass. 601.—**Parke v. Morin**, 22 N.E.2d 603, 304 Mass. 35.—**Marquis v. Massier**, 22 N.E.2d 473, 303 Mass. 553.—**Sherman v. Sidman**, 14 N.E.2d 145, 300 Mass. 102.—**Strong v. Haverhill Elec. Co.**, 13 N.E.2d 39, 299 Mass. 455.—**Moore**

**v. Patrons**, 10 N.E.2d 69, 298 Mass. 196.—**Gibbons v. Denoncourt**, 9 N.E.2d 633, 297 Mass. 448.—**Forbes v. Gordon & Gerber**, 9 N.E.2d 416, 298 Mass. 91.—**Griffin v. Rudnick**, 9 N.E.2d 388, 298 Mass. 82.—**Holt v. Mann**, 200 N.E. 403, 294 Mass. 21.—**Lauria v. Umaha**, 193 N.E. 725, 289 Mass. 238.—**Wrobel v. General Accident, Fire & Life Assur. Corporation**, 192 N.E. 498, 288 Mass. 206.

**Mo.**—**Central States Savings & Loan Ass'n v. U. S. Fidelity & Guaranty Co.**, 66 S.W.2d 550, 334 Mo. 580.—**Corpus Juris cited in State v. Sargent**, App., 256 S.W.2d 265, 273.—**Del Commune v. Bussen**, App., 179 S.W.2d 744.

**N.H.**—**Aetna Life Ins. Co. v. Chandler**, 193 A. 233, 89 N.H. 95.

**S.C.**—**Simms v. Clayton**, 7 S.E.2d 724, 193 S.C. 98.

64 C.J. p 1221 note 8.

#### Findings held not inconsistent

(1) In a law action tried without jury refusal of plaintiff's request for a ruling that on all the evidence a finding for plaintiff was required as matter of law was not inconsistent with the granting of requested rulings which were statements of general principles applicable to the case and merely rulings that certain findings were warranted by evidence.—**Memishian v. Phipps**, 42 N.E.2d 277, 311 Mass. 521.

(2) It would not have been inconsistent for judge to have granted request for ruling that evidence warranted a finding for defendant and then, after weighing all the evidence, to have found for plaintiff.—**Dangelo v. Farina**, 39 N.E.2d 754, 310 Mass. 758.

#### Error held not cured

A general finding for defendant does not go to extent of curing an error in refusal of plaintiff's request for ruling that there was evidence to warrant a finding for plaintiff.—**Bern v. Boston Consol. Gas Co.**, 39 N.E.2d 576, 310 Mass. 651.—**Home Sav. Bank v. Savransky**, 30 N.E.2d 831, 307 Mass. 601.—**Parke v. Morin**, 22 N.E.2d 603, 304 Mass. 35.—**Marquis v. Massier**, 22 N.E.2d 473, 303 Mass. 553.—**Sherman v. Sidman**, 14 N.E.2d 145, 300 Mass. 102.—**Strong v. Haverhill Elec. Co.**, 13 N.E.2d 39, 299 Mass. 455.—**Moore**

#### Finding held not required

Granting of request that there was sufficient evidence, if believed, to warrant finding for defendants in action on note, did not require finding in favor of defendants as matter of law.—**First Nat. Bank v. Sheridan**, 139 N.E. 71, 285 Mass. 338.

**Allowance of four of five subdivisions of request, headed by statement**

that upon evidence plaintiff could not recover, indicated that judge did not rule generally that on all evidence plaintiff could not recover, but that he adopted subdivisions without such conclusion.—**Woodman v. Haynes**, 193 N.E. 570, 289 Mass. 114.

**87. Mass.**—**New England Novelty Co. v. Sandberg**, 54 N.E.2d 915, 315 Mass. 739, certiorari denied 65 S. Ct. 63, 323 U.S. 740, 89 L.Ed. 693, rehearing denied 65 S.Ct. 128, 323 U.S. 815, 89 L.Ed. 648.—**Ahern v. Towle**, 39 N.E.2d 561, 310 Mass. 695.—**Conley v. Morash**, 30 N.E.2d 224, 307 Mass. 430.—**Kingsley v. Spofford**, 11 N.E.2d 487, 298 Mass. 469.—**McKenna v. Andreassi**, 197 N.E. 879, 292 Mass. 213.

**Mo.**—**Union Trust Co. v. Wyatt**, 58 S.W.2d 708.—**Pogus v. Metropolitan Life Ins. Co.**, App., 107 S.W.2d 144.—**Bolliot v. Income Guaranty Co.**, 102 S.W.2d 132, 231 Mo.App. 531.

64 C.J. p 1221 note 9, p 1222 note 21.

**88. Mo.**—**Gage v. Averill**, 57 Mo.App. 111.

**89. Mich.**—**Easton School Dist. No. 4 v. Snell**, 24 Mich. 350.

#### Request held not immaterial

**Mass.**—**Hoffman v. City of Chelsea**, 52 N.E.2d 7, 315 Mass. 54.

**Denial of defendant's request for ruling that plaintiff had failed to prove defendant grossly negligent was equivalent to a ruling that evidence warranted a finding that defendant was guilty of gross negligence.**—**O'Neill v. McDonald**, 16 N.E.2d 866, 301 Mass. 256.

**90. U.S.**—**Smith v. Russell**, C.C.A. Ark., 76 F.2d 91, certiorari denied 56 S.Ct. 135, 296 U.S. 614, 80 L.Ed. 436.

**Mass.**—**Wood v. Spedoni**, 104 N.E.2d 491, 328 Mass. 483.—**Bruyer v. P. S. Thorsen**, 100 N.E.2d 684, 327 Mass. 684.—**Grindle v. Brown**, 72 N.E.2d 431, 321 Mass. 182.—**Perry v. Hanover**, 50 N.E.2d 41, 314 Mass. 167.—**Burgess v. Giovannucci**, 49 N.E.2d 907, 314 Mass. 252.—**Lynch v. City of Boston**, 48 N.E.2d 26, 313 Mass. 478.—**Neu v. McCarthy**, 33 N.E.2d 570, 309 Mass. 17, 133 A.L.R. 1291.—**Georgopoulos v. Georgopoulos**, 21 N.E.2d 267, 303 Mass. 231.—**Gibbons v. Denoncourt**, 9 N.E.2d 633, 297 Mass. 448.—**Weiner v. Eggleston Amusement Co.**, 199 N.E. 306, 293 Mass. 82.—**Cummings v. National Shawmut Bank of Boston**, 188 N.E. 489, 284 Mass. 562.

argument are properly refused.<sup>91</sup> It has been held that peremptory declarations of law in a case tried by the court without a jury may only be given under such circumstances as would warrant the giving of a peremptory instruction in a case tried to a jury.<sup>92</sup> The court need not state reasons for declining to give requests for a declaration of law.<sup>93</sup>

**Filing.** The delay of the trial judge in filing the disposition of the requests for rulings until after he had filed his findings has been held not to constitute error at law.<sup>94</sup>

**Declarations good in part and bad in part.** Where requested declarations are good in part and bad in part, they may be properly refused;<sup>95</sup> the court is not obliged to separate the good from the bad.<sup>96</sup> Where the court refused to allow improper declarations of law, it need not formulate declarations of its own,<sup>97</sup> although it is the better practice for it to do so.<sup>98</sup>

**Length and number of declarations.** According to one view, the number of declarations presented is no reason for refusing to pass on them; when they are properly presented, the court should pass on a sufficient number of them to cover all legal questions in the case.<sup>99</sup> On the other hand, it has been held that requested declarations may be refused

on the ground of their bulk and number alone,<sup>1</sup> or the trial judge may require a party to reduce them to a reasonable number, or risk the loss of any rights under them.<sup>2</sup> It has also been held that the trial judge may require a party, in view of the great number of requests presented, to specify the requests for rulings thought not to be fairly covered by the charge.<sup>3</sup>

**Acts tantamount to allowance or refusal.** Where the court, through error or inadvertence, fails to mark declarations of law submitted "given" or "refused," the effect is precisely the same as if they had been formally marked and refused.<sup>4</sup> Ordinarily, where the court fails to pass on a request for a declaration of law, this is tantamount to a refusal thereof.<sup>5</sup> It has been held, however, that the admission of evidence is tantamount to a declaration of law that it is admissible, and a refusal to make a formal declaration of law to that effect is not erroneous.<sup>6</sup>

**Objections and exceptions.** Where a mere general objection to the action of the court in refusing propositions of law is made, error, if any, is deemed to have been waived.<sup>7</sup> It has been held that when a request is refused, an exception to a refusal to grant it must be sustained, unless the ground of

Mo.—Central States Savings & Loan Ass'n v. U. S. Fidelity & Guaranty Co., 66 S.W.2d 550, 334 Mo. 580—Jones v. Prudential Ins. Co. of America, App., 158 S.W.2d 209—Bixler v. Special Road Dist. No. 1, Newton County, 156 S.W.2d 950, 236 Mo.App. 336.

N.H.—U. S. Fidelity & Guaranty Co. v. Dunn, 7 A.2d 246, 90 N.H. 236, 64 C.J. p 1216 notes 24-27.

#### Court rule

(1) The trial judge did not err in refusing a particular request based on all the evidence in absence of compliance with court rule governing such a request.—Basky v. Hansen, 40 N.E.2d 12, 311 Mass. 14.

(2) Refusal of requested findings for defendant on all the evidence, where defendant did not specify grounds for his request, was proper under court rule.—Garrett v. M. McDonough Co., 7 N.E.2d 417, 297 Mass. 58.

#### Refusal of requests held proper

Mass.—Liberatore v. Town of Framingham, 53 N.E.2d 561, 315 Mass. 538—Modern Finance Co. v. Martin, 42 N.E.2d 533, 311 Mass. 509—Strong v. Haverhill Elec. Co., 13 N.E.2d 39, 299 Mass. 455—Gibbons v. Denoncourt, 9 N.E.2d 633, 297 Mass. 448.

N.H.—Connors v. Surgeon, 78 A.2d 925, 96 N.H. 479.

#### Ruling held obscure

In case tried without a jury, granting request for ruling "so far as applicable to facts found" was obscure and not approved, but more appropriate disposition would have been to refuse requested ruling on ground that some specified fact on which it was made to depend was not found to exist, or was found not to exist.—Liberatore v. Town of Framingham, 53 N.E.2d 561, 315 Mass. 538.

91. Mass.—H. C. Dusenberry, Inc., v. Import Drug Co., 149 N.E. 118, 253 Mass. 368.

64 C.J. p 1222 note 12.

92. Mo.—Noble v. Missouri Ins. Co., 204 S.W.2d 446.

93. Mass.—Marble v. Bloom, 159 N.E. 735, 262 Mass. 191.

94. Mass.—Society of Jesus of New England v. Joselson, 29 N.E.2d 554, 307 Mass. 608—Cameron v. Buckley, 13 N.E.2d 37, 299 Mass. 432.

95. U.S.—Moore v. Lee Tire & Rubber Co. of New York, C.C.A.Utah, 273 F. 465.

Mo.—Exchange Bank of Novinger v. Turner, 14 S.W.2d 425, 321 Mo. 1104.

96. Mo.—Exchange Bank of Novinger v. Turner, supra.

97. Md.—Hambleton & Co. v. Union

Nat. Bank of Pittsburgh, 157 A. 404, 161 Md. 318.

64 C.J. p 1222 note 16.

98. Md.—Hambleton & Co. v. Union Nat. Bank of Pittsburgh, supra.

99. Ill.—Lewis v. Drainage Com'rs of Drainage Dist. No. 1 Town of Young America, 188 Ill.App. 49.

1. Mass.—Hogan v. Coleman, 96 N.E.2d 864, 326 Mass. 770.

64 C.J. p 1222 note 20.

2. Mass.—Hogan v. Coleman, supra.

3. Mass.—Capano v. Melchionno, 7 N.E.2d 593, 297 Mass. 1.

4. Ill.—Boyle v. Boyle, 247 Ill.App. 554.

5. Mass.—Hogan v. Coleman, 96 N.E.2d 864, 326 Mass. 770—Wolfe v. Laurende, 96 N.E.2d 855, 327 Mass. 47—Liberatore v. Town of Framingham, 53 N.E.2d 561, 315 Mass. 538—Mason v. Wythe, 82 N.E.2d 615, 308 Mass. 268, certiorari denied 62 S.Ct. 74, 314 U.S. 638, 86 L.Ed. 512—Georgopoulos v. Georgeopoulos, 21 N.E.2d 267, 303 Mass. 231—Bankoff v. Coleman Bros., 18 N.E.2d 535, 302 Mass. 122—Kravetz v. Lipofsky, 200 N.E. 865, 294 Mass. 80.

64 C.J. p 1222 note 23.

6. Ark.—Wilenzick v. Simon, 3 S.W. 2d 297, 176 Ark. 1206.

7. Ill.—Pennsylvania Co. v. Rossett, 116 Ill.App. 342.

refusal is distinctly stated,<sup>9</sup> or it plainly appears in some way on the record,<sup>10</sup> or it is obvious that no harm is done or rights endangered by the refusal.<sup>10</sup> Where, at the close of the evidence, requests for rulings are made and the trial judge makes his findings without passing specifically on the requests, an exception may be taken to the implied denial of the requested rulings.<sup>11</sup> The trial justice's statement, in reply to a request to note an exception to a refusal of requests for rulings of law, that he would not do so, has been held to be immaterial, where such exception was shown by the transcript and set forth in the bill of exceptions as allowed by the trial judge.<sup>12</sup>

### e. Modification and Correction

In a proper case the court may modify or correct a declaration of law.

Where so provided by statute, the court may modify a declaration of law.<sup>13</sup> The trial judge may at any time prior to the entry of final judgment

correct his declarations of law in order that justice may be done.<sup>14</sup>

### § 602. Decision

In cases tried by the court without a jury, whether in equity or at law, there must be a decision of the court. The findings of fact and conclusions of law may constitute the decision of the court.

In cases tried by the court without a jury, whether in equity or at law, there must be a decision of the court,<sup>15</sup> although the evidence as to some material fact may not be entirely clear.<sup>16</sup> The parties are entitled to a decision by the judge who heard the evidence,<sup>17</sup> and they cannot be compelled to accept a decision on the facts from another judge.<sup>18</sup> The decision is the basis of the judgment to be entered in the case,<sup>19</sup> and it is analogous to the verdict of a jury.<sup>20</sup> In jurisdictions where the court trying a cause without a jury is required to make findings of fact and conclusions of law, as discussed infra § 610, the findings of fact and conclusions of law constitute the decision of the court<sup>21</sup> when other

8. Mass.—Georgopoulos v. Georgopoulos, 21 N.E.2d 267, 303 Mass. 231—John Hetherington & Sons v. William Firth Co., 95 N.E. 961, 210 Mass. 8.

9. Mass.—Georgopoulos v. Georgopoulos, 21 N.E.2d 267, 303 Mass. 231—John Hetherington & Sons v. William Firth Co., 95 N.E. 961, 210 Mass. 8.

10. Mass.—Georgopoulos v. Georgopoulos, 21 N.E.2d 267, 303 Mass. 231—John Hetherington & Sons v. William Firth Co., 95 N.E. 961, 210 Mass. 8.

11. Mass.—Bankoff v. Coleman Bros., 18 N.E.2d 535, 302 Mass. 122.

#### Time for taking exceptions

(1) Exceptions must be taken to a ruling, made in the absence of counsel in a trial without a jury within a reasonable time, where no statute or rule of court specifies the time in which such exceptions must be taken.—In re Poole, 116 N.E. 227, 237 Mass. 29—Hurley v. Boston Elevated St. Ry. Co., 99 N.E. 1056, 213 Mass. 192.

(2) Claim of exceptions within three days after filing of findings containing ruling which denied requests for rulings was made within reasonable time, under court rule, in absence of special facts showing the contrary.—Sullivan v. Roche, 153 N.E. 548, 257 Mass. 166.

12. R.I.—Muscente v. R. S. Brine Transp. Co., 196 A. 259, 69 R.I. 482, App. 438.

13. Ill.—Rone v. Robinson, 133 Ill. App. 438.

14. Mass.—Wolfe v. Laundre, 96 N.E.2d 855, 237 Mass. 47.

Inconsistency held cured  
Mass.—Wolfe v. Laundre, supra.

15. Del.—Huber Baking Co. v. Frank C. Sparks Co., 81 A.2d 132, 7 Terry 153.

N.Y.—Hartman v. Hartman, 107 N.Y. S.2d 459, 279 App.Div. 606—Steel Co. of Southern Cal. v. Associated Metals & Minerals Corp., 102 N.Y. S.2d 655, 277 App.Div. 637—Goldberg v. Bruns, Kimball & Co., 93 N.Y.S.2d 265, 276 App.Div. 862—Mario v. DeOteris, 88 N.Y.S.2d 79, 275 App.Div. 790.

64 C.J. p 1232 note 28.

#### "Order for judgment"

Where case was heard upon a case stated by a judge, his finding for plaintiff was in effect an "order for judgment."—Boston Five Cents Sav. Bank v. City of Boston, 61 N.E.2d 124, 318 Mass. 133—Edinburg v. Allen Squire Co., 13 N.E.2d 718, 299 Mass. 206.

Statement by court in memorandum that predominance of experts' opinions on specified issue were in affirmative, was not decision that preponderance of evidence was in affirmative on such issues.—Putman v. Murden, 184 N.E. 796, 97 Ind.App. 313.

#### Volition of court

The provision of the code that the court trying the facts without a jury shall dictate or prepare and file a statement announcing the ground for its decision if requested by any party before final submission, does not exclude the right of the court to make such a statement of its own volition.—Pudewitz v. Solomon, Mo.App., 224 S.W.2d 562.

16. Ind.—Sauer v. Sauer, 133 N.E. 169, 77 Ind.App. 22.

17. Cal.—De Mund v. Superior Court in and for Los Angeles County, 2 P.2d 985, 213 Cal. 502—In re Sullivan, 77 P. 153, 143 Cal. 462—Reimer v. Firpo, 212 P.2d 23, 94 Cal.App. 2d 798.

#### Judicial proceedings

In judicial as distinguished from administrative proceedings, there is an inherent right on the part of litigants to have a decision rendered by judge who presides at the trial and hears the testimony.—Lacomastic Corp. v. Parker, D.C.Md., 54 F.Supp. 135.

18. Cal.—In re Sullivan, 77 P. 153, 143 Cal. 462—Reimer v. Firpo, 212 P.2d 23, 94 Cal.App.2d 798.

19. N.M.—Mooley v. Magnolia Petroleum Co., 114 P.2d 740, 45 N.M. 230.

Ohio.—In re Ruhl's Estate, App., 43 N.E.2d 760.

W.Va.—Robertson v. Vandergriff, 193 S.E. 62, 119 W.Va. 219.

64 C.J. p 1232 note 31.

20. Ill.—Piercol v. Hays, 47 N.E.2d 835, 113 Ind.App. 214.

Ohio.—Boedker v. Warren E. Richards Co., 176 N.E. 660, 124 Ohio St. 12—Getzug v. Belvedere Bldg. Co., 187 N.E. 22, 45 Ohio App. 328.

21. Cal.—Richter v. Walker, 225 P.2d 593, 36 Cal.2d 634—Strudthoff v. Yates, 170 P.2d 873, 28 Cal.2d 602—Fuhrman v. Superior Court in and for City and County of San Francisco, 39 P.2d 803, 3 Cal.2d 250—Beverly Finance Co. v. Superior Court in and for Los Angeles County, 246 P.2d 142, 113 Cal.App.

statutory requirements, such as putting them in writing,<sup>22</sup> signing them,<sup>23</sup> ordering judgment thereon,<sup>24</sup> and filing with the clerk,<sup>25</sup> have been complied with. The decision of the trial judge is to be found in his rescript and not in oral statements made at the conclusion of the trial.<sup>26</sup> In deciding a case a court may out of consideration for the parties involved and the necessities of the case refrain from reciting the respective tendencies of the evidence.<sup>27</sup> A valid decision may under certain circumstances be announced in the judge's chambers.<sup>28</sup>

A mere opinion of the court,<sup>29</sup> or an announcement of a decision not reduced to writing,<sup>30</sup> or an oral announcement of the judge's views at the conclusion of the trial,<sup>31</sup> or an oral announcement that the action would be dismissed,<sup>32</sup> or a minute entry by the court directing that findings and decree be drawn in favor of defendant,<sup>33</sup> or a memorandum decision not amounting to a formal order,<sup>34</sup> or a mere statement of reasons for not taking the case

under advisement,<sup>35</sup> or a notation by the court that "the foregoing requested findings are found as above modified as marked," and the mere conclusion of law that plaintiffs were entitled to a judgment in the absence of any specific direction that judgment be entered,<sup>36</sup> do not constitute a decision, and are not binding on the court,<sup>37</sup> but may be changed or altered at the will of the court.<sup>38</sup> It has been held that a decision rendered by the court may be corrected before a judgment has been rendered thereon.<sup>39</sup>

**Mental processes.** The trial judge in trying a case without a jury has the right to announce the mental processes by which he determines the credibility of witnesses and by which he arrives at conclusions.<sup>40</sup>

**Notice.** When a decision is rendered in an action heard by the court without a jury, the clerk may be required to give written notice thereof to the parties or their attorneys.<sup>41</sup>

2d 881—Marshall v. City of Oakland, 207 P.2d 882, 92 Cal.App.2d 593—Peebler v. Oide, App., 162 P.2d 953, 71 Cal.App.2d 382—Wilcox v. Sway, 160 P.2d 154, 69 Cal.App.2d 560—Gossman v. Gossman, 126 P.2d 178, 52 Cal.App.2d 184. Idaho.—Roberts v. Roberts, 201 P.2d 91, 68 Idaho 535. Ind.—Piersol v. Hays, 47 N.E.2d 838, 113 Ind.App. 214. N.M.—Mosley v. Magnolia Petroleum Co., 114 P.2d 740, 45 N.M. 230. N.D.—Zimmerman v. Kitzan, 43 N.W.2d 822, 77 N.D. 477. R.I.—Gregson v. Superior Court, 128 A. 221, 46 R.I. 362. 64 C.J. p 1223 note 35.

22. Idaho.—Roberts v. Roberts, 201 P.2d 91, 68 Idaho 535. N.D.—Zimmerman v. Kitzan, 43 N.W.2d 822, 77 N.D. 477—Crane v. First Nat. Bank, 144 N.W. 96, 26 N.D. 268.

23. Cal.—Takekawa v. Hole, 149 P. 593, 170 Cal. 323. N.D.—Zimmerman v. Kitzan, 43 N.W.2d 822, 77 N.D. 477.

24. N.D.—Zimmerman v. Kitzan, supra—Crane v. First Nat. Bank, 144 N.W. 96, 26 N.D. 268.

25. Idaho.—Roberts v. Roberts, 201 P.2d 91, 68 Idaho 535. N.D.—Zimmerman v. Kitzan, 43 N.W.2d 822, 77 N.D. 477. 64 C.J. p 1223 note 39.

26. R.I.—Whitmarsh v. Streeter, 6 A.2d 453, 62 R.I. 411.

27. Ala.—Rhodes v. Lewis, 20 So.2d 206, 246 Ala. 231.

28. Tex.—Smith v. Columbian Carbon Co., 198 S.W.2d 727, 145 Tex. 478.

29. N.M.—Lusk v. First Nat. Bank of Carrizozo, 130 P.2d 1032, 45 N.M. 445—Mosley v. Magnolia Petroleum Co., 114 P.2d 740, 45 N.M. 230. Utah.—Wheat v. Denver & R. G. W. R. Co., 250 P.2d 932, certiorari denied Denver & R. G. W. R. Co. v. Wheat, 74 S.Ct. 218, 346 U.S. 896, 98 L.Ed. 397. 64 C.J. p 1223 note 40.

#### Form and language

Statute providing that court trying facts without a jury shall dictate or prepare and file statement announcing ground for its decision if requested before final submission, does not require court to answer specifically every interrogatory submitted by a litigant, and court may determine relevancy of interrogatory and whether request involved a principal fact issue and may then prepare opinion in such form and language as may best express its views and findings.—Dubinsky v. Lindburg Cadillac Co., Mo.App., 250 S.W.2d 830.

#### Request held complied with

Request that trial court prepare and file brief opinion containing statement of grounds for decision and method of determining any damages that might be awarded plaintiff, was complied with where court, at time of entering judgment, filed an opinion which included its findings on all principal fact issues raised by pleadings and supported by evidence.—Dubinsky v. Lindburg Cadillac Co., supra.

#### Statement held not error

Mich.—Wicker v. Trombly, 18 N.W.2d 817, 311 Mich. 262.

30. N.D.—Boyd v. Lemmon, 189 N.W. 681, 49 N.D. 64.

31. Wash.—State v. Kay, 4 P.2d 498, 164 Wash. 685.

32. Wash.—State v. Kay, supra—Ritter v. Johnson, 300 P. 518, 163 Wash. 153, 79 A.L.R. 1270.

33. Cal.—Canadian & American Mortgage & Trust Co. v. Clarita Land & Inv. Co., 74 P. 301, 140 Cal. 672.

34. Wash.—McClelland v. McClelland, 15 P.2d 941, 170 Wash. 170. 64 C.J. p 1223 note 45.

35. Wis.—Stephan v. Abe, 200 N.W. 682, 135 Wis. 78.

36. N.Y.—Hager v. Arland, 143 N.Y. S. 388, 81 Misc. 421.

37. Wash.—State v. Kay, 4 P.2d 498, 164 Wash. 685. 64 C.J. p 1223 note 48.

"No antecedent expression of the judge, whether casual or cast in the form of an opinion, can in any way restrict his absolute power to declare his final decision . . ."—Strudthoff v. Yates, 170 P.2d 873, 881, 28 Cal.2d 602—Scholle v. Fennell, 159 P. 1179, 1181, 173 Cal. 372.

38. Wash.—McClelland v. McClelland, 15 P.2d 941, 170 Wash. 170. 64 C.J. p 1223 note 49.

39. Mass.—Conway v. Kenney, 172 N.E. 888, 273 Mass. 19—Jannback v. Aamunkotto Temperance Soc., 172 N.E. 884, 273 Mass. 45.

40. Cal.—Singleton v. Singleton, 157 P.2d 888, 68 Cal.App.2d 681—Smith v. Coleman, 116 P.2d 133, 46 Cal. App.2d 507.

41. Mass.—Jefferson v. L'Heureux, 200 N.E. 355, 293 Mass. 490.

#### Oral notice

Giving oral notice of finding for plaintiff to defendants' attorney, who

**Damages.** The amount of damages should have no part in the judicial determination of facts and law, and it is improper to consider the amount of damages in reaching a decision.<sup>42</sup>

**Number of decisions.** Where one action was instituted against several defendants, and all the issues were tried and determined at the same time, the court properly rendered but one decision and judgment.<sup>43</sup> The trial court has no authority to make two signed decisions in one case with respect to the same issues tried at the same time.<sup>44</sup> There is no more authority for two decisions than for two judgments in an action.<sup>45</sup>

## § 603. — Requisites

- a. In general
- b. Matters to be determined
- c. Writing and signing
- d. Filing and directing entry of judgment

was in town on other business, did not relieve clerk of obligation to send written notice.—*Jefferson v. L'Heureux*, supra.

42. D.C.—*Rice v. U. S.*, 179 F.2d 26, 85 U.S.App.D.C. 404.

43. S.D.—*Redwater Land & Canal Co. v. Reed*, 128 N.W. 702, 26 S.D. 466.

44. N.Y.—*Simon v. Burgess*, 130 N.Y. S. 642, 146 App.Div. 37.

45. N.Y.—*Simon v. Burgess*, supra.

46. Ill.—*Claude Neon Federal Co. v. Raczynski*, 9 N.E.2d 486, 291 Ill. App. 607.

Ky.—*Stephenson v. Burton*, 246 S.W.2d 999—*Wacker v. Wacker*, 129 S.W.2d 1043, 279 Ky. 19—*Coleman v. Coleman*, 76 S.W.2d 593, 256 Ky. 530.

La.—*Nash v. Solvay Process Co.*, App., 189 So. 493.

Va.—*Skyline Swannanoa v. Nelson County*, 44 S.E.2d 437, 186 Va. 878.

Wash.—*Blehn v. Lyon*, 189 P.2d 482, 29 Wash.2d 750—*Henriod v. Henriod*, 89 P.2d 222, 198 Wash. 519, 64 C.J. p 1223 note 54.

### Duty to sift evidence

It is the duty of the court to sift the evidence and state the facts. *Mich.—Allen v. Currier Lumber Co.*, 61 N.W.2d 138, 337 Mich. 696.

Vt.—*Hammond's, Inc. v. Flanders*, 191 A. 925, 109 Vt. 78—*In re Wolf's Estate*, 182 A. 187, 108 Vt. 54.

### Ex parte statements

Trials of facts may not receive any ex parte oral communications outside of court, whether on an inspection or otherwise, and use these as factors in arriving at a decision, since communications as to facts on merits of any litigated case may be presented only

by sworn witnesses, or by agreement of counsel.—*Wisdom v. Stegall*, Miss. 70 So.2d 43.

### Motion to dismiss

Fact that trial court had overruled motion to dismiss at close of plaintiff's evidence did not preclude it from finding for defendant, if, after hearing whole case, it concluded that plaintiff had not sustained his case by a preponderance of all the evidence.—*Kitselman v. Rautzahn*, 232 F.2d 1008, 68 Nev. 342.

**The trial court in rendering oral decision** is not bound by what the clerk or stenographer takes down, but may rely on its own memory as to what was actually decided, and, in exercise of discretion, may refresh its memory from any source it deems reliable.—*Gottwals v. Rencher*, 98 P.2d 481, 60 Nev. 35, 126 A.L.R. 1262.

47. Ky.—*Stephenson v. Burton*, 246 S.W.2d 999—*Wacker v. Wacker*, 129 S.W.2d 1043, 279 Ky. 19—*Coleman v. Coleman*, 76 S.W.2d 593, 256 Ky. 530.

La.—*Nash v. Solvay Process Co.*, App., 189 So. 493.

48. Ill.—*Schikora v. Platzky*, 151 Ill. App. 280.

### Evidence introduced in other trials

Courts are required to decide cases on the basis of evidence submitted to them and not on the basis of evidence introduced in other trials.—*Blehn v. Lyon*, 189 P.2d 482, 29 Wash.2d 750.

49. Mass.—*Preston v. Peck*, 171 N.E. 54, 271 Mass. 159.

64 C.J. p 1224 note 56.

### Amendment of pleading

Where trial court heard case on its merits and both parties rested, trial court in accomplishing complete jus-

## a. In General

The decision in an action tried by the court without a jury must be based on the evidence admitted in the case.

The decision must be based on evidence admitted in the case,<sup>46</sup> and not on what the court may have learned or known outside the record,<sup>47</sup> and must be uninfluenced by the judge's recollection of testimony given by any witness on the trial of another case.<sup>48</sup> So the judge should not reach a final decision until he has heard all the evidence which a party is prepared to offer and has the right to introduce.<sup>49</sup> Decisions should be based on the record and law as expressed in statutes and authorities and not on the contents of scientific books.<sup>50</sup> The statutes usually require the decision to state separately the facts found and the conclusions of law, as discussed infra § 624, or to state concisely the grounds on which the issues have been decided,<sup>51</sup> or the reasons for the decision.<sup>52</sup>

tice between parties, could suggest that plaintiffs file amendments to complaint for money damages and could render decree without hearing further evidence.—*Weisbrodt v. Norris*, 75 N.E.2d 50, 332 Ill.App. 279.

50. Mich.—*Anderson v. Jersey Creamery Co.*, 270 N.W. 725, 278 Mich. 396.

51. N.Y.—*Steel Co. of Southern Cal. v. Associated Metals & Minerals Corp.*, 102 N.Y.S.2d 655, 277 App. Div. 687—*Mason v. Lory Dress Co.*, 102 N.Y.S.2d 285, 277 App.Div. 660—*Goldberg v. Bruns, Kimball & Co.*, 93 N.Y.S.2d 265, 276 App.Div. 862—*Mario v. De Oteris*, 88 N.Y.S.2d 79, 275 App.Div. 790—*Rosner v. Ehrenberg*, 106 N.Y.S.2d 880, 64 C.J. p 1224 note 58.

### Decision held sufficient

A decision which was equivalent to express findings of fact in favor of plaintiff on all of material facts alleged was in conformity with provision of Civil Practice Act providing for form of decision upon trial by the court.—*Schoengold v. Bler*, 49 N.Y.S.2d 212, 268 App.Div. 832.

### Decision held insufficient

Judgment dismissing action to impress a trust on realty on stated ground that plaintiff had not made out a case was insufficient to comply with statute dealing with form of decision, in absence of statement of the facts deemed essential by trial court or the allegations of complaint as to which trial court concluded plaintiff had not sustained the burden of proof.—*Williams v. Williams*, 117 N.Y.S.2d 192, 281 App.Div. 691.

52. Hawaii.—*Ortex v. Bargas*, 29 Hawaii 548.

64 C.J. p 1224 note 59.

It has been said that the decision should be self-explanatory, self-sustaining, and complete.<sup>53</sup>

### b. Matters to Be Determined

In cases tried by the court without a jury, it is the duty of the court to pass on all issues raised by the pleadings and evidence material to a determination of the case, and a failure or refusal to do so is error.

In cases tried by the court without a jury, it is the duty of the court to pass on all issues raised by the pleadings and evidence material to a determination of the case, and a failure or refusal to do so is error.<sup>54</sup>

It may decide a case on any point raised by the pleadings and evidence, whether or not insisted on by the parties.<sup>55</sup> On the other hand, the court should not find on issues not raised by the pleadings,<sup>56</sup> not argued,<sup>57</sup> and not essential to a decision of the cause.<sup>58</sup>

**In action of replevin** trial court could give the reasons for its decision.—*Swenik Loan Co. v. Courtney*, 10 N.E.2d 512, 291 Ill.App. 549.

53. Minn.—*Martens v. Martens*, 1 N.W.2d 356, 211 Minn. 369.

54. U.S.—*Frank Adam Elec. Co. v. Westinghouse Elec. & Mfg. Co.*, C.C.A.Mo., 146 F.2d 165.

R.I.—*Blackstone Val. Gas & Elec. Co. v. Rhode Island Power Transmission Co.*, 12 A.2d 739, 64 R.I. 204. 64 C.J. p 1224 note 60.

55. Miss.—*Mississippi Power & Light Co. v. Pitts*, 179 So. 363, 181 Miss. 344.

Okl.—*Johnson v. Myers*, 122 P. 713, 32 Okl. 421.

56. U.S.—*Ball v. Paramount Pictures*, 67 F.Supp. 1, reversed on other grounds, C.A., 169 F.2d 317.

Cal.—*Brockman v. Lane*, 230 P.2d 369, 103 Cal.App.2d 802.

Ill.—*Sweeting v. Campbell*, 119 N.E.2d 237, 2 Ill.2d 491.

Mich.—*Dolby v. Dillman*, 278 N.W. 694, 283 Mich. 609, 117 A.L.R. 538. 64 C.J. p 1224 note 62.

57. N.J.—*Moscowitz v. Middlesex Borough Bldg. & Loan Ass'n*, 82 A.2d 226, 14 N.J.Super. 515, affirmed 87 A.2d 33, 18 N.J.Super. 182.

Ohio.—*Anderson v. Cleveland-Cliffs Iron Co.*, Com.Pl., 87 N.E.2d 384.

58. U.S.—*Churchward International C. Co. v. Bethlehem Steel Co.*, D.C.Pa., 260 F. 962, reversed on other grounds, C.C.A., 268 F. 361, certiorari denied 41 S.Ct. 376, 255 U.S. 572, 65 L.Ed. 792.

Ohio.—*Garrison v. Patrick*, 62 N.E.2d 371, 145 Ohio St. 580.

Wash.—*Marrazzo v. Orino*, 78 P.2d 181, 194 Wash. 364—*Hillman v. Gordon*, 219 P. 46, 126 Wash. 614.

### Unnecessary motion

Where motion to dismiss action to

recover taxes paid for want of jurisdiction is denied, court would not pass on petitioner's unnecessary motion to dismiss the motion to dismiss.—*University Distributing Co. v. U. S.*, D.C.Mass., 22 F.Supp. 794.

### Immaterial finding

Where court expressed conclusion in formal printed decision that city chamberlain could not recover from city for certain services, it will not pass on proposed finding of value of such services in supplemental memorandum, since such finding would be immaterial.—*Buckley v. City of New York*, 10 N.Y.S.2d 650, 170 Misc. 412, affirmed 34 N.Y.S.2d 577, 264 App.Div. 116, affirmed 46 N.E.2d 352, 289 N.Y. 742.

### Demurrable counterclaim

Where counterclaims were demurrable for failure to state facts sufficient to constitute a counterclaim, trial court was not bound to determine whether counterclaims were barred by limitations.—*First and Am. Nat. Bank of Duluth v. Conley*, 24 N.W.2d 873, 249 Wis. 403.

### Immaterial question

Generally, courts seek to avoid decision of an immaterial question for the same reason, on principle, that evidence immaterial to any issue of a case is excluded.—*Evers v. Hollman*, Tenn., 268 S.W.2d 97.

59. Cal.—*Wilcox v. Sway*, 160 P.2d 154, 69 Cal.App.2d 560.

Idaho.—*Roberts v. Roberts*, 201 P.2d 81, 68 Idaho 535.

Mo.—*Witte v. Cooke Tractor Co.*, App., 261 S.W.2d 651.

N.M.—*Mosley v. Magnolia Petroleum Co.*, 114 P.2d 740, 45 N.M. 230.

N.D.—*Zimmerman v. Kitzan*, 43 N.W.2d 822, 77 N.D. 477.

Pa.—*Pearlman v. Newburger*, 178 A. 402, 117 Pa.Super. 328.

### c. Writing and Signing

Decisions of a court trying a case without a jury are very generally required by statute to be in writing, and to be signed by the judge.

Decisions of a court trying a case without a jury are very generally required by statute to be in writing.<sup>59</sup> These statutes are held to be mandatory,<sup>60</sup> and the fact that a jury are used in an advisory capacity does not relieve the court of the necessity of making a decision in writing,<sup>61</sup> although the court adopts the verdict of the jury.<sup>62</sup> Refusal of the court on request to render a decision in writing is fatal to the judgment.<sup>63</sup> It has been held, however, that a finding may be orally announced in open court,<sup>64</sup> and the oral announcement of a finding is analogous to the rendition of a judgment.<sup>65</sup>

**Signature.** Where a statute so requires the judge should sign the decision.<sup>66</sup>

Wis.—*In re Henry S. Cooper, Inc.*, 2 N.W.2d 866, 240 Wis. 377.

64 C.J. p 1224 note 64.

### Formal written decision not necessary

Where court has disposed of issues presented by written and signed opinion and parties have been directed to submit a judgment on notice in accordance, no formal written decision is required by statute.—*Hamer v. Platto*, 10 N.Y.S.2d 742, 170 Misc. 560.

60. Mo.—*Witte v. Cooke Tractor Co.*, App., 261 S.W.2d 651.

N.D.—*Zimmerman v. Kitzan*, 43 N.W.2d 822, 77 N.D. 477.

64 C.J. p 1225 note 65.

61. N.D.—*Zimmerman v. Kitzan*, supra.

64 C.J. p 1225 note 66.

62. Cal.—*McKeever v. Locke-Paddon Co.*, 193 P. 258, 49 Cal.App. 350.

S.D.—*Byrne v. McKeachie*, 137 N.W. 343, 29 S.D. 476.

63. Wash.—*State v. Olympia Veneer Co.*, 229 P. 529, 131 Wash. 209.

64. Ind.—*State ex rel. Harp v. Vanderburgh*, Circuit Court, 85 N.E.2d 254, 227 Ind. 353, 11 A.L.R.2d 1108.

—*Cohn v. Rumely*, 74 Ind. 120.

### Better practice

Instead of orally announcing findings in open court, better practice is for trial judge to have minutes of findings made in bench docket minute book, which, in case of any controversy after term, would be written evidence sufficient for a nunc pro tunc entry.—*State ex rel. Harp v. Vanderburgh*, Circuit Court, 85 N.E.2d 254, 227 Ind. 353, 11 A.L.R.2d 1108.

65. Ind.—*State ex rel. Harp v. Vanderburgh*, Circuit Court, supra.

66. N.M.—*Lusk v. First Nat. Bank*

### d. Filing and Directing Entry of Judgment

Where a statute so requires the decision must be filed with the clerk of court, and the decision must direct entry of judgment thereon.

The statutes usually require the decisions of a court trying a case without a jury to be filed with the clerk of court.<sup>67</sup> The statutes are mandatory,<sup>68</sup> and prior to filing, no judgment can be entered,<sup>69</sup> filing being necessary to effectuate the final judgment.<sup>70</sup> Affixing of filing marks by the clerk, a ministerial duty, is not meant by the term "filing."<sup>71</sup>

*Directing entry of judgment.* So, also, it has been held, under some statutes, that the decision must direct entry of judgment thereon.<sup>72</sup>

## § 604. — Time for Rendition and Filing

### a. In general

#### b. As affected by constitutional or statutory provisions

### a. In General

In the absence of statutory regulation, the time within which a judge may decide a case submitted to him for decision is largely a matter of discretion.

In the absence of statutory regulation, the time within which a judge may decide a case submitted to him for decision is largely a matter of discretion,<sup>73</sup> and he may take the case under advisement for a reasonable time, although such time extend beyond the term of the court at which the case was tried.<sup>74</sup> It has been held, however, that if he prologues his decision for an unreasonable length of

time, so that his conduct amounts to an abuse of discretion, he may, by proper proceedings, be compelled to decide the case.<sup>75</sup> Mere announcement of the decision before adoption of findings of fact is not error.<sup>76</sup>

*Rendering decision before day set.* When the trial court, at the close of the testimony, sets a day for its decision, a decision for defendant, rendered before such a day, in the absence of plaintiff and without notice to him, constitutes reversible error, since it deprives plaintiff of his right to take a nonsuit.<sup>77</sup>

*Fixing day for filing brief.* Where defendant's attorney was given until a certain date in which to file his brief, the justice has been held not to be compelled to wait until that time before giving his decision, provided defendant files his brief prior thereto.<sup>78</sup>

### b. As Affected by Constitutional or Statutory Provisions

Under a number of statutes and constitutional provisions, decisions in cases tried without a jury should be rendered and filed within a designated time after the cause is submitted, but such provisions have been declared to be directory only.

Under a number of statutes and constitutional provisions, decisions in cases tried without a jury should be rendered and filed within a designated time after the cause is submitted, but it has been generally held that the failure of the court to render its decision within the time so prescribed does

of Carrizozo, 130 P.2d 1032, 46 N.M. 445.

64 C.J. p 1225 note 68.

67. Cal.—Wilcox v. Sway, 160 P.2d 154, 69 Cal.App.2d 560—Gossman v. Gossman, 126 P.2d 178, 52 Cal.App. 2d 184.

Idaho.—Roberts v. Roberts, 201 P.2d 91, 68 Idaho 535.

N.M.—Lusk v. First Nat. Bank of Carrizozo, 130 P.2d 1032, 46 N.M. 445.

N.D.—Zimmerman v. Kitzan, 43 N.W. 2d 822, 77 N.D. 477.

Pa.—Pearlman v. Newburger, 178 A. 402, 117 Pa.Super. 328.

Wis.—In re Henry S. Cooper, Inc., 2 N.W.2d 866, 240 Wis. 377.

64 C.J. p 1225 note 69.

68. N.D.—Zimmerman v. Kitzan, 43 N.W.2d 822, 77 N.D. 477—Crane v. First Nat. Bank, 144 N.W. 96, 26 N.D. 268.

69. Cal.—Delger v. Jacobs, 125 P. 258, 19 Cal.App. 197.

N.D.—Zimmerman v. Kitzan, 43 N.W. 2d 822, 77 N.D. 477.

70. N.D.—Zimmerman v. Kitzan, supra.

64 C.J. p 1225 note 72.

71. N.D.—Crane v. First Nat. Bank, 144 N.W. 96, 26 N.D. 268.

72. N.Y.—Wise v. Cohen, 99 N.Y.S. 663, 113 App.Div. 859, 37 N.Y.Civ. Proc. 152.

64 C.J. p 1225 note 74.

73. Mass.—Cameron v. Buckley, 13 N.E.2d 37, 299 Mass. 432.

64 C.J. p 1225 note 75.

*Failure to withhold decision* was held not basis for petition for reargument, where counsel could have obtained notes of testimony before entry of decision.—Simpkins v. Pennsylvania R. Co., 81 Pa.Dist. & Co. 638, affirmed 5 A.2d 103, 334 Pa. 1.

### Cause held submitted

Where plaintiff introduced sufficient evidence to support findings for defendant, but did not formally rest or seek to dismiss, court was justified in concluding that cause was submitted for findings and decision.—Calhoun Beach Holding Co. v. Minne-

apolis Builders' Supply Co., 252 N.W. 442, 190 Minn. 576.

### Error held not shown

In action on account, where the defense was a novation, defendant was bound by testimony he had adduced, which showed that parties had reached no final agreement and that there had been no novation, and, therefore, trial judge did not err in assuming that witnesses which defendant had yet to offer would substantiate defendant's testimony, and in deciding cause before hearing such other witnesses.—Blaylock v. Stephens, 258 S. W.2d 779, 36 Tenn.App. 464.

74. Okl.—Potts v. First State Bank of Talihina, 151 P. 859, 51 Okl. 162 —Barnes v. Benham, 75 P. 1130, 13 Okl. 582.

75. Cal.—Wyatt v. Arnot, 94 P. 86, 7 Cal.App. 231.

76. Kan.—Harrison v. Lyon, 271 P. 395, 126 Kan. 705.

64 C.J. p 1225 note 78.

77. Ill.—Paepcke-Leicht Lumber Co. v. Berkowsky, 73 Ill.App. 400.

78. N.Y.—Collins v. Davis, 114 N.Y. S. 792, 1 N.Y.Civ.Proc., N.S., 11.



not deprive the court of jurisdiction to decide the case and file its decision at a later date,<sup>79</sup> or affect the validity of a judgment based on a decision so rendered.<sup>80</sup> In most decisions in which the foregoing views were enunciated it was expressly declared that provisions of this character are directory only;<sup>81</sup> and it has been stated in effect in numerous decisions, as a ground for holding the provisions to be directory, that, since the parties have no control over the action of the court, they should not be punished for its dereliction of duty.<sup>82</sup>

**Waiver.** Where counsel for parties submitted the cause to the trial judge and agreed to await his convenience, notwithstanding the judge's statement that he was going to the hospital, counsel waived the filing of a decision within the time provided by statute.<sup>83</sup> The failure of the trial judge to render judgment at least two days before the end of the trial term, as required by a rule of court, may be waived by the parties litigant, and defendant cannot object to a judgment rendered on the day preceding the close of the term, where he stood by at the time and made no protest.<sup>84</sup>

**Presumptions.** Where the court holds a case un-

der advisement for a period longer than that prescribed by statute without objection, the presumption will be indulged that it had a lawful excuse for the delay.<sup>85</sup>

**Time of rendition by visiting judge.** A statute which authorizes a visiting judge to transmit in writing the decision and entry of judgment after ten days' notice applies only where the visiting judge does not return to the county of the trial but mails the decision to the clerk.<sup>86</sup> If he comes back and actually renders judgment from the bench in the county of trial, the rule is the same as when the judgment is rendered by a local judge.<sup>87</sup>

## § 605. — Rendition in Absence of Counsel

The rendition of a final decision in the absence of counsel, in a proper case, is not error.

Rendition of a final decision in the absence of counsel is not error where the papers in the case had been before the court during the progress of the trial, and the judge had them accurately in his mind when he rendered the decision, and where, at the time of the decision, counsel had absented himself without leave and had the papers in his possession.<sup>88</sup> It has been held, however, that, where

79. Idaho.—*Roberts v. Roberts*, 201 P.2d 91, 63 Idaho 535.

Mass.—*Kerr v. Palmieri*, 91 N.E.2d 754, 325 Mass. 554.

Minn.—*Wenger v. Wenger*, 274 N.W. 517, 200 Minn. 436.

Pa.—*In re Griffith's Estate*, 57 A.2d 893, 358 Pa. 474—*Huron v. Schomaker*, 1 A.2d 537, 132 Pa.Super. 462.

64 C.J. p 1225 note 82.

### Special proceedings

The statute providing that on a trial of an issue of fact by court, its decision shall be given in writing and filed with clerk within 60 days after submission of the cause applies only to actions, and does not apply to a special proceeding.—*In re Henry S. Cooper, Inc.*, 2 N.W.2d 866, 240 Wis. 377—*Gill v. Milwaukee & L. W. R. Co.*, 45 N.W. 23, 76 Wis. 293.

### Postponing decision

A suitor cannot be deprived of right to immediate decision unless court judicially acts on request from federal government to the State Department, or the United States Attorney General, stating that it is for best interests of the government and its allies in the war to postpone decision.—*Cornellussen & Stakgold v. General Elec. Co.*, 46 N.Y.S.2d 227, 181 Misc. 716.

### After defendant had rested

Denial by trial court of motion of defendants for judgment at conclusion of plaintiff's proofs did not preclude a judgment of no cause of ac-

tion after defendants rested without introducing testimony.—*Hearst Pub. Co. v. Litsky*, 64 N.W.2d 687, 339 Mich. 642.

### Statute held invalid

The statute forbidding a court to hold any issue under advisement for more than 60 days and depriving court of jurisdiction in the cause for failure to determine any issue within 90 days after taking it under advisement is unconstitutional as constituting legislative interference with judicial functions.—*State ex rel. Kostas v. Johnson*, 69 N.E.2d 592, 224 Ind. 540, 168 A.L.R. 1118.

80. Mass.—*Kerr v. Palmieri*, 91 N.E. 2d 754, 325 Mass. 554.

Pa.—*In re Griffith's Estate*, 57 A.2d 893, 358 Pa. 474—*Huron v. Schomaker*, 1 A.2d 537, 132 Pa.Super. 462.

64 C.J. p 1225 note 83.

81. Mich.—*Cowen v. Chenot*, 296 N. W. 837, 296 Mich. 678.

Minn.—*Wenger v. Wenger*, 274 N.W. 517, 200 Minn. 436.

Pa.—*In re Griffith's Estate*, 57 A.2d 893, 358 Pa. 474—*In re Objections to Nomination Papers of "Socialist Labor"*, 1 A.2d 831, 332 Pa. 78—*Huron v. Schomaker*, 1 A.2d 537, 132 Pa.Super. 462—*Pearlman v. Newburger*, 178 A. 402, 117 Pa.Super. 328.

64 C.J. p 1226 note 84.

### Not condition precedent or subsequent

Statute providing that a justice of

a district court who has reserved his decision in a case heard by him shall render his decision within four months from date when the hearing was closed unless time be extended as therein provided, is a regulation for orderly and convenient conduct of public business and not a condition precedent to validity of act done and does not operate to impose a jurisdictional condition subsequent.—*Kerr v. Palmieri*, 91 N.E.2d 754, 325 Mass. 554.

82. Mich.—*Cowen v. Chenot*, 296 N. W. 837, 296 Mich. 678.

Minn.—*Wenger v. Wenger*, 274 N.W. 517, 200 Minn. 436.

Pa.—*In re Griffith's Estate*, 57 A.2d 893, 358 Pa. 474—*Huron v. Schomaker*, 1 A.2d 537, 132 Pa.Super. 462.

64 C.J. p 1226 note 85.

83. Pa.—*Pearlman v. Newburger*, 178 A. 402, 117 Pa.Super. 328.

84. Tex.—*Rowe v. Gohlman*, 98 S.W. 1077, 44 Tex.Civ.App. 315.

85. Ind.—*McCray v. Humes*, 18 N.E. 500, 116 Ind. 103.

86. Ariz.—*Aldous v. Intermountain Building & Loan Ass'n of Arizona*, 284 P. 353, 36 Ariz. 225.

87. Ariz.—*Aldous v. Intermountain Building & Loan Ass'n of Arizona*, supra.

88. Ga.—*Marshall v. Livingston*, 77 Ga. 21.

the decision is rendered in the absence of counsel, the court should direct immediate notice to be given to the party's attorneys.<sup>89</sup>

### § 606. — Amendment and Objections or Exceptions

A decision rendered by the court without a jury cannot be amended for the purpose of amplifying it. Objections and exceptions lie to the decision or to the rulings of the court on questions of law only.

A decision rendered by the court in a trial without a jury cannot be amended for the purpose of amplifying it.<sup>90</sup> One of the effects of such a practice, it has been said, would be to extend the time for filing and prosecuting exceptions. To permit this to be done would be to nullify the statutes relating to exceptions and the procedure thereunder.<sup>91</sup>

On a trial of a cause by the court without a jury, exceptions lie to the decision or to rulings of the court on questions of law only;<sup>92</sup> and under some statutes no exceptions lie even to decisions or rulings on matters of law unless the parties in the agreement to submit the cause to the court for trial without a jury expressly reserve the right to except,<sup>93</sup> and such rule applies even if the final decision is erroneous as a matter of law.<sup>94</sup> The right to except for supposed errors of decision is not affected by the absence of a written finding by the circuit judge.<sup>95</sup> Exceptions must be written and filed, and not taken orally.<sup>96</sup>

### § 607. Verdict

Where a case is tried by the court without a jury, a formal verdict is neither necessary nor proper.

Where a case is tried by the court without a jury,

a formal verdict is neither necessary<sup>97</sup> nor proper.<sup>98</sup> A decision of the court will have the force and effect of a verdict by the jury.<sup>99</sup> The court should render a judgment and not a verdict.<sup>1</sup>

### § 608. Withdrawal of Submission and Appointment of Special Judge

Under some statutes the submission of an issue may be withdrawn, and a special judge appointed to take jurisdiction thereof.

Under some statutes it is provided that if the judge fails to determine any issue of law or fact within ninety days after having taken it under advisement, on written application of any of the parties or their attorneys, duly filed in the clerk's office and called to the attention of the court before the announcement of the decision of the issue in question, the submission of the issue shall thereupon be withdrawn, and the judge before whom the cause is pending shall be disqualified to hear or determine any of the issues in the cause, and a special judge shall be appointed to take jurisdiction thereof, and such statutes, it has been held, create an optional procedural privilege which may be waived.<sup>2</sup> No arrangement between the court and one party to the action can effect a withdrawal of the cause from the advisement of the court.<sup>3</sup> A motion to withdraw a submission and appoint a special judge must be overruled where the moving party is responsible for,<sup>4</sup> or consents to,<sup>5</sup> the delay of the court in determining the issues. It is the duty of the trial court, on its own motion, to include in the record any facts which constitute a waiver of the privilege to compel withdrawal of submission, when these facts come to the knowledge of the judge in his capacity as judge of the cause.<sup>6</sup>

89. Nev.—Linville v. Scheeline, 33 P. 225, 30 Nev. 106.

90. R.I.—Ashaway Nat. Bank v. Superior Court, 67 A. 523, 28 R.I. 355.

91. R.I.—Ashaway Nat. Bank v. Superior Court, *supra*.

92. Me.—Frank v. Mallett, 42 A. 238, 92 Me. 77.

64 C.J. p 1227 note 95.

93. Me.—Stern v. Fraser Paper, Limited, 22 A.2d 129, 138 Me. 98, 136. 64 C.J. p 1227 note 96.

"Waiver"

Where plaintiff agreed to jury-waived hearing of original action, the case was "open," and opportunity was then before him to reserve the right to except on all questions of law which might subsequently arise in

the case, and his failure to exercise such opportunity was a "waiver" of right to except, precluding him from thereafter maintaining writ of error, particularly where defendant was not responsible for plaintiff's failure to reserve right of exceptions, and right of exceptions was not lost to plaintiff as result of contract with defendant, and both parties appeared and stood trial, and neither party was prevented by fraud or inevitable accident from being fully heard.—Stern v. Fraser Paper, Limited, *supra*.

94. Me.—Stern v. Fraser Paper, Limited, *supra*.

95. Mich.—People v. Littlejohn, 11 Mich. 60.

96. N.Y.—McKeon v. See, 27 N.Y.Su-

per. 449, affirmed 51 N.Y. 300, 10 Am.R. 659.

97. Iowa—Gray v. Phillips, Morr. 430.

64 C.J. p 1227 note 99.

98. Mass.—Bearing v. Bowker, 115 Mass. 129.

99. Miss.—Kelly v. Miller, 39 Miss. 17.

1. Mass.—Bearing v. Bowker, 115 Mass. 129.

2. Ind.—State v. Wirt, 177 N.E. 441, 203 Ind. 121.

3. Ind.—State v. Wirt, *supra*.

4. Ind.—State v. Wirt, *supra*. 64 C.J. p 1227 note 7.

5. Ind.—State v. Wirt, *supra*.

6. Ind.—State v. Wirt, *supra*.

## B. FINDINGS OF FACT AND CONCLUSIONS OF LAW

## § 609. In General

- a. General considerations; definitions
- b. Nature and purpose

## a. General Considerations; Definitions

A "finding of fact" is a statement of the ultimate facts on which the law of the case must determine the rights of the parties, and is a finding of the propositions of fact which the evidence establishes. "Conclusions of law" are those conclusions which the trial judge concludes flow from the ultimate facts.

The term "finding" ordinarily imports the ascertainment of facts by a judge,<sup>7</sup> in a judicial proceeding,<sup>8</sup> his decision on those facts,<sup>9</sup> resulting in the best judgment of the court of what the entire evidence establishes,<sup>10</sup> and is the all-important and all-inclusive basis for judgment.<sup>11</sup> The term commonly applies to the result reached by a judge.<sup>12</sup> The term "finding" is never used in the statutes or in common parlance, to designate the decision of the appellate court on appeal,<sup>13</sup> or the sitting of a court in banc,<sup>14</sup> since such courts generally have

no fact-finding powers. Sometimes, however, as a matter of interpretation it has been treated as a ruling of law.<sup>15</sup>

The phrase "findings of fact" has been defined as meaning a statement of the ultimate facts<sup>16</sup> on which the law of the case must determine the rights of the parties, and are findings of the propositions of fact which the evidence establishes, and not the evidence on which those ultimate facts are supposed to rest.<sup>17</sup> It has also been defined as the determination by a court, found on the evidence of a fact averred by one party and denied by the other,<sup>18</sup> or the written statement of each issuable fact established by the evidence,<sup>19</sup> or a conclusion by way of reasonable inference from the evidence.<sup>20</sup>

"Conclusions of law" are those conclusions which the trial judge concludes flow from the ultimate facts as he finds them illuminated by subsidiary facts,<sup>21</sup> and to arrive at and to apply legal conclusions is the function of the court.<sup>22</sup> Where a

7. Cal.—Herman v. Glasscock, 155 P. 2d 912, 68 Cal.App.2d 98.

Mass.—Garden Cemetery Corp. v. Baker, 105 N.E. 1070, 218 Mass. 339, 346, Ann.Cas.1916F 75.

Ohio.—Carr v. Home Owners Loan Corp., 76 N.E.2d 389, 148 Ohio St. 533.

Definitions, nature, purposes, and distinctions with respect to verdicts and findings of jury see *supra* § 485.

General or special findings see *infra* § 627.

## Referee and coroner

The use of the term "judge" includes a referee and coroner.—Benton v. Roberts, 185 S.E. 292, 53 Ga.App. 121.

8. Ohio.—Carr v. Home Owners Loan Corp., 76 N.E.2d 389, 148 Ohio St. 533.

Or.—Maeder Steel Products Co. v. Zanello, 220 P. 155, 109 Or. 562. 25 C.J. p 1133 note 9.

## Findings by commissions

The rule embraces courts and commissions acting in a quasi judicial capacity.—Sanders Bros. Radio Station v. Federal Communications Commission, 106 F.2d 321, 70 App.D.C. 297, reversed on other grounds Federal Communications Commission v. Sanders Bros. Radio Station, 60 S.Ct. 693, 309 U.S. 470, 642, 84 L.Ed. 869, 1037.—Saginaw Broadcasting Co. v. Federal Communications Commission, 96 F.2d 554, 68 App.D.C. 282, certiorari denied Gross v. Saginaw Broadcasting Co., 59 S.Ct. 72, 305 U.S. 613, 83 L.Ed. 391.

9. Ga.—Benton v. Roberts, 185 S.E. 292, 53 Ga.App. 121.

Or.—Maeder Steel Products Co. v. Zanello, 220 P. 155, 109 Or. 562. Pa.—Nelson v. City of Philadelphia, 9 Pa.Dist. & Co. 766.

Wis.—Williams v. Giblin, 57 N.W. 1111, 86 Wis. 648.

10. Cal.—Herman v. Glasscock, 155 P.2d 912, 68 Cal.App.2d 98.

Me.—Perry v. Curtiss, 95 A.2d 562.

Pa.—Pennsylvania Threshermen & Farmers' Mut. Cas. Ins. Co. v. Kaufman, Com Pl., 50 Lack.Jur. 165.

11. Cal.—Boone v. Doyle Cattle Co., 22 P.2d 542, 132 Cal.App. 355.

Ohio.—Carr v. Home Owners Loan Corp., 76 N.E.2d 389, 148 Ohio St. 533.

12. Or.—Maeder Steel Products Co. v. Zanello, 220 P. 155, 109 Or. 562.

13. Wis.—Williams v. Giblin, 57 N.W. 1111, 86 Wis. 648.

14. Pa.—Jann v. Linton's Lunch, 29 A.2d 219, 150 Pa.Super. 653.—Moore v. W. J. Gilmore Drug Co., 200 A. 250, 131 Pa.Super. 349.—Fritch v. Eagle Const. Co., 93 Pittsb.Leg.J. 181.

15. Mass.—Garden Cemetery Corp. v. Baker, 105 N.E. 1070, 218 Mass. 339, 346.—Clapp v. Wilder, 57 N.E. 692, 176 Mass. 332, 337, 50 L.R.A. 120.

16. Or.—Howard v. Klamath County, 215 P.2d 362, 188 Or. 205.—Larsen v. Martin, 143 P.2d 239, 172 Or. 605.

Utah.—Sandall v. Hoskins, 137 P.2d 819, 822, 104 Utah 50.

What are "ultimate" facts see *infra* § 629.

17. Or.—Howard v. Klamath County, 215 P.2d 362, 188 Or. 205.—Larsen v. Martin, 143 P.2d 239, 172 Or. 605.

18. Idaho.—C. I. T. Corp. v. Elliott, 159 P.2d 891, 66 Idaho 384.

Or.—Maeder Steel Products Co. v. Zanello, 220 P. 155, 109 Or. 562.

25 C.J. p 1133 note 13.

"Special verdict" distinguished

Iowa.—Morbey v. Chicago, etc., R. Co., 89 N.W. 105, 107, 116 Iowa 84.

19. Nev.—Elder v. Prevett, 3 P. 237, 18 Nev. 278.

20. R.I.—Burns v. Rhode Island Tool Co., 85 A.2d 925, 79 R.I. 169.—Esmond Mills, Inc. v. Molloy, 78 A.2d 365, 78 R.I. 27.—Baccari v. W. T. Grant Co., 56 A.2d 552, 73 R.I. 376.—Rechia v. Walsh-Kaiser Co., 43 A.2d 313, 71 R.I. 208.—Barker v. Narragansett Racing Ass'n, 16 A.2d 495, 65 R.I. 489, reargument denied 17 A.2d 23, 65 R.I. 489.—Jillson v. Ross, 94 A. 717, 38 R.I. 145.

21. Utah.—Sandall v. Hoskins, 137 P.2d 819, 104 Utah 50.

## Judicial determinations

"Conclusions of law" are not ministerial duties, but are fruits of judicial ascertainment.—Allen v. U. S., D.C. Tex., 10 F.2d 807, 809.

## Decision of court

"Conclusion of law" is the decision of the court on the facts found by the court when a trial has been had without a jury.—C. I. T. Corp. v. Elliott, 159 P.2d 891, 66 Idaho 384.

22. La.—Iglesias v. Campbell, App., 175 So. 145.

conclusion describes a legal status, or condition, or a legal offense, it is ordinarily termed a "conclusion of law;"<sup>23</sup> and where the ultimate conclusion can be arrived at only by applying a rule of law, the result so reached embodies a conclusion of law.<sup>24</sup> The phrase has been contrasted with "allegation of fact" in the definition of Allegation 3 C.J.S., p. 884, note 67, "finding of fact,"<sup>25</sup> "conclusion of fact,"<sup>26</sup> and "ultimate fact."<sup>27</sup>

### b. Nature and Purpose

The making of findings of fact and conclusions of law is for the protection of both the court and the parties.

The purpose of such findings and conclusions is to dispose of the issues raised by the pleadings, and to facilitate a review of the cause if there is an appeal.

The making of findings of fact and conclusions of law is for the protection of both court and parties.<sup>28</sup> The purpose of such findings and conclusions is to dispose of the issues raised by the pleadings,<sup>29</sup> facilitate a review of the cause if there is an appeal<sup>30</sup> by exhibiting the exact grounds on which the judgment rests,<sup>31</sup> and to enable the appellate court to determine whether the judgment appealed from is supported by sufficient facts.<sup>32</sup>

23. Wis.—Travelers' Ins. Co. v. Hal-lauer, 111 N.W. 527, 131 Wis. 371. 12 C.J. p 388 note 15.

24. Iowa.—Mallinger v. Webster City Oil Co., 234 N.W. 254, 256, 211 Iowa 847.

25. U.S.—Lambert Lumber Co. v. Jones Engineering & Construction Co., C.C.A. Mo., 47 F.2d 74, 77.

Iowa.—Mallinger v. Webster City Oil Co., 234 N.W. 254, 256, 211 Iowa 847.

Mo.—Jones v. Century Coal Co., App. 46 S.W.2d 196, 198—Schulte v. Grand Union Tea & Coffee Co., App. 43 S.W.2d 832, 833.

Distinction between findings of fact and conclusions of law generally see infra § 647.

26. Ill.—Caywood v. Farrell, 51 N. E. 775, 175 Ill. 480.

### Inference drawn from evidentiary facts

(1) As contradistinguished from "conclusion of law" "conclusion of fact" has been defined as meaning an inference drawn from evidentiary facts.—Caywood v. Farrell, 51 N.E. 775, 175 Ill. 480, 482.

(2) What are evidentiary facts see infra § 629.

27. Mo.—Maltz v. Jackaway-Katz Cap Co., 82 S.W.2d 909, 913, 336 Mo. 1009.

Or.—Oregon Home Builders v. Montgomery Inv. Co., 184 P. 487, 489, 94 Or. 349.

Wis.—Tesch v. Industrial Commission, 229 N.W. 194, 197, 200 Wis. 616.

65 C.J. p 1190 note 43 [B]—12 C.J. p 388 note 15 [d].

28. Neb.—Donald v. Heller, 10 N.W. 2d 447, 143 Neb. 600.

64 C.J. p 1227 note 12.

### Guarantees fair trial

The rule requiring courts to make basic findings of fact is designed to insure the decision of cases according to the evidence and law, rather than arbitrarily and in derogation of facts and issues involved, and to apprise parties and reviewing court of bases and validity of decisions thus ren-

dered and avoid situations in which reviewing court is left to surmise as to what actually occurred at trial.—Sanders Bros. Radio Station v. Federal Communications Commission, 106 F.2d 321, 70 App.D.C. 297, reversed on other grounds Federal Communications Commission v. Sanders Bros Radio Station, 60 S.Ct. 693, 309 U.S. 470, 642, 84 L.Ed. 869, 1037—Saginaw Broadcasting Co. v. Federal Communications Commission, 96 F.2d 554, 68 App.D.C. 282, certiorari denied Gross v. Saginaw Broadcasting Co., 59 S.Ct. 72, 305 U.S. 613, 83 L.Ed. 391.

29. Cal.—Bertone v. City & County of San Francisco, 245 P.2d 29, 111 Cal.App.2d 579—Kenfield v. Weir, 60 P.2d 885, 16 Cal.App.2d 501.

Neb.—Donald v. Heller, 10 N.W.2d 447, 143 Neb. 600.

64 C.J. p 1227 note 13.

### Failure to make finding

Failure to make finding on a material issue results in prejudicial error entitling complaining party to reversal if it appears from record that there was evidence introduced as to such issue and the evidence was sufficient to sustain a finding in favor of such party.—Bertrand v. Pacific Elec. Ry. Co., 115 P.2d 228, 46 Cal.App.2d 7.

### Means to set aside judgment

It is not the main purpose of findings to afford means whereby losing party may set aside a just judgment.—Kenfield v. Weir, 60 P.2d 885, 16 Cal.App.2d 501.

30. Cal.—Herman v. Glasscock, 155 P.2d 912, 68 Cal.App.2d 98.

Ind.—Cleveland v. Palm, 199 N.E. 142, 200 Ind. 382.

Neb.—Donald v. Heller, 10 N.W.2d 447, 143 Neb. 600.

Wash.—Mertens v. Mertens, 227 P.2d 724, 38 Wash.2d 55.

Wis.—Brown v. Sucher, 45 N.W.2d 73, 258 Wis. 123.

64 C.J. p 1227 note 14.

31. Cal.—Herman v. Glasscock, 155 P.2d 912, 68 Cal.App.2d 98.

N.M.—State Nat. Bank of El Paso, Tex., v. Cantrell, 127 P.2d 246, 46 N.M. 268.

64 C.J. p 1227 note 14.

### Basis of decision

Conn.—Hoyt v. City of Stamford, 165 A. 357, 116 Conn. 402.

Important right of litigant is to have a statement of facts, in a proper case on which the judgment was based, whereas the statement of the legal conclusion of the court, aside from its judgment, is unimportant.—Shunk v. Shunk Mfg. Co., 93 N.E.2d 321, 86 Ohio App. 467.

### Theory of case

Object of findings of fact in a case tried without a jury is to ascertain the theory on which the judge decided the case.

Ill.—Tarjan, for Use of Lefkow, v. National Surety Co., 268 Ill.App. 232.

Mo.—Sacre v. Sacre, 55 A.2d 592, 143 Me. 80, 173 A.L.R. 1261.

32. Utah.—In re Peterson, 48 P.2d 468, 87 Utah 144.

### Traverse same ground as trial court

Under statute, the courts must make such specific findings of ultimate facts as will enable the appellate court in reviewing such findings and the conclusions to traverse the same ground as the trial court.—Porter v. Mesilla Val. Cotton Products, 76 P.2d 937, 42 N.M. 217.

### Findings in accordance with law

Usually, facts may be separated from law by requests for rulings in order to enable reviewing court to determine whether general finding of trial court was permissible in accordance with law on facts found by him.—Langdoe v. Gevaert Co. of America, 51 N.E.2d 780, 315 Mass. 8.

### Findings not mere technicality

"When a decision is accompanied by findings of fact, the reviewing court may decide whether the decision reached by the court or commission follows as a matter of law from the facts stated as its basis, and also whether the facts so stated have any substantial support in the evidence. In the absence of findings of fact the reviewing tribunal can determine neither of these things. The requirement of findings is thus far from a technicality. On the contrary, it is

Findings of fact also serve the purpose of aiding a party to determine whether they warrant the legal conclusions reached by the court in rendering judgment in the case,<sup>32</sup> thus allowing a party specifically to assign error to such conclusions of fact or law as are claimed to be erroneous,<sup>34</sup> to the end that the trial court may withdraw or correct and amend them.<sup>35</sup> Since a request for findings is with a view of excepting to a decision on questions of law, until a party entitled to findings has them, he cannot determine what assignments of error he may desire to assert, and without such findings the reviewing court cannot consider his assignments of error.<sup>36</sup> Findings of fact also avoid the necessity of an extended bill of exceptions on review.<sup>37</sup> In analogy to a finding by the jury, discussed supra § 491, where the finding of the court with respect to the facts may be either general or special, the court finds a general verdict on all the issues for

plaintiff or defendant or its finds a special verdict.<sup>38</sup> The findings by the trial court constitute the actual decision of the court.<sup>39</sup> Once a judge has made his findings of fact, his functions as a trier of fact are ended, and his subsequent actions are performed in the capacity of a judge of the court.<sup>40</sup>

### § 610. General Authority and Duty to Make

In some jurisdictions the court is not bound and cannot be compelled to make special findings of fact in an action at law tried before it without a jury, but under some statutes and rules of court a mandatory duty is placed on court to state findings of fact and conclusions of law.

In some jurisdictions, in the absence of a statute or rule of court to the contrary,<sup>41</sup> the court is not bound and cannot be compelled to make special findings of fact in an action at law tried before it without a jury,<sup>42</sup> although it may, in its discre-

to insure against Star Chamber methods, to make certain that justice shall be administered according to facts and law.—Saginaw Broadcasting Co. v. Federal Communications Commission, 96 F.2d 554, 68 App.D.C. 282, certiorari denied *Gross v. Saginaw Broadcasting Co.*, 59 S.Ct. 72, 305 U.S. 613, 83 L.Ed. 391.

33. Ohio.—Bauer v. Cleveland Ry. Co., 47 N.E.2d 225, 141 Ohio St. 197.—Shunk v. Shunk Mfg. Co., 93 N.E.2d 821, 86 Ohio App. 467.

34. Ohio.—Manchester v. Cleveland Trust Co., App., 114 N.E.2d 242.—Shunk v. Shunk Mfg. Co., 93 N.E.2d 321, 86 Ohio App. 467.

Tex.—Farmers & Merchants Nat. Bank v. Arrington, Civ.App., 98 S.W.2d 378.

35. N.M.—State Nat. Bank of El Paso, Tex., v. Cantrell, 127 P.2d 246, 46 N.M. 268.

36. Ohio.—Shunk v. Shunk Mfg. Co., 93 N.E.2d 321, 86 Ohio App. 467.

37. Ohio.—Bauer v. Cleveland Ry. Co., 47 N.E.2d 225, 141 Ohio St. 197.—Shunk v. Shunk Mfg. Co., 93 N.E.2d 321, 86 Ohio App. 467.

38. U.S.—Norris v. Jackson, Ill., 9 Wall. 125, 19 L.Ed. 608.—Rhodes v. U. S. National Bank, Ill., 66 F. 512, 13 C.C.A. 612, 34 L.R.A. 742.

39. Cal.—Pereira v. Pereira, 244 P.2d 754, 111 Cal.App.2d 359.

#### "Decision"

(1) Word "decision" is synonymous with "finding."

Cal.—Chambers v. Farnham, 179 P.423, 424, 39 Cal.App. 17.

Ind.—Volderauer v. State, 143 N.E. 674, 676, 195 Ind. 415.—Scott v. Ameler, 13 N.E.2d 890, 891, 105 Ind.App. 131.

(2) The word "decision" means the finding of the court, and it denotes a

finding on the facts.—Heekin Can Co. v. Porter, 46 N.E.2d 486, 221 Ind. 69.

40. Pa.—Evans v. Stewart, 157 A. 515, 103 Pa.Super. 549.

41. Cal.—Carpenter v. Pacific Mut. Life Ins. Co. of California, 74 P.2d 761, 10 Cal.2d 307, affirmed 59 S.Ct. 170, 305 U.S. 297, 83 L.Ed. 152, rehearing denied 59 S.Ct. 355, 305 U.S. 675, 83 L.Ed. 437.  
Me.—Sacre v. Sacre, 55 A.2d 592, 143 Me. 80, 173 A.L.R. 1261.—Mitchell v. Mitchell, 11 A.2d 898, 136 Me. 406.

42. U.S.—Weeks v. White, C.C.A. Mass., 77 F.2d 817.—Carter v. U. S. D.C.Mo., 3 F.Supp. 782.

Mass.—In re Loeb, 52 N.E.2d 37, 315 Mass. 191.—Van Valkenburg v. Slowick, 51 N.E.2d 434, 314 Mass. 763.—Campanale v. General Ice Cream Corp., 49 N.E.2d 1013, 314 Mass. 387.—Codman v. Beane, 45 N.E.2d 948, 312 Mass. 570.—Memishian v. Phipps, 42 N.E.2d 277, 311 Mass. 521.—Gosselin v. Silver, 17 N.E.2d 706, 301 Mass. 481.—Dolham v. Peterson, 9 N.E.2d 406, 297 Mass. 479.—Industrial Bankers of Massachusetts v. Reid, Murdoch & Co., 8 N.E.2d 19, 297 Mass. 119.—Nicholas v. Lewis Furniture Co., 198 N.E. 753, 292 Mass. 500.—Gordon v. Harris, 195 N.E. 744, 290 Mass. 432.—Wrobel v. General Accident, Fire & Life Assur. Corporation, 192 N.E. 498, 288 Mass. 206.—Genard v. Hosmer, 189 N.E. 46, 285 Mass. 259, 91 A.L.R. 543.—Crownshield Shipbuilding Co. v. Jackson, 186 N.E. 87, 283 Mass. 21.

64 C.J. p 1227 note 17.

Necessity of finding ultimate facts see *infra* § 629.

#### At common law

The finding of an issue of fact by the court on the evidence, either

with or without the consent of parties, was a proceeding unknown at the common law.

U.S.—Wear v. Mayer, C.C.Mo., 6 R. 658, 2 McCrary 172, 3 C.J. p 611 note 16.

#### Matters of fact

Plaintiff was not entitled to and judge could not be required to make requested finding on stated grounds dealing only with matters of fact, particularly where, instead of stating such facts hypothetically, plaintiff assumed the truth of the matters contained in such grounds and on such assumptions requested not only a ruling of law as to each of them, but also an implied finding of all the facts involved in each of the alleged grounds, even though judge in refusing such request made findings on most of the material matters embraced in such grounds.—Strachan v. Prudential Ins. Co. of America, 73 N.E.2d 840, 321 Mass. 507.

#### Express or implied findings

On the law side of court, a judge cannot be required to make any express or implied findings of fact.—Liberatore v. Town of Framingham, 63 N.E.2d 561, 315 Mass. 538.

#### Ordinary rule

Where there was nothing to take case out of ordinary rule that a trial judge sitting without a jury in a law action is not required, even on request, to make special findings of fact, judge was not required to make special findings of fact with respect to grounds specified in plaintiff's request for ruling which raised question whether, on all the evidence, a finding for plaintiff was required as matter of law.—Memishian v. Phipps, 42 N.E.2d 277, 311 Mass. 521.

tion, do so.<sup>43</sup> Under some statutes and rules of court, however, on the trial of a case before it without a jury, the court must, as a basis of its judgment, state findings of fact and conclusions of law,<sup>44</sup> unless they are waived, as discussed *infra* § 613; but a failure to do so does not render a judg-

ment entered thereon absolutely void.<sup>45</sup> The mandatory provision of such statutes includes an obligation on the part of the court to answer all interrogatories involving the ultimate facts of the controversy,<sup>46</sup> and a trial court which refuses a party's requested findings of fact and conclusions of law

#### Itemization of damages

(1) In the absence of a statute to the contrary the court need not itemize damages in its findings.—*Ferguson v. Rochford*, 79 A. 177, 84 Conn. 202, Ann.Cas.1912B 1212.

(2) Where the cause is tried by the court, the court need not segregate in its findings the amount of actual damages from the amount given as exemplary damages, in the absence of a request.—*Foley v. Martin*, 71 P. 165, 75 P. 842, 142 Cal. 256, 100 Am.S.R. 123.

43. U.S.—*U. S. v. Dickinson, C.C.A. Mass.*, 95 F.2d 65.—*Fred W. Mears Heel Co. v. Walley, C.C.A.Me.*, 71 F.2d 876, certiorari denied *Fred W. Mears Heel Co. v. Walley*, 55 S.Ct. 122, 293 U.S. 605, 79 L.Ed. 695.

Mass.—*Memishian v. Phipps*, 42 N.E. 2d 277, 311 Mass. 521.

64 C.J. p 1228 note 18.

#### Completeness of findings

It is discretionary with the trial judge whether he shall make any express findings of fact and whether to state all the facts found or only part of them.—*In re Loeb*, 52 N.E.2d 37, 315 Mass. 191.

44. Ariz.—*Keystone Copper Min. Co. v. Miller*, 164 P.2d 603, 63 Ariz. 544.—*Schwartz v. Schwartz*, 79 P. 2d 501, 52 Ariz. 105, 116 A.L.R. 633.

Cal.—*Howard v. General Petroleum Corp.*, 238 P.2d 145, 108 Cal.App. 2d 25.—*Gilmore v. Gilmore*, 221 P. 2d 123, 99 Cal.App.2d 186.—*Herman v. Glasscock*, 155 P.2d 912, 68 Cal. App.2d 98.—*Corpus Juris cited in Euclid Candy Co. v. International L. & W. Union*, 121 P.2d 91, 93, 49 Cal.App.2d 137.—*Easterly v. Cook*, 35 P.2d 164, 140 Cal.App. 115.

Hawaii.—*Matsuo v. Teixeira*, 34 Hawaii 679.

Ind.—*Patterson v. City of Gary*, 190 N.E. 320, 98 Ind.App. 623.

Kan.—*Eresch v. Gulpre*, 51 P.2d 1016, 142 Kan. 747.

Ky.—*Patterson v. Miracle*, 69 S.W.2d 708, 253 Ky. 347.

Mich.—*Allen v. Currier Lumber Co.*, 61 N.W.2d 138, 337 Mich. 696.

Mo.—*Witte v. Cooke Tractor Co.*, App. 261 S.W.2d 651.

N.M.—*Goldenberg v. Village of Capitlan*, 203 P.2d 370, 58 N.M. 137.—*Porter v. Mesilla Val. Cotton Products*, 76 P.2d 937, 42 N.M. 217.

N.Y.—*Selzman v. Sakofsky*, 89 N.Y. S.2d 39, 195 Misc. 166.

N.D.—*Crane v. Bank*, 144 N.W. 96, 26 N.D. 268.

Ohio.—*Bauer v. Cleveland Ry. Co.*, 47 N.E.2d 225, 141 Ohio St. 197.—*Manchester v. Cleveland Trust Co.*, App. 114 N.E.2d 242.—*Heiland v. Hildebrand*, 70 N.E.2d 678, 81 Ohio App. 25.

S.D.—*Boshart v. National Ben. Ass'n of Mitchell*, 273 N.W. 7, 65 S.D. 260.—*Central Loan & Investment Co. v. Loiseau*, 239 N.W. 487, 59 S. D. 255.

Tex.—*Barnett v. Barnett*, Civ.App. 98 S.W.2d 215.

Vt.—*Hammond's, Inc. v. Flanders*, 191 A. 925, 109 Vt. 78.

Wash.—*Tobacco v. Rubatino*, 212 P. 2d 1019, 35 Wash.2d 398.—*State ex rel. Tollefson v. Novak*, 110 P.2d 636, 7 Wash.2d 544.—*Buob v. Feenaghty Machinery Co.*, 90 P.2d 1024, 199 Wash. 256.—*Kietz v. Gold Point Mines*, 87 P.2d 277, 198 Wash. 112, amended on other grounds 90 P.2d 1017, 198 Wash. 112.—*Walters v. Munson*, 30 P.2d 224, 176 Wash. 469.

64 C.J. p 1228 note 21.

#### Amendment of rule to include equity cases

(1) Superior Court rule which requires trial court to make findings of fact in all cases legal or equitable does not require findings of fact and conclusions of law where they were not formerly required in actions at law.—*State ex rel. Washington Water Power Co. v. Superior Court for Chelan County*, 250 P.2d 536, 41 Wash.2d 484.

(2) The rule as amended adds nothing new to law cases, since the rule as to law cases restates a statutory rule, and the rule applies not only where there is judgment for plaintiff, but also where the judgment is for the defendant, where there has been a complete trial on the merits.—*Bowman v. Webster*, 253 P.2d 934, 42 Wash.2d 129.

**Consolidation of actions for convenience** did not deprive trial court of right or duty to make special findings.—*Globe Indemnity Co. v. Hanly*, 20 P.2d 689, 217 Cal. 721, followed in *Latourette-Fical Co. v. Hanly*, 20 P.2d 693, 217 Cal. 791.

#### Findings as basis for costs

Trial court properly made findings of fact which were recited in judgment and on which findings action of court in taxing costs was predicated.—*Taylor v. Taylor*, Tex.Civ.App. 91 S.W.2d 394.

#### Findings on all material issues

Cal.—*Shenson v. Shenson*, 269 P.2d 170, 124 Cal.App.2d 747, rehearing denied 270 P.2d 896, 124 Cal.App. 2d 747.

#### Implied findings

Former doctrine of implied findings has no place in legal system of California since adoption of Code which expressly requires that facts found be stated.—*People v. Ocean Shore R. R.*, 72 P.2d 167, 22 Cal.App. 2d 657.

#### Right to findings held substantial right

Cal.—*People v. Ocean Shore R. R.*, 72 P.2d 167, 22 Cal.App.2d 657.

#### In Missouri

(1) Under V.A.M.S. § 510.310 and similar earlier statutes, in the absence of a specific request by counsel for findings on any of the principal controverted fact issues, the court may make a finding of facts.—*Conley v. Crown Coach Co.*, 159 S.W. 2d 281, 348 Mo. 1243.—*Swanson, Inc. v. Central Surety & Insurance Corp.*, 121 S.W.2d 783, 343 Mo. 350.

(2) Other particulars of rule under Missouri statutes see 64 C.J. p 1228 note 21 [b].

#### In Oregon

(1) In the trial of a case before a judge without a jury in a law action, the judge is not required to file conclusions of law.—*Howard v. Klamath County*, 215 P.2d 362, 188 Or. 205.

(2) Under statute authorizing any litigant to object to findings made by trial court and to request other different or additional findings, trial court has discretion to determine whether findings shall be general or special.—*Howard v. Klamath County*, 215 P.2d 362, 188 Or. 205.—*Ersvat v. Sterling*, 68 P.2d 137, 156 Or. 432.

(3) If trial court elects to make special findings within its discretion, it is not bound to make findings on every matter requested by a litigant.—*Howard v. Klamath County*, 215 P.2d 362, 188 Or. 205.

(4) Decisions under former Oregon statute requiring court to state the facts found and conclusions of law separately see 64 C.J. p 1228 note 21.

45. Utah.—*Openshaw v. Young*, 152 P.2d 84, 107 Utah 399.

46. Ohio.—*Heiland v. Hildebrand*, 70 N.E.2d 678, 81 Ohio App. 25.



against the state before a court of claims is within a statute requiring findings of fact and conclusions of law.<sup>60</sup> A statute requiring findings where questions of fact are tried by a court is applicable in an action for declaratory relief where questions of fact are put in issue by pleadings.<sup>61</sup> It is not objectionable for a judge to include in his judgment fact findings in proceedings had in vacation.<sup>62</sup>

### b. Suit in Equity

In some jurisdictions, in a suit of an equitable nature, the trial court is not required to state findings of fact and conclusions of law, but in other jurisdictions findings are necessary.

Where a judge is not required to comply with a request for specific findings of fact in an action at law, compliance with such a request is not re-

quired in an equity case.<sup>63</sup> In some jurisdictions statutes requiring the trial court to state findings of fact and conclusions of law are deemed applicable only in actions at law and not in suits in equity;<sup>64</sup> so that a trial court need not make special findings of fact,<sup>65</sup> or conclusions of law,<sup>66</sup> although it may in its discretion do so.<sup>67</sup> In other jurisdictions findings are necessary in an equity case<sup>68</sup> when requested,<sup>69</sup> and not waived.<sup>70</sup> Also a trial court may make ancillary findings to controlling issues found by a jury to support a decree which the court may enter pursuant to its power to grant full relief in an equity suit.<sup>71</sup> A statute which requires a chancellor to file written findings of fact, has no application to a case tried by a jury demanded by the parties.<sup>72</sup>

60. Ind.—State v. Scott Const. Co., 166 N.E. 775, 89 Ind.App. 714—State v. Wright, 161 N.E. 839, 162 N.E. 695, 89 Ind.App. 244.

61. Cal.—People v. Superior Court in and for City and County of San Francisco, 74 P.2d 326, 24 Cal. App.2d 8.

62. Tex.—White v. Perkins, Civ.App., 65 S.W.2d 423.

63. Mass.—City of Boston v. Dolan, 10 N.E.2d 275, 298 Mass 346.

64. Mo.—Walther v. Null, 134 S.W. 993, 233 Mo. 104.  
64 C.J. p 1229 note 29.

65. Ky.—Patterson v. Miracle, 69 S.W.2d 708, 253 Ky. 347.  
Or.—Marr v. Dunn, 158 P.2d 651, 176 Or. 442—Wickwire v. King, 88 P.2d 803, 161 Or. 369.

Requirement of findings in equity cases generally see Equity § 493.

#### Dismissal of cross complaint

Where trial court determined that defendants were not entitled to equitable relief sought in their cross complaint, dismissal of cross complaint without making findings of fact thereon was not error—Portland Mortg. Co. v. Elder, 53 P.2d 1045, 152 Or. 406.

#### Under Civil Practice Act

Ill.—Molner v. Cartenos, 112 N.E.2d 470, 415 Ill. 172.

#### In Missouri

(1) The rule stated in the text has been applied.—Bank of Brimmon v. Graham, 76 S.W.2d 376, 335 Mo. 1196, 96 A.L.R. 399.

(2) It has been stated, however, that a trial court must hear an equity case on its merits and make finding of facts as basis for entry of final decree, either granting plaintiff relief to which he may be entitled or dismissing bill if facts disclose a want of equity.—Hoynes v. Hoynes, App., 218 S.W.2d 823.

(3) Error cannot be assigned on

the action of the trial court in giving or refusing of findings of fact.—Maryland Cas. Co. v. Dobbin, 108 S.W.2d 166, 232 Mo App. 557.

66. Ky.—Patterson v. Miracle, 69 S.W.2d 708, 253 Ky. 347.

Mo.—Bank of Brimmon v. Graham, 76 S.W.2d 376, 335 Mo. 1196, 96 A.L.R. 399.

67. Ariz.—Berry v. Solomon, 137 P.2d 386, 60 Ariz. 333.

68. Cal.—Consolidated Irr. Dist. v. Crawshaw, 20 P.2d 119, 130 Cal. App. 455, followed in 20 P.2d 122, 130 Cal.App. 463.

N.Y.—Salzman v. Sakofsky, 89 N.Y.S.2d 39, 195 Misc. 166.

Pa.—Duquesne Slag Products Co. v. Woolworth, Com.Pl., 62 Dauph.Co. 431—Pennsylvania Threshermen & Farmers' Mut. Cas. Ins. Co. v. Kaufman, Com.Pl., 50 Lack.Jur. 165—Kahan v. Greenfield, Com.Pl., 31 West.Co. 9.

Utah.—Mower v. McCarthy, 215 P.2d 224.

64 C.J. p 1229 note 30.

#### In Washington

(1) Under Rules on Appeal, rule 43, findings are required in equity cases.—Howman v. Webster, 253 P.2d 934, 42 Wash.2d 129—State ex rel. Washington Water Power Co. v. Superior Court for Chelan County, 250 P.2d 536, 41 Wash.2d 484—Detjen v. Detjen, 244 P.2d 238, 40 Wash.2d 479.

(2) Prior to the adoption of this rule, findings in equity cases were unnecessary.—Group Health Co-op. of Puget Sound v. King County Medical Soc., 237 P.2d 737, 39 Wash.2d 586—Fisher v. Hagstrom, 214 P.2d 654, 35 Wash.2d 632—Darnell v. Noel, 208 P.2d 1194, 34 Wash.2d 428—Osawa v. Onishi, 206 P.2d 498, 33 Wash.2d 546—Black v. Porter, 198 P.2d 670, 31 Wash.2d 664—Mullally v. Parks, 190 P.2d 107, 29 Wash.2d 899—Wingard v. Pierce County, 160 P.2d 1009,

23 Wash.2d 296—Jones v. Mallon, 101 P.2d 332, 3 Wash.2d 382—Kietz v. Gold Point Mines, 87 P.2d 277, 198 Wash. 112, amended 90 P.2d 1017, 198 Wash. 112—Incorporated Investors v. Bridges, 34 P.2d 881, 178 Wash. 321—Wilkeson v. Rector, etc., of St. Luke's Parish of Tacoma, P.2d 748, 176 Wash. 377—64 C.J. p 1229 note 29.

(3) While unnecessary such findings were permissible.—Eckley v. Bonded Adjustment Co., 190 P.2d 718, 30 Wash.2d 96, 1 A.L.R.2d 717—Jones v. Mallon, supra—Oregon Mut. Life Ins. Co. v. Dixon, 78 P.2d 694, 194 Wash. 522.

(4) Such findings were given great weight when entered.—Group Health Co-op. of Puget Sound v. King County Medical Soc., 237 P.2d 737, 39 Wash.2d 586—Fisher v. Hagstrom, 214 P.2d 654, 33 Wash.2d 632—Darnell v. Noel, 208 P.2d 1194, 34 Wash.2d 428—Osawa v. Onishi, 205 P.2d 498, 33 Wash.2d 546.

(5) Prior to the adoption of the rule, the mere designation of a judgment as a decree, or directions in a judgment amounting to rescission of a contract between the parties did not turn a law action into an equitable one so as to obviate the necessity of fact findings and conclusions of law to support the judgment, since substance of action, not what it was called, or directed a party to do, was controlling.—Buob v. Feenaughty Machinery Co., 90 P.2d 1024, 199 Wash. 256.

69. Me.—Mitchell v. Mitchell, 11 A.2d 898, 136 Me. 406.

70. Cal.—Holland v. Kelly, 169 P. 1090, 177 Cal. 43.  
Waiver see infra § 613.

71. Tex.—Bell v. Board of Directors of Pythian Widows and Orphans Home, Civ.App., 219 S.W.2d 93, refused no reversible error.

72. Tenn.—National Life & Accident



## § 612. — In Particular Situations

- a. In general
- b. Agreed or stipulated facts
- c. Dismissal or nonsuit
- d. Jury trial
- e. Direction of verdict or motion therefor

## a. In General

Under some statutes findings of fact are necessary in a case tried to a court without a jury where fact questions are raised by the pleadings and evidence.

A code or statutory provision requiring findings of fact and conclusions of law is applicable and must be complied with where an action within the scope of the code or statutory provision is tried and determined on the merits by the court without a

jury,<sup>73</sup> and issues or controverted questions of fact are raised by the pleadings and evidence,<sup>74</sup> and the making of such findings and conclusions is properly and seasonably requested<sup>75</sup> and not waived<sup>76</sup> by a party. On the other hand, findings are not necessary where no issue of fact is presented by the pleadings and evidence,<sup>77</sup> where judgment is rendered by default,<sup>78</sup> by consent,<sup>79</sup> or on the pleadings, as discussed in Pleading § 508(2) b, or where there has been no inquiry as to the facts,<sup>80</sup> or where the question decided is one of law.<sup>81</sup> Likewise, findings of fact are not required where the trial court hears no evidence,<sup>82</sup> where special exceptions to the pleadings are sustained,<sup>83</sup> where the court has disposed of the issues presented by a written and signed opinion and the parties have been directed to submit a judgment on notice in ac-

Ins. Co. v. American Trust Co., 68 S.W.2d 971, 17 Tenn.App. 516—De Kalb County v. Tennessee Electric Power Co., 87 S.W.2d 555, 17 Tenn. App. 343.

73. Minn.—Fredsaal v. Minnesota State Life Ins. Co., 259 N.W. 780, 207 Minn. 18.

N.M.—Wilson v. Schermerhorn Oil Co., 245 P.2d 845, 56 N.M. 512—Frank A. Hubbell Co. v. Curtis, 58 P.2d 1163, 40 N.M. 234—Morrow v. Martinez, 200 P. 1071, 27 N.M. 354.

Vt.—Butler v. Milton Co-op. Dairy Corp., 28 A.2d 395, 112 Vt. 517—Conn Boston Co. v. Griswold, 157 A. 57, 164 Vt. 89.

64 C.J. p 1229 note 33.

**Reopened case**

Where trial court in setting aside findings of fact, conclusions of law, and judgments, was acting under statute authorizing reopening of case for additional evidence, it was duty of court, after receiving additional evidence, to make new findings of fact, conclusions of law.—Gardner v. Rich Mfg. Co., 158 P.2d 23, 68 Cal. App.2d 725.

74. Cal.—Bertrand v. Pacific Elec. Ry. Co., 115 P.2d 228, 46 Cal.App. 2d 7.

Minn.—In re Swick, 119 N.W. 791, 107 Minn. 130.

64 C.J. p 1229 note 35.

If evidence is conflicting, it is error, when timely request is made therefor, to refuse to file findings of fact and conclusions of law.—Treadaway v. Hodges, Tex.Civ.App., 125 S.W.2d 385—64 C.J. p 1229 note 35 [a].

Where case depends on parol evidence, the truth of which is denied or not admitted, or where substantial evidence for respective parties is contradictory and conflicting, judge or jury as trier of the facts should make a finding of the facts.—Noble

v. Missouri Ins. Co., Mo., 204 S.W.2d 446.

75. N.H.—Wentworth Bus Lines v. Sanborn, 104 A.2d 392.

Ohio.—Bauer v. Cleveland Ry. Co., 47 N.E.2d 225, 141 Ohio St. 197—Manchester v. Cleveland Trust Co., App., 114 N.E.2d 242—Heiland v. Hildebrand, 70 N.E.2d 678, 81 Ohio App. 25.

64 C.J. p 1229 note 38. Necessity and sufficiency of request see infra §§ 616–621.

76. Cal.—Bertrand v. Pacific Elec. Ry. Co., 115 P.2d 228, 46 Cal.App. 2d 7.

64 C.J. p 1229 note 37.

77. Cal.—In re Schaetzle's Estate, 112 P.2d 324, 44 Cal.App.2d 320—Crane Co. v. Borwick Trenching Corporation, 32 P.2d 387, 138 Cal. App. 319.

Colo.—Home Owners' Loan Corp. v. Meyer, 136 P.2d 282, 110 Colo. 501. Mo.—Price v. Gordon, 147 S.W.2d 609, 347 Mo. 354—Painter v. Prudential Ins. Co. of America, 71 S.W.2d 483, 228 Mo.App. 576.

Pa.—Burkley v. City of Philadelphia, 15 A.2d 201, 339 Pa. 426.

64 C.J. p 1229 note 38.

**Duty of trial court**

Where no issue of fact is presented by the evidence, only duty of trial court is to draw the proper legal conclusions from the admitted facts and peremptorily declare what the ultimate result shall be.—Noble v. Missouri Ins. Co., Mo., 204 S.W.2d 446.

**Election to stand on demurrer**

Wash.—State ex rel. Tollefson v. Novak, 110 P.2d 636, 7 Wash.2d 544.

**Findings held unnecessary**

(1) Where allegation of answer in an action against indorsers of note was merely evidentiary, a finding as to the allegation was not required.—Coverley v. Fred L. Wilke Co., 71 P. 2d 597, 22 Cal.App.2d 518.

(2) Trial court is not required to make findings concerning facts which are admitted.—Donaldson v. Horton, Tex.Civ.App., 256 S.W.2d 693.

**Lack of conflicting evidence**

If evidence for one party supports a proposition as to which opposite party has burden of persuasion, there is no issue of fact to be determined, and trial court may declare finding as a matter of law either by a peremptory declaration of law or by a directed verdict.—Noble v. Missouri Ins. Co., Mo., 204 S.W.2d 446.

78. Wash.—Waller v. Heinrichs, 233 P. 23, 133 Wash. 7.

64 C.J. p 1229 note 39.

**Inquest on default**

Court entering judgment on inquest on defendant's default need not make and file findings of fact.—Jensen v. Union Ry. Co. of New York City, 262 N.Y.S. 465, 237 App.Div. 655, certiorari denied Union Ry. Co. of New York City v. Jensen, 53 S.Ct. 795, 289 U.S. 761, 77 L.Ed. 1504.

79. Ill.—Sundberg v. Matteson, 29 N. E.2d 853, 307 Ill.App. 239.

80. Wash.—State ex rel. Tollefson v. Novak, 110 P.2d 636, 7 Wash.2d 544.

81. Cal.—In re Schaetzle's Estate, 112 P.2d 324, 44 Cal.App.2d 320—Wheeler v. Board of Medical Examiners of California, 276 P. 1119, 98 Cal.App. 267.

Tex.—Boyd v. Boyd, Civ.App., 207 S.W.2d 969.

Wash.—State ex rel. Washington Water Power Co. v. Superior Court for Chelan County, 250 P.2d 536, 41 Wash.2d 484.

82. Conn.—Winchester Repeating Arms Co. v. Radcliffe, 56 A.2d 1, 134 Conn. 164.

83. Tex.—Southwest Stone Co. v. Railroad Commission, Civ.App., 173 S.W.2d 325, error refused.

cordance,<sup>84</sup> or where the constitutionality of a statute can be determined from the face of the statute.<sup>85</sup> The trial court has been held not to be required to make a finding on a controverted issue where testimony of the parties is flatly contradictory so that evidence on that particular point is evenly balanced and the court in determining credibility cannot conclude that one of the parties has testified truthfully and the other falsely.<sup>86</sup>

### b. Agreed or Stipulated Facts

It is generally held that findings of fact are unnecessary where the case is submitted on an agreed statement or stipulation of facts which stipulates all the ultimate facts essential to support a judgment.

Except in a few jurisdictions,<sup>87</sup> findings of fact are deemed unnecessary where the case is submitted on an agreed statement or stipulation of facts<sup>88</sup> which embraces all<sup>89</sup> the ultimate<sup>90</sup> facts essential to support a judgment.<sup>91</sup> It is otherwise, however, where a stipulation or agreed statement embraces only detailed, evidentiary, or probative facts.<sup>92</sup> Also where a stipulation is entered into by the parties

to an action, but the taking of evidence on contested matters not covered by the stipulation is necessary, findings of fact are necessary to support a valid judgment.<sup>93</sup> Notwithstanding an agreed statement of facts which renders findings of fact unnecessary, it has been held in some jurisdictions that the court may make findings;<sup>94</sup> but in other jurisdictions it has been held that findings of fact by the court in such case are unauthorized<sup>95</sup> and the judgment is not to be tested thereby.<sup>96</sup> Unsworn statements by counsel, not intended to be, and not amounting to, stipulations of fact, do not constitute evidence in harmony with which a trial court is bound to make a finding.<sup>97</sup>

### c. Dismissal or Nonsuit

Findings of fact are proper and necessary where there is a dismissal after the determination of an issue of fact involving inferences and conclusions of fact, and the evidence is not such as to require a finding as a matter of law against the plaintiff.

While it has been held or stated generally that findings of fact are improper and unnecessary where there is a dismissal or nonsuit,<sup>98</sup> in an action tried

84. N.Y.—Hamer v. Flatto, 10 N.Y. S.2d 742, 170 Misc. 560.

85. D.C.—Township of Franklin, Somerset County, N. J., v. Tugwell, 85 F.2d 208, 66 App.D.C. 42.

86. La.—Powell v. Smith, App., 62 So.2d 671.

87. Pa.—State Mut. Fire Ins. Co. v. Keefer, 9 Pa.Super. 186.

#### Request of parties

Submission of evidence in form of agreed statement of facts did not prevent trial court from making special findings of fact on request of parties and stating conclusions of law thereon.—Cleveland v. Palin, 199 N. E. 142, 209 Ind. 382.

88. U.S.—Weeks v. White, C.C.A. Mass., 77 F.2d 817—Carter v. U. S., D.C.Mo., 3 F.Supp. 782.

Cal.—Taylor v. George, 212 P.2d 505, 34 Cal.2d 552—Capital Nat. Bank of Sacramento v. Smith, 144 P.2d 665, 62 Cal.App.2d 328—In re Hartman's Estate, 68 P.2d 744, 21 Cal. App.2d 266—Higbey v. Associated Acceptance Corporation, 41 P.2d 342, 4 Cal.App.2d 657—Crane Co. v. Borwick Trenching Corporation, 32 P.2d 387, 138 Cal.App. 319—Copp v. Rives, 217 P. 813, 62 Cal. App. 776.

Conn.—Winchester Repeating Arms Co. v. Radcliffe, 56 A.2d 1, 134 Conn. 164.

Mo.—Maryland Cas. Co. v. Dobbin, 108 S.W.2d 166, 232 Mo.App. 557—Friedman v. State Mut. Life Assur. Co. of Worcester, Mass., App., 108 S.W.2d 156.

N.Y.—Brogan v. Westchester County, 7 N.Y.S.2d 877, 265 App.Div. 875. N.C.—Hood ex rel. Page Trust Co. v. Johnson, 178 S.E. 865, 208 N.C. 77.

64 C.J. p 1230 note 43.

Operation and effect of admissions in general see Stipulations § 24 b.

Inference compelled as matter of law Court cannot make finding not embraced in, or conforming to, agreed statement or draw any inference not necessarily compelled as matter of law.—Cousins v. Cousins, Tex.Civ. App., 42 S.W.2d 1043.

89. Cal.—Stanwood v. Carson, 147 P. 562, 169 Cal. 640.

64 C.J. p 1230 note 44.

90. Cal.—Temple v. Corporation of America, 163 P.2d 67, 71 Cal.App. 2d 599.

64 C.J. p 1230 note 45.

91. Cal.—Wixom v. Davis, 246 P. 1041, 198 Cal. 641.

92. Cal.—Taylor v. George, 212 P. 2d 505, 34 Cal.2d 552—Temple v. Corp. of America, 163 P.2d 67, 71 Cal.App.2d 599.

64 C.J. p 1230 note 47.

Additional findings or inferences drawn by trial court would not be disregarded as surplusage on ground that they went beyond stipulated facts, where stipulated facts contained merely evidentiary matter, leaving ultimate facts or inferences to be found or drawn by court in order to settle issues presented.—Lagar v. Erickson, 56 P.2d 1287, 13 Cal.App.2d 365.

#### Facts judicially noticed

Trial court cannot find facts in addition to those agreed on, except such as are proper inferences therefrom or judicially noticed.—Big Diamond Mills Co. v. U. S., C.C.A.Minna., 51 F.2d 721.

93. Cal.—Supple v. Luckenbach, 84 P.2d 52, 12 Cal.2d 319.

94. Ga.—Anderson v. Mechanics Loan & Savings Co., 198 S.E. 87, 58 Ga.App. 147.

64 C.J. p 1230 note 49.

#### Incorporation of findings in prior suit

Incorporation of stipulation and judgment in action brought against plaintiff's predecessors and defendant's predecessor into findings of fact in subsequent case made recitals of stipulation and judgment, findings of fact in subsequent case.—Wallace Ranch Water Co. v. Foothill Ditch Co., 53 P.2d 929, 5 Cal.2d 103.

95. Tex.—Hafale v. Canfield Mfg. Co., Civ.App., 268 S.W. 986—Texas Mexican Ry. Co. v. Scott, 129 S.W. 1170, 60 Tex.Civ.App. 482.

96. Idaho.—McKune v. Continental Casualty Co., 154 P. 990, 28 Idaho 22.

97. Cal.—People v. Robin, 133 P.2d 436, 56 Cal.App.2d 885.

98. Cal.—Moak v. Scheinberg, 125 P.2d 872, 52 Cal.App.2d 154—Aufdenkamp v. Pierce, 40 P.2d 599, 4 Cal.App.2d 276.

Nev.—Thornton v. Malin, 229 P.2d 915, 68 Nev. 263.

either by the court<sup>99</sup> or by a jury,<sup>1</sup> and this is undoubtedly true where there is a failure to prove a simple fact and the evidence is such that, as a matter of law there can be no recovery,<sup>2</sup> it is otherwise where there is a dismissal on the merits after the determination of an issue of fact involving inferences and conclusions of fact,<sup>3</sup> and the evidence, although sufficient to sustain a finding for defendant, is not such as to require, as a matter of law, a finding against plaintiff.<sup>4</sup> Under some statutes findings of fact and conclusions of law are necessary even though the trial court sustained a demurrer to the evidence or a motion to dismiss.<sup>5</sup> At the close of the evidence produced by a party who has the burden of proof, a motion to dismiss which is amended to become a motion for judgment is prop-

erly considered by a trial court as a motion to challenge the sufficiency of the evidence to support any claim of such party, rather than of a motion for nonsuit, and a court on granting the motion is justified in making and entering findings of fact.<sup>6</sup>

### d. Jury Trial

As a general rule conclusions of law and findings of fact are unnecessary in an action tried before a jury, unless the court renders judgment notwithstanding the verdict, or the cause is of equitable cognizance.

Conclusions of law and findings of fact are inappropriate<sup>7</sup> and unnecessary<sup>8</sup> in an action tried before a jury, unless the court renders judgment notwithstanding the verdict,<sup>9</sup> or the cause is of equitable cognizance,<sup>10</sup> and the verdict of the jury

N.Y.—Levine v. Charlow, 5 N.Y.S.2d 954, 254 App.Div. 416.  
64 C.J. p 1230 note 53.

### After trial on merits

Where action was dismissed by the court after trial on the merits, no findings of fact were required.—Cochran v. Nelson, 173 P.2d 769, 26 Wash.2d 82.

### At conclusion of plaintiff's case

When an action is dismissed at the conclusion of plaintiff's case, no findings of fact are required.—Arne-  
man v. Arne-man, 264 P.2d 256, 43 Wash.2d 787.

### Where dismissal not on merits

N.Y.—People ex rel. Central New England Ry. Co. v. State Tax Commission, Franchise Assessments, Town of Lloyd, 1922, 1923, 1924, 26 N.Y.S.2d 425, 261 App.Div. 416.—Ten Eyck v. Lombard, 296 N.Y.S. 49, 162 Misc. 517.

### Dismissal of one party

Where actions had been consolidated for trial and at conclusion of the evidence in one of them nonsuit was properly granted for lack of evidence to sustain plaintiffs' complaint, adoption of only one set of findings which pertained to the other action was proper.—Aufdemkamp v. Pierce, 40 P.2d 599, 4 Cal.App.2d 276.

99. Minn.—Miller v. Miller, 50 N.W. 612, 47 Minn. 546.  
64 C.J. p 1230 note 54.

1. Cal.—Toulouse v. Pare, 37 P. 146, 103 Cal. 251.  
Wash.—Barkley v. Barton, 45 P. 654, 15 Wash. 33.

2. Nev.—Thornton v. Malin, 229 P. 2d 915, 68 Nev. 263.  
64 C.J. p 1230 note 56.

3. Minn.—State, by Burnquist v. Bollenbach, 63 N.W.2d 278.—Czanstowski v. Matter, 6 N.W.2d 629, 213 Minn. 257.

Wash.—Buob v. Feenaughty Machinery Co., 90 P.2d 1024, 199 Wash. 256  
—Kietz v. Gold Point Mines, 87 P.

2d 277, 198 Wash. 112, amended 90 P.2d 1017, 198 Wash. 112.  
64 C.J. p 1230 note 57.

### When dismissal deemed on merits

(1) Dismissal of complaint after plaintiff rests is deemed to be on merits, so as to require fact findings by court, but presumption is subject to direction of trial court whether dismissal occurs before or after close of plaintiff's case.—Ten Eyck v. Lombard, 296 N.Y.S. 49, 162 Misc. 517.

(2) Decision by trial court on defendant's motion to dismiss complaint at close of plaintiff's case will be deemed to be on merits, rather than nonsuit, so as to require fact findings, where defendant rests his case on testimony of plaintiff's witnesses or proves his case by making them his own witnesses on cross-examination or sole issue is construction or interpretation of written documents produced by plaintiff.—Ten Eyck v. Lombard, supra.

(3) Dismissals at end of plaintiff's case are deemed nonsuits for failure of proof only, in most instances, so as to render fact findings by trial court unnecessary.—Ten Eyck v. Lombard, supra.

(4) Dismissal of complaint for failure of proof is not on merits, so that fact findings by court are unnecessary, since merits are involved only where prima facie case is made out and proof offered to rebut it.—Ten Eyck v. Lombard, supra.

(5) Decision by trial court on defendant's motion to dismiss complaint at end of plaintiff's case that "The motion for a nonsuit is granted upon the sole ground that the plaintiff has failed to prove facts sufficient to constitute a cause of action" was merely nonsuit, not decision on merits, so as to require denial of defendant's application for fact findings.—Ten Eyck v. Lombard, supra.

### Conclusion of plaintiff's testimony

In action tried by court without jury, a dismissal at conclusion of plaintiff's testimony is a determination on merits and should be accompanied by findings and conclusions.—Roush v. Battin, 30 N.W.2d 453, 252 Wis. 8.

4. Minn.—Czanstowski v. Matter, 6 N.W.2d 629, 213 Minn. 257.  
64 C.J. p 1230 note 58.

5. N.M.—Pankey v. Hot Springs Nat. Bank, 119 P.2d 636, 46 N.M. 10.—Sandoval County Board of Education v. Young, 94 P.2d 508, 43 N.M. 397.

6. Wash.—Edison Oyster Co. v. Pioneer Oyster Co., 157 P.2d 302, 22 Wash.2d 616.

7. D.C.—Greene v. Mindell, Mun. App., 72 A.2d 775.

8. Tenn.—Harbin v. Elam, 1 Tenn. App. 496.

Tex.—Aubey v. Aubey, Civ.App., 264 S.W.2d 484.  
64 C.J. p 1230 note 60.

### Only recognized conclusions of fact or law

In an action tried by jury, the jury's verdict and the judgment of the court are the only recognized conclusions of fact or law.—Sinclair Refining Co. v. Costin, Tex.Civ.App., 116 S.W.2d 894.

### Mistrial

Where an action was commenced before a jury which found on the several questions submitted to them, and their further services in the case were waived by consent of both parties to the action, with further findings of fact being made by the court, it must be assumed there was not a mistrial.—Merchants' Nat. Bank v. Tracy, 29 N.Y.S. 77, 77 Hun 443, affirmed 44 N.E. 1126, 150 N.Y. 565.

9. Wash.—Hanson v. Roesch, 176 P. 349, 104 Wash. 257.

10. Ind.—Chicago, I. & L. Ry. Co. v.

is merely advisory.<sup>11</sup> Where written findings of fact are required by statute, it has been held that such a statute has no application to a law case tried to a jury;<sup>12</sup> and the court is not required to make findings where the jury sat in the case until the close of the evidence and were then discharged without the case being submitted to them, where the request for findings was not made until after all the evidence was in and the jury discharged.<sup>13</sup> In an action at law tried wholly before a jury, the court is not authorized to state conclusions of law and findings of fact<sup>14</sup> where it allows the verdict to stand and refuses to modify or set it aside,<sup>15</sup> but where only part of the issues are submitted to the jury in a law action the court, although it cannot be required to do so, may make separate findings on the issues not submitted to the jury provided there is no conflict with the jury findings.<sup>16</sup> Where part of the issues in an equitable action are submitted to the jury, the court may make findings on

the issues not submitted to the jury, as discussed in Equity § 509.

#### e. Direction of Verdict or Motion Therefor

Generally, findings of fact and conclusions of law are unnecessary where a verdict is directed.

Findings of fact and conclusions of law are unnecessary where a verdict is directed.<sup>17</sup> According to some authorities, findings should be made where both parties move for a directed verdict;<sup>18</sup> but other authorities take a view to the contrary.<sup>19</sup>

#### § 613. Waiver

The statutory right of a party to findings of fact and conclusions of law may be waived by him.

The statutory right of a party to findings of fact and conclusions of law may be waived by him,<sup>20</sup> as by entering into a stipulation for the submission of the case on an agreed statement of facts<sup>21</sup> or for the expression of the decision of the court in a verdict, for the purpose of relieving it of the neces-

Myers, 105 N.E. 645, 107 NE 296, 57 Ind App. 458.  
64 C.J. p 1230 note 62.

#### Independent findings by court

In suit to have two instruments in the form of deeds reformed to be mortgages, as allegedly intended by the parties, wherein jury found that the instruments were mortgages, trial court did not err in making a number of independent findings, without the request of any of the parties, concerning monetary accounts between the parties, alleged extension of vendor's lien note involved, and plaintiff's tender of all amounts he owed defendants where the contest had been waged over the whole gamut of dealings between the parties.—McAlexander v. Ludtke, Tex.Civ.App. 139 S.W.2d 123.

11. Ariz.—Berry v. Solomon, 137 P. 2d 386, 60 Ariz. 333.  
64 C.J. p 1231 note 63.

12. Tenn.—Tallent v. Fox, 141 S.W. 2d 485, 24 Tenn.App. 96—Young v. Tennessee Elec. Power Co., 122 S.W.2d 821, 22 Tenn.App. 308—Darnell v. McNichols, 122 S.W.2d 808, 22 Tenn.App. 287—Whitehurst v. Howell, 98 S.W.2d 1071, 20 Tenn.App. 314.  
Tex.—Lindsey v. Caston, Civ.App. 118 S.W.2d 843.

13. Ariz.—Schwartz v. Schwartz, 79 P.2d 501, 52 Ariz. 105, 116 A.L.R. 633.

14. D.C.—Greene v. Mindell. Mun. App., 72 A.2d 775.  
Ind.—Isley v. Isley, 56 N.E.2d 513, 115 Ind.App. 69.  
Okl.—Gantz v. Matthews, 219 P.2d 631, 203 Okl. 225.

Tenn.—Wilson v. Bryant, 67 S.W.2d 133, 167 Tenn. 107.  
64 C.J. p 1231 note 64.

15. Wis.—Wenzel v. Great Northern Ry. Co., 140 N.W. 81, 152 Wis. 418

16. Tex.—Ward v. Etier, 251 S.W. 1028, 113 Tex. 83—Southwestern Portland Cement Co. v. Latta & Happer, Civ.App., 193 S.W. 1115, error refused.

17. Tenn.—Young v. Tennessee Elec. Power Co., 122 S.W.2d 821, 22 Tenn.App. 308.

Tex.—Farr v. Kirby Lumber Corp. Civ.App., 203 S.W.2d 815—King v. Furray, Civ.App., 130 S.W.2d 1029, error refused.

64 C.J. p 1231 note 67.

#### Question of law

Trial court having directed a verdict for defendant at the close of plaintiff's evidence in a case being tried to a jury was not required by statute at plaintiff's request to state separately conclusions of fact and of law, since statute providing for such separate statements applies only to cases where questions of fact are tried by the court.—Bauer v. Cleveland Ry. Co., 47 N.E.2d 225, 141 Ohio St. 197.

18. Wash.—White v. Donini, 9 P.2d 92, 167 Wash. 290.

#### In New Mexico

(1) Where both parties to action request directed verdicts and make no requests to allow jury to determine fact questions, fact findings and conclusions of law must be made by trial court, unless waived.—Goldenberg v. Village of Capitan, 203 P.2d 370, 53 N.M. 137.

(2) Where only one of the parties

to action asks for a directed verdict, which is granted, it has been held that findings of fact and conclusions of law must be made by trial court, unless they are waived.—Goldenberg v. Village of Capitan, 227 P.2d 630, 55 N.M. 122.

(3) However, it has also been held that where only one of parties to action asks for directed verdict, which is granted, fact findings and conclusions of law by trial court are unnecessary.—Goldenberg v. Village of Capitan, 203 P.2d 370, 53 N.M. 137.

19. N.Y.—Franklin Sugar Refining Co. v. Lipowicz, 221 N.Y.S. 11, 220 App.Div. 160.

20. Cal.—Shenson v. Shenson, 269 P. 2d 170, 124 Cal.App.2d 747, rehearing denied 270 P.2d 896, 124 Cal. App.2d 747.

Ind.—Patterson v. City of Gary, 190 N.E. 320, 98 Ind.App. 623.

N.M.—Miera v. State, 129 P.2d 334, 46 N.M. 369.

S.D.—Hoshart v. National Ben. Ass'n of Mitchell, 273 N.W. 7, 65 S.D. 260—Central Loan & Investment Co. v. Loiseau, 239 N.W. 487, 59 S. D. 255.

Tenn.—Harbin v. Elam, 1 Tenn.App. 496.

64 C.J. p 1231 note 71.

#### Judgment immune from attack

Where an issue of fact is submitted to trial judge for determination and a finding of the issue is waived, a judgment entered without a written finding would be valid and immune from attack.—Petroleum Midway Co. v. Zahn, 145 P.2d 371, 62 Cal.App.2d 645.

21. Cal.—Copp v. Rives, 217 P. 818, 62 Cal.App. 776.

sity of making formal findings.<sup>22</sup> The failure to object, as required by some statutes, to alleged specific defects in findings made by the court constitutes a waiver of such defects, but such failure to object is not a waiver of the failure of the court to find at all on a material issue.<sup>23</sup> Under a statute which provides the circumstances under which findings may be waived it has been held that the only manner in which findings may be waived are in the statutory manner.<sup>24</sup> Under such a statute a finding may be waived by written consent filed with the court,<sup>25</sup> or by oral consent in open court and entered in the minutes,<sup>26</sup> or by failure to appear<sup>27</sup> at the trial. Giving notice of motion for a new trial does not amount to a waiver of findings,<sup>28</sup> and where a party duly excepts to a general finding made by the trial court, he does not waive his right to special findings of facts which were properly and timely requested at the beginning of the trial.<sup>29</sup> Where an issue of fact is submitted to a trial judge for his determination and a finding of such issue is not waived, the entry of a judgment without a

written finding is unauthorized.<sup>30</sup>

### § 614. Time for Making

Findings of fact by the court should not be made before all the proof has been offered and the parties have rested.

The court should not make findings of fact, either on motion or sua sponte,<sup>31</sup> before all the proof has been offered<sup>32</sup> and defendant has rested his case.<sup>33</sup> Also, the court is without power to make findings after the end of the term during which judgment was rendered,<sup>34</sup> or in vacation;<sup>35</sup> and it is held that findings unless waived must precede the entry of judgment<sup>36</sup> and can be made thereafter only where the judgment is vacated.<sup>37</sup> Findings, however, are not required to be made simultaneously with the entry of judgment;<sup>38</sup> the trial judge does not lose jurisdiction by delaying both findings and judgment until after the end of the term,<sup>39</sup> or the expiration of one term of office and the beginning of a new one.<sup>40</sup> It has been held that findings may be made at the same term during which the case is

22. Or.—*Collis v. Cone*, 129 P. 753, 64 Or. 157, Ann.Cas.1914D 795.

23. Cal.—*San Jose Abstract & Title Ins. Co. v. Elliott*, 240 P.2d 41, 108 Cal.App.2d 793.

24. Cal.—*San Jose Abstract & Title Ins. Co. v. Elliott*, supra.

25. Cal.—*San Jose Abstract & Title Ins. Co. v. Elliott*, supra.

26. Cal.—*San Jose Abstract & Title Ins. Co. v. Elliott*, supra.

27. Cal.—*San Jose Abstract & Title Ins. Co. v. Elliott*, supra.

28. Cal.—*Savings, etc., Soc. v. Thorne*, 7 P. 36, 67 Cal. 53.

29. Ind.—*Patterson v. City of Gary*, 190 N.E. 320, 98 Ind.App. 623.

30. Cal.—*Petroleum Midway Co. v. Zahn*, 145 P.2d 371, 62 Cal.App.2d 645.

31. D.C.—*Merriam v. Sugrue*, Mun. App., 41 A.2d 166.

Time for filing see infra § 645.

32. Wis.—*Wescott v. Catencamp*, 209 N.W. 691, 190 Wis. 520.

#### Evidence completed

(1) Findings of fact may be made only after evidence has been completed.—*Block v. Davis*, D.C.Mun. App., 87 A.2d 105—*Garrett v. Jamison*, D.C.Mun.App., 50 A.2d 802—*Carow v. Bishop*, D.C.Mun.App., 50 A.2d 598—*Merriam v. Sugrue*, D.C.Mun. App., 41 A.2d 166.

(2) Evidence is completed means that both sides have offered testimony and rested, or that plaintiff has rested and defendant has made motion for finding on plaintiff's case and stands on motion and declines to

offer evidence.—*Merriam v. Sugrue*, supra.

#### Motion at close of plaintiff's evidence

(1) Where defendants at the close of plaintiffs' evidence moved for findings in their favor and dismissal of complaints, but it was plain that defendants were not waiving their right to introduce evidence if motions were denied, trial court had no power at that stage to make a finding of fact.—*Carow v. Bishop*, D.C.Mun.App., 50 A.2d 598.

(2) Where findings of fact were made by trial judge at close of plaintiff's evidence in a nonjury case instead of waiting for evidence to be completed and controlling principles of law could not be determined until the facts were completed, a judgment thereon could not be sustained.—*Garrett v. Jamison*, D.C.Mun.App., 50 A.2d 602.

#### Court should consider defendant's evidence

Where evidence of plaintiffs, when given full credit would have entitled them to some relief and the evidence of defendants presented the transactions in a different light and the entire case was before the court, the evidence of defendants should have been considered.—*Howard v. General Petroleum Corp.*, 238 P.2d 145, 108 Cal.App.2d 25.

33. N.Y.—*Frank v. Witlin*, 194 N.Y. S. 795, 201 App.Div. 709.

34. Conn.—*Tilden v. Century Realty Co.*, 152 A. 707, 112 Conn. 439.

35. Ind.—*Isaacs v. Fletcher American Nat. Bank*, 185 N.E. 154, 98 Ind. App. 111.

#### Plaintiff's right to dismiss case

Judge had no power during vacation to announce any finding which would cut off plaintiff's right to dismiss his cause of action.—*Isaacs v. Fletcher American Nat. Bank*, supra.

36. Cal.—*Gilmore v. Gilmore*, 221 P.2d 123, 99 Cal.App.2d 186—*In re Pala's Estate*, 131 P.2d 593, 55 Cal. App.2d 647—*In re Dodds' Estate*, 126 P.2d 150, 52 Cal.App.2d 287—*In re Selpel's Estate*, 19 P.2d 808, 130 Cal.App. 273.

Idaho.—*Quinn v. Hartford Acc. & Indem. Co.*, 232 P.2d 965, 71 Idaho 449.

64 C.J. p 1231 note 80.

#### After hearing

In proceedings for support of wife, trial judge could not make findings in support of his decision after the hearing.—*Commonwealth ex rel. McClenen v. McClenen*, 193 A. 83, 127 Pa.Super. 471.

37. Mich.—*Stafford v. Crawford*, 76 N.W. 496, 118 Mich. 285.

#### Inconsistency with previous findings

Court was without jurisdiction to make findings on a party's request after judgment had been entered, particularly findings inconsistent with findings previously made on which judgment had been rendered.—*Mastrobuono v. Lange*, 270 N.Y.S. 564, 241 App.Div. 770.

38. Ala.—*Pappot v. Howard*, 45 So. 581, 154 Ala. 306.

39. Ind.—*Haag v. Lawrence Lumber Co.*, 164 N.E. 414, 88 Ind.App. 432.

40. Ind.—*Haag v. Lawrence Lumber Co.*, supra.

decided and judgment directed;<sup>41</sup> and under the construction accorded some statutes findings need not be made prior to the entry of judgment.<sup>42</sup> Lack of time to prepare findings before the close of the term has been held to excuse the making of findings;<sup>43</sup> but a mere press of other business does not constitute such a lack of time as will excuse.<sup>44</sup>

## § 615. Facts and Conclusions to Be Found and Effect of Failure to Find on Particular Questions

- a. Findings of fact
- b. Conclusions of law

### a. Findings of Fact

- (1) In general
- (2) Matters in issue or not in issue

#### (1) In General

Where the judgment is supported by the findings made, no fatal error results from failure of the trial court to find on particular matters which would not affect the judgment rendered or which are not supported by evidence; and it is not necessary to make findings as to facts judicially noticed or implied by law, matters which will be presumed, the law of the case, legal conclusions which have been pleaded, or prior interlocutory orders or proceedings in the same cause.

Where the judgment is supported by the findings made, no fatal error results from the failure of the trial court to find on particular matters which would not change or affect the judgment rendered,<sup>45</sup> or which would invalidate the judgment if supported by evidence, but which are not so supported.<sup>46</sup> Likewise, the want of a finding is not fatal unless

there was evidence before the court from which it was required to make a finding which would countervail its other findings.<sup>47</sup>

It is not necessary to make findings as to facts judicially noticed,<sup>48</sup> facts implied by law,<sup>49</sup> matters which will be presumed,<sup>50</sup> a ruling on a former appeal which is the law of the case,<sup>51</sup> legal conclusions which have been pleaded,<sup>52</sup> or prior interlocutory orders or proceedings in the same cause.<sup>53</sup>

*Statutes or municipal charters.* A municipal charter is not to be found as a fact where it has been made a public act to be read in evidence without proof.<sup>54</sup> Also, findings of fact may properly be silent as to validity or construction of statutes.<sup>55</sup> The law of a foreign state, however, is a question of fact on which findings should be made.<sup>56</sup>

*Repetition.* Where the same allegations are contained in two pleadings of defendant and there are complete findings as to one pleading, they need not be repeated as to the other pleading.<sup>57</sup> Also, it is unnecessary to make specific findings on affirmative allegations in the answer where such allegations follow and merely emphasize the denials in the answer and the answer is sufficient without them.<sup>58</sup>

#### (2) Matters in Issue or Not in Issue

Where findings of fact are required and not waived it is the duty of the court to make findings on all material issues of fact raised by the pleadings and evidence and in respect of which findings are necessary to support the judgment.

Where findings of fact are required and not waived,<sup>59</sup> it becomes the duty of the court to make

41. U.S.—South Utah Mines & Smelters v. Beaver County, Utah, 43 S.Ct. 577, 262 U.S. 325, 67 L.Ed. 1004.

42. Tex.—Wilcox v. Crawford, Civ. App., 231 S.W. 1104.

43. Tex.—Morrison v. Faulkner, 15 S.W. 797, 80 Tex. 128.  
64 C.J. p 1231 note 87.

44. Tex.—Love v. Rempe, Civ.App., 44 S.W. 681—Osborne v. Ayers, Civ. App., 32 S.W. 73.

45. Cal.—West v. House, 222 P.2d 269, 99 Cal.App.2d 643—Petersen v. Murphy, 139 P.2d 49, 59 Cal.App.2d 528—Co-Operative Dairy men's League v. Lucerne Cream & Butter Co., 63 P.2d 833, 18 Cal.App.2d 162.

Conn.—Flaxman v. Capitol City Press, 185 A. 417, 121 Conn. 423.

Nev.—Corpus Juris cited in Kohl-saat v. Kohl-saat, 155 P.2d 474, 476, 62 Nev. 485.

Okl.—Thomas v. Owens, 241 P.2d 1114, 206 Okl. 50.

Utah.—Duncan v. Hemmelwright, 186 P.2d 965, 112 Utah 262.  
64 C.J. p 1231 note 90.

46. Cal.—Giletti v. Saracco, 42 P. 918, 110 Cal. 428.

64 C.J. p 1232 note 91.  
Conformity of findings with evidence see infra § 634.

47. Cal.—Chambers v. Farnham, 179 P. 423, 39 Cal.App. 17.

Idaho.—Storey & Fawcett v. Nampa & Meridian Irr. Dist., 187 P. 946, 32 Idaho 713.

48. Cal.—Marr v. Superior Court in and for Siskiyou County, 250 P.2d 739, 114 Cal.App.2d 627.

64 C.J. p 1232 note 93.  
49. Cal.—Aydelotte v. Billing, 97 P. 698, 8 Cal.App. 673.

50. Ind.—Graham v. Plotner, 151 N. E. 735, 87 Ind.App. 462.

51. Utah.—Stephens v. Doxey, 218 P. 965, 62 Utah 241.

52. Utah.—Griffith v. Maxfield, 218 P. 105, 62 Utah 51.  
64 C.J. p 1232 note 97.

53. N.Y.—Tyndall v. Pinelawn Cemetery, 151 N.Y.S. 428.  
S.D.—Purinton v. Purinton, 176 N.W. 31, 42 S.D. 426.

54. Tex.—City of Austin v. Great Southern Life Ins. Co., Civ.App., 211 S.W. 482, reversed on other grounds 243 S.W. 778, 112 Tex. 1.

55. Cal.—City of Alameda v. City of Oakland, 246 P. 69, 198 Cal. 566.

56. Mass.—Russell v. Joya, 116 N.E. 549, 227 Mass. 263.

57. Cal.—Schlageter v. Cutting, 2 P.2d 875, 116 Cal.App. 489—Morris v. Filomeo, 265 P. 991, 90 Cal.App. 432.

58. Cal.—Tower v. Wilson, 188 P. 87, 45 Cal.App. 123.

64 C.J. p 1232 note 4.

59. Cal.—Beebe v. Richards, 252 P. 2d 688, 115 Cal.App.2d 589—San Jose Abstract & Title Ins. Co. v. Elliott, 240 P.2d 41, 108 Cal.App. 2d 793—People v. One 1940 Chrysler Engine No. C-28-10132, 175 P. 2d 555, 77 Cal.App.2d 306.

64 C.J. p 1232 note 6.

findings on all material issues<sup>60</sup> of fact<sup>61</sup> raised by | the pleadings<sup>62</sup> and evidence<sup>63</sup> and in respect of

Duty to make findings of fact in particular proceedings and situations see supra §§ 610-612.  
Waiver see supra § 613.

60. *Ariz.*—*Keystone Copper Min. Co. v. Miller*, 164 P.2d 603, 63 *Ariz.* 544.

*Cal.*—*Parker v. Shell Oil Co.*, 175 P.2d 888, 29 *Cal.* 503—*Krum v. Malloy*, 137 P.2d 18, 22 *Cal.* 132—*J. J. Howell & Associates v. Antonini*, 268 P.2d 557, 124 *Cal.* App. 2d 388—*Beebe v. Richards*, 252 P. 2d 688, 115 *Cal.* App. 2d 589—*Bertone v. City & County of San Francisco*, 245 P.2d 29, 111 *Cal.* App. 2d 579—*Hicks v. Barnes*, 241 P.2d 648, 109 *Cal.* App. 2d 859—*San Jose Abstract & Title Ins. Co. v. Elliott*, 204 P.2d 41, 108 *Cal.* App. 2d 793—*In re Ramsey's Estate*, 237 P.2d 20, 107 *Cal.* App. 2d 372—*Gschwend v. Stoll*, 232 P.2d 494, 104 *Cal.* App. 2d 806—*Reimer v. Firpo*, 212 P.2d 23, 94 *Cal.* App. 2d 798—*Flennaugh v. Heinrich*, 200 P.2d 580, 89 *Cal.* App. 2d 214—*People v. One 1940 Chrysler Engine No. C-28-10132*, 175 P.2d 585, 77 *Cal.* App. 2d 306—*Hagge v. Drew*, 167 P.2d 263, 73 *Cal.* App. 2d 739—*Elliott v. Bertsch*, 139 P.2d 332, 59 *Cal.* App. 2d 543—*Ruzich v. Boro*, 157 P.2d 55, 53 *Cal.* App. 2d 541—*Alphonzo E. Bell Corp. v. Little*, 130 P.2d 251, 55 *Cal.* App. 2d 300—*Mardesch v. C. J. Hendry Co.*, 125 P.2d 595, 51 *Cal.* App. 2d 567—*Powell v. Johnson*, 123 P.2d 875, 50 *Cal.* App. 2d 680—*Krauss v. Strop*, 118 P.2d 332, 47 *Cal.* App. 2d 452—*Lane v. Safeway Stores*, 91 P.2d 160, 33 *Cal.* App. 2d 169—*Gustafson v. Blank*, 41 P.2d 953, 4 *Cal.* App. 2d 630—*Alton v. Haywood*, 28 P. 2d 385, 136 *Cal.* App. 191.

*Colo.*—*Enlarged Southside Irr. Ditch Co. v. John's Flood Ditch Co.*, 183 P.2d 552, 116 *Colo.* 580.

*Conn.*—*Hoyt v. City of Stamford*, 165 A. 357, 116 *Conn.* 402.

*Idaho.*—*Cheesbrough v. Jensen*, 109 P.2d 889, 62 *Idaho* 255—*Gem State Lumber Co. v. Gallon Irrigated Land Co.*, 41 P.2d 620, 55 *Idaho* 314.

*Ill.*—*Cook v. Lauten*, 80 N.E.2d 280, 335 *Ill.* App. 32.

*Mo.*—*Painter v. Prudential Ins. Co. of America*, 71 S.W.2d 483, 228 *Mo.* App. 576.

*N.H.*—*Wentworth Bus Lines v. Sanborn*, 104 A.2d 392.

*N.M.*—*Laumbach v. Laumbach*, 270 P.2d 385, 58 *N.M.* 248.

*Ohio.*—*George v. Walton*, App., 43 N.E.2d 515.

*Okl.*—*Home Ins. Co. v. McClaran*, 168 P.2d 306, 196 *Okl.* 48.

*Or.*—*Howard v. Klamath County*, 215 P.2d 362, 188 *Or.* 205.

*Pa.*—*Hagy v. Sharp*, 177 A. 578, 117 *Pa.* Super. 187.

*S.D.*—*Davies v. Toms*, 63 N.W.2d 406.

*Tex.*—*Plaza Co. v. White*, *Civ.* App., 160 S.W.2d 312, error refused—*Watson v. Tamez*, *Civ.* App., 136 S.W.2d 645—*Postal Tel. & Cable Co. v. Paper*, *Civ.* App., 108 S.W.2d 259—*Mauritz v. Schwind*, *Civ.* App., 101 S.W.2d 1085, error dismissed—*Utah.*—*Duncan v. Hemmelwright*, 186 P.2d 965, 112 *Utah* 262—*Dahl v. Cayias*, 174 P.2d 430, 110 *Utah* 398—*Gray v. Defa*, 153 P.2d 544, 107 *Utah* 272—*O'Gorman v. Utah Realty & Const. Co.*, 129 P.2d 981, 102 *Utah* 523, modified on other grounds 133 P.2d 318, 102 *Utah* 534—*Pike v. Clark*, 79 P.2d 1010, 95 *Utah* 235—*Thomas v. Farrell*, 26 P.2d 328, 82 *Utah* 535—*Consolidated Wagon & Machine Co. v. Kay*, 21 P.2d 836, 81 *Utah* 595.

*Vt.*—*Crowley v. Goodrich*, 44 A.2d 128, 114 *Vt.* 304, 162 A.L.R. 691.

*Wash.*—*Rowman v. Webster*, 253 P.2d 934, 42 *Wash.* 129.

*Wis.*—*Perma-Stone Corp. v. Merkel*, 39 N.W.2d 730, 255 *Wis.* 565.

64 C.J. p 1233 note 7.

Failure to find on material issue as ground for new trial see *New Trial* § 64 b.

61. *Cal.*—*Petroleum Midway Co. v. Zahn*, 145 P.2d 371, 62 *Cal.* App. 2d 645.

*Ind.*—*Automobile Underwriters v. Tite*, 85 N.E.2d 365, 119 *Ind.* App. 251.

*Pa.*—*First Nat. Bank v. Jones' Estate*, 6 A.2d 273, 334 *Pa.* 577.

*Tex.*—*Carpenter v. Waxahachie Cotton Warehouse*, *Civ.* App., 162 S.W. 2d 139, error refused.

64 C.J. p 1233 note 8.

62. *Cal.*—*De Burgh v. De Burgh*, 250 P.2d 598, 39 *Cal.* 2d 858—*Fairchild v. Raines*, 151 P.2d 260, 24 *Cal.* 2d 557, 124 *Cal.* App. 2d 388—*Beebe v. Richards*, 252 P.2d 688, 115 *Cal.* App. 2d 589—*In re Toland's Estate*, 220 P.2d 16, 98 *Cal.* App. 2d 386—*Flennaugh v. Heinrich*, 200 P.2d 580, 89 *Cal.* App. 2d 214—*People v. One 1940 Chrysler Engine No. C-28-10132*, 175 P.2d 585, 77 *Cal.* App. 2d 306—*Wilcox v. Sway*, 160 P.2d 154, 69 *Cal.* App. 2d 560—*Herman v. Glascock*, 155 P.2d 912, 68 *Cal.* App. 2d 98—*Krauss v. Strop*, 118 P.2d 332, 47 *Cal.* App. 2d 452—*Wilcox v. West*, 114 P.2d 39, 45 *Cal.* App. 2d 267—*Rawlins v. Lory*, 111 P.2d 973, 44 *Cal.* App. 2d 20—*Richter v. Adams*, 66 P.2d 226, 19 *Cal.* App. 2d 572—*Caswell v. Gardner*, 55 P.2d 1222, 12 *Cal.* App. 2d 597—*Gustafson v. Blunk*, 41 P. 2d 953, 4 *Cal.* App. 2d 630.

*Idaho.*—*Cazier v. Economy Cash Stores*, 228 P.2d 436, 71 *Idaho* 178.

*S.D.*—*Foss v. Foss*, 1 N.W.2d 588, 68 S.D. 262—*Ellens v. Lind*, 277 N.W. 40, 65 S.D. 620.

*Utah.*—*Cook v. Cook*, 174 P.2d 434, 110 *Utah* 406—*Patton v. Kirkman*, 167

P.2d 282, 109 *Utah* 487—*Gray v. Defa*, 153 P.2d 544, 107 *Utah* 272—*Pike v. Clark*, 79 P.2d 1010, 95 *Utah* 235—*Piper v. Hatch*, 43 P.2d 700, 86 *Utah* 292—*Parowan Mercantile Co. v. Gurr*, 30 P.2d 207, 83 *Utah* 463—*West v. Standard Fuel Co.*, 17 P.2d 292, 81 *Utah* 300.

64 C.J. p 1233 note 9.

**Prayer of complaint is not an allegation of fact and hence requires no finding by trial court.**—*Markulics v. Maico Co.*, 168 P.2d 35, 74 *Cal.* App. 2d 66.

#### Allegations of answer

(1) Unless waived, full findings are required not only on issues raised by denials of allegations of complaint but on issues raised by affirmative defenses in answer.—*Bertone v. City & County of San Francisco*, 245 P. 2d 29, 111 *Cal.* App. 2d 579.

(2) Findings of truth or falsity of allegations of answer as well as of petition are essential to proper adjudication of controversy.—*In re Peterson*, 48 P.2d 468, 87 *Utah* 144.

63. *Cal.*—*Fairchild v. Raines*, 151 P. 2d 260, 24 *Cal.* 2d 518—*J. J. Howell & Associates v. Antonini*, 268 P.2d 557, 124 *Cal.* App. 2d 388—*Beebe v. Richards*, 252 P.2d 688, 115 *Cal.* App. 2d 589—*Bertone v. City & County of San Francisco*, 245 P.2d 29, 111 *Cal.* App. 2d 579—*Hayward Lumber & Inv. Co. v. Construction Products Corp.*, 241 P.2d 1054, 110 *Cal.* App. 2d 1—*Hicks v. Barnes*, 241 P. 2d 648, 109 *Cal.* App. 2d 859—*Rotea v. Rotea*, 209 P.2d 963, 93 *Cal.* App. 2d 327—*Chamberlain v. Abeles*, 198 P.2d 927, 88 *Cal.* App. 2d 291—*Rhoads v. Newby*, 175 P.2d 893, 77 *Cal.* App. 2d 580—*People v. One 1940 Chrysler Engine No. C-28-10132*, 175 P.2d 585, 77 *Cal.* App. 2d 306—*Lowe v. Pierce*, 172 P.2d 936, 76 *Cal.* App. 2d 316—*Fidelity & Cas. Co. of N. Y. v. Abraham*, 161 P.2d 689, 70 *Cal.* App. 2d 776—*Wilcox v. Sway*, 160 P.2d 154, 69 *Cal.* App. 2d 560—*Petersen v. Murphy*, 139 P.2d 49, 59 *Cal.* App. 2d 528—*Bolton v. Logan*, 116 P.2d 801, 46 *Cal.* App. 2d 739—*Wilcox v. West*, 114 P.2d 39, 45 *Cal.* App. 2d 267—*Sturdevant v. Sturdevant*, 39 P.2d 433, 3 *Cal.* App. 2d 433.

*Idaho.*—*Cheesbrough v. Jensen*, 109 P. 2d 889, 62 *Idaho* 255.

*Ind.*—*Automobile Underwriters v. Tite*, 85 N.E.2d 365, 119 *Ind.* App. 251.

*N.M.*—*Mitchell v. Jones*, 138 P.2d 522, 47 N.M. 169—*Corpus Juris cited in* *Roberson v. Bondurant*, 73 P.2d 321, 324, 41 N.M. 638.

*Tex.*—*Plaza Co. v. White*, *Civ.* App., 160 S.W.2d 312, error refused—*Herrin Transp. Co. v. Marmion*, *Civ.* App., 113 S.W.2d 291—*South Texas*

which findings are necessary to support the judgment.<sup>64</sup> So, generally, the court should find the facts on every issue,<sup>65</sup> every controverted issue of fact,<sup>66</sup> or every issue of fact raised by the pleadings.<sup>67</sup> Also, it has been held or stated in a few cases that the findings must cover all material issues raised by the pleadings regardless of the evidence,<sup>68</sup> and that the parties are entitled to findings of fact on a matter not alleged but litigated by common consent.<sup>69</sup>

A trial court is required, however, to file only such findings as the record justifies,<sup>70</sup> and is not required to make findings with respect to every item of evidence introduced in a case,<sup>71</sup> and it is generally deemed unnecessary to make findings on immaterial issues,<sup>72</sup> issues not determinative, or necessary to a determination, of the case,<sup>73</sup> questions which did not arise during the course of the trial,<sup>74</sup> issues which have been withdrawn,<sup>75</sup> matters not made issues by the pleadings,<sup>76</sup> or matters not

Cotton Co-op. Ass'n v. Burgess, Civ. App., 103 S.W.2d 1095—Mauritz v. Schwind, Civ.App., 101 S.W.2d 1085, error dismissed.

Utah.—Huber v. Newman, 145 P.2d 786, 106 Utah 363.

64 C.J. p 1233 note 10.

64. Cal.—Strong v. Strong, 140 P.2d 386, 22 Cal.2d 540—Petroleum Midway Co. v. Zahn, 145 P.2d 371, 62 Cal.App.2d 645.

N.M.—Pankey v. Hot Springs Nat. Bank, 119 P.2d 636, 46 N.M. 10. S.D.—Davies v. Toms, 63 N.W.2d 406.

Tex.—Tijerina v. Botello, Civ.App., 207 S.W.2d 136.

64 C.J. p 1233 note 11.

65. Pa.—Hagy v. Sharp, 177 A. 578, 117 Pa.Super. 187.

64 C.J. p 1233 note 12.

66. Wis.—Young v. Miner, 124 N.W. 660, 141 Wis. 501.

67. Or.—Kessling v. Orth, 249 P. 1052, 119 Or. 473.

64 C.J. p 1233 note 14.

68. Utah.—Simper v. Brown, 278 P. 529, 74 Utah 178.

64 C.J. p 1233 note 15.

69. Utah.—Golden v. American Keene Cement & Plaster Co., 95 P. 2d 755, 98 Utah 23.

64 C.J. p 1233 note 16.

70. Tex.—Donelson v. Horton, Civ. App., 256 S.W.2d 693.

71. Wash.—Williamson v. United Brotherhood of Carpenters & Joiners of America, 120 P.2d 833, 12 Wash.2d 171.

72. Cal.—Stanton v. Pratt, 116 P.2d 609, 18 Cal.2d 599—Moore v. Day, 266 P.2d 51, 123 Cal.App.2d 134—Dixon v. Eastown Realty Co., 233 P.2d 138, 105 Cal.App.2d 260—Fejer v. Paonessa, 231 P.2d 507, 104 Cal.App.2d 190—Kuenzel v. Grettenberg, 199 P.2d 732, 88 Cal. App.2d 656—Rosenfeld v. Vosper, 195 P.2d 530, 86 Cal.App.2d 687—Conrad v. Conrad, 152 P.2d 221, 66 Cal.App.2d 280—Banducci v. Banducci, 147 P.2d 73, 63 Cal.App. 2d 600—Lee Bowl v. Spalding Sales Corp., 133 P.2d 846, 55 Cal.App.2d 918—Vaughan v. Roberts, 113 P.2d 864, 45 Cal.App.2d 246—Lee v. Dawson, 112 P.2d 683, 44 Cal.App. 2d 362—San Juan Gold Co. v. San

Juan Ridge Mut. Water Ass'n, 93 P.2d 582, 34 Cal.App.2d 159—Bacon v. Bacon, 69 P.2d 884, 21 Cal. App.2d 540—Clark v. Western Feeding Co., 52 P.2d 991, 10 Cal.App.2d 727—McElligott v. Freeland, 33 P. 2d 430, 139 Cal.App. 143—Kort v. City of Los Angeles, 27 P.2d 66, 52 Cal.App.2d 804—Williams v. Rush, 25 P.2d 888, 134 Cal.App. 554—Platnauer v. Fornl, 21 P.2d 638, 131 Cal.App. 393—Crenshaw v. Roy C Seeley Co., 19 P.2d 50, 129 Cal.App. 627.

Idaho.—Metzker v. Lowther, 204 P. 2d 1025, 69 Idaho 158.

Mo.—Transamerican Freight Lines v. Monark Egg Corp., 161 S.W.2d 687, 236 Mo.App. 1047.

N.J.—Pitt v. Pennsylvania Greyhound Lines, 69 A.2d 210, 5 N.J. Super. 364.

N.M.—L. Bar Cattle Co. v. Board of Trustees of Town of Cebolleta Land Grant, 120 P.2d 432, 46 N.M. 26, certiorari denied Board of Trustees of Town of Cebolleta Land Grant v. L. Bar Cattle Co., 62 S. Ct. 1108, 316 U.S. 645, 86 L.Ed. 1729.

Okl.—Grigg v. Federal Deposit Ins. Corp., 257 P.2d 290, 208 Okl. 419.

—Roberts v. C. F. Adams & Son, 184 P.2d 634, 199 Okl. 369.

Or.—Yates v. Bjorkman, 19 P.2d 405, 142 Or. 119.

Pa.—First Nat. Bank v. Jones' Estate, 6 A.2d 273, 334 Pa. 577.

R.I.—Columbia Nat. Life Ins. Co. v. Industrial Trust Co., 190 A. 13, 57 R.I. 325, reargument denied 190 A. 787, 57 R.I. 468.

Tex.—Seaside Taxi Service v. Lyle, Civ.App., 123 S.W.2d 372, error dismissed—Consolidated Flour Mills Co. v. Holbrook, Civ.App., 66 S.W. 2d 376.

Utah.—Duncan v. Hemmelwright, 186 P.2d 965, 112 Utah 262—Gray v. Defa, 153 P.2d 544, 107 Utah 272—Seeley v. Houston, 141 P.2d 880, 105 Utah 202—Needham v. First Nat. Bank, 85 P.2d 786, 96 Utah 432—Campbell v. Glen Bros.—Roberts Piano Co., 48 P.2d 556, 87 Utah 294.

Vt.—Laplante v. Eastman, 105 A.2d 265.

Wash.—Bowman v. Webster, 253 P. 2d 934, 42 Wash.2d 129.

64 C.J. p 1233 note 17.

Effect of findings on immaterial issues see *infra* § 633 b.

73. Cal.—Freeman v. Jergins, 271 P.2d 210, 125 Cal.App.2d 536—Oaks v. Renshaw, 168 P.2d 199, 74 Cal. App.2d 144—Robinson v. Walker, 46 P.2d 174, 7 Cal.App.2d 268—Carlson v. Stanbitt, 45 P.2d 820, 7 Cal.App.2d 455.

Conn.—Bowen v. Morgillo, 14 A.2d 724, 127 Conn. 161.

Idaho.—Cazier v. Economy Cash Stores, 228 P.2d 436, 71 Idaho 178—Snyder v. Bock, 204 P.2d 1010, 69 Idaho 168.

N.M.—Williams v. Selby, 24 P.2d 728, 37 N.M. 474.

S.D.—Davies v. Toms, 63 N.W.2d 406.

Tex.—Tijerina v. Botello, Civ.App., 207 S.W.2d 136—Jinks v. Jinks, Civ. App., 205 S.W.2d 816—Boston Ins. Co. v. Rainwater, Civ.App., 197 S.W.2d 118—Plaza Co. v. White, Civ.App., 160 S.W.2d 312, error refused.

Utah.—Cook v. Cook, 174 P.2d 434, 110 Utah 406.

Vt.—Crawford v. Jerry, 11 A.2d 210, 111 Vt. 120.

64 C.J. p 1234 note 18.

**Moot issues**

Only facts necessary to be found are those in controversy and material to defenses submitted and on which cause is finally ruled, it being unnecessary to make finding as to issues which have become moot.—Painter v. Prudential Ins. Co. of America, 71 S. W.2d 483, 228 Mo.App. 576.

74. N.Y.—Century Ins. Co. v. Glidden Buick Corp., 20 N.Y.S.2d 108, 174 Misc. 149.

75. Cal.—Alhadeff v. Alhadeff, 20 P. 2d 112, 130 Cal.App. 578.

**Issues eliminated by stipulation**

Cal.—Williams v. Rush, 25 P.2d 888, 134 Cal.App. 554.

76. Cal.—Ho Gate Wah v. Fong Wan, 257 P.2d 674, 118 Cal.App.2d 150—Holden v. Johnson, 214 P.2d 78, 95 Cal.App.2d 872—Maguire v. Lees, 169 P.2d 411, 74 Cal.App.2d 697—Los Angeles Scenic Studios v. Television, 61 P.2d 1192, 17 Cal. App.2d 356.

Conn.—Catanzaro v. Catanzaro, 18 A. 2d 350, 127 Conn. 478.



made issues by the evidence.<sup>77</sup> Issues or questions which at first appear to be material may be rendered immaterial, so as to require no findings, by a finding or conclusion on another issue or question<sup>78</sup> which is determinative of the case,<sup>79</sup> an application of this principle being the lack of necessity of finding on all the defenses, where a finding on one issue necessarily determines the case against plaintiff.<sup>80</sup>

**Findings taken as whole.** It is not always necessary to make a specific finding as to each of several material issues where the findings taken as a whole, or construed together, clearly show that they include the conclusion of the court on all the material issues.<sup>81</sup>

**Agreed, admitted, or undenied matters.** Except in some jurisdictions,<sup>82</sup> it is not necessary to make findings as to matters admitted or not denied in the pleadings,<sup>83</sup> or otherwise agreed on.<sup>84</sup> However, an admission of one matter does not dispense with the necessity of a finding as to another matter not covered by the admission;<sup>85</sup> and a particular admission may not be so clear and definite as to relieve the court of making any finding on the matter to which it relates.<sup>86</sup>

**Express, implied, or negative findings.** Failure to make an express finding on an issue is not fatal where a finding thereon is necessarily implied from the findings made.<sup>87</sup> Also, it is not absolutely necessary to make an express finding as to a matter

Idaho.—*Mitchell v. Munn Warehouse Co.*, 86 P.2d 174, 59 Idaho 661.

Ind.—*Automobile Underwriters v. Tite*, 85 N.E.2d 365, 119 Ind.App. 251.

Utah.—*Hayden v. Collins*, 63 P.2d 223, 90 Utah 238—*Schofield v. Zion's Co-op. Mercantile Inst.*, 39 P.2d 342, 85 Utah 281, 96 A.L.R. 1083.

Wash.—*Barker v. Weeks*, 47 P.2d 1, 182 Wash. 384.  
64 C.J. p 1234 note 19.

77. Ariz.—*Gilliland v. Rodriguez*, 268 P.2d 334, 77 Ariz. 163.

Cal.—*Colburn Biological Institute v. De Bolt*, 59 P.2d 108, 6 Cal.2d 631—*Basin Oil Co. of Cal. v. Baash-Ross Tool Co.*, 271 P.2d 122, 125 Cal.App.2d 578—*Stone v. Lobsien*, 247 P.2d 357, 112 Cal.App.2d 750—*Staudigl v. Harper*, 173 P.2d 343, 76 Cal.App.2d 439—*Winsette v. Winsette*, 117 P.2d 897, 47 Cal.App.2d 308—*Franklin v. Bettencourt*, 60 P.2d 1017, 16 Cal.App.2d 511—*Nelson v. Canavan*, 53 P.2d 201, 11 Cal.App.2d 156—*Thomson v. Leak*, 27 P.2d 795, 135 Cal.App. 544—*Rancho Santa Margarita v. San Diego County*, 26 P.2d 716, 135 Cal. App. 134—*Alhadeff v. Alhadeff*, 20 P.2d 112, 130 Cal.App. 578.

Kan.—*Owen v. Christopher*, 62 P.2d 860, 14 Kan. 765.

Mass.—*De Cristafano v. Boston Elevated Ry. Co.*, 33 N.E.2d 971, 304 Mass. 650.

Ohio.—*Hauer v. Cleveland Ry. Co.*, 47 N.E.2d 225, 141 Ohio St. 197.

Vt.—*Laplane v. Eastman*, 105 A.2d 285—*Jaquith v. Smith*, 24 A.2d 341, 112 Vt. 353.

Wash.—*Kinney v. Sando*, 182 P.2d 45, 28 Wash.2d 252—*Villiamson v. United Broth. of Carpenters & Joiners of America*, 120 P.2d 833, 12 Wash.2d 171.  
64 C.J. p 1234 note 20.

**Failure to make definite finding held not error in view of the evidence**  
Mass.—*Burke v. Marlboro Awning Co.*, 113 N.E.2d 222, 330 Mass. 294.

78. Cal.—*Gish v. Ferrea*, 101 P. 27, 10 Cal.App. 53.

64 C.J. p 1235 note 21.

79. Cal.—*Associated Industries Insurance Corporation v. Industrial Accident Commission*, 259 P. 110, 85 Cal.App. 184.

64 C.J. p 1235 note 22.

"Where facts are found which necessarily defeat the losing party, all other issues thereby become immaterial."—*Hill v. Donnelly*, 132 P.2d 867, 870, 56 Cal.App.2d 387.

80. Cal.—*Lane v. Tanner*, 103 P. 846, 156 Cal. 135.  
64 C.J. 1235 note 23.

81. Cal.—*J. J. Howell and Associates v. Antonini*, 268 P.2d 557, 124 Cal.App.2d 1388—*Moore v. Day*, 266 P.2d 51, 123 Cal.App.2d 134—*Roeder v. Roeder*, 258 P.2d 581, 118 Cal.App.2d 572—*Cleverdon v. Gray*, 145 P.2d 95, 62 Cal.App.2d 611—*Petersen v. Murphy*, 139 P.2d 49, 59 Cal.App.2d 528—*Aster v. Safeway Stores*, 79 P.2d 146, 26 Cal. App.2d 163.

Utah.—*Paton v. Kirkman*, 187 P.2d 282, 109 Utah 487.  
64 C.J. p 1233 note 24.

#### Denials in answer

Where matters alleged in the answer do no more than contradict some allegation of the complaint, and findings on allegation of complaint are complete, it is unnecessary to make specific findings on matters alleged in answer.—*Vidler v. De Bell*, 270 P.2d 120, 120 Cal.App. 2d 326.

82. Utah.—*Baker v. Hatch*, 257 P. 673, 70 Utah 1

83. U.S.—*National Candy Co. v. Federal Trade Commission*, C.C.A.7, 104 F.2d 999, certiorari denied 60 S.Ct. 174, 308 U.S. 610, 84 L.Ed. 510—*March of Time Candies v. Federal Trade Commission*, C.C.A.7, 104 F.2d 999, certiorari denied 60 S.Ct. 174, 308 U.S. 610, 84 L.Ed. 510—*Dietz Gum Co. v. Feder-*

al Trade Commission, C.C.A.7, 104 F.2d 999, certiorari denied 60 S.Ct. 174, 308 U.S. 610, 84 L.Ed. 510.

Cal.—*Horney v. Horney*, 258 P.2d 555, 118 Cal.App.2d 679—*Shelton v. Vance*, 234 P.2d 1012, 106 Cal.App.2d 194—*Lifton v. Harshman*, 182 P.2d 222, 80 Cal.App.2d 422—*Bingham v. Bingham*, 120 P.2d 713, 48 Cal.App.2d 744.

Ind.—*Price v. Andrew*, 10 N.E.2d 436, 104 Ind.App. 619.

Mo.—*Kristanik v. Chevrolet Motor Co.*, 70 S.W.2d 890, 335 Mo. 60.

Or.—*Phillips v. Elliott*, 25 P.2d 557, 144 Or. 694.

64 C.J. p 1235 note 26.

Necessity of making findings when all facts are admitted or agreed see supra § 612.

84. Mo.—*Webb v. Archibald*, 28 S. W. 80, 128 Mo. 299.

64 C.J. p 1235 note 27.

Lack of necessity of findings as to facts settled by stipulation see Stipulations § 24 b (4).

85. Wis.—*First Savings & Trust Co. v. Milwaukee County*, 148 N.W. 22, 1093, 158 Wis. 207.

86. Cal.—*Katschinski v. Keller*, 193 P. 587, 49 Cal.App. 406.

87. Cal.—*Haigler v. Donnelly*, 117 P.2d 331, 18 Cal.2d 674—*Stewart v. Wagenbach*, 47 P.2d 267, 3 Cal. 2d 755—*J. J. Howell and Associates v. Antonini*, 268 P.2d 557, 124 Cal.App.2d 388—*Roeder v. Roeder*, 258 P.2d 581, 118 Cal.App.2d 572—*Brogdon v. Graham*, 242 P.2d 76, 110 Cal.App.2d 106—*Dixon v. Easttown Realty Co.*, 233 P.2d 138, 105 Cal.App.2d 260—*Cooper v. San Diego Elec. Ry. Co.*, 194 P.2d 559, 86 Cal.App.2d 304—*Lo Bue v. Porrazzo*, 119 P.2d 346, 48 Cal.App.2d 52—*San Juan Gold Co. v. San Juan Ridge Mut. Water Ass'n*, 93 P.2d 582, 34 Cal.App.2d 159—*Kramer v. Sanguinetti*, 91 P.2d 604, 33 Cal. App.2d 303—*Greenfield v. Sudden Lumber Co.*, 64 P.2d 1007, 18 Cal. App.2d 709.

which is necessarily<sup>88</sup> or reasonably<sup>89</sup> negated by the findings made. Thus, where the court makes affirmative findings of fact on the material issues in favor of one party and such findings are inconsistent with, and a complete negative of, the truth of the matter set forth in the pleadings of the other party, it need not expressly and specifically find on the matters the truth of which is thus negated.<sup>90</sup>

### b. Conclusions of Law

The conclusions of law necessary to be stated are the conclusions which, under the facts found, are required by the law and from which the judgment is to result; and while correct practice requires that conclusions be stated on every issue of fact formed by the pleadings and tried by the court, it is not necessary to state conclusions on every minor question of law which may arise in the case.

The conclusions of law necessary to be stated are the conclusions which, under the facts found, are required by the law<sup>91</sup> and from which the judgment is to result.<sup>92</sup> While correct practice requires that conclusions be stated on every issue of fact formed by the pleadings and tried by the court,<sup>93</sup> it is not necessary to state conclusions on

every minor question of law which may arise in the case,<sup>94</sup> such as questions relating to the burden of proof<sup>95</sup> or the recovery of costs, the awarding of which is provided for by statute,<sup>96</sup> and, as discussed infra § 631, in some, although not all, jurisdictions a general conclusion that judgment should be rendered for a specified party is sufficient.

### § 616. Requests

In order to be of any avail, a request for a finding must be made by one of the parties, and generally it devolves on the party desiring a certain finding to obtain it. In making such a request a party concedes as a matter of law that the case is a proper one to be decided as one of fact.

A request for a finding, in order to be of any avail, must be made by one of the parties.<sup>97</sup> It devolves on the party desiring a certain finding to obtain it.<sup>98</sup> While a request may be necessary to enable the unsuccessful party to obtain an appellate review of a failure to make findings, it has been asserted that it is the duty of the successful party to procure findings which will sustain the judgment in his favor.<sup>99</sup> The finding itself need not show at whose request it was made.<sup>1</sup> In making a request

Colo.—Slide Mines v. Denver Equipment Co., 148 P.2d 1009, 112 Colo. 285.

Utah.—Johnson v. Hughes, 232 P.2d 362—Bailey v. Gasparac, 215 P.2d 391, 117 Utah 298—Patton v. Kirkman, 167 P.2d 282, 109 Utah 487.

Vt.—Allen v. Travelers Indem. Co., 187 A. 512, 108 Vt. 317.

Wash.—Williamson v. United Brotherhood of Carpenters & Joiners of America, 120 P.2d 833, 12 Wash.2d 171.

64 C.J. p 1235 note 30.

88. Mass.—Howard v. Malden Sav. Bank, 15 N.E.2d 233, 300 Mass. 208. 64 C.J. p 1236 note 31.

89. Vt.—Labor v. Carpenter, 148 A. 867, 102 Vt. 418.

90. Cal.—Haigler v. Donnelly, 117 P.2d 331, 18 Cal.2d 674.

Utah.—Patton v. Kirkman, 167 P.2d 282, 109 Utah 487—Gray v. Defa, 153 P.2d 544, 107 Utah 272—Sidney Stevens Implement Co. v. Hintze, 67 P.2d 632, 92 Utah 264, 111 A.L.R. 331.

64 C.J. p 1236 note 33.

Omission of findings to cover a particular fact or issue deemed a finding on that fact or issue against party having burden of proof see infra § 649.

"It is unnecessary to make a specific finding on a given issue where the findings of the court are inconsistent with a finding on that particular issue which would have been

favorable to the complaining party."—McCarty v. Sauer, 136 P.2d 742, 746, 64 Idaho 748—Mine & Smelter Supply Co. v. Idaho Consolidated Mines Co., 118 P.2d 301, 304, 20 Idaho 300.

91. Mo.—Corpus Juris cited in Conley v. Crown Coach Co., 159 S.W.2d 281, 285, 348 Mo. 1243.

64 C.J. p 1236 note 36.

92. Wis.—Young v. Miner, 124 N.W. 660, 141 Wis. 501.

93. Ind.—Huntington First Nat. Bank v. Arnold, 60 N.E. 134, 156 Ind. 487.

N.M.—Corpus Juris quoted in Consolidated Placers v. Grant, 151 P.2d 48, 55, 48 N.M. 340.

94. N.M.—Corpus Juris quoted in Consolidated Placers v. Grant, 151 P.2d 48, 55, 48 N.M. 340. Tex.—Central Meat Market v. Longwell's Transfer, Civ.App., 43 S.W.2d 616.

95. N.M.—Corpus Juris quoted in Consolidated Placers v. Grant, 151 P.2d 48, 55, 48 N.M. 340.

Tex.—Central Meat Market v. Longwell's Transfer, Civ.App., 43 S.W.2d 616.

96. Ind.—Shandy v. Bell, 189 N.E. 627, 207 Ind. 215—Anderson v. Moise, 63 N.E.2d 303, 116 Ind.App. 240—Spath v. Francisco State Bank of Francisco, 13 N.E.2d 880, 105 Ind.App. 149—Milk Control Board of Indiana v. Phend, 9 N.E.2d 121, 104 Ind.App. 196.

N.M.—Corpus Juris quoted in Con-

solidated Placers v. Grant, 151 P.2d 48, 55, 48 N.M. 340.

64 C.J. p 1237 note 41.

97. Ind.—Jones v. Hall, 35 N.E. 923, 37 N.E. 25, 9 Ind.App. 453.

Request or other application for: Additional findings see infra § 643. Amendment or correction of findings see infra § 640.

Rulings or declarations of law see supra § 601.

Separate statement of findings of fact and conclusions of law see infra § 624.

98. Vt.—Manley Bros. Co. v. Somers, 138 A. 735, 100 Vt. 439.

### Fraud

(1) Where plaintiffs sued for fraud for defendant's alleged false representations as to value of timber which was made collateral for a loan to corporation of which defendant was president and principal stockholder, burden was on plaintiffs, rather than on defendant, to procure findings relating to question of damage.—Crowley v. Goodrich, 44 A.2d 128, 114 Vt. 304, 162 A.L.R. 691.

(2) Plaintiffs in such action also had burden to secure a finding on the question of solvency of corporation.—Crowley v. Goodrich, supra.

99. N.Y.—Triest v. New York, 86 N.E. 549, 193 N.Y. 525.

Request or other application for findings as predicate to appellate review see Appeal and Error §§ 310, 336.

1. Tenn.—Little v. Rosser, 7 Tenn. App. 305.

for findings of fact and conclusions of law a party concedes as a matter of law that the case is a proper one to be decided as one of fact,<sup>2</sup> even though the request is not in the precise form contemplated by statute;<sup>3</sup> but by submitting requested findings of fact and conclusions of law after the trial court has sustained defendant's motion to dismiss the complaint, plaintiff does not authorize the court to weigh the testimony as though the case had been submitted for determination on the evidence before the court.<sup>4</sup>

### § 617. — Necessity

In some jurisdictions it is the duty of the court in an action tried before it without a jury to make findings

and conclusions even when not requested to do so by either party, but in others a request by one of the parties is necessary in order to make it the duty of the court to state findings of fact or specific findings.

In some jurisdictions it is the duty of the court in an action tried before it without a jury to make findings and conclusions even when not requested to do so by either party,<sup>5</sup> or at least it is its duty to do so in respect of all material issues presented by the pleadings,<sup>6</sup> although not in respect of items of damages;<sup>7</sup> but under other statutes or court rules a request by one of the parties is necessary in order to make it the duty of the court to state findings of fact,<sup>8</sup> or at least to make it the duty of the court to state specific, rather than general, findings<sup>9</sup> or findings on any one particular issue,

2. Mo.—Labadie Bottoms River Protection Dist. of Franklin County v. Randall, 156 S.W.2d 713, 348 Mo. 867—Cantley v. American Surety Co. of New York, 38 S.W.2d 739, 225 Mo.App. 1146—Steele v. Johnson, 69 S.W. 1065, 96 Mo. App. 147.

Where defendant requested findings of fact and conclusions of law, defendant conceded as a matter of law that plaintiff had made a case to be decided as one of fact, and admitted that there was evidence sufficient to establish every essential element of plaintiff's case.—Blocher v. Huebner, Mo.App., 172 S.W.2d 475—Smith v. Universal Finance Corp., Mo.App., 137 S.W.2d 489.

3. Mo.—Transamerican Freight Lines v. Monark Egg Corp., 161 S.W.2d 687, 236 Mo.App. 1047—Smith v. Universal Finance Corp., App., 137 S.W.2d 489.  
Form and requisites of request see infra § 619.

4. N.M.—Sandoval County Board of Education v. Young, 94 P.2d 508, 43 N.M. 397.

#### Duty to make findings supported by evidence

Where plaintiff submitted requested findings of fact and conclusions of law after trial court had sustained defendant's motion to dismiss complaint, it was duty of trial court to make any relevant fact finding requested by plaintiff that was supported by substantial evidence, and, in making his decision on any requested finding, he should have taken as true all testimony and reasonable inferences flowing therefrom tending to prove that finding and should have disregarded all conflicts and all evidence tending to weaken or disprove it.—Sandoval County Board of Education v. Young, supra.

5. Mont.—Billings Realty Co. v. Big Ditch Co., 115 P. 828, 43 Mont. 251. 64 C.J. p 1237 note 44 [a].

#### In California

(1) Unless waived, findings must be made whether or not either party specifically demands findings.—Holland v. Kelly, 169 P. 1000, 177 Cal. 43.

(2) Under express provision of statute, findings in municipal court were waived by failure to request them at trial.—Annin v. Belridge Oil Emp. Federal Credit Union, 260 P.2d 295, 119 Cal.App.2d Supp. 900.

#### In Washington

(1) Under a mandatory provision of the statute, the making and filing of findings of fact and conclusions of law in a law action tried by the court are necessary even in the absence of a request therefor.—Davis & Banker v. Wenatchee-Okanogan Warehouse Co., 242 P. 965, 137 Wash. 470—64 C.J. p 1228 note 21.

(2) Some early cases were apparently to the contrary.—State v. Coriat, 96 P. 689, 50 Wash. 95—Slayton v. Felt, 82 P. 173, 40 Wash. 1.

(3) Such cases have been expressly or impliedly overruled.—Davis & Banker v. Wenatchee-Okanogan Warehouse Co., 242 P. 965, 966, 137 Wash. 470.

(4) Failure to find every probative fact necessary to establish ultimate facts supporting decree will not, however, in absence of timely request for such complete findings, render findings of ultimate facts insufficient to sustain decree.—Shorrock v. Shorrock, 56 P.2d 674, 185 Wash. 623.

6. Cal.—Haight v. Tryon, 44 P. 318, 112 Cal. 4.  
64 C.J. p 1237 note 45.

7. Cal.—Weisshand v. City of Petaluma, 174 P. 955, 37 Cal.App. 296.

#### Punitive and actual damages

In action for assault and battery where facts justifying recovery of punitive damages were pleaded, punitive damages were not required to be segregated in the findings from

actual damages awarded where segregation was not requested.—Rogers v. Kabakoff, 184 P.2d 312, 81 Cal.App. 2d 487.

8. Ariz.—Flier v. Maricopa County, 198 P.2d 131, 68 Ariz. 11.  
Mo.—Trask v. Arcadia Valley Bank, App., 230 S.W.2d 501—State ex rel. Luechtefeld v. Arnold, App., 149 S.W.2d 384—Edwards v. Metropolitan Life Ins. Co., App., 138 S.W.2d 651—Phillips v. Alford, App., 90 S.W.2d 1060.

N.M.—Selby v. Tolbert, 249 P.2d 498, 56 N.M. 718—Garcia v. Chavez, 212 P.2d 1052, 54 N.M. 22—Albuquerque Broadcasting Co. v. Bureau of Revenue, 184 P.2d 416, 51 N.M. 332, 11 A.L.R.2d 966—McDaniel v. Vaughn, 80 P.2d 417, 42 N.M. 422.

N.C.—Smith v. Pilot Life Ins. Co., 4 S.E.2d 321, 216 N.C. 152.

Tex.—Fitzgerald v. Lane, Civ.App. 126 S.W.2d 64, reversed on other grounds 155 S.W.2d 602, 137 Tex. 514.

64 C.J. p 1237 note 47.

Function of a request for conclusions is with a view of excepting to the decision of the court on questions of law involved in the trial, primarily to determine whether such conclusions of fact support or warrant the conclusions of law drawn from such facts, and a secondary function is to avoid the necessity of a transcript of the evidence in the record on appeal unless party appealing desires to attack one or more of the findings as unsupported by the evidence.—In re Harmon's Estate, 96 N.E.2d 34, 87 Ohio App. 451.

9. U.S.—Bourjois, Inc. v. Park Drug Co., C.C.A.Mo., 82 F.2d 468.  
Idaho—Reid v. Keator, 39 P.2d 926, 55 Idaho 172.

Neb.—George W. Condon Co. v. Loup River Public Power Dist., 281 N.W. 31, 135 Neb. 284.

N.H.—New Hampshire Sav. Bank v. National Rockland Bank, 41 A.2d 760, 93 N.H. 326.

question, point, or feature.<sup>10</sup> In some jurisdictions the court may of its own motion, and without any request by a party, make special findings of fact;<sup>11</sup> but it has been held that a finding so made is not regarded as a valid statutory finding,<sup>12</sup> and may not be considered<sup>13</sup> except as a general finding.<sup>14</sup> Where it is contemplated by the court rules that the trial judge may make such findings as may be found by him in support of his judgment rendered, he is not limited to such specific findings as may be requested by the losing party.<sup>15</sup>

### § 618. — Time for Making

A request for findings of fact and conclusions of law, in order to be effective, must be timely, but whether a particular request is timely depends on the rules or

practice of the particular court in which the request is made.

A request for findings of fact and conclusions of law, in order to be effective, must be timely.<sup>16</sup> In some jurisdictions a request, in order to be in time, must be made before the announcement, rendition, entry, or filing of the decision,<sup>17</sup> judgment,<sup>18</sup> or findings and conclusions,<sup>19</sup> or at the latest at the conclusion of the hearing;<sup>20</sup> and furthermore the request must be made at a reasonable time,<sup>21</sup> such as at the close of the argument<sup>22</sup> and before the case is submitted for decision<sup>23</sup> and taken under advisement.<sup>24</sup> Under the court rules or practice of some courts the request should be made at, or before, the commencement of the trial<sup>25</sup> or during the trial.<sup>26</sup> However, the rules or practice of other

N.M.—Teaver v. Miller, 208 P.2d 156, 53 N.M. 345.

Ohio.—Hiesenbeck v. Bauer, 82 N.E.2d 94, 83 Ohio App. 218.

Okl.—City of Lawton v. Sherman Mach. & Iron Works, 77 P.2d 567, 182 Okl. 254—Peebles v. Kansas Life Ins. Co., 52 P.2d 747, 178 Okl. 231.

Pa.—First Nat. Bank v. Jones' Estate, 6 A.2d 273, 334 Pa. 677, 64 C.J. p 1237 note 48.

General and specific findings generally see infra § 627.

10. U.S.—Fidelity Nat Bank & Trust Co. of Kansas City v. Southern United Ice Co., C.C.A.Mo., 78 F.2d 438.

Idaho.—Finn v. Rees, 141 P.2d 976, 65 Idaho 181—Mitchell v. Munn Warehouse Co., 86 P.2d 174, 59 Idaho 661.

Tenn.—A. J. Cook & Co. v. Seaton, 6 Tenn.App. 81.

64 C.J. p 1237 note 49.

11. Okl.—Evans v. Neal, 180 P.2d 661, 198 Okl. 515—Peebles v. Kansas Life Ins. Co., 52 P.2d 747, 178 Okl. 231.

64 C.J. p 1237 note 50.

#### In Connection

(1) Trial court has right and may be obligated to make finding, even though not requested, if deemed necessary to present issues on appeal.—Glazer v. Rosoff, 179 A. 407, 120 Conn 120.

(2) However, plaintiff desiring special finding on any particular issue should make a motion for such finding to trial court.—Dombron v. Rogozinski, 180 A. 453, 120 Conn. 245.

12. Mo.—Lesan Advertising Co. v. Castleman, 177 S.W. 597, 265 Mo. 345.

64 C.J. p 1237 note 51, p 1238 note 52.

13. Mo.—State ex rel. Sullivan County v. Maryland Casualty Co., 66 S.W.2d 537, 334 Mo. 259—Woolley v. Dori, 93 S.W.2d 1098, 230 Mo.App.

577—Carder v. Carder, 60 S.W.2d 706, 227 Mo.App. 1005.

64 C.J. p 1238 note 53.

14. Okl.—Setzer v. Moore, 22 P.2d 998, 164 Okl. 70—Watashe v. Tigger, 211 P. 415, 88 Okl. 77.

64 C.J. p 1250 note 64.

Special findings treated as general finding generally see infra § 627.

15. Tex.—Donelson v. Horton, Civ. App., 256 S.W.2d 693.

16. N.H.—Sisters of Mercy v. Town of Hooksett, 42 A.2d 222, 93 N.H. 301.

Ohio.—Wainwright v. Young, 77 N.E.2d 102, 81 Ohio App. 21.

Okl.—Midland Sav & Loan Co. v. Donohoe, 74 P.2d 1147, 181 Okl. 498.

Wyo.—Corpus Juris cited in Bruch v. Benedict, 165 P.2d 561, 564, 62 Wyo. 213.

64 C.J. p 1238 note 56.

Time for requesting separate statement of findings of fact and conclusions of law see infra § 624 a.

Request held timely when made at conclusion of testimony and before argument, and renewed at end of argument and before submission.—Bruch v. Benedict, 165 P.2d 561, 62 Wyo. 213.

Request held not timely where not proffered until order vacating judgment was made.—Cottonwood Sheep Co. v. Murphy, 44 P.2d 1000, 48 Wyo. 250, 98 A.L.R. 1373.

17. Okl.—Walden v. Automobile Brokers, 160 P.2d 400, 195 Okl. 453.

64 C.J. p 1238 note 57.

18. Ariz.—Filler v. Maricopa County, 198 P.2d 131, 68 Ariz. 11.

64 C.J. p 1238 note 58.

19. U.S.—Ewert v. Robinson, C.C.A. Okl., 289 F. 740.

64 C.J. p 1238 note 59.

20. Ohio.—Boyle v. Glidden Co., 9 Ohio Supp. 14.

21. Tex.—City Nat. Bank v. Stout, 61 Tex. 567.

64 C.J. p 1238 note 60.

#### Discretion of court

Opportunity to file requested findings and conclusions, was matter peculiarly within sound discretion of trial court, and denial thereof was not disturbed, in view of appellant's failure to act within five months' period between hearing and adjudication.—Barrows v. Allum, 66 A.2d 66, 361 Pa. 624.

22. Kan.—Wilcox v. Byington, 12 P. 826, 36 Kan. 212.

64 C.J. p 1238 note 61.

23. Ariz.—Julian v. Carpenter, 176 P.2d 693, 65 Ariz. 157.

Mo.—Bonnot v. Tackitt, App., 265 S.W.2d 748.

N.Y.—Mario v. DeOteris, 88 N.Y.S.2d 79, 275 App.Div. 790—Joroco Silk Corp. v. Nova, 39 N.Y.S.2d 473, 265 App.Div. 1061.

64 C.J. p 1238 note 62.

24. Mont.—State v. Edwards, 106 P. 705, 40 Mont. 320.

64 C.J. p 1238 note 63.

#### 25. Discretion of court

Where request for special findings of fact and conclusions of law is made after commencement of trial, granting of request is within sound discretion of court.—Gross Income Tax Division of Ind. v. Surface Combustion Corp., Ind., 111 N.E.2d 50, certiorari denied Gross Income Tax Division, Ind., Dept. of State Revenue, State of Ind. v. Surface Combustion Corp., 74 S.Ct. 51, 346 U.S. 829, 98 L.Ed. 553, and 74 S.Ct. 52, 346 U.S. 829, 98 L.Ed. 554—64 C.J. p 1238 note 64 [a].

Request held too late when not made until after all evidence was introduced.—St. Joseph Loan & Trust Co. v. Studebaker Corporation, C.C.A.Ind., 66 F.2d 151, certiorari denied 54 S.Ct. 209, 290 U.S. 699, 78 L.Ed. 601.

26. Ark.—Sewell v. Harkey, 174 S.

courts do not require the request to be made at the commencement of, or during, the trial,<sup>27</sup> or prior to the submission of the case;<sup>28</sup> and it has been held that a request is timely if made at any time before judgment is ordered,<sup>29</sup> as where the statutory requirement is that the request be made at the time of the trial.<sup>30</sup> At any rate the request must be made during the term at which the trial is had.<sup>31</sup>

*Request for passing on proposed findings and conclusions nunc pro tunc* as of the date of the decision or judgment is favored by some courts,<sup>32</sup> but not by others.<sup>33</sup>

*Motion to withdraw request* for a special finding of facts, not made until after a decision as to the facts has been announced, is properly overruled.<sup>34</sup>

## § 619. — Form and Requisites

A request for findings should be directed to the judge, demand specific findings of fact, and point out the points or propositions on which a finding is desired, with special particularity with respect to any particular issue or fact on which a finding is sought, and should be in writing where a statute or rule of court so provides. In some jurisdictions, but not in others, proposed findings may be submitted.

A request for findings should be directed to the judge,<sup>35</sup> demand specific findings of fact,<sup>36</sup> and point out the points or propositions on which a finding is desired,<sup>37</sup> with special particularity with respect to any particular issue or fact on which a finding is sought.<sup>38</sup> It must be in writing when a statute or rule of court so provides,<sup>39</sup> but not otherwise,<sup>40</sup> and the court may waive a written request by directing the clerk to note an oral request

W.2d 113, 206 Ark. 28.—Globe & Rutgers Fire Ins. Co. v. Pruitt, 64 S.W.2d 91, 188 Ark. 92, 64 C.J. p 1239 note 65.

**Alleged refusal to consider requests held not error**, where requests were not made until about twenty days after trial at time fixed for filing briefs, and record did not show that court failed to consider requests, but merely that it failed to make them.—Strole v. Combs, 56 P.2d 111, 143 Kan. 647.

### In Tennessee

(1) It has been held that the request for written finding of facts by the judge must be made upon the trial, and request made after the trial comes too late.—Harbin v. Elam, 1 Tenn.App. 496—64 C.J. p 1238 note 67.

(2) Requests made before rendition of judgment have, however, been held timely.—Stanley v. Donoho, 16 Lea, Tenn., 492—Marr v. Murphy, 5 Tenn.Civ.A. 159.

27. Ariz.—Valley Nat. Bank of Phoenix v. Shumway, 163 P.2d 676, 63 Ariz. 490.

Ohio.—Straus v. Friedman, 2 Ohio App. 11, 20 Ohio Cir.Ct.N.S., 158.

**Requests held timely** where filed on day of rendition of judgment granting divorce and on day after motion for new trial was filed, but before it was acted on.—Bittmann v. Bittmann, 194 N.E. 427, 48 Ohio App. 427, affirmed 194 N.E. 8, 129 Ohio St. 123.

28. Ariz.—Valley Nat. Bank of Phoenix v. Shumway, 163 P.2d 676, 63 Ariz. 490.

29. Ariz.—Valley Nat. Bank of Phoenix v. Shumway, supra.

**Requests made after entry of order for judgment** came too late.—Valley Nat. Bank of Phoenix v. Shumway, supra.

### 30. When request may be made under statute

(1) For purposes of statute requiring request for findings to be made at the time of trial, a trial continues until the issues of a case have been adjudicated.—Haupt v. La Brea Heating & Air Conditioning Co., 270 P.2d 125, 125 Cal.App.2d Supp. 888.

(2) The submission of a case for decision does not end trial and findings of fact may be requested until adjudication of the issues.—Hardy v. Foster, 270 P.2d 130, 125 Cal.App.2d Supp. 890—Haupt v. La Brea Heating & Air Conditioning Co., supra.

(3) Where taking of testimony had terminated and case had been submitted for decision, but permission was given counsel to file briefs, defendant's request for supporting findings was timely when made in his first filed brief.—Haupt v. La Brea Heating & Air Conditioning Co., supra.

(4) Request for findings of fact was timely, when made immediately after court announced its oral judgment and before judgment had been entered in clerk's official minutes.—Engleman v. Green, 270 P.2d 127, 125 Cal.App.2d Supp. 882.

(5) Where plaintiff requested findings of fact in letter, which was addressed to trial judge, and which was filed by clerk a week before judgment was entered court erred in failing to file findings of fact as requested.—Hardy v. Foster, supra.

31. Tex.—Industrial Transp. Co. v. White, Civ.App., 240 S.W. 1054.

32. N.Y.—Redondo S. S. Co. v. Irving Bank-Columbia Trust Co., 225 N.Y. S. 38, 221 App.Div. 694.

33. Ill.—Helburn Leather Co. v. Stone, 205 Ill.App. 347.

34. Ind.—Beach v. Franklin Tp., 103 N.E. 498, 56 Ind.App. 220.

35. Tex.—Industrial Transp. Co. v. White, Civ.App., 240 S.W. 1054.

64 C.J. p 1239 note 76.

36. Idaho.—Ford v. Connell, 204 P. 2d 1019, 69 Idaho 183.

Mo.—Schurman v. Western Casualty & Surety Co. of Fort Scott, Kan., 179 S.W.2d 31, 352 Mo. 650.

Neb.—Donald v. Heller, 10 N.W.2d 447, 143 Neb. 600.

N.M.—Carlisle v. Walker, 136 P.2d 479, 47 N.M. 83.

64 C.J. p 1239 note 77.

### Request made in alternative

In contested civil action tried by the court without a jury, defendant's request that trial judge give in writing his finding of facts and reasons for judgment, made in the alternative in connection with motion for a new trial, was authorized by constitutional provision.—Binks Mfg. Co. v. Guillot, 65 So.2d 787, 223 La. 337.

37. Neb.—Donald v. Heller, 10 N.W. 2d 447, 143 Neb. 600.

N.M.—Sundt v. Tobin Quarries, 175 P.2d 684, 50 N.M. 264, 169 A.L.R. 586.

64 C.J. p 1239 note 78.

38. Wis.—Wrigglesworth v. Wrigglesworth, 45 Wis. 255.

64 C.J. p 1239 note 79.

### Suggestion treated as proper request

The trial court may treat defendants' suggestion that the court would "probably want to make findings" as a proper request to do so.—Kubelsky v. Windell, 120 P.2d 803, 68 Ariz. 434.

39. Ala.—Brush v. Rountree, 32 So. 2d 244, 33 Ala.App. 227, certiorari denied 32 So.2d 246, 249 Ala. 567.

N.M.—Carlisle v. Walker, 136 P.2d 479, 47 N.M. 83.

64 C.J. p 1239 note 80.

40. Ariz.—Kubelsky v. Windell, 120 P.2d 803, 58 Ariz. 434.

Tex.—Bolding v. Porter & Billingsley, Civ.App., 55 S.W.2d 206.

64 C.J. p 1239 note 81.

in the record.<sup>41</sup> It is not proper,<sup>42</sup> necessary,<sup>43</sup> or customary<sup>44</sup> to question or interrogate the court. Requests for conclusions of fact and of law should be separated.<sup>45</sup> Also, a request must be applicable to, and supported by, the evidence<sup>46</sup> in the whole and not merely in part.<sup>47</sup> Requests should not be made which are frivolous<sup>48</sup> or unnecessarily numerous.<sup>49</sup> Notwithstanding a request to make findings on a certain issue is not in proper form, the matter may be so important to a right decision that the findings should not leave it in doubt.<sup>50</sup>

**Proposed findings.** In some jurisdictions a party should not present a proposed finding or attempt to dictate the terms of the finding;<sup>51</sup> but in other jurisdictions the proper practice is for a party or his counsel to submit to the trial judge such findings of fact and conclusions of law as, in his opinion, the evidence and the law justify, and request the judge to make such findings and conclusions.<sup>52</sup> Proposed findings are merely an aid and assistance to the court in preparing its findings of fact and conclusions of law.<sup>53</sup>

**Statement of claim, purpose, or evidence.** Under some statutes or rules of court the court should refuse to make a finding where neither party has filed a statement of what each has offered evidence to prove and claims to have proved;<sup>54</sup> and it is not required to make a finding on a question which

a party, in his request for a finding, has not included in the statement of the claims of law which he desires to raise on appeal.<sup>55</sup> A statement of the claims of law made at the trial is a necessary part of a finding, and the trial court is justified in refusing to make any finding if a party fails to file a statement of his claims of law as requested by the court.<sup>56</sup> In other jurisdictions a request need not be accompanied by a statement that it is presented with a view of taking an exception.<sup>57</sup>

**Motion.** A formal motion is not required in order to make a request;<sup>58</sup> and a motion, made at the close of the hearing, to introduce further evidence is not a request for a finding;<sup>59</sup> but a motion to find a verdict for defendant in a case tried without a jury has been held to be a request for findings of fact.<sup>60</sup>

## § 620. — Filing, Record, or Presentation

Under some statutes it is incumbent on a party desiring findings of fact and conclusions of law to call the judge's attention to the request, and according to some authority an entry of the request on the minutes of the court is necessary.

Under some statutes it is incumbent on a party desiring findings of fact and conclusions of law not only to make a request therefor but also to call the judge's attention to the request,<sup>61</sup> the judge not being required to examine the docket or files

41. Ariz.—Kubelsky v. Windell, 120 P.2d 803, 58 Ariz. 434.

42. Kan.—Peckham v. Keenan, 253 P. 205, 122 Kan. 544.  
64 C.J. p 1239 note 84.

43. Kan.—Vickers v. Buck Stove & Range Co., 79 P. 160, 70 Kan. 584.  
44. Kan.—Vickers v. Buck Stove & Range Co., supra.

45. N.Y.—Sniffen v. Koechling, 45 N.Y.Super. 61, affirmed 84 N.Y. 677.  
64 C.J. p 1239 note 87.

46. Mass.—Di Lorenzo v. Atlantic Nat. Bank of Boston, 180 N.E. 148, 278 Mass. 415.

64 C.J. p 1240 note 88.

47. N.Y.—Koehler v. Hughes, 42 N. E. 1051, 148 N.Y. 507.  
64 C.J. p 1240 note 89.

48. Pa.—Myersdale, etc., St. R. Co. v. Pennsylvania, etc., St. R. Co., 69 A. 92, 219 Pa. 558.

49. Mo.—Central Surety & Ins. Corp. v. Hinton, 130 S.W.2d 235, 233 Mo. App. 1218.

64 C.J. p 1240 note 91.

50. Minn.—Orr v. Sutton, 148 N.W. 1066, 127 Minn. 37, Ann.Cas.1916C 527.

51. Mo.—Schnurman v. Western Casualty & Surety Co. of Fort Scott, Kan., 179 S.W.2d 31, 352 Mo.

550—Central Surety & Ins. Corp. v. Hinton, 130 S.W.2d 235, 233 Mo.App. 1218—Arthur R. Lindberg, Inc., v. Quinn, App., 123 S.W.2d 215.

64 C.J. p 1239 note 82.

"Our attention has not been called to any statutory or other authority which permits a litigant in a law case tried by a court without a jury to submit special findings of fact and conclusions of law, which, when the court refuses to grant them or consider them afford ground for valid exceptions."—Capital Transit Co. v. Hazen, 93 F.2d 250, 252, 68 App.D.C. 91.

### In California

(1) There are some old cases supporting the rule of the text.—Edgar v. Stevenson, 11 P. 704, 70 Cal. 286—Miller v. Steen, 80 Cal. 402, 89 Am. D. 124.

(2) However, it has been held that parties have the right to request the trial judge to adopt proffered findings of fact and conclusions of law.—Howard v. Howard, 259 P.2d 41, 119 Cal.App.2d 122.

52. U.S.—American Elastics v. U. S. D.C.N.Y., 84 F.Supp. 198.  
N.M.—Carlisle v. Walker, 136 P.2d 479, 47 N.M. 83.

64 C.J. p 1239 note 83.

Adoption by court of findings prepared by party or attorney see infra § 623.

### Ultimate facts

Proposed statement of facts should be of ultimate facts, not evidentiary facts.—Hurley v. Toltfree, 105 N.Y.S. 2d 10, affirmed 127 N.Y.S.2d 854, 283 App.Div. 718.

53. Cal.—Howard v. Howard, 259 P. 2d 41, 119 Cal.App.2d 122.

54. Conn.—Dixon v. Gallon, 133 A. 213, 104 Conn. 740.

55. Conn.—In re Hotchkiss' Will, 92 A. 419, 88 Conn. 655—Banks v. Warner, 84 A. 325, 85 Conn. 613.

56. Conn.—Duncan v. Milford Sav. Bank, 58 A.2d 260, 134 Conn. 395.

57. Ind.—Western Union Tel. Co. v. Trissal, 98 Ind. 566—Trentman v. Eldridge, 98 Ind. 525.

58. Tex.—Pizzitola v. Jeffords, Civ. App., 294 S.W. 284.

59. N.H.—Cotton v. Stevens, 129 A. 873, 82 N.H. 106.

60. Mass.—Ashapa v. Reed, 182 N.E. 859, 280 Mass. 514.

61. Tex.—Birdwell v. Pacific Finance Corp., Civ.App., 259 S.W.2d 957—Stephenson v. Ettie, Civ.App., 145 S.W.2d 335, error dismissed, judgment correct—Fitzgerald v. Lane,

to ascertain whether a request has been made,<sup>62</sup> or to take cognizance of a motion or other request not called to his attention.<sup>63</sup> However, where the court has entered an order showing a request, the request need not again be called to the attention of the court.<sup>64</sup> According to some authority an entry of the request on the minutes of the court is necessary.<sup>65</sup>

### § 621. — Ruling

In jurisdictions wherein it is the duty of the court in an action tried before it without a jury to make findings and conclusions without any request therefor, where the court makes adequate findings and conclusions it is under no duty to consider requests, but in other jurisdictions the court should ordinarily respond to requests and grant those which are proper.

Where it is the duty of the court in an action tried before it without a jury to make findings and conclusions without any request therefor, and where the trial judge prepares his own findings of fact and conclusions of law which are fully and adequately responsive to all the issues framed by the pleadings, he is under no duty or obligation what-

soever to consider, respond to, or take action on, requests for findings.<sup>66</sup> In other jurisdictions where it is the duty of the court in an action tried before it alone to make findings of fact and conclusions of law when properly requested to do so, the court ordinarily should respond to each request<sup>67</sup> even though a decision might otherwise be reached,<sup>68</sup> and, when required to do so by statute or rule of court, note in the margin of each request the disposition made thereof.<sup>69</sup> The trial judge is not bound to accept in their entirety findings and conclusions proposed by a party;<sup>70</sup> he may do so in toto or in part, or disregard such proposed findings and conclusions in their entirety.<sup>71</sup> It has been said, however, that it is not proper for the trial court to refuse a proposed specific finding of an ultimate fact within the issues supported by substantial evidence, believed by the court, and necessary to determine the issues in the case.<sup>72</sup> A failure to respond to or categorically answer each specific request is not necessarily or always fatal,<sup>73</sup> as where the parties are not prejudiced thereby<sup>74</sup> or the ruling on the requests otherwise appears of record.<sup>75</sup>

Civ.App., 126 S.W.2d 64, reversed on other grounds 155 S.W.2d 602, 137 Tex. 514.—*Ross v. Odom*, Civ. App., 88 S.W.2d 1053.

64 C.J. p 1240 note 1.

Necessity for request see supra § 617.

62. Tex.—*Gulf, C. & S. F. Ry. Co. v. Woodley*, Civ.App., 2 S.W.2d 470.—*Pizzitola v. Jeffords*, Civ.App., 294 S.W. 284.

63. Tex.—*Ross v. Odom*, Civ.App., 88 S.W.2d 1053.

64 C.J. p 1240 note 3.

64. Tex.—*Lester v. Oldham*, Civ. App., 208 S.W. 575.

65. Cal.—*San Jose v. Shaw*, 45 Cal. 178.

66. Cal.—*In re Berry's Estate*, 233 P. 330, 195 Cal. 354.

67. U.S.—*American Elastics v. U. S.*, D.C.N.Y., 84 F.Supp. 198.

Ind.—*Patterson v. City of Gary*, 190 N.E. 320, 98 Ind.App. 623.

Mo.—*White v. Shepherd of the Hills Life Ins. Co.*, App., 62 S.W.2d 487.

Ohio—*State ex rel. Faulkner v. Kreinbuhl*, 14 Ohio Supp. 49.

Pa.—*Massachusetts Bonding & Ins. Co. v. Johnston & Harder*, 16 A.2d 444, 340 Pa. 253.

64 C.J. p 1240 note 9.

General or special findings see infra § 627.

68. Ohio—*State ex rel. Faulkner v. Kreinbuhl*, 14 Ohio Supp. 49.

69. N.Y.—*Bremer v. Manhattan R. Co.*, 84 N.E. 59, 191 N.Y. 333.

64 C.J. p 1240 note 10.

#### Practice held not objectionable

Trial judge's action in unqualifiedly marking all of plaintiff's requests

for findings "affirmed" was not objectionable practice, if court believed them correct, nor was repetition of requests in *hac verba* as judge's individual findings objectionable, although unnecessary.—*Leary v. City of Philadelphia*, 172 A. 459, 314 Pa. 458.

#### Practice resulting in uncertainty disapproved

(1) The practice reflected by statement that court trying case had considered all requests for rulings and findings and that those consistent with rulings and findings made were deemed to have been granted while those inconsistent were deemed to have been denied, is, because of the uncertainty which may result, not to be encouraged.—*Lynch v. Grundy*, 98 A.2d 160, 98 N.H. 282.

(2) Trial judge's action in marking defendant's requests for findings "refused as drawn," without explanation, was objectionable practice, since not sufficiently informing appellate court as to meaning of such answer to requests.—*Leary v. City of Philadelphia*, 172 A. 459, 314 Pa. 458.

70. Cal.—*Howard v. Howard*, 259 P. 2d 41, 119 Cal.App.2d 122.

Findings prepared by or for the court see infra § 623.

71. Cal.—*Howard v. Howard*, supra.

72. N.M.—*State Nat. Bank of El Paso, Tex.*, v. *Cantrell*, 127 P.2d 246, 46 N.M. 268.

#### Erroneous refusal

(1) In suit on note wherein defendant filed a cross complaint for alleged breach of warranty, where

defendant both pleaded and testified that warranty was substantially in the form proposed by plaintiff as a finding, refusal to make the finding in form as requested by plaintiff was error.—*Mitchell v. Jones*, 138 P.2d 522, 47 N.M. 169.

(2) It is error to refuse to make requested finding of fact abundantly supported by uncontradicted testimony, particularly when supported by testimony of wife and principal witness of opposing party.—*Greenfield v. Bruskas*, 68 P.2d 921, 41 N.M. 346.

73. Pa.—*Schwartz v. Home Life Ins. Co. of America*, 3 A.2d 949, 134 Pa.Super. 53.—*Huron v. Schomaker*, 1 A.2d 537, 132 Pa.Super. 462.—*Crew Levick & Co. v. Philadelphia Inv. Building & Loan Ass'n*, 177 A. 498, 117 Pa.Super. 397.—*Pennsylvania Thresherman & Farmers' Mut. Cas. Ins. Co. v. Kaufman*, Com.Pl., 60 Lack Jur. 165.

64 C.J. p 1240 note 11.

74. Pa.—*O'Brien v. Sovereign Camp, W. O. W.*, 184 A. 546, 122 Pa.Super. 39.

64 C.J. p 1240 note 12.

75. Conn.—*Atwater v. Morning News Co.*, 34 A. 865, 67 Conn. 504.

64 C.J. p 1241 note 13.

#### Controlling questions set forth in general opinion

N.Y.—*William H. Wise & Co. v. Doubleday, Doran & Co.*, 60 N.Y.S.2d 719, affirmed 74 N.Y.S.2d 421, 272 App.Div. 1005.—*Grace v. Corn Exchange Bank Trust Co.*, 14 N.Y.S.2d 400, 171 Misc. 522, modified on other grounds 19 N.Y.S.2d 925, 259

Filing a decision without including any finding of fact requested by a party constitutes a refusal to make any of the party's requested findings,<sup>76</sup> even though the court had endorsed "adopted" on some of them.<sup>77</sup> Requests to find which are not marked are deemed refused if not embodied in the decision.<sup>78</sup>

The court may adopt such requested findings and conclusions as it approves or modifies,<sup>79</sup> but a party is not entitled to a specific finding of fact or conclusion of law on every point which he may request.<sup>80</sup> The trial court has a right to prepare

its findings in support of its judgment in its own way,<sup>81</sup> and it is not necessary to make a finding in the exact language of a request therefor.<sup>82</sup> While a request for a finding of fact warranted by the evidence is properly granted,<sup>83</sup> it is not necessary to grant an improper request<sup>84</sup> or make a requested finding or conclusion which would be improper.<sup>85</sup> Accordingly, proposed findings may be rejected or requests refused for the reason that they are argumentative,<sup>86</sup> incomplete,<sup>87</sup> unsound in part,<sup>88</sup> or too general,<sup>89</sup> or where they are contradictory to, or inconsistent with, findings or conclusions actually made by the court;<sup>90</sup> also where they are substan-

App.Div. 896, reversed on other grounds 38 N.E.2d 449, 287 N.Y. 94, 145 A.L.R. 436, reargument denied 40 N.E.2d 34, 287 N.Y. 746, 145 A.L.R. 436.

Pa.—Crew Levick Co. v. Philadelphia Inv. Building & Loan Ass'n, 177 A. 498, 117 Pa.Super. 397.

64 C.J. p 1241 note 13 [c] (6).

76. N.M.—Sandoval County Board of Education v. Young, 94 P.2d 508, 43 N.M. 397.

77. N.M.—Sandoval County Board of Education v. Young, supra.

78. N.Y.—Jobbers Credit Ass'n v. State, 294 N.Y.S. 475, 163 Misc. 301—De Riso Bros. v. State, 293 N.Y.S. 436, 161 Misc. 934—Agostini v. State, 40 N.Y.S.2d 598, affirmed 47 N.Y.S.2d 869, 267 App.Div. 1008, adhered to 53 N.Y.S.2d 120, 368 App.Div. 1014, affirmed 62 N.E.2d 488, 294 N.Y. 860.

79. N.M.—McDaniel v. Vaughn, 80 P.2d 417, 42 N.M. 422.

80. Okl.—Thomas v. Owens, 241 P. 2d 1114, 206 Okl. 50.

81. Tex.—Donalson v. Horton, Civ. App., 256 S.W.2d 693.

82. Conn.—C. I. T. Corporation v. Deering, 176 A. 553, 119 Conn. 347. Okl.—Thomas v. Owens, 241 P.2d 1114, 206 Okl. 50.

Pa.—Risser v. Mellott, 45 Pa.Dist. & Co. 432—Pennsylvania Thresherman & Farmers' Mut. Cas. Ins. Co. v. Kaufman, Com.Pl., 50 Lack.Jur. 165.

64 C.J. p 1241 note 14.

83. Mass.—Howard v. Malden Sav. Bank, 15 N.E.2d 233, 300 Mass. 208.

#### Waiver construed

In realty broker's action for commission for procuring customer for realty owned by bank, wherein broker contended that bank's acting treasurer contracted to pay the commission, the trial judge by granting bank's requested finding that on all the evidence the broker could not recover, and that he could not recover on specified counts, did not rule that the evidence did not warrant a finding for the broker on the dec-

laration or on either count, but ruled that the broker had not proved his case.—Howard v. Malden Sav. Bank, supra.

#### Refusal of requests held error

Mass.—Home Sav. Bank v. Savransky, 30 N.E.2d 881, 307 Mass. 601.

84. N.H.—Vakalis v. Smart, 95 A.2d 782, 98 N.H. 156.

N.Y.—Stevens v. State, 92 N.Y.S.2d 732, 196 Misc. 712, motion denied 94 N.Y.S.2d 355, 197 Misc. 315, affirmed 100 N.Y.S.2d 826, 277 App. Div. 418, appeal dismissed 101 N.E.2d 486, 303 N.Y. 613, appeal denied 108 N.Y.S.2d 1004, 279 App. Div. 695, appeal denied 104 N.E.2d 360, 303 N.Y. 801.

Pa.—Levinaky v. Sklar, Com.Pl., 39 Del.Co. 300.

Vt.—Nelson v. Travelers Ins. Co., 30 A.2d 75, 113 Vt. 86.

64 C.J. p 1241 note 15.

85. Mo.—Transamerica Freight Lines v. Monark Egg Corp., 161 S.W.2d 687, 236 Mo.App. 1047.

N.H.—Vakalis v. Smart, 95 A.2d 782, 98 N.H. 156.

Vt.—Brooks v. Holmes, 35 A.2d 374, 113 Vt. 456—Nelson v. Travelers Ins. Co., 30 A.2d 75, 113 Vt. 86.

64 C.J. p 1241 note 16.

#### Cover-all

Where a request for separate findings of fact and conclusions of law was a mere cover-all, requesting a finding on each and every allegation pleaded, refusal of the request was not prejudicial error.—Donald v. Heller, 10 N.W.2d 447, 143 Neb. 600.

86. Cal.—Mammoth Gold Dredging Co. v. Forbes, 104 P.2d 131, 39 Cal. App.2d 739.

N.M.—Hart v. Northeastern N. M. Fair Ass'n, 285 P.2d 341, 58 N.M. 9—L Bar Cattle Co. v. Board of Trustees of Town of Cebolleta Land Grant, 120 P.2d 432, 46 N.M. 28, certiorari denied Board of Trustees of Town of Cebolleta Land Grant v. L Bar Cattle Co., 62 S. Ct. 1109, 316 U.S. 645, 86 L.Ed. 1729.

Pa.—Levinaky v. Sklar, Com.Pl., 39 Del.Co. 300.

87. N.M.—Sundt v. Tobin Quarries, 175 P.2d 684, 50 N.M. 254, 169 A.L.R. 586.

Incompleteness as objection to findings see infra § 625.

88. Vt.—Cole v. Cole, 91 A.2d 819, 117 Vt. 354—Anton v. Fidelity & Cas. Co. of N. Y., 91 A.2d 697, 117 Vt. 300—Brown v. Gallipeau, 75 A.2d 694, 116 Vt. 290—Scott v. Beland, 45 A.2d 647, 114 Vt. 383—Nelson v. Travelers Ins. Co., 30 A.2d 75, 113 Vt. 86.

64 C.J. p 1241 note 16 [a] (8).

89. Idaho.—Ford v. Connell, 204 P. 2d 1018, 69 Idaho 183.

64 C.J. p 1241 note 16 [a] (2).

90. Ariz.—Gilliland v. Rodriguez, 268 P.2d 334, 77 Ariz. 163.

Cal.—In re Miller's Estate, 230 P.2d 667, 104 Cal.App.2d 1—Law v. Crist, 107 P.2d 953, 41 Cal.App.2d 862—Mammoth Gold Dredging Co. v. Forbes, 104 P.2d 131, 39 Cal.App. 2d 739.

Mass.—Connell v. Maynard, 76 N.E. 2d 642, 322 Mass. 245.

N.M.—Alexander v. Cowart, 271 P. 2d 1005, 58 N.M. 395—Guzman v. Avila, 265 P.2d 363, 58 N.M. 43—Wedgwood v. Colclazier, 226 P.2d 99, 65 N.M. 32—Vance v. Forty-Eight Star Mill, 215 P.2d 1016, 54 N.M. 144—Libby v. De Baca, 179 P.2d 263, 51 N.M. 95—Alamogordo Imp. Co. v. Frendergast, 109 P.2d 254, 45 N.M. 40.

Tex.—Tijerina v. Botello, Civ.App., 207 S.W.2d 138—San Antonio Loan & Trust Co. v. Rabb, Civ.App., 165 S.W.2d 991, error refused—Brady v. Garrett, Civ.App., 68 S.W.2d 502, error dismissed.

Vt.—First Nat. Bank of St. Johnsbury v. Laperle, 86 A.2d 635, 117 Vt. 144, 30 A.L.R.2d 958—Nelson v. Travelers Ins. Co., 30 A.2d 75, 113 Vt. 86.

64 C.J. p 1241 note 16 [a] (10). Inconsistent findings and conclusions generally see infra § 626.

#### Rejected version of facts

Defendants' requested fact findings, conforming to their version of facts, which trial court refused to accept,



tially covered by the findings as made,<sup>91</sup> or contain mere recitations of evidentiary facts as distinguished from ultimate facts,<sup>92</sup> or are merely conclusions of law which would have been without force if compiled with.<sup>93</sup>

Likewise, proposed findings may be rejected or requests refused where they are not supported by the evidence,<sup>94</sup> or are not required as a matter of law on the evidence,<sup>95</sup> as where the evidence is conflicting<sup>96</sup> or there is evidence fairly and rea-

sonably tending to show the contrary,<sup>97</sup> even though a finding as requested might be permissible.<sup>98</sup> So proposed findings may be rejected or requests refused on the ground that they are immaterial,<sup>99</sup> but it has been said that where a party requests the finding of certain facts which have been proved, a trial court is seldom justified in omitting them from the finding because it deems them immaterial.<sup>1</sup> A requested conclusion of law is properly rejected if it is without basis of fact,<sup>2</sup> or is practically a

were properly refused.—*Oetken v. Shell*, 212 P.2d 329, 168 Kan. 244, opinion adhered to 217 P.2d 906, 169 Kan. 109—64 C.J. p 1241 note 16 [a] (11).

91. Cal.—*Hollar v. Saline Products*, 78 P.2d 237, 25 Cal.App.2d 542.  
Conn.—*Flaxman v. Capitol City Press*, 185 A. 417, 121 Conn. 423—*Sachs v. Feinn*, 183 A. 384, 121 Conn. 77.

N.M.—*Hart v. Northeastern N. M. Fair Ass'n*, 265 P.2d 341, 58 N.M. 9—*Emmco Ins. Co. v. Walker*, 260 P.2d 112, 57 N.M. 525—*Gorman v. Boehning*, 232 P.2d 701, 55 N.M. 306, 28 A.L.R.2d 868—*Cheek v. Radio Station KGFL*, 135 P.2d 510, 47 N.M. 79.

R.I.—*Columbia Nat. Life Ins. Co. v. Industrial Trust Co.*, 190 A. 13, 57 R.I. 325, reargument denied 190 A. 757, 57 R.I. 468.

Tex.—*Plaza Co. v. White*, Civ.App. 160 S.W.2d 812, error refused.

Vt.—*In re Moody's Estate*, 49 A.2d 562, 115 Vt. 1, certiorari denied *Perry v. Wheeler*, 67 S.Ct. 1201, 331 U.S. 814, 91 L.Ed. 1833.

92. Cal.—*Mammoth Gold Dredging Co. v. Forbes*, 104 P.2d 131, 39 Cal.App.2d 739.

Conn.—*Sachs v. Feinn*, 183 A. 384, 121 Conn. 77.

N.M.—*Libby v. De Baca*, 179 P.2d 263, 51 N.M. 95—*Sundt v. Tobin Quarries*, 175 P.2d 684, 50 N.M. 254, 169 A.L.R. 586.

64 C.J. p 1241 note 16 [a] (6).

93. Vt.—*In re Moody's Estate*, 49 A.2d 562, 115 Vt. 1, certiorari denied *Perry v. Wheeler*, 67 S.Ct. 1201, 331 U.S. 814, 91 L.Ed. 1833.

94. Cal.—*Law v. Crist*, 107 P.2d 953, 41 Cal.App.2d 862.

N.M.—*L Bar Cattle Co. v. Board of Trustees of Town of Cebolleta Land Grant*, 120 P.2d 432, 46 N.M. 26, certiorari denied Board of Trustees of Town of Cebolleta Land Grant v. L Bar Cattle Co., 62 S.Ct. 1108, 316 U.S. 645, 86 L.Ed. 1729.

Vt.—*Nelson v. Travelers Ins. Co.*, 30 A.2d 75, 113 Vt. 86—*Wetmore v. B. W. Hooker Co.*, 18 A.2d 181, 111 Vt. 519.

64 C.J. p 1241 note 16 [a] (12)—(14).

**Evidence uncontradicted but weak**  
Refusal of requested finding was

not error, although evidence relied on was not contradicted by testimony of other witnesses, where it contained such elements of weakness on cross-examination and otherwise as to justify court in refusing to hold that it supported requested finding.—*Walker v. Smith*, 42 P.2d 768, 39 N.M. 148.

95. Mass.—*Perry v. Hanover*, 50 N.E.2d 41, 314 Mass. 167—*Howard v. Malden Sav. Bank*, 15 N.E.2d 233, 300 Mass. 208.

**Fact to be inferred from circumstances**

It is not error to deny a request for a finding of a certain fact where the fact, to be found, must be inferred from circumstances and the circumstances do not compel but one inference.—*In re Bugbee's Will*, 102 A. 484, 92 Vt. 175.

96. Conn.—*Flaxman v. Capitol City Press*, 185 A. 417, 121 Conn. 423—*Sachs v. Feinn*, 183 A. 384, 121 Conn. 77.

N.M.—*Walker v. Smith*, 42 P.2d 768, 39 N.M. 148.

Vt.—*In re Moody's Estate*, 49 A.2d 562, 115 Vt. 1, certiorari denied *Perry v. Wheeler*, 67 S.Ct. 1201, 331 U.S. 814, 91 L.Ed. 1833.

Wash.—*Clarke v. Bohemian Breweries*, 110 P.2d 197, 7 Wash.2d 487.

64 C.J. p 1241 note 16 [a] (12).

97. Mo.—*Painter v. Prudential Ins. Co. of America*, 71 S.W.2d 483, 228 Mo.App. 576.

N.M.—*Williams v. Selby*, 24 P.2d 728, 37 N.M. 474.

Vt.—*Anton v. Fidelity & Cas. Co. of N. Y.*, 91 A.2d 697, 117 Vt. 300—*Taylor v. Henderson*, 22 A.2d 318, 112 Vt. 307.

Wash.—*Clarke v. Bohemian Breweries*, 110 P.2d 197, 7 Wash.2d 487.

Wis.—*Higbee v. Chicago, B. & Q. R. Co.*, 292 N.W. 320, 235 Wis. 91, 128 A.L.R. 734.

98. Mass.—*Howard v. Malden Sav. Bank*, 15 N.E.2d 233, 300 Mass. 208.

Mo.—*Painter v. Prudential Ins. Co. of America*, 71 S.W.2d 483, 228 Mo.App. 576.

Wash.—*Clarke v. Bohemian Breweries*, 110 P.2d 197, 7 Wash.2d 487.

99. Mass.—*De Souza v. Angelarous*, 116 N.E.2d 668, 330 Mass. 712.

N.H.—*N. E. Redion Co. v. Franklin Square Corp.*, 11 A.2d 821, 90 N.H. 519.

N.M.—*Hart v. Northeastern N. M. Fair Ass'n*, 265 P.2d 341, 58 N.M. 9—*Libby v. De Baca*, 179 P.2d 263, 51 N.M. 95—*Sundt v. Tobin Quarries*, 175 P.2d 684, 50 N.M. 254, 169 A.L.R. 586—*Cheek v. Radio Station KGFL*, 135 P.2d 510, 47 N.M. 79—*L Bar Cattle Co. v. Board of Trustees of Town of Cebolleta Land Grant*, 120 P.2d 432, 46 N.M. 26, certiorari denied Board of Trustees of Town of Cebolleta Land Grant v. L Bar Cattle Co., 62 S.Ct. 1108, 316 U.S. 645, 86 L.Ed. 1729.

Tex.—*Brumley v. Neeley*, Civ.App. 207 S.W.2d 931, error refused no reversible error—*Plaza Co. v. White*, Civ.App. 160 S.W.2d 812, error refused.

Vt.—*First Nat. Bank of St. Johnsbury v. Laperle*, 86 A.2d 635, 117 Vt. 144, 30 A.L.R. 958—*Sparrow v. Cimonetti*, 58 A.2d 875, 115 Vt. 292—*In re Moody's Estate*, 49 A.2d 562, 115 Vt. 1, certiorari denied *Perry v. Wheeler*, 67 S.Ct. 1201, 331 U.S. 814, 91 L.Ed. 1833—*Hoadley v. Hoadley*, 39 A.2d 769, 114 Vt. 75—*Nelson v. Travelers Ins. Co.*, 30 A.2d 75, 113 Vt. 86—*Wetmore v. B. W. Hooker Co.*, 18 A.2d 181, 111 Vt. 519.

64 C.J. p 1241 note 16 [a].

**Requests becoming inapplicable in view of findings made**

Mass.—*Howard v. Malden Sav. Bank*, 15 N.E.2d 233, 300 Mass. 208.

1. Conn.—*Watrous v. Snoway*, 55 A.2d 473, 135 Conn. 424—*Shulman v. Hartford Public Library*, 177 A. 269, 119 Conn. 428—*Bridgeport Airport v. Title Guaranty & Trust Co.*, 150 A. 509, 111 Conn. 537, 71 A.L.R. 345.

2. N.M.—*Sundt v. Tobin Quarries*, 175 P.2d 684, 50 N.M. 254, 169 A.L.R. 586.

**Request inapplicable to facts**

Pa.—*Crew Levick Co. v. Philadelphia Inv. Building & Loan Ass'n*, 177 A. 498, 117 Pa.Super. 397.

point for binding instructions because assuming that a default had been committed.<sup>3</sup> A general request that facts be found does not place on the court the duty to find all possible facts.<sup>4</sup> Where the court made findings amply sufficient to dispose of the case, a contention that it refused to make any findings is obviously without merit,<sup>5</sup> and where the court in its final order affirmed all requests made by a party, so is a contention that the court failed to make certain findings requested by that party.<sup>6</sup>

*Before, at, or after decision.* Although the court, after consenting or refusing to give requested findings, is at liberty to change its mind before the decision of the case,<sup>7</sup> where the court fails to pass on requests at or before the decision, it is not sufficient to do so on the settlement of the case,<sup>8</sup> or on overruling a motion for a new trial.<sup>9</sup>

*Statement of ground of refusal.* It has been held that where a request is refused, the ground of refusal must be distinctly stated,<sup>10</sup> unless it plainly

appears in some way on the record<sup>11</sup> or it is obvious that no harm is done or rights endangered by the refusal.<sup>12</sup>

## § 622. Preparation and Form Generally

Findings of fact and conclusions of law are ordinarily required to be in writing in English and signed by the judge, and while they should be formal, in narrative form, and conform to the practice of the particular jurisdiction, it is not necessary that they be in any particular form, unless a form is prescribed by statute.

Findings of fact and conclusions of law are ordinarily required to be in writing<sup>13</sup> in the English language<sup>14</sup> and signed by the judge,<sup>15</sup> although oral findings have been held sufficient where there were no disputed facts in the case,<sup>16</sup> or where none of the parties requested written findings or objected to the oral statements which were transcribed and set forth in the abstract.<sup>17</sup> While findings of fact should be formal,<sup>18</sup> in narrative form,<sup>19</sup> and conform to the practice of the particular jurisdiction,<sup>20</sup> it is not necessary that they be in any par-

3. Pa.—Crew Levick Co. v. Philadelphia Inv. Building & Loan Ass'n, 177 A. 498, 117 Pa.Super. 397.

4. N.H.—Record v. Rochester Trust Co., 192 A. 177, 89 N.H. 1, 110 A. L.R. 1218.

5. Okl.—Black, Sivalls & Bryson v. Farrell, 268 P. 276, 131 Okl. 249, 64 C.J. p 1241 note 18.

6. Pa.—Pennsylvania Water & Power Co. v. Relgalt, 193 A. 311, 127 Pa.Super. 600.

7. Kan.—Salls v. Barons, 20 P. 485, 40 Kan. 697.

8. N.Y.—Masterson v. Cranitch, 31 Hun 45, 66 How.Pr. 171, 64 C.J. p 1241 note 20.

9. Neb.—Wiley v. Shars, 33 N.W. 418, 21 Neb. 712.

10. Mass.—John Hetherington & Sons v. William Firth Co., 95 N.E. 961, 210 Mass. 8.

11. Mass.—John Hetherington & Sons v. William Firth Co., supra.

12. Mass.—John Hetherington & Sons v. William Firth Co., supra.

13. Cal.—In re Exterstein's Estate, 38 P.2d 151, 2 Cal.2d 13—Petroleum Midway Co. v. Zahn, 145 P.2d 371, 62 Cal.App.2d 645.

14. La.—Bates v. Hayden, App., 188 So. 170.

15. Minn.—State v. Anderson (Andrews), 291 N.W. 605, 207 Minn. 357.

16. Mo.—Edwards v. Metropolitan Life Ins. Co., App., 138 S.W.2d 651—Phillips v. Alford, App., 90 S.W.2d 1060.

17. Utah.—Wheat v. Denver & R. G. W. R. Co., 250 P.2d 932, certiorari denied Denver & R. G. W. R. Co. v.

Wheat, 74 S.Ct. 218, 346 U.S. 896, 98 L.Ed. —.

18. Wash.—Kietz v. Gold Point Mines, 87 P.2d 277, 198 Wash. 112, amended on other grounds 90 P.2d 1017, 198 Wash. 112, 64 C.J. p 1242 note 25.

*Dictation to court reporter*

Judge who dictated findings of fact to court reporter and caused court reporter to transcribe them found facts in writing and sufficiently complied with statute requiring judge, in action tried to court, to state findings in writing.—Bradham v. Robinson, 73 S.E.2d 555, 236 N.C. 589.

14. Ill.—Tarjan, for Use of Lefkow, v. National Surety Co., 268 Ill.App. 232.

The symbol "and/or" is an unsightly hieroglyphic which cannot be said to be in the English language, and its use in findings of fact is condemned.—Tarjan, for Use of Lefkow, v. National Surety Co., supra.

15. Cal.—Supple v. Luckenbach, 84 P.2d 52, 12 Cal.2d 319—Department of Social Welfare of Cal. v. Machado, 220 P.2d 411, 98 Cal.App.2d 364, 64 C.J. p 1242 note 26.

*Time of signing*

(1) Under statute so providing court may not adopt or sign proposed findings prior to expiration of five days after service on parties.—In re Pala's Estate, 131 P.2d 593, 55 Cal.App.2d 647.

(2) Such statute, however, is directory and not mandatory.—In re Duncan's Estate, 70 P.2d 174, 9 Cal.2d

207.—Treat v. Superior Court in and for City and County of San Francisco, 62 P.2d 147, 7 Cal.2d 636—Chamberlain v. Wakefield, 213 P.2d 62, 95 Cal.App.2d 280—Bradford v. Southern California Petroleum Corp., 145 P.2d 36, 62 Cal.App.2d 450—64 C.J. p 1242 note 26 [b].

(3) The signing of findings on fifth day after service did not impair validity of judgment subsequently entered, especially where motion for new trial presenting the question was denied.—Bradford v. Southern California Petroleum Corp., supra.

16. Colo.—Massachusetts Bonding & Ins. Co. v. Central Finance Corp., 237 P.2d 1079, 124 Colo. 379.

17. Kan.—Heller v. Rounkles, 232 P. 2d 225, 171 Kan. 323.

18. N.M.—Thrams v. Block, 86 P.2d 938, 43 N.M. 117, 64 C.J. p 1242 note 27.

19. U.S.—Babbitt Bros. Trading Co. v. New Home Sewing Mach. Co., C.C.A.Ariz., 62 F.2d 530.

20. N.M.—Thrams v. Block, 86 P.2d 938, 43 N.M. 117, 64 C.J. p 1242 note 28.

*Segregation of damages*

In action to recover damages for deprivation of peaceful possession of leased apartment by defendant landlord's wrongful acts, defendant had right to separate findings by court as to amounts of damages sustained by plaintiff as result of alleged business losses and because of humiliation, inconvenience, and mental distress.—Tooke v. Allen, 192 P.2d 804, 85 Cal.App.2d 230.

ticular form,<sup>21</sup> unless a form is prescribed by statute.<sup>22</sup> The document known as the Findings of Fact should in itself contain all of the findings of the court so that reference to that document alone will inform the parties what the facts are as found by the court, and should not attempt to include facts determined in another document by mere reference thereto.<sup>23</sup>

**Incorporation in judgment or bill of exceptions.** Statutes relating to findings of fact and conclusions of law may be substantially complied with by incorporating findings and conclusions in the judgment or decree,<sup>24</sup> although proper procedure may dictate that statutory findings should be made and filed entirely separate from the judgment itself.<sup>25</sup>

21. Cal.—Bourke v. Frisk, 206 P.2d 407, 92 Cal.App.2d 23.  
64 C.J. p 1242 note 20.  
Sufficiency as to substance see *infra* §§ 625-631.

**Letter** written by court should be considered as separate findings of fact and conclusions of law, although judgment had been rendered when request was made therefor, where order permitting letter to be so considered was made at term in which judgment was rendered—Peebles v. Kansas Life Ins. Co., 52 P.2d 747, 175 Okl. 231.

#### Caption

It is not indispensable that the findings signed by the trial judge be captioned.—Little v. Rosser, 7 Tenn. App. 305.

22. N.Y.—Dann v. Palmer, 135 N.Y. S. 411, 151 App.Div. 151, reversed on other grounds 99 N.E. 1106, 206 N.Y. 878.

Wis.—Adams v. Adams, 190 N.W. 359, 178 Wis. 522.

Statutory requirement of separate statement of findings and conclusions see *infra* § 624.

23. N.D.—Muhlhauser v. Becker, 20 N.W.2d 364, 74 N.D. 90.

#### Practice disapproved

The practice of attempting to enlarge formal findings of fact by reference to memorandum decision is disapproved—Group Health Co.-op. of Puget Sound v. King County Medical Soc., 237 P.2d 737, 39 Wash.2d 586—In re Sipes, 167 P.2d 139, 24 Wash. 2d 603—Clifford v. State, 148 P.2d 302, 20 Wash.2d 527.

24. Cal.—In re Exterstein's Estate, 38 P.2d 151, 2 Cal.2d 13—Furlott v. Security-First Nat. Bank of Los Angeles, 57 P.2d 552, 14 Cal.App. 2d 118—Consolidated Irr. Dist. v. Crawshaw, 20 P.2d 119, 130 Cal. App. 455, followed in 20 P.2d 122, 130 Cal.App. 463.

Mo.—Wisdom v. Keithley, 167 S.W. 2d 450, 237 Mo.App. 76.

N.J.—Westinghouse Elec. Corp. v. United Elec. Radio and Mach. Workers of America, Local No. 410, 49 A.2d 896, 139 N.J.Eq. 97.  
N.M.—McDaniel v. Vaughn, 80 P.2d 417, 42 N.M. 422.

Tex.—Stahl v. Westerman, Civ App., 250 S.W.2d 325.

Wash.—Fisher v. Hagstrom, 214 P. 2d 654, 35 Wash.2d 632.  
64 C.J. p 1242 note 31.

Effect of incorporation or lack of incorporation on validity of:

Decree see Equity § 596.

Judgment see Judgments § 71 c.

"Findings" and "judgment" distinguished see Judgments § 4.

**A recital in an order is equivalent to a finding.**—Brown v. Sucher, 45 N.W.2d 73, 258 Wis. 123—Wolfrom v. Anderson, 25 N.W.2d 880, 249 Wis. 433.

25. Mo.—Wisdom v. Keithley, 167 S.W.2d 450, 237 Mo.App. 76.

26. N.M.—Hittson v. Chicago, R. I. & P. Ry. Co., 86 P.2d 1037, 43 N.M. 122—McDaniel v. Vaughn, 80 P.2d 417, 42 N.M. 422.

27. Conn.—Whitney Frocks v. Jobrack, 66 A.2d 607, 135 Conn. 529—Berry v. Hartford Nat. Bank & Trust Co., 7 A.2d 847, 125 Conn. 615—Niewicz v. Niewicz, 132 A. 399, 104 Conn. 121.

Wis.—United Parcel Service of Milwaukee v. Public Service Commission, 4 N.W.2d 138, 240 Wis. 603, rehearing denied 5 N.W.2d 635, 240 Wis. 603.

**Mixed statements of law and fact** involving conflicting evidence are properly excluded from findings.—Rodgers v. Cox, 36 A.2d 373, 130 Conn. 616.

28. Vt.—Cole v. Cole, 91 A.2d 819, 117 Vt. 354.

Recital of evidence as unnecessary and improper see *infra* § 629.

**Refusal to include exceptions held not error**

Vt.—Cole v. Cole, *supra*.

The practice of placing findings and conclusions in the bill of exceptions is not to be commended.<sup>26</sup>

**Matters to be excluded.** The findings should not include matters which have no proper place therein,<sup>27</sup> such as exceptions to evidence,<sup>28</sup> rulings,<sup>29</sup> arguments,<sup>30</sup> reasons,<sup>31</sup> comment,<sup>32</sup> citations of authorities,<sup>33</sup> or a memorandum of decisions.<sup>34</sup> The conclusions of law should not include the reasons for,<sup>35</sup> or authorities supporting,<sup>36</sup> the conclusions.

**Particular matters.** Matters held not to constitute findings include a minute entry,<sup>37</sup> a reference in an order to findings of fact in prior cases,<sup>38</sup> recitals of facts contained in an order for a temporary injunction,<sup>39</sup> and remarks or oral statements made by the trial judge<sup>40</sup> at the close of the

29. Ind.—Pavey v. Braddock, 84 N.E. 5, 170 Ind. 178.

Mich.—Steele v. Matteson, 15 N.W. 488, 50 Mich. 313.

30. Minn.—Conlan v. Grace, 30 N.W. 880, 36 Minn. 276.

Wis.—United Parcel Service of Milwaukee v. Public Service Commission, 4 N.W.2d 138, 240 Wis. 603, rehearing denied 5 N.W.2d 635, 240 Wis. 603—Petrus v. Flynn, 225 N.W. 695, 199 Wis. 147.

31. Minn.—Conlan v. Grace, 30 N.W. 880, 36 Minn. 276.

64 C.J. p 1243 note 36.

32. Colo.—Aetna Ins. Co., Hartford, Conn. v. Rico, 252 P. 815, 80 Colo. 536.

Minn.—Conlan v. Grace, 30 N.W. 880, 36 Minn. 276.

33. Wis.—United Parcel Service of Milwaukee v. Public Service Commission, 4 N.W.2d 138, 240 Wis. 603, rehearing denied 5 N.W.2d 635, 240 Wis. 603—Petrus v. Flynn, 225 N.W. 695, 199 Wis. 147.

34. Conn.—Bridgeport Airport v. Title Guaranty & Trust Co., 150 A. 509, 111 Conn. 537, 71 A.L.R. 345.  
64 C.J. p 1243 note 39.

35. S.D.—Yellowhair v. Pratt, 182 N.W. 702, 44 S.D. 136.

Tex.—Jamison Cold Storage Door Co. v. Brown, Civ.App., 218 S.W.2d 883, error refused no reversible error.

36. S.D.—Yellowhair v. Pratt, 182 N.W. 702, 44 S.D. 136.

37. Ariz.—McFadden v. McFadden, 196 P. 452, 22 Ariz. 246.

38. N.Y.—Weaver v. Pacific Improvement Co., 138 N.E. 42, 234 N.Y. 418.

39. Cal.—Euclid Candy Co. of California v. International Longshoremen & Warehousemen's Union, Local 1-6, 121 P.2d 91, 49 Cal.App. 2d 137.

40. Cal.—Larson v. Thoresen, 254 P.2d 556, 116 Cal.App.2d 790—Sul-

trial<sup>41</sup> or on rendering judgment.<sup>42</sup> The rulings of the court at the trial do not constitute the conclusions of law contemplated by statute.<sup>43</sup> However, it has been held that the denial of defendant's motion for judgment on the ground of laches amounts to a finding that plaintiff was not guilty of laches;<sup>44</sup> and where the court did not make formal findings of fact, but its posttrial comments indicated clearly the impression made on its mind, its summary of the evidence has been held, in effect, to constitute findings of fact.<sup>45</sup> A statement which is obviously a finding of fact will be treated as such although inaptly described as a memorandum.<sup>46</sup>

**Opinion.** An opinion,<sup>47</sup> whether oral<sup>48</sup> or written,<sup>49</sup> is not a finding; and the general adoption of recitals in an opinion as and for findings of fact is unsatisfactory,<sup>50</sup> even if legally sufficient;<sup>51</sup> but statements of fact in an opinion may be treated as equivalent to a finding of facts,<sup>52</sup> as where the unsuccessful party or his counsel so regards them

and does not except to the method pursued by the trial court.<sup>53</sup>

**Decision.** It has been held that neither an oral<sup>54</sup> nor written<sup>55</sup> decision is a finding of fact within the meaning of statutes. However, facts stated in a memorandum made a part of the decision of the court which are not inconsistent with the facts specifically found have been held to become a part of the findings,<sup>56</sup> but before matter contained in the memorandum can be considered as a finding of fact, it must be a proper subject for a finding of fact.<sup>57</sup> Under a statute requiring the court to make a decision consisting of findings of facts and conclusions of law in a single document signed and filed in the cause as a part of the record proper, findings and conclusions requested by the parties and adopted by the court should be made a part of the decision of the court, and should be incorporated in the decision,<sup>58</sup> and not adopted merely by reference.<sup>59</sup>

*Hvan v. Selten*, 199 P.2d 316, 88 Cal.App.2d 813.

*N.M.—Ferret v. Ferret*, 237 P.2d 594, 55 N.M. 565.

*S.D.—Western Bldg. Co. v. J. C. Penney Co.*, 245 N.W. 909, 60 S.D. 630.

64 C.J. p 1243 note 44.

41. *Colo.—Jones v. Boyer*, 193 P. 492, 68 Colo. 568.

64 C.J. p 1243 note 45.

42. *Utah—Fender v. Anderson*, 235 P.2d 360.

64 C.J. p 1243 note 46.

43. *Mo.—Colorcraft Co. v. American Packing Co.*, App., 216 S.W. 831.

44. *Cal.—Suhr v. Lauterbach*, 130 P. 2, 164 Cal. 591.

45. *Kan.—Dinsmoor v. Hill*, 187 P. 2d 338, 164 Kan. 12.

46. *Mass.—Town of Lakeville v. City of Cambridge*, 30 N.E.2d 266, 307 Mass. 433.

47. *Colo.—Etna Ins. Co., Hartford, Conn., v. Rico*, 252 P. 815, 80 Colo. 535.

64 C.J. p 1243 note 49.

Opinion of lower court not regarded as part of finding of fact on appeal generally see Appeal and Error § 734.

48. *Ariz.—Deatsch v. Fairfield*, 233 P. 887, 27 Ariz. 387.

64 C.J. p 1243 note 50.

49. *Ind.—Putman v. Murden*, 184 N. E. 796, 97 Ind.App. 313.

64 C.J. p 1243 note 51.

#### Memorandum opinion

(1) A memorandum of opinion does not constitute a finding.—*Martin v.*

*Drexel Ice Cream Co.*, C.C.A.III., 80 F. 2d 768—64 C.J. p 1243 note 51 [a].

(2) The practice of adopting the memorandum opinion as the complete findings of fact and conclusions of law is objectionable.—*Group Health Co-op. of Puget Sound v. King County Medical Soc.*, 237 P.2d 737, 39 Wash.2d 586.

(3) Attempt of trial court, several terms after judgment and while appeal was pending, to convert its memorandum of opinion into findings of fact and conclusions of law by nunc pro tunc order, was ineffective.—*Martin v. Drexel Ice Cream Co.*, C. C.A.III., 80 F.2d 768.

50. *U.S.—Thomas E. Basham Co. v. Lucas*, C.C.A.Ky., 30 F.2d 97.

51. *U.S.—Thomas E. Basham Co. v. Lucas*, supra.

52. *Wis.—In re Vogel's Estate*, 47 N.W.2d 333, 259 Wis. 73—*Bobczyk v. Integrity Mut. Ins. Co. of Appleton*, 300 N.W. 909, 239 Wis. 196.

#### Document labeled "Opinion"

The circumstance that the determination of the trial court that a party exercised no diligence prior to a certain date was expressed in a document labeled "Opinion," did not necessarily prevent it from qualifying as an express finding.—*Macmillan Petroleum Corp. v. Griffin*, 255 P.2d 75, 116 Cal.App.2d 425.

53. *Mich.—Wormley v. Grand Rapids Trust Co.*, 206 N.W. 307, 232 Mich. 680.

64 C.J. p 1243 note 54.

54. *Wash.—Quigley v. Barash*, 237 P. 732, 135 Wash. 338, 64 C.J. p 1243 note 56.

55. *Ariz.—Watson v. Ocean Accident & Guarantee Corporation*, 238 P. 338, 28 Ariz. 573.

*Ohio—State ex rel. Korns v. Beightler*, App., 51 N.E.2d 213.

#### Memorandum of decision

(1) A memorandum of decision is not a finding of facts.

*Conn.—Goldblatt v. Ferrigno*, 82 A.2d 152, 138 Conn. 39—*Morehouse v. Employers' Liability Assurance Corporation of London, England*, 177 A. 568, 119 Conn. 415—*Preston v. Preston*, 128 A. 292, 102 Conn. 96. *Wash.—In re Sipes*, 167 P.2d 139, 24 Wash.2d 603—*Clifford v. State*, 148 P.2d 302, 20 Wash.2d 527.

(2) Such a decision is not a conclusion of law.—*In re Sipes*, 167 P.2d 139, 24 Wash.2d 603—*Clifford v. State*, 148 P.2d 302, 20 Wash.2d 527.

(3) Furthermore, it is not intended to, nor does it, take the place of formal findings of fact or conclusions of law.—*In re Sipes*, 167 P.2d 139, 24 Wash.2d 603.

56. *Minn.—Wilson v. Davidson*, 17 N.W.2d 31, 219 Minn. 42—*Sime v. Jensen*, 7 N.W.2d 325, 213 Minn. 476—*Thomas Peebles & Co. v. Sherman*, 181 N.W. 715, 148 Minn. 282.

57. *Minn.—State ex rel. Rose Bros. Lumber & Supply Co. v. Clousning*, 268 N.W. 844, 198 Minn. 35.

58. *N.M.—Thrams v. Block*, 86 P.2d 338, 43 N.M. 117—*McDaniel v. Vaughn*, 80 P.2d 417, 42 N.M. 422.

59. *N.M.—The Macabees v. Chavez*, 93 P.2d 990, 43 N.M. 329—*McDaniel v. Vaughn*, 80 P.2d 417, 42 N.M. 422.

## § 623. — Preparation by or for Court

In some jurisdictions it is the function of the judge, while in others it is the function of the court, to make findings; and in some jurisdictions it has become customary to have the prevailing party submit proposed findings and conclusions which the court may or may not adopt after examination.

In some jurisdictions it is the function of the judge,<sup>60</sup> while in others it is the function of the court,<sup>61</sup> to make findings. In the former jurisdictions the findings may be made up by the judge in a county other than the one in which the trial was had;<sup>62</sup> but in the latter jurisdictions the findings may be made only in open court<sup>63</sup> and not at chambers<sup>64</sup> or the home of the judge.<sup>65</sup> Under a statute requiring findings prepared by the court to be served on, or mailed to, the parties a specified time before the filing thereof, failure to follow the statutory procedure deprives the parties of rights which the law accords them.<sup>66</sup>

It has become customary in some jurisdictions to have the prevailing party submit proposed findings and conclusions.<sup>67</sup> Counsel who prepare findings for the trial court should do so in such a way as to enable the court to make such findings independent

of any references to the pleadings or exhibits.<sup>68</sup> Where findings are prepared by the attorney of the successful party, it has been held that the court should not sign them before they have been submitted to, or a copy served on, the adverse party;<sup>69</sup> but such submission or service is not necessary in the absence of a mandatory statute, in force at the time, requiring it.<sup>70</sup> Although by rule of court the adverse party may submit objections and proposed amendments to proposed findings and conclusions prepared by the prevailing party and the court may set a time for hearing the objections and proposed amendments, it is not error, in the absence of a mandatory requirement of the rule, to fail to give parties an opportunity to be heard.<sup>71</sup>

The court is not bound to adopt findings and conclusions prepared at its direction,<sup>72</sup> but may make its findings and conclusions independent of either such proposed findings and conclusions or objections and amendments offered thereto.<sup>73</sup> On the other hand, except in some jurisdictions,<sup>74</sup> it may adopt, after examination, findings prepared, at its direction, by the successful party or his attorney,<sup>75</sup> or those prepared by a referee<sup>76</sup> or another judge;<sup>77</sup> and when findings of fact and conclusions

60. Wash.—State v. French, 171 P. 527, 100 Wash. 552.

61. Utah.—Merrill v. Bailey & Sons Co., 106 P.2d 255, 99 Utah 323, 64 C.J. p 1243 note 59.

62. Cal.—Weinstock-Nichols Co. v. Courtney, 147 P. 218, 26 Cal.App. 445.

63. Ariz.—Deatsch v. Fairfield, 233 P. 887, 27 Ariz. 387, 38 A.L.R. 651.

64. Ariz.—Andrale v. Andrale, 128 P. 813, 14 Ariz. 379.

65. Ariz.—Deatsch v. Fairfield, 233 P. 887, 27 Ariz. 387, 38 A.L.R. 651.

66. Or.—Larsen v. Martin, 143 P.2d 239, 172 Or. 605.

67. Utah.—Merrill v. Bailey & Sons Co., 106 P.2d 255, 99 Utah 323.

68. U.S.—Babbitt Bros. Trading Co. v. New Home Sewing Mach. Co., C.C.A. Ariz., 62 F.2d 530.

Sufficiency of findings referring to pleadings, evidence, or other matters see infra § 630.

69. Utah.—In re Blodgett's Estate, 70 P.2d 742, 93 Utah 1.

70. Cal.—Peebler v. Seawell, 265 P. 2d 109, 122 Cal.App.2d 503.

64 C.J. p 1244 note 69.

**Statute held directory**

Cal.—Treat v. Superior Court in and for City and County of San Francisco, 62 P.2d 147, 7 Cal.2d 636—Peebler v. Seawell, 265 P.2d 109, 122 Cal.App.2d 503—Citizens' Nat. Trust & Savings Bank of Los An-

geles v. Meserve, 34 P.2d 730, 139 Cal.App. 89.

64 C.J. p 1244 note 69 [a].

**Purpose of statute requiring proposed findings of fact to be served and that no findings should be signed until expiration of five days after such service is to afford opposing party an opportunity to object to form or substance of the proposed findings and to propose other findings.**—Tooke v. Allen, 192 P.2d 804, 85 Cal.App.2d 230—Del Ruth v. Del Ruth, 171 P.2d 34, 75 Cal.App.2d 638.

71. Utah.—Merrill v. Bailey & Sons Co., 106 P.2d 255, 99 Utah 323.

**Time for consideration of proposed findings**

Where document which was entitled judgment, although dated June 9, was actually filed with clerk on July 16, trial court had until July 16, at least, ignoring statutory 30-day period during which court is given control over its judgments, to give consideration to findings proposed by defendants.—Quintana v. Vigil, 125 P.2d 711, 46 N.M. 200.

72. Cal.—Weinstock-Nichols Co. v. Courtney, 147 P. 218, 26 Cal.App. 445.

64 C.J. p 1244 note 64.

73. Utah.—Merrill v. Bailey & Sons Co., 106 P.2d 255, 99 Utah 323.

74. Tenn.—Nashville, C. & St. L. Ry. Co. v. Price, 148 S.W. 219, 125 Tenn. 646.

64 C.J. p 1244 note 65.

75. U.S.—Willapa Point Oysters v. Ewing, C.A.9, 174 F.2d 676, certiorari denied 70 S.Ct. 101, 338 U.S. 860, 94 L.Ed. 527, rehearing denied 70 S.Ct. 793, 339 U.S. 946, 94 L.Ed. 1360.

Iowa.—Baker v. Cutting, 280 N.W. 548.

Kan.—Rogers v. Dumas, 203 P.2d 165, 166 Kan. 519.

64 C.J. p 1244 note 66.

**Time for presentation**

In wholesaler's action against labor union to enjoin picketing, where court, at union's request, granted an unusually long extension of time for service and submission of proposed findings of fact and conclusions of law on condition that orally announced decision, which allowed picketing at wholesaler's plant but ruled that picketing at places of business of wholesaler's customers was illegal and would be enjoined, would be rigidly observed, and union nevertheless picketed place of business of one of wholesaler's customers, court revoked the extension of time.—Long Island Drug Co. v. Devery, 6 N.Y.S.2d 390.

76. N.Y.—Matter of Bettman, 72 N.Y.S. 728, 65 App.Div. 229.

N.C.—Silver Valley Min. Co. v. Baltimore Gold, etc., Min., etc., Co. 6 S.E. 735, 99 N.C. 445.

77. N.C.—Taylor v. Pope, 11 S.E. 257, 106 N.C. 267, 19 Am.S.R. 530.

64 C.J. p 1244 note 68.

of law requested by a party are approved and given by the court they become the findings and conclusions of the court.<sup>78</sup> The practice of adopting statements presented by the successful party, denominated findings of fact, and conclusions of law, as the decision of the court, or of writing the words "found" or "refused" or words of like import on a requested finding to signify its adoption or rejection is not to be commended.<sup>79</sup>

## § 624. Separate Statements of Law and Facts

### a. In general

### b. Form and requisites

78. Cal.—Howard v. Howard, 259 P. 2d 41, 119 Cal.App.2d 122.  
Mo.—Labadie Bottoms River Protection Dist. of Franklin County v. Randall, 156 S.W.2d 713, 348 Mo. 867, certiorari denied Randall v. Labadie Bottoms River Protection Dist. of Franklin County, Mo., 62 S.Ct. 943, 316 U.S. 663, 86 L.Ed. 1740, rehearing denied 62 S.Ct. 1105, 316 U.S. 709, 86 L.Ed. 1776—Arthur R. Lindburg, Inc., v. Quinn, App., 123 S.W.2d 215.

64 C.J. p 1244 note 66 [a] (1).

### Decision of trial court contemplated by statute

The statute requiring court to make findings of fact and conclusions of law at time of giving judgment contemplates that the decision as to nature of findings and conclusions shall be that of trial court and not that of counsel.—The Macabees v. Chavez, 93 P.2d 990, 43 N.M. 329.

78. N.M.—Hittson v. Chicago, R. I. & P. Ry. Co., 86 P.2d 1037, 43 N.M. 122—Thrams v. Block, 86 P.2d 938, 43 N.M. 117—McDaniel v. Vaughn, 80 P.2d 417, 42 N.M. 422.

64 C.J. p 1244 note 66 [a] (2).

Duty to note in margin disposition of each request when required by statute or rule of court see supra § 621.

80. N.Y.—Metropolitan Life Ins. Co. v. Union Trust Co. of Rochester, 51 N.Y.S.2d 318, 268 App.Div. 474, affirmed 62 N.E.2d 59, 294 N.Y. 254, motion denied 68 N.E.2d 187, 294 N.Y. 962.

64 C.J. p 1244 note 71.

81. Cal.—Gossman v. Gossman, 126 P.2d 178, 52 Cal.App.2d 184.

Idaho.—Roberts v. Roberts, 201 P.2d 91, 68 Idaho 535.

Ky.—Patton v. Blevins, 87 S.W.2d 623, 261 Ky. 307.

Minn.—State, by Attorney General, v. Riley, 293 N.W. 95, 208 Minn. 6—State v. Anderson (Andrews), 291 N.W. 605, 207 Minn. 357—Midland Loan Finance Co. v. Temple Garage Co., 288 N.W. 853, 206 Minn. 434.

Mo.—Robertson v. Brotherhood of Locomotive Firemen and Engi-

men, 114 S.W.2d 136, 233 Mo.App. 159, certiorari quashed State ex rel. Brotherhood of Locomotive Firemen and Enginemen v. Shaln, 123 S.W.2d 1, 343 Mo. 666.

Mont.—Coffman v. Niece, 105 P.2d 661, 110 Mont. 541.

N.H.—Wentworth Bus Lines v. Sanborn, 104 A.2d 392.

N.M.—Lusk v. First Nat. Bank of Carrizozo, 130 P.2d 1032, 46 N.M. 445.

N.C.—Jamison v. City of Charlotte, 79 S.E.2d 797, 239 N.C. 423—Bradham v. Robinson, 73 S.E.2d 555, 236 N.C. 589—Woodard v. Mordecai, 67 S.E.2d 639, 234 N.C. 462.

64 C.J. p 1244 notes 72-73.

### Objects of statute

(1) To abolish the doctrine of implied findings and to make definite and certain what was decided.—Graphic Arts Educational Foundation v. State, Minn., 59 N.W.2d 841—Fred-sall v. Minnesota State Life Ins. Co., 239 N.W. 780, 207 Minn. 13.

(2) To enable the losing party to except to the decisions of the court on the questions of law involved.—Schaaf v. Brown, 200 S.W.2d 908, 304 Ky. 466.

(3) To avoid necessity of an extended bill of exceptions.—In re Zimmerman's Guardianship, 70 N.E.2d 153, 78 Ohio App. 297.

### Statute held mandatory

Mo.—Clauson v. Tipton, App., 147 S.W.2d 148—Arthur R. Lindburg, Inc., v. Quinn, App., 123 S.W.2d 215.

Neb.—Dormer v. Dreith, 18 N.W.2d 94, 145 Neb. 742.

Ohio.—Bauer v. Cleveland Ry. Co., 47 N.E.2d 225, 141 Ohio St. 197.

Four-man v. Four-man, 80 N.E.2d 266, 82 Ohio App. 380—Holland v. Hildebrand, 70 N.E.2d 678, 81 Ohio App. 25—In re Zimmerman's Guardianship, 70 N.E.2d 153, 78 Ohio App. 297.

Okla.—In re Riddle's Estate, 25 P.2d 763, 165 Okl. 248.

Wash.—Kietz v. Gold Point Mines, 87 P.2d 277, 198 Wash. 112, amend-

## a. In General

In the absence of statutes so providing, it is not necessary on a trial of questions of fact by the court that the findings of fact and conclusions of law shall be stated separately, although under some statutes this is required where one of the parties has made a timely request therefor.

In the absence of statutes so providing, it is not necessary on a trial of questions of fact by the court that the findings of fact and conclusions of law shall be stated separately.<sup>80</sup> Under some statutes, however, the findings of fact and conclusions of law are required to be stated separately,<sup>81</sup> provided a separate statement has been requested by one of the parties<sup>82</sup> at a permissible time,<sup>83</sup> al-

ed on other grounds 90 P.2d 1017, 198 Wash. 112.  
64 C.J. p 1244 note 78 [a].

### Requirement held directory

Cal.—Ho Gate Wah v. Fong Wan, 257 P.2d 674, 118 Cal.App.2d 159—Gogo v. Los Angeles County Flood Control Dist., 114 P.2d 65, 45 Cal. App.2d 334, motion denied 117 P.2d 392, 47 Cal.App.2d 96—Gustafson v. Blunk, 41 P.2d 953, 4 Cal.App.2d 630.

Utah.—Consolidated Wagon & Machine Co. v. Kay, 21 P.2d 836, 81 Utah 595.

82. Ky.—Patterson v. Miracle, 69 S.W.2d 708, 253 Ky. 347.

Mo.—Ragsdale v. Brotherhood of R. Trainmen, App., 187 S.W.2d 786—Painter v. Prudential Ins. Co. of America, 71 S.W.2d 483, 228 Mo. App. 576.

Ohio.—Bauer v. Cleveland Ry. Co., 47 N.E.2d 225, 141 Ohio St. 197.

Pirro v. Goldman, App., 114 N.E.2d 741—Cooke v. Cortright, 39 N.E.2d 210, 68 Ohio App. 75.

Pa.—Cipolla v. National Bank of Malvern, Com.Pl., 5 Chest. Co. 55.

Tex.—Pittsburg Finance Co. v. New-some, Civ.App., 108 S.W.2d 573.

64 C.J. p 1244 note 74.

Request as condition precedent to making of any findings see supra § 617.

### Insufficient request

A request that the court adopt findings and conclusions tendered is not a sufficient request for a separate statement of conclusions.—Conley v. Crown Coach Co., 159 S.W.2d 281, 348 Mo. 1243—Arthur R. Lindburg, Inc., v. Quinn, Mo.App., 123 S.W.2d 215.

### Attachment of interrogatories to request

The attachment, to request for separate findings of fact and conclusions of law, of interrogatories involving probative facts from which the ultimate facts can be inferred as a matter of law is proper.—In re Harmon's Estate, 96 N.E.2d 34, 87 Ohio App. 451.

83. Neb.—State ex rel. Sorensen v.

though the duty of the losing party to make such a request is not mandatory where neither the law nor the facts, nor both combined, authorize the judgment rendered.<sup>84</sup>

Such statutes apply to ordinary actions<sup>85</sup> only, they do not apply to probate proceedings<sup>87</sup> or, except in at least one jurisdiction,<sup>88</sup> to equity or chancery cases.<sup>89</sup> Likewise, they do not apply where the final decision is embodied in, and evidenced by, an order, and no judgment is required

to be entered.<sup>90</sup> They apply if any evidence is presented,<sup>91</sup> but they do not apply where no question of fact is tried by the court,<sup>92</sup> and, accordingly, they do not apply where a complaint is dismissed before the introduction of testimony,<sup>93</sup> judgment is rendered on the pleadings,<sup>94</sup> or the case is submitted on an agreed statement of facts.<sup>95</sup> Where there can be only one finding or one conclusion, or where the facts are not disputed, there is no room for a separate written finding of facts,<sup>96</sup> and where

Mitchell Irr. Dist., 262 N.W. 543, 129 Neb. 586, certiorari denied Mitchell Irr. Dist. v. State of Nebraska ex rel. Sorenson, 56 S.Ct. 667, 297 U.S. 723, 80 L.Ed. 1007, 64 C.J. p 1245 note 75.

**Mononable time**

Request for court to state its conclusions of fact and of law separately is effective if made within reasonable time before action is required thereon.—Henley v. Live Stock Nat. Bank, 257 N.W. 244, 127 Neb. 857.

**Request held timely**

(1) Where within twenty-four hours after jury waived action was taken under advisement plaintiff filed written request for separate findings of law and fact and court held case for some ten days after request.—Henley v. Live Stock Nat. Bank, supra.

(2) If made at any time before final judgment.—Heiland v. Hildebrand, 70 N.E.2d 678, 81 Ohio App. 28.

(3) Where made after submission of the case and after trial court had announced its decision, but before entry of judgment.—Bittmann v. Bittmann, 194 N.E. 8, 129 Ohio St. 123—Hureh v. Pennsylvania R. Co., Ohio App., 109 N.E.2d 670—State ex rel. Kerns v. Beighler, Ohio App., 51 N.E.2d 213.

(4) Where made before final judgment, but not until trial judge had made oral announcement of this general findings of fact.—Heiland v. Hildebrand, 70 N.E.2d 678, 81 Ohio App. 28.

(5) Other requests held timely see 64 C.J. p 1245 note 75 [a].

**Request held too late when made**

(1) After final submission of cause.—State ex rel. Sorenson v. Mitchell Irr. Dist., 262 N.W. 543, 129 Neb. 586, certiorari denied Mitchell Irr. Dist. v. State of Nebraska ex rel. Sorenson, 56 S.Ct. 667, 297 U.S. 723, 80 L.Ed. 1007—64 C.J. p 1245 note 75 [a].

(2) After trial.—Southland Tractors, Inc. v. Clayton, 281 S.W.2d 539—64 C.J. p 1245 note 75 [a].

(3) After court had announced its decision. Neb.—In re Wiley's Estate, 36 N.W. 2d 483, 150 Neb. 898, opinion sup-

plemented 38 N.W.2d 434, 151 Neb. 633.

Okl.—Walden v. Automobile Brokers, 160 P.2d 400, 195 Okl. 453, 64 C.J. p 1245 note 75 [a].

(4) After motion for new trial was overruled.—Columbus Metropolitan Housing Authority v. Simpson, 85 N.E.2d 560, 85 Ohio App. 73.

(5) Fourteen days after judge announced that he would give judgment for defendants on a general finding.—School Dist. No. 1 v. Howard, 52 P.2d 421, 49 Wyo. 41.

(6) Thirty days after finding was made and journalized by court and two days after final decree was journalized.—Wainwright v. Young, 77 N.E.2d 102, 81 Ohio App. 21.

64. Ky.—Patterson v. Miracle, 69 S.W.2d 708, 253 Ky. 347.

85. Ky.—Chapman v. Majestic Collieries Co., 288 S.W. 299, 216 Ky. 652.

**Action to recover damages for waste** is one at law, notwithstanding a prayer for injunctive relief, with respect to defendant's right to request the court to state in writing its conclusions of fact found separately from the conclusions of law.—West v. West, Mo.App., 110 S.W.2d 398.

86. Ky.—Combs v. Combs, 171 S.W.2d 1001, 294 Ky. 414.

64 C.J. p 1245 note 80.

**Trial on issue of fact presented by pleadings**

The statute is applicable only to cases where there is a trial by the court of an issue of fact, arising on material averments, presented by formal pleadings, and where following the findings, a judgment must be entered.—First Nat. Bank of Waseca v. Paulson, 295 N.W. 84, 70 N.D. 383.

**On motion for allowance of attorney fees** in partition proceeding, court was not required, on defendant's request, to make separate findings of fact and conclusions of law.—Fourman v. Fourman, 80 N.E.2d 266, 82 Ohio App. 380.

**In proceeding on motion to vacate decree** after term on account of alleged irregularities in obtaining judgment and orders, failure of trial court to make separate findings of fact and conclusions of law was not ground

for complaint by movant.—Bank of Commerce v. Williams, 69 P.2d 525, 52 Wyo. 1, 110 A.L.R. 1463.

87. Wash.—In re Farnham's Estate, 84 P. 602, 41 Wash. 570.

88. Utah.—In re Thompson's Estate, 269 P. 103, 72 Utah 17.

89. Ky.—Deep v. Farmers' Nat. Bank of Lebanon, 57 S.W.2d 1002, 247 Ky. 801.

64 C.J. p 1245 note 83. Necessity of any findings in equitable action see supra § 611.

**In equitable actions or actions transferred to equity**, chancellor need not state separately law and facts.—Deep v. Farmers' Nat. Bank of Lebanon, supra.

90. N.D.—First Nat. Bank of Waseca v. Paulson, 295 N.W. 84, 70 N.D. 383.

**Order confirming mortgage foreclosure sale**

The statute does not apply to an order confirming a mortgage foreclosure sale, entered pursuant to statute.—First Nat. Bank of Waseca v. Paulson, supra.

91. N.Y.—Wood v. Lary, 26 N.E. 338, 124 N.Y. 83, 20 N.Y.Civ.Proc. 136.

92. Ohio.—Bauer v. Cleveland Ry. Co., 47 N.E.2d 225, 141 Ohio St. 197—Fourman v. Fourman, 80 N.E.2d 266, 82 Ohio App. 380.

93. N.Y.—Wood v. Lary, 26 N.E. 338, 124 N.Y. 83, 20 N.Y.Civ.Proc. 136.

94. N.Y.—Wood v. Lary, supra.

95. Ky.—Cincinnati, etc., R. Co. v. Hansford, 100 S.W. 251, 125 Ky. 37, 30 Ky.L. 1105—Owensboro v. Weir, 24 S.W. 115, 95 Ky. 158, 15 Ky.L. 506.

96. Mo.—In re Helm's Estate, App., 136 S.W.2d 427.

Okl.—Reed v. Richards & Conover Hardware Co., 110 P.2d 603, 188 Okl. 452.

**Written judgment**

Where the effect of the written judgment is that when taken in the light most favorable to plaintiff all the evidence is insufficient to support a favorable finding for him on any issue raised by the pleadings, there is a sufficient compliance with the statute even though the court makes no specific findings of fact.—Home Real Es-

the facts found lead to but one conclusion, the conclusions of law need not be separated therefrom.<sup>97</sup> The duty may not be performed by a successor judge.<sup>98</sup>

### b. Form and Requisites

In order to comply with a statute requiring findings of fact and conclusions of law to be stated separately, it is necessary and sufficient so to separate the material and controlling facts and conclusions as to render them distinguishable; and the fact that the separation is not made with technical accuracy in every instance is not necessarily fatal.

In order to comply with a statute requiring findings of fact and conclusions of law to be stated separately, it is necessary and sufficient so to separate the material and controlling facts and conclusions as to render them distinguishable.<sup>99</sup> All that is required is that the material and controlling facts and rulings of law be so separated and distinguished from each other as to afford the party

an opportunity to except to any particular findings of law or fact, thereby enabling him to assign and point out such finding as error.<sup>1</sup> The important requirement is that sufficient, ultimate facts be stated legally to support the conclusions of law reached.<sup>2</sup> Literal compliance with the statutory requirement is not necessary;<sup>3</sup> and the fact that the separation is not made with technical accuracy in every instance is not necessarily fatal.<sup>4</sup> The findings and conclusions need not be under separate covers;<sup>5</sup> and the putting of the conclusions of fact and law on the same page does not render them irregular, where they are separately stated and paragraphed.<sup>6</sup> Separation of findings and conclusions without separately designating them is sufficient.<sup>7</sup>

*Intermixture.* While matters of fact and matters of law should not be mixed or compounded,<sup>8</sup> an occasional intermixture or compounding does not

tate Loan & Ins. Co. v. Town of Carolina Beach, 7 S.E.2d 13, 216 N.C. 778.

97. Wash.—Gaffney v. Megrath, 39 P. 973, 11 Wash. 456.

98. Ohio.—Heiland v. Hildebrand, 70 N.E.2d 678, 81 Ohio App. 25.

99. Me.—Auburn Sav. Bank v. Portland R. Co., 65 A.2d 17, 144 Me. 74, certiorari denied 70 S.Ct. 74, 338 U.S. 831, 94 L.Ed. 506, rehearing denied 70 S.Ct. 156, 338 U.S. 831, 94 L.Ed. 541—Sacre v. Sacre, 55 A.2d 592, 143 Me. 80, 173 A.L.R. 1261.

N.C.—Corpus Juris cited in Woodard v. Mordecai, 67 S.E.2d 639, 234 N.C. 463.

Okl.—Grigg v. Federal Deposit Ins. Corp., 257 P.2d 290, 208 Okl. 419; Goodall v. City of Clinton, 161 P.2d 1011, 196 Okl. 10—Douthitt v. Scott, 155 P.2d 538, 195 Okl. 70—Trumbula v. State ex rel. Com'rs of Land Office, 126 P.2d 1015, 191 Okl. 119—Maynard v. Taylor, 91 P.2d 649, 185 Okl. 268.

64 C.J. p 1245 note 89.

#### Statutes held complied with

N.C.—Bradham v. Robinson, 73 S.E. 2d 555, 236 N.C. 589—Berry v. Payne, 13 S.E.2d 217, 219 N.C. 171—Daley v. Washington Nat. Ins. Co., 182 S.E. 332, 208 N.C. 817.

Ohio.—Abbott v. Industrial Commission, 74 N.E.2d 625, 80 Ohio App. 7—Powell v. Powell, 58 N.E.2d 806, 74 Ohio App. 335—McLaughlin v. Rawn, App. 41 N.E.2d 869.

Okl.—Thomas v. Owens, 241 P.2d 1114, 206 Okl. 50—Reed v. Richards & Conover Hardware Co., 110 P.2d 603, 188 Okl. 452—Cordilla v. Taylor, 72 P.2d 375, 181 Okl. 20.

64 C.J. p 1245 note 89 [b].

**Statutes held not complied with**  
N.C.—Jamison v. City of Charlotte, 79 S.E.2d 797, 239 N.C. 423.  
Utah.—Parish v. Parish, 35 P.2d 999, 84 Utah 390.  
64 C.J. p 1245 note 89 [c].

1. Me.—Sacre v. Sacre, 55 A.2d 592, 143 Me. 80, 173 A.L.R. 1261.  
Okl.—Renegar v. Fleming, 211 P.2d 272, 202 Okl. 197.

#### Immaterial facts

The court is not bound to make separate findings concerning immaterial facts.—Roberts v. C. F. Adams & Son, 184 P.2d 634, 199 Okl. 359.

**Held unnecessary to set out each fact in separate paragraphs**  
Tenn.—Little v. Rosser, 7 Tenn.App. 305.

2. Minn.—Graphic Arts Educational Foundation v. State, 59 N.W.2d 841.

#### All constitutive facts

Conclusions of fact must include all constitutive facts except those which are admitted in the pleadings or those about which there is no controversy.—Roberson v. Brotherhood of Locomotive Firemen and Engineers, 114 S.W.2d 136, 233 Mo.App. 159, certiorari quashed State ex rel. Brotherhood of Locomotive Firemen and Engineers v. Shain, 123 S.W.2d 1, 343 Mo. 666.

#### Sufficient fullness and detail to permit test of correctness of conclusions

A party invoking the statute is entitled to have the facts found separately and with such detail as to enable him fairly to test the correctness of the legal conclusion.—Wentworth Bus Lines v. Sanborn, N.H., 104 A.2d 392—Town of Tilton v. Sharpe, 151 A. 452, 84 N.H. 393.

3. Minn.—Graphic Arts Educational Foundation v. State, 59 N.W.2d 841.

**Failure to comply with statute held cured** where memorandum stating facts found and conclusions of law separately was appended to order refusing new trial.—Graphic Arts Educational Foundation v. State, Minn., 59 N.W.2d 841—Trones v. Olson, 285 N.W. 806, 197 Minn. 21, 103 A.L.R. 1419.

4. Kan.—Harper v. Harper, 113 P. 300, 83 Kan. 761.

5. Wash.—Shepherd v. Gove, 67 P. 256, 26 Wash. 452.

**Findings of fact may be included in the order or decree and are not required to be in a separate document.**—In re Dern's Estate, 251 P.2d 28, 114 Cal.App.2d 799—In re Rosland's Estate, 173 P.2d 830, 76 Cal.App.2d 709.

6. Cal.—Gainsley v. Gainsley, 44 P. 456, 111 Cal. xlv.

Wash.—Pierce v. Wheeler, 87 P. 361, 44 Wash. 326.

#### Held sufficient compliance with statute

Written finding that court had heard evidence and arguments of counsel and being advised found facts and law in favor of certain party was sufficient compliance with statute.—Rader v. Payne, 68 S.W.2d 457, 188 Ark. 399.

7. Iowa.—Beardsley v. Hobbs, 34 N. W.2d 916, 239 Iowa 132.

8. U.S.—Stuyvesant Ins. Co. v. Sussex Fire Ins. Co., C.C.A.N.J., 90 F.2d 281, certiorari denied 58 S.Ct. 144, 302 U.S. 742, 82 L.Ed. 573.

Wis.—Dawley v. Dawley, 16 N.W.2d 827, 246 Wis. 306.

64 C.J. p 1246 note 92.



necessarily call for a reversal,<sup>9</sup> at least in respect of a matter which is inherently a mixed or compound one,<sup>10</sup> as it frequently happens that a statement of fact cannot be made without including a conclusion, and as often a conclusion, although one of law, must be stated in the form of a statement of fact.<sup>11</sup>

**Improper classification.** In a majority of jurisdictions the fact that one finding of fact is improperly designated or classified as a conclusion of law, or the fact that one conclusion of law is improperly included in the findings of fact, does not invalidate it or prevent a consideration thereof;<sup>12</sup> but according to some authority it is required to be disregarded.<sup>13</sup>

9. *Tex.—Robert McLane Co. v. Swernemann & Schkade, Civ.App.*, 189 S.W. 282.

64 C.J. p 1246 note 94.

10. *Wis.—Calumet Service Co. v. City of Chilton*, 135 N.W. 131, 148 Wis. 834.

64 C.J. p 1246 note 95.

11. *Ill.—Roemheld v. Chicago*, 83 N.E. 291, 231 Ill. 467.

64 C.J. p 1246 note 96.

12. *Cal.—Kramer v. Watnick*, 146 P.2d 947, 63 Cal.App.2d 308—Gustafson v. Blunk, 41 P.2d 953, 4 Cal.App.2d 630—Janise v. Bryan, 201 P.2d 466, 89 Cal.App.2d Supp. 933.

64 C.J. p 1246 note 97.

Improper characterization or classification as not affecting character of finding or conclusion see *infra* § 647.

"The labeling of a conclusion of law as a 'finding of fact' is not determinative of its true nature."—Graphic Arts Educational Foundation v. State, Minn., 59 N.W.2d 841, 844.

**Whether findings are or are not conclusions depends on the nature of the evidence.**—*Del Riccio v. Photochart*, 268 P.2d 814, 124 Cal.App.2d 301—*Wendt v. Gates*, 283 P. 312, 102 Cal. App. 342.

**Findings held not objectionable.** *Cal.—Del Riccio v. Photochart*, 268 P.2d 814, 124 Cal.App.2d 301.

13. *Ind.—Kerfoot v. Kessener*, 84 N.E.2d 190, 227 Ind. 58—*State ex rel. Johnson v. Boyd*, 28 N.E.2d 256, 217 Ind. 348—*Hust v. City of Evansville*, 26 N.E.2d 387, 217 Ind. 147—*Byrum v. Wise*, 25 N.E.2d 992, 216 Ind. 678—*Klingler v. Ottinger*, 22 N.E.2d 805, 216 Ind. 9—*Evansville Veneer & Lumber Co. v. Claydon*, 73 N.E.2d 698, 117 Ind.App. 499—*Burkhart v. Simms*, 60 N.E.2d 141, 115 Ind.App. 576—*Myers v. Brane*, 87 N.E.2d 594, 115 Ind.App. 144—*Kaufmann v. Millies*, 18 N.E.2d 970, 106 Ind.App. 569—*Scott v.*

*Amsler*, 13 N.E.2d 890, 105 Ind.App. 131—*Milk Control Board of Indiana v. Phend*, 9 N.E.2d 121, 104 Ind.App. 196—*Clemens v. Lowe*, 196 N.E. 363, 100 Ind.App. 645.

64 C.J. p 1246 note 98.

14. *Minn.—Mienes v. Lucker Sales Co.*, 246 N.W. 687, 188 Minn. 162.

15. *Pa.—Lloyd & Elliott v. Lang*, 180 A. 74, 118 Pa.Super. 190.

16. *U.S.—U. S. v. Jefferson Electric Mfg. Co., Ct.Cl.*, 54 S.Ct. 443, 291 U.S. 386, 78 L.Ed. 859—*American Chain Co. v. Eaton, Ct.Cl.*, 54 S.Ct. 443, 291 U.S. 386, 78 L.Ed. 859—*Routzahn v. Willard Storage Battery Co., Ct.Cl.*, 54 S.Ct. 443, 291 U.S. 386, 78 L.Ed. 859.

*Ariz.—Gilliland v. Rodriguez*, 268 P.2d 334, 77 Ariz. 163.

*Cal.—Krum v. Malloy*, 137 P.2d 18, 22 Cal.2d 132—*Bank of America Nat. Trust & Sav. Ass'n v. Hill*, 71 P.2d 258, 9 Cal.2d 495—*Moore v. Day*, 266 P.2d 51, 123 Cal.App.2d 134—*Gschwend v. Stoll*, 232 P.2d 494, 104 Cal.App.2d 806—*Bobbie v. Bertone*, 220 P.2d 578, 98 Cal.App.2d 434—*Fancher v. Brunger*, 211 P.2d 633, 94 Cal.App.2d 727—*Clements v. Lanning*, 202 P.2d 98, 89 Cal.App.2d 817—*Flennaugh v. Heinrich*, 200 P.2d 580, 89 Cal.App.2d 214—*Williamson v. Clapper*, 199 P.2d 337, 88 Cal.App.2d 646—*Pellegrino v. Los Angeles Transit Lines*, 179 P.2d 39, 79 Cal.App.2d 40—*Hanna v. Kern County*, 177 P.2d 366, 78 Cal.App.2d 245—*Staudigl v. Harper*, 173 P.2d 343, 76 Cal.App.2d 439—*Karallus v. Shenass*, 152 P.2d 499, 66 Cal.App.2d 475—*Morgan v. Veach*, 139 P.2d 976, 59 Cal.App.2d 682—*French v. Smith Booth Usher Co.*, 131 P.2d 863, 56 Cal.App.2d 23—*Judson v. Herrington*, 130 P.2d 802, 55 Cal.App.2d 476—*Alphonzo E. Bell Corp. v. Listle*, 130 P.2d 251, 55 Cal.App.2d 300—*Kobida v. Hinkelmann*, 127 P.2d 657, 53 Cal.App.2d 186—*Hundley v. Marinkovich*, 127 P.2d 600,

## § 625. Sufficiency Generally

The sufficiency of the findings of fact to support the judgment rendered is the test commonly resorted to in determining their sufficiency, and the findings cannot be aided by the conclusions of law, but a particular finding may be disregarded where there are other findings sufficient to sustain the conclusions and judgment, or where it is immaterial or does not affect the legal rights of the parties, or is discredited by its own terms.

Counsel, as representatives of litigants and officers of the court, are entitled, after trial without a jury, to findings of fact fully responsive to their sincere contentions;<sup>14</sup> but a judge trying a case without a jury cannot make a finding of fact which a jury, if it were hearing the case, would not be permitted to make.<sup>15</sup> The sufficiency of the findings to support the judgment rendered is the test commonly resorted to in determining their sufficiency.<sup>16</sup>

53 Cal.App.2d 283—*Davies v. Symmes*, 122 P.2d 102, 49 Cal.App.2d 433—*Congregation Mukum Israel v. Congregation Ahavat Israel*, 90 P.2d 118, 32 Cal.App.2d 490—*Cornell v. Hollywood Turf Club*, 89 P.2d 449, 32 Cal.App.2d 204—*Cavagnaro v. Delmas*, 84 P.2d 274, 29 Cal.App.2d 352—*McVicar-Rood-Burkett Well No. 1 v. Crude Oil Drilling Co.*, 49 P.2d 901, 9 Cal.App.2d 371.

*Conn.—Linn v. City and Town of Hartford*, 66 A.2d 115, 135 Conn. 469—*Barca v. Mongillo*, 51 A.2d 698, 133 Conn. 374—*Perri v. City of New Haven*, 50 A.2d 421, 133 Conn. 291.

*D.C.—Capital Transit Co. v. Hazen*, 83 F.2d 250, 68 App.D.C. 91—*Krels v. Block, Mun.App.*, 75 A.2d 523.

*Idaho.—Cazier v. Economy Cash Stores*, 228 P.2d 436, 71 Idaho 178—*Charlton v. Wakimoto*, 216 P.2d 370, 70 Idaho 276—*Anderson v. Lloyd*, 139 P.2d 244, 64 Idaho 768.

*Ind.—Kerfoot v. Kessener*, 84 N.E.2d 190, 227 Ind. 58—*McClellan v. Tobin*, 39 N.E.2d 772, 219 Ind. 563—*Evansville Veneer & Lumber Co. v. Claydon*, 73 N.E.2d 698, 117 Ind. App. 499—*Bryant v. Barger*, 13 N.E.2d 965, 106 Ind.App. 245—*Neu v. Woods*, 7 N.E.2d 531, 103 Ind. App. 342—*Home Development Co. v. Arthur Jordan Land Co.*, 196 N.E. 337, 100 Ind.App. 453—*Union Ins. Co. of Indiana v. Glover*, 195 N.E. 583, 100 Ind.App. 327—*Provident Life & Accident Ins. Co. v. Fodder*, 193 N.E. 698, 99 Ind.App. 556—*Old First Nat. Bank & Trust Co. of Fort Wayne v. Shouffer*, 192 N.E. 369, 99 Ind.App. 325—*Cline v. Union Trust Co.*, 189 N.E. 643, 99 Ind.App. 296—*Patterson v. Gary Land Co.*, 188 N.E. 685, 101 Ind. App. 644—*Maloney v. Home Bank & Trust Co.*, 186 N.E. 997, 97 Ind. App. 564, modified on other grounds 187 N.E. 682, 97 Ind.App. 564.

*Md.—Kettle v. R. J. Look & Co.*, 85 A.2d 459, 199 Md. 95.

The findings need not state a legal deduction drawn from the facts found, such a deduction being properly included in the conclusions of law.<sup>17</sup> Furthermore, the findings cannot be aided by the conclusions of law,<sup>18</sup> and a judgment cannot stand when it is based on purported findings of fact which are in effect mere legal conclusions.<sup>19</sup> However, a particular finding may be disregarded where there are

other findings sufficient to sustain or support the conclusions<sup>20</sup> and judgment,<sup>21</sup> as well as where it is immaterial,<sup>22</sup> has no bearing on the conclusions of law,<sup>23</sup> does not affect the legal rights of the parties,<sup>24</sup> or is discredited or nullified by its own terms.<sup>25</sup>

*Incompleteness* is a fatal objection to findings.<sup>26</sup>

**Mass.**—*Gemma v. Gemma*, 71 N.E.2d 587, 320 Mass. 766—*Daniel v. Jardin*, 70 N.E.2d 801, 320 Mass. 764—*Pybus v. Grasso*, 59 N.E.2d 289, 317 Mass. 716.

**Minn.**—*Venier v. Forbes*, 25 N.W. 2d 704, 223 Minn. 69—*Hammond v. Flour City Coal & Oil Co.*, 14 N.W.2d 452, 217 Minn. 427.

**Mo.**—*Paulette v. Sernes*, App., 103 S.W.2d 573.

**N.H.**—*Thistle v. Halstead*, 72 A.2d 455, 96 N.H. 192.

**N.M.**—*Snider v. Town of Silver City*, 247 P.2d 178, 56 N.M. 603—*Goggin v. Dexter Gin Co.*, 130 P.2d 1029, 46 N.M. 440—*Daniel v. Clark*, 50 P.2d 429, 39 N.M. 494.

**Okl.**—*Thomas v. Owens*, 241 P.2d 1114, 206 Okl. 50—*Roberts v. C. F. Adams & Son*, 184 P.2d 634, 199 Okl. 369—*City of Lawton v. Sherman Mach. & Iron Works*, 77 P.2d 567, 192 Okl. 254.

**Or.**—*Howard v. Klamath County*, 215 P.2d 362, 188 Or. 205—*McCulloch v. Kollock*, 32 P.2d 770, 147 Or. 283.

**Tex.**—*Checker Cab Co. v. Wagner*, Civ.App., 199 S.W.2d 791—*Grant v. Pendley*, Civ.App., 88 S.W.2d 132.

**Utah.**—*In re Roth's Estate*, 269 P.2d 278, 2 Utah 2d 40—*Condas v. Staples*, 206 P.2d 628, 115 Utah 532.

**Vt.**—*Longchamp v. Conti*, 66 A.2d 115, 115 Vt. 492—*Glass v. Newport Clothing Co.*, 8 A.2d 651, 110 Vt. 368.

**Wash.**—*Edwards v. Meader*, 210 P.2d 1019, 34 Wash.2d 921.

64 C.J. p 1246 note 1.

Validity of judgment as dependent on support by findings see *Judgments* § 55.

Defects and errors see *infra* § 637.

**Findings made in alternative**

(1) Judgment will not be reversed as unsupported by findings, if findings are made in alternative, not inconsistent with each other, and either alternative standing alone will support judgment.—*Perkes v. Utah Idaho Milk Co.*, 39 P.2d 308, 85 Utah 217.

(2) In action for price of milk sold to defendant, findings that persons to whom milk was delivered were defendant's agents, and, if not defendant's agents, that plaintiff dealt with them believing they were his agents, supported judgment for plaintiff.—*Perkes v. Utah Idaho Milk Co.*, *supra*.

(3) In action for loss of whiskey stored, finding in warehouseman's

favor that loss occurred through theft or leakage was not inadequate on theory that specification of theft cancelled the specification of leakage and left the situation unexplained.—*Rubinstein v. Washington Cold Storage Co.*, 138 P.2d 852, 18 Wash.2d 238.

**Sufficiency determined by substance rather than form**

Whether findings of fact contained sufficient findings to support judgment, must be determined by their substance and the legitimate inferences that might be drawn therefrom rather than by their form.—*Cortella v. Salt Lake City*, 72 P.2d 630, 93 Utah 236.

**Fulfillment of purpose of statute**

Where fact findings actually made, including the converse of a refused finding on a vital issue, sufficiently support the judgment rendered and afford unsuccessful party a record adequate for review, purpose of statute requiring trial court to make fact findings has been fulfilled.—*Hartzell v. Jackson*, 73 P.2d 820, 41 N.M. 700.

**Fact that special finding contains conclusions of law or conclusions of fact or evidentiary facts is immaterial, if there exists sufficient ultimate facts to justify the conclusions.**—*Lyon v. Aetna Life Ins. Co.*, 44 N.E.2d 186, 112 Ind.App. 573.

**Reasons**

In making findings of fact, trial courts are not required to set down the reasons impelling them to reach such findings.—*In re Neils' Estate*, 225 P.2d 110, 170 Kan. 254.

17. Cal.—*Pacific Coast Joint Stock Land Bank of San Francisco v. Jones*, 92 P.2d 390, 14 Cal.2d 8, 123 A.L.R. 695.

18. Idaho.—*C. I. T. Corp. v. Elliott*, 159 P.2d 891, 66 Idaho 384.

Ind.—*State ex rel. Johnson v. Boyd*, 28 N.E.2d 256, 217 Ind. 345.

64 C.J. p 1247 note 2.

Separate statement of findings and conclusions see *supra* § 624.

19. N.M.—*Shepherd v. Graham Bell Aviation Service*, 243 P.2d 603, 56 N.M. 293.

64 C.J. p 1247 note 3.

**Finding held not objectionable as constituting a mere conclusion of law.**—*Shepherd v. Graham Bell Aviation Service*, *supra*.

20. Ind.—*Gagnon v. Baden Lick Sul-*

phur Springs Co., 105 N.E. 512, 56 Ind.App. 407.

Support of conclusions by findings generally see *infra* § 631.

**Finding reconcilable with other findings**

Cal.—*Costello v. Bowen*, 182 P.2d 615, 80 Cal.App.2d 621.

**Surplusage**

Reference in findings to title by adverse possession may be disregarded as surplusage where other findings adequately supported judgment quieting title on doctrine of title by agreement and acquiescence.—*Martin v. Lopes*, 164 P.2d 321, subsequent opinion 170 P.2d 881, 28 Cal.App.2d 618.

21. Mo.—*George C. Prendergast Const. Co. v. Goldsmith*, 201 S.W. 354, 273 Mo. 184, affirmed 40 S.Ct. 273, 254 U.S. 12, 64 L.Ed. 427.

64 C.J. p 1247 note 5.

22. Cal.—*Costello v. Bowen*, 182 P.2d 615, 80 Cal.App.2d 621.

Tex.—*Stephens v. Underwood*, Civ. App., 157 S.W.2d 936.

64 C.J. p 1247 note 6.

23. Minn.—*Stoering v. Swanson*, 165 N.W. 875, 139 Minn. 115.

24. Cal.—*Wilkinson v. Zumwalt*, 297 P. 94, 112 Cal.App. 416.

**Statement of simple, obvious fact**

In action for alienation of affections of plaintiff's wife, trial judge's finding that attorney representing wife sat with defendant's counsel and conferred with them was not improper as making judge a witness to material fact, without giving defendant opportunity to cross-examination, but was statement of simple, obvious fact.—*Armstrong v. Dolge*, 36 A.2d 24, 130 Conn. 616.

25. Tex.—*Texas Ice & Cold Storage Co. v. McGoldrick*, Civ.App., 284 S.W. 615.

26. U.S.—*Blockton Cahaba Coal Co. v. U. S. C.C.A. Ala.*, 24 F.2d 180.

64 C.J. p 1247 note 10.

Matters to be found see *supra* § 615.

**Findings held sufficiently comprehensive**

Idaho.—*Gem State Lumber Co. v. Gallion Irrigated Land Co.*, 41 P.2d 620, 55 Idaho 314.

Kan.—*Phillips v. Okey*, 207 P. 1106, 111 Kan. 732.

N.C.—*Central Hanover Bank & Trust Co. v. Cooke*, 169 S.E. 146, 204 N.C. 568.

If possible, the facts should be found and stated so fully that either litigant can have the case adequately reviewed on appeal without bringing up the evidence.<sup>27</sup> Where, however, the findings necessarily decide all facts in dispute, the findings are sufficient.<sup>28</sup>

**Presumptions.** It has been said that all presumptions and intendments are in favor of, rather than against, a finding of facts.<sup>29</sup> However, the rule of evidence that a thing proved to exist is presumed to continue to exist, discussed in Evidence § 124, is not applicable to a finding of the existence of a fact prior to the commencement of the action.<sup>30</sup>

#### Reference to proposed findings

The findings by the trial court should be complete in themselves without reference to proposed findings of counsel.—*Shaw v. Shaw*, 208 P.2d 514, 122 Mont. 593.

#### Reference to testimony

A finding of fact must be complete within itself, without reference to the testimony.—*Sundt v. Tobin Quarries*, 175 P.2d 684, 50 N.M. 254, 169 A.L.R. 558.

27. Minn.—*Mienes v. Lucker Sales Co.*, 246 N.W. 667, 188 Minn. 162.

28. Minn.—*Lafayette Club v. Roberts*, 265 N.W. 802, 196 Minn. 605.—*Gerlich v. Thompson Yards, Inc.*, 225 N.W. 273, 177 Minn. 425.

29. Ind.—*Harris v. Riggs*, 112 N.E. 36, 63 Ind.App. 201.

30. Cal.—*Wilkinson v. Grant*, 189 P. 319, 46 Cal.App. 429.

31. Minn.—*Mienes v. Lucker Sales Co.*, 246 N.W. 667, 188 Minn. 162. N.H.—*Bean v. Quirin*, 179 A. 421, 87 N.H. 343, reheard 180 A. 251, 87 N.H. 343.

64 C.J. p 1247 note 15.  
Uncertainty with respect to pleadings see *infra* § 630.

32. Wis.—*Fanning v. Murphy*, 105 N.W. 1056, 126 Wis. 538, 110 Am. St.Rep. 946, 4 L.R.A.N.S., 666. 64 C.J. p 1247 note 16.

33. Cal.—*Andrews v. Cunningham*, 233 P.2d 563, 105 Cal.App.2d 525. 64 C.J. p 1247 note 17.

#### Particulars not supported by evidence

Findings of fact should be definite and certain and should be so framed that defeated party can specify intelligibly the particulars in which they are not supported by evidence, where such point is made on appeal.

—*Andrews v. Cunningham*, *supra*.—*Murphy-Cantrell Co. v. Mulcahy*, 237 P. 557, 72 Cal.App. 426.

34. Cal.—*Kittle v. Lang*, 237 P.2d 678, 107 Cal.App.2d 604.—*Andrews v. Cunningham*, 233 P.2d 563, 105

Cal.App.2d 525.—*Edgar v. Bank of America Nat. Trust & Sav. Ass'n*, 123 P.2d 885, 50 Cal.App.2d 827. Conn.—*FitzSimmons v. International Ass'n of Machinists*, 7 A.2d 448, 125 Conn. 490.

N.J.—*New Jersey State Board of Optometrists v. Nemitz*, 90 A.2d 740, 21 N.J.Super. 18.

Or.—*Larsen v. Martin*, 143 P.2d 239, 172 Or. 605.

64 C.J. p 1248 note 18.

**Finding as to what the probabilities are with reference to an issue is equivalent to a definite finding on that issue.**—*Bean v. Quirin*, 179 A. 421, 87 N.H. 343, reheard 180 A. 251, 87 N.H. 343.

#### Findings held sufficiently definite and certain

Cal.—*Bourke v. Frisk*, 208 P.2d 407, 82 Cal.App.2d 23.

Wis.—*Nickel v. Theresa Farmers Coop. Ass'n*, 20 N.W.2d 117, 247 Wis. 412.

64 C.J. p 1248 note 18 [c].

#### Findings unaffected by rulings

Trial judges in cases tried without jury, should make it plain in their findings when such findings are unaffected by rulings of law and are intended to stand as findings of fact even if the rulings are erroneous.—*Brodeur v. Seymour*, 53 N.E.2d 566, 315 Mass. 527.

35. Cal.—*Kittle v. Lang*, 237 P.2d 673, 107 Cal.App.2d 604.—*Andrews v. Cunningham*, 233 P.2d 563, 105 Cal.App.2d 525.—*Halbert v. Jones*, 209 P.2d 812, 93 Cal.App.2d 783.—*Flennaugh v. Heinrich*, 200 P.2d 580, 89 Cal.App.2d 214.—*Schomer v. R. L. Craig Co.*, 31 P.2d 396, 137 Cal.App. 620.

Conn.—*State v. Hartford Acc. & Indem. Co.*, 70 A.2d 109, 126 Conn. 157.

N.J.—*New Jersey State Board of Optometrists v. Nemitz*, 90 A.2d 740, 21 N.J.Super. 18.

Or.—*Larsen v. Martin*, 143 P.2d 239, 172 Or. 605.

64 C.J. p 1248 note 18.

## § 626. — Definiteness and Certainty

Findings should be clear and certain, but extreme accuracy of statement or minuteness of detail is not required, and findings are sufficient if the truth or falsity of each material allegation not admitted can be demonstrated therefrom, or if they can be made certain by reference to the pleadings or record.

The essentials of findings of fact are that they should be clear,<sup>31</sup> concise,<sup>32</sup> intelligible,<sup>33</sup> definite,<sup>34</sup> certain,<sup>35</sup> unequivocal,<sup>36</sup> direct,<sup>37</sup> positive,<sup>38</sup> and conclusive,<sup>39</sup> and not be vague<sup>40</sup> or evasive.<sup>41</sup> The same precision and particularity are required as in a special verdict.<sup>42</sup> Although it has been held that findings should be tested by the same rules as pleadings,<sup>43</sup> the precision and particularity necessary in a special pleading are not necessary in a finding.<sup>44</sup>

#### Findings held not ambiguous or uncertain

Cal.—*Carbine v. Meyer*, App., 272 P. 2d 849.—*Placeres De Oro Co. v. Carpenter*, 102 P.2d 407, 38 Cal.App. 2d 650.

36. Nev.—*Crumley v. Fabbri*, 213 P. 1048, 47 Nev. 14.

64 C.J. p 1248 note 19.

37. Cal.—*Murphy-Cantrell Co. v. Mulcahy*, 237 P. 557, 72 Cal.App. 426.

Kan.—*Laithe v. McDonald*, 7 Kan. 254.

38. Kan.—*Laithe v. McDonald*, *supra*. Ohio.—*Patterson v. Lamson*, 8 N.E. 869, 44 Ohio St. 487.

39. Idaho.—*Bentley v. Kasiska*, 288 P. 897, 49 Idaho 416.

64 C.J. p 1247 note 21.

40. Or.—*Larsen v. Martin*, 143 P.2d 239, 172 Or. 605.

64 C.J. p 1248 note 22.

#### Finding held not vague

Idaho.—*Anderson v. Lloyd*, 139 P.2d 244, 64 Idaho 768.

Vt.—*McClary v. Hubbard*, 122 A. 469, 87 Vt. 222.

41. Idaho.—*Bentley v. Kasiska*, 288 P. 897, 49 Idaho 416.

42. Or.—*Oregon Home Builders v. Montgomery Inv. Co.*, 184 P. 487, 94 Or. 349.

64 C.J. p 1248 note 24.  
Requisites of special verdict see *supra* § 552.

43. Cal.—*Miller v. Gusta*, 283 P. 946, 103 Cal.App. 32.

"The sufficiency of the findings of fact to support a judgment is to be tested by the same rules that are applied to test the sufficiency of a pleading to state a cause of action."—*Carpenter v. Froloff*, 86 P.2d 691, 695, 30 Cal.App.2d 400.

44. Cal.—*McAuliffe v. McAuliffe*, 199 P. 1071, 53 Cal.App. 352.

64 C.J. p 1248 note 27.

but there is also authority to the contrary.<sup>45</sup> While findings should be prepared with great care and accuracy in order to establish the true factual basis for the decision of the court,<sup>46</sup> extreme accuracy of statement is not required,<sup>47</sup> and neither is minuteness of detail.<sup>48</sup> Findings are sufficient if the truth or falsity of each material allegation not admitted can be demonstrated therefrom,<sup>49</sup> or if they can be made certain by reference to the pleadings<sup>50</sup> or the record.<sup>51</sup> Even though a finding might have been more clearly phrased, it is sufficient if its language is clear enough to indicate what the court intended.<sup>52</sup>

The findings should leave nothing to be found by implication.<sup>53</sup> As discussed infra § 634, however, it is no objection to a finding that it is based on presumption or inference; and findings which do not expressly state the required facts are often held to state the legal equivalent thereof.<sup>54</sup>

*Two or more matters in general.* There should be distinct findings on every material issue made by

the pleadings.<sup>55</sup> Each issuable fact should be made the subject of a separate finding.<sup>56</sup> However, repetition should be avoided.<sup>57</sup> Separate findings on each of two items of damage alleged have been held not required where defendant made no request for segregation of such items.<sup>58</sup>

*Where there are several causes of action* the court should make a separate finding on each matter which is applicable only to one cause of action<sup>59</sup> and it should make only one finding as to each matter which is common or applicable to all causes of action.<sup>60</sup> It has been held that separate charges or causes of action need not be made the subject of distinct findings.<sup>61</sup>

*Several counts* require only one set of findings;<sup>62</sup> and where a single cause of action is made the subject of two or more counts for the purpose of meeting different phases of proof, a single finding on all of the counts is sufficient;<sup>63</sup> but where there are two contradictory counts the facts found must, in order to warrant a recovery, sustain one count

Certainty, definiteness, and particularity in pleading generally see Pleading § 40.

#### Negative pregnant

(1) The sufficiency of findings turns on the particular case, and there is no absolute rule that findings are insufficient because they are phrased as negatives pregnant.—Johndrow v. Thomas, 187 P.2d 681, 31 Cal.2d 202.

(2) The logical defect of a negative pregnant does not apply to findings of trial court.—Ballagh v. Williams, 122 P.2d 343, 50 Cal.App.2d 10.—McAuliffe v. McAuliffe, 199 P. 1071, 53 Cal.App. 352.

(3) Finding "that it is not true, as alleged," that plaintiff conducted himself "at all times" on day of assault in a proper manner, was not subject to criticism that it was in the form of a negative pregnant, and that therefore the finding did not support judgment for defendant, where remainder of finding was that plaintiff conducted himself in a threatening and belligerent manner.—Luisi v. Coviello, 132 P.2d 531, 56 Cal.App.2d 467.

(4) Finding that it was not true that defendants had any knowledge of plaintiff's purpose in purchasing property and made any representation inducing plaintiffs to purchase property was in nature of a negative pregnant, implying truth of affirmative allegations in complaint, and was insufficient to support a judgment.—Williamson v. Clapper, 199 P. 2d 337, 88 Cal.App.2d 645.

45. Iowa.—Van Riper v. Baker, 44 Iowa 450.

46. Cal.—Anderson v. Badger, 191 P.2d 768, 84 Cal.App.2d 736.

47. Cal.—Bourke v. Frisk, 206 P. 2d 407, 92 Cal.App.2d 23.

**Findings held not objectionable as inaccurate**  
N.Y.—Neddo v. State, 90 N.Y.S.2d 650, 275 App.Div. 492, affirmed 89 N.E.2d 253, 300 N.Y. 533.

48. Cal.—Bourke v. Frisk, 206 P.2d 407, 92 Cal.App.2d 23.

Okl.—Roberts v. C. F. Adams & Son, 184 P.2d 634, 199 Okl. 369.

Vt.—Duchaine v. Zaetz, 44 A.2d 165, 114 Vt. 274.

49. Cal.—Bourke v. Frisk, 206 P.2d 407, 92 Cal.App.2d 23.

50. Cal.—Bourke v. Frisk, supra—Johnson v. Marr, 47 P.2d 489, 8 Cal.App.2d 312.  
Reference to pleadings, evidence, or other matters generally see infra § 630.

51. Cal.—Bourke v. Frisk, 206 P.2d 407, 92 Cal.App.2d 23.—Brown v. Gow, 18 P.2d 377, 128 Cal.App. 671.

52. Cal.—Bourke v. Frisk, 206 P. 2d 407, 92 Cal.App.2d 23.

Wis.—Nickel v. Theresa Farmers Coop. Ass'n, 20 N.W.2d 117, 247 Wis. 412.

#### Determination of amount due by computation

Findings which state facts so that amount due can be determined by computation are sufficient.—Kerfoot v. Kessener, 84 N.E.2d 190, 227 Ind. 58.

53. Ind.—John H. Hibben Dry Goods Co. v. Hicks, 59 N.E. 938, 26 Ind. App. 646.

64 C.J. p 1248 note 28.

#### Possible inference held insufficient as finding of fact

Vt.—St. Germain v. Tuttle, 44 A.2d 137, 114 Vt. 263.

54. Cal.—Bourke v. Frisk, 206 P.2d 407, 92 Cal.App.2d 23.

64 C.J. p 1248 note 30.

55. Cal.—Perkins v. West Coast Lumber Co., 52 P. 118, 120 Cal. 27.  
Inconsistent findings see infra § 636.  
Necessity of findings on all material issues see supra § 615.

56. Wis.—McDougald v. New Richmond Roller Mills Co., 103 N.W. 244, 125 Wis. 121.

64 C.J. p 1249 note 33.

57. Wis.—Calumet Service Co. v. City of Chilton, 135 N.W. 131, 148 Wis. 334.

64 C.J. p 1249 note 34.

58. Cal.—Staub v. Muller, 60 P.2d 283, 7 Cal.2d 221.

59. Cal.—Edwards v. California Sweet Potato Corporation, 286 P. 733, 104 Cal.App. 715.

60. Cal.—Edwards v. California Sweet Potato Corporation, supra.  
64 C.J. p 1249 note 36.

61. Wash.—State v. Grover, 81 P. 564, 47 Wash. 39.

62. Cal.—Campbell v. Genshlea, 180 P. 338, 180 Cal. 213.

63. Mo.—Sain v. Rooney, 101 S.W. 1127, 125 Mo.App. 176.  
64 C.J. p 1249 note 39.

exclusively<sup>64</sup> and be such that it can be seen which count they sustain.<sup>65</sup>

Where actions or proceedings are consolidated, all the facts in issue may be embodied in a single set of findings.<sup>66</sup>

Two or more plaintiffs or defendants. The court cannot be required to make separate findings of fact as to each separate plaintiff or defendant or group of plaintiffs or defendants.<sup>67</sup> However, a finding evidently intended to refer to less than the whole number of plaintiffs<sup>68</sup> or defendants,<sup>69</sup> but not designating which one or ones, is uncertain.

### § 627. — General or Specific Findings

A general finding may be sufficient to support a judgment or decree, but under some circumstances a general finding is insufficient and special findings are necessary; and specific findings are always to be preferred to general findings.

A general finding may be sufficient<sup>70</sup> to support a judgment or decree,<sup>71</sup> especially where the judgment or decree is one of nonsuit or for defendant.<sup>72</sup> Such a finding need not show the facts sup-

porting it.<sup>73</sup> On the other hand, a general finding is insufficient and special findings are necessary where they are required by statute on request and a proper and timely request is made,<sup>74</sup> judgment is rendered for defendant on his claim for affirmative relief,<sup>75</sup> or damages are awarded a party who has pleaded special and particularized damages.<sup>76</sup> Under a statute which gives the parties the right to request either special or general findings, but does not expressly require the judge to enter special findings, the trial court is invested with discretion to make general findings even though special findings are requested,<sup>77</sup> and, as has been stated supra § 610, in a few jurisdictions the court may, in its discretion, make special findings but cannot be compelled to do so. Specific findings are always to be preferred to general findings.<sup>78</sup> A proper and sufficient special finding involves a specific statement of the facts on which the rights of the parties are to be determined.<sup>79</sup> The findings must be sufficiently specific to enable an appellate court to review the decision<sup>80</sup> and test the correctness of the judgment.<sup>81</sup> However, a finding need not be

64. Mich.—Capen v. Stevens, 29 Mich. 496.

65. Mich.—Capen v. Stevens, supra.

66. Cal.—Union Lumber Co. v. Simon, 89 P. 1077, 1081, 150 Cal. 751.

67. Ind.—Turple v. Lowe, 62 N.E. 628, 158 Ind. 47.

68. Cal.—Stockman v. Riverside Land, etc., Co., 28 P. 116, 64 Cal. 57.

64 C.J. p 1249 note 44.

69. Ill.—Niemeier v. Berg, 186 Ill. App. 107.

64 C.J. p 1249 note 45.

70. Cal.—Cherry v. Hayden, 223 P. 2d 878, 100 Cal.App.2d 416—Morgan v. Yeach, 139 P.2d 976, 59 Cal.App. 2d 682.

71. Colo.—Slide Mines v. Denver Equipment Co., 148 P.2d 1009, 113 Colo. 285.

72. Or.—Larsen v. Martin, 143 P.2d 239, 172 Or. 605—State ex rel. Bassett v. Bassett, 113 P.2d 432, 166 Or. 628—Ervas v. Sterling, 68 P.2d 137, 156 Or. 432.

64 C.J. p 1249 note 47.

General:

Conclusion of law see infra § 631.  
Finding as to truth of allegations see infra § 630.

Splitting issues

In action by county surveyor against county to recover per diem compensation under statute for services rendered, trial court, which elected to make special findings under statute, was required to find on all material issues raised by complaint and answer, but it was

not required to split up those issues by making separate findings as to particular days on which either work or service was performed, or to make a finding as to what was done as work and what as service.—Howard v. Klamath County, 215 P. 2d 362, 188 Or. 205.

Negative allegations

If general findings necessarily negative allegations of defendants' answer as to which specific findings were not made, the findings are sufficient.—Cleverdon v. Gray, 145 P.2d 95, 62 Cal.App.2d 612—Peterson v. Murphy, 139 P.2d 49, 59 Cal.App.2d 528—Remillard Brick Co. v. Remillard-Dandini Co., 125 P.2d 548, 51 Cal.App.2d 744.

71. U.S.—Huglin v. H. M. Byllesby & Co., C.C.A.Iowa, 72 F.2d 341.  
Ariz.—Gilliland v. Rodriguez, 268 P. 2d 334, 77 Ariz. 163.

Mo.—Rhodus v. Geatley, 147 S.W.2d 621, 347 Mo. 397.  
64 C.J. p 1249 note 48.

72. Ariz.—Newhall v. Porter, 62 P. 689, 7 Ariz. 160.

64 C.J. p 1249 note 49.  
Necessity of making any findings on dismissal or nonsuit see supra § 612.

73. Ind.—Barton v. McWhinney, 85 Ind. 481.

64 C.J. p 1249 note 51.

Conclusion of fact; subordinate facts  
Finding that due to improper installation of burglar alarm system by defendant, plaintiff sustained specified loss was not a finding of a

subordinate fact, but a conclusion of fact, and it could not stand unless subordinate facts found reasonably and logically supported it.—Vastola v. Connecticut Protective System, 47 A.2d 844, 133 Conn. 18, 165 A.L.R. 1251.

74. Pa.—Bossler v. Wilson, 55 Pa. Dist. & Co. 164.

64 C.J. p 1249 note 53.

Necessity of requests for findings see supra § 617.

75. Ariz.—Shattuck v. Costello, 68 P. 529, 8 Ariz. 22.

76. Cal.—Klein v. Milne, 243 P. 420, 198 Cal. 71.

64 C.J. p 1250 note 55.

77. Or.—Larsen v. Martin, 143 P. 2d 239, 172 Or. 605—State ex rel. Bassett v. Bassett, 113 P.2d 432, 166 Or. 628—Ervas v. Sterling, 68 P.2d 137, 156 Or. 432.

78. Cal.—Burrin v. Elizalde, 242 P. 109, 75 Cal.App. 44.

79. Or.—Howard v. Klamath County, 215 P.2d 862, 188 Or. 205.  
64 C.J. p 1250 note 58.

Finding held sufficiently specific

Cal.—Brea v. McGlashan, 39 P.2d 877, 3 Cal.App.2d 454—Anderson v. Geo. L. Barney Co., 36 P.2d 717, 1 Cal.App.2d 340.

Mo.—Sound Inv. & Realty Co. v. Griffin, App., 205 S.W.2d 267.  
64 C.J. p 1250 note 58 [c].

80. N.M.—Morrow v. Martinez, 300 P. 1071, 27 N.M. 354.

81. N.M.—Apodaca v. Lueras, 278 P. 197, 34 N.M. 121.

more specific than the pleading raising the issue to which it relates;<sup>82</sup> and where a finding is sufficient to refute the affirmative allegations of a pleading, more specific findings with relation thereto are not required.<sup>83</sup>

*Special findings treated as general finding.* It has been held that alleged special findings will be treated as a general finding if they are not signed by the judge<sup>84</sup> or are not followed by conclusions of law;<sup>85</sup> and in a least one jurisdiction wherein special findings are not authorized unless requested, special findings made without request will, as shown supra § 617, be treated as a general finding.

*General and special findings in same case.* Although frequently done, the making of both general and special findings in the same case is irregular.<sup>86</sup> When the general finding is first made, it is not superseded by the later special finding;<sup>87</sup> and error cannot be predicated on the insufficiency of special findings, unnecessarily made in addition to the general finding,<sup>88</sup> since such special findings may be treated as surplusage.<sup>89</sup> Sometimes, however, where both general and special findings are made, the general finding is disregarded.<sup>90</sup> In other instances the general finding is deemed to include any fact necessary to support the judgment not in

conflict with the special findings.<sup>91</sup> Also, what appears to be a general finding is sometimes regarded, not as an independent general finding, but as a mere preface to a special finding.<sup>92</sup>

## § 628. — Extrinsic Facts and Papers

Ordinarily, findings of fact cannot be aided by extrinsic facts or papers, but they may be aided by public records or matters appearing of record in the case.

Ordinarily, findings of fact cannot be aided by extrinsic facts or papers.<sup>93</sup> They may, however, be aided by deeds, maps, or other public records,<sup>94</sup> as well as by matters appearing of record in the case,<sup>95</sup> and, as discussed infra § 630, the findings may, in some jurisdictions, refer to the pleadings or exhibits or documents given in evidence.

## § 629. — Ultimate or Evidentiary Facts

It is necessary and sufficient for the findings to state the ultimate facts found by the court, and a statement or setting out of evidence or of probative, evidentiary, or subordinate facts is neither necessary nor proper unless the evidentiary fact and the inferential fact are identical.

It is necessary and sufficient for the findings to state the ultimate facts found by the court and in respect of which it is the province and duty of the court to make findings,<sup>96</sup> that is, the ultimate is-

82. Cal.—Gantner & Mattern Co. v. Hawkins, 201 P.2d 847, 89 Cal.App.2d 783—Whepley Oil Co. v. Associated Oil Co., 44 P.2d 670, 6 Cal.App.2d 84.

64 C.J. p 1250 note 61.

Following allegations of pleadings generally see infra § 633.

Where complaint pleaded only the common counts, it was sufficient for trial court to find in its language.—Cherry v. Hayden, 223 P.2d 878, 100 Cal.App.2d 416.

83. Cal.—Morganthaler v. Krieg, 281 P. 692, 101 Cal.App. 436.

84. Ind.—McCray v. Humes, 18 N. E. 500, 116 Ind. 103.

64 C.J. p 1250 note 65.

Necessity of signature see supra § 622.

85. Ind.—Stabno v. Leeds, 60 N.E. 1101, 27 Ind.App. 289, 701.

64 C.J. p 1250 note 66.

86. Or.—Larsen v. Martin, 143 P.2d 239, 172 Or. 605.

64 C.J. p 1250 note 67.

87. U.S.—U. S. v. Cleage, Mo., 161 F. 85, 83 C.C.A. 249.

64 C.J. p 1250 note 68.

88. U.S.—Meath v. Mississippi Levee Com'rs, Miss., 3 S.Ct. 284, 109 U.S. 263, 27 L.Ed. 930.

Kan.—Moody v. Arthur, 18 Kan. 419.

89. Cal.—Damon v. Quinn, 76 P. 818, 143 Cal. 75.

90. Ind.—Stephenson v. Boody, 38 N. E. 331, 139 Ind. 60.

64 C.J. p 1250 note 71.

91. Cal.—Adams v. Hopkins, 77 P. 712, 144 Cal. 19.

64 C.J. p 1250 note 72.

92. Ind.—Clark v. Deutsch, 101 Ind. 491.

93. U.S.—Corliss v. Pulaski County, Ill., 116 F. 289, 53 C.C.A. 567.

64 C.J. p 1250 note 74.

94. Idaho.—Murry v. Nixon, 79 P. 643, 10 Idaho 608.

95. U.S.—Corliss v. Pulaski County, Ill., 116 F. 289, 53 C.C.A. 567.

Instrument on which suit is founded Ind.—American Income Ins. Co. v. Kindlespark, 37 N.E.2d 304, 110 Ind.App. 517.

96. Ariz.—Gilliland v. Rodriguez, 268 P.2d 334, 77 Ariz. 163.

Cal.—Parker v. Shell Oil Co., 175 P. 2d 83, 29 Cal.2d 603—Fairchild v. Raines, 151 P.2d 260, 24 Cal.2d 818.

—Fitzpatrick v. Underwood, 112 P. 2d 3, 17 Cal.2d 722—California Canning Peach Growers v. Williams, 78 P.2d 1154, 11 Cal.2d 221—Hahn v. Hahn, 266 P.2d 519, 123 Cal.App.2d 97—Denbo v. Senness, 262 P.2d 31, 120 Cal.App.2d 863—Ho Gate Wah v. Fong Wan, 257 P.2d 674, 118 Cal.App.2d 159—Pierce v. Wright, 256 P.2d 1049, 117 Cal.App.2d 718—Gschwend v. Stoll, 232 P.2d 494,

104 Cal.App.2d 806—Leboire v. Royce, 224 P.2d 106, 100 Cal.App.2d 610—Bealmeear v. Smith, 204 P. 2d 642, 91 Cal.App.2d 179—Pellegrino v. Los Angeles Transit Lines, 179 P.2d 39, 79 Cal.App.2d 40—Heinz v. Heinz, 165 P.2d 987, 78 Cal.App.2d 61—Nichols v. Storch, 153 P.2d 561, 67 Cal.App.2d 8—Cleverdon v. Gray, 145 P.2d 95, 62 Cal.App.2d 612—Capital Nat. Bank of Sacramento v. Smith, 144 P.2d 665, 62 Cal.App.2d 323—Vosburgh v. Meda, 143 P.2d 41, 61 Cal.App.2d 396—Culjak v. Better Built Homes, 137 P.2d 492, 53 Cal.App.2d 720—Hill v. Donnelly, 132 P.2d 867, 56 Cal.App.2d 387—Taylor v. Odell, 122 P.2d 919, 50 Cal.App.2d 115—Clark v. Standard Acc. Ins. Co. of Detroit, Mich., 112 P.2d 298, 43 Cal.App.2d 563—Mammoth Gold Dredging Co. v. Forbes, 104 P.2d 131, 39 Cal.App.2d 739—Rogers v. Transamerica Corp., 97 P.2d 517, 36 Cal.App.2d 233—Williams v. Hebbard, 92 P.2d 657, 33 Cal.App.2d 686—McAllen v. Souza, 74 P.2d 863, 24 Cal.App.2d 247—McFarland v. Carpenter, 83 P.2d 859, 18 Cal.App. 2d 205—Brea v. McGlashan, 39 P. 2d 877, 3 Cal.App.2d 454—Forman v. Hancock, 39 P.2d 249, 83 Cal.App. 2d 291.

Idaho.—Fogelstrom v. Murphy, 222 P.2d 1080, 70 Idaho 458—Crenshaw v. Crenshaw, 199 P.2d 264, 66 Idaho

subable facts<sup>87</sup> on which and with respect to which | the rights of the parties to the litigation are to be

- 470—McCarty v. Sauer, 136 P.2d 742, 64 Idaho 748.
- Ind.—Fouts v. Largent, 94 N.E.2d 448, 228 Ind. 547—Gilbert v. Lusk, 106 N.E.2d 404, 123 Ind.App. 167—Pennsylvania R. Co. v. Martin, 102 N.E.2d 394, 122 Ind.App. 25—Automobile Underwriters v. Tite, 85 N.E.2d 365, 119 Ind.App. 251—Krueger v. Beecham, 61 N.E.2d 65, 116 Ind.App. 89—Daugherty v. Daugherty, 57 N.E.2d 599, 115 Ind. App. 253—Baker v. State Bank of Akron, 44 N.E.2d 257, 112 Ind.App. 612—American Income Ins. Co. v. Kindersparker, 37 N.E.2d 304, 110 Ind.App. 517—Schilling v. Parsons, 36 N.E.2d 958, 110 Ind.App. 52—Dickason v. Dickason, 18 N.E.2d 479, 107 Ind.App. 515, mandate denied 25 N.E.2d 1014, 107 Ind.App. 515—Lindley v. Seward, 5 N.E.2d 998, 103 Ind.App. 600, rehearing denied 8 N.E.2d 119, 103 Ind.App. 600—Stewart v. Flynn, 200 N.E. 706, 101 Ind.App. 692—American Income Ins. Co. v. Kindersparker, 200 N.E. 432, 102 Ind.App. 445—Union Ins. Co. of Indiana v. Glover, 195 N.E. 583, 100 Ind.App. 327.
- Kan.—Jernberg v. Evangelical Lutheran Bethany Home for the Aged, 131 P.2d 691, 156 Kan. 167.
- Mass.—Lawrence v. O'Neill, 53 N.E.2d 140, 317 Mass. 393—Liberator v. Town of Framingham, 53 N.E.2d 561, 315 Mass. 538—Perry v. Hanover, 50 N.E.2d 41, 314 Mass. 167—Memishian v. Phillips, 42 N.E.2d 277, 311 Mass. 521—Cameron v. Buckley, 13 N.E.2d 37, 299 Mass. 432.
- Mont.—Ely v. Montana State Federation of Labor, 160 P.2d 752, 117 Mont. 609.
- N.H.—New Hampshire Sav. Bank v. National Rockland Bank, 41 A.2d 760, 93 N.H. 326—Oullette v. Ledoux, 30 A.2d 13, 82 N.H. 302.
- N.M.—Goodwin v. Travis, 272 P.2d 672, 58 N.M. 465—Laumbach v. Laumbach, 270 P.2d 385, 58 N.M. 248—Shepherd v. Graham Bell Aviation Service, 243 P.2d 603, 56 N.M. 293—Campbell v. Doherty, 206 P.2d 1145, 53 N.M. 280, 9 A.L.R.2d 699—Lea County Fair Ass'n v. Elkan, 197 P.2d 228, 52 N.M. 250—Sundt v. Tobin Quarries, 175 P.2d 684, 50 N.M. 254—Stroope v. Potter, 151 P.2d 748, 48 N.M. 404—Christmas v. Cowden, 105 P.2d 464, 44 N.M. 517.
- N.Y.—William H. Wise & Co. v. Doubleday, Doran & Co., 60 N.Y.S.2d 719, affirmed 74 N.Y.S.2d 421, 272 App.Div. 1005.
- N.C.—St. George v. Hanson, 78 S.E.2d 885, 239 N.C. 259—*Corpus Juris* cited in Woodard v. Mordecai, 67 S.E.2d 639, 644, 234 N.C. 463.
- Tex.—Wade v. Taylor, Civ.App., 228 S.W.2d 922—Gleckler v. Denton, Civ.App., 149 S.W.2d 213, error dismissed, judgment correct.
- Utah.—Duncan v. Hemmelwright, 188 P.2d 965, 112 Utah 262—Teamsters Local Union No. 222 v. Strevel-Paterson Hardware Co., 174 P.2d 164, 110 Utah 388—Consolidated Wagon & Machine Co. v. Kay, 21 P.2d 836, 81 Utah 595.
- Wash.—Walters v. Munson, 80 P.2d 224, 176 Wash. 469.
- Wis.—Angers v. Sabatinelli, 17 N.W.2d 282, 246 Wis. 374, rehearing denied 18 N.W.2d 705, 246 Wis. 374—Finkelstein v. Chicago & N. W. Ry. Co., 259 N.W. 254, 217 Wis. 433. 64 C.J. p 1251 note 79.
- "Findings of fact" defined see supra § 609.
- "Courts are required to answer all interrogatories eliciting ultimate facts or probative facts from which ultimate facts can be inferred as a matter of law."—Randolph v. First Baptist Church of Lockland, Ohio Com.Pl., 120 N.E.2d 485, 499.
- What are "ultimate" and "evidentiary" facts
- (1) "There are only two kinds of facts, which are ultimate facts and evidentiary facts. The first is necessary and essential for any determination or decision by the court. The second contains the facts necessary to prove the essential or ultimate facts."—People ex rel. Hudson & M. R. Co. v. Sexton, 44 N.Y.S.2d 884, 885, affirmed 52 N.Y.S.2d 947, 268 App.Div. 1036, appeal denied 63 N.Y.S.2d 952, 269 App.Div. 664, affirmed 66 N.E.2d 125, 295 N.Y. 757—64 C.J. p 1251 note 83 [b].
- (2) "Ultimate facts are the final facts required to establish the plaintiff's cause of action or the defendant's defenses. . . . Ultimate facts are those found in that vaguely defined area lying between evidential facts on the one side and conclusions of law on the other. . . . An ultimate fact is the final result of effect which is reached by processes of logical reasoning from the evidentiary facts. . . . Whether a statement is an ultimate fact or a conclusion of law, depends upon whether it is reached by natural reasoning or by an application of fixed rules of law."—Woodard v. Mordecai, 67 S.E.2d 639, 644, 234 N.C. 463.
- (3) The rule which requires findings of fact requires only that ultimate facts be found, and it does not exclude conclusions of facts but only conclusions of law.—Hayward Lumber & Inv. Co. v. Construction Products Corp., 241 P.2d 1054, 110 Cal. App.2d 1.
- (4) If, from the facts in evidence, the result can be reached by that process of natural reasoning adopted in the investigation of truth, it becomes an ultimate fact, to be found as such, but if resort must be had to the artificial processes of law, in order to reach a final determination, the result is a conclusion of law.—Hayward Lumber & Inv. Co. v. Construction Products Corp., supra.
- (5) "Findings of fact" mean "ultimate facts" which are conclusions of fact or deductions to be made from one or more basic or evidentiary facts to arrive at the final facts although the stepping stone facts in between may require the application of legal propositions to resolve them, and what should be contained in the findings of facts are those facts on each issue which are necessary to make flow from them a law conclusion or to make such law conclusions intelligible.—Sandall v. Hoskins, 137 P.2d 819, 104 Utah 50.
- (6) Trial court in making findings must conclude from basic competent testimony certain facts which, although necessarily conclusions or inferences derived from "sense facts," which are facts derived from testimony of witnesses based on observation or use of senses of such witnesses, are not objectionable merely because they are conclusions.—In re Hanson's Estate, 52 P.2d 1103, 87 Utah 580.
- (7) Findings of fact distinguished from conclusions of law see infra §§ 646, 647.
- Findings held to be of ultimate facts
- Cal.—Bloss v. Rahilly, 104 P.2d 1049, 16 Cal.2d 70—California Canning Peach Growers v. Williams, 78 P.2d 1154, 11 Cal.2d 221—Thomasset v. Thomasset, 264 P.2d 626, 122 Cal. App.2d 116—Frankie v. Claus, 264 P.2d 108, 121 Cal.App.2d 777—Clark v. Capital Nat. Bank of Sacramento, 206 P.2d 16, 91 Cal.App.2d 865—Newland v. Hatch, 137 P.2d 884, 59 Cal.App.2d 13—Central Heights Imp. Co. v. Memorial Parks, 105 P.2d 596, 40 Cal.App.2d 591.
- Ind.—Baker v. State Bank of Akron, 44 N.E.2d 257, 112 Ind.App. 612.
- N.M.—Goodwin v. Travis, 272 P.2d 672, 58 N.M. 465.
- N.C.—Woodard v. Mordecai, 67 S.E.2d 639, 234 N.C. 463.
- Or.—Silver Falls Timber Co. v. Eastern & Western Lumber Co., 40 P.2d 703, 149 Or. 126.
- S.D.—Fischer v. Gorman, 274 N.W. 866, 65 S.D. 453.
- Utah.—Harris v. Butler, 63 P.2d 286, 81 Utah 11.
- 64 C.J. p 1251 note 79 [b].
97. Or.—Larsen v. Martin, 143 P.2d 239, 172 Or. 605.
- 64 C.J. p 1251 note 81.
- Necessity of findings on issues generally see supra § 615.

legally determined<sup>98</sup> and on which the judgment is to rest.<sup>99</sup> As discussed infra § 649, a finding of ultimate facts necessarily includes all the probative facts, together with the inferences, deduc-

tions, or conclusions therefrom; and a statement or setting out of evidence or of probative, evidentiary, or subordinate facts is neither necessary<sup>1</sup> nor proper,<sup>2</sup> unless the evidentiary fact and the infer-

### Basic facts

Findings should be a recitation of basic facts established by evidence as found by the trier of facts, from which may be inferred the ultimate facts in terms of statutory criterion required as basis for a particular order.—New Jersey State Board of Optometrists v. Nemitz, 90 A.2d 740, 21 N.J.Super. 18.

98. N.Y.—Bender v. Hutton, 111 N.Y.S.2d 180, 279 App.Div. 442, reargument and appeal denied 112 N.Y.S.2d 317, 279 App.Div. 976.—Metropolitan Life Ins. Co. v. Union Trust Co. of Rochester, 51 N.Y.S.2d 318, 268 App.Div. 474, affirmed 62 N.E.2d 59, 294 N.Y. 254, motion denied 63 N.E.2d 187, 294 N.Y. 962, 64 C.J. p 1251 note 82.

99. Cal.—Williams v. McDowell, 89 P.2d 155, 32 Cal.App.2d 49.  
Ind.—Cleveland v. Pallin, 199 N.E. 142, 209 Ind. 382.—Gilbert v. Lusk, 106 N.E.2d 404, 123 Ind.App. 167.  
R.I.—Muscente v. R. S. Brine Transp. Co., 196 A. 259, 59 R.I. 482.

64 C.J. p 1251 note 83.  
Sufficiency of findings to support judgment generally see supra § 625

**Conclusion of court held immaterial**  
N.M.—Fuller v. Crocker, 105 P.2d 472, 44 N.M. 499.

1. Ariz.—Gilliland v. Rodriguez, 268 P.2d 334, 77 Ariz. 183.

Cal.—Fairchild v. Raines, 151 P.2d 260, 24 Cal.2d 818.—Bloss v. Rahilly, 104 P.2d 1049, 16 Cal.2d 70.—Hahn v. Hahn, 266 P.2d 519, 123 Cal.App.2d 97.—Thomasset v. Thomasset, 264 P.2d 626, 122 Cal.App.2d 115.—Ho Gate Wah v. Fong Wan, 267 P.2d 674, 118 Cal.App.2d 159.—Bertone v. City & County of San Francisco, 245 P.2d 29, 111 Cal.App.2d 579.—Hayward Lumber & Inv. Co. v. Construction Products Corp., 241 P.2d 1054, 110 Cal.App.2d 1.—Gschwend v. Stoll, 232 P.2d 494, 104 Cal.App.2d 806.—Leboire v. Royce, 224 P.2d 106, 100 Cal.App.2d 610.—Bealmear v. Smith, 204 P.2d 642, 91 Cal.App.2d 179.—Pellegrino v. Los Angeles Transit Lines, 179 P.2d 39, 79 Cal.App.2d 40.—Hughes v. Hughes, 168 P.2d 429, 74 Cal.App.2d 327.—Heinz v. Heinz, 165 P.2d 967, 73 Cal.App.2d 61.—Cleveland v. Gray, 145 P.2d 95, 62 Cal.App.2d 612.—Capital Nat. Bank of Sacramento v. Smith, 144 P.2d 665, 62 Cal.App.2d 328.—Vosburgh v. Meda, 143 P.2d 41, 61 Cal.App.2d 396.—Culjak v. Better Built Homes, 137 P.2d 492, 58 Cal.App.2d 720.—Hill v. Donnelly, 132 P.2d 867, 56 Cal.App.2d 387.—Ryan v. San Diego Elec. Ry. Co., 126 P.2d 401, 52 Cal.

App.2d 460.—Hitchcock v. Lovelace, 119 P.2d 151, 47 Cal.App.2d 818.—Mammoth Gold Dredging Co. v. Forbes, 104 P.2d 131, 39 Cal.App.2d 739.—Williams v. Hebbard, 92 P.2d 657, 33 Cal.App.2d 686.—Williams v. McDowell, 89 P.2d 155, 32 Cal.App.2d 49.—Forman v. Hancock, 39 P.2d 249, 3 Cal.App.2d 291.  
Idaho.—Crenshaw v. Crenshaw, 199 P.2d 264, 68 Idaho 470.—McCarty v. Sauer, 136 P.2d 742, 64 Idaho 748.

Ind.—Fouts v. Largent, 94 N.E.2d 448, 228 Ind. 547.—Cleveland v. Pallin, 199 N.E. 142, 209 Ind. 382.—Gilbert v. Lusk, 106 N.E.2d 404, 123 Ind.App. 167.—Schilling v. Parsons, 36 N.E.2d 958, 110 Ind.App. 52.

Kan.—In re Koellen's Estate, 208 P.2d 595, 167 Kan. 676.—Jernberg v. Evangelical Lutheran Bethany Home for the Aged, 131 P.2d 691, 156 Kan. 167.

Me.—Mitchell v. Mitchell, 11 A.2d 898, 136 Me. 406.

Mass.—In re Santosuosso, 62 N.E.2d 105, 318 Mass. 489, 161 A.L.R. 892.

Neu.—Corpus Juris cited in Kohlsaat v. Kohlsaat, 155 P.2d 474, 476, 62 Nev. 485.

N.H.—New Hampshire Sav. Bank v. National Rockland Bank, 41 A.2d 760, 93 N.H. 326.—Oullette v. Ledoux, 80 A.2d 13, 92 N.H. 302.

N.M.—Shepherd v. Graham Bell Aviation Service, 243 P.2d 603, 56 N.M. 293.—Campbell v. Doherty, 206 P.2d 1145, 53 N.M. 280, 9 A.L.R. 699.—Lea County Fair Ass'n v. Elkman, 197 P.2d 228, 52 N.M. 250.—Sundt v. Tobin Quarries, 175 P.2d 684, 50 N.M. 254.—Stroope v. Potter, 151 P.2d 748, 48 N.M. 404.—Consolidated Placers v. Grant, 151 P.2d 48, 48 N.M. 340.—Burguete v. G. W. Bond & Bro. Mercantile Co., 85 P.2d 749, 43 N.M. 97.

N.Y.—Metropolitan Life Ins. Co. v. Union Trust Co. of Rochester, 61 N.Y.S.2d 318, 268 App.Div. 474, affirmed 62 N.E.2d 59, 294 N.Y. 254, motion denied 63 N.E.2d 187, 294 N.Y. 962.—William H. Wise & Co. v. Doubleday, Doran & Co., 60 N.Y.S.2d 719, affirmed 74 N.Y.S.2d 421, 272 App.Div. 1005.

Or.—Silver Falls Timber Co. v. Eastern & Western Lumber Co., 40 P.2d 703, 149 Or. 126.

Pa.—First Nat. Bank v. Jones' Estate, 6 A.2d 273, 834 Pa. 577.—Pennsylvania Threshermen & Farmers' Mut. Cas. Ins. Co. v. Kaufman, Com.Pl., 50 Lack.Jur. 165.

Tex.—Wade v. Taylor, Civ.App., 228 S.W.2d 922.—Tiferina v. Botello,

Civ.App., 207 S.W.2d 136.—Boston Ins. Co. v. Rainwater, Civ.App., 197 S.W.2d 118.—Plaza Co. v. White, Civ.App., 160 S.W.2d 312, error refused.—Gleckler v. Denton, Civ. App., 149 S.W.2d 213, error dismissed, judgment correct.—Grant v. Pendley, Civ.App., 88 S.W.2d 132.  
Utah.—Duncan v. Hemmelwright, 186 P.2d 965, 112 Utah 262.—Consolidated Wagon & Machine Co. v. Kay, 21 P.2d 836, 81 Utah 595.

Vt.—In re Lake Seymour, 91 A.2d 813, 117 Vt. 367.—Taylor v. Henderson, 22 A.2d 318, 112 Vt. 107.—Village of St. Johnsbury v. Cenedella, 194 A. 382, 109 Vt. 174.

Wash.—Blockerman v. Elckerman, 253 P.2d 962, 42 Wash.2d 165.—Williamson v. United Brotherhood of Carpenters & Joiners of America, 120 P.2d 833, 12 Wash.2d 171.—Walters v. Munson, 30 P.2d 224, 176 Wash. 469.

Wis.—Angers v. Sabatelli, 17 N.W. 2d 282, 246 Wis. 374, rehearing denied 13 N.W.2d 705, 246 Wis. 374.—Pinkelstein v. Chicago & N. W. Ry. Co., 259 N.W. 254, 217 Wis. 433.

64 C.J. p 1252 note 85.

### Ruling on effect of facts

Trial judge cannot be compelled to give ruling on effect of a single disconnected fact, and this rule cannot be avoided by multiplying requests until they cover all several material facts involved in decision of case.—Liggett Drug Co. v. Board of License Comrs of City of North Adams, 4 N.E.2d 628, 296 Mass. 41.—H. C. Dusenberry, Inc., v. Import Drug Co., 149 N.E. 118, 253 Mass. 368.

### Better practice to report all facts

Although it has been said to be better practice to report all facts upon which an ultimate finding is based, it is not legal error to omit to do so.—Guilford v. Guilford, 44 A.2d 158, 114 Vt. 278.—City of Montpelier v. Town of Calais, 39 A.2d 350, 114 Vt. 5.

2. Cal.—Denbo v. Senness, 262 P.2d 31, 120 Cal.App.2d 863.—Capital Nat. Bank of Sacramento v. Smith, 144 P.2d 665, 62 Cal.App.2d 328.—Mammoth Gold Dredging Co. v. Forbes, 104 P.2d 131, 39 Cal.App.2d 739.—White v. Rosenstein, 25 P.2d 884, 134 Cal.App. 576.  
Conn.—C. I. T. Corporation v. Cohen, 167 A. 102, 117 Conn. 159.  
Ind.—Kerfoot v. Kessener, 84 N.E. 2d 190, 227 Ind. 58.—Krueger v. Beecham, 61 N.E.2d 65, 116 Ind. App. 89.—Bryant v. Barger, 18 N.E. 2d 965, 106 Ind.App. 245.



ential fact are identical.<sup>3</sup> A statement of probative or evidentiary facts alone is insufficient,<sup>4</sup> unless they are of such a nature and are so stated that the ultimate facts necessarily result or are necessary inferences therefrom.<sup>5</sup> However, where the ultimate facts are properly found and stated, an additional statement of evidence or evidentiary facts is not error,<sup>6</sup> since such statement will be deemed surplusage and disregarded.<sup>7</sup>

### § 630. — Reference to Pleadings, Evidence, or Other Matters

It is generally held permissible for the findings to

refer to the pleadings or evidence for a specification of the facts found or not found.

Although there is some authority holding otherwise,<sup>8</sup> and although the practice is not to be commended,<sup>9</sup> it is generally held permissible for the findings to refer to the pleadings for a specification of the facts found or not found,<sup>10</sup> as by stating generally that all the allegations contained in the complaint or answer are true or untrue, as the case may be,<sup>11</sup> provided the reference is distinct, certain,

Ohio.—*Manchester v. Cleveland Trust Co., App.* 114 N.E.2d 242.  
64 C.J. p 1252 note 86—58 C.J. p 1217 note 87.

#### Statement regarding testimony

A finding of the trial court, which was not a finding of fact but a statement regarding testimony of witnesses, would be canceled.—*Mosley v. Magnolia Petroleum Co.*, 114 P.2d 740, 45 N.M. 230.

3. Ind.—*King v. Downey*, 56 N.E. 680, 24 Ind.App. 262.  
64 C.J. p 1252 note 87.

Where contract was foundation of action, it was proper to incorporate it in special finding of facts.—*Home Development Co. v. Arthur Jordan Land Co.*, 196 N.E. 337, 100 Ind.App. 458—64 C.J. p 1252 note 87 [a].

4. Ind.—*Michigan City v. State ex rel. Seidler*, 5 N.E.2d 968, 211 Ind. 586—*Union Ins. Co. of Indiana v. Glover*, 195 N.E. 583, 100 Ind.App. 327.

64 C.J. p 1252 note 88.

5. Ind.—*Angola State Bank v. State ex rel. Sanders*, 52 N.E.2d 620, 222 Ind. 244—*Kelley, Glover & Vale v. Heitman*, 44 N.E.2d 981, 220 Ind. 625, certiorari denied 63 S.Ct. 1320, 319 U.S. 762, 87 L.Ed. 1713—*Klingler v. Ottinger*, 22 N.E.2d 805, 216 Ind. 9—*Smith v. Smith*, App. 115 N.E.2d 217—*Garrett v. Northwestern Mut. Life Ins. Co.*, 38 N.E.2d 874, 111 Ind.App. 516—*Daugherty v. Daugherty*, 57 N.E.2d 599, 115 Ind.App. 253—*Baker v. State Bank of Akron*, 44 N.E.2d 257, 112 Ind. App. 612—*Bryant v. Barger*, 18 N.E.2d 965, 106 Ind.App. 245—*Stewart v. Flynn*, 200 N.E. 706, 101 Ind.App. 692—*Union Ins. Co. of Indiana v. Glover*, 195 N.E. 583, 100 Ind.App. 327.

64 C.J. p 1253 note 89.

Conclusions on existence of fraud may be drawn from facts found if they necessarily follow from those facts.—*Roy Stringer Co. v. Dillon*, 12 N.E.2d 365, 105 Ind.App. 194.

6. Cal.—*Fitzpatrick v. Underwood*, 112 P.2d 3, 17 Cal.2d 722.  
Ind.—*Lindley v. Seward*, 5 N.E.2d

398, 103 Ind.App. 600, rehearing denied 8 N.E.2d 119, 103 Ind.App. 600—*Stewart v. Flynn*, 200 N.E. 706, 101 Ind.App. 692—*American Income Ins. Co. v. Kindesparner*, 200 N.E. 432, 102 Ind.App. 445.  
Or.—*Silver Falls Timber Co. v. Eastern & Western Lumber Co.*, 40 P.2d 703, 149 Or. 126.  
64 C.J. p 1253 note 90.

7. Cal.—*Fitzpatrick v. Underwood*, 112 P.2d 3, 17 Cal.2d 722.  
Ind.—*Michigan City v. State ex rel. Seidler*, 5 N.E.2d 968, 211 Ind. 586—*Princeton Min. Co. v. Veach*, 53 N.E.2d 306, 116 Ind.App. 332—*Bryant v. Barger*, 18 N.E.2d 965, 106 Ind.App. 245—*Union Ins. Co. of Indiana v. Glover*, 195 N.E. 583, 100 Ind.App. 327.

64 C.J. p 1253 note 91.  
Conflict between findings of ultimate and evidentiary facts see *infra* § 636.

8. Utah.—*In re Peterson*, 48 P.2d 468, 87 Utah 144.  
64 C.J. p 1253 note 92.

#### Finding held insufficient

Statement, in decision, that "the Court finds the facts to be as testified to by . . . the only witness . . . and as shown by the written and record evidence introduced and the admissions in the pleadings," was not compliance with statutory requirement that decision contain statement of facts found.—*Shore v. Norfolk Nat. Bank of Commerce*, 178 S.E. 572, 207 N.C. 798.

9. Cal.—*Robbins v. Holther*, 220 P.2d 585, 98 Cal.App.2d 674—*Tucker v. Schumacher*, 202 P.2d 327, 90 Cal.App.2d 71—*Bole v. Lovejoy*, 31 P.2d 1074, 138 Cal.App. 211.

64 C.J. p 1253 note 94.

10. Cal.—*Swars v. Council of City of Vallejo*, 206 P.2d 355, 33 Cal.2d 867—*Bole v. Lovejoy*, 31 P.2d 1074, 138 Cal.App. 211.

64 C.J. p 1253 note 93.  
Sufficiency of findings capable of being made certain by reference to pleadings or record see *supra* § 626.

11. Cal.—*Tucker v. Schumacher*, 202

P.2d 327, 90 Cal.App.2d 71—*Wilbur v. Kemp*, 182 P.2d 206, 80 Cal.App.2d 787—*Shuff v. Blazer*, 152 P.2d 216, 66 Cal.App.2d 348—*Brooks v. Brooks*, 147 P.2d 417, 63 Cal.App.2d 671—*Petersen v. Murphy*, 139 P.2d 49, 59 Cal.App.2d 528—*French v. Smith Booth Usher Co.*, 131 P.2d 863, 56 Cal.App.2d 23—*Corpus Juris cited in Vaughan v. Roberts*, 113 P.2d 884, 892, 45 Cal.App.2d 246—*Sadik v. Wallberg Min. Corp.*, 53 P.2d 981, 11 Cal.App.2d 379—*Moore v. Craig*, 42 P.2d 647, 5 Cal.App.2d 283—*Schomer v. R. L. Craig Co.*, 31 P.2d 896, 137 Cal.App. 820—*Flatnauer v. Fornl*, 21 P.2d 638, 131 Cal.App. 393—*Nelson v. Schumacher*, 19 P.2d 936, 130 Cal.App. 278—*Hackler v. Tubach*, 19 P.2d 295, 129 Cal.App. 680.

64 C.J. p 1253 note 95.

Conformity of findings with pleadings generally see *infra* § 633.

#### "Omnibus findings"

General findings such as that the allegations of the defendant's answer are false are characterized as "omnibus findings" but are sufficient.—*In re Scherer's Estate*, 136 P.2d 103, 58 Cal.App.2d 133.

#### Finding as incorporating allegations of pleading

Finding that allegations contained in designated paragraphs of plaintiffs' complaint were true, by reference to such paragraphs, incorporated allegations contained therein to same extent as though court had specifically set forth allegations in detail, and finding was sufficient without setting forth such allegations in detail.—*Clevedon v. Gray*, 145 P.2d 95, 62 Cal.App.2d 612.

#### Allegations not expressly found to be true

A finding that all allegations of a paragraph of a complaint or answer not expressly found to be true are untrue is sufficient.—*Cirlincione v. Cirlincione*, 230 P.2d 642, 104 Cal.App.2d 35.

#### Negative pregnant

Contention of plaintiff that finding of trial court that all allegations contained in certain paragraphs of com-

and intelligible,<sup>12</sup> the facts are sufficiently stated in the pleadings,<sup>13</sup> and, if the reference is to the complaint, provided it states a cause of action<sup>14</sup> and the answer consists of denials only and presents no affirmative defenses.<sup>15</sup>

**Evidence.** In making up its findings, it is competent for the court, in some jurisdictions, merely to refer to exhibits or documents given in evidence.<sup>16</sup> Other authority holds, however, that findings cannot be limited or supplemented by reference to exhibits.<sup>17</sup> A finding which is uncertain in its reference to the evidence is insufficient,<sup>18</sup> as is also a finding that the facts are contained in the bill of evidence<sup>19</sup> or that the evidence does not show that plaintiff is entitled to the relief prayed for.<sup>20</sup> Incorporation of an exhibit into the finding by reference sufficiently makes the existence of the exhibit a fact found by the trial court, but does not mean that the truth of any statement which may be contained in the exhibit is established; if the court in-

tends to find a specific fact contained in an exhibit, it should include it among the facts found or by reference to the exhibit state that the facts recited therein are found.<sup>21</sup>

**Opinion.** It is improper practice for the trial court in its formal findings of fact to refer to its written opinion and make it a part of the findings to the extent that it passes on the facts.<sup>22</sup>

**Answers of jury to interrogatories** on which a special finding by the court is based may be incorporated into the finding by reference.<sup>23</sup>

### § 631. — Conclusions of Law

The conclusions of law must be based on, and sustained by, the findings of fact, but should not themselves find matters of fact. General conclusions are ordinarily sufficient.

The conclusions of law must be based on, and sustained by, the findings of fact,<sup>24</sup> but should not

plaint were not true, was in the form of a negative pregnant was hypercritical, as giving to a finding that "all are not true" the meaning "not all are true."—*Fereria v. Nunn*, 220 P.2d 20, 98 Cal.App.2d 367—*Baillagh v. Williams*, 122 P.2d 343, 50 Cal.App.2d 10.

12. Cal.—*Turner v. Turner*, 203 P. 109, 187 Cal. 632.  
64 C.J. p 1254 note 96.

#### Findings held insufficient

Findings that allegations of answer "which are in conflict with the foregoing findings are untrue" were insufficient.—*Davis v. Symmes*, 122 P. 2d 102, 49 Cal.App.2d 433.

13. Cal.—*Tucker v. Schumacher*, 202 P.2d 327, 90 Cal.App.2d 71—*Bole v. Lovejoy*, 31 P.2d 1074, 138 Cal. App. 211.

64 C.J. p 1254 note 97.

14. Cal.—*Neusted v. Skernswell*, 159 P.2d 49, 69 Cal.App.2d 361—*Schomer v. R. L. Craig Co.*, 31 P.2d 396, 137 Cal.App. 626.

64 C.J. p 1254 note 98.

15. Minn.—*Bahnsen v. Gilbert*, 56 N.W. 1117, 55 Minn. 334.

64 C.J. p 1254 note 99.

16. Cal.—*City of Los Angeles v. City of Huntington Park*, 89 P.2d 702, 32 Cal.App.2d 253.

Ind.—*American Income Ins. Co. v. Kindesparke*, 37 N.E.2d 304, 110 Ind.App. 517.

64 C.J. p 1254 note 1.

17. Vt.—*Incorporated Village of Enosburg Falls v. Hartford Steam Boiler Inspection & Ins. Co.*, 85 A.2d 577, 117 Vt. 114—*Ledoux v. Railway Exp. Agency*, 35 A.2d 865, 113 Vt. 480—*Bardwell v. Commercial Union Assur. Co.*, 163 A. 633,

105 Vt. 106, followed in *Bardwell v. Continental Ins. Co.*, 163 A. 639, 105 Vt. 121, *Bardwell v. Fire Ass'n of Philadelphia*, 163 A. 639, 105 Vt. 122, *Bardwell v. Home Ins. Co.*, 163 A. 639, 105 Vt. 123, *Bardwell v. Insurance Co. of North America*, 163 A. 640, 105 Vt. 124, *Bardwell v. National Fire Ins. Co.*, 163 A. 640, 105 Vt. 125, *Bardwell v. Pennsylvania Fire Ins. Co.*, 163 A. 640, 105 Vt. 126, and *Bardwell v. Phoenix Ins. Co.*, 163 A. 640, 105 Vt. 127—*Firestone Tire & Rubber Co. v. Hart*, 158 A. 90, 104 Vt. 100.

18. Cal.—*Lang v. Specht*, 62 Cal. 145, *Idaho—Pitcock v. Pitcock*, 98 P. 719, 15 Idaho 426.

19. Ky.—*Gugenheim v. City of Marlinton*, 46 S.W.2d 478, 242 Ky. 350.

20. Pa.—*Fitzsimmons v. Robb*, 34 A. 233, 173 Pa. 645.

21. Conn.—*Goldblatt v. Ferrigno*, 82 A.2d 152, 138 Conn. 39.

22. Nev.—*Day v. Cloke*, 215 P. 386, 47 Nev. 75—*Crumley v. Fabbri*, 213 P. 1048, 47 Nev. 14.

Whether opinion is finding see supra § 622.

23. Ind.—*Anderson v. Hubble*, 93 Ind. 570, 47 Am.R. 394.

24. Conn.—*Horowitz v. F. E. Spencer Co.*, 44 A.2d 702, 132 Conn. 373. Ind.—*Schwegman v. Neff*, 29 N.E.2d 985, 218 Ind. 63—*Pennsylvania R. Co. v. Martin*, 102 N.E.2d 394, 122 Ind.App. 28.

Mass.—*Hinkley v. Town of Barnstable*, 42 N.E.2d 581, 311 Mass. 600—*Tompkins v. Sullivan*, 34 N.E.2d 607, 309 Mass. 496.

N.M.—*Corpus Juris cited in Consolidated Placers v. Grant*, 151 P.2d 48, 63, 48 N.M. 340.

Tex.—*Jamison Cold Storage Door Co. v. Brown*, Civ.App., 218 S.W.2d 883, error refused no reversible error—*Korkmas v. Ham*, Civ.App., 141 S.W.2d 433.

Utah.—*Beneficial Life Ins. Co. v. Mason*, 160 P.2d 734, 108 Utah 437—*Mason v. Mason*, 160 P.2d 730, 108 Utah 428—*Needham v. First Nat. Bank*, 85 P.2d 785, 96 Utah 432.

Vt.—*Hackel v. Burroughs*, 91 A.2d 703, 117 Vt. 328—*Abraham v. Insurance Co. of North America*, 84 A.2d 670, 117 Vt. 75, 29 A.L.R.2d 783—*Abatiell v. Morse*, 56 A.2d 464, 115 Vt. 254.

64 C.J. p 1254 note 9.

"Conclusions of law" defined see supra § 609.

Declarations of law see supra §§ 597-601.

#### Conclusion held warranted by findings

Conn.—*Shea v. Stelcen*, 28 A.2d 580, 129 Conn. 76—*Marino v. Greco*, 19 A.2d 423, 127 Conn. 645—*Trachten v. Boyarsky*, 190 A. 869, 122 Conn. 465.

Ind.—*Wenbert v. Lincoln Nat. Bank & Trust Co.*, 61 N.E.2d 466, 116 Ind. App. 31—*McCabe v. Grantham*, 81 N.E.2d 658, 108 Ind.App. 695—*Melzer v. Orr*, 22 N.E.2d 878, 107 Ind. App. 434—*Milgram v. Milgram*, 12 N.E.2d 394, 105 Ind.App. 57—*Michigan City v. Brossman*, 11 N.E.2d 538, 105 Ind.App. 259.

Kan.—*Doman Hunting & Fishing Ass'n v. Doman*, 155 P.2d 438, 159 Kan. 439.

Mass.—*Threlfall v. Coffee Roasters Products*, 28 N.E.2d 445, 306 Mass. 378.

Minn.—*Graphic Arts Educational Foundation v. State*, 59 N.W.2d 841—*Hammond v. Flour City Coal &*

themselves find matters of fact.<sup>25</sup> They must be correct;<sup>26</sup> and, where they are correct, it is immaterial that an improper reason is given therefor.<sup>27</sup> Except in a few jurisdictions,<sup>28</sup> a general conclusion that plaintiff or defendant recover or have judgment is sufficient,<sup>29</sup> and so is a general conclusion that plaintiff is not entitled to the relief prayed for against defendant.<sup>30</sup> A simple statement that the law is with a designated party is a sufficient conclusion of law to justify judgment for such party if the facts found justify the conclu-

sion.<sup>31</sup> Conclusions to the same effect as findings and dependent on them must fall with the findings.<sup>32</sup>

# § 632. Conformity to Pleadings, Issues, and Evidence

It is improper to make a finding which is not warranted by the pleadings, evidence, or stipulated facts, and is wholly at variance with the claims of either party.

It is improper to make a finding which is not warranted by the pleadings, evidence, or stipulated facts,<sup>33</sup> and is wholly at variance with the claims of either party.<sup>34</sup>

Oil Co., 14 N.W.2d 452, 217 Minn. 427.—McHardy v. State, 9 N.W.2d 427, 215 Minn. 132.  
Mont.—Bowden v. Gabel, 76 P.2d 284, 105 Mont. 477.  
Pa.—In re Gordon, 195 A. 122, 228 Pa. 129.  
Vt.—Duchaine v. Zaetz, 44 A.2d 165, 114 Vt. 274.  
64 C.J. p 1254 note 9 [a].

Where facts found lead to but one conclusion or result, such deduction will be made as a conclusion of law.—Daugherty v. Daugherty, 57 N.E.2d 699, 115 Ind.App. 252—84 C. J. p 1254 note 9 [b].

28. Ind.—Braden v. Graves, 85 Ind. 92.  
64 C.J. p 1255 note 10.  
Insufficiency of conclusions of law as findings of fact see supra § 625.  
Separate statement of findings of fact and conclusions of law see supra § 424.

## Maid proper conclusion of law

(1) Conclusions of law were sufficient when they indicated the conclusions drawn by the court in the exercise of its legal judgment, based on the facts found, even though they may have been poorly drafted.—Smith v. Smith, Ind.App., 115 N.E.2d 217.

(2) In action to set aside a deed on ground that grantor was of unsound mind and that deed was procured by fraud and undue influence, statement that defendants by execution to them of deed by grantor acquired a good and sufficient indefeasible fee-simple title to the real estate described in deed was a proper conclusion of law.—Baker v. McCague, 75 N.E.2d 61, 118 Ind.App. 32.

28. Ind.—Pottenger v. Bond, 142 N. E. 616, 81 Ind.App. 107.  
Pa.—MacBrine-McAdams Realty Co. to Use of McAdams v. Morris, 195 A. 511, 129 Pa.Super. 604.  
Defects and errors see infra § 637.

Conclusion held defective and evasive, and insufficient to support judgment.—Lessinger v. Brown, 41 P.2d 473, 55 Idaho 354.

Conclusion held clearly erroneous Ohio.—Palotto v. Hanna Parking Garage Co., App., 68 N.E.2d 170.

27. Tex.—Austin City v. Emanuel, 12 S.W. 318, 74 Tex. 621.  
64 C.J. p 1255 note 12.  
Incorporation of reasons in conclusions see supra § 622.

28. Ky.—Clark v. Falmouth Turnpike Co., 7 Ky.L. 605.  
Pa.—Carpenter v. Yeadon Borough, 57 A. 837, 208 Pa. 396.

29. N.M.—Corpus Juris quoted in Consolidated Placers v. Grant, 151 P.2d 48, 55, 48 N.M. 240.  
64 C.J. p 1255 note 14.

30. Tex.—Jamison Cold Storage Door Co. v. Brown, Civ.App., 218 S.W.2d 883, error refused no reversible error.

In proceeding for execution by judgment creditor of corporation against subscriber of capital stock which had not been paid for, conclusion of law by court following findings of fact, that creditor was not entitled to levy of execution against subscriber, was sufficient.—Jamison Cold Storage Door Co. v. Brown, supra.

31. Ind.—Morthland v. Lincoln Nat. Life Ins. Co., 42 N.E.2d 41, 220 Ind. 892, rehearing denied 46 N.E.2d 203, 220 Ind. 692.—Smith v. Smith, App., 115 N.E.2d 217.

## Conclusions held sufficient

(1) Conclusion that the law is with plaintiffs.—Young v. Bunnell Cemetery Ass'n, 46 N.E.2d 825, 221 Ind. 178.—Klinger v. Ottinger, 22 N.E.2d 805, 216 Ind. 9.

(2) Conclusions that the law was with plaintiff and that plaintiff was entitled to recover of defendant a stated sum.—Esch v. Leithner, 69 N.E.2d 760, 117 Ind.App. 388.

(3) Conclusion "that the law is with the defendant."—Baker v. McCague, 75 N.E.2d 61, 118 Ind.App. 32.—Boyer v. Hadley, 66 N.E.2d 903, 117 Ind.App. 97.

(4) Conclusion "That the law is with the defendant, and plaintiff take nothing herein."—State ex rel. John-

son v. Boyd, 28 N.E.2d 256, 217 Ind. 348.

(5) Conclusions "that the law is with the cross-complainant" and against the insurance company, and that "the law is with the cross-complainant" and against plaintiff.—Billis v. Boettcher, 65 N.E.2d 495, 116 Ind. App. 631, rehearing denied 66 N.E.2d 131, 116 Ind.App. 631.

## Conclusion criticised

Conclusion of law "that the law was with the defendant" was a generalization insufficient to satisfy rule that a specific conclusion of law should be stated on every issue of fact formed by the pleadings and tried by the court.—Boyer v. Hadley, 66 N.E.2d 903, 117 Ind.App. 97.

32. Conn.—Jaronko v. Czerwinski, 166 A. 388, 117 Conn. 15, 90 A.L.R. 299.

33. Cal.—Hyde v. Hagen, 161 P.2d 242, 70 Cal.App.2d 617—Cole v. Gill, 144 P.2d 24, 62 Cal.App.2d 1.

Conn.—Central Coat, Apron & Linen Service v. Indemnity Ins. Co. of North America, 70 A.2d 126, 136 Conn. 234.

Ga.—Corpus Juris quoted in McMillan v. Kelly, 40 S.E.2d 653, 654, 655, 201 Ga. 692.

Mo.—Rains v. Moulder, 90 S.W.2d 81, 338 Mo. 275.

Utah.—In re Behm's Estate, 213 P.2d 657, 117 Utah 151.—Nuttall v. Holman, 173 P.2d 1015, 110 Utah 375.

Wash.—Elmorte Inv. Co. v. Schafer Bros. Logging Co., 72 P.2d 311, 192 Wash. 1.

64 C.J. p 1255 note 15.

34. Ga.—Corpus Juris quoted in McMillan v. Kelly, 40 S.E.2d 652, 654, 655, 201 Ga. 692.

Mont.—Batchoff v. Melnar, 230 P. 48, 71 Mont. 411.

## Compromise of controversy

In action on contract, court was without authority to make finding in compromise of controversy by disregarding allegations and proof submitted by parties on principal issues presented.—Horst v. Staley, 54 P.2d 376, 101 Mont. 543.

*Application of general finding.* Where there are several counts and some are bad or are not supported by the evidence, but there is one good count which is supported by the evidence, a general finding will be referred and applied to that count.<sup>35</sup>

### § 633. — Pleadings and Issues

#### a. Pleadings

##### b. Issues

#### a. Pleadings

Findings of fact must conform to, and be supported by, the pleadings, and while findings which follow the allegations or language of the pleadings are sufficient, it is not necessary that they closely follow the pleadings or the language thereof.

35. Ala.—Evans Bros. Const. Co. v. Steiner Bros., 94 So. 361, 208 Ala. 306.

64 C.J. p 1255 note 17.

36. Ala.—Bolte v. Schmale, 62 So.2d 797, 258 Ala. 373.

Ariz.—Drumm v. Simer, 205 P.2d 592, 68 Ariz. 319.

Cal.—Mayer v. Reondo, 189 P.2d 327, 83 Cal.App.2d 655, rehearing denied 190 P.2d 23, 85 Cal.App.2d 665—Palpar, Inc. v. Thayer, 186 P.2d 748, 82 Cal.App.2d 676—Nicolds v. Storch, 153 P.2d 561, 67 Cal.App.2d 8—Wiley v. Wright, 79 P.2d 196, 26 Cal.App.2d 303—Armstrong v. Armstrong, 23 P.2d 50, 132 Cal. App. 609.

Conn.—Kane v. Kane, 180 A. 308, 120 Conn. 184.

Ill.—Lewis v. West Side Trust & Sav. Bank of Chicago, 6 N.E.2d 481, 238 Ill.App. 271.

Ind.—In re Lowe's Estate, 70 N.E.2d 187, 117 Ind.App. 554—Burkhart v. Simms, 60 N.E.2d 141, 115 Ind.App. 576.

Neb.—Miller v. City of Scottsbluff, 60 N.W.2d 824, 155 Neb. 185—National Fire Ins. Co. of Hartford, Conn. v. Evertson, 46 N.W.2d 489, 153 Neb. 854—Fidelity Finance Co. v. Westfall, 254 N.W. 710, 127 Neb. 56.

N.Y.—Provisero v. Provisero, 12 N.Y. S.2d 441.

N.C.—Peoples v. Seaboard Air Line R. Co., 46 S.E.2d 649, 228 N.C. 590.

Pa.—In re Miller, Com.Pl., 32 Del. Co. 566.

Utah.—In re Behm's Estate, 213 P.2d 657, 117 Utah 151.

64 C.J. p 1255 note 19.

*If court permits filing of new complaint to conform to proof, findings should relate to new pleadings.*—Bakersfield Sandstone Brick Co. v. Cascade Oil Co., 23 P.2d 423, 133 Cal.App. 633.

*Where variance is not misleading, court may find facts according to evidence.*—Genger v. Albers, 202 P.2d 569, 90 Cal.App.2d 52.

Findings of fact must conform to, and be supported by, the pleadings.<sup>36</sup> A finding of a matter not alleged by either party will be disregarded.<sup>37</sup> However, findings have been held not objectionable, on the ground that they are at variance with the theory of the pleadings, where they are in harmony with the theory on which the case was actually and voluntarily tried by the parties without objection by either party,<sup>38</sup> and it has also been held that an objection to a finding on the ground it is based on matter not pleaded is without merit where it is not claimed that the finding is without evidence to support it, or that such evidence was objected to.<sup>39</sup> While findings which follow the allegations or language of the pleadings are sufficient,<sup>40</sup> it is

#### Objection held immaterial

Cal.—Fejer v. Paonessa, 231 P.2d 507, 104 Cal.App.2d 190.

*Findings held not responsive to, or in accordance with, the pleadings.*

Cal.—Hyde v. Hagen, 161 P.2d 242, 70 Cal.App.2d 517.

N.C.—Smith v. Mears, 10 S.E.2d 659, 218 N.C. 193, modified on other grounds 12 S.E.2d 649, 218 N.C. 775. 64 C.J. p 1255 note 19 [a].

*Findings held responsive to, or in accord or conformity with, the pleadings.*

Cal.—Howland v. Howland, 117 P.2d 884, 13 Cal.2d 790—Western Oil & Refining Co. v. Sullivan, 17 P.2d 156, 128 Cal.App. 319.

Ill.—Thomas v. Morris, 41 N.E.2d 990, 314 Ill.App. 570.

Ind.—Guardian Life Ins. Co. of America v. Brackett, 27 N.E.2d 103, 108 Ind.App. 442.

Iowa.—Miller v. King, 39 N.W.2d 307, 240 Iowa 1336.

Mass.—Fucillo v. Fucillo, 92 N.E.2d 595, 325 Mass. 723.

Mich.—Rutan v. Straehly, 286 N.W. 639, 289 Mich. 341.

Minn.—General Underwriters v. Kline, 46 N.W.2d 794, 233 Minn. 345.

Mo.—Bovard v. Bovard, 180 S.W.2d 592, 362 Mo. 953—Jackson v. Merz, App., 223 S.W.2d 136, appeal transferred 219 S.W.2d 320.

Nev.—Edmonds v. Perry, 140 P.2d 568, 62 Nev. 41.

Or.—St. Clair v. Jellinek, 210 P.2d 563, 187 Or. 151.

Tex.—Donaldson v. Horton, Civ.App., 256 S.W.2d 693—Davis v. Clark, Civ.App., 78 S.W.2d 1008, reversed on other grounds 105 S.W.2d 190, 129 Tex. 520.

64 C.J. p 1255 note 19 [b].

*Findings held at variance or inconsistent with pleadings*

Cal.—Weiner v. Mullaney, 140 P.2d 704, 59 Cal.App.2d 620—Alpha Stores v. Croft, 140 P.2d 688, 60 Cal.App.2d 349.

Conn.—Frosch v. Sears, Roebuck & Co., 199 A. 646, 124 Conn. 300.

*Findings held not opposed or repugnant to, or at variance or inconsistent with, the pleadings.*

Cal.—Stromerson v. Averill, 133 P.2d 617, reheard 141 P.2d 732, 22 Cal. 2d 808—Lytile v. Kroenke, 154 P.2d 919, 67 Cal.App.2d 596—Los Angeles Brick & Clay Products Co. v. City of Los Angeles, 141 P.2d 46, 60 Cal.App.2d 478—Booge v. Reimicke, 114 P.2d 427, 45 Cal.App.2d 260.

Conn.—Esserman v. Madden, 195 A. 739, 123 Conn. 386.

Mass.—Graustein v. Dolan, 185 N.E. 489, 282 Mass. 579.

Nev.—Bond v. Thruston, 98 P.2d 343, 60 Nev. 19, rehearing denied 100 P.2d 74, 60 Nev. 19.

N.J.—First Nat. Bank v. Burdett, 189 A. 398, 121 N.J.Eq. 277.

Tex.—Stevenson v. Fisk, Civ.App., 65 S.W.2d 507.

64 C.J. p 1255 note 19 [c].

*Held variance but not material departure*

Conn.—Keheley v. Uhl, 26 A.2d 357, 129 Conn. 30.

37. N.C.—Peoples v. Seaboard Air Line R. Co., 46 S.E.2d 649, 228 N.C. 590.

64 C.J. p 1255 note 20.

38. La.—Iglesias v. Campbell, App., 175 So. 145.

S.D.—Sweet v. Purinton, 166 N.W. 161, 40 S.D. 17.

"The trial court was justified in deciding the case on the theory on which it was tried."—Nearing v. City of Bridgeport, 75 A.2d 505, 137 Conn. 205.

39. Utah.—Stephens v. Doxey, 218 P. 965, 62 Utah 241.

40. Cal.—Parker v. Shell Oil Co., 175 P.2d 838, 29 Cal.2d 503—Webster v. Board of Dental Examiners of California, 110 P.2d 992, 17 Cal.2d 534—McCarthy v. Brown, 45 P. 14, 113 Cal. 15—Dam v. Zink, 44 P. 331, 112 Cal. 91—Thomasset v. Thomas-

not necessary that they closely<sup>41</sup> follow the pleadings<sup>42</sup> or the language thereof,<sup>43</sup> provided they are so drawn that the truth or falsity of every material allegation can be demonstrated therefrom.<sup>44</sup>

*Finding for plaintiff* must be responsive to the theory<sup>45</sup> or allegations<sup>46</sup> of the petition or complaint; but it need not be responsive to all the allegations, provided findings on part of them are sufficient to sustain the judgment.<sup>47</sup> Moreover, the trial court is not bound to follow the allegations of the complaint where the findings are properly based on allegations of the answer of cross defendants;<sup>48</sup> and an immaterial variance between the findings and the complaint is not fatal.<sup>49</sup> Where an action is tried on an amended complaint, an objection that a general finding that all the allegations of plaintiff's complaint are true refers to the original complaint is hypercritical.<sup>50</sup> A complaint will not be deemed amended to conform with a finding of a court.<sup>51</sup>

set, 264 P.2d 828, 122 Cal.App.2d 116—French v. Smith Booth Usher Co., 131 P.2d 863, 56 Cal.App.2d 23—Gordon v. Santa Cruz Portland Cement Co., App., 130 P.2d 232—Kenfield v. Welp, 60 P.2d 385, 16 Cal.App.2d 501—Hudson v. Becker, 56 P.2d 249, 12 Cal.App.2d 743.

64 C.J. p 1256 note 28.

#### Negation of allegation

(1) Generally, a finding which is in the identical language a negation of the allegation in complaint is sufficient.

Cal.—Turner v. Turner, 203 P. 109, 137 Cal. 632.  
Nev.—Edmonds v. Perry, 140 P.2d 568, 82 Nev. 41.

(2) However, findings following the conjunctive form attempting to negate allegations of answer charging asserted negligence of plaintiff and averring that each of specified acts was done negligently and carelessly are inadequate and imply the truth of the affirmative allegations in the pleading.—Mardesch v. C. J. Hendry Co., 125 P.2d 595, 51 Cal.App.2d 567.

(3) Nevertheless, a finding that it is not true, as alleged, that without provocation or justification, warning or right defendant committed an assault on plaintiff striking him in the eye and face and kicked him in the chest and body, was not subject to the criticism that findings, being in the conjunctive rather than in the disjunctive, implied that defendant assaulted plaintiff without provocation or justification by striking plaintiff either in the eye or face and kicking him in the chest or body, where all findings considered as a whole expressly repelled such implications.—

Luisi v. Coviello, 132 P.2d 531, 56 Cal. App.2d 467.

41. Cal.—Lawson v. Steinbeck, 188 P. 842, 44 Cal.App. 685.

42. Cal.—Cleverdon v. Gray, 145 P. 2d 95, 62 Cal.App.2d 612—Moore v. Craig, 42 P.2d 647, 5 Cal.App.2d 283.

64 C.J. p 1256 note 25.

43. Utah.—Parish v. Parish, 35 P.2d 999, 84 Utah 390—Consolidated Wagon & Machine Co. v. Kay, 21 P.2d 836, 81 Utah 695.

64 C.J. p 1256 note 26.

**Findings need not be in precise language of pleading**

Cal.—Pierce v. Wright, 256 P.2d 1049, 117 Cal.App.2d 718.

64 C.J. p 1256 note 26 [a].

44. Cal.—Cleverdon v. Gray, 145 P. 2d 95, 62 Cal.App.2d 612—Moore v. Craig, 42 P.2d 647, 5 Cal.App.2d 283.

64 C.J. p 1256 note 27.

45. Cal.—Moran v. McInerney, 61 P. 675, 129 Cal. 29.

64 C.J. p 1256 note 28.

46. Conn.—Malone v. Steinberg, 89 A.2d 213, 138 Conn. 718.

R.I.—Slravo v. C. J. Ehrlich, Inc., 197 A. 435, 60 R.I. 150.

64 C.J. p 1256 note 29.

47. Cal.—Haines v. Stilwell, 40 P. 332, 107 Cal. xvii.

64 C.J. p 1256 note 30.

48. Cal.—Booge v. Reinicke, 114 P. 2d 427, 45 Cal.App.2d 260.

49. Ind.—Cleveland, etc., R. Co. v. Closser, 26 N.E. 159, 128 Ind. 348, 22 Am.S.R. 593, 9 L.R.A. 754.

64 C.J. p 1256 note 31.

50. Cal.—Gray v. Walker, 108 P. 278, 157 Cal. 381.

*Defective or insufficient pleading.* A finding will not be sustained by a bad paragraph of a complaint,<sup>52</sup> or a plea which has been eliminated by the sustaining of a demurrer or exception thereto.<sup>53</sup> On the other hand, where the pleadings are indefinite, and the adverse party fails to move to make them definite and certain, the court may find facts which the pleadings on any fair construction will authorize.<sup>54</sup>

#### b. Issues

The findings when compared with the pleadings must be within the issues and be responsive thereto, and must cover the material issues raised by the pleadings. It is improper to make findings without the scope of the issues made by the pleadings, and where such findings are made they are nugatory and must be disregarded or treated as immaterial.

The findings when compared with the pleadings must be within the issues and be responsive thereto,<sup>55</sup> and must cover the material issues raised by the pleadings,<sup>56</sup> and this is required whether or

51. Mont.—Conlon v. Northern Life Ins. Co., 92 P.2d 284, 108 Mont. 473.

52. Ind.—Kehr v. Hall, 20 N.E. 279, 117 Ind. 405.

53. Cal.—McManus v. Arnold Taxi Corporation, 255 P. 756, 82 Cal. App. 215.

Tex.—First Nat. Bank of Roswell, N. M., v. Browne Grain Co., Civ.App., 187 S.W. 489.

54. Ohio.—Smith v. Woodruff, 1 Handy 276, 12 Ohio Dec. Reprint, 140.

55. Cal.—U. S. Credit Bureau v. Sanders, 230 P.2d 849, 103 Cal.App.2d 806.

Utah.—Parowan Mercantile Co. v. Gurr, 30 P.2d 207, 83 Utah 463—Thomas v. Farrell, 26 P.2d 328, 82 Utah 535—Dillon Implement Co. v. Cleaveland, 88 P. 670, 32 Utah 1.

56. Utah.—Parish v. Parish, 35 P.2d 999, 84 Utah 390—Parowan Mercantile Co. v. Gurr, 30 P.2d 207, 83 Utah 463—Thomas v. Farrell, 26 P.2d 328, 82 Utah 535—Dillon Implement Co. v. Cleaveland, 88 P. 670, 32 Utah 1.

Necessity of findings on all material issues see supra § 615.

**Findings held sufficient to cover issues**

Cal.—Shuff v. Blazer, 152 P.2d 216, 66 Cal.App.2d 348—Saracco Tank & Welding Co. v. Platz, 150 P.2d 918, 65 Cal.App.2d 806—Ryan v. San Diego Elec. Ry. Co., 126 P.2d 401, 52 Cal.App.2d 460—Remillard Brick Co. v. Remillard-Dandini Co., 125 P.2d 548, 51 Cal.App.2d 744—Wiley v. Wright, 79 P.2d 198, 26 Cal.App.2d 303—Chovin v. Miranda, 63 P.2d 845, 18 Cal.App.2d 193.

not evidence is introduced on such issues.<sup>57</sup> It is improper to make findings outside the scope of the issues<sup>58</sup> made by the pleadings;<sup>59</sup> and where such findings are made, they are nugatory<sup>60</sup> and cannot support conclusions of law<sup>61</sup> or the judgment;<sup>62</sup> they must be disregarded<sup>63</sup> or treated as immate-

rial.<sup>64</sup> These rules are subject to the qualification that a finding may be considered where it is within an issue which, although not formally raised by the pleadings, was tried without objection.<sup>65</sup> Furthermore, it is proper to find facts which, although outside the issues framed, are but logical conclusions

Mo.—Friedman v. State Mut. Life Assur. Co. of Worcester, Mass., App., 108 S.W.2d 156.

Ohio.—McLaughlin v. Rawn, App., 41 N.E.2d 869.

Or.—Howard v. Klamath County, 215 P.2d 362, 188 Or. 205.

Pa.—Chadwick v. Hepburn, 30 A.2d 235, 151 Pa.Super. 459.

Tex.—San Antonio Loan & Trust Co. v. Rabb, Civ.App., 155 S.W.2d 981, error refused.

Utah.—Huber v. Newman, 145 P.2d 780, 106 Utah 363—Schofield v. Zion's Co-Op. Mercantile Inst., 39 P.2d 342, 85 Utah 281, 96 A.L.R. 1083.

64 C.J. p 1256 note 36.

**Findings held insufficient to cover issues**

Ariz.—Keystone Copper Min. Co. v. Miller, 164 P.2d 603, 63 Ariz. 544. Cal.—Rotea v. Rotea, 209 P.2d 983, 93 Cal.App.2d 827—Olson v. Cornwell, 25 P.2d 879, 134 Cal.App. 419.

64 C.J. p 1256 note 37.

57. Utah.—Parowan Mercantile Co. v. Gurr, 30 P.2d 207, 83 Utah 463.

58. Cal.—Julien v. Gossner, 229 P.2d 786, 103 Cal.App.2d 338.

Kan.—In re Grove's Estate, 148 P.2d 497, 158 Kan. 444.

Mo.—Rains v. Moulder, 90 S.W.2d 81, 338 Mo. 275.

N.Y.—Metropolitan Life Ins. Co. v. Whipple, 284 N.Y.S. 734, 246 App. Div. 863—Loeb v. Clement, 278 N.Y.S. 136, 243 App.Div. 834.

N.D.—Hunt v. Holmes, 252 N.W. 376, 64 N.D. 389.

S.D.—Englund v. Berg, 8 N.W.2d 861, 69 S.D. 211.

Tex.—Schuyler v. Lacy, Civ.App., 79 S.W.2d 801, error dismissed.

Vt.—Noble v. Bird, 68 A.2d 793, 116 Vt. 17—Brezinski v. Tyler, 59 A.2d 221, 115 Vt. 816.

Wyo.—Carpenter & Carpenter v. Kingham, 109 P.2d 463, 56 Wyo. 314, modified on other grounds and rehearing denied 110 P.2d 824, 56 Wyo. 314.

64 C.J. p 1256 note 39.

**Findings held outside issues or not responsive thereto or in conformity therewith**

Cal.—Parker v. Shell Oil Co., 175 P.2d 888, 29 Cal.2d 503.

Ind.—Columbia Conserva Co. v. Watson, 39 N.E.2d 740, 219 Ind. 494—Esch v. Leithiser, 99 N.E.2d 760, 117 Ind.App. 338.

64 C.J. p 1256 note 39 [b].

**Findings held within issues or germane or responsive thereto**

Cal.—Gomes v. Borba, 221 P.2d 124, 99 Cal.App.2d 38—Duarte v. Postal Union Life Ins. Co., 171 P.2d 574, 75 Cal.App.2d 557.

Kan.—Reeves v. McAdoo, 193 P.2d 233, 165 Kan. 193.

64 C.J. p 1256 note 39 [c].

59. Ind.—New Albany Trust Co. v. Nadoff, 27 N.E.2d 116, 108 Ind. App. 229.

N.Y.—Provisiero v. Provisiero, 12 N.Y. S.2d 441.

Utah.—Garrett v. Ellison, 72 P.2d 449, 93 Utah 184, 129 A.L.R. 666.

64 C.J. p 1257 note 40.

**When issues arise**

In determining whether a trial court has made findings on all material issues, issues arise on the pleadings when a fact or conclusion of law is maintained by one party and controverted by other, and issue of fact arises on a material allegation in complaint controverted by answer.—Howard v. Klamath County, 215 P.2d 362, 188 Or. 205.

**Findings held outside of, or not responsive to, issues raised by pleadings**

Cal.—Julien v. Gossner, 229 P.2d 786, 103 Cal.App.2d 338.

64 C.J. p 1257 note 40 [b].

**Findings held within, or responsive to, issues made by pleadings**

Ariz.—Keystone Copper Min. Co. v. Miller, 164 P.2d 603, 63 Ariz. 544.

Cal.—Jett v. Craco, 267 P.2d 1055, 123 Cal.App.2d 876—Jura v. Sunshine Biscuits, Inc., 258 P.2d 597, 118 Cal.App.2d 442—Taylor v. Western States Land & Mortg. Co., 176 P.2d 975, 77 Cal.App.2d 869—Lemon v. Hancock, 145 P.2d 597, 62 Cal.App.2d 895—Remillard Brick Co. v. Remillard-Dandini Co., 125 P.2d 548, 51 Cal.App.2d 744—Central Heights Imp. Co. v. Memorial Parks, 105 P.2d 596, 40 Cal.App.2d 591—Bailey v. Ament, 48 P.2d 998, 9 Cal.App.2d 133—Forman v. Hancock, 39 P.2d 249, 3 Cal.App.2d 291.

Ind.—American Income Ins. Co. v. Kindlesparker, 37 N.E.2d 304, 110 Ind.App. 517.

Mo.—Paulette v. Sernes, App., 103 S.W.2d 573.

Wash.—Granston v. Boileau, 33 P.2d 96, 177 Wash. 640.

64 C.J. p 1257 note 40 [d].

60. Cal.—Horney v. Horney, 258 P.2d 555, 118 Cal.App.2d 679—Cole v. GIII, 144 P.2d 24, 62 Cal.App.2d 1.

Ind.—Neu v. Woods, 7 N.E.2d 531, 103 Ind.App. 342.

Or.—St. Clair v. Jellinek, 210 P.2d 563, 187 Or. 151—Larsen v. Martin, 143 P.2d 239, 172 Or. 605.

Utah.—Fisher v. Bylund, 93 P.2d 737, 97 Utah 463.

Vt.—Brezinski v. Tyler, 59 A.2d 221, 115 Vt. 816.

64 C.J. p 1257 note 41.

**Failure to plead defense is not cured by finding with respect thereto**—Richter v. Adams, 66 P.2d 226, 19 Cal.App.2d 572.

61. Ind.—Board of Com'rs of Wells County v. Falk, 47 N.E.2d 320, 221 Ind. 376, 145 A.L.R. 1190.

64 C.J. p 1257 note 42.

62. Cal.—Cole v. GIII, 144 P.2d 24, 62 Cal.App.2d 1.

64 C.J. p 1257 note 43.

63. Cal.—Horney v. Horney, 258 P.2d 555, 118 Cal.App.2d 679.

Ind.—Board of Com'rs of Wells County v. Falk, 47 N.E.2d 320, 221 Ind. 376, 145 A.L.R. 1190—Esch v. Leithiser, 99 N.E.2d 760, 117 Ind.App. 338—Neu v. Woods, 7 N.E.2d 531, 103 Ind.App. 342.

Mass.—Schuka v. Bagocius, 3 N.E.2d 215, 294 Mass. 597.

Vt.—Noble v. Bird, 68 A.2d 793, 116 Vt. 17.

64 C.J. p 1257 note 44.

64. Cal.—Horney v. Horney, 258 P.2d 555, 118 Cal.App.2d 679.

Tex.—State v. San Antonio Public Service Co., Com.App., 69 S.W.2d 38.

Vt.—Noble v. Bird, 68 A.2d 793, 116 Vt. 17.

64 C.J. p 1257 note 45.

65. Cal.—Cole v. GIII, 144 P.2d 24, 62 Cal.App.2d 1—Thomson v. Leak, 27 P.2d 795, 135 Cal.App. 544.

Ohio.—Helland v. Hildebrand, 70 N.E.2d 678, 81 Ohio App. 25.

64 C.J. p 1257 note 46.

**Attempt by finding to correct defect of pleading**

In action for money had and received, where plaintiff alleged that deceased collected rent from property belonging to plaintiff, the fact that finding that deceased did not collect rentals belonging to plaintiff, attempted to correct a defect by finding with reference to a substantial right, not alleged, did not render the finding objectionable.—Edmonds v. Perry, 140 P.2d 566, 62 Nev. 41.

66. Cal.—Cole v. GIII, 144 P.2d 24, 62 Cal.App.2d 1.

Ind.—Neu v. Woods, 7 N.E.2d 531, 103 Ind.App. 342.

Or.—St. Clair v. Jellinek, 210 P.2d 563, 187 Or. 151—Larsen v. Martin, 143 P.2d 239, 172 Or. 605.

Utah.—Fisher v. Bylund, 93 P.2d 737, 97 Utah 463.

Vt.—Brezinski v. Tyler, 59 A.2d 221, 115 Vt. 816.

64 C.J. p 1257 note 41.

**Failure to plead defense is not cured by finding with respect thereto**—Richter v. Adams, 66 P.2d 226, 19 Cal.App.2d 572.

61. Ind.—Board of Com'rs of Wells County v. Falk, 47 N.E.2d 320, 221 Ind. 376, 145 A.L.R. 1190.

64 C.J. p 1257 note 42.

62. Cal.—Cole v. GIII, 144 P.2d 24, 62 Cal.App.2d 1.

64 C.J. p 1257 note 43.

63. Cal.—Horney v. Horney, 258 P.2d 555, 118 Cal.App.2d 679.

Ind.—Board of Com'rs of Wells County v. Falk, 47 N.E.2d 320, 221 Ind. 376, 145 A.L.R. 1190—Esch v. Leithiser, 99 N.E.2d 760, 117 Ind.App. 338—Neu v. Woods, 7 N.E.2d 531, 103 Ind.App. 342.

Mass.—Schuka v. Bagocius, 3 N.E.2d 215, 294 Mass. 597.

Vt.—Noble v. Bird, 68 A.2d 793, 116 Vt. 17.

64 C.J. p 1257 note 44.

64. Cal.—Horney v. Horney, 258 P.2d 555, 118 Cal.App.2d 679.

Tex.—State v. San Antonio Public Service Co., Com.App., 69 S.W.2d 38.

Vt.—Noble v. Bird, 68 A.2d 793, 116 Vt. 17.

64 C.J. p 1257 note 45.

65. Cal.—Cole v. GIII, 144 P.2d 24, 62 Cal.App.2d 1—Thomson v. Leak, 27 P.2d 795, 135 Cal.App. 544.

Ohio.—Helland v. Hildebrand, 70 N.E.2d 678, 81 Ohio App. 25.

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from other facts found which are directly in issue.<sup>66</sup>

§ 634. — Evidence

It is essential to the sufficiency of findings that they be sustained by the evidence, but the findings need not

be premised on direct evidence, and even slender evidence may be the basis of a finding of fact when it appears that there is no more evidence to be had.

It is essential to the sufficiency of findings of fact that they be sustained by the evidence,<sup>67</sup> rather than by mere conjecture, surmise, or suspicion,<sup>68</sup>

66. U.S.—Corpus Juris quoted in Obartuch v. Security Mut. Life Ins. Co., C.C.A.Ill., 114 F.2d 873, 877, certiorari denied 61 S.Ct. 730, 312 U.S. 696, 85 L.Ed. 1131, rehearing denied 61 S.Ct. 824, 312 U.S. 716, 85 L.Ed. 1146.  
Cal.—Shelley v. Board of Trade of San Francisco, 262 P. 403, 87 Cal. App. 344.

67. U.S.—Glick v. U. S., C.C.A.Ill., 93 F.2d 953—Stuyvesant Ins. Co. v. Sussex Fire Ins. Co., C.C.A.N.J., 90 F.2d 281, certiorari denied 58 S.Ct. 144, 302 U.S. 742, 82 L.Ed. 573—Enterprise Coal Co. v. Phillips, D.C.Pa., 12 F.Supp. 49, affirmed, C.C.A., 84 F.2d 565.

Ariz.—Smith v. Pinner, 201 P.2d 741, 68 Ariz. 115.

Cal.—Wade v. Markwell & Co., 258 P. 2d 497, 118 Cal.App.2d 410—Alpha Stores v. Nobel, 135 P.2d 626, 57 Cal.App.2d 867.

Conn.—Maitland v. Town of Thompson, 27 A.2d 160, 129 Conn. 186—Marino v. Greco, 19 A.2d 423, 127 Conn. 645—Reiley v. Healey, 187 A. 661, 122 Conn. 64.

Fla.—Fletcher v. Fletcher, 38 So.2d 300.

Idaho.—C. I. T. Corp. v. Elliott, 159 P.2d 891, 66 Idaho 384.

Ill.—Lewis v. West Side Trust & Sav. Bank of Chicago, 6 N.E.2d 481, 288 Ill.App. 271.

Ind.—Gavin v. Miller, 54 N.E.2d 277, 222 Ind. 459.

Mass.—Schilling v. Levin, 101 N.E.2d 360, 328 Mass. 2.

Mo.—State ex rel. National Lead Co. v. Smith, App., 134 S.W.2d 1061.

N.M.—L Bar Cattle Co. v. Board of Trustees of Town of Cebolleta Land Grant, 120 P.2d 432, 46 N.M. 26, certiorari denied Board of Trustees of Town of Cebolleta Land Grant v. L Bar Cattle Co., 62 S. Ct. 1108, 316 U.S. 645, 86 L.Ed. 1729.

Ohio.—General Motors Corp. v. Barker, 110 N.E.2d 12, 92 Ohio App. 301.

Okl.—Texas Co. v. Forson, 167 P.2d 877, 196 Okl. 599.

Or.—Consolidated Freightways v. West Coast Fast Freight, 212 P. 2d 1075, 188 Or. 117, rehearing denied 214 P.2d 475, 188 Or. 117.  
S.D.—Nelson v. Consolidated Sand & Stone Co., 283 N.W. 164, 66 S.D. 357.

Utah.—In re Behm's Estate, 213 P.2d 657, 117 Utah 151.

Vt.—Levin v. Rouille, 2 A.2d 196, 110 Vt. 126.

Wash.—Anstine v. McWilliams, 163 P.2d 816, 24 Wash.2d 230.  
64 C.J. p 1257 note 50.

**Findings held contrary to uncontradicted evidence**

Cal.—Schwartzler v. Lemas, 53 P.2d 1039, 11 Cal.App.2d 442.

Kan.—Berry v. Wondra, 246 P.2d 282, 173 Kan. 273.

**Findings held not inconsistent with evidence**

Cal.—Stromerson v. Averill, 133 P.2d 617, reheard 141 P.2d 732, 22 Cal. 2d 808.

**Findings held supported by evidence**

Cal.—Elstrat v. Brush Indus. Lumber Co., App., 268 P.2d 181—Ray v. Freeman, 100 P.2d 332, 37 Cal. App.2d 656.

Conn.—Zimmerman v. MacDermid, Inc., 34 A.2d 698, 130 Conn. 385.

Ga.—Savannah Bank & Trust Co. v. Meldrim, 25 S.E.2d 567, 195 Ga. 765.

Ill.—Jordan v. Anagnost, 88 N.E.2d 378, 338 Ill.App. 660.

Ind.—Kelley, Glover & Vale v. Heitman, 44 N.E.2d 981, 220 Ind. 625, certiorari denied 63 S.Ct. 1320, 319 U.S. 762, 87 L.Ed. 1713.

Iowa.—White v. Grovier, 21 N.W.2d 769, 237 Iowa 377, 164 A.L.R. 943.

Kan.—Doman Hunting & Fishing Ass'n v. Doman, 155 P.2d 438, 159 Kan. 439—Godfrey v. Kansas City Public Service Co., 88 P.2d 1037, 149 Kan. 592.

Mass.—Mann v. Parkway Motor Sales, 85 N.E.2d 210, 324 Mass. 151.

—Scullyn v. Cities Service Oil Co., 22 N.E.2d 666, 304 Mass. 75.

Minn.—Coughlin v. Farmers & Mechanics Sav. Bank of Minneapolis, 272 N.W. 166, 199 Minn. 102.

Mo.—Paulette v. Sernes, App., 103 S.W.2d 573.

Okl.—O'Neal v. O'Neal, 141 P.2d 593, 193 Okl. 146.

R.I.—Payne v. Baker, 2 A.2d 518, 62 R.I. 118.

Tex.—Wilson v. Hughes Bros. Mfg. Co., Civ.App., 99 S.W.2d 411—Grant v. Pendley, Civ.App., 88 S.W.2d 132.

—Davis v. Clark, 78 S.W.2d 1008, Civ.App., reversed on other grounds, Com.App., 105 S.W.2d 190.

Utah.—Starley v. Deseret Foods Corp., 74 P.2d 1221, 93 Utah 577.

Vt.—Dundon v. Balthazar, 44 A.2d 156, 114 Vt. 812.

64 C.J. p 1257 note 50 [c].

**Finding held supported by evidence or failure thereof**

Nev.—Edmonds v. Perry, 140 P.2d 566, 62 Nev. 41.

**Improper consideration of matters not in evidence**

(1) In deciding case, court should not consider a scientific or technical work, treatise, or table not admitted in evidence.—Gaines v. Standard Acc. Ins. Co., La.App., 32 So.2d 633.

(2) Insurance companies' tables, showing distances required to bring vehicles to stop under certain speeds and particular circumstances, should not have been considered by district judge in determining question of negligence of driver of truck striking motorbike at street intersection, where such tables were not offered in evidence with proof of their accuracy.—Gaines v. Standard Acc. Ins. Co., La.App., 32 So.2d 633.

**Fact trier's rejection of evidence** does not authorize findings without evidentiary support or assumption of facts in conflict with discredited evidence.—Zwiercan v. International Shoe Co., 176 A. 286, 87 N.H. 196.

**Evidence not conclusively establishing fact**

When a case involving determination of a question of fact is tried before trial court without a jury, if any one fact material to a recovery by plaintiff is supported by some evidence, but not conclusively established in plaintiff's favor, trial court may render judgment for defendant, or fail to render judgment for plaintiff.—Evans v. Dr. Pepper Bottling Co., Tex.Civ.App., 123 S.W.2d 706.

**Exact accordance with evidence**

Court was not bound to find value of items omitted in building house in exact accord with defendant's evidence.—Zajonc v. Szrpekowski, 141 A. 651, 107 Conn. 532.

**Testamentary purpose**

A so-called finding that spendthrift trust was for maintenance and support of beneficiaries was not required to be supported by evidence since it was no more than statement of purpose of testator as court understood it from will.—In re De Lano's Estate, 145 P.2d 672, 62 Cal.App.2d 308.

68. D.C.—Senator Cab Co. v. Rothberg, Mun.App., 42 A.2d 245.

N.Y.—Turner v. American Metal Co., 50 N.Y.S.2d 800, 268 App.Div. 239, appeal dismissed 66 N.E.2d 591, 295 N.Y. 822.

64 C.J. p 1258 note 51.

**Future possibilities**

Findings of fact cannot be based on future possibilities.—National

the results of independent investigation, observation, or experiments by the trial judge,<sup>69</sup> or the statements of counsel;<sup>70</sup> and where a finding is not sustained by sufficient evidence, it will not support the judgment.<sup>71</sup> The findings need not be premised on direct evidence;<sup>72</sup> they may be supported by circumstantial evidence<sup>73</sup> or any substantial evidence,<sup>74</sup> or reasonable inferences supported by the evidence;<sup>75</sup> and even slender evidence may be the basis of a finding of fact when it appears that there is no more evidence to be had.<sup>76</sup> An affidavit which the court declared to constitute a pleading, and which was not admitted in evidence for that reason, cannot be considered evidence supporting a finding.<sup>77</sup> Papers before the court, but not formally introduced in evidence, such as exhibits attached to a pleading and consisting of certified copies of the pleadings and proceedings in another suit, are necessarily considered by the court as a basis for its findings of fact in passing on a plea of *res judicata*.<sup>78</sup>

**Absence or failure of proof.** While the failure to prove a fact or the absence of evidence concerning it should not be made the basis of a positive and affirmative finding as to that fact,<sup>79</sup> the court

may, in its discretion, state that no evidence has been offered with respect to a particular point or feature, where such is the case,<sup>80</sup> and where the absence or insufficiency of evidence is in respect of a material issue, the finding on that issue may and should be against the party having the burden of proof.<sup>81</sup>

**Inadmissible or excluded evidence.** Ordinarily, a finding may not properly be based on inadmissible evidence,<sup>82</sup> or on excluded evidence;<sup>83</sup> and evidence which was offered and received for a limited purpose cannot be made the basis of a finding of fact unconnected with such purpose.<sup>84</sup>

### § 635. — Agreed, Admitted, or Undenied Matters

The court is justified in finding facts as they are alleged and admitted or not denied in the pleadings, and may also base findings on admissions of counsel, but findings which are contrary to, or inconsistent with, admitted or agreed facts are unauthorized and cannot stand.

The court is justified in finding facts as they are alleged and admitted or not denied in the pleadings,<sup>85</sup> and may also base findings on admissions of counsel.<sup>86</sup> Findings which are contrary to, or inconsistent with, admitted or agreed facts are un-

Guernsey Dairy v. State ex re'. Department of Agr. and Markets, 288 N.W. 868, 232 Wis. 248.

69. Wash.—Saari v. Wells Fargo Express Co., 186 P. 898, 109 Wash. 415.

64 C.J. p 1258 note 52.

70. Conn.—Crane v. Loomis, 25 A.2d 650, 128 Conn. 697.

**Estimates of counsel held improper basis for finding**

S.C.—State v. Pacific Guano Co., 2 S.E. 265, 26 S.C. 610.

**Unsworn statements of counsel** not intended to be and not amounting to stipulations of fact do not constitute evidence which may be considered by trial court in making its findings of fact.—In re Silver's Estate, 206 P.2d 895, 92 Cal.App.2d 173.

71. Conn.—Relley v. Healey, 187 A. 661, 122 Conn. 64.

Wash.—W. T. Rawleigh Co. v. Harper, 22 P.2d 665, 173 Wash. 233.

64 C.J. p 1258 note 54.

72. Del.—Turner v. Vineyard, 80 A. 2d 177, 7 Terry 138.

**Surrounding circumstances**  
In finding facts the trial court may consider the surrounding circumstances of the particular case.

Me.—Perry v. Curtis, 95 A.2d 562.

Nev.—Edmonds v. Perry, 140 P.2d 566, 62 Nev. 41.

73. Conn.—Ziglatzki v. Cummings, 129 A. 274, 102 Conn. 501.

74. Cal.—Bates v. United Const. Co., 253 P. 328, 81 Cal.App. 295.

64 C.J. p 1258 note 56.

75. Cal.—Cummings v. Kendall, 107 P.2d 282, 41 Cal.App.2d 549.

Pa.—U. S. Gypsum Co. v. Birdsboro Steel Foundry & Mach. Co., 52 A.2d 344, 160 Pa.Super. 648, appeal transferred 50 A.2d 666, 355 Pa. 653.

64 C.J. p 1248 note 29.

Ultimate facts as including inferences from probative facts see supra § 629.

"A finding of fact . . . may be based upon inference."—Turner v. Vineyard, 80 A.2d 177, 179, 7 Terry, Del., 138.

76. N.Y.—Fitzgerald v. New York Cent. etc., R. Co., 48 N.E. 514, 154 N.Y. 263.

77. Mont.—State ex rel. Brindjone v. District Court of Second Judicial Dist. in and for Silver Bow County, 17 P.2d 1094, 93 Mont. 188.

78. Tex.—Baronian v. Sealy Oil Mill & Mfg. Co., Civ.App. 9 S.W.2d 292. Reference to pleadings or exhibits see supra § 630.

79. Conn.—City of Hartford v. Connecticut Coal, 140 A. 734, 107 Conn. 312.

Wash.—Hallidie Co. v. Washington Brick, Lime & Mfg. Co., 126 P. 96, 70 Wash. 80.

80. Cal.—Campbell v. Buckman, 49 Cal. 362.

64 C.J. p 1258 note 59.

81. Cal.—Lori, Limited, v. Wolfe, 192 P.2d 112, 85 Cal.App.2d 54.

64 C.J. p 1258 note 60.

**Laches**

Where no evidence was introduced to support issue raised by defendant as to whether plaintiff's suit to quiet title was barred by laches, trial court properly entered findings on issue against defendant.—Owens v. Ring, 256 P.2d 1040, 117 Cal.App.2d 672.

82. Ind.—Gentry v. Gentry, 110 N. E.2d 509, 123 Ind.App. 270.

Vt.—O'Rourke v. Cleary, 163 A. 583, 105 Vt. 85.

64 C.J. p 1258 note 61.

Effect of evidence admitted without objections see supra §§ 150-156.

83. Cal.—State Life Ins. Co. v. Williams, 81 P.2d 481, 27 Cal.App.2d 594.

64 C.J. p 1258 note 64.

84. Conn.—Maitland v. Town of Thompson, 27 A.2d 160, 129 Conn. 186.

N.M.—Ward v. Ares, 223 P. 766, 29 N.M. 418.

85. Cal.—Horney v. Horney, 258 P.2d 555, 118 Cal.App.2d 679—Servente v. Murray, 52 P.2d 270, 10 Cal.App. 2d 355.

64 C.J. p 1259 note 63.

86. N.M.—State ex rel. Walker v. Hinkle, 24 P.2d 286, 37 N.M. 444.



authorized or unjustified,<sup>87</sup> erroneous,<sup>88</sup> and without effect,<sup>89</sup> outside the issues,<sup>90</sup> and cannot stand;<sup>91</sup> they will be disregarded or set aside<sup>92</sup> unless judgment is based thereon, in which event a reversal must be had.<sup>93</sup>

### § 636. Inconsistent Findings and Conclusions

A judgment will not ordinarily be supported by findings of fact which are antagonistic, inconsistent, or contradictory as to material matters, or by conclusions of law which are at variance with the findings of fact or which are inconsistent with each other; but the courts endeavor to reconcile findings which appear to be contradictory so as to uphold the judgment if possible.

87. Cal.—Horney v. Horney, 258 P.2d 555, 118 Cal.App.2d 679—People v. Gabriel, 135 P.2d 378, 67 Cal.App.2d 788.

Mass.—Adiletto v. Brockton Cut Sole Corp., 75 N.E.2d 926, 322 Mass. 110, 64 C.J. p. 1259 note 69.

**Findings held not contrary to, or inconsistent with, admitted or agreed facts**

Mont.—Valier-Montana Land & Water Co. v. Ries, 97 P.2d 584, 109 Mont. 508.

64 C.J. p. 1259 note 69 [a].

88. Cal.—Horney v. Horney, 258 P.2d 555, 118 Cal.App.2d 679—Shelton v. Vance, 234 P.2d 1012, 106 Cal.App.2d 194—Lifton v. Harshman, 182 P.2d 222, 80 Cal.App.2d 422.

Or.—Reddick v. Magel, 195 P.2d 713, 184 Or. 270, rehearing denied 197 P.2d 683, 184 Or. 270.

64 C.J. p. 1259 note 70.

**Finding contrary to undenied allegation**

In action against executrix for work done for testator, where answer did not deny allegation that plaintiff had not been paid, finding that plaintiff had been paid was error.—Lucy v. Lucy, 71 P.2d 949, 22 Cal.App.2d 629.

89. Cal.—Adjustment Corporation v. Hollywood Hardware & Paint Co., 96 P.2d 161, 35 Cal.App.2d 566—Beatty v. Pacific States Savings & Loan Co., 41 P.2d 378, 4 Cal.App.2d 692—Economy Home Builders v. Berry, 273 P. 307, 95 Cal.App. 106.

**Findings do not control stipulated facts**

Cal.—Shaw v. Board of Administration, 241 P.2d 635, 109 Cal.App.2d 770.

90. Cal.—Julien v. Gossner, 229 P.2d 786, 103 Cal.App.2d 338—Crain v. Security Title Insurance & Guarantee Co., 44 P.2d 632, 6 Cal.App.2d 343.

91. Conn.—Point O'Woods Ass'n v. Busher, 187 A. 846, 117 Conn. 247. Utah.—Beinap v. Fox, 251 P. 1073, 69 Utah 15.

92. Cal.—Horney v. Horney, 258 P.2d 555, 118 Cal.App.2d 679—Jorgensen v. Dahlstrom, 127 P.2d 551, 53

Cal.App.2d 322—Cummings v. Columbia Pictures Corporation of California, 47 P.2d 504, 8 Cal.App.2d 244—Beatty v. Pacific States Savings & Loan Co., 41 P.2d 378, 4 Cal.App.2d 692—Los Angeles Athletic Club v. Board of Harbor Com'rs of Los Angeles, 20 P.2d 130, 130 Cal.App. 376—Smith v. Herron, 18 P.2d 1002, 129 Cal.App. 479.

64 C.J. p. 1259 note 73.

93. Cal.—Walker v. Brem, 8 P. 320, 87 Cal. 593.

64 C.J. p. 1259 note 74.

Error in finding as ground for reversal generally see Appeal and Error § 1893.

94. Cal.—Robbins v. Holther, 220 P.2d 555, 98 Cal.App.2d 674—Flenbaugh v. Heinrich, 200 P.2d 580, 89 Cal.App.2d 214—Lane v. Smith, 142 P.2d 944, 61 Cal.App.2d 340—Austin v. Harry E. Jones, Inc., 86 P.2d 379, 30 Cal.App.2d 362.

Idaho.—Henderson v. Nixon, 168 P.2d 594, 66 Idaho 780.

Mo.—Buschow Lumber Co. v. Union Pac. R. Co., 276 S.W. 409, 220 Mo. App. 743.

N.Y.—Sutphen v. Morey, 212 N.Y.S. 43, 214 App.Div. 164.

Tex.—Waters v. Yockey, 192 S.W.2d 769, 144 Tex. 592, answer to certified question conformed to, Civ. App., 193 S.W.2d 575—Mossler Acceptance Co. v. Robinson, Civ.App., 255 S.W.2d 914, refused no reversible error.—Railroad Commission v. Stephens, Civ.App., 147 S.W.2d 879, error dismissed, judgment correct.—French v. Hill, Civ.App., 69 S.W.2d 828.

64 C.J. p. 1259 note 76.

**Amendment of findings inconsistent with facts admitted see infra § 638.** Appellant entitled to benefit of finding most favorable to him in case of inconsistency see Appeal and Error § 1485 b.

**Consistency of findings on:** Equity hearing see Equity § 493. Trial by jury see supra §§ 562-564. Inconsistent findings as ground for new trial see New Trial § 56. Reversal of judgment generally see Appeal and Error § 1893.

A judgment will not be supported by findings of fact which are antagonistic, inconsistent, or contradictory as to material matters,<sup>94</sup> unless the evidence is such that the judgment can be said to be clearly right regardless of the findings.<sup>95</sup> Likewise, a judgment will not be supported by conclusions of law which are at variance with the findings of fact<sup>96</sup> or which are inconsistent with each other,<sup>97</sup> unless the judgment is in accordance with the correct conclusion of law from the facts found.<sup>98</sup> However, the courts endeavor to reconcile findings which appear to be contradictory,<sup>99</sup> so as to uphold the judg-

ment generally see Judgments § 55.

#### "Negative pregnant"

With respect to alleged inconsistency of findings, a "negative pregnant," in fact finding is such form of negative expression as may imply or carry with it an affirmative.—Jordan v. Jordan, 135 P.2d 416, 58 Cal. App.2d 371.

**Findings held inconsistent or contradictory**

(1) In general.

Cal.—In re Clippinger's Estate, 171 P.2d 567, 75 Cal.App.2d 426.

Wis.—Guschl v. Schmidt, 63 N.W.2d 759, 266 Wis. 410.

64 C.J. p. 1259 note 76 [e].

(2) Surrogate's finding that expenses and legal fees incurred by testamentary trustee were proper and legal charges against estate and finding that trustee, by incurring expenses and legal fees, was guilty of negligence so as to warrant removal.—In re De Beixodon's Will, 186 N.E. 431, 262 N.Y. 168, reargument denied 188 N.E. 97, 262 N.Y. 633.

(3) Decisions awarding entire balance due contractor notwithstanding finding that agreement had not been complied with and denying allowance to owner for faulty construction which court found to exist.—Zuccaro v. Frenze, 71 A.2d 277, 76 R.I. 391.

95. Wis.—Priewe v. Fitzsimons, etc., Co., 84 N.W. 317, 117 Wis. 494.

96. Ark.—Corpus Juris quoted in Mount v. Dillon, 138 S.W.2d 59, 60, 200 Ark. 153.

Mo.—Buschow Lumber Co. v. Union Pac. R. Co., 276 S.W. 409, 220 Mo. App. 743.

64 C.J. p. 1259 note 78.

97. N.Y.—Hochberg Contracting Co. v. F. & P. Auto Transp. Co., 153 N.Y.S. 879.

64 C.J. p. 1260 note 79.

98. N.Y.—Knox v. Metropolitan E.L. R. Co., 12 N.Y.S. 848, 58 Hun 517, affirmed 28 N.E. 485, 128 N.Y. 625.

64 C.J. p. 1260 note 80.

99. Cal.—Ungemach v. Ungemach, 142 P.2d 99, 61 Cal.App.2d 29.

ment if possible,<sup>1</sup> and in order to do so will construe the findings as a whole<sup>2</sup> and liberally in favor of the judgment;<sup>3</sup> but the rule cannot be used to uphold findings that are inconsistent with each other.<sup>4</sup> Where there is ample evidence to support a recovery on either of two inconsistent theories, and the trial court makes findings on both, the findings on the theory inconsistent with that on which the judgment was based may be disregarded as surplusage,<sup>5</sup> but where the evidence fails to support the finding on the theory relied on there can be no recovery on the finding on the inconsistent theory.<sup>6</sup> Since the trial judge has the right to change his mind at any time prior to the actual

entry of findings, it is immaterial that findings made in a memorandum decision are directly contradictory to the oral findings previously made at the trial.<sup>7</sup> Findings of fact will prevail over conclusions of law inconsistent therewith,<sup>8</sup> since erroneous conclusions are ineffectual to destroy the fact findings from which the conclusions were drawn.<sup>9</sup>

**General and special findings.** General and special findings will be construed if possible so as to sustain the judgment,<sup>10</sup> but unless the general finding is first made, in which event it is not superseded by a later special finding, special findings will control the general finding in the event of inconsistency.<sup>11</sup> Where two special findings are in con-

N.M.—Hartzell v. Jackson, 73 P.2d 820, 41 N.M. 700.  
Tex.—Manire v. Burt, Civ.App., 121 S.W.2d 630, error refused.  
Vt.—Jeffords v. Poor, 55 A.2d 605, 115 Vt. 149.  
64 C.J. p 1260 note 82.

1. Cal.—Quinn v. Rosenfeldt, 102 P.2d 817, 15 Cal.2d 486—Agdeppa v. Glougie, 162 P.2d 944, 71 Cal.App. 2d 468.  
64 C.J. p 1260 note 83.  
Construction in support of judgment generally see *infra* § 646.

#### Findings held consistent or reconcilable

Cal.—Silver v. Shemanski, 201 P.2d 418, 89 Cal.App.2d 520—Costello v. Bowen, 182 P.2d 615, 80 Cal.App.2d 621—Temple v. Corp. of America, 163 P.2d 67, 71 Cal.App.2d 599—Saracco Tank & Welding Co. v. Platz, 150 P.2d 918, 65 Cal.App. 2d 306—Wiley v. Wright, 79 P.2d 196, 26 Cal.App.2d 303—Hackler v. Tubach, 19 P.2d 295, 129 Cal.App. 680.

Ind.—Etna Cas. & Surety Co. v. Hughes, 15 N.E.2d 736, 105 Ind.App. 497.

Kan.—Jones v. Jones, 167 P.2d 634, 161 Kan. 284—Leslie v. Sherman, 139 P.2d 133, 167 Kan. 157.

Mass.—Alves v. Boulanger, 109 N.E. 2d 120, 329 Mass. 765—Federal Nat. Bank of Boston v. O'Connell, 26 N.E.2d 639, 305 Mass. 669.

N.M.—Wilson v. Black, 163 P.2d 287, 49 N.M. 303.

Ohio.—Riesenback v. Bauer, 82 N.E. 2d 94, 83 Ohio App. 218.  
64 C.J. p 1260 note 83 [b].

2. Cal.—Stoddard v. Goldenberg, 119 P.2d 800, 48 Cal.App.2d 519—Villa v. Brovelli, 39 P.2d 855, 3 Cal.App. 2d 713.

64 C.J. p 1260 note 84.  
Construction as whole generally see *infra* § 646.

3. Cal.—Price v. Occidental Life Ins. Co., 147 P. 1175, 169 Cal. 800.  
44 C.J. p 1261 note 85.

4. Cal.—Jensen v. Union Paving Co., 229 P.2d 121, 103 Cal.App.2d 164.

5. Cal.—Baird v. Oceodessa, 67 P.2d 1055, 8 Cal.2d 700—Provident Land Corp. v. Bartlett, 165 P.2d 469, 72 Cal.App.2d 672—Niles v. Louis H. Rapoport & Sons, 128 P.2d 50, 53 Cal.App.2d 644—Hirschberg v. Rose, 29 P.2d 785, 136 Cal.App. 653.

#### Redundant findings disregarded

Where claim contained a common count for value of materials sold and also, one on an open book account, and allegations of these causes of action were found to be true, since findings justify recovery on the express contract, the findings as to implied contract are redundant and should be disregarded.—American Foundry v. Milosevich, 283 P.2d 97, 121 Cal.App.2d 272.

6. Cal.—Thacker v. American Foundry, 177 P.2d 332, 78 Cal.App.2d 76.

#### Express or implied contract

In action on two counts, one alleging breach of an express oral contract of employment and the other seeking recovery of reasonable value of services rendered, where evidence failed to support finding as to damages for breach of express contract, and court also made a conflicting finding with respect to reasonable value of services, employee, who relied on and established right to compensation, if any, under an express contract, could not recover on separate theory of implied contract.—Thacker v. American Foundry, 177 P.2d 332, 78 Cal.App.2d 76.

7. Wash.—Carns v. Shirley, 269 P. 2d 804.

8. Ark.—Corpus Juris quoted in Mount v. Dillon, 138 S.W.2d 59, 60, 200 Ark. 153.

Tex.—Howth v. French Independent School Dist., Civ.App., 115 S.W.2d 1036, affirmed French Independent School Dist. of Jefferson County v. Howth, 134 S.W.2d 1036, 134 Tex. 211.

Vt.—Hackel v. Burroughs, 91 A.2d 703, 117 Vt. 338—Abraham v. Insurance Co. of North America, 34 A.2d 670, 117 Vt. 75, 29 A.L.R.2d 783—Abateili v. Morse, 56 A.2d 464, 115 Vt. 254—Preston v. Montgomery Ward & Co., 23 A.2d 534, 113 Vt. 295—Dieter v. Scott, 9 A.2d 95, 110 Vt. 376.  
64 C.J. p 1261 note 88.

#### Conflict between opinion and finding of fact

Where there is a conflict between an opinion and a finding of fact supported by substantial evidence, the finding prevails.—Woodson v. Raynolds, 76 P.2d 34, 42 N.M. 161.

9. Tex.—Ware v. Harkins, Civ.App., 228 S.W.2d 537, refused no reversible error—Keith v. Connally, Civ. App., 85 S.W.2d 788.

10. Cal.—Todd v. Orcutt, 183 P. 963, 42 Cal.App. 687.

Mass.—Duralith Corporation v. Leonard, 174 N.E. 511, 274 Mass. 397.

11. U.S.—Davis v. Etna Acceptance Co., 111, 55 S.Ct. 151, 293 U.S. 323, 79 L.Ed. 393.

Cal.—Wallace Ranch Water Co. v. Foothill Ditch Co., 53 P.2d 929, 5 Cal.2d 103—Breakers Holding Co. v. Josebra Co., 265 P.2d 938, 122 Cal.App.2d 741—Mooney v. Mooney, 202 P.2d 352, reheard 204 P.2d 630, 91 Cal.App.2d 118—In re Reid's Estate, 179 P.2d 353, 79 Cal.App.2d 34—Leathers v. Leathers, 174 P. 2d 875, 77 Cal.App.2d 134—Wilson v. Wilson, 172 P.2d 568, 76 Cal.App. 2d 119—Wood v. Keller, 163 P.2d 904, 72 Cal.App.2d 14—Ringis v. Otting, 146 P.2d 421, 63 Cal.App.2d 88—Ungemach v. Ungemach, 142 P.2d 99, 61 Cal.App.2d 29—Hitchcock v. Lovelace, 119 P.2d 151, 47 Cal.App.2d 818—Moore v. Craig, 42 P.2d 647, 5 Cal.App.2d 238.

Idaho.—Corpus Juris cited in Henderson v. Nixon, 168 P.2d 594, 596, 66 Idaho 780.

Kan.—Bottenberg Implement Co. v. Sheffield, 229 P.2d 1004, 171 Kan. 67.

dict, the one supporting the general finding will control.<sup>12</sup>

**Ultimate and probative facts.** With respect to inconsistency between the finding of an ultimate fact and findings of probative facts, the finding as to the ultimate fact will ordinarily control.<sup>13</sup> The findings of probative facts can be used, however, to overcome an express finding of the ultimate fact,<sup>14</sup> as where it clearly appears that the ultimate fact is found only as a conclusion from the particular probative facts found,<sup>15</sup> or the probative facts found are such as necessarily to overcome the finding of the ultimate fact,<sup>16</sup> or the primary facts stated lead to but one conclusion,<sup>17</sup> or it appears that the finding of probative facts disposes of all the facts involved in the pleadings and that the facts found constitute all the facts in the case.<sup>18</sup> Where the findings of probative facts are susceptible of a construction which will support the judgment, they do not adversely affect the findings of ultimate facts.<sup>19</sup>

**Findings by jury on special issues.** Where special issues are submitted to a jury, the findings of the jury are subordinate to, and controlled by, the findings of the court, in case of conflict.<sup>20</sup>

## § 637. Defects and Errors

Defects and errors in findings or conclusions are not fatal unless prejudicial; and in the absence of prejudice, findings and conclusions may be sufficient despite slight and inadvertent errors therein.

Defects and errors in findings or conclusions are not fatal unless prejudicial,<sup>21</sup> as where no relief is based thereon,<sup>22</sup> or, as sometimes stated, where the corrected findings would necessarily be against appellant;<sup>23</sup> and a party in whose favor findings are made will not be heard to complain of their insufficiency.<sup>24</sup> Thus, in the absence of prejudice, findings and conclusions may be sufficient despite slight and inadvertent errors therein,<sup>25</sup> such as clerical errors,<sup>26</sup> recitals of an erroneous date,<sup>27</sup> or mere mistakes in form.<sup>28</sup>

Mass.—Mooney v. McKenzie, 88 N.E. 2d 546, 324 Mass. 685.

Minn.—Thomas Peebles & Co. v. Sherman, 181 N.W. 715, 146 Minn. 282.

Mont.—Brubaker v. D'Orazi, 179 P.2d 533, 120 Mont. 22.

N.H.—Bean v. Quirin, 180 A. 251, 87 N.H. 343.

64 C.J. p 1261 note 92.

General finding first made as not superseded see supra § 627.

12. Wyo.—Cramer v. Munkres, 83 P. 374, 14 Wyo. 234.

13. U.S.—Winnett v. Helvering, C.C. A., 68 F.2d 614.

Cal.—Earl v. Saks & Co., 226 P.2d 340, 38 Cal.2d 602—Fitzpatrick v. Underwood, 112 P.2d 3, 17 Cal.2d 722—Sullivan v. Seiten, 199 P.2d 316, 88 Cal.App.2d 813—Brooks v. Brooks, 147 P.2d 417, 63 Cal.App.2d 671—Sayles v. Los Angeles County, 138 P.2d 768, 59 Cal.App.2d 295—White v. Rosenstein, 25 P.2d 884, 134 Cal.App. 576.

Ind.—Kilgler v. Ottinger, 22 N.E.2d 805, 216 Ind. 9.

Tex.—Railroad Commission v. Stephens, Civ.App., 147 S.W.2d 879, error dismissed, judgment correct.

64 C.J. p 1261 note 95.

14. Cal.—Robinson v. Raquet, 36 P.2d 821, 1 Cal.App.2d 533.

15. U.S.—Winnett v. Helvering, C.C. A., 68 F.2d 614.

Cal.—Garrison v. Edward Brown & Sons, 164 P.2d 377, 25 Cal.2d 473—Fitzpatrick v. Underwood, 112 P.2d 3, 17 Cal.2d 722—Sullivan v. Seiten, 199 P.2d 316, 88 Cal.App.2d 813—Lucich v. Lucich, 172 P.2d

73, 75 Cal.App.2d 890—Sayles v. Los Angeles County, 138 P.2d 768, 59 Cal.App.2d 295—Robinson v. Raquet, 36 P.2d 821, 1 Cal.App.2d 533.

64 C.J. p 1261 note 96.

**Evidentiary facts found held to support finding of ultimate fact**

Cal.—Sayles v. Los Angeles County, 138 P.2d 768, 59 Cal.App.2d 295.

**Ultimate and subsidiary findings**

Where ultimate finding of judge is inconsistent with some of his subsidiary findings, ultimate finding cannot stand.—Beckman v. Beckman, 103 N.E.2d 223, 328 Mass. 250.

16. U.S.—Winnett v. Helvering, C.C. A., 68 F.2d 614.

Cal.—Fitzpatrick v. Underwood, 112 P.2d 3, 17 Cal.2d 722—Sayles v. Los Angeles County, 138 P.2d 768, 59 Cal.App.2d 295—White v. Rosenstein, 25 P.2d 884, 134 Cal.App. 576.

64 C.J. p 1262 note 97.

17. Ind.—Smith v. Wells Mfg. Co., 46 N.E. 1000, 148 Ind. 333.

64 C.J. p 1262 note 98.

18. U.S.—Winnett v. Helvering, C.C. A., 68 F.2d 614.

Cal.—Forsythe v. Los Angeles R. Co., 87 P. 24, 149 Cal. 569—White v. Rosenstein, 25 P.2d 884, 134 Cal. App. 576.

19. Cal.—Quinn v. Rosenfeld, 102 P.2d 317, 15 Cal.2d 486.

20. Cal.—Dinsmore v. Renfro, 225 P. 886, 66 Cal.App.2d 207.

64 C.J. p 1262 note 5.

**Findings by jury on special issues generally see supra §§ 528-573.**

21. N.C.—Greene v. Mitchell County

Board of Education, 75 S.E.2d 129, 237 N.C. 336.

64 C.J. p 1262 note 6.

**Other conclusions not vitiated**

An erroneous conclusion of law would not vitiate other conclusions founded on valid findings of fact.—Ware v. Harkins, Tex.Civ.App., 228 S.W.2d 537, refused no reversible error.

22. N.Y.—Dunckel v. Dunckel, 36 N. E. 405, 141 N.Y. 427.

64 C.J. p 1262 note 7.

23. Cal.—Kraskey v. Wollpert, 66 P. 309, 134 Cal. 338.

64 C.J. p 1262 note 8.

24. Ind.—Louisville, etc., R. Co. v. Craycraft, 39 N.E. 533, 12 Ind.App. 203.

N.Y.—Morison v. New York El. R. Co., 26 N.Y.S. 640.

25. N.J.—Monahan v. Seaboard Surety Co., 18 A.2d 40, 126 N.J.Law 148.

N.C.—Greene v. Mitchell County Board of Education, 75 S.E.2d 129, 237 N.C. 336.

64 C.J. p 1263 note 10.

26. Or.—City Motor Trucking Co. v. Franklin Fire Ins. Co., 239 P. 812, 116 Or. 102.

64 C.J. p 1262 note 11.

27. Minn.—Leonard v. Green, 24 N. W. 915, 34 Minn. 137.

64 C.J. p 1262 note 12.

28. N.J.—Monahan v. Seaboard Surety Co., 18 A.2d 40, 126 N.J.Law 148.

N.C.—Greene v. Mitchell County Board of Education, 75 S.E.2d 129, 237 N.C. 336.

64 C.J. p 1262 note 13.

## § 638. Amendment or Correction

- a. In general
- b. Grounds

## a. In General

As a general rule a trial court has power to amend or correct its findings of fact and conclusions of law.

As a general rule, a trial court, at the proper time, has authority to change, modify, or correct its findings of fact and conclusions of law,<sup>29</sup> including special findings of fact and conclusions of law;<sup>30</sup> and under some rules of procedure it is the mandatory duty of the trial court to file amended findings where a party complies with the procedure prescribed for obtaining them.<sup>31</sup> The trial court may amend and correct its findings so as to make them conform to the decision actually made,<sup>32</sup> or to the facts as stipulated by the parties,<sup>33</sup> although amendments should be limited to questions litigated at the trial.<sup>34</sup> Where no findings of fact were made there can be no amendment thereof.<sup>35</sup>

There is authority holding that, after making and

entry of record of its finding, the court has no power to set aside such finding and without a new trial make another finding on the evidence that had been adduced and enter judgment thereon.<sup>36</sup> In a jurisdiction in which matters other than the material facts on which the judgment is based have no place in a special finding and can be presented only by a finding made for the purpose of an appeal, it has been held improper to seek to have a special finding take the place of a finding made for the purpose of appeal.<sup>37</sup>

*Findings supplementary to jury findings.* The making of findings supplementary to those of the jury has been held not error,<sup>38</sup> and is in any event not ground for complaint by the party requesting such supplementary findings.<sup>39</sup>

*Proposed findings* are subject to change<sup>40</sup> and may be followed by proposed amendments thereto.<sup>41</sup>

*Effect of denial of motion.* The denial of a motion to alter and amend findings is equivalent to a finding negating the facts requested to be found

29. Cal.—Sears v. Rule, 163 P.2d 443.

27 Cal.2d 131, certiorari denied 66 S.Ct. 1022, 328 U.S. 843, 90 L.Ed. 1617—Mather v. Mather, 140 P.2d 808, 22 Cal.2d 713.

D.C.—Rice v. Simmons, Mun.App., 53 A.2d 587.

Ind.—Jones v. Mayne, 55 N.E. 956, 154 Ind. 400—Louisa Coleman Che Mah Dunn v. Starke County Trust & Savings Bank, 184 N.E. 424, 98 Ind.App. 86, followed in Coleman Che Mah Dunn v. Smith, 184 N.E. 426, 98 Ind.App. 698.

Iowa.—Denny v. Jacobson, 55 N.W.2d 568, 243 Iowa 1383.

Mass.—Wolfe v. Laundre, 96 N.E.2d 855, 327 Mass. 47.

N.D.—Belakjon v. Hilstad, 35 N.W.2d 637, 76 N.D. 298.

64 C.J. p 1263 note 17.

Amendment of jury verdict to include findings by court see supra § 517.

Objections and exceptions see infra §§ 652-657.

Power of federal courts to amend findings see Federal Courts § 140.

#### Alteration held not shown

Ruling of trial judge that plaintiff could not recover on quantum meruit unless he acted in good faith or substantially performed contract did not alter the judge's definite and conclusive finding that unsigned agreement was not adopted as oral contract between the parties.—Oman v. Vickery, 62 N.E.2d 112, 318 Mass. 780.

#### Reentering finding

Where a trial judge has made findings of fact before discovering a mis-

laid request for a ruling of law, he can adopt the procedure of revoking his original finding and entering the same finding again at the time of his ruling on the mislaid request.—Society of Jesus of New England v. Josefson, 29 N.E.2d 554, 307 Mass. 608.

#### Findings of court

Findings in final form when judgment is rendered are findings of court, regardless of whether they were changed.—Louisa Coleman Che Mah Dunn v. Starke County Trust & Savings Bank, 184 N.E. 424, 98 Ind.App. 86, followed in Coleman Che Mah Dunn v. Smith, 184 N.E. 426, 98 Ind.App. 698.

#### Merits of controversy

Court has power to correct errors in its fact findings, even as to merits, at any time before judgment, where it has been imposed on.—N. E. Redlon Co. v. Franklin Square Corp., 23 A.2d 370, 91 N.H. 502.

30. Ind.—Tri-City Electric Service Co. v. Jarvis, 185 N.E. 136, 206 Ind. 5.

64 C.J. p 1264 note 28 [c] (1), (2).

#### Condition

Trial court need not withdraw findings and conclusion of law as condition precedent to exercise of power to amend original findings.—Tri-City Electric Service Co. v. Jarvis, supra.

31. Tex.—Wagner v. Riske, 178 S.W. 2d 117, 142 Tex. 337.

32. Minn.—State Sash, etc., Mfg. Co. v. Adams, 50 N.W. 360, 47 Minn. 389.

33. S.D.—Burgi v. Rudgers, 108 N.W. 253, 20 S.D. 846.

34. Minn.—Norton v. Metropolitan L. Ins. Co., 77 N.W. 539, 74 Minn. 484.

64 C.J. p 1263 note 20.

35. Ariz.—Filler v. Maricopa County, 198 P.2d 131, 68 Ariz. 11.

36. Ill.—Beard v. American Type Founders Co., 123 Ill.App. 50.

37. Conn.—Berry v. Hartford Nat. Bank & Trust Co., 7 A.2d 847, 125 Conn. 615.

38. Minn.—Schmitt v. Schmitt, 16 N.W. 543, 31 Minn. 105.

Tex.—Matula v. Lane, 55 S.W. 504, 22 Tex.Civ.App. 391.

39. N.Y.—Round Lake Assoc. v. Kellogg, 11 N.Y.S. 859, 58 Hun 605.

40. Cal.—City of Los Angeles v. Blondeau, 15 P.2d 553, 127 Cal. App. 136.

#### Inadvertent notations

The court has power to correct inadvertent notations it made on proposed findings submitted so as to conform them to its original intention and determination as well as its action on a different set of findings.—People v. Foote, 273 N.Y.S. 567, 242 App.Div. 162, motion denied 5 N.E.2d 352, 272 N.Y. 622, appeal dismissed 7 N.E.2d 728, 273 N.Y. 629 and 7 N.E.2d 729, 273 N.Y. 630, certiorari denied Foote v. People of State of New York, 58 S.Ct. 867, 302 U.S. 760, 82 L.Ed. 538.

41. Cal.—Boyd v. Superior Court in and for Los Angeles County, 279 P. 672, 100 Cal.App. 32.

in such motion,<sup>42</sup> and after denial of the motion it may not successfully be claimed that the court failed to pass on the issues of fact involved therein.<sup>43</sup> The rule, however, is inapplicable where both parties move for a specific finding on an issue, opposite in effect, and both motions are denied, since the application of the rule under such circumstances would leave inconsistent findings.<sup>44</sup>

*By successor or other judge.* It has been held that findings may be corrected by the successor of the judge originally making them,<sup>45</sup> or by a judge other than the one who tried the cause;<sup>46</sup> but there is other authority which holds that a trial judge's right to modify, change, or set aside his findings and conclusions resides only in him and is not transferable to his successor in office or any contemporaneous judge of the same court.<sup>47</sup>

*Effect of amendment.* Amended findings control as to any previous conflicting findings, regardless of whether or not the previous findings have been superseded.<sup>48</sup>

*Notice of proposed amendment.* Findings of fact may not be changed in a material manner without notice,<sup>49</sup> although before judgment the court may

change its conclusions of law without notice to the parties litigant.<sup>50</sup>

### b. Grounds

In general, the trial court may amend or correct findings of fact and conclusions of law on the ground that they are defective, incomplete, outside the issues, or not supported by the evidence; and it may properly refuse to amend or correct findings and conclusions supported by the evidence or which are proper and sufficient, or to make amendments or corrections not supported by the evidence, or which are immaterial or outside the issues, or which would make the findings inconsistent.

In general, the amendment or correction of findings of fact and conclusions of law by the trial court rests in its sound discretion.<sup>51</sup> Hence, while the trial court may properly amend or correct its findings of fact and conclusions of law where the evidence is sufficient to support the amendment made,<sup>52</sup> and should amend them as far as necessary to make them conform to the facts admitted,<sup>53</sup> provided the nonconformity is material,<sup>54</sup> or where they fail to follow the evidence and do not speak the truth to the detriment of the party complaining,<sup>55</sup> generally speaking, it is required to amend or strike them only when they are not supported

42. Minn.—Nelson v. Dorr, 58 N.W. 2d 876—Aldorf v. Svoboda, 57 N.W. 2d 824—Johnson v. Johnson, 27 N.W. 2d 289, 223 Minn. 420—Motzko v. Motzko, 22 N.W. 2d 920, 222 Minn. 36—Droegge v. Brockmeyer, 7 N.W. 2d 538, 214 Minn. 182—Herman v. Kelehan, 3 N.W. 2d 587, 212 Minn. 349—Martens v. Martens, 1 N.W. 2d 356, 211 Minn. 389—Lafayette Club v. Roberts, 268 N.W. 802, 196 Minn. 605—Smith v. Benefit Ass'n of Ry. Employees, 244 N.W. 817, 187 Minn. 202—Sheffield v. Clifford, 243 N.W. 129, 188 Minn. 300—National Surety Co. v. Wittich, 242 N.W. 545, 186 Minn. 93—Buro v. Morse, 237 N.W. 186, 183 Minn. 513—Seitz v. Union Brass & Metal Mfg. Co., 189 N.W. 588, 152 Minn. 460, 27 A.L.R. 293—In re Malchow's Estate, 172 N.W. 915, 143 Minn. 53.

64 C.J. p 1267 note 95.

43. Minn.—Johnson v. Johnson, 27 N.W. 2d 289, 223 Minn. 420—Martens v. Martens, 1 N.W. 2d 356, 211 Minn. 389.

64 C.J. p 1267 note 96.

44. Minn.—Nelson v. Dorr, 58 N.W. 2d 876.

45. S.D.—Schmidtall v. Walshtown Tp., 129 N.W. 1042, 27 S.D. 103. 64 C.J. p 1267 note 97.

46. Cal.—Mather v. Mather, 140 P. 2d 808, 22 Cal. 2d 713.

Iowa.—Denny v. Jacobson, 55 N.W. 2d 568, 243 Iowa 1383.

47. Minn.—Bahnsen v. Gilbert, 56 N.W. 1117, 55 Minn. 334. Wash.—State ex rel. Bloom v. Superior Court in and for King County, 18 P. 2d 510, 171 Wash. 536.

48. Tex.—Thompson v. San Pat Vegetable Co., Civ.App., 207 S.W. 2d 195, refused no reversible error.

#### Entirely new set of findings

Where the trial court filed an entirely new set of findings covering the whole case, which were complete in themselves and inconsistent with findings previously filed, trial judge would be regarded as having intended that amended findings should supersede original findings and should control in disposition of the case.—Waters v. Yockey, 192 S.W. 2d 769, 144 Tex. 592, answer to certified question conformed to, Civ.App., 193 S.W. 2d 575.

49. Cal.—Wunderlin v. Cadogan, 17 P. 713, 75 Cal. 617. 64 C.J. p 1267 note 98.

50. Cal.—Hume v. Lindholm, 258 P. 1003, 85 Cal.App. 80. 64 C.J. p 1267 note 94.

51. N.Y.—Tyng v. Halsted, 74 N.Y. 604.

*Motion to set aside findings of the court is addressed to the discretion of the trial judge.*—Pocahontas Coal

& Coke Co. v. Cook, C.C.A.W.Va., 74 F. 2d 878.

#### Limits of discretion

In action tried without jury, trial judge is not limited, in exercise of sound judicial discretion, in setting aside findings.—Mencl v. Orton Crane & Shovel Co., 139 N.E. 339, 285 Mass. 499.

#### Opening statement

Denial of motion to strike from findings in receivership proceeding statement that by consent of parties the opening was considered as if its contents had been received in evidence was held proper, where use of opening by court in making findings was in accordance with understanding between court and parties at hearing.—New England Theatres v. Olympia Theatres, 192 N.E. 93, 287 Mass. 485, certiorari denied E. M. Loew's, Inc., v. New England Theatres, 55 S.Ct. 509, 294 U.S. 713, 79 L. Ed. 1247.

52. Cal.—Walker v. Etcheverry, 109 P. 2d 385, 42 Cal.App. 2d 472. Minn.—Moriarty v. Maloney, 141 N.W. 186, 121 Minn. 285.

53. Or.—Boothe v. Farmers', etc., Bank, 98 P. 509, 101 P. 390, 53 Or. 578.

54. Conn.—Waterbury Clock Co. v. Irlon, 41 A. 827, 71 Conn. 254. 64 C.J. p 1265 note 56.

55. Wash.—City of Tacoma v. Nyman, 281 P. 484, 154 Wash. 154.

by the evidence<sup>66</sup> or are outside the issues litigated.<sup>67</sup>

Findings of fact and conclusions of law may be amended or corrected on the ground that they are defective or incomplete,<sup>68</sup> unresponsive to the issues,<sup>69</sup> inconsistent,<sup>60</sup> or contain a clerical error.<sup>61</sup> Also they may be stricken on the ground that they are inconsistent or ambiguous and unnecessary,<sup>62</sup> irrelevant<sup>63</sup> or immaterial<sup>64</sup> to the issues, or relate to issues which were eliminated by the statements of counsel on both sides;<sup>65</sup> and findings should be stricken where they relate to matters concerning which the court had stated that it would not rule,<sup>66</sup> or which, because they were entered during vacation, are void and at least constructively fraudulent as to plaintiff, as where they cut off his statutory right to dismiss his cause of action before the court announced its finding, caused his motion for a new trial to come too late, and cut off his right of appeal

from an adverse ruling on that motion.<sup>67</sup>

On the other hand, the court may properly refuse to amend or strike immaterial findings,<sup>68</sup> or findings supported by the evidence,<sup>69</sup> even though they are conflicting;<sup>70</sup> and it may properly refuse amendment or correction where the decisive findings of fact are sustained by the evidence and support the conclusions of law,<sup>71</sup> where the findings and conclusions already announced are proper and sufficient,<sup>72</sup> or where the findings fairly present all facts for the proper presentation of every question which complainant could urge on appeal.<sup>73</sup>

The court may refuse a requested amendment or correction which appears in substance in another finding,<sup>74</sup> which relates to an immaterial matter<sup>75</sup> or to a matter not within the issues raised at the trial,<sup>76</sup> which is not supported by the evidence<sup>77</sup> or record,<sup>78</sup> which is supported only by conflicting evidence<sup>79</sup> or is predicated on the mere statement

56. Minn.—Kehrer v. Seeman, 235 N. W. 386, 182 Minn. 596.

57. Minn.—Kehrer v. Seeman, supra.

58. Mont.—Marias River Syndicate v. Big West Oil Co., 38 P.2d 599, 98 Mont. 254.

59. Mont.—Marias River Syndicate v. Big West Oil Co., supra.

60. Mo.—Borders v. Niemoeller, App., 239 S.W.2d 555.

61. Cal.—Williams v. Koenig, 28 P. 2d 351, 219 Cal. 556—Beverly Finance Co. v. Superior Court in and for Los Angeles County, 246 P.2d 142, 112 Cal.App.2d 381—Boylan v. Marine, 231 P.2d 92, 104 Cal. App.2d 821.

62. Conn.—Doberrentz v. Gregory, 26 A.2d 475, 129 Conn. 57.

63. Iowa.—Denny v. Jacobson, 55 N. W.2d 568, 243 Iowa 1383.

#### Questions not at issue

N.Y.—Judy's Confections v. A. & A. Const. Corp., 88 N.Y.S.2d 396, 275 App.Div. 674.

64. N.Y.—Judy's Confections v. A. & A. Const. Corp., supra.

65. Cal.—San Juan Gold Co. v. San Juan Ridge Mnt. Water Ass'n, 93 P.2d 582, 34 Cal.App.2d 159.

66. Cal.—Barker v. Phillips, 289 P. 905, 107 Cal.App. 92.

67. Ind.—Isaacs v. Fletcher American Nat. Bank, 185 N.E. 154, 98 Ind.App. 111.

68. Conn.—Whalen v. Gleeson, 71 A. 908, 81 Conn. 638.

69. Kan.—Doman Hunting & Fishing Ass'n v. Doman, 155 P.2d 438, 159 Kan. 439—First Nat. Bank v. Cottingham, 65 P.2d 293, 145 Kan. 330. Minn.—Chamberlin v. Twin Ports De-

velopment Co., 261 N.W. 577, 195 Minn. 58.

Vt.—Wetmore v. B. W. Hooker Co., 18 A.2d 181, 111 Vt. 519. 64 C.J. p 1265 note 64.

70. Kan.—Doman Hunting & Fishing Ass'n v. Doman, 155 P.2d 438, 159 Kan. 439.

Minn.—Chamberlin v. Twin Ports Development Co., 261 N.W. 577, 195 Minn. 58.

64 C.J. p 1265 note 65.

71. Kan.—First Nat. Bank v. Cottingham, 65 P.2d 293, 145 Kan. 330. Minn.—Buro v. Morse, 237 N.W. 186, 183 Minn. 518—Jarvalse Academy of Beauty Culture v. St. Paul Institute of Cosmetology, 237 N.W. 183, 183 Minn. 507.

Nev.—Las Vegas Mach. & Engineering Works v. Roemisch, 213 P.2d 319, 67 Nev. 1.

72. Colo.—Eitel v. Alford, 257 P.2d 955, 122 Colo. 341.

73. Conn.—Appeal of James, 78 A. 420, 83 Conn. 702.

64 C.J. p 1265 note 63.

74. Conn.—Drouin v. Chelsea Silk Co., 187 A. 904, 122 Conn. 129—Hartford-Connecticut Trust Co. v. Cambell, 116 A. 186, 97 Conn. 251.

75. Conn.—Drouin v. Chelsea Silk Co., 187 A. 904, 122 Conn. 129.

Vt.—Wetmore v. B. W. Hooker Co., 18 A.2d 181, 111 Vt. 519.

64 C.J. p 1265 note 67.

76. Minn.—Sorenson v. School Dist. No. 28 of Otter Tail County, 141 N.W. 1105, 122 Minn. 59.

#### After determination of all issues

After decision responsive to all contentions of parties, it is ordinarily too late for counsel to raise new fact issue by motion for amended findings.

—Allen v. Central Motors, 283 N.W. 490, 204 Minn. 295.

#### Applicability of statute

Where action on trial was by consent limited to question of applicability of a single subdivision of a statute, and court made findings pursuant to such limitation, defeated party could not resort to another and additional subdivision of statute by motion for amended findings.—American Sur. Co. of N. Y. v. Greenwald, 25 N.W.2d 681, 223 Minn. 37.

#### Implied warranty

Where defense of breach of implied warranty was neither pleaded nor litigated by consent, defendants could not raise it for first time by motion for amended findings.—Allen v. Central Motors, 283 N.W. 490, 204 Minn. 295.

#### Presentment and dishonor

Indorser's right to have presentment of notes to maker and notice of dishonor could not be raised for first time on motion for amended findings, since, if indorser had made timely complaint, holder might have amended pleadings and proved presentment and notice.—Allen v. Central Motors, supra.

77. Conn.—Frederick Raff Co. v. Murphy, 147 A. 709, 110 Conn. 234. Minn.—Yess v. Ferch, 15 N.W.2d 134, 218 Minn. 22.

Vt.—Wetmore v. B. W. Hooker Co., 18 A.2d 181, 111 Vt. 519.

78. Conn.—Lesser v. Kline, 127 A. 279, 101 Conn. 740.

79. Conn.—Drouin v. Chelsea Silk Co., 187 A. 904, 122 Conn. 129—Smith v. Welas, 121 A. 828, 99 Conn. 262.

Minn.—Chamberlin v. Twin Ports Development Co., 261 N.W. 577, 195 Minn. 58.

that the witnesses testified in accordance with the request,<sup>80</sup> which embodies matters merely evidential,<sup>81</sup> which is in direct contradiction of the former contention of the party seeking it,<sup>82</sup> or which would make the findings at variance with the decision of the court<sup>83</sup> or would completely destroy the decision on the merits.<sup>84</sup> Original conclusions which are consistent with the findings should not be amended or changed so as to be contrary to the original findings where the findings are not changed.<sup>85</sup>

*Failure of findings made to follow findings proposed* is not ground for complaint.<sup>86</sup>

### § 639. — Time of Amendment

- a. In general
- b. After judgment
- c. During or after term

#### a. In General

As a general rule a trial court may amend, correct, modify, or otherwise change its findings of fact and conclusions of law before entry of judgment or decree.

Generally speaking, a trial court may amend, correct, modify, or otherwise change its findings and conclusions before entry of judgment or decree.<sup>87</sup>

as in the case of additional findings, which may be made during the term and before entry of final judgment, as discussed infra § 643. Under the practice in some jurisdictions, however, it has been held that the trial court has power to modify or amend its findings until the signing thereof,<sup>88</sup> and that the trial justice cannot review or change his conclusions of law and fact after the docket entry thereof has been made.<sup>89</sup> It has also been held that the power of the trial judge to amend or change the findings exists until the judge has made a formal decision or finding which has been entered in the minutes and docket of the court,<sup>90</sup> but once the decision becomes a formal one and is formally entered in the records of the court, the judge may not thereafter amend or change the findings.<sup>91</sup> Under some rules of procedure the trial court is required to file amended findings within a specified time after a party has made timely and proper request therefor.<sup>92</sup>

*Within time for motion for new trial.* There is authority holding that the court may amend findings and conclusions on or while a motion for new trial is pending,<sup>93</sup> or after judgment and on motion for new trial,<sup>94</sup> and that it may do so without

80. Vt.—Wetmore v. B. W. Hooker Co., 18 A.2d 181, 111 Vt. 519.

81. Minn.—Fairfield v. Hart, 102 N. W. 641, 139 Mich. 136.

64 C.J. p 1266 note 72.

82. Minn.—Sorenson v. School Dist. No. 28 of Otter Tail County, 141 N.W. 1105, 122 Minn. 59.

83. Conn.—Farley-Harvey Co. v. Madden, 142 A. 469, 108 Conn. 93.

84. N.Y.—Brennan v. Delaware, L. & W. R. Co., 92 N.Y.S.2d 512, appeal dismissed 105 N.Y.S.2d 368, 278 App.Div. 886, affirmed 103 N.E.2d 532, 303 N.Y. 411, motion granted 105 N.E.2d 492, 303 N.Y. 907, certiorari denied 72 S.Ct. 1073, 343 U.S. 977, 96 L.Ed. 1369, and Switchmen's Union of North America v. Delaware, L. & W. R. Co., 72 S.Ct. 1073, 343 U.S. 977, 96 L.Ed. 1369.

85. Cal.—Howe v. Deck, 116 P.2d 155, 46 Cal.App.2d 569.

86. Cal.—City of Los Angeles v. Blondeau, 15 P.2d 553, 127 Cal.App. 136.

64 C.J. p 1266 note 74.

87. Cal.—Engleman v. Green, 270 P. 2d 127, 125 Cal.App.2d Supp. 882.

Ind.—Louisa Coleman Che Mah Dunn v. Starke County Trust & Savings Bank, 184 N.E. 424, 98 Ind.App. 86, followed in Coleman Che Mah Dunn v. Smith, 184 N.E. 426, 98 Ind.App. 698.

Mass.—Wolfe v. Laundre, 96 N.E.2d 855, 327 Mass. 47.

N.H.—N. E. Redlon Co. v. Franklin Square Corp., 23 A.2d 370, 91 N.H. 502.

64 C.J. p 1264 note 28.

Time of application for amendment see infra § 641 b.

#### Change in judgment to be entered

Where findings are filed which constitute the rendition of a judgment, the court retains power to change the conclusions of law so as to point to a different judgment, and to enter a judgment different from that first announced, and such power continues until the entry of the judgment.—Mather v. Mather, 140 P.2d 808, 22 Cal.2d 713—Brownell v. Superior Court of Yolo County, 109 P. 91, 157 Cal. 703.

*Special findings and conclusions of law* may be amended at any time before final judgment and during the period within which a bill of exceptions containing the evidence may be filed.—Tri-City Electric Service Co. v. Jarvis, 185 N.E. 136, 206 Ind. 5—Whitcomb v. Stringer, 66 N.E. 443, 160 Ind. 82—Jones v. Mayne, 55 N.E. 956, 154 Ind. 400—Thompson v. Connecticut Mut. Life Ins. Co., 38 N.E. 796, 139 Ind. 326—Dowell v. Talbot Paving Co., 38 N.E. 389, 138 Ind. 675—64 C.J. p 1264 note 28 [c] (2).

88. N.Y.—R. A. Freed & Co. v. Doe, 283 N.Y.S. 186.

89. R.I.—Everett J. Horton & Co. v. Grinnell, 199 A. 315, 60 R.I. 457.

90. D.C.—Rice v. Simmons, Mun. App. 53 A.2d 587.

#### Complete authority

Until the trial judge makes a formal decision or finding which is entered in the minutes and docket of the court, he has complete authority to change or amend any informal or tentative decisions he may have made during the progress of the trial, even to the extent of reversing them.—Rice v. Simmons, supra.

91. D.C.—Rice v. Simmons, supra.

92. Tex.—Wagner v. Rlake, 178 S.W. 2d 117, 142 Tex. 337.

93. Cal.—Sears v. Rule, 163 P.2d 443, 27 Cal.2d 181, certiorari denied 66 S.Ct. 1022, 328 U.S. 843, 90 L.Ed. 1617—Walker v. Etcheverry, 109 P. 2d 385, 42 Cal.App.2d 472.

Mo.—Borders v. Niemoeller, App., 239 S.W.2d 555.

64 C.J. p 1265 note 47.

Authority of court, under statute, to modify the findings in ruling on motion for a new trial see New Trial § 211 b.

Right to set aside erroneous findings of fact on a motion for a new trial see New Trial § 64 a.

94. Cal.—Spier v. Lang, 53 P.2d 138, 4 Cal.2d 711—Price v. Schroeder, 96 P.2d 949, 35 Cal.App.2d 700—Bureau of Welfare, California Teachers' Ass'n, Southern Section v. Drapeau, 88 P.2d 998, 21 Cal.App. 2d 138—Allen v. Blair, 56 P.2d 544, 13 Cal.App.2d 227—Veterans' Wel-

granting a new trial,<sup>95</sup> or reopening the case for additional testimony.<sup>96</sup> Also, it has been held that the trial court may amend its findings and conclusions at any time during which a motion for a new trial may rightfully be filed,<sup>97</sup> but not thereafter,<sup>98</sup> or after the expiration of the period within which a trial court can act on a motion for a new trial.<sup>99</sup>

*After expiration of time for filing findings.* Where the time for filing findings has expired, as discussed infra § 645, it has been held too late for the court to amend its findings by supplying omissions.<sup>1</sup>

*Where case appealed.* It has been held under the local practice in some jurisdictions that the court may amend its findings of fact and conclusions of law at any time before the cause is removed from the court by appeal,<sup>2</sup> and in others, that they may be amended at any time before argument of the appeal.<sup>3</sup>

### b. After Judgment

Subject to statute or rule of court providing otherwise, a trial court, as a general rule, may not substantially amend, correct, modify, or otherwise change its

findings after entry of judgment or decree, but it may correct clerical errors or inadvertent mistakes therein.

Subject to statute or rule of court providing otherwise,<sup>4</sup> a trial court, as a general rule, may not substantially amend, correct, modify, or otherwise change its findings after entry of judgment or decree,<sup>5</sup> as by adding, as discussed infra § 643, striking,<sup>6</sup> or substituting<sup>7</sup> findings, and the only remedy is by motion for new trial<sup>8</sup> or by appeal.<sup>9</sup>

The power of the trial court to remedy clerical errors in its findings is inherent and is not abrogated or suspended by the pendency of an appeal or lost through lapse of time.<sup>10</sup> Even after judgment, the trial court may correct a clerical error<sup>11</sup> or inadvertent mistake,<sup>12</sup> or supply an omission,<sup>13</sup> or make such amendments in the findings as are not inconsistent with, and do not affect the validity of, any findings or conclusions on which the judgment rests,<sup>14</sup> or correct purported findings to make them conform to the real findings made.<sup>15</sup> Merely calling an error clerical, however, will not give the court power to correct a judicial error after judgment;<sup>16</sup> and a judicial error is not subject to correction after

fare Board v. Burt, 41 P.2d 587, 4 Cal.App.2d 659.

Power to modify findings on motion for new trial exercisable only in conjunction with a ruling on a motion for a new trial see New Trial § 211 b.

95. Cal.—Spier v. Lang, 53 P.2d 138, 4 Cal.2d 711—Bureau of Welfare, California Teachers' Ass'n. Southern Section v. Drapeau, 68 P.2d 998, 21 Cal.App.2d 138—Moore v. Levy, 18 P.2d 362, 128 Cal.App. 687.

96. Cal.—Moore v. Levy, 18 P.2d 362, 128 Cal.App. 687.

97. Ind.—Brown v. Powell, 176 N.E. 241, 92 Ind.App. 467—Apple v. Smith, 60 N.E. 456, 26 Ind.App. 659.

98. Ind.—Apple v. Smith, supra.

99. Cal.—Gustafson v. Blunk, 41 P.2d 953, 4 Cal.App.2d 630.

### Filing and signing after period

The signing and filing of the formal documents changing the findings of facts and conclusions of law after the expiration of the period within which the trial court is authorized to act on a motion for a new trial did not make the action of the court too late where the minute order announcing the determination of the court to make the change was within the proper time.—Spier v. Lang, 63 P.2d 138, 4 Cal.2d 711.

1. Tex.—Smith v. Grand High Court of Jericho of Texas, Civ.App., 31 S.W.2d 192.

2. Utah.—Panson v. Pappas, 206 P.2d 1, 59 Utah 571.

64 C.J. p 1265 note 53.

3. Conn.—Botticelli v. Winters, 21 A.2d 381, 128 Conn. 210.

4. Utah.—In re Bundy's Estate, 241 P.2d 462.

### After notice of entry

Under permissive statute the trial court could amend its findings on motion made within ten days after notice of entry of judgment.—Belakjon v. Hilstad, 35 N.W.2d 637, 76 N.D. 298.

5. Cal.—Stanton v. Superior Court within and for Los Angeles County, 261 P. 1001, 202 Cal. 478—Jones v. Clover, 74 P.2d 517, 24 Cal.App.2d 210.

N.Y.—Brennan v. Delaware, L. & W. R. Co., 92 N.Y.S.2d 512, appeal dismissed 105 N.Y.S.2d 368, 278 App.Div. 886, affirmed 103 N.E.2d 532, 303 N.Y. 411, motion granted 105 N.E.2d 492, 303 N.Y. 907, certiorari denied 72 S.Ct. 1073, 343 U.S. 877, 96 L.Ed. 1369, and Switchmen's Union of North America v. Delaware, L. & W. R. Co., 72 S.Ct. 1073, 343 U.S. 977, 96 L.Ed. 1369.

64 C.J. p 1264 note 28.

### After decision

After the rendition of a decision no substantial change can be made by the trial judge in his decision, or in the findings of fact and conclusions of law directing judgment.—Hydraulic Power Co. of Niagara Falls v. Pettebone-Cataract Paper Co., 186

N.Y.S. 1, 194 App.Div. 819—President and Directors of Manhattan Co. v. Erlandsen, 36 N.Y.S.2d 136, affirmed 43 N.Y.S.2d 639, 266 App.Div. 883, appeal denied 44 N.Y.S.2d 471, 266 App.Div. 924.

6. N.Y.—Progressive Construction & Leasing Co. v. Sayre, 181 N.Y.S. 218, 174 App.Div. 456.

7. Idaho.—Lawrence v. Corbeille, 154 P. 495, 28 Idaho 329.

8. Cal.—Jones v. Clover, 74 P.2d 517, 24 Cal.App.2d 210.

64 C.J. p 1264 note 32.

9. Mont.—Merhar v. Powers, 236 P. 1076, 78 Mont. 451.

N.Y.—J. H. & S. Theatres v. Fay, 257 N.Y.S. 64, 65, 235 App.Div. 820.

10. Cal.—Boylan v. Marline, 231 P.2d 92, 104 Cal.App.2d 321.

Power of court to amend court records see Courts § 232.

11. Cal.—Williams v. Koenig, 28 P.2d 351, 219 Cal. 656—Jones v. Clover, 74 P.2d 517, 24 Cal.App.2d 210.

64 C.J. p 1264 note 34.

12. N.Y.—Swing v. Wanamaker, 124 N.Y.S. 231, 189 App.Div. 627.

64 C.J. p 1264 note 35.

13. Minn.—Rockey v. Meyers, 158 N.W. 787, 134 Minn. 468.

14. N.Y.—Judy's Confections v. A. & A. Const. Corp., 86 N.Y.S.2d 396, 275 App.Div. 674.

15. S.D.—Schmidtgal v. Walshtown Tp., 129 N.W. 1042, 27 S.D. 103.

16. Cal.—McKannay v. McKannay, 220 P. 218, 68 Cal.App. 709.



judgment,<sup>17</sup> even though it was made inadvertent-ly.<sup>18</sup> In an action for an accounting, an amendment, after judgment and on motion for new trial, of the findings listing the specific items of the account has been held not prejudicial.<sup>19</sup>

*After interlocutory judgment.* Findings or conclusions made at the time of the entry of an interlocutory judgment are subject to change or modification at the time of entry of the final judgment.<sup>20</sup>

### c. During or after Term

Subject to the rules with respect to amendments after judgment and in the absence of a statute or rule of court providing otherwise, the trial court generally may amend, modify, set aside, or otherwise change its findings at any time during the term at which they were rendered, but not, except as to clerical errors or omissions, at a subsequent term.

Subject to the rules with respect to amendment after judgment, as discussed supra subdivision b of this section, and in the absence of a statute or rule of court providing otherwise, the trial court may amend, modify, set aside, or otherwise change its findings at any time during the term at which they were rendered.<sup>21</sup> The power of a court to change its findings at a subsequent term has been denied,<sup>22</sup> although, where an amendment relates merely to correction of obvious mistakes or omissions, the court may amend findings and conclusions after expiration of the term.<sup>23</sup>

*In vacation.* After adjournment of the term and in vacation the court may not revise or alter its findings,<sup>24</sup> and statutes authorizing entry of a judgment in vacation, discussed in Judgments § 114, do not authorize the court to change its findings in vacation.<sup>25</sup>

## § 640. — Method of Seeking Amendment or Correction

Either party may request the amendment and correction of findings by the court, but in so doing the method, if any, prescribed by statute should be followed.

The amendment and correction of findings by the court may be made at the suggestion of either party.<sup>26</sup> Where the method of seeking amendment or correction of findings is prescribed by statute, such method is ordinarily deemed exclusive.<sup>27</sup> Under some rules of procedure a request for amended findings should be in writing,<sup>28</sup> it should be presented to the trial court within a specified number of days after the original findings and conclusions have been filed,<sup>29</sup> and it should specify the amended findings which the party making the request desires the trial court to make and file.<sup>30</sup> The method of attempting to correct a finding by substituting the draft finding for a major part of the finding as made has been disapproved.<sup>31</sup>

*On motion to vacate judgment* and substitute a different judgment because of an incorrect or erroneous conclusion of law not supported by the findings of fact, the court may not change its findings of fact.<sup>32</sup>

## § 641. — Motions to Amend, Correct, or Otherwise Change

- a. In general
- b. Time for making
- c. Hearing

### a. In General

A motion to amend, correct, or otherwise change the findings and conclusions of the court, which is insufficient in its form and requisites, may be denied.

A motion to amend, correct, or otherwise change the findings and conclusions of the court, which is insufficient in its form and requisites, may be denied,<sup>33</sup>

17. Cal.—Beverly Finance Co. v. Superior Court in and for Los Angeles County, 246 P.2d 142, 112 Cal.App.2d 381.

18. Cal.—McKannay v. McKannay, 230 P. 218, 68 Cal.App. 709.

19. Cal.—Sears v. Rule, 163 P.2d 448, 27 Cal.2d 131, certiorari denied 68 S.Ct. 1022, 328 U.S. 843, 90 L.Ed. 1617.

20. Cal.—David v. Goodman, 250 P. 2d 704, 114 Cal.App.2d 571.

21. Colo.—Graybill v. Cornelius, 246 P. 1029, 79 Colo. 498, 64 C.J. p 1264 note 41.

22. Utah.—Holm v. Davis, 125 P. 403, 41 Utah 200, 44 L.R.A.N.S., 89.

64 C.J. p 1265 note 42.

23. Ind.—Chicago, I. & S. R. Co. v. Taylor, 108 N.E. 1, 183 Ind. 240, 64 C.J. p 1265 note 43.

24. Colo.—Wilson v. Collin, 102 P. 21, 45 Colo. 412, Vt.—Barnes v. Albert, 88 A. 815, 87 Vt. 251.

25. Colo.—Wilson v. Collin, 102 P. 21, 45 Colo. 412.

26. Ind.—Jones v. Mayne, 55 N.E. 956, 154 Ind. 400. Motion for new trial as proper remedy see New Trial § 64 a.

27. Conn.—Gaucso v. Levy, 93 A. 136, 89 Conn. 169.

64 C.J. p 1266 note 76. Methods of raising objections see infra § 654.

28. Tex.—Wagner v. Riske, 178 S. W.2d 117, 142 Tex. 337.

29. Tex.—Wagner v. Riske, supra—Hillert v. Melton, Civ.App., 64 S. W.2d 991, error refused.

30. Tex.—Wagner v. Riske, 178 S.W. 2d 117, 142 Tex. 337.

31. Conn.—Eastern Sportswear Co. v. S. Augstein & Co., 106 A.2d 476, 141 Conn. 420—K. B. Noble Co. v. Popielarczyk, 8 A.2d 33, 125 Conn. 699.

32. Cal.—Dahlberg v. Girsch, 107 P. 616, 187 Cal. 324—Jones v. Clover, 74 P.2d 517, 24 Cal.App.2d 210.

33. Mich.—Wisconsin Chair Co. v. Barton, 155 N.W. 405, 189 Mich. 548, 64 C.J. p 1266 note 79.

as where the motion or request is not accompanied by a required transcript of testimony supporting it,<sup>34</sup> or where the party seeking an amendment fails to submit his proposed amendments as required by rules of court.<sup>35</sup> It has been held that a motion to modify the findings by striking therefrom certain expressions, made at a term subsequent to that at which the judgment was rendered, is ineffective where not based on anything in the record or any note or memorandum by which the record may be corrected.<sup>36</sup>

*Motion dual in form* is properly overruled if either part thereof should have been denied.<sup>37</sup>

### b. Time for Making

Motions for the amendment and correction of findings must be timely and are properly denied where made too late.

An application for amendment of findings is properly denied where made too late.<sup>38</sup> Subject to statute or rule of court providing otherwise,<sup>39</sup> after entry of judgment a motion will not lie to amend or change findings of fact,<sup>40</sup> complainant's remedy at that time being by motion for a new trial,<sup>41</sup> or for an order relieving him of any default in submitting a request for findings and conclusions of law;<sup>42</sup> and a motion to amend findings after judgment is not authorized by statutes permitting motions to

vacate judgments<sup>43</sup> or by statutes authorizing motions to substitute a judgment that should have been given as matter of law on the findings made where the judgment already given is an incorrect conclusion from such findings.<sup>44</sup>

### c. Hearing

On a motion or other application to amend or correct findings, the court may consider the correction requested as a whole and any satisfactory evidence thereon.

On a motion or other application to amend or correct findings, the court may consider the correction requested as a whole,<sup>45</sup> and may consider any satisfactory evidence.<sup>46</sup> The court is not required to act singly on each of the proposed changes or modifications,<sup>47</sup> or to state any reason for its ruling thereon.<sup>48</sup> The court may decline to adopt any proposed change or modification of the findings by simply denying the motion therefor.<sup>49</sup>

## § 642. — Amendment by Court Sua Sponte

In a proper case the trial court may amend, correct, or otherwise change its findings of fact and conclusions of law on its own motion.

In a proper case the court may amend, correct, or otherwise change its findings and conclusions on its own motion.<sup>50</sup>

Motion to amend, correct, or otherwise change findings and conclusions of the court as a method of objecting to defective findings and conclusions see *infra* § 654.

*Similar to motion for new trial*  
Colo.—Eitel v. Alford, 257 P.2d 955, 127 Colo. 341.

### Motion construed

Motion filed by defendant in action to recover balance due under contract though designated as a motion for new trial, was held in effect a request that finding for plaintiff be corrected on ground that finding was inconsistent with rulings made by judge and should not have included two items for extras.—Wolfe v. Laundre, 96 N.E.2d 855, 327 Mass. 47.

34. Conn.—Banks v. Warner, 84 A. 325, 85 Conn. 613.

35. Mich.—Wisconsin Chair Co. v. Barton, 155 N.W. 405, 189 Mich. 548.

36. Ind.—Moore v. Moore, 135 N.E. 382, 81 Ind.App. 169.

37. Ind.—Overbay v. Fisher, 115 N.E. 368, 64 Ind.App. 44.

38. Tex.—Martin v. Cage, Civ.App., 135 S.W.2d 151.

64 C.J. p 1266 note 85.  
Time of amendment see *supra* § 639.

### Relief from default

Fact that counsel was out of town and received no notice or copy of findings did not relieve movant for amendment of findings of their default in failing to file such motion within time provided by Rules of Civil Procedure.—In re Bundy's Estate, Utah, 241 P.2d 482.

39. Utah.—In re Bundy's Estate, *supra*.

40. Cal.—Hole v. Takekawa, 132 P. 445, 165 Cal. 372.

N.Y.—Brennan v. Delaware, L. & W. R. Co., 92 N.Y.S.2d 512, appeal dismissed 105 N.Y.S.2d 368, 278 App. Div. 886, affirmed 103 N.E.2d 532, 303 N.Y. 411, motion granted 105 N.E.2d 492, 303 N.Y. 907, certiorari denied 72 S.Ct. 1073, 343 U.S. 977, 96 L.Ed. 1369, and Switchmen's Union of North America v. Delaware L. & W. R. Co., 72 S.Ct. 1073, 343 U.S. 977, 96 L.Ed. 1369.

41. Cal.—Dahlberg v. Girsch, 107 P. 616, 157 Cal. 324.

64 C.J. p 1266 note 87.

42. N.Y.—Brennan v. Delaware, L. & W. R. Co., 92 N.Y.S.2d 512, appeal dismissed 105 N.Y.S.2d 368, 278 App. Div. 886, affirmed 103 N.E.2d 532, 303 N.Y. 411, motion granted 105 N.E.2d 492, 303 N.Y. 907, certiorari denied 72 S.Ct. 1073, 343

U.S. 977, 96 L.Ed. 1369, and Switchmen's Union of North America v. Delaware, L. & W. R. Co., 72 S.Ct. 1073, 343 U.S. 977, 96 L.Ed. 1369.

43. Cal.—Hole v. Takekawa, 132 P. 445, 165 Cal. 372.

44. Cal.—Hole v. Takekawa, *supra*.

45. Conn.—Ematrudo v. Gordon, 123 A. 14, 100 Conn. 163.

64 C.J. p 1266 note 90.

46. S.D.—Schmidtall v. Walshtown Tp., 129 N.W. 1042, 27 S.D. 103.

64 C.J. p 1266 note 91.

47. Colo.—Eitel v. Alford, 257 P.2d 955, 127 Colo. 341.

48. Colo.—Eitel v. Alford, *supra*.

49. Colo.—Eitel v. Alford, *supra*.

50. Ind.—Jones v. Mayne, 55 N.E. 955, 154 Ind. 400—Louisa Coleman Che Mah Dunn v. Starke County Trust & Savings Bank, 184 N.E. 424, 98 Ind.App. 86, followed in Coleman Che Mah Dunn v. Smith, 184 N.E. 426, 98 Ind.App. 698.

64 C.J. p 1266 note 92.

*Constructively fraudulent entry*

Court had power to set aside, of its own motion, void and constructively fraudulent entry during vacation announcing finding and judgment for defendant.—Isaacs v. Fletcher American Nat. Bank, 185 N.E. 154, 98 Ind.App. 111.

§ 643. Additional Findings

- a. In general
- b. Request
- c. When granted or refused

a. In General

In a proper case the trial court has power to make further or additional findings.

In general the trial court has power to supplement its findings with further or additional findings,<sup>51</sup> so that they truly express that which was actually passed on and decided;<sup>52</sup> and in a proper case, where there is compliance with the procedure prescribed by rule, it has been held to be the mandatory duty of the trial court to make and file additional findings.<sup>53</sup> Additional findings, at least those of a substantial nature, must be made within the time allowed therefor by statute or rule, and may not be made subsequent thereto.<sup>54</sup> Ordinarily they may be made during the term and before entry of final judgment,<sup>55</sup> but under the varying statutes or rules of court they cannot be made after judgment,<sup>56</sup> or after the term,<sup>57</sup> or a specified time after adjournment of the court,<sup>58</sup> except to add matter in amplification or explanation of the findings already made.<sup>59</sup> However, it has been held that the court has power to rule on proposed findings of fact and conclusions after the entry of judgment, provided such rulings are not inconsistent with, or do not affect the validity of, findings of fact and conclusions of law on which the judgment rests;<sup>60</sup> and it has also been held that after judgment it may supply omissions in the findings,<sup>61</sup> or make findings on additional points not touched on in the

findings already made, where the additional findings merely state facts disclosed by the record and do not change the original judgment or the original findings.<sup>62</sup> Under some statutes the trial court, in ruling on a motion for new trial, may add to the findings in a proper case,<sup>63</sup> but it cannot do so after the expiration of the period within which a trial court can act on a motion for a new trial.<sup>64</sup>

b. Request

A party who desires additional findings of fact or conclusions of law should make a proper request therefor.

Where the findings of fact and conclusions of law do not pass on all the material issues or are otherwise incomplete, an aggrieved party should request additional findings or conclusions.<sup>65</sup> However, no request is necessary as to additional findings on points on which the court has previously declined to pass,<sup>66</sup> and, where the court has failed to find on material issues, a party is entitled, on request, to additional findings embracing such issues despite his failure to raise the question before the findings were filed.<sup>67</sup> Additional findings of fact and conclusions of law may be obtained in the form of interrogatories and the judge's answers thereto where the trial judge consents to such practice and there is no statute to the contrary;<sup>68</sup> however, it has been held not error to overrule a request for additional findings of fact where the request is in the form of questions practically constituting a cross-examination of the court on findings that have been made.<sup>69</sup> No effort should ever be made to add to a finding any facts which are inconsistent with those found without also seeking to strike the

51. Mont.—O'Keefe v. Routledge, 103 P.2d 307, 110 Mont. 138, 148 A.L.R. 409.

52. Mont.—O'Keefe v. Routledge, *supra*.

53. Tex.—Wagner v. Riske, 178 S.W. 2d 117, 142 Tex. 337.

54. Tex.—Ivey v. Neyland, Civ.App., 11 S.W.2d 608.

Application or request for additional findings is properly denied where made after the time allowed therefor by statute or rule.—Martin v. Cagle, Tex.Civ.App., 135 S.W.2d 151.—Hillert v. Melton, Tex.Civ.App., 64 S.W.2d 991, error refused.

55. Colo.—Graybill v. Cornelius, 246 P. 1029, 79 Colo. 498.

64 C.J. p 1267 note 99.

56. Neb.—Wachsmuth v. Orient Ins. Co., 68 N.W. 935, 49 Neb. 590. 64 C.J. p 1267 note 1.

57. Okl.—First Nat. Bank of Ardmore v. Commissioners of the Land Office, 260 P. 69, 127 Okl. 190.

Vt.—Barnes v. Albert, 88 A. 815, 87 Vt. 251.

58. Tex.—De Bruin v. Santo Domingo Land & Irrigation Co., Civ.App., 194 S.W. 664.

59. Kan.—Walsh v. Hill, 246 P. 997, 121 Kan. 246.

64 C.J. p 1267 note 3.

60. N.Y.—Rosen v. Weinstein, 277 N.Y.S. 278, 243 App.Div. 728.

61. Minn.—Rockey v. Meyers, 158 N.W. 787, 134 Minn. 468.

Readvertent omission  
Wis.—Hansen v. Allen, 93 N.W. 805, 117 Wis. 61.

62. Mont.—O'Keefe v. Routledge, 103 P.2d 307, 110 Mont. 138, 148 A.L.R. 409.

Where original judgment and findings entered at same time

Mont.—O'Keefe v. Routledge, *supra*.

63. Cal.—Walker v. Etcheverry, 109 P.2d 385, 42 Cal.App.2d 472.

Filing of amended complaint

In cause tried without a jury, court

had statutory power to change or add to findings if there was evidence to support such action, irrespective of whether amended complaint was filed.—Walker v. Etcheverry, *supra*.

64. Cal.—Gustafson v. Blunk, 41 P. 2d 953, 4 Cal.App.2d 630.

65. Minn.—Rockey v. Meyers, 158 N.W. 787, 134 Minn. 468.

64 C.J. p 1267 note 5.

Proper remedy for the omission to find on an issue litigated is by application to the court for a finding.—Rockey v. Meyers, *supra*—Warner v. Foote, 41 N.W. 935, 40 Minn. 176.

66. Minn.—State v. Germania Bank, 114 N.W. 651, 103 Minn. 129.

67. Wis.—Wells v. McGeoch, 35 N.W. 769, 71 Wis. 198.

64 C.J. p 1267 note 8.

68. Tex.—Berryman v. Froneberger, Civ.App., 265 S.W. 232.

69. Kan.—Caroline Products Co. v. Mohler, 102 P.2d 1044, 152 Kan. 2.—Jola Oil & Gas Co. v. Strauss, 203 P. 1111, 110 Kan. 608.

latter.<sup>70</sup> Under some statutes or rules of procedure a request for further or additional findings should be in writing,<sup>71</sup> it should be presented to the trial court within a specified number of days after the original findings and conclusions have been filed,<sup>72</sup> and should specify the further additional findings desired.<sup>73</sup>

**Motion or application.** In various jurisdictions the remedy of a party objecting to incompleteness is by motion to the trial court for additional findings,<sup>74</sup> although in a jurisdiction where under the local practice the proper remedy is by motion for new trial, as discussed in New Trial § 64 a, it has been held that motions for additional findings are not authorized,<sup>75</sup> and that it is not error for the court to overrule a motion to add to findings.<sup>76</sup>

**Hearing of motion.** If it defers actual decision thereon until after hearing, the court may properly reduce its tentative conclusion to writing before it has heard the parties on a motion for additional findings.<sup>77</sup>

#### c. When Granted or Refused

The court may make additional findings where there is evidence to support them, they are material to the case, and equivalent findings have not already been made.

The court may make additional findings where

there is evidence to support such action.<sup>78</sup> It has been held improper to refuse to make specific additional findings requested where, or only where, the court has failed to find on a material issue, and where additional findings requested thereon are sustained by undisputed evidence,<sup>79</sup> or by such a preponderance of evidence that a finding to the contrary would not be sustained.<sup>80</sup> Although the party requesting additional findings cannot compel the trial court to find in a particular way, where particular findings are requested, the trial court should respond to the request by finding as it may deem the record to justify.<sup>81</sup>

The court may refuse additional findings of fact and conclusions of law where those already made are proper and adequate, cover the material issues of the case, and fully protect the rights of the parties;<sup>82</sup> where those made are sustained by the evidence and are sufficient to support the conclusions of law;<sup>83</sup> where the additional findings and conclusions are equivalent to those already made,<sup>84</sup> or are sufficiently included in the findings made;<sup>85</sup> where the facts as to which a finding is requested sufficiently appear of record;<sup>86</sup> where the additional findings requested are evidentiary in character<sup>87</sup> and would not change the conclusions of law;<sup>88</sup> where the requested additional findings are imma-

70. Conn.—Saunders v. Saunders, 98 A.2d 815, 140 Conn. 140.

71. Tex.—Wagner v. Riske, 178 S.W. 2d 117, 142 Tex. 337.

72. Tex.—Wagner v. Riske, supra—Hillert v. Melton, Civ.App., 64 S.W. 2d 991, error refused.

73. Tex.—Wagner v. Riske, 178 S.W. 2d 117, 142 Tex. 337.

74. Or.—Umatilla Irr. Co. v. Barnhart, 30 P. 37, 22 Or. 389. 64 C.J. p 1268 note 11.

75. Ind.—Gross Income Tax Division of Ind. v. Surface Combustion Corp., 111 N.E.2d 50, certiorari denied Gross Income Tax Division, Ind., Department of State Revenue, State of Ind. v. Surface Combustion Corp., 74 S.Ct. 51, 346 U.S. 829, 98 L.Ed. 353, and 74 S.Ct. 52, 346 U.S. 829, 98 L.Ed. 354—Wilkinson v. First Nat. Bank, 14 N.E.2d 530, 214 Ind. 513.

76. Ind.—Gross Income Tax Division of Ind. v. Surface Combustion Corp., 111 N.E.2d 50, certiorari denied Gross Income Tax Division, Ind., Department of State Revenue, State of Ind. v. Surface Combustion Corp., 74 S.Ct. 51, 346 U.S. 829, 98 L.Ed. 353, and 74 S.Ct. 52, 346 U.S. 829, 98 L.Ed. 354—Wilkinson v. First Nat. Bank, 14 N.E.2d 530, 214 Ind. 513. 64 C.J. p 1268 note 12.

77. Kan.—Iola Oil & Gas Co. v. Strauss, 203 P. 1111, 110 Kan. 608.

78. Cal.—Walker v. Etcheverry, 109 P.2d 385, 42 Cal.App.2d 472.

79. Minn.—Bahr v. Union Fire Ins. Co., 209 N.W. 490, 167 Minn. 479. 64 C.J. p 1268 note 15.

80. Minn.—Bahr v. Union Fire Ins. Co., supra—Turner v. Fryberger, 108 N.W. 1118, 109 N.W. 229, 99 Minn. 236.

81. Tex.—Wagner v. Riske, 178 S.W. 2d 117, 142 Tex. 337.

82. Colo.—Eitel v. Alford, 257 P.2d 955, 127 Colo. 341.

Kan.—Caroline Products Co. v. Mohler, 102 P.2d 1044, 152 Kan. 2—Goodman v. Malcolm, 58 P. 564, 9 Kan.App. 887.

Tex.—Plaza Co. v. White, Civ.App., 160 S.W.2d 312, error refused—Holmes v. Lawrence, Civ.App., 118 S.W.2d 900, error dismissed.

**Refusal to make further findings held not error**

(1) Generally.—Barreda v. Barreda, Tex.Civ.App., 216 S.W.2d 1009.

(2) It is not improper to refuse to make additional findings, at least to the extent of making fuller findings, where the evidence discloses that, while a few additional facts might have been included in the findings,

the material facts were included and the findings made justify the conclusion reached.—Dyer v. Starluth, 78 P.2d 900, 147 Kan. 767.

(3) Where findings of fact showed amount of compensation to which testamentary trustees were entitled for services performed, refusal to relate in findings all services performed by trustees was not error.—Achenbach v. Baker, 118 P.2d 584, 154 Kan. 252.

83. Minn.—Lafayette Club v. Roberts, 265 N.W. 802, 196 Minn. 605—Kehrer v. Seeman, 235 N.W. 386, 182 Minn. 596—Bahr v. Union Fire Ins. Co., 209 N.W. 490, 167 Minn. 479—Kent v. Costin, 153 N.W. 874, 130 Minn. 450.

84. S.D.—St. Paul, etc., R. Co. v. Howard, 119 N.W. 1032, 23 S.D. 34.

85. Tex.—Austin v. Freestone County, Civ.App., 238 S.W. 870.

86. Conn.—Contino v. Turello, 126 A. 725, 101 Conn. 655.

87. Minn.—Sandstone Spring Water Co. v. Kettle River Co., 142 N.W. 885, 122 Minn. 610.

Tex.—Holmes v. Lawrence, Civ.App., 118 S.W.2d 900, error dismissed.

88. Minn.—Kehrer v. Seeman, 235 N.W. 386, 182 Minn. 596.

terial,<sup>89</sup> or inapplicable to the facts in the case;<sup>90</sup> where there is no evidence in support of the additional finding,<sup>91</sup> or it is supported only by conflicting evidence,<sup>92</sup> or the evidence is not conclusive in favor of the proposed finding;<sup>93</sup> where the additional findings are in conflict, or inconsistent, with evidentially supported findings already made;<sup>94</sup> where the additional findings requested constitute merely a statement of a party's theory of the case at variance with the findings of the court;<sup>95</sup> where the granting of additional findings rests in the discretion of the trial court and no abuse thereof is shown;<sup>96</sup> where the requested additional finding is made without any reason given for its late filing and the draft finding accompanying it consists of allegations taken from the printed record in the original case or are immaterial;<sup>97</sup> or where no prejudicial error results from refusal of additional findings.<sup>98</sup> Additional findings which go beyond the issues made by the pleadings should not be made.<sup>99</sup>

Where a motion to make additional findings is made the court is not required to act singly on each of the proposed additions,<sup>1</sup> or to state any reason for its ruling thereon.<sup>2</sup> It may decline to adopt any proposed additional finding by simply denying the motion therefor,<sup>3</sup> and it has been held that the trial court is justified in failing to reply to a request for additional findings, where it had previously considered and refused a request for the very same findings.<sup>4</sup>

*Effect of denial of motion.* The denial of a motion for an additional finding has been held equivalent to a finding in favor of the other party on the issue.<sup>5</sup>

*Form and sufficiency of additional findings.* Additional findings will be construed in connection with the original findings and are not required to be complete and sufficient in themselves.<sup>6</sup>

## § 644. Venire de Novo

The remedy of venire de novo, although generally applicable only to jury trials, in some jurisdictions is also employed to reach defects in form in findings by the court.

Although technically the remedy of venire de novo is appropriate only to jury trials, there is such a close similarity between verdicts by the jury and findings by the court that the courts in at least one jurisdiction have employed the term in designating the remedy available when the findings of a court are defective in form.<sup>7</sup> The motion reaches defects apparent on the face of the record,<sup>8</sup> and is available and properly granted where findings are so indefinite, uncertain, and ambiguous that they cannot sustain the judgment.<sup>9</sup> It has been said, however, that this is the sole instance in which the remedy may be invoked,<sup>10</sup> and that in case of a special finding of facts it will not be awarded unless the finding is defective in form.<sup>11</sup>

89. Tex.—Holmes v. Lawrence, Civ. App., 118 S.W.2d 900, error dismissed—Austin v. Freestone County, Civ.App., 288 S.W. 870.

90. Colo.—Downing v. Ernest, 92 P. 280, 40 Colo. 137.

91. Kan.—Horney v. Buffenbarger, 219 P.2d 345, 169 Kan. 342—Doman Hunting & Fishing Ass'n v. Doman, 155 P.2d 438, 159 Kan. 439.

### Speculation

Where plaintiff's request for an additional finding in effect called on trial court to speculate, request was properly refused.—Nelson v. Travelers Ins. Co., 30 A.2d 75, 113 Vt. 86.

92. Conn.—Saunders v. Saunders, 98 A.2d 815, 140 Conn. 140.

93. Minn.—Kent v. Costin, 153 N.W. 874, 130 Minn. 450—Mann v. Lamb, 85 N.W. 827, 83 Minn. 14.  
64 C.J. p 1268 note 23.

94. Minn.—National Surety Co. v. Wittich, 242 N.W. 545, 186 Minn. 93—Kent v. Costin, 153 N.W. 874, 130 Minn. 450—Banning v. Hall, 72 N.W. 817, 70 Minn. 819.

Tex.—Wade v. Taylor, Civ.App., 228 S.W.2d 922—Plaza Co. v. White, Civ.App., 160 S.W.2d 312, error refused—Holmes v. Lawrence, Civ.

App., 118 S.W.2d 900, error dismissed—Brady v. Garrett, Civ. App., 66 S.W.2d 502.

95. Tex.—Holmes v. Lawrence, Civ. App., 118 S.W.2d 900, error dismissed.

96. U.S.—Fidelity & Deposit Co. of Maryland v. Highland Trust & Savings Bank, C.C.A.Tenn., 44 F.2d 697.  
64 C.J. p 1268 note 27.

97. Conn.—Costello v. Costello, 96 A. 2d 755, 139 Conn. 690.

98. Tex.—Hoffman v. Buchanan, 123 S.W. 168, 67 Tex.Civ.App. 368.  
64 C.J. p 1268 note 29.

99. Cal.—Allen v. Blair, 56 P.2d 544, 13 Cal.App.2d 227.

1. Colo.—Eitel v. Alford, 257 P.2d 955, 127 Colo. 341.

2. Colo.—Eitel v. Alford, supra.

3. Colo.—Eitel v. Alford, supra.

4. Tex.—Donaldson v. Horton, Civ. App., 256 S.W.2d 693.

5. Minn.—Aaby v. Better Builders, 37 N.W.2d 234, 228 Minn. 222.

6. Conn.—Barber v. Mexico International Co., 48 A. 758, 73 Conn. 587.  
Effect of inconsistency between con-

clusions of law and findings of fact see supra § 636.

7. Ind.—Clevenger v. Kern, 197 N.E. 731, 100 Ind.App. 581.

64 C.J. p 1268 note 32.  
Venire de novo on jury trials see supra § 519.

8. Ind.—La Follette v. Higgins, 28 N.E. 768, 129 Ind. 412—Sutton v. Bunnell, 167 N.E. 731, 91 Ind.App. 427.

9. Ind.—In re Lowe's Estate, 70 N. E.2d 187, 117 Ind.App. 554—Clevenger v. Kern, 197 N.E. 731, 100 Ind. App. 581.

64 C.J. p 1268 note 34.

### Where conclusions of law impossible

Where special findings of facts are so incomplete and improper in form and so replete with evidentiary matters that no conclusions of law either way could rightfully be drawn therefrom, venire de novo is the proper remedy.—Lesh v. Trustees of Purdue University, Ind.App., 116 N.E.2d 117.

10. Ind.—Ginther v. Rochester Improvement Co., 92 N.E. 698, 46 Ind. App. 378.

64 C.J. p 1269 note 35.

11. Ind.—La Follette v. Higgins, 28 N.E. 768, 129 Ind. 412—Mitchell v.

The motion should not be granted unless the finding is so defective or uncertain on its face as to be incapable of supporting any conclusion of law or of forming the basis of any judgment on the issue involved.<sup>12</sup> In other words the motion is properly overruled where the findings are sufficiently definite and certain to support the judgment.<sup>13</sup> The motion has been held unavailable where the ground of objection was that the finding embraced more than was necessary,<sup>14</sup> as where evidentiary matter was included,<sup>15</sup> or that the conclusions of law were not sustained by the facts found<sup>16</sup> or were otherwise improper,<sup>17</sup> or that a special finding was unsigned.<sup>18</sup>

**Failure to find on material issues.** A venire de novo may not be awarded on the ground that special findings do not cover all the material issues in the case<sup>19</sup> or all the material facts involved in any of the issues,<sup>20</sup> or that they fail to find an ultimate fact essential to a decision;<sup>21</sup> but the failure to find on all material issues is ground therefor where it occurs with respect to a general finding.<sup>22</sup>

**Uncertainty in an unnecessary finding** is not ground for venire de novo where the findings on material matters are sufficiently certain.<sup>23</sup>

**Distinguished from motion for new trial.** A motion for a venire de novo is distinguished from a motion for a new trial in that the motion for new trial lies when the defect is not apparent from the face of the record, and the motion for venire de novo lies only when the defect is so apparent.<sup>24</sup>

**Time for motion.** A motion for a venire de novo may properly be made at any time before final judgment on the finding.<sup>25</sup>

**Construction of findings on motion.** In determining the sufficiency of findings on a motion for a venire de novo, they should be construed as a whole.<sup>26</sup>

## § 645. Filing and Record

- a. In general
- b. Demand or request for filing
- c. Time for filing
- d. Nunc pro tunc filing and entry

### a. In General

In general findings of fact and conclusions of law by the court are required to be filed.

As a general rule the findings of fact and conclusions of law by the court are required to be filed<sup>27</sup> with the clerk of court.<sup>28</sup> They must be filed

Friedley, 26 N.E. 391, 126 Ind. 545—Citizens' Bank v. Bolen, 23 N.E. 146, 121 Ind. 301.

12. Ind.—In re Lowe's Estate, 70 N.E.2d 187, 117 Ind.App. 554—Clevenger v. Kern, 197 N.E. 731, 100 Ind.App. 581.

64 C.J. p 1269 note 38.

13. Ind.—In re Lowe's Estate, 70 N.E.2d 187, 117 Ind.App. 554.

64 C.J. p 1269 note 37.

14. Ind.—Dehority v. Nelson, 56 Ind. 414.

15. Ind.—Thomas v. Hennes, 135 N.E. 392, 78 Ind.App. 276—Ginther v. Rochester Improvement Co., 92 N.E. 698, 46 Ind.App. 378.

16. Ind.—Hamilton v. Byram, 23 N.E. 795, 122 Ind. 283—Holmes v. Phoenix Mut. Life Ins. Co., 49 Ind. 356.

17. Ind.—Bryan v. Reiff, 135 N.E. 886, 192 Ind. 264.

64 C.J. p 1269 note 41.

18. Ind.—Martin v. Marks, 57 N.E. 249, 154 Ind. 549.

64 C.J. p 1269 note 42.

19. Ind.—Citizens' Bank v. Bolen, 23 N.E. 136, 121 Ind. 301—In re Lowe's Estate, 70 N.E.2d 187, 117 Ind.App. 554.

64 C.J. p 1269 note 43.

20. Ind.—Citizens' Bank v. Bolen, 23 N.E. 136, 121 Ind. 301—In re Lowe's

Estate, 70 N.E.2d 187, 117 Ind.App. 554.

21. Ind.—Lesh v. Trustees of Purdue University, App., 116 N.E.2d 117.

22. Ind.—Clevenger v. Kern, 197 N.E. 731, 100 Ind.App. 581.

64 C.J. p 1269 note 44.

23. Ind.—Huntington First Nat. Bank v. Henry, 58 N.E. 1057, 156 Ind. 1.

64 C.J. p 1269 note 45.

24. Ind.—Sutton v. Bunnell, 167 N.E. 731, 91 Ind.App. 427.

25. Ind.—Parker v. Hubble, 75 Ind. 580.

26. Ind.—Sutton v. Bunnell, supra.

27. Idaho.—Roberts v. Roberts, 201 P.2d 91, 68 Idaho 535.

N.M.—Lusk v. First Nat. Bank of Carrizozo, 130 P.2d 1032, 46 N.M. 445.

Ohio.—In re Lowry's Estate, 35 N.E. 2d 154, 66 Ohio App. 437.

S.D.—Edmonds v. Riley, 90 N.W. 139, 15 S.D. 470.

Tex.—Bostwick v. Bucklin, Civ.App., 190 S.W.2d 814, motion denied 190 S.W.2d 818, two cases, 144 Tex. 375.

Utah.—Lynch v. Coviglio, 53 P. 983, 17 Utah 106.

64 C.J. p 1269 note 50.

### Orderly procedure

Where a case is tried before judge, orderly procedure is to file a "finding entry."—Western Reserve Mut. Cas. Co. v. Holstein, 47 N.E.2d 794, 72 Ohio App. 65.

### On docket

In case tried by the superior court without the intervention of a jury, the court is required to briefly note its conclusions of law and fact on its docket.—Everett J. Horton & Co. v. Grinnell, 199 A. 815, 60 R.I. 457.

**Journal entry** which contained no specific finding of fact for plaintiff, but which stated that plaintiff was entitled to judgment, and specifically rendered judgment for plaintiff, was held sufficient to show a finding and judgment for plaintiff.—Bunch v. Humphreys, 50 P.2d 337, 174 Okl. 206.

28. Cal.—Brownell v. Superior Court of Yolo County, 109 P. 91, 157 Cal. 703—Crim v. Kessing, 26 P. 1074, 89 Cal. 478, 23 Am.S.R. 491—Gilmore v. Gilmore, 221 P.2d 123, 99 Cal.App.2d 136—In re Pala's Estate, 131 P.2d 593, 55 Cal.App.2d 647—In re Dodde's Estate, 126 P.2d 150, 52 Cal.App.2d 287.

Idaho.—Roberts v. Roberts, 201 P.2d 91, 68 Idaho 535.

Ind.—Peoria Marine and Fire Ins. Co. v. Walser, 22 Ind. 73.

S.D.—Edmonds v. Riley, 90 N.W. 139, 15 S.D. 470.

in order to become effective,<sup>29</sup> and are a part of the record.<sup>30</sup>

**What constitutes filing.** Leaving findings and conclusions with the clerk for filing in itself constitutes a filing thereof.<sup>31</sup> Sending findings and conclusions to counsel for one of the parties, however, is not a filing thereof.<sup>32</sup>

**Notice of filing.** In the absence of a statute to the contrary, notice of filing need not be given counsel on either side.<sup>33</sup>

**Lost findings.** Under a statute empowering the court to authorize a copy of a lost paper to be filed and used instead of the original, a court order substituting new findings and conclusions in place of original findings and conclusions which previously had been filed and had become lost is proper.<sup>34</sup>

### b. Demand or Request for Filing

A party who has made timely demand or request therefor is entitled to have findings of fact and conclusions of law filed, and to have them filed in time.

Tex.—*Boatwick v. Bucklin*, Civ.App., 190 S.W.2d 814, motion denied 190 S.W.2d 818, two cases, 144 Tex. 375. Utah.—*Lynch v. Coviglio*, 53 P. 983, 17 Utah 106.

28. Cal.—*Department of Social Welfare of Cal. v. Machado*, 220 P.2d 411, 98 Cal.App.2d 364. 64 C.J. p 1269 note 50.

#### Final

The trial justice's conclusions of law and fact do not become final as a decision until the docket entry thereof is made.—*Fiverett J. Horton & Co. v. Grinnell*, 189 A. 315, 60 R.I. 457.

#### Reconsideration

Until findings are filed the judge is free to reconsider his evaluation of the evidence.—*Department of Social Welfare of Cal. v. Machado*, 220 P.2d 411, 98 Cal.App.2d 364.

30. Tex.—*Boatwick v. Bucklin*, Civ. App., 190 S.W.2d 814, motion denied 190 S.W.2d 818, two cases, 144 Tex. 375.

**Under court rule** the trial judge must file his decision, consisting of findings of such ultimate facts and conclusions of law stated separately as are necessary to support his judgment, in the cause as a part of the record proper.—*Lusk v. First Nat. Bank of Carrizozo*, 130 P.2d 1032, 46 N.M. 445.

31. N.D.—*Crane v. First Nat. Bank*, 144 N.W. 96, 26 N.D. 268. 64 C.J. p 1269 note 51.

32. Tex.—*Guadalupe County v. Poth*, Civ.App., 153 S.W. 919.

33. Mich.—*Alba Marketing Ass'n v. Gilbert*, 207 N.W. 14, 233 Mich. 523. 64 C.J. p 1271 note 86.

On seasonable demand or request any party has the right to have findings and conclusions filed,<sup>35</sup> and to have them filed in time.<sup>36</sup> Failure of the trial court to file its findings in time after seasonable request is improper,<sup>37</sup> although where the request is not timely it is not error to deny it;<sup>38</sup> and in the absence of prejudice the fact that findings and conclusions were filed too late will not invalidate the judgment.<sup>39</sup> A party may not complain of the trial judge's failure timely to make and file his findings of fact and conclusions of law where he did not make timely request therefor,<sup>40</sup> or where the delay in filing is chargeable to him.<sup>41</sup>

### c. Time for Filing

Findings of fact and conclusions of law should be filed within the time prescribed by statute or rule of court.

In general, findings of fact and conclusions of law should be filed within the time prescribed by statute or rule of court.<sup>42</sup> Under the various statutes the findings must be filed within a designated period

34. Cal.—*Moffitt v. Moffitt*, 18 P.2d 387, 128 Cal.App. 676.

35. Tex.—*Boatwick v. Bucklin*, Civ. App., 190 S.W.2d 814, motion denied 190 S.W.2d 818, two cases, 144 Tex. 375.—*Watts v. Hartford Acc. & Indem. Co.*, Civ.App., 140 S.W.2d 604.—*Gulf Mfg. & Lumber Co. v. Newton*, Civ.App., 27 S.W.2d 873.—*Q. Flores & Son v. First State Bank of Mission*, Civ.App., 266 S.W. 542. 64 C.J. p 1270 note 53.

#### Where preparation

Where plaintiff made timely request for findings of fact and conclusions of law, judge had duty of preparing and filing statement of facts, not merely of preparing statement which he was willing to deliver to counsel.—*Pittsburg Finance Co. v. Newsome*, Tex.Civ.App., 108 S.W.2d 673.

36. Tex.—*Q. Flores & Son v. First State Bank of Mission*, Civ.App., 266 S.W. 542.

64 C.J. p 1270 note 54.

37. Tex.—*Boatwick v. Bucklin*, Civ. App., 190 S.W.2d 814, motion denied 190 S.W.2d 818, two cases, 144 Tex. 375.—*Gulf Mfg. & Lumber Co. v. Newton*, Civ.App., 27 S.W.2d 873.—*Jefferson v. Williams*, Civ.App., 286 S.W. 614.—*Q. Flores & Son v. First State Bank of Mission*, Civ.App., 266 S.W. 542.

64 C.J. p 1270 note 55.

38. Tex.—*Payne & Joubert Machine & Foundry Co. v. Dilley*, Civ.App., 140 S.W. 496.

64 C.J. p 1270 note 56.

39. Tex.—*Boatwick v. Bucklin*, 190 S.W. 818, 144 Tex. 375.—*Cantu v.*

*Cantu*, Civ.App., 253 S.W.2d 957.—*Hewitt v. Green*, Civ.App., 28 S.W.2d 892.

64 C.J. p 1270 note 57.

40. Tex.—*International Harvester Co. of America v. Smith*, Civ.App., 91 S.W.2d 827, error dismissed.

41. Tex.—*Teal v. Lakey*, Civ.App., 181 S.W. 759.

64 C.J. p 1270 note 58.

42. Idaho.—*Roberts v. Roberts*, 201 P.2d 91, 68 Idaho 535.

Effect of filing findings after expiration of judge's term of office see *Judges* § 47.

#### In Texas

(1) Under Rules of Civil Procedure, rule 297, the judge of a district or county court, on demand therefor, is required to file his findings of fact and conclusions of law thirty days before the time for filing transcript in the cause.—*Boatwick v. Bucklin*, Civ.App., 190 S.W.2d 814, motion denied 190 S.W.2d 818, two cases, 144 Tex. 375.—*Dean Rubber Mfg. Co. v. Tom W. Grace Co.*, Civ. App., 151 S.W.2d 321.

(2) The trial court commits no error in failing to file fact findings within term of court at which judgment was rendered.—*Watts v. Hartford Acc. & Indem. Co.*, Civ.App., 140 S.W.2d 604.

(3) Prior to the adoption of the rule there were various decisions construing the statutes with respect to the time of filing.—*In re Supplies' Estate*, Civ.App., 131 S.W.2d 13.—*Hewitt v. Green*, Civ.App., 28 S.W.2d 892.—*Gulf Mfg. & Lumber Co. v. Newton*, Civ.App., 27 S.W.2d 873—

after submission of the case,<sup>43</sup> at or before entry of judgment,<sup>44</sup> before the judgment becomes final,<sup>45</sup> or during the term.<sup>46</sup> Some provisions with respect to the time of filing have been held mandatory,<sup>47</sup> and findings of fact and conclusions of law which were not filed by the trial court within the time prescribed are of no avail and cannot be considered;<sup>48</sup> but other provisions are construed as merely directory,<sup>49</sup> and a mere delay in filing is not fatal when not prejudicial.<sup>50</sup> Where the statute is directory, the failure to file within the statutory period neither makes the case subject to a motion for reopening,<sup>51</sup> nor deprives the court of jurisdiction to file its findings and conclusions after expiration of the statutory period.<sup>52</sup> Where they are filed subsequent to the entry of judgment it has been held that the filing should ordinarily be with the consent of opposing counsel or made nunc pro tunc on order of the court after notice to opposing counsel.<sup>53</sup>

It has been held sufficient, in the absence of statute or rule of court as to the time when they must

be filed, that findings or conclusions are filed within a reasonable time before the time fixed by law for the filing of the transcript of the record in an appellate court,<sup>54</sup> and that it is not necessary that they be filed within the time for the making of a motion for new trial.<sup>55</sup>

**Agreement of parties.** The time for filing the findings may be extended by consent of the parties,<sup>56</sup> but the fact that the parties agree that the time for signing the bill of exceptions shall be extended does not extend the time for the judge to file his findings of fact.<sup>57</sup> On the other hand, under a mandatory statute as to the time for filing findings of fact and conclusions of law, an agreement of the parties is ineffectual to extend the time for filing.<sup>58</sup>

**Proof of time of filing.** While merely leaving findings with the clerk may constitute a filing thereof, as discussed supra subdivision a of this section, the date of the clerk's indorsement, rather than the date of the findings, controls as to the time of filing in the absence of other evidence.<sup>59</sup>

Jefferson v. Williams, Civ.App., 288 S.W. 614—De Brulin v. Santo Domingo Land & Irrigation Co., Civ.App., 194 S.W. 654—Maverick v. Burney, Civ. App., 30 S.W. 566, reversed on other grounds 32 S.W. 512, 88 Tex. 560—64 C.J. p 1270 note 65 [b], [c].

42. Cal.—Hutchinson v. Marshall, 193 P. 164, 49 Cal.App. 307. Idaho.—Roberts v. Roberts, 201 P.2d 91, 68 Idaho 535.

Ind.—State v. Bridges, 64 N.E.2d 411, 116 Ind.App. 483.

Mont.—Hoppin v. Lang, 241 P. 636, 74 Mont. 558.

S.D.—Edmonds v. Riley, 90 N.W. 139, 15 S.D. 470.

44. Cal.—Brownell v. Superior Court of Yolo County, 109 P. 91, 157 Cal. 708—Crim v. Kessing, 26 P. 1074, 89 Cal. 478, 28 Am.S.R. 491—Gillmore v. Gilmore, 221 P.2d 123, 99 Cal.App.2d 186—In re Pala's Estate, 131 P.2d 593, 55 Cal.App.2d 647—In re Dodds' Estate, 136 P.2d 150, 52 Cal.App.2d 287.

Idaho.—Quinn v. Hartford Acc. & Indem. Co., 232 P.2d 965, 71 Idaho 449—Roberts v. Roberts, 201 P.2d 91, 68 Idaho 535.

64 C.J. p 1270 note 62.

In absence of waiver

Cal.—In re Seipel's Estate, 19 P.2d 808, 130 Cal.App. 273.

Right to demand judgment

Judgment cannot be demanded as of right until findings have been filed and amended or corrected.—Marías River Syndicate v. Big West Oil Co., 33 P.2d 599, 38 Mont. 254.

45. Ala.—Pappot v. Howard, 45 So. 551, 154 Ala. 204.

46. Iowa.—Hodges v. Goetsman, 41 N.W. 195, 76 Iowa 478.

47. N.D.—Crane v. First Nat. Bank, 144 N.W. 96, 26 N.D. 288.

Tex.—Dean Rubber Mfg. Co. v. Tom W. Grace Co., Civ.App., 151 S.W. 2d 321.

64 C.J. p 1270 note 65 [b].

48. Mo.—Loewen v. Forsee, 38 S.W. 712, 137 Mo. 29, 59 Am.S.R. 489—Hamilton v. Armstrong, 26 S.W. 545, 120 Mo. 597.

Tex.—Bostwick v. Bucklin, Civ.App., 190 S.W.2d 814, motion denied 190 S.W.2d 818, two cases, 144 Tex. 375

—Dean Rubber Mfg. Co. v. Tom W. Grace Co., Civ.App., 151 S.W.2d 321

—In re Supples' Estate, Civ.App., 151 S.W.2d 13—Waring v. Waring, Civ.App., 48 S.W.2d 611—Hewitt v. Green, Civ.App., 28 S.W.2d 392—

Gulf Mfg. & Lumber Co. v. Newton, Civ.App., 27 S.W.2d 373—Tallafarro v. Saar, Civ.App., 294 S.W. 658—

Jefferson v. Williams, Civ.App., 288 S.W. 614—Bray v. Peters, Civ.App., 283 S.W. 531—Maverick v. Burney, Civ.App., 30 S.W. 566, reversed on other grounds 32 S.W. 512, 88 Tex. 560.

Fact findings and conclusions of law not properly made a part of the record not considered on appeal see Appeal and Error § 1187.

49. Cal.—Hutchinson v. Marshall, 193 P. 164, 49 Cal.App. 307.

Ind.—State v. Bridges, 64 N.E.2d 411, 116 Ind.App. 483.

Mont.—Hoppin v. Lang, 241 P. 636, 74 Mont. 558—In re Bradford's Estate, 221 P. 531, 69 Mont. 247.

64 C.J. p 1270 notes 65 [a], 66.

50. Cal.—Broad v. Murray, 44 Cal. 228—Hutchinson Co. v. Marshall, 193 P. 164, 49 Cal.App. 307.

Minn.—Vogel v. Grace, 5 Minn. 294. S.D.—Edmonds v. Riley, 90 N.W. 139, 15 S.D. 470.

Utah.—Lynch v. Coviglio, 53 P. 983, 17 Utah 106.

51. Cal.—Eddy v. American Amusement Co., 132 P. 82, 21 Cal.App. 487.

52. Mont.—Hoppin v. Lang, 241 P. 636, 74 Mont. 558.

Utah.—Lynch v. Coviglio, 53 P. 983, 17 Utah 106.

53. Idaho.—Roberts v. Roberts, 201 P.2d 91, 68 Idaho 535.

54. Tex.—Johnson v. Woodruff, Civ. App., 42 S.W.2d 687.

64 C.J. p 1270 note 59.

Time of trial of case

Consideration of motion for new trial made during preceding term was part of "trial" of case, with respect to time for filing findings of facts and conclusions of law.—Johnson v. Woodruff, supra.

55. Tex.—Anderson v. Horn, 18 S.W. 24, 75 Tex. 675.

56. Iowa.—Hodges v. Goetsman, 41 N.W. 195, 76 Iowa 478.

57. Iowa.—Hodges v. Goetsman, 41 N.W. 195, 76 Iowa 478.

58. Tex.—Maverick v. Burney, Civ. App., 30 S.W. 566, reversed on other grounds 32 S.W. 512, 88 Tex. 560.

64 C.J. p 1271 note 70.

59. Wis.—State v. Reese, 15 N.W. 383, 87 Wis. 423.

64 C.J. p 1271 note 74.



## d. Nunc Pro Tunc Filing and Entry

In some jurisdictions the trial court, in a proper case, may file findings of fact and conclusions of law nunc pro tunc, but in others such practice is not permitted.

Under the statutes and practice in some jurisdictions findings of fact and conclusions of law may not be filed nunc pro tunc.<sup>60</sup> In other jurisdictions, however, the trial court has authority, in a proper case, to order findings of fact and conclusions of law filed nunc pro tunc,<sup>61</sup> subject to the condition that the rights of a party are not jeopardized thereby.<sup>62</sup> It may order them filed nunc pro tunc as of such date as will preserve them,<sup>63</sup> and as far as it is necessary to protect the rights of the parties the court may order them filed nunc pro tunc as of a day anterior to the death of a party.<sup>64</sup> Thus, it has been held that the court has authority to order findings filed nunc pro tunc as of the date of submission of the cause, where a party dies after its submission but before its decision,<sup>65</sup> and that where a party dies after trial but before actual submission of the cause, the court may order findings filed nunc pro tunc as of a date prior to the death of

the party, but that findings covering supplemental proceedings after the death of the party must be considered as of their actual date.<sup>66</sup> Where findings are filed nunc pro tunc before appeal is taken, failure to file them sooner does not render the judgment void.<sup>67</sup>

**Entry.** Where findings and conclusions have been duly made and filed, but not entered in the minutes or journal, it is proper after judgment to order the findings entered nunc pro tunc as of the proper date.<sup>68</sup>

## § 646. Construction and Operation

Findings and conclusions of the trial court are to be reasonably construed as a whole, so as to uphold, rather than to defeat, the judgment.

Findings and conclusions of the trial court should be given a reasonable construction<sup>69</sup> in accordance with the intention of the trial court.<sup>70</sup> Particular words and phrases employed in the findings or conclusions of a trial court will be given their ordinary meaning in the absence of anything to show that they were used in a different sense.<sup>71</sup> The words

60. Ohio.—Chapman v. Park Lane Villa, App., 101 N.E.2d 258.

64 C.J. p 1271 note 76.

61. Utah.—Openshaw v. Young, 152 P.2d 84, 107 Utah 399.

**Filing subsequent to entry of judgment**

Idaho.—Roberts v. Roberts, 201 P.2d 91, 68 Idaho 535.

**Same as judgment**

The court has the same authority to order findings of fact and conclusions of law to be filed nunc pro tunc as it has to order the judgment thereon to be so entered.—Norton v. City of Pomona, 53 P.2d 952, 5 Cal.2d 54.—Kalliterna v. Wright, 212 P.2d 32, 94 Cal.App.2d 926.

**Misplaced findings**

Where findings of fact and conclusions of law had been misplaced through no fault of the litigants, filing of them nunc pro tunc as of the time they were actually made was proper and judgment was not void or voidable merely because judgment roll showed that the findings of fact and conclusions of law were actually filed after the judgment.—Fisher v. Lossey, 177 P.2d 384, 78 Cal.App.2d 121.

62. Utah.—Openshaw v. Young, 152 P.2d 84, 107 Utah 399.

**Rights of appeal**

Utah.—Openshaw v. Young, supra.

63. Cal.—Norton v. City of Pomona, 53 P.2d 952, 5 Cal.2d 54.

**Date of signing**

Where findings of fact were actual-

ly signed before judgment but were not on file at time of signing and filing judgment, trial court properly ordered findings filed nunc pro tunc as of date of their signing.—Kalliterna v. Wright, 212 P.2d 32, 94 Cal.App.2d 926.

64. Cal.—Norton v. City of Pomona, 53 P.2d 952, 5 Cal.2d 54.

**Authorization as to judgment**

A statute providing for entry of judgment after death of a party on a verdict or decision before death, does not do away with the rule which authorizes the court to direct that its decision shall be entered nunc pro tunc as of a day anterior to the death of a party.—Norton v. City of Pomona, supra.

**Date opinion filed**

Where the trial court, before defendant's death, rendered its opinion ordering judgment for plaintiff, it had the right, after defendant's death, to order the findings filed nunc pro tunc as of the date of the opinion.—Copp v. Rives, 217 P. 813, 62 Cal. App. 778.

65. Cal.—Fox v. Hale, etc., Silver Min. Co., 41 P. 328, 108 Cal. 478.

66. Cal.—Leavitt v. Gibson, 43 P.2d 1091, 3 Cal.2d 90.

67. Cal.—Nielsen v. Witter, 296 P. 121, 111 Cal.App. 742, followed in Re Nielsen's Guardianship, 296 P. 123, 111 Cal.App. 767.

68. Ala.—Pappot v. Howard, 45 So. 581, 154 Ala. 806.

64 C.J. p 1271 note 79.

69. Cal.—Anderson v. Pastorini, 255 P.2d 855, 117 Cal.App.2d 428.

64 C.J. p 1271 note 81—26 C.J. p 568 note 98.

**Awkward phrase**

Findings which comport with rationality must prevail over an obviously awkward phrase which from the context of the findings, as well as the subject matter of the action, cannot be true, and would lead, if given effect, to an absurd result.—Nisbet v. Rhinehart, 42 P.2d 71, 2 Cal.2d 477.

**Particular findings construed**

(1) Compensation for services.—Nichols v. Spindler, 53 N.E.2d 888, 222 Ind. 502—64 C.J. p 1271 note 81 [c] (1).

(2) Rights of parties.—Jones & Polson v. O'Toole, 199 N.E. 925, 293 Mass. 399.

(3) Other findings see 64 C.J. p 1271 note 81 [c].

70. Mass.—Brodeur v. Seymour, 53 N.E.2d 566, 816 Mass. 527—Scullin v. Cities Service Oil Co., 22 N.E.2d 866, 304 Mass. 75.

71. Mass.—Pequod Realty Corp. v. Jeffries, 51 N.E.2d 308, 314 Mass. 713.

64 C.J. p 1271 note 82.

**Particular words or phrases construed**

(1) "As aforesaid."—Gaw v. Haw Const. Co., 15 N.E.2d 225, 300 Mass. 250.

(2) "Duly."—Federal Nat. Bank of Boston v. O'Connell, 26 N.E.2d 539, 305 Mass. 559.

employed should not be accorded a technical construction,<sup>72</sup> or be so strained as to make out a case of conflict.<sup>73</sup>

Clear and explicit findings are not subject to construction,<sup>74</sup> and cannot be explained by other parts of the record.<sup>75</sup> Where not so clear as to bar construction, findings and conclusions should be interpreted in the light of the pleadings<sup>76</sup> and proof,<sup>77</sup> together with such inferences of fact as the trial court might properly draw therefrom,<sup>78</sup> and in the light of oral<sup>79</sup> or memorandum<sup>80</sup> decisions. As an

aid to construction the upper court may properly refer to the record of the case<sup>81</sup> and to the opinion of the trial court.<sup>82</sup> In construing a finding, remarks made by the judge during the course of a trial do not control.<sup>83</sup> Findings should not be construed with reference to the record of a former suit.<sup>84</sup>

In case of doubt or ambiguity, findings or conclusions will be construed to uphold, rather than to defeat, the judgment;<sup>85</sup> they are subject to a fav-

(3) "I do not find."—National Shawmut Bank of Boston v. Cumming, 91 N.E.2d 337, 325 Mass. 457.

(4) "I find and rule," etc.—National Shawmut Bank of Boston v. Cumming, 91 N.E.2d 337, 325 Mass. 457; Druzik v. Board of Health of Haverhill, 85 N.E.2d 232, 324 Mass. 129; Durgin v. Allen, 85 N.E.2d 208, 324 Mass. 167; Pequod Realty Corp. v. Jeffries, 51 N.E.2d 308, 314 Mass. 713;—Scullin v. Cities Service Oil Co., 22 N.E.2d 666, 304 Mass. 75; Flesher v. Handier, 21 N.E.2d 975, 303 Mass. 482.

(5) "I find upon all the evidence."—Broder v. Seymour, 53 N.E.2d 566, 315 Mass. 527.

(6) "Is absolute in form."—Hill v. Donnelly, 132 P.2d 867, 56 Cal.App.2d 387.

(7) "Unable to find."—Scott v. Beland, 45 A.2d 641, 114 Vt. 383; Miller v. Roesser, 181 A. 105, 107 Vt. 479.

(8) Additional words or phrases see 64 C.J. p. 1271 note 82 [a].

72. Cal.—Johnndrow v. Thomas, 187 P.2d 681, 31 Cal.2d 202—City of Napa v. Navoni, 132 P.2d 566, 56 Cal.App.2d 289.

73. Cal.—Johnndrow v. Thomas, 187 P.2d 681, 31 Cal.2d 202—City of Napa v. Navoni, 132 P.2d 566, 56 Cal.App.2d 289.

74. Minn.—Stevens v. Minneapolis Fire Department Relief Ass'n, 17 N.W.2d 642, 219 Minn. 276.

#### Absence of uncertainty

While letters, remarks, or opinion of a trial judge may be looked to in order to clarify ambiguities or inconsistencies in findings made, formal findings must prevail in absence of some such uncertainty concerning them.—Sanders v. Carmichael Enterprises, Inc., 260 P.2d 916, 57 N.M. 554.

75. Minn.—Stevens v. Minneapolis Fire Department Relief Ass'n, 17 N.W.2d 642, 219 Minn. 276.

76. U.S.—American Propeller & Mfg. Co. v. U. S., Ct.Cl. 57 S.Ct. 521, 300 U.S. 475, 81 L.Ed. 751.

Cal.—Johnndrow v. Thomas, 187 P.2d 681, 31 Cal.2d 202—City of Napa v. Navoni, 132 P.2d 566, 56 Cal.App.2d 289.

Ind.—Wilkins v. Leach, 95 N.E.2d 836, 229 Ind. 114.

N.M.—Heisel v. York, 125 P.2d 717, 46 N.M. 210.

Utah.—Consolidated Wagon & Machine Co. v. Kay, 21 P.2d 836, 81 Utah 695.

64 C.J. p. 1272 note 33.

77. Cal.—Rotea v. Izuel, 95 P.2d 927, 125 A.L.R. 1424, 14 Cal.2d 605—City of Napa v. Navoni, 132 P.2d 566, 56 Cal.App.2d 289—Chard v. O'Connell, 120 P.2d 125, 48 Cal.App.2d 475.

Minn.—Stevens v. Minneapolis Fire Department Relief Ass'n, 17 N.W.2d 642, 219 Minn. 276.

Tex.—Strooud v. Pechacek, Civ.App. 120 S.W.2d 626.

64 C.J. p. 1272 note 34.

#### Exhibits attached to pleadings

Cal.—Johnndrow v. Thomas, 187 P.2d 681, 31 Cal.2d 202.

78. Cal.—Johnndrow v. Thomas, 187 P.2d 681, 31 Cal.2d 202—City of Napa v. Navoni, 132 P.2d 566, 56 Cal.App.2d 289.

79. Wash.—Payne v. Vincore, 246 P.2d 448, 40 Wash.2d 748.

64 C.J. p. 1272 note 85.

80. Conn.—Perrotti v. Bennett, 109 A. 890, 94 Conn. 533.

64 C.J. p. 1272 note 86.

81. Minn.—Stevens v. Minneapolis Fire Department Relief Ass'n, 17 N.W.2d 642, 219 Minn. 276.

Wis.—Lepper v. Wisconsin Sugar Co., 128 N.W. 54, 131 N.W. 985, 146 Wis. 494.

82. Wis.—Lepper v. Wisconsin Sugar Co., supra.

83. Cal.—Ertman v. Municipal Court of City and County of San Francisco, 156 P.2d 940, 68 Cal.App.2d 143.

84. Cal.—Dobbins v. Economic Gas Co., 189 P. 1073, 182 Cal. 616.

64 C.J. p. 1272 note 90.

85. Cal.—Gin S. Chow v. City of Santa Barbara, 22 P.2d 5, 217 Cal. 673, followed in Matthiessen v. Montecito County Water Dist., 22 P.2d 19, 217 Cal. 788, and Matthiessen v. City of Santa Barbara, 22 P.

2d 19, 217 Cal. 788—Ambroz v. Ireland, App., 271 P.2d 580—Auslen v. Johnson, 257 P.2d 664, 118 Cal. App.2d 319—Anderson v. Pastorini, 255 P.2d 855, 117 Cal.App.2d 428—K. & M. Inc. v. LeCuyer, 238 P.2d 28, 107 Cal.App.2d 710, followed in 238 P.2d 33, 107 Cal.App.2d 845—Shelley v. Kofka, 237 P.2d 984, 107 Cal.App.2d 827—K. & M. Inc. v. LeCuyer, 233 P.2d 569, reheard 238 P.2d 28, 107 Cal.App.2d 710 and followed in 233 P.2d 574, reheard 238 P.2d 33, 107 Cal.App.2d 845—Penna v. Noffsinger, 232 P.2d 521, 105 Cal. App.2d 99—Ferreira v. Nunn, 220 P.2d 20, 98 Cal.App.2d 387—Gantner & Matten Co. v. Hawkins, 201 P.2d 847, 89 Cal.App.2d 783—Chamberlain v. Abelen, 198 P.2d 927, 86 Cal. App.2d 291—Good v. Lindstrom, 181 P.2d 933, 80 Cal.App.2d 476—Burton v. Los Angeles Ry. Corp., 180 P.2d 357, 79 Cal.App.2d 605—Petersen v. Murphy, 139 P.2d 49, 59 Cal. App.2d 528—City of Napa v. Navoni, 132 P.2d 566, 56 Cal.App.2d 289—Shore v. Crall, 123 P.2d 840, 50 Cal.App.2d 736—Ballagh v. Williams, 122 P.2d 843, 50 Cal.App.2d 10—Vaughan v. Roberts, 113 P.2d 884, 45 Cal.App.2d 246—In re Furtsch's Estate, 110 P.2d 104, 43 Cal.App.2d 1—Placeres De Oro Co. v. Carpenter, 102 P.2d 407, 38 Cal. App.2d 650—Marshall v. Great Western Power Co. of California, 97 P.2d 1025, 38 Cal.App.2d 422—Midleton v. Parsons, 70 P.2d 515, 22 Cal.App.2d 250—Comstock v. Finn, 56 P.2d 957, 18 Cal.App.2d 151—Schomer v. R. L. Craig Co., 31 P.2d 396, 137 Cal.App. 620—Gialdini v. Russell, 25 P.2d 845, 134 Cal.App. 524.

Iowa.—Corpus Juris cited in Rank v. Kuhn, 20 N.W.2d 72, 74, 236 Iowa 854—Corpus Juris quoted in In re Evans' Estate, 291 N.W. 460, 465, 228 Iowa 908.

Nev.—Edmonds v. Perry, 140 P.2d 566, 62 Nev. 41.

N.M.—Mathews v. New Mexico Light & Power Co., 122 P.2d 410, 46 N.M. 118—Greenfield v. Bruskas, 68 P.2d 921, 41 N.M. 846.

N.C.—Corpus Juris cited in Bradham v. Robinson, 73 S.E.2d 555, 558, 238 N.C. 589.

orable<sup>86</sup> and liberal<sup>87</sup> construction in support of the judgment, although this rule cannot be used to uphold findings that are unsupported.<sup>88</sup> The rule that findings are to be construed liberally so as to support the judgment cannot be expanded to the point of rewriting them.<sup>89</sup> Findings are not to be construed with the strictness of special pleadings.<sup>90</sup>

**Construction as whole.** Findings or conclusions are to be construed as a whole,<sup>91</sup> for example, in the ascertainment of their meaning,<sup>92</sup> effect,<sup>93</sup> and sufficiency.<sup>94</sup> Certain language may not be isolated from the entire context, where to do so would place an interpretation on such finding different

from that which would follow from a reading of the finding as a whole.<sup>95</sup> Words inadvertently used may be disregarded where construction of the findings as a whole reveals the inadvertent use of the words and the sufficiency of the findings to support the judgment aside from such inadvertent and disregarded words.<sup>96</sup>

## § 647. — Whether Findings of Fact or Conclusions of Law

a. In general

b. Particular findings of fact or conclusions of law

**S.D.—Corpus Juris cited in** Fischer v. Gorman, 274 N.W. 866, 871, 65 S.D. 463.

**Tex.—Chance v. Warlick, Civ.App.,** 145 S.W.2d 283, error dismissed, judgment correct—Petroleum Cas. Co. v. Kincaid, Civ.App., 93 S.W.2d 499, dismissed 122 S.W.2d 1048, 132 Tex. 325—Hardwicke v. Trinity Universal Ins. Co., Civ.App., 89 S.W.2d 500, error dismissed.

**Vt.—Anton v. Fidelity & Cas. Co. of N. Y.,** 91 A.2d 697, 117 Vt. 300—Abatiell v. Morse, 56 A.2d 464, 115 Vt. 254—Jeffords v. Poor, 55 A.2d 605, 115 Vt. 149—St. Germain v. Tuttle, 44 A.2d 137, 114 Vt. 263—Stratton v. Cartmell, 42 A.2d 419, 114 Vt. 191—Taylor v. Henderson, 22 A.2d 318, 112 Vt. 107—Town of Manchester v. Town of Townshend, 2 A.2d 207, 110 Vt. 136.

64 C.J. p 1272 note 91.

**86. Iowa.—Corpus Juris quoted in** In re Evans' Estate, 291 N.W. 460, 465, 228 Iowa 908.

64 C.J. p 1272 note 92.

**87. Cal.—Johndrow v. Thomas, 187 P.2d 681, 31 Cal.2d 202—Menghetti v. Dillon, 75 P.2d 596, 10 Cal.2d 470—K. & M., Inc. v. LeCuyer, 238 P.2d 28, 107 Cal.App.2d 710, followed in 238 P.2d 33, 107 Cal.App.2d 845—Quader-Kino A. G. v. Nebenzal, App., 208 P.2d 422—Chamberlain v. Abeles, 198 P.2d 927, 88 Cal.App.2d 291—Agdeppa v. Glougie, 162 P.2d 944, 71 Cal.App.2d 463—Weiner v. Mullane, 140 P.2d 704, 59 Cal.App.2d 620—Peterson v. Murphy, 139 P.2d 49, 59 Cal.App.2d 528—City of Napa v. Navoni, 132 P.2d 566, 56 Cal.App.2d 289—Chard v. O'Connell, 120 P.2d 125, 48 Cal.App.2d 475—Foster v. Peters, 117 P.2d 726, 47 Cal.App.2d 204—Comstock v. Flinn, 56 P.2d 957, 13 Cal.App.2d 151—Salmon v. Allen, 36 P.2d 153, 1 Cal.App.2d 115.**

**Idaho.—Dickey v. Clarke, 142 P.2d 597, 65 Idaho 247—Anderson v. Lloyd, 139 P.2d 244, 64 Idaho 768—Gem State Lumber Co. v. Gallon Irrigated Land Co., 41 P.2d 620, 55 Idaho 814.**

**Iowa.—Corpus Juris quoted in** In re Evans' Estate, 291 N.W. 460, 465, 228 Iowa 908.

64 C.J. p 1272 note 93.

**88. Cal.—Jensen v. Union Paving Co.,** 229 P.2d 121, 103 Cal.App.2d 164.

**89. Cal.—Williamson v. Clapper, 199 P.2d 337, 88 Cal.App.2d 645.**

**90. Cal.—Johndrow v. Thomas, 187 P.2d 681, 31 Cal.2d 202.**

**N.M.—Helsel v. York, 125 P.2d 717, 46 N.M. 210.**

64 C.J. p 1273 note 94.

**91. Cal.—Johndrow v. Thomas, 187 P.2d 681, 31 Cal.2d 202—Hise v. Superior Court of Los Angeles County, 134 P.2d 748, 21 Cal.2d 614—Menghetti v. Dillon, 75 P.2d 596, 10 Cal.2d 470—K. & M., Inc. v. LeCuyer, 238 P.2d 28, 107 Cal.App.2d 710, followed in 238 P.2d 33, 107 Cal.App.2d 845—Pensa v. Noffsinger, 232 P.2d 521, 105 Cal.App.2d 99—Chamberlain v. Abeles, 198 P.2d 927, 88 Cal.App.2d 291—Burton v. Los Angeles Ry. Corp., 180 P.2d 367, 79 Cal.App.2d 605—In re Reid's Estate, 179 P.2d 353, 79 Cal.App.2d 34—Agdeppa v. Glougie, 162 P.2d 944, 71 Cal.App.2d 463—Peterson v. Murphy, 139 P.2d 49, 59 Cal.App.2d 528—Armstrong v. Schoenborn, 20 P.2d 79, 130 Cal.App. 501.**

**Ind.—Satterblom v. Wasson, 41 N.E.2d 674, 111 Ind.App. 377—Speth v. Francisco State Bank of Francisco, 13 N.E.2d 880, 105 Ind.App. 149.**

**Kan.—Jordan v. Austin Securities Co., 51 P.2d 38, 142 Kan. 631.**

**Mass.—Federal Nat. Bank of Boston v. O'Connell, 26 N.E.2d 539, 305 Mass. 559.**

**Mont.—Conner v. Helvik, 73 P.2d 541, 105 Mont. 437.**

**N.M.—Helsel v. York, 125 P.2d 717, 46 N.M. 210—Mathews v. New Mexico Light & Power Co., 122 P.2d 410, 46 N.M. 118.**

**Tex.—Chance v. Warlick, Civ.App., 145 S.W.2d 283, error dismissed,**

judgment correct—Stroud v. Pechack, Civ.App., 120 S.W.2d 626.

**Utah.—Consolidated Wagon & Machine Co. v. Kay, 21 P.2d 836, 81 Utah 595.**

64 C.J. p 1273 note 95.

**92. Cal.—Costello v. Bowen, 182 P.2d 615, 80 Cal.App.2d 621.**

**Ind.—Roy Stringer Co. v. Dillon, 12 N.E.2d 365, 105 Ind.App. 194—Home Development Co. v. Arthur Jordan Land Co., 196 N.E. 337, 100 Ind.App. 458.**

64 C.J. p 1273 note 96.

**93. Ind.—Roy Stringer Co. v. Dillon, 12 N.E.2d 365, 105 Ind.App. 194—Home Development Co. v. Arthur Jordan Land Co., 196 N.E. 337, 100 Ind.App. 458—National Fire Ins. Co. v. Gellman, 144 N.E. 154, 83 Ind.App. 219.**

**94. Cal.—Berg v. Berg, 132 P.2d 871, 56 Cal.App.2d 495.**

**Ind.—Kelley, Glover & Vale v. Heitman, 44 N.E.2d 981, 220 Ind. 625, certiorari denied 63 S.Ct. 1320, 319 U.S. 762, 87 L.Ed. 1713—McCabe v. Grantham, 31 N.E.2d 658, 108 Ind. App. 695—Guardian Life Ins. Co. of America v. Brackett, 27 N.E.2d 103, 108 Ind.App. 442—Roy Stringer Co. v. Dillon, 12 N.E.2d 365, 105 Ind.App. 194—Lindley v. Steward, 5 N.E.2d 998, 103 Ind.App. 600, rehearing denied 8 N.E.2d 119, 103 Ind.App. 600—Stewart v. Flynn, 200 N.E. 706, 101 Ind.App. 692—American Income Ins. Co. v. Kindlespark, 200 N.E. 432, 102 Ind.App. 445—Sabinske v. Patterson, 196 N.E. 539, 100 Ind.App. 657.**

**Kan.—Bottenberg Implement Co. v. Sheffield, 229 P.2d 1004, 171 Kan. 67.**

**Tex.—First Nat. Bank v. Blewett, Civ.App., 89 S.W.2d 487, error dismissed.**

64 C.J. p 1273 note 98.

**95. Cal.—Zeibak v. Nasser, 82 P.2d 375, 12 Cal.2d 1.**

**96. Cal.—Stone v. San Francisco Brick Co., 109 P. 103, 13 Cal.App. 203.**

## a. In General

A conclusion of law is distinguished from a finding of fact in that it is arrived at through the application of a rule of law and not as a result of a process of natural reasoning.

A conclusion of law may be distinguished from a finding of fact in that it is arrived at through the application of a rule of law and not as a result of a process of natural reasoning.<sup>97</sup> The line of demarcation between findings of fact and conclusions of law is not easily drawn in all cases,<sup>98</sup> and whether a particular statement is a conclusion of law or finding of fact, or mixture of the two, may depend on the circumstances involved,<sup>99</sup> such as averments of a complaint,<sup>1</sup> other findings,<sup>2</sup> the intention of the trial court as shown by an examination of the issues and evidence,<sup>3</sup> and the whole record.<sup>4</sup> Declarations or statements by the trial judge as to right of recovery,<sup>5</sup> and as to the state of the proof,<sup>6</sup> are ordinarily regarded as conclusions of law, although a general finding for one party may constitute a finding of ultimate facts,<sup>7</sup> and failure of the trial judge to credit particular testimony has been held not a ruling of law but a finding of fact.<sup>8</sup> An ultimate finding based on special findings of fact may be a conclusion of law.<sup>9</sup> Where the evidence is undisputed, the findings of the court

amount to conclusions of law.<sup>10</sup> A finding that the statute of limitations has not run is a mixed finding of fact and law.<sup>11</sup> Under particular court rules, it has been held that there is no distinction between "findings of fact and conclusions of law" and "specific findings of fact and conclusions of law."<sup>12</sup>

*Construction to support judgment.* If there is doubt as to whether particular statements should be construed as findings of fact or conclusions of law, the doubt will be resolved in favor of the judgment;<sup>13</sup> but this rule will not be carried so far as to permit rejection of specific facts found by the court and acceptance of mere conclusions of law in direct conflict therewith in order to sustain the judgment.<sup>14</sup>

*Effect of characterization by trial court.* Although the characterization given it by the court is a factor for consideration,<sup>15</sup> fundamentally the character of a statement as one of fact or law is to be determined by its contents.<sup>16</sup> Findings of fact retain their character as such although they may be inaccurately designated as conclusions or rulings of law,<sup>17</sup> and conclusions of law do not lose their character as such because erroneously listed or described as findings of fact.<sup>18</sup> Findings

97. Cal.—Jordan v. Jordan, 135 P.2d 416, 58 Cal.App.2d 371—Gossman v. Gossman, 126 P.2d 178, 52 Cal.App. 2d 184.

Mo.—Maltz v. Jackoway-Katz Cap Co., 82 S.W.2d 909, 336 Mo. 1000 64 C.J. p 1273 note 2.

98. Cal.—Gossman v. Gossman, 126 P.2d 178, 52 Cal.App.2d 184.

Ind.—Klingler v. Ottinger, 22 N.E. 2d 805, 216 Ind. 9—Evansville Veneer & Lumber Co. v. Claydon, 73 N.E.2d 698, 117 Ind.App. 499. 64 C.J. p 1274 note 3.

99. U.S.—Citizens' Trust Co. v. Croll, C.C.A.III., 289 F. 421.

1. Cal.—Lynip v. Alturas School Dist. of Modoc County, 141 P. 835, 24 Cal.App. 426.

2. Cal.—Fitzpatrick v. Underwood, 112 P.2d 3, 17 Cal.2d 722. 64 C.J. p 1274 note 6.

3. U.S.—Citizens' Trust Co. v. Croll, C.C.A.III., 289 F. 421.

Or.—Oregon Home Builders v. Montgomery Inv. Co., 184 P. 487, 94 Or. 349.

4. Wash.—Laughlin v. Seattle Taxicab & Transfer Co., 146 P. 847, 84 Wash. 342.

5. Ind.—Kerfoot v. Kessener, 84 N. E.2d 190, 227 Ind. 58.

Mo.—State ex rel. Winn v. Banks, 145 S.W.2d 362, 346 Mo. 1177. N.M.—Porter v. Mesilla Val. Cotton Products, 76 P.2d 937, 42 N.M. 217.

Utah.—Duncan v. Hemmelwright, 186 P.2d 965, 112 Utah 262.

64 C.J. p 1274 note 9.

*Truth of pleadings*

Cal.—Noble v. Beach, 130 P.2d 426, 21 Cal.2d 91.

6. U.S.—U. S. v. Jefferson Electric Mfg. Co., Ct.Cl., 54 S.Ct. 443, 291 U.S. 386, 78 L.Ed. 859—American Chain Co. v. Eaton, Ct.Cl., 54 S. Ct. 443, 291 U.S. 386, 78 L.Ed. 859 —Routzahn v. Willard Storage Battery Co., Ct.Cl., 54 S.Ct. 443, 291 U. S. 386, 78 L.Ed. 859.

N.M.—Gillespie v. O'Neil, 28 P.2d 1040, 38 N.M. 141.

64 C.J. p 1274 note 10.

7. Cal.—Spring St. Realty Co. v. Trask, 15 P.2d 195, 126 Cal.App. 765.

8. Mass.—Maglio v. Lane, 167 N.E. 228, 268 Mass. 135.

N.Y.—Ryan v. Franklin, 92 N.E. 673, 199 N.Y. 347.

9. Cal.—Stark v. Shevrada, 204 P. 214, 187 Cal. 785.

10. Cal.—Leis v. City and County of San Francisco, 2 P.2d 26, 213 Cal. 256—Moody Institute of Science v. Los Angeles County, 233 P.2d 51, 105 Cal.App.2d 107.

Ind.—Evansville Veneer & Lumber Co. v. Claydon, 73 N.E.2d 698, 117 Ind.App. 499.

11. Cal.—Kornbau v. Evans, 152 P. 2d 651, 66 Cal.App.2d 677.

12. N.M.—Miera v. State, 129 P.2d 334, 46 N.M. 369.

13. Wyo.—Bishop v. Hawley, 238 P. 284, 33 Wyo. 271. 64 C.J. p 1275 note 87.

14. Cal.—Adams-Campbell Co. v. Jones, 235 P. 322, 71 Cal.App. 723.

15. Or.—Oregon Home Builders v. Montgomery Inv. Co., 184 P. 487, 94 Or. 349.

Improper classification as affecting validity or preventing consideration of finding of fact or conclusion of law see supra § 624.

16. Mo.—Monnig v. Easton Amusement Co., App. 27 S.W.2d 495—Platte Valley Bank of Cosby v. Farmers' & Traders' Bank, 14 S.W. 2d 12, 223 Mo.App. 500.

17. Ariz.—Gilliland v. Rodriguez, 268 P.2d 334, 77 Ariz. 163.

Cal.—Bechtold v. Bishop & Co., 105 P.2d 984, 16 Cal.2d 285—Walsh v. Walsh, 108 P.2d 765, 42 Cal.App. 2d 287.

S.D.—Cohrt v. Sun Ins. Office, Limited, 49 N.W.2d 589, 74 S.D. 153.

Tex.—McAsahan v. Cavitt, 229 S.W.2d 1016, 149 Tex. 147—First Nat. Bank v. Blewett, Civ.App., 89 S.W.2d 487, error dismissed.

64 C.J. p 1276 note 92.

18. Wis.—In re Curtis' Trust Estate, 33 N.W.2d 193, 253 Wis. 119, re-

or conclusions properly stated and classified are not affected by the improper inclusion or classification therewith of other findings or conclusions,<sup>19</sup> and embodying a conclusion of law among findings of fact neither adds to,<sup>20</sup> nor detracts from,<sup>21</sup> the force and effect of the true fact findings. A finding that the allegations of fact in a complaint are true is not a finding that any conclusions of law therein are true,<sup>22</sup> although it is a finding of fact.<sup>23</sup> Conclusions stated in the course of a general opinion of the court may not be treated as statutory findings of fact.<sup>24</sup> A finding of the trial court stated among the subordinate facts is prima facie a finding of a primary fact and not a conclusion.<sup>25</sup> The reason for a decision is not a finding of fact although included with such findings.<sup>26</sup>

## b. Particular Findings of Fact or Conclusions of Law

Particular findings have been held to be or not to be findings of fact or conclusions of law.

Among other findings which, under the circumstances of particular cases, have been held findings of facts are findings as to: abandonment of former action,<sup>27</sup> acceptance,<sup>28</sup> amount due,<sup>29</sup> appointment to office,<sup>30</sup> authority,<sup>31</sup> benefit by drains,<sup>32</sup> broker's agency in procuring sale,<sup>33</sup> cancellation of contract,<sup>34</sup> cause of death,<sup>35</sup> character of a sum or fund of money,<sup>36</sup> consideration,<sup>37</sup> construction of lease,<sup>38</sup> cost,<sup>39</sup> damages,<sup>40</sup> effect of granting request,<sup>41</sup> election to take under will,<sup>42</sup> execution of deed,<sup>43</sup> existence of a partnership,<sup>44</sup> existence of valid claims against an estate,<sup>45</sup> fraud, duress, or undue influence,<sup>46</sup> identity of importer,<sup>47</sup> incompetency,<sup>48</sup> indebtedness,<sup>49</sup> intent,<sup>50</sup> joint interest,<sup>51</sup>

hearing denied 33 N.W.2d 884, 253 Wis. 119.  
64 C.J. p 1276 note 93.

19. Cal.—Johnndrow v. Thomas, 187 P.2d 681, 31 Cal.2d 202—Lennher v. Chase, 220 P.2d 921, 98 Cal.App.2d 794—Lande v. Southern Cal. Freight Lines, 193 P.2d 144, 85 Cal.App.2d 416—Wood v. Keller, 163 P.2d 904, 72 Cal.App.2d 14—In re Blak's Estate, 150 P.2d 567, 65 Cal.App.2d 232—Sayles v. Los Angeles County, 138 P.2d 768, 59 Cal.App.2d 296—Gossman v. Gossman, 128 P.2d 178, 52 Cal.App.2d 184—In re Keeley, 97 P.2d 468, 36 Cal.App.2d 254—People v. Ocean Shore R. R., 72 P.2d 167, 22 Cal.App.2d 657—McVicar-Rood-Burkett Well No. 1 v. Crude Oil Drilling Co., 49 P.2d 901, 9 Cal.App.2d 371.  
Kan.—Frontier Lodge No. 104, A. F. & A. M. of Washington, Kan., v. Wilson, 80 P.2d 807, 139 Kan. 75.  
N.M.—Helsel v. York, 125 P.2d 717, 46 N.M. 210—Pankey v. Hot Springs Nat. Bank, 119 P.2d 638, 46 N.M. 10.  
Utah—Miller Brewing Co. v. Capitol Distributing Co., 77 P.2d 359, 94 Utah 51—Consolidated Wagon & Machine Co. v. Kay, 21 P.2d 836, 61 Utah 595.  
64 C.J. p 1276 note 94.

20. Ind.—Klingler v. Ottinger, 22 N.E.2d 805, 216 Ind. 8.  
Or.—Adler v. Rosen, 207 P. 467, 104 Or. 418.

21. Cal.—New York Life Ins. Co. v. Occidental Petroleum Corp., 111 P.2d 707, 43 Cal.App.2d 747, followed in Guardian Life Ins. Co. of America v. Occidental Petroleum Corp., 111 P.2d 710, 43 Cal.App.2d 848, and Sun Life Assur. Co. of Canada v. Occidental Petroleum Corp., 111 P.2d 710, 43 Cal.App.2d 849.

Kan.—Raynes v. Riss & Co., 103 P.2d 818, 152 Kan. 383.  
64 C.J. p 1276 note 96.

22. Cal.—Postal Telegraph-Cable Co. v. City of Los Angeles, 128 P. 19, 164 Cal. 156.

23. Cal.—Whepley Oil Co. v. Associated Oil Co., 44 P.2d 670, 6 Cal.App.2d 94.

24. U.S.—Fleischmann Const. Co. v. U. S. Va., 46 S.Ct. 284, 270 U.S. 349, 70 L.Ed. 624—Morrison Mill Co. v. Hartford Fire Ins. Co. of Hartford, Conn., D.C.Wash., 85 F.2d 862.

25. Conn.—Fraser v. City of Norwich, 23 A.2d 866, 128 Conn. 461.

26. Cal.—Dow v. Swain, 58 P. 271, 125 Cal. 674.

27. Cal.—Collins v. Ramiah, 188 P. 550, 182 Cal. 360.

28. Ind.—Kerfoot v. Kessener, 84 N.E.2d 190, 227 Ind. 58.

29. Idaho.—Union Cent. Life Ins. Co. v. Nielson, 114 P.2d 252, 62 Idaho 483.

Ind.—Schlamborg v. Schlamborg, 41 N.E.2d 801, 220 Ind. 209—Walcz v. Kozacic, 156 N.E. 589, 86 Ind.App. 484.

30. Utah.—Snyder v. Emerson, 57 P. 800, 19 Utah 819.

31. U.S.—Citizens' Trust Co. v. Croll, C.C.A.III., 289 F. 421.  
Or.—Reade v. Pacific Supply Assoc., 66 P. 443, 40 Or. 60.

32. Ind.—Perkins v. Hayward, 24 N.E. 1033, 124 Ind. 445.

33. Tex.—Leonard v. Torrance, Civ. App., 210 S.W. 295.

34. Cal.—Palmer v. Fix, 286 P. 498, 104 Cal.App. 562—Head v. Solomon, 181 P. 807, 41 Cal.App. 6.

35. Cal.—Price v. Occidental Life Ins. Co., 147 P. 1175, 169 Cal. 800.

36. Ind.—State v. Williams, 77 N.E. 1137, 39 Ind.App. 876.

37. Cal.—Rusk v. Johnston, 63 P.2d 1167, 18 Cal.App.2d 408.  
Utah.—Utah Nat. Bank of Salt Lake City v. Nielson, 111 P. 907, 38 Utah 169.

38. Utah.—Sandall v. Hoskins, 137 P.2d 819, 104 Utah 50.

39. U.S.—Dgan v. Clasbey, Utah, 11 S.Ct. 231, 137 U.S. 654, 34 L.Ed. 822.

40. Cal.—Wood v. Keller, 163 P.2d 904, 72 Cal.App.2d 14.  
Nev.—Brownfield v. F. W. Woolworth Co., 248 P.2d 1078, 69 Nev. 294, rehearing denied 251 P.2d 589, 69 Nev. 294.

41. Mass.—Woodworth v. Woodworth, 173 N.E. 578, 273 Mass. 402.

42. Vt.—In re Peck's Estate, 88 A. 568, 87 Vt. 194.

43. Cal.—Johnndrow v. Thomas, 187 P.2d 681, 31 Cal.2d 202.

44. Utah.—Kahn v. Central Smelting Co., 2 Utah 371.

45. Ind.—Warren County Bank v. Keister, 138 N.E. 517, 80 Ind.App. 134, modified on other grounds 139 N.E. 379, 80 Ind.App. 134.

46. Cal.—Weger v. Rocha, 32 P.2d 417, 138 Cal.App. 109.  
64 C.J. p 1274 note 29.

47. N.M.—Tres Ritos Ranch Co. v. Abbott, 105 P.2d 1070, 44 N.M. 556, 130 A.L.R. 963.

48. N.H.—Oullette v. Ledoux, 30 A. 2d 13, 92 N.H. 302.

49. Cal.—Nisbet v. Rhinehart, 42 P.2d 71, 2 Cal.2d 477.  
64 C.J. p 1274 note 30.

50. Conn.—Prendergast v. Drew, 130 A. 75, 103 Conn. 88.  
64 C.J. p 1274 note 31.

51. N.H.—Lakeport Nat. Bank v. McDonald, 116 A. 638, 80 N.H. 337.

and a justifiable decrease in number of positions.<sup>52</sup>

Additional findings which have been held to be findings of fact are findings as to: knowledge,<sup>53</sup> liability under contract,<sup>54</sup> location of house,<sup>55</sup> making of contract,<sup>56</sup> making of determination as to issuance of patents,<sup>57</sup> malice,<sup>58</sup> nature of contract,<sup>59</sup> nature of work,<sup>60</sup> negligence,<sup>61</sup> ownership, title, or interest,<sup>62</sup> partition of property,<sup>63</sup> passage of resolutions with reference to particular work,<sup>64</sup> payment,<sup>65</sup> proximate cause,<sup>66</sup> ratification,<sup>67</sup> relationship of parties,<sup>68</sup> rescission,<sup>69</sup> residence,<sup>70</sup> right of way,<sup>71</sup> sale,<sup>72</sup> testamentary capacity,<sup>73</sup> type of

school,<sup>74</sup> use under claim of right,<sup>75</sup> value,<sup>76</sup> and water rights.<sup>77</sup>

Among other findings which, under the circumstances of particular cases, have been held to be conclusions of law are: amount due,<sup>78</sup> assignment,<sup>79</sup> assumption of obligation,<sup>80</sup> authority,<sup>81</sup> breach of contract,<sup>82</sup> broker's agency in procuring sale,<sup>83</sup> cause of water shortage,<sup>84</sup> character of property as a homestead,<sup>85</sup> character of use generally,<sup>86</sup> consideration,<sup>87</sup> construction of contract,<sup>88</sup> constructive knowledge or notice,<sup>89</sup> conversion and appropriation of property,<sup>90</sup> credits,<sup>91</sup> damages,<sup>92</sup> date

52. Ind.—Kostanser v. State ex rel. Ramsey, 187 N.E. 337, 205 Ind. 536.

53. Utah—Harris v. Butler, 63 P.2d 286, 91 Utah 11.

54. Cal.—Alkus v. Johnson-Pacific Co., 181 P.2d 72, 80 Cal.App.2d 1.

55. Conn.—Spencer v. Merwin, 68 A. 370, 80 Conn. 230.

56. Mass.—American Mut. Liability Ins. Co. v. Condon, 133 N.E. 106, 280 Mass. 517.

57. Cal.—Anderson v. Southern Pacific R. Co., 65 P. 950, reheard 67 P. 1124, 135 Cal. xix.

58. Ind.—May v. Anderson, 42 N.E. 946, 14 Ind.App. 251.

59. Cal.—Oakley v. Rosen, 173 P.2d 55, 76 Cal.App.2d 310.

60. Mass.—Caton v. Winslow Bros. & Smith Co., 34 N.E.2d 638, 309 Mass. 150.

61. Conn.—Marley v. New England Transp. Co., 53 A.2d 296, 133 Conn. 586—Doherty v. Connecticut Co., 52 A.2d 436, 133 Conn. 469—McCarthy v. Consolidated R. Co., 63 A. 725, 79 Conn. 71.

Mass.—Fibre Leather Mfg. Corp. v. Ramsay Mills, Inc. 109 N.E.2d 910, 229 Mass. 575—Quinby v. Boston & M. R. R., 81 N.E.2d 853, 318 Mass. 438, 160 A.L.R. 724.

Ohio.—Riesenbeck v. Bauer, 82 N.E. 2d 94, 83 Ohio App. 215.

Tex.—McAshan v. Cavitt, 229 S.W.2d 1016, 149 Tex. 147.

62. U.S.—Bogan v. Hynes, C.C.A. Cal., 65 F.2d 524, certiorari denied 54 S.Ct. 126, 290 U.S. 690, 78 L. Ed. 594.

Cal.—In re Woods' Estate, 72 P.2d 265, 28 Cal.App.2d 187.

Ind.—Fouts v. Largent, 94 N.E.2d 448, 228 Ind. 547—Kerfoot v. Kesener, 84 N.E.2d 190, 227 Ind. 58.

Willard v. Bringolf, 5 N.E.2d 315, 103 Ind.App. 16—Sabinske v. Patterson, 195 N.E. 539, 100 Ind. App. 657—Mellencamp v. Reeves Auto Co., 190 N.E. 618, 100 Ind. App. 26.

64 C.J. p 1274 note 28.

63. Ind.—Myers v. Brane, 57 N.E.2d 594, 115 Ind.App. 144.

64. Cal.—Pacific Paying Co. v. Diglins, 87 P. 415, 4 Cal.App. 240.

65. Cal.—Wilson v. General Water Heater Corporation, 33 P.2d 415, 138 Cal.App. 769.

64 C.J. p 1275 note 40.

66. Ariz.—Gilliland v. Rodriguez, 268 P.2d 334.

Ind.—Evansville Veneer & Lumber Co. v. Claybon, 73 N.E.2d 698, 117 Ind.App. 499.

67. Ind.—Minnich v. Darling, 36 N.E. 173, 8 Ind.App. 539.

68. Tex.—Tjerliva v. Botello, Civ. App., 207 S.W.2d 136.

Status as independent contractor Iowa.—Banks v. Carrell, 43 N.W.2d 142, 241 Iowa 786.

Whether parties lived together as man and wife

Ind.—Schilling v. Parsons, 36 N.E.2d 958, 110 Ind.App. 52.

69. Cal.—Hollenbach v. Schnabel, 35 P. 872, 101 Cal. 312, 40 Am.S.R. 57.

70. Kan.—Ford v. Peck, 225 P. 1054, 116 Kan. 74, rehearing denied 227 P. 527, 116 Kan. 481.

71. N.H.—Hatch v. Hillsgrove, 138 A. 423, 139 A. 866, 83 N.H. 91.

72. Or.—Lancaster Tire & Rubber Co. v. McGraw, 195 P. 815, 99 Or. 406.

73. Cal.—Clements v. McGinn, 83 P. 920, 99 Cal. xvii.

74. Ind.—State ex rel. Johnson v. Boyd, 28 N.E.2d 256, 217 Ind. 348.

75. Conn.—Phillips v. Bonadies, 136 A. 684, 106 Conn. 722.

76. Mass.—Tegelaar Bros. v. Auburndale Conservatories, 190 N.E. 599, 286 Mass. 363.

Wash.—Fisher v. Coy Valve Co., 244 P. 125, 247 P. 966, 133 Wash. 35.

77. Cal.—Weidenmuller v. Stearns Ranchos Co., 61 P. 374, 128 Cal. 623.

78. N.D.—First Nat. Bank v. Mahoney, 135 N.W. 771, 23 N.D. 177.

79. Tex.—Central Texas Exch. Nat. Bank of Waco v. First Nat. Bank. Civ.App., 243 S.W. 998, rehearing overruled 246 S.W. 111.

80. Vt.—Greenwood v. Lamson, 188 A. 915, 106 Vt. 37.

81. Ind.—Foulkes Contracting Co. v. Crowder, App., 171 N.E. 304.

Mo.—Monmouth College v. Dockery, 145 S.W. 785, 241 Mo. 522.

82. Ariz.—Welker & Clifford v. Merrill, 255 P. 991, 32 Ariz. 90.

Conn.—Rockwell v. New Departure Mfg. Co., 128 A. 302, 102 Conn. 255.

83. Tex.—Goodwin v. Gunter, 195 S.W. 848, 109 Tex. 56.

84. Utah.—Miller v. Mt. Nebo Land & Irrigation Co., 106 P. 504, 37 Utah 1.

85. S.D.—Farmers' & Merchants' Nat. Bank of Milbank v. Bank of Commerce of Milbank, 206 N.W. 691, 49 S.D. 130.

86. Conn.—Rooney v. Woolworth, 52 A. 411, 74 Conn. 720.

87. Cal.—Drovers' Nat. Bank v. Browne, 264 P. 265, 38 Cal.App. 716.

88. Ind.—Columbia Conserve Co. v. Watson, 39 N.E.2d 740, 219 Ind. 494.

Tex.—Fleming Oil Co. v. Anco Gas Corp., Civ.App., 217 S.W.2d 29.

Wis.—Elkhorn Production Credit Ass'n v. Johnson, 29 N.W.2d 64, 251 Wis. 280, 2 A.L.R.2d 256.

89. Utah.—Gay v. Young Men's Consol. Co-op. Mercantile Inst., 107 P. 237, 37 Utah 230.

Wash.—Bailey v. E. C. Miller Cedar Lumber Co., 286 P. 57, 155 Wash. 673.

90. Ind.—Burkhart v. Simms, 60 N.E.2d 141, 115 Ind.App. 576.

91. Cal.—San Joaquin Brick Co. v. Mulcahy, 205 P. 351, 58 Cal.App. 295.

92. Cal.—Robinson v. Raquet, 36 P. 2d 821, 1 Cal.App.2d 533—Klein v. Lewis, 182 P. 789, 41 Cal.App. 463.

Utah.—B. T. Moran, Inc. v. First Sec. Corporation, 24 P.2d 354, 83 Utah 516.

of final settlement,<sup>93</sup> effectiveness of notice,<sup>94</sup> effect of order,<sup>95</sup> effect of relationship between parties,<sup>96</sup> existence of corporation,<sup>97</sup> existence of resulting or constructive trust,<sup>98</sup> indebtedness,<sup>99</sup> intent,<sup>1</sup> issuance of deed,<sup>2</sup> and justification.<sup>3</sup>

Additional findings which have been held to be conclusions of law are findings as to: knowledge,<sup>4</sup> lack of adequate remedy,<sup>5</sup> liability under contract,<sup>6</sup> lien,<sup>7</sup> malicious mischief,<sup>8</sup> nature of agreement,<sup>9</sup> nature of deposits,<sup>10</sup> negligence,<sup>11</sup> nuisance,<sup>12</sup> ownership, title, or interest,<sup>13</sup> payment,<sup>14</sup> performance of contract,<sup>15</sup> proximate cause,<sup>16</sup> reasonable character of use,<sup>17</sup> reason for denying relief,<sup>18</sup> recordable character of an instrument,<sup>19</sup> right of way,<sup>20</sup> right to a lien,<sup>21</sup> right to interest,<sup>22</sup> service of process,<sup>23</sup> status of person as bona fide or innocent holder or purchaser,<sup>24</sup> sufficiency of ordinance,<sup>25</sup> sufficiency of resolution,<sup>26</sup> time during which commissioners were in session,<sup>27</sup> timely institution of action,<sup>28</sup> and waiver.<sup>29</sup>

Various findings, under the circumstances of

particular cases, have been held not to be conclusions of law, such as findings with respect to amount due,<sup>30</sup> failure of a broker to produce a purchaser for property,<sup>31</sup> prior or paramount rights of a party,<sup>32</sup> and that a trial was based on the assumption of a particular pleading.<sup>33</sup>

## § 648. — Ultimate or Probative Facts

Generally, the distinction between findings of ultimate facts and findings of probative facts is that findings of probative facts relate to evidence of the existence of some other fact, and those of ultimate facts to the final resulting effect reached by logical reasoning from the evidentiary facts.

While it is sometimes difficult to distinguish between findings of ultimate facts and findings of evidentiary facts,<sup>34</sup> and whether a particular finding is one of ultimate or probative facts will depend on the circumstances involved,<sup>35</sup> generally speaking the distinction is that the findings of evidentiary facts relate to evidence of the existence of some other fact, and those of ultimate facts to the final

93. U.S.—Lambert Lumber Co. v. Jones Engineering & Construction Co., C.C.A.Mo., 47 F.2d 74, certiorari denied 51 S.Ct. 489, 283 U.S. 642, 75 L.Ed. 1452.
94. Cal.—Fuller v. Towne, 193 P. 88, 184 Cal. 89.
95. Ind.—Board of Trustees of Firemen's Pension Fund v. State ex rel. Stuck, 194 N.E. 623, 208 Ind. 117.
96. Vt.—Dieter v. Scott, 9 A.2d 95, 110 Vt. 876.
97. Wis.—Linsley v. Farmers Exchange Inv. Co., 271 N.W. 364, 223 Wis. 665.
98. Cal.—Stromerson v. Averill, 133 P.2d 617, reheard 141 P.2d 732, 22 Cal.2d 808.
99. Vt.—Hartford School Dist. v. Hartford School Dist. No. 13, 37 A. 252, 69 Vt. 147.
- 64 C.J. p 1275 note 64.
1. Cal.—Petersen v. Civil Service Board of City of Oakland, 227 P. 238, 47 Cal.App. 70, motion denied 230 P. 196, 68 Cal.App. 752.
- Ohio.—Phipps v. Ratterman, 10 Ohio Cir.Ct. 205, 6 Ohio Cir.Dec. 488.
2. Ind.—Essex v. Meyers, 62 N.E. 96, 27 Ind.App. 639.
3. Pa.—Massachusetts Bonding & Ins. Co. v. Johnston & Harder, 16 A.2d 444, 340 Pa. 253.
4. Vt.—Russell v. Buck, 63 A.2d 691, 116 Vt. 40.
- Wash.—Field v. Copping, Agnew & Scales, 118 P. 329, 65 Wash. 359, 36 L.R.A.N.S., 488.
5. Ind.—New Albany Gas Light, etc. Co. v. New Albany, 89 N.E. 462, 139 Ind. 660.
6. Vt.—Granite City Co-op. Creamery Ass'n v. B & K Cheese Co., 63 A.2d 193, 115 Vt. 408.
7. Utah.—Pinney v. Pinney, 245 P. 329, 66 Utah 612.
8. N.M.—Rea v. Motors Ins. Corp., 144 P.2d 676, 48 N.M. 9.
9. Cal.—Wayt v. Patee, 269 P. 660, 205 Cal. 46.
- 64 C.J. p 1276 note 70.
10. U.S.—Utter v. Eckerson, C.C.A. Idaho, 78 F.2d 307.
11. Ind.—Long v. Archer, 46 N.E.2d 818, 221 Ind. 186.
- Utah.—Warren v. Robison, 70 P. 989, 25 Utah 205.
12. Cal.—People v. Goddard, 191 P. 1012, 47 Cal.App. 730.
- Tex.—McGuffey v. Pierce-Fordyce Oil Ass'n, Civ.App., 211 S.W. 335.
13. Idaho.—C. I. T. Corp. v. Elliott, 159 P.2d 891, 66 Idaho 384.
- 64 C.J. p 1275 note 73.
14. Mass.—Hogan v. Coleman, 96 N. E.2d 864, 326 Mass. 770.
- 64 C.J. p 1275 note 74.
15. Ind.—American Income Ins. Co. v. Kindiesparker, 37 N.E.2d 304, 110 Ind.App. 517.
16. La.—Iglesias v. Campbell, App., 175 So. 145.
17. N.H.—Town of Tilton v. Sharpe, 151 A. 452, 84 N.H. 393.
18. Cal.—Dow v. Swain, 58 P. 271, 125 Cal. 674.
19. S.D.—Cordington County Land Co. v. Hill, 202 N.W. 637, 48 S.D. 90.
20. Conn.—New York, N. H. & H. R. Co. v. Armstrong, 103 A. 791, 92 Conn. 349—Knowlton v. New York, etc., R. Co., 44 A. 2, 72 Conn. 188.
21. Ind.—Johnson v. Citizens' Trust Co., 136 N.E. 49, 78 Ind.App. 487.
22. Ind.—Deep Vein Coal Co. v. Jones, 97 N.E. 341, 49 Ind.App. 314.
23. Ohio.—Barnes v. Butler County Lumber Co., 176 N.E. 103, 38 Ohio App. 445.
24. Cal.—Smith v. Armstrong, 260 P. 347, 85 Cal.App. 624.
25. Cal.—Harris v. City of Piedmont, 42 P.2d 356, 5 Cal.App.2d 146.
26. Cal.—Ahlmán v. Barber Asphalt Paving Co., 181 P. 238, 40 Cal.App. 395.
27. Ind.—State v. Richey, 172 N.E. 119, 202 Ind. 116.
28. Wash.—Harrison v. Consolidated Holding Co., 93 P.2d 729, 200 Wash. 434.
29. Or.—Adler v. Rosen, 207 P. 467, 104 Or. 418.
30. Cal.—Fejer v. Paonessa, 231 P. 2d 507, 104 Cal.App.2d 190.
31. Cal.—Fitzpatrick v. Underwood, 112 P.2d 3, 17 Cal.2d 722.
32. Cal.—Jones v. Pleasant Val. Canal Co., 113 P.2d 289, 44 Cal.App. 2d 798.
33. Tex.—Tri-State Ass'n of Credit Men v. Hinson, 144 S.W.2d 831, 136 Tex. 260, rehearing overruled 146 S.W.2d 723, 136 Tex. 260.
34. Or.—Oregon Home Builders v. Montgomery Inv. Co., 184 P. 487, 94 Or. 349.
- Controlling effect see supra § 636.
35. Cal.—Ford v. Cotton, 256 P. 301, 82 Cal.App. 675.
- 64 C.J. p 1276 note 2.

resulting effect reached by logical reasoning from the evidentiary facts.<sup>36</sup> Mere evidentiary facts have no bearing on the conclusions of law stated on a finding of facts.<sup>37</sup> The general rule of construction in support of the judgment, discussed supra § 646, applies to construction of findings of ultimate facts.<sup>38</sup> An ultimate fact, fairly and reasonably inferable from facts and circumstances proved, is to be taken as established.<sup>39</sup>

### § 649. — Implied and Negative Findings

A finding of fact or conclusion of law will have the effect of a decision or determination of any matter or issue necessarily involved and settled by the finding made.

Findings and conclusions include not only that which is expressly stated, but also matters of

necessary implication from the language used,<sup>40</sup> as where a fact not expressly found is inferred from express findings by reason of business custom,<sup>41</sup> legal presumption,<sup>42</sup> or mathematical computation.<sup>43</sup> In other words, a finding or conclusion will have the legal effect of a decision or determination of any matter or issue necessarily involved and settled by the finding made,<sup>44</sup> and this rule has been applied, among other instances,<sup>45</sup> to findings as to such matters as champerty,<sup>46</sup> compensation,<sup>47</sup> consideration,<sup>48</sup> delivery,<sup>49</sup> demand,<sup>50</sup> existence of a contract,<sup>51</sup> fraud or undue influence,<sup>52</sup> laches,<sup>53</sup> last clear chance,<sup>54</sup> making of a loan,<sup>55</sup> misrepresentation,<sup>56</sup> mistake,<sup>57</sup> modification of contract,<sup>58</sup> nature of transaction,<sup>59</sup> nature of possession,<sup>60</sup> necessity for appointment of deputy officer,<sup>61</sup> negligence,<sup>62</sup> ownership,<sup>63</sup> proximate

36. U.S.—C. I. R. v. Sharp, C.C.A.3, 91 F.2d 804—Brooks Paper Co. v. U. S., 40 C.C.P.A. Customs 38.  
Or.—Oregon Home Builders v. Montgomery Inv. Co., 184 P. 487, 94 Or. 349.

Tex.—Wilson v. Metcalf, Civ.App., 257 S.W.2d 855, error refused no reversible error.

37. Ind.—Diedrich v. Way, 119 N.E. 223, 67 Ind.App. 375.

38. Cal.—Ewalt v. Mortgage Securities of Santa Barbara, 19 P.2d 60, 129 Cal.App. 559—Tower v. Wilson, 188 P. 87, 45 Cal.App. 123.

Vt.—Duchaine v. Zaetz, 44 A.2d 165, 114 Vt. 274.

39. Neb.—Kirkpatrick v. Chocolate Sales Corporation, 256 N.W. 89, 127 Neb. 604—Struve v. City of Fremont, 250 N.W. 663, 125 Neb. 463.

40. Mass.—Maher v. Haycock, 18 N.E.2d 348, 301 Mass. 594—Mahoney v. Norcross, 187 N.E. 227, 284 Mass. 153.

64 C.J. p 1277 note 11.

Nothing can be added to a special finding of fact by presumption, inference, or intendment.—Kerfoot v. Kessener, 84 N.E.2d 190, 227 Ind. 585—Bryant v. Barger, 18 N.E.2d 965, 106 Ind.App. 245—64 C.J. p 1277 note 11 [c] (2).

41. Conn.—Hadfield v. Tracy, 125 A. 199, 101 Conn. 118, 34 A.L.R. 581. 64 C.J. p 1277 note 12.

42. Wash.—City of Seattle v. Shorrock, 170 P. 590, 100 Wash. 234. 64 C.J. p 1277 note 13.

43. Cal.—Sannes v. McEwen, 10 P. 2d 81, 122 Cal.App. 265.

44. Cal.—Boas v. Bank of America Nat. Trust & Sav. Ass'n, 125 P. 2d 620, 51 Cal.App.2d 592—Phillips v. Hooper, 111 P.2d 22, 43 Cal.App. 2d 467.

Kan.—Scrivner v. Tucker, 201 P.2d

632, 166 Kan. 295—Dinsmoor v. Hill, 187 P.2d 338, 164 Kan. 12.

Mass.—Adamowicz v. Iwanicki, 190 N.E. 711, 286 Mass. 453. 64 C.J. p 1277 note 15.

#### Recompent and set-off

Where defendant filed declaration in recompent and set-off for unliquidated damages, and judge found for plaintiff in set-off, such finding must be treated as finding for defendant on its plea of recompent where there was no ground for finding in set-off.—Tegelaar Bros. v. Auburndale Conservatories, 190 N.E. 599, 286 Mass. 363.

#### 45. Particular findings or conclusions

(1) Arrest or detention.—Ogulin v. Jeffries, 263 P.2d 75, 121 Cal.App.2d 211.

(2) Futility of bringing case to trial.—Rauer's Law & Collection Co. v. Higgins, 174 P.2d 450, 76 Cal.App. 2d 854.

(3) Misleading or confusing names.—National Shoe Corp. v. National Shoe Mfg. Co., 19 N.E.2d 734, 302 Mass. 449.

(4) Purpose of deeds.—Kramer v. Watnick, 146 P.2d 947, 63 Cal.App.2d 308.

(5) Reduction of price.—Gschwend v. Stoll, 232 P.2d 494, 104 Cal.App. 2d 806.

(6) Striking.—Fayne v. Baker, 3 A.2d 518, 62 R.I. 118.

(7) Voluntary delivery.—New Hampshire Sav. Bank v. National Rockland Bank, 41 A.2d 760, 93 N.H. 326.

46. Mo.—Mytton v. Missouri Pac. R. Co., App., 211 S.W. 111. 64 C.J. p 1278 note 17.

47. Colo.—Johnson v. Neel, 229 P. 2d 939, 123 Colo. 377.

48. Cal.—Abel v. O'Hearn, 218 P.2d 827, 97 Cal.App.2d 747.

Ind.—Wabash Val. Coach Co. v. Turner, 46 N.E.2d 212, 221 Ind. 52, certiorari denied 63 S.Ct. 1167, 319 U. S. 754, 193 L.Ed. 1707. 64 C.J. p 1278 note 18.

49. W.Va.—Boyd v. Pancake Realty Co., 46 S.E.2d 633, 131 W.Va. 150.

50. Okl.—O'Neal v. O'Neal, 141 P. 2d 593, 193 Okl. 146.

51. Cal.—Wood v. Girot, 282 P. 981, 102 Cal.App. 160. 64 C.J. p 1278 note 19.

52. Ky.—McCoy v. Kentucky & W. Va. Gas Co., 226 S.W.2d 515, 312 Ky. 57. 64 C.J. p 1278 note 20.

53. Cal.—Spadoni v. Maggenti, 8 P. 2d 874, 121 Cal.App. 147.

54. N.M.—George v. Jensen, 165 P. 2d 129, 49 N.M. 410.

55. D.C.—Sachs v. Ewing, 133 F.2d 403, 77 U.S.App.D.C. 166.

56. Cal.—Earl v. Saks & Co., 226 P. 2d 340, 36 Cal.2d 602.

57. Vt.—Burlington Bldg. & Loan Ass'n v. Cummings, 17 A.2d 319, 111 Vt. 447.

58. Cal.—Consolidated Irr. Dist. v. Crawshaw, 20 P.2d 119, 130 Cal. App. 455, followed in 20 P.2d 122, 130 Cal.App. 463.

59. Tex.—Latta v. Transit Grain Co., Civ.App., 222 S.W.2d 467.

60. Cal.—Bicknell v. Strawn, 79 P. 2d 775, 26 Cal.App.2d 491.

Vt.—Glass v. Newport Clothing Co., 8 A.2d 651, 110 Vt. 368.

61. Idaho.—Dukes v. Board of County Com'rs of Boise County, 107 P. 491, 17 Idaho 736.

62. Conn.—Schuster v. Johnson, 145 A. 29, 108 Conn. 704.

Utah.—Patton v. Kirkman, 167 P.2d 282, 109 Utah 487.

63. Cal.—Ayer v. Grondoni, 187 P. 137, 45 Cal.App. 218.



cause,<sup>64</sup> real or personal character of property,<sup>65</sup> soundness of mind,<sup>66</sup> status of a party,<sup>67</sup> and the terms of an agreement.<sup>68</sup>

Findings and conclusions will not be implied, however, unless they are a legitimate inference to be drawn from the language used,<sup>69</sup> and a finding will not be implied when such implied finding would conflict with an express finding,<sup>70</sup> nor are specific statements in a special finding to be controlled or modified by inferences suggested by uncertain or equivocal expressions.<sup>71</sup> In other words, a finding or conclusion will not constitute a determination as to matters or issues beyond its logical scope or meaning.<sup>72</sup> Thus where plaintiff's affirmative case is wholly inconsistent with the truth of defendant's case, the conclusive establishment of the former is necessarily a complete negative of the latter.<sup>73</sup> Findings will not be interpolated by implication where the findings expressly stated follow in such logical and closely connected sequence as to prevent it.<sup>74</sup> Findings will not be construed as mere inferences from other facts found where they are clearly independent findings from the entire evidence.<sup>75</sup> Where findings are made substantially

in the language of the pleadings, they do not include issues not raised by the pleadings.<sup>76</sup>

**Negative findings.** Findings need not expressly negative every possible exception or qualification of the facts found,<sup>77</sup> since an implied negation necessarily exists where the facts found are inconsistent with those not found.<sup>78</sup> A finding in the form of a negative pregnant attempting to negative an affirmative allegation implies the truth of the allegation.<sup>79</sup> The lack of a finding as to a directed verdict is negatively a finding of fact conclusive on the parties where each party moves for a directed verdict.<sup>80</sup>

**Ultimate facts.** A finding of ultimate facts includes by implication a finding of all probative or evidentiary facts necessary to sustain it,<sup>81</sup> and a finding that contradictory probative declarations are untrue.<sup>82</sup>

**Implication to support judgment.** In accordance with the general rule that findings will be construed to support the judgment, as discussed supra § 646, wherever from the facts expressly found other facts may be inferred which will support the judgment, such inference will be made,<sup>83</sup> and it has been

64. *Tex.*—*McAshan v. Cavitt*, 229 S.W.2d 1016, 149 Tex. 147.

65. *Mass.*—*Medford Trust Co. v. Priggen Steel Garage Co.*, 174 N.E. 126, 273 Mass. 349.

66. *Ky.*—*McCoy v. Kentucky & W. Va. Gas Co.*, 226 S.W.2d 515, 312 Ky. 57.

67. *Cal.*—*Hughes v. City of Torrance*, 175 P.2d 290, 77 Cal.App.2d 272.

68. *Ind.*—*Andrews v. Peters*, 145 N.E. 579, 82 Ind.App. 200.

69. *Utah.*—*Alken v. Less Taylor Motor Co.*, 171 P.2d 676, 110 Utah 265.

70. *S.C.*—*Taggart v. Taggart*, 71 S.E. 1081, 89 S.C. 490.

71. *Cal.*—*Mont.*—*Beaverhead Canal Co. v. Dillon Electric Light, etc., Co.*, 85 P. 880, 34 Mont. 135.

72. *Cal.*—*Strong v. Strong*, 140 P.2d 386, 22 Cal.2d 540.

73. *Mich.*—*Schelske v. Orange Tp.*, 110 N.W. 506, 147 Mich. 135.

74. *Cal.*—*Strong v. Strong*, 140 P.2d 386, 22 Cal.2d 540.

75. *Mass.*—*Sawyer v. Clark*, 100 N.E. 1079, 214 Mass. 124.

76. *Cal.*—*Strong v. Strong*, 140 P.2d 386, 22 Cal.2d 540.

77. *Mich.*—*Schelske v. Orange Tp.*, 110 N.W. 506, 147 Mich. 135.

78. *Cal.*—*Strong v. Strong*, 140 P.2d 386, 22 Cal.2d 540.

79. *Cal.*—*Austin v. Harry E. Jones, Inc.*, 86 P.2d 379, 30 Cal.App.2d 362.

80. *U.S.*—*Dektor v. Overbrook Nat.*

(4) *Intent to defraud.*—*National Shawmut Bank of Boston v. Cumming*, 91 N.E.2d 337, 325 Mass. 457.

(5) *Knowledge of defect.*—*Hoffman v. City of Chelsea*, 52 N.E.2d 7, 315 Mass. 54—64 C.J. p 1278 note 30 [b] (3).

(6) *Living together as husband and wife.*—*Willis v. Willis*, 54 P.2d 814, 49 Wyo. 296.

(7) *Ruling on motion for directed verdict.*—*Brown v. Compton & Roush*, 53 N.W.2d 164, 243 Iowa 665.

(8) *Other findings or conclusions see 64 C.J. p 1278 note 30 [b].*

73. *U.S.*—*Fox v. Haarstick*, Utah, 15 S.Ct. 457, 156 U.S. 674, 39 L.Ed. 576.

74. *C.J. p 1278 note 31.*

75. *N.Y.*—*Brown v. Robinson*, 120 N.E. 694, 224 N.Y. 301.

76. *Mass.*—*Sawyer v. Clark*, 100 N.E. 1079, 214 Mass. 124.

77. *Mich.*—*Schelske v. Orange Tp.*, 110 N.W. 506, 147 Mich. 135.

78. *Cal.*—*Strong v. Strong*, 140 P.2d 386, 22 Cal.2d 540.

79. *Cal.*—*Austin v. Harry E. Jones, Inc.*, 86 P.2d 379, 30 Cal.App.2d 362.

80. *U.S.*—*Dektor v. Overbrook Nat.*

81. *Cal.*—*Bloss v. Rahilly*, 104 P.2d 1049, 16 Cal.2d 70—*Rahilly & Rahilly, Inc. v. Ambort*, 258 P.2d 18, 118 Cal.App.2d 465—*Gschwend v. Stoll*, 232 P.2d 494, 104 Cal.App.2d 806—*Glens Falls Indem. Co. v. Perscallo*, 216 P.2d 567, 96 Cal.App.2d 799—*Pellegrino v. Los Angeles Transit Lines*, 179 P.2d 39, 79 Cal.App.2d 40—*Heinz v. Heinz*, 165 P.2d 967, 73 Cal.App.2d 61—*Hitchcock v. Lovelace*, 119 P.2d 151, 47 Cal.App.2d 818—*Jones v. Pleasant Val. Canal Co.*, 113 P.2d 289, 44 Cal.App.2d 798.

82. *Cal.*—*Ford v. Cotton*, 256 P. 301, 82 Cal.App. 675—*Tower v. Wilson*, 188 P. 87, 45 Cal.App. 123.

83. *Cal.*—*City of Napa v. Navoni*, 132 P.2d 566, 56 Cal.App.2d 289.

Bank of Philadelphia, C.C.A.Pa., 77 F.2d 491, certiorari denied 55 S.Ct. 917, 295 U.S. 755, 79 L.Ed. 1698, rehearing denied 58 S.Ct. 82, 296 U.S. 661, 80 L.Ed. 471.

81. *Cal.*—*Bloss v. Rahilly*, 104 P.2d 1049, 16 Cal.2d 70—*Rahilly & Rahilly, Inc. v. Ambort*, 258 P.2d 18, 118 Cal.App.2d 465—*Gschwend v. Stoll*, 232 P.2d 494, 104 Cal.App.2d 806—*Glens Falls Indem. Co. v. Perscallo*, 216 P.2d 567, 96 Cal.App.2d 799—*Pellegrino v. Los Angeles Transit Lines*, 179 P.2d 39, 79 Cal.App.2d 40—*Heinz v. Heinz*, 165 P.2d 967, 73 Cal.App.2d 61—*Hitchcock v. Lovelace*, 119 P.2d 151, 47 Cal.App.2d 818—*Jones v. Pleasant Val. Canal Co.*, 113 P.2d 289, 44 Cal.App.2d 798.

82. *C.J. p 1251 note 84, p 1276 note 9.*

**Findings as conclusions generally.**

Unless they are clothed in the very words of the evidence on which they are based, practically all findings of ultimate or general facts are conclusions of fact based on detailed facts and circumstances shown by the evidence.

*Wash.*—*Clamby v. Copland*, 100 P. 1031, 52 Wash. 580.

*Wyo.*—*Corpus Juris cited in Gore v. John*, 167 P.2d 552, 561, 61 Wyo. 246.

83. *Cal.*—*Ford v. Cotton*, 256 P. 301, 82 Cal.App. 675—*Tower v. Wilson*, 188 P. 87, 45 Cal.App. 123.

83. *Cal.*—*City of Napa v. Navoni*, 132 P.2d 566, 56 Cal.App.2d 289.

held that entry of a decree imports a finding of subsidiary facts necessary to warrant it.<sup>84</sup> Conversely, the court will not ordinarily imply findings which would defeat the judgment.<sup>85</sup>

**Findings as to truth of allegations.** A general finding as to the truth of allegations in a pleading is equivalent to a special finding respecting facts alleged therein,<sup>86</sup> and the absence of express findings as to such facts is immaterial.<sup>87</sup> A finding that all the allegations of a pleading are true has been construed as a finding of the truth not only of what is expressly alleged,<sup>88</sup> but also of what may reasonably be implied from the allegations,<sup>89</sup> and a finding that the allegations of a complaint are true is an implied finding of the facts therein alleged.<sup>90</sup> A finding that all of the denials and allegations in an answer to a specified complaint are, each and every one, supported by the evidence and true, is equivalent to a finding that each allegation of such complaint is untrue.<sup>91</sup> Where the court finds that all of the allegations of the complaint are true except as specifically otherwise mentioned, and thereafter finds on a specific matter, a failure to find on a specific aspect of such matter is a finding that such allegation was not true.<sup>92</sup> Where all the allegations of defendant's answer are found to be true, except as otherwise expressly found, every affirmative allegation set up by defendant which is not expressly found against him is found in his favor.<sup>93</sup>

General findings that allegations of a pleading are untrue means merely that the pleader did not prove

what he alleged,<sup>94</sup> and will not be construed as affirmatively establishing the contrary of the allegations,<sup>95</sup> although a finding that each and all of the allegations touching a particular matter are untrue has been construed as equivalent to a finding that the facts were the contrary of what was alleged.<sup>96</sup> A finding that all of the allegations of a pleading "are not true" is not a finding that all of them are untrue,<sup>97</sup> or that any particular one of them is untrue.<sup>98</sup> Finding that all of the allegations of the pleadings not embraced within the express findings of fact are not true should not be construed as negating the truth of express admissions of the pleadings.<sup>99</sup> A finding that all of the allegations of plaintiff's complaint are untrue, and that all of the allegations of defendant's answer are true negatives plaintiff's allegations.<sup>1</sup> Where the court finds substantially in accordance with the facts alleged in an affirmative defense, other allegations in the answer in conflict therewith must be deemed to have been found untrue, without an express finding to that effect.<sup>2</sup>

**Refusal or failure to find.** A denial by the court of proposed findings of fact is equivalent to a finding to the contrary.<sup>3</sup> Refusal to find a fact requested is not necessarily equivalent to an affirmative finding to the contrary,<sup>4</sup> although where the record shows that the court found for defendant on one affirmative defense only, it has been held that an inference arises that it found against defendant on all other affirmative defenses.<sup>5</sup> A refusal to grant requests for findings does not imply a ruling that

Iowa.—*Corpus Juris* cited in Rank v. Kuhn, 20 N.W.2d 72, 74, 236 Iowa 854.

N.Y.—*Masterson v. Becker*, 5 N.Y.S.2d 528, 254 App.Div. 904. 64 C.J. p 1279 note 38.

84. Mass.—*In re Loeb*, 52 N.E.2d 37, 315 Mass. 191.—*Boucher v. Hamilton Mfg. Co.*, 156 N.E. 424, 259 Mass. 259.

85. Cal.—*F. A. Hihn Co. v. City of Santa Cruz*, 150 P. 62, 170 Cal. 436.

86. Cal.—*Mazuran v. Stefanich*, 272 P. 772, 95 Cal.App. 327. Minn.—*Barnum v. Jefferson*, 122 N.W. 459, 109 Minn. 1.

87. Conn.—*Schuster v. Johnson*, 145 A. 29, 108 Conn. 704.

88. Cal.—*Lynip v. Alturas School Dist. of Modoc County*, 141 P. 835, 24 Cal.App. 426.

89. Cal.—*Lynip v. Alturas School Dist. of Modoc County*, supra. 64 C.J. p 1279 note 44.

90. Cal.—*Dreisbach v. Braden*, 181 P. 262, 40 Cal.App. 407. 54 C.J. p 1279 note 45.

91. Cal.—*Fritz v. Mills*, 150 P. 375, 170 Cal. 449.

92. Cal.—*Wilcox v. Sway*, 160 P.2d 154, 69 Cal.App.2d 560.

**Special damages**  
Cal.—*Wilcox v. Sway*, supra.

93. Cal.—*Honsberger v. Durfee*, 130 P.2d 189, 55 Cal.App.2d 68.

94. Cal.—*Gould v. Crawford*, 192 P. 38, 48 Cal.App. 389.

95. Cal.—*Gould v. Crawford*, supra. 64 C.J. p 1279 note 47.

96. Cal.—*Lathrop v. National Sugar Co.*, 116 P. 982, 16 Cal.App. 350. 64 C.J. p 1279 note 48.

97. Cal.—*Auerbach v. Healy*, 161 P. 1157, 174 Cal. 60.

98. Cal.—*Auerbach v. Healy*, supra. Minn.—*Martinson v. Hensler*, 157 N.W. 714, 991, 132 Minn. 437.

1. Cal.—*Rohl v. Van Cleve*, 202 P.2d 807, 90 Cal.App.2d 317.

2. Cal.—*Central Heights Imp. Co. v. Memorial Parks*, 105 P.2d 596, 40 Cal.App.2d 591.

3. Minn.—*Hall-Vesole Co. v. Durkee-Atwood Co.*, 35 N.W.2d 601, 227 Minn. 379.—*Kiebach v. Kiebach*, 35 N.W.2d 530, 227 Minn. 328.—*Marsco v. Graff*, 33 N.W.2d 717, 226 Minn. 540.—*Blodgett v. Hollo*, 298 N.W. 249, 210 Minn. 298.

N.C.—*City of Hickory v. Catawba County*, 173 S.E. 56, 206 N.C. 165.—*Independence Trust Co. v. Kessler*, 173 S.E. 53, 206 N.C. 12. Pa.—*Pearlman v. Newburger*, 178 A. 402, 117 Pa.Super. 323.

Tex.—*Thompson v. Lee Roy Crawford Produce Co.*, 233 S.W.2d 295, 149 Tex. 357.

4. N.M.—*State Nat. Bank of El Paso, Tex. v. Cantrell*, 127 P.2d 246, 46 N.M. 268. N.Y.—*Moorehouse v. Brooklyn Heights R. Co.*, 78 N.E. 179, 185 N.Y. 520.

5. Iowa.—*Toedt v. Bollhoefer*, 215 N.W. 58, 206 Iowa 39. 64 C.J. p 1279 note 55.

contrary findings made by the court are required as a matter of law.<sup>6</sup>

An omission of the findings to cover a particular fact or issue is to be deemed a finding, on that fact or issue, against the party having the burden of proof,<sup>7</sup> and any fact in issue which was not found by the trial court must be considered as not having been proved.<sup>8</sup> Where the record indicates that the court would not make a finding and it further indicates the reason of the court for refusing to do so, the failure to find is not equivalent to a finding against the party having the burden of proof.<sup>9</sup> Where there is no evidence that a party intended or attempted to do a particular matter, a failure to make a finding on such point is not a finding against such party.<sup>10</sup> Where the court finds against defendant on one specification of negligence, the failure of the court to mention other specifica-

tions of negligence contained in the petition does not constitute findings thereon adverse to plaintiff.<sup>11</sup> Where, under statute, a finding is required that a record was made in good faith in the regular course of business in order to render the record admissible, the exclusion of the record, without any express finding as to the circumstances, indicates a finding to the contrary.<sup>12</sup>

### § 650. — General and Special Findings

In the absence of special findings in irreconcilable conflict therewith, a general finding imports a finding of all subsidiary facts necessary to render it sufficient and support it, and a general finding for one party is equivalent to a special finding in his favor.

In the absence of special findings in irreconcilable conflict therewith, a general finding imports a finding of all subsidiary facts necessary to render it sufficient and support it<sup>13</sup> as well as the judg-

6. N.H.—Thistle v. Halstead, 72 A. 2d 455, 96 N.H. 192.

7. Ariz.—Corpus Juris cited in Drumm v. Simer, 205 P.2d 592, 593, 68 Ariz. 319.

Cal.—Bishop v. Kelley, 224 P.2d 814, 100 Cal.App.2d 775.

Ind.—Fouts v. Largent, 94 N.E.2d 448, 228 Ind. 547—Kerfoot v. Kessee, 84 N.E.2d 190, 227 Ind. 58—App. v. Class, 75 N.E.2d 543, 225 Ind. 387—Newman v. Newman, 48 N.E.2d 455, 221 Ind. 432—City of Frankfort v. Easterly, 46 N.E.2d 817, 221 Ind. 268, rehearing denied 47 N.E.2d 819, 221 Ind. 268—Wabash Val. Coach Co. v. Turner, 46 N.E.2d 212, 221 Ind. 52, certiorari denied 63 S.Ct. 1167, 319 U.S. 754, 87 L.Ed. 1707—Kelley, Glover & Vale v. Heltman, 44 N.E.2d 981, 220 Ind. 625, certiorari denied 63 S.Ct. 1320, 319 U.S. 762, 87 L.Ed. 1713—McClellan v. Tobin, 39 N.E.2d 772, 219 Ind. 563—Home Equipment Co. v. Gorham, 33 N.E.2d 99, 218 Ind. 454—State ex rel. Johnson v. Boyd, 28 N.E.2d 256, 217 Ind. 348—Deming Hotel Co. v. Sisson, 24 N.E.2d 912, 216 Ind. 587—Michigan City v. State ex rel. Seidler, 5 N.E.2d 968, 211 Ind. 586—Erie R. Co. v. C. Callahan Co., 184 N.E. 264, 204 Ind. 580, 87 A.L.R. 778—Stoner v. Howard Sober, Inc., App., 118 N.E.2d 504—McCoy v. Farm Bureau Mut. Ins. Co. of Ind., 111 N.E.2d 728, 123 Ind.App. 424—Gilbert v. Lusk, 106 N.E.2d 404, 123 Ind.App. 167—Owens v. Downs, 98 N.E.2d 914, 121 Ind.App. 294—Blume v. First Nat. Bank of Chicago, Ill., 78 N.E.2d 459, 118 Ind.App. 533—Esch v. Leitheiser, 69 N.E.2d 760, 117 Ind.App. 338—Boyer v. Leas, 64 N.E.2d 38, 116 Ind.App. 502, rehearing denied 64 N.E.2d 591, 116 Ind.App. 502—Wenbert v. Lincoln Nat. Bank & Trust Co., 61 N.E.2d

466, 116 Ind.App. 31—Burkhart v. Simms, 60 N.E.2d 141, 115 Ind.App. 576—Linville v. Chenoweth, 59 N.E.2d 129, 115 Ind.App. 355—Myers v. Brane, 57 N.E.2d 594, 115 Ind.App. 144—Oleska v. Kotur, 48 N.E.2d 88, 113 Ind.App. 428—City of Lafayette v. Keen, 48 N.E.2d 63, 113 Ind.App. 552—Steele v. Fowler, 41 N.E.2d 678, 111 Ind.App. 364—Satterblom v. Wasson, 41 N.E.2d 674, 111 Ind.App. 377—Schilling v. Parsons, 36 N.E.2d 958, 110 Ind. App. 52—Minter v. Bittler, 29 N.E.2d 799, 108 Ind.App. 522—Bryant v. Barger, 18 N.E.2d 965, 106 Ind. App. 245—Neu v. Woods, 7 N.E.2d 531, 103 Ind.App. 342—Lindley v. Seward, 5 N.E.2d 998, 103 Ind. App. 600, rehearing denied 8 N.E.2d 119, 103 Ind.App. 600—Clemens v. Lowe, 196 N.E. 363, 100 Ind.App. 645—Home Development Co. v. Arthur Jordan Land Co., 196 N.E. 377, 100 Ind.App. 458—Union Ins. Co. of Indiana v. Glover, 195 N.E. 583, 100 Ind.App. 327—Provident Life & Accident Ins. Co. v. Fodder, 193 N.E. 698, 99 Ind.App. 566—Old First Nat. Bank & Trust Co. of Fort Wayne v. Snouffer, 192 N.E. 369, 99 Ind.App. 325—Kratil v. Booth, 191 N.E. 180, 99 Ind.App. 178—Chine v. Union Trust Co., 189 N.E. 643, 99 Ind.App. 296.

Ky.—Wilcox v. Lee, 94 S.W.2d 294, 264 Ky. 65.

Nev.—Peterson v. Wiesner, 146 P.2d 789, 62 Nev. 184—Corpus Juris quoted in Burlington Transp. Co. v. Wilson, 114 P.2d 1094, 1095, 61 Nev. 22.

N.M.—Mosley v. Magnolia Petroleum Co., 114 P.2d 740, 45 N.M. 230.

Wash.—Corpus Juris cited in Ingle v. Ingle, 48 P.2d 576, 577, 183 Wash. 234.

64 C.J. p 1236 note 34.

Omission held rejection of contentions

La.—Ramsey v. La Baw, App., 22 So. 2d 685—Lillard v. Hulbert, App., 9 So.2d 852—Veitkam v. Johnston, App., 5 So.2d 582, rehearing denied 6 So.2d 54.

8. Ind.—Bulen v. Pendleton Banking Co., 78 N.E.2d 440, 118 Ind. App. 217.

9. Ind.—Automobile Underwriters v. Tite, 85 N.E.2d 365, 119 Ind. App. 251.

10. Ind.—Leckrone v. Lawler, App., 118 N.E.2d 381.

11. Iowa.—Schlotterbeck v. Anderson, 26 N.W.2d 340, 238 Iowa 208.

12. Mass.—Omsansky v. Shain, 46 N. E.2d 524, 313 Mass. 129.

13. U.S.—O'Keefe v. Pearson, C.C. A.Mass., 7 F.2d 673, 97 A.L.R. 1243.

Kan.—Mingenback v. Mingenback, 271 P.2d 782, 176 Kan. 471—Hill v. Partridge Co-op. Equity Exchange, 214 P.2d 316, 168 Kan. 506—Sledd v. Munsell, 86 P.2d 587, 149 Kan. 110.

Mass.—Wasserman v. Caledonian-American Ins. Co., 95 N.E.2d 547, 326 Mass. 518—O'Leary v. Hayden, 91 N.E.2d 663, 325 Mass. 525—Devore v. Good, 72 N.E.2d 405, 321 Mass. 84—Howard v. Malden Sav. Bank, 15 N.E.2d 233, 300 Mass. 208—Indemnity Ins. Co. of North America v. Paige, 113 N.E.2d 616, 299 Mass. 523—Commissioner of Banks v. Chase Securities Corp., 10 N.E.2d 472, 298 Mass. 285, appeal dismissed Chase Securities Corporation v. Husband, 58 S.Ct. 476, 302 U.S. 660, 82 L.Ed. 510—O'Toole v. Magoon, 4 N.E.2d 357, 295 Mass. 527—Povey v. Colonial Beacon Oil Co., 200 N.E. 891, 294 Mass. 86—MacDonald v. Adamian,

ment which is rendered in the proceedings.<sup>14</sup> In other words, a general finding for one party is equivalent to a special finding in his favor on every disputed fact,<sup>15</sup> and a general finding against a party constitutes an adverse decision on all issues.<sup>16</sup> In a proper case a general finding may be implied from other general and specific findings.<sup>17</sup> In the absence

of a request for a special finding, findings of the court must be construed as general,<sup>18</sup> a finding made after withdrawal of a request therefor will be considered only as a general finding,<sup>19</sup> and an oral statement made by the court without request is not a special finding.<sup>20</sup> Where, however, the court makes specific findings, and recites that it is un-

200 N.E. 888, 294 Mass. 187—  
Weathers v. Jarvis, 200 N.E. 886,  
294 Mass. 227—Munro v. Bowers,  
200 N.E. 393, 293 Mass. 514—Nico-  
li v. Berglund, 200 N.E. 373, 293  
Mass. 426—Wood v. Town of Ox-  
ford, 195 N.E. 321, 290 Mass. 388  
—Hill v. Creditors' Nat. Clearing  
House, 194 N.E. 128, 289 Mass. 437  
—Kennedy Bros. v. Bird, 192 N.E.  
73, 287 Mass. 477—Genard v. Hog-  
mer, 189 N.E. 46, 285 Mass. 259, 91  
A.L.R. 543—Farina v. Vittl, 186 N.  
E. 236, 282 Mass. 532.  
N.H.—Caldwell v. Yeatman, 15 A.2d  
252, 91 N.H. 150—H. P. Welch Co.  
v. State, 199 A. 886, 89 N.H. 428,  
120 A.L.R. 282, affirmed H. P.  
Welch Co. v. State of New Hamp-  
shire, 59 S.Ct. 438, 306 U.S. 79, 83  
L.Ed. 500—Hope Shoe Co. v. Ad-  
vance Wood Heel Co., 195 A. 669, 89  
N.H. 178—Keyes v. Baird, 190 A.  
707, 88 N.H. 449.

Okl.—Coca-Cola Bottling Co. v.  
Chandler, 251 P.2d 1042, 207 Okl.  
613—Matthews v. Stovall, 216 P.2d  
975, 203 Okl. 108—Hamel v. Toron-  
to Inv. Co., 216 P.2d 319, 202 Okl.  
553—Andrews v. English, 199 P.2d  
202, 200 Okl. 667—Hitchcock v.  
George, 143 P.2d 137, 193 Okl. 327  
—In re Caldwell's Estate, 98 P.2d  
22, 186 Okl. 399—Crenshaw v. Can-  
ning, 80 P.2d 835, 183 Okl. 198—  
Lester v. Streich, 57 P.2d 246, 177  
Okl. 64—Fitzgerald v. Fitzgerald,  
56 P.2d 789, 176 Okl. 612—Smith v.  
Beam, 55 P.2d 980, 176 Okl. 408—  
Milsap v. Kahn, 49 P.2d 729, 174  
Okl. 158—Warren v. Dorrill, 49 P.  
2d 137, 173 Okl. 634—Boled v.  
Rogers, 45 P.2d 1069, 173 Okl. 91  
—Lena v. Clinkenbeard, 44 P.2d  
2, 172 Okl. 6—Jones v. Storie, 40  
P.2d 1067, 172 Okl. 473—Hoodenpyl  
v. Guinn, 38 P.2d 510, 178 Okl. 78  
—Chesnut v. Worley, 23 P.2d 196,  
164 Okl. 153.

Wyo.—Wallis v. Nauman, 157 P.2d  
285, 61 Wyo. 231.  
64 C.J. p 1280 note 57.

Special findings as controlling see su-  
pra § 636.

14. Okl.—Wilson v. Vance, 240 P.2d  
198, 205 Okl. 641—Ridgeway v. Lo-  
gan, 239 P.2d 778, 205 Okl. 603—  
Bartlett v. Lashley, 229 P.2d 185,  
204 Okl. 299—Jenkins v. Abercom-  
bie, 228 P.2d 657, 204 Okl. 213—  
Hattabaugh v. Thomas, 224 P.2d  
602, 203 Okl. 578—Evans v. Neal,  
180 P.2d 661, 198 Okl. 515—Barry

v. Hubbard, 155 P.2d 512, 195 Okl.  
112—Broadwell v. Flynn, 118 P.2d  
1029, 189 Okl. 620—Williams v.  
Downing, 95 P.2d 612, 185 Okl. 633  
—First Federal Sav. & Loan Ass'n  
of Elk City v. Rose, 79 P.2d 796, 183  
Okl. 262—Elem v. Mahannah, 61  
P.2d 241, 177 Okl. 597—Noble v.  
Bodovitz, 52 P.2d 1046, 175 Okl.  
432—Garrett v. Reinhart, 38 P.2d  
884, 169 Okl. 249—Smart v. Billings,  
35 P.2d 923, 169 Okl. 26.

Wyo.—Luckinger v. Salisbury, 262  
P.2d 396, rehearing denied 264 P.  
2d 1007—Nussbacher v. Mander-  
feld, 186 P.2d 548, 64 Wyo. 55—  
Dulaney v. Jensen, 181 P.2d 605,  
63 Wyo. 313—Jacoby v. Town of  
City of Gillette, 174 P.2d 505, 62  
Wyo. 487, 169 A.L.R. 502, rehear-  
ing denied 177 P.2d 204, 62 Wyo.  
487—Wallis v. Nauman, 157 P.2d  
285, 61 Wyo. 231.

64 C.J. p 1280 note 58.

15. U.S.—O'Keefe v. Pearson, C.C.A.  
Mass., 73 F.2d 673, 97 A.L.R. 1243.  
Mass.—Stern v. Lieberman, 29 N.E.  
2d 539, 207 Mass. 77—Spritz v.  
Brockton Sav. Bank, 25 N.E.2d 155,  
305 Mass. 170—J. P. O'Connell Co.  
v. Maryland Cas. Co., 18 N.E.2d 805,  
302 Mass. 232—Rosemont v. Equi-  
table Life Assur. Soc. of U. S.,  
16 N.E.2d 654, 301 Mass. 139—  
Rosenblum v. Glnis, 9 N.E.2d 525,  
297 Mass. 493—Griffin v. Rudnick,  
9 N.E.2d 388, 298 Mass. 82—Cam-  
bridgeport Sav. Bank v. City of  
Boston, 8 N.E.2d 790, 297 Mass.  
309—Herman v. Sadolf, 2 N.E.2d  
201, 294 Mass. 358—Nicolli v. Berg-  
lund, 200 N.E. 373, 293 Mass. 426.

Mo.—McKay v. Snider, 190 S.W.2d  
886, 354 Mo. 674—Bank of Brim-  
son v. Graham, 76 S.W.2d 376, 235 Mo.  
1196, 96 A.L.R. 399.

Ohio.—Eisenberger v. Ziehl, App.  
115 N.E.2d 760.

Okl.—American Cas. Co. of Reading,  
Pa. v. Blevins, 223 P.2d 347, 203  
Okl. 405—Stewart v. Martin, 146  
P.2d 836, 193 Okl. 686—Barron v.  
Chicorasse, 113 P.2d 376, 189 Okl.  
35—Allen v. Clawson, 108 P.2d 121,  
188 Okl. 278—Leonard v. Tulsa  
Bldg. & Loan Ass'n, 88 P.2d 875,  
184 Okl. 558—Blackstock Oil Co.  
v. Caston, 87 P.2d 1087, 184 Okl.  
489—City of Lawton v. Sherman  
Mach. & Iron Works, 77 P.2d 587,  
182 Okl. 254—Negim v. First State  
Bank of Picher, 49 P.2d 763, 172  
Okl. 602.

Wyo.—Wallis v. Nauman, 157 P.2d  
285, 61 Wyo. 231.  
64 C.J. p 1280 note 59.

#### Making rulings of law

The general rule that a general  
finding for plaintiff by trial judge  
sitting without jury imports a find-  
ing of all essential subsidiary facts  
may not be invoked to relieve judge  
from duty under court rule to make  
pertinent rulings of law upon proper  
request therefor.—Home Sav. Bank  
v. Savransky, 80 N.E.2d 881, 307  
Mass. 601.

18. Cal.—Shedd v. Downie, 87 P.2d  
395, 31 Cal.App.2d 104.  
Mass.—Marshall v. Landau, 31 N.E.  
2d 540, 308 Mass. 239—Sheila v.  
Commonwealth, 29 N.E.2d 12, 306  
Mass. 535.

Mo.—Tillman v. Melton, 165 S.W.2d  
684, 350 Mo. 155.

Wyo.—Corpus Juris cited in Holmes  
v. Holmes, 211 P.2d 946, 951, 66  
Wyo. 317—Wallis v. Nauman, 157  
P.2d 285, 61 Wyo. 231.  
64 C.J. p 1280 note 60.

17. Cal.—Fletcher v. Lloyd, 242 P.  
746, 75 Cal.App.205.  
64 C.J. p 1281 note 61.

18. Ind.—Public Service Commission  
v. Fort Wayne Union Ry. Co., 111  
N.E.2d 719—Chicago & E. I. Ry.  
Co. v. Public Service Commission  
of Indiana, 186 N.E. 330, 205 Ind.  
253, certiorari denied 54 S.Ct. 123,  
290 U.S. 688, 78 L.Ed. 592.

Mo.—Sager v. State Highway Com-  
mission, App., 125 S.W.2d 89.  
Okl.—Midland Savings & Loan Co. v.  
Donohoo, 74 P.2d 1147, 181 Okl.  
498.

64 C.J. p 1281 note 62.

#### Interlocutory order

In action to restrain town from  
constructing sewage disposal plant,  
where temporary injunction was is-  
sued and at request of town special  
findings were made, those findings  
would be treated as a general find-  
ing since statute relating to special  
findings did not contemplate making  
of such on an application for an in-  
terlocutory order.—Town of Speed-  
way v. Dugan, 94 N.E.2d 542, 228  
Ind. 761.

19. Ind.—Geisendorff v. Cobbs, 94 N.  
E. 236, 47 Ind.App. 573.

20. Mo.—Meridian Lumber Co. v.  
Lowry Lumber Co., 229 S.W. 287,  
207 Mo.App. 41.  
64 C.J. p 1281 note 64.

necessary to pass on the other issues posed, the court does not determine any issues except those specifically adjudicated, even though a general finding is made.<sup>21</sup> It has been held that a general finding for plaintiff in an action for negligence does not necessarily imply a finding in his favor on an issue of contributory negligence.<sup>22</sup>

## § 651. Conclusiveness and Effect

Generally, findings of fact are conclusive on the rights of the parties as to the issues necessarily involved and passed on.

Generally speaking, findings of fact are conclusive on the rights of the parties as to the issues necessarily involved and passed on,<sup>23</sup> until formally set aside by the trial or appellate court.<sup>24</sup> Findings are, however, not conclusive where unauthorized,<sup>25</sup> not necessary to judgment,<sup>26</sup> or purely optional.<sup>27</sup> An adverse finding on one cause of action is not determinative of another cause of action.<sup>28</sup> It has been held that a mere finding has no effect since it cannot be levied on or given a judgment lien,<sup>29</sup> and the most a finding might possibly be considered to be is a cause of action.<sup>30</sup>

The findings and conclusions prepared and filed by the trial judge as a part of the record of the case cannot be contradicted by oral statements of the judge at the time of his rendition of judgment.<sup>31</sup> Where a purported finding of fact is a mere conclusion that the evidence is not sufficient to authorize relief, it is the same in legal effect as though the court had sustained a general demurrer to the complaint and dismissed the action.<sup>32</sup> It is within the province of the trial court to determine whether the findings of fact and conclusions of law it filed were merely preliminary or whether it intended them to be final when filed.<sup>33</sup> Findings of fact made at the request of a party are of the same force and effect as though embodied in the decision.<sup>34</sup> Where the court files a memorandum order for judgment and later files findings of fact to the contrary, the findings prevail over the memorandum.<sup>35</sup> Findings speak as of the date of complaint.<sup>36</sup>

*Similarity to verdict of jury or finding of referee.* The findings and conclusions of the trial court have the effect of a verdict,<sup>37</sup> a general finding for one of the parties being equivalent to a general verdict;<sup>38</sup> and findings of fact, when made, are analo-

21. Colo.—George v. Dower, 240 P. 2d 897, 125 Colo. 45.

22. Wyo.—Johnston v. Vukelic, 213 P.2d 925, 67 Wyo. 1.

23. Ind.—Schlamborg v. Schlamborg, 41 N.E.2d 801, 229 Ind. 209.

Okla.—Millsap v. Kahn, 49 P.2d 729, 174 Okl. 158—Harjo v. Mathis, 41 P.2d 92, 170 Okl. 523.

Tex.—Long Bell Lumber Co. v. Miller, Civ.App., 240 S.W.2d 405.

64 C.J. p. 1281 note 66.

### Finding held not determinative

Finding that no route book existed for retail customers of linen supply business served by former route man was not determinative of former employer's right to injunctive relief against route man and his present employer where route man had testified that he carried his list in his mind and his customers were easily identified—George v. Burdusis, 130 P.2d 399, 21 Cal.2d 153.

24. Mo.—Miller v. St. Louis, etc., R. Co., 63 S.W. 85, 162 Mo. 421.

Utah.—Pisher v. Emerson, 50 P. 619, 15 Utah 517.

25. Alaska.—Martin v. Heckman, 1 Alaska 165.

Hawaii.—Oahu R., etc., Co. v. Kaili, 22 Hawaii 673.

26. Cal.—Burke v. Meyerstein, 271 P. 343, 94 Cal.App. 349.

N.Y.—Muller v. Ackerman, 293 N.Y.S. 547, 250 App.Div. 129.

Wyo.—Corpus Juris cited in Holmes v. Holmes, 211 P.2d 946, 951, 66 Wyo. 317.

27. Tex.—Smith v. Clark, Civ.App., 266 S.W. 518.

64 C.J. p. 1281 note 70.

28. Cal.—Manteca Veal Co. v. Corbair, 254 P.2d 884, 116 Cal.App.2d 896.

29. Ohio.—Victor Mortg. Co. v. Arnoff, Com.Pl., 120 N.E.2d 615.

30. Ohio.—Victor Mortg. Co. v. Arnoff, supra.

31. Cal.—Huth v. Katz, 184 P.2d 521, 30 Cal.2d 605—Wilcox v. Sway, 160 P.2d 154, 69 Cal.App.2d 560—Dell v. Hjorth, 125 P.2d 505, 51 Cal.App.2d 576.

Tex.—Long v. Smith, Civ.App., 162 S.W. 25.

Utah.—In re Roth's Estate, 269 P.2d 278, 2 Utah 2d 40—McCollum v. Clothier, 241 P.2d 468.

32. Utah.—Monstere Mining Co. v. Columbus Rexall Consol. Mines Co., 174 P. 172, 53 Utah 413.

33. Kan.—In re Freeman's Estate, 231 P.2d 261, 171 Kan. 211.

34. N.Y.—Squaw Island Freight Terminal Co. v. City of Buffalo, 1 N.Y.S.2d 589, 165 Misc. 722, modified on other grounds 11 N.Y.S.2d 459, 256 App.Div. 582, resettled 12 N.Y.S.2d 770, 257 App.Div. 912, affirmed 24 N.E.2d 479, 281 N.Y. 794.

35. Cal.—Department of Social Wel-

fare of Cal. v. Machado, 220 P.2d 411, 98 Cal.App.2d 364.

36. Wash.—Burg v. Burg, 22 P.2d 664, 173 Wash. 273.

37. Ind.—Corpus Juris cited in Cynthiana State Bank of Cynthiana v. Murphy, 88 N.E.2d 252, 253, 119 Ind. 685.

N.C.—Harrison v. Brown, 24 S.E.2d 470, 222 N.C. 610.

Pa.—Beato v. Di Palato, 106 A.2d 641, 175 Pa.Super. 602—Pennsylvania Threshermen & Farmers' Mut. Cas. Ins. Co. v. Kaufman, Com.Pl., 50 Lack. Jur. 165—Fritsch v. Eagle Const. Co., 93 Pittsb.Leg.J. 181.

Tex.—John Hancock Mut. Life Ins. Co. v. Stanley, Civ.App., 215 S.W.2d 416—First Nat. Bank v. Blewett, Civ.App., 89 S.W.2d 487, error dismissed.

64 C.J. p. 1281 note 73.

38. Ind.—Corpus Juris cited in Cynthiana State Bank of Cynthiana v.

### Absence of findings or conclusions

Where on day court without request from either party made what was designated as findings of fact and conclusions of law, the memorandum did not constitute "findings of fact" or "conclusions of law" as contemplated by statute and amounted to nothing more than its reasons for conclusion reached and did not have the effect of a special verdict—Lessner v. Monarch Ins. Co., 153 S.W.2d 129, 236 Mo.App. 161.

39. Ind.—Corpus Juris cited in Cynthiana State Bank of Cynthiana v.

gous to, and have the force and effect of, a special verdict,<sup>39</sup> or the findings of a referee.<sup>40</sup>

### § 652. Objections and Exceptions

Particular matters with respect to objections and exceptions to findings of fact and conclusions of law are discussed *infra* §§ 653-657.

Examine Pocket Parts for later cases.

### § 653. — Necessity

Advantage cannot be taken of errors and defects in the findings of fact or conclusions of law unless presented by proper and timely objection.

In general, errors and defects in the findings of fact<sup>41</sup> or conclusions of law<sup>42</sup> cannot be taken advantage of unless presented by proper and timely objection. This rule is applicable, for example to such matters as a lack of findings<sup>43</sup> or of special findings,<sup>44</sup> or defects in the findings made;<sup>45</sup> and a party who has failed to object will not be heard to complain that findings were not sufficiently specific,<sup>46</sup> that they were in a form other than that prescribed by law,<sup>47</sup> or that the findings were not warranted by the evidence.<sup>48</sup> However, a party is not concluded by findings of fact because of failure to except to them where, the judgment being wholly in his favor, he cannot appeal from it or file any bill of exceptions.<sup>49</sup> Failure to except to the findings of fact does not preclude one from later objecting to the conclusions of law.<sup>50</sup> It has been

held that no exception lies to a simple finding of fact,<sup>51</sup> and, where a party is entitled to a finding on a material issue, the failure to object is not a waiver of the failure to find at all on a material issue.<sup>52</sup> The statement by the court that all rights on appeal would be protected and that it would allow an exception in the event the ruling would be adverse to either side does not obviate the necessity of entering specific objections to such rulings and findings as are objected to.<sup>53</sup>

### § 654. — Right to Object and Mode of Objection

The right to object for supposed errors of decision cannot be affected by the absence of a written finding. Objections and exceptions to errors and defects in findings and conclusions must be urged in the mode prescribed by local practice.

The right to except for supposed errors of decision cannot be affected by the absence of a written finding.<sup>54</sup> Where the statute so provides, no exception will lie to the rulings of the trial court in matters of law unless the right to except is specially reserved before the hearing.<sup>55</sup> The entry of judgment simultaneously with the filing of findings of fact and conclusions of law, without giving defendant an opportunity to present and argue his exceptions, is error.<sup>56</sup>

*Mode.* Objections and exceptions to errors and defects in findings and conclusions must be urged in the mode prescribed by local practice,<sup>57</sup> for ex-

Murphy, 88 N.E.2d 252, 253, 119 Ind. 685.

Or.—Larsen v. Martin, 143 P.2d 239, 172 Or. 605.

Pa.—Rosine v. Gerlach, 98 A.2d 436, 173 Pa.Super. 240.  
64 C.J. p 1281 note 74.

39. Wash.—Gilmartin v. Stevens Inv. Co., 261 P.2d 73, 43 Wash.2d 239, opinion adhered to on rehearing 266 P.2d 800, 43 Wash.2d 239.  
64 C.J. p 1281 note 75.

#### Facts not in dispute

Rule that findings of fact in jury waived cases shall have effect of a special verdict, is not abrogated because facts are not in dispute.—Cleary v. Wolin, 58 N.W.2d 830, 244 Iowa 956.

40. N.H.—Town of Tilton v. Sharpe, 151 A. 452, 84 N.H. 393.

41. Cal.—Del Ruth v. Del Ruth, 171 P.2d 34, 75 Cal.App.2d 638.

Pa.—Levinson v. Sklar, Com.Pl., 39 Del.Co. 390.  
64 C.J. p 1282 note 79.

#### Court's memorandum

Defendants were not under obligation, when they received court's memorandum, to make special objection

to item for punitive damages contained therein.—Superior Const. Co. v. Elmo, Md., 103 A.2d 739, reheard 104 A.2d 581.

42. Pa.—Commonwealth v. Automobiles Banking Corp., Com.Pl., 46 Dauph.Co. 83—Levinson v. Sklar, Com.Pl., 39 Del.Co. 300.  
64 C.J. p 1282 note 80.

43. N.M.—Dalley v. Foster, 134 P. 206, 17 N.M. 654.  
64 C.J. p 1282 note 81.

44. Ind.—Lehman v. City of Goshen, 98 N.E. 1, 710, 178 Ind. 54.

45. Idaho.—Ruthruff v. Ruthruff, 14 P.2d 958, 52 Idaho 330.  
64 C.J. p 1282 note 83.

46. Tex.—Hatton v. Bodan Lumber Co., 123 S.W. 163, 57 Tex.Civ.App. 475.  
64 C.J. p 1282 note 84.

47. Mich.—In re Eason's Estate, 230 N.W. 938, 251 Mich. 149.  
64 C.J. p 1282 note 85.

48. S.D.—Thomas v. Ryan, 123 N.W. 68, 24 S.D. 71.  
64 C.J. p 1282 note 86.

49. Mo.—Egger v. Egger, 123 S.W. 923, 225 Mo. 116, 135 Am.S.R. 566

—Patterson v. Patterson, 98 S.W. 613, 200 Mo. 335.

50. Wash.—Vansant v. Hartman, 153 P. 1062, 88 Wash. 636, rehearing denied 157 P. 461, 81 Wash. 690.  
64 C.J. p 1282 note 88.

51. Mass.—Lender v. London, 189 N. E. 797, 236 Mass. 45.

52. Cal.—San Jose Abstract & Title Ins. Co. v. Elliott, 240 P.2d 41, 108 Cal.App.2d 793.

53. U.S.—Union Bleachery v. U. S., C.C.A.S.C., 79 F.2d 545, 103 A.L.R. 204.

#### General exception

Such statement by trial judge had effect of general exception.—Pelham Mills v. U. S., C.C.A.S.C., 79 F.2d 552.

54. Mich.—People v. Littlejohn, 11 Mich. 60.

55. Me.—State v. Intoxicating Liquors, 47 A. 812, 102 Me. 335, 120 Am.S.R. 504.

64 C.J. p 1282 note 90.

56. Pa.—Schware v. Home Life Ins. Co. of America, 3 A.2d 949, 134 Pa.Super. 53.

57. Minn.—Osborn v. Hartfield, 276 N.W. 276, 201 Minn. 247.  
64 C.J. p 1282 note 92.

ample, the proper procedure for testing conclusions of law on special findings is by taking or reserving exceptions to such conclusions<sup>58</sup> and not to the findings,<sup>59</sup> although, after the disposal of such exceptions, the correctness of the facts specially found or the failure of the court to find certain facts may be questioned by a motion for a new trial or by a motion for venire de novo,<sup>60</sup> and where the right of a party to take exceptions is confined by statute to rulings in matters of law, the party must have a distinct statement made of the ruling or opinion of the court on the matters of law involved in the issue.<sup>61</sup> The proper procedure may be a motion to make necessary findings.<sup>62</sup>

In some jurisdictions, the proper remedy of a party aggrieved at defective findings is an application or motion to the trial court for their amendment or correction.<sup>63</sup> Where the appropriate remedy is by motion for new trial or venire de novo, it is not error for the court to overrule motions to alter,<sup>64</sup> amend,<sup>65</sup> change,<sup>66</sup> correct,<sup>67</sup> correct and restate,<sup>68</sup> modify,<sup>69</sup> or reconsider<sup>70</sup> findings, al-

though the court may, if it so desires, alter findings at the suggestion of counsel,<sup>71</sup> or sua sponte,<sup>72</sup> as where it supplies an omission after having previously overruled a motion for new trial.<sup>73</sup> In jurisdictions where the appropriate method of objecting to conclusions of law is by exception thereto, it is not error for the court to overrule a motion to modify<sup>74</sup> or restate<sup>75</sup> the conclusions of law.

*Motion for more specific findings.* If a finding is defective in omitting to pass on a question, a proper mode of obtaining relief is to apply to the trial court for a more specific finding,<sup>76</sup> unless the jurisdiction is one in which objection should be taken by motion for new trial, in which case the motion will not lie,<sup>77</sup> and the court may properly overrule motions to make findings more specific,<sup>78</sup> or to correct and make more specific.<sup>79</sup>

*Motion to substitute.* The point that findings are not responsive to the issues may properly be raised by a motion to substitute other findings,<sup>80</sup> although, in jurisdictions where objections to findings should be taken by motion for new trial, and objections to

Motion for new trial on grounds of irregularities and defects in verdicts and findings and for a verdict or decision contrary to law or evidence see New Trial §§ 63-77.

58. *Ind.—Walters v. Walters*, 79 N.E. 1037, 168 Ind. 45.  
64 C.J. p 1283 note 93.

59. *Ind.—Smith v. Davidson*, 45 Ind. 396.

64 C.J. p 1283 note 94.

60. *Ind.—Fairbanks v. Meyers*, 98 Ind. 92.

61. *Mass.—Kettell v. Foote*, 3 Allen 212.

64 C.J. p 1283 note 96.

62. *Minn.—Osborn v. Hartfield*, 276 N.W. 270, 201 Minn. 317.

63. *Mass.—Lapp Insulator Co. v. Boston & M. R. R.*, 112 N.E.2d 359, 330 Mass. 205—*Vieira v. Balduino*, 101 N.E.2d 371, 328 Mass. 37—*Higgs v. Denmore*, 80 N.E.2d 38, 323 Mass. 106—*Godfrey v. Caswell*, 72 N.E.2d 402, 321 Mass. 161—*Daniel v. Jardin*, 70 N.E.2d 801, 320 Mass. 764—*National Shawmut Bank of Boston v. Johnson*, 58 N.E.2d 849, 317 Mass. 485.

*Minn.—Morse v. Graif*, 33 N.W.2d 717, 226 Minn. 510.  
64 C.J. p 1283 note 98.

#### Challenge of finding

In tort action, motion to correct trial judge's ruling, granting defendant's request that evidence warranted finding for defendant, on ground that defendant was not sufficiently identified in evidence as person involved in accident, was properly denied as having nothing to do

with correction of any ruling of law, but amounting to no more than challenge of judge's finding, but such question should have been raised by appropriate requests for rulings before closing arguments or within such time thereafter as court might allow—*Godfrey v. Caswell*, 72 N.E.2d 402, 321 Mass. 161.

64. *Ind.—Hilgenberg v. Northup*, 33 N.E. 786, 134 Ind. 92.

65. *Ind.—La Follette v. Higgins*, 28 N.E. 768, 129 Ind. 412—*Meridan Life, etc. Co. v. Eaton*, 81 N.E. 667, 82 N.E. 480, 41 Ind. App. 118.

66. *Ind.—Allen v. Hollingshead*, 57 N.E. 917, 155 Ind. 178.

64 C.J. p 1283 note 3.

67. *Ind.—McCleery v. Zintsmaster*, 114 N.E. 625, 187 Ind. 37.

68. *Ind.—Hilgenberg v. Northup*, 33 N.E. 786, 134 Ind. 92.

69. *Ind.—Gross Income Tax Division of Ind. v. Surface Combustion Corp.*, 111 N.E.2d 50, certiorari denied Gross Income Tax Division, Ind. Dept. of State Revenue, State of Ind. v. Surface Combustion Corp., 74 S.Ct. 51, 346 U.S. 829, 98 L.Ed. 353, and 74 S.Ct. 52, 346 Ind. 829, 98 L.Ed. 354—*Wilkinson v. First Nat. Bank*, 14 N.E.2d 630, 214 Ind. 513—*Scott v. Collier*, 73 N.E. 184, 166 Ind. 644—*Wolverton v. Wolverton*, 71 N.E. 123, 163 Ind. 26—*Jones v. Mayne*, 55 N.E. 956, 154 Ind. 400—*Windfall Natural Gas, Mining & Oil Co. v. Terwilliger*, 53 N.E. 284, 152 Ind. 364—*Louisa Coleman Che Mah Dunn v. Starke County Trust & Savings*

*Bank*, 184 N.E. 421, 98 Ind. App. 86, followed in *Coleman Che Mah Dunn v. Smith*, 184 N.E. 426, 98 Ind. App. 698.

64 C.J. p 1283 note 6.

70. *Ind.—Kruzer v. Duckwall*, 134 N.E. 895, 78 Ind. App. 577.

64 C.J. p 1283 note 7.

71. *Ind.—Royse v. Bourne*, 47 N.E. 827, 149 Ind. 187—*Louisa Coleman Che Mah Dunn v. Starke County Trust & Savings Bank*, 184 N.E. 424, 98 Ind. App. 86, followed in *Coleman Che Mah Dunn v. Smith*, 184 N.E. 426, 98 Ind. App. 698.

72. *Ind.—Whitcomb v. Stringer*, 66 N.E. 443, 160 Ind. 82.

73. *Ind.—Chicago, I. & S. R. Co. v. Taylor*, 105 N.E. 1, 183 Ind. 240.

74. *Ind.—Adams v. Pittsburg, etc. R. Co.*, 74 N.E. 991, 165 Ind. 618.  
64 C.J. p 1283 note 12.

75. *Ind.—Waxler v. State*, 154 N.E. 6, 199 Ind. 33.

64 C.J. p 1283 note 13.

76. *Minn.—Slosson v. Hall*, 17 Minn. 95.

77. *Ind.—Smith v. Barber*, 53 N.E. 1014, 153 Ind. 322—*Petty v. Petty*, 85 N.E. 995, 42 Ind. App. 443.

78. *Ind.—Tewksbury v. Howard*, 37 N.E. 355, 138 Ind. 103.

64 C.J. p 1281 note 17.

79. *Ind.—Citizens' Trust Co. v. National Equipment & Supply Co.*, 98 N.E. 865, 178 Ind. 167, 41 L.R.A.N.S. 695.

80. *Or.—Annand v. Austin*, 168 P. 725, 167 P. 1017, 86 Or. 403.

conclusions by exception thereto, motions to substitute other findings<sup>81</sup> or conclusions<sup>82</sup> are not recognized as proper procedure.

**Motions to strike.** A motion to strike certain paragraphs of the conclusion is not the proper way to attack their soundness.<sup>83</sup> In jurisdictions where the appropriate remedy for defective findings of fact is by motion for new trial, the court may properly overrule a motion to strike,<sup>84</sup> and a motion to strike on the ground that findings are without the issues may be entertained only when a request for a special finding of facts has been made and special findings have been filed pursuant thereto.<sup>85</sup>

**Motion for judgment on the findings.** In jurisdictions where objection to conclusions of law should be taken by exception thereto, objection to such conclusions may not be taken by motion for judgment on the special findings.<sup>86</sup>

**Motion for judgment notwithstanding the findings** has been held not the proper remedy of the party against whom the findings are made.<sup>87</sup>

## § 655. — Time

Unless otherwise provided by statute or rule of court, exception must be taken at the time the ruling in question is made.

In the absence of a statute or rule of court to the contrary, an exception to findings of fact or conclusions of law must be taken at the time the ruling is made,<sup>88</sup> or within a reasonable time thereafter,<sup>89</sup> as, for example, on presentation and allowance of a bill of exceptions,<sup>90</sup> and what is a reasonable time will depend on the particular circumstances involved.<sup>91</sup> It is too late to except to a finding after the decision is made.<sup>92</sup> Where the

time for objecting is specified by statute,<sup>93</sup> or rule of court,<sup>94</sup> an objection or exception made thereafter is ordinarily too late, and the fact that a motion to dismiss was then pending will not excuse failure to except at the specified time.<sup>95</sup> Under a statute providing that, if either party is not in court or represented in court at the time of the announcement of the decision, the clerk shall mail a written notice thereof to such absent party, where no notice is mailed to an absent party, exceptions may properly be made a reasonable time after expiration of the period set by court rule.<sup>96</sup> Where exceptions precede a decree it is the duty of the court to dispose of them.<sup>97</sup>

Statutes in terms permitting exceptions to rulings or directions where objections were seasonably made have been construed as requiring objections to be made seasonably,<sup>98</sup> and it has been held that in order to be seasonable a request for a report of the facts must be made before or at the time the cause is submitted.<sup>99</sup> Under a statute providing that exceptions to rulings, directions, and decisions made during a hearing in a cause shall be taken immediately, and that exceptions to the final decision in a cause heard by a court without a jury may be taken within a prescribed period after notice of the decision, exceptions to a decision for defendant at the close of plaintiff's testimony may be taken within the prescribed period instead of immediately.<sup>1</sup> Where, under the statute, exceptions to findings may be filed at any time within ten days after service of a copy of the decision and a written notice of entry of judgment thereon, and where a copy of the decision has not been served, the time for filing exceptions has not expired.<sup>2</sup> Un-

81. Ind.—Walters v. Walters, 79 N. E. 1037, 168 Ind. 45.

82. Ind.—Walters v. Walters, supra.

83. Conn.—Bauby v. Krasow, 139 A. 508, 107 Conn. 109, 57 A.L.R. 331.

84. Ind.—Gross Income Tax Division of Ind. v. Surface Combustion Corp., 111 N.E.2d 50, certiorari denied Gross Income Tax Division, Ind., Dept. of State Revenue, State of Ind. v. Surface Combustion Corp., 74 S.Ct. 51, 346 U.S. 829, 98 L.Ed. 353, and 74 S.Ct. 52, 346 U.S. 829, 98 L.Ed. 354—Snell v. Gresso, 19 N.E.2d 1011, 215 Ind. 424. 64 C.J. p 1284 note 26.

85. Ind.—Snell v. Gresso, 19 N.E. 2d 1011, 215 Ind. 424.

86. Ind.—Walters v. Walters, 79 N. E. 1037, 168 Ind. 45. 64 C.J. p 1284 note 28.

87. Ind.—Walters v. Walters, supra. 64 C.J. p 1284 note 29.

88. U.S.—First Nat. Bank v. U. S., C.C.A. Ill., 102 F.2d 907, certiorari denied 59 S.Ct. 1038, 307 U.S. 641, 83 L.Ed. 1521, rehearing denied 60 S.Ct. 69, 308 U.S. 633, 84 L.Ed. 527, motion denied 60 S.Ct. 1090, 310 U.S. 658, 84 L.Ed. 1421. Pa.—Penn Jewelers v. Traders Bank & Trust Co., Com.Pl., 32 Luz.Leg. Reg. 201. 64 C.J. p 1284 note 40.

89. Mass.—Lawrence v. Briry, 132 N.E. 174, 239 Mass. 424. 64 C.J. p 1284 note 41.

90. Tex.—Waring v. Waring, Civ. App., 43 S.W.2d 611.

91. Mass.—In re Poole, 116 N.E. 227, 227 Mass. 29. 64 C.J. p 1285 note 42.

Exception held timely U.S.—Tipton v. U. S., C.C.A. Tex., 70 F.2d 525.

92. Mass.—Lender v. London, 189 N.E. 797, 286 Mass. 45.

93. Cal.—Tooke v. Allen, 192 P.2d 804, 85 Cal.App.2d 230.

64 C.J. p 1285 note 44.

94. Mich.—In re Eason's Estate, 230 N.W. 928, 251 Mich. 149.

64 C.J. p 1285 note 45.

95. Ind.—Bennett v. West, 88 N.E. 309, 44 Ind.App. 398.

96. Mich.—Karsten v. La Huis, 239 N.W. 882, 256 Mich. 524.

64 C.J. p 1285 note 47.

97. Mont.—Allendale Irr. Co. v. State Water Conservation Board, 127 P.2d 227, 113 Mont. 436.

98. N.H.—Moynihan v. Brennan, 90 A. 964, 77 N.H. 273.

99. N.H.—Moynihan v. Brennan, supra.

1. R.I.—Faulkner v. Rocket, 80 A. 380, 33 R.I. 152.

2. N.Y.—Schwarz v. Weber, 8 N.E. 728, 103 N.Y. 658, 18 Abb.N.Cas. 60.



der a statute providing that exceptions to findings of fact or conclusions of law in a decision of a court on a cause tried without a jury may be taken orally at the time the decision is signed, or by filing written exceptions within five days after the filing of the decision, where the record shows that the trial court noted exceptions the day after the findings were signed and on the same day that the findings were filed, it will be presumed that oral exceptions were made in time;<sup>3</sup> and under the provision as to filing of written exceptions, the five-day period runs from the date of the actual signing of findings by the trial judge,<sup>4</sup> and not from the date of preparation and serving of proposed findings.<sup>5</sup> Where the court enters its findings on two different occasions, exceptions are in time if filed within the prescribed period after filing of the last exceptions.<sup>6</sup> Under a further provision of such statute that, where the decision is signed subsequently to the hearing and in the absence of the exceptant, exception may be taken by filing written exceptions within five days after service on him of a copy of the decision or of written notice of its filing, the right to except continues until five days after notice of the filing,<sup>7</sup> or until five days after actual notice,<sup>8</sup> which is equivalent to service of notice,<sup>9</sup> but may not be taken thereafter.<sup>10</sup>

*The court may not extend the time prescribed by statute for filing exceptions.*<sup>11</sup>

*Filing nunc pro tunc.* Where exceptions are seasonably offered, but not filed because judgment has been prematurely entered, after setting aside of the premature judgment, they may be entered nunc pro tunc as of the date offered.<sup>12</sup> There is authority

holding that in actions of an equitable nature it is within the discretion of one sitting as chancellor to permit nunc pro tunc filing of exceptions after expiration of the time prescribed in a case where refusal would be productive of injustice or exceptional hardship.<sup>13</sup> Where exceptions to findings are not filed within the time required by court rules, because plaintiff did not receive notice of the filing thereof and his attorney was absent from the jurisdiction at the time, a petition to file exceptions nunc pro tunc will be granted.<sup>14</sup>

*Premature exception,* such as one made to a decision before it is reduced to writing, is ineffectual.<sup>15</sup>

### § 656. — Form and Sufficiency

In the absence of statute or rule of court to the contrary, no particular form or mode of making and saving exceptions to findings of fact and conclusions of law is required.

In the absence of a statute or rule of court to the contrary,<sup>16</sup> no particular form or mode of making and saving exceptions to findings of fact and conclusions of law is required.<sup>17</sup> It must, however, appear that what counsel did at the time was intended to preserve the question for review by a higher court,<sup>18</sup> and a mere statement by counsel that he disagrees with the court is not equivalent to an exception.<sup>19</sup> An objection that a finding is a mere conclusion is not valid since the finding should be a conclusion.<sup>20</sup> Exceptions which are allowed to a refusal to find cannot be treated as substitutes for exceptions to the findings as made.<sup>21</sup> An exception by a party that that party, as a defendant in one case and plaintiff in the other, had duly excepted to the general finding, has been held to be insufficient.<sup>22</sup>

3. Wash.—Burrows v. Kinsley, 63 P. 332, 27 Wash 694.  
61 C.J. p 1285 note 52.

4. Wash.—Rugger v. Hammond, 163 P. 408, 95 Wash. 85.

5. Wash.—Rugger v. Hammond, supra.  
61 C.J. p 1285 note 54.

6. Wash.—Walker v. Vincent, 252 P. 925, 142 Wash 181.  
64 C.J. p 1286 note 58.

7. Wash.—Lindsay v. Scott, 105 P. 462, 56 Wash 206.  
64 C.J. p 1286 note 56.

8. Wash.—Meeker v. Waddle, 145 P. 967, 83 Wash 628.  
64 C.J. p 1286 note 57.

9. Wash.—Cornthwaite v. Barrington Transp. Co., 104 P. 609, 55 Wash. 389.  
64 C.J. p 1286 note 58.

10. Wash.—Peterson v. Peterson, 184 P. 380, 113 Wash 317.  
64 C.J. p 1286 note 59.

11. Pa.—Harris v. Mercier, 51 A. 969, 202 Pa. 313.  
64 C.J. p 1286 note 60.

12. Mass.—Everett-Morgan Co. v. Boyajian Pharmacy, 139 N.E. 170, 244 Mass. 460.

13. Pa.—Hinnershitz v. United Traction Co., 206 Pa. 31.  
64 C.J. p 1286 note 62.

14. Pa.—Pennsylvania Co. for Insurances on Lives & Granting Annuities v. Clark, 18 A.2d 807, 340 Pa. 432.

15. Hawaii.—Onah R. etc., Co. v. Kahi, 22 Hawaii 673—Nahaolelua v. Heen, 20 Hawaii 613.

16. Wash.—Fender v. McDonald, 102 P. 1026, 54 Wash 130.  
64 C.J. p 1286 note 64.

17. Mass.—Thurston v. Blunt, 103 N.E. 478, 216 Mass. 264.

Pa.—Paladino v. Sillarico, Com Pl., 30 Wash Co 36.  
64 C.J. p 1286 note 65.

#### Broadside exception

An exception to the signing of the judgment and to findings of fact is a broadside exception which merely challenges sufficiency of facts found to support the judgment entered.—Warshaw v. Warshaw, 73 S.E. 2d 900, 236 N.C. 754.

18. Ill.—Climax Tag Co. v. American Tag Co., 84 N.E. 873, 234 Ill. 179.

19. Ill.—Climax Tag Co. v. American Tag Co., supra.

20. Tex.—Hughes v. Jones, Civ.App., 94 S.W.2d 534.

21. Vt.—Levin v. Roulle, 2 A.2d 136, 110 Vt. 126.

22. Mass.—Carney v. Cold Spring Brewing Co., 23 N.E.2d 1000, 304 Mass. 392.

An exception to the judgment is unnecessary where an exception is taken to the conclusion of law on which the judgment is based,<sup>23</sup> and exceptions to the judgment when rendered have been held sufficient to support objections to the findings and conclusions filed by the court.<sup>24</sup>

**Specification of error or ground of objection.** Ordinarily, exceptions should not be general but should specifically point out the error complained of.<sup>25</sup> It is the rule that a general exception is of no avail where any of the findings or conclusions are correct,<sup>26</sup> although, since there is no need of exceptions being more specific than the findings objected to, general exceptions are sometimes held sufficient;<sup>27</sup> and, where all the findings of fact or conclusions of law excepted to are erroneous, a general exception is sufficient.<sup>28</sup>

**Joint exception.** A joint exception to more than one conclusion of law presents no question if any one is correct.<sup>29</sup> Where two defendants make a joint exception to a conclusion of law which is correct as to one of them, the exception is not available to the other defendant.<sup>30</sup>

## XI. WAIVER AND CORRECTION OF IRREGULARITIES AND ERRORS

### § 658. Irregularities in Preliminary Proceedings, Rulings, and Conduct of Trial in General

Errors and irregularities in the conduct of the trial or the proceedings preliminary thereto may be waived

### § 657. — Effect

An exception to conclusions of law operates as an admission, for the purposes of the exception, that all the facts within the issues are fully and correctly found.

An exception to conclusions of law operates as an admission, for the purposes of the exception, that all the facts within the issues are fully and correctly found,<sup>31</sup> and supported by the evidence,<sup>32</sup> but will not supply a material fact not found,<sup>33</sup> or admit that the facts found were within the issues;<sup>34</sup> and, in determining the correctness of the conclusions of law, the reviewing court is limited to the facts found regardless of the sufficiency of the evidence to support them.<sup>35</sup> An exception to a finding of fact has been held to present only the question of whether there is any evidence to support it.<sup>36</sup> The sustaining of exceptions generally has the same effect as it would have on a verdict.<sup>37</sup> An exception to a finding has been held to be in effect, if not in form, the same as if taken to a judgment based on the facts found.<sup>38</sup> Where a motion to strike off exceptions is answered by a party, the averments of the answer must be taken as admitted in the absence of depositions.<sup>39</sup>

or cured by an affirmative act of the injured party amounting to an express or implied assent to the improper procedure.

Errors and irregularities in the conduct of the trial may be waived or cured by some affirmative

23. Iowa.—Barnhart v. Farr, 7 N.W. 644, 55 Iowa 366.

24. Tex.—Voight v. Mackle, 8 S.W. 623, 71 Tex. 78.

61 C.J. p 1286 note 69.

25. N.C.—Battle v. Mayo, 9 S.E. 384, 102 N.C. 413.

Pa.—Levinisky v. Sklar, Com Pl., 39 Del.Co. 300.

64 C.J. p 1287 note 70.

26. Ind.—Turpie v. Lowe, 62 N.E. 628, 158 Ind. 47.

64 C.J. p 1287 note 71.

27. Wis.—Milwaukee County v. Pabst, 35 N.W. 337, 70 Wis. 352.

64 C.J. p 1287 note 72.

28. Wis.—Reinke v. Wright, 67 N.W. 737, 93 Wis. 368.

64 C.J. p 1287 note 73.

29. Ind.—Knight v. Nicholas, App., 102 N.E. 50.

64 C.J. p 1287 note 74.

30. N.Y.—Booley v. National Mach. Co., 35 N.E. 990, 123 N.Y. 550.

31. Ind.—Byrum v. Wise, 24 N.E.2d 1006, 216 Ind. 678, rehearing denied 25 N.E.2d 992, 216 Ind. 678—Evansville, L. & T. H. R. Co. v.

Board of Com'rs of Gibson County, 199 N.E. 583, 210 Ind. 74—Princeton Min. Co. v. Veach, 63 N.E.2d 306, 116 Ind.App. 332—Kruoger v. Beecham, 61 N.E.2d 65, 116 Ind.App. 89—Guardian Life Ins. Co. of America v. Brackett, 27 N.E.2d 103, 108 Ind.App. 443—Bryant v. Barger, 18 N.E.2d 965, 106 Ind.App. 245—Spath v. Francisco State Bank of Francisco, 13 N.E.2d 680, 105 Ind.App. 149—Roy Stringer Co. v. Dillon, 12 N.E.2d 365, 106 Ind.App. 194—Lindley v. Seward, 6 N.E.2d 998, 103 Ind.App. 600, rehearing denied 8 N.E.2d 119, 103 Ind.App. 600—Cline v. Union Trust Co., 189 N.E. 643, 99 Ind.App. 296—Maloney v. Home Bank & Trust Co., 186 N.E. 897, 97 Ind.App. 664, modified on other grounds 187 N.E. 682, 97 Ind.App. 564—City of Huntington v. Sonken, 155 N.E. 449, 89 Ind.App. 645.

Utah—Olken v. Bank of Ephraim, 68 P.2d 195, 93 Utah 364, rehearing denied 73 P.2d 78, 93 Utah 379.

64 C.J. p 1287 note 76.

**Function as demurrer**

Function of exception to a conclu-

sion of law is analogous to that of demurrer, in that, even admitting as true the facts as found, the conclusion of law is not supported by the facts—Kerfoot v. Kessener, 84 N.E. 2d 190, 227 Ind. 58.

32. Ind.—State v. Richey, 172 N.E. 119, 202 Ind. 116.

33. Ind.—Warrick v. Spary, 97 N.E. 361, 49 Ind.App. 327.

34. Ind.—Bird v. St John's Episcopal Church, 56 N.E. 129, 154 Ind. 188.

35. Ind.—Baker v. Johnson, 138 N.E. 780, 79 Ind.App. 413.

36. U.S.—Shambergan v. U. S., C.C. A.R.L., 100 F.2d 414.

N.Y.—Shorman v. Foster, 53 N.E. 504, 158 N.Y. 587.

37. Mass.—Robinson v. Trofitter, 108 Mass. 51.

38. Vt.—Abatieli v. Morse, 56 A.2d 464, 115 Vt. 254.

39. Pa.—Pennsylvania Co. for Insurance on Lives & Granting Annuities v. Clark, 18 A.2d 807, 340 Pa. 433.

act of the complaining party amounting to an express or implied assent to the improper procedure.<sup>40</sup> Voluntary compliance with an erroneous order of the court may be a waiver of the right to except.<sup>41</sup> Even a fundamental error, it has been held, may be waived unless it is of such a nature as to render the judgment void.<sup>42</sup> The power to correct errors in their own proceedings is inherent in courts of general jurisdiction,<sup>43</sup> and errors in rulings, which are clearly corrected by the court

before the trial closes or in the charge of the court to the jury, are not generally fatal to the judgment.<sup>44</sup> If counsel has induced the court to commit error, he cannot thereafter complain of the action of the court in correcting such error.<sup>45</sup>

On the other hand, conduct not amounting to an express or implied assent to the error is not a waiver thereof,<sup>46</sup> and the form of a trial, as prescribed by statute, is a matter of public interest and cannot be changed by agreement of the par-

40. Cal.—Larson v. Blue & White Cab Co., 75 P.2d 612, 24 Cal.App.2d 576.

Conn.—Hartwell v. Town of Watertown, 197 A. 755, 123 Conn. 657.

Fla.—Watkins v. Riverside Military Academy, 23 So.2d 386, 156 Fla. 298.

Miss.—Ramsey v. Natchez Coca-Cola Bottling Co., 51 So.2d 779.

N.J.—Robinson v. Equitable Life Assur. Soc. of U. S., 3 A.2d 600, 126 N.J.Eq. 242.

N.M.—Heron v. Gaylor, 126 P.2d 295, 48 N.M. 230.

N.Y.—New York Life Ins. Co. v. Marchin, 299 N.Y.S. 832, 164 Misc. 781.

S.C.—Jordan v. State Highway Dept., 198 S.E. 174, 138 S.C. 83.

Tex.—Molter v. Madden, Civ.App., 207 S.W.2d 934.

Vt.—Sears v. Laberge, 71 A.2d 887, 116 Vt. 168—Frederick v. Gay's Exp., 17 A.2d 248, 111 Vt. 411.

64 C.J. p. 1288 note 84.

Failure to object or take affirmative action with respect to error, irregularity, or omission in conduct of trial as waiver see supra § 54.

#### Reopening case

A party offering additional testimony after parties have rested on discovering that such action has operated adversely to his interests will not be permitted to repudiate additional testimony and claim that court had no right to take such action.—Heron v. Gaylor, 126 P.2d 295, 48 N.M. 230.

#### Participation in hearing

A litigant cannot participate in a hearing and, on realizing that the decision of the court will be adverse to his cause or interest, request the court to withhold its decision and proceed as if no hearing had been held.—Jordan v. State Highway Dept., 198 S.E. 174, 138 S.C. 83.

#### Motion that witness be rebuked

Defendant's counsel, moving for rebuke of plaintiff's witness because of improper, unresponsive statement on direct examination, waived exception to previous refusal of mistrial on such ground.—United Motor Freight Terminal Co. v. Hixon, 48 S.E.2d 769, 77 Ga.App. 506.

#### Submission of exhibits to jury

Where court ruled that only certain of the documents requested by

defendant would be sent to the jury room, whereupon defendant moved that none of the documents be sent into the jury room unless all of them were sent, defendant waived his motion to send certain exhibits into the jury room.—Continental Fire & Cas. Ins. Corp. v. Drummond, Tex. Civ.App., 220 S.W.2d 922, error refused no reversible error.

#### Issues tried together

Where trial court suggested that both attachment and debt issues be tried together and both sides acquiesced and went ahead and tried whole lawsuit, if court was in error, such error was waived.—Christopher v. Brown, 51 So.2d 579, 211 Miss. 322.

#### Failure to obtain ruling

If a party permits the court to proceed to judgment without action on his motion or objection, he will be held to have waived the right to have the motion or objection acted on.—In re Coleman's Estate, 28 N.W. 2d 500, 238 Iowa 768.

41. Ga.—Macon v. Humphries, 50 S. E. 986, 122 Ga. 800.

64 C.J. p. 1288 note 85.

#### Production of books and records

A party could not comply with order requiring him to produce certain of his books and records on trial in action on notes and then object to introduction of records produced on ground that order was improper, since his remedy would be by appropriate proceedings to resist the order and not by objection to introduction of records.—Selig Cahn, Inc. v. California Wrecking Co., 71 P.2d 1113, 9 Cal.2d 617.

42. Tex.—McKenzie v. Imperial Irr. Co., Civ.App., 166 S.W. 495.

43. Okl.—Todd v. Orr, 145 P. 393, 44 Okl. 469.

Tex.—Brazeos River Conservation and Reclamation Dist. v. Costello, Civ. App., 169 S.W.2d 977, error refused.

#### Purpose of statute

Statute providing that mistake or defect may be corrected in discretion of court at any stage of action, special proceeding, or appeal is remedial in nature with respect to procedure, to end that slight mistakes or irregularities not affecting merits or

substantial right of party shall not invalidate proceedings.—People ex rel. Di Leo v. Edwards, 286 N.Y.S. 840, 247 App.Div. 331.

44. Colo.—Croll & Co. v. Miller, 184 P.2d 202, 110 Colo. 299.

Ill.—Haram v. Krans, 71 N.E.2d 804, 330 Ill.App. 620.

Pa.—Redditt v. Horn, Com.Pl., 36 Del. Co. 137, 63 York Leg.Rec. 89, affirmed 64 A.2d 809, 361 Pa. 533.

64 C.J. p. 1289 note 88.

45. Ill.—Luken v. Lake Shore & M. S. Ry. Co., 154 Ill.App. 650, affirmed 84 N.E. 175, 248 Ill. 377, 140 Am. S.R. 220, 21 Ann.Cas. 82.

46. N.J.—Vozne v. Springfield Fire & Marine Ins. Co. of Springfield, Mass., 180 A. 852, 115 N.J.Law 449.

Tex.—Travelers Ins. Co. v. Simon, Civ.App., 186 S.W.2d 674.

Wash.—Miller v. O'Brien, 137 P.2d 525, 17 Wash.2d 758.

Motion to reopen evidence

Motion of defendant's counsel to reopen evidence and allow them to put on witnesses for defendant, after error had been committed in denying defendant's counsel the right to open and conclude arguments on no evidence being introduced for defendant, did not constitute a waiver or ratification of the error.—Phillips v. Smith, 47 S.E.2d 156, 76 Ga.App. 705.

#### Explicit objection to ruling

Where appellant's counsel in replying to remark of trial court that it had right to lay down rule on impeachment of witness and if counsel had any authorities to contrary to produce them stated "I don't think it is of that much consequence, your honor, and I just take an exception to the ruling of the Court," counsel's statement was not waiver of alleged prejudicial remarks of trial court.—Travelers Ins. Co. v. Simon, Tex.Civ.App., 138 S.W.2d 674.

#### Submission of issue

A plaintiff does not waive his right to question the propriety of submitting the issue of his alleged wilful and wanton conduct by giving instructions that he is obliged to give.—Goldschmidt v. Chicago Transit Authority, 82 N.E.2d 357, 335 Ill.App. 461.

ties.<sup>47</sup> So it has been held that compliance with an erroneous order that a cause be tried on depositions does not waive the error;<sup>48</sup> and where the defendant's right to open and close the arguments to the jury was denied, the error is not cured by the fact that plaintiff's counsel, during final argument for plaintiff, states that he is willing that defendant's attorney shall conclude the argument after plaintiff's counsel has finished, in which statement the court acquiesces, where defendant's attorney declines the offer.<sup>49</sup>

*Preliminary proceedings.* Errors and irregularities in the proceedings preliminary to the trial may be waived and cured by some affirmative act of the complaining party amounting to an express or implied assent to the improper procedure;<sup>50</sup> but conduct not amounting to an express or implied assent to the error or irregular procedure is not a waiver thereof.<sup>51</sup>

### § 659. — Curing Improper Remarks or Conduct of Judge by Instruction or Withdrawal of Remarks

Improper remarks or conduct on the part of the judge may ordinarily be cured, and the impropriety obviated, by admonishing or instructing the jury to disregard them.

Improper remarks or conduct on the part of the judge presiding at the trial of an action may ordinarily be cured, or the impropriety obviated, by admonishing or instructing the jury to disregard

them,<sup>52</sup> or by withdrawing or correcting improper comments,<sup>53</sup> or even, it has been held, by an instruction stating the correct rule of law to be applied in deciding the matter to which the comment related,<sup>54</sup> or directing the jury not to consider the evidence to which the remark related,<sup>55</sup> or advising the jury that they are the exclusive judges of all questions of fact;<sup>56</sup> but where a remark or conduct is so prejudicial that the impression thereby produced in the minds of the jury cannot reasonably be expected to be removed by an admonition or corrective statement, the impropriety is not thereby cured,<sup>57</sup> nor is the error cured where the form and substance of the corrective statement is not sufficient to remove the prejudicial effect of the improper conduct or remark.<sup>58</sup> An admonition to disregard previous improprieties, or a correction of them, is not itself ordinarily improper or objectionable;<sup>59</sup> but if the judge in attempting to correct an impression produced by prior improper remarks or conduct succeeds only in reiterating or emphasizing it,<sup>60</sup> or on the other hand goes so far as to leave a contrary and equally improper impression,<sup>61</sup> impropriety still exists.

### § 660. Rulings as to Evidence

Errors or irregularities with respect to evidence may be waived or cured.

Errors or irregularities in rulings with respect to evidence may be waived<sup>62</sup> or such errors or irregu-

47. *Philippine*.—*Arzadon v. Arzadon*, 15 *Philippine* 77.

64 C.J. p 1289 note 90.

48. *Iowa*.—*In re County Printing of Cherokee County*, 136 N.W. 765, 156 *Iowa* 282.

49. *Ga.*—*Fite v. Hooks*, 130 S.E. 692, 34 *Ga.App.* 629.

Waiver of right to open and close argument generally see supra § 44.

50. *Cal.*—*Capital Nat. Bank of Sacramento v. Smith*, 144 P.2d 665, 62 *Cal.App.2d* 328.—*Parmely v. Boone*, 96 P.2d 164, 35 *Cal.App.2d* 517.

51. *Wash.*—*Friese v. Adams*, 267 P.2d 107.

52. *W.Va.*—*Buck v. Hathaway*, 182 S.E. 673, 116 *W.Va.* 585.

Waiver of particular errors or irregularities in proceedings preliminary to trial see supra §§ 1-35.

53. *N.Y.*—*Hilton v. Mack*, 15 N.Y.S. 2d 187, 257 *App.Div.* 709, appeal dismissed *Hilton v. Gaston*, 24 N.E. 2d 506, 281 N.Y. 881.

54. *Wash.*—*State ex rel. Pacific Fruit & Produce Co. v. Superior Court for King County*, 155 P.2d 1005, 22 *Wash.2d* 327.

55. *Cal.*—*Loper v. Morrison*, 145 P. 2d 1, 23 *Cal.2d* 600.

56. *N.J.*—*Ench Equipment Corp. v. Lorenzo*, 92 A.2d 480, 23 N.J.Super. 63.

64 C.J. p 103 note 74.

Correction or withdrawal of improper instructions see infra §§ 669-671.

57. *Mass.*—*Garnick v. Eastern Mass. St. Ry. Co.*, 109 N.E.2d 114, 329 *Mass.* 520.

64 C.J. p 103 note 75.

58. *Mass.*—*Conroy v. Fall River Herald News Co.*, 28 N.E.2d 729, 306 *Mass.* 488, 133 A.L.R. 927.

64 C.J. p 103 note 76.

59. *Mo.*—*Whitaker v. Bell Oil Co.*, 167 S.W. 619, 182 *Mo.App.* 229.

60. *Cal.*—*Keim v. D. B. Berelson & Co.*, 233 P.2d 123, 105 *Cal.App.2d* 154.

64 C.J. p 103 note 78.

61. *Cal.*—*Steele v. Wardwell*, 135 P. 2d 628, 57 *Cal.App.2d* 642.

62. *N.C.*—*Thompson v. Angel*, 197 S.E. 618, 214 N.C. 3.

63. *Tex.*—*Commercial Standard Ins. Co. v. Billings, Civ.App.*, 114 S.W.2d 709, error dismissed.

64 C.J. p 103 note 79.

64. *N.Y.*—*Marchant v. Fred F. French Management Co.*, 90 N.Y.S. 2d 5.

59. *Ala.*—*Rogers v. Smith*, 63 So. 530, 184 *Ala.* 506.

60. *S.C.*—*Lorick & Lowrance v. Julius H. Walker & Co.*, 145 S.E. 33, 147 S.C. 178.

61. *S.C.*—*Sumter Trust Co. v. Holman*, 132 S.E. 811, 134 S.C. 412.

64 C.J. p 103 note 82.

62. *Ga.*—*Mutual Furniture Co. v. Moore*, 4 S.E.2d 711, 60 *Ga.App.* 655.

63. *Mo.*—*Marczuk v. St. Louis Public Service Co.*, 196 S.W.2d 1000, 355 *Mo.* 536.

64. *Mont.*—*Corpus Juris cited in Pilgeram v. Haas*, 167 P.2d 339, 347, 113 *Mont.* 431.

65. *Okl.*—*First Nat. Pictures v. Pappe*, 39 P.2d 526, 170 *Okl.* 279.

64 C.J. p 1289 note 93.

Waiver by:

Act or omission prior to ruling see supra § 114.

Failure to object see supra § 115.

Waiver of:

Formal introduction of documentary evidence see supra § 62.

Proof see supra § 59.

Recall of witness after resting Defendant by proceeding with his own evidence waived alleged error in

larities in rulings may be corrected.<sup>63</sup> A motion for a peremptory instruction at the close of the evidence is not a waiver of exceptions to rulings on evidence.<sup>64</sup> Where an objection that a certified copy of a document is not the best evidence is waived, it is error to exclude it.<sup>65</sup>

# § 661. — Admission

Error in the admission of evidence may be waived by some subsequent affirmative act amounting to an express or implied assent to the reception of the evidence.

The erroneous admission of evidence may be waived or cured by stipulation or consent of the parties,<sup>66</sup> or by some affirmative act done after the ruling on the admission of the evidence which

amounts to an express or implied assent to the reception of the evidence,<sup>67</sup> or by acts or statements inconsistent with objections previously urged,<sup>68</sup> and where the attorney for the party who seeks to introduce certain papers states that he will offer them in evidence if his opponent will not object to their competency but will confine his objection to their materiality, and the attorney for the other party assents, objection to their competency is waived.<sup>69</sup> Error in the admission of evidence is not waived by conduct not amounting to an express or implied assent to the reception of the evidence.<sup>70</sup>

Objections to evidence have been held to be waived by objecting to a withdrawal, or the striking of the evidence,<sup>71</sup> although there is also au-

permitting plaintiff to recall a witness for further examination after having announced close of plaintiff's case, and after defendant had argued his motion for a directed verdict.—*Norman v. Jefferson City Coca-Cola Bottling Co.*, Mo App., 211 S.W.2d 552.

63. Mass.—*Todd v. Boston Elevated Ry. Co.*, 94 N.E. 683, 208 Mass. 505, Ann. Cas. 1912A 1005.

N.H.—*Caswell v. Maplewood Garage*, 149 A. 746, 84 N.H. 241, 73 A.L.R. 433.

## Amendment of pleading

In action on written contract under which father agreed to make his illegitimate child father's sole heir trial court did not abuse its discretion in permitting amendment to petition, after motion for directed verdict was made, pleading loss of the written contract, and any error in admitting evidence concerning contents of the contract was cured by the amendment.—*Hehr's Adm'r v. Hehr*, 157 S.W.2d 111, 288 Ky. 580.

64. Tenn.—*Allen v. Melton*, 99 S.W. 2d 119, 20 Tenn.App. 387.

65. Tex.—*Texas Employers' Ins. Ass'n v. Adcock*, Civ.App., 27 S.W. 2d 363.

66. Ark.—*Gantt v. Sissell*, 263 S.W. 2d 916.

Cal.—*Reisman v. Los Angeles City School Dist.*, 267 P.2d 36, 123 Cal. App.2d 493.

Neb.—*Hope v. Tapelt*, 50 N.W.2d 352, 155 Neb. 10.

64 C.J. p 1283 note 96.

Waiver or estoppel as to objection to admission of evidence generally see supra § 114 et seq.

## Public policy

Where public policy does not absolutely bar or disqualify testimony, its inadmissibility may be waived.—*Albany Federal Sav. & Loan Ass'n v. Henderson*, 31 S.E.2d 20, 198 Ga. 116.

## Issue limited by agreement of parties

Where, on agreement of plaintiff

and defendant, only issue submitted to jury was reasonable rental value of realty, any errors in admitting evidence not bearing on such rental value would be treated as waived.—*Jackson v. Oliphant*, 76 S.E.2d 625, 88 Ga.App. 313.

67. La.—*Hope v. Gordon*, 173 So. 177, 186 La. 697.—*Corpus Juris* quoted in *Acosta v. Lea*, App., 66 So.2d 201, 202.

Neb.—*Corpus Juris* quoted in *In re Kaiser's Estate*, 34 N.W.2d 366, 374, 150 Neb. 295.

64 C.J. p 1290 note 21.

68. N.C.—*Lipe v. Guilford Nat. Bank*, 72 S.E.2d 759, 236 N.C. 328.

64 C.J. p 1289 note 97.

## Failure to object to subsequent reception of evidence

(1) The admission of similar evidence without objection waives first objection.

N.C.—*Steele v. Cox*, 36 S.E.2d 288, 225 N.C. 726.—*Gray v. City of High Point*, 166 S.E. 911, 203 N.C. 756.

Tex.—*Gifford-Hill & Co. v. Henderson*, Civ.App., 81 S.W.2d 274, error dismissed.

(2) Objections to certain testimony were waived by allowing witnesses to testify to virtually the same facts without objection in other portions of their examinations.—*Hunt v. Wooten*, 76 S.E.2d 326, 238 N.C. 42.—*Lipe v. Guilford Nat. Bank*, 72 S.E. 2d 759, 236 N.C. 328.—*Sprinkle v. City of Reidsville*, 69 S.E.2d 179, 235 N.C. 140.—*Owens v. Blackwood Lumber Co.*, 193 S.E. 219, 212 N.C. 133.

(3) Objection to plaintiff's introduction of photograph of an automobile severely damaged by defendant's truck after it had struck plaintiff's truck was waived by introduction of a second photograph of the automobile with no objection by defendant.—*Gary Fish Co. v. Lelsure*, 102 N.E. 2d 209, 122 Ind.App. 190.

(4) Failure to object to admission of evidence as waiver see supra § 115.

(5) Failure to object to prior admission of similar evidence as waiver see supra § 116.

69. N.Y.—*State Bank v. Southern Nat. Bank*, 62 N.E. 677, 170 N.Y. 1.

70. Ariz.—*Tucker v. Reil*, 77 P.2d 203, 51 Ariz. 357.

N.J.—*Fred J. Brotherton, Inc. v. Kreielsheimer*, 92 A.2d 57, 22 N.J. Super. 355.

64 C.J. p 1290 note 22.

## Exception to charge

In cases tried by jury, exceptions to the reception of evidence are not waived by failure to except to the charge of the court.—*Holton v. Ellis*, 49 A.2d 210, 114 Vt. 471.

## Trial in accordance with ruling

Action of a defendant in action for breach of contract, in proceeding to try case in accordance with ruling of trial court overruling defendant's objection to admission of evidence, was not a waiver of objection to admission of such evidence.—*Fred J. Brotherton, Inc. v. Kreielsheimer*, 92 A.2d 57, 22 N.J. Super. 355.

## Reference to matter on voir dire

Where, in tort action, plaintiffs had sought to keep issue of covenant not to sue out of case by filing motion to strike that portion of answer which set forth covenant as defense, but motion was overruled, it was proper for plaintiffs to examine jury on voir dire on such question, and in doing so, plaintiffs did not waive their objection to the introduction of the covenant.—*De Lude v. Rimek*, 115 N.E.2d 561, 351 Ill.App. 466.

## Failure to accept mistrial

Error in admission of incompetent evidence was not waived by failure to accept offer to set aside swearing of jury.—*Occidental Ins. Co. v. Chasteen*, 75 S.W.2d 363, 255 Ky. 710.

71. Cal.—*Mitchell v. Davis*, 23 Cal. 381.

W.Va.—*Pardee v. Johnston*, 74 S.E. 721, 70 W.Va. 347.

thority to the contrary.<sup>72</sup> Error in allowing a witness to answer a question objected to is cured where the court sustains an objection to the answer.<sup>73</sup> Valid objections to evidence may be obviated by supplying deficiencies later in the trial,<sup>74</sup> or by an amendment of the pleadings.<sup>75</sup> Thus, the admission of evidence prima facie inadmissible may be cured by the subsequent introduction of the necessary preliminary and connecting proof.<sup>76</sup> Where, after adverse rulings on objections to evidence, motion to strike, and for a nonsuit, defendant proceeds with the case and introduces evidence which supplies the defects in plaintiff's proof, the error is cured.<sup>77</sup> It has been held that objections to the admission of secondary evidence are waived if the party objecting subsequently produces the best evidence himself,<sup>78</sup> or if he fails to object to the introduction of other secondary evidence as to the same matter.<sup>79</sup> Objections to evidence are not waived by a subsequent amendment of the record making the evidence admissible,<sup>80</sup> or, ordinarily, by failure to cross-examine a witness giving incompetent testimony over objection.<sup>81</sup>

*Withdrawal, striking, or excluding improper evidence.* Where erroneous evidence is withdrawn by an instruction,<sup>82</sup> or where it is stricken on motion of the objecting party,<sup>83</sup> and the jury instructed to disregard it,<sup>84</sup> or the court, after receiving evidence over objections, rules that it is incompetent, and excludes it,<sup>85</sup> error in its admission is cured, in the absence of exceptional circumstances.<sup>86</sup> Er-

ror in the admission of evidence may be cured by an instruction limiting the purposes for which it may be considered.<sup>87</sup>

Error in permitting a question and answer so couched as to bring out a conclusion invading the province of the jury is cured where the question and answer are withdrawn and properly rephrased.<sup>88</sup> Exception to the admission of evidence is not waived by motion to strike it, where the court denies the motion,<sup>89</sup> and where objection is properly made to the admission of evidence and an exception taken to the overruling of the objection, the objecting party does not waive the objection by moving to exclude all the evidence of the witness, some of which is admissible.<sup>90</sup>

*Withdrawal of objections.* The erroneous admission of evidence is waived by a subsequent withdrawal of objections thereto;<sup>91</sup> but the waiver must be so specific as to leave no doubt on the subject,<sup>92</sup> and a mere statement by counsel, after the evidence objected to has been received, that he is willing to try the issue to which the evidence relates does not show a waiver.<sup>93</sup> A party who withdraws his objection to evidence which has been excluded does not thereby waive his right to object to leading questions asked the witness when he is recalled to testify.<sup>94</sup>

*Subsequent introduction or use of same or similar evidence.* It is a general rule, subject to some exceptions and qualifications, that a party waives his objection to the admission of evidence by subsequent-

72. N.Y.—Furst v. Second Avenue R. Co., 72 N.Y. 542.  
64 C.J. p 1290 note 4.

73. Ala.—St. Louis & S. F. R. Co. v. Sutton, 55 So. 989, 169 Ala. 389, Ann Cas. 1912B 366.

74. Ariz.—Western Truck Lines v. Berry, 78 P.2d 997, 52 Ariz. 38.  
Cal.—Singer Metals, Inc. v. Industrial Management Corp., 253 P.2d 515, 116 Cal.App.2d 85.  
64 C.J. p 1289 note 1.

75. N.C.—Hicks v. Niven, 185 S.E. 469, 210 N.C. 44.

76. Ala.—Louisville & N. R. Co. v. Shepherd, 61 So. 14, 7 Ala.App. 496.  
64 C.J. p 1289 note 2.

77. Cal.—Western California Land Co. v. Welch, 183 P. 169, 41 Cal.App. 435.

78. S.C.—Hodges v. Tarrant, 9 S.E. 1038, 31 S.C. 608.  
64 C.J. p 1292 note 50.

79. N.H.—Ware v. Champagne's Super Market, 104 A.2d 736.

80. Pa.—Dexter v. Billings, 1 A. 180, 110 Pa. 135.

81. Mo.—Wabash R. Co. v. Cockrell, 192 S.W. 443.  
64 C.J. p 1290 note 6.

82. Ariz.—Western Truck Lines v. Berry, 78 P.2d 997, 52 Ariz. 38.  
Mo.—Stauffer v. Metropolitan St. Ry. Co., 147 S.W. 1032, 243 Mo. 305.  
Cannon v. S. S. Kresge Co., 116 S.W.2d 559, 233 Mo.App. 173.

83. Ill.—Curtis v. Lowe, 87 NE 2d 865, 338 Ill.App. 463.  
N.H.—Capelle v. Trober, 112 A. 798, 80 N.H. 43.  
N.D.—Liraun v. Martin, 293 N.W. 317, 70 N.D. 216.  
Or.—Covogro v. Tracey, 64 P.2d 1321, 156 Or. 1.

84. Ariz.—Western Truck Lines v. Berry, 78 P.2d 997, 52 Ariz. 38.  
Mo.—Stearns v. Prudential Ins. Co. of America, 140 S.W.2d 766, 235 Mo.App. 135.  
64 C.J. p 1291 note 29.

85. Mo.—Goodman v. Griffith, 142 S.W. 259, 238 Mo. 706.  
N.D.—Kaye v. Taylor, 148 N.W. 629, 28 N.D. 293.

86. Mo.—Stauffer v. Metropolitan

St. Ry. Co., 147 S.W. 1032, 243 Mo. 305.

87. Ga.—Foremost Dairy Products v. Sawyer, 196 S.E. 436, 185 Ga. 702.

88. Mo.—Kane v. Missouri Pac. Ry. Co., 157 S.W. 644, 251 Mo. 13.

89. Minn.—Gaspar v. Heimbach, 55 N.W. 559, 53 Minn. 414.

90. Ky.—Elliott v. Campbell, 78 S.W. 1122, 117 Ky. 719, 25 Ky.L. 1841.

91. Cal.—George v. City of Los Angeles, 124 P.2d 872, 51 Cal.App.2d 311.  
64 C.J. p 1290 note 17.

*Motion for mistrial*  
A litigant may withdraw his motion for a mistrial because of admission of prejudicial evidence at any time prior to ruling by the court thereon.—Pope v. Tapett, 50 N.W.2d 352, 155 Neb. 10.  
92. Or.—Dornis v. Ralston, 106 P. 13, 55 Or. 254.

93. Or.—Dornis v. Ralston, supra.  
94. Tex.—Yellow Pine Paper Mill Co. v. Lyons, Civ.App., 159 S.W. 809.

ly introducing the same<sup>95</sup> or similar<sup>96</sup> evidence, or evidence to the same effect or relating to the same matter;<sup>97</sup> and the same result follows where the party objecting to the admission of the evidence subsequently uses it for his own purposes.<sup>98</sup> A subsequent reference by both parties to incompetent evidence cures error in its admission.<sup>99</sup>

On the other hand, it has been held that a party does not waive error in the admission of evidence over his objections by subsequently introducing evidence of the same general character;<sup>1</sup> that where the objection of defendants, relying on the statute of frauds, to the introduction of oral statements is overruled, they do not waive the objection by voluntarily testifying to their understanding of such statements;<sup>2</sup> that, in an action on a note, plaintiff's introduction of correspondence between the parties after the debt was incurred, in negotiations for a settlement, and showing the contentions of the parties, was not a waiver of the parol evidence rule;<sup>3</sup> that a person sued for malicious prosecution does not waive error in the admission of evidence on the issue of probable cause by presenting evidence tending to show nonliability notwithstanding want of probable cause,<sup>4</sup> and that a party, by agreeing to what the tax records would

show as to the assessed value of land for general taxation, does not waive his previous objection to the competency of such evidence.<sup>5</sup>

Where a party, after objecting to the admission of a document, offers such document in evidence,<sup>6</sup> or asks that it go to the jury,<sup>7</sup> or uses it for his own purposes,<sup>8</sup> he waives his previous objection; and an objection to the admission of part of a memorandum used by a witness to refresh his memory is waived where the opposing party introduces the rest of it.<sup>9</sup> So error in admitting in evidence certified copies of indictments against a party is waived where he testifies that such indictments had been returned against him.<sup>10</sup> On the other hand, it has been held that where, after a document had been admitted and marked in evidence, over objection, the objecting party asks that it be shown to the jury, he does not waive the benefit of his exception,<sup>11</sup> and a party does not waive his objection to the admission of a document by insisting that the entire document be read and not only the portions unfavorable to him,<sup>12</sup> but it has also been held that where a party's objection to the introduction of part of a statement is overruled, he waives the error by offering in evidence the entire statement.<sup>13</sup>

95. Mo.—*Stearns v. Prudential Ins. Co. of America*, 140 S.W.2d 768, 235 Mo.App. 135.

N.C.—*Queen v. DeHart*, 184 S.E. 7, 209 N.C. 414.

S.C.—*Smith v. Peebles*, 181 S.E. 653, 177 S.C. 479.

Tex.—*Germann v. Kaufman's, Inc.*, Civ.App., 155 S.W.2d 969, error refused.

Wash.—*Rustuen v. Apro*, 243 P.2d 479, 40 Wash.2d 395.

64 C.J. p 1291 note 34.

Same or similar evidence previously elicited or introduced by objecting party as waiver of subsequent admission see *supra* § 116.

98. Ill.—*Porter v. Terminal R. Ass'n of St. Louis*, 65 N.E.2d 31, 327 Ill. App. 645.

Minn.—*In re Forsythe's Estate*, 22 N.W.2d 19, 221 Minn. 303, 167 A.L.R. 1.

Wash.—*Sevener v. Northwest Tractor & Equipment Corp.*, 247 P.2d 237, 41 Wash.2d 237.

64 C.J. p 1291 note 35.

97. Ill.—*Corzine v. Keith*, 51 N.E.2d 538, 384 Ill. 435.

Ky.—*Carroll v. Carroll*, 251 S.W.2d 989.

La.—*Acosta v. Lea*, App., 55 So.2d 1, rehearing refused 56 So.2d 201.

*Williams v. Brown*, App., 181 So. 679—*Zeller v. Chetta*, App., 148 So. 99.

N.H.—*Vallee v. Spaulding Fibre Co.*,

197 A. 697, 89 N.H. 285, rehearing denied 199 A. 894, 89 N.H. 558.

Tex.—*Minchen v. First Nat. Bank of Alpine*, Civ.App., 263 S.W.2d 601, error refused no reversible error 61 C.J. p 1291 note 36.

**Character and reputation evidence**

Error in admitting two witnesses' testimony, before plaintiff testified, that plaintiff was man of good character entitled to belief, was not cured by defendant's subsequent testimony as to plaintiff's good character, as witness' character may be different from his reputation for truth and veracity in community wherein he lives—*West v. Todd*, 180 S.W.2d 522, 207 Ark. 341.

96. Wash.—*Sevener v. Northwest Tractor & Equipment Corp.*, 247 P.2d 237, 41 Wash.2d 237.

99. N.C.—*American Trust Co. v. United Cash Store Co.*, 136 S.E. 289, 193 N.C. 122.

1. Ill.—*City of West Frankfort v. A. C. Marsh Lodge*, No. 496, I. O. O. F., 115 N.E. 711, 315 Ill. 32.

64 C.J. p 1291 note 40.

2. Mo.—*McKee v. Rudd*, 121 S.W. 312, 222 Mo. 444, 133 Am.S.R. 529.

3. Ala.—*Hamilton Furniture Co. v. Brenard Mfg. Co.*, 110 So. 153, 215 Ala. 187.

64 C.J. p 1291 note 42.

4. Wash.—*Aldrich v. Island Empire*

*Telephone & Telegraph Co.*, 113 P. 264, 62 Wash. 173.

5. Mo.—*Kansas City & G. Ry. Co. v. Haake*, 53 S.W.2d 891.

6. Iowa.—*Goodale v. Murrav*, 259 N.W. 450, 227 Iowa 843, 126 A.L.R. 1121.

1a.—*Hope v. Gordon*, 173 So. 177, 186 La. 697.

Tex.—*Texas Indemnity Ins. Co. v. Desheria*, Civ.App., 237 S.W.2d 715.

64 C.J. p 1291 note 45.

7. Me.—*Ward v. Abbott*, 14 Me. 275.

8. U.S.—*The Blandon*, D.C.N.Y., 39 F.2d 933, affirmed, C.C.A., 42 F.2d 1013.

Mo.—*Dell-Wood Tires v. Riss & Co.*, App., 198 S.W.2d 347.

**Moving pictures**

Where plaintiffs caused moving pictures to be exhibited again to jury, they thereby waived objection to previous exhibition by defendant.—*Heiman v. Market St. Ry. Co.*, 69 P.2d 178, 21 Cal.App.2d 311.

9. Ga.—*Scott v. Gidlight Mfg. Co.*, 139 S.E. 686, 37 Ga.App. 240.

10. Tex.—*Huff v. Reber*, Civ.App., 13 S.W.2d 995.

11. N.Y.—*Zimmerman v. Shapiro*, 105 N.Y.S. 104, 53 Misc. 299.

12. Mo.—*Accomac Realty Co. v. City of St. Louis*, 152 S.W.2d 100, 317 Mo. 1224.

13. Tex.—*Airline Motor Coaches v.*

**Introduction of evidence in rebuttal.** A party does not ordinarily waive his objection to the erroneous admission of evidence by subsequently introducing evidence to disprove the matters testified to, to explain them or to prove facts inconsistent therewith,<sup>14</sup> even though it is of the same kind or nature.<sup>15</sup>

**Cross-examination or reexamination as to objectionable matter.** As a general rule, a party does not waive his previous objection to the admission of improper evidence merely by cross-examining the

witness with respect to the objectionable matter,<sup>16</sup> unless he makes the witness his own.<sup>17</sup> However, according to some authority a party waives his objection to the testimony of a witness by going into the matter on cross-examination<sup>18</sup> without reserving his objection.<sup>19</sup> It has also been held that, while a cross-examination with respect to incompetent testimony admitted over objection may be made without waiving the objection, the cross-examiner cannot rely on his original objection, where he has the witness embody such incompetent evi-

Howell, Civ App. 195 S.W.2d 713, error refused no reversible error

14. Ala.—**Corpus Juris cited in** Smith v. State, 24 So.2d 516, 550, 247 Ala. 354.

Ariz.—Tucker v. Reil, 77 P.2d 203, 51 Ariz. 357.

Ill.—De Lude v. Rimek, 115 N.E.2d 561, 351 Ill.App. 466—Crane Packing Co. v. Brummer, 67 N.E.2d 592, 329 Ill.App. 272.

Iowa.—Goodale v. Murray, 289 N.W. 450, 227 Iowa 817, 126 A.L.R. 1121

Md.—Vocell v. Ambroseotti, 94 A.2d 437, 201 Md. 475.

Mich.—Bartkowiak v. Bartkowiak, 283 N.W. 49, 286 Mich. 623.

Minn.—Warren v. Marsh, 11 N.W.2d 528, 215 Minn. 615

Okla.—**Corpus Juris quoted in** Vogel v. Fisher, 225 P.2d 348, 348, 203 Okl. 657.

Wash.—Sovenor v. Northwest Tractor & Equipment Corp., 247 P.2d 237, 41 Wash.2d 237.

64 C.J. p 1292 note 51.

15. Ariz.—Tucker v. Reil, 77 P.2d 203, 51 Ariz. 357.

Okla.—**Corpus Juris quoted in** Vogel v. Fisher, 225 P.2d 348, 348, 203 Okl. 657.

64 C.J. p 1292 note 52.

**Religious affiliations**

A defendant did not waive his objections to plaintiff's cross-examination of defendant's witnesses as to whether witnesses were members of a particular church by asking them on redirect examination as to whether their connection with the church had anything to do with their attitude toward the case.—Tucker v. Reil, 77 P.2d 203, 51 Ariz. 357.

16. Ariz.—Lee Moor Contracting Co. v. Blanton, 65 P.2d 35, 49 Ariz. 130, Cal.—Moore v. Norwood, 106 P.2d 939, 41 Cal.App.2d 359.

Fla.—**Corpus Juris cited in** Louette v. State, 12 So.2d 168, 174, 158 Fla. 495.

Iowa.—Halligan v. Lone Tree Farmers Exchange, 300 N.W. 551, 230 Iowa 1277—Goodale v. Murray, 289 N.W. 450, 227 Iowa 843, 126 A.L.R. 1121.

Ky.—Evans v. Payne, 258 S.W.2d 919.

Md.—Vocell v. Ambroseotti, 94 A.2d 437, 201 Md. 475

Mo.—Levin v. Hilliard, 266 S.W.2d 573—**Corpus Juris cited in**

O'Shaughnessy v. Rogers, App., 202 S.W.2d 92, 96—City of Gallatin ex rel. Dixon v. Murphy, App., 217 S.W.2d 400—Tinsley v. Washington Nat. Ins. Co., App., 97 S.W.2d 874

—Rodeler v. Grange Mut. Ins. Co. of Lewis County, App., 91 S.W.2d 112—Gilman v. Thompson, 61 S.W.2d 310, 238 Mo. App. 1087—Allen v. Allen, App., 60 S.W.2d 709.

Okla.—Washita Val. Grain Co. v. McElroy, 262 P.2d 133—Hinds v. Atlas Acceptance Corp., 63 P.2d 29, 178 Okl. 474.

64 C.J. p 1292 note 53.

**In Ohio**

(1) Defendant did not waive his objection to admission of expert's opinion testimony for plaintiff by cross-examining witness or later offering evidence in conformity to ruling admitting such testimony.—Ross v. Stricker, 88 N.E.2d 80, 85 Ohio App. 56, reversed on other grounds 91 N.E.2d 18, 153 Ohio St. 153.

(2) Where defendant cross-examined plaintiff's witness quite fully with respect to gouge marks on highway at place of collision of trucks and also with respect to location and relative positions, after collision, of damaged trucks and debris, defendant waived right to object on appeal as to improper action of trial court in overruling defendant's objection to opinion evidence given by such witness on direct examination with respect to gouge marks.—Patterson v. George F. Alger Co., Ohio App., 112 N.E.2d 65.

**In Tennessee**

(1) Defendant has been held to waive error in admitting plaintiff's testimony in answer to defendant's motion to set aside default judgment by cross-examining plaintiff.—Fidelity-Phoenix Fire Ins. Co. v. Oliver, 152 S.W.2d 254, 25 Tenn.App. 114

(2) It has also been held, however, that a litigant does not waive objection to incompetent testimony by cross-examination to break force of such testimony if witness, on cross-

examination, repeats evidence given on direct examination.—Gulf Refining Co. v. Frazier, 83 S.W.2d 285, 19 Tenn. App. 76.

**In Texas**

(1) A litigant does not waive a valid objection to testimony by cross-examination of the witness.

U.S.—Standard Acc. Ins. Co. v. Terrell, C.A. Tex., 180 F.2d 1.

Tex.—Roosth & Genecov Production Co. v. White, 262 S.W.2d 99—Dallas Txy & Terminal Co. v. Bailey, 250 S.W.2d 379, 181 Tex. 359—Hall v. Collins, Civ.App., 161 S.W.2d 338, error refused—Stanley v. Stanley, Civ.App., 139 S.W.2d 876—Thomason v. Burch, Civ.App., 233 S.W.2d 320, error refused no reversible error—Oliver v. Corzeliuss, Civ.App., 223 S.W.2d 271, error dismissed—Reed v. Burlew, Civ.App., 157 S.W.2d 933, error refused—Great American Indemnity Co. v. Dabney, Civ.App., 128 S.W.2d 496, error dismissed, judgment correct.

64 C.J. p 1292 note 53 [b].

(2) On the other hand, there are a number of cases in which it has been held that a party waives his objection to the testimony of a witness by cross-examination as to the matter objected to.—Keller v. Downey, Civ.App., 161 S.W.2d 803, affirmed—Humble Oil & Refining Co. v. Downey, 183 S.W.2d 426, 143 Tex. 171—Dunn v. Peters, Civ.App., 126 S.W.2d 997—64 C.J. p 1292 note 53 [b] (5).

17. Colo.—American Min. Co. v. Himrod-Kimball Mines Co., 235 P.2d 804, 124 Colo. 186.

Pa.—Binns v. First Nat. Bank of Cal., 80 A.2d 768, 367 Pa. 359.

S.D.—McIlwaine v. First Nat. Bank of Frederic, Wis., 146 N.W. 574, 33 S.D. 389.

18. Miss.—Ellington v. Eley, 56 So. 2d 796

N.C.—Eledge v. Welch, 76 S.E.2d 340, 238 N.C. 61.

19. S.C.—Sinclair Refining Co. v. Stroud, 9 S.E.2d 214, 194 S.C. 79—McLane v. Reliance Life Ins. Co. of Pittsburgh, 6 S.E.2d 13, 192 S.C. 245—Smith v. Metropolitan Life Ins. Co., 4 S.E.2d 270, 191 S.C. 310.



dence in his cross-examination<sup>20</sup> or where the cross-examination is extended beyond the scope of the evidence on direct examination.<sup>21</sup>

Objection to evidence introduced in cross-examination is waived by asking substantially the same question on re-examination in chief.<sup>22</sup> On the other hand, it has been held that re-examination by plaintiff of a witness on matters elicited on cross-examination by defendant over plaintiff's objection does not waive all objections made to the relevancy of the cross-examination.<sup>23</sup>

*Demurrer to evidence and motion to dismiss or to direct verdict.* While it has been held in some jurisdictions that a party does not waive his objections to evidence by a demurrer to the evidence,<sup>24</sup> it has been held in other jurisdictions that such objections are waived by demurring to the evidence,<sup>25</sup> or by a motion to dismiss,<sup>26</sup> or to direct a verdict.<sup>27</sup>

*Request for instructions.* The admission of incompetent evidence is waived where the complaining party asks and obtains an instruction which assumes the competency of the evidence complained of,<sup>28</sup> and, where evidence affecting the measure of damages is admitted, the party objecting to its admission waives his objection by requesting instructions which embody the same theory on the measure of damages.<sup>29</sup> On the other hand, an objection to improper evidence is not waived by a request for an instruction limiting the prejudicial effect of the evidence.<sup>30</sup> It has been held that the right to challenge the competency of evidence admitted over objection is not waived by offering instructions on

the issue presented by such evidence,<sup>31</sup> and that, where a case is tried on a theory to which proper objection is made, the fact that the objecting party requests instructions which he deems necessary for his protection does not waive error in the overruling of his objections to the admission of evidence in accordance with the theory objected to.<sup>32</sup>

## § 662. — Exclusion

A party may waive or estop himself to object to the exclusion of evidence; error in the exclusion of evidence is cured by its subsequent admission.

A party may waive or estop himself to object to the exclusion of evidence,<sup>33</sup> and error in the exclusion of evidence is cured by its subsequent admission.<sup>34</sup> An exception to the exclusion of evidence is waived by action of the party, after the ruling, inconsistent with the exception.<sup>35</sup> So error in excluding evidence is waived where the objection to it is withdrawn and the evidence is not reoffered,<sup>36</sup> or where the court reverses its ruling and offers to permit the evidence to be introduced and the offer is declined.<sup>37</sup> The voluntary dismissal of a cross complaint by defendant waives any error in excluding evidence offered in support of it.<sup>38</sup> Where evidence on which plaintiff's claim depends exclusively is erroneously excluded, he does not waive the error by failure to take a nonsuit,<sup>39</sup> since the ruling is reviewable on appeal of the final adverse judgment.<sup>40</sup> Where the court directs a verdict for defendant, without objection or exception by plaintiff, error in the exclusion of testimony is waived.<sup>41</sup>

20. Tenn.—Scott v. Union & Planters' Bank & Trust Co., 130 S.W. 757, 123 Tenn. 258.

21. Wash.—Gregory v. Peabody, 290 P. 232, 157 Wash. 674—Robertson v. O'Neill, 120 P. 884, 67 Wash. 121.

22. Tex.—Germann v. Kaufman's Inc., Civ.App., 155 S.W.2d 969, error refused.  
Va.—McComb v. Farrow, 104 S.E. 812, 128 Va. 455.

23. Cal.—Balcorn v. F. A. Shipley Co., 204 P. 29, 55 Cal.App. 474.

24. Va.—Norfolk & W. Ry. Co. v. Warden, 86 S.E. 103, 117 Va. 801.  
W.Va.—Braude & McDonnell v. Isadore Cohen Co., 106 S.E. 52, 87 W. Va. 763.

25. Iowa—Wilkins v. Germania Fire Ins. Co., 10 N.W. 916, 57 Iowa 529.  
64 C.J. p 1290 note 8.

26. Iowa—Wilkins v. Germania Fire Ins. Co., supra.  
N.C.—Roscoe v. John L. Roper Lumber Co., 82 S.E. 389, 124 N.C. 42.

27. Iowa—Battis v. McCord, 30 N.W. 11, 70 Iowa 46.

28. Ill.—Shannon v. Polts, 117 Ill. App. 80.  
Ky.—McNeal v. Talbott, 7 Ky L. 604, 612.

29. Iowa—City of Ottumwa v. Nicholson, 143 N.W. 439, 161 Iowa 473, L.R.A.1916E 983.

30. Mo.—Warren v. Pulitzer Pub. Co., 78 S.W.2d 404, 336 Mo. 184.  
N.D.—First State Bank of Eckman v. Kelly, 162 N.W. 125, 30 N.D. 84, Ann.Cas.1917D 1044.

Or.—Peters v. Consolidated Freight Lines, 73 P.2d 713, 157 Or. 605.

31. Mo.—Caruthersville Lumber Co. v. Taylor, App., 281 S.W. 97—Newman v. Standard Accident Ins. Co., 177 S.W. 803, 192 Mo.App. 159.

32. Colo.—Western Live Stock Loan Co. v. Craghe, 206 P. 795, 71 Colo. 334.

33. Cal.—Le Cyr v. Dow, 86 P.2d 900, 30 Cal.App.2d 457.  
Neb.—In re Kaiser's Estate, 34 N.W. 2d 366, 150 Neb. 295.

Ohio.—Westropp v. E. W. Scripps Co., 59 N.E.2d 205, 76 Ohio App. 463.  
64 C.J. p 167 note 63.

34. Mo.—Marlow v. Nafziger Baking Co., 63 S.W.2d 115, 333 Mo. 790.  
Va.—Poole v. Kelley, 173 S.E. 537, 162 Va. 279.  
64 C.J. p 1293 note 61.

35. Ill.—Mathais v. Aharonian, 57 N.E.2d 140, 324 Ill.App. 82.

36. Ill.—Mathais v. Aharonian, supra.  
64 C.J. p 1294 note 63.

37. Ind.—Gary Fish Co. v. Leisure, 102 N.E.2d 209, 122 Ind.App. 190.  
64 C.J. p 1294 note 64.

38. Cal.—Downey Plumbing Co. v. Secret Const. Co., 227 P.2d 31, 102 Cal.App.2d 166.  
64 C.J. p 1294 note 62.

39. Ala.—Sales Corporation v. U. S. Fidelity & Guaranty Co., 110 So. 277, 215 Ala. 198.

40. Ala.—Sales Corporation v. U. S. Fidelity & Guaranty Co., supra.

41. Pa.—Guemple v. Philadelphia

An exception, properly taken, to the exclusion of a part of certain evidence is not waived where the judge remarked that he supposed "that may go out," and the excepting party's counsel merely repeated the statement in the form of an interrogatory to the court with respect to its ruling.<sup>42</sup> Exceptions to the exclusion of evidence are not waived by a failure to except to the charge.<sup>43</sup>

### § 663. — Motion to Strike

Error in denying a motion to strike evidence improperly admitted may be waived by subsequent acts of the moving party.

Error in denying a motion to strike evidence improperly admitted may be waived by subsequent acts of the moving party,<sup>44</sup> as where the objection to the evidence is subsequently withdrawn<sup>45</sup> or the evidence is stricken by consent;<sup>46</sup> and the same result follows where the moving party refuses to consent to an offer of the other party to withdraw the evidence, thus causing it to remain before the jury.<sup>47</sup> A motion to strike testimony is waived where counsel, without waiting for a ruling on the

motion, admonished the witness and proceeded with the examination.<sup>48</sup>

### § 664. Misconduct of Counsel

Misconduct of counsel may be waived or cured by the subsequent conduct of the complaining party.

Misconduct of counsel in argument to the jury<sup>49</sup> or otherwise<sup>50</sup> may be waived or cured by the subsequent conduct of the complaining party. An objection to the misconduct of counsel in indicating to the jury that defendant was insured against liability has been held not to be waived by a failure to ask for a mistrial.<sup>51</sup> Misconduct of plaintiff's counsel in suggesting to jurors on their examination that defendant carried liability insurance is waived by defendant's consent to proceed to impanel the jury from talesmen in attendance,<sup>52</sup> but such misconduct is not waived by defendant's request that the court instruct the jury to disregard liability insurance.<sup>53</sup> Plaintiff's improper argument on the humanitarian doctrine is not waived by defendant's arguing to the jury what he considers to be such doctrine.<sup>54</sup>

Rapid Transit Co., 73 A. 330, 224 Pa. 327.

42. Iowa.—Stokes v. Sac City, 130 N. W. 786, 151 Iowa 10.

43. Vt.—Holton v. Ellis, 49 A. 2d 210, 114 Vt. 471.—Paska v. Saunders, 153 A. 451, 103 Vt. 204.

44. Cal.—Western California Land Co. v. Welch, 183 P. 169, 41 Cal. App. 435.

#### Abandonment of motion

Where trial court overruled defendants' objection to testimony concerning appearance of many boils on plaintiff's head, neck and shoulders after automobile accident with statement that motion could be renewed at a later time, defendants failed to renew motion and subsequently offered an instruction on subject of plaintiff's boils, failure to renew the motion and offer of the instruction constituted an abandonment of the motion, and reviewing court would not consider whether trial court erred in failing to strike such testimony.—Pfaus v. Stokke, 103 P.2d 673, 110 Mont. 471.

45. Cal.—Bronge v. Mowat & Co., 155 P. 827, 29 Cal.App. 388.  
Ind.—Nelson v. Masterson, 28 N.E. 731, 2 Ind.App. 524.

46. Ill.—Weber Wagon Co. v. Kehl, 29 N.E. 714, 139 Ill. 644.

47. Cal.—Kahn v. Triest-Rosenberg Cap. Co., 73 P. 164, 139 Cal. 340.—Mitchell v. Davis, 23 Cal. 381.

48. Cal.—Driscoll v. California Street Cable R. Co., 250 P. 1062, 80 Cal.App. 208.

49. Or.—Mason v. Allen, 195 P.2d 717, 183 Or. 638.

50. C.J. p. 1294 note 76.

Cure by withdrawal or correction of objectionable matter or by action of court see supra § 197 et seq.  
Waiver by failure to object see supra § 196.

51. Cal.—Baldarachi v. Leach, 186 P. 1060, 44 Cal.App. 603.

52. Cal.—Schellenberg v. Southern California Music Co., 35 P.2d 156, 139 Cal.App. 777.

Cure of error in showing or suggesting insurance or other indemnity see supra § 53 c.  
Propriety of reference to protection of party by insurance or other indemnity see supra § 180.

#### Curative instruction; reservation of error

(1) Where during trial of an action arising out of automobile collision, counsel for plaintiff asks question indicating that defendant has insurance, defendant waives appellate review of action of court in overruling motion to declare mistrial by agreeing to statement by court to jury that no insurance is carried by any party to suit, even though agreement is conditional on right to rely on error in refusing to declare a mistrial, if it were error.—Redding v. Hatcher, 14 Tenn.App. 561.

(2) Where motorist in requesting instruction concerning reference in testimony to an insurance company expressly stated that he was not waiving but was insisting on motion to discharge the jury because of such

reference, motorist, by requesting the instruction, did not waive his right to urge that motion to discharge jury be sustained.—Pitcher v. Schoch, 139 S.W.2d 463, 345 Mo. 1184.

#### Subsequent disclosure by complaining party

(1) In action to recover damages for personal injuries alleged to have been caused by defendant's negligence, references to fact that plaintiff had made claim against his employer under Workmen's Compensation Law were unnecessary and improper, but where plaintiff's attorney in such action brought out, by request to charge and by statement made on trial, fact that plaintiff had received such compensation and that compensation carrier had lien on any recovery by plaintiff, any error in that regard was waived.—Johnson v. Gianino, 108 N.Y.S.2d 895, 279 App. Div. 760.

(2) Where defendant, in cross-examination, informed jury that he had insurance covering accident on which suit was brought, he was not in position to complain about action of trial judge in refusing to grant mistrial because of plaintiff's improper reference to insurance agent's visit to plaintiff.—Chilcote v. Keating, Miss., 71 So.2d 472.

53. Cal.—Baldarachi v. Leach, 186 P. 1060, 44 Cal.App. 603.

54. Iowa.—Miller v. Kooker, 224 N.W. 46, 225 N.W. 868, 208 Iowa 687.  
64 C.J. p. 1294 note 75.

55. Mo.—Stout v. Kansas City Pub-

§ 665. Rulings as to Weight and Sufficiency of Evidence

Error in overruling a motion made at the close of the plaintiff's case, based on the insufficiency of the evidence, is waived by proceeding with the defense and introducing evidence in support thereof.

Objections relating to the sufficiency of the evidence, whether arising on demurrer to the evidence, as discussed infra § 666, motion for dismissal or nonsuit infra § 667, request for direction of verdict infra § 668, or otherwise,<sup>55</sup> may be waived or the defect in the proof cured.<sup>56</sup> Error in overruling a motion made at the close of plaintiff's case, based on the insufficiency of the evidence, is waived by proceeding with the defense and introducing evidence in support thereof,<sup>57</sup> provided, in some jurisdictions, the evidence so introduced supplies the defect in the proof.<sup>58</sup> Error in the denial of a motion to withdraw from the jury the question of damages for loss of earning capacity, because of lack of evidence, is cured by an instruction to the jury not to consider loss of earning capacity in reaching a verdict.<sup>59</sup> However, where, over the objection of defendant, an issue is submitted to the jury, defendant does not waive his objection by requesting an appropriate instruction on the issue submitted,<sup>60</sup> and defendant's submission of special interrogatories to the jury, after his objection to the sufficiency of the evidence is overruled, does not make the answers to such interrogatories binding on him, in the absence of evidence to support them.<sup>61</sup> The right to question the sufficiency of the evidence is not lost

by the withdrawal of a demurrer to the complaint,<sup>62</sup> or by failure to request a peremptory instruction.<sup>63</sup> A party does not waive his right to go to the jury by leading the court to believe that he considers that there is no question for the jury, where, after the adverse party has moved for a direction of a verdict, and the court has intimated an intention to grant it, following the course taken in other cases, but before a verdict is actually directed, he asks to go to the jury on the whole case and excepts to the refusal of the court to allow him to do so.<sup>64</sup> A defendant does not waive his right to go to the jury on reasonable request, by moving to dismiss the complaint at the close of the whole case.<sup>65</sup>

§ 666. — Demurrer to Evidence

The defendant waives any error in the overruling of his demurrer, or motion in the nature thereof, at the close of the plaintiff's case where he does not stand on his demurrer, but introduces evidence in his own behalf, at least where such evidence supplies the deficiencies of the plaintiff's evidence.

Where, at the close of plaintiff's case, the court refuses an instruction in the nature of a demurrer to the evidence, defendant may save the point by standing on his demurrer and abandoning the case at that point.<sup>66</sup> However, where defendant fails to take this course, and introduces evidence in his own behalf, after his demurrer, or motion in the nature thereof, has been overruled, error in overruling his demurrer is waived<sup>67</sup> at least where such

He Service Co., App., 17 S.W.2d 363.

55. Mo.—Fleming v Insurance Co of North America, App. 50 S.W.2d 177.

64 C.J. p 1294 note 85

Waiver by failure to question sufficiency of evidence see supra § 221.

56. Cal.—Hoffman v McNamara, 282 P. 990, 102 Cal.App. 280.

64 C.J. p 1295 note 86.

57. D.C.—Breuninger v. Lighthouse, 53 F.2d 551, 60 App.D.C. 297.

Md.—Wilhem v. Boyd, 190 A. 823, 172 Md 79

Tex.—Donaldson v Oak Park Cemetery, Civ.App., 110 S.W.2d 119

Va.—Interstate Veneer Co v. Edwards, 60 S.E.2d 4, 191 Va. 107, 23 A.L.R.2d 532—Rawle v. McIlhenny, 177 S.E. 214, 163 Va. 735, 98 A.L.R. 920.

Wash.—Thompson v. City of Seattle, 253 P.2d 625, 42 Wash.2d 53—Hill v. King County, 250 P.2d 960, 41 Wash.2d 592

W Va.—State v. Zitzelsberger, 39 S.E.2d 835, 129 W.Va. 229.

61 C.J. p 1295 note 87—3 C.J. p 842 note 60.

Motion for judgment

(1) By introducing evidence after the overruling of his motion for judgment, made at the close of plaintiff's case, defendant waives error in the ruling

N.M.—First Nat. Bank in Albuquerque v Tanney, 178 P.2d 561, 51 N.M. 60

Vt.—Town of Marshfield v. Town of Cabot, 180 A. 897, 107 Vt. 409.

64 C.J. p 1295 note 87 [b].

(2) Defendant had option to stand upon his motion for judgment at close of plaintiff's case when it was overruled—First Nat. Bank in Albuquerque v. Tanney, supra.

58. Colo.—Weil v. Nevitt, 31 P. 487, 18 Colo. 10.

3 C.J. p 842 note 61.

59. Mont.—Montague v Hanson, 99 P. 1063, 38 Mont. 376.

60. N.Y.—Runtoul v. White, 15 N.E. 318, 108 N.Y. 222.

64 C.J. p 1295 note 89.

Request for instruction as waiver of error in overruling:

Demurrer to evidence see infra § 666.

Motion to direct verdict see infra § 668.

61. Wash.—Larson v. Centennial Mill Co., 82 P. 294, 40 Wash. 224, 111 Am.S.R. 904.

62. Wash.—Lee v. Gorman Packing Corporation, 282 P. 205, 154 Wash. 376.

63. Ark.—Bank of Hatfield v. Clayton, 250 S.W. 347, 158 Ark. 119.

64. N.Y.—Elmira Second Nat. Bank v. Weston, 55 N.E. 1080, 161 N.Y. 520, 76 Am.S.R. 283.

65. N.Y.—Reed v. America Co., 136 N.Y.S. 75

66. Mo.—Clay v. Owen, 93 S.W.2d 914, 338 Mo. 1061.

64 C.J. p 1295 note 95.

67. U.S.—H. F. Wilcox Oil & Gas Co. v. Skidmore, C.C.A. Mo., 72 F.2d 748—Detroit Fire & Marine Ins. Co. v. Oklahoma Terminal Elevator Co., C.C.A. Okl., 64 F.2d 671.

Md.—Yellow Cab Co. v. Henderson, 39 A.2d 546, 183 Md. 546, 175 A.L.R. 267—Carroll v. Kerrigan, 197 A. 127, 173 Md. 687—Mahan v. State, to Use of Carr, 191 A. 575, 172 Md. 373—North Chesapeake Beach Land

evidence supplies the deficiencies of plaintiff's evidence,<sup>68</sup> and failure to rule on the demurrer is equivalent to overruling it within the waiver rule.<sup>69</sup> It has been held that the error in overruling the demurrer to the evidence is not waived where defendant's evidence does not supply the deficiency in plaintiff's proof,<sup>70</sup> and defendant's waiver of his demurrer by putting in his own case does not preclude him from insisting that on all the evidence produced by both sides, a prima facie case for plaintiff has not been established.<sup>71</sup> Where defendant does not stand on his demurrer, but introduces

evidence, the question of whether the evidence is sufficient to warrant the submission of plaintiff's case to the jury is to be determined on the basis of all of the evidence and not on plaintiff's evidence alone,<sup>72</sup> and a second demurrer at the close of the whole case searches all the evidence to see if plaintiff's case was not aided by defendant's proof.<sup>73</sup> Where defendant introduces his evidence after his demurrer to plaintiff's evidence has been overruled, and does not, at the close of all the evidence, renew his demurrer<sup>74</sup> or move for a directed verdict,<sup>75</sup> he waives the right to contend that the evi-

& Improvement Co. v. Cochran, 144 A 505, 156 Md. 524.

Miss—Kurn v. Fendren, 198 So. 727, 189 Miss. 739.

Mo.—Neal v. Kansas City Public Service Co., 184 S.W.2d 441, 353 Mo. 779—Clay v. Owen, 93 S.W.2d 914, 338 Mo. 1061—Kelso v. W. A. Ross Const. Co., 85 S.W.2d 527, 337 Mo. 202—Perles & Stone v. Childs Co., 84 S.W.2d 1052, 337 Mo. 448—Bauke v. Adams, 188 S.W.2d 355, 239 Mo App. 84—Morris v. Ian Co. v. Universal Credit Co., 168 S.W.2d 136, 237 Mo App 355—Red v. Coleman, App., 167 S.W.2d 125—Witte v. Smith, 152 S.W.2d 661, 237 Mo. App. 639—Hickney v. Fairbanks, Morse & Co., App., 143 S.W.2d 457—Newkirk v. City of Tipton, 137 S.W.2d 147, 234 Mo App 920—Green v. Baum, App., 132 S.W.2d 665—McNicholas v. Continental Baking Co., App., 112 S.W.2d 849—Gannaway v. Pittcarr, App., 109 S.W.2d 78—Jordan v. St. Louis Public Service Co., 103 S.W.2d 552, 232 Mo App 267—Hall v. Baldwin, App., 90 S.W.2d 146—Miller v. Mutual Life Ins. Co. of New York, App., 79 S.W.2d 750—Wood v. Kansas City Life Ins. Co., 75 S.W.2d 412, 228 Mo App 979—Pritchett v. Northwestern Mut. Life Ins. Co., 73 S.W.2d 815, 228 Mo App. 661—Paetz v. London Guarantee & Accident Co., Limited, of London, England, 71 S.W.2d 826, 228 Mo App 564—Peppas v. H. Ehrlich & Sons Mfg. Co., 71 S.W.2d 821, 228 Mo App. 556—Friedman v. Maryland Casualty Co., 71 S.W.2d 491, 228 Mo App. 580—Steffen v. Equitable Life Assur. Soc. of U. S., App., 64 S.W.2d 302—Cable v. Johnson, App., 63 S.W.2d 433—Waller v. Tootle-Campbell Dry Goods Co., App., 59 S.W.2d 751—Cooper v. Winnwood Amusement Co., 55 S.W.2d 737, 227 Mo App 608—Sutton v. Kansas City Star Co., App., 54 S.W.2d 454.

N.M.—Kumor v. Graham, 44 P.2d 722, 39 N.M. 245.

Ok.—Miller v. Roberts, 257 P.2d 1068, 208 Okl. 549—Oklahoma Ry. Co. v. Flores, 219 P.2d 206, 203 Okl. 171—Self v. Vickery, 207 P.2d 287,

201 Okl. 492—Wright v. Linder, 166 P.2d 101, 196 Okl. 493—Pope v. Rector, 166 P.2d 94, 196 Okl. 489—Mason v. McNeal, 160 P.2d 451, 187 Okl. 31—Plains Petroleum Corp. v. Hatcher, 57 P.2d 599, 177 Okl. 22—Burnsall Oil Co. v. Ricks, 53 P.2d 210, 175 Okl. 478—Huseman v. Battles, 44 P.2d 941, 172 Okl. 254—Graf Packing Co. v. Pelphrey, 42 P.2d 889, 171 Okl. 416—Holon v. Smith, 40 P.2d 677, 170 Okl. 407—Bond Transfer & Storage Co. v. Fisher, 37 P.2d 825, 169 Okl. 484—Holmes v. Chadwell, 36 P.2d 499, 169 Okl. 191—Marland Refining Co. v. Harrel, 31 P.2d 121, 167 Okl. 548—Midland Valley R. Co. v. Barnes, 16 P.2d 1089, 162 Okl. 44—Stout v. Idlett, 16 P.2d 1088, 161 Okl. 23, 64 C.J. p 1295 note 96.

68. Kan.—Henks v. Panning, 264 P.2d 483, 175 Kan 424—Wilson v. Holm, 188 P.2d 899, 164 Kan 229—Harris v. Exon, 170 P.2d 827, 161 Kan 582, opinion adhered to 176 P.2d 260, 162 Kan. 270—Lechleitner v. Cummings, 152 P.2d 843, 159 Kan 171—Rush v. Brown, 109 P.2d 84, 153 Kan. 59—Waldner v. Metropolitan Life Ins. Co., 87 P.2d 515, 149 Kan. 287—Kansas City v. Burns, 22 P.2d 444, 137 Kan. 905. Okl.—Hart v. Lewis, 103 P.2d 65, 187 Okl. 394—Sooner Distributing Co. v. Langley, 80 P.2d 590, 183 Okl. 236—Anthony v. Griffith, 77 P.2d 77, 182 Okl. 210—Mohrman v. Paxton, 44 P.2d 926, 172 Okl. 389—Ward v. Coleman, 39 P.2d 113, 170 Okl. 201.

64 C.J. p 1296 note 99.

69. U.S.—Arkansas Bridge Co. v. Kelly-Atkinson Const. Co., C.C.A. Mo., 282 F. 802.

Mo.—Baugh v. Gamble Const. Co., 26 S.W.2d 946, 324 Mo. 1233.

70. Kan.—Parsons v. State Highway Commission, 72 P.2d 75, 146 Kan 476.

71. Mo.—Clay v. Owen, 93 S.W.2d 914, 338 Mo 1061.

72. Kan.—Tuggle v. Cathers, 254 P.2d 807, 174 Kan. 122.

Mo.—Johnson v. Chicago & E. I. Ry. Co., 64 S.W.2d 674, 334 Mo. 23—McPadden v. Baldwin, App., 119 S.

W.2d 36—Raw v. Maddox, 93 S.W.2d 282, 230 Mo App 515

Okl.—W. L. Hulet Lumber Co. v. Bartlett-Collins Co., 241 P.2d 378, 206 Okl. 93—Atchison, T. & S. P. Ry. Co. v. Perryman, 192 P.2d 670, 200 Okl. 266—Butler v. Civic Gas Co., 188 P.2d 813, 199 Okl. 597—Logan v. Logan, 168 P.2d 878, 197 Okl. 88.

Tenn.—Southern Ry. Co. v. Hooper, 65 S.W.2d 847, 16 Tenn App. 112, 64 C.J. p 1297 note 3.

73. Mo.—Fernandez v. Mutual Life Ins. Co. of Baltimore, 78 S.W.2d 526, 230 Mo App 557.

64 C.J. p 1297 note 4

74. Mo.—Clay v. Owen, 93 S.W.2d 914, 338 Mo. 1061—Sullenger v. Towle, App., 91 S.W.2d 188.

Okl.—C. P. A. Co. v. Jones, 263 P.2d 731—Shultz v. Dillard, 262 P.2d 139—Gibbins v. Wade, 210 P.2d 955, 202 Okl. 138—Self v. Vickery, 207 P.2d 287, 201 Okl. 492—Roger Mills County Co-operative Ass'n of America v. Neice, 81 P.2d 621, 184 Okl. 48—Hunt Battery Mfg. Co. v. Stoval, 60 P.2d 623, 183 Okl. 242—Good Samaritan Life Ass'n v. Smith, 51 P.2d 651, 176 Okl. 61—Doughty v. Laubach, 41 P.2d 105, 172 Okl. 42—Panther Oil & Gas Co. v. Brown, 39 P.2d 150, 170 Okl. 210—Long v. Higgins, 34 P.2d 589, 169 Okl. 27.

64 C.J. p 1296 note 97

75. Okl.—C. P. A. Co. v. Jones, 263 P.2d 761—Smith v. Dillard, 262 P.2d 139—Miller v. Roberts, 257 P.2d 1068, 208 Okl. 549—Hitchardson v. Butler, 240 P.2d 1058, 206 Okl. 79—Lewis v. Boice, 236 P.2d 258, 205 Okl. 189—Birchfield v. Eeds, 228 P.2d 642, 204 Okl. 240—Gibbins v. Wade, 210 P.2d 955, 202 Okl. 138—Self v. Vickery, 207 P.2d 287, 201 Okl. 492—Wright v. Linder, 166 P.2d 104, 196 Okl. 493—Magnolia Petroleum Co. v. Jones, 91 P.2d 769, 185 Okl. 309—Industrial Bldg. & Loan Ass'n v. Ashlock, 88 P.2d 874, 184 Okl. 551—Shiffett v. Wright, 86 P.2d 314, 184 Okl. 188—Roger Mills County Co-operative Ass'n of America v. Neice, 81 P.2d 621, 184 Okl. 48—Hunt Battery Mfg. Co.

dence is insufficient to warrant the submission of plaintiff's case to the jury. Error in directing the jury, on demurrer to the evidence, to find the full amount of plaintiff's claim, is not cured by directing the jury further to consider their finding, and by their doing so and finding the same amount.<sup>76</sup>

**Request for instructions.** Defendant has been held not to waive error in the refusal of an instruction in the nature of a demurrer to the evidence by asking further instructions to meet those given for plaintiff,<sup>77</sup> but this rule does not apply to the overruling of a demurrer to the evidence requested by plaintiff who, after such refusal, asks and secures an instruction inconsistent with his demurrer.<sup>78</sup> Where defendant does not file a written demurrer to the evidence, as required by statute, but joins plaintiff in offering, and having the court give instructions on the merits, he waives the overruling of his demurrer.<sup>79</sup>

### § 667. — Dismissal or Nonsuit

Error in overruling a motion for dismissal or nonsuit at the close of the plaintiff's case is waived or cured

where the defendant introduces evidence which supplies the defect in the plaintiff's proof, or where the evidence at the close of the entire case introduced by either party warrants a submission of the case to the jury.

Error in denying a motion for nonsuit may be waived or cured.<sup>80</sup> The declaration by defendant's counsel, on moving for a directed verdict, that a "clean-cut legal issue" was raised, is a waiver of exceptions to the refusal of a nonsuit.<sup>81</sup> A motion for a new trial and for the dismissal of the complaint has been held not to deprive defendant of the right to rely on his earlier motion to dismiss.<sup>82</sup>

**Waiver by introducing evidence in behalf of defendant.** It is well settled that error in overruling a motion for dismissal or nonsuit at the close of plaintiff's case is waived or cured where defendant introduces evidence which supplies the defects in plaintiff's proof,<sup>83</sup> or where the evidence at the time both parties rest, introduced by either party, warrants a submission of plaintiff's case to the jury.<sup>84</sup> Where defendant does not stand on his

v. Stovall, 80 P.2d 623, 183 Okl. 242 —Mid-Continent Life Ins. Co. v. Bean, 65 P.2d 1018, 179 Okl. 394—International Printing Ink Corp. v. Leader Press, 61 P.2d 664, 177 Okl. 642—Singer Sewing Mach. Co. v. Riley, 61 P.2d 235, 177 Okl. 558—Good Samaritan Life Ass'n v. Smith, 54 P.2d 651, 176 Okl. 61—Barnsdall Oil Co. v. Ricks, 53 P.2d 210, 175 Okl. 478—Huseman v. Battles, 44 P.2d 941, 172 Okl. 284—Doughty v. Laubach, 44 P.2d 105, 172 Okl. 42—Lindley v. Hopkins, 43 P.2d 71, 171 Okl. 330—Panther Oil & Gas Co. v. Brown, 39 P.2d 150, 170 Okl. 210—Holmes v. Chadwell, 36 P.2d 499, 169 Okl. 191—Long v. Higgins, 34 P.2d 589, 169 Okl. 27.

64 C.J. p 1296 note 98.

76. W Va.—Williamsport Hardwood Lumber Co. v. Baltimore & O. R. Co., 77 S.E. 333, 71 W Va. 741.

77. Mo.—Klotsch v. P. F. Collier & Son Corp., 159 S.W.2d 589, 349 Mo. 40—Grimes v. Red Line Service, 85 S.W.2d 767, 337 Mo. 743—Williams v. St. Louis Public Service Co., 73 S.W.2d 199, 335 Mo. 335—Badgett v. Hartford Fire Ins. Co., 138 S.W.2d 761, 238 Mo.App. 797—Longley v. Prudential Ins. Co. of America, App., 161 S.W.2d 27—Hughes v. Kiel, App., 100 S.W.2d 48—Easton v. Phillips Petroleum Co., App., 57 S.W.2d 547.

64 C.J. p 1297 notes 6, 8.

**Several grounds of recovery; general demurrer**

(1) It was formerly held that where the petition alleges several grounds for recovery, and defendant's

general demurrer is overruled, and he thereafter does not ask instructions withdrawing the specific grounds of recovery from the consideration of the jury, he is estopped to claim that the evidence is insufficient to support a recovery as to the grounds of recovery as to which he requests instructions.—Curtis v. Kansas City Public Service Co., Mo.App., 74 S.W.2d 255—Cooper v. Winnwood Amusement Co., 55 S.W.2d 737, 227 Mo.App. 608—64 C.J. p 1298 notes 9, 10

(2) However, this line of authority has now been overruled and defendant does not waive the error in overruling his demurrer at the close of the case by asking for or receiving instructions which are the converse of those given for plaintiff whether the petition alleges one or a number of grounds for recovery.—McGrew v. Thompson, 184 S.W.2d 994, 353 Mo. 856—Klotsch v. P. F. Collier & Son Corp., 159 S.W.2d 589, 349 Mo. 40—In re Thomasson's Estate, 144 S.W.2d 79, 346 Mo. 911—Phillibert v. Benjamin Ansell Co., 119 S.W.2d 797, 342 Mo. 1239—Ambruster v. Levitt Realty & Inv. Co., 107 S.W.2d 74, 341 Mo. 364—Elkin v. St. Louis Public Service Co., 74 S.W.2d 600, 335 Mo. 951—Riggs v. City of Springfield, 126 S.W.2d 1144, 344 Mo. 420, 122 A.L.R. 1496—Martin v. Shryock Realty Co., 163 S.W.2d 804, 236 Mo.App. 1265.

(3) In any event, the rule does not apply where defendant requests special instructions withdrawing every ground of recovery from the jury's consideration.—Elkin v. St. Louis Public Service Co., supra.

78. Mo.—Blair Horse & Mule Co. v.

Hatfield, 62 S.W. 319, 175 Mo.App. 296.

64 C.J. p 1297 note 7.

79. Mo.—Thompson v. Main St. Bank, App., 42 S.W.2d 56.

80. U.S.—Sleekner v. Great Lakes Transit Corp., D.C.N.Y., 17 F.Supp. 330.

64 C.J. p 1298 note 12.

81. S.C.—Simpson v. Palmetto Fire Ins. Co., 143 S.E. 184, 145 S.C. 405.

82. N.Y.—O'Brien v. Lehigh Val. R. Co., 27 N.Y.S.2d 540, 176 Misc. 404.

83. U.S.—New York Life Ins. Co. v. Murdaugh, C.C.A.S.C., 94 F.2d 104. Cal.—People v. Keith Ry. Equipment Co., 161 P.2d 244, 70 Cal.App.2d 339.

Colo.—Melnick v. Bowman, 79 P.2d 368, 102 Colo. 384.

Nev.—J. C. Penney Co. v. Gravelle, 155 P.2d 477, 62 Nev. 434.

N.M.—Wellington v. Mutual Ben Health & Accident Ass'n, 40 P.2d 630, 39 N.M. 98.

64 C.J. p 1298 note 16.

84. Cal.—Withey v. Hammond Lumber Co., 35 P.2d 1080, 140 Cal.App. 587—La Mar v. La Mar, 28 P.2d 63, 135 Cal.App. 693.

Ca.—Home Owners' Loan Corp. v. Brazzeal, 9 S.E.2d 773, 62 Ga.App. 683.

N.J.—Kagan v. Berman, 98 A.2d 683, 27 N.J.Super. 20, reversed on other grounds 102 A.2d 765, 14 N.J. 467.

—Guzzi v. Jersey Central Power & Light Co., 90 A.2d 23, 20 N.J.Super. 296, reversed on other grounds 96 A.2d 387, 12 N.J. 251—Shimp v. Pennsylvania R. Co., 78 A.2d 111,

11 N.J.Super. 88, affirmed 83 A.2d

motion to dismiss, but introduces evidence after the denial of the motion, he assumes the risk of supplying the deficiency in plaintiff's case,<sup>85</sup> and in determining the question the evidence will be considered in its entirety.<sup>86</sup> In some jurisdictions it is held that error in denying defendant's motion to dismiss is waived by the mere fact of defendant's introducing evidence,<sup>87</sup> at least unless the motion is renewed at the close of all the evidence.<sup>88</sup> Nevertheless, it is the rule in a number of jurisdictions that defendant does not waive an erroneous

ruling on a motion for nonsuit by introducing evidence after the motion is overruled, unless in so doing he supplies the defects in plaintiff's case.<sup>89</sup>

### § 668. — Direction of Verdict

As a general rule, the defendant waives error in the denial of his motion for a directed verdict at the close of the plaintiff's case where he thereafter introduces evidence, at least where the motion is not renewed at the close of the case or his proof supplies the deficiencies in the plaintiff's case.

A party may waive or abandon a motion for the

- 521, 8 N.J. 1—Armstead v. Schletter Full Fashion Silk Hosiery, 76 A.2d 28, 9 N.J. Super. 270—Iarrette v. Citizens Cas. Co. of N. Y., 68 A.2d 758, 5 N.J. Super. 259—Beck v. Monmouth Lumber Co., 65 A.2d 400, 137 N.J. Law 268—Borough of Hawthorne v. Jowett, 1 A.2d 431, 121 N.J. Law 38—Taffey v. New Jersey State Firemen's Ass'n, 192 A. 725, 118 N.J. Law 352—Hollingshead v. Zemkowski, 163 A. 214, 116 N.J. Law 177, 178, two cases—Ass'n v. Travelers' Indemnity Co., 176 A. 712, 114 N.J. Law 425—Zochowski v. Zukowski, 176 A. 364, 114 N.J. Law 437—Schreifer v. Public Service Co-ordinated Transport, 169 A. 629, 112 N.J. Law 199—McGee v. Kraft, 166 A. 80, 110 N.J. Law 532—First Nat. Bank & Trust Co. of Paulsboro v. Lugar, 184 A. 399, 14 N.J. Misc. 303—Horan v. Harris, 172 A. 730, 12 N.J. Misc. 513—Abramson v. T. Grant Co., 170 A. 815, 12 N.J. Misc. 192—Kremin v. Brehn, 167 A. 5, 11 N.J. Misc. 491.
- N.Y.—Spreen v. McCann, 263 N.Y.S. 46, 147 Misc. 41, affirmed 264 N.Y.S. 1008, 240 App. Div. 709, affirmed 191 N.E. 558, 264 N.Y. 546.
- S.C.—Mooney v. Gilreath, 117 S.E. 186, 124 S.C. 1.
- Tenn.—Taylor v. Liddon-White Truck Co., 233 S.W.2d 52, 191 Tenn. 336, 64 C.J. p 1299 note 17.
85. Mont.—Mellon v. Kelly, 41 P.2d 49, 99 Mont. 10—Harrington v. H. D. Lee Mercantile Co., 33 P.2d 553, 97 Mont. 40—Jones v. Northwestern Auto Supply Co., 18 P.2d 305, 93 Mont. 224.
- 64 C.J. p 1300 note 21.
86. Mont.—Jones v. Northwestern Auto Supply Co., supra.
- N.H.—Morin v. Hood, 79 A.2d 4, 96 N.H. 485.
- N.J.—Wright v. Lee Const. Co., 50 A.2d 642, 135 N.J. Law 149.
- 64 C.J. p 1301 note 23.
87. U.S.—Novick v. Gouldsberry, C.A. Alaska, 173 F.2d 496—Moore v. Tremelling, C.C.A. Idaho, 100 F.2d 39—Humphreys Gold Corp. v. Lewis, C.C.A. Mont., 90 F.2d 896—Century Indem. Co. v. Nelson, C.C.A. Cal., 90 F.2d 644, reversed on other grounds 58 S.Ct. 531, 303 U.S. 213,

- 82 L.Ed. 755, mandate conformed to, C.C.A., 96 F.2d 679, rehearing denied 98 F.2d 903.
- Alaska—Sakow v. J. R. Riley Inv. Co., 9 Alaska 427, affirmed, C.C.A., 110 F.2d 345.
- Aik.—Kyle v. Zellner, 220 S.W.2d 806, 215 Ark. 349.
- Cal.—Housh v. Pacific States Life Ins. Co., 37 P.2d 741, 2 Cal.App.2d 14.
- Colo.—Colorado Life Co. v. Winegarner, 36 P.2d 860, 95 Colo. 261—Gilligan v. Blakesley, 26 P.2d 808, 93 Colo. 370.
- Ill.—Johnson v. Johnson, 45 N.E.2d 625, 381 Ill. 362—Havill v. Darch, 52 N.E.2d 64, 320 Ill.App. 667.
- Mo.—Graham v. Guarantor Trust Life Ins. Co., App., 267 S.W.2d 692—Adams v. Kansas City, App., 266 S.W.2d 771.
- Nev.—Eldorado-Rand Min. Co. v. Thompson, 65 P.2d 678, 57 Nev. 407.
- N.M.—Apodaca v. Allison & Haney, 258 P.2d 711, 57 N.M. 315.
- N.C.—Atkins v. White Transp. Co., 32 S.E.2d 209, 224 N.C. 688.
- Ohio—In re Robinson's Estate, 60 N.E.2d 615, 146 Ohio St. 55—Lewis v. Ansporn, 109 N.E.2d 545, 92 Ohio App. 78.
- Vt.—Sears v. Laberge, 71 A.2d 687, 116 Vt. 168—Federal Land Bank of Springfield, Mass., v. Flanders, 164 A. 539, 105 Vt. 204.
- Wash.—James v. Ellis, 269 P.2d 573—McDonald v. Wockner, 267 P.2d 97—Minch v. Local Union No. 370, Intern. Union of Operating Engineers, 265 P.2d 286—Saffer v. Saffer, 254 P.2d 746, 42 Wash.2d 298—McCormick v. Gilbertson, 250 P.2d 546, 41 Wash.2d 495—In re Shaner's Estate, 248 P.2d 560, 41 Wash.2d 236—Sevener v. Northwest Tractor & Equipment Corp., 247 P.2d 237, 41 Wash.2d 237—Jones v. Bard, 246 P.2d 831, 40 Wash.2d 877—Peterson v. Department of Labor & Industries, 245 P.2d 1161, 40 Wash.2d 635—Kiesling v. Northwest Greyhound Lines, 229 P.2d 335, 38 Wash. 2d 289—Theurer v. Condon, 209 P.2d 311, 34 Wash.2d 448—Western Asphalt Co. v. Valle, 171 P.2d 159, 25 Wash.2d 428—Hanford v. Goeh-

- ry, 167 P.2d 678, 24 Wash.2d 859—Roller v. Hartford Acc. & Indem. Co., 166 P.2d 173, 24 Wash.2d 473—Hansen v. Lindell, 129 P.2d 234, 14 Wash.2d 643—Wilder v. Nolte, 79 P.2d 682, 195 Wash. 1—Kohout v. Brooks, 52 P.2d 805, 185 Wash. 4, 64 C.J. p 1299 note 18.
88. U.S.—Novick v. Gouldsberry, C.A. Alaska, 173 F.2d 496.
- N.C.—Sprinkle v. City of Reidsville, 69 S.E.2d 179, 235 N.C. 140—Goldston Bros. v. Newkirk, 67 S.E.2d 69, 234 N.C. 279—Hawkins v. Town of Dallas, 50 S.E.2d 561, 229 N.C. 561—Choate Rental Co. v. Justice, 188 S.E. 609, 211 N.C. 54—Stephenson v. Honeycutt, 184 S.E. 482, 209 N.C. 701.
- 64 C.J. p 1300 note 19.
- Additional evidence by plaintiff**
- Where defendant moved to dismiss complaint at close of plaintiff's case, and again at conclusion of defendant's case renewed the motion and moved for a directed verdict, and the court reserved decision on such motions, and thereafter plaintiff recalled two witnesses and introduced additional testimony, and defendant failed to renew his motions for dismissal and for directed verdict, and issues were submitted to jury, defendant, not having renewed his motions at close of all the evidence, failed to preserve his right to move for such relief after the verdict had been received, even though plaintiff had failed to establish a prima facie case.—Buxhoeveden v. Estonian State Bank, 112 N.Y.S.2d 785, 279 App. Div. 1089, reargument denied 113 N.Y.S.2d 773, 280 App. Div. 806.
89. Or.—Buckles v. Continental Cas. Co., 251 P.2d 476, 197 Or. 128—Berkshire v. Harem, 178 P.2d 133, 181 Or. 42.
- 64 C.J. p 1300 note 20.
- No waiver where motion is renewed**
- The advantage of defendants' exception to denial of their motion for nonsuit was not waived, where the motion was renewed at the close of the case and denied, and defendants thereupon duly excepted.—Gloshinsky v. Bergen Milk Transp. Co., 17 N.E.2d 768, 279 N.Y. 54.

direction of a verdict in his favor, by acts inconsistent with such motion.<sup>90</sup> Consent by both counsel that the court may direct a verdict for defendant is a waiver of all objections to such ruling.<sup>91</sup> Where, after the refusal of a trial court to direct a verdict in his favor, defendant allows the jury to be discharged, and consents to a trial before the court, he will be held to have waived the error, if any, with respect to the ruling on his motion for a verdict;<sup>92</sup> and, where defendant does not demur to the evidence, or waive his right to introduce evidence, should his motion for a directed verdict be overruled, but expressly reserves such right, he cannot object to the overruling of his motion.<sup>93</sup> It has also been held that defendant waives his right to object to the refusal of a peremptory instruction in his favor if he fails to offer an instruction with his motion,<sup>94</sup> or if he submits a peremptory instruction with a series of instructions;<sup>95</sup> but the denial of a motion for a peremptory instruction or direction of a verdict is not waived because, after the denial, movant requests proper instructions on the issues, or submits his case to the jury on general instructions as to the law of the case given at his request or with his consent.<sup>96</sup> So it has been held that a request for a general charge at the same time other instructions, which assume that the general charge will not be given, are requested, is not a waiver of the request for the general charge.<sup>97</sup>

While it has been held that a party does not waive error in the denial of his motion for a directed verdict by thereafter requesting the submission of special issues or interrogatories,<sup>98</sup> the rule has been laid down that a party who requests that the case be submitted to the jury on special issues waives his right to a directed verdict,<sup>99</sup> and the right to complain of the finding of the jury on such issues;<sup>1</sup> but this rule is inapplicable where defendant, after the refusal of a peremptory instruction in his favor, requests the submission of an issue by a qualified motion which preserves his objection to the previous ruling,<sup>2</sup> or where defendant does not induce the court to submit an issue, but, after a refusal to direct a verdict in his favor, requests special charges on the issue, in an attempt to have the issue correctly submitted.<sup>3</sup> A defendant does not waive his motion for a peremptory instruction because such motion is made at the close of all the evidence,<sup>4</sup> or by his failure to except to a subsequent order restoring the case to the docket for retrial after the jury have failed to agree.<sup>5</sup> An exception, saved to the denial of a motion for a directed verdict, is not waived by failure to except to a charge on the issue.<sup>6</sup>

Where the court directs a verdict in favor of one of defendants sued jointly and plaintiff elects to proceed against the remaining defendant, he has been held thereby to waive the right to complain of the directed verdict,<sup>7</sup> but this rule does not apply

90. Iowa—Ballard v. Ballard, 285 N.W. 165, 226 Iowa 699  
Wash.—O'Neil v. Crampton, 140 P.2d 308, 18 Wash.2d 579.  
64 C.J. p 1301 note 25.

**Motion to go to jury**

A motion for directed verdict was abandoned by moving to go to the jury on the facts—Watson v. Morton, 26 N.Y.S.2d 514, 261 App.Div. 1050.

91. Ill.—Clifford v. Drake, 110 Ill. 135.

92. N.D.—Erickson v. Citizens' Nat. Bank, 81 N.W. 46, 9 N.D. 81.

93. Tex.—Thos. Goggan & Bro. v. Goggan, Civ.App., 146 S.W. 968.

94. Ill.—Chicago Union Traction Co. v. O'Donnell, 71 N.E. 1015, 211 Ill. 349.

64 C.J. p 1301 note 29.

95. Ill.—Chicago Union Traction Co. v. O'Donnell, supra.

64 C.J. p 1301 note 30.

96. Ark.—Arkansas Western Gas Co. v. Brage, 107 S.W.2d 528, 194 Ark. 402—Kurn v. Teague, 94 S.W.2d 1037, 192 Ark. 687.

Minn.—Engberg v. Great Northern Ry. Co., 290 N.W. 579, 207 Minn. 194, 154 A.L.R. 206.

Wash.—Corpus Juris cited in Walsh v. West Coast Coal Mines, 197 P.2d 233, 243, 31 Wash.2d 396.  
64 C.J. p 1301 note 31.

**In Missouri**

(1) In action tried subsequent to enactment of new code of civil procedure, plaintiff did not waive point raised by motion for directed verdict on ground that plaintiff asked instructions after motion was overruled.—Jacob Dold Packing Plant v. General Box Co., Mo App., 194 S.W.2d 55.

(2) Prior thereto, it was held that a plaintiff who requested and received instruction on merits of case thereby waived his objection to refusal to give peremptory instruction.—Fawkes v. National Refining Co., 108 S.W.2d 7, 341 Mo. 630—Park v. Park, App., 190 S.W.2d 285—Green v. Boothe, 188 S.W.2d 84, 239 Mo App 73—Farmers Bank of Trenton v. Ray & Son, App., 167 S.W.2d 963—Frost v. Jensen, App., 155 S.W.2d 553—Wissmann v. Pearlman, 135 S.W.2d 1, 235 Mo App. 314—John Deere Plow Co. v. Cooper, 91 S.W.2d 145, 230 Mo App. 167.

(3) Defendant does not waive peremptory instruction for him by re-

questing instruction on merits—John Deere Plow Co. v. Cooper, 91 S.W.2d 145, 230 Mo App 167.

97. Ala.—Sullivan v. North Pratt Coal Co., 87 So. 804, 205 Ala. 56.

98. Iowa—Kinney v. Larsen, 31 N.W.2d 635, 239 Iowa 494.

99. Tex.—Benefit Ass'n of Ry. Employees v. Dover, Civ App., 167 S.W.2d 1047.

64 C.J. p 1302 note 23.

1. Tex.—Benefit Ass'n of Ry. Employees v. Dover, supra.

64 C.J. p 1302 note 31.

2. Tex.—Missouri, K. & T. Ry. Co. v. Masqueda, Civ App., 189 S.W. 328.

64 C.J. p 1302 note 35.

3. Tex.—Patton v. Dallas Gas Co., 192 S.W. 1060, 105 Tex. 321.

64 C.J. p 1302 note 36.

4. Ill.—Chicago Union Traction Co. v. O'Donnell, 71 N.E. 1015, 211 Ill. 349.

5. Tenn.—Wm J. Oliver Mfg. Co. v. Shump, 202 S.W. 60, 139 Tenn. 297.

6. N.H.—Niemi v. Boston & M. R. R., 175 A. 245, 87 N.H. 1.

64 C.J. p 1302 note 39.

7. Ga.—Hodges v. Seaboard Loan &

where a directed verdict against one defendant was entered simultaneously with the entry of a judgment declaring a mistrial as to the other defendants.<sup>8</sup> Error in the direction of a verdict for defendant on one count is cured where a verdict for plaintiff on another count involving the same damage is allowed to stand.<sup>9</sup> A party who has waived his right to go to the jury may, on obtaining an intimation from the court as to what he may do, withdraw from an acquiescence that the court shall

direct the verdict, and ask to go to the jury.<sup>10</sup>

*Waiver by introducing evidence after denial of motion.* An exception to the ruling of the court denying a motion to direct a verdict for defendant made at the close of plaintiff's evidence is not waived, where defendant does not thereafter introduce any evidence.<sup>11</sup> As a general rule, the error in ruling on his motion is waived where, after denial of his motion for a verdict at the close of plaintiff's case, defendant introduces evidence,<sup>12</sup> at

Savings Ass'n, 3 S.E.2d 677, 188 Ga. 410

9. *Ga*—Consolidated Realty Investments v. Gasque, 48 S.E.2d 510, 203 Ga. 790

9. *Mass*—Schuler v. Union News Co., 4 N.E.2d 465, 295 Mass. 350

10. *NY*—Elmira Second Nat. Bank v. Weston, 55 N.E. 1080, 161 N.Y. 520, 76 Am.S.R. 283—Seddon v. Tagliahue, 98 N.Y.S. 236, 50 Misc. 166

11. *Ill*—Day v. Ukena, 113 N.E.2d 574, 351 Ill.App. 26

Vt.—Emerson v. Hickens, 164 A. 381, 105 Vt. 197

#### Resting

(1) Error in the denial of a motion for a directed verdict is not waived where defendant does not thereafter introduce any evidence, and a formal announcement that he rests his case is not necessary—Kinnear Mfg. Co. v. Carlisle, Ohio, 152 F. 933, 82 C.C.A. 81.

(2) If defendant intended to stand by motion for directed verdict at close of plaintiff's case, he should have so informed court and should have refused to participate further in trial instead of merely resting after denial of motion—Carson v. Weston Hotel Corp., 115 N.E.2d 800, 351 Ill.App. 523.

#### Failure to renew motion after proof by codefendant

(1) Defendant's failure to renew motion for directed verdict at conclusion of all proof was not a waiver of motion, where defendant, prior to introduction of codefendant's testimony, stated that defendant would stand on motion and would offer no evidence and would not be bound by evidence offered by codefendant—Pikeville Fuel Co. v. Marsh, 232 S.W.2d 789, 34 Tenn.App. 82.

(2) Trial judge's statement, before submitting case to jury, that defendant city relied on its motion for a directed verdict made at end of plaintiff's proof, put defendant city in same position it would have been in, had it renewed its motion at the end of all the evidence, where defendant had introduced no evidence to effect a waiver of the former motion, and evidence introduced by codefend-

ant did not touch the question of city's liability—City of Knoxville v. Hargis, 198 S.W.2d 555, 184 Tenn. 262.

12. *US*—Meier & Pohlmann Furniture Co. v. Troeger, C.A. Mo., 195 F.2d 193—Hart v. Grim, Empire State Ins. Co., Intervener, C.A.N.D., 179 F.2d 334—Italston Furina Co. v. Novak, C.C.A. Neb., 111 F.2d 631—Mutual Life Ins. Co. of New York v. Wells Fargo Bank & Union Trust Co., C.C.A. Cal., 86 F.2d 585—U.S. v. Martin, C.C.A. Kan., 80 F.2d 460—Washburn v. Douthitt, C.C.A. Ark., 73 F.2d 23—Order of United Commercial Travelers of America v. Elliott, C.C.A. Mich., 65 F.2d 79—U.S. v. Alberty, C.C.A. Okl., 63 F.2d 965—Hofmann v. La. Pontaine, D.C.Wyo., 16 F.Supp. 178.

*Ariz*—Central Arizona Light & Power Co. v. Bell, 64 P.2d 1249, 49 Ariz. 99—Lillywhite v. Coleman, 52 P.2d 1167, 46 Ariz. 523—S. A. Gerrard v. Cannon, 28 P.2d 1016, 43 Ariz. 14

*Ark*—Fort Smith Cotton Oil Co. v. Swift & Co., 124 S.W.2d 1, 197 Ark. 594.

*D.C.*—Capital Transit Co. v. Smallwood, 162 F.2d 14, 82 U.S.App.D.C. 228—Capital Transit Co. v. Gamble, 160 F.2d 283, 82 U.S.App.D.C. 51—District of Columbia v. Disney, 81 F.2d 272, 65 App.D.C. 138—Chevy Chase Dairy v. Mullineaux, 71 F.2d 982, 63 App.D.C. 259, followed in 71 F.2d 984, 63 App.D.C. 261 and 71 F.2d 985, 63 App.D.C. 262—Fred Drew Const. Co. v. Mire, Mun.App., 89 A.2d 634—Brooks v. Jensen, Mun.App., 73 A.2d 32—Snyder v. Thorniley, Mun.App., 62 A.2d 316—Woodward & Lothrop v. Heed, Mun.App., 44 A.2d 369—Henderson v. Allison, Mun.App., 44 A.2d 220—De Bohula v. Coppedge, Mun. App., 40 A.2d 255

*Ill*—Hoppe v. Yellow Cab Co., 63 N.E.2d 140, 326 Ill.App. 598—Saluto v. Publick Great States Theatres, 56 N.E.2d 635, 323 Ill.App. 648—Vieceli v. Cummings, 54 N.E.2d 717, 322 Ill.App. 569—Ferrier v. Sheridan, 47 N.E.2d 551, 318 Ill. App. 232—Hirshman v. National Mineral Co., 35 N.E.2d 693, 311 Ill. App. 169—Salzman v. Boeing, 35 N.E.2d 536, 311 Ill.App. 83—Kahler

v. Marchi, 29 N.E.2d 854, 307 Ill. App. 23—Spikings v. Ellis, 8 N.E.2d 962, 290 Ill.App. 585—Meier v. Hurtman, 266 Ill.App. 466.

*Ind*—Louisville & N. R. Co. v. Revlett, 65 N.E.2d 731, 221 Ind. 313—Drinkwater v. Eikenberry, 64 N.E.2d 399, 224 Ind. 84—Long v. Archer, 46 N.E.2d 818, 221 Ind. 186—Indiana Ins. Co. v. Handlon, 24 N.E.2d 1003, 216 Ind. 442—Trent v. Rodgers, 104 N.E.2d 759, 123 Ind. App. 139—McKinnon v. Parrill, 38 N.E.2d 1008, 111 Ind.App. 343—Dickerson v. Dickerson, 10 N.E.2d 424, 104 Ind. App. 686, reheard 11 N.E.2d 514, 104 Ind. App. 686—Farmers & Merchants Bank of Hanna v. Peoples Trust & Sav. Bank of La Porte, 199 N.E. 892, 101 Ind. App. 474.

*Md*—Well v. Free State Oil Co. of Md., 37 A.2d 826, 200 Md. 62—Emery v. George F. Hazelwood Co., 64 A.2d 112, 192 Md. 239—Brown v. Hebb, 175 A. 602, 167 Md. 535, 97 A.L.R. 366—West v. Driscoll, 130 A. 445, 142 Md. 205

*Mass*—Hall v. Smith, 185 N.E. 850, 283 Mass. 166

*Miss*—Frishy v. Grayson, 63 So.2d 96, 215 Miss. 753—Dixie Drive It Yourself System Jackson Co. v. Matthews, 54 So.2d 263, 212 Miss. 190—State Farm Mut. Auto. Ins. Co. v. McKay, 48 So.2d 349, 209 Miss. 706—Aponaugh Mfg. Co. v. Collins, 42 So.2d 431, 207 Miss. 460.

*Mo*—Stephens v. Kansas City Gas Co., 191 S.W.2d 601, 354 Mo. 836—Evans v. Farmers Elevator Co., 147 S.W.2d 593, 347 Mo. 326—Baird v. Ellsworth Realty Co., App., 265 S.W.2d 770—Palmer v. Security Ins. Co. of New Haven, Conn., App., 263 S.W.2d 210—Smith v. Thompson, App., 258 S.W.2d 278, dismissed 74 S.Ct. 66—Doelling v. St. Louis Public Service Co., App., 258 S.W.2d 244—Hieber v. Thompson, App., 252 S.W.2d 116—Hieber v. Thompson, App., 252 S.W.2d 116—Vandevert v. Shields, App., 241 S.W.2d 53—Doran v. Kansas City, App., 237 S.W.2d 907—Waltermire v. Stuart, App., 222 S.W.2d 945—Ellis v. Kansas City Public Service Co., App., 203 S.W.2d 475—Hale v. Kansas City, Mo., 187 S.W.2d 31, 239 Mo. App. 12—Arnold v. Manzella, App.



east where the motion is not renewed at the close | of all the evidence,<sup>13</sup> or the evidence so introduced

- 186 S.W.2d 892—Nick v. Travelers Ins. Co., 185 S.W.2d 326, 238 Mo. App. 1181, affirmed 189 S.W.2d 532, 354 Mo. 376—Kasperaki v. Rainey, App., 155 S.W.2d 11—Taylor v. Kelder, 88 S.W.2d 436, 239 Mo.App. 1117—Power v. Frischer, 87 S.W.2d 692, 229 Mo.App. 1056—Buls v. Prudential Ins. Co. of America, 77 S.W.2d 127, 229 Mo.App. 190—Fenton v. Hart, App., 73 S.W.2d 1034—Myers v. Kansas City Junior Orpheum Co., 78 S.W.2d 313, 228 Mo. App. 840—Porter v. Equitable Life Assur. Soc. of U. S., App., 71 S.W.2d 766—O'Connell v. Kansas City, App., 54 S.W.2d 802.
- M.—McDonald v. Senn, 174 P.2d 564, 60 N.M. 222—Crocker v. Johnston, 95 P.2d 214, 43 N.M. 468.
- Mo.—Hurt v. Charles J. Rogers Transp. Co., 113 N.E.2d 489, 160 Ohio St. 70—Wilkeson v. Erskine & Son, 61 N.E.2d 201, 145 Ohio St. 218—In re Robinson's Estate, 60 N.E.2d 615, 145 Ohio St. 55—Halkias v. Wilkoff Co., 47 N.E.2d 199, 141 Ohio St. 139—Marolt v. Lisitz, 115 N.E.2d 169, 94 Ohio App. 298—Peterchak v. Carnegie-Illinois Steel Corp., 109 N.E.2d 509, 92 Ohio App. 431—Partlow v. Aaron, App., 109 N.E.2d 30—First Discount Corp. v. Hatcher Auto Sales, 104 N.E.2d 587, 90 Ohio App. 553, affirmed 102 N.E.2d 4, 156 Ohio St. 191—Werner v. City of Youngstown, 103 N.E.2d 843, 90 Ohio App. 134—Reebel v. Ignat, App., 102 N.E.2d 16—Barbush v. Ohio Finance Co., App., 101 N.E.2d 792—Senn v. Lackner, App., 100 N.E.2d 413, rehearing denied 100 N.E.2d 432, 91 Ohio App. 83, affirmed 105 N.E.2d 49, 157 Ohio St. 396, motion sustained, App., 107 N.E.2d 558—Persim v. City of Youngstown, App., 95 N.E.2d 287—Nungesser v. Suhayek, App., 92 N.E.2d 616—Zentko v. G. M. McKelvey Co., App., 88 N.E.2d 265—Linzey v. Fabian, App., 88 N.E.2d 260—Thompson v. Iarmly, App., 88 N.E.2d 627, appeal dismissed 79 N.E.2d 909, 149 Ohio St. 581—Dickerson v. Russo, 81 N.E.2d 276, 82 Ohio App. 229—Sawec v. Rshaban, App., 80 N.E.2d 173—Hrobak v. Metropolitan Life Ins. Co., App., 79 N.E.2d 360—Bayer v. Sanford, 78 N.E.2d 67, 81 Ohio App. 145—Clark v. Co-operative Transit Co., App., 77 N.E.2d 725—Focht v. Justice, 77 N.E.2d 506, 81 Ohio App. 297—Lucente v. Philipides, App., 68 N.E.2d 558—Kercher v. City of Conneaut, 65 N.E.2d 272, 76 Ohio App. 491—Morris v. Pearl St. Auction Co., 23 N.E.2d 710, 61 Ohio App. 452.
- Tenn.—City of Memphis v. Uselton, App., 260 S.W.2d 293—Reid v. Messner, 231 S.W.2d 400, 33 Tenn.App. 255—(Blue) Star Service, Inc. v. McCurdy, 251 S.W.2d 139, 36 Tenn. App. 1—Martin v. Miller Bros. Co., 163 S.W.2d 187, 26 Tenn.App. 110—Fulmer v. Jennings, 148 S.W.2d 39, 24 Tenn.App. 635—Tallent v. Fox, 141 S.W.2d 485, 24 Tenn.App. 86—Duling v. Burnett, 124 S.W.2d 294, 22 Tenn.App. 522—Walters v. Staton, 111 S.W.2d 381, 21 Tenn. App. 401—Life & Cas. Ins. Co. v. Gardner, 103 S.W.2d 1100, 21 Tenn. App. 244—Allen v. Melton, 99 S.W.2d 219, 20 Tenn.App. 387—Town of Dickson v. Stephens, 96 S.W.2d 201, 20 Tenn.App. 195—Nashville Gas & Heating Co. v. Phillips, 69 S.W.2d 914, 17 Tenn.App. 648—Hoover Motor Express Co. v. Thomas, 65 S.W.2d 621, 16 Tenn.App. 664—Kerheart v. Hazlewood Bros., 15 Tenn. App. 454—Marion Const. Co. v. Steepleton, 14 Tenn.App. 127—Petway v. Hoover, 12 Tenn.App. 618—Smith v. Fisher, 11 Tenn.App. 273—Hot Blast Coal Co. v. Wilhax, 10 Tenn.App. 228—Tilnin v. Siner, 9 Tenn.App. 252—Dennie v. Isler, 8 Tenn.App. 1—Adamant Stone & Roofing Co. v. Vaughn, 7 Tenn.App. 170—Life & Casualty Ins. Co. v. Robertson, 6 Tenn.App. 43—Yellow Cab Co. v. Halley, 5 Tenn.App. 349—Rhoton v. Burton, 2 Tenn.App. 184—Tennessee Cent. Ry. Co. v. Zearing, 2 Tenn.App. 451—Chicago, M. & G. R. Co. v. Wheeler, 1 Tenn. App. 100.
- Tex.—Baker v. Corse, Civ.App. 120 S.W.2d 817, error dismissed—Sovereign Camp, W. O. W., v. Rivera, Civ.App., 118 S.W.2d 1213—American Nat. Ins. Co. v. Valencia, Civ. App., 91 S.W.2d 832, error dismissed—Castelo v. Castelo, Civ.App., 89 S.W.2d 1033, error dismissed—Citizens' Mut. Life Ins. Ass'n v. Miles, Civ.App., 77 S.W.2d 717.
- Vt.—Gregoire v. Willett, 8 A.2d 660, 110 Vt. 453—Johnson v. Hardware Mut. Cas. Co., 187 A. 788, 108 Vt. 269—Garvey v. Michaud, 184 A. 713, 108 Vt. 226—Beauregard v. Orleans Trust Co., 182 A. 182, 108 Vt. 42—Shuppy v. McGarry, 174 A. 856, 106 Vt. 466.
- W.Va.—Gilkerson v. Baltimore & O. R. Co., 41 S.E.2d 188, 129 W.Va. 649—Watson v. Woodall, 61 S.E.2d 747, 134 W.Va. 787—Yuncke v. Welker, 36 S.E.2d 410, 128 W.Va. 299.
- Wyo.—Hawkins v. Loffland Bros. Co., 250 P.2d 498, 70 Wyo. 366.
- 84 C.J. p 1303 note 47.
- Evidence introduced after motion granted**
- Where defendant introduced evidence on subject matter of count of complaint on which verdict had been directed for defendant at close of plaintiff's case and jury was instructed thereon, such count was reinstated and appellate court would deal with defendant's appeal as though verdict had not been directed on such count, even though plaintiff did not cross-appeal.—Kamienksi v. Bluebird Air Service, 53 N.E.2d 131, 321 Ill.App. 340, error dismissed 59 N.E.2d 853, 380 Ill. 462.
- IS. U.S.—Ralston Purina Co. v. Novak, C.C.A.Neb., 111 F.2d 631—Cook Paint & Varnish Co. v. Hickling, C.C.A.Neb., 76 F.2d 718.**
- III.—Popadowski v. Bergaman, 26 N.E.2d 722, 304 Ill.App. 423—Spikings v. Ellis, 8 N.E.2d 962, 290 Ill.App. 585.**
- Ind.—McKinnon v. Parrill, 38 N.E.2d 1008, 111 Ind.App. 343.**
- Iowa.—Olson v. Barnick, 61 N.W.2d 733—Smith v. Pine, 12 N.W.2d 236, 234 Iowa 256.**
- Mo.—Cable v. Amoss, 28 A.2d 566, 181 Md 56.**
- Ohio.—Kintner v. Checks, 49 N.E.2d 962, 71 Ohio App. 333.**
- Tenn.—Pikeville Fuel Co. v. Marsh, 232 S.W.2d 789, 34 Tenn.App. 82—Southern Surety Co. v. Southern Surety Co., 10 Tenn.App. 506—Sullivan v. Tigert, 1 Tenn.App. 262.**
- Vt.—Parrow v. Froulx, 15 A.2d 835, 111 Vt. 271.**
- Wyo.—York v. James, 148 P.2d 596, 60 Wyo. 222—Montgomery Ward & Co. v. Arbogast, 81 P.2d 885, 53 Wyo. 275.**
- 64 C.J. p 1301 note 48.
- Subsequent presentation of evidence by plaintiff**
- (1) Any error in overruling plaintiff's motion for judgment at close of testimony of plaintiff and defendants was waived by plaintiff's subsequent introduction of rebuttal testimony.—Cullender v. Doyal, 105 P.2d 326, 44 N.M. 491—Cullender v. Doyal, 102 P.2d 1115, 44 N.M. 378.
- (2) Where defendant at conclusion of defendant's case moved for a directed verdict, and the court reserved decision on such motions, and thereafter, plaintiff introduced additional testimony, and defendant failed to renew his motion for directed verdict, and issues were submitted to jury, defendant, not having renewed his motions at close of all the evidence, failed to preserve his right to move for such relief after the verdict had been received, even though plaintiff had failed to establish a prima facie case.—Buxhoeveden v. Estonian State Bank, 112 N.Y.S.2d 785, 279 App.Div. 1089, reargument denied 113 N.Y.S.2d 773, 280 App Div 806.
- Reopening of case**
- Where a motion for a directed verdict, made after the case is closed, is denied, and the case is reopened, on witness being called on each side, and a few unimportant questions asked, whereupon the court proceeds to charge, defendant's failure to renew

supplies the deficiency in plaintiff's proofs.<sup>14</sup> Defendant, by introducing evidence after his motion for a directed verdict is denied takes the chance that his evidence will aid plaintiff's case,<sup>15</sup> but he is not thereby barred from asking for a directed verdict on all of the evidence,<sup>16</sup> or from insisting that on all of the evidence plaintiff is not entitled to a submission of the case to the jury.<sup>17</sup> However, plaintiff's right to a submission of his case is to be determined from all of the evidence regardless of who introduced it.<sup>18</sup> While it has been indicated that where defendant renews his motion for a directed verdict at the close of the case, it is to be determined as of the time the original motion was made,<sup>19</sup> it is generally held that where the motion is renewed at the close of the case, it is to be determined on all of the evidence, and not alone on the evidence at the time the original motion was made.<sup>20</sup> In at least one jurisdiction, the rule that defendant, by introducing evidence after his motion for a directed verdict is denied, thereby waives error in the denial of his motion has been abrogated by statute.<sup>21</sup>

*Motions by both parties for direction of verdict.*  
Error in sustaining a motion to direct a verdict

is not waived because the party against whom it is directed also moved for a direction in his favor.<sup>22</sup>

*Motion for new trial.* A motion for a new trial has been held to be a waiver of an exception to a refusal to direct a verdict where the new trial is sought on the same grounds.<sup>23</sup> A motion for a peremptory instruction is not waived by the reliance on other matters in a motion for new trial.<sup>24</sup>

### § 669. Instructions to Jury

Waiver of error as to instructions given by subsequent affirmative acts or statements is discussed infra § 670, and waiver of error in failure or refusal to give instructions, infra § 671. The cure of error in instructions by other instructions is considered supra §§ 441-448.

Examine Pocket Parts for later cases.

### § 670. — Instructions Given

Error in instructions to the jury may be waived by subsequent acts or statements of the complaining party.

Error in instructions to the jury may be expressly or impliedly waived by subsequent affirmative acts or statements of the complaining party<sup>25</sup> or may be

his motion for a verdict is not a waiver of the motion—Weizinger v. Erie R. Co., 94 N.Y.S. 869, 106 App.Div. 411.

14. Ky.—Kennedy Transfer Co. v. Greenfield's Adm'x, 59 S.W.2d 978, 248 Ky. 708.  
64 C.J. p 1304 note 49

15. Ky.—Kentucky Aerospray, Inc. v. Mays, 251 S.W.2d 460

16. Ky.—Paducah Dry Goods Co. v. Thompson, 213 S.W.2d 140, 308 Ky. 12

17. Md.—Weil v. Free State Oil Co. of Md., 87 A.2d 826, 200 Md. 62.

18. Mo.—Taylor v. Kelder, 88 S.W.2d 436, 229 Mo.App. 1117.

19. Ky.—Kentucky Aerospray, Inc. v. Mays, 251 S.W.2d 460  
Mo.—Kasperski v. Rainey, App., 135 S.W.2d 11—Manson v. May Department Stores Co., 71 S.W.2d 1081, 230 Mo.App. 678.  
64 C.J. p 1304 note 50.

20. Wash.—Sheppard v. Department of Labor and Industries, 70 P.2d 732, 191 Wash. 80.

21. Ill.—Orr v. Herzog, 64 N.E.2d 382, 327 Ill.App. 555.  
Iowa—Dilliner v. Joyce, 6 N.W.2d 275, 233 Iowa 279.

Mo.—Altenderfer v. Harkins, App., 243 S.W.2d 558.

Ohio—A. Macaluso Fruit Co. v. Commercial Motor Freight, App., 57 N.E.2d 692.

Wyo.—Hawkins v. Loffland Bros. Co., 250 P.2d 498, 70 Wyo. 366  
64 C.J. p 1305 note 51.

#### New motion or renewal of motion

(1) A defendant who moves for directed verdict at close of plaintiff's case must introduce no evidence if he desires to save the point, and if he puts in evidence must make a second motion for directed verdict, and cannot merely renew his previous motion—Popadowski v. Bergaman, 26 N.E.2d 722, 304 Ill.App. 422.

(2) Where defendant put in evidence after making motion for directed verdict at close of plaintiff's case, the motion was out of the case for all time and could not be reserved and it could not be renewed.—Goldberg v. Capitol Freight Lines, 41 N.E.2d 302, 314 Ill.App. 347, affirmed 47 N.E.2d 67, 382 Ill. 283.

(3) Error of trial court in not directing verdict for defendant, where the evidence was insufficient to support plaintiff's cause of action, was not waived by offering testimony after the court refused to rule on the motion for a directed verdict, where such motion was again renewed at the close of all the evidence.—Blair v. Modern Woodmen of America, 282 Ill.App. 36

21. Mich.—Snyder v. Johnson, 249 N.W. 856, 264 Mich. 286.  
64 C.J. p 1304 note 48 [c].

22. Iowa—Tepple v. Hawkeye Gold

Dredging Co., 114 N.W. 906, 137 Iowa 206.  
64 C.J. p 1302 note 42.

23. Me.—Herman v. Greene, 34 A.2d 17, 140 Me. 54  
64 C.J. p 1302 note 43.

24. Tenn.—Barnes v. Noel, 174 S.W. 276, 131 Tenn. 126.

25. U.S.—Morrissey v. U. S. C.C.A. Cal., 70 F.2d 729, certiorari denied 65 S.Ct. 77, 293 U.S. 566, 79 L.Ed. 666.

Conn.—Proto v. Bridgeport Herald Corp., 72 A.2d 820, 136 Conn. 557.  
D.C.—Becker v. David, 182 F.2d 243, 86 U.S.App. D.C. 347.

Ill.—Goodrich v. Sprague, 42 N.E.2d 337, 314 Ill.App. 671.

Mo.—Grosvenor v. New York Cent. R. Co., 123 S.W.2d 173, 343 Mo. 611  
—Crews v. Kansas City Public Service Co., 111 S.W.2d 54, 341 Mo. 1090

N.H.—George v. New England Dressed Meat & Wool Co., 164 A. 209, 86 N.H. 121

Ohio—Ellis v. Horn, App., 126 N.E.2d 893

64 C.J. p 1305 note 55.  
Cure or waiver by:  
Failure to object or except see supra § 425.

Prior acts or omissions see supra § 414.

#### Effect of waiver

Waiver of error in giving instruction on law of case where case was submitted on special issues rendered

cured or corrected by the acts or statements of the court;<sup>26</sup> and whether or not there is a waiver or cure of the error depends on the circumstances of the particular case.<sup>27</sup> Where plaintiff expressly approves a charge, he waives error, if any, in another paragraph to the same effect, but in different language,<sup>28</sup> and error in an instruction to the jury is waived by asking for a modification thereof which does not cure the error.<sup>29</sup> Where defendant, not standing on his objection to a charge, undertakes at the request of the court to prepare special charges on an issue, some of which were given by the court, he cannot complain that they were not full and specific.<sup>30</sup> It has been held that a party waives his objection to an instruction by asking and receiving counter instructions involving the same error;<sup>31</sup> but where an exception to an erroneous instruction is overruled, the excepting party does not waive the exception by adapting himself to the view of the court and attempting, by requests for a modification of such view, to soften as far as possible the emphasis of the instruction given,<sup>32</sup> and where plaintiff, after the refusal of his request for an instruction that the jury should disregard an alleged compromise, yields to the ruling of the court and offers instructions in which the question of

compromise is submitted to the jury, he does not thereby waive his right to object to the action of the court in giving instructions for defendant submitting such question.<sup>33</sup> A request for instructions covering matters other than the instruction objected to is not a waiver of the objection.<sup>34</sup> Error in an instruction permitting the jury to consider elements of damages not alleged in the petition is not cured by an amendment of the petition after verdict alleging such damages.<sup>35</sup>

## § 671. — Failure or Refusal to Instruct

Error in failing or refusing to give instructions may subsequently be cured or waived.

Error in failing or refusing to give instructions may subsequently be waived or cured.<sup>36</sup> Thus, error in refusing to give requested instructions is cured where the court subsequently gives them of its own motion,<sup>37</sup> or recalls the jury shortly after they have retired for consultation, and submits such instructions to them.<sup>38</sup> Where a requested instruction is properly refused, but afterward given with the consent of the opposite party, the party making the request cannot complain.<sup>39</sup> So, where counsel has an opportunity to have the jury recalled, and his requests charged, but does not avail himself of such

immaterial extent or number of prejudicial effects—*Traders' & General Ins. Co. v. Williams*, Tex.Civ.App., 66 S.W.2d 780

28. Mich.—*Toutloff v. King*, 5 N.W. 2d 542, 302 Mich. 689

Cure of error in instructions by other instructions see supra §§ 441-447.

Instructions correcting previous erroneous instructions or omissions see supra § 377.

27. S.C.—*Strom v. Payne*, 111 S.E. 798, 119 S.C. 51  
64 C.J. p 1306 note 57

### Introduction of evidence

Where switchman brought action under Federal Employers' Liability Act against railroad for injuries sustained when switchman was knocked from boxcar by overhanging building canopy, and instruction on behalf of switchman exceeded pleadings by presenting issue of necessity of warning of presence of canopy by artificial illumination thereof, fact that railroad had joined in introduction of evidence as to extent of illumination in yards could not be construed as consent that issue presented by instruction be tried as ground of negligence as though specifically pleaded.—*Spankie v. Thompson*, Mo., 243 S.W.2d 510.

### Satisfaction with instruction

Where defendant objected and ex-

cepted to four instructions given by the court, and asked for time to prepare other instructions, but the court declined to give any time, a recital in the bill of exceptions that the court called the attention of the defendant's counsel to the second instruction, and he agreed that it was the law on that issue, and expressed himself as satisfied with the instruction, but did not state that he consented thereto, does not show that he waived his right to complain of any error in the instructions.—*Lang v. Bach*, 134 S.W. 188, 142 Ky. 224

28. Tex.—*Moore v. Davis*, Com.App., 27 S.W.2d 153, rehearing denied 32 S.W.2d 181.

29. Ark.—*Southern Anthracite Coal Co. v. Bowen*, 124 S.W. 1048, 93 Ark. 140.

30. Tex.—*Southern Traction Co. v. Dillon*, Civ.App., 199 S.W. 698, error refused.

31. Ill.—*Warner Const. Co. v. Lincoln Park Com'rs*, 278 Ill.App. 42  
Mo.—*Grimes v. Red Line Service*, 85 S.W.2d 767, 337 Mo. 743—*Snelling v. Triplett*, App., 171 S.W.2d 739.  
Tex.—*Texas & P. Ry. Co. v. Hancock*, Civ.App., 59 S.W.2d 313, error refused.

32. Iowa.—*Harper & Ward v. Kurtz*, 175 N.W. 45, 188 Iowa 1047.  
Mo.—*State ex rel. Brosnahan v. Shain*, 126 S.W.2d 1193, 344 Mo. 404

—*Hammell v. St. Louis Public Service Co.*, App., 268 S.W.2d 60.

33. Miss.—*Postor v. City of Meridian*, 116 So. 820, 150 Miss. 715.

34. Mo.—*Jenkins v. Wabash Ry. Co.*, 73 S.W.2d 1002, 335 Mo. 748.

35. Iowa.—*Pettijohn v. Halloran*, 206 N.W. 631, 200 Iowa 1355

36. Ga.—*Boynkin v. McRae*, 185 S.E. 246, 182 Ga. 252, conformed to 187 S.E. 271, 54 Ga.App. 158

64 C.J. p 1305 note 66, p 1306 note 73.

Waiver by failure to object see supra § 484.

The mere silence of counsel on statement by trial court, that "without objection the court will not attempt to recapitulate the evidence, word by word," was not a waiver of the statutory right to have evidence stated in plain and correct manner and the law arising thereon declared and explained.—*Carruthers v. Atlantic & Y. Ry. Co.*, 2 S.E.2d 878, 215 N.C. 675.

37. Ark.—*Barkman v. State*, 13 Ark. 705.

Okl.—*Brown v. Tull*, 164 P. 785, 65 Okl. 119  
64 C.J. p 1306 note 67.

38. N.Y.—*Phillips v. New York Cent., etc.*, R. Co., 27 N.E. 978, 127 N.Y. 657, 3 Silv.A. 467.

39. Ala.—*Kansas City, etc., R. Co. v. Phillips*, 13 So. 65, 98 Ala. 159.

offer, he must be deemed to waive whatever right he has with respect thereto.<sup>40</sup> Failure to instruct with respect to an issue is waived where with the consent of counsel the case is submitted solely on another issue.<sup>41</sup> Exceptions to refusals of requests to charge are waived by a subsequent consent that particular questions be submitted to the jury and that after verdict on such questions the cause be decided by the court.<sup>42</sup> An exception to the refusal to give an instruction is not waived by proceeding with the trial after such refusal.<sup>43</sup>

## § 672. Conduct and Deliberations of Jury

### Misconduct of the jury may be waived.

Misconduct of the jury may be waived.<sup>44</sup> Waiver of a juror's disqualification or incompetency is not a waiver of the juror's subsequent misconduct.<sup>45</sup> A party has been held not to waive the right to claim jury misconduct by moving for judgment on the verdict and judgment non obstante verdicto.<sup>46</sup> It has been held that error in returning a compromise verdict is one which no waiver by defendant can cure, where such compromise represents not a divergence as to the amount, but differing views as

to defendant's liability.<sup>47</sup>

## § 673. Verdict and Findings

Objections relating to the verdict or findings of the jury or the findings of fact and conclusions of law of the court may be waived.

Objections relating to the verdict or findings of a jury,<sup>48</sup> or the findings of fact and conclusions of law of the court,<sup>49</sup> may ordinarily be waived or cured by some subsequent affirmative act of the objecting party or of the court. The submission of special issues to a jury in an equity suit, if error, is cured by the action of the court in adopting the jury's findings as those of the court.<sup>50</sup> It has been held that error in submitting special issues to the jury cannot be cured by ignoring the answers thereto, since the verdict must stand or fall as a whole.<sup>51</sup> A fatal conflict in the answers to special issues cannot be waived by the parties.<sup>52</sup> Where a verdict is returned against an employer and in favor of an employee in an action against both for the employee's tort, the inconsistency in the verdict cannot be cured by the employee's consent that a verdict be directed against him.<sup>53</sup>

40. *N.Y.—Druckklee v. Universal Tobacco Co.*, 94 N.Y.S. 777, 106 App. Div. 470.

### Coercion

Where, at time defendant excepted to refusal to give requested instructions, court stated that, if counsel insisted on such exceptions, court was inclined to call jury back and give plaintiff's proposed instruction, and that, if counsel would waive exception court on its own responsibility would refuse plaintiff's proposed instruction counsel's waiver of exceptions to requested instructions was not brought about by coercion so as to entitle defendant to claim error based on failure to give such requested instructions.—*Wiggins v. North Coast Transp. Co.*, 98 P.2d 675, 2 Wash.2d 446.

41. *Ohio—Northwestern Nat. Ins. Co. v. Hicks*, 197 NE 424, 50 Ohio App. 21.

42. *N.Y.—Carr v. Carr*, 52 N.Y. 251.

43. *Mont.—Chessman v. Hale*, 79 P. 254, 31 Mont. 577, 68 L.R.A. 410.

44. *Idaho.—Goetz v. Burgess*, 238 P.2d 444, 72 Idaho 186.

Effect of failure to object to misconduct of jurors see supra § 483.

### Failure to present matter to court until after verdict

If plaintiffs considered the fact that during the trial a juror talked to a witness for the defendant and to an insurance man for company which allegedly carried insurance on defendant's truck prejudicial, plaintiffs

should have presented the matter to the trial court prior to submission of case to jury, and where they sought a verdict without presenting the matter to the trial court, they thereby waived their claim of misconduct.—*Goetz v. Burgess*, supra.

45. *Mo.—Cook v. Kansas City*, 214 S.W.2d 430, 358 Mo. 286.

46. *Tex.—City of San Antonio v. McKenzie Const. Co.*, 150 S.W.2d 989, 136 Tex. 315.

47. *N.Y.—Cohen v. International Brokerage & Clearing Co.*, 207 N.Y.S. 449, 211 App.Div. 311, 64 C.J. p.1306 note 80.

48. *Ga.—Smith v. Jones*, 194 S.E. 556, 185 Ga. 236.

*N.Y.—Engle v. City of New York*, 8 N.Y.S.2d 704, 170 Misc. 306, affirmed 14 N.Y.S.2d 490, 257 App.Div. 1046, reargument denied 15 N.Y.S.2d 616, 258 App.Div. 731.

64 C.J. p.1306 note 75.  
Waiver by failure to object or except see supra § 525, 572.

### Taxing costs

Where trespassers admitted entering tract of land and removing portion of fence, in landowners' action against them, such unlawful entry warranted verdict in favor of landowners and taxing of costs against trespassers did not correct error in verdict in favor of trespassers.—*Holeton v. Ellison*, Ohio App., 111 N.E.2d 399.

49. *U.S.—U. S. v. Grigaluskas*, C.A. Mass., 195 F.2d 494.

*Iowa—Korsrud v. Korsrud*, 45 N.W. 2d 848, 212 Iowa 178.

*Tex.—Culligan v. Wootton*, Civ.App., 254 S.W.2d 155, refused no reversible error.—*Guadalupe County v. 10th, Civ.App.*, 153 S.W. 919.  
Waiver by failure to object or except see supra § 652 et seq.

### Motion for new trial

A party may move for new trial after court has definitely announced its decision and made it a matter of record, although findings of fact and conclusions of law have not been filed, and by making the motion party waives objection that findings and conclusions have not been filed.—*Application of Mitchell*, 13 N.W.2d 20, 216 Minn. 368.

### Uncertainty and omission in findings

Appellant not specifying particular ultimate facts, as to which he desired findings, by request therefor in court below, nor embracing such facts in requested findings containing nothing objectionable, cannot complain of uncertainty and omissions in findings.—*Williams v. Selby*, 24 P.2d 728, 37 N.M. 474.

50. *Cal.—Whiting v. Squaglia*, 232 P. 986, 70 Cal. App. 108.

51. *Tex.—Jeffers v. Dent*, Civ.App., 280 S.W. 347.

52. *Tex.—Little Rock Furniture Mfg. Co. v. Dunn*, 222 S.W.2d 985, 148 Tex. 197.—*Sevine v. Heissner*, Civ.App., 262 S.W.2d 218, error refused no reversible error.

53. *N.Y.—Steiner v. Rafanecrus*, 18 N.Y.S.2d 41, 173 Misc. 423.

**TRIANTHRIMIDE.** Also referred to as "dianthraquinonylaminoanthraquinone" and as a "dianthraquinonyl-diamino-anthraquinone compound." It is composed of three anthraquinones joined by two amino groups and is distinguished from a dianthrimide which consists of two anthraquinones joined by one amino group. There are different trianthrimides, depending on the position of the linkage of the amino groups, which may be in alpha or beta positions on the end anthraquinones and also on the middle anthraquinone.<sup>1</sup>

**TRIATIO.** As the first word of a maxim of which there have been no recent applications see 64 C.J. p 1308 note 32.

**TRIBAL LANDS.** See the index to the title Indians.

**TRIBE.** See the index to the title Indians.

**TRIBORD.** A French nautical term meaning "star-board."<sup>2</sup>

**TRIBUNAL.** See Courts § 1.

**TRIBUTARY.** The word "tributary" may be either a noun or an adjective.<sup>3</sup>

As a noun, and in ordinary language, "tributary" means a stream running into another stream;<sup>4</sup> a running natural stream which empties into another stream;<sup>5</sup> a stream feeding a larger stream;<sup>6</sup> all streams flowing directly or indirectly into a river;<sup>7</sup> a river or lake or other similar body immediately connected with another body of water of larger size.<sup>8</sup> In its derived sense "tributary" means that which contributes to.<sup>9</sup>

The adjective "tributary" is defined as meaning paying or yielding tribute;<sup>10</sup> taxed or assessed by tribute;<sup>11</sup> and in this sense it has been distinguished from "abutting" see 1 C.J.S. p 407 note 31, and "contiguous" see 17 C.J.S. p 180 note 15.

**TRICHINA; TRICHINOSIS.** The trichina, also called "trichina spiralis,"<sup>12</sup> is a parasitic worm<sup>13</sup> about one and four-tenths of a millimeter long.<sup>14</sup> Trichinae are not infrequently found in pork,<sup>15</sup> and also in rats, dogs, polecats, and monkeys.<sup>16</sup>

Trichinae cause the disease known as "trichinosis."<sup>17</sup> Trichinae mate and propagate in the body,<sup>18</sup> and produce muscular swelling, pain, and fever.<sup>19</sup> Trichinosis may be a serious disease, and

1. U.S.—In re Wuertz Cust & Pat. App., 110 F.2d 854, 855.

2. U.S.—The Charles Tiberghien, D. C.N.Y., 143 F. 676.

3. U.S.—Peders v Hartford Fire Ins. Co., D.C.N.Y., 49 F.2d 927, 933.

4. Eng.—Harbottle v Terry, 10 Q.B. D 131, 137.—Cook v Charelbrough, 94 L.T.Rep., N.S., 550 note.

64 C.J. p 1308 note 45.

5. Colo.—Ogilvy Irrigating & Land Co. v. Insinger, 75 F. 598, 599, 19 Colo App 380.

**Limited definition**

Colo.—Ogilvy Irrigating & Land Co. v. Insinger, supra.

6. N.C.—In re Westover Canal, 52 S.E.2d 225, 228, 230 N.C. 91.

7. Or.—Bull v Siegrist, 126 P.2d 832, 834, 169 Or 180.

8. U.S.—Peders v Hartford Fire Ins. Co., D.C.N.Y., 49 F.2d 927, 930.

64 C.J. p 1309 note 48.

9. Eng.—Hall v. Reid, 10 Q.B.D. 134, 135 note.

10. Idaho.—Reynard v. City of Caldwell, 42 P.2d 292, 296, 55 Idaho 342.

64 C.J. p 1309 note 51.

11. Idaho.—Reynard v. City of Caldwell, supra.

64 C.J. p 1309 note 52.

12. N.Y.—McSpedon v. Kunz, 2 N.E. 2d 513, 271 N.Y. 131.—Catalanello v Cudahy Packing Co., 27 N.Y.S.2d 637, 642.

13. Md.—Vaccarino v Cozzubo, 31 A. 2d 316, 317, 181 Md 614.

Mass.—De Stefano v. Alpha Lunch Co. of Boston, 30 N.E.2d 827, 308 Mass 38.—Holt v. Mann, 200 N.E. 403, 405, 294 Mass 21.

N.Y.—McSpedon v. Kunz, 2 N.E.2d 513, 271 N.Y. 131.

**Trichinae are nematodes**

Md.—Vaccarino v Cozzubo, 31 A.2d 316, 317, 181 Md 614.

14. N.Y.—McSpedon v. Kunz, 2 N.E.2d 513, 271 N.Y. 131.

**Female is larger**

It is about three or four millimeters long.—McSpedon v. Kunz, supra.

15. Md.—Vaccarino v Cozzubo, 31 A. 2d 316, 317, 181 Md. 614.

Mass.—Holt v. Mann, 200 N.E. 403, 404, 294 Mass 21.

N.Y.—McSpedon v. Kunz, 2 N.E.2d 513, 271 N.Y. 131.

**Two or three per cent**

It is estimated that two or three per cent of the pork which is slaughtered for human consumption are infested with trichinae.—McSpedon v. Kunz, supra.

**Trichinae are usually found encysted or encapsulated,** and are usually found in hogs or rats and mice, and sometimes are found in rabbits, badgers, bear meat, or deer meat.—Catalanello v Cudahy Packing Co., 27 N.Y.S.2d 637, 642.

16. N.Y.—McSpedon v. Kunz, 2 N.E. 2d 513, 271 N.Y. 131.

**Nothing commonly used as food except pork**

Mass.—De Stefano v. Alpha Lunch Co. of Boston, 30 N.E.2d 827, 308 Mass. 38.

17. Md.—Vaccarino v Cozzubo, 31 A.2d 316, 317, 181 Md 614.

Mass.—Holt v. Mann, 200 N.E. 403, 405, 294 Mass. 21.

N.Y.—McSpedon v. Kunz, 2 N.E.2d 513, 271 N.Y. 131.

**Similarly expressed**

Trichinosis comes only from eating a meat or meat product containing the parasite trichinae spiralis, and can be transmitted only by ingestion; it cannot be transmitted by contact.—Catalanello v. Cudahy Packing Co., 27 N.Y.S.2d 637, 642.

18. Md.—Vaccarino v Cozzubo, 31 A.2d 316, 317, 181 Md. 614.

Mass.—De Stefano v. Alpha Lunch Co. of Boston, 30 N.E.2d 827, 308 Mass. 38.—Holt v. Mann, 200 N.E. 403, 405, 294 Mass. 21.

19. Md.—Vaccarino v Cozzubo, 31 A. 2d 316, 317, 181 Md. 614.

Mass.—Holt v. Mann, 200 N.E. 403, 405, 294 Mass. 21.

**More specifically described**

The young burrow in the tissue and cause illness which is relieved only by their becoming encysted and thus made comparatively, although not completely, harmless.—De Stefano v. Alpha Lunch Co. of Boston, 30 N.E. 2d 827, 828, 308 Mass. 38.

may be both painful and disabling, and it may have permanent effects of varying degrees of intensity.<sup>20</sup> The symptoms of the disease are not constant, and in light cases the various stages of the disease are not clear.<sup>21</sup>

Trichinae cannot be seen with the naked eye,<sup>22</sup> and there is no inspection of a product which can determine the presence or absence of trichinae without destroying the product.<sup>23</sup> There are several known methods of killing trichinae in meat which is intended for human consumption.<sup>24</sup> If the meat is exposed to a temperature of 137 degrees Fahrenheit the trichinae are destroyed,<sup>25</sup> and they are also destroyed if the meat is stored for a period of twenty days at a temperature which does not exceed five degrees above zero.<sup>26</sup>

Liability may arise where meat infested with trichinae is sold for human consumption, the subject being treated in Food § 59 and Sales §§ 305, 331.

**TRICK.** The word "trick" is defined both as a noun and as a verb.<sup>27</sup>

As a noun, the word "trick" means a crafty or deceitful contrivance or procedure;<sup>28</sup> an artifice or stratagem;<sup>29</sup> a sly, dexterous, ingenious procedure fitted to puzzle or amuse.<sup>30</sup> "Trick" has been held to be synonymous with "deception" see 26 C.J.S. p 35 note 15, "delusion" see 26 C.J.S. p 699 note 92, "fraud" see Fraud § 1, "strategy" see 83 C.J.S. p 111 note 65, and "wile."<sup>31</sup> It has been compared

with, or distinguished from, "device" see 26 C.J.S. p 1295 note 61.

The verb "to trick" is defined as meaning to cheat;<sup>32</sup> to deceive by cunning<sup>33</sup> or artifice;<sup>34</sup> to defraud;<sup>35</sup> to effect by deceit or trickery;<sup>36</sup> to impose on.<sup>37</sup>

**TRICYCLE.** A three-wheeled vehicle, especially a modernized form of velocipede, for one or sometimes two persons, having the wheels variously arranged, but usually two being loose with one serving as driver.<sup>38</sup> "Tricycle" has been distinguished from "bicycle" see 10 C.J.S. p 355 note 94.

**TRIED.** See Try, post.

**TRIENNIALS PACIFICUS POSSESSOR BENEFICIUM EST INDE SECURUS.** See 64 C.J. p 1310 note 80.

**TRIENNIAL COHABITATION RULE.** As a rule of the common law that the nonconsummation of a marriage after a cohabitation of three years, the wife being apt and a virgin, raises a presumption of impotency of the husband see Marriage § 59.

**TRIERS OR TRIORS.** In practice, persons who are appointed to try challenges to jurors, that is, to hear and determine whether a juror challenged for favor is or is not qualified to serve.<sup>39</sup>

**TRIFLING.** A relative term used in comparison with "consequential";<sup>40</sup> and meaning "trivial."<sup>41</sup>

20. N.Y.—Catalanello v. Cudahy Packing Co., 27 N.Y.S.2d 637, 643.

21. Mass.—Holt v. Mann, 200 N.E. 403, 406, 294 Mass. 21.

22. N.Y.—McSpedon v. Kunz, 2 N.E.2d 513, 271 N.Y. 131.

Seen only with microscope N.Y.—McSpedon v. Kunz, supra.

23. Mass.—Holt v. Mann, 200 N.E. 403, 405, 294 Mass. 21.

May be present in one part only

Trichinae spiralis can be present in one portion or part of a meat product and not in another portion or part of the same product.—Catalanello v. Cudahy Packing Co., 27 N.Y.S.2d 637, 642.

24. Md.—Vaccarino v. Cozzubo, 31 A.2d 316, 319, 181 Md. 614.

N.Y.—McSpedon v. Kunz, 2 N.E.2d 513, 271 N.Y. 131.

25. Md.—Vaccarino v. Cozzubo, 31 A.2d 316, 319, 181 Md. 614.

Mass.—Holt v. Mann, 200 N.E. 403, 405, 294 Mass. 21.

N.Y.—McSpedon v. Kunz, 2 N.E.2d 513, 271 N.Y. 131.—Catalanello v. Cudahy Packing Co., 27 N.Y.S.2d 637, 642.

26. Md.—Vaccarino v. Cozzubo, 31 A.2d 316, 319, 181 Md. 614.

N.Y.—McSpedon v. Kunz, 2 N.E.2d 513, 514, 271 N.Y. 131.—Catalanello v. Cudahy Packing Co., 27 N.Y.S.2d 637, 642.

27. Or.—Butts v. Purdy, 125 P. 313, 319, 63 Or. 150.

Phrases employing the word "trick" and of which more recent adjudications have not been found see 64 C.J. p 1309 note 63-p 1310 note 67.

28. Or.—Butts v. Purdy, supra.

29. Or.—Butts v. Purdy, supra.

30. Minn.—State v. Smith, 85 N.W. 12, 13, 82 Minn. 342.

Mo.—Meriwether v. Publishers George Knapp & Co., 97 S.W. 257, 268, 120 Mo. App. 354.

31. Minn.—State v. Smith, 85 N.W. 12, 13, 82 Minn. 342.

Mo.—Meriwether v. Publishers George Knapp & Co., 97 S.W. 257, 268, 120 Mo. App. 354.

32. Mo.—Meriwether v. Publishers George Knapp & Co., supra Or.—Butts v. Purdy, 125 P. 313, 319, 63 Or. 150.

33. Mo.—Meriwether v. Publishers:

George Knapp & Co., 97 S.W. 257, 268, 120 Mo. App. 354.

34. Or.—Butts v. Purdy, 125 P. 313, 319, 63 Or. 150.

35. Mo.—Meriwether v. Publishers George Knapp & Co., 97 S.W. 257, 268, 120 Mo. App. 354.

Or.—Butts v. Purdy, 125 P. 313, 319, 63 Or. 150.

36. Or.—Butts v. Purdy, supra.

37. Mo.—Meriwether v. Publishers George Knapp & Co., 97 S.W. 257, 268, 120 Mo. App. 354.

Or.—Butts v. Purdy, 125 P. 313, 319, 63 Or. 150.

38. New Standard 1) 64 C.J. p 1310 notes 75-78. Operation on sidewalks as subject to regulation see Municipal Corporations § 1776.

39. Black L.D.

64 C.J. p 1310 note 82. See Juris § 278.

40. U.S.—Bear Cat Mining Co. v. Grasselli Chemical Co., Mo., 247 P. 286, 288, 159 C.C.A. 380, L.R.A.1918C 907.

41. Webster New Int. D. 64 C.J. p 1310 note 84.

**TRIM.** In one sense the word "trim" means to adjust, dispose, regulate, or set in order;<sup>42</sup> and in another sense it means to decorate or embellish with ornaments.<sup>43</sup>

As used with reference to trees, "trim" means to reduce to a neat or orderly state, as by clipping, paring, pruning, lopping, or otherwise removing the superfluous or disfiguring parts,<sup>44</sup> but not to destroy or remove them.<sup>45</sup>

*Trimming.* As a verbal noun, "trimming" is defined as that which serves to trim, make complete, ornament, or the like; usually in the plural, as, trimmings for a hat.<sup>46</sup>

As the present participle of the verb "to trim" the word "trimming" is defined in several senses. In connection with a ship's cargo when loading, "trimming" is stowing it and securing it for the voyage;<sup>47</sup> and when used with reference to loading or unloading of canalboats at grain elevators "trimming" is shoveling the grain from one place to another and is work performed by longshoremen with hand scoops or shovels, on the vessel unloading or receiving the grain;<sup>48</sup> and, when, in discharging coal from storage bins having discharge chutes at the bottom, the coal ceases to flow freely from the chute, resort is had to the process of "trimming" which consists in shoveling the coal closer to the place of discharge.<sup>49</sup>

**TRIMMER.** A man, employed by an electric light company, who at stated intervals went to each street are lamp, lowered it, cleaned the globe, renewed the carbons, and replaced the lamp, was so called.<sup>50</sup>

<sup>42</sup> "Trimming sum" as that phrase is used in the definition of "nominal damages," is such a sum as a penny, one cent, six and a quarter cents, etc.—*Maher v. Wilson*, 73 P. 418, 421, 139 Cal 514.

<sup>43</sup> Century D.

<sup>44</sup> Century D.

<sup>45</sup> Century D.

<sup>46</sup> Iowa—*Newlands v. Iowa Ry & Light Co.*, 159 N.W. 244, 246, 179 Iowa 228.

<sup>47</sup> U.S.—*Walling v. Brooklyn Braid Co.*, C.C.A.N.Y., 152 F.2d 938, 940. As subject to tariff regulations see Customs Duties § 45.

<sup>48</sup> U.S.—*Budd v. New York, N.Y.*, 12 S.Ct. 468, 471, 479, 143 U.S. 517, 36 L.Ed. 247.

<sup>49</sup> U.S.—*Budd v. New York*, supra.

<sup>50</sup> N.Y.—*Burns v. Palmer*, 95 N.Y.S. 161, 107 App.Div. 321.

<sup>51</sup> Mass.—*Lutolf v. United Electric Light Co.*, 67 N.E. 1025, 1026, 184 Mass 53.

<sup>52</sup> Black L.D.

<sup>53</sup> Ga.—*Ocean Steamship Co. v. Way*, 17 S.E. 57, 60, 90 Ga. 747, 20 L.R.A. 123.

<sup>54</sup> C.J. p 1311 notes 12-15.

<sup>55</sup> Black L.D.

<sup>56</sup> "Working the roads by conscription of labor was the common-law method. It was part of the 'trinoda necessitas,' from which no man was exempt."—*State v. Covington*, 34 S.E. 272, 125 N.C. 641—64 C.J. p 1311 note 16.

<sup>57</sup> N.Y.—*People v. Colborne*, 20 How Pr 378, 380. See Actions § 1 a (1) (c) note 42.

<sup>58</sup> N.Y.—*F. S. Royster Guano Co. v. Globe & Rutgers Fire Ins. Co.*, 168 N.E. 834, 837, 252 N.Y. 75.

<sup>59</sup> Phrases employing the word "trip" and of which more recent adjudica-

**TRINITARIANS.** See Religious Societies § 1 d (4).

**TRINITY TERM.** One of the four terms of the English courts of common law, beginning on the 22nd day of May and ending on the 12th day of June.<sup>51</sup>

**TRINKET.** Any small piece of ornament or decoration; a small ornament, as a jewel, a ring, or the like of more ornament than use; ornaments of dress; superfluities of decoration.<sup>52</sup>

**TRINODA NECESSITAS.** In Saxon law, a threefold necessity or burden. A term used to denote the three things from contributing to the performance of which no lands were exempted, namely pontis reparatio, (the repair of bridges,) areis constructio, (the building of castles,) et expeditio contra hostem, (military service against an enemy).<sup>53</sup>

**TRINUS ACTUS, TRIUM PERSONARUM.** A Latin expression, ascribed to Bracton, to describe a legal action, as the threefold act of three persons, the idea including not only the act of the plaintiff who makes a lawful demand and the act of the defendant in opposition, but also the action of the court in passing judgment between the parties.<sup>54</sup>

**TRIP.** The noun "trip" is an ordinary word,<sup>55</sup> and in its ordinary signification<sup>56</sup> it means a going from one place to another;<sup>57</sup> a jaunt or excursion by some person;<sup>58</sup> a journey.<sup>59</sup> "Trip" has been distinguished from "expedition" see 35 C.J.S. p 206 note 81.

In its relation to transportation, a "trip" is the performance of service one way over a route,<sup>60</sup> and

tions have not been found see 64 C.J. p 1312 notes 29-35.

<sup>56</sup> N.Y.—*Pier v. Finch*, 24 Barb. 514, 516.

<sup>57</sup> N.Y.—*F. S. Royster Guano Co. v. Globe & Rutgers Fire Ins. Co.*, 168 N.E. 834, 836, 252 N.Y. 75.

<sup>58</sup> In the postal service the term "trip" is technical, and refers to the wagon which will carry the whole or part of the dispatch, that is, the mass of matter to be sent to a certain place at a certain time.—*Utah, N. & C. Stage Co. v. U. S.*, 39 Ct.Cl. 420, 438.

<sup>59</sup> N.Y.—*Pier v. Finch*, 24 Barb. 514, 516.

<sup>60</sup> N.Y.—*F. S. Royster Guano Co. v. Globe & Rutgers Fire Ins. Co.*, 168 N.E. 834, 836, 252 N.Y. 75—*Pier v. Finch*, 24 Barb. 514, 516.

<sup>61</sup> N.Y.—*Kelly v. New York City R. Co.*, 104 N.Y.S. 561, 565, 119 App. Div. 223.

in this sense it conveys the idea of transportation in one direction,<sup>61</sup> the performance of service both ways being a round trip.<sup>62</sup>

The verb "to trip" is defined as meaning to make a false step; to catch the foot; to stumble;<sup>63</sup> to cause to stumble or take a false step;<sup>64</sup> to cause to lose the footing, as by suddenly checking the motion of a foot or leg; to throw off balance.<sup>65</sup>

As a mining term, "trip" is defined in *Mines and Minerals* § 3 h.

**TRIPLE-TAPE FUSE.** See 37 C.J.S. p 1418 note 43.

**TRIPLICATE.** Threefold; triple; made in three identical copies or the like.<sup>66</sup>

**TRIPPING.** In mechanics, "tripping" consists in releasing or setting free some mechanism.<sup>67</sup>

**TRISTIBUS ET TACITIS NON FIDUNTUR.** See 64 C.J. p 1312 note 48.

**TRITURATE.** To grind; to pulverize.<sup>68</sup>

**TRIVET.** A three-legged stand; especially, a tripod to hold cooking-vessels near a fire.<sup>69</sup>

**TRIVIAL.** Trifling; inconsiderable; of small worth or importance.<sup>70</sup> It has been distinguished from "material" see 57 C.J.S. p 451 note 70.

**TRIWEEKLY.** Occurring or appearing every three weeks or three times a week; as, a triweekly newspaper.<sup>71</sup>

**TROLL.** See Fish § 1.

**TROLLEY.** The word "trolley" comes from the middle English word "trollen," or the old French word "troller," meaning to roll or wander about, and, while it had other meanings, it came to refer to several types of small vehicles including those used in shops and mines which run on overhead wires or rails.<sup>72</sup> In this sense the term came to refer to streetcars which run on rails and draw their propelling power from overhead electric wires.<sup>73</sup>

*Phrases* employing the word "trolley" are set out in the note.<sup>74</sup>

**TROMBONE.** A powerful brass instrument of the trumpet kind, thought by some to be the ancient sackbut, consisting of a tube in three parts, bent twice upon itself and ending in a bell.<sup>75</sup>

61. N.Y.—*Kelly v. New York City Ry. Co.*, 84 N.E. 569, 870, 192 N.Y. 97.

64 C.J. p 1312 note 27.

62. N.Y.—*Kelly v. New York City Ry. Co.*, 104 N.Y.S. 561, 565, 119 App. Div. 223.

63. Mo.—*Johnston v. City of St. Louis, App.*, 138 S.W.2d 666, 671.

64. Mo.—*Johnston v. City of St. Louis, supra*.

65. Mo.—*Johnston v. City of St. Louis, supra*.

Tex.—*Southwestern Greyhound Lines v. Dickson, Civ.App.*, 219 S.W.2d 592, 594.

66. Webster New Int. D. "Triplicate original" see 67 C.J.S. p 527 note 63.

67. U.S.—*Duff Mfg. Co. v. Forge, C.C.Pa.*, 78 F. 626, 631.

**Tripping plate**

A plate which performs the function of tripping—*Duff Mfg. Co. v. Forge, supra*.

68. U.S.—*Lewis Gorman & Co. v. U. S.*, C.C.N.Y., 128 F. 467, 468.

69. U.S.—*U. S. v. Hunt Dederich, 19 C.C.P.A.*, Customs, 156, 157.

70. Black L.D.

*Phrases* employing the word and of which more recent adjudications have not been found see 64 C.J. p 1312 notes 53-59.

71. Webster New Int. D. 61 C.J. p 1313 note 61.

72. Ga.—*Thompson v. Georgia Power Co.*, 37 S.E.2d 622, 630, 73 Ga. App. 587.

73. Ga.—*Thompson v. Georgia Power Co., supra*.

**74. Trackless trolley**

(1) The trackless trolley comes from the streetcar. The power propelling system is the same for each. A trackless trolley derives its power from stationary plants through contact with overhead electric wires, the main difference between a streetcar and a trackless trolley being that a streetcar operates only on rails while a trackless trolley operates on pneumatic tires—*Thompson v. Georgia Power Co., supra*.

(2) The word "automobile" does not include a trackless trolley, as stated in *Motor Vehicles* § 1 b (2).

**Other phrases**

(1) "Trolley service wire" is an insulated wire used to transmit electricity from the feed wire of an electric trolley system to the trolley wires—*Gentzkow v. Portland Ry. Co.*, 102 P. 614, 616, 54 Or. 114, 135 Am.S.R. 821.

(2) "Trolley stand" is the means by which the trailing arm, carried above a trolley car, is hinged and pivoted to the car, with a capacity for lateral and vertical movement,

and is pressed upward by some suitable spring—*Morrin v. Robert White Engineering Co.*, C.C.N.Y., 138 F. 68, 71—*Thompson-Houston Electric Co. v. Kelsey Electric Ry. Specialty Co.*, Conn., 75 F. 1005, 1006, 22 C.C.A. 1.

(3) "Trolley system" is a term which, when used with reference to street railroads, has been said to imply the use of a stationary engine and overhead wires strung on poles—*Hooper v. Baltimore City Pass. R. Co.*, 37 A. 359, 361, 85 Md. 509, 514, 38 L.R.A. 509—64 C.J. p 1313 note 73.

(4) "Trolley wires;" In electric railways, heavy copper wires, suspended over the center of each track and parallel therewith, and with which the trolleys of the cars are in contact to receive the current for propelling the cars—*Gentzkow v. Portland Ry. Co.*, 102 P. 614, 616, 54 Or. 111, 135 Am.S.R. 821.

75. U.S.—*U. S. v. Sears, Roebuck & Co.*, 23 C.C. App. 348, 351.

**More detailed description**

The middle part, bent double, slips into the outer parts, as in a telescope, so that by change of the vibrating length any note within the compass of the instrument (which may be bass or tenor or alto or even, in rare instances, soprano) is commanded. It can slide from note to note as smoothly as a violin. Softly blown, it has a rich and mellow



**TROOPER.** A term said to include only persons regularly enrolled in some troop of cavalry.<sup>76</sup>

**TROOPS.** Defined see Army and Navy § 1.

**TROPHY.** Anything taken from an enemy and shown or treasured up in proof of victory; a prize or token of victory in any contest; hence, a memento of victory or success. Also, an ornamental group of

objects hung together on a wall, or any collection of objects typical of some event, art, industry, or branch of knowledge; a memento or memorial.<sup>77</sup>

**TROUBLE.** In general, that which causes disturbance, annoyance, or the like.<sup>78</sup>

**TROUT.** See Fish § 1.

sound.—U. S. v. Sears, Robuck & Co.,  
supra.

76. S.C.—Southwell v. Harley, 37 S.  
C.L. 180, 181.

64 C.J. p 1313 notes 77, 78.

77. U.S.—In re Vortex Cup Co. Cust  
& Pat App. 83 F.2d 821, 822.

78. Webster New Int D.

"Trouble shooter," also called "trou-  
ble hunter" or "trouble man," de-

finer see Electricity § 1, and Tele-  
graphs, Telephones, Radio and Tel-  
evision § 4.

## TROVER AND CONVERSION

This Title includes dealings with personal property of others, without authority, in a manner inconsistent with the rights of the owner or other person entitled to immediate possession, by wrongfully taking or retaining possession, altering the nature, quality, condition, etc., thereof; justification or excuse for such acts; nature and extent of liability for such conversion; and actions of trover, bail trover, and like actions for damages for conversion.

*Matters not in this Title, treated elsewhere in this work, see Descriptive-Word Index*

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## I. DEFINITIONS

## § 1. Conversion

Conversion is an unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of an owner's rights.

Conversion is "an unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of an owner's rights."<sup>1</sup> The legal wrong denominated "con-

L. Ala.—W. E. Herron Motor Co. v. Maynor, 167 So. 793, 232 Ala. 319.  
 Kan.—**Corpus Juris cited in** Rodgers v. Crum, 215 P.2d 190, 193, 168 Kan. 688—**Corpus Juris quoted in** Dougherty v. Norlin, 78 P.2d 65, 66, 147 Kan. 565—**Corpus Juris quoted in** Taylor v. Missouri Central Type Foundry Co., 53 P.2d 815, 819, 143 Kan. 175.  
 Mo.—Kegan v. Park Bank of St. Joseph, 8 S.W.2d 858, 871, 320 Mo. 623—State v. Pate, 188 S.W. 139, 141, 268 Mo. 431—**Corpus Juris quoted in** Blum v. Frost, 116 S.W. 2d 541, 546, 234 Mo.App. 695.  
 N.Y.—Hinkle Iron Co. v. Kohn, 171 N.Y.S. 537, 538, 184 App.Div. 181—Hutchings v. Torrey, 119 N.Y.S. 2d 119, 121, 203 Misc. 1038—In re Di Crocco's Estate, 12 N.Y.S.2d 276, 278, 170 Misc. 826—McGrevey v. New York Cent. R. Co., 256 N.Y.S. 211, 214, 143 Misc. 519—Bloom v. Wiener, 239 N.Y.S. 571, 576, 135 Misc. 757.  
 Okl.—Wade v. Ray, 168 P. 447, 449, 67 Okl. 39, L.R.A. 1914B 796.  
 S.C.—Ray v. Pilgrim Health & Life Ins. Co., 34 S.E.2d 218, 219, 206 S.C. 344—Powell v. A. K. Brown Motor Co., 20 S.E.2d 636, 637, 200 S.C. 75—Neel v. Clark, 8 S.E.2d 740, 742, 193 S.C. 412—Commercial Credit Co. v. Cook, 164 S.E. 17, 19, 165 S.C. 387.  
 Tenn.—Warters v. Boswell, 279 S.W. 793, 795, 152 Tenn. 476.  
 Tex.—Ashbrook v. Hammer, Civ. App., 106 S.W.2d 776, 778.  
 Utah—Madsen v. Madsen, 269 P. 132, 134, 72 Utah 96.  
 W.Va.—State v. Holley, 177 S.E. 302, 303, 115 W.Va. 464.  
 66 C.J. p. 11 note 2.  
 Equitable conversion see Conversion § 1-89.

## Other definitions

(1) Any distinct act of dominion wrongfully exerted over one's property, in denial of his right, or inconsistent with it.  
 Cal.—Zaslav v. Kroenert, 176 P.2d 1, 6, 29 Cal.2d 541, followed in Kroenert v. Zaslav, 176 P.2d 8, 29 Cal.2d 878—Gruber v. Pacific States Sav. & Loan Co., 88 P.2d 137, 139, 13 Cal.2d 144—Susumu Igayue v. Howard, 249 P.2d 558, 561, 114 Cal. App.2d 122.  
 Colo.—Dorris v. San Luis Valley Finance Co., 7 P.2d 407, 408, 90 Colo. 209—Lutz v. Becker, 2 P.2d 1081, 1082, 89 Colo. 360—Pennsylvania

Fire Ins. Co. v. Levy, 277 P. 779, 780, 85 Colo. 565, 75 A.L.R. 1416—Linsinger Implement Co. v. Queen City Foundry Co., 216 P. 527, 529, 73 Colo. 412.  
 Conn.—Coleman v. Francis, 129 A. 718, 719, 102 Conn. 612.  
 Del.—Drug, Inc. v. Hunt, 165 A. 87, 93, 5 W.Harr. 339.  
 Ga.—Comer v. Rome Chevrolet Co., 151 S.E. 678, 679, 40 Ga.App. 820.  
 Idaho—Klam v. Koppel, 118 P.2d 729, 63 Idaho 171.  
 Iowa.—Goeman v. Live Stock Nat. Bank, 29 N.W.2d 528, 238 Iowa 1088, 10 A.L.R.2d 452—Leonard v. Schman, 220 N.W. 77, 78, 206 Iowa 277—Mulenix v. Fairfield Nat. Bank of Fairfield, 209 N.W. 432, 433, 203 Iowa 897—Iowa Farm Credits Co. v. People's Sav. Bank of Menlo, 192 N.W. 139, 141, 196 Iowa 967.  
 La.—Edwards v. Max Thleme Chevrolet Co., App., 191 So. 569, 571.  
 Mich.—Nelson v. Texas Co., 239 N.W. 289, 291, 256 Mich. 65.  
 Mo.—Goud Roads Machinery Co. v. Broadway Bank, 267 S.W. 40, 42.  
 Mont.—Lahlutt v. Bunston, 277 P. 805, 806, 84 Mont. 579—Engelhart v. Sake, 235 P. 767, 768, 73 Mont. 139, 40 A.L.R. 590—Swords v. Occident Elevator Co., 232 P. 189, 192, 72 Mont. 189—Interstate Nat. Bank v. McCormick, 214 P. 949, 951, 67 Mont. 80, 34 A.L.R. 721.  
 Neb.—Jessen v. Blackard, 65 N.W.2d 345, 159 Neb. 103—Indiana Harbor Belt R. Co. v. Alpin, 296 N.W. 168, 162, 139 Neb. 14.  
 N.M.—State v. First Nat. Bank, 30 P.2d 728, 730, 38 N.M. 225.  
 N.Y.—Meyer v. Price, 165 N.E. 814, 819, 250 N.Y. 370—Employers' Fire Ins. Co. v. Cotten, 156 N.E. 629, 630, 245 N.Y. 102—Sears v. Sovie, 143 N.Y.S. 317, 318, 158 App.Div. 102—Kaufman v. Provident Sav. Bank & Trust Co. of Cincinnati, 23 N.Y.S.2d 637, 644, affirmed 31 N.Y.S.2d 664, 263 App.Div. 703, appeal denied 32 N.Y.S.2d 129, 263 App.Div. 809.  
 N.D.—Cunningham v. Jahr Motor Sales Co., 198 N.W. 347, 348, 50 N.D. 846.  
 Ohio.—North Canton Bank v. Cocklin, 187 N.E. 638, 639, 46 Ohio App. 27—Bear v. Colonial Finance Co., 182 N.E. 521, 523, 42 Ohio App. 482.  
 Okl.—Magle City Steel & Metal Corp. v. Mitchell, 265 P.2d 473, 474—Champlin Refining Co. v. Aladdin Petroleum Corp., 238 P.2d 827, 830, 205 Okl. 524—Hall v. Deal, 234 P.2d 384, 387, 205 Okl. 46—Brown

v. Higby, 127 P.2d 195, 197, 191 Okl. 173—**Corpus Juris cited in** American Nat. Bank of Enid v. Crews, 126 P.2d 733, 744, 191 Okl. 53—Smith v. Wixson, 123 P.2d 250, 251, 190 Okl. 314—American Nat. Bank of Wetumka v. Hightower, 87 P.2d 311, 316, 184 Okl. 294—Farmer's Nat. Grain Corporation v. Kirken-dall, 79 P.2d 570, 571, 183 Okl. 17—Madwine v. Osage Supply Co., 58 P.2d 131, 133, 177 Okl. 200—Pugh-Bishop Chevrolet Co. v. Duncan, 55 P.2d 1003, 1006, 176 Okl. 310—Federal Nat. Bank of Shawnee v. Lindsey, 43 P.2d 1036, 1037, 172 Okl. 30—Shefts Supply v. Fischer, 41 P.2d 902, 903, 171 Okl. 72—Beicher v. Spohn, 39 P.2d 87, 89, 170 Okl. 139—Wilson & Co. v. Russell, 290 P. 1106, 1107, 144 Okl. 284—Cassidy v. First Nat. Bank, 287 P. 392, 394, 143 Okl. 42—George W. Brown & Sons State Bank v. Polen, 270 P. 9, 11, 132 Okl. 121—Wilson Motor Co. v. Dunn, 264 P. 194, 198, 129 Okl. 211, 57 A.L.R. 17—First Nat. Bank v. Stockton, 245 P. 638, 640, 117 Okl. 120—Atchison, T. & S. F. R. Co. v. Tulsa Rig. Reel & Mfg. Co., 225 P. 696, 698, 99 Okl. 40—Buffalo Farmers' Co-op Elevator Co. v. Harmon, 218 P. 698, 699, 95 Okl. 138—Oklahoma State Bank of Enid v. Buckner, 217 P. 189, 190, 90 Okl. 109—Moxley v. Coleman, 212 P. 431, 432, 88 Okl. 118—Clark v. Shick Oil Co., 211 P. 496, 501, 88 Okl. 55—Collinsville Nat. Bank v. Esau, 176 P. 514, 515, 74 Okl. 45—Mayo v. Thede, 175 P. 348, 349, 73 Okl. 181—First Nat. Bank v. City Nat. Bank, 175 P. 253, 254, 71 Okl. 62—Swiss v. Aldridge, 162 P. 198, 199, 62 Okl. 89—McCracken v. Cline, 154 P. 1174, 1175, 55 Okl. 37.  
 Or.—Williams v. International Harvester Co., 141 P.2d 837, 841, 172 Or. 270.  
 S.C.—Spencer v. First Carolinas Joint-Stock Land Bank of Columbia, 165 S.E. 731, 732, 167 S.C. 36.  
 Tex.—Staats v. Miller, Civ. App., 240 S.W.2d 342, 344, reversed on other grounds, Sup., 243 S.W.2d 686—Wallace v. Hurston, Civ. App., 86 S.W.2d 803, 806.  
 Tex.—R-F Finance Corporation v. Jones, Civ. App., 50 S.W.2d 475, 477—American Surety Co. of New York v. Hill County, Civ. App., 254 S.W. 241, 245—Texas & N. O. R. Co. v. Patterson & Roberts, Civ. App., 192 S.W. 585, 587—Copeland v. Porter, Civ. App., 169 S.W. 915, 916.



version" is any unauthorized act of dominion or property belonging to another in denial of, or in ownership exercised by one person over personal consistent with, his right.<sup>2</sup>

W. Va.—Pine & Cypress Mfg. Co. v. American Engineering & Construction Co., 125 S.E. 375, 377, 97 W. Va. 471.

Wis.—Heuer v. Wiese, 60 N.W.2d 385, 386, 265 Wis. 6—Adams v. Maxey, 252 N.W. 598, 600, 214 Wis. 240. 65 C.J. p 11 note 2 [a] (4)

(2) A wrong done by an unauthorized act which deprives another of his property permanently or for an indefinite time

Ill.—Jonn v. Auto Dealers Inv. Co., 47 N.E.2d 568, 318 Ill. App. 95, reversed on other grounds 52 N.E.2d 635, 385 Ill. 211

Mont.—Harri v. Isaac 167 P.2d 137, 141, 111 Mont. 152  
65 C.J. p 11 note 2 [a] (3)

(3) The unlawful and wrongful exercise of dominion, ownership, or control by one person over the property of another to the exclusion of the exercise of the same rights by owner, either permanently or for an indefinite time.

Okl.—Pugh v. Hassell, 242 P.2d 701, 702, 206 Okl. 290—Griffith v. McBride, 108 P.2d 169, 110, 188 Okl. 227—First Nat. Bank v. Melton & Holmes, 9 P.2d 703, 707, 156 Okl. 63.

Tex.—Minter v. Sparks, Civ.App., 246 S.W.2d 954, 956, error refused no reversible error—Bradley v. McKinzie, Civ.App., 226 S.W.2d 458, 460—General Motors Acceptance Corp. v. Boyd, Civ.App., 120 S.W.2d 481, 459—Boyd v. Martin, Civ.App., 119 S.W.2d 1110, 1112—Zerr v. Howell, Civ.App., 88 S.W.2d 116, 118—Stidham v. Lewis, Civ.App., 23 S.W.2d 851, 852—Compton v. Farrington, Civ.App., 16 S.W.2d 345, 346—France v. Gibson, Civ.App., 101 S.W. 536

(4) A conversion in the sense of the law of trover, consists either in the appropriation of the thing to the party's own and beneficial enjoyment, or in its destruction, or in exercising dominion over it, in exclusion or defiance of the plaintiff's right, or in withholding the possession from the plaintiff, under a claim of title inconsistent with his own.

Ala.—Geneva Gin & Storage Co. v. Rawls, 199 So. 734, 735, 240 Ala. 320  
—American Ry. Express Co. v. Henderson, 107 So. 746, 749, 214 Ala. 268—First Nat. Bank v. Morgan, 104 So. 407, 405, 213 Ala. 125  
Ark.—Meyers v. Meyers, 216 S.W.2d 54, 55, 214 Ark. 273

Idaho—Carver v. Ketchum, 26 P.2d 139, 141, 53 Idaho 595.

Ind.—Shank Fireproof Warehouse Co. v. Harlan, 29 N.E.2d 1003, 1005, 108 Ind.App. 592—Sullivan & O'Brien v. Kennedy, 25 N.E.2d 267, 268, 107 Ind.App. 457—Prudential Ins. Co. of America v. Thatcher, 4 N.E.2d 574,

577, 104 Ind.App. 14—Beaver Products Co. v. Voorhees, 142 N.E. 717, 81 Ind.App. 181.

Utah.—Christensen v. Pugh, 36 P.2d 100, 102, 84 Utah 440.  
65 C.J. p 11 note 2 [a] (1).

(5) A conversion in the broad sense consists of an act of willful interference with any chattel without lawful justification, whereby any person entitled thereto is deprived of the possession of it

Del.—Van Dyke v. Pennsylvania R. Co., 46 A.2d 346, 352, 7 Terry 529.  
Minn.—Larson v. Archer-Daniels-Midland Co., 32 N.W.2d 649, 650, 226 Minn. 315  
Wash.—Martin v. Sikes, 229 P.2d 546, 549, 38 Wash.2d 274.

(6) Conversion is dealing by person with chattels not belonging to him in manner inconsistent with owner's rights.—Carver v. Ketchum, 26 P.2d 139, 141, 53 Idaho 595—Schlieff v. Blistine, 15 P.2d 726, 728, 52 Idaho 353.

(7) Conversion is unauthorized dealing with the goods of another by one in possession, whereby the nature or quality of the goods is essentially altered, or whereby one having the right of possession is deprived of all substantial use of his goods, temporarily or permanently.—Burghore v. H. M. Bylesby & Co., 1 N.W.2d 327, 332, 140 Neb. 603—Coulter v. Cummings, 142 N.W. 109, 111, 93 Neb. 646.

(8) Conversion is any unauthorized act which deprives a man of his property permanently.—Walker v. Cascade Milk Products Co., 152 P.2d 603, 606, 21 Wash.2d 615—Phillips v. Mihan, 80 P. 527, 528, 38 Wash. 402.

(9) Conversion is the exercise of dominion over property in violation of the rights of the owner or person entitled to possession.—Quality Motors v. Hays, 225 S.W.2d 326, 328, 216 Ark. 264—Thomas v. Westbrook, 177 S.W.2d 331, 332, 206 Ark. 841.

(10) Conversion consists in appropriation or destruction of the property of another, or in exercising dominion over it in defiance of owner's rights, or in withholding possession from him under an adverse claim of title.—Martin v. W. W. Lanahan & Co., 105 A. 777, 778, 133 Md. 525—Merchants' Nat. Bank of Baltimore v. Williams, 72 A. 1111, 1117, 110 Md. 334, 352

(11) Conversion consists in unwarranted interference by defendant with dominion over property of plaintiff, from which injury to plaintiff results.—Eichhorn v. De La Cantera, 255 P.2d 70, 75, 117 Cal.App.2d 50—Kee v. Becker, 129 P.2d 159, 162, 54 Cal.App.2d 466—Hull v. Laugharn, 39

P.2d 478, 480, 3 Cal.App.2d 310—Fisher v. Pickwick Hotel, 108 P.2d 1001, 1002, 42 Cal.App.2d Supp. 823.

(12) Conversion is any act of ownership or exercise of dominion over personal property of another in defiance of his rights.—Lindsey v. Commercial Discount Co., 55 P.2d 896, 897, 12 Cal.App.2d 345—Vuich v. Smith, 35 P.2d 365, 140 Cal.App. 453.

(13) Conversion is an appropriation of, and dealing with, the property of another as if it were one's own, without right.

Okl.—Daisy-Belle Petroleum Co. v. Thomas, 1 P.2d 700, 702, 151 Okl. 94

Tex.—Land v. Klein, 50 S.W. 638, 639, 21 Tex. Civ.App. 3.

(14) Further definitions somewhat similar to text.

Conn.—Bruneau v. W. & W. Transp. Co., 82 A.2d 923, 924, 138 Conn. 179.  
N.Y.—Fisher v. Title Guarantee & Trust Co., 28 N.Y.S.2d 410, 416, 262 App.Div. 293, affirmed 39 N.E.2d 237, 287 N.Y. 275—In re Barrett's Estate, 82 N.Y.S.2d 137.  
Tex.—Forrest v. Burns, Civ.App., 57 S.W.2d 1111, 1112, error dismissed 65 C.J. p 11 note 2 [a].

## Antonym of permission

"Conversion" and "permission" are direct antonyms and cannot exist simultaneously.—Hodges v. Ocean Accident & Guarantee Corporation, 18 S.E.2d 28, 66 Ga. App. 431.

Constructive conversion takes place when a person does such acts in reference to the goods of another as amount in law to appropriation of the property to himself

N.Y.—Laverty v. Snethen, 68 N.Y. 522, 524, 23 Am.R. 184.

Okl.—Wade v. Ray, 168 P. 447, 449, 67 Okl. 39, L.R.A. 1918B 796.  
65 C.J. p 11 note 2 [b].

2. Conn.—Brower v. Perkins, 68 A.2d 146, 151, 135 Conn. 675—Moore v. Waterbury Tool Co., 199 A. 97, 100, 124 Conn. 201, 116 A.L.R. 564  
—New Britain Real Estate & Title Co. v. Hartford Acceptance Corporation, 153 A. 658, 659, 112 Conn. 613.

Mo.—Corpus Juris quoted in Blum v. Frost, 116 S.W.2d 541, 546, 234 Mo. App. 695.

N.J.—Mueller v. Technical Devices Corp., 84 A.2d 620, 623, 8 N.J. 201

—Corpus Juris cited in Manufacturer's Casualty Ins. Co. v. Mink, 30 A.2d 510, 512, 129 N.J. Law 575.  
N.Y.—Corpus Juris cited in 160 Realty Corp. v. 162 Realty Corp., 113 N.Y.S.2d 618, 621, affirmed 113 N.Y.S.2d 678, 280 App.Div. 762—First Nat. Bank of Fleischmanns v. Creamery Package Mfg. Co., 21 N.Y.S.2d 976.

## § 2. Trover

Trover is the technical name of the action to recover damages for a wrongful conversion of the personal property of another.

## II. NATURE AND ELEMENTS OF CONVERSION IN GENERAL

## § 3. In General

The essence of conversion is not the acquisition of property by the wrongdoer, but a wrongful deprivation of it to the owner, whether temporary or permanent; in consequence it is of no importance that the defendant derived no benefit from his act.

Conversion is a tort,<sup>4</sup> a wrongful act,<sup>5</sup> which in the nature of things cannot spring from the exercise of a legal right.<sup>6</sup> The law of conversion, it

Trover is the technical name of the action to recover damages for a wrongful conversion of the personal property of another.<sup>3</sup>

has been said, is concerned with possession, not title,<sup>7</sup> conversion being an offense against possession of property.<sup>8</sup> It may be either direct or constructive,<sup>9</sup> and may be proved directly or by inference.<sup>10</sup> The essence of conversion is not the acquisition of property by the wrongdoer, but a wrongful deprivation of it to the owner,<sup>11</sup> although a temporary deprivation will be sufficient;<sup>12</sup> and in consequence it is of no importance what subsequent

R.I.—Kaminow v. Cooper-Kenworthy Inc., 89 A 2d 165, 167, 79 R.I. 352.  
S.C.—Blanchett v. Willis, 159 S.E. 469, 471, 161 S.C. 83, 75 A.L.R. 1428.

Tex.—Bradley v. McKinzie, Civ.App., 226 S.W.2d 458, 460—**Corpus Juris** quoted in Ashbrook v. Hammer, Civ.App., 106 S.W.2d 776, 778—**Corpus Juris** quoted in General Motors Acceptance Corporation v. Wilcox, Civ.App., 95 S.W.2d 1368, 1369.  
Utah—Christensen v. Fugh, 36 P.2d 100, 102, 84 Utah 440.  
65 C.J. p 11 note 3.

3. U.S.—Choice v. Texas Co., D.C. Tex., 2 F.Supp. 160.

Cal.—**Corpus Juris** cited in Veich v. Smith, 35 P.2d 365, 140 Cal.App. 453.

N.J.—**Corpus Juris** cited in Manufacturers' Casualty Ins. Co. v. Mink, 30 A.2d 510, 512, 129 N.J.Law 575.  
S.C.—Blanchett v. Willis, 159 S.E. 469, 471, 161 S.C. 83, 75 A.L.R. 1428.

65 C.J. p 12 note 4.

4. U.S.—Kock Enterprises, Inc., v. Braunschweiler, D.C. Cal., 108 F.Supp. 925.

Cal.—Home v. Kramer, 60 P.2d 851, 7 Cal.2d 361.

Ga.—Curthier v. Maddox, 55 S.E.2d 775, 80 Ga.App. 230.

La.—Bryson v. Bates-Crumley Chevrolet Co., App., 171 So. 605.

S.C.—Ray v. Pilgrim Health & Life Ins. Co., 34 S.E.2d 218, 206 S.C. 344.  
65 C.J. p 12 note 6.

5. N.J.—**Corpus Juris** cited in Manufacturers' Casualty Ins. Co. v. Mink, 30 A.2d 510, 512, 129 N.J.Law 575.

S.C.—Ray v. Pilgrim Health & Life Ins. Co., 34 S.E.2d 218, 206 S.C. 344.  
65 C.J. p 12 note 6.

6. S.C.—Ray v. Pilgrim Health & Life Ins. Co., supra.

Tex.—Ashbrook v. Hammer, Civ.App., 106 S.W.2d 776.  
65 C.J. p 12 note 6.

Acts constituting conversion see infra §§ 34-62.

7. N.Y.—Heinaman v. George W. Haxton & Son, 272 N.Y.S. 598, 242 App.Div. 62—Kaufman v. Provident Sav. Bank & Trust Co. of Cincinnati, 23 N.Y.S.2d 637, affirmed 31 N.Y.S.2d 664, 263 App.Div. 703, appeal denied 32 N.Y.S.2d 129, 263 App.Div. 809—Vangellow v. 35ast Side Sav. Bank, 11 N.Y.S.2d 962.

Tex.—Ashbrook v. Hammer, Civ.App., 106 S.W.2d 776—**Corpus Juris** cited in John Hancock Mut. Life Ins. Co. v. Howard, Civ.App., 85 S.W.2d 986, 988.  
65 C.J. p 12 note 7.

Necessity for title and right to possession in plaintiff see infra §§ 71-76.

**Infringement of right to possession** may constitute conversion—Geneva Production Credit Ass'n v. C. S. Mead & Co., 290 N.Y.S. 445, 248 App.Div. 910.

8. N.Y.—Kaufman v. Provident Sav. Bank & Trust Co. of Cincinnati, 23 N.Y.S.2d 637, affirmed 31 N.Y.S.2d 664, 263 App.Div. 703, appeal denied 32 N.Y.S.2d 129, 263 App.Div. 809.

Tex.—Stuats v. Miller, Civ.App., 240 S.W.2d 342, reversed on other grounds, Sup., 243 S.W.2d 666—Bradley v. McKinzie, Civ.App., 226 S.W.2d 458—Reef v. Hamilton, Civ. App., 47 S.W.2d 375.

9. N.Y.—Kaufman v. Provident Sav. Bank & Trust Co. of Cincinnati, 23 N.Y.S.2d 637, affirmed 31 N.Y.S.2d 664, 263 App.Div. 703, appeal denied 32 N.Y.S.2d 129, 263 App.Div. 809.  
65 C.J. p 12 note 9.

10. Md.—Hammond v. Du Bois, 161 A. 612, 131 Md. 116—Dietus v. Fuss, 8 Md. 148.

11. U.S.—U. S. v. Rogers & Rogers, D.C. Minn., 36 F.Supp. 79, appeal dismissed, C.C.A., 121 F.2d 1019.  
Cal.—Byer v. Canadian Bank of Commerce, 65 P.2d 67, 8 Cal.2d 297.

Fla.—Star Fruit Co. v. Eagle Lake Growers, 33 So.2d 858, 160 Fla. 130—Wilson Cypress Co. v. Logan, 162 So. 489, 120 Fla. 124.

Ga.—Whelchel v. Roark, 119 S.E. 451, 31 Ga.App. 75.

Ind.—**Corpus Juris** cited in Selp v. Gray, 83 N.E.2d 790, 792, 227 Ind. 52—Shank Fireproof Warehouse Co. v. Harlan, 29 N.E.2d 1003, 108 Ind.App. 592—Steel Const. Co. v. Rossville Alcohol & Chemical Corp., 12 N.E.2d 987, 105 Ind.App. 520, petition dismissed 16 N.E.2d 638, 105 Ind.App. 520—Fagan v. Baharaz, 1 N.E.2d 299, 102 Ind.App. 558—Chicago, I. & L. Ry. Co. v. Pope, 188 N.E. 594, 99 Ind.App. 280.

Ky.—Peoples Nat. Bank v. Guler, 145 S.W.2d 1042, 284 Ky. 702.

Md.—Saunders v. Mullintx, 72 A.2d 720, 195 Md. 235.

Mo.—Milne Lumber Co. v. Michigan Cent. R. Co., App., 57 S.W.2d 732.

N.D.—Taucher v. Northern Pac. Ry. Co., 129 N.W. 747, 21 N.D. 111.

S.D.—Richtstein v. Roesch, 25 N.W.2d 558, 71 S.D. 451, 169 A.L.R. 98.

Tex.—**Corpus Juris** quoted in Bradley v. McKinzie, Civ.App., 226 S.W.2d 458, 460.

Utah—Christensen v. Fugh, 36 P.2d 100, 84 Utah 440.

65 C.J. p 13 note 11.

**Loss of possession or title**

"Conversion" is a law action predicated on the loss of possession or title to personal chattels through the unlawful act of defendant.—Wheaton v. Chandler, 6 Ohio Supp. 217, reversed on other grounds 42 N.E.2d 193, 68 Ohio App. 474.

12. Mich.—Even-Heat Co. v. Wade Elec. Products Co., 58 N.W.2d 923, 236 Mich. 564.

N.Y.—Pierpoint v. Farnum, 254 N.Y. 558, 234 App.Div. 205.

Tex.—**Corpus Juris** quoted in Bradley v. McKinzie, Civ.App., 226 S.W.2d 458, 460.  
65 C.J. p 13 note 12.

application was made of the converted property,<sup>13</sup> or that defendant derived no benefit from his act.<sup>14</sup>

In order to constitute a conversion there must be either some repudiation of the owner's right,<sup>15</sup> or some exercise of dominion over it inconsistent with such right,<sup>16</sup> or some act done which has the effect of destroying or changing its character,<sup>17</sup> or, as otherwise expressed, there must be a wrongful taking or a wrongful detention, or an illegal assumption of ownership, or an illegal user or misuser.<sup>18</sup> Conversions, it has been said, are of two classes, where possession is originally wrongful,<sup>19</sup> and where possession originally rightful becomes wrongful by wrongful detention.<sup>20</sup>

# § 4. Necessity for Positive and Tortious Act

A conversion cannot be accomplished by mere words, but only by positive and tortious acts; mere nonfeasance or neglect of some legal duty does not amount to a conversion and will not support an action of trover.

Mere words, that is, declarations, will not, in and of themselves alone, amount to a conversion; it must be accomplished by acts.<sup>21</sup> Furthermore, the acts alleged to constitute a conversion must be positive and tortious.<sup>22</sup> An act constituting a conversion need not be accompanied by force or violence.<sup>23</sup> Mere nonfeasance or neglect of some legal duty does not amount to conversion and will not support an action of trover,<sup>24</sup> although it may con-

13. Ind.—Peoples State Bank v. Kelly, 136 N.E. 30, 78 Ind.App. 418.
- Okl.—Sisler v. Smith, 267 P.2d 1081.
- First National Bank v. Melton & Homes, 9 P.2d 703, 156 Okl. 63.
- Tenn.—Bostic & Bostic v. Watson, 2 Tenn.App. 203.
- Tex.—Corpus Juris quoted in Bradley v. McKinzie, Civ.App., 226 S.W.2d 458, 460.
- Wis.—Meyer v. Doherty, 113 N.W. 671, 133 Wis. 398.

**Destruction of the property** is not essential to a "conversion."—Gruber v. Pacific States Savings & Loan Co., 88 P.2d 137, 13 Cal.2d 144.

14. Tex.—Corpus Juris quoted in Bradley v. McKinzie, Civ.App., 226 S.W.2d 458.
- 65 C.J. p 13 note 14.

## Lack of profit

In trover suit, defendant's lack of profit or conversion of funds to his own use is not decisive answer.—Maryland Cas. Co. v. Wolff, 25 A.2d 665, 180 Md. 513.

15. Cal.—Kee v. Becker, 129 P.2d 159, 54 Cal.App.2d 466.
- Minn.—Steller v. Thomas, 45 N.W.2d 537, 232 Minn. 275—Borg & Powers Furniture Co. v. Relling, 7 N.W.2d 310, 213 Minn. 539.
- N.J.—Mueller v. Technical Devices Corp., 84 A.2d 620, 8 N.J. 201—Farrow v. Ocean County Trust Co., 2 A.2d 352, 121 N.J.Law 344—Potash Stores v. Bay Development Corp., 192 A. 379, 118 N.J.Law 242.
- Tex.—Morrison v. Farmer, Civ.App., 210 S.W.2d 245, reversed on other grounds 213 S.W.2d 813, 147 Tex. 122—Lingo Lumber Co. v. Harris, Civ.App., 11 S.W.2d 589.
- 65 C.J. p 13 note 15.

16. Minn.—Steller v. Thomas, 45 N.W.2d 537, 232 Minn. 275—Borg & Powers Furniture Co. v. Relling, 7 N.W.2d 310, 213 Minn. 539—Dow-Arneson Co. v. City of St. Paul, 253 N.W. 6, 191 Minn. 28.
- N.J.—Mueller v. Technical Devices Corp., 84 A.2d 620, 8 N.J. 201—Farrow v. Ocean County Trust Co.,

- 2 A.2d 352, 121 N.J.Law 344—Potash Stores v. Bay Development Corp., 192 A. 379, 118 N.J.Law 242.
- First Nat. Bank of Bloomingdale v. North Jersey Trust Co., Ridge-wood, 14 A.2d 765, 18 N.J.Misc. 449.
- Pa.—Allegheny By-Product Coke Co. v. J. H. Hillman & Sons Co., 118 A. 900, 275 Pa. 181.
- S.D.—Richstein v. Roesch, 25 N.W.2d 558, 71 S.D. 451, 169 A.L.R. 98.
- Tex.—Morrison v. Farmer, Civ.App., 210 S.W.2d 245, reversed on other grounds 213 S.W.2d 813, 147 Tex. 122—Lingo Lumber Co. v. Harris, Civ.App., 11 S.W.2d 589.
- 65 C.J. p 13 note 16.

17. Minn.—Steller v. Thomas, 45 N.W.2d 537, 232 Minn. 275—Borg & Powers Furniture Co. v. Relling, 7 N.W.2d 310, 213 Minn. 539—Dow-Arneson v. City of St. Paul, 253 N.W. 6, 191 Minn. 28.
- N.J.—Mueller v. Technical Devices Corp., 84 A.2d 620, 8 N.J. 201—Farrow v. Ocean County Trust Co., 2 A.2d 352, 121 N.J.Law 344—Potash Stores v. Bay Development Corp., 192 A. 379, 118 N.J.Law 242.
- S.D.—Richstein v. Roesch, 25 N.W.2d 558, 71 S.D. 451, 169 A.L.R. 98.
- 65 C.J. p 13 note 17.

18. Ala.—Consolidated Graphite Corporation v. Kelly, 150 So. 682, 227 Ala. 516—Wolff v. Zurga, 150 So. 144, 227 Ala. 370—First Nat. Bank v. Morgan, 104 So. 403, 213 Ala. 125—Davis v. Hurt, 21 So. 468, 114 Ala. 146.
- S.C.—Ray v. Pilgrim Health & Life Ins. Co., 34 S.E.2d 218, 206 S.C. 344—Neel v. Clark, 8 S.E.2d 740, 193 S.C. 412—Commercial Credit Co. v. Cook, 164 S.E. 17, 165 S.C. 387.
- 65 C.J. p 13 note 18.

19. Conn.—Moore v. Waterbury Tool Co., 199 A. 97, 124 Conn. 201, 116 A.L.R. 564—Coleman v. Francis, 129 A. 718, 102 Conn. 612.

20. Conn.—Moore v. Waterbury Tool Co., 199 A. 97, 124 Conn. 201, 116 A.L.R. 564—Coleman v. Francis, 129 A. 718, 102 Conn. 612.

21. Ala.—Jenkins v. Holly, 86 So. 390, 204 Ala. 519.
- 65 C.J. p 13 note 19.

22. U.S.—Keck Enterprises, Inc., v. Braunschweiger, D.C.Cal., 108 F. Supp. 925.
- Cal.—Home v. Kramer, 60 P.2d 854, 7 Cal.2d 861.
- Id.—Western Maryland Dairy v. Maryland Wrecking & Equipment Co., 126 A. 135, 146 Md. 318.
- N.J.—Mueller v. Technical Devices Corp., 84 A.2d 620, 8 N.J. 201—Farrow v. Ocean County Trust Co., 2 A.2d 352, 121 N.J.Law 344.
- N.D.—Nye v. Johnson, 4 N.W.2d 819, 72 N.D. 95—Farmers' State Bank of Knox v. Bowles, 203 N.W. 903, 52 N.D. 553, 40 A.L.R. 377.
- R.I.—Corpus Juris quoted in Nestle-Lemur Co. v. Corrigan, 193 A. 360, 363, 60 R.I. 312, 118 A.L.R. 387.
- Vt.—Cone v. Drohat, 85 A.2d 498, 17 Vt. 101—Dansro v. Scribner, 187 A. 803, 108 Vt. 408.
- 65 C.J. p 13 note 20.

23. La.—Victor v. Fairchild Motor Corp., App., 8 So.2d 566.
- Id.—Saunders v. Mullinix, 72 A.2d 720, 195 Md. 235.

24. U.S.—Corpus Juris cited in Goddard v. Metropolitan Trust Co. of California, C.C.A.Cal., 32 F.2d 902, 904—Lambros Seaplane Base v. The Batory, D.C.N.Y., 117 F.Supp. 16.
- Cal.—Emmert v. United Bank & Trust Co. of California, 57 P.2d 963, 14 Cal.App.2d 1.
- Ill.—McInerney v. Nachman, 3 N.E.2d 105, 286 Ill.App. 477.
- Me.—Rutland v. Boston & M. R. Co., 9 A.2d 131, 136 Me. 328.
- Id.—Western Maryland Dairy v. Maryland Wrecking & Equipment Co., 126 A. 135, 146 Md. 318.
- Neb.—American Surety of New York v. Smith, Landeryou & Co., 4 N.W.2d 859, 141 Neb. 719.
- N.D.—Nye v. Johnson, 4 N.W.2d 819, 72 N.D. 95—Farmers' State Bank of Knox v. Bowles, 203 N.W. 903, 52 N.D. 553, 40 A.L.R. 377.

stitute sufficient ground to maintain an action on the case.<sup>25</sup> Likewise, a mere breach of contract does not constitute conversion,<sup>26</sup> although resulting in a loss of property.<sup>27</sup>

### § 5. Want of Consent of Owner

Nonconsent to the possession and disposition of the property by the defendant is indispensable to a conversion.

In order to constitute conversion, nonconsent to the possession and disposition of the property by defendant is indispensable.<sup>28</sup> However, the property need not have come wrongfully into the possession

of the party making the conversion.<sup>29</sup> Except where it is obtained by duress,<sup>30</sup> or from one lacking capacity to consent,<sup>31</sup> or is obtained,<sup>32</sup> or acted on,<sup>33</sup> fraudulently, if the owner expressly or impliedly assents to or ratifies the taking, use, or disposition of his property, he cannot recover as for a conversion thereof;<sup>34</sup> and this is true although defendant exceeded the power given him.<sup>35</sup>

### § 6. Manual Taking and Asportation

Neither actual manual taking nor asportation is an essential element of conversion.

Neither actual manual taking<sup>36</sup> of property by

Or.—**Corpus Juris** cited in *Williams v. International Harvester Co.*, 141 P.2d 837, 172 Or. 270.

R.I.—**Corpus Juris** quoted in *Nestle-Lemur Co. v. Corrigan*, 198 A. 360, 363, 60 R.I. 312, 116 A.L.R. 867.

Tex.—*Texas & N. O. R. Co. v. Paterson & Roberts*, Civ.App., 192 S.W. 585.

Vt.—*Welmore v. B. W. Hooker Co.*, 18 A.2d 181, 111 Vt. 519—*Dunsro v. Scribner*, 187 A. 803, 108 Vt. 408.

65 C.J. p. 14 note 21

**Deprivation of opportunity to remove oil and gas** from containing soil does not constitute conversion.—*Eadus v. Hunter*, 256 N.W. 323, 268 Mich. 233.

**The duty not to convert property** or funds of another inheres in fact of ownership of such property in such other person.—*May v. City Nat. Bank & Trust Co.*, Okl., 258 P.2d 945.

25. Ill.—*McInerney v. Nachman*, 3 N.E.2d 105, 286 Ill.App. 477.

R.I.—**Corpus Juris** quoted in *Nestle-Lemur Co. v. Corrigan*, 198 A. 360, 363, 60 R.I. 312, 116 A.L.R. 867.

65 C.J. p. 14 note 22

26. Cal.—*Emmert v. United Bank & Trust Co. of California*, 57 P.2d 963, 14 Cal.App.2d 1.

Md.—*Western Maryland Dairy v. Maryland Wrecking & Equipment Co.*, 126 A. 135, 146 Md. 318.

N.D.—*Farmers' State Bank of Knox & Bowles*, 203 N.W. 903, 62 N.D. 553, 40 A.L.R. 377.

Or.—*Williams v. International Harvester Co.*, 141 P.2d 837, 841, 172 Or. 270.

Pa.—*Lee Tire & Rubber Co. v. Bonholtzer*, 81 Pa. Dist. & Co. 218, 38 Del. Co. 331.

65 C.J. p. 14 note 23.

#### **Failure to enter into lease**

Where oil and gas lessees paid consideration to lessors for extension of lease, and lessees recorded original lease taken from escrow, lessors were not entitled to damages for conversion for failure to enter into new lease, where lessors retained consideration and there was no fraud on

part of lessees.—*Eadus v. Hunter*, 256 N.W. 323, 268 Mich. 233.

27. Wis.—*Lund v. Keller*, 233 N.W. 769, 203 Wis. 458.

65 C.J. p. 14 note 24.

28. U.S.—**Corpus Juris** cited in *Adair v. Reorganization Inv. Co.*, CCA Mo., 125 F.2d 901, 905.

Cal.—**Corpus Juris** quoted in *French v. Smith Booth Usher Co.*, 131 P.2d 863, 866, 56 Cal.App.2d 23.

Okl.—**Corpus Juris** quoted in *Farmer's Nat. Grain Corporation v. Kirkendall*, 79 P.2d 570, 571, 183 Okl. 17.

S.C.—**Corpus Juris** quoted in *Williams v. Haverly Furniture Co.*, 188 S.E. 512, 514, 182 S.C. 100.

S.D.—*Buesmann v. Black Hills United Mining Co.*, 264 N.W. 518, 64 S.D. 82.

Tenn.—*New York Life Ins. Co. v. Bank of Commerce & Trust Co.*, 111 S.W.2d 371, 172 Tenn. 226, 115 A.L.R. 643.

Tex.—*Staats v. Miller*, Civ.App., 240 S.W.2d 342, reversed on other grounds, Sup., 243 S.W.2d 686.

65 C.J. p. 14 note 25.

29. Okl.—*Federal Nat. Bank of Shawnee v. Lindsey*, 43 P.2d 1036, 172 Okl. 30.

30. Miss.—*Latimer v. Stubbs*, 161 So. 869, 173 Miss. 436.

31. Miss.—*Latimer v. Stubbs*, supra.

32. Miss.—*Latimer v. Stubbs*, supra.

33. Miss.—*Latimer v. Stubbs*, supra.

34. Ala.—*Clay County Abstract Co. v. McKay*, 147 So. 407, 226 Ala. 394.

Cal.—*Watson v. Commonwealth Ins. Co. of New York*, 63 P.2d 295, 8 Cal.2d 61—**Corpus Juris** cited in *Farrington v. A. Teichert & Son*, 139 P.2d 80, 83, 59 Cal.App.2d 468.

—**Corpus Juris** quoted in *French v. Smith Booth Usher Co.*, 131 P.2d 863, 866, 56 Cal.App.2d 23.

Ill.—*McInerney v. Nachman*, 3 N.E.2d 105, 286 Ill.App. 477.

Mass.—*Edinburg v. Allen Squire Co.*, 12 N.E.2d 718, 239 Mass. 206.

Mich.—**Corpus Juris** cited in *Crowley v. Atkinson's Estate*, 296 N.W. 864, 867, 297 Mich. 15.

Miss.—**Corpus Juris** cited in *Latimer v. Stubbs*, 161 So. 869, 173 Miss. 436.

Mo.—*Kegan v. Park Bank of St. Joseph*, 8 S.W.2d 858, 320 Mo. 623.

Neb.—*Burchmore v. H. M. Byllesby & Co.*, 1 N.W.2d 327, 140 Neb. 603.

Okl.—**Corpus Juris** quoted in *Farmer's Nat. Grain Corporation v. Kirkendall*, 79 P.2d 570, 571, 183 Okl. 17, followed in *Farmer's Nat. Grain Corp. v. Singree*, 79 P.2d 572, 183 Okl. 18.

Pa.—*Porter v. Levering*, 199 A. 482, 330 Pa. 392.

S.C.—**Corpus Juris** quoted in *Williams v. Haverly Furniture Co.*, 188 S.E. 512, 514, 182 S.C. 100.

Tex.—*Mills v. Clark*, Civ.App., 257 S.W.2d 746, error refused no reversible error.

Utah—*Christensen v. Pugh*, 36 P.2d 100, 84 Utah 440.

65 C.J. p. 14 note 26.

#### **Acts held not ratification**

N.Y.—*Soma v. Handrulis*, 14 N.E.2d 46, 277 N.Y. 223, reargument denied 15 N.E.2d 71, 278 N.Y. 481.

35. Okl.—*Dodd-Lear Hardwood Lumber Co. v. Gyr*, 146 P. 16, 44 Okl. 630.

65 C.J. p. 15 note 27.

36. Cal.—*Gruber v. Pacific States Savings & Loan Co.*, 88 P.2d 137, 13 Cal.2d 144—*Mears v. Crocker First Nat. Bank of San Francisco*, 191 P.2d 501, 84 Cal.App.2d 637.

—*Kee v. Becker*, 129 P.2d 159, 64 Cal.App.2d 466.

Del.—*Drug, Inc. v. Hunt*, 168 A. 87, 5 W.W. Harr. 339.

Ga.—*Wheichel v. Roark*, 119 S.E. 451, 31 Ga.App. 75.

Mont.—*Englehart v. Sage*, 235 P. 767, 73 Mont. 139, 40 A.L.R. 590—*Interstate National Bank v. McCormick*, 214 P. 949, 67 Mont. 80.

N.Y.—*Stuckles v. Bernier*, 249 N.Y. S. 430, 139 Misc. 405—*Page v. Clark*, 165 N.Y.S. 1058, 100 Misc. 395.

one other than the owner nor its asportation<sup>37</sup> is an essential element of conversion. It constitutes conversion if the wrongdoer exercises dominion over the property in exclusion of, or in defiance of, the owner's right.<sup>38</sup>

### § 7. Intent

Although an intent to do an act amounting to a conversion, together with some positive act, is necessary to constitute a conversion, it is very generally held that it is not essential to a conversion that the motive or intent with which the act is done be wrongful.

While an intent to do some act amounting to a conversion is necessary,<sup>39</sup> mere intention to convert property, without more, is not enough to constitute a conversion, but the intent must be accompanied by some positive act.<sup>40</sup> It is the act of conversion itself that gives a right of action, and not the intent

to convert.<sup>41</sup> While an intent to convert consummated by some positive act, is necessary to constitute conversion, it is very generally held that it is not essential to conversion that the motive or intent with which the act was committed should be wrongful,<sup>42</sup> or willful or corrupt,<sup>43</sup> although, as in actions for damages for torts generally, discussed in Damages § 121, factors of this character may be taken into consideration in determining whether exemplary damages shall be allowed.<sup>44</sup>

It is sufficient if the owner has been deprived of his property by the act of another assuming an unauthorized dominion and control over it.<sup>45</sup> It is the effect of the act which constitutes the conversion.<sup>46</sup> In consequence, subject to some limitations discussed infra §§ 8, 10, it has very generally been held that the question of good faith,<sup>47</sup> and the ad-

Pa.—Baker v. Connolly, Com.Pl., 23 Northumb.Leg.J. 171.

R.I.—Nestle-Lemur Co. v. Corrigan, 198 A. 260, 60 R.I. 312, 116 A.L.R. 867.

S.D.—Richstein v. Roesch, 25 N.W. 2d 558, 71 S.D. 451, 169 A.L.R. 98.

Tenn.—Lewis Brown Co., Inc., v. Malloy, 8 Tenn.App. 36.

Tex.—Staats v. Miller, Civ.App., 240 S.W.2d 342, reversed on other grounds, Sup., 243 S.W.2d 686—American Surety Co. of New York v. Hill County, Civ.App., 254 S.W. 241, 245.

Wash.—Martin v. Sikes, 229 P.2d 546, 38 Wash.2d 274.

65 C.J. p 15 note 28.

#### Underground pipes

Town, rendering water pipes, laid by owner of water system, useless as part thereof by cutting main, was liable for conversion of pipes, even though not taken by it.—Town of West University Place v. Anderson, Tex.Civ.App., 60 S.W.2d 528.

37. Tex.—Staats v. Miller, Civ.App., 240 S.W.2d 342, reversed on other grounds, Sup., 243 S.W.2d 686.

65 C.J. p 15 note 29.

38. Del.—Drug, Inc. v. Hunt, 168 A. 87, 93, 5 W.W.Harr. 339.

Ga.—Whelchel v. Roark, 119 S.E. 451, 31 Ga.App. 75.

Mont.—Engelhart v. Sage, 235 P. 767, 768, 73 Mont. 139, 40 A.L.R. 590—Interstate National Bank v. McCormick, 214 P. 949, 951, 67 Mont. 80.

N.Y.—Page v. Clark, 165 N.Y.S. 1058, 1060, 100 Misc. 395.

R.I.—Nestle-Lemur Co. v. Corrigan, 198 A. 260, 362, 60 R.I. 312, 116 A.L.R. 867.

Wash.—Martin v. Sikes, 229 P.2d 546, 550, 38 Wash.2d 274.

65 C.J. p 15 note 30.

39. U.S.—Lambros Seaplane Base v. The Batory, D.C.N.Y., 117 F.Supp. 16.

Cal.—Susumu Igauye v. Howard, 249 P.2d 558, 114 Cal.App.2d 122.

N.J.—Gunter v. Morey Larue Laundry Co., 29 A.2d 718, 129 N.J.Law 345, affirmed 33 A.2d 893, 130 N.J. Law 557.

N.D.—Nye v. Johnson, 4 N.W.2d 819, 73 N.D. 95.

65 C.J. p 15 note 31.

40. Cal.—Kee v. Becker, 129 P.2d 159, 54 Cal.App.2d 466—Vagim v. Hasset Warehouse Co., 20 P.2d 992, 131 Cal.App. 197.

Utah.—Christensen v. Pugh, 36 P.2d 100, 84 Utah 440.

65 C.J. p 15 note 32.

41. Ala.—Wilson v. Ratcliff, 80 So. 623, 16 Ala.App. 619.

Wash.—Bayley v. National Pole Co., 156 P. 867, 90 Wash. 664.

42. U.S.—Morissette v. U. S., Mich., 72 S.Ct. 240, 342 U.S. 246, 96 L.Ed. 288.

Idaho.—Carver v. Ketchum, 26 P.2d 139, 53 Idaho 595.

Ind.—Sullivan & O'Brien v. Kennedy, 25 N.E.2d 267, 107 Ind.App. 457—Prudential Ins. Co. of America v. Thatcher, 4 N.E.2d 574, 104 Ind. App. 14.

Minn.—Larson v. Archer-Daniels-Midland Co., 32 N.W.2d 649, 226 Minn. 315.

Mo.—State v. Pate, 188 S.W. 139, 268 Mo. 431—Blackwell v. Laird, 163 S.W.2d 91, 286 Mo.App. 1217.

Ohio.—Etna Cas. & Sur. Co. v. Higbee Co., 76 N.E.2d 404, 80 Ohio App. 437, 174 A.L.R. 1429.

S.D.—Skinner v. First Nat. Bank & Trust Co. of Watertown, 249 N.W. 321, 61 S.D. 481.

Wash.—Crutcher v. Scott Pub. Co., 253 P.2d 925, 42 Wash.2d 89—Clapp v. Johnson, 57 P.2d 1235, 136 Wash. 327.

Wis.—Gulbrandsen v. Chaseburg State Bank, 295 N.W. 729, 236 Wis. 391.

65 C.J. p 15 note 35.

"The foundation for the action of conversion rests neither in the knowledge nor the intent of the defendant. It rests upon the unwarranted interference by defendant with the dominion over the property of the plaintiff from which injury to the latter results."—Poggi v. Scott, 139 P. 815, 818, 167 Cal. 372, 51 L.R.A.N.S., 925—Edwards v. Jenkins, 7 P.2d 702, 214 Cal. 713—Fisher v. Pickwick Hotel, 108 P.2d 1001, 1002, 42 Cal.App.2d Supp. 823.

A converter's innocence of wrong is not always a complete answer to suit in trover.—Maryland Cas. Co. v. Wolf, 25 A.2d 665, 189 Md. 513.

43. Cal.—McGaffey Canning Co. v. Bank of America, 234 P. 45, 109 Cal.App. 415.

65 C.J. p 16 note 36.

44. U.S.—Morissette v. U. S., Mich., 72 S.Ct. 240, 342 U.S. 246, 96 L.Ed. 288.

Ind.—Prudential Ins. Co. of America v. Thatcher, 4 N.E.2d 574, 104 Ind.App. 14.

Minn.—Larson v. Archer-Daniels-Midland Co., 32 N.W.2d 649, 226 Minn. 315.

65 C.J. p 16 note 38.

45. Mo.—State v. Pate, 188 S.W. 139, 268 Mo. 431.

Wis.—Gulbrandsen v. Chaseburg State Bank, 295 N.W. 729, 236 Wis. 391—Boldewahn v. Schmidt, 62 N.W. 177, 89 Wis. 444.

65 C.J. p 16 note 39.

46. Neb.—State v. Omaha Nat. Bank, 81 N.W. 319, 59 Neb. 483.

47. U.S.—Morissette v. U. S., Mich., 72 S.Ct. 240, 342 U.S. 246, 96 L. Ed. 288—First Camden Nat. Bank & Trust Co. v. J. R. Watkins Co., C.C.A.Pa., 122 F.2d 826.

ditional questions or elements of motive,<sup>48</sup> knowledge or ignorance,<sup>49</sup> or care or negligence,<sup>50</sup> are not involved in actions for conversion.

## § 8. — Ignorance of Owner's Rights or Title

The general rule is that one who exercises unauthorized acts of dominion over the property of another, in exclusion or denial of his rights or inconsistent therewith, is guilty of conversion although he acted in good faith and in ignorance of the rights or title of the owner.

The general rule is that one who exercises unauthorized acts of dominion over the property of another, in exclusion or denial of his rights or inconsistent therewith, is guilty of conversion although he acted in good faith and in ignorance of the rights or title of the owner.<sup>51</sup> The state of his knowledge with respect to the rights of such owner is of no importance, and cannot in any respect affect the case.<sup>52</sup> Circumstances may exist, however, by virtue of which it is the duty of a party to give notice, either actual or constructive, of his ownership or right to possession, and in this event the general rule does not apply.<sup>53</sup> Likewise, the

rule does not apply to one who, in good faith and without notice of the owner's rights, received in payment of a debt the proceeds of a sale of the property by the party who converted it.<sup>54</sup>

## § 9. — Delivery by Mistake to Person Other than Owner

Ordinarily, a delivery of property or the proceeds of a sale thereof by mistake to a person other than the owner, whereby it is lost to the latter, constitutes a conversion.

Ordinarily, a delivery of property or the proceeds of a sale thereof by mistake to a person other than the owner, whereby it is lost to the latter, constitutes a conversion.<sup>55</sup> However, where the assignee of a claim recovers judgment thereon and has a chattel mortgage securing the debt foreclosed, he is not entitled to hold the assignor as for conversion, because he, by mistake, receipted the claim and delivered the evidence thereof to the debtor instead of to the assignee, since the court has treated the delivery as a mistake and adjusted the rights of the parties as if no such delivery had occurred.<sup>56</sup>

Cal.—Byer v Canadian Bank of Commerce, 65 P.2d 67, 8 Cal.2d 297—Kee v. Becker, 129 P.2d 159, 54 Cal. App.2d 466—Vagim v. Haslett Warehouse Co., 20 P.2d 992, 131 Cal.App. 197—Fisher v. Pickwick Hotel, 108 P.2d 1001, 42 Cal.App.2d Supp. 823.

Fla.—Home Ins. Co. of New York v. Handley, 162 So. 516, 120 Fla. 226—Idaho.—Carver v. Ketchum, 26 P.2d 139, 53 Idaho 595

Ind.—Prudential Ins. Co. of America v. Thatcher, 4 N.E.2d 574, 101 Ind. App. 14.

Mich.—Nibbelink v. Coopersville State Bank, 281 N.W. 415, 286 Mich. 1.

Wash.—Clapp v. Johnson, 57 P.2d 1235, 186 Wash. 327.  
65 C.J. p 16 note 42.

### Holding of debtor's property

Conversion was committed in good faith under a mistaken belief in a right to the property, where convertor, under sincere and honest belief that he was entitled to do so, held debtor's property because of unpaid indebtedness—Stark v. Stark, 276 N.W. 820, 201 Minn. 491

### Restoration of property

The hope or expectation of restoring the wrongfully appropriated funds of another does not affect degree of offender's guilt.—State v. Rogers, 275 N.W. 910, 226 Wis. 39.

48. U.S.—Morissette v. U. S., Mich. 72 S.Ct. 240, 342 U.S. 246, 96 L.Ed. 288.

Minn.—Larson v Archer-Daniels-Midland Co., 32 N.W.2d 649, 226 Minn. 315

49. U.S.—Morissette v. U. S., Mich. 72 S.Ct. 240, 342 U.S. 246, 96 L.Ed. 288

Cal.—Byer v Canadian Bank of Commerce, 65 P.2d 67, 8 Cal.2d 297—Vagim v. Haslett Warehouse Co., 20 P.2d 992, 131 Cal.App. 197—Fisher v. Pickwick Hotel, 108 P.2d 1001, 42 Cal.App.2d Supp. 823

Idaho.—Carver v. Ketchum, 26 P.2d 139, 53 Idaho 595

Minn.—Larson v. Archer-Daniels-Midland Co., 32 N.W.2d 649, 226 Minn. 315

65 C.J. p 16 note 43.

50. Cal.—Byer v Canadian Bank of Commerce, 65 P.2d 67, 8 Cal.2d 297—Vagim v. Haslett Warehouse Co., 20 P.2d 992, 131 Cal.App. 197—Fisher v. Pickwick Hotel, 108 P.2d 1001, 42 Cal.App.2d Supp. 823.

Idaho.—Carver v. Ketchum, 26 P.2d 139, 53 Idaho 595

Mass.—Row v Home Sav. Bank, 29 N.E.2d 552, 306 Mass. 522, 131 A.L.R. 160.

65 C.J. p 17 note 44.

51. U.S.—National Atlas Elevator Co. v U. S., C.C.A.N.D., 97 F.2d 940—Bowles v. Brannagan, D.C. Neb., 60 F.Supp. 897

Ala.—Moore v. Stephens, 18 So.2d 577, 31 Ala.App. 446, certiorari denied 18 So.2d 578, 245 Ala. 656.

Ga.—Briscoe v. Pool, 177 S.E. 346, 50 Ga.App. 147

Ill.—Thompson v. Pollack, 53 N.E.2d 737, 322 Ill.App. 73

Mass.—Row v. Home Sav. Bank, 29 N.E.2d 552, 306 Mass. 522, 131 A.L.R. 160

N.Y.—Mebel Tire Co. v. Ralph, 1 N.Y.S.2d 143, 164 Misc. 845.

N.D.—Hoviand v. Farmers Union Elevator Co., 269 N.W. 842, 67 N.D. 71

Okl.—Corpus Juris cited in Wilson v. Holmes, 50 P.2d 1081, 174 Okl. 527

65 C.J. p 17 note 45.  
Taking of property from person other than owner generally see *infra* § 45.

52. N.J.—West Jersey R. Co. v. Trenton Car Works Co., 32 N.J. Law 517

R.I.—Donahue v. Shippee, 8 A. 541, 15 R.I. 453.

53. S.D.—La. Crosse Boot, etc., Mfg. Co. v. Mons Anderson Co., 83 N.W. 331, 13 S.D. 301, reheard 86 N.W. 641, 14 S.D. 597

65 C.J. p 17 note 47.

54. Or.—Walker v. Athena First Nat. Bank, 72 P. 635, 43 Or. 102.  
65 C.J. p 17 note 48.

55. Ala.—Louisville, etc., R. Co. v. Barkhouse, 13 So. 534, 100 Ala. 543.  
65 C.J. p 17 note 49.

Misdelivery by  
Bailee in general see Bailments § 44.

Carrier see Carriers § 174.

56. Tex.—Port Arthur Townsite Co. v. Johnson, Civ.App., 149 S.W. 562.

§ 10. — Property Taken by Mistake

The general rule is well settled that one who takes and disposes of the goods of another is guilty of a conversion thereof, although he did so under an honest but mistaken belief that the goods were his own.

The general rule is well settled that one who takes and disposes of the goods of another is guilty of a

conversion thereof, although he did so under an honest but mistaken belief that the goods were his own.<sup>57</sup> However, the rule does not apply where the mistake is mutual and where the owner's error is solely responsible for the taking and use of the property by defendant.<sup>58</sup>

III. PROPERTY SUBJECT OF CONVERSION

§ 11. In General

An action of trover lies only for the conversion of tangible personal property, or tangible evidence of title to intangible or real property.

An action of trover lies only for the conversion of personal chattels.<sup>59</sup> Such action does not lie for a wrongful deprivation of,<sup>60</sup> or for injuries to,<sup>61</sup> land or other real property. Generally every species of personal property which is the subject of private ownership is the subject of conversion,<sup>62</sup> if of a tangible nature,<sup>63</sup> or if it is tangible evidence of title to intangible or real property.<sup>64</sup>

§ 12. Written Instruments Generally

Generally speaking, all valuable written instruments may be the subjects of conversion.

Generally speaking, all valuable written instruments may be the subjects of conversion.<sup>65</sup> It has been so held in respect of county warrants,<sup>66</sup> instruments giving the right to deliver or call for stock,<sup>67</sup> insurance policies,<sup>68</sup> liquor licenses which under the ordinances granting them are transferable,<sup>69</sup> a liquor tax certificate,<sup>70</sup> and a bank deposit book.<sup>71</sup>

§ 13. Negotiable Instruments

Negotiable instruments are subjects of conversion.

Negotiable instruments are chattels, and as such are subjects of conversion as well as any other ar-

57. N.D.—Nye v. Johnson, 4 N.W. 2d 819, 72 N.D. 95.  
Tex.—Moore v. Conway, Civ. App., 108 S.W.2d 954.  
65 C.J. p 17 note 51.

58. N.Y.—Richardson v. Stevens, 6 N.Y.S. 361.  
65 C.J. p 18 note 52

59. Mich.—Eadus v. Hunter, 256 N.W. 323, 268 Mich. 233.  
Tex.—Wedgworth v. City of Fort Worth, Civ. App., 189 S.W.2d 40, error dismissed.  
65 C.J. p 18 note 53.

60. Cal.—Graner v. Hogsett, 191 P. 2d 497, 84 Cal. App. 2d 657.  
Mich.—Eadus v. Hunter, 256 N.W. 323, 268 Mich. 233.  
Mo.—Luhmann v. Schaefer, App., 142 S.W.2d 1088.  
Tex.—Cage Bros. v. Whiteman, 163 S.W.2d 638, 139 Tex. 522—Wedgworth v. City of Fort Worth, Civ. App., 189 S.W.2d 40, error dismissed—Batson v. Coley & Wilson, Civ. App., 59 S.W.2d 445—Smith v. Jagers, Civ. App., 16 S.W.2d 969.

61. Okl.—Etchen v. Ferguson, 159 P. 306, 59 Okl. 280.  
65 C.J. p 18 note 55

62. Ark.—Hooten v. State, 178 S.W. 310, 119 Ark. 334, L.R.A.1916C 544  
65 C.J. p 18 note 56.

63. Mich.—Corpus Juris cited in Powers v. Fisher, 272 N.W. 737, 739, 279 Mich. 442  
65 C.J. p 18 note 57.

Account for work and labor

Trover did not lie in favor of employee against defendant for alleged conversion of an account owing by employer for work and labor, since the "account" was not personally subject to conversion, but was a mere demand, claim or right of action possessing no tangible entity—Knox v. Moskna Stores, 2 So.2d 449, 241 Ala. 346.

Choses in action

Generally an action for conversion of choses in action cannot be maintained.

Ill.—Siegal v. Traveler Karenola Radio & Television Corp., 76 N.E.2d 802, 333 Ill. App. 158.  
Ohio—Broad v. Cincinnati Time Recorder Co., 77 N.E.2d 293, 82 Ohio App. 26.

Copyrighted books

Copying of abstract company's title abstract books, being at most violation of company's common-law copyright, will not support action of trover.—Clay County Abstract Co. v. McKay, 147 So. 407, 226 Ala. 394.

Good will

Mich.—Corpus Juris cited in Powers v. Fisher, 272 N.W. 737, 739, 279 Mich. 442.  
65 C.J. p 18 note 57 [a] (1).

List of customers

Trover would not lie for the conversion of a copy wrongfully made by employee of secret list of employer's customers and information concerning their accounts—Illinois Minerals Co. v. McCarty, 48 N.E.2d 421, 318 Ill. App. 423

84. N.Y.—Roystone v. John H. Woodbury Dermatological Institute, 122 N.Y.S. 414, 67 Misc. 265

65. Military certificate issued by state to soldier for the balance of his pay and subsistence may be subject of conversion—Wilson v. Rucker, 1 Call 500, 5 Va. 500

66. Ark.—Shelton v. Landers, 270 S.W. 522, 167 Ark. 638.

67. N.Y.—Vroom v. Sage, 91 N.Y.S. 456, 100 App. Div. 285, affirmed 76 N.E. 1111, 184 N.Y. 512.

68. Ala.—Hamilton v. Hamilton, 51 So.2d 13, 255 Ala. 284.

Fla.—Handley v. Home Ins. Co. of New York, 150 So. 902, 112 Fla. 225.

65 C.J. p 18 note 73.

69. Wash.—Jaffe v. Pacific Brewing & Malting Co., 124 P. 1122, 69 Wash. 308.

70. N.Y.—Bachmann-Bechtel Brewing Co. v. Gehl, 139 N.Y.S. 807, 154 App. Div. 849.

71. N.Y.—Newman v. Munk, 74 N.Y. S. 467, 36 Misc. 639.

ticles of personal property.<sup>72</sup> So it has been uniformly held that promissory notes are a subject of conversion,<sup>73</sup> as are also bills of exchange,<sup>74</sup> drafts,<sup>75</sup> and checks,<sup>76</sup> because by their seizure and their transfer to bona fide holders for value the owner may lose the thing in action which they represent.<sup>77</sup>

*Payment or discharge as affecting right of action*  
While a rule to the contrary obtains in some jurisdictions,<sup>78</sup> it has elsewhere been held that payment or other discharge of a note is not a bar to an action for conversion brought by the maker against the payee or holder who refuses to surrender it,<sup>79</sup> even though the fact of payment is denied.<sup>80</sup> However, trover will not lie for the conversion of a note on which judgment has been rendered.<sup>81</sup>

## § 14. Bonds

**Bonds are subjects of conversion.**

It has very generally been held that bonds of all descriptions are subjects of conversion and that trover may be maintained for conversion thereof.<sup>82</sup> It has been so held in respect of federal, state, municipal, and corporation bonds,<sup>83</sup> bonds for delivery of property,<sup>84</sup> bonds given for the dissolution of at-

tachments,<sup>85</sup> and bonds conditioned for the payment of money secured by mortgage.<sup>86</sup>

## § 15. Muniments of Title

**Trover may be maintained for the conversion of muniments of title to tangible property, both real and personal.**

Trover may be maintained for the wrongful conversion of muniments of title to tangible property, such as title deeds to real estate,<sup>87</sup> bonds for title,<sup>88</sup> mortgages,<sup>89</sup> a certificate issued by the state entitling the holder to receive a deed of lands on making specified payments,<sup>90</sup> land scrip,<sup>91</sup> a contract for the sale of land,<sup>92</sup> or instruments evidencing title to personalty,<sup>93</sup> such as a bill of lading,<sup>94</sup> or certificates of corporate stock, considered *infra* § 16. It has been held, however, that, where there is a dispute about the delivery of a title deed involving a determination of the title to the land conveyed by it, trover will not lie for the conversion of the deed.<sup>95</sup>

## § 16. Corporate Stock and Certificates

**Certificates of stock, as well as shares of stock, may be the subjects of conversion.**

A certificate of stock, like any other muniment of title, is a subject of conversion,<sup>96</sup> and this is true

72. Md.—Thomson v. Gortner, 21 A. 371, 73 Md. 474.  
N.M.—Corpus Juris quoted in State v. First Nat. Bank, 30 P.2d 728, 730, 38 N.M. 225.

73. Ill.—Knight v. Seney, 121 N.E. 813, 290 Ill. 11.  
65 C.J. p. 18 note 80.

74. N.M.—Corpus Juris quoted in State v. First Nat. Bank, 30 P.2d 728, 730, 38 N.M. 225.  
65 C.J. p. 19 note 81.

75. N.M.—Corpus Juris quoted in State v. First Nat. Bank, 30 P.2d 728, 730, 38 N.M. 225.  
65 C.J. p. 19 note 82.

76. Ala.—Tarrant American Sav. Bank v. Smokeless Fuel Co., 172 So. 603, 233 Ala. 507.  
Md.—Maryland Cas. Co. v. Wolff, 25 A.2d 665, 180 Md. 513.

N.M.—Corpus Juris quoted in State v. First Nat. Bank, 30 P.2d 728, 730, 38 N.M. 225.  
65 C.J. p. 19 note 83.

77. N.M.—Corpus Juris quoted in State v. First Nat. Bank, 30 P.2d 728, 730, 38 N.M. 225.

N.Y.—Vogedes v. Benkes, 56 N.Y.S. 662, 38 App. Div. 330.

78. Ala.—W. E. Herron Motor Co. v. Maynor, 167 So. 793, 232 Ala. 319.  
65 C.J. p. 20 note 85.

79. Me.—Otisfield v. Mayberry, 63 Me. 197.  
65 C.J. p. 20 note 86.

80. Vt.—Spencer v. Dearth, 43 Vt. 98.

81. N.C.—Platt v. Potts, 33 N.C. 266, 53 Am. D. 412.  
65 C.J. p. 20 note 88.

82. Pa.—Mackay v. Benjamin Franklin Realty & Holding Co., 135 A. 613, 288 Pa. 207, 50 A.L.R. 1164.  
65 C.J. p. 20 note 89.

83. Okl.—School Dist. No. 4 of Marshall County v. Stanley, 275 P. 1042, 136 Okl. 14.  
65 C.J. p. 20 note 90.

84. N.Y.—Pierson v. Townsend, 2 Hill 550.

85. Minn.—Johnson v. Dun, 78 N.W. 98, 75 Minn. 533.

86. N.Y.—Barber v. Hathaway, 62 N.Y.S. 329, 47 App. Div. 165.

87. Ga.—Corpus Juris cited in Dobbs v. First Nat. Bank of Atlanta, 16 S.E.2d 485, 487, 65 Ga. App. 796.  
65 C.J. p. 20 note 95.

88. N.Y.—Clowes v. Hawley, 12 Johns. 424.

89. N.Y.—Barber v. Hathaway, 62 N.Y.S. 329, 47 App. Div. 165, affirmed 61 N.E. 1127, 169 N.Y. 575.  
65 C.J. p. 21 note 97.

90. Wis.—Mowry v. Wood, 12 Wis. 413.

91. Tex.—Nelson v. King, 25 Tex. 655.

92. N.Y.—Hazelwell v. Coursen, 45 N.Y. Super. 22, reversed on other grounds 81 N.Y. 630.

93. Ill.—Hayes v. Massachusetts Mut. Life Ins. Co., 18 N.E. 322, 125 Ill. 626, 1 L.R.A. 303.

94. Tex.—Alderson v. Gulf, C. & S. F. Ry. Co., Civ. App., 23 S.W. 617.

95. N.C.—Hooker v. Latham, 23 S.E. 1004, 118 N.C. 179.

96. U.S.—Reading Finance & Securities Co. v. Harley, Pa., 186 F. 673, 108 C.C.A. 529.

Cal.—Mears v. Crocker First Nat. Bank of San Francisco, 191 P.2d 501, 84 Cal. App. 2d 637.

Mo.—Frugh, Combett & Land, Inc. v. Linwood State Bank, App., 241 S.W.2d 83.

Nev.—Berch v. Marye, 9 Nev. 312.  
Pa.—Mills v. Jacobs, 200 A. 233, 131 Pa. Super. 469, modified on other grounds 4 A.2d 152, 333 Pa. 231, 122 A.L.R. 333.  
65 C.J. p. 21 note 10.

Conversion of corporate stock by refusal to transfer on books of corporation see Corporations § 438.

### Effect

The conversion of a stock certificate constitutes conversion of the



although no use was or can be made of the certificate because it has not been indorsed.<sup>97</sup> Although there is some authority to the contrary,<sup>98</sup> particularly at common law,<sup>99</sup> it has been held, sometimes by virtue of statute,<sup>1</sup> that an action of trover will lie for the conversion of shares of stock in corporations;<sup>2</sup> and this is true even though the owner's possession of the certificate evidencing his title has not been disturbed,<sup>3</sup> but the mere withholding of an undorsed stock certificate cannot amount to a conversion of the stock itself.<sup>4</sup>

## § 17. Copies of Accounts and Account Books

A book of accounts may be the subject of conversion.

There can be a conversion of a book of accounts,<sup>5</sup> and trover lies for the conversion of an account audited and allowed, and delivered to the debtor, who paid it in part, but refused to pay the balance on demand, or to return the account to the owner.<sup>6</sup> A debtor who has made copies of his creditor's account against him may, if the creditor obtain possession of such copies, and refuse to redeliver them to the debtor, maintain trover therefor against the creditor.<sup>7</sup> The seizure of books of account and the service of notice on the debtors of the husband, who has assigned his claims against them to his wife, by a sheriff acting under a warrant of attachment against the husband, do not amount to a conversion of the accounts.<sup>8</sup>

## § 18. Certificate of Membership in Social Club

An untransferred certificate of membership in a social club is not the subject of an action of trover.

Where membership certificates in a social club are issued to one in payment for services in organiz-

ing and securing members, they cannot, until transferred by him, be considered as representing membership, and are not subject to an action of trover.<sup>9</sup>

## § 19. Records

In general, trover will not lie for a public record; however, this rule must be understood as applying to individuals who suppose themselves interested in the preservation of the record, but not to a person having the official custody of it.

In general, trover will not lie for a public record because it is not private property.<sup>10</sup> It has been said, however, that the rule must be understood as extending to individuals, who suppose themselves interested in the preservation of the record, but not to a person having the official custody of it,<sup>11</sup> and it has been held that the rule should be taken as being predicated of the record strictly so-called, which is made and preserved by public authority, and not of such papers as have relation to the record, but are not parcel of it.<sup>12</sup> Accordingly it has been held that trover may be brought for the conversion of an execution,<sup>13</sup> even though the execution may have expired previous to the commencement of the action.<sup>14</sup>

## § 20. Judgments

Since judgments are not private property, it is generally held, although there is authority to the contrary, that such judgments, whether or not of a court of record, cannot be the subject of an action of trover.

In accordance with the principle that trover will not lie for a public record because it is not private property, discussed supra § 19, it has been held that judgments of courts of record are not private property for which an action of trover will lie.<sup>15</sup> It has also been held that judgments of a justice of the peace, although not records, are quasi records,

stock—Bradley v. Roe, 13 N.Y.S.2d 693, 257 App.Div. 1005, reversed on other grounds 27 N.E.2d 35, 282 N.Y. 525, 129 A.L.R. 633.

97. Mich.—Duggett v. Davis, 18 N.W. 548, 53 Mich. 35, 51 Am.R. 91. N.Y.—Pierpont v. Hoyt, 182 N.E. 235, 260 N.Y. 26.

98. Pa.—Mills v. Jacobs, 200 A. 233, 235, 131 Pa.Super 469, modified on other grounds 4 A.2d 152, 333 Pa. 231, 122 A.L.R. 333.

99. Del.—Drug, Inc., v. Hunt, 168 A. 87, 5 W.W.Harr. 339—Haskell v. Middle States Petroleum Corporation, 165 A. 562, 5 W.W.Harr. 380.

1. Del.—Haskell v. Middle States Petroleum Corporation, supra.

2. Cal.—Mears v. Crocker First Nat. Bank of San Francisco, 191 P.2d 501, 84 Cal.App.2d 637—Bell v.

Bayly Bros of California, 127 P.2d 662, 53 Cal.App.2d 149.

Mass.—Corpus Juris cited in Lane v. Volunteer Co-Operative Bank, 30 N.E.2d 821, 824, 307 Mass. 508. S.C.—Daniel v. Post, 187 S.E. 915, 181 S.C. 468.

65 C.J. p. 21 note 13—14 C.J. p. 479 note 53 [a] (4).

3. Cal.—Payne v. Elliott, 54 Cal. 439, 35 Am.R. 80.

4. Utah.—Pardee v. Nelson, 205 P. 322, 59 Utah 497, 21 A.L.R. 385.

65 C.J. p. 22 note 15.

5. Ark.—Plunkett-Jarrell Grocery Co. v. Terry, 263 S.W.2d 239.

6. Mo.—O'Donoghue v. Corby, 22 Mo. 393.

7. Vt.—Fullam v. Cummings, 36 Vt. 697.

65 C.J. p. 22 note 17.

8. N.Y.—Vogedes v. Beakes, 56 N.Y.S. 662, 38 App.Div. 380.

65 C.J. p. 22 note 18.

9. Ill.—Genslinger v. New Illinois Athletic Club of Chicago, 171 N.E. 514, 339 Ill. 426.

65 C.J. p. 22 note 19.

10. N.C.—Cobb v. Cornegay, 28 N.C. 358, 45 Am.D. 497.

Vt.—Keeler v. Fassett, 21 Vt. 539, 52 Am.D. 71.

11. Vt.—Keeler v. Fassett, supra.

65 C.J. p. 22 note 21.

12. Vt.—Keeler v. Fassett, supra.

13. Vt.—Keeler v. Fassett, supra.

14. Vt.—Keeler v. Fassett, supra.

65 C.J. p. 22 note 24.

15. N.Y.—Austin v. Rawdon, 44 N.Y. 63.

N.C.—Patt v. Potts, 33 N.C. 266, 53 Am.D. 412.

and are not private property for which an action of trover will lie.<sup>16</sup> There is, however, authority apparently to the effect that a judgment, although of a court of record, may be the subject of an action of trover.<sup>17</sup>

### § 21. Mail Matter

Mail matter is a subject of conversion.

Mail matter is a subject of conversion, and a wrongful detention of mail matter by a postmaster will render him liable to an action for trover.<sup>18</sup>

### § 22. Leasehold Estates

Leasehold estates are not subjects of conversion.

Leasehold estates are not subjects of conversion,<sup>19</sup> the reasons assigned being that they are not "personal chattels,"<sup>20</sup> and are not tangible property.<sup>21</sup>

### § 23. Money

Money may be the subject of conversion, but trover will not lie to enforce a mere obligation to pay money.

Money of any kind is as much the subject of conversion as any other kind of personal chattels,<sup>22</sup> and trover will lie whenever plaintiff's money has come into defendant's possession, and has been converted by him, without any assent on plaintiff's part, express or implied, that the relation of debtor and creditor should thereby arise.<sup>23</sup> However, money is a subject of conversion only when it is capable

of being identified, and described as a specific chattel,<sup>24</sup> although identification as far as is needful to determine the rights of the parties will be sufficient.<sup>25</sup> It is not necessary for purposes of identification that money should be specifically earmarked.<sup>26</sup>

In other words, trover lies for the conversion of determinate sums, although the specific coin and bills are not identified.<sup>27</sup> There can be, however, no conversion of money, unless there was an obligation on the part of defendant to deliver specific money to plaintiff,<sup>28</sup> or unless the money was wrongfully received by defendant.<sup>29</sup> Trover does not lie to enforce a mere obligation to pay money,<sup>30</sup> or for money had and received for payment of a debt.<sup>31</sup> On the other hand, where defendant is under an obligation to deliver specific money to plaintiff, and fails or refuses to do so,<sup>32</sup> or when wrongful possession thereof has been obtained by defendant,<sup>33</sup> there is a conversion for which trover lies.

### § 24. Earth, Sand, and Gravel

Earth, sand, or gravel, while remaining in its original bed is a part of the realty and as such cannot be a subject of conversion; but where it has been dug up by the owner, or wrongfully severed, it becomes personalty for the conversion of which an action will lie.

Earth, sand, or gravel, while remaining in its original bed, is a part of the realty and as such cannot be a subject of conversion;<sup>34</sup> but where it

16. N.C.—Platt v. Potts, *supra*.  
65 C.J. p 22 note 27.

17. Minn.—Johnson v. Dun, 78 N.W. 98, 75 Minn. 533.

18. N.Y.—Teall v. Felton, 1 N.Y. 537, 49 Am.D. 352, affirmed 12 How. 284, 13 L.Ed. 990.  
Refusal to deliver mail generally see Post Office § 7.

19. Cal.—Corpus Juris cited in Vuch v. Smith, 35 P.2d 365, 366, 140 Cal.App. 453  
65 C.J. p 22 note 30.

20. Or.—Lun v. Mahaffey, 185 P. 746, 94 Or. 292.

21. Okl.—Whayne v. Seamans, 217 P. 859, 95 Okl. 168.

22. Ala.—Hall v. Hall, 2 So.2d 908, 241 Ala. 397.

Pa.—Pearl Assur. Co. v. National Ins. Agency, 28 A.2d 334, 150 Pa.Super. 265, reheard 30 A.2d 333, 151 Pa.Super. 146.

Wash.—Seekamp v. Small, 237 P.2d 489, 39 Wash.2d 678.  
65 C.J. p 22 note 33.

23. N.Y.—De Fino v. Stern, 38 N.Y.S. 616, 5 App.Div. 56.  
65 C.J. p 23 note 34.

24. Ala.—Russell v. The Praetorians, 28 So.2d 786, 248 Ala. 576.

Tex.—Smith v. Burns, Civ.App. 107 S.W.2d 397.  
65 C.J. p 23 note 35.

25. N.Y.—Gordon v. Hostetter, 37 N.Y. 99, 4 Transer A. 375, 4 Abb.Pr. N.S. 263.

26. N.Y.—Gordon v. Hostetter, *supra*—Kelsey v. Mansfield Bank, 83 N.Y.S. 281, 85 App.Div. 334.

27. N.Y.—Gordon v. Hostetter, 37 N.Y. 99, 4 Transer A. 375, 4 Abb.Pr. N.S. 263.  
65 C.J. p 23 note 38.

28. Mich.—Corpus Juris quoted in Garra v. Bekires, 23 N.W.2d 239, 242, 315 Mich. 141—Thrift v. Hamer, 282 N.W. 219, 286 Mich. 495.

N.Y.—Corpus Juris cited in Hutchings v. Torrey, 119 N.Y.S.2d 119, 121, 203 Misc. 1038.  
Wash.—Seekamp v. Small, 237 P.2d 489, 39 Wash.2d 578.  
65 C.J. p 23 note 39.

Current money

The action of conversion will not lie for current money.—Schlavone v. De Mayo, 82 Pa.Dist. & Co. 561.

#### Money collected on checks

An action for conversion of money allegedly collected by a bank on checks does not lie—U. S. Fidelity & Guaranty Co. v. Mississippi Valley Trust Co., Mo.App., 153 S.W.2d 752.

29. N.Y.—Stoltz v. Reynolds, 169 N.Y.S. 170.

Wash.—Seekamp v. Small, 237 P.2d 489, 39 Wash.2d 578.

65 C.J. p 21 note 40.

30. Tex.—Story v. Palmer, Civ.App. 284 S.W. 331.

65 C.J. p 24 note 41.

31. Mo.—Anderson Electric Car Co. v. Savings Trust Co., 213 S.W. 60, 201 Mo.App. 400.

65 C.J. p 24 note 42.

32. Mich.—Garra v. Bekires, 23 N.W.2d 239, 315 Mich. 141.

65 C.J. p 24 note 43.

33. Me.—Hazelton v. Locke, 71 A. 661, 104 Me. 164, 20 L.R.A., N.S., 35, 15 Ann.Cas. 1009.

65 C.J. p 24 note 44.

34. Tex.—Corpus Juris quoted in Cage Bros. v. Whiteman, 163 S.W. 2d 638, 641, 139 Tex. 522.

65 C.J. p 25 note 46.  
Conversion of ore see Mines and Minerals § 138.

has been severed from the soil, gathered up and secured for use elsewhere,<sup>35</sup> or where it has been wrongfully severed and removed,<sup>36</sup> it becomes personally for the conversion of which an action will lie. It has been held, however, that where, by statute, a city which has condemned land as a gravel and clay pit is entitled to take therefrom "earth and gravel" for street construction or repair, it may take any earth, gravel, or stones suitable for the purposes, and capable of being dug out of the ground and removed by ordinary excavation, and an action of trover does not lie for removal of stones as well as earth and gravel.<sup>37</sup> Where plaintiff purchases top soil and strips it from the land, leaving it thereon in piles until it can be removed, the piles of dirt are personally for which suit for conversion may be maintained.<sup>38</sup>

## § 25. Manure

Manure, when severed from the soil, gathered up, and secured for use elsewhere, becomes a personal chattel, and as such is a subject of conversion.

According to the prevailing view, manure made in the course of husbandry on a farm is real property, at least if it is the produce of the land, as considered in Property § 7 c, but like earth, sand, or gravel, discussed supra § 24, when severed from the soil, gathered up, and secured for use elsewhere, it becomes a personal chattel, and as such is a subject of conversion.<sup>39</sup>

## § 26. Fixtures

Whether or not fixtures are the subject of conversion is considered in Fixtures § 60.

Examine Pocket Parts for later cases.

## § 27. Buildings and Building Materials

All kinds of buildings which are personal property are subject to conversion, and the owner or possessor

of land who wrongfully prevents their removal may be compelled to respond in trover for their value.

All kinds of building which are personal property, as considered in Fixtures § 11, are subject to conversion, and the owner or possessor of the land who wrongfully prevents their removal may be compelled to respond in trover for their value.<sup>40</sup> However, the owner of a building cannot at the same time treat it as realty and personally, and if he rents the house to a tenant, he necessarily rents it as a tenement, to stand where it was, and cannot maintain an action of trover therefor.<sup>41</sup>

*Material out of which house built.* Trover will lie for the material out of which a house was built, if the house was subject to conversion at the time it was wrecked,<sup>42</sup> but not otherwise.<sup>43</sup>

## § 28. Timber, Crops, Fruit, and Turpentine

Timber, crops, fruit, and turpentine are personal property and may be the subject of conversion.

The unauthorized cutting and removal of standing trees from the land of another constitutes a conversion for which an action of trover will lie.<sup>44</sup> While trees standing on land are real estate, as considered in Property § 7 c, they become personal property as soon as they are severed from the soil,<sup>45</sup> but the title thereto remains unchanged,<sup>46</sup> and a wrongful assumption of dominion over them after severance constitutes a conversion.<sup>47</sup> It has been held, however, that, where trees were cut from the owner's land, and, without the knowledge or procurement of defendant, were converted into timber and incorporated into fences and a building on his property, the trees so cut lost their character as personal property and became a fixture or part of the realty, and not subject to an action of trover.<sup>48</sup>

*Crops.* The severing and removal of growing crops, such as grain, hay, cotton, and the like, constitutes a conversion for which the owner may maintain an action of trover.<sup>49</sup> It has been held that

35. Ill.—*Corpus Juris* cited in *Palumbo v. Harry M. Quinn, Inc.*, 55 N.E.2d 825, 828, 323 Ill.App. 404.  
65 C.J. p 25 note 47.

36. Tex.—*Corpus Juris* quoted in *Cage Bros v. Whiteman*, 163 S.W. 2d 638, 641, 139 Tex. 522.  
65 C.J. p 25 note 47.

37. Mass.—*Hatch v. Hawkes*, 126 Mass. 177.  
65 C.J. p 25 note 48.

38. Ill.—*Palumbo v. Harry M. Quinn, Inc.*, 55 N.E.2d 825, 323 Ill.App. 404.

39. Ill.—*Corpus Juris* cited in *Palumbo v. Harry M. Quinn, Inc.*,

55 N.E.2d 825, 828, 323 Ill.App. 404.  
65 C.J. p 25 note 52.

40. Mich.—*Osborn v. Potter*, 59 N.W. 606, 101 Mich. 300.  
65 C.J. p 26 note 64.

41. Mich.—*Bracelin v. McLaren*, 26 N.W. 533, 69 Mich. 327.

42. Mo.—*Luhmann v. Schaefer*, App., 142 S.W.2d 1088.  
65 C.J. p 26 note 66.

43. Mass.—*Peirce v. Goddard*, 22 Pick. 559, 33 Am.D. 764.

44. Tex.—*Cage Bros v. Whiteman*, 163 S.W.2d 638, 139 Tex. 522.  
65 C.J. p 26 note 68.

45. Me.—*Moody v. Whitney*, 34 Me. 563.

46. Minn.—*Jones v. Bradley Timber & Ry. Co.*, 131 N.W. 494, 114 Minn. 415.

47. Me.—*Whidden v. Seelye*, 40 Me. 247, 63 Am.D. 661.

48. Me.—*Moody v. Whitney*, 34 Me. 563.

49. Ala.—*Blynum v. Gay*, 49 So. 757, 161 Ala. 140, 135 Am.S.R. 121.

49. Tex.—*Cage Bros v. Whiteman*, 163 S.W.2d 638, 139 Tex. 522.  
65 C.J. p 27 note 74.

Fully matured corn may be subject of conversion like any other person-

the severing of crops alone without removing them, or attempting to do so, and without preventing the owner from removing them, amounts to a conversion,<sup>50</sup> and in jurisdictions where crops are considered personal property, severance or removal of growing crops is not necessary in order to constitute a conversion, but it will be sufficient that defendant exercise some act of dominion over the property, such as keeping the owner out of possession<sup>51</sup> or refusing to allow him to remove the property.<sup>52</sup> Crops which are in an immature state and could not profitably be severed from the soil are not subject to conversion.<sup>53</sup>

**Fruits.** Matured fruits, whether on the tree or on the ground, are fructus industriales properly the basis of an action of trover.<sup>54</sup>

**Turpentine.** Crude turpentine collected in cavities made, or boxes cut, in the trees which supply it is personal property for which trover may be maintained.<sup>55</sup>

## § 29. Materials Used in Repair of Chattel

Materials used in the repair of a chattel ordinarily become part of it and are incapable of conversion.

Ordinarily, materials used in the repair of a chattel become a part of it and are therefore incapable of conversion;<sup>56</sup> but the rule is otherwise when repairs are made under a stipulation that title to the parts added to the chattel shall not pass until they are paid for.<sup>57</sup>

## § 30. Animals

Domestic animals, and wild animals which have been tamed, are subjects of conversion.

Domestic animals are property, and as such are

subjects of conversion.<sup>58</sup> So trover is maintainable for wild animals which have been tamed and which have strayed away without gaining their natural liberty,<sup>59</sup> but not for wild animals which were not in the possession of plaintiff and which have no earmarks of ownership.<sup>60</sup>

## § 31. Property in Custody of Law

An action in trover will lie for the conversion of property in the custody of the law.

Although property of which conversion is alleged is in the custody of a chancery court, an action for its conversion may be brought in a law court, since it does not affect the possession of the property or interfere with its custody.<sup>61</sup>

## § 32. Effect of Change in Form of Property

As long as property may be identified, trover may be maintained for its conversion, although its form may have been in a large measure or entirely changed.

As long as property may be identified, trover may be maintained for its conversion, although its form may have been in a large measure or entirely changed,<sup>62</sup> as, for instance, where wood has been converted and made into charcoal,<sup>63</sup> or trees into lumber,<sup>64</sup> or saw logs,<sup>65</sup> or staves,<sup>66</sup> or into boards or shingles.<sup>67</sup>

## § 33. Property of No Value

Trover cannot be maintained for the conversion of any kind of personal property unless it is shown that it was of some value.

Trover cannot be maintained for the conversion of any kind of personal property unless it is shown that it was of some value.<sup>68</sup>

ality—Durlinger v. Heaton, 258 N.W. 513, 219 Iowa 528.

### Unidentified property

Where plaintiff was entitled to a part of the total acres of row crop, all of which were appropriated by defendant, the rule that no suit for conversion of personal property can be maintained unless identical property alleged to have been converted can be identified did not apply.—Friel v. Crouch, Tex.Civ.App. 189 S.W.2d 764, refused for want of merit.

50. RI—Donahue v. Shippee, 8 A 541, 15 R.I. 453.

51. Mo—Corpus Juris quoted in Blum v. Frost, 116 S.W.2d 541, 546, 234 Mo App. 695.

Pa.—McKay v. Pearson, 6 Pa.Super. 529.

52. Mo—Leidy v. Carson, 90 S.W. 754, 115 Mo App. 1. 65 C.J. p 27 note 77.

53. Ark.—W. U. Tel. Co. v. Bush,

89 S.W.2d 723, 191 Ark. 1085, 103 A.L.R. 367.

54. Colo.—Koerner v. Wilson, 271 P. 737, 85 Colo. 140, 63 A.L.R. 227.

55. Fla.—Quitman Naval Stores Co. v. Conway, 58 So 810, 63 Fla. 253. 65 C.J. p 27 note 80.

56. Vt.—Clark v. Wells, 45 Vt. 4, 12 Am.R. 187.

57. Vt.—Clark v. Wells, supra.

58. Mass.—Blair v. Forehand, 100 Mass 136, 97 Am.D. 82, 1 Am.R. 94.

N.Y.—Mullaly v. People, 86 N.Y. 365.

—Central Westchester Humane Soc v. Hilleboe, 116 N.Y.S.2d 403, 202 Misc 881.

65 C.J. p 27 note 85.

Departure from terms of bailment as conversion of animal see Animals § 14 c.

Use of animal by agistor as conversion see Animals § 17 d.

59. N.Y.—Amory v. Flynn, 10 Johns. 102, 6 Am.D. 316.

60. N.J.—Shepard v. Loverson, 2 N.J.Law 369.

N.Y.—Brinkerhoff v. Starkins, 11 Barb. 248.

61. Ark.—Garabaldi v. Wright, 12 S.W. 875, 52 Ark 116.

62. Minn.—Whitney v. Huntington, 33 N.W. 561, 37 Minn 197.

65 C.J. p 28 note 91.

63. Ala.—Riddle v. Driver, 12 Ala. 590.

64. N.Y.—Pierrepont v. Barnard, 5 Barb. 364, reversed on other grounds 6 N.Y. 279.

65. Mich.—Gates v. Rifle Boom Co., 38 N.W. 245, 70 Mich. 309.

Minn.—Whitney v. Huntington, 33 N.W. 561, 37 Minn 197.

66. Miss.—Heard v. James, 49 Miss. 236.

67. N.Y.—Brown v. Sax, 7 Cow. 95.

68. Cal.—Corpus Juris cited in Metropolitan Life Ins. Co. v. San Francisco Bank, 136 P.2d 856, 857, 58

IV. ACTS CONSTITUTING CONVERSION AND LIABILITY THEREFOR

§ 34. In General

Any unauthorized act which deprives an owner of his property permanently, or for an indefinite time, is a conversion.

Any unauthorized act which deprives an owner of his property permanently, or for an indefinite time, is a conversion.<sup>69</sup> Acts rightfully done do not constitute a conversion.<sup>70</sup> Acts of conversion have been classified as a taking from the owner without his consent, an unwarranted assumption of ownership, an illegal use or abuse of the chattel, and a wrongful detention after demand.<sup>71</sup>

§ 35. Destruction of, or Injury to, Property

The destruction of goods or personality by a positive and tortious act is a conversion, as is also the serious maltreatment of a chattel.

The destruction of goods or personality by a posi-

tive and tortious act is a conversion,<sup>72</sup> as is also the serious maltreatment of a chattel.<sup>73</sup> However, the destruction or damaging of property is not, in and of itself, a conversion;<sup>74</sup> it must be tortious;<sup>75</sup> and it will not be regarded as tortious when it is necessary for the protection either of defendant or his property.<sup>76</sup> It is occasioned by act of public authorities,<sup>77</sup> or it results from accident.<sup>78</sup> Also, the destruction or loss of property is not a conversion where it is not the result of a positive act, as where it is the result of negligence,<sup>79</sup> or omission to act.<sup>80</sup>

*Destruction of crops by livestock.* The value of crops eaten or destroyed by livestock cannot be recovered in trover,<sup>81</sup> even though defendant knew that his stock were habituated to such depredations.<sup>82</sup>

*Canceling certificate of membership in board of trade* is a conversion of such certificate.<sup>83</sup>

Cal.App.2d 897—Metropolitan Life Ins. Co. v. San Francisco Bank, 136 P.2d 853, 856, 58 Cal.App.2d 528—*Corpus Juris* cited in *Pentley v. Mountain*, 124 P.2d 91, 94, 51 Cal.App.2d 95.  
65 C.J. p. 28 note 97.

69. Conn.—Bruneau v. W. & W. Transp. Co., 82 A.2d 923, 138 Conn. 179.

Idaho.—Forbush v. San Diego Fruit & Produce Co., 266 P. 659, 46 Idaho 231.

70. Cal.—*Corpus Juris* quoted in *Van Dorn v. Couch*, 64 P.2d 1197, 1200, 21 Cal.App.2d Supp. 749.

Ky.—Greasy Creek Coal & Land Co. v. Greasy Creek Coal Co., 7 S.W.2d 853, 225 Ky. 77.

*Deposits of depositor's own funds* and taking of certificates payable to depositor or his brother or to depositor or his brother in case of depositor's death carried no evidence of fixed rights therein in favor of brother upon which to base a holding of conversion by depositor of money belonging to brother—*Hacker v. Hacker*, 283 N.W. 629, 287 Mich. 135.

71. U.S.—*Maine v. Halev*, C.C.Me., 16 Fed. Cas. No. 8,977, 2 Hask. 354.  
Ala.—*Davis v. Hurt*, 21 So. 468, 114 Ala. 146—*Bolling v. Kirby*, 7 So. 914, 90 Ala. 215, 24 Am.S.R. 789—*Thwait v. Stamps*, 67 Ala. 96—*Conner & Johnson v. Allen & Reynolds*, 33 Ala. 615—*Glaze v. McMillan*, 7 Port. 279.

Ark.—*Ray v. Light*, 34 Ark. 421.

Ky.—*Kennet v. Robinson*, 2 J.J. Marsh. 84—*Abernathy v. Wheeler*, 13 Ky.L. 730.

Mo.—*German American Bank v.*

*Brunswig*, 81 S.W. 461, 107 Mo. App. 401.

N.C.—*Glover v. Riddick*, 33 N.C. 582.  
Tenn.—*Roach v. Turk*, 9 Helsk. 708, 24 Am.R. 360—*Jordan v. Greer*, 5 Sneed 165.

Tex.—*Gulf, C. & S. F. R. Co. v. Pratt*, Civ.App. 183 S.W. 103.

Vt.—*Tinker v. Morrill*, 39 Vt. 477, 94 Am.D. 345.

Wis.—*Donovan v. Barkhausen Oil Co.*, 227 N.W. 940, 200 Wis. 194—*Aschermann v. Philip Best Brewing Co.*, 45 Wis. 262.

72. Ala.—*Long-Lewis Hardware Co. v. Albston*, 180 So. 261, 235 Ala. 599.  
Ind.—*Block v. Talge*, 51 N.E.2d 81, 221 Ind. 658.

N.D.—*Taugher v. Northern Pac. R. Co.*, 129 N.W. 747, 21 N.D. 111.

Or.—*Lee Tunk v. Burkhart*, 116 P. 1066, 59 Or. 194.

S.D.—*Richstein v. Roesch*, 25 N.W.2d 558, 71 S.D. 451, 169 A.L.R. 98.

Tex.—*American Surety Co. of New York v. Hill County, Civ.App.*, 251 S.W. 241, affirmed, Com.App. 267 S.W. 265.

Wis.—*Heuer v. Wiese*, 60 N.W.2d 385, 265 Wis. 6.

65 C.J. p. 28 note 2.

*Change in nature of property* see *infra* § 47.

*Injury to, or destruction of, property by:*

*Bailee* see *Bailments* §§ 27, 31, 44.  
*Tenant in common* see *Tenancy in Common* § 103.

**Destruction of promissory note**

*Maker's withholding and destroying of note* after having allegedly obtained possession thereof wrongfully could not change terms of note or precipitate due date thereof—*Foudy v. Daugherty*, 76 N.E.2d 268, 118 Ind.App. 68.

73. N.H.—*Wentworth v. McDuffie*, 48 N.H. 492.

74. Wash.—*Lockit Cap Co. v. Globe Mfg. Co.*, 290 P. 813, 158 Wash. 183.

75. Wash.—*Lockit Cap Co. v. Globe Mfg. Co.*, *supra*.

76. U.S.—*McKeesport Sawmill Co. v. Pennsylvania Co.*, C.C.Pa., 122 F. 184.

Wis.—*Harrington v. Edwards*, 17 Wis. 586, 84 Am.D. 768.

77. Ala.—*Traylor v. Hughes*, 7 So. 159, 88 Ala. 617.

Tenn.—*Weakley v. Pearce*, 5 Helsk. 401.

78. N.Y.—*Salt Springs Nat. Bank v. Wheeler*, 48 N.Y. 492, 8 Am.R. 564—*Meise v. Wachtel*, 104 N.Y.S. 915, 54 Misc. 549.

79. Wash.—*Spokane Grain Co. v. Great Northern Express Co.*, 104 P. 794, 55 Wash. 545.

65 C.J. p. 29 note 10.

*Negligence by*  
*Bailee generally* see *Bailments* § 44.

*Carrier* see *Carriers* § 181.

*Positive and tortious act as element of conversion* generally see *supra* § 4.

80. Ky.—*Lexington, etc., R. Co. v. Kidd*, 7 Dana 245.

Mich.—*Kearney v. Clutton*, 59 N.W. 419, 101 Mich. 106, 45 Am.S.R. 394.

81. Ill.—*Smith v. Archer*, 53 Ill. 241.

82. Ill.—*Smith v. Archer*, *supra*.

*Form of action for damages by domestic animals generally* see *Animals* § 265.

83. Ill.—*Olds v. Chicago Open Board of Trade*, 33 Ill.App. 445.

*Cutting wires.* The cutting and carrying away of electric wires without first offering the owner a reasonable opportunity for reclaiming them is a conversion.<sup>84</sup>

### § 36. Assertion of Ownership or Control of Property

Any distinct act which is an unauthorized and wrongful assumption and exercise of control, dominion,

or ownership by one person over the personal property of another person, and is in denial or exclusion of, or inconsistent with, the owner's rights, is a conversion.

Any distinct act which is an unauthorized and wrongful assumption and exercise of control, dominion, or ownership by one person over the personal property of another person, and is in denial or exclusion of, or inconsistent with, the owner's rights, is a conversion,<sup>85</sup> even though defendant does not apply the property to his own use.<sup>86</sup> Con-

84. N.Y.—*Electric Power Co. v. New York*, 55 N.Y.S. 460, 36 App.Div. 383—*Electric Power Co. v. Metropolitan Tel., etc., Co.*, 27 N.Y.S. 93, 75 Hun 68, affirmed 43 N.E. 986, 148 N.Y. 746.

85. U.S.—*Southern Counties Ice Co. v. RKO Radio Pictures, D.C. Cal.*, 39 F.Supp. 157.

Ala.—*Hamilton v. Hamilton*, 51 So. 2d 13, 255 Ala. 284—*Geneva Gin & Storage Co. v. Rawls*, 199 So. 731, 240 Ala. 320—*Long-Lewis Hardware Co. v. Abston*, 180 So. 261, 235 Ala. 599—*Moore v. Stephens*, 18 So.2d 577, 31 Ala.App. 446, certiorari denied 18 So.2d 578, 245 Ala. 666.

Ark.—*Thomas v. Westbrook*, 177 S.W.2d 931, 206 Ark. 841.

Cal.—*George v. Bekins Van & Storage Co.*, 205 P.2d 1037, 33 Cal.2d 834—*Gruber v. Pacific States Savings & Loan Co.*, 88 P.2d 137, 13 Cal.2d 144—*Lusitanian-American Development Co. v. Seaboard Dairy Credit Corporation*, 34 P.2d 139, 1 Cal.2d 121—*Susumu Igauye v. Howard*, 249 P.2d 558, 111 Cal.App. 2d 122—*Staley v. McClurken*, 98 P.2d 805, 35 Cal.App.2d 623—*Lindsey v. Commercial Discount Co.*, 55 P.2d 896, 12 Cal.App.2d 345.

Conn.—*Bruneau v. W. & W. Transp. Co.*, 82 A.2d 923, 138 Conn. 179.

Del.—*Mastellone v. Argo Oil Corp.*, 76 A.2d 118, 6 Terry 617, affirmed 82 A.2d 379, 7 Terry 102—*Drug, Inc. v. Hunt*, 168 A. 87, 5 W.W. Harr. 339.

Fla.—*Wilson Cypress Co. v. Logan*, 162 No. 489, 120 Fla. 124.

Ind.—*Hardy v. Heeter*, 96 N.E.2d 682, 120 Ind.App. 711—*Sullivan & O'Brien v. Kennedy*, 25 N.E.2d 267, 107 Ind.App. 457.

Ia.—*Edwards v. Max Thieme Chevrolet Co., App.*, 191 So. 569.

Mass.—*Lawyers' Mortg. Inv. Corporation of Boston v. Paramount Laundries*, 191 N.E. 398, 287 Mass. 367.

Me.—*Dubie v. Branz*, 73 A.2d 217, 145 Me. 170—*Corpus Juris cited in Sanborn v. Matthews*, 41 A.2d 704, 705, 141 Me. 213—*Harvey v. Anacone*, 184 A. 889, 134 Me. 245.

Mo.—*Sigmund v. Lowes, App.*, 238 S.W.2d 14—*Corpus Juris cited in Blum v. Frost*, 116 S.W.2d 541,

546, 231 Mo.App. 695—*St. Louis Fixture & Show Case Co. v. F.W. Woolworth Co.*, 88 S.W.2d 254, 232 Mo.App. 10.

Mont.—*Corpus Juris cited in Sorrensen v. Jacobson*, 232 P.2d 332, 338, 125 Mont. 148, 26 A.L.R.2d 1166.

Neb.—*Indiana Harbor Belt R. Co. v. Alprin*, 296 N.W. 158, 139 Neb. 14.

N.H.—*Largy v. Morrison*, 188 A. 6, 88 N.H. 270.

N.Y.—*In re Barrett's Estate*, 82 N.Y.S.2d 137—*Corrao v. Dewey Garage Corp.*, 24 N.Y.S.2d 592.

ND.—*Taughter v. Northern Pac. R. Co.*, 129 N.W. 717, 21 N.D. 111.

Ohio.—*Etna Cas. & Sur. Co. v. Higbee Co.*, 76 N.E.2d 404, 80 Ohio App. 437, 174 A.L.R. 1429—*North Canton Bank v. Cocklin*, 187 N.E. 638, 46 Ohio App. 27.

Okla.—*Sisler v. Smith*, 267 P.2d 1081—*Corpus Juris cited in Aust v. Pursey*, 117 P.2d 523, 524, 189 Okl. 388.

Or.—*Lee Tung v. Burkhardt*, 116 P. 1066, 59 Or. 194.

R.I.—*Needle-Lemur Co. v. Corrigan*, 198 A. 360, 60 R.I. 312, 116 A.L.R. 867.

Tenn.—*Lewis Brown Co., Inc. v. Mallory*, 8 Tenn.App. 36—*Bostic & Bostic v. Watson*, 2 Tenn.App. 203.

Tex.—*Cox v. Rhodes*, Civ.App. 233 S.W.2d 924—*Bradley v. McKinnis*, Civ.App. 226 S.W.2d 458—*Ragland v. Cone*, Civ.App. 114 S.W.2d 620—*Kilgore v. De Vault*, Civ.App. 82 S.W.2d 1048—*Neyland v. Brammer*, Civ.App. 73 S.W.2d 884, error dismissed—*Hornaby v. Hornaby*, Civ. App. 60 S.W.2d 489, reversed on other grounds 93 S.W.2d 379, 127 Tex. 474—*American Surety Co. of New York v. Hill County*, Civ.App. 254 S.W. 241, affirmed, Com.App. 267 S.W. 265.

Wash.—*Martin v. Sikes*, 229 P.2d 546, 38 Wash.2d 274.

Wis.—*Russwits v. Wisconsin Teachers' Ass'n*, 205 N.W. 808, 188 Wis. 121, 42 A.L.R. 873.

65 C.J. § 29 note 17.

Assertion of ownership, dominion, or control.

By pledgee see Pledges § 36.

In connection with:

Detention see infra § 50.

Removal or asportation see infra § 49.

Taking see infra § 39.

Exercise of dominion over mortgaged property see Chattel Mortgages §§ 214-217.

#### Change of lien of mortgage

Where trust company from which plaintiff purchased undivided shares in two mortgages, and which was acting as plaintiff's agent in collecting principal and interest, made loan secured by another mortgage on same property, and thereafter entered into agreement with its debtor consolidating the three mortgages into one first mortgage, trust company, by thus changing lien of mortgages in which plaintiff held an interest, was guilty of conversion—*Mendelson v. Boettger*, 12 N.Y.S.2d 671, 257 App.Div. 167, affirmed 23 N.E.2d 554, 281 N.Y. 747.

#### Refusal to exchange shares of stock

(1) Where bank was made transfer agent for block shares of corporation and agent for conversion of shares into block shares, but refused to comply with plaintiff's demand to transfer his shares to block shares prior to communicating with corporation, bank was not liable for conversion, even if delay or refusal was wrongful, where bank was not a party to agreement with stock exchange on the mechanics of selling the shares thereon—*Mears v. Crocker First Nat. Bank of San Francisco*, 218 P.2d 91, 97 Cal.App.2d 482.

(2) Where pursuant to agreement of a company, its transfer agent and stock exchange, common shares of company could not be traded in unless converted into blocks of 20 shares each, transfer agent was required on proper demand to make necessary conversion and was liable as for a conversion when it wrongfully refused to do so—*Mears v. Crocker First Nat. Bank of San Francisco*, 191 P.2d 501, 84 Cal.App.2d 937.

86. U.S.—*Wilcox v. C. I. R., C.C.A.*, 148 P.2d 933, affirmed 66 S.Ct. 546, 327 U.S. 404, 90 L.Ed. 752, 166 A.1.R. 884—*Ivey v. U. S., D.C. Tenn.*, 88 F.Supp. 6.

Cal.—*Staley v. McClurken*, 98 P.2d 805, 35 Cal.App.2d 622.

Del.—*Mastellone v. Argo Oil Corp.*, 76 A.2d 118, 6 Terry 617, affirmed 82 A.2d 379, 7 Terry 102—*Drug, Inc. v. Hunt*, 168 A. 87, 5 W.W. Harr. 339.

versely, in order to constitute conversion there must be some unauthorized and unlawful assumption and exercise of control, dominion, or ownership by defendant over the personal property involved in defiance or exclusion of plaintiff's rights.<sup>87</sup> Verbal assertions of ownership or right of possession do not amount to a conversion,<sup>88</sup> unless they are made by a person in possession of the property, as considered infra § 37, or are uttered in proximity to the property, in a manner indicating a determination to

control it, and coupled with an apparent ability to do so.<sup>89</sup> Merely forbidding an officer to sell property on execution against another person is not a conversion.<sup>90</sup>

**Interference with property.** An unauthorized interference with a decedent's personal estate will render the wrongdoer liable in trover for whatever loss occurs.<sup>91</sup> However, an interference with a chattel under circumstances which show the owner's right to be unquestioned is not a conversion,<sup>92</sup> and

La—*Edwards v. Max Thome Chevrolet Co.*, App. 191 So. 569.  
Me—*Harvey v. Anancone*, 181 A. 889, 134 Me 245.  
RI—*Nestle-Lemur Co. v. Corrigan*, 198 A 360, 60 RI 312, 116 ALR 867.  
Tenn—*Lewis Brown Co., Inc. v. Mallory*, 8 Tenn App 36.  
Wash—*Martin v. Sikes*, 229 P 2d 516, 38 Wash 2d 274.  
65 C.J. p 30 note 18.

87. U.S.—*Lambros Seaplane Base v. The Batery*, D.C.N.Y., 117 F.Supp 16—*Keck Enterprises, Inc. v. Braunschweiger*, D.C.Cal., 108 F.Supp 925.

Ala—*American Standard Life Ins. Co. v. Johnson*, 163 So 632, 231 Ala 94—*Walls v. Borders*, 36 So 2d 41, 33 Ala App. 95—*Warren v. Penders*, 17 So 2d 585, 31 Ala App 391.  
Cal—*Zaklaw v. Kroenert*, 176 P 2d 1, 29 Cal 2d 541, followed in 176 P 2d 8, 29 Cal 2d 878—*Aronson v. Bank of America Nat. Trust & Savings Ass'n*, 72 P 2d 518, 9 Cal 610—*Kee v. Becker*, 129 P 2d 159, 54 Cal App 2d 466—*Van Dorn v. Couch*, 64 P 2d 1197, 21 Cal App 2d Supp. 719.

Ill—*Dunn v. Auto Dealers Inv. Co.*, 47 N.E.2d 568, 318 Ill App 95, reversed on other grounds 52 N.E.2d 695, 385 Ill 211.

Mass—*Edinburg v. Allen Square Co.*, 12 N.E.2d 718, 299 Mass. 296.  
N.Y.—*Sam R. Levy Fabrics v. Shapiro Bros Factors Corp.*, 19 N.Y.S.2d 593, 259 App Div 463—*Gross v. Todor*, 8 N.Y.S.2d 446, 255 App Div 964—*Bloom v. Wiener*, 239 N.Y.S. 574, 135 Misc 757.

N.D.—*Nye v. Johnson*, 4 N.W.2d 819, 72 N.D. 95.

Okl—*Continental Oil Co. v. Berry*, 103 P 2d 69, 187 Okl 390—*Johnston v. American Finance Corp.*, 79 P 2d 242, 182 Okl. 567—*Kelly v. Oliver Farm Equipment Sales Co.*, 36 P 2d 888, 169 Okl 269.

Or—*Williams v. International Harvester Co.*, 141 P 2d 837, 172 Or 270.

Tenn—*New York Life Ins. Co. v. Bank of Commerce & Trust Co.*, 111 S.W.2d 371, 172 Tenn. 226, 115 ALR 613.

Tex.—*Hicks Rubber Co., Distributors,*

*v. Stacy*, Civ App., 133 S.W.2d 249.  
—*Boyd v. Martin*, Civ App., 119 S.W.2d 1110—*American Cotton Co-op Ass'n v. Plainview Compress & Warehouse Co.*, Civ App., 114 S.W.2d 689, error dismissed—*Zerr v. Howell*, Civ App., 88 S.W.2d 116.  
Utah—*Christensen v. Pugh*, 36 P 2d 100, 84 Utah 440.  
67 C.J. p 30 note 19—12 C.J. p 753 note 96.

**Application of rule must depend on the particular facts of the individual case.** *Kaufman v. Provident Sav. Bank & Trust Co. of Cincinnati*, 23 N.Y.S.2d 537, affirmed 31 N.Y.S.2d 664, 263 App Div 703, appeal denied 32 N.Y.S.2d 129, 263 App Div 809.

# Filing and assignment of mechanic's lien

The mere filing and assignment of purported mechanic's lien on an elevator tractor, by one who did not have a lien on the tractor, did not constitute such dominion over the tractor as to entitle the owner to maintain an action for wrongful conversion against the one filing and assigning the lien—*Hitchstein v. Roesech*, 25 N.W.2d 558, 71 S.D. 151, 169 A.L.R. 98.

# Innocent transporter of stolen property

Common carrier or person transporting stolen property in ignorance of ownership of property does not necessarily claim title or exercise dominion for benefit of hirer inconsistent with true owner's right so as to become liable in trover for meddling with property of another—*Williams v. Roberts*, 1 S.E.2d 587, 59 Ga App 473.

# Patent infringement

Where welder infringed patents covering drilling bit for hard rock formations by reconstructing worn teeth and original pattern of lessee's bits for which service he was paid by lessee, welder was not guilty of conversion as against patent owners in absence of evidence that welder sold bits or exercised any acts of ownership over them—*Hughes Tool Co. v. Williams*, D.C.Okl., 82 F.Supp. 408, cause remanded in part and affirmed in part on other grounds, C.A. Williams v. Hughes Tool Co., 186 F 2d

278, certiorari denied 71 S.Ct. 612, 341 U.S. 903, 95 L.Ed. 1342, rehearing denied 71 S.Ct. 802, 311 U.S. 931, 95 L.Ed. 1362, and 71 S.Ct. 1013 311 U.S. 956, 95 L.Ed. 1377.

88. Cal—*Kee v. Becker*, 129 P 2d 159, 54 Cal App 2d 466.  
N.Y.—*Wenbach Corp. v. Emigrant Industrial Sav. Bank*, 31 N.Y.S.2d 688, 261 App Div 161, affirmed 45 N.E.2d 169, 289 N.Y. 662.

Wyo—*Henn v. Marcante*, 113 P.2d 940, 57 Wyo 81.  
65 C.J. p 30 note 20.

89. N.Y.—*Gillet v. Roberts*, 57 N.Y.

28—*Wenbach Corp. v. Emigrant Industrial Sav. Bank*, 31 N.Y.S.2d 688, 261 App Div 161, affirmed 45 N.E.2d 169, 289 N.Y. 662.

90. Vt—*Lowry v. Walker*, 1 Vt 76.

91. Mo—*Corpus Juris cited in Blum v. Frost*, 116 S.W.2d 511, 546, 234 Mo App 697.  
65 C.J. p 31 note 21.

Trover against executor de son tort see *Executors and Administrators* § 1068.

92. Or—*Reid v. Wentworth & Irwin*, 63 P 2d 210, 155 Or 265.  
65 C.J. p 31 note 25.

# Act falling short of disseisin

One may be compelled by threats or even by physical coercion to forego full exercise of his own dominion as owner of property yet if the wrongful act falls short of a disseisin, thereof, the wrongdoer is not guilty of conversion—*Martin v. Sikes*, 229 P 2d 546, 38 Wash 2d 274.

# Permitting removal of goods conditionally sold

Where a tenant absented himself from leased building containing furniture conditionally bought, the act of landlord in opening the door to enable seller to remove the furniture was not a conversion—*Copeland v. Porter*, Tex.Civ App., 169 S.W. 915.

# Protection of property subject to lien

An act which is done to preserve and protect property in order that it may remain subject to lien and which is equally beneficial to those having subordinate rights and not antagonistic thereto, does not constitute a wrongful conversion—*Enfield v. Huffman Motor Co.*, 257 P 2d 158, 117 Cal App 2d 800.

the assumption and exercise of dominion by one person over the personal property of another person may constitute a conversion regardless of whether or not any actual interference with the property itself is involved.<sup>93</sup>

### § 37. — Possession by Defendant

A person cannot be charged with conversion of goods unless he had an actual or constructive possession of them at the time of the conversion alleged.

Regardless of whether he came into possession of the property lawfully<sup>94</sup> or unlawfully,<sup>95</sup> a person in possession of the personal property of another is guilty of conversion where he makes an unfounded claim or assertion of ownership or title thereto,<sup>96</sup> or treats or deals with the property as owner.<sup>97</sup> A person cannot be charged with a conversion of goods unless he had an actual or constructive possession of them at the time of the conversion alleged.<sup>98</sup>

notwithstanding he may have forcibly interposed obstacles in order to prevent the owner from obtaining the possession sought.<sup>99</sup> It is not necessary that his possession shall have continued until the commencement of the action.<sup>1</sup> Where a person exercised dominion over the property to the exclusion of, and in defiance of, the owner's right, it is not necessary that he shall have actually taken or had manual or physical possession of the property.<sup>2</sup>

### § 38. — Part of Chattel

Conversion of a part amounts to conversion of the whole of a chattel where the circumstances evince a purpose to control or dispose of the whole of it, or wherever the remaining part is thereby impaired in value or utility.

Conversion of a part amounts to conversion of the whole of a chattel where the circumstances evince a purpose to control or dispose of the whole of it,<sup>3</sup> or wherever the remaining part is thereby impaired in value or utility.<sup>4</sup>

93. N.Y.—Mendelson v. Boettger, 12 N.Y.S.2d 671, 257 App.Div. 167, affirmed, 23 N.E.2d 551, 281 N.Y. 747.  
Tex.—Cox v. Rhodes, Civ.App., 233 S.W.2d 924.  
65 C.J. p 31 note 27.

**Trespass** involved in going upon land and cutting timber was not element in action for conversion of such timber, since appropriation of cut timber was the act which was inconsistent with rights of true owner.—Wilson Cypress Co. v. Logan, 162 So. 489, 120 Fla. 124.

94. Mo.—Corpus Juris quoted in Blum v. Frost, 116 S.W.2d 541, 234 Mo.App. 695.

N.Y.—In re Riley, 43 N.Y.S.2d 753, 266 App.Div. 160, appeal dismissed, 62 N.E.2d 245, 294 N.Y. 825.

Ohio—Fidelity & Deposit Co. of Maryland v. Farmers & Citizens Bank of Lancaster, 52 N.E.2d 549, 72 Ohio App. 432.

Tex.—Cox v. Rhodes, Civ.App., 233 S.W.2d 924—Jordan v. Broad, Civ. App., 170 S.W.2d 655.  
65 C.J. p 31 note 28.

95. Mo.—Corpus Juris quoted in Blum v. Frost, 116 S.W.2d 541, 546, 234 Mo.App. 695.

W.Va.—Pine & Cypress Mfg. Co. v. American Engineering & Construction Co., 125 S.E. 375, 97 W.Va. 471.

96. Mo.—Corpus Juris quoted in Blum v. Frost, 116 S.W.2d 541, 546, 234 Mo.App. 695.

N.D.—Taughner v. Northern Pac. R. Co., 129 N.W. 747, 21 N.D. 111.  
Or.—Lee Tung v. Burkhart, 116 P. 1066, 59 Or. 194.

Tex.—Jordan v. Broad, Civ.App., 170 S.W.2d 655—American Surety Co. of New York v. Hill County, Civ. App., 254 S.W. 241, affirmed, Com. App., 267 S.W. 265.  
65 C.J. p 31 note 30.

#### Possession coupled with intent

Conversion may be committed by acquiring possession of goods with intent to assert a right over them adverse to that of owner thereof.—Lambros Seaplane Base v. The Battery, D.C.N.Y., 117 F.Supp. 16.

#### Produce stored on farm

Where claimants against deceased's estate at time they conveyed farm and assigned lease thereon to deceased during his lifetime left beans stored in barn pursuant to agreement with tenant, assertion of ownership over beans by deceased to exclusion of claimants prior to expiration of lease amounted to a conversion without more.—In re Klippel's Estate, 83 N.Y.S.2d 816, 194 Misc. 769.

97. N.Y.—In re Riley, 43 N.Y.S.2d 753, 266 App.Div. 160, appeal dismissed, 62 N.E.2d 245, 294 N.Y. 825.  
Ohio—Fidelity & Deposit Co. of Maryland v. Farmer's & Citizens Bank of Lancaster, 52 N.E.2d 549, 72 Ohio App. 432.  
65 C.J. p 31 note 31.

98. N.J.—Potash Stores v. Hay Development Corp., 192 A. 379, 117 N.J. Law 242—Baudé v. Chemical Bank & Trust Co., 178 A. 799, 115 N.J. Law 120.

N.C.—Suskin v. Hodges, 4 S.E.2d 891, 216 N.C. 333.  
R.I.—Dimon v. O'Connor, 106 A.2d 509.  
65 C.J. p 31 note 32.

**The permission of the possessor of realty by which personality is allowed to remain on the premises does not make him liable for conversion of the personality.**—Zaslow v. Kroenert, 176 P.2d 1, 29 Cal.2d 541, followed in Kroenert v. Zaslow, 176 P.2d 8, 29 Cal.2d 878.

99. Cal.—Zaslow v. Kroenert, 176 P.

2d 1, 29 Cal.2d 541, followed in Kroenert v. Zaslow, 176 P.2d 8, 29 Cal.2d 878.

Me.—Boobier v. Boobier, 39 Me. 406.

1. Me.—Sanborn v. Matthews, 41 A. 2d 704, 141 Me. 213.  
65 C.J. p 31 note 34.

2. Cal.—Susumu Igauye v. Howard, 249 P.2d 558, 114 Cal.App.2d 122.  
La.—Edwards v. Max Thiemer Chevrolet Co., App., 191 So. 569.  
Mass.—Lawyer's Mortg. Inv. Corporation of Boston v. Paramount Laundries, 191 N.E. 398, 287 Mass. 357.

R.I.—Nestle-Lemur Co. v. Corrigan, 198 A. 350, 60 R.I. 312, 116 A.L.R. 867.  
65 C.J. p 31 note 35.

#### Participation in wrongful act

In order to support an action for conversion, it is not always necessary that defendant has personally acquired possession, as where he has participated in the wrongful act of a third party who himself has taken possession to the extent of aiding or abetting consummation of the wrong.—Martin v. Sikes, 229 P.2d 546, 38 Wash.2d 274.

3. Cal.—Corpus Juris quoted in Horn v. Klatt, 151 P.2d 149, 154, 65 Cal.App.2d 510.  
Or.—Lamm v. Green, 211 P. 791, 106 Or. 311.  
65 C.J. p 31 note 36.

4. Cal.—Corpus Juris quoted in Horn v. Klatt, 151 P.2d 149, 154, 65 Cal.App.2d 510.  
Tex.—Town of West University Place v. Anderson, Civ.App., 60 S.W.2d 528.  
65 C.J. p 31 note 37.

#### Destruction of character of chattel

Where there is an unauthorized removal and appropriation to one's



§ 39. Taking or Reception of Property

An illegal, wrongful, or unauthorized taking of chattels out of the possession of the owner with intent to appropriate them to the taker's use is a conversion, but there is no conversion where a person takes property rightfully or takes or receives only that to which he is entitled.

An illegal,<sup>5</sup> wrongful,<sup>6</sup> or unauthorized<sup>7</sup> taking of chattels out of the possession of the owner with intent to appropriate them to the taker's use<sup>8</sup> is a conversion. In order that the wrongful taking of possession may constitute conversion it is not necessary that the taker assert absolute ownership;<sup>9</sup> it

is sufficient if the taking is wrongful or unauthorized and under a claim of right inconsistent with the owner's right of possession,<sup>10</sup> or with an intent to exercise an ownership inconsistent with the real owner's right of possession.<sup>11</sup>

On the other hand there is no conversion where a person takes property rightfully<sup>12</sup> or takes or receives only that to which he is entitled;<sup>13</sup> and where the ownership of property is in dispute it is not an unlawful conversion to induce the other party by means of an affidavit of ownership to surrender possession thereof.<sup>14</sup> Merely taking pos-

own use of any of the substantial and essential parts of an entire chattel, such conversion will, if chattel is a complicated mechanism constructed to perform certain work, amount to a "conversion" of the whole, if the removal of such parts so impairs the chattel as to destroy its character as a whole and defeat its intended use.—Klam v. Koppel, 118 P.2d 729, 63 Idaho 171.

5. Md.—Saunders v. Mullinix, 72 A.2d 720, 195 Md. 235.

Okl.—Sisler v. Smith, 267 P.2d 1081.—First Nat. Bank v. Melton & Holmes, 9 P.2d 703, 156 Okl. 63.

Tenn.—Hostie & Bostic v. Watson, 2 Tenn.App. 200.

W.Va.—Johnson v. National Exchange Bank of Wheeling, 19 S.E.2d 441, 124 W.Va. 157.

Taking and retention of crop by tenant in common see Landlord and Tenant § 814.

Taking by mortgagee see Chattel Mortgages § 215.

**Taking of tenant's property by landlord without legal process.**—Wutke v. Yelton, Tex.Civ.App., 71 H.W.2d 649, error refused—65 C.J. p. 32 note 41 [a].

6. Cal.—Susumu Igauye v. Howard, 249 P.2d 558, 114 Cal.App.2d 123. Conn.—Brueau v. W. & W. Transp. Co., 82 A.2d 923, 138 Conn. 179.

Md.—Saunders v. Mullinix, 72 A.2d 720, 195 Md. 235.

Minn.—Rothrich v. Holt Motor Co., 277 N.W. 274, 261 Minn. 586.

Tex.—Hill v. Childers, Civ.App., 268 S.W.2d 203, error refused no reversible error—Hicks Rubber Co. Distributors, v. Stacy, Civ.App., 133 S.W.2d 249.

Wash.—Walling v. S. Birch & Sons Const. Co., 213 P.2d 478, 35 Wash.2d 435.

65 C.J. p. 32 note 42.

7. Ala.—Yellow Pine Lumber Co. v. Alabama State Land Co., 54 So. 608, 171 Ala. 77.

Cal.—Klein-Simpson Fruit Co. v. Hunt, Hatch & Co., 225 P. 14, 55 Cal.App. 625.

Md.—Saunders v. Mullinix, 72 A.2d 720, 195 Md. 235.

Tex.—Hicks Rubber Co. Distributors, v. Stacy, Civ.App., 133 S.W.2d 249.

Wash.—Egge v. West Dependable Stores, 17 P.2d 609, 171 Wash. 64. 65 C.J. p. 32 note 43.

8. Ark.—Plunkett-Jarrell Grocery Co. v. Terry, 263 S.W.2d 229.

Cal.—Arques v. National Superior Co., 155 P.2d 643, 67 Cal.App.2d 763.

N.Y.—Mateo v. Abad, 267 N.Y.S. 436, 239 App.Div. 376.

Ohio.—Avondale Motor Car Co. v. Donovan, 19 N.E.2d 521, 60 Ohio App. 78.

65 C.J. p. 32 note 44.

**Stolen property**

(1) One who steals the property of another is guilty of a tort against the owner, for which the owner may bring an action for conversion; and since the trespass, committed in the original taking, does not in contemplation of law divest the true owner of possession, every moment's continuance of the trespass and felony is, in legal consideration, a new caption and asportation.—Geneva Gin & Storage Co. v. Hawis, 199 So. 734, 240 Ala. 320.

(2) One who steals from an infant or aids the thief to dispose of the stolen property does so at his own peril.—Hayward v. Edwards, 4 N.Y. 32 699, 167 Misc. 694.

**Taker acts at his peril**

Where a person with notice of another's claim to property deliberately chooses not to avail himself of orderly processes of law in determining validity of the asserted rights and chooses to substitute himself as sole arbiter of the law and facts and renders decision in his own self-interest, and thereafter takes the property, he acts at his peril, and if his conclusions are erroneous, he alone must bear the consequences of his deliberate usurpation of authority.—Case Bros. v. Whitteman, Civ.App., 153 S.W.2d 727, reversed on other grounds 163 S.W.2d 638, 139 Tex. 522.

9. Ohio.—Gillepie v. Holland, 20 Ohio Cir.Ct., N.S., 17.

10. Tex.—Hicks Rubber Co. Distributors, v. Stacy, Civ.App., 133 S.W.2d 249.

65 C.J. p. 32 note 46.

11. Fla.—West Yellow Pine Co. v. Stephens, 86 So. 241, 80 Fla. 298.—Quimman N. S. Co. v. Conway, 58 So. 810, 63 Fla. 255.

12. Cal.—Corpus Juris quoted in Van Dorn v. Couch, 64 P.2d 1197, 1200, 21 Cal.App.2d Supp. 749.

Ill.—National Bond & Inv. Co. v. Monr, 283 Ill.App. 187.

N.Y.—Hoyt v. Wright, 261 N.Y.S. 131, 237 App.Div. 124.

Ohio.—White Co. v. Canton Transp. Co., 2 N.E.2d 501, 131 Ohio St. 190.

Or.—Kondo v. Aylsworth, 158 P. 948, 81 Or. 225.

**Collection of proceeds of insurance policies**

Mother who, as beneficiary and pledgee of policies on son's life, collected proceeds without knowledge of alleged parol gift of policies by son to wife, to whom policies had never been delivered as alleged, was not liable to son's widow in damages for alleged wrongful collection of proceeds.—Beck v. Beck, Tex.Civ.App., 90 S.W.2d 284.

**Taking of matured crop**

The conversion, if any, of corn crop growing on land devised by testator to sisters and heirs of deceased sister by widow who went into possession on death of testator and cultivated and gathered crop did not occur on date after maturity and gathering of crop, where executrix suing for conversion was never on premises from time of death of testator until after crop had been gathered and disposed of.—Blum v. Frost, 116 S.W.2d 541, 234 Mo App 695.

13. Cal.—Corpus Juris quoted in Van Dorn v. Couch, 64 P.2d 1197, 1200, 21 Cal.App.2d Supp. 749.

N.J.—Durbark v. Fidelity & Guaranty Ins. Corp., 85 A.2d 315, 17 N.J. Super 160.

65 C.J. p. 32 note 48.

14. N.C.—Finch v. Clarke, 61 N.C. 335.

session of property under a lease from the owner is not a conversion.<sup>15</sup>

**Estray.** The taking up of an estray and delivering it to a third person on the order of a county commissioner has been held not to be a conversion.<sup>16</sup>

**Carrier.** A carrier is not guilty of conversion where he in good faith takes goods from the possession of the owner by the direction of another having apparent control of the goods and the present capacity of investing himself with actual possession;<sup>17</sup> but this rule cannot be extended to cover a case wherein the carrier has notice of a disputed ownership.<sup>18</sup>

#### § 40. — Force, Duress, or Legal Proceedings

Conversion may result from a taking by duress or force, or from a wrongful seizure under legal process or proceedings, or from a wrongful confiscation of private property by public authorities.

It is a conversion to obtain chattel property by duress.<sup>19</sup> Also, the wrongful or unauthorized taking of the personal property of another by force is a conversion,<sup>20</sup> even though the owner is indebted to the taker.<sup>21</sup> On the other hand, there is no conversion for which trover will lie where one takes that which he is entitled to possess, as discussed supra § 39, even though he obtains it by force<sup>22</sup> or trespass.<sup>23</sup>

**Confiscation by public authorities.** An officer who

wrongfully confiscates the property of a private person for public or other use is guilty of conversion.<sup>24</sup> He who receives and enjoys the property so taken is also liable.<sup>25</sup> However, a warehouseman from whom confiscating officers take goods is not liable in trover therefor,<sup>26</sup> unless he was negligent.<sup>27</sup> The fact that the property might lawfully have been confiscated by the public authorities does not justify the conversion of the property by a private individual to his own use.<sup>28</sup>

**Legal process or proceedings.** An action for conversion may be maintained for a wrongful seizure and disposition of property under an attachment,<sup>29</sup> execution,<sup>30</sup> or writ of replevin,<sup>31</sup> such as the taking of property by virtue of a void writ<sup>32</sup> or the seizure of exempt property<sup>33</sup> or of property belonging to a person other than the one against whom the process ran.<sup>34</sup> Also, the appropriation of money by virtue of a judgment which is void on its face constitutes a conversion.<sup>35</sup> However, a wrongful levy on books of account is not a conversion of the accounts,<sup>36</sup> nor is a taking of possession of nonexempt property<sup>37</sup> under legal process.<sup>38</sup>

Likewise, a conversion will not result from a taking by a party under an order of the clerk of court entered by consent of the parties,<sup>39</sup> or by direction of a receiver and in accordance with a decree which has not been stayed or reversed.<sup>40</sup> A person who is authorized under the statute to replevy property levied on, and who does so in good faith, under an order of the court having jurisdiction of the subject

15. Ala.—*Morris v. Brown* 58 No 910, 177 Ala. 389.

16. Tex.—*Johnson v. Barker*, 1 Tex. App. Civ. Cas. § 283.

Trover for taking up estray wrongfully see *Animals* § 102.

17. N.J.—*La Touche v. Simpson*, 88 A 946, 85 N.J. Law 149.

18. N.J.—*La Touche v. Simpson*, supra.

19. Md.—*Saunders v. Mullinix*, 72 A 2d 720, 195 Md. 235, 65 C.J. p 32 note 55.

20. Minn.—*Roehrich v. Holt Motor Co.*, 277 N.W. 274, 201 Minn. 586. Tex.—*Hicks Rubber Co., Distributors, v. Stacy*, Civ. App., 133 S.W.2d 249, 65 C.J. p 32 note 58.

21. Okl.—*Caldwell v. Carpenter*, 234 P. 767, 109 Okl. 63, 65 C.J. p 32 note 59.

22. Cal.—*Corpus Juris* quoted in *Van Dorn v. Couch*, 64 P.2d 1197, 1200, 21 Cal.App.2d Supp. 749. N.Y.—*Conlan v. Letting*, 3 E.D. Smith 353.

23. Cal.—*Corpus Juris* quoted in *Van Dorn v. Couch*, 64 P.2d 1197, 1200, 21 Cal.App.2d Supp. 749, 65 C.J. p 33 note 62.

24. Tenn.—*Davidson v. Manlove*, 2 Coldw. 316.

25. Va.—*Eastern Lunatic Asylum v. Garrett*, 27 Gratt. 163, 68 Va. 163. W.Va.—*Moran v. Smell*, 5 W.Va. 26.

26. N.Y.—*Ningarn F. Ins. Co. v. Campbell Stores*, 92 N.Y.S. 208, 101 App. Div. 400, affirmed 77 N.E. 1192, 184 N.Y. 582.

27. Ala.—*Abraham v. Nunn*, 42 Ala. 51.

28. Mo.—*Charles v. McCune*, 57 Mo. 166.

29. N.Y.—*Livermore v. Northrup*, 41 N.Y. 107, 55 C.J. p 33 note 64.

30. Tex.—*House v. Phelan*, 19 S.W. 140, 83 Tex. 595, 55 C.J. p 33 note 65.

31. Ind.—*Seip v. Gray*, 83 N.E.2d 790, 237 Ind. 52.

32. Tex.—*Crawford v. Thomason*, 117 S.W. 181, 53 Tex. Civ. App. 561, 65 C.J. p 33 note 67.

33. Mass.—*Magaw v. Beals*, 172 N.E. 347, 272 Mass. 334.

34. Wis.—*Selvert v. Galvin*, 113 N.W. 680, 133 Wis. 391, 65 C.J. p 33 note 69.

Remedies of claimant of attached property generally see *Attachment* § 349.

Trover by third person claiming sequestered property see *Sequestration* § 18.

35. S.D.—*Talbour Realty Co. v. Nelson*, 228 N.W. 807, 56 S.D. 405.

36. N.Y.—*Vogdes v. Boakes*, 56 N.Y.S. 662, 38 App. Div. 380.

37. Mass.—*Magaw v. Beals*, 172 N.E. 347, 272 Mass. 331.

38. Cal.—*Mayer v. Northwood Textile Mills*, 233 P.2d 657, 105 Cal. App.2d 406, 65 C.J. p 33 note 74.

39. S.C.—*Yancey v. Southern Wholesale Lumber Co.*, 131 S.E. 32, 133 S.C. 369.

40. Cal.—*Asato v. Emirzian*, 171 P. 90, 177 Cal. 493, 65 C.J. p 33 note 76.

matter, without any notice of the claim of the real owner, and who makes no use or disposition of the property inconsistent with his duty as a bailee thereof under such order, and who holds in subordination thereto, and not otherwise, is not liable in an action of trover to the real owner.<sup>41</sup>

# § 41. — Fraud, Misrepresentations, or Undue Influence

A person who obtains the personal property of another by false representations, fraudulent devices, or undue influence is liable in trover.

A person who obtains the personal property of another by false representations or fraudulent devices of any kind is liable in trover.<sup>42</sup> Thus, a sale of goods procured by fraud entitles the vendor to bring trover for their value against the defrauding vendee.<sup>43</sup> If possession only and not title to the goods is obtained by the fraudulent vendee or assignee, a subvendee or second assignee, having received and converted the goods, is liable to the owner thereof for conversion;<sup>44</sup> but if both title and right to possession passed to the fraudulent vendee or assignee, a third person who took the goods from him and converted them is not liable in trover,<sup>45</sup> unless he took them without consideration or with notice of the fraud.<sup>46</sup> Obtaining property by undue influence is a conversion thereof.<sup>47</sup>

# § 42. — Taking by Buyer

The taking of property under a void bill of sale may constitute a conversion, as may also the appropriation

to one's use of property purchased at an invalid public sale.

The taking of property under a void bill of sale may constitute a conversion,<sup>48</sup> as may also the appropriation to one's use of property purchased at an invalid public sale.<sup>49</sup> When delivery of, and payment for, goods are to be concurrent acts, a buyer who receives and refuses to pay for the goods obtains a wrongful possession rendering him liable in trover.<sup>50</sup> But this is not the case where the goods are sold on credit.<sup>51</sup>

# § 43. — Retaking by Seller

A vendor of goods sold and delivered on credit is liable in trover for their value if he retakes possession of them without due process of law or the buyer's consent.

A vendor of goods sold and delivered on credit is liable in trover for their value if he retakes possession of them without due process of law or the buyer's assent,<sup>52</sup> and, a fortiori, he is liable where the buyer has paid for the goods.<sup>53</sup> It is also a conversion to retake goods the title to which passed on a condition which the buyer stands ready and willing to fulfill.<sup>54</sup> A seller is not liable in trover for retaking possession of the goods when the contract of sale provides that he may do so on deeming himself insecure;<sup>55</sup> and where delivery and payment are to take place at the same time, and the seller has not waived his rights, he does not convert goods not paid for by removing them from the railroad car in which they have been loaded for shipment.<sup>56</sup>

41. Ala.—*Morris v Hall*, 41 Ala 510.

42. Md.—*Saunders v Mullin*, 72 A 2d 720, 195 Md 236.

Minn.—*Hoehrich v Holt Motor Co.*, 277 NW 274, 201 Minn 586.

N.M.—*Hurst v Craven*, 263 P 2d 382, 57 N.M. 724.

Ohio.—*Long v Crawford Finance Co.*, 6 Ohio Supp 36.

Wis.—*Corpus Juris cited in Potts v Farmers' Mut Automobile Ins Co.*, 289 NW 606, 608, 233 Wis. 313, 65 C.J. p 33 note 83.

## Recipient of pension checks

Where veteran's widow wrongfully applied pension checks to her own use, knowing she was not entitled thereto because of her remarriage, and checks were cashed by corporations having full knowledge of widow's remarriage and that she was not entitled to the checks, government was entitled to recover against the widow and against corporations on theory of conversion.—*U S v Michaelson*, D.C.Minn., 58 F Supp. 796.

43. Ohio.—*Haird v Howard*, 36 NE 732, 51 Ohio St 57, 46 Am SR 550, 22 L.R.A. 846, 65 C.J. p 31 note 81.

44. N.J.—*Ashton v Allen*, 56 A 165, 70 N.J. Law 117, 65 C.J. p 31 note 85.

45. U.S.—*Morrow Shoe Mfg Co v New England Shoe Co.*, 111, 57 F 685, 6 C.C.A. 506, 24 L.R.A. 417, 65 C.J. p 34 note 86.

46. U.S.—*Morrow Shoe Mfg. Co v New England Shoe Co.*, supra, 65 C.J. p 31 note 86.

47. Mass.—*Davlin v Houghton*, 88 N.E. 580, 202 Mass 75—*Hagar v Norton*, 73 NE 3073, 188 Mass 47.

48. Tex.—*Harris v Staples*, Civ. App., 89 SW 801.

## Sale by person of unsound mind

Where personal property is sold by a person declared to be of unsound mind, the legal guardian may recover from the purchaser for the conversion.—*Bolton v Stewart*, Tex Civ. App., 191 SW 2d 798.

49. Mass.—*Marotte v Massachusetts Sec Corporation*, 145 N.E. 464, 250 Mass 246, 65 C.J. p 34 note 80.

50. U.S.—*First Nat Bank of Cincinnati v Felker*, C.C.Ark., 185 F. 878, affirmed 196 F 200, 116 C.C.A. 32.

65 C.J. p 31 note 91.

51. Ga.—*Sutton v McCoy*, 59 S.E. 21, 2 Ga App 758, 65 C.J. p 34 note 92.

52. N.Y.—*Huellet v Ityns*, 1 Abb. Pr.N.S., 27. Right of unpaid seller to recover goods or their proceeds see Sales §§ 412-425.

53. N.Y.—*Helson v Broditsky*, 153 N.Y.S. 1029.

54. N.Y.—*Washburn v Corlis*, 21 N. Y.S. 422, 1 Misc 427.

55. Minn.—*McClelland v Nichols*, 24 Minn 176.

Recovery of goods sold under conditional sale see Sales §§ 602-611.

56. N.Y.—*Wixon v Ervay*, 134 N.Y. S. 350, 150 App Div. 26.

## § 44. — Proceeds of Sale

An appropriation of the proceeds of the sale of a chattel which was authorized by its owner will not justify an action for conversion of the chattel.

An appropriation of the proceeds of the sale of a chattel which was authorized by its owner will not justify an action for conversion of the chattel;<sup>57</sup> but an appropriation or unauthorized diversion of the proceeds by the purchaser will sustain an action in conversion for the amount.<sup>58</sup>

*Wrongful sale.* A receipt of the proceeds, or a part thereof, of goods which have been wrongfully converted by a third person is not a conversion,<sup>59</sup> unless defendant participated in the wrongful act,<sup>60</sup> had knowledge thereof,<sup>61</sup> or took such proceeds in accordance with a prior agreement which related to the act of conversion as well as to the sharing in the proceeds.<sup>62</sup>

## § 45. — Taking from Person Other than Owner

## a. In general

## b. Knowledge or good faith

57. Cal.—*Corpus Juris* cited in *Thomson v. Culver City Motor Co.*, 41 P.2d 597, 600, 1 Cal.App.2d 639, 65 C.J. p. 31 note 98.

58. Ga.—*Stephenson v. Wyatt Hardware Co.*, 135 S.E. 316, 36 Ga.App. 57.

59. Minn.—*Guerter v. Western El. Co.*, 116 N.W. 945, 104 Minn. 467.

59. S.C.—*International Agr. Corporation v. Lockhart Power Co.*, 188 S.E. 243, 181 S.C. 501, 65 C.J. p. 31 note 1.

60. Mass.—*Pulley v. Lenox Iron Works*, 2 Allen 182.

61. S.C.—*International Agr. Corporation v. Lockhart Power Co.*, 188 S.E. 243, 181 S.C. 501.

61. Wash.—*Peck v. Farmers' Nat. Bank of Colfax*, 213 P. 861, 137 Wash. 627.

62. S.C.—*International Agr. Corporation v. Lockhart Power Co.*, 188 S.E. 243, 181 S.C. 501.

Vt.—*Johnson v. Powers*, 40 Vt. 611.

63. U.S.—*First Camden Nat. Bank & Trust Co. v. J. R. Watkins Co., C.C. A Pa.*, 122 F.2d 826.

Idaho.—*Klum v. Koppel*, 118 P.2d 729, 63 Idaho 171; *Federal Land Bank of Spokane v. McCloud*, 20 P.2d 201, 52 Idaho 694.

Mo.—*Corpus Juris* cited in *Allen v. Bagley*, 133 S.W.2d 1027, 1029, 231 Mo.App. 891.

Nev.—*Dixon v. Southern Pac. Co.*, 172 P. 366, 42 Nev. 73, L.R.A.1918d 969, reheard 177 P. 14, 42 Nev. 73, L.R.A.1918d 969.

Okla.—*Magic City Steel & Metal Corp. v. Mitchell*, 265 P.2d 473.

Or.—*Keegan v. Lenzie*, 135 P.2d 717, 171 Or. 191.

Tex.—*Kimbell Milling Co. v. Greene*, Civ.App., 162 S.W.2d 991, affirmed 170 S.W.2d 191, 111 Tex. 81, 65 C.J. p. 35 note 5.

Acquisition from conditional buyer after default see *Sales* § 618.

Trover against bank paying check bearing forged indorsement see *Banks and Banking* § 257.

## Refusal to pay on negotiable instruments

Where bank's debtor bought cotton with drafts attached to bills of lading, drawn on bank, but bank pursuant to previous conspiracy refused to honor drafts and took bill of exchange obtained by debtor by reselling cotton to apply on debtor's indebtedness, and person to whom cotton was resold refused payment of the bill of exchange after having accepted it, original sellers of cotton had causes of action in conversion against debtor, bank, and person to whom cotton was resold.—*Texas State Bank & Trust Co. v. Pattee*, Tex.Civ.App., 111 S.W.2d 1157.

## Separate conversion

If sawmill company purchased logs from person who had been guilty of conversion in removing them from land of another, and appropriated them to its own use, such act was separate conversion by it having no relation to original act of conversion in so far as such alleged conversion was joint act of company and original converter.—*Wilson Cypress Co. v. Logan*, 162 So. 489, 120 Fla. 124.

## a. In General

One who takes possession of, and claims title rights in, a chattel through a purchase or other means, from a person who had no power from the owner so to dispose of it, is guilty of a conversion of the chattel and liable in trover.

One who takes possession of, and claims rights in, a chattel through a purchase or other means, from a person who had no power from the owner so to dispose of it, is guilty of a conversion of the chattel and liable in trover.<sup>63</sup> Liability for conversion attaches to whomsoever receives and converts to his own use, or otherwise disposes of, property which was delivered to him by one to whom the property had been intrusted by the owner for another and specific purpose.<sup>64</sup> If, however, the person from whom defendant obtained the property had possession of it under circumstances known or assented to by the owner, which justified an inference of apparent authority to make the disposition complained of, trover will not lie;<sup>65</sup> nor will trover lie if the

64. N.Y.—*Forbes v. United States Mortgage & Trust Co.*, 96 N.E. 424, 203 N.Y. 181.

65 C.J. p. 35 note 6.

Trover against agent for sale or delivery in violation of instructions see *Agency* § 154.

## Diversion by factors

Importers who agreed to pay percentage of drawback refund to another for work on goods could recover from latter's factors for conversion, where factors, with knowledge of agreement, directed customs broker to divert refund checks.—*Hirschberg v. Hermal Textile Co.*, 264 N.Y.S. 215, 238 App.Div. 338.

65. Ga.—*Southern Discount Co. v. Elliott*, 70 S.E.2d 605, 86 Ga.App. 50.

Vt.—*Murphy v. Britton*, 1 A.2d 724, 109 Vt. 522, 65 C.J. p. 35 note 7.

## Authorization of loan

Where plaintiff gave to treasurer of corporation check payable to order of treasurer and signed letter which clearly authorized bank to make a loan to the treasurer on security of bonds delivered by plaintiff to the treasurer, bank which loaned money to the treasurer to pay an indebtedness of the corporation to the bank, applied proceeds of the check to the corporation's indebtedness, and applied proceeds realized from sale of bonds, upon the failure of the treasurer to pay the note at maturity, to the payment of the treasurer's note, was not guilty of conversion of the check and bonds.—*Thelan v. Atlan-*

purchase is assented to by the real owner, even if the goods are sold by a wrongdoer.<sup>66</sup>

**Redelivery of property.** One is not liable in trover for redelivering a chattel to the person from whom he received it,<sup>67</sup> notwithstanding he knew that such person's possession was wrongful.<sup>68</sup> If property is carried off by one person with intent to commit a larceny, it is not conversion for another person to seize it, on behalf of the owner, for the purpose of restoring it to him.<sup>69</sup>

### b. Knowledge or Good Faith

It is well established that it constitutes a conversion to receive property from one who has no right to part with, or dispose of, such property, and thereafter to exercise dominion over it, whether with knowledge of the owner's rights or in good faith without any notice thereof.

It is well established that it constitutes a conversion to receive property from one who has no right to part with, or dispose of, such property and

thereafter to use, sell, or exercise dominion over it, whether with knowledge of the owner's rights<sup>70</sup> or in good faith without any notice whatever of the rights of the owner.<sup>71</sup> However, the mere purchase of personal property in good faith from a person who has no right to sell it is not a conversion;<sup>72</sup> there is no conversion until the title of the lawful owner is made known and resisted<sup>73</sup> or the purchaser exercises dominion over the property by use, sale, or otherwise.<sup>74</sup> Also, it has been held not to be a conversion to receive purchase money for an interest in land without knowledge that the money is held in trust.<sup>75</sup>

### § 46. Use or Disposition of Property

Any use or disposition of the personal property of another is a conversion where it is unauthorized by, without the license or consent of, or in violation of, the orders or instructions of the owner and is in denial or defiance of his rights.

Any use<sup>76</sup> or disposition of the personal property

the Nat. Bank of Boston, 17 NE 2d 697, 301 Mass. 463.

#### Protection of statute

Where owner of goods clothed employee with indicia of ownership thereof and employee converted and sold the goods to bona fide purchasers for value, bona fide purchasers were protected by statute which provided that if one of two innocent persons must suffer by the act of the third, he, by whose negligence it happened, must be the sufferer.—*J. G. Boswell Co. v. W. D. Felder & Co.*, 230 P.2d 386, 103 Cal App 2d 767.

66. Fla.—*Wilson Cypress Co. v. Logan*, 162 So 489, 120 Fla. 124.

67. Conn.—*Coleman v. Francis*, 129 A. 718, 102 Conn. 612.

68. Mass.—*Loring v. Mulcahy*, 3 Allen 575.

Mo.—*Ittembaugh v. Phlips*, 75 Mo 422.

Return to bailor after notice of true ownership see Bailments § 40.

69. N.C.—*Sharp v. Newsmith*, 40 S.C. L. 31.

70. S.C.—*International Agr. Corp. v. Lockhart Power Co.*, 188 S.E. 213, 181 S.C. 501.

65 C.J. p. 36 note 13.

Knowledge or bad faith as element of conversion generally see supra § 8.

#### Pledge of stock

Where vice president of bank, pursuing an alleged independent fraudulent course, known to brokers through employees of brokers, wrongfully pledged bonds of customers on margin account of his own, the purported pledges could have been treated as conversions on part of pledgee.—*Union Old Lowell Nat. Bank v. Paine*, 61 N.E.2d 666, 316 Mass. 313.

71. U.S.—*First Camden Nat. Bank & Trust Co. v. J. R. Watkins Co.*, C.C.A. Pa., 122 F.2d 826.—*National Atlas Elevator Co. v. U. S.*, C.C.A. N.D., 97 F.2d 940.

Ala.—*Claybrooke Warehouse & Gin Co. v. Farmers Co-op Warehouse & Gin Co.*, 71 So 2d 88, 260 Ala. 518.—*Geneva Gin & Storage Co. v. Rawls*, 199 So 734, 240 Ala. 320.

Idaho.—*Klam v. Koppel*, 118 P.2d 729, 63 Idaho 171.

La.—*State ex rel. Muslow v. Louisiana Oil Refining Corp.*, App., 176 So 686, motion denied 177 So 476, affirmed *Arkansas Fuel Oil Co. v. State of Louisiana ex rel. Muslow*, 58 S.Ct. 632, 304 U.S. 197, 62 L.Ed. 1287, rehearing denied 58 S.Ct. 1044, 104 U.S. 589, 42 L.Ed. 1549.

Okla.—*Corpus Juris cited in Wilson v. Holmes*, 50 P.2d 1081, 174 Okl. 527.

Or.—*Keegan v. Lenzie*, 135 P.2d 717, 171 Or. 191.

S.C.—*International Agr. Corp. v. Lockhart Power Co.*, 188 S.E. 213, 181 S.C. 501.

Tenn.—*Cravch v. Ralph Nichols Co.*, App., 267 S.W.2d 132.

Tex.—*Bolton v. Stewart*, Civ.App., 191 S.W.2d 798.—*Kenyon v. Bender*, Civ.App., 174 S.W.2d 110, error refused.

65 C.J. p. 36 note 14.

#### Requirements of statute

In action against junk dealer for conversion of chattels, where junk dealer had acquired property without exacting from seller a written statement that seller had paid for or owned the property, as required by statute, junk dealer was guilty of fraud, was a purchaser in bad faith, and was under duty to explain how, when, and from whom the property was acquired.—*McGuire v. Monroe*

*Scrap Material Co.*, 180 So. 413, 189 La. 573.

72. Okl.—*McJunkin v. Hancock*, 176 P. 740, 71 Okl. 257.

65 C.J. p. 36 note 15.

73. N.Y.—*Gillet v. Roberts*, 57 N.Y. 28.

Okla.—*McJunkin v. Hancock*, 176 P. 740, 71 Okl. 257.

74. Conn.—*Coleman v. Francis*, 129 A. 718, 102 Conn. 612.

75. Tex.—*West v. Rule*, Civ.App., 195 S.W. 230.

76. Cal.—*Zanlow v. Kroenert*, 176 P. 2d 1, 29 Cal 2d 541, followed in *Kroenert v. Zanlow*, 176 P.2d 8, 29 Cal 2d 478.

Mass.—*Brown v. General Trading Co.*, 37 NE 2d 987, 310 Mass. 263.

Minn.—*Wirdale v. Anderson*, 258 N.W. 726, 193 Minn. 384.

Mo.—*Sigmund v. Lowes*, App., 236 S.W.2d 14.

Okla.—*Lesh v. Branch*, 58 P.2d 578, 177 Okl. 211.

Or.—*Conselmann v. Northwest Poultry & Dairy Products Co.*, 235 P.2d 757, 190 Or. 332.

65 C.J. p. 36 note 19.

Unauthorized use by bailee see Bailments § 31, 44.

#### Reason for rule

One cannot deal with another's property as his own without the other's knowledge or consent and thereby dissipate that property.—*Blankenship v. Zimmerman*, 199 S.E. 527, 188 S.C. 413.

The use as collateral for a loan of notes and a trust deed owned by another and pledged without the owner's consent or knowledge constitutes a wrongful conversion of such property.—*Gernaci v. Sultan*, 288 Ill.App. 291.

ty of another<sup>77</sup> is a conversion where it is unauthorized by, without the license or consent of, or contrary to, or in violation of, the orders or instructions of the owner and is in denial or defiance of his rights; and an abuse or misuse of possession lawfully obtained constitutes a conversion.<sup>78</sup> However, an authorized or lawful use of another's property,<sup>79</sup> or a mere use by a person in rightful or lawful possession,<sup>80</sup> is not a conversion. In order that use by a person in rightful possession may constitute conversion it must be in complete defiance of the owner's title and with an intent permanently to deprive him of his property.<sup>81</sup> Also, it is not a conversion for a person to assign and transfer all his right, title, and interest in a chattel,<sup>82</sup> or to turn the property over to the real owner;<sup>83</sup> and if a fund is to be turned over to one on the happening of a contingency on or before a certain day, it is not a conversion otherwise to dispose of the fund after the specified day, where the contingency has

not happened.<sup>84</sup>

**Deposit or storage.** A person depositing another's funds in a bank without authority is guilty of conversion of such funds;<sup>85</sup> but merely placing another's chattels in a building for storage, preservation, or safekeeping is not necessarily a conversion,<sup>86</sup> as where it is done to prevent a repetition of unauthorized use by a third person.<sup>87</sup>

**Transfer of stock on company's books.** It has been both affirmed<sup>88</sup> and denied<sup>89</sup> that it is a conversion to cause a certificate of shares of stock to be transferred on the company's books to a person other than the owner.

## § 47. — Change in Nature

One who effects a substantial change in the form or nature of property without the knowledge or consent of the owner is liable for a conversion.

One who effects a substantial change in the form or nature of property without the knowledge or con-

77. Ill.—Geraci v. Sultan, *supra*.  
Mass.—Geguzis v. Brockton Standard Shoe Co., 197 N.E. 51, 281 Mass. 368.

N.Y.—Pemberton v. Windsor Leasing Co., 58 N.Y.S.2d 292—Del Piccolo v. Newburger, 9 N.Y.S.2d 512.  
N.D.—Juzeler v. Buchli, 249 N.W. 780, 68 N.D. 657.  
65 C.J. § 39 note 20.

**Pledging merchandise,** title to which was in another, without authority, for personal loan, was wrongful conversion of property, and owner was entitled to reclaim it so long as its identity was not lost.—In re Petrosimolo's Estate, 273 N.Y.S. 713, 162 Misc. 419.

### Methods

A conversion may be committed by disposing of a chattel by lease, pledge, gift or other transaction intending to transfer a proprietary interest in it.—Coles v. Sutphen, 75 A.2d 623, 167 Pa.Super. 457.

### Renewal of note

Where holders left note secured by mortgage with bank for collection with instructions not to renew, and bank without knowledge or consent of holders renewed note, holders were entitled to recover face of note from makers and bank unless they accepted new note or ratified renewal by accepting interest payments with full knowledge that payment was on new note.—Bailey v. Riggs, 74 S.W.2d 396, 189 Ark. 456.

78. Conn.—Bruneau v. W. & W. Transp. Co., 82 A.2d 923, 138 Conn. 179.

N.H.—E. J. Caron Enterprises v.

State Operating Co., 179 A. 665, 87 N.H. 371.  
65 C.J. § 37 note 21.

79. U.S.—Determan v. Jenkins, D.C. Ga., 111 F.Supp. 604.

Ill.—McInerney v. Nachman, 3 N.E.2d 105, 286 Ill.App. 477.  
65 C.J. § 37 note 22.

### Aiding cashing of check

In action by corporate payee against drawer for allegedly aiding payee's president in converting proceeds of check, if proceeds were used by president to pay valid corporate debt to president, payee could not recover, especially where all claims of creditors of payee other than the president had been liquidated.—Sam R. Levy Fabrics v. Shapiro Bros. Factors Corp., 19 N.Y.S.2d 593, 259 App. Div. 463.

### Repayment of bonds as contemplated

Seller of bonds, redelivered to it by purchaser for collection and enforcement of mortgage securing them pursuant to their provisions, was not liable to purchaser for conversion of bonds in purchasing mortgaged property at foreclosure sale and crediting upon bonds proportionate amount of purchase price, since use of bonds in foreclosure was contemplated and such use precluded their return.—Lambert v. American Trust Co., 264 N.W. 299, 274 Mich. 86.

80. Ill.—McInerney v. Nachman, 3 N.E.2d 105, 286 Ill.App. 477.  
65 C.J. § 37 note 23.

### Copying abstract book

Copying of abstract company's title abstract books was not conversion of books.—Clay County Abstract Co. v. McKay, 147 So. 407, 226 Ala. 394.

### Indorsing checks by payee

A restaurant keeper, turning over to insurance company's office employee amounts of company's checks, made payable to and indorsed or cashed by such keeper, in reliance on employee's false representations that money was due employee for commissions on insurance sold by him, was not liable in trover to surety on employee's fidelity bond for amount of company's loss paid by surety.—Maryland Cas. Co. v. Wolfe, 25 A.2d 665, 180 Md. 513.

81. Or.—Jeffries v. Pankow, 223 P. 903, 112 Or. 439.

82. Va.—Williams v. Melendez, Gano & Faye, 127 S.E. 32, 141 Va. 370.

83. Miss.—Abasi Bros. v. Louisville & N. R. Co., 76 So. 665, 115 Miss. 803, L.R.A.13183 652.

Surrender by carrier in obedience to legal process see Carriers § 187.

84. N.Y.—Halliday v. Nicholas, 34 N.Y.S. 104, 13 Misc. 111.

85. Tex.—Gray v. Black, Civ.App., 267 S.W. 291, reversed on other grounds, Com.App., 280 S.W. 573.

86. Neb.—Breslow v. City of Lincoln, 240 N.W. 553, 122 Neb. 895.  
85 C.J. § 37 note 23.

Placing goods in warehouse by carrier see Carriers § 179.

87. Tex.—Guif, C. & S. F. R. Co. v. Pratt, Civ.App., 183 S.W. 103.

88. U.S.—McAllister v. Kuhn, Utah, 96 U.S. 87, 24 L.Ed. 815.  
85 C.J. § 37 note 22.

Liability of, and remedies against, corporation see Corporations § 439.

89. Cal.—Thompson v. Toland, 48 Cal. 99—Atkins v. Gamble, 48 Cal. 86, 10 Am.R. 282.

sent of the owner is liable for a conversion;<sup>90</sup> but the rule does not apply to acts which do not work a substantial change in the form or nature of the property in question.<sup>91</sup> Trover may, it seems, be brought for the value of the property in its new or improved state,<sup>92</sup> at least where the conversion was willful and with knowledge of the true ownership.<sup>93</sup>

# § 48. — Sale

- a. In general
- b. Sale of property in which another has part interest or lien

## a. In General

A sale of the personal property of another person is an actionable conversion where it is wrongful or unauthorized by law or the consent of the owner and is in defiance of his rights.

A sale of the personal property of another person is an actionable conversion where it is wrongful or unauthorized by law or the consent of the owner and is in defiance of his rights.<sup>94</sup> Obviously, a sale of property by a person entitled to its possession,<sup>95</sup> or by the owner thereof,<sup>96</sup> is not a conversion, unless it is in derogation of a mortgage, as considered in Chattel Mortgages § 260.

*Necessity of delivery.* A sale, in order to constitute a conversion, must be consummated by a delivery.<sup>97</sup>

*Conveyance of realty.* A conveyance of premises is not a conversion of chattels thereon belonging to the tenant or to a third person not in possession.<sup>98</sup> Timber regarded at the time as a part of the freehold is not susceptible of being converted by the execution of a deed conveying it.<sup>99</sup>

*Property previously sold.* A vendor who by sale or otherwise deprives a vendee of property previously sold to him is guilty of conversion,<sup>1</sup> and the second vendee is also liable where he has sold the goods and converted the proceeds to his own use.<sup>2</sup> However, neither a devisee who was without notice of plaintiff's claim to testator's realty, under an alleged oral contract to devise, until after he had conveyed it to third persons, and who was not alleged to have received anything for the conveyance,<sup>3</sup> nor the executors, whose only interest in the land was to subject it to the debts of the testator,<sup>4</sup> are liable to plaintiff under the theory of conversion.

## b. Sale of Property in Which Another Has Part Interest or Lien

A wrongful sale of goods whereby a person who has a part interest therein, or a lien thereon, is deprived of his right is a conversion whether the wrongdoer is an owner of another part or a lienholder, or a stranger to the property.

A wrongful sale of goods whereby a person who

90. Cal.—Asato v. Emirzian, 171 P. 90, 177 Cal. 493.  
65 C.J. p 37 note 35.

91. Wis.—Donovan v. Barkhausen Oil Co., 227 N.W. 940, 200 Wis. 194.  
65 C.J. p 37 note 36.

92. Ala.—Riddle v. Driver, 12 Ala. 590.

N.Y.—Brown v. Sax, 7 Cow. 95. Measure of damages see infra § 169.

93. N.Y.—Silsbury v. McConn, 3 N. Y. 379, 53 Am.D. 307.

94. Cal.—Lustanian-American Development Co. v. Seaboard Dairy Credit Corporation, 34 P.2d 139, 1 Cal.2d 121.

Idaho.—Black v. Darrag, 233 P.2d 415, 71 Idaho 404.

Ind.—Meyer-Kiser Bank Liquidating Committee v. Byrum, 199 N.E. 255, 210 Ind. 11—Sullivan & O'Brien v. Kennedy, 26 N.E.2d 267, 107 Ind. App. 457.

La.—Bryson v. Bates-Crumley Chevrolet Co., App. 166 So. 879, reheard 171 So. 605.

Miss.—Corpus Juris cited in Rigby v. Stone, 13 So.2d 230, 231, 194 Miss. 775.

N.Y.—U. S. Fidelity & Guaranty Co. v. Leon, 300 N.Y.S. 331, 165 Misc. 549.

Dr.—Blake-McFall Co. v. Wilson, 193 P. 902, 98 Or. 626, 14 A.L.R. 1275.

Pa.—Coles v. Sutphen, 75 A.2d 623, 167 Pa.Super. 457.

R.I.—Nestle-Lemur Co. v. Corrigan, 198 A. 360, 60 R.I. 312, 116 A.L.R. 887.

Tenn.—Newhall Chain, Forge & Iron Co. v. William J. Oliver Mfg. Co., 7 Tenn.App. 127.

Tex.—Texas State Bank & Trust Co. v. Patee, Civ.App., 111 S.W.2d 1157, 65 C.J. p 38 note 40.

## Interpretation of bill of sale

In action for reasonable value of property alleged to have been converted, if plaintiff's predecessor had legal title to some of goods involved, question whether bill of sale executed by defendant's predecessor constituted a wrongful exercise of dominion, or whether bill merely purported to convey interest of defendant's predecessor, depended upon interpretation of the bill.—American Castype Corp. v. Niles-Bement-Pond Co., 42 N.Y.S.2d 638, 286 App.Div. 557, reargument denied 44 N.Y.S.2d 268, 286 App.Div. 949.

## Conversion of stock certificate

Act of brokerage firm which received stolen stock certificate in surrendering it to transfer agent for new certificate was equivalent to sale, constituting conversion.—U. S. Fidelity & Guaranty Co. v. Newburger, 188 N.E. 141, 263 N.Y. 16.

95. N.Y.—United States Fidelity & Guaranty Co. v. Leon, 300 N.Y.S. 331, 165 Misc. 549.

96. Cal.—Thomsen v. Culver City Motor Co., 41 P.2d 597, 4 Cal.App. 2d 639.

Tex.—Sandoval v. Eagle Pass Lumber Co., Civ.App., 248 S.W. 132.

97. Tex.—San Antonio Irr. Co. v. Deutschmann, 105 S.W. 486, 102 Tex. 201, 114 S.W. 1174.  
65 C.J. p 38 note 44.

98. N.Y.—Huntington v. Herrman, 98 N.Y.S. 48, 111 App.Div. 875, affirmed 81 N.E. 1166, 188 N.Y. 622.  
65 C.J. p 38 note 45.

99. Tex.—Berry v. Hindman, 129 S. W. 1181, 61 Tex.Civ.App. 291.

1. Wash.—Wilson Motor Co. v. Lamping Motors, 78 P.2d 559, 194 Wash. 416.  
65 C.J. p 39 note 47.

2. U.S.—Northwestern State Bank v. Silberman, Neb., 154 F. 809, 88 C.C.A. 535.

Wash.—Wilson Motor Co. v. Lamping Motors, 78 P.2d 559, 194 Wash. 416.

3. Mo.—Page v. Joplin Nat. Bank & Trust Co., 255 S.W.2d 821, 363 Mo. 1008.

4. Mo.—Page v. Joplin Nat. Bank & Trust Co. supra.

has a part interest therein, or a lien thereon, is deprived of his right, is a conversion whether the wrongdoer is an owner of another part or a lienholder,<sup>5</sup> or a stranger to the property.<sup>6</sup> However, the assignment of a chose in action subject to a lien does not constitute a conversion as to the lienholder, if the assignee take with notice of the lien.<sup>7</sup> The satisfaction of a lien by an invalid sale of chattels is a conversion.<sup>8</sup> Where a deposit of school land certificates amounted not to a pledge but to a mortgage of the depositor's equitable interest in the land, a sale of the certificates at public auction by the holder, although void, is not a conversion.<sup>9</sup>

#### § 49. — Removal or Asportation

A removal or asportation of a chattel is not in itself a sufficient assertion of ownership to constitute a conversion, unless prompted by an intent to deprive the owner either of his property or possession.

A removal or asportation of a chattel is not in itself a sufficient assertion of ownership to constitute a conversion,<sup>10</sup> unless prompted by an intent to de-

prive the owner either of his property or possession.<sup>11</sup> It is not a conversion for one to move from his premises, or from one part of his premises to another, chattels which the owner has left there either with or without license therefor.<sup>12</sup> The removal of another's property out of the state is an unwarranted assumption of control of the property constituting a conversion where it is without the consent of the owner and is not justified by necessity or by any warrant whatever.<sup>13</sup>

#### § 50. Detention of Property in General

A wrongful detention of property, where another is entitled to the immediate possession thereof, is a conversion; but a mere detention of property which rightfully came into one's possession is not an actionable conversion.

A wrongful detention of personal property, where another person is entitled to immediate possession thereof, may constitute a conversion,<sup>14</sup> even though possession was rightfully obtained,<sup>15</sup> such as a detention based on a negation of the owner's rights<sup>16</sup> or accompanied by an intent to convert the property

5. Conn.—*Corpus Juris* cited in *Hansel v. Hartford-Connecticut Trust Co.*, 49 A.2d 666, 675, 133 Conn. 181. N.D.—*Hochstetler v. Graber*, 48 N.W. 2d 15, 78 N.D. 90.

Vt.—*Eastman v. Pelletier*, 47 A.2d 298, 114 Vt. 419. 65 C.J. p. 39 note 49.

#### Time of conversion

Where vendor placed sale of farm in hands of plaintiffs and orally agreed to give them title to vendor's share of growing crops as part of their commission in event plaintiffs found a purchaser, and where vendor did not take part in sale of crops by purchaser or receive any part of proceeds thereof, conversion of plaintiffs' share of crops by vendor occurred, if at all, at time vendor sold farm without specific reservation of growing crops.—*Ax v. Schloot*, 64 N.E.2d 668, 116 Ind.App. 366.

6. Ind.—*Collins v. Ayers*, 57 Ind. 239.

7. Minn.—*Comfort v. Creelman*, 53 N.W. 1157, 52 Minn. 280.

8. Or.—*Swank v. Elwert*, 105 P. 901, 55 Or. 487. 65 C.J. p. 39 note 52.

9. Wis.—*Mowry v. Wood*, 12 Wis. 413.

10. N.Y.—*Hammond v. Sullivan*, 99 N.Y.S. 472, 473, 112 App.Div. 738. 65 C.J. p. 39 note 56.

11. N.H.—*E. J. Caron Enterprises v. State Operating Co.*, 179 A. 665, 87 N.H. 371. 65 C.J. p. 39 note 57.

12. Conn.—*Sharkiewicz v. Lepone*, 98 A.2d 798, 139 Conn. 706. 65 C.J. p. 39 note 58.

#### Worthless property

(1) Where mortgagee which took possession of vacant building upon foreclosure did not know to whom two unlocked trunks and suitcase and contents found in building belonged, and owner had known that building was being abandoned but had continued without right to keep the property in building, mortgagee was not liable for conversion in causing the property, which was reasonably deemed to be worthless, to be removed from building and thrown away; and in determining its liability, mortgagee was entitled to act on appearances, and its duty depended upon value of the property to eyes of reasonable man in its position, not upon value that property might later be shown to have had, and its duty did not extend beyond reasonable conduct.—*Row v. Home Sav. Bank*, 29 N.E.2d 552, 306 Mass. 522, 131 A.L.R. 160.

(2) Property of no value see supra § 33.

13. N.Y.—*Fitchett v. Canary*, 14 N.Y.S. 479, 59 N.Y.Super.Ct. 383, affirmed 30 N.E. 868, 131 N.Y. 564. Okl.—*Lesh v. Branch*, 58 P.2d 578, 177 Okl. 211.

14. Ala.—*Geneva Gin & Storage Co. v. Rawlis*, 199 So. 734, 240 Ala. 320. Conn.—*Bruneau v. W. & W. Transp. Co.*, 32 A.2d 923, 138 Conn. 179. N.Y.—*Pierpoint v. Hoyt*, 182 N.E. 235, 260 N.Y. 26.

N.D.—*Taugher v. Northern Pac. R. Co.*, 129 N.W. 747, 21 N.D. 111. Or.—*Lee Tung v. Burkhardt*, 116 P. 1066, 59 Or. 194.

Tex.—*American Surety Co. of New York, Civ.App.*, 354 S.W. 241, affirmed, *Com.App.*, 287 S.W. 265.

15. Conn.—*Bruneau v. W. & W. Transp. Co.*, 32 A.2d 923, 138 Conn. 179.

16. U.S.—*City of Fort Worth v. McCamey*, C.C.A.Tex., 93 F.2d 984, certiorari denied 58 S.Ct. 1041, 304 U.S. 571, 32 L.Ed. 1535.

Ky.—*Getzug v. Work*, 168 S.W.2d 721, 293 Ky. 193.

La.—*Cunningham v. Bell, App.*, 26 So.2d 769—*Edwards v. Max Thieme Chevrolet Co., App.*, 191 So. 569.

Mich.—*Cozadd v. Healy*, 61 N.W.2d 20, 338 Mich. 187.

Okl.—*Continental Oil Co. v. Berry*, 103 P.2d 69, 187 Okl. 390—*Johnston v. American Finance Corp.*, 79 P.2d 242, 182 Okl. 567—*Kelly v. Oilver Farm Equipment Sales Co.*, 36 P.2d 888, 169 Okl. 269.

R.I.—*Nestle-Lemur Co. v. Corrigan*, 198 A. 360, 60 R.I. 312, 116 A.L.R. 867.

Tex.—*Parchman v. Parchman, Civ. App.*, 239 S.W.2d 902—*Alexander Trust Estate v. Lindsey Drug Co., Civ.App.*, 214 S.W.2d 475—*English v. Nichols, Civ.App.*, 142 S.W.2d 534—*Ellis Oil Co. v. Adams, Civ. App.*, 109 S.W.2d 1026, error dismissed—*Neyland v. Bremmer, Civ. App.*, 73 S.W.2d 884, error dismissed.

65 C.J. p. 39 note 62.



to the holder's own use,<sup>17</sup> or a detention or non-delivery, without legal excuse, after demand for delivery has been made by the person entitled to possession or his duly authorized agent,<sup>18</sup> or after the owner has accepted a tender of the property by the person in possession thereof.<sup>19</sup>

On the other hand, a mere detention of another's chattels which rightfully came into one's possession is not an actionable conversion;<sup>20</sup> a rightful detention is not a conversion;<sup>21</sup> and obviously trover cannot be based on an alleged detention by defendant where plaintiff holds the property,<sup>22</sup> the property is in the hands of a third person and has never been in the possession of defendant,<sup>23</sup> or it is simply missing, rather than detained by defendant.<sup>24</sup>

**Invalid or rescinded contract.** Trover will lie for the detention by defendant of property which he obtained under an invalid or illegal contract<sup>25</sup> of sale,<sup>26</sup> or a contract which has been rescinded,<sup>27</sup> except where the failure to return the property was merely a breach of an agreement to return it.<sup>28</sup> Retention of possession of property after the holder

has learned or had reasonable means of knowing that the person from whom he purchased it had no right to convey title is a conversion,<sup>29</sup> and the guilty party is not relieved of liability therefor by his ignorance of the owner's title.<sup>30</sup>

**Effect of legal proceedings.** The levy of an attachment on property in one's possession is a legal excuse for refusing to deliver it to the owner.<sup>31</sup> An action of trover may be brought for the failure to return property to a person who has recovered a judgment establishing his ownership and right to possession<sup>32</sup> in a replevin suit against him.<sup>33</sup> The issuance of a temporary restraining order, even if improvidently issued, which prevents one from removing lumber from the land of another, is not a conversion by the owner of the land and lumber.<sup>34</sup>

Even though plaintiff was required, pursuant to a criminal complaint, not to remove property, which was in his possession, from its location, he cannot hold the complainant liable for conversion, since there had been no dealing with the property inconsistent with his rights.<sup>35</sup>

17. Tex.—*Neiland v. Brammer*, Civ App, 73 S.W.2d 854, error dismissed.  
65 C.J. p 40 note 63

18. La.—*Edwards v. Max Thieme* (Chevrolet Co., App. 191 So. 569)  
Me.—*Sanborn v. Matthews*, 41 A.2d 704, 141 Me. 213  
Mo.—*Sigmund v. Lowes*, App. 236 S.W.2d 14

Tex.—*Parchman v. Parchman*, Civ. App. 239 S.W.2d 902—*Alexander Trust Estate v. Lindsey Drug Co.*, Civ. App. 214 S.W.2d 475—*English v. Nichols*, Civ. App. 142 S.W.2d 531—*Ellis Oil Co. v. Adams*, Civ. App. 109 S.W.2d 1026, error dismissed

65 C.J. p 10 note 64.

Demand and refusal generally see infra §§ 54-62

**Property attached to convertor's chattel**

Refusal of conditional seller of truck, retaking possession after tires conditionally sold by plaintiff were attached, to deliver tires up on demand, was conversion—*Bousquet v. Mack Motor Truck Co.*, 168 N.E. 800, 269 Mass. 200.

19. U.S.—*Southern Oil Corporation v. Waggoner*, CCA Tex., 276 F.487, certiorari denied 42 S.Ct. 382, 258 U.S. 626, 66 L.Ed. 798

20. U.S.—*City of Fort Worth v. McCamey*, CCA Tex., 93 F.2d 964, certiorari denied 58 S.Ct. 1041, 304 U.S. 571, 82 L.Ed. 1535.

Mass.—*Edinburg v. Allen Squire Co.*, 12 N.E.2d 718, 299 Mass. 206.  
65 C.J. p 40 note 66

**Awaiting repossession by owner**

Where vaporizers had been returned for repair to manufacturer which stripped and examined vaporizers for claimed defects but discovered vaporizers required cleaning only, and manufacturer had not authorized their return for cleaning and had not exercised complete ownership and dominion over vaporizers, manufacturer's failure to reassemble and return units did not constitute conversion—*Ceresal Chemical Corp. v. Design Engineering Co.*, D.C. Minn., 100 F.Supp. 271

**Awaiting plaintiff's disposition**

Where plaintiff's automobile, after damage by defendant's train at crossing, was taken by defendant with plaintiff's knowledge for repair, and afterwards held by defendant awaiting plaintiff's disposition defendant was not guilty of conversion—*Gulf, C. & S. F. R. Co. v. Pratt*, Tex. Civ. App. 183 S.W. 103, error refused.

21. U.S.—*British-American Tobacco Co. v. Federal Reserve Bank of New York*, CCA N.Y., 165 F.2d 935, certiorari denied 60 S.Ct. 131, 308 U.S. 600, 84 L.Ed. 502.  
Ill.—*Vincent v. Riling*, 168 Ill.App. 445.

Ind.—*La Plante v. City of Vincennes*, 194 N.E. 191, 100 Ind.App. 261, rehearing denied 195 N.E. 297, 100 Ind.App. 261.  
65 C.J. p 40 note 67.

22. ND.—*Wright v. Myers*, 174 N.W. 882, 43 ND 375

23. N.Y.—*Landers, Prary & Clark v. Fulton Metal Co.*, 165 N.Y.S. 229

24. N.Y.—*Vulcan Asbestos Mfg. Co. v. Flatow*, 149 N.Y.S. 945, 87 Misc. 324

25. N.C.—*Tomlinson v. Bennett*, 59 S.E. 37, 145 N.C. 279.

Tex.—*Uvalde Nat. Bank v. Dockery*, Civ. App., 83 S.W. 29

26. Ala.—*Strauss v. Schwab*, 16 So. 692, 104 Ala. 669.  
65 C.J. p 41 note 72.

27. N.Y.—*Intner v. Emery*, 174 N.Y.S. 150—*Hellerman v. Schantz*, 112 N.Y.S. 1063

28. S.C.—*Itay v. Pilgrim Health & Life Ins. Co.*, 34 S.E.2d 218, 206 S.C. 344.

29. Conn.—*Semple v. Morganstern*, 116 A. 906, 97 Conn. 402, 26 A.L.R. 21.

30. Conn.—*Semple v. Morganstern*, supra

31. N.H.—*Fletcher v. Fletcher*, 7 N.H. 452, 28 Am.D. 359.

32. Cal.—*Jackson v. Bacon*, 218 P. 1027, 63 Cal.App. 463.

33. N.C.—*Asher v. Reizenstein*, 10 S.R. 589, 105 N.C. 213.  
65 C.J. p 41 note 76.

34. Minn.—*Steller v. Thomas*, 45 N.W.2d 537, 232 Minn. 275.

35. Wash.—*Martin v. Sikes*, 229 P.2d 546, 38 Wash.2d 274.

### § 51. — To Permit Investigation of Title or Right to Possession

A bona fide reasonable detention of goods by one who has assumed, or is charged with, some duty with respect to them, for the purpose of ascertaining their true ownership or of determining the right of the demandant to receive them, will not sustain an action for conversion.

A bona fide reasonable detention of goods by one who has assumed, or is charged with, some duty with respect to them,<sup>36</sup> for the purpose of ascertaining their true ownership or of determining the right of demandant to receive them,<sup>37</sup> will not sustain an action for conversion. Such a defense will be of no avail, however, if plaintiff's title is admitted,<sup>38</sup> or any other reason is advanced for the detention alleged.<sup>39</sup>

### § 52. — To Enforce Payment or Reimbursement

Where property was detained for the alleged purpose of enforcing payment or restoration of the purchase price, or reimbursement of expenses incurred in connection with the property, trover will lie where the possession was wrongful, but not where the possession was rightful.

Where property was detained for the alleged purpose of enforcing payment or restoration of the purchase price, or reimbursement of expenses incurred in connection with the property, trover will lie where the possession was wrongful,<sup>40</sup> or the amount due was tendered,<sup>41</sup> but not where the possession was rightful<sup>42</sup> and there was no legal tender of the amount due.<sup>43</sup>

### § 53. — Preventing Removal of Property

A wrongful prevention of the removal of chattels by an owner who has the right of immediate possession thereof is a conversion.

A wrongful prevention of the removal of chattels by an owner who has the right of immediate possession thereof is a conversion, whether accomplished by forbidding<sup>44</sup> or refusing to allow<sup>45</sup> it, force and violence,<sup>46</sup> threats,<sup>47</sup> locking up the goods,<sup>48</sup> or requiring the performance of a condition which is not enforceable at law against the owner of the property.<sup>49</sup> A landowner who refuses to permit an owner to remove chattels wrongfully on the land, unless payment is made for such permission, is not guilty of conversion.<sup>50</sup>

### § 54. Demand and Refusal

The necessity and sufficiency of a demand and refusal, as well as the effect of a refusal of, or compliance with, the demand, are considered infra §§ 55-62.

Examine Pocket Parts for later cases.

### § 55. — As against Original Taker

It is the general rule that, where some other independent act of conversion can be shown, there is no necessity for a demand for personal property by the person claiming ownership or right to possession, and a refusal by the original taker thereof to deliver it, in order to show a conversion of the property; but, such a demand and refusal are ordinarily necessary where the original taker acquired possession of the property rightfully and has neither asserted title to it nor exercised

36. Neb.—Jessen v. Blackard, 65 N. W.2d 345, 159 Neb. 103—Hansen v. Village of Rulston, 22 N.W.2d 719, 147 Neb. 251—Hansen v. Village of Rulston, 18 N.W.2d 213, 145 Neb. 838.

63 C.J. p. 41 note 78.

37. Neb.—Jessen v. Blackard, 65 N. W.2d 345, 159 Neb. 103—Hansen v. Village of Rulston, 22 N.W.2d 719, 147 Neb. 251—Hansen v. Village of Rulston, 18 N.W.2d 213, 145 Neb. 838.

63 C.J. p. 41 note 79.

38. N.H.—Duty v. Hawkins, 6 N.H. 247, 25 Am.D. 459.

39. Tex.—Smith v. Texas, etc., R. Co., 108 S.W. 819, 101 Tex. 405, 63 C.J. p. 41 note 81.

40. Conn.—Simple v. Morganstern, 116 A. 908, 97 Conn. 402, 26 A.L.R. 21.

Mich.—Even-Heat Co. v. Wade Electric Products Co., 58 N.W.2d 923, 336 Mich. 584.

N.Y.—Allegro for Children, Inc., v. Weisbrod, 27 N.Y.2d 645.

Ohio—Dunn v. Barish, 166 N.E. 912, 32 Ohio App. 310.

Tex.—James v. Klar & Winterman, Civ. App., 118 S.W.2d 625.

**Detention under improper claim of lien**

Md.—Saunders v. Mullinix, 72 A.2d 720, 195 Md. 235.  
Wash.—Fischmuller v. Sussman, 9 P.2d 378, 167 Wash. 367.

41. Mass.—Wright v. Frank A. Andrews Co., 96 N.E. 798, 212 Mass. 186.

42. Tex.—May v. Anthony, Civ. App., 151 S.W. 602.  
63 C.J. p. 41 note 85.

43. Ill.—Donaldson v. Wellington Hotel Co., 175 Ill. App. 623.

Tex.—May v. Anthony, Civ. App., 151 S.W. 602.

44. Tex.—Yorsee v. Bradley, Civ. App., 275 S.W. 410.  
65 C.J. p. 41 note 89.

45. Cal.—Corpus Juris cited in Zaslou v. Kroenert, 176 P.2d 1, 6, 29 Cal.2d 541, followed in Kroenert v. Zaslou, 176 P.2d 8, 29 Cal.2d 878.  
65 C.J. p. 41 note 90.

**Release of rights under lease**  
Where oil and gas lease provided

that lessee shall have right at any time during or after expiration of lease to remove all property placed by lessee on realty, including right to draw and remove casing and lessee executed instrument releasing, relinquishing and forever quitclaiming all right under lease, lessee was not thereby precluded from removing property including casing, within a reasonable time after termination of lease and present lessee who prevented such removal was guilty of conversion—Texas Co. v. Sorrell, D. C. Mont., 116 F.Supp. 137.

46. Md.—Kirby v. Porter, 125 A. 41, 144 Md. 261.

47. Mass.—Jean v. Cawley, 105 N.E. 1009, 218 Mass. 271.

63 C.J. p. 41 note 92.

48. Or.—Trehle v. Hanna, 244 P. 75, 117 Or. 306.

65 C.J. p. 41 note 93.

49. Tex.—Kolp v. Prewitt, Civ. App., 9 S.W.2d 490.

65 C.J. p. 42 note 94.

50. Ind.—Chicago, I. & L. Ry. Co. v. Pope, 188 N.E. 594, 99 Ind.App. 280.

dominion over it inconsistent with the rights of the plaintiff.

It is the general rule that, where some other independent act of conversion can be shown, there is no necessity for a demand for personal property by the person claiming ownership or right to possession, and a refusal by the original taker thereof to deliver it, in order to show a conversion of the property.<sup>51</sup> This is because a demand and refusal are ordinarily treated as merely evidence of conversion,<sup>52</sup> making a prima facie case,<sup>53</sup> becoming conclusive if not rebutted or explained.<sup>54</sup>

Since a demand and refusal is but one means of showing that there has been a conversion, it is not

necessary when there has been a wrongful taking,<sup>55</sup> acquisition of the property as the result of a wrongful levy,<sup>56</sup> a wrongful transfer or sale of the property by defendant,<sup>57</sup> retention of money which it was defendant's duty to pay to plaintiff,<sup>58</sup> a possession maintained in violation of one's contract,<sup>59</sup> an unfulfilled promise to return the goods,<sup>60</sup> a diversion of property from the special purpose for which it was received,<sup>61</sup> the wrongful use or disposition of property by a bailee thereof,<sup>62</sup> or by a pledgee,<sup>63</sup> the wrongful taking of personalty on leased premises by a landlord on termination of the lease,<sup>64</sup> assumption of ownership by the possessor,<sup>65</sup> or any exercise of dominion and control over the property inconsistent with the rights of the owner.<sup>66</sup>

51. Ala.—Strauss v. Schwab, 16 So 892, 104 Ala. 689—Glaze v. McMillon, 7 Port. 279.  
Cal.—Weinberg v. Dayton Storage Co., 134 P.2d 155, 50 Cal.App.2d 750.  
Del.—Mastellone v. Argo Oil Corp., 82 A.2d 379, 7 Terry 102.  
Ind.—Prudential Ins. Co. of America v. Thatcher, 4 N.E.2d 574, 104 Ind. App. 14.  
Mass.—Edinburg v. Allen Squire Co., 12 N.E.2d 718, 299 Mass. 208—Lawyers' Mortg. Inv. Corporation of Boston v. Paramount Laundries, 191 N.E. 398, 287 Mass. 357.  
Mo.—Sigmund v. Lowes, App., 236 S.W.2d 14.  
Ohio.—Fidelity & Deposit Co. of Maryland v. Farmers & Citizens Bank of Lancaster, 52 N.E.2d 549, 72 Ohio App. 432.  
Okla.—Potts v. Biggs & Co., 54 P.2d 841, 176 Okl. 96—Hanson v. Brannon, 18 P.2d 517, 161 Okl. 265.  
Pa.—Corpus Juris cited in Commonwealth v. Spiegel, 82 A.2d 692, 694, 169 Pa.Super. 252.  
Vt.—Coburn v. Drown, 40 A.2d 528, 114 Vt. 158.  
Wash.—Crutcher v. Scott Pub. Co., 253 P.2d 925, 42 Wash.2d 89.  
65 C.J. p 42 note 95.

Where pledgee's possession sounds in tort from the beginning, no demand is necessary before beginning of suit to recover amount pledged.—O'Connell v. Chicago Park Dist., 34 N.E.2d 836, 376 Ill. 550, 135 A.L.R. 698.

52. Del.—Drug, Inc. v. Hunt, 168 A. 87, 5 W.W.Harr. 339.  
Mo.—Sigmund v. Lowes, 236 S.W.2d 14.  
N.D.—Hochstetler v. Graber, 48 N.W. 2d 15, 78 N.D. 98.  
Tex.—Corpus Juris cited in Meador v. Wagner, Civ.App., 70 S.W.2d 794, 799, error dismissed.  
Vt.—Weimore v. B. W. Hooker Co., 18 A.2d 181, 111 Vt. 519.  
65 C.J. p 42 notes 95, 96.  
Weight and sufficiency of evidence of demand see *infra* § 135.

53. Tex.—Corpus Juris cited in Meador v. Wagner, Civ.App., 70 S.W. 2d 794, 799, error dismissed.  
65 C.J. p 42 note 97.  
54. Iowa.—Brown v. Dubuque Altar Mfg. Co., 144 N.W. 613, 163 Iowa 343.  
65 C.J. p 42 note 98.  
55. Cal.—Flennaugh v. Heinrich, 209 P.2d 580, 89 Cal.App.2d 214.  
Idaho.—Klan v. Koppel, 118 P.2d 728, 63 Idaho 171.  
Ill.—Faubel v. Michigan Boulevard Bldg. Co., 278 Ill.App. 159.  
Me.—Sanborn v. Matthews, 41 A.2d 704, 141 Me. 213.  
Mo.—Detmer v. Miller, App., 230 S.W.2d 739.  
Mont.—Beyerlein v. Whitcomb, 26 P. 2d 349, 95 Mont. 293.  
N.Y.—Meisel Tire Co. v. Ralph, 1 N.Y.S.2d 143, 164 Misc. 845.  
65 C.J. p 42 note 99.  
56. Mass.—Massachusetts Lubricant Corp. v. Socony-Vacuum Oil Co., 25 N.E.2d 719, 305 Mass. 269.  
65 C.J. p 43 note 1.  
57. Cal.—Metzler v. Foster Holding Co., 54 P.2d 447, 5 Cal.2d 278.  
Mich.—Nibbelink v. Coopersville State Bank, 281 N.W. 415, 285 Mich. 1.  
R.I.—Nestle-Lemur Co. v. Corrigan, 198 A. 360, 60 R.I. 312, 116 A.L.R. 867.  
65 C.J. p 43 note 2.

58. N.Y.—In re Riley, 43 N.Y.S.2d 753, 266 App.Div. 150, appeal dismissed, 62 N.E.2d 245, 294 N.Y. 825.  
65 C.J. p 43 note 3.

59. Or.—Corpus Juris quoted in Kuhnhausen v. Stadelman, 149 P. 2d 168, 170, 174 Or. 252.  
65 C.J. p 43 note 4.

60. N.Y.—Durell v. Mosher, 8 Johns. 445.

Or.—Corpus Juris quoted in Kuhnhausen v. Stadelman, 149 P.2d 168, 170, 174 Or. 252.

61. Ala.—Clay County Abstract Co. v. McKay, 147 So. 407, 226 Ala. 394.

- Or.—Corpus Juris quoted in Kuhnhausen v. Stadelman, 149 P.2d 168, 170, 174 Or. 252.  
65 C.J. p 43 note 6.

62. Ala.—Shriner v. Meyer, 55 So. 156, 171 Ala. 112, Ann.Cas.1913A 1103.

63. Mo.—Richardson v. Ashby, 83 S.W. 806, 132 Mo. 238.  
65 C.J. p 43 note 8.

64. Colo.—Carper v. Ridson, 76 P. 744, 19 Colo.App. 530.  
Mont.—Scott v. Waggoner, 139 P. 454, 48 Mont. 535, L.R.A.1916C 491.

65. Ill.—Hunt v. Rosenbaum Grain Corporation, 189 N.E. 907, 355 Ill. 504—Donn v. Auto Dealers Inv. Co., 47 N.E.2d 588, 318 Ill.App. 95, reversed on other grounds 52 N.E. 2d 695, 355 Ill. 211.  
N.Y.—Del Piccolo v. Newburger, 9 N.Y.S.2d 512.  
65 C.J. p 43 note 10.

**Obtaining Injunction**  
Persons employed by purchaser of land to cut timber thereon were not required to make demand for wood on third person asserting conflicting claim of title, where third person obtained injunction which prevented taking of wood.—Price v. Evans, 275 N.Y.S. 558, 153 Misc. 302.

66. Ala.—Moore v. Stephens, 18 So. 2d 577, 31 Ala.App. 448, certiorari denied 18 So.2d 578, 245 Ala. 656.  
Del.—Drug, Inc. v. Hunt, 168 A. 87, 5 W.W.Harr. 339.  
Idaho.—Carver v. Ketchum, 28 P.2d 139, 53 Idaho 595.  
Mass.—Atlantic Finance Corp. v. Galvum, 39 N.E.2d 951, 311 Mass. 49—Geguzis v. Brockton Standard Shoe Co., 137 N.E. 51, 291 Mass. 368.  
N.Y.—Cutler-Hammer, Inc. v. Troy, 126 N.Y.S.2d 452, 283 App.Div. 123.  
R.I.—Terrien v. Joseph, 53 A.2d 923, 73 R.I. 112.  
65 C.J. p 43 note 11.

Where the original taker acquired possession of the property rightfully and has neither asserted title to it nor exercised dominion over it inconsistent with the rights of plaintiff, ordinarily a demand and refusal are necessary to establish a conversion of the property.<sup>67</sup> Where the person in possession has committed no independent act of conversion, a rightful possession in him continues as such until it is transformed into a wrongful detention by a demand for the property and a refusal to deliver it,<sup>68</sup> and in such a case an absolute and unqualified refusal, without legal excuse, may constitute a conversion in itself, as considered *infra* § 61.

*Property taken by trespasser.* Where the taking possession of the property by defendant constituted

a trespass, no demand for its return is necessary to show a conversion.<sup>69</sup>

*Property taken by mistake.* The fact that defendant carried away or otherwise converted the property in controversy by mistake does not entitle him to a demand.<sup>70</sup>

*Property obtained by fraud.* One from whom chattels have been obtained by fraud can maintain an action for conversion against the person so obtaining them without a prior demand.<sup>71</sup>

*Property obtained by void contract.* Ordinarily, a demand and refusal need not be made before bringing an action for conversion against a defendant who has obtained the property in question by

67. Ala.—Shriner v. Meyer, 55 So. 156, 171 Ala. 112, Ann.Cas.1913A 1103—Strauss v. Schwab, 16 So. 692, 104 Ala. 669.

Ark.—Kearbey v. Douglas, 221 S.W. 2d 426, 215 Ark. 523.

Cal.—Flennagh v. Heinrich, 200 P. 2d 580, 89 Cal.App.2d 214—Scott's Valley Fruit Exchange v. Grower's Refrigeration Co., 184 P.2d 183, 81 Cal.App.2d 437.

Conn.—Slosberg v. Callahan Oil Co., 7 A.2d 853, 125 Conn. 651.

Del.—Drug, Inc. v. Hunt, 168 A. 87, 5 W.W.Harr. 339.

Idaho.—Kiam v. Koppel, 118 P.2d 729, 83 Idaho 171.

Ind.—Prudential Ins. Co. of America v. Thatcher, 4 N.E.2d 574, 104 Ind. App. 14.

Mass.—Atlantic Finance Corp. v. Galvam, 89 N.E.2d 951, 311 Mass. 49.

Minn.—Corpus Juris cited in Steller v. Thomas, 45 N.W.2d 537, 545, 283 Minn. 276.

Mo.—Detmer v. Miller, App., 220 S.W.2d 739—St. Louis Fixture & Show Case Co. v. F. W. Woolworth Co., 88 S.W.2d 254, 232 Mo.App. 10.

Mont.—Beyerlein v. Whitcomb, 38 P.2d 349, 95 Mont. 293.

Neb.—Cummins v. People's Building Loan & Savings Ass'n, Neb., 86 N.W. 474, 61 Neb. 728.

N.J.—Mueller v. Technical Devices Corp., 84 A.2d 620, 8 N.J. 201.

N.Y.—Cutler-Hammer, Inc. v. Troy, 126 N.Y.S.2d 452, 283 App.Div. 123—Price v. Evans, 275 N.Y.S. 558, 153 Misc. 303.

Ohio.—Fidelity & Deposit Co. of Maryland v. Farmers & Citizens Bank of Lancaster, 52 N.E.2d 549, 72 Ohio App. 432.

Or.—Cross v. Campbell, 146 P.2d 83, 173 Or. 477—Reid v. Wentworth & Irwin, 63 P.2d 210, 155 Or. 286.

Pa.—Dalton v. South Bethlehem Brewing Co., Com.Pl., 29 North.Co. 215.

R.I.—Terrien v. Joseph, 53 A.2d 923, 73 R.I. 112.

Tex.—Guyer v. Guyer, Civ.App., 141 S.W.2d 963, error refused—Neyland v. Brammer, Civ.App., 73 S.W.2d 884, error dismissed—Meador v. Wagner, Civ.App., 70 S.W.2d 794, error dismissed.

Vt.—Tinker v. Morrill, 39 Vt. 477, 94 Am.D. 345.

Wyo.—Corpus Juris quoted in Visenberg v. Bresnahan, 202 P.2d 662, 669, 65 Wyo. 367—Corpus Juris cited in Hein v. Mercante, 113 P.2d 940, 946, 57 Wyo. 81.

65 C.J. p 44 note 12.

Demand of bailee see Bailments § 45.

Reason for rule

Where defendant has come into possession of property lawfully or without fault, it is generally necessary to make demand of possession of defendant before suit will lie, since there is no conversion until there has been a refusal to surrender such possession.—Hansen v. Village of Ralston, 18 N.W.2d 213, 145 Neb. 838.

Where pledges are such that the tort can be waived and the transaction can be ratified, a demand and refusal are necessary.—O'Connell v. Chicago Park Dist., 34 N.E.2d 836, 376 Ill. 550, 135 A.L.R. 698.

As fixing time of conversion

Where evidence showed only demand legally binding on purchaser of apartment at foreclosure sale who was liable for conversion of property therein at time of sale, was one made in writing more than three years after sale, such time would be the earliest date from which purchaser could be held responsible for conversion.—Tudor Arms v. McKendall Land Co., 6 A.2d 735, 63 R.I. 52.

68. N.J.—Mueller v. Technical Devices Corp., 84 A.2d 620, 8 N.J. 201—Farrow v. Ocean County Trust Co., 2 A.2d 552, 121 N.J.Law 344.

N.Y.—Cutler-Hammer, Inc. v. Troy, 126 N.Y.S.2d 452, 283 App.Div. 123—

Del Piccolo v. Newburger, 9 N.Y. S.2d 512.

Wyo.—Corpus Juris quoted in Visenberg v. Bresnahan, 202 P.2d 662, 669, 65 Wyo. 367.

65 C.J. p 45 note 13.

Property left on land

In action against coal company which leased land to plaintiff, for conversion of equipment used in mining coal, where property was brought or left on defendant company's land by plaintiff himself, defendant company's possession could not have become wrongful until a demand for it had been made and refused.—Persson v. McKay Coal Co., 92 P.2d 1108, 200 Wash. 75.

Sale by maker of promissory note

Automobile corporation's authority to make sales to customers after its president executed note to bank for loans and bills of sale as security on corporation's behalf was not terminated by mere maturity of note, in absence of demand for possession of automobiles, so that subsequent sales thereof did not constitute conversion of bank's property.—Thomsen v. Culver City Motor Co., 41 P.2d 597, 4 Cal.App.2d 639.

69. Mich.—Nibbelink v. Coopersville State Bank, 281 N.W. 415, 286 Mich. 1—Trudo v. Anderson, 10 Mich. 357, 81 Am.D. 795.

Tex.—Hicks Rubber Co. Distributors v. Stacy, Civ.App., 133 S.W.2d 249, 65 C.J. p 43 note 15.

Constructive trespass

Cal.—Dodge v. Meyer, 61 Cal. 405—Kee v. Becker, 129 P.2d 159, 54 Cal.App.2d 466.

70. N.H.—Bartlett v. Hoyt, 33 N.H. 151.

N.Y.—Purves v. Moltz, 28 N.Y.Super. 553, 2 Abb.Pr.N.S., 409, 82 How. Pr. 473.

71. Cal.—Douglass v. Guardian Holding Corporation, 23 P.2d 80, 132 Cal.App. 585.

65 C.J. p 43 note 18.

means of a void contract.<sup>72</sup> However, it has been held, in the case of a void contract to purchase goods entered into by a married woman, that the taking under such contract was not wrongful and that a demand and refusal are necessary to the maintenance of an action of trover.<sup>73</sup>

**Conversion by agent or servant.** An action for conversion may be maintained without previous demand and refusal against an agent who has converted the property of his principal,<sup>74</sup> or against a servant who has converted the property of his master.<sup>75</sup> However, the mere refusal of an agent to pay over on demand money collected for his principal is not sufficient to sustain an action of trover.<sup>76</sup>

**Transfer of property by person having no title or right.** An action for conversion without a prior demand and refusal is justified by a transfer of property by one having no right or title thereto, irrespective of the character of his possession.<sup>77</sup>

## § 56. — As against Third Person

- a. In general
- b. Where third person retains property
- c. Where third person has disposed of property

### a. In General

There must be a demand by the owner for the property and a refusal to return it before an action for conversion may be maintained against a defendant who has received the property from one unauthorized to dispose of it, in good faith and without notice of the owner's rights.

There must be a demand by the owner for the property and a refusal to return it before an action for conversion may be maintained against a defendant who has received the property from one unauthorized to dispose of it, in good faith and without notice of the owner's rights,<sup>78</sup> or against one who

has purchased the property at execution sale without notice of any claim of the true owner.<sup>79</sup> However, where a person with knowledge of the owner's rights receives property into his possession by purchase or otherwise from one without title or authority to dispose of it, he is liable for its conversion without a showing of demand and refusal.<sup>80</sup>

### b. Where Third Person Retains Property

There is a conflict in authority on the necessity of a demand on one who acquired property from one having no right or authority to dispose of it, where the recipient has the property in his possession when suit is brought.

Where a third person has the property in his possession when suit is brought, having acquired it from one having no right or authority to dispose of it, it is the rule in a number of jurisdictions that, although he be a bona fide purchaser, the acquisition is itself sufficient evidence of a conversion, without the showing of a demand and refusal.<sup>81</sup> The courts in a number of jurisdictions, however, have taken the position that a demand is necessary as against a bona fide purchaser who has the property in his possession,<sup>82</sup> and that such a purchaser cannot be held liable for conversion in the absence of demand and refusal unless he has sold the property or has done some other act amounting to a conversion.<sup>83</sup>

### c. Where Third Person Has Disposed of Property

Where a third person who has acquired the property has disposed of it, by sale or other disposition amounting to a conversion, a demand and refusal are not necessary to show a conversion, regardless of the manner in which the third person acquired possession of the property.

Where a third person who has acquired the property has disposed of it, by sale or other disposition amounting to a conversion, a demand and refusal are not necessary to show a conversion, whether

72. Ill.—*Corpus Juris* cited in *O'Connell v. Chicago Park Dist.*, 84 N.E.2d 885, 840, 376 Ill. 550. 65 C.J. p 45 note 19.

73. Ala.—*Strauss & Sons v. Schwab*, 16 So. 692, 104 Ala. 669.

74. Iowa.—*Hass v. Damon*, 9 Iowa 559.

75. Pa.—*Shamburg v. Moorehead*, 4 Brewst. 92.

76. N.Y.—*Pilebury v. Webb*, 33 Barb. 213.

77. Me.—*Hazleton v. Locke*, 71 A. 861, 104 Me. 164, 20 L.R.A.N.S., 35, 15 Ann.Cas. 1009.

78. Okl.—*Corpus Juris* quoted in

*Magie City Steel & Metal Corp. v. Mitchell*, 265 P.2d 478, 476.

85 C.J. p 43 note 26.

78. N.Y.—*Ochs v. Pohly*, 34 N.Y.S. 1, 37 App.Div. 92.

85 C.J. p 46 note 27.

79. N.Y.—*Shipley Construction & Supply Co. v. Mager*, 150 N.Y.S. 969, 165 App.Div. 886, affirmed 117 N.E. 1084, 221 N.Y. 879.

85 C.J. p 46 note 28.

80. Kan.—*Corpus Juris* cited in *Glass v. Brunt*, 188 P.2d 453, 455, 157 Kan. 27.

N.J.—*Corona Kid Co. v. Lichtman*, 86 A. 371, 84 N.J.Law 363.

85 C.J. p 46 note 29.

81. Ala.—*Claybrooke Warehouse & Gin Co. v. Farmers Co-op. Warehouse & Gin Co.*, 71 So.2d 88, 260 Ala. 518.

Mass.—*Heckle v. Lurvey*, 101 Mass. 244, 3 Am.R. 368.

N.D.—*Hovland v. Farmers Union Elevator Co.*, 269 N.W. 842, 67 N.D. 71.

85 C.J. p 46 note 30.

82. S.C.—*Ladson v. Mostowitz*, 23 S.E. 49, 45 S.C. 383.

85 C.J. p 46 note 31.

83. N.Y.—*Goebel v. Clark*, 275 N.Y. B. 43, 242 App.Div. 408.

85 C.J. p 46 note 32.

such person was a bona fide purchaser,<sup>84</sup> an innocent bailee of the wrongdoer,<sup>85</sup> or other innocent taker,<sup>86</sup> or was one taking with notice of the rights of the true owner.<sup>87</sup>

### § 57. — Where Demand Useless

A demand and refusal are not essential to a conversion where it is clear that a demand would have been useless or unavailing, if it had been made.

A demand and refusal are not essential to a conversion where it is clear that a demand would have been useless or unavailing, if it had been made.<sup>88</sup> This may be either because defendant has asserted an adverse claim of ownership or right of possession in himself or in a third person,<sup>89</sup> or because it is shown that defendant had placed it beyond his power to comply with a demand if made,<sup>90</sup> as by having placed the property out of his possession and control.<sup>91</sup>

*In case of prior refusal.* Where defendant has already refused to deliver the property, further demand is not necessary to the maintenance of an action for its conversion, brought either by the original owner,<sup>92</sup> or by his transferee, the transfer having been made after demand and refusal.<sup>93</sup> However, it has also been held that a purchaser from the owner after refusal cannot maintain an action to recover for the wrongful detention of the property without himself making a demand on defendant for its return.<sup>94</sup>

### § 58. — Sufficiency of Demand

- Nature of demand
- By whom demand made
- On whom demand made
- Place of demand
- Time of demand

#### a. Nature of Demand

No formal words are required to constitute a demand, whether it is oral or in writing, but it should be a request for present delivery of the property, and must be clothed in absolute unequivocal terms.

No formal words are required to constitute a demand, whether it is oral or in writing,<sup>95</sup> but it should be a request for present delivery of the property,<sup>96</sup> and must be clothed in absolute, unequivocal terms.<sup>97</sup> The demand must be sufficiently definite and complete to apprise defendant of the specific property claimed,<sup>98</sup> and must not embrace more property than the owner is entitled to recover,<sup>99</sup> but a demand covering more than one is entitled to does not justify a refusal of what he may rightfully claim, unless he declines to accept anything less than the full quantity demanded.<sup>1</sup> A demand must be reasonable in nature in order to render the possessor guilty of conversion in failing to surrender possession to the owner.<sup>2</sup>

*Requiring possession to transport or deliver; demand by letter.* A demand is insufficient which would require for compliance therewith that the person on whom it is made transport or carry the chat-

84. N.Y.—Goebel v. Clark, 275 N.Y.S. 43, 242 App.Div. 408.

65 C.J. p 46 note 33.

85. Ga.—Seago v. Pomeroy, 46 Ga. 227.

Mo.—Lafayette County Bank v. Metcalf, Moore & Co., 40 Mo.App. 494, 155 Pa. 538.

65 C.J. p 47 note 35.

87. Me.—Wyman v. Carrabassett Hardwood Lumber Co., 116 A. 729, 121 Me. 271.

65 C.J. p 47 note 38.

88. Cal.—Flennbaugh v. Heinrich, 200 P.2d 580, 89 Cal.App.2d 214—Scott's Valley Fruit Exchange v. Growers Refrigeration Co., 184 P.2d 183, 81 Cal.App.2d 437—Weinberg v. Dayton Storage Co., 124 P.2d 155, 50 Cal.App.2d 750.

R.I.—Dimon v. O'Connor, 106 A.2d 509.

Neb.—Corpus Juris cited in Hansen v. Village of Raiston, 18 N.W.2d 213, 215, 145 Neb. 838.

N.D.—Eochstetler v. Graber, 48 N.W.2d 15, 78 N.D. 90.

Okla.—Potts v. Biggs & Co., 54 P.2d 341, 176 Okl. 96—Hanson v. Brannon, 18 P.2d 517, 161 Okl. 265.

Vt.—Simonds v. Bishop, 196 A. 754, 109 Vt. 343.

Wash.—Persson v. McKay Coal Co., 32 P.2d 1108, 200 Wash. 75—Kohout v. Brooks, 52 P.2d 905, 185 Wash. 4.

65 C.J. p 47 note 37.

89. N.Y.—Price v. Evans, 275 N.Y.S. 558, 153 Misc. 302.

Tex.—Neyland v. Brammer, Civ.App., 73 S.W.2d 884, error dismissed.

Wash.—Crutcher v. Scott Pub. Co., 253 P.2d 925, 42 Wash.2d 89—Kohout v. Brooks, 52 P.2d 905, 185 Wash. 4.

65 C.J. p 47 note 38.

90. Kan.—Schooley v. Kerr, 33 P.2d 140, 139 Kan. 669.

65 C.J. p 47 note 39.

91. U.S.—American Surety Co. of N.Y. v. Baker, C.A.N.C., 172 F.2d 689.

65 C.J. p 47 note 40.

92. N.Y.—Cutler-Hammer, Inc. v. Troy, 126 N.Y.S.2d 452, 288 App. Div. 123.

65 C.J. p 47 note 41.

93. N.D.—First Nat. Bank v. Woodworth Elevator Co., 206 N.W. 795, 53 N.D. 447.

65 C.J. p 47 note 42.

94. N.Y.—Howell v. Kroose, 4 E.D. Smith 357, 2 Abb.Pr. 187.

95. Md.—Swartz v. Gottlieb-Baurnschmidt-Straus Brewing Co., 71 A. 854, 109 Md. 383, 16 Ann.Cas. 1156.

65 C.J. p 47 note 44.

96. Ind.—Cumberland Telephone & Telegraph Co. v. Taylor, 88 N.E. 631, 44 Ind.App. 27.

65 C.J. p 48 note 45.

**Demand for value**

Gravel company was not obliged to pay for steam shovel allegedly converted by them under facts showing that it was borrowed, and only demand was made for its value or cost.

—Wilkinson v. Victory Gravel Co., 150 So. 18, 177 La. 1064.

97. Wash.—Wilcox v. Hubbard, 282 P. 218, 154 Wash. 344.

65 C.J. p 48 note 46.

98. Mich.—Harris v. Hackley, 86 N.W. 389, 127 Mich. 46.

65 C.J. p 48 note 47.

99. Ill.—Forth v. Parsley, 82 Ill. 152—Swartwout v. Evans, 87 Ill. 442.

1. Vt.—Gregg v. Hull, 41 Vt. 217.

2. N.J.—Mueller v. Technical Devices Corp., 84 A.2d 620, 8 N.J. 204.

tel to the owner.<sup>3</sup> Therefore, it has been held that a demand by letter, in the absence of a reply, is insufficient where it would require for compliance that the possessor take the goods to the person demanding.<sup>4</sup> If, however, the letter of demand is replied to by a refusal to deliver or a denial of possession of the property, such demand and refusal are sufficient evidence of conversion.<sup>5</sup> A letter written after an alleged conversion has been held not to be construable as a demand.<sup>6</sup>

*Showing of title or right to possession.* In order that a demand and refusal may serve as a sufficient basis for an action for conversion, it is not necessary that plaintiff show evidence of his title or right to immediate possession at the time of demand,<sup>7</sup> unless the person in possession of the property is ignorant of the identity of the true owner.<sup>8</sup> It has been held that a demand by a transferee of the property on a bailee of the transferor must be accompanied by evidence of change of ownership, in order that a demand and refusal in such a case may be sufficient evidence of conversion by the bailee.<sup>9</sup>

*Readiness to remove property.* In order to constitute a valid demand it is not necessary that the owner be prepared to remove his property immediately.<sup>10</sup>

*Demand for proceeds or payment.* A demand of payment for, or of the proceeds of the sale of, the converted property is equivalent to a demand of the property itself.<sup>11</sup>

*Circumstances under which made.* A demand for delivery of chattels to the owner thereof must be made under such circumstances as to enable the possessor to comply therewith.<sup>12</sup>

*Further use of property after an abortive demand* therefor and a refusal to surrender it does not and

cannot make that demand a lawful one.<sup>13</sup>

### b. By Whom Demand Made

A demand, in order to be sufficient, must be made by the person having the right of immediate possession of the property demanded,<sup>14</sup> or by his attorney,<sup>15</sup> or by some other agent.

A demand, in order to be sufficient, must be made by the person having the right of immediate possession of the property demanded,<sup>14</sup> or by his attorney,<sup>15</sup> or by some other agent.<sup>16</sup> The authority of an attorney to make a demand for his client will be presumed, as considered in Attorney and Client § 73, unless another method of making a demand has been agreed on between the owner of the property and the holder thereof.<sup>17</sup> The fact that a person who makes a demand is the attorney for the owner in bringing an action for conversion of the property is not sufficient to raise a presumption of his authority to make a demand, unless it is shown that he was acting as attorney at the time of the demand.<sup>18</sup>

An agent who is not an attorney must exhibit his authority if requested to do so by the person in possession of the property.<sup>19</sup> If, when the agent of the owner makes a demand, his authority is not questioned by the person in possession of the property, it operates as a waiver of all objection to the authority of the agent, and that issue cannot be raised at the trial.<sup>20</sup>

### c. On Whom Demand Made

A demand, to be effective, must be made on the person who has the actual possession or control of the property claimed, who is obligated to surrender it, and who has the power to deliver it up, if he would.

A demand, to be effective, must be made on the person who has the actual possession or control of the property claimed,<sup>21</sup> who is obligated to sur-

3. Ind.—Cumberland Telephone & Telegraph Co. v. Taylor, 88 N.E. 631, 44 Ind.App. 27.  
65 C.J. p 48 note 51.
4. Iowa.—Teasle v. Hawkeye Gold Dredging Co., 114 N.W. 906, 137 Iowa 206.  
65 C.J. p 48 note 52.
5. N.D.—First Nat. Bank v. Woodworth Elevator Co., 206 N.W. 795, 53 N.D. 447.  
65 C.J. p 48 note 53.
6. Mich.—Knowles v. Smith, 157 N.W. 276, 190 Mich. 409.
7. N.Y.—Mechanics, etc., Bank v. Farmers, etc., Nat. Bank, 80 N.Y. 40—Cass v. N. Y. & N. H. R. R. Co., 1 E.D.Smith 522.
8. N.Y.—McEntee v. New Jersey

- Steamboat Co., 45 N.Y. 34, 6 Am.R. 28.  
65 C.J. p 48 note 57.
9. Me.—Whiting v. Whiting, 87 A. 381, 111 Me. 13.
10. Mass.—Edmundson v. Bric, 138 Mass. 189.
11. Ga.—Kirkland v. Wallace, 114 S.E. 649, 29 Ga.App. 238.
12. N.Y.—La Place v. Aupoix, 1 Johns. Cas. 406.
13. N.J.—Mueller v. Technical Devices Corp., 84 A.2d 620, 8 N.J. 201.
14. N.J.—Mueller v. Technical Devices Corp., supra.
15. Mo.—Defeo v. Goodwin, 237 S.W. 1075, 221 Mo.App. 789.  
65 C.J. p 48 note 63.
16. N.H.—Lovejoy v. Jones, 30 N.H. 164.

16. Mich.—Kendrick v. Beard, 51 N.W. 645, 90 Mich. 589.  
65 C.J. p 48 note 65.
17. Neb.—Tingley v. Parshall, 9 N.W. 571, 11 Neb. 448.
18. Ala.—Jesse French Piano & Organ Co. v. Johnston, 37 So. 924, 142 Ala. 419.
19. Tex.—Blankenship v. Berry, 28 Tex. 449.  
65 C.J. p 48 note 69.
20. Miss.—Robertson v. Crane, 27 Miss. 562, 61 Am.D. 520.  
65 C.J. p 48 note 70.
21. N.Y.—Wernbach Corp. v. Emigrant Industrial Sav. Bank, 34 N.Y.S.2d 688, 284 App.Div. 161, affirmed 45 N.E.2d 169, 289 N.Y. 662.  
65 C.J. p 48 note 71.

render it,<sup>22</sup> and who has the power to deliver it up, if he would.<sup>23</sup> If demand is made on an agent or employee, the power to surrender the goods must be within the scope of his agency or employment.<sup>24</sup> In order to maintain an action for conversion against two or more who are wrongfully in joint possession of the property of another, a demand must be made on each of them.<sup>25</sup>

On the other hand, an action may be maintained against copartners, although a demand was made of but one of them, where their possession was joint.<sup>26</sup> However, a demand on one partner after a dissolution of the partnership will not charge another partner with a conversion of goods delivered to the firm.<sup>27</sup> A demand for property held by a corporation must be made on the officer or governing body authorized to act in the premises.<sup>28</sup>

*A demand made on an agent in charge of a warehouse or grain elevator is a sufficient demand as against his principal,<sup>29</sup> and the sufficiency of the demand in such a case cannot be affected by any agreement with, or instructions from, the principal, but is controlled by public policy.<sup>30</sup>*

*A demand on a carrier to which defendant has intrusted the goods for shipment is sufficient demand as against the shipper.<sup>31</sup>*

*Demand on public officer.* A demand on a public officer who has seized property under an execution will not operate as a demand on the execution creditor, in order to make him liable for conversion of the property without further demand.<sup>32</sup> Where the statutes do not require his official designation, a demand addressed to a public officer in his private name is sufficient.<sup>33</sup>

#### d. Place of Demand

A demand for the delivery of chattels must be made at such a place as to enable the possessor to comply therewith.

A demand for the delivery of chattels must be made at such a place as to enable the possessor to comply therewith.<sup>34</sup> The demand for return of the property need not be made at the place where it is to be received,<sup>35</sup> and a personal demand for the possession of chattels is sufficient if made on the one having them under his control, although the property is not at the place of demand,<sup>36</sup> and although defendant is not bound to deliver the property where demanded.<sup>37</sup> However, a demand made on defendant at a considerable distance from the location of the property has been held insufficient.<sup>38</sup> A demand is ordinarily sufficient if made at defendant's dwelling, particularly if defendant was under contract to deliver specific articles on demand,<sup>39</sup> and when it is made long enough before the commencement of the action for conversion to enable defendant to comply therewith.<sup>40</sup>

A showing of a written demand left at defendant's dwelling, without more, has been held insufficient evidence of conversion, and it has been said that defendant is not bound under such circumstances to carry the property to the owner.<sup>41</sup> Property may be demanded of a bailee wherever he may be at the time, and although he is not bound to deliver it at that place, and, if the bailee refuses to deliver the property, no further demand is necessary.<sup>42</sup>

#### e. Time of Demand

A demand, in order to be sufficient, must be made after the plaintiff's right of possession has accrued, and

22. N.J.—Mueller v. Technical Devices Corp., 84 A.2d 620, 8 N.J. 201.

23. Md.—Hammond v. DuBois, 101 A. 612, 181 Md. 116.  
85 C.J. p. 49 note 72.

24. N.J.—Mueller v. Technical Devices Corp., 84 A.2d 620, 8 N.J. 201.

25. N.Y.—Mitchell v. Williams, 4 Hill 18.  
65 C.J. p. 49 note 73.

26. N.Y.—Ball v. Larkin, 8 E.D. Smith 555.

27. N.H.—Pattée v. Gilmore, 18 N. H. 460, 45 Am.D. 385.

28. Iowa.—Temple v. Hawkeye Gold Dredging Co., 114 N.W. 906, 137 Iowa 208.

N.J.—Corpus Juris cited in Mueller v. Technical Devices Corp., 84 A.2d 620, 625, 8 N.J. 201.

29. Minn.—Jackson v. Severson, 83 N.W. 664, 79 Minn. 275.  
65 C.J. p. 49 note 78.

30. N.D.—Seymour v. Cargill Elevator Co., 71 N.W. 132, 6 N.D. 444.

31. N.Y.—Wooster v. Sherwood, 25 N.Y. 278.

32. Ill.—Mulheisen v. Lane, 82 Ill. 117.

33. Mass.—Duggan v. Wright, 32 N. E. 159, 157 Mass. 228.

34. N.J.—Mueller v. Technical Devices Corp., 84 A.2d 620, 8 N.J. 201.

35. Conn.—Higgins v. Emmons, 5 Conn. 76, 13 Am.D. 41.

36. Conn.—Clark v. Hale, 34 Conn. 398.

37. N.Y.—Dunlap v. Hunting, 2 Den. 643, 43 Am.D. 763.

38. N.Y.—Shea v. Chinn, 229 N.Y.S. 24, 223 App.Div. 476.  
65 C.J. p. 49 note 86.

**Waiver of insufficiency**  
In order to make out a case of

conversion on proof of demand and refusal of surrender of property, the parties must, at the time such demand and refusal occurs, be in close proximity to each other and to the property, so that defendant can deliver and plaintiff can receive such property; but if defendant, who allegedly converted plaintiff's property, claimed title thereto in defiance of plaintiff's claimed title, he thereby waived fact that plaintiff's demand for the property was made when neither was near it.—Pantz v. Nelson, 135 S.W.2d 397, 234 Mo.App. 1043.

39. Mass.—Mason v. Briggs, 16 Mass. 453.

40. N.H.—White v. Demary, 2 N.H. 546.

41. N.H.—Pheps v. Gilchrist, 28 N. H. 266.

42. N.Y.—Dunlap v. Hunting, 2 Den. 643, 43 Am.D. 763.



while he has the right of immediate possession, and at such time as to enable the possessor to comply therewith.

A demand for the delivery of a chattel must be made at such time as to enable the possessor to comply therewith.<sup>43</sup> A demand, in order to be sufficient, must be made after plaintiff's right of possession has accrued,<sup>44</sup> and while plaintiff has the right of immediate possession,<sup>45</sup> and, where plaintiff relies on demand and refusal as the only evidence of conversion, while defendant has control of the property so as to be able to comply with the demand.<sup>46</sup> Where demand and refusal are relied on as the sole evidence of conversion, the demand must be made before the action for conversion is brought,<sup>47</sup> but a demand and refusal may serve as evidence of a prior conversion, although made after issuance or service of summons in the action.<sup>48</sup>

### § 59. — Sufficiency of Refusal

- a. In general
- b. Qualified refusal
- c. Refusal by agent, servant, or partner

#### a. In General

Where a demand and refusal are relied on to show a conversion, the refusal must be absolute and unconditional and a denial of the plaintiff's title and right to possession of the property demanded.

Where a demand and refusal are relied on to show a conversion, the refusal must be absolute and unconditional and a denial of plaintiff's title or right to possession of the property demanded.<sup>49</sup> An oral refusal, in order to be actionable, must be positive and unambiguous, and not merely evasive.<sup>50</sup> Mere silence or neglect to answer will not constitute a sufficient refusal,<sup>51</sup> unless defendant took time to consider and promised to answer,<sup>52</sup> or unless the

situation is such as to impose on defendant an obligation to speak.<sup>53</sup> Likewise, a mere failure to deliver when demand is made is not equivalent to a refusal.<sup>54</sup> A sufficient refusal will be presumed when evasion or delay makes it apparent that defendant does not intend to comply with the demand.<sup>55</sup> A commingling of plaintiff's goods with defendant's, so that neither party could identify them, is equivalent to a refusal.<sup>56</sup>

*Refusal by person having only part of property.* A general refusal to deliver property on demand, which refusal is made by a person having in his possession or under his control only a part of the property demanded, will show a conversion by him of that portion of the property demanded which he had under his control at the time of the refusal.<sup>57</sup>

*Statement of grounds of refusal.* If, when refusing to deliver the property on demand, defendant states any ground for his refusal, and has at the time any sufficient reason for refusing, his refusal must be placed distinctly on the true ground,<sup>58</sup> and all reasons for refusal which are not mentioned at the time of refusal, if any at all are mentioned, are deemed to be waived, and cannot be later raised.<sup>59</sup>

#### b. Qualified Refusal

Where the refusal is not absolute, but is qualified by certain conditions which are reasonable and justifiable, imposed in good faith, and in recognition of the rights of the plaintiff, it will not serve as a sufficient basis for an action in conversion.

Where the refusal is not absolute, but is qualified by certain conditions which are reasonable and justifiable, and which are imposed in good faith, and in recognition of the rights of plaintiff, it will not serve as a sufficient basis for an action for conversion.<sup>60</sup> The conditions, however, must have a

43. N.J.—Mueller v. Technical Devices Corp., 84 A.2d 820, 8 N.J. 201.

44. Me.—Whiting v. Whiting, 87 A. 381, 111 Me. 13.

65 C.J. p 49 note 92.

45. Ill.—Poppers v. Peterson, 85 Ill. App. 384.

46. Md.—Hammond v. DuBois, 101 A. 612, 131 Md. 116.

65 C.J. p 50 note 94.

47. N.Y.—Storm v. Livingston, 6 Johns. 44.

48. N.H.—Robinson v. Burlingame, 5 N. H. 225.

49. Cal.—Kagee v. Bencich, 81 P.2d 285, 27 Cal.App.2d 463.

65 C.J. p 50 note 97.

*Refusal held unqualified*

Refusal of defendant who allegedly converted plaintiff's furniture, to deliver it to plaintiff, would be

deemed to have been unqualified and in defiance of title claimed by plaintiff, even though they were not in close proximity to each other and to furniture when demand was made, where defendant's agent was in charge of furniture at place from which plaintiff made demand on defendant by telephone, and defendant unqualifiedly refused to permit plaintiff to have the furniture.—Pants v. Nelson, 135 S.W.2d 897, 234 Mo.App. 1048.

50. N.Y.—Roberts v. Berdell, 52 N. Y. 644, 15 Abb.Pr.N.S., 177.

51. N.Y.—Richards v. Pitts Agricultural Works, 37 Hun 1.

52. N.Y.—Ryerson v. Ryerson, 3 N. Y.S. 738, 55 Hun 611.

53. Conn.—Higgins v. Emmons, 5 Conn. 76, 13 Am.D. 41.

N.Y.—Fry v. Clow, 3 N.Y.S. 593, 60 Hun 574.

54. Iowa.—Teeple v. Hawkeyes Gold Dredging Co., 114 N.W. 906, 137 Iowa 206.

65 C.J. p 50 note 2.

55. Mich.—Ingersoll v. Barnes, 10 N. W. 127, 47 Mich. 104.

N.H.—Sargent v. Gile, 8 N.H. 325.

56. Tex.—Rabe v. Jourdan, 102 S.W. 1187, 46 Tex.Civ.App. 456.

57. Minn.—Leuthold v. Fairchild, 27 N.W. 503, 35 Minn. 99.

65 C.J. p 51 note 12.

58. Ill.—Ingalls v. Bulkley, 15 Ill. 224.

65 C.J. p 51 note 13.

59. Cal.—Briggs v. Haycock, 63 Cal. 343.

65 C.J. p 51 note 19.

60. Colo.—Corpus Juris cited in Obodov v. Foster, 97 P.2d 426, 428, 108 Colo. 254.

legal foundation,<sup>61</sup> or rest on a reasonable doubt as to the validity of plaintiff's claim,<sup>62</sup> or be based on a reasonable doubt as to defendant's duty under the circumstances.<sup>63</sup> Where the qualified or conditional refusal is not reasonable or justifiable under the circumstances, and amounts to a denial of plaintiff's rights in the property, it will be sufficient to sustain an action for conversion,<sup>64</sup> and it is for the jury, under proper instructions from the court, to pass on the existence of the qualification and its reasonableness, as discussed *infra* § 146.

### c. Refusal by Agent, Servant, or Partner

The refusal by an agent or a servant to deliver to the plaintiff on demand property intrusted to such agent or servant by his principal or master ordinarily will not make the principal or master liable for conversion.

The refusal by an agent<sup>65</sup> or a servant<sup>66</sup> to deliver to plaintiff on demand property intrusted to such agent or servant by his principal or master ordinarily will not make the principal or master liable for conversion of the property. If, however, it was the duty of the agent or servant, in obedience to instructions from his principal or master,<sup>67</sup> or by virtue of the nature of his business,<sup>68</sup> to act in response to a demand for the property, the refusal by the agent or servant is treated as the refusal of the principal or master, and will sustain an action against such principal or master for the conversion of the property.

A refusal by one member of a partnership to deliver property in the possession of the partnership is equally effective to show a conversion by the other partners.<sup>69</sup>

## § 60. — Time for Complying or Refusing

One on whom demand is made for property in his possession may have a reasonable time to determine the validity of the claim, and whether to comply with the demand.

Before complying with, or refusing a demand for, delivery of property in his possession or control, the person on whom the demand is made may have a reasonable time for investigation and consideration of the validity of the claim, and to determine what course to pursue.<sup>70</sup>

## § 61. — Effect of Demand and Refusal

- a. In general
- b. Necessity of possession or control of property
- c. As waiver

### a. In General

Where the possession of a person remains rightful until transformed into a wrongful detention by a demand and refusal of delivery, the demand and refusal may constitute a conversion in itself.

Where the possession of a person remains rightful until transformed into a wrongful detention by a demand and refusal of delivery, the demand and refusal may constitute a conversion in itself.<sup>71</sup> Where a demand and refusal are relied on to show a conversion, the date of the demand and refusal is ordinarily treated as the date of the conversion of the property,<sup>72</sup> and in such case the statute of limitations on an action for conversion runs from that time, as discussed *infra* § 91. If, before demand and refusal, an actual conversion has already oc-

Neb.—Jessen v. Blackard, 65 N.W.2d 345, 159 Neb. 103.

N.J.—Mueller v. Technical Devices Corp., 84 A.2d 620, 8 N.J. 201. 68 C.J. p 50 note 6.

### Proof of title by owner

Where a person is rightfully in possession of property, continued custody of the property and refusal to deliver on demand of owner until owner proves his right constitutes no conversion thereof, and owner is wronged by custodian only where there is a defiance of owner's right, a determination to exercise dominion and control over the property and to exclude owner from the exercise of his rights.—Bradley v. Roe, 27 N.E.2d 38, 282 N.Y. 525, 129 A.L.R. 683.

61. Ind.—Jonsson v. Lindstrom, 16 N.E. 400, 114 Ind. 152. 68 C.J. p 50 note 7.

Where possessor knows of plaintiff's claim

The principle that, where demand is made for delivery of property which originally came into posses-

sor's possession rightfully, it is not conversion for him to refuse to deliver the property until he has had a reasonable time to investigate concerning the true ownership, did not apply where the possessor admitted knowledge of the claimant's claim and unqualifiedly claimed title himself.—Pantz v. Nelson, 135 S.W.2d 297, 284 Mo.App. 1042.

62. N.Y.—Carroll v. Mix, 51 Barb. 212.

65 C.J. p 50 note 8.

63. N.H.—Hett v. Boston & M. R.R., 44 A. 310, 69 N.H. 139—Fletcher v. Fletcher, 7 N.H. 452, 28 Am.D. 859.

64. Colo.—Pennsylvania Fire Ins. Co. v. Levy, 277 P. 779, 35 Colo. 565, 75 A.L.R. 1416.

65 C.J. p 51 note 10.

65. Pa.—Cary v. Bright, 58 Pa. 70. 65 C.J. p 51 note 13.

66. N.Y.—Goodwin v. Wertheimer, 1 N.E. 404, 99 N.Y. 149.

65 C.J. p 51 note 14.

67. Mo.—Ward v. Moffett, 28 Mo. App. 395.

68. Minn.—Jackson v. Severson, 82 N.W. 634, 79 Minn. 275.

65 C.J. p 51 note 16.

69. N.Y.—Holbrook v. Wight, 24 Wend. 169, 35 Am.D. 607.

Effect of demand upon one partner see Partnership § 175.

70. Me.—Whiting v. Whiting, 87 A.

281, 111 Me. 13.

65 C.J. p 51 note 20.

71. Ark.—Kearby v. Douglas, 221 S.W.2d 425, 215 Ark. 523.

N.Y.—U. S. Fidelity & Guaranty Co. v. Newburger, 188 N.E. 141, 263 N. Y. 16—First Nat. Bank of Fleischmanns v. Creamery Package Mfg. Co., 21 N.Y.S.2d 976.

Pa.—Dalton v. South Bethlehem Brewing Co., Com.Pl., 29 North.Co. 215—Commonwealth v. Kashner, Quar.Sess., 53 Dauph.Co. 303.

R.I.—Terrien v. Joseph, 53 A.2d 923,

73 R.I. 112.

65 C.J. p 51 note 21.

72. U.S.—Logan County Nat. Bank v. Townsend, Ky., 11 S.Ct. 496, 138

U.S. 87, 35 L.Ed. 107.

65 C.J. p 51 note 22.

curred, however, the evidence of demand and refusal relates back to the time of the actual conversion.<sup>73</sup>

*Necessity of existence of property demanded.* In order that a demand and refusal may suffice to establish a conversion it must affirmatively appear that at the time thereof the property was in existence.<sup>74</sup>

#### b. Necessity of Possession or Control of Property

In order that a demand and refusal may be relied on as the basis of an action for conversion, it must appear that at the time of the demand the property was in the defendant's possession or so far under his control as to permit his compliance with the demand when made.

Where no other conversion can be shown, in order that a demand and refusal may of themselves be a sufficient basis for an action for conversion, it must appear that at the time of the demand the property was in defendant's possession or so far under his control as to permit his compliance with the demand when made.<sup>75</sup> However, an unqualified refusal by one having control of the property is sufficient evidence of a conversion, even though he was unable at the time of demand and refusal to make an immediate delivery.<sup>76</sup>

#### c. As Waiver

A demand for delivery of property made subsequent to an act amounting to a conversion of the property will not amount to a waiver of the prior act of conversion.

A demand for delivery of property made subsequent to an act amounting to a conversion of the property will not amount to a waiver of the prior act of conversion,<sup>77</sup> and it has been held that, if a demand is made and the property demanded is not delivered up in response thereto, a second demand for the same property will not operate as a waiver of the first demand.<sup>78</sup> However, a demand in person has been held to waive a prior demand by letter,<sup>79</sup> and plaintiff's assent to defendant's retention of the property after demand will operate as a waiver of the demand.<sup>80</sup>

#### § 62. — Effect of Compliance with Demand

The defendant's compliance with a demand before an action for conversion is instituted bars a recovery in such an action, if the defendant was lawfully in possession of the property.

Defendant's compliance with a demand before an action for conversion is instituted bars a recovery in such an action, if defendant was lawfully in possession of the property.<sup>81</sup> However, a promise to comply, not followed by complete compliance with the demand before an action is brought, does not constitute compliance.<sup>82</sup> An offer to comply made after the commencement of an action for conversion does not affect the plaintiff's rights in the action, where the plaintiff's original demand was disregarded,<sup>83</sup> or refused.<sup>84</sup>

### V. ACTIONS FOR CONVERSION

#### A. IN GENERAL

#### § 63. Nature, Form, and Scope of Trover in General

The nature, form, and scope of the action of trover generally are considered infra §§ 64-76. The

statutory substitute in Georgia for the actions of detinue, replevin, or trover, known as bail trover, is considered infra §§ 202-242.

Examine Pocket Parts for later cases.

73. N.Y.—*Corpus Juris* cited in *Jones v. National Chautauqua County Bank*, 74 N.Y.S.2d 498, 504, 272 App.Div. 521.  
65 C.J. p 52 note 24.

74. Mich.—*McDonald v. McKinnon*, 62 N.W. 560, 104 Mich. 428.  
65 C.J. p 52 note 25.

75. Ariz.—*Wells Fargo & Co., Express, S. A., v. Tribollet*, 50 P.2d 878, 46 Ariz. 311.

Cal.—*Kee v. Becker*, 129 P.2d 153, 54 Cal.App.2d 466—*Thomsen v. Culver City Motor Co.*, 41 P.2d 597, 4 Cal.App.2d 633.

Mass.—*Marshall Vessels, Inc. v. Wright*, 120 N.E.2d 286.  
65 C.J. p 52 note 27.

Where refusal insufficient

Where defendant alleged to have

converted cattle never had anything to do with them, mere refusal to deliver them to officer, in absence of evidence that he had possession, and act of telephoning to another party instructing her not to deliver cattle to officer, unless relied on, did not render defendant liable for conversion.—*Johnson v. Tuttle*, 187 A. 515, 108 Vt. 291, 106 A.L.R. 1291.

76. Conn.—*Clark v. Hale*, 34 Conn. 398.  
N.H.—*Ferguson v. Clifford*, 37 N.H. 86.

77. Nev.—*Ward v. Carson River Wood Co.*, 13 Nev. 44.  
Vt.—*Manwell v. Briggs*, 17 Vt. 176.

78. Mass.—*Winterbottom v. Morehouse*, 4 Gray 332.

79. Me.—*Whiting v. Whiting*, 87 A. 381, 111 Me. 13.

80. Ala.—*Bolling v. Kirby*, 7 So. 914, 90 Ala. 215.

Me.—*Hagar v. Randall*, 62 Me. 439.

81. Ohio.—*Morris v. Commercial Credit Co.*, 9 N.E.2d 880, 55 Ohio App. 391.

Tex.—*Freear-Brin Furniture Co. v. Merritt*, Civ.App., 174 S.W. 859.

65 C.J. p 52 note 35.

82. Mo.—*Siff v. Jackson*, 172 S.W. 1169, 187 Mo.App. 141.

83. N.Y.—*Pierpoint v. Farnum*, 254 N.Y.S. 758, 234 App.Div. 205, reversed on other grounds 182 N.E. 235, 260 N.Y. 26, conformed to 259 N.Y.S. 956, 236 App.Div. 802.

84. Mo.—*Pantz v. Nelson*, 135 S.W. 2d 397, 234 Mo.App. 1043.

## § 64. — Origin and History

Originally, trover was an action of trespass on the case for recovery of damages against one who had found goods and refused to return them on demand but converted them to his own use.

The action of trover was, in its origin, an action of trespass on the case for the recovery of damages against a person who had found goods and refused to deliver them on demand to the owner, but converted them to his own use, from which word finding (trover) the remedy is called an action of trover.<sup>85</sup> By a fiction of law actions of trover were at length permitted to be brought against any person who had in his possession, by any means whatever, the personal property of another, or sold or used it without the consent of the owner, or refused to deliver it when demanded.<sup>86</sup> As was said of this action by Lord Mansfield: "In form it is a fiction; in substance it is a remedy to recover the value of personal chattels wrongfully converted by another to his own use."<sup>87</sup> The form supposes defendant may have come lawfully by the possession of the goods,<sup>88</sup> and if he did not, by bringing this action plaintiff waives the trespass.<sup>89</sup>

## § 65. — Gist of Action

A conversion is the gist of an action of trover. Ir-

respective of the manner in which possession was obtained by the defendant.

A conversion is the gist of the action of trover,<sup>90</sup> irrespective of the manner in which defendant obtained possession of the property.<sup>91</sup> Where the act of conversion is admitted, the only question to be determined is the amount recoverable,<sup>92</sup> and without proof of conversion plaintiff cannot recover, whatever else he may prove, or whatever may be his right of recovery in another form of action.<sup>93</sup> No damages are recoverable for the act of taking; all must be for the act of conversion.<sup>94</sup> Since a conversion is the gist of the action, the statement of finding or trover is now immaterial and not traversable, as is discussed *infra* § 101.

## § 66. — Nature

An action of trover is a tort action, possessory and transitory in its nature.

An action of trover has always been classified as an action of tort,<sup>95</sup> and is one form of the action of trespass on the case.<sup>96</sup>

*Transitory action.* The action of trover is a transitory action.<sup>97</sup>

*Legal or equitable.* The remedy by action of trover is in its nature legal as distinguished from

85. Me.—Giguere v. Morrisette, 48 A.2d 257, 142 Me. 95.

Mo.—St. Louis Fixture & Show Case Co. v. F. W. Woolworth Co., 88 S.W.2d 254, 232 Mo.App. 10.

Pa.—Pearl Assur. Co. v. National Ins. Agency, 28 A.2d 334, 150 Pa. Super. 265, affirmed 30 A.2d 333, 151 Pa. Super. 146.

65 C.J. p 53 note 39.

Detinue distinguished see Detinue § 1. Replevin distinguished see Replevin § 6.

Trespass distinguished see Trespass § 3.

86. Me.—Giguere v. Morrisette, 48 A.2d 257, 142 Me. 95.

Pa.—Pearl Assur. Co. v. National Ins. Agency, 28 A.2d 334, 150 Pa. Super. 265, affirmed 30 A.2d 333, 151 Pa. Super. 146.

65 C.J. p 53 note 40.

87. Ohio.—Athens & Pomeroy Coal & Land Co. v. Tracy, 153 N.E. 240, 22 Ohio App. 21.

65 C.J. p 53 note 41.

88. Ohio.—Athens & Pomeroy Coal & Land Co. v. Tracy, *supra*.

65 C.J. p 53 note 42.

89. Ohio.—Athens & Pomeroy Coal & Land Co. v. Tracy, *supra*.

65 C.J. p 53 note 43.

90. Ala.—Long-Lewis Hardware Co. v. Abston, 180 So. 261, 235 Ala. 599

—Consolidated Graphite Corporation v. Kelly, 150 So. 682, 227 Ala. 516—Malone Motor Co. v. Green, 105 So. 897, 213 Ala. 635

Ill.—Kilmas v. Kilmas, 110 N.E.2d 463, 349 Ill.App. 243.

Minn.—Larson v. Archer-Daniels-Midland Co., 32 N.W.2d 649, 226 Minn. 315.

Mo.—St. Louis Fixture & Show Case Co. v. F. W. Woolworth Co., 88 S.W.2d 254, 232 Mo.App. 10.

N.J.—Mueller v. Technical Devices Corp., 84 A.2d 620, 8 N.J. 201—Baudé v. Chemical Bank & Trust Co., 178 A. 799, 115 N.J.Law 120.

N.Y.—Kaufman v. Provident Sav. Bank & Trust Co. of Cincinnati, 23 N.Y.S.2d 637, affirmed 31 N.Y.S.2d 664, 263 App.Div. 703, appeal denied 32 N.Y.S.2d 129, 263 App.Div. 809.

Or.—Windle v. Flinn, 251 P.2d 136, 196 Or. 654.

Pa.—Pearl Assur. Co. v. National Ins. Agency, 28 A.2d 334, 150 Pa. Super. 265, affirmed 30 A.2d 333, 151 Pa. Super. 146.

R.I.—Terrien v. Joseph, 53 A.2d 923, 73 R.I. 112.

W.Va.—Johnson v. National Exchange Bank of Wheeling, 19 S.E. 2d 441, 124 W.Va. 157.

65 C.J. p 53 note 45.

91. Conn.—Platt v. Tuttle, 23 Conn. 233.

Mo.—St. Louis Fixture & Show Case Co. v. F. W. Woolworth Co., 88 S.W.2d 254, 232 Mo.App. 10.

92. R.I.—Combination Fountain Co. v. Millard, 144 A. 883, 50 R.I. 50.

93. Ala.—Conner v. Allen, 33 Ala. 515.

65 C.J. p 53 note 47.

94. Ohio.—Athens & Pomeroy Coal & Land Co. v. Tracy, 153 N.E. 240, 22 Ohio App. 21.

Pa.—Peterson v. Kier, 2 Pittsb.Leg.J. 191 reversed on other grounds 41 Pa. 357.

95. Ill.—Lipman v. Goebel, 192 N.E. 203, 357 Ill. 315, certiorari denied 55 S.Ct. 508, 294 U.S. 712, 79 L.Ed. 1246.

Mich.—Thrift v. Haner, 282 N.W. 219, 286 Mich. 495.

S.C.—Citizens' Nat. Bank of Prosperity v. Hawkins, 133 S.E. 541, 140 S.C. 43.

65 C.J. p 54 note 51—1 C.J. p 995 note 83.

Ill.—Lipman v. Goebel, 192 N.E. 203, 357 Ill. 315, certiorari denied 55 S.Ct. 508, 294 U.S. 712, 79 L.Ed. 1246.

65 C.J. p 54 note 52.

97. Ala.—Williamson v. Howell, 17 Ala. 830.

65 C.J. p 54 note 53.

equitable.<sup>98</sup> While it has been said that the action of trover is equitable in its nature,<sup>99</sup> and that a decision necessitates the weighing of equities as between the parties,<sup>1</sup> this form of action is not available for the protection or enforcement of equitable titles or rights.<sup>2</sup>

*Possessory.* It has been held that trover is a possessory action based on a disturbance of the owner's right to possession of a chattel.<sup>3</sup>

# § 67. — Purpose

Action of trover is a remedy to recover the value of the property wrongfully converted and not the specific property itself, unless otherwise provided by statute.

An action of trover is not an action to enrich the owner at the expense of the converter,<sup>4</sup> but is merely a remedy to recover the value of the property wrongfully converted.<sup>5</sup> The specific property itself cannot be recovered by an action of trover,<sup>6</sup> but only by an action of detinue or replevin.<sup>7</sup>

*Trial of title.* Questions of title to personalty are triable in actions of trover.<sup>8</sup> Trover being a purely personal and transitory action, is not a proper form of action to try title to land,<sup>9</sup> and it will not

lie when title to land is an issue;<sup>10</sup> but it will lie against a defendant claiming under a void tax deed when it appears that his holding was fugitive and solely for the purpose of cutting timber.<sup>11</sup>

# § 68. Statutory Provisions and Remedies

Generally, where the common-law action of trover has been abolished by statutory provisions, the substance of the action has been retained and in some instances has been enlarged to include remedies in cases not recognized by the common law.

In some jurisdictions wherein the common-law action of trover has been abolished by code or statutory provisions, or the name is no longer used,<sup>12</sup> the substance of the common-law action has not been abolished,<sup>13</sup> the rule of damages has not been changed,<sup>14</sup> and there is a remedy as complete as the common-law action.<sup>15</sup> A statute may grant relief by trover in cases wherein such form of action was not recognized by the common law,<sup>16</sup> and may create an enlarged measure of damages.<sup>17</sup> In some states the statutory form of action for conversion is limited to the conversion of "plaintiff's goods."<sup>18</sup> The Negotiable Instruments Law has no relation to an action for conversion.<sup>19</sup>

98. Okl.—Dobbins v. Texas Co., 275 P. 643, 136 Okl. 40.

65 C.J. p 54 note 54—1 C.J. p 1045 note 61.

99. Ala.—Kelley v. Cassels, 147 So. 597, 226 Ala. 410.—Fields v. Brice, 18 So. 142, 108 Ala. 632.

Ohio.—Long v. Crawford Finance Co., 6 Ohio Supp. 36.

1. Ohio.—Long v. Crawford Finance Co., supra.

"It is competent for the law court to administer justice according to the principles of equity."—Robertson v. Business Boosters' Country Club, 98 So. 272, 273, 210 Ala. 460.

2. Ala.—Draper v. Walker, 13 So. 595, 98 Ala. 310.  
65 C.J. p 54 note 55.

3. Fla.—Fletcher v. Dees, 134 So. 234, 101 Fla. 402.

N.Y.—Moskowitz v. Cohen, 286 N.Y. S. 152, 158 Misc. 489.

4. Miss.—Bank of Forest v. Capital Nat. Bank, 169 So. 193, 178 Miss. 163.

5. Cal.—Peterson v. Sherman, 157 P.2d 863, 68 Cal.App.2d 706.

Ind.—Seip v. Gray, 83 N.E.2d 790, 227 Ind. 52.

Md.—Maryland Cas. Co. v. Wolff, 25 A.2d 665, 180 Md. 513.

Miss.—Bank of Forest v. Capital Nat. Bank, 169 So. 193, 178 Miss. 163.

Mo.—St. Louis Fixture & Show Case Co. v. F. W. Woolworth Co., 88 S.W.2d 254, 232 Mo.App. 10.

N.H.—E. J. Caron Enterprises v.

State Operating Co., 179 A. 665, 87 N.H. 371.

N.J.—Baron v. Peoples Nat. Bank of Secaucus, 84 A.2d 492, 16 N.J. Super. 243, appeal dismissed 87 A.2d 398, 9 N.J. 249.—Manufacturers' Casualty Ins. Co. v. Mink, 30 A.2d 510, 129 N.J. Law 575.

Pa.—Pearl Assur. Co. v. National Ins. Agency, 28 A.2d 334, 150 Pa. Super. 265, affirmed 30 A.2d 333, 151 Pa. Super. 146.

Tex.—Hankney v. Employer's Cas. Co., Civ. App., 176 S.W.2d 357.

65 C.J. p 54 note 53.

6. Md.—Maryland Cas. Co. v. Wolff, 25 A.2d 665, 180 Md. 513.

Mo.—St. Louis Fixture & Show Case Co. v. F. W. Woolworth Co., 88 S.W.2d 254, 232 Mo.App. 10.

65 C.J. p 54 note 59.

Recovery of property in ball trover action see infra § 202.

7. N.J.—Baron v. Peoples Nat. Bank of Secaucus, 84 A.2d 492, 16 N.J. Super. 243, appeal dismissed 87 A.2d 398, 9 N.J. 249.

N.Y.—Burnham v. Pidcock, 66 N.Y.S. 806, 33 Misc. 65 affirmed 68 N.Y.S. 1007, 58 App. Div. 273.

8. Wis.—Heber v. Heber, 121 N.W. 328, 139 Wis. 472.

9. U.S.—Choice v. Texas Co., D.C. Tex., 2 F. Supp. 160.

65 C.J. p 55 note 61.

10. N.J.—Lehigh Zinc, etc., Co. v. New Jersey Zinc, etc., Co., 26 A. 920, 23 A. 79, 55 N.J. Law 350.

65 C.J. p 55 note 82.

Real property as not subject of conversion see supra § 11.

11. Mich.—Moret v. Mason, 64 N.W. 193, 106 Mich. 340.—Cook v. Cook, 64 N.W. 12, 106 Mich. 164.

12. Ky.—Dennis Bros. v. Strunk, 108 S.W. 957, 32 Ky.L. 1230.

13. Ky.—Dennis Bros. v. Strunk, supra.  
65 C.J. p 56 note 84.

14. Mich.—Maycroft v. The Jennings Farms, 176 N.W. 545, 209 Mich. 187. Damages generally see infra §§ 161-201.

15. U.S.—Berio v. Gay, C.C.A. Puerto Rico, 272 F. 404.

65 C.J. p 56 note 86.

16. U.S.—U. S. v. Fleming, D.C. Iowa, 69 F. Supp. 252.

N.Y.—Mintzer v. Windsor Lamp Mfg. Co., 23 N.Y.S.2d 990, 175 Misc. 551.

65 C.J. p 56 note 87.

Statutory provisions creating and regulating the remedy of ball trover see infra § 202 et seq.

As including injury to property

N.Y.—Mintzer v. Windsor Lamp Mfg. Co., supra.

17. Minn.—Berg v. Baldwin, 13 N.W. 821, 31 Minn. 541.  
65 C.J. p 56 note 88.

18. Fla.—Dekle v. Calhoun, 53 So. 14, 60 Fla. 53.

19. Conn.—Pilosio v. Crossman, 149 A. 774, 111 Conn. 178.

### § 69. Exclusiveness of Remedy; Availability of Other Remedies

An action of trover will lie even though it is not an exclusive remedy and other remedies are available.

Trover is a remedy for the redress of the legal wrong denominated "conversion", as discussed supra § 2, and it will lie even though it is not the exclusive remedy for a wrongful conversion,<sup>20</sup> and other remedies may be available.<sup>21</sup> If the following actions are permissible in the particular jurisdiction and the facts warrant them, the owner of property which has been wrongfully converted has the choice of bringing trover or replevin;<sup>22</sup> trover or detinue;<sup>23</sup> a suit for wrongful conversion or one on the implied promise for the value of the property;<sup>24</sup> trover, replevin, or a suit on an implied promise for the value of the property;<sup>25</sup> trover or a suit in sequestration;<sup>26</sup> trover or an action for money had and received;<sup>27</sup> or trover, trespass, or an action for money had and received.<sup>28</sup>

Indeed, in some instances an action of trover may be brought even though another civil action relating to,<sup>29</sup> or an indictment for larceny of,<sup>30</sup> the subject matter is pending. However, as against an individual who participated actively in a conversion by a corporation but was not himself enriched there-

by, plaintiff has a cause of action in trover only.<sup>31</sup> Trover cannot be maintained for goods obtained under an invalid contract while an action founded on the contract is pending,<sup>32</sup> and, as discussed in Judgments §§ 746-749, a judgment in another form of action will bar an action of trover for the same act.

*Action available whenever trespass lies.* Whenever an action of trespass will lie for the taking of a chattel, an action of trover may be maintained.<sup>33</sup>

*Waiver of other rights of action.* Where property has been wrongfully taken or seized, the owner may waive the trespass<sup>34</sup> or the right to claim the return of the property<sup>35</sup> and sue for conversion.

### § 70. What Law Governs

The law of the place where the property is situated at the time of conversion governs in an action of trover.

The law which governs in an action of trover is that of the place where the property in question was situated at the time of the alleged conversion thereof.<sup>36</sup> Some statutes have been construed to relate only to actions thereafter commenced,<sup>37</sup> while others have been held applicable to pending actions.<sup>38</sup>

20. U.S.—In re Franklin Saving & Loan Co., D.C.Tenn., 34 F.Supp. 585.
- Ark.—W. U. Tel. Co. v. Bush, 89 S.W.2d 723, 191 Ark. 1085, 103 A.L.R. 367.
- Tex.—Barker v. Swenson, 1 S.W. 117, 69 Tex. 407—James v. Klar & Winterman, Civ.App., 118 S.W.2d 625.
21. Ala.—Spivy-Johnson Portrait Co. v. Belt Automobile Indemnity Ass'n, 99 So. 80, 210 Ala. 681.
- Fla.—Handley v. Home Ins. Co. of New York, 150 So. 902, 112 Fla. 225.
- Ky.—Paducah & Illinois Ferry Co. v. Robertson, 171 S.W. 171, 161 Ky. 485.
- Miss.—Potomac Ins. Co. of District of Columbia v. Wilkinson, 71 So.2d 785.
- N.J.—Schrage v. Liebshtein, 79 A.2d 910, 12 N.J.Super. 550.
- Tex.—Myatt v. Elliott, Civ.App., 143 S.W.2d 205, error dismissed, judgment correct—Kelly v. R-F Finance Corporation, Civ.App., 60 S.W.2d 1067.
- Va.—Raven Red Ash Coal Co. v. Ball, 39 S.E.2d 231, 185 Va. 534, 167 A.L.R. 785.
- Wash.—Bill v. Gattavara, 209 P.2d 457, 34 Wash.2d 645.
- 65 C.J. p 55 note 56.
- Replevin where trover or trespass available see Replevin § 8.
22. Cal.—Shaw v. Palmer, 224 P. 106, 65 Cal.App. 441.
- 65 C.J. p 55 note 67.
- Return or value of property
- Tex.—Ellis Oil Co. v. Adams, Civ. App., 109 S.W.2d 1026, error dismissed.
- 65 C.J. p 55 note 67 [a].
23. Tex.—Hankey v. Employer's Cas. Co., Civ.App., 176 S.W.2d 357.
24. U.S.—Wynne v. McCarthy, C.C. A.Okl., 97 F.2d 964.
- Tex.—Ferguson v. Plainview Nat. Bank, Civ.App., 42 S.W.2d 834.
25. Mont.—Yancey v. Northern Pac. Ry. Co., 112 P. 533, 42 Mont. 342.
26. Tex.—Riply v. Less, 118 S.W. 1084, 55 Tex.Civ.App. 492.
27. S.C.—Daniel v. Post, 187 S.E. 915, 181 S.C. 468.
28. N.Y.—National Trust Co. v. Gleason, 77 N.Y. 400, 33 Am.R. 632.
- 65 C.J. p 55 note 71.
29. Me.—Wyman v. Bowman, 71 Me. 121.
- 65 C.J. p 55 note 72.
- Trespass, trover, and replevin as consistent remedies see Election of Remedies § 5.
30. Pa.—Keyser v. Rodgers, 50 Pa. 275.
31. Minn.—Burleson v. Langdon, 219 N.W. 155, 174 Minn. 264.
32. Mass.—Peters v. Ballistier, 3 Pick. 495—Kimball v. Cunningham, 4 Mass. 502, 3 Am.D. 230.
- Trover and assumpsit as inconsistent remedies see Election of Remedies § 5.
33. Mo.—Pitcock v. Higgins, App., 239 S.W. 870.
- 65 C.J. p 55 note 78.
34. Ky.—Christopher v. Covington, 2 B.Mon. 367—Sanders v. Vance, 7 T.B.Mon. 209, 18 Am.D. 167.
35. Wash.—Mansfield v. Yates—American Mach. Co., 279 P. 595, 153 Wash. 345.
36. U.S.—Wynne v. McCarthy, C.C. A.Okl., 97 F.2d 964—Petroleum Products Corp. v. Sklar, D.C.La., 87 F.Supp. 715—Federman v. Verni, D.C.N.Y., 42 F.Supp. 113.
- N.Y.—M. Salimoff & Co. v. Standard Oil Co. of New York, 136 N.E. 679, 262 N.Y. 220, 89 A.L.R. 345.
- Tenn.—Shuford v. Wynne Love & Co., 3 Tenn.App. 215.
- 65 C.J. p 56 note 91.
37. S.C.—Rogers v. Moore, 24 S.C.L. 60.
38. Cal.—Tulley v. Tranor, 53 Cal. 274.

§ 71. Persons Entitled to Sue

The rules governing persons entitled to sue in an action of trover and conversion are considered infra §§ 72-76.

Examine Pocket Parts for later cases.

§ 72. — Title and Right to Possession in General

An action in trover will not lie unless at the time of conversion the plaintiff had a right of property, general or special, and a right of possession, or was in actual possession.

It is stated in some decisions that trover will not lie unless at the time of conversion plaintiff had a property right, general or special, in the chattel converted, or was in possession, or had a right to the immediate possession, thereof,<sup>39</sup> while in other decisions it is declared that plaintiff in trover must

have had both property, either general or special, and possession or the right of immediate possession.<sup>40</sup> Also it has been stated that plaintiff must have had either an absolute or special title or the right to possession of the property at the time of the conversion,<sup>41</sup> and in other decisions it is declared that he must have had both.<sup>42</sup> Furthermore, it has been said that plaintiff must have had title at the time of the conversion.<sup>43</sup> Another statement or holding is that plaintiff must have had some right, title, or interest in the property alleged to have been converted.<sup>44</sup>

It is generally regarded as necessary<sup>45</sup> and sufficient<sup>46</sup> that plaintiff shall have had either possession or the right to possession at the time of the alleged conversion; he must have had at least a right to immediate possession.<sup>47</sup> Since a right of possession ordinarily depends on some title or right

39. Mo.—Jackson v. Rothschild, App., 98 S.W.2d 859.  
65 C.J. p 56 note 94.

40. Ala.—Jordan v. Henderson, 63 So.2d 379, 253 Ala. 419—Hamilton v. Hamilton, 51 So.2d 13, 255 Ala. 284—Long-Lewis Hardware Co. v. Abston, 180 So. 261, 235 Ala. 599—Tarrant American Sav. Bank v. Smokeless Fuel Co., 172 So. 603, 233 Ala. 507—American Standard Life Ins. Co. v. Johnson, 163 So. 632, 231 Ala. 94—Stanley v. People's Sav. Bank, 157 So. 844, 229 Ala. 446—Consolidated Graphite Corporation v. Kelly, 150 So. 682, 227 Ala. 516—Wolff v. Zurga, 150 So. 144, 227 Ala. 370—Walls v. Borders, 30 So.2d 41, 33 Ala.App. 95—Warren v. Peppers, 17 So.2d 535, 31 Ala.App. 394—Snead v. Stephens, 5 So.2d 737, 30 Ala.App. 349, reversed on other grounds 5 So.2d 740, 242 Ala. 78.

Me.—Sanborn v. Matthews, 41 A.2d 704, 141 Me. 213—Patten v. Dennison, 14 A.2d 12, 137 Me. 1.

Pa.—Commercial Banking Corp. v. Active Loan Co. of Philadelphia, 4 A.2d 616, 135 Pa.Super. 124.  
Utah—Johnson v. Flowers, 228 P.2d 406.

65 C.J. p 56 note 95.

**Growing crops**

Ind.—Ax v. Schloot, 84 N.E.2d 668, 116 Ind.App. 366.

41. Neb.—Jeessen v. Blackard, 65 N.W.2d 345, 159 Neb. 103—Kimball v. Cooper, 279 N.W. 194, 134 Neb. 538.

N.Y.—Kaufman v. Simons Motor Sales Co., 184 N.E. 739, 261 N.Y. 146—In re Barrett's Estate, 82 N.Y.S.2d 137.

Va.—Kisner v. Commercial Credit Co., 174 S.E. 330, 114 W.Va. 811.  
65 C.J. p 57 note 96.

**Engagement gifts**

Where plaintiff was concerned in

an immoral and unlawful engagement to marry deceased at a time when he had a living wife, whether plaintiff should recover damages from executors and widow for conversion of diamond ring which deceased had allegedly given plaintiff, and which she had thereafter returned, involved a question of public policy. Plaintiff could not recover damages from executors and widow for alleged conversion.—In re Uriis' Estate, 71 N.Y.S.2d 620, 133 Misc. 772.

42. U.S.—Armstrong v. New La Paz Gold Mining Co., C.C.A.Cal., 107 F.2d 453.

Mo.—Osborn v. Chandeysson Elec. Co., 243 S.W.2d 657.

Ohio.—North Canton Bank v. Cocklin, 187 N.E. 638, 46 Ohio App. 27.  
Wis.—Holleb Liquor Distributors v. Lincoln Fireproof Warehouse Co., 270 N.W. 545, 223 Wis. 231.

65 C.J. p 57 note 97, p 58 note 7 [a].

43. Me.—Corinna Seed Potato Farms v. Corinna Trust Co., 131 A. 307, 125 Me. 131.

Mich.—Detroit Trust Co. v. Struggles, 278 N.W. 885, 283 Mich. 471—Muskegon Booming Co. v. Hendricks, 50 N.W. 799, 89 Mich. 172.  
Tenn.—Kemble v. Wolfe, 14 Tenn. App. 545.

Tex.—Smith v. Burns, Civ.App., 107 S.W.2d 397.

Vt.—Evarts v. Beaton, 30 A.2d 92, 113 Vt. 151.

65 C.J. p 57 note 98.

Where plaintiff has abandoned his property and title he cannot recover in trover.—Clay County Abstract Co. v. McKay, 147 So. 407, 226 Ala. 394.

**Title held not abandoned**

N.Y.—In re Kluppel's Estate, 83 N.Y.S.2d 816, 194 Misc. 789.

44. N.Y.—Kaufman v. Simons Mo-

tor Sales Co., 184 N.E. 739, 261 N.Y. 146.

65 C.J. p 57 note 1.

45. Mass.—Raymond v. Guttentag, 59 N.E. 448, 177 Mass. 562.

Mo.—Luhmann v. Schaefer, App., 142 S.W.2d 1088—Allen v. Bagley, 133 S.W.2d 1027, 234 Mo.App. 891—Jackson v. Rothschild, App., 98 S.W.2d 859—Major v. Berg, App., 95 S.W.2d 861.

Neb.—Corpus Juris quoted in Fitzsimons v. Frey, 45 N.W.2d 603, 605, 153 Neb. 550—Burchmore v. H. M. Byllesby & Co., 1 N.W.2d 32, 140 Neb. 603.

N.Y.—Silk v. Silk, 295 N.Y.S. 517, 163 Misc. 773—In re Barrett's Estate, 82 N.Y.S.2d 137.

65 C.J. p 57 note 2.

46. Ind.—Isaacs v. Fletcher American Nat. Bank, 198 N.E. 829, 103 Ind.App. 246, rehearing denied and opinion explained 200 N.E. 440, 103 Ind.App. 246.

Me.—Amey v. Augusta Lumber Co., 148 A. 687, 138 Me. 472.

Neb.—Corpus Juris quoted in Fitzsimons v. Frey, 45 N.W.2d 603, 605, 153 Neb. 550.

R.I.—Greenstein v. Singer, 93 A.2d 306, reargument denied 95 A.2d 623.

47. Cal.—Bastanchury v. Times-Mirror Co., 156 P.2d 488, 68 Cal.App. 2d 217.

Colo.—Second Industrial Bank v. Surratt, 31 P.2d 1116, 94 Colo. 571.

Mo.—State ex rel. Lipic v. Flynn, 215 S.W.2d 446, 358 Mo. 429.

Neb.—Corpus Juris quoted in Fitzsimons v. Frey, 45 N.W.2d 603, 605, 153 Neb. 550.

N.Y.—Goebel v. Clark, 275 N.Y.S. 43, 242 App.Div. 408.

Utah.—Larsen v. Knight, 233 P.2d 365—Johnson v. Flowers, 228 P.2d 406.

65 C.J. p 58 note 4.

of property, general or special, as discussed infra § 73, he must have had, generally speaking, either actual possession or ownership and right of possession.<sup>48</sup> At any rate, trover may be brought by a person who had both a right of property and a right of possession at the time of the conversion,<sup>49</sup> or, in other words, it may be brought by any one whose ownership of, or special interest in, the property involved entitled him to the right of immediate possession thereof at the time of its conversion.<sup>50</sup> On the other hand, trover cannot be maintained by a person who had neither title, nor right of possession,<sup>51</sup> nor prior possession.<sup>52</sup>

### § 73. — Title, Possession, or Right of Possession, Alone

Title or a right of property without possession or the right to immediate possession is insufficient to support an action in trover, while actual possession or the right to immediate possession is sufficient against anyone but the true owner.

Title to, or a right of property in, a chattel will not alone support an action in trover;<sup>53</sup> plaintiff

must have had either actual possession or the right to immediate possession at the time of the alleged conversion, as is discussed supra § 72. Prima facie, however, a person having the title to, or general property in, a chattel is in constructive possession, or has the right of possession, thereof, and may sue in trover.<sup>54</sup>

*Actual possession* of a chattel at the time of a conversion thereof will sustain trover<sup>55</sup> as against a stranger, trespasser, person without title, or any person except the true owner, or one claiming under him.<sup>56</sup> While actual possession is regarded as sufficient evidence of title to enable plaintiff to maintain trover against a wrongdoer or stranger to the title,<sup>57</sup> the rule that a person who was in actual possession at the time of the conversion is entitled to maintain trover against a person not connected with the title may apply even though the title is conceded to be in a third person,<sup>58</sup> plaintiff obtained possession under a void transfer or proceeding,<sup>59</sup> or, except in some jurisdictions,<sup>60</sup> even though plaintiff acquired possession wrongfully.<sup>61</sup>

48. Cal.—Schweitzer v. Bank of America N. T. & S. A., 109 P.2d 441, 42 Cal.App.2d 536—McCoy v. Northwestern Casualty & Surety Co., 39 P.2d 864, 3 Cal.App.2d 534—Muessler v. Bridgewater, 31 P.2d 1089, 138 Cal.App. 217.

Neb.—Corpus Juris quoted in Fitzsimons v. Frey, 45 N.W.2d 603, 605, 153 Neb. 550.  
65 C.J. p 58 note 6.

49. Ind.—Ax v. Schloot, 81 N.E.2d 379, 118 Ind.App. 453.

Me.—Harvey v. Anacone, 184 A. 889, 134 Me. 245.

Mo.—Osborn v. Chandeysson Elec. Co., 248 S.W.2d 657.

N.J.—First Nat. Bank of Bloomington v. North Jersey Trust Co., Ridgewood, 14 A.2d 765, 18 N.J. Misc. 449.

Tex.—Pacific Finance Corp. v. Crouch, Civ.App., 248 S.W.2d 432.  
65 C.J. p 58 note 7.

#### Waiver of interest

A party who has legal title and entitled to possession may maintain an action for conversion even though such party had waived his interest in favor of a third party.—Gerard v. Sanner, 103 P.2d 314, 110 Mont. 71.

50. Cal.—Carvell v. Weaver, 202 P. 897, 54 Cal.App. 734.  
65 C.J. p 58 note 8.

51. Ala.—Clay County Abstract Co. v. McKay, 147 So. 407, 226 Ala. 394.

Pa.—Lee Tire and Rubber Co. v. Bonholtzer, 81 Pa. Dist. & Co. 218, 33 Del. Co. 331.

W. Va.—Kisner v. Commercial Credit Co., 174 S.E. 330, 114 W. Va. 811.  
65 C.J. p 58 note 9.

52. Mo.—Turner Lumber & Investment Co. v. Chicago, R. I. & P. Ry. Co., 34 S.W.2d 1009, 225 Mo.App. 1002.

53. Me.—Harvey v. Anacone, 184 A. 889, 134 Me. 245.

Mo.—State ex rel. Lipic v. Flynn, 215 S.W.2d 446, 358 Mo. 429.

Neb.—Jessen v. Blackard, 65 N.W.2d 345, 159 Neb. 103.  
65 C.J. p 58 note 11.

54. Mass.—Massachusetts Lubricant Corp. v. Socony-Vacuum Oil Co., 25 N.E.2d 719, 305 Mass. 269.

Mo.—State ex rel. Lipic v. Flynn, 215 S.W.2d 446, 358 Mo. 429.

65 C.J. p 59 note 14.

55. Ala.—Arledge v. J. D. Pittman Tractor Co., 181 So. 91, 236 Ala. 131.

Cal.—Susumu Igauye v. Howard, 249 P.2d 553, 114 Cal.App.2d 122—Fletcher Aviation Corp. v. Landis Mfg. Co., 214 P.2d 400, 95 Cal.App. 2d 905.

N.M.—Bustin v. Craven, 263 P.2d 392, 57 N.M. 724.

Tex.—Lee C. Moore & Co. v. Jarecki Mfg. Co., Civ.App., 82 S.W.2d 1002, error refused.  
65 C.J. p 59 note 15.

"Actual possession," entitling one without title to goods to sue for conversion thereof, means "actual and continuous occupancy or exercise of full dominion."—Jackson v. Rothschild, Mo.App., 99 S.W.2d 859.

56. Ala.—Arledge v. J. D. Pittman Tractor Co., 181 So. 91, 236 Ala. 131. Cal.—Fletcher Aviation Corp. v. Landis Mfg. Co., 214 P.2d 400, 95 Cal. App.2d 905.

Minn.—Anderson v. Gouldberg, 53 N. W. 636, 51 Minn. 294.

Tex.—Lee C. Moore & Co. v. Jarecki Mfg. Co., Civ.App., 82 S.W.2d 1002, error refused.

Utah.—Hi-Way Motor Co. v. Service Motor Co., 249 P. 133, 68 Utah 65.

65 C.J. p 59 note 16.

57. Ala.—Arledge v. J. D. Pittman Tractor Co., 181 So. 91, 236 Ala. 131.

Mass.—New England Box Co. v. C & R Const. Co., 49 N.E.2d 121, 313 Mass. 696, 150 A.L.R. 152.

65 C.J. p 59 note 17.

58. Ala.—Carpenter v. Lewis, 6 Ala. 682.

Fla.—Skinner v. Pinney, 19 Fla. 42, 45 Am.R. 1.

59. N.M.—Bustin v. Craven, 263 P. 2d 392, 57 N.M. 724.

65 C.J. p 59 note 19.

60. Mo.—Turley v. Tucker, 6 Mo. 583, 35 Am.D. 449.

65 C.J. p 59 note 20.

61. Ala.—Arledge v. J. D. Pittman Tractor Co., 181 So. 91, 236 Ala. 131.

Mass.—New England Box Co. v. C & R Const. Co., 49 N.E.2d 121, 313 Mass. 696, 150 A.L.R. 152.

Minn.—Anderson v. Gouldberg, 53 N.W. 636, 51 Minn. 294.

N.H.—Ricard v. Pollard Auto. Co., 169 A. 876, 86 N.H. 433.

65 C.J. p 59 note 21.



*Right to immediate possession* may be a sufficient basis for the maintenance of an action of trover<sup>62</sup> against a person who is not the true owner.<sup>63</sup> Title or right of property, general or special, must also be proved to be in plaintiff whenever his right of immediate possession cannot be otherwise shown.<sup>64</sup>

#### § 74. — Nature and Extent of Right, Title, Interest, or Possession

An equitable title will not suffice for the maintenance of trover, unless coupled with actual possession. Legal title or a vested legal interest, either general or special, is sufficient. Plaintiff's recovery, however, must be on the strength of his own title and not on the weakness of that of his adversary.

An equitable title or right will not suffice for the maintenance of trover,<sup>65</sup> or at least it alone is not sufficient;<sup>66</sup> but equitable ownership and actual possession are sufficient.<sup>67</sup> Legal title or actual ownership in plaintiff is sufficient,<sup>68</sup> and in some

cases has been held necessary,<sup>69</sup> but absolute or unqualified title need not be shown.<sup>70</sup> A vested legal interest, if acquired prior to the conversion alleged,<sup>71</sup> is sufficient to support trover.<sup>72</sup> Such an interest may be either general or special,<sup>73</sup> and may be founded on a possession warranted by law,<sup>74</sup> or consented to by the owner.<sup>75</sup> Plaintiff must recover on the strength of his own right or title, and not on the weakness of that of his adversary;<sup>76</sup> and where his alleged title is void, he cannot recover<sup>77</sup> unless he had actual possession and defendant is a stranger to the title, as is discussed supra § 73. Possession under a claim of title or right is sufficient to sustain an action for conversion against one who does not show a better right or title.<sup>78</sup>

*Right to immediate possession*, to constitute the basis of plaintiff's suit in trover, must be absolute, unconditional,<sup>79</sup> and exist at the time the action

62. Ala.—Hamilton v. Hamilton, 51 So.2d 13, 255 Ala. 284.

65 C.J. p 53 note 22.

63. Mo.—Kalinowski v. M. A. Newhouse & Son, App., 53 S.W.2d 1094.

64. Pa.—Lee Tire and Rubber Co. v. Bonholtzer, 81 Pa. Dist. & Co. 215, 38 Del. Co. 331.

65 C.J. p 60 note 24.

65. Ala.—McNutt v. King, 59 Ala. 597.

Mo.—Corpus Juris cited in Osborn v. Chandeysson Elec. Co., 248 S.W. 2d 657.

N.Y.—Pompez Exhibition Co. v. Flatto, 26 N.Y.S.2d 854, 261 App. Div. 613.—In re Barrett's Estate, 82 N.Y.S.2d 137.

Wash.—Nelson v. Nelson Neal Lumber Co., 17 P.2d 626, 171 Wash. 55, 92 A.L.R. 554.

65 C.J. p 60 note 26.

66. Miss.—Hook v. Bank of Leland, 98 So. 594, 134 Miss. 185.

Mo.—Corpus Juris cited in Osborn v. Chandeysson Elec. Co., 248 S.W.2d 657.

N.Y.—In re Barrett's Estate, 82 N.Y.S.2d 137.

67. Cal.—Luke v. Mercantile Acceptance Corp. of Cal., 244 P.2d 764, 111 Cal.App.2d 431.

65 C.J. p 60 note 28.

68. La.—Antoine v. Hamilton, App., 144 So. 614.

N.Y.—Sheldon v. McFee, 111 N.E. 220, 216 N.Y. 618, rehearing denied 112 N.E. 1076, 217 N.Y. 665.

Ohio.—North Canton Bank v. Cocklin, 187 N.E. 638, 46 Ohio App. 27.

Tex.—Cox v. Rhodes, Civ.App., 233 S.W.2d 924.—Neyland v. Brammer, Civ.App., 73 S.W.2d 884, error dismissed.—Cox v. Patten, Civ.App., 66 S.W. 64.

69. Ala.—Jordan v. Lindsay, 31 So.

484, 132 Ala. 567.—McNutt v. King, 59 Ala. 597.

65 C.J. p 60 note 30.

70. Cal.—Bastanchury v. Times-Mirror Co., 156 P.2d 488, 68 Cal.App.2d 217.

Colo.—Second Industrial Bank v. Surratt, 31 P.2d 1116, 94 Colo. 571.

Or.—Elarath Steel & Iron Co. v. Cornfoot, 240 P. 229, 116 Or. 83.

R.I.—Greenstein v. Singer, 93 A.2d 306, reargument denied 96 A.2d 623.

71. Ala.—Farrow v. Wooley & Jordan, 43 So. 144, 149 Ala. 373.

65 C.J. p 60 note 32.

72. Ala.—Hamilton v. Hamilton, 51 So.2d 13, 255 Ala. 284.

65 C.J. p 60 note 33.

**Plaintiff held to have sufficient right and interest**  
Ala.—Hamilton v. Hamilton, supra.

N.H.—Morin v. Hood, 79 A.2d 4, 96 N.H. 485.

65 C.J. p 60 note 33 [a].

**Plaintiff held not to have sufficient right and interest**  
Utah.—Johnson v. Flowers, 228 P.2d 406.

73. Ala.—Jordan v. Henderson, 63 So.2d 379, 258 Ala. 419.—American Standard Life Ins. Co. v. Johnson, 163 So. 632, 231 Ala. 94.—Jordan v. Lindsay, 31 So. 484, 132 Ala. 567.

Del.—Cochran v. Clements, 183 A. 632, 7 W.W.Harr. 410.

Minn.—Larson v. Archer-Daniels-Midland Co., 32 N.W.2d 649, 226 Minn. 315.

N.Y.—Mitchell v. Vande, 289 N.Y.S. 1033, 160 Misc. 63.

Ohio.—North Canton Bank v. Cocklin, 187 N.E. 638, 46 Ohio App. 27.

R.I.—Greenstein v. Singer, 93 A.2d 306, reargument denied 96 A.2d 623.

Tex.—Pacific Finance Corp. v. Crouch, Civ.App., 243 S.W.2d 432.

65 C.J. p 60 note 34.

74. Mich.—Witherspoon v. Clegg, 4 N.W. 209, 43 Mich. 484.

75. Ala.—Farrow v. Wooley & Jordan, 43 So. 144, 149 Ala. 373.

65 C.J. p 61 note 38.

76. Cal.—Lee On v. Long, 234 P.2d 9, 37 Cal.2d 499, certiorari denied 72 S.Ct. 553, 342 U.S. 947, 96 L. Ed. 704.

Colo.—Kranz v. Rubush, 209 P.2d 555, 120 Colo. 264.

Ind.—Foudy v. Daugherty, 76 N.E.2d 268, 113 Ind.App. 68.

Mo.—Pearl v. Interstate Securities Co., 206 S.W.2d 975, 357 Mo. 160.—Personal Finance Co. of Missouri v. Lewis Inv. Co. App., 138 S.W.2d 455.—Jackson v. Rothschild, App., 99 S.W.2d 859.

Neb.—Jessen v. Blackard, 65 N.W. 2d 345, 159 Neb. 103.

N.Y.—Pompez Exhibition Co. v. Flatto, 26 N.Y.S.2d 654, 261 App. Div. 613.

Ohio.—Pennington v. First Discount Corp., 102 N.E.2d 469, 89 Ohio App. 384.

Wash.—Sussman v. Mentzer, 76 P.2d 595, 193 Wash. 517.—Smith v. Dahlquist, 28 P.2d 262, 176 Wash. 84.

65 C.J. p 61 note 37.

77. Ala.—Hartshorn v. Williams, 31 Ala. 149.

65 C.J. p 61 note 38.

78. Mass.—Putnam v. Lewis, 133 Mass. 264.

65 C.J. p 61 note 40.

79. Ill.—Nettleton v. Kerr, 167 Ill. App. 74.

Mass.—Lane v. Volunteer Co-op. Bank, 30 N.E.2d 821, 307 Mass. 508.

Neb.—Jessen v. Blackard, 65 N.W.2d 345, 159 Neb. 103.

is commenced.<sup>80</sup> There is no necessity, however, that the right of possession should have existed prior to the time of conversion, where such right springs out of the conversion itself.<sup>81</sup>

**Constructive possession.** A constructive possession founded on a valid title<sup>82</sup> is sufficient for the maintenance of trover.<sup>83</sup>

**Insufficient possession.** A person did not have such possession as enables him to maintain the action where the goods in question were not delivered to him but remained in defendant's store subject to defendant's control and direction,<sup>84</sup> even though plaintiff's representative had a key to the store.<sup>85</sup> Where plaintiff claims ownership of certain goods which have never been separated from a larger number, such goods cannot be the subject of conversion.<sup>86</sup>

**Unlawful possession.** Where by statute a possession is deemed to be unlawful, possession under such circumstances does not constitute any interest or ownership for the maintenance of an action in trover.<sup>87</sup>

## § 75. — Property Taken from Land

In order to maintain an action of trover for conversion of personality taken from land, it is necessary that the plaintiff shall have had at the time of conversion either actual possession, or title and constructive possession, or right to possession of the land.

The right of a person to maintain trover for the conversion of property taken from land depends on the possession of the land from which the property was taken.<sup>88</sup> In order to be entitled to sue, it is

necessary and sufficient that plaintiff shall have had, at the time of the alleged conversion, either actual possession, or title and constructive possession, or right to possession of the land from which the property was taken,<sup>89</sup> or that defendant's possession of the land was only fugitive, fraudulent, and under no bona fide claim of title.<sup>90</sup>

## § 76. — Right, Title, or Possession of Particular Persons

- a. Holder or owner of negotiable instrument
- b. Consignor or consignee
- c. Person interested in decedent's estate
- d. Part or joint owner or owners
- e. Lessor or lessee
- f. Lienholder
- g. Other persons

### a. Holder or Owner of Negotiable Instrument

The owner of a note may maintain an action for conversion thereof, even though the note has never been delivered to him.

Only the owner of a note may maintain an action for the conversion thereof.<sup>91</sup> On the other hand, the owner may sue even though the note has never been delivered to him.<sup>92</sup> Also, the holder and owner of a check note, or bond may sue for a conversion thereof,<sup>93</sup> even though he cannot maintain an action thereon in his own name,<sup>94</sup> as where he is neither the payee nor an indorsee.<sup>95</sup> In some states, however, it has been held that the owner of a note or bond cannot recover for a conversion of it, unless it has been legally indorsed to him.<sup>96</sup> The

80. Me.—Sanborn v. Matthews, 41

A.2d 704, 141 Me. 213—Harvey v. Anaconda, 184 A. 889, 134 Me. 245.

Neb.—Fitzsimons v. Frey, 45 N.W. 2d 603, 605, 153 Neb. 550.

Utah.—Johnson v. Flowers, 228 P. 2d 406.

81. Mo.—Allen v. Bagley, 133 S.W.2d 1027, 234 Mo.App. 891.

82. Ala.—Landrum v. Davidson, 39 So.2d 662, 252 Ala. 125.

Conn.—Sharkiewicz v. Lepone, 96 A. 2d 796, 139 Conn. 708.

Me.—Hardison v. Jordan, 44 A.2d 892, 141 Me. 429.

N.Y.—Clements v. Yturria, 81 N.Y. 285.

83. Ala.—Landrum v. Davidson, 39 So.2d 662, 252 Ala. 125.

Conn.—Sharkiewicz v. Lepone, 96 A. 2d 796, 139 Conn. 708.

Me.—Hardison v. Jordan, 44 A.2d 892, 141 Me. 429.

65 C.J. p 61 note 43.

84. N.Y.—Groves v. Warren, 164 N.Y.S. 925, 178 App.Div. 333.

85. N.Y.—Groves v. Warren, supra.

86. Ala.—Wolff v. Zurga, 150 So. 144, 227 Ala. 370.

87. Ill.—Maxon v. U. S. Underwriters' Co., 246 Ill.App. 335.

88. Me.—Webber v. McAvoy, 104 A. 513, 117 Me. 326.

89. U.S.—Choice v. Texas Co., D.C. Tex., 2 F.Supp. 160.

Ala.—Landrum v. Davidson, 39 So. 2d 662, 252 Ala. 125.

Me.—Hardison v. Jordan, 44 A.2d 892, 141 Me. 429.

Tex.—Wright v. Davis, Civ.App., 193 S.W.2d 294.

65 C.J. p 61 note 48.

**Acquisition of title to land by state in tax sale gives right of action for conversion.**—Eden Drainage Dist. of Yazoo County v. Swaim, 54 So.2d 547, 212 Miss. 386, suggestion of error overruled 55 So.2d 439, 212 Miss. 386.

**Right of entry against adverse possessor in good faith is insufficient.**

—Gray v. Alabama Fuel & Iron Co., 113 So. 35, 216 Ala. 416.

90. U.S.—Choice v. Texas Co., D.C. Tex., 2 F.Supp. 160.

91. Mo.—Cooper v. Commonwealth Trust Co., 122 S.W. 791, 142 Mo. App. 610.

Instrument as subject of conversion see supra § 13.

92. Minn.—Niminger v. Banning, 7 Minn. 274.

93. N.Y.—Mazur v. Urbach, 142 N. Y.S. 323, 81 Misc. 133.

**Actual possession and equitable title** N.Y.—Mazur v. Urbach, supra.

94. Ala.—Lowremore v. Berry, 19 Ala. 130, 54 Am.D. 183.

65 C.J. p 62 note 54.

95. Va.—White v. Bonney, 68 S.E. 273, 110 Va. 864.

96. N.C.—Killian v. Carrol, 35 N.C. 431.

65 C.J. p 62 note 56.

holder of a note indorsed in blank may maintain trover for a conversion thereof.<sup>97</sup>

### b. Consignor or Consignee

A consignor who has title and right of immediate possession or a consignee who has accepted an assignment may maintain an action of trover.

A consignor of goods may bring trover for the conversion of them where he has title<sup>98</sup> and the right of immediate possession.<sup>99</sup> So may a consignee who has accepted a consignment,<sup>1</sup> or made advances thereon.<sup>2</sup>

### c. Person Interested in Decedent's Estate

An executor or administrator having title or right of immediate possession may maintain an action in trover for conversion of decedent's goods, but an heir or distributee may not, unless there has been no administration or possession by the administrator.

A conversion of a decedent's goods will subject the wrong-doer to an action in trover by the executor or administrator, as discussed in Executors and Administrators § 710, provided the latter has title to the goods or right to the immediate possession thereof,<sup>3</sup> or a special right of property,<sup>4</sup> even though letters testamentary are not issued until after the time of conversion.<sup>5</sup> Ordinarily, an heir or distributee is not entitled to sue, as discussed in Decedent and Distribution § 85. It is otherwise, however, where there has been no administration<sup>6</sup> or the administrator has never taken possession.<sup>7</sup> The surviving widow may sue if the property was in her possession at the time of the conversion<sup>8</sup> or is exempted to her by statute.<sup>9</sup> It is held that a subvendee from the next of kin may sue.<sup>10</sup>

### d. Part or Joint Owner or Owners

Joint owners may unite in an action for conversion without showing the exact interest of each in the converted chattel.

Joint owners of a chattel may unite in an action for a conversion of it,<sup>11</sup> without showing the exact interest of each in it.<sup>12</sup> A part-owner may maintain trover for the conversion of his interest.<sup>13</sup>

The necessity or propriety of joining part or joint owners as parties plaintiff is discussed infra § 92.

### e. Lessor or Lessee

A lessor entitled to immediate possession may maintain trover for the wrongful conversion of fixtures, and a lessee may maintain trover for a wrongful removal of personality rented with the premises.

A lessor entitled to the immediate possession may maintain trover for the wrongful conversion of fixtures.<sup>14</sup> A lessee may bring trover for goods taken under a wrongful distress, as discussed in Landlord and Tenant § 715, or for wrongful removal by a landlord of personality rented with the premises.<sup>15</sup>

### f. Lienholder

Ordinarily, a lien will not support trover, unless at the time of conversion the lienholder had possession, or the right of immediate possession.

A lien will not support trover,<sup>16</sup> unless at the time of the conversion the lienholder had possession<sup>17</sup> or the right to immediate possession,<sup>18</sup> defendant took the property with notice or knowledge of the lien,<sup>19</sup> or the lien was rendered ineffectual or diminished in value by the conversion.<sup>20</sup> The existence at one time of another and prior lien on

97. Ala.—Dawsey v. Kirven, 83 So. 338, 203 Ala. 446, 7 A.L.R. 1658—Carter v. Lehman, 7 So. 735, 90 Ala. 128.

98. Ga.—Cox v. N. K. Fairbanks Co., 116 S.E. 43, 29 Ga.App. 538.

99. Mass.—Hardy v. Munroe, 127 Mass. 64.  
65 C.J. p 62 note 60.

1. Mich.—Gibbons v. Farwell, 24 N. W. 668, 58 Mich. 233.

N.Y.—Brown v. Bowe, 7 N.Y.St. 387.

2. N.Y.—Fitzhugh v. Wiman, 9 N.Y. 559, 1 Seid. 250.

3. Ill.—Massachusetts Mut. Life Ins. Co. v. Hayes, 16 Ill.App. 233.

4. Ill.—Faubel v. Michigan Boulevard Bldg. Co., 278 Ill.App. 159.

5. Ill.—Faubel v. Michigan Boulevard Bldg. Co., supra.

6. N.Y.—Hyde v. Stone, 7 Wend. 354, 22 Am.D. 582.

7. Ala.—Nashville, etc., R. Co. v. Karthaus, 43 So. 791, 150 Ala. 633.

8. Ala.—Meyer v. Hearst, 75 Ala. 390.  
65 C.J. p 62 note 68.

9. Ky.—Singleton v. McQuerry, 2 S. W. 652, 85 Ky. 41, 8 Ky.L. 710.

10. N.C.—Craig v. Miller, 34 N.C. 375.

11. Mass.—Parker v. Parker, 1 Allen 245.

Vt.—Spencer v. Dearth, 43 Vt. 98.

12. Tex.—Robertson v. Gourley, 19 S.W. 1006, 84 Tex. 575.

13. Ala.—C. W. Zimmerman Mfg. Co. v. Dunn, 44 So. 533, 151 Ala. 435.

14. Ala.—Middleton v. Alabama Power Co., 71 So. 461, 196 Ala. 1.

15. Mass.—Chamberlain v. Neale, 9 Allen 410.

16. Ala.—Jordan v. Henderson, 63 So.2d 379, 258 Ala. 419—Jordan v. Lindsay, 31 So. 484, 132 Ala. 567.

Cal.—Thomsen v. Culver City Motor Co., 41 P.2d 597, 4 Cal.App.2d 639.

N.Y.—In re Barrett's Estate, 82 N. Y.S.2d 137.

65 C.J. p 63 note 87.

17. Cal.—Bastanchury v. Times-Mirror Co., 156 P.2d 488, 68 Cal. App.2d 217—Arques v. National Superior Co., 155 P.2d 643, 87 Cal. App.2d 763—Thomsen v. Culver City Motor Co., 41 P.2d 597, 4 Cal. App.2d 639.

Ohio.—Wheaton v. Chandler, 42 N. E.2d 193, 68 Ohio App. 474.

65 C.J. p 63 note 88.

18. Cal.—Thomsen v. Culver City Motor Co., 41 P.2d 597, 4 Cal.App. 2d 639.

65 C.J. p 63 note 89.

19. S.C.—Waldrop v. M. & J. Finance Corporation, 183 S.E. 460, 178 S.C. 527.

65 C.J. p 63 note 90.

20. U.S.—U. S. v. Fleming, D.C. Iowa, 69 F.Supp. 252.

Tenn.—Shuford v. Wynne Love & Co., 3 Tenn.App. 215.  
65 C.J. p 63 note 91.

the property does not necessarily disentitle plaintiff to recover in the absence of a showing that the lien still exists or is being asserted.<sup>21</sup>

### g. Other Persons

The rights of various other persons to maintain trover have been considered by the courts.

A person who was in possession of personal property as an agent may have such a special interest in it as will support an action of trover,<sup>22</sup> but not as against the principal or one acting under his consent.<sup>23</sup>

**Militia commander.** A commander of a company of the National Guard who is liable to the state for the safe custody and return of certain property, as discussed in Militia § 17, has such a rightful possession or special property as enables him to sue.<sup>24</sup>

**Creditor without judgment lien** cannot maintain trover against one who took goods from the debtor with fraudulent intent.<sup>25</sup>

**Creditor in possession.** A creditor holding possession of a debtor-corporation's property may not maintain an action of conversion, where the legal title to the corporation's property is held by its directors as trustees for all creditors.<sup>26</sup>

**Buyer of merchandise** acquiring title prior to delivery may maintain an action of conversion,<sup>27</sup> and any statutory provisions to the contrary as to the passage of title may be waived for purposes of such an action.<sup>28</sup>

## § 77. Persons Liable

Every person is liable in trover who personally or by agent commits an act of conversion or who participates in the conversion by instigating, aiding, or assisting another, or who knowingly benefits by its proceeds in whole or in part.

Every person is liable in trover who personally<sup>29</sup> or by agent, as discussed in Agency, § 255, commits an act of conversion, or who participates in the conversion<sup>30</sup> by instigating, aiding, or assisting an-

21. Minn.—National Citizens' Bank of Mankato v. McKinley, 132 N.W. 290, 115 Minn. 378.

22. Mass.—Eaton v. Lynde, 15 Mass. 242.

23. C.J. p 63 note 92.

23. Utah.—Hi-Way Motor Co. v. Service Motor Co., 249 P. 133, 68 Utah 65.

24. Ala.—Crescent News & Hotel Co. v. Hines, 81 So. 9, 7 Ala.App. 609.

25. N.Y.—Cramer v. Blood, 57 Barb. 155, affirmed 48 N.Y. 634.

26. Mo.—Jackson v. Rothschild, App., 99 S.W.2d 859.

27. Ill.—Superior Household Mfg. Co. v. Brune, 89 N.E.2d 538, 339 Ill.App. 253.

28. Ill.—Superior Household Mfg. Co. v. Brune, supra.

29. Ill.—People v. Roth, Inc., 107 N.E.2d 692, 412 Ill. 446.

Mass.—New England Box Co. v. C & R Const. Co., 49 N.E.2d 121, 313 Mass. 696, 150 A.L.R. 152.

N.J.—Mueller v. Seaboard Commercial Corp., 73 A.2d 905, 5 N.J. 28. N.Y.—Wembach Corp. v. Emigrant Industrial Sav. Bank, 34 N.Y.S.2d 688, 264 App.Div. 161, affirmed 45 N.E.2d 169, 289 N.Y. 682—Passaic Falls Throwing Co. v. Villeneuve-Pohl Corp., 155 N.Y.S. 669, 169 App. Div. 727.

65 C.J. p 64 note 2.

**Manufacturer's refusal to deliver to consumer**

Where automobile manufacturer

had received full payment for automobile sold by distributor and distributor's agent, but withheld delivery in an attempt to collect money allegedly due to distributor's agent which had nothing to do with sale of automobile, whether distributor or distributor's agent had authority to represent manufacturer was immaterial to manufacturer's liability in conversion to buyer for refusal to deliver automobile.—Lomba v. General Motors Corp., 6 N.W.2d 890, 303 Mich. 556.

### Owner of incorporated business

Where seller filed assumed name certificate stating that he owned radio products company, and the certificate was on record when cause of action against seller for conversion arose in favor of buyer as well as at date of trial and although there was evidence that the seller's business had been incorporated prior to the time the buyer's cause of action arose, there was no showing that the seller complied with statute requiring a business firm to give notice of intention of becoming incorporated, the seller was personally liable for the act of conversion.—Spokane v. Coy, Tex.Civ.App., 153 S.W.2d 672.

**A purchaser of real property leased to a tenant was put on inquiry as to the terms of the lease and was liable for the "conversion" of tenant's property if he prevented tenant from removing improvements permitted to be removed under the lease.**—Grossman v. Jones, Tex.Civ.App., 157 S.W.2d 448, error refused.

30. N.J.—Mueller v. Seaboard Com-

mercial Corp., 73 A.2d 905, 5 N.J. 28.

N.Y.—Wembach Corp. v. Emigrant Industrial Savings Bank, 34 N.Y.S.2d 688, 264 App.Div. 161, affirmed 45 N.E.2d 169, 289 N.Y. 682—Passaic Falls Throwing Co. v. Villeneuve-Pohl Corp., 155 N.Y.S. 669, 169 App.Div. 727.

65 C.J. p 64 note 4.

### Successive conversions

There can be successive converters of the same property and the party wronged by the successive conversions has a cause of action against all the participants.—U. S. v. Fleming, D.C.Iowa, 69 F.Supp. 252.

### Storage company and creditor of third person

Storage company with which wife stored furniture in her name, and husband's creditor who instituted garnishment proceedings against storage company were both liable to wife for conversion where storage company made no attempt to defend garnishment action or to postpone sale until wife should have notice of proceedings, and stated in garnishment answer that goods were those of husband.—Sprague v. Allied Mills, 261 N.W. 892, 129 Neb. 394.

### Purchaser and seller

Where buyer of automobile sold old automobile, which he had agreed to turn in as part of purchase price, to third party after title had passed to seller, third party was in same position as buyer with respect to liability to seller for conversion.—Wilson Motor Co. v. Lamping Motors, 78 P.2d 559, 194 Wash. 416.

other,<sup>31</sup> or who knowingly<sup>32</sup> benefits by its proceeds in whole or in part.<sup>33</sup> On the other hand, one person is not liable for a conversion by another person where he did not direct, advise, participate in, or benefit from, it, and he does not bear such a relationship to the latter person as would make him responsible for his acts.<sup>34</sup>

**Purchasers or creditors.** One who purchases property from a person in whose possession it was placed for his exclusive use may be held liable in trover to the original owner.<sup>35</sup> Persons taking and removing property in their debtor's possession notwithstanding a sale thereof to another, have been held guilty of conversion, where there was evidence that they knew of and urged such sale and no show-

ing was made that they did anything to bring themselves within the statute relating to fraudulent conveyances.<sup>36</sup>

**Persons directing levy by officer.** A judgment creditor, attachment plaintiff, or a stranger, who advises, directs, or assists an officer to seize property not belonging to the debtor, or who ratifies the sale thereof by the officer, is liable to the owner for a conversion.<sup>37</sup> However, merely pointing out to an officer property on which to levy will not in the event of a wrongful levy render a creditor guilty of a conversion.<sup>38</sup> Also, plaintiff in attachment is not liable in trover for the value of property which without fault on the officer's part was destroyed pending the attachment.<sup>39</sup>

31. La.—*Edwards v. Max Thieme Chevrolet Co.*, App. 191 So. 569.  
Me.—*Corpus Juris* quoted in *Lewiston Trust Co. v. Deveno*, 74 A.2d 457, 458, 145 Me. 224—*Scott v. Perkins*, 28 Me. 22.

Neb.—*Sprague v. Allied Mills*, 261 N.W. 392, 139 Neb. 394—*Starr v. Banker's Union*, 116 N.W. 61, 81 Neb. 378—*Stevenson v. Valentine*, 43 N.W. 107, 27 Neb. 338—*McCormick v. Stevenson*, 12 N.W. 823, 13 Neb. 70.

N.J.—*Mueller v. Seaboard Commercial Corp.*, 73 A.2d 905, 5 N.J. 23.  
N.Y.—*Wembach Corp. v. Emigrant Industrial Savings Bank*, 34 N.Y.S. 2d 688, 264 App.Div. 181, affirmed 45 N.E.2d 163, 289 N.Y. 662—*Pasalaic Falls Throwing Co. v. Ville-neuve-Pohl Corp.*, 155 N.Y.S. 669, 169 App.Div. 727.

S.D.—*Skinner v. First Nat. Bank & Trust Co. of Watertown*, 249 N.W. 321, 61 S.D. 431.

Vt.—*Parker v. Cone*, 163 A. 715, 105 Vt. 426—*Hill v. Bedell*, 126 A. 493, 98 Vt. 82.

Wash.—*Layman v. Swanson*, 101 P. 2d 304, 3 Wash.2d 370—*Contractors' Machinery & Storage Co. v. Stewart*, 31 P.2d 546, 177 Wash. 283.

65 C.J. p 64 note 5.

#### Conversion of infant's property

One who contracts with an infant acts at his own peril and one who steals from an infant or aids the thief to dispose of the stolen property should be no less favored.—*Hayward v. Edwards*, 4 N.Y.S.2d 699, 167 Misc. 694.

32. Me.—*Corpus Juris* quoted in *Lewiston Trust Co. v. Deveno*, 74 A.2d 457, 458, 145 Me. 224.

N.C.—*Lavecchia v. North Carolina Joint Stock Land Bank of Durham*, 1 S.E.2d 119, 215 N.C. 73, rehearing denied 3 S.E.2d 276, 215 N.C. 28.  
65 C.J. p 64 note 6.

33. Me.—*Corpus Juris* quoted in *Lewiston Trust Co. v. Deveno*, 74 A.2d 457, 458, 145 Me. 224.  
65 C.J. p 64 note 7.

34. Mo.—*American Employers Ins. Co. of Boston, Mass., v. Manufacturers & Mechanics Bank of Kansas City*, 85 S.W.2d 174, 229 Mo. App. 994.

Mont.—*Corpus Juris* cited in *Harri v. Isaac*, 107 P.2d 137, 140, 111 Mont. 152.

65 C.J. p 64 note 8.

#### Landlord and tenant

Mere relation of landlord and tenant does not ipso facto create tenant an agent for landlord with respect to landlord's liability for tenant's conversion of plow.—*Kelly v. Oliver Farm Equipment Sales Co.*, 36 P.2d 888, 169 Okl. 269.

#### Employee

One employed by oil company as branch manager at its bulk sales station under contract making him responsible for company's stocks, equipment, and funds coming into his possession, and shortages developed by company's audits was not liable to corporation for shortage caused by his employee's embezzlement or theft of company's funds or goods committed to custody solely of such employee, who acknowledged sole responsibility for such shortage.—*Arkansas Fuel Oil Co. v. National Surety Corp.*, 184 So. 560, 191 La. 115.

#### Bank

Where prospective buyer of scrap iron went to bank and informed the vice president that he understood that the scrap iron was the property of a certain estate, and that the bank had the right to sell it, and vice president of bank informed prospective buyer that he knew nothing of any property of such estate being in the neighborhood but that if there was any, the bank had the right to sell it, and would sell it to the pro-

spective buyer for certain sum, but that prospective buyer should make sure that the scrap iron belonged to the estate before removing it, and prospective buyer took the scrap iron which proved to belong to a third person, the bank was not liable for "conversion".—*Nye v. Johnson*, 4 N.W.2d 819, 72 N.D. 95.

#### Manufacturer

Manufacturer was not liable to debtor for conversion of debtor's property by credit manager of its collecting agent while collecting for lamps consigned to debtor by manufacturer, where manufacturer had been paid in full, converted property had not been sold by manufacturer to debtor, and manufacturer had not participated in acts of conversion.—*McCarthy v. General Electric Co.*, 49 P.2d 993, 151 Or. 519, 100 A.L.R. 1370.

#### Credit association

Credit association which had advanced money to tenant on strength of landlords' waivers of their landlords' liens on crops, and which had taken a mortgage from tenant, was not liable to landlords for alleged conversion by tenant of a portion of the crop, where there was no showing that association knew or should have known of alleged conversion or that association had participated in the alleged conversion.—*White River Production Credit Ass'n v. Fears*, 209 S.W.2d 294, 213 Ark. 75.

35. Ala.—*Southern R. Co. v. Attalla*, 41 So. 664, 147 Ala. 653.

36. Cal.—*Hildebrand v. Delta Lumber & Box Co.*, 153 P.2d 377, 67 Cal. App.2d 88.

37. N.Y.—*Phelps v. Delmore*, 23 N.Y.S. 229, 69 Hun 13.  
65 C.J. p 65 note 11.

38. Vt.—*Adams v. Abbot*, 2 Vt. 383.

39. N.Y.—*Jenner v. Joliffe*, 6 Johns. 9.

## § 78. — Joint Tort-Feasors

All persons engaged in a conversion are liable and may be sued jointly or severally, provided, if it is sought to hold them jointly liable, the conversion was joint.

A joint conversion is the single concerted act of several persons, or the result of the acts of several persons which, although separately committed, all tend to the same end.<sup>40</sup> All persons engaged in a conversion are liable<sup>41</sup> as principals;<sup>42</sup> they are liable<sup>43</sup> and may be sued<sup>44</sup> jointly or severally, provided, if it is sought to hold them jointly liable, the conversion was joint.<sup>45</sup> In order to hold persons jointly liable for conversion it is necessary to show that each was guilty of conversion, either by agreement among them or each acting separately in such a manner as to show that the act of each was the exercise of the assumption of dominion over the property unauthorized by the rightful owner.<sup>46</sup> Concert of action and unity of design, required to

hold persons jointly and severally liable, may be inferred from the nature of their acts, the relation of the persons, their respective interests, and other circumstances.<sup>47</sup> If liable and sued jointly, damages will be assessed against all jointly, even though all were not equally guilty.<sup>48</sup> The fact that no case is made or recovery obtained against one defendant does not necessarily enable another defendant to escape liability.<sup>49</sup>

## § 79. Conditions Precedent

A failure of the plaintiff to perform a condition precedent will defeat his action for a wrongful conversion.

A failure of plaintiff to perform a condition precedent will defeat his action for a wrongful conversion.<sup>50</sup> However, an action for conversion of a note secured by a trust deed may be maintained without first foreclosing the trust deed, since the

40. Tenn.—*Corpus Juris* quoted in *Breeden v. Elliott Bros.*, 118 S.W. 2d 219, 220, 173 Tenn. 382. 65 C.J. p 65 note 15.

41. U.S.—*U. S. v. Fleming, D.C.Iowa*, 69 F.Supp. 252.

Kan.—*Farmers' Grain & Supply Co. v. Atchison, T. & S. F. Ry. Co.*, 245 P. 734, 120 Kan. 121, 121 Kan. 10. Tenn.—*Corpus Juris* quoted in *Breeden v. Elliott Bros.*, 118 S.W.2d 219, 220, 173 Tenn. 382.

## Persons held liable

(1) A husband whose fraudulent management of plaintiff wife's securities pledged for his indebtedness resulted in a total loss thereof, is liable, and a corporation controlled by the husband which wrongfully received proceeds of sales of the securities was also liable.—*Dow v. Brookline Trust Co.*, 31 N.E.2d 13, 308 Mass. 90.

(2) A bank with which converted check was deposited and bank through which check was cleared were liable for conversion of check subject to any appropriate defenses that might be interposed and established.—*Soma v. Handrulis*, 14 N.E.2d 46, 277 N.Y. 223, reargument denied 15 N.E.2d 71, 278 N.Y. 481.

(3) Where false oath that individual defendant had personally served plaintiff with summons and complaint in prior action resulted in taking of plaintiff's property by defendant corporation, both defendants were liable for plaintiff's loss.—*Mateo v. Abad*, 287 N.Y.S. 436, 239 App. Div. 376.

42. Tenn.—*Corpus Juris* quoted in *Breeden v. Elliott Bros.*, 118 S.W.2d 219, 220, 173 Tenn. 382. 65 C.J. p 65 note 17.

## Indorser of converted check

An indorser, to whom holder of check for safekeeping delivered the check after check had been indorsed by payee "for deposit," was liable for conversion in the same manner as the holder.—*Soma v. Handrulis*, 14 N.E.2d 46, 277 N.Y. 223, reargument denied 15 N.E.2d 71, 278 N.Y. 481.

43. Mass.—*Refrigeration Discount Corp. v. Catino*, 112 N.E.2d 790, 380 Mass. 230.

Tenn.—*Corpus Juris* quoted in *Breeden v. Elliott Bros.*, 118 S.W.2d 219, 220, 173 Tenn. 382. 65 C.J. p 65 note 18.

## Joint liability of master and servant see Master and Servant § 579. Good faith

(1) Where thief sold and delivered stolen property to buyer and buyer received and undertook to assume dominion over the stolen property, both became "joint tort-feasors" and both became liable jointly in an action of trover and conversion to the owner, without regard to whether the buyer had prior knowledge of the fact that the thief had stolen the property.

Ala.—*Geneva Gin & Storage Co. v. Rawls*, 199 So. 734, 240 Ala. 320. Idaho.—*Klam v. Koppel*, 118 P.2d 729, 63 Idaho 171.

(2) A professional bookmaker receiving a bond as an accommodation for a gambling customer who presumably stole bond and to whom bookmaker transmitted proceeds after he deposited bond in bank and caused it to be sold was jointly liable as a participant in the conversion with customer for damages suffered by owner of bond, whether or not bookmaker acted in good faith.—*U. S. Fidelity & Guaranty Co. v. Leach*, 300 N.Y.S. 331, 165 Misc. 549.

44. Iowa.—*Independent School Dist. of Dubuque in Dubuque County v. Sass*, 261 N.W. 30, 220 Iowa 1.—*Home Savings Bank v. Otterbach*, 112 N.W. 769, 135 Iowa 157.

Tenn.—*Corpus Juris* quoted in *Breeden v. Elliott Bros.*, 118 S.W.2d 219, 220, 173 Tenn. 382. 65 C.J. p 65 note 19.

45. Tenn.—*Corpus Juris* quoted in *Breeden v. Elliott Bros.*, 118 S.W.2d 219, 220, 173 Tenn. 382. 65 C.J. p 65 note 20.

46. Fla.—*Wilson Cypress Co. v. Logan*, 162 So. 489, 120 Fla. 124.

## Insurance policy

Insurer and insurance agent who, under instructions from the insurer, withdrew fire policy from bank in which it had been deposited and sent it to insurer for cancellation at insurer's direction were both guilty of conversion of the policy.—*Home Ins. Co. of New York v. Handley*, 162 So. 516, 120 Fla. 226.

47. Cal.—*Luke v. Mercantile Acceptance Corp. of Cal.*, 244 P.2d 764, 111 Cal.App.2d 431.

48. Ind.—*Everroad v. Gabbert*, 83 Ind. 489. 65 C.J. p 65 note 21.

49. Ala.—*Geneva Gin & Storage Co. v. Rawls*, 199 So. 734, 240 Ala. 320. Mont.—*Corpus Juris* quoted in *Bowman v. Lewis*, 102 P.2d 1, 2, 110 Mont. 435. 65 C.J. p 65 note 22.

50. Neb.—*Corpus Juris* quoted in *Jessen v. Blackard*, 65 N.W.2d 246, 355, 159 Neb. 103. 65 C.J. p 65 note 24. Demand and refusal see *supra* § 64, 62.

action is for conversion and not on the note.<sup>51</sup> The abandonment of ownership and right of possession by the owner of property which has been converted is not a necessary prerequisite to his maintaining an action in damages for conversion.<sup>52</sup>

# § 80. — Tender of Amount of Lien or Indebtedness

Generally, where a lien on, or an indebtedness for, goods exist in favor of one in possession of them, a tender of the amount of such lien or indebtedness must be made before trover will lie.

Where a lien on, or an indebtedness for, goods exist in favor of one in possession of them, a tender of the amount of such lien or indebtedness must be made before trover will lie,<sup>53</sup> unless he previously disposed of the property or otherwise terminated his lien,<sup>54</sup> neglected to claim a lien and state the amount thereof,<sup>55</sup> states that he does not intend to accept payment,<sup>56</sup> coupled the lien with another claim,<sup>57</sup> based his refusal to deliver on another ground,<sup>58</sup> or failed to perform the contract which would have entitled him to a lien.<sup>59</sup> Tender of amount actually due need not be shown where defendant claimed a lien for a larger sum than he was entitled to collect,<sup>60</sup> or the owner offered to pay all just charges.<sup>61</sup>

# § 81. — Rescission of Contract and Return of Consideration

Where title has passed in a sale or exchange of goods procured by the defendant's fraud, the plaintiff cannot recover for a conversion thereof without proof of a rescission of the contract and of a return or tender of the consideration received.

Where title has passed in a sale or exchange of goods procured by defendant's fraud, plaintiff cannot recover for a conversion thereof without proof of a rescission of the contract and of a return or tender of the consideration received.<sup>62</sup> If, however, title has not passed to the holder of the goods, and he converts them, the owner may bring trover without tendering or paying back anything received as hire or part payment therefor.<sup>63</sup> A return or tender at the trial has been held sufficient.<sup>64</sup> Also, an offer to return is sufficient where defendant waives an actual or formal tender.<sup>65</sup>

# § 82. — Institution of Criminal Proceedings

In some, but not other, jurisdictions, the institution of a criminal prosecution against one who has feloniously obtained goods and converted them is a condition precedent to the bringing of trover against him.

In some,<sup>66</sup> but not other,<sup>67</sup> jurisdictions, the institution of a criminal prosecution against one who has feloniously obtained goods and converted them is a condition precedent to the bringing of trover against him. The institution of a criminal prosecution is not a condition precedent to the bringing of trover against a receiver of goods stolen in another state.<sup>68</sup>

# § 83. Defenses

In general, any defense may be set up which disproves the right of recovery in the plaintiff or negatives liability on the part of the defendant.

In general, any defense may be set up which disproves a right of recovery in plaintiff<sup>69</sup> or nega-

51. Cal.—Meyer v. Thomas, 63 P.2d 1176, 18 Cal.App.2d 299.

52. Conn.—Chiavo v. Cozzolino, 57 A.2d 723, 134 Conn. 388, 3 A.L.R. 2d 214.

53. Tex.—Corpus Juris cited in Staats v. Miller, 240 S.W.2d 342, 345, reversed on other grounds 243 S.W.2d 688, 150 Tex. 581.

54. C.J. p 65 note 28.  
Tender of mortgage debt see Chat-tel Mortgages § 220.

55. Or.—Austin v. Vanderbilt, 85 P. 519, 48 Or. 206, 120 Am.S.R. 800, 6 L.R.A.N.S., 298.  
56. C.J. p 66 note 27.

57. Conn.—Alling v. Weissmann, 59 A. 419, 77 Conn. 394.  
58. Wagenblast v. McKean, 2 Grant 393.

59. Tex.—Wallace v. Renfro, Civ. App., 124 S.W.2d 456, error dis-mitted, judgment correct.

60. Me.—Bowden v. Dugan, 39 A. 467, 91 Me. 141.

61. N.C.—Corbett Buggy Co. v. Dukes, 52 S.E. 931, 140 N.C. 393.  
62. C.J. p 66 note 30.

63. Ill.—Reeve v. Fox, 40 Ill.App. 127.

64. N.Y.—Phillips v. McNab, 9 N.Y.S. 526, 16 Daly 150.

65. N.Y.—Murr v. Western Assur. Co., 64 N.Y.S. 12, 50 App.Div. 4.

66. Mass.—Stickney v. Allen, 10 Gray 352.  
67. C.J. p 66 note 33.

68. Vt.—Corpus Juris cited in Everts v. Beaton, 30 A.2d 92, 94, 113 Vt. 151.  
69. C.J. p 66 note 35.

70. Ohio.—Baird v. Howard, 36 N.E. 732, 51 Ohio St. 57, 46 Am.S.R. 550, 22 L.R.A. 846.  
71. C.J. p 66 note 38.

72. N.Y.—King v. Fitch, 2 Abb.Dec. 508, 1 Keyes 432.  
73. C.J. p 66 note 37.

74. Ga.—Sasser v. Pierce, 70 S.E. 197, 9 Ga.App. 27.

75. Ala.—Martin v. Martin, 25 Ala. 201.

76. Pa.—Keyser v. Rodgers, 50 Pa. 275.  
77. C.J. p 66 note 39.

78. Cal.—Rogers v. Huie, 1 Cal. 429, 54 Am.D. 300.

79. Ga.—McBain v. Smith, 13 Ga. 315.  
80. Pa.—Johnson v. Kaas, 23 Leg. Int. 80.

81. Cal.—Gray v. Eschen, 57 P. 664, 125 Cal. 1.  
82. C.J. p 66 note 44.

**Failure to remove property**  
Where employee was notified that his connection with employer would be severed on a certain date, employee entered into agreement with employer to help dispose of certain of employer's property in order to raise money to pay employee's salary, and, when provisions of agreement were violated, temporary injunction was issued to enjoin employee from disposing of employer's property or going on employer's premises, employee's tools left on the premises after employment ter-

tives liability on the part of defendant.<sup>70</sup> Absence of damage to plaintiff is a good defense,<sup>71</sup> as is abandonment of the property by plaintiff.<sup>72</sup> On the other hand, there are various matters which, regardless of whether or not they may mitigate the damages and be shown in evidence for that purpose, do not constitute a complete defense in bar of the action, such as good faith, as discussed supra §§ 8, 45, possession originally acquired in a lawful manner,<sup>73</sup> advice of counsel,<sup>74</sup> a bona fide purchase without notice,<sup>75</sup> a desire to protect the wife of plaintiff,<sup>76</sup> deceit practiced on defendant by a third person,<sup>77</sup> lack of profit or benefit to defendant,<sup>78</sup> benefits conferred by defendant on plaintiff by making voluntary payments on the obligations of the latter,<sup>79</sup> a proper sale of part of the goods,<sup>80</sup> or a

license or agency which had been revoked or terminated.<sup>81</sup>

Other such matters include defendant's exercise of reasonable care in handling,<sup>82</sup> or failure to use<sup>83</sup> the property after wrongfully taking it, the obtaining of possession by defendant under a Sunday contract,<sup>84</sup> lack of possession by defendant at the time of pleading,<sup>85</sup> an unreasonable excuse for withholding plaintiff's goods,<sup>86</sup> another conversion by defendant or a third person prior to the one alleged,<sup>87</sup> subsequent theft<sup>88</sup> or destruction<sup>89</sup> of the property, a subsequent fraudulent act on the part of defendant,<sup>90</sup> a settlement of a different claim against a third person,<sup>91</sup> a settlement which was not fully carried out,<sup>92</sup> indebtedness of plaintiff to defendant,<sup>93</sup> plaintiff's intention prior to the conver-

minated were left at the employee's own risk and the employer was not liable for the tools.—*H. & P. Mfg. Co. v. Hanson*, Ark., 261 S.W.2d 800.

**Refusal to deliver stock certificate.** Alleged fact that promise in exchange for which stock subscription was given was worthless so as not to constitute property within statute relating to payment for stock subscription in property other than cash was available as defense to corporation and corporate directors in action for damages for conversion of stock by failure to deliver stock certificate.—*Trotta v. Metalnold Corp.*, 96 A.2d 798, 139 Conn. 668.

70. N.D.—*Erstad v. Jacobson*, 150 N. W. 584, 29 N.D. 647, 65 C.J. p 68 note 45.

71. U.S.—*Burke County v. First Nat. Bank*, C.C.A. Ala., 73 F.2d 783.

Or.—*Madden v. Condon Nat. Bank*, 149 P. 80, 76 Or. 363—*State v. West*, 145 P. 15, 74 Or. 112.

65 C.J. p 68 note 44 [a] (4).

72. D.C.—*Block v. Fisher*, Mun.App., 103 A.2d 575.

Kan.—*Rodgers v. Crum*, 215 P.2d 190, 168 Kan. 668.

73. Okl.—*General Motors Acceptance Corporation v. Vincent*, 83 P. 2d 598, 183 Okl. 547—*Pugh-Bishop Chevrolet Co. v. Duncan*, 55 P.2d 1003, 176 Okl. 310.

74. Ill.—*Rushville First Nat. Bank v. Slack*, 19 Ill.App. 330.

75. Ala.—*Milner, etc., Co. v. Deloach Mill Mfg. Co.*, 36 So. 765, 139 Ala. 645, 101 Am.S.R. 68.

Pa.—*Robinson v. Hodgson*, 73 Pa. 202.

76. N.Y.—*Heyert v. Reubman*, 86 N. Y.S. 797.

77. Mo.—*Pettigrew v. Lynch*, App., 204 S.W. 741.

78. Me.—*McPheters v. Page*, 22 A. 101, 83 Me. 234, 23 Am.S.R. 772, 65 C.J. p 66 note 54.

#### Prediction of future adjustments

The directors and officers of trust company from which plaintiff purchased undivided shares in two mortgages could not avoid liability for conversion, based on company's acceptance of a third mortgage on same property and entry into agreement consolidating all of mortgages, by prediction that on final foreclosure of consolidated mortgage the equities would be so adjusted that no advantage would be accorded trust company.—*Mendelson v. Boettger*, 12 N. Y.S.2d 671, 257 App.Div. 167, affirmed 23 N.E.2d 554, 281 N.Y. 747.

79. Tex.—*Frank v. Tatum*, Civ.App., 28 S.W. 800.

80. Ga.—*Huntington v. Bonds*, 68 Ga. 23.

81. Cal.—*Newlove v. Pond*, 62 P. 561, 180 Cal. 342.

N.H.—*Putney v. Day*, 6 N.H. 480, 25 Am.D. 470.

82. Mass.—*Row v. Home Sav. Bank*, 29 N.E.2d 552, 306 Mass. 522, 131 A.L.R. 160.

Tex.—*Jones v. City Nat. Bank*, Civ. App., 166 S.W. 442.

83. Ala.—*Harden v. Conwell*, 87 So. 673, 205 Ala. 191.

84. Iowa.—*Doolittle v. Shaw*, 60 N. W. 621, 92 Iowa 348, 54 Am.S.R. 562, 26 L.R.A. 366.

Mass.—*Hall v. Corcoran*, 107 Mass. 251, 9 Am.R. 30.

85. Ga.—*Jones v. Kimbrough, Bickers & Co.*, 74 S.E. 59, 137 Ga. 688.

86. Conn.—*Molski v. Bendza*, 164 A. 387, 116 Conn. 710.

65 C.J. p 67 note 62.

**Property given to third persons as commission.**

Fact that automobile which plaintiff traded for defendant dealer's used automobile had been given by defendant to third persons as a commission for effecting trade did not

relieve defendant from liability to plaintiff for value of plaintiff's automobile where defendant repudiated transaction and did not return such automobile to plaintiff.—*Deboue v. Gilman*, La.App., 2 So.2d 690.

87. Ala.—*Warren v. Barnett*, 3 So. 609, 33 Ala. 208.

N.Y.—*Kruse v. Seeger, etc.*, No. 16 N.Y.S. 529.

65 C.J. p 67 note 63.

88. N.Y.—*Lepard v. Symons*, 85 N. Y.S. 1025.

89. Miss.—*Mason v. O'Brien*, 42 Miss. 420.

65 C.J. p 67 note 65.

90. Cal.—*Rose v. Hilden Lumber & Mill Co.*, 14 P.2d 137, 125 Cal.App. 740.

91. U.S.—*Swiss Bankverein v. Zimmermann*, N.Y., 240 F. 87, 153 C.C. A. 123.

92. N.Y.—*Pierrepont v. Shepard, etc.*, Lumber Co., 42 N.Y.S. 498, 11 App.Div. 383.

93. Cal.—*Travis Glass Co. v. Ibbetson*, 200 P. 595, 186 Cal. 724—*Hildebrand v. Delta Lumber & Box Co.*, 153 P.2d 377, 67 Cal.App.2d 88.

Okla.—*Sisler v. Smith*, 267 P.2d 1081.

Tex.—*Jones v. City Nat. Bank*, Civ. App., 166 S.W. 442.

**Converted goods credited on indebtedness.**

No creditor without process and authority or right, except such as belongs to him as creditor, can dispossess his debtor of his goods and then defeat recovery by showing that the property taken has, without any assent or concession of the debtor, been applied on the debt. *Mich.—Northrup v. McGill*, 27 Mich. 234.

Or.—*McCarthy v. General Electric Co.*, 49 P.2d 933, 151 Or. 519, 100 A.L.R. 1370.



sion to use the property unlawfully,<sup>94</sup> plaintiff's breach or nonperformance of a contract,<sup>95</sup> or a partial failure of consideration.<sup>96</sup> Other matters include payment,<sup>97</sup> nonpayment,<sup>98</sup> or maturity after the institution, but before the trial, of the trover action,<sup>99</sup> of the promissory note alleged to have been converted; the failure of plaintiff to pay debts which he intended to pay by realizing on the property converted;<sup>1</sup> the acquisition by plaintiff of the check in question otherwise than in payment of any debts due him;<sup>2</sup> and negligence on the part of the plaintiff<sup>3</sup> in not discovering,<sup>4</sup> or giving notice of,<sup>5</sup> the facts at an earlier date where it was not so gross as to imply consent<sup>6</sup> and did not cause any loss to, or change of position by, defendant.<sup>7</sup>

Also, it is not a complete defense that plaintiff was only part-owner of the property<sup>8</sup> or that the value of goods converted is not ascertainable;<sup>9</sup> the assertion of a right other than that under which property was wrongfully taken or detained will not be allowed as a defense;<sup>10</sup> plaintiff's right to recover should not be made to depend on the opinion of the jury as to whether he would, if the conversion had not occurred, have continued to comply with his contract with defendant;<sup>11</sup> and the delivery of a sum of money by a stranger to plaintiff as a mere agent to pay it over to another person does not discharge an instrument alleged to have been converted where it is not made or accepted with that object or purpose but rather under an agreement

that plaintiff shall bring an action to recover for the conversion.<sup>12</sup> Since the value of commercial paper must depend largely on the integrity and business habits of those who issue it, the mere fact that the maker of a note, which has been wrongfully converted, has not sufficient property liable to execution to pay it cannot of itself be regarded as a good defense in an action of trover for its wrongful conversion.<sup>13</sup> Where a chattel mortgagee converts property on which plaintiff has a prior landlord's lien, it is no defense that there remained on the landlord's premises other property of the lessee sufficient to satisfy the landlord's claim for rent.<sup>14</sup>

*Acting under orders of superior officer* will justify a conversion only when the orders and surrounding circumstances amount to duress.<sup>15</sup>

*Defense set up by another defendant.* Where the liability of defendants is both joint and several, a valid defense set up by one will be available for the others.<sup>16</sup>

*Equitable defenses* are admissible in trover,<sup>17</sup> except where defendant obtained possession of the property tortiously.<sup>18</sup>

## § 84. — Title or Right of Possession of Defendant

It is competent and proper for the defendant in an action of trover to allege in himself as a defense either

94. Cal.—California Grape Control Board v. Boothe Fruit Co., 29 P.2d 857, 220 Cal. 279.

95. Tex.—Sawyer v. Dixon, Civ.App., 143 S.W.2d 987, error dismissed, judgment correct.  
55 C.J. p 67 note 70.

96. Md.—Penniman v. Winner, 54 Md. 127.

Okl.—Capps v. Vesey Bros., 101 P. 1048, 23 Okl. 554.

97. Mo.—Fry v. Baxter, 10 Mo. 302.

98. Ind.—First Nat. Bank v. Ransford, 104 N.E. 604, 55 Ind.App. 663.

99. N.Y.—Thayer v. Manley, 73 N.Y. 305.

1. Minn.—Behrens v. Kruse, 155 N. W. 1055, 132 Minn. 69.

2. N.Y.—Carter v. Eighth Ward Bank, 67 N.Y.S. 300, 33 Misc. 128.

3. Conn.—Platt v. Tuttle, 23 Conn. 233.

Ill.—Gustin Bacon Mfg. Co. v. First Nat. Bank, 224 Ill.App. 457, affirmed 137 N.E. 793, 306 Ill. 179.

Mass.—Union Old Lowell Nat. Bank v. Paine, 61 N.E.2d 666, 318 Mass. 313—Row v. Home Sav. Bank, 29

N.E.2d 552, 306 Mass. 522, 181 A. L.R. 160.

N.Y.—Pease v. Smith, 61 N.Y. 477.

### Conversion constituting larceny

The holder of a check for safekeeping could not avoid liability for conversion of proceeds on ground of negligence where appropriation of check constituted larceny.—Soma v. Handrulis, 14 N.E.2d 46, 277 N.Y. 223, reargument denied 15 N.E.2d 71, 278 N.Y. 481.

4. Ill.—Gustin-Bacon Mfg. Co. v. First Nat. Bank, 137 N.E. 793, 306 Ill. 179.

Mo.—Pittsburg & Midway Coal Co. v. Laning Harris Coal Co., 187 S.W. 263, 193 Mo.App. 664.

5. Mass.—Blum Jr.'s Sons v. Whipple, 80 N.E. 501, 194 Mass. 253, 120 Am.S.R. 553, 13 L.R.A.N.S., 211.

6. N.Y.—Pease v. Smith, 61 N.Y. 477.

7. Mass.—Blum Jr.'s Sons v. Whipple, 80 N.E. 501, 194 Mass. 253, 13 L.R.A.N.S., 211, 120 Am.S.R. 553.

8. Ala.—Powers v. Hatter, 44 So. 359, 152 Ala. 636.  
65 C.J. p 67 note 82.

9. N.Y.—Electric Power Co. v. New York, 55 N.Y.S. 460, 38 App.Div. 383.

10. Wash.—Hill's Garage v. Rice, 234 P. 1023, 134 Wash. 101.  
65 C.J. p 67 note 84.

11. Tex.—Jones v. City Nat. Bank, Civ.App., 166 S.W. 442.

12. U.S.—Bank of Italy Nat. Trust & Savings Ass'n v. Farmers' & Merchants' Nat. Bank of Merced, C.C.A. Cal., 44 F.2d 325.

13. Mich.—Rose v. Lewis, 10 Mich. 483.

14. Tex.—Commercial Credit Corp. v. Patterson, Civ.App., 248 S.W.2d 965.

15. N.Y.—Corpus Juris cited in Plesch v. Banque Nationale De La Republique D'Haiti, 77 N.Y.S.2d 43, 46, 273 App.Div. 224.  
65 C.J. p 67 note 88.

16. Cal.—Story, etc., Commercial Co. v. Story, 34 P. 671, 100 Cal. 30.

17. Ala.—Kelley v. Cassels, 147 So. 597, 226 Ala. 410.  
65 C.J. p 67 note 90.

18. Ala.—Kelley v. Cassels, supra.  
65 C.J. p 68 note 91.

title to the property in controversy, a right of possession, or a rightful possession.

It is competent and proper for defendant in an action of trover to allege in himself as a defense either title to the property in controversy,<sup>19</sup> a right of possession,<sup>20</sup> or a rightful possession<sup>21</sup> in the absence of an intent to convert.<sup>22</sup> Some claims of title, however, have been held insufficient to defeat an action of trover;<sup>23</sup> and title in defendant does not justify a conversion of personal property when it was in the custody of the law<sup>24</sup> or on the premises of another person.<sup>25</sup> Where defendant claims title by adverse possession, he must rely on the strength of his own title, and not on the weakness of plaintiff's title.<sup>26</sup>

**Subsequent acquisition of mortgage.** Defendant cannot escape liability for a conversion by subsequently discharging and taking an assignment to himself of a mortgage on the goods involved in the action;<sup>27</sup> but he may defeat plaintiff, a second mortgagee, by buying in before the commencement of the action a first mortgage on which default had been made.<sup>28</sup>

19. Conn.—Kligerman v. Union & New Haven Trust Co., 18 A.2d 683, 127 Conn. 622.

N.J.—Hirsch v. Philly, 69 A.2d 585, 6 N.J.Super. 447, reversed on other grounds 73 A.2d 173, 4 N.J. 408. 65 C.J. p 70 note 26.

#### Purchase in good faith

Persons coming into possession of stolen United States Liberty Bond in good faith without notice of theft and for a valuable consideration have right to possession as against the owner.—U. S. Fidelity & Guaranty Co. v. Leon, 300 N.Y.S. 331, 165 Misc. 549.

#### Sale to defendant by agent of plaintiff

In action for conversion of timber cut and removed from owner's premises, where jury found that owner's brother sold timber and collected amount charged for stumpage and was general agent of owner, owner was bound by acts of his agent in collecting the agreed market price of timber received by defendants, and defendant is not liable in conversion.—McArthur v. Byrd, 195 S.E. 777, 213 N.C. 321.

#### Title after unwarranted rescission of sale

Where sale of mortgaged automobile was made with consent of the mortgagee and encumbrance was removed before there was any threat of loss to the plaintiff who took automobile in exchange for another, plaintiff's attempted rescission before first payment on note given as result of exchange became due, whether before or after payment of

mortgage note was unwarranted, and he was not entitled to maintain trover, since the most that he could claim was a technical breach of warranty from which he suffered no damage, and would have suffered none if he had fully performed his contract.—Baranowski v. Linetsis, 57 A.2d 155, 95 N.H. 55.

20. Ill.—Middleton v. Commercial Inv. Corp., 22 N.E.2d 723, 301 Ill. App. 242.

65 C.J. p 70 note 27.

21. Tex.—American Cotton Co.-op. Ass'n v. Plainview Compress & Warehouse Co., Civ.App., 114 S.W.2d 689, error dismissed—Zerr v. Howell, Civ.App., 88 S.W.2d 116. 65 C.J. p 70 note 28.

22. Tex.—Allison v. Victoria Bank & Trust Co., Civ.App., 133 S.W.2d 151, petition granted on other grounds Victoria Bank & Trust Co. v. Monteith, 153 S.W.2d 63, 133 Tex. 216, conformed to, Civ.App., 159 S.W.2d 528.

23. Ala.—Hodges v. Westmoreland, 96 So. 573, 209 Ala. 498.

65 C.J. p 70 note 29.

24. Pa.—Wendensaul v. Reynolds, 49 Pa. 73.

25. Mo.—Berns v. P. A. Starck Piano Co., App., 298 S.W. 239. Whether defense in action of trespass see Trespass § 46.

26. Me.—Webber v. Barker Lumber Co., 116 A. 586, 121 Me. 259.

27. Ark.—Gaines v. Briggs, 9 Ark. 46.

28. Ala.—Draper v. Walker, 13 So. 595, 98 Ala. 310.

## § 85. — Title or Right of Possession of Third Person

Except in some jurisdictions, title in a third person is not a defense.

Except in some jurisdictions,<sup>29</sup> title in a third person is not a defense<sup>30</sup> unless defendant is in privity with, or connects himself in some way with the title of, such third person,<sup>31</sup> or the conversion is in the wrongful detention and not in the taking,<sup>32</sup> or plaintiff relies solely on his own title rather than on former possession or a mere right to possession.<sup>33</sup> It is a good defense that a third person has the right of possession<sup>34</sup> or where defendant came into possession lawfully, that he delivered the property to a third person entitled to possession.<sup>35</sup>

## § 86. — Recovery, Restoration, or Offer to Restore Property

After an act of conversion has taken place and become complete, a return, restoration or tender of, or offer to return or restore, the property by the wrongdoer will not bar a cause of action in trover.

After an act of conversion has taken place and

29. Mich.—Heilwig v. Nybeck, 146 N.W. 141, 179 Mich. 232, Ann.Cas. 1915D 356.

65 C.J. p 70 note 35.

30. U.S.—Cook v. Bail, C.C.A.Ind., 144 F.2d 423, certiorari denied 65 S.Ct. 93, 223 U.S. 761, 89 L.Ed. 609, and George and Frances Ball Foundation v. Cook, 65 S.Ct. 93, 223 U.S. 761, 89 L.Ed. 609.

Cal.—Fletcher Aviation Corp. v. Landis Mfg. Co., 214 P.2d 400, 95 Cal. App.2d 905.

Mass.—New England Box Co. v. C & R Const. Co., 49 N.E.2d 121, 313 Mass. 695, 150 A.L.R. 152.

65 C.J. p 70 note 36.

#### Source and soundness of owner's title

A trespasser who had converted property which had been purchased and paid for by alleged owner was not entitled to question the source and soundness of alleged owner's title.—Berman v. Wreck-A-Pair Bldg. Co., 132 So. 54, 236 Ala. 301.

31. Minn.—Brown v. Shaw, 53 N. W. 633, 51 Minn. 266.

65 C.J. p 71 note 37.

32. N.Y.—Kaufman v. Simons Motor Sales Co., 184 N.E. 739, 261 N.Y. 146.

33. Ala.—Pruitt v. Gunn, 44 So. 569, 151 Ala. 65.

65 C.J. p 71 note 38.

34. N.Y.—Chasnoff v. Marlane Holding Co., 244 N.Y.S. 455, 137 Misc. 332.

35. U.S.—McKinnon v. Western Development Co., N.Y., 196 F. 427, 116 C.C.A. 462.

become complete, a return, restoration or tender of, or offer to return or restore, the property by the wrongdoer, although provable in some cases in mitigation of damages, will not bar the cause of action in trover,<sup>36</sup> and, a fortiori, the cause of action is not barred by matters not constituting a good offer, tender, or return.<sup>37</sup> Likewise, plaintiff's recovery,<sup>38</sup> or opportunity to recover,<sup>39</sup> the property, otherwise than by legal proceedings or acceptance of a return, tender, or offer to return, is not a bar or complete defense to the action. Furthermore, where defendant transferred the property, a return of it by the transferee to defendant after the institution of the suit does not bar plaintiff's right of action for the initial conversion.<sup>40</sup> On the other hand, it is a defense that defendant tendered the property to plaintiff before there was any conversion<sup>41</sup> or, where plaintiff is not the owner, that defendant surrendered possession to the true owner.<sup>42</sup>

§ 87. — Other Legal Proceedings

It is a good defense that the property claimed to have been converted was seized under an attachment against the real owner, or where it is sought to show conversion by proof of a demand and refusal, that at the time of the demand, and up to the time of the commencement of the action, the fund in question was under order of court in garnishment proceedings.

It is a good defense that the property claimed to have been converted was seized under an attachment against the real owner,<sup>43</sup> or, where it is sought to show conversion by proof of a demand and refusal, that at the time of the demand, and up to the time of the commencement of the action, the fund in question was under order of court in garnishment proceedings.<sup>44</sup> Also, in trover for unlawful conversion of different items of personal property it is a valid defense pro tanto to plead a former adjudication as to any such item.<sup>45</sup> However, it is not a defense that the property was taken under legal process where such process was invalid<sup>46</sup> or was resorted to by the wrongdoer only

36. Fla.—Garrett v. American Fruit Growers, 186 So. 269, 135 Fla. 398.

Mo.—Corpus Juris cited in King v. Kannan City Life Ins. Co., 164 S. W.2d 458, 467, 350 Mo. 75.  
Mont.—De Celles v. Casey, 139 P. 586, 48 Mont. 568.

N.Y.—Brewster v. Silliman, 38 N.Y. 423—Carpenter v. Manhattan Life Ins. Co., 22 Hun 47—Hammer v. Wiley, 17 Wend. 91.

Or.—McCarthy v. General Electric Co., 49 P.2d 993, 151 Or. 519, 100 A.L.R. 1370.

Tex.—Weaver v. Ashcroft, 50 Tex. 427—Ellis Oil Co. v. Adams, Civ. App., 109 S.W.2d 1026, error dismissed.

65 C.J. p 68 note 10.

Unaccepted return, tender, or offer

(1) In general.

Iowa.—Hamilton v. Chicago, etc., R. Co., 72 N.W. 536, 103 Iowa 325.

Ky.—Louisville, etc., R. Co. v. Lawson, 11 S.W. 511, 88 Ky. 496, 11 Ky.L.Rep. 38.

Me.—Carpenter v. Dresser, 72 Me. 377, 39 Am.R. 337.

Mass.—Gibbs v. Chase, 10 Mass. 125.  
N.C.—Stephens v. Koonce, 9 S.E. 315, 103 N.C. 266.

S.C.—Nielsen v. Warner, 281 N.W. 110, 66 S.D. 214.

65 C.J. p 69 note 10 [a] (1).

(2) Owner was under no obligation to receive back property after conversion, but could hold persons converting property to answer for conversion.

La.—McGuire v. Monroe Scrap Material Co., 180 So. 413, 189 La. 573.  
N.J.—Sheehy v. Commonwealth-Merchants Trust Co., 23 A.2d 902, 127

N.J.Law 574—Wooley v. Carter, 7 N.J.Law 85

Wash.—Contractors' Machinery & Storage Co. v. Stewart, 31 P.2d 546, 177 Wash. 263.  
65 C.J. p 69 note 10 [a] (2).

(3) Where there is an actual appropriation by defendant of plaintiff's property, defendant cannot relieve himself of responsibility by anything short of an actual redelivery of property to owner and its acceptance by him—Sheehy v. Commonwealth-Merchants Trust Co., 23 A.2d 902, 127 N.J.Law 574—Ketchum v. Amsterdam Apartments Co., 110 A. 590, 94 N.J.Law 7.

Return of purchase price after failure to deliver

Where defendant automobile manufacturer had ratified acts of distributor and distributor's agent in sale of automobile, but had wrongfully refused delivery of automobile in an attempt to collect money allegedly due distributor's agent from buyer, although money allegedly due distributor's agent had nothing to do with sale of automobile, the subsequent return of purchase price to distributor did not relieve defendant from liability to purchaser in conversion for wrongful refusal of delivery of automobile—Lomba v. General Motors Corp., 6 N.W.2d 890, 303 Mich. 556.

37. Mich.—Ryan v. Chown, 125 N.W. 46, 160 Mich. 204, 136 Am.S.R. 433.  
65 C.J. p 69 note 11.

38. Ky.—Urban v. Lansing's Adm'r 39 S.W.2d 219, 239 Ky. 218.  
Mont.—De Celles v. Casey, 139 P. 586, 48 Mont. 568.

39. Ark.—Sloan v. Butler, 228 S.W. 1046, 148 Ark. 117.

Offer to permit search

In action by owner of chattels against junk dealer for conversion, where owner found parts of chattels in dealer's junk yard wherein junk was piled fifteen to twenty feet high, and dealer offered to deliver the parts to owner and to deliver any other parts which might be found in the junk pile, owner did not have to accept the return of the parts which were found, and was not under duty to search the yard for other parts.—McGuire v. Monroe Scrap Material Co., 180 So. 413, 189 La. 573.

40. Tex.—Mutual Loan & Investment Co. v. Matthews, Civ.App., 176 S.W. 924.

41. Md.—Mattingly v. Mattingly, 133 A. 625, 150 Md. 671.  
Tex.—Copeland v. Porter, Civ.App., 169 S.W. 915.

42. Mo.—Ernest Wolff Mfg. Co. v. Battreal Shoe Co., 180 S.W. 396, 192 Mo App. 113.  
N.C.—Thompson v. Andrews, 53 N.C. 125.

43. S.D.—Jolley v. Dunlop, 147 N.W. 980, 34 S.D. 213.

44. Ill.—Iles v. Heidenreich, 202 Ill. App. 1.

45. Ind.—Dawson v. Sparks, 77 Ind. 88—Switzer v. Miller, 58 Ind. 561.  
Judgment in prior action involving same property generally see Judgments §§ 746-750.

46. Mo.—Walker v. Huddleston, App., 261 S.W.2d 502.  
65 C.J. p 69 note 20.

after the property had been wrongfully taken,<sup>47</sup> or was not against the owner of the property,<sup>48</sup> or was against the wrongdoer after the conversion alleged,<sup>49</sup> unless it is further shown that the owner or person entitled to the possession has received it or the proceeds of any disposition which may have been made of it.<sup>50</sup> Furthermore, it is not a defense that a sale by defendant was ineffective to pass title by reason of its being made during the pendency of a suit in replevin for the property.<sup>51</sup> An involuntary return of the property as a result of replevying by plaintiff's husband in a replevin suit against him is not a defense.<sup>52</sup>

### § 88. — Waiver and Estoppel

The right to sue in trover may be defeated by any act or conduct which amounts to an estoppel, and one otherwise entitled to bring an action of trover may afford the wrongdoer a complete defense to the action by waiving the right to treat the act as wrongful.

The right to sue in trover may be defeated by any act or conduct which amounts to an estoppel,<sup>53</sup> and one otherwise entitled to bring an action of trover

may afford the wrongdoer a complete defense to the action by waiving the right to treat the act as wrongful.<sup>54</sup> The right may be waived by acts indicating a continued claim of ownership;<sup>55</sup> ratification of the tortious act,<sup>56</sup> provided plaintiff had knowledge of the material facts;<sup>57</sup> the receipt of the proceeds of defendant's wrongful act;<sup>58</sup> or by bringing an action for damages or assumpsit for the proceeds of the wrongful disposition of the property.<sup>59</sup> On the other hand, the facts in particular cases may not be sufficient to constitute an estoppel,<sup>60</sup> or waiver.<sup>61</sup> A demand is not a waiver;<sup>62</sup> the release of a maker of a note which has been converted will not discharge the person guilty of the conversion;<sup>63</sup> the acceptance of usurious interest unrelated to the conversion is not a waiver;<sup>64</sup> and a waiver of a conversion of part of the property is not a waiver of a conversion of the remainder.<sup>65</sup>

According to some authorities, taking back the property as if no tort had been committed is a waiver.<sup>66</sup> However, other authorities hold that it is not,<sup>67</sup> or is not necessarily,<sup>68</sup> a waiver. Accepting

47. Or—Kaller v. Spady, 24 P.2d 351, 144 Or. 206.

48. N.Y.—MacDonnell v. Buffalo Loan, etc., Co., 85 N.E. 801, 193 N.Y. 92.

Mass.—Young v. Riggs, 185 N.E. 15, 282 Mass. 570.

49. Mich.—Erie Preserving Co. v. Witherspoon, 13 N.W. 781, 49 Mich. 377.

65 C.J. p. 69 note 22.

50. Neb.—Coburn v. Watson, 67 N.W. 171, 48 Neb. 257—Watson v. Coburn, 53 N.W. 477, 35 Neb. 492.

51. Mo.—Caldwell v. Ryan, App. 79 S.W. 743.

52. Minn.—Klein v. Frerichs, 149 N.W. 2, 127 Minn. 177.

53. Colo.—Dando Co. v. Mangini, 109 P.2d 1055, 107 Colo. 170.

La.—General Motors Acceptance Corp. v. Hahn, App. 190 So. 869—Smith v. Dover, App. 185 So. 74.

65 C.J. p. 68 note 92.

54. U.S.—In re Grigsby-Grunow, Inc., C.C.A. Ill., 80 F.2d 478.

Mich.—Eadus v. Hunter, 256 N.W. 323, 268 Mich. 233.

55. Tenn.—Johnston v. Cincinnati, N. O. & T. P. Ry. Co., 240 S.W. 429, 146 Tenn. 135.

65 C.J. p. 68 note 93.

56. Or.—Conzelmann v. Northwest Poultry & Dairy Products Co., 225 P.2d 757, 190 Or. 332.

65 C.J. p. 68 note 94.

**Purchase of the converted property by plaintiff**

Fact that owner, while action against defendants enjoining them

from digging slag on owner's land and for conversion of slag was pending, purchased slag from defendants constituted waiver of conversion only as to slag actually purchased by owner entitling defendants to credit for such slag but did not constitute waiver of conversion as to slag not purchased and converted by defendants where defendants were not misled by owner's action—St. Louis Smelting & Refining Co. v. Hoban, 209 S.W.2d 119, 357 Mo. 436.

57. U.S.—Holland Furnace Co. v. Allen, C.C.A. Mich., 118 F.2d 969.

58. Ga.—Bullard v. Madison Bank, 33 SE 681, 107 Ga. 772.

Wis.—Hulst v. Flanders, 45 Wis. 185.

65 C.J. p. 68 note 95.

59. N.Y.—Bowker v. Fertilizer Co. v. Cox, 13 N.E. 95, 106 N.Y. 555.

65 C.J. p. 68 note 96.

**Right to waive conversion and sue in contract.**

See Actions § 50.

**Money Received § 10.**

**Action for damages was alternate relief**

Any cause of action for conversion of property is waived by bringing action for recovery of possession thereof with demand for recovery of its value only as alternative relief if possession cannot be had.—Dubon v. Haslan, 186 N.Y.S. 481, 195 App. Div. 117.

60. N.H.—E. J. Caron Enterprises v. State Operating Co., 179 A. 665, 87 N.H. 371.

N.Y.—Soma v. Handrills, 14 N.E.2d

46, 277 N.Y. 223, reargument denied 15 N.E.2d 71, 278 N.Y. 481.

Or—Kaller v. Spady, 24 P.2d 351, 144 Or. 206

Rt.—Moss v. Rocky Point Park, Inc., 103 A.2d 72

65 C.J. p. 68 note 97

61. N.Y.—Cutler-Hammer, Inc. v. Troy, 126 N.Y.S.2d 452, 283 App. Div. 123.

62. Ala.—Dixie v. Harrison, 50 So. 284, 163 Ala. 201.

65 C.J. p. 68 note 98.

63. Iowa—Allison v. King, 25 Iowa 66.

64. Ill.—Knight v. Seney, 124 N.E. 813, 290 Ill. 11.

65. Mich.—Bryant v. Kenyon, 81 N.W. 1093, 123 Mich. 151.

66. Wis.—Collins v. Lowery, 47 N.W. 612, 78 Wis. 329.

65 C.J. p. 68 note 3.

**Existence of valid lien immaterial**

Whether defendant had a valid chattel mortgage or vendor's lien on plaintiff's automobile, of which he had taken possession and which he thereafter temporarily returned to plaintiff who accepted it, was immaterial in determining whether plaintiff was entitled to recover for alleged tortious conversion of automobile by defendant since in accepting return of the car plaintiff waived his right to sue in trover.—Smith v. Dover, La.App., 185 So. 74.

67. Me.—Merrill v. How, 24 Me. 126.

68. Tenn.—Traynor v. Johnson, 1 Head 51

65 C.J. p. 68 note 5.

the hire agreed on for the use of the thing converted may constitute a waiver,<sup>69</sup> but it is not conclusive.<sup>70</sup>

*Estoppel to set up defense.* Defendant in trover will not be permitted to set up a defense inconsistent with his silence, language, or conduct where-

by he induced plaintiff to act to his prejudice.<sup>71</sup> It has been held that one who on demand admitted being in possession of goods and refused to give them up is estopped when sued in trover to allege that he did not have them at such time;<sup>72</sup> but the contrary has also been held.<sup>73</sup>

## B. JURISDICTION, VENUE, PARTIES, AND PRELIMINARY PROCEEDINGS

### § 89. Jurisdiction

Since an action of trover is transitory, it may be brought in one state for a conversion of personal property in another state.

Since an action of trover is transitory, it may be brought in one state, for a conversion of personal property in another state;<sup>74</sup> and an action of trover may be maintained in one country for the conversion of personal property in another country.<sup>75</sup> Where land in one state is held adversely by defendant under claim and color of title, the courts of a second state have been held not to have jurisdiction of an action for the conversion of personalty severed from the land.<sup>76</sup> Jurisdiction, it has been said, will not be refused on the ground of public policy.<sup>77</sup>

Since the action of trover is a creature of the common law and involves the right to trial by jury, it comes under the jurisdiction of the courts of law.<sup>78</sup> Although property of which conversion is alleged is in the custody of a chancery court, an action for its conversion may be brought in a law court, since it does not affect the possession of the property, or interfere with its custody.<sup>79</sup>

### § 90. Venue

An action of trover is transitory in nature and, unless otherwise provided by statute, such action may be brought in any county where jurisdiction over the parties can be obtained.

An action of trover is transitory in its nature, and, unless it is otherwise provided by statute, an action of trover may be brought in any county where jurisdiction over the parties can be obtained, although the conversion was not committed in that county.<sup>80</sup> In some jurisdictions, however, the venue of actions of trover is fixed by statute.<sup>81</sup> A conversion of property by two gives the owner a joint cause of action against them, and if they live in different counties, he may sue both in the county in which either resides.<sup>82</sup>

*Change of venue.* Defendant may be entitled to a change of venue to the county where the cause of action arose where he shows by affidavit that there are witnesses material to his defense residing in that county.<sup>83</sup> A defendant, in an action for damages for property severed from the realty, cannot have a change of venue to a county in which the realty is situated on the ground that the action was for injury to the realty.<sup>84</sup>

69. Ala.—Fall v. McArthur, 31 Ala. 26.

65 C.J. p 68 note 6.

70. Vt.—Moore v. Hill, 19 A. 997, 62 Vt. 424.

65 C.J. p 48 note 7.

71. Pa.—Tradesmen's Nat. Bank v. Indiana Bicycle Co., 31 A. 327, 166 Pa. 554.

65 C.J. p 71 note 41.

72. Mich.—Cadwell v. Pray, 49 N.W. 150, 86 Mich. 266.

N.Y.—McNeil v. Hall, 94 N.Y.S. 920, 107 App Div. 36, modified on other grounds 95 N.Y.S. 1144, 108 App. Div. 357, affirmed 80 N.E. 1113, 187 N.Y. 549.

73. Kan.—Topeka Bank v. Miller, 54 P. 1070, 59 Kan. 743.  
Mass.—Jackson v. Fixel, 9 Cush. 490, 57 Am.D. 64.

74. N.J.—Kryn v. Kahn, 54 A. 870, 65 C.J. p 71 note 46.

75. Me.—Whidden v. Seelye, 40 Me. 247, 63 Am D 661—Robinson v. Armstrong, 34 Me. 145.

76. U.S.—Henderson v. Shell Oil Co., C.A.Mo., 173 F.2d 840.

77. N.J.—Kryn v. Kahn, 54 A. 870

78. W.Va.—Johnson v. National Exchange Bank of Wheeling, 19 S.E. 2d 441, 124 W.Va. 157.

#### Limitations of county court

Under constitutional provision creating and prescribing powers of county court, such court has no jurisdiction to adjudicate substantive right based upon a conversion grounded in a duty imposed by law rather than by mutual assent, the enforcement of which may be had through legal processes distinctively developed in common law practice—Johnson v.

National Exchange Bank of Wheeling, supra.

79. Ark.—Garabaldi v. Wright, 12 S.W. 875, 52 Ark. 416.

80. Ark.—Short v. Kennedy, 35 S.W. 2d 591, 183 Ark. 310.  
65 C.J. p 71 note 64.

81. Colo.—Updegraff v. Lessem, 62 P. 342, 15 Colo App. 297.  
65 C.J. p 71 note 55.

#### County where conversion occurred

Pa.—First Nat. Bank of Altoona v. Automobile Finance Co., Com.Pl., 57 York Leg Rec. 197, affirmed 36 A. 2d 499, 348 Pa. 624.

82. Ala.—Williamson v. Howell, 17 Ala. 830.

83. N.Y.—Dunham v. Parmenter, 26 N.Y.S. 955, 74 Hun 559.  
65 C.J. p 72 note 57.

84. N.C.—Makely v. A. Boothe Co., 39 S.E. 582, 129 N.C. 11.

## § 91. Time to Sue and Limitations

The owner of personalty suing on a cause of action for conversion must bring his action within the period of limitations after the cause arose. Where the taking was tortious, the statute runs from the time of such taking, and, where there was an unlawful disposition after lawful acquisition, the statute commences to run from the date of the unlawful disposition.

An action for conversion of property is sometimes expressly made subject to limitation,<sup>85</sup> and the period necessary to create a bar to an action for conversion is prescribed by statute.<sup>86</sup> The owner of personalty suing on a cause of action for conversion must bring his action within the period of limitations after the cause arose.<sup>87</sup> The right of action for conversion arises when the act of conversion is complete,<sup>88</sup> and not until then.<sup>89</sup> This right of action accrues in favor of the owner of

goods as soon as they are wrongfully taken from his possession or otherwise wrongfully converted.<sup>90</sup> Where the action has not been filed until the period of limitations manifestly has run, the action is barred in the absence of circumstances sufficient to indicate a tolling of the statute,<sup>91</sup> although, where the statute must be specifically pleaded to be availed of, the statute is waived in the absence of such plea.<sup>92</sup> When the conversion is once complete, a subsequent wrongful transfer does not alter the running of the statute from the original conversion.<sup>93</sup> Where the initial possession is lawful, as in subordination to the title of the owner, the statute does not commence to run while the relation of the parties continues unchanged and unrepudiated.<sup>94</sup> Accordingly, where a pledgee, sued for con-

95. Tex.—Clevenger v. Galloway, Civ.App., 104 S.W. 914.  
87 C.J. p 778 note 23.

86. R.I.—Williams v. Smith, 68 A. 306, 28 R.I. 531.  
65 C.J. p 72 note 68.

#### Actions within limitations for conversion

Resale of automobile without knowledge of seller by buyer having right to possession thereof under conditional sales contract constituted "conversion" and not "theft" of automobile so that action by seller's assignee against purchaser from conditional buyer for value of automobile was subject to five-year statute of limitations applicable to conversion and not subject to one-year statute.—Elmer v. Commercial Credit Corp., 209 S.W.2d 846, 307 Ky 77.

#### Actions not within limitations for conversion

(1) An action for infringement of a copyright is not an "action for the conversion of personal property" within the six year limitation statute.—Local Trademarks v. Price, C. A. Ala., 170 F.2d 715.

(2) Where owner placed diamond rings with agent for purpose of sale, agent, on about June 1, 1933, intrusted rings with another having in view a sale, the other proved to be a thief, rings were located in store of pawnbroker who refused to return rings without payment of loan secured thereby, agent promised to pay loan but did not return to store until August, 1934, and pawnbroker made auction sale of rings on March 12, 1935, owner's action of conversion instituted in October, 1935, was not barred by two-year statute of limitations.—James v. Klar & Winterman, Tex.Civ.App., 118 S.W.2d 625.

87. Ill.—O'Connell v. Chicago Park Dist., 34 N.E.2d 836, 376 Ill. 550.  
Tex.—Marathon Oil Co. v. Gulf Oil Corporation, Civ.App., 130 S.W.2d

365, modified on other grounds Gulf Oil Corporation v. Marathon Oil Co., 152 S.W.2d 711, 137 Tex 59.—James v. Klar & Winterman, Civ. App., 118 S.W.2d 625.

#### Attaching creditor against converter

Cause of action for damages does not accrue to attaching creditor against one converting part of attached property until sale of remainder has shown that creditor has not full satisfaction of judgment.—Humble Oil & Refining Co v. Andrews, Tex.Civ.App., 285 S.W. 894.

#### Period determined from time of actual knowledge

Under statutes forbidding mortgages to sell mortgaged property without consent of mortgagees or to dispose of mortgaged property with intent to defraud where chattel mortgagees first ascertained that mortgaged property had been sold by mortgagors when mortgagors failed to pay five of installment notes secured by mortgage, action for conversion brought within two years from date mortgagees acquired actual knowledge of conversion but more than two years after conversion was not barred by limitations since mortgagees were not required to exercise diligence to discover conversion but had a right to assume that property would not be disposed of in violation of law without their consent.—Melear v. E. A. Fretz Co., Tex.Civ.App., 155 S.W.2d 983, error dismissed.

88. Idaho.—Corpus Juris cited in Davidson v. Davidson, 188 P.2d 323, 332, 68 Idaho 58.

Ill.—O'Connell v. Chicago Park Dist., 34 N.E.2d 836, 376 Ill. 550, 135 A.L.R. 698.

N.Y.—Kelsey v. Griswold, 6 Barb. 436.—Roberts v. Berdell, 15 Abb. Pr.N.S., 177.  
65 C.J. p 72 note 59.

#### Absence of assertion of ownership

Action for conversion of corpora-

tion's stock by officer's pledging thereof to secure private indebtedness held not barred by two-year limitation where pledgee asserted no unconditional ownership to stock until within two years of suit by corporation's bankruptcy trustee.—Kirby v. Pitzgerald, Civ.App., 57 S.W.2d 362, affirmed 89 S.W.2d 408, 126 Tex. 411.

89. Colo.—People v. Kendall, 59 P. 409, 14 Colo App. 175.

Ill.—Addante v. Pompilio, 25 N.E.2d 123, 303 Ill App 172.

90. Idaho.—Davidson v. Davidson, 188 P.2d 323, 68 Idaho 58.

Ill.—O'Connell v. Chicago Park Dist., 34 N.E.2d 836, 376 Ill. 550, 135 A.L.R. 698.

Tex.—Industrial State Bank v. Oldham, 221 S.W.2d 912, 148 Tex. 126.—Ellis v. Heidrick, Civ.App., 154 S.W.2d 293, error refused.

91. Tex.—Taylor v. Batta, Civ App., 145 S.W.2d 1116.

92. Ill.—Addante v. Pompilio, 25 N.E.2d 123, 303 Ill App 172.

93. Ill.—O'Connell v. Chicago Park Dist., 34 N.E.2d 836, 376 Ill. 550, 135 A.L.R. 698.

94. Tex.—Federal Elec. Co. v. Johnson, Civ.App., 187 S.W.2d 410, error dismissed.

#### Acts held insufficient to be conversion or adverse possession

(1) Mortgagee's failure to reply to mortgagor's request for statement of balance due on mortgage debt, so that mortgagor might pay it, did not constitute assertion of mortgagee's ownership of mortgaged automobile and amount to conversion thereof so as to start running of two-year statute of limitations against mortgagor's action for conversion, but mortgagee's subsequent wrongful sale of automobile was only overt act amounting to conversion.—Ellis v. Heidrick, Tex.Civ.App., 154 S.W.2d 293, error refused.

version of personalty, seeks to avail himself of the defense of limitations he must repudiate the relationship of pledgor and pledgee;<sup>95</sup> so also must a bailee<sup>96</sup> or a mortgagee<sup>97</sup> repudiate their contractual relationships.

If the holding or possession sounds in tort from the beginning, a demand and refusal are unnecessary for the purpose of determining when the statute of limitations begins to run.<sup>98</sup> Where the statute has already begun to run, no subsequent demand and refusal can start it afresh.<sup>99</sup> In the case of an illegal pledge of securities by a bank it has been held that, in the absence of a demand, the statute runs from the time of a subsequent sale,<sup>1</sup> while other authority holds that the statute runs from the time of the original illegal pledge.<sup>2</sup>

The rule of tacking two or more continuous and uninterrupted periods of adverse possession is ap-

plicable to chattels,<sup>3</sup> and where the combined time thus covered exceeds the limitation period the owner's action for conversion is barred.<sup>4</sup>

## § 92. Parties Plaintiff

One who has title and right to possession is a proper party plaintiff, and joint owners of a chattel may join in an action for conversion.

A party with the requisite ownership or right to possession is a proper party to institute the action.<sup>5</sup> Where there are several joint owners of a chattel it has been held that all of the owners should be joined as plaintiffs in trover.<sup>6</sup> Other cases have held, however, that trover may be brought by one joint owner,<sup>7</sup> if he has been duly authorized by his co-owners to sue.<sup>8</sup> On the other hand, persons having no interest in the property converted are neither necessary<sup>9</sup> nor proper<sup>10</sup> parties plaintiff. One who has the title and right of possession need not join

(2) In suit to recover value of seven-eighths of oil produced by defendants from land in which plaintiffs claimed a leasehold working interest, where royalty owners intervened and defendants did not claim adversely with respect to portions of production claimed by them, the defense of limitations was not available to defendants as against royalty owners—*Marathon Oil Co v Gulf Oil Corporation*, Civ App., 130 S.W.2d 365, modified on other grounds *Gulf Oil Corporation v Marathon Oil Co*, 152 S.W.2d 711, 137 Tex. 69.

95. Tex.—*James v. Klar & Winterman*, Civ.App., 118 S.W.2d 625.

### Repudiation and appropriation

To make defense of limitation available to pledgee sued for conversion of stock, repudiation of pledge and appropriation of stock, must be shown and must have continued for entire statutory period—*Kirby v. Fitzgerald*, Civ.App., 67 S.W.2d 362, affirmed 89 S.W.2d 408, 126 Tex. 411.

### Auction sale as repudiation

Where stolen diamond rings had been pledged as security for loan, and owner's agent acquiesced in pledgee's possession of rings until paid agreed amount of original advancement, thereby creating relation of pledgor and pledgee, pledgee's auction sale of rings constituted repudiation of such relationship and at time of sale owner's cause of action for conversion accrued and the statute of limitations began to run—*James v. Klar & Winterman*, Tex.Civ.App., 118 S.W.2d 625.

96. Mont.—*Gates v. Powell*, 252 P. 377, 77 Mont. 554.

97. Tex.—*Ellis v. Heidrick*, Civ.App., 154 S.W.2d 293, error refused.

98. Ill.—*O'Connell v. Chicago Park Dist.*, 34 N.E.2d 836, 376 Ill. 550, 135 A.L.R. 698—*Albers v. Continental Illinois Bank & Trust Co.*, 17 N.E.2d 67, 296 Ill.App. 596.

Necessity of demand and refusal generally see supra §§ 54-59.

99. Ill.—*O'Connell v. Chicago Park Dist.*, 34 N.E.2d 836, 376 Ill. 550, 135 A.L.R. 698.

1. U.S.—*City of Fort Worth v. McCamey*, C.C.A.Tex., 93 F.2d 964, certiorari denied 58 S.Ct. 1041, 304 U.S. 571, 82 L.Ed. 1535.

### Action held not barred

A suit against a city for the conversion of securities of a national bank illegally pledged to the city to secure its deposits in the bank is not barred by limitations when brought within one year after a conversion of the securities by sale, as the city could not have been sued unless it refused to return the securities on demand or did something with them beyond keeping them safe.—*City of Fort Worth v. McCamey*, supra.

2. Ill.—*O'Connell v. Chicago Park Dist.*, 34 N.E.2d 836, 376 Ill. 550.

### Actions held barred

(1) Where bank pledged securities and the possession of the pledgee was wrongful and adverse to the rights of the pledgor bank from the beginning, the alleged conversion by subsequent sale of the securities related back to the time the pledge was made and therefore action for conversion, instituted more than five years after the pledge but less than five years after the sale, was barred as to both pledgee and pledgee's agent making sale and the "liability for successive conversion doctrine" was not applicable—*O'Connell v. Chicago Park Dist.*, 34 N.E.2d 836, 376 Ill. 550, 135 A.L.R. 698.

(2) The right of a state bank's receiver to recover damages for conversion on ground of ultra vires pledge of bank's assets to secure deposit of public funds was barred by limitations when suit was brought more than five years after deposit was made, as against contention that no action accrued until after receiver was appointed and demanded return of securities—*Albers v. Continental Illinois Bank & Trust Co.*, 17 N.E.2d 66, 296 Ill.App. 592—*Albers v. Continental Illinois Bank & Trust Co.*, 17 N.E.2d 67, 296 Ill.App. 596.

3. Kan.—*Taylor v. Missouri Central Type Foundry Co.*, 53 P.2d 815, 143 Kan. 175.

Adverse possession of chattels see Adverse Possession §§ 236-246.

Doctrine of Tacking see Adverse Possession §§ 128-139.

4. Kan.—*Taylor v. Missouri Central Type Foundry Co.*, 53 P.2d 815, 143 Kan. 175.

5. U.S.—*Armstrong v. New La Paz Gold Mining Co.*, C.C.A.Cal., 107 F.2d 453. Persons entitled to sue see supra § 71.

6. Mo.—*Little v. Harrington*, 71 Mo. 290—*Johnson v. St. Joseph Stock Yards Bank*, 76 S.W. 699, 102 Mo. App. 395, 65 C.J. p.73 note 84.

7. Pa.—*Tayne v. Davis*, 2 Phila. 364.

8. Wis.—*Arpin v. Burch*, 32 N.W. 681, 68 Wis. 619.

Trover by joint tenants see Joint Tenancy § 18.

9. Colo.—*Updegraff v. Lessem*, 62 P. 312, 15 Colo. 297.

10. Colo.—*Updegraff v. Lessem*, supra. Ohio—*Schaeffer v. Marienthal*, 17 Ohio St. 183.

with himself as plaintiff another who has a beneficial interest in the property.<sup>11</sup> A wife in whose custody her husband has left property during his temporary absence cannot sue in her own name for the conversion thereof, since her possession is that of her husband.<sup>12</sup>

Under a statute authorizing the joinder as plaintiffs parties interested in the subject of the action and in obtaining the relief demanded, where one plaintiff was the owner of the property at the time of the conversion and his coplaintiff was entitled to possession by virtue of an agreement between them, and each was entitled to an equal share of the profits from a sale thereof, they are properly joined as plaintiffs.<sup>13</sup> Plaintiffs who deposit fungibles in a common storage wherein the fungibles are commingled with a common mass have a unity of interest sufficient to entitle them to sue jointly for an alleged conversion of such property.<sup>14</sup> Where an action of trover was brought by a sheriff for goods levied on by him, it has been held that he need not sue as sheriff since the rule requiring a plaintiff to sue in the name of his office or in his special character applies only to those cases in which the action is peculiar to his office.<sup>15</sup>

### § 93. Parties Defendant

If the wrongful acts of each person guilty of conversion were separate and distinct, they cannot be sued jointly; but where the conversion is the joint act of several, all may be joined as defendants, although it is not necessary to join them.

If the wrongful act of each person guilty of conversion was separate and distinct, they cannot be sued jointly.<sup>16</sup> Where the conversion is the joint act of several, all may be joined as defendants,<sup>17</sup> and there is no misjoinder if the defendants are

joint tort-feasors.<sup>18</sup> However, it is not necessary to join them since the action may be brought against one alone,<sup>19</sup> although the joint tort-feasors are partners,<sup>20</sup> as all persons engaged in a conversion are liable as principals.<sup>21</sup>

In an action against the president of a company for a conversion to his own use of funds collected by him, the company having no interest in the funds so converted is not a necessary party.<sup>22</sup> A lessor of premises on which the property converted had been placed who did not participate in the wrong, and who in consequence incurred no liability, is not a necessary party,<sup>23</sup> and, likewise, one not the owner of the premises on which the converted property was stored and not otherwise interested in the controversy should be dismissed as a defendant to the action.<sup>24</sup> In an action by the seller of goods against one to whom the purchaser had executed a trust deed of the goods for the benefit of creditors, the beneficiaries are not necessary parties as they are sufficiently represented by the trustee,<sup>25</sup> nor is the purchaser a necessary party if he is insolvent, since the redress sought as to him would be fruitless.<sup>26</sup>

The impleading of new parties defendant is improper in the absence of a showing that they might be liable to the original defendant in the event of a recovery by plaintiff.<sup>27</sup> A bank as custodian of a fund allegedly converted has been held to be a proper party defendant even though it had not been liable as a party to the conversion of the funds.<sup>28</sup> In trover, defendant cannot, by amendment to his answer equitable in its nature, have reformation of a written instrument on which he relies to define the character of his possession, without making the person, executing such instrument, a party.<sup>29</sup>

11. N.Y.—Wyckoff v. Anthony, 90 N. Y. 442.

12. Mich.—Janaschek v. Eddy, 65 N.W. 752, 108 Mich. 752.

13. Mont.—Frost v. J. B. Long & Co., 213 P. 1107, 66 Mont. 385.

14. Ind.—Sawers Grain Co. v. Goodwin, 146 N.E. 837, 83 Ind.App. 556.

15. N.J.—Brewster v. Vail, 20 N.J. Law 56, 38 Am.D. 547.

16. Ala.—Ensley Lumber Co. v. Lewis, 25 So. 729, 125 Ala. 94. 65 C.J. p. 73 note 89.

17. U.S.—State ex rel Williams v. Neustadt, C.C.A. Okl., 149 F.2d 143. 65 C.J. p. 73 note 90.

18. Thief and purchaser without knowledge.

Where thief sold and delivered stolen property to buyer and the buyer received and undertook to assume dominion over the stolen property,

both became "joint tort-feasors" and both became liable jointly in an action of trover and conversion to the owner without regard to whether the buyer had prior knowledge of the fact that the thief had stolen the property.—Geneva Gin & Storage Co. v. Rawls, 199 So. 734, 240 Ala. 320.

19. S.C.—Daniel v. Post, 187 S.E. 915, 181 S.C. 468.

20. Ala.—Geneva Gin & Storage Co. v. Rawls, 199 So. 732, 29 Ala.App. 606, reversed on other grounds 199 So. 734, 240 Ala. 320.

21. 65 C.J. p. 73 note 91.

22. N.H.—Pattée v. Gilmore, 18 N. H. 460, 45 Am.D. 385.

23. N.Y.—Wood v. Proudman, 107 N.Y.S. 757, 122 App.Div. 826.

24. Ala.—Geneva Gin & Storage Co. v. Rawls, 199 So. 732, 29 Ala.App. 606, reversed on other grounds 199 So. 734, 240 Ala. 320.

25. Ind.—Pugh v. Miller, 25 N.E. 1010, 126 Ind. 189.

26. Colo.—Updegraff v. Lessem, 62 P. 342, 15 Colo. App. 297.

27. La.—National Pumps Corp. v. Bruning, App., 1 So.2d 320, amended 4 So.2d 244.

28. Tex.—Harrison v. Hawley, 26 S. W. 765, 7 Tex. Civ. App. 398.

29. Tex.—Harrison v. Hawley, supra.

30. N.Y.—Allerpo for Childron v. Weishrod, 18 N.Y.S. 2d 370.

31. N.Y.—Land Mark Corporation v. Manufacturers' Trust Co., 262 N.Y. S. 709, 238 App.Div. 844, motion denied 263 N.Y.S. 352, 238 App.Div. 859.

32. Ga.—Holland v. Lawrence, 94 S. E. 561, 147 Ga. 479.



§ 94. Bonds and Other Security

The mere fact that the defendant has a verdict does not constitute a breach of conditions of plaintiff's bond given to answer for all damages to the defendant by any illegal conduct of the plaintiff in commencing and conducting the action.

In an action on a bond given by plaintiff in trover in pursuance of a statute providing for such bond "to be answerable for all damages which the defendants may sustain by any illegal conduct in commencing and conducting the said action of trover," the mere fact that defendant in trover had a verdict does not constitute a breach of the condition of the bond.<sup>30</sup> Where statutes so provide, defendant in trover may be required to give bond for the production of the property.<sup>31</sup> When defendant has given a bond and security for the production of personality, such personality may be delivered up to the sheriff, and the bond canceled in order to discharge the surety.<sup>32</sup>

C. PLEADING

§ 95. Declaration, Petition, or Complaint

- a. In general
- b. Cure or waiver of defects

a. In General

A declaration, petition, or complaint which alleges that the plaintiff is the owner and entitled to the possession of property therein described and that the defendant converted it to his own use, and which states the value of the property, or alleges that the plaintiff has been damaged in a named sum, sufficiently states a cause of action for conversion.

A declaration, petition, or complaint which alleges

that plaintiff is the owner and entitled to the possession of property therein described and that defendant converted it to his own use, and which states the value of the property, or alleges that plaintiff has been damaged in a sum named, sufficiently states a cause of action for conversion,<sup>33</sup> unless other averments are required by statute.<sup>34</sup> Although the code abolishes the distinction between different forms of action, a complaint for the conversion of property must still contain all the material allegations which were necessary at common law,<sup>35</sup> but it has been held that, in an action for the

30. S.C.—Dehay v. Ferguson and Dangerfield, 27 S.C.L. 228—Brown v. Spann, 21 S.C.L. 324.

"Illegal conduct" means something which the law prohibits, and a plaintiff's conduct is not illegal because he failed to establish his right of action.—Brown v. Spann, supra.

31. S.C.—Vose v. Hannahan, 40 S.C.L. 225—Smith v. Cook, 27 S.C.L. 58—Nesbit v. McDaniel, 25 S.C.L. 12.

32. S.C.—Brown v. Spann, 21 S.C.L. 324.

33. ARIZ.—Corpus Juris cited in MacNeil v. Vance, 60 P.2d 1078, 1080, 48 Ariz. 187.

Mont.—Corpus Juris cited in Radosevich v. Egle, 111 P.2d 299, 304, 111 Mont. 504.

Ohio.—Armstrong v. Feldhaus, 93 N.E.2d 776, 87 Ohio App. 75.

Okl.—May v. City Nat. Bank & Trust Co., 258 P.2d 945.

Or.—Corpus Juris cited in Williams v. International Harvester Co., 141 P.2d 837, 172 Or. 270.

Pa.—Shuppas v. West, Com.Pl., 31 Del.Co. 560.

S.C.—International Agr. Corp. v. Lockhart Power Co., 188 S.E. 243, 181 S.C. 501.

65 C.J. p. 74 note 99

Complaint held sufficient  
Ark.—Bailey v. Riggs, 74 S.W.2d 396, 189 Ark. 456.

Cal.—Dalkell v. Kelly, 230 P.2d 830, 104 Cal.App.2d 66.

Idaho.—Williams v. Bone, 259 P.2d 810, 74 Idaho 185.

Ill.—Addante v. Pompilio, 25 N.E.2d 123, 303 Ill.App. 172.

Ind.—Page v. Johnson, 184 N.E. 419, 97 Ind.App. 40.

Miss.—Lancaster v. Jordan Auto Co., 187 So. 535, 185 Miss. 530.

Mo.—Detmar v. Miller, 220 S.W.2d 739.

N.J.—Newark Hardware & Plumbing Supply Co. v. Stove Mfrs. Corp., 66 A.2d 605, 136 N.J.Law 401, affirmed 61 A.2d 240, 137 N.J.Law 612.

—Arnold v. Hamilton Inv. Co., 38 A.2d 118, 132 N.J.Law 10, affirmed 40 A.2d 649, 132 N.J.Law 419.

Okl.—Murray v. Teape, 211 P.2d 1012, 202 Okl. 234—First Nat. Bank v. Bradley, 98 P.2d 897, 186 Okl. 498.

—Lugh-Bishop Chevrolet Co. v. Duncan, 55 P.2d 1003, 176 Okl. 310.

Or.—Derby v. Newton, 20 P.2d 439, 142 Or. 427.

Tex.—Platte v. Kossman Buick Co., Civ.App., 265 S.W.2d 643—Oil Country Pipe & Supply Co. v. Carter, Civ.App., 143 S.W.2d 831, error dismissed, judgment correct—Reymershofer v. Ray, Civ.App., 85 S.W.2d 1102, error refused.

65 C.J. p. 74 note 1.

Ancient form of declaration  
Me.—Guere v. Morrisette, 48 A.2d 257, 142 Me. 46.

34. N.Y.—Schroepell v. Corning, 2 N.Y. 132.

35. U.S.—Cummings v. Greif Bros. Co., 202 F.2d 824—Corpus Juris cited in Byland v. Miller, D.C.Ky., 13 F.Supp. 137, 138.

Colo.—Sigel-Campion Live Stock Commission Co. v. Holly, 101 P. 68, 44 Colo. 580.

Mont.—Bethel v. Giebel, 55 P.2d 1287, 101 Mont. 410, 104 A.L.R. 1150.

Particularity and certainty  
Conversion must be alleged with particularity and certainty.—Staats v. Miller, Tex.Civ.App., 240 S.W.2d 342—Field v. Davis, Tex.Civ.App., 32 S.W. 71.

Complaint held insufficient  
(1) In general.

Cal.—Michaels v. Mulholland, 252 P.2d 757, 115 Cal.App.2d 563.

Del.—McCabe v. Baltimore Trust Co., 180 A. 780, 7 W.V.Harr. 116.

N.Y.—In re Urie's Estate, 71 N.Y.S.2d 620, 188 Misc. 772.

(2) Allegations that plaintiff planted grape plants on land with owner's consent, that defendant purchased land at sale under federal court decree and took possession of land notwithstanding plaintiff offered to pay reasonable rent until plants could be transplanted, held not to state cause of action for conversion.—Consolidated Graphite Corporation v. Kelly, 150 So. 682, 227 Ala. 516.

(3) A complaint which set out an action of tort for conversion of stock against a corporation was held not to have stated a cause of action against individual defendants who were alleged to have assumed its liabilities, as liabilities were considered to be confined to those of a contractual nature.—Nicholson v. Sprague,

recovery of the value of personal property converted, plaintiff need not state whether he is suing on a breach of contract or for trespass.<sup>36</sup> Furthermore, technical rules formerly applicable to common-law actions of trover cannot be applied under the statutes to defeat an action for conversion in which plaintiff states facts which, if true, entitle him to the relief asked.<sup>37</sup>

**Statutory forms.** Where the declaration follows a form prescribed by statute, it is sufficient.<sup>38</sup>

**Conclusion contrary to statute.** Where the action is based on a statute giving a right of action in trover to recover goods received contrary to its provisions, and providing that plaintiff shall allege that the property was converted contrary to the provisions of the statute, a declaration in the usual form for trover is insufficient; it must conform to the requirements of the statute, otherwise it will be fatally defective if an objection is made at the trial.<sup>39</sup>

**Negating defenses.** In accordance with general principles of pleading, a complaint in trover need not negative possible defenses.<sup>40</sup>

**Surplusage.** As in other civil actions, unnecessary allegations will not vitiate a pleading otherwise sufficient; they may be treated as surplusage and disregarded.<sup>41</sup>

**Erroneous prayer for relief.** In accordance with general principles, it has been held that, where the facts stated disclosed a good cause of action for

conversion, plaintiff may recover as in such action, notwithstanding the relief asked for is the possession of the property, or its value.<sup>42</sup>

### b. Cure or Waiver of Defects

Insufficiencies of a petition or declaration may be supplied by the defendant's plea or answer, or they may be waived by the defendant's failure properly to object to them, or cured by the verdict or findings.

Insufficiencies of a petition or declaration may be supplied by defendant's plea or answer,<sup>43</sup> or may be waived by defendant's failure to demur,<sup>44</sup> or by trial of the cause as though the proper allegations were in the pleading.<sup>45</sup> Defects and insufficiencies of the declaration or petition may be cured by verdict or findings of the court.<sup>46</sup>

## § 96. — Description of Parties

The general rules of pleading govern the plaintiff's description of parties in the declaration, petition, or complaint.

In trover for goods taken from his possession and converted, an officer need not name himself as such in his declaration.<sup>47</sup> The use of the term "assignee" after the name of plaintiff in a declaration in trover has been held merely descriptio personae.<sup>48</sup>

## § 97. — Description of Property

In an action of trover, the declaration, petition, or complaint must describe the property converted. Ordinarily, a general description is sufficient.

In an action of trover, the declaration, petition, or complaint must describe the property converted,<sup>49</sup>

152 N.Y.S. 228, affirmed 154 N.Y.S. 461, 170 App.Div. 888.

(4) Cross-petition alleging that cross-defendant had embezzled, misappropriated and stolen from cross-plaintiff stated sum by drawing checks on his bank accounts and appropriating the proceeds thereof did not state a cause of action for conversion.—Corrigan v. Heard, Tex. Civ. App., 225 S.W.2d 446, refused no reversible error.

36. Ark.—Short v. Kennedy, 35 S.W. 2d 591, 183 Ark. 310.

37. Mo.—Cammann v. Edwards, 100 S.W.2d 846, 340 Mo. 1—Knipper v. Blumenthal, 18 S.W. 23, 107 Mo. 665.

38. Fla.—Leon v. Kerrison, 36 So. 173, 47 Fla. 178.  
65 C.J. p 74 note 3.

39. N.Y.—Schroepell v. Corning, 2 N.Y. 132.  
65 C.J. p 74 note 4.

40. Ind.—First Nat. Bank of Richmond v. Gibbons, 35 N.E. 31, 7 Ind. App. 629.

65 C.J. p 74 note 6.

41. Cal.—Woodham v. Cline, 62 P. 822, 130 Cal. 497.

65 C.J. p 74 note 8.

42. Minn.—Howard v. Barton, 9 N. W. 584, 28 Minn. 116.  
65 C.J. p 75 note 10.

43. Tex.—Platte v. Kossman Buick Co., Civ.App., 265 S.W.2d 643, error refused no reversible error.  
65 C.J. p 87 note 91.

44. Cal.—Corpus Juris cited in Flenbaugh v. Heinrich, 200 P.2d 580, 583, 89 Cal.App.2d 214.  
Wis.—Brickley v. Walker, 32 N.W. 773, 68 Wis. 563.

45. Ariz.—Levandowski v. Ford, 83 P. 2d 281, 52 Ariz. 454.

Cal.—Corpus Juris cited in Flenbaugh v. Heinrich, 200 P.2d 580, 583, 89 Cal.App.2d 214.  
65 C.J. p 87 note 93.

**Trial without objection to evidence**

In action for conversion of two trucks and trailers, defendant's failure to demur to complaint and his recognition of plaintiff's ownership of vehicles by affirmative allegations in cross-complaint and on trial of case,

without objection to evidence on such question, constituted waiver of defect in count of complaint failing to state properly plaintiff's ownership and right to possession of vehicles at date of conversion.—Flenbaugh v. Heinrich, 200 P.2d 580, 583, 89 Cal. App.2d 214.

46. Cal.—Corpus Juris quoted in Flenbaugh v. Heinrich, 200 P.2d 580, 584, 89 Cal.App.2d 214.

Ill.—Addante v. Pompilio, 25 N.E.2d 123, 303 Ill.App. 172.

65 C.J. p 87 note 94—49 C.J. p 873 note 34 [1].

47. N.J.—Brewster v. Vall, 20 N.J. Law 56, 38 Am.D. 547.

Pleading plaintiff's interest generally and the capacity in which he sues see Pleading § 71.

48. Mich.—Bloom v. Sexton, 33 Mich. 181.

49. U.S.—Cummings v. Greif Bros. Co., 202 F.2d 824.

Okl.—May v. City Nat. Bank & Trust Co., 258 P.2d 945.

otherwise it will be fatally defective.<sup>50</sup>

In actions of trover, a less specific description of the property converted will suffice than where the action seeks a recovery of the property itself.<sup>51</sup> While the property should be described with reasonable certainty,<sup>52</sup> in order that the jury may know what is meant, and in order that defendant may be protected from another action based on the same grounds,<sup>53</sup> all that is required is that the property should be described with as much reasonable certainty as the nature of the case will permit,<sup>54</sup> and ordinarily a general description has been held sufficient.<sup>55</sup> The nature and kind,<sup>56</sup> and the quantity<sup>57</sup> or number<sup>58</sup> of the chattels converted should be stated. However, the courts construe liberally the descriptions of quantity, and will sustain the declaration whenever, by any reasonable intendment, it can be supposed the evidence may give certainty to terms ordinarily used in a loose and indefinite sense.<sup>59</sup>

If the foregoing requirements as to kind and number, or quantity, are complied with, the pleading will ordinarily be held sufficient in the matter of description,<sup>60</sup> although the situs of the property at the time of its alleged conversion should also be stated if this is necessary to render the identification of the property reasonably certain.<sup>61</sup>

**Money.** In actions for the conversion of money, it has generally been held that a description of it in general terms will be sufficient,<sup>62</sup> provided the de-

scription is such that the jury may know what money is meant, and defendant will be protected against another action based on the same grounds.<sup>63</sup> While a declaration describing the money converted as bank notes issued by designated banks and setting forth the number of the notes and the denomination of each will be sufficient,<sup>64</sup> such particularity has been held unnecessary. It is not essential that the declaration should "set out the money verbatim,"<sup>65</sup> as by specifically describing the bills, notes, or coins converted,<sup>66</sup> but it will be sufficient to state the aggregate amount converted.<sup>67</sup> There are, however, decisions which are not in accord with the principles just stated, it having been variously held that a description of bank notes without giving the names, numbers, or marks to identify them is insufficient,<sup>68</sup> that a description of bank bills as "certain current bank bills representing in all one hundred and fifty dollars in money, and of the value of one hundred and fifty dollars" is insufficient, but good after verdict,<sup>69</sup> and that the description "three thousand dollars, in United States treasury and national bank notes of various denominations and value, issued by virtue, and under authority of the laws of the United States" is defective, but is sufficient on motion in arrest of judgment after verdict.<sup>70</sup>

**Written instruments.** In trover for a bond, bill, or note, it is not necessary to describe the instrument particularly.<sup>71</sup> Thus, in declaring for the conversion of notes or bills, it is not necessary to state

Or—**Corpus Juris** cited in *Smith v. Dunn*, 107 P.2d 985, 987, 165 Or. 418.

65 C.J. p 75 note 12.

50. *Mass.*—*Thayer v. Kitchen*, 86 N. E. 952, 200 Mass. 382.

51. *US.*—*Byland v. Miller*, D.C.Ky., 13 F.Supp. 137.

65 C.J. p 75 note 14.

52. *Ala.*—**Corpus Juris** cited in *Gaines v. Stevens*, 28 So.2d 786, 789, 248 Ala. 576.

*Pa.*—*Liquid Carbonic Corp. v. Merivine*, 4 Monroe L.R. 117.

65 C.J. p 75 note 15.

53. *Vt.*—*Parker v. Cone*, 168 A. 715, 165 Vt. 426.

65 C.J. p 75 note 16.

54. *Ala.*—*Howton v. Mathias*, 73 So. 92, 197 Ala. 457.

65 C.J. p 75 note 17.

55. *Conn.*—*Dunham v. Cox*, 70 A. 1033, 81 Conn. 268, 271.

65 C.J. p 75 note 18.

56. *N.H.*—*Edgerly v. Emerson*, 23 N.H. 555, 55 Am.D. 207.

65 C.J. p 75 note 19.

**Nursery stock as personality**

A complaint, alleging that plaintiff

placed nursery stock on land purchased by him solely for purpose of removal and sale and that defendants prevented him from removing such stock and converted it to their own use after re-entering on land because of plaintiff's failure to pay interest on contract price and taxes, as required by sale contract, stated cause of action for conversion of "stock in trade."—*Story v. Christin*, 95 P.2d 925, 14 Cal.2d 592, 125 A.L.R. 1402.

57. *N.H.*—*Edgerly v. Emerson*, 23 N.H. 555, 55 Am.D. 207.

65 C.J. p 75 note 20.

58. *Pa.*—*Neller v. Kelley*, 69 Pa. 403.

59. *N.H.*—*Edgerly v. Emerson*, 23 N.H. 555, 55 Am.D. 207.

65 C.J. p 75 note 22.

60. *Ala.*—*Hooper v. Dorsey*, 58 So. 951, 5 Ala.App. 463.

65 C.J. p 75 note 23.

61. *Idaho.*—*Norman v. Rose Lake Lumber Co.*, 128 P. 85, 22 Idaho 711, Ann.Cas.1913E 673.

65 C.J. p 75 note 24.

62. *Me.*—*Williams v. Williams*, 90

A 500, 112 Me. 21, Ann.Cas.1916D 928.

65 C.J. p 76 note 28.

63. *Ala.*—*Russell v. The Practorians, Inc.*, 28 So.2d 786, 218 Ala. 576.

64. *N.Y.*—*Dows v. Bignall*, Lator 407.

65. *Me.*—*Williams v. Williams*, 90 A. 500, 112 Me. 21, Ann.Cas.1916D 928.

66. *Conn.*—*Dunham v. Cox*, 70 A. 1033, 81 Conn. 268.

Or—*Salom Traction Co. v. Anson*, 67 P. 1015, 69 P. 675, 41 Or. 562.

67. *Conn.*—*Dunham v. Cox*, 70 A. 1033, 81 Conn. 268.

65 C.J. p 76 note 32.

68. *N.J.*—*Little v. Gibbs*, 4 N.J. Law 211.

69. *N.H.*—*Town of Colebrook v. Merrill*, 46 N.H. 160.

70. *US.*—*Henry v. Sowles*, C.C.Vt., 28 F. 521.

71. *N.J.*—*Receivers of Bank of New Brunswick v. Neilson*, 15 N.J. Law 337, 29 Am.D. 691.

65 C.J. p 76 note 37.

their dates,<sup>72</sup> or time of payment,<sup>73</sup> or the amount, if not known,<sup>74</sup> since plaintiff is not supposed to have them in his possession and any misrecital would be fatal to his action,<sup>75</sup> and since to require a specific description of each note sued on would be in effect to preclude plaintiff from bringing trover at all.<sup>76</sup> So, also, in an action of trover for a bond, it is not necessary to allege its date,<sup>77</sup> or number,<sup>78</sup> or the name of the person in whose name it was issued,<sup>79</sup> or to recite any part of it,<sup>80</sup> nor need authentication of the bonds be alleged, as it would be a matter of defense to show that they were not in a condition to be of value;<sup>81</sup> but it has been held that the declaration must show who were the parties to the instrument.<sup>82</sup> A declaration in trover for a deed, although failing to state the names of the parties thereto or the nature or boundaries of the estate thereby conveyed, is sufficient after verdict, as it must be taken that everything was proved on the trial necessary to enable plaintiff to recover.<sup>83</sup>

*Description of property in schedule annexed to declaration* In at least one jurisdiction, by reason of long usage, a description of the property converted may be made in a schedule annexed to the declaration. The "untechnicality" of so doing, it was said, must yield to long usage.<sup>84</sup>

## § 98. — Value

It is generally essential to allege the value of the property converted, or at least that the property is of some value, but where a proper allegation of the damages sustained is made, allegations of value are rendered unnecessary.

While it has been held that the declaration in trover need not state the value of the thing con-

verted, although it is otherwise in detinue,<sup>85</sup> it has generally been held that it is essential to allege the value of the property converted,<sup>86</sup> or at least that the property is of some value.<sup>87</sup> It is not necessary to allege that the converted property had no market value in order to state a cause of action for the actual value thereof;<sup>88</sup> and it has been held that an allegation of the value of the property,<sup>89</sup> or that the property was of some value,<sup>90</sup> is rendered unnecessary where the declaration, petition, or complaint contains a proper allegation as to the amount of damages sustained.

## § 99. — Ownership, Possession, or Right to Possession

- a. Ownership
- b. Possession or right to possession
- c. Time of ownership, possession, or right to possession

### a. Ownership

The declaration or complaint must show in the plaintiff a general or special ownership in the property converted at the time of the conversion.

The declaration or complaint must show a general or special ownership in the property converted in plaintiff<sup>91</sup> at the time of the conversion, either by direct allegation or necessary inference from facts well pleaded.<sup>92</sup> However, it is not necessary to negative title in defendant.<sup>93</sup>

Although there is authority to the contrary,<sup>94</sup> it has been held that it is sufficient to allege ownership generally without stating how such ownership was acquired.<sup>95</sup> Such an averment is an affirmation of

72. Mich.—Burrows v. Keays, 37 Mich. 430.

N.J.—Receivers of Bank of New Brunswick v. Neilson, 15 N.J.Law 337, 29 Am D 691.

73. N.J.—Receivers of Bank of New Brunswick v. Neilson, supra.

74. Mich.—Burrows v. Keays, 37 Mich. 430.

65 C.J. p 76 note 40.

75. N.J.—Receivers of Bank of New Brunswick v. Neilson, 15 N.J.Law 337, 29 Am D 691.

76. Mich.—Burrows v. Keays, 37 Mich. 430.

77. N.Y.—Pierson v. Townsend, 2 Hill 550.

Pa.—Neiler v. Kelley, 69 Pa. 403.

78. N.Y.—Neiler v. Kelley, supra.

79. Pa.—Neiler v. Kelley, supra.

80. Pa.—Neiler v. Kelley, supra.

65 C.J. p 77 note 46.

81. N.Y.—Saratoga Gas & Electric

Light Co v. Hazard, 7 N.Y.S. 844, 65 Hun 251, affirmed 24 N.E. 1095, 121 N.Y. 677.

82. N.Y.—Pierson v. Townsend, 2 Hill 550.

83. Pa.—Weiser v. Zelsinger, 2 Yeates 537.

84. Me.—Stinchfield v. Twaddle, 17 A. 66, 81 Me. 273.

85. Va.—Pearpoint v. Henry, 2 Wash 192, 2 Va. 192.

86. Ky.—Ford Lumber & Mfg. Co v. Burt & Brabb Lumber Co, 163 S.W. 1105, 157 Ky. 706, 65 C.J. p 77 note 52.

**Reasonable market value**

In order to recover for conversion, pleading must allege reasonable market value of property converted—Callihan v. Fort Worth Well Machinery & Supply Co, Tex Civ.App. 88 S.W.2d 1057, error dismissed.

87. U.S.—Byland v. Miller, D.C.Ky., 13 F.Supp. 137.

Cal.—Bentley v. Mountain, 124 P.2d 91, 51 Cal.App.2d 95, 65 C.J. p 77 note 53.

88. Tex.—Wulke v. Yoltan, Civ. App. 71 S.W.2d 549, error refused.

89. Mont.—Klus v. Lamire, 230 P. 364, 71 Mont. 445, 65 C.J. p 77 note 54.

90. U.S.—Corpus Juris cited in Byland v. Miller, D.C.Ky., 13 F. Supp 137, 138.

Cal.—Trolier v. Buckner, 58 P. 691, 126 Cal. 268.

91. Ala.—Abercrombie v. Pell, 179 So 371, 235 Ala. 396, 65 C.J. p 78 note 56.

92. Ind.—Waters v. Delagrang, 109 N.E. 758, 183 Ind. 497.

93. Ind.—Richmond First Nat. Bank v. Gibbons, 35 N.E. 31, 7 Ind.App. 629.

94. Kan.—Kennett v. Peters, 37 P. 999, 54 Kan. 119, 46 Am.S.R. 274.

95. Colo.—Casco Mercantile & Trust

a fact, and is not open to the objection that it is a mere legal conclusion.<sup>96</sup> The precise nature of plaintiff's title, or what are the evidences of it, it has been said, are matters of evidence merely;<sup>97</sup> nevertheless, although it has been said that the practice of setting forth the evidence of facts showing ownership is a pernicious one,<sup>98</sup> plaintiff may, if he sees fit, set forth the facts showing his title and right of possession,<sup>99</sup> and if he does so, no express averment of ownership is necessary.<sup>1</sup> However, the averment of facts showing ownership must be clear and concise to a common intent.<sup>2</sup>

If the pleading purports to state the evidential facts, it must state them sufficiently to show a cause of action in plaintiff, otherwise it will be fatally defective.<sup>3</sup> A statement of facts from which ownership by plaintiff is necessarily inferred will be sufficient; but ownership must be the necessary and inevitable inference from the facts stated.<sup>4</sup> It is not sufficient to allege facts from which ownership may be inferred.<sup>5</sup> A pleading which alleges facts insufficient to show ownership is not helped by the addition of a general averment of ownership,<sup>6</sup> since the particular facts alleged will control.<sup>7</sup>

### b. Possession or Right to Possession

Since title to, or right of property in, a chattel will not alone support an action for its conversion, the declaration or complaint must allege that at the time the property was converted the plaintiff had possession or the right to immediate possession.

Title to, or a right of property in, a chattel will not alone support an action for its conversion, and in consequence the declaration or complaint must allege that at the time the property was converted plaintiff had possession or the right to immediate possession<sup>8</sup> or state facts from which this will be legally inferred,<sup>9</sup> and an allegation that plaintiff has title to the property converted is not sufficient.<sup>10</sup>

### c. Time of Ownership, Possession, or Right to Possession

In actions for conversion it is necessary to allege ownership, possession, or the right of possession of the property converted in the plaintiff at the time it is alleged to have been converted.

In actions for conversion it is necessary to allege ownership, possession, or right of possession of the property converted in plaintiff at the time it is alleged to have been converted;<sup>11</sup> and a complaint for conversion which alleges ownership in the present tense instead of as of the time of the conversion is defective,<sup>12</sup> since it does not show that

Co. v. Central Sav. Bank & Trust Co., 226 P. 868, 75 Colo. 478. 65 C.J. p 78 note 61.

96. Mont.—Paine v. British-Butte Mining Co., 108 P. 12, 41 Mont. 28. N.Y.—Davis v. Hoppeck, 13 N.Y. Super 264.

97. Mich.—Warren v. Dwyer, 51 N. W. 1062, 91 Mich. 411—Harvey v. McAdams, 32 Mich. 472.

98. N.Y.—Stall v. Wilbur, 77 N.Y. 158.

99. Wash.—Stoessel v. Van De Venter, 47 P. 221, 16 Wash. 9. 65 C.J. p 79 note 65.

**Complaint held sufficient**  
Mont.—Hage v. Orton, 175 P. 2d 174, 119 Mont 419.

1. N.Y.—Decker v. Mathews, 12 N.Y. 313.

2. Mont.—Paine v. British-Butte Mining Co., 108 P. 12, 41 Mont. 28.

**At common law plaintiff could not maintain action for conversion as owner, and recover as assignee of owner**—Weber v. West Seattle Land & Improvement Co., 63 P.2d 418, 188 Wash. 512.

3. Cal.—Imperial Valley Land Co. v. Globe Grain & Milling Co., 202 P. 129, 187 Cal 352. 65 C.J. p 79 note 68.

**Pleading held defective**  
In action for conversion of chat-

tels, complaint alleging execution and delivery by plaintiff to corporate defendant of bill of sale covering the chattels and alleging that a subsequent bill of sale executed by corporate defendant in blank, the object of which apparently was to reconvey title to plaintiff or its agents, was destroyed after execution, was required to be dismissed on defendants' motion for judgment as not stating a cause of action—Pompey Exhibition Co. v. Flatto, 26 N.Y.S.2d 654, 261 App Div. 613.

4. Minn.—Brunswick - Balke - Colender Co. v. Brackett, 33 N.W. 214, 37 Minn 58. 65 C.J. p 79 note 69.

5. Mont.—Paine v. British-Butte Min Co., 108 P. 12, 41 Mont. 28.

6. Mont.—Paine v. British-Butte Mining Co., supra. 65 C.J. p 79 note 71.

7. Minn.—First Nat Bank of Anoka v. St Croix Boom Corporation, 42 N.W. 861, 41 Minn. 141.

8. U.S.—Byland v. Miller, D.C.Ky., 13 F.Supp. 137.

Mo.—Cammann v. Edwards, 100 S.W. 2d 846, 340 Mo 1. Tex.—Staats v. Miller, Civ.App., 240 S.W.2d 342, reversed on other grounds 243 S.W.2d 686, 150 Tex 581.

65 C.J. p 79 note 74.

9. Mo.—Corpus Juris cited in Cammann v. Edwards, 100 S.W.2d 846, 340 Mo 1. 65 C.J. p 80 note 76.

10. Pa.—Scott v. Zuroski, 27 Pa. Dist. & Co. 518, 37 Lack Jur. 109. 65 C.J. p 80 note 77.

11. U.S.—Corpus Juris quoted in United States v. Fleming, D.C.Iowa, 69 F.Supp. 252, 258.

Ariz.—Corpus Juris quoted in Levandoski v. Ford, 83 P.2d 281, 283, 52 Ariz. 454.

Or.—Cross v. Campbell, 146 P.2d 83, 173 Or 477. 65 C.J. p 80 note 79.

### "On or about" a certain date

Complaint alleging that "on or about" a certain date plaintiff was owner and entitled to possession of certain property and that on or about that day defendants wrongfully deprived plaintiff of the property and converted property to their own use sufficiently alleged plaintiff's ownership at time of conversion, where defendants were not misled and sufficiency of complaint was not challenged by motion or demurrer.—Cross v. Campbell, supra.

12. Kan.—Kennett v. Peters, 37 P. 999, 54 Kan. 119, 45 Am S.R. 274. Minn.—Smith v. Force, 16 N.W. 704, 31 Minn. 119.

plaintiff was the owner or had any special interest in, or possession of, the property at the date of the conversion.<sup>13</sup> It is not necessary to allege that plaintiff was the owner and entitled to possession of the property at the time of the commencement of the action;<sup>14</sup> but an unnecessary allegation of this character will not vitiate a complaint which alleges ownership or right of possession in plaintiff at the time of the conversion.<sup>15</sup>

### § 100. — Property Subject of Conversion

The declaration, petition, or complaint must show that the property allegedly converted was personal property.

In trover for the conversion of a building, plaintiff must specifically aver a state of facts showing that it is personal property, since the law presumes that a building located upon a tract of land is a part of the land it occupies, and is therefore real property.<sup>16</sup> It has accordingly been held that a petition in trover for conversion of a building erected on leased lands under agreement for its removal by the lessee at the expiration of the lease and on payment of rent, not alleging performance of such conditions, is insufficient to state a cause of action.<sup>17</sup>

### § 101. — Conversion

#### a. Necessity

#### b. Requisites and sufficiency

#### a. Necessity

Since the conversion of property is the gist of an action of trover, it is indispensable that the declaration, petition, or complaint should allege a conversion by the defendant.

Since the conversion of property is the gist of an action of trover, it is indispensable that the declara-

tion, petition, or complaint should allege a conversion by defendant,<sup>18</sup> either by direct averments of a conversion or by stating facts from which a conversion will be legally inferred.<sup>19</sup> Merely alleging a breach of contract,<sup>20</sup> or a trespass,<sup>21</sup> without alleging a conversion, is insufficient.

#### b. Requisites and Sufficiency

- (1) In general
- (2) Characterizing act as wrongful, unlawful, fraudulent or deceitful
- (3) Time and place of conversion
- (4) Loss of goods and finding by defendant

#### (1) In General

While averments as to conversion must be definite and certain, no particular form of words is essential in alleging a conversion, providing the fact of the conversion is sufficiently stated, and it has been generally held sufficient to allege in general terms that the defendant converted the plaintiff's property.

In accordance with general principles of pleading, the averment as to the conversion must be definite and certain,<sup>22</sup> and it is not sufficient to allege conversion inferentially.<sup>23</sup> Indefiniteness and uncertainty, however, cannot be taken advantage of on general demurrer.<sup>24</sup> Nevertheless, no particular form of words is essential in alleging a conversion, provided the fact of the conversion is sufficiently stated.<sup>25</sup> It has very generally,<sup>26</sup> but not universally,<sup>27</sup> been held that it will be sufficient to allege in general terms that defendant converted plaintiff's property, and that it is not necessary to allege the specific act or acts which constitute the conversion, or the means by which it was accomplished. This was the rule at common law, and the codes have not changed it.<sup>28</sup>

13. Kan.—Kennett v. Peters, 37 P. 999, 54 Kan. 119, 45 Am.S.R. 274.

14. Mont.—Babcock v. Caldwell, 56 P. 1081, 22 Mont. 460, 461. 65 C.J. p. 80 note 82.

15. Minn.—Northness v. Hillestad, 91 N.W. 1112, 87 Minn. 304, 307. 65 C.J. p. 81 note 83.

16. Okl.—Shelton v. Jones, 167 P. 458, 66 Okl. 83, L.R.A.1918A 830.

17. Okl.—Shelton v. Jones, supra.

18. Mont.—Radosevich v. Engle, 111 P.2d 239, 111 Mont. 504. 65 C.J. p. 81 note 88.

Conversion as gist of action of trover see supra § 63.

19. Tex.—Field v. Davis, Civ.App., 32 S.W. 71. Sufficiency see infra §§ 134-137.

20. U.S.—Kruerger Corp v. Detroit Trust Co., C.A.Mich., 210 F.2d 152.

N.J.—Morcanille Co-operative Bank v. Frost, 41 A. 685, 62 N.J.Law 476.

21. N.Y.—Bernstein v. Warland, 67 N.Y.S. 444, 33 Misc. 280.

22. Cal.—Michaels v. Mulholland, 252 P.2d 757, 115 Cal.App.2d 563. Wyo.—Cone v. Ivins, 33 P. 31, 35 P. 933, 4 Wyo. 203.

23. Mo.—Perry v. Musser, 68 Mo. 477.

24. Cal.—Haigler v. Donnelly, 117 P.2d 331, 18 Cal.2d 674. Wyo.—Cone v. Ivins, 33 P. 31, 35 P. 933, 4 Wyo. 203.

25. Or.—Williams v. International Harvester Co., 141 P.2d 837, 172 Or. 270.

65 C.J. p. 81 note 96

Complaint held sufficient  
Colo.—Melnick v. Bowman, 79 P.2d 368, 102 Colo. 384.  
Ind.—Selp v. Gray, 83 N.E.2d 790, 227

Ind. 52—Kroeger Laundry & Dry Cleaners v. Williams, 47 N.E.2d 612, 221 Ind. 299.

Kan.—Pratt v. Barnard, 154 P.2d 133, 159 Kan. 255.

Ky.—Commercial Credit Corp. v. Tackett, 249 S.W.2d 43.

Mo.—Hussey v. Ellerman, App., 215 S.W.2d 38.

Tex.—Dean v. Thompson, Civ.App., 213 S.W.2d 327, error refused no reversible error—Wallace v. Renfro, Civ.App., 124 S.W.2d 466, error dismissed, judgment correct.

26. Del.—Drug, Inc. v. Hunt, 162 A. 87, 5 W.W.Harr. 339. 65 C.J. p. 81 note 97.

27. Conn.—Healey v. Flammia, 113 A. 449, 96 Conn. 233. 65 C.J. p. 82 note 98.

28. N.Y.—Decker v. Mathews, 12 N.Y. 313.

Nevertheless, unless it is forbidden by statute,<sup>29</sup> and although it has been characterized as a "pernicious practice,"<sup>30</sup> plaintiff may, if he prefers to do so, state the facts which constitute the conversion,<sup>31</sup> in which event, if the facts so stated show a conversion, the declaration or complaint will be sufficient without characterizing such acts as a conversion or alleging in direct and positive terms that the property was converted.<sup>32</sup> A complaint which not only alleges that defendant converted plaintiff's property, but sets out specific acts sufficient to constitute a conversion, is not objectionable.<sup>33</sup>

If, however, the complaint purports to set out the acts constituting the conversion, it will be fatally defective when all the facts stated therein, if true, will not warrant a recovery;<sup>34</sup> and this is true although in addition thereto the pleading contains a general averment that there was a wrongful conversion. The specific facts alleged will control the general averment,<sup>35</sup> unless the statement of evidential facts is forbidden by statute, in which case the evidential matter alleged must be ignored and the complaint held sufficient.<sup>36</sup> If the pleader elects to state the facts constituting the conversion, he should state the facts concisely without the addition of irrelevant or redundant matter; and if such matter is inserted in the pleading, it will be stricken or regarded as surplusage.<sup>37</sup>

## (2) Characterizing Act as Wrongful, Unlawful, Fraudulent, or Deceitful

The approved forms of declarations in actions for conversion usually recite that the act was wrongfully or unlawfully done, although such an averment is not a necessity, since a charge that a person converted personal property belonging to another is a charge by implication of an unlawful act.

The approved forms of declarations in actions for conversion, it has been said, usually recite that the act was wrongfully or unlawfully done.<sup>38</sup> Such an averment, however, is unnecessary,<sup>39</sup> since to charge a person with converting personal property belonging to another is to charge him by implication with an unlawful act,<sup>40</sup> and if such allegation is made, whether considered a mere conclusion of law<sup>41</sup> or not,<sup>42</sup> it may be rejected as surplusage and the pleading upheld if otherwise it sufficiently states a conversion. On the other hand, if the complaint is otherwise insufficient to charge a conversion, a characterization of the act alleged as wrongful will not help it.<sup>43</sup>

**Fraud.** It is not necessary to characterize the act of conversion as fraudulent<sup>44</sup> or deceitful,<sup>45</sup> since it is immaterial in an action for conversion whether the property be converted innocently or knowingly.<sup>46</sup>

## (3) Time and Place of Conversion

While it may depend on the statutes as to whether an allegation as to the time of conversion is necessary, it is generally held that the time should be alleged, but it is not essential to allege the precise time of the conversion. Allegations as to the place of conversion may be necessary.

In trover time is not of the essence.<sup>47</sup> Where so provided by statute, it is not necessary to allege the time of the conversion;<sup>48</sup> and it has been held that no allegation as to the time of conversion is necessary, although there is no statute so providing, the view being taken that the failure to show that the action was brought within the statutory period is a matter of defense;<sup>49</sup> however, it has generally been held that the time of the conversion should be

29. Colo.—First Nat. Bank of Taos, N. M. v. Booth, 235 P. 570, 77 Colo 122.

30. N.Y.—Stall v. Wilbur, 77 N.Y. 158.

31. Del.—Drug, Inc. v. Hunt, 168 A. 87, 5 W.W.Harr 339. 65 C.J. p 82 note 3.

32. Mo.—Battel v. Crawford, 59 Mo. 216.

33. N.Y.—Thompson v. Vroman, 21 N.Y. S. 179, 66 Hun 215.

34. Or.—Osborne v. Eldredge, 280 P. 497, 130 Or. 385.

35. Ala.—S. H. Pope & Co. v. Union Warehouse Co., 70 So. 169, 195 Ala 309. 65 C.J. p 82 note 6.

36. Minn.—Kendall v. City of Duluth, 66 N.W. 1150, 61 Minn. 295. 65 C.J. p 82 note 7.

37. Colo.—First Nat. Bank of Taos, N. M. v. Booth, 235 P. 570, 77 Colo 122.

38. Cal.—Woodham v. Cline, 62 P. 822, 130 Cal. 497. 65 C.J. p 82 note 9.

39. Minn.—Cordill v. Minnesota Elevator Co., 95 N.W. 306, 89 Minn. 442.

40. Mo.—McDonald v. Mangold, 61 Mo. App 291.

41. Minn.—Cordill v. Minnesota Elevator Co., 95 N.W. 306, 89 Minn. 442. 65 C.J. p 82 note 12.

42. U.S.—Corpus Juris cited in Byland v. Miller, D.C.Ky., 13 F. Supp 137, 138. 65 C.J. p 82 note 13.

43. Mich.—Williams v. Raper, 34 N. W. 890, 67 Mich. 427.

44. S.C.—Nance v. Georgia, C. & N. R. Co., 14 N.E. 629, 35 S.C. 307. 65 C.J. p 83 note 15.

45. Cal.—Tracy v. Orr, 49 Cal. 612—Rurd v. Olsheski, 283 P. 321, 102 Cal App. 452. 65 C.J. p 83 note 16.

46. U.S.—Krueger Corp. v. Detroit Trust Co., C.A. Mich., 210 F.2d 152. 65 C.J. p 83 note 17.

47. Colo.—Benson v. Eli, 66 P. 450, 16 Colo.App. 494.

48. Colo.—Platt v. Walker, 196 P. 190, 69 Colo 564. Intent generally see supra § 7.

49. Ala.—Atchley v. Wood, 51 So.2d 705, 255 Ala 227.

50. Fla.—Leon v. Kerrison, 36 So. 173, 47 Fla. 178. 65 C.J. p 83 note 21.

51. Pa.—George v. Graham, 1 Phila. 69.

alleged;<sup>50</sup> and statutes may expressly require it.<sup>51</sup> It is not essential that the precise time of the conversion should be alleged.<sup>52</sup> Every action for conversion, it has been said, must depend on its own particular facts as to how certain and definite an averment of the time of the conversion can be made.<sup>53</sup> It is necessary, and also sufficient, to state that the conversion occurred at a time prior to the commencement of the suit and within the time limited by statute for bringing actions of this character.<sup>54</sup>

**Place.** While it may be necessary to allege the place of conversion as an element of the cause of action,<sup>55</sup> exactness in the statement of the place of the conversion is not a condition precedent to the right to recover for the conversion.<sup>56</sup>

#### (4) Loss of Goods and Finding by Defendant

It is no longer necessary to allege that the property in suit was lost by the plaintiff and found by the defendant.

The action of trover was in its origin an action to recover damages against a person who had found goods and who had refused to deliver them on demand to the owner, as discussed supra § 64; but by a fiction of law this action was at length permitted to be brought against any person who had in his possession, by any means whatever, the personal property of another and who used it or refused to deliver it to the owner, the gist of the action being the conversion;<sup>57</sup> and, in consequence, it is not necessary to allege that the property in suit

was lost by plaintiff and found by defendant.<sup>58</sup> Such an averment is immaterial and not traversable.<sup>59</sup>

#### § 102. — Demand and Refusal

Where conversion is in terms alleged, it is not necessary that the declaration, petition, or complaint should also allege that a demand was made on the defendant for the property before instituting the suit and that he refused to deliver it.

Where conversion is in terms alleged, it is not necessary that the declaration, petition, or complaint should also allege that a demand was made on defendant for the property before instituting the suit and that he refused to deliver it,<sup>60</sup> and this principle applies although it may be necessary to show a demand and refusal for the purpose of establishing a conversion.<sup>61</sup> This is on the theory that the ultimate fact to be pleaded is the conversion,<sup>62</sup> and that the demand "is not a matter of pleading but of evidence."<sup>63</sup> Nevertheless, if the complaint shows that the possession was originally rightful, plaintiff must then aver a demand,<sup>64</sup> or something to obviate the necessity of a demand;<sup>65</sup> but it has been held that this requirement is satisfied by alleging in general terms a wrongful conversion of the property by defendant to his own use.<sup>66</sup>

If the complaint assumes to set out the facts constituting a conversion, and the facts so stated do not show a conversion in the absence of a demand and refusal, the complaint will be fatally defective if it fails to allege a demand and refusal;<sup>67</sup> and

50. Okl.—May v. City Nat. Bank & Trust Co., 258 P.2d 945.

Pa.—Liquid Carbonic Corp. v. Merivine, Com.Pl., 4 Monroe L.R. 117.

RI.—Dimon v. O'Connor, 106 A.2d 509.

Tex.—Callihan v. Fort Worth Well Machinery & Supply Co., Civ App., 88 S.W.2d 1057, error dismissed.

65 C.J. p. 83 note 23.

51. Ala.—Tallapoosa Falls Mfg. Co. v. First Nat. Bank of Alexander City, 49 So. 246, 159 Ala. 315.

65 C.J. p. 83 note 24.

52. U.S.—Cummings v. Greif Bros. Co., C.A. Ark., 202 F.2d 824.

Ala.—Atchley v. Wood, 51 So.2d 705, 255 Ala. 227.

Or.—Cross v. Campbell, 146 P.2d 83, 173 Or. 477.

65 C.J. p. 83 note 25.

53. Ala.—Abercrombie v. Pell, 179 So. 871, 235 Ala. 396—Howton v. Mathias, 78 So. 92, 197 Ala. 457.

54. Ala.—Howton v. Mathias, supra.

65 C.J. p. 83 note 27.

55. Okl.—May v. City Nat. Bank & Trust Co., 258 P.2d 945.

RI.—Dimon v. O'Connor, 106 A.2d 509.

Tex.—Callihan v. Fort Worth Well Machinery & Supply Co., Civ App., 88 S.W.2d 1057, error dismissed.

56. U.S.—Cummings v. Greif Bros. Co., C.A. Ark., 202 F.2d 824.

57. Pa.—Pearl Assur. Co. v. National Ins. Agency, 28 A.2d 334, 150 Pa. Super. 265, reheard 30 A.2d 333, 151 Pa. Super. 146.

58. Ill.—Kerwin v. Balhatchett, 147 Ill. App. 661.

65 C.J. p. 83 note 30.

59. N.Y.—Burnham v. Pidcock, 66 N.Y.S. 808, 33 Misc. 55, affirmed 68 N.Y.S. 1007, 58 App. Div. 273.

Okla.—Robinson v. Peru Mfg. & Wheel Co., 31 P. 983, 1 Okl. 140.

60. Idaho.—Klam v. Koppel, 118 P.2d 729, 63 Idaho 171.

III.—Community Acceptance Corp. v. Falzone, 98 N.E.2d 788, 343 Ill. App. 258.

Or.—Cross v. Campbell, 146 P.2d 83, 173 Or. 477.

65 C.J. p. 84 note 33.

61. Cal.—Duggett v. Gray, 42 P. 568, 110 Cal. 169, 171.

65 C.J. p. 84 note 31.

62. Ky.—Joseph Goldberger Iron Co. v. Cincinnati Iron & Steel Co., 154 S.W. 374, 154 Ky. 20, 24.

Ohio.—Baltimore & O. R. Co. v. O'Donnell, 32 N.E. 476, 49 Ohio St. 489, 34 Am. S.R. 879, 21 L.R.A. 117.

63. N.Y.—Carter v. Eighth Ward Bank, 67 N.Y.S. 300, 302, 33 Misc. 128.

65 C.J. p. 84 note 36.

64. Colo.—Barkhausen v. Bulkley, 11 P.2d 220, 90 Colo. 558.

Idaho.—Klam v. Koppel, 118 P.2d 729, 63 Idaho 171.

65. Or.—Jeffries v. Pankow, 223 P. 745, 229 P. 903, 112 Or. 439.

65 C.J. p. 84 note 38.

66. Mo.—Knipper v. Blumenthal, 18 S.W. 23, 107 Mo. 665.

67. Minn.—Kendall v. City of Duluth, 66 N.W. 1150, 64 Minn. 295.

Complaint held insufficient.

N.Y.—Kearns v. Citizens Nat. Bank of Potsdam, 37 N.Y.S.2d 197, 264 App. Div. 975.



this is true although the complaint contains a general averment that defendant converted the property, since the specific facts alleged will control the general averment.<sup>68</sup> If plaintiff alleges a demand and refusal, but omits to aver a conversion, the declaration is insufficient, the demand and refusal being only evidence of a conversion.<sup>69</sup>

**Alternative allegations.** A complaint may allege an unlawful taking and conversion of personal property in one paragraph, and in another plead that, if it should appear that the taking was lawful, then the conversion occurred through a refusal to surrender the property.<sup>70</sup>

**Definiteness and certainty.** If a demand and refusal are alleged, the averment should be definite and certain,<sup>71</sup> but an insufficiency of a pleading in this regard cannot be reached by a general demurrer.<sup>72</sup>

### § 103. — Damages

- a. In general
- b. Special damages
- c. Exemplary, punitive, or multiple damages
- d. Election between value at time of conversion and highest market value

#### a. In General

In an action for conversion, the declaration or petition should sufficiently allege the damages sustained.

In an action for conversion it is usual, although not always necessary, to allege that plaintiff was damaged in a certain sum.<sup>73</sup> A declaration or complaint which fails to show that the property was of some value, or that plaintiff had been damaged by reason of the unlawful conversion, is insufficient.<sup>74</sup> A declaration, petition, or complaint which

alleges the value of the property without alleging that defendant sustained damages in a particular amount is sufficient,<sup>75</sup> although it has been said that it is proper and better pleading to aver that the conversion is to the damage of the owner.<sup>76</sup>

**Interest.** Where interest is recoverable only as damages and not by reason of some statutory provision, the petition must demand interest.<sup>77</sup> It has been held, however, that, where the damages prayed for largely exceeded the amount recovered, interest may be recovered, although it was not specifically prayed for.<sup>78</sup>

**Amount recoverable as limited by amount claimed.** Plaintiff cannot recover an amount of damages larger than the amount he has claimed.<sup>79</sup>

#### b. Special Damages

In order to recover special damages in an action for conversion, such damages must be specially pleaded.

In accordance with general principles governing the law of damages, if it is sought to recover special damages in an action for conversion, such damages must be specially pleaded,<sup>80</sup> and the amount stated.<sup>81</sup> In an action of conversion, it has been held that a claim of damages for injuries to a buyer's credit and reputation by a forcible entry and taking of goods from the buyer's store by the seller, whose title to some of the goods the buyer admitted, must be considered as a whole on a general demurrer to the petition, and that a demurrer is properly sustained.<sup>82</sup>

#### c. Exemplary, Punitive, or Multiple Damages

The facts authorizing a recovery of exemplary or punitive damages must be pleaded.

In accordance with general principles governing the law of damages, exemplary or punitive dam-

68. Minn.—Kendall v. City of Duluth, 66 N.W. 150, 64 Minn. 295.

69. Cal.—Ashton v. Heydenfeldt, 56 P. 624, 124 Cal. 14.

N.H.—Watriss v. Pierce, 36 N.H. 232.

70. Tex.—Bryden v. Croft, Civ.App., 46 S.W. 853.

71. Pleading held sufficient

Cal.—Faulkner v. First Nat. Bank, 62 P. 463, 130 Cal. 258—Genger v. Albers, 202 P.2d 569, 90 Cal.App.2d 52.

72. Wash.—Howard v. Seattle Nat. Bank, 38 P. 1040, 39 P. 100, 10 Wash. 280.

73. Ariz.—Andersen v. Thude, 25 P. 2d 272, 42 Ariz. 271.

74. Tex.—Wende v. Goza, Civ.App., 25 S.W.2d 184.  
65 C.J. p 85 note 49.

**Allegations sounding in contract**

Complaint, which mentioned conversion but alleged measure of damages in contract, stated action in contract and was therefore insufficient—Minez v. Merrill, D.C.N.Y., 43 F.2d 201.

75. Cal.—Meyer v. Thomas, 63 P.2d 1176, 18 Cal.App.2d 299.  
65 C.J. p 84 note 47.

76. Ind.—Ryan v. Hurley, 21 N.E. 463, 119 Ind. 115.

Allegation as to value see supra § 98

77. Tex.—Hicks Rubber Co., Distributors, v. Stacy, Civ.App., 133 S.W.2d 249.  
65 C.J. p 85 note 50

78. U.S.—New Dunderberg Min. Co. v. Old, Colo., 97 F. 150, 38 C.C.A. 89.

79. Conn.—Hannon v. Bramley, 32 A. 336, 65 Conn. 193.

80. N.H.—Gove v. Watson, 61 N.H. 136.

Okl.—Anthony v. Sapulpa Motor Co., 20 P.2d 172, 162 Okl. 263.  
65 C.J. p 85 note 56.

**Usable value of personally converted constitutes "special damages."**—Anthony v. Sapulpa Motor Co., supra.

**Petition held insufficient**

Tex.—Lone Star Finance Corporation v. Davis, Civ.App., 77 S.W.2d 711.

81. Mont.—Williams v. Gray, 203 P. 524, 62 Mont. 1.

82. Tex.—Askey v. Oliver Chilled Plow Works, Civ.App., 67 S.W.2d 210, error dismissed.

ages are not recoverable in an action for conversion unless the facts authorizing the recovery of such damages are pleaded.<sup>83</sup> It is necessary to allege that the acts were willful or malicious or oppressive;<sup>84</sup> but a complaint which alleges the willful and malicious taking of property and the refusal to return it after repeated demands is sufficient to warrant exemplary damages as for maliciously retaining the property after demand.<sup>85</sup> A petition in an action for the wrongful seizure of household furniture which alleges the seizure of enumerated articles, and which sets forth insulting language of defendant and his agent at the time of the seizure, and which avers that defendant and his agent made divers other insinuations and charges, is not objectionable for failing to set forth with sufficient particularity the insulting language complained of.<sup>86</sup>

*Double or treble damages.* To entitle one to recover double or treble damages for a conversion, under a statute providing therefor, he must make a demand therefor in his declaration or complaint,<sup>87</sup> and allege that he bases his claim on the statute,<sup>88</sup> in order to give notice to defendant of the extent to which he claims;<sup>89</sup> otherwise only actual damages are recoverable.<sup>90</sup>

#### d. Election between Value at Time of Conversion and Highest Market Value

An election to take the value of the property at the time of its conversion or its highest market value be-

tween the time of the conversion and the return of the verdict may be made orally in open court.

Election to take the value of the property at the time of the conversion or its highest market value between the time of the conversion and the return of the verdict need not be pleaded but may be made orally in open court.<sup>91</sup> An allegation that when the property was taken it was of a specified value is not an election to claim as the measure of damages the value of the property at the time, with interest, rather than the highest market value between the conversion and verdict, without interest.<sup>92</sup>

#### § 104. — Construction

The general rules governing the construction of pleadings in civil actions are applicable in determining whether a cause of action for conversion is alleged.

Rules governing the construction of pleadings in civil actions generally are applicable in determining whether a cause of action for conversion is alleged,<sup>93</sup> or in the construction of pleadings charging a conversion.<sup>94</sup>

#### § 105. — Amendments

The general rules governing amendments of declarations or complaints in civil actions apply in actions for conversion.

The general rules governing amendments of declarations or complaints in civil actions apply in actions for conversion.<sup>95</sup> Amendments adding an allegation of conversion,<sup>96</sup> and changing the descrip-

83. Wash.—Fish v. Nethercutt, 45 P. 44, 14 Wash. 582, 53 Am.S.R. 892.

65 C.J. p 85 note 60.

**Pleading held sufficient**

Idaho.—Williams v. Bone, 259 P.2d 810, 74 Idaho 185.

Ohio.—Armstrong v. Feldhaus, 93 N.E.2d 776, 87 Ohio App. 75.

**Special exception**

In trover action, where pleadings on issue of exemplary damages were defective and meager, the vice was subject to an attack by special exception rather than general demurrer.—Nahm v. J. R. Fleming & Co., Tex. Civ.App., 116 S.W.2d 1174.

84. Tex.—Walker v. Farmers' & Merchants' State Bank of Winters, Civ.App., 146 S.W. 312.

Wash.—Fish v. Nethercutt, 45 P. 44, 14 Wash. 582, 53 Am.S.R. 892.

**Complaint held sufficient**

(1) Where complaint, after alleging that defendants wrongfully deprived plaintiff of his property, alleged that defendants wrongfully and maliciously converted property to their own use and that defendants

acted maliciously and were guilty of wanton disregard of rights and feelings of plaintiff, the complaint sufficiently alleged circumstances of conversion to justify recovery of punitive damages.—Cross v. Campbell, 146 P.2d 83, 173 Or. 477.

(2) Allegations for exemplary damages are sufficient when property in the possession of plaintiff is alleged to have been wrongfully obtained by another by malicious misrepresentations with a fraudulent intention, purpose or scheme and plan to convert the same to defendant's own use and benefit.—Wilson v. English, Tex.Civ.App., 144 S.W.2d 946.

85. Mont.—Shandy v. McDonald, 100 P. 203, 38 Mont. 393.

86. Tex.—Souther v. Hunt, Civ.App., 141 S.W. 359.

87. N.Y.—Rock v. Belmar Contracting Co., 252 N.Y.S. 463, 141 Misc. 242.

88. N.Y.—Brown v. Bristol, 1 Cow. 176.

65 C.J. p 85 note 66.

89. N.Y.—Brown v. Bristol, supra.

90. Or.—Springer v. Jenkins, 84 P. 479, 47 Or. 502.

91. Cal.—Potts v. Paxton, 153 P. 957, 17 Cal. 493.

92. Okl.—Funk v. Hendricks, 105 P. 352, 24 Okl. 837.

93. Kan.—Blackwell v. Blackwell, 129 P. 173, 88 Kan. 495.

65 C.J. p 86 note 72.

**Demand held not sounding in conversion**

Demand in complaint that defendants deliver certificate for stock or pay plaintiff value thereof assessed as of date determined by law did not sound in conversion but was analogous to demand in replevin action.—Satterwhite v. Harriman Nat. Bank & Trust Co. of City of New York, D. C.N.Y., 13 F.Supp. 493.

94. Ala.—Mattingly v. Houston, 52 So. 78, 167 Ala. 167.

65 C.J. p 86 note 73.

95. Me.—Nickerson v. Bradbury, 34 A. 521, 88 Me. 593.

65 C.J. p 86 note 75.

96. Me.—Lord v. Pierce, 33 Me. 350.

tion of the property,<sup>97</sup> are permissible. Amendments may be allowed in respect of the date<sup>98</sup> and place<sup>99</sup> of the conversion, and the value of property,<sup>1</sup> and to correct the names or descriptions of the parties plaintiff;<sup>2</sup> and amendments by inserting an allegation of demand,<sup>3</sup> or correcting allegations of demand not sufficiently positive and direct,<sup>4</sup> are permissible. An amendment alleging that the conversion was willful and malicious is permissible,<sup>5</sup> as is an amendment before trial reducing the amount of damages claimed.<sup>6</sup> However, as in other actions, plaintiff will not be permitted by an amendment to introduce an entirely new cause of action.<sup>7</sup>

## § 106. Plea or Answer

- a. In general
- b. Under the codes

### a. In General

At common law the general issue in trover is the plea of not guilty, which denies all which the plaintiff, in legal effect, alleges in the declaration, namely, property in himself and an illegal conversion by the defendant.

At common law the general issue in trover is the plea of not guilty.<sup>8</sup> It denies all which plaintiff, in legal effect, alleges in the declaration, namely, property in himself and an illegal conversion by defendant.<sup>9</sup> A special plea which amounts to the general issue is bad on special demurrer.<sup>10</sup> There

is a line of authority which repudiates all special pleas in trover going to the original cause of action.<sup>11</sup> A release is a proper subject of a special plea,<sup>12</sup> and it has been recognized that, in addition, the statute of limitations<sup>13</sup> and a former recovery<sup>14</sup> may be specially pleaded.

However, it has been recognized by other authorities that defendant may admit the property in plaintiff and the conversion alleged in the declaration and justify the conversion,<sup>15</sup> or plead a special defense denying either the property or possession of plaintiff or the conversion,<sup>16</sup> although it has been held that a special plea showing either property out of plaintiff or that there was no conversion, or showing both facts, would be bad on special demurrer as amounting to the general issue,<sup>17</sup> and that a special plea denying the conversion,<sup>18</sup> or plaintiff's property,<sup>19</sup> or setting up title in defendant<sup>20</sup> or in a third person,<sup>21</sup> or which shows merely a lawful receipt of the goods,<sup>22</sup> or to the effect that defendant was not indebted to plaintiff,<sup>23</sup> is bad. The only legitimate plea, in any of these cases, it has been said, is the general issue.<sup>24</sup> In any event a special plea is good which admits that there once was a cause of action and sets up subsequent matter in discharge or avoidance.<sup>25</sup> Where plaintiff alleges wrongful conversion after defendant obtained the property, defendant may plead the manner in which possession was obtained.<sup>26</sup> A plea admitting

97. Kan.—Emporia Nat. Bank v. Layteth, 64 P. 973, 63 Kan. 17. 65 C.J. p 86 note 77.

98. U.S.—Corpus Juris cited in Cummings v. Greif Bros. Co., 202 F.2d 824, 827. Mich.—Guarantee Bond & Mortgage Co. v. Hilding, 224 N.W. 613, 246 Mich. 334. 84 C.J. p 86 note 78.

99. U.S.—Corpus Juris cited in Cummings v. Greif Bros. Co., 202 F.2d 824, 827. Conn.—Nash v. Adams, 24 Conn. 33.

1. Wis.—Horneffer v. Duress, 13 Wis. 603. 65 C.J. p 86 note 80.

2. Mich.—Final v. Backus, 18 Mich. 218. 65 C.J. p 86 note 81.

3. Wash.—Hulbert v. Brackett, 36 P. 284, 8 Wash. 438.

4. Wash.—Howard v. Seattle Nat. Bank, 38 P. 1040, 39 P. 100, 10 Wash. 280.

5. N.Y.—Wilde v. Hexter, 50 Barb. 448.

6. Nev.—Carlyon v. Lannan, 4 Nev. 156.

7. Me.—Nickerson v. Bradbury, 31 A. 521, 88 Me. 593. 65 C.J. p 86 note 87.

8. Min.—Carrett v. American Fruit Growers, 186 So. 269, 135 Fla. 398. Ill.—Mitchell v. Fox, 275 Ill. App. 592. 65 C.J. p 87 note 96<sup>1</sup>.

9. N.Y.—Hurst v. Cook, 19 Wend. 463. Tenn.—A. Greener & Sons v. Southern Ry. Co., 290 S.W. 988, 165 Tenn. 486.

10. N.Y.—Kennedy v. Strong, 10 Johns. 289. 65 C.J. p 87 note 98.

11. N.Y.—Hurst v. Cook, 19 Wend. 463.

12. N.Y.—Hurst v. Cook, supra.

13. Ark.—Vaden v. Ellis, 18 Ark. 355. N.Y.—Hurst v. Cook, 19 Wend. 463.

14. Ind.—Piquet v. McKay, 2 Blackf. 465. 65 C.J. p 87 note 6.

15. Mo.—Fry v. Baxter, 10 Mo. 302. 65 C.J. p 88 note 6.

### Full defense

(1) In trespass and trover, plea of justification must set forth matter which, if proved, would constitute full defense to action.—Bryan v. Day, 151 So. 854, 228 Ala. 91.

(2) So much of defendant's plea in action of trover and conversion and

trespass de bonis asportatis as averred justification of defendant's taking of oranges from trees on plaintiff's land under contract with plaintiff stated complete defense.—Carrett v. American Fruit Growers, 186 So. 269, 135 Fla. 398.

16. Del.—Carey v. Baxey, 5 Del. 445.

17. N.Y.—Hurst v. Cook, 19 Wend. 463.

18. Ind.—Coffin v. Anderson, 4 Blackf. 395.

65 C.J. p 88 note 9.

19. Ind.—Coffin v. Anderson, supra.

65 C.J. p 88 note 10.

20. Vt.—Turner v. Waldo, 40 Vt. 51.

21. N.Y.—Hurst v. Cook, 19 Wend. 463.

22. Ind.—Coffin v. Anderson, 4 Blackf. 395.

23. Ala.—Womnuck v. Davis, 153 So. 611, 228 Ala. 362.

24. Ind.—Coffin v. Anderson, 4 Blackf. 395.

25. N.Y.—Hurst v. Cook, 19 Wend. 463.

26. Iowa.—Commercial Credit Corp. v. Interstate Finance Corp., 9 N.W. 2d 369, 233 Iowa 375.

the conversion is not sufficient where it pleads facts which do not justify it, but merely operate to reduce the damages.<sup>27</sup> The fictions of losing and finding alleged in the declaration are not traversable.<sup>28</sup>

**Definiteness and certainty.** Rules applicable to pleadings in civil actions generally requiring definiteness and certainty in alleging material facts apply to special pleas in actions for conversion.<sup>29</sup> In a jurisdiction where recovery in assumpsit for money had and received for property converted is not permissible unless there has been a sale and reception of money, a plea in an action for conversion alleging that plaintiff had previously instituted suit in assumpsit against defendant, but which fails to allege a sale of the property by defendant before the institution of that action, is fatally defective.<sup>30</sup> Pleas undertaking to justify under legal process must describe the process with sufficient certainty to identify it,<sup>31</sup> and a plea defective in this manner is demurrable.<sup>32</sup>

**Duplicity.** As in other civil actions, the statement in the same plea of two or more grounds of defense renders the plea bad for duplicity.<sup>33</sup>

#### b. Under the Codes

The general rules applicable to the defendant's pleadings in actions under the codes are applicable in actions for conversion of personal property.

The general rules applicable to defendant's pleadings in actions under the codes are applicable in actions for conversion of personal property.<sup>34</sup> As in other cases, an answer setting up new matter in defense must contain a statement of the facts relied on.<sup>35</sup> An answer is not subject to the objection of indefiniteness or uncertainty where sufficient matter is pleaded to render the precise nature of the defense apparent.<sup>36</sup> While facts should not be alleged

argumentatively, it has been held that an answer alleging that the taking was with plaintiff's consent and in pursuance of an agreement to do so, although amounting to an argumentative denial, is not, for that reason, insufficient to withstand a demurrer, if otherwise good.<sup>37</sup>

**Answer in confession and avoidance** is good if the facts alleged are such as to show that there was no such wrong as that alleged as the cause of action;<sup>38</sup> in order to constitute such an answer, the cause of action must be confessed,<sup>39</sup> although it need not be confessed precisely as alleged, but it is sufficient if the answer confesses a *prima facie* cause of action.<sup>40</sup>

**Defenses equivalent to, or provable under, general denials.** In a jurisdiction in which a defense setting up new matter provable under a general denial is demurrable, a defense setting up an excuse for failure to deliver goods to plaintiff is demurrable where a general denial is pleaded.<sup>41</sup> Where a general denial is pleaded, it is not error to strike pleas of special matter tending to show that the alleged conversion was not unlawful,<sup>42</sup> or was justifiable.<sup>43</sup> A paragraph of an answer which is merely an argumentative denial of the conversion alleged, every material fact alleged being admissible under a general denial pleaded, is subject to a motion to strike, but is not demurrable under a code which does not make argumentativeness a ground for demurrer.<sup>44</sup>

**Partial defenses and matter in mitigation.** When the code so requires, facts relied on as a partial defense must be expressly so pleaded.<sup>45</sup> An answer which sets up that a note and mortgage, the conversion of which was sued for, were barred by limitations alleges matter affecting the amount of dam-

27. Mo.—Fry v. Baxter, 10 Mo. 302.

28. Del.—Carey v. Dazey, 5 Del. 445.

29. Ala.—Tallassee Falls Mfg. Co. v. First Nat. Bank, 49 So. 246, 159 Ala. 315.

65 C.J. p 88 note 21

30. Ala.—Southern R. Co. v. Attalla, 41 So. 661, 147 Ala. 653

31. Ala.—Bryan v. Day, 151 So. 854, 228 Ala. 91

#### Showing of regularity

In trover, plea of justification under legal process, to be good as against proper demurrer, must show process regular on its face and issued by competent authority.—Bryan v. Day, supra.

32. Ala.—Bryan v. Day, 145 So. 150, 225 Ala. 687.

33. N.Y.—Kennedy v. Strong, 10 Johns 289.

65 C.J. p 88 note 24.

34. Neb.—Norton v. Bankers' Fire Ins. Co. of Lincoln, 213 N.W. 615, 115 Neb. 490.

65 C.J. p 89 note 26.

35. Tex.—Mynatt v. Hudson, 17 S. W. 396, 66 Tex. 66.

65 C.J. p 89 note 28.

36. N.Y.—Bryant v. Bryant, 25 N.Y. Super. 612, 4 Abb.Pr., N.S., 138.

65 C.J. p 89 note 29.

#### Information and belief

An answer denying plaintiff's ownership on information and belief may be proper.—Manha v. Grass Valley Meat Co., 249 P.2d 45, 113 Cal.App.2d 773.

37. Ind.—Leary v. Moran, 7 N.E. 236, 106 Ind. 560.

38. Ind.—McFadden v. Schroeder, 29 N.E. 491, 4 Ind.App. 305.

65 C.J. p 89 note 32.

39. Ind.—Benham v. Heath, 133 N. E. 179, 77 Ind.App. 91.

65 C.J. p 89 note 33.

40. Ind.—Cooper v. Smith, 21 N.E. 887, 119 Ind. 313.

41. Ind.—Cleveland, C. & St. L. R. Co. v. Wright, 58 N.E. 559, 25 Ind.App. 525.

65 C.J. p 89 note 36.

42. Ind.—Gerard v. Jones, 78 Ind. 378.

43. Ind.—Gerard v. Jones, supra.

65 C.J. p 89 note 38.

44. Ind.—Ford v. Griffin, 100 Ind. 85.

45. N.Y.—Carter v. Elphinstone Ward Bank, 67 N.Y.S. 300, 33 Misc. 128.

65 C.J. p 89 note 40.

ages and is bad where the facts are not expressly pleaded as a partial defense or in mitigation of damages as required by a code provision as to such matter.<sup>46</sup> Where an indebtedness of plaintiff to defendant is a charge against the chattel alleged to have been converted, if defendant has wholly made away with plaintiff's property he must, in order to take advantage of the indebtedness in defense, plead it in mitigation of damages.<sup>47</sup>

*Inconsistent defenses.* In jurisdictions where the rule authorizing defendant to set forth in his answer as many defenses as he may have is held not to authorize the pleading of inconsistent defenses, the pleading of inconsistent defenses in actions of conversion is not permissible.<sup>48</sup>

### § 107. — Amended, Supplemental, or Additional Pleas or Answers

The general rules governing amendments of answers or the filing of supplemental or additional pleas or answers in civil actions apply in actions for conversion.

The general rules governing amendments of answers or the filing of supplemental or additional pleas or answers in civil actions apply in actions for conversion.<sup>49</sup> Under such rules it has been held that a plea of the general issue may be amended by attaching a notice of the defense that the property was seized on process of creditors of one who has assigned the property to plaintiff.<sup>50</sup> An answer may be amended so as to allege that defendant had waived the conversion by bringing an action to recover the identical sum of money on an implied contract for money had and received.<sup>51</sup> It has been held that it is not an abuse of discretion for the trial court to refuse, after judgment, to permit defendant to amend his answer so as to allege the defense of election of remedies where defendant knew the facts thereof before the issues were made up.<sup>52</sup>

*Supplemental answer.* Defendant may plead by way of supplemental answer that he acquired title to the property in controversy pending suit, such

fact at least being material and relevant as being in mitigation of damages.<sup>53</sup>

*Additional plea.* In Florida, where, by rule of court, the plea of not guilty raises no issue as to plaintiff's property in the goods, where defendant misapprehending his plea of the general issue has failed to file a special plea denying plaintiff's title to the goods, he may be given leave to file such plea at the trial even after the close of plaintiff's testimony.<sup>54</sup>

### § 108. Replication or Reply and Subsequent Pleadings

It has been held that a replication is proper to a plea setting up matters in justification; under the codes, ordinarily, a reply is unnecessary where new matter is not set up by the answer.

It has been held that a replication is proper to a plea setting up matters in justification.<sup>55</sup> Under the codes, ordinarily, a reply is unnecessary where new matter is not set up by the answer;<sup>56</sup> and under a statute providing that new matter in an answer not pleaded as a part of a counterclaim is to be deemed controverted by the adverse party, as on a direct denial, plaintiff may, without reply, show that a bill of sale relied on by defendant in justification has been released.<sup>57</sup>

Except as the code may otherwise provide, new matter in avoidance of the allegations of the answer must be specially pleaded.<sup>58</sup> If the reply purports to be addressed to the entire answer, it must be a complete answer to every allegation thereof.<sup>59</sup> It must not amount to a departure from the declaration or complaint.<sup>60</sup>

### § 109. Issues, Proof, and Variance

In actions of trover for conversion the issues are determined by the pleadings.

The questions to be tried in an action for conversion of personality relate to ownership and right of possession and a wrongful taking by defendant.<sup>61</sup>

46. N.Y.—Thompson v. Halbert, 16 N.E. 675, 109 N.Y. 329, 21 Abb.N. Cas. 266.

47. Or.—Barber v. Motor Investment Co., 298 P. 216, 136 Or. 361—Morgan v. Johns, 165 P. 369, 84 Or. 557.

48. Minn.—Zimmerman v. Lamb, 7 Minn. 421—Derby v. Gallup, 5 Minn. 119, 65 C.J. p. 90 note 44.

49. Kan.—Trapani v. Universal Credit Co., 100 P.2d 735, 151 Kan. 715.

50. Mich.—Frankel v. Coats, 1 N.W. 940, 41 Mich. 75.

51. Wis.—Carroll v. Fethers, 78 N.W. 604, 102 Wis. 436.

52. Kan.—Trapani v. Universal Credit Co., 100 P.2d 735, 151 Kan. 715.

53. Cal.—George v. Pierce, 55 P. 775, 56 P. 53, 123 Cal. 172.

54. Fla.—Robinson v. Hartridge, 13 Fla. 501.

55. U.S.—Erskine v. Hohnbach, Wis., 14 Wall. 613, 20 L.Ed. 745.

56 C.J. p. 91 note 70.

57. Ohio—Dunning v. Choate, 8 Ohio Dec., Reprint, 316, 7 Cinc.L. Bul. 77.

57. Wis.—Janek v. Buzzelli, 134 N.W. 1124, 148 Wis. 610.

58. Tex.—Mulliner v. Shumake, Civ. App., 55 S.W. 983, 65 C.J. p. 91 note 74.

59. Ind.—Gerard v. Jones, 78 Ind. 378.

60 C.J. p. 91 note 75.

60. Colo.—Colorado Fuel & Iron Co. v. Chappell, 55 P. 606, 12 Colo.App. 385.

65 C.J. p. 91 note 76.

61. Mont.—Sorensen v. Jacobson, 232 P.2d 332, 125 Mont. 148, 26 A.L.R. 2d 1186.

The issues are determined by the pleadings.<sup>62</sup> An answer which denies plaintiff's ownership on information and belief is sufficient to place plaintiff's title in issue.<sup>63</sup> Where defendant admits a taking or withholding, the only issue for trial is the amount of damages which plaintiff suffered by such taking or withholding.<sup>64</sup>

### § 110. — What Must Be Proved

In accordance with principles of general application, in actions for conversion, the plaintiff must prove every fact essential to his cause of action if put in issue.

In accordance with principles of general application, in actions for conversion, plaintiff must prove every fact essential to his cause of action if put in issue.<sup>65</sup>

**Ownership and right to possession.** In order to sustain an action for conversion, plaintiff must prove property in himself, either general or special, and possession or the right to possession of the property converted at the time of its conversion.<sup>66</sup> If, instead of alleging ownership generally, he sets forth a particular title, it is incumbent on him to prove the particular title as alleged,<sup>67</sup> since defendant is only called on to look to the pleadings to see what he is required to meet.<sup>68</sup> If defendant denies plaintiff's title only as to certain particulars, the latter need not offer evidence as to other particulars.<sup>69</sup>

**Conversion.** Plaintiff must prove the commission of such acts by defendant with respect to the prop-

erty alleged to have been converted as amounted to a repudiation of plaintiff's title or to an exercise of dominion over the property.<sup>70</sup> Where it is shown that defendant converted the property to his own use, it is not necessary to prove that the taking was tortious, although it was so alleged; this averment may be treated as surplusage;<sup>71</sup> and it has similarly been held that, where the declaration alleges, and the evidence establishes, a conversion, it is not necessary to prove a further allegation that plaintiff had lost and defendant had found the property, such statement also being surplusage.<sup>72</sup> Proof of a demand and refusal is not essential to recovery if a conversion is otherwise shown,<sup>73</sup> as, for instance, where defendant denies plaintiff's title and sets up ownership and right of possession in himself,<sup>74</sup> or where an unlawful taking is established.<sup>75</sup>

Where the circumstances of themselves do not amount to an actual conversion, plaintiff must show a demand and refusal prior to the commencement of the action,<sup>76</sup> and that at the time of the demand and refusal it was within defendant's power to give up the property.<sup>77</sup> A wrongful intent on the part of defendant is not an element of conversion, and, therefore, proof of wrongful intent is not necessary.<sup>78</sup> Where two or more persons are sued jointly for a conversion, a joint conversion must be proved.<sup>79</sup> Proof that the conversion took place on the date alleged in the declaration has been held unnecessary.<sup>80</sup>

62. Wyo.—Griggs v. Meek, 264 P. 91, 37 Wyo. 282.

63. Cal.—Manha v. Grass Valley Meat Co., 249 P.2d 45, 113 Cal.App. 2d 773.

64. Mont.—Proctor v. Irvin, 57 P. 183, 22 Mont. 547.

65. Ala.—Southern Ry. Co. v. Woodstock Mills, 161 So. 519, 230 Ala. 494.

66. U.S.—Gentry v. Billing, C.C.A. Cal., 73 F.2d 925.

67. Ala.—Southern Ry. Co. v. Woodstock Mills, 161 So. 519, 230 Ala. 494.

68. Cal.—General Motors Acceptance Corp. v. Dallas, 245 P. 184, 198 Cal. 365.

69. Del.—Drug, Inc. v. Hunt, 168 A. 87, 5 W.W.Harr. 339.

70. Mo.—New First Nat. Bank v. C. L. Rhodes Produce Co., 58 S.W.2d 742, 332 Mo. 163.

71. Tex.—O'Connor v. Fred M. Manning, Inc., Civ App., 255 S.W.2d 277, error refused.

72. 65 C.J. p 91 note 79.

**Theory of bare possession against trespasser**

Plaintiff, suing for conversion of oil well derrick and failing to prove title under judgment foreclosing ma-

terialman's lien, was not entitled to recover on theory that bare possession was sufficient title as against trespasser, under allegations that plaintiff owned and possessed derrick, that defendant unlawfully took possession and converted it and plaintiff thereby sustained damages, which did not apprise defendant that plaintiff would rely alone on alleged bare possession.—Lee C. Moore & Co. v. Jarecki Mfg. Co., Tex.Civ.App., 82 S.W.2d 1002, error refused.

73. Conn.—Gregory Point Marine R. Co. v. Selleck, 43 Conn. 320.

74. 65 C.J. p 91 note 80.

75. Tex.—Trott v. Flato, Civ.App., 244 S.W. 1085.

76. Tex.—Sonnentheil v. Texas Guaranty, etc. Co., 30 S.W. 945, 10 Tex.Civ.App. 274.

77. Okl.—Van Tilborg v. First Nat Bank of Marlow, 136 P.2d 887, 192 Okl. 408.—Farmer's Nat. Grain Corp. v. Kirkendall, 79 P.2d 570, 183 Okl. 17.—Farmer's Nat. Grain Corp. v. Singree, 79 P.2d 572, 183 Okl. 18.—Federal Nat. Bank of Shawnee v. Lindsey, 43 P.2d 1036, 172 Okl. 30.

78. 65 C.J. p 91 note 83.

79. Kan.—Foster Lumber Co. v. Kelly, 58 P. 124, 9 Kan App. 377.

80. Pa.—Heller v. Fabel, 138 A. 217, 290 Pa. 43.

73. Ill.—Community Acceptance Corp. v. Falzone, 98 N.E.2d 788, 343 Ill.App. 258.

65 C.J. p 92 note 87.

74. Okl.—Motor Exchange v. Commercial Inv. Co., 3 P.2d 178, 151 Okl. 176.—Cassidy v. First Nat Bank, 287 P. 392, 143 Okl. 42.

75. Wash.—Burnett v. Edw. J. Dunnigan, Inc., 4 P.2d 829, 165 Wash. 164.

76. Iowa.—Cutter v. Fanning, 2 Iowa 580.

77. Md.—Western Maryland Dairy v. Maryland Wrecking & Equipment Co., 126 A. 135, 146 Md. 318.

78. Md.—Western Maryland Dairy v. Maryland Wrecking & Equipment Co., supra.

79. Cal.—Edwards v. Jenkins, 7 P. 2d 702, 214 Cal. 713.

80. N.Y.—Black v. Strange, 152 N. Y.S. 515, 167 App.Div. 149.—Williams v. Sheldon, 10 Wend. 654.

81. Vt.—Dunsro v. Scribner, 187 A. 803, 108 Vt. 408.

*Property converted.* Where the action is for the conversion of money, if the money be described as a specific lump sum of a certain value, the precise amount must be proved to have been converted, since the sum named is the only descriptive feature of the money.<sup>81</sup> In trover for a note, where an unnecessarily particular description of it is given in the declaration, an entire failure of any proof, as to such needless averments, will not defeat the action.<sup>82</sup>

*Value of property and damages.* While plaintiff will be entitled to nominal damages if an actual conversion is established, if he seeks to recover more than nominal damages, he must prove his damages,<sup>83</sup> and this is true even on default.<sup>84</sup> Plaintiff must prove the market value of the property at the time<sup>85</sup> and place<sup>86</sup> of conversion, and proof of what plaintiff paid for the property is insufficient.<sup>87</sup> Where there is no proof as to the value of the property converted, which proof is necessary to show the amount of damages, there can be no recovery.<sup>88</sup>

*Exemplary damages.* In order to authorize a recovery of exemplary damages, plaintiff must introduce evidence showing a right thereto; merely alleging that the conversion was wrongful and malicious is not enough.<sup>89</sup>

*Justification or excuse* for refusing to deliver constitutes matter of defense to be established by defendant, after a case of presumptive conversion has been made out by evidence of a demand and refusal.<sup>90</sup>

# § 111. — Evidence Admissible under Declaration, Petition, or Complaint

In conformity with general principles of law, on evidence admissible under the pleadings, the plaintiff cannot, in an action for conversion, introduce evidence to prove another and different cause of action.

In conformity with general principles, plaintiff

cannot, in an action for conversion, introduce evidence to prove another and different cause of action.<sup>91</sup> Where joint liability for conversion is alleged against two defendants the allegation may be sustained by proof of such liability without reference to their partnership relation,<sup>92</sup> or by showing a partnership relation without alleging it in the declaration.<sup>93</sup>

*Description of property.* Under a declaration for the conversion of an article, a recovery may be had for the value of another article attached to it and essential to its use;<sup>94</sup> but it has been held that, under a declaration for a conversion of a "trunk containing sundry clothes," only the value of the trunk may be shown.<sup>95</sup> A declaration alleging the conversion of boots is not supported by proof of a conversion of unfinished boots, in process of manufacture.<sup>96</sup>

*Ownership.* Under a general averment of ownership of property alleged to have been converted, plaintiff may show any interest in the property which will support an action for its conversion.<sup>97</sup> It has been held that a deed of assignment is admissible to show plaintiff's right to possession, although the petition alleged that possession was held under "a chattel mortgage or deed of trust" to secure certain debts.<sup>98</sup> Likewise, it has been held that, where the complaint, after alleging a mortgage of the goods to plaintiff and default thereon, also alleges a delivery of them to plaintiff by the mortgagor in satisfaction of the mortgage debt, there is no error in permitting plaintiff to make proof of his title simply as mortgagee.<sup>99</sup> So, in an action for conversion of a county warrant, an allegation that defendant, without authority, procured the clerk to issue the warrant to him, was sufficient, in the absence of a motion to make more specific, to let in proof as to the method used by defendant to procure the clerk to issue the warrant to him.<sup>1</sup> On the other

81. Ill.—Harper v. Scott, 63 Ill.App. 401.

82. Me.—Ewell v. Gillis, 14 Me. 72.

83. N.Y.—Duffus v. Bangs, 15 N.Y. S. 444, 61 Hun 23, dismissed 30 N.E. 66, 131 N.Y. 568—Connors v. Meir, 2 E.D.Smith 314.

Right to nominal damages generally see infra § 161.

84. N.Y.—Duffus v. Bangs, 15 N.Y. S. 444, 61 Hun 23, dismissed 30 N.E. 66, 131 N.Y. 568.

85. Ill.—Speer v. Slakis, 180 Ill.App. 304.

86. Ill.—Speer v. Slakis, supra.

Tex.—Waldrop v. Goltzman, Civ. App. 202 S.W. 335.

87. Ill.—Speer v. Slakis, 180 Ill.App. 304.

88. La.—J. H. McMahon & Co. v. Winn Motor Co., 8 La.App. 775.

89. Tex.—Puckett v. Patton, Civ. App. 16 S.W.2d 856.

90. Tenn.—Garvin v. Luttrell, 10 Humphr. 16.

91. Okl.—Pierce v. Barks, 159 P. 323, 60 Okl. 97.

65 C.J. p 92 note 8.

92. Fla.—Wilson Cypress Co. v. Logan, 162 So 489, 120 Fla. 124.

93. Fla.—Wilson Cypress Co. v. Logan, supra.

94. Mass.—Patterson v. Dudley, 12 Gray 375.

95. U.S.—Hall v. Patterson, D.C., 2 F.Cas.No.813, 1 Cranch C.C. 604.

96. Mass.—Fitzgerald v. Jordan, 11 Allen 128.

97. Wash.—Mansfield v. Yates-American Machine Co., 279 P. 595, 153 Wash 345.

65 C.J. p 92 note 12.

98. Tex.—R. F. Scott Grocer Co. v. Carter, Civ.App., 34 S.W. 375.

65 C.J. p 13 note 13.

99. Wis.—Smith v. Konst, 7 N.W. 233, 294, 50 Wis. 360.

65 C.J. p 93 note 14.

1. Ark.—Shelton v. Landers, 270 S. W. 522, 167 Ark. 638.

hand, where plaintiff pleads a special title in the property, he cannot introduce evidence to prove a different title.<sup>2</sup> Where plaintiffs, suing for the conversion of property, claim its entire value, they cannot show, on defendants' counterclaiming for the keep of the property, an animal, that defendants were part owners.<sup>3</sup>

**Conversion.** A general averment of conversion is sufficient to admit any evidence on the trial of issue joined that tends to prove such conversion;<sup>4</sup> but where the evidence concerns a matter not in issue the evidence should be excluded.<sup>5</sup> Thus, under an allegation of conversion, it may be shown that possession of plaintiff's property was obtained by fraud,<sup>6</sup> forgery,<sup>7</sup> theft,<sup>8</sup> conspiracy,<sup>9</sup> or collusion between defendant and a third person,<sup>10</sup> or that the property had been acquired in a lawful manner and then unlawfully withheld,<sup>11</sup> or unlawfully sold when so acquired.<sup>12</sup>

A general allegation of conversion will permit proof of several or successive conversions.<sup>13</sup> Where the count is a general one, there is no rule of law which limits plaintiff's proof to one act of conversion.<sup>14</sup> However, where the complaint alleges the conversion and sale of property and a demand for payment for it, evidence that plaintiff demanded the property which defendant refused and claimed as his own is incompetent and immaterial and fails to support the pleading.<sup>15</sup>

**Damages and value of property.** In order to recover exemplary or punitive damages, or special damages, such damages must be specially pleaded in actions for conversion; if this is not done plain-

tiff is not entitled to introduce evidence to establish exemplary or punitive damages,<sup>16</sup> or special damages.<sup>17</sup> On the other hand, evidence of loss of rental and loss of opportunity to sell, being alleged as special elements of damage in a declaration in trover for an article which was returned to plaintiff, is admissible as a proper subject of consideration in the assessment of damages.<sup>18</sup>

An allegation that property was of a certain value warrants proof of either the market or intrinsic value at the time and place of conversion.<sup>19</sup> Where the property converted was kept for use and not for sale, it is not necessary to allege that it had no market value as a condition to the right to introduce evidence of actual value.<sup>20</sup> Where the complaint asks for the cash market value of the property converted, evidence of its value as junk is not admissible.<sup>21</sup>

## § 112. — Evidence Admissible under General Issue or General Denial

- a. In general
- b. Property and right to possession
- c. Conversion
- d. Justification under judicial proceedings
- e. Distress for rent or taking animals damage feasant
- f. Waiver or ratification; estoppel
- g. Value of property and damages

### a. In General

Under a plea of the general issue or general denial, the defendant may introduce any competent evidence

2. Conn.—Gregory Point Marine R. Co. v. Selleck, 43 Conn. 320. 65 C.J. p 93 note 16.

3. Tex.—Gooch v. Isbell, Civ.App. 77 S.W. 973.

4. Mass.—Duggan v. Wright, 32 N.E. 159, 157 Mass. 228, 231. 65 C.J. p 93 note 18.

5. S.D.—Davis v. Lenhoff, 50 N.W. 2d 213, 74 S.D. 190.

#### Delay in execution of contract

In action by buyer of cattle against seller for conversion of the cattle, where hour of delivery was not an essential part of the sales agreement, the shrinkage of the cattle during two hour delay of buyer in arriving to take delivery was not an issue and therefore exclusion of evidence relating to shrinkage was proper.—Davis v. Lenhoff, supra.

6. N.J.—Corona Kid Co. v. Lichtman, 86 A. 371, 84 N.J.Law 363. 65 C.J. p 93 note 19.

7. N.Y.—Schmidt v. Garfield Nat. Bank, 19 N.Y.S. 252, 64 Hun 298, affirmed 33 N.E. 1084, 138 N.Y. 631.

8. N.J.—Corona Kid Co. v. Lichtman, 86 A. 371, 84 N.J.Law 363.

9. N.J.—Corona Kid Co. v. Lichtman, supra.

10. N.J.—Corona Kid Co. v. Lichtman, supra.

11. Minn.—Johnson v. Gerber, 120 N.W. 995, 114 Minn. 174.

N.J.—Corona Kid Co. v. Lichtman, 86 A. 371, 84 N.J.Law 363.

12. Minn.—Johnson v. Gerber, 120 N.W. 995, 114 Minn. 174.

13. Mass.—Bacon v. Hooker, 54 N.E. 253, 173 Mass. 554. 65 C.J. p 93 note 25.

14. Mass.—Bacon v. Hooker, supra.

15. Ariz.—Hereford v. Fusch, 68 P. 547, 8 Ariz. 76.

16. Or.—Garber v. Bradbury, 209 P. 477, 106 Or. 490. 65 C.J. p 94 note 31.

17. Conn.—Smith & Egge Mfg. Co. v. Webster, 85 A. 763, 87 Conn. 74. 65 C.J. p 94 note 32.

18. Vt.—Lyman v. James, 89 A. 932, 87 Vt. 486.

19. Tex.—Foster v. Balderaz, Civ. App. 32 S.W.2d 876.

#### Inference of value in pleading

In action for conversion of truck and trailer, proof of value of the truck and trailer was admissible under the pleadings which by inference indicated amount sought to be recovered but which did not contain specific allegation as to value.—Edwards v. Max Thiene Chevrolet Co., La. App. 191 So. 569.

20. Tex.—Kilgore v. De Vault, Civ. App. 82 S.W.2d 1048.

Wash.—Kimball v. Betts, 169 P. 849, 99 Wash. 348.

21. Tex.—Southern Round Bale Press Co. v. Behrend, Civ.App., 257 S.W. 655.



controverting any fact which the plaintiff is required to prove in order to establish his cause of action.

Unless it is otherwise provided by statute or rule of court, under a plea of the general issue or general denial, defendant may introduce any competent evidence controverting any fact which plaintiff is required to prove in order to establish his cause of action.<sup>22</sup> It has been said that the plea of the general issue puts in issue every matter which can be pleaded in bar except a release and the statutes of limitations,<sup>23</sup> and that it admits of almost any defense arising before the cause of action accrued.<sup>24</sup> A general denial puts in issue only the facts alleged in the complaint.<sup>25</sup>

*Want of demand prior to instituting suit.* Failure of plaintiff to make demand for the property before instituting suit may be shown under the general denial, notwithstanding a statutory provision that an objection that no demand for the subject matter of the action was made before suit is unavailable unless expressly set up by way of the defense in the answer or replication, the statute having no application to actions for trover and conversion.<sup>26</sup>

In trover against two defendants, as copartners, under a plea of not guilty interposed by both, either defendant can introduce any competent evidence tending to show his nonliability.<sup>27</sup>

### b. Property and Right to Possession

It is generally held that a plea of the general issue or general denial puts in issue the plaintiff's ownership of the property and his right to possession.

Except where it is otherwise provided by statute or rule of court,<sup>28</sup> it has almost universally been held that the plea of the general issue or general denial puts in issue plaintiff's ownership of the property and right to possession and permits defendant to introduce any competent evidence which will overcome such allegations,<sup>29</sup> although there is also some authority to the contrary.<sup>30</sup>

*Title in defendant or third person.* Unless otherwise provided by rule of court or statute, it has very generally been held that under a plea of the general issue or a general denial defendant may show title in himself or a third person,<sup>31</sup> although intimations to the contrary are found in some decisions.<sup>32</sup>

*Fraud or usury in acquisition of plaintiff's title.* The general rule recognized by the weight of authority is that, under the general issue or general denial, defendant may show that plaintiff's acquisition of title or ownership of the property alleged to have been converted was fraudulent,<sup>33</sup> the rule being subject to the limitation that if plaintiff sets out the source of his title, fraud in the acquisition thereof cannot be shown without pleading it,<sup>34</sup> or giving notice that defendant intends to attack the title for fraud by attaching such notice to the plea of the general issues.<sup>35</sup> On the other hand, in some jurisdictions it is held that fraud in the acquisition of title by plaintiff of the property alleged to have been converted cannot be shown unless specially pleaded,<sup>36</sup> and in other jurisdictions the decisions

22. Ariz.—*Corpus Juris* cited in *Wells Fargo & Co., Express, S. A., v. Tribolet*, 50 P.2d 878, 884, 46 Ariz. 311.

Kan.—*Corpus Juris* cited in *Rodgers v. Crum*, 215 P.2d 190, 193, 168 Kan. 668.

Mont.—*Isaiah v. Giebel*, 55 P.2d 1287, 101 Mont. 410, 104 A.L.R. 1150.

Okl.—*Ingram v. Oklahoma Nat. Bank of Clinton*, 56 P.2d 406, 176 Okl. 544.

65 C.J. p. 94 note 38.

23. Ala.—*Bryant v. De Kalb Warehouse Co.*, 71 So.2d 51, 260 Ala. 443.

—*Harris Motors v. Universal C. I. T. Credit Corp.*, 45 So.2d 1, 253 Ala. 420.

—*Cannady v. Jinnright*, 44 So. 2d 737, 253 Ala. 341.—*Kelley v. Cassels*, 147 So. 597, 226 Ala. 410.

Pa.—*In re Throne's Estate*, Orph., 49 Dauph. Co. 251.

65 C.J. p. 94 note 39, p. 87 note 99.

24. Ill.—*Mitchell v. Fox*, 275 Ill.App. 592.

Plea of not guilty see supra § 106.

25. Minn.—*Johnson v. Oswald*, 38 N. W. 630, 38 Minn. 550, 8 Am.S.R. 698.

65 C.J. p. 94 note 41.

### Illegality of contract

In suit for conversion of automobile, evidence showing plaintiff knew identification numbers had been removed from automobile and that number of secondhand truck motor had been stamped thereon was held inadmissible under general denial where plaintiff made out a prima facie case which did not disclose the illegality of the contract.—*Gabert v. Eastus*, Civ.App., 62 S.W.2d 618, reversed on other grounds *Eastus v. Gabert*, 93 S.W.2d 396, 127 Tex. 290.

26. Mo.—*Handlan Duck Mfg. Co. v. Stave Electrical Co.*, 168 S.W. 785, 184 Mo.App. 247.

65 C.J. p. 98 note 66.

27. Fla.—*Shaw v. Saunders*, 85 So. 162, 79 Fla. 816.—*Peacock v. Peaster*, 40 So. 74, 51 Fla. 269.

28. Fla.—*Anderson v. Agnew*, 20 So. 766, 38 Fla. 30.

65 C.J. p. 94 note 43.

29. Ala.—*Wolff v. Zurga*, 150 So. 144, 227 Ala. 370.

65 C.J. p. 94 note 44.

30. Or.—*Krewson & Co. v. Purdom*, 11 P. 281, 13 Or. 563.

65 C.J. p. 95 note 45.

31. La.—*Eduardo Fernandez Y Compania v. Longino & Collins*, 6 So. 2d 137, 199 La. 343.

Mass.—*MacNeil v. Hazelton*, 28 N.E. 2d 477, 306 Mass. 366.

Mont.—*Currie v. Langston*, 16 P.2d 708, 92 Mont. 570.

S.D.—*Walton v. Commercial Credit Co.*, 299 N.W. 300, 68 S.D. 151.

65 C.J. p. 95 note 47.

32. Tex.—*Keystone Pipe & Supply Co. v. Osborne*, Civ.App., 73 S.W.2d 120.

65 C.J. p. 95 note 48.

33. Mich.—*Eureka Iron & Steel Works v. Bresnahan*, 33 N.W. 831, 66 Mich. 489.

65 C.J. p. 95 note 49.

34. Minn.—*Johnson v. Oswald*, 38 N. W. 630, 38 Minn. 550, 8 Am.S.R. 698.

65 C.J. p. 95 note 50.

35. Mich.—*Eureka Iron & Steel Works v. Bresnahan*, 33 N.W. 834, 66 Mich. 489.

36. Iowa.—*Kerrick v. Mitchell*, 24 N. W. 151, 26 N.W. 434, 68 Iowa 273.

65 C.J. p. 96 note 52.

on this question are apparently not in harmony.<sup>37</sup>

### c. Conversion

Under a plea of the general issue or general denial, the defendant is entitled to show that he did not convert the property.

Under the general issue or general denial, defendant is entitled to prove any state of facts tending to show that he had not converted the property.<sup>38</sup> Thus, defendant may show that the property had never been received by him;<sup>39</sup> that, although he took the property, the taking was with plaintiff's consent and in pursuance of an agreement between the parties;<sup>40</sup> that he had a valid excuse for failure to deliver the property on demand, thereby repelling any inference of conversion deducible therefrom;<sup>41</sup> that the taking was not wrongful but by authority of law;<sup>42</sup> that title to plaintiffs had been vested in defendant by proceedings before a justice of the peace under a statute relative to animals suffered to run at large;<sup>43</sup> or that animals had been seized and destroyed in accordance with statutory authority because they were afflicted with an infectious and contagious disease.<sup>44</sup>

### d. Justification under Judicial Proceedings

Justification under judicial proceedings generally cannot be shown under the general issue or general denial.

According to some decisions it cannot be shown

under the general issue or general denial by way of justification that the property was seized and sold under execution either against plaintiff<sup>45</sup> or against a third person.<sup>46</sup> It has been held that this defense, in order to be available in favor of either the officer seizing the property<sup>47</sup> or of plaintiff in execution,<sup>48</sup> must be specially pleaded. Likewise, it has been held that defendant cannot justify the taking of the property by virtue of an execution against a third person under a plea of the general issue unless notice of such defense is attached thereto.<sup>49</sup>

Under statutory provisions it has been held that, where defendant seeks to justify on the ground that plaintiff's property had been attached and sold under execution in an action brought in another state before a justice of the peace by himself and other creditors of plaintiff, the answer must set out facts showing the jurisdiction and authority of the justice to render such judgment.<sup>50</sup> Other decisions have held that, in an action against a sheriff,<sup>51</sup> or against a sheriff and execution plaintiff,<sup>52</sup> for seizure and sale of plaintiff's property as that of a third person, defendants may, under the general issue, show an execution and judgment, and a special plea of justification is not necessary. It has further been declared that a special plea setting up a sale under execution against a third person is irregular, the view being taken that it is not permissible to plead a justification unless it admits the property to be

### Fraud and breach of contract

Neither fraud nor breach of contract are relevant in an action of trover for the conversion of property which merchantiser had allegedly delivered to a fabricator for processing.—*Krueger Corp. v. Detroit Trust Co.*, C.C.A. Mich., 210 F.2d 152.

### 37. In New York

(1) It was held in one decision that, in an action for an alleged wrongful taking and conversion of chattels, where plaintiff claimed title to the chattels by virtue of a bill of sale by her husband to M. and another bill of sale thereof by the latter to her, evidence that such bills of sale were a sham and fraudulent, and that there was really no sale and delivery, may be admitted under a general denial.—*Tum Suden v. Jurgens*, 66 N.Y.S. 452, 32 Misc. 660.

(2) In another that defendant cannot show under the general denial that bill of sale under which plaintiffs claimed title was in fraud of creditors.—*Boyle v. Williams*, 20 N.Y.S. 727, 1 Misc. 112.

(3) In still another that, when a vendor is sued in trover by the ven-

dee for retaking a part of the goods sold, he must plead his right of rescission of the contract of sale on the ground that he had been induced to enter into it by fraud in order to avail himself of this fact as a defense.—*McLeod v. Maloney*, 3 N.Y.S. 517, 51 Hun 636, affirmed 24 N.E. 1099, 121 N.Y. 698.

38. Ala.—*Southern Ry. Co. v. Woodstock Mills*, 161 So. 519, 230 Ala. 494.—*Irryan v. Day*, 145 So. 150, 225 Ala. 637.

N.Y.—*Hi-Lo Corp. v. Rankow*, 49 N.Y.S.2d 595, 65 C.J. p. 96 note 55.

### Purchase from agent of plaintiff

In action for conversion of personality, defendant may, under plea of general denial, introduce evidence tending to show that he purchased property from plaintiff's duly authorized agent.—*Wilson v. Holmes*, 50 P.2d 1081, 174 Okl. 527.

39. Wis.—*Willard v. Giles*, 24 Wis. 309.

40. Idaho.—*Haynes v. Kettenbach Co.*, 81 P. 114, 11 Idaho 73.

Ind.—*Leary v. Moran*, 7 N.E. 236, 106 Ind. 560.

41. Ind.—*Cleveland, C., & St. L.*

Ry. Co. v. Wright, 58 N.E. 559, 25 Ind. App. 525, 65 C.J. p. 96 note 58.

42. Ala.—*Barrett v. City of Mobile*, 30 So. 36, 129 Ala. 179, 87 Am.S.R. 51.

65 C.J. p. 96 note 59.

43. Pa.—*Miller v. Knapp*, 19 A. 555, 133 Pa. 275.

44. Ala.—*Barrett v. City of Mobile*, 30 So. 36, 129 Ala. 179, 186, 87 Am.S.R. 54.

65 C.J. p. 96 note 61.

45. N.Y.—*Reaty v. Swarthout*, 32 Barb. 293.

46. N.Y.—*Wheeler v. Lawson*, 8 N.E. 360, 103 N.Y. 40.

65 C.J. p. 97 note 63.

47. N.Y.—*Wheeler v. Lawson*, supra, 65 C.J. p. 96 note 64.

48. N.Y.—*Graham v. Harrower*, 18 How.Pr. 144.

49. Mich.—*Grenier v. Hild*, 82 N.W. 1052, 124 Mich. 222.

50. Ind.—*Baker v. Flint*, 63 Ind. 137.

51. Tenn.—*Pemberton v. Smith*, 3 Head 17.

52. Colo.—*Thomas v. Seldom*, 250 P. 381, 80 Colo. 189.

N.C.—*Weaver v. Cryer*, 12 N.C. 337.

in plaintiff, and the conversion, but justifies the latter.<sup>53</sup>

**Attachment.** The decisions are apparently uniform in holding that seizure by virtue of a writ of attachment of property either as belonging to plaintiff, or to a third person, cannot be shown as a defense to an action for its conversion, either by the officer making the attachment or by the attaching creditor, under a plea of the general issue or a general denial, but the defense must be specially pleaded.<sup>54</sup>

#### e. Distress for Rent or Taking Animals Damage Feasant

The taking of property as distress for rent, or taking of animals damage feasant may be shown under the general issue.

According to the weight of authority, the taking of animals damage feasant<sup>55</sup> may be shown in bar of an action for conversion under a plea of the general issue; and it has further been held that a special plea that the property alleged to have been converted was seized as a distress for rent is bad as being in contravention of rules stated supra § 106, which condemn special pleas which do not confess and avoid the conversion,<sup>56</sup> and which amount to the general issue.<sup>57</sup> There are, however, decisions which are not in accord with this view and which hold that a special plea that defendant seized animals alleged to have been converted damage feasant admits the property in plaintiff, and the conversion, justifies the latter, and is a good plea in confession and avoidance.<sup>58</sup>

#### f. Waiver or Ratification; Estoppel

Various decisions have allowed or refused to allow a showing of waiver, ratification, or estoppel, under a plea of the general issue or general denial.

In some jurisdictions it is held that waiver of the conversion may be shown under the general issue or general denial,<sup>59</sup> as, for instance, a waiver by the

institution of a prior action of assumpsit;<sup>60</sup> but in other jurisdictions it has been held that such waiver must be specially pleaded to be available as a defense.<sup>61</sup> In one jurisdiction it has been held that subsequent ratification by plaintiff of the acts constituting the conversion may be shown as a defense under a plea of the general issue;<sup>62</sup> but in another jurisdiction it has been held that ratification constitutes new matter which must be pleaded in order to be available as a defense.<sup>63</sup>

**Estoppel.** According to some decisions, an estoppel, to be availed of as a defense in an action of trover, need not be specially pleaded but may be shown under a plea of the general issue or general denial.<sup>64</sup> Others, however, hold that estoppel is not available unless set up in the answer as a special ground of defense.<sup>65</sup>

#### g. Value of Property and Damages

The value of the property, and damages, may be shown under the general issue or general denial.

The general issue or general denial puts in issue the value of the property at the time of the conversion,<sup>66</sup> and defendant is entitled to prove any facts in reduction of damages.<sup>67</sup> Where the unlawful conversion consists in cutting timber, it may be shown under the general denial in mitigation of damages that the trespass was not willful but was committed under the honest and reasonable belief in the right to do the act.<sup>68</sup>

### § 113. — Evidence Admissible under Plea of Not Possessed

The almost universal rule in America permits defendant under a general denial to introduce evidence denying ownership or right to possession of the property in plaintiff. This rule is discussed supra § 112.

Examine Pocket Parts for later cases.

53. N.C.—Weaver v. Cryer, supra.

54. Mass.—Savage v. Darling, 23 N. E. 234, 151 Mass. 5.  
65 C.J. p 97 note 72.

55. N.H.—Drew v. Spaulding, 45 N. H. 473.

56. N.Y.—Briggs v. Brown, 3 Hill 87.

57. N.Y.—Briggs v. Brown, supra.

58. Del.—Carey v. Dazey, 5 Del. 445.  
65 C.J. p 97 note 78.

59. Mich.—Thomas v. Watt, 62 N. W. 345, 104 Mich. 201.

Wis.—Carroll v. Fethers, 79 N.W. 604, 102 Wis. 436.

60. Mich.—Thomas v. Watt, 62 N.W. 345, 104 Mich. 201.

Wis.—Carroll v. Fethers, 79 N.W. 604, 102 Wis. 436.

61. N.Y.—Wood v. Proudman, 107 N. Y.S. 757, 122 App.Div. 826.  
65 C.J. p 98 note 81.

62. Ala.—Steinhardt v. Bell, 80 Ala. 208.

63. N.M.—Southern Car Mfg & Supply Co. v. Wagner, 89 P. 259, 261, 14 N.M. 195.  
65 C.J. p 98 note 83.

64. Ala.—Barkdale v. Strickland & Hazard, 124 So. 234, 237, 220 Ala. 86.  
65 C.J. p 98 note 84.

65. Neb.—Norwegian Plow Co. v. Hainek, 33 N.W. 475, 21 Neb. 689.

66. Iowa.—Thew v. Miller, 36 N.W. 771, 73 Iowa 742.

67. Ala.—Hodges v. Westmoreland, 98 So. 573, 209 Ala. 498.

68. Minn.—Hoxsie v. Empire Lumber Co., 43 N.W. 476, 41 Minn. 548.  
65 C.J. p 98 note 90.

### § 114. — Evidence Admissible under Answer of New Matter

Where an answer sets up new matter by way of defense, any competent evidence which is relevant and material is admissible.

Where an answer sets up new matter by way of defense, any competent evidence which is relevant and material is admissible.<sup>69</sup> Thus, where the validity of a chattel mortgage by which plaintiff claims is attacked by defendant because fraudulent and void as to him, defendant may show that creditors who are shown by the mortgage, which is made an exhibit to the answer, to have accepted it, did not in fact do so;<sup>70</sup> and in an action for conversion of an animal under an answer justifying the taking of animals by defendant under his authority as poundmaster, setting out the ordinance under which he acted, any pertinent and relevant evidence tending to establish the defense is admissible.<sup>71</sup>

### § 115. — Variance

In actions for conversion, proof adduced either by the plaintiff or the defendant in order to be effectual must correspond substantially with the allegations of the pleadings.

In accordance with general principles, proof adduced either by plaintiff or defendant in order to be effectual must correspond substantially with the allegations of the pleadings.<sup>72</sup> There can be no recovery in an action for conversion on evidence which establishes another and different cause of

action,<sup>73</sup> especially on a cause of action inconsistent with the one alleged.<sup>74</sup> Thus, there can be no recovery where the evidence established a contract and a breach thereof instead of a conversion,<sup>75</sup> or a mere breach of duty on the part of defendant,<sup>76</sup> or an equitable cause of action,<sup>77</sup> since this amounts to a failure of proof of the cause of action alleged.<sup>78</sup> There can be no recovery for a conversion other than the one alleged,<sup>79</sup> or for a conversion of property other than that described in the declaration or petition.<sup>80</sup> Where defendant has alleged a particular ground of defense, he is not entitled to defend on another and different ground.<sup>81</sup> However, it is only variances of a substantial character, such as are calculated to surprise and mislead the opposite party to his prejudice, which will be fatal to a recovery; immaterial variances will be disregarded.<sup>82</sup>

*Time and place of conversion.* In accordance with general principles of pleading, it has very generally,<sup>83</sup> but not universally,<sup>84</sup> been held that, in actions for conversion, allegations as to time of conversion are immaterial, and it is not necessary that the proof should be in strict conformity with the averment as to the date of the conversion;<sup>85</sup> and that a variance in proof as to date, if the conversion be shown to have been committed prior to the commencement of the action,<sup>86</sup> and within the period fixed by the statute of limitations for bringing such actions,<sup>87</sup> is immaterial.

69. Idaho.—*Rest v. Broadhead*, 108 P. 333, 18 Idaho 11.

Tex.—*Farlin & Orendorff Co v. Hanson*, 53 S.W. 62, 21 Tex.Civ. App. 401.

70. Tex.—*Farlin & Orendorff Co. v. Hanson*, *supra*.

71. Idaho.—*Rest v. Broadhead*, 108 P. 333, 18 Idaho 11.

72. Neb.—*Worth v. Buck*, 52 N.W. 566, 34 Neb. 703.

#### Variance held fatal

In action to recover damages for alleged conversion by publishing company of historical plaques, there was a fatal variance between allegations that plaintiff submitted plaques in connection with, but collaterally to and not as part of company's contest, that company's agent in charge of contest promised that plaques would be returned, and that plaintiff was unable to recover plaques despite repeated demands, and proof that plaques were submitted independently of contest to acquaint company with plaintiff's ability in commercial art in order to secure employment, and were not delivered until after the contest was ended.—

*Aland v. P-G Pub. Co.*, 10 A.2d 5, 337 Pa. 259.

Proof held to support allegations  
Tex.—*Geistmann v. Schkade*, Civ. App., 121 S.W.2d 491.

73. Neb.—*Worth v. Buck*, 52 N.W. 566, 34 Neb. 703.  
65 C.J. p 99 note 98.

74. Mo.—*Priest v. Way*, 87 Mo. 16.  
N.Y.—*Walter v. Bennett*, 16 N.Y. 250.

75. Mont.—*Guthrie v. Halloran*, 3 P. 2d 406, 90 Mont. 473.  
65 C.J. p 99 note 1.

76. Neb.—*Worth v. Buck*, 52 N.W. 566, 34 Neb. 703.  
65 C.J. p 99 note 2.

77. Mo.—*Priest v. Way*, 87 Mo. 16.  
65 C.J. p 99 note 3.

78. Tex.—*Continental Bank & Trust Co v. Dealey Bros.*, Civ. App., 171 S.W. 552.  
65 C.J. p 99 note 4.

79. Ala.—*Larkins v. Eckwurz*, 42 Ala. 322, 94 Am.D. 651.  
65 C.J. p 99 note 5.

80. Ala.—*Wilkinson v. King*, 8 So. 189, 81 Ala. 156.  
65 C.J. p 99 note 6.

81. Tex.—*Hubbard First Nat. Bank v. Cleland*, 82 S.W. 337, 36 Tex. Civ. App. 478.  
65 C.J. p 99 note 7.

82. Or.—*Cross v. Campbell*, 146 P. 2d 83, 173 Or. 177.  
65 C.J. p 99 note 9.

83. Conn.—*Aldrich v. Higgins*, 59 A. 498, 77 Conn. 370.  
65 C.J. p 100 note 11.

84. Ala.—*Mohile, J. & K. C. R. Co v. Day Shore Lumber Co.*, 48 So. 377, 158 Ala. 422.  
65 C.J. p 100 note 12.

Allegations as to time held sufficiently proven  
Ala.—*Attchley v. Wood*, 51 So. 2d 705, 255 Ala. 237.

85. Colo.—*Corpus Juris cited in Obodov v. Foster*, 97 P.2d 426, 428, 105 Colo. 264.  
Tex.—*Snow v. Auto Loan Co.*, Civ. App., 259 S.W.2d 340.

86. Cal.—*Banroft Co v. Haslett*, 39 P. 602, 104 Cal. 151.  
65 C.J. p 100 note 13.

87. Cal.—*Jackson v. Bacon*, 218 P. 1027, 63 Cal.App. 462.

Plaintiff's averments as to place or county where the conversion occurred are immaterial, and if one county is alleged and another proved, the variance is not fatal,<sup>88</sup> at least if it was not shown that the tort was committed within a different jurisdiction.<sup>89</sup>

**Ownership.** An allegation that the property converted was "the property of the plaintiff" is supported by evidence showing that plaintiff had a

mortgage title to the property.<sup>90</sup> On the other hand, it has been held that there is a fatal variance between an allegation of ownership in plaintiff and proof that he was joint owner with another,<sup>91</sup> and that there is a fatal variance between an allegation in an action brought by plaintiff for the benefit of another that plaintiff was the owner of the property at the time of the conversion and proof that the beneficial plaintiff was such owner.<sup>92</sup>

## D. EVIDENCE

### § 116. Presumptions and Burden of Proof

In actions for conversion the plaintiff has the burden of establishing the material allegations of his complaint, and the burden of proof is on the plaintiff to prove every fact essential to his right to recover.

In actions for conversion the burden of proof is on plaintiff to prove every fact essential to his right to recover,<sup>93</sup> except such facts as are admitted,<sup>94</sup> and the burden does not shift to defendant,<sup>95</sup> although plaintiff has made out a prima facie case.<sup>96</sup> If defendant places his defense on the insolvency of a third person, it is incumbent on him to prove it.<sup>97</sup> In an action against persons jointly and severally liable for conversion, the burden of proving that a recovery against one has been followed by payment is on defendant.<sup>98</sup>

Presumptions as to particular matters are discussed infra §§ 117-121.

### § 117. — Title, Ownership, and Right of Possession

- a. Presumptions
- b. Burden of proof

#### a. Presumptions

As a general rule, possession is presumptive evidence of title; but a possession which is shown to be permissive in its inception raises no presumption of title, unless the possession is shown to have been adverse.

As a general rule, possession is presumptive evi-

88. Tex.—First Nat. Bank of Colorado v. Brown, 23 S.W. 862, 85 Tex. 30.

89. Tex.—First Nat. Bank of Colorado v. Brown, supra.

90. Mass.—Duggan v. Wright, 32 N.E. 169, 157 Mass. 228, 231. 65 C.J. p 100 note 17.

91. Mo.—Johnson v. St. Joseph Stock Yards Bank, 76 S.W. 699, 102 Mo.App. 395.

92. Ill.—Gates v. Thede, 91 Ill.App. 603.

93. U.S.—Corpus Juris cited in Adair v. Reorganization Inv. Co., C.C.A.Mo., 125 F.2d 901, 905.

Ind.—Heeter v. Fleming, 67 N.E.2d 317, 116 Ind.App. 644.

N.Y.—Arakjanian v. Arakian, 48 N.Y. 82d 501, 268 App.Div. 41.

N.D.—Hart v. Rigler, 295 N.W. 308, 70 N.D. 407.

65 C.J. p 102 note 45

**Facts required to be proved by plaintiff in particular instances**

(1) In action by partnership for alleged conversion of horses and corn sheller on which partnership held a lien, partnership had burden of proving alleged purchase and payment of price to representative of bank by which payments were to be credited to partnership's account.—Shimp Bros. v. Place, 281 N.W. 471, 225 Iowa 1098.

(2) Where a state livestock inspector, acting on belief that a cow which had been sold by plaintiff had been stolen, performed his statutory duty of impounding proceeds of sale pending determination of ownership of cow or right to proceeds, the inspector's action did not authorize an action for conversion of proceeds, at least until such time as plaintiff submitted satisfactory proof of his ownership of cow or legal right to proceeds of sale.—Bohart v. Songer, 101 F.2d 64, 110 Mont. 405.

(3) In suit for conversion of wheat, plaintiff had burden of establishing number of bushels of wheat appropriated by defendant.—Moore v. Conway, Tex.Civ.App., 108 S.W.2d 954.

**Right to recover damages**

In trover action, plaintiff must establish right in himself to recover damages.—Harvey v. Anaconda, 184 A. 889, 134 Me. 245.

**Facts required to be proved by defendant**

Where plaintiff alleged misappropriation by defendant of proceeds of the sale of a mortgage bond by relative occupying a fiduciary relationship to plaintiff, after relationship of parties and circumstances under which plaintiff parted with proceeds was shown, defendant had the burden to show affirmatively that no de-

ception was practiced, no undue influence was employed, and that everything was fair, open, voluntary and well understood.—Arakjanian v. Arakian, 48 N.Y.2d 501, 268 App.Div. 41.

**Effect of denial by defendant**

In action by administrator of deceased payee's estate against maker for wrongful conversion of note, where maker denied that note constituted a part of payee's estate, or that he had converted the note, or that he had wrongfully withheld or retained the note, administrator had burden of proving such facts, though maker did not file a plea of non est factum, and by other paragraphs of the answer maker set up affirmative defenses of payment and gift.—Foudy v. Daugherty, 76 N.E.2d 288, 118 Ind.App. 68.

94. Ky.—Johnson v. Kelley, 106 S.W. 864, 32 Ky.L. 701.

95. Conn.—Floss v. Crossman, 149 A. 774, 111 Conn. 178. 65 C.J. p 102 note 47.

96. N.C.—Acme Mfg. Co. v. McQueen, 127 S.E. 246, 189 N.C. 311. Tex.—Citizens' Loan Inv. Co. v. Young, Civ.App., 247 S.W. 662.

97. N.Y.—Walrod v. Hall, 9 Barb. 271.

98. N.Y.—Squire v. Ordemann, 87 N.E. 435, 194 N.Y. 394.

dence of title.<sup>99</sup> A possession which is shown to be permissive in its inception raises no presumption of title, unless the possession is shown to have been adverse;<sup>1</sup> and where the property of plaintiff has once been established, possession by defendant will not draw after it presumptive evidence of ownership, such as will excuse him from proving title.<sup>2</sup> Where plaintiff shows generally his ownership and right of immediate possession, the presumption is that he continued to be the owner with right of possession until the contrary is shown.<sup>3</sup> It will be presumed that a consignee is the owner of the goods shipped;<sup>4</sup> and that a father, instead of his unmarried son who lived with him, is the owner of chattels on the premises;<sup>5</sup> and plaintiff's testimony, received without objection, that he owned the property raises a presumption that such ownership was legal in the absence of countervailing evidence.<sup>6</sup>

**Possession.** A possession of the goods in defendant at the time they were demanded of him nearly a year after he sold and boxed the goods for shipment will not be presumed in the absence of evidence as to what became of them.<sup>7</sup> Where a part

of the allegedly converted property is found in the possession of defendant a presumption arises that he acquired possession and appropriated the owner's property in its entirety;<sup>8</sup> and such presumption is not rebutted by defendant's testimony that he had no idea how the parts came into his possession.<sup>9</sup> Where the evidence does not warrant it no inference will be indulged in to the effect that defendant had possession of the alleged converted property.<sup>10</sup>

## b. Burden of Proof

- (1) Title or ownership
- (2) Possession or right to possession

### (1) Title or Ownership

The burden of proof is on the plaintiff to show that he has either a general or special property in the goods; he must show title or ownership in himself of the property involved.

The burden of proof is on plaintiff to show that he has either a general or special property in the goods;<sup>11</sup> he must show title or ownership in himself of the property involved,<sup>12</sup> and this burden re-

99. Tex.—Chavez v. Schaller, Civ. App., 199 S.W. 892, 65 C.J. p 100 note 20.

1. S.C.—Willis v. Snelling, 40 S.C.L. 280.

65 C.J. p 101 note 21.

2. Me.—Weston v. Higgins, 40 Me. 102.

3. Mont.—Laubenheimer v. Bach, 47 P. 803, 19 Mont. 177.

#### Sign constructed by plaintiff

In action for value of sign allegedly removed by defendants from premises of plaintiff, where it was proved that sign was constructed by plaintiff on his own property, continued ownership by plaintiff would be presumed until contrary was established.—Oradell Gardens v. Mooney, 178 A. 270, 13 N.J.Misc. 364.

4. Minn.—Benjamin v. Levy, 38 N. W. 702, 39 Minn. 11.

5. Ga.—Reid v. Butt, 25 Ga. 28.

6. Tex.—Mack-International Motor Truck Corporation v. Coonrod, Civ. App., 264 S.W. 129.

7. N.Y.—Whitney v. Slauson, 30 Barb. 276.

8. La.—McGuire v. Monroe Scrap Material Co., 180 So. 413, 189 La. 573.

9. La.—McGuire v. Monroe Scrap Material Co., supra.

10. Cal.—Metter v. Los Angeles Examiner, 95 P.2d 491, 35 Cal.App. 2d 304.

#### Inference of possession

In action against newspaper for publishing picture of plaintiff's wife

In connection with story of wife committing suicide, it could not be inferred that, because picture of wife similar to one taken from plaintiff's home appeared in newspaper, defendant newspaper had possession of photograph which was taken from plaintiff's home, so as to entitle plaintiff to recover on his allegations of conversion.—Metter v. Los Angeles Examiner, supra.

11. Ill.—Faubel v. Michigan Boulevard Bldg. Co., 278 Ill.App. 159.

Me.—Giguere v. Morrisette, 48 A.2d 257, 142 Me. 95.—Patten v. Dennison, 14 A.2d 12, 137 Me. 1.

Mass.—Massachusetts Lubricant Corp. v. Socony-Vacuum Oil Co., 25 N.E.2d 719, 305 Mass. 269.—Handy v. C. I. T. Corporation, 197 N.E. 64, 291 Mass. 157, 101 A.L.R. 447.

12. Ala.—Hampton v. Stewart, 194 So. 509, 240 Ala. 2.—Wolff v. Zurga, 150 So. 144, 227 Ala. 370.

Cal.—Scutt v. Bassett, 194 P.2d 781, 86 Cal.App.2d 373.—D'Alessandro v. Pickford, 70 P.2d 648, 22 Cal.App. 2d 242.

Ill.—Kilmas v. Kilmas, 110 N.E.2d 463, 349 Ill.App. 243.

Ind.—Ax v. Schloot, 81 N.E.2d 379, 118 Ind.App. 458.—Foudy v. Daugherty, 76 N.E.2d 268, 118 Ind.App. 68.—Ax v. Schloot, 64 N.E.2d 668, 116 Ind.App. 366.—Brackin v. Franklin Sec. Co., 8 N.E.2d 97, 103 Ind.App. 418.

Kan.—Gantz v. Bondurant, 155 P.2d 450, 159 Kan. 389.

Mass.—MacNeil v. Hazelton, 28 N.E. 2d 477, 306 Mass. 366.—Standard

Plumbing Supply Co. v. Gulesian, 8 N.E.2d 508, 297 Mass. 214.

Minn.—Fryberger v. Anderson, 260 N.W. 625, 194 Minn. 443.

Mo.—Pearl v. Interstate Securities Co., App., 198 S.W.2d 867, reversed on other grounds 206 S.W.2d 976.—Jackson v. Rothschild, App., 99 S.W.2d 859.

Mont.—Hohart v. Songer, 101 P.2d 64, 110 Mont. 405.—Henderson v. Campbell, 26 P.2d 351, 95 Mont. 180. N.Y.—In re Barrett's Estate, 82 N.Y. S.2d 137.

Pa.—First Nat. Bank of Blairtown v. Goldberg, 17 A.2d 377, 340 Pa. 337.

S.C.—Waldrop v. M. & J. Finance Corp., 183 S.E. 460, 178 S.C. 527.

Tex.—Guinn v. Lokey, 249 S.W.2d 185, 151 Tex. 260.—Satterfield v. Knippel, Civ.App., 169 S.W.2d 795.—Gabert v. Eastus, Civ.App., 62 S.W.2d 618, reversed on other grounds Eastus v. Gabert, 93 S.W.2d 396, 127 Tex. 290.

Wash.—Junkin v. Anderson, 150 P.2d 678, 21 Wash.2d 256. 65 C.J. p 102 note 51.

#### Better title than defendant

In action for wrongfully taking automobiles, wherein defendants denied that plaintiff had any title to automobiles and asserted title in themselves, plaintiff had burden to show a better title to automobiles than defendants had.

Ohio.—Pennington v. First Discount Corp., 102 N.E.2d 469, 89 Ohio App. 384.

mains throughout the entire trial,<sup>13</sup> and is not shifted to defendant on the making of a prima facie case of ownership in plaintiff.<sup>14</sup> Where a prima facie case has been made out for plaintiff, the burden is on defendant to establish such matters of defense as that plaintiff's title to the property was void as having been acquired in fraud of his vendor's creditors;<sup>15</sup> or that title to the property is in defendant,<sup>16</sup> or in a third person with whom defendant so connects himself that he can stand on his right;<sup>17</sup> or to overcome the presumption of title arising from possession.<sup>18</sup> Where title in plaintiff's ancestor is admitted, recovery can be defeated only by proof that such title has been divested.<sup>19</sup>

Where the property converted is a negotiable instrument, if defendant desires to defend on the ground that he is an innocent holder for value, the burden is on him to establish this fact,<sup>20</sup> and, if he is asserting title in his predecessor, that the latter was a bona fide holder.<sup>21</sup>

## (2) Possession or Right to Possession

In order to maintain an action for conversion, the plaintiff must show that at the time of the conversion he was in possession of the property, or was entitled to the immediate possession thereof.

In order to maintain an action for conversion, plaintiff must show that at the time of the conversion he was in possession of the property, or was

entitled to the immediate possession thereof.<sup>22</sup> Where plaintiff's right to possession depends on a condition, he must show a compliance with the condition.<sup>23</sup> It is not incumbent on defendant to prove that he never had possession of the property, at least until plaintiff makes a prima facie case tracing the property into defendant's hands.<sup>24</sup> It has been held that where plaintiff has proved his ownership and loss of the property, the burden then shifts to defendant to show that he came into possession of the property under such circumstances as to relieve him from liability for a conversion.<sup>25</sup>

## § 118. — Conversion

- a. Presumptions
- b. Burden of proof

### a. Presumptions

Conversion may be inferred from the taking of property and neglect to return it; and a defendant's refusal to surrender another's property, when called on to do so, affords a presumption that he has converted it to his own use, but this presumption is rebuttable.

Conversion may be inferred from the taking of property and neglect to return it.<sup>26</sup> A defendant's refusal to surrender another's property, when called on to do so, affords a presumption that he has converted it to his own use,<sup>27</sup> but this presumption is rebuttable.<sup>28</sup> A conversion may be inferred from

Pa.—Commercial Banking Corp. v. Active Loan Co. of Philadelphia, 4 A.2d 616, 135 Pa.Super. 124.

13. Tex.—Humphreys-Storts Ins. Agency v. Hoffman, Civ.App., 254 S.W. 154—Citizens' Loan Inv. Co. v. Young, Civ.App., 247 S.W. 662.

14. Tex.—Citizens' Loan Inv. Co. v. Young, supra.

15. Minn.—Derby v. Gallup, 5 Minn. 119.

16. Tex.—Corpus Juris cited in Lang v. Harwood, Civ.App., 145 S.W.2d 946, 950.  
65 C.J. p 103 note 55.

17. Mo.—Ernest Wolff Mfg. Co. v. Battreal Shoe Co., 180 S.W. 396, 192 Mo.App. 113, 123.  
65 C.J. p 103 note 56.

18. U.S.—Eiseman v. Maul, C.C. Iowa, 8 F.Cas No.4,322.

19. Ala.—Powers v. Hatter, 44 So. 859, 152 Ala. 636.

20. N.Y.—U. S. Fidelity & Guaranty Co. v. Leon, 300 N.Y.S. 331, 165 Misc. 549.  
65 C.J. p 103 note 59.

21. N.Y.—U. S. Fidelity & Guaranty Co. v. Leon, supra.

22. U.S.—Selby Mfg. Co. v. Granda, C.A.Conn., 200 F.2d 932.  
Ala.—Hampton v. Stewart, 194 So.

509, 240 Ala. 2—Wolff v. Zurga, 150 So. 144, 227 Ala. 370.

Cal.—Triggs v. Zilovich, 257 P.2d 60, 117 Cal App 2d 768—Scutt v. Bassett, 194 P.2d 781, 86 Cal App.2d 373—V'Alessandro v. Pickford, 70 P.2d 648, 22 Cal App 2d 242.

Ill.—Faubel v. Michigan Boulevard Bldg. Co., 278 Ill.App 159.

Ind.—Ax v. Schloot, 81 N.E.2d 379, 118 Ind.App. 458—Poudy v. Daugherty, 76 N.E.2d 268, 118 Ind App 68—Ax v. Schloot, 64 N.E.2d 668, 116 Ind App. 366.

Me.—Giguere v. Morrisette, 48 A.2d 257, 142 Me. 95—Sanborn v. Matthews, 41 A.2d 704, 141 Me. 213—Patten v. Dennison, 14 A.2d 12, 137 Me. 1.

Mass.—Marshall Vessels, Inc v. Wright, 120 N.E.2d 286—MacNeil v. Hazelton, 28 N.E.2d 477, 306 Mass. 366—Massachusetts Lubricant Corp. v. Socony-Vacuum Oil Co., 25 N.E. 719, 305 Mass. 269—Standard Plumbing Supply Co. v. Gulesian, 8 N.E.2d 508, 297 Mass. 214—Handy v. C. I. T. Corporation, 197 N.E. 64, 291 Mass. 157, 101 A.L.R. 447.

Mo.—Pearl v. Interstate Securities Co., App., 198 S.W.2d 867, reversed on other grounds 206 S.W.2d 975—Jackson v. Rothschild, App., 99 S.W.2d 859.

Mont.—Bohart v. Songer, 101 P.2d 64, 110 Mont. 405.

N.Y.—In re Barrett's Estate, 82 N.Y. S.2d 137.

S.C.—Vaidrop v. M. & J. Finance Corp., 183 S.E. 460, 178 S.C. 527.

Tex.—Satterfield v. Knippel, Civ.App., 169 S.W.2d 795.  
Wash.—Junkin v. Anderson, 150 P.2d 678, 21 Wash 2d 256.  
65 C.J. p 103 note 60.

### Basin of right to possession

While plaintiff was required only to show right to possession, it would nevertheless be necessary to ascertain on what the right to possession was based—Selby Mfg. Co. v. Granda, C.A.Conn., 200 F.2d 932.

23. Me.—Giguere v. Morrisette, 48 A.2d 257, 142 Me. 95.

24. N.D.—Hart v. Rigler, 295 N.W. 308, 70 N.D. 407.

25. Pa.—First Nat. Bank of Blairstown v. Goldberg, 17 A.2d 377, 340 Pa. 337.

26. Minn.—Stuckney v. Smith, 5 Minn. 486.

27. Ind.—Chicago, I. & L. Ry. Co. v. Pope, 188 N.E. 594, 99 Ind.App. 280.

28. Ind.—Chicago, I. & L. Ry. Co. v. Pope, supra.

a failure of a bailee to deposit in a bank money which was given to him for that purpose;<sup>29</sup> or where one having possession of property, and knowing that he has no claim to it, withholds it from the true owner, he may be presumed to have assented to the wrongful act of another by which such possession was obtained;<sup>30</sup> but a bare possession of another's property will not be presumed to be tortious.<sup>31</sup> It has been said that no presumption arises that defendant converted the entire amount of chattels lost because an insignificant portion thereof was seen to be taken away by his employees.<sup>32</sup>

**Intention to convert.** A legal presumption arises that one who takes or converts to his own use the property of another intends to do so,<sup>33</sup> and a jury may lawfully infer that such a wrongdoer had knowledge of the right and title of the owner of the property which he appropriated, and that he intended to convert it to his own use from his reckless disregard of the owner's right and title, unless the presumption is overcome by evidence of his innocence and good faith.<sup>34</sup>

**Place of conversion.** In the absence of evidence to show where an alleged conversion of stock by a corporation having offices only in two states was committed, the presumption arises that the stock was converted at the company's office in one of these two states and not in another state, so as to render its law applicable.<sup>35</sup>

**Time of conversion.** In the absence of proof as to the date of the conversion of property, the presumption is that it was as of the date of taking the property into possession.<sup>36</sup>

### b. Burden of Proof

The burden of proof is on the plaintiff to show a conversion of the property involved; and he must show either an actual conversion, or demand for, and refusal of, the property where this is relied on to establish a conversion.

The burden of proof is on plaintiff to show a conversion of the property involved;<sup>37</sup> and in order to establish a conversion, plaintiff must prove some affirmative wrongful act,<sup>38</sup> since, as discussed supra § 4, acts alleged to constitute a conversion must be positive and tortious and not a mere nonfeasance, or neglect of some legal duty, or a mere breach of contract. He must show either an actual conversion,<sup>39</sup> or a demand for, and refusal of, the property where this is relied on to establish a conversion.<sup>40</sup> In the latter case, according to the weight of authority, it is also necessary for plaintiff to show that at the time of the demand and refusal defendant had control of the property so as to be able to comply with the demand;<sup>41</sup> but there are also decisions which are apparently in conflict with this rule.<sup>42</sup> Where, however, conversion is otherwise established, proof of demand and refusal is not necessary.<sup>43</sup>

29. Ind.—Spencer v. Morgan, 5 Ind. 146.

30. Mo.—Anderson v. Kincheloe, 30 Mo. 520.

31. Ala.—Glaze v. McMillion, 7 Port 279.

32. U.S.—Greenburg v. Norfolk & Western Ry. Co., C.C.A.W.Va., 29 F.2d 111.

33. U.S.—U. S. v. Ute Coal, etc., Co., Colo., 158 F. 20, 85 C.C.A. 302. Tex.—Gulf, C. & S. F. R. Co. v. Pratt, Civ.App., 183 S.W. 103.

34. U.S.—U. S. v. Ute Coal & Coke Co., Colo., 158 F. 20, 85 C.C.A. 302.

35. U.S.—Arkansas Anthracite Coal & Land Co. v. Stokes, C.C.A.Ark., 2 F.2d 511.

36. N.C.—Parker v. Harden, 28 S.E. 20, 121 N.C. 57.

37. Ark.—Plunkett-Jarrell Grocery Co. v. Terry, 263 S.W.2d 229.

III.—Klimas v. Klimas, 110 N.E.2d 463, 349 Ill.App. 243—Faubel v. Michigan Boulevard Bldg. Co., 278 Ill.App. 159.

Ind.—Ax v. Schlott, 81 N.E.2d 379, 118 Ind.App. 458—Foudy v. Daugherty, 76 N.E.2d 268, 118 Ind.App. 68—Ax v. Schlott, 64 N.E.2d 668, 116 Ind.App. 366—Brackin v.

Franklin Sec. Co., 8 N.E.2d 97, 103 Ind.App. 418.

Me.—Harvey v. Anacone, 184 A. 889, 134 Me. 245.

Minn.—Fryberger v. Anderson, 260 N.W. 625, 194 Minn. 443.

Mont.—Bohart v. Songer, 101 P.2d 64, 110 Mont. 405.

Okl.—Corpus Juris cited in Smith v. Wixson, 123 P.2d 250, 251, 190 Okl. 314.

Tex.—Meador v. Wagner, Civ.App., 70 S.W.2d 794, error dismissed. 65 C.J. p 103 note 61.

38. Okl.—Corpus Juris cited in Smith v. Wixson, 123 P.2d 250, 251, 190 Okl. 314.

65 C.J. p 103 note 62.

39. Tex.—American Mortgage Corporation v. Wyman, Civ.App., 41 S.W.2d 270.

65 C.J. p 103 note 64.

40. Ala.—Clay County Abstract Co. v. McKay, 147 So. 407, 226 Ala. 394.

Mass.—Premium Cut Beef Co. v. Karp, 61 N.E.2d 112, 318 Mass. 229.

N.J.—Mueller v. Technical Devices Corp., 84 A.2d 620, 8 N.J. 201.

65 C.J. p 103 note 65.

**Consent to possession of property**  
In trover, where property has come into possession of defendant by

plaintiff's consent, and plaintiff relies on wrongful detention, plaintiff has burden of showing demand by plaintiff and refusal of defendant to deliver possession.—Clay County Abstract Co. v. McKay, 147 So. 407, 226 Ala. 394.

### Unlawful detention of property

In trover for conversion of plaintiff's property in defendant's lawful possession, plaintiff was bound to prove defendant's unlawful detention thereof.—Mueller v. Technical Devices Corp., 84 A.2d 620, 8 N.J. 201.

### Conversion by wrongful taking

In conversion by wrongful taking, it is not necessary to prove a demand and refusal.—Klam v. Koppel, 118 P.2d 729, 63 Idaho 171.

41. Mass.—Premium Cut Beef Co. v. Karp, 61 N.E.2d 112, 318 Mass. 229.

65 C.J. p 104 note 66.

42. N.Y.—Krusse v. Seeger & Guernsey Co., 15 N.Y.S. 825, affirmed 16 N.Y.S. 529.

65 C.J. p 104 note 67.

43. Vt.—Vermont Acceptance Corporation v. Whitshire, 153 A. 199, 103 Vt. 219, 73 A.L.R. 792.

65 C.J. p 104 note 68.



*Aiding in conversion.* Where plaintiff brings action against a party for damages for aiding in the conversion of his property, it is incumbent on such plaintiff to show that the party charged with aiding in the conversion had actual notice of plaintiff's rights, or had actual notice of the infirmity in the title of the party defendant is charged with aiding in the conversion, before he is entitled to recover a personal judgment for damages.<sup>44</sup>

*Intent.* In order to establish a conversion, it is incumbent on plaintiff to show an intention or purpose to convert the goods and to exercise ownership over them, or to prevent the owner from taking possession of his property.<sup>45</sup>

### § 119. — Identity

The general rules as to presumptions and burden of proof in actions for conversion apply in identifying property.

Identity of plaintiff's property as that taken by defendant will be presumed where defendant refused to let plaintiff examine it to ascertain whether it belonged to him.<sup>46</sup> Plaintiff has the burden of proving the identity of the property converted;<sup>47</sup> and also the burden of proving that the articles alleged to have been converted were personalty.<sup>48</sup>

### § 120. — License

Although there is authority to the contrary, it has been held that one who cuts timber on adjoining land is presumed to have a license or authority therefor from the owner.

It has been held that a tenant of timber land who cut trees on adjoining land will be presumed to have license or authority therefor from the owner of the latter tract;<sup>49</sup> but there also is authority to the contrary.<sup>50</sup>

### § 121. — Damages and Value

- a. Presumptions
- b. Burden of proof

#### a. Presumptions

Ordinarily, the damage caused by the wrongful conversion will be presumed to be the value of the property at the time of the conversion; and in the absence of other evidence, property converted by a wrongful sale will be presumed to be worth the price received for it.

Ordinarily, the damage caused by the wrongful conversion will be presumed to be the value of the property at the time of the conversion.<sup>51</sup> In the absence of other evidence, property converted by a wrongful sale will be presumed to be worth the price received for it.<sup>52</sup>

*As to value of choses in action.* In trover for the conversion of choses in action, such as promissory notes, bills of exchange, checks, drafts, bonds, corporate stock, or other evidences of indebtedness, in the absence of any evidence to the contrary, it will be presumed that the value of the instrument is its face value;<sup>53</sup> although, as discussed *infra* § 130, this presumption may be rebutted by evidence that the instrument is worth less than its face value, or that in fact it has no value. It has been held that it will be assumed in the absence of evidence, that the sale price of converted stock of fluctuating value between the date of conversion and the date the owner learned thereof did not exceed the highest sale price on the date the owner learned of the conversion.<sup>54</sup> The ability of the maker to pay a note will be presumed until the contrary is proved;<sup>55</sup> and a presumption exists that the maker of the note will pay it.<sup>56</sup>

#### b. Burden of Proof

The plaintiff has the burden of proving the damages sustained by him, and for this purpose he must show the

44. Okl.—Davis v. Howe, 226 P. 316, 99 Okl. 118.

45. Cal.—Zaslow v. Kroenert, 176 P. 2d 1, 29 Cal.2d 541, followed in 176 P.2d 8, 29 Cal.2d 878.

#### Intent held immaterial

In conversion by wrongful taking the intent of the party is immaterial. —Klun v. Koppel, 118 P.2d 729, 63 Idaho 171.

46. Colo.—Casco Mercantile & Trust Co. v. Central Sav. Bank & Trust Co., 226 P. 868, 75 Colo. 478. 65 C.J. p 101 note 37.

47. Mo.—Hayes v. O'Dell, App., 236 S.W.2d 367.

N.Y.—In re Uris' Estate, 71 N.Y.S. 2d 620, 188 Misc. 772.

Tex.—Satterfield v. Knippel, Civ.App., 169 S.W.2d 795.

48. Mass.—Standard Plumbing Sup-

ply Co. v. Gulesian, 8 NE2d 508, 297 Mass. 214.

49. Pa.—Winlack v. Geist, 107 Pa. 297, 52 Am.R. 473. 65 C.J. p 101 note 38.

50. Wis.—Millard v. McDonald Lumber Co., 25 N.W. 656, 64 Wis. 626.

65 C.J. p 101 note 39.

51. Mont.—Guthrie v. Halloran, 3 P. 2d 406, 90 Mont. 376.

#### "Reasonable time"

In applying the "reasonable time" rule in the determination of damages resulting from conversion of stock certificates, courts presume that plaintiff had a knowledge of stock trading.—Hayward v. Edwards, 4 N. Y.S.2d 699, 167 Misc. 694.

52. N.Y.—Sun Mut. Ins. Co. v. Talmadge, 4 Daly 539.

53. Miss.—Bank of Forest v. Capital Nat. Bank, 169 So. 193, 176 Miss. 163.

N.J.—Arnold v. Hamilton Inv. Co., 38 A.2d 118, 132 N.J.Law 10, affirmed 40 A.2d 649, 132 N.J.Law 419.

N.Y.—B. C. S. Corp. v. Colonial Discount Co., 8 N.Y.S.2d 65, 169 Misc. 711.

Tex.—Forrest v. Burns, Civ.App., 57 S.W.2d 1111.

65 C.J. p 101 note 42.

54. Del.—Wyndham, Inc. v. Wilmington Trust Co., 59 A.2d 456, 5 Terry 324.

55. N.Y.—Neff v. Clute, 12 Barb. 466.

56. Miss.—Bank of Forest v. Capital Nat. Bank, 169 So. 193, 176 Miss. 163.

value of the property; the burden is on the defendant to prove facts which will authorize a reduction or mitigation of the damages claimed.

Plaintiff has the burden of proving the damages sustained by him,<sup>57</sup> and for this purpose he must show the value of the property,<sup>58</sup> or of his special interest therein, which is necessary<sup>59</sup> and sufficient<sup>60</sup> to fix the limit of defendant's liability; and if special damages are claimed for expenses incurred in pursuit of the property, defendant must establish the value of the time and the reasonableness of the expenses.<sup>61</sup> While it has been said that proof that the property had no market value is not a condition precedent to the recovery of actual value thereof by the owner,<sup>62</sup> there is authority to the effect that it is incumbent on parties to produce evidence of market value, where property has market value,<sup>63</sup> and that where market value of property is pleaded and the evidence shows that there is a market for such property, plaintiff is required to prove the market value.<sup>64</sup>

In order to recover the value of the property converted the owner is not required to show what dispositions he would have made had the conversion not occurred,<sup>65</sup> and if the wrongful detention of property causes the owner to lose a ready market, the damage is recoverable, without necessity for

proof that the owner would have availed himself of that market but for the wrongful detention.<sup>66</sup> Where it is shown that defendant is withholding the property and refused to surrender it to plaintiff on demand, it is not necessary to plaintiff's recovery of damages for conversion to show that defendant has actually used any part of the property.<sup>67</sup> In an action for the conversion of a draft, it is not necessary for plaintiff to show the solvency of the drawee or acceptor.<sup>68</sup>

#### *Matters in reduction or mitigation of damages.*

The burden is on defendant to prove facts which will authorize a reduction or mitigation of the damages claimed.<sup>69</sup> If defendant claims a reduction of damages by reason of his good faith in committing the conversion, the burden is on him to establish this fact.<sup>70</sup> If it is claimed that the property was damaged when converted, the burden rests on defendant to prove it.<sup>71</sup> While in actions of trover for conversion of choses in action, such as notes, bills of exchange, drafts, or other evidences of indebtedness, it will be presumed, in the absence of evidence to the contrary, that the value of the instrument converted is its face value, if defendant claims that the instrument is worth less than its face value, or is worthless, he has the burden of establishing this fact.<sup>72</sup> A statute providing that the

57. Ark.—Plunkett-Jarrell Grocery Co. v. Terry, 263 S.W.2d 229.

La.—Eduardo Fernandez Y Compania v. Longino & Collins, 6 So.2d 137, 139 La. 343.

Mass.—Buckley v. White, 104 N.E.2d 168, 328 Mass. 653.

Mont.—Bohart v. Songer, 101 P.2d 64, 110 Mont. 405.

65 C.J. p 104 note 70.

#### **Counterclaim**

In action for libel and slander, defendant, filing counterclaim for amount of plaintiff's alleged indebtedness to defendant for conversion of checks belonging to defendant, had burden of proving amount, as well as existence, of such indebtedness.—Taylor v. Virginia Metal Products Corp., D.C.Va., 111 F.Supp. 321, affirmed, C.A., 204 F.2d 457, certiorari denied Virginia Metal Products Corp. v. Taylor, 74 S.Ct. 104, 346 U.S. 865, 98 L.Ed. 375.

58. Mass.—Corsiglia v. French, 187 N.E. 702, 284 Mass. 211.

Minn.—Fryberger v. Anderson, 260 N.W. 625, 194 Minn. 443.

N.Y.—Kolodny v. Schwartz, 90 N.Y.S.2d 48, reversed on other grounds 94 N.Y.S.2d 713, 276 App.Div. 930.—Spartis v. Doscas, 68 N.Y.S.2d 462.

65 C.J. p 104 note 71.

#### **Proof of value not required**

Where it appeared that, in remov-

ing parts of tractor, the tractor had been so badly injured and impaired as to render it valueless for use for which it was originally designed, and that tractor was not capable of being repaired, owner was entitled to recover in action in trover for conversion of the tractor, without proving value of any of parts taken and converted.—Klam v. Koppel, 118 P.2d 729, 63 Idaho 171.

**Failure to prove value of property** alleged to have been converted precludes recovery on theory of conversion.—Knighton v. Manning, 33 P.2d 401, 84 Utah 1.

59. N.D.—Miller v. National Elevator Co., 155 N.W. 871, 32 N.D. 352.

60. Ala.—Redd Chemical & Nitrate Co. v. W. T. Clay Mercantile Co., 122 So. 652, 219 Ala. 478.

61. Okl.—Fitch v. Green, 134 P. 34, 39 Okl. 18.

62. Tex.—Galveston, H. & S. A. R. Co. v. Wallhaven, Civ.App., 160 S.W. 116.

65 C.J. p 104 note 75.

63. Mass.—Corsiglia v. French, 187 N.E. 702, 284 Mass. 211. Utah.—Haycraft v. Adams, 24 P.2d 1110, 82 Utah 347.

64. Tex.—Eagle Furniture Stores v. Jones, Civ.App., 110 S.W.2d 610.

65. U.S.—In re New York, N. H. &

H. R. Co., D.C.Conn., 54 F.Supp. 487.

66. U.S.—In re New York, N. H. & H. R. Co., supra.

67. Tex.—Myatt v. Elliott, Civ.App., 143 S.W.2d 205, error dismissed. Judgment correct.

68. Tex.—Forrest v. Burns, Civ.App., 57 S.W.2d 1111, error dismissed.

69. Wash.—Crutcher v. Scott Pub. Co., 253 P.2d 925, 42 Wash.2d 89, 65 C.J. p 104 note 76.

**In action for conversion of mortgaged property**, burden was on defendant, seeking credit for unpaid balance due on mortgaged property, to show that it had paid such balance or had exonerated plaintiff from all liability therefor.—Crutcher v. Scott Pub. Co., 253 P.2d 925, 42 Wash.2d 89.

70. U.S.—Dartmouth College v. International Paper Co., C.C.N.H., 132 F.2 92.

65 C.J. p 104 note 77.

71. Ind.—Kavanaugh v. Taylor, 28 N.E. 553, 2 Ind.App. 502.

72. Tex.—Forrest v. Burns, Civ.App., 57 S.W.2d 1111.

Va.—American Nat. Bank of Portsmouth v. Ames, 194 S.E. 784, 169 Va. 711, certiorari denied 58 S.Ct. 1046, 304 U.S. 577, 82 L.Ed. 1540.

65 C.J. p 104 note 80.

statutory presumption of detriment caused by the wrongful conversion of personalty cannot be repelled in favor of one whose possession was wrongful from the beginning, by his subsequent application of the property to the benefit of the owner, without his consent, applies only to a situation where the property was voluntarily applied by the person guilty of conversion to the benefit of the injured person, and can have no application to a situation where the application was compelled by a legal duty.<sup>73</sup>

## § 122. Admissibility

Evidence otherwise competent is admissible if it tends to prove or disprove a material allegation or denial of either party's pleading.

Evidence otherwise competent is admissible if it tends to prove or disprove a material allegation or denial of either party's pleading;<sup>74</sup> and is inadmissible if it does not in some degree sustain or defeat one or more of the issues presented for decision.<sup>75</sup>

## § 123. — Existence, Identity, and Description of Property

Evidence relating to the existence or nonexistence, identity, description, or quantity of property in controversy is admissible.

Evidence of any fact which relates to the exist-

ence or nonexistence,<sup>76</sup> to the identity,<sup>77</sup> to the description,<sup>78</sup> or to the quantity<sup>79</sup> of property in controversy, which is alleged to have been wrongfully converted, is admissible. Similarly, evidence as to the location of the area in which the alleged conversion occurred is admissible.<sup>80</sup>

## § 124. — Title and Right to Possession

- a. Of plaintiff
- b. Of defendant

### a. Of Plaintiff

The general rule is that evidence, oral or written, which tends in any degree to prove or to disprove the plaintiff's title or right of possession is admissible.

The general rule is that evidence, oral or written, which tends in any degree to prove<sup>81</sup> or to disprove<sup>82</sup> plaintiff's title or right of possession is admissible; and on the other hand evidence which has no tendency to prove<sup>83</sup> or disprove<sup>84</sup> plaintiff's title or right of possession is immaterial and should not be admitted.

### b. Of Defendant

The right of the defendant to the admission of evidence in support of title or right of possession in himself is as broad as that of the plaintiff.

The right of defendant to the admission of evidence in support of title or right of possession in

73. Cal.—Goldberg v. List, 79 P. 2d 1087, 11 Cal.2d 389, 116 A.L.R. 900.

74. La.—Smith v. Dover, App., 185 So. 74.

Me.—McCully v. Bessey, 49 A.2d 230, 142 Me. 209.

Mont.—Hage v. Orton, 175 P.2d 174, 119 Mont. 419.

65 C.J. p 106 note 81.

75. Ariz.—Simpson v. Shaw, 226 P. 2d 557, 71 Ariz. 293.

Or.—Mattechek v. Pugh, 55 P.2d 730, 153 Or. 1, 168 A.L.R. 725.

65 C.J. p 106 note 82.

76. Iowa.—McNamara v. New Mel-leraey Corp., 55 N.W. 322, 88 Iowa 502.

65 C.J. p 106 note 83.

77. Vt.—Picknell v. Fulton, 94 A. 104, 89 Vt. 51.

65 C.J. p 106 note 84.

78. Conn.—Bugbee v. Allen, 14 A. 778, 56 Conn. 167.

Iowa.—Casey v. Ballou Banking Co., 67 N.W. 98, 98 Iowa 107.

79. U.S.—City Bank of Wheeling v. Rhodhamel, W.Va., 223 F. 979, 139 C.C.A. 355.

65 C.J. p 106 note 86.

80. Ala.—Ganey v. Henley, 71 So. 2d 281, 260 Ala. 514.

81. Cal.—Kirkman Corp. v. Owens, 144 P.2d 405, 62 Cal.App.2d 193.

Me.—McCully v. Bessey, 49 A.2d 230, 142 Me. 209.

Mont.—Henderson v. Campbell, 26 P. 2d 351, 95 Mont. 180.

Wash.—Kohout v. Brooks, 52 P.2d 905, 185 Wash. 4.

65 C.J. p 106 note 87.

**Evidence held admissible**

In action for conversion of nursery stock, where plaintiff claimed that defendants' lessor agreed to grow the stock for plaintiff under terms of a certain contract, plaintiff was entitled to have agreement and memorandum relating thereto admitted in evidence in order to establish plaintiff's title.—Kirkman Corp. v. Owens, 144 P.2d 405, 62 Cal. App.2d 193.

**Evidence held unnecessary**

In action for conversion of automobile, proof that certificate of ownership of automobile had been issued plaintiffs held unnecessary, since automobile was new when purchased by plaintiff and certificate of ownership was required only of owners of secondhand motor vehicles.—Vetter v. Browne, 85 S.W.2d 197, 231 Mo.App. 1147.

82. Mass.—MacNeil v. Hazelton, 28 N.E.2d 477, 306 Mass. 366.

65 C.J. p 106 note 88.

**Evidence held admissible**

In action for conversion of a "clamshell bucket," evidence tending to show that plaintiff in earlier action against third person for conversion of the same "bucket" had received satisfaction, that title thereto had passed to such third person and that plaintiff did not have right to possession of the "bucket" at date of writ in subsequent action was properly admitted.—MacNeil v. Hazelton, supra.

83. Me.—Morrison v. Barron Furniture Co., 1 A.2d 182, 136 Me. 509.

Or.—Mattechek v. Pugh, 55 P.2d 730, 153 Or. 1, 168 A.L.R. 725.

65 C.J. p 106 note 89.

84. Colo.—Carlson v. McNeill, 162 P.2d 226, 114 Colo. 78.

Pa.—Municipal Band of Harrisburg v. Aurand, Com.Pl., 54 Dauph.Co. 428.

Wash.—Watkins v. Siler Logging Co., 116 P.2d 315, 9 Wash.2d 703.

65 C.J. p 106 note 90.

**Evidence held inadmissible**

In action for conversion of personalty trial court did not err in refusing to permit defendants to show that plaintiff's interest was only the amount or equity he had above tax liens against the property held by one of the defendants.—Carlson v. McNeill, 162 P.2d 226, 114 Colo. 78.

himself is as broad as that of plaintiff,<sup>85</sup> and is, on the other hand, similarly subject to the same limitations as to its admissibility.<sup>86</sup>

### § 125. — Acts Constituting Conversion

Evidence of any unauthorized act of dominion over the plaintiff's property, or participation therein, by the defendant, either on behalf of himself or another or through the agency of another, is relevant to the issue of conversion, and, therefore, admissible.

Evidence of any unauthorized act of dominion over plaintiff's property, or participation therein, by defendant, either on behalf of himself or another or through the agency of another, is relevant to the issue of conversion, and, therefore, admissible,<sup>87</sup> if the acts sought to be proved occurred before the suit was commenced, but evidence of acts committed after the commencement of the suit is not admissible to prove a conversion.<sup>88</sup> Where plaintiff has proved conversion by evidence of demand and refusal, there is no objection to proof of a conversion by other evidence, the evidence being merely cumulative.<sup>89</sup> Defendant on the other hand is entitled to introduce any evidence having a tendency to show that the acts complained of do not constitute a conversion.<sup>90</sup> Evidence to establish a conversion is immaterial and inadmissible where the question of conversion has been settled in another case and where the only question in the instant case is the amount of damages recoverable.<sup>91</sup>

85. La.—Smith v. Dover, App., 185 So. 74.

65 C.J. p 106 note 91.

86. Ariz.—Simpson v. Shaw, 226 P. 2d 557, 71 Ariz. 293.

65 C.J. p 107 note 92.

87. U.S.—Colonial Oil Co. v. American Oil Co., D.C.S.C. 43 F.Supp. 718, reversed on other grounds American Oil Co. v. Colonial Oil Co., 130 F.2d 72, certiorari denied 63 S.Ct. 159, 317 U.S. 679, 87 L.Ed. 545.

Mo.—St. Louis Fixture & Show Case Co. v. F. W. Woolworth Co., 88 S.W.2d 254, 232 Mo.App. 10.

Or.—Friedenburg v. Horn, 218 P. 939, 108 Or. 672, 30 A.L.R. 1153.

65 C.J. p 107 note 93.

#### Intent of defendant

Where defendant in trover action lawfully comes into possession of goods and does not dispute plaintiff's title thereto, question of defendant's intent is material in determining whether defendant's refusal to permit plaintiff to take possession of goods is wrongful act amounting to conversion.—St. Louis Fixture & Show Case Co. v. F. W. Woolworth Co., 88 S.W.2d 254, 232 Mo.App. 10.

88. Ill.—Wright v. Sipple, 179 Ill. App. 386.

89. Conn.—Aldrich v. Higgins, 59 A. 498, 77 Conn. 376.

65 C.J. p 107 note 95.

90. Ala.—Harbin v. Burrow, 172 So. 910, 27 Ala.App. 381.

Cal.—Farrington v. A. Telchert & Son, 139 P.2d 80, 59 Cal.App.2d 468 N.Y.—Sam R. Levy Fabrics v. Shapiro Bros. Factors Corp., 19 N.Y.S.2d 593, 259 App.Div. 463.

S.D.—Bohl v. Koster, 23 N.W.2d 164, 71 S.D. 203.

65 C.J. p 107 note 96.

#### Evidence held admissible

(1) In suit for conversion of heifer cow, evidence of judgment of justice of peace in proceeding to have heifer cow condemned and sold in satisfaction of damages caused thereby while running at large was held admissible.—Harbin v. Burrow, 172 So. 910, 27 Ala.App. 381.

(2) Where it was understood between owner of land on which gravel pit was partially located and contractor that contractor might continue to remove rock, sand and gravel from the land, paying reasonable value thereof and of rock, sand and gravel previously moved, evidence of such understanding was admissible as defeating owner's right to hold

### § 126. — Fraud

Evidence is admissible to show that the defendant obtained the property by fraud.

Evidence is admissible to show that defendant obtained the property by fraud, as bearing on the character of his alleged act of conversion.<sup>92</sup>

### § 127. — Acts and Declarations of Parties

It is proper to put in evidence any act, declaration, or admission of the plaintiff which tends to contradict a material averment of his pleading or disclose his consent to the act of conversion; or of the defendant which shows or admits his liability, or disproves his defense.

It is proper to put in evidence any act, declaration, or admission of plaintiff which tends to contradict a material averment of his pleading or disclose his consent to the act of conversion;<sup>93</sup> or of defendant which admits his liability, or disproves his defense.<sup>94</sup> On the other hand it has been held that defendant may introduce the declarations made by him at the time of the demand showing a reasonable excuse for a refusal thereof if the court were first apprised that such declarations tended to establish the fact that such excuse was made.<sup>95</sup> Plaintiff, by examining a witness to prove a demand and refusal, does not make the declarations of defendant, in reply to the demand, evidence in defendant's favor.<sup>96</sup> Plaintiff may present evidence as to his transactions with, and statements made to him by, one who the evidence tends to show was repre-

contractor as a converter.—Farrington v. A. Telchert & Son, 139 P.2d 80, 59 Cal.App.2d 468.

(3) Other evidence held admissible see 65 C.J. p 107 note 96 [a].

91. Vt.—Green v. Laclair, 99 A. 244, 91 Vt. 23.

92. Conn.—Filosi v. Crossman, 149 A. 774, 111 Conn. 178.

65 C.J. p 107 note 98.

93. Mass.—Hill v. Wiley, 88 N.E. 328, 202 Mass. 243.

65 C.J. p 108 note 99.

94. Or.—Mattechek v. Pugh, 55 P. 2d 730, 153 Or. 1, 168 A.L.R. 725.

65 C.J. p 108 note 1.

#### Evidence held admissible

In action for conversion of apartment house personally, conveyances and transfers executed by defendants after plaintiff had presented his claim were held admissible to show guilty conscience and recognition of liability by transferors.—Mattechek v. Pugh, 55 P.2d 730, 153 Or. 1, 168 A.L.R. 725.

95. Ala.—Dent & Cade v. Chiles, 5 Stew. & F. 383, 26 Am.D. 350.

65 C.J. p 108 note 2.

96. S.C.—Barber v. Anderson, 17 S. C.L. 358.

sending and acting for defendant.<sup>97</sup> It has been held that evidence that agents of defendant made overtures to plaintiff with reference to the purchase of the property is not admissible in an action for the subsequent conversion of the property.<sup>98</sup>

*Acts of defendant showing intent.* Evidence that defendant had, either before, or subsequent to, the alleged conversion, obtained goods from plaintiff or others is admissible on the question of intent<sup>99</sup> and guilty knowledge;<sup>1</sup> but it has been held that, in order to render such evidence admissible, it must relate to acts so recent as to throw light on the intent at the time of the commission of the act under consideration.<sup>2</sup>

### § 128. — Motive and Good Faith of Defendant

While evidence of good faith on the defendant's part is ordinarily inadmissible, in particular instances such evidence is admissible.

Since it is not essential to conversion that the motive or intent with which the act was committed should be wrongful, or willful, or corrupt, as discussed supra § 7, evidence of good faith on defendant's part is ordinarily inadmissible,<sup>3</sup> except, as discussed infra § 130, where it is sought to recover exemplary or punitive damages, in which case defendant is entitled to show that he did the acts complained of in good faith in order to prevent an allowance of exemplary or punitive damages.

### § 129. — Indictment and Conviction

Evidence of a prior indictment and conviction of the thief or of the purchaser is admissible in trover against a purchaser of stolen goods.

Evidence of a prior indictment and conviction of the thief is admissible in trover against a purchaser of stolen goods to account for the absence of the witness and as strengthening the proof of conversion;<sup>4</sup> but in trover against one indicted for larceny of property, evidence of his acquittal is inadmissible, where the only question in controversy

at the trial of the indictment is whether the property, a note, had been paid by the maker at the time of its alleged conversion.<sup>5</sup> In an action for the conversion of stolen property, knowing that it was stolen, it has been held that evidence that defendant had pleaded guilty to indictments which charged him with receiving, concealing, and storing the stolen property, and with conspiracy to violate statutes relating thereto, is competent not for the purpose of attacking defendant's character, but for the purpose of showing his motive, intent, and design.<sup>6</sup>

### § 130. — Nature and Extent of Injury

- a. In general
- b. Value of property converted
- c. Exemplary, punitive, or special damages
- d. Matters negating, or in reduction or mitigation of, damages

#### a. In General

The plaintiff is entitled to the admission in evidence of any facts and circumstances which pertain to the extent of his loss, or the measure of damages.

Plaintiff is entitled to the admission in evidence of any facts and circumstances which pertain to the extent of his loss, or the measure of damages.<sup>7</sup> Evidence of expenses incurred by plaintiff on subsequent trials after the first trial of an action for trover is not admissible where the necessity of subsequent trials was due to no fault of defendant.<sup>8</sup>

#### b. Value of Property Converted

- (1) In general
- (2) Price obtained on sale of property
- (3) Price paid or cost of production
- (4) Inventory or appraisal
- (5) Property without market value

#### (1) In General

In establishing the value of property, the same rules govern as in other actions in which the question of value is involved; and in order to determine the value of the property either party may offer in evidence any facts or

97. Ala.—Long-Lewis Hardware Co. v. Abston, 180 So. 261, 235 Ala. 599.

98. Ala.—C. W. Zimmerman Mfg. Co. v. Dunn, 44 So. 533, 151 Ala. 435.

99. Colo.—Trinidad Creamery Co. v. McDonald, 259 P. 1028, 82 Colo. 328.

65 C.J. p 108 note 5.

1. Colo.—Trinidad Creamery Co. v. McDonald, supra.

2. Colo.—Platt v. Walker, 196 P. 190, 69 Colo. 584, 65 C.J. p 108 note 7.

3. N.Y.—Douglass v. Scott, 114 N. Y.S. 470, 130 App Div. 322, 65 C.J. p 108 note 9.

4. N.Y.—Pease v. Smith, 5 Lans. 619, affirmed 61 N.Y. 477, 65 C.J. p 108 note 11.

5. Mass.—Farker v. Kenyon, 112 Mass. 264.

6. S.C.—Globe & Rutgers Fire Ins. Co. v. Foil, 200 S.E. 97, 189 S.C. 91

—Sun Ins. Office v. Foil, 197 S.E. 683, 187 S.C. 183.

7. Or.—Kaller v. Spady, 24 P.2d 351, 144 Or. 206.

S.C.—Sample v. Gulf Refining Co., 191 S.E. 209, 183 S.C. 399.

Va.—Straley v. Fisher, 10 S.E.2d 551, 176 Va. 163.

Wis.—Harvey v. Wheeler Transfer & Storage Co., 277 N.W. 627, 227 Wis. 36.

65 C.J. p 108 note 13.

8. Tex.—Security State Bank of Tahoka v. Spinnaker, Civ.App., 78 S.W.2d 275.

circumstances which will fairly inform the jury of the character and condition of the property.

In establishing the value of property, the same rules govern as in other actions in which the question of value is involved.<sup>9</sup> After identification of the property in controversy,<sup>10</sup> and proof of conversion thereof by defendant,<sup>11</sup> either party may offer in evidence any facts or circumstances which will fairly inform the jury of the character and condition of the property, and thereby enable them by their experience and the aid of expert testimony, if any be offered, to determine the value<sup>12</sup> of the property as of the particular time of the wrongful conversion thereof, as well as at the particular place of its conversion.<sup>13</sup> Evidence which is incompetent and immaterial,<sup>14</sup> or which has no probative force on the value of the property converted,<sup>15</sup> or which would be too uncertain and speculative to afford more than a conjecture as to the value,<sup>16</sup> or which is merely hearsay,<sup>17</sup> or which would not be a proper test of the value of the property,<sup>18</sup> or which would furnish an erroneous standard of computation,<sup>19</sup> should be excluded.

**Assessment of Property.** Where the market value of the property alleged to have been wrongfully converted is in issue, the assessed value of the property may be shown as a circumstance in determining the market value although the assessed value is not conclusive of the market value.<sup>20</sup> Evidence that plaintiff did not assess the property for the purpose of taxation is admissible to aid in determin-

ing whether the property had a value for the purpose for which it was purchased or had become mere junk as defendant contends.<sup>21</sup>

### (2) Price Obtained on Sale of Property

In an action for the conversion of property evidence of what it, or similar property, sold for at a subsequent time in a bona fide transaction is admissible; and while ordinarily unaccepted offers of sale and purchase are not admissible, in particular circumstances such evidence has been admitted.

In an action for the conversion of property evidence of what it, or similar property, sold for at a subsequent time in a bona fide transaction is admissible.<sup>22</sup> The price of goods obtained at a sale by auction by an officer of the law is admissible as evidence of their value in plaintiff's behalf,<sup>23</sup> at least in the absence of any showing that the sale brought unusual prices,<sup>24</sup> since a forced sale will not be presumed to be for more than the goods are really worth;<sup>25</sup> and while the contrary has also been held,<sup>26</sup> the price of goods obtained at a forced sale by auction by an officer of the law is competent evidence in defendant's behalf of the value of the goods.<sup>27</sup> It has also been held that the price of property sold at auction in accordance with a clause in a chattel mortgage of the property authorizing such sale is evidence for plaintiff of the value of the property, although not conclusive.<sup>28</sup> While there is some authority to the contrary,<sup>29</sup> the prevailing doctrine is that evidence of the price obtained at a private sale of the property is admissible,<sup>30</sup> ei-

9. N.D.—Dearborn Truck Co. v. Nedrelo, 193 N.W. 311, 49 N.D. 793.

10. N.Y.—Ellis v. Thomas, 82 N.Y. S. 1064, 84 App Div. 626.

11. Miss.—Barclay v. Smith, 36 So. 449.

12. Cal.—Wade v. Markwell & Co., 258 P.2d 497, 118 Cal.App.2d 410. Ind.—Anchor Stove & Furnture Co. v. Blackwood, 35 N.E.2d 117, 109 Ind.App. 367.

Wis.—Harvey v. Wheeler Transfer & Storage Co., 277 N.W. 627, 227 Wis. 36.

65 C.J. p 109 note 17.

#### Evidence held admissible

In action of trover and conversion by buyer of timber against seller of timber who sold a portion of it to a third person, evidence that the buyer built roads on the seller's lands in order to remove the timber purchased by the buyer, was admissible only to show that timber products were accessible to the market, for purpose of showing the value of it.—Straley v. Fisher, 10 S.E.2d 551, 176 Va. 163.

13. Colo.—Hannan v. Connitt, 50 P. 214, 10 Colo.App. 171. 65 C.J. p 109 note 18.

14. Neb.—Jessen v. Blackard, 65 N.W.2d 345, 159 Neb. 103.

15. Okl.—Billy v. Le Flore County Gas & Electric Co., 26 P.2d 149, 166 Okl. 130.

65 C.J. p 109 note 19.

16. Mich.—Mulholland v. Kelsey, 131 N.W. 546, 166 Mich. 269. 65 C.J. p 109 note 20.

17. Mich.—Vessels v. Beeman, 49 N.W. 483, 87 Mich. 481. 65 C.J. p 109 note 21.

18. Cal.—Grange Co. v. McCabe, 80 P.2d 135, 26 Cal.App.2d 597. 65 C.J. p 109 note 22.

19. Mich.—Allen v. Kinyon, 1 N.W. 863, 41 Mich. 281. 65 C.J. p 109 note 23.

20. Ark.—Helena Oil & Gas Co. v. Goodkin, 110 S.W.2d 698, 195 Ark. 7.

21. Ark.—Helena Oil & Gas Co. v. Goodkin, supra.

22. Idaho.—Higgins v. Belson, 168 P.2d 813, 66 Idaho 736.

23. U.S.—Shoup v. Marks, Alaska. 128 P. 32, 62 C.C.A. 540. 65 C.J. p 109 note 24.

24. Md.—Swartz v. Gottlieb-Baurnschmidt-Straus Brewing Co., 71 A. 854, 109 Md. 393, 16 Ann.Cas. 1156.

25. Md.—Swartz v. Gottlieb-Baurnschmidt-Straus Brewing Co., supra.

26. Ala.—Steiner Bros. & Co. v. Trannum, 13 So. 365, 98 Ala. 315. 65 C.J. p 110 note 27.

27. N.Y.—Parmenter v. Fitzpatrick, 31 N.E. 1032, 135 N.Y. 190. 65 C.J. p 110 note 28.

28. Mo.—Deer v. People's Bank of Springfield, App., 47 S.W.2d 787.

29. Idaho.—Corpus Juris cited in Mitchell v. Munn Warehouse Co., 86 P.2d 174, 178, 59 Idaho 561. 65 C.J. p 110 note 30.

30. Idaho.—Corpus Juris cited in Mitchell v. Munn Warehouse Co., 86 P.2d 174, 178, 59 Idaho 561.

Mo.—Corpus Juris cited in Howard Nat. Bank & Trust Co. v. Jones, App., 238 S.W.2d 905, 911, affirmed 243 S.W.2d 305. 65 C.J. p 110 note 31.

ther for plaintiff<sup>31</sup> or defendant<sup>32</sup> on the question of the value of the goods.

Generally, unaccepted offers of sale and purchase are not admissible,<sup>33</sup> but in particular circumstances such evidence has been admitted.<sup>34</sup> Where the ground of the action is conversion of unfinished stock in process of manufacture, defendant will not be permitted to show the proceeds realized from a sale of the chattels converted after they had been manufactured, since such evidence would throw no light on its value at the time of the conversion.<sup>35</sup>

### (3) Price Paid or Cost of Production

In determining the value of the property at the time of the conversion, evidence is admissible of the cost of the property, or the average cost of its production, as circumstances in aid of arriving at the value at the time in question.

In determining the value of the property at the time of the conversion, competent evidence is admissible of the cost of the property,<sup>36</sup> or the average cost of its production,<sup>37</sup> as circumstances in aid of arriving at the value at the time in question. However, it has been held that such evidence is incompetent in the absence of any showing as to the date of the purchase,<sup>38</sup> or the condition of the property when converted.<sup>39</sup> When a large number of articles are sold in the aggregate for a given sum, the opinion of witnesses as to the value of a part of the

articles will not be received for the purpose of ascertaining the value of the other part.<sup>40</sup>

### (4) Inventory or Appraisal

There is authority to the effect that an inventory or appraisal of the property by the defendant is admissible for the purpose of showing the value of the property.

According to some decisions, an inventory or appraisal of the property by defendant is admissible for the purpose of showing the value of the property,<sup>41</sup> at least if the property is of such a nature that the opinion of an expert witness is not necessary;<sup>42</sup> but there is also authority to the contrary.<sup>43</sup>

### (5) Property without Market Value

Where the property converted is without market value, the plaintiff may introduce evidence to show its actual or intrinsic value.

Where the property converted is without market value, plaintiff may introduce evidence to show its actual or intrinsic value.<sup>44</sup> Where there is no reasonably available market for the sale of a stock of goods in bulk or in convenient lots, the value of such stock when sold at retail may be admitted in evidence in a conversion action when accompanied by other evidence showing the value of factors included in the retail price in such a manner as to permit the jury, under proper instructions, to eliminate therefrom that portion of the retail price which

31. Me.—Norton v. Willis, 73 Me. 580.

65 C.J. p 110 note 22.

32. N.Y.—Howditch v. Page, 30 N.Y. S. 691, 81 Hun 170, affirmed 47 N.E. 44, 153 N.Y. 104.

33. Tex.—Waldrop v. Goltzman, Civ. App., 202 S.W. 335.  
65 C.J. p 110 note 34.

34. R.I.—Moss v. Rocky Point Park, Inc., 103 A.2d 72.

#### Evidence held admissible

In action for conversion by defendant by sale to a third party of an amusement ride allegedly owned by plaintiff and located on defendant's amusement park premises, testimony of witness who had purchased from defendant after repairs had been made that defendant had originally offered to sell the ride for three thousand dollars to three thousand five hundred dollars before it was repaired, was admissible for consideration along with other evidence as to value and was not to be considered as merely testimony as to an unaccepted offer.—Moss v. Rocky Point Park, Inc., *supra*.

35. N.Y.—Flannagan v. Maddin, 81 N.Y. 623.

36. U.S.—The J. Oswald Boyd, D.C. Mich., 53 F.Supp. 103.

Cal.—Greenebaum v. Taylor, 36 P.

557, 102 Cal. 624.—Wade v. Markwell & Co., 258 P.2d 497, 118 Cal. App.2d 410.—Pletcher Aviation Corp. v. Landis Mfg. Co., 214 P.2d 400, 95 Cal.App.2d 905.—Loneragan v. Monroe, 175 P.2d 42, 77 Cal.App.2d 223.

Ind.—Anchor Stove & Furniture Co. v. Blackwood, 35 N.E.2d 117, 109 Ind.App. 357.

Or.—Mattechek v. Fugh, 55 P.2d 730, 153 Or. 1, 168 A.L.R. 725.

Wash.—Anstine v. McWilliams, 163 P.2d 816, 24 Wash.2d 230.

Wis.—Harvey v. Wheeler Transfer & Storage Co., 277 N.W. 627, 227 Wis. 36.

65 C.J. p 110 note 36.

#### Evidence held inadmissible

In suit by paving contractor against junk dealers for conversion of used paving equipment, introduction in evidence of contractor's check, which had been given a number of years before in payment for converted equipment and other equipment, was error, where portion of check representing cost of converted equipment was not shown except indirectly through extended cross-examination.—Rosenfield v. White, Tex.Civ. App., 267 S.W.2d 596, error refused no reversible error.

#### Time of purchase

Purchase price of personality, if

not too far removed in point of time, may be shown in action for conversion as tending to prove value at time of conversion.—Anstine v. McWilliams, 163 P.2d 816, 24 Wash.2d 230.

37. Mich.—Hennes v. Charles Hebard & Sons, 135 N.W. 1073, 169 Mich. 670.

38. Conn.—Storrs v. Robinson, 51 A. 135, 74 Conn. 443.

39. Colo.—Carper v. Risdon, 76 P. 744, 19 Colo.App. 530.

40. N.Y.—Wells v. Kelsey, 38 Barb. 242, 15 Abb.Pr. 53, reversed on other grounds 37 N.Y. 143, 4 Abb.Pr., N.S., 234, 4 Transc.A. 328.

41. Okl.—Robinson v. Peru Plow & Wheel Co., 31 P. 988, 1 Okl. 140.  
Wash.—Hietrick v. Smith, 122 P. 363, 67 Wash. 664.

42. Okl.—Robinson v. Peru Plow & Wheel Co., 31 P. 988, 1 Okl. 140.

43. Mich.—Dyer v. Rosenthal, 8 N.W. 560, 45 Mich. 588.

44. Idaho.—Corpus Juris cited in Higgins v. Bolson, 168 P.2d 813, 815, 66 Idaho 736.

Tex.—Eagle Furniture Stores v. Jones, Civ.App., 110 S.W.2d 610.—Rubenowitz v. Jefferies, Civ.App., 58 S.W.2d 137.

65 C.J. p 110 note 44.

does not represent the value of the stock of goods in bulk or in conveniently salable lots.<sup>45</sup>

### c. Exemplary, Punitive, or Special Damages

For the purpose of recovering exemplary or punitive damages, the plaintiff is entitled to introduce evidence which tends to show that the act complained of was characterized by malice, oppression, or a wanton or reckless disregard of his rights; and the defendant is entitled to introduce evidence to prove the contrary.

For the purpose of recovering exemplary or punitive damages, plaintiff is entitled to introduce any evidence which tends to show that the act complained of was characterized by malice, oppression, or a wanton or reckless disregard of his rights;<sup>46</sup> and defendant is entitled to introduce evidence to prove the contrary.<sup>47</sup> Accordingly, for this purpose the facts and circumstances immediately connected with the transaction tending to exhibit or explain the motive and intention of defendant, or tending to show that he did the acts complained of in good faith, are admissible in evidence.<sup>48</sup> In a proper case, evidence tending to show the financial worth of defendant is admissible in support of plaintiff's claim for punitive damages.<sup>49</sup>

**Special damages.** Evidence of loss of profits as an element of damages from the conversion of a manufacturing plant resulting in prevention of performance of a contract is admissible on the issue of special damages.<sup>50</sup> In trover for the conversion of machinery, a letter written by plaintiff to defendant demanding possession of the machinery and giving notice of possible damages following his refusal to deliver is admissible.<sup>51</sup> Where defendant claims damages by reason of plaintiff's depriving him of the use of a motortruck, testimony of defendant's witness indicating that his measure of damage is based on the use of the truck for a particular business is inadmissible.<sup>52</sup>

### d. Matters Negating, or in Reduction or Mitigation of, Damages

The defendant is entitled to introduce any competent evidence which would legitimately negative, mitigate, or reduce the damages alleged.

Defendant is entitled to introduce any competent evidence which would legitimately negative, mitigate, or reduce the damages alleged.<sup>53</sup> Thus, in an action for the conversion of a note, defendant may show payment in whole or in part;<sup>54</sup> the inability of the maker to pay wholly or partially,<sup>55</sup>

45. N.D.—Mevorah v. Goodman, 60 N.W.2d 581.

#### Admission of evidence held error

In action for conversion of personal property, admission of evidence of resale retail value of goods was error, in absence of evidence showing value of factors included in retail value which would permit jury to eliminate therefrom that portion which did not represent value of stock of goods in bulk or in conveniently saleable lots.—Mevorah v. Goodman, supra.

46. Mo.—Walker v. Huddleston, App., 261 S.W.2d 502.  
65 C.J. p 111 note 45.

47. Mo.—Walker v. Huddleston, supra.

65 C.J. p 111 note 45.

#### Customary practice of magistrate courts

In conversion action by owner of automobile against garageman, who, pursuant to instructions of sheriff, picked up automobile after it was stolen, wrecked, and abandoned, and who stored automobile in garage and later sold it pursuant to void judgment of magistrate court for towing and storage charges, evidence concerning customary practice in magistrate courts in suits of kind instituted therein by garageman was admissible on question whether garageman maliciously, wilfully, intentionally or recklessly converted

the automobile, so as to be liable for punitive damages.—Walker v. Huddleston, supra.

48. Mich.—Anderson v. Besser, 91 N.W. 737, 131 Mich. 481.

65 C.J. p 111 note 47.

49. Mo.—Hussey v. Ellerman, App., 215 S.W.2d 38.

#### Evidence held inadmissible

In action for trespass for wrongful taking of possession of plaintiff's business, where plaintiff claims punitive damages, exclusion of testimony as to amount of savings account of defendant was proper where ownership of account was in controversy at time and had been impounded in orphans' court.—Cervi v. Mori, 186 A. 261, 122 Pa Super 355.

50. Or.—Frebile v. Hanna, 244 P. 75, 117 Or 306.

51. Tex.—Texas Warehouse Co. v. Imperial Rice Co., Civ App, 164 S. W. 396.

52. Cal.—Lowrey v. Rego, 149 P.2d 706, 65 Cal.App.2d 18.

53. Miss.—Bank of Forest v. Capitol Nat Bank, 169 So. 193, 176 Miss 163.

65 C.J. p 111 note 50.

#### Evidence held admissible

In action for conversion of stoker where the stoker had no value as such at time of alleged conversion, trial court erred in excluding evidence as to junk value of cast iron at date of

alleged conversion.—E. H. Barden Range & Foundry Co. v. Weaver, Ohio App., 44 N.E.2d 130.

#### Evidence held inadmissible

In action for value of furniture allegedly converted by defendant, trial court properly excluded letter sought to be introduced in mitigation of damages by defendant in which a tender of the furniture was made, where letter was written after action was filed, prior to that time defendant had unqualifiedly refused to surrender furniture on demand, and willfully claimed it as his own in defiance of plaintiff's claims, and he had taken part of the furniture to another state where it still remained.—Pantz v. Nelson, 135 S.W.2d 897, 234 Mo App. 1043.

#### Equitable rule

Since the reason for the rule that a converter may show a tender of the converted property to the owner in mitigation of damages is an equitable one, rule was not applicable where owner was compelled to, and did, buy other property because of alleged converter's unlawful refusal to deliver the property to her.—Pantz v. Nelson, supra.

54. Cal.—Meyer v. Thomas, 63 P.2d 1176, 18 Cal.App.2d 299.  
65 C.J. p 111 note 51.

55. Utah.—Walley v. Deseret Nat. Bank, 47 P. 147, 14 Utah 305.  
65 C.J. p 111 note 52.



or his insolvency;<sup>56</sup> a release of the maker from his undertaking;<sup>57</sup> the invalidity of the instrument;<sup>58</sup> that the note is outlawed by the statute of limitations;<sup>59</sup> or any other matter which will legitimately affect or diminish its value.<sup>60</sup> In actions for conversion of certificates of deposit, it may be shown that at the time of the conversion the bank issuing them was insolvent.<sup>61</sup> In trover, after a default, matter which shows that plaintiff had no right to recover, and which might have been given in evidence under the general issue, may avail defendant in mitigation of damages.<sup>62</sup>

### § 131. Weight and Sufficiency of Evidence

As in civil actions generally, in an action in trover, any material fact or issue must be proved by a preponderance of the evidence.

As in civil actions generally, any material fact or issue must be proved by a preponderance of the evidence,<sup>63</sup> even when the act of conversion alleged constitutes a crime.<sup>64</sup> Positive or direct testimony of the facts essential to a recovery is not indispensable; these facts may be proved inferentially by direct or circumstantial evidence.<sup>65</sup> Notwithstanding, under the codes, no particular form of complaint may be necessary, substantial differences which control and determine the rights of the parties are still in force,<sup>66</sup> and a judgment in trover must be supported by the same proof that was necessary under the common law.<sup>67</sup> It has been said that surmise or conjecture cannot be substituted for proof in an action of trover.<sup>68</sup>

*Prima facie case.* A prima facie case for recovery is made out where plaintiff shows title to

58. Cal.—Meyer v. Thomas, 63 P.2d 1176, 18 Cal.App.2d 299.  
65 C.J. p 111 note 53.  
57. N.Y.—Booth v. Powers, 56 N.Y. 22.  
58. Conn.—Healey v. Flammia, 113 A. 449, 96 Conn 233.  
N.Y.—Booth v. Powers, 56 N.Y. 22.  
59. N.Y.—Thompson v. Halbert, 16 N.E. 675, 109 N.Y. 329, 21 Abb.N. Cas. 266.  
60. Cal.—Meyer v. Thomas, 63 P.2d 1176, 18 Cal.App.2d 299.  
Miss.—Bank of Forest v. Capitol Nat. Bank, 169 So. 192, 176 Miss. 183.  
65 C.J. p 111 note 57.  
61. Dak.—Los Angeles First Nat. Bank v. Dickson, 40 N.W. 331, 5 Dak. 286.  
62. Vt.—Collins v. Smith, 16 Vt. 9.  
63. Ky.—Childers v. Turner, 82 S.W.2d 769, 259 Ky. 545.  
Mo.—Hayes v. O'Dell, App., 236 S.W.2d 367.  
Mont.—Hitchner & Hitchner v. Fox, 98 P.2d 327, 109 Mont. 593.  
N.Y.—Arakjinyan v. Araklian, 48 N.Y.S.2d 501, 268 App.Div. 41.  
65 C.J. p 112 note 62, p 112 note 64.  
**Evidence held sufficient to sustain recovery for plaintiff**  
U.S.—Mourikas v. Vardianos, C.C.A. W.Va., 169 F.2d 53.  
Cal.—Union Oil Co. of California v. Hane, 94 P.2d 387, 34 Cal.App.2d 489.  
Colo.—Manion v. Stephens, 261 P.2d 1021.  
Ga.—Graham v. Frazier, 66 S.E.2d 77, 84 Ga.App. 458.  
Ky.—Sherman v. Adams, 194 S.W.2d 625, 302 Ky. 490.  
Mich.—Even-Heat Co. v. Wade Elec. Products Co., 58 N.W.2d 923, 336 Mich. 564—Schlesel v. Bluesavage, 22 N.W.2d 758, 314 Mich. 415.

- N.Y.—Dupont v. Port Chester Sav. Bank, 21 N.Y.S.2d 11, 259 App.Div. 1042—Thompson v. Mursten, 13 N.Y.S.2d 726, 257 App.Div. 1029—Mallier v. U. S. Pipe & Foundry Co., 282 N.Y.S. 591, 246 App.Div. 540.  
N.D.—Hochstetler v. Graber, 48 N.W.2d 15, 78 N.D. 90.  
Okla.—Sialer v. Smith, 267 P.2d 1081—Gilbaugh v. Rose, 239 P.2d 406, 205 Okl. 508—Belcher v. Spohn, 39 P.2d 87, 170 Okl. 139—Le Bow v. Tague, 25 P.2d 1101, 166 Okl. 7.  
R.I.—G. H. Waterman & Co. v. Dwares, 27 A.2d 327, 68 R.I. 303.  
Tenn.—Lewis Brown Co., Inc. v. Mallory, 8 Tenn.App. 36.  
Tex.—Motor Finance Co. of Tex v. Allen, Civ App., 252 S.W.2d 1022, error refused no reversible error—Farmers State Bank in Merkel v. Russell, Civ App., 117 S.W.2d 816—Standard Finance Corporation v. Moore, Civ.App., 69 S.W.2d 458, error dismissed.  
Utah.—Best v. Larsen Bros., 134 P.2d 179, 103 Utah 142.  
Wash.—Schneider v. Noel, 16 P.2d 1002, 23 Wash.2d 388.  
65 C.J. p 112 note 68 [b].  
**Evidence held insufficient to sustain recovery for plaintiff**  
Ill.—Klimas v. Klimas, 110 N.E.2d 463, 349 Ill.App. 243.  
Miss.—L. L. Fair Lumber Co. v. Federal Land Bank of New Orleans, 128 So. 733, 155 Miss. 87.  
N.Y.—Spaulding v. Tully, 108 N.Y.S.2d 595, 279 App.Div. 712.  
N.D.—Hart v. Rugler, 295 N.W. 308, 70 N.D. 467.  
Wis.—Adams v. Maxcy, 262 N.W. 698, 214 Wis. 240.  
65 C.J. p 112 note 68 [c].  
**Evidence held sufficient to sustain decision for defendant**  
U.S.—Krueger Corp. v. Detroit Trust Co., C.A. Mich., 210 P.2d 152.

- Ariz.—Tidwell v. Riggs, 222 P.2d 795, 70 Ariz. 417.  
Ill.—Central Fuel Corp. v. Reaven, 6 N.E.2d 537, 288 Ill.App. 624.  
Kan.—Gantz v. Bondurant, 155 P.2d 450, 159 Kan. 389.  
Ky.—Childers v. Turner, 82 S.W.2d 769, 259 Ky. 545.  
Neb.—Dickerson v. Surety Nat. Farm Loan Ass'n, 254 N.W. 679, 127 Neb. 67.  
65 C.J. p 112 note 68 [d].  
**Evidence held insufficient to sustain a decision for defendant**  
Ill.—Simon v. Ralasic, 63 N.E.2d 676, 327 Ill.App. 211—Long v. Burnside, 14 N.E.2d 660, 295 Ill.App. 82.  
65 C.J. p 112 note 68 [e].  
**Evidence held sufficient to sustain recovery for defendant on counterclaim**  
S.D.—Loewenthal Co. v. Ribnick, 263 N.W. 710, 64 S.D. 14.  
**Evidence held sufficient to support judgment in favor of intervenor**  
Idaho.—Graham v. Hirsch, 154 P.2d 183, 66 Idaho 28.  
**Evidence held sufficient to support finding of referee**  
Me.—Bickford v. Bragdon, 102 A.2d 412.  
64. Ind.—Bissell v. Wert, 35 Ind. 54.  
65. Mo.—Hayes v. O'Dell, App., 236 S.W.2d 367.  
65 C.J. p 112 note 65.  
66. N.Y.—Wamsley v. Atlas S. S. Co., Ltd., 61 N.E. 896, 168 N.Y. 533, 85 Am.S.R. 699.  
67. N.Y.—McCoy v. American Express Co., 171 N.E. 749, 253 N.Y. 477—Wamsley v. Atlas S. S. Co., Ltd., 61 N.E. 896, 168 N.Y. 533, 85 Am.S.R. 699.  
68. Me.—Rutland v. Boston & M. R. Co., 9 A.2d 131, 138 Me. 328.

the property in himself and a conversion of the property to his own use by defendant.<sup>69</sup>

### § 132. — Identification of Property

In actions for conversion, the identity of the property must be established by a preponderance of the evidence.

In actions for conversion, the identity of the property must be established by a preponderance of the evidence;<sup>70</sup> and any evidence which reasonably satisfies the jury of the identity of the property con-

verted is sufficient.<sup>71</sup>

### § 133. — Title and Right to Possession

The same character of evidence which will suffice in other actions to establish title to, or possession or right to possession of chattels will suffice to prove these facts in an action for conversion.

The same character of evidence which will suffice to establish title to, or possession or right to possession of, chattels in other actions will suffice to prove these facts in an action for conversion.<sup>72</sup> Proof of

69. Ill.—Witzke v. Greer, 195 Ill. App. 206.

N.J.—Oradell Gardens v. Mooney, 178 A. 270, 13 N.J. Misc. 364.

70. Miss.—Anderson, Clayton & Co. v. Rayborn, 192 So. 28.

71. Evidence held sufficient to identify property

Ariz.—Simpson v. Shaw, 226 P.2d 557, 71 Ariz. 293.

Utah.—Lym v. Thompson, 184 P.2d 667, 112 Utah 24.

65 C.J. p 112 note 70 [a].

Evidence held insufficient to identify property

Iowa.—Shimp Bros v. Place, 281 N. W. 471, 225 Iowa 1098.

Miss.—Anderson, Clayton & Co. v. Rayborn, 192 So. 28.—D. L. Fair Lumber Co. v. Federal Land Bank of New Orleans, 128 So. 733, 158 Miss. 87.

Mo.—Hayes v. O'Dell, App., 236 S.W. 2d 367.

Tex.—Satterfield v. Knippel, Civ. App., 169 S.W. 2d 795

65 C.J. p 112 note 70 [c].

Evidence held sufficient to go to jury or court sitting as jury on question of identity

Colo.—Cascio Mercantile & Trust Co. v. Central Sav. Bank & Trust Co., 226 P. 868, 75 Colo. 478.

65 C.J. p 112 note 70 [b].

Reasonable certainty

Complainant to recover in suit for converting timber on which lien exists must show with reasonable certainty that lumber was made from timber subject to lien.—D. L. Fair Lumber Co. v. Federal Land Bank of New Orleans, 128 So. 733, 158 Miss. 87.

Evidence held insufficient to establish that defendant took one thousand eight hundred bushels of wheat instead of one thousand eighteen bushels.—Moore v. Conway, Tex. Civ. App., 108 S.W. 2d 954.

Specific money

In action of conversion wherein plaintiff sought to recover sum of money delivered to defendant for investment for plaintiff in onion futures plus profit from sale of onions, evidence was insufficient to establish that defendant was to deliver specific

money to plaintiff.—Seekamp v. Small, 237 P.2d 489, 39 Wash. 2d 578.

72. Or.—Elerath Steel & Iron Co. v. Cornfoot, 240 P. 229, 116 Or. 83.

65 C.J. p 113 note 72.

Evidence held sufficient to show title or ownership in plaintiff

Ala.—Ganey v. Henley, 71 So. 2d 281, 260 Ala. 514.

Ill.—Thompson v. Pollack, 53 N.E. 2d 737, 322 Ill. App. 73.—Diegley v. Lilly, 43 N.E. 2d 166, 315 Ill. App. 491.

Sweeney v. Bismarck Hotel Co., 27 N.E. 2d 674, 305 Ill. App. 496.

Ind.—Kirk Co. of Indiana v. Cadick, 195 N.E. 588, 100 Ind. App. 627.

Kan.—Hill v. Citizens' Nat. Bank of Emporia, 29 P. 2d 1075, 139 Kan. 19.

Ky.—Phillips Petroleum Co. v. Cunningham, 169 S.W. 2d 628, 293 Ky. 514.

La.—Antoine v. Hamilton, App., 144 So. 614.

Me.—Hassen v. Hassen, 60 A. 2d 518, 143 Me. 411.

Mass.—Massachusetts Lubricant Corp. v. Socony-Vacuum Oil Co., 25 N.E. 2d 719, 305 Mass. 269.

Mont.—Smith v. Armstrong, 198 P. 2d 795, 121 Mont. 377.—Smith v. Armstrong, 166 P. 2d 793, 118 Mont. 290.

N.Y.—Lundstrom v. De Santos, 127 N.Y. S. 2d 610, 205 Misc. 260.

Or.—Cross v. Campbell, 146 P. 2d 83, 173 Or. 477.

S.D.—Cussen v. Applegate, 269 N.W. 562, 64 S.D. 631.

Tex.—Erwin v. Southwestern Inv. Co., 215 S.W. 2d 330, 147 Tex. 260.

Pacific Finance Corp. v. Gilkerson, Civ. App., 217 S.W. 2d 440, refused no reversible error.

65 C.J. p 113 note 72 [a].

Evidence held insufficient to show title or ownership in plaintiff

Ind.—Foudy v. Daugherty, 76 N.E. 2d 268, 118 Ind. App. 68.

La.—Smith v. Bell, 68 So. 2d 737, 224 La. 1.

Me.—Hardison v. Jordan, 44 A. 2d 892, 141 Me. 429.

Mont.—Bohart v. Songer, 101 P. 2d 64, 110 Mont. 405.

Tex.—O'Connor v. Fred M. Manning, Inc., Civ. App., 255 S.W. 2d 277, er-

ror refused.—Lee C. Moore & Co. v. Jarecki Mfg. Co., Civ. App., 82 S. W. 2d 1002, error refused.

65 C.J. p 113 note 72 [b].

Evidence held sufficient to show that plaintiff had no title

Cal.—Manha v. Grass Valley Meat Co., 249 P. 2d 45, 113 Cal. App. 2d 773.—Graner v. Hogsett, 191 P. 2d 497, 84 Cal. App. 2d 657.

65 C.J. p 113 note 72 [c].

Evidence held sufficient to show title in defendant

U.S.—Krueger Corp. v. Detroit Trust Co., C.A. Mich., 210 F. 2d 152.

La.—Turner v. Chariton, App., 197 So. 187.

65 C.J. p 113 note 72 [e].

Evidence held insufficient to show title in defendant

Mass.—Young v. Riggs, 185 N.E. 15, 282 Mass. 570.

Mo.—St. Louis Smelting & Refining Co. v. Hoban, 209 S.W. 2d 119, 367 Mo. 436.

65 C.J. p 113 note 72 [f].

Evidence held sufficient to show that plaintiff was entitled to possession

Wash.—Layman v. Swanson, 101 P. 2d 304, 3 Wash. 2d 370.

65 C.J. p 113 note 72 [g].

Evidence held sufficient to show that plaintiff was not entitled to possession

Wash.—Smith v. Dahlquist, 28 P. 2d 262, 176 Wash. 84.

Evidence held insufficient to show that plaintiff was entitled to possession

Ind.—Foudy v. Daugherty, 76 N.E. 2d 268, 118 Ind. App. 68.

Evidence held sufficient to show title or ownership and right of possession in plaintiff

Cal.—Ross v. Pacific Mortg. Guaranty Co., 61 P. 2d 368, 16 Cal. App. 2d 672.

Idaho.—Black v. Darrah, 233 P. 2d 415, 71 Idaho 404.

65 C.J. p 113 note 72 [h].

Evidence held insufficient to show title or ownership and right of possession in plaintiff

Cal.—Scutt v. Bassett, 194 P. 2d 781, 86 Cal. App. 2d 373.

title will suffice as proof of possession until the presumption created thereby is overcome by other evidence,<sup>73</sup> since one having title is constructively in possession in the absence of testimony showing the contrary;<sup>74</sup> and actual possession is sufficient evidence of title to maintain an action for conversion unless the presumption of title arising from possession is rebutted by evidence adduced by defendant.<sup>75</sup> It has been held that possession of land, either under a title or a claim of title, is sufficient proof of ownership in an action for the conversion of crops or timber asported therefrom,<sup>76</sup> and that one who has never been in possession may establish prima facie title by showing a sale to him by one in actual possession claiming title.<sup>77</sup> Plaintiff must prove his ownership or right of possession by a preponderance of the evidence,<sup>78</sup> and if the evidence

is evenly balanced on the right of possession, he cannot recover.<sup>79</sup>

# § 134. — Conversion

In actions for conversion, the conversion must be established by a preponderance of the evidence; any evidence of an act of ownership or control wrongfully exercised over the plaintiff's property will suffice as proof of a conversion, but evidence is insufficient to prove conversion where it fails to afford a reasonable inference that the defendant is guilty.

In actions for conversion, the conversion must be established by a preponderance of the evidence,<sup>80</sup> but it may be proved either directly<sup>81</sup> or by inference,<sup>82</sup> and may be shown by circumstantial evidence.<sup>83</sup> Any evidence of an act of ownership or control wrongfully exercised over plaintiff's property will suffice as proof of a conversion.<sup>84</sup> It has

Mass.—John T. D. Blackburn, Inc. v. Livermore, 56 N.E.2d 593, 317 Mass. 20.

Tenn.—Goodwin v. Goodwin, 260 S.W. 2d 186, 36 Tenn. App. 630.

Utah.—Workman Motor Co. v. Pacific Finance Corporation, 26 P.2d 961, 83 Utah 19.

65 C.J. p 113 note 72 [1].

**Evidence held sufficient to show that defendant purchased property with notice of plaintiff's title or interest**  
Ill.—Palumbo v. Harry M. Quinn, Inc. 55 N.E.2d 825, 323 Ill. App. 404  
65 C.J. p 113 note 72 [K].

**Evidence held insufficient to show actual possession by plaintiff**  
Cal.—Scutt v. Bassett, 194 P.2d 781, 86 Cal. App. 2d 373  
Mo.—Jackson v. Rothschild, App., 99 S.W.2d 859.

**Evidence held insufficient to show constructive possession by plaintiff**  
Mo.—Jackson v. Rothschild, supra.

**Evidence held sufficient to show that plaintiff's predecessor had no right to possession**

N.Y.—American Castype Corp. v. Niles-Bement-Pond Co., 42 N.Y.S. 2d 638, 266 App. Div. 587, reargument denied 44 N.Y.S.2d 263, 266 App. Div. 949.

**Evidence held sufficient to show title in intervenors**

Ark.—Horne v. Howe Lumber Co., 190 S.W.2d 7, 209 Ark. 202.

**Evidence held insufficient to show fraud that would defeat plaintiff's right to possession or title**

Ill.—Long v. Burnside, 14 N.E.2d 660, 295 Ill. App. 82.

**Evidence held sufficient to show that defendant has possession of the property**

La.—Carso v. Crals, App., 146 So. 760.

**Evidence held to show lack of authority to sell property**

S.D.—Skinner v. First Nat. Bank &

Trust Co. of Watertown, 249 N.W. 821, 61 S.D. 481.

**Evidence held sufficient to show consent by plaintiff of defendant's possession**  
Wash.—Moxee Co. v. Lloyd L. Hughes, Inc., 163 P.2d 603, 24 Wash. 2d 224.

**Evidence held insufficient to establish lien**  
U.S.—Brooks v. Superior Oil Co., D.C. Ark., 108 F. Supp. 665, affirmed, C. A., 210 F.2d 533.

**Denial of ownership by defendant**  
Evidence held sufficient to support finding that defendants did not admit that they were not the owners of the property.—General Oil & Gasoline Co. v. Czellath, Ohio App., 47 N.E.2d 679.

**Community of title in property**  
Evidence held insufficient to show a community of title in property.—Smith v. Armstrong, 166 P.2d 793, 118 Mont. 290.

**Claim of right**  
Evidence held insufficient to show that defendant was not acting under claim of right when he sold property allegedly converted.—Lee C. Moore & Co. v. Jarecki Mfg. Co., Tex. Civ. App., 82 S.W.2d 1002, error refused.

**Nature of claim of possession**  
Evidence supported jury's finding that seller claimed right of possession as owner and not merely as pledgee or mortgagee.—Wallace v. Renfro, Tex. Civ. App., 124 S.W.2d 456, error dismissed, judgment correct.

73. Me.—Amey v. Augusta Lumber Co., 148 A. 687, 128 Me. 472.  
65 C.J. p 113 note 73.

74. Me.—Amey v. Augusta Lumber Co., supra.

75. Tex.—Chavez v. Schairer, Civ. App., 199 S.W. 892.  
65 C.J. p 113 note 75.

76. Ark.—Horne v. Howe Lumber Co., 190 S.W.2d 7, 209 Ark. 202.  
65 C.J. p 113 note 76.

77. Ga.—Farmers' Bank of Pelham v. Powell, 113 S.E. 818, 29 Ga. App. 100

65 C.J. p 113 note 77.

78. Colo.—Davis v. Patterson, 193 P. 662, 69 Colo. 226  
Mont.—Hitchner & Hitchner v. Fox, 98 P.2d 327, 109 Mont. 593.

79. Colo.—Davis v. Patterson, 193 P. 662, 69 Colo. 226.

80. Me.—Shallow v. Roux, 84 A. 999, 109 Me. 567.

Miss.—Krouse v. Jones, 198 So. 552  
Okla.—Gilbaugh v. Rose, 239 P.2d 406, 205 Okl. 508.

81. Md.—Western Maryland Dairy v. Maryland Wrecking & Equipment Co., 126 A. 135, 146 Md. 318.—Hammond v. Du Bois, 101 A. 612, 131 Md. 116.

82. Okla.—Gilbaugh v. Rose, 239 P.2d 406, 205 Okl. 508.  
65 C.J. p 114 note 81.

83. Cal.—Bhumgara v. Gazvini, 190 P. 854, 47 Cal. App. 615.

Okla.—Gilbaugh v. Rose, 239 P.2d 406, 205 Okl. 508.

Utah.—Lynn v. Thompson, 184 P.2d 667, 112 Utah 24.

84. Ala.—Crump v. Cole, 50 So.2d 291, 35 Ala. App. 560.  
65 C.J. p 114 note 83.

**Evidence held sufficient to establish conversion**  
Ala.—Crump v. Cole, 50 So.2d 291, 35 Ala. App. 560

Ariz.—Levandovski v. Ford, 83 P.2d 281, 52 Ariz. 454.

Cal.—Woodbine v. Van Horn, 173 P. 2d 17, 29 Cal.2d 95—Allen v. Alberts, 185 P.2d 372, 82 Cal. App. 2d 13—Sloss v. General Motors Acceptance Corp., 120 P.2d 85, 48 Cal. App. 2d 574—Staley v. McClurken, 96 P.2d 805, 35 Cal. App. 2d 622.

been held that, where the right of property is shown to be in plaintiff, and defendant continues to hold the property after the action has been commenced, very slight evidence of conversion will suffice.<sup>85</sup> Evidence is insufficient to prove conversion where it fails to afford a reasonable inference that defendant is guilty,<sup>86</sup> or to connect defendant with the

taking or use of the property.<sup>87</sup> The mere assertion of ownership of property, without interfering in any way with the property or with the owner's right to control, is not evidence of a conversion.<sup>88</sup>

*Time of conversion.* Inasmuch as the rights of the parties must be determined as they stood at the commencement of the suit,<sup>89</sup> it must be shown that

Conn.—Molski v. Bendza, 164 A. 387, 116 Conn. 710.

Fla.—Wilson Cypress Co. v. Logan, 156 So. 286, 115 Fla. 845.

Ill.—Dombrow v. Dombrow, 82 N.E. 2d 47, 401 Ill. 324—Simon v. Bala-sic, 63 N.E.2d 676, 327 Ill.App. 211—Dolejs v. Lietuva Building & Loan Ass'n, 26 N.E.2d 419, 305 Ill. App. 498.

Ind.—Block v. Talge, 51 N.E.2d 81, 221 Ind. 658.

Kan.—Wingerson v. Tucker, 265 P.2d 842, 175 Kan. 538.

La.—Cunningham v. Bell, App., 26 So.2d 769—Birdow v. Midyett, App., 9 So.2d 414.

Mass.—Reid v. Bacas, 57 N.E.2d 632, 317 Mass. 240—Gallagher v. It E. Cunniff, Inc., 49 N.E.2d 448, 314 Mass. 7.

Minn.—Melin v. Baker, 27 N.W.2d 647, 223 Minn. 319.

Miss.—Potomac Ins. Co. of District of Columbia v. Wilkinson, 71 So. 2d 765—Lipscomb v. Dalton, 68 So. 2d 430—Dixie Pine Products Co. v. Breland, 39 So.2d 265, 205 Miss. 610.

N.H.—Ancil v. Du Pont, 79 A.2d 11, 96 N.H. 501.

N.Y.—Luciano v. Camp Ideal, 72 N.Y. S.2d 80, 272 App.Div. 947—Araklin-jian v. Arakian, 48 N.Y.S.2d 501, 268 App.Div. 41—Blum v. Continental Bank & Trust Co., 53 N.Y.S. 2d 75.

N.C.—Woodbury v. Nu-Enamel Corp., 1 S.E.2d 568, 215 N.C. 790.

N.D.—Hochstetler v. Graber, 48 N.W. 2d 15, 78 N.D. 90.

Okl.—American Nat. Bank of Wetum-ka v. Hightower, 87 P.2d 311, 184 Okl. 294.

Pa.—Coles v. Sutphen, 76 A.2d 623, 167 Pa.Super. 457.

R.I.—Dimon v. O'Connor, 106 A.2d 509.

Tex.—Bradley v. McKinzie, Civ.App., 226 S.W.2d 458—English v. Nichols, Civ.App., 142 S.W.2d 534—Wallace v. Renfro, Civ.App., 124 S.W.2d 456, error dismissed, judgment correct.

Utah—Lym v. Thompson, 184 P.2d 667, 112 Utah 24.

Wash.—Crutcher v. Scott Pub. Co., 253 P.2d 925, 42 Wash.2d 89—James v. Berger, 222 P.2d 855, 37 Wash.2d 261—Trott v. Gilbert, 156 P.2d 234, 22 Wash.2d 361.

65 C.J. p. 114 note 83 [b].

**Evidence established constructive fraud on part of defendants in pur-**

chasing pipe stolen from plaintiff, so as to render defendants liable in conversion action.—Petroleum Products Corp. v. Sklar, D.C.La., 87 F.Supp. 715.

#### **Retrosession deed**

In action to recover damages for conversion of an automobile sold to plaintiff by defendant, evidence showed that a retrosession deed authorizing repossession was either not signed by plaintiff or signed in error at the time of signing note and mortgage and was of no effect.—Birdow v. Midyett, La.App., 9 So.2d 414.

85. S.C.—Fowler v. Stuart, 12 S.C.L. 504.

86. Ala.—Louisville, etc., R. Co. v. Schneiert, 47 So. 293, 156 Ala. 411. 65 C.J. p. 114 note 85.

**Evidence held insufficient to establish conversion**

Cal.—Tinsley v. Bauer, App., 271 P.2d 110—Mulrooney v. Pietro, 180 P.2d 62, 79 Cal.App.2d 311—Appel v. Webster, 81 P.2d 467, 27 Cal. App.2d 551—Thomsen v. Culver City Motor Co., 41 P.2d 597, 4 Cal. App.2d 639.

Ind.—Foudy v. Daugherty, 76 N.E.2d 268, 118 Ind. App. 68—Steel Const. Co. v. Rossville Alcohol & Chemical Corp., 12 N.E.2d 987, 105 Ind. App. 520, petition dismissed 16 N. E.2d 698, 105 Ind. App. 620.

La.—Dickerson v. Dickerson, 2 So.2d 643, 197 La. 907.

Minn.—Halvorson v. Geurkink, 56 N.W.2d 793, 238 Minn. 371—Schrunk v. Andres, 22 N.W.2d 548, 221 Minn. 465.

Miss.—Krouse v. Jones, 198 So. 652 Neb.—Burchmore v. H. M. Bylesby & Co., 1 N.W.2d 327, 140 Neb. 603 N.J.—Atlantic Northern Airlines v. Schwimmer, 96 A.2d 652, 12 N.J. 293—Mueller v. Technical Devices Corp., 84 A.2d 620, 8 N.J. 201—Potash Stores v. Bay Development Corp., 192 A. 379, 118 N.J.Law 242.

N.Y.—Sam R. Levy Fabrics v. Shapiro Bros. Factors Corp., 19 N.Y. S.2d 593, 259 App.Div. 463—Gross v. Toder, 8 N.Y.S.2d 446, 256 App. Div. 964—Blum v. Continental Bank & Trust Co., 63 N.Y.S.2d 75 Okl.—Griffith v. McBride, 108 P.2d 109, 188 Okl. 227—Kelly v. Oliver Farm Equipment Sales Co., 36 P.2d 888, 169 Okl. 269.

Pa.—Dittsburgh No. 8 Coal Corp. v. Newcomer, Com.Pl., 13 Fay.L.J. 98, affirmed 76 A.2d 371, 365 Pa. 462.

S.C.—Wolfe v. Herlihy, 61 S.E.2d 764, 218 S.C. 90.

Tex.—Morrison v. Farmer, Civ.App., 210 S.W.2d 245, reversed on other grounds 213 S.W.2d 813, 147 Tex. 122—Parker v. Burleson, Civ.App., 129 S.W.2d 389.

Vt.—Dansro v. Scribner, 187 A. 803, 108 Vt. 408.

Utah.—Heisel Const. Co. v. Garff, 225 P.2d 720.

Wash.—Seekamp v. Small, 237 P.2d 489, 39 Wash.2d 578—Persson v. McKay Coal Co., 92 P.2d 1108, 200 Wash. 75.

Wis.—Adams v. Maxcy, 252 N.W. 598, 214 Wis. 240. 65 C.J. p. 114 note 85 [a].

**Evidence held sufficient to establish that there was no conversion**

U.S.—Mendez v. Murdock, D.C.Mo., 83 F.Supp. 630.

Cal.—Kruker v. City of Oakland, 266 P.2d 537, 123 Cal.App.2d 270—Mayer v. Northwood Textile Mills, 233 P.2d 657, 105 Cal.App.2d 406—Flenbaugh v. Heinrich, 200 P.2d 550, 89 Cal.App.2d 214—Graner v. Hoysett, 191 P.2d 497, 84 Cal.App.2d 657.

Ill.—McGill v. H. J. Coleman & Co., 9 N.E.2d 456, 291 Ill.App. 606.

La.—Turner v. Chariton, App., 197 So. 187.

Minn.—Dow-Arneson Co. v. City of St. Paul, 253 N.W. 6, 191 Minn. 28. 65 C.J. p. 114 note 85 [c].

**Trial court's disbelief of testimony introduced in action tried by court for conversion of money which defendant had withdrawn from a bank account standing in name of plaintiff's decedent as trustee, upon order executed by decedent in favor of defendant two days before death of decedent, to effect that defendant had delivered the money to decedent before decedent's death, would not warrant a finding that money was not delivered to decedent by defendant.**—Ancil v. Du Pont, 79 A.2d 11, 96 N.H. 501.

87. Cal.—Martin v. Barry, 79 P. 66, 145 Cal. 540.

88. Vt.—Irish v. Cloyes, 8 Vt. 30, 30 Am.D. 446.

89. N.Y.—Storm v. Livingston, 6 Johns. 44.

**Evidence held sufficient to show time of conversion and to justify finding that property had been in defendant's possession.**—Kagee v.

the acts claimed to constitute a conversion occurred before the commencement of the suit, and if the evidence shows that these acts occurred after the commencement of the suit,<sup>90</sup> or fails to show whether the acts were committed before or after the commencement of the action,<sup>91</sup> the evidence cannot avail as evidence of a conversion. So, evidence which does not show that the property was disposed of by defendant at a time when plaintiff had an interest in it is insufficient to show a conversion.<sup>92</sup>

**Connection of defendant with act of conversion.** The connection of defendant with a conversion will be sufficiently shown by proof of any facts or circumstances which will justify an inference that he assisted in wrongfully taking the goods, shared in the proceeds thereof with guilty knowledge, or participated in some act which in law amounted to a conversion.<sup>93</sup>

### § 135. — Demand and Refusal

In general, a refusal to surrender property on demand is evidence of conversion,<sup>94</sup> and proof of demand and refusal makes a prima facie case for the plaintiff.

In general, a refusal to surrender property on demand is evidence of conversion,<sup>94</sup> and proof of demand and refusal makes a prima facie case for plaintiff.<sup>95</sup> Nevertheless, a demand made after the

property was out of defendant's possession and, in consequence, when he could not give it up is not evidence of a conversion.<sup>96</sup> Evidence of conversion arising from demand and refusal is rebutted by proof that compliance with the demand was impossible.<sup>97</sup>

### § 136. — Value of Property Converted and Damages

In an action for conversion, a person seeking to recover the value of articles converted must produce dependable evidence as to the value of such articles; and direct testimony as to value is not indispensable, if there is proof of the character, quality, and quantity of the injury from which the jury may properly estimate the loss or damage.

In an action for conversion, a person seeking to recover the value of articles converted must produce dependable evidence as to the value of such articles;<sup>98</sup> and direct testimony as to value is not indispensable, if there is proof of the character, quality, and quantity of the injury from which the jury may properly estimate the loss or damage.<sup>99</sup> A verdict for nominal damages will be sustained, if an actual conversion has been proved, even though evidence as to the value of the property converted be entirely wanting;<sup>1</sup> but a verdict for more than nominal damages cannot be sustained if there be no

Hench, 81 P.2d 265, 27 Cal.App.2d 469.

90. Ala.—Plott v. Robertson, 39 So. 771.

N.Y.—Storm v. Livingston, 6 Johns 44.

91. Ala.—Hawkins Lumber Co. v. Bray, 17 So. 96, 105 Ala. 96.

92. Vt.—Cory v. Barnes, 21 A. 384, 43 Vt. 456.

93. Cal.—Lusitanian-American Development Co. v. Seaboard Dairy Credit Corporation, 34 P.2d 139, 1 Cal.2d 121—Arques v. National Superior Co., 155 P.2d 643, 67 Cal. App.2d 763.

Okl.—Gilbaugh v. Rose, 239 P.2d 406, 205 Okl. 508.

65 C.J. p 115 note 96.

**Evidence held insufficient to connect defendant with the conversion.**—J. G. Boswell Co. v. W. D. Felder & Co., 220 P.2d 886, 103 Cal.App.2d 767—65 C.J. p 115 note 96 [b].

94. Conn.—Molski v. Benzke, 164 A. 387, 116 Conn. 710.

Mich.—Timm v. Cass Circuit Judge, 158 N.W. 1028, 192 Mich. 508.

N.J.—Mueller v. Technical Devices Corp., 84 A.2d 620, 8 N.J. 201.

N.D.—Peterson v. Wolff, 280 N.W. 187, 68 N.D. 354—Hovland v. Farmers Union Elevator Co., 269 N.W. 842, 67 N.D. 71.

Vt.—Tinker v. Morrill, 39 Vt. 477, 94 Am Dec. 346.

65 C.J. p 115 note 88.

**Evidence held sufficient to show demand.**

Cal.—Del Barrio v. Sherman, 60 P.2d 559, 16 Cal.App.2d 407.

65 C.J. p 115 note 88 [a].

**Evidence held sufficient to show demand and refusal.**

Cal.—Abdallah v. Barth, 21 P.2d 435, 131 Cal.App. 448.

Mo.—Dantz v. Nelson, 135 S.W.2d 397, 234 Mo App. 1013.

Tex.—Ellis Oil Co. v. Adams, Civ App., 109 S.W.2d 1026, error dismissed.

Wash.—Layman v. Swanson, 101 P.2d 304, 3 Wash.2d 370.

65 C.J. p 115 note 88 [b].

**Evidence held insufficient to show demand and refusal.**

N.J.—Mueller v. Technical Devices Corp., 84 A.2d 620, 8 N.J. 201.

Utah.—Heisel Const. Co. v. Garff, 225 P.2d 720.

65 C.J. p 115 note 88 [c].

**Retention of articles**

Evidence held sufficient to sustain finding that decedent intended to retain articles for his own use.—Del Barrio v. Sherman, 60 P.2d 559, 16 Cal.App.2d 407.

95. Mich.—Timm v. Cass Circuit Judge, 158 N.W. 1028, 192 Mich. 508.

65 C.J. p 115 note 89.

96. S.C.—Hoover v. Alexander, 17 S. C.L. 510.

97. N.Y.—Hill v. Covell, 1 N.Y. 522.

98. Miss.—Citizens Bank of Coldwater v. Callicott, 174 So. 78, 178 Miss. 747.

**Expert testimony**

In action of trover for conversion of certain personality consisting of miniature golf course equipment, where, prior to the conversion, owner renovated equipment, expert testimony as to the reasonableness of charges for materials furnished and work done in renovating equipment was not necessary where other evidence showed lack of repair and depreciation of such equipment.—Winslow v. Einhorn, 2 A.2d 390, 82 R.I. 1.

99. Cal.—Corpus Juris cited in Paine v. Bank of Ceres, 138 P.2d 396, 399, 59 Cal.App.2d 242, motion denied 141 P.2d 219, 60 Cal.App.2d 621.

Tenn.—Roith Coal Co. v. Louisville & N. R. Co., 215 S.W. 404, 142 Tenn. 62.

1. Iowa.—Bowers v. Bradley, 84 N. W. 534, 113 Iowa 537.

65 C.J. p 115 note 92.

evidence of value, or the evidence be too indefinite, uncertain, or weak to sustain a judgment.<sup>2</sup>

2. Cal.—Stiller v. Geske, 220 P.2d 437, 98 Cal App 2d 413.  
65 C.J. p 116 note 99.

#### Evidence held sufficient

(1) To establish value of property  
U.S.—Federman v. Vorn, D.C.N.Y., 42 F Supp 113.  
Cal.—Nend v. Specimen Hill Mining Co., 126 P.2d 450, 52 Cal App 2d 475.  
Kan.—Glass v. Brunt, 138 P.2d 453, 157 Kan. 27.  
La.—Cunningham v. Bell, App., 26 So.2d 769—Edwards v. Max Thiene Chevrolet Co., App., 191 So. 869—Rodgers v. A. & B. Pipe & Supply Co., App., 162 So. 445.  
Minn.—Melin v. Baker, 27 N.W.2d 647, 223 Minn. 319—Owens v. Owens, 292 N.W. 89, 207 Minn. 489.  
Mo.—Richardson v. Kuhlmyer, 250 S.W.2d 355.  
N.Y.—Cutler-Hammer, Inc. v. Troy, 126 N.Y.S.2d 452, 283 App Div. 123—Lundstrom v. De Santos, 127 N.Y.S.2d 610 205 Misc. 260.  
Tex.—Radcliff v. Clemons, Civ.App., 265 S.W.2d 182, error refused no reversible error—Scott v. Doggett, Civ.App., 226 S.W.2d 183, refused no reversible error—Dean v. Thompson, Civ.App., 213 S.W.2d 327, error refused no reversible error—Gelstman v. Schlucke, Civ.App., 121 S.W.2d 494—Universal Credit Co. v. Ratliff, Civ.App., 57 S.W.2d 238.  
Utah—Heiselt Const. Co. v. Garff, 225 P.2d 720.  
Wash.—Layman v. Swanson, 101 P.2d 304, 3 Wash.2d 370.  
65 C.J. p 116 note 99 [a] (1).  
(2) To sustain recovery for amount awarded.  
Ark.—Plunkett-Jarrell Grocery Co. v. Terry, 263 S.W.2d 229—Strickland v. Quality Bldg. & Sec. Co., 249 S.W.2d 557, 220 Ark. 708—Van Meter Lumber Co. v. Alexander, 217 S.W.2d 833, 214 Ark. 640.  
Cal.—Woodbine v. Van Horn, 173 P.2d 17, 29 Cal.2d 95—Stroman v. Lynch, 205 P.2d 409, 91 Cal.App.2d 406—Bradley v. Osborn, 194 P.2d 53, 86 Cal.App.2d 18—Longner v. Monroe, 175 P.2d 42, 77 Cal.App.2d 223—Griffin v. Porter, 128 P.2d 820, 54 Cal.App.2d 254—Nead v. Specimen Hill Mining Co., 126 P.2d 450, 52 Cal.App.2d 475—Sloss v. General Motors Acceptance Corp., 120 P.2d 85, 48 Cal.App.2d 574—Bacigalupi v. Western Machinery Co., 26 P.2d 701, 135 Cal.App. 242.  
Idaho.—Williams v. Bone, 259 P.2d 810, 74 Idaho 185.  
Ill.—Mueller v. Bittle, 53 N.E.2d 56, 321 Ill.App. 363—Ford Motor Co. v. National Bond & Investment Co., 14 N.E.2d 306, 294 Ill.App. 555.

Ind.—Hardy v. Heeter, 96 N.E.2d 682, 120 Ind.App. 711.  
Iowa.—Larnile v. Schreiber, 19 N.W.2d 669, 236 Iowa 597.  
Ky.—Phillips Petroleum Co. v. Cunningham, 169 S.W.2d 628, 293 Ky. 514.  
La.—Schultz v. Texas & P. Ry. Co., 185 So. 49, 191 La. 624—McCann v. Louisiana, Arkansas & Texas Transp. Co., App., 35 So.2d 603.  
Mich.—Burton v. Rex Oil & Gas Co., 36 N.W.2d 731, 324 Mich. 426.  
Miss.—Potomac Ins. Co. of District of Columbia v. Wilkinson, 71 So.2d 765.  
Mo.—Detmer v. Miller, App., 220 S.W.2d 729—Iowa-Missouri Walnut Co. v. Grahl, 170 S.W.2d 437, 237 Mo. App. 1093.  
Mont.—Engle v. Pfister, 257 P.2d 561.  
N.D.—Mevorah v. Goodman, 60 N.W.2d 581.  
Ohio.—Armstrong v. Feldhaus, 93 N.E.2d 776, 87 Ohio App. 75.  
Okla.—Gantz v. Matthews, 219 P.2d 631, 203 Okl. 226.  
Or.—Perry v. Thomas, 253 P.2d 299, 197 Or. 374.  
R.I.—G. H. Waterman & Co. v. Dwares, 27 A.2d 327, 68 R.I. 303.  
Tex.—Manley v. Razien, Civ.App., 172 S.W.2d 798.  
65 C.J. p 116 note 99 [a] (2).  
(3) To show damages  
U.S.—T. G. Cooper & Co. v. Brice, 1 C.N.Y., 86 F.Supp. 308.  
Ark.—Plunkett-Jarrell Grocery Co. v. Terry, 263 S.W.2d 229.  
Cal.—Sloss v. General Motors Acceptance Corp., 120 P.2d 85, 48 Cal.App.2d 574.  
Ind.—Hardy v. Heeter, 96 N.E.2d 682, 120 Ind.App. 711.  
Ohio.—Universal Credit Co. v. Gossney, 46 N.E.2d 305, 70 Ohio App. 379.  
Pa.—Croft v. Malli, 105 A.2d 372, 378 Pa. 6.  
Tex.—Scott v. Doggett, Civ.App., 226 S.W.2d 183, error refused no reversible error.  
Wash.—Tobin v. Orino, 44 P.2d 795, 181 Wash. 668.  
65 C.J. p 116 note 99 [a] (3).  
(4) To authorize allowance for exemplary or punitive damages.  
Cal.—Sloss v. General Motors Acceptance Corp., 120 P.2d 85, 48 Cal.App.2d 574.  
Okla.—Gantz v. Matthews, 219 P.2d 631, 203 Okl. 226.  
Tex.—Home Furniture Co. v. Hawkins, Civ.App., 84 S.W.2d 830—Universal Credit Co. v. Ratliff, Civ.App., 57 S.W.2d 238.  
Utah.—Host v. Larsen Bros., 134 P.2d 179, 103 Utah 142.  
65 C.J. p 116 note 99 [a] (6).  
(5) With respect to exemplary damages, to show

Furniture Co. v. Hawkins, Tex.Civ. App., 84 S.W.2d 830, error dismissed.  
(6) With respect to exemplary damages, to show gross negligence.—Home Furniture Co. v. Hawkins, supra.  
**Evidence held insufficient**  
(1) To establish value of property.  
Cal.—Stiller v. Geske, 220 P.2d 437, 98 Cal.App.2d 413.  
N.C.—Carolina Mineral Co. v. Young, 190 S.E. 520, 211 N.C. 387.  
Ohio.—Hanes v. Block, 65 N.E.2d 86, 78 Ohio App. 394.  
Okla.—Anthony v. Sapulpa Motor Co., 20 P.2d 172, 162 Okl. 263.  
Tex.—Kenyon v. Bender, Civ.App., 174 S.W.2d 110, error refused—English v. Nichols, Civ.App., 142 S.W.2d 534.  
65 C.J. p 116 note 99 [c] (1).  
(2) To sustain recovery for amount awarded.  
Cal.—Stiller v. Geske, 220 P.2d 437, 98 Cal.App.2d 413—Friedman v. Renz, 87 P.2d 386, 31 Cal.App.2d 71.  
Kan.—Trapani v. Universal Credit Co., 100 P.2d 735, 151 Kan. 715.  
Mo.—Howard Nat. Bank & Trust Co. v. Jones, App., 238 S.W.2d 905, affirmed 243 S.W.2d 305.  
N.J.—Friedman v. Gufanti, 59 A.2d 1, 137 N.J.Law 195.  
Utah.—Haycraft v. Adams, 24 P.2d 1110, 82 Utah 347.  
Wash.—Anstine v. McWilliams, 163 P.2d 816, 24 Wash.2d 230.  
65 C.J. p 116 note 99 [c] (2).  
(3) To show damages.  
U.S.—H. F. Wilcox Oil & Gas Co. v. Diffe, C.A. Okl., 186 F.2d 683.  
Ala.—B. F. Goodrich Co. v. Hughes, 194 So. 842, 239 Ala. 373.  
Mass.—Buckley v. White, 104 N.E.2d 168, 328 Mass. 653.  
Tex.—Universal Credit Co. v. Wyatt, Civ.App., 56 S.W.2d 487.  
Wis.—Rumary v. Livestock Mortg. Credit Corp., 290 N.W. 611, 234 Wis. 145.  
65 C.J. p 116 note 99 [c] (5).  
(4) To authorize exemplary or punitive damages.  
Or.—Perry v. Thomas, 253 P.2d 299, 197 Or. 374.  
S.C.—Williams v. Haverly Furniture Co., 188 S.E. 512, 182 S.C. 100.  
Tex.—Taylor-Fichter Steel Const. Co. v. Curtis, Civ.App., 144 S.W.2d 285, error dismissed, judgment correct.  
65 C.J. p 116 note 99 [c] (6).  
**Purchase price of personality**, standing alone, is insufficient to support a judgment fixing value at time and place of conversion.—Anstine v. McWilliams, 163 P.2d 816, 24 Wash.2d 230.  
**Evidence held not conclusive**  
In action for conversion of plaintiff's automobile, the fact that a blue

*Description of property as basis of determining value.* A general description of the property by witnesses, such as will enable the jury to estimate its value, will suffice as proof of value,<sup>3</sup> and authorize a recovery of the actual damages sustained.<sup>4</sup>

*Price obtained on sale of goods.* Since, as discussed supra § 130, according to the weight of authority, either plaintiff or defendant may introduce evidence showing the price for which the property was sold, either at a public or private sale, it has been said that such evidence is slight or cogent according to the circumstances,<sup>5</sup> and that it does not fix the price but is only evidence bearing on the value.<sup>6</sup> The price at which willing and uncompelled buyers and sellers meet is the best evidence of market value;<sup>7</sup> and it has been held that proof of the price obtained at a private sale made in a bona fide manner and not forced or made for the purpose of fixing a price is sufficient for a jury to base a

verdict on, in the absence of other evidence on the subject.<sup>8</sup>

*Value of written instruments.* As discussed supra § 121, in trover for the conversion of choses in action, such as promissory notes, bills of exchange, checks, drafts, bonds, corporate stock, or other evidences of indebtedness, it will be presumed, in the absence of any evidence to the contrary, that the value of the instrument is its face value, and, as discussed supra § 130, such presumption may be rebutted by evidence that the instrument is worth less than its face value, or is of no value; but in the absence of such rebutting evidence the presumption becomes conclusive.<sup>9</sup>

*Special damages.* If plaintiff seeks to recover special damages, consisting of legal or other expenses, he must show the jury what the expenses were, and if he merely states a lump sum, a verdict for such sum will not be allowed to stand but will be reduced to the value of the goods.<sup>10</sup>

## E. TRIAL AND JUDGMENT

### § 137. In General

In an action of trover the court has a wide discretion as to the form in which evidence shall be submitted and as to the order of its introduction.

In an action of trover, as in other civil actions, the court has large discretion as to the form in which evidence shall be submitted,<sup>11</sup> and as to the order of its introduction, including the admission or rejection of evidence in rebuttal or surrebuttal which should have been introduced in chief;<sup>12</sup> and

permission to a plaintiff who has rested his case to reopen it and make further proof.<sup>13</sup>

### § 138. Dismissal or Nonsuit before Trial

Where several parties are sued for conversion, the plaintiff may dismiss the action as to any of them.

Where several parties are sued for conversion, plaintiff may dismiss the action as to any of them and seek a recovery against one of them alone.<sup>14</sup> A nonsuit will not be directed where plaintiff is en-

book showed that value of automobile was \$963.80 was not conclusive upon jury but was merely evidence of value of automobile.—*Sloss v. General Motors Acceptance Corp.*, 120 P.2d 85, 48 Cal.App.2d 574.

#### Evidence held inconsistent

In action for conversion of household furnishings, plaintiff's testimony as to value of goods was not to be considered as uncontradicted in view of inconsistent claims as to value in complaint and in sworn statement given to tax assessor.—*Siroman v. Lynch*, 205 P.2d 409, 91 Cal.App.2d 406.

#### Evidence of indebtedness

Owner of property held not entitled to recover for conversion thereof against person to whom owner owed debt in absence of evidence of amount of indebtedness.—*Sanders v. O'Connor*, Tex.Civ.App., 98 S.W.2d 401, error dismissed.

#### Reduction of damages

In action for conversion of furnace slag from land located in Illinois

after expiration of a lease agreement under Illinois law, defendants were not entitled to credit for the cost of processing, loading and selling the slag after it had been severed and converted where they offered no evidence from which the cost of selling the slag could be ascertained and no evidence from which the cost of processing and loading could be ascertained separately from the cost of severance and conversion.—*St. Louis Smelting & Refining Co. v. Hoban*, 209 S.W.2d 119, 357 Mo. 436.

3. Mass.—*Hall v. Burgess*, 5 Gray 12, 65 C.J. p 116 note 1.

4. Mass.—*Hall v. Burgess*, supra.

5. N.Y.—*Campbell v. Woodworth*, 20 N.Y. 499.

6. Mich.—*Dyer v. Rosenthal*, 8 N.W. 560, 45 Mich. 688.—*Smith v. Mitchell*, 12 Mich. 180.

7. U.S.—*In re Schuyler, Chadwick & Burnham*, C.C.A.N.Y., 63 F.2d 241.

8. N.Y.—*Parmenter v. Fitzpatrick*, 31 N.E. 1032, 135 N.Y. 190.

9. Wash.—*Cremidas v. Dallas*, 157 P. 1084, 91 Wash. 441, 65 C.J. p 117 note 9.

*Face value of note, and not value alone of security given to secure note, constituted measure of damages for conversion of note and trust deed in absence of proof tending to reduce value of note.*—*Meyer v. Thomas*, 63 P.2d 1176, 18 Cal.App.2d 299.

10. Pa.—*Withrow v. Walker*, 41 Pa. Super. 155.

11. U.S.—*New York Life Ins. Co. v. Allison*, N.Y. 107 F. 179, 46 C.C.A. 229 certiorari denied 21 S.Ct. 923, 181 U.S. 618, 45 L.Ed. 1030.

12. R.I.—*Dodge v. Goodell*, 12 A. 236, 16 R.I. 48.

13. N.Y.—*Dexter v. Dexter*, 4 N.Y.S. 712, 56 N.Y. Super. 568, affirmed 30 N.E. 68, 132 N.Y. 540.

14. Ky.—*Weisiger v. McDonald*, 81 S.W. 687, 116 Ky. 862, 26 Ky.L. 416.

titled to general damages although he may not be entitled to special damages claimed.<sup>15</sup>

### § 139. Tender of Property

In a proper case, the defendant may in an action of conversion bring the chattel into court and make a tender thereof in reduction of damages.

In some jurisdictions, at least as to bills, notes, bonds and other contracts for payment of money, or articles of a fixed and unchangeable value, defendant may in an action of conversion bring such notes etc., into court and make a tender thereof in reduction of damages,<sup>16</sup> having first obtained leave to do so by a motion addressed to the discretion of the judge, whose decision may be final in some jurisdictions,<sup>17</sup> but not in others.<sup>18</sup> While recognizing that the right may exist in a proper case, in at least one jurisdiction the court has held otherwise as to chattels which may deteriorate while in the possession of defendant.<sup>19</sup>

### § 140. Stay of Proceedings

A court may stay proceedings in trover where complete justice can be done by delivery of the chattel into court and on payment of costs by the defendant.

A trial court may stay proceedings in an action of

trover where complete justice can be done plaintiff by delivery of the chattel alleged to have been converted into court and on payment of costs by defendant.<sup>20</sup> Defendant should make his application to the court both as to costs and the delivery of the chattel at some convenient stage of the cause.<sup>21</sup>

### § 141. Questions of Law and Fact

In actions for trover and conversion questions of law are for the court and questions of fact are for the jury.

As in other civil actions, questions of law are for the determination of the court;<sup>22</sup> and, on the other hand, questions of fact are for the jury,<sup>23</sup> or for the court sitting as a jury, where the case is tried to the court.<sup>24</sup>

### § 142. — Title or Right to Possession

Generally, the question whether a party has title or right to possession of chattel claimed to be converted is one of fact for the jury or court sitting as a jury.

Ordinarily, the question whether plaintiff had title or right to the chattels which he claims have been converted is one of fact for the determination of the jury,<sup>25</sup> or for the court sitting as a jury,<sup>26</sup> as where the evidence relating to the question is conflicting;<sup>27</sup>

15. N.Y.—*Djildes v. Wishnevsky*, 179 N.Y.S. 99.

Taking case from jury see *infra* § 149.

16. Wis.—*Churchill v. Welsh*, 1 N. W. 398, 47 Wis. 39.

65 C.J. p 117 note 22.

Offer to return or restore property in mitigation of damages see *infra* § 185.

Recovery, restoration, or offer to restore property generally see *supra* § 86.

17. Me.—*Rogers v. Crombie*, 4 Me. 274.

18. Wis.—*Churchill v. Welsh*, 1 N. W. 398, 47 Wis. 39.

19. N.Y.—*Shotwell v. Wendover*, 1 Johns. 65.

20. Pa.—*Tracey v. Good*, 1 Pa.L.J. 472, 3 Pa.L.J. 135.

Stay of proceedings generally see *Actions* §§ 131-137.

21. Pa.—*Tracey v. Good*, *supra*.

22. Okl.—*McKinnon v. Monarch Loan Co*, 239 P. 170, 111 Okl. 213.

65 C.J. p 117 note 32.

23. Mo.—*American Employers Ins. Co. of Boston, Mass., v. Manufacturers & Mechanics Bank of Kansas City*, 85 S.W.2d 174, 229 Mo. App. 994.

N.J.—*Grover v. Bruere*, 9 N.J.Law 319.

Okl.—*Magic City Steel & Metal Corp. v. Mitchell*, 265 P.2d 473.

Tex.—*Rosenfield v. White*, Civ.App., 267 S.W.2d 596, error refused no

reversible error—*Moore v. Conway*, Civ.App., 108 S.W.2d 954.

65 C.J. p 117 note 33.

**Intent of parties**  
S.D.—*Loewenthal Co v. Ribnick*, 263 N.W. 710, 64 S.D. 14.

24. Colo.—*Denver & S. L. R. Co. v. Hitchcock & Tinkler Equipment Co*, 285 P. 941, 87 Colo. 169.

25. U.S.—*Lauth v. Pickup*, C.C.A.N. Y., 64 F.2d 115.

Ill.—*Diegley v. Lilly*, 43 N.E.2d 156, 315 Ill.App. 491.

Ind.—*Ax v. Schloot*, 64 N.E.2d 668, 116 Ind.App. 366.

Ky.—*Nussbaum v. Standard Hy-Products Co*, 287 S.W. 353, 216 Ky. 119.

Me.—*Giguere v. Morrisette*, 48 A.2d 257, 142 Me. 95.

Mont.—*Smith v. Armstrong*, 198 P.2d 795, 121 Mont. 377—*Hage v. Orton*, 175 P.2d 174, 119 Mont. 419.

Okl.—*Kova Pipe Line Co. v. Liles*, 97 P.2d 43, 186 Okl. 212.

S.D.—*Bohl v. Koster*, 23 N.W.2d 164, 71 S.D. 203.

Wash.—*Junkin v. Anderson*, 150 P.2d 678, 21 Wash.2d 256—*Junkin v. Anderson*, 120 P.2d 548, 12 Wash.2d 58, reheard 123 P.2d 759, 12 Wash.2d 63.

**Title dependent on determination of prior dispute**

In action for reasonable value of property alleged to have been converted, where question as to where legal title to chattels rested depend-

ed largely on a determination of effect of transactions with respect to modification of licensing agreement under which plaintiff's predecessor was licensee, and there was a dispute between parties as to what such transaction consisted of in fact, a prior determination of such dispute was necessary before legal questions resting thereon could be determined.

—*American Castype Corp v. Niles-Bement-Pond Co*, 42 N.Y.S.2d 638, 266 App.Div. 557, reargument denied 44 N.Y.S.2d 263, 266 App.Div. 949.

**Admission by plaintiff**

Weight of admission that car involved in trover belonged to defendant was for jury—*Coulombe v. Gross*, 148 A. 582, 84 N.H. 212.

26. Colo.—*Denver & S. L. Ry. Co. v. Hitchcock & Tinkler Equipment Co*, 285 P. 941, 87 Colo. 169.

Tex.—*Eastus v. Gabert*, 93 S.W.2d 396, 127 Tex. 290.

27. N.Y.—*Lauth v. Pickup*, C.C.A.N. Y., 64 F.2d 115.

Idaho.—*Carver v. Ketchum*, 28 P.2d 139, 63 Idaho 595.

N.C.—*Williamson v. Freeman*, 174 S. E. 457, 206 N.C. 914.

65 C.J. p 118 note 37.

**Evidence held sufficient to make issue for jury as to plaintiff's ownership of chattel.**

Ill.—*Diegley v. Lilly*, 43 N.E.2d 156, 315 Ill.App. 491.

Neb.—*Sprague v. Allied Mills*, 261 N. W. 892, 129 Neb. 394.



or ambiguous,<sup>28</sup> or where reasonable minds might draw different conclusions from the evidence,<sup>29</sup> or where the question of ownership depends solely on the unsupported testimony of plaintiff.<sup>30</sup> It is improper to submit such questions to the jury where there is no evidence of plaintiff's title or right to possession,<sup>31</sup> or where such title or right is not denied but it is urged as a defense that the chattels were worthless;<sup>32</sup> and it has been held that the court may properly take from the jury the question of ownership of the property, where the testimony of plaintiff and his witnesses is uncontradicted and shows indisputably that he owned the property.<sup>33</sup> In determining whether plaintiff in a trover action is entitled to possession of the property at the time of the alleged conversion the jury should consider all the surrounding circumstances.<sup>34</sup>

§ 143. — Conversion

Aside from facts which are found or conceded making the issue of conversion a question of law, whether facts in evidence establish conversion is generally a question for the jury.

What constitutes an unlawful conversion is a question of law where the facts are found or conceded,<sup>35</sup> and, in accordance with the general rule that questions of law should not be submitted to the jury, as discussed in Trial § 295, it is error for the court to submit to the jury the question whether defendant "unlawfully converted" plaintiff's chattels to his own use.<sup>36</sup> Nevertheless, the question whether the facts adduced in evidence establish an unlawful conversion is usually a question to be determined by the jury,<sup>37</sup> under proper instructions from the court;<sup>38</sup> and it has been so held where the evidence is conflicting,<sup>39</sup> where the evidence makes out

Pa.—Valicenti v. Central Motors, 174 A. 799, 116 Pa.Super. 74.

**Evidence held insufficient to submit to jury question as to title.**—Platzsmans v. Frey, 45 N.W.2d 603, 153 Neb. 550.

28. N.Y.—Bromley v. Miles, 64 N.Y.S. 353, 51 App.Div. 95.

29. N.Y.—Crosby v. Delaware & Hudson Canal Co., 36 N.E. 332, 141 N.Y. 589.

30. Ky.—Sherman v. Adams, 194 S.W.2d 625, 302 Ky. 490.

N.Y.—Simar v. Paris, 65 N.Y.S. 133, 52 App.Div. 439.

31. Ill.—Diegley v. Lilly, 43 N.E.2d 156, 315 Ill.App. 491.

Md.—Stewart v. Spedden, 5 Md. 433.

32. Vt.—Fullam v. Cummings, 16 Vt. 697.

33. Ark.—Kesterson v. Hays, 209 S.W. 721, 137 Ark. 592.

34. Wash.—Smith v. Dahlquist, 28 P.2d 262, 176 Wash. 84.

35. Mo.—Speak v. Ely & Walker Dry Goods Co., 22 Mo.App. 122.

**Evidence undisputed**

In action for conversion of negotiable bonds, where there appeared in the testimony no circumstances to suggest knowledge of defendant that person disposing of bonds was not a holder thereof in due course, nor any bad faith on defendant's part, and the evidence was undisputed and presented by plaintiff itself, it was proper for the trial court to declare as a matter of law that the facts conclusively established the innocence of defendant in the transaction.—First Nat. Bank of Blairtown v. Goldberg, 17 A.2d 377, 340 Pa. 337.

**Slight conflict as to minor details**

In action for conversion of automobile, where material and controlling facts were proven by undisputed

evidence with slight conflict in testimony as to some of the minor details, defendant's liability was question of law, not of fact.—Davidson v. Conner, 46 So.2d 832, 254 Ala. 38.

**Debtor and creditor relationship**

Evidence that employee was indebted to employer, in that he owed employer for freight charges collected in behalf of employer, indicated a debtor and creditor relation and that employee had authority to mingle funds collected with his own funds, and, under such circumstances, mere refusal or failure of employee to pay money to employer would not constitute a conversion.—Massachusetts Bonding & Ins. Co. v. Lineberry, 70 N.E.2d 308, 320 Mass. 510.

36. Mo.—Speak v. Ely & Walker Dry Goods Co., 22 Mo.App. 122.

37. U.S.—American Oil Co. v. Colonial Oil Co., C.C.A.S.C., 130 F.2d 72, certiorari denied 63 S.Ct. 159, 317 U.S. 679, 87 L.Ed. 545.

Ala.—Long-Lewis Hardware Co. v. Abston, 180 So. 261, 235 Ala. 599.—W. T. Smith Lumber Co. v. Fox, 164 So. 214, 231 Ala. 159.—Wolff v. Zurka, 150 So. 144, 227 Ala. 370.—Walls v. Borders, 30 So.2d 41, 33 Ala.App. 95.

Ark.—Hollena Oil & Gas Co. v. Goodkin, 110 S.W.2d 698, 195 Ark. 7. Cal.—Wolfe v. Willard H. George, Inc., 294 P. 436, 110 Cal.App. 632. Colo.—Mangini v. Dando Co., 74 P.2d 675, 101 Colo. 453.

Fla.—Handley v. Home Ins. Co. of New York, 150 So. 902, 112 Fla. 225.

Kan.—Ahring v. White, 131 P.2d 699, 156 Kan. 60.

N.Y.—Soma v. Handrulis, 14 N.E.2d 46, 277 N.Y. 223, reargument denied 15 N.E.2d 71, 278 N.Y. 481.—Soma v. Handrulis, 9 N.Y.S.2d 252, 256 App.Div. 338, reargument denied 11 N.Y.S.2d 229, 256 App.Div.

946, affirmed 22 N.E.2d 161, 281 N.Y. 583.

R.I.—Harvey v. Atherton, 163 A. 546. S.C.—Sun Ins. Office v. Foll, 197 S.E. 683, 187 S.C. 183.

Tex.—Forrest v. Burns, Civ.App., 67 S.W.2d 1111, error dismissed. 65 C.J. p. 118 note 47.

**Evidence held sufficient to go to jury on question of conversion**

Ark.—Morgan v. Norfolk, 262 S.W.2d 139.

Iowa.—Olson v. Barnick, 61 N.W.2d 733.

Miss.—Byrd v. Masonite Corp., 67 So. 2d 724. 65 C.J. p. 114 note 83 [c].

**Evidence held insufficient to go to jury on question of conversion**

(1) Generally. Cal.—Sund v. Paul, 62 P.2d 803, 17 Cal.App.2d 682.

Conn.—Bruneau v. W. & W. Transp. Co., 82 A.2d 923, 138 Conn. 179.

Fla.—Brockington v. Central Life Ins. Co., 173 So. 908, 131 Fla. 250.

Ill.—Urbanus v. Burns, 20 N.E.2d 869, 300 Ill.App. 207.

Mass.—Susi v. M. H. Peavey Transp. Co., 89 N.F.2d 338, 325 Mass. 161.

N.J.—Mueller v. Technical Devices Corp., 84 A.2d 620, 8 N.J. 201.

Ohio.—Modlin v. Wood, App., 36 N.E.2d 481.

Okla.—Smith v. Wixson, 123 P.2d 250, 190 Okl. 314.

Tex.—Kenyon v. Bender, Civ.App., 174 S.W.2d 110, error refused. 65 C.J. p. 115 note 85 [b].

(2) As to whether some of defendants had possession or control of the chattels at any time so as to warrant submitting case to jury as to such defendants.—Urbanus v. Burns, 20 N.E.2d 869, 300 Ill.App. 207.

38. Md.—Martin v. W. W. Lanahan & Co., 105 A. 777, 133 Md. 625. 65 C.J. p. 119 note 48.

39. Ala.—National Supply Co. v.

a prima facie case for plaintiff,<sup>40</sup> where there is some evidence to establish a conversion,<sup>41</sup> although slight,<sup>42</sup> where defendant's refusal to deliver plaintiff's chattels on demand was not unconditional, but qualified,<sup>43</sup> or where the evidence, if true, would authorize a recovery.<sup>44</sup>

It has been held that whether a conversion by defendant brought in by amendment took place before the commencement of the suit is a question for the jury.<sup>45</sup> Where, however, the testimony is undisputed, that defendant claimed to own the property absolutely, it is unnecessary to submit the issue of conversion to the jury if they find that he held the goods as security only.<sup>46</sup> A party by not excepting to a charge and not challenging the verdict on certain grounds may practically concede that the fact whether he aided in the conversion is a question for the jury to decide.<sup>47</sup>

*Trial by court.* Where the case is tried by the court without a jury, the question of conversion is ordinarily a question of fact to be determined by the court sitting as a jury.<sup>48</sup>

#### § 144. — Identification and Value of Property

Ordinarily, the questions whether property converted is sufficiently identified, and the value thereof, are for the jury.

Whether the property alleged to have been converted is sufficiently identified is ordinarily a question of fact to be determined by the jury.<sup>49</sup> The

value of a chattel alleged to be converted is a question of fact for the jury at least where there is some evidence submitted as to its value,<sup>50</sup> and where there is a conflict in the evidence as to value.<sup>51</sup> The fact that plaintiff's testimony was the only evidence of the value of the property at the place of conversion does not authorize the withdrawal of such issue from the jury since the jury are not bound to accept his testimony as true, especially where it was shown that he was poorly qualified to testify as to its value.<sup>52</sup>

#### § 145. — Motive and Good Faith

Whether a party accused of conversion acted in good faith, or had a reasonable or proper purpose in taking or detaining the property, is generally a question for the jury.

Whether the taking or detention of plaintiff's chattels by defendant, relied on as constituting a conversion, was in good faith or if for any reasonable or proper purpose and, therefore, justifiable, is ordinarily a question for the jury.<sup>53</sup> However, if what evidence there is on the issue of malice rebuts any inference thereof, it is error to submit the issue to the jury.<sup>54</sup>

#### § 146. — Demand

Whether a demand has been made for the property is generally a question for the jury.

Whether a demand has been made on defendant for the property is ordinarily a question of fact to

Simpson, 182 So. 459, 236 Ala. 369—Clay County Abstract Co. v. McKay, 147 So. 407, 226 Ala. 394.

Ark.—Bailey v. Riggs, 74 S.W.2d 396, 189 Ark. 456.

Ind.—Ederer v. Wilbur Lumber Co., 104 N.E.2d 581, 122 Ind. App. 308.

R.I.—Greenstein v. Singer, 93 A.2d 306, reargument denied 96 A.2d 623.

S.D.—Skinner v. First Nat. Bank & Trust Co. of Watertown, 249 N.W. 821, 61 S.D. 481.

Wis.—Wausau Canning Co. v. Woodruff, 267 N.W. 421, 189 Wis. 184, 44 A.L.R. 435.

65 C.J. p 119 note 49.

60. N.C.—Acme Mfg. Co. v. McQueen, 127 S.E. 246, 189 N.C. 311.

41. Ala.—Clay County Abstract Co. v. McKay, 147 So. 407, 226 Ala. 394. 65 C.J. p 119 note 51.

42. N.Y.—Armstrong v. Dubois, 1 Abb. Dec. 8, 4 Keyes 291.

43. Minn.—Sutton v. Great Northern R. Co., 109 N.W. 816, 99 Minn. 376.

65 C.J. p 51 note 11, p 119 note 53.

44. Ky.—Johnson v. Kelley, 106 S.W. 464, 32 Ky.L. 701.

45. Ala.—Hayes v. Sander, Vann & Chalker, 80 So. 682, 16 Ala. App. 608.

46. Tex.—Payne v. Lindsley, 126 S.W. 329, 53 Tex. Civ. App. 545.

47. Vt.—Parker v. Cone, 168 A. 715, 104 Vt. 426.

48. Cal.—Abdallah v. Barth, 21 P.2d 435, 131 Cal. App. 448—Wolfe v. Willard H. George, Inc., 294 P. 436, 119 Cal. App. 532.

65 C.J. p 119 note 57.

**Evidence held not to show conversion as matter of law**

Mass.—John T. D. Blackburn, Inc. v. Livermore, 56 N.E.2d 693, 317 Mass. 20.

49. Wis.—Russell Timber Co. v. Kenfield-Lamoureux Co., 161 N.W. 358, 165 Wis. 136.

65 C.J. p 119 note 58.

50. Idaho—Carver v. Ketchum, 26 P.2d 139, 53 Idaho 595.

Ky.—Nussbaum v. Standard By-Products Co., 287 S.W. 353, 216 Ky. 119.

Okl.—Kova Pipe Line Co. v. Liles, 97 P.2d 43, 186 Okl. 212.

Pa.—Cervi v. Mori, 186 A. 261, 122 Pa. Super. 355.

R.I.—Moss v. Rocky Point Park, Inc., 103 A.2d 72.

#### Value of automobile

In action for conversion of an automobile, where evidence showed original cost of automobile, the name of the automobile and the year of its manufacture and it was admitted by pleadings that automobile was sold after the conversion for a certain price, the trial court was not warranted in taking the case from the jury because of lack of sufficient evidence to enable the jury to determine the value of the automobile.—Junkin v. Anderson, 120 P.2d 548, 12 Wash.2d 58, reheard 123 P.2d 759, 12 Wash.2d 58.

51. Idaho—Higgins v. Belson, 168 P.2d 813, 66 Idaho 736.

52. Tex.—Morriss v. Knepper, Civ. App., 10 S.W.2d 1012.

53. Mo.—Spitzengel v. Greenlease Motor Car Co., 136 S.W.2d 100, 234 Mo. App. 962.

Neb.—Hansen v. Village of Ralston, 18 N.W.2d 213, 145 Neb. 838.

65 C.J. p 119 note 61.

54. Tex.—Lawson v. Townsend, Civ. App., 25 S.W.2d 170.

be determined by the jury;<sup>55</sup> but the question of a demand need not be submitted to the jury where plaintiff fails to make out even a prima facie case of conversion,<sup>56</sup> or where the evidence conclusively shows a demand.<sup>57</sup> The existence and reasonableness of a qualified refusal to a demand are ordinarily questions for the jury to pass on.<sup>58</sup> The sufficiency of a demand involves a question of fact which is for the decision of the trial court where the case is tried to the court without a jury.<sup>59</sup>

### § 147. — Waiver of Conversion

Whether or not a conversion of property has been waived is a question for the jury.

Whether or not a conversion of chattels has been waived is a question of intent,<sup>60</sup> and a question of fact for the determination of the jury,<sup>61</sup> under proper instructions from the court.<sup>62</sup>

### § 148. — Damages

- a. In general
- b. Exemplary damages

#### a. In General

The rule of damages is a question of law for the court, but the amount of damages is a question of fact for the jury.

In trover the rule of damages is a question of law for the court,<sup>63</sup> but the amount of damages is a question of fact to be determined by the jury from the evidence under proper instructions from the court,<sup>64</sup> its discretion in fixing the matter of dam-

ages, however, being subject to the limitation that the verdict must not be inadequate or excessive;<sup>65</sup> and it has been held that the rendition of a final judgment even by default in an action of trover without submitting the case to a jury to assess damages is unauthorized and erroneous.<sup>66</sup>

#### b. Exemplary Damages

It is proper to submit to the jury the question of exemplary damages where the facts authorize a finding of malicious or reckless and wanton conversion.

If the facts authorize a finding of unlawful and malicious acts,<sup>67</sup> or a finding of reckless and wanton conversion,<sup>68</sup> it is proper to submit to the jury the question of exemplary damages, and it is for them to determine the amount of such damages from all the facts and circumstances in the case.<sup>69</sup> On the other hand, it is improper to submit to the jury the question of exemplary damages where the facts show that the property was taken under a claim of right although over the protest of the one in possession.<sup>70</sup>

### § 149. Taking Case from Jury

- a. In general
- b. Dismissal or nonsuit
- c. Demurrer to evidence
- d. Directing verdict

#### a. In General

The court should withdraw the case from the consideration of the jury where the evidence does not make out a prima facie case.

55. N.Y.—*Delahunty v. Hake*, 46 N.Y.S. 929, 20 App.Div. 430.

65 C.J. p 120 note 63

56. Dak.—*Knapp v. Sioux Falls Nat. Bank*, 40 N.W. 587, 5 Dak. 378.

57. Tex.—*Caw v. Bingham, Civ.App.*, 107 S.W. 931.

58. Minn.—*Sutton v. Great Northern R. Co.*, 109 N.W. 815, 99 Minn. 376. 65 C.J. p 51 note 11.

59. Cal.—*Del Barrio v. Sherman*, 60 P.2d 559, 16 Cal.App.2d 407.

60. Tenn.—*Traynor v. Johnson*, 2 Head 51.

61. N.J.—*Mausert v. Mutual Distributing Co.*, 109 A. 503, 94 N.J. Law 222. 65 C.J. p 120 note 67.

#### Maturation

In action for conversion of check bearing restrictive indorsement, whether plaintiff by subsequent acts ratified collection of check by person to whom possession was intrusted was a fact question—*Soma v. Handrulis*, 9 N.Y.S.2d 252, 256 App.Div. 838, reargument denied 11 N.Y.S.2d

229, 256 App.Div. 946, affirmed 22 N.E.2d 161, 281 N.Y. 583.

62. Tenn.—*Traynor v. Johnson*, 1 Head 51.

63. N.Y.—*Baker v. Wheeler*, 8 Wend. 505, 24 Am.D. 66.

#### Determining day of appraisal

In action for conversion of stock certificate which was registered in name of ten year old boy, question as of what day the value of the certificate should be appraised, in ascertaining damages, was for the court.—*Hayward v. Edwards*, 4 N.Y.S.2d 699, 167 Misc. 694.

64. Mo.—*Huddleston v. Ozark Acceptance Corp., App.*, 125 S.W.2d 81.

Pa.—*Cervi v. Mori*, 186 A. 261, 122 Pa.Super. 355.

65 C.J. p 120 note 70.

Great latitude is allowed jury in fixing measure of damages for conversion of personal property.—*Murray v. Williams*, C.C.A.S.C., 114 F.2d 282.

#### Discretion of triers of fact

U.S.—*Vietake v. Austin Co., D.C. Wash.*, 54 F.Supp. 265.

65. N.Y.—*Taft v. Smith, Gray & Co.*, 134 N.Y.S. 1011, 76 Misc. 283.

66. Ala.—*Abraham v. Alford*, 64 Ala. 281.

67. Ill.—*Chapin v. Tampoorlos*, 59 N.E.2d 324, 325 Ill.App. 219.

68. U.S.—*American Oil Co. v. Colonial Oil Co., D.C.S.C.*, 130 F.2d 72, certiorari denied 63 S.Ct. 159, 317 U.S. 679, 87 L.Ed. 545.

Mo.—*Spitzengel v. Greenleaf Motor Car Co.*, 136 S.W.2d 100, 234 Mo. App. 962.

Pa.—*Cervi v. Mori*, 186 A. 261, 122 Pa.Super. 355. 65 C.J. p 120 note 74.

Evidence insufficient to submit to jury question of punitive damages Mo.—*Walker v. Huddleston, App.*, 261 S.W.2d 502.

69. Mo.—*Hussey v. Ellerman, App.*, 215 S.W.2d 38—*Berns v. P. A. Starck Piano Co., App.*, 296 S.W. 239.

70. U.S.—*American Oil Co. v. Colonial Oil Co., D.C.S.C.*, 130 F.2d 72, certiorari denied 63 S.Ct. 159, 317 U.S. 679, 87 L.Ed. 545.

As in other civil actions, if there is an entire absence of evidence to sustain the cause of action alleged,<sup>71</sup> as where the evidence does not make out a prima facie case,<sup>72</sup> or the absence of some fact indispensable to a recovery,<sup>73</sup> the court may and should withdraw the case from the consideration of the jury; and such is the case where reasonable minds would not be warranted in drawing different conclusions from the evidence.<sup>74</sup> So, where the evidence is all one way and is not contradicted, and but one legitimate inference may be drawn from it, and a case is thereby made for plaintiff or a defense made for defendant, the case should be taken from the jury.<sup>75</sup> On the other hand, the case should not be withdrawn from the jury on defendant's motion unless the evidence requires, as a matter of law, a verdict against plaintiff,<sup>76</sup> or if there is any evidence tending to support the cause of action alleged.<sup>77</sup>

#### b. Dismissal or Nonsuit

A motion to dismiss should be granted, or a nonsuit may properly be directed, where there is an entire failure to prove some fact indispensable to the plaintiff's cause of action.

A motion by defendant to dismiss the petition or complaint should be granted where there is an entire failure to prove some fact indispensable to the cause of action,<sup>78</sup> such, for instance, as ownership of the property alleged to have been converted by plaintiff,<sup>79</sup> or that the property had been converted.<sup>80</sup> Where the action is against several defendants the complaint will be dismissed as to such defendants whose connection with the transaction involved has

not been made clear.<sup>81</sup> It is error to dismiss where there is some evidence tending to establish a cause of action,<sup>82</sup> and it is error to dismiss as to some of plaintiffs when defendant asks for affirmative relief.<sup>83</sup> It is not improper to overrule a motion to dismiss where the proof shows that the tort of conversion was committed, as against defendant's contention that it shows a breach of contract.<sup>84</sup>

**Nonsuit.** As in civil actions generally, a nonsuit is properly directed where plaintiff fails to establish some fact indispensable to a recovery.<sup>85</sup> On the other hand, a judgment for nonsuit should not be awarded where the evidence is sufficient to support the allegations of the petition,<sup>86</sup> or to make out a prima facie case entitling plaintiff to some amount of damages,<sup>87</sup> or where, considering the evidence in the light most favorable to plaintiff, it tends to show a conversion,<sup>88</sup> or where there is sufficient evidence of a conversion to raise a question for the jury,<sup>89</sup> or where the evidence, although circumstantial only, tends strongly to show that defendant had got possession of the property by undue means.<sup>90</sup> Prospective difficulty in apportioning between plaintiffs in an action of conversion any possible recovery because of complicated business arrangements is of no concern to defendants and not a proper ground for motion of nonsuit for misjoinder of parties plaintiff.<sup>91</sup> A nonsuit should not be granted for want of proof of ownership where the evidence adduced makes out a prima facie case of ownership,<sup>92</sup> or where the evidence as to ownership is conflicting.<sup>93</sup> A motion for nonsuit will not be granted because plaintiff fails to establish facts

71. Md.—Martin v. W. W. Lanahan & Co., 105 A. 777, 133 Md. 525. 65 C.J. p 120 note 77.

72. Ala.—W. E. Herron Motor Co. v. Maynor, 167 So. 793, 232 Ala. 319.

73. Ill.—Dingley v. Lilly, 43 N.E.2d 156, 315 Ill. App. 491. 65 C.J. p 120 note 78.

74. Neb.—Sindelar v. T. B. Hord Grain Co., 219 N.W. 145, 116 Neb. 776.

Okla.—Davis v. Howe, 226 P. 216, 99 Okl. 118.

75. Mich.—Boudeman v. Arnold, 166 N.W. 985, 200 Mich. 162, 8 A.L.R. 789.

76. Minn.—Woodworth Elevator Co. v. Theis, 122 N.W. 310, 109 Minn. 4.

77. Md.—Martin v. W. W. Lanahan & Co., 105 A. 777, 133 Md. 525.

78. Wash.—Hanson v. Ostrander Ry. & Timber Co., 265 P. 159, 147 Wash. 104.

79. Wash.—Hanson v. Ostrander Ry. & Timber Co., supra.

80. Wash.—Hanson v. Ostrander Ry. & Timber Co., supra.

81. N.Y.—Crosby v. 20 Fifth Ave. Hotel Co., 20 N.Y.S.2d 227, 173 Misc. 595, modified on other grounds 17 N.Y.S.2d 498, 173 Misc. 604.

82. N.Y.—Goodwin v. Sommer, 97 N.Y.S. 960, 49 Misc. 552. 65 C.J. p 120 note 87.

**Delivery, retention, and nonpayment shown**

Where plaintiff sued in conversion for recovery of goods sold on consignment under agreement providing for stipulated division of profits of sale, and delivery, retention, and nonpayment was shown, complaint for conversion should not have been dismissed, until such time as defendant should adduce evidence disproving a conversion and showing that only an accounting was necessary—S. C. Carter, Jr., Agent, Inc. v. Burke, 122 N.Y.S.2d 874.

83. Tex.—Gooch v. Isbell, Civ.App., 77 S.W. 973.

84. Mo.—Hussey v. Ellerman, App., 215 S.W.2d 38.

85. N.Y.—Hanson v. Wetmore, 39 Barb. 104.

86. Mont.—Matthias v. Campbell, 274 P. 501, 84 Mont. 195.

87. Or.—Montesano Lumber & Mfg. Co. v. Portland Iron Works, 186 P. 428, 94 Or. 677.

88. N.C.—Porter v. Alexander, 141 S.E. 343, 195 N.C. 5.

89. Idaho—Carver v. Ketchum, 26 P.2d 139, 53 Idaho 595. 65 C.J. p 121 note 97.

90. N.Y.—Woodworth v. Kissam, 15 Johns. 186.

91. Mont.—Frost v. Long, 213 P. 1107, 66 Mont. 385.

92. Colo.—Thomas v. Seeloom, 250 P. 381, 80 Colo. 189. 65 C.J. p 121 note 99.

93. Or.—Elerath Steel & Iron Co. v. Cornfoot, 253 P. 529, 121 Or. 232.

not essential to his cause of action.<sup>84</sup> The fact that plaintiff, suing as owner for conversion of property, was in reality an assignee of the owner's cause of action does not require granting a motion for nonsuit on the ground that defendant might have pleaded offset against the owner had plaintiff sued as assignee, at least where defendant has not asked leave to plead such offset or to amend his pleadings.<sup>85</sup>

### c. Demurrer to Evidence

Where there is some evidence for the jury on the question of conversion, it is not proper to sustain a demurrer to the evidence.

If there is evidence from which the jury might find a verdict for plaintiff, it is erroneous to sustain a demurrer to the evidence.<sup>86</sup> So, a demurrer to the evidence should not be sustained for entire failure to prove the cause of action alleged, by reason of the fact that the petition alleged ownership and possession of the property converted and the evidence established possession only, since right to immediate possession supports the action, and the allegation of ownership may be treated as surplusage.<sup>87</sup> Peremptory instructions in the nature of special demurrers to evidence as to conversion are properly refused, where there is evidence tending to establish a conversion.<sup>88</sup> On the other hand, where there is an entire lack of evidence to show a conversion, a demurrer to the evidence is properly sustained.<sup>89</sup>

### d. Directing Verdict.

The trial judge may in a proper case require the jury to return a particular verdict.

In a proper case it is permissible for a trial judge to withdraw it from a jury and require them to return a particular verdict.<sup>1</sup> A verdict should not be directed for either party, however, where there is a substantial conflict in the evidence,<sup>2</sup> as where there is a conflict in the evidence with respect to title to the property in suit,<sup>3</sup> or on the question of conversion.<sup>4</sup>

*For plaintiff.* A verdict may be directed for plaintiff where a case is made for him by evidence<sup>5</sup> which is all one way and is uncontradicted, and where but one legitimate inference may be drawn from it,<sup>6</sup> where plaintiff's evidence plainly establishes his right to recover and defendant does not offer sufficient evidence to justify a verdict in his favor,<sup>7</sup> or where reasonable minds would not be warranted in drawing different conclusions from the evidence.<sup>8</sup> It is error to direct a verdict for nominal damages only where there is evidence permitting a reasonably certain estimate of the quantity of property converted, although the precise quantity was not shown.<sup>9</sup> On the other hand, a verdict should not be directed for plaintiff where different inferences might be drawn from the evidence,<sup>10</sup> where he has failed to establish some essential element of his case,<sup>11</sup> such as possession or right of possession in himself,<sup>12</sup> and conversion of the property in suit by defendant,<sup>13</sup> or where the question of ownership depends solely on the unsupported testimony of plaintiff.<sup>14</sup>

*For defendant.* A verdict may and should be directed for defendant where there is a total failure of proof authorizing a recovery,<sup>15</sup> where the evidence is all one way and is uncontradicted and but

94. S.C.—Rakestraw v. Floyd, 32 S. E. 419, 54 S.C. 288, 65 C.J. p 121 note 2.

95. Wash.—Weber v. West Seattle Land & Improvement Co., 63 P.2d 418, 188 Wash. 512.

96. Kan.—Mentze v. Rice, 172 P. 516, 102 Kan. 855.

Mo.—Sanderson v. Nunn, App., 259 S.W. 892.

97. Mo.—Kalinowski v. M. A. Newhouse & Son, App., 53 S.W.2d 1094.

98. Mo.—Ozark Acceptance Corp. v. Yellow Truck & Coach Mfg. Co., App., 137 S.W.2d 965—Sanderson v. Nunn, App., 259 S.W. 892.

Okl.—Gantz v. Matthews, 219 P.2d 631, 203 Okl. 225.

99. Okl.—Davis v. Howe, 226 P. 316, 99 Okl. 118.

1. Tex.—Jackman v. Gay, Civ.App., 237 S.W. 315, reversed on other grounds, Com.App., 252 S.W. 1042, rehearing overruled 254 S.W. 927.

2. ND—Thompson v. Tweto, 134 N.W. 743, 22 ND 528, 65 C.J. p 122 note 39.

3. Tex.—Stunt Motor Co. v. Bourroughs Adding Mach. Co., Civ.App., 47 S.W.2d 637.

65 C.J. p 122 note 40.

4. Wis.—Schultz v. Becker, 110 N. W. 214, 131 Wis. 235.

65 C.J. p 122 note 41.

5. Tex.—Reymershoffer v. Ray, Civ. App., 85 S.W.2d 1102, error refused.

6. Mich.—Boudeman v. Arnold, 166 N.W. 985, 200 Mich. 162, 8 A.L.R. 789.

7. Okl.—Cassity v. First Nat. Bank, 287 P. 392, 143 Okl. 42.

8. Neb.—Sindelar v. T. B. Hord Grain Co., 219 N.W. 145, 116 Neb. 776.

9. U.S.—Union Naval Stores Co. v. U. S., Ala. 36 S.Ct. 308, 240 U.S. 284, 60 L.Ed. 644.

10. U.S.—Swiss Bankverein v. Zim-

mermann, N.Y., 240 F. 87, 153 C.C. A. 123.

11. N.Y.—Leishing v. Van Buren, 170 N.Y.S. 688, 183 App.Div. 296.

12. N.Y.—Leishing v. Van Buren, supra.

13. Me.—Bouthot v. Bouthot, 160 A. 461, 131 Me. 199.

65 C.J. p 121 note 18.

#### Possession by defendant

In action for conversion of truck and trailer, overruling of plaintiff's motion, for instructed verdict for possession of truck and trailer, was not error in absence of evidence showing that defendant ever took or had possession of truck and trailer—Edmondson v. Coffman, Tex.Civ. App., 97 S.W.2d 779, error dismissed.

14. N.Y.—Simar v. Paris, 65 N.Y.S. 133, 62 App.Div. 439.

15. Me.—Brunswick Const. Co. v. Leonard, 103 A.2d 115, 65 C.J. p 122 note 22.

one legitimate inference may be drawn from it and a defense is thereby made out for defendant,<sup>16</sup> where the uncontradicted evidence shows defendant had a better title,<sup>17</sup> where there was an entire lack of evidence to show there was a conversion,<sup>18</sup> where plaintiff did not make out a prima facie case of ownership,<sup>19</sup> where plaintiff did not have possession or right to immediate possession of the property at the time of the conversion,<sup>20</sup> where from the testimony adduced all men of reasonable minds would come to the conclusion that defendant had not converted the property,<sup>21</sup> or where the material evidence on which plaintiff based his case was excluded and no exception was taken by him.<sup>22</sup> A verdict is properly directed for defendant where it is shown that, at the time plaintiff demanded a return of the chattels, he was unable to comply with the demand, because the chattels were in the custody of a constable by virtue of an attachment, although defendant controlled the building where the chattels were locked up.<sup>23</sup>

On the other hand, a verdict should not be directed for defendant unless the evidence is such as to require, as a matter of law, a verdict against plaintiff.<sup>24</sup> A verdict should not be directed for defendant where the evidence makes a prima facie case for plaintiff;<sup>25</sup> where there is substantial<sup>26</sup> or undisputed<sup>27</sup> evidence to show ownership in plain-

tiff; where there is some evidence of plaintiff's title and defendant's lack of title;<sup>28</sup> where there is evidence to go to the jury on facts necessary to be established by plaintiff;<sup>29</sup> where defendant concedes that his liability is an issue for the jury;<sup>30</sup> where there is some evidence tending to show a conversion;<sup>31</sup> or where, although no direct evidence of value is offered, enough appears from the evidence to show that the property was of some value.<sup>32</sup> Likewise, a verdict should not be directed for defendant merely because the evidence does not show the precise quantity of chattels converted, where there is evidence permitting a reasonably certain estimate of quantity.<sup>33</sup> It has been held that the court may not direct a verdict for defendant on the ground of absence of proof of value, since plaintiff is entitled to nominal damages on proof of conversion without proof of value.<sup>34</sup>

### § 150. Instructions

Instructions given in an action for conversion, as in other civil actions, must state correctly the law applicable to the case. The defendant is entitled to an instruction on the burden of proof. Requested instructions which are correct as to the law should be given.

In an action of trover, the instructions given must state correctly the law applicable to the case.<sup>35</sup> Instructions should not be given which are incom-

16. Mich.—Boudeman v. Arnold, 166 N.W. 985, 200 Mich. 162, 8 A.L.R. 789.

17. Mo.—Dietrich v. Mothershead, App., 150 S.W.2d 565—Pioneer Coopera Co. v. Bland, 75 S.W.2d 431, 228 Mo App 994.

18. Ill.—Rodak v. Cohen, 26 NE 2d 174, 304 Ill.App. 257.  
Okl.—Davis v. Howe, 226 P. 316, 99 Okl. 118.

19. Mo.—Pioneer Coopera Co v. Bland, 75 S.W.2d 431, 228 Mo App. 994.

#### Passing of title

In action for alleged conversion of oil well casing, where evidence showed no more than an executory contract of sale of such casing and it did not show passing of title to plaintiff verdict was properly instructed for defendant.—O'Connor v. Fred M. Manning, Inc., Tex Civ.App., 255 S.W.2d 277, error refused.

20. Neb.—Fitzsimons v. Frey, 45 N.W.2d 603, 153 Neb. 550.  
Tex.—O'Connor v. Fred M. Manning, Inc., Civ.App., 255 S.W.2d 277, error refused.

21. Tex.—Southern Round Bale Press Co. v. Behrend, Civ.App., 257 S.W. 655.

22. Ala.—Senn v. Enterprise Banking Co., 7 So.2d 777, 30 Ala.App. 449.

23. Mass.—Magaw v. Beals, 172 N.E. 347, 272 Mass. 334.

24. Minn.—Woodworth Elevator Co. v. Theis, 122 N.W. 810, 109 Minn. 4.

#### Instructed verdict for defendant held properly refused

Tex.—Grossman v. Jones, Civ.App., 157 S.W.2d 448, error refused—Hill v. Reynolds Trust, Civ.App., 137 S.W.2d 195.

25. W Va.—Barker v. Stephenson, 68 S.E. 113, 67 W.Va. 490.  
65 C.J. p 122 note 29.

26. Pa.—Heller v. Fabel, 138 A. 217, 290 Pa. 43.  
65 C.J. p 122 note 30.

27. Ky.—Nussbaum v. Standard By-Products Co., 287 S.W. 353, 216 Ky. 119.

28. Ala.—Kelly v. Cook, 73 So. 220, 15 Ala.App. 350.

29. Ala.—Cotton v. Harris Transfer & Warehouse Co., 106 So. 220, 21 Ala.App. 136, certiorari denied 106 So. 223, 214 Ala. 6.

Minn.—Mueller v. Olsen, 97 N.W. 115, 90 Minn. 416.  
65 C.J. p 122 note 33.

30. Vt.—Parker v. Cone, 168 A. 715, 104 Vt. 426.

31. Md.—Gray v. Frazier, 148 A. 457, 158 Md. 189.  
65 C.J. p 122 note 35.

#### Conversion before acquiring any interest

The right of one owner of chattels to bring trover against a coowner is not raised by motion to direct a verdict for defendant where there is evidence of conversion by defendant before he acquired any interest in the property.—Stamps v. Thomas, 62 So. 314, 7 Ala.App. 622.

32. Miss.—Kellogg v. Hamilton, 10 So. 479.

33. U.S.—Union Naval Stores Co. v. U. S., Ala., 36 S.Ct. 308, 240 U.S. 284, 60 L.Ed 644.

34. Ala.—Stamps v. Thomas, 62 So. 314, 7 Ala.App. 622.

35. Ohio.—Metropolitan Securities Corporation v. Kalfas, 178 N.E. 848, 40 Ohio App. 438.  
65 C.J. p 122 note 45.

plete,<sup>36</sup> argumentative,<sup>37</sup> conflicting,<sup>38</sup> involved,<sup>39</sup> calculated to confuse the jury,<sup>40</sup> too indefinite to furnish a proper guide to the jury,<sup>41</sup> or which are in any respect misleading.<sup>42</sup> So instructions should be limited to the theory on which the case was tried<sup>43</sup> and must be confined to the issues raised by the pleadings and evidence;<sup>44</sup> and should not be given by the court on its motion, or on the request of the parties, where they are not applicable to the issues made by the pleadings,<sup>45</sup> or to the facts in evidence,<sup>46</sup> although if applicable to the issues raised by the pleadings and evidence, it is not only proper to give them,<sup>47</sup> but erroneous to refuse them.<sup>48</sup>

Instructions should not ignore elements essential to a recovery,<sup>49</sup> since defendant is entitled to instructions stating matters necessary to make out a cause of action,<sup>50</sup> nor should they ignore or exclude from the consideration of the jury issues having support in the evidence,<sup>51</sup> or assume as proved a fact which the evidence only tends to prove,<sup>52</sup> or with respect to which the evidence is contradictory,<sup>53</sup> or which the evidence tends to show does not exist.<sup>54</sup> Instructions should not express an opinion on the weight and sufficiency of the evidence,<sup>55</sup> or state the weight which should be attached to a particular portion of the evidence,<sup>56</sup> or single out the testimony of a particular witness, where there are others testifying to the same mat-

ters, and require the jury to find in accordance with his testimony if they believe it.<sup>57</sup>

*Burden of proof and degree of proof.* Defendant is entitled to instructions on the burden of proof;<sup>58</sup> but an instruction is erroneous which imposes on plaintiff the burden of proof on all the issues where the burden of proof is on defendant as to some of the issues.<sup>59</sup> A preponderance of evidence is all that is required to sustain an issue, and an instruction which casts on a party the burden of proving his contention beyond a doubt is erroneous.<sup>60</sup>

*Requests for instructions.* Requested instructions which state principles of law which are correct and applicable to the issues should be given,<sup>61</sup> and it is error to refuse a requested instruction in such a case,<sup>62</sup> unless already covered by other instructions.<sup>63</sup> On the other hand, an instruction is properly refused where it does not state the law correctly,<sup>64</sup> and where numerous and complicated instructions are asked by counsel, calculated, in the opinion of the court, to embarrass the jury, it has the right to refuse all, and to give such prepared by itself as may illustrate the principles of the law involved in the controversy, and asked for by the parties.<sup>65</sup>

## § 151. — Conversion

The court should correctly state the law as to those

36. Hawaii—Correa v. Walahea Mill Co., 31 Hawaii 317.

Mass.—Wright v. Frank A. Andrews Co., 98 N.E. 798, 212 Mass. 186. 65 C.J. p 123 note 47.

37. Mont.—Yoder v. Reynolds, 72 P. 417, 28 Mont. 183.

38. N.Y.—Johnson v. Blaney, 91 N.E. 721, 198 N.Y. 312. 65 C.J. p 123 note 49.

39. Ala.—Lincoln Reserve Life Ins. Co. v. Armes, 110 So. 818, 215 Ala. 407.

40. Mont.—Yoder v. Reynolds, 72 P. 417, 28 Mont. 183. 65 C.J. p 123 note 51.

41. Vt.—Gragg v. Hull, 41 Vt. 217.

42. Va.—Straley v. Fisher, 10 S.E. 2d 551, 176 Va. 163. 65 C.J. p 123 note 53.

43. Utah.—Bowe v. Stilwell, 117 P. 876, 39 Utah 377. 65 C.J. p 123 note 54.

### Instruction held sufficient

Okl.—Kellams v. Helfenbein, 214 P. 2d 894, 202 Okl. 415.

44. Mass.—Corsiglia v. French, 187 N.E. 702, 284 Mass. 211. 65 C.J. p 123 note 55.

### Instruction held properly refused under the evidence

Mo.—Buchanan v. Rechner, 62 S.W. 2d 1071, 333 Mo. 634.

45. Tex.—Harris v. Staples, Civ. App., 89 S.W. 801. 65 C.J. p 123 note 56.

46. Mich.—Parnell v. Pungs, 157 N.W. 357, 190 Mich. 638. 65 C.J. p 123 note 57.

47. Mo.—Summers v. Rutherford, App., 195 S.W. 511—Miliken v. Larrabee, App., 192 S.W. 103.

48. Mo.—Robertson v. Energy Const. Co., App., 15 S.W.2d 865.

49. Mo.—Summers v. Baker, 139 S.W. 226, 158 Mo.App. 666. 65 C.J. p 123 note 60.

50. Cal.—Pullin v. Allen, 173 P. 772, 37 Cal.App. 218.

51. Mich.—Reed v. Gould, 53 N.W. 356, 93 Mich. 359.

52. Mo.—Bower v. Bower, 71 S.W. 739, 97 Mo.App. 674. 65 C.J. p 123 note 64.

53. Colo.—Benson v. Ell, 66 P. 450. 16 Colo.App. 494. 65 C.J. p 123 note 65.

54. Mich.—Schmittiel v. Moore, 60 N.W. 279, 101 Mich. 590.

55. Iowa.—Doyle v. Burns, 99 N.W. 195, 123 Iowa 488.

N.C.—Weisenfeld v. McLean, 2 S.E. 56, 96 N.C. 248.

56. Mont.—Doll v. Hennesey Mercantile Co., 81 P. 625, 33 Mont. 80.

57. N.C.—Weisenfeld v. McLean, 2 S.E. 56, 96 N.C. 248.

58. Mont.—Palmer v. McMaster, 25 P. 1056, 10 Mont. 390.

65 C.J. p 124 note 72.

59. Ill.—Wright v. Sipple, 179 Ill. App. 386.

60. N.Y.—Foo Long v. Chu Fong, 5 N.Y.S. 406.

61. Colo.—First Nat. Bank v. Booth, 235 P. 570, 77 Colo. 122. 65 C.J. p 124 note 77.

62. U.S.—Shell Oil Co. v. Kamper, C.C.A.Mass., 111 F.2d 569.

63. Tex.—France v. Gibson, Civ. App., 101 S.W. 536. 65 C.J. p 124 note 73.

64. Ala.—Farrow v. Wooley & Jordan, 43 So. 144, 149 Ala. 373.

Mo.—Buchanan v. Rechner, 62 S.W. 2d 1071, 333 Mo. 634.

Or.—Barber v. Motor Inv. Co., 298 P. 216, 136 Or. 361.

65. Ky.—Lowry v. Beckner, 5 B.Mon. 41.

acts of which evidence has been admitted which are sufficient, if proved, to constitute conversion.

The court should instruct the jury as to whether acts of which evidence has been admitted are sufficient, if proved, to constitute conversion;<sup>66</sup> and it is error to give instructions as to such matters where the law is incorrectly stated,<sup>67</sup> unless they are corrected by other instructions.<sup>68</sup> On the other hand, requested instructions on the issue of conversion are properly refused where they state the law incorrectly.<sup>69</sup> It is also error to give an instruction to find for defendant if the evidence shows the date of conversion to be different from that alleged, since the allegation as to time is immaterial in an action of trover.<sup>70</sup> Where the evidence is conflicting as to whether the taking of the property by defendant and his conversion thereof to his own use was with the consent of plaintiff, it is error to charge that, if the jury find that defendant took and carried away the property and converted it to his own use, they must find for plaintiff, without regard to any agreement or understanding had between the parties concerning the taking of the property by defendant.<sup>71</sup>

## § 152. — Title and Right to Property

Where title or right to property is in issue, an instruction that the plaintiff must prove title or right to

the property should be given, even though the plaintiff's evidence as to title is uncontradicted.

Where title or right to property alleged to have been wrongfully converted by defendant is in issue, a general instruction that plaintiff must prove it will suffice;<sup>72</sup> and such an instruction should be given even though plaintiff's testimony as to his title is uncontradicted.<sup>73</sup> Either plaintiff<sup>74</sup> or defendant,<sup>75</sup> who has adduced evidence to show that the title to the property is in him, is entitled to an appropriate instruction on the evidence in his favor. Where plaintiff and defendant claim through different chains of title, there is no error in giving an instruction that plaintiff cannot recover if defendant's vendor owned the property when he transferred it to defendant.<sup>76</sup> An instruction as to title of the property alleged to have been converted, not based on evidence,<sup>77</sup> or unsound in law,<sup>78</sup> is improper.

## § 153. — Identity of Property

If the identity of the property alleged to have been converted is put in issue, the court should instruct that the plaintiff cannot recover unless he establishes such identity.

If the identity of the property alleged to have been converted is an issue, the court should instruct that plaintiff cannot recover unless he establishes such identity,<sup>79</sup> and an instruction which assumes the identity of the property converted with that of plaintiff is erroneous.<sup>80</sup>

66. Wis.—Brickley v. Walker, 32 N. W. 773, 68 Wis 563.  
65 C.J. p 124 note 81.

### Instructions defining conversion

(1) In action against owner for damages for forcible eviction from dwelling and conversion of plaintiff's personal property found therein, evidence that defendant, having forcibly entered premises, removed plaintiff's furniture and clothing from living quarters to basement and that such property was never returned to plaintiff entitled plaintiff to instructions defining conversion.—Elchorn v. De La Cantera, 255 P.2d 70, 117 Cal.App. 2d 50.

(2) In action for conversion of stoker, instruction containing words "without right to do so" in referring to interference with owner's right of dominion and control sufficiently defined conversion.—E. H. Bards Range & Foundry Co. v. Weaver, Ohio App., 44 N.E.2d 130.

### Instructions held proper

Cal.—Elchorn v. De La Cantera, 255 P.2d 70, 117 Cal.App.2d 50.—Lowrey v. Rego, 149 P.2d 706, 65 Cal.App. 2d 16.

Iowa.—Sergeant v. Watson Bros. Transp. Co., 52 N.W.2d 86, 244 Iowa 185.

S.D.—Davis v. Lenhoff, 50 N.W.2d 213, 74 S.D. 190.  
Wash.—Kohout v. Brooks, 52 P.2d 905, 185 Wash. 4.

67. Conn.—Trotta v. Metalmod Corp., 36 A.2d 798, 139 Conn. 668.  
65 C.J. p 124 note 82.

### Instruction as to plaintiff's proof

In action for conversion of chattels, instruction that before plaintiff could recover she must prove that defendant at time of alleged conversion had knowledge that property belonged to plaintiff was error.—Wilson v. Holmes, 50 P.2d 1081, 174 Okl. 527.

### Tender of property

In action for conversion of personalty, the issue was whether plaintiff's personalty had been wrongfully converted by defendant, and instruction, that defendant's failure to tender property to plaintiff would amount to conversion, failed to state the issue correctly and placed too heavy a burden on plaintiff.—Shell Oil Co. v. Kamper, C.C.A.Miss., 111 F.2d 569.

68. Neb.—Pecha v. Kastl, 89 N.W. 1047, 64 Neb. 380.  
65 C.J. p 124 note 83.

69. Wash.—Browder v. Phinney, 79 P. 598, 37 Wash. 70.

70. Okl.—Missouri, O. & G. Ry. Co. v. Diamond, 150 P. 175, 48 Okl. 424.

71. Minn.—Freeman v. Etter, 21 Minn. 2.

72. Mich.—Hoffman v. Harrington, 6 N.W. 225, 44 Mich. 183.

Tex.—Jacobs v. Totty, 13 S.W. 372, 76 Tex. 343.

65 C.J. p 124 note 87.

73. Mont.—Palmer v. McMaster, 25 P. 1056, 10 Mont. 390.

74. Conn.—Wilson v. Griswold, 63 A. 659, 79 Conn. 18.

75. Ala.—Nashville, etc., R. Co. v. Walley, 41 So. 134, 147 Ala. 697.

65 C.J. p 124 note 90.

76. Mich.—Burdick v. Michael, 32 Mich. 246.

65 C.J. p 124 note 91.

77. Cal.—Darden v. Callaghan, 31 P. 263, 96 Cal. xvii.

65 C.J. p 124 note 92.

78. Mass.—Guiffre v. Carapezza, 11 N.E.2d 433, 298 Mass. 458, 125 A.L.R. 1.

79. N.C.—Long v. Hall, 2 S.E. 229, 97 N.C. 286.

80. Colo.—Benson v. Ell, 16 P. 450, 16 Colo.App. 494.



§ 154. — Demand and Refusal

Instructions as to demand and refusal need not be given except where necessary to establish a conversion in the particular case.

Where, under the pleadings and evidence of the particular case, proof of demand and refusal are essential to conversion,<sup>81</sup> or may constitute one mode of conversion,<sup>82</sup> the jury should be so instructed; but otherwise no instruction as to demand and refusal need be given,<sup>83</sup> and requested instructions on these points are properly refused.<sup>84</sup> Where there is a qualified refusal to a demand, the court should give appropriate instructions as to the existence and reasonableness of the qualified refusal.<sup>85</sup> A requested instruction need not be given where covered by other instructions.<sup>86</sup>

§ 155. — Intent; Good Faith; Malice

Since intent is merged in the act in an action for conversion, it is not error to omit from a requested instruction words predicating recovery on the intention of the defendant.

In an action for conversion, the court may properly omit from a requested instruction any words predicating recovery on the intent of defendant, since the intent is merged in the act so that it is not what defendant intended, but what he did that governs.<sup>87</sup> As discussed supra § 7, the question whether defendant acted in good faith or willfully and corruptly is not as a general rule involved in an action for conversion unless exemplary damages are asked. On the other hand, where the good faith of defendant constitutes a defense, an instruction that if he exercised good faith and reasonable caution under the circumstances they should return a verdict for defendant is proper.<sup>88</sup> If the act of

alleged conversion consisted in the purchase of plaintiff's goods from a third person and there was evidence that defendant was a bona fide purchaser for value, who relied on conduct of plaintiff, leading him to believe that the seller had authority from plaintiff to make the sale, it is the duty of the court to submit these facts to the jury, explaining the doctrine of agency by estoppel that would bind the principal.<sup>89</sup>

In an action where exemplary damages are asked by reason of malice, an instruction that the term "malice" means, not spite or ill will, but the knowing or intentional doing of a wrongful act, is not erroneous in omitting the further phrase "without just cause or excuse," since the intentional doing of a wrongful act is necessarily an act done without just cause or excuse.<sup>90</sup> An instruction which makes freedom from knowledge of circumstances or facts which ought to put a person on inquiry as to the rights of others a necessary element of good faith is a misstatement of law, and erroneous, since neither such knowledge nor its absence is, as a matter of law, conclusive of defendant's motive.<sup>91</sup>

§ 156. — Damages

- a. In general
- b. Exemplary damages

a. In General

In an action for conversion, it is the duty of the court to instruct the jury as to the correct measure of damages, including rules as to special and nominal damages.

In accordance with general principles, discussed in Damages §§ 177-188, it is the duty of the court to instruct the jury as to the correct measure of damages.<sup>92</sup> The jury should not be left without

81. U.S.—Blakely v. Ruddell, Super. Ark., 30 F.Cas No.18,241, Hempst. 18.

82. Mass.—Salisbury v. Gourgass, 10 Metc. 442.

N.H.—Walcott v. Keith, 22 N.H. 196.

83. Ala.—Williams v. McKissack, 22 So. 489, 117 Ala. 441.

Wis.—Dunham v. Converse, 28 Wis. 306.

84. Okl.—Magic City Steel & Metal Corp v. Mitchell, 265 P.2d 473.

85. Minn.—Sutton v. Great Northern R. Co., 109 N.W. 815, 99 Minn. 376, 65 C.J. p 61 note 11.

86. Mo.—Wall v. Weiler, App., 200 S.W. 731.

87. Wash.—Bayley v. National Pole Co., 156 P. 867, 90 Wash. 664.

88. Cal.—J. G. Boswell Co. v. W. D. Felder & Co., 230 P.2d 386, 103 Cal. App.2d 767.

89. N.Y.—Goodwin v. Sommer, 97 N.Y.S. 960, 49 Misc. 552.

90. Mo.—State v. Allen, 270 S.W. 633, 307 Mo. 480, mandate conformed to, Civ App., 273 S.W. 1119.

91. Hawaii—Correa v. Waiakae Mill Co., 31 Hawaii 317.

92. Cal.—Eichhorn v. De La Cerna, 255 P.2d 70, 117 Cal.App.2d 60, 65 C.J. p 125 note 6.

Evidence sufficient to support instructions

In action for conversion of an automobile, plaintiff's testimony that automobile was worth from five hundred dollars to six hundred dollars at time of conversion was sufficient to support instruction to assess actual damages at fair cash value of automobile when converted.—Detmer v. Miller, Mo App., 220 S.W.2d 730.

Instructions held proper

Ark.—Plunkett-Jarrell Grocery Co. v. Terry, 263 S.W.2d 229.

Mo.—Spitzengel v. Greenlease Motor Car Co., 136 S.W.2d 100, 234 Mo. App. 962.

S.C.—Sample v. Gulf Refining Co., 191 S.E. 209, 183 S.C. 399.

Va.—Straley v. Fisher, 10 S.E.2d 551, 176 Va. 163.

Instructions held improper

(1) In general  
Ala.—Simmons v. Cochran, 41 So.2d 579, 252 Ala. 461.

Ind.—First State Bank v. Montoney, 17 NE2d 870, 106 Ind.App. 61.

Mont.—First Nat. Bank v. Perrine, 33 P.2d 997, 97 Mont. 262.

Okl.—Sestak v. Cowan, 23 P.2d 146, 164 Okl. 152.

Or.—Mattecek v. Pugh, 55 P.2d 730, 153 Or. 1, 168 A.L.R. 725.

Va.—Straley v. Fisher, 10 S.E.2d 551, 176 Va. 163.

a guide as to the amount of damages they may award.<sup>93</sup> Requested instructions which prescribe erroneous rules for the measure of damages are properly refused;<sup>94</sup> and a charge which in one portion states the measure of damages correctly is fatally defective where another portion prescribes a different and erroneous rule for fixing the measure of damages.<sup>95</sup>

Where the instruction taken as a whole correctly states the measure of damages and could not have misled the jury, it is not subject to objection, although a portion of it standing alone might perhaps be understood as authorizing some special damages in addition to the amount to which plaintiff was actually entitled.<sup>96</sup> An instruction authorizing the jury to determine whether there existed a market value for the property is error where the evidence fails to show the absence of such value.<sup>97</sup> However, where the property has no market value at the time and place it was converted, it is proper to instruct the jury that the permissible recovery is the reasonable worth and value of such property as shown by the evidence.<sup>98</sup> An instruction dealing with the intrinsic value of the property converted which fails properly to define the term is erroneous,<sup>99</sup> as, for example, where the court restricts its definition to the value of the property to the owner.<sup>1</sup>

**Special damages.** Where special damages are alleged and proved, the court should properly instruct the jury as to awarding such damages,<sup>2</sup> and should submit rules prescribed by statute for determining the measure of damages for wrongful conversion and supplement those rules by an instruction that, if the special damages pleaded, or any of them,

were proved, such damages might be allowed in addition to those contemplated by the statute.<sup>3</sup>

**Nominal damages.** An instruction limiting damages to a nominal amount is proper where the conversion is alleged to have resulted from a wrongful act with respect to property in plaintiff's possession, and there is no evidence establishing a difference in the value of the property before and after the alleged conversion thereto.<sup>4</sup>

**Construction.** A charge limiting the amount recoverable to the actual value of the property taken, at the time and place of its conversion, is equivalent to a charge that plaintiffs could not recover the amount which might be recoverable by them if the trespass had been willful.<sup>5</sup>

### b. Exemplary Damages

Subject to the limitation that the plaintiff must have suffered actual damages, if there is evidence which, if believed, would authorize the allowance of exemplary damages, the court should instruct the jury as to such damages.

Since actual damages must be shown in order to recover exemplary damages, it is proper for the court to refuse to submit the question of exemplary damages when plaintiff has proved no actual damages.<sup>6</sup> Subject to this limitation, if there is evidence, which if believed, would authorize the allowance of exemplary damages, the court may so instruct the jury;<sup>7</sup> but a requested instruction for exemplary damages is properly refused where the evidence does not support it.<sup>8</sup> The court in instructing the jury as to exemplary damages should require the jury to find the facts alleged as a basis therefor, or to find for defendant thereon.<sup>9</sup> Instructions

(2) In suit by paving contractor against junk dealers for conversion of used paving equipment, instruction defining intrinsic value as the real worth, in money, if any, of the equipment of the contractor for the purpose for which the equipment was used or was capable of being used in the future by the contractor was erroneous, since intrinsic value of property is the true, inherent, and essential value of the property, not depending on accident, place, or person, but the same everywhere and to everyone.—*Rosenfield v. White*, Tex. Civ. App., 267 S.W.2d 596, error refused no reversible error.

93. Ark.—*Kirchoff v. Wilcox*, 36 S. W.2d 667, 183 Ark. 460.

94. Mo.—*Banner Lumber Co. v. McDermott*, 106 S.W. 583, 128 Mo.App. 89.

Mont.—*First Nat. Bank v. Perrine*, 33 P.2d 997, 97 Mont. 262.

Tex.—*Rosenfield v. White*, Civ. App.,

267 S.W.2d 596, error refused no reversible error.

95. Conn.—*Barker v. S. A. Lewis Storage & Transfer Co.*, 61 A. 363, 78 Conn. 198, 3 Ann.Cas. 889.

96. U.S.—*Downing v. Outerbridge*, N.Y., 79 F. 931, 25 C.C.A. 244.

97. Or.—*Mattechek v. Pukh*, 55 P. 2d 730, 153 Or. 1, 168 A.L.R. 725.

98. Idaho—*Klam v. Koppel*, 118 P.2d 729, 63 Idaho 171.

99. Tex.—*Rosenfield v. White*, Civ. App., 267 S.W.2d 596, error refused no reversible error.

1. Tex.—*Rosenfield v. White*, supra.

2. N.C.—*Binder v. General Motors Acceptance Corp.*, 23 S.E.2d 894, 222 N.C. 512.

3. Mont.—*Ferrat v. Adamson*, 163 P. 112, 53 Mont. 172.

4. Mass.—*Corsiglia v. French*, 187 N.E. 702, 284 Mass. 211.

5. Fla.—*Shaw v. Saunders*, 85 So. 162, 79 Fla. 846.

6. Tex.—*Mulliner v. Shumake*, Civ. App., 55 S.W. 983.

7. Mo.—*Berns v. P. A. Starck Piano Co.*, App., 296 S.W. 239, 65 C.J. p 126 note 15.

#### Instructions held proper

Where allegations and proof showed that defendant had converted personal property and there was evidence that conversion was wanton and in reckless disregard of plaintiff's rights, it was not error for court to submit question of assessment of punitive damages as prayed for by the plaintiff.—*Armstrong v. Feldhaus*, 93 N.E.2d 776, 87 Ohio App. 75.

Instructions held properly refused  
S.C.—*Sample v. Gulf Refining Co.*, 191 S.E. 209, 183 S.C. 399.

8. Mont.—*Smith v. Armstrong*, 198 P.2d 795, 121 Mont. 377.

9. Tex.—*Lee v. McDonnell*, 72 S.W. 612, 31 Tex. Civ. App. 468.

that the jury may award, in their discretion, punitive damages have been held proper where a party's rights have been consciously, willfully, and recklessly violated,<sup>10</sup> or where the taking was willful, malicious, and unlawful.<sup>11</sup> Failure of an instruction to define the terms "wantonly" and "without legal cause or excuse" is not erroneous, where used in the ordinary and popular sense, so that the jury could not have been misled thereby;<sup>12</sup> but it has been held that the court should properly define the legal terms "wanton and reckless disregard of rights" of plaintiff in submitting issue of exemplary damages to the jury.<sup>13</sup>

An instruction, authorizing exemplary damages if defendant seized the property "willfully or maliciously and with intent to vex" plaintiff, has been held to be erroneous because of the use of the word "or" instead of the word "and," since every act intentionally done is done willfully.<sup>14</sup> An instruction that no punitive damages may be awarded if defendant honestly believed he had the right to remove the property under his contract with plaintiff, and there was no willfulness on his part to injure plaintiff in his business, has been held substantially correct.<sup>15</sup>

## § 157. — Interest

The propriety of instructions as to interest on the value of the property converted may be controlled by applicable statutory provisions.

Where by statute it is made discretionary with the jury as to whether they shall allow interest on the value of the property converted, it is error for the court to give a peremptory instruction allowing such interest.<sup>16</sup>

10. S.C.—Sample v. Gulf Refining Co., 191 S.E. 209, 183 S.C. 399.

11. Mo.—Spitzengel v. Greenlease Motor Car Co., 136 S.W.2d 100, 234 Mo App. 962.

12. Mo.—Berns v. P. A. Starck Plano Co. App., 296 S.W. 239.

13. Tex.—Parker v. Burleson, Civ. App., 129 S.W.2d 389.

14. Tex.—Baldwin v. G. M. Davidson & Co., Civ.App., 127 S.W. 562.

15. S.C.—Sample v. Gulf Refining Co., 191 S.E. 209, 183 S.C. 399.

16. Mo.—Carson v. Smith, 34 S.W. 855, 133 Mo. 606—Jensen v. Turner Bros., App., 16 S.W.2d 742.

17. Ariz.—Brown v. Beck, 202 P.2d 528, 68 Ariz 139  
65 C.J. p 126 note 22

### Damages in specified amount

In action to recover damages for alleged wrongful taking from plaintiff of an automobile which she

claimed to have purchased from defendant, jury's verdict finding for plaintiff actual damages in specified amount did not accord with requirements of verdict in claim and delivery action, but conformed to requirements of verdict in action for conversion.—Rhode v. Ray Walts Motors, Inc., 74 S.E.2d 823, 223 S.C. 160.

18. Ala.—Toulmin v. Lesesne, 2 Ala. 359.

### Finding establishing prima facie a conversion

Jury findings that defendant, who was in possession of airplane parts belonging to plaintiffs, did not make an unconditional tender thereof until fifteen days after defendant had refused plaintiffs' demand for the property, established prima facie a conversion.—Minter v. Sparks, Tex.Civ. App., 246 S.W.2d 954, error refused no reversible error.

19. Ill.—Bernstein v. Walker, 25 Ill. App. 224.

## § 158. Verdict and Findings

- a. Verdict
- b. Findings of court

### a. Verdict

The verdict of the jury in an action of conversion, as in other civil actions, must be responsive to the issues raised and supported by the evidence adduced.

In actions of trover the verdict must be responsive to the issues,<sup>17</sup> and be so expressed as to show that the jury decided the question submitted to them,<sup>18</sup> and it must be supported by the evidence.<sup>19</sup> After the formal parts, a verdict for plaintiff should contain nothing more than a finding of the issues for plaintiff,<sup>20</sup> and the amount which he is entitled to recover.<sup>21</sup> This latter requirement, however, is indispensable.<sup>22</sup>

*Surplusage* will not vitiate a verdict which is in other respects valid. The surplusage will be rejected and judgment rendered independently of the unnecessary matter.<sup>23</sup>

*Amendment.* The court may amend the verdict so as to express the meaning of the jury where there is no room for doubt as to the party in whose favor the jury intended to decide or as to the amount which they held him entitled to recover.<sup>24</sup>

*Operation and effect.* By a verdict in trover, the property converted is no longer in plaintiff but has passed by operation of law to defendant.<sup>25</sup>

*Special verdict.* As in other civil actions, special verdicts in actions of trover must find ultimate and

N.Y.—Gardner v. Baer, 56 N.Y.S. 1096, 26 Misc 181.  
65 C.J. p 126 note 24.

**Verdict held not sustained by findings**  
Kan.—Smith v. Quivira Land Co., 113 P.2d 1077, 153 Kan. 794.

**Award of exemplary damages held not sustained by findings**  
Tex.—Security State Bank v. Spinner, Civ.App., 55 S.W.2d 128, error dismissed.

20. Okl.—Hopkins v. Dipert, 69 P. 883, 11 Okl. 630.

21. Okl.—Hopkins v. Dipert, supra.  
22. N.Y.—Ferrier v. Manning, 54 N. Y.S. 1019, 25 Misc 531.  
65 C.J. p 126 note 27.

23. Ala.—McGowan v. Lynch, 44 So. 573, 151 Ala. 458  
65 C.J. p 126 note 28.

24. Me.—Hoey v. Candage, 61 Me. 257.

25. S.C.—Vauters v. Elders, 9 S.C.L. 184.

not evidentiary facts so that only questions of law are referred to the court.<sup>26</sup>

*In actions against several defendants.* A verdict may be found against one or more defendants and in favor of the others<sup>27</sup> the verdict and judgment being shaped so as to hold liable those only who are shown by the evidence to have been guilty of conversion.<sup>28</sup>

*Finding by jury.* A finding that plaintiff had not satisfied the jury by a fair balance of the evidence that defendant acted in bad faith is not tantamount to a finding that he acted in good faith.<sup>29</sup>

### b. Findings of Court

Where trial is by the court in an action of conversion, the findings of fact must be supported by the evidence, and be responsive to and cover all material issues.

Rules governing findings in a trial to the court in civil actions generally require that the findings of fact in actions of this character must be supported by the evidence,<sup>30</sup> and not be inconsistent,<sup>31</sup> and must be responsive to<sup>32</sup> and cover<sup>33</sup> all material issues, but findings which comply with this requirement will be sufficient.<sup>34</sup> So also, the findings must be sufficient to sustain the judgment.<sup>35</sup> The findings need not include matters immaterial to a decision of the case,<sup>36</sup> and a finding of ultimate facts

includes all the probative facts, together with the inferences therefrom.<sup>37</sup> A motion at the close of plaintiff's evidence<sup>38</sup> and at the close of all the evidence<sup>39</sup> in a trial by the court on waiver of the evidence to have given on instruction that the court finds the issues for defendant is in effect a demurrer to the evidence and is properly refused where there is evidence tending to support plaintiff's case.

*Construction.* Where the complaint charged the conversion of money only by defendant, and there was a finding as to the conversion of chattels and no finding as to their value or as to the amount of money converted, a conclusion that defendant had converted "money and property" cannot be treated as applying only to the conversion of money.<sup>40</sup>

*Findings of referee.* The findings of a referee have been held sufficient even as to facts that are not expressly stated, where they are clearly implied.<sup>41</sup>

### § 159. Judgment

In an action of conversion the judgment must conform to, and be supported by, the pleadings, evidence, and verdict. A judgment for a joint conversion against two or more defendants must be joint in form.

The judgment must conform to, and be supported by, the pleadings<sup>42</sup> and evidence,<sup>43</sup> otherwise it

26. N.Y.—Hill v. Covell, 1 N.Y. 522, 65 C.J. p 126 note 33.

27. Mont.—Corpus Juris cited in Bowman v. Lewis, 102 P.2d 1, 2, 110 Mont. 435, 65 C.J. p 127 note 40.

28. Fla.—Shaw v. Saunders, 85 So 162, 79 Fla. 846—Peacock v. Feaster, 40 So. 74, 51 Fla. 269.

#### Agent

Insurer and insurance agent who withdrew fire policy from bank in which it had been deposited and sent it to insurer for cancellation at insurer's direction were both guilty of conversion of policy, notwithstanding that agent acted on instructions from insurer and that he acted in good faith with purpose of replacing policy with another policy in another company, and finding of jury that agent was not guilty of conversion did not exonerate insurer.—Home Ins. Co. of New York v. Handley, 162 So. 516, 120 Fla. 226.

29. Vt.—Hassam v. J. E. Sanford Lumber Co., 74 A. 197, 82 Vt. 444.

30. Cal.—Jordan v. Reynolds, 237 P. 2d 1005, 108 Cal.App.2d 91, 65 C.J. p 127 note 44.

#### Findings held against clear preponderance of the evidence

Mich.—Even-Heat Co. v. Wade Elec. Products Co., 58 N.W.2d 923, 336 Mich. 564.

#### Evidence as to property claimed by plaintiff

In action for conversion of household furnishings, where evidence showed that goods were on defendant's premises and that plaintiff had been refused permission to remove them, a finding of not guilty based on defendant's subsequent consent to removal of the property, without permitting parties to introduce evidence on question whether property which defendants consented to have removed was in fact the property claimed by plaintiff, was error.—Simon v. Balasie, 55 N.E.2d 109, 323 Ill. App. 280.

31. Mich.—Even-Heat Co. v. Wade Elec. Products Co., 58 N.W.2d 923, 336 Mich. 564.

#### Findings held not inconsistent

Cal.—Chastain v. Belmont, 271 P.2d 498.

32. N.Y.—Taylor v. Bowen, 65 N.Y.S. 36, 52 App.Div. 126.

33. Cal.—Brinkley-Douglas Fruit Co. v. Silman, 166 P. 371, 33 Cal.App. 643, 65 C.J. p 127 note 46.

34. Cal.—Brinkley-Douglas Fruit Co. v. Silman, supra, 65 C.J. p 127 note 47.

35. Cal.—Flennaugh v. Heinrich, 200 P.2d 580, 89 Cal.App.2d 214, 65 C.J. p 127 note 48.

36. Cal.—Dieffendorff v. Hopkins, 28 P. 265, 30 P. 549, 95 Cal. 343, 65 C.J. p 128 note 49 a.

37. Cal.—Poits v. Paxton, 153 P. 957, 171 Cal. 493, 65 C.J. p 128 note 50.

38. Ill.—Cramer v. Daniels, 70 N.E. 569, 209 Ill. 296.

39. Ill.—Cramer v. Daniels, supra.

40. Ind.—Lesh v. Davison, 104 N.E. 642, 181 Ind. 429.

41. N.Y.—Thompson v. Vrooman, 21 N.Y.S. 179, 66 Hun 245—Durfee v. Bump, 3 N.Y.S. 505.

42. Okl.—Wasson v. Collett, 242 P. 2d 703, 206 Okl. 248, 65 C.J. p 128 note 54.

43. Kan.—Wingerson v. Tucker, 265 P.2d 842, 175 Kan. 538, Okl.—Wasson v. Collett, 242 P.2d 703, 206 Okl. 248.

65 C.J. p 128 note 55

#### Judgment for defendant authorized

Where no evidence of probative force was offered to show that defendant had converted to his own use plaintiff's household goods and defendant disclaimed in open court any interest in such goods, judgment for defendant on charge of conversion was authorized.—Wilson v. Fuston, Civ.App., 189 S.W.2d 769, reversed on other grounds 192 S.W.2d 444, 144 Tex. 588.

will be erroneous;<sup>44</sup> and it must conform to, and be supported by, the verdict of the jury or the findings of the court. If it fails to meet this requirement, it will be void.<sup>45</sup> Since, as discussed supra § 67, an action of trover is an action to recover the value of the property wrongfully converted, and not the specific property itself, the judgment in this form of action should be for damages only, and not for the recovery of the property converted,<sup>46</sup> and a judgment in the alternative for damages or for a return of the property is erroneous.<sup>47</sup> It has been held, however, where judgment was obtained for a certain sum for the value of the personalty taken that defendant could discharge the judgment by returning the personalty to plaintiff and that defendant may not complain that the result constitutes a double recovery.<sup>48</sup>

**Joint judgments.** A judgment rendered on a verdict against two or more defendants for a joint conversion must be joint in form;<sup>49</sup> but a joint judgment against two or more defendants for conversions committed by them severally is erroneous.<sup>50</sup> A joint judgment in favor of plaintiffs necessarily imports a finding that the joint ownership of the property alleged to be converted was established on the trial to have existed at the time of the conversion.<sup>51</sup>

**Interest.** The court may properly enter judgment for plaintiff for interest at the legal rate, although it had not submitted to the jury the issue of plaintiff's right to interest.<sup>52</sup>

## § 160. — Operation and Effect

- a. In general
- b. As transferring title to property to defendant

### a. In General

The general rules applicable to the construction, operation, and effect of judgments apply to judgments in actions of trover.

The general rules governing the construction, operation, and effect of judgments in civil actions, as discussed in Judgments §§ 436-453, apply to judgments in actions of trover.<sup>53</sup> Defendant may not complain, where the suit prayed for return of the property or its value, that the judgment is for value only, since the judgment in the absence of a showing to the contrary is equivalent to a finding that the property cannot be returned.<sup>54</sup> Where the court finds that there has been no conversion, and that the personalty in controversy belongs to plaintiff, that portion of the judgment purporting to deprive plaintiff of his title to the personalty on failure to remove it from the premises of defendant within a stipulated period has been held erroneous.<sup>55</sup>

### b. As Transferring Title to Property to Defendant

Where judgment for the plaintiff has been satisfied, the title to the property is, by operation of law, vested in the defendant, but where the judgment is unsatisfied, the majority rule is that title to the property does not vest in the defendant.

The general rule is well settled that, where a judgment for plaintiff has been satisfied, the title to the property, whether legal or equitable,<sup>56</sup> is, by operation of law, vested in defendant.<sup>57</sup> independent

44. Ind.—Bricker v. Whisler, 117 N. E. 550, 65 Ind App 492.

45. N.Y.—Cohen v. Salet, 21 N.Y.S. 585, 2 Misc. 51.

65 C.J. p 128 note 57.

#### Return of purchase money to plaintiff

In action by purchaser against dealers for conversion of automobile after alleged sale to purchaser, wherein jury accepted defense that no sale took place, purchaser was entitled as a matter of law to return of purchase money, which should have been deposited in court before judgment was entered on verdict for dealers, or else judgment should have been entered in purchaser's favor for amount of money retained.—Knapp v. Hurd, 68 P.2d 557, 100 Colo. 537.

46. N.Y.—John Mullins & Sons v. Kommich, 31 N.Y.S.2d 569, 65 C.J. p 128 note 60.

#### Relief from money judgment

In suit for conversion of corporate stock in a company owning a patent,

where the order of the trial court relieving defendants from a money judgment if they transferred the stock to plaintiffs was conditioned on the fact that at time of transfer title to the patent should be in the company, but when defendants attempted to transfer the shares title had been lost because a good faith incumbrance had been foreclosed, defendants were liable to a money judgment as for failure to accept the privilege of transfer offered them, even though a certain defendant did all in his power as a single stockholder to avoid foreclosure of the incumbrance, and though his appeals to plaintiffs for aid were disregarded.—Bryan & Co. v. Scurlock, 180 N.W. 634, 190 Iowa 534.

47. N.Y.—John Mullins & Sons v. Kommich, 31 N.Y.S.2d 569, 65 C.J. p 129 note 62.

48. Tex.—Hopkins v. Robertson, Civ. App., 138 S.W.2d 310, error refused.

49. Mass.—Gerrish v. Cummings, 4 Cush. 391.

50. Tenn.—Crenshaw v. Smith, 10 Heisk. 1.

51. Conn.—Sibley v. Krauskopf, 171 A. 4, 118 Conn. 158.

52. Tex.—Cotten v. Heimbecher, Civ. App., 48 S.W.2d 402.

53. Tex.—Hickman v. Aldridge, Civ. App., 21 S.W.2d 341, 65 C.J. p 129 note 68.

54. Ariz.—McFadden v. Miller, 42 P. 2d 1101, 45 Ariz. 324.

55. Utah—Heiselt Const. Co. v. Garff, 225 P.2d 720.

56. N.D.—Mevorah v. Goodman, 65 N.W.2d 278.

57. U.S.—Hatten v. Vose, C.C.A.Okl., 156 F.2d 464.

Ala.—W. Cleve Stokes Co. v. Rush-ton, 191 So. 614, 238 Ala. 458.  
Conn.—Schlavo v. Cozzolino, 57 A.2d 723, 134 Conn. 388, 3 A.L.R.2d 214.

of any provision in the judgment to that effect.<sup>58</sup> and plaintiff is conclusively estopped to assert any further right or title to, or interest in, the property converted.<sup>59</sup> It has been said that if, to effectuate the transfer, some affirmative act by plaintiff is necessary, the court has power to provide for it in the judgment or otherwise to compel it,<sup>60</sup> and the title thus acquired relates back to the date of the conversion.<sup>61</sup> Nevertheless, the rule has no application where it is apparent that the value of the property converted does not furnish the rule of damages and that the judgment is for less than its value.<sup>62</sup>

Imprisonment of defendant under a judgment in trover is not such satisfaction of the judgment as will transfer the title in the converted property to him.<sup>63</sup> So, also, the rule is without application where, in an action brought against him, the owner of chattels sets up a counterclaim for damages for

plaintiff's alleged conversion of the property and plaintiff denies the conversion, and the parties stipulate for a dismissal of their respective causes of action with prejudice and, pursuant to the stipulation, judgment of dismissal is entered;<sup>64</sup> and it cannot be invoked by one who was not a party to the action and who did not connect his title with the title acquired by defendant,<sup>65</sup> or as against a third claimant of the property to whom defendant voluntarily surrendered it after the conversion, and before the judgment.<sup>66</sup>

*Unsatisfied judgment.* While there is some authority holding that an unsatisfied judgment for plaintiff in an action of trover will pass title to the property converted to defendant,<sup>67</sup> it is generally held that a judgment for plaintiff in an action of trover, if unsatisfied, does not vest title to the property in suit in defendant.<sup>68</sup>

Ill.—*Segal v. Travler Karenola Radio & Television Corp.*, 76 N.E.2d 802, 333 Ill.App. 158.

Mass.—*Lawyers' Mortg. Inv. Corporation of Boston v. Paramount Laundries*, 191 N.E. 398, 287 Mass. 357.

Mo.—*Corpus Juris cited in St. Louis Fixture & Show Case Co. v. F. W. Woolworth Co.*, 88 S.W.2d 254, 263, 232 Mo. App. 10.

N.H.—*Smith v. Smith*, 50 N.H. 212.  
N.D.—*Mevorah v. Goodman*, 65 N.W. 2d 278.

Tex.—*Gillette v. Houston Nat. Bank*, Civ. App., 139 S.W.2d 646, error dismissed, judgment correct, 65 C.J. p. 129 note 69.

#### Forced sale

A judgment for conversion has normally no other consequence than to compel the defendant to buy the converted goods at what is in reality a forced sale.—*Martin v. Sikes*, 229 P.2d 546, 38 Wash.2d 274.

#### Title confirmed by implication

An award of damages for conversion impliedly confirms title in converter.—*Southwestern Peanut Growers Ass'n v. Womack*, Tex. Civ. App., 179 S.W.2d 371.

#### Prior action

(1) If plaintiff has received satisfaction in an earlier action for conversion against another, title to article involved passes to defendant in the earlier action.—*MacNeil v. Hazleton*, 28 N.E.2d 477, 306 Mass. 366.

(2) A prior decree directing complainant's former president to pay to complainant the amount of complainant's funds misappropriated by former president did not pass title

to misappropriated funds so as to preclude complainant from recovering inventions, patents, and other assets obtained with misappropriated funds.—*Flannery v. Flannery Bolt Co., CCA Pa.*, 108 F.2d 531, certiorari denied 60 S.Ct. 615, 309 U.S. 671, 84 L.Ed. 1017.

#### Proceedings in equity

(1) The doctrine that a judgment in trover for conversion passes title to the res is never applied to proceedings in equity to trace proceeds of res, but is confined to cases of trover.—*Flannery v. Flannery Bolt Co.*, supra.

58. Tex.—*St. Louis, etc., R. Co. v. McKimsey*, 14 S.W. 615, 78 Tex. 298, 22 Am.S.R. 51.—*Smith v. So. R.R.*, Civ. App., 54 S.W. 38.

59. Tex.—*Sibley v. Fitch*, Civ. App., 226 S.W.2d 885, error refused.

#### Legal effect of trover judgment

(1) The legal effect of a money judgment for plaintiff in trover for a specific chattel, when satisfied, is to transfer title, rights, and interest thereto in defendant.—*Segal v. Travler Radio Corp.*, 94 N.E.2d 751, 311 Ill.App. 664.

(2) Where owner of mold used to manufacture plastic radio cabinets had secured a money judgment against a corporation for conversion thereof and judgment was satisfied, he could not later bring an action for an accounting of profits made from sale of cabinets manufactured with mold.—*Segal v. Travler Radio Corp.*, supra.

#### Proceeds of sale by court order

Where mortgagees caused writ of

sequestration to be levied on livestock covered by chattel mortgage and had stock sold under order of court as perishable property, if mortgagees were liable for converting livestock, they were entitled to proceeds derived from sale, less costs incurred.—*Parker v. Burleson*, Tex. Civ. App., 129 S.W.2d 389.

60. N.Y.—*Pierpoint v. Hoyt*, 182 N.E. 235, 260 N.Y. 26.

61. Mo.—*Corpus Juris cited in St. Louis Fixture & Show Case Co. v. F. W. Woolworth Co.*, 88 S.W.2d 254, 263, 232 Mo. App. 10.

65 C.J. p. 129 note 72.

62. N.H.—*Dearth v. Spencer*, 52 N.H. 213.

65 C.J. p. 129 note 73.

63. N.Y.—*Goff v. Craven*, 34 Hun 156.—*Osterhout v. Roberts*, 8 Cow. 43.

65 C.J. p. 129 note 74.

64. Minn.—*Shepard v. Alden*, 202 N.W. 71, 201 N.W. 537, 161 Minn. 135, 39 A.L.R. 1094.

65. Minn.—*Shepard v. Alden*, supra.

66. U.S.—*Third Nat. Bank of St. Louis v. Rice*, Mo., 161 F. 822, 88 C.C.A. 640, 23 L.R.A.N.S. 1167, 15 Am.Cas. 450.

65 C.J. p. 130 note 77.

67. S.C.—*Hawkins v. Collins*, 39 S.E. 768, 61 S.C. 537.

65 C.J. p. 130 note 79.

68. U.S.—*Hatten v. Vose*, C.C.A. Okl., 156 F.2d 464.

65 C.J. p. 130 note 80.

F. DAMAGES

§ 161. Nominal Damages

If there has been a technical conversion the defendant is liable for at least nominal damages although no actual loss is shown.

Although no actual loss is shown, if there has been a technical conversion the defendant is liable for at least nominal damages.<sup>69</sup>

§ 162. Compensatory Damages in General

As a general rule the plaintiff's damages, in an action of conversion, are measured by the sum necessary to compensate him for all actual losses or injuries sustained as a natural and proximate result of the defendant's wrong.

As a general rule plaintiff's damages, in an action of conversion, are measured by the sum necessary to compensate him for all actual losses or injuries sustained as a natural and proximate result of defendant's wrong;<sup>70</sup> but there can be no recovery for losses which are too remote and uncertain.<sup>71</sup> Although the technical action of trover

may have been abolished, and replaced by a statutory action of trespass on the case for the unlawful conversion of personal property, the rule of damages in such cases remains the same.<sup>72</sup>

*Reference.* It is the duty of the court, when an action for conversion has been referred, to see that the measure of damages adopted conforms to the rule applicable in such trials by juries.<sup>73</sup>

§ 163. Value of Property in General

While exceptions are often recognized, the ordinary measure of damages in an action of trover is the value of the property converted at the time and place of conversion, with interest.

While exceptions are often recognized where the application of this measure does not accord with the principle of just compensation for the loss sustained, the ordinary measure of damages in an action of trover is the value of the property converted at the time and place of the conversion,<sup>74</sup> with interest, as discussed *infra* § 171.

69. *Tex.*—*Minter v. Sparks*, Civ.App., 246 S.W.2d 954, error refused no reversible error.

65 C.J. p 130 note 81.

Damages for breach of contract to deliver property see *Damages* § 79.

70. *U.S.*—*Petroleum Products Corp. v. Sklar*, D.C.La., 87 F.Supp. 715 Cal.—*Woodbine v. Van Horn*, 173 P.2d 17, 29 Cal.2d 95—*Chatterton v. Boone*, 185 P.2d 610, 81 Cal.App.2d 943.

*Mass.*—*Lawyers' Mortg. Inv. Corporation of Boston v. Paramount Laundries*, 191 N.E. 398, 287 Mass. 357.

*Ohio.*—*Wheaton v. Chandler*, 42 N.E.2d 193, 68 Ohio App. 474.

*Tenn.*—*Polskee v. Friedlander*, 8 Tenn.App. 533.

*Tex.*—*Kennann v. Deats*, Civ.App., 258 S.W.2d 145, error refused no reversible error—*Minter v. Sparks*, Civ.App., 246 S.W.2d 954, error refused no reversible error.

65 C.J. p 131 note 82.

71. *N.C.*—*Sledge v. Reid*, 73 N.C. 440.

*Pa.*—*Farmers' Bank v. McKee*, 2 Pa. 318.

72. *Mich.*—*Mayeroff v. The Jennings Farms*, 176 N.W. 545, 209 Mich. 187.

73. *Pa.*—*Garrison v. Bryant*, 10 Phila. 474.

74. *U.S.*—*St. Paul Mercury Indem. Co. v. U. S. C.A. Kan.*, 201 F.2d 57—*Guido v. Hudson Transit Lines*, C.A.N.J., 178 F.2d 740—*Plack v. Baumer*, C.C.A.Ia., 121 F.2d 676—*Arizona Power Corp. v. Smith*, C.

*C.A.Ariz.*, 119 F.2d 888—*Kapsemals v. Taylor*, C.C.A.Okl., 112 F.2d 406—*Wynne v. McCarthy*, C.C.A.Okl., 97 F.2d 964—*Corpus Juris cited in In re New York*, N. H. & H. R. Co., D.C.Conn., 64 F.Supp. 487, 491.

*Cal.*—*Fletcher Aviation Corp v. Landis Mfg. Co.*, 214 P.2d 400, 95 Cal App 2d 906—*Loneragan v. Monroe*, 175 P.2d 42, 77 Cal.App.2d 223—*Betzler v. Olney*, 57 P.2d 1376, 14 Cal App.2d 53.

*Conn.*—*Mayflower Sales Co. v. Kavalier*, 6 A.2d 326, 125 Conn. 452.

*Fla.*—*Garrett v. American Fruit Growers*, 186 So. 269, 135 Fla. 398.

*Idaho*—*Corpus Juris cited in Sacramento v. North Idaho Shingle Co.*, 252 P.2d 518, 522, 73 Idaho 284.

*Ill.*—*Thompson v. Pollack*, 53 N.E.2d 737, 322 Ill.App. 73.

*Ind.*—*New York Cent. R. Co. v. Buckley Rubber Co.*, 187 N.E. 353, 99 Ind.App. 191.

*Kan.*—*Corpus Juris cited in Wingerston v. Tucker*, 265 P.2d 842, 844, 175 Kan. 538.

*Ky.*—*Lane v. Rowland*, 175 S.W.2d 1000, 295 Ky. 868—*Long's Ex'rs v. Bischoff*, 127 S.W.2d 851, 277 Ky. 842—*Davis v. Kentland Coal & Coke Co.*, 57 S.W.2d 542, 247 Ky. 642.

*La.*—*A B C Oil Burner & Heating Co. v. Palmer*, App., 28 So.2d 462.

—*Debout v. Gillman*, App., 2 So. 2d 690—*Edwards v. Max Thiene Chevrolet Co.*, App., 191 So. 569—*Bryson v. Bates-Crumley Chevrolet Co.*, App., 166 So. 879, set aside on other grounds 171 So. 605—

*Rodgers v. A. & B. Pipe & Supply Co.*, App., 162 So. 445.

*Me.*—*Corpus Juris cited in Sanborn v. Matthews*, 41 A.2d 704, 705, 141 Me. 213—*Jeffery v. Sheehan*, 194 A. 543, 125 Me. 246—*Moody v. Whitney*, 34 Me. 563.

*Mass.*—*Loring v. Baker*, 106 N.E.2d 434, 329 Mass. 63—*Manhattan Clothing Co. v. Goldberg*, 78 N.E.2d 1, 322 Mass. 472—*Dow v. Brookline Trust Co.*, 31 N.E.2d 13, 308 Mass. 90—*G. E. Lothrop Theatres Co. v. Edison Electric Illuminating Co. of Boston*, 195 N.E. 305, 290 Mass. 189.

*Mich.*—*Even-Heat Co. v. Wade Elec. Products Co.*, 58 N.W.2d 923, 336 Mich. 564—*Hudson v. Enichen*, 13 N.W.2d 215, 308 Mich. 79.

*Minn.*—*Theon v. First Nat. Bank*, 271 N.W. 111, 199 Minn. 47.

*Miss.*—*Skrmetta v. Clark*, 177 So. 11, 180 Miss. 21—*Fernwood Lumber Co. v. Rowley*, 71 So. 3, 110 Miss. 821.

*Mo.*—*Osborn v. Chandeysson Elec. Co.*, 248 S.W.2d 657.

*Mont.*—*Sorensen v. Jacobson*, 232 P. 2d 332, 125 Mont. 148, 26 A.L.R.2d 1186—*First Nat. Bank v. Perrine*, 33 P.2d 997, 97 Mont. 262.

*N.H.*—*F. J. Caron Enterprises v. State Operating Co.*, 179 A. 665, 87 N.H. 371—*Guay v. Brotherhood Bldg. Ass'n*, 177 A. 409, 87 N.H. 216, 97 A.L.R. 1053.

*N.Y.*—*German v. Sneddeker*, 13 N.Y. 8.2d 237, 257 App Div. 596, reargument denied 14 N.Y.S.2d 1012, 258 App.Div. 708, affirmed 24 N.E.2d 492, 281 N.Y. 832—*Maxherman Co. v. Alper*, 206 N.Y.S. 233, 210 App.

### § 164. Special or Qualified Right or Interest in Plaintiff

A plaintiff having only a special or qualified right or interest may recover the full value of the converted property, as against a stranger; but, as against one having an interest or right in the property, recovery is limited to the value of the plaintiff's interest or right.

A plaintiff having only a special or qualified right or interest may recover the full value of the converted property, as against a stranger having neither

title nor right of possession;<sup>75</sup> but, as against a defendant having an interest or right in the property, recovery is limited to the value of plaintiff's interest or right,<sup>76</sup> and to the fair value of the property.<sup>77</sup>

### § 165. Value or Price to Be Taken

Generally, if the property has such a value, the value to be taken is its fair market value.

Generally, if the property has such a value, the value to be taken is its fair market value,<sup>78</sup> rather

Div. 389.—In re Klippel's Estate, 83 N.Y.S.2d 816, 194 Misc. 789; Henry R. Jahn & Son v. Jorba, 105 N.Y.S.2d 57.

N.D.—Sax Motor Co. v. Mann, 10 N.W.2d 242, 72 N.D. 595.

Ohio.—Hanes v. Block, 65 N.E.2d 86, 78 Ohio App. 394.—Morris v. Pearl Street Auction Co., 22 N.E.2d 741, 61 Ohio App. 452.—Avondale Motor Car Co. v. Donovan, 19 N.E.2d 521, 60 Ohio App. 78.

Or.—Abrams v. Rushlight, 69 P.2d 1063, 157 Or. 53, 111 A.L.R. 1292.

Pa.—Berry v. Helml Motors, 56 A.2d 374, 162 Pa.Super. 52.—Campbell v. Clark & Melia, 29 A.2d 350, 160 Pa.Super. 635.

Tenn.—Clark v. Simpson, 1 Tenn.App. 397.

Tex.—De Shazo v. Wool Growers Central Storage Co., 162 S.W.2d 401, 139 Tex. 143.—Sibley v. Fitch, Civ. App., 226 S.W.2d 855, error refused.—Scott v. Doggett, Civ.App., 226 S.W.2d 183, refused no reversible error.—Universal Credit Co. v. O'Neal, Civ.App., 140 S.W.2d 596.—Sanders v. O'Connor, Civ.App., 99 S.W.2d 401, error dismissed.—Town of West University Place v. Anderson, Civ.App., 60 S.W.2d 528.

Utah.—Lym v. Thompson, 184 P.2d 687, 112 Utah 24.—Columbia Trust Co. v. Farmers' & Merchants' Bank, 22 P.2d 164, 82 Utah 117.

Va.—Straley v. Fishor, 10 S.E.2d 561, 176 Va. 163.

Wash.—Glaspey v. Prelusky, 219 P.2d 585, 36 Wash.2d 592.—Watkins v. Siler Logging Co., 116 P.2d 315, 9 Wash.2d 703.—Parks v. Yakima Valley Production Credit Ass'n, 78 P.2d 162, 194 Wash. 380.

Wis.—Traeger v. Sperberg, 41 N.W.2d 214, 256 Wis. 330.—Linker v. Batavian Nat. Bank of La Crosse, 12 N.W.2d 721, 244 Wis. 459, rehearing denied 14 N.W.2d 496, 244 Wis. 459.—Tzopant v. Koshe, 9 N.W.2d 136, 242 Wis. 585.

65 C.J. p 131 note 87.

#### Where sale is forbidden

The owner is entitled to recover the value of property converted, even though such property has no market value because its sale is forbidden.—Anstine v. McWilliams, 163 P.2d 816, 24 Wash.2d 230.

#### Effect of price ceilings

(1) Measure of damages for conversion of automobile was value of automobile at time and place of conversion without regard to federal regulations fixing ceiling prices on used automobiles.—Anstine v. McWilliams, supra.

(2) Office of Price Administration price ceilings were not promulgated to govern amount of recovery for loss of personal property by wrongful conversion, and hence court properly took plaintiff's testimony as to cost of tubes, rather than ceiling price thereof, in fixing value of tubes as basis for assessment of damages, whether in recognition of fact that such cost closely approximated present market price of tubes or as most equitable and reliable way of fixing amount of damages.—Lym v. Thompson, 184 P.2d 667, 112 Utah 24.

Where no conversion is shown, total value of the property was not correct measure of owner's damages, and refusal to award damages was proper, where other damages were not sought or shown.—Guyer v. Guyer, Tex. Civ.App., 141 S.W.2d 953, error refused.

75. Wash.—Crutcher v. Scott Pub. Co., 253 P.2d 925, 42 Wash.2d 89.

65 C.J. p 132 note 90.

Underlying basis for recovery of full value of converted property by person having only limited or qualified interest therein is the fact that the party having the limited or qualified interest is liable over to the owner of the remaining interest, and that in order to be adequately compensated such person must receive sufficient compensation not only to compensate himself for his own loss but to satisfy the demands of the other owner.—Goldberg v. List, 79 P.2d 1087, 11 Cal.2d 389, 116 A.L.R. 900.

76. U.S.—Scroggins Farms Co. v. Commodity Credit Corp., D.C.Ark., 60 F.Supp. 119.

Ark.—Barham v. Standridge, 148 S.W.2d 648, 201 Ark. 1143.

Cal.—Rastanchury v. Times-Mirror Co., 156 P.2d 488, 68 Cal.App.2d 217.—Arques v. National Superior Co., 155 P.2d 643, 67 Cal.App.2d 763.

Me.—Hardison v. Jordan, 44 A.2d 892, 141 Me. 429.

N.D.—Kelly v. Baird, 252 N.W. 70, 64 N.D. 346.

Okla.—Lash v. Branch, 58 P.2d 578, 177 Okl. 211.

Pa.—Corpus Juris cited in Campbell v. Clark & Melia, 29 A.2d 350, 353, 150 Pa.Super. 635.

Tex.—Rabenowitz v. Jefferies, Civ. App., 58 S.W.2d 137.

Wash.—Wilson Motor Co. v. Lamping Motors, 78 P.2d 559, 194 Wash. 416.

65 C.J. p 133 note 91.

77. Me.—Amey v. Augusta Lumber Co., 148 A. 687, 128 Me. 472.

78. U.S.—National Discount Corp. v. O'Mell, C.A.Mich., 194 F.2d 452.—Wynne v. McCarthy, C.C.A.Okla., 97 F.2d 964.—Joseph Truck Mfg. Co. v. Singer Steel Co., D.C.Ohio, 111 F.Supp. 485.—In re Schilling, D. C.Ohio, 264 F. 357.

Ind.—Hardy v. Heester, 96 N.E.2d 682, 120 Ind.App.2d 711.

Iowa.—Griffith v. Burden, 85 Iowa 138.

Kan.—Wingerson v. Tucker, 265 P.2d 842, 175 Kan. 538.

Mass.—Manhattan Clothing Co. v. Goldberg, 72 N.E.2d 1, 322 Mass. 472.—Gallagher v. R. E. Cummin, Inc., 49 N.E.2d 448, 314 Mass. 7.

Mo.—Pantz v. Nelson, 135 S.W.2d 397, 234 Mo.App. 1043.—Roll v. Fidelity Nat. Bank & Trust Co. of Kansas City, App., 115 S.W.2d 148.

N.J.—Arnold v. Hamilton Inv. Co., 38 A.2d 118, 132 N.J.Law 10, affirmed 40 A.2d 649, 132 N.J.Law 419.

Ohio.—Sopronyi v. Asztalos, App., 101 N.E.2d 161.—Morris v. Pearl Street Auction Co., 22 N.E.2d 740, 61 Ohio App. 452.

RI.—Seligman v. Russo, 170 A. 788.

Tenn.—Clark v. Simpson, 1 Tenn. App. 397.

Tex.—Hill v. Childers, Civ.App., 268 S.W.2d 203, error refused no reversible error.—Rosenfield v. White, Civ.App., 267 S.W.2d 596, error refused no reversible error.—Scott v. Daggett, Civ.App., 226 S.W.2d 183, refused no reversible error.—Universal Credit Co. v. O'Neal, Civ. App., 140 S.W.2d 596.—Rabenowitz v. Jefferies, Civ.App., 58 S.W.2d 137.



than the price paid for the property by plaintiff,<sup>79</sup> a price lower than the market value at which the plaintiff could purchase property of like species, quantity, and quality, under a contract he has with a third person,<sup>80</sup> the price at which it was sold,<sup>81</sup> or contracted to be sold,<sup>82</sup> the fair retail price of the property,<sup>83</sup> the "reasonable value" of the property,<sup>84</sup> the par value,<sup>85</sup> or its fair value to the owner.<sup>86</sup> If the property has little or no market value, and is of a special or higher value to plaintiff, the value to be taken as the measure of recovery is the actual and fair value to plaintiff,<sup>87</sup> provided it is not merely fanciful or sentimental.<sup>88</sup> Where there is no market value for the goods in controversy, other standards, including the replacement value, may be used to determine the value of the goods.<sup>89</sup> Moreover, the market value will never be adhered to as the absolute measure of recovery where to do so would be a departure from the more fundamental principle of just compensation for the injury or loss sustained by reason of the conversion.<sup>90</sup>

Where plaintiff has contracted to sell the property to a solvent purchaser at a specified price and the conversion prevents the carrying out of the contract either because the property is not obtainable on the market<sup>91</sup> or plaintiff does not know of the

conversion until it is too late to go into the market and get property to fulfill the contract,<sup>92</sup> the measure of recovery is the actual value to plaintiff, which is the price he would have received under the contract. If, because of the expense and cost of putting the property in the place and condition it was in before removed by the converter, the property was of greater value as in use than as property being sold on the market, plaintiff is entitled to the actual value of the property as in use rather than its value on the market;<sup>93</sup> but the value of the property as in use cannot be taken as the measure of damages where the conversion does not violate a right to continue a particular use of the property in a particular place, but merely violates plaintiff's right to have possession of the property and remove it from the place where it has been put to a particular use.<sup>94</sup> Where the property has one value for the purpose for which such property is normally intended, and another value for some other purpose to which it could be put, it is the former value that is to be taken as the measure of damages rather than the latter.<sup>95</sup>

# § 166. — Conversion of Part of Article

If a partial conversion destroys the value of the entire article, it is regarded as a conversion of the whole,

Utah.—Lym v. Thompson, 184 P.2d 667, 112 Utah 24—Haycraft v. Adams, 24 P.2d 1110, 82 Utah 347. Wash.—Glaspey v. Perlusky, 219 P.2d 585, 86 Wash.2d 592—Watkins v. Siler Logging Co., 116 P.2d 315, 9 Wash.2d 793. 65 C.J. p 133 note 94. Weight and sufficiency of evidence as to value see supra § 136.

## Market value

(1) The amount for which a stock of goods could be sold in bulk or in convenient lots by willing seller to a willing buyer.—Mevorah v. Goodman, N.D., 60 N.W.2d 581.

(2) The price which the property will bring when it is offered for sale by one who desires to sell, but is not compelled so to do, and is bought by one who desires to buy, but is not obligated so to do.—In re Schilling, D.C.Ohio, 264 F. 357.

79. Colo.—Beaman v. Stewart, 74 P. 342, 19 Colo.App. 222. 65 C.J. p 134 note 95.

80. MASS.—Hart v. Brierley, 76 N.E. 286, 189 Mass. 598. 65 C.J. p 134 note 96.

81. Ala.—Samford v. Going Road Machinery Co., 124 So. 880, 220 Ala. 306. 65 C.J. p 134 note 97.

82. U.S.—Mitsubishi Shoji Kaisha v. Davis, C.C.A.N.Y., 291 F. 57, cer-

tiorari denied 44 S.Ct. 34, 263 U. S. 706, 68 L.Ed. 516. 65 C.J. p 134 note 98.

## Contract price held not to determine amount of damages

Evidence of contract price, although admissible to aid in arriving at value, did not determine amount of damages to be awarded.—Lonergan v. Monroe, 175 P.2d 42, 77 Cal. App.2d 223.

83. Idaho.—Sears v. Lydon, 49 P. 122, 5 Idaho 358. 65 C.J. p 134 note 99.

84. Tex.—Lincoln v. Packard, 60 S. W. 682, 25 Tex. Civ. App. 22

85. Tex.—Baumont Hotel Co. v. Caswell, Civ. App., 14 S.W.2d 232.

86. Conn.—Kuzemka v. Gregory, 146 A. 17, 109 Conn. 117. 65 C.J. p 134 note 3.

87. U.S.—Arizona Power Corp. v. Smith, C.C.A. Ariz., 119 F.2d 888. Idaho.—Corpus Juris cited in Condie v. Swainston, 112 P.2d 787, 790, 62 Idaho 472.

Mo.—Corpus Juris cited in State v. Ace Storage & Moving Co., 135 S.W.2d 363 368.

N.Y.—Corpus Juris cited in MacGregor v. Watts, 5 N.Y.S.2d 525, 526, 254 App. Div. 904, reargument denied 7 N.Y.S.2d 220, 255 App. Div. 783.

Ohio.—Morris v. Pearl Street Auction Co., 23 N.E.2d 740, 61 Ohio App. 452.

Tex.—Bolton v. Stewart, Civ. App., 191 S.W.2d 788—Wald Transfer & Storage Co. v. Giese, Civ. App., 101 S.W. 2d 603, error dismissed. 65 C.J. p 134 note 4.

Actual value as measure for articles kept for personal use see infra § 196.

88. U.S.—Richards v International Agricultural Corporation, D.C.Ga., 10 F.2d 218.

N.Y.—Corpus Juris cited in MacGregor v. Watts, 5 N.Y.S.2d 525, 526, 254 App. Div. 904, reargument denied 7 N.Y.S.2d 220, 255 App. Div. 783.

89. N.Y.—Cutler-Hammer, Inc. v. Troy, 126 N.Y.S.2d 452, 283 App. Div. 123.

90. U.S.—In re Schilling, D.C.Ohio, 264 F. 357. 65 C.J. p 135 note 6.

91. Wis.—Corpus Juris cited in Traeger v. Sperberg, 41 N.W.2d 214, 216, 256 Wis. 330.

92. Ohio.—Rogers v. Standard Steel Castings Co., 16 Ohio App. 474.

93. N.Y.—Starkey v. Kelly, 50 N.Y. 676. 65 C.J. p 135 note 9.

94. Tex.—Clayton v. Phillipp, Civ. App., 159 S.W. 117. 65 C.J. p 135 note 10.

95. Wis.—La Chapelle v. Warehouse, etc., Supply Co., 70 N.W. 589, 95 Wis. 518.

and the measure of damages is the value of the whole article; but if the part not converted remains of some value, damages are limited to the extent that the property was deprived of its value to the plaintiff.

If the conversion of part of an article destroys the value of the entire article, so that the part not converted is worthless to plaintiff, the conversion is regarded as a conversion of the whole so that the ordinary measure of damages is the value of the whole article with interest;<sup>96</sup> but if the part not converted remains of some value, after the conversion, the damages are limited to the extent that the property was deprived of its value to plaintiff.<sup>97</sup> The difference between a conversion which is only partial or temporary and one in which the property is wholly made away with is one affecting the damages only, the damages go to the whole value of the property in the one case, and are commonly less in the other.<sup>98</sup>

### § 167. — Of What Place

As a general rule the value to be taken is that of the place where the conversion occurred.

As a general rule the value to be taken is that of the place where the conversion occurred;<sup>99</sup> but if there is no market value for such or like property at the place of conversion the measure of damages

may be fixed by taking the market value at the nearest or principal market, and deducting the cost of getting the property to that place;<sup>1</sup> and, should the conversion occur while the property is in the course of transportation to a particular market, the damages are to be measured by the market value at the place of destination, less the cost of carriage and the cost of effecting a sale in that market.<sup>2</sup> In at least one jurisdiction, it is the rule that, in the absence of exceptional circumstances, if chattels wrongfully taken or converted are still in defendant's possession at the time of trial, plaintiff may, at his election, recover the present value of the chattels at the place where they were taken or converted, in the form they were in when so taken or converted.<sup>3</sup> Under some statutory provisions the place of conversion is not considered as an element in fixing the value of the property converted.<sup>4</sup>

### § 168. — Of What Time

It is usually conceded that the value as it existed at the time of the conversion is, in general, the measure of damages in trover, unless the property is of fluctuating value, in which case a different measure may be applied.

It is usually conceded that the value as it existed at the time of the conversion is, in general, the measure of damages in trover,<sup>5</sup> and a considerable

96. Cal.—*Corpus Juris* quoted in *Horn v. Klatt*, 151 P.2d 149, 154, 65 Cal App.2d 510.

Minn.—*Walker v. Johnson*, 9 N.W. 632, 28 Minn. 147.

Conversion of part as conversion of whole see *supra* § 38.

97. Cal.—*Corpus Juris* quoted in *Horn v. Klatt*, 151 P.2d 149, 151, 65 Cal App.2d 510.

Ind.—*New York Cent. R. Co. v. Buckle Rubber Co.*, 187 N.E. 353, 99 Ind. App. 191.

Minn.—*Walker v. Johnson*, 9 N.W. 632, 28 Minn. 147.

98. Mich.—*Even-Heat Co. v. Wade Elec. Products Co.*, 58 N.W.2d 823, 336 Mich. 564.

#### Where loss not shown

In action for conversion of three stamping dies, where there was no showing of loss occasioned to plaintiff by the wrongful withholding of two of the dies, no damages would be awarded therefor on condition however of their actual return to plaintiff.—*Even-Heat Co. v. Wade Elec. Products Co.*, *supra*.

99. Mass.—*E. Kronman, Inc. v. Bunn Bros.*, 163 N.E. 711, 265 Mass. 549.

65 C.J. p. 135 note 15.

1. *Tex.—Myatt v. Elliott*, Civ. App., 143 S.W.2d 205, error dismissed, judgment correct.

Va.—*Corpus Juris* cited in *Straley v. Fisher*, 10 S.E.2d 551, 553, 176 Va. 363.

65 C.J. p. 136 note 16.

2. N.Y.—*Wallington v. Kaiser*, 96 N.Y.S. 881, 110 App. Div. 503, affirmed 84 N.E. 295, 191 N.Y. 382, 123 Am. St. R. 600, 15 L.R.A.N.S. 1126.

65 C.J. p. 136 note 17.

Measure of damages against carrier for goods in transit see *Carriers* § 264.

3. Wis.—*Lanker v. Batavian Nat. Bank of La Crosse*, 12 N.W.2d 721, 241 Wis. 459, rehearing denied 14 N.W.2d 496, 244 Wis. 459.—*Toppan v. Koshe*, 9 N.W.2d 136, 242 Wis. 585.

4. Okl.—*Wilson v. Hickey*, 97 P.2d 561, 156 Okl. 324.

5. U.S.—*Plack v. Baumer*, C.C.A. Pa., 121 F.2d 676.—*Arizona Power Corp. v. Smith*, C.C.A. Ariz., 119 F.2d 888.—*Wynne v. McCarthy*, C.C.A. Okl., 97 F.2d 964.—*Twobig v. Lawrence Warehouse Co.*, D.C. Iowa, 118 F. Supp. 322.—*Joseph Turk Mfg. Co. v. Singer Steel Co.*, D.C. Ohio, 111 F. Supp. 485.—*In re Franklin Savings & Loan Co.*, D.C. Tenn., 34 F. Supp. 585.

Ala.—*Industrial Sav. Bank v. Greenwald*, 158 So. 734, 229 Ala. 529. Cal.—*Woodbine v. Van Horn*, 173

P.2d 17, 29 Cal.2d 95.—*Fletcher Aviation Corp. v. Landis Mfg. Co.*, 214 P.2d 400, 95 Cal App.2d 905.—*Chatterton v. Boone*, 185 P.2d 610, 81 Cal App.2d 943.

Conn.—*Mavflower Sales Co. v. Kavanier*, 6 A.2d 326, 125 Conn. 452.

Del.—*Wyndham, Inc. v. Wilmington Trust Co.*, 59 A.2d 456, 5 Terry 324.

Ill.—*Thomson v. Pollack*, 53 N.E.2d 737, 322 Ill. App. 73.—*A. A. Excavating Co. v. First United Finance Corporation*, 52 N.E.2d 837, 321 Ill. App. 309.—*National Bond, etc., Co. v. Zakos*, 230 Ill. App. 608.

Ind.—*Hardy v. Heeter*, 96 N.E.2d 682, 120 Ind. App.2d 711.

Kan.—*Winkerson v. Tucker*, 265 P.2d 842, 175 Kan. 538.

Ky.—*Lane v. Rowland*, 175 S.W.2d 1000, 295 Ky. 868.—*Davis v. Kenilworth Coal & Coke Co.*, 57 S.W.2d 542, 247 Ky. 642.—*Commercial Credit Co. v. Cooper*, 55 S.W.2d 381, 246 Ky. 513.

Me.—*Bartlett v. Newton*, 92 A.2d 611.—*Sanborn v. Matthews*, 41 A.2d 704, 141 Me. 213.—*Jeffery v. Sheehan*, 194 A. 543, 135 Me. 246.

Mo.—*Saunders v. Mullinix*, 72 A.2d 720, 195 Md. 235.

Mass.—*Manhattan Clothing Co. v. Goldberg*, 78 N.E.2d 1, 322 Mass. 473.—*Colella v. Essex County Acceptance Corporation*, 192 N.E. 622, 228 Mass. 221.—*Lawyers' Mortg.*

number of states have adhered to this rule despite the fact that the property is subject to subsequent fluctuations in value,<sup>6</sup> although in such circumstances departures have been made in many jurisdictions.<sup>7</sup> Under statutes so providing, plaintiff is often allowed to elect between the value at the time of the conversion with interest, or the highest value from the time of the conversion up to the time of the trial, without interest, where the action has been prosecuted with reasonable diligence,<sup>8</sup> and in a few jurisdictions if there has been a fluctuation in value subsequent to the conversion the jury may, in their discretion, fix the damages at the highest value

between the time of the conversion and the time of trial.<sup>9</sup>

According to other cases, if the property converted is by nature a thing of fluctuating value, and the value increases after the conversion, plaintiff may have as his damages the highest value between the time of the conversion and the time of trial,<sup>10</sup> but this latter rule has received several qualifications or modifications, some cases stating that the action must have been prosecuted with reasonable diligence,<sup>11</sup> others holding that the time within which the highest market value can be taken is limited to a reasonable time after the conversion,<sup>12</sup> and still

Inv. Corporation of Boston v. Paramount Laundries, 181 N.E. 898, 287 Mass. 357.

Miss.—Lancaster v. Jordan Auto Co., 187 So. 535, 185 Miss. 530—Skremetta v. Clark, 177 So. 11, 180 Miss. 21—Bank of Forest v. Capital Nat. Bank, 169 So. 193, 176 Miss. 163.

Mo.—Pant v. Nelson, 135 S.W.2d 397, 234 Mo.App. 1043—Roll v. Fidelity Nat. Bank & Trust Co. of Kansas City, App., 115 S.W.2d 148.

Mont.—Sorensen v. Jacobson, 232 P. 2d 832, 125 Mont. 148, 26 A.L.R.2d 1184—First Nat. Bank v. Perrine, 33 P.2d 997, 97 Mont. 262.

N.H.—E. J. Caron Enterprises v. State Operating Co., 179 A. 665, 87 N.H. 371.

N.J.—Friedman v. Guffanti, 59 A.2d 1, 137 N.J.Law 195—Arnold v. Hamilton Inv. Co., 38 A.2d 118, 132 N.J.Law 10, affirmed 40 A.2d 619, 132 N.J.Law 419.

N.Y.—Jones v. National Chautauque County Bank of Jamestown, 74 N.Y.S.2d 498, 272 App.Div. 521—German v. Snodcker, 13 N.Y.S.2d 237, 267 App.Div. 598, reargument denied 14 N.Y.S.2d 1012, 258 App.Div. 708, affirmed 24 N.E.2d 492, 281 N.Y. 432.

Or.—Abrams v. Rushlight, 69 P.2d 1063, 157 Or. 53, 111 A.L.R. 1292.

Pa.—Foley v. Wasserman, 179 A. 595, 319 Pa. 420—Dalton v. South Bethlehem Brewing Co., Com.P.L., 29 North Co. 215.

R.I.—National Cash Register Co. v. Underwood, 185 A. 909, 56 R.I. 379—Schuman v. Russo, 170 A. 788.

Tenn.—Clark v. Simpson, 1 Tenn.App. 397.

Tex.—Lloyds America v. El Paso-Hudspeth Counties Road Dist. of Texas, Civ.App., 107 S.W.2d 1008, error refused—Security State Bank of Tahoka v. Spinnier, Civ.App., 78 S.W.2d 275—Neyland v. Brammer, Civ.App., 78 S.W.2d 884, error dismissed.

Utah.—Haycraft v. Adams, 24 P.2d 1110, 82 Utah 347—Columbia Trust

Co v Farmers' & Merchants' Bank, 22 P.2d 164, 82 Utah 117.

Wash.—Ansline v. McWilliams, 163 P.2d 816, 24 Wash.2d 230—Junkin v. Anderson, 120 P.2d 548, 12 Wash.2d 58, opinion supplemented 123 P.2d 759, 12 Wash.2d 58—Watkins v. Siler Logging Co., 116 P.2d 315, 9 Wash.2d 703—Parks v. Yakima Valley Production Credit Ass'n, 78 P.2d 162, 194 Wash. 280.

Wis.—Corpus Juris cited in Traeger v. Sperberg, 41 N.W.2d 214, 216, 256 Wis. 530—Linker v. Satavian Nat. Bank of La Crosse, 12 N.W.2d 724, 244 Wis. 459, rehearing denied 14 N.W.2d 496, 244 Wis. 459—Tupant v. Kosha, 9 N.W.2d 136, 243 Wis. 555.

65 C.J. p 136 note 18—42 C.J. p 754 notes 16, 18—26 C.J. p 398 note 5.

#### Conversion by seller after passage of title

The general rule that value of property at time of conversion fixes amount of recovery for conversion is inapplicable, where title has passed to purchaser who has not paid purchase price, and seller, before delivery, converts property sold to his own use—Wilson Motor Co. v. Lamping Motors, 78 P.2d 559, 194 Wash. 416.

6. Colo.—Barkhausen v. Bulkeley, 11 P.2d 220, 90 Colo. 558.

65 C.J. p 138 note 19.

7. Ala.—Industrial Sav. Bank v. Greenwald, 158 So. 734, 229 Ala. 529.

Okla.—Champlin Refining Co. v. Aladdin Petroleum Corp., 238 P.2d 827, 205 Okl. 524.

8. Okla.—Champlin Refining Co. v. Aladdin Petroleum Corp., supra—Miller v. Tidal Oil Co., 17 P.2d 957, 161 Okl. 155, 87 A.L.R. 811.

65 C.J. p 138 note 21.

#### Delay held not reasonable diligence

Okla.—Miller v. Tidal Oil Co., supra.

The term "trial" means the trial which is the final determination of the case and the final disposition of the controversy on the facts.—Kvame

v. Farmers Co-op. Elevator Co. of Simcoe, 281 N.W. 52, 68 N.D. 439.

9. Ala.—Industrial Sav. Bank v. Greenwald, 158 So. 734, 229 Ala. 529.

65 C.J. p 139 note 22.

10. Tex.—Security State Bank v. Spinnier, Civ.App., 55 S.W.2d 133, error dismissed.

65 C.J. p 139 note 23—25 C.J. p 398 note 6, 7.

#### Willful conversion

Tex.—Agricultural Bond & Credit Corporation v. Shepherd, Civ.App., 69 S.W.2d 213.

11. Cal.—Friedman v. Renz, 87 P.2d 386, 31 Cal.App.2d 71.

N.Y.—Romane v. Van Allen, 26 N.Y. 309—Wilson v. Mathews, 24 Barb. 295—Mitchell v. Colonial Trust Co., 41 N.Y.S.2d 562.

12. Tenn.—Clark v. Simpson, 1 Tenn. App. 397.

65 C.J. p 139 note 25—25 C.J. p 398 note 8.

#### In Pennsylvania

(1) The statute, providing that damages for conversion of property shall be limited to difference between proceeds of conversion and such higher value as property may have reached within reasonable time after notice of conversion, has been construed to allow recovery of highest value between date of conversion and reasonable time after notice thereof, and not to prevent recovery of value at date of conversion, since the statute merely limits recovery of damages in excess of value at date of conversion.—Foley v. Wasserman, 179 A. 595, 319 Pa. 420.

(2) Under earlier decisions plaintiff was entitled to the highest value between the time of conversion and the time of trial.—Leacock v. Paxson, 57 A. 1097, 208 Pa. 602—Bank of Montgomery v. Reese, 26 Pa. 143.

#### Intention of parties to be considered

Where it was the intention of the parties to sell the property at a definite time, or price, that intention

mediate value, between the time of the conversion and a reasonable time after notice thereof within which to enable the owner to replace the property, which is to be taken as the measure of damages.<sup>13</sup>

Where the taking is willful and without color of right,<sup>14</sup> or is willful, intentional, or the result of culpable negligence,<sup>15</sup> the measure of recovery has been held to be the value of the property at the time demand is made for its return, or its highest market value between the date of conversion and the filing of suit for damages;<sup>16</sup> and where property has been obtained by fraud, plaintiff may recover its value at the time of the conversion, or its value at any time prior to the trial of the cause.<sup>17</sup> In a statute providing that the measure of damages should be the highest market value between the conversion and the verdict, the term "verdict" includes findings of a court trying a case without a jury,<sup>18</sup> and refers to that verdict which finally decides the case.<sup>19</sup>

*Replacement of property by plaintiff.* Although the situation is one where ordinarily plaintiff would be entitled to highest value until time of trial, if plaintiff during the intermediate period replaces the property at less than the highest price, he will be limited to the price paid.<sup>20</sup>

### § 169. — Increased Value Due to Expenditure of Converter

Under the majority rule, where the property has been enhanced by labor or expenditure of the converter, the

plaintiff may recover such enhanced value, without deduction for the defendant's labor or expense where the conversion was willful or intentional, but not where it was in good faith or under a bona fide claim of right.

Under the majority rule, where the property has been enhanced in value by labor or expenditure of the converter, plaintiff may recover such enhanced value, without deduction for defendant's labor or expense, where the conversion was willful or intentional,<sup>21</sup> but not where it was in good faith or under a bona fide claim of right.<sup>22</sup> Some courts, however, unqualifiedly deny recovery for any enhancement in value due to act or expenditure of defendant after the conversion,<sup>23</sup> while a few other cases have gone to the opposite extreme and allowed recovery for such an enhancement in value, existing at any time plaintiff might have recovered the property in specie, irrespective of the good faith of defendant.<sup>24</sup> If defendant has innocently purchased from the original converter, defendant is entitled to deductions for such enhancement in value as he himself has added to the property;<sup>25</sup> and as to enhancements made by the original converter defendant is entitled to a deduction if the original conversion was innocent and without bad faith,<sup>26</sup> but not if the original conversion was willful.<sup>27</sup>

### § 170. Damages Other than, or in Addition to, Value of Property

While some cases limit recovery strictly to the value of the converted property with interest, as a general rule, if special damages are pleaded and proved, the

should be considered in determining the time within which to limit the inquiry as to the market price of the property converted.—*Scott v. Rogers*, 81 N.Y. 676, 4 Abb. Dec. 157—25 C.J. p 398 note 9.

13. Tenn.—*Dysart v. Hamilton*, 11 Tenn. App. 43—*Clark v. Simpson*, 1 Tenn. App. 397  
65 C.J. p 139 note 26.

14. Minn.—*Thoen v. First Nat. Bank*, 271 N.W. 111, 199 Minn. 47.

15. Tex.—*Bayle v. Norris*, Civ. App., 134 S.W. 767.

16. Tex.—*Cochran v. Wool Growers Central Storage Co.*, 166 S.W.2d 994, 140 Tex. 184—*De Shazo v. Wool Growers Central Storage Co.*, 162 S.W.2d 401, 139 Tex. 143.

17. Tex.—*Withiff v. Spreen*, 112 S.W. 98, 61 Tex. Civ. App. 544.

18. N.D.—*Kvame v. Farmers Co-op. Elevator Co. of Simcoe*, 281 N.W. 62, 68 N.D. 439.

19. N.D.—*Kvame v. Farmers Co-op. Elevator Co. of Simcoe*, supra.

20. Tex.—*Burmarsal Co. v. Lake*, Civ. App., 272 S.W. 582.

21. U.S.—*Corpus Juris* cited in *The J. Oswald Boyd*, D.C. Mich., 53 F. Supp. 103, 105.

Ala.—*Simmons v. Cochran*, 41 So.2d 579, 252 Ala. 461.

Vt.—*Parker v. Cone*, 168 A. 715, 105 Vt. 426.

65 C.J. p 140 note 29

Acquisition of title by additions and changes by trespasser see Accession § 5.  
Damages where property attached to realty is enhanced see *infra* § 198

22. U.S.—*Corpus Juris* cited in *The J. Oswald Boyd*, D.C. Mich., 53 F. Supp. 103, 105.

Mass.—*Loring v. Baker*, 106 N.E.2d 434, 329 Mass. 63.

Mo.—*Corpus Juris* cited in *Adams v. Adams*, 177 S.W.2d 483, 484.

Tex.—*Martin v. Grogan-Cochran Lumber Co.*, Civ. App., 176 S.W.2d 780.

65 C.J. p 140 note 30.

23. Colo.—*Omaha, etc., Smelting, etc., Co. v. Tabor*, 21 P. 925, 13 Colo. 41, 16 Am. St. R. 185, 5 L.R.A. 236.  
65 C.J. p 140 note 31.

24. Del.—*Harris v. Gosalin*, 3 Del. 310.

65 C.J. p 141 note 32.

25. U.S.—*The J. Oswald Boyd*, D.C. Mich., 53 F. Supp. 103.

65 C.J. p 141 note 33.

26. Wash.—*Watkins v. Siler Logging Co.*, 116 P.2d 315, 9 Wash.2d 703.

65 C.J. p 141 note 34.

27. U.S.—*The J. Oswald Boyd*, D.C. Mich., 53 F. Supp. 103.

Wash.—*Watkins v. Siler Logging Co.*, 116 P.2d 315, 9 Wash.2d 703.

65 C.J. p 141 note 35.

#### Time and place of conversion

In landowner's action for conversion of logs against boom company and logging company which converted logs after original conversion by logger, time and place of conversion were established by determining when and where defendants asserted dominion over logs and disposed of them by sale to landowner's prejudice.—*Watkins v. Siler Logging Co.*, supra.

plaintiff may recover for all injuries or losses sustained as a direct and proximate result of the conversion.

While some cases display a tendency to limit recovery strictly to the value of the converted property with interest,<sup>28</sup> as a general rule, if the special damages are pleaded and proved, plaintiff may recover in trover for all injuries or losses that he has sustained as a direct and proximate result of the conversion;<sup>29</sup> but there can be no recovery for losses or injuries which are too remote and uncertain,<sup>30</sup> or which plaintiff could have avoided by the exercise of ordinary diligence.<sup>31</sup> In an action for conversion, the buyer's admission of the seller's title to the goods, taken by the seller from the buyer's store after forcible entry, precludes the buyer from

claiming damages to his credit and reputation.<sup>32</sup>

# § 171. — Interest

Except in cases where a value higher than that existing at the time of the conversion is allowed as the measure of damages, it is usually held that a sum equal to the legal rate of interest on the value of the property from the time of conversion to the time the verdict is rendered is a recoverable element of damages.

Except in cases where a value higher than that existing at the time of the conversion is allowed as the measure of damages,<sup>33</sup> it is usually held that a sum equal to the legal rate of interest on the value of the property from the time of the conversion to the time the verdict is rendered,<sup>34</sup> or to the date of the judgment,<sup>35</sup> is a recoverable element of dam-

28. Kan.—Trapani v. Universal Credit Co., 100 P.2d 735, 151 Kan 715.

65 C.J. p 141 note 38.

29. U.S.—Petroleum Products Corp v. Sklar, D.C.La., 87 F.Supp. 715. Utah.—Liljenquist v. Utah State Nat. Bank, 100 P.2d 185, 99 Utah 163.

65 C.J. p 141 note 39.

Necessity of alleging special damages see supra § 103.

30. N.C.—Bowen v. Harris, 59 S.E. 1044, 146 N.C. 85.

65 C.J. p 141 note 40.

## Damages not recoverable

In action of trover and conversion by buyer of timber against seller of timber who sold a portion of the timber to a third person, evidence that the buyer built roads on the seller's lands in order to remove the timber purchased by the buyer, was admissible only to show that timber products were accessible to the market, for purpose of showing the value of the timber, and buyer could not recover for the cost of building the roads and also realize on the increase in value of the timber products as result of construction of the roads.—Straley v. Fisher, 10 S.E.2d 551, 176 Va. 163.

31. N.C.—Sledge v. Bond, 73 N.C. 410. Wash.—Cannon v. Oregon Molins Plow Co., 197 P. 39, 115 Wash. 273.

32. Tex.—Askey v. Oliver Chilled Plow Works, Civ.App., 57 S.W.2d 210, error dismissed.

33. N.Y.—Kavanaugh v. McIntyre, 133 N.Y.S. 679, 74 Misc. 222, affirmed 135 N.Y.S. 1120, 151 App. Div. 910, affirmed 104 N.E. 135, 210 N.Y. 176.

65 C.J. p 142 note 43.

34. U.S.—Pack v. Baumer, C.C.A. Pa., 121 F.2d 676—Kauschulis v. Taylor, C.C.A. Okl., 112 F.2d 406—Wynne v. McCarthy, C.C.A. Okl., 97 F.2d 964—Corpus Juris cited in American Surety Co. of New York v. First Nat. Bank in West Union,

D.C.W.Va., 57 F.Supp. 355, 358, affirmed, C.C.A., 148 F.2d 654.

Cal.—Woodhine v. Van Horn, 173 P.2d 17, 29 Cal.2d 95—Fletcher Aviation Corp v. Landis Mfg. Co., 214 P.2d 400, 95 Cal.App.2d 906—Chattelet v. Boone, 185 P.2d 610, 81 Cal.App.2d 943—Betzner v. Olney, 57 P.2d 1376, 14 Cal.App.2d 53.

Idaho.—Black v. Darrah, 233 P.2d 415, 71 Idaho 404.

Ill.—Thompson v. Pollack, 53 N.E.2d 737, 322 Ill.App. 73—A.A. Excavating Co. v. First United Finance Corporation, 52 N.E.2d 837, 321 Ill. App. 309.

Kan.—Corpus Juris cited in Trapani v. Universal Credit Co., 100 P.2d 735, 740, 151 Kan 715.

Ky.—Lane v. Rowland, 175 S.W.2d 1000, 295 Ky. 868—Davis v. Kentland Coal & Coke Co., 57 S.W.2d 512, 247 Ky. 612.

La.—A. B. C. Oil Burner & Heating Co. v. Palmer, App., 28 So.2d 462—Edwards v. Max Thome Chevrolet Co., App., 191 So. 569—Bryson v. Bates-Crumley Chevrolet Co., App., 166 So. 879, set aside on other grounds 171 So. 605.

Me.—Bartlett v. Newton, 92 A.2d 611—Sanborn v. Matthews, 41 A.2d 701, 141 Me. 213—Jeffery v. Sheehan, 194 A. 543, 135 Me. 246.

Md.—Saunders v. Mullins, 72 A.2d 720, 195 Md. 235.

Mass.—Lawyers' Morig. Inv. Corporation of Boston v. Paramount Laundries, 191 N.E. 398, 287 Mass. 357.

Mont.—Sorensen v. Jacobson, 232 P.2d 332, 125 Mont. 118, 26 A.L.R.2d 1186—Gallbreath v. Armstrong, 193 P.2d 630, 121 Mont. 387—First Nat. Bank v. Ferrine, 33 P.2d 997, 97 Mont. 262.

N.H.—E. J. Caron Enterprises v. State Operating Co., 179 A. 665, 85 N.H. 371.

N.J.—Friedman v. Guffanti, 59 A.2d 1, 137 N.J. Law 195—Arnold v. Hamilton Inv. Co., 38 A.2d 118, 132 N.J. Law 10, affirmed 40 A.2d 649, 132 N.J. Law 419.

Ohio.—Morris v. Pearl Street Auction Co., 22 N.E.2d 740, 61 Ohio App. 452.

Okl.—Billy v. Le Flore County Gas & Electric Co., 26 P.2d 149, 166 Okl. 130.

Or.—Abrams v. Rushlight, 69 P.2d 1063, 157 Or. 53, 111 A.L.R. 1292.

Tex.—Scott v. Doggett, Civ.App., 226 S.W.2d 183, refused no reversible error—General Motors Acceptance Corp. v. Boyd, Civ.App., 120 S.W.2d 484—Lloyds America v. El Paso-Hudspeth Counties Road Dist. of Texas, Civ.App., 107 S.W.2d 1008, error refused.

Wash.—Watkins v. Siler Logging Co., 116 P.2d 315, 9 Wash.2d 703.

Wis.—Corpus Juris cited in Traeger v. Sperberg, 41 N.W.2d 214, 216, 256 Wis. 330.

65 C.J. p 142 note 44.

## Election by plaintiff

In action for conversion of personal property, upon judgment rendered in his favor, plaintiff could properly elect to have interest allowed on the property from date of conversion, even though value of the property is in dispute or amount of property converted is to be determined by the court or jury; but under statute interest on special damages would run from time of verdict.—Gallbreath v. Armstrong, 193 P.2d 630, 121 Mont. 387.

## Interest on judgment

In suit for conversion against lessee of pipe and purchaser from lessee, interest on judgment against purchaser would be awarded from date suit was instituted against him.—Callahan v. White, Tex.Civ.App., 139 S.W.2d 129.

35. N.H.—E. J. Caron Enterprises v. State Operating Co., 179 A. 665, 87 N.H. 371—Johnson v. Furr, 60 N.H. 426.

## On review

On reversal of final decree fixing certain sums found due interest on amounts found due by reviewing court should be brought down to date

age, although in some states recovery of interest from the time of the conversion is denied if the damages are of an unliquidated nature.<sup>36</sup> According to some authorities the allowance or refusal of interest from the date of the conversion, as an item of damage, is a matter within the discretion of the jury;<sup>37</sup> but there are others which hold that the interest is a necessary part of a complete indemnity to which plaintiff is entitled as a matter of legal right.<sup>38</sup> Where defendant has innocently purchased the property from the original or willful converter it has been held that interest runs not from the date of the conversion but from the date that demand has been made by plaintiff.<sup>39</sup>

### § 172. — Detention or Loss of Use

Generally, where the value of the property is recoverable, the plaintiff is limited to that sum with interest and cannot recover anything for the value of the use of the property during the period he was deprived of it; but there are authorities which allow the plaintiff compensation for the use or detention of the property.

As a general rule, where the value of the property is recoverable, plaintiff is limited to that sum with interest and may recover nothing for the value of the use of the property during the period he was deprived of it.<sup>40</sup> However, it has been held proper to allow plaintiff compensation for the use or detention of the property where this is necessary com-

pletely to indemnify plaintiff for the natural and probable consequences of defendant's wrong;<sup>41</sup> but such compensation is not allowable where the loss of use did not result in damage.<sup>42</sup> Where plaintiff has regained the property, it is sometimes held that the value of the use of the property, during the period intervening between its conversion and its return, is to be allowed as an element of damages.<sup>43</sup>

If plaintiff has only a special interest entitling him to use the property for a specified period his damages recoverable against the general owner are the value of the use of the property during the residue of the period he was entitled to use it.<sup>44</sup> If plaintiff recovers for the usable value of the property he cannot ask for depreciation covering the same period of time,<sup>45</sup> or interest, since recovery for use takes the place of interest.<sup>46</sup>

### § 173. — Increase of, or Dividends or Interest on, Converted Property

While there may be a recovery for the value of increases which take place prior to the conversion, it is usually held that there can be no such recovery for increases which take place after the conversion.

While there may be a recovery for the value of increases which have come into existence before the conversion, and have been converted with the property,<sup>47</sup> it is usually held that there can be no re-

of new final decree—*Dow v. Brookline Trust Co.*, 31 N.E.2d 13, 308 Mass 90

36. *Wash.—B. & B. Building Material Co. v. Winston Bros. Co.*, 290 P. 839, 158 Wash. 130, 65 C.J. p 143 note 45.

**Refusal of interest held not an abuse of discretion**

In a suit for value of securities showing that the damages were unliquidated and in dispute, where there was considerable delay in bringing the action to trial, the court did not abuse its discretion in refusing to allow interest prior to the decree—*City of Fort Worth v. McCamey, C. C.A. Tex.*, 93 F.2d 964, certiorari denied 58 S.Ct. 1041, 304 U.S. 571, 82 L.Ed. 1535.

37. *Mo.—Kemper Mill & Elevator Co. v. Hines*, 239 S.W. 803, 293 Mo. 88, 65 C.J. p 143 note 46.

38. *N.Y.—American Castype Corp. v. Niles-Bement-Pond Co.*, 29 N.Y.S.2d 888, 177 Misc. 13, reversed on other grounds 42 N.Y.S.2d 638, 266 App.Div. 557, reargument denied 44 N.Y.S.2d 263, 266 App.Div. 949 —*Kellison v. City of New York*, 126 N.Y.S.2d 666, 65 C.J. p 143 note 47.

#### **In absence of conversion**

Where defendant, appealing from judgment, delivered to plaintiff a certified check, pursuant to agreement, in lieu of undertaking to stay execution, and plaintiff cashed check and kept proceeds in safe deposit box, and where defendant paid amount to which judgment was reduced by court of appeals, plaintiff was not liable for interest on the deposit on theory that the cashing of check constituted conversion.—*Woollard v. Shaffer Stores Co.*, 1 N.Y.S.2d 464, 253 App.Div. 856

39. *U.S.—Union Naval Stores Co. v. United States, Ala.*, 202 F. 491, 123 C.C.A. 1, affirmed 36 S.Ct. 308, 240 U.S. 284, 60 L.Ed. 644

40. *Ohio—Colonial Finance Co. v. Bear*, 189 N.E. 673, 46 Ohio App 498, 65 C.J. p 143 note 49.

41. *Idaho—Corpus Juris cited in Saccomano v. North Idaho Shingle Co.*, 252 P.2d 518, 522, 73 Idaho 284.

42. *La.—Craddock v. Jones*, App., 143 So. 529.

43. *Tex.—Minter v. Sparks*, Civ.App., 246 S.W.2d 954, error refused no reversible error—**Corpus Juris cited in Lone Star Finance Corporation v. Davis, Civ.App., 77 S.W.2d 711,**

715—*Universal Credit Co. v. Wyatt*, Civ.App., 56 S.W.2d 487, Wash.—*Dunn v. Guaranty Inv. Co.*, 42 P.2d 434, 181 Wash. 245, 65 C.J. p 143 note 50

#### **Use of motor vehicle**

Or—*Williams v. International Harvester Co.*, 141 P.2d 837, 172 Or. 270, 65 C.J. p 143 note 50 [a].

42. *La.—Debout v. Gillman*, App., 2 So.2d 690—*Carso v. Crais*, App., 146 So. 760

43. *Tex.—Hankey v. Employer's Cas. Co.*, Civ.App., 176 S.W.2d 357

44. *Ala.—Electric Lighting Co. v. Rust*, 31 So. 486, 131 Ala. 484, 65 C.J. p 144 note 51.

45. *Vt.—Hickok v. Buck*, 22 Vt. 149.

46. *N.Y.—McGreevey v. New York Cent. R. Co.*, 256 N.Y.S. 211, 143 Misc. 519.

47. *N.Y.—American Castype Corp. v. Niles-Bement-Pond Co.*, 29 N.Y.S.2d 888, 177 Misc. 13, reversed on other grounds 42 N.Y.S.2d 638, 266 App.Div. 557, reargument denied 44 N.Y.S.2d 263, 266 App.Div. 949.

48. *U.S.—Arkansas Valley Land, etc. Co. v. Mann*, Colo., 9 S.Ct. 458, 130 U.S. 69, 32 L.Ed. 851.

covery for increases which have come into existence after the conversion has taken place.<sup>48</sup> Thus, there can be no recovery for the value of wool which has been sheared from sheep previously converted.<sup>49</sup> However, it has been held, that if the converter deprives the true owner of a race horse and enters the horse in races from which he collects purses, the money so collected would belong to the true owner, less amounts deductible for expenses incurred in caring for the horse.<sup>50</sup> Accumulated dividends earned prior to the date of the conversion of stock are proper elements of damage;<sup>51</sup> and, where plaintiff has been awarded the highest intermediate value, in a jurisdiction allowing such recovery, he is also entitled to all dividends earned by the stock down to the time the value is fixed by the jury;<sup>52</sup> but it has been held that there can be no recovery for dividends earned after the date of the conversion,<sup>53</sup> although there is authority to the effect that there can be recovery for interest which defendant has collected on a promissory note after its conversion.<sup>54</sup>

#### § 174. — Expenses of Pursuing or Recovering Property

As a general rule, reasonable and necessary expenses incurred in recovering the property are a proper element of damage.

As a general rule, reasonable and necessary expenses incurred in recovering the property are a proper element of damage;<sup>55</sup> and this rule applies although the defendant is one who innocently acted as agent for the original converter in selling the property to third persons;<sup>56</sup> but for expenses which have been incurred solely because of the acts of the

original converter there can be no recovery from an innocent purchaser of the property.<sup>57</sup> According to some cases, expenses incurred in searching for or pursuing the property are a recoverable element of damage although they have not resulted in a recovery of the property by plaintiff;<sup>58</sup> but as to this there is also authority to the contrary.<sup>59</sup> Expenses incurred in having defendant arrested, after plaintiff discovers the theft of his property, are not necessary to recovery of the property and are not recoverable items of damage.<sup>60</sup>

#### § 175. — Attorney's Fees and Costs and Expenses of Suit

As a general rule the plaintiff is not entitled to recover, in addition to the regularly taxable costs, for attorney's fees or other expenses involved in the prosecution of the instant action, except as provided for by statute.

As a general rule plaintiff is not entitled to recover, in addition to the regularly taxable costs, for attorney's fees<sup>61</sup> or other expenses involved in the prosecution of the instant action against the defendant,<sup>62</sup> except as provided for by statute.<sup>63</sup> Attorney's fees which do not grow out of the instant suit against defendant, but have been incurred in litigation against a third person for the recovery of the property, may properly be considered as elements of damage;<sup>64</sup> and where plaintiff has a security interest in the converted property to secure not only the principal debt, but also attorney's fees incurred in collecting the debt, the attorney's fees may be added to the principal debt as the amount of plaintiff's recovery if the total does not exceed the value of the property.<sup>65</sup>

48. Utah.—Madsen v. Madsen, 269 P. 132, 72 Utah 96.  
65 C.J. p 144 note 55.

49. Utah.—Madsen v. Madsen, supra.

50. Md.—Rowan v. State, to Use of Grove, 191 A. 244, 172 Md. 190.

51. U.S.—Clarke v. Eureka County Bank, C.C.Nev., 123 F. 922, affirmed 130 F. 325, 64 C.C.A. 571, certiorari denied 25 S.Ct. 788, 195 U.S. 631, 49 L.Ed. 353.

Ind.—Citizens' St. R. Co. v. Robbins, 42 N.E. 916, 43 N.E. 649, 144 Ind. 671.

52. Iowa.—Doyle v. Burns, 99 N.W. 195, 123 Iowa 488.

Mich.—Hubbell v. Blandy, 49 N.W. 502, 87 Mich. 209, 24 Am.St.R. 154.

53. Ind.—Citizens' St. R. Co. v. Robbins, 42 N.E. 916, 43 N.E. 649, 144 Ind. 671.

65 C.J. p 144 note 60.

54. Neb.—Halbert v. Rosenbalm, 68 N.W. 622, 49 Neb. 498.

55. U.S.—Petroleum Products Corp. v. Sklar, D.C.La., 87 F.Supp. 715. Cal.—Woodbine v. Van Horn, 173 P. 2d 17, 29 Cal.2d 95—Viner v. Untrecht, 158 P.2d 3, 26 Cal.2d 261—Hornaday v. Hornaday, 213 P.2d 91, 95 Cal.App.2d 384—Chatterton v. Boone, 185 P.2d 610, 81 Cal.App.2d 943.

65 C.J. p 144 note 63.  
Attorneys' fees see *infra* § 175.

56. Mo.—Laughlin v. Barnes, 76 Mo. App. 258.

65 C.J. p 145 note 64.

57. Ala.—Renfro v. Hughes, 69 Ala. 581.

65 C.J. p 145 note 65.

58. Wis.—Tarrski v. Goldberg, 50 N.W. 191, 80 Wis. 339.

65 C.J. p 145 note 66.

59. Ariz.—Jones v. Stanley, 233 P. 598, 27 Ariz. 381.

65 C.J. p 145 note 67.

60. La.—Craddock v. Jones, App. 143 So. 529.

61. Cal.—Viner v. Untrecht, 158 P. 2d 3, 26 Cal.2d 261—Hornaday v. Hornaday, 213 P.2d 91, 95 Cal.App.2d 384.

Tex.—Security State Bank v. Spinner, Civ App., 55 S.W.2d 128, error dismissed.

65 C.J. p 145 note 69.

62. Kan.—Trapani v. Universal Credit Co., 100 P.2d 735, 151 Kan. 715.

65 C.J. p 145 note 70.

63. Okl.—Lesh v. Branch, 58 P.2d 578, 177 Okl. 211.

N.Y.—Wilson v. Vallin, 66 N.Y.S. 499, 32 Misc. 739.

64. Mass.—Berry v. Ingalls, 85 N.E. 191, 199 Mass. 77.

65. Or.—Pade v. First Nat. Bank, 242 P. 833, 117 Or. 47, 43 A.L.R. 374.

### § 176. — Profits Derived from Sale by Defendant

Although there is some authority to the contrary, it has been held that if the defendant sells the property at a price in excess of its market value at the time of the conversion, the plaintiff may, at his option, elect the price at which the property was sold as his measure of damages.

According to some cases, if defendant sells the property at a price in excess of the market value of the property at the time of the conversion, plaintiff may, at his option, elect the price at which the property was sold as his measure of damages,<sup>66</sup> with interest from the time of sale to the date of trial;<sup>67</sup> but there is other authority which limits recovery strictly to the value at the time of the conversion and will not allow plaintiff an increased amount at which defendant has subsequently sold the property.<sup>68</sup>

### § 177. — Mental Anguish

Ordinarily, in the absence of a malicious intent to harm the plaintiff, the latter cannot recover for mental anguish in an action for conversion.

If there has been no malicious intent to harm plaintiff the latter's mental anguish or humiliation is not ordinarily a proper element of damage in actions for the conversion of personal property.<sup>69</sup>

### § 178. — Loss of Profits and Injuries to Trade or Business

While it has been held that there can be no recovery, in an action for conversion, for an injury to business or loss of profits of a speculative and uncertain nature, it is often held that there can be a recovery for such losses if they are shown with certainty.

While it has been held absolutely that injuries to business are not recoverable as damages in trover,<sup>70</sup>

and there can be no recovery for loss of profits<sup>71</sup> or injuries to business<sup>72</sup> of a speculative and uncertain nature, it is often held that if it is shown with certainty that defendant's conversion has resulted in a loss of profits,<sup>73</sup> injuries to plaintiff's business,<sup>74</sup> or prevented plaintiff from carrying on his usual trade or employment,<sup>75</sup> the losses so sustained are recoverable elements of damages, except in so far as they could have been avoided or minimized by the exercise of due diligence on the part of plaintiff.<sup>76</sup> There can be no recovery for loss of profits where the nature of the article or the circumstances are not such that the loss might reasonably be supposed to follow from the conversion.<sup>77</sup> The fact that the fulfillment of a contract is prevented by the conversion is not ground for special damages where the same contract is subsequently performed and all profits are made that would have sooner been made had the conversion not occurred.<sup>78</sup>

### § 179. — Expense of Replacing Converted Property

It has been held that there can be no recovery for the expense of replacing the converted property, or for the inability to replace the object of the conversion.

It has been held that plaintiff may not recover more than the value of the property because he was forced to hire other property to carry on his business;<sup>79</sup> and the inability to replace that which has been lost, destroyed, or converted, does not produce an element of damage in addition to that which has been lost, destroyed, or converted.<sup>80</sup>

### § 180. Mitigation or Reduction of Damages

Generally, the defendant is entitled to show in mitigation or reduction of damages any facts or circumstances which would tend to reduce the amount required

66. Wis.—Linker v. Batavian Nat. Bank of La Crosse, 12 N.W.2d 721, 244 Wis. 469, rehearing denied 14 N.W.2d 496, 244 Wis. 469—Topzant v. Koshe, 9 N.W.2d 186, 242 Wis. 585.

65 C.J. p 145 note 76. Rights where property is sold for less than value see supra § 165. Sale at increased price because of act or expenditure of defendant see supra § 169.

#### Measure for rule

One who has converted the property of another to his own use is a wrongdoer, and cannot justly complain because wronged owner is allowed an election as to measure of damages so as to prevent wrongdoer from profiting by his own wrong.—Topzant v. Koshe, supra.

67. Wis.—Linker v. Batavian Nat. Bank of La Crosse, 12 N.W.2d 721, 244 Wis. 469, rehearing denied 14

N.W.2d 496, 244 Wis. 469—Topzant v. Koshe, 9 N.W.2d 186, 242 Wis. 585.

68. Mass.—Kennedy v. Whitwell, 4 Pick 466.

69. Tex.—White Sewing Mach. Co. v. Lindsay, Civ.App., 14 S.W.2d 311, 65 C.J. p 145 note 78.

70. N.J.—Ward v. Huff, 109 A. 287, 94 N.J.Law 81.

71. Va.—Corpus Juris cited in Straley v. Fisher, 10 S.E.2d 551, 553, 176 Va. 163.  
65 C.J. p 145 note 80.

72. N.C.—Bowen v. Harris, 59 S.E. 1044, 146 N.C. 385.

73. Or.—Preble v. Hanna, 244 P. 75, 117 Or. 306.

65 C.J. p 145 note 82.

74. Ky.—Phillips Petroleum Co. v. Cunningham, 169 S.W.2d 628, 293 Ky. 514.

Mass.—Manhattan Clothing Co. v. Goldberg, 78 N.E.2d 1, 332 Mass. 472—Whitcomb v. Reed-Prentice Co., 159 N.E. 922, 263 Mass. 348.  
Wash.—Crutcher v. Scott Pub. Co., 253 P.2d 925, 42 Wash.2d 89.

75. La.—Craddock v. Jones, App., 143 So 529.  
N.Y.—Dlides v. Vishnovsky, 179 N.Y.S. 99.

76. Wash.—Cannon v. Oregon Moline Plow Co., 197 P. 39, 115 Wash. 278.

77. N.Y.—Barrington v. Offenbach, 163 N.Y.S. 423.

78. Tex.—Texarkana & Ft. S. Ry. Co. v. Neches Iron Works, 122 S.W. 64, 57 Tex.Civ.App. 249.

79. S.C.—Mims v. Bennett, 158 S.E. 124, 180 S.C. 39, 78 A.L.R. 350.

80. N.Y.—Gerdes v. Reynolds, 30 N.Y.S.2d 755.



to compensate the plaintiff for the actual loss he has sustained.

As a general rule defendant is entitled to show in mitigation or reduction of damages any facts or circumstances which would tend to reduce the amount required justly to compensate plaintiff for the actual loss he has sustained as the proximate result of defendant's act.<sup>81</sup> Where plaintiff is indebted to defendant the amount of indebtedness must be deducted from the reasonable value of the converted property to determine the correct amount due plaintiff.<sup>82</sup> Where the property of plaintiff wrongfully converted was not fully paid for, the amount unpaid may not be deducted from the award against defendant, since plaintiff is still obligated to pay the balance owing on the property.<sup>83</sup> If defendant wrongfully converts property which he has sold plaintiff, and on which there remains an unpaid balance of the purchase price, plaintiff is entitled to recover what he has paid without regard to depreciation of the property.<sup>84</sup>

#### § 181. — Brevity of Detention by Defendant

In an action for conversion, brevity of detention cannot be shown in mitigation of damages.

The fact that defendant himself detained the property only for a short period cannot be shown in mitigation of damages.<sup>85</sup>

#### § 182. — Motive or Intent of Defendant

The defendant's motive and intent in converting the property do not affect plaintiff's right to recover for damages actually sustained.

The motive and intent of defendant in converting the property do not affect the right of plaintiff to recover the damages actually sustained.<sup>86</sup>

#### § 183. — Subsequent Right to Take Property Lawfully

Where the premature exercise of what would otherwise have been a legal right to take the property constitutes the conversion, the defendant cannot show in mitigation his legal right to take the property after the conversion.

Where the conversion consists in taking the property by the premature exercise of what would otherwise have been a legal right to take the property, defendant cannot mitigate the damages by showing that he could legally have taken the property within a short time after the conversion.<sup>87</sup>

#### § 184. — Expenses of Conserving or Caring for Property

Although there is authority to the contrary, ordinarily the defendant can show in mitigation expenses incurred in protecting or preserving the property.

Ordinarily defendant, in an action of conversion, is entitled to have allowed in mitigation of damages any expenses he has incurred in protecting or preserving the property in controversy.<sup>88</sup> On the other hand, it has been held that defendant cannot recover anything for the expense of storing the converted property.<sup>89</sup>

#### § 185. — Attachment by Plaintiff

The fact that the plaintiff, in an action of trover, attached the property while in the defendant's hands is not ground for mitigation where the attaching officer returned the property to the defendant and the latter retained it.

The fact that plaintiff, in bringing his action of trover, has attached the converted property while in the hands of defendant affords no ground for mitigation of damages where the attaching officer has returned the property to the defendant and it has since been retained by him.<sup>90</sup>

#### § 186. — Offer to Return or Restore Property

Although there are some cases to the contrary, the generally declared and followed rule is that an unaccepted tender or offer to return the property or other property of like species, quantity, and quality cannot be considered in mitigation of damages.

There are a number of cases to the effect that an offer to return the property should be considered in mitigation of damages where it is made shortly after a conversion which is technical or inadvertent, and while the property remains unchanged and un-

81. N.D.—Larson v. Quanrud, Brink & Reinhold, 47 N.W.2d 743, 78 N.D. 70, 29 A.L.R.2d 230.  
65 C.J. p 146 note 90.

**Deduction of cost of removal held proper**  
U.S.—Texas Co. v. Sorrell, D.C.Mont., 116 F.Supp. 137.

82. Tex.—Sanders v. O'Connor, Civ. App., 98 S.W.2d 401, error dismissed.

83. Cal.—Susumu Igauye v. Howard, 219 P.2d 558, 114 Cal.App.2d 122.

La.—Edwards v. Max Thieme Chevrolet Co., App., 191 So. 569.

84. La.—Bryson v. Bates-Crumley Chevrolet Co., App., 171 So. 605.

85. Ala.—Williams v. Crum, 27 Ala. 468.

Md.—Kirby v. Porter, 125 A. 41, 144 Md. 261.

86. Tex.—Alexander v. Bowers, Civ. App., 79 S.W. 342.

Intent as element of conversion see supra §§ 7-10

87. Mich.—Dalton v. Laudahn, 27 Mich. 529

88. N.D.—Lamoureux v. Randall, 208 N.W. 104, 53 N.D. 697, 44 A.L.R. 1315.

65 C.J. p 146 note 94.

89. La.—Rodgers v. A. & B. Pipe & Supply Co., App., 162 So. 445

90. Conn.—Luckey v. Roberts, 25 Conn. 486.

injured;<sup>91</sup> but the rule, as generally declared and followed, is that an unaccepted tender or offer to return the particular property,<sup>92</sup> or other property of like species, quantity, and quality,<sup>93</sup> cannot be considered in mitigation of damages. An attempt to plead and prove a qualified return in mitigation of the damages is not permissible, since one who wrongfully converts personalty should not be allowed to state a condition which the owner of the property is bound to comply with in order to have the property returned to him.<sup>94</sup> Where property has been stolen and sold to defendant, and some items thereof have been sold by him and others demolished, the owner is under no duty to accept defendant's offer of remaining property.<sup>95</sup>

### § 187. — Return or Recovery of Property

Although the plaintiff's repossession of the property will not bar his action in trover, it is generally held that repossession of the property is to be considered in reduction or mitigation of damages.

Although the fact that plaintiff has regained possession of the property will not bar his cause of action in trover, as discussed supra § 86, it is gen-

erally held that plaintiff's repossession of the property is to be considered in reduction or mitigation of damages,<sup>96</sup> so that the general measure of damages in such cases, if no other and special damages are shown, is the difference between the value of the property at the time it was converted and its value at the time it was regained by plaintiff,<sup>97</sup> unless the resumption of possession is in some way qualified so that plaintiff does not resume dominion over the property as owner,<sup>98</sup> or the repossession is a temporary and useless one from which plaintiff derives no substantial benefit or reparation,<sup>99</sup> or the repossession was acquired only by purchase by plaintiff from defendant who still retains the proceeds.<sup>1</sup> A surrender of the property to one who has no title or right of possession will not operate to mitigate the damages.<sup>2</sup>

*Stipulation as to effect of return.* The fact that plaintiff accepts a return of the property under a stipulation that it is to be without prejudice to his cause of action for conversion does not prevent defendant from mitigating the damages by showing a return of the property.<sup>3</sup>

91. Colo.—Moody v. Sindlinger, 149 P. 263, 27 Colo App 230.

65 C.J. p 147 note 97.

Leave to tender property into court see supra § 139.

Offer to restore as defense see supra § 86.

#### Sufficiency of tender or offer

Mo.—King v. Kansas City Life Ins

Co., 164 S.W.2d 458, 350 Mo 75.

65 C.J. p 147 note 97 [f].

92. Mass.—Lawyers' Mortg. Inv Corporation of Boston v. Paramount Laundries, 191 N.E. 398, 287 Mass. 357.

Mich.—Even-Heat Co. v. Wade Elec Products Co., 58 N.W.2d 923, 336 Mich. 564.

Okl.—Corpus Juris quoted in Magic City Steel & Metal Corp. v. Mitchell, 265 P.2d 473, 475.

Tex.—Sibley v. Fitch, Civ.App., 226 S.W.2d 885, error refused—Hicks Rubber Co., Distributors, v. Stacy, Civ.App., 133 S.W.2d 249.

65 C.J. p 147 note 98.

Offer to return as mitigating exemplary damages see infra § 199.

93. Mo.—Michael—Swanson—Brady Produce Co. v. Oregon Short Line R. Co., 271 S.W. 854, 219 Mo App. 419.

Okl.—Corpus Juris quoted in Magic City Steel & Metal Corp. v. Mitchell, 265 P.2d 473, 475.

94. Tex.—Hicks Rubber Co., Distributors, v. Stacy, Civ.App., 133 S.W.2d 249.

#### Refusal to allow a return held not erroneous

In an action by a trustee in bankruptcy to recover value of property transferred as a preference, refusal by court to permit defendant to return property in mitigation of damages was not error, where offer to return goods, contained in the answer, was made on condition that defendant would not win the suit—Doohittle v. Robinson, 206 P. 229, 106 Or. 163.

95. Okl.—Magic City Steel & Metal Corp v Mitchell, 265 P.2d 473

96. U.S.—Truth Seeker Co. v. Durning, C.C.A.N.Y., 147 F.2d 54—Corpus Juris cited in Kupschmalis v. Taylor, C.C.A.Okl., 112 F.2d 406, 408.

Me.—Carpenter v. Dresser, 72 Me. 377, 39 Am R. 337.

Mass.—Colella v. Essex County Acceptance Corporation, 192 N.E. 622, 288 Mass 221—Lawyers' Mortg. Inv. Corporation of Boston v. Paramount Laundries, 191 N.E. 398, 287 Mass. 357—Stickney v. Allen, 10 Gray 352.

Neb.—Coburn v. Watson, 67 N.W. 171, 48 Neb. 257.

N.J.—Bigelow Co. v. Heintze, 21 A. 109, 53 N.J.Law 69.

N.Y.—Brewster v. Stillman, 38 N.Y. 423—Carpenter v. Manhattan L. Ins. Co., 22 Hun 47—Hanner v. Wiley, 17 Wend. 91.

Utah.—Fudge v. Downing, 27 P.2d 33, 83 Utah 101

Vt.—Ittland, etc., R. Co. v. Middlebury Bank, 32 Vt 639.

Wis.—Parr v. Phillips State Bank, 58 N.W. 377, 87 Wis. 223, 41 Am.S.R. 40

65 C.J. p 147 note 3.

97. Idaho.—Corpus Juris cited in Sacramento v. North Idaho Shingle Co., 252 P.2d 518, 522, 73 Idaho 284. Mass.—Corriglia v. French, 187 N.E. 702, 284 Mass 211.

Mo.—Mauck v. O'Donnell, App., 135 S.W.2d 389—Vetter v. Browne, 85 S.W.2d 197, 231 Mo App. 1147.

Ohio.—Sopronyi v. Anziales, App., 101 N.E.2d 161

65 C.J. p 148 note 4.

Expenses of recovering property as recoverable damages see supra § 174

Recovery for value of use where property returned see supra § 172.

98. N.Y.—People v. Bank of North America, 75 N.Y. 547.

65 C.J. p 148 note 5.

99. U.S.—Southern Counties Ice Co. v. RKO Radio Pictures, D.C.Cal., 39 F Supp 157.

65 C.J. p 148 note 6.

1. N.Y.—Murphy v. John Hoffman Co., 163 N.Y.S. 932, 177 App.Div. 380.

65 C.J. p 148 note 7.

2. Conn.—Greenhalt v. Lincoln, 36 A. 813, 68 Conn. 384.

Mass.—Russell v. Cole, 44 N.E. 1057, 167 Mass. 6, 57 Am.S.R. 432.

3. N.Y.—Rapid Mach. Works v. Silberstein, 248 N.Y.S. 735, 140 Misc. 30.

§ 188. — Application of Property to Use of Plaintiff or Owner

It has been held that the defendant cannot show in mitigation that he has, by his own act without the aid of a valid legal process or the plaintiff's consent, applied the property or its proceeds on a debt owed by the plaintiff to the defendant or to a third person; but there is also authority to the contrary.

According to some cases, defendant cannot claim a mitigation of damages by showing that he has, by his own act without the aid of a valid legal process or the consent of plaintiff, applied the property or its proceeds on a debt owed by plaintiff to defendant<sup>4</sup> or to a third person;<sup>5</sup> but there are other authorities which will consider in mitigation either an application to a debt due a third person<sup>6</sup> or a debt owed to defendant himself.<sup>7</sup> It has been held that a purchaser from an original converter can show in mitigation of damages that the latter applied the proceeds of the purchase in payment of a debt owed by plaintiff to a third person;<sup>8</sup> but there is also authority to the contrary.<sup>9</sup>

Should the property, while it is in the hands of defendant wrongdoer, be taken from his possession by valid legal process in favor of another, and applied to a debt due from the owner to the third person, such application may be shown in mitigation of damages;<sup>10</sup> and, according to some authorities, an application of the property to the owner's debt by means of a valid legal process, subsequent to the prior tortious conversion, may be shown in mitigation of damages although the process and application are in favor of defendant;<sup>11</sup> but on this latter point there is also authority to the contrary.<sup>12</sup>

*Consent to, or ratification of, application by plaintiff.* If plaintiff accepts or ratifies defendant's application of the property to the payment of plain-

tiff's debts, such application may be shown in mitigation of damages.<sup>13</sup>

§ 189. — Deduction of Sums Received

As a general rule, there will be deducted from the plaintiff's recovery all sums that he has received on account of the property, either from the defendant, or the latter's predecessor in interest.

As a general rule, there will be deducted from plaintiff's recovery all sums that he has received on account of the property, either from defendant<sup>14</sup> or the latter's predecessor in interest.<sup>15</sup> A payment by one of two joint converters to obtain a personal release for himself will be deducted from plaintiff's recovery against the other converter,<sup>16</sup> and the damages may be reduced by a showing that a third person has made a partial payment in discharge of the debt incurred by the conversion;<sup>17</sup> but payment by a third person will form no basis for a reduction if it was not paid or accepted in discharge of the liability for the conversion.<sup>18</sup> Furthermore, a converter is not entitled to a deduction from the usual measure of damages because of a debt owed by plaintiff to a third person with respect to the property converted.<sup>19</sup>

§ 190. Particular Kinds of Property

As shown *infra* §§ 191-198 the rules for establishing the value to be taken as to the measure of damages may vary with respect to the particular kinds of property.

Examine Pocket Parts for later cases.

§ 191. — Shares of Stock and Certificates Thereof

As a general rule, the plaintiff is limited to the market value of the stock and while many authorities

4. Ala.—Banks v. Windham, 62 So. 297, 7 Ala.App. 616.

65 C.J. p 149 note 11.

Measure of recovery where defendant has lien or interest see *supra* § 164.

5. Minn.—Farmers' & Merchants' Nat Bank of Ivanhoe v. Przymsus, 200 N.W. 931, 161 Minn. 85.

65 C.J. p 149 note 12.

6. Neb.—Clements v. Eliseley, 88 N. W. 871, 63 Neb. 551.

65 C.J. p 149 note 13.

7. Ark.—Franklin v. Spratt, 295 S. W. 26, 174 Ark. 268.

65 C.J. p 149 note 14.

**Statute construed**

Statute providing that in action for conversion of personalty defendant may show in mitigation of damages amount due on any lien to which plaintiff's rights were subject, and

which was held or paid by defendant or any person under whom he claims, must be construed and applied in furtherance of general rule that action for damages sounding in tort presents basic question of what amount of money will fairly and justly compensate plaintiff for injury which he has received—Larson v. Quanrud, Brink & Reibold, 47 N.W.2d 743, 78 N.D. 70, 29 A.L.R.2d 230.

8. Ohio—Doollittle & Chamberlain v. McCullough, 7 Ohio St. 299.

9. Ala.—Carpenter v. Going, 20 Ala 587.

65 C.J. p 149 note 16.

10. Mass.—Dahill v. Booker, 5 N.E. 496, 140 Mass. 308, 54 Am.R. 465

65 C.J. p 149 note 17.

11. Tex.—Mississippi Mills v. Meyer, 18 S.W. 748, 83 Tex. 433.

65 C.J. p 149 note 18.

12. N.Y.—Wehle v. Butler, 61 N.Y. 245.

65 C.J. p 149 note 19.

13. US.—Schlaflly v. Mercantile Trust Co., C.C.A.Mo., 6 F.2d 137.

14. N.Y.—Arakjjanian v. Arakian, 48 N.Y.S.2d 501, 268 App.Div. 41.

65 C.J. p 149 note 21.

15. N.Y.—Meeks v. Simon, 21 N.Y.S. 1004, 2 Misc. 241.

16. R.I.—Heyer v. Carr, 6 R.I. 45.

17. Ind.—Sharpe v. Graydon, 99 Ind 232.

18. U.S.—Bank of Italy Nat. Trust & Savings Ass'n v. Farmers' & Merchants' Nat. Bank of Merced, C.C.A.Cal., 44 F.2d 325.

19. Me.—Bartlett v. Newton, 92 A.2d 611, 148 Me. 279.

adhere to the general rule that the value to be taken is the value which existed at the time of conversion, even in the case of stock of fluctuating value, there are authorities which apply a different rule in such cases.

As a general rule, plaintiff is limited to the market value of the stock and he cannot recover the higher price at which he has purchased it<sup>20</sup> or contracted to sell it to a third person,<sup>21</sup> or the par value of the stock.<sup>22</sup> If the stock has no market value the value to be taken is the actual value,<sup>23</sup> as shown by the dividend earning capacity of the stock,<sup>24</sup> and by the value of the property and business of the corporation after deducting its liabilities.<sup>25</sup>

While many authorities, even in the case of stocks of fluctuating value, conform to the general rule that the value to be taken is that value which existed at the time of the conversion,<sup>26</sup> there are cases, where the stock has subsequently increased in value, following the rule allowing plaintiff the highest value intermediate the conversion and the trial;<sup>27</sup> but this rule has been to a great extent modified by the adoption of the more recent and widely followed New York rule, which limits plaintiff to the highest intermediate value between the time he receives notice of the conversion and a reasonable time thereafter within which he can replace the stock.<sup>28</sup> This rule does not, however, preclude plaintiff from recovering instead the amount of the proceeds received on a sale by the converter.<sup>29</sup>

The case originally promulgating this rule contained a clear implication that it applied only where plaintiff had not paid for the stock in full or was not the absolute owner thereof;<sup>30</sup> and in apparent adoption of this limitation it has been stated that where plaintiff has paid for the stock in full he is entitled to the highest value between the time of conversion and trial;<sup>31</sup> but it was subsequently held in New York, that the rule was equally applicable to a case where plaintiff was absolute owner of the stock and such plaintiff was likewise limited to the highest value within a reasonable time after notice of the conversion in which to replace the stock.<sup>32</sup> There is some authority to the effect that plaintiff, under the New York rule, is limited to the highest value within a reasonable time after notice of the conversion in which to replace the stock, although the stock has a higher value at the time of the conversion;<sup>33</sup> but there are other authorities holding that plaintiff is entitled to at least the value at the time of the conversion if the value subsequently decreases.<sup>34</sup> It has been held that, where the stock reaches a higher value between the time of the conversion and the time plaintiff receives notice of the conversion, this value is not the measure of damages, but plaintiff is limited to the value at the time of the conversion or the highest value between the time of notice of the conversion and a reasonable time thereafter.<sup>35</sup>

20. Ill.—Brewster v. Van Liew, 8 N.E. 842, 119 Ill. 554.

21. Conn.—Seymour v. Ives, 46 Conn. 109.

22. Cal.—Myers v. Chittyna Exploration Co., 129 P. 469, 20 Cal.App. 418.

N.Y.—Hussey v. Flanagan, 142 N.E. 594, 237 N.Y. 227.

23. Ill.—Gorham v. Massillon Iron & Steel Co., 120 N.E. 467, 284 Ill. 594.

65 C.J. p 149 note 30.

24. Mo.—Brinkerhoff-Farris Trust, etc., Co. v. Home Lumber Co., 24 S.W. 129, 118 Mo. 447.

25. Ill.—McDonald v. Danahy, 63 N.E. 648, 195 Ill. 133.

65 C.J. p 150 note 32.

26. Colo.—Barkhausen v. Bulkley, 11 P.2d 220, 90 Colo. 558.

65 C.J. p 150 note 33.

27. Cal.—Friedman v. Renz, 87 P.2d 386, 31 Cal.App.2d 71.

Tex.—Corpus Juris cited in Fenner & Beane v. Tatum, Civ.App., 129 S.W.2d 490, 492.

65 C.J. p 150 note 34.

28. U.S.—In re Franklin Saving & Loan Co., D.C.Tenn., 34 F.Supp. 585.

Del.—Wyndham, Inc. v. Wilmington Trust Co., 59 A.2d 456, 5 Terry 324.

N.Y.—Jones v. National Chautauqua County Bank of Jamestown, 74 N.Y.S.2d 498, 272 App Div. 521—German v. Snedeker, 13 N.Y.S.2d 237, 257 App Div. 596, reargument denied 14 N.Y.S.2d 1012, 258 App Div. 708, affirmed 24 N.Y.S.2d 492, 281 N.Y. 832—Phillips v. Bank of Athens Trust Co., 119 N.Y.S.2d 47, 202 Misc. 698—Gerdes v. Reynolds, 30 N.Y.S.2d 755.

Tenn.—Clark v. Simpson, 1 Tenn.App. 397.

65 C.J. p 150 note 35.

#### Reasonable time

What constitutes reasonable time after knowledge or notice of wrongful sale of stock for purpose of measuring damages for the conversion depends on circumstances of each particular case.

N.Y.—Phillips v. Bank of Athens Trust Co., 119 N.Y.S.2d 47, 202 Misc. 698.

Va.—Morrison v. Dominion Nat Bank of Bristol, 1 S.E.2d 292, 172 Va. 293.

#### Innocent conversion

Statute providing that damages for conversion of property shall be limited to difference between proceeds of conversion and such higher value as

property may reach within reasonable time after notice of conversion was held not to require party who innocently converts bonds to account for more than market value plus interest, which was all common-law rule required—Wolfe v. Pennsylvania Co. for Insurances on Lives and Granting Annuities, 185 A. 292, 322 Pa. 344.

#### Time held reasonable

U.S.—Satterwhite v. Harriman Nat. Bank & Trust Co. of City of New York, D.C.N.Y., 13 F.Supp. 493.

29. N.Y.—Gerdes v. Reynolds, 30 N.Y.S.2d 755.

30. N.Y.—Baker v. Drake, 53 N.Y. 211, 13 Am.R. 507, 66 N.Y. 518, 23 Am.R. 80.

31. Iowa—Doyle v. Burns, 99 N.W. 195, 123 Iowa 488.

32. N.Y.—Wright v. Metropolis Bank, 18 N.E. 79, 110 N.Y. 237, 6 Am.S.R. 356, 1 L.R.A. 289.

33. Mich.—Wallace v. H. W. Noble & Co., 168 N.W. 984, 203 Mich. 58.

34. Tex.—Neyland v. Brammer, Civ. App. 73 S.W.2d 884, error dismissed.

65 C.J. p 150 note 40.

35. U.S.—In re New York, N. H. & H. R. Co., D.C.Conn., 64 F.Supp. 487.

—Satterwhite v. Harriman Nat.

**Certificates.** In some jurisdictions the conversion of a certificate of stock is regarded as the same thing as a conversion of the stock itself so that plaintiff's measure of damages is the value of the stock represented by the certificate,<sup>36</sup> irrespective of whether the conversion actually deprives the plaintiff of his rights as a shareholder;<sup>37</sup> and such is universally the measure of damages where the conversion involves a wrongful use of the certificate which deprives plaintiff of his ownership or rights as a shareholder;<sup>38</sup> but it has been held that where only the certificate is converted, so that plaintiff has in no way lost his rights as a shareholder, the measure of damages is not the market value of the stock but rather compensation for the loss and expense plaintiff has actually sustained by reason of the conversion.<sup>39</sup>

**Conversion of stock certificate belonging to an infant.** One who steals from a child of tender years should be held to a greater degree of civil liability because of the ease with which the theft can be accomplished and the likelihood of a long lapse of time before discovery;<sup>40</sup> and the policy of the courts to protect infants should be followed when fixing a rule of damages to be applied against those who have taken an infant's property.<sup>41</sup> Thus, with respect to damages recoverable for the conversion of an infant's stock certificate, an infant should not be forced to depend on the judgment of relatives or any one else for the sole purpose of diminishing liability which a wrongdoer toward the infant merits as a consequence of his acts.<sup>42</sup> Furthermore, the reasonable time for fixing damages when the conversion is discovered should be longer in such cases than in other cases.<sup>43</sup>

## § 192. — Gold or Silver

The measure of damages for the conversion of gold coin or silver bullion is the value of the property in currency.

The measure of damages for the conversion of gold coin<sup>44</sup> or silver bullion<sup>45</sup> is the value of the property in currency.

## § 193. — Money

Ordinarily, the measure of damages for the conversion of money is the amount thereof with legal interest from the date of conversion; but if the defendant has loaned the money and received interest thereon the plaintiff may recover the amounts actually received and not merely the legal rate of interest.

Where money has been converted the measure of damages is ordinarily its amount with legal interest from the date of the conversion;<sup>46</sup> but if defendant has loaned the money and received interest thereon plaintiff may recover the amounts actually received and is not limited merely to the legal rate of interest.<sup>47</sup> Where the conversion of money, set aside for the purpose of discharging a lien on the real estate of plaintiff, results in the land being sold to satisfy the lien, plaintiff cannot recover as special damages whatever amount he may choose to pay the purchaser for the latter's interest but he will be limited to the reasonable and fair value of the interest acquired by the purchaser.<sup>48</sup>

## § 194. — Choses in Action and Evidences of Indebtedness

Prima facie the amount which appears to be due on the face of the instrument is the measure of damages for the conversion of commercial paper or evidences of indebtedness; however, the ultimate measure is not its face value but its actual value.

Bank & Trust Co. of City of New York, D.C.N.Y., 13 F.Supp. 493 N.Y.—German v. Snedeker, 13 N.Y.S. 2d 237, 257 App. Div. 596, rehearing denied 14 N.Y.S.2d 1012, 258 App. Div. 708, affirmed 24 N.E.2d 492, 281 N.Y. 832.

65 C.J. p 150 note 41.

38. N.Y.—U. S. Fidelity & Guaranty Co. v. Newburger, 188 N.E. 141, 263 N.Y. 16

65 C.J. p 151 note 42

**Liability held not limited to nominal damages**

(1) Fact that owner of stolen stock certificate had secured duplicate from transfer agent before stolen certificate came into possession of brokerage firm was held not to limit liability firm for conversion to nominal damages, where owner, in order to obtain duplicate certificate, was required to and did indemnify transfer agent.—U. S. Fidelity & Guaranty Co. v. Newburger, supra.

(2) Nominal damages generally see supra § 161

37. N.Y.—Pierpoint v. Hoyt, 182 N. E. 235, 260 N.Y. 26.

38. Ill.—McDonald v. Danahy, 96 Ill App 380, affirmed 63 N.E. 648, 196 Ill 133.

65 C.J. p 151 note 44.

39. Mo.—Shewalter v. Wood, App., 183 S.W. 127.

65 C.J. p 151 note 45.

40. N.Y.—Hayward v. Edwards, 4 N. Y.S.2d 699, 167 Misc. 694.

41. N.Y.—Hayward v. Edwards, supra Protection of infant's interest by court see Infants § 105.

42. N.Y.—Hayward v. Edwards, supra.

**Knowledge not imputed**

Knowledge of uncle's acts was not imputed to the infant since the law appoints no mentor to act for such

infant—Hayward v. Edwards, supra.

43. N.Y.—Hayward v. Edwards, supra.

**Date held within reasonable time**

N.Y.—Hayward v. Edwards, supra

44. Ind.—State Bank v. Burton, 27 Ind 426.

65 C.J. p 151 note 46.

45. Cal.—Fox v. Hale, etc., Silver Min Co., 41 P. 308, 108 Cal 369

46. Md.—McShane v. Howard Bank, 20 A. 776, 73 Md. 135, 10 L.R.A. 552

Neb.—McCready v. Phillips, 63 N.W.

7, 14 Neb 790

Gold coin see supra § 192.

Interest as element of damage see supra § 171.

47. Tex.—Black v. Black, Civ App, 67 S.W. 928 reversed on other grounds 69 S.W. 65, 95 Tex 627.

48. Ill.—Firsbach v. Novak, 185 Ill App 105.

65 C.J. p 151 note 50.

Prima facie the amount which appears to be due on the face of the instrument is the measure of damages for the conversion of commercial paper or evidences of indebtedness,<sup>49</sup> such as promissory notes<sup>50</sup> and bonds.<sup>51</sup> So, also, the rule has been applied to drafts or bills,<sup>52</sup> checks,<sup>53</sup> bank books,<sup>54</sup> certificates of deposit,<sup>55</sup> accounts receivable,<sup>56</sup> and a judgment.<sup>57</sup> However, the ultimate measure of damages for the conversion of such instruments is not their face value but rather their actual value,<sup>58</sup> which may be less than the face value because of the insolvency or inability of the debtor to pay,<sup>59</sup> his neglect or refusal to pay,<sup>60</sup> an unsuccessful attempt to collect on the instrument by suit,<sup>61</sup> payment in whole or in part,<sup>62</sup> nonenforceability or invalidity of the instrument,<sup>63</sup> or any other fact which would affect or diminish the value of the instrument in the hands of the owner.<sup>64</sup>

On the other hand, the damages recoverable for conversion of a bond payable in gold may be more than its face value in currency where bonds payable in gold are of higher value than bonds for the same amount in currency.<sup>65</sup> If the instrument converted is shown to have a market value on a regular market, it is the market value that is to be taken as the measure of damages rather than the face value.<sup>66</sup> Where a converted note imposes no personal liability on the maker, but is collectable

only from property mortgaged to secure it, the measure of damages is not the face value of the note but its value as measured by the value of its security at the date of the conversion.<sup>67</sup>

### § 195. — Title, Deeds, Insurance Policies, and Other Documents

Where a document evidencing a property right or title is converted by the grantor or obligor in the document, it has been held that the plaintiff's measure of damages is the value of the property or right described in the document.

Where a document evidencing a property right or title, such as a bond for the conveyance of land,<sup>68</sup> or a certificate of membership in a board of trade,<sup>69</sup> is converted by the grantor or obligor in the document, it has been held that plaintiff's measure of damages is the value of the property or right described in the document. Since possession of a warehouse receipt is regarded, in law, as possession of the property itself, it has been held that the measure of damages for the conversion of a warehouse receipt is the value of the property represented by the receipt.<sup>70</sup> Ordinarily, however, where evidences of title, such as school land certificates,<sup>71</sup> bonds for the conveyance of land,<sup>72</sup> or executory land contracts,<sup>73</sup> have been converted by one other than the grantor or obligor, and plaintiff's title or right is in no way affected by the conversion, the

49. Colo.—Rogers v. Rogers, 44 P 2d 909, 95 Colo. 473.

N.J.—Arnold v. Hamilton Inv. Co., 38 A 2d 118, 132 N.J. Law 10, affirmed 40 A.2d 649, 132 N.J. Law 419.

50. Cal.—Meyer v. Thomas, 63 P 2d 1176, 18 Cal App 2d 299.

Miss.—Bank of Forest v. Capital Nat Bank, 169 So. 193, 176 Miss. 163.

Va.—Corpus Juris cited in American Nat Bank of Portsmouth v. Ames, 194 S.E. 784, 796, 169 Va. 711, certiorari denied 58 S. Ct. 1046, 304 U.S. 677, 82 L Ed 1640.

65 C.J. p 151 note 51.

The "face value" of an interest bearing note, is the principal plus accrued interest.—American Nat Bank of Portsmouth v. Ames, supra.

#### Limitation on rule

In suits for conversion of a note, the face value of the note is the proper measure of damages only in absence of proof that the note is not worth its face value, or that it is worth less than its face value.—First State Bank v. Montoney, 17 N.E.2d 870, 106 Ind.App. 61.

51. Okl.—Fourth Nat Bank v Board of Com'rs of Craig County, 95 P.2d 878, 186 Okl. 102.

65 C.J. p 152 note 52.

52. Kan.—Davies v Stevenson, 54 P 679, 59 Kan 648.

65 C.J. p 152 note 53.

53. Cal.—Acme Paper Co. v. Gofstein, App., 270 P.2d 505.

65 C.J. p 152 note 54.

54. Mass.—Stebbins v. North Adams Trust Co., 136 N.E. 880, 243 Mass. 69.

65 C.J. p 152 note 55.

55. Mo.—Summers v. Keller, 133 S.W. 1180, 152 Mo App 626, affirmed on condition 171 S.W. 336, 262 Mo 324.

56. Wash.—Hetrick v. Smith, 122 P. 363, 67 Wash. 664.

65 C.J. p 152 note 57.

57. N.J.—Arnold v. Hamilton Inv Co., 38 A 2d 118, 132 N.J. Law 10, affirmed 40 A.2d 649, 132 N.J. Law 419.

58. N.Y.—Griggs v. Day, 32 N.E. 612, 136 N.Y. 152, 32 Am.S.R. 704, 18 L.R.A. 120, rehearing denied 32 N.E. 1001, 137 N.Y. 542.

65 C.J. p 152 note 58.

59. Cal.—Zeigler v. Wells, etc., Co., 23 Cal. 179, 83 Am.D. 87.

65 C.J. p 152 note 59.

60. Utah.—Walley v. Deseret Nat Bank, 47 P. 147, 14 Utah 305.

61. Ill.—Turner v. Retter, 68 Ill. 264.

62. Ga.—Citizens' Bank of Madison v. Shaw, 65 S.E. 81, 132 Ga. 771.

Okla.—Capps v. Vasey, 101 P. 1043, 23 Okl. 554.

63. Okla.—Capps v. Vasey, supra.

65 C.J. p 152 note 63.

64. Conn.—Healey v. Flammia, 113 A. 449, 96 Conn. 233.

65 C.J. p 152 note 64.

65. N.Y.—Simpkins v. Low, 54 N.Y. 179.

66. Tex.—Braumont Hotel Co. v. Caswell, (1st App., 14 S.W.2d 292.

65 C.J. p 152 note 66.

67. Wash.—Wylde v. Schoening, 164 P. 752, 96 Wash. 86.

68. N.Y.—Clowes v. Hawley, 12 Johns. 484.

69. Ill.—Olds v. Chicago Open Board of Trade, 33 Ill.App. 445.

70. Ill.—Canadian Bank of Commerce v. McCrea, 106 Ill. 281.

71. Wis.—Mowry v. Wood, 12 Wis. 413.

72. Me.—Rogers v. Crombie, 4 Me. 274.

73. N.D.—McKindley v. Citizens' State Bank of Edgeley, 161 N.W. 601, 36 N.D. 451.

65 C.J. p 153 note 77.

measure of damages is not the value of the property, but such sum as will recompense plaintiff for any actual loss he has sustained, and for his trouble and expenses in establishing and perpetuating the evidence of his title.

**Insurance policies.** It has been said that, as a general rule, the measure of damages for the conversion of a policy of life insurance is its market value, or, if it has no market value, its actual value to plaintiff;<sup>74</sup> and, as against the insurer,<sup>75</sup> or as against one claiming to have incurred expense on behalf of a deceased insured in an insurance policy payable to any person who has incurred expense on behalf of the insured,<sup>76</sup> that the measure of damages is *prima facie* the face value of the policy. It has been held, however, that where the conversion of a fire insurance policy on a car, after its destruction by fire, does not extinguish plaintiff's right of action against the insurer, plaintiff's measure of damages is not the value of the car, to the extent it was covered by the insurance, but such sum as will compensate plaintiff for the inconvenience, trouble, and expense, that he has been put to by the conversion.<sup>77</sup> Recovery for conversion of a health and accident insurance policy has been held limited to the inconvenience suffered by plaintiff as a result of the conversion.<sup>78</sup>

## § 196. — Heirlooms and Articles Kept for Personal or Family Use

According to the great weight of authority the measure of damages for the conversion of household goods and other articles kept for personal use, is not the second hand market value of the property, but the actual and fair value to the owner, excluding any fanciful or sentimental value he may place on it.

According to the great weight of authority the measure of damages for the conversion of household goods,<sup>79</sup> furniture,<sup>80</sup> books,<sup>81</sup> manuscripts,<sup>82</sup> or wearing apparel,<sup>83</sup> kept and adapted for personal use, is not the second hand market value of the property, but the actual and fair value to the owner, excluding any fanciful or sentimental value he may place on it. An automobile, however, is an article commonly bought and sold in the market, having no special value to the owner,<sup>84</sup> and the measure of damages for its conversion is the market value at the time and place of conversion with interest.<sup>85</sup>

**Heirlooms and keepsakes.** In fixing the damages for the conversion of keepsakes<sup>86</sup> or heirlooms,<sup>87</sup> which are of considerable sentimental value to the owner, consideration may be given to the sentiments and feelings of the owner.

74. Miss.—*Corpus Juris* quoted in Van Norman v. Van Norman, 34 So.2d 733, 734, 203 Miss. 310. 65 C.J. p 153 note 78.

75. Fla.—*Handley v. Home Ins. Co. of New York*, 150 So. 902, 112 Fla. 225.

III.—*Hayes v. Massachusetts Mut. L. Ins. Co.* 18 N.E. 322, 125 Ill. 626, 1 L.R.A. 303.

76. R.I.—*Stafford v. Lang*, 56 A. 684, 25 R.I. 488.

77. Ariz.—*Commercial Credit Co. v. Eisenhour*, 236 P. 126, 28 Ariz. 112, 41 A.L.R. 1274.

78. U.S.—*Thompson v. Mutual Ben. Health & Acc. Ass'n of Omaha, Neb.*, D.C.Iowa, 83 F.Supp. 656.

79. Ind.—*Anchor Stove & Furniture Co. v. Blackwood*, 35 N.E.2d 117, 109 Ind.App. 357.

Mo.—*Corpus Juris* cited in *State v. Ace Storage & Moving Co.* 135 S.W.2d 363, 368.

N.Y.—*Taggart v. Graby*, 286 N.Y.S. 382, 159 Misc. 186—*Weinstein v. Santini Transfer Co.*, 278 N.Y.S. 388, 155 Misc. 139.

Okl.—*American Transfer & Storage Co. v. Greninger*, 143 P.2d 617, 193 Okl. 338—*Joe Hodges Transfer & Storage v. Keffe*, 115 P.2d 251, 189 Okl. 142.

Tex.—*Wald v. Transfer & Storage*

*Co. v. Giese*, Civ.App., 101 S.W.2d 603, error dismissed.

Wis.—*Harvey v. Wheeler Transfer & Storage Co.*, 277 N.W. 627, 227 Wis. 36.

65 C.J. p 153 note 84.

Generally as to value or price to be taken see *supra* p 165.

**Fair cash market value**

III.—*Kilmas v. Kilmas*, 110 N.E.2d 463, 319 Ill.App. 243.

The term "market," in order that market value may be considered just compensation for conversion of household goods kept for personal use, implies not only that a person having a particular piece of goods may readily sell it at the given value, but that some one who desires a particular piece may readily buy it at the given value.—*Harvey v. Wheeler Transfer & Storage Co.*, 277 N.W. 627, 227 Wis. 36.

**Measure of damages for conversion of secondhand household goods and wearing apparel** is the difference in their actual value just prior to, and just after, the injury, and not the difference in the market value of similar goods at secondhand stores at or near their destination.—*Holton v. Stewart*, Tex.Civ.App., 191 S.W.2d 798.

80. Tex.—*Wutke v. Yoltan*, Civ.App., 71 S.W.2d 549, error refused.

Wis.—*Harvey v. Wheeler Transfer & Storage Co.*, 277 N.W. 627, 227 Wis. 36.

65 C.J. p 153 note 85.

81. Conn.—*Barker v. S. A. Lewis Storage, etc. Co.*, 61 A. 363, 78 Conn. 198, 65 A. 143, 79 Conn. 342, 118 Am.S.R. 141.

82. N.Y.—*MacGregor v. Watts*, 5 N.Y.S.2d 525, 254 App.Div. 904, reargument denied 7 N.Y.S.2d 220, 255 App.Div. 783.

83. Ind.—*Anchor Stove & Furniture Co. v. Blackwood*, 35 N.E.2d 117, 109 Ind.App. 357.

N.Y.—*Taggart v. Graby*, 286 N.Y.S. 382, 159 Misc. 155.

65 C.J. p 154 note 87.

**Reasonable value to owner at time of conversion**

Ohio.—*Employers' Fire Ins. Co. v. United Parcel Service of Cincinnati*, 99 N.E.2d 794, 89 Ohio App. 447.

84. Conn.—*Kuzemka v. Gregory*, 146 A. 17, 109 Conn. 117.

85. Tex.—*Morris v. Knepper*, Civ. App., 10 S.W.2d 1012, 65 C.J. p 154 note 89.

86. Utah.—*Pennington v. Redman Van, etc. Co.*, 97 P. 115, 34 Utah 223.

87. Mo.—*Kalinowski v. M. A. Newhouse & Son*, App., 53 S.W.2d 1094, 65 C.J. p 154 note 91.

## § 197. — Models

Where the plaintiff has created a model, but has not copyrighted it, the measure of damages for its conversion is the cost of production rather than any peculiar value it may have as a product of the plaintiff's mind.

Where plaintiff has created a model, which is the original product of his mind, but has not copyrighted it, so that anyone can copy or reproduce the article without being liable to the owner, the measure of damages for a conversion of the model is its cost of production rather than any peculiar value it may have as a product of plaintiff's mind.<sup>88</sup> If the conversion of the model of a patented article deprives plaintiff of the use and benefit of the invention and prevents him from carrying out a contract with a third person, the losses thus sustained are recoverable as damages.<sup>89</sup> Where the property alleged to have been converted consisted of drawings, models, and tools, which have become obsolete by reason of changes made in the machine involved in connection with its manufacture in quantity, the cost of the property is not a fair measure of their worth, but neither will nominal damages suffice to compensate plaintiff, since property may have some substantial value even as junk.<sup>90</sup>

## § 198. — Property Attached to, or Part of, Realty

The general rule is that there may be a recovery for the enhanced value of property severed from realty, without deduction for the converter's labor or expense, where the severed property was willfully or intentionally taken and converted.

While some cases, despite the willfulness of the conversion, limit recovery to the value of the property when it first became a chattel by severance from the realty,<sup>91</sup> and others without respect to the good faith of the converter allow recovery for any enhancement in value that has been added

while plaintiff could have recovered the property in specie,<sup>92</sup> the majority of courts allow recovery for the enhanced value, without deduction for the converter's labor or expense, where the severed property was willfully or intentionally taken and converted,<sup>93</sup> but not where the property has been converted innocently or in good faith.<sup>94</sup> As to the precise allowance or measure of recovery in these latter cases there is considerable variance among the authorities.<sup>95</sup> Some of the cases fix the measure of recovery at the value of the property immediately after its severance from the realty, so that no deduction is allowed for the converter's labor or expense in transforming the property into a chattel.<sup>96</sup> Others fix the measure of recovery at the value of the property after it has been severed and also completely removed from the land,<sup>97</sup> while a considerable number of cases take the reverse attitude and limit recovery to the value of the property immediately prior to its severance from the realty.<sup>98</sup>

Although defendant has innocently purchased the severed property from one who willfully converted it and enhanced its value by subsequent labor or expenditures, the measure of damages is the enhanced value of the property at the time it was sold to defendant;<sup>99</sup> but if the original conversion was innocent the enhanced value, due to the labors or expenditures of the converter, cannot be recovered from an innocent purchaser from the latter.<sup>1</sup> A statute which in substance applies the foregoing rules to the case where timber is cut and carried away has been held to be but merely declaratory of well recognized principles of the general law.<sup>2</sup> Where defendant was to receive all the lumber cut from a timber tract by plaintiff at a specified price and plaintiff sold some of the lumber defendant should have received, defendant is entitled to re-

88. Cal.—Richardson v. Hislop, 293 P. 168, 109 Cal.App. 440.

89. Conn.—Smith & Egge Mfg. Co. v. Webster, 86 A. 763, 87 Conn. 74.

90. N.Y.—American Castype Corp. v. Niles-Bement-Pond Co., 42 N.Y.S.2d 638, 266 App.Div. 557, reargument denied 44 N.Y.S.2d 263, 266 App.Div. 949.

91. Colo.—Omaha, etc., Smelting, etc. Co. v. Tabor, 21 P. 925, 13 Colo. 41, 16 Am.S.R. 185, 5 L.R.A. 236.

65 C.J. p 154 note 95.

92. Del.—Harris v. Goslin, 3 Del. 340.

93. Ala.—Simmons v. Cochran, 41 So.2d 579, 252 Ala. 461.

Tex.—Dean v. Thompson, Civ.App.,

213 S.W.2d 327, error refused no reversible error.

Vt.—Parker v. Cone, 168 A. 715, 105 Vt. 426.

65 C.J. p 154 note 97.

94. Mo.—Corpus Juris cited in Adams v. Adams, 177 S.W.2d 483, 484, 352 Mo. 389.

Tex.—Dean v. Thompson, Civ.App., 213 S.W.2d 327, error refused no reversible error—Martin v. Grogan—Cochran Lumber Co., Civ.App., 176 S.W.2d 780.

65 C.J. p 154 note 98.

95. U.S.—Trustees of Dartmouth College v. International Paper Co., C.C.N.H., 132 F. 92.

96. Ala.—Lee v. Gidley, 40 So.2d 80, 252 Ala. 156.

Tex.—C. D. Shamburger Lumber Co.

v. Bredthauer, Civ.App., 62 S.W.2d 603, error dismissed.

65 C.J. p 155 note 1.

97. Fla.—Wright v. Skinner, 16 So. 335, 34 Fla. 453.

65 C.J. p 155 note 2.

98. U.S.—U. S. v. Ute Conl., etc., Co., Colo., 158 F. 20, 85 C.C.A. 302.

65 C.J. p 155 note 3.

99. Ark.—Warren Stave Co. v. Hardy, 198 S.W. 99, 130 Ark. 547, L. R.A. 1918P 183.

65 C.J. p 156 note 4.

1. Ala.—White v. Yawkey, 19 So. 360, 108 Ala. 270, 54 Am.S.R. 159, 32 L.R.A. 199.

65 C.J. p 156 note 5.

2. Ga.—Milltown Lumber Co. v. Carter, 63 S.E. 270, 273, 5 Ga.App. 344. 65 C.J. p 156 note 7.



cover from plaintiff the difference between the contract price and the value of the lumber sold and delivered to the third person.<sup>3</sup>

**Crops.** Where trover is brought for the conversion of crops the measure of damages is the market value of the crops rather than the rental value of the land on which they were grown.<sup>4</sup>

**Injuries to freehold.** If trover is brought for articles which have been wrongfully severed from the real estate, there can be no recovery for the trespass or injuries to the freehold.<sup>5</sup>

### § 199. Exemplary and Double Damages

Generally, exemplary damages may be awarded if the conversion is characterized by malice, willfulness, fraud, oppression, or a reckless or wanton disregard of the plaintiff's rights.

Although there is authority holding that exem-

plary damages may not be allowed in an action for conversion,<sup>6</sup> generally, exemplary damages may be awarded if the conversion is characterized by malice, willfulness, fraud, or oppression,<sup>7</sup> or by a reckless or wanton disregard of plaintiff's rights;<sup>8</sup> but such damages will be denied if none of these elements are present.<sup>9</sup> Exemplary damages can be recovered only because of the nature of the act constituting the conversion for which plaintiff is also entitled to recover other damages.<sup>10</sup> If plaintiff bases two causes of action on the same wrongful act he cannot recover exemplary damages in both causes of action as this would constitute double punishment to defendant for a single wrongful act.<sup>11</sup> The assessment of punitive damages is not precluded by the fact that the act complained of is a crime for which defendant could be criminally punished,<sup>12</sup> or the fact that the value of the prop-

3. Ark.—Van Meter Lumber Co. v. Alexander, 217 S.W.2d 833, 214 Ark. 640.

4. N.Y.—Hatch v. Luckman, 118 N.Y.S. 689, 64 Misc. 508, 10 Mills 519, affirmed 140 N.Y.S. 1123, 155 App. Div. 765, 10 Mills 519.

5. Ala.—Davis v. Erwin, 107 So. 903, 214 Ala. 341.

6. Wash.—Parks v. Yakima Valley Production Credit Ass'n, 78 P.2d 162, 194 Wash. 380.

7. U.S.—Morissette v. U. S., Mich. 72 S.Ct. 240, 312 U.S. 216, 96 L. Ed. 268—Thompson v. Mutual Ben. Health & Acc. Ass'n of Omaha, Neb., D.C.Iowa, 83 F.Supp. 656—Colonial Oil Co. v. American Oil Co., D.C.S.C., 43 F.Supp. 718, reversed on other grounds American Oil Co. v. Colonial Oil Co., 130 F.2d 72, certiorari denied 63 S.Ct. 159, 87 U.S. 679, 87 L.Ed. 545.

8. Ala.—B. F. Goodrich Co. v. Hughes, 194 So. 842, 239 Ala. 373—Roberson Motor Co. v. Heath, 60 So.2d 862, 36 Ala.App. 678.

9. Idaho.—Klam v. Koppel, 118 P.2d 729, 63 Idaho 171.

10. Iowa.—Inman v. Bull, 22 N.W. 666, 65 Iowa 543.

11. Kan.—Glass v. Brunt, 138 P.2d 453, 157 Kan. 27.

12. La.—Iryson v. Bates-Crumley Chevrolet Co., App., 171 So. 606—Antoine v. Hamilton, App., 144 So. 614.

Mo.—Luhmann v. Schaefer, App., 142 S.W.2d 1088—Spitzengel v. Greenlease Motor Car Co., 136 S.W.2d 100, 234 Mo.App. 962.

Ohio.—Wheaton v. Chandler, 42 N.E. 2d 193, 68 Ohio App. 474.

Okl.—Gilbaugh v. Rose, 239 P.2d 406, 205 Okl. 508—General Motors Acceptance Corp. v. Vincent, 83 P.2d 539, 183 Okl. 547—Belcher v. Spohn, 39 P.2d 87, 170 Okl. 139.

Or.—Perry v. Thomas, 258 P.2d 299, 197 Or. 374—Corpus Juris cited in Cross v. Campbell, 146 P.2d 83, 89, 173 Or. 477.

Pa.—Courtney v. Brighenti, Com.Pl., 38 Pittsb.Leg.J. 209.

S.C.—Rhode v. Ray Waits Motors, Inc., 74 S.E.2d 823, 223 S.C. 160—Cox v. Coleman, 200 S.E. 762, 189 S.C. 218—Daniel v. Post, 187 S.E. 915, 181 S.C. 468.

Tex.—Corpus Juris cited in Hankey v. Employer's Casualty Co., Civ. App., 176 S.W.2d 357, 361—Wool Growers Central Storage Co. v. Cochran, Civ.App., 153 S.W.2d 638, affirmed 166 S.W.2d 904, 140 Tex. 184—Wright Titus, Inc. v. Swafford, Civ.App., 133 S.W.2d 287, error dismissed, judgment correct—Trevelly v. Wilson, Civ.App., 125 S.W.2d 654, error dismissed, judgment correct.

65 C.J. p 156 note 11.

Excessiveness see infra § 201.

#### Malice

(1) "Malice" as a basis for punitive damages for the conversion of personality means the intentional doing of a wrongful act without just cause or excuse, and this requires that defendant not only intended to do the wrongful act, but that he knew it was wrongful when he did it.—Hussey v. Ellerman, Mo.App., 215 S.W.2d 38—Luhmann v. Schaefer, Mo.App., 112 S.W.2d 1088—Spitzengel v. Greenlease Motor Car Co., 136 S.W.2d 100, 234 Mo.App. 962.

(2) Proof that converter was actuated by personal ill will, spite, or hostility toward plaintiff, is unnecessary.—Detmer v. Miller, Mo.App., 220 S.W.2d 739.

In determining punitive damages for conversion of cotton, plaintiff's difficulty in paying taxes and tenant's abandonment of farms cannot be con-

sidered, but expenses incurred, including attorneys' fees although not recoverable may be considered in determining punitive damages.—Security State Bank v. Spinner, Tex.Civ. App., 55 S.W.2d 128, error dismissed.

8. Ohio.—Armstrong v. Feldhaus, 93 N.E.2d 776, 87 Ohio App. 75—Edwards v. Automobile Finance Co. of Pennsylvania, 25 N.E.2d 851, 63 Ohio App. 193.

Tex.—Corpus Juris cited in Hankey v. Employer's Casualty Co., Civ. App., 176 S.W.2d 357, 361.

65 C.J. p 157 note 12.

9. U.S.—American Oil Co. v. Colonial Oil Co., C.C.A.S.C., 130 F.2d 72, certiorari denied 63 S.Ct. 159, 317 U.S. 679, 87 L.Ed. 545.

Ala.—Drake v. Kizziah, 12 So.2d 79, 244 Ala. 16.

Miss.—Potomac Ins. Co. of District of Columbia v. Wilkinson, 71 So. 2d 765.

Mo.—Walker v. Huddleston, App. 261 S.W.2d 502—Luhmann v. Schaefer, App., 142 S.W.2d 1088.

S.C.—Cox v. Coleman, 200 S.E. 762, 189 S.C. 218.

Tex.—Gulf Stream Realty Co. v. Monte Alto Citrus Ass'n, Civ.App., 253 S.W.2d 933—Bulton v. Stewart, Civ.App., 191 S.W.2d 798.

65 C.J. p 157 note 13.

Recovery of punitive damages disallowed although act was intentional S.C.—Cox v. Coleman, 200 S.E. 762, 189 S.C. 218.

10. Mont.—Bowman v. Lewis, 102 P.2d 1, 110 Mont. 435.

Vt.—Green v. Laclair, 95 A. 499, 89 Vt. 346.

65 C.J. p 157 note 14.

11. Okl.—General Motors Acceptance Corporation v. Davis, 7 P.2d 157, 151 Okl. 255.

12. Mo.—Summers v. Keller, 133 S.

erty converted cannot be accurately ascertained.<sup>13</sup>

*Mitigation of exemplary damages.* The fact that defendant shortly after the conversion offers to return the property may be considered in mitigation of exemplary damages based on malice.<sup>14</sup>

*Double damages.* Statutes imposing double damages are penal in nature and will be strictly construed so as to avoid the imposition of such damages where the case is not within the evident purpose of the statute.<sup>15</sup>

## § 200. Amount

While noninal damages are recoverable in actions for trover and conversion, as discussed supra § 161, generally, the value of the property at the time and place of conversion, as considered supra § 164, determines the amount of recovery, but there are cases in which damages other than, or in addition to, the value are recoverable, as pointed out supra §§ 170-179, and, as considered supra § 199, exemplary and double damages may also be recovered.

Examine Pocket Parts for later cases.

W. 1180, 152 Mo.App. 626, affirmed on condition 171 S.W. 336, 262 Mo. 324

13. Mo.—Summers v. Keller, supra 14. Tex.—Bitterman v. Hearn, Civ. App. 32 S.W. 341

Mitigation of compensatory damages by offer to return property see supra § 186

15. Wis.—Dixon v. Sheridan, 103 N.W. 239, 125 Wis. 60, 65 C.J. p. 157 note 20.

16. Cal.—Santos v. Dondero, 71 P. 2d 840, 22 Cal.App.2d 585, 65 C.J. p. 157 note 23

**Awards held not excessive**  
Cal.—Knox v. Wolfe, 167 P.2d 3, 73 Cal.App.2d 494.

Colo.—Carlson v. McNeill, 162 P.2d 226, 114 Colo. 78

Ga.—London v. Jacobs, 48 S.E.2d 781, 77 Ga.App. 529.

Ind.—Curtis Storage & Transportation Co. v. Rosenberg, 21 N.E.2d 410, 106 Ind.App. 622

Ky.—Story v. Jorris, 255 S.W.2d 656  
Mo.—Luhmann v. Schaefer, App. 112 S.W.2d 1088

R.I.—Terrien v. Joseph, 53 A.2d 923, 73 R.I. 112

S.C.—Sample v. Gulf Refining Co., 191 S.E. 209, 183 S.C. 399

Wash.—Dunn v. Guaranty Inv. Co., 42 P.2d 434, 181 Wash. 245, 65 C.J. p. 157 note 23 [a].

**Awards held excessive**  
Mo.—Manley v. Ryan, 126 S.W.2d 909, 235 Mo.App. 45.

17. Mo.—Borns v. P. A. Starck Piano Co., App. 296 S.W. 239, 65 C.J. p. 158 note 24

18. Cal.—Zaslav v. Kroenert, 176 P. 2d 1, 29 Cal.2d 541, followed in 176 P.2d 8, 29 Cal.2d 878

Ill.—A. A. Excavating Co. v. First United Finance Corp., 52 N.E.2d 837, 321 Ill.App. 309, 65 C.J. p. 158 note 25

**Excessive awards**  
Cal.—Arques v. National Superior Co., 155 P.2d 643, 67 Cal.App.2d 763

Kan.—Glass v. Brunt, 138 P.2d 453, 157 Kan. 27.

La.—Smith v. Bell, App. 62 So.2d 513, affirmed in part and reversed in part on other grounds 68 So.2d 737, 221 La. 1, 65 C.J. p. 158 note 25 [a]

19. N.Y.—Independent Linen Supply & Steam Laundry Co. v. Zakrowsky, 158 N.Y.S. 721

Wash.—Lockit Cap. Co. v. Globe Mfg. Co., 290 P. 813, 158 Wash. 183

20. Cal.—Booth v. People's Finance & Thrift Co. of Modesto, 12 P.2d 50, 124 Cal.App. 131, 65 C.J. p. 158 note 27.

## § 201. Excessive or Inadequate Damages

Since the amount of damages is largely within the discretion of the fact finding body, the courts usually will not interfere with its award as being excessive, unless the excess is due to passion or prejudice, or is not based on the evidence, or unless it results from the adoption of an erroneous measure of damages.

Since the amount of damages is largely within the discretion of the fact finding body, as discussed supra § 148, its award will usually not be interfered with by the court on the ground that it is excessive,<sup>16</sup> unless the excess is so great as to indicate the influence of passion or prejudice,<sup>17</sup> or there is no basis in the evidence for allowing the amount awarded,<sup>18</sup> or the excess is due to the adoption of an erroneous measure of damages.<sup>19</sup> While the jury are allowed an extremely wide range with reference to exemplary damages,<sup>20</sup> their award in this respect will be interfered with if it does not bear a reasonable proportion to the actual damages sustained.<sup>21</sup>

*Inadequate damages.* Although the evidence might have justified a larger award, the court will not interfere with the verdict on the ground that it is inadequate if there is nothing which clearly shows that the jury has failed to perform their duty.<sup>22</sup>

**Nonexcessive awards**  
Colo.—Carlson v. McNeill, 162 P.2d 226, 114 Colo. 78

Mo.—Hussey v. Ellerman, App. 215 S.W.2d 38

Or.—McCarthy v. General Electric Co., 49 P.2d 993, 151 Or. 519, 100 A.L.R. 1370, 65 C.J. p. 158 note 27 [a]

21. Idaho.—Williams v. Bone, 259 P. 2d 810, 74 Id. 185, 65 C.J. p. 158 note 28

**Excessive awards**  
Kan.—Motor Equipment Co. v. McLaughlin, 133 P.2d 149, 156 Kan. 258, 65 C.J. p. 158 note 28 [a]

**Exemplary damages held not disproportionate to actual damages**  
Tex.—Home Furniture Co. v. Hawkins, Civ. App. 81 S.W.2d 830, error dismissed

22. La.—Craddock v. Jones, App. 113 So. 529, 65 C.J. p. 158 note 29.

**Inadequate awards**  
Mich.—Hudson v. Enichen, 16 N.W. 2d 670, 310 Mich. 18—Hudson v. Enichen, 13 N.W.2d 215, 308 Mich. 79

N.Y.—Davidoff v. Flynn, 286 N.Y.S. 49, 247 App.Div. 834—Mateo v. Abad, 267 N.Y.S. 436, 239 App.Div. 376.

VI. BAIL TROVER

§ 202. Nature and Purpose

In Georgia the statutory remedy of bail trover to recover possession of personal property wrongfully taken from the plaintiff lies where detinue, replevin, or trover lay at common law, and by it the plaintiff may recover possession or damages for conversion.

The action to recover personal property is commonly called trover in Georgia<sup>23</sup> where it has been defined as the statutory right to recover the possession of any form of personal property which has been wrongfully taken from the possession of plaintiff.<sup>24</sup> The statutory action of trover lies where detinue, replevin, or trover lay at common law,<sup>25</sup> and its purpose is to ascertain title<sup>26</sup> and restore possession of particular property unlawfully converted or its equivalent in money,<sup>27</sup> or secure to plaintiff damages for its conversion,<sup>28</sup> although it has been said that its purpose is not so much to recover the specific chattels as to recover damages as for a conversion.<sup>29</sup> It is not the sole remedy of the owner,<sup>30</sup> but it may be maintained whenever an action of trespass will lie for the taking of a chattel.<sup>31</sup>

The statutory right on the trial to elect to take a verdict for the property or its value, considered infra § 235, does not change the nature of an action of trover so as to make it the equivalent of an

action of assumpsit,<sup>32</sup> and the action cannot, under any circumstances, be converted into an action on account for the price of property sold and delivered.<sup>33</sup> The action sounds in tort,<sup>34</sup> and conversion is the gist of the action.<sup>35</sup>

§ 203. Property Subject to Bail Trover

Trover may be maintained for the wrongful conversion of every species of personal property which is the subject of private ownership and having some value.

Trover may be maintained for the wrongful conversion of every species of personal property, animate or inanimate,<sup>36</sup> which is the subject of private ownership and which belongs to plaintiff and is of some value to him, although it may have no commercial value.<sup>37</sup> Accordingly, trover lies for the recovery of tax receipts alleged to be of value to plaintiff;<sup>38</sup> deeds;<sup>39</sup> muniments of title to real property;<sup>40</sup> bonds for title;<sup>41</sup> certificates of stock;<sup>42</sup> promissory notes,<sup>43</sup> even though they are past due<sup>44</sup> and fully paid;<sup>45</sup> dogs;<sup>46</sup> slaves;<sup>47</sup> spirits of turpentine or resin manufactured from crude gum wrongfully extracted from plaintiff's growing trees;<sup>48</sup> cotton screws;<sup>49</sup> dwelling houses detached from the land,<sup>50</sup> although subsequently attached to the land of the wrongdoer;<sup>51</sup> felled

23. Ga.—Harpers v. Jeffers, 78 S.E. 172, 139 Ga. 756.

24. Ga.—Smith v. R. F. Brodegaard & Co., 49 S.E.2d 500, 77 Ga.App. 451.—Yeomans v. Jones, 188 S.E. 62, 54 Ga.App. 330.

65 C.J. p 158 note 31.

25. Ga.—Breen v. Barfield, 60 S.E.2d 513, 82 Ga.App. 204.—Breen v. Barfield, 56 S.E.2d 791, 80 Ga.App. 615.—Dobbs v. First Nat. Bank of Atlanta, 16 S.E.2d 485, 65 Ga.App. 796.—Livingston v. Epstein-Roberts Co., 177 S.E. 73, 60 Ga.App. 25.

65 C.J. p 54 note 57 (1), p 158 note 32.

26. Ga.—Commercial Bank of Crawford v. Pharr, 43 S.E.2d 439, 75 Ga.App. 364.—Tidwell v. Bush, 1 S.E.2d 457, 59 Ga.App. 471.—Skinner v. Hillis, 104 S.E. 508, 25 Ga.App. 711.

65 C.J. p 158 note 33.

27. Ga.—Hudson v. Gunn, 92 S.E. 546, 20 Ga.App. 95.

65 C.J. p 54 note 57(2), p 158 note 34.

28. Ga.—Harper v. Jeffers, 78 S.E. 172, 139 Ga. 756.

Action held in "trover"

29. Ga.—Millender v. Looper, 61 S.E.2d 573, 82 Ga.App. 563.—Rowland v. Gardner, 53 S.E.2d 198, 79 Ga.App. 153.

65 C.J. p 55 note 66 [b].

29. Ga.—Gatlin v. Matthews, 85 S.E. 953, 16 Ga.App. 645.

65 C.J. p 158 note 36.

30. Ga.—Comer v. Rome Chevrolet Co., 151 S.E. 678, 40 Ga.App. 820.

31. Ga.—Gaines v. Briggs, 1 Ga. 259.

32. Ga.—Harper v. Jeffers, 78 S.E. 172, 139 Ga. 756.

33. Ga.—Palmour v. Durham Fertilizer Co., 22 S.E. 931, 97 Ga. 244.

65 C.J. p 159 note 39.

34. Ga.—Powers v. Wren, 31 S.E.2d 713, 198 Ga. 316.—Carithers v. Maddox, 55 S.E.2d 775, 80 Ga.App. 230.—Yeomans v. Jones, 188 S.E. 62, 54 Ga.App. 330.

35. Ga.—Powers v. Wren, 31 S.E.2d 713, 198 Ga. 316.—Taylor v. Hammock, 7 S.E.2d 200, 61 Ga.App. 640.—Tidwell v. Bush, 1 S.E.2d 457, 59 Ga.App. 471.—Milltown Lumber Co. v. Carter, 63 S.E. 270, 5 Ga.App. 344.

65 C.J. p 53 note 45, p 159 note 41. What constitutes conversion see supra § 1.

36. Ga.—Graham v. Smith, 28 S.E. 225, 100 Ga. 434, 40 L.R.A. 503, 62 Am.S.R. 323.

37. Ga.—Vaughn v. Wright, 78 S.E. 123, 139 Ga. 736, 45 L.R.A. N.S., 785, Ann.Cas.1914B 821.

38. Ga.—Vaughn v. Wright, supra.

39. Ga.—Gay v. Warren, 42 S.E. 86, 115 Ga. 734, 90 Am.S.R. 151.—Gaskins v. Gaskins, 79 S.E. 483, 13 Ga. App. 583.

40. Ga.—Dobbs v. First Nat. Bank of Atlanta, 18 S.E.2d 485, 65 Ga. App. 796.

41. Ga.—Copeland v. Pyles, 102 S.E. 552, 25 Ga.App. 95.

42. Ga.—Tow v. Evans, 20 S.E.2d 922, 194 Ga. 160.—Small v. Wilson, 93 S.E. 518, 20 Ga.App. 674.

43. Ga.—Long v. McIntosh, 59 S.E. 779, 129 Ga. 660, 16 L.R.A. N.S., 1043, 12 Ann.Cas. 263.

65 C.J. p 18 note 80, p 159 note 47.

44. Ga.—Long v. McIntosh, supra.

45. Ga.—Long v. McIntosh, supra.

46. Ga.—Graham v. Smith, 28 S.E. 225, 100 Ga. 434, 40 L.R.A. 503, 62 Am.S.R. 323.

47. Ga.—Riley v. Martin, 35 Ga. 136.—Porter v. Thomas, 23 Ga. 467.

65 C.J. p 159 note 51.

48. Ga.—Strickland v. Miller, 78 S.E. 48, 12 Ga.App. 671.

49. Ga.—Woods v. McCall, 67 Ga. 506.

50. Ga.—Chalker v. Beasley, 34 S.E. 2d 658, 72 Ga.App. 662.—Kennedy v. Smith, 99 S.E. 318, 23 Ga.App. 724.

51. Ga.—Kennedy v. Smith, 99 S.E.

timber;<sup>52</sup> or gathered crops.<sup>53</sup> Crops not severed from the soil, being regarded as realty,<sup>54</sup> are not subject to recovery in the action,<sup>55</sup> and it is wholly immaterial whether they are growing or matured.<sup>56</sup>

*Property in custodia legis* is not subject to bail trover.<sup>57</sup>

*Recovery of money.* An action for the recovery of money will lie on a legal obligation on the part of defendant to deliver specific money to plaintiff,<sup>58</sup> but it is not applicable to recovering a sum of money which may be due and unpaid.<sup>59</sup>

*Property wrongfully seized under execution* may be the subject of a suit in trover.<sup>60</sup>

## § 204. Right to Maintain Suit and Persons Liable

Every person who, personally or through an agent, converts personality of another, is liable in trover.

Every person is liable in trover who personally<sup>61</sup>

or by agent<sup>62</sup> commits an act of conversion, or who participates in the conversion by instigating, aiding, or assisting another,<sup>63</sup> even though, being ignorant of the true owner's title, he may have acted in perfect good faith.<sup>64</sup>

## § 205. — Title and Right to Possession of Plaintiff

One having the right of possession, or title and a right to possession, or a special interest in the property with the right to possession, may maintain trover for conversion of personality.

The mere right of possession,<sup>65</sup> even if the holder has no legal title to the property,<sup>66</sup> gives him a right to maintain an action of bail trover against a wrongdoer who has deprived him of that possession, although it has been variously stated that plaintiff must have title,<sup>67</sup> title or right of possession,<sup>68</sup> title and right of possession,<sup>69</sup> the concurrent right of property and possession,<sup>70</sup> title, prior possession, or the right of possession,<sup>71</sup> or a general or special

27, 149 Ga. 61—Woods v. McCall, 67 Ga. 506

65 C.J. p 159 note 55.

52. Ga.—Roid v. Newton County, 98 S.E. 237, 23 Ga.App. 358.

53. Ga.—Williams v. Mitchem, 106 S.E. 284, 151 Ga. 227, conformed to 107 S.E. 397, 27 Ga.App. 80, 65 C.J. p 159 note 57.

54. Ga.—Farmers' Warehouse Co. v. First Nat. Bank of Milledgeville, 109 S.E. 900, 152 Ga. 262—Williams v. Mitchem, 106 S.E. 284, 151 Ga. 227, conformed to 107 S.E. 397, 27 Ga.App. 80.

55. Ga.—Farmers' Warehouse Co. v. First Nat. Bank of Milledgeville, 109 S.E. 900, 152 Ga. 262—Williams v. Mitchem, 106 S.E. 284, 151 Ga. 227, conformed to 107 S.E. 397, 27 Ga.App. 80.

56. Ga.—Williams v. Mitchem, supra.

57. Ga.—Ray v. Gunn, 7 S.E.2d 686, 61 Ga.App. 805.

65 C.J. p 159 note 62.

58. Ga.—Carter v. Hornsby, 23 S.E. 2d 95, 68 Ga.App. 424, 65 C.J. p 159 note 63.

59. Ga.—Harper v. Jeffers, 78 S.E. 172, 139 Ga. 756, 65 C.J. p 159 note 64.

60. Ga.—Hitley v. Martin, 35 Ga. 136.

61. Ga.—Carpenter v. Williams, 154 S.E. 298, 41 Ga.App. 685—Broadway Apartment Co. v. Barnett, 118 S.E. 601, 39 Ga.App. 562, 65 C.J. p 64 note 2.

62. Ga.—Broadway Apartment Co. v. Barnett, supra.

Liability of:

Association for conversion by officer see Associations § 14,

Corporation for conversion by officer or agent see Corporations § 1276.

Master for conversion by servant see Master and Servant § 575

Partner for conversion by copartner see Partnership § 165.

Principal for conversion by agent see Agency § 255

63. Ga.—Brothers v. Horne, 79 S.E. 468, 140 Ga. 617—Brooks v. Ashburn, 9 Ga. 297.

64. Ga.—Broadway Apartment Co. v. Barnett, 118 S.E. 601, 39 Ga.App. 562.

65. Ga.—Sellers v. Sellers, 46 S.E. 2d 205, 78 Ga.App. 410—Zugar v. Glen Falls Indemnity Co., 11 S.E. 2d 839, 63 Ga.App. 660, 65 C.J. p 159 note 66.

66. Ga.—Mitchell v. Georgia, etc., R. Co., 36 S.E. 971, 111 Ga. 760, 51 L.R.A. 622.

65 C.J. p 159 note 67.

67. Ga.—Proper v. Todd, 79 S.E.2d 346, 89 Ga.App. 308—Browder v. Cox, for Use and Benefit of American Sec. Ins. Co., 64 S.E.2d 460, 83 Ga.App. 738, followed in Coffee v. Cox, for Use and Benefit of American Sec. Ins. Co., 64 S.E.2d 464, 83 Ga.App. 743—Bush v. Smith, 48 S.E.2d 582, 77 Ga.App. 329, 65 C.J. p 159 note 68.

Deposits on bottles

Where plaintiff and defendant who were soft drink bottlers verbally agreed to follow general practice of demanding deposit for each bottle sent out and exchanging empty stray bottles of other dealer's product which had come into their possession, for their own bottles, the plaintiff

upon accepting deposits on his bottles, which amounted to an "insurance" that if the bottles were not returned the deposits would be forfeited, no longer had clear title to the bottles, and could not recover them from defendant in action of trover until the tender to defendant of the deposit for each of plaintiff's bottles in possession of defendant.—Worth v. Williams, 12 S.E.2d 139, 64 Ga.App. 47.

68. Ga.—Padgett v. Collins, 81 S.E. 2d 309, 89 Ga.App. 769—Moore v. King, 80 S.E.2d 74, 89 Ga.App. 521—Powell v. Riddick, 80 S.E.2d 70, 89 Ga.App. 505—Proper v. Todd, 79 S.E.2d 346, 89 Ga.App. 308—Smith v. State Farm Mut. Auto. Ins. Co., 79 S.E.2d 7, 89 Ga.App. 292—Hinchliffe v. Pinson, 74 S.E. 2d 497, 87 Ga.App. 526—Anderson v. Reese, 69 S.E.2d 656, 85 Ga.App. 437—Smith v. R. F. Brodegaard & Co., 49 S.E.2d 500, 77 Ga.App. 661—Carter v. Hornsby, 23 S.E.2d 95, 68 Ga.App. 424—Noras v. McCord, 200 S.E. 513, 59 Ga.App. 311, 65 C.J. p 58 note 9, p 160 note 69.

69. Ga.—Sawyer v. Service Motor Sales, 46 S.E.2d 628, 76 Ga.App. 609—Jowman v. Davis, 180 S.E. 917, 51 Ga.App. 917—Mann v. Massey, 158 S.E. 341, 43 Ga.App. 201, 65 C.J. p 160 note 70.

70. Ga.—Young v. Durham, 84 S.E. 165, 15 Ga.App. 678—Roper Wholesale Grocery Co. v. Faver, 68 S.E. 883, 8 Ga.App. 178.

71. Ga.—Smith v. State Farm Mut. Auto. Ins. Co., 79 S.E.2d 7, 89 Ga.App. 292—Graham v. Frazier, 60 S.E.2d 833, 82 Ga.App. 185—Sellers v. Sellers, 46 S.E.2d 205, 78 Ga.App.

property therein, the actual possession, or the right of possession.<sup>72</sup> Actual possession of a chattel at the time of the conversion thereof will sustain trover,<sup>73</sup> except as against the true owner or one claiming under him;<sup>74</sup> but title or right to property, general or special, must also be proved to be in plaintiff whenever his right of immediate possession cannot be otherwise shown.<sup>75</sup> The right to immediate possession may be a sufficient basis for the maintenance of the action.<sup>76</sup> It has been held that only actual possession of the land will sustain an action to recover the value of timber cut and removed therefrom.<sup>77</sup>

Plaintiff must recover on the strength of his own title,<sup>78</sup> which must be the legal,<sup>79</sup> not the equitable,<sup>80</sup> title, or on his right of possession lawfully acquired under contract;<sup>81</sup> and the mere fact that he advanced the money whereby another obtained

title,<sup>82</sup> or that he was in possession of the property solely as agent of another,<sup>83</sup> is not sufficient to authorize him to maintain the suit. A bailee, however, has such title as will enable him to maintain the action.<sup>84</sup> So also has a warehouseman after he pays the rightful owner for cotton stored with him;<sup>85</sup> a bonded constable who has levied on the property;<sup>86</sup> notwithstanding he has deposited the property with an agent;<sup>87</sup> a person having a right of possession based on a qualified title;<sup>88</sup> the purchaser in possession of the property under a conditional sale,<sup>89</sup> even as against the seller who has reserved title<sup>90</sup> or his transferee;<sup>91</sup> a surviving widow who was in possession of personal property of a decedent's estate at the time of its conversion by defendant;<sup>92</sup> or the seller in a contract of sale whereby title is retained in him or his agent until payment of the purchase price,<sup>93</sup> but not where the

410—Chalker v. Beasley, 34 S E 2d 658, 72 Ga App. 652—Winton v. Butler, 186 S E 773, 53 Ga App. 696—Page v. Moxley, 112 S E 731, 28 Ga App 620—Southern Railway Co. v. Strozzer & Waters, 73 S E 42, 10 Ga App 157.

65 C.J. p 58 note 10.

72. Ga.—Liptrot v. Holmes, 1 Ga 381—Jush v. Smith, 48 S E 2d 582, 77 Ga App 329—Yeomans v. Jones, 188 S E 62, 54 Ga App 336—Livingston v. Epstein-Roberts Co., 177 S E 79, 50 Ga App. 25

73. Ga.—Groover v. Savannah Bank & Trust Co., 198 S E 217, 186 Ga 476—Cohn v. Riggsby, 5 S E 2d 93, 60 Ga App 728—Small v. Wilson, 93 S E 618, 20 Ga App. 674.

65 C.J. p 67 note 98, p 69 note 17, p 160 note 74.

74. Ga.—Camp v. Turner, 91 S E 910, 19 Ga App. 452.

75. Ga.—Burch v. Pedigo, 39 S E 493, 113 Ga 1157, 54 L.R.A. 808. 65 C.J. p 160 note 75.

76. Ga.—Summerfield v. Kinard, 68 S E 955, 8 Ga App. 253.

77. Ga.—Moore v. Bowen, 35 S E 2d 924, 73 Ga App. 192.

78. Ga.—Powell v. Riddick, 80 S E 2d 70, 89 Ga App 506—Anderson v. Reese, 69 S E 2d 656, 85 Ga App. 437—McDay v. Long, 11 S E 2d 395, 63 Ga App. 421—Rollins v. Personal Finance Co., 175 S E. 609, 49 Ga App. 365.

65 C.J. p 160 note 76.

#### Connection with legal title

The rule, that plaintiff cannot recover where he relies on title to recover possession and his evidence shows paramount outstanding title in a third person, did not apply where plaintiff was shown to have such a connection with legal title of another as to give him the right of

possession as owner of an interest in the property—Cohn v. Riggsby, 5 S E 2d 93, 60 Ga App 728.

79. Ga.—Hincheliffe v. Pinson, 74 S E 2d 497, 87 Ga App 526—Pusey v. Front Motor Co., 65 S E 2d 427, 84 Ga App 30—Bush v. Smith, 48 S E 2d 582, 77 Ga App. 329—Tidwell v. Bush, 1 S E 2d 457, 59 Ga App. 471—Livingston v. Epstein-Roberts Co., 177 S E 79, 50 Ga App 25—Itrater v. Painter, 64 S E. 1003, 6 Ga App 292.

65 C.J. p 160 note 77.

80. Ga.—Smith v. State Farm Mut Auto Ins Co., 79 S E 2d 7, 89 Ga App 292—Hincheliffe v. Pinson, 74 S E 2d 497, 87 Ga App 526—Bush v. Smith, 48 S E 2d 582, 77 Ga App. 329—Tidwell v. Bush, 1 S E 2d 457, 59 Ga App 471.

65 C.J. p 160 note 78

81. Ga.—Rollins v. Personal Finance Co., 175 S E 609, 49 Ga App. 365

#### Executory agreement

Trover was held not to lie, where contract relied on to show title and right of possession in plaintiff was mere executory agreement to sell, notwithstanding down payment of part of purchase money and tender of rest, where seller repudiated contract, declining tender, and refusing to deliver property; plaintiff's remedy being action for damages for breach of contract—McEntire v. Naylor, 171 S E 387, 47 Ga App. 752

82. Ga.—Crison v. Groover, 102 S E 3k, 24 Ga App 715

65 C.J. p 160 note 79.

Where one purchases property with another's funds and the latter is thereby vested with an equitable title as beneficiary of a constructive trust, the equitable title, while it can be asserted in trover against the trustee or those holding the property for the beneficiary, cannot be asserted

against one who occupies the position of a bona fide purchaser of the property for value and without notice of the equitable title of the beneficiary of the trust—Padgett v. Collins, 81 S E 2d 309, 89 Ga App. 769

83. Ga.—Zugar v. Glen Falls Indemnity Co., 11 S E 2d 839, 63 Ga App. 660

65 C.J. p 160 note 80.

84. Ga.—Thompson v. Ward, 86 S E. 224, 144 Ga 91—American Ry. Express Co. v. Willis, 111 S E 550, 28 Ga App 430.

85. Ga.—McWhorter & Armor v. Moore, 67 S E. 115, 7 Ga App 439. 65 C.J. p 160 note 82.

86. Ga.—Pepper v. James, 67 S E. 218, 7 Ga App 518.

87. Ga.—Pepper v. James, supra 65 C.J. p 160 note 85.

88. Ga.—Groover v. Savannah Bank & Trust Co., 198 S E 217, 186 Ga 476—Smith v. R F. Brodegaard & Co., 49 S E 2d 500, 77 Ga App 661—Cohn v. Riggsby, 5 S E 2d 93, 60 Ga App 728—Comer v. Home Chevrolet Co., 151 S E. 678, 40 Ga App. 820—Atlantic Coast Line R Co v. Gordon, 73 S E. 594, 10 Ga App. 311

Amount of recovery by plaintiff with special interest see *infra* § 239.

89. Ga.—White v. Dotson, 153 S E. 233, 41 Ga App 436

65 C.J. p 161 note 87.

90. Ga.—White v. Dotson, 153 S E 233, 41 Ga App. 436—Roper Wholesale Grocery Co. v. Faver, 68 S E. 883, 8 Ga App. 178.

91. Ga.—White v. Dotson, 153 S E. 233, 41 Ga App. 436

92. Ga.—Camp v. Turner, 91 S E. 910, 19 Ga App 452. 65 C.J. p 161 note 90.

93. Ga.—Jowers v. Mandy, 53 Ga.

goods were sold on credit.<sup>94</sup> A defrauded seller may maintain trover, since for purposes of the action title to the property never passes to the buyer.<sup>95</sup>

The transferee of the owner can maintain the action against the agent of the transferor in possession.<sup>96</sup> Title in plaintiff at the time suit is instituted is sufficient even though plaintiff may have thereafter divested himself of title.<sup>97</sup> Where an owner brings trover, and pending the action sells the property, and without objection amends his petition, making it a suit for the use of the vendee, the sale of the property does not defeat his right to recover.<sup>98</sup>

**Invalid title.** A plaintiff who, when proof of title is essential, relies on one which is fraudulent or void, cannot recover.<sup>99</sup>

### § 206. — Possession of, or Conversion by, Defendant

It is essential to an action of trover that the plaintiff show that the defendant has actual possession of the property, or that he converted it. Acts of the defendant must be positive and tortious.

It is essential, in order successfully to maintain an

action of trover, that plaintiff show that defendant has actual possession of the property<sup>1</sup> or that he converted it.<sup>2</sup> Acts of defendant must be positive and tortious.<sup>3</sup> Mere nonfeasance or neglect of some legal duty is not sufficient,<sup>4</sup> and a mere breach of contract is not conversion,<sup>5</sup> nor is destruction or loss of property as a result of negligence.<sup>6</sup> It is generally not essential that defendant's motive or intent should be wrongful,<sup>7</sup> and his good faith,<sup>8</sup> or his knowledge or ignorance,<sup>9</sup> is not involved in actions for conversion.

Any distinct act which is an unauthorized and wrongful assumption and exercise of control or dominion over the property of another in denial of, or inconsistent with the owner's rights, is a conversion,<sup>10</sup> even though defendant does not apply the property to his own use.<sup>11</sup> Possession of property with a claim of title adverse to that of the true owner is a conversion,<sup>12</sup> but defendant cannot be charged with conversion unless he had actual or constructive possession at the time of the alleged conversion.<sup>13</sup> It is not necessary that his possession should continue until the commencement of the action.<sup>14</sup>

Any use<sup>15</sup> or disposition,<sup>16</sup> such as a sale,<sup>17</sup> of

379—Moon v. Fish, 89 S.E. 374, 18

Ga App 267.

94. Ga.—Sutton v. McCoy, 59 S.E. 21, 2 Ga App 758.

95. Ga.—Taylor v. Gill Equipment Co., 73 S.E.2d 755, 87 Ga App 309.

96. Ga.—Holland v. Lawrence, 91 S.E. 561, 147 Ga. 479.

97. Ga.—C. I. T. Corp. v. Smith, 193 S.E. 261, 55 Ga App 544, affirmed Smith v. C. I. T. Corp., 197 S.E. 322, 186 Ga. 199.

98. Ga.—McElmurray v. Harris, 43 S.E. 987, 117 Ga. 919.

99. Ga.—Mulligan v. Bailey, 28 Ga. 507.

1. Ga.—Crooke v. Ware, 106 S.E. 560, 26 Ga App. 524, 65 C.J. p 161 note 96.

#### Possession of parts

In suit against junk dealer for conversion of tractor, evidence that defendant had not purchased tractor as a whole or exercised any control or dominion over it but had merely purchased parts of tractor as junk from third person, believing in good faith that seller had purchased tractor from owner, demanded a verdict for defendant, since no conversion of tractor by defendant was shown.—Itzenberg v. Sund, 60 S.E.2d 390, 81 Ga App 856.

2. Ga.—Smith v. Kershaw, 1 Ga. 259—Jeems v. Lewis, 79 S.E. 235, 13 Ga App. 456, 65 C.J. p 161 note 97.

3. Ga.—Southern Express Co. v. Sinclair, 60 S.E. 849, 130 Ga. 372—Shore v. Brown, 91 S.E. 909, 19 Ga App. 476.

4. Ga.—Southern Express Co. v. Sinclair, 60 S.E. 849, 130 Ga. 372, 65 C.J. p 14 note 21.

5. Ga.—Reid v. Caldwell, 35 S.E. 684, 110 Ga. 481, 65 C.J. p 14 note 23.

6. Ga.—Green v. Fairburn Banking Co., 113 S.E. 59, 29 Ga App 3.

7. Ga.—Merchants & Miners Transportation Co. v. Moore & Co., 52 S.E. 802, 124 Ga. 482, 65 C.J. p 15 note 35.

8. Ga.—Merchants & Miners Transportation Co. v. Moore & Co., supra, 65 C.J. p 16 note 42.

9. Ga.—McCann Lumber Co. v. Hall, 49 S.E.2d 150, 77 Ga App. 455, 65 C.J. p 17 notes 43, 45.

10. Ga.—James v. Newman, 35 S.E. 2d 581, 73 Ga App 79—Williams v. Roberts, 1 S.E.2d 557, 59 Ga App 473—Georgia, E. & A. Ry. Co. v. Blush Milling Co., 82 S.E. 781, 15 Ga App. 142, 65 C.J. p 29 note 17.

#### Taking by force

Owner did not lose title to automobile when it was forcibly taken from him, though he did lose the use and enjoyment of automobile and he had the right to recover automobile or the value thereof from the person in possession of it and the right to

transfer or dispose of such right of action.—Broadner v. Cox, for Use and Benefit of American Sec. Ins. Co., 64 S.E.2d 460, 83 Ga App. 738, followed in Coffee v. Cox, for Use and Benefit of American Sec. Ins. Co., 64 S.E.2d 461, 83 Ga App 743.

**Obtaining property by fraud or false representation** is conversion.—Taylor v. Gill Equipment Co., 73 S.E.2d 755, 87 Ga App. 309—Gustin v. Scott, 56 S.E.2d 778, 80 Ga App 630.

11. Ga.—James v. Newman, 35 S.E.

2d 581, 73 Ga App. 79.

65 C.J. p 30 note 18.

**The seizure of church funds** by unauthorized persons constitutes a conversion irrespective of manner of its expenditure.—Carlson v. Fox, 31 S.E.2d 597, 198 Ga. 400.

12. Ga.—Heaver v. Magid, 192 S.E. 497, 56 Ga App 272, 65 C.J. p 31 note 30.

13. Ga.—Merchants', etc., Bank v. Seaboard Air-Line R. Co., 60 S.E. 571, 130 Ga. 224.

14. Ga.—Chumbley v. Livingston, 51 S.E. 314, 123 Ga. 257—Wilkin v. Boykin, 56 Ga. 45.

15. Ga.—Spurs v. Hubbard, 78 S.E. 136, 12 Ga App. 676.

16. Ga.—Phillips v. Taber, 10 S.E. 270, 83 Ga. 565—Thompson v. Carter, 65 S.E. 599, 6 Ga App. 604.

17. Ga.—Wilson-Wescner-Wilkinson Co. v. Collier, 8 S.E.2d 171, 62 Ga App. 457.

the personal property of another is a conversion where it is unauthorized by, and is in denial of, the owner's rights; but a sale by an agent of the owner authorized to sell is not a conversion even though he exceeds his authority.<sup>18</sup> No contractual relationship between plaintiff and defendant is necessary to maintain an action in trover, it being sufficient that defendant has converted to his own use the property of plaintiff.<sup>19</sup> Trover will lie for conversion, even though the property has been destroyed before the commencement of the action,<sup>20</sup> or has been sold by defendant prior to demand and suit.<sup>21</sup> Conversion of a part of a chattel is a conversion of the whole where the remaining part is thereby impaired in value or utility.<sup>22</sup> An unauthorized appropriation or diversion of the proceeds of a sale by the purchaser is a conversion.<sup>23</sup> A seizure by an officer, under authority of a statute, of property being used in violation of law is not a conversion;<sup>24</sup> and a sale on foreclosure of a lien is not a conversion where there is due process of law and the owner has failed to take the steps provided by law for testing the right to the lien in the foreclosure proceedings.<sup>25</sup>

*Purchase of property.* The buyer of property sold conditionally is liable in trover where he refuses to comply with the condition on receiving the property.<sup>26</sup> One who takes possession of, and claims rights in, a chattel through a purchase or other means, from a person who had no power to dispose of it, is guilty of conversion,<sup>27</sup> even though he receives it in good faith without notice of the rights of the owner;<sup>28</sup> and where property is entrusted by the owner to another for a specific purpose, liability for conversion attaches to one who receives it from such other and converts it to his own use.<sup>29</sup>

A purchase at an invalid public sale may be a conversion.<sup>30</sup> An innocent purchaser of property from one who had lawfully acquired it from the owner is not liable for conversion for reselling the property.<sup>31</sup>

### § 207. — Waiver and Estoppel

The plaintiff may waive his right, or be estopped to maintain trover.

Plaintiff may waive his right to sue in trover, as by receiving the proceeds of defendant's wrongful act<sup>32</sup> or by accepting the promise of a new article in place of the one converted.<sup>33</sup> Plaintiff will not be estopped to assert his rights unless his conduct under the circumstances was sufficient to raise an estoppel under the general rules of estoppel.<sup>34</sup> The seller of personal property holding a note for the purchase price in which title is retained in himself is not estopped to bring an action of trover for the property by the fact that he has previously sued out a purchase money attachment,<sup>35</sup> nor, as long as nobody was injured by his disclaimer, is a party who has disclaimed title to the property estopped thereby subsequently to assert it in an action of trover.<sup>36</sup> Where a materialman files a claim of lien after the time allowed by law, and never seeks to enforce it, he is not estopped afterwards to sue in trover for his materials.<sup>37</sup> A widow who, as an individual, has illegally disposed of the property of an estate is not estopped to maintain, as administratrix, an action of trover to recover it.<sup>38</sup>

### § 208. Conditions Precedent

There must be compliance with all essential conditions precedent to the maintenance of an action in trover.

Where title has passed in a sale or exchange of

18. Ga.—Loveless v. Fowler, 4 S.E. 102, 79 Ga. 134, 11 Am S.R. 407.

19. Ga.—Kelley v. Sheehan, 7 S.E. 2d 298, 61 Ga.App. 714.

20. Ga.—Scoggins v. General Finance & Thrift Corp., 57 S.E.2d 686, 80 Ga.App. 847.

21. Ga.—Scoggins v. General Finance & Thrift Corp., 57 S.E.2d 686, 80 Ga.App. 847.

22. Ga.—Nalley v. Thomason, 113 S.E. 65, 28 Ga.App. 787.

23. Ga.—Stevenson v. Wyatt Hardware Co., 135 S.E. 316, 36 Ga.App. 57.

24. Ga.—Martin v. English, 98 S.E. 505, 23 Ga.App. 484.

At common law any person might, at his peril, seize property for a forfeiture to the government under its laws, and if the government adopted the seizure by forfeiting under appro-

private procedure, it was sufficient recognition and confirmation of the seizure to give the seizure an equal validity in law with original seizure under authority, and precluded person making seizure from being liable to owner for the conversion.—Kitchens v. Beverly, 72 S.E.2d 819, 86 Ga.App. 380.

25. Ga.—Fitzgerald Trust Co. v. Burkhardt, 77 S.E. 7, 12 Ga.App. 222.

26. Ga.—Jowers v. Blandy, 58 Ga. 379—Moon v. Gulf Fish Co., 89 S.E. 374, 18 Ga.App. 267.

27. Ga.—Ware v. Simmons, 55 Ga. 94—Darby v. Parrish, 156 S.E. 462, 42 Ga.App. 492.

28. Ga.—Comer v. Rome Chevrolet Co., 151 S.E. 678, 40 Ga.App. 820, 65 C.J. p 36 note 14.

29. Ga.—Seago v. Pomeroy, 46 Ga. 227.

30. Ga.—Harrell v. Harrell, 73 Ga. 697.

31. Ga.—Smith v. Norman Motors Co., 65 S.E.2d 699, 84 Ga.App. 186—Morris v. Courts, 1 S.E.2d 687, 59 Ga.App. 666.

32. Ga.—Hullard v. Madison Bank, 33 S.E. 684, 107 Ga. 772.

33. Ga.—Moate v. Griswold, 107 S.E. 387, 27 Ga.App. 31.

34. Ga.—Rushin v. Tharpe, 15 S.E. 830, 88 Ga. 779.

35. Ga.—Wilson v. Owen, 91 S.E. 233, 19 Ga.App. 159—Jordan v. Jenkins, 86 S.E. 278, 17 Ga.App. 58.

36. Ga.—Frith v. Siler, 32 Ga. 665.

37. Ga.—Broadway Apartment Co. v. Barnett, 118 S.E. 601, 30 Ga.App. 562.

38. Ga.—Gouldsmith v. Coleman, 57 Ga. 425.

goods procured by defendant's fraud, plaintiff cannot recover without proof of a rescission of the contract and a return or tender of the consideration received,<sup>39</sup> but the tender is waived by defendant's refusal to rescind.<sup>40</sup> Institution of criminal proceedings against one who has stolen the property is not a condition precedent to an action of trover to recover possession thereof,<sup>41</sup> especially when the offense was committed in a foreign jurisdiction,<sup>42</sup> unless required by statute.<sup>43</sup>

*Demand to give bond.* The law does not require that the officer serving a bail trover proceeding shall first make demand of defendant to give bond, in order that plaintiff may maintain his suit,<sup>44</sup> and failure on the part of the officer to make such a demand cannot in any way affect plaintiff's rights.<sup>45</sup>

### § 209. — Demand and Refusal

The necessity and sufficiency of a demand for the return of the property and refusal thereof depend on the facts and circumstances of the particular case.

No demand is necessary to maintain a suit in bail trover where there was an actual conversion before institution of the suit<sup>46</sup> or, ordinarily, where defendant is in possession of the property at the time suit is brought<sup>47</sup> and enters a plea denying plaintiff's right to recover,<sup>48</sup> the only purpose of the demand in such case being to save plaintiff the costs of court should defendant disclaim title to the property.<sup>49</sup> It is not necessary that there be a demand and refusal where property was taken under a wrongful levy;<sup>50</sup> where there was a wrongful use or disposi-

tion of property by a bailee thereof;<sup>51</sup> where there was a transfer of property by one having no right or title thereto, irrespective of the character of his possession;<sup>52</sup> or where there was other exercise of dominion and control over the property inconsistent with the rights of the owner.<sup>53</sup> Where there has been a demand on a corporation, it is not necessary that there be a demand on each of the individuals who control it, in order to hold them individually liable for conversion.<sup>54</sup> Where the owner of the property sues a bailee of the converter, service of the petition in the action on the bailee while the property is in its possession has been held to be sufficient notice of plaintiff's title to the property.<sup>55</sup>

Where no actual or constructive conversion is otherwise shown, and it appears that defendant is in possession of the property, plaintiff must prove a demand and refusal.<sup>56</sup> Where a qualified or conditional refusal is not reasonable or justifiable under the circumstances and amounts to a denial of plaintiff's rights, it will be sufficient to support an action for conversion.<sup>57</sup> In order that a demand and refusal may be sufficient to establish a conversion, it must affirmatively appear that at the time thereof the property was in existence,<sup>58</sup> and that at the time of the demand the property was in defendant's possession or so far under his control that he could comply with the demand.<sup>59</sup> Demand is necessary where defendant has, in good faith and without notice of the owner's rights, received property from one not authorized to dispose of it.<sup>60</sup> When a demand is necessary, it must be made after plaintiff's right of possession has accrued.<sup>61</sup>

39. Ga.—Sasser v. Pierce, 70 S.E. 197, 9 Ga.App. 27.

40. Ga.—Sasser v. Pierce, *supra*.

41. Ga.—McBain v. Smith, 13 Ga. 315.

42. Ga.—McBain v. Smith, *supra*.

43. Ga.—Broughton v. Winn, 60 Ga. 486.

65 C.J. p 161 note 4.

44. Ga.—Davis v. Boswell, 89 S.E. 382, 18 Ga.App. 270.

45. Ga.—Davis v. Boswell, *supra*.

46. U.S.—Hendryx v. E. C. Atkins & Co., C.C.A. Ga., 79 F.2d 508.

Ga.—Briscoe v. Pool, 177 S.E. 346, 50 Ga.App. 147—Bush v. Ogletree, 142 S.E. 463, 38 Ga.App. 55.

65 C.J. p 42 note 95, p 161 note 8.

47. Ga.—C. I. T. Corp. v. Smith, 193 S.E. 261, 56 Ga.App. 544, affirmed Smith v. C. I. T. Corp., 197 S.E.2d

322, 186 Ga. 199—Sappington v. Rimes, 95 S.E. 316, 21 Ga.App. 810

65 C.J. p 41 note 12 [b].

48. Ga.—Kalus v. Fay, 120 S.E. 28, 31 Ga.App. 109.

65 C.J. p 47 note 38 [b].

49. Ga.—Harris v. Bennett Bros., 34 S.E.2d 615, 72 Ga.App. 589—Kalus v. Fay, 120 S.E. 28, 31 Ga.App. 109—Pearson v. Jones, 89 S.E. 536, 18 Ga.App. 448.

50. Ga.—Braswell & Son v. McDonald, 71 Ga. 319—Robinson v. McDonald, 2 Ga. 116.

51. Ga.—Cox v. N. K. Fairbanks Co., 116 S.E. 43, 29 Ga.App. 538—Thompson v. Carter, 65 S.E. 599, 6 Ga.App. 606.

52. Ga.—Harrell v. Harrell, 75 Ga. 697—Branch v. Planters' Loan, etc., Bank, 75 Ga. 342.

53. Ga.—Merchants & Miners

Transp. Co. v. Moore & Co., 52 S.E. 802, 124 Ga. 482.

65 C.J. p 43 note 11.

54. Ga.—Garbutt Lumber Co. v. Prescott, 67 S.E. 1127, 134 Ga. 382.

55. Ga.—Ocean S. S. Co. v. Southern States Naval Stores Co., 89 S.E. 838, 145 Ga. 798.

56. Ga.—Haston v. Rabun, 41 S.E. 568, 115 Ga. 378.

65 C.J. p 161 note 12.

57. Ga.—Southern Ry. Co. v. American Whip Co., 81 S.E. 1114, 141 Ga. 708.

58. Ga.—Southern Express Co. v. Sinclair, 60 S.E. 849, 130 Ga. 372.

59. Ga.—Hare v. Atlanta City Brewing Co., 65 Ga. 348—Seago v. Pomeroy, 46 Ga. 227.

60. Ga.—Atlantic Coast Line Ry. Co. v. Nellwood Lumber Co., 94 S.E. 86, 21 Ga.App. 209.

61. Ga.—Hudson v. Goff, 3 S.E. 152, 77 Ga. 281.



§ 210. Defenses

The defendant may, in bail trover, set up any legal defense which would defeat the right of the plaintiff to recover.

Defendant has the right, in bail trover, to set up any legal defense which would defeat plaintiff's right to recover.<sup>62</sup> A defendant may always defend a trover action by showing that plaintiff does not have title or right of possession.<sup>63</sup> It is a good defense to an action of bail trover that title, where plaintiff relies on his title, is in defendant<sup>64</sup> or is outstanding in a third person,<sup>65</sup> that the right of possession is in defendant<sup>66</sup> notwithstanding legal title may be in plaintiff,<sup>67</sup> that plaintiff's right of action depends on an immoral contract,<sup>68</sup> or that plaintiff has ratified the act constituting the alleged conversion.<sup>69</sup> A person sued in his individual capacity for a conversion may justify by showing that the property alleged to have been wrongfully converted by him was rightfully held as the property of a lunatic for whom, subsequent to the conversion, he has been appointed guardian.<sup>70</sup> A plea that defendant possessed the property to accommodate plaintiff and that thereafter the property was wrongfully removed by a third person, without fault on the part of defendant, presents a meritorious defense to an action in trover.<sup>71</sup>

It is no defense, however, that defendant is not in possession of the property sued for;<sup>72</sup> that defendant, although abetting the conversion in pursuance of a conspiracy, never had actual possession of the property, all of it being appropriated by his coconspirator;<sup>73</sup> as against the owner, that he is in possession under a contract for the repair of the

property, where he claims no lien thereon;<sup>74</sup> that the property was returned;<sup>75</sup> or sent out of the state;<sup>76</sup> that defendant paid the value of the property to one not authorized to receive it<sup>77</sup> or in good faith took the property by consent of one mistakenly believed to be the owner;<sup>78</sup> or that plaintiff acquired title from a former owner in fraud of the rights of another, where defendant is not a privy of the person allegedly defrauded.<sup>79</sup>

It is no defense that defendant was an agent acting for his principal in the matter<sup>80</sup> in good faith<sup>81</sup> and in ignorance of the true owner's title;<sup>82</sup> but it has been held that it is no conversion of a chose in action by an agent, in possession thereof for his principal, to decline compliance with a demand of the true owner for its delivery on the ground that he is a mere agent, and for the sole purpose of restoring the note to his principal, which purpose he executes before any action is brought against him.<sup>83</sup> The fact that plaintiff permitted the property to remain in the possession of defendant for a lengthy period of time will not bar plaintiff from recovering the property where the possession of defendant is not such as would vest title in him by prescription.<sup>84</sup>

§ 211. — Recoupment, Set-Off, or Counterclaim

In the absence of some special intervening equity arising in his favor, the defendant may not claim damages by way of recoupment, set-off, or counterclaim.

Unless some special intervening equity arises in favor of defendant,<sup>85</sup> such as nonresidence or in-

62. Ga.—Little v. Lawrence, 193 S. E 181, 56 Ga.App. 524.

63. Ga.—Propes v. Todd, 79 S.E.2d 346, 89 Ga.App. 308.

One in possession of property, even wrongfully, may defend against action instituted by any one claiming title or right to possession except a person having such title or right of possession.—Propes v. Todd, supra.

64. Ga.—Powers v. Wren, 31 S.E.2d 713, 198 Ga. 316.—Little v. Lawrence, 193 S.E. 181, 56 Ga.App. 524.—Bridges v. Shirling, 105 S.E. 862, 26 Ga.App. 279.

65. Ga.—Propes v. Todd, 79 S.E.2d 346, 89 Ga.App. 308.  
65 C.J. p 162 note 21.

66. Ga.—Little v. Lawrence, 193 S. E. 181, 56 Ga.App. 524.—Mann v. Massey, 158 S.E. 341, 43 Ga.App. 201.

65 C.J. p 162 note 22.

67. Ga.—Martin v. English, 98 S.E. 505, 23 Ga.App. 484.

68. Ga.—Abbott Furniture Co. v. Mobley, 81 S.E. 196, 141 Ga. 456.  
65 C.J. p 162 note 24.

69. Ga.—Roynolds Banking Co. v. Neisler, 61 S.E. 828, 130 Ga. 789.—Lowe v. Rush, 107 S.E. 394, 27 Ga.App. 82.

70. Ga.—Elliott v. Keith, 29 S.E. 155, 102 Ga. 117.

71. Ga.—Williams v. Edwards, 60 S. E.2d 538, 82 Ga.App. 76.

72. Ga.—Brothers v. Horne, 79 S.E. 468, 140 Ga. 617.  
65 C.J. p 162 note 27.

73. Ga.—Brothers v. Horne, supra.

74. Ga.—Denny v. Belsinger, 184 S. E. 914, 52 Ga.App. 851.

75. Ga.—Pierce v. Loo Sing, 109 S. E. 549, 27 Ga.App. 577.

65 C.J. p 66 note 10, p 162 note 29.

76. Ga.—Jordan v. Thornton, 7 Ga. 517.

77. Ga.—Jones v. Kimbrough, etc., Co., 74 S.E. 59, 137 Ga. 638.  
65 C.J. p 162 note 31.

78. Ga.—Comer v. Rome Chevrolet Co., 151 S.E. 678, 40 Ga.App. 820.

79. Ga.—Jarrett v. Hudson, 74 S.E. 1092, 138 Ga. 202.

80. Ga.—Plannery v. Harley, 43 S. E. 765, 117 Ga. 483.  
65 C.J. p 162 note 34.

81. Ga.—Plannery v. Harley, supra.  
65 C.J. p 162 note 35.

82. Ga.—Miller v. Wilson, 25 S.E. 578, 98 Ga. 567, 58 Am.S.R. 319.  
65 C.J. p 162 note 36.

83. Ga.—Wando Phosphate Co. v. Parker, 21 S.E. 53, 93 Ga. 414.

84. Ga.—Culbreath v. Patton, 37 S. E.2d 719, 73 Ga.App. 667.—Rawson v. Tift, 185 S.E. 397, 53 Ga.App. 248.

85. Ga.—Parton v. Conner, 105 S.E. 712, 26 Ga.App. 219.—Youngblood v. Armour Fertilizer Works, 99 S.E. 314, 23 Ga.App. 731.—Steinhauer & Wight v. Adair, 93 S.E. 280, 20 Ga. App. 733.  
65 C.J. p 162 note 39.

solvency of plaintiff,<sup>86</sup> a claim for damages arising from a breach of contract cannot be interposed by way of recoupment,<sup>87</sup> set-off,<sup>88</sup> or counterclaim.<sup>89</sup> However, if the owner brings trover to recover an article which was taken from him in a crude state and improved by labor and expense placed on it by the person taking it, defendant is entitled to plead as a set-off and to recover, *ex aquo et bono*, the value of his labor and expense by which the property has been enhanced, provided he makes it appear that his trespass in taking the property was innocent or inadvertent, and was not committed willfully or in bad faith;<sup>90</sup> if the taking was not in good faith the set-off is not allowable.<sup>91</sup> Defendant in trover, who claims that he purchased the property from plaintiff and paid part of the price, may, despite this rule, recover the amount of payment, where he prevails, and elects a money verdict instead of the property.<sup>92</sup>

*Action converted into equitable proceeding.* In an action of trover, which had been converted into an equitable proceeding, it was not error to refuse to strike defendant's answer and to rule out evidence introduced in proof of its allegations, on the ground that a claim for damages arising from a breach of contract could not be allowed in recoupment to an action in trover.<sup>93</sup>

*If plaintiff elects to take money verdict* the amount of his recovery may be offset by damage resulting to defendant by reason of any breach of contract by plaintiff which has not been waived.<sup>94</sup>

## § 212. — Estoppel to Assert Defense

The defendant may, under the circumstances of a particular case, be estopped to assert a particular defense.

### Value of storage

Proof of reasonable value of storage of cotton before alleged conversion thereof by warehouseman was irrelevant in action for the conversion—*Henry Cotton Mills v. Shoeng & Co.*, 127 S.E. 238, 33 Ga.App. 467.

86. Ga.—*Youngblood v. Armour Fertilizer Works*, 99 S.E. 314, 23 Ga.App. 731—*Steinhauer & Wight v. Adair*, 93 S.E. 280, 20 Ga.App. 733.

87. Ga.—*Bell v. G. Ober, etc., Co.*, 36 S.E. 904, 111 Ga. 668—*Harden v. Lang*, 36 S.E. 100, 110 Ga. 392.

88. Ga.—*Simons v. Bargainer*, 105 S.E. 714, 26 Ga.App. 251.  
65 C.J. p 162 note 41.

89. Ga.—*Ellis, McKinnon & Brown v. Hopps*, 118 S.E. 583, 30 Ga.App. 453—*Youngblood v. Armour Fertilizer Works*, 99 S.E. 314, 23 Ga.App. 731.

The giving of a forthcoming bond in bail trover does not estop defendant to set up the defense that plaintiff had ratified his alleged tortious act,<sup>95</sup> or to deny that he was ever in possession of the property to recover which the suit was instituted;<sup>96</sup> but one who has made a gift of a chattel to another and afterwards regains and holds possession of it is estopped in an action of trover brought by the donee to set up title in a third person at the time the gift was made.<sup>97</sup>

## § 213. Jurisdiction

Jurisdiction is not defeated by the fact that the property is in custodia legis.

The fact that the property is in custodia legis does not operate to deprive the court of jurisdiction<sup>98</sup> but is matter to be pleaded by way of defense,<sup>99</sup> even if affording a ground for defeating the action.<sup>1</sup>

## § 214. Time to Sue and Limitations

While bail trover must not be brought prematurely, it must be brought within the period of limitations fixed by statute.

The rules governing civil cases generally as to the commencement of actions prematurely are applicable in actions of bail trover.<sup>2</sup> The action must be brought within the time prescribed by the statute of limitations.<sup>3</sup>

## § 215. Parties Plaintiff

The rules as to parties plaintiff in civil actions apply in bail trover.

In accordance with the rules relating to civil actions generally, the action of bail trover should be brought in the name of the real plaintiff,<sup>4</sup> and the

90. Ga.—*Taylor v. Hammack*, 7 S.E. 2d 200, 61 Ga.App. 640.  
65 C.J. p 162 note 43

91. Ga.—*De Bardolaben v. Coleman*, 39 S.E.2d 589, 74 Ga.App. 261.  
65 C.J. p 163 note 44.

92. Ga.—*Stonhauer & Wight v. Adair*, 93 S.E. 280, 20 Ga.App. 733.

93. Ga.—*Dyson v. Washington Telephone Co.*, 121 S.E. 105, 157 Ga. 67.

94. Ga.—*Ellis v. Hopps*, 118 S.E. 583, 30 Ga.App. 453

95. Ga.—*Lowe v. Rush*, 107 S.E. 394, 27 Ga.App. 82.

96. Ga.—*Bell v. G. Ober & Sons Co.*, 36 S.E. 904, 111 Ga. 668—*Commercial Bank of Crawford v. Pharr*, 43 S.E.2d 439, 75 Ga.App. 364

97. Ga.—*Hartz v. Hartz*, 79 S.E. 230, 13 Ga.App. 401

98. Ga.—*Coker v. Eison*, 151 S.E. 682, 40 Ga.App. 835

99. Ga.—*Coker v. Eison*, supra.

**Property in custody of defendant as agent for officer seizing it**  
Ga.—*Coker v. Eison*, supra.

1. Ga.—*Coker v. Eison*, supra.

2. Ga.—*Gamble v. Shingler*, 96 S.E. 705, 22 Ga.App. 608  
65 C.J. p 163 note 55.

3. U.S.—*Singletary v. General Motors Acceptance Corporation, C.C. A. Ga.*, 73 F.2d 453.  
Ga.—*Gaskin v. Mobley*, 89 S.E. 337, 145 Ga. 376—*Hicks v. Meyer*, 73 S.E. 754, 10 Ga.App. 488.

### Action held barred

U.S.—*Hendryx v. E. C. Atkins & Co.*, C.C.A. Ga., 79 F.2d 508.

4. Ga.—*Lee v. Hamilton*, 62 S.E.2d 419, 83 Ga.App. 59.  
65 C.J. p 163 note 57.

person in whose name the action is brought is not to be regarded as a nominal and formal party only.<sup>5</sup> The name of a usee as a coplaintiff will be treated as surplusage when the other coplaintiff was the owner of the goods at the time of their conversion,<sup>6</sup> and a nominal plaintiff will fail to recover unless he establishes a right of action in himself.<sup>7</sup> Where plaintiff is represented in a contract of sale by an agent who retains title in himself as agent until payment of the purchase price, in an action of bail trover to recover the property the agent need not sue in his own name;<sup>8</sup> the action lies in the name of the principal.<sup>9</sup>

## § 216. Parties Defendant

Who may or must be parties defendant in bail trover is governed by the general rules of civil actions.

It is unnecessary to make both parties to a bill of sale parties to bail trover proceedings brought by the person to whom the property was conveyed, where the petition alleged that one of them was in possession of property and refused to deliver it to plaintiff.<sup>10</sup> Joint tort-feasors may properly be joined as parties defendant.<sup>11</sup> Defendant cannot, by an amendment to his answer equitable in its nature, have reformed a written instrument which he relies on to define the character of his possession of the property in controversy, without making the person who executed the instrument a party to the case.<sup>12</sup>

## § 217. Intervention

Generally, a third person has no right to intervene in bail trover.

A third person has no right to intervene in an action to recover personal property for the purpose of asserting equitable rights to the property,<sup>13</sup> nor can he assert title to property seized in bail trover proceedings under a statute permitting third per-

sons to claim property levied on by an officer under an execution or other process.<sup>14</sup>

## § 218. Bail Proceedings

- a. In general
- b. Construction of statutes authorizing proceeding

### a. In General

A bail proceeding is a species of ancillary proceeding in connection with the action of trover, but is not an essential part thereof.

A bail proceeding is not an essential part of a trover case;<sup>15</sup> such a proceeding constitutes a species of ancillary proceeding in connection with the action of trover.<sup>16</sup> Plaintiff is not compelled to require bail of defendant, but has the privilege of making the affidavit provided by the statute for that purpose;<sup>17</sup> but, where after a nonsuit, plaintiff, having retained possession of the property, renews his action of trover, it is improper to require bail.<sup>18</sup> The purpose of bail process is to require security for the forthcoming of the property,<sup>19</sup> or to authorize the seizure of the property,<sup>20</sup> or, if the property cannot be found, to arrest defendant;<sup>21</sup> but it is not to punish him for illegal acts in obtaining property.<sup>22</sup> The purpose of the statute allowing plaintiff to have possession of the property pending the suit is to preserve it so as to answer the final judgment.<sup>23</sup>

### b. Construction of Statutes Authorizing Proceeding

Statutes authorizing bail proceeding are to be strictly construed.

While the statute authorizing the proceeding for bail is not in derogation of common law,<sup>24</sup> it is in derogation of common right<sup>25</sup> and should be strictly construed;<sup>26</sup> but this does not require a literal com-

5. Ga.—Sligh v. Smith, 136 S.E. 175, 26 Ga.App. 237.

6. Ga.—McElmurray v. Harris, 43 S.E. 987, 117 Ga. 319—Villis v. Burch, 42 S.E. 718, 116 Ga. 374.

7. Ga.—Willis v. Burch, supra.

8. Ga.—Jowers v. Blandy, 58 Ga. 379.

9. Ga.—Jowers v. Blandy, supra.

10. Ga.—Williams v. Yarbrough, 130 S.E. 361, 34 Ga.App. 500.

11. Ga.—Council v. Nunn, 153 S.E. 234, 41 Ga.App. 407.

12. Ga.—Holland v. Lawrence, 94 S.E. 561, 147 Ga. 479.

13. Ga.—First Nat. Bank v. Knowles, 175 S.E. 791, 179 Ga. 377.

65 C.J. p. 163 note 64.

14. Ga.—Central Bank of Oakland, Cnt. v. Georgia Grocery Co., 48 S.E. 325, 120 Ga. 883.

15. Ga.—Harper v. Jeffers, 78 S.E. 172, 139 Ga. 756—Little v. Lawrence, 193 S.E. 181, 56 Ga.App. 524.

16. Ga.—Harper v. Jeffers, 78 S.E. 172, 139 Ga. 756—Little v. Lawrence, 193 S.E. 181, 56 Ga.App. 524.

17. Ga.—Harper v. Jeffers, 78 S.E. 172, 139 Ga. 756.

18. Ga.—Tinsley v. Block, 25 S.E. 429, 98 Ga. 243.

19. Ga.—Savannah Guano Co. v. Stubbs, 75 S.E. 433, 138 Ga. 409—Ragan v. Chicago Packing Co., 21 S.E. 143, 93 Ga. 712—Hudson v. Goff, 77 Ga. 281.

20. Ga.—Little v. Lawrence, 193 S.E. 181, 56 Ga.App. 524.

21. Ga.—Little v. Lawrence, supra.

22. Ga.—Savannah Guano Co. v. Stubbs, 75 S.E. 433, 138 Ga. 409—Ragan v. Chicago Packing Co., 21 S.E. 143, 93 Ga. 712.

23. Ga.—Mallory Bros. & Co. v. Moon, 61 S.E. 401, 130 Ga. 591.

24. Ga.—Gladden v. Dozier, 71 Ga. 380.

25. Ga.—Savannah Guano Co. v. Stubbs, 75 S.E. 433, 138 Ga. 409—Gladden v. Dozier, 71 Ga. 380—Everett, Ridley & Co. v. Holcomb, 58 S.E. 287, 1 Ga.App. 794.

26. Ga.—Savannah Guano Co. v. Stubbs, 75 S.E. 433, 138 Ga. 409—Gladden v. Dozier, 71 Ga. 380.

pliance with the statutory requirements,<sup>27</sup> and the courts will give the statutes a reasonable application.<sup>28</sup>

### § 219. — Affidavit

#### a. Requisites, validity, and sufficiency

#### b. Defects and objections

#### a. Requisites, Validity, and Sufficiency

The affidavit prescribed by statute may be made by the plaintiff, his agent, or his attorney, and will be sufficient if in the language of the statute.

The affidavit prescribed by statute to require defendant to give bail in the action of trover may be made by plaintiff,<sup>29</sup> his agent,<sup>30</sup> or his attorney,<sup>31</sup> and affiant need not state his reasons for believing that the property will be cloigned or moved away.<sup>32</sup> An affidavit in the language of the statute is valid and sufficient.<sup>33</sup> The affidavit may be made before a notary public,<sup>34</sup> who need not attest it under his notarial seal<sup>35</sup> or any other seal.<sup>36</sup> The affidavit must sufficiently describe the property to be seized by the officer, or produced by defendant, or for the production of which security can be required.<sup>37</sup> The property described at the time of the making of the affidavit, must be in the possession, custody, or control of defendant,<sup>38</sup> unless it affirmatively appears that since plaintiff's affidavit was made defendant has acquired the power of producing the property.<sup>39</sup>

#### b. Defects and Objections

Objections to the affidavit must be properly taken, on proper grounds, and amendable defects may be cured by judgment.

The fact that plaintiff's affidavit was not sworn

to positively, but on information and belief of his attorney, is an amendable defect,<sup>40</sup> which is cured by a judgment in the bail trover case against both principal and surety.<sup>41</sup> On the trial it is not competent for defendant to make an oral motion to dismiss the bail proceeding and, in support of the motion, to introduce evidence in denial of the official character of the person whose attestation appears officially to the bail affidavit.<sup>42</sup> The fact that the clerk attached the original affidavit, instead of a copy thereof as required, to the declaration and process, is not such a defect as entitles defendant to have the bail process dismissed,<sup>43</sup> nor is the proceeding rendered void by the fact that the copy attached is incomplete or otherwise defective.<sup>44</sup> The nature of the original affidavit as the basis for bail should be looked to in determining its validity, rather than an inaccurate copy served on defendant.<sup>45</sup>

### § 220. — Bond

Substantial compliance with the terms of the statute prescribing the bond in bail trover actions is sufficient.

An obligation although not literally conforming to the terms of the statute prescribing it in bail trover actions is sufficient if in substantial compliance therewith.<sup>46</sup> Thus, a bond given in the terms of the statute, except that it is made payable to the sheriff instead of to plaintiff, is sufficient to support a judgment against the obligors where it was accepted by the sheriff and the parties treated it as valid, to the advantage of the obligors;<sup>47</sup> but a forthcoming bond given for both realty and personalty is not such a statutory bond as will support a summary judgment<sup>48</sup> although it may be good as a

The words "possession, custody, or control," as used in statute providing for bail in actions for personalty, do not state three different situations or grounds on which plaintiff can require a bond of defendant, but they express an alternative of terms, definitions, or explanations of the same thing in different words, meaning substantially that property is within power and dominion of defendant.—Smith v. R. F. Brodegaard & Co., 49 S.E.2d 500, 77 Ga.App. 661.

#### Strict proof

"Persons seeking to avail themselves of this remedy should be held to strict proof of the statutory requisites."—Everett, Ridley & Co. v. Holcomb, 58 S.E. 287, 289, 1 Ga.App. 794.

27. Ga.—Gladden v. Dozier, 71 Ga. 380.

28. Ga.—Gladden v. Dozier, supra.

29. Ga.—Little v. Lawrence, 193 S. E. 181, 56 Ga.App. 524.

30. Ga.—Little v. Lawrence, supra.  
31. Ga.—Purdy v. Dunn Machinery Co., 82 S.E. 888, 142 Ga. 309.—Little v. Lawrence, 193 S.E. 181, 56 Ga. App. 524.

32. Ga.—Purdy v. Dunn Machinery Co., 82 S.E. 888, 142 Ga. 309.

33. Ga.—Smith v. R. F. Brodegaard & Co., 49 S.E.2d 500, 77 Ga.App. 661.

34. Ga.—Jowers v. Blandy, 58 Ga. 379.

35. Ga.—Jowers v. Blandy, supra.

36. Ga.—Jowers v. Blandy, supra.

37. Ga.—Harper v. Jeffers, 78 S.E. 172, 139 Ga. 756.

#### Affidavit held insufficient

Ga.—Harper v. Jeffers, supra.

#### Affidavit held sufficient

Ga.—Hatchcock v. Hatchcock, 184 S. E. 785, 52 Ga.App. 805.

38. Ga.—Ragan v. Chicago Packing Co., 21 S.E. 143, 93 Ga. 712.—Ever-

ett, Ridley & Co. v. Holcomb, 58 S.E. 287, 1 Ga.App. 794.

39. Ga.—Ragan v. Chicago Packing Co., 21 S.E. 143, 93 Ga. 712.—Everett, Ridley & Co. v. Holcomb, 58 S. E. 287, 1 Ga.App. 794.

40. Ga.—Knight v. Gaskins, 99 S.E. 634, 22 Ga.App. 788.

41. Ga.—Knight v. Gaskins, supra.

42. Ga.—Jowers v. Blandy, 58 Ga. 379.

43. Ga.—Gladden v. Dozier, 71 Ga. 380.

44. Ga.—Taylor v. Dobson, 15 S.E. 470, 89 Ga. 361.

45. Ga.—Harris v. Hines, 133 S.E. 294, 35 Ga.App. 414.

46. Ga.—Holmes v. Langston, 36 S. E. 251, 110 Ga. 861.—Wolf v. Kennedy, 18 S.E. 433, 93 Ga. 219.

47. Ga.—Fillington v. Conrad & Lee, 113 S.E. 822, 29 Ga.App. 139.

48. Ga.—Williams v. Mitchem, 106

common-law bond.<sup>49</sup> A bond is not rendered void by the fact that the affidavit provided for by the statute when plaintiff requires bail is not sworn to positively.<sup>50</sup> By giving the bond required to be in double the amount sworn to by plaintiff as the value of the property, defendant does not admit such amount to be the value,<sup>51</sup> but he thereby admits that he has in his possession property answering to the description.<sup>52</sup> A bond made and filed by defendant and not accepted by the arresting officer or plaintiff is not such a bond as authorizes a trial judge to enter judgment thereon against the sureties on the recovery of a verdict by plaintiff in the bail trover action.<sup>53</sup>

### § 221. — Seizure of Property

The property described in the petition should be seized by the levying officer by taking it into his possession and exercising dominion over it.

It is essential to the seizure of property described in the petition in a bail trover suit that the levying officer take the property in his own possession and assume dominion over it.<sup>54</sup> The failure of the officer properly to perform his duty in the execution of a bail trover proceeding does not bar defendant from defending such a suit,<sup>55</sup> nor does it constitute ground for the dismissal of his answer.<sup>56</sup> Where an officer wrongfully seizes property under void or invalid process and delivers the property to the bail trover affiant who removes it to another county, the officer and affiant are liable as joint trespassers.<sup>57</sup>

### § 222. — Sale of Property Seized but Not Replevied

Seized property not replevied may, in a proper case, be sold under the provisions of the statute.

Where neither party replevies property seized by the sheriff under bail process, and such property re-

mains in the hands of the officer and is of a perishable nature or liable to deterioration from keeping, or there is expense attending its keeping, it may, under the provisions of the statute, be sold; and, where plaintiff authorized the sheriff to notify defendant of plaintiff's intention to apply for leave to sell the property, this was equivalent to a permission for the sheriff to proceed in plaintiff's name in obtaining such an order.<sup>58</sup>

### § 223. Pleading

The rules of pleading in civil actions generally apply in bail trover actions.

The pleadings will be construed as a whole<sup>59</sup> and the general common-law rule of strict construction against the pleader applies.<sup>60</sup> Where a petition alleges ownership of property in plaintiff, a conversion of it by defendant, and a measure of damages peculiarly appropriate to a trover case, the case will be construed to be an action of trover.<sup>61</sup> Defendant cannot, by special demurrer, compel plaintiff to disclose the evidence by which he proposes to prove title.<sup>62</sup>

### § 224. — Petition

- a. In general
- b. Title and right to possession
- c. Description and value of property
- d. Demand and refusal
- e. Damages

#### a. In General

The petition in bail trover must allege every fact essential to the statement of a cause of action. Statutory forms may be used.

In accordance with the rules relating to civil actions generally, the petition in bail trover must contain allegations of facts sufficient to state a cause of action.<sup>63</sup> In the absence of statute or court rules,

S.E. 284, 151 Ga. 227, conformed to 107 S.E. 397, 27 Ga.App. 80.

65 C.J. p 164 note 87.

49. Ga.—Williams v. Mitchem, supra.

50. Ga.—Knight v. Gaskins, 99 S.E. 631, 23 Ga.App. 788.

65 C.J. p 164 note 89.

51. Ga.—Downs v. Herrymann, 100 S.E. 226, 24 Ga.App. 170.

52. Ga.—Farmers' Alliance Warehouse, etc., Co. v. McElhannon, 25 S.E. 568, 98 Ga. 394.—Commercial Bank of Crawford v. Pharr, 43 S.E. 2d 439, 75 Ga.App. 364.

53. Ga.—Branan v. Feldman, 123 S.E. 710, 158 Ga. 377.

54. Ga.—Battle v. Ricks Lumber Co., 144 S.E. 919, 38 Ga.App. 621.

55. Ga.—Little v. Lawrence, 193 S.E. 12, 181, 56 Ga.App. 521.

Liability for breach of duty see Sheriffs and Constables §§ 52-62.

56. Ga.—Little v. Lawrence, supra.

57. Ga.—Minhinnett v. Jackson, 161 S.E. 96, 45 Ga.App. 207.

Liability of officer for wrongful seizure generally see Sheriffs and Constables § 64.

58. Ga.—Marshall v. Armour Fertilizer Works, 100 S.E. 766, 24 Ga.App. 402.

59. Ga.—Darley v. H. B. Ehrlich & Co., 122 S.E. 219, 31 Ga.App. 795.

65 C.J. p 164 note 99.

60. Ga.—Hill v. Fourth Nat. Bank of Macon, 120 S.E. 1, 156 Ga. 704—

Mumford v. Strubling, 111 S.E. 224, 28 Ga.App. 292.

65 C.J. p 164 note 2.

61. Ga.—Comer v. Rome Chevrolet Co., 151 S.E. 678, 40 Ga.App. 820.—Alexander v. Dean, 116 S.E. 643, 29 Ga.App. 722.

62. Ga.—Sparta Bank v. Butts, 57 S.E. 1061, 1 Ga.App. 771.

#### 63. Statutory forms

(1) The legislative intent in enacting statute prescribing forms of actions for the recovery of personal property was not to abolish the distinctive features of good pleading but to authorize a simplified and concise form of a petition applicable to certain actions.—Breen v. Barfield, 56 S.E. 2d 791, 80 Ga.App. 615.

neither the petition in bail trover<sup>64</sup> nor an amendment thereto<sup>65</sup> is required to be verified. Where plaintiff brings an action in trover on defendant's acts of trespass and conversion, plaintiff need not allege whether or not defendant's trespass was willful.<sup>66</sup> If plaintiff does allege that the trespass through which the conversion came about was willful, his case does not fail if it develops that the trespass was innocent or inadvertent.<sup>67</sup> A petition which shows that the court has no jurisdiction of the action,<sup>68</sup> and which, even after amendment, contradicts the attached bail affidavit which shows the same lack of jurisdiction,<sup>69</sup> is demurrable.

### b. Title and Right to Possession

The petition must properly allege the plaintiff's title and right to possession.

A petition which shows the title to the property sued for in another person,<sup>70</sup> and fails to show that plaintiff had any title<sup>71</sup> or right of possession,<sup>72</sup> or that defendant is not entitled to possession,<sup>73</sup> is

fatally defective. An allegation that plaintiff "claims title" is, however, sufficient;<sup>74</sup> and an allegation that plaintiff<sup>75</sup> or a named third person<sup>76</sup> delivered the property to defendant, being merely an aid in description, does not tend to deny plaintiff's title.

### c. Description and Value of Property

The petition must describe the property with such particularity as will enable the court to seize and hold it, the particularity required being dependent on the nature of the property and the circumstances of the case. Proper allegations of value are required.

In an action of bail trover, the petition must describe the goods with such particularity as will enable the court to seize the chattels for which the action is brought, and hold them for restitution in the event of final recovery by plaintiff,<sup>77</sup> and plaintiff is not relieved of the necessity of so describing the property by the fact that he has a right at the trial to elect to take a verdict for damages in lieu of the property sued for.<sup>78</sup> No exact rule can be

(2) The legislative object in prescribing forms for actions for the recovery of personality is that allegations of various statutory forms may be regarded as containing all substantial and necessary averments of the common law form of the same kind of action.—Greenwood v. Stewart, 72 S.E.2d 539, 86 Ga.App. 764.—Breen v. Barfield, 56 S.E.2d 791, 80 Ga.App. 615.

(3) The use of statutory forms is permissive and not obligatory.—Breen v. Barfield, supra.

(4) The "Jack Jones" form for a trover suit is sufficient in all cases within provisions of the statute if property, sought to be recovered or for which damages for conversion are sought, is sufficiently described.—Graham v. Raines, 64 S.E.2d 98, 83 Ga.App. 581.—Crews v. Robertson, 10 S.E.2d 114, 62 Ga.App. 855.

#### Petition held sufficient

Ga.—Willis Lumber Co. v. Roddenberry, 77 S.E.2d 110, 88 Ga.App. 352.—Graham v. Raines, 64 S.E.2d 98, 83 Ga.App. 581.—Smith v. R. F. Brodegaard & Co., 49 S.E.2d 500, 77 Ga.App. 561.—McCann Lumber Co. v. Hall, 49 S.E.2d 150, 77 Ga.App. 455.—American Surety Co. v. Merriman, 17 S.E.2d 888, 66 Ga.App. 408.—Kelley v. Sheehan, 7 S.E.2d 298, 61 Ga.App. 714.—Brooks v. Hartsfield Co., 192 S.E. 459, 56 Ga.App. 184.—Yeomans v. Jones, 188 S.E. 62, 54 Ga.App. 330.—Seaboard Security Co. v. Goodson, 180 S.E. 858, 51 Ga.App. 512.—Comer v. Rome Chevrolet Co., 151 S.E. 678, 40 Ga.App. 820.

65 C.J. p 165 note 7 [a].

64. Ga.—Farmers' Alliance Ware-

house, etc. Co v McElhannon, 25 S.E. 558, 98 Ga. 394.

65. Ga.—Farmers' Alliance Warehouse, etc. Co. v. McElhannon, supra.

66. Ga.—Taylor v. Hammack, 7 S.E. 2d 200, 61 Ga.App. 640.—Milltown Lumber Co v Carter, 63 S.E. 270, 5 Ga.App. 344.

67. Ga.—Taylor v. Hammack, 7 S.E. 2d 200, 61 Ga.App. 640.—Milltown Lumber Co v Carter, 63 S.E. 270, 5 Ga.App. 344.

68. Ga.—Tucker v. Du Bose, 3 S.E. 2d 754, 60 Ga.App. 238.

69. Ga.—Tucker v. Du Bose, supra.

70. Ga.—Monk v. Jackson, 102 S.E. 382, 25 Ga.App. 25.

71. Ga.—Carter v. Vinson, 87 S.E. 692, 17 Ga.App. 469.

72. Ga.—Monk v. Jackson, 102 S.E. 382, 25 Ga.App. 25.—Carter v. Vinson, 87 S.E. 692, 17 Ga.App. 469.

73. Ga.—Carter v. Vinson, supra.

74. Ga.—Greenwood v. Stewart, 72 S.E.2d 539, 86 Ga.App. 764.—Breen v. Barfield, 56 S.E.2d 791, 80 Ga.App. 615.—Crews v. Robertson, 10 S.E.2d 114, 62 Ga.App. 855.—Brooks v. Hartsfield Co., 192 S.E. 459, 56 Ga.App. 184.

65 C.J. p 165 note 14.

75. Ga.—Phelan v. Vestner, 54 S.E. 897, 125 Ga. 825.

76. Ga.—Sparta Bank v. Butts, 57 S.E. 1061, 1 Ga.App. 771.

77. Ga.—North American Loan & Thrift Co. No. 2 v. Burel, 80 S.E. 2d 495, 89 Ga.App. 654.—O'Hara v. Youmans, 60 S.E.2d 841, 82 Ga.App. 164.—Turner v. Plottel, 166 S.E. 31, 45 Ga.App. 621.—Teal v.

Equitable Loan Co., 159 S.E. 904, 43 Ga.App. 673.

65 C.J. p 165 note 17.

**Criterion for determining sufficiency of petition in any bail trover proceeding is whether description in petition is sufficient to isolate things sued for from general class to which they belong.**—North American Loan & Thrift Co. No. 2 v. Burel, 80 S.E.2d 495, 89 Ga.App. 654.

#### Description held sufficient

Ga.—Head v. Pollard Lumber Sales, Inc., 77 S.E.2d 827, 88 Ga.App. 757.—Graham v. Raines, 64 S.E.2d 98, 83 Ga.App. 581.—Breen v. Barfield, 56 S.E.2d 791, 80 Ga.App. 615.—Harris v. Bennett Bros., 34 S.E.2d 615, 72 Ga.App. 589.—Sadler v. Harrison, 14 S.E.2d 485, 65 Ga.App. 3.—Brooks v. Hartsfield Co., 192 S.E. 459, 56 Ga.App. 184.—Hathcock v. Hathcock, 184 S.E. 785, 52 Ga.App. 805.—Seaboard Security Co. v. Goodson, 180 S.E. 858, 51 Ga.App. 512.—Turner v. Plottel, 166 S.E. 31, 45 Ga.App. 621.

65 C.J. p 165 note 17 [b].

#### Description held insufficient

Ga.—Seaboard Security Co. v. Goodson, 180 S.E. 858, 51 Ga.App. 512.

65 C.J. p 165 note 17 [c].

#### Effect of description

Description of deed in statutory form prescribed for actions for recovery of personality did not make gist of action one for realty or respecting title to land but description merely assisted in identifying paper or deed sought to be recovered.—Breen v. Barfield, 56 S.E.2d 791, 80 Ga.App. 615.

78. Ga.—McLennan v. Livingston, 83 S.E. 974, 108 Ga. 342.

prescribed as a measure of description,<sup>79</sup> the particularity of description necessarily varying in degree according to the nature of the articles to be described and the circumstances which may tend to render this identification perfect,<sup>80</sup> and very meager terms of identity may be sufficient.<sup>81</sup>

This identification may be accomplished by a particular description or by a general description coupled with such additional allegations as to the time and place or manner of the taking or conversion as plainly to isolate the property from the general class to which it belongs;<sup>82</sup> but if the description is altogether general and there is nothing in the description by which the property can be separated from the general mass of similar articles, the law is not met.<sup>83</sup> As a general rule, it may be said that the property involved is sufficiently described if from the description the property can be separated from that general mass of similar property by extrinsic evidence limited in its range by the description in the petition.<sup>84</sup> Where the purpose of the action is to recover damages for a conversion rather than the specific chattels themselves, it has been said that the same particularity of description is not essential as is requisite in detinue.<sup>85</sup> It is not essential to the sufficiency of the description that the description of the property as contained in the bill of sale be alleged.<sup>86</sup>

*Value.* Where various articles of different kinds are sued for, the value of each should be alleged,<sup>87</sup> or at least the aggregate value of all.<sup>88</sup> Where the petition describes specifically each article of property sought to be recovered, a statement of the aggregate value of all the articles is sufficient, without a statement of the value of each article.<sup>89</sup> In the absence of a special demurrer, a petition in trover

will not be dismissed for failure to allege the value of the article alleged to have been converted.<sup>90</sup>

#### d. Demand and Refusal

Unless a conversion is otherwise alleged, an allegation of demand and refusal is necessary.

Where the petition in an action of trover does not otherwise allege an actual or constructive conversion, an allegation of demand and refusal is necessary;<sup>91</sup> but where the petition alleges that defendant is in possession of the property sued for, and it does not appear that he lawfully acquired the possession, it is not necessary to allege that plaintiff before the suit was brought demanded possession of defendant, and that he refused to comply.<sup>92</sup> So, where defendant is in possession at the time suit is entered and does not disclaim title to the property, the petition need not allege a demand before suit brought.<sup>93</sup> A petition alleging that defendant refuses to deliver the described property to plaintiff has been held sufficient although it fails to allege a demand.<sup>94</sup> Failure to allege a demand is an amendable defect which may be cured by the verdict and judgment.<sup>95</sup>

#### e. Damages

The petition should contain proper allegations as to the damages sought and the amount thereof.

Plaintiff cannot recover an amount of damages larger than the amount he has claimed in his pleading,<sup>96</sup> although the evidence shows that a larger amount is due.<sup>97</sup> Where there is no specific ad damnum clause in the petition in an action of trover, and the only prayer is for process, the amount of damages asked for will be construed to be the alleged value of the property sued for.<sup>98</sup> If exemplary damages are sought, it is proper to allege facts authorizing the recovery of such damages.<sup>99</sup>

79. Ga.—Pepper v. James, 67 S.E. 218, 7 Ga.App. 518.

80. Ga.—Pepper v. James, *supra*.

81. Ga.—Charles v. Valdosta Foundry, etc., Co., 62 S.E. 493, 4 Ga.App. 733.  
65 C.J. p 166 note 21.

82. Ga.—Sadler v. Harrison, 14 S.E. 2d 485, 65 Ga.App. 3.—Seaboard Security Co. v. Goodson, 180 S.E. 858, 51 Ga.App. 512.—Mumford v. Stribling, 111 S.E. 224, 28 Ga.App. 292.—Sparks v. Fort, 108 S.E. 244, 27 Ga.App. 349.—Collins v. West, 63 S.E. 540, 5 Ga.App. 429.

83. Ga.—Crews v. Roberson, 10 S.E. 2d 114, 62 Ga.App. 855.

84. Ga.—Graham v. Raines, 64 S.E. 2d 98, 83 Ga.App. 581.

85. Ga.—Gatlin v. Matthews & Co., 85 S.E. 953, 16 Ga.App. 645.

86. Ga.—Brooks v. Hartsfield Co., 192 S.E. 459, 56 Ga.App. 184.

87. Ga.—Gatlin v. Ed. Matthews & Co., 85 S.E. 953, 16 Ga.App. 645.

88. Ga.—Gatlin v. Ed. Matthews & Co., *supra*.  
65 C.J. p 166 note 24.

89. Ga.—Seaboard Security Co. v. Goodson, 180 S.E. 858, 51 Ga.App. 512.—McCord v. Hill, 73 S.E. 559, 10 Ga.App. 254.

90. Ga.—Watson v. Tompkins Chevrolet Co., 63 S.E. 2d 681, 83 Ga.App. 440.—Gatlin v. Ed. Matthews & Co., 85 S.E. 953, 16 Ga.App. 645.

91. Ga.—Atlantic Coast Line R. Co. v. McRee, 76 S.E. 1057, 12 Ga.App. 137.

92. Ga.—Vaughn v. Wright, 78 S.E. 123, 139 Ga. 736, 45 L.R.A.N.S., 785, Ann.Cas.1914B 821.—Wallis v. Heliah, 1 S.E. 2d 773, 59 Ga.App. 633.

93. Ga.—Pearson v. Jones, 89 S.E. 536, 18 Ga.App. 448.

94. Ga.—Harris v. Bennett Bros., 34 S.E. 2d 615, 72 Ga.App. 589.

95. Ga.—Harris v. Bennett Bros., *supra*.

96. Conn.—Hannon v. Bramley, 32 A. 336, 65 Conn. 193.

97. Ga.—Pitts & Son Co. v. Bank of Shiloh, 92 S.E. 775, 20 Ga.App. 143.

98. Ga.—Southern Timber Co. v. Bland, 124 S.E. 359, 32 Ga.App. 553.

65 C.J. p 166 note 30.

99. Ga.—Louisville & N. R. Co. v. Earl, 77 S.E. 638, 139 Ga. 456.

*How defective allegations availed of.* Although a complaint may be defective in respect of its allegations as to damages, the defect cannot be reached by a general demurrer unless the pleading against which it is directed as a whole is fatally defective.<sup>1</sup>

### § 225. — Answer

The answer of the defendant should allege all facts necessary to his defense.

In his answer, defendant cannot both admit and deny the cause of action on which plaintiff relies to recover.<sup>2</sup> When plaintiff's petition is not verified, although an affidavit for bail process is filed, it is not necessary that defendant's answer be verified.<sup>3</sup> An amended answer in trover, alleging merely that defendant is ready and willing to surrender the property, and thereby tenders it to plaintiff, sets forth no defense, but, in view of other allegations that no demand was ever made on him for such property and that he has never refused to surrender it, and has not converted it, is defective only as omitting to disclaim title.<sup>4</sup> Defendant's answer may cure defects in plaintiff's petition.<sup>5</sup>

*Consent rule* prescribed by statute in actions of ejectment has no application to proceedings in bail trover.<sup>6</sup>

### § 226. — Amendment

Pleadings in bail trover may be amended at any stage of the proceeding.

The pleadings in an action of trover may be amended at any stage thereof.<sup>7</sup> An amendment to

the petition may be allowed to correct the names or descriptions of parties plaintiff<sup>8</sup> or defendant,<sup>9</sup> to describe the property more specifically,<sup>10</sup> to allege title or right of possession in plaintiff,<sup>11</sup> to allege the separate value of each article sued for where the original petition alleges merely the aggregate value,<sup>12</sup> or to reduce the amount alleged as the value of the property.<sup>13</sup> An amendment to the petition more clearly specifying the article sought will not be denied on the ground that the surety's liability will be affected where judgment in excess of the penal sum of the bond is not being sought and the principals of the surety are vigorously defending the suit.<sup>14</sup> A mere clerical error in describing the property may be cured by amendment if it is apparent from the two descriptions, that is, the description as shown by the original petition and the description as shown by the amendment, that the pleader had in mind the same property.<sup>15</sup> Amendments which are wholly unnecessary,<sup>16</sup> or which are insufficient to remedy the defect sought to be corrected,<sup>17</sup> should not be allowed. Where the action is brought by one having no interest in the property, he will not be permitted to amend so as to proceed in his name for the use of the owner of the property.<sup>18</sup>

The answer may be amended where defendant admits possession and claims title in himself to show the interest actually claimed;<sup>19</sup> and defendant's tender, after the first term, of the property sued for to limit plaintiff's recovery to such property may be made by amendment<sup>20</sup> if made prior to an elec-

1. Ga.—Elbert County v. Brown, 86 S.E. 651, 16 Ga.App. 834.

2. Ga.—Moore v. Bowen, 35 S.E.2d 924, 73 Ga.App. 192.

**Answer held not inconsistent**  
Ga.—Moore v. Bowen, supra.

3. Ga.—Little v. Lawrence, 193 S.E. 181, 56 Ga.App. 524.

4. Ga.—Securities Trust Co. v. Marshall, 118 S.E. 478, 30 Ga.App. 379.

5. Ga.—Coward v. Dees, 67 S.E. 705, 7 Ga.App. 601.

6. Ga.—Horn v. Towson, 135 S.E. 487, 163 Ga. 37.

7. Ga.—Pearson v. Jones, 89 S.E. 536, 18 Ga.App. 448.

**Amendment as matter of right**

On demurrer to petition in trover action, plaintiff could amend petition as a matter of right by striking out the name of plaintiff which had been signed thereto by an agent and by substituting the signature of plaintiff's attorney.—Lanier v. Lanier, 63 S.E.2d 131, 79 Ga.App. 131.

**Amendment held proper**

In trover, where defendant had

filed plea of tender after first term, amendment to petition striking allegations that proceeds of plaintiffs' temporary bonds were converted into stock, and alleging conversion of temporary into permanent bonds which defendant refused to turn over and had converted to its own use, and alleging that defendant was indebted to plaintiffs in sum representing value thereof, was not demurrable as stating new cause of action, nor because filed after plea of tender.—Hanner v. Trust Co. of Georgia, 176 S.E. 800, 49 Ga.App. 867.

8. Ga.—Maxwell v. Harrison, 8 Ga. 61, 52 Am.D. 385.

9. Ga.—Rome R. Co. v. Sullivan, 14 Ga. 277.

10. Ga.—King v. Wright, 77 Ga. 581.

65 C.J. p 156 note 36.

11. Ga.—Rollins v. Personal Finance Co., 175 S.E. 609, 49 Ga.App. 365.—Turner v. Plottel, 166 S.E. 31, 45 Ga.App. 621.

12. Ga.—Charles v. Valdosta Found-

dry, etc., Co., 62 S.E. 493, 4 Ga.App. 733.

13. Ga.—Griffith v. Wilmore, 167 S.E. 914, 46 Ga.App. 481.

14. Ga.—Witt v. Nesar, 89 S.E. 747, 145 Ga. 674.

15. Ga.—Forsyth v. South Side Motors, 54 S.E.2d 445, 79 Ga.App. 719.—Small v. Wilson, 93 S.E. 518, 20 Ga.App. 674.

**Refusal of amendment held error**

Ga.—Forsyth v. South Side Motors, 54 S.E.2d 445, 79 Ga.App. 719.

16. Ga.—Malcolm v. Dobbs, 56 S.E. 622, 127 Ga. 487.

17. Ga.—Carter v. Vinson, 87 S.E. 692, 17 Ga.App. 469.

18. Ga.—Mitchell v. Georgia, etc., R. Co., 36 S.E. 971, 111 Ga. 760, 51 L.R.A. 622.

19. Ga.—Ryan v. Richardson, 143 S.E. 781, 38 Ga.App. 274.

20. Ga.—Carpenter v. Bankers' Health & Life Ins. Co., 141 S.E. 327, 37 Ga.App. 642.  
65 C.J. p 160 note 40.



tion by plaintiff to take a money verdict.<sup>21</sup> An amendment seeking to set up a previous oral tender,<sup>22</sup> or one seeking to plead a present tender but making no present disclaimer of title,<sup>23</sup> is defective. An amendment of a plea or answer to set up tender of property and disclaimer of title has been held demurrable where filed after the first term.<sup>24</sup> An amendment to the answer which shows no cause of action against plaintiff or any defense to his demand is properly stricken.<sup>25</sup>

*Service.* Amendments to the petition need not be served on defendant.<sup>26</sup>

# § 227. — Issues, Proof, and Variance

- a. In general
- b. Conformity of pleadings and proof
- c. Variance

## a. In General

In an action of bail trover the sole issue presented is one of title.

The sole issue in the trial of an action of bail trover is that of title to the property in dispute<sup>27</sup> and not of debt,<sup>28</sup> and the fact that plaintiff may elect to take a money verdict in lieu of the specific personality claimed can in no event alter that issue.<sup>29</sup> A general denial of the allegations of the petition presents an issue as to the amount of plaintiff's damages,<sup>30</sup> and evidence tending to prove the amount of the damages is admissible thereunder.<sup>31</sup> It is unnecessary to prove conversion in an action

in trover, where defendant is in possession of the property<sup>32</sup> and in his answer denies the averments of plaintiff's title;<sup>33</sup> nor is it necessary that the possession be defendant's own, but it is sufficient if he holds it as agent of another.<sup>34</sup> This rule does not apply, however, where defendant's possession was lawfully acquired.<sup>35</sup> It is unnecessary to show possession by defendant at the time plaintiff filed suit if defendant had converted the property prior thereto.<sup>36</sup> Where plaintiff claims title, alleges possession as being in defendant, and defendant thereafter denies such possession, proof of defendant's possession is required.<sup>37</sup>

*Demand and refusal.* Evidence of a demand and refusal is necessary only as evidence of conversion,<sup>38</sup> and need not be proved where the conversion is otherwise shown,<sup>39</sup> or the necessity of proving a conversion is dispensed with,<sup>40</sup> as where defendant in his answer admits possession in himself and denies plaintiff's averments of title.<sup>41</sup>

*Value.* Although if plaintiff elects to take a money verdict proof of the value of the property is necessary, where a suit is brought for property and not for its value, but the value is alleged in the declaration, it need not be proved.<sup>42</sup>

## b. Conformity of Pleadings and Proof

As in other civil actions, there must be conformity between the pleadings and the evidence sought to be introduced.

In accordance with the rules pertaining to civil actions generally, evidence not within the issues

21. Ga.—Carpenter v. Bankers' Health, etc., Ins. Co., supra.  
65 C.J. p 166 note 41.

22. Ga.—Downs Motor Co. v. Colbert, 130 S.E. 592, 34 Ga.App. 542.

23. Ga.—Downs Motor Co. v. Colbert, supra.

24. Ga.—Hanner v. Trust Co. of Georgia, 176 S.E. 800, 49 Ga.App. 867.

25. Ga.—Holland v. Lawrence, 94 S.E. 561, 147 Ga. 479.

26. Ga.—Pearson v. Jones, 89 S.E. 536, 18 Ga.App. 448.

27. Ga.—Anderson v. Reese, 69 S.E. 2d 656, 86 Ga.App. 437—Meders v. Wirchball, 63 S.E.2d 674, 83 Ga.App. 408—Little v. Lawrence, 193 S.E. 181, 56 Ga.App. 524—Hudson v. Gunn, 92 S.E. 546, 20 Ga.App. 95.

28. C.J. p 166 note 45.  
Nature and purpose of bail trover generally see supra § 202.

29. Ga.—Citizens' Bank v. Mullis, 181 S.E. 44, 161 Ga. 371, answer to certified question conformed to 131 S.E. 923, 35 Ga.App. 12.  
65 C.J. p 166 note 44.

29. Ga.—Citizens' Bank v. Mullis, supra.  
65 C.J. p 166 note 48.

30. Ga.—Southern Timber Co. v. Bland, 124 S.E. 359, 32 Ga.App. 658.

31. Ga.—Southern Timber Co. v. Bland, supra.

32. Ga.—Mercier v. Mercier, 43 Ga. 323—James v. Newman, 35 S.E.2d 581, 73 Ga.App. 79—Dickerson v. Universal Credit Co., 170 S.E. 822, 47 Ga.App. 512.

33. Ga.—Altman v. Crown Finance Co., 58 S.E.2d 196, 81 Ga.App. 117—Dickerson v. Universal Credit Co., 170 S.E. 822, 47 Ga.App. 512.  
65 C.J. p 167 note 52.

34. Ga.—Coley v. Dortch, 77 S.E. 77, 139 Ga. 239.

35. Ga.—Wood v. Sanders, 73 S.E. 2d 55, 87 Ga.App. 84.

36. Ga.—Maddox v. Carithers, 47 S.E.2d 888, 77 Ga.App. 280.

37. Ga.—Commercial Bank of Crawford v. Pharr, 43 S.E.2d 439, 75 Ga.App. 364.

38. Ga.—Eubanks v. Hilliard, 76 S.E.2d 133, 88 Ga.App. 106—Stanley v. Ellis, 47 S.E.2d 776, 77 Ga.App. 12—James v. Newman, 35 S.E.2d 581, 73 Ga.App. 79—Council v. Nunn, 153 S.E. 234, 41 Ga.App. 407.  
65 C.J. p 167 note 55.

39. Ga.—Stanley v. Ellis, 47 S.E.2d 776, 77 Ga.App. 12—James v. Newman, 35 S.E.2d 581, 73 Ga.App. 79—Council v. Nunn, 153 S.E. 234, 41 Ga.App. 407—Shealy v. Wilder, 127 S.E. 805, 33 Ga.App. 745.  
65 C.J. p 104 note 68, p 167 note 56.

40. Ga.—Eubanks v. Hilliard, 76 S.E.2d 133, 88 Ga.App. 106—Ellis, McKinnon & Brown v. Hopps, 118 S.E. 583, 30 Ga.App. 453.

41. Ga.—Smith v. C. I. T. Corp., 197 S.E. 322, 186 Ga. 199—Eubanks v. Hilliard, 76 S.E.2d 133, 88 Ga.App. 106—Stanley v. Ellis, 47 S.E.2d 776, 77 Ga.App. 12—Culbreath v. Patton, 37 S.E.2d 719, 73 Ga.App. 667.  
65 C.J. p 167 note 58.

42. Ga.—White v. White, 71 Ga. 670—Young v. Durham, 84 S.E. 165, 15 Ga.App. 678.

joined in an action of trover is not admissible.<sup>43</sup> Thus, where the pleading does not raise the question, evidence that a bill of sale relied on to show title in plaintiff is without consideration is properly excluded;<sup>44</sup> and, if defendant has failed to file an issuable defense, he cannot contest plaintiff's title or right of possession<sup>45</sup> and is restricted in his cross-examination of witnesses to an inquiry as to the value of the property.<sup>46</sup> Defendant has the right to attack an instrument by which plaintiff seeks to prove title, and show that it is void, without filing a plea to that effect.<sup>47</sup>

Proof that title is in defendant is admissible under a plea denying title in plaintiff;<sup>48</sup> and where defendant denies ownership in plaintiffs, and alleges a sale by him to plaintiffs on conditions never fulfilled, and it appears that plaintiffs had received possession, and defendant had wrongfully retaken possession, it is proper to permit plaintiffs to show the tender of the cash payments and notes, and their right to the property, without any formal pleading of a tender.<sup>49</sup> Although no claim for hire is made in the petition, evidence of the value of the property therefor is admissible when, in defense to an action for the recovery of goods sold by plaintiff to defendant under a contract reserving title until payment of the purchase price, the latter set up payment of a part of such price and claimed that the former was not entitled to recover the property without returning the amount paid.<sup>50</sup>

### c. Variance

An immaterial variance between the pleading and proof in an action of bail trover is harmless.

In accordance with the rules applicable in civil actions generally, an immaterial variance between the pleadings and proof in an action of bail trover is harmless, so that, although plaintiff in his petition alleges that the property sued for is in defendant's possession, a verdict for plaintiff will not be set aside on the ground that plaintiff has failed to prove possession in him;<sup>51</sup> but plaintiff cannot recover where he relies on his title, and his evidence shows that a paramount outstanding title to the property is in a third person.<sup>52</sup> If plaintiff alleges a willful trespass his action does not fail if it develops that the trespass was inadvertent or in good faith.<sup>53</sup> Defendant's admission of possession of the property precludes any inquiry as to a variance between allegations and proof of description.<sup>54</sup>

### § 228. Presumptions and Burden of Proof

The plaintiff in an action of bail trover has the burden of showing that he is entitled to recover, and the defendant has the burden of proving affirmative matters asserted by him. Title is presumed to follow possession of the property.

In accordance with the general rule that the burden of proof is on the party who has the affirmative of the issue as determined by the pleadings, plaintiff in an action of bail trover has the burden of showing that he is entitled to recover,<sup>55</sup> as where both plaintiff and defendant claim title and defendant files no affirmative plea.<sup>56</sup> The burden is on plaintiff to show title in himself,<sup>57</sup> or right of possession,<sup>58</sup> and in some instances he must show both.<sup>59</sup> Title is presumed to follow possession of the property.<sup>60</sup> Where such fact is necessary to

43. Ga.—Bell v. G. Ober & Sons Co., 23 S.E. 7, 96 Ga. 214.

65 C.J. p. 96 note 53 [a].

44. Ga.—Butler v. Johnson, 87 S.E. 809, 17 Ga.App. 533.

45. Ga.—Bowman v. Winn, 85 S.E. 787, 14 Ga.App. 546.  
65 C.J. p. 167 note 64.

46. Ga.—Bowman v. Winn, 85 S.E. 787, 14 Ga.App. 546.

47. Ga.—Citizens' Bank of Valdosta v. Peoples, 74 S.E. 303, 10 Ga.App. 703.

65 C.J. p. 167 note 66.

48. Ga.—Bridges v. Shirling, 105 S.E. 862, 26 Ga.App. 279.

49. Ga.—Langdale v. J. H. Bowden Co., 77 S.E. 172, 189 Ga. 324.

50. Ga.—Commercial Pub. Co. v. Campbell Printing-Press, etc., Co., 36 S.E. 756, 111 Ga. 388.

51. Ga.—Woodbury v. Atlanta Dental Supply Co., 137 S.E. 302, 36 Ga.App. 548.

65 C.J. p. 167 note 72.

52. Ga.—Adams v. Morris, 151 S.E. 59, 40 Ga.App. 598—Reverly v. Wilson, 91 S.E. 515, 19 Ga.App. 393.

53. Ga.—Taylor v. Hammack, 7 S.E. 2d 200, 61 Ga.App. 640.

54. Ga.—Cannon v. Mikell, 24 S.E. 2d 807, 69 Ga.App. 38.

55. Ga.—Hawkins v. Davis, 71 S.E. 873, 136 Ga. 550.  
65 C.J. p. 168 note 75.

56. Ga.—Hawkins v. Davis, 71 S.E. 873, 136 Ga. 550.

57. Ga.—Powell v. Riddick, 80 S.E. 2d 70, 89 Ga.App. 505—Itaines v. Graham, 70 S.E. 2d 125, 85 Ga.App. 815—Anderson v. Reese, 69 S.E. 2d 556, 85 Ga.App. 437—Gostin v. Scott, 56 S.E. 2d 778, 80 Ga.App. 630—Bush v. Smith, 48 S.E. 2d 582, 77 Ga.App. 329—Moore v. Bowen, 35 S.E. 2d 924, 73 Ga.App. 192—Carter v. Hornsby, 23 S.E. 2d 95, 68 Ga.App. 424—Union Salt Co. v. Boone, 95 S.E. 319, 23 Ga.App. 10—Hudson v. Gunn, 92 S.E. 546, 30 Ga.App. 95—Birmingham Fertilizer Co. v. Dozier, 79 S.E. 927, 13 Ga.App. 759.

Ilzer Co. v. Dozier, 79 S.E. 927, 13 Ga.App. 759.

65 C.J. p. 102 note 51.

58. Ga.—Itaines v. Graham, 70 S.E. 2d 125, 85 Ga.App. 815—Bush v. Smith, 48 S.E. 2d 582, 77 Ga.App. 329—Carter v. Hornsby, 23 S.E. 2d 95, 68 Ga.App. 424—Birmingham Fertilizer Co. v. Dozier, 79 S.E. 927, 13 Ga.App. 759.

59. Ga.—Carter v. Hornsby, 23 S.E. 2d 95, 68 Ga.App. 424—Birmingham Fertilizer Co. v. Dozier, 79 S.E. 927, 13 Ga.App. 759.

#### Surrender of possession

Where plaintiff has by contract surrendered possession to another, he cannot recover possession by mere proof of title. He must also prove right of possession.—Carter v. Hornsby, 23 S.E. 2d 95, 68 Ga.App. 424—Birmingham Fertilizer Co. v. Dozier, 79 S.E. 927, 13 Ga.App. 759.

60. Ga.—Powell v. Riddick, 80 S.E. 2d 70, 89 Ga.App. 505—Hinchcliffe v. Pinson, 74 S.E. 2d 497, 87 Ga.

recovery, the burden is on plaintiff to show prior possession in himself<sup>61</sup> and a conversion by defendant.<sup>62</sup> It has been held that where the parties both claim title from a common grantor, it is unnecessary for plaintiff to show title in such common grantor.<sup>63</sup> When plaintiff elects to take a money judgment he must show the value of the property.<sup>64</sup>

The burden of showing the true value of the property shifts to defendant where, by his wrongful conversion, he has put it beyond the power of plaintiff to prove such value.<sup>65</sup> If defendant claims a reduction of the damages by reason of the fact that he has enhanced the value of the article innocently converted, the burden is on him to show the facts necessary to the establishment of this defense,<sup>66</sup> including proof as to the value that has been added to the property.<sup>67</sup> If he claims a reduction of damages by reason of his good faith in committing the conversion he has the burden of proving his good faith.<sup>68</sup> It will be presumed that a father, instead of his unmarried son who lives with him, is the owner of chattels on the premises.<sup>69</sup>

## § 229. Admissibility of Evidence

Any evidence properly admissible in a common-law action of detinue, replevin, or trover, is admissible in an action of bail trover.

The rules relating to admissibility of evidence in civil actions generally are applicable in an action of bail trover.<sup>70</sup> Since the statutory action of bail trover is available in any case in which replevin, detinue, or trover could be used at common law, as discussed supra § 202, all proof which would be admissible at common law in those actions is admissible under a petition in bail trover.<sup>71</sup> Accordingly, evidence is admissible to prove<sup>72</sup> or disprove<sup>73</sup> plaintiff's title; to prove title in defendant;<sup>74</sup> to prove<sup>75</sup> or disprove<sup>76</sup> defendant's possession of the particular property sued for; to prove that defendant has settled or accounted for the goods converted;<sup>77</sup> to disprove conversion by defendant;<sup>78</sup> to prove good faith of defendant;<sup>79</sup> to prove the value of the property;<sup>80</sup> to mitigate the

App. 526—Haas & Howell v. Godby, 125 S.E. 897, 33 Ga.App. 218.

61. Ga.—Southern Ry. Co. v. Strozler & Waters, 73 S.E. 42, 10 Ga.App. 157.  
65 C.J. p 103 note 60.

62. Ga.—Wood v. Sanders, 73 S.E. 2d 55, 87 Ga.App. 84—Itanes v. Graham, 70 S.E.2d 125, 85 Ga.App. 815—Hudson v. Gunn, 92 S.E. 546, 20 Ga.App. 95.

65 C.J. p 103 notes 61, 64.

### Act of dominion over property

Plaintiff must show some act of dominion over property by defendant inconsistent with ownership in plaintiff—Brewell v. Thompson, 191 S.E. 872, 55 Ga.App. 863.

63. Ga.—McEntyre v. Burns, 58 S.E. 2d 442, 81 Ga.App. 239.

64. Ga.—Odum v. Cotton States Fertilizer Co., 112 S.E. 470, 38 Ga.App. 46—Hudson v. Gunn, 92 S.E. 546, 20 Ga.App. 95.

65. Ga.—W. W. Gordon & Co. v. Atlantic Coast Line R. Co., 66 S.E. 988, 7 Ga.App. 354.

66. Ga.—Shealy v. Wilder, 127 S.E. 805, 33 Ga.App. 745—Miltown Lumber Co. v. Carter, 63 S.E. 270, 5 Ga.App. 344.

67. Ga.—Miltown Lumber Co. v. Carter, supra.

68. Ga.—Rowland v. Gardner, 53 S.E.2d 198, 79 Ga.App. 153.

65 C.J. p 104 note 77.

### Cutting timber

In action for value of timber cut and removed by trespasser from plaintiff's land, defendant had burden of showing good faith in committing

conversion as well as amount of deduction claimed by reason of expenditures of money and labor by defendant in manufacturing the timber into lumber, in order to be entitled to deduct expenditures from recovery by plaintiff of value of timber in the manufactured state—Itowland v. Gardner, supra—McCann Lumber Co. v. Hall, 49 S.E.2d 150, 77 Ga.App. 455—Taylor v. Hammack, 7 S.E.2d 200, 61 Ga.App. 640.  
65 C.J. p 104 note 77 [a].

69. Ga.—Reid v. Butt, 25 Ga. 28.

### 70. Evidence held admissible

Ga.—Hend v. Pollard Lumber Sales, Inc., 77 S.E.2d 827, 88 Ga.App. 767—Morris v. Courts, 1 S.E.2d 687, 59 Ga.App. 66b.

### Evidence held inadmissible

Ga.—Hamilton v. Pulaski County, 72 S.E.2d 187, 86 Ga.App. 705—McDay v. Long, 11 S.E.2d 395, 63 Ga.App. 421—Check v. Tripp, 105 S.E. 247, 25 Ga.App. 800.

### Execution of mortgage

It is error to admit in evidence a mortgage the execution of which has not been properly proved.—Pepper v. James, 67 S.E. 218, 7 Ga.App. 518—65 C.J. p 105 note 82.

71. Ga.—Breen v. Barnfield, 56 S.E. 2d 791, 80 Ga.App. 615.

72. Ga.—Everroad v. Dickson Planning Mill Co., 106 S.E. 193, 26 Ga.App. 329.

65 C.J. p 168 note 92.

73. Ga.—Jaques v. Stewart, 6 S.E. 81b, 81 Ga. 81.

65 C.J. p 168 note 93.

74. Ga.—Byrne v. Attaway, 44 Ga.

302—Lee v. Palmer, 44 S.E.2d 516, 75 Ga.App. 752.

75. Ga.—Burgsteiner v. Street-Overland Co., 117 S.E. 268, 30 Ga.App. 140.

65 C.J. p 168 note 95.

76. Ga.—Ayash v. Georgia Show Case Co., 87 S.E. 689, 17 Ga.App. 467.

65 C.J. p 168 note 96.

77. Ga.—Bell v. G. Ober, etc., Co., 23 S.E. 7, 96 Ga. 214.

78. Ga.—Brooke v. Lowe, 50 S.E. 146, 122 Ga. 358.

65 C.J. p 168 note 98.

79. Ga.—McCann Lumber Co. v. Hall, 49 S.E.2d 150, 77 Ga.App. 455.

80. Ga.—Cooper v. Brock, 48 S.E.2d 156, 77 Ga.App. 152—Cohn v. Riggsby, 5 S.E.2d 93, 60 Ga.App. 728—Henry Cotton Mills v. Shoenig, 127 S.E. 238, 33 Ga.App. 467.

### Manufactured value of property

(1) In an action in trover the manufactured value of the property converted may be material—McCann Lumber Co. v. Hall, 49 S.E.2d 150, 77 Ga.App. 455.

(2) Purchaser of timber who suffered default in vendor's trover action for value of the lumber or manufactured product could contest the amount of damages, but could not introduce evidence of value of trees while standing or of stumpage value.—Cooper v. Brock, 48 S.E.2d 156, 77 Ga.App. 152.

(3) In suit against lumber company and others for alleged conversion of timber from lands of plaintiffs, wherein there was evidence that

damages;<sup>81</sup> or to prove prosecution of defendants for the felony.<sup>82</sup> Evidence of indictment is inadmissible in the absence of a showing that the person indicted has been convicted.<sup>83</sup>

Where plaintiff sued in trover and defendant counterclaimed for certain property taken possession of by plaintiff, plaintiff can show valid liens on the property so as to reduce defendant's damages by the amount due on such liens.<sup>84</sup> Evidence which does not in some degree sustain or defeat one or more of the issues presented for decision is inadmissible.<sup>85</sup>

trees of kinds specified had been cut on plaintiffs' lands and hauled therefrom by defendants, and that the trees were carried to company's saw mill where the trees, inferentially, were manufactured into lumber, court properly admitted a witness to testify, over defendants' objection, as to price of lumber made from trees of a stated kind, though there was no direct evidence to show that trees of such kind cut from plaintiffs' lands had been manufactured into lumber.—McCann Lumber Co. v. Hall, 49 S.E.2d 150, 77 Ga.App. 455.

81. Ga.—Blagelov v. Young, 30 Ga. 121—Spiers v. Hubbard, 78 S.E. 136, 12 Ga.App. 676.

**Exclusion of evidence held erroneous**  
In suit against lumber company and others for alleged conversion of timber from plaintiffs' lands, exclusion of testimony of company's auditor, tending to sustain defendants' contention that timber taken from plaintiffs' lands was only a small part of the amount claimed by plaintiffs, was error, where company's log checkers testified that they had made an accurate check of logs in question, had entered the figures in their original record book, and that the book was delivered to company's auditor.—McCann Lumber Co. v. Hall, 49 S.E.2d 150, 77 Ga.App. 455.

82. Ga.—Broughton v. Winn, 60 Ga. 486.

65 C.J. p 168 note 2.

83. Ga.—Morris v. Courts, 1 S.E.2d 687, 59 Ga.App. 666.

84. Ga.—Spiers v. Hubbard, 78 S.E. 136, 12 Ga.App. 676.

85. Ga.—Jones v. Kimbrough, etc., Co., 74 S.E. 59, 137 Ga. 638.  
65 C.J. p 169 note 3.

86. Ga.—Ayash v. Georgia Show Case Co., 87 S.E. 689, 17 Ga.App. 467.

65 C.J. p 169 note 4.

**87. Evidence held sufficient**

(1) In general.—Lilly v. Citizens' Bank & Trust Co., 162 S.E. 639, 44 Ga.App. 653—65 C.J. p 169 note 6 [a], p 112 note 70 [a].

(2) As to value generally.—Hamilton v. Pulaski County, 72 S.E.2d 487,

86 Ga.App. 705—Carithers v. Maddox, 55 S.E.2d 775, 80 Ga.App. 230—Cohn v. Rignby, 5 S.E.2d 93, 60 Ga.App. 728—Stapleton v. Dismukes, 159 S.E. 768, 43 Ga.App. 611.

65 C.J. p 169 note 6 [a] (1).

(3) As to identity of property.—Starr v. Greenwood, 173 S.E. 245, 48 Ga.App. 535.

(4) To show conversion by defendant.—Hamilton v. Pulaski County, 72 S.E.2d 487, 86 Ga.App. 705—Sullivan v. Dixon, 34 S.E.2d 318, 72 Ga.App. 507—Hayes v. Grantham, 200 S.E. 517, 58 Ga.App. 859—Council v. Nunn, 153 S.E. 234, 41 Ga.App. 407.  
65 C.J. p 169 note 6 [a] (6).

(5) To sustain finding that there had been neither a conversion of property by defendants nor a demand by plaintiff for her property and refusal by defendants to deliver it.—Wood v. Sanders, 73 S.E.2d 55, 87 Ga.App. 84.

(6) To show a demand and refusal.—Culbreath v. Patton, 37 S.E.2d 719, 73 Ga.App. 667.

(7) To show defendant's acts were willful.—Porter v. Rucker, 76 S.E. 2d 842, 88 Ga.App. 486.

(8) To show title or right of possession in plaintiff.—Head v. Pollard Lumber Sales, Inc., 77 S.E.2d 827, 88 Ga.App. 757—Hincheliffe v. Pinson, 74 S.E.2d 497, 87 Ga.App. 526—Tossey v. Frost Motor Co., 65 S.E.2d 427, 84 Ga.App. 30—Meders v. Wierball, 63 S.E.2d 674, 83 Ga.App. 408—Carter v. Hornsby, 23 S.E.2d 95, 68 Ga.App. 424—Farmers' Bank of Pelham v. Powell, 113 S.E. 818, 29 Ga.App. 100—65 C.J. p 169 note 6 [a] (7), p 113 note 72 [a].

(9) To show title to property in a third person.—Proves v. Todd, 79 S.E.2d 346, 89 Ga.App. 308.

(10) To show that plaintiff had no title or right of possession in the property.—Italnes v. Graham, 70 S.E.2d 125, 85 Ga.App. 815—65 C.J. p 169 note 6 [a] (9).

(11) To support a verdict for plaintiff.—Willis Lumber Co. v. Roddenberry, 77 S.E.2d 110, 88 Ga.App. 352—Porter v. Rucker, 76 S.E.2d 842, 88 Ga.App. 486—Banks v. Kilday, 76

A written contract between the parties is inadmissible for any purpose other than to show title in plaintiff.<sup>86</sup>

## § 230. Weight and Sufficiency of Evidence

The rules of evidence in civil actions generally are controlling as to the weight and sufficiency of evidence in actions of bail trover.

The rules relating to the weight and sufficiency of evidence in civil actions generally are applicable in actions of bail trover.<sup>87</sup> Any evidence of an act of

S.E.2d 642, 88 Ga.App. 307—Bedgood v. Karp's U-Drive-It Co., 55 S.E.2d 654, 80 Ga.App. 216—Rowland v. Gardner, 53 S.E.2d 198, 79 Ga.App. 158—Sapp v. Howe, 52 S.E.2d 571, 79 Ga.App. 1—Commercial Auto Loan Corp. v. Baker, 37 S.E.2d 636, 73 Ga.App. 534—Adams v. Webb, 32 S.E.2d 922, 72 Ga.App. 66—Durdin v. Durdin, 197 S.E. 493, 58 Ga.App. 46—Earle v. Barrett, 180 S.E. 855, 51 Ga.App. 514—Cauthorn Motor Co. v. Wheeler, 176 S.E. 683, 49 Ga.App. 582—Dempsey v. Browning, 171 S.E. 839, 48 Ga.App. 96—Hart v. Light, 169 S.E. 703, 47 Ga.App. 169.  
65 C.J. p 169 note 6 [a] (12).

(12) To support a verdict for defendant.—Young v. Kendrick, 80 S.E.2d 201, 89 Ga.App. 547—Anderson v. Reese, 69 S.E.2d 656, 85 Ga.App. 437—Commercial Bank of Crawford v. Pharr, 43 S.E.2d 439, 75 Ga.App. 364—Brinsky v. Cunningham, 34 S.E.2d 458, 72 Ga.App. 522—Kinney v. Connell, 17 S.E.2d 926, 66 Ga.App. 284—Cooley v. Ilyrant, 193 S.E. 485, 56 Ga.App. 665—Wilkinson v. Edmondson, 176 S.E. 647, 49 Ga.App. 757—65 C.J. p 169 note 6 [a] (13), p 112 note 58 [d].

(13) To sustain allowance of attorney's fee on account of bad faith of the defendant.—Sapp v. Howe, 52 S.E.2d 571, 79 Ga.App. 1.

**Evidence held insufficient**

(1) In general.—Bontenreiter v. Fulton Nat. Bank, 6 S.E.2d 148, 61 Ga.App. 521—65 C.J. p 169 note 6 [b].

(2) As to identity of property.—Air Reduction Sales Co. v. McDonald, 44 S.E.2d 67, 75 Ga.App. 590—65 C.J. p 169 note 6 [b] (1).

(3) To show title and right of possession.—Padgett v. Collins, 81 S.E.2d 309, 89 Ga.App. 769—Bush v. Smith, 48 S.E.2d 582, 77 Ga.App. 329—Worthy v. Williams, 12 S.E.2d 139, 64 Ga.App. 47—McDay v. Long, 11 S.E.2d 395, 63 Ga.App. 421—Corker v. Quick, 2 S.E.2d 157, 59 Ga.App. 649—Hill v. Stevens Warehouse Co., 113 S.E. 813, 29 Ga.App. 110—65 C.J. p 169 note 6 [b] (7).

(4) To show title in defendant.—Powell v. Riddick, 80 S.E.2d 70, 89

ownership or control wrongfully exercised over plaintiff's property will suffice as proof of a conversion.<sup>88</sup> Promissory notes are evidence of their own value in an action to recover them.<sup>89</sup>

*Prima facie case.* Proof of title to the property in plaintiff, possession in defendant, a demand for possession and a refusal thereof, prior to the filing of the suit, makes a prima facie case for recovery,<sup>90</sup> although it does not appear that defendant was in possession at the time the suit was filed.<sup>91</sup> Plaintiff establishes a prima facie case by proving a bill of sale from one in possession claiming title,<sup>92</sup> which defendant may rebut by showing his possession subsequent to that of plaintiff's vendor.<sup>93</sup> It has been said that plaintiff makes out a prima facie case in a trover suit by showing proof of his peaceable possession of the property sued for and the wrongful interference therewith by defendant, where defendant is shown neither to have been wrongfully deprived of the property nor to be the true owner thereof.<sup>94</sup> The value of the property as set out in plaintiff's affidavit for bail<sup>95</sup> or the agreed price, as stated in a contract of sale between the parties, of the property in suit,<sup>96</sup> is prima facie evidence of the actual value thereof; but the bond given by defendant is not,<sup>97</sup> and, as against one not

a party to the contract, the amount stated in a contract of purchase is of no such evidentiary value.<sup>98</sup>

### § 231. Trial

Particular matters relating to the trial of an action of bail trover are discussed infra §§ 231-235.

Examine Pocket Parts for later cases.

### § 232. — Questions of Law and Fact

- a. In general
- b. Taking case from jury

#### a. In General

In actions of bail trover, as in other civil actions, questions of fact are for the jury.

In an action of bail trover, as in other civil actions, as discussed in Trial § 203 et seq, questions of fact are for the jury,<sup>99</sup> and issues of fact must be submitted to them.<sup>1</sup> Thus, on conflicting evidence it is for the jury to determine whether plaintiff had title or right of possession;<sup>2</sup> whether the facts adduced in evidence establish an unlawful conversion;<sup>3</sup> the value of the property allegedly converted;<sup>4</sup> or of plaintiff's equity therein;<sup>5</sup> whether defendant's possession was in good faith;<sup>6</sup> and the credibility of witnesses.<sup>7</sup>

Ga.App. 505.—Southern Timber Co. v. Bland, 124 S.E. 359, 32 Ga.App. 658

(5) To show conversion—Goodwin v. Anderson, 12 S.E.2d 444, 64 Ga.App. 99.

(6) To demand finding that plaintiff's title was divested or that he was estopped to assert his title—Meders v. Wirthhall, 63 S.E.2d 674, 83 Ga.App. 408.

(7) To support verdict for plaintiff—Moore v. Bowen, 35 S.E.2d 924, 73 Ga.App. 192—61 C.J. p 169 note 6 [b] (8).

88. Ga.—Mercher v. Mercier, 43 Ga. 323—Maxwell v. Harrison, 8 Ga. 61, 52 Am D 385.

89. Ga.—Caswell v. Vanderbilt, 132 S.E. 123, 35 Ga.App. 34. 65 C.J. p 169 note 8

90. Ga.—Chambliss v. Livingston, 51 S.E. 314, 123 Ga. 457—Durdin v. Durden, 197 S.E. 493, 58 Ga.App. 46.

65 C.J. p 112 note 68.

#### On election to take property

Plaintiff in a trover action, having elected to take a verdict for property, waiving verdict for value and hire thereof, by offering evidence tending to prove title, conversion of property by defendant, demand therefor, and defendant's refusal to deliver

before institution of suit, makes out a prima facie case—Commercial Bank of Crawford v. Pharr, 43 S.E. 2d 439, 75 Ga.App. 364

91. Ga.—Chambliss v. Livingston, 51 S.E. 314, 123 Ga. 457.

92. Ga.—Johnson v. Masters, 122 S.E. 724, 32 Ga.App. 60—Farmers' Bank v. Powell, 113 S.E. 818, 29 Ga.App. 100.

93. Ga.—Farmers' Bank v. Powell, supra.

94. Ga.—Powell v. Riddick, 80 S.E. 2d 70, 89 Ga.App. 505

95. Ga.—Smith v. Adams, 5 S.E. 242, 79 Ga. 812—Trammell v. Georgia Engineering, etc., Co., 69 S.E. 921, 8 Ga.App. 501.

96. Ga.—Wilson v. Owen, 91 S.E. 233, 19 Ga.App. 159. 65 C.J. p 168 note 86.

97. Ga.—Downs v. Berryman, 100 S.E. 226, 24 Ga.App. 170.

98. Ga.—Gamble v. Shingler, 96 S.E. 705, 22 Ga.App. 608. 65 C.J. p 168 note 88.

99. Ga.—Holcombe v. Richmond & D. R. Co., 3 S.E. 755, 78 Ga. 776—Rowland v. Gardner, 53 S.E.2d 198, 79 Ga.App. 153.

1. Ga.—Grier v. North, etc., R. Co., 47 S.E. 898, 120 Ga. 353. 65 C.J. p 170 note 31.

2. Ga.—Knox v. Cook, 46 S.E. 968, 119 Ga. 689—Holcombe v. Richmond & D. R. Co., 3 S.E. 755, 78 Ga. 776—Chalker v. Beasley, 34 S.E.2d 658, 72 Ga.App. 662.

Evidence held sufficient to raise jury question

Ga.—Wallis v. Bellah, 1 S.E.2d 773, 59 Ga.App. 633.

3. Ga.—Funsten v. Muse, 72 S.E.2d 501, 86 Ga.App. 759—Sullivan v. Dixon, 34 S.E.2d 318, 72 Ga.App. 507—O'Neill v. Self, 161 S.E. 277, 44 Ga.App. 322.

4. Ga.—Watson v. Tompkins Chevrolet Co., 63 S.E.2d 681, 83 Ga.App. 410—Bedgood v. Karp's U-Drive-It Co., 55 S.E.2d 654, 80 Ga.App. 216—Nottingham v. West, 27 S.E.2d 44, 69 Ga.App. 876—Coward v. McDaris, 24 S.E.2d 68, 68 Ga.App. 734—Caswell v. Vanderbilt, 132 S.E. 123, 35 Ga.App. 34—Reynolds Banking Co. v. McGuffin, 124 S.E. 807, 32 Ga.App. 765—Johnson v. Stevens, 91 S.E. 220, 19 Ga.App. 192.

5. Ga.—Cohn v. Riggsby, 5 S.E.2d 93, 60 Ga.App. 728.

6. Ga.—Gostin v. Scott, 56 S.E.2d 778, 80 Ga.App. 630.

7. Ga.—Hinchcliffe v. Pinson, 74 S.E.2d 497, 87 Ga.App. 528.

**b. Taking Case from Jury**

- (1) In general
- (2) Dismissal or nonsuit
- (3) Direction of verdict

**(1) In General**

In an action of bail trover if there is an entire absence of proof of some fact indispensable to a recovery the court may and should withdraw the case from the consideration of the jury.

In an action of bail trover, as in other civil actions, discussed in Trial § 203 et seq, if there is an entire absence of proof of some fact indispensable to a recovery the court may and should withdraw the case from the consideration of the jury.<sup>8</sup> In view of the fact that issues of fact must be submitted to the jury, as discussed supra subdivision a of this section, the court should not take the case away from the jury where the evidence is such as to raise issues of fact.<sup>9</sup>

**(2) Dismissal or Nonsuit**

In an action of bail trover, a nonsuit may be granted where the plaintiff fails to establish a material allegation of his petition. A nonsuit in bail trover, where the plaintiff has obtained possession of the property, does not conclude him on the merits.

A nonsuit in an action of bail trover will be justified by plaintiff's failure to offer evidence tending to prove a material allegation of his petition<sup>10</sup> or where his evidence disproves a material allegation,<sup>11</sup> but a nonsuit will not be justified by a failure to prove a matter immaterial to the case.<sup>12</sup> A nonsuit is properly granted in the absence of proof of value where plaintiff elects to take a money verdict;<sup>13</sup> where there is no evidence to establish plaintiff's title to the personal property sued for<sup>14</sup> or to establish actual conversion or that defendant was in possession of the property at the time the action was

brought;<sup>15</sup> or where there is no proof of a demand or an actual conversion before suit brought;<sup>16</sup> and the case may be dismissed for want of prosecution.<sup>17</sup>

It is not ground for a nonsuit, however, that the value of the property has not been shown before an election to recover damages instead of the identical property, where it does not appear that it is beyond the power of defendant to restore the property;<sup>18</sup> that plaintiff has not announced his election of the form of verdict which he desires when his evidence closes;<sup>19</sup> especially where, on defendant's failure to give bond in a bail proceeding, plaintiff gave bond, took possession of the property, and sold some of it, so that he could not have elected to take a money verdict;<sup>20</sup> that a defense was improperly allowed interposed by amendment to the plea;<sup>21</sup> or, as to other defendants, that plaintiff has failed to prove a conversion against an unnecessary party defendant.<sup>22</sup> The fact that the affidavit to hold to bail is defective and not amended is not cause for dismissing the petition.<sup>23</sup> Evidence of defendant's possession when the action was brought may be inferential<sup>24</sup> and need not be strong to prevent a nonsuit.<sup>25</sup>

A judgment for nonsuit should not be awarded where the evidence is sufficient to sustain a verdict for plaintiff,<sup>26</sup> where there is some evidence on which a verdict for plaintiff might be based,<sup>27</sup> where there is sufficient evidence of a conversion to raise a question for the jury,<sup>28</sup> where the evidence as to ownership is conflicting<sup>29</sup> or where the evidence is sufficient to sustain allegations of fraud against defendant.<sup>30</sup>

*Dismissal of second suit.* Where defendant in a bail trover action in a city court obtained an injunction in the superior court restraining plaintiff from

8. Ga.—Brooke v. Lowe, 60 S.E. 146, 122 Ga. 358—Allen v. Fader, 86 S.E. 643, 17 Ga.App. 290.

9. Ga.—Haney, Chandler & Co. v. J. H. Johnson & Co., 120 S.E. 675, 31 Ga.App. 316.

10. Ga.—Brooke v. Lowe, 60 S.E. 146, 122 Ga. 358.

65 C.J. p 169 note 10, p 120 note 90.

11. Ga.—Adams v. Morris, 151 S.E. 59, 40 Ga.App. 558.

65 C.J. p 169 note 11.

12. Ga.—Scarboro v. Goethe, 45 S.E. 413, 118 Ga. 543—Howard v. Snelling, 28 Ga. 469.

13. Ga.—Brooke v. Lowe, 60 S.E. 146, 122 Ga. 358—Downs v. Berryman, 100 S.E. 226, 24 Ga.App. 170.

14. Ga.—Citizens' Trust Co. v. Butler, 103 S.E. 852, 25 Ga.App. 623—E.

E. Forbes Piano Co. v. Oliver, 74 S.E. 713, 11 Ga.App. 65.

15. Ga.—Allen v. Fader, 86 S.E. 643, 17 Ga.App. 290.

16. Ga.—Haston v. Rabun, 41 S.E. 566, 115 Ga. 378.

17. Ga.—Calloway v. McElmurray, 17 S.E. 163, 91 Ga. 166.

18. Ga.—W. W. Gordon & Co. v. Atlantic Coast Line R. Co., 66 S.E. 988, 7 Ga.App. 354.

19. Ga.—Mallory Bros. Mach. Co. v. Wood, 66 S.E. 785, 133 Ga. 615.

20. Ga.—Mallory Bros. Mach. Co. v. Wood, supra.

21. Ga.—Downs Motor Co. v. Colbert, 130 S.E. 592, 34 Ga.App. 542.

22. Ga.—Howard v. Snelling, 28 Ga. 469.

23. Ga.—Harrell v. Attaway, 89 S.E. 347, 18 Ga.App. 269.

24. Ga.—Securities Trust Co. v. Marshall, 118 S.E. 478, 30 Ga.App. 379.

25. Ga.—Securities Trust Co. v. Marshall, supra.

26. Ga.—James v. Newman, 35 S.E. 2d 581, 73 Ga.App. 79—Small v. Wilson, 93 S.E. 518, 20 Ga.App. 674.

27. Ga.—Camp v. Turner, 91 S.E. 910, 19 Ga.App. 452.

28. Ga.—Howard v. Senoia Duck Mills, 77 S.E. 572, 139 Ga. 461.

29. Ga.—Holcombe v. Richmond, etc., R. Co., 3 S.E. 765, 78 Ga. 776.

30. Ga.—Yeomans v. Jones, 188 S.E. 62, 54 Ga.App. 330.

prosecuting his action, and plaintiff dismissed his action and thereafter commenced an identical action in the city court, dismissal of the second action on the theory that it violated the injunction granted on the ground that defendant's defenses were shut off in the original action has been held improper, since by dismissal of the first action and the filing of the identical suit all defenses of defendant were available to him.<sup>31</sup>

**Effect.** The granting of a nonsuit in an action of bail trover, where plaintiff has obtained possession of the property, does not conclude him on the merits of the action<sup>32</sup> even though defendant obtains a money judgment on the bond in lieu of a judgment of restitution;<sup>33</sup> but dismissal by plaintiff estops him from litigating any further in the same suit<sup>34</sup> and he cannot take advantage of any of the defenses set up by defendant in his answer.<sup>35</sup>

### (3) Direction of Verdict

Where, in an action of bail trover, only one verdict can be returned under the law and the evidence, it is proper to direct a verdict.

Only where but one verdict can be returned under the law and the evidence is it permissible to direct a verdict.<sup>36</sup> A verdict may be directed for plaintiff where there is no conflict in the evidence, and the evidence with all reasonable deductions therefrom demands a verdict for plaintiff.<sup>37</sup> A verdict is

properly directed for defendant where the evidence offered by plaintiff to show title or right of possession is inconclusive<sup>38</sup> or hearsay and of no probative value,<sup>39</sup> or where the evidence demands a finding that plaintiff has neither title to the chattel nor the right to its possession.<sup>40</sup> Issues of fact, however, must be submitted to the jury, as discussed supra subdivision a of this section, and the court should not direct a verdict where the evidence is such as to raise issues for the jury,<sup>41</sup> where the verdict is not the only possible result which could be reached by the jury,<sup>42</sup> or where it is not authorized by the pleading and evidence.<sup>43</sup> Where it is essential to a recovery that a conversion prior to the bringing of the action be proved, a verdict should not be directed for plaintiff where the evidence does not show with certainty that there was a conversion.<sup>44</sup> Although there are conflicts in the testimony, if such conflicts are not material a verdict may properly be directed.<sup>45</sup>

### § 233. — Instructions

The court, in an action of bail trover, must properly instruct the jury with respect to the law governing the case.

The rules relating to instructions to the jury in civil cases generally govern and control the instructions in actions of bail trover.<sup>46</sup> Accordingly, they must conform to the issues,<sup>47</sup> must not invade the

31. Ga.—Primm v. Mathis, 7 S.E.2d 295, 61 Ga.App. 679.

32. Ga.—Tinsley v. Block, 25 S.E. 429, 93 Ga. 243.

33. Ga.—Tinsley v. Block, supra.

34. Ga.—Trammell v. Georgia Engineering & Construction Co., 69 S.E. 921, 8 Ga.App. 501.

35. Ga.—Trammell v. Georgia Engineering & Construction Co., supra.

36. Ga.—Elder v. Woodruff Hardware & Mfg. Co., 85 S.E. 268, 16 Ga.App. 255.

37. Ga.—W. E. Austin Co. v. T. L. Smith Co., 75 S.E. 1048, 138 Ga. 651, Ann Cas 1913E 1042—Taylor v. Gill Equipment Co., 73 S.E.2d 755, 87 Ga.App. 309.

**Verdict held properly directed.**  
Ga.—Broadway Apartment Co. v. Barnett, 118 S.E. 501, 30 Ga.App. 562.

#### On default

Where purchaser of timber suffered default in trover action by vendor, and evidence of value of manufactured lumber was uncontradicted and supported by purchaser's admission, court properly directed verdict for vendor for amount of value of lumber at time of filing suit.—Cooper v. Brock, 48 S.E.2d 156, 77 Ga.App. 152.

38. Ga.—Groover v. Savannah Bank & Trust Co., 3 S.E.2d 745, 60 Ga.App. 357—Hills v. Stevens Warehouse Co., 113 S.E. 813, 29 Ga.App. 110.

#### One of several defendants

When plaintiff in trover action fails to prove as to one of the defendants either conversion of the property or possession at the time suit is brought, case fails as to such defendant and a verdict is demanded in his favor.—Commercial Bank of Crawford v. Pharr, 43 S.E.2d 439, 75 Ga.App. 364.

39. Ga.—Great Union Fire & Marine Ins. Co. v. Cox, 125 S.E. 770, 33 Ga.App. 171.

40. Ga.—Pickard v. Garrett, 82 S.E. 251, 141 Ga. 831.  
65 C.J. p 170 note 33.

41. Ga.—Taylor v. Hammack, 7 S.E.2d 200, 61 Ga.App. 640.  
65 C.J. p 170 note 35.

**Direction of verdict held improper.**  
Ga.—Smart v. Sunday, 178 S.E. 411, 50 Ga.App. 458—Reynolds Banking Co. v. McGuffin, 124 S.E. 507, 32 Ga.App. 765.

42. Ga.—Thomasville Live Stock Co. v. Battle, 89 S.E. 485, 145 Ga. 478.  
65 C.J. p 170 note 36.

43. Ga.—Real Estate Bank & Trust Co. v. Baldwin Locomotive Works, 90 S.E. 49, 145 Ga. 831.  
65 C.J. p 170 note 37.

44. Ga.—Wallace v. Mallory, 43 S.E. 424, 117 Ga. 161.

45. Ga.—Burgsteiner v. Street-Overland Co., 117 S.E. 268, 30 Ga.App. 140.  
65 C.J. p 170 note 38.

#### 46. Instructions held not erroneous and properly given

Ga.—Mimor v. Fincher, 58 S.E.2d 389, 206 Ga. 721—Hamilton v. Pulaski County, 72 S.E.2d 487, 86 Ga.App. 705—Anderson v. Reese, 69 S.E.2d 656, 85 Ga.App. 437—Graham v. Frazier, 66 S.E.2d 77, 84 Ga.App. 458—South Side Motors v. Forsyth, 59 S.E.2d 29, 81 Ga.App. 374—Sapp v. Howe, 52 S.E.2d 571, 79 Ga.App. 1—Reaver v. Magid, 192 S.E. 497, 56 Ga.App. 272—Iriscoe v. Pool, 177 S.E. 346, 50 Ga.App. 147.

#### Instructions held erroneous or properly refused

Ga.—Ayash v. Georgia Show-Case Co., 87 S.E. 689, 17 Ga.App. 467.  
65 C.J. p 170 note 40.

47. Ga.—Mallory v. Moon, 61 S.E. 401, 130 Ga. 591.  
65 C.J. p 170 note 41.

province of the jury,<sup>48</sup> must not be misleading<sup>49</sup> or confusing to the jury,<sup>50</sup> must be adapted to the evidence,<sup>51</sup> and must not express an opinion as to a point on which there is an issue of fact.<sup>52</sup> The instructions should not ignore or exclude from the consideration of the jury competent evidence in the case,<sup>53</sup> or issues which there is evidence tending to support.<sup>54</sup>

It is the duty of the court to instruct the jury to render the verdict which plaintiff has elected if they find in his favor.<sup>55</sup> Proper instructions should be given as to what plaintiff may recover on his election to take a verdict for damages alone.<sup>56</sup> An instruction which gives plaintiff a right of election as to the measure of damages where defendant asks for, and is entitled to, affirmative relief is erroneous,<sup>57</sup> as is one requiring that, before plaintiff could recover, it must have appeared that defendant was in possession of the property at the time of the filing of the suit.<sup>58</sup> Where the pleadings and evidence indisputably establish a conversion unless defendant has title, there is no prejudicial error in failing to charge the law of conversion.<sup>59</sup>

#### Instructions held conforming to issues

Ga.—Lovett v. Rowland, 157 S.E. 889, 43 Ga.App. 53.  
65 C.J. p 170 note 41 [a].

48. Ga.—Flint River Motor Car Co. v. Farrar, 172 S.E. 97, 48 Ga.App. 150.

49. Ga.—Jones v. Kimbrough, Dickers & Co., 74 S.E. 59, 137 Ga. 638  
65 C.J. p 170 note 42.

#### Instructions held not misleading

Ga.—Wilkerson v. Edmondson, 176 S.E. 647, 49 Ga.App. 757.  
65 C.J. p 170 note 42 [a].

50. Ga.—Napier v. Bigham, 113 S.E. 51, 28 Ga.App. 796.

51. Ga.—Knox v. Cook, 46 S.E. 868, 119 Ga. 689—Flint River Motor Car Co. v. Farrar, 172 S.E. 97, 48 Ga.App. 150—Hawkins v. Smith, 141 S.E. 917, 37 Ga.App. 781.

#### Instructions held supported by evidence

Ga.—Beaver v. Magid, 192 S.E. 497, 56 Ga.App. 272.

52. Ga.—Waynesboro Planing Mill v. Perkins Mfg. Co., 134 S.E. 831, 35 Ga.App. 767.  
65 C.J. p 171 note 44.

53. Ga.—Stipe v. Willingham, 143 S.E. 614, 38 Ga.App. 244.

54. Ga.—Wilcox v. Citizens' Banking Co., 120 S.E. 433, 31 Ga.App. 202.

#### Limitation of rule

In trover to recover notes from defendant, executed by him and which he claimed rightfully to possess as being paid, where the pleadings and evidence tended without dispute to

establish a conversion unless the notes were paid, it was not prejudicial error to fail to charge the law of conversion, or to limit the jury to a consideration of the only essential issue in dispute—Wilcox v. Citizens' Banking Co., supra.

55. Ga.—Drury v. Holmes, 89 S.E. 487, 145 Ga. 558—Avery v. Sorrell, 89 S.E. 194, 145 Ga. 329—Mallory v. Moon, 61 S.E. 401, 130 Ga. 591—Holmes v. Langston, 36 S.E. 251, 110 Ga. 561.

56. Ga.—White v. Dalton, 191 S.E. 386, 55 Ga.App. 768.

#### Instructions held proper

Ga.—Sapp v. Howe, 52 S.E.2d 571, 79 Ga.App. 1—White v. Dalton, 191 S.E. 386, 55 Ga.App. 768.

#### Instructions properly refused

Ga.—Wilson-Weesner-Wilkinson Co. v. Collier, 8 S.E.2d 171, 62 Ga.App. 457.

57. Ga.—Malsby v. Young, 30 S.E. 854, 104 Ga. 205.

58. Ga.—Citizens' Bank of Valdosta v. Peoples, 74 S.E. 303, 10 Ga.App. 703.

59. Ga.—Wilcox v. Citizens' Banking Co., 120 S.E. 433, 31 Ga.App. 202.

60. Ga.—Burch v. Pedigo, 39 S.E. 493, 113 Ga. 1160, 54 L.R.A. 808.

61. Ga.—Clarke Bros. v. Stowe, 64 S.E. 786, 132 Ga. 621.

62. Ga.—Smith v. State Farm Mut. Auto. Ins. Co., 79 S.E.2d 7, 89 Ga.App. 292—Beaver v. Magid, 192 S.E. 497, 56 Ga.App. 272.  
65 C.J. p 171 note 51.

## § 234. — Verdict and Findings in General

- a. In general
- b. Responsiveness

### a. In General

The verdict ordinarily to be rendered in an action of bail trover is either for the plaintiff or the defendant, and is governed by the general rules applicable in civil actions.

The verdict ordinarily to be rendered in an action of bail trover is either for plaintiff or for defendant.<sup>60</sup> It must not be vague or uncertain,<sup>61</sup> and a verdict for a stated sum as principal and a stated sum as interest is too uncertain to be upheld;<sup>62</sup> but a verdict is not necessarily incompetent to support a judgment for a specific amount of money merely because in finding the right to a money recovery it fails to find in any specific amount.<sup>63</sup> A verdict which, although not expressed in a gross sum, indicates the intention of the jury, so that it is a mere matter of calculation to ascertain the gross sum which the jury intended to find, is sufficient.<sup>64</sup> The verdict must be supported by the evidence.<sup>65</sup> If a verdict is rendered for plaintiff,

### Lump sum verdict

(1) Where plaintiff in trover elects to take a money verdict, proper practice is for jury to return a verdict in a lump sum, including value of the property and interest, or value of property and hire—Douglas Motor Co. v. Watson, 22 S.E.2d 766, 68 Ga.App. 336—Keel v. Attaway, 15 S.E.2d 562, 65 Ga.App. 172—Stephens v. Wilson, 197 S.E. 350, 58 Ga.App. 24—Beaver v. Magid, 192 S.E. 497, 56 Ga.App. 272—White v. Dalton, 191 S.E. 386, 55 Ga.App. 768—65 C.J. p 171 note 51 [b].

(2) In trover suit where plaintiff elected to take a money verdict, verdict for principal and interest separately instead of for a lump sum, was error, and judgment would be reversed, unless interest should be written off by plaintiff at time of the remittitur—Adams v. Webb, 32 S.E.2d 922, 72 Ga.App. 66.

63. Ga.—Pound v. Baldwin, 131 S.E. 291, 34 Ga.App. 810.

64. Ga.—O'Neil Mfg. Co. v. Woodley, 44 S.E. 380, 118 Ga. 114.  
65 C.J. p 171 note 53.

65. Ga.—Bridges v. Griffin, 93 S.E. 170, 20 Ga.App. 598.

**Verdict held supported by evidence**  
Ga.—Bridges v. Griffin, 93 S.E. 170, 20 Ga.App. 598.

**Verdict held unsupported by evidence**  
Ga.—Sammons v. Copeland, 69 S.E. 2d 617, 85 Ga.App. 318—Rosenberg v. Sund, 60 S.E.2d 390, 81 Ga.App. 856.  
65 C.J. p 126 note 33 [c].



its legal effect is that he shall have the property sued for,<sup>66</sup> and, where plaintiff has elected to take the property with hire, a verdict finding for him but that he recover nothing for hire is not void for uncertainty.<sup>67</sup> A verdict finding the property in dispute in favor of defendant will, at his instance, be construed as one finding for him for the value of the property<sup>68</sup> in the amount established by plaintiff's affidavit for bail;<sup>69</sup> and this is true notwithstanding he did not, prior to the rendition thereof, elect to take such a verdict.<sup>70</sup>

Where the losing party is in possession of the property, a money verdict in favor of the prevailing party is permissible<sup>71</sup> even though that party be defendant.<sup>72</sup> A money verdict rendered for plaintiff at his election represents the damages he has sustained;<sup>73</sup> and it is not essential to its validity, where plaintiff does not so elect, that it shall provide for the making of the money out of the property.<sup>74</sup> A money verdict for defendant in replevin is not demanded, as a matter of law, where he has no title or interest in the property<sup>75</sup> or where the property seized was in possession of one defendant as custodian for a levying officer of another court.<sup>76</sup> A verdict improperly written on the bail affidavit may be transferred to the declaration.<sup>77</sup>

*Agreed substitute.* A verdict giving the prevailing party that which the parties had acknowledged in court to be an agreed substitute for the property instead of the property itself is sufficient.<sup>78</sup>

*Relief awarded.* A verdict seeking to compel such affirmative action by defendant as an indorsement and delivery of certificates other than those sued for, a delivery of cash deposited in a foreign state in the name of defendant as administrator under appointment in that state, and to have an equitable

settlement of the accounts of defendant as such administrator, is unauthorized.<sup>79</sup>

### b. Responsiveness

The verdict in bail trover must be responsive to the pleadings and evidence.

In accordance with the general rule in civil actions, the verdict and findings in bail trover must respond to the issues as raised by the pleadings and evidence.<sup>80</sup> In order to authorize a money verdict there must be some evidence of the value of the personalty converted.<sup>81</sup> A verdict awarding plaintiff the property when he elected to take a money verdict is erroneous.<sup>82</sup> A verdict awarding the property to defendant is contrary to law where it is undisputed that the title to, and right of possession of, the property were in plaintiff who had demanded it.<sup>83</sup>

## § 235. — Election of Verdict

### a. In general

#### b. Time for making election

### a. In General

Under the statute providing the remedy of bail trover, the plaintiff may say whether he will accept an alternative verdict for the property or its value, or demand a verdict for damages alone, or the property alone, and its hire; and in a proper case the defendant is entitled to a like election.

It is provided by statute that plaintiff, in an action to recover property, may, on the trial, say whether he will accept an alternative verdict for the property or its value, or demand a verdict for damages alone, or the property alone, and its hire;<sup>84</sup> and, inasmuch as the law entertains an impartial reciprocity of protection between the parties,<sup>85</sup> where plaintiff has given bond and taken the

66. Ga.—Burch v. Pedigo, 39 S.E. 493, 113 Ga. 1160, 54 L.R.A. 808.

67. Ga.—Kaplan v. Glover, 33 S.E. 967, 108 Ga. 301.

68. C.J. p 171 note 55.

69. Ga.—Pound v. Baldwin, 131 S.E. 291, 34 Ga.App. 810.

70. Ga.—Pound v. Baldwin, supra.

71. Ga.—Pound v. Baldwin, supra.

72. Ga.—Pound v. Baldwin, supra.

73. Ga.—Pound v. Baldwin, supra.

74. Ga.—Burch v. Pedigo, 39 S.E. 493, 113 Ga. 1160, 54 L.R.A. 808.

75. Ga.—Williams v. C. C. Bagges Auto Co., 122 S.E. 805, 32 Ga.App. 253.

76. Ga.—Sargent v. Ramsey, 131 S.E. 185, 34 Ga.App. 813.

77. Ga.—Sargent v. Ramsey, supra.

78. Ga.—Erskine v. Wiggins, 58 Ga. 187.

79. Ga.—Herring v. Rogers, 30 Ga. 615.

80. Ga.—McFarland v. Morrison, 84 S.E. 540, 143 Ga. 251.

81. Ga.—White v. McWhorter, 92 S.E. 954, 20 Ga.App. 216.

82. C.J. p 171 note 69.

83. Ga.—Malcolm v. Dobbs, 56 S.E. 622, 127 Ga. 487.

84. C.J. p 172 note 72.

85. Ga.—Avery & Co. v. Sorrell, 104 S.E. 26, 25 Ga.App. 41—Moats v. Farkas, 88 S.E. 685, 17 Ga.App. 778.

86. Ga.—Albany Coca-Cola Bottling Co. v. Lowrey, 88 S.E. 903, 18 Ga.

App 57—Georgia Ry. & Power Co. v. Peck, 38 S.E. 33, 17 Ga.App. 652.

87. U.S.—Union Bag & Paper Corp. v. Mitchell, C.A. Ga., 177 F.2d 909.

88. Ga.—Wilson-Weesner-Wilkinson Co. v. Collier, 8 S.E.2d 171, 62 Ga.App. 457—White v. Dalton, 191 S.E. 386, 55 Ga.App. 768.

89. C.J. p 172 note 73, p 127 note 34.

Purpose of statute providing for election by plaintiff in trover action as to whether he wishes to recover property or its value, damages or hire and providing that it is duty of court to render verdict as plaintiff elects, if plaintiff is successful, is to enable jury to render intelligent verdict, as regards recovery.—Banks v. Kilday, 76 S.E.2d 642, 88 Ga.App. 307.

90. Ga.—Mallory Bros. & Co. v. Moon, 81 S.E. 401, 130 Ga. 591.

91. C.J. p 172 note 74.

property and is then cast in the suit or dismisses the action, defendant is entitled to a like election.<sup>86</sup> Failure to allege the value of the articles to be recovered, however, precludes plaintiff from exercising his option to elect an alternative verdict,<sup>87</sup> and he has no such option if defendant at the first term tenders the property to plaintiff together with reasonable hire thereon;<sup>88</sup> but the tender is not available to defeat plaintiff's right where it does not embrace all the property claimed by plaintiff,<sup>89</sup> where made after refusal to return the goods on demand,<sup>90</sup> or where made after the first term.<sup>91</sup> Even after the first term defendant may make such a tender so as to limit plaintiff's recovery to the property,<sup>92</sup> but in order to do this, the tender must be made prior to the exercise of plaintiff's option of alternative verdict.<sup>93</sup>

Where neither party repleves property seized by the sheriff under bail process, and it is sold as perishable or expensive to keep, the successful plaintiff, being limited by statutory provision to a money verdict for the proceeds, cannot elect to take a verdict and judgment for the property;<sup>94</sup> but this rule is not applicable as to property not included in the sale.<sup>95</sup> A party's right to elect a money verdict is not lost by reason of the fact that he purchased the property when sold by the sheriff as perishable or expensive to keep<sup>96</sup> or by reason of the fact that he has instituted bail proceedings,<sup>97</sup> even though defendant may not have regained possession of the property,<sup>98</sup> or, although on failure of defendant to give bond, plaintiff repleved the property himself and has it in his possession when the verdict is returned.<sup>99</sup>

Where plaintiff receives the property from the executing officer, however, and thereafter disposes of it so as to put it beyond his power to return it, he is not entitled to elect to take a money verdict,<sup>1</sup> although he may proceed for hire and cost.<sup>2</sup> So where defendant fails to replevy property taken by bail process, and restoration thereafter becomes impossible without fault on his part, plaintiff cannot take a money verdict except for hire and costs.<sup>3</sup>

#### b. Time for Making Election

The election may be made in the complaint, or at any time during the course of the proceedings.

Although plaintiff may do so in his complaint,<sup>4</sup> he is not required to make his election at the beginning of the trial<sup>5</sup> or at the close of his evidence,<sup>6</sup> but may make it at the conclusion of the taking of the testimony<sup>7</sup> or after the close of the argument and before the case is submitted to the jury;<sup>8</sup> and, in the absence of objection, the court may recall the jury after they have retired, and permit plaintiff to change his election.<sup>9</sup>

### § 236. Judgment and Effect Thereof

- a. In general
- b. Conclusiveness on surety
- c. Effect of judgment or satisfaction on title to property

#### a. In General

The successful party in an action of bail trover is entitled to such a judgment as the pleading and proof warrant.

The successful party in an action of bail trover is entitled to such a judgment as the pleading and

86. Ga.—Zachos v. Rowland, 55 S. E.2d 166, 80 Ga.App. 81.

65 C.J. p 172 note 75.

87. Ga.—Gatlin v. Matthews, 85 S. E. 953, 16 Ga.App. 645.

88. Ga.—Downs Motor Co. v. Colbert, 130 S.E. 592, 34 Ga.App. 542.

#### Time of tender

In a bail trover action, defendant has a right to tender property at first term although there is no provision that he can tender value of property then or later.—Zachos v. Rowland, 55 S.E.2d 166, 80 Ga.App. 81.

89. Ga.—Walton v. Henderson, 61 S. E. 28, 4 Ga.App. 173.

90. Ga.—Walton v. Henderson, supra.

91. Ga.—Hanner v. Trust Co of Georgia, 176 S.E. 800, 49 Ga.App. 867.

92. Ga.—Carpenter v. Bankers' Health, etc., Ins. Co., 141 S.E. 327, 37 Ga.App. 642.

65 C.J. p 172 note 80.

93. Ga.—Carpenter v. Bankers' Health, etc., Ins. Co., supra.—Downs Motor Co. v. Colbert, 130 S. E. 592, 34 Ga.App. 542.

94. Ga.—Ellis, McKinnon & Brown v. Hopps, 118 S.E. 583, 30 Ga.App. 453.

65 C.J. p 172 note 84.

95. Ga.—Ellis, McKinnon & Brown v. Hopps, supra.

96. Ga.—Smith v. Commercial Credit Co., 111 S.E. 821, 28 Ga.App. 403.

97. Ga.—Hudson v. Goff, 8 S.E. 152, 77 Ga. 281.

98. Ga.—Hudson v. Goff, supra.

99. Ga.—Pearson v. Jones, 89 S.E. 536, 18 Ga.App. 448.

1. Ga.—Mallory Bros. Machinery Co. v. Wood, 66 S.E. 785, 133 Ga. 615.—Mallory Bros. & Co. v. Moon, 61 S. E. 401, 130 Ga. 591.

2. Ga.—Mallory Bros. Mach. Co. v. Wood, 66 S.E. 785, 133 Ga. 615.

3. Ga.—Jeffersonville v. Cotton States Bldg., etc., Co., 118 S.E. 442, 30 Ga.App. 470.

65 C.J. p 172 note 92.

4. Ga.—Comer v. Rome Chevrolet Co., 151 S.E. 678, 40 Ga.App. 820.

5. Ga.—Holland v. Lawrence, 94 S. E. 561, 147 Ga. 479.

65 C.J. p 172 note 94.

6. Ga.—Holland v. Lawrence, supra.

7. Ga.—Brooks v. Hartsfield Co., 192 S.E. 459, 56 Ga.App. 184.—Woodbury v. Atlanta Dental Supply Co., 137 S.E. 302, 36 Ga.App. 548.

8. Ga.—Zachos v. Rowland, 55 S.E. 2d 166, 80 Ga.App. 81.—Garrett v. Atlanta Home Underwriters, 193 S.E. 285, 35 Ga.App. 404.—Young v. Durham, 84 S.E. 165, 15 Ga.App. 678.

9. Ga.—Thornton v. Eubanks, 5 S.E. 2d 602, 60 Ga.App. 894.

proof warrant,<sup>10</sup> but the judgment, in accordance with general rules, must conform to the pleadings, issues, and proof.<sup>11</sup> Plaintiff cannot recover an amount larger than he sues for, as shown by his pleadings,<sup>12</sup> and recovery cannot legally exceed the alleged value,<sup>13</sup> with interest.<sup>14</sup> A judgment dismissing an action of bail trover is amendable at the same term of court.<sup>15</sup> A judgment will not be set aside merely because the property is loosely described in the petition,<sup>16</sup> and an immaterial departure from the verdict is not ground for reversal.<sup>17</sup>

**Election of judgment.** In an action of bail trover tried without a jury, an election to take a money judgment may be made at any time before rendition of judgment.<sup>18</sup>

**Satisfaction of judgment.** An alternative judgment in trover can be satisfied only by restoring the whole of the property or paying the entire amount of damages,<sup>19</sup> and restoration of part of the property and payment for the remainder is not sufficient.<sup>20</sup>

### b. Conclusiveness on Surety

The plaintiff may have judgment against the defendant and his surety, and as against the latter the judgment is conclusive until reversed or set aside.

The bail of a defendant who has given bond is bound by the judgment equally with defendant.<sup>21</sup>

and, where plaintiff recovers a verdict, he may have judgment rendered thereon against defendant and his sureties jointly, without scire facias or other proceedings.<sup>22</sup> A judgment against defendant and his surety in bail trover, finding the property for plaintiff, is conclusive against the surety until reversed or set aside;<sup>23</sup> and the latter cannot, in a subsequent suit instituted by him against plaintiff in the trover action, go behind the judgment and assert title to an interest in the property alleged to have existed at the time of the judgment.<sup>24</sup> The surety on an eventual condemnation bond cannot, after judgment, raise any question which his principal might have raised before judgment.<sup>25</sup>

### c. Effect of Judgment or Satisfaction on Title to Property

A judgment for the plaintiff vests title to the property absolutely in him, and a money judgment in his favor becomes a special lien on the property sued for, and a general lien on all other property of the defendant.

The judgment in trover vests title absolutely in plaintiff, as far as the property itself is concerned.<sup>26</sup> A verdict for damages for plaintiff in a trover suit does not vest the property in defendant until the judgment for damages has been discharged by him,<sup>27</sup> but when defendant discharges such judgment, his title to the property, as far as plaintiff is concerned, becomes absolute.<sup>28</sup> So, by taking a money judgment in an action where plaintiff has

### 10. Judgment held proper

Where plaintiff in petition in trover suit alleged title to various items of personal property, including certain described cash, and sought recovery therefor, and jury found in its favor, trial court had authority to declare in judgment that title to and right of possession of the cash had been established in plaintiff and to direct sheriff to deliver the cash to plaintiff.—*Harris v. Bennett Bros.*, 34 S.E.2d 615, 72 Ga.App. 589.

### 11. Judgment held authorized by evidence

*Gu—McKnight v. Crawford*, 76 S.E.2d 440, 88 Ga.App. 202.—*Hankin v. Denton*, 22 S.E.2d 341, 68 Ga.App. 113.—*McDay v. Long*, 19 S.E.2d 436, 67 Ga.App. 50.

### Conformity to election

Where plaintiff in bail trover action did not specifically pray in original petition for a property judgment, but at trial elected to take verdict for property, and jury was so instructed, trial judge was without authority to render a money judgment concluding the matter otherwise without first giving plaintiff an opportunity to be heard.—*Zachos v. Rowland*, 55 S.E.2d 166, 80 Ga.App. 31.

*12. Ga.—Williams v. C. C. Baggs Auto Co.*, 122 S.E. 805, 32 Ga.App. 253.—*Pitts, etc., Co. v. Bank of Shiloh*, 92 S.E. 775, 20 Ga.App. 143.

*13. Ga.—Moonaugh v. Everett*, 13 S.E. 837, 88 Ga. 67, 65 C.J. p 173 note 4.

*14. Ga.—Moonaugh v. Everett, supra*, 65 C.J. p 173 note 5.

*15. Ga.—Calloway v. McElmurray*, 17 S.E. 103, 91 Ga. 166, 65 C.J. p 173 note 6.

### Reinstatement of case

Where trial judge in bail trover action rendered order dismissing plaintiff's action and marked case settled without notice to plaintiff although plaintiff had elected a property verdict, judgment so rendered was void, and judge at subsequent hearing could grant motion placing case on trial docket notwithstanding motion contained no prayer that order be vacated or set aside.—*Zachos v. Rowland*, 55 S.E.2d 166, 80 Ga.App. 31.

*16. Ga.—Wolf v. Kennedy*, 18 S.E. 433, 93 Ga. 219.

*17. Ga.—Mitchell v. Printup*, 19 Ga. 579.

*18. Ga.—Zachos v. Rowland*, 55 S.E. 2d 166, 80 Ga.App. 31.—*Young v. Durham*, 84 S.E. 165, 15 Ga.App. 678.

*19. Ga.—Evans v. Lipscomb*, 31 Ga. 71.—*Willis v. Willis*, 22 Ga. 290.—*Mitchell v. Printup*, 19 Ga. 579.

*20. Ga.—Evans v. Lipscomb*, 31 Ga. 71, 65 C.J. p 174 note 27.

*21. Ga.—Jones v. Funston*, 99 S.E. 237, 23 Ga.App. 706, 65 C.J. p 174 note 28.

*22. Ga.—Mourning v. Hodges*, 33 Ga. Suppl. 104.

*23. Ga.—Hartz v. Hartz*, 86 S.E. 220, 144 Ga. 98.

*24. Ga.—Hartz v. Hartz, supra*, 146 Ga. 126, 65 C.J. p 174 note 32.

*25. Ga.—McWilliams v. Hemingway*, 57 S.E.2d 623, 80 Ga.App. 843.

*27. Ga.—Mallory Bros. & Co. v. Moon*, 61 S.E. 401, 130 Ga. 591.—*Frick v. Davis*, 5 S.E. 498, 80 Ga. 482.

*28. Ga.—Mallory Bros. & Co. v. Moon*, 61 S.E. 401, 130 Ga. 591.—*Frick v. Davis*, 5 S.E. 498, 80 Ga. 482.

obtained possession of the property, defendant relinquishes all right to subsequent possession thereof.<sup>29</sup> Where a money judgment is elected, the judgment for plaintiff becomes a special lien on the property sued for,<sup>30</sup> and a general lien on all other property of defendant.<sup>31</sup>

### § 237. — Judgment for Defendant

Where the defendant in bail trover is entitled to judgment, he may be entitled to demand and have restitution of the property, or a judgment for its value and damages for loss of its use.

Where uncontradicted evidence shows plaintiff has no title or right to possession, defendant is entitled to judgment.<sup>32</sup> Where the property is taken in bail proceedings from defendant, who fails to replevy it, and plaintiff dismisses the action or refuses to prosecute or is cast in the suit, defendant is entitled to demand a restitution of the property,<sup>33</sup> or a judgment against plaintiff for its value<sup>34</sup> and damages for loss of the use,<sup>35</sup> whether<sup>36</sup> or not<sup>37</sup> plaintiff replevied the property; and defendant, in order to obtain this relief, is not required to bring a separate suit,<sup>38</sup> or, if he is content with the value stated in plaintiff's affidavit to obtain bail, adduce

further proof as to value.<sup>39</sup>

A dismissal amounts in law to a judgment of restitution<sup>40</sup> and ipso facto entitles defendant to a writ of restitution or a verdict for the property<sup>41</sup> and its reasonable hire.<sup>42</sup> Where there has been no adjudication of title, however, it is error, after awarding nonsuit, to permit defendant to adduce evidence as to the value of the property sued for and to enter judgment in the amount so found against plaintiff and sureties on a bail trover bond,<sup>43</sup> the proper practice in such case being to restore possession of the property to defendant so as to leave the parties as near as possible where the court found them.<sup>44</sup>

Defendant may recover the value of the property against plaintiff replevying the property but dismissing suit, although defendant does not claim title but holds possession for a special purpose or under a limited right,<sup>45</sup> the money recovered in such case being held for the benefit of all persons having lawful claims in the property according to their respective interests.<sup>46</sup> Where defendant has a special interest in the property taken by plaintiff under bail process, title thereto being admittedly in plain-

29. Ga.—Tinsley v. Block, 25 S.E. 429, 98 Ga. 243.

30. Ga.—McWilliams v. Hemingway, 57 S.E.2d 623, 80 Ga.App. 843.

31. Ga.—McWilliams v. Hemingway, *supra*.

32. Ga.—Lynch v. Etheridge, 34 S.E.2d 670, 72 Ga.App. 712—McKinney v. Mechanics Loan & Thrift Corp., 12 S.E.2d 208, 63 Ga.App. 795.

33. Ga.—Stewart v. Hasty, 48 S.E.2d 757, 77 Ga.App. 524—Rooks v. Odum, 186 S.E. 747, 53 Ga.App. 631, 65 C.J. p 173 note 11.

34. Ga.—Pacey v. Frost Motor Co., 65 S.E.2d 427, 84 Ga.App. 30, 65 C.J. p 173 note 12.

#### On dismissal of second suit

Where bail trover action was dismissed by plaintiff, and trial court did not retain jurisdiction for purpose of rendering judgment against plaintiff, and plaintiff thereafter commenced the same action against defendant, trial court could not, when second action was improperly dismissed, render judgment for defendant against plaintiff for amount that property was alleged to be worth in original action.—Frimm v. Mathis, 7 S.E.2d 295, 61 Ga.App. 679.

#### Failure to recover

Within statute, providing that when plaintiff in trover suit has replevied property and, on trial "fails to recover," defendant may recover sworn value placed upon property,

the quoted phrase means failure to recover on the merits, and a judgment sustaining a jurisdictional plea in bail-trover suit did not have effect of adjudicating defendant's right to hold the property against plaintiff in another trover suit and did not entitle defendant to recover sworn value placed upon the property.—Futch v. Automobile Financing, 80 S.E.2d 697, 89 Ga.App. 634.

#### Petition held insufficient

Petition, filed by successful defendant in trover suit, seeking money judgment for sworn value of property, was fatally defective in that it failed to allege that plaintiff in trover suit had replevied the property or had dismissed such suit or had failed to recover on the merits.—Futch v. Automobile Financing, *supra*.

35. Ga.—Wilson v. Swords, 95 S.E. 1013, 22 Ga.App. 233—Underwood Typewriter Co. v. Veal, 76 S.E. 645, 12 Ga.App. 11.

36. Ga.—Petty v. Piedmont Fertilizer Co., 90 S.E. 966, 146 Ga. 149, 65 C.J. p 173 note 14.

37. Ga.—Kennedy v. Linder, 147 S.E. 64, 168 Ga. 247, answer to certified questions conformed to 147 S.E. 791, 39 Ga.App. 594, 65 C.J. p 173 note 15.

38. Ga.—Petty v. Piedmont Fertilizer Co., 90 S.E. 966, 146 Ga. 149, 65 C.J. p 173 note 16.

39. Ga.—Stacy v. Fleming, 159 S.E. 735, 43 Ga.App. 591—Kaufman v.

Seaboard Air Line Ry., 73 S.E. 592, 10 Ga.App. 248.

40. Ga.—Kennedy v. Linder, 147 S.E. 64, 168 Ga. 247, answer to certified questions conformed to 147 S.E. 791, 39 Ga.App. 594, 65 C.J. p 173 note 18.

#### Reinstatement of case

Trial court had no jurisdiction to reinstate over objection of defendant, bail trover action voluntarily dismissed by plaintiff, in absence of proof that such dismissal was induced by fraud or mutual mistake of law as to effect of such dismissal, and court must enter restitution judgment for defendant on motion by defendant.—Stewart v. Hasty, 48 S.E.2d 757, 77 Ga.App. 524.

41. Ga.—Thomas v. Price, 15 S.E. 11, 88 Ga. 533.

65 C.J. p 173 note 19.

42. Ga.—Trammell v. Georgia Engineering & Construction Co., 69 S.E. 921, 8 Ga.App. 501.

43. Ga.—Barfield Music House v. Harris, 92 S.E. 402, 20 Ga.App. 42, 65 C.J. p 174 note 21.

44. Ga.—Barfield Music House v. Harris, *supra*.

45. Ga.—Stacy v. Fleming, 159 S.E. 735, 43 Ga.App. 591—Kaufman v. Seaboard Air Line Ry., 73 S.E. 592, 10 Ga.App. 248.

46. Ga.—Stacy v. Fleming, 159 S.E. 735, 43 Ga.App. 591—Kaufman v. Seaboard Air Line Ry., 73 S.E. 592, 10 Ga.App. 248.

tiff, a general verdict for defendant warrants a judgment for the return of the property to him or, in default thereof, that he recover the amount of his special interest therein.<sup>47</sup>

### § 238. Costs

In bail trover costs will be charged to the plaintiff or defendant in accordance with the provisions of the bail trover statute.

Under the statute requiring plaintiff to pay the costs of the action in the absence of proof of a previous demand and refusal, where defendant at the first term tenders the property to plaintiff together with reasonable hire therefor since the conversion, the tender must embrace all the property claimed by plaintiff<sup>48</sup> and must be unconditional.<sup>49</sup> A tender of the property made after institution of the suit is not in compliance with the statute if unaccompanied by tender of hire,<sup>50</sup> and a tender will not throw the costs on plaintiff if made after the first term.<sup>51</sup> A tender of the property without a tender of hire is sufficient if the property is worth nothing for hire,<sup>52</sup> or if there has been no conversion.<sup>53</sup> Although plaintiff in an action brought without previous demand has obtained possession of the property, thus making it impossible for defendant to tender such property, if the latter fails to disclaim title and tender reasonable hire he is liable for costs in the suit.<sup>54</sup>

*Tender of cumbrous articles.* Where the property consists of cumbrous articles and plaintiff is a non-resident of the county in which they are situated, a bona fide offer to deliver such property at any rail-

road station within the county which plaintiff may select constitutes a tender sufficient to charge plaintiff with costs.<sup>55</sup>

*Counsel fees* are not recoverable as costs where the property was tendered before suit, and the tender refused and no subsequent demand was made for it.<sup>56</sup>

### § 239. Damages

- a. In general
- b. Interest
- c. Hire
- d. Effect of particular circumstances
- e. Mitigation or reduction of damages

#### a. In General

In bail trover the criterion of damages is the true value of the property. In a proper case, the plaintiff may elect to recover the highest proved value of the property at any time between the time of conversion and the trial, or the value at the time of conversion with interest or hire.

The criterion of damages in a suit in trover is the true value of the property.<sup>57</sup> Where plaintiff elects to take a money judgment instead of a return of the property, he has a further right to elect in what way his damages shall be made up.<sup>58</sup> He may, subject to the qualification that the amount of his recovery is limited to the value of the property alleged in the pleadings, recover the highest proved value of the property, at any time between the time of the conversion and the time of the trial,<sup>59</sup> without hire, as discussed *infra* subdivision c of this section, or interest, as discussed subdivision b of

47. Ga.—Jesse French Piano, etc., Co. v. Cardwell, 40 S.E. 292, 114 Ga. 340.

48. Ga.—Chalker & Russell v. Savannah Motor Car Co., 140 S.E. 916, 37 Ga.App. 532.  
65 C.J. p 177 note 93.

49. Ga.—Chalker & Russell v. Savannah Motor Car Co., *supra*.

50. Ga.—Powers v. Franklin, 124 S. E. 363, 32 Ga.App. 641.

51. Ga.—Downs Motor Co. v. Colbert, 130 S.E. 592, 34 Ga.App. 542 —Securities Trust Co. v. Marshall, 118 S.E. 478, 30 Ga.App. 379.

52. Ga.—Trammell v. Mallory, 42 S. E. 62, 115 Ga. 748.

53. Ga.—Trammell v. Mallory, *supra*—Securities Trust Co. v. Marshall, 118 S.E. 478, 30 Ga.App. 379.

54. Ga.—Wall v. Johnson, 15 S.E. 15, 88 Ga. 524.

55. Ga.—Trammell v. Mallory, 42 S.E. 62, 115 Ga. 748.  
65 C.J. p 177 note 1.

56. Ga.—Wall v. Johnson, 15 S.E. 15, 88 Ga. 524.

57. Ga.—Watson v. Tompkins Chevrolet Co., 63 S.E.2d 681, 83 Ga.App. 440.  
65 C.J. p 174 note 37, p 131 note 87.

58. Ga.—Douglas Motor Co. v. Watson, 22 S.E.2d 766, 68 Ga.App. 335 —White v. Dalton, 191 S.E. 386, 55 Ga.App. 768.  
65 C.J. p 174 note 41.

59. Ga.—Graham v. Frazier, 66 S.E. 2d 77, 84 Ga.App. 458—Bedgood v. Karp's U-Drive-It Co., 55 S.E.2d 654, 80 Ga.App. 216—Rowland v. Gardner, 53 S.E.2d 198, 79 Ga.App. 153—White v. Dalton, 191 S.E. 386, 55 Ga.App. 768.

65 C.J. p 174 note 43, p 138 note 21.

#### Highest proved value

(1) For purposes of rule providing that plaintiff in trover action may recover the "highest proved value" of personality between date of conver-

sion and date of trial, means highest value which jury, from consideration of all proofs, may fix.—*Sammons v. Copeland*, 69 S.E.2d 617, 85 Ga.App. 318—*Sapp v. Howe*, 52 S.E. 2d 571, 79 Ga.App. 1—65 C.J. p 174 note 43 [a], p 138 note 21 [d].

(2) In trover suit, the "highest proved value" of the property is not the highest estimate of value given by any witness, but the highest value which jury finds that the property was worth between time of conversion and time of trial, if there was a change in value.—*Durden v. Durden*, 197 S.E. 493, 58 Ga.App. 46.

#### Market value

Ga.—*Sapp v. Howe*, 52 S.E.2d 571, 79 Ga.App. 1.

#### Value above ceiling price

In trover action, judgment for an amount in excess of OPA ceiling price of automobile at time of conversion was not error.—*Carithers v. Maddox*, 55 S.E.2d 775, 80 Ga.App. 230.

this section, or he may recover the value at the time of the conversion with interest or such hire as he may be able to prove.<sup>60</sup> This right of election applies whether the prevailing party is plaintiff<sup>61</sup> or defendant.<sup>62</sup>

A party's right to recover the value of the property is not affected by the fact that he may have purchased it for less than its value<sup>63</sup> or received it as a gift;<sup>64</sup> and plaintiff's recovery against the principal in the bail-bond is not limited to the amount of such bond.<sup>65</sup> If plaintiff elects to recover an alternative verdict, and by the wrongful conversion it has been placed beyond his power to show the true value of the property, if no value be shown by defendant, plaintiff may recover the highest value of the best quality of such property.<sup>66</sup> Attorney's fees<sup>67</sup> and expenses of suit<sup>68</sup> which have been incurred in litigation against a third person for recovery of the property have been held an element of damage.

*Exemplary damages* have been allowed.<sup>69</sup>

*Timber cut and carried away.* The measure of damages for timber cut and carried away has been fixed by statute, and plaintiff may recover accordingly.<sup>70</sup>

*Contract price* of a chattel is not the measure of its damages as against one not a party to the contract,<sup>71</sup> nor is the price fixed as between the parties

by an option contract where the option expired before the accrual of the action.<sup>72</sup>

*Cost of transportation* may be a material factor in determining the value of the chattel converted.<sup>73</sup>

### b. Interest

Interest, *eo nomine*, is not recoverable in a bail trover action.

Interest, *eo nomine*, is not recoverable in a bail trover action.<sup>74</sup> Such an allowance is not awarded as interest but as additional damages,<sup>75</sup> and the allowance is discretionary with the jury.<sup>76</sup> The allowance of such additional damages, the equivalent of interest is predicated on the ground that plaintiff, having been unlawfully deprived of his property, is entitled to be fully compensated for the wrong inflicted, and calculation on a basis of interest at a certain percentage is deemed a proper measure for the additional damages.<sup>77</sup> If plaintiff elects to recover, as damages, the highest proved value of the property at any time between the time of the conversion and the time of the trial, no interest on that amount is allowable.<sup>78</sup> If plaintiff elects to recover the value of the property at the time of its conversion, he is entitled to interest to the time of the trial.<sup>79</sup> Where the only evidence of the value of the property is as to its value at the date of conversion, the measure of damages is that amount with interest to the time of the trial.<sup>80</sup> In accord-

60. Ga.—Taylor v. Gill Equipment Co., 73 S.E.2d 755, 87 Ga.App. 309.  
—Douglas Motor Co. v. Watson, 22 S.E.2d 766, 68 Ga.App. 335.—White v. Dalton, 191 S.E. 386, 55 Ga.App. 768.

61. C.J. p 175 note 46, p 138 note 21.

62. Ga.—O'Neil Mfg. Co. v. Woodley, 44 S.E. 980, 118 Ga. 114.—Jacques v. Stewart, 8 S.E. 815, 81 Ga. 81.

63. Ga.—Blakely Bank v. Cobb, 63 S.E. 24, 5 Ga.App. 289.

64. Ga.—Elbert County v. Brown, 86 S.E. 651, 16 Ga.App. 834.

65. Ga.—Elbert County v. Brown, supra.

66. Ga.—Phillips v. Taber, 10 S.E. 270, 83 Ga. 565.

67. C.J. p 175 note 57.

68. Ga.—Gordon v. Atlantic Coast Line R. Co., 66 S.E. 988, 7 Ga.App. 354.

69. Ga.—Atlantic Coast Line R. Co. v. Nellwood Lumber Co., 94 S.E. 86, 21 Ga.App. 209.

70. Ga.—Atlantic Coast Line R. Co. v. Nellwood Lumber Co., supra.

71. Ga.—Louisville & N. R. Co. v. Earl, 77 S.E. 638, 139 Ga. 456.

72. Ga.—Minor v. Fincher, 58 S.E.2d

389, 206 Ga. 721.—Rowland v. Gardner, 53 S.E.2d 198, 79 Ga.App. 153.—McCann Lumber Co. v. Hall, 49 S.E.2d 150, 77 Ga.App. 455.—De Bardelaben v. Coleman, 39 S.E.2d 589, 74 Ga.App. 261.—Lawson v. Branch, 12 S.E.2d 641, 191 Ga. 311.

### Punitive damages

Under statute, in action to recover the value of lumber manufactured from timber allegedly cut and removed from plaintiffs' premises without a deduction for added value because of labor and expense incurred in manufacturing process, plaintiffs are not entitled to recover punitive damages in addition to value of manufactured lumber.—De Bardelaben v. Coleman, 39 S.E.2d 589, 74 Ga.App. 261.—Taylor v. Hammack, 7 S.E.2d 200, 61 Ga.App. 640.

73. Ga.—Chalker & Russell v. Savannah Motor Car Co., 140 S.E. 916, 37 Ga.App. 532.

74. Ga.—Henry Cotton Mills v. Shoenig, 127 S.E. 238, 33 Ga.App. 467.

75. Ga.—Elbert County v. Brown, 86 S.E. 651, 16 Ga.App. 834.

76. Ga.—Cooper v. Brock, 48 S.E.2d 156, 77 Ga.App. 152.—Payne v. American Agricultural Chemical Co., 18 S.E.2d 635, 66 Ga.App. 596.—Stephens v. Wilson, 197 S.E. 350,

58 Ga.App. 24.—Beaver v. Magid, 192 S.E. 497, 56 Ga.App. 272.—White v. Dalton, 191 S.E. 386, 55 Ga.App. 768.

65 C.J. p 175 note 52.

75. Ga.—Payne v. American Agricultural Chemical Co., 18 S.E.2d 635, 66 Ga.App. 596.—Stephens v. Wilson, 197 S.E. 350, 58 Ga.App. 24.—Beaver v. Magid, 192 S.E. 497, 56 Ga.App. 272.

76. Ga.—White v. Dalton, 191 S.E. 386, 55 Ga.App. 768.

77. Ga.—Stephens v. Wilson, 197 S.E. 350, 58 Ga.App. 24.—Beaver v. Magid, 192 S.E. 497, 56 Ga.App. 272.

78. Ga.—Parks v. Parks, 80 S.E.2d 837, 89 Ga.App. 725.—Payne v. American Agricultural Chemical Co., 18 S.E.2d 635, 66 Ga.App. 596.—White v. Dalton, 191 S.E. 386, 55 Ga.App. 768.

65 C.J. p 175 note 45, p 142 note 43.

79. Ga.—Tuller v. Carter, 59 Ga. 395.—Commercial Auto Loan Corp. v. Baker, 37 S.E.2d 636, 73 Ga.App. 534.—Stevens v. Wilson, 197 S.E. 350, 58 Ga.App. 24.—White v. Dalton, 191 S.E. 386, 55 Ga.App. 768.

80. C.J. p 175 note 46, p 142 note 44.  
80. Ga.—Dunn v. Young, 95 S.E. 374, 22 Ga.App. 17.

ance with the rule that verdicts should be construed so as to stand and are not to be avoided unless from necessity, as discussed generally in Trial § 521, where the only evidence of the value of the property is as to its value at the date of conversion, a verdict for plaintiff for a stated sum with interest will be construed to mean that the jury found the stated sum to be the value of the property at the time of the conversion, rather than at some date between the time of conversion and the trial.<sup>81</sup>

### c. Hire

Reasonable hire is recoverable on election to take a return of the property, or on election to recover the value of the property at the time of conversion.

Hire, by that name, is not recoverable in a verdict for damages alone,<sup>82</sup> but is allowable as an additional element of damages,<sup>83</sup> and the allowance thereof is discretionary with the jury.<sup>84</sup> Where the prevailing party elects to take a return of the property converted by the other, he is also entitled to recover reasonable hire for it from the date of the conversion<sup>85</sup> to the date when the property is delivered in accordance with the verdict.<sup>86</sup> Where plaintiff elects to recover the highest proved value of the property at any time between the time of the conversion and the time of trial he is not entitled to hire.<sup>87</sup> If plaintiff elects to recover the value of the property at the time of the conversion,<sup>88</sup> and the property converted is of such a character that hire for it may be recovered,<sup>89</sup> he is entitled to reasonable<sup>90</sup> hire for it from the date of conversion to the date of trial, except that if the amount of the hire is not stated in the affidavit he cannot recover the hire from the time of the conversion,<sup>91</sup> but only from the time of filing his affidavit and declaration.<sup>92</sup>

### d. Effect of Particular Circumstances

#### (1) Conversion of promissory notes

81. Ga.—Beaver v. Magid, 192 S.E. 497, 56 Ga.App. 272.

82. Ga.—White v. Dalton, 191 S.E. 386, 55 Ga.App. 768.

83. Ga.—White v. Dalton, supra.

84. Ga.—White v. Dalton, supra.

85. Ga.—Woods v. McCall, 67 Ga. 506—Commercial Auto Loan Corp. v. Baker, 37 S.E.2d 636, 73 Ga.App. 534—Douglas Motor Co. v. Watson, 22 S.E.2d 766, 68 Ga.App. 335, 65 C.J. p 174 note 39.

Award held proper and not excessive Ga.—Wilson-Weesner-Wilkinson Co. v. Collier, 8 S.E.2d 171, 62 Ga.App. 457.

86. Ga.—O'Neil Mfg. Co. v. Woodley, 44 S.E. 980, 118 Ga. 114—Sanders v. Williams, 75 Ga. 283.

87. Ga.—Parks v. Parks, 80 S.E.2d 837, 89 Ga.App. 726—White v. Dalton, 191 S.E. 386, 55 Ga.App. 768, 65 C.J. p 175 note 44, p 143 note 50 [el].

88. Ga.—O'Neil Mfg. Co. v. Woodley, 44 S.E. 980, 118 Ga. 114, 65 C.J. p 175 note 46.

89. Ga.—O'Neil Mfg. Co. v. Woodley, supra—White v. Dalton, 191 S.E. 386, 55 Ga.App. 768.

90. Ga.—O'Neil Mfg. Co. v. Woodley, 44 S.E. 980, 118 Ga. 114.

91. Ga.—Phillips v. Taber, 10 S.E. 270, 83 Ga. 565.

92. Ga.—Phillips v. Taber, supra.

93. Ga.—Citizens' Bank v. Shaw, 65 S.E. 81, 132 Ga. 771.

(2) Sale of property as perishable or expensive to keep

(3) Special interest in property

#### (1) Conversion of Promissory Notes

On conversion of a promissory note the measure of damages is prima facie the amount of principal and interest due and unpaid at the time of conversion with interest.

The measure of damages for the conversion of promissory notes is prima facie the amount of the principal and interest appearing at the time of conversion to be owing and unpaid,<sup>93</sup> with interest on that aggregate from thence to the trial.<sup>94</sup>

#### (2) Sale of Property as Perishable or Expensive to Keep

Where perishable property is sold the measure of recovery is the proceeds of the sale.

Where under the statute permitting it, the property is sold by the sheriff as perishable or expensive to keep, it is error to direct a verdict for more than the amount of the proceeds of the sale.<sup>95</sup> Where, however, only part of the property sued for has been sold, as to the part not sold plaintiff may recover a money judgment the amount of which may be added to the sum recoverable on account of the property sold.<sup>96</sup>

#### (3) Special Interest in Property

Where the plaintiff has only a special interest in the property his recovery ordinarily is limited to the value of his special interest.

Even though plaintiff has only a special interest in the property sued for in trover, and elects to take a money verdict, he may make the further election between the highest proved value and the value at the time of the conversion with interest or hire,<sup>97</sup> but his recovery ordinarily is limited to the value of his special interest.<sup>98</sup> Thus, where plaintiff sues

94. Ga.—Citizens' Bank v. Shaw, supra.

95. Ga.—Branch v. Fisher, Lowrey & Fisher, 122 S.E. 720, 32 Ga.App. 126.

96. Ga.—Ellis, McKinnon & Brown v. Hopps, 118 S.E. 583, 80 Ga.App. 453.

97. Ga.—Equitable Credit & Discount Co. v. Murray, 54 S.E.2d 650, 79 Ga.App. 795, 65 C.J. p 176 note 69.

98. Ga.—Equitable Credit & Discount Co. v. Murray, supra—Commercial Auto Loan Corp. v. Baker, 37 S.E.2d 636, 73 Ga.App. 534—Douglas Motor Co. v. Watson, 22 S.E.2d 766, 68 Ga.App. 335—Botten-

for property, the title to which he holds merely as security, and elects to take a money verdict, he cannot recover more than the debts secured.<sup>99</sup> A distinction has been made, however, between cases in which the action is brought against the general owner or against a stranger or wrongdoer,<sup>2</sup> if against the general owner, then plaintiff can recover the value of his special property only;<sup>2</sup> but if the suit is against a stranger or wrongdoer, plaintiff recovers the full value of the property, and holds the balance, beyond his own interest, for the general owner<sup>3</sup> and all others in community of possession or title with him, as their respective interests may appear.<sup>4</sup>

*Sale with reservation of title.* Where, in a suit for the recovery of personalty sold of which the seller had reserved title and which has been partly paid for, plaintiff elects to take a money verdict, the proper amount to be recovered is the unpaid balance of the purchase money, with interest thereon, embraced in an aggregate sum;<sup>5</sup> and if plaintiff elects to recover the specific property, before doing so he must return the money paid him after deducting reasonable hire.<sup>6</sup>

#### e. Mitigation or Reduction of Damages

Generally, the defendant is entitled to show in mitigation of damages any facts or circumstances which would reduce the amount required justly to compensate the plaintiff.

Defendant is entitled to a deduction from the value of the converted property of all sums received by the owner on account thereof.<sup>7</sup> Thus where, after a party chargeable with fraud has refused to accept the return of the property transferred by him and to retransfer the property received by him, and after an action by the defrauded party to recover the property transferred by him or its value

has been commenced, the defrauded party disposes of the property received by him, defendant is entitled to have the fair market value or the fruits of the disposition applied in mitigation of the damages.<sup>8</sup> Although defendant is, under certain circumstances, permitted to set off the value of his labor and expense by which property innocently converted was improved, he can in no case reduce plaintiff's recovery below the value his chattel would have had if left in the state in which the wrongdoer found it.<sup>9</sup> The converter of a promissory note has the right to show in reduction the fact of payment in whole or in part,<sup>10</sup> the inability of the makers to pay wholly or partially,<sup>11</sup> a release of the makers from their undertaking,<sup>12</sup> the invalidity of the notes,<sup>13</sup> or other matter which will legitimately affect and diminish their value.<sup>14</sup>

*Surrender of property after conversion*, although not defeating the action, goes in mitigation of damages.<sup>15</sup> A tender of return, in order effectively to go in mitigation of damages, must embrace all the property claimed by plaintiff<sup>16</sup> and must be unconditional.<sup>17</sup>

#### § 240. Liability on Bonds and Undertakings

General rules governing liability of principals on bonds apply to principals on bonds given in bail trover actions.

Where plaintiff has given bond and obtained possession of the property in suit, on dismissal of the action, the court is authorized to enter judgment on the replevy bond for the value of the property,<sup>18</sup> and it is not necessary to bring suit on the bond<sup>19</sup> or have a jury trial.<sup>20</sup> The rule is applicable notwithstanding defendant may not claim any title to the property and holds possession only for some special purposes or under some limited right or title,<sup>21</sup> the money recovered in such case being held

reiter v. Fulton Nat. Bank, 6 S.E.2d 148, 61 Ga.App. 521.

65 C.J. p 176 note 70, p 133 note 91.

99. Ga.—Durden v. Durden, 197 S.E. 493, 58 Ga.App. 46.

65 C.J. p 176 note 71.

1. Ga.—Schley v. Lyon, 6 Ga. 530.

2. Ga.—Schley v. Lyon, supra—Atlantic Coast Line R. Co. v. Gordon, 73 S.E. 594, 10 Ga.App. 311.

3. Ga.—Schley v. Lyon, 6 Ga. 530—Smith v. R. F. Brodegaard & Co., 49 S.E.2d 500, 77 Ga.App. 661.

4. Ga.—Atlantic Coast Line R. Co. v. Gordon, 73 S.E. 594, 10 Ga.App. 311.

5. Ga.—Ross v. McDuffie, 16 S.E. 648, 91 Ga. 120.

65 C.J. p 176 note 76.

6. Ga.—Hays v. Jordan, 11 S.E. 833, 85 Ga. 741, 9 L.R.A. 378.

7. Ga.—Ross v. McDuffie, 16 S.E. 648, 91 Ga. 120.

65 C.J. p 176 note 79.

8. Ga.—Barnett v. Speir, 21 S.E. 168, 93 Ga. 762.

9. Ga.—Milltown Lumber Co. v. Carter, 63 S.E. 270, 5 Ga.App. 344.

65 C.J. p 176 note 82.

10. Ga.—Citizens' Bank v. Shaw, 65 S.E. 81, 132 Ga. 771.

11. Ga.—Citizens' Bank v. Shaw, supra.

12. Ga.—Citizens' Bank v. Shaw, supra.

13. Ga.—Citizens' Bank v. Shaw, supra.

14. Ga.—Citizens' Bank v. Shaw, supra.

15. Ga.—Bodega v. Perkinson, 60 Ga.

516—Spiers v. Hubbard, 78 S.E. 136, 12 Ga.App. 676.

16. Ga.—Georgia, etc., R. Co. v. Blush Milling Co., 82 S.E. 784, 15 Ga.App. 142.

17. Ga.—Georgia, etc., R. Co. v. Blush Milling Co., supra.

18. Ga.—Petty v. Piedmont Fertilizer Co., 90 S.E. 966, 146 Ga. 149.

65 C.J. p 177 note 4.

19. Ga.—Petty v. Piedmont Fertilizer Co., supra.

65 C.J. p 177 note 5.

20. Ga.—Petty v. Piedmont Fertilizer Co., supra.

65 C.J. p 177 note 6.

21. Ga.—Stacy v. Fleming, 159 S.E. 735, 43 Ga.App. 591—Kaufman v. Seaboard Air Line Ry., 72 S.E. 592, 10 Ga.App. 244.



by defendant for the benefit of all persons having lawful claims to the property according as their interests may appear.<sup>22</sup> The court has no jurisdiction to enter judgment on the bond where no process is attached to the petition or served on defendant and the deficiency has not been waived.<sup>23</sup>

# § 241. — Liability or Discharge of Surety

The liability of a surety, or his discharge therefrom, on bonds in a bail trover action is determined by the general rules governing liability and discharge of sureties.

A bond given by defendant as security for the forthcoming of the property renders the surety thereon liable for the eventful condemnation money as soon as plaintiff recovers in his action.<sup>24</sup> A person signing as additional surety on a bond given by defendant in bail trover, knowing that the bond had been refused for want of additional surety, and thereby enabling his principal to obtain the property, is liable on the bond regardless of whether his signing operated to discharge the other surety.<sup>25</sup> Where the action is brought against two persons who unite in one bond with another person as surety, plaintiff's failure to recover against one of the defendants does not discharge the surety;<sup>26</sup> and, where judgment is obtained against defendant and his surety for a certain sum with a special lien on the property, a levy thereon will not operate to discharge the surety where the levy is insufficient to

satisfy the judgment,<sup>27</sup> nor will the taking of other property by the obligee from the principal on the bond under a claim of right be held to increase the risk of the surety on the bond or require credit for the property taken;<sup>28</sup> but a party, by taking possession of the property sued for after rendition of judgment in his favor, discharges the surety pro tanto in the amount of the value of the property.<sup>29</sup> Where plaintiff, in fieri facias on property belonging to the surety on a replevin bond, has removed part of the principal's property outside the county, such surety is discharged to the extent of the property thus removed.<sup>30</sup> A judgment of nonsuit in favor of defendant inures to the benefit of his surety on his forthcoming bond.<sup>31</sup>

# § 242. — Actions and Proceedings to Enforce

Actions on bonds in bail trover are governed by the rules applicable in actions on replevin or redelivery bonds.

The general rules applicable in actions on replevin and redelivery bonds are applicable in an action on a replevy bond given in a suit in trover.<sup>32</sup> Where the evidence shows that defendant was surety on the bond sued on and liable as such, that he has not been released by the acts of plaintiff, and that plaintiff's verdict and judgment in the trover suit have not been satisfied, it is error to direct a verdict for defendant.<sup>33</sup>

22. Ga.—Stacy v. Fleming, 159 S.E. 735, 43 Ga.App. 591—Kaufman v. Seaboard Air Line Ry., 73 S.E. 593, 10 Ga.App. 248.

23. Ga.—Morse v. Turner, 92 S.E. 767, 20 Ga.App. 108.

24. Ga.—Snell v. Mayo, 62 Ga. 743.

25. Ga.—Clark v. Macon Telegraph Pub. Co., 84 S.E. 577, 143 Ga. 278.

26. Ga.—Waldrop v. Wolff, 40 S.E. 830, 114 Ga. 610.

27. Ga.—Jenkins v. Swicord, 104 S.E. 18, 25 Ga.App. 640.

28. Ga.—Trice v. Cabero, 155 S.E. 54, 41 Ga.App. 816.

29. Ga.—Trice v. Cabero, supra.

30. Ga.—Dasher v. I. A. Brannen & Bro., 116 S.E. 206, 29 Ga.App. 253.

31. Ga.—Barry Finance Co. v. Lanier, 53 S.E.2d 694, 79 Ga.App. 344.

## Renewal action

Surety on forthcoming bond was not a party to bail trover action against his principal and could not be made a party in renewal of action after nonsuit relieving defendant and surety of liability on bond; and after judgment of nonsuit the action could not be reinstated as against

surety without notice to or service upon him and judgment against principal obtained without such notice or service, *fi. fa.* issued thereon, and levy thereunder were properly set aside as against surety—Larry Finance Co. v. Lanier, supra.

## 32. Defenses

That property described in a forthcoming bond is taken from obligor's possession under valid legal process superior to that under which the property was originally brought into law's possession may be shown as a defense to action on bond but it would be no defense if obligor surrendered property under a process which was invalid or inferior to lien or title upon which first proceeding was based—V. M. C. Products, Inc. v. Henry, 76 S.E.2d 451, 87 Ga.App. 827.

## Burden of proof

Where obligor and surety assert as defense to action on forthcoming bond that property described in bond was taken from obligor's possession under valid legal process superior to that under which property was originally brought into law's possession, obligor and surety have burden of

showing that process by which property was taken from obligor's possession was legally adequate.—V. M. C. Products, Inc. v. Henry, supra.

## Admissibility of evidence

Where obligor and surety on forthcoming bond sought to show that breach of bond sued upon was occasioned by a levy under execution of lien superior to title of plaintiff in trover suit in which forthcoming bond was made, but it appeared by entry of levy of execution that other property had been previously levied upon which was worth more than amount of execution, and proceeds of first levy were unaccounted for, execution was shown *prima facie* to have been satisfied, and so invalid, and court did not err in excluding from evidence the execution and second levy thereon upon property described in forthcoming bond and in rendering judgment for plaintiff for value of such property.—V. M. C. Products, Inc. v. Henry, supra.

## Evidence held sufficient

To authorize inference that defendant executed bond.—Trice v. Cabero, 155 S.E. 54, 41 Ga.App. 816.

33. Ga.—Trice v. Cabero, 155 S.E. 54, 41 Ga.App. 816.

**TRUANCY.** A child is a truant if his parent fails to cause him to attend school as required by a compulsory attendance statute, as stated in Schools and School Districts § 471, and the subject of truancy is treated in that title §§ 471-474.

**TRUCE.** An agreement between belligerent forces for a temporary cessation of hostilities.<sup>1</sup> It has been compared with "armistice" see 6 C.J.S. p 342 note 58. The various methods of terminating a war are treated in the C.J.S. title War § 42, also 67 C.J. p 429 note 11-p 431 note 56.

**TRUCK.** Originally the word "truck" meant a strong, small wheel,<sup>2</sup> but it is now applied to any of numerous vehicles for transporting heavy articles,<sup>3</sup> and it is defined generally as meaning a wheeled vehicle for carrying heavy weights;<sup>4</sup> a strong vehicle for transporting freight, merchandise, and other heavy articles.<sup>5</sup>

The term is commonly employed to denote more than one kind or character of vehicle,<sup>6</sup> and it may signify any strong, heavy cart or wagon, horse-drawn or self-propelled, for heavy handling;<sup>7</sup> a kind of handbarrow or handcarts, consisting essentially of a strong, braced frame, terminating in a pair of handles at one end supported on a pair of small heavy wheels with broad rim,<sup>8</sup> a small heavy rectangular frame supported on four small wheels,

used instead of rollers for moving heavy objects, as on a floor;<sup>9</sup> any of various small flat-topped cars for pulling or pushing by hand, with or without a handle and sometimes with stakes or vertical ends to prevent the load from falling off,<sup>10</sup> used in shops, railroad stations, etc., for moving heavy articles.<sup>11</sup> The term may also signify a strong frame or platform on wheels such as is used for carrying baggage in and around railroad stations,<sup>12</sup> or a strong carriage used about a sawmill for conveying heavy timber.<sup>13</sup> An open railroad freight car, a railway goods wagon,<sup>14</sup> and a framework mounted on wheels and used to support one end of a locomotive,<sup>15</sup> are all commonly referred to as trucks.

The word "truck" has been distinguished from "dolly" see 27 C.J.S. p 1317 note 9. It is stated in Motor Vehicles § 1 b (2) that the word "automobile" as used in statutes includes an automobile truck, auto truck, motor truck, or truck, and the term "automobile truck" is defined in Motor Vehicles § 4.

*Payment of wages.* The word "truck" is employed in a very specific sense to denote the payment of wages in goods instead of in cash,<sup>16</sup> and in English law the "Truck Act" is the name given to St. 1 & 2 Wm. IV. c. 37, passed to abolish what is commonly called the "Truck System," under which employers were in the practice of paying the wages of their work people in goods, or of requiring them to purchase goods at certain shops.<sup>17</sup>

1. U.S.—Commercial Cable Co. v. Burleson, D.C.N.Y., 255 F. 99, 105
2. Ark.—Rapert v. State, 223 S.W. 2d 192, 193, 215 Ark. 768.
- Tex.—Harrison v. State, 210 S.W.2d 591, 592, 151 Tex.Cr. 606—Montgomery v. State, 143 S.W.2d 945, 140 Tex.Cr. 81.
3. Ark.—Rapert v. State, 223 S.W. 2d 192, 193, 215 Ark. 768.
- Tex.—Harrison v. State, 210 S.W.2d 591, 592, 151 Tex.Cr. 606—Montgomery v. State, 143 S.W.2d 945, 140 Tex.Cr. 81.
- Wash.—McGillivray v. Montgomery Ward & Co., 143 P.2d 550, 552, 19 Wash.2d 582.
4. Neb.—Paltani v. Sentinel Life Ins. Co., 237 N.W. 392, 393, 121 Neb. 447.

#### Phrases

- (1) "Dump truck" see 28 C.J.S. p 588 note 95-p 589 note 97.
- (2) "Truck wagon"—Smith v. Chase, 71 Me. 164, 166—65 C.J. p 178 note 11.
- (3) "Truck-mixers" are concrete mixers mounted on trucks, which either mix the cement or aggregate pre-mixed cement en route to a job.—U. S. v. Carrozzo, D.C.Ill., 37 F.Supp. 191, 195.

5. Neb.—Paltani v. Sentinel Life Ins. Co., 237 N.W. 392, 393, 121 Neb. 447
- Tenn.—Hemlock 6100 Tire Co. v. McLeomore, 268 S.W. 116, 117, 151 Tenn. 99.
6. Tex.—Harrison v. State, 210 S.W. 2d 591, 592, 151 Tex.Cr. 606—Montgomery v. State, 143 S.W.2d 945, 110 Tex.Cr. 81.
7. Tex.—Harrison v. State, 210 S.W.2d 591, 592, 151 Tex.Cr. 606
8. N.Y.—Manigault v. W. H. Beaumont & Son, 237 N.Y.S. 370, 371, 227 App.Div. 259.
- Tex.—Harrison v. State, 210 S.W.2d 591, 592, 151 Tex.Cr. 606—Wash.—McGillivray v. Montgomery Ward & Co., 143 P.2d 550, 552, 19 Wash.2d 582.
- "Hand truck" see 39 C.J.S. p 768 note 24.
9. N.Y.—Manigault v. W. H. Beaumont & Son, 237 N.Y.S. 370, 371, 227 App.Div. 259.
- Tex.—Harrison v. State, 210 S.W.2d 591, 592, 151 Tex.Cr. 606—Wash.—McGillivray v. Montgomery Ward & Co., 143 P.2d 550, 552, 19 Wash.2d 582.
10. N.Y.—Manigault v. W. H. Beau-

- mont & Son, 237 N.Y.S. 370, 371, 227 App.Div. 259.
- Tex.—Harrison v. State, 210 S.W.2d 591, 592, 151 Tex.Cr. 606
- Wash.—McGillivray v. Montgomery Ward & Co., 143 P.2d 550, 552, 19 Wash.2d 582
11. N.Y.—Manigault v. W. H. Beaumont & Son, 237 N.Y.S. 370, 371, 227 App.Div. 259.
- Wash.—McGillivray v. Montgomery Ward & Co., 143 P.2d 550, 552, 19 Wash.2d 582.
12. Tex.—Harrison v. State, 210 S.W. 2d 591, 592, 151 Tex.Cr. 606—Montgomery v. State, 143 S.W.2d 945, 140 Tex.Cr. 81.
13. Tex.—Harrison v. State, 210 S.W. 2d 591, 592, 151 Tex.Cr. 606—Montgomery v. State, 143 S.W.2d 945, 140 Tex.Cr. 81.
14. Tex.—Harrison v. State, 210 S.W. 2d 591, 592, 151 Tex.Cr. 606.
15. Tex.—Harrison v. State, supra—Montgomery v. State, 143 S.W.2d 945, 140 Tex.Cr. 81.
16. Webster New Int.D. 65 C.J. p 178 note 12.
17. W.Va.—State v. Peel Splint Coal Co., 15 S.E. 1000, 1010, 36 W.Va. 802, 17 L.R.A. 385.

**TRUCKMAN.** A person whose business it is to convey goods on trucks,<sup>18</sup> and the term refers to the hauling of merchandise or personal property, and not the hauling of passengers.<sup>19</sup> Although a truckman may be a common carrier, usually the word indicates a private carrier.<sup>20</sup>

**TRUE.** The word "true" is frequently employed as meaning that which is frank and actual, rather than that which is precise and technical,<sup>21</sup> and in one sense it is defined as meaning conformable to fact;<sup>22</sup> conformable to truth;<sup>23</sup> conformable to,<sup>24</sup> or in accordance with,<sup>25</sup> the actual state of things; correct;<sup>26</sup> free from error;<sup>27</sup> not false, erroneous, inaccurate, or the like.<sup>28</sup> In another sense, "true" is right to precision;<sup>29</sup> conformable to a rule or pattern;<sup>30</sup> exact;<sup>31</sup> accurate.<sup>32</sup>

18. Cal.—American Motorists Ins Co. v. Moses, 244 P.2d 760, 762, 111 Cal.App.2d 344.

#### Use of teams

Where a person's occupation was listed as truckman, and in his work he used both trucks and teams and at the time of the accident he was engaged as a mule skinner, the use of teams would not constitute the person something other than a truckman.—Federal Underwriters Exchange v. Stricklin, Tex.Civ.App., 151 S.W.2d 612, 616.

19. Cal.—American Motorists Ins Co. v. Moses, 244 P.2d 760, 762, 111 Cal.App.2d 344.

20. Mass.—Goodman v. New York, N. H. & H. R. Co., 3 N.E.2d 777, 779, 295 Mass. 330, 106 A.L.R. 1151.

21. N.J.—Strong v. Gaskill, 116 A. 692, 693, 95 N.J.Law 14—Smith v. Weaver, 65 A. 941, 942, 75 N.J. Law 31—Abeles v. Guelick, 137 A. 853, 856, 101 N.J.Eq. 180.

22. Iowa.—Johnson v. Des Moines Life Ins. Co., 75 N.W. 101, 102, 105 Iowa 273.

Tenn.—State v. Texas Co., 116 S.W. 2d 583, 584, 173 Tenn. 154.

#### Negatively stated

In strictness, a statement is untrue which is not in precise conformity with the facts.—Clapp v. Massachusetts Ben. Ass'n, 16 N.E. 433, 436, 146 Mass. 519.

23. Tex.—First State Bank of Teague v. Hadden, Civ.App., 158 S.W. 1168, 1170.

24. U.S.—Zolintakis v. Equitable Life Assur. Soc. of U. S., C.C.A. Utah, 108 F.2d 902, 905.—North American Accident Ins. Co. v. Tebbis, C.C.A. Utah, 107 F.2d 853, 856.—Zolintakis v. Equitable Life Assur. Soc. of U. S., C.C.A. Utah, 97 F.2d 583, 587.—Sentinel Life

Ins. Co. v. Blackmer, C.C.A. Colo., 77 F.2d 347, 351.

Ariz.—Illinois Bankers' Life Ass'n v. Theodore, 34 P.2d 423, 426, 44 Ariz. 160.

Ill.—Rataj v. Providers Life Assur. Co., 221 Ill.App. 459, 466.

65 C.J. p 179 note 19.

25. Iowa.—Johnson v. Des Moines Life Ins. Co., 75 N.W. 101, 102, 105 Iowa 273.

Tenn.—State v. Texas Co., 116 S.W.2d 583, 584, 173 Tenn. 154.

26. Tenn.—State v. Texas Co., supra.

65 C.J. p 179 note 20.

27. Tex.—First State Bank of Teague v. Hadden, Civ.App., 158 S.W. 1168, 1170.

28. Iowa.—Johnson v. Des Moines Life Ins. Co., 75 N.W. 101, 102, 105 Iowa 273.

Tenn.—State v. Texas Co., 116 S.W. 2d 583, 584, 173 Tenn. 154.

29. Iowa.—Johnson v. Des Moines Life Ins. Co., 75 N.W. 101, 102, 105 Iowa 273.

30. Iowa.—Johnson v. Des Moines Life Ins. Co., supra.

31. Iowa.—Johnson v. Des Moines Life Ins. Co., supra.

32. Iowa.—Johnson v. Des Moines Life Ins. Co., supra.

Tex.—First State Bank of Teague v. Hadden, Civ.App., 158 S.W. 1168, 1170.

#### 33. True verdict

(1) The voluntary conclusion of the jury after deliberate consideration.—Bank of Tallahassee v. Elmore Fertilizer Co., 78 So 648, 649, 16 Ala. App. 465—65 C.J. p 180 note 55. Verdict in criminal prosecutions see Criminal Law §§ 1388—1416; in civil actions see Trial §§ 485—573.

(2) The truthful saying of twelve impartial, fair-minded men, who arrive at a conclusion because it is

"True" has been held to be equivalent to, or synonymous with, "correct" see 20 C.J.S. p 237 note 39.1, "in good faith" see 35 C.J.S. p 490 note 4, "not fraudulent" see 37 C.J.S. p 837 note 25, "honest" see 41 C.J.S. p 323 note 29, "intrinsic" see 48 C.J.S. p 752 note 16, "just" see 50 C.J.S. p 1101 note 81, and "sincere" see 80 C.J.S. p 1307 note 18; and it has been held to be the opposite of "false" see 35 C.J.S. p 497 note 16.

Phrases employing the word are set out in the note.<sup>33</sup>

**TRUFFLE.** Any one of various fleshy underground fungi of the genus *Tuber*.<sup>34</sup>

**TRULY.** The word "truly" is defined as embracing the meaning of "faithfully,"<sup>35</sup> and as one of the

their duty, under the evidence, to do so, and not because they are coerced, whether wittingly or unwittingly, by a trial judge to do so.—Meadows v. State, 62 So. 737, 738, 182 Ala. 51, Ann.Cas.1915D 663.

(3) A verdict is not a "true verdict" if it is the result of any arbitrary rule or order, whether imposed by the jurors themselves or by the court or officer in charge.—Southern R. Co. v. Williams, 21 So. 328, 329, 113 Ala. 620—Ledbetter v. State, 85 So. 581, 582, 17 Ala.App. 417.

#### Other phrases

(1) "True copy" and other phrases of similar import see 18 C.J.S. p 132 notes 55—58.

(2) "True value" as the basis for the assessment of property for purposes of taxation see Taxation § 410 a.

(3) "True cash value" see 14 C.J.S. p 23 note 31.

(4) Additional phrases of which more recent adjudications have not been found see 65 C.J. p 180 note 58—p 181 note 87.

#### 34. New Standard D.

##### Generally regarded as condiment

Although truffles belong to the vegetable kingdom, they are used solely as a condiment in cooking and are never served separately as a table dish.—S. S. Pierce Co. v. U. S., C. Mass., 176 F. 440, 443—Von Bremen, MacMonnies & Co. v. U. S., N.Y., 168 F. 889, 94 C.C.A. 301.

35. Wyo.—Miller v. Hagie, 140 P.2d 746, 752, 59 Wyo. 383.

##### "Truly taken" and "truly copied"

A certificate that a paper is "truly taken" from the court records is more unequivocal than a certificate that a paper is "truly copied" from court records.—Edmiston v. Schwartz, 13 Serg. & R., Pa., 135—65 C.J. p 181 note 90.

words which comprise "faithfully" see 35 C.J.S. p 491 note 16.

"Truly" has been held to be synonymous with "verily,"<sup>36</sup> and it has been distinguished from "fairly" see 35 C.J.S. p 487 note 55.

**TRUMPET.** A wind instrument consisting of a long metallic tube, commonly once or twice curved, with cup-shaped mouthpiece, and ending in a bell. It is typical of the well-known and ancient family of instruments giving their tones by the vibration of the player's lips against the mouthpiece of a long tube. Besides its fundamental tone, a series of harmonies can be produced by varying the force of blowing and the embouchure. Other tones are variously secured, as by means of finger holes and keys, as in the obsolete key bugle and serpent, of a slide, as in the trombone, or of valves, as in the modern cornet-a-pistons, which last give easily all the scale tones of its compass, although with some loss of purity.<sup>37</sup>

**TRUNK.** In one sense the word "trunk" means the main body or stock of a tree, as distinguished from the branches and roots;<sup>38</sup> the body of a tree above the soil;<sup>39</sup> hence, the main or central body of any structure or system, as a railroad.<sup>40</sup>

In a different sense, the word "trunk" means a light-framed box or case with a hinged lid, usually covered with leather and lined with linen or paper, and often having a tray, used for packing articles, as for a journey.<sup>41</sup> In this sense "trunk" and "chest" are not synonymous as stated in 14 C.J.S. p 1103 note 61.

**TRUSS.** The dominant idea of a "truss" is that its members are fitted to interpose against the expected strain their capacity for resistance to longitudinal compression and are sufficiently rigid so that they will not buckle.<sup>42</sup> The word is not completely ap-

propriate as applied to certain wire structures for use in cushions or mattresses.<sup>43</sup>

**TRUST.** The word "trust," as a noun, is defined in Trusts § 2, in its technical legal sense as the right, enforceable solely in equity, to the beneficial enjoyment of property the legal title to which is vested in another; and in a broader popular sense the term is frequently employed to indicate duties, relations, and responsibilities which are not strictly technical trusts. The various kinds and classes of trusts, such as express, implied, resulting, constructive, executed and executory, complete and incomplete, simple and special, passive and active, technical and operative, voluntary and involuntary, public and private, legal and illegal, and other kinds and classes of trusts are defined in Trusts §§ 10-21. As defined in Monopolies § 1 b, a "trust" is a combination, confederation, or contract, express or implied, between individuals or corporations or both, which aims at a union of energy, capital, and interest in order to eliminate competition, limit production, and control the price of commodities or services for the benefit of the parties thereto and to the injury of the public, and which tends to create a monopoly.

As a verb, the word "trust" is defined generally as meaning to repose trust in; rely upon; have faith in.<sup>44</sup> In a more specific sense the term relates to a person's financial ability to pay his debts,<sup>45</sup> and is defined as meaning to give credit to.<sup>46</sup>

**Trust company.** The term "trust company" is sometimes employed to designate a bank, although there is a distinction between a trust company and a bank, which is stated in Banks and Banking § 1044. In its primary and ordinary sense the term "trust company" signifies a corporation organized for the purpose of accepting, administering, and executing trusts.<sup>47</sup> However, from the standpoint

36. N.D.—Storing v. Stutsman, 218 N.W. 223, 225, 56 N.D. 531.

37. U.S.—U. S. v. Sears Roebuck Co., 23 Ct.Cust.App. 348, 351.

38. New Standard D.

39. Vt.—Cobb v. Western Union Tel. Co., 98 A. 758, 759, 90 Vt. 342, Ann. Cas.1918B 1156—Skinner v. Walder, 38 Vt. 115, 122, 88 Am.D. 615.

40. New Standard D.

**Phrases**

(1) "Trunk line highway" see Highways § 1 c.

(2) "Trunk railway" see Railroads § 1 a (2) (a).

(3) "Trunk sewer" see 80 C.J.S. p. 133 notes 20, 21.

41. New Standard D.

42. U.S.—Marshall Ventilated Mattress Co. v. D'Arcy Spring Co., C.C.A.Mich., 280 F. 945, 946.

43. C.J. p 181 note 3.

44. U.S.—Marshall Ventilated Mattress Co. v. D'Arcy Spring Co., supra.

45. C.J. p 181 note 4.

**Phrases** employing the words "truss" or "trussed" and of which more recent adjudications have not been found see 65 C.J. p 182 notes 6-9.

46. New Standard D.

47. Fla.—Putnal v. Inman, 80 So. 316, 318, 76 Fla. 553, 3 A.L.R. 1580.

48. Fla.—Putnal v. Inman, supra.

49. Ill.—People ex rel. Nelson v. Citizens Trust & Savings Bank, 272 Ill.App. 444.

N.Y.—People v. National Surety Co., 177 N.Y.S. 838, 839, 189 App.Div. 38.

Va.—Loudoun Nat. Bank of Leesburg v. Continental Trust Co., 180 S.E. 548, 551, 164 Va. 536.

**Popular designation**

N.J.—State v. Twining, 64 A. 1073, 1075, 73 N.J.Law 683—65 C.J. p 182 note 26.

**Functions**

U.S.—Mercantile Nat. Bank v. New York City, N. Y., 7 S.Ct. 826, 837, 121 U.S. 138, 30 L.Ed. 895.

65 C.J. p 182 note 27 [a].

of the variety of transactions in which, as a matter of common knowledge, this class of corporations currently engage, "trust company" might almost be regarded as *nomen generalissimum* for financial and promoting companies.<sup>48</sup> A corporation authorized to transact the business of registrar and transfer agent of other corporations is not a "trust company," although a like power has been granted to trust companies.<sup>49</sup> A corporation does not become a "trust company," under the statutes of the state, by accepting a trust imposed by the assignment

of notes payable to, and the certificates of stock of, its debtor corporation, with the direction that the proceeds be applied to the payment of the indebtedness of such corporation.<sup>50</sup>

**Trust receipt.** A well-known instrument of commerce,<sup>51</sup> a useful and convenient method of financing commercial transactions.<sup>52</sup> It is an independent security device employed in commercial credit transactions,<sup>53</sup> frequently employed in the importing trade,<sup>54</sup> and also in the marketing of automobiles,<sup>55</sup>

48. Md.—*State v. Central Trust Co.*, 67 A. 267, 270, 106 Md. 268.  
65 C.J. p 182 note 28.

49. N.Y.—*People v. National Security Co.*, 177 N.Y.S. 838, 839, 189 App Div. 38.

50. Fla.—*Hitchcock v. Mortgage Securities Corp.*, 116 So. 244, 254, 95 Fla. 147.

51. Mass.—*People's Nat. Bank v. Mulholland*, 117 N.E. 46, 47, 228 Mass. 152.

#### Thoroughly established

Trust receipts, because of their beneficial features in quick credit transactions and their frequent judicial concern, have become thoroughly established and identified in business and law.—In re Boswell, D.C. Cal., 20 F.2d 239, 241.

#### Not of recent origin

U.S.—In re Bell Motor Co., C.C.A. Mo., 45 F.2d 19, 22.

"The origin and development of the trust receipt as a convenient means of financing importations, and its later application to domestic transactions, is exhaustively discussed by the Court of Appeals of the Second Circuit in the case of *In re Fountain, Inc.*, N. Y., 282 F. 816, 25 A.L.R. 319."—*Hamilton Nat. Bank v. McCallum*, C.C.A. Tenn., 58 F.2d 912, 913.

52. U.S.—In re Chappell, D.C.Or., 77 F.Supp. 573, 575.

Ga.—*Motor Contract Co. v. Citizens & Southern Nat. Bank*, 17 S.E.2d 195, 198, 66 Ga.App. 78.

53. U.S.—In re Boswell, D.C.Cal., 20 F.Supp. 748, 751.

Ga.—*Motor Contract Co. v. Citizens & Southern Nat. Bank*, 17 S.E.2d 195, 198, 200, 66 Ga.App. 78.

#### Method of securing mercantile loans

"The essential character of the 'trust receipts' has long been understood by the mercantile and banking community. Such 'trust receipts' include the long-established method of securing mercantile loans by a transaction in which the lender, having no prior title to the goods upon which the loan is to be given, and without having possession, which remains in the borrower, lends his money to the borrower upon the security of the

goods, which the borrower is privileged to sell clear of the lien, he agreeing to pay all or part of the proceeds of the sale to the lender. The documents in which the transactions are expressed are known in the business and banking world as 'trust receipts'."—In re Boswell, C.C.A. Cal., 96 F.2d 239, 241.

#### Used in domestic transactions

"In trade practice and by the support of the judicial authority, a trust receipt might equally be used in connection with a domestic transaction as it is used in an importation of merchandise."—In re James, Inc., C. C.A.N.Y., 30 F.2d 556, 557.

#### 54. Original use

Trust receipts were originally employed as a convenient method of financing importations, and are still so used.—In re Bell Motor Co., C.C.A. Mo., 45 F.2d 19, 22.

#### Of vital importance in importing trade

By the arrangement known as the "trust receipt" plan a banker advances money to an intending importer, and thereby lends the aid of capital, of credit, and of business facilities and agencies abroad, to the enterprise of foreign commerce. This practice is of great importance to importers, and without it much of our foreign trade would be impossible because the individual importer lacks the necessary capital and foreign credit.—In re Dunlap Carpet Co., D.C.Pa., 206 F. 726, 730, 731.

#### As used in the importing trade

(1) The term "trust receipt" is applied to an instrument in writing whereby a banker, having advanced money for the purchase of imported merchandise and having taken title in his own name and retaining such title, delivers possession of the merchandise to the importer on an agreement in writing to hold the merchandise in trust for the banker until he is paid. The only kind of instrument which we have recognized and called a trust receipt is one where the banker at the request of the importer buys goods directly from the foreign seller and takes title in his own name from the foreign seller and then turns the goods which he

has thus bought directly in his own name over to the importer on a trust receipt in order that the latter may carry on his own commercial adventure.—*Simons v. Northeastern Finance Corporation*, 171 N.E. 643, 644, 271 Mass. 285.

(2) A merchant who wishes to import goods for which he has not funds to pay obtains credit from a bank to a fixed amount, against which he draws for the price of the goods to the order of the vendor or the vendor draws for the price of the goods to his own order. The draft with the bill of lading indorsed in blank or to the order of the bank is forwarded by the vendor to the banker for acceptance. The banker accepts the draft payable in one, two, three, or four months, as the case may be, forwards the bill of lading indorsed in blank to his agent in New York, who delivers the same to the importer against a receipt called a trust receipt, whereby he agrees to sell the goods for account of the banker, to pay him the proceeds and so put him in funds to take up the acceptance at maturity.—In re Cattus, N.Y., 183 F. 733, 734, 106 C.C.A. 171.

(3) It is an instrument whereby the banker advancing the money on an importation takes title directly to himself, and as owner delivers the goods to the dealer in whose behalf he is acting secondarily and to whom the title ultimately is to go when the primary right of the banker has been satisfied, the title remaining in the banker until the price is paid to him.—*People's Nat. Bank v. Mulholland*, 117 N.E. 46, 47, 228 Mass. 152.

55. U.S.—In re Bell Motor Co., C.C.A. Mo., 45 F.2d 19, 22.

Cal.—*Chichester v. Commercial Credit Co.*, 99 F.2d 1083, 1085, 37 Cal. App.2d 439.

Ga.—*Motor Contract Co. v. Citizens & Southern Nat. Bank*, 17 S.E.2d 195, 198, 66 Ga.App. 78.

#### Use extended because of marketing of automobiles

The use of trust receipts has become greatly extended in the United States since the automobile has assumed its nationwide and popular

and the same principles govern whether the transaction is domestic or the financing of imports.<sup>56</sup>

As used in commerce by credit and financial agencies it is regarded as a security instrumentality which resembles a pledge, a chattel mortgage, or a conditional sales contract, but is exactly none of these mediums of trade and credit.<sup>57</sup> Some of the chief differences are the absence of actual or im-

mediate delivery, or change of possession, the removal of notice, recordation or verification requirements, and the retention of title in the vendor.<sup>58</sup> By means of the trust receipt, title to goods passes directly from the manufacturer or seller to the banker or lender who, as owner, delivers the goods to the dealer in whose behalf he is acting secondarily, and to whom title goes ultimately when the primary right of the banker has been satisfied.<sup>59</sup>

proportions in financing and credit requirements for this major industry.—In *re* Boswell, D.C. Cal., 20 F. Supp. 748, 751.

56. U.S.—In *re* Bell Motor Co., C.C. A. Mo., 45 F.2d 19, 22.

57. U.S.—In *re* Boswell, D.C. Cal., 20 F. Supp. 748, 751.

#### Similarly expressed

(1) "There are various forms of chattel security, as a pledge, conditional sale, or mortgage. But the trust receipt does not, on its face or by its name, purport to conform to any of these types. It is not a pledge, for a pledge depends upon possession of the parties secured, and, when possession is lost, so is the security. While the title in the case of a pledge is in the pledgor, or in another than the pledgee, such is not true in a trust receipt, where the title is intended to remain in the party secured while the possession is entrusted to one who has a certain interest as yet indefinite in the property. The practice of a conditional sale bears some resemblance to a trust receipt. Possession cannot be retaken until there is a default, whereas in a trust receipt, it can be retaken at any time. The holder of the trust receipt is not interested in the sale of the property or its commercial or market value. If he retakes the goods, and sells them for an amount in excess of the sum, this excess belongs to the buyer or importer; whereas, in a conditional sale, the buyer is interested only in such amount as he has paid on account of his contract. In any event, the holder of the trust receipt does not sell the goods to the importer or domestic trader, and whether or not the bank, finance company, or individual has an intention of selling goods to him, it lends him credit and advances the money for the buyer's account. In the case of a mortgage, whether of chattels or realty, the security is dependent upon the title, as distinguished from a pledge, which rests upon possession. Title is given to the person, while possession may be given to the mortgagor, or the debtor, or his representative. The title thus conveyed to the mortgagee is as security for the performance of his obligation, and, in the case of a trust receipt, title has never been in

the importer or domestic buyer, and he consequently cannot convey such title back to the holder of the trust receipt. If the mortgagor conveys his title to the mortgagee as security for the performance of an obligation to a third person, the equity of redemption belongs to him, and not to the third person, and the property reverts to him upon performance of the obligation by the third person. In a trust receipt, under no circumstances does title revert to the manufacturer or seller."—In *re* James, Inc., C.C. N.Y., 30 F.2d 555, 557, 558.

(2) "While the security interest afforded by a trust receipt prior to the enactment of the uniform law was somewhat similar to many other forms of chattel security, it may be distinguished from such transactions as a mortgage, pledge or conditional sale. In the case of a mortgage, a lien is given by the mortgagor to the mortgagee in order to secure the latter for the performance of an obligation by the mortgagor who retains possession of the property. The trust receipt does not conform to a pledge, since in the case of a pledge the security depends upon possession of the goods by the person secured; whereas in the case of a trust receipt, the entruster does not have possession of the goods. In the case of a conditional sale, possession may not ordinarily be retaken until there is a default in the contract, whereas under a trust receipt transaction, possession may be retaken at any time. Other distinguishing features of these various types of security interest under the former law are clearly indicated in the case of *In re* James, Inc., 2 Cir., 30 F.2d 555"—C. I. T. Corporation v. Commercial Bank of Patterson, 149 P.2d 439, 442, 64 Cal. App.2d 722—*Chichester v. Commercial Credit Co.*, 99 P.2d 1083, 1085, 37 Cal. App.2d 439.

(3) In a trust receipt transaction it was held that no element of a conditional sale or chattel mortgage was present, and consequently none of the requisites to the validity of such instruments was required.—In *re* E. Reboulin Pills & Co., D.C. N.J., 165 F. 245, 248.

#### May be a chattel mortgage

When the substance of the trans-

action is considered rather than the form, a trust receipt may be nothing but a chattel mortgage on a stock of merchandise daily exposed for sale in parcels at retail.—*General Motors Acceptance Corporation v. Boddicker*, Tex. Civ. App., 274 S.W. 1016, 1018.

#### Not chattel mortgage

(1) "Upon examination of the instrument in suit it seems plain enough that there was no obligation imposed on the sales company either to pay or to secure a purchase price, nor did any title pass to the sales company to support a chattel mortgage back."—*Globe Securities Co. v. Gardner Motor Co.*, 85 S.W.2d 561, 567, 337 Mo. 177.

(2) "The decisions are not entirely in harmony as to the nature of trust receipts of the character involved in this proceeding, or their proper interpretation, whether they constitute conditional sales contracts, or, are, in their nature, chattel mortgages, or contracts of agency creating bailments. The holding in this state is that they are contracts creating bailments for sale and not in their nature chattel mortgages."—*Commercial Credit Co. v. Interstate Securities Co.*, Mo. App., 197 S.W.2d 1000, 1001.

#### Close resemblance to conditional sale

The trust receipt transaction in its historic aspects and fundamental theory more nearly falls under the category of a conditional sale than a chattel mortgage.—*Walter v. Commercial Credit Co.*, 299 N.W. 300, 302, 68 S.D. 151.

58. U.S.—In *re* Boswell, D.C. Cal., 20 F. Supp. 748, 751.

#### Superior protection to unrecorded chattel mortgage

It has been recognized that trust receipts should have superior protection as compared with an unrecorded chattel mortgage, when they are given to a lender of money by some one other than the debtor, and where either the delivery or possession against trust receipts is made to the debtor.—In *re* James, Inc., C.C. A.N.Y., 30 F.2d 555, 558.

59. U.S.—*Hamilton Nat. Bank v. McCallum*, C.C.A. Tenn., 58 F.2d 912, 913.—In *re* Chappell, D.C. Or., 77 F. Supp. 573, 575.

A trust receipt purports to vest and retain title in the holder of the receipt, and it is generally held that the rights incident to such title and ownership will be recognized not only as against the one giving the receipt, but his receiver, trustee in bankruptcy, and creditors generally, unless the contract is itself violative of local statute.<sup>60</sup>

Trust receipts have generally been held not subject to recording or filing acts,<sup>61</sup> the reason being that such statutes are to prevent secret liens on property of persons who have had prior possession and ownership of the property,<sup>62</sup> and it is for the same reason that holders of trust receipts have been allowed to prevail against the ultimate purchaser or his trustee in bankruptcy only where the title of the holder was derived from some one other than the debtor.<sup>63</sup>

There are two types of trust receipt transactions. The first is the tripartite, or the true or orthodox type, where the finance company advances the funds for the purchase of the chattel, purchases it and receives title to it from the manufacturer, and delivers possession to the dealer, who gives his trust receipt to the finance company.<sup>64</sup> The second type

is the bipartite where the dealer has purchased and received title directly from the manufacturer and gives his receipt to the finance company.<sup>65</sup> In certain jurisdictions trust receipt transactions are governed by the Uniform Trust Receipts Act,<sup>66</sup> and one of the purposes of the Uniform Trust Receipt Act was to recognize and validate the second or bipartite type of trust receipt transaction.<sup>67</sup>

Trust receipts as chattel mortgages are discussed at length in Chattel Mortgages § 9, and for other references see the index to that title. Trust receipts are also treated in Bankruptcy and for specific references see the index to that title. See also Banks and Banking § 179 and Sales § 574 b (4). For other references consult the Descriptive-Word Index.

*Other phrases* employing the word "trust" are set out in the note,<sup>68</sup> and for additional phrases of which more recent adjudications have not been found see 65 C.J. p 182 notes 16-20, 31-37.

**TRUSTEE.** The word "trustee" is defined both in its technical or legal sense, and in its broader and more general sense, in Trusts § 3.

60. U.S.—In re Bell Motor Co., C.C.A.Mo., 45 F.2d 19, 22.

#### Similarly expressed

Under the ordinary form of trust receipt, it is well settled that the title to the property is in the holder of the receipt, and not in the receptor; and the rights incident to such title and ownership will be enforced as against the one giving the receipt, his receiver, trustee in bankruptcy, and creditors generally. The courts in so holding are, in most instances, merely giving effect to the express provisions of the trust receipt, one of which commonly is that the goods are held as the property of the party to whom the receipt is given.—In re Otto-Johnson Mercantile Co., D.C.N.M., 52 F.2d 678, 680.

61. U.S.—Hamilton Nat. Bank v. McCallum, C.C.A.Tenn., 58 F.2d 912, 913.

S.D.—Walton v. Commercial Credit Co., 299 N.W. 300, 302, 68 S.D. 151.

#### Recording not required

The holder of a trust receipt, if he derives his security title from a person other than the one responsible for the satisfaction of the obligation which the property secures, is not obliged to file his security as is required in the case of a chattel mortgage. In such cases only can he deliver the property to the obligor to act as his fiduciary.—In re James, Inc., C.C.A.N.Y., 30 F.2d 555, 557.

62. U.S.—Hamilton Nat. Bank v. McCallum, C.C.A.Tenn., 58 F.2d 912, 913.

63. U.S.—Hamilton Nat. Bank v. McCallum, supra.

64. Pa.—Automobile Banking Corp. v. Weicht, 51 A.2d 409, 412, 160 Pa. Super. 422.

65. Pa.—Automobile Banking Corp. v. Weicht, supra.

66. U.S.—In re Boswell, D.C.Cal., 20 F.Supp. 748, 751.

Cal.—Chichester v. Commercial Credit Co., 99 P.2d 1083, 1085, 37 Cal. App.2d 439.

#### Purpose of act

"The Uniform Trust Receipt Act is a perplexing maze of technical phrases wholly incomprehensible without an extensive study of the background and development of the security device known as the trust receipt. To avoid trespassing upon the traditional and well defined fields of such common security devices as the pledge, conditional sale and chattel mortgage, most of the act is devoted to definition, limitation and restriction of the arena in which the new device is to play its part in the world of commerce. The object of the Act is to standardize and protect the trust receipt method of financing the acquisition and resale of goods in their journey from producer to retailer"—In re Chappell, D.C.Or., 77 F.Supp. 573, 575.

67. Pa.—Automobile Banking Corp.

v. Weicht, 51 A.2d 409, 412, 160 Pa. Super. 422.

#### 68. Phrases

(1) "Trust deed" defined see Mortgages § 5, and for other specific references see the index to that title

(2) "Trust estate" is a term used with some confusion in the text-books, sometimes to express the estate of a trustee, and sometimes that of the beneficiary.—Cooper v. Cooper, 5 N.J.Eq. 9, 12.

(3) "Trust ex delicto" as a constructive trust see Trusts § 15.

(4) "Trust ex maleficio" as a constructive trust see Trusts § 15.

(5) "Trust fund doctrine" is the rule that the capital stock of a corporation constitutes a trust fund for the benefit of its creditors as its capital is the basis of its credit, but the trust does not arise until the corporation becomes insolvent, as stated in Corporations § 583.

(6) "Trust fund theory" is theory that charitable institution was created by donation for strictly charitable use and that to make its funds subject to damages for negligence of institution employees would be to deplete funds and thwart purpose of donors.—Haynes v. Presbyterian Hospital Ass'n, 45 N.W.2d 151, 153, 241 Iowa 1269. Liability of charitable institution for torts see Charities § 75.

(7) "Trust in invitum" as a constructive trust see Trusts § 15.

*Phrases* employing the word "trustee" are set out in the note.<sup>69</sup> **TRUSTOR.** As a term employed to designate one who creates a trust see Trusts § 4.

**69. Phrases**

<p>(1) "Trustee in bankruptcy" see the index to the title Bankruptcy.</p>	}	<p>(2) "Trustee process" as a term for garnishment see Garnishment § 1.</p> <p>(3) Other phrases employing the word "trustee" and of which more recent adjudications have not been found see 65 C.J. p 183 notes 40, 43.</p>
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# TRUSTS

This Title includes nature and incidents of estates in property the legal title or power of disposition of which is held by one or more persons, wholly or in part for the use of another or others, under an equitable obligation, express or implied, resting upon such person or persons by reason of confidence reposed in him or them, to convey, apply, or deal with such property or its profits at the will or for the benefit of such other person or persons according to the confidence so reposed; rights, powers, duties, and liabilities of persons creating such trusts, of trustees, and of cestuis que trustent or beneficiaries in general; judicial protection and control of trust property and trustees; and remedies and proceedings relating thereto.

Matters not in this Title, treated elsewhere in this work, see Descriptive-Word Index

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**C. ACTIONS**

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**VIII. LIABILITIES ON TRUSTEES' BONDS**

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I. DEFINITIONS, HISTORY, KINDS, AND NATURE IN GENERAL

§ 1. Definitions and Distinctions

Definitions and distinctions with respect to terms coming within the scope of the title Trusts are considered infra §§ 2-7, 10-21.

Examine Pocket Parts for later cases.

§ 2. — Trust

In its technical legal sense, a trust is defined as the right, enforceable solely in equity, to the beneficial enjoyment of property the legal title to which is vested in another, but the word "trust" is frequently employed to indicate duties, relations, and responsibilities which are not strictly technical trusts.

In its technical legal sense a trust has been defined as the right, enforceable solely in equity, to the

beneficial enjoyment of property the legal title to which is vested in another.<sup>1</sup> It has been otherwise defined as an obligation on a person arising out of a confidence reposed in him to apply property faithfully and according to such confidence;<sup>2</sup> a holding of property, subject to a duty of employing it or applying its proceeds according to directions given by the person from whom it was derived;<sup>3</sup> or a right to property, real or personal, held by one party for the benefit of another.<sup>4</sup> The term "trust" has also been defined as that relation between two persons by virtue of which one of them holds property for the benefit of the other,<sup>5</sup> or as an equitable right, title, or interest in property, real or personal, distinct from the legal ownership thereof.<sup>6</sup>

1. Colo.—Bowes v. Cannon, 116 P. 338, 50 Colo 262

Mich.—Corpus Juris cited in Fox v. Greene, 286 N.W. 203, 205, 289 Mich. 179—Corpus Juris quoted in Rossman v. Marsh, 286 N.W. 83, 85, 287 Mich 720

Ohio.—Ulmer v. Fulton, 195 N.E. 557, 564, 129 Ohio St. 323, 97 A.L.J. 1170.

Tex.—Corpus Juris cited in Guadalupe-Blanco River Authority v. Tuttle, Civ.App., 171 S.W.2d 520, 525

2. Ill.—Kilgore v. State Bank of Co-lusa, 26 N.E.2d 39, 42, 372 Ill. 578 —Gurnett v. Mutual Life Ins. Co. of New York, 191 N.E. 250, 252, 356 Ill. 612—Merchants Nat Bank of Aurora v. Frazier, 67 N.E.2d 611, 617, 329 Ill App. 191—Pratt v. Board of Education of Dist. No. 61, Kankakee County, 63 N.E.2d 275, 281, 326 Ill App. 610.

Mich.—MacKenzie v. Union Guardian Trust Co., 247 N.W. 914, 919, 262 Mich. 563

Wyo.—Corpus Juris cited in Dallas Dome Wyoming Oil Fields Co. v. Brooder, 97 P.2d 311, 318, 55 Wyo 109.

65 C.J. p 212 note 3.

Similar definitions

(1) A deposition by which a proprietor transfers to another the property of the subject entrusted, not that it should remain with him, but that it should be applied to certain uses for the behoof of a third person.—Pratt v. Board of Education of Dist. No. 61, Kankakee County, 63 N.E.2d 275, 281, 326 Ill.App. 610.

(2) An equitable obligation either expressly undertaken or constructively imposed by the court, under which obligor, who is called the trustee, is bound to deal with property over which he has control, and which is called trust property, for benefit of certain persons, who are called

beneficiaries or cestui que trust, of whom he may or may not himself, be one.—Morrison v. Farmer, Civ.App., 210 S.W.2d 245, 249, reversed on other grounds 213 S.W.2d 813, 147 Tex. 122.—Christopher v. Davis, Civ.App., 284 S.W. 253, 257.

(3) Other similar definitions.

Mich.—MacKenzie v. Union Guardian Trust Co., 247 N.W. 914, 919, 262 Mich. 563.

Tenn.—Knox County v. Fourth & First Nat. Bank, 182 S.W.2d 980, 984, 181 Tenn 569.

65 C.J. p 212 note 3 [a].

Active duties

The definition of word "trust" assumes active duties, however slight.—Sharpe v. C. I. R., C.C.A.3, 107 F.2d 13, certiorari denied 60 S.Ct 591, 309 U.S. 666, 84 L.Ed 1013.

3. Iowa.—Corpus Juris cited in Trustees of Iowa College v. Baillie, 17 N.W.2d 143, 146, 236 Iowa 235. Wash.—State ex rel. Wirt v. Superior Court for Spokane County, 116 P. 2d 752, 755, 10 Wash.2d 362.

65 C.J. p 213 note 4.

4. Tenn.—Sternborger v. Glenn, 137 S.W.2d 269, 271, 175 Tenn. 644.

Utah.—Duchene County v. State Tax Commission, 140 P.2d 335, 338, 104 Utah 365

65 C.J. p 213 note 5.

Similar definitions

(1) A trust is any arrangement whereby property is transferred with intention that it be administered by trustee for another's benefit.—Egbert v. Pacific States Savings & Loan Co., 136 P.2d 822, 825, 57 Cal.App.2d 239 —Raffo v. Foltz, 238 P. 884, 886, 106 Cal App. 51.

(2) Other similar definitions see 65 C.J. p 213 note 5 [a].

5. Colo.—Botkin v. Pyle, 14 P.2d 187, 191, 91 Colo. 221.

Pa.—D'Amico v. Cianci, Com.Pl., 32 North.Co. 264.

65 C.J. p 213 note 6.

Similar definitions

U.S.—Jaiser v. Milligan, D.C.Neb., 120 F Supp 599, 612

Iowa.—Corpus Juris cited in Ponzelino v. Ponzelino, 26 N.W.2d 330, 331, 238 Iowa 201

Tenn.—American Bank & Trust Co. v. Lebanon Bank & Trust Co., 192 S.W.2d 245, 250, 28 Tenn.App. 618, 65 C.J. p 213 note 6 [a].

As defined in the Restatement of Trusts, a "trust" is a fiduciary relationship with respect to property, subjecting the person by whom the property is held to equitable duties to deal with the property for the benefit of another person, which arises as a result of a manifestation of an intention to create it.

U.S.—Collins v. Mosher, C.C.A.Ariz., 91 F.2d 582, 584.—Hanson v. Birmingham, D.C.Iowa, 92 F.Supp. 33, 40, appeal dismissed, C.A., 190 F.2d 206.

Iowa.—Ponzelino v. Ponzelino, 26 N.W.2d 330, 331, 238 Iowa 201—Trustees of Iowa College v. Baillie, 17 N.W.2d 143, 145, 236 Iowa 235

Kan.—Lafferty v. Sheets, 267 P.2d 962, 966, 175 Kan. 741.—In re Dieter's Estate, 239 P.2d 954, 959, 172 Kan. 359.

Neb.—O'Connor v. Burns, Potter & Co., 36 N.W.2d 507, 517, 151 Neb. 9.—Schurman v. Pegan, 286 N.W. 921, 924, 136 Neb. 628.—Parker v. Bourke, 269 N.W. 105, 104, 131 Neb. 617.

Ohio.—Hill v. Irons, 113 N.E.2d 243, 246, 160 Ohio St. 21.—Thompson v. Board of Trustees of White Cross Hospital, 9 Ohio Supp. 104, 106.

6. Ill.—Merchants Nat Bank of Aurora v. Frazier, 67 N.E.2d 611, 617, 329 Ill.App. 191.

Iowa.—Sinclair v. Allender, 26 N.W. 2d 320, 325, 238 Iowa 212, 65 C.J. p 213 note 7.

"Confidence" or "use." It has been said that at common law no distinction was made between trusts and confidences and uses,<sup>7</sup> and this rule has been applied in determining the operation of the statute of uses.<sup>8</sup> It has even been said that a trust cannot be more accurately defined than in the terms employed by Lord Coke for the definition of a use.<sup>9</sup>

**Broader usage.** In a popular sense the word "trust" covers many things besides legal technical trusts,<sup>10</sup> and, since the term is not of legal necessity, unvarying in meaning and measure, parties employing it may, by their express or implied agreement, give it such meaning or place such a limitation on its meaning as they may desire.<sup>11</sup> The word "trust" is frequently employed to indicate duties, relations, and responsibilities which are not strictly technical

trusts<sup>12</sup> and it has been used as applicable to almost any case in which a confidence is reposed.<sup>13</sup> However, that such usage is not strictly and technically accurate has been frequently recognized and pointed out,<sup>14</sup> for properly speaking in order to give rise to a trust there must be something more than a confidence reposed by one person in another,<sup>15</sup> since this element appears in perhaps a majority of the ordinary commercial transactions,<sup>16</sup> and the conduct of public offices.<sup>17</sup>

**Distinctions.** Trusts have been distinguished from various other legal relationships,<sup>18</sup> such as an agency, discussed in Agency § 2 k, an annuity, discussed in Annuities § 1, a bailment, discussed in Bailments § 4, or a charge.<sup>19</sup> A distinction has also been drawn between a trust and a contract,<sup>20</sup> a gift inter vivos, discussed in Gifts § 8, a mortgage, dis-

#### Similar definitions

(1) The beneficial title or ownership of property of which the legal title is in another.

Mo.—Shelton v. Harrison, 167 S.W. 634, 636, 182 Mo App. 404.  
N.J.—Malback v. Mehl, 57 A 2d 44, 48, 141 N.J. Eq. 281.

(2) An estate, legal title to which is vested in trustee, while equitable title is held by individuals, who bear no contractual relations among themselves.—Schumann-Heink v. Folsom, 159 N.E. 250, 252, 328 Ill. 321.  
58 A.L.R. 485—Kronsky v. De Swarte, 82 N.E.2d 168, 171, 235 Ill. App. 435.

(3) Other similar definitions see 65 C.J. p 213 note 7 [a].

7. W.Va.—Nease v. Capehart, 8 W. Va. 95, 107.  
65 C.J. p 213 note 8.

8. Colo.—Teller v. Hill, 72 F. 811, 812, 18 Colo App 509  
Operation of statute of uses see infra § 176.

9. Mich.—MacKenzie v. Union Guardian Trust Co., 247 N.W. 914, 919, 262 Mich 563  
65 C.J. p 213 note 10.

**Lord Coke's definition of a use** was "a confidence reposed in some other, not issuing out of the land, but as a thing collateral, annexed in privity to the estate of the land, and to the person touching the land, for which cestui que use has no remedy but by subpoena in chancery."—MacKenzie v. Union Guardian Trust Co., 247 N.W. 914, 919, 262 Mich. 563—65 C.J. p 213 note 10 [a].

10. U.S.—Central Life Assur. Soc. v. Birmingham D.C.Iowa, 48 F.Supp. 863, affirmed, C.C.A., 141 F.2d 116, Mich.—Fox v. Greene, 288 N.W. 203, 289 Mich. 179.

Pa.—Brunner v. Edwards, 12 A 2d 36, 337 Pa. 613.

Wis.—Davies v. Davies, 85 N.W. 201, 109 Wis. 129, 134.

11. Conn.—Rabeock v. Hubbard, 15 A. 791, 56 Conn. 284, 302.

12. Del.—Corpus Juris cited in Maull v. Stokes, 68 A 2d 200, 202, 31 Del Ch. 188.

Ind.—Holsapple v. Schrontz, 117 N.E. 547, 548, 65 Ind App. 390.

Pa.—In re Miller's Estate, 19 Pa Dist & Co. 141.

13. Colo.—Bowes v. Cannon, 116 P. 326, 338, 50 Colo 262.  
65 C.J. p 213 note 14.

14. Pa.—Brunner v. Edwards, 12 A 2d 36, 337 Pa. 613—In re Miller's Estate, 19 Pa. Dist. & Co. 141.  
65 C.J. p 214 note 15.

15. N.Y.—In re Arons' Estate, 121 N.Y.S.2d 512.  
65 C.J. p 214 note 16.

#### Dual nature

A fiduciary relation is dual in its nature, and cannot be created by one person merely deciding that he will repose great trust and confidence in a stranger.—Walker v. Wagner, 77 F.2d 370, 194 Wash. 119.

16. U.S.—Chapman v. Forsyth, Ky., 2 How. 202, 208, 11 L.Ed 236.  
65 C.J. p 214 note 17.

17. RI.—In re New Statehouse, 37 A. 4.  
65 C.J. p 214 note 18.

18. U.S.—Hanson v. Birmingham, D. C. Iowa, 92 F.Supp. 33, appeal dismissed, C.A., 190 F.2d 206—Equitable Trust Co. v. Magruder, D.C.Md., 37 F.Supp. 711.

Md.—Dunlop Sand & Gravel Corp v. Hospelhorn, 191 A. 701, 172 Md 279.

N.Y.—In re Seeberg's Estate, 46 N.Y. S.2d 412.

Tenn.—Knox County v. Fourth & First Nat. Bank, 182 S.W.2d 980, 181 Tenn. 569.

19. Cal.—Woodley v. Woodley, 117 P. 2d 722, 47 Cal App.2d 188.

Tex.—Forshing v. Henry, Civ.App.,

236 S.W. 213, affirmed, Com.App., 255 S.W. 382.

11 C.J. p 232 note 78 [b].

#### Statements of distinction

(1) An "equitable charge" is like a "trust" in that in each case the legal title to property is vested in one person and an equitable interest is given to another, but equitable encumbrancer has only a security interest in the property, while beneficiary of a trust is, to the extent of his beneficial interest, the equitable owner of the trust property.—Woodley v. Woodley, 117 P.2d 722, 47 Cal. App.2d 188.

(2) An "equitable charge" on land and a "trust" are alike in that in both a person holds title subject to an equitable interest in another, but they differ in that holder of title to land subject to a charge has no fiduciary relationship to equitable encumbrancer and is the owner of land subject only to a lien in favor of the equitable encumbrancer and may convey his interest subject to the charge while in a trust there is a fiduciary relationship between trustee and beneficiary and trustee, although he has title, is not beneficial owner and cannot convey land unless expressly authorized by terms of trust.—Dial v. Dial, 38 N.E.2d 43, 378 Ill. 276.

(3) Generally, transfer which gives beneficial interest in property to transferee and mere security interest to third person creates an "equitable charge," while transfer which gives beneficial interest in property to transferee and imposes on transferee duty to deal with property for benefit of such third person creates a "trust"—Anderson v. Anderson, 12 N.W.2d 571, 234 Iowa 277.

#### 20. Divided ownership

In a "trust," as distinguished from "contract," there is always a divided ownership of property, to which trust-

cussed in Mortgages § 11, a partnership, discussed in Partnership § 1, a power, discussed in Powers § 1, a sale, of personality, discussed in Sales § 2, and a sale of lands creating the relationship of vendor and purchaser.<sup>21</sup> A trust is distinguishable from a debt,<sup>22</sup> in that a debt does not necessarily involve specific subject matter and that the debtor's obligations are legal and his relation not fiduciary, while the trustee's obligations are equitable and his relation fiduciary.<sup>23</sup> Further, a debt, in the technical sense, is money due or owing on account of a contract, expressed or implied, while a trust, strictly

speaking, is an obligation arising out of a confidence reposed in a person to whom the legal title to property is conveyed on the condition that he will faithfully apply it according to the direction and risks of the vendor.<sup>24</sup>

*Analogous civil law terms.* The term "fidei-commisum," in the civil law, refers to an arrangement resembling the "trust" of English equity.<sup>25</sup>

"Fidei-comiso" is a disposition by which the donee, heir, or legatee is charged to preserve for, or return a thing to, a third person.<sup>26</sup>

tee usually has legal title and cestui an equitable title.—*Consalves v. Hodgson*, 237 P.2d 656, 38 Cal.2d 91.

**A contract for benefit of a third person** is one in which promisor engages with promisee to render prompt performance to a third person, and beneficiary of such contract has merely a personal claim against promisor, while beneficiary of a trust has a beneficial interest in trust property.—*Sutherland v. Pierner*, 24 N.W.2d 883, 249 Wis. 462.

21. Cal.—*Kellogg v. Mallory*, 119 P. 937, 161 Cal. 526.  
66 C.J. p 483 note 79.

22. Cal.—*Doane v. Hooper*, 170 P.2d 970, 75 Cal.App.2d 542

23. U.S.—*In re United Cigar Stores Co. of America*, C.C.A.N.Y., 70 F.2d 313.

Cal.—*Downey v. Humphreys*, 227 P.2d 484, 102 Cal.App.2d 323.

Mo.—*Dutton v. Prudential Ins. Co. of America*, 193 S.W.2d 938, appeal transferred 190 S.W.2d 933, 238 Mo App. 1058.

Pa.—*Ramsey v. Ramsey*, 41 A.2d 559, 351 Pa. 413, 171 A.L.R. 425.

Tex.—*Long v. Long*, Civ App., 252 S.W.2d 235, error refused no reversible error.—*Guardian Trust Co. v. Studdert*, Civ.App., 36 S.W.2d 578

#### Other statement of distinction

(1) A "trust" differs from a "debt" in many respects, in that the beneficiary of a trust has the beneficial interest in the trust property, whereas a creditor has only a personal claim against the debtor, there is no fiduciary relationship between a debtor and a creditor, and trusts are enforced ordinarily in equity whereas creditors usually must sue at law.—*Pure Oil Co. v. Byrnes*, 57 N.E.2d 356, 358 Ill. 26.—*Kilgore v. State Bank of Colusa*, 25 N.E.2d 39, 372 Ill. 578

(2) In order to constitute a "trust," there must be a distinct fund which the trustee is required to preserve intact and for which he must eventually account, and, if there is no such fund but merely a general obligation ultimately to pay

a sum of money, there is no trust but only a "debt"—*Petition of Travers*, 32 N.Y.2d 742, 117 Misc. 1014.

(3) The difference between a "trust" and a "debt," insofar as concerns the beneficiary and the creditor as the parties to whom are due performance of obligations arising out of the trust and debt respectively, lies chiefly in fact that beneficiary of trust has a beneficial interest in the trust property and the creditor has merely a personal claim against the debtor, but a debt is not a trust and involves no fiduciary relationship or duty.—*Farmers State Bank of Fosston v. Sig Ellingson & Co.*, 16 N.W.2d 319, 218 Minn. 411.

(4) A "trust" is distinguished from a "debt" in that trust involves duty to deal as fiduciary with some specific property for benefit of another and debt involves merely personal obligation to make payment of a sum of money to another, and creditor has no legal or equitable interest in property of debtor, while beneficiary has equitable interest in trust property.—*Broadus v. Gresham*, 26 S.E.2d 33, 181 Va. 725.

24. Ind.—*Thornburg v. Buck*, 41 N.E. 85, 13 Ind.App. 446.

#### Intention

Whether "debt" or "trust" is created by payment of money by one person to another depends on manifested intention of parties, and, if intention is that money shall be kept or used as separate fund for benefit of payor, or third person, "trust" is created, but, if intention is that person receiving money shall have unrestricted use thereof, being liable to pay similar amount with or without interest to payor or third person, "debt" is created

—*Mid-Dunlop Sand & Gravel Corp. v. Hospelhorn*, 191 A. 701, 172 Md. 279. Minn.—*Farmers State Bank of Fosston v. Sig Ellingson & Co.*, 16 N.W. 2d 319, 218 Minn. 411

Va.—*Broadus v. Gresham*, 26 S.E. 2d 33, 181 Va. 725.

#### Duty to pay

Fact that trustee is under duty to pay money immediately and un-

conditionally to beneficiary, so as to authorize beneficiary to maintain action at law against trustee to enforce payment, does not change trustee's relation to that of a "debtor."—*Broadus v. Gresham*, supra.

25. La.—*Breaux v. Breaux*, 51 So.2d 73, 218 La. 795.  
25 C.J. p 1087 note 4.

#### With respect to wills

(1) A "fidei commissum," with respect to wills, is a species of trust, being a gift of property to a person accompanied by a request or direction of donor that the recipient will transfer it to another who is not capable of taking under the will or gift, but must receive the thing bequeathed from the hands of the first legatee or donee.—*In re Courtin*, 81 So. 457, 459, 144 La. 971.

(2) If testamentary disposition conveys the property in trust to one person to be by him delivered to another, the disposition is a "fidei commissum."—*Succession of Hall*, 75 So. 802, 141 La. 860

#### "Substitution" compared and distinguished

A "substitution" is a donation of property to a donee, who holds title in possession for life, without power of alienation, the property to be transmitted at his death to a second donee originally designated by donor, while a "fidei commissum" is created when property is given to one for the benefit of another, to vest in the latter at a given time or upon a stated condition.—*Breaux v. Breaux*, 51 So.2d 73, 218 La. 795—25 C.J. p 1086 note 4 [c].

#### Held to constitute fidei commissum

La.—*Succession of Manthey*, 106 So. 289, 159 La. 743.

#### Held not to constitute fidei commissum

La.—*Succession of Maginnis*, 104 So. 726, 158 La. 815—*Steege v. Leopold Weil Bldg. & Imp. Co.*, 52 So. 232, 126 La. 101.

26. Tex.—*Gortario v. Cantu*, 7 Tex. 35, 42

25 C.J. p 1086 note 98.

## § 3. — Trustee

The term "trustee" as used in a technical or legal sense means the person who takes and holds the legal title to trust property for the benefit of another, but persons occupying confidential relationships which are not trusts in the technical sense are frequently denominated trustees in a broad and loose use of the term.

In a technical or legal sense a trustee has been variously defined as the person who takes and holds the legal title to the trust property for the benefit of another,<sup>27</sup> one to whom another's property is legally committed in trust;<sup>28</sup> or a person holding the legal title to property, under an express or implied agreement to apply it, and the income arising from it, to the use and for the benefit of another person, who is called the cestui que trust.<sup>29</sup> A trustee may also be defined as a person to whom property or funds have been committed in the belief or trust that he will hold and apply them for the benefit of those who are entitled according to an expressed intention either by the parties themselves or by the deed, will, settlement, or arrangement of another,<sup>30</sup> also by extension, a person held accountable as if he were expressly a trustee at law.<sup>31</sup> A

fiduciary acting in his representative capacity is a different person for juridical purposes from the same person in his individual capacity.<sup>32</sup>

**Broader usage.** As in the case of the term "trust" the word "trustee" is not, of legal necessity, of unvarying meaning and measure,<sup>33</sup> and it is often used broadly and loosely,<sup>34</sup> and not in a strictly and technically accurate sense.<sup>35</sup> In a broad sense a trustee is defined to be a person in whom some estate, interest, or power in or affecting property of any description is vested for the benefit of another.<sup>36</sup> Persons occupying confidential relationships, which are not trusts in the technical sense, are frequently denominated trustees in a broad and loose use of the term.<sup>37</sup>

**Other relationships and obligations distinguished.** The term "trustee" in its strict and technical sense is not properly applicable to a person occupying the position merely of an agent, discussed in Agency § 2 k, assignee, Assignments § 1 d, bailee, Bailments § 1, commissioner charged with the expenditure of a fund for a particular purpose,<sup>38</sup> committee of a lunatic,<sup>39</sup> or custodian.<sup>40</sup> A "trustee" is also to be

27. U.S.—*Corpus Juris* quoted in Central Life Assur. Soc. v. Birmingham, D.C.Iowa, 48 F.Supp. 863, 865, affirmed, C.C.A., 141 F.2d 116 Iowa—Dillenbeck v. Pinnell, 96 N.W. 860, 121 Iowa 201.

Mo.—*Corpus Juris* cited in State ex rel. Lee v. Sartorius, 130 S.W.2d 547, 549, 344 Mo. 912.

**Similar definitions**

(1) One to whom property is given in trust and in whom legal title vests U.S.—*Hopkins v. C. I. R.*, C.C.A. 6, 144 F.2d 683, 690, 158 A.L.R. 1201. Ohio—*Ulmer v. Fulton*, 195 N.E. 557, 564, 129 Ohio St. 323, 97 A.L.R. 1170.

(2) A person in whom there is vested, for benefit of another, some estate, interest, or power in or affecting property.

Ohio—*Muth v. Maxton*, Com.Pl., 119 N.E.2d 162, 166.

Tenn.—*Stornerberger v. Glenn*, 137 S.W.2d 269, 271, 175 Tenn. 644.

(3) Other similar definitions. Neb.—*Drainage Dist. No. 1 of Lincoln County v. Kirkpatrick-Pettis Co.*, 300 N.W. 582, 590, 140 Neb. 530. 65 C.J. p. 214 note 31 [a].

**A real estate agent** selected by an executor whose duties are to collect rentals and to secure a purchaser for property in an estate is not a trustee for the heirs—*Farley v. Davis*, 116 P.2d 263, 10 Wash.2d 62, 155 A.L.R. 1302.

28. U.S.—*Corpus Juris* quoted in Central Life Assur. Soc. v. Birmingham, D.C.Iowa, 48 F.Supp. 863, 865, affirmed, C.C.A., 141 F.2d 116.

Ill.—*Kennell v. Herbert*, 174 N.E. 558, 342 Ill. 164, 568.

Mass.—*Wellesley College v. Attorney General*, 49 N.E.2d 220, 224, 313 Mass. 722.

Neb.—*Simon v. Simon*, 5 N.W.2d 140, 142, 141 Neb. 839.

29. U.S.—*Corpus Juris* quoted in Central Life Assur. Soc. v. Birmingham, D.C.Iowa, 48 F.Supp. 863, 865, affirmed, C.C.A., 141 F.2d 116. Neb.—*State v. Exchange Bank of Okallala*, 209 N.W. 249, 252, 253, 114 Neb. 664.

N.C.—*Neel v. Clark*, 8 S.E.2d 740, 742, 193 S.C. 412.

30. U.S.—*Pioneer Mining Co. v. Tyberg*, C.C.A.Alaska, 215 F. 501, 506, L.R.A. 1915B 342. 65 C.J. p. 214 note 34.

**Trustees are indifferent persons** administering properties for beneficiaries and exercising administrative and quasi judicial functions within prescribed limits—*Mook v. Republic Nat. Bank & Trust Co.*, D.C.Tex., 9 F.Supp. 651, 652, modified on other grounds, C.C.A., Wallace v. Republic Nat. Bank & Trust Co. of Dallas, 80 F.2d 787, certiorari denied Crook v. Wallace, 55 S.Ct. 952, 238 U.S. 683, 80 L.Ed. 1403.

31. U.S.—*Pioneer Mining Co. v. Tyberg*, Alaska, 215 F. 501, 506, L.R.A. 1915B 442.

**Duties imposed**

Where duties of trustee are imposed on person, he will be regarded as trustee rather than as executor—*In re Baldwin's Will*, 284 N.Y.S. 761, 157 Misc. 538.

32. N.Y.—*In re McCabe's Estate*, 27 N.Y.S.2d 127, 176 Misc. 286—*In re Clark's Will*, 3 N.Y.S.2d 264, 166 Misc. 909.

33. Conn.—*Babcock v. Hubbard*, 15 A. 791, 56 Conn. 284.

34. Colo.—*Burchinell v. Koon*, 46 P. 932, 933, 8 Colo. App. 463. 65 C.J. p. 215 note 38.

35. Pa.—*In re Miller's Estate*, 19 Pa. Dist. & Co. 141. 65 C.J. p. 215 note 39.

36. Mich.—*Equitable Trust Co. v. Milton Realty Co.*, 249 N.W. 30, 31, 253 Mich. 673. 65 C.J. p. 215 note 40.

37. Del.—*In re Goldstein*, 85 A 2d 351, 7 Terry 450.

Mo.—*State ex rel. Lee v. Sartorius*, 130 S.W.2d 547, 549, 344 Mo. 912. 65 C.J. p. 215 note 42.

**Every fiduciary in surrogate's court**, regardless of what he may be called, is a "trustee," since he is a person to whom the management of property of others is intrusted.—*In re Epstein's Estate*, 278 N.Y.S. 260, 154 Misc. 776.

38. R.I.—*In re New Statehouse*, 37 A. 2, 4.

65 C.J. p. 215 note 47.

39. N.Y.—*People v. New York Tax, etc.*, Com'rs, 3 N.E. 85, 100 N.Y. 215.

65 C.J. p. 215 note 48.

40. U.S.—*Jackson v. U. S.*, C.C.A. Pa., 72 F.2d 764, 765. 17 C.J. p. 439 note 54 [a].



distinguished from a debtor,<sup>41</sup> executor, or administrator, as discussed in Executors and Administrators § 3 b, factor, Factors § 1, guardian, Guardian and Ward § 1, or holder of collateral security.<sup>42</sup> Further, a distinction may be drawn between a "trustee" and a mortgagee in possession,<sup>43</sup> surviving partner, discussed in Partnership § 271 b, a wrongdoer who acquires property tortiously,<sup>44</sup> or other persons to whom the term has sometimes been loosely or in a popular sense applied.<sup>45</sup> While "nominee" and "trustee" have been held to be synonymous in meaning,<sup>46</sup> the terms have been distinguished.<sup>47</sup>

A trustee for bondholders has the characteristics of both depositary and ordinary trustee.<sup>48</sup>

**Conventional trustee.** A conventional trustee is a trustee appointed under a decree.<sup>49</sup> A conventional trustee is the special agent of the creator of the trust.<sup>50</sup>

**Joint trustees.** Joint trustees are two or more persons who are intrusted with property for the benefit of one or more others.<sup>51</sup>

**Judicial trustee** is an officer of a chancery court.<sup>52</sup> A testamentary or other conventional trustee is distinguishable from a judicial trustee.<sup>53</sup>

**Naked or dry trustee** is one who is a trustee of a naked or dry trust.<sup>54</sup>

**Quasi trustee.** A quasi trustee is a person who reaps a benefit from a breach of trust, and so becomes answerable as a trustee.<sup>55</sup>

**Testamentary trustee.** As defined by statute, the expression "testamentary trustee" includes every person, except an executor, an administrator with the will annexed, or a guardian who is designated by a will, or by any competent authority, to execute a trust created by a will;<sup>56</sup> and it includes such an executor or administrator where he is acting in the execution of a trust created by the will, which is separable from his functions as executor or administrator.<sup>57</sup>

**Trustee de son tort.** He, who of his own authority enters into the possession, or assumes the management of property which belongs beneficially to another, is a trustee de son tort.<sup>58</sup>

**Trustee ex maleficio.** A trustee ex maleficio is a person who, being guilty of wrongful or fraudulent conduct, is held by equity to the duty and liability of a trustee, in relation to the subject matter, to prevent him from profiting by his own wrong.<sup>59</sup>

41. Tex.—Guardian Trust Co. v. Studdert, Civ.App., 36 S.W.2d 578, 582.

65 C.J. p 215 note 49.

42. U.S.—National Bank of Commerce v. Allen, Colo., 90 F. 545, 552, 33 C.C.A. 169.

65 C.J. p 216 note 54.

43. Cal.—Murdock v. Clarke, 24 P. 272, 274, 3 Cal.Unrep.Cases 265.

65 C.J. p 216 note 55.

44. N.J.—Henninger v. Heald, Ch., 30 A. 809, 811.

65 C.J. p 216 note 57.

45. Wis.—Merton v. O'Brien, 94 N. W. 340, 117 Wis. 437, 442.

46. U.S.—Schub Trading Co. v. Commissioner of Internal Revenue, C. C.A. 7, 95 F.2d 404, 411.

Cal.—Cisco v. Van Lew, 141 P.2d 433, 438, 60 Cal.App.2d 575.

47. U.S.—B. F. Avery & Sons Co. v. Glenn, D.C.Ky., 16 F.Supp. 514, 547, 548.

48. U.S.—Dunn v. Reading Trust Co., C.C.A. Pa., 121 F.2d 854.

49. Md.—Gilbert v. Kolb, 37 A. 423, 85 Md. 627, 633.

"Testamentary trust" distinguished Md.—Gilbert v. Kolb, 37 A. 423, 85 Md. 627, 633.

50. Md.—Kramme v. Mewshaw, 128 A. 468, 473, 147 Md. 535.

51. Black L.D.

52. Md.—Kramme v. Mewshaw, 128 A. 468, 472, 147 Md. 535.

53. Md.—Kramme v. Mewshaw, supra.

54. Ill.—Englestein v. Mintz, 177 N. E. 746, 751, 345 Ill. 48.

65 C.J. p 216 note 63.

55. Black L.D.

56. N.Y.—In re Hawley, 10 N.E. 352, 104 N.Y. 250, 263.

62 C.J. p 825 note 71.

## Necessity of express trust

In order to constitute a "testamentary trustee," there must be some express trust set up in will, and merely calling an executor or life tenant a trustee does not make him such, since every executor and life tenant in possession is, in a general sense, a trustee; but he is not a "trustee" in sense in which term is used in courts of equity and in statutes.—In re Rapley's Will, 290 N.Y.S. 517, 160 Misc. 615.

57. N.Y.—In re Valentine, 23 N.Y.S. 289, 291, 1 Misc. 491, 1 Pow.Surr. 310.

62 C.J. p 826 note 72.

58. W.Va.—Morris v. Joseph, 1 W. Va. 256, 259, 91 Am.D. 386.

65 C.J. p 216 note 68.

## Other definitions

A person may become a trustee by construction by intermeddling with, and assuming the management of trust property without authority, and

such person is a "trustee de son tort" U.S.—De Korwin v. First Nat. Bank of Chicago, D.C.Ill., 84 F.Supp. 918, affirmed in part and reversed in part on other grounds, C.A., 179 F.2d 347, certiorari denied Pratt v. De Korwin, 70 S.Ct. 1025, 339 U.S. 982, 94 L.Ed. 1386, 70 S.Ct. 1026, two cases, 339 U.S. 982, 94 L.Ed. 1386, De Korwin v. First Nat. Bank of Chicago, 70 S.Ct. 1028, 339 U.S. 982, 94 L.Ed. 1386, and Koch v. De Korwin, 70 S.Ct. 1028, 339 U.S. 982, 94 L.Ed. 1386—U.S. v. North State Lumber Corp., D.C.S.C., 54 F.Supp. 825, affirmed, C.C.A., North State Lumber Corp. v. U.S., 141 F.2d 1020.

Ill.—Lawndale Nat. Bank of Chicago v. Kaspar American State Bank, 6 N.E.2d 670, 288 Ill.App. 555, 65 C.J. p 216 note 68 [a].

## Held trustee de son tort

Ala.—Maya Corporation v. Smith, 199 So. 549, 240 Ala. 371.

## Held not trustee de son tort

Pa.—Squirlock v. Rogan, Com.Pl., 54 Lack.Jur. 237.

59. Ala.—Alabama Water Co. v. City of Anniston, 151 So. 457, 458, 227 Ala. 579.

Mo.—Lucas v. Central Missouri Trust Co., 166 S.W.2d 1053, 1056, 350 Mo. 593.

## Similar definitions

(1) Person who receives money or property from another by some

**Trustee in invitum.** One who acts without authority, or exceeds his authority, in some matter of fact or law, is a trustee in invitum.<sup>60</sup>

**Analogous civil and Spanish law terms.** "Fideicomisario," in Spanish law, is a term sometimes used in a sense having a meaning similar to "trustee."<sup>61</sup> "Fiduciario" means the one to whom property is intrusted by a testator for delivery to another.<sup>62</sup> The word "fiduciarius" denotes a person who in the English law is called a "trustee."<sup>63</sup>

#### § 4. — Trustor, Donor, Creator, or Founder

The person who establishes the trust is called the "donor," "creator," or "founder."

wrongful act.—In re Harr, 186 A. 120, 323 Pa. 380.

(2) Any one wrongfully possessed of an estate.—Whitcomb v. Carpenter, 111 N.W. 825, 134 Iowa 227, 10 L.R.A.N.S., 928.

(3) Other similar definitions.—Lucas v. Central Missouri Trust Co., 166 S.W.2d 1053, 1056, 350 Mo. 593—65 C.J. p. 216 note 69 [a].

**Persons held trustees ex maleficio**  
U.S.—Flannery v. Flannery Bolt Co., C.C.A.Pa., 108 F.2d 531—Petroleum

Royalties Co. of Oklahoma v. Hartford Accident & Indemnity Co., C.C.A. Okl., 106 F.2d 440, 124 A.L.R. 1403

—In re Franklin Savings & Loan Co., D.C.Tenn., 34 F.Supp. 585.

Ala.—Maya Corporation v. Smith, 199 So. 549, 240 Ala. 371.

Ariz.—Eckert v. Miller, 111 P.2d 60, 64, 57 Ariz. 94.

Ga.—Ross v. Rambo, 23 S.E.2d 687, 195 Ga. 100—Millers Nat. Ins. Co. v. Hatcher, 22 S.E.2d 99, 194 Ga. 449

—Cordovano v. State, 7 S.E.2d 45, 61 Ga.App. 590

Ill.—Campbell v. Albers, 39 N.E.2d 672, 313 Ill.App. 152.

Iowa.—Higbee v. Walsh, 294 N.W. 597, 607, 229 Iowa 408

Mich.—Gulf Refining Co. v. Perry, 6 N.W.2d 756, 757, 303 Mich. 487.

Mo.—Lucas v. Central Missouri Trust Co., 162 S.W.2d 569, 576, 349 Mo. 537—Tobin v. Wood, 159 S.W.2d 287, 290—Schneider v. Schneider,

146 S.W.2d 584, 347 Mo. 102—Hott v. Landis Mach. Co., 139 S.W. 256, 236 Mo. 546—Harrison v. Craven, 87 S.W. 962, 188 Mo. 590

N.Y.—Frier v. J. W. Sales Corporation, 25 N.Y.S.2d 576, 579, 580, 261 App.Div. 388—La Vin v. La Vin, 39 N.Y.S.2d 317, 323, 179 Misc. 1000—Brown v. Brown, 31 N.Y.S. 650, 83 Hun 160—Yeoman v. Townsend, 26 N.Y.S. 605, 74 Hun 625—Brooklyn

Packing Co. v. Zasloff, 18 N.Y.S.2d 443.

Okla.—Collar v. Mills, 125 P.2d 197, 190 Okl. 481.

Or.—First Nat. Bank of Portland v.

Connolly, 138 P.2d 613, 172 Or. 434

—Metzger v. Guynap, 265 P. 420, 125 Or. 507—Farrish v. Farrish, 54 P. 352, 33 Or. 486.

Pa.—Hamburg v. Barsky, 50 A.2d 345, 355 Pa. 462—Hice v. Braden, 89 A. 877, 880, 243 Pa. 141.

**Persons held not trustees ex maleficio**

Ind.—Fidelity & Deposit Co. of Maryland v. Citizens State Bank, Ind. App., 11 N.E.2d 52, 104 Ind.App. 332.

Md.—Grimes v. Grimes, 40 A.2d 58, 184 Md. 59.

Mass.—Pho v. Prime Mfg. Co., 50 N.E.2d 401, 314 Mass. 686.

Mo.—Howard County v. Fayette Bank, 149 S.W.2d 841, 347 Mo. 982

S.C.—All v. Prillaman, 20 S.E.2d 741, 200 S.C. 279.

60. Ala.—Houston v. Farris, 11 So. 330, 93 Ala. 587, 589.

**Similar definition**

"Trustee in invitum," sometimes called *ex delicto* or *ex maleficio*, is one who, being guilty of wrongful or fraudulent conduct, is held by equity to duty and liability of trustee, in relation to subject matter, to prevent him from profiting by his own wrong.—Johnston v. Johnston,

55 So.2d 838, 841, 256 Ala. 485—Alabama Water Co. v. City of Anniston, 151 So. 457, 458, 227 Ala. 579.

"Trustee de son tort" synonymous

Ala.—Houston v. Farris, 11 So. 330, 93 Ala. 587.

**Persons held trustees in invitum**

Ala.—Lottin v. Smith, 36 So.2d 312, 251 Ala. 202—Winston v. Winston, 4 So.2d 730, 242 Ala. 45

N.J.—Miske v. Habay, 63 A.2d 883, 1 N.J. 368.

61. *Eseriche Dictionario.*

62. *Eseriche Dictionario.*

63. *Rapalje & L. L. D.*

64. U.S.—Hopkins v. C. I. R., C.C.A. 6, 144 F.2d 683, 690, 158 A.L.R. 1301.

Ohio.—Ulmer v. Fulton, 195 N.E. 557,

The person who establishes the trust is called the "donor," "creator," or "founder,"<sup>64</sup> and is also sometimes called the "trustor"<sup>65</sup> or "settlor."<sup>66</sup> The person who furnishes the consideration for the creation of a trust is the "settlor" even though in form the trust is created by another.<sup>67</sup>

#### § 5. — Cestui Que Trust or Beneficiary

The term "cestui que trust" is used to signify the beneficiary of an estate held in trust.

The term "cestui que trust" is one which has been characterized as awkward<sup>68</sup> and barbarous,<sup>69</sup> and which is used to signify the beneficiary of an estate

564, 129 Ohio St. 323, 97 A.L.R. 1170.

#### Other definition

The creator of a trust is ordinarily the person who conveys his property to another for a third person, or to a charitable corporation, or who, without

a conveyance, holds the property charged with a trust for another by virtue of a declaration of trust, or who has made a promise to another as trustee, and the transferee is not usually considered the creator of a trust.—Wellesley College v. Attorney General, 49 N.E.2d 220, 313 Mass. 722.

65. U.S.—Hopkins v. Commissioner of Internal Revenue, C.C.A.6, 144 F.2d 682, 690

Ohio.—Ulmer v. Fulton, 195 N.E. 557, 561, 129 Ohio St. 323, 97 A.L.R. 1170.

65 C.J. p. 217 note 73.

66. U.S.—Hopkins v. C. I. R., C.C.A. 6, 144 F.2d 683, 690, 158 A.L.R. 1301.

Ohio.—Ulmer v. Fulton, 195 N.E. 557, 129 Ohio St. 323, 97 A.L.R. 1170.

67. U.S.—Lehman v. Commissioner of Internal Revenue, C.C.A.2, 109 F.2d 99, certiorari denied 60 S.Ct. 1080, 310 U.S. 637, 84 L.Ed. 1406—Blackman v. U. S., Ct.Cl., 48 F. Supp. 342

N.Y.—Guaranty Trust Co. of N. Y. v. New York Trust Co., 74 N.E.2d 232, 297 N.Y. 45.

**Held not grantor**

Person who pursuant to trust indenture paid premiums required to prevent forfeiture of life policies constituting corpus of trust, was not grantor of proportion of trust equivalent to amount that premiums paid by him were to the total premiums paid.—In re Sabin's Trust, 99 N.Y.S. 2d 626.

68. Ga.—Grubbs v. McGlawn, 39 Ga. 672, 675.

N.Y.—Brown v. Brown, 31 N.Y.S. 650, 83 Hun 160, affirmed 42 N.E. 543, 146 N.Y. 385.

69. N.Y.—Brown v. Brown, *supra*.

held in trust;<sup>70</sup> one who has a right to a beneficial interest in and out of an estate, the legal title to which is vested in another as trustee.<sup>71</sup> The cestui que trust is also called the "beneficiary"<sup>72</sup> or "fide commissary."<sup>73</sup>

*Cestui que trustent.* Those for whose benefit others are seized of real or personal property.<sup>74</sup>

*Analogous civil and Spanish law terms.* The term "fidei-comisario," in Spanish law, is frequently used in a sense as having a meaning similar to "cestui que trust" or "beneficiary."<sup>75</sup> So also, "fidei-commissarius," in the civil law, is a term corresponding to "cestui que trust" or "beneficiary in American and English law;"<sup>76</sup> a person who had a beneficial interest in the estate, which for a time was committed to the faith or trust of another.<sup>77</sup>

## § 6. — Trust Estate or Trust Fund

The term "trust estate" is used in different senses and may mean the estate of the trustee or the estate of the beneficiary or cestui que trust.

70. Ga.—Grubbs v. McGlawn, 39 Ga 672, 677.

### Similar definitions

(1) "The person for whose benefit the trust is created"  
Iowa.—Dillenbeck v. Pinnell, 96 N.W. 860, 861, 121 Iowa 201  
Ohio.—Ulmer v. Fulton, 195 N.E. 557, 564, 129 Ohio St. 323, 97 A.L.R. 1170.

(2) Other similar definitions—  
Bernardsville Methodist Episcopal Church v. Seney, 96 A. 388, 389, 85 N.J.Eq. 271—65 C.J. p. 217 note 78 [a] (2).

71. Ala.—Gindrat v. Montgomery Gas-Light Co., 2 So. 327, 82 Ala. 596, 601, 60 Am.R. 769  
65 C.J. p. 217 note 79

72. Ariz.—Phoenix R. Co. v. Landis, 108 P. 247, 248, 13 Ariz. 80 reheard 112 P. 844, 13 Ariz. 279, affirmed 34 S.Ct. 179, 231 U.S. 578, 58 L.Ed. 377.  
65 C.J. p. 217 note 80.

### Beneficiary defined

(1) A person having enjoyment of property of which a trustee has legal possession.—Lenzner v. Falk, 68 N.Y.S.2d 699, 703.

(2) One who has the enjoyment of or ultimate right to the property whereof the trustee for duration of the trust has the legal title.—Schelentrager v. Tradeshmens Nat. Bank & Trust Co., 88 A.2d 773, 774, 370 Pa. 501.

(3) With respect to spendthrift trust, the person who is recipient of another's bounty, or who receives benefit or advantage, one for whose benefit trust is created.—St. Louis

Union Trust Co. v. Bassett, 85 S.W.2d 569, 575, 337 Mo. 604, 101 A.L.R. 1266

73. N.Y.—Brown v. Brown, 31 N.Y.S. 650, 83 Hun 160, affirmed 42 N.E. 543, 116 N.Y. 385.  
65 C.J. p. 217 note 81.

74. N.J.—Larkin v. Wikoff, 72 A. 98, 75 N.J.Eq. 462, 474, affirmed 78 A. 1134, 77 N.J.Eq. 589 and decree settled 79 A. 365, 75 N.J.Eq. 462, reversed on other grounds 81 A. 365, 79 N.J.Eq. 209.

75. Escribano Diccionario.

76. N.Y.—Brown v. Brown, 31 N.Y.S. 650, 83 Hun 160  
Tex.—Gortario v. Cantu, 7 Tex. 35, 42.  
25 C.J. p. 1087 note 3.

77. Burrill L.D.

78. N.J.—Cooper v. Cooper, 5 N.J.Eq. 9, 12.  
65 C.J. p. 217 note 84.

### Terms of description

The locutions "trust" and "trust estate" are merely convenient terms of description of a body of rights of parties interested in an aggregation of assets held by trustee who has certain powers and duties with respect to them, including the legal although not beneficial title thereto.—In re Alderice's Will, 71 N.Y.S.2d 81, reversed on other grounds Emigrant Indus. Sav. Bank v. New Rochelle Trust Co., 75 N.Y.S.2d 313, 273 App.Div. 62, affirmed 80 N.E.2d 455, 297 N.Y. 996.—In re McGinnis' Estate, 44 N.Y.S.2d 932, affirmed 51 N.Y.S.2d 768, 268 App.Div. 966

79. N.J.—Cooper v. Cooper, 5 N.J.Eq. 9, 12.

The term "trust estate" is used in different senses,<sup>78</sup> and may mean the estate of the trustee,<sup>79</sup> or the estate of the beneficiary or cestui que trust.<sup>80</sup> In this latter sense it has been described as a right in equity to take the rents and profits of lands whereof the legal estate is vested in some other person.<sup>81</sup> It is also defined to be the corpus of the property which is the subject of the trust.<sup>82</sup>

*A trust fund* is a fund held by a trustee for the specific purposes of the trust,<sup>83</sup> the words tending to indicate personal rather than real estate.<sup>84</sup>

*Trust property.* The term "trust property" denotes the interests held in trust and includes such interests as may be the subject of present transfer by outright gift, devise, bequest, or sale.<sup>85</sup>

*Trust res.* The property given in trust is called the subject matter or trust res.<sup>86</sup>

*Principal and residue.* The "principal" of a trust is the corpus or main body of the trust as distinguished from income,<sup>87</sup> whereas the "residue" is

80. N.J.—Cooper v. Cooper, supra.  
65 C.J. p. 217 note 86.

81. N.Y.—Farmers' Loan & Trust Co. v. Carroll, 5 Barb. 618, 643.  
65 C.J. p. 217 note 87.

82. Black L.D.

83. Black L.D.

### Benefit of class

Any fund which has been protected by a court for the benefit of a class is in a broad sense a "trust fund"—Intas v. American Car & Foundry Co., 32 A.2d 90, 92, 133 N.J.Eq. 301, modified on other grounds 37 A.2d 205, 135 N.J.Eq. 305.

*A "trust fund" exists* where equitable title of fund is in owner and legal title in trustee.—Hidalgo County Bank & Trust Co. v. Goodwin, Tex. Civ. App., 137 S.W.2d 161, error dismissed, judgment correct.

*Trust fund is not an entity*, and the parties in real interest are the owners respectively of the income and the remainder interests in the property.—In re Alderice's Will, 71 N.Y.S.2d 81, reversed on other grounds Emigrant Indus. Sav. Bank v. New Rochelle Trust Co., 75 N.Y.S.2d 313, 273 App.Div. 62, affirmed 80 N.E.2d 455, 297 N.Y. 996.

84. Mass.—Baker v. Commissioner of Corporations and Taxation, 148 N.E. 593, 596, 253 Mass. 130.

85. Cal.—Gonsalves v. Hodgson, 237 P.2d 656, 660, 38 Cal.2d 91.

86. Ohio.—Ulmer v. Fulton, 195 N.E. 557, 564, 129 Ohio St. 323, 97 A.L.R. 1170.

87. Cal.—Security-First Nat. Bank of Los Angeles v. Wellsjager, 198 P.2d 709, 705, 706, 88 Cal.App.2d 210.

that which remains after a part is taken, separated, removed, or designated.<sup>88</sup>

### § 7. — Gift in Trust

A gift in trust is one which passes equitable title to the donee but withholds the legal title.

A gift in trust is one which withholds the legal title from the donee although the equitable title passes.<sup>89</sup>

### § 8. Origin and History of Trusts

The law of trusts has its origin in "uses" which were first introduced by the clergy for the purpose of evading the statutes of mortmain, and courts of equity continued to recognize and enforce such uses under the name of trusts after adoption of the statute of uses.

It has been generally assumed that trusts owed their origin to the *fidei commissum* of the Roman law,<sup>90</sup> which were supposed to have furnished the model or suggestion for the English uses,<sup>91</sup> but it has also been held that the law of trusts as known in England and America has no exact counterpart in the Roman law and has none under the Spanish law.<sup>92</sup> So under the civil law of some countries, the relation of trust, prevailing in the United States, is unknown.<sup>93</sup>

Uses, it seems, were first introduced by the clergy for the purpose of evading the statutes of mortmain.<sup>94</sup> The system of uses was extended and applied to a variety of other purposes and transactions, and gave rise to many inconveniences, evils,

and abuses, to remedy which the statute of uses was finally enacted, the general intent of which was to transfer the use into possession and make the cestui que use the complete owner at law as well as in equity.<sup>95</sup> Under the construction subsequently put on this statute by the courts, there were, however, several kinds of uses which were not within its application and therefore not executed by it,<sup>96</sup> and these the courts of equity continued to recognize and enforce under the name of trusts;<sup>97</sup> so that a trust became practically what a use was before the statute of uses,<sup>98</sup> or a use not executed by the statute.<sup>99</sup> In any event, a trust is regarded as a creature of equity.<sup>1</sup>

### § 9. Nature, Elements, and Purpose of Trusts in General

In its simplest elements a trust is a confidence reposed in one person, called the trustee, for the benefit of another, called the cestui que trust, with respect to property held by the former for the benefit of the latter; and it is fundamentally essential to the existence of any trust that there be a trust res or subject matter and that there be a separation of the legal estate from the beneficial enjoyment.

In its simplest elements a trust is a confidence reposed in one person, called the trustee, for the benefit of another, called the cestui que trust, with respect to property held by the former for the benefit of the latter.<sup>2</sup> It is one of several juridical devices whereby one person is enabled to deal with property for the benefit of another person,<sup>3</sup> that is, it is a device for making dispositions of property.<sup>4</sup>

88. Cal.—Security-First Nat. Bank of Los Angeles v. Wellsfager, supra.

89. Me.—Cazallis v. Ingraham, 110 A. 359, 360, 119 Me. 240. 65 C.J. p 217 note 92

90. N.Y.—In re Coutts' Will, 249 N.Y.S. 788, 794, 140 Misc. 93. 65 C.J. p 219 note 13.

91. N.Y.—Farmers' Loan & Trust Co. v. Carroll, 5 Barb. 613, 642.

92. Philippine.—Roman Catholic Bishop of Jaro v. De la Pena, 26 Philippine 144, 145.

93. N.Y.—Dohschiner v. Levy, 39 N.Y.S.2d 277, 179 Misc. 416

94. N.Y.—Farmers' Loan & Trust Co. v. Carroll, 5 Barb. 613, 642.

95. Md.—Ware v. Richardson, 3 Md. 505, 547, 56 Am D. 762. 65 C.J. p 219 note 21

Operation of statute of uses and similar statutes generally see infra §§ 176-178.

96. N.Y.—Farmers' Loan & Trust Co. v. Carroll, 5 Barb. 613, 643. 65 C.J. p 219 note 22.

97. Md.—Ware v. Richardson, 3 Md. 505, 547, 56 Am D. 762.

N.Y.—Farmers' Loan & Trust Co. v. Carroll, 5 Barb. 613, 643

98. S.C.—Fuller v. Missroon, 14 S.E. 714, 35 S.C. 314, 329. 65 C.J. p 219 note 24

99. Md.—Ware v. Richardson, 3 Md. 505, 547, 56 Am D. 762. 65 C.J. p 219 note 25.

1. Ky.—Landenberger v. Kentucky Title Trust Co., 110 S.W.2d 301, 270 Ky. 579.

Ohio.—Fulton v. Gardiner, 186 N.E. 724, 127 Ohio St. 77.

2. Wash.—State ex rel. Wirt v. Superior Court for Spokane County, 116 P.2d 752, 755, 10 Wash.2d 362.

Wyo.—Corpus Juris cited in Dallas Dome Wyoming Oil Fields Co. v. Brooder, 97 P.2d 311, 318, 55 Wyo. 109

65 C.J. p 218 note 94.

Elements and essentials of express trusts see infra §§ 22-29.

Nature of: Constructive trusts see infra § 139. Resulting trusts see infra § 98.

Segregation of property Trusts usually are dependent on

possession and use of property or money involved for benefit of the cestui que trust, and segregation of property or funds for that purpose.—Steuber v. O'Keefe, D.C.N.J., 16 F. Supp. 97.

Setting aside of thing or fund

Word "trust" implies setting aside of a specified thing or fund, for benefit of an identified person, in hands of another who possesses well-defined active powers and is subject to establish limitations in its care and use.—In re Weinberg's Estate, 196 N.Y.S. 7, 162 Misc. 867.

3. Del.—Wise v. Delaware Steepchase & Race Ass'n, 39 A.2d 212, 28 Del.Ch. 161, affirmed 45 A.2d 547, 28 Del.Ch. 532, 165 A.L.R. 830.

Legal entity

A trust once created is a legal entity which becomes operative when adequately constructed.—In re Ihmen's Estate, 3 N.Y.S.2d 125, 253 App. Div. 472.—Inckney v. City Bank Farmers Trust Co., 292 N.Y.S. 835, 249 App.Div. 375.

4. Va.—Collins v. Lyon, Inc., 24 S.E.2d 572, 181 Va. 230.

The term implies the separate coexistence of two estates or interests, one equitable and one legal.<sup>5</sup> It is fundamentally essential to the existence of any trust that there be a trust res or subject matter<sup>6</sup> and that there be a separation of the legal estate from the beneficial enjoyment.<sup>7</sup> However, the ben-

eficial interest may repose in persons standing in different relationships.<sup>8</sup> Indeed, it is frequently said that whenever the legal interest to property is in one person and the equitable in another,<sup>9</sup> or where there are rights, titles, and interests in property distinct from the legal ownership,<sup>10</sup> a trust

5. Minn.—Droege v. Brockmeyer, 7 N.W.2d 538, 214 Minn. 182—First Trust Co. of St. Paul v. Northwestern Mut. Life Ins. Co., 283 N.W. 236, 204 Minn. 244.

Tenn.—Sternberger v. Glenn, 137 S. W.2d 269, 175 Tenn. 644.

Utah.—Duchesne County v. State Tax Commission, 140 P.2d 335, 104 Utah 865.

65 C.J. p. 218 note 95.

#### Separation of interests

An "express trust" involves the separation of the legal and beneficial interest in a thing or res, whereby the legal interests in the trust res are held by a person, the trustee, for the benefit of another, the beneficiary, who has an equitable interest in the res to receive whatever benefits he is entitled to therefrom by the terms of the trust.—Farmers State Bank of Fosston v. Sig Ellingson & Co., 16 N.W.2d 319, 218 Minn. 411.

A "trust in real estate" implies a holding of the legal title by one for benefit of another, who holds equitable title.—State ex rel. Wirt v. Superior Court for Spokane County, 116 P.2d 752, 10 Wash.2d 362.

6. U.S.—Solomon v. Boschulte, C.A. Virgin Islands, 200 F.2d 482—Hackner v. Morgan, C.C.A.N.Y., 139 F.2d 300, certiorari denied Eastman v. Guaranty Trust Co. of New York, 63 S.Ct. 266, 317 U.S. 691, 87 L.Ed. 553, rehearing denied 63 S.Ct. 440, 317 U.S. 713, 87 L.Ed. 556—American Surety Co. of New York v. Baldwin, C.C.A.Ind., 90 F.2d 708—Edisto Nat. Bank of Orangeburg, S.C., v. Bryant, C.C.A.S.C., 72 F.2d 917.

Cal.—Ballan v. Ballan's Market, 119 P.2d 426, 48 Cal.App.2d 160—Ex parte Lamb, 215 P. 109, 61 Cal. App. 321.

Ill.—Gurnett v. Mutual Life Ins. Co. of New York, 268 Ill.App. 518, affirmed 191 N.E. 250, 356 Ill. 612.

Mont.—Fitzpatrick v. Stevenson, 67 P.2d 310, 104 Mont. 439.

N.J.—Pemberton Lumber & Millwork Industries, Inc. v. Maple Shade Development Co., 106 A.2d 32, 31 N.J.Super. 155—Lubowski v. Travelers Ins. Co., 8 A.2d 842, 18 N.J.Misc. 19.

N.Y.—Kahmeyer v. Green-Wood Cemetery, 23 N.Y.S.2d 17, 175 Misc. 187, modified on other grounds 27 N.Y.S.2d 446, 261 App.Div. 950, reargument denied 27 N.Y.S.2d 1013, 261 App.Div. 1075, motion denied 37 N.E.2d 138, 286 N.Y. 696, affirmed 40 N.E.2d 650, 287 N.Y. 787.

Ohio—Fulton v. Gardiner, 186 N.E. 724, 127 Ohio St. 77—Mudgett v. Mudgett, 87 N.E.2d 918, 85 Ohio App. 18.

Okl.—Brinkley v. Patton, 149 P.2d 261, 194 Okl. 244.

W.Va.—Inter-Ocean Casualty Co. v. Lecony Smokeless Fuel Co., 17 S.E.2d 51, 123 W.Va. 541, 137 A.L.R. 488.

Wyo.—Corpus Juris cited in Dallas Dome Wyoming Oil Fields Co. v. Brooder, 97 P.2d 311, 318, 55 Wyo. 109.

There must be an asset, whether it be land, a chattel, or chose in action, in order to have a trust of any kind, whether express, implied in fact, or impressed by law.—Bradford v. Chase Nat. Bank of City of New York, D.C.N.Y., 24 F.Supp. 28, affirmed, C.C.A., Berger v. Chase Nat. Bank of City of New York, 105 F.2d 1001, affirmed 60 S.Ct. 707, 309 U.S. 632, 84 L.Ed. 990, rehearing denied 60 S.Ct. 885, 309 U.S. 698, 84 L.Ed. 1037, affirmed Schram v. Chase Nat. Bank of City of New York, 60 S.Ct. 707, 309 U.S. 632, 84 L.Ed. 990, rehearing denied 60 S.Ct. 885, 309 U.S. 698, 84 L.Ed. 1037, affirmed Wardell v. Chase Nat. Bank of City of New York, 60 S.Ct. 707, 309 U.S. 632, 84 L.Ed. 990, rehearing denied 60 S.Ct. 885, 309 U.S. 698, 84 L.Ed. 1037, affirmed Young v. Chase Nat. Bank of City of New York, 60 S.Ct. 707, 309 U.S. 632, 84 L.Ed. 990, rehearing denied 60 S.Ct. 885, 309 U.S. 698, 84 L.Ed. 1037, affirmed Feucht v. Chase Nat. Bank of City of New York, 60 S.Ct. 708, 309 U.S. 632, 84 L.Ed. 990, rehearing denied 60 S.Ct. 886, 309 U.S. 698, 84 L.Ed. 1037.

#### Power of court

Wherever there is a res with respect to a trust, the court may deal with it in enforcement of the trust.—Gilbert v. Beach, D.C., 42 F.Supp. 168, affirmed 133 F.2d 50, 77 U.S.App.D.C. 117.

#### Failure to deliver title

Where escrow agreement contemplated that monies deposited were to be delivered to vendor only when purchasers should receive title free and clear of encumbrances, and vendor never made delivery of such title, there was no res over which a trust in favor of vendor's creditors could be declared.—Pemberton Lumber & Millwork Industries, Inc. v. Maple Shade Development Co., 106 A.2d 32, 31 N.J.Super. 155.

7. Md.—Gray v. Harriet Lane Home

for Invalid Children, 64 A.2d 102, 192 Md. 251.

Minn.—Julian v. Northwestern Trust Co., 255 N.W. 622, 192 Minn. 136.

Mont.—Hames v. City of Polson, 215 P.2d 950, 123 Mont. 469.

Ohio—Hill v. Irons, 113 N.E.2d 243, 150 Ohio St. 21.

Okl.—Brinkley v. Patton, 149 P.2d 261, 194 Okl. 244.

Or.—Morse v. Paulson, 186 P.2d 394, 182 Or. 111.

Tex.—Corpus Juris cited in Wheeler v. Haralson, 99 S.W.2d 885, 886, 128 Tex. 429—Knight v. Tannehill Bros., Civ.App., 140 S.W.2d 552, error dismissed, judgment correct.

Corpus Juris cited in Brinkman v. Tinkler, Civ.App., 117 S.W.2d 139, 145, error refused.

Wash.—State ex rel. Wirt v. Superior Court for Spokane County, 116 P.2d 752, 10 Wash.2d 362.

65 C.J. p. 218 note 97.

#### Other statement of rule

In order to create a voluntary trust, equitable title must pass to cestui que trust while legal title is transferred to a third person or is retained by settlor to be held for purpose of the trust.—Webster v. St. Petersburg Federal Sav. & Loan Ass'n, 20 So.2d 400, 155 Fla. 412.

#### Interest in beneficiaries

A trust requires that a beneficial interest in trust property is always in beneficiaries.—C. I. R. v. City Nat. Bank & Trust Co., C.C.A.10, 112 F.2d 771, certiorari denied 65 S.Ct. 118, 323 U.S. 764, 89 L.Ed. 612, rehearing denied 65 S.Ct. 187, 323 U.S. 816, 89 L.Ed. 649.

#### Co-existence with life estate

A trust estate or equitable interest and a life estate cannot exist in the same realty at the same time.—In re Werner's Estate, 22 N.E.2d 490, 61 Ohio App. 304—Schwan v. Meinert, 10 N.E.2d 951, 56 Ohio App. 336.

8. Ia.—Love v. Clayton, 134 A. 422, 287 Pa. 205.

65 C.J. p. 218 note 98.

9. Ill.—Merchants Nat. Bank of Aurora v. Frazier, 67 N.E.2d 611, 617, 329 Ill.App. 191—Martin v. Rockford Trust Co., 281 Ill.App. 441.

65 C.J. p. 218 note 99.

10. Ill.—Merchants Nat. Bank of Aurora v. Frazier, 67 N.E.2d 611, 617, 329 Ill.App. 191—Martin v. Rockford Trust Co., 281 Ill.App. 441.

65 C.J. p. 218 note 1.

is created in judicial intendment, to exist until these interests are completely reunited.<sup>11</sup>

Although a trust is not considered a contractual relation<sup>12</sup> it may arise out of a contract<sup>13</sup> and it may arise by implication no less than by express words.<sup>14</sup> So a trust relation may grow out of express contract or result from facts and circumstances independent of contract,<sup>15</sup> or, as otherwise expressed, a trust may arise by agreement or intention, or, without either, the circumstances may be such that a trust will arise by implication or operation of law.<sup>16</sup> On the other hand, a trust can arise only from an agreement, express or implied, or by operation of law,<sup>17</sup> and equity cannot create a trust where the parties did not intend to do so, and where none arose by operation of law.<sup>18</sup> Express trusts and trusts implied from the language of the instrument must possess inherently the legal specifications which will enable a court to decree its administration in accordance with the wishes of the settlor, who alone has power to assent to it and to declare it.<sup>19</sup> A trust cannot be upheld unless it is of such a nature that the beneficiary is capable of enforcing its execution by a proceeding in chancery.<sup>20</sup>

The legal and equitable obligations of a fiduciary result from the real nature of the relationship between the parties and not merely from the literal wording of their contract.<sup>21</sup> Trusts are always imperative and are obligatory on the conscience of the person intrusted,<sup>22</sup> they are made with strict reference to their faithful execution,<sup>23</sup> and it has been said that the entire doctrine of trusts rests on the principle that equity regards that as done which should be done.<sup>24</sup> Since the primary object of a trust is to confine the powers of the beneficiary and to deprive him of any power to dispose of and manage the trust,<sup>25</sup> it has been the policy of the courts vigorously to protect trust estates and to resist any attempts to defeat the will of a testator or to allow improvident beneficiaries to obtain their estates outright,<sup>26</sup> especially where rights of infant remaindermen are involved.<sup>27</sup> It has been said that a trust is usually created to preserve property intact and to earn income for the beneficiary,<sup>28</sup> and ordinarily the trustee is directed to administer the fund in order to substitute his supposedly superior judgment for that of the beneficiary.<sup>29</sup>

#### Division of estate

A "trust" arises on division of estate into legal and equitable parts—*Henshaw v. Texas Natural Resources Foundation*, Civ App., 212 S.W.2d 241, reversed on other grounds 216 S.W.2d 566, 147 Tex. 436.

11. N.Y.—*In re Coutts' Will*, 249 N.Y.S. 788, 140 Misc. 93.

12. Ohio.—*McClain v. Custer*, 29 Ohio Cir.Ct., N.S., 591.

13. Ky.—*Ginn's Adm'r v. Ginn's Adm'r*, 32 S.W.2d 971, 236 Ky. 217.

#### Vested right

A trust agreement between settlor and trustee is a contract, and right of beneficiary to receive income in accordance with provisions of will or inter vivos trust instrument is vested right—*Fidelity Union Trust Co. v. Price*, 87 A.2d 565, 18 N.J.Super. 578, affirmed in part and reversed in part on other grounds 93 A.2d 321, 11 N.J. 90.

14. Pa.—*In re Cotton's Estate*, 6 Pa. Dist. 44, 19 Pa.Co. 247.

15. U.S.—*John L. Walker Co. v. Alden*, D.C.Ill., 6 F.Supp. 262.

Status of trustee can be created from acts and words and from express agreements—*In re Grigsby-Grunow, Inc.*, C.C.A.Ill., 80 F.2d 478, reversed on other grounds *McKey v. Paradise*, 57 S.Ct. 124, 299 U.S. 119, 81 L.Ed. 75.

16. Iowa.—*Sinclair v. Allender*, 26 N.W.2d 320, 238 Iowa 212.

*Tex.—Booth Fisheries Corp. v. Barclay*, Civ.App., 233 S.W.2d 872.

17. Wis.—*1st Orth Co. v. New Richmond Roller Mills Co.*, 287 N.W. 713, 232 Wis. 491.

18. Mo.—*Milgram v. Jiffy Equipment Co.*, 247 S.W.2d 668, 362 Mo. 1194, 30 A.L.R.2d 925.

19. D.C.—*Dahlgren v. Dahlgren*, 1 F.2d 755, 65 App.D.C. 52, certiorari denied 45 S.Ct. 125, 266 U.S. 626, 69 L.Ed. 475.

20. Md.—*Salem Church of United Brethren in Christ in Baltimore County v. Numsen*, 59 A.2d 757, 191 Md. 43, 4 A.L.R.2d 117.

21. U.S.—*In re Chandler Ins. Agency*, D.C.Md., 92 F.Supp. 878.

22. N.C.—*Henderson v. Western Carolina Power Co.*, 157 S.E. 425, 200 N.C. 443, 80 A.L.R. 497, 65 C.J. p. 218 note 7.

#### Honorary obligation insufficient

Trust cannot be created unless it is capable of being enforced against will of trustee, and mere honorary obligation which trustee may perform at his will does not create a trust, and legal representatives of donor may compel surrender of property sought to be charged with trust—*Seran v. Davis*, 50 P.2d 662, 174 Okl. 433.

23. Tenn.—*Law Guarantee, etc. Co. v. Jones*, 58 S.W. 219, 103 Tenn. 245, 252.

24. Ark.—*Adams v. Harrell*, 292 S.W. 409, 173 Ark. 123, 65 C.J. p. 218 note 9.

25. Ill.—*Corpus Juris cited in Kluge v. State Bank of Colusa*, 21 N.E.2d 9, 11, 300 Ill.App. 409, affirmed 25 N.E.2d 39, 372 Ill. 578. *Wash.—State ex rel. Wirt v. Superior Court for Spokane County*, 116 P.2d 752, 10 Wash.2d 362, 65 C.J. p. 219 note 10.

#### Power in trust

Donation of power in trust is primarily for purpose of administering trust estate in behalf of infant beneficiaries, and hence partakes primarily of testamentary trust.—*In re Kennedy's Will*, 62 N.Y.S.2d 499.

26. N.Y.—*In re Lenneman's Will*, 243 N.Y.S. 126, 137 Misc. 77—*In re Harriman's Estate*, 208 N.Y.S. 672, 124 Misc. 320, affirmed 216 N.Y.S. 845, 217 App.Div. 733.

27. N.Y.—*In re Harriman's Estate*, supra.

28. Cal.—*Day v. First Trust & Savings Bank of Pasadena*, 118 P.2d 51, 47 Cal.App.2d 470.

Ky.—*People's State Bank & Trust Co. v. Wade*, 106 S.W.2d 74, 269 Ky. 89.

29. Cal.—*Day v. First Trust & Savings Bank of Pasadena*, 118 P.2d 51, 47 Cal.App.2d 470.

Ky.—*People's State Bank & Trust Co. v. Wade*, 106 S.W.2d 74, 269 Ky. 89.

## § 10. Kinds and Classes of Trusts in General

Trusts, with respect to the manner of their creation, are divided primarily into two classes, express and implied; and implied trusts are subdivided into the two classes, resulting and constructive.

Trusts with respect to the manner of their creation are divided primarily into two classes, express and implied,<sup>30</sup> or, as it is sometimes stated, trusts are either express or they arise by operation of law,<sup>31</sup> or are voluntary or involuntary, as discussed infra § 18. Express trusts are further classified into active, alive or operative trusts<sup>32</sup> and passive, simple, nominal or dry trusts,<sup>33</sup> and into executed or complete and executory or incomplete trusts, discussed infra § 16.

As ordinarily classified and defined implied trusts are subdivided into the two classes, resulting and constructive;<sup>34</sup> but by some authorities the term "implied trust" is used in a sense exclusive of these two classes,<sup>35</sup> and by others the term is used interchangeably with "resulting trust."<sup>36</sup>

These different classifications have led to some variance and confusion with respect to terms,<sup>37</sup> but in so far as the decision of particular cases is concerned it is of no practical importance what system of classification or subdivision is adopted.<sup>38</sup> As a matter of administration, courts are not concerned with formal classifications of trust made by text writers for convenience in treating the subject, as long as emphasis is permitted to remain on the factual situations out of which the trust arises or on which it may be declared.<sup>39</sup>

## § 11. — Express Trusts

Express trusts are those which are created by the direct and positive acts of the parties, by some writing, or deed, or will, or by words either expressly or impliedly evincing an intention to create a trust.

Express trusts are those which are created by the direct and positive acts of the parties, by some writing, or deed, or will,<sup>40</sup> or by words either expressly or impliedly evincing an intention to create a

30. Ark.—Hunt v Hunt, 149 S.W.2d 930, 932, 202 Ark 130.

Ohio.—In re Barnes' Estate, Com.Pl., 108 N.E.2d 88, affirmed, App., 108 N.E.2d 101.

Okl.—Corpus Juris cited in De Moss v. Rule, 152 P.2d 594, 599, 194 Okl. 440.

Tex.—Miller v. Donald, Civ.App., 235 S.W.2d 201, error refused no reversible error—Ellbert v. Waples-Platter Co., Civ.App., 156 S.W.2d 146, error refused—Lang v. Shell Petroleum Corp., Civ.App., 141 S.W.2d 667, affirmed 159 S.W.2d 478, 138 Tex. 399.

65 C.J. p 220 note 27.

Classes of trustees see supra § 3.

31. N.Y.—Le Fevre v. Reliable Paint Supply Co., 273 N.Y.S. 903, 152 Misc. 594.

R.I.—Broadway Bldg Co. v. Salafia, 132 A. 527, 47 R.I. 263, 46 A.L.R. 847.

All possible trusts, whether of real or personal property, are separated into those created by intentional act of some party, having dominion over property, done with view to creating of trusts, which are "express trusts," and those created by operation of law, where acts of parties may have had no intention or reference to existence of trust, which are "implied" or "resulting" or "constructive trusts"—Seran v. Davis, 50 P.2d 662, 174 Okl. 433.

32. Me.—Dixon v. Dixon, 124 A. 198, 199, 123 Me. 470.

Active, alive, or operative trusts defined see infra § 17.

33. Me.—Dixon v. Dixon, 124 A. 198, 199, 123 Me. 470.

Passive trusts defined see infra § 17.

34. Ark.—Mortensen v. Ballard, 188 S.W.2d 719, 209 Ark 1—Ripley v. Kelly, 183 S.W.2d 793, 207 Ark. 1011.

Cal.—Loggins v. Daves, 40 S.E.2d 520, 201 Ga. 628.

Idaho.—Reid v. Keator, 39 P.2d 926, 55 Idaho 172.

Ill.—Peters v. Meyers, 96 N.E.2d 493, 408 Ill. 253—Murray v. Behrendt, 76 N.E.2d 431, 299 Ill. 22.

Md.—Stines v. Shipes, 63 A.2d 748, 192 Md. 139—Pasman v. Pottashnick, 51 A.2d 664, 188 Md. 105.

N.Y.—Le Fevre v. Reliable Paint Supply Co., 273 N.Y.S. 903, 152 Misc. 594.

Ohio.—In re Barnes' Estate, Com.Pl., 108 N.E.2d 88, affirmed, App., 108 N.E.2d 101.

Okl.—Corpus Juris cited in De Moss v. Rule, 152 P.2d 594, 599, 194 Okl. 440.

Pa.—Corpus Juris cited in Gast v. Engel, 85 A.2d 403, 405, 369 Pa. 137.

Tex.—Miller v. Donald, Civ.App., 235 S.W.2d 201, error refused no reversible error—Morrison v. Farmer, Civ.App., 210 S.W.2d 245, reversed on other grounds 213 S.W.2d 813, 147 Tex. 122.

65 C.J. p 220 note 30.

## Scope

(1) Implied trusts include constructive trusts, trusts ex maleficio, and resulting trusts—Ripley v. Kelly, 183 S.W.2d 793, 207 Ark. 1011.

(2) An "implied trust" includes a "resulting trust"—Hunt v. Hunt, 149 S.W.2d 930, 202 Ark. 130.

35. Kan.—Corpus Juris quoted in Ellbert v. Alibert, 83 P.2d 795, 798, 148 Kan. 527.

65 C.J. p 220 note 31.

36. Wash.—Farrell v. Mentzer, 174 P. 482, 483, 102 Wash. 629.

65 C.J. p 220 note 32.

## Other statement of rule

Trusts arising by implication or operation of law are commonly called "implied trusts" or "resulting trusts," and sometimes "constructive trusts," although, properly speaking, a constructive trust is one arising from fraud either actual or constructive, or the essence of the trust is wrongdoing of some kind—Sinclair v. Allender, 26 N.W.2d 320, 238 Iowa 212.

37. Mo.—Ferguson v. Robinson, 167 S.W. 447, 452, 258 Mo. 113.

65 C.J. p 220 note 33.

38. Tenn.—Kaphan v. Toney, Ch., 68 S.W. 909, 913.

65 C.J. p 220 note 34.

39. N.C.—Atkinson v. Atkinson, 33 S.E.2d 666, 225 N.C. 120.

40. Minn.—Corpus Juris quoted in American Sur Co. of N. Y. v. Greenwald, 25 N.W.2d 681, 685, 223 Minn.

37—Corpus Juris quoted in Werten v. Werten, 13 N.W.2d 749, 751, 217 Minn. 51, 151 A.L.R. 1302.

Neb.—Nelson v. Seever, 10 N.W.2d 349, 351, 143 Neb. 522.

Or.—Corpus Juris cited in Platt v. Jones, 38 P.2d 703, 709, 149 Or. 246, reheard 39 P.2d 955, 149 Or. 246.

Tex.—Miller v. Donald, Civ.App., 235 S.W.2d 201, 205, error refused no reversible error—Morrison v. Farmer, Civ.App., 210 S.W.2d 215, 249, reversed on other grounds 213 S.W.2d 813, 147 Tex. 122—Ellbert v. Waples-Platter Co., Civ.App., 156 S.W.2d 146, 150, error refused.

65 C.J. p 220 note 39.

Testamentary trusts see the C.J.S. title Wills § 1001 et seq. also 69 C.J. p 692 note 50 et seq.

trust.<sup>41</sup> Express trusts are also sometimes called "direct,"<sup>42</sup> "declared,"<sup>43</sup> or "conventional"<sup>44</sup> trusts.

A "power in trust" involves a form of express fiduciary obligation similar to that of an express trust.<sup>45</sup>

**Constructive and resulting trusts distinguished.** An express trust is to be distinguished from a constructive trust.<sup>46</sup> They are distinct concepts.<sup>47</sup> A constructive trust differs from an express trust in much the same way as a quasi contractual obligation differs from a contractual obligation.<sup>48</sup>

An express trust springs from the agreement of the parties, while a constructive trust arises from the construction of equity, in order to satisfy the demands of justice.<sup>49</sup> Also, a constructive trust, unlike an express trust, is remedial in character.<sup>50</sup> A constructive trust, unlike an express trust, is not a fiduciary relation, although the circumstances which give rise to a constructive trust may or may not involve a fiduciary relation.<sup>51</sup> They are similar

#### Similar definitions

(1) Those which are created in express terms either by a writing or orally, not barred by statute of frauds.—*De Mott v. National Bank of New Jersey*, 179 A. 470, 472, 118 N.J. Eq. 396.

(2) Those which arise from intention of trustor as shown by his declaration or declaration of trustee or by agreement of the parties.—*In re Barnes' Estate*, Ohio Com.Pl., 108 N. E.2d 88, 99, affirmed, App., 108 N.E.2d 101.

(3) Those which result from, and are based on, a contract which involves the separation of legal and equitable title.—*Lobban v. Wierhauser*, Tex.Civ.App., 141 S.W.2d 384, 385, error refused.

(4) Those which are created by the direct or express words of a grantor or settlor, or by the intentional act of the party having dominion over the property, done with a view to the creation of a trust.—*Sanford v. Van Pelt*, 282 S.W. 1022, 1031, 314 Mo. 175.—*Gwin v. Gwin*, 219 S.W.2d 282, 285, 240 Mo.App. 782.

(5) Fiduciary relationship with respect to property, subjecting holder thereof to equitable duty to deal with property for another's benefit, and arising as result of manifestation of intention to create trust.

U.S.—*First Nat. Bank of Birmingham v. Manufacturers Trust Co.*, D.C.N.J., 2 F.R.D. 125, 127.

N.C.—*Sinclair v. Travis*, 57 S.E.2d 394, 400, 231 N.C. 345.—*Wescott v. First & Citizens Nat. Bank of Elizabeth City*, 40 S.E.2d 461, 462, 227 N.C. 39.

Ohio.—*Norris v. Norris*, App., 57 N.E.2d 254, 258, appeal dismissed 53 N.E.2d 647, 142 Ohio St. 634.—*Moskowitz v. Federman*, 61 N.E.2d 48, 52, 72 Ohio App. 149.

(6) Other similar definitions

U.S.—*Titcomb v. Billings*, Olcott & Co., D.C.N.Y., 104 F.Supp. 168.

Ark.—*Cox v. Wasson*, 60 S.W.2d 566, 568, 187 Ark. 452.

Ga.—*Jones v. Jones*, 26 S.E.2d 602, 605, 196 Ga. 492.

Ill.—*Martin v. Rockford Trust Co.*, 281 Ill.App. 441.

Minn.—*American Sur. Co. of N. Y. v. Greenwald*, 25 N.W.2d 681, 685,

223 Minn. 37.—*In re Burton's Estate*, 289 N.W. 66, 206 Minn. 516 N.C.—*Teachey v. Gurley*, 199 S.E. 83, 86, 214 N.C. 288.

Tex.—*Lang v. Shell Petroleum Corp.*, Civ.App., 141 S.W.2d 667, 672, affirmed 159 S.W.2d 478, 138 Tex. 399.

—*First State Bank v. National Bank of Commerce*, Civ.App., 93 S.W.2d 406, 409, error refused.

Wash.—*Tucker v. Brown*, 92 P.2d 221, 225, 199 Wash. 320.

W.Va.—*Straton v. Aldridge*, 6 S.E.2d 222, 121 W.Va. 631.

65 C.J. p. 220 note 39 [a]–[e].

#### Direct and positive acts

An express trust can arise only out of parties' direct and positive acts, and can never be implied or arise by operation of law.—*Hunt v. Hunt*, 149 S.W.2d 930, 202 Ark. 130.

#### Promise or agreement

(1) Every express trust involves, in some measure, a promise by trustee to do some act for grantor or some person named by him.—*Elbert v. Waples-Platter Co.*, Tex.Civ.App., 156 S.W.2d 146, error refused.

(2) If there is an agreement of parties that property shall be held in trust, an express trust arises.—*Davis v. Pearce*, Tex.Civ.App., 205 S.W.2d 653.

41. Minn.—*Corpus Juris* quoted in *American Surety Co. of N. Y. v. Greenwald*, 25 N.W.2d 681, 685, 223 Minn. 37.—*Corpus Juris* quoted in *Wertlin v. Wertlin*, 13 N.W.2d 749, 751, 217 Minn. 51, 151 A.L.R. 1302.

65 C.J. p. 221 note 40.

#### Distinguishing feature

A trust created intentionally by settlor is an express or direct trust, as distinguished from trust created by operation of law.—*Hill v. Irons*, 109 N.E.2d 699, 82 Ohio App. 141, reversed on other grounds 113 N.E.2d 243, 160 Ohio St. 21.—*Homer v. Wullenweber*, 101 N.E.2d 229, 89 Ohio App. 255.

#### Consensual origin

Express trusts are consensual in origin.—*Brown v. New York Life Ins. Co.*, D.C.Or., 58 F.Supp. 262, affirmed, C.C.A., 162 F.2d 246.

42. Ohio.—*Homer v. Wullenweber*, 101 N.E.2d 229, 89 Ohio App. 255.

65 C.J. p. 221 note 41.

43. W.Va.—*Currence v. Ward*, 27 S.E. 329, 43 W.Va. 367, 369.

44. Md.—*Keller v. Kunkel*, 46 Md. 565, 569.

45. N.Y.—*In re Brooklyn Trust Co.*, 295 N.Y.S. 1007, 163 Misc. 117.

Trust distinguished from:

Power generally see Powers § 1.

Power in trust see Powers § 6.

#### Duty

Power in trust places on grantee duty to execute trust in favor of some persons other than himself, and involves idea of trust as much as trust estate does, and in execution thereof grantee may act in his own name.—*In re Brooklyn Trust Co.*, supra.

General power of appointment is not power in trust within statute providing that general power is in trust, where any person or class of persons other than grantee of power is designated as entitled to proceeds or any portion thereof.—*Chase Nat. Bank of City of New York v. Chicago Title & Trust Co.*, 284 N.Y.S. 472, 246 App.Div. 201, affirmed 3 N.E.2d 205, 271 N.Y. 602, reargument denied 3 N.E.2d 472, 271 N.Y. 659.

46. U.S.—*Nelson Development Co. v. Ohio Oil Co.*, D.C.Ill., 45 F.Supp. 933, 935.

S.D.—*In re Zech's Estate*, 6 N.W.2d 432, 69 S.D. 51.—*In re Farmers State Bank of Amherst*, 289 N.W. 75, 67 S.D. 51, 126 A.L.R. 619.

47. S.D.—*In re Farmers State Bank of Amherst*, supra.

48. S.D.—*In re Farmers State Bank of Amherst*, supra.

49. N.Y.—*Lloyd v. Phillips*, 71 N.Y. 82d 103, 272 App.Div. 222.

W.Va.—*Dye v. Dye*, 39 S.E.2d 98, 128 W.Va. 754.

50. Cal.—*Sampson v. Bruder*, 118 P.2d 28, 47 Cal.App.2d 431.

Remedial institution

A "constructive trust" is a remedial institution as distinguished from substantive, the latter being typically exemplified by an "express trust".

—*Kerber v. Rowe*, 156 S.W.2d 925, 348 Mo. 1125.

51. S.C.—*Searson v. Webb*, 38 S.E.2d 654, 208 S.C. 453.



only in that in both one person holds title to property subject to an equitable duty to hold the property for, or to convey it to, another, and the latter has in each case some kind of an equitable interest in the property.<sup>52</sup>

An express trust has also been distinguished from a resulting trust.<sup>53</sup> So it has been held that a resulting trust differs from an express trust in the manner of its creation and in the nature and extent of the duties of the trustee;<sup>54</sup> but it has also been held that these trusts differ only in the manner in which they are proved; when proved a resulting trust is enforced in the same manner as an express trust.<sup>55</sup>

*Implied trust distinguished.* Express and implied trusts differ chiefly in that express trusts are created by the acts of the parties,<sup>56</sup> while implied trusts are raised by operation of law,<sup>57</sup> either to carry out a presumed intention of the parties or to satisfy the demands of justice or protect against fraud.<sup>58</sup>

## § 12. — Implied Express Trusts or Incompletely Expressed Trusts

The term "implied trust" sometimes refers to a form of express trust arising from the construction of the language used by the trustor, and in this sense is defined

as a trust that the courts imply from the words of an instrument, where no express trust is declared.

The term "implied trust" is sometimes used to designate a form of express trusts arising from the construction of the language used by the trustor.<sup>59</sup> In this sense implied trusts are defined as trusts that the courts imply from the words of an instrument, where no express trust is declared, but such words are used that the court infers or implies that it was the purpose or intention of the parties to create a trust.<sup>60</sup> Such a trust may arise where precatory words in the document require interpretation, but cannot arise where the express terms are unambiguous.<sup>61</sup>

## § 13. — Implied Trusts

Implied trusts are those which, without being expressed, are deducible from the nature of the transaction as matters of intent, or which are superinduced on the transaction by operation of law as matters of equity, independently of the particular intention of the parties.

Implied trusts are usually defined as those which, without being expressed, are deducible from the nature of the transaction as matters of intent, or which are superinduced on the transaction by operation of law as matters of equity, independently of the particular intention of the parties.<sup>62</sup> How-

S.D.—In re Farmers State Bank of Amherst, 289 N.W. 76, 67 S.D. 51, 126 A.L.R. 619.

52. S.D.—In re Farmers State Bank of Amherst, supra.

53. Mo.—Kerber v. Rowe, 156 S.W. 2d 925, 348 Mo. 1125.

55. C.J. p. 223 note 61 [d].

### Agreement of parties

An express trust springs from the agreement of the parties, and a resulting trust from the construction of equity, in order to satisfy the demands of justice—Dye v. Dye, 39 S.E.2d 98, 128 W.Va. 754.

### Implied by law

Resulting trust, as distinguished from an express trust, is one implied by law from acts and conduct of parties and facts and circumstances which at the time exist and attend transaction out of which it arises.—Little v. Mettee, 93 S.W.2d 1000, 338 Mo. 1223.

54. Tex.—Elbert v. Waples-Platter Co., Civ.App., 156 S.W.2d 146, 150, error refused.

55. Cal.—Scadden Flat Gold-Min. Co. v. Scadden, 53 P. 440, 121 Cal. 33.

56. Ark.—Corpus Juris quoted in Hunt v. Hunt, 149 S.W.2d 930, 932, 202 Ark. 130.

Minn.—Corpus Juris quoted in American Sur. Co. of N. Y. v. Greenwald, 25 N.W.2d 681, 685, 223 Minn. 37.

Tex.—Mellette v. Hudstan Oil Corp., Civ.App., 243 S.W.2d 438, error refused no reversible error.

65 C.J. p. 222 note 52.

57. Ark.—Corpus Juris quoted in Hunt v. Hunt, 149 S.W.2d 930, 932, 202 Ark. 130.

Ill.—Murray v. Behrendt, 76 N.E.2d 431, 399 Ill. 22.

Minn.—Corpus Juris quoted in American Sur. Co. of N. Y. v. Greenwald, 25 N.W.2d 681, 685, 223 Minn. 37.

Tex.—Mellette v. Hudstan Oil Corp., Civ.App., 243 S.W.2d 438, error refused no reversible error—Miller v. Donald, Civ.App., 235 S.W.2d 201, error refused no reversible error.

65 C.J. p. 222 note 53.

58. Ark.—Corpus Juris quoted in Hunt v. Hunt, 149 S.W.2d 930, 932, 202 Ark. 130.

Minn.—Corpus Juris quoted in American Sur. Co. of N. Y. v. Greenwald, 25 N.W.2d 681, 685, 223 Minn. 37. 65 C.J. p. 222 note 54.

59. Or.—Corpus Juris quoted in Platt v. Jones, 38 P.2d 703, 709, 149 Or. 246.

R.I.—Broadway Bldg. Co. v. Salafia, 132 A. 527, 528, 47 R.I. 263, 45 A.L.R. 847.

Implied trusts as contradistinguished from express trusts see supra § 11.

60. Or.—Corpus Juris quoted in Platt v. Jones, 38 P.2d 703, 709, 149 Or. 246.

65 C.J. p. 221 note 46.

61. R.I.—Broadway Bldg. Co. v. Salafia, 132 A. 527, 47 R.I. 263, 45 A.L.R. 847.

62. U.S.—Corpus Juris quoted in Reed v. Kellerman, D.C.Pa., 40 F. Supp. 46, 50, motion dismissed 2 F.R.D. 195.

Ark.—Hunt v. Hunt, 149 S.W.2d 930, 932, 202 Ark. 130.

Kan.—Corpus Juris quoted in Albert v. Albert, 83 P.2d 795, 798, 148 Kan. 527.

Pa.—Corpus Juris quoted in Peoples-Pittsburgh Trust Co. v. Saupp, 182 A. 376, 378, 320 Pa. 138, 103 A.L.R. 844.

65 C.J. p. 221 note 48.

Subdivision of implied trusts into constructive trusts and resulting trusts see supra § 10.

### Similar definitions

(1) A trust inferred by law from the nature of the transaction or the conduct of the parties—Jones v. Jones, 26 S.E.2d 602, 605, 196 Ga. 492—65 C.J. p. 221 note 48 [a] (7).

(2) One declared by party not directly but only by implication—O'Keefe v. Equitable Trust Co., C.C. A.N.J., 103 F.2d 904, 908.

(3) Other similar definitions.

Ark.—Mortensen v. Ballard, 188 S.W. 2d 749, 754, 209 Ark. 1.

Tex.—Lang v. Shell Petroleum Corp., Civ.App., 141 S.W.2d 667, 671, 159 S.W.2d 478, 138 Tex. 399—Ashby v. Standard Pipe & Supply Co.,

ever, some definitions disregard the element of intent and define these trusts to be such only as arise by operation of law.<sup>63</sup> By some authorities the term "implied trusts" is used in a sense exclusive of resulting and constructive trusts to designate a form of express trusts, as discussed supra § 12.

**Synonymous.** "Trusts by implication of law,"<sup>64</sup> "trusts by operation of law,"<sup>65</sup> "trusts arising or resulting by operation of law,"<sup>66</sup> and "involuntary trusts,"<sup>67</sup> are all synonymous with "implied trusts."

## § 14. — Resulting Trusts

A resulting trust is broadly defined as a trust which is raised or created by the act or construction of law, but in its more restricted sense it is a trust raised by implication of law and presumed always to have been contemplated by the parties, the intention as to which is to be found in the nature of their transaction, but not expressed in the deed or instrument of conveyance.

Civ.App., 56 S.W.2d 218, 222, error refused.  
65 C.J. p 221 note 48 [a], [b].

63. Kan.—**Corpus Juris** quoted in *Albert v. Albert*, 83 P.2d 795, 798, 148 Kan. 527.

65 C.J. p 222 note 49.

### Other definitions

(1) In general.—*Old Ladies' Home Ass'n v. Grubbs' Estate*, 2 So.2d 593, 594, 131 Miss. 250—65 C.J. p 222 note 49 [a].

(2) Implied trusts are usually raised or determined by operation of law or rules of equity for purpose of carrying out presumed intention of parties or to protect against fraud.—*Morrisson v. Farmer*, Tex.Civ.App., 210 S.W.2d 245, reversed on other grounds 213 S.W.2d 813, 147 Tex. 122.

64. N.D.—*Arntson v. First Nat. Bank*, 167 N.W. 760, 763, 39 N.D. 408, L.R.A.1915F 1038.

65. Ill.—*Murray v. Behrendt*, 76 N.E.2d 431, 399 Ill. 22.

N.Y.—*Le Fevre v. Reliable Paint Supply Co.*, 273 N.Y.S. 903, 907, 152 Misc. 594.

N.D.—*Arntson v. First Nat. Bank*, 167 N.W. 760, 763, 39 N.D. 408, L.R.A.1915F 1038.

66. N.D.—*Arntson v. First Nat. Bank*, supra.

67. Ill.—*Murray v. Behrendt*, 76 N.E.2d 431, 399 Ill. 22.

68. Neb.—**Corpus Juris** quoted in *Holbein v. Holbein*, 30 N.W.2d 899, 905, 149 Neb. 281—**Corpus Juris** quoted in *Reetz v. Olson*, 20 N.W.2d 687, 688, 146 Neb. 621.

Wash.—**Corpus Juris** quoted in *Mouser v. O'Sullivan*, 156 P.2d 655, 656, 22 Wash.2d 543.

65 C.J. p 222 note 59.

**Corpus Juris** text has been cited in cases holding that a resulting trust

was established under particular circumstances.

Md.—*Krauch v. Krauch*, 20 A.2d 719, 720, 179 Md. 423.

Mo.—*Carroll v. Carroll*, 178 S.W.2d 435, 437.

Tex.—*Brown v. O'Meara*, Civ.App., 206 S.W.2d 122, 125.

### Other definitions

Ohio.—*Steiner v. Feeyoz*, 50 N.E.2d 617, 621, 72 Ohio App. 13.

Tex.—*Brown v. Warfield*, Civ.App., 234 S.W.2d 264, 267, error refused.

65 C.J. p 222 note 59 [a].

**Resulting trust held species of implied trust**

Tex.—*Miller v. Donald*, Civ.App., 235 S.W.2d 201, error refused no reversible error—*Brown v. Warfield*, Civ.App., 234 S.W.2d 264, error refused—*Elbert v. Waples-Platter Co.*, Civ.App., 156 S.W.2d 146, error refused.

69. Ala.—**Corpus Juris** cited in *Leonard v. Duncan*, 16 So.2d 879, 881, 245 Ala. 320.

Kan.—**Corpus Juris** quoted in *Herd v. Chambers*, 149 P.2d 583, 593, 153 Kan. 614—**Corpus Juris** quoted in *Albert v. Albert*, 83 P.2d 795, 798, 148 Kan. 527.

Neb.—**Corpus Juris** quoted in *Holbein v. Holbein*, 30 N.W.2d 899, 905, 149 Neb. 281—**Corpus Juris** quoted in *Reetz v. Olson*, 20 N.W.2d 687, 688, 146 Neb. 621.

N.D.—**Corpus Juris** quoted in *Bodding v. Herman*, 35 N.W.2d 561, 562, 76 N.D. 324.

Wash.—**Corpus Juris** quoted in *Mouser v. O'Sullivan*, 156 P.2d 655, 656, 22 Wash.2d 543.

65 C.J. p 223 note 61.

### Other definitions

(1) In general.

Del.—*Greenly v. Greenly*, 49 A.2d 126, 129, 23 Del.Ch. 297.

N.M.—*Browne v. Sieg*, 234 P.2d 1045, 1048, 55 N.M. 447.

Although the term "resulting trust" has been broadly defined as a trust which is raised or created by the act or construction of law,<sup>68</sup> in its more restricted sense and contradistinguished from constructive trusts a resulting trust has been defined to be one raised by implication of law and presumed always to have been contemplated by the parties, the intention as to which is to be found in the nature of their transaction, but not expressed in the deed or instrument of conveyance.<sup>69</sup> Such trusts are also called "presumptive" trusts,<sup>70</sup> and are frequently defined in terms of, or in connection with, the character of the transaction out of which they most frequently arise, namely, where one person pays the consideration for a purchase and the title is taken in the name of another,<sup>71</sup> although they may result from other kinds of transactions, as discussed

Tex.—*Mills v. Gray*, 210 S.W.2d 985, 987, 147 Tex. 33.

65 C.J. p 223 note 61 [a], [b].

(2) One which the court of equity declares to exist where the legal estate is transferred or acquired by one under facts and circumstances which indicate that the beneficial interest is not intended to be enjoyed by the legal title holder.—In re *Barnes' Estate*, Ohio Com.Pl., 108 N.E.2d 88, 100, affirmed, App., 108 N.E.2d 101.

(3) One which arises where the legal estate in property is disposed of, conveyed, or transferred, but the intent appears or is inferred from the terms of the disposition, or from the accompanying facts that the beneficial interest is not to go with the legal title, or to be enjoyed by the holder thereof.—*McGill v. McGill*, 113 P.2d 826, 827, 189 Okl. 3—*Crane v. Owens*, 69 P.2d 654, 657, 180 Okl. 462—*McClellan v. Smith*, 68 P.2d 875, 877, 180 Okl. 348.

W.Va.—*Belmont Iron Works v. Boyle*, 198 S.E. 527, 531, 120 W.Va. 339.

65 C.J. p 223 note 61 [a] (1).

70. Neb.—**Corpus Juris** quoted in *Holbein v. Holbein*, 30 N.W.2d 899, 905, 149 Neb. 281—**Corpus Juris** quoted in *Reetz v. Olson*, 20 N.W.2d 687, 688, 146 Neb. 621.

Wash.—**Corpus Juris** quoted in *Mouser v. O'Sullivan*, 156 P.2d 655, 656, 22 Wash.2d 543.

65 C.J. p 223 note 62.

71. Neb.—**Corpus Juris** quoted in *Holbein v. Holbein*, 30 N.W.2d 899, 905, 149 Neb. 281—**Corpus Juris** quoted in *Reetz v. Olson*, 20 N.W.2d 687, 688, 146 Neb. 621.

Wash.—**Corpus Juris** quoted in *Mouser v. O'Sullivan*, 156 P.2d 655, 656, 22 Wash.2d 543.

65 C.J. p 223 note 63.

infra § 98. It has been held that a resulting trust is not a "trust" strictly speaking, but equity imposes a trust relationship because morality, justice, conscience, and fair dealing demand that the relation be established.<sup>72</sup>

**Constructive trust distinguished.** Resulting and constructive trusts, while frequently confused, are clearly distinguishable.<sup>73</sup> A resulting trust is a status that automatically arises by operation of law out of certain circumstances, while a constructive trust is a remedy that equity applies in order to prevent injustice or in order to do justice.<sup>74</sup> In the case of a resulting trust there is always the element, although it is an implied one, of an intention to create a trust,<sup>75</sup> by reason of which, although it is by no means an express trust, it approaches more nearly thereto.<sup>76</sup> Constructive trusts on the other hand have none of the elements of an express trust,<sup>77</sup> but arise entirely by operation of law without reference to any actual or supposed intention of creating a trust, and often directly contrary to such intention, for the purpose of working out

right and justice or frustrating fraud.<sup>78</sup> Constructive trusts embrace a much larger class of cases than resulting trusts.<sup>79</sup>

### § 15. — Constructive Trusts

The term "constructive trust" is broadly defined as a trust raised by construction of law, or arising by operation of law, as distinguished from an express trust; but in a more restricted sense and contradistinguished from a resulting trust, it is defined as a trust not created by any words, either expressly or impliedly evincing a direct intention to create a trust, but by the construction of equity in order to satisfy the demands of justice.

While the term "constructive trust" has been broadly defined as a trust raised by construction of law, or arising by operation of law, as distinguished from an express trust,<sup>80</sup> in a more restricted sense and contradistinguished from a resulting trust it has been variously defined as a trust not created by any words, either expressly or impliedly evincing a direct intention to create a trust, but by the construction of equity in order to satisfy the demands of justice;<sup>81</sup> one not arising by agreement

#### Definitions of such character

Wash.—Cressman v. Boyle, 196 P.2d 835, 840, 31 Wash.2d 345  
65 C.J. p 223 note 63 [a].

72. N.C.—Teachey v. Gurley, 199 S. E. 83, 214 N.C. 288.

73. U.S.—Doyle v. Riley, C.A. Fla., 176 F.2d 449, 459—Nelson Development Co. v. Ohio Oil Co., D.C. Ill., 45 F.Supp. 933, 935.

Del.—Greenly v. Greenly, 49 A.2d 126, 29 Del.Ch. 297.

Mo.—Kerber v. Rowe, 156 S.W.2d 925, 927, 348 Mo. 1125.

Pa.—A. B. Dick Co. v. Third Nat. Bank, 17 Pa. Dist. & Co. 549.

Tex.—Corpus Juris cited in Sohio Petroleum Co. v. Jurek, Civ. App., 248 S.W.2d 294, 297.

65 C.J. p 225 note 80.

74. U.S.—Doyle v. Riley, C.A. Fla., 176 F.2d 449.

75. Mo.—Kerber v. Rowe, 156 S.W.2d 925, 348 Mo. 1125.

Tex.—Sohio Petroleum Co. v. Jurek, Civ. App., 248 S.W.2d 294.

Wash.—Carkonen v. Alberts, 83 P.2d 899, 196 Wash. 575, 135 A.L.R. 209.

#### Presumed intention

Resulting trusts, arise on the presumed intention of the parties, while constructive trusts, are independent of any such intention and are forced on the conscience of the party by operation of law.—Sines v. Shipes, 63 A.2d 748, 192 Md. 139—Fasman v. Pottashnick, 51 A.2d 664, 188 Md. 105.

76. Ala.—Robinson v. Pierce, 24 So. 984, 118 Ala. 273, 301, 72 Am.S.R. 160, 45 L.R.A. 66.

77. Ala.—Robinson v. Pierce, supra. S.D.—In re Farmers State Bank of Amherst, 289 N.W. 75, 80, 67 S.D. 51, 126 A.L.R. 619.

78. N.J.—Moses v. Moses, 53 A.2d 865, 140 N.J.Eq. 575, 173 A.L.R. 273.

Okl.—De Moss v. Rule, 152 P.2d 594, 194 Okl. 449.

Pa.—Copenhaver v. Duncan, Com. Pl., 61 York Leg. Rec. 105.

Tex.—Sohio Petroleum Co. v. Jurek, Civ. App., 248 S.W.2d 294.

79. S.D.—Farmers', etc., Bank v. Kimball Milling Co., 47 N.W. 402, 1 S.D. 388, 394, 36 Am.S.R. 739.

80. Ill.—Corpus Juris cited in Compton v. Compton, 111 N.E.2d 109, 113, 414 Ill. 149.

Mich.—Corpus Juris quoted in Union Guardian Trust Co. v. Emery, 290 N.W. 841, 846, 292 Mich. 394—Corpus Juris quoted in Stephenson v. Golden, 276 N.W. 849, 859, 279 Mich. 710.

Okl.—Corpus Juris cited in Jones v. Jones, 148 P.2d 989, 991, 194 Okl. 228.

65 C.J. p 223 note 66.

81. Ga.—Corpus Juris quoted in Wages v. Wages, 42 S.E.2d 481, 486, 202 Ga. 155—Corpus Juris quoted in Mitchell v. Mitchell, 40 S.E.2d 738, 739, 201 Ga. 621—Corpus Juris quoted in Harris v. Rowe, 36 S.E.2d 787, 792, 200 Ga. 265—Corpus Juris quoted in Murray County v. Pickering, 26 S.E.2d 287, 292, 196 Ga. 208.

Ky.—Long v. Reiss, 160 S.W.2d 668, 676, 290 Ky. 198—Molloy's Adm'r v. Tabor, 271 S.W. 1064, 208 Ky. 702.

Mich.—Corpus Juris quoted in Potter v. Lindsay, 60 N.W.2d 133, 137, 337 Mich. 404—Corpus Juris quoted in Union Guardian Trust Co. v. Emery, 290 N.W. 841, 846, 292 Mich. 394—Corpus Juris quoted in Stephenson v. Golden, 276 N.W. 849, 859, 279 Mich. 710.

N.C.—Corpus Juris quoted in Speight v. Branch Banking & Trust Co., 182 S.E. 734, 736, 209 N.C. 663.

Pa.—Corpus Juris quoted in Fox v. Fox, 189 A. 758, 761, 125 Pa. Super. 541.

Tenn.—Fehn v. Schlickling, 175 S.W. 2d 37, 40, 26 Tenn. App. 608.

65 C.J. p 223 note 68.

82. Tenn.—Fehn v. Schlickling, 175 S.W. 2d 37, 40, 26 Tenn. App. 608.

83. C.J. p 223 note 68.

84. C.J. p 223 note 68.

85. C.J. p 223 note 68.

Wash.—Carkonen v. Alberts, 83 P.2d 899, 901, 196 Wash. 575, 135 A.L.R. 209.

65 C.J. p 223 note 66 [a].

81. Ga.—Corpus Juris quoted in Wages v. Wages, 42 S.E.2d 481, 486, 202 Ga. 155—Corpus Juris quoted in Mitchell v. Mitchell, 40 S.E.2d 738, 739, 201 Ga. 621—Corpus Juris quoted in Harris v. Rowe, 36 S.E.2d 787, 792, 200 Ga. 265—Corpus Juris quoted in Murray County v. Pickering, 26 S.E.2d 287, 292, 196 Ga. 208.

Ky.—Long v. Reiss, 160 S.W.2d 668, 676, 290 Ky. 198—Molloy's Adm'r v. Tabor, 271 S.W. 1064, 208 Ky. 702.

Mich.—Corpus Juris quoted in Potter v. Lindsay, 60 N.W.2d 133, 137, 337 Mich. 404—Corpus Juris quoted in Union Guardian Trust Co. v. Emery, 290 N.W. 841, 846, 292 Mich. 394—Corpus Juris quoted in Stephenson v. Golden, 276 N.W. 849, 859, 279 Mich. 710.

N.C.—Corpus Juris quoted in Speight v. Branch Banking & Trust Co., 182 S.E. 734, 736, 209 N.C. 663.

Pa.—Corpus Juris quoted in Fox v. Fox, 189 A. 758, 761, 125 Pa. Super. 541.

Tenn.—Fehn v. Schlickling, 175 S.W. 2d 37, 40, 26 Tenn. App. 608.

65 C.J. p 223 note 68.

82. Tenn.—Fehn v. Schlickling, 175 S.W. 2d 37, 40, 26 Tenn. App. 608.

83. C.J. p 223 note 68.

84. C.J. p 223 note 68.

85. C.J. p 223 note 68.

86. C.J. p 223 note 68.

87. C.J. p 223 note 68.

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91. C.J. p 223 note 68.

92. C.J. p 223 note 68.

93. C.J. p 223 note 68.

94. C.J. p 223 note 68.

95. C.J. p 223 note 68.

96. C.J. p 223 note 68.

97. C.J. p 223 note 68.

or intention, but by operation of law;<sup>82</sup> or one that arises when a person clothed with some fiduciary character, by fraud or otherwise, gains some advantage to himself.<sup>83</sup> As otherwise expressed, a

who are not innocent purchasers.—*Doung v. Riley, C.A.Fla., 176 F.2d 449, 458.*

(2) A trust raised by equity for purpose of circumventing fraud where parties do not intend to create trust relation.—*Dotson v. Dotson, 209 S.W.2d 852, 853, 307 Ky. 106.*

(3) A fiction of equity, devised to the end that equitable remedies available against conventional fiduciary may be available under the same name and processes because through fraud or any other means, ex maleficio, defendant has procured a valuable advantage of another which in equity he ought not to retain.

U.S.—*Nelson Development Co. v. Ohio Oil Co., D.C.Ill., 45 F.Supp. 933, 935*

N.Y.—*Stephens v. Evans, 75 N.Y.S. 2d 909, 911, 190 Misc. 922.*

(4) A method or formula used by equity court to effect restitution or rectify situation where one seeking aid of equity has been wrongfully deprived of, or lost, some title, right, equity, interest, expectancy, or benefit in property as result of violation of confidence or faith reposed in another or latter's fraudulent act or conduct.—*Suhre v. Busch, 123 S.W. 2d 8, 15, 343 Mo. 679.*

(5) The formula through which the conscience of equity finds expression when property has been acquired in such circumstances that holder of legal title may not in good conscience retain beneficial interest.—*Maas v. Weitzman, 77 N.Y.S.2d 300, 191 Misc. 348, affirmed 80 N.Y.S.2d 729, 274 App.Div. 765—Stephens v. Evans, 75 N.Y.S.2d 909, 911, 190 Misc. 922.*

(6) Other similar definitions  
U.S.—*New Mexico Potash & Chemical Co. v. Independent Potash & Chemical Co., C.C.A.N.M., 115 F.2d 544, 547.*

Ariz.—*Eckert v. Miller, 111 P.2d 60, 57 Ariz. 94.*

Ohio.—*Steiner v. Feecey, 50 N.E.2d 617, 621, 72 Ohio App. 18.*

Or.—*Pouchek v. Janicek, 225 P.2d 783, 784, 190 Or. 251.*

Tex.—*Elbert v. Waples-Platter Co., Civ.App., 156 S.W.2d 116, error refused.*

Wash.—*In re Peterson's Estate, 123 P.2d 733, 761, 12 Wash.2d 686—Carkonen v. Alberts, 83 P.2d 899, 901, 196 Wash. 576, 135 A.L.R. 209—Nicolai v. Desllets, 55 P.2d 604, 605, 185 Wash. 435.*

65 C.J. p 223 note 68 [a]. [b].

**As defined in Restatement of Trusts** a "constructive trust" is a relationship with respect to property subjecting person by whom title is held to an equitable duty to convey the property to another on ground

that his acquisition or retention of the property is wrongful and that he would be unjustly enriched if permitted to retain the property.

Neb.—*Vielehr v. Malone, 63 N.W.2d 497, 502, 158 Neb. 436—Wiskocil v. Kliment, 50 N.W.2d 786, 791, 155 Neb. 103—Jenkins v. Jenkins, 36 N.W.2d 637, 643, 151 Neb. 113—Smith v. Kinsey, 28 N.W.2d 588, 592, 148 Neb. 786—Watkins v. Waits, 28 N.W.2d 206, 211, 148 Neb. 543—In re Scott's Estate, 26 N.W. 2d 799, 802, 148 Neb. 182—Box v. Box, 21 N.W.2d 868, 873, 146 Neb. 826—Kozina v. J. B. Watkins Lumber Co., 20 N.W.2d 606, 609, 146 Neb. 594—Tuttle v. Wyman, 18 N.W.2d 744, 748, 146 Neb. 146—O'Shea v. O'Shea, 11 N.W.2d 540, 549, 143 Neb. 813—Nelson v. Seever, 30 N.W.2d 349, 352, 143 Neb. 522—Fisher v. Keeler, 7 N.W.2d 659, 662, 142 Neb. 728—Wilcox v. Wilcox, 293 N.W. 378, 379, 138 Neb. 510.*

Pa.—*City of Philadelphia v. Heinel Motors, 16 A.2d 761, 765, 142 Pa. Super 493—Moore v. Moore, Com. Pl., 35 Berks Co. 269, 57 York Leg. Rec. 141.*

Tex.—*Talley v. Howsley, 176 S.W.2d 158, 160, 142 Tex. 81.*

"Constructive trusts" include all those instances in which a trust is raised by the doctrine of equity for the purpose of working out justice in the most efficient manner, where there is no intention of the parties to create a relation, and in most cases contrary to the intention of the one holding the legal title, and where there is no express or implied, written or verbal, declaration of the trust.—*Wofford v. Jackson, 111 S.W.2d 542, 544, 194 Ark. 1049—65 C.J. p 223 note 68 [e].*

82. Mich.—*Corpus Juris* quoted in *Union Guardian Trust Co. v. Emery, 290 N.W. 841, 846, 292 Mich. 394—Corpus Juris* quoted in *Stephenson v. Golden, 276 N.W. 849, 859, 279 Mich. 710.*

Tex.—*Mills v. Gray, 21 S.W.2d 955, 957, 147 Tex. 33—Mollette v. Hudson Oil Corp., Civ.App., 213 S.W. 2d 438, 444, error refused no reversible error.*

65 C.J. p 224 note 69.

**Similar definitions**  
Or.—*Hughes v. Hielzer, 185 P.2d 537, 544, 182 Or. 205.*

65 C.J. p 224 note 69 [a].

A quasi contractual obligation and a constructive trust closely resemble each other, the chief difference being that plaintiff in bringing an action to enforce a contractual obligation seeks to obtain a judgment imposing a merely personal liability on defendant to pay a sum of money,

whereas in a suit to enforce a constructive trust plaintiff seeks to recover specific property.—*In re Farmers State Bank of Amherst, 289 N.W. 75, 67 S.D. 51, 126 A.L.R. 619.*

83. U.S.—*Corpus Juris* cited in *Strates v. Dimotsis, C.C.A.Tex., 110 F.2d 374, 376, certiorari denied 61 S.Ct. 24, 811 U.S. 666, 85 L.Ed. 427.*

Mich.—*Corpus Juris* quoted in *Union Guardian Trust Co. v. Emery, 290 N.W. 841, 846, 292 Mich. 394—Corpus Juris* quoted in *Stephenson v. Golden, 276 N.W. 849, 859, 279 Mich. 710.*

65 C.J. p 224 note 70.

**Similar definitions**

(1) In general.

Ga.—*Hancock v. Hancock, 54 S.E.2d 355, 389, 205 Ga. 684.*

Mo.—*Beach v. Beach, 207 S.W.2d 481, 486.*

(2) One arising from fraud either actual or constructive, or the essence of the trust is wrongdoing of some kind.—*Sinclair v. Allender, 26 N.W.2d 320, 325, 238 Iowa 212.*

(3) A trust which courts of equity declare to exist as a means of prevention or correction of fraud or prevention of unjust enrichment.—*In re Barnes' Estate, Ohio Com.Pl., 108 N.E.2d 88, 100, affirmed, App., 108 N.E.2d 101.*

(4) A trust raised by equity in respect of property which has been acquired by fraud or if originally acquired without fraud, should not in equity be retained by holder thereof.

U.S.—*Hartford Acc. & Indem. Co. v. Petroleum Royalties Co. of Oklahoma, D.C.Okl., 24 F.Supp. 759, 762, modified on other grounds, C.C.A., Petroleum Royalties Co. of Oklahoma v. Hartford Accident & Indemnity Co., 106 F.2d 440, 124 A.L.R. 1403, certiorari denied 60 S.Ct. 384, 208 U.S. 626, 84 L.Ed. 622.*  
Ga.—*Brown v. Brown, 75 S.E.2d 13, 17, 209 Ga. 620—Hancock v. Hancock, 54 S.E.2d 385, 390, 205 Ga. 684—Wages v. Wages, 42 S.E.2d 481, 486, 202 Ga. 155—Mitchell v. Mitchell, 40 S.E.2d 738, 739, 201 Ga. 621—Pittman v. Pittman, 26 S.E.2d 764, 770, 196 Ga. 397—Murray County v. Pickering, 26 S.E.2d 287, 292, 196 Ga. 208—Grant v. Hart, 14 S.E.2d 860, 192 Ga. 153—O'Neal v. O'Neal, 168 S.E. 262, 264, 176 Ga. 418.*

Mo.—*Sacre v. Sacre, 55 A.2d 592, 600, 143 Mo. 80, 173 A.L.R. 1261.*  
Okl.—*Jackson v. Jackson, 167 P.2d 51, 52, 196 Okl. 580—Itengar v. Bruning, 123 P.2d 686, 687, 190 Okl. 340.*

65 C.J. p 224 note 70 [a] (1).

constructive trust is a device used by chancery to compel one who unfairly holds money or property to convey it to another to which it justly belongs,<sup>84</sup> a remedial device by which the holder of legal title is held to be a trustee for the benefit of another who in good conscience is entitled to the beneficial interest,<sup>85</sup> or a remedy to redress a wrong or to prevent unjust enrichment, usually arising out of circum-

stances evidencing either fraud, accident, mistake, duress, or undue influence.<sup>86</sup> By some of the authorities constructive trusts are defined to be trusts that arise from some equitable principle independent of the existence of fraud.<sup>87</sup>

Constructive trusts are also called trusts ex maleficio,<sup>88</sup> and trusts ex delicto.<sup>89</sup> In still other

(5) One imposed by law because of proven fraud, duress or undue influence exercised by the party charged.—*Brown v. New York Life Ins. Co.*, D.C.Or., 58 F.Supp. 252, 254, affirmed, C.C.A., 152 F.2d 246.

(6) A trust which is not expressed but is imposed on a person by a court of equity on ground of public policy so as to prevent him from holding for his own benefit and advantage that which he has gained by reason of a fiduciary relationship subsisting between him and those for whose benefit it is his duty to act.—*Hull v. Fitz-Gerald*, Civ App., 232 S.W.2d 93, 99, affirmed 237 S.W.2d 256, 150 Tex. 39.—*Cawthon v. Cochell*, Tex., Civ App., 121 S.W.2d 414, 417, error dismissed.

#### Sub-classifications

(1) Constructive trusts are divided into two general classes, one being where actual fraud is considered as equitable ground for raising the trust and the other where there is a confidential relationship, and subsequent abuse of confidence reposed is sufficient to establish such trust.—*Bremer v. Bremer*, 104 N.E.2d 299, 411 Ill. 454.—*Stephenson v. Kulleheek*, 101 N.E.2d 542, 410 Ill. 139.—*Ridgely v. Central Pipe Line Co.*, 97 N.E.2d 817, 409 Ill. 46.—*Peters v. Meyers*, 96 N.E.2d 493, 408 Ill. 253.—*Kester v. Crilly*, 91 N.E.2d 419, 405 Ill. 425.—*Brod v. Brod*, 61 N.E.2d 675, 390 Ill. 312.—*Steinmetz v. Kern*, 32 N.E.2d 151, 375 Ill. 616.—*Skidmore v. Johnson*, 79 N.E.2d 762, 334 Ill.App. 347.

(2) Constructive trusts may be divided into three classes, namely, trusts that arise from actual fraud, trusts that arise from constructive fraud, and trusts that arise from some equitable principle independent of existence of any fraud.—*Long v. Huseman*, 47 A.2d 75, 186 Md. 495.

**Declaration of a constructive trust** is a form of equitable remedy used for purpose of reaching property acquired or held wrongfully, not a designation of the wrong which puts it in a special category for purpose of statute of limitations.—*Reynolds v. Whitin Mach. Works*, C.C.A.N.C., 167 F.2d 78, 87.

84. U.S.—*Grand Trunk Western R. Co. v. Chicago & Western Indiana R. Co.*, C.C.A.Ill., 131 F.2d 215, 219.—*U. S. v. Bennett*, D.C.Wash., 57 F.Supp. 670, 679.

Ill.—*Allen v. Borlin*, 84 N.E.2d 575, 578, 336 Ill.App. 460.—*People ex rel. Nelson v. Central Mfg. Dist. Bank*, 28 N.E.2d 154, 156, 306 Ill. App. 15.

Iowa.—*Ontjes v. MacNider*, 5 N.W.2d 860, 867, 232 Iowa 562.

Mo.—*Lucas v. Central Missouri Trust Co.*, 166 S.W.2d 1053, 1056, 350 Mo. 593.—*Kerber v. Rowe*, 156 S.W.2d 925, 927, 348 Mo. 1125.

Tenn.—*Akers v. Gillelline*, 231 S.W.2d 369, 371, 191 Tenn. 35.

#### Similar definitions

(1) A device employed by equity to prevent a person from retaining property to which he is not in good conscience entitled.—*Cecil v. Dollar*, Civ App., 218 S.W.2d 445, 447, reversed on other grounds 218 S.W.2d 448, 147 Tex. 541.

(2) A device used by chancery to compel one unfairly holding property interest to convey it to owner thereof, to effect restitution, or to rectify situation where person has been wrongfully deprived of or lost some title, right, equity, interest, expectancy or benefit in property because of another's violation of confidence or fraudulent conduct.—*Wier v. Kansas City*, 204 S.W.2d 268, 270, 356 Mo. 882.—*Gwin v. Gwin*, 219 S.W.2d 282, 285, 240 Mo.App. 782.

(3) An equitable device to prevent fraud or unjust enrichment.—*Grubman v. American General Corporation*, 23 A.2d 578, 580, 130 N.J.Eq. 607.

(4) A remedy through which equity avoids unjust enrichment.—*In re Zech's Estate*, 6 N.W.2d 432, 434, 69 S.D. 51.

(5) A mode by which courts of equity work out equity and prevent or circumvent fraud and overreaching.—*Miss—Pitchford v. Howard*, 45 So.2d 142, 147, 208 Miss. 567.

Neb.—*Nelson v. Seever*, 10 N.W.2d 349, 351, 143 Neb. 522.

(6) The formula through which the conscience of equity finds expression, and converts holder of legal title into a trustee when property has been acquired in such circumstances that he may not in good conscience retain the beneficial interest.

U.S.—*Liken v. Shaffer*, C.C.A.Iowa, 141 F.2d 877, certiorari denied *Shaffer v. Wilson*, 65 S.Ct. 90, 323 U.S. 766, 89 L.Ed. 603.

N.Y.—*Beatty v. Guggenheim Exploration Co.*, 122 N.E. 378, 380, 225 N.Y. 380.

N.C.—*Atkinson v. Atkinson*, 33 S.E.2d 666, 671, 225 N.C. 120.

Pa.—*City of Philadelphia v. Heinel Motors*, 16 A.2d 761, 766, 142 Pa. Super. 493.

Wash.—*In re Peterson's Estate*, 123 P.2d 733, 751, 12 Wash.2d 686.

85. Minn.—*Wilcox v. Nelson*, 35 N.W.2d 741, 744, 227 Minn. 545.—*Larkin v. McCabe*, 299 N.W. 649, 211 Minn. 11.

86. Pa.—*Metzker v. Cruikshank*, 57 A.2d 703, 705, 162 Pa. Super. 280.

87. N.J.—*Safford v. Barber*, 70 A.371, 375, 74 N.J.Eq. 352.

65 C.J. p. 224 note 71.

88. Ala.—*Knowles v. Canant*, 51 So.2d 355, 357, 255 Ala. 331.

Ariz.—*Eckert v. Miller*, 111 P.2d 60, 57 Ariz. 94.

Ark.—*Hippley v. Kelly*, 183 S.W.2d 793, 207 Ark. 1011.

Ga.—*Cordovano v. State*, 7 S.E.2d 45, 61 Ga.App. 590.

Idaho—*Corpus Juris cited in Reid v. Keator*, 39 P.2d 926, 932, 55 Idaho 172.

Mich.—*Corpus Juris quoted in Union Guardian Trust Co. v. Emery*, 290 N.W. 841, 846, 292 Mich. 394.—*Corpus Juris quoted in Stephenson v. Golden*, 276 N.W. 849, 859, 279 Mich. 710.

Mo.—*Corpus Juris quoted in Lucas v. Central Missouri Trust Co.*, 166 S.W.2d 1053, 1056, 350 Mo. 593.—*Orrick v. Heberer*, App., 124 S.W.2d 664.

Okla.—*Corpus Juris cited in Locke v. Jones*, 116 P.2d 975, 976, 189 Okl. 373.

S.C.—*Greene v. Brown*, 19 S.E.2d 114, 199 S.C. 218.

Tex.—*McLean v. Harkrove*, Com.App., 162 S.W.2d 954, 139 Tex. 236.—*Collins v. Griffith*, Civ.App., 125 S.W.2d 419.

Wash.—*Carikonen v. Alberts*, 83 P.2d 899, 196 Wash. 575, 135 A.L.R. 209.

65 C.J. p. 225 note 73.

89. Ala.—*Knowles v. Canant*, 51 So.2d 355, 357, 255 Ala. 331.

Ariz.—*Eckert v. Miller*, 111 P.2d 60, 57 Ariz. 94.

Idaho—*Corpus Juris cited in Reid v. Keator*, 39 P.2d 926, 932, 55 Idaho 172.

Mich.—*Corpus Juris quoted in Union Guardian Trust Co. v. Emery*, 290 N.W. 841, 846, 292 Mich. 394.

instances they have been called trusts in invitum,<sup>90</sup> or involuntary trusts.<sup>91</sup> It has been held that a constructive trust is not a "trust" strictly speaking, but equity imposes a trust relation because morality, justice, conscience, and fair dealing demand that the relation be established.<sup>92</sup> The forms and varieties of constructive trusts are said to be practically without limit, as discussed *infra* § 139.

*Trust ex maleficio.* One growing out of fraud, misdoing, or tort.<sup>93</sup> These trusts are sometimes termed *ex delicto*<sup>94</sup> or trusts in invitum.<sup>95</sup>

### § 15. — Executed and Executory, or Complete and Incomplete Trusts

An executed trust is one in which the limitations and trusts are fully and perfectly declared, while an executory trust is one in which the limitations are imperfectly declared, and the donor's intention is expressed in such

general terms that something not fully declared is required to be done, in order to complete and perfect the trust, and give it effect.

Trusts are classified as executed and executory,<sup>96</sup> and the distinction between the two classes has been long recognized,<sup>97</sup> although it is not always easy of application.<sup>98</sup> In one sense of the word all trusts may be said to be executory,<sup>99</sup> because there is always something to be done,<sup>1</sup> but this is not the sense in which the terms "executed" and "executory" are properly used with respect to trusts;<sup>2</sup> nor has the classification any reference to the effect of the statute of uses.<sup>3</sup> An executed trust is one in which the limitations and trusts are fully and perfectly declared.<sup>4</sup> An executory trust is one in which the limitations are imperfectly declared, and the donor's intention is expressed in such general terms that something not fully declared is required

N.W. 841, 846, 292 Mich. 394.—*Corpus Juris* quoted in *Stephenson v. Golden*, 276 N.W. 849, 859, 279 Mich. 710.

Mo.—*Corpus Juris* quoted in *Lucas v. Central Missouri Trust Co.*, 166 S.W.2d 1053, 1056, 350 Mo. 593.

SC—*Greene v. Brown*, 19 S.E.2d 114, 199 S.C. 218.

Wash.—*Carlson v. Alberta*, 83 P.2d 899, 196 Wash. 575, 135 A.L.R. 209.

65 C.J. p. 225 note 74.

90. Ark.—*Wofford v. Jackson*, 111 S.W.2d 542, 544, 194 Ark. 1049.

Mich.—*Corpus Juris* quoted in *Union Guardian Trust Co. v. Emery*, 290 N.W. 841, 846, 292 Mich. 394.

*Corpus Juris* quoted in *Stephenson v. Golden*, 276 N.W. 849, 859, 279 Mich. 710.

Mo.—*Corpus Juris* quoted in *Lucas v. Central Missouri Trust Co.*, 166 S.W.2d 1053, 1056, 350 Mo. 593.

65 C.J. p. 225 note 75.

91. US—*Nelson Development Co. v. Ohio Oil Co.*, D.C.Ill., 45 F.Supp. 933, 934.

Mich.—*Corpus Juris* quoted in *Union Guardian Trust Co. v. Emery*, 290 N.W. 841, 846, 292 Mich. 394.

*Corpus Juris* quoted in *Stephenson v. Golden*, 276 N.W. 849, 859, 279 Mich. 710.

Mo.—*Corpus Juris* quoted in *Lucas v. Central Missouri Trust Co.*, 166 S.W.2d 1053, 1056, 350 Mo. 593.

65 C.J. p. 225 note 76.

92. N.C.—*Teachey v. Gurley*, 199 S.E. 83, 214 N.C. 288.

**Creation of equity**

A constructive trust is not in its true sense a trust at all but purely a creation of equity designed to provide a remedy for prevention of unjust enrichment where person holding property is under duty to convey it to another to whom it justly belongs.—*Knox v. Knox*, 25 N.W.2d 225, 222 Minn. 477.

33. Mo.—*Corpus Juris* quoted in *Lucas v. Central Missouri Trust Co.*, 166 S.W.2d 1053, 1056, 350 Mo. 593.

NC—*Lefkowitz v. Silver*, 109 S.E. 56, 182 NC 339, 347, 23 A.L.R. 1491.

**Other definitions**

(1) In general

Ill.—*Union Nat. Bank of Chicago v. Goetz*, 35 Ill.App. 396

Mo.—*Thierry v. Thierry*, 249 S.W. 946, 954, 298 Mo. 25—*William R. Compton Co. v. Farmers' Trust Co. of Grant City*, 279 S.W. 746.

748, 220 Mo App. 1081

65 C.J. p. 225 note 77 [a]

(2) A trust *ex maleficio* is a constructive trust arising out of some fraud, misconduct, or breach of faith on part of persons to be charged as trustees, which renders it an equitable necessity that a trust should be implied

Mich.—*Union Guardian Trust Co. v. Emery*, 290 N.W. 841, 846, 292 Mich. 394

Tex.—*Chanowsky v. Friedman*, Civ. App., 108 S.W.2d 752, 754, error dismissed.

(3) A trust *ex maleficio* occurs when a person acquires legal title to property by means of intentionally false and fraudulent verbal promise to hold it for specified purpose,

as by promise to convey land to designated individual or reconvey it to grantor, but retains, uses and claims property as absolutely his own—

*Hipley v. Kelly*, 183 S.W.2d 793, 791, 207 Ark. 1011.

(1) A constructive trust *ex maleficio* is a remedial device, not referred to intent of parties, but imposed on the wrongdoer in invitum, often contrary to the intent, to prevent consummation of fraud or unconscionable practice.—*Atkinson v. Atkinson*, 33 S.E.2d 666, 670, 235 N.C. 120.

94. Mo.—*Corpus Juris* quoted in *Lucas v. Central Missouri Trust Co.*, 166 S.W.2d 1053, 1056, 350 Mo. 593

65 C.J. p. 225 note 78.

95. Ala.—*Sanford v. Hamner*, 22 So. 117, 115 Ala. 406, 416.

Mo.—*Corpus Juris* quoted in *Lucas v. Central Missouri Trust Co.*, 166 S.W.2d 1053, 1056, 350 Mo. 593.

96. Tenn.—*Deakins v. Webb*, 84 S.W. 2d 367, 370, 19 Tenn.App. 182.

65 C.J. p. 225 note 89.

Construction as executory or executed see *infra* § 171

97. Tenn.—*Corpus Juris* quoted in *Deakins v. Webb*, 84 S.W.2d 367, 370, 19 Tenn.App. 182.

65 C.J. p. 225 note 90.

98. Tenn.—*Corpus Juris* quoted in *Deakins v. Webb*, 84 S.W.2d 367, 370, 19 Tenn.App. 182.

65 C.J. p. 225 note 91

99. Tenn.—*Corpus Juris* quoted in *Deakins v. Webb*, 84 S.W.2d 367, 370, 19 Tenn.App. 182.

65 C.J. p. 225 note 92, p. 510 note 55 [a].

1. Tenn.—*Corpus Juris* quoted in *Deakins v. Webb*, 84 S.W.2d 367, 370, 19 Tenn.App. 182.

65 C.J. p. 225 note 93.

2. Tenn.—*Corpus Juris* quoted in *Deakins v. Webb*, 84 S.W.2d 367, 370, 19 Tenn.App. 182.

65 C.J. p. 225 note 94, p. 510 note 55 [a].

3. Tenn.—*Corpus Juris* quoted in *Deakins v. Webb*, 84 S.W.2d 367, 370, 19 Tenn.App. 182.

65 C.J. p. 225 note 95.

4. Tenn.—*Corpus Juris* quoted in *Deakins v. Webb*, 84 S.W.2d 367, 370, 19 Tenn.App. 182.

65 C.J. p. 225 note 96.

to be done, in order to complete and perfect the trust, and give it effect.<sup>5</sup>

The distinction between executed and executory trusts properly so called, therefore, depends on the manner in which the trusts are declared,<sup>6</sup> and the terms "executed" and "executory" refer rather to the manner and perfection of their creation than to the action of the trustee in administering the property.<sup>7</sup> The distinction between executed and executory trusts as thus defined and distinguished is recognized by the decided weight of authority.<sup>8</sup> However, in some decisions the term "executory" seems to be used rather in the sense of something remaining to be done, that is, some duty to be performed by the trustee.<sup>9</sup>

The terms "complete" and "incomplete" as applied to trusts have reference to the manner and perfection of their creation rather than to the action of the trustee in administering the property.<sup>10</sup> A complete trust is defined as one in which the estates and interests in the subject matter of the trust are

completely limited and defined by the instrument creating the trust and require no further instruments to complete them.<sup>11</sup>

## § 17. — Simple and Special, Passive and Active, Technical and Operative Trusts

A simple, passive, technical, dry, or naked trust is one in which the trustee is a mere passive depositary of the property, with no active duties to perform, while a special, active, or operative trust is one in which either from the express directions of the language creating the trust, or from the very nature of the trust itself, the trustee is charged with the performance of active, and substantial duties with respect to the control, management, and disposition of the trust property for the benefit of the cestui que trust.

Trusts are also classified as "simple" and "special,"<sup>12</sup> "passive" and "active,"<sup>13</sup> or "technical" and "operative."<sup>14</sup> A simple, passive, technical, dry, or naked trust, as a trust of this nature has been variously denominated,<sup>15</sup> is one in which the trustee is a mere passive depositary of the property, with no active duties to perform.<sup>16</sup> On the other hand,

5. Tenn.—*Corpus Juris* quoted in *Deakins v. Webb*, 84 S.W.2d 367, 370, 19 Tenn.App. 182, 65 C.J. p 226 note 97.

Further conveyance or settlement  
Executory trusts are those in which a further conveyance or settlement is to be made by the trustee—*Sutliff v. Aydelott*, 27 N.E.2d 529, 532, 373 Ill. 633.

6. Tenn.—*Corpus Juris* quoted in *Deakins v. Webb*, 84 S.W.2d 367, 370, 19 Tenn.App. 182, 65 C.J. p 226 note 98.

### Tests

(1) The test as to whether a trust is an "executory trust" is to determine whether settlor has acted as his own conveyancer and defines precisely the settlement to be made, and, if he has, the word "heirs" is one of limitation, and if he has not, the trust is executory, and the word "heirs" is a word of purchase, and the persons coming within such definition have an interest in the property.—*Sutliff v. Aydelott*, 27 N.E.2d 529, 373 Ill. 633.

(2) One of the tests to determine whether a settlor of a trust has acted as his own conveyancer is to ascertain whether the trust instrument purports to pass title directly to the beneficiaries, or whether the instrument requires a trustee to make the conveyance.—*Sutliff v. Aydelott*, supra.

7. Tenn.—*Corpus Juris* quoted in *Deakins v. Webb*, 84 S.W.2d 367, 370, 19 Tenn.App. 182, 65 C.J. p 226 note 99.

8. Tenn.—*Corpus Juris* quoted in

*Deakins v. Webb*, 84 S.W.2d 367, 370, 19 Tenn.App. 182, 65 C.J. p 226 note 1.

9. Ga.—*Macy v. Hayes*, 136 S.E. 517, 522, 163 Ga. 478, 65 C.J. p 227 note 2.

10. Iowa.—*In re Leigh's Estate*, 173 N.W. 143, 147, 186 Iowa 931

11. Iowa.—*In re Leigh's Estate*, supra.

12. N.J.—*Pallades Trust & Guaranty Co. v. Probst*, 10 A.2d 271, 273, 128 N.J.Eq. 332, 65 C.J. p 227 note 5.

13. Ill.—*Martin v. Rockford Trust Co.*, 281 Ill.App. 441, 65 C.J. p 227 note 6.

14. Pa.—*Appeal of Barnett*, 46 Pa. 392, 398, 86 Am.D. 502.

15. N.J.—*Pallades Trust & Guaranty Co. v. Probst*, 10 A.2d 271, 273, 128 N.J.Eq. 332, 65 C.J. p 227 note 8.

16. U.S.—*Corpus Juris* cited in *U. S. v. 3,000 Acres of Land*, D.C.Ill., 54 F.Supp. 511, 513.

Ill.—*City Nat. Bank & Trust Co. of Evanston v. Pearsons*, 30 N.E.2d 774, 307 Ill.App. 548.

Tex.—*Corpus Juris* cited in *Humphries v. Wiley*, Civ.App., 76 S.W.2d 793, 797.

Wyo.—*Corpus Juris* cited in *Carpenter & Carpenter v. Kingham*, 109 P.2d 463, 474, 56 Wyo. 314, rehearing denied and former opinion modified on other grounds 110 P.2d 824, 56 Wyo. 314.

65 C.J. p 227 note 9.

Other definitions

(1) "Dry trust" is one where trustees have mere legal title and have

no active duties to perform.—*Trants v. Lemp*, 46 S.W.2d 135, 142, 329 Mo. 580.

(2) A "dry or simple trust" is one in which the trustee has no duties to perform and the cestui que trust has the management of the estate, and the separation of the equitable and legal estate can be united at the option of the cestui que trust.—*Winn v. William*, 165 S.W.2d 951, 955, 292 Ky. 44—65 C.J. p 227 note 9 [c].

(3) A trust nature of which is not qualified by the settlor, and the cestui que trust of which has the right to be put into actual possession of the subject of the trust, is a "dry trust."—*In re Friedholm's Estate*, 26 A.2d 341, 342, 344 Pa. 542.

(4) A "passive trust" is one where there is mere holding of title for benefit of another without imposing on trustee any duty or responsibility, except to convey legal title to cestui or at his direction.—*Fidelity Union Trust Co. v. Mintz*, 4 A.2d 44, 45, 125 N.J.Eq. 52.

(5) A "technical trust" is an obligation arising out of confidence reposed in person to whom legal title is conveyed, that he will faithfully apply the property according to the wishes of the creator of the trust.—*Jackson v. Dobbs*, 290 S.W. 402, 405, 154 Tenn. 602.

(6) Other similar definitions.

Ky.—*Young v. Robinette*, 239 S.W.2d 91.

Tenn.—*McDowell v. Rees*, 122 S.W.2d 839, 843, 22 Tenn.App. 336—Allen v. Folwell, 1 Tenn.App. 515, 520.

65 C.J. p 227 note 9 [a]—[j].

special, active, or operative trusts, as trusts of this kind have been designated,<sup>17</sup> are those in which either from the express directions of the language creating the trust, or from the very nature of the trust itself, the trustees are charged with the performance of active and substantial duties with respect to the control, management, and disposition of the trust property for the benefit of the cestui que trust.<sup>18</sup> As disclosed by the above definitions these classes of trusts are in theory clearly distinguishable<sup>19</sup> and the distinction has been said to be well settled,<sup>20</sup> although it has also been said that in its application to particular cases it is sometimes not very obvious.<sup>21</sup>

An *express active trust* is one in which, from the express directions of the language creating the trust or from the very nature of the trust itself, the trustee is charged with the performance of active and substantial duties with respect to the control, management, and disposition of the trust property for the benefit of the cestui que trust.<sup>22</sup>

An "express private passive trust" has been defined as existing where land is conveyed to or held by one person in trust for another, without any power being expressly or impliedly given trustee to take actual possession of land or exercise acts of ownership over it, except by beneficiary's direction, and only naked legal title is vested in trustee, while beneficiary's equitable estate is to all intents beneficial ownership, virtually equivalent in equity to corresponding legal estate.—*Elvins v. Seestedt*, 193 So. 54, 57, 141 Fla. 266, 126 A.L.R. 1001.

17. Me.—*Dixon v. Dixon*, 124 A. 198, 199, 123 Me. 470.  
65 C.J. p. 228 note 10.

18. Ill.—*Martin v. Rockford Trust Co.*, 281 Ill.App. 411.  
Pa.—*In re Zoller's Estate*, 96 A.2d 321, 323, 373 Pa. 451.  
65 C.J. p. 228 note 11.

**Corpus Juris text has been cited** in a case holding that a special trust was established under the circumstances.—*Ragan v. Kelly*, 24 A.2d 289, 294, 189 Md. 324.

#### Other definitions

(1) An "active trust" is one imposing on trustee duty of taking active measures in execution of the trust and maintaining legal estate in trustee to enable him to perform duties devolved on him by trust's terms, and giving cestui only an equitable right to enforce performance.—*Fidelity Union Trust Co. v. Mintz*, 4 A.2d 44, 45, 125 N.J. Eq. 52.

(2) An "active trust" or "special trust" as distinguished from a "pas-

sive trust" or "simple trust" exists where agency of a trustee is introduced for execution of some specified purposes and trustee is not therefore a mere depository.—*Skovborg v. Smith*, 72 A.2d 911, 913, 8 N.J. Super. 424.—*Lalisesades Trust & Guaranty Co. v. Probst*, 16 A.2d 271, 273, 128 N.J. Eq. 332.—*Cooper v. Cooper*, 36 N.J. Eq. 121.

(3) Other similar definitions.—*Welch v. Northern Bank & Trust Co.*, 170 P. 1029, 1032, 100 Wash. 349.—65 C.J. p. 228 note 11 [a]—[d].

**The test of activity of trust** is not importance or obligatory nature of duty to be performed by trustee, but what trust empowers him to do and demands of him and if trust requires action on his part, it is active trust, even though act required or duty imposed may be one which statute might execute when time for performance arrives.—*In re Fischer's Will*, 120 N.E.2d 688, 307 N.Y. 149.

19. N.J.—*Skovborg v. Smith*, 72 A.2d 911, 913, 8 N.J. Super. 424.  
65 C.J. p. 228 note 13.

20. Pa.—*Owens v. Naughton*, 23 Pa. Super. 639, 640.  
65 C.J. p. 228 note 14.

21. Tenn.—*Jourolmon v. Massengill*, 5 S.W. 719, 86 Tenn. 81, 91.

22. U.S.—*Village of Brookfield v. Pentis*, C.C.A. Ill., 101 F.2d 516, 521.  
Mo.—*Hell v. Hell*, 84 S.W. 45, 184 Mo. 665.

23. Mont.—*Lewis v. Bowman*, 121 P.2d 162, 113 Mont. 68.  
65 C.J. p. 229 note 17.

## § 18. — Voluntary and Involuntary Trusts

Trusts have been classified as voluntary and involuntary, and under this classification voluntary trusts are express trusts, and involuntary trusts are implied or constructive trusts.

In some states trusts are divided into voluntary and involuntary trusts<sup>23</sup> and under this classification voluntary trusts are express trusts, and involuntary trusts are implied or constructive trusts.<sup>24</sup> A voluntary trust is defined as an obligation arising out of a personal confidence reposed in, and voluntarily accepted by, one for the benefit of another.<sup>25</sup> An involuntary trust is one which is created by operation of law.<sup>26</sup>

A *complete voluntary trust* is one which has been completely created, that is, the subject matter has been designated, the trustee and beneficiary have been named, and the limitations and trusts are fully and perfectly declared.<sup>27</sup>

A *voluntary executed trust* is an express trust arising out of a personal confidence reposing in, and

24. Cal.—*Barker v. Hurley*, 63 P. 1071, 64 P. 480, 132 Cal. 21, 26.  
65 C.J. p. 229 note 18.

#### Resulting or constructive trusts

(1) Involuntary trusts are either resulting or constructive trusts.—*Lewis v. Dowman*, 121 P.2d 162, 113 Mont. 68.

(2) A constructive trust is one of those designated by statute as involuntary trusts arising by reason of fact that party sought to be charged with a trust has gained something by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act.—*Smith v. Bliss*, 112 P.2d 30, 44 Cal.App.2d 171.

25. Cal.—*In re Reith*, 77 P. 942, 144 Cal. 314.

65 C.J. p. 229 note 19.  
Voluntary trust distinguished from gift inter vivos see *Gifts* § 8.

#### Other definitions

(1) A device by which a donor effectuates a gift either of property or of its beneficial use to a designated donee.

Iowa.—*In re Podhajsky's Estate*, 115 N.W. 590, 592, 137 Iowa 742.  
Mont.—*Stagg v. Stagg*, 300 P. 539, 513, 90 Mont. 180.

(2) Other similar definitions.  
Ohio.—*Whitehead v. Bishop*, 155 N.E. 565, 23 Ohio App. 315.  
Okla.—*Cameron v. Cameron*, 220 P. 889, 890, 96 Okl. 98.  
65 C.J. p. 229 note 19 [a].

26. Mont.—*Mantle v. White*, 132 P. 22, 23, 47 Mont. 234.  
65 C.J. p. 229 note 18.

27. Iowa.—*In re Leigh's Estate*, 173 N.W. 143, 147, 186 Iowa 931.  
65 C.J. p. 229 note 21.



accepted by, some person for the benefit of another, in which the scheme or plan has been completely declared at the outset, and no further instrument need be executed, or no further act done, towards its complete creation or full effect.<sup>28</sup>

## § 19. — Public and Private Trusts

Trusts are classified as public and private, and under such classification a private trust is one wherein the beneficial interest is vested absolutely in one or more individuals, who are or may be within a certain time distinctly ascertained.

Since they may be created for either public or private purposes,<sup>29</sup> trusts may be classified as public and private.<sup>30</sup> A public, or as it is frequently called, a charitable trust is one constituted for the benefit either of the public at large or some particular portion of it answering to a particular description, as discussed in Charities § 1. A private trust is one wherein the beneficial interest is vested absolutely in one or more individuals, who are or may be within a certain time distinctly ascertained.<sup>31</sup>

## § 20. — Legal and Illegal Trusts

Trusts have been classified as legal and illegal.

Some authorities classify trusts as legal and illegal.<sup>32</sup> Trusts are legal when they are for some honest purpose, such as to pay debts or make a provision for families.<sup>33</sup> They are illegal when they are for purposes of immorality, or vice, or of defrauding creditors, or contravene some statute,

or are contrary to public policy.<sup>34</sup>

## § 21. — Other Kinds and Classes of Trusts

A conventional trust is a trust created by decree of the court; a parol trust is a right to property created without writing by one person for the benefit of another; and a spendthrift trust is a trust created to provide a fund for the maintenance of the beneficiary, and at the same time to secure it against his improvidence or incapacity.

The courts and law lexicographers have defined many terms descriptive of kinds and classes of trusts other than those heretofore considered.<sup>35</sup> Trusts defined and discussed elsewhere are "Massachusetts trusts," discussed in Business Trusts § 1, savings bank trusts, discussed *infra* § 54, testamentary trusts, discussed in the C.J.S. title Wills §§ 1004-1061, also 69 C.J. p 692 note 49-p 823 note 27, voting trusts, discussed in Corporations § 552, and trusts *ex maleficio*, trusts *ex delicto*, and trusts *in invitum*, discussed *supra* § 15.

**Annuity trust and common trust.** Provision of a fixed amount of income regardless of the amount of principal is a distinguishing feature of an "annuity trust," while in a "common trust" the amount of the principal is fixed regardless of the income as long as the income is reasonable.<sup>36</sup>

**Contingent trust.** An express trust may depend for its operation on a future event, and is then a contingent trust.<sup>37</sup>

**Conventional trust.** A trust created by decree of the court.<sup>38</sup>

28. Mo.—Van Studdiford v. Randolph, App. 49 S.W.2d 250, 253

29. Miss.—State Sinking Fund Com'rs v. Walker, 7 Miss. 143, 151, 38 Am D. 433.

30. Miss.—State Sinking Fund Com'rs v. Walker, *supra*.

31. Kan.—Corpus Juris cited in Daughters of the American Revolution v. Washburn College, 164 P.2d 128, 132, 160 Kan. 683  
S.D.—In re Geppert's Estate, 59 N.W. 2d 727.  
65 C.J. p 229 note 27.

**Certain trustee and cestui que trust.**  
In a private trust there must be a certain trustee who holds legal title, and a certain specified cestui que trust, clearly identified, or incapable of identification by the terms of the instrument creating the trust.—Porcher v. Cappellmann, 198 S.E. 8, 187 S.C. 491.

**Importance of distinction.**

Whether a trust is a public trust or a charitable trust is of negligible importance because the main thing about a trust is that it be so declared and so executed as to conserve

the purposes of the declarant or settlor.—Pravel v. Shreve, 24 S.E.2d 417, 181 Va. 225.

32. Tex.—Corpus Juris cited in La Force v. Bracken, 169 S.W.2d 465, 468, 141 Tex 18  
65 C.J. p 229 note 28.

33. Mo.—Corpus Juris quoted in Wade v. Wade, App., 108 S.W.2d 1058, 1062.

Tex.—Corpus Juris cited in La Force v. Bracken, 169 S.W.2d 465, 468, 141 Tex 18  
65 C.J. p 229 note 29.

34. Mo.—Corpus Juris quoted in Wade v. Wade, App., 108 S.W.2d 1058, 1062.

Tex.—Corpus Juris cited in La Force v. Bracken, 169 S.W.2d 465, 468, 141 Tex 18.  
65 C.J. p 229 note 30.

35. **Mandatory trust**

Where will bequeathed testator's dog to certain person and directed executor to deposit certain sum to be used to pay the one to whom the dog was bequeathed at rate of certain amount a day, for care of dog as long as it should live, an honorary

trust was created.—In re Searight's Estate, 95 N.E.2d 779, 87 Ohio App. 417.

**Illusory trust and ostensible trust**

(1) An "illusory trust" is predicated on a fraud of marital rights and connotes a trust made *inter vivos* and designed to circumvent a surviving spouse from receiving such interest in estate of deceased spouse as he or she might rightfully expect under law had deceased spouse died with title to property conveyed by the trust instrument, and it has all attributes in form and substance of conveyance in trust designed to defraud creditors, including transfer of title to third persons as trustees.—Windle v. Flinn, 251 P.2d 136, 147, 195 Or. 654.

(2) The terms "illusory trust" and "ostensible trust" are not synonymous.—Windle v. Flinn, *supra*.

36. N.Y.—In re McQueen's Will, 65 N.Y.S.2d 201.

37. Black L.D.

38. Iowa—Gilmer v. Gilmer, 202 N. W. 527, 199 Iowa 748.  
65 C.J. p 230 note 35.

**Directory trust.** One which is subject to be molded or applied according to subsequent directions of the grantor.<sup>39</sup>

**Discretionary trust.** A discretionary trust is one where by the terms of the trust no direction is given as to the manner in which the trust fund shall be vested till the time arrives at which it is to be apportioned in satisfaction of the trust.<sup>40</sup>

**Donative trust.** A "donative trust" is a trust not requiring payment of any consideration by the beneficiary.<sup>41</sup> Such a trust may be created by transfer of property in trust as a gift for the benefit of another person or by proper declaration of the legal owner of property that he will hold it in trust for another's benefit.<sup>42</sup> Where such a trust is created, the law of trusts is superimposed on the law of gifts or the law of wills.<sup>43</sup>

**Enforceable trust.** A trust in which some person or class of persons have a right to all or a part of a designated fund, and can demand its conveyance to them.<sup>44</sup>

**General trust.** A transfer by a person of all his property to a trustee to hold as a trust fund.<sup>45</sup>

**Ministerial trust.** A trust which demands no further exercise of reason or understanding than every intelligent agent must necessarily employ;

also called "instrumental trust." It is a species of special trust, distinguished from a discretionary trust, which necessarily require much exercise of the understanding.<sup>46</sup>

**Parol trust.** A right to property created without writing by one person for the benefit of another.<sup>47</sup> Sometimes the term is applied to trusts which do not come within the statute of frauds and may be proved by parol.<sup>48</sup> In this sense resulting trusts are known as parol trusts.<sup>49</sup>

**Precatory trust.** A trust created by certain words which are more like words of entreaty and permission than of command or certainty.<sup>50</sup>

**Secret trust.** Where a testator gives property to a person, on a verbal promise by the legatee or devisee that he will hold it in trust for another person, this is called a secret trust.<sup>51</sup>

**Shifting trust.** An express trust which is so settled that it may operate in favor of beneficiaries additional to, or substituted for, those first named, on specified contingencies.<sup>52</sup>

**Spendthrift trust.** A trust created to provide a fund for the maintenance of the beneficiary, and at the same time to secure it against his improvidence or incapacity.<sup>53</sup> A spendthrift trust, therefore, is an active trust,<sup>54</sup> clearly distinguishable from other

39. Black L.D.  
65 C.J. p 230 note 36.

40. Tenn.—Deaderick v. Cantrell, 10 Yerg. 263, 269, 31 Am.D. 576.

41. Tex.—Elbert v. Waples-Platter Co., Civ.App., 156 S.W.2d 146, 151, error refused.

42. Tex.—Elbert v. Waples-Platter Co., supra.

In order to prove a donative trust, it is necessary to show either that there was agreement between grantor and grantee that grantee should hold title in trust or that grantee agreed with alleged beneficiary, in manner not condemned by statute of frauds, to hold title in trust for his benefit.—Elbert v. Waples-Platter Co., supra.

43. Tex.—Elbert v. Waples-Platter Co., supra.

44. N.Y.—Tilden v. Green, 28 N.E. 880, 130 N.Y. 29, 27 Am.S.R. 487, 14 L.R.A. 33.

20 C.J. p 1256 note 56.

45. N.J.—Babbitt v. Fidelity Trust Co., 65 A. 1076, 1080, 72 N.J.Eq. 745.

46. Black L.D.

47. Ky.—Moore v. Shifflett, 216 S. W. 614, 187 Ky. 7, 11.

48. N.C.—Lefkowitz v. Silver, 109 S. E. 56, 182 N.C. 339, 23 A.L.R. 1491.  
55 C.J. p 230 note 41.

49. N.C.—Jackson v. Thompson, 200 S.E. 16, 214 N.C. 539.

65 C.J. p 230 note 42

50. Mo.—Simpson v. Corder, 170 S. W. 357, 359, 185 Mo.App. 398.  
65 C.J. p 230 note 44

"Precatory" is properly applied to an expression of a trustor wherein a hope, a wish, a desire, a recommendation, or a request is indicated by him, and the words by which a "precatory trust" is created constitute an "entreaty" that is beseeching, or suppliant, or prayerful in nature.—In re Sloan's Estate, 46 P.2d 1007, 7 Cal App 2d 319.

51. Black L.D.

52. Black L.D.

53. Cal.—Corpus Juris cited in In re De Lano's Estate, 145 P.2d 672, 674, 65 Cal App.2d 808.

Colo.—Corpus Juris quoted in In re Nicholson's Estate, 93 P.2d 850, 883, 104 Colo. 561.—Corpus Juris quoted in Newell v. Tubbs, 84 P. 2d 820, 821, 103 Colo. 224.

Iowa.—Corpus Juris cited in In re Bucklin's Estate, 51 N.W.2d 412, 414, 243 Iowa 312.

Tex.—Estes v. Estes, Civ.App., 255 S.W. 649, 650, affirmed, Com.App., 267 S.W. 709, rehearing denied 268 S.W. xv.

Utah.—Corpus Juris cited in Cronquist v. Utah State Agricultural College, 201 P.2d 280, 283, 114 Utah 426

Vt.—Corpus Juris cited in Huestis v. Manley, 8 A.2d 644, 646, 110 Vt. 413.

#### Other definitions

(1) A trust by terms of which beneficiary is entitled to income and in which it is provided that his interest shall not be transferable by him and shall not be subject to claim of his creditors.—In re Bucklin's Estate, 51 N.W.2d 412, 414, 243 Iowa 312.

(2) A trust in which beneficiary is prohibited from anticipating or assigning his interest in or income from trust estate.—Long v. Long, Tex.Civ.App., 252 S.W.2d 235, 246, error refused no reversible error.

(3) A trust in which by the terms thereof a valid restraint on the voluntary and involuntary transfer of the interest of the beneficiary is imposed.—In re Tono's Estates, 39 N. W.2d 401, 407, 240 Iowa 1315.

(4) Other similar definitions.—Von Kessler v. Scully, 267 Ill.App. 495—65 C.J. p 230 note 50 [a], [b].

54. N.C.—Fowler & Lee v. Webster, 92 S.E. 157, 173 N.C. 442.  
65 C.J. p 231 note 51.

trusts,<sup>55</sup> its provisions against the alienation of the fund or property<sup>56</sup> by the voluntary act of the beneficiary<sup>57</sup> or through legal process by creditors<sup>58</sup> being its usual, necessary, and distinguishing incidents and features. It is an equitable, and not a legal, interest or estate.<sup>59</sup>

**Tentative trust.** A suggested or proposed trust, not completed or consummated.<sup>60</sup>

**Transgressive trust.** A trust which transgresses the rule against perpetuities,<sup>61</sup> being in equity, the substantial equivalent of what in law is called a perpetuity.<sup>62</sup>

## II. CREATION, EXISTENCE, AND VALIDITY

### A. EXPRESS TRUSTS

#### 1. IN GENERAL

#### § 22. Elements and Requisites in General

The most common elements of an express trust have been said to be sufficient words to create a trust, a definite subject, and a certain and ascertained object.

While the elements of an express trust have been variously stated,<sup>63</sup> the most common elements of an express trust have been said to be sufficient words

55. N.C.—Fowler & Lee v. Webster, *supra*.

65 C.J. p 231 note 52.

56. Minn.—In re Moulton's Estate, 46 N.W.2d 667, 233 Minn. 667, 24 A.L.R.2d 1092.

57. Iowa.—In re Tone's Estates, 39 N.W.2d 401, 240 Iowa 1315.

65 C.J. p 231 note 53.

58. Iowa.—In re Bucklin's Estate, 51 N.W.2d 412, 243 Iowa 312.

65 C.J. p 231 note 54.

59. W.Va.—Bruceton Bank v. Alexander, 98 S.E. 804, 805, 83 W.Va. 673.

60. N.Y.—In re U. S. Trust Co., 102 N.Y. 271, 272, 117 App.Div. 178, affirmed 81 N.E. 1177, 189 N.Y. 500.

61. Me.—Pulitzer v. Livingston, 36 A. 635, 89 Me. 359.

62. Me.—Pulitzer v. Livingston, *supra*.

63. U.S.—Corpus Juris cited in Bingen v. First Trust Co. of St. Paul, C.C.A. 8, 103 F.2d 260, 263—Corpus Juris cited in Bank of America Nat. Trust & Savings Ass'n v. Scully, C.C.A. Colo., 92 F. 2d 97, 103.

Cal.—Corpus Juris cited in Miranda v. Miranda, 183 P.2d 61, 65, 81 Cal. App.2d 61.

Mo.—Corpus Juris cited in Atlantic Nat. Bank of Jacksonville, Fla. v. St. Louis Union Trust Co., 211 S.W.2d 2, 5, 357 Mo. 770.

Okl.—Corpus Juris cited in Fitzgerald v. Terry, 123 P.2d 683, 684, 190 Okl. 310.

Wis.—Corpus Juris cited in Wyse v. Puchner, 51 N.W.2d 38, 41, 260 Wis. 365.

65 C.J. p 231 note 67.

#### Elements of express trust stated

(1) In general.

U.S.—Mahaffey v. Helvering, C.C.A. 8, 140 F.2d 879—Kunk v. Richardson, C.C.A. N.C., 136 F.2d 849, certiorari denied 64 S.Ct. 91, 320 U.S. 777, 88

L.Ed. 466—Bingen v. First Trust Co. of St. Paul, C.C.A. Minn., 103 F.2d 260—Jaiser v. Millikan, D.C. Neb., 120 F.Supp. 599—Mullen v. Mullen, D.C. Alaska, 117 F.Supp. 538

—Hanson v. Birmingham, D.C. Iowa, 92 F.Supp. 33, appeal dismissed 190 F.2d 206—In re Prudence Co., D.C.N.Y., 24 F.Supp. 666.

Ala.—Dunn v. Poncelor, 161 So. 450, 230 Ala. 375—Birmingham Trust & Savings Co. v. Marx, 159 So. 483, 230 Ala. 68.

Ark.—Vaughan v. Shurey, 208 S.W.2d 441, 212 Ark. 935.

Cal.—Gonsalves v. Hodgson, 237 P.2d 656, 38 Cal.2d 91—Hansfelder v. Security-First Nat. Bank of Los Angeles, 176 P.2d 84, 77 Cal. App.2d 478—Azevedo v. Azevedo, 122 P.2d 311, reheard 129 P.2d 127, 54 Cal. App.2d 486—Randall v. Bank of America N. T. & S. A., 119 P.2d 754, 48 Cal. App.2d 249—In re Mallon's Estate, 93 P.2d 245, 34 Cal. App.2d 147.

D.C.—Murray v. Gadsden, C.A.D.C., 197 F.2d 191, 91 U.S. App.D.C. 38, 33 A.L.R.2d 551.

Ill.—Wynekoop v. Wynekoop, 95 N.E.2d 467, 407 Ill. 219—Heighley v. Continental Ill. Nat. Bank & Trust Co. of Chicago, 61 N.E.2d 29, 390 Ill. 212.

Md.—Dougherty v. Dougherty, 2 A.2d 433, 175 Md. 411.

Mich.—Equitable Trust Co. v. Milton Realty Co., 246 N.W. 500, 261 Mich. 571, reheard 249 N.W. 30, 263 Mich. 673, and followed in Bankers' Trust Co. of Detroit v. Solovich, 246 N.W. 505, 261 Mich. 582, reheard 249 N.W. 477.

N.Y.—Reed v. Browne, 56 N.Y.S.2d 861, 269 App.Div. 576, appeal denied in re Ster's Will, 57 N.Y.S.2d 653, 269 App.Div. 913, reversed on other grounds 66 N.E.2d 47, 295 N.Y. 184, 165 A.L.R. 1061—Bacorn v. People, 88 N.Y.S.2d 628, 195 Misc. 917—In re Rapple's Will, 290 N.Y.S. 517,

160 Misc. 615—In re Freistadt's Will, 104 N.Y.S.2d 510, affirmed 105 N.Y.S.2d 995, 278 App.Div. 962, amended 107 N.Y.S.2d 466, 279 App. Div. 603.

Or.—Windle v. Flinn, 251 P.2d 136, 196 Or. 654—Endicott v. Bratzel, 27 P.2d 883, 145 Or. 654.

Pa.—Glatfelter v. School Dist. of Col., Com.Pl., 52 Lanc.Rev. 325, 137 Monroe L.R. 44—Styer v. Hess, Com.Pl., 59 Montg.Co. 41.

Tex.—Tolle v. Sawtelle, Civ.App., 246 S.W.2d 916, error refused—Miller v. Donald, Civ.App., 235 S.W.2d 201, error refused no reversible error—Patrick v. McGaha, Civ.App., 164 S.W.2d 236.

Wis.—Sutherland v. Pierner, 24 N.W.2d 883, 249 Wis. 462.

65 C.J. p 231 note 67.

(2) A designated beneficiary; a designated trustee, who must not be the beneficiary; a fund or other property sufficiently designated or identified to enable title thereto to pass to the trustee; and the actual delivery of the fund or other property, or of a legal assignment thereof to the trustee, with the intention of passing legal title thereto to him as trustee—In re Ihmsen's Estate, 3 N.Y.S.2d 125, 253 App.Div. 472—Pinckney v. City Bank Farmers Trust Co., 292 N.Y.S. 835, 249 App.Div. 375—City Bank Farmers' Trust Co. v. Charity Organization Soc. of City of New York, 265 N.Y.S. 267, 238 App.Div. 720, affirmed 191 N.E. 504, 264 N.Y. 441—Bacorn v. People, 88 N.Y.S.2d 628, 195 Misc. 917—In re Spruce's Will, 67 N.Y.S.2d 545, 188 Misc. 776—In re Pantaleo's Will, 45 N.Y.S.2d 2, 180 Misc. 423—In re Albros's Will, 300 N.Y.S. 1103, 165 Misc. 486—In re Pratt's Estate, 232 N.Y.S. 144, 156 Misc. 328—In re Soley's Estate, 271 N.Y.S. 595, 150 Misc. 839—In re Shelley's Estate, 50 N.Y.S.2d 570—In re Fitzpatrick's Estate, 17 N.Y.S.2d 280—65 C.J. p 231 note 67.

to create a trust, a definite subject, and a certain and ascertained object.<sup>64</sup> Stated more comprehensively, in order to constitute an express trust there must be an explicit declaration of trust, or circumstances which show beyond reasonable doubt that a trust was intended to be created, as discussed infra § 43, accompanied with an intention to create

a trust,<sup>65</sup> followed by an actual conveyance or transfer, as considered infra § 63, of lawful, definite property, infra § 24, or estate or interest,<sup>66</sup> made by a person capable of making a transfer thereof, as discussed infra § 23, for a definite term,<sup>67</sup> vesting the legal title, as considered infra § 63, presently<sup>68</sup> in a person capable of holding it, to hold as trust-

(3) In order to constitute a valid trust of personality, there must be a declaration by competent person, a trustee, designated beneficiaries, a certain and ascertained object, a definite fund or subject matter, and its delivery or assignment to trustee. *U.S.—Heifrich's Estate v. C. I. R., C. CA 7, 143 F.2d 43.*

Ill.—*Kilgore v. State Bank of Colusa, 25 N.E.2d 39, 372 Ill. 578—Gurnett v. Mutual Life Ins. Co. of New York, 191 N.E. 250, 356 Ill. 612—Velde v. Reardon, 54 N.E.2d 91, 322 Ill.App. 177.*

(4) In order to create a trust, there must be assignment of designated property to trustee with intention of passing title thereto to hold for benefit of others, and there must be a separation of legal estate from beneficial enjoyment.—*Pierowich v. Metropolitan Life Ins. Co., 275 N.W. 789, 282 Mich. 118—Equitable Trust Co. v. Milton Realty Co., 246 N.W. 500, 261 Mich. 571.*

#### Gift inter vivos

Requirements of valid voluntary declaration of trust are same as requirements of valid gift inter vivos.—*Travers v. Reid, 182 A. 908, 119 N.J.Eq. 416—Nicklas v. Parker, 61 A. 267, 69 N.J.Eq. 743—In re Coyle's Estate, 154 A. 744, 9 N.J.Misc. 158.*

#### Pari mutual system

A betting transaction under pari-mutuel system of wagering, under which defendant accepted money and issued a ticket evidencing wager and engaged to perform clerical functions with respect to this and other sums received and to divide the pool, after deductions, in redemption of tickets issued, was a mere contract and did not create an express trust.—*Wise v. Delaware Steeplechase & Race Ass'n, 39 A.2d 212, 28 Del.Ch. 161, affirmed 45 A.2d 547, 165 A.L.R. 830.*

64. Fla.—*Bay Biscayne Co. v. Baile, 75 So. 860, 73 Fla. 1120.*  
65 C.J. § 231 note 7 [a].

65. U.S.—*Mahaffey v. Helverink, C. CA. 8, 140 F.2d 879—Kling v. Richardson, C.C.A.N.C., 136 F.2d 849, certiorari denied 64 S.Ct. 91, 320 U.S. 777, 88 L.Ed. 466—Buhl v. Kavanagh, C.C.A.Mich., 118 F.2d 315—Cullen v. Chappell, C.C.A.Conn., 116 F.2d 1017—Quinn v. Central Co., C.C.A.Cal., 104 F.2d 450.—O'Keefe v. Equitable Trust Co., C.C.A.N.J., 103 F.2d 904—Titcomb*

*v. Billings, Olcott & Co., D.C.N.Y., 104 F.Supp. 168—In re Newark Shoe Stores, D.C.Md., 3 F.Supp. 293.—First Nat. Bank of Bloomingdale v. Manufacturers Trust Co., 2 F.R. D. 125.*

Ark.—*Krickberg v. Hoff, 143 S.W. 2d 560, 201 Ark 63.*

Cal.—*People v. Pierce, 243 P.2d 585, 110 Cal.App.2d 598—Miranda v. Miranda, 183 P.2d 61, 81 Cal.App.2d 61—Randall v. Bank of America N. T. & S. A., 119 P.2d 754, 48 Cal. App.2d 249—Bishop's School Upon Scripps Foundation v. Wells, 65 P. 2d 105, 19 Cal.App.2d 141.*

Del.—*Bodley v. Jones, 32 A.2d 436, 28 Del.Ch. 273.*

D.C.—*Murray v. Gadsden, 197 F.2d 194, 91 U.S.App.D.C. 38, 33 A.L.R.2d 554.*

Fla.—*Columbia Bank for Cooperatives v. Okelanta Sugar Co-op., 52 So.2d 670—Smehyl v. Hammond, 44 So.2d 673—Flanagan v. Herrett, 178 So. 147, 130 Fla. 531.*

Ill.—*Schauck v. Reiter, 23 N.E.2d 714, 372 Ill. 328—Nelson v. John B. Colegrove & Co. State Bank, 188 N.E. 461, 354 Ill. 408.*

Kan.—*Corpus Juris quoted in Shumway v. Shumway, 44 P.2d 247, 248, 141 Kan. 835.*

Ky.—*Frazier v. Hudson, 130 S.W.2d 809, 279 Ky. 334, 123 A.L.R. 1331.*

Md.—*National Union Mortg. Corporation v. Potomac Consol. Debenture Corp., 16 A.2d 866, 178 Md. 658.*

Mass.—*Russell v. Meyers, 56 N.E.2d 604, 316 Mass. 669—Smith v. Shanahan, 60 N.E.2d 397, 314 Mass. 329—Greeley v. Flynn, 36 N.E.2d 394, 310 Mass. 23.*

Mich.—*Harmon v. Harmon, 6 N.W.2d 762, 303 Mich. 513.*

Mo.—*Warwick v. De Mayo, 213 S.W. 2d 392, 358 Mo. 130—Kerber v. Rowe, 156 S.W.2d 925, 348 Mo. 1125—Gwin v. Gwin, 219 S.W.2d 282, 240 Mo.App. 782—In re Geel's Estate, App. 143 S.W.2d 327.*

N.J.—*State v. U. S. Steel Co., 95 A. 2d 740, 12 N.J. 51—Cohen v. Cohen, 20 A.2d 594, 126 N.J.Law 605—Bendix v. Hudson County Nat. Bank, 55 A.2d 253, 142 N.J.Eq. 487—Eagles Building & Loan Ass'n v. Fiducia, 37 A.2d 116, 135 N.J.Eq. 7, affirmed 40 A.2d 627, 136 N.J.Eq. 117.*

N.Y.—*Equity Corp. v. Groves, 60 N.E.2d 19, 294 N.Y. 8—Garners v. Commercial Cable Co., 32 N.Y.S.2d 856, 177 Misc. 1047—In re Cushman's*

*Estate, 82 N.Y.S.2d 714—In re Ayres' Will, 76 N.Y.S.2d 897.*

N.D.—*Hagerott v. Davis, 17 N.W.2d 15, 73 N.D. 532—Reel v. Hansboro State Bank, 201 N.W. 861, 52 N.D. 182.*

Okl.—*Childers v. Breese, 213 P.2d 565, 202 Okl. 377.*

Or.—*Claude v. Claude, 228 P.2d 776, 191 Or. 308, rehearing denied 230 P.2d 211, 191 Or. 308—Winters v. Winters, 109 P.2d 857, 165 Or. 659.*

Pa.—*Gray v. Leibert, 53 A.2d 132, 357 Pa. 130—Volkwein v. Volkwein, 22 A.2d 81, 146 Pa.Super. 265—Crossan v. Galloway, Com.Pl., 5 Chest.C. 229—Manziak v. Zulovich, Com.Pl., 97 Pittsb. Leg. J. 55.*

S.D.—*Zadel v. Johnston, 41 N.W.2d 227, 73 S.D. 216—Hedell v. Steele, 28 N.W.2d 369, 71 S.D. 609.*

Tex.—*Mills v. Gray, 210 S.W.2d 885, 147 Tex. 33—Tolle v. Sawtelle, Civ. App., 246 S.W.2d 916, error refused Wash.—Colman v. Colman, 171 P.2d 691, 25 Wash.2d 606.*

65 C.J. § 232 note 69.

#### Conscious intention

Where father had expressed the desire to convey land to daughter, daughter agreed with a son to hold title for benefit of herself and other children, and father thereafter conveyed land to such daughter, the father's conscious intention to create trust was not essential to validity of trust agreement.—*Frint v. Tate, Tex. Civ.App., 162 S.W.2d 737.*

66. U.S.—*Buhl v. Kavanagh, C.C.A. Mich., 118 F.2d 315.*

Kan.—*Corpus Juris quoted in Shumway v. Shumway, 44 P.2d 247, 248, 141 Kan. 835.*

Mo.—*Trautz v. Lemp, 46 S.W.2d 135, 329 Mo. 580.*

67. U.S.—*Buhl v. Kavanagh, C.C.A. Mich., 118 F.2d 315.*

Kan.—*Corpus Juris quoted in Shumway v. Shumway, 44 P.2d 247, 248, 141 Kan. 835.*

65 C.J. § 232 note 74.

68. Kan.—*Corpus Juris quoted in Shumway v. Shumway, 44 P.2d 247, 248, 141 Kan. 835.*

N.Y.—*Central Trust Co. of New York v. Gaffney, 142 N.Y.S. 902, 157 App. Div. 501, affirmed 109 N.E. 1069, 215 N.Y. 740.*

#### Interest "in praesenti"

In order for owner of property to make himself trustee for benefit of another, it is necessary that owner use words or do acts clearly denoting

tec<sup>69</sup> for the benefit of a cestui que trust or purpose to which the trust fund is to be applied;<sup>70</sup> or a retention of title by the owner under circumstances which clearly and unequivocally disclose an intent to hold for the use of another, as considered *infra* § 50. The terms of the trust must be sufficiently declared, as discussed *infra* § 42. Considered from the standpoint of parties, an express trust implies a coöperation of three persons: A settlor, or a person who creates or establishes a trust; a trustee, or person who takes and holds the legal title to the trust property for the benefit of another; and a cestui que trust or person for whose benefit the trust is created.<sup>71</sup>

*Spendthrift trusts.* In order to constitute a valid spendthrift trust, there must be an intention to create such a trust;<sup>72</sup> the interest of the donee cannot exceed an equitable life estate in the income of the property,<sup>73</sup> without title or right to the possession of the property itself,<sup>74</sup> securing it against the beneficiary's improvidence or incapacity;<sup>75</sup> the legal title must be vested in a trustee,<sup>76</sup> who may be authorized or directed at his discretion,<sup>77</sup> or on the happening of certain events,<sup>78</sup> to pay money or deliver benefits to the beneficiary;<sup>79</sup> and the trust must be an active one.<sup>80</sup> The beneficiary must not possess power to destroy the trust and acquire full power of alienation,<sup>81</sup> and it has been held that the

intention to relinquish his beneficial interest in the property "in praesenti" and to hold it for benefit of another, that there be specific property to be held in trust, and an absolute parting by alleged trustor with beneficial interest which was his up to the declaration of trust—*Fritz v. Thompson*, Cal.App., 271 P.2d 205.

69. U.S.—*Buhl v. Kavanagh*, C.C.A. Mich., 118 F.2d 315.

Cal.—*Sefton v. San Diego Trust & Savings Bank*, App., 106 P.2d 974.

Kan.—*Corpus Juris* quoted in *Shumway v. Shumway*, 44 P.2d 247, 248, 141 Kan. 835.

N.Y.—*Gifford v. Rising*, 3 N.Y.S. 392, 51 Hun 1.

Appointment of trustee by court see *infra* § 217.

70. U.S.—*Buhl v. Kavanagh*, C.C.A. Mich., 118 F.2d 315.

Cal.—*Sefton v. San Diego Trust & Savings Bank*, App., 106 P.2d 974.

Ill.—*Robbins v. Continental Nat. Bank & Trust Co. of Chicago*, 58 N.E.2d 254, 324 Ill.App. 422—*Kingsley v. Montrose Cemetery Co.*, 26 N.E.2d 613, 304 Ill.App. 273.

Kan.—*Corpus Juris* quoted in *Shumway v. Shumway*, 44 P.2d 247, 248, 141 Kan. 835.

N.Y.—*In re Voorhis' Estate*, 27 N.Y. S.2d 818, 176 Misc. 585.

Ohio.—*Hagerty v. Squire*, 26 N.E.2d 603, 63 Ohio App. 300, reversed on other grounds 28 N.E.2d 554, 137 Ohio St. 207—*Whiting v. Bortman*, 199 N.E. 367, 51 Ohio App. 40.

Pa.—*In re Pullet's Trust*, Com.Pt., 65 Montg.Co. 211.

R.I.—*Bliven v. Borden*, 185 A. 239, 56 R.I. 283.

65 C.J. p 232 note 79.

71. Iowa.—*Sinclair v. Allender*, 26 N.W.2d 320, 238 Iowa 212—*Dillenbeck v. Pinnell*, 96 N.W. 860, 121 Iowa 201, 203.

Kan.—*Corpus Juris* quoted in *Shumway v. Shumway*, 44 P.2d 247, 248, 141 Kan. 835.

72. Iowa.—*Corpus Juris* cited in *In re Bucklin's Estate*, 51 N.W.2d 412, 415, 243 Iowa 312.

Tenn.—*State ex rel. v. Nashville Trust Co.*, 190 S.W.2d 785, 28 Tenn. App. 388—*Rose v. Third Nat. Bank*, 183 S.W.2d 1, 27 Tenn. App. 553.

65 C.J. p 232 note 83.

"Spendthrift trust" defined see *supra* § 21.

Sufficiency of declaration to show intent to create spendthrift trust see *infra* § 43.

73. Mich.—*In re Ford's Estate*, 49 N.W.2d 154, 331 Mich. 220.

N.H.—*Brahmey v. Rollins*, 179 A. 186, 87 N.H. 290.

N.C.—*Corpus Juris* cited in *Chinnis v. Cobb*, 185 S.E. 638, 640, 210 N.C. 104.

S.C.—*Corpus Juris* cited in *Albergotti v. Summers*, 26 S.E.2d 395, 398, 203 S.C. 137.

Tenn.—*Robertson v. Brown*, 13 Tenn. App. 211.

65 C.J. p 233 note 84.

74. Iowa.—*In re Tonic's Estates*, 39 N.W.2d 401, 240 Iowa 1315.

Mich.—*In re Ford's Estate*, 49 N.W.2d 154, 331 Mich. 220.

N.H.—*Brahmey v. Rollins*, 179 A. 186, 87 N.H. 290.

N.C.—*Corpus Juris* cited in *Chinnis v. Cobb*, 185 S.E. 638, 640, 210 N.C. 104.

S.C.—*Corpus Juris* cited in *Albergotti v. Summers*, 26 S.E.2d 395, 398, 203 S.C. 137.

65 C.J. p 233 note 85.

**Trust created by beneficiaries**

Spendthrift provisions of trust were not valid as to tax years involved where the trust was continued and, in effect, created by the beneficiaries themselves—*McFaddin v. C. I. R.*, C.C.A. Tex., 148 F.2d 570.

75. Conn.—*Greenwich Trust Co. v. Tyson*, 27 A.2d 166, 129 Conn. 21.

Pa.—*In re Heyl's Estate*, 40 A.2d 149, 156 Pa. Super. 277, affirmed 43 A.2d 130, 352 Pa. 407.

Tex.—*Nunn v. Tiche-Goettinger Co.*, Com.App., 245 S.W. 421—*Long v. Long*, Civ.App., 252 S.W.2d 235, error refused no reversible error.

Wash.—*Miner v. Outcalt*, 219 P.2d 982, 36 Wash.2d 720.

76. Mich.—*In re Ford's Estate*, 49 N.W.2d 154, 331 Mich. 220.

Mo.—*Loehr v. Glaser*, 133 S.W.2d 394.

N.C.—*Corpus Juris* cited in *Chinnis v. Cobb*, 185 S.E. 638, 640, 210 N.C. 104.

S.C.—*Corpus Juris* cited in *Albergotti v. Summers*, 26 S.E.2d 395, 398, 203 S.C. 137.

Tenn.—*Robertson v. Brown*, 13 Tenn. App. 211.

65 C.J. p 233 note 87.

77. Iowa.—*Keating v. Keating*, 165 N.W. 74, 182 Iowa 1056.

78. Iowa.—*Keating v. Keating*, *supra*.

65 C.J. p 233 note 89.

79. Iowa.—*In re Tonic's Estates*, 39 N.W.2d 401, 240 Iowa 1315—*Keating v. Keating*, 165 N.W. 74, 182 Iowa 1056.

80. Mich.—*In re Ford's Estate*, 49 N.W.2d 154, 331 Mich. 220.

N.C.—*Corpus Juris* cited in *Chinnis v. Cobb*, 185 S.E. 638, 640, 210 N.C. 104.

S.C.—*Corpus Juris* cited in *Albergotti v. Summers*, 26 S.E.2d 395, 398, 203 S.C. 137.

Tenn.—*State ex rel. v. Nashville Trust Co.*, 190 S.W.2d 785, 28 Tenn. App. 388—*Rose v. Third Nat. Bank*, 183 S.W.2d 1, 27 Tenn. App. 553—*Robertson v. Brown*, 13 Tenn. App. 211.

Tex.—*Long v. Long*, Civ.App., 252 S.W.2d 235, error refused no reversible error.

65 C.J. p 233 note 91.

81. Iowa.—*Corpus Juris* cited in *In re Bucklin's Estate*, 51 N.W.2d 412, 415, 243 Iowa 312—*In re Tonic's Estates*, 39 N.W.2d 401, 240 Iowa 1315.

N.J.—*Moore v. Moore*, 44 A.2d 639, 137 N.J.Eq. 311.

Pa.—*In re Heyl's Estate*, 43 A.2d 130, 352 Pa. 407—*In re Harrison's Estate*, 185 A. 766, 322 Pa. 532.

Utah.—*Cronquist v. Utah State Agr. College*, 201 P.2d 280, 114 Utah 426.

65 C.J. p 233 note 92.

trust deed must contain a provision against alienation or anticipation of income.<sup>82</sup> It is not necessary that the beneficiary be a spendthrift,<sup>83</sup> or that there be a gift over on the termination of the trust.<sup>84</sup> The court will not inquire into the reason or wisdom of creating a spendthrift trust; it will assume that it is sufficient.<sup>85</sup> It has been held that the validity of a spendthrift trust depends on the sufficiency and legality of the expressed purposes of the trustor and not on the trustor's reasons for creating the trusts.<sup>86</sup>

### § 23. Parties

#### a. Settlor or creator

##### "Anticipation"

The term "anticipation," as used with reference to a spendthrift trust, means dealing with trust property before it is due to be paid to a beneficiary.—*Moore v. Moore*, 44 A.2d 639, 137 N.J.Eq. 314.

82. Md.—*Houghton v. Tiffany*, 82 A. 831, 116 Md. 655.

##### Restraint on alienation

A spendthrift trust is in the nature of a restraint on alienation.—*Mercantile Trust Co. v. Hofferbert*, D.C. Md., 58 F.Supp. 701.

83. Cal.—In re De Lano's Estate, 145 P.2d 672, 62 Cal.App.2d 808.  
Kan.—In re Watts, 162 P.2d 82, 169 Kan. 377.

Minn.—In re Moulton's Estate, 46 N.W.2d 667, 233 Minn. 667, 24 A.L.R. 2d 1092.

N.J.—*Moore v. Moore*, 44 A.2d 639, 137 N.J.Eq. 314.

N.C.—*Chinnis v. Cobb*, 185 S.E. 638, 210 N.C. 104.

Tex.—*Long v. Long*, Civ.App., 252 S.W.2d 235, error refused no reversible error.

65 C.J. p 233 note 94.

##### Rule criticized

"When, finally, it is observed that the policy [of spendthrift trusts] is indifferent to any distinction between beneficiaries who are and are not spendthrifts in fact, thus infolding within its arms those needing none of its favor from any standpoint of protection, it is entitled to even less respect. The policy in practice and as developed is thrown aside in complete disregard of its proper limits of application. The argument that any one may become a spendthrift and thus warrant his treatment as having already become one is too strained for acceptance."—*Brahmey v. Rollins*, 179 A. 186, 194, 87 N.H. 290.

84. Ill.—*Wagner v. Wagner*, 91 N.E. 66, 244 Ill. 101, 18 Ann.Cas. 490.

85. Ill.—Estate of Beckwith v. Cooper, 258 Ill.App. 411.

N.C.—*Corpus Juris* cited in *Chinnis v. Cobb*, 185 S.E. 638, 440, 210 N.C. 104.

#### b. Trustee

#### c. Cestui que trust

#### a. Settlor or Creator

Every person competent to make a will or enter into a contract has the power to dispose of his property by creating a trust.

Every person competent to make a will or enter into a contract has the power to dispose of his property by creating a trust.<sup>87</sup> The state, by legislative enactment, may create a valid trust.<sup>88</sup> In the absence of statute, a court has no power to create a trust.<sup>89</sup> Obviously, a person who has no title or interest in property can create no trust therein.<sup>90</sup>

88. Cal.—In re De Lano's Estate, 145 P.2d 672, 62 Cal.App.2d 808.

87. U.S.—*Beazley v. Allen*, D.C. Ga., 61 F.Supp. 929.  
65 C.J. p 233 note 98.

(Creation of trust by married woman for husband see *Husband and Wife* § 142)

##### Beneficiary of life policy

A beneficiary to whom life policies have been assigned was entitled to assign the insurance in trust for her own benefit.—*First Trust Co. of St. Paul v. Northwestern Mut. Life Ins. Co.*, 283 N.W. 236, 204 Minn. 244.

##### Debtor

(1) A debtor may set apart a portion of his assets as the res of a trust for the purpose of assuring the creditor of collection of the debt or as a substitute for the debt.—In re *Prudence Co.*, D.C.N.Y., 24 F.Supp. 666.

(2) The existence of a trust is not defeated because of debtor-creditor relationship between part or all of parties.—*Bank of America Nat. Trust & Savings Ass'n v. Hazelbush*, 68 P.2d 385, 21 Cal.App.2d 109.

##### Grantee

A grantee may create a trust although the property was conveyed to him without an obligation to hold it in trust.—*Wellesley College v. Attorney General*, 49 N.E.2d 220, 313 Mass. 723.

##### Labor council

Trust instrument and deed executed pursuant to resolution of labor council on a labor temple building whose purchase had been contributed to by labor unions was valid as within the authority of the council which was the sole beneficiary under the original trust, and on ground that the council validly exercised such right, that the building committee validly carried the trust into execution, and that the administrative details were appropriate to the authorized purpose of the trust and impaired no right of property therein.

—*Alsop v. Gard*, Tex.Civ.App., 227 S.W.2d 323, error refused no reversible error.

##### Person held creator of trust

N.H.—*Smith v. Pratt*, 63 A.2d 237, 95 N.H. 337.

Where individuals solicited funds from general public for creation of a fund to be used to meet needs of child, solicitors of fund acted as agents of donors, and were responsible to carry out donors' intent.—*Habcock v. Plisk*, 41 N.W.2d 479, 327 Mich. 72—65 C.J. p 233 note 98 [b].

88. Miss.—*Sinking Fund Com'rs v. Walker*, 7 Miss. 143, 38 Am.D. 433.  
Tex.—*Corpus Juris* cited in *Federal Trust Co. v. Brand*, Civ.App., 76 S.W.2d 142, 144, error refused.

89. U.S.—*Van Selver v. Rothenales*, D.C.Pa., 36 F.Supp. 577, affirmed 122 F.2d 697.

Cal.—*Simpson v. Simpson*, 22 P. 167, 80 Cal. 237.

Pa.—*Dougherty v. Shillingsburg*, 34 A. 319, 175 Pa. 56.

S.D.—In re *Zech's Estate*, 6 N.W.2d 432, 69 S.D. 51.

Wash.—*Stalder v. Pacific Nat. Bank of Seattle*, 183 P.2d 793, 28 Wash. 2d 638.

90. U.S.—*Buhl v. Kavanagh*, C.C.A. Mich., 118 F.2d 315.—*Johnson v. C. I. R.*, C.C.A.8, 108 F.2d 104.—*Brainard v. Commissioner of Internal Revenue*, C.C.A.7, 91 F.2d 880, certiorari dismissed 58 S.Ct. 748, 303 U.S. 665, 82 L.Ed. 1122.—*Hird v. Stein*, D.C.Miss., 102 F.Supp. 399, reversed on other grounds, C.A., 204 F.2d 122, rehearing denied 205 F.2d 512.

Cal.—*California Bank v. Bell*, 101 P.2d 724, 38 Cal.App.2d 533.

Fla.—*Columbia Bank for Cooperatives v. Okelania Sugar Co-op*, 62 So.2d 670.

Ill.—*Baur v. O'Connell*, 6 N.E.2d 140, 365 Ill. 208.

Md.—*Dougherty v. Dougherty*, 2 A.2d 433, 175 Md. 441.

Mass.—*Chandler v. Lally*, 31 N.E.2d 1, 308 Mass. 41.

Where the legal title to property is already held by one person for the benefit of another, the power to declare a further trust resides in the beneficial owner.<sup>91</sup>

### b. Trustee

While a trustee is essential to a trust, as considered supra § 22, equity will not permit a trust, otherwise perfectly declared, to fail for want of a trustee, as discussed infra § 211, but will, in case of a vacancy, either appoint a trustee, as discussed infra § 217, or assume the administration and execution of the trust itself, as considered infra § 262.

### c. Cestui Que Trust

The cestui que trust must be a person or legal entity, distinct from the trustee, but it is not necessary that the cestui que be in existence at the time of the creation of the trust.

It is essential to a private trust that there be a cestui que trust or beneficiary, as discussed supra

§ 22, which must be a person or legal entity,<sup>92</sup> distinct from the trustee, as considered infra § 210; but it is not necessary that the cestui que trust be in existence at the time of the creation of the trust, and it is sufficient if it comes into being during the life of the trustee.<sup>93</sup> It is not necessary that the beneficiary be named if he is so described that he is capable of being identified and distinguished from every other human being.<sup>94</sup> It is the general rule, with some exceptions,<sup>95</sup> that persons who have no right to acquire and hold property cannot become beneficiaries and acquire the beneficial interest in property through the medium of a trust.<sup>96</sup>

It has been held that a trust may be created for the benefit of minors,<sup>97</sup> heirs at law,<sup>98</sup> the settlor's wife and children,<sup>99</sup> the trustee's wife and children,<sup>1</sup> a school,<sup>2</sup> an unincorporated joint stock company,<sup>3</sup> and the residents of an unincorporated village.<sup>4</sup> Except where the rights of creditors are concerned,<sup>5</sup> a trust may be created for the benefit of the settlor during his life, with remainder to other persons,<sup>6</sup>

N.C.—*Corpus Juris* quoted in *Randle v. Grady*, 32 S.E.2d 20, 22, 224 N.C. 651.

S.D.—In re Zech's Estate, 6 N.W.2d 432, 69 S.D. 51.

Tenn.—*Hailey v. Halley*, 182 S.W.2d 127, 27 Tenn App. 496.

65 C.J. p 233 note 2.

91. U.S.—*Buhl v. Kavanagh*, C.C.A. Mich., 118 F.2d 315.

Mass.—*Chandler v. Lally*, 31 N.E.2d 1, 308 Mass. 44.

65 C.J. p 233 note 2.

92. U.S.—*Quinn v. Central Co.*, C.C. A.Cal., 104 F.2d 450.

Okla.—*Corpus Juris* cited in *Modern Woodmen*, etc. v. *Tulsa Modern Woodmen B. A.*, 264 F.2d 993, 996.

65 C.J. p 233 note 11.

### Class

(1) Members of a definite class of persons or members of a class who can readily be identified may properly be made the beneficiaries of a trust, or a trust may be created for the benefit of a class of persons, although, by the terms of the trust, the trustee is authorized to select which of the members shall take in what proportions.—*Edgerton v. Johnson*, C. A.Ill., 178 F.2d 106.

(2) Where an interest can be transferred only to members of a particular class of persons, a trust of the interest cannot be created in favor of a person not within the class.—*Jones v. U. S.*, D.C.Mass., 61 F.Supp. 406.

### Private burial grounds

In absence of statute, bequest or devise to a trustee for erection of monuments and markers on private burial grounds is defective as a private trust because it has no specified

beneficiary.—In re *Voorhis' Estate*, 27 N.Y.S.2d 818, 176 Misc. 555.

93. U.S.—*Bruun v. Hanson*, C.C.A. Idaho, 103 F.2d 685, certiorari denied *Hanson v. Bruun*, 60 S.Ct. 86, 308 U.S. 571, 84 L.Ed. 479, conformed to 30 F.Supp. 602.

Ga.—*Carmichael Tile Co. v. Yaarab Temple Bldg. Co.*, 185 S.E. 504, 182 Ga. 348.

65 C.J. p 234 note 13.

94. Ga.—*Carmichael Tile Co. v. Yaarab Temple Bldg. Co.*, supra.

65 C.J. p 234 note 14.

### Pari-mutuel ticket holder

Under statute pursuant to which race association was given authority to conduct race meetings and to "sell pools by the use of pari-mutuel machines or totalizers," relationship between parties to sale is in nature of a contract rather than one of "trust," particularly since association has no way of knowing who is holder of any particular pari-mutuel ticket or to whom amount due thereon belongs.—*Wise v. Delaware Steeplechase & Race Ass'n*, 45 A.2d 547, 28 Del.Ch. 532, 165 A.L.R. 530.

### 95. Sole and separate use trust

A sole and separate use trust cannot be created except for a married woman or one in immediate contemplation of marriage: it ceases on discovery and does not revive on a second marriage.—In re *Simon's Estate*, 34 Pa.Dist. & Co. 475—65 C.J. p 234 note 15 [a].

96. Va.—*Dunlop v. Harrison*, 14 Gratt. 261, 55 Va. 251.

65 C.J. p 234 note 16.

97. Pa.—*Appeal of Cressman*, 42 Pa. 147, 82 Am.D. 498.

Utah—*Capps v. Capps*, 175 P.2d 470, 110 Utah 468.

98. Cal.—*Bixby v. Hotchkiss*, 136 P. 2d 597, 58 Cal.App.2d 445.

99. N.Y.—*Sloan v. Birdsall*, 11 N.Y. S. 814, 58 Hun 317.

1. Pa.—*De Roy v. Richards*, 8 Pa. Super. 119.

2. Conn.—*Proprietors White School House v. Post*, 31 Conn. 240.

65 C.J. p 234 note 20.

3. Ill.—*Hart v. Seymour*, 35 N.E. 246, 147 Ill. 598.

4. Mo.—*Miller v. Rosenberger*, 46 S. W. 167, 144 Mo. 232.

5. Cal.—*Sefton v. San Diego Trust & Savings Bank*, App. 106 P.2d 974.

65 C.J. p 234 note 23.

6. U.S.—*United Bldg. & Loan Ass'n v. Garrett*, D.C.Ark., 64 F.Supp. 460.

—*First Nat Bank of Bloomington v. Manufacturers Trust Co.*, D.C.N.J., 2 F.R.D. 125.

N.J.—*Fidelity Union Trust Co. v. Anthony*, 81 A.2d 191, 13 N.J.Super. 596, affirmed *Fidelity Union Trust Co. v. Heller*, 86 A.2d 594, 18 N.J.Super. 49.

Tenn.—*American Bank & Trust Co. v. Lebanon Bank & Trust Co.*, 192 S.W.2d 245, 28 Tenn.App. 618.

W.Va.—*Lamb v. First Huntington Nat. Bank*, 7 S.E.2d 441, 122 W.Va. 88.

65 C.J. p 234 note 24.

Change in substance

When grantor makes himself a beneficiary of a trust of his own creation, the law must be astute to see whether substance as well as appearance of things has been changed and takes note of the status quo ante of the trust, and if it finds that, aft-

although trusts for the sole use and benefit of the settlor are expressly or impliedly prohibited by some statutes.<sup>7</sup> The beneficiary may enhance the corpus of the estate by voluntary contribution.<sup>8</sup>

**Extent of interest.** The extent of the interest of the beneficiary of a trust need not be definite at the time of the creation of the trust if it is definitely ascertainable within the period of the rule against perpetuities.<sup>9</sup> The time of vesting of express trusts is considered *infra* § 29.

**Statutory limitation of trusts to beneficiaries not sui juris.** In some jurisdictions there are certain restrictions on the right of a person to create a trust for a person sui juris, which are unknown to the common law.<sup>10</sup> Under a statute providing that trust estates may be created for the benefit of any minor, or person non compos mentis, or any male person of age, whenever in fact such person is, because of mental weakness, intemperate habits, or wasteful and profligate habits, unfit to be intrusted with the right and management of property, it has been held that a trust estate cannot be created for the benefit of one sui juris,<sup>11</sup> who has no wasteful, intemperate, or profligate habits;<sup>12</sup> that a person cannot, by deed, create out of his own property, on his own behalf, a trust estate;<sup>13</sup> but a trust may be created for

minors although there are no active duties to be discharged by the trustee.<sup>14</sup> A valid trust may, however, under certain circumstances, be created for the benefit of one sui juris.<sup>15</sup> Such a statute does not prevent the creation of a trust for the benefit of a person sui juris, for life, with a limitation in trust to another person sui juris;<sup>16</sup> but the mere fact that there is a legal remainder over will not suffice to uphold a trust for one sui juris.<sup>17</sup> A valid trust may be created in favor of a minor, not only where the trustee takes the legal title for him in fee simple, but where the trustee takes it in trust for a life tenant who is sui juris, with remainder over in fee to the minor,<sup>18</sup> and in such a case the trust embraces both estates, and the trustee is empowered to act and manage the property for both.<sup>19</sup>

**Trust for benefit of two persons.** There may be a single beneficiary, or several beneficiaries of a trust.<sup>20</sup> It has been held, however, that there can be no trust in property for the common benefit of two persons where one of them has power at any time to destroy the trust by disposing of the property.<sup>21</sup>

**Use on bargain and sale.** It has been held that a use upon a bargain and sale cannot be limited to

or creation of trust, grantor still is the one who has the primary right to enjoy fruits of ownership, it may disregard change in legal title in order to prevent some policy of the law from being nullified by a legal device.—Kent v. U. S., 60 F.Supp. 203, 103 Ct.Cl. 714.

7. Kan.—Herd v. Chambers, 149 P.2d 583, 158 Kan. 614.  
65 C.J. p. 234 note 25.

#### British statute held inapplicable

British statute, declaring deeds of gifts in trust to use of persons making them void, was inapplicable to trust deed directing payment of income to settlor during her life and principal to her testamentary appointees, surviving issue, or next of kin.—Mercantile Trust Co. of Baltimore v. Bergdorf & Goodman Co., 173 A. 31, 167 Md. 158, 93 A.L.R. 1205.

#### In California

(1) Under Civil Code § 857, which has been repealed, a trust to hold rents and profits to the sole use of the settlor was held not to be within the uses authorized.—Carpenter v. Cook, 54 P. 997, 132 Cal. 621, 84 Am. S.R. 118.

(2) Under later decisions trusts created for the benefit of the settlor have been held valid.  
U.S.—Quinn v. Central Co., C.C.A. Cal., 104 F.2d 450.—In re Regal, D. C. Cal., 112 F.Supp. 712.

Cal.—Birby v. Hotchkiss, 136 P.2d 597, 58 Cal.App.2d 445.—Sefton v. San Diego Trust & Savings Bank, 106 P.2d 874.

8. N.Y.—Central Trust Co. of New York v. Fulck, 164 N.Y.S. 473, 177 App.Div. 501.

9. Or.—Williamson v. Denison, 202 P.2d 477, 185 Or. 249.

Private trusts as subject to rule against perpetuities see Perpetuities §§ 26-29.

10. Ga.—Clark v. Baker, 196 S.E. 750, 186 Ga. 65.—People's Nat. Bank v. Cleveland, 44 S.E. 20, 117 Ga. 908.

11. Ga.—Hoffman v. Chester, 39 S.E.2d 857, 201 Ga. 447.—Citizens & Southern Nat. Bank v. Howell, 196 S.E. 741, 186 Ga. 47.—Armour Fertilizer Works v. Lacy, 91 S.E. 12, 146 Ga. 196.

#### Mental and not physical capacity

The statute providing that, in an executed trust for the benefit of a person "capable of taking and managing property," beneficiary obtains perfect title, uses quoted phrase with respect to mental and not to physical capacity.—Clark v. Baker, 196 S.E. 750, 186 Ga. 65.

12. Ga.—Hoffman v. Chester, 39 S.E.2d 857, 201 Ga. 447.—Lester v. Stephens, 39 S.E. 109, 113 Ga. 495.

13. Ga.—Finn v. Dobbs, 4 S.E.2d 655, 188 Ga. 602.—Citizens & Southern Nat. Bank v. Howell, 196 S.E. 741,

185 Ga. 47.—Sargent v. Burdett, 22 S.E. 607, 99 Ga. 111.—Gray v. Osborn, 54 Ga. 231.—Lewis v. Fry, 28 S.E. 2d 122, 69 Ga.App. 461, transferred 22 S.E.2d 817, 194 Ga. 842.

14. Ga.—Sides v. Shewmaker, 4 S.E. 2d 829, 188 Ga. 672.—Turner v. Barber, 62 S.E. 587, 131 Ga. 444.

15. Ga.—Sides v. Shewmaker, 4 S.E. 2d 829, 188 Ga. 672.—Finn v. Dobbs, 4 S.E.2d 655, 188 Ga. 602.—Clark v. Baker, 196 S.E. 750, 186 Ga. 65.—Citizens & Southern Nat. Bank v. Howell, 196 S.E. 741, 186 Ga. 47.—De Vaughn v. Hays, 78 S.E. 844, 140 Ga. 208.

16. Ga.—Budreau v. Mingleddorf, 63 S.E.2d 320, 207 Ga. 538.—Clark v. Baker, 196 S.E. 750, 186 Ga. 65.—Citizens & Southern Nat. Bank v. Howell, 196 S.E. 741, 186 Ga. 47.—People's Nat. Bank v. Cleveland, 44 S.E. 20, 117 Ga. 908.

65 C.J. p. 234 note 32.

17. Ga.—Finn v. Dobbs, 4 S.E.2d 655, 188 Ga. 602.—De Vaughn v. Hays, 78 S.E. 844, 140 Ga. 208.

18. Ga.—Sides v. Shewmaker, 4 S.E. 2d 829, 188 Ga. 672.

19. Ga.—Sides v. Shewmaker, *supra*.

20. Tenn.—American Bank & Trust Co. v. Lebanon Bank & Trust Co., 192 S.W.2d 245, 28 Tenn.App. 618.

21. Wash.—Guys v. Guys, 115 P. 721, 63 Wash. 340, 37 L.R.A.N.S. 186.



any person other than the bargainee, in whom alone the legal estate can be executed.<sup>22</sup>

## § 24. Subject Matter

While the subject matter of a trust must be lawful, definite property, there appears to be no limitation or restriction on its kind or nature.

While the subject matter of a trust must be law-

ful,<sup>23</sup> definite<sup>24</sup> property, there appears to be no limitation or restriction on its kind or nature, it being the rule that a trust may exist in any property, real or personal, legal or equitable, which is in existence and which, in the eye of a court of equity, is of value.<sup>25</sup> Thus, it is held that a trust may exist in a bond,<sup>26</sup> choses in action,<sup>27</sup> contingent interests,<sup>28</sup> expectancies,<sup>29</sup> life insurance policies or proceeds therefrom;<sup>30</sup> and further has also been

22. N.Y.—*Jackson v. Cary*, 16 Johns. 302—*Jackson v. Myers*, 3 Johns. 388, 3 Am.D. 504.

23. Fla.—*Byrne Realty Co. v. South Florida Farms Co.*, 89 So. 318, 81 Fla. 805, 864.

Kan.—*Shumway v. Shumway*, 44 P. 2d 247, 141 Kan. 835.

24. Cal.—*Gonzales v. Hodgson*, 237 P.2d 856, 38 Cal.2d 91—*Garrison v. Edward Brown & Sons*, 154 P.2d 377, 25 Cal.2d 475—*Balian v. Balian's Market*, 119 P.2d 426, 48 Cal. App.2d 150.

Ill.—*Kilgore v. State Bank of Colusa*, 25 N.E.2d 39, 372 Ill. 578—*Gurnett v. Mutual Life Ins. Co. of New York*, 191 N.E. 250, 356 Ill. 612—*Velde v. Reardon*, 54 N.E.2d 91, 322 Ill.App. 177—*Reynolds v. First Nat. Bank*, 279 Ill.App. 551, 600 P.2d 247, 141 Kan. 835.

Kan.—*Shumway v. Shumway*, 44 P. 2d 247, 141 Kan. 835.

Ky.—*Corpus Juris cited in DeLeuil's Exrs v. DeLeuil*, 74 S.W.2d 474, 477, 255 Ky. 406.

Md.—*Dougherty v. Dougherty*, 2 A 2d 433, 175 Md. 441.

Pa.—*Styer v. Hess*, Conn.Pl. 59 Montg.Co. 41.

65 C.J. p 235 note 37.

### Definite or definitely ascertainable

(1) The subject matter of a trust must be definite or definitely ascertainable from the facts existing at the time of the creation of the trust. U.S.—*Lewis v. Jackson & Squire, Inc.*, Ark., 86 F.Supp. 354, appeal dismissed, C.A., 181 F.2d 1011, *Lewis v. Midwest Min. Co.*, 181 F.2d 1011 and *Lewis v. F. S. Neely Co.*, 181 F.2d 1011—*First Nat. Bank of Bloomingdale v. Manufacturers Trust Co.*, D.C.N.J., 2 F.R.D. 125 Ky.—*Ridley v. Shepard*, 168 S.W.2d 550, 293 Ky. 91 Or.—*Williamson v. Denison*, 202 P.2d 477, 185 Or. 249.

(2) Defendant could not urge that oral trust of ten thousand dollars worth of bonds for plaintiff's benefit was not established because subject matter of trust was not definite or definitely ascertainable, where bonds in a larger amount than ten thousand dollars had been turned over to defendant by settlor, and defendant failed in his duty of segregating ten thousand dollars worth of the bonds for the trust estate.—*Fricke v. Weber*, C.C.A. Ohio, 145 F.2d 737.

25. U.S.—*U. S. Trust Co. of New York v. C. I. R.*, 56 S.Ct. 329, 295 U.S. 481, 80 L.Ed. 340, followed in *Halvering v. McIlvaine*, 56 S.Ct. 332, 296 U.S. 488, 80 L.Ed. 345—*Buhl v. Kavanagh*, C.C.A. Mich., 118 F.2d 315—*Corpus Juris cited in Bank of America Nat. Trust & Savings Ass'n v. Scully*, C.C.A. Colo., 92 F.2d 97, 103.

Ark.—*Matlock v. Bledsoe*, 90 S.W. 848, 77 Ark. 60.

Ga.—*Carmichael Tile Co. v. Yaarab Temple Bldg. Co.*, 185 S.E. 504, 182 Ga. 348.

Ill.—*Kilgore v. State Bank of Colusa*, 25 N.E.2d 39, 372 Ill. 578—*Gurnett v. Mutual Life Ins. Co. of New York*, 191 N.E. 250, 356 Ill. 612.

Mass.—*Chandler v. Lally*, 31 N.E.2d 1, 308 Mass. 41—*Mee v. Fay*, 76 N.E. 229, 190 Mass. 40.

Minn.—*First Trust Co. of St. Paul v. Northwestern Mut. Life Ins. Co.*, 283 N.W. 236, 204 Minn. 241.

Mo.—*Page v. Joplin Nat. Bank & Trust Co.*, 255 S.W.2d 821, 363 Mo. 1008—*Gwin v. Gwin*, 219 S.W.2d 232, 210 Mo.App. 782.

Neb.—*Dahlke v. Dahlke*, 51 N.W.2d 266, 155 Neb. 169.

N.J.—*Eagles Building & Loan Ass'n v. Fiducia*, 27 A.2d 116, 135 N.J. Eq. 7, affirmed 40 A.2d 627, 136 N.J. 194, 117.

N.Y.—*In re Fischer's Will*, 120 N.E. 2d 688, 307 N.Y. 119 *In re Jarvis's Trust*, N.Y. Sup., 73 N.Y.S.2d 216.

Ohio.—*Braun v. Central Trust Co.*, 109 N.E.2d 476, 92 Ohio App. 110 Okl.—*Brinkley v. Patton*, 119 P.2d 261, 194 Okl. 241.

Tenn.—*Hunt v. Hunt*, 80 S.W.2d 666, 169 Tenn. 1—*Cothren v. Cothren*, 110 S.W.2d 1051, 21 Tenn.App. 358.

—*Harris v. Union Bank*, 1 Cold 152

21 C.J. p 1045 note 10—65 C.J. p 235 note 38.

### Corporate stock

(1) The holders of corporate shares may create a trust therein for any purpose they deem desirable, as long as the purpose is not prohibited by statute or some rule of public policy.—*Morris v. The Broadview*, 65 N.E.2d 605, 328 Ill.App. 267.

(2) Accordingly, stockholders may surrender part of their stock to a trustee to be held for disposition as directed by the board of directors.—

*Fox v. McKeown*, 280 P. 939, 154 Wash. 34

(3) Voting trusts see Corporations § 552.

### Future interest

(1) A vested future interest constitutes a property interest in the subject matter of a trust.—*Williamson v. Denison*, 202 P.2d 477, 185 Or. 249.

(2) A transfer to trustee need not be of a present interest in order to create a valid trust, but may be of a future interest.—*Oakland Scavenger Co. v. Gundi*, 124 P.2d 143, 51 Cal.App. 2d 68.

### Property in possession of agent

Principal may declare a trust in property in possession of his agent to carry out trust.—*Deakins v. Webb*, 84 S.W.2d 367, 119 Tenn.App. 182.

26. Md.—*McIntyre v. Smith*, 141 A. 405, 154 Md. 640 65 C.J. p 235 note 39.

27. Ill.—*Gurnett v. Mutual Life Ins. Co. of New York*, 191 N.E. 250, 356 Ill. 612.

28. Ill.—*Gurnett v. Mutual Life Ins. Co. of New York*, supra.

29. Ill.—*Gurnett v. Mutual Life Ins. Co. of New York*, supra.

30. U.S.—*Union Central Life Ins. Co. v. Flicker*, C.C.A. Cal., 101 F.2d 857, certiorari denied *Flicker v. Rabonovich*, 59 S.Ct. 1039, 307 U.S. 641, 83 L.Ed. 1522.

Ark.—*Matlock v. Bledsoe*, 90 S.W. 848, 77 Ark. 60

Ill.—*Bus v. Beckwith*, 49 Ill. 121—*Gurnett v. Mutual Life Ins. Co. of New York*, 268 Ill.App. 518, affirmed, 1941, 191 N.E. 250, 356 Ill. 612.

Md.—*Coyne v. Supreme Conclave of I. of H.*, 66 A. 704, 106 Md. 54.

Mass.—*Mee v. Fay*, 76 N.E. 229, 190 Mass. 40—*Kendrick v. Ray*, 53 N.E. 823, 173 Mass. 305, 73 Am.St.Rep. 289.

Minn.—*First Trust Co. of St. Paul v. Northwestern Mut. Life Ins. Co.*, 283 N.W. 236, 201 Minn. 244.

N.J.—*Hose v. Meury*, 163 A. 276, 112 N.J. Eq. 62.

N.Y.—*Hirsch v. Auer*, 40 N.E. 397, 146 N.Y. 13—*In re Kyte's Will*, 22 N.Y.S.2d 236, 171 Misc. 1094—*Lauterbach v. New York Investment Co.*, 117 N.Y.S. 152, 62 Misc. 561.

Pa.—*In re Galli's Estate*, Com.Pl., 40 Luz.Leg.Reg. 231.

held to exist in money,<sup>31</sup> promissory notes,<sup>32</sup> a deposit in a bank,<sup>33</sup> future earnings,<sup>34</sup> leaseholds,<sup>35</sup> a growing crop,<sup>36</sup> slaves,<sup>37</sup> an interest in a patent,<sup>38</sup> and an undivided interest in property.<sup>39</sup>

In order that a trust may attach, there must be something tangible to which it can attach.<sup>40</sup> For example, an idea, which is not patented, is not property which can be impressed with a trust.<sup>41</sup> An obligor has no such interest in his own obligation as can be held in trust,<sup>42</sup> and a person cannot have a legal claim against himself whether for his own benefit or for the benefit of another.<sup>43</sup> A privilege personal in character cannot be the subject of a trust.<sup>44</sup> It has been held, however, that a declaration of trust of property executed before the ac-

quisition of the property, but which is subsequently acquired, does not fail for want of the requisite subject matter,<sup>45</sup> but that the instrument takes full effect when the subsequent title vests in the decedent.<sup>46</sup>

## § 25. Purposes

Subject to statutory requirements and the public policy of the state, an active express trust may be created for any lawful purpose.

Except as to a purpose foreign to the public policy of the state,<sup>47</sup> or within the meaning of a statutory prohibition, the policy of the law to permit a man to make whatever disposition of his property he sees fit allows him to create an active express trust for any lawful<sup>48</sup> purpose he deems wise and ex-

Tex.—Eaton v. Husted, 172 S.W.2d 493, 141 Tex. 349—Dunn v. Second Nat. Bank, 113 S.W.2d 165, 131 Tex. 198, 115 A.L.R. 730.

31. Ala.—Hill v. Hill, 118 So. 306, 216 Ala. 435.

32. Ga.—Broughton v. West, 8 Ga. 248.

Ohio—Duly v. Duly, 2 Ohio Dec. Reprint, 425, 3 West L.Month. 42.

33. Cal.—Garrison v. Edward Brown & Sons, 154 P.2d 377, 25 Cal.2d 473—Mitchell v. Dunn, 294 P. 386, 211 Cal. 129—Noble v. Noble, 243 P. 439, 198 Cal. 129, 43 A.L.R. 1235—Kubisa v. Hinkelmann, 127 P.2d 567, 53 Cal.App. 186.

Mass.—McCarthy v. Provident Sav. Inst., 34 NE 1073, 159 Mass. 527.

34. Ky.—Siter v. Hall, 294 S.W. 767, 220 Ky. 43.

35. U.S.—Chase Nat. Bank of City of New York v. Citizens Gas Co. of Indianapolis, C.C.A.Ind., 113 F.2d 217, reversed on other grounds City of Indianapolis v. Chase Nat. Bank of City of New York, 62 S.Ct. 15, 314 U.S. 63, 86 L.Ed. 47, rehearing denied 62 S.Ct. 355, 314 U.S. 714, 86 L.Ed. 569, reversed on other grounds Chase Nat. Bank of City of New York v. Citizens Gas Co. of Indianapolis, 62 S.Ct. 15, 314 U.S. 63, 86 L.Ed. 47, rehearing denied 62 S.Ct. 355, 314 U.S. 714, 86 L.Ed. 569.

Tex.—Christopher v. Davis, Civ.App., 284 S.W. 253.

36. Ala.—Mauldin v. Armistead, 14 Ala. 702.

37. Va.—Curtis v. Fitzhugh, Jeff 72.

38. Mass.—Thayer v. Pressey, 56 N. E. 5, 175 Mass. 225.

39. U.S.—U. S. Trust Co. of New York v. C. I. R., 56 S.Ct. 329, 296 U.S. 481, 80 L.Ed. 340, followed in Helvering v. McIlvaine, 56 S.Ct. 332, 296 U.S. 488, 80 L.Ed. 345—Commissioner of Internal Revenue v. McIlvaine, C.C.A., 78 P.2d 787, 102 A.L.R. 252, affirmed 56 S.Ct. 332, 296 U.S. 488, 80 L.Ed. 345—Fiduciary Trust Co. v. U. S., D.C.N.Y., 36 F.Supp. 653.

## Undivided share in ship in process of construction

N.Y.—Starbuck v. Farmers' L. & T. Co., 51 N.Y.S. 58, 28 App.Div. 272.

40. Cal.—Calou v. Jones, 122 P.2d 951, 50 Cal.App.2d 299.

Va.—Hise v. Grasty, 166 S.E. 567, 159 Va. 635.

An expectation or hope of receiving property in the future cannot be held in trust—Lubowicki v. Travelers Ins. Co., 8 A.2d 842, 18 N.J. Misc. 19.

41. Va.—Hise v. Grasty, 166 S.E. 567, 159 Va. 535.

42. U.S.—Johnson v. C. I. R., C.C.A., 8, 108 F.2d 104.

Cal.—Hise v. Burgess, 83 P.2d 527, 28 Cal.App.2d 654.

43. U.S.—Johnson v. C. I. R., C.C.A., 8, 108 F.2d 104.

Cal.—Hise v. Burgess, 83 P.2d 527, 28 Cal.App.2d 654.

44. Nev.—American Sodium Co. v. Shelley, 276 P. 11, 61 Nev. 314, 65 C.J. p. 235 note 51.

45. U.S.—Grubb v. General Contract Purchase Corp., C.C.A.N.Y., 94 F.2d 70.

N.Y.—Bryant v. Shaw, 180 N.Y.S. 301, 190 App.Div. 578.

46. N.Y.—Bryant v. Shaw, supra.

47. Ark.—Hammond v. Stringer, 258 S.W.2d 46.

Cal.—Nelson v. California Trust Co., 202 P.2d 1021, 33 Cal.2d 501.

Ill.—Vlahos v. Andrews, 1 N.E.2d 59, 362 Ill. 593.

Kan.—Fry v. McCormick, 228 P.2d 727, 170 Kan. 741.

N.Y.—In re Wilson's Will, 45 N.Y.S. 2d 167, 182 Misc. 698.

N.C.—Leimmond v. Peoples, 41 N.C. 137.

Va.—Collins v. Lyon, Inc., 24 S.E.2d 572, 181 Va. 230.

## Trusts held invalid

(1) Trust merely for benefit of trustees—White v. Bourne, 9 So.2d 170, 151 Fla. 12.

(2) Trust for illegitimate children to be thereafter begotten—Kingsley v. Broward, 19 Fla. 722.

## Trust held not contrary to public policy

Mass.—Union Trust Co. of Springfield v. Nelen, 186 N.E. 66, 283 Mass. 144.

48. Ark.—Hammond v. Stringer, 258 S.W.2d 46—Hardy v. Hardy, 230 S.W.2d 6, 217 Ark. 296.

Cal.—Miranda v. Miranda, 183 P.2d 61, 81 Cal.App.2d 61—Reiss v. Reiss, 114 P.2d 718, 45 Cal.App.2d 740.

Ill.—Vlahos v. Andrews, 1 N.E.2d 59, 362 Ill. 593.

Md.—Dougherty v. Dougherty, 2 A. 2d 433, 175 Md. 441.

Mass.—National Shawmut Bank of Boston v. Cumming, 91 N.E.2d 337, 325 Mass. 457.

N.J.—Fidelity Union Trust Co. v. Margetts, 82 A.2d 191, 7 N.J. 556—Wilber v. Asbury Park Nat. Bank & Trust Co., 59 A.2d 570, 142 N.J. Eq. 99, affirmed 65 A.2d 843, 2 N.J. 167.

Ohio—Cleveland Trust Co. v. Mansfield, Com.Pl., 71 N.R.2d 287.

Pa.—In re Bergland's Estate, 92 A. 2d 207, 372 Pa. 1.

Tenn.—State v. Nashville Trust Co., 190 S.W.2d 785, 28 Tenn.App. 388.

Va.—Collins v. Lyon, Inc., 24 S.E.2d 572, 181 Va. 230.

65 C.J. p. 235 note 57.

Illegality of provision see *infra* § 78.

pedient,<sup>49</sup> whether or not the cestui que trust is sui juris.<sup>50</sup>

Thus, trusts are valid where they are created for the purpose of satisfying charges and encumbrances out of rents and profits;<sup>51</sup> of applying the income, and principal, if necessary, for the benefit of a beneficiary;<sup>52</sup> of payment of creditors out of funds deposited;<sup>53</sup> of selling realty to pay creditors;<sup>54</sup> of preserving a future estate;<sup>55</sup> of educating grandchildren of testator;<sup>56</sup> of paying over to a beneficiary who should use it for any purpose he deems best for his minor son;<sup>57</sup> of conserving property pending exercise of a power of appointment after a life estate;<sup>58</sup> of paying annuities;<sup>59</sup> of supporting the settlor during the remainder of his life;<sup>60</sup> of protecting the trust property from the control of the beneficiary's husband;<sup>61</sup> or his creditors;<sup>62</sup> and of keeping up a grave or burial lot.<sup>63</sup>

On the other hand, some useful purpose must be served by trust, and a mere dry trust is invalid.<sup>64</sup> When a statute regulating trusts is applicable only

to realty, trusts in personalty may be created for any purpose not unlawful,<sup>65</sup> and a trust is one of personalty, within the meaning of the rule, when the trust instrument manifestly contemplates the conversion of realty into personalty.<sup>66</sup> Where property is given for a prescribed purpose, its use otherwise is avoided.<sup>67</sup>

**Statutory limitation or authorization.** Some statutes regulating uses and trusts have manifested an intention to abolish all uses and trusts except such as are expressly permitted by statute. It follows that, under such a statute, a trust for a purpose not within those enumerated by statute is invalid,<sup>68</sup> and it has been held that there must be something to indicate that the settlor contemplated one of the classes of trusts enumerated by the statute.<sup>69</sup> Some statutes are intended to abolish passive trusts by prohibiting, either expressly or by elimination, trusts wherein the right both to possession and profits vests in the beneficiary.<sup>70</sup> Under some statutes trusts may be created for the purpose of conveying merely;<sup>71</sup> or for a variety of other purposes such as

49. Ark.—Hardy v. Hardy, 230 S.W. 2d 6, 217 Ark. 286.

N.J.—Fidelity Union Trust Co. v. Margetta, 82 A.2d 191, 7 N.J. 556.  
N.Y.—In re Wilson's Will, 45 N.Y.S. 2d 167, 183 Misc. 698.

65 C.J. p. 236 note 58.

**Vesting on death of beneficiary**

A provision that property held in trust for benefit of a person during his lifetime shall vest absolutely in him on his death is not so incongruous that it is not to be given effect.—California Trust Co. v. Ott, 140 P.2d 79, 59 Cal.App.2d 715.

50. Pa.—Appeals of Williams, 83 Pa. 377—Appeal of Orden, 70 Pa. 501.

51. Mich.—Tams v. Williams, 2 N.W. 814, 41 Mich. 552.

52. Cal.—Miranda v. Miranda, 183 P.2d 61, 81 Cal.App.2d 61.

Pa.—In re Bierland's Estate, 92 A.2d 207, 372 Pa. 1.

65 C.J. p. 236 note 61.

53. Pa.—Preas v. Ennis, 7 Pa.Co. 43.

54. Ala.—Stewart v. Cross, 63 So. 956, 184 Ala. 166.

55. Pa.—In re Field's Estate, 109 A. 677, 266 Pa. 474.

65 C.J. p. 236 note 64.

56. Pa.—Illl v. Clark, 74 Pa.Super. 181.

57. Mo.—Plummer v. Brown, 287 S.W. 316, 315 Mo. 627.

65 C.J. p. 236 note 68.

58. Pa.—In re Kerns' Estate, 145 A. 824, 296 Pa. 348, 66 A.L.R. 1342.

59. Mass.—Brooks v. Rice, 131 Mass. 408.

N.Y.—In re Fischer's Will, 120 N.E.2d 688, 307 N.Y. 149.

**Income tax**

A donor or settlor of trust may by appropriate language in trust agreement direct trustee to pay a yearly benefaction and also to pay for beneficiary amount of any income tax assessed on such annual payment.—Toretta v. Wilmington Trust Co., D.C.Del., 71 F.Supp. 281.

61. Md.—Musgrave v. Renkin, 183 P. 145, 180 Cal. 785.

61. Md.—Bishop v. Safe Deposit & Trust Co. of Baltimore, 185 A. 325, 170 Md. 615.

65 C.J. p. 236 note 70.

62. Mo.—Seigel v. Quigley, 24 S.W. 742, 119 Mo. 76.

63. Ark.—Hammond v. Stringer, 258 S.W.2d 46.

65 C.J. p. 236 note 72.

Care, maintenance, or improvement of burial grounds and monuments as charitable purpose see Charities § 14.

64. N.J.—Fidelity Union Trust Co. v. Margetta, 82 A.2d 191, 7 N.J. 556.

Pa.—In re Bierland's Estate, 92 A.2d 207, 372 Pa. 1.

65 C.J. p. 236 note 73.

Execution by statute of uses see infra § 178.

65. N.Y.—In re Wilkin, 76 N.E. 1105, 183 N.Y. 104.

65 C.J. p. 236 note 74.

66. Wis.—McWilliams v. Gough, 93 N.W. 550, 116 Wis. 576.

65 C.J. p. 236 note 75.

67. N.H.—Drahmey v. Rollins, 179 A. 186, 87 N.H. 290.

68. N.Y.—In re Wolanski's Estate, 283 N.Y.S. 797, 157 Misc. 470.

65 C.J. p. 236 note 77.

Effect of statutory limitation or authorization on testamentary trusts see the C.J.S. title Wills § 1005, also 69 C.J. p. 693 note 75—p. 695 note 97.

**Trusts held not within statutory purposes**

(1) Trust to hold realty during life of settlor and settlor's daughter in trust for two named grandchildren of settlor and to be divided to grandchildren at death of the settlor and daughter.—In re Suffolk County Trust Co., 65 N.Y.S.2d 213.

(2) Other trusts held not among those permitted by statute see 65 C.J. p. 236 note 77.

69. N.Y.—In re Catlin, 160 N.Y.S. 1034, 97 Misc. 223.

70. Kan.—Hayer v. Sims, 60 P. 309, 61 Kan. 593.

65 C.J. p. 237 note 79.

71. Mont.—In re Strod's Estate, 167 P.2d 579, 118 Mont. 540.

**In California**

(1) The rule as stated in the text has been applied.—Lake v. Dowd, 277 P. 1047, 207 Cal. 290—65 C.J. p. 237 note 80 [a] (1), (2).

(2) Prior to this statute trusts to convey were declared void.—In re Aldersley's Estate, 163 P. 206, 174 Cal. 366—65 C.J. p. 237 note 80 [a] (3).

(3) A trust to receive and hold realty to be transferred to the trustor on demand was not considered as a trust merely to convey.—Varrois v. Gomet, 185 P. 1001, 43 Cal.App. 756.

that of paying the settlor's debts;<sup>72</sup> of maintaining a kindergarten for children;<sup>73</sup> of selling real property for the benefit of creditors;<sup>74</sup> annuitants;<sup>75</sup> or legatees;<sup>76</sup> and of improving a stream and mill privilege.<sup>77</sup> Under a statute providing that a valid trust may be created for the purpose of selling realty and dividing the proceeds thereof among the legatees, it is essential that the purpose to sell be the primary object of the trust,<sup>78</sup> and that the duty to sell be imperative.<sup>79</sup>

Many trusts derive their validity from statutory provisions authorizing the creation of trusts for the purpose of receiving the rents and profits of real property, and applying them to the use of a person, during his life or for a shorter period.<sup>80</sup> Under such a statute it is not necessary, in order to create a valid trust that the statutory words "to receive the rents" be used, it being sufficient if the power to collect rents is clearly imputed from an express and undisputed power to rent and divide the proceeds among designated beneficiaries.<sup>81</sup> A direction to pay over the rents and profits of land to a beneficiary is a direction to apply them to the use of a person within the meaning of the statute.<sup>82</sup> Where a trust depends for its validity on such a

statute, the provisions of the trust instrument must come within the terms of the statute.<sup>83</sup> For example, the rents and profits must be applied to the use of some person.<sup>84</sup> The power to rent must not be merely incidental to the trust.<sup>85</sup> The validity of the purpose for which the trust is created will be governed by the statute in effect at the time the trust is created.<sup>86</sup>

*Two purposes.* A deed combining the two characters of a deed of trust to secure creditors, and a deed of settlement in trust for a wife and children, may take effect in both characters.<sup>87</sup>

## § 25. — Spendthrift Trusts

*Spendthrift trusts, that is, trusts intended to secure the trust fund against the improvidence of the cestui que trust by protecting it against his creditors and rendering it inalienable by him before payment, have generally been upheld as valid.*

Although at common law and under some statutes the rule is to the contrary,<sup>88</sup> spendthrift trusts, that is, trusts intended to secure the trust fund against the improvidence of the cestui que trust by protecting it against his creditors and rendering it inalienable by him before payment, have generally been upheld as valid,<sup>89</sup> not out of any consideration for

72. Cal.—Thomas v. Lamb, 106 P. 254, 11 Cal.App. 717.

65 C.J. p 237 note 81

73. Minn.—City of Owatonna v. Rosebrock, 82 N.W. 1122, 88 Minn 318.

65 C.J. p 237 note 82.

74. Wis.—Marvin v. Titworth, 10 Wis. 320.

65 C.J. p 237 note 83

75. N.Y.—In re Graczyk's Will, 66 N.Y.S.2d 750.

76. N.Y.—In re Narwood's Estate, 252 N.Y.S. 295, 141 Misc. 199—In re Graczyk's Will, 66 N.Y.S.2d 750—In re Freedman's Will, 35 N.Y.S. 2d 11, modified on other grounds In re Freedman's Estate, 41 N.Y.S.2d 152, 266 App Div. 746.

65 C.J. p 237 note 84.

### **Sell, mortgage, or lease**

Statute authorizing trustees to sell, mortgage, or lease realty for legatees was held distinct from statute authorizing trust to receive rents and profits limited to beneficiary's life.—In re Nimphius' Will, 247 N.Y.S. 841, 139 Misc. 133.

77. N.Y.—Troy, Iron, etc., Factory v. Corning, 45 Barb. 231.

65 C.J. p 238 note 85.

78. Wis.—McLennan v. Yelzer, 91 N.W. 682, 115 Wis. 304.

65 C.J. p 238 note 86.

79. N.Y.—In re Suffolk County Trust Co., 65 N.Y.S.2d 243—In re

Freedman's Will, 35 N.Y.S.2d 11, modified on other grounds In re Freedman's Estate, 41 N.Y.S.2d 152, 266 App Div. 746.

65 C.J. p 238 note 87.

80. N.Y.—In re Souren's Will, 99 N.Y.S.2d 908, 199 Misc. 583—In re Morris' Will, 97 N.Y.S.2d 710, 197 Misc. 322—In re Wolanski's Estate, 283 N.Y.S. 797, 157 Misc. 470—In re Nimphius' Will, 247 N.Y.S. 841, 139 Misc. 133—In re Freedman's Will, 35 N.Y.S.2d 11, modified on other grounds In re Freedman's Estate, 41 N.Y.S.2d 152, 266 App Div. 746.

65 C.J. p 238 note 88.

81. N.Y.—In re Morris' Will, 97 N.Y.S.2d 710, 197 Misc. 322—Nichols v. Nichols, 86 N.Y.S. 719, 42 Misc. 381.

82. N.Y.—Moore v. Hegeman, 72 N.Y. 376—Vernon v. Vernon, 53 N.Y. 351.

83. N.Y.—In re Suffolk County Trust Co., 65 N.Y.S.2d 243

84. N.Y.—Holly v. Hirsch, 32 N.E. 709, 135 N.Y. 590.

65 C.J. p 238 note 92.

85. N.Y.—Hagerty v. Hagerty, 9 Hun 175—Stanley v. Payne, 119 N.Y.S. 570, 65 Misc. 77.

86. N.Y.—Cutler v. Winberry, 166 N.Y.S. 627, 179 App Div. 221.

87. N.C.—Johnston v. Malcom, 59 N.C. 120.

88. Cal.—Canfield v. Security-First Nat. Bank of Los Angeles, 87 P.2d 830, 13 Cal.2d 1.

65 C.J. p 238 note 97.

### **Statutory right of creditors**

(1) Settlor cannot provide that beneficiary's creditors cannot reach rights of beneficiary in trust where statute permits creditors to reach rights of beneficiary in trust.—Brahmeyer v. Rollins, 179 A. 186, 87 N.H. 290.

(2) Interest of beneficiary in trust property is or is not subject to seizure according to statutory authorization, and settlor cannot relieve beneficiary's interest in property from seizure by beneficiary's creditors, if authorized by statute, by assertion that beneficiary's interest is exempt from such seizure.—Brahmeyer v. Rollins, supra.

89. U.S.—Corpus Juris cited in Dallas Nat. Bank v. U. S., C.C.A.5, 167 F.2d 468, 469—C. I. R. v. Porter, C.C.A.Tex., 148 F.2d 566—Mellon v. Driscoll, C.C.A.Pa., 117 F.2d 477, certiorari denied 61 S.Ct. 1100, 313 U.S. 579, 85 L.Ed. 1536—Splea v. U. S., D.C.Iowa, 84 F.Supp. 769, affirmed, C.A., 180 F.2d 336—U. S. v. Dallas Nat. Bank, D.C. Tex., 56 F.Supp. 181, reversed on other grounds 152 F.2d 582, conformed to 87 F.Supp. 573, reversed on other grounds 164 F.2d 489—Mutual Life Ins. Co. of New York v. Latimer, D.C.Cal., 23 F.Supp. 259—

the beneficiary, but out of consideration for the | right of the donor to control his bounty and dispose

King v. U. S., D.C. Mass., 12 F. Supp. 614, affirmed, C.C.A. 84 F.2d 156.  
Ark.—Vaughan v. Shirey, 208 S.W. 2d 441, 212 Ark. 935.  
Cal.—Canfield v. Security-First Nat. Bank of Los Angeles, 87 P.2d 830, 13 Cal.2d 1—In re Edwards' Estate, 17 P.2d 116, 217 Cal. 25—Alvis v. Bank of America Nat. Trust & Sav. Ass'n, 212 P.2d 608, 95 Cal.App.2d 118—In re De Lano's Estate, 145 P.2d 672, 62 Cal.App.2d 808—Coughran v. First Nat. Bank, 64 P.2d 1013, 19 Cal.App.2d 152.  
Conn.—Greenwich Trust Co. v. Tyson, 27 A.2d 166, 129 Conn. 211.  
Fla.—Waterbury v. Munn, 32 So.2d 603, 159 Fla. 754, 174 A.L.R.2d 620.  
Ill.—Geiger v. Geer, 69 N.E.2d 848, 395 Ill. 367—McKown v. Fridmore, 35 N.E.2d 376, 310 Ill.App. 634—Von Kessler v. Scully, 267 Ill.App. 495.  
Iowa.—Corpus Juris cited in In re Bucklin's Estate, 51 N.W.2d 412, 414, 248 Iowa 312—In re Tonic's Estates, 39 N.W.2d 401, 240 Iowa 1315—Roorda v. Roorda, 300 N.W. 294, 230 Iowa 1103—Standard Chemical Co. v. Weed, 285 N.W. 175, 226 Iowa 882.  
Kan.—In re Watts, 162 P.2d 82, 160 Kan. 377.  
Md.—Safe Deposit & Trust Co. of Baltimore v. Robertson, 55 A.2d 292, 192 Md. 653—Medwedoff v. Fisher, 17 A.2d 141, 179 Md. 192, 138 A.L.R. 1313.  
Mass.—State Street Trust Co. v. Kissel, 19 N.E.2d 25, 302 Mass. 328, 121 A.L.R. 796.  
Mich.—Wyzykowski v. City of Hamtramck, 37 N.W.2d 686, 324 Mich. 731.  
Minn.—In re Moulton's Estate, 46 N.W.2d 667, 233 Minn. 286, 24 A.L.R. 2d 1092—In re Lee's Estate, 9 N.W.2d 245, 214 Minn. 449.  
N.Y.—In re Knuss's Estate, 121 N.Y.S.2d 5, 204 Misc. 207—In re Caswell's Estate, 56 N.Y.S.2d 507, 185 Misc. 599, affirmed 56 N.Y.S.2d 407, 269 App. Div. 809—Application of Renn, 29 N.Y.S.2d 410, 177 Misc. 195—In re Senior's Estate, 14 N.Y.S.2d 121, 171 Misc. 90—In re Cramer's Estate, 3 N.Y.S.2d 75, 166 Misc. 713—Ebbets v. International Factors, 43 N.Y.S.2d 622.  
S.C.—Corpus Juris cited in Albergotti v. Summura, 26 S.E.2d 395, 398, 203 S.C. 137.  
Tenn.—Jones v. Jones, 206 S.W.2d 801, 185 Tenn. 586—State v. Caldwell, 178 S.W.2d 624, 181 Tenn. 74, 151 A.L.R. 1410—State v. Nashville Trust Co., 190 S.W.2d 755, 28 Tenn. App. 388—Davis v. Mitchell, 178 S.W.2d 889, 27 Tenn. App. 182.  
Vt.—Harlicker v. Clark, 55 A.2d 468, 115 Vt. 261—In re Manley's Estate, 24 A.2d 357, 112 Vt. 314—Hucstis v. Manley, 8 A.2d 644, 110 Vt. 413.

Wash.—Milner v. Outcalt, 219 P.2d 382, 36 Wash.2d 720.  
65 C.J. p. 239 note 99.  
Elements and requisites of spendthrift trusts see supra § 22.  
"Spendthrift trust" defined see supra § 21.  
**Corpus of estate**  
A valid spendthrift trust may be created as to the corpus as well as income of trust estate—Hitchens v. Safe Deposit & Trust Co. of Baltimore, 66 A.2d 93, 193 Md. 53—Medwedoff v. Fisher, 17 A.2d 141, 179 Md. 192, 138 A.L.R. 1313.  
**Gift**  
Spendthrift trust statute authorizing restraints on alienation of beneficial interests was designed for trusts in which a gift is involved—Tracey v. Franklin, 67 A.2d 56, 81 Del.Ch. 477, 11 A.L.R.2d 990.  
**Married woman**  
A spendthrift trust may be created for benefit of a married woman.—In re De Lano's Estate, 145 P.2d 672, 62 Cal.App.2d 808.  
**Property right**  
Right to create a spendthrift trust is a property right entitled to the full protection of the law.—In re Harrison's Estate, 185 A. 766, 322 Pa. 632.  
**Public policy**  
(1) Public policy is the determining factor whether restraint on alienation involved in a spendthrift trust is upheld by statute or judicial decision.—Mercantile Trust Co. v. Hoferbert, D.C.Md., 58 F.Supp. 701.  
(2) In determining validity of trust annuity which by its terms was not subject to seizure by annuitant's creditors, established legal principles would be followed unless persistent public policy demanded departure therefrom.—Brahmey v. Rollins, 179 A. 186, 87 N.H. 290.  
**Alienation or anticipation**  
(1) The intention of founder of a spendthrift trust, if it can be ascertained, and if it is not contrary to public policy or forbidden by law, must be regarded by the court as the measure by which validity of an attempted alienation or anticipation shall be determined.—Moore v. Moore, 44 A.2d 639, 137 N.J. Eq. 314.  
(2) In a spendthrift trust, validity of the restriction upon alienation or anticipation will not be judged by propriety of the purposes served by an attempted alienation or anticipation.—Moore v. Moore, supra.  
**In Missouri**  
(1) The rule of the text has been applied.—Mullin v. Trolinger, 179 S.W.2d 484, 237 Mo. App. 939—Brumbaugh v. Young, 144 S.W.2d 823, 235 Mo. App. 643—Gentemann v. Dyer, App. 140 S.W.2d 75.

(2) The Missouri statute declaring spendthrift trusts void as against the claims of any wife or children of cestui que trust for support and maintenance or as against claim of wife for alimony, applied to foreign decree for divorce and alimony—Howard v. Jennings, C.C.A. Mo., 146 F.2d 332.

#### In Pennsylvania

(1) The rule as stated in the text has been applied.  
Cal.—Kelly v. Kelly, 79 P.2d 1059, 11 Cal.2d 356, 119 A.L.R. 71, applying Pennsylvania law.  
Pa.—In re Borsch's Estate, 67 A.2d 119, 362 Pa. 581—Riverside Trust Co. v. Twitchell, 20 A.2d 768, 342 Pa. 558—C. I. T. Corp. v. Flint, 5 A.2d 126, 333 Pa. 350, 121 A.L.R. 1022—In re Harrison's Estate, 185 A. 766, 322 Pa. 632—In re Lafferly's Estate, 167 A. 44, 311 Pa. 455—Rehr v. Fidelity-Philadelphia Trust Co., 165 A. 380, 310 Pa. 301, 91 A.L.R. 99—Holmesburg Bldg. Ass'n v. Badger, 18 A.2d 529, 144 Pa. Super. 65—In re Toy's Estate, Orph., 33 Del. Co. 509.  
(2) A spendthrift trust is a favorite of the law, the donor having an individual right of property in the execution of the trust and the right to protect his beneficiaries from a presumed incapacity to manage the property; any attempt to vary the purposes of the trust or to divert principal or income to other than the declared purposes is to be steadfastly resisted, the primary consideration being the estate of the donor and the interests of the beneficiary being secondary.—In re Heyl's Estate, 50 Pa. Dist. & Co. 357, affirmed 40 A.2d 149, 156 Pa. Super. 277, affirmed 43 Pa. 352, 353 Pa. 407—65 C.J. p. 239 note 99 [d] (1), (2).

(3) As to claims for maintenance and support of deserted and neglected wives, not divorced, spendthrift trusts are invalid, and deserted wife may seize by attachment her husband's interest in a spendthrift trust, regardless whether the wife is a resident or a nonresident—Lippincott v. Lippincott, 37 A.2d 741, 349 Pa. 501—65 C.J. p. 239 note 99 [d] (3).

(4) Decree for support and maintenance may not, in some circumstances, be subject to limitation by spendthrift clause of instrument creating trust.—Kelly v. Kelly, 79 P.2d 1059, 11 Cal.2d 356, 119 A.L.R. 71, applying Pennsylvania law.

(5) The fact that a husband's motive in creating a trust was to deprive his wife of her distributive share of his estate is not, standing alone, such fraud as to render the trust void.—Buchner v. Buchner, 34 Pa. Dist. & Co. 597.

of his property in any manner he sees fit, provided it is not repugnant to law.<sup>90</sup> It has been held that a settlor is under no legal or moral obligation to the creditors of the beneficiary of a spendthrift trust,<sup>91</sup> and the creation of such a trust takes nothing from a creditor of the beneficiary to which he previously had the right to look for payment.<sup>92</sup> On the other

hand, the courts in at least one jurisdiction have refused to extend the doctrine of spendthrift trusts to trusts in which the trustee's duty to pay the beneficiary is absolute.<sup>93</sup>

A spendthrift trust for the benefit of the donor, during life, is invalid, both as to past and future creditors,<sup>94</sup> even though there is a provision for a

#### In Virginia

(1) The rule as stated in the text has been applied—*Alderman v. Virginia Trust Co.*, 25 S.E.2d 333, 181 Va. 497—65 C.J. p. 239 note 99 [e] (2).

(2) Spendthrift trusts are valid for purposes prescribed by and within specified pecuniary limitations of statute authorizing trusts on condition that corpus and income or either be applied to beneficiaries' support without being subject to their liabilities or alienation by them—*Alderman v. Virginia Trust Co.*, supra.

(3) A spendthrift trust, providing that beneficiary shall not transfer or anticipate his interest therein and that such interest shall not be subject to seizure by beneficiary's creditors, is permitted under statute without in specified pecuniary limits—*Blackwell v. Virginia Trust Co.*, 14 S.E.2d 301, 177 Va. 299.

(4) The statutory provision that estates up to value of \$100,000 may be held in trust on condition that corpus and income or either be applied to beneficiaries' support, without being subject to their liabilities or alienation by them, is remedial, not restrictive, and makes material change in state's public policy respecting spendthrift trusts, so as to permit entire income or corpus of estate to be held in trust for beneficiary's support without being subject to alienation by him or payment of his debts, whether or not such maximum amount is reasonably necessary or proper for beneficiary's support—*Alderman v. Virginia Trust Co.*, supra.

(5) The statute authorizing estates in trust on condition that corpus and income or either be applied to beneficiaries' support, without being subject to their liabilities or alienation by them, permits donor of estate to protect it from beneficiaries' spendthrift tendencies as to principal of trust as well as income therefrom—*Alderman v. Virginia Trust Co.*, supra.

(6) Under statute authorizing spendthrift trusts, and equitable fee-simple or absolute equitable estate may be given to a person, subject to any spendthrift trust for his benefit for life or lesser period, which would be good under such statute if remainder in trust property were given

to another—*Alderman v. Virginia Trust Co.*, supra—*Sheridan v. Krause*, 172 S.E. 508, 161 Va. 873, 91 A.L.R. 1067.

(7) Spendthrift trust is not invalid under statute because it provides trustee shall pay income to cestui for support and maintenance instead of providing it shall be "applied" by trustee to his support and maintenance—*Sheridan v. Krause*, supra.

(8) Public policy does not require that statute respecting spendthrift trusts shall be strictly construed to end that wherever possible provisions against alienation by and subjection to debts of cestui may be held void—*Sheridan v. Krause*, supra.

(9) Where, under discretionary protective testamentary trust, trustee holds property, free from cestui's debts and may apply income to his support and such other purposes for his benefit as trustee considers proper, such trust is valid to extent necessary to enable trustee to carry it out for support and maintenance of cestui, but invalid to any greater extent—*Sheridan v. Krause*, supra.

(10) Under former statutes it was held that spendthrift trusts could not be created—*Browning v. Blue Grass Hardware Co.*, 149 S.W.2d 497, 153 Va. 20—65 C.J. p. 239 note 99 [e] (1).

90. Conn.—*Greenwich Trust Co. v. Tyson*, 27 A.2d 166, 129 Conn. 211. Iowa—*In re Bucklin's Estate*, 51 N.W.2d 412, 243 Iowa 312.

Minn.—*In re Moulton's Estate*, 46 N.W.2d 667, 233 Minn. 286, 24 A.L.R. 2d 1092.

Mo.—*Mullin v. Trolinger*, 179 S.W.2d 484, 237 Mo.App. 339—*Brunihaug v. Young*, 144 S.W.2d 823, 235 Mo.App. 643.

N.C.—*Corpus Juris cited in* *Chinnis v. Cobb*, 185 S.E. 638, 640, 210 N.C. 104.

Pa.—*In re Borsch's Estate*, 67 A.2d 119, 362 Pa. 581—*Riverside Trust Co. v. Twitchell*, 20 A.2d 768, 342 Pa. 558.

S.C.—*Corpus Juris cited in* *Alberghetti v. Summers*, 26 S.E.2d 395, 398, 203 S.C. 137.

Tenn.—*State ex rel. v. Nashville Trust Co.*, 190 S.W.2d 785, 28 Tenn.App. 388.

Vt.—*Huestis v. Manley*, 8 A.2d 644, 110 Vt. 413.

Va.—*Alderman v. Virginia Trust Co.*, 25 S.E.2d 333, 181 Va. 497.

Wash.—*Milner v. Outcall*, 219 P.2d 982, 36 Wash.2d 720, 65 C.J. p. 239 note 1.

91. S.C.—*Alberghetti v. Summers*, 26 S.E.2d 395, 203 S.C. 137.

92. S.C.—*Alberghetti v. Summers*, supra.

93. N.H.—*Brahmev v. Rollins*, 179 A. 186, 194, 87 N.H. 290.

"The policy of protecting a spendthrift at the expense of his creditors is exceptional to the policy yet prevailing in the unwritten law that ability to pay debts requires payment. . . . A spendthrift, being one, will spend his income as he receives it. His unrestricted selection of his creditors whom he will pay seems almost a scorn of the law instead of a salutary guard. As has been said, protection and immunity from debts are not the same. One's welfare may be looked out for, but one's property may not be stamped as sealed against creditors. It is one thing to provide for another's needs and comforts, it is another to smooth the ways of improvidence."—*Brahmev v. Rollins*, supra.

94. U.S.—*Corpus Juris cited in* *Hughes v. Commissioner of Internal Revenue*, C.C.A.9, 104 F.2d 144, 148.

Cal.—*Nelson v. California Trust Co.*, 202 P.2d 1021, 33 Cal.2d 501—*Spring Street Corp. v. Walsh*, O'Connor & Barneson, App. 101 P.2d 783—*Coughran v. First Nat. Bank*, 64 P.2d 1013, 19 Cal.App.2d 152.

Conn.—*Greenwich Trust Co. v. Tyson*, 27 A.2d 166, 129 Conn. 211.

D.C.—*Liberty Nat. Bank v. Hicks*, 173 F.2d 631, 84 U.S.App.D.C. 198, 9 A.L.R.2d 1355.

N.J.—*Pennsylvania Co. for Insurance on Lives and Granting Annuities v. Kelly*, 34 A.2d 538, 134 N.J.Eq. 120, applying Pennsylvania law.

Pa.—*I T Corp. v. Flint*, 5 A.2d 126, 333 Pa. 350, 121 A.L.R. 1022—*Commonwealth ex rel. Stevenson v. Stevenson*, Com.Pl., 40 Del.Co. 51—*In re Carson's Trust Estate*, Com.Pl., 31 Del.Co. 311.

Tenn.—*McArthur v. Faw*, 193 S.W.2d 763, 183 Tenn. 504, certiorari denied 67 S.Ct. 201, 329 U.S. 780, 91 L.Ed. 669—*Rose v. Third Nat. Bank*, 183 S.W.2d 1, 27 Tenn.App. 563.

65 C.J. p. 240 note 2.

contingent remainder in a third person,<sup>95</sup> which rule applies to trusts created by women in contemplation of marriage<sup>96</sup> or settlement of property after marriage.<sup>97</sup> The rule cannot be evaded by giving trustees unlimited discretion as to the use of property.<sup>98</sup> A spendthrift trust created for the benefit of the donor, however, is not invalid or revocable as far as the settlor is concerned,<sup>99</sup> but it has been held to be ineffective against his right to alienate his beneficial interest thereunder.<sup>1</sup>

## § 27. — Trusts with Unauthorized Purpose Taking Effect as Powers

Under some statutes where a trust is created for an unlawful purpose it may be valid as a power in trust if it directs or authorizes the performance of any act which may be lawfully performed under a power.

Under some statutes where a trust is created for a purpose not authorized by statute and is consequently void as such, it shall nevertheless be valid as a power in trust, if it directs or authorizes the performance of any act which may be lawfully performed under a power.<sup>2</sup> Under these statutory provisions many trusts, invalid as such, have been upheld as valid powers in trust,<sup>3</sup> as for example, trusts to sell<sup>4</sup> or to convey<sup>5</sup> realty, or trusts to maintain a residence,<sup>6</sup> or a trust for the use of infant children,<sup>7</sup> or trusts to hold realty for the benefit of

a corporation to be used for religious and charitable purposes, the term of the trust to be measured by the lives of persons having no interest in the performance of the trust.<sup>8</sup> The purposes of a power in trust are unlimited,<sup>9</sup> except that they must be lawful purposes.<sup>10</sup> The statute is not applicable where the instrument confers no power on the trustee to do any act in connection with the property.<sup>11</sup> It is indispensable to the creation of a power in trust that the authority to perform the required act should be rightfully delegated to the trustee by the person having authority to dispose of the estate, or some interest therein, in the manner directed by the power.<sup>12</sup> Where the trust is to be executed by the grantee for his own benefit, it cannot be valid as a power in trust.<sup>13</sup>

## § 28. Consideration

The necessity of a valuable consideration to support a trust depends on whether the trust is executed or executory.

A trust may be with or without consideration.<sup>14</sup> The necessity of a valuable consideration to support a trust depends on whether the trust is executed or executory, it being the rule that equity will no more enforce a voluntary executory agreement to create or establish a trust, when made without consideration,<sup>15</sup> than it will perfect a defective gift, as dis-

### Person in prison

The fact that it is against public policy for a man at large to tie up his property for himself by a spendthrift trust, presents no valid reason for holding that a man in prison might not, consistent with sound public policy, create a spendthrift trust for himself during the period of his imprisonment.—Booth v. Chadwick, Tex.Civ.App., 184 S.W.2d 268, error refused.

### Fraudulent conveyance

A spendthrift provision contained in trust may be invalid even though creation of such trust may not constitute a fraudulent conveyance.—Murphy v. C. I. T. Corp., 33 A.2d 16, 347 Pa. 691.

### Solvency

A spendthrift provision cannot be inserted in a trust for benefit of grantor himself, even if he is solvent at time of its creation.—Murphy v. C. I. T. Corp., supra.

### Partial invalidity

Spendthrift trusts in favor of settlor providing that unexpended principal should revert to settlor on certain date if alive, and in event of his prior death that 75 per cent should go to remaindermen and 25 per cent should be payable in accordance with settlor's will, were, as against settlor's creditors, void as to income,

and as to the 25 per cent payable in accordance with settlor's will.—Liberty Storage & Warehouse Co. v. Van Wyck, 1 N.Y.S.2d 149, 165 Misc. 890.

96. Mo.—Jamison v. Mississippi Valley Trust Co., 207 S.W. 788.

Pa.—Murphy v. C. I. T. Corp., 33 A.2d 16, 347 Pa. 691.

96. Md.—Brown v. Macgill, 39 A. 613, 87 Md. 161, 67 Am.S.R. 331, 39 L.R. A. 806.

97. Mass.—Pacific Nat. Bank v. Windram, 133 Mass. 175.

98. Pa.—Hay v. Price, 15 Pa.Dist. 144.

99. D.C.—Liberty Nat. Bank v. Hicks, 173 F.2d 631, 84 U.S.App.D.C. 198, 9 A.L.R.2d 1355.

Pa.—King v. York Trust Co. of York, 123 A.2d 237, 278 Pa. 141.

1. Tenn.—Rose v. Third Nat. Bank, 183 S.W.2d 1, 27 Tenn.App. 553.

2. N.Y.—St. Andrew's Protestant Episcopal Church of Astoria v. Crisfield Homes, Inc., 11 N.Y.S.2d 16.

65 C.J. p 240 note 10.

Purposes for which powers may be created see Powers § 2.

3. N.Y.—St. Andrew's Protestant Episcopal Church of Astoria v. Crisfield Homes, Inc., supra.

4. N.Y.—St. Andrew's Protestant

Episcopal Church of Astoria v. Crisfield Homes, Inc., supra.

65 C.J. p 240 note 12.

8. Okl.—Hill v. Hill, 153 P. 1185, 54 Okl. 441.

65 C.J. p 240 note 18.

9. N.Y.—McGuire v. McGuire, 193 N.Y.S. 772, 201 App.Div. 71.

7. N.Y.—Sterricker v. Dickinson, 9 Barb. 516.

8. N.Y.—Downing v. Marshall, 23 N.Y. 350, 80 Am.D. 290, 23 How Fr. 4, 4 Abb Dec. 662.

9. N.Y.—Kondolf v. Britton, 145 N.Y.S. 791, 160 App.Div. 381.

10. N.Y.—Murray v. Miller, 70 N.E. 870, 178 N.Y. 316.

65 C.J. p 240 note 18.

11. S.D.—Murphy v. Cook, 75 N.W. 387, 11 S.D. 47.

12. N.Y.—Selden v. Vermilya, 3 N.Y. 525.

13. N.Y.—Coster v. Lorillard, 14 Wend. 265.

14. Iowa.—Trustees of Iowa College v. Baillie, 17 N.W.2d 143, 236 Iowa 236—Iaulman v. Haulman, 146 N.W. 930, 164 Iowa 471.

15. U.S.—Cullen v. Chappell, C.C.A. Conn., 116 F.2d 1017—Brainard v. C. I. R., C.C.A.7, 91 F.2d 880, certiorari dismissed 58 S.Ct. 748, 303 U.S. 665, 82 L.Ed. 1122—Morseman

cussed in Gifts § 34. On the other hand, where there is a completely executed voluntary contract to establish a trust and nothing further remains to be done by the grantor to transfer the title, the relation of trustee and cestui que trust is established and the equitable rights growing out of such conveyance in trust, although made without consideration, will be recognized and enforced,<sup>16</sup> since it is considered as an executed gift, needing no consideration.<sup>17</sup> Ordinarily, an incomplete voluntary trust, resting in fieri, will not be enforced in equity;<sup>18</sup> but under some circumstances equity will enforce an incomplete trust, not supported by valuable consideration, by virtue of a meritorious

consideration.<sup>19</sup> This doctrine has been declared to be limited to trusts partially carried into effect by a deceased parent, in behalf of a child or children,<sup>20</sup> and it must plainly appear that the trust was created for the single and well defined purpose of the parent to execute the natural parental duty to support and maintain his child or children,<sup>21</sup> which cannot be defeated without obvious injustice.<sup>22</sup> If there is a valuable and sufficient consideration, equity will enforce the trust regardless of whether it is executed or executory.<sup>23</sup>

*Matters held to constitute sufficient consideration.* Among other instances<sup>24</sup> which have been held to

v. C. I. R., C.C.A. 8, 90 F.2d 18, 113 A.L.R. 441, certiorari denied *Morgan v. Helvering*, 58 S.Ct. 20, 302 U.S. 701, 82 L.Ed. 542.

Me.—*Strout v. Burgess*, 88 A.2d 241, 144 Me. 263, 12 A.L.R.2d 939.

N.J.—*Carberry v. Carberry*, 43 A.2d 215, 137 N.J.Eq. 9—*Hanstein v. Kelly*, 24 A.2d 386, 131 N.J.Eq. 132.

Okl.—*Corpus Juris cited in Burns v. Bastien*, 50 P.2d 877, 384, 174 Okl. 40.

Tenn.—*Corpus Juris cited in Pearson v. McCallum*, 173 S.W.2d 150, 156, 26 Tenn.App. 413.

Tex.—*Confield v. Sorrells*, Civ.App. 183 S.W.2d 223, affirmed 187 S.W.2d 980, 144 Tex. 81—*Nettles v. Doss*, Civ.App., 161 S.W.2d 138, error refused—*Lohban v. Wierhauser*, Civ.App., 141 S.W.2d 364, error refused—*Corpus Juris cited in Stanley v. Stanley*, Civ.App., 139 S.W.2d 876, 880.

65 C.J. p. 240 note 23.

*Matters held not to constitute consideration*

(1) Agreement not to resist foreclosure made by one helpless to prevent foreclosure—*Garcia v. Garcia De Ortiz*, Tex.Civ.App., 257 S.W.2d 804.

(2) Consent to purchase of stock by person having legal right to make purchase—*Perkins v. Meyer*, 96 N.E.2d 744, 302 N.Y. 133, reargument denied 98 N.E.2d 492, 302 N.Y. 703.

(3) Promise not to prosecute claim which had no foundation in law or fact.—*Dyckus v. Rogers*, 181 P.2d 253, 198 Okl. 632.

(4) Services performed in clearing title to realty where services were no part of purchase price—*Lohban v. Wierhauser*, Tex.Civ.App., 141 S.W.2d 384, error refused.

*Inadequacy of price*

Generally, mere inadequacy of price will not be considered as sufficient to have a deed declared the basis of a trust, although gross insufficiency of price is always considered as an evidentiary fact.—*David-*

*son v. Iwanowski*, 93 N.E.2d 139, 341 Ill.App. 152.

16. U.S.—*Cullen v. Chappell*, C.C.A. Conn., 116 F.2d 1017—*Brainard v. C. I. R.*, C.C.A. 7, 91 F.2d 880, certiorari dismissed 58 S.Ct. 748, 303 U.S. 665, 82 L.Ed. 1123—*In re Pilot Radio & Tube Corporation*, C.C.A. Mass., 72 F.2d 316, certiorari denied *Reichardt v. Ball*, 55 S.Ct. 98, 293 U.S. 584, 79 L.Ed. 680.

Ark.—*Hughes v. Coffey*, 263 S.W.2d 589.

Cal.—*Mahony v. Crocker*, 136 P.2d 810, 58 Cal.App.2d 196—*Hamilton v. Junction City Mining Co.*, 136 P.2d 591, 58 Cal.App.2d 221.

Del.—*Bodley v. Jones*, 32 A.2d 436, 27 Del.Ch. 273—*Delaware Trust Co. v. Fitzmaurice*, 31 A.2d 332, 27 Del.Ch. 101, modified on other grounds *Crumlish v. Delaware Trust Co.*, 38 A.2d 463, 27 Del.Ch. 374.

Ill.—*Wynekoop v. Wynekoop*, 95 N.E.2d 457, 407 Ill. 219—*Reighley v. Continental Ill. Nat. Bank & Trust Co. of Chicago*, 61 N.E.2d 29, 390 Ill. 242—*Meyer v. Pfahler*, 199 N.E. 801, 362 Ill. 336.

Ind.—*Crawfordsville Trust Co. v. Elston Bank & Trust Co.*, 25 N.E.2d 626, 216 Ind. 596.

Ky.—*Mills v. Mills*, 87 S.W.2d 389, 261 Ky. 190—*DeLeun's Ex'r v. DeLeun*, 74 S.W.2d 474, 256 Ky. 406.

N.J.—*Pieddilly Union Trust Co. v. Parfner*, 37 A.2d 675, 135 N.J.Eq. 137—*Eagles Building & Loan Ass'n v. Fiducia*, 37 A.2d 116, 135 N.J.Eq. 7, affirmed 40 A.2d 627, 136 N.J.Eq. 117—*Hanstein v. Kelly*, 24 A.2d 386, 131 N.J.Eq. 132.

N.Y.—*Hutchison v. Ross*, 187 N.E. 65, 262 N.Y. 381, 89 A.L.R. 1007, reargument denied 188 N.E. 102, 262 N.Y. 643, 89 A.L.R. 1023—*Diamond v. Berman*, 60 N.Y.S.2d 339, affirmed 61 N.Y.S.2d 881, 270 App.Div. 841.

N.C.—*Hare v. Well*, 196 S.E. 869, 213 N.C. 484—*Wilmington Furniture Co. v. Cole*, 178 S.E. 579, 207 N.C. 840, 847.

N.D.—*Hagerott v. Davis*, 17 N.W.2d 15, 73 N.D. 532.

Okl.—*Burns v. Bastien*, 50 P.2d 877, 174 Okl. 40.

Tenn.—*American Bank & Trust Co. v. Lebanon Bank & Trust Co.*, 193 S.W.2d 245, 28 Tenn.App. 618—*Corpus Juris cited in Pearson v. McCallum*, 173 S.W.2d 150, 156, 26 Tenn.App. 413.

Vt.—*Smith v. Deshaw*, 78 A.2d 479, 116 Vt. 441—*Warner v. Burlington Federal Sav. & Loan Ass'n*, 49 A.2d 93, 114 Vt. 463, 168 A.L.R. 1265.

Wash.—*In re Swartwood's Estate*, 89 P.2d 203, 198 Wash. 557.

W.Va.—*Dye v. Dye*, 39 S.E.2d 98, 128 W.Va. 754.

65 C.J. p. 241 note 25.

17. Ill.—*Meyer v. Pfahler*, 199 N.E. 801, 362 Ill. 336.

Ky.—*Lane v. Taylor*, 152 S.W.2d 271, 287 Ky. 116—*Underhill v. U. S. Trust Co.*, 13 S.W.2d 502, 227 Ky. 444.

18. N.J.—*Carberry v. Carberry*, 43 A.2d 215, 137 N.J.Eq. 9—*Landon v. Hutton*, 25 A. 953, 50 N.J.Eq. 500.

Tenn.—*Pearson v. McCallum*, 173 S.W.2d 150, 26 Tenn.App. 413.

19. N.J.—*Landon v. Hutton*, 25 A. 953, 50 N.J.Eq. 500.

20. N.J.—*Landon v. Hutton*, supra.

21. N.J.—*Landon v. Hutton*, supra.

22. N.J.—*Landon v. Hutton*, supra.

23. Me.—*Strout v. Burgess*, 88 A.2d 241, 144 Me. 263, 12 A.L.R.2d 939.

65 C.J. p. 213 note 32.

24. U.S.—*Watts v. Holland*, C.C.A. Cal., 153 F.2d 337.

Cal.—*California Bank v. Bell*, 101 P.2d 724, 38 Cal.App.2d 533.

Ill.—*Reighley v. Continental Ill. Nat. Bank & Trust Co. of Chicago*, 61 N.E.2d 29, 390 Ill. 242—*Meyer v. Pfahler*, 199 N.E. 801, 362 Ill. 336—*In re Wheeler's Estate*, 1 N.E.2d 425, 284 Ill.App. 132.

Ind.—*Van Orman v. Van Orman*, 41 N.E.2d 693, 112 Ind.App. 394.

Iowa.—*Dunlop v. Hammingway*, 63 N.W.2d 901.

Minn.—*In re Edgar's Trust*, 274 N.W. 226, 200 Minn. 340.



constitute a sufficient consideration are payment of the purchase price;<sup>25</sup> prior interest in the land;<sup>26</sup> legal obligation to repay all or a part of the purchase price;<sup>27</sup> the personal convenience of the settlor;<sup>28</sup> covenant to care for and maintain the grantor in suitable condition during his natural life;<sup>29</sup> agreement to pay income to settlor;<sup>30</sup> agreement of heirs at law to have the executor carry out the provisions of an invalid will;<sup>31</sup> abandonment of heir's privilege to contest will;<sup>32</sup> agreement of wife to support herself and children;<sup>33</sup> a conveyance of land in trust made by one heir in recognition of the interest of other heirs;<sup>34</sup> agreement to pay one half of a mortgage note for money borrowed on land for a one-half interest in the land;<sup>35</sup> rights growing out of prior agreements;<sup>36</sup> the condonation of a wife's adultery and the resumption of marital relations;<sup>37</sup> renunciations of rights under a separation agreement and a resumption of marital relations;<sup>38</sup> wife's settlement of cause of action for separate maintenance;<sup>39</sup> abandonment of a will contest by

one heir, and surrender by another heir of lots devised him;<sup>40</sup> and the trustee's acceptance of service as trustee and performance of prescribed duties.<sup>41</sup> A trust agreement based on a false premise, which is quite contrary to fact, is without a sufficient consideration to support it.<sup>42</sup>

**Illegal consideration.** Although consideration for the creation of a trust is illegal, the trust is enforceable if the beneficiary is not a party to the illegality.<sup>43</sup>

**Deed of trust under seal.** A deed of trust under seal imports a consideration,<sup>44</sup> but the fact that an instrument agreeing to create a trust in the future is under seal does not prevent the court from ascertaining whether it was actually made on sufficient consideration.<sup>45</sup>

**Time of payment of consideration.** The consideration need not be paid at the time of execution in order to create an express trust.<sup>46</sup>

Neb.—Simon v. Simon, 5 N.W.2d 140, 141 Neb 338.

N.C.—Cannon v. Blair, 50 S.E.2d 732, 229 N.C. 606; Embler v. Embler, 32 S.E.2d 619, 224 N.C. 811.

Ohio.—Alward v. Mahore, 3 N.E.2d 547, 62 Ohio App. 129.

S.C.—Leprande v. Leprande, 182 S.E. 432, 178 S.C. 230, 102 A.L.R. 582.

Tex.—W. T. Knealeigh Co. v. Cowan, Civ. App., 152 S.W.2d 796; Baker v. Griffith, Civ. App., 79 S.W.2d 626, reversed on other grounds, Griffith v. Baker, 107 S.W.2d 371, 130 Tex. 17. Wash.—State ex rel. Hamilton v. Thomas, 30 P.2d 373, 176 Wash. 544.

65 C.J. p. 242 note 32.

25. Tex.—Colfield v. Sorrells, Civ. App., 183 S.W.2d 223, affirmed 187 S.W.2d 980, 144 Tex. 31; Lohlin v. Wierhauser, Civ. App., 141 S.W.2d 381, error refused.

26. Tex.—Colfield v. Sorrells, Civ. App., 183 S.W.2d 223, affirmed 187 S.W.2d 980, 144 Tex. 31; Lohlin v. Wierhauser, Civ. App., 141 S.W.2d 381, error refused.

27. Tex.—Colfield v. Sorrells, Civ. App., 183 S.W.2d 223, affirmed 187 S.W.2d 980, 144 Tex. 31; Lohlin v. Wierhauser, Civ. App., 141 S.W.2d 381, error refused.

28. N.Y.—Townsend v. Allen, 13 N.Y.S. 73, 59 Hun 622, affirmed 27 N.E. 853, 126 N.Y. 616.

29. Ariz.—Pass v. Stephens, 198 P. 712, 22 Ariz. 461.

**Held not inequitable**

(1) Where trustor, aged 85, conveyed property to trustee in consideration of monthly payments from ben-

eficiary for life and provided for conveyance of property to beneficiary upon trustor's death, fact that trustor died shortly after the agreement was made, so that actual obligations of the beneficiary were slight, did not render transaction inequitable.—Ballard v. MacCallum, 101 P.2d 692, 15 Cal.2d 439.

(2) Where trust agreement provided for payment of certain charges and payments to trustor by beneficiary and that, in case of default for 10 days or 30 days after notice in writing, trustor at his option could cancel trust, beneficiary's claim to rights in trust estate was not rendered inequitable by failure to make required payments, since he was still obligated to pay at decedent's death and remedy of forfeiture after notice was available if he refused.—Ballard v. MacCallum, supra.

30. Ky.—Hindin's Committee v. Shelman, 63 S.W.2d 923, 215 Ky. 608.

65 C.J. p. 242 note 36.

31. Mass.—Colburn v. Hodgdon, 125 N.E. 107, 241 Mass. 183.

32. Tex.—Lester v. Bouche, Civ. App., 5 S.W.2d 831, affirmed in part and reversed in part on other grounds, Com. App., 14 S.W.2d 808.

33. Va.—Fraser v. Stokes, 71 S.E. 545, 112 Va. 335.

34. Ind.—Fraser v. Churchman, 86 N.E. 1029, 43 Ind. App. 200.

35. Tex.—Watkins v. Watkins, Civ. App., 141 S.W. 1017.

36. Ind.—Nills v. Thomas, 144 N.E. 412, 194 Ind. 648.

65 C.J. p. 242 note 42.

37. Mich.—Duffy v. White, 73 N.W. 363, 115 Mich. 264.

38. N.Y.—Griffin v. Griffin, 137 N.Y.S. 3, 77 Misc. 468, affirmed 141 N.Y.S. 1121, 157 App. Div. 888.

39. N.J.—Second Nat. Bank v. Curie, 172 A. 560, 116 N.J. Eq. 101.

40. Iowa.—De Roussee v. Williams, 164 N.W. 896, 191 Iowa 379.

41. Mo.—McGuire v. Hutchinson, 210 S.W.2d 521, 240 Mo. App. 504.

42. Kan.—Quinton v. Kendall, 253 P. 600, 122 Kan. 814.

65 C.J. p. 242 note 46.

43. N.Y.—Thompson v. Finholm, 77 N.Y.S.2d 718, affirmed, 85 N.Y.S.2d 314, 274 App. Div. 992.

44. N.J.—Hackensack Trust Co. v. Ackerman, 47 A.2d 832, 138 N.J. Eq. 244.

65 C.J. p. 242 note 47.

45. N.Y.—Central Trust Co. of New York v. Gaffney, 142 N.Y.S. 902, 157 App. Div. 501, affirmed 109 N.E. 1069, 315 N.Y. 740.

46. Tex.—Graves v. Graves, Civ. App., 232 S.W. 513.

**Rule not applicable**

The rule that resulting trust in land may not be created, unless payment of money to purchaser thereof is made before or concurrently with acquisition of property, is inapplicable to express trust in land, for interest in which others than trustee obligate themselves, before or concurrently with acquisition of title to pay part of consideration, which is paid after taking of title in trustee's name.—Nettles v. First Nat. Bank of Temple, Tex. Civ. App., 168 S.W.2d 920, error refused.

*To whom consideration must pass.* It is not necessary to the validity of a trust that it be based on a consideration passing to the trustee.<sup>47</sup>

*From whom derived.* It is immaterial from whom the consideration is derived to support an express trust,<sup>48</sup> consequently the consideration need not be furnished by the beneficiary.<sup>49</sup> It has been held that if the consideration is the property of a minor, a person in loco parentis to such minor has no authority to impress on the property an express trust.<sup>50</sup>

*Trust on condition.* A declaration of trust dependent on conditions precedent which are not fulfilled is not enforceable, since there is a failure of consideration.<sup>51</sup> A trust made on condition of

the surrender of a promissory note of the grantor has been held to be supported by the same consideration as the note.<sup>52</sup>

## § 29. Time of Vesting

Subject to the rule against perpetuities, ordinarily it is no objection to the creation and validity of a trust that the enjoyment of the beneficiary's interest is postponed.

Subject to the rule against perpetuities, which is applicable to trusts, as discussed in Perpetuities §§ 20-34, and the rule that a trust must arise at the time it is attempted to be created, instead of being brought forth by subsequent and independent circumstances,<sup>53</sup> it is no objection to the creation and validity of a trust that the enjoyment of the ben-

47. Iowa.—Schumacher v. Dolan, 134 N.W. 624, 154 Iowa 207.

48. Va.—Fleenor v. Hensley, 93 S.E. 582, 121 Va. 367.

49. Mo.—Ketcham v. Miller, 37 S.W.2d 635.

Va.—Fleenor v. Hensley, 93 S.E. 582, 121 Va. 367.

50. N.C.—Randle v. Grady, 45 S.E.2d 35, 222 N.C. 159.

51. Idaho.—Olympia Min. & Mill. Co. v. Kerns, 135 P. 255, 24 Idaho 481, appeal dismissed 35 S.Ct. 415, 236 U.S. 211, 59 L.Ed. 542, 65 C.J. p. 242 note 53.

52. Iowa.—In re Leigh's Estate, 173 N.W. 143, 186 Iowa 931.

53. U.S.—Buhl v. Kavanagh, C.C.A. Mich., 118 F.2d 315—U. S. v. Dickerson, D.C. Mo., 101 F.Supp. 262—Lewis v. Jackson & Squire, D.C. Ark., 86 F.Supp. 354, appeal dismissed, C.A., 181 F.2d 1011, Lewis v. Midwest Min. Co., 181 F.2d 1011, and Lewis v. P. S. Noeley Co., 181 F.2d 1011.

Cal.—Oakland Scavenger Co. v. Gaudin, 124 P.2d 143, 51 Cal.App.2d 69—In re Albert's Estate, 100 P.2d 538, 38 Cal.App.2d 42.

Del.—Bodley v. Jones, 82 A.2d 436, 27 Del.Ch. 273.

Ky.—Ridley v. Shepard, 168 S.W.2d 550, 293 Ky. 91.

Mass.—Harpel v. Craig, 97 N.E.2d 741, 327 Mass. 239.

Mo.—Odum v. Langston, 195 S.W.2d 466, 355 Mo. 115—Loehr v. Glaser, 133 S.W.2d 394.

N.M.—McClendon v. Dean, 117 P.2d 250, 45 N.M. 496.

N.Y.—U. S. Trust Co. of New York v. Preston, 34 N.Y.S.2d 646, 264 App.Div. 152—Rubinstein v. Jamaica Nat. Bank of New York, 40 N.Y.S.2d 238, affirmed 44 N.Y.S.2d 950, 286 App.Div. 977, affirmed 61 N.E.2d 455, 294 N.Y. 737, motion granted 63 N.E.2d 394, 294 N.Y. 843.

ND.—Johnson v. Weldy, 54 N.W.2d 829.

Or.—Claude v. Claude, 228 P.2d 776, 191 Or. 308, rehearing denied 230 P.2d 211, 191 Or. 308.

Pa.—In re Williams' Estate, 37 A.2d 584, 349 Pa. 568—Thompson v. Fitzgerald, 22 A.2d 658, 344 Pa. 90—In re Wallace's Estate, 174 A. 397, 315 Pa. 148—In re Kenin's Estate, 41 Pa.Dist. & Co. 572, affirmed in re Kenin's Trust Estate, 23 A.2d 537, 343 Pa. 549, and affirmed 23 A.2d 846, 343 Pa. 567—In re McKean's Trust, Orph., 1 Fidelity 26.

Tex.—Fleck v. Baldwin, 173 S.W.2d 975, 141 Tex. 340—Patrick v. McGaha, Civ.App., 164 S.W.2d 236—Elbert v. Waples-Platter Co., Civ. App., 156 S.W.2d 146, error refused Vt.—Smith v. Deshaw, 78 A.2d 479, 116 Vt. 441, 65 C.J. p. 243 note 57.

### Trust in life policies

Beneficiaries of trust in life policies claiming trust became effective on death of insured could not claim trust agreement was executory, since agreement could become effective on insured's death only if executed during insured's lifetime.—Love v. First Nat. Bank, 153 So. 189, 228 Ala. 268.

### Melation back

Where mother conveyed realty to son and took his oral promise to hold it in trust for purposes written down two years later in memorandum of agreement between son and beneficiary of trust, the trust was created when realty was first conveyed.—Davis v. U. S., D.C.N.Y., 27 F.Supp. 698.

### Trust held not shown

(1) Under trust agreement whereby taxpayer agreed to hold securities as trustee for immediate benefit of himself, and whereby securities were ultimately to be divided among taxpayer's "heirs" if taxpayer left no surviving widow or issue, no valid present trust arose for benefit of

"heirs"—Morsman v. C. I. R., C.C.A. 8, 90 F.2d 18, 113 A.L.R. 441, certiorari denied Morsman v. Helvering, 58 S.Ct. 20, 302 U.S. 701, 82 L.Ed. 542.

(2) Under trust agreement whereby bachelor agreed to hold securities as trustee for immediate benefit of himself, and whereby securities would ultimately pass to bachelor's widow, if any, on failure of issue, no trust arose for benefit of widow.—Morsman v. C. I. R., C.C.A. 8, 90 F.2d 18, 113 A.L.R. 441, certiorari denied Morsman v. Helvering, 58 S.Ct. 20, 302 U.S. 701, 82 L.Ed. 542.

(3) Under trust agreement whereby bachelor agreed to hold securities as trustee for immediate benefit of himself, and whereby securities were ultimately to be held by successor trustee for benefit of bachelor's issue, if any, for certain period, and then to be divided among issue, if any, no express trust arose on behalf of issue.—Morsman v. C. I. R., C.C.A. 8, 90 F.2d 18, 113 A.L.R. 441, certiorari denied Morsman v. Helvering, 58 S.Ct. 20, 302 U.S. 701, 82 L.Ed. 542.

### Declarations held insufficient

Declarations in letter from stepmother, who was executrix of will of plaintiff's father, that father had left certain sum in trust with stepmother, and that she would do as he wanted, indicated only stepmother's belief that it was desire of father of plaintiff to create a trust taking effect after his death, but the desire, being testamentary in character, could only be made effective by provision therefor in a properly executed will, in absence of which, no trust was created. Such declaration by stepmother was not, under all the circumstances, such a clear and unequivocal indication by stepmother absolutely to relinquish her beneficial interest in the fund in present as would result in the creation of a trust in personality.—Fritz v. Thompson, Cal.App., 271 P.2d 205.

eficiary's interest is postponed,<sup>54</sup> provided the legal title passes to the trustee, as considered supra § 22, and a present interest vests.<sup>55</sup> The fact that the enjoyment of the estate is postponed to a future date does not negative the idea that a present interest is created,<sup>56</sup> and the fact that a trust cannot be administered and settled until after the death of the settlor does not invalidate the trust.<sup>57</sup> Where the settlor reserves a life interest, the receipt of dividends or use of the trust property is not inconsistent with an intention to create a present trust.<sup>58</sup> The rule applicable to constructive trusts, as discussed infra § 139, and resulting trusts, infra § 102, that the trust arises, if at all, at the time title passes, does not apply to express trusts.<sup>59</sup>

**Vesting in possession.** It is competent for the settlor to make his death the event on the happening of which the estate in interest, previously vested in present but to be enjoyed in futuro, is to come into possession,<sup>60</sup> and such a trust does not circumvent the statute of wills.<sup>61</sup>

**Trusts for benefit of future subscribers.** Where titles are held by trustees under articles of agreement for the benefit of subscribers under the articles, the trust does not take effect until there are subscribers.<sup>62</sup>

### § 30. Statutory Provisions in General

Where there are statutes regulating trusts, a trust, in order to be valid, must be created in accordance with their provisions; but the validity of a trust created before the passage of a statute regulating or prohibiting trusts of that class is not affected thereby, since such statutes are prospective and not retrospective in operation.

A statutory prohibition of some kind is necessary to render invalid any trust which would otherwise be valid at common law.<sup>63</sup> Where there are statutes regulating trusts, a trust, in order to be valid, must be created in accordance with their provisions;<sup>64</sup> but the validity of a trust created before the passage of a statute regulating or prohibiting trusts of that class is not affected thereby, since such statutes are prospective and not retrospective in operation.<sup>65</sup>

54. U.S.—*Morsman v C I R*, C.C. A.8, 90 F.2d 18, 113 A.L.R. 441, certiorari denied *Morsman v. Holvering*, 58 S.Ct. 20, 302 U.S. 701, 82 L.Ed. 542.

Cal.—*Randall v. Bank of America N. T. & S. A.*, 119 P.2d 754, 48 Cal.App. 2d 249.

Kan.—*Fry v. McCormick*, 228 P.2d 727, 170 Kan. 741.

Mo.—*Idle v. Union Nat. Bank of Springfield*, App. 156 S.W.2d 941, opinion quashed on other grounds State ex rel. Union Nat. Bank of Springfield v. Blair, 166 S.W.2d 1085, 350 Mo. 622.

Pa.—*McCreary's Estate v. Pitts*, 47 A.2d 235, 354 Pa. 347—In re Kenin's Estate, 41 Dist. & Co. 572, affirmed In re Kenin's Trust Estate, 23 A.2d 837, 343 Pa. 549, and affirmed 23 A.2d 846, 343 Pa. 567.

65 C.J. p. 243 note 58

55. U.S.—*Van Seiver v. Rothensies*, C.C.A. Pa., 122 F.2d 697.

Cal.—*Oakland Scavenger Co. v. Gnn-dal*, 124 P.2d 143, 51 Cal.App.2d 69—*Hendall v. Bank of America N. T. & S. A.*, 119 P.2d 754, 48 Cal.App.2d 249—In re Albert's Estate, 100 P.2d 538, 38 Cal.App.2d 42.

Kan.—*Fry v. McCormick*, 228 P.2d 727, 170 Kan. 741.

Pa.—In re Kenin's Estate, 41 Dist. & Co. 572, affirmed In re Kenin's Trust Estate, 23 A.2d 837, 343 Pa. 549, and affirmed 23 A.2d 846, 343 Pa. 567.

65 C.J. p. 243 note 60

#### "Shall vest"

Under a trust agreement whereby trustor invested money in an investment certificate of a building and loan association and providing that

certificate was to be in trust for trustor during his lifetime with power of revocation and substitution by surrender and cancellation of certificate and that on trustor's death unpaid principal and interest "shall vest" in trustor's nephew, use of quoted words was not inconsistent with a present transfer of interest to nephew—*Randall v. Bank of America N. T. & S. A.*, 119 P.2d 754, 48 Cal.App. 2d 249.

#### Supplying omission

Where alleged trust was void because beneficiaries thereunder acquired no present interest in subject matter of trust, court could not thereafter supply the omission and create a valid trust—*U. S. v. Dickerson*, D.C.Mo., 101 F.Supp. 262.

56. Or.—*Allen v. Hendrick*, 206 P. 733, 104 Or. 202

65 C.J. p. 243 note 62.

57. N.D.—*Reel v. Hanshoro State Bank*, 201 N.W. 861, 52 N.D. 182, 65 C.J. p. 243 note 63.

58. R.I.—*Talbot v. Talbot*, 78 A. 535, 32 R.I. 72, Ann.Cas.1912C 2221.

59. Tex.—*Frint v. Tate*, Civ App., 162 S.W.2d 737—*Temple v. City of Coleman*, Civ App., 245 S.W. 264

#### Conveyance culmination of agreement

Even if rule that trust must arise simultaneously with conveyance applies to express trusts, the rule was sufficiently complied with where son and daughter to whom father conveyed separate tracts of land had agreed to hold title for benefit of themselves and other children, since the conveyance was the culmination of the trust agreement—*Frint v. Tate*, Tex.Civ.App., 162 S.W.2d 737.

60. Or.—*Allen v. Hendrick*, 206 P. 733, 104 Or. 202.

65 C.J. p. 243 note 68.

61. Mass.—*Jones v. Old Colony Trust Co.*, 146 N.E. 716, 261 Mass. 309.

62. Pa.—*Urket v. Coryell*, 5 Watts & S. 60.

63. Pa.—In re Harrison's Estate, 165 A. 766, 322 Pa. 532, 65 C.J. p. 243 note 71.

64. N.Y.—*Fraw Realty Co. v. Natanson*, 185 N.E. 679, 261 N.Y. 396—*Fowler v. Coates*, 94 N.E. 997, 201 N.Y. 257—In re Wolanski's Estate, 283 N.Y.S. 797, 157 Misc. 470—In re Brockway's Will, 111 N.Y.S.2d 849—*Guokas v. Bishara*, 57 N.Y.S. 2d 588

#### Law of trusts held statutory

Ohio—*Harris v. Harris*, 16 Ohio Supp. 40, appeal dismissed 70 N.E. 2d 905, 147 Ohio St. 260, reversed on other grounds 74 N.E.2d 407, 79 Ohio App. 443, affirmed 72 N.E.2d 378, 147 Ohio St. 437.

#### Statute held applicable

The sections of Real Property Law governing powers are equally applicable to trusts of personality.—*Application of Schlüssel*, 89 N.Y.S.2d 47, 195 Misc. 1008.

#### Validity

The legislature had power to enact statute invalidating conveyances of personality to use of persons making them—*Herd v. Chambers*, 149 P.2d 543, 158 Kan. 614.

65. Ill.—*Mudge v. Mitchell Hutchins & Co.*, 54 N.E.2d 708, 322 Ill.App. 409

La.—*Succession of Manning*, 171 So. 68, 185 La. 894.

Where, however, a statute deals only with procedure, such statute is a remedial one, and it may be retrospective.<sup>66</sup> Since the courts do not favor repeals by implication, as a general rule a statute with respect to trusts is not deemed to repeal an earlier one without express words of repeal, unless the two are in such conflict that both cannot be given effect.<sup>67</sup>

In some jurisdictions where the civil law prevails,

the fidei commissum of the Roman law, which correspond to the trusts of the English law, are abolished by statute,<sup>68</sup> but subsequent constitutional provisions have authorized the legislature to enact statutes authorizing the creation of such trusts.<sup>69</sup> In a few other jurisdictions statutes have been passed abolishing all uses and trusts except such as are therein expressly authorized, as discussed supra § 25, and trusts not so authorized are absolute-

N.M.—Ruhalcava v. Garst, 206 P.2d 1154, 53 N.M. 295.

N.Y.—Hutchinson v. Ross, 187 N.E. 55, 262 N.Y. 381, 89 A.L.R. 1007, reargument denied 188 N.E. 102, 262 N.Y. 643, 89 A.L.R. 1023—Margaretten v. Margaretten, 76 N.Y.S.2d 854 Pa.—In re Steele's Estate, 103 A.2d 409, 377 Pa. 250—In re Williamson's Estate, 82 A.2d 49, 368 Pa. 343—In re Pew's Estate, 67 A.2d 129, 362 Pa. 468—In re Crawford's Estate, 87 A.2d 124, 362 Pa. 458—In re Borsch's Estate, 67 A.2d 119, 362 Pa. 581—Edson v. Norrisstown Penn Trust Co., 59 A.2d 82, 359 Pa. 386—In re Bonnell's Estate, 65 Pa. Dist. & Co. 351.

Tex.—Sevine v. Helmsner, 224 S.W.2d 184, 148 Tex. 345—Blanford v. Snyder, 139 S.W.2d 471, 144 Tex. 134—Powe v. Powe, Civ.App., 268 S.W.2d 558, error refused no reversible error—Garcia v. Garcia De Ortiz, Civ.App., 257 S.W.2d 804—Ditto v. Piper, Civ.App., 244 S.W.2d 547, error refused no reversible error—Hueschen v. Dunn, Civ.App., 219 S.W.2d 586.

W.Va.—Bobbitt v. Bobbitt, 43 S.E.2d 65, 130 W.Va. 173.  
65 C.J. p 243 note 73.

#### Statute held retrospective

Fiduciaries Act was held applicable to trust created by cancellation of widow's dower interest and placing of specific fund in trust, notwithstanding trust was created two months before passage of act.—In re McGuffey's Estate, 187 A. 298, 123 Pa.Super. 432.

#### Expression of policy

(1) The Uniform Fiduciaries Act, although not retrospective, furnishes guiding principles and an expression of policy for decision of a controversy arising before effective date of the act.—Mudrey v. Mitchell Hutchins & Co., 54 N.E.2d 708, 322 Ill.App. 409.

(2) While statute, providing that validity and effect of trust in personality within state when trust was created shall be determined by laws thereof when trust instrument declares that trust shall be construed and regulated by such laws, did not retroactively change established rule of law, but merely established definite public policy in field wherein rules of law were undefined, courts

cannot entirely disregard such policy in defining such rules even as of earlier date.—Hutchinson v. Ross, 187 N.E. 55, 262 N.Y. 381, 89 A.L.R. 1007, reargument denied 188 N.E. 102, 262 N.Y. 643, 89 A.L.R. 1023.

66. U.S.—Swanson v. Bates, C.C.A. 10, 170 F.2d 648.

Mo.—McManus v. Park, 229 S.W. 211, 287 Mo. 109.

Neb.—In re Greenamyre's Estate, 276 N.W. 686, 132 Neb. 693.

Okl.—Swanson v. Bates, 211 P.2d 781, 202 Okl. 128.

#### Retrospective statutes held valid

(1) Statute providing for payment of compensation of trustees before termination of trust.—In re Statesbury's Estate, 85 Pa.Dist. & Co. 551, 3 Fiduciary 505, 69 Montg.Co. 356, 68 York Leg.Rep. 12.

(2) Statute providing for division of trust into two or more separate parts.—In re Statesbury's Estate, supra.

#### Vested interest

No one has a vested interest in the form of procedure; no one has a vested right to have his cause tried by any particular mode.

U.S.—Swanson v. Bates, C.C.A.10, 170 F.2d 648.

Mo.—McManus v. Park, 229 S.W. 211, 287 Mo. 109.

Neb.—In re Greenamyre's Estate, 276 N.W. 686, 132 Neb. 693.

Okl.—Swanson v. Bates, 211 P.2d 781, 202 Okl. 128.

67. N.Y.—In re Caswell's Estate, 56 N.Y.S.2d 507, 185 Misc. 599, affirmed 56 N.Y.S.2d 407, 259 App.Div. 809.

#### Statute held not superseded

(1) The provision of Decedent Estate Law for court confirmation of settlement of litigation involving estates does not supersede provisions of Real Property Law and Personal Property Law prohibiting alienation of right to income from a trust.—In re Caswell's Estate, supra.

(2) Where the Principal and Income Act of July 3, 1947, repealing the Uniform Principal and Income Act of May 8, 1945, was a substantial re-enactment thereof, the act of 1945 must be construed as continuing in active operation as to all rights and liabilities incurred under it.—In

re Crawford's Estate, 67 A.2d 124, 362 Pa. 458.

68. La.—In re Liquidation of Canal Bank & Trust Co., 159 So. 385, 181 La. 207.

65 C.J. p 244 note 74.

#### 69. In Louisiana

(1) Constitutional provision authorizing trusts and statute enacted thereunder contemplate tenure characterizing trusts under Anglo-American common law.—Daugherty v. Canal Bank & Trust Co. in Liquidation, App., 154 So. 681, reversed in part on other grounds and affirmed in part 158 So. 368, 180 La. 1003.

(2) Louisiana constitutional provision limiting trust to period of 10 years after death of donor has reference primarily to donations, both inter vivos and mortis causa and was intended to prohibit the creation of entailed estates or trusts for an indefinite period contrary to the principles of the Civil Code.—Hart v. Mechanics & Traders Ins. Co. of Hartford, Conn., D.C.La., 46 F.Supp. 166.

(3) Plaintiff as trustee claiming legal title to open accounts under trust agreement could not maintain suit on such accounts, since trust estate with tenures of property as legal title in one person and equitable title in another was not recognized under civil law.—Buck v. Larcade, 144 So. 539, 183 La. 570.

(4) Where insured corporation executed trust agreement authorizing trustee to prosecute suit on fire policies, the trust was valid under Louisiana law, and the trustee was authorized to maintain the suit.—Hart v. Mechanics & Traders Ins. Co. of Hartford, Conn., supra.

(5) Judge's ruling that trust for settlor's wife and children was governed by 1920 statute permitting donations, and that 1902 statute regulating banks organized to conduct savings and trust banking business was inapplicable, was held correct, as was judicially admitted by children when alleging in petition for appointment of new trustees that trust was created under 1920 statute, with respect to trustee bank's right to sell securities and reinvest proceeds.—In re Liquidation of Canal Bank & Trust Co., 159 So. 325, 181 La. 207.

ly void and unenforceable.<sup>70</sup> There is, however, an increasing tendency in the direction of liberality in construing such statutes, and, while there has been no abatement by the courts of the strictness with which limitations which transgress the rule

against perpetuities are construed, dispositions of property by way of trust within that limit will be sustained where they can fairly be brought within the spirit of the statute of uses and trusts, although not within its literal language.<sup>71</sup>

## 2. PAROL TRUSTS AND EFFECT OF STATUTE OF FRAUDS

### § 31. In General

Whether an express trust is required to be in writing or may be created or proved by parol depends on the statutory provisions relating thereto, if any, in the jurisdiction.

While it has been broadly stated without more in some jurisdictions that express trusts must be created or proved by a writing and cannot be created or proved by parol,<sup>72</sup> it would be more accurate to state that in such jurisdictions, under statutes to that effect, an express trust in land cannot be created or proved by parol, as discussed infra § 32, but that in most of such jurisdictions an express trust in personalty can be created or proved by parol, as considered infra § 35. The rule is that except as otherwise provided by statute an enforceable trust can be created without a writing.<sup>73</sup> At common law a trust can be created by parol;<sup>74</sup> but since secret and parol trusts offer easy means of effectuating fraud, and promote perjury, the English statute of frauds was enacted, providing in section seven that all declarations or cre-

ations of trusts or confidences in lands, tenements, or hereditaments shall be manifested and proved by some writing signed by the party who is by law to declare such trust or by his last will in writing, or else they shall be utterly void and of no effect.<sup>75</sup> In those states in which this section has been substantially reenacted, the rule of construction adopted is that the trust need not be created by writing, but the evidence of the existence of the trust must be in writing.<sup>76</sup> In other jurisdictions the statutes which provide substantially that trusts in or concerning lands, except such as arise by operation of law, must be created or declared by an instrument in writing have been held not to be substantially different,<sup>77</sup> while in at least one jurisdiction it is the requirement that all express trusts must be created or declared in writing.<sup>78</sup> In a few jurisdictions in which this section of the statute of frauds has not been reenacted in any form it has been held not to be necessary for an express trust to be in writing.<sup>79</sup> Nevertheless, in at least one jurisdiction which failed to adopt the provision from the English stat-

70. Minn.—Mattson v. U S Ensilage Harvester Co., 213 N.W. 893, 171 Minn 237

65 C.J. p 244 note 76.

71. Kan.—Herd v Chambers, 149 P. 2d 583, 158 Kan 614.

65 C.J. p 244 note 78.

72. Ark.—Hunt v. Hunt, 149 S.W.2d 930, 202 Ark. 130

D.C.—Thurm v. Wall, Mun.App., 104 A.2d 835.

Ga.—Hancock v. Hancock, 54 S.E.2d 385, 205 Ga. 684—Caswell v. Caswell, 169 S.E. 748, 177 Ga. 153.

Ill.—Finn v. Monk, 85 N.E.2d 701, 403 Ill. 167—Carrillo v. O'Hara, 81 N.E.2d 513, 400 Ill. 518

Miss.—Chichester v. Chichester, 48 So.2d 123, 209 Miss. 628—Triplett v. Bridgforth, 38 So.2d 756, 205 Miss. 328.

Mo.—Mays v. Jackson, 145 S.W.2d 392, 346 Mo. 1221—Purvis v. Hardin, 122 S.W.2d 936, 343 Mo. 652.

Pa.—Poplock v. Pernikowski, 56 A.2d 326, 161 Pa.Super. 587—Ditzel v. Fetterhoff, Com.Pl., 58 Dauph.Co. 833—Gaast v. Engel, Com.Pl., 41 Luz. Leg.Reg. 385.

Agreement held not one to establish trust

N.Y.—Biothermal Process Corp. v. Cohu & Co., 119 N.Y.S.2d 158, affirmed in part and reversed in part on other grounds 126 N.Y.S.2d 1, 283 App.Div. 60.

73. Wis.—Hartman v. Loverud, 277 N.W. 641, 227 Wis. 6.

74. Ariz.—Corpus Juris cited in Rogers v. Greer, 219 P.2d 760, 763, 70 Ariz. 264—Corpus Juris cited in Stewart v. Dumron, 160 P.2d 321, 321, 63 Ariz. 158.

65 C.J. p 244 note 80.

75. Ky.—Smith v. Smith, 121 S.W. 1902.

65 C.J. p 244 note 82.

76. U.S.—Davis v. U. S., D.C.N.Y., 27 F.Supp 698

Ark.—Hawkins v. Scanlon, 206 S.W. 2d 179, 212 Ark. 180—Hunt v. Hunt, 149 S.W.2d 930, 202 Ark. 130.

Ill.—First Nat. Bank of Ottawa v. Weise, 76 N.E.2d 538, 333 Ill.App. 1.

Ind.—Lehman v. Pierce, 36 N.E.2d 952, 109 Ind.App. 497.

Md.—O'Connor v. Estevez, 35 A.2d 148, 182 Md. 541.

Mass.—Simpson v. Henry N. Clark

Co. 55 NE.2d 10, 316 Mass. 118, 154 A.L.R. 380, stating New Hampshire law

N.J.—Coles v. Osback, 80 A.2d 464, 13 N.J. Super. 367, reversed on other grounds 92 A.2d 35, 22 N.J. Super. 358—Eastmond v. Eastmond, 64 A.2d 901, 2 N.J. Super. 529—Lach v. Weber, 197 A. 417, 123 N.J.Eq. 303.

65 C.J. p 244 notes 83, 84.

77. U.S.—Jenkins v. Eldredge, C.C. Mass., 13 F.Cas No.7,266, 3 Story 181.

65 C.J. p 245 note 85.

78. Ga.—Hancock v. Hancock, 54 S.E.2d 385, 205 Ga. 684—Malone v. Malone, 73 S.E. 660, 137 Ga. 429.

79. U.S.—Fricke v. Weber, C.C.A. Ohio, 145 F.2d 737.

N.C.—Cuthrell v. Greene, 50 S.E.2d 525, 229 N.C. 475—Thompson v. Davis, 28 S.E.2d 556, 223 N.C. 792—Taylor v. Addington, 23 S.E.2d 318, 223 N.C. 393.

Ohio—In re Barnes' Estate, Com.Pl., 105 N.E.2d 88, affirmed 108 N.E. 2d 101.

Tenn.—State, for Use of Burrow, v. Cuthron, 118 S.W.2d 81, 21 Tenn. App. 519.

65 C.J. p 245 note 87.

ute of frauds it has been held that it is a part of the common law from the earliest days that an express trust in real estate may not be proved by parol.<sup>80</sup>

The benefit of the statute of frauds was intended to be for those claiming title under instruments absolute on their face and not for those seeking to defeat the operation of such instruments by showing that they were made on trusts not appearing on their face.<sup>81</sup> The creditor of a legatee has no better rights against the estate than the legatee himself, and cannot, therefore, establish in the executors a secret trust by parol declarations or instructions of the testator,<sup>82</sup> although it has been held that the fact that a trust was not in writing is no defense as against creditors seeking to set aside conveyances as in fraud of their rights.<sup>83</sup> Agreements, transactions, or conveyances which do not create or attempt to create any trust are obviously not affected by statutes of this character.<sup>84</sup> The statute of trusts was not designed to operate as a vehicle for the promotion of injustice but as a means of preventing fraud;<sup>85</sup> and the statute of frauds does not apply to a trust where the action of the trustee amounts to a fraud.<sup>86</sup>

In jurisdictions where the statute of frauds or similar provision prohibiting parol trusts does prevail it does not apply to resulting trusts, as discussed *infra* § 101, or constructive trusts, *infra* § 141.

## § 32. Trusts in or Affecting Land

- a. Statutes relating specifically to trusts
- b. In absence of statute relating specifically to trusts

### a. Statutes Relating Specifically to Trusts

In jurisdictions which have adopted some form of statute similar to the original statute of frauds relating to trusts, or recognize such rule, express trusts in lands cannot be created or declared, or manifested and proved, by parol; nor can an express trust be engraved by parol on a conveyance absolute in form.

While a parol trust in land is valid and enforceable at common law and general equity jurisprudence,<sup>87</sup> it is the rule, where the provisions of the statute of frauds, which are expressly applicable to trusts in lands, tenements, and hereditaments, have been enacted, that express trusts in lands cannot be "created or declared" or cannot be "manifested and proved," according to the particular phraseology of the statute invoked, by parol;<sup>88</sup> and the opera-

80. Conn.—Hannev v. Clark, 198 A 577, 124 Conn 140—Wilson v. Warner, 80 A 718, 84 Conn. 560.

81. Mich.—Douglass v. Douglass, 40 N.W. 177, 72 Mich. 86.  
65 C.J. p 245 note 91.

82. Cal.—Sparks v. De la Guerra, 14 Cal. 108.

83. Ill.—Andrews v. Scott, 113 Ill App. 581, affirmed 71 N.E. 1112, 211 Ill. 612, 103 Am.S.R. 215.

84. Iowa.—Bird v. Jacobus, 84 N.W. 1062, 113 Iowa 194.  
65 C.J. p 245 note 94.

85. Kan.—Powell v. Leon, 239 P.2d 974, 172 Kan. 267.

86. Pa.—Greene v. Pflch, 53 Pa.Dist & Co. 505.

87. N.Y.—McKenna v. Mochan, 161 N.E. 472, 248 N.Y. 206.  
65 C.J. p 245 note 95.

88. U.S.—American Bonding Co. of Baltimore v. Hord, CCA Ark. 98 F.2d 750—Rivley v. Wheatley, CCA Mass. 68 F.2d 297—Mullen v. Mullen, D.C. Alaska, 117 F.Supp. 538, applying California law—Davis v. U. S., D.C.N.Y., 27 F.Supp. 698.

Ala.—Snow v. State, 60 So.2d 346, 257 Ala. 614—Ammons v. Ammons, 42 So.2d 776, 253 Ala. 82.

Ariz.—Rogers v. Greer, 219 P.2d 760, 70 Ariz. 264—Parker v. Gentry, 185 P.2d 767, 66 Ariz. 149—Stewart v. Darnon, 160 P.2d 321, 63 Ariz. 158—Solomon v. Solomon, 157 P.2d 605, 62 Ariz. 311.

Ark.—Harbour v. Harbour, 181 S.W. 2d 805, 207 Ark. 551

Cal.—Kingsley v. Carroll, 234 P.2d 1039, 106 Cal App.2d 358—Mullh v. Mullh, 232 P. 556, 105 Cal App.2d 68—Metzenbaum v. Metzenbaum, 195 P.2d 492, 86 Cal App.2d 750—Haskell v. First Nat Bank, 91 P.2d 931, 33 Cal App.2d 399

D.C.—Baldi v. Ambrogi, 89 F.2d 845, 67 App D.C. 101.

Ill.—Murray v. Behrendt, 76 N.E.2d 431, 399 Ill. 22.

Ind.—Hollin v. Bloom, 28 N.E.2d 53, 217 Ind. 656—Vance v. Grow, 190 N.E. 747, 206 Ind. 614.

Iowa.—McBain v. Sorenson, 20 N.W. 2d 449, 236 Iowa. 996—Hardy v. Daum, 259 N.W. 561, 219 Iowa 982.

Kan.—In re Gercke's Estate, 195 P. 2d 323, 166 Kan. 249.

Me.—Shaw v. Merrill, 163 A. 792, 131 Me. 441.

Md.—Grimes v. Grimes, 40 A.2d 58, 184 Md. 59—O'Connor v. Estevez, 35 A.2d 148, 182 Md. 541—Jacobs v. Schwartz, 20 A.2d 489, 179 Md. 606.

Mass.—MacDonald v. Gough, 93 N.E. 2d 260, 326 Mass. 93.

Mich.—Howe v. Webert, 50 N.W.2d 725, 332 Mich. 84—Vobless v. Weisenthal, 22 N.W. 493, 293 Mich. 565.

Miss.—Wilson v. Martin, 37 So.2d 254, 294 Miss. 196, suggestion of error overruled 37 So.2d 776, 201 Miss. 196—Smith v. Taylor, 184 So. 423, 183 Miss. 542.

Mo.—Strype v. Lewis, 180 S.W.2d 688, 352 Mo. 1001, 155 A.L.R. 99—

Diendo v. Diendo, 179 S.W.2d 754—Myra v. Jackson, 145 S.W.2d 392, 346 Mo. 1224—Corpus Juris cited in

Woodard v. Cohorn, 137 S.W.2d 497, 498, 345 Mo. 967—Darker v. Blakely, 93 S.W.2d 981, 338 Mo. 1189

Mont.—Opp v. Boggs, 183 P.2d 879, 121 Mont 131

Neb.—Anderson v. Anderson, 36 N. W.2d 287, 150 Neb. 879.

N.H.—Hatch v. Rideout, 65 A.2d 702, 95 N.H. 431.

N.J.—Stretch v. Watson, 69 A.2d 596, 6 N.J. Super 456, affirmed in part, reversed in part on other grounds

74 A.2d 597, 5 N.J. 266—Moses v. Moses, 63 A.2d 805, 140 N.J. Eq. 575, 173 A.L.R. 273—Lach v. Weber, 197 A. 417, 123 N.J. 303.

N.Y.—Fraw Realty Co. v. Nutanson, 185 N.E. 679, 261 N.Y. 395—Guokas v. Hishara, 57 N.Y.S.2d 588.

N.D.—Johnson v. Weldy, 54 N.W.2d 829—McDonald v. Miller, 16 N.W. 2d 270, 73 N.D. 474, 156 A.L.R. 1328.

Okl.—Scott v. Nelson, 179 P.2d 116, 198 Okl. 392—Abraham v. McSoud, 109 P.2d 822, 188 Okl. 409

Or.—Bowns v. Bowns, 200 P.2d 586, 184 Or. 603—Callan v. Western Investment & Holding Co., 72 P.2d 48, 167 Or. 412.

Pa.—Kalyvas v. Kalyvas, 89 A.2d 819, 371 Pa. 371—Arndt v. Matz, Corn'l., 42 Berks Co. 83—Heller v. Executors of Davidson's Estate,

tion of the rule is not affected by the fact that the parties to the trust agreement are copartners,<sup>89</sup> or by the fact that the lands which form the subject matter of the parol agreement are directed by a will to be converted into personalty, where the agreement forms no part of the will.<sup>90</sup>

In accordance with the above rule it is generally held, except in jurisdictions where there is no provision in the statute of frauds relating specifically to trusts, as discussed *infra* subdivision b of this section, that an express trust cannot be engrafted by parol on a deed, devise, assignment, or other conveyance absolute in form,<sup>91</sup> even though such parol trust agreement does not operate as a mortgage so that it will not be invalid under a statute prohibiting a parol defeasance of a deed absolute on its face,<sup>92</sup> at least in the absence of fraud or a similar factor in the procurement of the execution of the deed,<sup>93</sup> and particularly after a long period has elapsed.<sup>94</sup> However, the rule does not apply to an absolute deed which is not valid both in form

and substance, as where it is wholly without consideration.<sup>95</sup>

A statute requiring an express trust concerning lands to be in writing does not apply to a trust created by a collector of money contributions for the benefit of another.<sup>96</sup> Since a resulting trust is not within the statute of frauds, as discussed *infra* § 101, such a trust is not converted into an express trust, to which the statute would apply, by a writing subsequently made, acknowledging the trust.<sup>97</sup> Where parol evidence is offered as to a trust, not for the purpose of establishing it, but for the purpose of showing that the conveyance made in executing it was made on an adequate consideration and for a proper purpose, it is admissible.<sup>98</sup>

*Where a trust springs out of the relationship of principal and agent*, the relation arises from the agreement between the parties, and such agreement is within the statute of frauds requiring the trust to be proved by written testimony.<sup>99</sup>

*In Texas.* Under the statute, Vernon's Ann. Civ.

Com.Pl., 59 Dauph.Co 169, 172—City Building & Loan Ass'n of the Bethlehem v. Delia, Com.Pl., 27 North.Co. 59.

S.D.—Schwartz v. Dale, 54 N.W.2d 351, 74 S.D. 467.

Wis.—Healy v. Fidelity Sav. Bank, 298 N.W. 170, 238 Wis. 12.

65 C.J. p 245 note 98.

Application of statute of frauds to equitable estates in land generally see *Frauds*, Statute of, § 81.

Parol evidence to explain apparently absolute deed see *infra* § 70.

**Purpose of statute is to prevent frauds and perjuries.**—Bellin v. Bloom, 28 N.E.2d 53, 217 Ind. 656.

**Mineral rights held within rule** Ind.—Callihan v. Bander, 73 N.E.2d 360, 117 Ind.App. 467.

#### In Georgia

(1) Under the code, providing that "all express trusts must be created or declared in writing," a parol trust in land is invalid.—Woo v. Markwalter, 78 S.E.2d 473, 210 Ga. 156—Jones v. Jones, 26 S.E.2d 602, 196 Ga. 492—65 C.J. p 245 note 98 [h].

(2) Where plaintiff purportedly conveyed her duplex to her son-in-law for ten thousand dollars by duly recorded deed, which stated that conveyance was for ten dollars and other valuable consideration, in return for right to have a home in one of the apartments for balance of her life without cost, plaintiff did not obtain any interest under such purported agreement since parties would be attempting to set up an express trust by parol.—Smith v. Lynch, 80 S.E.2d 175, 210 Ga. 338.

#### Land in another jurisdiction

In suit to impose trust on Texas lands purchased by devise with proceeds of foreign lands allegedly devised by nonresident in trust for plaintiff, devisee's writings and parol evidence to establish oral trust was held inadmissible, and judgment imposing trust was erroneous, in absence of any written declaration of trust as required by foreign statute.—King v. Lowry, Tex.Civ.App., 80 S.W.2d 730, error refused, applying Missouri law.

69. N.Y.—Frieda Popkov Corp. v. Stack, 103 N.Y.S.2d 507, 198 Misc. 826.

65 C.J. p 247 note 99.

90. Ala.—Moore v. Campbell, 14 So. 780, 102 Ala. 445.

91. U.S.—Mullen v. Mullen, D.C. Alaska, 117 F.Supp. 538, applying California law.

Ark.—Hawkins v. Scanlon, 206 S.W.2d 179, 212 Ark. 180.

Cal.—Hill v. Donnelly, 132 P.2d 887, 56 Cal App 2d 387.

Conn.—Worobey v. Siblieh, 71 A.2d 80, 136 Conn. 352.

Fla.—Grable v. Nunez, 64 So 2d 154—Wodonos v. Wodonos, 62 So.2d 78.

Ga.—Estes v. Estes, 55 S.E.2d 217, 205 Ga. 814—Pantone v. Pantone, 44 S.E.2d 518, 202 Ga. 733—Pittman v. Pittman, 26 S.E.2d 764, 196 Ga. 397—Jones v. Jones, 26 S.E.2d 602, 196 Ga. 492—Heecher v. Carter, 5 S.E.2d 648, 189 Ga. 234.

Idaho.—Dunn v. Dunn, 83 P.2d 471, 59 Idaho 473.

Ia.—Holloway v. Holloway, 60 So.2d

468, 221 La. 875—Lewis v. Patterson, App., 34 So.2d 646—Guidry v. Sigler, App., 20 So.2d 631, set aside 21 So.2d 232.

Mass.—Saulnier v. Saulnier, 103 N.E.2d 225, 323 Mass. 238.

Mich.—Hacker v. Hacker, 283 N.W. 639, 287 Mich. 435.

N.J.—Coles v. Oshack, 80 A.2d 464, 13 N.J.Super. 367, reversed on other grounds 92 A.2d 35, 22 N.J.Super. 358.

Pa.—Kalyvas v. Kalyvas, 89 A.2d 819, 371 Pa. 371—Gray v. Leibert, 53 A.2d 132, 357 Pa. 130.

65 C.J. p 247 note 4.

92. Pa.—Kalyvas v. Kalyvas, 89 A.2d 819, 371 Pa. 371.

93. Ala.—Ammons v. Ammons, 42 So.2d 776, 253 Ala. 82.

**Confidential relationship between parties**

Utah.—Peterson v. Peterson, 141 P.2d 882, 106 Utah 133.

94. Ark.—Blalock v. Blalock, 258 S.W.2d 891—Hawkins v. Scanlon, 206 S.W.2d 179, 212 Ark. 180.

95. Ga.—Pittman v. Pittman, 26 S.E.2d 764, 196 Ga. 397.

96. Ind.—Union Trust Co. v. Children's Aid Ass'n, 134 N.E. 207, 77 Ind.App. 575.

N.J.—Warren v. Tynan, 34 A. 1065, 54 N.J.Eq. 402.

65 C.J. p 248 note 7.

97. U.S.—U. S. Fidelity & Guaranty Co. v. Mills, C.C.A.S.C., 146 F.2d 694.

99. N.J.—Seacoast R. Co. v. Wood 56 A. 337, 65 N.J.Eq. 530, affirmed 81 A. 1132, 78 N.J.Eq. 298.

St. Tex. art. 7425 b-7, enacted in 1943, a trust in relation to, or consisting of, real property is invalid unless created, established, or declared by a written instrument subscribed by the trustor, or by any other instrument under which the trustee claims the estate affected,<sup>1</sup> and the rule now is the same as it is in those states in which the seventh section of the English statute of frauds has been adopted,<sup>2</sup> although prior to this statute parol trusts of realty were recognized.<sup>3</sup> However, even though the enforcement of a parol trust on an absolute deed was formerly recognized,<sup>4</sup> it would not be permitted where to do so would be in fraud of the rights of

creditors or innocent purchasers.<sup>5</sup> Moreover, even under the prior rule it was held that in order to establish a parol trust it was necessary to show a valid and enforceable contract between the parties, the requisites of which contract included, among other things, mutuality and valid consideration and compliance with other provisions of the statute of frauds.<sup>6</sup>

*In West Virginia.* Under a statute enacted in 1931, Code, 36-1-4, the legislature in effect adopted the seventh section of the statute of frauds, and hence there may no longer be an oral express trust of real property,<sup>7</sup> except in so far as the statute ex-

1. U.S.—McClelland v. Cowden, C.A. Tex., 175 F.2d 601.

Tex.—Collins v. Republic Nat. Bank of Dallas, 258 S.W.2d 805—Morrison v. Farmer, 213 S.W.2d 813, 147 Tex. 122—Mills v. Gray, 210 S.W.2d 985, 147 Tex. 33—Garcia v. Garcia De Ortiz, Civ.App., 257 S.W.2d 804—Tolle v. Sawtelle, Civ.App., 246 S.W.2d 916, error refused—Howard v. O'Neal, Civ.App., 246 S.W.2d 907, error refused no reversible error—Mellette v. Hudstan Oil Corp., Civ.App., 243 S.W.2d 438, error refused no reversible error.

2. Tex.—Klein v. Sibley, Civ.App., 203 S.W.2d 239.

3. U.S.—Harris v. Gurley, C.C.A. Tex., 80 F.2d 744.

Tex.—Sorrentis v. Coffield, 187 S.W.2d 980, 144 Tex. 31—Whittenburg v. Miller, 164 S.W.2d 497, 139 Tex. 586—Grasty v. Wood, Civ.App., 230 S.W.2d 658, error refused no reversible error—MacDonald v. Sanders, Civ.App., 207 S.W.2d 155, error refused no reversible error—Jones v. Parker, Civ.App., 193 S.W.2d 863, error refused no reversible error—Hamill & Smith v. Parr, Civ.App., 173 S.W.2d 725—Nettles v. First Nat. Bank of Temple, Civ.App., 168 S.W.2d 920, error refused—Small v. Brooks, Civ.App., 163 S.W.2d 263, error refused—Stone v. Pitts, Civ.App., 160 S.W.2d 1013, reversed on other grounds Pitts v. Stone, 166 S.W.2d 897, 140 Tex. 206—Vicars v. Quinn, Civ.App., 154 S.W.2d 947—Miller v. Whittenburg, Civ.App., 144 S.W.2d 381, reversed on other grounds Whittenburg v. Miller, 164 S.W.2d 497, 139 Tex. 586—Knight v. Tannehill Bros., Civ.App., 140 S.W.2d 552, error dismissed, judgment correct—Tiemman v. Dyer, Civ.App., 114 S.W.2d 669—Wauke v. Hill, Civ.App., 99 S.W.2d 1047, error refused—Schuyler v. Lacy, Civ.App., 79 S.W.2d 901, error dismissed—Martin v. Martin, Civ.App., 71 S.W.2d 951.

65 C.J. p 248 note 9.

Prior to effective date of statute

Tex.—Svine v. Helmsner, 224 S.W.2d

134, 148 Tex. 345—Ditto v. Piper, Civ.App., 244 S.W.2d 547, error refused no reversible error.

#### Trial subsequent to statute

Statute providing that an express trust in land cannot be established by parol evidence would not bar parol evidence of an oral express trust arising before its passage—Svine v. Helmsner, 224 S.W.2d 134, 148 Tex. 345—Binford v. Snyder, 189 S.W.2d 471, 144 Tex. 134—Hueschen v. Dunn, Civ.App., 219 S.W.2d 586.

4. Tex.—Binford v. Snyder, 189 S.W.2d 471, 144 Tex. 134—Amercado Petroleum Corp. v. Massad, Civ.App., 239 S.W.2d 730, error refused no reversible error—Scott v. Clett, Civ.App., 213 S.W.2d 562—Grantham v. Anderson, Civ.App., 211 S.W.2d 275—Jones v. Parker, Civ.App., 193 S.W.2d 863, error refused no reversible error—Hall v. Rawls, Civ.App., 188 S.W.2d 807, refused for want of merit—Johnson v. Durst, Civ.App., 115 S.W.2d 1000, error dismissed—Redwine v. Coleman, Civ.App., 71 S.W.2d 921, error refused.

65 C.J. p 249 notes 11, 14.

This was exception to parol evidence rule forbidding the introduction of parol evidence to vary the terms of a written contract—Snyder v. Citizens State Bank, Tex.Civ.App., 184 S.W.2d 684, affirmed 189 S.W.2d 471, 144 Tex. 134—Knight v. Tannehill Bros., Tex.Civ.App., 140 S.W.2d 552, error dismissed, judgment correct—Sparkes v. Mince, Tex.Civ.App., 138 S.W.2d 203—Tiemman v. Dyer, Tex.Civ.App., 114 S.W.2d 669.

5. Tex.—Shook v. Shook, Civ.App., 125 S.W. 638.

65 C.J. p 249 note 12.

6. Tex.—Lockhart v. Williams, 192 S.W.2d 146, 144 Tex. 553—Sorrentis v. Coffield, 187 S.W.2d 980, 144 Tex. 31—Clayton v. Ancell, 168 S.W.2d 230, 140 Tex. 441—Pitts v. Stone, 166 S.W.2d 897, 140 Tex. 206—Whittenburg v. Miller, 164 S.W.2d 497, 139 Tex. 586—Howard v. O'Neal, Civ.App., 246 S.W.2d 907, error refused no reversible error

—Davis v. Pearce, Civ.App., 205 S.W.2d 653—Johnson v. Black, Civ.App., 197 S.W.2d 623, error refused no reversible error—Nettles v. Doss, Civ.App., 161 S.W.2d 138, error refused—Elbert v. Waples-Platter Co., Civ.App., 156 S.W.2d 146, error refused—Knox v. Lyarels, Civ.App., 155 S.W.2d 435, error refused—Lobban v. Wierhauser, Civ.App., 141 S.W.2d 384, error refused—Martin v. Martin, Civ.App., 71 S.W.2d 951.

Agreement prior to, or at time of, conveyance

Tex.—Prestone v. Sims, Civ.App., 174 S.W.2d 279, error refused.

No parol trust based on contractual consideration

Tex.—Knox v. Long, 257 S.W.2d 289—Kidd v. Young, 190 S.W.2d 65, 144 Tex. 322—Garcia v. Garcia De Ortiz, Civ.App., 257 S.W.2d 804—Republic Nat. Bank of Dallas v. Collins, Civ.App., 254 S.W.2d 406, affirmed Collins v. Republic Nat. Bank of Dallas, 258 S.W.2d 305—Bradshaw v. McDonald, Civ.App., 211 S.W.2d 797, affirmed 216 S.W.2d 972, 147 Tex. 455—Small v. Brooks, Civ.App., 163 S.W.2d 263, error refused.

Evidence held insufficient

Tex.—Prestone v. Sims, Civ.App., 174 S.W.2d 279, error refused—Tarkenton v. Marshall, Civ.App., 91 S.W.2d 473.

7. W.Va.—Ross v. Middleburg, 42 S.E.2d 185, 129 W.Va. 851—Cain v. Kreeley, 41 S.E.2d 185, 129 W.Va. 642—Dye v. Dye, 39 S.E.2d 98, 128 W.Va. 754.

Statement to contrary

However, the old rule, that an express trust may be proved by oral evidence, has been stated since the enactment of the statute without any comment thereon—Stalnaker v. Stalnaker, W.Va., 80 S.E.2d 878.

Deed executed prior to statute

Statute abrogating rule that, in absence of fraud, voluntary grantor cannot set up parol trust in land in his favor, was held not to apply to



pressly provides for an enforceable oral trust where a grantee, in connection with the transfer of title of land to him, agrees to hold it in trust for the benefit of the grantor or a third person, as discussed infra § 33.

### b. In Absence of Statute Relating Specifically to Trusts

Subject to some exceptions and restrictions, a valid trust in land may ordinarily be created and established by parol in jurisdictions where the statute of frauds relating to trusts has not been adopted.

Except where the principle prohibiting parol trusts of land is recognized apart from statute, as part of the common law,<sup>8</sup> a valid trust in land may ordinarily be created and established by parol in jurisdictions where the seventh section of the English statute of frauds has not been enacted in any form,<sup>9</sup> or where a like provision did not exist at the time the trust was created;<sup>10</sup> and in these juris-

dictions it is generally held that an express trust may, by parol, be engrafted on an absolute deed,<sup>11</sup> provided the declaration of trust is contemporaneous with or a condition of the giving of the deed, and is not made thereafter.<sup>12</sup> It has been held that a parol trust of land is necessarily created by a transaction of contract to which the parol promise is complementary;<sup>13</sup> and, hence, that a parol trust cannot be engrafted on an inheritance since the devolution of title in case of intestacy is not a voluntary act of the deceased owner.<sup>14</sup>

A provision that contracts concerning land shall be in writing does not affect the validity of trusts, or the evidence by which they may be established, in some of the jurisdictions in which the statute of frauds does not deal specifically with the creation of trusts;<sup>15</sup> but in other jurisdictions of this class it is held that a general provision that all conveyances of real estate or of any interest therein, and all contracts creating or evidencing any encum-

deed executed prior to enactment of statute.—*Hull v. Burns*, 169 S.E. 522, 113 W.Va. 820.

B. Conn.—*Van Auken v. Tyrrell*, 33 A.2d 339, 130 Conn. 239—*Hanney v. Clark*, 198 A. 577, 124 Conn. 140.

#### Evidence excluded

In action to establish an alleged resulting trust in favor of plaintiff and his brothers and sisters in farm conveyed in fee to one of brothers, evidence of contributions by friends and neighbors to enable brother to purchase farm was properly excluded as an attempt to establish an express trust by parol.—*Dickinson v. Dickinson*, 40 A.2d 184, 131 Conn. 392.

9. N.C.—*McCorkle v. Beatty*, 33 S.E. 2d 753, 225 N.C. 178—*Atkinson v. Atkinson*, 33 S.E.2d 666, 225 N.C. 120—*Thompson v. Davis*, 28 S.E.2d 556, 223 N.C. 792—*Taylor v. Addington*, 23 S.E.2d 318, 222 N.C. 393—*Peterson v. Taylor*, 166 S.E. 800, 203 N.C. 673.

Ohio—*Ford v. Ford*, App., 118 N.E. 2d 235—*In re Barnes' Estate*, 108 N.E.2d 83, affirmed 108 N.E.2d 101—*Tenn v. Hunt*, 80 S.W.2d 666, 169 Tenn. 1—*Kelley v. Whitehurst*, App., 264 S.W.2d 1.

Va.—*Vren v. Tate*, 57 S.E.2d 48, 190 Va. 505, opinion adhered to 60 S.E.2d 54, 191 Va. 59—*Jingles v. Greear*, 27 S.E.2d 222, 181 Va. 838.

65 C.J. p 248 note 9.

#### Agreement to convey

A mere parol agreement to convey land to another raises no trust in favor of the person claiming as grantee under such alleged agreement, and comes within the provisions of the statute of frauds.—*Wolfe v. North Carolina Joint Stock Land Bank*, 13 S.E.2d 533, 219 N.C. 313.

#### "Contract to sell lands" distinguished

The distinction between a "contract to sell lands" which would be within the statute of frauds, and oral contract for establishment of a trust which would not, is that in the former, a suit would be for specific performance of the contract, and in the latter for enforcement of a parol trust.—*Peele v. LeRoy*, 22 S.E.2d 244, 222 N.C. 123.

#### General admissibility of parol evidence

(1) Since an oral declaration of trust in realty is lawful, and can only be proved by oral evidence, it is not within operation of rule forbidding admission of parol evidence to vary, alter, or contradict the terms of a valid written instrument.—*Virginia Trust Co. v. Minar*, 18 S.E.2d 879, 179 Va. 377.

(2) A trust may be impressed on realty by parol proof which does not contradict the terms of the deed or a valid written instrument relating to character of title conveyed by the deed.—*Seaton v. Dye*, Tenn.App., 263 S.W.2d 544.

(3) Parol evidence of trust is not inadmissible as tending to contradict the terms of a written instrument unless the language of the instrument is such as to exclude the existence of a trust.—*Adrian v. Brown*, 196 S.W.2d 118, 29 Tenn.App. 236.

#### In Kentucky

(1) The rule stated in the text generally prevails.

U.S.—*Dempsey v. D. B. & M. Oil & Gas Co.*, D.C.Ky., 112 F.Supp. 408.

Ky.—*Moore v. Terry*, 170 S.W.2d 29, 293 Ky. 727.

65 C.J. p 248 note 9 [b].

(2) An oral agreement between testator and devisee, his wife, that wife would permit property to pass to his heirs on her death was ineffective under the statute of frauds unless the heirs could show by clear and convincing proof that the wife accepted the property under her husband's will with the understanding and agreement that it would pass to his heirs upon her death.—*Driskill v. Driskill's Adm'r*, 211 S.W.2d 840, 307 Ky. 627.

10. Miss.—*Anding v. Davis*, 38 Miss. 574, 77 Am D. 658.  
65 C.J. p 249 note 10.

11. Ky.—*Evans v. Payne*, 258 S.W. 2d 919.

N.C.—*Jefferson Standard Life Ins. Co. v. Morehead*, 183 S.E. 606, 209 N.C. 174.

Ohio—*Homer v. Wullenweber*, 101 N.E.2d 229, 89 Ohio App. 255—*Steiner v. Feeycz*, 50 N.E.2d 617, 72 Ohio App. 18.

65 C.J. p 249 note 11.

12. N.C.—*Atkinson v. Atkinson*, 33 S.E.2d 666, 225 N.C. 120—*Taylor v. Addington*, 23 S.E.2d 318, 222 N.C. 393.

Ohio—*Hill v. Irons*, 113 N.E.2d 243, 160 Ohio St. 21—*Homer v. Wullenweber*, 101 N.E.2d 229, 89 Ohio App. 255.

Tenn.—*Adrian v. Brown*, 196 S.W.2d 118, 29 Tenn.App. 236—*Dunlap v. P'Pool*, 6 Tenn.App. 91—*Wallace v. P'Pool*, 4 Tenn.App. 30.

65 C.J. p 249 note 13.

13. N.C.—*Taylor v. Addington*, 23 S.E.2d 318, 222 N.C. 393.

14. N.C.—*Taylor v. Addington*, supra.

15. N.C.—*Jones v. Jones*, 80 S.E. 430, 164 N.C. 320.

brance on real estate, shall be by deed, forbids the creation of an express trust in land by parol,<sup>16</sup> although it does not apply to resulting trusts, as discussed infra § 101, or constructive trusts, as considered infra § 141. A wife purchasing land in her own name with money from her separate estate cannot create a parol trust therein in favor of her husband in the event he survive.<sup>17</sup>

### § 33. — Agreement by Grantee to Hold in Trust or Reconvey

Except in so far as the rule may differ under statutes of frauds not relating specifically to trusts, it is generally held that an oral promise or agreement to hold property acquired by an absolute conveyance in trust for the grantor or other designated persons does not create an enforceable trust under the statute of frauds.

A verbal promise or agreement by the grantee in an absolute conveyance, either contemporaneous

with, or prior or subsequent to, the conveyance, to hold the land conveyed in trust for the grantor or other designated persons, does not create an enforceable trust under the statute of frauds or similar statutes,<sup>18</sup> unless the circumstances surrounding the transaction are such as to show a resulting trust, as discussed infra § 109, or a constructive trust, as considered infra § 149; and the grantee takes the absolute title the same as though the agreement had not been made.<sup>19</sup> Illustrations of this rule may be found in cases where such an oral agreement accompanies a conveyance from husband to wife, either directly<sup>20</sup> or through the medium of a third person,<sup>21</sup> as well as conveyances from several joint tenants in common to one of their number;<sup>22</sup> and it has frequently been held that a parol agreement by the grantee in an absolute conveyance to reconvey, on request, to the grantor,<sup>23</sup> or to some

16. Wash.—*Rodgers v. Simmons*, 262 P.2d 204, 43 Wash 2d 587—*Kaunsky v. Kosten*, 179 P.2d 950, 27 Wash 2d 721—*Tucker v. Brown*, 150 P.2d 604, 20 Wash 2d 740—*Georges v. Loutalis*, 145 P.2d 901, 20 Wash 2d 92—*Laughlin v. March*, 145 P.2d 549, 19 Wash 2d 874—*In re Cunningham's Estate*, 143 P.2d 852, 19 Wash 2d 589—*State ex rel. Wirt v. Superior Court for Spokane County*, 116 P.2d 752, 10 Wash 2d 362—*In re Swartwood's Estate*, 89 P.2d 203, 198 Wash 557—*Aarkonen v. Alberta*, 83 P.2d 899, 196 Wash 575, 135 A.L.R. 209—*Zioncheck v. Nadeau*, 81 P.2d 811, 190 Wash 33 65 C.J. p 219 note 17.

Parol trust may not be grafted on absolute deed

- Wash.—*State ex rel. Wirt v. Superior Court for Spokane County*, 116 P.2d 752, 10 Wash 2d 362

17. N.C.—*Cutter v. Oxendine*, 137 S.E. 242, 193 N.C. 478.

18. U.S.—*Crowl v. Brooks*, D.C.Pa., 35 F.Supp. 720

- Cal.—*Holtz v. Holtz*, 42 P.2d 323, 2 Cal 2d 566—*Holtz v. Wood*, 212 P.2d 906, 95 Cal App 2d 314

- Fla.—*Crockett v. Crockett*, 199 So. 237, 115 Fla. 311.

- Gu.—*Atcher v. Kelley*, 21 S.E.2d 61, 194 Ga. 117.

- Ill.—*Tuntland v. Haugen*, 78 N.E.2d 306, 399 Ill. 695.

- Iowa.—*Frame v. Wright*, 9 N.W.2d 364, 232 Iowa 394, 147 A.L.R. 1154

- Kan.—*Horley v. Ilrendrich*, 73 P.2d 1010, 146 Kan. 767—*Anderson v. Anderson*, 22 P.2d 471, 137 Kan. 833, rehearing denied 23 P.2d 474, 138 Kan. 77.

- Md.—*Grimes v. Grimes*, 40 A.2d 58, 184 Md. 69—*Messick v. Pennell*, 35 A.2d 148, 182 Md. 531.

- Mo.—*Parker v. Blakeley*, 83 S.W.2d 981, 238 Mo. 1189.

- Mont.—*McLaughlin v. Corcoran*, 69 P.2d 597, 104 Mont. 590

- Okla.—*Wilson v. Hummer*, 228 P.2d 176, 204 Okl. 157

- Pa.—*Arndt v. Matz*, Com.Pl., 41 Berks Co. 267—*Butler v. Cole*, Com.Pl.,

- 24 Erie Co. 178—*Int'l Bk. v. Int'l Bk. Com.Pl.*, 44 Luz. Leg. Rec. 37—

- City Building & Loan Ass'n of the Bethlehem v. Delia*, Com.Pl., 27

- North Co. 52, 65 C.J. p 250 note 21.

#### Oral declaration instead of reformation

It has been held that where a deed has been made to the wrong grantee, if no attempt is made to secure the reformation, but those interested rely entirely on an oral declaration of the grantee that he will hold the property in trust for those who are interested, the oral declaration is within the statute and not enforceable—*Tourillotte v. Tourillotte*, 21 N.E. 909 205 Mass 547.

#### In Texas

(1) Where plaintiff and defendant were buying lands jointly and plaintiff did not pay or become liable for payment of any of the consideration moving to the grantor of the lands which were conveyed to defendant, and the agreement contemplated that title should be taken only in the name of defendant, trust, if any, was an "express trust," and hence invalid under the statute providing that a trust in relation to realty to be valid must be supported by a written instrument—*Starr v. Hopley*, Tex. Civ. App., 265 S.W.2d 225

(2) Where administratrix, who acquired an undivided one-third interest in estate of intestate from the heirs, allegedly made an oral agree-

ment that she would hold one-half of the one-third interest in trust for her sister, but the heirs had no knowledge of such alleged oral agreement, and no trust was created, parol evidence was not admissible to change effect of deed from heirs to administratrix—*Sevine v. Heasner*, Tex. Civ. App., 262 S.W.2d 218, error refused no reversible error.

(3) Effect of adoption of statute of frauds relating to trusts generally see supra § 32 a.

(4) Decisions under law prior to statutory change—*Wheeler v. Haralson*, 99 S.W.2d 855, 128 Tex 429—*Johnson v. Black*, Tex. Civ. App., 197 S.W.2d 522, error refused no reversible error—*Sims v. Dimean*, Tex. Civ. App., 196 S.W.2d 156, error refused no reversible error—*Paker v. Griffith*, Tex. Civ. App., 79 S.W.2d 626, reversed on other grounds *Griffith v. Baker*, 107 S.W.2d 371, 130 Tex 17—*Spangler v. Spangler*, Tex. Civ. App., 28 S.W.2d 463, modified on other grounds, Com. App., 41 S.W.2d 60—65 C.J. p 251 note 33 [1]

19. Ill.—*Skahan v. Irving*, 69 N.E. 510, 206 Ill. 597, 65 C.J. p 250 note 24.

20. Wis.—*Folz v. Folz's Estate*, 174 N.W. 908, 170 Wis. 650, 65 C.J. p 250 note 25.

21. Mo.—*Crawley v. Crafton*, 91 S.W. 1027, 191 Mo. 421

- N.J.—*Board of Missions and Church Extension of Protestant Episcopal Church in Diocese of Newark v. Hobble*, 122 A. 692, 95 N.J. Eq. 117.

22. Pa.—*Watson v. Watson*, 47 A. 1096, 198 Pa. 234, 65 C.J. p 250 note 27.

23. Ark.—*Umberger v. Westmoreland*, 238 S.W.2d 466, 218 Ark 632

other person who may be designated in the agreement,<sup>24</sup> is within the statute of frauds and unenforceable, although, on the other hand, where the statute is used as a cover to fraud, equity will grant relief.<sup>25</sup> The same general rule has been held to apply to property which has been acquired pursuant to judicial process.<sup>26</sup> However, where a grantee's agreement is essentially a mere parol contract for the payment of money rather than a trust it does not come within the requirements of the statute of frauds as to trusts and is valid.<sup>27</sup>

Where property is conveyed to a grantee with the understanding that he is subsequently to reconvey it and the grantee makes a declaration of trust with provisions not contemplated by the grantor, the grantor is nevertheless bound by that instrument and cannot assert the statute of frauds as to the challenged provisions while relying on the other

parts of the instrument to sustain his claim of ownership.<sup>28</sup>

*Under statutes of frauds not relating specifically to trusts.* In jurisdictions where, owing to the absence of any statute equivalent to the seventh section of the English statute of frauds, parol trusts in land are or were generally held valid, as discussed supra § 32 b, agreements by which a parol trust is impressed on land conveyed by absolute deed have in some cases and under some circumstances been held valid, and in other cases invalid.<sup>29</sup>

*In West Virginia.* Under the statute, Code 36-1-4, expressly so providing, if a conveyance of land, not fraudulent, is made to one in trust either for the grantor or a third person, such trust may be enforced, even though it is not disclosed on the face of the conveyance or evidenced by a writing;<sup>30</sup>

Fla.—Crockett v. Crockett, 199 So. 337, 145 Fla. 311.

Md.—Grimes v. Grimes, 40 A.2d 58, 184 Md. 59.

Mass.—Ranicar v. Goodwin, 96 N.E.2d 853, 326 Mass. 710.

Mich.—Musial v. Yatzlik, 45 N.W.2d 329, 329 Mich. 379.

N.J.—Szpak v. Szpak, 168 A. 386, 114 N.J.Eq. 143.

N.M.—Vehn v. Bergman, 258 P.2d 734, 57 N.M. 351.

65 C.J. p 250 note 28.

Promises to reconvey as within statute of frauds generally see Frauds, Statute of, § 95.

24. Kan.—Young v. Jackson, 36 P.2d 91, 140 Kan. 237.

Md.—Grimes v. Grimes, 40 A.2d 58, 184 Md. 59.

Okla.—Adams v. Adams, 256 P.2d 458, 208 Okl. 378.

65 C.J. p 251 note 29.

25. Ind.—Teague v. Fowler, 56 Ind. 569.

65 C.J. p 251 note 30.

26. Ga.—King v. King, 48 S.E.2d 465, 203 Ga. 811, 2 A.L.R.2d 1181.

**Oral agreement as to year's support**  
Alleged oral agreement between widow and children after all of the children had attained their majority that property which had previously been set aside to widow and three minor children as a year's support would be subsequently divided between widow and all the children and that widow thereby held property in trust could not be given effect, since to do so would be engrafting an express trust by parol on a judgment of the court of ordinary.—King v. King, supra.

27. S.D.—Jaeger v. Sechser, 270 N.W. 631, 65 S.D. 38.

**Naked promise to pay part value of property**

Statute requiring trusts relating

to realty to be in writing was not applicable to agreement establishing naked promise on behalf of sisters to pay to their brother, in money, one-third of value of property conveyed to them.—Jaeger v. Sechser, supra.

28. Ill.—Carrell v. Hibner, 92 N.E.2d 121, 405 Ill. 645.

29. Ky.—Smith v. Smith, 121 S.W. 1002.

65 C.J. p 251 note 33.

**In North Carolina**

(1) A parol trust may be enforced where grantee takes title to property under an express agreement to hold property for benefit of a person other than grantor.—Carlisle v. Carlisle, 35 S.E.2d 418, 225 N.C. 462.—Reynolds v. Morton, 171 SE 781, 205 N.C. 491—65 C.J. p 251 note 33 [c].

(2) An express trust cannot be engrafted in favor of the grantor on a deed conveying the fee.—Jones v. Brinson, 55 S.E.2d 808, 231 N.C. 63.—McCullen v. Durham, 50 S.E.2d 511, 229 N.C. 418.—Loftin v. Kornegar, 35 S.E.2d 607, 225 N.C. 490.—Carlisle v. Carlisle, 35 S.E.2d 418, 225 N.C. 462.—Taylor v. Addington, 23 S.E.2d 218, 222 N.C. 393.—Briley v. Roberson, 199 S.E. 73, 214 N.C. 295—65 C.J. p 251 note 33 [c] (3), (4).

**In Ohio**

Oral agreement, contemporaneous with delivery of deed, that realty would be held in trust for grantor for express purpose impressed express oral trust upon the realty.—Ford v. Ford, Ohio App., 118 N.E.2d 235.

**In Tennessee**

An contemporaneous oral agreement made at time of execution and delivery of conveyance of real estate, absolute upon its face, that the grantee will hold the property conveyed

in trust for certain person is not within the statute of frauds.—Pugh v. Burton, 166 S.W.2d 624, 25 Tenn. App. 614.—Dunlap v. P'Pool, 8 Tenn. App. 91.—Wallace v. P'Pool, 4 Tenn. App. 30—65 C.J. p 251 note 33 [e].

**In Washington**

Under a statute which, without expressly relating to trusts, declares that all conveyances of real estate or of any interest therein, and all contracts creating or evidencing any encumbrance on real estate, shall be by deed, a trust in favor of the grantor in an absolute conveyance, or of persons designated by him, cannot be set up or established by parol.—Moe v. Brumfield, 179 P.2d 968, 27 Wash.2d 714.—Kalkwarf v. Geschke, 77 P.2d 612, 194 Wash. 135—65 C.J. p 251 note 33 [h].

30. W.Va.—Cain v. Keeley, 41 S.E.2d 185, 129 W.Va. 642.—Dye v. Dye, 39 S.E.2d 98, 128 W.Va. 754.

**What constitutes fraud**

The fraud contemplated by legislature in enactment of statutory provision must be in conveyance itself on basis of which a trust is sought to be established; and fact that plaintiff entered into a contract for sale of realty to defendants which contained false statement that defendants had paid plaintiff a specified sum of money, which statement was inserted so that defendant could obtain an FHA loan, did not vitiate the transaction or defendants' oral promise to reconvey the realty to plaintiff when plaintiff's military service was terminated, and was not such fraud as would bar plaintiff in court of equity from establishing a parol trust whereunder defendants were obligated to reconvey the realty to plaintiff when plaintiff's military service was terminated.—Hoglund v. Curtis, 61 S.E.2d 642, 134 W.Va. 735.

and, since the statute so providing contains the general prohibition against parol trusts, as appears supra § 32 a, the method set out in the provision is the only permissible way of creating an oral express trust.<sup>31</sup>

### § 34. — Agreement as to Land to Be Purchased

Except where statutes do not forbid parol trusts of land, a parol promise or agreement by one person to purchase lands and hold them in trust for, or convey to, another is within the statute of frauds and unenforceable.

A parol promise or agreement by one person to purchase lands and hold them in trust for, or convey to, another is within the statute of frauds, and not enforceable as an express trust.<sup>32</sup> A verbal agreement between two or more persons to make a joint purchase of lands, title to be taken in the name of one for the benefit of all, is within the rule,<sup>33</sup> as is also a parol promise or agreement by

one to purchase at an execution, foreclosure, or other judicial sale and hold in trust for the judgment debtor or convey to him on reimbursement of the purchase price;<sup>34</sup> and a like rule applies to a parol agreement to purchase land at a judicial sale, for the benefit of the debtor's wife,<sup>35</sup> children,<sup>36</sup> or heirs,<sup>37</sup> or of an assignor of the judgment.<sup>38</sup> So an agreement to purchase from the purchaser at a judicial sale and then allow the debtor to redeem on reimbursement of the money advances,<sup>39</sup> or an agreement of the same general nature,<sup>40</sup> is within the statute of frauds and must be in writing; but a contract merely reserving to a redemptioner his right to redeem, or purchasing such right from him, is not within the statute of frauds.<sup>41</sup>

Where statute does not expressly forbid parol trusts. In jurisdictions having no statute corresponding to the seventh section of the English statute of frauds, parol agreements to purchase land at a judicial or other sale and hold it for the benefit of another,<sup>42</sup> provided the agreement is made be-

#### Deed executed prior to adoption of statute

(1) A grantor making a conveyance of land, which is not fraudulent, may enforce a trust for his benefit with respect to the land, even though the trust is not disclosed on the face of the conveyance, or evidenced by any writing, but the statute so permitting is inapplicable to a deed executed prior to its adoption, and prior to adoption of statute a grantor in a deed absolute on its face conveying land, and reciting a cash consideration which was not paid, could not establish for his benefit a parol trust in such land, nor could such trust be established after his death for the benefit of those claiming under him.—Robbitt v. Robbitt, 43 S.E. 2d 65, 130 W.Va. 173.

(2) Decisions under law prior to adoption of statute see 65 C.J. § 251 note 33 [1].

31. W.Va.—Cain v. Keeley, 41 S.E. 2d 185, 129 W.Va. 642—Dye v. Dye, 39 S.E.2d 98, 128 W.Va. 754.

32. Ark.—McKindley v. Humphrey, 161 S.W.2d 962, 204 Ark. 333—Castleberry v. Castleberry, 155 S.W.2d 44, 202 Ark. 1039—Holman v. Kirby, 128 S.W.2d 357, 198 Ark. 326—Lisko v. Hicks, 114 S.W.2d 9, 195 Ark. 705—George v. Donohue, 88 S.W.2d 1108, 191 Ark. 584.

Kan.—Anderson v. Anderson, 23 P. 2d 474, 138 Kan. 77.

N.Y.—Waggoner v. Jagoecks, 272 N.Y.S. 182, 241 App.Div. 324, appeal dismissed 193 N.E. 296, 355 N.Y. 511.

Okl.—McDonald v. Harrod, 135 P.2d 979, 192 Okl. 266.

65 C.J. § 253 note 35.

Agreement as to lands to be sold and proceeds held in trust see infra § 36

#### Creation of:

Constructive trust by agreement as to land to be purchased see infra § 150.

Resulting trust by agreement to purchase or hold for joint benefit see infra § 108

Requisites of agreement by person acquiring title to hold for, or convey to, use of another generally see infra § 51.

#### In Texas

(1) The rule stated in the text prevails since the adoption of the statute prohibiting parol express trusts of land.—Tolle v. Sawtelle, Tex.Civ. App., 246 S.W.2d 916, error refused

(2) There were decisions to the contrary prior to the statutory change.—McAlister v. Ellipse Oil Co. 88 S.W.2d 171, 128 Tex. 449—Patrick v. McGaha, Tex.Civ.App., 164 S.W.2d 236—Elbert v. Waples-Platter Co., Tex.Civ.App., 156 S.W.2d 146, error refused—American Nat. Ins. Co. v. Warnock, Tex.Civ.App., 143 S.W.2d 624, error dismissed, judgment correct—Lyons v. Texorodo Oil & Gas Co., Tex.Civ.App., 91 S.W.2d 375, error refused—Emery v. Emery, Tex.Civ.App., 75 S.W.2d 725, error dismissed—Sanders v. Stinnette, Tex.Civ.App., 73 S.W.2d 637, error refused—65 C.J. § 253 notes 45, 47.

#### In West Virginia

(1) The rule stated in the text prevails since the adoption of the statute prohibiting parol express trusts of land.—Ross v. Middelburg, 42 S.E. 2d 185, 129 W.Va. 851.

(2) Decisions under law prior to such statutory change see 65 C.J. § 253 notes 45-47.

33. Ala.—Talley v. Talley, 28 So.2d 586, 248 Ala. 84.  
65 C.J. § 253 note 36.

34. W.Va.—Ross v. Middelburg, 42 S.E.2d 185, 129 W.Va. 851—Dye v. Dye, 39 S.E.2d 98, 128 W.Va. 754  
65 C.J. § 253 note 37.

35. S.C.—Lamar v. Wright, 9 S.E. 736, 31 S.C. 60.  
W.Va.—Cain v. Keeley, 41 S.E.2d 185, 129 W.Va. 642.

36. Ill.—Kyle v. Willis, 46 N.E. 1121, 186 Ill. 501.

37. Iowa.—Maroney v. Maroney, 66 N.W. 311, 97 Iowa 711.

38. Iowa.—Hemstreet v. Wheeler, 69 N.W. 521, 100 Iowa 230.

39. Ark.—W. B. Worthen Co. v. Vogler, 224 S.W. 526, 145 Ark. 161.  
65 C.J. § 253 note 42.

40. Iowa.—Dunn v. Zwilling, 62 N.W. 746, 94 Iowa 233.  
65 C.J. § 253 note 43.

41. Ind.—Moorman v. Wood, 19 N.E. 739, 117 Ind. 144.

42. N.C.—Embler v. Embler, 32 S.E. 2d 618, 224 N.C. 811—Wolfe v. North Carolina Joint Stock Land Bank, 13 S.E.2d 533, 219 N.C. 313.  
Tenn.—Caprum v. Bransford Realty Co., 4 Tenn.App. 237.  
65 C.J. § 253 note 45.

#### Assignment to one acting for mortgagor

An oral contract between mortgagee's and mortgagor's attorneys that mortgagee should bid in mortgaged realty at foreclosure sale and assign bid to mortgagor's daughter, who

fore or at the time of the sale,<sup>43</sup> have been held valid in some cases, as have parol agreements between two or more parties whereby one of them is to purchase land for the common benefit of all, taking title in his own name.<sup>44</sup> However, a declaration by a purchaser of land, made subsequent to the purchase, that a third person should be admitted as a partner in the purchase,<sup>45</sup> or a mere agreement to buy land for another, the purchase being in fact made in the promisor's own name and on his own credit,<sup>46</sup> has been held to violate the statute of frauds requiring contracts for the sale of realty to be in writing.

should pay mortgage debt by certain date, was not unenforceable under statute of frauds because daughter had no title to property, as she acted for mortgagor who had title thereto—*Hunter v. Hunt*, 178 S.W.2d 609, 296 Ky 769.

43. N.C.—*Kelly v. McNeill*, 24 SE 738, 118 N.C. 349.

65 C.J. p 254 note 46.

44. U.S.—*Dexter & Carpenter v. Houston*, C.C.A.Va., 20 F.2d 617.

65 C.J. p 254 note 47.

45. Va.—*Henderson v. Hudson*, 1 Munf 510, 15 Va. 510.

46. Kv.—*Doom v. Brown*, 188 S.W. 475, 171 Ky. 469.

65 C.J. p 254 note 48.

47. Ga.—*Evans v. Pennington*, 179 S.E. 123, 150 Ga. 488.

65 C.J. p 256 note 65.

#### Stock

Claim to proceeds of stock conveyed to daughter by intestate on ground that daughter accepted stock under oral agreement to hold stock for benefit of herself and her sisters was held invalid because attempting to establish express trust by oral agreement—*Alston v. McGonigal*, 176 S.W. 632, 179 Ga. 617.

48. Tenn.—*McDowell v. Rees*, 122 S.W.2d 539, 22 Tenn.App. 356—*Gorgys Juris cited in State v. Cothron*, 113 S.W.2d 81, 85, 21 Tenn.App. 519—*Gorgys Juris cited in Cothron v. Cothron*, 110 S.W.2d 1054, 1058, 21 Tenn.App. 388—*Derrick v. Lumpkins*, 95 S.W.2d 939, 20 Tenn.App. 77.

49. *Potteroff v. Stafford*, Civ App., 81 S.W.2d 539, error refused, certiorari denied 56 S.Ct. 139, 296 U.S. 619, 80 L.Ed. 439.

Wash.—*Smith v. Fitch*, 171 P.2d 682, 25 Wash.2d 619.

W.Va.—*Straton v. Aldridge*, 6 S.E.2d 222, 11 W.Va. 691.

65 C.J. p 255 note 53.

49. U.S.—*Halden v. Cremlin*, C.C.A.

Iowa, 66 F.2d 943, 81 A.L.R. 247, certiorari denied 54 S.Ct. 123, 290 U.S. 687, 78 L.Ed. 692—*Mutual Life Ins. Co. of N. Y. v. Cleveland*, D.C.Pa., 82 F.Supp. 358—*Overly v. Overly*, D.C.Pa., 65 F.Supp. 174, affirmed, C.C.A., 158 F.2d 281—*Copier v. U. S. C.I.C.*, 19 F.Supp. 752—*First Nat. Bank of Bloomingdale v. Manufacturers Trust Co.*, D.C.N.J., 2 F.R.D. 125.

Ala.—*Westcott v. Sharp*, 54 So.2d 758.

256 Ala. 418—*Merchants Nat. Bank of Mobile v. Bertolla*, 18 So.2d 378.

215 Ala. 662—*Masters v. Chambers*, 4 So.2d 261, 241 Ala. 623—*Hall v. Hall*, 2 So.2d 908, 241 Ala. 397.

Ark.—*Interville Truck Line v. Martin*, 213 S.W.2d 729, 219 Ark. 603.

*Hawkins v. Scanlon*, 206 S.W.2d 179, 212 Ark. 180—*Hand v. Mitchell*, 193 S.W.2d 333, 209 Ark. 996.

*Mottensen v. Ballard*, 188 S.W.2d 749, 209 Ark. 1—*Lester v. Oldham*, 69 S.W.2d 1078, 189 Ark. 5.

Cal.—*Chard v. O'Connell*, 62 P.2d 369.

7 Cal.3d 663—*Roberts v. Wachter*, 231 P.2d 540, 104 Cal.App.2d 281.

*Wagner v. Mullaney*, 140 P.2d 704, 69 Cal.App.2d 630—*Hardison v. Corbett*, 180 P.2d 226, 55 Cal.App.2d 310—*Kobida v. Hinkelmann*, 127 P.2d 667, 63 Cal.App.2d 186—*Calou v. Jones*, 122 P.2d 951, 50 Cal.App.2d 299—*In re Kellogg*, 107 P.2d 964.

41 Cal.App.2d 833—*De Olazabal v. Min. 74 P.2d 787*, 24 Cal.App.2d 258.

*Barritt v. Barritt*, 23 P.2d 54, 132 Cal.App. 538.

Ill.—*Williams v. Anderson*, 5 N.E.2d 593, 238 Ill.App. 149—*People ex rel. Barrett v. Cairo-Alexander County Bank*, 232 Ill.App. 343, reversed on other grounds 2 N.E.2d 889, 363 Ill. 589.

Ind.—*Zorich v. Zorich*, 88 N.E.2d 694, 119 Ind.App. 547—*McCabe v. Grant*, 21 N.E.2d 658, 108 Ind.App. 695.

Me.—*Rose v. Osborne*, 180 A. 315, 133 Me. 497.

Md.—*Grimes v. Grimes*, 40 A.2d 58,

## § 35. Trusts in Personality in General

As a general rule express trusts in personality may be created and established, or engrafted on a written instrument, by parol.

While it has been held that where the statute declares that all express trusts must be created or declared in writing, a trust in personal property cannot be created by parol,<sup>47</sup> it is the general rule that express trusts in personal property may be created and established, or engrafted on a written instrument, by parol, not only in those jurisdictions where there is no provision relating specifically to the creation of trusts,<sup>48</sup> but also in those jurisdictions in which the statutes requiring declarations of trust to be in writing by their express terms relate only to trusts in real property;<sup>49</sup> and a trust

184 Md. 59—*Mushaw v. Mushaw*, 39 A.2d 465, 183 Md. 511.

Mass.—*Hugo v. Hugo*, 91 N.E.2d 826, 325 Mass. 612—*Cohen v. Newton Sav. Bank*, 87 N.E.2d 748, 320 Mass. 90, 168 A.L.R. 1321—*Russell v. Meyers*, 56 N.E.2d 604, 216 Mass. 669—*Greeley v. Flynn*, 36 N.E.2d 394, 310 Mass. 23—*Stuck v. Schumm*, 194 N.E. 895, 290 Mass. 159.

Mich.—*Harmon v. Harmon*, 6 N.W. 2d 762, 303 Mich. 513—*Newton v. Old-Merchants Nat. Bank & Trust Co. of Battle Creek*, 300 N.W. 559, 299 Mich. 499—*Boyer v. Rackus*, 276 N.W. 564, 282 Mich. 593, motion denied 280 N.W. 756, 282 Mich. 701, certiorari denied 59 S.Ct. 147, 305 U.S. 644, 82 L.Ed. 416, rehearing denied 59 S.Ct. 248, 305 U.S. 674, 82 L.Ed. 437—*Economy v. Roberts*, 265 N.W. 441, 274 Mich. 484.

Mo.—*Harris Banking Co. v. Miller*, 89 S.W. 629, 190 Mo. 640, 1 L.R.A. N.S. 790, overruling State ex rel. Rife v. Hawes, 76 S.W. 653, 177 Mo. 360 and Mt. Calvary Church v. Albers, 73 S.W. 508, 174 Mo. 331—*Gwin v. Gwin*, 219 S.W.2d 282, 240 Mo. App. 782—*Walton Bank & Trust Co. v. American Hereford Cattle Breeders Ass'n*, 129 S.W.2d 1090, 235 Mo.App. 1243—*Eldridge v. Logan*, App., 217 S.W.2d 588—*Coon v. Stanley*, 94 S.W.2d 96, 239 Mo. App. 524—*Hoelscher v. Pate*, App., 79 S.W.2d 776—*McPheters v. Scott County Bank*, App., 63 S.W.2d 455.

Neb.—*Simon v. Simon*, 5 N.W.2d 140, 141 Neb. 839—*Whalen v. Swircin*, 4 N.W.2d 737, 141 Neb. 650.

N.J.—*Livingston v. Rein*, 33 A.2d 840, 133 N.J.Eq. 585—*Hudson Trust Co. v. Holt*, 169 A. 516, 115 N.J.Eq. 34.

N.Y.—*Blanco v. Veloz*, 66 N.E.2d 171, 295 N.Y. 224—*Goldstein v. Brookstein*, 118 N.Y.S.2d 280, 281 App. Div. 782—*Woodside Presbyterian Church v. Burden*, 269 N.Y.S. 682, 240 App.Div. 43, appeal dismissed.

created by parol is valid, if it related only to personal property at the time of its creation, even though it subsequently affects real property.<sup>50</sup> Nevertheless, it has been held that the courts are reluctant to enforce an alleged parol trust in personal property,<sup>51</sup> and may require a high degree of proof to establish such a trust by parol evidence, as discussed *infra* § 71.

The rule that trusts in personality may be created or established by parol has been held to apply to

various items of personal property,<sup>52</sup> including money,<sup>53</sup> bank deposits,<sup>54</sup> promissory notes,<sup>55</sup> securities,<sup>56</sup> shares of corporate stock,<sup>57</sup> and the proceeds of life insurance policies<sup>58</sup> even though insurer is ignorant thereof.<sup>59</sup> The rule has also been applied to real estate mortgages;<sup>60</sup> and, on the theory that partnership property is regarded in law as personal property as among the partners in connection with the partnership business, a trust may be created by parol of partnership rights which are essentially in the nature of real estate.<sup>61</sup>

191 N.E. 629, 264 N.Y. 690.—*In re Sweeney's Estate*, 279 N.Y.S. 927, 155 Misc. 461.—*In re Freistadt's Will*, 104 N.Y.S.2d 510, affirmed 105 N.Y.S.2d 995, 278 App.Div. 902, amended on other grounds 107 N.Y.S.2d 466, 279 App.Div. 603.—*Margaret v. Margaret*, 76 N.Y.S.2d 854.—*Falcone v. Palotta*, 29 N.Y.S.2d 918, affirmed 29 N.Y.S.2d 719, 262 App.Div. 875.

Pa.—*Keller v. Keller*, 41 A.2d 547, 351 Pa. 461.—*In re Williams' Estate*, 37 A.2d 584, 349 Pa. 568.—*Gribbel v. Gribbel*, 17 A.2d 892, 341 Pa. 11.—*Gritz v. Gritz*, 7 A.2d 1, 336 Pa. 161, 122 A.L.R. 1297.—*In re Free's Estate*, 194 A. 492, 327 Pa. 362.—*Popilock v. Piernikowski*, 56 A.2d 326, 161 Pa.Super. 587.—*Majors v. Majors*, 33 A.2d 442, 153 Pa.Super 175, affirmed 37 A.2d 528, 349 Pa. 334.—*In re Tuttle's Estate*, 200 A. 921, 132 Pa.Super 356.—*Dime Bank & Trust Co. of Pittston v. Walsh*, 17 A.2d 728, 143 Pa.Super. 189.—*Crossan v. Galloway*, Com.Pl. 5 Chest Co. 229.—*In re Williams' Estate*, Com.Pl. 45 Lack.Jur. 170, 12 Som.Leg.J. 101.—*In re Galil's Estate*, Com.Pl. 40 Luz.Leg.Reg. 231.—*In re Gorgas' Estate*, 34 Luz.Leg.Reg. 441, reversed on other grounds 24 A.2d 171, 147 Pa.Super 319.—*D'Amico v. Cianci*, Com.Pl. 32 North.Co. 264.—*Manzlak v. Zulovich*, Com.Pl. 97 Pittsb.Leg.J. 55.

Tenn.—*McDowell v. Rees*, 122 S.W.2d 839, 22 Tenn.App. 336.

Vt.—*Smith v. Deshaw*, 78 A.2d 479, 116 Vt. 441.—*Varner v. Burlington Federal Sav. & Loan Ass'n*, 49 A.2d 93, 114 Vt. 463, 168 A.L.R. 1265.

Wis.—*Wysse v. Puchner*, 51 N.W.2d 38, 260 Wis. 365.—*Swazee v. Lee*, 47 N.W.2d 733, 269 Wis. 136.

65 C.J. § 254 note 52.  
Agreements as to proceeds of sale of lands see *infra* § 36.  
Statutes expressly applicable to trusts in lands, tenements, and hereditaments, see *supra* § 32 a.

**Oral trusts** held not abolished or invalidated by statutes.—*Salscheider v. Holmes*, 286 N.W. 347, 205 Minn. 459.

#### Inadequate writing

Where trust did not involve real property, failure of trust agreement

to set forth precise terms of trust or specify beneficiaries' names was immaterial.—*Hamilton v. Junction City Mining Co.*, 136 P.2d 591, 58 Cal.App.2d 221.

#### Parol evidence of collateral agreement

Although a writing purports to make an absolute transfer, extrinsic evidence may be offered, under exception to parol evidence rule, of collateral agreement to hold property in trust.—*In re Games' Estate*, 100 P.2d 1055, 15 Cal.2d 255.

#### Rights of third persons

Where landlord brought suit against tenant for unpaid rent and caused writ of attachment before judgment to be sued out, and, under writ, money, which had been received by auctioneer from sale of tenant's mortgaged furniture and furnishings, was seized, and tenant moved to quash writ, and agent of chattel mortgagee intervened, claiming that the money was not subject to attachment because of alleged oral agreement with tenant that sum realized from sale of furniture and furnishings should be paid to mortgagee in full settlement of mortgaged debt, alleged oral agreement was without force or effect under statute of frauds to defeat rights of landlord.—*Thurm v. Wall*, D.C.Mun.App., 104 A.2d 835.

50. Cal.—*Roach v. Caraffa*, 25 P. 22, 85 Cal. 436.

51. U.S.—*Zolintakis v. Orfanos*, C.C. A. Utah, 119 F.2d 571, certiorari denied *Orfanos v. Zolintakis*, 62 S.Ct. 62, 314 U.S. 630, 86 L.Ed. 506.

N.J.—*In re Hudspeth's Estate*, 172 A.2d 200, 116 N.J.Eq. 20.

52. Cal.—*In re Kellogg*, 107 P.2d 964, 41 Cal.App.2d 833.

#### Slaves

Tenn.—*Saunders v. Harris*, 1 Head 185.

65 C.J. § 255 note 62.

53. Ark.—*Mortensen v. Ballard*, 188 S.W.2d 749, 209 Ark. 1.

Cal.—*In re Kellogg*, 107 P.2d 964, 41 Cal.App.2d 833.

N.J.—*Jivingson v. Rein*, 33 A.2d 840, 133 N.J.Eq. 585.

65 C.J. § 255 note 55.

54. Ark.—*Mortensen v. Ballard*, 188 S.W.2d 749, 209 Ark. 1.

Ill.—*Williams' Estate v. Tuch*, 39 N.E.2d 695, 313 Ill.App. 230.

Mass.—*Gibbons v. Gibbons*, 4 N.E.2d 1019, 296 Mass. 89.—*Buteau v. Lavale*, 187 N.E. 628, 284 Mass. 276.

N.J.—*Hudson Trust Co. v. Holt*, 169 A. 515, 115 N.J.Eq. 34.

Ohio.—*Steiner v. Pecky*, 50 N.E.2d 617, 72 Ohio App. 18.

Tenn.—*Derrick v. Lumpkins*, 95 S.W.2d 939, 20 Tenn.App. 77.

65 C.J. § 255 note 56.

55. Cal.—*De Olazabal v. Mix*, 74 P.2d 787, 24 Cal.App.2d 258.

Va.—*Cope v. Shedd-Carter*, 7 S.E.2d 891, 175 Va. 273.

65 C.J. § 255 note 57.

56. Ariz.—*O'Brien v. Bank of Douglas*, 143 P.747, 17 Ariz. 203.

65 C.J. § 255 note 58.

57. Ark.—*Corpus Juris* quoted in *Mortensen v. Ballard*, 188 S.W.2d 749, 755, 209 Ark. 1.

65 C.J. § 255 note 59.

58. U.S.—*Jackman v. Equitable Life Assurance Soc. of U.S.*, C.C.A.Pa., 145 F.2d 945.

Ky.—*Quinlan v. Quinlan*, 169 S.W.2d 617, 293 Ky. 565.

Md.—*Hayward v. Campbell*, 199 A. 530, 174 Md. 540.

N.Y.—*Blanco v. Velez*, 66 N.E.2d 171, 295 N.Y. 224.—*In re Kyle's Will*, 22 N.Y.S.2d 236, 174 Misc. 1094.

Pa.—*D'Amico v. Cianci*, Com.Pl. 32 North.Co. 264.—*In re Galil's Estate*, Com.Pl. 40 Luz.Leg.Reg. 231.

Tex.—*Eaton v. Husted*, 172 S.W.2d 493, 141 Tex. 349.—*Dunn v. Second Nat. Bank*, 113 S.W.2d 165, 131 Tex. 198, 115 A.L.R. 730.—*Rape v. Gardner*, Civ.App., 54 S.W.2d 594.

65 C.J. § 255 note 60.

59. Tex.—*Dunn v. Second Nat. Bank*, 113 S.W.2d 165, 131 Tex. 198, 115 A.L.R. 730.—*Jackson v. Hughes*, Civ.App., 52 S.W.2d 687.

60. S.D.—*Warren v. Lincoln*, 235 N.W. 597, 58 S.D. 195.

65 C.J. § 255 note 63.

Application of statutes of frauds generally to assignments of mortgages see *Frauds*, Statute of § 118 b (3).

61. Cal.—*Barritt v. Barritt*, 23 P.2d 54, 132 Cal.App. 528.

*Creation of parol trust in personality.* Where a trust in personality may be created by parol, no particular words are required to create or declare such a trust;<sup>62</sup> but a voluntary executory agreement for the creation of an oral trust in personality, or an unexecuted or imperfect gift of personality, is insufficient to establish the existence of a completed verbal trust.<sup>63</sup>

### § 36. Agreements as to Proceeds of Sale of Land

A parol agreement to hold the proceeds of a sale of land in trust for another constitutes a trust in personality and is enforceable if the agreement is unconnected with, or separable from, any trust in the land itself.

It has been held that, even where an express trust in land cannot be established by parol, as discussed supra § 32 a, a parol agreement, on sufficient consideration, to hold the proceeds of a sale of land in trust for another constitutes a trust in personal property and is enforceable if the agreement is unconnected with, or separable from, any trust in the land itself,<sup>64</sup> or if that part of the trust relating to the land has been fully performed,<sup>65</sup> or the promise to hold the proceeds in trust is made or renewed after the land has been sold.<sup>66</sup> However, where there were no proceeds in existence at the time the agreement was made, and no new promise was made after the sale of the land,<sup>67</sup> or the agreement as to the proceeds is otherwise inseparable from a trust in the land,<sup>68</sup> the parol agreement is within the statute of frauds and unenforceable unless it has been

executed; but it has also been held that, if the land has been converted into money, a trust as to the proceeds is enforceable although there was no declaration of trust after the conversion.<sup>69</sup>

Applying these rules, it has been held that a valid parol trust is created by an agreement to share the profits arising on a sale of land;<sup>70</sup> an agreement to pay over to a third person a portion of the price received on sale of specific real property;<sup>71</sup> an agreement by the grantees in a quitclaim deed to redeem the land from a sale under mortgage foreclosure, sell it at a price to be approved by the grantor, pay themselves out of the proceeds, and pay the balance to the grantor;<sup>72</sup> an agreement to buy a mortgage on the land of another, sell the premises for his benefit, and account for the balance over disbursements;<sup>73</sup> an agreement by a mortgagee, on a conveyance to him of the mortgaged property, to account on a sale of the property for the proceeds in excess of the mortgage debt;<sup>74</sup> an agreement between a mortgagee and the wife of the mortgagor that if she would join in the mortgage and not contest foreclosure or redeem from the sale the mortgagee would purchase the land and, on reselling the same, would pay her a certain portion of the proceeds;<sup>75</sup> or an agreement between a mortgagor and mortgagee that the former shall enter appearance to a pending foreclosure and waive the stay allowed by law, in consideration of which the mortgagee shall bid in the premises at the amount of the decree, interest, and costs, resell at private sale, and pay the mortgagor the amount realized in excess of the bid.<sup>76</sup>

#### Mineral rights reserved

Agreement between partners, at time partnership was terminated and assets divided, that mineral rights reserved from conveyances of partnership land title to which was taken in individual names of partners should be held in trust for different copartners could be created by parol—*Barritt v. Barritt*, supra.

62. Ala.—*Merchants Nat. Bank of Mobile v. Bertolla*, 18 So.2d 378, 245 Ala. 662.

Cal.—*De Olazabal v. Mix*, 74 P.2d 787, 24 Cal App 2d 258.

Mo.—*Eldridge v. Logan*, App., 217 S.W.2d 688.

63. Mo.—*Northrup v. Burge*, 164 S.W. 584, 255 Mo. 641—*Perry v. First Nat. Bank*, 91 S.W.2d 78, 230 Mo App. 374.

Pa.—*In re Wallace's Estate*, 174 A.397, 316 Pa. 148.

64. Mass.—*Simpson v. Henry N. Clark Co.*, 55 N.E.2d 10, 316 Mass 118, 154 A.L.R. 380.

65 C.J. p 256 note 68.

#### Absolute transfer of land to trustee

Where plaintiffs allegedly executed oral agreement with defendant under which plaintiffs' property was sold to defendant in consideration for payment of certain obligations of plaintiffs by defendant, and defendant agreed to resell the property and retain amount expended by him and pay balance to the plaintiffs, plaintiffs in bringing action based on alleged refusal of defendant to accept reasonable offer for the property were not seeking to enforce an oral trust in realty and the claim was not barred by the statute of frauds.—*Williams v. Moodhard*, 19 A.2d 101, 241 Pa. 273.

65. Okl.—*Taylor v. Walker*, 239 P.601, 112 Okl. 75.

65 C.J. p 256 note 69.

Execution or part performance generally see infra § 37.

66. Mo.—*Watson v. Payne*, 128 S.W.238, 143 Mo.App 721.

65 C.J. p 256 note 70.

67. Ala.—*Westcott v. Sharp*, 54 So.2d 758, 256 Ala. 418.

65 C.J. p 256 note 71.

68. Cal.—*Kinley v. Thelen*, 110 P.613, 158 Cal. 175.

65 C.J. p 256 note 72.

69. Mass.—*Chace v. Gardner*, 117 N.E. 841, 228 Mass. 533.

70. Mich.—*Price v. Nellist*, 25 N.W.2d 512, 316 Mich 418.

N.J.—*Chew v. Markeim*, 16 A.2d 337, 126 N.J.Law 695.

65 C.J. p 256 note 75.

71. Minn.—*Randall v. Constans*, 23 N.W. 530, 33 Minn. 329.

72. Minn.—*Macklanburg v. Griffith*, 131 N.W. 1063, 115 Minn. 131.

73. Vt.—*McGinnis v. Cook*, 57 Vt.36, 52 Am.R. 115.

74. Mo.—*Mulrooney v. Irish-American Savings & Building Ass'n*, 155 S.W. 804, 249 Mo. 629.

75. Ind.—*Talbot v. Barber*, 38 N.E.487, 11 Ind.App. 1, 54 Am.S.R. 491.

76. Neb.—*Jones Nat. Bank v. Price*, 55 N.W. 1045, 37 Neb. 291.

On other other hand, it has been held that no enforceable trust arises from a parol agreement between a trustee and the beneficial owner of land that the trustee shall sell the land, discharge liens, and hold the balance of the proceeds for the benefit of the owner's children;<sup>77</sup> an oral declaration after the grant of land by decedent that the purpose thereof was to avoid the necessity of making a will and that he intended the grantee to sell the property and distribute the proceeds among decedent's children;<sup>78</sup> an agreement that the grantee of land should hold the premises in trust for the benefit of a designated person, to collect the rents, pay taxes and encumbrances, sell the land, and pay over the difference between the sums received and those paid by the grantee;<sup>79</sup> an agreement between one who holds an option to purchase land and another that the latter shall buy the land, take title in his own name, and on resale pay the optionee one half of the profits;<sup>80</sup> an agreement that land conveyed by an absolute deed to the cashier of a bank shall be held as security for the grantor's indebtedness to the bank, that the grantee shall sell the land, and apply the proceeds on the debt;<sup>81</sup> an agreement to buy land at execution sale and resell it, and, after deducting the purchase price and expenses, pay over the balance to the execution defendant;<sup>82</sup> or an agreement that a grantee of land, under a deed containing no restrictions or directions, shall sell the land after the grantor's death and divide the proceeds between designated persons.<sup>83</sup>

A verbal agreement accompanying an absolute conveyance of land, that the property should be sold by the grantee and the proceeds be given to the grantor, after reimbursing the grantee for advances, creates an express trust void under the statute of frauds.<sup>84</sup> So also it has been held that an agreement, made at the time of executing a deed, that the grantee shall hold the title in trust for the grantor and, on sale of the land, pay the proceeds to him, is within the statute of frauds forbidding express trusts in lands by parol,<sup>85</sup> but that the rule does not apply where the grantor retains possession of the premises, collects the rents and profits, and converts them to his own use.<sup>86</sup>

*Income from land.* It has been held that an oral trust to pay over the income from certain lands may in a proper case be recognized as a valid oral trust.<sup>87</sup>

### § 37. Execution or Part Performance of Trust and Waiver of Statute

A parol trust obnoxious to the statute of frauds is merely voidable by the trustee, who may waive the statute; and a parol trust is valid if acknowledged by the trustee or fully, or even partly, performed.

The statute of frauds relating to trust concerns only the parties to the trust agreement and their privies.<sup>88</sup> Accordingly, a parol trust obnoxious to the statute of frauds is not absolutely void, but merely voidable at the election of the trustee<sup>89</sup> who may waive the benefit of the statute.<sup>90</sup> If the existence of the trust is acknowledged by the trustee,<sup>91</sup> or the

77. D.C.—Dahlgren v. Dahlgren, 1 F. 2d 765, 55 App.D.C. 52, certiorari denied 45 S.Ct. 125, 256 U.S. 626, 69 L.Ed. 475.

78. Md.—Messick v. Pennell, 35 A.2d 143, 182 Md. 531.

79. Minn.—Randall v. Constans, 23 N.W. 630, 33 Minn. 329.

80. Kan.—Grantham v. Conner, 154 P. 246, 97 Kan. 150.

81. Cal.—Kinley v. Thelen, 110 P. 513, 158 Cal. 175.

82. Pa.—Bryan v. Douds, 62 A. 828, 213 Pa. 221, 110 Am.S.R. 544, 5 Ann.Cas. 171.

83. Ala.—Willard v. Sturkie, 105 So. 800, 213 Ala. 609.  
65 C.J. p 257 note 87.

84. Mich.—Glieberman v. Fine, 226 N.W. 669, 248 Mich. 8.

85. Neb.—Marvel v. Marvel, 97 N.W. 640, 70 Neb. 498, 113 Am.S.R. 792.  
—Cameron v. Nelson, 77 N.W. 771, 57 Neb. 381.

86. Neb.—Doll v. Doll, 147 N.W. 471, 36 Neb. 185.  
65 C.J. p 257 note 89.

87. Ala.—First Nat. Bank of Birmingham v. Huddleston, 6 So.2d 893, 242 Ala. 437.

**Agreement to repay advancements from income of land**

Ala.—First Nat. Bank of Birmingham v. Huddleston, 6 So.2d 893, 242 Ala. 437.

88. Kan.—Powell v. Leon, 239 P.2d 974, 172 Kan. 267.

89. Ariz.—Stewart v. Damron, 160 P.2d 321, 63 Ariz. 158.

Cal.—Husick v. First Nat. Bank, 91 P.2d 934, 33 Cal.App.2d 399.

Mass.—Perkins v. Hilton, 107 N.E.2d 822, 329 Mass. 291.

Or.—Hanscom v. Hanscom, 208 P.2d 330, 186 Or. 641.

Pa.—Faunce v. McCorkle, 183 A. 926, 321 Pa. 116.

S.D.—Schwartzle v. Dale, 54 N.W.2d 361, 74 S.D. 467.

65 C.J. p 257 note 90.

**Observance of oral agreement not prohibited**  
The observance of oral agreement between grantor and grantee that grantee would reconvey land to grantor for certain purposes and that

grantor would later reconvey land to grantee was not prohibited by statute requiring trusts concerning land to be in writing.—Stump v. Smarsh, 113 P.2d 1058, 153 Kan. 804.

90. La.—Byrd v. J. F. Mecke Lumber Co. App., 158 So. 701.

Pa.—Faunce v. McCorkle, 183 A. 926, 321 Pa. 11.  
65 C.J. p 257 note 91.

91. Iowa.—Bates v. Zehnpfennig, 262 N.W. 141, 220 Iowa 164.

Md.—Trossbach v. Trossbach, 42 A.2d 905, 185 Md. 47.

Mass.—Perkins v. Hilton, 107 N.E.2d 822, 329 Mass. 291.—Simpson v. Henry N. Clark Co., 55 N.E.2d 10, 316 Mass. 118, 154 A.L.R. 380.

Pa.—Williams v. Moodhard, 19 A.2d 101, 341 Pa. 273.

65 C.J. p 257 note 92.

**Written acknowledgment; retrospective operation**

The statute of frauds does not preclude a court from enforcing a trust resting in parol alone if such trust is manifested and proved by subsequent written acknowledgment by trustee and such trust operates ret-



trust has been fully performed and executed,<sup>92</sup> it will be upheld and the statute of frauds deemed to have no application, and the acknowledgment of the trust, or the performance thereof, may be shown by parol, as discussed *infra* § 70; and this is particularly true where the trustee has by his conduct in ratifying and affirming the trust induced others to change their position because of it.<sup>93</sup> In such case a conveyance by the trustee in execution of the trust is based on sufficient consideration as against strangers,<sup>94</sup> and relates back to the oral agreement, so as to take precedence over any interest meanwhile derived from the trustee by one who is not an innocent purchaser for value,<sup>95</sup> but where a trust is only a constructive one no oral recognition of it by the trustee will operate to change his relation from a constructive to an express trustee.<sup>96</sup> It has been held that a deed absolute in form may be

shown by parol evidence to have been made in trust for the benefit of the grantor, where the grantor remains in possession of the land.<sup>97</sup> On the other hand, it has also been held that the recognition by the grantee of property that he holds the title thereto in trust does not aid the party claiming such to be the case, for however convincing the proof of the parol trust may be, the court cannot enforce a mere parol trust in the face of the statute declaring it void.<sup>98</sup>

**Part performance.** An express parol trust may be taken out of the statute of frauds by part performance,<sup>99</sup> but the acts relied on for such purpose must be those of the beneficiary, rather than of the grantor,<sup>1</sup> and must have been done solely with a view to, or in connection with, the performance of the verbal agreement,<sup>2</sup> and the agreement must have

respectively from time of its creation by subsequent proof or acknowledgment—*Coles v. Osback*, 80 A.2d 464, 13 N.J. Super. 367, reversed on other grounds 92 A.2d 35, 22 N.J. Super. 358.

#### Consent to steps taken by beneficiary

There is exception to general rule that no express trust in land based on entirely oral transaction can be enforced when beneficiary as such with consent of trustee enters into possession of land or makes valuable improvements thereon or irrevocably changes his position in reliance upon the trust—*Mull v. Mull*, 232 P.2d 556, 105 Cal.App.2d 68—*Haskell v. First Nat. Bank*, 91 P.2d 934, 33 Cal.App.2d 399.

92. Cal.—*Mull v. Mull*, 232 P.2d 556, 105 Cal.App.2d 68—*Owings v. Laugharn*, 128 P.2d 114, 53 Cal.App.2d 789.

Iowa—*Hardy v. Daum*, 259 N.W. 561, 219 Iowa 982.

Mass.—*Perkins v. Hilton*, 107 N.E.2d 822, 329 Mass. 291.

Minn.—*Corpus Juris* cited in *Salschelder v. Holmes*, 286 N.W. 347, 350, 205 Minn. 459.

N.J.—*Luci v. Weber*, 137 A. 417, 123 N.J. Eq. 303.

Pa.—*Kalyvas v. Kalyvas*, 89 A.2d 819, 371 Pa. 371.

65 C.J. p. 258 note 93.

#### Executed consideration

Parol testimony is admissible to show that a deed absolute on its face was given in trust, if consideration is executed and not contractual; and in suit for cancellation of mineral quitclaim deed, which recited consideration of \$10 cash and other good and valuable consideration, parol evidence that grantee would apply amount received for rentals and royalties to debt owing by grantors to grantee and that when debt was paid realty would be reconveyed to grantors was properly admitted over ob-

jection that statute of frauds was contravened—*Henderson v. Jimmerison*, 234 S.W.2d 710, error refused no reversible error.

93. Cal.—*Mull v. Mull*, 232 P.2d 556, 105 Cal.App.2d 68—*Haskell v. First Nat. Bank*, 91 P.2d 934, 33 Cal.App.2d 399.

94. Iowa—*Sheffield Milling Co. v. Heltzman*, 181 N.W. 631, 192 Iowa 288.

95. Wis.—*Davis v. Kurella*, 276 N.W. 321, 226 Wis. 297—*Blaha v. Borgman*, 124 N.W. 1017, 142 Wis. 43.

96. Cal.—*Norton v. Bassett*, 97 P. 894, 154 Cal. 411, 129 Am.S.R. 162—*Nouques v. Newlands*, 50 P. 386, 118 Cal. 102.

97. Ga.—*Harper v. Harper*, 33 S.E.2d 154, 199 Ga. 26—*Hall v. Turner*, 32 S.E.2d 829, 198 Ga. 763—*Chandler v. Georgia Chemical Works*, 185 S.E. 787, 182 Ga. 419, 105 A.L.R. 837.

98. Mo.—*Parker v. Blakely*, 93 S.W.2d 981, 338 Mo. 1189.

99. Ala.—*Talley v. Talley*, 26 So.2d 586, 248 Ala. 84.

*Ariz.—Corpus Juris* cited in *Stewart v. Dunnon*, 160 P.2d 321, 324, 63 Ariz. 158.

Colo.—*Vandewiele v. Vandewiele*, 136 P.2d 523, 110 Colo. 556.

Iowa—*Hardy v. Daum*, 259 N.W. 561, 219 Iowa 982.

65 C.J. p. 259 note 99.

Part performance of contracts within statute of frauds generally see *Frauds*, Statute of §§ 248-263.

#### Acts held sufficient to constitute part performance

(1) In general—*Dickens v. Dickens*, Tex.Civ.App., 262 S.W.2d 795, error refused no reversible error.

(2) Where plaintiff made cash contributions toward purchase price and subsequent maintenance of realty and

also made improvements thereto in connection with which he contributed his own labor and other cash expenditures—*Muller v. Sobol*, 97 N.Y.S.2d 905, 277 App.Div. 884, reargument and appeal denied 99 N.Y.S.2d 767, 277 App.Div. 951.

(3) Where defendant, to carry out her oral agreement to afford a home and support for plaintiff and her son for life, held legal title to a house and lot obtained with plaintiff's funds and the parties lived in house for about a year—*Van Auken v. Tyrrell*, 33 A.2d 339, 130 Conn. 289.

(4) Where full possession of the property is passed by the trustor to the trustee—*Salschelder v. Holmes*, 286 N.W. 347, 205 Minn. 459.

(5) Where a portion of the purchase price for land conveyed by deed was paid for—*Machann v. Machann*, Tex.Civ.App., 269 S.W.2d 826.

1. Conn.—*Hanney v. Clark*, 198 A. 677, 124 Conn. 140.

#### Acts held insufficient to constitute part performance

Daughter's continued occupation of premises after mother's conveyance thereof to another did not permit proof of an oral trust therein in daughter's favor, on ground of "part performance," in absence of anything in daughter's possession to indicate the commencement of a new estate or interest—*Hanney v. Clark*, *supra*.

2. Minn.—*Wentworth v. Wentworth*, 2 Minn. 277, 72 Am.D. 97.

Va.—*Marsie v. Parrish*, 126 S.E. 691, 140 Va. 717.

#### Acts held insufficient to validate trust

The repairs made by daughter's husband on property conveyed by mother in fee to another with a life estate reserved were insufficient part performance, under the statute of frauds, to permit proof of an oral

been so far executed that refusal of full execution would be inequitable.<sup>3</sup>

### § 38. Requisites and Sufficiency of Writing to Satisfy Statute of Frauds

The writing declaring or manifesting the existence of the trust need not be executed contemporaneously with the transfer of the legal title and the creation of the trust, but may be executed subsequent thereto.

It is not necessary that the writing declaring or manifesting the existence of the trust be executed contemporaneously with the transfer of the legal title and the creation of the trust,<sup>4</sup> but it is sufficient if executed subsequent thereto;<sup>5</sup> and the fact that a considerable period of time has intervened between the agreement creating the trust and the making of the writing required by the statute of frauds is immaterial,<sup>6</sup> although it has been held that a parol agreement to hold land in trust was not validated by a writing made over twenty years afterward, setting down what the parties could remember of the original agreement.<sup>7</sup>

The requisites and sufficiency of a writing or memorandum to satisfy the requirements of a stat-

ute of frauds generally are discussed in *Frauds*, Statute of §§ 170-215.

### § 39. — Nature and Form

- a. In general
- b. Particular writings

#### a. In General

The statute of frauds may be satisfied by any writing or writings, however informal, which sufficiently manifest or acknowledge the existence of the trust and disclose its nature, subject, purpose, and terms with certainty.

In so far as the statute of frauds has been construed as not requiring the trust to be declared in writing, but as requiring merely that there be some written evidence manifesting the existence of the trust, as discussed supra § 31, the courts, although strict in interpreting the statute of frauds to require some writing, are liberal in their construction as to the kind of writing required, and hold that the statute is satisfied by any writing, however informal, which sufficiently manifests or acknowledges the existence of the trust,<sup>8</sup> and discloses its nature, subject, purpose, and terms,<sup>9</sup> with the cer-

trust in the premises in daughter's favor, in absence of proof that the repairs were made subsequent to mother's death—*Hanney v. Clark*, 198 A. 577, 124 Conn. 140.

3. *Vt.*—*Straw v. Mower*, 130 A. 687, 99 Vt. 56.  
65 C.J. p. 259 note 2.

4. *Ala.*—*Hughes v. Davis*, 15 So.2d 567, 244 Ala. 680.

III.—*First Nat. Bank of Ottawa v. Weise*, 76 N.E.2d 538, 323 Ill.App. 1.  
N.J.—*Coles v. Osback*, 80 A.2d 464, 13 N.J.Super. 367, reversed on other grounds 92 A.2d 35, 22 N.J.Super. 358.

65 C.J. p. 260 note 11.  
Time of making memoranda of contracts within statute of frauds generally see *Frauds*, Statute of § 171.

#### Part of original transaction

Where, pursuant to oral agreement, deed to realty was delivered to trustee who six days later executed declaration of trust and it was shown that the execution of written declaration of trust was part of original transaction agreed on, valid trust was created—*Sagendorph v. Lutz*, 281 N.W. 553, 286 Mich. 103.

5. *Ala.*—*Hughes v. Davis*, 15 So.2d 567, 244 Ala. 680.

III.—*McDiarmid v. McDiarmid*, 15 N.E.2d 493, 368 Ill. 638—*Albert v. Albert*, 80 N.E.2d 69, 334 Ill.App. 440.  
N.J.—*Coles v. Osback*, 80 A.2d 464, 13 N.J.Super. 367, reversed on other grounds 92 A.2d 35, 22 N.J.Super. 358.

65 C.J. p. 260 note 12.

6. *Kan.*—*Palk v. Fulton*, 262 P. 1025, 124 Kan. 745.  
65 C.J. p. 260 note 13.

7. *Kan.*—*Quanton v. Kendall*, 253 P. 600, 122 Kan. 814.

8. *D.C.*—*Moore v. Guy*, 135 F.2d 476, 77 U.S.App.D.C. 379—*Tschiffely v. Tschiffely*, 107 F.2d 191, 70 App. D.C. 386.

III.—*McDiarmid v. McDiarmid*, 15 N.E.2d 493, 368 Ill. 638—*Seales v. McMahon*, 4 N.E.2d 872, 364 Ill. 413—*Albert v. Albert*, 80 N.E.2d 69, 334 Ill.App. 440—*First Nat. Bank of Ottawa v. Weise*, 76 N.E.2d 538, 323 Ill.App. 1.

*Ind.*—*Lehman v. Pierce*, 36 N.E.2d 952, 109 Ind.App. 497.

*Ky.*—*Corpus Juris* cited in *Kollmann v. Latonia Deposit Bank & Trust Co.*, 121 S.W.2d 721, 725, 275 Ky. 347.

65 C.J. p. 259 note 5.

Nature, form, and contents of writing to satisfy statute of frauds generally see *Frauds*, Statute of §§ 174-200.

#### Subsequent formal trust contemplated

The mere fact that trust settlor contemplates subsequent execution of formal trust instrument does not necessarily negative present creation of trust, if its terms are sufficiently indicated—*Newton v. Old Merchants Nat. Bank & Trust Co. of Battle Creek*, 300 N.W. 859, 299 Mich. 499.

9. *D.C.*—*Moore v. Guy*, 135 F.2d 476, 77 U.S.App.D.C. 379—*Tschiffely v.*

*Tschiffely*, 107 F.2d 191, 70 App. D.C. 386.

*Mass.*—*Simpson v. Henry N. Clark Co.*, 65 N.E.2d 10, 316 Mass. 118, 151 A.L.R. 380, applying New Hampshire law.

65 C.J. p. 259 note 6.

"The writing or writings must give a correct picture of the oral trust actually agreed upon and contain the trust terms which were in fact fixed."—*Lehman v. Pierce*, 36 N.E.2d 952, 955, 109 Ind.App. 497.

#### Essential elements to be stated

Deed or instrument containing a voluntary trust must indicate with reasonable certainty intention to create the trust, subject matter, purpose, and beneficiary of the trust and acceptance of the trust by the trustee—*Laughlin v. March*, 145 P.2d 549, 19 Wash.2d 874, applying California law.

#### Sufficiency to permit introduction of parol evidence

Where realty was conveyed to grantor's daughter without consideration, and grantee thereafter, in a writing delivered to grantor, promised that she would make a specific disposition, such writing together with subsequent letters, acknowledging the promise to divide, which referred to "the farm" sufficiently satisfied statute, requiring trusts concerning lands to be created in writing, to permit introduction of parol evidence to identify the real estate subject to trust—*Lehman v. Pierce*, 36 N.E.2d 952, 109 Ind.App. 497.

tainty which is required in declarations of trust generally without regard to the statute of frauds.<sup>10</sup> While it has been held that the writing must contain within itself, and without the aid of parol evidence, all that is necessary to enable the court to declare a trust,<sup>11</sup> at least in so far as the identity of land involved is concerned,<sup>12</sup> it has also been held that the writings, in being considered for the purpose of satisfying the statute of frauds, are to be considered in their setting,<sup>13</sup> and that parol evidence is admissible to make clear the terms of a trust the existence of which is established by a writing, as discussed *infra* § 70.

Ordinarily the written evidence of an express trust must come from the grantor or from the trustee, not from the cestui que trust.<sup>14</sup> The writing evidencing or establishing the trust need not be addressed to the cestui que trust.<sup>15</sup> The writing need not contain the words "trust" or "in trust."<sup>16</sup>

*Separate writings.* In so far as the requirement of a writing is concerned, the declaration of trust

need not be contained in the instrument which transfers the legal title, but may be set out in a separate instrument,<sup>17</sup> or in several papers or instruments, provided they are related to, and connected with, each other and, when construed together, evidence the existence of a trust,<sup>18</sup> although the grantee in a deed is not affected by a declaration of trust as to the land conveyed, made by the grantor in a separate paper which is not referred to in the deed or known by the grantee,<sup>19</sup> and a trust is not sufficiently created in writing where an affidavit merely refers to a declaration of trust, without adopting its statements or affirming its truth.<sup>20</sup>

### b. Particular Writings

The statute of frauds may be satisfied by a variety of writings, including memoranda, letters and correspondence, accounts, wills, pleadings, and depositions.

The statute of frauds has been held to be satisfied by a large variety of writings,<sup>21</sup> such as assign-

**Description of lands involved held inadequate**  
Tex.—Starr v. Ripley, Civ App., 265 S.W.2d 225.

10. D.C.—Moore v. Guy, 135 F.2d 476, 77 U.S.App.D.C. 379—Tschiffely v. Tschiffely, 107 F.2d 191, 70 App. D.C. 386.

Wash.—Laughlin v. March, 145 P.2d 549, 19 Wash.2d 874 stating California law—In re Weir's Estate, 236 P. 285, 134 Wash. 560.

Sufficiency of declaration of trust generally see *infra* §§ 42-49.

11. Pa.—Jourdan v. Andrews, 102 A. 33, 258 Pa. 347.

12. Wash.—Laughlin v. March, 145 P.2d 549, 19 Wash.2d 874, stating California law.

13. Ind.—Lehman v. Pierce, 36 N.E.2d 952, 109 Ind.App. 497.

14. Ind.—Richards v. Wilson, 112 N.E. 780, 185 Ind. 335.

**Written deed under trustor's oral directions**  
Okla.—King v. Courtney, 122 P.2d 1014, 190 Okl. 256.

15. Ill.—McDiarmid v. McDiarmid, 15 N.E.2d 493, 368 Ill. 638—Albert v. Albert, 80 N.E.2d 69, 334 Ill.App. 440.

16. Mich.—Jannis v. Michigan Trust Co., 213 N.W. 85, 238 Mich. 282.

17. U.S.—Corpus Juris cited in Sadler v. Sadler, D.C.Nev., 73 F. Supp. 583, 586.

Ind.—Lehman v. Pierce, 36 N.E.2d 952, 109 Ind.App. 497.

Mass.—Herman v. Edington, 118 N.E.2d 865.

Mo.—Ervin v. Davis, 199 S.W.2d 366, 355 Mo. 951—Corpus Juris cited in Tootle-Lacy Nat. Bank v. Rollier, 111 S.W.2d 12, 16, 341 Mo. 1029.

N.C.—Corpus Juris cited in Peele v. LeRoy, 22 S.E.2d 244, 246, 222 N.C. 123.

65 C.J. p. 262 note 50.

18. Cal.—Weiner v. Mullaney, 140 P.2d 704, 59 Cal.App.2d 620.

Ill.—Wynekoop v. Wynekoop, 95 N.E.2d 457, 407 Ill. 219.

Mo.—Corpus Juris cited in Tootle-Lacy Nat. Bank v. Rollier, 111 S.W.2d 12, 16, 341 Mo. 1029.

N.C.—Corpus Juris cited in Peele v. LeRoy, 22 S.E.2d 244, 246, 222 N.C. 123.

65 C.J. p. 262 note 51.

Declaration of trust by means of several writings generally see *infra* § 48.

### Writing and subsequent letters

Where realty was conveyed to grantor's daughter without consideration, and grantee thereafter, in a writing delivered to grantor, promised that she would make a specified disposition, such writing together with subsequent letters, acknowledging the promise to divide with grantor's son, was sufficient to establish creation of an express trust under statute requiring such trusts concerning realty to be created in writing—Lehman v. Pierce, 36 N.E.2d 952, 109 Ind.App. 497.

19. Wis.—Rogers v. Rogers, 10 N.W.2d 53 Wis. 36, 40 Am.R. 756.

20. N.Y.—Kimball v. De Grauw, 9 N.Y.S.2d 339.

21. Tex.—Johnson v. Smith, 280 S.W. 158, 115 Tex. 193.

Particular writings as satisfying requirements of statute of frauds generally see *Frauds*, Statute of § 176.

### Particular writings held sufficient

(1) A deed conveying realty, to which grantor held title in trust, to beneficiary as trustee for his sons until his death, on which title should vest in sons, created valid trust for sons' benefit—Aronian v. Asadoorian, 52 N.E.2d 397, 315 Mass. 274.

(2) An instrument, reciting that signer held title to realty, conveyed to her by ordinary grant deed, in trust for her sister and would execute deed thereof to latter on her request—Wood v. American Nat. Bank of San Bernardino, 74 P.2d 1051, 24 Cal.App.2d 313.

(3) Where at time wife took title to realty under deed there was an oral agreement that she was to hold title for benefit of bank and husband who were to divide net proceeds from property, and oral agreement was referred to and incorporated in two written instruments and in divers correspondence—First Nat. Bank of Ottawa v. Weiss, 76 N.E.2d 538, 333 Ill.App. 1.

(4) Where written entry of savings bank deposit in name of depositor as trustee for another was made on bank's records at depositor's direction, passbook evidencing deposit was issued by bank in favor of depositor as trustee, and depositor signed identification card as trustee—Wilder v. Howard, 4 S.E.2d 199, 188 Ga. 428.

ments,<sup>22</sup> bonds,<sup>23</sup> notes and mortgages,<sup>24</sup> receipts,<sup>25</sup> memoranda,<sup>26</sup> and written agreements.<sup>27</sup> On the other hand, tax lists or books are not sufficient to establish a trust;<sup>28</sup> nor is an irrevocable power of attorney, when not accompanied by any transfer of the legal title.<sup>29</sup>

**Letters and correspondence.** Letters and correspondence may constitute sufficient memoranda to satisfy the statute of frauds,<sup>30</sup> but a letter is insufficient where it is written, not by the owner of the land, but by the owner's husband,<sup>31</sup> or where it does not clearly show an intention to create a trust and the terms thereof,<sup>32</sup> or where the statement of the terms or subject matter is not sufficient.<sup>33</sup> So a letter which shows merely an unperformed promise to create a trust, unattended by any consideration, is insufficient;<sup>34</sup> and in some cases letters directing a disposition of the writer's property after his death have been held invalid as a testamentary disposition of property other than by will.<sup>35</sup>

**Accounts.** An account may constitute a sufficient writing to prove an express trust within the re-

quirements of the statute of frauds;<sup>36</sup> but a statement of account showing merely the amount a grantee had received as rent and how he had paid it out is insufficient,<sup>37</sup> and a mere memorandum in a firm ledger on the margin of an account, not describing the land or otherwise importing a trust, is insufficient.<sup>38</sup>

**Wills.** A trust may be sufficiently manifested in a will;<sup>39</sup> but not by an invalid will,<sup>40</sup> although it has been held that a will declaring by way of recital that land devised to testatrix's husband was held by her in trust for him was a sufficient declaration of trust, even though invalid as a will.<sup>41</sup> A deed of trust incorporating portions of an invalid will, and declaring that the trustees shall hold on the same trusts as declared in the will, has been held valid;<sup>42</sup> but a statute requiring an express trust in land to be created by a writing is not complied with by a mere statement in a will that it was made in accordance with a mutual agreement between testatrix and her husband, and a recital that the husband by his will gave his estate to his wife.<sup>43</sup>

22. Mich.—Innis v. Michigan Trust Co., 213 N.W. 85, 238 Mich. 282.

N.J.—Collins v. Stewart, 44 A. 467, 58 N.J. Eq. 392, affirmed 46 A. 1098, 60 N.J. Eq. 488.

23. Mich.—Innis v. Michigan Trust Co., 213 N.W. 85, 238 Mich. 282.

65 C.J. p 260 note 20.

24. Me.—Johnson v. Candage, 31 Me. 28.

Mich.—Innis v. Michigan Trust Co., 213 N.W. 85, 238 Mich. 282.

25. Mich.—Innis v. Michigan Trust Co., supra.

65 C.J. p 260 note 22.

26. Colo.—Vandewiele v. Vandewiele, 136 P.2d 523, 110 Colo. 556.

Ill.—McDiarmid v. McDiarmid, 15 N.E.2d 493, 368 Ill. 638—Scales v. McMahon, 4 N.E.2d 872, 364 Ill. 413.

—Albert v. Albert, 80 N.E.2d 69, 334 Ill.App. 440.

Ind.—Lehman v. Pierce, 36 N.E.2d 952, 109 Ind.App. 497.

65 C.J. p 260 note 23.

27. U.S.—Sadler v. Sadler, C.C.A. Nev., 117 F.2d 1.

65 C.J. p 261 note 24.

28. Ala.—Bibb v. Hunter, 79 Ala. 351.

N.H.—Moulton v. Adams, 32 A. 760, 67 N.H. 102.

29. Cal.—Freeman v. Rahm, 58 Cal. 111.

30. Ala.—Hughes v. Davis, 15 So.2d 567, 244 Ala. 680.

Ill.—Scales v. McMahon, 4 N.E.2d 872, 364 Ill. 413—Albert v. Albert, 80 N.E.2d 69, 334 Ill.App. 440.

Mass.—Cohen v. Newton Sav. Bank,

67 N.E.2d 748, 320 Mass. 90, 168 A.L.R. 1321.

Tex.—Frint v. Tate, Civ.App., 162 S.W.2d 737.

65 C.J. p 261 note 27.

**Particular writings held sufficient**

(1) Letters showing that tenant in common was paying his brothers and sisters their part of proceeds of sale of land, title to which he held for them, and wherein he informed them that it would be necessary to hold land for better price after a purchaser had surrendered possession, satisfied requirements of statute of frauds.—McDiarmid v. McDiarmid, 15 N.E.2d 493, 368 Ill. 638.

(2) Other writings.—McKenzie v. Birkholtz, 50 N.W.2d 95, 74 S.D. 173—65 C.J. p 261 note 27 [a].

31. Ala.—Jacoby v. Funkhouser, 40 So. 291, 147 Ala. 254.

32. Wash.—Pacheco v. Mello, 247 P. 927, 139 Wash. 566.

65 C.J. p 261 note 29.

**Letter held insufficient**

A letter from a father to his son stating that he deemed it expedient to transfer title to certain properties to son or his estate, notwithstanding the three girls understood that properties were to be willed to son by the last survivor in compensation for money loaned to repair and improve the properties, was insufficient to constitute a declaration of trust under statute of frauds requiring declarations or creations of trust to be in writing.—Tschiffely v. Tschiffely, 107 F.2d 191, 70 App.D.C. 386.

33. Tex.—Starr v. Ripley, Civ.App., 265 S.W.2d 225.

**Inadequate description of lands involved**

A letter confirming fact that parties were partners in ownership in a certain tract of land was insufficient as a written instrument under the statute requiring that a trust in relation to realty to be valid must be supported by a written instrument in view of inadequate description of the lands involved.—Starr v. Ripley, supra.

34. Pa.—Appeal of Wolff, 16 A. 470, 123 Pa. 438.

35. Conn.—Bryan v. Bigelow, 60 A. 266, 77 Conn. 604, 107 Am.St. 64.

Minn.—Conrad v. Douglas, 61 N.W. 673, 59 Minn. 498.

36. Mich.—Innis v. Michigan Trust Co., 213 N.W. 85, 238 Mich. 282.

65 C.J. p 261 note 32.

37. Cal.—Hasshagen v. Hasshagen, 22 P. 294, 80 Cal. 514.

38. Mass.—Homer v. Homer, 107 Mass. 82.

39. Mich.—Innis v. Michigan Trust Co., 213 N.W. 85, 238 Mich. 282.

65 C.J. p 261 note 36.

Testamentary trusts see the C.J.S. title Wills § 1004 et seq. also 69 C.J. p 692 note 50 et seq.

40. Pa.—Appeal of Long, 86 Pa. 196.

41. Mich.—Innis v. Michigan Trust Co., 213 N.W. 85, 238 Mich. 282.

42. N.Y.—Dupre v. Thompson, 8 Barb. 537.

43. Mass.—Young v. Young, 146 N.E. 574, 251 Mass. 218.

65 C.J. p 261 note 40.

*Pleadings and depositions.* It has been held that a trust is sufficiently declared and manifested by an admission or acknowledgment by the trustee that he holds in trust, contained in a pleading,<sup>44</sup> either in a bill or complaint,<sup>45</sup> or in an answer<sup>46</sup> or deposition.<sup>47</sup> On the other hand, it has been held that an answer or deposition admitting the existence of a parol trust is insufficient where the trustee, at the same time, sets up the statute of frauds as a bar to the enforcement of the trust,<sup>48</sup> or where the answer or deposition is made after the trustee has divested himself of all interest in the land by an absolute deed.<sup>49</sup> So it has been held that the testimony of defendant, taken down in writing after the death of his brother, and in settlement of the estate, was not a written declaration of trust, even though defendant admitted therein that there was such a trust.<sup>50</sup>

#### § 40. — Execution and Delivery

Although the writing in order to satisfy the statute of frauds must generally be signed by the proper party, it is ordinarily not required to be sealed or acknowledged. Delivery of the writing is in some instances required.

In general, a deed or declaration of trust need not be under seal,<sup>51</sup> stamped,<sup>52</sup> or acknowledged,<sup>53</sup> unless the statute so requires;<sup>54</sup> and certainly as between the parties to the transaction an instrument

creating an express trust is valid and enforceable without acknowledgment.<sup>55</sup> Where there is no statute of frauds specifically relating to trusts, it has been held that a declaration of trust made simultaneously with the acceptance of a legal title, although not embodied therein, does not require formal execution or acknowledgment in the absence of statute.<sup>56</sup>

On the other hand, the different statutes of frauds generally require the writing to be signed<sup>57</sup> by the proper party;<sup>58</sup> and, where the writing is not signed, or is signed by the wrong person, it is insufficient.<sup>59</sup> It has been held that the signature of the trustee is sufficient without that of the cestui que trust,<sup>60</sup> as is the signature of the declarant without those of the beneficiaries;<sup>61</sup> and, on the other hand, a written agreement signed by all the parties thereto except the trustee has been held binding where his signature formed no element of the consideration for the signatures of the other parties, and the writing expressly provided that it should be binding, regardless of the trustee.<sup>62</sup> Since a trust may be created and declared by the same person, or it may be created by one person and declared by another,<sup>63</sup> where the statute is held not to require that the trust be both created and declared in writing, but merely that it be either created or

44. N.J.—*Lach v. Weber*, 197 A. 417, 123 N.J. Eq. 303.  
N.Y.—*Cook v. Barr*, 44 N.Y. 156.  
Admission or execution of trust by trustee generally see *supra* § 37.

45. Mich.—*Bridgman v. McIntyre*, 113 N.W. 776, 150 Mich. 78.  
Vt.—*Straw v. Mower*, 130 A. 687, 99 Vt. 56.

46. Ill.—*Albert v. Albert*, 80 N.E. 2d 69, 334 Ill. App. 440.  
65 C.J. p. 261 note 44.

47. Ill.—*Kellogg v. Peddicord*, 54 N.E. 623, 181 Ill. 22.  
65 C.J. p. 262 note 45.

48. Ill.—*Davis v. Stambaugh*, 45 N.E. 170, 163 Ill. 557.

49. Ill.—*Stubbings v. Stubbings*, 91 N.E. 51, 248 Ill. 406—*Phillips v. South Park Com'rs*, 10 N.E. 230, 119 Ill. 626.

50. Cal.—*Hasshagen v. Hasshagen*, 22 P. 294, 80 Cal. 514.

51. Mass.—*Cohen v. Newton Sav. Bank*, 67 N.E. 2d 748, 320 Mass. 90, 168 A.L.R. 1321.  
65 C.J. p. 262 note 55.

Requirements of execution of writing as to contracts within statute of frauds generally see *Frauds, Statute of* §§ 172, 201-215.

52. Nev.—*Sime v. Howard*, 4 Nev. 473.  
65 C.J. p. 262 note 56.

53. Iowa.—*Schumacher v. Dolan*, 134 N.W. 624, 154 Iowa 207.  
Wis.—*White v. Fitzgerald*, 19 Wis. 480.  
65 C.J. p. 262 note 57.

54. Miss.—*Board of Trustees of M. E. Church South v. Odom*, 56 So. 314, 100 Miss. 64.

55. U.S.—*Hudson v. Jones*, D.C. Okl., 22 F. Supp. 938.  
Okl.—*Kimberly v. Classna*, 16 P. 2d 1090, 161 Okl. 17.

56. N.C.—*Poele v. Leltoy*, 22 S.E. 2d 214, 222 N.C. 123.

57. Or.—*Devereaux v. Cockerline*, 170 P. 2d 727, 179 Or. 229.  
65 C.J. p. 262 note 59.

#### Agreement signed by testatrix and devisee

A written agreement, signed by both testatrix and absolute devisee, that devisee should convey all property received by him under will to testatrix' brother, if alive at time of testatrix' death, created valid trust in devisee under statute requiring creation of express trust in lands by written instrument signed by party creating or declaring trust.—*Hughes v. Davis*, 15 So. 2d 567, 244 Ala. 680.

58. Md.—*O'Connor v. Estevez*, 35 A. 2d 148, 182 Md. 541.

#### By party enabled by law to declare trust

Md.—*O'Connor v. Estevez*, *supra*.  
65 C.J. p. 262 note 59 [e].

59. Iowa.—*Rubler v. Bibler*, 216 N.W. 99, 205 Iowa 639.  
65 C.J. p. 263 note 60.

#### Signature of clerk or bookkeeper held insufficient

N.J.—*Austin v. Young*, 106 A. 395, 90 N.J. Eq. 47.

#### Failure of wife to sign

Even if agreement whereby husband and wife agreed to provide purchase price of land and broker agreed to contribute certain services and was to receive one-half of net profits as commission for his services created a trust, it was not valid as to the wife who did not sign it.—*Devereaux v. Cockerline*, 170 P. 2d 727, 179 Or. 229.

60. U.S.—*Sadler v. Sadler*, CCA Nev., 167 P. 2d 1.  
65 C.J. p. 263 note 61.

61. N.J.—*Lach v. Weber*, 197 A. 417, 123 N.J. Eq. 303.

62. Cal.—*Smith v. Davis*, 27 P. 26, 90 Cal. 25, 25 Am. S.R. 92.

63. Vt.—*Straw v. Mower*, 130 A. 687, 99 Vt. 56.

declared in writing,<sup>64</sup> a writing is sufficient to satisfy the statute if it is signed by either the person who creates the trust or the person who declares it.<sup>65</sup>

**Sufficiency of signature.** Whether a signature or subscription is sufficient is frequently a matter of intent and must be determined by the circumstances of the particular case.<sup>66</sup> Thus, the signature may consist of initials instead of being written out at length,<sup>67</sup> and need not be handwritten, but may be typed, lithographed, rubber-stamped, or printed.<sup>68</sup> Where the statute requires a signature, and not a subscription, the name of the signer need not appear at the end of the writing, but may be placed in the body.<sup>69</sup>

**Signatures to separate writings.** Where the terms of a trust are collected from several writings it is not necessary that all of them be signed if they are so connected with the one that is signed that they may be identified as parts of the transaction.<sup>70</sup>

**Attesting witnesses.** Under a statute so providing, the writing effecting the trust must be attested by the prescribed number and kind of witnesses.<sup>71</sup>

**Delivery.** While it has been broadly stated that the instrument creating the trust need not be delivered to anyone,<sup>72</sup> with respect to delivery of the writing required by a statute of frauds, the ques-

tion of the necessity of a delivery has been rendered unimportant in many cases by holdings that the delivery was sufficient.<sup>73</sup> The rules deducible from the remaining authorities are that, while memoranda showing the existence of a trust and found among the effects of the settlor or trustee after his death are a sufficient declaration in writing within the meaning of the statute,<sup>74</sup> where the declaration of trust is contained in the deed transferring the legal title, there must be a valid delivery in order to render the deed operative,<sup>75</sup> as in the case of deeds generally, as discussed in Deeds §§ 40-53, although there is some apparent authority to the contrary,<sup>76</sup> but that no delivery is necessary where the grantor is himself the trustee and the deed is recorded.<sup>77</sup> It has been held that, where the trust is created by a declaration of an owner of land that he holds the land in trust for another, it is not essential that the declaration be delivered to a third person.<sup>78</sup>

The necessity of the delivery of a writing to satisfy the statute of frauds generally is discussed in Frauds, Statute of § 173.

**Destruction or revocation of writing.** A deed, will, or other instrument, which has been destroyed or revoked before it took effect, is not a sufficient declaration within the meaning of the statute,<sup>79</sup> although the existence and validity of the trust are not affected by a destruction of the instrument after it took effect.<sup>80</sup>

64. Vt.—Straw v. Mower, *supra*.

65. Vt.—Straw v. Mower, *supra*.

66. Cal.—Weiner v. Mullaney, 140 P.2d 704, 59 Cal.App.2d 620.

67. Cal.—Weiner v. Mullaney, *supra*, 65 C.J. p 263 note 64.

68. Cal.—Weiner v. Mullaney, *supra*.

**Writings not denied**

Where brother did not deny writing letters and subsequently conducted himself in accordance with many declarations therein contained and adopted his initials as signature, letters were sufficiently signed, although some of the initials were typewritten, within statute requiring writing instruments to be "subscribed" by trustee.—Weiner v. Mullaney, *supra*.

69. N.J.—McVay v. McVay, 10 A 178, 43 N.J.Eq. 47.

70. Ill.—Wynekoop v. Wynekoop, 95 N.E.2d 457, 407 Ill. 219, 65 C.J. p 263 note 66.

Sufficiency of separate writings to comply with statute of frauds see *supra* § 39 a.

71. Pa.—In re Darr's Estate, 39 Pa. Dist. & Co. 210, 88 Pittsb. Leg. J. 242.

**Notary's signature as immaterial**

When a decedent trustee acknowledged a written settlement in trust to be his act and deed, in the presence of one attesting witness and before a notary public, before the repeal of the act of April 26, 1856, P. L. 328, by the act of May 16, 1933, P. L. 141, it was held that the signature of the notary was for the single purpose of recording, not attesting, and that since the deed of trust did not meet the strict requirements of the act of 1856, *supra*, it was void.—In re Darr's Estate, *supra*.

**Compliance held sufficient**

Pa.—In re Dravo's Trust, 86 Pa. Dist. & Co. 174, 4 Fiduciary 91.

72. Mass.—Cohen v. Newton Sav. Bank, 67 N.E.2d 748, 320 Mass. 90, 168 A.L.R. 1321.

73. Ga.—New South Bldg. etc. Co., Ass'n v. Cann, 29 S.E. 15, 101 Ga. 678.

65 C.J. p 263 note 68.  
Delivery of trust instrument or declaration generally see *infra* § 62.

74. N.Y.—In re Brown's Will, 169 N.E. 612, 252 N.Y. 366, 65 C.J. p 263 note 69.

75. Kan.—Madden v. Glathart, 265 P. 42, 125 Kan. 466, 65 C.J. p 263 note 70.

**Date of execution as delivery date**

Date of instrument is not necessarily date of execution, since execution involves delivery which is essential for operation of instrument as contract.

Ala.—Stocks v. Inzer, 168 So. 877, 232 Ala. 482.

Pa.—In re McKean's Trust, Orph. 1 Fiduciary 26.

76. N.J.—Turbox v. Grant, 39 A. 378, 56 N.J.Eq. 199, 65 C.J. p 263 note 72.

77. N.Y.—Moloney v. Tilton, 51 N. Y.S. 19, 22 Misc. 682, 65 C.J. p 263 note 73.

78. U.S.—Stoehr v. Miller, C.C.A.N. Y., 296 F. 414.

79. Ill.—Davis v. Stambaugh, 45 N. E. 170, 163 Ill. 557, 65 C.J. p 264 note 75.

80. R.I.—Stone v. King, 7 R.I. 358, 84 Am.D. 557, 65 C.J. p 264 note 76.

§ 41. — Recording and Registration

While the recording of written declarations of trust may be required, the failure to record does not ordinarily invalidate the instrument as between the parties.

Under some statutes to that effect the recording of written declarations of trust is permissible or even required.<sup>81</sup> Thus, it has been held that a loss resulting from failure to record must be borne by the person charged with the duty of having the instrument recorded.<sup>82</sup> However, it has also been held that the failure to have a deed or other declaration of trust put on record does not render it void or inoperative as between the parties,<sup>83</sup> the only effect of such omission being to render the instrument void as to creditors or purchasers without notice.<sup>84</sup>

Provisions prescribing the time within which a deed creating a trust shall be recorded and providing that if not recorded in accordance with the statute it shall be null and void should be construed as meaning that such instrument shall be voidable,<sup>85</sup> and that only such persons as may have been injured by the failure to record within the time prescribed should be heard to complain of such failure.<sup>86</sup>

While it has been held that the fact that a trust instrument is not acknowledged is no excuse for failure to record it,<sup>87</sup> there is also some authority to the contrary.<sup>88</sup> The registration act does not apply to parol trusts.<sup>89</sup> The recording of an unproved copy of a lost deed of trust does not give constructive notice of the trust.<sup>90</sup>

3. DECLARATION OF TRUST

§ 42. In General

- a. In general
- b. Spendthrift trusts

a. In General

A sufficient declaration of trust is essential to the creation of express or voluntary trusts, which generally

are created by an instrument or instruments pointing out directly and expressly the property, persons, and purpose of the trust, or by an agreement or contract expressing the intended trust.

A sufficient declaration of trust is essential to the creation of an express or voluntary trust,<sup>91</sup> which, as discussed supra §§ 31-35, when the stat-

- 81. Ga.—Hentley v. Long, 68 S.E. 783, 135 Ga. 152.
- 65 C.J. p 264 note 77

Particular estate held not trust

Deed conveying described land to named trustees of named free school and their successors as long as such land was used for school purposes conveyed an estate in fee simple defeasible and did not create a trust in lands within statute requiring every writing declaring or creating a trust in lands to be acknowledged or proved and lodged with clerk of chancery court to be recorded, since a trust is an equitable estate.—Kelly v. Wilson, 36 So.2d 817, 204 Miss. 66

**Spendthrift trust** must be declared by will or deed duly recorded, and the recordation, being notice to the public, prevents beneficiary from misleading creditors or obtaining false credit on his apparent ownership of trust property.—State ex rel. v. Nashville Trust Co., 190 S.W.2d 785, 28 Tenn.App. 385—Rose v. Third Nat. Bank, 183 S.W.2d 1, 27 Tenn.App. 553.

- 82. Ga.—New South Bldg., etc., Assoc. v. Gann, 24 S.E. 448, 97 Ga. 367.

- Minn.—Burgess v. Bragaw, 52 N.W. 45, 49 Minn. 462.

- 83. U.S.—Rose v. Commissioner of Internal Revenue, C.C.A.6, 65 F.2d 616, applying Tennessee law—Norris v. Jones, D.C.Okl., 31 F.Supp. 463, affirmed, C.C.A., Jones v. Norris, 122 F.2d 6—Hudson v. Jones, D.C.Okl., 22 F.Supp. 938.

- Conn.—Janahan v. Janahan, 39 A.2d 895, 131 Conn. 307.

- Ga.—Corpus Juris cited in Metropolitan Life Ins. Co. v. Hall, 12 S.E.2d 53, 61, 191 Ga. 294

- Mass.—Aronian v. Asadoorian, 52 N.E.2d 397, 315 Mass. 274

- Okl.—Kimberly v. Cissna, 16 P.2d 1090, 161 Okl. 17.

- 65 C.J. p 264 note 79

- 84. Md.—Hoffman v. Gosnell, 24 A.2d 78, 75 Md. 577.

- 65 C.J. p 264 note 80

- 85. Ga.—Metropolitan Life Ins. Co. v. Hall, 12 S.E.2d 53, 191 Ga. 294.

- 86. Ga.—Metropolitan Life Ins. Co. v. Hall, supra.

- 87. U.S.—Whittle v. Vanderbilt Min., etc., Co., C.C.Cal., 83 F. 48.

- 88. Wash.—Egkert v. Ford, 150 P.2d 719, 21 Wash.2d 152.

**An unacknowledged instrument denominated "declaration of trust"** declaring that certain undivided interests in property were held in trust, was not an instrument which the law required to be recorded.—Egkert v. Ford, supra.

- 89. N.C.—Sansom v. Warren, 2 S.E.2d 459, 215 N.C. 432—Lowery v. Wilson, 200 S.E. 861, 214 N.C. 800—Spence v. Foster Pottery Co., 117 S.E. 32, 185 N.C. 218.

- 90. Ky.—Cunningham v. Estill, 68 S.W. 1081, 24 Ky.L. 559.

- 91. Cal.—Bambridge v. Stoner, 106 P.2d 423, 16 Cal.2d 423.

- Ill.—Kilgore v. State Bank of Colusa, 25 N.E.2d 39, 372 Ill. 578.

- Mo.—State ex rel. Union Nat. Bank of Springfield v. Blair, 166 S.W.2d 1055, 350 Mo. 622

- 65 C.J. p 264 note 87.

- Of personal property**

- U.S.—In re Helrich's Estate v. C. I. R., C.C.A. 7, 143 F.2d 443.

- Intent**

An instrument, to be a "declaration of trust," must appear to have been so intended by maker.—Pickering v. Higgins, 30 A.2d 846, 69 R.I. 22.

**A trust may be made by declaration;** the declaration bears the same relationship to an equitable gift which delivery bears to a legal gift.—In re Turley's Estate, 289 N.Y.S. 704, 160 Misc. 190.

- "Declaration of trust"**

(1) A "declaration of trust" is the act by which an individual acknowledges that property, the title to which he holds in his own name, in fact belongs to another, for whose use he holds it.—Bingen v. First Trust Co. of St. Paul, C.C.A.Minn., 103 F.2d 260—65 C.J. p 264 note 86 [a] (1).

(2) Other definition see 65 C.J. p 264 note 86 [a] (2).

**Time of creation**

A trust is created when no act is necessary to be done to give it effect and when the trust is fully and finally declared in the instrument creating it.—Meyer v. Pfahler, 199 N.E. 801, 362 Ill. 336.

ute so requires, must be in writing. Such trusts are generally created by an instrument or instruments pointing out directly and expressly the property, persons, and purpose of the trust,<sup>92</sup> or by an agreement or contract between the parties expressing the intended trust.<sup>93</sup> The declaration must contain sufficient words to create the trust,<sup>94</sup> and it must

**92.** *Okl.—Bryant v. Mahan*, 264 P. 811, 130 Okl. 67.

**Tex.—Corpus Juris cited in** *Golob v. Stone*, Civ App., 262 S.W.2d 536, 538—**Corpus Juris cited in** *Brown v. Donald*, Civ.App., 216 S.W.2d 679, 683.

Transactions and agreements raising express trusts see *infra* §§ 50–59.

#### Any writing

The existence of a trust may be shown by any writing which connects the trustee with the subject matter of the trust—*Clay v. Crawford*, 153 S.W.2d 797, 298 Ky. 654.

#### Dependent on language

Whether or not a trust is created is dependent on the language of the instrument—*Hobbs v. Board of Education of Northern Baptist Convention*, 253 N.W. 627, 126 Neb. 416.

#### When trust fully declared

A trust is created when no act is necessary to be done to give it effect and when the trust is fully and finally declared in the instrument creating it—*Wynekoop v. Wynekoop*, 95 N.E.2d 457, 407 Ill. 219.

#### Trust held created

##### (1) Generally.

**U.S.—Board of National Missions of Presbyterian Church in the U. S. v. Smith**, C.A.Ill., 182 F.2d 362—**Bingen v. First Trust Co. of St. Paul**, C.C.A.Minn., 103 F.2d 260—**Meek v. Republic Nat. Bank & Trust Co.**, D.C.Tex., 9 F.Supp. 651, modified on other grounds, C.C.A., Wallace v. Republic Nat. Bank & Trust Co. of Dallas, 80 F.2d 787, certiorari denied *Crook v. Wallace*, 56 S.Ct. 952, 298 U.S. 683, 80 L.Ed. 1403.

**Cal.—Del Giorgio v. Powers**, 81 P.2d 1006, 27 Cal App 2d 668—**Crenshaw v. Roy C. Seeley Co.**, 19 P.2d 50, 129 Cal.App. 627

**Ill.—Herdien v. Herdlen**, 8 N.E.2d 726, 290 Ill.App. 606.

**Mich.—Rose v. Rose**, 1 N.W.2d 458, 300 Mich. 73.

**N.Y.—Pinkney v. City Bank Farmers Trust Co.**, 292 N.Y.S. 835, 219 App.Div. 375—**City Bank Farmers' Trust Co. v. Charity Organization Soc. of City of New York**, 265 N.Y.S. 267, 238 App.Div. 720, affirmed 191 N.E. 504, 264 N.Y. 441—**Bacorn v. People**, 88 N.Y.S.2d 628, 195 Misc. 917.

**Pa.—Thornton v. Koch**, 176 A. 3, 317 Pa. 400—**In re Pleibel's Estate**, 20 Pa.Dist. & Co. 389.

(2) A deed to minerals in place together with acceptance wherein grantee agreed to assign to grantor one-half of any royalty which grantee might recover under grantor's claim

of title, after clearance of title by grantor, created a trust for grantor in one-half the royalty notwithstanding amount of royalty was not definitely stated since there was a separation of royalty, the royalty reserved was realty, and customary royalty would be implied in absence of statement of amount—*Moseley v. Pikes*, Tex.Civ. App., 126 S.W.2d 589, error granted.

#### Trust held not created

##### (1) Generally.

**U.S.—Atwood v. Kieberg**, C.C.A.Tex., 133 F.2d 69, rehearing denied 135 F.2d 452, certiorari denied 61 S.Ct. 45, 320 U.S. 744, 88 L.Ed. 441.

**Ark.—Krickberg v. Hoff**, 143 S.W.2d 560, 261 Ark. 63.

**Cal.—Balian v. Balian's Market**, 119 P.2d 426, 48 Cal.App.2d 150.

**Colo.—Beatty v. Fellows**, 74 P.2d 677, 101 Colo. 466.

**D.C.—Moore v. Guy**, 135 F.2d 476, 77 U.S.App.D.C. 379.

**Fla.—Webster v. St. Petersburg Federal Sav. & Loan Ass'n**, 20 So.2d 400, 155 Fla. 412.

**Ill.—Kilgore v. State Bank of Colusa**, 25 N.E.2d 39, 372 Ill. 578.

**Mass.—Day Trust Co. v. Malden Sav. Bank**, 105 N.E.2d 363, 328 Mass. 576.

**Mo.—Atlantic Nat. Bank of Jacksonville, Fla. v. St. Louis Union Trust Co.**, 211 S.W.2d 2, 357 Mo. 770.

**Neb.—O'Connor v. Burns, Potter & Co.**, 36 N.W.2d 507, 151 Neb. 9.

**N.Y.—Riegel v. Central Hanover Bank & Trust Co.**, 42 N.Y.S.2d 657, 266 App.Div. 586.

**N.C.—Sinclair v. Travis**, 57 S.E.2d 394, 231 N.C. 345.

**Pa.—Styer v. Hess**, Com.Pl., 59 Montg. Co. 41.

**R.I.—Pickering v. Higgins**, 30 A.2d 816, 69 R.I. 22.

**S.D.—Strain v. Chamberlain Auto & Supply Co.**, 274 N.W. 661, 65 S.D. 427.

(3) By power or letter of attorney.—*In re Miller's Estate*, 19 Pa.Dist. & Co. 141.

(3) Agreement of oil company, which was desirous of obtaining mineral lease on mortgaged land and which in consideration for such lease paid off mortgages, taxes and other claims against the land, that all sums arising from the land should be paid to oil company to be credited in extinguishment of the mortgage.—*Morse v. Texas Co.*, D.C.La., 117 F.Supp. 634.

(4) Deed conveying realty in fee simple to wife and two sons as long as she remained grantor's wife or widow, otherwise property to revert to sons to be used as their home, sub-

ject to the further condition that the property could not be sold during the minority of the youngest son unless deed made pursuant to such sale was signed by the grantor, gave wife and two sons of grantor fee-simple title to property described as tenants in common, except that wife's interest was only for such period as she remained the wife or widow of the grantor with remainder to the sons, and it did not create an implied trust in favor of the grantor.—*Moore v. Moore*, 4 S.E.2d 18, 188 Ga. 303.

(5) Direction that trustee, on settlor's death, set aside so much of the remaining principal as the trustee deemed sufficient to produce the income payable to the beneficiary was held not to create a new trust.—*In re Baugier's Estate*, 36 N.Y.S.2d 117, 264 App.Div. 925.

**93.** *Mo.—Stevens v. Fitzpatrick*, 118 S.W. 51, 218 Mo. 708.

#### Joint tenants

Issuance of mortgage certificate in names of decedent and educational corporation "as joint tenants," under agreement wherein decedent reserved right to receive interest and to revoke gift, created trust for decedent.—*American Bible Soc. v. Mortgage Guarantee Co.*, 17 P.2d 105, 217 Cal. 9.

#### Consideration

(1) A contract to declare a trust, where it is founded on a valuable consideration, may be considered as equivalent to an actual declaration.—*Conn.—Itayhol Co. v. Holland*, 148 A. 358, 110 Conn. 516.

**N.J.—Austin v. Young**, 106 A. 395, 80 N.J.Eq. 47.

(2) However, a mere promise, without consideration, is insufficient.—*Allen v. Hendrick*, 206 P. 733, 104 Or. 202.

(3) An undertaking which is not binding as a contract because of lack of consideration will not be tortured into a declaration of trust.—*Volkwein v. Volkwein*, 22 A.2d 81, 146 Pa. Super. 265.

#### Permission to occupy premises

An agreement whereby owner agreed to permit son-in-law and his family to occupy premises as long as they would live thereon, without reserving any annual rental to owner, was insufficient to create a trust estate in son-in-law.—*Barbee v. Lamb*, 34 S.E.2d 65, 225 N.C. 211.

**94.** *U.S.—Jackman v. Equitable Life Assur. Soc. of U. S.*, C.C.A.Pa., 145 F.2d 945—*Bingen v. First Trust Co. of St. Paul*, C.C.A.Minn., 103 F.2d 260—*U. S. Fidelity & Guar-*



embody all the essential elements of a trust.<sup>95</sup> It must express the intention to create a trust, as discussed infra §§ 43-44, and state with certainty the terms,<sup>96</sup> subject,<sup>97</sup> persons,<sup>98</sup> and object<sup>99</sup> of the trust; and it has been stated that the trustee must be authorized and directed to perform certain duties and assume certain obligations.<sup>1</sup> A trust is not created unless the settlor imposes enforceable duties on the transferee.<sup>2</sup> A trust, whether of real or personal property, is created as to the trustor and beneficiary, by any words or acts of the trustor, indicating with reasonable certainty an intention on the part of the trustor to create a trust and the subject, purpose, and beneficiary of the trust.<sup>3</sup>

It has been held that the declaration of trust must have been made by the person owning the property,<sup>4</sup> although there is other authority holding that a trust of real estate may be created by a writing of the grantor or may be declared in writing by the grantee.<sup>5</sup> A written declaration of trust need not be addressed to anyone.<sup>6</sup> It has been held that an instrument cannot constitute a trust declaration where no trust res is in existence at the time of its execution or adoption.<sup>7</sup> The omission to fix the compensation of the trustee by the trust instrument does not invalidate the trust.<sup>8</sup>

*Purpose of trust.* It has been stated that the declaration must set forth the purposes of the

ty Co. v. Salmon, C.C.A. Del., 81 F. 2d 420.  
Fla.—Lines v. Darden, 5 Fla. 51.  
N.H.—State v. Federal Square Corp., 3 A.2d 109, 89 N.H. 538.

Pa.—Pugh v. Gaines, 41 A.2d 287, 156 Pa.Super. 613—In re Rodgers' Estate, 80 Pa.Dist. & Co. 531, 2 Fiduciary 540, affirmed 97 A.2d 789, 374 Pa. 246.

95. Minn.—Farmers State Bank of Fosston v. Sig Ellington & Co., 16 N.W.2d 319, 218 Minn. 411.

Mo.—Northrup v. Burge, 164 S.W. 584, 225 Mo. 641.

Pa.—Provident Trust Co. of Philadelphia v. Lukens Steel Co., 58 A.2d 23, 359 Pa. 1—Gribbel v. Gribbel, 17 A.2d 892, 341 Pa. 11—Brubaker v. Lauver, 185 A. 848, 322 Pa. 461—Bair v. Snyder County State Bank, 171 A. 274, 314 Pa. 85—Popilock v. Piernikoski, 56 A.2d 326, 161 Pa.Super. 587—In re Kelso's Estate, Orph., 34 Del Co. 148.

**Legal requirements of voluntary declaration of trust are the same as those of gift inter vivos.**—Zimmerman v. Nauhauser, 183 A. 820, 119 N.J.Eq. 424.

96. U.S.—Ringen v. First Trust Co. of St. Paul, C.C.A. Minn., 103 F.2d 260.

Cal.—Nicholas v. Nicholas, 242 P.2d 679, 110 Cal.App.2d 349.

Pa.—Gribbel v. Gribbel, 17 A.2d 892, 341 Pa. 11—In re Rodgers' Estate, 80 Pa.Dist. & Co. 531, 2 Fiduciary 540, affirmed 97 A.2d 789, 374 Pa. 246.

Tex.—Ray v. Fowler, Civ.App., 144 S.W.2d 665, error dismissed, judgment correct.

65 C.J. p. 264 note 89.

97. U.S.—Jackman v. Equitable Life Assur. Soc. of U. S., C.C.A. Pa., 145 F.2d 945—Helfrich's Estate v. C. I. R., C.C.A. 7, 143 F.2d 43—Bingen v. First Trust Co. of St. Paul, C.C. Minn., 103 F.2d 260—U. S. Fidelity & Guaranty Co. v. Salmon, C.C. A. Del., 81 F.2d 420.

Ill.—Albert v. Albert, 80 N.E.2d 69, 334 Ill.App. 440.

Mo.—Northrup v. Burge, 164 S.W. 584, 225 Mo. 641.

Pa.—Gribbel v. Gribbel, 17 A.2d 892, 341 Pa. 11—Pugh v. Gaines, 41 A.2d 287, 156 Pa.Super. 613—In re Rodgers' Estate, 80 Pa.Dist. & Co. 531, 2 Fiduciary 540, affirmed 97 A.2d 789, 374 Pa. 246.

Tex.—Corpus Juris cited in Golob v. Stone, Civ.App., 262 S.W.2d 536.

538—Corpus Juris cited in Brown v. Donald, Civ.App., 216 S.W.2d 679, 683.

65 C.J. p. 264 note 90.

98. Tex.—Golob v. Stone, Civ.App., 262 S.W.2d 536.

#### Beneficiary

A trust is not created, notwithstanding the intention so to do, where there is a failure to disclose the beneficiary thereof.

Cal.—In re Gaines' Estate, 100 P.2d 1055, 15 Cal.2d 255.

Tex.—Ray v. Fowler, Civ.App., 144 S.W.2d 665, error dismissed, judgment correct.

99. U.S.—Jackman v. Equitable Life Assur. Soc. of U. S., C.C.A. Pa., 145 F.2d 945—In re Helfrich's Estate v. C. I. R., C.C.A. 7, 143 F.2d 43—Bingen v. First Trust Co. of St. Paul, C.C.A. Minn., 103 F.2d 260—U. S. Fidelity & Guaranty Co. v. Salmon, C.C.A. Del., 81 F.2d 420.

Mo.—Northrup v. Burge, 164 S.W. 584, 225 Mo. 641.

Pa.—Pugh v. Gaines, 41 A.2d 287, 156 Pa.Super. 613—In re Rodgers' Estate, 80 Pa.Dist. & Co. 531, 2 Fiduciary 540, affirmed 97 A.2d 789, 374 Pa. 246.

1. N.Y.—In re Palumbo's Estate, 125 N.Y.S.2d 886, 204 Misc. 852, reversed on other grounds 132 N.Y. 2d 386, 284 App.Div. 834.

2. Iowa.—Hodgson v. Dorsey, 298 N.W. 895, 230 Iowa 730, 137 A.L.R. 456.

Mich.—Townsend v. Gordon, 14 N.W. 2d 67, 308 Mich. 438, 151 A.L.R. 1432.

Or.—Hall v. Dolph, 198 P.2d 272, 184 Or. 319.

Pa.—Provident Trust Co. of Philadelphia v. Lukens Steel Co., 58 A.2d 23, 359 Pa. 1—Gribbel v. Gribbel, 17 A.2d 892, 341 Pa. 11—Brubaker v. Lauver, 185 A. 848, 322 Pa. 461—Popilock v. Piernikoski, 56 A.2d 326, 161 Pa.Super. 587.

**Enforceable obligation held not imposed**

Iowa.—Ponzellino v. Ponzellino, 26 N.W.2d 330, 238 Iowa 201.

#### Discretion

"Wherever a clear discretion or choice to act or not to act is given, wherever the prior dispositions of the property import absolute uncontrollable ownership, wherever the trustees have an option to withdraw funds from the purposes of the trust and apply them in their discretion, the court cannot execute a trust."

Ill.—Booth v. Krug, 14 N.E.2d 645, 647, 308 Ill. 487, 117 A.L.R. 1193.

Tex.—Rich v. Witherspoon, Civ.App., 208 S.W.2d 674, 676.

3. Cal.—Ephraim v. Metropolitan Trust Co. of Cal., 172 P.2d 501, 28 Cal.2d 824—Weiner v. Mullaney, 149 P.2d 704, 59 Cal.App.2d 620—Shaw v. Johnson, 59 P.2d 876, 15 Cal.App.2d 599.

4. Mich.—Lerche v. Kishpaugh, 147 N.W. 499, 180 Mich. 617.

Necessity of title or interest in settlor see supra § 23.

5. Mass.—Cohen v. Newton Sav. Bank, 67 N.E.2d 748, 320 Mass. 90, 168 A.L.R. 1321.

Wash.—Porter v. Laue, 267 P.2d 1064.

6. Mass.—Cohen v. Newton Sav. Bank, 67 N.E.2d 748, 320 Mass. 90, 168 A.L.R. 1321.

7. Ill.—In re Wheeler's Estate, 1 N.E. 425, 284 Ill.App. 132.

8. Cal.—Shaw v. Johnson, 59 P.2d 876, 15 Cal.App.2d 599.

trust.<sup>9</sup> There is, however, no requirement that the settlor set forth his purpose in detail or explain why he used a trust as the vehicle of his transfer instead of some other mode.<sup>10</sup> No purpose need be expressly stated where it is otherwise clear what was intended;<sup>11</sup> and where statutory provisions allow trusts for certain specified purposes only, as discussed supra § 25, the precise words of the statute need not be used to express it.<sup>12</sup> The fact that the settlor may have created the trust for reasons other than those disclosed by the trust instrument does not in itself invalidate an otherwise valid gift in trust.<sup>13</sup>

**Creator as trustee.** Where the creator of the trust selects himself trustee, a mere declaration to that effect is sufficient.<sup>14</sup> It has been held, however, that in order for one to constitute himself a trustee of his own property, there should be some words of

a conveyance, some expression of an intention to become trustee.<sup>15</sup>

**Penalty provision.** The failure of a trust instrument to contain a penalty provision for a breach or forfeiture of the trust by the trustees will not invalidate the trust instrument.<sup>16</sup>

**Provision for termination.** An express provision for the termination of the trust is not required.<sup>17</sup>

### b. Spendthrift Trusts

In order that a spendthrift trust may be created, the declaration of trust must manifest a clear and undoubted intention by the creator or settlor to create such a trust.

In order that a spendthrift trust may be created, the declaration must manifest a clear and undoubted intention by the creator or settlor to create such a trust.<sup>18</sup> The intention must appear in the instru-

9. *Miss*—*Estes v. Estes*, 27 So.2d 854, 200 Miss 541.

N.J.—*Eagles Building & Loan Ass'n v. Fiducia*, 37 A.2d 116, 135 N.J. Eq. 7, affirmed 40 A.2d 627, 136 N.J. Eq. 117.

Tex.—*Golob v. Stone*, Civ.App., 262 S.W.2d 536.

#### Passive trust

A declaration that declarant holds certain property in trust or as trustee for another is complete and specific declaration of inactive or passive trust—*Eagles Building & Loan Ass'n v. Fiducia*, 37 A.2d 116, 135 N.J. Eq. 7, affirmed 40 A.2d 627, 136 N.J. Eq. 117.

#### Essential to creation

A "trust" is not created, notwithstanding intention to create trust, where there is failure to disclose purpose of trust—*In re Gaines' Estate*, 100 P.2d 1055, 15 Cal.2d 255.

10. U.S.—*In re Helfrich's Estate v. C. I. R.*, C.C.A.7, 143 F.2d 43.

#### Object as not meaning purpose

The word "object" in the rule requiring the declaration of trust to set forth a certain ascertained object is synonymous in most cases with "beneficiary" and does not mean purpose—*In re Helfrich's Estate v. C. I. R.*, supra.

11. Cal.—*La Fleur v. M. A. Burns Lumber Co.*, 205 P. 102, 188 Cal. 321.

12. N.Y.—*Morse v. Morse*, 85 N.Y. 63.

65 C.J. p. 265 note 96.

13. U.S.—*Adams v. Hagerott*, C.C.A. N.D., 34 F.2d 599.

14. Iowa.—*Corpus Juris* cited in *Wagner v. Wagner*, 45 N.W.2d 508, 512, 242 Iowa 480.

Tenn.—*Deakins v. Webb*, 84 S.W.2d 867, 19 Tenn.App. 182.

Wis.—*Wyse v. Puchner*, 51 N.W.2d 38, 260 Wis. 365.

65 C.J. p. 264 note 86.  
Settlor constituting himself trustee generally see infra § 50.

#### Trust of personal property

Del.—*Rodley v. Jones*, 32 A.2d 436, 27 Del. Ch. 273.

15. Mo.—*State ex rel. Union Nat. Bank of Springfield v. Blair*, 166 S.W.2d 1085, 350 Mo. 622.  
Tenn.—*Deakins v. Webb*, 84 S.W.2d 867, 19 Tenn.App. 182.

16. Kan.—*Prv v. McCormick*, 228 P.2d 727, 170 Kan. 741.

17. Wis.—*Wyse v. Puchner*, 51 N.W.2d 38, 260 Wis. 365.  
Duration and termination of express trusts generally see infra §§ 92-97.

18. Colo.—*In re Nicholson's Estate*, 93 P.2d 880, 101 Colo. 561.

Ill.—*Mohler v. Wesner*, 47 N.E.2d 64, 382 Ill. 225.

Pa.—*Trank v. Shaffer*, 14 A.2d 211, 140 Pa.Super. 505.

Tex.—*Long v. Long*, Civ.App., 252 S.W.2d 235, error refused no reversible error.

65 C.J. p. 272 note 83.  
Presumption against creation of spendthrift trust see infra § 65.

#### Matters required to be shown

The "spendthrift trust" doctrine will not be extended to apply where the instrument creating the property right fails to create a trust in unmistakable terms and fails to provide for a trustee—*Sternberger v. Glenn*, 137 S.W.2d 269, 175 Tenn. 644.

#### Power to use principal

Discretionary power of trustee to use part or all of principal of trust property for care, health, or comfort of beneficiaries was held not to preclude characterization of spendthrift

trust—*Adair v. Sharp*, 197 N.E. 399, 49 Ohio App. 507.

#### Right to occupy premises

Fact that deed creating trust for trustor's son authorized trustee to permit son to occupy premises as a home for himself upon condition that son pay trustee sums required to effect preservation of trust estate did not defeat trustor's intention to create spendthrift trust, since deed did not invest son with absolute right of possession—*Gentemann v. Dyer*, Mo. App., 140 S.W.2d 75.

#### Spendthrift trust held created

(1) In general.

U.S.—*Mellon v. Driscoll*, C.C.A.Pa., 117 F.2d 477, certiorari denied 61 S.Ct. 1100, 313 U.S. 579, 85 L.Ed. 1536.

Ill.—*Continental Illinois Nat. Bank & Trust Co. of Chicago v. Kelley*, 8 N.E.2d 527, 290 Ill. App. 361.

Iowa.—*In re Tanc's Estate*, 39 N.W.2d 401, 240 Iowa 1315—*leemer v. Chalmers*, 276 N.W. 60, 221 Iowa 411.

Mo.—*Gentemann v. Dyer*, App., 140 S.W.2d 75.

Ohio—*Adair v. Sharp*, 197 N.E. 399, 49 Ohio App. 507.

Pa.—*Riverdale Trust Co. v. Twitchell*, 20 A.2d 768, 342 Pa. 558.

S.C.—*Albergoth v. Summers*, 26 S.E.2d 395, 203 S.C. 137.

Va.—*Alderman v. Virginia Trust Co.*, 25 S.E.2d 333, 181 Va. 497.

(2) With respect to both principal and income—*Zouck v. Zouck*, 104 A.2d 573, 105 A.2d 214, 204 Md. 285.

#### Spendthrift trust held not created

Colo.—*Newell v. Tubbs*, 84 P.2d 820, 103 Colo. 224.

Iowa.—*Standard Chemical Co. v. Weed*, 285 N.W. 175, 226 Iowa 482.

Mich.—*In re Ford's Estate*, 49 N.W.2d 154, 331 Mich. 220.

Pa.—*In re Keeler's Estate*, 3 A.2d 413, 334 Pa. 225, 121 A.L.R. 1301.

ment creating the trust.<sup>19</sup> Clear and unequivocal, or specific, language declaring the trust a spendthrift trust is required,<sup>20</sup> or, in the absence thereof, the language of the entire instrument must raise a clear inference of an intent to create such a trust and be susceptible of no other reasonable conclusion.<sup>21</sup>

Express language, however, is not necessary to create such a trust;<sup>22</sup> nor is any set phraseology or technical or particular form of words required.<sup>23</sup> The declaration need not denominate the beneficiary a spendthrift,<sup>24</sup> give reasons for creating the trust,<sup>25</sup> contain all restrictions and qualifications incident to such a trust,<sup>26</sup> express specific restraints on alienation and anticipation,<sup>27</sup> or expressly declare that the interest of the cestui que trust shall

be beyond the reach of creditors.<sup>28</sup> It is sufficient if the intention is reasonably plain on a consideration of the instrument as a whole.<sup>29</sup>

It has been held usual in spendthrift trusts to find a provision against alienation of the trust fund by the voluntary act of the beneficiary, or in invitum by his creditors.<sup>30</sup> Also, it has been held that a spendthrift trust is created where there is an express provision forbidding anticipatory alienation and attachment by creditors;<sup>31</sup> but there is other authority which holds that the mere incorporation of words of restriction of the power of alienation in an instrument transferring an estate for life does not operate to create a spendthrift trust.<sup>32</sup>

The court cannot rewrite an invalid instrument so as to create a valid spendthrift trust.<sup>33</sup> There

Tenn.—Sternberger v. Glenn, 137 S W 2d 269, 175 Tenn. 644—Robertson v. Brown, 13 Tenn.App. 211.  
Utah—Cronquist v. Utah State Agr College, 201 P.2d 280, 114 Utah 426.  
18. Tex.—Long v. Long, Civ.App., 252 S.W.2d 235, error refused no reversible error.

#### Outside circumstances

The intention must appear on the face of the trust instrument, and it cannot be found outside it, as by the circumstance that the beneficiary was a spendthrift and insolvent at the time the instrument was executed—Standard Chemical Co. v. Weed, 285 N.W. 175, 226 Iowa 882.

20. Colo.—Corpus Juris cited in In re Nicholson's Estate, 93 P.2d 880, 884, 104 Colo. 561—Corpus Juris cited in Newell v. Tubbs, 81 P.2d 820, 821, 103 Colo. 221.

Tex.—Long v. Long, Civ.App., 252 S.W.2d 235, error refused no reversible error.  
65 C.J. p. 265 note 6 [b]

21. Tex.—Long v. Long, supra.  
Utah—Cronquist v. Utah State Agr College, 201 P.2d 280, 114 Utah 426.

22. Ohio.—Adair v. Sharp, 197 N.E. 399, 49 Ohio App. 507.

#### General context

The settlor's intention to create a spendthrift trust may be inferred from the general context of the instrument—In re Watts, 162 P.2d 82, 160 Kan. 377.

23. Cal.—In re De Lano's Estate, 145 P.2d 672, 62 Cal.App.2d 808.  
Minn.—In re Moulton's Estate, 46 N.W.2d 667, 233 Minn. 667, 24 A.L.R. 2d 1092.

S.C.—Allbergott v. Summers, 26 S.E.2d 395, 203 S.C. 137.

Tex.—Long v. Long, Civ.App., 252 S.W.2d 235, error refused no reversible error.

Utah—Cronquist v. Utah State Agr College, 201 P.2d 280, 114 Utah 426.

24. Ill.—Mohler v. Wesner, 47 N.E. 2d 64, 382 Ill. 225.

Ohio—Corpus Juris quoted in Adair v. Sharp, 197 N.E. 399, 402, 49 Ohio App. 507.

Utah—Cronquist v. Utah State Agr College, 201 P.2d 280, 114 Utah 426.

65 C.J. p. 265 note 2.

25. Ill.—Mohler v. Wesner, 47 N.E. 2d 64, 382 Ill. 225.

Ohio—Corpus Juris quoted in Adair v. Sharp, 197 N.E. 399, 402, 49 Ohio App. 507.

Tex.—Long v. Long, Civ.App., 252 S.W.2d 235, error refused no reversible error.

W.Va.—Hoffman v. Reltzhoover, 76 S.E. 968, 71 W.Va. 72.

26. Cal.—In re De Lano's Estate, 145 P.2d 672, 62 Cal.App.2d 808.

Ill.—Mohler v. Wesner, 47 N.E.2d 61, 382 Ill. 225.

Ohio—Corpus Juris quoted in Adair v. Sharp, 197 N.E. 399, 402, 49 Ohio App. 507.

W.Va.—Hoffman v. Reltzhoover, 76 S.E. 968, 71 W.Va. 72.

#### Customary provisions

Some of the provisions ordinarily found in a spendthrift trust are a strictly limited income payable only at certain times and not subject to claims of creditors—Welch v. Welch, 290 N.W. 758, 235 Wis. 282, modified on other grounds 293 N.W. 150, 235 Wis. 282.

27. Utah—Cronquist v. Utah State Agr. College, 201 P.2d 280, 114 Utah 426.

28. Ohio—Corpus Juris quoted in Adair v. Sharp, 197 N.E. 399, 402, 49 Ohio App. 507.

65 C.J. p. 265 note 5.

#### Inalienability

An intent to restrain alienation may be inferred from inter vivos trust instrument when read as a

whole.—In re Moulton's Estate, 46 N.W.2d 667, 233 Minn. 667, 24 A.L.R. 2d 1092.

29. Cal.—In re De Lano's Estate, 145 P.2d 672, 62 Cal.App.2d 808.

Colo.—Corpus Juris cited in In re Nicholson's Estate, 93 P.2d 880, 884, 104 Colo. 561—Corpus Juris cited in Newell v. Tubbs, 81 P.2d 820, 821, 103 Colo. 221.

Minn.—In re Moulton's Estate, 46 N.W.2d 667, 233 Minn. 667, 24 A.L.R. 2d 1092.

Ohio—Corpus Juris quoted in Adair v. Sharp, 197 N.E. 399, 402, 49 Ohio App. 507.

S.C.—Corpus Juris cited in Allbergott v. Summers, 26 S.E.2d 395, 399, 203 S.C. 137.

Utah—Cronquist v. Utah State Agr. College, 201 P.2d 280, 114 Utah 426, 65 C.J. p. 265 note 6.

"The intent to create a spendthrift trust is not to be set aside merely because it is not clearly expressed by the scrivener."—Riverside Trust Co. v. Twitchell, 20 A.2d 768, 770, 342 Pa. 558.

All grantor's words must be considered in the search for his intention, and they are to be given their natural effect, if this can be done without violating any rule of law—Riverside Trust Co. v. Twitchell, supra.

30. Ill.—Mohler v. Wesner, 47 N.E. 2d 64, 382 Ill. 225.

31. Pa.—Riverside Trust Co. v. Twitchell, 20 A.2d 768, 342 Pa. 558.—In re Keeler's Estate, 3 A.2d 413, 334 Pa. 225, 121 A.L.R. 1301.—In re Insull's Estate, Orph., 57 Montg. Co. 186.

32. Tenn.—Sternberger v. Glenn, 137 S.W.2d 269, 175 Tenn. 644.

33. U.S.—West Tennessee Co. v. Townes, D.C.Miss., 52 F.2d 764, 65 C.J. p. 265 note 7.

must be a substantial compliance with statutory provisions with respect to the creation of spendthrift trusts.<sup>34</sup> Under some statutes a spendthrift trust must be declared by will or deed,<sup>35</sup> which, as appears supra § 41, must be duly recorded.

**Active trust.** The intention to create an active trust must appear from the trust instrument;<sup>36</sup> and, although it is not necessary that the trust instrument expressly convey legal title to a trustee, if the intention to create an active trust appears from the instrument, such intention must be as clearly manifested as if express terms had been employed.<sup>37</sup>

### § 43. Expression of Intention

#### a. In general

34. N.C.—Gray v. Hawkins, 45 S.E. 363, 133 N.C. 1.  
 35. Tenn.—State ex rel. v. Nashville Trust Co., 190 S.W.2d 755, 28 Tenn. App. 384—Rose v. Third Nat. Bank, 183 S.W.2d 1, 27 Tenn. App. 553.  
 36. Tex.—Long v. Long, Civ. App., 252 S.W.2d 235, error refused no reversible error. Requirement that spendthrift trust be active trust see supra § 22.  
 37. Tex.—Long v. Long, supra.  
 38. U.S.—Quinn v. Central Co., C.C. A. Cal., 104 F.2d 450—Elliott v. Gordon, C.C.A. Kan., 70 F.2d 9—First Nat. Bank of Bloomington, 2 Manufacturers Trust Co., 120 N.J., 2 M.F.R.D. 125.  
 Ark.—Kriegerberg v. Hoff, 143 S.W.2d 590, 201 Ark. 63.  
 Cal.—Bell v. Bayly Bros of California, 127 P.2d 662, 53 Cal. App. 2d 149.  
 Fla.—Columbia Bank for Co-operations v. Okaloosa Sugar Co-op., 52 So.2d 670—Webster v. St. Petersburg Federal Sav. & Loan Ass'n, 20 So.2d 400, 155 Fla. 412—Flanagan v. Herrett, 178 So. 147, 130 Fla. 531.  
 Ill.—Schack v. Reiter, 23 N.E.2d 714, 372 Ill. 328.  
 Ky.—Frazier v. Hudson, 180 S.W.2d 809, 279 Ky. 334, 123 A.L.R. 1331.  
 Md.—National Union Mortg. Corporation v. Potomac Consol. Deben-ture Corp., 16 A.2d 866, 178 Md. 658—Doty v. Ghinger, 171 A. 40, 166 Md. 426.  
 Mich.—Harmon v. Harmon, 6 N.W.2d 762, 303 Mich. 513.  
 Minn.—Jordan v. Jordan, 259 N.W. 356, 193 Minn. 428.  
 Mo.—Warwick v. De Mayo, 213 S.W.2d 392, 358 Mo. 130—Gwin v. Gwin, 219 S.W.2d 232, 240 Mo. App. 782—In re Geel's Estate, App., 143 S.W.2d 327.  
 Neb.—Dahlke v. Dahlke, 51 N.W.2d 266, 155 Neb. 169—Hobbs v. Board of Education of Northern Baptist

#### b. Necessity for particular formality or technical language

##### a. In General

The declaration of trust must clearly manifest an intention to create a trust in order that an express or voluntary trust may be created.

In general, in order to create an express or voluntary trust the declaration of trust must manifest an intention so to do by the settlor or transferor of the property.<sup>38</sup> The intention, in the absence of a statute providing otherwise, may properly be manifested by written or spoken words or by conduct<sup>39</sup> considered in some instances in connec-

- Convention, 253 N.W. 627, 126 Neb. 416.  
 N.J.—Cohen v. Cohen, 20 A.2d 594, 126 N.J. Law 605—Hendix v. Hudson County Nat. Bank, 59 A.2d 233, 142 N.J. Eq. 487.  
 N.Y.—In re Ballhaghe's Estate, 106 N.Y.S.2d 332, 201 Misc. 750—In re Cushman's Estate, 82 N.Y.S.2d 711—In re Ayres' Will, 76 N.Y.S.2d 597.  
 Ohio—Norris v. Norris, App., 57 N.E.2d 254, appeal dismissed 53 N.E.2d 617, 142 Ohio St. 634.  
 Okl.—Children v. Breece, 213 P.2d 565, 202 Okl. 377.  
 Or.—Winters v. Winters, 109 P.2d 557, 165 Or. 659.  
 Pa.—In re Evans' Estate, 93 A.2d 683, 372 Pa. 284—Gray v. Leibert, 53 A.2d 132, 357 Pa. 130—Gribbel v. Gribbel, 17 A.2d 892, 341 Pa. 11—Brubaker v. Lauver, 185 A. 818, 322 Pa. 461—Thornton v. Koch, 176 A. 3, 317 Pa. 400—In re Wallace's Estate, 174 A. 397, 316 Pa. 118—In re Gillen's Will, 41 A.2d 412, 156 Pa. Super. 650—Volkwein v. Volkwein, 22 A.2d 81, 146 Pa. Super. 265—In re Miller's Estate, 19 Pa. Dist. & Co. 141—Crossan v. Gallows, Com. Pl., 5 Chest. Co. 229—In re Kelso's Estate, Orph. 34 Del. Co. 148—In re Williams' Estate, Com. Pl., 45 Lack. Jur. 170, 12 Som. Leg. J. 101.  
 S.D.—Zadel v. Johnston, 41 N.W.2d 227, 73 S.D. 216—Bedell v. Steele, 28 N.W.2d 369, 71 S.D. 609—Johnson v. Graff, 23 N.W.2d 166, 71 S.D. 231.  
 Tenn.—Derrick v. Lumpkins, 95 S.W.2d 939, 20 Tenn. App. 77—Deakins v. Webb, 84 S.W.2d 367, 19 Tenn. App. 182.  
 Tex.—Mills v. Gray, 210 S.W.2d 985, 147 Tex. 33.  
 Utah.—Hansen v. Hansen, 171 P.2d 392, 110 Utah 222.  
 Vt.—Smith v. Dushaw, 78 A.2d 479, 116 Vt. 441—Warner v. Burlington Federal Sav. & Loan Ass'n, 49

- A.2d 93, 114 Vt. 463, 168 A.L.R. 1265.  
 Wash.—Colman v. Colman, 171 P.2d 691, 25 Wash.2d 606.  
 65 C.J. p. 268 note 20.  
 Intention of owner constituting himself a trustee see infra § 50.  
**Manifestation of intention to create trust** is the external expression of such intention as distinguished from an undisclosed intention—O'Connor v. Burns, Potter & Co., 36 N.W.2d 507, 151 Neb. 9.  
**Courts look to the intent of the parties.**—Peole v. LeRoy, 22 S.E.2d 214, 222 N.C. 123.  
**It is enough that the creator of a trust uses language sufficient to show his intention.**—In re Schwedler's Trust, 113 N.Y.S.2d 306.  
**Knowledge of grantee.**  
 The intention of grantor to create a trust, not revealed to grantee at time of conveyance and of which grantee knows nothing, is not sufficient to create a trust.—Flanagan v. Herrett, 178 So. 147, 130 Fla. 531.  
**Fact of delivery of declaration of trust to beneficiary alone does not supply inadequacy of the declaration as a sufficient disclosure of an intention to create a trust.**—Bodley v. Jones, 32 A.2d 436, 27 Del. Ch. 273.  
**Question of fact.**  
 Whether or not parties manifested intention to create a trust is ordinarily a question of fact.—Russell v. Meyers, 56 N.E.2d 604, 316 Mass. 669.  
 39. U.S.—Edgerton v. Johnson, C.A. Ill., 178 F.2d 106—Mahaffey v. Holvering, C.C.A. 8, 140 F.2d 879.  
 Del.—Wilmington Trust Co. v. Wilmington Trust Co., 15 A.2d 153, 25 Del. Ch. 121, affirmed 24 A.2d 309, 26 Del. Ch. 397, 139 A.L.R. 1117.  
 Mass.—Povey v. Colonial Beacon Oil Co., 200 N.E. 891, 294 Mass. 86.  
 Mo.—Platt v. Huegel, 32 S.W.2d 605, 326 Mo. 776—Gwin v. Gwin, 219 S.W.2d 232, 240 Mo. App. 782.

tion with the end to be accomplished,<sup>40</sup> and the intention may be gathered from powers granted and duties imposed and from manifest purposes which cannot be accomplished except through a trust,<sup>41</sup> or from the relationship of the parties and acts affecting the title to, and possession of, the trust prop-

erty.<sup>42</sup>

The intention to create a trust must be sufficiently expressed,<sup>43</sup> and the declaration of trust must show the intention with reasonable certainty.<sup>44</sup> It must be clear that a trust was intended.<sup>45</sup> It is necessary

N.J.—Eagles Building & Loan Ass'n v. Fiducia, 37 A.2d 116, 135 N.J.Eq. 7, affirmed 40 A.2d 627, 136 N.J.Eq. 117.

Ohio.—In re Barnes' Estate, Com.Pl., 108 N.E.2d 88, affirmed, App., 108 N.E.2d 101.

Pa.—Gray v. Leibert, 53 A.2d 132, 357 Pa. 130.—Bair v. Snyder County State Bank, 171 A. 274, 314 Pa. 85.—Munzlak v. Zulovich, Com.Pl., 97 Pittsb.Leg.J. 55.

**Gift of personal property in trust**  
U.S.—Elliott v. Gordon, C.C.A.Kan., 70 F.2d 9.

Del.—Bodley v. Jones, 32 A.2d 436, 27 Del.Ch. 273.

#### Oral trust

Where alleged oral trust in personalty is relied on intent will be gathered from parties' words and acts before, at time of, and after, transaction.—Coon v. Stanley, 94 S.W.2d 96, 230 Mo.App. 524.

#### By words and circumstances

Whether a trust exists is to be ascertained from the intention of the parties as manifested by the words used and the circumstances of the particular case.—Herman v. Edington, Mass., 118 N.E.2d 865

#### Words or acts

A valid trust in personal property may be created, as to trustor and beneficiary, by any words or acts of trustor indicating with reasonable certainty his intention to create trust and subject, purpose and beneficiary of trust.—Hardison v. Corbett, 130 P.2d 226, 55 Cal.App.2d 310.

40. Mass.—Povey v. Colonial Beacon Oil Co., 200 N.E. 891, 294 Mass. 86.

41. Tex.—Cruse v. Reinhard, Civ. App., 208 S.W.2d 598, error refused on reversible error

42. Or.—Winters v. Winters, 109 P. 2d 857, 165 Or. 659.

43. U.S.—Jackman v. Equitable Life Assur. Soc. of U. S., C.C.A.Pa., 145 F.2d 945.

Md.—Sands v. Church of Ascension and Prince of Peace, 30 A.2d 771, 181 Md. 536

Mo.—In re Geel's Estate, App., 143 S.W.2d 327.

N.C.—Stephens v. Clark, 189 S.E. 191, 211 N.C. 51.

Pa.—Thornton v. Koch, 176 A. 3, 317 Pa. 490.

Tex.—Patrick v. McGaha, Civ.App., 164 S.W.2d 236.

44. U.S.—Elliott v. Gordon, C.C.A. Kan., 70 F.2d 9.—Bingen v. First

Trust Co. of St. Paul, D.C.Minn., 23 F.Supp. 958, reversed on other grounds, C.C.A., 103 F.2d 260.

Del.—Bodley v. Jones, 32 A.2d 436, 27 Del.Ch. 273.

Ind.—Sundlinger v. Department of Financial Institutions of Indiana, 199 N.E. 715, 210 Ind. 83, 105 A.L.R. 501

S.D.—Zadel v. Johnston, 41 N.W.2d 227, 73 S.D. 216.

45. U.S.—King v. Richardson, C.C.A.N.C., 136 F.2d 849, certiorari denied 64 S.Ct. 91, 320 U.S. 777, 88 L.Ed. 466.

Cal.—In re Ralston's Estate, 37 P. 2d 76, 1 Cal.2d 724, 96 A.L.R. 953.

Md.—Corpus Juris cited in Dougherty v. Dougherty, 2 A.2d 433, 436, 175 Md. 441.

N.Y.—In re Weir's Will, 14 N.Y.S.2d 655, 172 Misc. 74

Pa.—Provident Trust Co. of Philadelphia v. Lukens Steel Co., 58 A.2d 23, 359 Pa. 1.—Keller v. Keller, 41 A.2d 547, 351 Pa. 461.—Gribbel v. Gribbel, 17 A.2d 892, 341 Pa. 11.—Poplock v. Piernikowski, 56 A.2d 326, 161 Pa.Super. 587.—In re Rodgers' Estate, 80 Pa.Dist. & Co. 551, 2 Fiduciary 540, affirmed 97 A.2d 789, 374 Pa. 246.—In re Kelso's Estate, Orpha., 34 Del.Co. 148.

Tenn.—Derrick v. Lumpkins, 95 S.W. 2d 939, 20 Tenn.App. 77.

Wash.—Hoffman v. Tieton View Community M. E. Church, 207 P.2d 639, 33 Wash.2d 716.

65 C.J. p. 266 note 16.

#### Intent to create trust held sufficiently disclosed

##### (1) Generally.

U.S.—Jackman v. Equitable Life Assur. Soc. of U. S., C.C.A.Pa., 145 F.2d 915.—King v. Richardson, C.C.A.N.C., 136 F.2d 849, certiorari denied 64 S.Ct. 91, 320 U.S. 777, 88 L. Ed. 466.—Bingen v. First Trust Co. of St. Paul, C.C.A.Minn., 103 F.2d 260.—Heden v. Cremin, C.C.A.Iowa, 66 F.2d 913, 91 A.L.R. 247, certiorari denied 54 S.Ct. 123, 230 U.S. 687, 78 L.Ed. 592.

Cal.—Weimer v. Mullaney, 140 P.2d 704, 59 Cal.App.2d 620

Ill.—Golstein v. Handley, 60 N.E. 2d 851, 390 Ill. 118.—Merchants Nat. Bank of Aurora v. Frazier, 67 N.E. 2d 611, 329 Ill.App. 191

Ky.—Fannin's Adm'r v. Segraves, 198 S.W.2d 802, 303 Ky. 697.

Mass.—Cohen v. Newton Sav. Bank, 67 N.E.2d 748, 320 Mass. 90, 118 A.L.R. 1321.

Mich.—Union Guardian Trust Co. v. Nichols, 18 N.W.2d 363, 311 Mich.

107—Reichert v. Guaranty Trust Co. of Detroit, 245 N.W. 785, 260 Mich. 504.

Minn.—Jordan v. Jordan, 259 N.W. 386, 193 Minn. 428.

Mo.—Stephenson v. Stephenson, 171 S.W.2d 565, 351 Mo. 8.—Tuttle-Lacy Nat. Bank v. Rollier, 111 S.W. 2d 12, 341 Mo. 1029.—St. Louis Uniformed Firemen's Credit Union v. Haley, App., 190 S.W.2d 636

Neb.—Whalen v. Swircin, 4 N.W.2d 737, 141 Neb. 650.—Crancer v. Reichenbach, 266 N.W. 57, 130 Neb. 645.

N.Y.—Finn v. Brown, 12 N.Y.S.2d 150, 257 App.Div. 51.—Gillies v. Gillies, 268 N.Y.S. 199, 239 App.Div. 582.—Falcone v. Palotta, 29 N.Y.S.2d 918, affirmed 29 N.Y.S.2d 719, 262 App.Div. 875.

Pa.—Converse v. Hawse, 190 A. 899, 326 Pa. 1.—Brubaker v. Lauver, 185 A. 848, 322 Pa. 461.—Thornton v. Koch, 176 A. 3, 317 Pa. 400.—Lehigh University v. Howser, 46 A.2d 516, 159 Pa.Super. 84.

S.D.—Bedell v. Steele, 28 N.W.2d 369, 71 S.D. 609.

Tex.—Pottorff v. Stafford, Civ.App., 81 S.W.2d 539, error refused, certiorari denied 58 S.Ct. 139, 296 U. S. 619, 80 L.Ed. 439.

Wis.—Wyse v. Buchner, 51 N.W.2d 38, 260 Wis. 365

65 C.J. p. 266 note 16 [a].

(2) Plaintiffs' transfer of realty encumbered by trust deeds to defendant under agreement giving defendant irrevocable power to sell, lease, or otherwise dispose thereof, and to use proceeds to pay the encumbrances, created a voluntary trust and made defendant a trustee and not a mere mortgagee in possession notwithstanding defendant's letter constituting part of agreement stated that defendant declined to enter into any trust agreement.—Neel v. Barnard, 150 P.2d 177, 24 Cal.2d 406.

(3) Landowner's agreement conveying legal title to property to trustee or his successor for period of years, and imposing on trustee and successor burden of leasing or renting land and collecting rents therefrom and making annual payments to grantors of pro rata share of net proceeds, created valid active trust.—Schmidt v. Schmidt, Tex.Civ.App., 261 S.W.2d 892.

(4) A writing drawn by bank and entitled "declaration of trust," naming settlor and another as trustees for life to hold money deposited in bank checking account in trust for

that there be a definite,<sup>46</sup> unequivocal,<sup>47</sup> explicit<sup>48</sup> | declaration of trust, or circumstances which show

their son, and reciting that no other agreement existed was sufficient to establish a trust for the benefit of the named son, even though the instrument failed to provide for the contingency of the beneficiary's death prior to the death of the trustees.—*Albert v. Albert*, 80 N.E.2d 69, 334 Ill.App. 440.

#### Intent to create trust held not sufficiently disclosed

(1) Generally.  
U.S.—*Cullen v. Chappell*, C.C.A. Conn., 116 F.2d 1017.

Ark.—*Krickberg v. Hoff*, 143 S.W. 2d 560, 201 Ark. 63.

Cal.—*Hardison v. Corbett*, 130 P.2d 226, 55 Cal.App.2d 310.—*Bishop's School Upon Scripps Foundation v. Wells*, 65 P.2d 105, 19 Cal.App.2d 141.

Conn.—*Town of Winchester v. Cox*, 26 A.2d 592, 129 Conn. 106.

Del.—*Rodley v. Jones*, 32 A.2d 436, 27 Del.Ch. 273.

Ill.—*Schaack v. Reiter*, 23 N.E.2d 714, 372 Ill. 828.

Iowa.—*Hodgson v. Dorsey*, 298 N.W. 895, 230 Iowa 730, 137 A.L.R. 456.

Ky.—*Frazier v. Hudson*, 130 S.W.2d 809, 279 Ky. 334, 123 A.L.R. 1371.

Mo.—*Golins v. Melton*, 121 S.W.2d 821, 343 Mo. 413.

Neb.—*O'Connor v. Burns, Potter & Co.*, 36 N.W.2d 507, 151 Neb. 9.

N.Y.—*Riegel v. Central Hanover Bank & Trust Co.*, 42 N.Y.S.2d 657, 266 App.Div. 586.—*In re Laytin's Estate*, 266 N.Y.S. 705, 149 Misc. 60.

Ohio.—*Norris v. Norris*, App. 57 N.E.2d 254, appeal dismissed 53 N.E.2d 647, 142 Ohio St. 634.

Pa.—*Thornton v. Koch*, 176 A. 3, 317 Pa. 400.—*Volkwein v. Volkwein*, 2d A.2d 81, 146 Pa.Super. 265.—*In re Zimmerman's Estate*, 77 Pa.Dist. & Co. 90, 52 Lanc.L.Rev. 315, 65 York Leg.Rep. 82.

S.D.—*Zadel v. Johnston*, 41 N.W.2d 227, 73 S.D. 216.

Tenn.—*Deakins v. Webb*, 84 S.W.2d 357, 19 Tenn.App. 182.

Vt.—*Warner v. Burlington Federal Sav. & Loan Ass'n*, 49 A.2d 93, 114 Vt. 463, 168 A.L.R. 1265.

65 C.J. p. 266 note 16 [b].

(2) Conveyance, which on its face vested fee simple title in grantee, who thereafter executed a contract agreeing that if the grantor would deliver the deed to grantee he would by will devise the realty to a specified person or persons.—*Oglesby v. Springfield Marine Bank*, 69 N.E.2d 269, 395 Ill. 37.

(3) Instrument giving property of signer to his sister "without bond," did not evidence intention that donee should receive the property as trustee.—*Estes v. Estes*, 27 So.2d 854, 200 Miss. 541.

(4) Where owner placed mortgage participation certificates in unsealed envelopes, wrote names of certain individuals on envelopes, placed envelopes in safe at his place of business, instructed business associates to deliver envelopes to owner's executor on owner's death, and used interest on certificates until his death.—*In re Skuse's Estate*, 1 N.Y.S.2d 202, 165 Misc. 554.

(5) Statement on envelope containing bonds placed in alleged donor's safety deposit box, that bonds belonged to alleged donee, and were deposited for safe-keeping, was held insufficient to constitute enforceable trust.—*Elliott v. Gordon*, C.C.A. Kan., 70 F.2d 9.

46. U.S.—*O'Keefe v. Equitable Trust Co.*, C.C.A.N.J., 103 F.2d 904.—*Elliott v. Gordon*, C.C.A. Kan., 70 F.2d 9.

Del.—*Rodley v. Jones*, 32 A.2d 436, 27 Del.Ch. 273.

Pa.—*In re Evans' Estate*, 93 A.2d 683, 372 Pa. 284.—*Provident Trust Co. of Philadelphia v. Lukens Steel Co.*, 58 A.2d 23, 359 Pa. 1.—*Gribbel v. Gribbel*, 17 A.2d 892, 341 Pa. 11.—*Brubaker v. Lauer*, 185 A. 848, 322 Pa. 461.—*Popilock v. Piernikowski*, 56 A.2d 326, 161 Pa.Super. 587.—*In re Kelso's Estate*, Orph., 34 Del.Ch. 148.

Parol trust

Tex.—*Miller v. Whittenburg*, Civ. App., 144 S.W.2d 381, reversed on other grounds *Whittenburg v. Miller*, 164 S.W.2d 497, 139 Tex. 586.

47. U.S.—*Elliott v. Gordon*, C.C.A. Kan., 70 F.2d 9.

Del.—*Rodley v. Jones*, 32 A.2d 436, 27 Del.Ch. 273.

Fla.—*Webster v. St. Petersburg Federal Sav. & Loan Ass'n*, 20 So.2d 400, 155 Fla. 412.

Mich.—*Hoyer v. Buckus*, 276 N.W. 564, 282 Mich. 593, motion denied 280 N.W. 756, 282 Mich. 701, certiorari denied 59 S.Ct. 147, 305 U.S. 644, 83 L.Ed. 416, rehearing denied 59 S.Ct. 248, 305 U.S. 674, 83 L.Ed. 437.

Mo.—*Blairidge v. Logan*, App., 217 S.W.2d 588.

N.Y.—*Riegel v. Central Hanover Bank & Trust Co.*, 42 N.Y.S.2d 657, 266 App.Div. 586.—*Falcone v. Palotta*, 29 N.Y.S.2d 918, affirmed 29 N.Y.S.2d 719, 262 App.Div. 875.

Pa.—*In re Wallace's Estate*, 174 A. 397, 316 Pa. 148.

Tenn.—*Derrick v. Lumpkins*, 95 S.W.2d 939, 20 Tenn.App. 77.—*Deakins v. Webb*, 84 S.W.2d 367, 19 Tenn.App. 182.

Vt.—*Warner v. Burlington Federal Sav. & Loan Ass'n*, 49 A.2d 93, 114 Vt. 463, 168 A.L.R. 1265.

Va.—*Virginia Trust Co. v. Minar*, 18 S.E.2d 879, 179 Va. 377.

65 C.J. p. 268 note 17.

#### No other interpretation

The acts performed and the words spoken in creating a trust must admit of no other interpretation than that the owner ceases to be and some one else becomes the beneficial owner of the property.—*Gribbel v. Gribbel*, 17 A.2d 892, 341 Pa. 11.

#### Parol trust

Intention to create parol trust cannot be derived from loose and equivocal expressions made at different times and occasions.—*First Union Trust & Savings Bank v. U. S., Ct.Cl.*, 5 F.Supp. 143.

48. U.S.—*Elliott v. Gordon*, C.C.A. Kan., 70 F.2d 9.

Cal.—*Bainbridge v. Stoner*, 106 P.2d 423, 16 Cal.2d 423.

Del.—*Rodley v. Jones*, 32 A.2d 436, 27 Del.Ch. 273.

Ind.—*Sindlinger v. Department of Financial Institutions of Indiana*, 199 N.E. 715, 210 Ind. 83, 105 A.L.R. 601.

Kan.—*Shumway v. Shumway*, 44 P.2d 247, 141 Kan. 835.

Mich.—*Searney v. Clarke*, 275 N.W. 765, 282 Mich. 56.

Mo.—*In re Geel's Estate*, App., 143 S.W.2d 327.

N.Y.—*Brown v. J. P. Morgan & Co.*, 31 N.Y.S.2d 323, 177 Misc. 626, motion denied 31 N.Y.S.2d 815, 177 Misc. 763, reversed on other grounds 40 N.Y.S.2d 229, 265 App.Div. 631, affirmed 67 N.E.2d 263, 295 N.Y. 867.—*In re Albro's Will*, 300 N.Y.S. 1103, 165 Misc. 486.—*In re Skuse's Estate*, 1 N.Y.S.2d 202, 165 Misc. 554.—*In re Freistadt's Will*, 104 N.Y.S.2d 510, affirmed 105 N.Y.S.2d 995, 278 App.Div. 962, amended on other grounds on reargument 107 N.Y.S.2d 465, 279 App.Div. 603.—*Wojtkowiak v. Wojtkowiak*, 85 N.Y.S.2d 198, affirmed 81 N.Y.S.2d 171, 273 App.Div. 1052.

Pa.—*Provident Trust Co. of Philadelphia v. Lukens Steel Co.*, 58 A.2d 23, 359 Pa. 1.—*Gribbel v. Gribbel*, 17 A.2d 892, 341 Pa. 11.—*Brubaker v. Lauer*, 185 A. 848, 322 Pa. 461.—*Popilock v. Piernikowski*, 56 A.2d 326, 161 Pa.Super. 587.—*In re Kelso's Estate*, Orph., 34 Del.Ch. 148.

Va.—*Woods v. Stull*, 30 S.E.2d 675, 182 Va. 888.—*Virginia Trust Co. v. Minar*, 18 S.E.2d 879, 179 Va. 377.

65 C.J. p. 268 note 18.

Plain words showing intention are required.—*Malco Trading Corporation v. Mendelson-Silverman, Inc.*, 269 N.Y.S. 95, 240 App.Div. 322, affirmed 191 N.E. 609, 264 N.Y. 651.

with reasonable certainty<sup>49</sup> or beyond a reasonable doubt<sup>50</sup> that a trust was intended to be created. The declaration must show a desire to pass benefits through the medium of a trust and not through some related or similar instrumentality.<sup>51</sup>

The expression of intention, however, is sufficient if the language used shows the intention to create a trust,<sup>52</sup> even though the creator of the trust calls

it something else<sup>53</sup> or does not call it anything,<sup>54</sup> or even though the parties may not understand what a trust is;<sup>55</sup> and any words which indicate with sufficient certainty an intention to create a trust will be effective for that purpose.<sup>56</sup> If the other essential requisites of an express trust exist and the intent to hold or deal with the property for the benefit of another appears, a trust will be created.<sup>57</sup>

49. U.S.—Elliott v. Gordon, C.C.A. Kan., 70 F.2d 9.  
Del.—Hodley v. Jones, 32 A.2d 436, 27 Del.Ch. 273.  
Va.—Woods v. Stull, 80 S.E.2d 675, 182 Va. 888.

50. Ind.—Sindlinger v. Department of Financial Institutions of Indiana, 199 N.E. 715, 210 Ind. 83, 105 A.L.R. 601.

Kan.—Shumway v. Shumway, 44 P.2d 247, 141 Kan. 835.  
Mich.—Scarney v. Clarke, 275 N.W. 765, 282 Mich. 56.

N.Y.—Brown v. J. P. Morgan & Co., 31 N.Y.S.2d 323, 177 Misc. 626, motion denied 31 N.Y.S.2d 815, 177 Misc. 763, reversed on other grounds 40 N.Y.S.2d 229, 265 App. Div. 631, affirmed 67 N.E.2d 263, 295 N.Y. 867.—In re Albro's Will, 300 N.Y.S. 1103, 165 Misc. 486.—In re Freistadt's Will, 104 N.Y.S.2d 510, affirmed 105 N.Y.S.2d 995, 278 App.Div. 962, amended on other grounds on reargument 107 N.Y.S.2d 466, 279 App.Div. 603.—Wojtkowiak v. Wojtkowiak, 85 N.Y.S.2d 198, affirmed 81 N.Y.S.2d 171, 273 App.Div. 1052.

65 C.J. p. 258 note 19.

#### When words unnecessary

The nature and terms of a transaction may give rise to an express trust and no formality of words is necessary if the unequivocal intent of the party can be determined from the attending circumstances.—Crech v. Crech, 24 S.E.2d 642, 222 N.C. 656.

#### Other interpretation impossible

(1) In order that a trust may be implied from a transaction, the acts must be such as admit of no other interpretation than that the creator retained no legal rights over the property, and the inference arising from the acts must be plain that either the settlor constituted another trustee, or else that he held the property himself as trustee.—O'Keefe v. Equitable Trust Co., C.C.A.N.J., 103 F.2d 904.

(2) Where reliance is placed on acts alone, those acts must be so clear as not to be capable of another construction or consistent with a different intention.—In re Skuse's Estate, 1 N.Y.S.2d 202, 165 Misc. 554.

**Partners handling money for others**  
Whether partners are debtors or

trustees for their clients in handling money, managing properties, and other activities depends on relations of parties and their intentions, to be ascertained from their words and conduct in light of all circumstances.—Boss v. Hardee, 103 F.2d 751, 70 App. D.C. 50.

51. U.S.—O'Keefe v. Equitable Trust Co., C.C.A.N.J., 103 F.2d 904.  
Pa.—In re Evans' Estate, 93 A.2d 683, 373 Pa. 284.

Wash.—Hoffman v. Tieton View Community M. E. Church, 207 P.2d 699, 33 Wash.2d 716.  
Imperfect gift as trust see *infra* § 69.

#### Gift or contract

The creation of a parol trust in personal property requires the expression of an intention to create a trust and not to make a present gift or a bilateral contract.—Gribbel v. Gribbel, 17 A.2d 892, 341 Pa. 11.

#### Motive for gift

A donor's expression of motive or reason for gift does not ordinarily prove that donee was intended to hold gift in trust for another.—In re Evans' Estate, 93 A.2d 683, 373 Pa. 284.  
52. U.S.—King v. Richardson, C.C.A.N.C., 136 F.2d 849, certiorari denied 64 S.Ct. 91, 320 U.S. 777, 88 L.Ed. 466.

Hawaii.—Ako v. Russell, 32 Hawaii 769.  
Mass.—Rugo v. Rugo, 91 N.E.2d 826, 325 Mass. 612.

Pa.—Buchner v. Buchner, 174 A. 643, 114 Pa. Super. 503.

#### Sufficiency

(1) It is enough that settlor's intent to create trust is clearly manifested.—Mahaffey v. Helvering, C.C.A. 8, 140 F.2d 879.

(2) It is sufficient to create a trust where the intention is clearly established and its object distinctly manifested.—Clay v. Crawford, 183 S.W.2d 797, 298 Ky. 654.

#### Transfer of beneficial interest

A trust intended to be created at present moment, comes into existence, and beneficial title to trust property passes to beneficiary, on mere manifestation of donor's will.—Eagles Building & Loan Ass'n v. Fiducia, 37 A.2d 116, 135 N.J.Eq. 7, affirmed 40 A.2d 627, 136 N.J.Eq. 117.

#### Appropriate instrumentality

The law will hold that a trust ex-

ists where, in view of a sufficiently manifested purpose or intent, that is the appropriate instrumentality.—Douglas' Will, 89 N.Y.S.2d 498, 195 Misc. 661.

**Whatever evinces intention of party**  
That property of which he is legal owner is beneficially another's is sufficient.—Burns v. Bastien, 50 P.2d 377, 174 Okl. 40.

#### Court will support intention

Wherever an intention to create a trust can be fairly collected from the language of the instrument and the terms employed, such intention will be supported by the court.—Stowell v. Satorius, 109 N.E.2d 734, 413 Ill. 482.—Goldstein v. Handley, 60 N.E.2d 851, 390 Ill. 118.

#### Direction to pay income

The absence of an explicit direction to pay over income is not necessarily fatal to validity.—In re Walbridge's Estate, 33 N.Y.S.2d 47, 178 Misc. 32.

53. N.Y.—In re Douglas' Will, 89 N.Y.S.2d 498, 195 Misc. 661.

54. N.Y.—In re Douglas' Will, *supra*.

55. Ohio.—Norris v. Norris, App. 57 N.E.2d 254, *app. dismissed* 53 N.E.2d 647, 142 Ohio St. 634.—In re Barnes' Estate, Com.Pl., 108 N.E.2d 88, affirmed, App., 108 N.E.2d 101.

56. U.S.—Cullen v. Chappell, C.C.A. Conn., 116 F.2d 1017.

Cal.—Cooper v. Cooper, 39 P.2d 820, 3 Cal.App.2d 151.

Mo.—St. Louis Uniformed Firemen's Credit Union v. Haley, App., 190 S.W.2d 636.

Pa.—In re Rodgers' Estate, 80 Pa. Dist. & Co. 511, 2 Fiduciary 440, affirmed 97 A.2d 789, 374 Pa. 246.

57. Cal.—In re Clippinger's Estate, 171 P.2d 567, 75 Cal.App.2d 426.

Ill.—Merchants Nat. Bank of Aurora v. Frayler, 67 N.E.2d 511, 329 Ill. App. 191.

N.C.—Stephens v. Clark, 189 S.E. 191, 211 N.C. 81.

Pa.—Converse v. Hawse, 190 A. 899, 326 Pa. 1.

Va.—Broadus v. Gresham, 26 S.E.2d 33, 181 Va. 725.

#### Words imposing duties

An intent to create a trust may be found in words of grantor imposing duties on grantee to hold or act for benefit of another.—Cooke v. U.S., D.C.Hawaii, 115 F.Supp. 830, mo-

The expression of intention to hold the legal title of property for the benefit of another necessarily implies the intention to create a trust,<sup>58</sup> and creates a trust where founded on valuable consideration.<sup>59</sup>

An expression of intent alone, however, is not enough to create a trust.<sup>60</sup> Some act evidencing the

intention is essential;<sup>61</sup> the intention must be accompanied by acts or steps bringing the trust into existence.<sup>62</sup> The intention shown must be an intention to create a present trust, or a trust in praesenti,<sup>63</sup> and an expression of a mere intention or agreement to create a trust at some future time is insufficient.<sup>64</sup> A trust is not created by a mere

tion to dismiss denied, C.A., U. S. v. Cooke, 215 F.2d 528.

#### Charge or trust

As general rule, where property is transferred to another subject to payment of certain sum to third person, equitable charge and not trust is created, but if transferor manifests intention to impose duty on transferee to deal with property for benefit of third person and to give third person beneficial interest therein, trust is created.—*Dahlke v. Dahlke*, 51 N.W.2d 266, 155 Neb. 169.

58. Cal.—*Hayden Plan Co. v. Wood*, 275 P. 248, 87 Cal.App. 1.—*Taber v. Bailey*, 185 P. 975, 22 Cal.App. 620.

59. N.Y.—*In re Leverich's Will*, 238 N.Y.S. 632, 125 Misc. 771, affirmed 251 N.Y.S. 876, 234 App. Div. 625.

60. U.S.—*Cullen v. Chappell, C.C.A. Conn.*, 116 F.2d 1017.

Cal.—*Bell v. Baily Bros. of California*, 127 P.2d 662, 63 Cal.App.2d 149.  
Mo.—*Atlantic Nat. Bank of Jacksonville, Fla. v. St. Louis Union Trust Co.*, 211 S.W.2d 3, 357 Mo. 770.

#### Expression of an unexecuted intention

Cal.—*Wood v. American Nat. Bank of San Bernardino*, 74 P.2d 1051, 21 Cal.App. 313.

61. Ark.—*Kansas City Life Ins. Co. v. Taylor*, 43 S.W.2d 372, 184 Ark. 772.

#### Primary consideration

In determining whether an express trust has been created, the primary consideration is the intention of the settlor or creator.—*St. Louis Uniformed Firemen's Credit Union v. Halsey, Mo.App.*, 190 S.W.2d 626.

#### Determinative factor

(1) Whether or not a trust has been created in any given case is, in the last analysis, a question of intention.—*Kozłowska v. Napierkowski*, 170 A. 193, 165 Md. 620.

(2) In determining whether or not a trust exists the controlling factor is the manifestation by the parties of an intention that a trust be created.—*Levy v. Levy*, 35 N.E.2d 659, 309 Mass. 486.

(3) Equity needs only to ascertain the intention of the creator of the trust.—*Hamsey v. City of Brookfield*, 237 S.W.2d 143, 261 Mo. 657.

#### At time of creation

In determining the existence of a trust, the intention of the parties

at the time the trust is alleged to have been created controls.—*Kozłowska v. Napierkowski*, 170 A. 193, 165 Md. 620.

62. U.S.—*Cullen v. Chappell, C.C.A. Conn.*, 116 F.2d 1017.

Intest, without acts, is of no effect with respect to creation of a trust.—*Lewis v. Jackson & Squire, D.C. Ark.*, 86 F.Supp. 354, appeal dismissed, C.A., 181 F.2d 1011, *Lewis v. Midwest Min. Co.*, 181 F.2d 1011, and *Lewis v. F. S. Neeley Co.*, 181 F.2d 1011.

#### Consummation of intent required

The act creating a trust must be consummated and not rest in mere intention, and it must appear from written or oral declaration, nature of transaction, relationship of the parties, and purpose of the gift that the fiduciary relationship is completely established.—*Wagner v. Burlington Federal Sav. & Loan Ass'n*, 49 A.2d 93, 114 Vt. 463, 168 A.L.R. 1266.

#### Direct and positive action

A special or technical trust arises from the direct and positive action of the parties evidenced by written instrument, words expressed, or both.—*Schwarz v. Reiter*, 23 N.E.2d 714, 372 Ill. 328.

63. U.S.—*Elliott v. Gordon, C.C.A. Kan.*, 70 F.2d 9.—*U. S. v. Dickerson*, D.C. Mo., 101 F.Supp. 262.  
Mass.—*Rock v. Rock*, 33 N.E.2d 973, 309 Mass. 44.

Mo.—*Atlantic Nat. Bank of Jacksonville, Fla. v. St. Louis Union Trust Co.*, 211 S.W.2d 3, 357 Mo. 770.

N.D.—*Johnson v. Weldy*, 54 N.W.2d 429.

Ohio.—*Rosselott v. Rosselott*, 113 N.E.2d 639, 93 Ohio App. 425.

Pa.—*Gribbel v. Gribbel*, 17 A.2d 892, 311 Pa. 11.

Utah.—*Hansen v. Hansen*, 171 P.2d 392, 110 Utah 222.  
65 C.J. § 265 note 93.

#### At date of execution

Pa.—*In re McKean's Trust, Orph.*, 1 Fiduciary 26.

#### Executed gift of equitable title

There must be a present executed gift of the equitable title without reference to it taking effect at some future time.—*Webster v. St. Petersburg Federal Sav. & Loan Ass'n*, 20 So.2d 400, 155 Fla. 412.

Property settlement agreement between husband and wife held not to show a present declaration of trust.

—*Riegel v. Central Hanover Bank & Trust Co.*, 42 N.Y.S.2d 657, 266 App. Div. 586.

64. U.S.—*Van Seiver v. Rothensies*, D.C. Pa., 36 F.Supp. 577, affirmed, C.A., 122 F.2d 687.

Ill.—*Williams v. Anderson*, 5 N.E.2d 593, 258 Ill.App. 149.

Mass.—*Rock v. Rock*, 33 N.E.2d 973, 309 Mass. 44.

N.M.—*McClendon v. Dean*, 117 P.2d 250, 45 N.M. 496.

N.D.—*Johnson v. Weldy*, 54 N.W.2d 429.

Ohio.—*Rosselott v. Rosselott*, 113 N.E.2d 639, 93 Ohio App. 425.

Pa.—*In re Williams' Estate*, 37 A.2d 584, 345 Pa. 568.—*Poplock v. Plankowski*, 56 A.2d 326, 161 Pa.Super. 587.—*In re Williams' Estate, Com. Pl.*, 45 Lack.Jur. 170, 12 Som.Leg.J. 101.

Tenn.—*Deakins v. Webb*, 84 S.W.2d 367, 19 Tenn.App. 182.

Vt.—*Warner v. Burlington Federal Sav. & Loan Ass'n*, 49 A.2d 93, 114 Vt. 463, 168 A.L.R. 1265.

#### Necessity for legal liability

Declaration of intention to create trust is unenforceable and revocable without legal liability.—*Newell v. Capelle, D.C. Del.*, 14 F.Supp. 147, affirmed, C.C.A., 86 F.2d 1007.

#### Promise to create trust

(1) Declarations of a purpose to create a trust, or mere voluntary unfulfilled promises to give property to a person or persons, or to dispose of it in the future for the benefit of such person or persons are not sufficient to create a trust, nor is a mere intention or mere voluntary agreement to create a trust, where the owner of the property contemplates some further action by him to make it effectual, sufficient to establish a trust.—*Hansen v. Hansen*, 171 P.2d 392, 110 Utah 222.

(2) A promise to create a trust in the future is enforceable, if the requirements for an enforceable contract are complied with.—*Lewis v. Jackson & Squire, D.C. Ark.*, 86 F.Supp. 354, appeal dismissed, C.A., 181 F.2d 1011, *Lewis v. Midwest Min. Co.*, 181 F.2d 1011, and *Lewis v. F. S. Neeley Co.*, 181 F.2d 1011.

(3) If a person declares his intention or promises that he will at a subsequent time transfer property then owned or thereafter to be acquired by him to another person in trust, no trust arises until he makes the transfer in trust.—*Lewis v. Jack-*



intent, at some time, to convey or devise lands to certain persons,<sup>65</sup> or where property is transferred to a person to be disposed of by him in any manner or to any person he may select,<sup>66</sup> or if the transferor manifests an intention to give the property to the transferee for his own benefit,<sup>67</sup> or if the words and circumstances are as consistent with another form of undertaking as with that of a trust.<sup>68</sup>

**Payment of interest.** A provision in the trust instrument for the payment of interest by the trustee does not necessarily show an intent not to create a trust.<sup>69</sup>

### b. Necessity for Particular Formality or Technical Language

The mere form of the instrument, or the use or non-

use of particular or technical words, is not alone determinative of whether or not a trust was created, although the use of technical words is important and constitutes evidence of an intention to create a trust.

The mere form of the instrument,<sup>70</sup> or the use or nonuse of technical words<sup>71</sup> is not alone determinative of whether or not a trust was created. The transaction itself must be scrutinized.<sup>72</sup> Although there must be something equivalent to an express statement,<sup>73</sup> a trust estate may be created by implication,<sup>74</sup> and definite<sup>75</sup> or express<sup>76</sup> words are not necessary. Formal or technical language is not required;<sup>77</sup> and, unless otherwise required by statute,<sup>78</sup> no special or particular words,<sup>79</sup> and no par-

son & Squire, D.C. Ark., 86 F.Supp. 354, appeal dismissed, C.A., 181 F.2d 1011, Lewis v. Midwest Min. Co., 181 F.2d 1011, and Lewis v. F. S. Neeley Co., 181 F.2d 1011.

(4) Although a promise to create a trust in the future does not create a present trust, a present trust may be created of the rights of a promisee under the contract to create a trust.—McClendon v. Dean, 117 P.2d 250, 45 N.M. 496.

(5) Where a person purports to create a present trust of property to be acquired in the future, the transaction may be considered as in effect a promise to create a trust when the property is acquired, and, if there is a binding promise to transfer after-acquired property to another as a trustee, a trust may be immediately created, not of the after-acquired property but of the rights arising out of the contract.—McClendon v. Dean, *supra*.

(6) If a person receives consideration for his promise to create a trust, he may incur a liability upon the promise if he fails to perform it, and a court of equity may specifically enforce the promise.—McClendon v. Dean, *supra*.

65. Wash.—In re Swartwood's Estate, 89 P.2d 203, 198 Wash. 567.

66. Iowa—Hodgson v. Dorsey, 298 N.W. 895, 230 Iowa 730, 137 A.L.R. 456.

Mich.—Townsend v. Gordon, 14 N.W. 2d 57, 308 Mich. 438, 151 A.L.R. 1432.

67. Mich.—Townsend v. Gordon, *supra*.

68. Del.—Bodley v. Jones, 32 A.2d 436, 27 Del.Ch. 273.

69. Mich.—Reichert v. Guaranty Trust Co. of Detroit, 245 N.W. 785, 280 Mich. 601.

70. U.S.—Morsman v. C. I. R., C.C.A. 8, 90 F.2d 18, 113 A.L.R. 441, certiorari denied Morsman v. Helver-

ing, 58 S.Ct. 20, 302 U.S. 701, 82 L.Ed. 642.

71. Ill.—Oglesby v. Springfield Marine Bank, 69 N.E.2d 269, 395 Ill. 37.

Mich.—Union Guardian Trust Co. v. Nichols, 19 N.W.2d 883, 311 Mich. 107.

Pa.—In re Evans' Estate, 93 A.2d 683, 372 Pa. 284—Lehigh University v. Howar, 46 A.2d 516, 159 Pa.Super. 84.

### Use to indicate other relationships

The words "trust" and "trustee" are frequently used to indicate duties, relationships, and responsibilities, which are not strictly and technically trusts.—Daniels v. Indiana Trust Co., 51 N.E.2d 838, 222 Ind. 36.

72. U.S.—Morsman v. C. I. R., C.C.A. 8, 90 F.2d 18, 113 A.L.R. 441, certiorari denied Morsman v. Helvering, 58 S.Ct. 20, 302 U.S. 701, 82 L.Ed. 642.

### Dependent on facts

Existence of a trust is to be determined by reference to facts on which it depends, rather than on particular technical words used.—Cooper v. Cooper, 193 N.E. 722, 100 Ind.App. 252.

73. Me.—Rose v. Osborne, 180 A. 315, 133 Me. 497.

Tenn.—Deakins v. Webb, 84 S.W.2d 367, 19 Tenn.App. 182.

74. Ky.—Crawford v. Crawford, 162 S.W.2d 4, 290 Ky. 542.

75. Cal.—Nicholas v. Nicholas, 242 P.2d 679, 110 Cal.App.2d 349.

76. U.S.—Universal Ins. Co. v. Steinbach, C.A. Or., 170 F.2d 303—Cullen v. Chappell, C.C.A. Conn., 116 F.2d 1017.

Cal.—Nicholas v. Nicholas, 242 P.2d 679, 110 Cal.App.2d 349.

Me.—Rose v. Osborne, 180 A. 315, 133 Me. 497.

Mo.—Tootle-Lacy Nat. Bank v. Rollier, 111 S.W.2d 12, 341 Mo. 1029.

—Eldridge v. Logan, App., 217 S.W.2d 588.

Tenn.—Deakins v. Webb, 84 S.W.2d 367, 19 Tenn.App. 182.

Wis.—Wyse v. Puchner, 51 N.W.2d 38, 260 Wis. 365.

77. U.S.—King v. Richardson, C.C.A. N.C., 136 F.2d 849, certiorari denied 64 S.Ct. 91, 320 U.S. 777, 88 L.Ed. 466—Bingen v. First Trust Co. of St. Paul, D.C. Minn., 23 F.Supp. 958, reversed on other grounds, C.A., 103 F.2d 260.

Cal.—In re Clippinger's Estate, 171 P.2d 567, 75 Cal.App.2d 426.

Del.—Delaware Trust Co. v. Fitzmaurice, 38 A.2d 925, 28 Del.Ch. 165, reversed on other grounds Crumlish v. Delaware Trust Co., 46 A.2d 888, 29 Del.Ch. 503, 169 A.L.R. 451.

—Bodley v. Jones, 32 A.2d 436, 27 Del.Ch. 273—Delaware Trust Co. v. Fitzmaurice, 31 A.2d 383, 27 Del.Ch. 101, modified on other grounds Crumlish v. Delaware Trust Co., 38 A.2d 463, 27 Del.Ch. 374.

Hawaii—Ako v. Russell, 32 Hawaii 769.

Id.—Sands v. Church of Ascension and Prince of Peace, 30 A.2d 771, 141 Md. 556.

Mo.—Tootle-Lacy Nat. Bank v. Rollier, 111 S.W.2d 12, 341 Mo. 1029.

Pa.—Stineman v. Stineman, Com'l Pl., 16 Cambria 61.

Tenn.—Deakins v. Webb, 84 S.W.2d 367, 19 Tenn.App. 182.

Va.—Broadus v. Gresham, 26 S.E.2d 33, 181 Va. 725.

78. Min.—Tyler v. Triesback, 69 So. 49, 69 Min. 595.

65 C.J. § 265 note 13.

79. U.S.—U. S. v. Certain Land in Wayne County, Mo., Known as Trust No. 8, Mingo Nat. Wildlife Refuge Project, D.C. Mo., 70 F.Supp. 730.

Del.—Jones v. Bodley, 27 A.2d 84, 26 Del.Ch. 218, reversed on other grounds Bodley v. Jones, 32 A.2d 438, 27 Del.Ch. 273.

ticular formality or form of words<sup>80</sup> is essential to the creation of a trust, as long as the intent is

**Mo.**—Kozłowska v. Napierkowski, 170 A. 193, 165 Md. 620.

**Mo.**—Ramsey v. City of Brookfield, 237 S.W.2d 143, 361 Mo. 857—Stephenson v. Stephenson, 171 S.W.2d 565, 351 Mo. 8—Zottle-Lacy Nat. Bank v. Rollier, 111 S.W.2d 12, 341 Mo. 1029—Eldridge v. Logan, App., 217 S.W.2d 588.

**Neb.**—Crancer v. Reichenbach, 266 N.W. 57, 130 Neb. 645.

**N.H.**—State v. Federal Square Corp., 3 A.2d 109, 89 N.H. 538.

**N.Y.**—Kahlmeyer v. Green-Wood Cemetery, 23 N.Y.S.2d 17, 175 Misc. 187, modified on other grounds 27 N.Y.S.2d 446, 261 App.Div. 950, reargument denied 27 N.Y.S.2d 1013, 261 App.Div. 1075, motion denied 37 N.E.2d 138, 286 N.Y. 696, affirmed 40 N.E.2d 650, 287 N.Y. 787—In re Albro's Will, 300 N.Y.S. 1103, 165 Misc. 486—In re Freistadt's Will, 104 N.Y.S.2d 510, affirmed 105 N.Y.S.2d 995, 278 App.Div. 962, amended on other grounds 107 N.Y.S.2d 466, 279 App.Div. 603.

**N.C.**—Stephens v. Clark, 189 S.E. 191, 211 N.C. 84.

**Okla.**—Burns v. Bastien, 50 P.2d 377, 174 Okl. 40.

**Any sufficient statement**, which shows without question that estate is vested in one person for benefit of another or for definite purpose, if specific as to prerequisites, is sufficient.—Voorhies v. Blood, 173 So. 765, 127 Fla. 337.

**80. U.S.**—Edgerton v. Johnson, C.A. III, 178 F.2d 106—Jackman v. Equitable Life Assur. Soc. of U. S. C. A. Pa., 145 F.2d 945—Mahaffey v. Helvering, C.C.A. 8, 140 F.2d 879—Elliot v. Gordon, C.C.A. Kan., 70 F.2d 9—Helden v. Cremin, C.C.A. Iowa, 66 F.2d 913, 91 A.L.R. 247, certiorari denied 54 S.Ct. 123, 290 U.S. 687, 78 L.Ed. 592—Jaiser v. Milligan, D.C. Neb., 120 F.Supp. 599—In re Prudence Co., D.C.N.Y., 24 F.Supp. 666.

**Ala.**—Wolosoff v. Dadsden Land & Building Corp., 18 So.2d 568, 245 Ala. 628.

**Cal.**—Neel v. Barnard, 150 P.2d 127, 24 Cal.2d 406—Wight v. Street, 44 P.2d 322, 3 Cal.2d 146—People v. Pierce, 243 P.2d 585, 110 Cal.App.2d 598—Title Ins. & Trust Co. v. McGraw, 161 P.2d 846, 72 Cal.App.2d 390—Kornbau v. Evans, 152 P.2d 651, 66 Cal.App.2d 677—Del Giorgio v. Powers, 81 P.2d 1006, 27 Cal.App.2d 668.

**Conn.**—Town of Winchester v. Cox, 26 A.2d 592, 129 Conn. 106.

**Del.**—Bodley v. Jones, 32 A.2d 436, 27 Del.Ch. 273—Tippett v. Tippett, 7 A.2d 612, 24 Del.Ch. 115.

**Ill.**—Goldstein v. Handley, 60 N.E.2d 851, 390 Ill. 118—Merchants Nat. Bank of Aurora v. Frazier, 67 N.E.2d 611, 329 Ill.App. 191—Herdien

v. Herdien, 8 N.E.2d 726, 290 Ill. App. 606—People ex rel Barrett v. Cairo-Alexander County Bank, 282 Ill.App. 343, reversed on other grounds 2 N.E.2d 889, 363 Ill. 589.

**Ind.**—Sindlinger v. Department of Financial Institutions of Indiana, 199 N.E. 715, 210 Ind. 83, 105 A.L.R. 501—Zorich v. Zorich, 88 N.E.2d 694, 119 Ind.App. 547.

**Mass.**—Herman v. Edgington, 118 N.E.2d 865—Harrington v. Donlin, 45 N.E.2d 963, 312 Mass. 577.

**Mo.**—Gwin v. Gwin, 219 S.W.2d 282, 240 Mo.App. 782—St. Louis Uniformed Firemen's Credit Union v. Halev, App., 190 S.W.2d 636.

**N.J.**—Eagles Building & Loan Ass'n v. Fiducia, 37 A.2d 116, 135 N.J.Eq. 7, affirmed 40 A.2d 627, 136 N.J.Eq. 117.

**N.Y.**—Gilles v. Gilles, 268 N.Y.S. 199, 239 App.Div. 582—Douglas' Will, 89 N.Y.S.2d 498, 195 Misc. 661—Brown v. J. P. Morgan & Co., 31 N.Y.S.2d 323, 177 Misc. 626, motion denied 31 N.Y.S.2d 815, 177 Misc. 763, reversed on other grounds 40 N.Y.S.2d 229, 265 App.Div. 631, affirmed 67 N.E.2d 263, 295 N.Y. 867—In re Weir's Will, 14 N.Y.S.2d 655, 172 Misc. 74—In re Skuse's Estate, 1 N.Y.S.2d 202, 165 Misc. 564—In re Schwedler's Trust, 113 N.Y.S.2d 306—Wojtkowiak v. Wojtkowiak, 85 N.Y.S.2d 198, affirmed 81 N.Y.S.2d 171, 273 App.Div. 1052—In re Boughton's Will, 78 N.Y.S.2d 696—In re Banks' Will, 68 N.Y.S.2d 857—In re Shelley's Estate, 50 N.Y.S.2d 570—Fulcone v. Palotta, 29 N.Y.S.2d 918, affirmed 29 N.Y.S.2d 719, 262 App.Div. 875.

**N.C.**—Poele v. LeRoy, 22 S.E.2d 244, 222 N.C. 123.

**Ohio.**—Homer v. Wullenweber, 101 N.E.2d 229, 89 Ohio App. 255—In re Barnes' Estate, Com.Pl., 108 N.E.2d 88, affirmed, App., 108 N.E.2d 101.

**Okla.**—Corpus Juris cited in Burns v. Bastien, 50 P.2d 377, 384, 174 Okl. 40.

**Pa.**—In re Evans' Estate, 93 A.2d 683, 372 Pa. 284—Provident Trust Co. of Philadelphia v. Lukens Steel Co., 58 A.2d 23, 359 Pa. 1—Keller v. Keller, 41 A.2d 547, 351 Pa. 461—Gribbel v. Gribbel, 17 A.2d 892, 341 Pa. 11—Converse v. Hawse, 190 A. 899, 326 Pa. 1—Brubaker v. Lauer, 185 A. 848, 322 Pa. 461—Thornton v. Koch, 176 A. 3, 317 Pa. 400—Bair v. Snyder County State Bank, 171 A. 274, 314 Pa. 85—Popilock v. Pierikoski, 56 A.2d 326, 161 Pa.Super. 587—Buchner v. Buchner, 174 A. 643, 114 Pa.Super. 503—In re Loy's Estate, Orph., 37 Berks Co. 267—Styer v. Hess, Com.Pl., 59 Montg. Co. 41.

**Tex.**—Patrick v. McGaha, Civ.App., 164 S.W.2d 236—Miller v. Whittenburg, Civ.App., 144 S.W.2d 381, re-

versed on other grounds Whittenburg v. Miller, 164 S.W.2d 497, 139 Tex. 586—Pottorff v. Stafford, Civ. App., 81 S.W.2d 539, error refused, certiorari denied 56 S.Ct. 139, 296 U.S. 619, 80 L.Ed. 439.

**Vt.**—Smith v. Dushaw, 78 A.2d 479, 116 Vt. 441—Warner v. Burlington Federal Sav. & Loan Ass'n, 49 A.2d 93, 114 Vt. 463, 168 A.L.R. 1265—Dieter v. Scott, 9 A.2d 95, 110 Vt. 376.

65 C.J. p.265 note 14.  
Transactions raising express trusts see infra §§ 50-59.

#### Absolute transfer

A transfer may be held to be a gift in trust even if language, from its surface appearance, has indicated an absolute gift to donee, if it is followed by instructions to the donee to use the property for benefit of certain third parties.—Jaiser v. Milligan, D.C.Neb., 120 F.Supp. 599.

**Any oral or written declaration**, however informal, evidencing intention to create trust with sufficient clearness is sufficient, and it may be implied from words and acts.—In re Frank's Estate, 275 N.Y.S. 843, 163 Misc. 688.

**Declaration of trust may be made by:**  
(1) Letters.

**U.S.**—Bingen v. First Trust Co. of St. Paul, C.C.A.Minn., 103 F.2d 260. Cal.—Weiner v. Mullaney, 140 P.2d 704, 59 Cal.App.2d 620.

**Ill.**—Albert v. Albert, 80 N.E.2d 69, 334 Ill.App. 440.

**Mass.**—Cohen v. Newton Sav. Bank, 67 N.E.2d 748, 320 Mass. 90, 168 A.L.R. 1321.

**Wis.**—Wyse v. Puchner, 51 N.W.2d 38, 260 Wis. 365.

65 C.J. p.265 note 14 [c] (3).

(2) Memoranda.—Albert v. Albert, 80 N.E.2d 69, 334 Ill.App. 440—65 C.J. p.265 note 14 [c] (4).

(3) Pleadings.—Albert v. Albert, supra—65 C.J. p.265 note 14 [c] (5).

(4) Writings of the most informal nature.—Albert v. Albert, supra.

(5) Undertaking to make provision for others by will.—Rayhol Co. v. Holland, 148 A. 358, 110 Conn. 516.

(6) Other instruments or writings by which declaration of trust may be made see 65 C.J. p.265 note 14 [c].

#### Dead not required

**Mass.**—Cohen v. Newton Sav. Bank, 67 N.E.2d 748, 320 Mass. 90, 168 A.L.R. 1321.

#### Irregularities in execution

Settlor, by signing second declaration of trust which was drawn at his request and in accordance with his instructions, was held to have made that instrument his act, notwithstanding presence of formal irregularities in execution of declaration.—

sufficiently expressed.<sup>81</sup> Express trusts may be recognized and enforced which have not been directly and expressly declared, but which are inferred from the circumstances by a construction of all the

terms and dispositions.<sup>82</sup>

Thus, it is not necessary to use the words "upon trust,"<sup>83</sup> "trust,"<sup>84</sup> "trustee,"<sup>85</sup> or other phraseology

Lambdin v. Dantsebecker, 181 A. 353, 169 Md. 240.

#### Parol trust

Mo.—Coon v. Stanley, 94 S.W.2d 96, 230 Mo.App. 524.

N.C.—Wilmington Furniture Co. v. Cole, 178 S.E. 579, 207 N.C. 840, 847.

#### Personal property

(1) The requirements for written declarations of trusts of personal property are not stricter than are required for written declarations of trusts of realty—Cohen v. Newton Sav. Bank, 67 N.E.2d 748, 320 Mass. 90, 168 A.L.R. 1321.

(2) The facts as found from which the intention to create a trust is to be determined must be considered—McCabe v. Grantham, 31 N.E.2d 658, 108 Ind.App. 695.

#### Question involved

The question is not whether draftsman was thinking in terms of a technical trust nor whether he was attempting to give any particular name or label to the relationship being created, but whether settlor manifested an intention to impose on a transferee of the property equitable duties to deal with property for the benefit of another person.—In re Bab-bage's Estate, 106 N.Y.S.2d 332, 201 Misc. 750.

#### Reservation in deed

Statement in deed conveying realty with reservation of three-fourths interest in royalties of oil and gas that such reservation of royalties should belong to grantor and two other named persons, share and share alike, was held to constitute an executed express trust in favor of parties named therein as beneficiaries—Burns v. Bastion, 50 P.2d 377, 174 Okl. 40.

#### Terminology

The existence of a trust does not depend on the terminology used—Hugo v. Hugo, 91 N.E.2d 826, 325 Mass. 612.

#### Writing for other purpose

Writing declaring trust need not have been made for that purpose.

Ill.—Osborn v. Reardon, 156 N.E. 802, 325 Ill. 529—Albert v. Albert, 50 N.E.2d 69, 334 Ill.App. 140.

Okl.—Burns v. Bastion, 50 P.2d 377, 174 Okl. 40.

Words "for benefit of" may be a sufficient manifestation of intention to create a trust—Mull v. Mull, 232 P.2d 556, 107 Cal.App.2d 68—65 C.J. p. 265 note 14 [d].

#### Words of art not required

Cal.—Nicholas v. Nicholas, 242 P.2d 679, 110 Cal.App.2d 349.

U.S.—Bingen v. First Trust Co. of St. Paul, C.C.A.Minn., 103 F.2d 260.

Cal.—Nicholas v. Nicholas, 242 P.2d 679, 110 Cal.App.2d 349.

N.Y.—Gillies v. Gillies, 268 N.Y.S. 199, 239 App.Div. 582—In re Weir's Will, 14 N.Y.S.2d 655, 172 Misc. 74—In re Banker's Will, 68 N.Y.S.2d 857.

Pa.—Converse v. Hawse, 190 A. 899, 326 Pa. 1—Thornton v. Koch, 176 A. 3, 317 Pa. 400—Stineman v. Stineman, Com.Pl., 16 Cambria. 61—Styer v. Hess, Com.Pl., 59 Montg. Co. 41.

65 C.J. p. 266 note 15.

It is sufficient if the settlor declares the present creation of a fiduciary relationship with respect to certain property subjecting the person by whom the property is theretofore held to the equitable duty of dealing with it for the benefit of beneficiaries according to the terms and conditions of the trust—US—Jaiser v. Milligan, D.C.Neb., 120 F.Supp. 699.

Mo.—St. Louis Uniformed Firemen's Credit Union v. Haley, App., 190 S.W.2d 636.

22. Mo.—Platt v. Hugel, 32 S.W.2d 605, 326 Mo. 776.

#### Absence of express agreement

Mere absence of express agreement to hold realty as trustee was held not conclusively to negative existence of such relationship—112 West 59th St. Corporation v. Helvering, 68 F.2d 397, 62 App.D.C. 350.

#### Effect of court determination

When an express trust is found by court to have been intended, it is in every respect an express trust which the donor did not unambiguously declare, but which the court has helped out by interpretation and inference—Tootle-Lacy Nat. Bank v. Rollier, 111 S.W.2d 12, 311 Mo. 1029.

33. Ala.—Cresswell v. Jones, 68 Ala. 420.

Hawaii—Ako v. Russell, 32 Hawaii 769.

U.S.—Bingen v. First Trust Co. of St. Paul, C.C.A.Minn., 103 F.2d 260—Elliot v. Gordon, C.C.A.Kan., 70 P.2d 9—Jaiser v. Milligan, D.C. Neb., 120 F.Supp. 699.

Cal.—Niel v. Barnard, 150 P.2d 177, 24 Cal.2d 406—People v. Pierce, 242 P.2d 585, 110 Cal.App.2d 598—Mull v. Mull, 232 P.2d 556, 105 Cal.App.2d 68—Title Ins. Co. v. McGraw, 164 P.2d 846, 72 Cal.App.2d 390—Weiner v. Mullane, 140 P.2d 701, 59 Cal.App.2d 620—Hardison v. Corbett, 130 P.2d 226, 55 Cal.App.2d 310—Del Giorgio v. Powers, 81 P.2d 1006, 27 Cal.App.2d 154.

—Del Giorgio v. Powers, 81 P.2d 1006, 27 Cal.App.2d 668.

Fla.—Voorhies v. Blood, 173 So. 705, 127 Fla. 337.

Hawaii—Ako v. Russell, 32 Hawaii 769.

Minn.—Farmers State Bank of Fos-ton v. Sig. Ellingson & Co., 16 N.W. 2d 319, 218 Minn. 411—Jordan v. Jordan, 259 N.W. 386, 193 Minn. 425.

Mo.—Ramey v. City of Brookfield, 237 S.W.2d 143, 361 Mo. 857—Stephenson v. Stephenson, 171 S.W.2d 565, 351 Mo. 8—St. Louis Uniformed Firemen's Credit Union v. Haley, App., 190 S.W.2d 636.

Neb.—O'Connor v. Burns, Potter & Co., 36 N.W.2d 507, 161 Neb. 9.

N.J.—State v. U.S. Steel Co., 95 A.2d 740, 12 N.J. 61.

N.Y.—Gillies v. Gillies, 268 N.Y.S. 199, 239 App.Div. 582—In re Bab-bage's Estate, 106 N.Y.S.2d 332, 201 Misc. 750—Le Graff v. Joyce, 16 N.Y.2d 601, 172 Misc. 919—In re Albro's Will, 300 N.Y.S. 1103, 165 Misc. 486—In re Freistadt's Will, 104 N.Y.S.2d 510, affirmed 105 N.Y.S.2d 985, 278 App.Div. 962, amended on other grounds 107 N.Y.S.2d 466, 279 App.Div. 603.

N.C.—Stephens v. Clark, 189 S.E. 191, 211 N.C. 84.

Okl.—Corpus Juris cited in Burns v. Bastion, 50 P.2d 377, 384, 174 Okl. 40.

Pa.—Gribbel v. Gribbel, 17 A.2d 892, 341 Pa. 11.

Vt.—Dieter v. Scott, 9 A.2d 95, 110 Vt. 376.

65 C.J. p. 269 note 28.

#### To create oral trust

Cal.—Cooper v. Cooper, 39 P.2d 820, 3 Cal.App.2d 154.

U.S.—Bingen v. First Trust Co. of St. Paul, C.C.A.Minn., 103 F.2d 260—Elliot v. Gordon, C.C.A.Kan., 70 P.2d 9—Jaiser v. Milligan, D.C. Neb., 120 F.Supp. 699.

Cal.—Niel v. Barnard, 150 P.2d 177, 24 Cal.2d 406—People v. Pierce, 242 P.2d 585, 110 Cal.App.2d 598—Title Ins. Co. v. McGraw, 164 P.2d 846, 72 Cal.App.2d 390—Weiner v. Mullane, 140 P.2d 704, 59 Cal.App.2d 620—Hardison v. Corbett, 130 P.2d 226, 55 Cal.App.2d 310—Del Giorgio v. Powers, 81 P.2d 1006, 27 Cal.App.2d 668—Cooper v. Cooper, 39 P.2d 820, 3 Cal.App.2d 154.

Fla.—Voorhies v. Blood, 173 So. 705, 127 Fla. 337.

Hawaii—Ako v. Russell, 32 Hawaii 769.

Minn.—Jordan v. Jordan, 259 N.W. 386, 193 Minn. 425.

Mo.—Ramey v. City of Brookfield, 237 S.W.2d 143, 361 Mo. 857—Ste-

incorporating the word trust such as "trust fund,"<sup>88</sup> or equivalent words,<sup>87</sup> if the creation of a trust is otherwise sufficiently evident;<sup>88</sup> and their absence does not prevent a declaration of trust from being sufficient.<sup>89</sup> On the other hand, the use of such words is not conclusive of an intention to create a trust, and does not necessarily, and will not of itself be sufficient to, create a trust.<sup>90</sup>

The use of formal or technical words, however, is important in determining whether or not a trust was intended,<sup>91</sup> and it is a circumstance to be considered in determining whether a trust was cre-

ated.<sup>92</sup> The fact that such words are used is evidence of an intention to create a trust,<sup>93</sup> and their absence is significant where it is claimed that a trust was created.<sup>94</sup> The word "trustee," following a grantee's name in an instrument, has been held to evidence the existence of a trust, and not to be merely *descriptio personae*,<sup>95</sup> although it does not, by itself, create a trust;<sup>96</sup> but there is other authority holding that such a use of the word "trustee" in a deed of conveyance is mere surplusage or *descriptio personae*, and the grantee takes the title for his own use where no trust is declared and no beneficiary named.<sup>97</sup> The trustee may be called

phenson v. Stephenson, 171 S.W.2d 585, 351 Mo. 8.—St. Louis Uniformed Firemen's Credit Union v. Haley, App. 190 S.W.2d 636.

Neb.—O'Connor v. Burns, Potter & Co., 36 N.W.2d 507, 151 Neb. 9.

N.Y.—Gillies v. Gillies, 268 N.Y.S. 199, 239 App. Div. 582.—In re Babbage's Estate, 106 N.Y.S.2d 332, 201 Misc. 750.—De Graff v. Joyce, 16 N.Y.S.2d 601, 173 Misc. 919.

N.C.—Stephens v. Clark, 189 S.E. 191, 211 N.C. 84.

Okla.—*Corpus Juris* cited in Burns v. Bastien, 50 P.2d 377, 384, 174 Okl. 40.

Pa.—Gribbel v. Gribbel, 17 A.2d 892, 341 Pa. 11.—In re Pleibel's Estate, 20 Pa. Dist. & Co. 389.—In re Loy's Estate, Orph. 37 Berks Co. 267.—In re Thomas' Estate, Orph. 25 Erie Co. 388.

Tenn.—Dunkins v. Webb, 84 S.W.2d 367, 19 Tenn. App. 182.

Vt.—Dieter v. Scott, 9 A.2d 95, 110 Vt. 376.

Va.—Tate v. Hain, 25 S.E.2d 321, 181 Va. 402.

65 C.J. p. 269 note 27.

38. Neb.—O'Connor v. Burns, Potter & Co., 36 N.W.2d 507, 151 Neb. 9.

87. Mo.—St. Louis Uniformed Firemen's Credit Union v. Haley, App. 190 S.W.2d 636.

65 C.J. p. 269 note 28.

39. Hawaii.—Ako v. Russell, 32 Hawaii 769.

Neb.—O'Connor v. Burns, Potter & Co., 36 N.W.2d 507, 151 Neb. 9.

65 C.J. p. 269 note 28.

89. N.Y.—In re Babbage's Estate, 106 N.Y.S.2d 332, 201 Misc. 750.

65 C.J. p. 269 note 31.

90. U.S.—Morsman v. C. I. R., C.C.A. 8, 90 F.2d 18, 113 A.L.R. 441, certiorari denied Morsman v. Iltfvering, 58 S.Ct. 20, 302 U.S. 701, 82 L. Ed. 542.

Conn.—Connecticut Junior Republic Ass'n v. Town of Litchfield, 174 A.304, 119 Conn. 106, 95 A.L.R. 56.

Ind.—Cooper v. Cooper, 193 N.E. 722, 100 Ind.App. 252.

Iowa.—*Corpus Juris* quoted in Hodg-

son v. Dorney, 298 N.W. 895, 897, 230 Iowa 730, 137 A.L.R. 456.

Mass.—Greely v. Flynn, 35 N.E.2d 394, 310 Mass. 23.

Mich.—Union Guardian Trust Co. v. Nichols, 18 N.W.2d 383, 311 Mich. 107.—Relchert v. Guaranty Trust Co. of Detroit, 245 N.W. 785, 260 Mich. 504.

Neb.—O'Connor v. Burns, Potter & Co., 36 N.W.2d 507, 151 Neb. 9.

N.Y.—City Bank Farmers Trust Co. v. Arnold, 197 N.E. 288, 268 N.Y. 297.—In re Babbage's Estate, 106 N.Y.S.2d 332, 201 Misc. 750.

Pa.—Provident Trust Co. of Philadelphia v. Lukens Steel Co., 58 A.2d 21, 359 Pa. 1.—In re Tunnell's Estate, 190 A. 906, 325 Pa. 554.—E. P. Wilbur Trust Co. v. Knadler, 185 A. 319, 323 Pa. 17.—In re Wallace's Estate, 174 A. 397, 316 Pa. 148.

S.D.—Strain v. Chamberlain Auto & Supply Co., 274 N.W. 661, 65 S.D. 427.

Tex.—Golob v. Stone, Civ.App., 262 S.W.2d 536.

65 C.J. p. 269 note 30.

In holographic will.

N.Y.—In re Douglas' Will, 89 N.Y.S.2d 408, 195 Misc. 661.

Force of statute.

Statute providing that deeds in which the words "trustee" or "as trustee" are added to the name of grantee shall be treated as granting a fee-simple estate under certain conditions was intended to prevent secret trusts and to convey the beneficial title to the grantee along with legal title in order to prevent fraud being perpetrated on persons who might subsequently rely on the record when dealing with grantee.—Arundel Ducture Corp. v. Le Blond, 190 So. 765, 139 Fla. 668.

91. Del.—Delaware Trust Co. v. Fitzmaurice, 38 A.2d 925, 28 Del.Ch. 155, reversed on other grounds Crumlish v. Delaware Trust Co., 46 A.2d 888, 29 Del.Ch. 503, 169 A.L.R. 451.

Delaware Trust Co. v. Fitzmaurice, 31 A.2d 383, 27 Del.Ch. 101, modified on other grounds Crumlish v. Delaware Trust Co., 38 A.2d 463, 27 Del.Ch. 374.—Jones v. Bodley, 27

A.2d 84, 26 Del.Ch. 218, reversed on other grounds Rodley v. Jones, 32 A.2d 436, 27 Del.Ch. 273.

92. Neb.—O'Connor v. Burns, Potter & Co., 36 N.W.2d 507, 151 Neb. 9.

93. Mich.—Union Guardian Trust Co. v. Nichols, 18 N.W.2d 383, 311 Mich. 107.

Neb.—O'Connor v. Burns, Potter & Co., 36 N.W.2d 507, 151 Neb. 9.

Pa.—Lehigh University v. Howser, 46 A.2d 516, 159 Pa.Super. 84.

65 C.J. p. 270 note 32.

Deed reading "in trust for" in premise created trust though grant, use, and habendum are to grantee, her heirs, and assigns forever.—In re Greenbrook & North Caldwell Water Co., 142 A. 308, 103 N.J.Eq. 60.

Reference to trust.

Term "trustee" is always understood to refer to a trust.—Coon v. Stanley, 94 S.W.2d 96, 230 Mo. App. 524.

Held to show trust.

Devises of residuary estate using words "to be held by them in trust," "said trustees," "to be held by said trustees," "in trust," throughout the entire instrument, created trust, where uses and purposes of trust were valid.—Stacey v. Taylor, 264 N.W. 809, 196 Minn. 202.

94. R.I.—Reynolds v. Hennessy, 3 A.701, 18 R.I. 218.

When use indispensable.

Use of word trust or trustee is indispensable to creation of trust unless intention to create trust otherwise appears.—Phillips v. Savings Trust Co. of St. Louis, 85 S.W.2d 923, 231 Mo.App. 1178.

95. Mo.—Meyer Milling Co. v. Strohefeld, 4 S.W.2d 864, 222 Mo.App. 1194.

65 C.J. p. 270 note 34.

96. N.M.—Pershing v. Ward, 280 P. 254, 34 N.M. 298.

65 C.J. p. 270 note 35.

97. Ga.—Brenner v. Wright, 194 S.E. 553, 185 Ga. 280.—Andrews v. Atlanta Real-Estate Co., 18 S.E. 548, 92 Ga. 260.

an "agent" or other similar designation,<sup>98</sup> or "attorney."<sup>99</sup>

## § 44. — Precatory Words

Precatory or recommendatory words will be sufficient to create an express or voluntary trust where, and only where, it clearly appears that such was the intention of the donor or settlor and the trust is otherwise sufficiently declared.

Precatory or recommendatory words may or may not be sufficient to create an express or voluntary trust.<sup>1</sup> Each case must be considered separately, and whether or not a trust has been created by precatory words must be determined on the basis of the facts thereof and the guides and tests gen-

erally applicable in determining the force and effect of precatory words.<sup>2</sup> Such words will create a trust where, and only where, it clearly appears that such was the intention of the settlor.<sup>3</sup> Of themselves, such words are insufficient.<sup>4</sup> A mere expression of a wish,<sup>5</sup> such as expressions of a wish, desire, or recommendation that the transferee of property should use or dispose of it in a specified manner,<sup>6</sup> is not enough.

An intention to impose enforceable duties on the transferee is essential to the creation of an express or voluntary trust, as discussed supra § 42 a; and the intention not to impose enforceable duties may be shown by the use of precatory words rather than mandatory words,<sup>7</sup> or by the fact that the purposes

Iowa.—Hodgson v. Dorsey, 298 N.W. 895, 230 Iowa 730, 137 A.L.R. 456.  
Ky.—Sansom v. Ayer & Lord Tie Co., 129 S.W. 778, 144 Ky 555

Tex.—Barker v. Temple Lumber Co., Com App., 12 S.W.2d 175, reversed on other grounds 37 S.W.2d 721, 120 Tex. 244

98. Ga.—Johnson v. Cook, 50 S.E. 867, 122 Ga 524  
65 C.J. p 270 note 36.

99. N.Y.—Mersereau v. Bennet, 108 N.Y.S. 868, 124 App.Div. 413.

1. Ky.—Jasoworth v. Kilbourn, 201 S.W.2d 904, 304 Ky. 628.  
Md.—Pratt v. Trustees of Sheppard and Enoch Pratt Hospital, 42 A. 51, 88 Md 610

Precatory words as creating testamentary trust see the C.J.S. title Willis § 1011, also 69 C.J. p 716 note 58-p 727 note 62.

Trust intent may be couched in words of request, suggestion, or entreaty only; that is, the language may be "precatory."—Norris v. C. I. R., C.C.A.7, 134 F.2d 796, 149 A.L.R. 1324, certiorari denied 64 S.Ct. 63, 320 U.S. 756, 88 L.Ed. 450, rehearing denied 64 S.Ct. 199, 320 U.S. 813, 88 L.Ed. 491.

Situations in which doctrine applicable

Although the doctrine of precatory trusts is applied in most cases in situations where an apparent absolute gift is made to one person and followed by the expression of a desire or request that it be used for the benefit of another, it is not confined to such situations, and is also applicable in cases where a gift is made to an individual or institution with a request that it be used in a given manner or for a suggested purpose.—Bankers Trust Co. v. New York Women's League for Animals, 92 A.2d 820, 23 N.J. Super. 170.

2. Iowa.—In re Campbell, 229 N.W. 247, 209 Iowa 954.  
Ky.—Bosworth v. Kilbourn, 201 S.W. 2d 904, 304 Ky. 628.

3. U.S.—King v. Richardson, C.C.A. N.C., 136 F.2d 849, certiorari denied 64 S.Ct. 91, 320 U.S. 777, 88 L.Ed. 466

Iowa.—In re Hellman's Estate, 266 N.W. 36, 221 Iowa 552.  
N.M.—Torres v. Abeyta, 84 P.2d 592, 42 N.M. 665

Wash.—Corpus Juris quoted in In re Bradley's Estate, 59 P.2d 1129, 1131, 187 Wash. 221.  
65 C.J. p 270 note 40.

Intention controlling

Whether or not a trust has in fact been created in a particular case by the use of precatory words is, in the final analysis, a question of intention—Sands v. Church of Ascension and Prince of Peace, 30 A.2d 771, 181 Md. 536

Precatory words held to create trust  
Ky.—Newland v. McNeill, 126 S.W.2d 127, 277 Ky 245—Curd v. Field, 45 S.W. 92, 103 Ky 293, 19 Ky.L. 2016  
—Hohon v. Barrett's Ex'r, 79 Ky 378, 2 Ky.L. 371—Major v. Herndon, 78 Ky. 123.

N.Y.—Phillips v. Phillips, 19 NE 411, 112 N.Y. 197, 8 Am.S.R. 737  
N.C.—Cook v. Ellington, 79 N.C. 371

Precatory words held not to create trust

Md.—Pratt v. Trustees of Sheppard and Enoch Pratt Hospital, 42 A. 51, 88 Md. 610.

N.Y.—Clay v. Wood, 47 N.E. 274, 153 N.Y. 134  
S.C.—Brunson v. King, 11 S.C.Eq. 483.

4. Ariz.—Newhall v. McGill, 212 P.2d 764, 69 Ariz. 259.

Iowa.—In re Hellman's Estate, 266 N.W. 36, 221 Iowa 552.  
Pa.—Brubaker v. Lauver, 185 A. 848, 322 Pa. 461.

Discretionary right

Expressions of desire or expectation are not in themselves sufficient to convert an absolute devise or bequest into a trust, but they imply a discretionary right.—Brubaker v. Lauver, supra.

Precatory trusts are not favored and their extension is not to be encouraged by the courts.—Torres v. Abeyta, 84 P.2d 592, 42 N.M. 665.

Provisions held not precatory

Where father created trust with income payable to himself during his life and thereafter to his children and with direction for division of principal on termination of trust, provisions that, if a deceased child had not made will complying with trust agreement, his share of property should go to surviving children or descendants of any who might have died, could not be regarded as precatory and were not made nugatory because they created a condition subsequent.—Linahan v. Linahan, 39 A.2d 895, 131 Conn. 307.

5. Fla.—Magnant v. Peacock, 25 So. 2d 566, 157 Fla. 271.

Ohio.—Union Central Life Ins Co v. Macbair, 31 N.E.2d 172, 66 Ohio App 144.

Pa.—Brubaker v. Lauver, 185 A. 848, 322 Pa. 461—In re Tuttle's Estate, 200 A. 921, 132 Pa. Super 356.

Wash.—Corpus Juris quoted in In re Bradley's Estate, 59 P.2d 1129, 1131, 187 Wash. 221  
65 C.J. p 270 note 41.

"Wish"

Precatory word "wish" does not according to its ordinary use embrace a command but may in certain contexts and under certain conditions otherwise indicating such a purpose be held to create a trust.—Smith v. Reynolds, 121 S.W.2d 572, 173 Tenn 579

"Wish" held not to create trust

Iowa.—In re Campbell, 229 N.W. 247, 248, 209 Iowa 954.

6. N.Y.—Clay v. Wood, 47 N.E. 274, 153 N.Y. 134.

Pa.—Brubaker v. Lauver, 185 A. 848, 322 Pa. 461.

7. Iowa.—Hodgson v. Dorsey, 298 N.W. 895, 230 Iowa 730, 137 A.L.R. 456.

to which the property transferred is to be applied are so broad as to show that the transferor intended that the transferee should be entitled to use the property for his own benefit.<sup>8</sup> The trust must be otherwise sufficiently declared in order that precautionary or recommendatory words may create a trust, and such words, taken in connection with all the other terms of the disposition and in the light of all the circumstances, must impose an imperative and enforceable obligation and exclude the exercise of discretion as to the disposition of the property by the person to whom the precautionary words are addressed;<sup>9</sup> and the subject of the recommendation or wish,<sup>10</sup> and the objects or persons intended to have

the benefit of the recommendation or wish,<sup>11</sup> must be certain. A trust is not created if the donor or settlor manifests an intention to impose merely a moral obligation,<sup>12</sup> even though he desires the property applied to a purpose other than for the personal benefit of the transferee.<sup>13</sup>

Precatory or recommendatory words will not be sufficient to create a trust where the donor shows an intention to leave the property absolutely.<sup>14</sup> Hence, a precatory trust will not be created where the writing imports a grant of absolute ownership to the donee and there are additional words expressing the donor's wish as to the use or disposition of the property;<sup>15</sup> and indefinite and unsatisfactory ex-

Mich.—Townsend v. Gordon, 14 N.W. 2d 57, 308 Mich. 438, 151 A.L.R. 1432.

8. Mich.—Townsend v. Gordon, supra.

9. Ariz.—Newhall v. McGill, 212 P. 2d 764, 69 Ariz. 259.

Fla.—Lines v. Darden, 5 Fla. 51.

Ky.—Bosworth v. Kilbourn, 201 S.W. 2d 304, 304 Ky. 628.

Or.—Hall v. Dolph, 198 P.2d 272, 184 Or. 319.—Cooke v. King, 61 P.2d 429, 154 Or. 621, 107 A.L.R. 881, rehearing denied 62 P.2d 20, 154 Or. 621, 107 A.L.R. 881.

S.C.—Corpus Juris cited in Albergotti v. Summers, 26 S.E.2d 395, 399, 203 S.C. 187.

Tenn.—Rich v. Witherspoon, Civ.App., 208 S.W.2d 674.

Wash.—Corpus Juris quoted in re Bradley's Estate, 59 P.2d 1129, 1131, 187 Wash. 221.

65 C.Y. p. 270 note 39.

#### Mandatory character of words

In order to create an enforceable "trust," the words of the testator must be construed as mandatory.—Newland v. McNeill, 126 S.W.2d 127, 277 Ky. 245.

#### As certain as ordinary language

Precatory words, in order to create an express trust, must show an intention to create an express trust as surely as though the trust were declared in the ordinary manner.

Iowa.—In re Hellman's Estate, 256 N.W. 36, 221 Iowa 552.

Md.—Pratt v. Trustees of Sheppard and Enoch Pratt Hospital, 42 A. 51, 88 Md. 610.

N.M.—Torres v. Abeyta, 84 P.2d 592, 42 N.M. 665.

Or.—Cooke v. King, 61 P.2d 429, 154 Or. 621, 107 A.L.R. 881, rehearing denied 62 P.2d 20, 154 Or. 621, 107 A.L.R. 881.

Sufficient words to raise it is a prerequisite to the establishment of a valid trust.—Magnant v. Peacock, 25 So.2d 566, 157 Fla. 271.

#### Test

(1) The real test is whether the

language used is imperative or leaves the use and disposition of the property to the discretion of the donee.—King v. Richardson, C.C.A.N.C. 136 F.2d 849, certiorari denied 64 S.Ct. 91, 320 U.S. 777, 88 L.Ed. 466.

(2) The test is whether precatory expression was used in a mandatory sense, although couched in a mild, polite, courteous command, or only as suggestion or wish, falling short of binding and compulsory direction.—Brubaker v. Lauver, 185 A. 848, 322 Pa. 461.

10. Ariz.—Newhall v. McGill, 212 P. 2d 764, 69 Ariz. 259.

Fla.—Lines v. Darden, 5 Fla. 51.

Md.—Pratt v. Trustees of Sheppard and Enoch Pratt Hospital, 42 A. 51, 88 Md. 610.

Or.—Hall v. Dolph, 198 P.2d 272, 184 Or. 319.—Cooke v. King, 61 P.2d 429, 154 Or. 621, 107 A.L.R. 881, rehearing denied 62 P.2d 20, 154 Or. 621, 107 A.L.R. 881.

Tenn.—Rich v. Witherspoon, Civ.App., 208 S.W.2d 674.

#### Amount of property

Tenn.—Smith v. Reynolds, 121 S.W. 2d 572, 173 Tenn. 579.

#### Subject matter held too indefinite

Fla.—Magnant v. Peacock, 25 So.2d 566, 157 Fla. 271.

11. Ariz.—Newhall v. McGill, 212 P. 2d 764, 69 Ariz. 259.

Fla.—Magnant v. Peacock, 25 So.2d 566, 157 Fla. 271.—Lines v. Darden, 5 Fla. 51.

Md.—Pratt v. Trustees of Sheppard and Enoch Pratt Hospital, 42 A. 51, 88 Md. 610.

Or.—Hall v. Dolph, 198 P.2d 272, 184 Or. 319.—Cooke v. King, 61 P.2d 429, 154 Or. 621, 107 A.L.R. 881, rehearing denied 62 P.2d 20, 154 Or. 621, 107 A.L.R. 881.

Tenn.—Rich v. Witherspoon, Civ.App., 208 S.W.2d 674.

12. N.Y.—Clay v. Wood, 47 N.E. 274, 153 N.Y. 134.

Or.—Hall v. Dolph, 198 P.2d 272, 184 Or. 319.

Pa.—Poplock v. Piernikowski, 56 A.2d 326, 161 Pa.Super. 587.

#### Trust held not created

(1) Generally.—Harmen v. Harmon, 6 N.W.2d 762, 303 Mich. 513.

(2) The decedent's statement to her sisters that she wanted her property to go to her husband and their statements that they were willing and were glad that she felt that way did not entitle husband to the land on theory that a parcel trust had been created in his favor.—Taylor v. Addington, 23 S.E.2d 318, 222 N.C. 393.

13. Mich.—Townsend v. Gordon, 14 N.W.2d 57, 308 Mich. 438, 151 A.L.R. 1432.

14. Tenn.—Smith v. Reynolds, 121 S.W.2d 572, 173 Tenn. 579.

15. Ky.—Bosworth v. Kilbourn, 201 S.W.2d 304, 304 Ky. 628.

Md.—Sands v. Church of Ascension and Prince of Peace, 30 A.2d 771, 181 Md. 536.

#### Trust held not created

(1) Generally.

N.Y.—Clay v. Wood, 47 N.E. 274, 153 N.Y. 134.

Or.—Hall v. Dolph, 198 P.2d 272, 184 Or. 319.

Pa.—In re Tuttle's Estate, 200 A. 921, 132 Pa.Super. 356.

(2) Soldier's letter to sister informing her that he had taken out war risk policy, naming her as beneficiary.—Brubaker v. Lauver, 185 A. 848, 322 Pa. 461.

(3) Provision of will leaving bulk of estate to designated legatee, described as "my dear friend and companion," and stating that "she must take care of my dear cats," was held not to create trust in favor of cats.—In re Bradley's Estate, 59 P.2d 1129, 187 Wash. 221.

(4) Statement by donors in letter accompanying bonds that they were making gift of bonds to church and that they wished income therefrom to be used for payment of ground rent or that bonds be used to retire ground rent, together with state-

pressions of a mere intention will not suffice as a declaration of trust when the deed is absolute.<sup>16</sup>

#### § 45. Certainty

- a. In general
- b. Subject matter or property
- c. Beneficiaries
- d. Interests of beneficiaries
- e. Manner of performance

##### a. In General

In order to constitute an express or voluntary trust,

ments by vestry, thanking donors for their gift for extinguishment of ground rent, and the delivery of such bonds to a custodian, did not create a trust.—*Sands v. Church of Ascension and Prince of Peace*, 30 A.2d 771, 181 Md. 536.

16. *Wash.—Corpus Juris* quoted in *In re Bradley's Estate*, 59 P.2d 1129, 1131, 187 Wash. 221. 65 C.J. p 270 note 42.

17. *Minn.—Farmers State Bank of Fosston v. Sig Ellington & Co.*, 16 N.W.2d 319, 218 Minn. 411.

18. *U.S.—U. S. v. Certain Land in Wayne County, Mo., Known as Tract No. 8, Mingo Nat Wildlife Refuge Project*, D.C.Mo., 70 F.Supp. 730.

III.—*Williams v. Anderson*, 5 N.E.2d 593, 288 Ill App 119.

Pa.—*In re Wallace's Estate*, 174 A. 397, 316 Pa. 148.—*Bair v. Snyder County State Bank*, 171 A. 274, 314 Pa. 85.—*Poplock v. Piernikowski*, 56 A.2d 326, 161 Pa.Super. 587.—*In re Gillen's Will*, 41 A.2d 412, 156 Pa. Super. 650.

Tenn.—*Derrick v. Lumpkins*, 95 S.W. 2d 939, 20 Tenn App 77.

Trust is created by words and acts of trustor and trustee indicating with reasonable certainty the essential elements of a trust.—*People v. Pierce*, 243 P.2d 585, 110 Cal App.2d 598.

19. *U.S.—Helden v. Cremlin, C.C.A. Iowa*, 60 F.2d 943, 91 A.L.R. 247, certiorari denied 54 S.Ct. 123, 290 U.S. 687, 78 L.Ed. 592.—*U. S. v. Dickerson*, D.C.Mo., 101 F.Supp. 262.—*Bingen v. First Trust Co of St Paul*, D.C.Minn., 23 F.Supp. 958, reversed on other grounds, C.C.A., 103 F.2d 260.

Ark.—*Krickberg v. Hoff*, 143 S.W. 2d 560, 201 Ark. 63. Cal.—*Lane v. Whitaker*, 123 P.2d 53, 50 Cal App.2d 327.

III.—*Tucker v. Countryman*, 111 N.E.2d 101, 414 Ill. 215.—*Wagner v. Clawson*, 78 N.E.2d 303, 399 Ill. 403, 3 A.L.R.2d 672.—*Merchants Nat. Bank of Aurora v. Frazer*, 67 N.E.2d 611, 329 Ill.App. 191.—*Corpus Juris* cited in *Kilgore v. Use*

of *John Deere Plow Co. v. State Bank of Colusa*, 21 N.E.2d 9, 11, 300 Ill App 409, affirmed *Kilgore v. State Bank of Colusa*, 25 N.E.2d 29, 372 Ill 578.—*People ex rel. Nelson v. Chicago Bank of Commerce*, 16 N.E.2d 601, 296 Ill App. 497, affirmed 21 N.E.2d 303, 371 Ill 396.—*Rynolds v. First Nat. Bank*, 279 Ill App 581, 600.

Okl.—*Scran v. Davis*, 50 P.2d 662, 174 Okl 433.

Pa.—*Provident Trust Co. of Philadelphia v. Lukens Steel Co.*, 58 A.2d 23, 359 Pa 1.—*In re Friedmann's Estate, Orph.*, 40 Del Co 305.

Tex.—*Ray v. Fowler, Civ App.*, 144 S.W.2d 665, error dismissed, judgment correct.

Va.—*Corpus Juris* cited in *Woods v. Stull*, 30 S.E.2d 675, 682, 182 Va. 888.

Wash.—*Laughlin v. March*, 145 P.2d 549, 19 Wash.2d 874. 65 C.J. p 270 note 43.

Declaration of trust held sufficiently certain

(1) Generally.

Cal.—*Reiss v. Reiss*, 114 P.2d 718, 45 Cal.App.2d 740.

NH.—*In re Smard's Estate*, 102 A.2d 508, 98 N.H. 454.

N.J.—*Savings Investment & Trust Co. v. Little*, 39 A.2d 392, 135 N.J.Eq. 546.

N.C.—*Fuller v. Hedgpath*, 80 S.E.2d 18, 239 N.C. 270.

S.D.—*Higgins v. Higgins*, 20 N.W.2d 523, 71 S.D. 17.

(2) Provisions in trust instrument directing trustees on termination of trust by death or marriage of named beneficiary to make cash payments in definite proportions to board or body authorized to receive such payments for named institutions were not so indefinite as to be invalid.—*Odum v. Langston*, 195 S.W.2d 466, 355 Mo. 115.

(3) Trust set up by corporation to provide financial assistance for its employees and their dependents in certain emergencies under a trust agreement naming bank as trustee and creating a committee having authority to pass on applications for assistance and to a limited extent to

the declaration of trust must clearly set forth the essentials thereof and be reasonably certain in its material terms.

In order to constitute an express or voluntary trust, the essentials of a trust must appear clearly.<sup>17</sup> Clear, explicit, definite, unequivocal, and unambiguous language or conduct is required.<sup>18</sup> The declaration must be reasonably certain in its material terms and embody the essential elements of a trust,<sup>19</sup> so that a court may enforce its execution.<sup>20</sup> Certainty is required as to the disposition of the corpus or property,<sup>21</sup> the nature of the trust,<sup>22</sup> the

make loans to employees was not too indefinite.—*Wachovia Bank & Trust Co. v. Steele's Mills*, 34 S.E.2d 425, 225 N.C. 302.

(4) A trust providing for payment of income and such amounts of principal as settlor might direct to him for life, payment of income after his death to his widow, mother, brothers and sisters equally, and distribution of principal, on last surviving life beneficiary's death, to settlor's then living nieces and nephews and deceased nieces' or nephews' living issue, was not illusory.—*National Shawmut Bank of Boston v. Cumming*, 91 N.E.2d 337, 325 Mass. 457.

Trust held void for uncertainty

(1) Generally.

Cal.—*Italian v. Ballan's Market*, 119 P.2d 436, 48 Cal App.2d 150.

Ky.—*Farmers Nat. Bank of Cynthia v. McKenney*, 264 S.W.2d 881. NH.—*Tunis v. Dole*, 89 A.2d 760, 97 N.H. 420.

Ohio.—*Jill v. Irons*, 113 N.E.2d 243, 160 Ohio St. 21.

(2) A trust agreement executed by widow and legal representative of deceased husband's estate which provided for marshaling of assets of deceased husband, including proceeds of life policy payable to widow as beneficiary, was defective when it lacked clarity as to whether widow did in fact transfer her interest in the policy to the trustee named.—*Prudential Ins. Co. of America v. Osadchy*, D.C. Mo., 54 F.Supp. 711.

30. Ark.—*Krickberg v. Hoff*, 143 S.W.2d 560, 201 Ark. 63.

III.—*Corpus Juris* cited in *Kilgore v. Use of John Deere Plow Co. v. State Bank of Colusa*, 21 N.E.2d 9, 11, 300 Ill App. 409, affirmed *Kilgore v. State Bank of Colusa*, 25 N.E.2d 39, 372 Ill. 578. 65 C.J. p 270 note 44.

31. U.S.—*U. S. v. Dickerson*, D.C. Mo., 101 F.Supp. 282.

Provisions held uncertain

U.S.—*U. S. v. Dickerson*, supra.

32. Ala.—*Wolosoff v. Gadsden Land & Building Corp.*, 18 So.2d 568, 245 Ala. 628.

use to be made of the trust,<sup>23</sup> the purpose,<sup>24</sup> the objects to be attained thereby,<sup>25</sup> and the time of termination of the trust.<sup>26</sup>

If the language is so vague, general, or equivocal that any of the necessary elements of the trust are not described with certainty, a trust will not be created.<sup>27</sup> It cannot arise from loose and equivocal expressions,<sup>28</sup> or from loose statements admitting possible inferences consistent with other relationships.<sup>29</sup> It is not necessary, however, that the declaration express every element so clearly that nothing can be left to inference or implication,<sup>30</sup> it being sufficient if the donor's general intent and the

objects thereof are ascertainable by the tribunal provided for that purpose;<sup>31</sup> and where the trust instrument itself provides a definite test whereby the obscurity may reasonably be made certain, the trust is not void.<sup>32</sup>

### b. Subject Matter or Property

The declaration must describe the subject matter or property embraced in the trust with reasonable certainty.

The requirement of certainty in the material terms of the declaration of trust extends to, and includes, the subject matter or property embraced in the trust.<sup>33</sup> It has been held that the property

**Trust held void for uncertainty as to the nature of the trust.**—Union & New Haven Trust Co. v. Koletsky, 187 A. 803, 117 Conn. 334.

**23. U.S.—U. S. v. Dickerson, D.C. Mo., 101 F.Supp. 262.**

#### Provisions held uncertain

U.S.—U. S. v. Dickerson, supra.

**24. U.S.—Mahaffey v. Helvering, C. C.A.8, 140 F.2d 879**

**Ind.—Sindlinger v. Department of Financial Institutions of Indiana, 199 N.E. 715, 210 Ind. 83, 105 A.L.R. 501.**

**S.D.—Johnson v. Graff, 23 N.W.2d 166, 71 S.D. 231.**

**Tex.—Brown v. Donald, Civ.App., 216 S.W.2d 679.**

#### Benefit of specified person

The purpose of a trust is sufficiently declared, where it appears to be for use and benefit of specified person.—Hill v. Irons, 109 N.E.2d 699, 92 Ohio App. 141, reversed on other grounds 113 N.E.2d 243, 160 Ohio St. 21.—Homer v. Wullenweber, 101 N.E.2d 229, 89 Ohio App. 255.

**Purpose held sufficiently definite and certain**

**N.I.—In re Simard's Estate, 102 A.2d 508, 98 N.H. 454.**

**Ohio.—Homer v. Wullenweber, 101 N.E.2d 229, 89 Ohio App. 255.**

**25. Ala.—Wolosoff v. Gadsden Land & Building Corp., 18 So.2d 568, 245 Ala. 628.**

**26. U.S.—U. S. v. Dickerson, D.C. Mo., 101 F.Supp. 262.**

#### Specific date

It is not necessary that there be a specific date for termination of a trust and if, from terms of instrument, termination date can be clearly and fairly arrived at, trust is not subject to attack on ground of uncertainty of termination.—Wood v. Continental Ill. Nat. Bank & Trust Co. of Chicago, 104 N.E.2d 246, 411 Ill. 345.

#### Held sufficiently certain

Trust instrument for conveyance of property was held not void because instrument did not fix time for trans-

fer of legal title to beneficiary, where beneficiary on reaching majority could have procured such transfer on theory that such was approximate time set for conveyance, or that beneficiary was sui juris and entitled to have trust terminated and corpus given to beneficiary.—Wight v. Street, 44 P.2d 322, 3 Cal.2d 146.

**Provisions held uncertain**  
U.S.—U. S. v. Dickerson, D.C. Mo., 101 F.Supp. 262.

**27. D.C.—Moore v. Guy, 135 F.2d 476, 77 U.S.App.D.C. 379.**

**Ill.—Tucker v. Countryman, 111 N.E.2d 101, 414 Ill. 215.—Wagner v. Clauson, 78 N.E.2d 203, 399 Ill. 403, 3 A.L.R.2d 672.—Kilgore, for Use of John Deere Plow Co., v. State Bank of Colusa, 21 N.E.2d 9, 300 Ill.App. 409, affirmed Kilgore v. State Bank of Colusa, 25 N.E.2d 39, 372 Ill. 578.—People ex rel Nelson v. Chicago Bank of Commerce, 16 N.E.2d 601, 296 Ill.App. 497, affirmed 21 N.E.2d 363, 371 Ill. 396.—Itynolds v. First Nat. Bank, 279 Ill.App. 581, 600.**

**Okla.—Seran v. Davis, 50 P.2d 662, 174 Okl. 433**

**Pa.—Provident Trust Co. of Philadelphia v. Lukens Steel Co., 58 A.2d 23, 359 Pa. 1.**

**Va.—Woods v. Stull, 30 S.E.2d 675, 182 Va. 888**

**28. Me.—Rose v. Osborne, 180 A.315, 133 Me. 497**

**Pa.—In re Rodgers' Estate, 80 Pa. Dist. & Co. 531, 2 Fiduciary 540, affirmed 97 A.2d 789, 374 Pa. 246**

**29. Pa.—In re Wallace's Estate, 174 A. 397, 316 Pa. 148.—Bur v. Snyder County State Bank, 171 A. 274, 311 Pa. 85.—In re Gillen's Will, 41 A.2d 412, 156 Pa. Super. 650.**

**Tenn.—Derrick v. Lumpkins, 95 S.W.2d 939, 20 Tenn.App. 77.**

**30. Ill.—Goldstein v. Handley, 60 N.E.2d 851, 390 Ill. 118.—Albert v. Albert, 80 N.E.2d 69, 334 Ill.App. 440, 65 C.J. p. 271 note 45.**

**31. Pa.—In re Mearns' Estate, 149 A. 157, 299 Pa. 217.**

**Wis.—Wyse v. Puchner, 51 N.W.2d 38, 260 Wis. 365.**

**32. Cal.—Willits v. Bosworth, 166 P. 357, 33 Cal.App. 710, 65 C.J. p. 271 note 47.**

**33. U.S.—King v. Richardson, C.C.A. N.C., 136 F.2d 849, certiorari denied 64 S.Ct. 91, 320 U.S. 777, 88 L.Ed. 466.—Jenkins v. First Trust Co. of St. Paul, C.C.A. Minn., 103 F.2d 260.—Helden v. Cremin, C.C.A. Iowa, 66 F.2d 912, 91 A.L.R. 247, certiorari denied 54 S.Ct. 123, 290 U.S. 687, 78 L.Ed. 592.**

**Ala.—Wolosoff v. Gadsden Land & Building Corp., 18 So.2d 568, 245 Ala. 628**

**Ariz.—Newhall v. McGill, 212 P.2d 764, 69 Ariz. 259.**

**Ark.—Kriegerberg v. Hoff, 143 S.W.2d 560, 201 Ark. 63.**

**Cal.—In re Halston's Estate, 37 P.2d 76, 1 Cal.2d 724, 96 A.L.R. 953.—Nichols v. Nichols, 242 P.2d 679, 110 Cal.App.2d 349.—Lane v. Whitaker, 123 P.2d 53, 50 Cal.App.2d 327.—Baltun v. Baltun's Market, 119 P.2d 426, 48 Cal.App.2d 150.**

**D.C.—Moore v. Guy, 135 F.2d 476, 77 U.S.App.D.C. 379**

**Ill.—Wagner v. Clauson, 78 N.E.2d 203, 399 Ill. 403, 3 A.L.R.2d 672.—People ex rel Nelson v. Chicago Bank of Commerce, 21 N.E.2d 303, 371 Ill. 396.—Albert v. Albert, 80 N.E.2d 69, 334 Ill.App. 440.—Morchants Nat. Bank of Aurora v. Frazier, 67 N.E.2d 611, 329 Ill.App. 191.—Latwin v. Hulsey, Stuart & Co., 58 N.E.2d 737, 321 Ill.App. 525.—Williams v. Anderson, 5 N.E.2d 593, 288 Ill.App. 149.—Reynolds v. First Nat. Bank, 279 Ill.App. 581, 600.**

**Ind.—Sindlinger v. Department of Financial Institutions of Indiana, 199 N.E. 715, 210 Ind. 83, 105 A.L.R. 501.**

**Kan.—Shumway v. Shumway, 41 P.2d 247, 141 Kan. 835.**

**Ky.—Newland v. McNeill, 126 S.W.2d 127, 277 Ky. 245.**

**Minn.—Farmers State Bank of Foston v. Sig Ellingson & Co., 16 N.W.2d 319, 218 Minn. 411.**



must be identified with as much certainty as is required in a deed of conveyance,<sup>34</sup> and that it must be sufficiently designated or identified to enable title thereto to pass to the trustee.<sup>35</sup> However, reasonable certainty in the designation of the trust estate is sufficient,<sup>36</sup> and, if the subject of the trust is made sufficiently clear that the proper court can judicially determine it, that will be sufficient.<sup>37</sup> The rule of *id certum est quod certum reddi potest* has been held applicable.<sup>38</sup> A trustee cannot object that the subject matter of the trust was not ascertained with

sufficient definiteness where it was due to his own dereliction.<sup>39</sup> The fact that the set-up of a trust fund may conceivably be affected by an unexpected turn of events does not make it ineffective.<sup>40</sup>

### c. Beneficiaries

The objects or beneficiaries of a trust must be designated with certainty.

The rule of certainty in the material terms of a declaration of trust requires that there be certainty as to the objects or beneficiaries of the trust.<sup>41</sup> The

Okl.—*Seran v. Davis*, 50 P.2d 662, 174 Okl. 433.  
S.D.—*Johnson v. Graft*, 23 N.W.2d 166, 71 S.D. 231.  
Tenn.—*Derrick v. Lumpkins*, 95 S.W.2d 839, 20 Tenn.App. 77.  
Tex.—*Brown v. Donald*, Civ.App., 216 S.W.2d 679—*Potter v. Stafford*, Civ.App., 81 S.W.2d 539, error refused, certiorari denied 56 S.Ct. 139, 296 U.S. 619, 80 L.Ed. 439.  
65 C.J. p 271 note 49.

### Attached papers

Where separate sheet of paper attached by clip to declaration of trust and containing description of property was not referred to in the declaration, certainty of description contained in declaration was not enhanced by description contained in paper.—*Laughlin v. March*, 145 P.2d 549, 19 Wash.2d 874.

### Declarations as to subject held sufficiently certain

Cal.—*Weiner v. Mullaney*, 140 P.2d 704, 59 Cal.App.2d 620.  
Mass.—*Newton v. Shepard*, 22 N.E.2d 618, 304 Mass. 6.  
N.Y.—*In re Wilson's Will*, 45 N.Y.S.2d 167, 182 Misc. 698.  
S.D.—*Higgins v. Higgins*, 20 N.W.2d 523, 71 S.D. 17.  
Tex.—*Jones v. Watkins*, Civ.App., 97 S.W.2d 1027, error dismissed.  
65 C.J. p 271 note 49 [a].

### Declarations held uncertain

(1) Generally.—*Tucker v. Countryman*, 111 N.E.2d 101, 414 Ill. 215—65 C.J. p 271 note 49 [b].  
(2) As to amount.—*Gibson v. Security Trust Co.*, D.C.W. Va., 107 F.Supp. 766, affirmed, C.A., 201 F.2d 573.

(3) As to realty intended.  
Ga.—*Metropolitan Life Ins. Co. v. Hull*, 12 S.E.2d 53, 191 Ga. 294.  
Wash.—*Laughlin v. March*, 145 P.2d 549, 19 Wash.2d 874.  
65 C.J. p 271 note 49 [b] (1), (4).

(4) Under conditional sale contract, the contract was insufficient to create a "trust" as to the proceeds of resales.—*Kilgore v. State Bank of Colusa*, 26 N.E.2d 39, 372 Ill. 578.

### Facts at time of creation

The subject matter of a trust must be definite or definitely ascertainable

from the facts existing at the time of the creation of the trust.—*Smith v. Deshaw*, 78 A.2d 479, 116 Vt. 441.  
"Something"

It is not sufficient to ascertain merely that the testator intended the beneficiaries to have "something" under the trust.—*Tucker v. Countryman*, 111 N.E.2d 101, 414 Ill. 215.

### Time of conveyance

The rule, with respect to the need for certainty of description of land, applies where the declaration of trust is made before the conveyance of the land; where the declaration is made after the conveyance, a reference to the conveyance sufficiently identifies the land in question.—*Porter v. Laue*, Wash., 267 P.2d 1064.

34. Wash.—*Laughlin v. March*, 145 P.2d 549, 19 Wash.2d 874—*Pacheco v. Mello*, 247 P. 927, 139 Wash. 566.  
35. N.Y.—*In re Albro's Will*, 300 N.Y.S. 1103, 765 Misc. 486.

36. U.S.—*Mahaffey v. Helvering*, C.C.A.8, 140 F.2d 879.

37. Wis.—*Wyse v. Fuchner*, 51 N.W.2d 38, 260 Wis. 366.

38. N.Y.—*Sinclair v. Purdy*, 139 N.E.255, 235 N.Y. 345.  
65 C.J. p 271 note 51.

39. US.—*Fricke v. Weber*, C.C.A. Ohio, 145 F.2d 737.

### Failure to segregate from larger amount

US.—*Fricke v. Weber*, *supra*.

40. Mass.—*First Nat. Bank v. Truestead Hospital*, 192 N.E. 150, 288 Mass. 35.

### Encroachment on corpus

Authority to trustees to encroach on corpus of trust in stated emergencies for the benefit of beneficiary to whom trustees were directed to pay the entire net income during her life or widowhood did not invalidate trust.—*Odum v. Langston*, 195 S.W.2d 466, 355 Mo. 115.

41. U.S.—*King v. Richardson*, C.C.A.N.C., 136 F.2d 849, certiorari denied 64 S.Ct. 91, 320 U.S. 777, 88 L.Ed. 466—*Bingen v. First Trust Co. of St. Paul*, C.C.A.Minn., 103 F.2d 260—*Heiden v. Cremin*, C.C.A.Iowa, 66 F.2d 943, 91 A.L.R. 247,

certiorari denied 54 S.Ct. 123, 290 U.S. 687, 78 L.Ed. 592.  
Cal.—*In re Bunn's Estate*, 206 P.2d 635, 33 Cal.2d 897—*In re Robinson's Estate*, 87 P.2d 76, 1 Cal.2d 121, 96 A.L.R. 953—*Nicholas v. Nicholas*, 212 P.2d 679, 110 Cal.App.2d 349—*Lane v. Whitaker*, 123 P.2d 53, 50 Cal.App.2d 327—*Balian v. Balian's Market*, 119 P.2d 426, 48 Cal.App.2d 150.

D.C.—*Moore v. Guy*, 135 F.2d 476, 77 U.S.App.D.C. 379.

Idaho.—*Hedin v. Westdale Lutheran Church*, 81 P.2d 741, 59 Idaho 241.

Ill.—*Wagner v. Clauson*, 78 N.E.2d 203, 389 Ill. 403, 3 A.L.R.2d 672—*People ex rel. Nelson v. Chicago Bank of Commerce*, 21 N.E.2d 303, 371 Ill. 396—*Kanter v. City of Chicago*, 117 N.E.2d 790, 1 Ill.App.2d 420—*Albert v. Albert*, 80 N.E.2d 69, 334 Ill.App. 440—*Merchants Nat. Bank of Aurora v. Frazier*, 67 N.E.2d 611, 329 Ill.App. 191—*Litwin v. Halsey, Stuart & Co.*, 58 N.E.2d 737, 324 Ill.App. 525—*Kilgore for Use of John Deere Plow Co. v. State Bank of Colusa*, 21 N.E.2d 9, 300 Ill.App. 409, affirmed *Kilgore v. State Bank of Colusa*, 26 N.E.2d 39, 372 Ill. 578—*Williams v. Anderson*, 5 N.E.2d 593, 288 Ill.App. 149—*Reynolds v. First Nat. Bank*, 279 Ill.App. 681, 600.

Ind.—*Sindlinger v. Department of Financial Institutions of Indiana*, 199 N.E. 715, 210 Ind. 83, 105 A.L.R. 501.

Ky.—*Newland v. McNeill*, 126 S.W.2d 127, 277 Ky. 245.

Minn.—*Farmers State Bank of Foston v. Sig Ellingson & Co.*, 16 N.W.2d 319, 218 Minn. 411.

Miss.—*Estes v. Estes*, 27 So.2d 854, 200 Miss. 541—*National Bank of Greece v. Savariku*, 148 So. 549, 167 Miss. 571.

Ohio.—*Moskowitz v. Federman*, 51 N.E.2d 48, 72 Ohio App. 149.

Okl.—*Seran v. Davis*, 50 P.2d 662, 174 Okl. 433.

Or.—*Endicott v. Bratzel*, 27 P.2d 883, 145 Or. 654.

Pa.—*Provident Trust Co. of Philadelphia v. Lukens Steel Co.*, 58 A.2d 23, 359 Pa. 1—*Brutaker v. Lauver*, 185 A. 843, 322 Pa. 461.

beneficiaries must be expressly named<sup>42</sup> or so designated or described as to be capable of identification,<sup>43</sup> or of being ascertained.<sup>44</sup> It is sufficient, however, if the language used clearly points out the beneficiaries<sup>45</sup> or if they are designated with reasonable certainty,<sup>46</sup> or if they are made sufficiently certain that the proper court can determine them.<sup>47</sup>

Designation of beneficiaries as a class is a sufficiently certain designation,<sup>48</sup> provided the class is clearly defined.<sup>49</sup> It is not necessary that the ben-

eficiaries must all be named, or in existence, or known at the time of the creation of the trust.<sup>50</sup> A trust is valid although the beneficiaries are left to be determined by the will of the settlor.<sup>51</sup> Certainty as to all beneficiaries of a trust is not essential to its validity as long as it is certain as to some, since as to those it will be held valid, although not as to the uncertain ones.<sup>52</sup> A trust conferring on the trustee ample power to determine the beneficiaries thereof has been held not uncertain.<sup>53</sup> A trust leav-

S.D.—Higgins v. Higgins, 20 N.W.2d 523, 71 S.D. 17.

Tenn.—Derrick v. Lumpkins, 95 S.W. 2d 939, 20 Tenn. App. 77.

Tex.—Brown v. Donald, Civ. App., 216 S.W.2d 679—Hay v. Fowler, Civ. App., 144 S.W.2d 665, error dismissed, judgment correct—Pottorff v. Stafford, Civ. App., 81 S.W.2d 539, error refused, certiorari denied 56 S.Ct. 139, 296 U.S. 619, 80 L.Ed. 439.

65 C.J. p 271 note 54.

Definiteness and certainty required with respect to beneficiaries of a charitable trust see Charities § 39.

Who may be beneficiary see supra § 23.

#### Reasonable certainty required

S.D.—Johnson v. Graff, 23 N.W.2d 166, 71 S.D. 231.

#### Uncontrollable power of disposition

Trust conferring uncontrollable power of disposition is void—Gaston County United Dry Forces v. Wilkins, 191 S.E. 8, 211 NC 500.

#### Beneficiaries held designated with sufficient certainty

(1) Generally.  
Cal.—Weiner v. Mullane, 140 P.2d 704, 59 Cal. App. 2d 620.  
Mass.—Newton v. Shepard, 22 N.E. 2d 618, 204 Mass. 6.  
N.H.—In re Simard's Estate, 102 A. 2d 508, 98 N.H. 454.  
N.Y.—In re Wilson's Will, 45 N.Y. 82d 167, 182 Misc. 698.  
Wis.—In re Gallagher's Estate, 283 N.W. 615, 251 Wis. 621, mandate clarified 291 N.W. 335, 231 Wis. 621.

65 C.J. p 271 note 54 [a].

(2) Where grantors executed unrecorded land contracts and then conveyed the land in trust under trust deeds authorizing trustees to convey land to any persons trustees might ascertain were entitled to conveyance and to see to application of purchase money, the trust deeds were construable as creating trusts for benefit of purchasers under the land contracts and pledgees of purchase-money notes, and were not void for indefiniteness.—Virginia Trust Co. v. Minar, 18 S.E.2d 879, 179 Va. 377.

#### Trust held uncertain as to beneficiaries

(1) Generally.  
U.S.—Gibson v. Security Trust Co., D.C.W.Va., 107 F.Supp. 766, affirmed, C.A., 201 F.2d 573.

Ill.—Tucker v. Countryman, 111 N.E. 2d 101, 414 Ill. 215.  
Mass.—Bowditch v. Attorney General, 134 N.E. 796, 211 Mass. 168, 28 A.L.R. 713.

65 C.J. p 271 note 54 [b].

(2) Provision that certain property pass to designated person to be distributed as he deems advisable or as he thinks will be in accordance with the donor's wishes discloses an attempted trust for indefinite beneficiaries, which is void—Tunis v. Dole, 69 A.2d 760, 91 N.H. 420.

Fla.—Reid v. Barry, 112 So. 846, 93 Fla. 819.

#### Specific designation

Beneficiaries must be specifically designated.—Newhall v. McGill, 212 P.2d 764, 69 Ariz. 259.

43. Or.—Bodgett v. Bratzel, 27 P.2d 883, 145 Or. 651.

65 C.J. p 272 note 56.

44. Pa.—Brubaker v. Lauver, 185 A. 848, 322 Pa. 161.

65 C.J. p 272 note 57.

45. U.S.—King v. Richardson, C.C.A. N.C., 136 F.2d 849, certiorari denied 61 S.Ct. 91, 320 U.S. 777, 88 L.Ed. 466.

46. U.S.—Mahaffey v. Helvering, C.C.A. 8, 110 F.2d 879.

47. Wis.—Wysc v. Tuchner, 51 N.W. 2d 38, 260 Wis. 365.

48. Iowa.—Gunn v. Wagner, 48 N.W. 2d 292, 242 Iowa 1001.

Neb.—In re Reynolds' Estate, 268 N.W. 440, 131 Neb. 557.

N.H.—In re Simard's Estate, 102 A. 2d 508, 98 N.H. 454.

Ohio.—Moskowitz v. Federman, 51 N.E. 2d 48, 72 Ohio App. 149.

65 C.J. p 272 note 58.

49. Iowa.—Gunn v. Wagner, 48 N.W. 2d 292, 242 Iowa 1001.

N.H.—In re Simard's Estate, 102 A. 2d 508, 98 N.H. 454.

65 C.J. p 272 note 59.

#### Definiteness required

The class is definite enough if its membership can be ascertained.

Ohio.—Moskowitz v. Federman, 51 N.E. 2d 48, 72 Ohio App. 149.

S.D.—Higgins v. Higgins, 20 N.W. 2d 523, 71 S.D. 17.

#### Definite class held designated

(1) Grandchildren, in existence and to be born constitute a "definite class" within meaning of rule that members of a definite class of persons can be beneficiaries of a trust.—Higgins v. Higgins, supra.

(2) Where testamentary trust gave trustees uncontrolled discretion in distribution of trust estate to persons and charities, provision immediately following expressing desire that distribution of residue be made to next of kin consisting of brothers, sisters, their children and grandchildren, was necessarily included to create a definite class of persons to which trustees could make distribution.—Moskowitz v. Federman, 51 N.E. 2d 48, 72 Ohio App. 149.

50. N.Y.—Harrison v. Harrison, 38 N.Y. 513, 2 Transer App. 318—Gillman v. Heddington, 24 N.Y. 9.

#### Name

(1) It is not necessary to designate beneficiaries of a trust by name, other proper designation suffices. Iowa.—Murphy v. Murphy, 181 N.W. 398, 190 Iowa 1221.  
Neb.—In re Reynolds' Estate, 268 N.W. 440, 131 Neb. 557.

(2) A trust is valid if beneficiary is ascertainable, even though not named.—In re Gallagher's Estate, 283 N.W. 615, 251 Wis. 621, mandate clarified 291 N.W. 335, 231 Wis. 621.

51. Mass.—Loring v. Massachusetts Horticultural Soc., 50 N.E. 936, 171 Mass. 401.

#### Effect

A trust results for the settlor until the will takes effect.—National Shawmut Bank of Boston v. Joy, 53 N.E. 2d 113, 315 Mass. 457.

52. Va.—Russell's Ex'rs v. Thompson, 103 S.E. 652, 127 Va. 475.

53. Ohio.—Miller v. Teachout, 24 Ohio St. 625.

#### Nature of memorial

Mu.—Odum v. Langston, 195 S.W.2d 466, 355 Mo. 115.

ing to the discretion of the trustee the selection of beneficiaries from a certain class is valid,<sup>64</sup> even though he has discretion to exclude some members of the class altogether.<sup>65</sup>

**Alternative beneficiaries.** A trust for the benefit of certain persons, or either of them, has been held void for uncertainty;<sup>66</sup> but a trust for the benefit of certain persons "or their heirs" has been held valid on the basis that "or" will be construed as "and."<sup>67</sup>

**Unincorporated associations.** A trust for an unincorporated association and the use and benefit of the members thereof, without stating who the members are, has been held too uncertain as to the beneficiaries,<sup>68</sup> unless it is contemplated at the time

that the association will, and subsequently does, become incorporated.<sup>69</sup> However, there is no uncertainty as to the beneficiaries of a trust for a joint stock association where the shares of the members are transferable only on the books of the association.<sup>60</sup>

#### d. Interests of Beneficiaries

In an express or voluntary trust the declaration of trust must show the nature of the interest of the beneficiary and the quantity or extent of each beneficiary's interest.

The certainty required in a declaration of trust extends to the nature of the interest of the beneficiary,<sup>61</sup> and the quantity or amount of each beneficiary's interest.<sup>62</sup> While a trust is valid where it is imperative as to the amount to be used for

64. Iowa.—Gunn v. Wagner, 48 N.W. 2d 292, 242 Iowa 1001—**Corpus Juris** cited in *Gewinger v. Gelsinger*, 41 N.W.2d 86, 90, 241 Iowa 283—**Corpus Juris** cited in *Ponzelino v. Ponzelino*, 26 N.W.2d 330, 333, 238 Iowa 201.

Mass.—National Shawmut Bank of Boston v. Joy, 63 N.E.2d 113, 315 Mass. 467—*Newton v. Shepard*, 22 N.E.2d 618, 304 Mass. 6.  
Ohio.—Moskowitz v. Federman, 51 N.E.2d 48, 72 Ohio App. 149.  
65 C.J. p 274 note 81.

55. Ohio.—Moskowitz v. Federman, *supra*.

#### Alternative classes

Trust, giving trustees discretion to select between relatives of settlor as one class and charitable organizations as another class in distribution of trust estate, was not void on theory no one could enforce trust because trustees might exclude completely one or the other of the classes, since any one in the class of relatives could enforce trust as could a proper government official on behalf of the charitable organizations.—*Moskowitz v. Federman*, *supra*.

56. Conn.—Wright v. Pond, 10 Conn. 255.

57. Mass.—O'Rourke v. Beard, 23 N.E. 576, 151 Mass. 9.

58. Minn.—Lane v. Eaton, 71 N.W. 1031, 69 Minn. 141, 65 Am.S.R. 559, 38 L.R.A. 669.  
65 C.J. p 273 note 66.

Unincorporated associations as beneficiaries of trusts generally see *supra* p 23.

59. Minn.—Kahle v. Evangelical Lutheran Joint Synod, etc, 83 N.W. 460, 81 Minn. 7—*Lane v. Eaton*, 71 N.W. 1031, 69 Minn. 141, 65 Am.S.R. 559, 38 L.R.A. 669.

60. Md.—Reffon Realty Corp. v. Adams Land & Building Co., 98 A. 199, 128 Md. 666.

61. Cal.—Lane v. Whitaker, 123 P. 2d 53, 50 Cal.App.2d 327—*Dallan v. Ballan's Market*, 119 P.2d 426, 48 Cal.App.2d 150.

D.C.—*Moore v. Guy*, 135 F.2d 476, 77 U.S.App.D.C. 379

Ill.—*Wagner v. Clauson*, 78 N.E.2d 203, 399 Ill. 403, 3 A.L.R.2d 672—*People ex rel. Nelson v. Chicago Bank of Commerce*, 21 N.E.2d 303, 371 Ill. 396—*Merchants Nat. Bank of Aurora v. Frazier*, 67 N.E.2d 611, 329 Ill.App. 191—*Litwin v. Halsey, Stuart & Co.*, 53 N.E.2d 737, 324 Ill.App. 555—*Kilgore for Use of John Deere Plow Co. v. State Bank of Colusa*, 21 N.E.2d 9, 300 Ill.App. 409, affirmed *Kilgore v. State Bank of Colusa*, 25 N.E.2d 39, 372 Ill. 578—*Reynolds v. First Nat. Bank*, 279 Ill.App. 581, 600.

Mich.—*Boyer v. Backus*, 276 N.W. 564, 282 Mich. 593, motion denied 280 N.W. 756, 282 Mich. 701, certiorari denied 59 S.Ct. 147, 305 U.S. 644, 83 L.Ed. 416, rehearing denied 59 S.Ct. 248, 305 U.S. 674, 83 L.Ed. 437.

Okla.—*Seran v. Davis*, 50 P.2d 662, 174 Okl. 433.

65 C.J. p 273 note 70.

#### Life estate or principal

Where under one provision in a trust agreement the beneficiaries were limited to a life estate in one-half of the income only, and under a subsequent provision they were given the principal, their interest being vested as to title, but contingent as to time of enjoyment, the provisions were so repugnant as to be ambiguous and render the agreement unworkable.—*Lissauer v. Union Bank & Trust Co. of Los Angeles*, 114 P.2d 367, 45 Cal.App.2d 468.

**Nature of interests of beneficiaries held sufficiently definite**

Mass.—*Newton v. Shepard*, 22 N.E.2d 618, 304 Mass. 6.

#### Held void for uncertainty

Ill.—*Tucker v. Countryman*, 111 N.E. 2d 101, 414 Ill. 215.

62. Cal.—*Lane v. Whitaker*, 123 P. 2d 53, 50 Cal.App.2d 327—*Dallan v. Ballan's Market*, 119 P.2d 426, 48 Cal.App.2d 150.

D.C.—*Moore v. Guy*, 135 F.2d 476, 77 U.S.App.D.C. 379

Ill.—*Tucker v. Countryman*, 111 N.E. 2d 101, 414 Ill. 215—*Wagner v. Clauson*, 78 N.E.2d 203, 399 Ill. 403, 3 A.L.R.2d 672—*Merchants Nat. Bank of Aurora v. Frazier*, 67 N.E.2d 611, 329 Ill.App. 191—*Kilgore for Use of John Deere Plow Co. v. State Bank of Colusa*, 21 N.E.2d 9, 300 Ill.App. 409, affirmed *Kilgore v. State Bank of Colusa*, 25 N.E.2d 39, 372 Ill. 578—*People ex rel. Nelson v. Chicago Bank of Commerce*, 21 N.E.2d 303, 371 Ill. 396—*Reynolds v. First Nat. Bank*, 279 Ill.App. 581, 600.

Mich.—*Boyer v. Backus*, 276 N.W. 564, 282 Mich. 593, motion denied 280 N.W. 756, 282 Mich. 701, certiorari denied 59 S.Ct. 147, 305 U.S. 644, 83 L.Ed. 416, rehearing denied 59 S.Ct. 248, 305 U.S. 674, 83 L.Ed. 437.

Okla.—*Seran v. Davis*, 50 P.2d 662, 174 Okl. 433.

65 C.J. p 273 note 71.

#### Contingent on need

Where interest of each beneficiary under testamentary trust is made contingent as to its extent by need of the particular beneficiary and exercise of trustee's discretion in beneficiary's favor, such interest is none the less a valid one.—*In re Simard's Estate*, 102 A.2d 508, 98 N.H. 454.

**Quantity or extent of interests held sufficiently certain**

Ill.—*Golstein v. Handley*, 60 N.E.2d 851, 390 Ill. 118.  
N.H.—*In re Simard's Estate*, 102 A. 2d 508, 98 N.H. 454.

the beneficiary,<sup>63</sup> where the amounts, if any, which the beneficiaries are to receive are wholly discretionary with the alleged trustee, the trust is too uncertain to be enforceable,<sup>64</sup> and there is no property which can be the subject matter of a trust, where its application to the purposes of the trust depends on the absolute and unconditional discretion of the person in control of the property.<sup>65</sup> However, a trust leaving to the discretion of the trustee the determination of the proportion or amount the beneficiaries shall receive has been held valid and enforceable as long as the trustee must divide the property to the class designated.<sup>66</sup>

Respective interests need not be designated where there are several beneficiaries, as it is presumed they take equal interests, so that the trust is not uncertain.<sup>67</sup> It is not essential that a beneficiary should have the entire beneficial interest or that the extent of the interest of the beneficiary be definite or definitely ascertainable at the time of the creation of the trust.<sup>68</sup>

### e. Manner of Performance

In an express or voluntary trust the declaration of trust must show with certainty the manner in which the trust is to be performed.

The requisite of certainty in the declaration of trust, as discussed supra subdivision a of this section, includes certainty as to the manner in which the trust is to be performed.<sup>69</sup> The rights and duties of the parties must be defined.<sup>70</sup> It is not necessary, however, that all the details of the management and execution of the trust be specified,<sup>71</sup> or that remote contingencies be provided against,<sup>72</sup> and the fact that the ultimate disposition of the property is uncertain does not invalidate the trust.<sup>73</sup> It is sufficient if the language used clearly points out the disposition to be made of the property<sup>74</sup> or if the general scheme of the trust is made sufficiently clear that the proper court can judicially determine it and superintend the execution of the trust.<sup>75</sup>

It is not essential to the validity of the trust that the power and duties of the trustee be enumerated in

63. Iowa—*Corpus Juris* quoted in *Ponzelino v. Ponzelino*, 26 N.W.2d 330, 331-332, 238 Iowa 201.

65 C.J. p 273 note 72.  
Judicial control and supervision of trustee see *infra* §§ 261-262.

64. Iowa—*Corpus Juris* quoted in *Ponzelino v. Ponzelino*, 26 N.W.2d 330, 331-332, 238 Iowa 201.

65 C.J. p 273 note 73

65. Ill.—*Booth v. Krug*, 14 N.E.2d 645, 368 Ill. 487, 117 A.L.R. 1193.

Unbridled discretion in trustee as to disposition of trust property invalidates trust as negating necessary separation of legal and equitable ownerships of property and involving uncertainty.—*Ponzelino v. Ponzelino*, 26 N.W.2d 330, 238 Iowa 201.

66. Iowa—*Gunn v. Wagner*, 48 N.W.2d 232, 242 Iowa 1001—*Corpus Juris* cited in *Geisinger v. Geisinger*, 41 N.W.2d 86, 90, 241 Iowa 283—*Corpus Juris* cited in *Ponzelino v. Ponzelino*, 26 N.W.2d 330, 332, 238 Iowa 201.

Ohio—*Moskowitz v. Federman*, 51 N.E.2d 48, 72 Ohio App. 149.

Utah—*In re Dewey's Estate*, 143 P. 124, 45 Utah 98, Ann Cas. 1918A 475.

67. Mont.—*Corpus Juris* quoted in *Bell Holt McCull Co. v. Caplice*, 175 P.2d 416, 419, 119 Mont. 463.

65 C.J. p 273 note 74.

### Division of income

The failure of a trust instrument to specify how the income is to be divided between two beneficiaries does not invalidate the trust, since the law imposes on a trustee the duty to deal impartially with two or more beneficiaries.—*Hughes v. Coffey*, Ark., 263 S.W.2d 689.

68. Vt.—*Smith v. Deshaw*, 78 A.2d 479, 116 Vt. 441.

69. Cal.—*Lane v. Whitaker*, 123 P.2d 53, 50 Cal App 2d 327—*Baban v. Baban's Market*, 119 P.2d 426, 48 Cal App 2d 150.

D.C.—*Moore v. Guy*, 135 F.2d 476, 77 U.S.App.D.C. 379.

Ill.—*Tucker v. Countryman*, 111 N.E.2d 101, 414 Ill. 215—*Wagner v. Clauson*, 78 N.E.2d 203, 399 Ill. 403, 3 A.L.R.2d 672—*People ex rel. Nelson v. Chicago Bank of Commerce*, 21 N.E.2d 303, 371 Ill. 396—*Merchants Nat. Bank of Aurora v. Prazier*, 67 N.E.2d 611, 329 Ill. App. 191—*Litwin v. Halsey, Stuart & Co.*, 58 N.E.2d 737, 324 Ill. App. 625—*Kilgore for Use of John Deere Plow Co. v. State Bank of Colusa*, 21 N.E.2d 9, 300 Ill. App. 409, affirmed *Kilgore v. State Bank of Colusa*, 25 N.E.2d 39, 372 Ill. 578—*Ryndolds v. First Nat. Bank*, 279 Ill. App. 581, 600.

Okla.—*Scraper v. Davis*, 50 P.2d 662, 171 Okl. 433.

65 C.J. p 273 note 76.

### Method of transfer

Under deed in trust reserving to grantor power to convey the property by "absolute deed or by mortgage", if quoted words could be construed as limiting grantor to such two methods and as precluding grantor from executing a subsequent deed in trust or a will, the purported trust would be void for uncertainty.—*Boeker v. Nalley*, 140 F.2d 171, 78 U.S.App.D.C. 312.

### Provision as to manner and method of performance held sufficient

(1) Generally.—*Golstein v. Handley*, 60 N.E.2d 851, 390 Ill. 118.

(2) Where parties agreed to create a trust fund for purpose of purchasing a building, the facts that amounts to be contributed by each party were left to future agreement, and that manner in which fund should be used for the purchase, and that manner of making withdrawals from fund, or of distribution, was to be subsequently determined by a majority vote of all the parties, did not invalidate trust agreement for uncertainty.—*Gaess v. Gaess*, 42 A.2d 796, 132 Conn. 96, 160 A.L.R. 432.

70. Minn.—*Farmers State Bank of Fosston v. Sig Ellingson & Co.*, 16 N.W.2d 319, 218 Minn. 411.

Trust held void for uncertainty as to the rights and duties of the trustee.—*Union & New Haven Trust Co. v. Koletsky*, 167 A. 803, 117 Conn. 331.

71. U.S.—*Corpus Juris* cited in *Hilgen v. First Trust Co. of St. Paul*, C.C.A. Minn., 103 F.2d 260, 264.

65 C.J. p 273 note 77.

72. Ill.—*Orr v. Yates*, 70 N.E. 731, 209 Ill. 222.

65 C.J. p 274 note 78.

73. N.Y.—*In re Sprague's Will*, 231 N.Y.S. 473, 129 Misc. 290.

74. U.S.—*Kling v. Richardson*, C.C.A. N.C., 136 F.2d 849, certiorari denied 64 S.Ct. 91, 320 U.S. 777, 88 L.Ed. 466.

75. Wis.—*Wyse v. Puchner*, 61 N.W.2d 38, 260 Wis. 365.

detail.<sup>76</sup> Literal directions to collect income and disburse it to a named beneficiary are not necessary to the creation of a valid trust.<sup>77</sup> The benefits provided for need not be absolute and payable in all events in order to make the trust valid, but it is sufficient if the contingency is one that probably might occur.<sup>78</sup> Broad discretion may be given the trustee.<sup>79</sup> The donor or settlor may leave the trustee a wide discretion as to the mode of realizing the end sought.<sup>80</sup> However, where the settlor declares himself trustee for another, he need not declare the duties, implied by law, devolving on him as trustee in order that the terms of the trust be not uncertain.<sup>81</sup>

## § 46. Recital of Consideration

Consideration need not be recited in the declaration of trust.

76. U.S.—*Bingen v. First Trust Co.* of St. Paul, C.C.A. Minn., 103 F.2d 260.

**Instrument held not to declare or imply trust powers**

Kan.—*Sinclair Prairie Oil Co. v. Worcester*, 183 P.2d 947, 163 Kan. 540.

77. N.Y.—*In re Shelley's Estate*, 350 N.Y.S.2d 570.

### Power implied

The power of the trustees to receive the income may be implied from the intention of the creator of the trust and the language employed by him.—*In re Shelley's Estate*, supra.

78. Ky.—*Sanford's Adm'r v. Sanford*, 20 S.W.2d 83, 230 Ky. 423. 65 C.J. p. 274 note 80.

79. Iowa.—*Ponzelino v. Ponzelino*, 26 N.W.2d 330, 238 Iowa 201.

80. Tex.—*Taysum v. El Paso Nat. Bank*, Civ App., 256 S.W.2d 172, error refused.

81. Mo.—*Rollestone v. National Bank of Commerce in St. Louis*, 252 S.W. 394, 299 Mo. 57.

82. Mass.—*Arms v. Ashley*, 4 Pick. 71.

65 C.J. p. 274 note 86.

83. Pa.—*Wells v. McNell*, 64 Pa. 207.

84. U.S.—*United Bldg. & Loan Ass'n v. Garrett*, D.C. Ark., 64 F.Supp. 460.

**Corpus Juris quoted in** *Rose v. Rose*, 1 N.W.2d 458, 460, 300 Mich. 73.—**Corpus Juris quoted in** *Goodrich v. City Nat. Bank & Trust Co. of Battle Creek*, 258 N.W. 253, 255-256, 270 Mich. 222.

Mo.—*Davis v. Rossi*, 34 S.W.2d 8, 326 Mo. 911.

Ohio.—*Cleveland Trust Co. v. White*, 15 N.E.2d 627, 134 Ohio St. 1, 118 A.L.R. 475.

**Retention of possession and control of trust res by donor as not affecting validity of trust see** *infra* § 64.

### Any legal power

The settlor of a trust can reserve to himself any power which he desires with respect to the property delivered in trust, if the power is not illegal, and the reservation of the power will not of itself invalidate the trust.

Neb.—*Whalen v. Swirein*, 4 N.W.2d 737, 141 Neb. 680.

Tex.—*Lower Colorado River Authority v. Chemical Bank & Trust Co.*, Civ.App., 185 S.W.2d 461, affirmed 190 S.W.2d 48, 144 Tex. 326.

### Evasion of taxes

The settlor's reservation of sundry rights and powers will not render the trust void on the ground that it might allow the evasion of taxes, since the government has ample power to conserve its taxing authority and trusts may have different private and public effect.—*Rose v. Rose*, 1 N.W.2d 458, 300 Mich. 73.—*Goodrich v. City Nat. Bank & Trust Co. of Battle Creek*, 258 N.W. 253, 270 Mich. 222.

### Bankruptcy of beneficiary

A provision in trust that bankruptcy of beneficiary terminated trust as to beneficiary was a valid limitation, notwithstanding, under trust, trustees could at their election make payments to bankrupt, or his wife or children.—*Miller v. Miller*, 31 S.E.2d 844, 127 W.Va. 140.

85. U.S.—*Hopkins v. C. I. R.*, C.C.A. 6, 144 F.2d 683, 158 A.L.R. 1301. W.Va.—*Ray v. Frick Co.*, 57 S.E.2d 890, 133 W.Va. 715.

65 C.J. p. 555 note 37.

### Reversion

(1) The reservation of a reversion is not inconsistent with the creation of a trust to continue until the death of the reversioner.—*Scholtz v. Central Hanover Bank & Trust Co.*, 68 N.E.2d 503, 295 N.Y. 488.—*Doctor v. Hughes*, 122 N.E. 221, 225 N.Y.

While the necessity for consideration depends on whether the trust is executed or executory, as discussed supra § 28, consideration need not be recited in the declaration of trust.<sup>82</sup> Such words as "contemplation of marriage" need not be expressed in the instrument.<sup>83</sup>

## § 47. Reservations and Conditions

In a proper case the settlor in an express or voluntary trust may reserve to himself various rights and powers, without invalidating the trust.

The fact that the settlor, in creating the trust, makes certain reservations, does not in itself affect the validity of the declaration.<sup>84</sup> Thus, in a proper case, he may, without invalidating the trust, reserve an estate or interest in the trust property.<sup>85</sup> He may reserve to himself a beneficial interest in the property for his life,<sup>86</sup> such as a reservation to himself

305.—*Julier v. Central Hanover Bank & Trust Co.*, 74 N.Y.S.2d 262, 272 App.Div. 598.—*In re Isaacs' Trust*, 83 N.Y.S.2d 808.

(2) In order to transform into a remainder that which would ordinarily be a reversion, the intention to work the transformation must be clearly expressed.—*Scholtz v. Central Hanover Bank & Trust Co.*, supra.—*Doctor v. Hughes*, supra.—*Julier v. Central Hanover Bank & Trust Co.*, supra.

(3) A trust instrument directing trustees to pay principal, after deaths of settlor and his wife, to settlor's children and his deceased children's descendants, or, if none, to settlor's then next of kin, did not express intent to create remainder with sufficient clarity to overcome prima facie precept of construction that a reservation to the settlor's heirs or next of kin is equivalent to the reservation of a reversion to the settlor himself.—*Julier v. Central Hanover Bank & Trust Co.*, supra.

### Possibility of reverter

Deed conveying realty to corporate grantee in trust as long as it obeyed purposes in will under which the grantor acquired the realty, with provision for reverter to grantor if grantee failed to use it for such purposes, did not convey property strictly in trust, but vested determinable fee in grantee.—*Connecticut Junior Republic Ass'n v. Town of Litchfield*, 174 A. 304, 119 Conn. 106, 95 A.L.R. 56.

86. U.S.—*United Bldg. & Loan Ass'n v. Garrett*, D.C. Ark., 64 F.Supp. 460.

Ark.—*Cribbs v. Walker*, 85 S.W. 244, 74 Ark. 104.

Conn.—*Cramer v. Hartford-Connecticut Trust Co.*, 147 A. 139, 110 Conn. 22, 73 A.L.R. 201.

of a life income from the subject matter of the trust;<sup>87</sup> or he may reserve the right to use or consume,<sup>88</sup> or dispose of,<sup>89</sup> the corpus, such as a power of appointment over the principal,<sup>90</sup> or the power to

**Fla.**—Williams v. Collier, 158 So. 815, 120 Fla. 248, rehearing denied 162 So. 868, 120 Fla. 248.

**Mass.**—National Shawmut Bank of Boston v. Joy, 53 N.E.2d 113, 315 Mass. 457.

**N.Y.**—In re Ford's Estate, 108 N.Y. S.2d 122, 279 App.Div. 152, affirmed 107 N.E.2d 87, 304 N.Y. 598.

**Ohio.**—Cleveland Trust Co. v. White, 16 N.E.2d 588, 58 Ohio App. 339.

#### Support

Trust deed was not void because it provided for the support of the grantor by the beneficiaries.—Lunt v. Van Gorden, 294 N.W. 351, 229 Iowa 263.

**87. U.S.**—United Bldg. & Loan Ass'n v. Garrett, D.C.Ark., 64 F.Supp. 460.

**Cal.**—American Bible Soc. v. Mortgage Guarantee Co., 17 P.2d 195, 217 Cal. 9.

**Conn.**—Cramer v. Hartford-Connecticut Trust Co., 147 A. 139, 110 Conn. 32, 73 A.L.R. 201.

**Fla.**—Corpus Juris cited in Williams v. Collier, 162 So. 868, 370, 120 Fla. 248.

**Ill.**—Bergmann v. Foreman State Trust & Savings Bank, 273 Ill.App. 408.

**Mass.**—Cohen v. Newton Sav. Bank, 67 N.E.2d 748, 320 Mass. 90, 168 A.L.R. 1321.—Rock v. Rock, 23 N.E.2d 973, 309 Mass. 44.—Murray v. O'Hara, 195 N.E. 909, 291 Mass. 75.—Coolidge v. Brown, 190 N.E. 723, 286 Mass. 504.—Buteau v. Lavalle, 197 N.E. 628, 284 Mass. 276.

**Mich.**—Corpus Juris quoted in Rose v. Rose, 1 N.W.2d 458, 460, 300 Mich. 73.—Corpus Juris quoted in Goodrich v. City Nat. Bank & Trust Co. of Battle Creek, 258 N.W. 253, 255, 256, 270 Mich. 222.

**Mo.**—In re Geel's Estate, App., 143 S.W.2d 327.—Coon v. Stanley, 94 S.W.2d 96, 230 Mo.App. 524.

**Neb.**—Whalen v. Swircin, 4 N.W.2d 737, 141 Neb. 650.

**N.J.**—Jassin v. Enoch-Pearl Co., 54 A.2d 824, 140 N.J.Eq. 428.—National Newark & Essex Banking Co. v. Rosahl, 128 A. 566, 97 N.J.Eq. 74.

**N.Y.**—City Bank Farmers' Trust Co. v. Charity Organization Soc. of City of New York, 265 N.Y.S. 267, 238 App.Div. 720, affirmed 191 N.E. 504, 264 N.Y. 441.—Application of Central Hanover Bank & Trust Co. (Mondand), 26 N.Y.S.2d 924, 176 Misc. 183, affirmed 32 N.Y.S.2d 128, 263 App.Div. 809, affirmed Central Hanover Bank & Trust Co. v. Mondand, 42 N.E.2d 610, 288 N.Y. 608.

**Ohio.**—Dolles v. Toledo Trust Co., 58 N.E.2d 381, 144 Ohio St. 195, 157 A.L.R. 1164.—Central Trust Co. v. Watt, 38 N.E.2d 185, 139 Ohio St. 50.—Cleveland Trust Co. v. White,

15 N.E.2d 627, 134 Ohio St. 1, 118 A.L.R. 475.—Fifth Third Union Trust Co. v. Foss, 15 Ohio Supp. 55.

**Pa.**—McCreary's Estate v. Pitts, 47 A.2d 235, 354 Pa. 347.—In re Tunnell's Estate, 190 A. 906, 325 Pa. 554.—Reirne v. Continental-Equitable Trust Co., 161 A. 721, 307 Pa. 570.—Windolph v. Girard Trust Co., 91 A. 634, 245 Pa. 319.—Appeal of Dickerson, 8 A. 64, 115 Pa. 198.

**2 Am.S.R.** 547.—Collins v. Provident Trust Co. of Philadelphia, 83 Pa. Dist. & Co. 459, 68 Montg.Co. 376.

**R.I.**—Talbot v. Talbot, 78 A. 535, 32 R.I. 72, Ann.Cas.1912C 1221.

**Utah.**—Leggroom v. Zion's Sav. Bank & Trust Co., 232 P.2d 746.

**Vt.**—Smith v. Deshaw, 78 A.2d 479, 116 Vt. 441.

**65 C.J.** p. 274 note 90.  
Who may be cestui see supra § 23.

#### Effect on passing of title

The trustor's reservation of interest on bonds held in trust was held not to affect the passing of title to principal of bonds from trustor to trustee for beneficiaries.—Williams v. Collier, 158 So. 815, 120 Fla. 248, rehearing denied 162 So. 868, 120 Fla. 248.

#### Time of vesting

Trust agreement which reserved to settlor the income for life was not invalid because of condition that one-half of corpus and accumulated income was to vest absolutely in children and their issue only at death of settlor.—Liberty Nat. Bank v. Hicks, 173 F.2d 631, 84 U.S.App.D.C. 108, 9 A.L.R.2d 1355.

**88. U.S.**—United Bldg. & Loan Ass'n v. Garrett, D.C.Ark., 64 F.Supp. 460.

**Mass.**—Cohen v. Newton Sav. Bank, 67 N.E.2d 748, 320 Mass. 90, 168 A.L.R. 1321.

**Mich.**—Corpus Juris quoted in Rose v. Rose, 1 N.W.2d 458, 460, 300 Mich. 73.—Corpus Juris quoted in Goodrich v. City Nat. Bank & Trust Co. of Battle Creek, 258 N.W. 253, 255, 256, 270 Mich. 222.

**Mo.**—Corpus Juris cited in In re Geel's Estate, App., 143 S.W.2d 327, 331.—Coon v. Stanley, 94 S.W.2d 96, 230 Mo.App. 524.

**Neb.**—Whalen v. Swircin, 4 N.W.2d 737, 141 Neb. 650.

**Ohio.**—Central Trust Co. v. Watt, 38 N.E.2d 185, 139 Ohio St. 50.—Corpus Juris cited in Cleveland Trust Co. v. White, 15 N.E.2d 627, 134 Ohio St. 1, 118 A.L.R. 475.—Fifth Third Union Trust Co. v. Foss, 15 Ohio Supp. 55.

**65 C.J.** p. 274 note 91.

#### In whole or in part

**Mo.**—In re Geel's Estate, App., 143 S.W.2d 327.

#### Discretion

Where settlor reserved right to dip into principal or corpus for his support and provided that his discretion as to what was a proper expenditure for his support could not be questioned, settlor's discretion as to what was proper expenditure for his support, could not be questioned, except possibly in case of abuse of discretion, but any expenditure of trust property, however extravagant, would have to be confined to his support, and he would have no right to give it away or to use it for other purposes.—Smith v. Deshaw, 78 A.2d 479, 116 Vt. 441.

#### Extent of right

The right reserved in trust indenture to "use" securities, money, personally and choses in action necessarily implies the right to employ, invest, expend, and alienate such property as desired in any manner.—Atlantic Nat. Bank of Jacksonville, Fla. v. St. Louis Union Trust Co., 211 S.W.2d 2, 357 Mo. 770.

**89. Mich.**—Corpus Juris quoted in Rose v. Rose, 1 N.W.2d 458, 460, 300 Mich. 73.—Corpus Juris quoted in Goodrich v. City Nat. Bank & Trust Co. of Battle Creek, 258 N.W. 253, 255, 256, 270 Mich. 222.

**Vt.**—Smith v. Deshaw, 78 A.2d 479, 116 Vt. 441.

**65 C.J.** p. 274 note 92.

#### Particular provisions construed

Provision of trust deed that grantor reserved right to change provisions as to disposition of trust property after his death, but should have no right to exclude his wife from benefits thereof, did not reserve power to change wife's interest.—Tait v. Safe Deposit & Trust Co. of Baltimore, C.C.A.Md., 74 F.2d 851.

**90. N.Y.**—Application of Central Hanover Bank & Trust Co. (Mondand), 26 N.Y.S.2d 924, 176 Misc. 183, affirmed 32 N.Y.S.2d 128, 263 App.Div. 809, affirmed Central Hanover Bank & Trust Co. v. Mondand, 42 N.E.2d 610, 288 N.Y. 608.

**Power to appoint principal by will**  
**Pa.**—McCreary's Estate v. Pitts, 47 A.2d 235, 354 Pa. 347.—Collins v. Provident Trust Co. of Philadelphia, 83 Pa. Dist. & Co. 459, 68 Montg.Co. 376.

**Existence of power of appointment**  
The existence of a general power of appointment, the exercise of which would defeat provisions for distribution of the trust property in default of appointment, does not make the trust property the property of the settlor.—National Shawmut Bank of Boston v. Joy, 53 N.E.2d 113, 315 Mass. 457.

borrow money on the trust res.<sup>91</sup> or to withdraw all or any part of the trust estate;<sup>92</sup> or he may reserve the power to sell, assign, transfer, set over, and deliver the property;<sup>93</sup> or he may reserve powers incidental to the administration of the trust,<sup>94</sup> such as the power to manage, control, or supervise the trust property,<sup>95</sup> or to control investments,<sup>96</sup> or to substitute a new trustee;<sup>97</sup> or, as discussed infra §§

87-91, he may reserve the power to modify or revoke the trust, or to revoke a gift to a beneficiary.<sup>98</sup>

Generally, such reservations are construed to be conditions subsequent,<sup>99</sup> and where the settlor never exercises the powers reserved, the interests of the beneficiaries are present and subsisting at the time of his death and they are entitled to have the trust administered according to its terms.<sup>1</sup> Even though

91. Mich.—Rose v. Rose, 1 N.W.2d 458, 300 Mich. 73.

92. Mass.—Coolidge v. Brown, 190 N. E. 723, 286 Mass. 504.

Mich.—Goodrich v. City Nat. Bank & Trust Co. of Battle Creek, 258 N.W. 253, 270 Mich. 222.

Mo.—In re Geel's Estate, App., 143 S.W.2d 827.

#### Judicial control

Where depositor of fund in bank created trust, and expressly reserved right on her order alone to withdraw any part of fund from bank, discretionary power as trustee was subject to control by court only under special circumstances.—Katz v. Greeninger, 215 P.2d 121, 96 Cal.App. 2d 245.

93. U.S.—United Bldg. & Loan Ass'n v. Garrett, D.C.Ark., 64 F.Supp. 460.

94. Fla.—Williams v. Collier, 162 So. 868, 120 Fla. 248.

#### Sale of trust property

Provisions in trust instrument as to time for, and who should make, sale of bonds given in trust was held not to affect absolute rights of beneficiaries to trust estate, where death of trustor merely fixed time when property should be distributed to beneficiaries.—Williams v. Collier, 162 So. 868, 120 Fla. 248.

#### Redelivery of property to trustor

(1) Reserved power in trust instrument to require redelivery of bonds to trustor if trustee died before execution of trust, or prior thereto at pleasure of trustor was construed to refer to administration of trust and not to revocation of trust, where bonds were subject to consummation of trust by which beneficial interest in principal of bonds passed to designated beneficiaries.—Williams v. Collier, supra.

(2) Words "this instrument shall become inoperative" within trust instrument providing that in event of death of trustee before execution of trust or prior thereto at pleasure of trustor such instrument shall become inoperative and bonds shall be returned to trustor was held to refer to contingent termination of administration of trust by named trustee and not to discontinuance of trust, where trust was completely created and bonds to be delivered were ex-

pressly made subject to consummation of trust.—Williams v. Collier, 162 So. 868, 120 Fla. 248, denying rehearing 158 So. 815, 120 Fla. 248.

95. Ga.—Farkas v. Stephens, 188 S. E. 919, 54 Ga.App. 706.

Town.—Keck v. McKinstry, 221 N.W. 851, 206 Iowa 1121.

Kv.—Corpus Juris cited in Newland v. McNeill, 126 S.W.2d 127, 130, 277 Ky. 245.

Mich.—Corpus Juris quoted in Rose v. Rose, 1 N.W.2d 458, 460, 300 Mich. 73.—Corpus Juris quoted in Goodrich v. City Nat. Bank & Trust Co. of Battle Creek, 258 N.W. 253, 255, 256, 270 Mich. 222.

Neb.—Whalen v. Swirein, 4 N.W.2d 737, 111 Neb. 650.

N.Y.—In re Ford's Estate, 108 N.Y.S. 2d 122, 279 App.Div. 152, affirmed 107 N.E.2d 87, 304 N.Y. 598.

65 C.J. p. 275 note 93.

#### Legal or beneficial title not affected

Reservation to grantor in deed creating trust of right to control property conveyed as long as he lived and of right to sell property for re-investment on written consent of trustee reserved no legal title in grantor as trustee and no beneficial interest as a cestui que trust, but gave him right to control property as trustee's agent.—Farkas v. Stephens, 188 S.E. 919, 54 Ga.App. 706.

#### Right to vote stock

Donor's reservation of right to vote stock held in trust did not prevent trust from taking effect.

Ky.—Newland v. McNeill, 126 S.W.2d 127, 277 Ky. 245.

Ohio.—Cleveland Trust Co. v. White, 16 N.E.2d 588, 58 Ohio App. 339, 65 C.J. p. 274 note 90 [a] (2).

96. U.S.—Hopkins v. C. I. R., C.C.A. 6, 144 F.2d 683, 158 A.L.R. 1301.

Ill.—Bear v. Milliken Trust Co., 168 N.E. 349, 336 Ill. 366, 73 A.L.R. 173.

Mass.—Leahy v. Old Colony Trust Co., 93 N.E.2d 238, 326 Mass. 49—

National Shawmut Bank of Boston v. Joy, 53 N.E.2d 113, 315 Mass. 457.

Mich.—Rose v. Rose, 1 N.W.2d 458, 300 Mich. 73.—Goodrich v. City Nat. Bank & Trust Co. of Battle Creek, 258 N.W. 253, 270 Mich. 222.

N.Y.—Pinckney v. City Bank Farmers Trust Co., 292 N.Y.S. 835, 249 App. Div. 375.

Ohio.—Central Trust Co. v. Watt, 38 N.E.2d 185, 139 Ohio St. 50.—Cleveland Trust Co. v. White, 15 N.E.2d 627, 134 Ohio St. 1, 118 A.L.R. 475.—Fifth Third Union Trust Co. v. Foss, 15 Ohio Supp. 55.

#### Reinvestment

Power reserved to settlor to pass on securities purchased for reinvestment will not invalidate trust, where the trustee otherwise had full discretion including full power to sell any and all property constituting the trust funds.—City Bank Farmers' Trust Co. v. Charity Organization Soc. of City of New York, 265 N.Y.S. 267, 238 App.Div. 720, affirmed 191 N.E. 504, 264 N.Y. 441.

#### Right to veto investments

A settlor's reservation of power to veto investments by trustee did not constitute the trustee a mere agent and prevent title from passing to the trustee or render the trust executory.—Cleveland Trust Co. v. White, 16 N.E.2d 588, 58 Ohio App. 339.

97. Mich.—Corpus Juris quoted in Rose v. Rose, 1 N.W.2d 458, 460, 300 Mich. 73.—Corpus Juris quoted in Goodrich v. City Nat. Bank & Trust Co. of Battle Creek, 258 N.W. 253, 255, 256, 270 Mich. 222.

Pa.—In re Barler's Estate, 155 A. 565, 304 Pa. 235.

98. Cal.—American Bible Soc. v. Mortgage Guarantee Co., 17 P.2d 105, 217 Cal. 9.

99. U.S.—United Bldg. & Loan Ass'n v. Garrett, D.C.Ark., 64 F.Supp. 460.

Mich.—Rose v. Rose, 1 N.W.2d 458, 300 Mich. 73.

Ohio.—Cleveland Trust Co. v. White, 15 N.E.2d 627, 134 Ohio St. 1, 118 A.L.R. 475.

#### Particular conditions

Provisions of trust instrument that in event of death of trustee before execution of trust or at any time prior thereto, at trustor's option, instrument should become inoperative and the trust property should be returned to trustor, were "conditions subsequent" which did not divest trustee of title.—Williams v. Collier, 162 So. 815, 120 Fla. 248, rehearing denied 162 So. 868, 120 Fla. 248.

1. U.S.—United Bldg. & Loan Ass'n v. Garrett, D.C.Ark., 64 F.Supp. 460.

the donor has reserved the right to enjoy the income from an irrevocable trust, it is nevertheless a completed transfer.<sup>2</sup> The fact that there may be no portion of the trust property left for the beneficiaries to receive, by reason of the settlor's exercise of his reserved right to use or dispose of it, does not render the declaration invalid.<sup>3</sup> The reservation of the power of control over the trust property does not invest the trustor or donor with control over the economic benefits or income from the trust property.<sup>4</sup>

Where, however, the settlor retains powers which in their cumulative effect amount to ownership of the trust estate with such control over the administrative functions of the trustee as to make of him simply the settlor's agent or representative, no trust is established.<sup>5</sup> In determining whether the powers reserved by the settlor are so great as to negate an intent to create any present interest in the beneficiaries, factors to be considered are the formality of the transaction,<sup>6</sup> and the combination of reservations.<sup>7</sup>

*Express words.* In an inter vivos trust, a power

reserved to a grantor, it has been held, must be by express words of reservation.<sup>8</sup>

*Conditions.* A settlor may validly impose conditions on the use of the trust property after his death.<sup>9</sup> A declaration of trust, to take effect on the happening of certain conditions, does not become operative if such conditions never occur.<sup>10</sup>

*Restraint on alienation.* Provisions in a trust instrument prohibiting the alienation or mortgage of the trust property are valid under certain circumstances,<sup>11</sup> but a provision prohibiting incumbering the property is invalid and unenforceable where there is no penalty or forfeiture provided for its violation,<sup>12</sup> although such a provision is waived by the execution of incumbrances by the only persons who can complain of the breach.<sup>13</sup>

## § 48. Use of Several Instruments

An express or voluntary trust may be declared by means of several instruments or writings.

A trust may be declared by means of several writings.<sup>14</sup> It is not necessary that the declaration

2. U.S.—*Helvering v. Helmholtz*, App.D.C., 56 S.Ct. 68, 296 U.S. 93, 80 L.Ed. 76—*May v. Heimer*, Pa. 50 S.Ct. 286, 281 U.S. 238, 74 L.Ed. 826, 67 A.L.R. 1244—*Commissioner of Internal Revenue v. Northern Trust Co.*, C.C.A.7, 41 F.2d 732, affirmed 51 S.Ct. 342, 283 U.S. 782, 75 L.Ed. 1412—*Smith v. U. S.*, D.C. Mass., 16 F.Supp. 397, affirmed, C.C.A., U.S. v. Nichols, 92 F.2d 704.

3. Mich.—*Corpus Juris* quoted in *Rose v. Rose*, 1 NW.2d 458, 460, 300 Mich. 72—*Corpus Juris* quoted in *Goodrich v. City Nat. Bank & Trust Co. of Battle Creek*, 258 N.W. 253, 255, 256, 270 Mich. 222, 65 C.J. p. 275 note 95.

4. U.S.—*Clifford v. Helvering*, C.C.A. 8, 105 F.2d 546, reversed on other grounds *Helvering v. Clifford*, 60 S.Ct. 534, 309 U.S. 331, 81 L.Ed. 788, mandate conformed to, C.C.A., *Clifford v. Helvering*, 111 F.2d 896.

5. N.Y.—*In re Ford's Estate*, 108 N.Y.S.2d 122, 279 App.Div. 152, affirmed 107 N.E.2d 87, 304 N.Y. 598.

Ohio.—*Cleveland Trust Co. v. White*, 15 N.E.2d 627, 134 Ohio St. 1, 118 A.L.R. 475.

### When trust may be questioned

Validity of trust may be questioned where settlor declares himself trustee but reserves power and right to withdraw, consume, or dispose of principal or corpus of trust property, but where settlor's right to use principal is restricted to use for settlor's support, trust is not testamentary, and, where restriction is so confined,

beneficial interest clearly passes to beneficiary—*Smith v. Deshaw*, 78 A.2d 479, 116 Vt. 441.

6. U.S.—*United Bldg. & Loan Ass'n v. Garrett*, D.C.Ark., 64 F.Supp. 460.

### Held present interest

Where settlor executed and acknowledged each declaration of trust and their filing was acknowledged by officers of corporations which issued beneficial certificates constituting the trust res and on each certificate was indorsed a notice attested by officer that certificate was subject to declaration of trust and declarations satisfied all formal requirements for creating a valid trust, powers reserved to settlor were in nature of "conditions subsequent," and the beneficiaries received a present interest.—*United Bldg. & Loan Ass'n v. Garrett*, supra.

7. Mich.—*Goodrich v. City Nat. Bank & Trust Co. of Battle Creek*, 258 N.W. 253, 270 Mich. 222.

### Held invalid

Trust indenture purporting to give trustor's personal property but reserving to trustor during life the right to use, occupy, and enjoy such property was held void ab initio—*Atlantic Nat. Bank of Jacksonville, Fla. v. St. Louis Union Trust Co.*, 211 S.W.2d 2, 367 Mo. 770.

8. U.S.—*C. I. R. v. Waterbury*, C.A.2, 97 F.2d 383, certiorari denied *Helvering v. Waterbury*, 59 S.Ct. 105, 4 cases, 305 U.S. 638, 83 L.Ed. 411—*Higgins v. White*, C.C.A.Mass.,

93 F.2d 357, conformed to, D.C., 31 F.Supp. 796, reversed on other grounds, C.C.A., *White v. Higgins*, 116 F.2d 312.

9. Conn.—*Gaess v. Gaess*, 42 A.2d 796, 132 Conn. 96, 160 A.L.R. 432.

10. U.S.—*Stoehr v. Miller*, C.C.A.N.Y., 296 F.414.

11. Ky.—*Spilman v. Mercer County Nat. Bank of Harrodsburg*, 105 S.W.2d 1031, 268 Ky. 761.

12. Ky.—*Spilman v. Mercer County Nat. Bank of Harrodsburg*, supra—*Ford v. Ford*, 18 S.W.2d 559, 230 Ky. 66.

13. Ky.—*Spilman v. Mercer County Nat. Bank of Harrodsburg*, 105 S.W.2d 1031, 268 Ky. 761.

14. Cal.—*Weiner v. Mullaney*, 140 P.2d 701, 59 Cal.App.2d 620.

Mo.—*Stephenson v. Stephenson*, 171 S.W.2d 555, 351 Mo. 8—*Corpus Juris* cited in *Trotter-Lacy Nat. Bank v. Trotter*, 111 S.W.2d 12, 16, 341 Mo. 1029.

Mont.—*Hodgkiss v. Northland Petroleum Consol.*, 67 P.2d 811, 104 Mont. 328.

Pa.—*In re Corbin's Trust*, Orph., 57 York Leg.Rec. 201.

Tex.—*Mosely v. Fikes*, Civ.App., 126 S.W.2d 589, affirmed 151 S.W.2d 202, 136 Tex. 386.

65 C.J. p. 275 note 98.

Use of several instruments as sufficient to satisfy requirement that declarations of trust be in writing see supra § 39.



of trust be contained in, or endorsed on, the instrument which transfers the legal title to the property,<sup>15</sup> or, where the property is described in the conveyance, that it be described in the declaration of trust.<sup>16</sup> Although it has been held that the declaration of a trust must be contemporaneous with a deed,<sup>17</sup> it has also been held that the writings need not be contemporaneous,<sup>18</sup> or inter partes.<sup>19</sup> Contemporaneous instruments may be a sufficient declaration of trust if, when construed together, they show the intent to create a trust.<sup>20</sup> A trust declaration resting on a contemporaneously executed void deed is void.<sup>21</sup>

*Separate and several trusts* may be created by the same instrument.<sup>22</sup>

## § 49. Construction

The construction of a declaration of trust is a matter

of law and should be based on a consideration of the whole instrument or instruments, and the facts and circumstances of the case, and should give effect to the intent of the parties.

The construction of a declaration or acknowledgment of trust is a matter of law.<sup>23</sup>

Whether a trust is declared by a particular instrument depends on the construction to be placed on that instrument,<sup>24</sup> which, where it is clear and unambiguous, is deduced from the language thereof.<sup>25</sup> Regard will be had to the provisions of the instrument as expressed,<sup>26</sup> and the instrument or instruments will be considered in the light of the surrounding facts and circumstances;<sup>27</sup> and whether or not a trust relationship arises from a particular transaction is to be determined from a written agreement entered into, plus the acts and declarations of the parties.<sup>28</sup>

The whole instrument is to be considered<sup>29</sup> and

### Incorporation by reference

Under deed wherein grantee was described as trustee and provision was made following description of real estate conveyed that terms under which grantee should hold property as trustee were same terms and conditions under which he held real estate devised to him by will of his wife, the grantee took the property subject to the same terms and conditions and subject to the same trust as that provided in wife's will.—*Sullivan v. Rhode Island Hospital Trust Co.*, 185 A. 148, 56 R.I. 253.

### Trust held created

U.S.—Board of National Missions of Presbyterian Church in the U. S. v. Smith, C.A. Ill., 182 F.2d 362.  
Ill.—Herdien v. Herdian, 8 N.E.2d 726, 290 Ill.App. 606.  
Minn.—Jordan v. Jordan, 259 N.W. 386, 193 Minn. 428.

15. Mo.—Stephenson v. Stephenson, 171 S.W.2d 565, 351 Mo. 8.—*Tootle-Lacy Nat. Bank v. Rollier*, 111 S.W.2d 12, 341 Mo. 1029.

16. Mont.—Hudekiss v. Northland Petroleum Consol., 67 P.2d 811, 104 Mont. 328.

17. Ohio.—Petvak v. Petvak, App., 92 N.E.2d 412.

18. Mo.—Stephenson v. Stephenson, 171 S.W.2d 565, 351 Mo. 8.—*Corpus Juris cited in Tootle-Lacy Nat. Bank v. Rollier*, 111 S.W.2d 12, 16, 341 Mo. 1029.

Pa.—In re Corbin's Trust, Orph., 57 York Leg. Rec. 201.  
65 C.J. p. 275 note 99.

### After title vests

An express trust may be declared by a writing made after legal title has vested in trustee.—*Kurtz v. Robinson*, Tex.Civ.App., 256 S.W.2d 1003.

19. U.S.—Adamson v. Black Rock

Power & Irrigation Co., C.C.A. Wash., 297 F. 905, certiorari denied 45 S.Ct. 196, 266 U.S. 630, 69 L. Ed. 477, and appeal dismissed 45 S.Ct. 196, 266 U.S. 592, 69 L. Ed. 458.

20. Kan.—Shive v. Hayes, 294 P. 935, 132 Kan. 137.

21. Ill.—Hess v. Gilbert, 77 N.E.2d 536, 333 Ill.App. 330.

22. U.S.—Commissioner of Internal Revenue v. McIlvaine, C.C.A. 7, 78 F.2d 787, 102 A.L.R. 252, affirmed *Helvering v. McIlvaine*, 56 S.Ct. 332, 296 U.S. 488, 80 L. Ed. 345.

23. U.S.—Schneider v. Murphy, C.A. Tex., 183 F.2d 777, certiorari denied 71 S.Ct. 292, 340 U.S. 911, 95 L. Ed. 659.

24. N.C.—Oakhurst Land Co. v. Newell, 117 S.E. 341, 185 N.C. 410  
65 C.J. p. 275 note 5.

### Particular instruments construed not to create trusts

Neb.—O'Connor v. Burns, Potter & Co., 36 N.W.2d 507, 151 Neb. 9,  
65 C.J. p. 275 note 5 [b].

25. Neb.—Crancer v. Reichenbach, 266 N.W. 57, 130 Neb. 645.

26. Neb.—O'Connor v. Burns, Potter & Co., 36 N.W.2d 507, 151 Neb. 9.

### Particular provisions construed

Neb.—O'Connor v. Burns, Potter & Co., supra.

27. Minn.—Jordan v. Jordan, 259 N.W. 386, 193 Minn. 428.  
Mo.—St. Louis Uniformed Firemen's Credit Union v. Haley, App., 190 S.W.2d 636.

Neb.—O'Connor v. Burns, Potter & Co., 36 N.W.2d 507, 151 Neb. 9.  
Ohio.—Norris v. Norris, App., 57 N.E.2d 254, appeal dismissed 53 N.E.2d 647, 142 Ohio St. 634.  
Wash.—Hoffman v. Tieton View Com-

munity M. E. Church, 207 P.2d 699,  
33 Wash.2d 716  
65 C.J. p. 275 note 9.

### Transferor's language

Whether or not a transfer intended to give property in trust or for the transferee's own benefit is determined by an interpretation of the transferor's language in the light of all the circumstances.—*Townsend v. Gordon*, 14 N.W.2d 57, 308 Mich. 438, 151 A.L.R. 1432.

### Particular circumstances

In construing writing in Norwegian language from Norwegian in the United States to relatives in Norway which was relied on as declaration of trust, court would view instrument in light of facts that writer was not native of United States, that he prided himself in carrying out details of his own affairs, was suspicious of lawyers, and did not depend on them in his own business.—*Bingen v. First Trust Co. of St. Paul*, C.C.A. Minn., 103 F.2d 260.

### Fact question

Whether a trust has been perfectly created is largely question of fact, and court in determining fact will give efficacy to situation and relation of parties, nature and situation of property, and purposes and objects which settlor had in view.—*Wyne v. Puchner*, 51 N.W.2d 38, 260 Wis. 365.

28. Cal.—People v. Pierce, 243 P.2d 585, 110 Cal.App.2d 698.

### Not limited to writings

The determination of the intention is not limited to a construction of the writing; this is particularly true in the criminal field since the prosecution is not bound by any such contract.—*People v. Pierce*, supra.

29. U.S.—Bingen v. First Trust Co. of St. Paul, D.C. Minn., 23 F.Supp.

its various parts compared;<sup>30</sup> and where there are several instruments or writings, they are to be considered and taken together.<sup>31</sup> Words are to be construed according to their natural meaning.<sup>32</sup> In determining whether or not a writing creates an express trust the court is not permitted to speculate, guess, or surmise as to the meaning of the instruments and relationship of the parties.<sup>33</sup> The fact that the declaration is open to more than one interpretation and requires judicial construction does not defeat the trust.<sup>34</sup>

The court must give effect to the true intent of the parties,<sup>35</sup> which is to be gathered from the general purpose and scope of the instrument or instru-

ments.<sup>36</sup> Where an intention to create a trust is manifest, that intention should not be nullified by construction if there is any way in which it can be sustained.<sup>37</sup> Where construction is necessary, the practical interpretation given the declaration by the parties themselves is entitled to great weight,<sup>38</sup> and many times is controlling.<sup>39</sup> However, an instrument may be construed as creating a trust, although it expressly states it is not to be so construed.<sup>40</sup> Thus, an agreement of the parties to an instrument that it shall constitute a present sale and not be construed as a transfer of property in trust cannot change the true character of the agreement of the parties as disclosed by the instrument which evidences the transaction.<sup>41</sup>

#### 4. AGREEMENTS, COVENANTS, AND TRANSACTIONS CREATING OR OPERATING AS TRUSTS

##### § 50. In General

- a. General principles
- b. Conveyances or transfers absolute in form
- c. Conveyances containing reservations, conditions, or other provisions indicating trust
- d. Settlor constituting himself trustee

##### a. General Principles

Whether or not a particular agreement or transaction creates an express trust depends on the intention of the parties.

Generally speaking, whether or not a particular agreement or transaction creates an express trust depends on the intention of the parties as indicated by their acts and declarations and the surrounding

958, reversed on other grounds, C. C.A., 103 F.2d 260.

Cal.—Crenshaw v. Roy C Seeley Co., 19 P.2d 50, 129 Cal.App. 627.

Md.—Sands v. Church of Ascension and Prince of Peace, 30 A.2d 771, 181 Md. 536.

Mich.—Union Guardian Trust Co. v. Nichols, 18 N.W.2d 383, 311 Mich. 107—Reichert v. Guaranty Trust Co. of Detroit, 245 N.W. 785, 260 Mich. 564.

N.Y.—In re Brunswick's Estate, 256 N.Y.S. 879, 143 Misc. 573—In re Schwedler's Trust, 113 N.Y.S.2d 366.

S.D.—Bedell v. Steele, 28 N.W.2d 869, 71 S.D. 609.

Wash.—Hoffman v. Tieton View Community M. E. Church, 207 P.2d 699, 33 Wash.2d 716.

30. Wash.—Hoffman v. Tieton View Community M. E. Church, supra.

31. Mo.—St. Louis Uniformed Firemen's Credit Union v. Huley, App. 190 S.W.2d 636.

Pa.—In re Corbin's Trust, Orph., 57 York Leg.Rec. 291.

##### As single agreement

Trust agreement covering lots purchased by owners of residence property in same neighborhood and contemporaneous agreement expressing purpose to prevent erection of apartment houses on described lots, were held required to be considered as

single agreement—Heltekemper v. Schmeer, 29 P.2d 540, 146 Or. 304, rehearing denied 30 P.2d 1119, 146 Or. 304.

32. Pa.—Brubaker v. Lauver, 185 A. 848, 322 Pa. 461.

Precatory words are not to be given the force of a command, where there is nothing to indicate that they were used in that sense—Brubaker v. Lauver, supra.

33. U.S.—U S v. Certain Land in Wayne County, Mo., Known as Tract No. 8, Mingo Nat Wildlife Refuge Project, D.C.Mo., 70 F. Supp. 730.

34. Conn.—Hoyt v. Bliss, 105 A. 699, 93 Conn. 344.

35. Mich.—Union Guardian Trust Co v Nichols, 18 N.W.2d 383, 311 Mich. 107.

##### Formalism not controlling

In creation of trusts, settlors are not handicapped by formalism, but rather courts of equity will seek to find real meaning of language used by settlors and construe it to indicate a trust intent if legal incidents of a trust were desired, no matter how clumsy or unsuitable the phrase used.—McClendon v. Dean, 117 P.2d 250, 45 N.M. 496.

36. Md.—Doty v. Ghinger, 171 A. 40, 166 Md. 426.

Wash.—Hoffman v. Tieton View Com-

munity M. E. Church, 207 P.2d 699, 33 Wash.2d 716.

##### Execution

The word "execution" as used in a trust indenture embraces the actual signing and formal delivery of trust instruments and also embraces the actual carrying out and administration of the trust, and word must be given that meaning which trustor intended it to have as indicated by context—Petition of Tuckerman, 60 N.Y.S.2d 734.

37. N.Y.—Close v. Farmers' Loan & Trust Co., 87 N.E. 1005, 195 N.Y. 92.

65 C.J. p. 275 note 10.

38. Cal.—Eggert v. Pacific States Savings & Loan Co., 136 P.2d 822, 57 Cal.App.2d 239.

Neb.—O'Connor v. Burns, Potter & Co., 36 N.W.2d 507, 151 Neb. 9.

65 C.J. p. 275 note 6.

39. Ind.—Warner v. Keiser, 177 N.E. 369, 93 Ind.App. 517.

40. U.S.—California & Hawaiian Sugar Refining Corp. v. C. I. R., C.C.A.9, 163 F.2d 531, certiorari denied 68 S.Ct. 350, two cases, 332 U.S. 846, 92 L.Ed. 417, applying California law.

Cal.—Neel v. Barnard, 150 P.2d 177, 24 Cal.2d 406.

41. Cal.—Eggert v. Pacific States Savings & Loan Co., 136 P.2d 822, 57 Cal.App.2d 239.

circumstances.<sup>42</sup> A trust may be created by a contract based on a valuable consideration to stand seized to the use of, or in trust for, another.<sup>43</sup> Any agreement or contract in writing made by a person having the power of disposal over property, whereby such person agrees or directs that particular property or a certain fund shall be held or dealt with in a particular manner for the benefit of another raises a trust in favor of such other person against the person making it.<sup>44</sup> A trust exists where property or funds are placed by one person

in the custody of another,<sup>45</sup> or where the legal title of property is conveyed for a limited purpose,<sup>46</sup> as for example, the securing of performance of an obligation by the transferor.<sup>47</sup>

#### b. Conveyances or Transfers Absolute in Form

A conveyance or transfer of real or personal property absolute in form may be held to have been made in trust and the grantee may be held to be a trustee.

Subject to limitations imposed by the statute of frauds in respect of real property, the conveyance or transfer of real<sup>48</sup> or personal property by a con-

#### Liquidation agreement

Where agreement for transfer of assets from one building and loan association to another provided series of restrictions on power of vendee to sell assets it had acquired and required quarterly statement to vendor, statement in agreement that agreement and conveyance was intended by parties as a present sale was held not conclusive on parties.—*Egbert v. Pacific States Savings & Loan Co.*, supra.

42. Colo.—*Smith v. Simmons*, 61 P. 2d 589, 99 Colo. 227.

Del.—*Bodley v. Jones*, 32 A.2d 436, 27 Del.Ch. 273.

Mich.—*Babcock v. Flisk*, 41 N.W.2d 479, 327 Mich. 72.

Pa.—*IV Amlico v. Cianci*, Com.Pl., 32 D.N.C. 264.

66 C.J. § 483 note 79.  
Constructive trusts see infra §§ 139-159.

Elements and requisites of express trust generally see supra § 22.

Expression of intention in declaration of trust see supra § 47.

Resulting trusts see infra §§ 98-138.

Trust arising from nature and terms of transaction without explicit declaration see infra § 52.

"Whether a trust relationship arises from a particular transaction is to be determined from any written agreement plus the acts and declarations of the parties."—*People v. Pierce*, Cal.App., 243 P. 585, 590.

#### Particular agreements or transactions held to create trust

(1) In general

US.—*Carmack v. U. S.*, C.A.Mo., 177 F.2d 463—*Thioeco v. Magnolia Petroleum Co.*, C.C.A.Tex., 141 F.2d 924, certiorari denied 65 S.Ct. 276, 323 U.S. 785, 89 L.Ed. 627.—*Brooks v. U. S.*, D.C.Cal., 84 F.Supp. 622.

Ala.—*Nixon v. Nixon*, 15 So.2d 561, 245 Ala. 43.

Cal.—*Barritt v. Barritt*, 23 P.2d 54, 132 Cal.App. 638.

Ind.—*Boyer v. Beyer*, 106 N.E.2d 247, 122 Ind.App. 649.—*Newlin v. Newlin*, 52 N.E.2d 503, 114 Ind.App. 574.

Mo.—*McGuire v. Hutchison*, 210 S.W.2d 531, 240 Mo.App. 504, appeal transferred 201 S.W.2d 322, 356 Mo. 203.

N.J.—*Tannenbaum v. Seacoast Trust Co. of Ashbury Park*, 198 A. 855, 16 N.J.Misc. 234, affirmed 5 A.2d 778, 125 N.J.Eq. 360.

(2) Where decedent withheld certain fund from his employees in order to pay income taxes and social security taxes, amount withheld immediately became a trust fund in hands of decedent and decedent could not change character of fund because its character was specified by statute and when decedent's administrator received erroneous income tax refund, amount received by administrator was impressed with a trust for benefit of United States of America for unpaid income and social security taxes.—*In re Carl's Estate*, Ohio Prob. 94 N.E.2d 239.

#### Particular agreements or transactions held not to create trust

(1) In general

Ark.—*Scott v. State*, 29 S.W.2d 667, 181 Ark. 1138.

Ill.—*Smith v. Kelley*, 56 N.E.2d 360, 387 Ill. 213.

Wash.—*Arneman v. Arneman*, 264 P.2d 256, 43 Wash.2d 787.—*State ex rel Wirt v. Superior Court for Spokane County*, 116 P.2d 752, 10 Wash.2d 362.

(2) Where inventor of vending machine disclosed his secret to another under an alleged agreement that the other would advance money for manufacturing and marketing machine and that net profits would be shared equally, no express trust arose in favor of inventor.—*Warwick v. De Mayo*, 213 S.W.2d 392, 358 Mo. 130.

(3) Where father and mother conveyed certain realty to first son in trust to provide for maintenance first of mother and then father and, on their deaths, their two sons and daughter, and thereafter second son and wife by quitclaim deed conveyed farm to first son as trustee, deed of farm did not create an express trust in farm by which it became a part of the trust created by the father and mother.—*Beyer v. Beyer*, 106 N.E.2d 247, 122 Ind.App. 649.

43. N.C.—*Peete v. LeRoy*, 22 S.E.2d 244, 222 N.C. 123.—*Anderson v. Har-*

lington, 79 S.E. 426, 163 N.C. 140.—*Wood v. Cherry*, 77 N.C. 110.

44. Pa.—*Converse v. Hawse*, 190 A. 899, 326 Pa. 1.—*Cumberland County v. Lemoyne Trust Co.*, 178 A. 32, 318 Pa. 85.

Agreement of person acquiring title to hold or convey to use of another see infra § 51.

45. Cal.—*People v. Pierce*, 243 P.2d 585, 110 Cal.App.2d 598.

Acceptance of possession of personal property as creating an express trust see infra § 55.

#### Money to be retained

Cal.—*People v. Pierce*, supra.

46. Cal.—*People v. Pierce*, supra.

47. Cal.—*People v. Pierce*, supra.

48. Cal.—*Knudson v. Adams*, 30 P.2d 608, 137 Cal.App. 261.

Ohio.—*Corpus Juris* quoted in *Showalter v. Miller*, 45 N.E.2d 774, 775, 70 Ohio App. 232.

Utah.—*Haws v. Jensen*, 209 P.2d 229, 116 Utah 212.

65 C.J. § 276 note 13.

Agreement of person acquiring title to hold or convey to use of another see infra § 51.

Parol trusts and effect of statute of frauds see supra §§ 31-41.

#### Fraud, accident, or mistake

Showing of fraud, accident, or mistake is not necessary to engraft a trust on deed absolute on its face.—*Sparks v. Mince*, Tex.Civ.App., 138 S.W.2d 203.—*Ratcliff v. Ratcliff*, Tex. Civ.App., 161 S.W. 30.

#### Grantee as trustee or property impressed with lien

Where grantor conveys property to grantee in return for grantee's promise to provide support and care for balance of grantor's life, even though deed is absolute in form, grantee holds title as trustee for benefit of grantor during his lifetime to insure the carrying out of obligation of agreement, or property is impressed with lien for that purpose.—*Gibbons v. Brimm*, Wash., 230 P.2d 983.

#### Mineral leases

Tex.—*Powell v. Parks*, 86 S.W.2d 725, 126 Tex. 338.

veyance or transfer absolute in form<sup>49</sup> may be held to have been made in trust and the grantee may be held to be a trustee, where the prior or contemporaneous acts, declarations, and agreements of the parties evidence an intent and understanding that the grantee was to take and hold the property for a trust purpose. It is not permissible, however, for one who has made an absolute conveyance of property to fasten a trust thereon by his own subsequent acts and declarations alone,<sup>50</sup> although such subsequent acts and declarations are sometimes considered in connection with prior and contemporaneous ones in determining whether or not a trust exists.<sup>51</sup> While there is no objection to the grantee subsequently declaring that he holds in trust,<sup>52</sup> it has been held that statements made by a grantee to third persons, not agents or representatives of the grantor, to the effect that the grantee would hold

the property subject to a trust do not create a trust enforceable against the grantee.<sup>53</sup> An intention to create a trust must exist,<sup>54</sup> and such intention must be communicated to the grantee.<sup>55</sup> Within the meaning of the rules just stated, the facts and circumstances surrounding many absolute conveyances have been held insufficient to disclose a trust.<sup>56</sup>

### c. Conveyances Containing Reservations, Conditions, or Other Provisions Indicating Trust

An express trust may be created by a deed or other transfer containing conditions, reservations, or other provisions sufficiently indicating an intention that the title shall be held in trust.

An express trust may be created, not only by a deed or conveyance which expressly provides that the property conveyed shall be held for the beneficiary,<sup>57</sup> but also by a deed or other transfer con-

#### Warranty deed

(1) A warranty deed may be shown to have been upon trust for grantor and not as a conveyance of the beneficial interest.—Wyant v. Crittenden, 113 F.2d 170, 72 App.D.C. 163.

(2) Warranty deed may be shown to be without consideration and to have been intended to convey to grantee only naked legal title as trustee for grantor.—Payne v. Allen, 62 P.2d 1227, 178 Okl. 328.

49. U.S.—Mallers v. Equitable Life Assur. Soc. of U. S., C.C.A. III, 87 F.2d 233, certiorari denied 57 S.Ct. 786, 301 U.S. 685, 81 L.Ed. 1343.

Ohio—Corpus Juris quoted in Showalter v. Miller, 45 N.E.2d 774, 775, 70 Ohio App. 232.

65 C.J. p. 276 note 14.  
Delivery or possession of personal property creating trust see infra § 55.

#### Contract to sell realty

Where decedent's son entered into contract with decedent under which decedent assigned all his interest in a contract to sell realty to son in consideration of son's agreement to pay all decedent's expenses for his care, and to pay unpaid balance due on contract to sell realty which was not used for such expenses, as decedent directed, or in equal shares among decedent's children, including son, assignment to son of decedent's interest in contract to sell realty was not absolute, but was in trust.—In re Bodvin's Estate, 226 P.2d 878, 37 Wash.2d 872.

50. Ohio—Corpus Juris quoted in Showalter v. Miller, 45 N.E.2d 774, 775, 70 Ohio App. 232.

65 C.J. p. 276 note 15.

51. Ohio—Corpus Juris quoted in

Showalter v. Miller, 45 N.E.2d 774, 775, 70 Ohio App. 232.

65 C.J. p. 276 note 16.

52. Wash.—Porter v. Laue, 267 P.2d 1064.

65 C.J. p. 276 note 17.

#### Mining claims

Where one of two joint owners of mining claims executed absolute and unconditional deed to third person relinquishing, releasing, and forever quieting such claims, second owner, who ratified such execution, received a right, title, and interest in claims under subsequent agreement whereby grantee acknowledged that he held title as trustee for owners, with respect to whether assignee under second owner's subsequent assignment of his right, title, and interest in and to agreement received any interest in claims.—Moore v. Hour, 81 P.2d 226, 27 Cal.App.2d 269.

53. Cal.—Hill v. Donnelly, 110 P.2d 135, 43 Cal.App.2d 47.

54. Cal.—Knudson v. Adams, 30 P.2d 608, 137 Cal.App. 261.

Fia.—Sample v. Semple, 105 So. 134, 90 Fla. 7.

Ohio—Corpus Juris quoted in Showalter v. Miller, 45 N.E.2d 774, 775, 70 Ohio App. 232.

#### Time of execution of instrument

Whether a trust exists different from terms of conveyance that vested title depends on intention of parties at time instrument was executed.—Benbow v. Benbow, 157 So. 512, 117 Fla. 77.

55. Fla.—Semple v. Semple, 105 So. 134, 90 Fla. 7.

Ohio—Corpus Juris quoted in Showalter v. Miller, 45 N.E.2d 774, 775, 70 Ohio App. 232.

#### Life estate

Devisee's fee title to interest in land, devised to him by his sister,

to whom it had been conveyed by another sister's deed, handed to devisee by grantor with request not to record it until she died, was subject to grantor's life estate, as to which devisee was trustee for grantor.—Knudson v. Adams, 30 P.2d 608, 137 Cal.App. 261.

56. Ark.—Goode v. King, 76 S.W.2d 300, 188 Ark. 1093.

Mich.—Hacker v. Hacker, 283 N.W. 639, 287 Mich. 435.

Miss.—Jones v. Crawford, 30 So.2d 57, 201 Miss. 791, suggestion of error overruled 30 So.2d 513, 201 Miss. 791.

Ohio—Schmitt v. Schnell, 14 Ohio Cir.Ct. 153, 7 Ohio Cir.Dec. 657.

65 C.J. p. 276 note 20.

Admissibility and sufficiency of evidence to charge grantee as trustee see infra §§ 69-71.

Agreements or transactions, creating or intended to create other relations generally see infra § 59.

#### Easement rights

Where conveyance of lot by local lodges to grand lodge was accompanied by separate agreement reciting that grand lodge should construct building and that local lodges should have easement rights to use of lodge room in such building, subject to specified contingencies, agreement was not a trust agreement and did not have effect of impressing a trust on land conveyed or on land purchased from proceeds of sale of land conveyed or on money paid on notes executed by local lodges to grand lodge.—Knox v. Lyarels, Tex.Civ. App., 156 S.W.2d 435, error refused.

57. Ga.—May v. Trotti, 111 S.E. 559, 153 Ga. 82.

65 C.J. p. 277 note 21.

"A trust may be created by the execution of a conveyance in trust."—

taining conditions, reservations, or other provisions sufficiently indicating an intention that the title shall be held in trust,<sup>58</sup> and an indorsement on a conveyance may constitute a declaration of trust.<sup>59</sup> On the other hand, in order that an instrument may operate as a trust deed the essentials of such a deed must be present.<sup>60</sup> So a deed does not of itself operate as a declaration of trust when it does not contain apt words to create a trust,<sup>61</sup> or where the words claimed to be sufficient for that purpose merely describe and recognize the existing rights and titles of others,<sup>62</sup> amount simply to a stipulation against alienation by the grantee without the consent of his wife,<sup>63</sup> or are merely declaratory of the object and purpose in making an absolute conveyance.<sup>64</sup>

#### d. Settlor Constituting Himself Trustee

A person may create a trust in his own personal or real property by constituting himself a trustee thereof.

It is not essential in all cases that the creator of a trust shall constitute a third person trustee and transfer the legal title to him;<sup>65</sup> one may create a trust in his own personal property by constituting himself trustee,<sup>66</sup> where his words or acts clearly and unequivocally denote an intention to hold henceforth as trustee for the benefit of another,<sup>67</sup> even in the absence of a consideration.<sup>68</sup> It has been held or recognized that the owner of real property may constitute himself a trustee in respect thereof for the benefit of another,<sup>69</sup> at least where the dec-

*Smehyl v. Hammond*, Fla., 44 So.2d 678.

#### Trust deed

Transaction whereby decedent executed trust deed to his brother who was to obtain title upon decedent's death in consideration that brother would supply decedent with room, board, clothes, and medical attendance during lifetime of decedent and upon his death to pay funeral expenses created an express trust.—*In re Doyle's Estate*, 279 N.Y.S. 601, 155 Misc. 88.

58. N.J.—*MacKenzie v. Jersey City Presbytery*, 61 A. 1027, 67 N.J.Eq. 652, 3 L.R.A.N.S., 227, 65 C.J. p 277 note 22.

59. N.C.—*Blackburn v. Blackburn*, 13 S.E. 937, 109 N.C. 488, 65 C.J. p 277 note 23.

60. Fla.—*Smehyl v. Hammond*, 44 So.2d 678.

61. *Hart v. Sribnik*, 109 S.E. 112, 117 S.C. 298.

62. N.C.—*St James Parish v. Bagley*, 50 S.E. 841, 138 N.C. 384, 70 L.R.A. 160, 65 C.J. p 277 note 25.

63. Neb.—*Friendless Home Soc. v. State*, 78 N.W. 726, 58 Neb. 447, 65 C.J. p 277 note 26.

64. Ky.—*Huff v. Thomas*, 1 T.B. Mon. 158.

65. Tenn.—*Guy v. Culbertson*, 51 S.W.2d 500, 164 Tenn. 509, 65 C.J. p 277 note 28.

66. Del.—*Delaware Trust Co. v. Fitzmaurice*, 31 A.2d 383, 27 Del. Ch. 101, modified on other grounds, *Crumlish v. Delaware Trust Co.*, 38 A.2d 463, 27 Del. Ch. 374.

67. Mo.—*St. Louis Uniformed Firemen's Credit Union*, App. 190 S.W.2d 636. Transfer of legal title to trustee see *infra* § 63.

68. U.S.—*Clifford v. Helvering*, C.C. A. 105 F.2d 586, reversed on other grounds, 60 S.Ct. 554, 309 U.S. 331,

84 L.Ed. 788, conformed to 111 F.2d 836—*United Bldg. & Loan Ass'n v. Garrett*, D.C. Ark., 64 F.Supp. 460. Eligibility of settlor to office of trustee see *infra* § 210.

Trust involving bank deposit see *infra* § 64.

67. Del.—*Bodley v. Jones*, 32 A.2d 436, 27 Del. Ch. 273—*Delaware Trust Co. v. Fitzmaurice*, 31 A.2d 383, 27 Del. Ch. 101, modified on other grounds *Crumlish v. Delaware Trust Co.*, 38 A.2d 463, 27 Del. Ch. 374.

Ky.—*De Leuil's Ex'rs v. De Leuil*, 74 S.W.2d 474, 255 Ky. 406.

Mass.—*Harrington v. Donlin*, 45 N.E. 2d 953, 312 Mass. 577—*Rock v. Rock*, 33 N.E.2d 973, 309 Mass. 44.

Mich.—*Hoyer v. Buckus*, 276 N.W. 564, 283 Mich. 593, motion denied 280 N.W. 756, 283 Mich. 701, certiorari denied 59 S.Ct. 147, 305 U.S. 644, 83 L.Ed. 416, rehearing denied 59 S.Ct. 248, 305 U.S. 674, 83 L.Ed. 437.

Mo.—*St. Louis Uniformed Firemen's Credit Union v. Huley*, App. 190 S.W.2d 636—*Corpus Juris cited in In re Geel's Estate*, App. 143 S.W.2d 327, 330.

N.Y.—*In re Tobin's Estate*, 113 N.Y. 82d 831.

Ohio.—*Tosselott v. Rosselott*, 113 N.E.2d 639, 93 Ohio App. 425—*Thomas v. Ives*, Com.Pl., 117 N.E.2d 515.

Or.—*Winters v. Winters*, 109 P.2d 857, 165 Or. 659.

Wis.—*Corpus Juris cited in Wyse v. Fuchner*, 51 N.W.2d 38, 41, 260 Wis. 365.

Wyo.—*Corpus Juris cited in Dallas Dome Wyoming Oil Fields Co. v. Brooder*, 97 P.2d 311, 317, 55 Wyo. 109.

65 C.J. p 278 note 31.

#### Oral or written declaration

(1) When a person sui juris, orally or in writing, explicitly or impliedly, declares that he holds personal property for another, he there-

by constitutes himself an express trustee.—*Eldridge v. Logan*, Mo. App., 217 S.W.2d 588.

(2) Owner of personal property may, by oral or written declaration without consideration, declare himself trustee of the property for a beneficiary.—*In re Barnes' Estate*, Ohio Com.Pl., 108 N.E.2d 88, affirmed 108 N.E.2d 101.

#### Particular agreements or transactions

(1) A creditor's gift of the principal of a note which was made payable to the donee but which creditor retained for purpose of collecting interest established trust of which the note was the subject, the creditor was the trustee, and the donee was the beneficiary.—*Cooley v. Cooley*, 182 So. 202, 132 Fla. 716.

(2) A person procuring shares of stock or other property to be put in his name as trustee for another sufficiently manifests intention to create trust, if such is his intention, and such fact is some proof of that intention.—*Eagles Building & Loan Ass'n v. Fiducia*, 37 A.2d 116, 135 N.J.Eq. 7, affirmed 40 A.2d 627, 136 N.J.Eq. 117.

(3) The purchase of a certificate of deposit in a bank in the name of the purchaser "for" her son, and payable to "herself or order," which certificate is retained in the purchaser's possession until her death, creates a tentative trust for the benefit of the son which, if unrevoked during the purchaser's lifetime, becomes vested at her death.—*Nace v. Fulton County Nat. Bank*, 79 Pa.Dist. & Co. 326.

68. Del.—*Bodley v. Jones*, 32 A.2d 436, 27 Del. Ch. 373, 65 C.J. p 278 note 32.

69. N.Y.—*In re Brown's Will*, 169 N.E. 612, 252 N.Y. 366, 65 C.J. p 279 note 33. Covenant to stand seized to uses see *infra* § 53.

laration of trust is supported by a consideration.<sup>70</sup> There is also authority for the view that an effective trust in land may be created in the absence of a valuable consideration,<sup>71</sup> but the view has been taken that an executory agreement, without consideration to hold one's land in trust, is not enforceable.<sup>72</sup>

While, in respect of personal property, the view has been expressed that title must pass from the owner as an individual,<sup>73</sup> since the nature and effect of a transaction of this character are such that the legal title remains in the donor for the benefit of the donee, no transfer or assignment of the legal title is necessary,<sup>74</sup> or, as sometimes stated, the declaration of trust is regarded in a court of equity as the equivalent of the actual transfer of the legal interest.<sup>75</sup> So also, while it has been recognized that a person who has legal title to land may formally transfer it to himself as trustee,<sup>76</sup> there is apparently authority for the view that even in the case of real property a trust may be created in which the owner is trustee, without an effective transfer of legal title.<sup>77</sup> Although in order to create a trust, it is necessary that the equitable title or interest shall pass to the cestui que trust,<sup>78</sup> and there must be an intent to establish a present trust

and create an equitable interest in the beneficiary,<sup>79</sup> an unequivocal declaration by the settlor that he holds property in present passes the equitable title or interest to the cestui que trust.<sup>80</sup>

All essentials of a trust must exist,<sup>81</sup> and, in accordance with the general rule, whether or not the owner has become a trustee is primarily a question of intention,<sup>82</sup> which is always a question of fact, depending on the circumstances,<sup>83</sup> and a trust does not arise in the absence of the owner's intention to create a trust.<sup>84</sup> While it is not necessary that technical words or language be used,<sup>85</sup> such intention must be made apparent in an unequivocal manner,<sup>86</sup> and the owner should declare in unmistakable terms that he means to stand in a fiduciary relation to the object of his bounty.<sup>87</sup> Although any words which indicate with sufficient certainty an intention to create a trust will be effective<sup>88</sup> without the use of the words "trust" or "trustees,"<sup>89</sup> or, as sometimes stated, without declaring the trust in express terms,<sup>90</sup> the mere expression of an intention,<sup>91</sup> or an intention not carried into effect,<sup>92</sup> to create a trust is not sufficient, and a written statement sufficient in form will not control in the absence of an intention to create a trust.<sup>93</sup>

70. Ky.—Squires v. O'Maley, 84 S.W. 1173, 27 Ky L. 307.  
65 C.J. p 279 note 34.

71. Pa.—Morrison v. Beirer, 2 Watts & S 81.

72. Ind.—Moore v. Ransdel, 59 N.E. 936, 60 N.E. 1068, 156 Ind. 658.

73. Mo.—Citizens' Nat. Bank v. McKenna, 153 S.W. 521, 168 Mo App 284.

Tenn.—Ferry v. Bryant, 93 S.W.2d 344, 19 Tenn App. 612.

74. U.S.—United Bldg. & Loan Ass'n v. Garrett, D.C.Ark., 64 F.Supp. 460.  
Del.—Jones v. Bodley, 27 A.2d 84, 26 Del.Ch. 218, reversed on other grounds, Bodley v. Jones, 32 A.2d 436, 27 Del.Ch. 273.

Pa.—In re Rodgers' Estate, 80 Pa. Dist. & Co. 531, 2 Fiduciary 540, affirmed 97 A.2d 789, 374 Pa. 246.  
65 C.J. p 279 note 38.

Necessity of transfer of title where third person is made trustee see *infra* § 63.

76. Md.—McDevitt v. Sponseller, 154 A. 140, 160 Md. 497.  
65 C.J. p 279 note 39.

78. Md.—Brandau v. McCurley, 92 A. 540, 124 Md. 243, L.R.A.1915C 767.  
65 C.J. p 279 note 40.

77. Pa.—Morrison v. Beirer, 2 Watts & S 81.  
65 C.J. p 279 note 41.

78. U.S.—Bingen v. First Trust Co. of St. Paul, C.C.A. Minn., 103 F.2d 260.  
65 C.J. p 279 note 42.

79. Mass.—Rock v. Rock, 33 N.E.2d 973, 309 Mass. 44.

80. Del.—Jones v. Bodley, 27 A.2d 84, 26 Del.Ch. 218, reversed on other grounds, Bodley v. Jones, 32 A.2d 436, 27 Del.Ch. 273.

Mo.—Korompilos v. Tompras, App. 251 S.W. 80.

Ohio—Thomas v. Dye, Com.Pl., 117 N.E.2d 515.

81. Ky.—Dick v. Harris' Ex'r, 141 S.W. 56, 145 Ky. 739.  
65 C.J. p 279 note 44.

82. Mo.—In re Geel's Estate, App. 143 S.W.2d 327.

N.D.—Hagerott v. Davis, 17 N.W.2d 15, 73 N.D. 532.  
65 C.J. p 279 note 46.

83. Del.—Delaware Trust Co. v. Fitzmaurice, 31 A.2d 383, 27 Del.Ch. 101, modified on other grounds *Crumlish v. Delaware Trust Co.*, 38 A.2d 463, 27 Del.Ch. 374.

84. Ohio.—Rossilott v. Rosselott, 113 N.E.2d 639, 93 Ohio App. 425.  
65 C.J. p 279 note 47.

**Intention to impose enforceable duties**

A writing which manifests no intention on part of settlor to impose any enforceable duties on himself as trustee does not create a trust.—

Application of Cerchia, 108 N.Y.S.2d 753, 279 App.Div. 734.

85. Ohio.—Rossilott v. Rosselott, 113 N.E.2d 639, 93 Ohio App. 425.

86. Del.—Bodley v. Jones, 32 A.2d 436, 27 Del.Ch. 273.  
65 C.J. p 280 note 48.

87. Ohio.—Rossilott v. Rosselott, 113 N.E.2d 639, 93 Ohio App. 425.

88. Ky.—De Leuil's Ex'r's v. De Leuil, 74 S.W.2d 474, 255 Ky St. 406.  
65 C.J. p 280 note 50.

89. N.J.—Collins v. Stewart, 44 A. 467, 58 N.J. 392.  
65 C.J. p 280 note 51.

90. Cal.—Noble v. Learned, 94 P. 1047, 152 Cal. 245.  
65 C.J. p 280 note 52.

91. N.Y.—In re Tobin's Estate, 113 N.Y.S.2d 831.

Pa.—Estate of Smith, 22 A. 916, 144 Pa. 428, 27 Am.S.R. 641.

92. N.Y.—In re Tobin's Estate, 113 N.Y.S.2d 831.

65 C.J. p 280 note 54.

93. U.S.—Ambrosius v. Ambrosius, N.Y., 239 F. 473.

Ky.—Schauherger v. Tafel, 258 S.W. 953, 202 Ky. 9.

**Inscription on envelopes**

Inscription by testatrix of names and the words "in trust" on envelopes containing cash was not, without further act creating trust, a valid

In general at least, no trust is created where the transaction is as consistent with another type of transaction as with that of a trust.<sup>94</sup> It is necessary that there should be a res to which the trust may attach,<sup>95</sup> and that there shall be a setting aside of the res in some manner for the purpose of the trust.<sup>96</sup> The mere statement of a person that he holds property as trustee for someone else is not sufficient to establish an express trust, if in truth and in fact he does not have title to, or ownership of, the property for which he declares himself trustee for the benefit of someone else.<sup>97</sup>

### § 51. Agreement by Person Acquiring Title to Hold or Convey to Use of Another

#### a. In general

#### b. Agreement to purchase or acquire property for another and joint acquisition

declaration of trust.—In re Tobin's Estate, 113 N.Y.S.2d 831

94. Del.—*Corpus Juris* cited in Bodley v. Jones, 32 A.2d 436, 438, 27 Del Ch 273.

Neb.—O'Connor v. Burns, Potter & Co., 36 N.W.2d 507, 151 Neb 9.

Wyo.—*Corpus Juris* quoted in Dallas Dome Wyoming Oil Fields Co. v. Brooder, 97 P.2d 311, 318, 55 Wyo 109.

65 C.J. p 280 note 56.

95. N.Y.—Hickok v. Bunting, 73 N.Y.S. 967, 67 App.Div. 560.

96. N.Y.—Matter of Small, 50 N.Y.S. 341, 27 App Div 438, appeal dismissed 52 N.E. 723, 158 N.Y. 128

97. Ohio.—Kuck v. Sommers, App. 100 NE2d 68

98. Ark.—Vaughn v. Shirey, 208 S.W.2d 441, 212 Ark. 936.

Ky.—Evans v. Payne, 258 S.W.2d 919—Gibson v. Gibson, 249 S.W.2d 53

N.C.—Carlisle v. Carlisle, 35 SE2d 418, 225 N.C. 462—Hare v. Weil, 196 S.E. 869, 213 N.C. 484.

Tenn.—Savage v. Savage, 4 Tenn.App. 277.

Tex.—Kidd v. Young, Civ.App., 185 S.W.2d 173, reversed on other grounds, 190 S.W.2d 65, 144 Tex. 322—Knight v. Tannehill Bros., Civ.App., 140 S.W.2d 552, error dismissed, judgment correct.

65 C.J. p 280 note 66

Parol trusts and effect of statute of frauds see supra §§ 31-41.

#### Particular agreements

(1) A grantee held title to land only as trustee for benefit of grantor, where he paid no consideration to grantor and thereafter permitted grantor to borrow money and otherwise treat the property as his own—Sepulveda v. Apablaza, 77 P.2d 526, 25 Cal.App.2d 381.

#### a. In General

In the absence of a statute to the contrary, a person acquiring title to property may create an enforceable express trust by agreeing to hold in trust for another or to convey or transfer to such other.

Subject to provisions of statutes regulating the creation and validity of trusts and the statute of frauds, a person acquiring title to property may create an enforceable express trust therein by agreeing to hold in trust for another<sup>98</sup> or to convey or transfer to such other<sup>99</sup> on the happening of a certain contingency.<sup>1</sup> Thus, a trust may be created by an agreement by a person taking title to property to convey or transfer to another on payment of a designated sum of money,<sup>2</sup> or to reconvey or re-transfer to the grantor or transferor under certain circumstances,<sup>3</sup> as, for example, on demand,<sup>4</sup> or on

(2) Where brother and sister executed a trust agreement reciting that the sister as trustee had title to brother's realty, and reciting that the sister had taken the title and would hold it for the ultimate use and benefit of the brother and, on his death, for the brother's wife, title to the realty was vested in the sister, and a valid trust existed—Ross v. Ross, 94 NE2d 885, 406 Ill. 598.

(3) Where testamentary trustee of infant devisee, who had never qualified, executed deed of testator's realty to testator's executor and infant's general guardian "as trustees in trust for the estate of" testator, deed was valid as constituting express trust for benefit of infant as legatee.—Railroad Federal Savings & Loan Ass'n v. Wolchik, 296 N.Y.S. 843, 251 App Div. 568.

99. Cal.—Cardoza v. White, 27 P.2d 639, 219 Cal 474—Reiss v. Reiss, 114 P.2d 718, 45 Cal.App.2d 740.

Ga.—Jones v. Jones, 26 S.E.2d 602, 196 Ga. 492.

Ky.—Morris v. Thomas, 220 S.W.2d 958, 310 Ky. 501.

65 C.J. p 281 note 67.

#### Particular agreements or transactions

(1) Agreement whereby father transferred bond for title to son in consideration of son's promise to pay balance of purchase money and, on receiving title, to convey to father and his wife, life estate in property, created trust for benefit of father and his wife—Rank of Arlington v. Sasser, 185 S.E. 826, 182 Ga. 474.

(2) Provision in deed under which grantor conveyed farm to his mother, reserving a life estate in himself, that grantee, as part of consideration, should make a will devising realty, at termination of grantor's life es-

tate, to grantor's heirs of the body, created a valid trust.—Britsch v. Roth, 17 Ohio Supp 46.

1. Vt.—Vilas v. Seith, 189 A. 862, 108 Vt. 526.

2. Cal.—Cardoza v. White, 27 P.2d 639, 219 Cal 474.

Iowa.—Carlson v. Hamilton, 255 N.W. 906, 221 Iowa 529

N.C.—Hare v. Weil, 196 S.E. 869, 213 N.C. 484

65 C.J. p 281 note 68.

#### Reimbursement of purchase price and taxes

If a son acquired father's property from tax purchaser pursuant to agreement that son would hold title to the land in trust until such time as revenues would reimburse son for money paid to purchaser and such other sums as he might pay for taxes and upkeep and would then reconvey to father and brothers and sisters, a trust relationship arose in favor of the father and brothers and sisters on son's acquisition of the property.—Butler v. Butler, Tex.Civ. App., 144 S.W.2d 956, error dismissed, judgment correct.

3. Mont.—Hanson v. Lancaster, 226 P.2d 105, 124 Mont 441.

Okla.—Turner v. Turner, 223 P.2d 536, 203 Okl. 513.

Tex.—Ley v. Patton, Civ.App., 81 S.W.2d 1087, error dismissed.

65 C.J. p 281 note 69.

4. Cal.—Swallers v. Swallers, 201 P.2d 23, 89 Cal.App.2d 458.

Md.—Jacobs v. Schwartz, 20 A.2d 489, 179 Md. 605.

65 C.J. p 281 note 70.

#### Subject to wishes as to reconveyance

"Where one conveys realty to another, to be held as the property of the grantor, and subject to his wishes as to reconveyance, it is held in trust by the grantee for the benefit

payment of a designated sum of money<sup>5</sup> within a certain time.<sup>6</sup>

A trust may be created by an agreement of the grantee or transferee to apply and account for the property, income, or the proceeds in a specified manner,<sup>7</sup> as, for example, by allowing the grantor or transferor the interest, rents, or profits,<sup>8</sup> or a share thereof,<sup>9</sup> or by applying the proceeds of a sale of the property to the support of the grantor,<sup>10</sup> or by paying over to the grantor or transferor such proceeds<sup>11</sup> or a share thereof.<sup>12</sup> Likewise, a trust is created where the transferee agrees or is directed to pay the proceeds of the property or a certain

amount therefrom to a third person.<sup>13</sup>

So, while the mere giving of a power to a creditor to sell property for the payment of the debt due him does not make him a trustee for his debtor,<sup>14</sup> a trust may be created by an agreement on the part of the grantee or assignee to sell, pay certain debts, and return the residue of the property, or its proceeds to the grantor or transferor<sup>15</sup> or debtor,<sup>16</sup> or to the children of the grantor and debtor;<sup>17</sup> to manage the property transferred, satisfy certain claims or debts out of the earnings, and then reconvey to the grantor or transferor;<sup>18</sup> or to manage the property, pay certain claims or debts, reimburse

of the grantor."—*Bellin v. Bloom*, 28 N.E.2d 53, 55, 217 Ind. 555.

5. *Tex.*—*Ley v. Patton*, Civ.App., 81 S.W.2d 1087, error dismissed—*Baker v. Griffith*, Civ.App., 79 S.W.2d 626, reversed on other grounds *Griffith v. Baker*, 107 S.W.2d 371, 130 Tex. 17.

65 C.J. p 281 note 71.

6. *Tex.*—*Ley v. Patton*, Civ.App., 81 S.W.2d 1087, error dismissed.

7. *Cal.*—*Baumann v. Harrison*, 115 P.2d 530, 46 Cal.App.2d 84.

*Iowa*—*Trustees of Iowa College v. Baillie*, 17 N.W.2d 143, 236 Iowa 235.

*Tenn.*—*Wilson v. Wilson*, 130 S.W.2d 140, 23 Tenn.App. 244.

65 C.J. p 282 note 72.

8. *U.S.*—*Bettendorf v. Commissioner of Internal Revenue*, C.C.A., 49 F.2d 173.

65 C.J. p 282 note 73.

9. *U.S.*—*Roberts v. Taylor*, C.C.A. Cal., 300 F. 257, certiorari denied 45 S.Ct. 195, 266 U.S. 629, 69 L.Ed. 477.

*W.Va.*—*Wilson v. Kennedy*, 59 S.E. 786, 63 W.Va. 1.

**Annual payments to grantors and others**

(1) Where college was deeded realty to increase its endowment, under an agreement requiring college to make annual payments to grantors and others from net income to extent income might be sufficient, with college being empowered to establish an annuity reserve fund to make good any deficiency, a trust was created rather than a charge on realty.—*Trustees of Iowa College v. Baillie*, 17 N.W.2d 143, 236 Iowa 235.

(2) Fact that agreement also stated a definite consideration "approximately our cost," apparently for income tax purposes, and reserved a vendor's lien, did not change trust created by agreement to a charge on realty.—*Trustees of Iowa College v. Baillie*, supra.

**Mechanic's lienor and owner**

Transaction whereunder property was put in name of mechanic's lienor

to secure lien and enable owner to save property from loss by paying lienor designated sum, with understanding that, if buyer should be found for designated price, profit would be divided between mechanic's lienor and owner, created trust whereunder mechanic's lienor became obligated to hold property in conformity with terms of agreement, unless it should be sold in accordance with provisions thereof—*Gelrud v. Los Angeles Lick & Gravel Co.*, 58 P.2d 673, 14 Cal.App.2d 604.

10. *N.C.*—*Ramsey v. Ramsey*, 31 S.E. 835, 123 N.C. 685.

Or.—*Martin v. Martin*, 72 P. 639, 43 Or. 118.

11. *Fla.*—*Craft v. Craft*, 76 So. 772, 74 Fla. 262.

*Ohio*—*Bonnell v. Brown*, 30 Ohio Cir. Ct. 712.

12. *S.D.*—*Gallagher v. Monk*, 205 N.W. 71, 48 S.D. 521.

65 C.J. p 282 note 78.

13. *Iowa*—*Carlson v. Hamilton*, 268 N.W. 906, 231 Iowa 539.

*Tenn.*—*American Bank & Trust Co. v. Lebanon Bank & Trust Co.*, 192 S.W.2d 216, 28 Tenn.App. 618—*Wilson v. Wilson*, 130 S.W.2d 140, 23 Tenn.App. 244.

*Tex.*—*Montgomery v. Culton*, 18 Tex. 736.

*Wis.*—*Sutherland v. Piernor*, 24 N.W. 2d 883, 249 Wis. 462.

65 C.J. p 282 note 75.

**Grantor's grandchildren**

A deed conveying realty to grantor's daughter subject to condition that, upon grantor's death, daughter would pay to grantor's grandchildren designated sums of money, created a trust for benefit of grantor's grandchildren and required daughter to pay only the amount named if realized out of property conveyed.—*Sutherland v. Piernor*, supra.

**Part of consideration for conveyance**

Where part of consideration for conveyance of land is payment of certain sums to designated third persons, express trust, created in their favor, is impressed on the land.—

*Taylor v. Turner*, 173 S.E. 777, 114 W.Va. 707.

**Trust and not equitable charge created**

Where property is transferred to another with a direction to pay a third person a certain sum out of the property or its proceeds, or "subject to the payment from the property or its proceeds" or "paying from the property or its proceeds," such sums, a trust and not an equitable charge is created, since the transferor thereby manifests an intention to impose a duty on the transferee to deal with the property in part at least for the benefit of a third person.

*Iowa*—*Trustees of Iowa College v. Baillie*, 17 N.W.2d 143, 236 Iowa 235.

*Ohio*—*Chisholm v. Chisholm*, App., 94 N.E.2d 705.

14. *Ind.*—*Huff v. Earl*, 3 Ind. 306.

65 C.J. p 282 note 79.

15. *U.S.*—*Flagg v. Walker*, Ill., 5 S.Ct. 697, 113 U.S. 659, 23 L.Ed. 1072.

65 C.J. p 282 note 80.

**Widow and children**

That the whole title to community real estate was conveyed to codefendant, who represented corporation to which deceased was indebted, by an administrator's deed, did not negate that codefendant held the real estate under a trust for deceased's widow and children where, by a verbal agreement with codefendant, widow had retained equitable title in herself and children, which had the effect of separating equitable from legal title.—*Knigh v. Tannehill Bros.*, Tex.Civ.App., 140 S.W.2d 552, error dismissed, judgment correct.

16. *Neb.*—*Carter v. Gibson*, 45 N.W. 634, 29 Neb. 334, 26 Am.S.R. 381.

65 C.J. p 282 note 81.

17. *Ga.*—*Eaton v. Barnes*, 49 S.E. 593, 121 Ga. 548.

*Miss.*—*Anding v. Davis*, 38 Miss. 574, 77 Am.D. 558.

18. *U.S.*—*Gisbourn v. Charter Oak L. Ins. Co.*, Utah, 12 S.Ct. 277, 142 U.S. 336, 35 L.Ed. 1029.

*Cal.*—*Adams v. Lambert*, 23 P. 150, 30 Cal. 424.



the grantee or transferee from earnings or the proceeds of sale, and divide the balance of such proceeds between the parties to the conveyance or transfer.<sup>19</sup>

There is authority for the view that no trust is created where the agreement of the grantee or transferee to perform certain acts for the benefit of the grantor or another is merely the consideration for the conveyance or transfer,<sup>20</sup> as, for example, where there is an agreement of the grantee of real property to support the grantor,<sup>21</sup> or where the promise of the grantee or transferee to pay a certain sum of money to a third person constitutes part or all of the consideration for an absolute conveyance or transfer.<sup>22</sup> So a trust does not arise where it is clearly the intention of the parties that a conveyance shall pass all the interest of the grantor, whether legal or equitable, notwithstanding certain agreements or promises by the grantee.<sup>23</sup>

In any event it is essential that there should be an agreement<sup>24</sup> instead of a mere voluntary unexecuted promise or declaration,<sup>25</sup> and that the agreement should be clear and unequivocal in its terms,<sup>26</sup> setting out the terms of the trust with sufficient certainty to render it enforceable.<sup>27</sup> A mere promise to obtain money and thereupon hold it in trust does not create a trust until it is at least so far executed that the money has been obtained in accordance with the promise,<sup>28</sup> but there is au-

thority for the view that where there is a promise, based on a consideration, to pay out of a particular fund, the promisor is a trustee as soon as he obtains title to the fund.<sup>29</sup>

**Conditions precedent.** Where the agreement contains a condition to be performed by the beneficiary, he may enforce the trust on performing the condition,<sup>30</sup> but only in that event.<sup>31</sup> An agreement by one person to compensate another for such other's services by paying such other out of a fund to be acquired,<sup>32</sup> or by giving such other an interest in property to be obtained in the future,<sup>33</sup> according to some cases, creates an express trust enforceable on performance of the services and the acquisition of the fund or property; and a like rule has been recognized where compensation for the use of a person's property is to be made out of fund to be acquired.<sup>34</sup> An agreement by the grantee of land that the grantor is to control the property, and that the grantee will join him in any deed, does not create a trust, where no deed is directed by the grantor.<sup>35</sup>

**Person entitled to claim as beneficiary.** No trust arises from an agreement, in behalf of one who does not show himself to be connected in any way with the agreement or alleged trust.<sup>36</sup>

**Transactions not constituting trusts.** A trust of the class here considered cannot be established by a transaction which merely creates an equitable

19. Ind.—Kintner v. Jones, 23 N.E. 701, 122 Ind. 148.

20. Iowa—Riddle v. Beattie, 41 N.W. 606, 77 Iowa 168.

21. Iowa—Riddle v. Beattie, supra. 65 C.J. p. 282 note 87.

22. Conn.—Hyland v. Crofery, 86 A. 755, 87 Conn. 49. 65 C.J. p. 282 note 88.

23. Kan.—McCullough v. McCullough, 200 P. 298, 109 Kan. 497.

24. Tex.—Jones v. Siler, 100 S.W.2d 352, 129 Tex. 18—Speights v. Deon, Civ.App., 182 S.W.2d 1016, error refused. 65 C.J. p. 282 note 90.

**Particular transactions held not to create trust**

(1) Under antenuptial agreement whereunder decedent merely named his children and, in contemplation of his marriage to defendant, agreed to make will bequeathing specified sum monthly to defendant, and defendant released all other claims against estate of decedent and agreed to execute instruments necessary to enable decedent to dispose of realty owned by decedent clear of defendant's interests in realty, no trust was created in favor of children of decedent and

defendant could accept by gift or devise any property of decedent free of claims of children of decedent.—Bartle v. Bartle, 216 P.2d 649, 121 Colo. 388.

(2) Fact that defendant who was plaintiff's brother to whom their mother had conveyed her property had stated in questionnaire relating to military draft that he had invalid brother whom he had taken care of for years past, and that his mother could not live in same house with brother unless defendant was there to take charge of situation did not create express trust for plaintiff, nor was such result achieved by accompanying affidavits of mother that she had transferred her property to defendant so that he might handle all of her affairs and take care of brother.—Hough v. Foster, 254 P.2d 364, 208 Okl. 226.

25. Iowa—Acker v. Priest, 61 N.W. 235, 92 Iowa 610. 65 C.J. p. 282 note 91.

26. Me.—Lane v. Lane, 16 A. 323, 80 Me. 570. 65 C.J. p. 282 note 92.

27. Tex.—Roth v. Schroeter, Civ. App., 129 S.W. 203. 65 C.J. p. 283 note 93.

28. Cal.—Molera v. Cooper, 160 P. 231, 173 Cal. 259.

29. U.S.—In re Interborough Consol. Corporation, C.C.A.N.Y., 248 F. 334, 32 A.J.R. 952, certiorari denied Porges v. Sheffield, 43 S.Ct. 700, 262 U.S. 752, 67 L.Ed. 1215. 65 C.J. p. 283 note 95.

30. N.C.—Owens v. Williams, 41 S.E. 93, 130 N.C. 165. 65 C.J. p. 285 note 12.

31. Cal.—Prefumo v. Russell, 101 P. 21, 10 Cal.App. 113. 65 C.J. p. 285 note 13.

32. U.S.—McKee v. Latrobe, App. D.C., 16 S.Ct. 15, 159 U.S. 327, 40 L.Ed. 169. 65 C.J. p. 285 note 14.

33. Cal.—Lauco v. De Toro, 27 P. 1082, 91 Cal. 405. 65 C.J. p. 285 note 15.

34. U.S.—Hagenbeck v. Hagenbeck Zoological Arena Co., C.C.Ill., 59 F. 14.

35. Ky.—Johnson v. Wikstrom, 47 S.W.2d 61, 242 Ky. 636.

36. Colo.—Eberville v. Leadville Tunneling, etc., Co., 64 P. 200, 28 Colo. 241. N.Y.—Morgan v. Regensberger, 2 N.Y.City Ct. 430.

lien,<sup>37</sup> mortgage,<sup>38</sup> or other security;<sup>39</sup> an executory contract to sell or convey<sup>40</sup> or reconvey;<sup>41</sup> or an option to purchase.<sup>42</sup> So a trust is not created by an agreement which merely creates a condition subsequent,<sup>43</sup> or by an agreement that if the promisor should obtain certain property in a specified manner he will discharge a debt due him from the promisee.<sup>44</sup> It has also been held that no trust is created where a debtor conveys real property to his creditor on the consideration that the property is to be sold, the proceeds applied first to the debt, and the remainder paid to the debtor.<sup>45</sup>

### b. Agreement to Purchase or Acquire Property for Another and Joint Acquisition

An express trust may be created by an agreement to purchase or acquire title to land for the benefit of another.

In some jurisdictions at least, an enforceable express trust may be created by an agreement thereafter to purchase or acquire title to land for the benefit of another who agrees to,<sup>46</sup> and does,<sup>47</sup> pay

the consideration. The existence of an agreement to purchase for another on the part of the person who acquires the property is an essential of a trust,<sup>48</sup> and, according to some cases, the agreement must exist when the grantee acquires title in the case of a conveyance by deed without reservation of a lien for the purchase price, even though payment is subsequently made out of funds of another;<sup>49</sup> but an enforceable trust may be created by an agreement between the grantee under a deed retaining a vendor's lien to secure payment of notes given for the purchase price, and another that if such other will pay the notes the land shall belong to such other, where the agreement is duly performed by such other.<sup>50</sup> A promise to buy land and convey it to another, who has no interest in the land and who does not furnish any part of purchase money, does not create a trust.<sup>51</sup>

**Joint acquisition.** While there is authority for the view that a contract providing that one party shall obtain title to certain land and then convey a

27. S.C.—Menude v. Delaire, 2 S.C. Eq 564.

Transactions creating or intended to create other relations generally see infra § 55.

#### Equitable charge and not trust

Ordinarily, where property is transferred to another "subject to the payment of" a certain sum to a third person, or "paying" such a sum, an equitable charge and not a trust is created, since the transferee does not thereby manifest an intention to impose a duty on the transferee to deal with the property for the benefit of a third person.

Iowa.—Dunnell v. Bowers, 28 N.W.2d 618, 238 Iowa 702—Trustees of Iowa College v. Dailie, 17 N.W.2d 143, 256 Iowa 235.

Ohio.—Chisholm v. Chisholm, App. 9 NE 2d 705

38. Mass.—Poire v. Dorr, 8 Pick 238.

65 C.J. p 285 note 20.

39. N.J.—Wallace v. Wallace, 75 A. 770.

40. Cal.—Grotefend v. May, 165 P. 27, 33 Cal App. 321.

65 C.J. p 285 note 22.

#### Contract to convey not trust

(1) A contract to convey property is not a trust, whether or not contract is specifically enforceable.—Huebener v. Chinn, 207 P.2d 1185, 186 Or 508.

(2) If contract to convey property is specifically enforceable, purchaser acquires equitable interest in property, but relationship between vendor and purchaser is not a trust but is more analogous to a mortgage.—Huebener v. Chinn, supra.

41. Tex.—Roach v. Grant, 130 S.W. 2d 1019, 134 Tex 10—Griffith v. Baker, 107 S.W.2d 371, 130 Tex 17—Wheeler v. Haralson, 99 S.W. 2d 885, 128 Tex. 429.

42. U.S.—Carter Coal Co. v. Litz, D. C. Va., 54 F.Supp. 115, affirmed, C.C. A. 140 F.2d 934.

Tex.—Michael v. Busby, 162 S.W.2d 662, 130 Tex. 278.

65 C.J. p 285 note 23.

#### Mortgagor

The granting to mortgagor of an oral option to repurchase premises involved did not charge the purchaser of such premises at mortgage foreclosure sale as trustee or impress a trust on the purchaser's title.—Gunter v. Gunter, 55 S.E.2d 81, 230 N.C. 662.

43. U.S.—McNaught v. Hoffman, C.C. A. Mont., 274 F. 918.

65 C.J. p 285 note 21.

44. Pa.—Chadwick v. Phelps, 45 Pa. 105

45. Pa.—Harrison v. Ward, 46 Pa. Super 537.

46. N.C.—Hare v. Well, 196 S.E. 869, 213 N.C. 484.

65 C.J. p 283 note 97.

Constructive trust as arising from parol agreement as to land to be purchased see infra § 150.

Necessity of written agreement to purchase or acquire land for benefit of another see supra § 34.

Resulting trust as arising from payment of consideration for title in another see infra §§ 115-130.

#### Contract with mortgagor

Where one contracts orally with a mortgagor for a valuable consideration to buy in land at a sale and

to hold the title for the mortgagor, an express trust is created.—American Nat. Ins. Co. v. Warnock, Tex. Civ.App., 143 S.W.2d 624, error dismissed, judgment correct.

47. N.C.—Crech v. Crech, 24 S.E. 2d 612, 222 N.C. 656.

Tex.—La Force v. Bracken, Civ.App., 163 S.W.2d 239, affirmed 169 S.W. 2d 465, 111 Tex. 18—Glenn v. McCarty, Civ.App., 130 S.W.2d 295, affirmed 155 S.W.2d 912, 137 Tex. 608.

65 C.J. p 283 note 98.

48. Mont.—Largy v. Leggat, 75 P. 950, 30 Mont 118.

65 C.J. p 283 note 99.

#### Agent's compliance with instruction

Where property is purchased with the funds of another who pays the purchase price on the express condition that the purchase shall be for the mayor's benefit and that title shall be taken and held in the name of the agent making the purchase, who himself carries out the instruction, agent's act in compliance with the instruction will imply assent and agreement thereto and will supply a want of direct or express promise to hold the property in trust.—Crech v. Crech, 24 S.E.2d 612, 222 N.C. 656.

49. Tex.—Allen v. Allen, 107 S.W. 528, 101 Tex. 362.

65 C.J. p 283 note 1.

50. Tex.—Johnson v. Smith, 280 S. W. 158, 115 Tex. 193—Walkup v. Stone, Civ.App., 73 S.W.2d 912, error dismissed.

51. Tex.—Lobban v. Wierhauser, Civ.App., 141 S.W.2d 364, error refused.

65 C.J. p 283 note 2.

part of such land to the other party does not necessarily create an express trust,<sup>52</sup> it has been held that an express trust may be created by an agreement between or among persons jointly purchasing or acquiring title to land or other property that title shall be taken in the name of less than all for the benefit of all.<sup>53</sup> In any event it is essential that there should be an agreement, on the part of the person who acquires title, to purchase for the joint benefit of himself and another,<sup>54</sup> and that there should be a consideration to support the agreement where the person claiming as beneficiary has no interest in the property involved.<sup>55</sup> A trust is not created, however, by an agreement under which certain parties thereto have an option to acquire an equitable interest in real estate purchased by one of them, by payments to extinguish indebtedness for the purchase price.<sup>56</sup>

While there is authority for the view that, where the purchase is not joint but is made by the person who takes title and who agrees to allow another person a share in the profits on a resale, the pur-

chaser does not hold title to part of the property as trustee for such other party,<sup>57</sup> according to some decisions a provision for resale of the land purchased by the party who takes legal title and for sharing in profits does not necessarily prevent the existence of a trust,<sup>58</sup> and a trust may exist in respect of the land purchased where, under the contract, the property is in fact purchased by both parties, notwithstanding title is taken by one and provision is made for sharing in the profits of a resale.<sup>59</sup>

## § 52. Trust Arising from Nature and Terms of Transaction without Explicit Declaration

A trust may arise from the nature and terms of the transaction without an explicit declaration of trust.

Under the rule that the declaration of trust need not be explicit and that the nature and terms of the transaction may give rise to an express trust, discussed supra § 43, trusts have been recognized or upheld under varying circumstances.<sup>60</sup>

52. Cal.—Grotefend v. May, 185 P. 27, 33 Cal App 321 65 C.J. p 283 note 4

53. Tex.—Cluck v. Sheets, Civ App, 171 S.W.2d 857, affirmed 171 S.W. 2d 860, 141 Tex. 210. 65 C.J. p 283 note 5.

Resulting trust arising from joint purchase of property see infra §§ 108, 122.

### Money used

Under agreement that defendant was to pay half of purchase price and own half interest in land, whether plaintiff's husband had used identical money which defendant had entrusted to plaintiff's husband with which to pay for the land was immaterial in determining whether a trust was established.—Cluck v. Sheets, supra.

### Time of payment

Rule that no trust results from payment of money to purchaser of property as contribution to purchase price unless money is paid prior to or concurrently with acquisition of the property does not apply to express trusts.—Cluck v. Sheets, supra.

54. Va.—Mansie v. Parrish, 125 S.E. 691, 140 Va. 717. 65 C.J. p 284 note 6.

55. Tex.—Watkins v. Watkins, Civ. App., 141 S.W. 1047.

56. Ind.—Aylesworth v. Aylesworth, 109 N.E. 750, 181 Ind. 80. 65 C.J. p 284 note 8.

57. Ill.—MacDonald v. Dexter, 85 N.E. 209, 234 Ill. 517. 65 C.J. p 284 note 9.

58. W.Va.—Bennett v. Bennett, 115 S.E. 436, 92 W.Va. 391 65 C.J. p 284 note 10

59. Mass.—Bisbee v. Mackey, 102 N.E. 327, 215 Mass. 21 65 C.J. p 284 note 11

60. US.—In re Prudence Co., D.C.N.Y., 24 F.Supp. 666—Corum v. U.S., 81 F.Supp. 728, 132 Ct.Cl. 479 Cal.—Whiting-Mead Co. v. West Coast Bond & Mortgage Co., 152 P.2d 620, 66 Cal App 2d 460—Rutledge v. Harritt, 23 P.2d 54, 132 Cal. App. 538

Ill.—Merchants Nat. Bank of Aurora v. Frazier, 67 N.E.2d 611, 329 Ill. App. 191—Schmitt v. Wright, 46 N.E.2d 184, 317 Ill.App. 384

Mich.—Isablock v. Fisk, 41 N.W.2d 479, 327 Mich. 72.

Pa.—In re Fitzgerald's Estate, 11 Pa.194d 628—Good v. Capital Bank & Trust Co., Com Pl., 47 Dauph Co. 414, affirmed 11 A.2d 489, 337 Pa. 463.

W.Va.—Charlton v. Chevrolet Motor Co., 174 S.E. 570, 115 W.Va. 25. 65 C.J. p 285 note 28.

### Particular transactions

(1) The proceeds of private settlement of stockholders' derivative action in state court against officers and directors of corporation, over and above the value of stock in corporation delivered by plaintiffs as part of settlement, constituted a trust fund for benefit of corporation and were held by plaintiffs and their attorney in trust for corporation.—Dabney v. Levy, D.C.N.Y., 93 F.Supp. 551, affirmed, C.A., 191 F.2d 201, certiorari denied Levy v. Dabney, 72 S.Ct. 177, 342 U.S. 887, 96 L.Ed. 665,

rehearing denied 72 S.Ct. 301, 342 U.S. 911, 96 L.Ed. 682.

(2) Where title to ranch property was quieted in favor of two heirs on their entering into agreement that property together with cattle thereon should be sold "at first good chance for the best price possible" and remainder of money divided according to deceased's will, agreement was a declaration of trust, and the heirs became cotrustees of an express trust.—Sadler v. Sadler, D.C.Nev., 73 F.Supp. 583, affirmed, C.C.A., 167 F.2d 1

(3) Where agent had mortgage executed and delivered to him with understanding that he would finance building owner to extent of paying balance due contractor for benefit of materialman, trust was created.—Shellings v. Builders' Supply Co., 152 So. 459, 228 Ala. 47, rehearing refused 155 So. 858, 229 Ala. 1.

(4) Where parties, as a condition precedent to consideration by court of husband's action for divorce, agreed that wife should have half of husband's property, and agreement provided that title to land should rest in respective parties with delivery of deeds by an escrow agent when divorce was decreed, husband became a trustee as to wife's rights under agreement.—Orr v. Orr, 177 S.W.2d 915, 206 Ark. 844.

(5) Where corporation established profit-sharing and pension plan and presented each eligible employee with a profit-sharing account book outlining trust and two deposits were made in a separate trust bank ac-

## § 53. Covenant to Stand Seized to Uses

A form of conveyance which has been employed to create a use or trust is a covenant to stand seized to uses.

A form of conveyance at one time employed to create a use or trust, but little used at the present time, is a covenant to stand seized to uses,<sup>61</sup> which has been defined as a conveyance by which a man seized of lands covenants, in consideration of blood or marriage, that he will stand seized of the lands to the use of his wife, child, or kinsman.<sup>62</sup> While it has been held that a deed of land to take effect at the grantor's death is good as a covenant to stand seized to the grantee's use notwithstanding the absence of any relationship of blood or marriage,<sup>63</sup> in accordance with the above definition it is usually held or recognized that the characteristic which differentiates this from other declarations of trust is the fact that the consideration necessary<sup>64</sup> and sufficient<sup>65</sup> to support it is that of blood or marriage. An instrument may operate as a covenant to stand seized to uses where the existence of a consideration of blood or marriage appears or may be inferred, although it is not expressly recited,<sup>66</sup> and notwithstanding a valuable consideration also exists.<sup>67</sup>

count and board of directors of corporation adopted trust instrument and officers of corporation conducted their operations in accordance with its provisions, by acts of corporation and trustees an express trust was created for benefit of participants and no particular formality was necessary.—*Humpal v. Hedstrom*, 94 N.E.2d 614, 341 Ill.App. 606.

(6) Where separation agreement incorporated into divorce decree provided that father would pay certain sums weekly for support of minor children, with respect to any benefits intended for such children, mother's position was that of trustee charged with duty both legal and moral to effect collection so as to make available to minor children benefits intended for them.—*Carson v. Carson*, 89 N.E.2d 555, 120 Ind.App. 1.

(7) Where owner of adjoining plantations sold one with exception of 2 acres and then, after having executed trust deed covering the other, conveyed it and the 2 acres, not covered by trust deed, to purchaser who assumed to pay indebtedness secured by trust deed, assumption under which purchaser took possession of land created trust in favor of beneficiary of trust deed as to the 2 acres.—*Federal Land Bank of New Orleans v. Boyd*, 171 So. 1, 177 Miss. 311.

(8) Under agreement giving surviving tenant in common sole right

to determine when and on what terms property should be sold and providing proportion of proceeds to which each tenant should be entitled, power of sale vested in survivor was a power in trust.—*In re Taylor's Will*, 122 N.Y.S.2d 500, 282 App.Div. 304.

(9) Where bank holding collateral securing deposit of county funds contracted that it would accept no collateral in substitution which it was not satisfied would at all times have a market value equal to amount of the deposit, the bank was a trustee.—*Knox County v. Fourth & First Nat Bank*, 182 S.W.2d 980, 181 Tenn. 569.

(10) Other particular transactions see 65 C.J. p 285 note 28 [a].

61. Ala.—*Holt v. Wilson*, 75 Ala. 58, 65 C.J. p 286 note 30.

Covenant to stand seized in general see Deeds § 76

62. N.Y.—*Corwin v. Corwin*, 9 Barb. 219, 224, reversed on other grounds 6 N.Y. 342, 57 Am.D. 453.

65 C.J. p 286 note 31.

63. Mass.—*Trafton v. Hawes*, 102 Mass. 533, 3 Am.R. 494.

64. N.H.—*Rollins v. Riley*, 44 N.H. 9, 65 C.J. p 286 note 33.

Consideration generally see supra § 28.

65. N.Y.—*Jackson v. Sebring*, 16 Johns. 515, 8 Am.D. 357.

65 C.J. p 286 note 34.

66. N.Y.—*Jackson v. Sebring*, supra.

65 C.J. p 286 note 35.

While there is authority for the view that an instrument may be given effect as a covenant to stand seized to the use of the grantor for life and after his death to the use of the grantee and his heirs,<sup>68</sup> it has been held that an instrument conveying the fee of land to the grantee charged with the usufruct for life in favor of the grantor is not a covenant to stand seized to uses.<sup>69</sup> It has also been held that, where the common-law prohibition against a man's contracting with his wife obtains, a covenant by him with her to stand seized for her use is inoperative in a court of law.<sup>70</sup>

## § 54. Deposit of Money in Bank or Other Financial Institution

- a. In general
- b. Account in several names
- c. Deposit in name of another
- d. Tentative trusts

## a. In General

A trust may be created in respect of moneys deposited in a bank, provided all the essentials of a trust are present.

It is usually recognized that a trust in respect of moneys deposited in bank may be created<sup>71</sup> by the

67. Mass.—*Drew v. Hardy*, 22 Pick. 376, 33 Am.D. 747, 65 C.J. p 286 note 36.

68. Conn.—*Harrett v. French*, 1 Conn. 351, 6 Am.D. 241.

69. S.C.—*Steele v. Smith*, 66 S.E. 200, 84 S.C. 464, 29 L.R.A.N.S. 939.

70. Ala.—*Tutwiler v. Munford*, 73 Ala. 308.

71. Ala.—*Vinston v. Winston*, 4 So. 2d 730, 242 Ala. 45.

Cal.—*Katz v. Greeninger*, 215 P.2d 121, 96 Cal.App.2d 245.

N.J.—*Mucha v. Jackson*, 182 A. 827, 119 N.J. Eq. 348.

Pa.—*Dickson v. Commonwealth Trust Co.*, Com Pl., 96 Pittsb.Leg.J. 279.

Tenn.—*Corpus Juris* quoted in *Derrick v. Lumpkins*, 95 S.W.2d 939, 941, 20 Tenn.App. 77.

65 C.J. p 287 note 41.

Bank as trustee of deposits in general see Banks and Banking §§ 274, 992.

Deposit of trust funds in bank in general see Banks and Banking § 276.

Gift of bank deposit see Gifts §§ 48-52, 99-102, 131-134.

Notice to, or knowledge of, beneficiary see infra § 62.

Trust character of deposits of funds of savings banks with other banks see Banks and Banking § 278.

At common law and by statute, a person can, by depositing his own

owner and depositor of the moneys<sup>72</sup> under an agreement with the bank<sup>73</sup> for the benefit of one other than the depositor,<sup>74</sup> and, in accordance with the rule that one may create a trust in his own personal property by constituting himself trustee, discussed supra § 50, the depositor may constitute himself a trustee in respect of the moneys deposited.<sup>75</sup> The declaration of trust may be made after the deposit is made.<sup>76</sup> It is necessary that the es-

sentials of a trust should be present in order to create an express trust.<sup>77</sup>

In respect of trusts created by the deposit of money in a bank by one person in trust for another, or savings bank trusts as they are sometimes called,<sup>78</sup> in the earlier cases, at least, there was some confusion, due in part to the development of the law,<sup>79</sup> and in part to the application of the law to varying states of facts.<sup>80</sup> The courts have engraf-

money in a bank and declaring his intent, create a trust in favor of another, even without the knowledge of that person, and although the depositor reserves the right to withdraw the money, if he so desires.—*Marine Midland Trust Co. of Binghamton v. Stanford*, 9 N.Y.S.2d 648, 256 App. Div. 26, appeal denied 11 N.Y.S.2d 647, 256 App. Div. 1026, affirmed 24 N.E.2d 20, 281 N.Y. 760.

72. *Mass.—Harrington v. Donlin*, 45 N.E.2d 953, 312 Mass. 577.  
Miss.—*Williams v. Bailey*, 165 So. 439, 174 Miss. 760.  
Tenn.—*Corpus Juris* quoted in *Derrick v. Lumpkins*, 95 S.W.2d 939, 941, 20 Tenn.App. 77.  
65 C.J. p. 287 note 42.

73. *U.S.—Helfrich's Estate v. C. I. R.*, C.C.A.7, 143 F.2d 43.  
Cal.—*Katz v. Greeninger*, 215 P.2d 121, 96 Cal.App.2d 245.

#### Existence of debtor and creditor relationship

(1) An agreement that bank and trust company should hold deposits in savings account in trust for depositor during his lifetime and at his death for his sister constitutes a trust, notwithstanding existence of debtor and creditor relationship between parties.—*Bank of America Nat. Trust & Sav. Ass'n v. Hazelbud*, 68 F.2d 385, 21 Cal.App.2d 109.

(2) A deposit of moneys in a bank corporate or governmental debtor, with instructions to pay maturing bond interest coupons of depositor, does not ordinarily create a trust for benefit of bondholders, but merely creates a debtor-creditor relation between bank and depositor, coupled with an agency on part of bank to make the prescribed payment, and fact that the moneys are deposited in a special account for the specified purpose does not change rule.—*Ehng Eisenbahnwerte Holding Aktiengesellschaft v. Banca Nazionale A. Romanelli*, 117 N.E.2d 346, 306 N.Y. 242.

(3) Agreements or transactions as creating a debtor and creditor relationship and not a trust generally see infra § 59.

#### Use of funds by bank

An alleged violation of statute prohibiting trustee from using property for his own profit will not defeat

otherwise complete right of sister under agreement that bank and trust company should hold deposits in savings account in trust for depositor during his lifetime and at his death for his sister.—*Bank of America Nat. Trust & Savings Ass'n v. Hazelbud*, 68 F.2d 385, 21 Cal.App.2d 109.

74. Cal.—*Katz v. Greeninger*, 215 P.2d 121, 96 Cal.App.2d 245.

Mo.—*Corpus Juris* cited in *In re Geel's Estate*, App., 143 S.W.2d 327, 331.

Tenn.—*Corpus Juris* quoted in *Derrick v. Lumpkins*, 95 S.W.2d 939, 941, 20 Tenn.App. 77.

Husband for wife  
Pa.—*Manstein v. Manstein*, 85 A.2d 150, 369 Pa. 252.

Father for child or children  
Miss.—*Williams v. Bailey*, 165 So. 439, 174 Miss. 760.

R.I.—*Pickering v. Higgins*, 38 A.2d 640, 70 R.I. 265, 157 A.L.R. 918.

Mother for daughters  
N.J.—*Trust Co. of New Jersey v. Farawell*, 11 A.2d 98, 127 N.J.Eq. 45.

#### Trust for coupon holders

Obligor, in order to meet interest on bonds, may so deposit money as to create trust for coupon holders.—*Sherry v. Union Gas Utilities*, 171 A. 188, 20 Del.Ch. 60.

75. Cal.—*Katz v. Greeninger*, 215 P.2d 121, 96 Cal.App.2d 245.

Mo.—*In re Geel's Estate*, App., 143 S.W.2d 327, 331.

Tenn.—*Corpus Juris* quoted in *Derrick v. Lumpkins*, 95 S.W.2d 939, 941, 20 Tenn.App. 77.

65 C.J. p. 287 note 45.

76. Del.—*Sherry v. Union Gas Utilities*, 171 A. 188, 20 Del.Ch. 60.

Me.—*Hallowell Saving Inst. v. Titcomb*, 51 A. 249, 96 Me. 62.

Tenn.—*Corpus Juris* quoted in *Derrick v. Lumpkins*, 95 S.W.2d 939, 941, 20 Tenn.App. 77.

77. Md.—*Mushaw v. Mushaw*, 39 A.2d 465, 183 Md. 511.

Pa.—*In re Krill's Estate*, 64 Pa. Dist. & Co. 155.—*In re Humphries' Estate*, 44 Pa. Dist. & Co. 452, 58 Mont.G. 211.

N.C.—*Wescott v. First Nat. Bank of Elizabeth City*, 40 S.E.2d 461, 227 N.C. 39.

Tenn.—*Corpus Juris* quoted in *Derrick v. Lumpkins*, 95 S.W.2d 939, 941, 20 Tenn.App. 77.

*rick v. Lumpkins*, 95 S.W.2d 939, 941, 20 Tenn.App. 77.

65 C.J. p. 287 note 47.

#### Certainty

Statement signed by depositor and attached to bank's ledger card that depositor wished to leave money in that bank in trust for named person was not sufficiently certain to create a complete trust inter vivos.—*Warner v. Burlington Federal Sav. & Loan Ass'n*, 49 A.2d 93, 114 Vt. 463, 168 A.L.R. 1265.

#### Delivery of book

A trust can be created in bank account moneys by handing the saving account book to the intended beneficiary and by using the proper words of manifestation of a trust.—*In re Alberts' Estate*, 106 P.2d 538, 38 Cal.App.2d 42.

#### Trust held not created as to particular deposits

(1) Where foreign government deposited with bank, in a special account, funds which were to be forwarded to a trustee charged with duties of applying the funds to payment of interest and maintenance of sinking fund and the government retained control over fund while in bank, there was no final appropriation of funds merely by deposit with bank, in absence of instructions from government.—*Ehng Eisenbahnwerte Holding Aktiengesellschaft v. Banca Nazionale A. Romanelli*, 117 N.E.2d 346, 306 N.Y. 242.

(2) Where partnership delivered certified check to bank with instructions to cash check and pay proceeds to first lumber company when company delivered to bank written statement of title insurance company certifying that company had marketable title to certain realty, and thereafter partnership instructed bank to hold money and not permit its withdrawal unless second lumber company should authorize its withdrawal, money was not the res of a trust.—*Moore Mill & Lumber Co. v. Curry County Bank*, 267 P.2d 202, 200 Or. 558.

78. N.Y.—*In re Totten*, 71 N.E. 748, 179 N.Y. 112, 70 L.R.A. 711, 1 Ann. Cas. 900.

79. N.Y.—*In re Totten*, supra.

80. Me.—*Bath Sav. Inst. v. Hathorn*,

ed some limitations on the general doctrine laid down in the early cases which recognized that trusts may be created by such a deposit.<sup>81</sup> Because of the common practice of persons to make deposits in this form, without any intention of creating a trust<sup>82</sup> or divesting themselves of beneficial ownership,<sup>83</sup> but for other reasons,<sup>84</sup> such as the evasion of restrictions on the amount of deposits,<sup>85</sup> there has developed in some jurisdictions the doctrine of so-called tentative trusts, considered in subdivision d of this section.

Primarily, the intention of the depositor controls in determining whether or not a trust has been created<sup>86</sup> and what are the terms of the trust.<sup>87</sup> No trust is created in the absence of such intention<sup>88</sup> or if the intention is not given effect.<sup>89</sup> Usually, in

deciding as to the existence of a trust,<sup>90</sup> including the intention of the depositor,<sup>91</sup> the surrounding facts and circumstances are considered in connection with the acts and declarations of the depositor,<sup>92</sup> and the question is determined as one of fact and not of law.<sup>93</sup>

The form of the account or deposit is not necessarily conclusive as to the existence of a trust,<sup>94</sup> including the intention of the depositor.<sup>95</sup> Thus, while a deposit of one's own money in his own name, with nothing in the form of the deposit to indicate that it is in trust for another, does not, without more, create a trust,<sup>96</sup> it is not necessary that the depositor should technically and precisely declare his purpose and intention to create a trust,<sup>97</sup> and the absence of the word "trust" or "trustee"

83 A. 836, 88 Me. 122, 51 Am SR 382, 32 L.R.A. 377.

81. N.Y.—In re Totten, 71 N.E. 748, 179 N.Y. 112, 70 L.R.A. 711, 1 Ann. Cas. 900.  
65 C.J. p 288 note 51.

82. N.J.—Eagle Building & Loan Ass'n v. Piducia, 37 A.2d 116, 135 N.J. Eq. 7, affirmed 40 A.2d 627, 136 N.J. Eq. 117.

83. N.Y.—Beaver v. Beaver, 22 N.E. 940, 117 N.Y. 421, 430, 15 Am SR 531, 6 L.R.A. 403.  
65 C.J. p 288 note 51.

84. N.Y.—In re Totten, 71 N.E. 748, 179 N.Y. 112, 70 L.R.A. 711, 1 Ann. Cas. 900.  
65 C.J. p 288 note 51.

**Purposes other than trust**  
Bank deposits may be made by one nominally as trustee for another but in reality for purposes other than on a trust.—Downey v. Duquesne City Bank, 22 A.2d 124, 146 Pa. Super. 289.

85. N.Y.—In re Totten, 71 N.E. 748, 179 N.Y. 112, 70 L.R.A. 711, 1 Ann. Cas. 900.  
65 C.J. p 288 note 51.

**Evasion of law**  
Where a deposit is made in trust to evade a law forbidding one from depositing more than a specific sum in his own name, the depositor is entitled thereto, as no real trust exists.—Brubrook v. Boston Five Cents Sav. Bank, 104 Mass. 228, 6 Am.R. 222.

N.Y.—Weber v. Weber, 9 Daly 211.

86. Conn.—Stamford Sav. Bank v. Everett, 42 A.2d 662, 132 Conn. 92.  
Del.—Sherry v. Union Gas Utilities, 171 A. 188, 20 Del. Ch. 60.

Pa.—In re Furjanick's Estate, 100 A.2d 85, 375 Pa. 484.—Downey v. Duquesne City Bank, 22 A.2d 124, 146 Pa. Super. 289.

Tenn.—Corpus Juris quoted in Derrick v. Lumpkins, 95 S.W.2d 939, 941, 20 Tenn. App. 77.

Tex.—Fleck v. Baldwin, 172 S.W.2d 975, 141 Tex. 340.

65 C.J. p 288 note 53.

#### At time of making deposit

Depositor's intention at time of making savings bank deposit is controlling question in determining whether trust was created by deposit.—Wilder v. Howard, 4 S.E.2d 199, 188 Ga. 426.

#### Fundamental question

Voluntary savings bank account trusts in their creation are like gifts, in that the fundamental question in each instance is whether the donor has by both act and intention completed the gift or trust.—Malley's Estate v. Malley, 34 A.2d 761, 69 Ill. 407.—Slepknow v. McSoley, 172 A. 328, 54 R.I. 210.

#### Intent and conduct

Whether owner of bank deposit declared trust of deposit for another depends on owner's intention and legal steps taken to effectuate it.—Marshall & Isley Bank v. Voigt, 252 N.W. 355, 214 Wis. 27.

87. N.Y.—Hemmerich v. Union Dime Sav. Inst., 98 N.E. 499, 205 N.Y. 366, Ann. Cas. 1913E 514.

Tenn.—Corpus Juris quoted in Derrick v. Lumpkins, 95 S.W.2d 939, 941, 20 Tenn. App. 77.

88. Conn.—Stamford Sav. Bank v. Everett, 42 A.2d 662, 132 Conn. 92.  
N.C.—Wescott v. First Nat. Bank of Elizabeth City, 40 S.E.2d 461, 227 N.C. 39.

Tenn.—Corpus Juris quoted in Derrick v. Lumpkins, 95 S.W.2d 939, 941, 20 Tenn. App. 77.  
65 C.J. p 288 note 55.

89. Tenn.—Corpus Juris quoted in Derrick v. Lumpkins, 95 S.W.2d 939, 941, 20 Tenn. App. 77.  
65 C.J. p 288 note 56.

90. Mass.—Kelley v. Snow, 70 N.E. 89, 185 Mass. 288.  
Tenn.—Corpus Juris quoted in Der-

rick v. Lumpkins, 95 S.W.2d 939, 941, 20 Tenn. App. 77.

**Statutory provision intended to protect bank in which a deposit was made in paying fund under certain circumstances was not pertinent in determining whether the deposit of the sum in a savings bank for benefit of another created a trust.**—Delaware Trust Co. v. Fitzmaurice, 31 A.2d 383, 27 Del. Ch. 101, modified on other grounds Crumlish v. Delaware Trust Co., 38 A.2d 463, 27 Del. Ch. 374.

91. Tenn.—Corpus Juris quoted in Derrick v. Lumpkins, 95 S.W.2d 939, 941, 20 Tenn. App. 77.  
65 C.J. p 288 note 58.

92. Del.—Sherry v. Union Gas Utilities, 171 A. 188, 20 Del. Ch. 60.  
Tenn.—Corpus Juris quoted in Derrick v. Lumpkins, 95 S.W.2d 939, 941, 20 Tenn. App. 77.  
65 C.J. p 288 note 60.

93. Mass.—Buteau v. Lavalley, 187 N.E. 628, 284 Mass. 276.

Tenn.—Corpus Juris quoted in Derrick v. Lumpkins, 95 S.W.2d 939, 941, 20 Tenn. App. 77.  
65 C.J. p 288 note 61.

94. R.I.—Blackstone Canal Nat. Bank v. Oast, 121 A. 223, 45 R.I. 218.

Tenn.—Corpus Juris quoted in Derrick v. Lumpkins, 95 S.W.2d 939, 941, 20 Tenn. App. 77.

95. Tenn.—Corpus Juris quoted in Derrick v. Lumpkins, 95 S.W.2d 939, 941, 20 Tenn. App. 77.  
65 C.J. p 288 note 63.

96. Tenn.—Corpus Juris quoted in Derrick v. Lumpkins, 95 S.W.2d 939, 942, 20 Tenn. App. 77.  
65 C.J. p 288 note 64.

97. Cal.—Drinkhouse v. German Savings & Loan Society, 118 P. 953, 17 Cal. App. 162.

Tenn.—Corpus Juris quoted in Derrick v. Lumpkins, 95 S.W.2d 939, 941, 20 Tenn. App. 77.

from the title of the account does not prevent a determination that a trust has been created where the essentials of a trust are present.<sup>98</sup>

On the other hand, while the fact that the deposit is in form in trust for one other than the depositor is some proof of intention<sup>99</sup> and entitled to consideration,<sup>1</sup> or raises a presumption of an intention to create a trust,<sup>2</sup> and may control in the absence of countervailing circumstances,<sup>3</sup> or when supported by other circumstances,<sup>4</sup> the fact that the depositor is designated as trustee<sup>5</sup> for another<sup>6</sup> is

not necessarily controlling or conclusive, and will not prevail where there is an absence of an intention to create a trust,<sup>7</sup> as shown by the declarations of the depositor<sup>8</sup> and the surrounding circumstances.<sup>9</sup>

Recognizing or applying the foregoing rules, it has frequently been held that making a particular deposit in the name of the depositor which on the face of the deposit or account is in trust for another creates a trust,<sup>10</sup> especially where the fact of such a deposit has been communicated to the beneficiary,<sup>11</sup> which may be complete or irrevocable.<sup>12</sup> There

98. Del.—*Corpus Juris* cited in *Delaware Trust Co. v. Fitzmaurice*, Ch., 31 A.2d 383, 390, 27 Del. Ch. 101.

N.Y.—*In re Ellis' Estate*, 34 N.Y.S. 2d 884, 178 Misc. 491, affirmed 36 N.Y.S.2d 187, 264 Ill.App. 846

Tenn.—*Corpus Juris* quoted in *Derrick v. Lumpkins*, 95 S.W.2d 939, 941, 20 Tenn.App. 77.

65 C.J. p. 288 note 67.

99. Cal.—*Koslosky v. Cis*, 160 P.2d 565, 70 Cal.App.2d 174.

Conn.—*Stamford Sav. Bank v. Everett*, 42 A.2d 662, 132 Conn. 92.

N.J.—*Eagles Building & Loan Ass'n v. Fiducia*, 37 A.2d 116, 133 N.J. Eq. 117, affirmed 40 A.2d 627, 136 N.J. Eq. 117.

1. Me.—*Bath Sav. Inst. v. Hathorn*, 33 A. 836, 88 Me. 122, 51 Am.S.R. 382, 32 L.R.A. 377.

N.Y.—*Macy v. Williams*, 31 N.Y.S. 620, 83 Hun 243, affirmed 39 N.E. 858, 144 N.Y. 701.

2. Me.—*Cazallis v. Ingraham*, 110 A. 359, 119 Me. 240.

65 C.J. p. 289 note 70.

#### Inference

When a savings account is opened by one person in trust for another, and no explanatory evidence of intent appears, the inference will be drawn that a trust is intended, although revocable at the will of the depositor.—*Delaware Trust Co. v. Fitzmaurice*, 31 A.2d 383, 27 Del.Ch. 101, modified on other grounds, *Crumlish v. Delaware Trust Co.*, 38 A.2d 463, 27 Del.Ch. 374.

3. Me.—*Cazallis v. Ingraham*, 110 A. 359, 119 Me. 240.

65 C.J. p. 289 note 71.

4. Md.—*McDevitt v. Sponseller*, 154 A. 110, 160 Md. 497.

N.Y.—*Decker v. Union Dime Sav. Inst.*, 44 N.Y.S. 521, 15 App.Div. 563.

5. Ind.—*Rowe v. Rand*, 12 N.E. 377, 111 Ind. 706.

65 C.J. p. 289 note 73.

6. U.S.—*Wasserman v. C. I. R.*, CC A., 139 F.2d 778

Conn.—*Stamford Sav. Bank v. Everett*, 42 A.2d 662, 132 Conn. 92.

Mass.—*Hogarth-Swann v. Steele*, 2 N.E.2d 446, 294 Mass. 396—Robert-

son v. Parker, 191 N.E. 645, 287 Mass. 351.

Mich.—*Royer v. Backus*, 276 N.W. 564, 282 Mich. 593

R.I.—*Malley's Estate v. Malley*, 34 A.2d 761, 69 R.I. 407—*Slepokow v. McSoley*, 172 A. 328, 54 R.I. 210.

65 C.J. p. 289 note 74.

7. Conn.—*Stamford Sav. Bank v. Everett*, 42 A.2d 662, 132 Conn. 92

Mass.—*Hogarth-Swann v. Steele*, 2 N.E.2d 446, 294 Mass. 396—*Murray v. O'Hara*, 195 N.E. 909, 291 Mass. 75.

R.I.—*Malley's Estate v. Malley*, 34 A.2d 761, 69 R.I. 407—*Slepokow v. McSoley*, 172 A. 328, 54 R.I. 210.

65 C.J. p. 289 note 76.

Failure to notify bank

Where bank deposit is made in depositor's name as trustee for another, and depositor could have notified bank that he had no interest except as trustee in deposit, and did not do so, trust was not created.—

*Mulloy v. Charlestown Five Cents Sav. Bank*, 188 N.E. 608, 285 Mass. 101.

8. N.Y.—*Haux v. Dry Dock Savings Inst.*, 37 N.Y.S. 917, 2 App.Div. 165, affirmed 49 N.E. 1097, 154 N.Y. 736.

9. Mich.—*Royer v. Backus*, 276 N.W. 564, 282 Mich. 593, motion denied 280 N.W. 756, 282 Mich. 701, certiorari denied 59 S.Ct. 147, 305 U.S. 614, 83 L.Ed. 416, rehearing denied 59 S.Ct. 248, 305 U.S. 674, 83 L.Ed. 437.

R.I.—*Malley's Estate v. Malley*, 34 A.2d 761, 69 R.I. 407.

65 C.J. p. 289 note 78.

Retention or reservation of control

(1) That depositor in bank account in his name as trustee for brothers intended to draw thereon, at least in part, to furnish support for one of brothers, did not establish that such brother or his estate had legal interest therein as long as depositor intended to retain full control.—*Stamford Sav. Bank v. Everett*, 42 A.2d 662, 132 Conn. 92

(2) A mere bank deposit made by a person in his own name as "trustee" or in his name and that of a faithful and obedient agent as "trustee," for a "Foundation" which has

no legal existence, over which deposit the depositor reserves complete control during his life, is insufficient to create a trust entitling the supposed beneficiary to the deposit as against the depositor's administrator.—*Castle v. Cross*, 32 Hawaii 197.

(3) The manner in which settlor, who as one of three trustees assumed actual management of trust, kept his personal books, wherein he made charges for expenditures on behalf of trust under trust instrument, or expenditures for beneficiary from his own funds, and withdrew money from savings account in which income from trust had been deposited, to reimburse himself, was not indicative of secondary trust of savings account, to which beneficiary would be entitled absolutely.—*Royer v. Backus*, 276 N.W. 564, 282 Mich. 593, motion denied 280 N.W. 756, 282 Mich. 701, certiorari denied 59 S.Ct. 147, 305 U.S. 614, 83 L.Ed. 416, rehearing denied 59 S.Ct. 248, 305 U.S. 674, 83 L.Ed. 437.

10. Mass.—*Buteau v. Lavalley*, 187 N.E. 628, 284 Mass. 276.

65 C.J. p. 289 note 79.

#### Deposit card

A deposit card stating that depositor held savings account in trust, to control and dispose of as he saw fit during his lifetime, and on his death to pay to named beneficiary the full amount then standing to credit of account, was sufficient to establish a valid trust for benefit of named beneficiary, who was entitled on depositor's death to possession of deposit book and to the deposit represented thereby.—*Cohen v. Newton Sav. Bank*, 67 N.E.2d 748, 320 Mass. 90, 168 A.L.R. 1321.

11. R.I.—*Slepokow v. McSoley*, 172 A. 328, 54 R.I. 210

Necessity of notifying beneficiary generally see *infra* § 62

12. Mass.—*Buteau v. Lavalley*, 187 N.E. 628, 284 Mass. 276.

N.J.—*Mucha v. Jackson*, 182 A. 827, 119 N.J. Eq. 348.

65 C.J. p. 290 note 80.

Revocation of bank deposit trusts in general see *infra* § 83.

is authority for the view that the mere deposit of money in a bank in trust for another is equivocal and ambiguous,<sup>13</sup> and is not sufficient alone to create an enforceable trust,<sup>14</sup> that there must in addition be some unequivocal act or declaration showing an intention to create a trust,<sup>15</sup> and that, where a person deposits money in a bank in his own name in trust for another, who is neither a party nor privy to the transaction,<sup>16</sup> and retains full control

over such money,<sup>17</sup> a trust is not created, but merely an executory one which is not enforceable.<sup>18</sup>

*Retention of control and subsequent deposits or withdrawals.* While the fact that the depositor retains possession of the bankbook may, under certain circumstances, show an absence of intention to create a trust,<sup>19</sup> retention of the book<sup>20</sup> or the certificate of deposit,<sup>21</sup> his making subsequent deposits in the account,<sup>22</sup> his retention of the power of with-

#### Completion by act and intention

Where it is shown that the donor of a savings bank account has at a certain time completed the trust by both act and intention, the trust is irrevocably constituted.—*Malley's Estate v. Malley*, 34 A.2d 761, 69 R.I. 407.

#### Return of bankbook

Where wife, after depositing earnings of herself, husband, and son in her name, had new bankbook issued to herself as trustee for son, and handed book to son, fully executed trust inter vivos of entire account was created, even though son returned book so wife could obtain interest.—*Scanzo v. Morano*, 187 N.E. 552, 284 Mass. 188.

13. *Tex.—Fleck v. Baldwin*, 172 S.W.2d 975, 141 Tex. 340.

#### Words synonymous

The words "equivocal" and "ambiguous" are synonymous and as used in proposition that deposit of money in a bank under a trust title is considered equivocal or ambiguous and does not result in creation of a trust, both connote that such transactions have two or more equally applicable significations.—*Fleck v. Baldwin*, *supra*.

14. *N.J.—Bendix v. Hudson County Nat. Bank*, 59 A.2d 253, 142 N.J. Eq. 487.—*Abuzzese v. Oestrich*, 47 A.2d 883, 138 N.J. Eq. 33.—*Passaic Nat. Bank & Trust Co. v. Taub*, 45 A.2d 679, 137 N.J. Eq. 544.—*Eagles Building & Loan Ass'n v. Fiducia*, 37 A.2d 116, 135 N.J. Eq. 117.—*Hickey v. Kahl*, 19 A.2d 33, 129 N.J. Eq. 233.—*Thatcher v. Trenton Trust Co., Mercer Branch*, 182 A. 912, 119 N.J. Eq. 408.—*Travers v. Reid*, 182 A. 908, 119 N.J. Eq. 416.—*Mucha v. Jackson*, 182 A. 827, 119 N.J. Eq. 848.

*Tex.—Fleck v. Baldwin*, 172 S.W.2d 975, 141 Tex. 340.  
65 C.J. p 290 note 82.

*Other circumstances are looked to, such as what the depositor said, whether he used fund on deposit, as if it were his own, whether beneficiary was sui juris, and why an outright gift was not made.*—*Abuzzese v. Oestrich*, 47 A.2d 883, 138 N.J. Eq. 33.—*Eagles Bldg. & Loan Ass'n v. Fiducia*, 37 A.2d 116, 135 N.J. Eq.

7, affirmed 40 A.2d 627, 136 N.J. Eq. 117.

*Signature card showing that account was held by mother in trust for daughters was not of itself sufficient to constitute trust declaration but was a factor to be considered with other circumstances in determining whether a presently effective trust was established in favor of the daughters.*—*Trust Co. of New Jersey v. Farawell*, 11 A.2d 98, 127 N.J. Eq. 45.

15. *N.J.—Bendix v. Hudson County Nat. Bank*, 59 A.2d 253, 142 N.J. Eq. 487.—*Passaic Nat. Bank & Trust Co. v. Taub*, 45 A.2d 679, 137 N.J. Eq. 544.—*Thatcher v. Trenton Trust Co., Mercer Branch*, 182 A. 912, 119 N.J. Eq. 408.—*Travers v. Reid*, 182 A. 908, 119 N.J. Eq. 416.  
*Tex.—Fleck v. Baldwin*, 172 S.W.2d 975, 141 Tex. 340.  
65 C.J. p 290 note 83.

#### Transfer of passbook

Wife's opening of savings account in trust for husband, followed by transfer of passbook, created valid "dry" trust enforceable by husband.—*Long Branch Banking Co. v. Winter*, 163 A. 903, 112 N.J. Eq. 218.

16. *N.H.—Bartlett v. Remington*, 59 N.H. 364.  
65 C.J. p 290 note 84.

17. *N.H.—Packard v. Foster*, 56 A. 2d 925, 95 N.H. 47.  
*Tex.—Fleck v. Baldwin*, 172 S.W.2d 975, 141 Tex. 340.  
65 C.J. p 290 note 84.

#### Immediate interest

If depositor who opened up savings account in bank in his own name in trust for woman with whom he was living, intended woman to take balance of the credit in event of her survival without any immediate interest in deposit, there was not a valid trust inter vivos.—*Bendix v. Hudson County Nat. Bank*, 59 A.2d 253, 142 N.J. Eq. 487.

#### Ownership or dominion

Where testator opened a savings account with a mutual savings bank and deposited a specific sum in his name as trustee for charity fund of a named village in foreign country, and no withdrawals from or additions to account were made, except accumulation of interest, and testator

at all times retained control over account and did not strip himself of ownership or dominion over subject matter, no valid trust was established and sum on deposit was payable to executors of testator's estate as though account had been opened in name of testator alone.—*Howard Sav. Inst. v. Baronych*, 73 A.2d 853, 8 N.J. Super. 599.

#### Withdrawals

(1) Where mother opened savings accounts as trustee for daughters and withdrew moneys from the accounts for her own purposes, there was no trust created for their benefit.—*Abuzzese v. Oestrich*, 47 A.2d 883, 138 N.J. Eq. 33.

(2) The style of savings accounts in names of depositor and wife as trustees for minor children and trustees' testimony that accounts were opened for children's benefit were insufficient to show a valid trust in either account as against depositor's subsequent judgment creditor, where evidence as to source of original deposits and number, time and source and amount of later deposits were vague or entirely lacking and depositor had made withdrawals from both accounts for his personal use.—*Passaic Nat. Bank & Trust Co. v. Taub*, 45 A.2d 679, 137 N.J. Eq. 544.

18. *N.H.—Bartlett v. Remington*, 59 N.H. 364.  
"Executory trust" defined see *supra* § 16.

19. *Ga.—Corpus Juris* quoted in *Wilder v. Howard*, 4 S.E.2d 199, 202, 188 Ga. 426.  
65 C.J. p 290 note 92.

20. *Cal.—Sherman v. Ilbernia Savings & Loan Soc.*, 20 P.2d 138, 129 Cal. App. Supp. 795.

*Ga.—Corpus Juris* quoted in *Wilder v. Howard*, 4 S.E.2d 199, 202, 188 Ga. 426.  
65 C.J. p 290 note 93.

21. *Ga.—Corpus Juris* quoted in *Wilder v. Howard*, 4 S.E.2d 199, 202, 188 Ga. 426.

*Mo.—Harris Banking Co. v. Miller*, 89 N.W. 629, 190 Mo. 640, 1 L.R.A. N.S., 790.

22. *Ga.—Corpus Juris* quoted in *Wilder v. Howard*, 4 S.E.2d 199, 202, 188 Ga. 426.  
65 C.J. p 290 note 95.



drawal,<sup>23</sup> or his subsequent withdrawals of deposits<sup>24</sup> or interest,<sup>25</sup> do not necessarily prevent the existence of a trust or destroy a trust duly executed; such retention of the passbook,<sup>26</sup> subsequent deposits,<sup>27</sup> or withdrawals of deposits<sup>28</sup> or interest<sup>29</sup> may be consistent with the existence of a trust.

*Transfer of beneficial or equitable interest.* While there are statements to the effect that it is not necessary that the entire beneficial interest in the fund must immediately and irrevocably be vested in the beneficiary in order to create a valid trust,<sup>30</sup> in respect of an executed or complete trust, the creator, while retaining title in himself<sup>31</sup> or transferring it to a third person,<sup>32</sup> transfers the equitable or beneficial title to the cestui que trust;<sup>33</sup> and the view

has been taken that, in order to create a voluntary, enforceable, executed, or complete trust, it is necessary that there should be a transfer or gift of the equitable or beneficial title.<sup>34</sup>

### b. Account in Several Names

A trust may be created by a bank deposit in the form of a joint account or an account in several names.

In some jurisdictions at least, the fact that a bank account is in form a joint account or an account in several names does not necessarily prevent the existence of a trust in respect thereof.<sup>35</sup> The question as to whether a trust has been created is primarily one of intention<sup>36</sup> and, in the absence of an intention on the part of the depositor to create a trust, no trust arises.<sup>37</sup> In order to create an

23. Cal.—*Sherman v. Hibernia Savings & Loan Soc.*, 20 P.2d 138, 129 Cal.App., Supp., 795.

Ga.—*Corpus Juris* quoted in *Wilder v. Howard*, 4 S.E.2d 199, 202, 188 Ga. 426.

Mo.—*Corpus Juris* cited in *In re Geol's Estate*, App., 143 S.W.2d 327, 331.

N.Y.—*Marine Midland Trust Co. of Binghamton v. Stanford*, 9 N.Y.S.2d 648, 256 App.Div. 26, appeal denied 11 N.Y.S.2d 547, 256 App.Div. 1026, affirmed 24 N.E.2d 20, 281 N.Y. 760.

65 C.J. p 290 note 96.

**Right to dip into principal or corpus**  
Fact that settlor of self-declared trust in bank deposits reserved right to dip into principal or corpus for her own support and reserved absolute discretion in exercise of that right was not such reservation of dominion and control over trust property by settlor as to invalidate self-declared trust—*Smith v. Deshaw*, 78 A.2d 479, 116 Vt. 441.

24. Ga.—*Corpus Juris* quoted in *Wilder v. Howard*, 4 S.E.2d 199, 202, 188 Ga. 426.  
65 C.J. p 291 note 97.

25. Ga.—*Corpus Juris* quoted in *Wilder v. Howard*, 4 S.E.2d 199, 202, 188 Ga. 426.  
65 C.J. p 291 note 98.

26. Ga.—*Corpus Juris* quoted in *Wilder v. Howard*, 4 S.E.2d 199, 202, 188 Ga. 426.  
65 C.J. p 291 note 99.

27. Ga.—*Corpus Juris* quoted in *Wilder v. Howard*, 4 S.E.2d 199, 202, 188 Ga. 426.  
65 C.J. p 291 note 1.

28. Ga.—*Corpus Juris* quoted in *Wilder v. Howard*, 4 S.E.2d 199, 202, 188 Ga. 426.  
65 C.J. p 291 note 2.

29. Ga.—*Corpus Juris* quoted in *Wilder v. Howard*, 4 S.E.2d 199, 202, 188 Ga. 426.  
65 C.J. p 291 note 3.

30. Cal.—*Kuck v. Raftery*, 4 P.2d 552, 117 Cal.App. 755.

31. Me.—*Cazallis v. Ingraham*, 110 A. 359, 119 Me. 240.

32. Me.—*Cazallis v. Ingraham*, supra.

33. Me.—*Cazallis v. Ingraham*, supra.

65 C.J. p 290 note 90.

34. U.S.—*Eschen v. Steers, C.C.A. Mo.*, 10 F.2d 739.

65 C.J. p 290 note 91.

**Letter from soldier overseas** directing deposit of money so that he alone could withdraw it and expressing desire that in event of his death grandfather should be the beneficiary without, however, transferring any present beneficial interest in money deposited, did not create a trust in favor of grandfather enforceable in equity.—*Wescott v. First & Citizens Nat. Bank of Elizabeth City*, 40 S.E.2d 461, 227 N.C. 39.

35. Cal.—*American Bible Soc. v. Mortgage Guarantee Co.*, 17 P.2d 105, 217 Cal. 9.

36. Md.—*Miholland v. Whalen*, 43 A. 43, 89 Md. 212.  
N.M.—*Menger v. Otero County State Bank*, 98 P.2d 834, 44 N.M. 82.

N.Y.—*In re Haseltine's Will*, 113 N.Y.S.2d 752, 280 App.Div. 857.  
Ohio.—*Steiner v. Feezy*, 50 N.E.2d 617, 72 Ohio App. 18.

65 C.J. p 291 note 5.  
Ownership of joint deposits in savings banks in general see *Banks and Banking* § 994.

### Particular accounts

(1) Where depositor placed fund from personal bank account in joint account with another, and at time issued a directive that joint account should be held in trust for benefit of persons named should they be in special need, and second person accepted trust, joint account created a valid trust when account was opened.—*Davenport v. Davenport Foundation*, 222 P.2d 11, 36 Cal.2d 67.

(2) A joint tenancy in a bank account may create a trust, dependent on the intention of the parties, which may be established by extrinsic evidence rebutting mere presumption of an absolute transfer of title by means of a written instrument like a deed.—*In re Kellogg*, 107 P.2d 964, 41 Cal. App.2d 833.

(3) Where a sister opens a saving fund in her name jointly with a brother under an express arrangement and understanding with the bank and the brother that the fund is to be used only to pay the brother's funeral expenses, a trust is created—*Department of Public Assistance v. Bubenko*, 69 Pa.Dist. & Co. 605.

38. N.J.—*Mitchell v. Mitchell*, 46 A. 2d 85, 137 N.J. Eq. 557.  
65 C.J. p 291 note 7.

### Intention of original owner

Whether a trust in law with respect to a bank deposit has been created effectually to vest fund in original owner or another as survivor depends entirely on actual intention of original owner of fund when he had entry in bankbook made vesting ownership in himself and another, with balance to the survivor—*Whittington v. Whittington, Md.*, 106 A.2d 72—*Rugai v. Kelly*, 24 A.2d 289, 180 Md. 324.

### Instrument directing transfer

Instrument directing bank to transfer money from account of one signer of instrument to joint account in his name and name of other signer, and declaring amount of joint account should be used solely for payment of certain notes or should be drawn only on joint signatures of persons who shared the account indicated that a trust was declared in such funds.—*In re Haseltine's Will*, 113 N.Y.S.2d 752, 280 App.Div. 857.

37. N.J.—*Mitchell v. Mitchell*, 46 A. 2d 85, 137 N.J. Eq. 557.  
65 C.J. p 291 note 7.

executed or complete trust, there must be a transfer or gift of the equitable or beneficial title.<sup>38</sup>

Although an account or deposit in the name of two persons, or the survivor of them, does not necessarily create a trust,<sup>39</sup> since an intent to create a trust must be established,<sup>40</sup> it has also been held or recognized that a depositor, by making such a deposit of his funds, may create a trust<sup>41</sup> for the

benefit of the other person named<sup>42</sup> in the balance of the deposit at the death of the depositor,<sup>43</sup> or for the joint benefit of the depositor and such other person.<sup>44</sup> It has been stated that as a general rule, there is a sufficient declaration of trust where the entry by the depositor is in trust for himself and another, joint owners, subject to the order of either, balance at death of either to belong to the survivor,<sup>45</sup> with the deposit as the corpus, the depositor as

#### Possession of bankbook

(1) The fact that bankbook was in possession of the one other than the original owner was not, of itself, sufficient to establish an intention of the original owner to vest the entire ownership of the balance of the fund in the other after the original owner's death.—*Ragan v. Kelly*, 24 A.2d 289, 180 Md. 324.

(2) Possession of a bankbook, in order to constitute the other the owner of the fund, must be with the full knowledge of the original owner of the fund.—*Ragan v. Kelly*, supra.

#### Treatment of fund as own

Where with donative intent member of armed forces made an allotment of portion of his pay in favor of his sister for sole purpose of her support and she opened bank account in her name and in name of brother but treated fund as her own, the fund was a gift and not trust and she was not required to surrender fund to administrator of brother's estate.—*Mitchell v. Mitchell*, 46 A.2d 85, 137 N.J. Eq. 557.

38. *Mc—Bath Sav. Inst. v. Fogg*, 63 A. 731, 101 Me. 188.  
65 C.J. p. 291 note 8.

39. *N.M.—Menger v. Otero County State Bank*, 98 P.2d 834, 44 N.M. 82.  
65 C.J. p. 291 note 9.

#### Particular transactions

(1) Where original depositor in bank changed nature of account to joint account with another payable to survivor and such other contributed nothing to fund on deposit, there was no trust title under which deposit could pass to such other on death of original depositor.—*Northcott v. Livingood*, La.App., 10 So.2d 401.

(2) Husband was held entitled to recover from wife money which she withdrew from bank accounts in both of their names, or for survivor, where agreement existed between husband and wife that deposit was his sole property and that arrangement was solely for wife's benefit in event of husband's death.—*Gibbons v. Gibbons*, 4 N.E.2d 1019, 296 Mass. 89.

(3) Where intestate deposited money with trust company and received mortgage trust certificates in name of himself or his son, and in names

of himself or his grandchildren, and subsequently directed that certificates be indorsed with name of himself or his wife, and company was obligated to pay fixed sum on certain date and to pay interest on such sum at fixed rate at stated intervals, company's obligation was that of debtor and not that of trustee, and hence irrevocable trust was not created in favor of son and grandchildren.—*E. P. Wilbur Trust Co. v. Knadler*, 185 A. 319, 322 Pa. 17.

40. *Pa.—E. P. Wilbur Trust Co. v. Knadler*, 185 A. 319, 322 Pa. 17.

#### Evidence of intention necessary

(1) If there be substantial evidence from which the intention of the parties may be ascertained and such intention is to set up a trust, action accomplishes that result.—*Menger v. Otero County State Bank*, 98 P.2d 834, 44 N.M. 82.

(2) Deposit by one of his money in account in names of himself and another is not of itself sufficient in absence of affirmative evidence to that effect to indicate intention on part of depositor to vest in added party a joint beneficial interest in fund with right of survivorship.—*E. P. Wilbur Trust Co. v. Knadler*, 185 A. 319, 322 Pa. 17.

41. *Cal.—American Bible Soc. v. Mortgage Guarantee Co.*, 17 P.2d 105, 217 Cal. 19.—*Randall v. Bank of America N. T. & S. A.*, 119 P.2d 754, 48 Cal.App.2d 249.

42. *Pa.—Fairfax v. Savings Bank of Baltimore*, 199 A. 872, 175 Md. 136, 116 A.L.R. 1334.  
65 C.J. p. 292 note 10.

"It makes no difference, in the absence of fraud, whose money it was when deposited, or how much either contributed to the trust or deposit."—*Kormann v. Safe Deposit & Trust Co. of Baltimore*, 23 A.2d 692, 694, 180 Md. 270.

#### Description as joint owners

Although the more usual form describes the beneficiaries as joint owners, and permits withdrawal by either party, this is not essential to the creation of a trust.—*Mushaw v. Mushaw*, 39 A.2d 465, 183 Md. 511.

#### Not revocable as tentative trust

A joint deposit of the proceeds from a mortgage loan on realty in which both husband and wife had in-

vested money and which was owned by them as tenants by the entirety, in trust for both husband and wife with a right of survivorship, was not revocable as a tentative trust created by one with a reserved power.—*Fairfax v. Savings Bank of Baltimore*, 199 A. 872, 175 Md. 136, 116 A.L.R. 1334.

#### Rights determined by terms

The rights of beneficiary of trust created by joint deposit were determined by terms of the deed of trust.—*Fairfax v. Savings Bank of Baltimore*, supra.

43. *Cal.—Randall v. Bank of America N. T. & S. A.*, 119 P.2d 754, 48 Cal.App.2d 249.  
65 C.J. p. 292 note 11.

44. *Cal.—Randall v. Bank of America N. T. & S. A.*, supra.  
65 C.J. p. 292 note 12.

45. *Cal.—Carr v. Carr*, 115 P. 261, 15 Cal.App. 480.  
65 C.J. p. 292 note 13.

46. *Md.—Whittington v. Whittington*, 106 A.2d 72.—*Ilancock v. Savings Bank of Baltimore*, 85 A.2d 770, 199 Md. 163.—*Bradford v. Eutaw Sav. Bank of Baltimore City*, 46 A.2d 284, 186 Md. 127.—*Ragan v. Kelly*, 24 A.2d 289, 180 Md. 324.—*Fairfax v. Savings Bank of Baltimore*, 199 A. 872, 175 Md. 136, 116 A.L.R. 1334.—*Bollack v. Bollack*, 182 A. 317, 169 Md. 407.—*McDevitt v. Spenseller*, 154 A. 140, 160 Md. 497.—*Peschka v. Peschka*, 148 A. 121, 158 Md. 69.

#### Motive behind deposit

The motive behind a bank deposit by one, in trust, until withdrawal thereof, for himself and another, joint owners, subject to withdrawal by either, the balance at death of either to belong to survivor, is that either of beneficiaries may have access to the fund at any time, that it shall not be subject to claims of any except their joint creditors, and that generally, in death of either, administration by orphans' court may be avoided.—*Kormann v. Safe Deposit & Trust Co. of Baltimore*, 23 A.2d 692, 180 Md. 270.

#### Power of withdrawal

The power to withdraw from a joint bank deposit, in trust for depositors as joint owners subject to the order of either with a right of

trustee, and the depositor and another as beneficiaries,<sup>46</sup> since unexplained it indicates an intention to create a trust.<sup>47</sup> In such cases, the balance at the death of either belongs to the survivor, not by a gift and delivery of the bankbook, or by right of survivorship of one of two joint owners, or by a gift of the funds *inter vivos*, but purely and exclusively because of the trust.<sup>48</sup> However, such an entry may be explained and the intention it indicates may be rebutted.<sup>49</sup> While the depositor's retention of the passbook may indicate the want of intention to create a trust,<sup>50</sup> the fact that the depositor retains the passbook<sup>51</sup> or retains the right to withdraw all or any portion of the deposit,<sup>52</sup> does not prevent the existence of a trust since the retention of the passbook may be an act pursuant to a proper execution of the trust.<sup>53</sup>

Where an owner with a single account in a bank signs an order in a proper form for the transfer of the account into a trust account for the owner and another, such an order is sufficient to authorize the bank to transfer the account to a trust form, notwithstanding the fact that the order does not state the amount of the account or the account num-

ber.<sup>54</sup> Where the account is made a joint account merely for the convenience and benefit of the depositor,<sup>55</sup> and the depositor delivers the book to the other person designated, in order to effectuate the purpose for which the account is created,<sup>56</sup> it has been held that the person so designated holds whatever title he acquires in trust for the depositor.

### c. Deposit in Name of Another

An express trust may arise in favor of the depositor or a third person, where a deposit is made in the name of one other than the depositor for the benefit of the depositor or such third person.

It has been recognized that an express trust may arise in favor of the depositor or owner of money<sup>57</sup> or a third person,<sup>58</sup> where a deposit is made in the name of one other than the depositor or owner for the benefit of the depositor or owner or such third person. However, while the fact that a deposit in the name of one other than the depositor, subject to the control of the depositor, may constitute a trust for the benefit of such other,<sup>59</sup> and the declaration of trust may be made after the deposit is made,<sup>60</sup> a deposit in the name of a person

survivorship, is not joint, but exists completely in each beneficiary as a reserved personal right.—Kornmann v. Safe Deposit & Trust Co. of Baltimore, supra—Fairfax v. Savings Bank of Baltimore, 199 A. 872, 175 Md. 136, 116 A.L.R. 1334.

46. Md.—Fairfax v. Savings Bank of Baltimore, supra.

47. Md.—Whittington v. Whittington, 106 A.2d 72—Hancock v. Savings Bank of Baltimore, 85 A.2d 770, 199 Md. 163—Ragan v. Kelly, 24 A.2d 289, 180 Md. 321—Bollack v. Bollack, 182 A. 317, 169 Md. 407—McDevitt v. Spenseller, 154 A. 140, 160 Md. 497.

48. Md.—Hancock v. Savings Bank of Baltimore, 85 A.2d 770, 199 Md. 163—Mitholland v. Whalen, 43 A. 43, 89 Md. 212.

49. Md.—Whittington v. Whittington, 106 A.2d 72—Hancock v. Savings Bank of Baltimore, 85 A.2d 770, 199 Md. 163—Bradford v. Eutaw Sav. Bank of Baltimore City, 46 A.2d 284, 186 Md. 127—McDevitt v. Spenseller, 154 A. 140, 160 Md. 497—Ragan v. Kelly, 24 A.2d 289, 180 Md. 324.

#### Signature cards

Signature cards indicating intention to create trust may be rebutted by proof that in signing them the donor had no such intention.—Bollack v. Bollack, 182 A. 317, 169 Md. 407.

#### Creation of special trust

Where original owner of fund in bank, who was seventy-nine years of age, went to hospital for a serious operation, and a niece obtained his bank book from a sister of the hospital and then secured from bank a card to change entry in bank book, and original owner signed the card, and card was taken to bank where entry was made in bank book establishing a trust in original owner and niece, subject to order of either, with balance to survivor, evidence failed to establish a clear and definite intention of original owner to relinquish absolute control over fund, or that it was his desire that niece become owner of balance of fund at his death, and there was created merely a special trust which came to an end on death of original owner.—Ragan v. Kelly, 24 A.2d 289, 180 Md. 324.

50. Me.—Bath Sav. Inst. v. Fogg, 63 A. 731, 101 Me. 188.

51. Cal.—Randall v. Bank of America, N. T. & S. A., 119 P.2d 754, 48 Cal.App.2d 249—Williams v. Savings Bank of Santa Rosa, 156 P. 366, 33 Cal.App. 655.

52. Cal.—Randall v. Bank of America, N. T. & S. A., 119 P.2d 754, 48 Cal.App.2d 249.

53. Me.—Bath Sav. Inst. v. Fogg, 63 A. 731, 101 Me. 188.

54. Md.—Hancock v. Savings Bank of Baltimore, 85 A.2d 770, 199 Md. 163.

55. Mass.—Gibbons v. Gibbons, 4 N. E.2d 1019, 296 Mass. 89.

#### Payment of medical and hospital expenses

Where aged decedent, in signing joint tenancy agreement with grandnephew, respecting her checking account, intended only to authorize him to pay her medical and hospital expenses, the bank, as between itself, grandnephew, and decedent, and, after decedent's death, her executrix, would be justified in treating the account as a fund in which parties had a joint interest, but as between grandnephew and decedent money in account belonged wholly to decedent and after her death to her legal representative, and any legal title of grandnephew in joint account deposit was in trust for decedent.—Williams v. Tuck, 39 N.E.2d 695, 313 Ill. App. 230.

56. Mass.—Bradford v. Eastman, 118 N.E. 579, 229 Mass. 499.

57. N.H.—Barrett v. Cady, 98 A. 225, 78 N.H. 60.

58. Cal.—Kelly v. Dollard, 13 P.2d 926, 216 Cal. 312.

59. N.Y.—Martin v. Martin, 61 N.Y. 813, 46 App. Div. 445, appeal dismissed 59 N.E. 1126, 166 N.Y. 611.

60. Me.—Hallowell Sav. Inst. v. Titcomb, 51 A. 249, 96 Me. 62.

other than the depositor does not necessarily create a trust for such other<sup>61</sup> or for the depositor.<sup>62</sup>

### d. Tentative Trusts

Some courts have recognized that a tentative trust may be created where a deposit is made by the depositor in his own name in trust for another.

61. N.H.—Fernald v. Fernald, 113 A. 223, 80 N.H. 75.  
65 C.J. p 292 note 27.

62. Conn.—Potter v. Yale College, 8 Conn. 52.  
65 C.J. p 292 note 28.

63. U.S.—In re Helfrich's Estate v. C. I. R., C.C.A.7, 143 F.2d 43.  
Ga.—Corpus Juris quoted in Wilder v. Howard, 4 S.E.2d 199, 201, 188 Ga. 426.

Ky.—Corpus Juris quoted in Hale v. Hale, 231 S.W.2d 2, 6, 313 Ky. 344.  
N.Y.—Tiber v. Heller, N.Y. Sup., 17 N.Y.S.2d 59, 173 Misc. 333.  
Pa.—In re Knast's Estate, 66 Pa. Dist. & Co. 383.  
65 C.J. p 293 note 29.

#### Claims of depositor's creditors

Monies deposited in bank in irrevocable trust for another are beyond control of the depositor and are not subject to claims of depositor's creditors—Workmen's Compensation Board v. Furman, 106 N.Y.S.2d 404

64. Ga.—Corpus Juris quoted in Wilder v. Howard, 4 S.E.2d 199, 201, 188 Ga. 426

Ky.—Corpus Juris quoted in Hale v. Hale, 231 S.W.2d 2, 6, 313 Ky. 344  
65 C.J. p 293 note 31.

65. Cal.—Hyman v. Tarplee, 149 P. 2d 453, 64 Cal.App.2d 805.

Del.—Delaware Trust Co. v. Fitzmaurice, 31 A.2d 383, 27 Del.Ch. 101, modified on other grounds, Crumlish v. Delaware Trust Co., 38 A.2d 463, 27 Del.Ch. 374.

Ga.—Corpus Juris quoted in Wilder v. Howard, 4 S.E.2d 199, 201, 188 Ga. 426.

Ky.—Smallwood v. Boyd, 237 S.W.2d 66, 314 Ky. 763.—Corpus Juris quoted in Hale v. Hale, 231 S.W.2d 2, 6, 313 Ky. 344.

Minn.—Rickett v. Peck, 2 N.W.2d 140, 211 Minn. 576, 138 A.L.R. 1375

Mo.—Corpus Juris cited in In re Geel's Estate, App., 143 S.W.2d 327, 331.

N.Y.—In re Gross, 62 N.Y.S.2d 392.

Pa.—Brown v. Monaca Federal Sav. & Loan Ass'n, 42 A.2d 50, 352 Pa. 1—In re Krewson's Estate, 36 A.2d 250, 154 Pa.Super. 509—Banca D'Italia & Trust Co. v. Giordano, 36 A.2d 242, 154 Pa.Super. 462—Downey v. Duquesne City Bank, 22 A.2d 124, 126, 146 Pa.Super. 289—In re Pozzuto's Estate, 188 A. 209, 124 Pa.Super. 93—Nace v. Fulton County Nat. Bank, 79 Pa.Dist. & Co. 325

—In re Williams' Estate, 38 Pa. Dist. & Co. 93.  
65 C.J. p 293 note 30.  
"Tentative trust" defined see supra § 21.

Nothing passes to tentative beneficiary by the opening of such an account, and the jus disponendi of the avails remains as completely in the depositor during his lifetime as if the account stood in his own name.—In re Kelly's Will, 271 N.Y.S. 457, 151 Misc. 277.

#### Particular deposits

(1) Trust created by mother's deposit in bank in account reading "in trust for" her daughter prior to adjudication of mother as an incompetent, which was intended for support of daughter who was an incompetent in fact was a tentative and not irrevocable trust where mother retained custody of bank book, had withdrawn accrued interest and had once withdrawn part of principal.—Brooklyn Trust Co. v. Smart, 293 N.Y.S. 823, 161 Misc. 857.

(2) Where claimant's grandmother, who was named as beneficiary in claimant's deceased father's life policy and who knew that the father wanted proceeds of policy to be used for claimant's support and education, deposited proceeds in a bank under a savings account in grandmother's name as trustee, with directions that fund was to revert to the grandmother when claimant became of age, the grandmother's acts created a tentative trust in money representing proceeds.—In re Gorgas' Estate, 24 A.2d 171, 147 Pa.Super. 319.

#### Recoverable trust

(1) A valid recoverable trust may be created in a savings account with power remaining in the settlor to withdraw a part or all of the money where the settlor is named as trustee.—In re Alberts' Estate, 100 P.2d 538, 38 Cal.App.2d 42.

(2) The delivery of the bank book to the intended beneficiary is not, however, contemplated as one of the acts of the settlor in conformity to the continuation of such a trust.—In re Alberts' Estate, 100 P.2d 538, 38 Cal.App.2d 42.

Statute relating to declarations and grants of trust and to implied trusts did not preclude court from recognizing as a trust fund money on deposit with building association in name of testatrix as trustee for her grandson

In some jurisdictions, while it is recognized that a trust may be created in respect of a bank deposit which is absolute and irrevocable by the donor or depositor,<sup>63</sup> in cases in which usually, if not always, saving deposits or accounts are involved,<sup>64</sup> the courts have recognized so-called tentative trusts,<sup>65</sup> or Totten trusts,<sup>66</sup> in respect of such deposits, as

who was a polio victim.—In re Scott's Estate, D.C.D.C., 96 F.Supp. 290.

66. N.Y.—In re Totten, 71 N.E. 748, 179 N.Y. 112, 70 L.R.A. 711, 1 Ann. Cas. 900—Tiber v. Heller, 17 N.Y. S.2d 59, 173 Misc. 333.—In re Stiles' Estate, N.Y.Sur., 289 N.Y.S. 697, 160 Misc. 162.—In re Kelly's Will, 271 N.Y.S. 457, 151 Misc. 277.—Steinkner v. Bowery Sav. Bank, 86 N.Y.S.2d 747.—In re Gross, 62 N.Y. S.2d 392.—Application of National Commercial Bank & Trust Co. of Albany, 50 N.Y.S.2d 274.—In re Haggerty's Estate, 38 N.Y.S.2d 433.

#### Validity and incidents

(1) Totten trusts, if real and not merely colorable or pretended, are valid transfers with legally fixed effects.—In re Halpern's Estate, 100 N.Y.2d 120, 303 N.Y. 33.—In re Prokasky's Will, 109 N.Y.S.2d 888.

(2) A Totten trust is either totally valid or totally invalid and a court has no power to divide up such a trust and call part of it illusory and the other part good.—In re Halpern's Estate, supra.—In re Friesling's Estate, 123 N.Y.S.2d 207.

(3) The sole test in case of Totten trust is whether depositor has in good faith divested himself of ownership of his property or has made an illusory transfer, and the law is not concerned with actual motive of depositor.—In re Philippe's Will, 125 N.Y. S.2d 606.

(4) A Totten trust is not illusory merely because it operates or was intended to defeat a wife's expectant interest in her husband's property.—In re Naydan's Estate, 107 N.Y.S.2d 701.

(5) Right of settlor of Totten trust to assert complete dominion and control over account in his lifetime is an incident of such trust.—In re Prokasky's Will, supra.

(6) The creator of a Totten trust may withdraw any or all of such fund, the theory being that during the lifetime of the creator the fund remains his to be withdrawn by him at will.—Silk v. Silk, 295 N.Y.S. 517, 162 Misc. 773.

(7) Under Totten trusts, whereby depositor opens savings account in trust for named person, reserving right of revocation, depositor is both settlor and trustee, retains enjoyment of the entire income for life, and can control his own actions as trustee.—Murray v. Brooklyn Sav. Bank, 9 N.

where a deposit is made by the depositor in his own name in trust for another<sup>67</sup> or where the account is opened by the depositor in the name of a third person in trust for another.<sup>68</sup> The rule as frequently stated with respect to such deposits is that a deposit

made by one person of his own money in his own name as trustee for another, standing alone, does not establish an irrevocable trust during his lifetime, but is a tentative trust merely, revocable at will,<sup>69</sup> until the depositor dies or completes the gift in

Y.S.2d 227, 169 Misc. 1014, reversed on other grounds 15 N.Y.S.2d 915, 258 App.Div. 132.

(8) In the case of the so-called Totten trust, ownership by beneficiary of bank account is purely tentative unless there is an actual delivery of bank book in lifetime of creator of trust, or like completion of donation, or unless trust becomes operative by reason of death of real owner of fund and the title of real owner of fund continues unimpaired until death supervenes.—In re Haggerty's Estate, 38 N.Y.S.2d 433.

(9) Right to revoke entire Totten trust clearly includes lesser right to revoke it pro tanto.—In re Prokasky's Will, 109 N.Y.S.2d 888.

(10) Moneys deposited in Totten trust are subject to claims of the depositor's creditors.—Workmen's Compensation Board v. Furman, 106 N.Y.S.2d 404.

67. Cal.—Frucks v. Home Federal Sav. & Loan Ass'n, 228 P.2d 545, 36 Cal.2d 845.—Brucks v. Home Federal Sav. & Loan Ass'n, 228 P.2d 545, 548, 36 Cal.2d 845.

Minn.—Richey v. Peck, 2 N.W.2d 140, 211 Minn. 576, 138 A.L.R. 1375.—Coughlin v. Farmers & Mechanics Sav. Bank of Minneapolis, 272 N.W. 166, 199 Minn. 102.

N.J.—Conry v. Maloney, 76 A.2d 899, 5 N.J. 590, stating New York rule.—Hudson Trust Co. v. Holt, 169 A. 516, 115 N.J.Eq. 34 stating New York rule.

N.Y.—Murray v. Brooklyn Sav. Bank, 15 N.Y.S.2d 915, 258 App.Div. 132.—In re Berleys' Will, 288 N.Y.S. 325, 169 Misc. 560.—In re Yarmie's Estate, 266 N.Y.S. 93, 148 Misc. 457, affirmed 273 N.Y.S. 403, 242 App.Div. 693.—In re Rasmussen's Estate, 264 N.Y.S. 231, 147 Misc. 564.—In re City Sav. & Loan Ass'n, 123 N.Y.S.2d 852.—In re Freistadt's Will, 104 N.Y.S.2d 510, affirmed 105 N.Y.S.2d 995, 278 App.Div. 962, amended on reargument 107 N.Y.S.2d 466, 279 App.Div. 603.—Garlick v. Garlick, 53 N.Y.S.2d 321.

Pa.—Brown v. Monaca Federal Sav. & Loan Ass'n 42 A.2d 50, 51, 352 P.1.—In re Bearinger's Estate, 9 A.2d 342, 336 Pa. 253.—In re Krewson's Estate, 36 A.2d 250, 351, 154 Pa.Super. 509.—Banca D'Italia & Trust Co. v. Giordano, 36 A.2d 242, 154 Pa.Super. 452.—In re Snyder's Estate, 33 Pa.Dist. & Co. 25.—In re Erie Trust Co., Com.Pl., 20 Erie Co. 83.—In re Shue's Estate, Orph., 52 York Leg. Rec. 190.

#### Account must be in such form

(1) A Totten trust depends on the form of depositor's account with bank and arises only where the account stands in the name of the depositor in trust for another.—Phillipsen v. Emigrant Indus. Sav. Bank, 86 N.Y.S.2d 133.

(2) Where depositor opened a joint savings account in his name or in the name of his sister, and thereafter the depositor placed in the passbook a paper writing stating that he bequeathed what was left of the money in the account to charitable institution, institution was not entitled to proceeds of the account on theory of a Totten trust.—Phillipsen v. Emigrant Indus. Sav. Bank, supra.

(3) A trust in bank account in name of claimed beneficiary, who was specifically designated therein and acted as trustee for depositor, was not a Totten trust.—Application of Wheeler, 72 N.Y.S.2d 115.

(4) A tentative trust when used in its strict legal sense applies only to a deposit made by one person of his own money in his own name as trustee for another.—In re Brill's Estate, 64 Pa.Dist. & Co. 155.

(5) Where it is uncontroverted that the funds were those of the ostensible beneficiary of the account and not those of the ostensible depositor the tentative trust or Totten trust theory has no application.—In re Goldsmith's Estate, Pa.Orph., 32 North Co. 157.

#### Donee's deposit for donor

Donee's deposit of money given to him by donor in name of donee as trustee for donor does not necessarily create a trust in which donor has a present interest and is not necessarily inconsistent with a completed gift.—Hyman v. Tarplee, 149 P.2d 453, 64 Cal.App.2d 805.

#### Tentative nature

While a trust created by an account opened by one person in trust for another is of a tentative nature, in the sense that its continued existence depends on the depositor, its creation does not depend on his death.—Delaware Trust Co. v. Fitzmaurice, 31 A.2d 383, 27 Del.Ch. 101, modified on other grounds, Crumlish v. Delaware Trust Co., 38 A.2d 463, 27 Del.Ch. 374.

#### Presumptively tentative trust

(1) Deposit of money in savings or checking account in name of depositor in trust for another creates presumptively a tentative or revocable

trust.—In re Furjanick's Estate, 100 A.2d 85, 375 Pa. 484.

(2) A presumptively tentative trust, created by savings bank deposit in name of depositor as trustee for another, stands as executed trust as of time of its creation, in absence of evidence that depositor had no intention to create trust or revoke it.—Wilder v. Howard, 4 S.E.2d 199, 188 Ga. 426.

68. N.Y.—Lattan v. Van Ness, 95 N.Y.S. 97, 107 App.Div. 393, affirmed 77 N.E. 1190, 184 N.Y. 601. 65 C.J. p 294 note 38.

69. Cal.—In re Alberts' Estate, 100 P.2d 538, 38 Cal.App.2d 42. Ga.—Corpus Juris quoted in Wilder v. Howard, 4 S.E.2d 199, 201, 188 Ga. 426.

Ky.—Hale v. Hale, 231 S.W.2d 2, 313 Ky. 344.

N.Y.—In re Sterling's Estate, 35 N.Y.S.2d 399, 264 App.Div. 308, affirmed 50 N.E.2d 234, 290 N.Y. 820.—Gannley v. Lincoln Sav. Bank of Brooklyn, 13 N.Y.S.2d 571, 257 App.Div. 609.—In re Kiley's Estate, 94 N.Y.S.2d 64, 197 Misc. 34.—In re Stites' Estate, 289 N.Y.S. 697, 160 Misc. 162.—Hoppe v. President, etc., of Manhattan Co., 278 N.Y.S. 26, 154 Misc. 745.—In re City Sav. & Loan Ass'n, 123 N.Y.S.2d 852.—Steinkner v. Bovey Sav. Bank, 86 N.Y.S.2d 747.—Imperatrice v. Imperatrice, 77 N.Y.S.2d 431, affirmed 75 N.Y.S.2d 347, 273 App.Div. 764, affirmed 80 N.E.2d 95, 298 N.Y. 549.—In re Brennan's Estate, 59 N.Y.S.2d 182.—In re Shelley's Estate, 50 N.Y.S.2d 570.

Pa.—In re Bearinger's Estate, 9 A.2d 342, 336 Pa. 253.—In re Krewson's Estate, 36 A.2d 250, 154 Pa.Super. 509.—Banca D'Italia & Trust Co. v. Giordano, 36 A.2d 242, 154 Pa.Super. 452.—In re Snyder's Estate, 33 Pa.Dist. & Co. 25.

65 C.J. p 293 note 34.

Revocation of trusts generally see infra §§ 88–91.

#### Deposit in building and loan association

A person depositing money in building and loan association in his own name and as trustee for his brother and signing signature card with his own name solely created a trust revocable at will during such person's lifetime.—Evinger v. MacDougall, 82 P.2d 194, 28 Cal.App.2d 175.

#### Withdrawal or other disposition

(1) A deposit in name of depositor as trustee for third person, where depositor retains right to withdraw

his lifetime<sup>70</sup> by some unequivocal act or declaration,<sup>71</sup> such as delivery of the passbook or notice to the beneficiary.<sup>72</sup>

Unless set aside for fraud or incompetency,<sup>73</sup> the

trust becomes absolute and irrevocable on the death of the depositor before the beneficiary without revocation or some decisive act or declaration of disaffirmance,<sup>74</sup> and entitles the beneficiary to the

all money deposited and third person is entitled to balance only on death of depositor if no other disposition has been made of fund by depositor, is a tentative trust revocable at will, and, in absence of agreement to contrary, third person has no right to withdraw money prior to death of depositor.—*Hynan v. Tarplee*, 149 P.2d 453, 64 Cal.App.2d 805

(2) A person may make himself a trustee of a bank deposit even though he reserves the right to withdraw or otherwise dispose of the fund during his lifetime.—*Smallwood v. Boyd*, 237 S.W.2d 66, 314 Ky. 763.

(3) A deposit in a savings account in name of depositor as trustee for another with right to make withdrawals or otherwise revoke the trust creates a tentative trust revocable by depositor during his lifetime.—*Rickel v. Peck*, 2 N.W.2d 140, 211 Minn. 576, 138 A.L.R. 1375.

(4) A trust was a tentative trust in so far as settlor reserved right to make withdrawals against principal, in that the trust was either partially or solely revocable at will of settlor during his lifetime but subject to becoming absolute at his death.—*In re Geel's Estate*, Mo App., 143 S.W.2d 327.

(5) The changing of account to the name of the depositor in trust for sister-in-law and turning of passbook over to her, followed by a retention of control over the account and withdrawals therefrom by depositor created merely a revocable or tentative trust for the sister-in-law.—*In re Bearinger's Estate*, 9 A.2d 342, 336 Pa. 253.

(6) If withdrawal of money from "Totter" trust by creator during his lifetime is without his knowledge and consent, is involuntary or is result of fraud and duress, withdrawal is a nullity and moneys so withdrawn are recoverable by creator during his lifetime or his legal representative after his death. When so recovered, they would again become a part of fund impressed with the trust, and pass to the cestui que trust when trust becomes irrevocable on death of creator.—*Silk v. Silk*, 295 N.Y.S. 517, 162 Misc. 773.

70. *US—Kardon v. Willing, D.C. Pa.*, 20 F.Supp. 471.

*Cal—Brucks v. Home Federal Sav. & Loan Ass'n*, 228 P.2d 545, 36 Cal.2d 845.—*In re Alberts' Estate*, 100 P.2d 538, 38 Cal.App.2d 42.—*Evinger v. MacDougall*, 82 P.2d 194, 28 Cal.App. 175.

*Ga.—Wildor v. Howard*, 4 S.E.2d 199, 188 Ga. 426.

*N.Y.—Application of Halpern*, 100 N.Y.S.2d 894, 277 App.Div. 525, affirmed 100 N.E.2d 120, 303 N.Y. 33.—*Murray v. Brooklyn Sav. Bank*, 15 N.Y.S.2d 915, 258 App.Div. 132.—*McKendry v. McKendry*, 103 N.Y.S.2d 183, 200 Misc. 835, appeal dismissed 108 N.Y.S.2d 1006.—*In re Smith's Estate*, 31 N.Y.S.2d 603, 607, 177 Misc. 601.—*Tiber v. Heller*, 17 N.Y.S.2d 59, 173 Misc. 333.—*In re Herle's Estate*, 300 N.Y.S. 103, 165 Misc. 46.—*In re Weinberg's Estate*, 296 N.Y.S.2d 7, 162 Misc. 867.—*In re Stittes' Estate*, 289 N.Y.S. 697, 160 Misc. 162.—*In re McCann's Estate*, 281 N.Y.S. 445, 155 Misc. 743.—*Hoppe v. President, etc., of Manhattan Co.*, 278 N.Y.S. 26, 154 Misc. 745.—*In re McLaughlin's Estate*, 265 N.Y.S. 332, 148 Misc. 113.—*In re Rasmussen's Estate*, 264 N.Y.S. 231, 147 Misc. 564.—*In re Mannix' Estate*, 261 N.Y.S. 24, 147 Misc. 479.—*In re Reich's Estate*, 262 N.Y.S. 623, 146 Misc. 616.—*In re Phipps' Will*, 125 N.Y.S.2d 606.—*In re Proskaukey's Will*, 109 N.Y.S.2d 888.—*In re Gross*, 62 N.Y.S.2d 392.—*Application of National Bank & Trust Co. of Albany*, 50 N.Y.S.2d 274.

*Pa.—In re Rodgers' Estate*, 97 A.2d 789, 374 Pa. 246.—*In re Scanlon's Estate*, 169 A. 106, 313 Pa. 424.—*Downey v. Duquesne City Bank*, 22 A.2d 124, 146 Pa.Super. 289.

71. *US—Kardon v. Willing, D.C. Pa.*, 20 F.Supp. 471.

*Cal—Brucks v. Home Federal Savings & Loan Ass'n*, 228 P.2d 545, 36 Cal.2d 845.—*In re Alberts' Estate*, 100 P.2d 538, 38 Cal.App.2d 42.—*Evinger v. MacDougall*, 82 P.2d 194, 28 Cal.App.2d 175.

*Ga.—Wildor v. Howard*, 4 S.E.2d 199, 188 Ga. 426.

*N.Y.—Application of Halpern*, 100 N.Y.S.2d 894, 277 App.Div. 525, affirmed 100 N.E.2d 120, 303 N.Y. 33.—*In re Gross*, 62 N.Y.S.2d 392.—*McKeever v. Empire Trust Co.*, 270 N.Y.S. 494.

*Pa.—In re Pozzuto's Estate*, 188 A. 209, 124 Pa.Super. 93.

**Tentative rights turned into present vested rights**

(1) The tentative rights of presumptive beneficiary of trust created by deposit of money by one person in his own name as trustee for another may be turned into vested present rights during depositor's lifetime, if he completes gift in his lifetime either by acts sufficient to constitute a valid gift inter vivos, or to effect the creation of a present trust.—*In re*

*Smith's Estate*, 31 N.Y.S.2d 603, 177 Misc. 601.—*In re McCabe's Estate*, 27 N.Y.S.2d 127, 176 Misc. 286.

(2) Such acts must be unequivocal, plainly implying that depositor intended to divest himself of his interest in deposit and hold it thereafter for the named beneficiary.—*In re McCabe's Estate*, supra.

72. *US—Kardon v. Willing, D.C. Pa.*, 20 F.Supp. 471.

*Cal—Brucks v. Home Federal Sav. & Loan Ass'n*, 228 P.2d 545, 36 Cal.2d 845.—*In re Alberts' Estate*, 100 P.2d 538, 38 Cal.App.2d 42.

*N.Y.—Application of Halpern*, 100 N.Y.S.2d 894, 277 App.Div. 525, affirmed 100 N.E.2d 120, 303 N.Y. 33.—*Murray v. Brooklyn Sav. Bank*, 15 N.Y.S.2d 915, 258 App.Div. 132.—*McKendry v. McKendry*, 103 N.Y.S.2d 183, 200 Misc. 835, appeal dismissed 108 N.Y.S.2d 1006.—*In re Kiley's Estate*, 94 N.Y.S.2d 64, 197 Misc. 34.—*In re Smith's Estate*, 31 N.Y.S.2d 603, 177 Misc. 601.—*Tiber v. Heller*, 17 N.Y.S.2d 59, 173 Misc. 333.—*In re Weinberg's Estate*, 296 N.Y.S.2d 7, 162 Misc. 867.

*—Hoppe v. President, etc., of Manhattan Co.*, 278 N.Y.S. 26, 154 Misc. 745.—*In re McLaughlin's Estate*, 265 N.Y.S. 332, 148 Misc. 113.—*In re Mannix' Estate*, 264 N.Y.S. 24, 147 Misc. 479.—*In re Reich's Estate*, 262 N.Y.S. 623, 146 Misc. 616.—*In re Phipps' Will*, 125 N.Y.S.2d 606.—*In re Proskaukey's Will*, 109 N.Y.S.2d 888.—*In re Freistadt's Will*, 104 N.Y.S.2d 510, affirmed 105 N.Y.S.2d 995, 278 App.Div. 962, amended on other grounds 107 N.Y.S.2d 466, 279 App.Div. 603.—*Imperatrice v. Imperatrice*, 77 N.Y.S.2d 431, affirmed 75 N.Y.S.2d 347, 273 App.Div. 764, affirmed 80 N.E.2d 95, 298 N.Y. 549.

*Pa.—In re Rodgers' Estate*, 97 A.2d 789, 374 Pa. 246.—*In re Scanlon's Estate*, 169 A. 106, 313 Pa. 424.—*Downey v. Duquesne City Bank*, 22 A.2d 124, 146 Pa.Super. 289.—*In re Williams' Estate*, 38 Pa.Dist. & Co. 93.—*Cardoni v. Cardoni, Com.Pl.*, 43 Lack.Jur. 141.

65 C.J. p. 294 note 39.

73. *Minn.—Coughlin v. Farmers & Mechanics Sav. Bank of Minneapolis*, 272 N.W. 166, 199 Minn. 102.

74. *Ga.—Corpus Juris quoted in Wilder v. Howard*, 4 S.E.2d 199, 201, 188 Ga. 426.

*Ky.—Corpus Juris quoted in Hale v. Hale*, 231 S.W.2d 6, 313 Ky. 344.

*Minn.—Rickel v. Peck*, 2 N.W.2d 140, 211 Minn. 576, 138 A.L.R. 1375.—

balance remaining at the time of the depositor's death,<sup>75</sup> but not to anything more than such balance.<sup>76</sup> In the event, however, of the prior death of the beneficiary his interest in the account ceases and the fund becomes the absolute property of the depositor, free from the trust.<sup>77</sup> According to some cases, a tentative trust may be made absolute or irrevocable only by one or the other of the two

methods above indicated, that is, by the death of the depositor before the beneficiary without revocation or by some unequivocal act or declaration of the depositor during his lifetime.<sup>78</sup> It is difficult to lay down general rules for the purpose of determining whether a particular trust is tentative or irrevocable.<sup>79</sup> Whether the trust is tentative or irrevocable depends on the intention of the depositor

Coughlin v. Farmers & Mechanics Sav. Bank of Minneapolis, 272 N.W. 166, 199 Minn. 102.

Mo.—Corpus Juris cited in In re Geel's Estate, App., 143 S.W.2d 327, 331.

N.Y.—In re Greniewich's Will, 278 N.Y.S. 279, 243 App.Div. 811.—In re Beck's Estate, 19 N.Y.S.2d 83, 178 Misc. 733, affirmed 23 N.Y.S.2d 625, 260 App.Div. 651.—Tiber v. Heller, 17 N.Y.S.2d 59, 173 Misc. 333.—Silk v. Silk, 295 N.Y.S. 517, 162 Misc. 773.—In re Denison's Estate, 281 N.Y.S. 705, 157 Misc. 385.—In re Timko's Will, 270 N.Y.S. 323, 150 Misc. 701.—In re Naydan's Estate, 107 N.Y.S.2d 701.—Michurko v. Richardson, 107 N.Y.S.2d 365.—Steinkner v. Bowers Sav. Bank, 86 N.Y.S.2d 747.—Application of Wheeler, 72 N.Y.S.2d 115.—In re Sterling's Will, 27 N.Y.S.2d 36, reversed on other grounds In re Sterling's Estate, 35 N.Y.S.2d 399, 264 App.Div. 308, affirmed 50 N.E.2d 234, 290 N.Y. 820.

Pa.—In re Gorgan's Estate, 24 A.2d 171, 147 Pa.Super. 319.

65 C.J. p. 294 note 85.

#### Absolute title to res

A savings bank deposit made by mother in her name as trustee for her two sons creates a Totten trust which, unless revoked during settlor's lifetime, vests beneficiary with absolute title to the res.—Garlick v. Garlick, 53 N.Y.S.2d 321.

#### Deposit in new account without trust provision

Where bank deposit was made in depositor's name in trust and his attorney in fact deposited liquidating dividend checks received in course of liquidation of bank in new account in another bank in depositor's name without any trust provision for beneficiary, fund so transferred was impressed with trust in favor of beneficiary, who was entitled thereto on depositor's death in absence of any disaffirmance or revocation of trust.—In re Stitt's Estate, 289 N.Y.S. 697, 160 Misc. 162.

75. Cal.—In re Alberts' Estate, 100 P.2d 538, 38 Cal.App.2d 42.

Del.—Delaware Trust Co. v. Fitzmaurice, 31 A.2d 383, 27 Del.Ch. 101, modified on other grounds Crumlish v. Delaware Trust Co., 38 A.2d 468, 27 Del.Ch. 374.

Ga.—Corpus Juris quoted in Wilder v. Howard, 4 S.E.2d 199, 201, 188 Ga. 426.—Corpus Juris cited in Reynolds v. Dorsey, 3 S.E.2d 564, 566, 188 Ga. 218.

Ky.—Smallwood v. Boyd, 237 S.W.2d 66, 314 Ky. 763.—Corpus Juris quoted in Hale v. Hale, 231 S.W.2d 2, 6, 313 Ky. 344.

Md.—Fairfax v. Savings Bank of Baltimore, 199 A. 872, 175 Md. 136, 116 A.1.R. 1334.

Mo.—Corpus Juris cited in In re Geel's Estate, App., 143 S.W.2d 327, 331.

N.J.—Conry v. Maloney, 76 A.2d 899, 6 N.J. 590, stating New York rule.—Abruzzese v. Oestrich, 47 A.2d 883, 138 N.J.Eq. 33.

N.Y.—Murray v. Brooklyn Sav. Bank, 15 N.Y.S.2d 915, 258 App.Div. 132.—In re Ungara's Estate, 51 N.Y.S.2d 386, 183 Misc. 907.—Silk v. Silk, 295 N.Y.S. 517, 162 Misc. 773.—In re Vaughan's Estate, 260 N.Y.S. 197, 145 Misc. 33.—Steinkner v. Bowers Sav. Bank, 86 N.Y.S.2d 747.

Pa.—In re McWilliams' Estate, 38 Pa.Dist. & Co. 93.—In re Snyder's Estate, 33 Pa.Dist. 25.

65 C.J. p. 294 note 36.

Presumption that absolute trust was created as to balance remaining on deposit after death of depositor without disaffirming trust see infra § 67.

#### Absolute owners

Where wife living apart from husband within three years after separation opened bank accounts in her own name in trust for designated persons and thereafter made withdrawals from certain of the accounts, and there was no evidence that transfers were illusory, trusts became effective on death of wife, and beneficiaries became absolute owners of balance.—In re Prokasky's Will, 109 N.Y.S. 2d 888.

#### Absence of contemporaneous facts or declarations

Decedent's bank deposit in own name in trust for niece created absolute trust for niece as to amount on hand on decedent's death, in absence of evidence of contemporaneous facts or declarations with respect to deposit.—In re Clark's Estate, 268 N.Y.S. 253, 149 Misc. 374.

#### Enforcement as to any part

Even though decedent reserved power to withdraw deposit made in trust for another beneficiary could enforce trust as to any part of fund remaining at death of decedent if it were unrevoked.—In re Pozzuto's Estate, 188 A. 209, 124 Pa.Super. 93.

#### Funeral expenses

Where bank book had not been delivered to beneficiary of Totten trust during lifetime of creator of trust, fund which was subject of trust was chargeable with reasonable funeral expenses of creator of trust where there were no other assets of estate.—In re Haggerty's Estate, 38 N.Y.S. 2d 433.

76. Ga.—Corpus Juris quoted in Wilder v. Howard, 4 S.E.2d 199, 201, 188 Ga. 426.

Ky.—Corpus Juris quoted in Hale v. Hale, 231 S.W.2d 2, 6, 313 Ky. 344. N.Y.—In re Rasmussen's Estate, 264 N.Y.S. 231, 147 Misc. 664.—In re Barley, 114 N.Y.S. 725.

77. Pa.—In re McWilliams' Estate, 38 Pa.Dist. & Co. 93.

#### Death of depositor and beneficiary in common disaster

Since it is an inherent incident of a tentative trust that the beneficiary must survive the settlor before title to the fund can vest in him, unless the gift is completed in the depositor's lifetime by some unequivocal act or declaration, where one who has deposited money in a savings account in his own name as trustee for another dies in a common disaster with the beneficiary, under circumstances giving rise to no presumption of survivorship, the balance of the deposit passes to the personal representatives of the depositor rather than to those of the beneficiary.—In re McWilliams' Estate, supra.

78. N.Y.—Hessen v. McKinley, 140 N.Y.S. 724, 155 App.Div. 496, affirmed 102 N.E. 1104, 209 N.Y. 532.—Tierney v. Fitzpatrick, 107 N.Y.S. 527, 122 App.Div. 623, reversed on other grounds 88 N.E. 750, 195 N.Y. 433.

79. N.Y.—Hemmerlich v. Union Dime Savings Inst., 98 N.E. 499, 205 N.Y. 366, Ann.Cas.1913E 514.

or donor,<sup>80</sup> determinable as a question of fact,<sup>81</sup> in view of established legal principles.<sup>82</sup> The general rule that a trust does not arise unless the intent of the alleged settlor to create one clearly appears is applicable in determining whether a depositor who has created a tentative savings bank trust intended to make it irrevocable,<sup>83</sup> and clear and unambiguous language or conduct is required to establish such an intention.<sup>84</sup> It has been held that in order to render a trust, tentative in form, absolute or irrevocable during the lifetime of the donor or depositor, his intention to transfer a present interest to the named beneficiary must ex-

ist,<sup>85</sup> and not an interest which would arise only after his death.<sup>86</sup>

While the delivery of the bankbook to the beneficiary has been held sufficient to transform a tentative trust into an irrevocable one,<sup>87</sup> at least where there are other supporting circumstances,<sup>88</sup> it has also been held that notifying the named beneficiary of the deposit and its nature and delivering the passbook to such beneficiary for safekeeping, considered either separately<sup>89</sup> or jointly,<sup>90</sup> do not conclusively establish an irrevocable trust, and that, in order to transform a tentative trust into an irrevocable

80. Cal.—Brucks v. Home Federal Savings & Loan Ass'n, 228 P.2d 545, 38 Cal. 845.

Ga.—Corpus Juris quoted in Wilder v. Howard, 4 S.E.2d 199, 201, 188 Ga. 426.

Ky.—Corpus Juris quoted in Hale v. Hale, 231 S.W.2d 2, 6, 213 Ky. 344.

N.Y.—McKendry v. McKendry, N.Y. Sup., 103 N.Y.S.2d 183, 200 Misc. 835, appeal dismissed, 108 N.Y.S.2d 1006.

Pa.—In re Furlanick's Estate, 100 A.2d 85, 375 Pa. 484—In re Bearinger's Estate, 9 A.2d 342, 336 Pa. 253—Downey v. Duquesne City Bank, 22 A.2d 124, 146 Pa. Super 289.

65 C.J. p. 293 note 32.

81. Cal.—Brucks v. Home Federal Savings & Loan Ass'n, 228 P.2d 545, 38 Cal. 845.

Ga.—Corpus Juris quoted in Wilder v. Howard, 4 S.E.2d 199, 201, 188 Ga. 426.

Ky.—Corpus Juris quoted in Hale v. Hale, 231 S.W.2d 2, 6, 213 Ky. 344.

N.Y.—McKendry v. McKendry, 103 N.Y.S.2d 183, 200 Misc. 835, appeal dismissed 108 N.Y.S.2d 1006.

65 C.J. p. 293 note 33.

82. N.Y.—McKendry v. McKendry, supra—In re McLaughlin's Estate, 265 N.Y.S. 332, 148 Misc. 113.

83. Pa.—In re Ingels' Estate, 92 A.2d 881, 372 Pa. 171.

#### Strong circumstantial evidence

Even strong circumstantial evidence that a tentative trust was created in consideration of the creation of a similar trust by the beneficiary for the settlor will not make a tentative trust irrevocable in the absence of direct testimony establishing such fact and an agreement that the trusts were to be irrevocable.—In re Rodgers' Estate, 80 Pa. Dist. & Co. 531, 2 Fiduciary 540, affirmed 97 A.2d 789, 374 Pa. 246.

84. Pa.—In re Rodgers' Estate, 97 A.2d 789, 374 Pa. 246—In re Ingels' Estate, 92 A.2d 881, 372 Pa. 171.

#### Facts held insufficient

(1) Fact that testatrix and her sister lived together, sharing all expenses, had reciprocal wills and reciprocal tentative trusts, with common possession of passbooks, was not sufficient to establish intent that such trusts were to be irrevocable.—In re Rodgers' Estate, 97 A.2d 789, 374 Pa. 246.

(2) Where decedent placed money in savings account in her own name in trust for beneficiary, and later sent beneficiary letter stating that money was a gift which might come in handy when depositor died, and depositor on two later occasions withdrew money from account and also wrote bank cashier that she did not feel that she should put money in hands of beneficiary at that time, decedent had not intended by letter to create an irrevocable trust, the presumption of revocability arising from form of deposit controlled, and beneficiary was not entitled to money formerly deposited in account.—In re Ingels' Estate, 92 A.2d 881, 372 Pa. 171.

85. N.Y.—McKendry v. McKendry, 103 N.Y.S.2d 183, 200 Misc. 835, appeal dismissed 108 N.Y.S.2d 1006.

65 C.J. p. 295 note 42.

86. N.Y.—McKendry v. McKendry, supra.

65 C.J. p. 295 note 42 [a] (2).

87. N.Y.—In re Farrell, 81 N.E.2d 61, 298 N.Y. 129—McKendry v. McKendry, 103 N.Y.S.2d 183, 200 Misc. 835, appeal dismissed 108 N.Y.S.2d 1006.

65 C.J. p. 295 note 46.

88. N.Y.—Tibbitts v. Zink, 247 N.Y. S. 300, 231 App.Div. 339.

65 C.J. p. 295 note 47.

#### Particular transactions

(1) Where evidence established a delivery of a savings bank book to donee by decedent during his lifetime, accompanied by words of gift, tentative trust became irrevocable.—Application of Silverson, 95 N.Y.S.2d 591, 276 App.Div. 1025—In re Freidstadt's Will, 104 N.Y.S.2d 610, affirmed 105 N.Y.S.2d 995, 278 App.Div.

962, amended on other grounds 107 N.Y.S.2d 466, 279 App.Div. 603.

(2) Delivery of bank passbook to one who kept it in her possession until her death, whereupon it was taken into possession by her attorney, was held to have created an irrevocable trust.—Larkin v. Greenwich Sav. Bank, 279 N.Y.S. 267, 244 App.Div. 756, affirmed 3 N.E.2d 189, 271 N.Y. 569.

(3) Where an uncle gives his niece a savings account book in his name in trust for the niece's son and in effect says that the son, an infant, "has now" some money, an irrevocable trust is created and on the uncle's death the cestui que trust is entitled to the account.—In re Knast's Estate, 66 Pa. Dist. & Co. 383.

89. N.Y.—In re Slobiansky's Estate, 273 N.Y.S. 869, 152 Misc. 232.

65 C.J. p. 295 note 43.

#### Delivery of bankbook

(1) Delivery of bankbook to the beneficiary is not, of itself, sufficient.—In re Hahigan, 143 N.Y.S. 676, 82 Misc. 30.

(2) The mere changing of an account in a savings bank to the name of the depositor in trust for another does not show an intention to create an irrevocable trust, notwithstanding delivery of the passbook to the beneficiary, in absence of words of gift or a declaration that depositor is thereby giving to cestui que trust the money to the credit of the depositor.—In re Bearinger's Estate, 9 A.2d 342, 336 Pa. 253.

#### Possession of bankbook

Where decedent transferred funds originally owned by him to bank account in name of sister-in-law in trust for himself, account remained the property of decedent with right thereto in administrator, notwithstanding sister-in-law had possession of the bankbook.—Application of Kronk, 109 N.Y.S.2d 516, 202 Misc. 150.

90. N.Y.—Matthews v. Brooklyn Savings Bank, 102 N.E. 520, 208 N.Y. 508.



one, there must be both delivery of the bankbook and notice to the beneficiary.<sup>91</sup>

It is the general rule that whether any trust, tentative or irrevocable, is in fact created depends on the intention of the parties,<sup>92</sup> and the fact that a deposit is in form in the name of the depositor in trust for another is not conclusive that any trust, tentative or irrevocable, is created, in the absence of the depositor's intention to create a trust,<sup>93</sup> and the claim that a deposit in the name of another or the depositor created a tentative trust has been denied.<sup>94</sup>

## § 55. Delivery or Possession of Personal Property

A valid and enforceable express trust exists where

91. N.Y.—In re Richardson's Estate, 235 N.Y.S. 747, 134 Misc. 174.  
65 C.J. p. 295 note 45.

92. Pa.—In re Purjanick's Estate, 100 A.2d 85, 375 Pa. 484—Downey v. Duquesne City Bank, 22 A.2d 124, 126, 146 Pa.Super. 239.

### Totten trust

Even if a slip of paper pasted on the fly leaf of savings bank book was in handwriting of deceased and slip contained language which indicated intention of deceased to create, a Totten trust in favor of holder of bankbook, such unilateral conduct of deceased would be wholly ineffective, where bank was not a party to the plan.—In re Bodker's Estate, 72 N.Y.S.2d 237.

93. N.Y.—Garvey v. Clifford, 99 N.Y.S. 555, 114 App.Div. 193.  
65 C.J. p. 295 note 48.

94. N.Y.—In re Gokey's Estate, 252 N.Y.S. 434, 140 Misc. 779.

95. Ala.—Smith v. Eshelman, 180 So. 313, 235 Ala. 588.

Ark.—Van Meter Lumber Co. v. Alexander, 217 S.W.2d 835, 214 Ark. 610—People v. Pierce, 243 P.2d 585, 110 Cal.App.2d 598.

Fla.—Spicer v. Erpenbeck, 150 So. 585, 112 Fla. 285.

Ill.—In re Trapp's Estate, 269 Ill. App. 269.

Ind.—Lencioni v. Folk, 36 N.E.2d 980, 109 Ind.App. 519.

N.Y.—Tampa Electric Co. v. Ferend, 14 N.Y.S.2d 791.

N.C.—Corpus Juris cited in Stell v. First Citizens Bank & Trust Co., 27 S.E.2d 524, 528, 223 N.C. 516—Cooper Guano Co. v. Southerland, 95 S.E. 364, 175 N.C. 228.

Ohio.—Huntington Nat. Bank of Columbus v. Roan, App., 43 N.E.2d 769.

Tex.—First Nat. Bank v. Slaton Independent School Dist., Civ.App., 58 S.W.2d 870, error dismissed.

Wash.—Smith v. Fitch, 171 P.2d 682,

25 Wash.2d 619—Corpus Juris cited in Tucker v. Brown, 92 P.2d 221, 226, 199 Wash. 320—City of Tacoma v. Young, 16 P.2d 617, 170 Wash. 385.

65 C.J. p. 295 note 52.

Creation of gift causa mortis by delivery to third person as trustee for donee see Gifts § 86.

Necessity of delivery of property see infra § 64.

Necessity of transfer of title see infra § 63.

Settlor constituting himself trustee of personal property see supra § 50.

### Specific or identical property

Rule that acceptance of money or property delivered by one person to another for specific purpose creates trust applies to specific or identical property so delivered and accepted.—Regan v. Elizondo, Tex.Civ.App., 73 S.W.2d 900, error refused.

### Transferor or third person

An enforceable trust is created where personal property is transferred pursuant to an oral agreement whereby the transferee promises to hold the goods, securities, or money in trust for the benefit of the transferor or a third person, and all of transferor's statements made to trustee previous to acceptance of trust are deemed to be a part of the declaration of trust.—Coombs v. Minor, 141 P.2d 491, 60 Cal.App.2d 645.

### Particular transactions

(1) Where plaintiff and defendant bought a dry-cleaning machine under conditional sale contract and thereafter entered into a contract whereby defendant was to operate machine on his own account until he could find a buyer at a price sufficient to pay the balance due conditional seller and return amount paid by plaintiff into business, contract created a trust in the property for beneficial interest of plaintiff.—Masters v. Chambers, 4 So.2d 261, 241 Ala. 623.

a person has or accepts possession of personal property, with the express or implied understanding that he is not to hold it as his own absolute property, but is to hold and apply it for certain specified purposes or for the benefit of certain specified persons.

Subject to general rules as to the essentials of an express trust, where a person has or accepts possession of personal property, with the express or implied understanding that he is not to hold it as his own absolute property, but is to hold and apply it for certain specified purposes or for the benefit of certain specified persons, a valid and enforceable express trust exists.<sup>95</sup> Such a trust will be enforced in the absence of fraud, regardless of whether it was voluntary or based on a consideration.<sup>96</sup> This rule has been applied to the delivery of money,<sup>97</sup> and also to the delivery of such personal property as

(2) Where mother made up her mind to give a bankbook to her son and called son on the telephone and told him that bankbook was his and that his sister would deliver it to him, and mother handed it over to sister, and never spoke of bankbook again, sister became a trustee of bankbook for the benefit of her brother.—Scorzaflava v. Scorzaflava, 101 N.Y.S.2d 548, affirmed 101 N.Y.S.2d 249, 277 App.19v. 1088.

(3) Where lessee assigned leases to defendant with provision directing defendant to "collect, have and use all of rents and income from said property for the purpose of paying the rent on said leases," a trust of as much of income as might be necessary to pay rent under leases was created.—Dieter v. Scott, 9 A.2d 95, 110 Vt. 376.

96. Tenn.—American Bank & Trust Co. v. Lebanon Bank & Trust Co., 192 S.W.2d 245, 25 Tenn.App. 618. Necessity for consideration generally see supra § 28.

97. US.—Schloss v. Powell, C.C.A. Va., 93 F.2d 518—Driscoll v. Fitch, D.C.N.Y., 52 F.Supp. 869, affirmed, C.C.A. Driscoll v. Public Nat. Bank & Trust Co. of New York, 139 F.2d 318—In re Newark Shoe Stores, D.C.Md., 3 F.Supp. 293.

Cal.—People v. Pierce, 243 P.2d 585, 110 Cal.App.2d 598.

Ill.—People ex rel. Nelson v. People's Bank & Trust Co. of Rockford, 268 Ill.App. 39, affirmed 187 N.E. 522, 353 Ill. 479.

Ind.—Lencioni v. Folk, 36 N.E.2d 980, 109 Ind.App. 519.

N.Y.—Owen v. Blumenthal, 3 N.Y.S.2d 192, 167 Misc. 213, affirmed 6 N.Y.S.2d 366, 254 App.Div. 853, reversed on other grounds 19 N.E.2d 977, 280 N.Y. 96.

Ohio.—Caswell v. Lenihan, App., 120 N.E.2d 317.

Pa.—Ramsey v. Ramsey, Com.Pl., 57 Dauph.Co. 373—Hartman v. Dime

certificates of deposit,<sup>98</sup> promissory notes,<sup>99</sup> stock,<sup>1</sup> and other securities.<sup>2</sup>

It is essential to a trust of this nature not only that there should be an agreement or something to indicate a holding in trust,<sup>3</sup> for the benefit of the

**Building & Loan Ass'n, Com Pl.**, 89 Pittsb. Leg. J. 273.  
**R.I.—McKenna v. Mark Stadium**, 187 A. 133.  
**Tex.—First Nat. Bank v. Slaton Independent School Dist.**, Civ App., 58 S.W.2d 870, error dismissed.  
**Wash.—Smith v. Fitch**, 171 P.2d 682, 25 Wash.2d 619—**Tucker v. Brown**, 92 P.2d 221, 199 Wash. 320—**City of Tacoma v. Young**, 16 P.2d 617, 170 Wash. 385.  
 65 C.J. p 295 note 52.

#### Person who receives money

Every deposit, except possibly general bank deposits, is a trust and every person who receives money to be paid to another or to be applied to a particular purpose is a trustee if so applied, as well as when not so applied—**Appeal of Rogers**, 62 A.3d 900, 361 Pa. 51—**In re Mellier's Estate**, 182 A. 388, 320 Pa. 150—**In re Vosburgh's Estate**, 123 A. 813, 279 Pa. 329—**In re Ickler's Estate**, Orph., 34 Del.Co 538.

#### Particular transactions held to create trusts

(1) **In general.**  
**Cal.—In re Hovland's Estate**, 101 P.2d 500, 38 Cal.App.2d 439—**Long v. Neeland**, App. 4 P.2d 815.  
**D.C.—Brown v. Christman**, 126 F.2d 625, 75 U.S.App.D.C. 293.  
**Fla.—First Nat. Bank v. Massey**, 182 So. 187, 133 Fla. 113.  
**Mass.—Anderson v. Commissioner of Corporations and Taxation**, 42 N.E.2d 793, 312 Mass. 40.  
**Mo.—St. Louis Uniformed Firemen's Credit Union v. Haley**, App., 190 S.W.2d 636.  
**N.J.—Trednor v. First-Mechanics Nat. Bank of Trenton**, 24 A.2d 850, 131 N.J. Eq. 141.  
**N.Y.—Brown v. J. P. Morgan & Co.**, 40 N.Y.2d 229, 265 App.Div. 631, affirmed 67 N.E.2d 263, 295 N.Y. 867.  
**Ohio—Caswell v. Lenihan**, App., 120 N.E.2d 317—**Ilumington Nat. Bank of Columbus v. Roan**, App., 43 N.E.2d 769.  
**Tenn.—American Bank & Trust Co. v. Lebanon Bank & Trust Co.**, 192 S.W.2d 245, 28 Tenn.App. 618.  
**Tex.—Brouse v. Miers**, Civ App., 261 S.W.2d 734, reversed on other grounds **Miers v. Brouse**, 271 S.W.2d 419.  
**Utah—Renshaw v. Tracy Loan & Trust Co.**, 49 P.2d 403, 87 Utah 364, 100 A.L.R. 872.  
 (2) **Neighbor of elderly woman, to whom the woman entrusted money to pay for her hospital bills and other expenses, was a trustee of that fund**—**Wobb v. Saunders**, 181 P.2d 43, 79 Cal.App.2d 863.

(3) **Agreement whereunder father of son in military service agreed to hold money for benefit of father until son returned from military service, and to place the money in savings account in bank in name of son's infant children, and agreed that such money would not be withdrawn or used until infants reached legal age, created an enforceable tentative trust.**—**Smallwood v. Boyd**, 237 S.W.2d 66, 314 Ky. 763.

(4) **A husband may establish a trust in funds which he delivered to wife for purpose of paying expenses for their support and of holding the remainder of funds for his benefit or their mutual benefit.**—**Russell v. Meyers**, 56 N.E.2d 604, 316 Mass. 669.

(5) **Action of donor in giving money to donee, accompanied by statement that he was giving the money to donee as a gift in the knowledge that he could trust donee, that he could depend on them to care for him if he should get sick, and that, if he should die, donee would give him a decent burial, created a trust.**—**Garrela v. Santini**, 193 P.2d 702, 65 Nev. 215.

(6) **Where surety on performance and payment bonds of public contractor agreed to act as depository of money payable by Government under contract, moneys in hands of the surety were impressed with a trust for benefit primarily of creditors with valid claim for labor and materials furnished in performance of the contract.**—**Adelson v. Dreyman**, 61 N.Y.2d 87.

(7) **Insurance premiums paid to insurance broker for transmission to insurance company become trust funds when received by broker.**—**Leiderman v. Pink**, 291 N.Y.S. 219, 249 App.Div. 161—**In re Sommer's Estate**, 12 N.Y.S.2d 47.

**Statutory provision declaring any money received by contractor in connection with contract for construction of a building to be trust funds does not create a trust in true sense of the term but does create a fiduciary relationship of that nature between contractor and owner.**—**Maul v. Stokes**, 68 A.2d 200, 31 Del.Ch. 188.

**Tex.—Pegues v. Moss**, Civ App., 140 S.W.2d 461, error dismissed.

**99. Ill.—In re Trapp's Estate**, 269 Ill. App. 269.

**Wash.—Smith v. Fitch**, 171 P.2d 682, 25 Wash.2d 619—**Corpus Juris cited in Tucker v. Brown**, 92 P.2d 221, 226, 199 Wash. 320.  
 65 C.J. p 295 note 52.

**An antenuptial agreement, whereby**

man conveyed to trustee a note to hold and with joint consent of the man and woman to sell and reinvest the proceeds in such securities as might be approved by both parties, and to pay the income to woman after the marriage, created a valid trust for benefit of the woman and the remaindermen.—**Application of Jones**, 51 N.Y.S.2d 926.

#### Direction to collect and hold proceeds

The delivery of a note and mortgage to an alleged trustee, with directions to collect the amount thereof and hold a specified amount of the proceeds for designated third persons, creates a trust by parol.—**Hartman v. Loverud**, 277 N.W. 641, 237 Wis. 6.

#### Transactions held to create trusts

(1) **Transfer of stock pursuant to resolution requiring each stockholder to indorse and deliver to corporation certificate of stock owned by him, and authorizing corporation on stockholder's death to transfer stock to his son or some other person qualified to fill vacancy, created a trust in stock, regardless of whether stockholders understood the legal nature of their acts.**—**Oakland Scavenger Co. v. Gandi**, 124 P.2d 143, 51 Cal.App.2d 69.

(2) **Stockholder's surrender of stock certificates in national bank and acceptance of new certificates as trustee for minor son created trust in stock.**—**Pottorff v. Stafford**, Tex. Civ. App., 81 S.W.2d 539, error refused, certiorari denied 56 S.Ct. 139, 296 U.S. 619, 80 L.Ed. 439.

**2. U.S.—Sundeland v. C. I. R., C.C. A. 3**, 151 P.2d 675—**City of Philadelphia v. Lieberman**, C.C.A. 1st, 112 P.2d 424, certiorari denied **Lieberman v. City of Philadelphia**, 61 S.Ct. 48, 311 U.S. 679, 85 L.Ed. 438.

**Ill.—Robbins v. Continental Nat. Bank & Trust Co. of Chicago**, 58 N.E.2d 251, 324 Ill.App. 422.  
**Ky.—Deleuil's Ex'rs v. Deleuil**, 74 N.W.2d 474, 255 Ky. 406.  
**N.Y.—Fischer v. Furman**, 54 N.Y.S.2d 820.

**3. Cal.—Simpson v. Gillis**, 33 P.2d 1071, 1 Cal.2d 42—**Bradley v. Duty**, 166 P.2d 914, 73 Cal.App.3d 522.  
**N.Y.—Kahlmeyer v. Green-Wood Cemetery**, 23 N.Y.S.2d 17, 175 Misc. 187, modified on other grounds 27 N.Y.S.2d 446, 261 App.Div. 950, reargument denied 27 N.Y.S.2d 1013, 261 App.Div. 1075, motion denied 37 N.E.2d 138, 286 N.Y. 696, affirmed 40 N.E.2d 650, 287 N.Y. 737—**Guaranty Trust Co. of N. Y. v. Lyon**, 124 N.Y.S.2d 680.

person claiming as beneficiary,<sup>4</sup> but also that general requirements as to the existence of the intention to create a trust,<sup>5</sup> and as to certainty,<sup>6</sup> including the designation, or furnishing means of ascertaining, a beneficiary,<sup>7</sup> should be complied with. The delivery of moneys by one person to another with instructions that they be paid to a third person may be effectual to create a trust for the latter's benefit,<sup>8</sup> but only where the depositor's manifested intention read in connection with all the circumstances of the case indicates that the delivery was to be a

finality, and that the money was to be from that moment dedicated to the use of the third person.<sup>9</sup> On the other hand, no trust results, if the use of the money or property was intended to be subject to the directions of the person delivering it or if the holding was for his benefit and under his orders.<sup>10</sup>

It has been held or recognized that no trust is created where possession is vested in a person merely as agent,<sup>11</sup> or if possession is vested in him

Ohio—*Rossellott v. Rossellott*, 113 N. E.2d 639, 93 Ohio App. 425.

Tenn.—*Durham v. Pierson*, 197 S.W. 2d 898, 29 Tenn App. 511.

Tex.—*Fleck v. Baldwin*, 172 S.W.2d 375, 141 Tex. 340.

65 C.J. p 299 note 53.

#### Indentures

Where no property was conveyed to trustee by corporations' indentures, there was no res possessed or held for benefit of another, debentures issued under the indentures were unsecured by any collateral, and trustee, until default occurred, had not much more than clerical duties to perform, no trust was created.—*Driscoll v. Fitch*, D.C.N.Y., 52 F. Supp. 869, affirmed, C.C.A., *Driscoll v. Public Nat. Bank & Trust Co. of New York*, 139 F.2d 348.

#### Use of safety deposit box

Transaction by which decedent in his lifetime with his own funds purchased corporate stock and had certificates issued to himself and another as joint tenants, received certificates and placed them in his safety deposit box and received a dividend paid on the stock, did not create a trust.—*Buffaloe v. Barnes*, 38 S. E.2d 222, 226 N.C. 313, rehearing denied 39 S.E.2d 599, 226 N.C. 778.

**Condition in purchaser's bid for insolvent's property requiring receiver to hold sum sufficient to pay claim of city against insolvent for electric charges did not impress purchase money with trust for city.**—*City of Tacoma v. Young*, 16 P.2d 617, 170 Wash. 385.

4. D.C.—*Hall v. Gardiner*, 126 F.2d 227, 75 U.S.App.D.C. 226.  
65 C.J. p 299 note 54.

#### Uncommunicated memoranda

Where a decedent purchased bonds with his own funds, retained the income therefrom for his own purposes and disposed of them in his lifetime, retaining the proceeds, the fact that after his death certain memoranda were found in his handwriting stating that the bonds belonged to his wife, which fact he never communicated to her, is insufficient to raise a trust from the proceeds of the bonds in her favor.—

In re *Raistrick's Estate*, 46 Pa. Dist. & Co. 225.

5. U.S.—*Well v. C. I. R.*, C.C.A. 5, 82 F.2d 561, certiorari denied 57 S. Ct. 14, 299 U.S. 552, 81 L.Ed. 466.

—*Titcomb v. Billings, Olcott & Co.*, D.C.N.Y., 104 F.Supp. 168—

In re *Newark Shoe Stores, D.C. Md.*, 3 F.Supp. 293.

Colo.—*Smith v. Simmons*, 61 P.2d 589, 99 Colo. 227.

Del.—*Bodley v. Jones*, 32 A.2d 436, 27 Del.Ch. 115.

Pa.—*Rumbaugh v. Lance, Com.Pl.*, 89 Luz Leg.Reg. 414.

65 C.J. p 299 note 56.

"This end may be accomplished by an express declaration of trust or by circumstances indicating an intention of the depositor to place the fund irrevocably beyond his control and to devote it to the indicated purpose."—*Schloss v. Powell, CC A.Va.*, 93 F.2d 518, 519.

#### Intention of owner

The intention of the owner of money, and not that of the receiver, is controlling on the question whether title to money has been transferred and a trust has been created.—*Brown v. J. P. Morgan & Co.*, 31 N.Y.S.2d 323, 177 Misc. 626, motion denied 31 N.Y.S.2d 815, 177 Misc. 763, reversed on other grounds 40 N.Y.S.2d 229, 265 App.Div. 631, affirmed 67 N.E.2d 263, 295 N.Y. 867.

#### Trust or bailment

Whether a trust or a bailment is created on delivery of personality to another for the benefit of a third person depends on the manifestation of the intention of the parties, and if that intention is that the person to whom delivery is made shall thereby acquire title to the property, a trust is created.—*Whalen v. Swirclin*, 4 N.W.2d 737, 141 Neb. 650.

#### Statement of future intent

Transaction by which mother and daughter closed their joint accounts and divided money equally among mother, daughter with whom mother had the account, and another daughter, was held not to create a voluntary express trust in favor of mother in money transferred to daughter who did not have the account with mother, where money was treated as

daughter's money, notwithstanding daughter stated that she intended to use money to care for mother in case it became necessary.—*Nusbaum v. Glickman*, 190 A. 692, 57 R.I. 506.

8. R.I.—*Nusbaum v. Glickman, supra*.

Vt.—*Dieter v. Scott*, 9 A.2d 95, 110 Vt. 376.

65 C.J. p 299 note 57.

#### Segregation of funds

In absence of proof that account of employing corporation designated as reserve for pensions and benefits represented a segregation of funds, thus creating a trust fund upon which a trust was impressed, no basis was established by employee who claimed pension under retirement plan that pension reserve account constituted trust fund from which his pension was payable.—*Gearns v. Commercial Cable Co.*, 56 N.E.2d 67, 293 N.Y. 105, 153 A.L.R. 813, reargument denied 56 N.E.2d 749, 293 N.Y. 755.

7. N.Y.—*Title Guarantee & Trust Co. v. Haven*, 108 N.E. 819, 214 N.Y. 468.

65 C.J. p 299 note 58.

**Beneficiary held definitely ascertainable**

Vt.—*Dieter v. Scott*, 9 A.2d 95, 110 Vt. 376.

8. N.Y.—*Ehag Eisenbahnwerte Holding Aktiengesellschaft v. Banca Nationala A Romaniei*, 117 N.E.2d 346, 306 N.Y. 242.

9. N.Y.—*Ehag Eisenbahnwerte Holding Aktiengesellschaft v. Banca Nationala A Romaniei, supra*.

10. N.Y.—*Ehag Eisenbahnwerte Holding Aktiengesellschaft v. Banca Nationala A Romaniei, supra*.

11. Colo.—*Smith v. Simmons*, 61 P. 2d 589, 99 Colo. 227.

N.Y.—*French v. Kensico Cemetery*, 35 N.Y.S.2d 826, 264 App.Div. 617, appeal denied 37 N.Y.S.2d 443, 264 App.Div. 955, affirmed 50 N.E.2d 551, 291 N.Y. 77.

Pa.—*Provident Trust Co. of Philadelphia v. Lukens Steel Co.*, 58 A.2d 23, 359 Pa. 1—Appeal of *Steinmetz*, 185 A. 207, 321 Pa. 577.

65 C.J. p 299 note 59.

as bailee,<sup>12</sup> pledgee,<sup>13</sup> or stakeholder.<sup>14</sup> So also, it has been held that no trust is created where the transaction constitutes a sale with an assumption by the buyer of the seller's obligation to deliver part of the property to a third person,<sup>15</sup> or with an agreement for resale to the seller under certain conditions.<sup>16</sup> The fact that one person has collected money for another and has it in his possession does not, without more, establish a trust relationship between them.<sup>17</sup>

A person dealing with a stockbroker by depositing securities with him is not as a general rule creating an express trust by such an arrangement nor has he such intention,<sup>18</sup> and it has been held that where a claimant placed certain sums of money in the custody of a realty broker on his promise to invest the money together with his own money but did not undertake to guarantee the return of principal, and the money invested was lost, the relation-

ship between the claimant and the broker was that of customer and broker, and not that of trustee and beneficiary, and claimant assumed risks involved in investments.<sup>19</sup>

**Trust or debt.** No trust is created where the transaction merely creates a debtor and creditor relationship,<sup>20</sup> as where the transaction is in the nature of a loan.<sup>21</sup> Where one person pays money to another, it depends on the manifested intention of the parties whether a trust or a debt is created.<sup>22</sup> If the intention is that the money shall be kept or used as a separate fund for the benefit of the payor or a third person, a trust is created.<sup>23</sup> Where, however, the intention is that the person receiving the money shall have the unrestricted use thereof, being liable to pay a similar amount,<sup>24</sup> with or without interest,<sup>25</sup> to the payor or to a third person, a debt is created. The intention of the parties will be ascertained by a consideration of their words and

"Agency" distinguished from "trust" see Agency § 2.

#### Fiscal agency

Generally, a trust does not arise in moneys deposited with a fiscal agency for the purpose of receiving interest on coupons of corporate obligations unless an express trust agreement is entered into for that purpose.—Finn v. Brown, 7 N.Y.S.2d 115, 169 Misc. 436, reversed on other grounds 12 N.Y.S.2d 150, 257 App.Div. 51.

#### Paying agent

Where obligor deposits money to meet interest on bonds, depository being merely paying agent, no trust for coupon holders arises.—Sherry v. Union Gas Utilities, 171 A. 188, 30 Del.Ch. 60.

12. Iowa.—Cornick v. Weir, 237 N. W. 245, 212 Iowa 715.

65 C.J. p 300 note 60.

"Bailment" distinguished from "trust" see Bailments § 4.

#### Property delivered for safekeeping

U.S.—Driscoll v. Fitch, D.C.N.Y., 52 F.Supp. 869, affirmed, C.C.A. District v. Public Nat. Bank & Trust Co., of New York, 139 F.2d 348. Neb.—O'Connor v. Burns, Potter & Co., 36 N.W.2d 507, 151 Neb. 9. 65 C.J. p 300 note 60 [a].

13. U.S.—In re Third Ave Transit Corp., D.C.N.Y., 120 F.Supp. 833. N.J.—Colantuoni v. Baleno, 123 A. 541, 96 N.J. Eq 748. 65 C.J. p 300 note 61.

"Pledge" distinguished from "trust" see Pledges § 3.

#### Pledge held destroyed

Lessor's contract to hold sum pledged by lessee for latter's benefit, and apply it to payment of rentals destroyed pledge and created trust.—

Boteler v. Koulouris, 37 P.2d 136, 1 Cal App 2d 566

14. Wis.—Stebbins v. Cosden Oil Co., 4 N.W.2d 282, 221 Wis. 72.

15. Ohio—Weiser v. Julian, 15 Ohio App 171. 65 C.J. p 300 note 63

16. Idaho—Bowman v. Adams, 261 P. 678, 45 Idaho 217.

17. U.S.—In re W. & A. Bacon Co., D.C.Mass. 261 F. 103.

18. U.S.—Titcomb v. Billings, Oilcott & Co., D.C.N.Y., 104 F.Supp. 168.

19. N.Y.—In re Arons' Estate, 121 N.Y.S.2d 512

#### Sending of checks

Where claimant placed certain sums of money in custody of realty broker upon broker's promise to invest money together with his own, broker invested money in second mortgages and upon foreclosure of first mortgages second mortgage equities were lost, fact that broker continued to send monthly or semi-monthly checks to claimant from about time of foreclosure proceedings until broker's death was not sufficient of itself to establish trust or quasi-trust relationship.—In re Arons' Estate, supra.

20. Ky.—Norman v. Judy, 251 S.W. 2d 467. N.Y.—Guaranty Trust Co. of N. Y. v. Lyon, 124 N.Y.S.2d 680.

#### Commingling with other funds

Where the depositor of cash consents to commingling it with other funds of the depositee, the relationship resulting from the transaction is not that of trustee and beneficiary, even though the deposit is for the latter's benefit, but that of debtor and creditor.—Farmers State Bank of

Forston v. Sig Ellingson & Co., 16 N.W.2d 319, 218 Minn. 411.

21. Mo.—Wheat v. Platte City Ben. Assessment Special Road Dist of Platte County, 59 S.W.2d 88, 227 Mo App 863. 65 C.J. p 300 note 62.

22. Minn.—City of Canby v. Bank of Canby, 257 N.W. 520, 192 Minn 571.

Ohio—Squire v. Oxenreiter, 200 N.E. 503, 130 Ohio St. 475.—Norris v. Norris, App., 57 N.E.2d 254, appeal dismissed 53 N.E.2d 647, 142 Ohio St. 634.—Guardian Trust Co. v. Kirby, 199 N.E. 81, 50 Ohio App. 539.

23. D.C.—Brown v. Christman, 126 F.2d 625, 75 U.S.App.D.C. 203. Minn.—City of Canby v. Bank of Canby, 257 N.W. 520, 192 Minn. 571. Ohio—Squire v. Oxenreiter, 200 N.E. 503, 130 Ohio St. 475.—Norris v. Norris, App., 57 N.E.2d 254 appeal dismissed 53 N.E.2d 647, 142 Ohio St. 634.—Guardian Trust Co. v. Kirby, 199 N.E. 81, 50 Ohio App. 539.

#### Express trust held established

Pleading of master, hearing administrator's suit for accounting, that stated amount was paid by plaintiff's intestate and received by defendant, not as loan but in trust for investment, established express trust in personal property.—Stuck v. Schumm, 194 N.E. 895, 290 Mass. 159.

24. Cal.—Downey v. Humphreys, 227 P.2d 484, 102 Cal.App.2d 323.

25. Ohio—Squire v. Oxenreiter, 200 N.E. 503, 130 Ohio St. 475.—Norris v. Norris, App., 57 N.E.2d 254, appeal dismissed 53 N.E.2d 647, 142 Ohio St. 634.—Guardian Trust Co. v. Kirby, 199 N.E. 81, 50 Ohio App. 539.

conduct in the light of surrounding circumstances.<sup>26</sup> Some of the circumstances which may be important in determining the intention of the parties are the presence or absence of an agreement to pay interest on the money paid,<sup>27</sup> the amount of money paid,<sup>28</sup> the time which is to elapse before the payee is to be called on to perform his agreement,<sup>29</sup> the relative financial situation of the parties,<sup>30</sup> their respective callings,<sup>31</sup> and the usage or custom in such or similar transactions.<sup>32</sup>

26. Ohio—Squire v. Oxenreiter, 200 N.E. 503, 130 Ohio St. 475—Norris v. Norris, App., 57 N.E.2d 254, appeal dismissed 53 N.E.2d 647, 142 Ohio St. 634—Guardian Trust Co. v. Kirby, 199 N.E. 81, 50 Ohio App. 539

#### Contract provision

Provision in dealer-contracts requiring written notice of cancellation and giving company thirty days thereafter in which to refund deposits by dealers to secure performance did not necessarily indicate that such deposits created debtor-creditor relationships, rather than trust relationships.—People v. Pierce, 243 P.2d 585, 110 Cal.App.2d 598.

#### Marital relationship

Proof of marital relationship did not establish a fiduciary relationship essential to establishment of a trust between the parties with respect to money paid over by wife to husband, but the marital status implied a confidential relationship which was to be considered along with other circumstances as it reflected upon the fiduciary relation and ultimate question as to what was the understanding between the parties when money was given to husband.—Norris v. Norris, App., 57 N.E.2d 254, appeal dismissed 53 N.E.2d 647, 142 Ohio St. 634.

27. Cal.—People v. Pierce, 243 P.2d 585, 110 Cal.App.2d 598

Ohio—Squire v. Oxenreiter, 200 N.E. 503, 130 Ohio St. 475—Guardian Trust Co. v. Kirby, 199 N.E. 81, 50 Ohio App. 539.

#### Payment of interest as creating debt relationship

(1) An undertaking that party to whom money is paid by other party thereto shall pay interest on such money at fixed or current rate, not merely such interest as money being invested may earn, practically always creates a debt, not a trust relationship, as interest is paid for use of money and party paying interest is entitled to use money for his own purposes, in absence of definite contrary understanding.—Norman v. Judy, Ky., 251 S.W.2d 467.

(2) One given money by another, with understanding that recipient should pay interest thereon pending his investment thereof in securities

to be approved by person from whom money was received, became such person's debtor, not his trustee.—Barr v. Luckenbill, 41 A.2d 627, 351 Pa. 508.

28. Ohio—Squire v. Oxenreiter, 200 N.E. 503, 130 Ohio St. 475—Guardian Trust Co. v. Kirby, 199 N.E. 81, 50 Ohio App. 539.

29. Ohio—Squire v. Oxenreiter, 200 N.E. 503, 130 Ohio St. 475—Guardian Trust Co. v. Kirby, 199 N.E. 81, 50 Ohio App. 539.

30. Ohio—Squire v. Oxenreiter, 200 N.E. 503, 130 Ohio St. 475—Guardian Trust Co. v. Kirby, 199 N.E. 81, 50 Ohio App. 539.

31. Ohio—Squire v. Oxenreiter, 200 N.E. 503, 130 Ohio St. 475—Guardian Trust Co. v. Kirby, 199 N.E. 81, 50 Ohio App. 539.

32. Ohio—Squire v. Oxenreiter, 200 N.E. 503, 130 Ohio St. 475—Guardian Trust Co. v. Kirby, 199 N.E. 81, 50 Ohio App. 539.

33. Pa.—Cibula v. Cibula, Com.Pl., 98 Pittsb.Leg.J. 243.

65 C.J. § 300 note 67.

Right of trustees named in policy to proceeds in general see Insurance § 1164.

#### Payment under option in policies

Where industrial policies payable to insured's executor or administrator gave insurer option to make payment to some relative of insured, title to proceeds received by insured's son pursuant to insurer's exercise of option vested in son as trustee for estate, and son was accountable therefor to probate court which could determine son's right to reimbursement for premiums allegedly paid by him.—Lutostanski v. Lutostanski, 181 A. 533, 120 Conn. 471.

#### Support and education of infant beneficiary

Provision in life policy that proceeds thereof received by trustee were to be used in trustee's discretion for support and education of infant beneficiary created valid, active express trust.—Bellinger v. Bellinger, 46 N.Y.S.2d 263, 180 Misc. 948.

34. N.Y.—In re Kyte's Will, 23 N.Y. 82d 236, 174 Misc. 1094.

Pa.—Pugh v. Gaines, 41 A.2d 287, 156 Pa.Super. 613—In re Yaeck's Estate, 22 Pa.Dist. & Co. 553.

## § 56. Proceeds of Life Insurance

A trust in the proceeds of a life insurance policy may be created by a declaration or provision in the policy or by collateral declarations or transactions from which the intention to create a trust appears.

A trust in the proceeds of a life insurance policy or certificate may be created by a declaration or provision in the policy<sup>33</sup> or by collateral declarations or transactions from which the intention to create a trust appears,<sup>34</sup> as, for example, by an

Tex.—Corpus Juris cited in Dunn v. Second Nat. Bank of Houston, Com. App., 113 S.W.2d 165, 171.

65 C.J. § 300 note 68.

#### Creditor

A creditor may be the designated beneficiary for a limited purpose, and, where such a limited purpose has been satisfactorily shown, the creditor becomes a trustee of the proceeds in excess of the amount of the debt.—Zolintakis v. Orfanos, C.C.A. Utah, 119 F.2d 571, certiorari denied Orfanos v. Zolintakis, 62 S.Ct. 62, 314 U.S. 630, 86 L.Ed. 506.

#### Gift

Where an unmarried woman who lived with and supported a man was informed that she could not become beneficiary in insurance policies on his life, but that same result could be obtained by a gift of policies to her, after issuance of policy a trust arose in her favor.—Jenkins v. Hill, 96 P.2d 168, 35 Cal.App.2d 521.

#### Indemnity

Where life policy was procured by decedent in pursuance of an agreement on his part to take it out as indemnity of a surety on his note, proceeds of policy in the hands of the administrator on decedent's death were subject to a parol trust or equitable lien for payment of the note.—Winston v. Winston, 4 So.2d 730, 242 Ala. 45.

#### Payment for medical services

Wife's promise to pay physician for services to husband from proceeds of benefit certificate of insurance on his life, when collected by her as beneficiary, created trust in her for physician's benefit.—Rape v. Gardner, Tex.Civ.App., 54 S.W.2d 594.

#### Reimbursement for premiums

(1) A transfer of policies to persons as beneficiaries solely for the purpose of affording them security for repayment of advancements on account of premiums paid, and payment of the insurance to them, created a trust in favor of wife of insured who was beneficiary formerly named in the policies, for so much of the insurance received by the persons as was not required to reimburse them for the premiums paid.—Hayward v. Campbell, 199 A. 530, 174 Md. 540.

(2) Assignment of life policy to party who subsequently disclaimed

agreement between the insured and the designated beneficiary,<sup>35</sup> or the actual beneficiary,<sup>36</sup> that such beneficiary shall pay over to a third person part or all of the proceeds. While it has been held that such a trust cannot be created without the knowledge or consent of the person who became a beneficiary under the terms of the life insurance policy,<sup>37</sup> it has also been held that a trust may be created for another than the designated beneficiary where that is the intention of the insured although the designated beneficiary has no knowledge that he is so designated until after the death of the insured,<sup>38</sup> and his consent to act as trustee had not been obtained.<sup>39</sup>

It is no objection to a trust with respect to such proceeds that it is not created wholly by one written instrument, but is created by two or more, which are retained by the insured during his life,<sup>40</sup> or is

created partly by a written instrument and partly by oral declarations.<sup>41</sup> The fact that the trust fund in such case is contingent does not prevent the creation of a trust.<sup>42</sup> There is, however, authority for the view that the creation by the insured of a trust in proceeds, without change of beneficiary, in order to be binding on the designated beneficiary, must be before, or contemporaneous with, the issuance of the policy.<sup>43</sup> Printed matter in a policy indicating that the proceeds are to be held in trust must, it has been held, yield to an intention of the insured to the contrary shown by written matter contained in the application for insurance which is by an express provision of the policy made a part of the contract.<sup>44</sup> In any event, the requisites of a trust must exist,<sup>45</sup> and a mere voluntary executory agreement to execute a trust in future may not be given effect as a created trust.<sup>46</sup>

any interest in the policy except for premiums paid and stated that remainder of proceeds from policy was to go to insured's wife, who was named as beneficiary, and her two boys, such declarations, being uncontradicted, created a trust, particularly where declarations were attended by corroborating circumstances, including assignee's deposit of proceeds of policy in separate account in same bank in which he maintained his personal account.—*In re Free's Estate*, 194 A 492, 327 Pa 362.

35. U.S.—*Jackman v. Equitable Life Assur. Soc. of U. S.*, C.C.A. Pa., 145 F.2d 945.

Ill.—*Gurnett v. Mutual Life Ins. Co. of New York*, 191 N.E. 250, 356 Ill. 612.

Ky.—*Quinlan v. Quinlan*, 169 S.W.2d 617, 293 Ky 565.

N.Y.—*In re Kyle's Will*, 22 N.Y.S.2d 236, 174 Misc. 1094.—*Brooks v. Rome Trust Co. of Rome*, N.Y., 272 N.Y.S. 101, 161 Misc. 641.

65 C.J. p. 300 note 69.

#### Contract with beneficiary necessary

Proceeds of life insurance may be the proper subject of a trust even when payable to a specified beneficiary without such conditions being expressed in policy, but it must be by contract with beneficiary to hold or use proceeds for benefit of another.—*Parks' Ex's v. Parks*, 156 S.W.2d 480, 288 Ky. 435.

#### Express agreement or force of attendant circumstances

A beneficiary, named in insurance policy, may become trustee of proceeds thereof by express agreement or by force of attendant circumstances, whether or not designated as such in policy.—*Gritz v. Gritz*, 7 A.2d 1, 336 Pa. 161, 122 A.L.R. 1297.—*In re Gorgas' Estate*, Orph., 34 Luz.L.R. 441, reversed on other grounds, 24 A.2d 171, 147 Pa.Super. 319.

#### Insurance trust

(1) "Insurance trust" is agreement between insured and trustee, whereby proceeds of policy are paid directly to trustee for investment and distribution to designated beneficiaries in manner and at such time as insured has directed in trust agreement.—*In re Reynolds' Estate*, 268 N.W. 480, 131 Neb. 557.

(2) In suit by insured's creditors after death of insured, insurance trust created by insured was valid, even though insured depositing policies with trustee and agreeing to make trustee beneficiary reserved right to change beneficiary, borrow money on policies, use them as security, receive dividends thereon, and surrender any policy for cash value, and insured had right to terminate, modify, or amend agreement.—*Gurnett v. Mutual Life Ins. Co. of New York*, 191 N.E. 250, 356 Ill. 612.

36. N.J.—*Steller v. Sell*, 37 A. 1010, 55 N.J. Eq. 530.

37. Tex.—*Oliver v. Oliver*, Civ. App., 170 S.W.2d 575, error dismissed.

#### Beneficiary unaware of agreement

Insured's agreement to support wife and to carry life insurance for her did not impress with trust policy previously issued payable to another beneficiary, of which wife was ignorant, where beneficiary was unaware of insured's agreement.—*Mina Life Ins. Co. v. Hartley*, D.C. Md., 4 F.Supp. 639.

38. Pa.—*Donithen v. Independent Order of Foresters*, 58 A. 142, 209 Pa. 170.

39. Pa.—*Carter v. Carter*, 184 A. 78, 321 Pa. 391.

40. Mass.—*Kendrick v. Ray*, 53 NE 823, 173 Mass. 305, 73 Am.S.R. 289.

41. Mass.—*Kendrick v. Ray*, supra. N.Y.—*Bloodgood v. Massachusetts Ben. Life Assoc.*, 44 N.Y.S. 563, 19 Misc. 460.

42. Ill.—*Gurnett v. Mutual Life Ins. Co. of New York*, 191 N.E. 250, 356 Ill. 612.

65 C.J. p. 301 note 74.

43. Colo.—*Fee v. Wells*, 176 P. 829, 65 Colo. 348.

44. Mass.—*Harding v. Littlehale*, 22 NE 703, 150 Mass. 100.

45. U.S.—*Gullon v. Chappell*, C.C.A. Conn., 116 F.2d 1017.

Mich.—*Pierowich v. Metropolitan Life Ins. Co.*, 275 N.W. 789, 232 Mich. 118.

N.J.—*Chelsea-Wheeler Coal Co. v. Marvin*, 24 A.2d 405, 131 N.J. Eq. 76, reversed on other grounds, 28 A.2d 505, 132 N.J. Eq. 462.—*McLaughlin v. Equitable Life Assur. Soc. of U. S.*, 164 A. 579, 112 N.J. Eq. 344.

N.Y.—*Bellinger v. Bellinger*, 46 N.Y.S.2d 263, 180 Misc. 948.

Ohio.—*Loewenstine v. Loewenstine*, 42 NE 2d 1007, 69 Ohio App. 536.

65 C.J. p. 301 note 77.

#### Payment of proceeds to person not entitled

Insurer's payment of proceeds of life policy to one not entitled was no basis for establishment of trust in his favor of money never intended to be paid to him or for his benefit.—*Capuano v. Boghosian*, 175 A. 830, 54 R.I. 489.

#### Debtor and creditor relationship did not create a trust

Mo.—*Dutton v. Prudential Ins. Co. of America*, 193 S.W.2d 938, 238 Mo. App. 1058.

N.J.—*Cohen v. Cohen*, 20 A.2d 594, 126 N.J. Law 605.

46. Cal.—*Estate of Webb*, 49 Cal. 541.

§ 57. Property Devised, Bequeathed, or Inherited

An express trust may be created by a promise by a devisee or legatee that he will devote his devise or legacy to a certain lawful purpose.

A trust may be impressed on property devised or bequeathed by an express provision in the will that the devisee or legatee shall hold and apply it for another person, as for his support.<sup>47</sup> While it has been held or recognized that a trust may be created by a promise, either express or implied, by the devisee or legatee, that he will devote his devise or legacy to a certain lawful purpose,<sup>48</sup> which promise induces the testator either to make a will or to change or not to change one theretofore made,<sup>49</sup> and such a trust has specifically been designated an express trust,<sup>50</sup> it seems that, usually, where a trust arises in such cases, it is treated as a constructive trust or trust ex maleficio, as discussed infra § 148.

In any event, the essentials of an express trust must be present in order to create such a trust, based on an alleged contract between a testator and a

person taking under the will<sup>51</sup> or on directions of the testator not contained in the will.<sup>52</sup> No trust is created by a simple declaration of a person named as beneficiary, to the testator, of the intention to make a future gift to a third person of property to be received under the will,<sup>53</sup> or by a promise to the testator, made by a legatee and designated executor, other than the residuary legatee, to make a future gift to a certain person of property which, under the will, goes to the residuary legatee.<sup>54</sup> So it has been held that a will giving all the property of the testator to his wife cannot be varied or contradicted by proof of an alleged oral agreement that the wife shall hold in trust for others.<sup>55</sup>

A person does not make himself a trustee by executing a will making provision for certain persons and reciting an agreement by one of such persons as to how such one will dispose of the property to be received under the will.<sup>56</sup> A joint will of two persons giving the income of their property to the survivor for life and providing for the disposal of the property on the death of the survivor does not constitute each the trustee of his own property,<sup>57</sup> but the survivor becomes the trustee

47. Mass.—Buffinton v. Maxam, 5 N. E. 519, 140 Mass. 557.  
65 C.J. p. 301 note 79.

Testamentary trusts in general see the C.J.S. title Wills §§ 1004-1061, also 69 C.J. p. 692 note 50-p. 823 note 87.

**Beneficiary of devise as trustee**

Where wife left her estate to husband when husband orally agreed to leave the estate remaining on his death to wife's niece, a beneficiary to whom the husband left estate by will in violation of agreement with wife took as trustee for the wife's niece, since equity would not permit the statute of wills to be employed as an instrument of fraud.—Sick v. Weigand, 197 A. 413, 123 N.J.Eq. 239.

48. U.S.—Markham v. Tibbetts, D.C. N.Y., 79 F.Supp. 47, modified on other grounds, 79 F.Supp. 60.

Ky.—Moore v. Garvey's Adm'r, 160 S.W.2d 363, 290 Ky. 61.

Okla.—Collar v. Mills, 125 F.2d 197, 190 Okl. 481.

Tenn.—Brunson v. Gladish, 125 S.W.2d 141, 174 Tenn. 309—Wartrace Bank & Trust Co. v. Yell, 15 Tenn. App. 306.

65 C.J. p. 301 note 80.  
Trusts not appearing in will in general see C.J.S. title Wills §§ 1020-1022, also 69 C.J. p. 749 note 30-p. 751 note 44.

49. U.S.—Markham v. Tibbetts, D.C. N.Y., 79 F.Supp. 47, modified on other grounds, 79 F.Supp. 60.

N.J.—Sick v. Weigand, 197 A. 413, 123 N.J.Eq. 239.

R.I.—Greene v. Rhode Island Hospital Trust Co., 197 A. 464, 60 R.I. 184.

65 C.J. p. 301 note 81.

50. Or.—Platt v. Jones, 38 P.2d 703, 149 Or. 246, modified on other grounds 39 P.2d 955, 149 Or. 246.  
65 C.J. p. 301 note 82.

51. Cal.—O'Neil v. Ross, 277 P. 123, 98 Cal.App. 306.  
Wash.—In re Weir's Estate, 236 P. 285, 134 Wash. 560.

**Absence of duty to perform**

Where lawyer by will gave all his property to his wife to do with as she chose, and evidence showed that it was lawyer's intention that the trust, which he provided for by oral agreement with his wife, to the effect that one-half of the property should go to his family on her death, was made wholly dependent on the will of his wife, such trust would not be imposed on the property at insistence of lawyer's relatives, although wife failed to make testamentary provision for them.—Williams v. Bartlett, Tex.Civ.App., 254 S.W.2d 559, error refused no reversible error.

**Effect of statute**

A testatrix, procuring letters from her children, assuring her that if any portion of her estate, not effectually disposed of by her will, passed to them under provisions thereof, it would be given by them to named charitable institutions on same terms as gifts of testatrix's residuary personal estate to such institutions by

will, did not impose trust on property receivable by children under will by reason of their invocation of statute prohibiting testamentary gifts to charity in excess of fifty per cent of testator's gross estate less debts.—In re Watson's Estate, 30 N.Y.S.2d 577, 177 Misc. 308.

**Property involved**

A trust could not be declared in realty willed by husband who had executed an instrument of a property settlement with his wife whereby they agreed to convey property to each other and that each should convey property to their children reserving a life estate, where such agreement referred only to property which husband owned or possessed at the time of execution of agreement and record failed to show when property willed was acquired by husband.—Mulholland v. Parker, 78 P.2d 1045, 26 Cal.App.2d 107.

52. Or.—Garde v. Goldsmith, 283 P. 39, 131 Or. 481.  
65 C.J. p. 302 note 86.

53. Mass.—Bennett v. Littlefield, 53 N.E. 1011, 177 Mass. 294.

54. Tenn.—Sims v. Walker, 8 Humphr. 503.

55. Va.—Sprinkle v. Hayworth, 26 Gratt. 384, 67 Va. 384.

56. Cal.—O'Neil v. Ross, 277 P. 123, 98 Cal.App. 306.  
65 C.J. p. 302 note 90.

57. N.Y.—Rastetter v. Hoenninger, 108 N.E. 210, 214 N.Y. 66.

of the personal estate of the deceased testator.<sup>58</sup> Where a person destroys his will so that another may take absolutely property which such other would not be entitled to take under the will, a mere expression by such person of a wish that such other should, on the latter's death, dispose of the property does not create a trust.<sup>59</sup> An agreement of a person to pay his debt out of property which will come to him from another on the latter's death does not create a trust with respect to such property when received.<sup>60</sup>

#### *Agreements after death of testator or intestate.*

In order that a trust may be created with respect to property which has passed as a decedent estate, the essentials of a trust must exist,<sup>61</sup> and it has been held that a mere voluntary agreement for the creation of a trust, as long as it remains executory, will not be given effect as a trust.<sup>62</sup> A person who has no interest in such property may not create a trust with respect to the property.<sup>63</sup> Persons taking property as the result of the death of the deceased owner may create a trust by an express or implied agreement that one of them shall hold for their benefit.<sup>64</sup> So, also, by agreement among persons interested in the estate, a third person may be constituted a trustee for one of the persons interested.<sup>65</sup> Likewise, a trust may be created by a contract for the settlement of a threatened contest of a will.<sup>66</sup> An agreement by a party to a contract to hold his interest in personal property of a decedent's estate as collateral security for the benefit of the other party to the contract creates a trust.<sup>67</sup> An absolute conveyance for a valuable consideration of an interest in property of a decedent's es-

tate to others who also have an interest does not, however, create an express trust in the absence of any provision therefor in the instrument of conveyance or otherwise.<sup>68</sup>

Among other agreements or transactions by which a trust has been created in property passing as a decedent's estate are an assignment by a beneficiary under a will, of his interest thereunder to the executor with directions to the latter to pay or have expended, or invested yearly to, or for, such beneficiary's children what would be due such beneficiary,<sup>69</sup> an agreement by an executor to pay a legacy in monthly installments,<sup>70</sup> and a contract between a person, designated and subsequently qualifying as executor, and another pursuant to which the latter collects money belonging to the estate and holds it for the benefit of the estate.<sup>71</sup> On the other hand, a trust is not created by a mere promise by an administrator to pay the administrator of another estate a debt owing to the latter's intestate from the former's intestate out of the proceeds of the sale of certain real property,<sup>72</sup> or by a promise to claimant to pay a claim against the estate, but of the property devised.<sup>73</sup>

### § 58. Transactions between Persons in Confidential, Fiduciary, or Family Relation

A trust may arise out of the nature and terms of transactions or agreements where the parties are related by blood or marriage, or occupy some confidential or fiduciary relationship.

Trusts sometimes arise out of the nature and terms of transactions or agreements where the parties are related by blood or marriage,<sup>74</sup> or occupy

58. N.Y.—Rastetter v. Hoenninger, supra.

59. Wis.—In re Woehler's Estate, 220 N.W. 379, 198 Wis. 301.  
60 C.J. p 302 note 93.

60. N.Y.—Wemple v. Hauenstein, 46 N.Y.S. 288, 19 App.Div. 552.

61. Ga.—Cornelson v. Sansom, 165 S.E. 264, 175 Ga. 467.  
65 C.J. p 302 note 95.

62. Mass.—Bennett v. Littlefield, 58 NE 1011, 177 Mass. 294.

63. Ga.—Cornelson v. Sansom, 165 S.E. 264, 175 Ga. 467—Sansom v. Cornelson, 155 S.E. 764, 171 Ga. 427.

64. Ill.—Fox v. Fox, 95 N.E. 498, 250 Ill. 384.  
65 C.J. p 302 note 98.

65. Tex.—Adcock v. Shell, Civ.App., 273 S.W. 900.  
65 C.J. p 303 note 99.

66. Mass.—Hayles v. Payson, 5 Allen 473.  
65 C.J. p 303 note 1.

67. N.Y.—In re Leverich's Will, 238 N.Y.S. 533, 135 Misc. 774, affirmed 251 N.Y.S. 870, 234 App.Div. 625.

68. Kan.—McCullough v. McCullough, 200 P. 298, 109 Kan. 497.  
65 C.J. p 303 note 3.

69. N.J.—Beekman v. Hendrickson, Ch., 21 A. 567.

70. Ala.—Glennon v. Harris, 42 So. 1003, 149 Ala. 236, 9 L.R.A., N.S., 214, 13 Ann.Cas. 1163.  
65 C.J. p 303 note 5.

71. Cal.—England v. Winslow, 237 P. 542, 196 Cal. 260.  
65 C.J. p 303 note 6.

72. Mass.—Sillsbee v. Ingalls, 10 Pick. 526.

73. Ill.—Hamilton v. Downer, 38 N.E. 733, 152 Ill. 651.

74. U.S.—Universal Ins. Co. v. Steinbach, C.A.Or., 170 F.2d 303.

Iowa.—In re Willenbrock's Estate, 290 N.W. 502, 228 Iowa 234.  
Mo.—Stephenson v. Stephenson, 171 S.W.2d 555, 351 Mo. 8.

65 C.J. p 303 note 10.  
Constructive trust arising out of family relation see infra § 151.

#### **Husband and wife**

(1) Conveyance of realty by husband to wife, with understanding that wife would hold title for benefit of husband and would reconvey property on husband's request, created a trust relationship—Swallows v. Swallows, 201 P.2d 23, 89 Cal.App.2d 458.

(2) A property settlement providing for monthly payments to divorced wife during husband's lifetime, and on his death for the purchase of annuities at a designated cost by the executor of husband's will for the wife's benefit, created an irrevocable trust in favor of the wife.—In re Belknap's Estate, 152 P.2d 657, 68 Cal.App.2d 644.



some confidential or fiduciary relationship.<sup>75</sup> In this connection, a fiduciary relationship exists where confidence is reposed on one side and resulting superiority and influence on the other,<sup>76</sup> and it has been held that mere friendship does not constitute a confidential relationship in the absence of a showing of the exercise of undue influence.<sup>77</sup> In order to create an express trust in such a case the essentials of a trust must exist,<sup>78</sup> including the intention to create a trust,<sup>79</sup> and certainty.<sup>80</sup> Such transactions are not to be confused with those creating or intending to create some relation other than that of trustee and cestui que trust,<sup>81</sup> and the facts in some cases, although involving transac-

tions between persons related to each other, or occupying confidential relations, have been held insufficient to create an express trust, but to create, at the most, a mere agency<sup>82</sup> or a debt.<sup>83</sup>

## § 59. Agreements, or Transactions, Creating or Intended to Create Other Relations

Particular agreements or transactions have been held not to constitute a trust, but some other relationship such as that of debtor and creditor or principal and agent.

While the fact that an agreement creates a relationship other than a trust does not necessarily prevent the existence of a trust relationship also,<sup>84</sup>

(3) Under separation agreement providing that, on death of husband or wife, all of property of either would go to survivor and that on death of survivor, property would go to their children, the husband and wife each became a trustee one for the other, and both for the heirs named as beneficiaries in the agreement.—*Sonnicksen v. Sonnickson*, 113 P.2d 495, 45 Cal.App.2d 46

(4) Where husband, at request of wife, turned over funds to her for setting up housekeeping on her promise to return on demand any money left over and on her representation that money would thereby be protected if husband encountered business difficulties, a trust was created in so far as funds were to be used for setting up housekeeping.—*Levy v. Levy*, 35 N.E.2d 659, 309 Mass. 486.

(5) Where divorced husband deposited sum with court to be paid to wife for care of parties' children and thereafter on parties' joint petition divorce petition was vacated and parties' used sum deposited for purchase of a farm, title to which was taken by parties jointly, conveyance was in trust for parties' children.—*Stretch v. Watson*, 74 A.2d 597, 5 N.J. 268.

(6) Other transactions between husband and wife see 65 C.J. p 303 note 10 [a].

75. Md.—*Roberts v. First Nat. Bank*, 115 A. 220, 157 Md. 36.  
65 C.J. p 304 note 11.  
Constructive trust arising out of confidential, or fiduciary relation see *infra* § 151.

### Trustee of express trust

The person occupying a fiduciary relationship, who has property deposited with him on strength of such relationship, is to be dealt with as a trustee of an express trust.—*Tucker v. Brown*, 92 P.2d 221, 199 Wash. 320.

76. Wash.—*Tucker v. Brown*, *supra*.  
Fiduciary relationship held to exist

A fiduciary relationship existed between seventy-year-old woman who

reposed complete and absolute confidence in stranger influencing and controlling all her actions and who turned over to stranger all her property valued at more than one million dollars.—*Tucker v. Brown*, *supra*

77. Cal.—*Hausfelder v. Security-First Nat Bank of Los Angeles*, 176 P.2d 84, 77 Cal.App.2d 478.

78. Ark.—*Aycock v. Bottoms*, 144 S. W.2d 43, 201 Ark. 104.  
Cal.—*Balian v. Balian's Market*, 119 N.E. 426, 48 Cal.App.2d 150.  
Pa.—*Brown v. Monaca Federal Sav & Loan Ass'n*, 42 A.2d 50, 352 Pa. 1

Tex.—*Oden v. McAdams*, Civ.App., 108 S.W.2d 920  
65 C.J. p 305 note 13.

**Express words of trust held not necessary**

U.S.—*Universal Ins. Co. v. Steinbach*, C.A. 9, 170 F.2d 303

**Mortgages taken in joint name of spouses** were not held by surviving spouse impressed with trust.—*In re Loeach's Estate*, 185 A. 191, 322 Pa. 105.

### Unrecorded deed

Where widow conveyed realty to son, who executed warranty deed to same realty in favor of widow and placed it in an envelope with instructions that it was to be recorded by the widow in event of death or serious injury to son, and envelope was placed in safety deposit box, kept in the names of the widow and son, and son thereafter dealt with the property as the absolute owner, son did not hold property in trust for the widow.—*First Sec Trust Co. v. Tracy Loan & Trust Co.*, 84 P.2d 414, 96 Utah 148.

79. Mass.—*Levy v. Levy*, 35 N.E.2d 659, 309 Mass. 486.  
65 C.J. p 305 note 14.

### Intent held sufficiently disclosed

Cal.—*Weiner v. Mullaney*, 140 P.2d 704, 59 Cal.App.2d 620.

80. Cal.—*Balian v. Balian's Market*, 119 P.2d 426, 48 Cal.App.2d 150.

81. Ark.—*Aycock v. Bottoms*, 144 S. W.2d 43, 201 Ark. 104.  
Mass.—*Millett v. Temple*, 188 N.E. 382, 285 Mass. 87.

Tex.—*Oden v. McAdams*, Civ.App., 108 S.W.2d 920  
65 C.J. p 305 note 15

82. Mass.—*Millett v. Temple*, 188 N.E. 382, 285 Mass. 87.

83. N.J.—*Tucker v. Linn*, Ch., 57 A. 1017.  
65 C.J. p 305 note 16.

84. Okl.—*Hall v. Deal*, 234 P.2d 384, 205 Okl. 46.  
65 C.J. p 305 note 18.

### Agency

(1) While an agency is not a trust, if an agent is intrusted with title to property for his principal, he is a trustee of that property.—*Minneapolis Fire & Marine Ins. Co. v. Bank of Dawson*, 257 N.W. 510, 193 Minn. 14.

(2) Where an agent in possession of principal's property is clothed by principal with power thereafter to be exercised for alternate benefit of principal and another, such agency becomes a trusteeship.—*Hall v. Deal*, 234 P.2d 384, 205 Okl. 46.

### Joint adventure

(1) Fact that a written agreement constitutes parties joint adventurers would not prevent such agreement creating a trust relationship between the parties.—*In re Leverich's Will*, 238 N.Y.S. 533, 135 Misc. 774, affirmed *In re Meeker*, 251 N.Y.S. 870, 234 App.Div. 625.

(2) Where relationship between musical composers and publishers who became members of non-profit association engaged solely in issuing license for non-dramatic public performances for profit of musical compositions of its members was basically a joint venture with composers contributing their songs and publishers their copyrights, a publisher after becoming a member held his copyright in trust for association and its members, and such trust relationship continued after expiration of five

in cases of voluntary settlement or gifts the court will not impute a trust where a trust is not in fact the thing contemplated,<sup>85</sup> and the courts, in many cases, have held or recognized that the agreement or transaction under consideration created, not a trust, but another relation.<sup>86</sup> Thus, particular

agreements or transactions have been held not to create a trust but an ordinary contract relationship,<sup>87</sup> such as that of debtor and creditor,<sup>88</sup> or the relationship of assignor and assignee,<sup>89</sup> landlord and tenant,<sup>90</sup> mortgagor and mortgagee,<sup>91</sup> principal and agent,<sup>92</sup> or vendor and purchaser or seller

year assignments of copyrights made by publishers to the association—*Broadcast Music v. Taylor*, 55 N.Y.S. 2d 94.

85. *N.Y.—Young v. Young*, 80 N.Y. 422, 36 Am R. 634—1strestor v. Hohloch, 75 N.Y.S. 405, 70 App.Div. 256.

86. *Mass.—New England Mut Life Ins. Co. v. Harvey*, D.C. Mass., 82 F.Supp. 702—*Cooper v. Ohio Oil Co.*, 26 F.Supp. D.C.Wyo., 304, affirmed, C.C.A., 108 F.2d 535.

Ill.—*Roe v. Cooke*, 112 N.E.2d 511, 350 Ill.App. 183

Ind.—*Baker v. Metropolitan Life Ins. Co.*, 48 N.E.2d 173, 221 Ind. 411

Md.—*Engle v. U. S. Fidelity & Guaranty Co.*, 200 A. 827, 175 Md. 174

N.Y.—*Guttman v. Whitehall Imp Corp.*, 120 N.Y.S.2d 786, 281 App. Div. 528, reargument denied 122 N.Y.S.2d 892, 282 App.Div. 760—

*Moyer v. Dunseith*, 46 N.Y.S.2d 360, 180 Misc. 1004, affirmed 45 N.Y.S.2d 126, 266 App.Div. 1008

Pa.—*Bair v. Snyder County State Bank*, 171 A. 274, 314 Pa. 55.

S.C.—*Crotts v. Fletcher Motor Co.*, 64 S.E.2d 540, 219 S.C. 204.

Other transactions distinguished, see supra § 2.

**Oil and gas lease**

U.S.—*Phillips Petroleum Co. v. Johnson*, C.C.A.Tex., 155 F.2d 185, certiorari denied 67 S.Ct. 87, 329 U.S. 730, 91 L.Ed. 632—*Chapman v. Texas*—*McAlister v. Eclipse Oil Co.*, 98 S.W.2d 171, 128 Tex. 449.

87. Cal.—*Mulligan v. Wilson*, 210 P. 2d 526, 94 Cal.App.2d 286

Kan.—*G. S. Johnson Co. v. N. Sauer Milling Co.*, 84 P.2d 934, 148 Kan. 861—*G. H. Leidenheimer Baking Co. v. Enns Milling Co.*, 84 P.2d 940, 148 Kan. 737.

N.J.—*In re Laubenstein*, 79 A.2d 725, 12 N.J.Super. 363.

N.Y.—*French v. Kensico Cemetery*, 30 N.Y.S.2d 737, 177 Misc. 305, affirmed 35 N.Y.S.2d 826, 264 App. Div. 617, appeal denied 37 N.Y.S.2d 443, 264 App.Div. 955, affirmed 50 N.E.2d 551, 291 N.Y. 77—*Kahmeyer v. Green-Wood Cemetery*, 23 N.Y.S.2d 17, 175 Misc. 187, modified on other grounds, 27 N.Y.S.2d 416, 261 App.Div. 950, reargument denied 27 N.Y.S.2d 1013, 261 App.Div. 1075, motion denied 37 N.E.2d 138, 286 N.Y. 696, affirmed 40 N.E.2d 650, 287 N.Y. 787.

Wyo.—*Corpus Juris cited in Dallas Dome Wyoming Oil Fields Co. v.*

*Broder*, 97 P.2d 311, 318, 55 Wyo. 109.

65 C.J. p. 305 note 21.

**Contract for benefit of third person**

Ind.—*Krull v. Pierce*, 71 N.E.2d 617, 117 Ind.App. 638.

**Particular contracts**

(1) Where beneficiary requested insurer to retain proceeds of life policies and make interest payments to beneficiary for life, and insurer issued an interest income bearing certificate which provided that if beneficiary did not exercise right to have principal paid to her during her life, principal should be paid to insured's sisters, sisters were not entitled to proceeds of policies on theory that certificate created a trust in their favor, since insurer's promise to pay interest, and the absence of a renegotiated such a relationship—*Mutual Ben. Life Ins. Co. v. Ellis*, C.C.A. N.Y., 125 F.2d 127, 138 A.L.R. 1478, certiorari denied *Eisenlord v. Ellis*, 62 S.Ct. 945, 316 U.S. 665, 86 L.Ed. 1741

(2) Landowner, who allegedly orally agreed to devise realty to plaintiff in return for performance of certain acts which plaintiff allegedly did perform, was at most under contractual duty to convey the realty to plaintiff and did not hold it in trust for plaintiff—*Page v. Joplin Nat Bank & Trust Co.*, 255 S.W.2d 821, 363 Mo. 1008.

(3) Contract for purchase of bank stock in which buyer agreed to also buy stock of third person not party to contract did not amount to trust or equitable charge on stock or on money to be paid therefor—*Illines v. Pacific Bancorporation*, 30 P.2d 763, 146 Or. 407.

(4) Other contracts.

Cal.—*Gonzales v. Hodgson*, 237 P.2d 556, 38 Cal.2d 91.

Iowa.—*Evans v. Cole*, 281 N.W. 230, 225 Iowa 756.

65 C.J. p. 305 note 21 [a].

88. U.S.—*Hughes v. Sun Life Assur Co. of Canada*, C.C.A.Ill., 159 F.2d 110—*U. S. v. Gordon*, C.C.A.N.Y., 118 F.2d 671—*U. S. v. Sinclair Prairie Oil Co.*, D.C.Okla., 21 F.Supp. 179.

Cal.—*Downey v. Humphreys*, 227 P.2d 484, 102 Cal.App. 484.

Ga.—*Turner v. Olympian Hills*, 191 S.E. 106, 184 Ga. 340

Ill.—*Kilgore v. State Bank of Colusa*, 25 N.E.2d 39, 273 Ill. 578.

Ky.—*Norman v. Judy*, 251 S.W.2d 467—*Brickley v. Standard Mort-*

*gage Co.*, 160 S.W.2d 633, 290 Ky. 125

Mo.—*Putton v. Prudential Ins. of America*, 193 S.W.2d 938, 238 Mo. App. 1058.

N.J.—*Cohen v. Cohen*, 20 A.2d 594, 126 N.J.Law 605—*National Gypsum Co. v. J. E. Stevenson Co.*, 26 A.2d 798, 132 N.J. 59, 58.

N.Y.—*In re Lawyers Westchester Mortgage & Title Co.*, 287 N.Y.S. 86, 247 App.Div. 895, affirmed 4 N.E.2d 733, 272 N.Y. 553—*Gearns v. Commercial Cable Co.*, 32 N.Y.S.2d 856, 177 Misc. 1047

Pa.—*E. P. Wilbur Trust Co. v. Knadler*, 185 A. 319, 322 Pa. 17—*Bair v. Snyder County State Bank*, 171 A. 274, 314 Pa. 85.

Wyo.—*Dallas Dome Wyoming Oil Fields Co. v. Broder*, 97 P.2d 311, 55 Wyo. 109.

65 C.J. p. 306 note 22.

**A gift for life**, with right to consume, creates a relation of debtor and creditor and not that of trustee and cestui que trust—*In re Hays' Estate*, 55 A.2d 763, 358 Pa. 38.

89. Iowa.—*McBain v. Sorenson*, 20 N.W. 449, 236 Iowa 996.

N.Y.—*Johnson v. Williams*, 63 How. Pr. 233

**90. Instrument in form of ordinary lease**

An instrument in form of ordinary lease of realty to incorporated local church for "church, charity, literary or community purposes" only and primarily to provide ground for erection of parsonage, with provision for reversion of right of possession and title to lessors, their heirs or assigns, on expiration of lease or lessee's abandonment of property, was a lease, creating relationship of landlord and tenant as between parties thereto, and did not create trust relationship as between lessors and lessee or community.—*Hoffman v. Tieton View Community M. E. Church*, 207 P.2d 699, 33 Wash. 716.

91. Cal.—*Anglo-Californian Bank v. Corf*, 81 P. 1077, 147 Cal. 384.

65 C.J. p. 306 note 24.

92. Mo.—*State ex rel. Lee v. Sartorius*, 130 S.W.2d 547, 344 Mo. 912

N.Y.—*Ehag Eisenbahnwerte Holding Aktiengesellschaft v. Banca Nazionale A. Romanina*, 117 N.E.2d 346, 306 N.Y. 242—*Cohen v. Hughes*, 38 N.Y.S.2d 874, affirmed 41 N.Y.S.2d 210, 266 App.Div. 658, affirmed 52 N.E.2d 591, 291 N.Y. 698.

65 C.J. p. 306 note 26.

and buyer.<sup>93</sup>

So, also, it has been held that a trust is not created where there is merely an agreement of a debtor to apply to the payment of the debt money to be received by him on the sale of his property,<sup>94</sup> or a combination or quasi partnership of creditors for the purpose of realizing something from the insolvent estate of their debtor;<sup>95</sup> and the members of a committee representing creditors merely for the purpose of supervising the business of the debtor who continues business and retains possession of the property involved are not trustees.<sup>96</sup> Likewise, an absolute and perfect gift for the sole benefit of the donee does not create a trust,<sup>97</sup> nor does a by-law of a town with respect to the application of certain money, which may be changed or repealed at the option of the town, and which does not constitute a contract with individuals.<sup>98</sup> A deed to one for life with provision that thereafter the property should revert back to the grantor's estate for distribution among the grantor's next of kin does not create a trust.<sup>99</sup>

The fact that an agreement or instrument was intended to create some relationship other than that of trust, but is insufficient to do so, does not alone authorize the court to construe it to be a declaration of trust.<sup>1</sup> Thus, the court will not, unless all the elements of a trust are present, convert into a declaration of trust an imperfectly executed will<sup>2</sup> or an imperfect gift.<sup>3</sup> There is, however, authority for the view that an imperfect gift may be enforced as a trust when it possesses all the elements of a trust,<sup>4</sup> and it has been held that where a gift is incomplete by reason of some technicality in the law and where the essential elements of a trust are established, the manifest intention of the donor may be sustained through the agency of a trust.<sup>5</sup> A mere voluntary executory agreement for the creation of a trust is not enforceable as a trust.<sup>6</sup> Where the existence of a trust in certain property depends on the performance by the prospective beneficiary of certain acts, no trust arises in the absence of such performance.<sup>7</sup>

93. 111—Widell v. Carmichael, 126 N.E. 529, 285 Ill. 15—Littwin v. Halsey, Stuart & Co., 58 N.E.2d 737, 324 Ill.App. 525.

65 C.J. p. 306 note 23—66 C.J. p. 483 note 79 [b].

**Option to buy land**

Where plaintiff's vendor had contracted with defendant to sell land to defendant for a specified price with interest from date of contract, the only right defendant had was an option to buy land and receive a deed when he paid agreed purchase price with interest, and he was not entitled to assert a trust relationship with plaintiff's vendor and recover from vendor, on basis of that relationship, the price vendor received from plaintiff in excess of amount owing to vendor by defendant.—Thomas v. Smith, 221 S.W.2d 408, 215 Ark. 527.

94. N.Y.—Thacher v. Hope Cemetery Assoc., 27 N.E. 1040, 126 N.Y. 507, 65 C.J. p. 307 note 27.

95. N.D.—Comer v. Thompson, 174 N.W. 212, 43 N.D. 172, 65 C.J. p. 307 note 28.

96. Ill.—Hall v. Crane Bros. Mfg. Co., 87 Ill. 283, 65 C.J. p. 307 note 29.

97. Del.—Shockley v. Halbig, 75 A. 2d 512, 31 Del.Ch. 400.

N.Y.—Cadman Memorial Congregational Soc. of Brooklyn v. Kenyon, 116 N.E.2d 481, 306 N.Y. 151, 65 C.J. p. 307 note 30.

98. Mass.—Fay v. Milford, 124 Mass. 79.

99. S.C.—Boyce v. Moseley, 86 S.E. 771, 102 S.C. 361, 65 C.J. p. 307 note 32.

1. Ky.—Pikeville Nat. Bank & Trust Co. v. Shirley, 135 S.W.2d 426, 281 Ky. 150, 126 A.L.R. 919, 65 C.J. p. 307 note 33.

2. N.D.—McGillivray v. First Nat. Bank, 217 N.W. 150, 56 N.D. 152, 65 C.J. p. 307 note 31.

3. U.S.—Weil v. C. I. R., C.C.A.5, 82 F.2d 561, certiorari denied 57 S.Ct. 14, 299 U.S. 552, 81 L.Ed. 406—Hungen v. First Trust Co. of St. Paul, D.C. Minn., 23 F.Supp. 958, reversed on other grounds, C.C.A., 103 F.2d 260.

Cal.—Fritz v. Thompson, Cal.App. 271 P.2d 205.

Ky.—Frazier v. Hudson, 130 S.W.2d 809, 279 Ky. 334, 123 A.L.R. 1331. Mass.—Mulloy v. Charlestown Five Cents Sav. Bank, 188 N.E. 608, 285 Mass. 101.

Vt.—Warner v. Burlington Federal Sav. & Loan Ass'n, 49 A.2d 93, 114 Vt. 463, 168 A.L.R. 1265—Mathews v. Drew, 172 A. 638, 106 Vt. 245, 65 C.J. p. 307 note 35.

"An imperfect gift does not constitute a trust."—Rock v. Rock, 33 N.E.2d 973, 976, 309 Mass. 44.

**Want of delivery**

The courts are reluctant to extend the doctrine of declaration of trust

in cases where an attempt has been made to make a gift, which for want of delivery is imperfect.—In re Solot's Estate, 50 N.Y.S.2d 401, affirmed 55 N.Y.S.2d 125, 269 App.Div. 759.

**Savings account**

Transaction whereby donor sent letter to bank directing bank to transfer donor's savings account to his sister, which inclosed passbook indorsed over to sister, which was unenforceable as gift inter vivos because letter was not received by the bank prior to donor's death by suicide, was not enforceable as declaration of trust, since gift of equitable or beneficial title must be as complete and effectual in case of trust as is gift of thing itself in gift inter vivos.—Pikeville Nat. Bank & Trust Co. v. Shirley, 135 S.W.2d 426, 281 Ky. 150, 126 A.L.R. 919.

4. Ky.—Ginn's Adm'r v. Ginn's Adm'r, 32 S.W.2d 971, 236 Ky. 217, 65 C.J. p. 308 note 36.

5. Cal.—American Bible Soc. v. Mortgage Guarantee Co., 17 P.2d 105, 217 Cal. 9.

6. Mass.—Stone v. Hackett, 12 Gray 227.

Mo.—Estate of Soulard, 101 S.W. 617, 141 Mo. 642—Citizens' Nat. Bank v. McKenna, 153 S.W. 521, 168 Mo. App. 254.

65 C.J. p. 308 note 37.

7. Ariz.—Wilson v. Coerver, 279 P. 253, 35 Ariz. 488.

65 C.J. p. 308 note 38.

## 5. ACCEPTANCE OR DECLARATION OF TRUST AND TRANSFER OF TITLE AND POSSESSION

## § 60. Acceptance and Disclaimer by Trustee

- a. Acceptance
- b. Disclaimer

## a. Acceptance

While an express trust cannot be imposed on one who does not accept it, as a general rule the trustee's assent is not necessary in order to render the trust valid.

An express trust cannot be imposed on one who does not, expressly or by implication, accept it,<sup>8</sup> especially where the terms of the trust are such that the duties imposed are or may become burdensome.<sup>9</sup> An acceptance of the office by a trustee is

necessary in order to constitute him trustee<sup>10</sup> and to vest title in him.<sup>11</sup> However, his assent is not necessary in order to render the trust valid,<sup>12</sup> and his refusal to accept does not defeat the trust,<sup>13</sup> since equity will not allow a trust to fail for want of a trustee, as discussed infra § 217, although a provision of a trust instrument which makes the operative effect dependent on the decision of the trustee may be given effect.<sup>14</sup>

Acceptance of a trust, created by will, deed, or other instrument, is ordinarily presumed<sup>15</sup> until the contrary is shown,<sup>16</sup> especially after a long lapse of

8. Mass.—*Daley v. Daley*, 14 N.E. 2d 113, 300 Mass. 17.

N.Y.—*In re Kellogg*, 108 N.E. 844, 214 N.Y. 460, Ann Cas 1916D 1298. Or.—*Corpus Juris* cited in *re Buelow's Estate*, 161 P.2d 909, 915, 177 Or. 218.

65 C.J. p 312 note 21.

## Unprofitable act

Trustees are not obliged to act and thus execute a trust which would be unprofitable to them.—*Harold v. Beard*, 35 N.E. 488, 140 N.Y. 260.—*In re Maas' Estate*, 38 N.Y.S.2d 261.

9. Ohio—*Reichert v. Mikesell*, 57 N.E.2d 160, 73 Ohio App. 504.

10. Cal.—*Smith v. Bliss*, 112 P.2d 30, 44 Cal.App.2d 171.

11.—*Darmstadt v. Horwitz*, 19 N.E.2d 105, 298 Ill. App. 523.

Kan.—*Shumway v. Shumway*, 44 P.2d 247, 141 Kan. 835.

Ky.—*Hinton's Ex'r v. Hinton's Committee*, 76 S.W.2d 8, 256 Ky. 315.

Ohio—*In re Emswiler's Estate*, 7 Ohio Supp. 199, affirmed, App. 38 N.E.2d 917.

Or.—*Corpus Juris* cited in *In re Buelow's Estate*, 161 P.2d 909, 915, 177 Or. 218.

65 C.J. p 312 note 22.

Trust is incomplete and does not become effective until acceptance.—*Ross v. Ross*, 253 N.Y.S. 871, 233 App. Div. 626, affirmed *Hutchinson v. Ross*, 187 N.E. 65, 262 N.Y. 381.—*In re Riva's Trust*, 100 N.Y.S.2d 357.

11. Ill.—*Darmstadt v. Horwitz*, 19 N.E.2d 105, 298 Ill. App. 523.

Ky.—*Hinton's Ex'r v. Hinton's Committee*, 76 S.W.2d 8, 256 Ky. 315. 65 C.J. p 312 note 23.

## Power to deal with property as trustee

Where inter vivos trust instrument was executed by grantor on July 11, 1929, but was not accepted in writing and acknowledged by named trustees until July 25, 1929, the trust instrument did not become effective until acceptance of the trust by trustees and the transfer to them as

trustees of the securities set forth therein, and they had no power to deal with the securities as trustees prior to that time.—*In re Rivas' Trust*, 100 N.Y.S.2d 357.

12. N.J.—*Hooton v. Neeld*, 97 A.2d 153, 12 N.J. 296.

Or.—*In re Buelow's Estate*, 161 P.2d 909, 177 Or. 218.

Wis.—*Sutherland v. Pierner*, 24 N.W.2d 884, 219 Wis. 402.

65 C.J. p 312 note 24.

## In California

(1) The rule as stated has been followed.—*Corpus Juris* cited in *Shaw v. Johnson*, 59 P.2d 876, 879, 15 Cal.App.2d 599—65 C.J. p 312 note 24.

(2) However, it has also been held that the acceptance of the trust by the trustee is an essential element of every valid trust.—*Azevedo v. Azevedo*, 122 P.2d 311, reheard 129 P.2d 127, 54 Cal.App.2d 486.—*Bishop's School Upon Scripps Foundation v. Wells*, 65 P.2d 105, 19 Cal.App.2d 141.—*Dingwell v. Seymour*, 267 P. 327, 91 Cal.App. 483.

(3) The delivery to plaintiff by decedent shortly before death, of bankbook containing a small joint bank account of plaintiff and decedent, together with dated and signed memorandum "make it joint tenancy 20,000" and promise that decedent and executor of her deceased husband's estate would be trustees until her legacy from husband's estate was ordered distributed when money would be deposited in joint account, was insufficient under statute to establish a valid "trust," where no one having possession of the subject matter thereof was shown to have consented to act as trustee.—*Smith v. Bliss*, 112 P.2d 30, 44 Cal.App.2d 171.

13. Iowa.—*Wells v. German Ins. Co.*, 105 N.W. 123, 128 Iowa 643.

65 C.J. p 312 note 25.

14. Ky.—*Gathright's Trustee v. Gaut*, 124 S.W.2d 782, 276 Ky. 562, 120 A.L.R. 1403.

Ohio—*Reichert v. Mikesell*, 57 N.E.2d 160, 73 Ohio App. 504.

65 C.J. p 312 note 27.

15. Or.—*In re Buelow's Estate*, 161 P.2d 909, 177 Or. 218.

Tex.—*Corpus Juris* quoted in *Lange v. Houston Bank & Trust Co.*, 194 S.W.2d 797, 801, error refused no reversible error.

65 C.J. p 312 note 28.

## Settlor's death before acceptance

A testamentary trust once created is not affected by settlor's death before notice of trust to trustee, or acceptance by him.—*Smith v. Rizzuto*, 276 N.W. 406, 153 Neb. 655.

## Beneficiary of insurance policy as trustee

(1) Where deceased's son was substituted as beneficiary of life insurance policies for purpose of having son collect insurance and distribute it to certain persons named in letter written by deceased addressed to son and found among deceased's effects after his death and son collected proceeds of the policy after he had knowledge of the trust created, it was not necessary to have notified the trustee and obtained his consent before designating him as such, and the son was held to be trustee.—*Carter v. Carter*, 184 A. 78, 321 Pa. 391.

(2) Where insured designated his brother as beneficiary, and although he did not inform his brother, stated to others that he took out the insurance for the benefit of his wife and had put it in the brother's name because his wife was a minor but that his brother would carry out his intentions, and the brother collected the insurance, it was not necessary that deceased should have notified his brother and obtained his consent before naming him.—*Donithen v. Independent Order of Foresters*, 55 A. 142, 209 Pa. 170.

16. Tex.—*Lange v. Houston Bank & Trust Co.*, Civ.App., 194 S.W.2d

time, even though the trustee may have done nothing in execution of the trust.<sup>17</sup> While an express acceptance of the trust is effective,<sup>18</sup> no formal acceptance is necessary.<sup>19</sup> So acceptance need not be in writing<sup>20</sup> or manifested by express words.<sup>21</sup> It may be shown by words or actions or by both<sup>22</sup> and any conduct of the trustee indicating with reasonable certainty that he understood and accepted the terms of the trust is sufficient.<sup>23</sup> The acceptance

may often be implied or established by inference,<sup>24</sup> as, for example, as the result of accepting and retaining the trust deed,<sup>25</sup> voluntary interference with the trust property,<sup>26</sup> assertion of ownership,<sup>27</sup> execution of the duties of the trust,<sup>28</sup> or, in general, acts relating to the control, management, or disposition of the subject matter of the trust.<sup>29</sup> Where the trust instrument authorizes the trustee to appoint a successor, bringing suit to resign the trust and

797, error refused no reversible error.

65 C.J. p 313 note 28 [a].

**Acceptance presumed under the facts**  
Tex.—Lange v. Houston Bank & Trust Co., supra.

17. Mass.—Daley v. Daley, 14 N.E. 2d 113, 300 Mass 17.

65 C.J. p 313 note 28 [b].

18. Iowa.—Nowlen v. Nowlen, 98 N.W. 383, 122 Iowa 541.

**Tex.—Corpus Juris quoted in Lange**  
v. Houston Bank & Trust Co., Civ App., 194 S.W.2d 797, 801, error refused no reversible error.

**Acceptance with request for application of cy pres doctrine**

Where judgment in previous action provided that, if trustee refused to accept bequest in trust, decedent should be adjudged to have died intestate as to residuary estate, decedent's heirs were not entitled to residuary estate where trustee accepted bequest in writing, but asked that cy pres doctrine be applied.—In re Swan's Will, 261 N.Y.S. 428, 237 App Div. 454, affirmed in re St John's Church of Mt Morris, 189 N.E. 734, 263 N.Y. 638.

19. Cal.—Cooper v. Cooper, 39 P.2d 820, 3 Cal App 2d 154

Ky.—Hinton's Ex'r v. Hinton's Committee, 76 S.W.2d 8, 256 Ky 345.

**Tex.—Corpus Juris quoted in Lange**  
v. Houston Bank & Trust Co., Civ App., 194 S.W.2d 797, 801, error refused no reversible error

Wash.—In re Eustace' Estate, 87 P. 2d 305, 198 Wash 142.

65 C.J. p 313 note 30

**Physical acceptance**

Trust deed may pass title, although there is no physical acceptance thereof, or acceptance does not occur at time of execution of trust deed, and no particular form or actual words of acceptance are necessary.—Hinton's Ex'r v. Hinton's Committee, 76 S.W.2d 8, 256 Ky. 345.

20. Mich.—McBride v. McIntyre, 51 N.W. 1113, 91 Mich. 406.

65 C.J. p 313 note 31.

21. Cal.—Cooper v. Cooper, 39 P.2d 820, 3 Cal App 2d 154.

Ky.—Hinton's Ex'r v. Hinton's Committee, 76 S.W.2d 8, 256 Ky. 345.  
Wash.—In re Eustace' Estate, 87 P. 2d 305, 198 Wash 142.

65 C.J. p 313 note 32.

**Acceptance shown**

Evidence that persons named in will as substitute trustees advised executor of deceased original trustee's estate of their decision personally to administer trust and requested that trust fund be turned over to them and that they be furnished applications and information necessary to file bonds required of them by executor established acceptance of trust, even though bonds were not filed.—Lange v. Houston Bank & Trust Co., Tex Civ App., 194 S.W.2d 797, error refused no reversible error

22. Ky.—Hinton's Ex'r v. Hinton's Committee, 76 S.W.2d 8, 256 Ky. 345

Mo.—Williams v. Hund, 258 S.W. 703, 302 Mo. 451.

**Acceptance a matter of intention**

(1) Acceptance of trust deed is matter of intention and must be determined from acts and words, or both, of grantee with respect to deed.—Hinton's Ex'r v. Hinton's Committee, 76 S.W.2d 8, 256 Ky. 345

(2) Acceptance of a trust is a matter of intention which must be determined from the acts of person named as trustee.—In re Eustace' Estate, 87 P.2d 305, 198 Wash. 142.

23. Cal.—Cooper v. Cooper, 39 P.2d 820, 3 Cal App 2d 154

**Acceptance of donor's funds** with full knowledge and understanding of his desire and intent will constitute the person receiving the funds a trustee.—American Bible Soc. v. Mortgage Guarantee Co., 17 P.2d 105, 217 Cal 9.

24. Ill.—Bismstadt v. Horwitz, 19 N.E.2d 105, 298 Ill App. 523.

65 C.J. p 313 note 34.

**As a matter of law**, trustee's acceptance is inferred when he performs any act of trustee or unreasonably delays rejection after being informed of his nomination, and after acceptance, he cannot withdraw without the consent of the beneficiaries or of the court.—Ihrd v. Stein, D.C. Miss., 102 F Supp. 399, reversed on other grounds, C.A., 204 F.2d 122, rehearing denied 205 F.2d 512.

**Issuance of investment certificate**

Where trustor invested money in an investment certificate of a building and loan association which certi-

ficate was issued in names of trustor or his nephew "under a trust agreement," the issuance of certificate under hand and seal of association was sufficient acceptance of the trust, when taken with the fact that declaration of trust was delivered to and remained with association.—Randall v. Bank of America N. T. & S. A., 119 P.2d 754, 48 Cal.App.2d 249.

25. N.M.—Daly v. Bernstein, 28 P. 764, 6 N.M. 380.

65 C.J. p 313 note 35.

**Acceptance in silence** is a tacit agreement to comply with the terms of the trust.—Becker v. Schwerdtle, 74 P. 1029, 141 Cal. 386.

26. Ala.—First Nat. Bank v. Cash, 125 So. 28, 220 Ala. 319.

65 C.J. p 313 note 36.

27. Ala.—Kennedy v. Winn, 80 Ala. 165

28. Mo.—Williams v. Hund, 258 S.W. 703, 302 Mo. 451.

65 C.J. p 313 note 38.

**Acceptance shown**

(1) Evidence that the trustee approved amendments of the original trust agreement requiring such approval, and that the trustee leased a farm of the grantor and water rights thereon and executed checks and agreements as trustee, warranted the master's finding that the trustee transacted considerable business matters, as trustee, after the date of the trust agreement.—Jackson v. Pillsbury, 41 N.E.2d 537, 380 Ill. 554.

(2) A person was deemed to have accepted office of a trustee where such person, after signing an instrument acknowledging receipt of note to be held in trust and expressly providing for the undertaking of certain trust duties, wrote in his personal account book that the trust had been transferred to him and made remittances to beneficiaries in accordance with requirements of trust and otherwise showed familiarity with and concern over trust, notwithstanding note representing trust res was found among transferor's effects after deaths of transferor and trustee.—Elliot v. Mosgrove, 91 P.2d 852, 162 Or. 507, rehearing denied 93 P.2d 1070, 162 Or. 507.

29. Ill.—Huffman v. Gould, 64 N.E. 2d 773, 327 Ill App 428.

65 C.J. p 313 note 39.

have a successor appointed, after a long lapse of time, has been regarded as sufficient to prove that there had previously been an acceptance.<sup>30</sup>

Acceptance furnishes a consideration for the enforcement of the trust against the trustee.<sup>31</sup> It is not essential that the acceptance of the trust deed occur at the time of its execution,<sup>32</sup> and delay in acceptance for a substantial period does not necessarily prevent a subsequent acceptance.<sup>33</sup> Where a contract provides for the transfer to a third person as trustee property of the parties to the contract and imposes certain obligations on such third person, the latter's agreement to accept the trust if certain substantial modifications in the terms are made does not constitute an acceptance.<sup>34</sup>

**Joining in execution of trust deed.** Acceptance may be established by, or implied from, the trustee's joining in the execution of the trust deed,<sup>35</sup> and the view has been taken that the proper way to manifest an acceptance is to join in the execution of the deed,<sup>36</sup> that such joinder may be necessary where the instrument contains covenants to be made and executed by the trustee,<sup>37</sup> and that, under certain circumstances, the trust may not be complete until the trust instrument is accepted and executed by the trustee.<sup>38</sup> In general, however, the trustee is not confined to this mode of acceptance<sup>39</sup> even,

according to some cases, although the deed creating the trust provides for the trustee's acceptance thereof by signing the deed.<sup>40</sup>

**Estoppel.** According to some decisions, by the acceptance of the trust property or any part thereof the trustee becomes estopped to deny his acceptance of the trust.<sup>41</sup>

**Relation back.** Acceptance relates back to the date of the trust instrument.<sup>42</sup>

### b. Disclaimer

While it is generally recognized that one who has accepted a trust may not at will disclaim or renounce it, in general, prior to acceptance, a person designated as trustee may renounce or disclaim the trust.

While it is generally recognized that one who has accepted a trust may not at will disclaim or renounce it,<sup>43</sup> in general, prior to acceptance, a person designated as trustee may renounce or disclaim the trust.<sup>44</sup> In order to constitute a renunciation there must be an express rejection or a tacit refusal to act,<sup>45</sup> and there can be no renunciation where the person designated as trustee is ignorant of the existence of the instrument creating the trust.<sup>46</sup> Renunciation may, however, be by deed<sup>47</sup> or other written instrument,<sup>48</sup> by matter of record,<sup>49</sup> or by an answer in chancery.<sup>50</sup> There is authority for the view that formal disclaimer or renunciation is not

30. Ky.—Barclay v. Goodloe, 83 Ky. 493, 5 Ky L. 936.  
65 C.J. p 314 note 40.

31. N.C.—Egerton v. Carr, 94 N.C. 648, 55 Am.R. 630.  
Pa.—Carter v. Carter, 184 A. 78, 321 Pa. 391.

### Acceptance and performance of obligations

Trustee who accepted trust and performed its obligations for substantial time was bound by its terms. Ind.—Green's Administrator v. Green, 32 Ind. 276.

Mass.—Cummings v. Tolman, 197 N. E. 476, 292 Mass. 58, 101 A.L.R. 1457.

### Form of assumption immaterial

The trustee in a trust instrument who accepts the trust, is bound by its obligations, and the form of the assumption is immaterial, provided it casts on the grantee the burden to pay the indebtedness.—Hays' Estate v. C. I. R., C.A.5, 181 F.2d 169.

### Transfer on condition

Under deed conveying realty to grantor's daughter on condition that on grantor's death daughter would pay designated sums to beneficiaries, daughter accepted conveyance subject to duty to beneficiaries to administer trust solely in interest of beneficiaries.—Sutherland v. Pierner, 24 N.W. 2d 883, 249 Wis. 462.

32. Ky.—Hinton's Ex'r v. Hinton's Committee, 76 S.W.2d 8, 256 Ky. 245.

33. Wash.—In re Eustace's Estate, 87 P. 2d 305, 198 Wash. 142.

34. Va.—Christian v. Yancey, 2 Pat. & H. 240.

65 C.J. p 314 note 42.

35. Kan.—Denny v. Guarantee Title & Trust Co., 234 P. 966, 118 Kan. 286.

65 C.J. p 314 note 43.

36. Md.—Dartton v. Stewart, 59 A. 281, 99 Md. 643.

65 C.J. p 314 note 44.

37. Mo.—Roberts v. Moseley, 51 Mo. 282.

38. Mo.—Roberts v. Moseley, supra Pa.—Smith v. Knowles, 2 Grant 413.  
65 C.J. p 314 note 46.

39. N.Y.—Ross v. Ross, 253 N.Y.S. 871, 233 App.Div. 626.

39. Mo.—Jamison v. Zausch, 126 S. W. 1023, 227 Mo. 406, 21 Ann.Cas. 1132.—Roberts v. Moseley, 51 Mo. 282.

40. N.M.—Daly v. Bernstein, 28 P. 764, 6 N.M. 380.  
65 C.J. p 314 note 49.

41. Mich.—McBride v. McIntyre, 51 N.W. 1113, 91 Mich. 406.

65 C.J. p 314 note 50.

42. Ala.—Corpus Juris cited in Stocks v. Inzer, 168 So. 877, 232 Ala. 482.  
65 C.J. p 314 note 51.

43. U.S.—Bird v. Stein, D.C.Miss., 102 F.Supp. 399, reversed on other grounds, C.A., 204 F.2d 122, rehearing denied 205 F.2d 512.  
65 C.J. p 314 note 53.

44. Mass.—Daley v. Daley, 14 N.E. 2d 113, 300 Mass. 17.—Sells v. Delgado, 70 N.E. 1036, 186 Mass. 25.

Or.—Corpus Juris cited in In re Buelow's Estate, 161 P.2d 909, 915, 177 Or. 218.

Wis.—Sutherland v. Pierner, 24 N.W. 2d 883, 249 Wis. 462.  
65 C.J. p 315 note 55.

45. Pa.—Read v. Robinson, 6 Watts & S. 329.

Va.—Bowden v. Parrish, 9 S.E. 616, 86 Va. 67, 19 Am.S.R. 873.  
65 C.J. p 315 note 56.

46. Pa.—Read v. Robinson, 6 Watts & S. 329.

47. Tenn.—Goss v. Singleton, 2 Head 67.

48. Tenn.—Goss v. Singleton, supra.  
65 C.J. p 315 note 59.

49. Tenn.—Goss v. Singleton, supra.

50. Tenn.—Goss v. Singleton, supra.

necessary,<sup>51</sup> although an informal disclaimer should be unequivocal.<sup>52</sup> It has been laid down that a formal deed of disclaimer need not be made.<sup>53</sup> Disclaimer may be shown or established by the conduct or acts of the person designated as trustee<sup>54</sup> or by nonaction long continued.<sup>55</sup>

*Conditional acceptance as disclaimer.* The imposition by the trustee of a condition on which he will accept the trust, the condition not being inconsistent with the trust expressed, is not equivalent to a disclaimer.<sup>56</sup>

*Failure to qualify.* Long continued failure to qualify by a person designated as a testamentary trustee may be sufficient to constitute a declination of the trust,<sup>57</sup> and, under some statutes, failure of a person designated as a testamentary trustee to give a bond required by statute may constitute a disclaimer or declination.<sup>58</sup> Notwithstanding some statutes of this general type, however, it has been held or recognized that the failure of persons nominated as trustees to procure their formal appointment as trustees by the probate court and to give bonds does not conclusively show that they had declined to act in that capacity,<sup>59</sup> that failure to furnish a bond does not operate as a declination where it does not appear that the persons designated were required or requested to furnish a bond,<sup>60</sup> and that the delay in giving a bond which may be treated as a declination under some statutes does not usually occur until the duty to file the bond arises.<sup>61</sup>

*Retraction.* While there is authority for the view that a person designated as testamentary trustee may retract his renunciation of the trust at any

time before letters are granted to another,<sup>62</sup> such person may not retract after his renunciation has been accepted by a court having jurisdiction and another has been appointed as administrator,<sup>63</sup> or, it has been held, after the other trustees designated have entered on their duties.<sup>64</sup>

*Partial disclaimer or renunciation.* Where there are two distinct independent trusts, the person designated as trustee may accept one and renounce the other,<sup>65</sup> unless the settlor has manifested an intention that he must accept both or neither.<sup>66</sup>

*Effect of disclaimer.* Disclaimer or refusal to accept on the part of the person designated as trustee does not defeat the trust;<sup>67</sup> it protects such person against responsibilities which he is not willing to assume.<sup>68</sup> It has been laid down broadly that by the proper refusal or disclaimer of a trust all parties are placed precisely in the same position relative to the trust property as if the disclaiming party had not been named in the trust instrument.<sup>69</sup> While it has been held that no title passes to a trustee named in a deed where he refuses to accept the trust,<sup>70</sup> it has been laid down in general terms that, after renunciation by a person designated as trustee by a will and pending the appointment of a new trustee, the legal title to land covered by the trust is not in abeyance,<sup>71</sup> and that, if the sole trustee or all the trustees disclaim a devise of land in trust, the legal title will not vest in the heirs of the deviser,<sup>72</sup> but nominally vests in the trustees designated by the testator.<sup>73</sup> In general, where one of two or more trustees refuses to accept, the estate vests in the others as though the trustee refusing were dead or had not been named.<sup>74</sup> Title to mon-

51. Mass.—Daley v. Daley, 14 N.E.2d 113, 300 Mass. 17.

52. C.J. p 315 note 66.

53. Mass.—Daley v. Daley, supra.

54. N.Y.—Dunning v. Ocean Nat Bank, 61 N.Y. 497, 19 Am.R. 293—Burrill v. Silliman, 13 N.Y. 93.

55. Or.—Corpus Juris cited in re Buelow's Estate, 161 P.2d 909, 915, 177 Or. 218.

56. C.J. p 315 note 68.

57. Or.—Corpus Juris cited in re Buelow's Estate, 161 P.2d 909, 915, 177 Or. 218.

58. C.J. p 315 note 68½.

59. Ill.—Atterson v. Johnson, 113 Ill. 559.

60. Mass.—Sells v. Delgado, 70 N.E. 1036, 186 Mass. 25.

61. C.J. p 315 note 71.

# Inference

Unnecessary delay of person named as trustee in completing his qualification justified inference that he had declined to act as trustee.—Mc-

Mahon v. Krapf, 80 N.E.2d 314, 323 Mass. 118.

58. Mich.—Punga v. Hilgendorf, 286 N.W. 152, 289 Mich. 46.

Neb.—In re Camp's Estate, 299 N.W. 528, 140 Neb. 272—Smith v. Rizzuto, 276 N.W. 406, 133 Neb. 655.

65. C.J. p 315 note 72.

Effect of failure to give security generally see infra § 224.

59. Mass.—Coates v. Lunt, 100 N.E. 829, 213 Mass. 401.

60. N.H.—Attwill v. Dole, 67 A. 403, 74 N.H. 300.

61. Mass.—Everett v. Monk, 177 N.E. 797, 277 Mass. 65, 76 A.L.R. 1382.

62. Tex.—Lednum v. Dallas Trust & Savings Bank, Civ.App., 193 S.W. 1127.

63. Tex.—Lednum v. Dallas Trust & Savings Bank, supra.

64. N.Y.—Matter of Kellogg, 108 N.E. 844, 214 N.Y. 460, Ann.Cas.1916D 1298.

65. C.J. p 316 note 78.

65. N.Y.—In re Matthiessen's Will, 23 N.Y.S.2d 802, 175 Misc. 466.

66. C.J. p 316 note 80.

66. N.Y.—In re Matthiessen's Will, supra.

67. Iowa.—Wells v. German Ins. Co., 105 N.W. 123, 128 Iowa 649.

68. C.J. p 312 note 25.

68. Fla.—Braswell v. Downs, 11 Fla. 62.

69. Tenn.—Goss v. Singleton, 2 Head 67.

70. Ky.—Beard v. Griggs, 1 J.J. Marsh. 22.

71. N.J.—Delling v. Bill, 108 A. 761, 91 N.J.Eq. 213.

66. C.J. p 316 note 85.

72. Tenn.—Goss v. Singleton, 2 Head 67.

73. N.Y.—King v. Donnelly, 5 Paige 46.

65. C.J. p 316 note 87.

74. N.Y.—Matter of Kellogg, 108 N.

ey bequeathed does not vest in the beneficiary on refusal of the trustee to accept.<sup>75</sup> Disclaimer or refusal to accept the trust, whenever made, will relate back, and will be held to have been made at the time of the grant, if no act has been done to preclude the party from taking such position.<sup>76</sup>

## § 61. Knowledge of, and Acceptance and Declination by, Cestui Que Trust

- a. Knowledge of, and acceptance
- b. Rejection or renunciation

El. 844, 214 N.Y. 460, Ann.Cas.1916D 1298.

65 C.J. p 316 note 88.

75. Ill.—Bennett v. Bennett, 75 N.E. 339, 217 Ill. 434, 4 L.R.A., N.S., 470.

76. Tenn.—Goss v. Singleton, 2 Head 87.

77. Cal.—Corpus Juris cited in Silver v. Shemanski, 201 P.2d 418, 436, 89 Cal.App.2d 520—In re Hovland's Estate, 101 P.2d 500, 38 Cal.App. 2d 439.

Md.—Citizens' Nat. Bank of Pocomoke City v. Parsons, to Use of Worth, 175 A. 852, 167 Md. 631.

Mo.—Ketcham v. Miller, 37 SW 2d 635—McPheters v. Scott County Bank, App. 63 SW 2d 466.

N.J.—Provident Inst. for Sav in Jersey City v. Bolton, 52 A.2d 833, 140 N.J.Eq. 1—Bankers' Trust Co. v. Bank of Rockville Center Trust Co., 168 A. 733, 114 N.J.Eq. 391, 89 A.L.R. 697.

N.Y.—Woodside Presbyterian Church v. Burden, 269 N.Y.S. 682, 240 App. Div. 43, appeal dismissed 191 N.E. 629, 264 N.Y. 690.

Ohio.—Thomas v. Dye, Com.Pl., 117 N.E.2d 515.

Utah.—Capps v. Capps, 175 P.2d 470, 110 Utah 468.

Vt.—Warner v. Burlington Federal Sav. & Loan Ass'n, 49 A.2d 93, 114 Vt. 463, 168 A.L.R. 1265—Dieter v. Scott, 9 A.2d 96, 110 Vt. 376.

Wis.—Wyse v. Fuchner, 51 N.W.2d 38, 260 Wis. 365.

65 C.J. p 316 note 92.

### In Massachusetts

(1) The text rule is recognized where a person other than the creator is trustee.—National Shawmut Bank of Boston v. Joy, 53 N.E.2d 113, 315 Mass. 457—Aronian v. Asadoorian, 52 N.E.2d 397, 315 Mass. 274—Stuart v. Sargent, 186 N.E. 649, 283 Mass. 536—65 C.J. p 316 note 92 [b] (1).

(2) The rule is apparently otherwise where the trust is a voluntary one, and the donor has not parted with possession or physical control of the property.—Aronian v. Asadoorian, supra—Harrington v. Donlin, 45 N.E.2d 953, 313 Mass. 577—Murray v. O'Hara, 195 N.E. 909, 291

Mass. 75—65 C.J. p 316 note 92 [b] (2).

(3) However, it has also been held that in order for a beneficiary of a trust to create a valid trust of his equitable interest in the original trust, for the benefit of a third person, no notice to the third person is necessary even though trust instrument is in possession of another person as trustee, since notice is not necessary except in certain restricted cases of which this is not one.—Stern v. Stern, 113 N.E.2d 55, 330 Mass. 312.

78. U.S.—Buhl v. Kavanagh, C.C.A. Mich., 118 F.2d 315—Morsman v. C. I. R., C.C.A.8, 90 F.2d 18, 113 A.L.R. 411, certiorari denied Morsman v. Helvering, 58 S.Ct. 20, 302 U.S. 701, 82 L.Ed. 542—In re Pilot Radio & Tube Corp., C.C.A.Mass., 72 F.2d 316, certiorari denied Eckhardt v. Bull, 55 S.Ct. 98, 293 U.S. 584, 79 L.Ed. 680—In re Prudence Co., D.C.N.Y., 24 F.Supp. 666.

Del.—Bodley v. Jones, 32 A.2d 436, 27 Del.Ch. 273—Delaware Trust Co. v. Fitzmaurice, 31 A.2d 383, 27 Del.Ch. 101, modified on other grounds Crumlish v. Delaware Trust Co., 38 A.2d 463, 27 Del.Ch. 374.

N.J.—West Jersey Trust Co. v. Read, 158 A. 113, 109 N.J. 475—Engles Building & Loan Ass'n v. Fiducial, 37 A.2d 116, 135 N.J.Eq. 7, affirmed 40 A.2d 627, 136 N.J.Eq. 117—Mucha v. Jackson, 182 A. 827, 119 N.J.Eq. 348—Bankers' Trust Co. v. Bank of Rockville Center Trust Co., 168 A. 733, 114 N.J.Eq. 391, 89 A.L.R. 697—In re Farrell, 159 A. 617, 110 N.J.Eq. 260.

Pa.—In re Tunnell's Estate, 190 A. 906, 325 Pa. 564.

Vt.—Smith v. Deshaw, 78 A.2d 479, 116 Vt. 441.

65 C.J. p 316 note 93.

79. U.S.—In re Pilot Radio & Tube Corp., C.C.A.Mass., 72 F.2d 316, certiorari denied Eckhardt v. Bull, 55 S.Ct. 98, 293 U.S. 584, 79 L.Ed. 680.

Cal.—Corpus Juris cited in Silver v. Shemanski, 201 P.2d 418, 436, 89 Cal.App.2d 520.

### a. Knowledge of, and Acceptance

It is not essential to the existence of a valid trust and the right of the beneficiary to enforce it that he have knowledge thereof at the time of its creation, or that the creator should notify the beneficiary of the existence of the trust.

It is not essential to the existence of a valid trust and the right of the beneficiary to enforce it that he have knowledge thereof at the time of its creation,<sup>77</sup> or that the creator should notify the beneficiary of the existence of the trust.<sup>78</sup> So it is not necessary that the beneficiary should consent to the creation of,<sup>79</sup> or expressly accept,<sup>80</sup> the trust.

Iowa.—Carlson v. Hamilton, 265 N.W. 906, 221 Iowa 529.

Vt.—Warner v. Burlington Federal Sav. & Loan Ass'n, 49 A.2d 93, 114 Vt. 463, 168 A.L.R. 1265—Dieter v. Scott, 9 A.2d 96, 110 Vt. 376.

65 C.J. p 317 note 94.

### In Massachusetts

(1) The text rule has been recognized where a person other than the creator is trustee.—Stuart v. Sargent, 186 N.E. 649, 283 Mass. 536—65 C.J. p 317 note 94.

(2) Where, in the case of a voluntary trust, the donor had parted with possession of the property by delivery to the trustee, it was held that no assent by any beneficiary was necessary to the validity of the trust.—Thorp v. Lund, 116 N.E. 946, 287 Mass. 474, Ann.Cas.1918B 1204.

(3) However, where a trust was voluntary but the donor had not parted with possession of the property, the court in deciding the case, held that where a trust was voluntary the law required at least an implied acceptance by the cestui que trust in order to perfect the creation of the trust.—Murray v. O'Hara, 195 N.E. 909, 291 Mass. 75—Supple v. Suffolk Savings Bank, 84 N.E. 432, 198 Mass. 393—Boynnton v. Gale, 80 N.E. 448, 194 Mass. 320.

80. U.S.—Buhl v. Kavanagh, C.C.A. Mich., 118 F.2d 315—Morsman v. C. I. R., C.C.A.8, 90 F.2d 18, 113 A.L.R. 441, certiorari denied Morsman v. Helvering, 58 S.Ct. 20, 302 U.S. 701, 82 L.Ed. 542.

Cal.—Corpus Juris cited in Silver v. Shemanski, 201 P.2d 418, 436, 89 Cal.App.2d 520—In re Hovland's Estate, 101 P.2d 500, 38 Cal.App.2d 439.

65 C.J. p 317 note 95.

### Express acceptance shown

Trust created by deposit with bank of writing obligatory for payment of money to be given to obligee upon obligor's death was accepted by obligee during obligor's life, where obligee wrote to bank requesting that instrument be put in safe deposit vault until he called for it.—Citizens' Nat. Bank of Pocomoke City v. Par-



As a general rule acceptance by the beneficiary will be presumed<sup>81</sup> because of benefit derived by him under the trust,<sup>82</sup> but this presumption may be rebutted<sup>83</sup> and does not operate where the trust imposes onerous conditions in consideration of the benefits conferred.<sup>84</sup> Where such conditions are imposed, the cestui que trust will not be bound unless he assents or accepts.<sup>85</sup> Although notice is not essential to the existence of a trust it is of great importance in determining the real intent of the alleged declarant.<sup>86</sup> Failure to notify the beneficiary,<sup>87</sup> or his nonacceptance,<sup>88</sup> is evidence that the owner does not intend immediately to create a trust,<sup>89</sup> and is also evidence that, although a trust is created, the owner reserves the right to revoke it.<sup>90</sup>

**Sufficiency of acceptance.** The bringing of an action by the beneficiary to enforce the trust is a sufficient acceptance,<sup>91</sup> as is also the appointment of an attorney in fact to protect the interests of the beneficiary.<sup>92</sup> While, where several beneficiaries are provided for and the consent of all is required, consent of one is not sufficient,<sup>93</sup> the view has been taken that, where one beneficiary accepts a deed of trust, the validity of the instrument and his right to enforce it are not affected by the fact that another beneficiary has not accepted it and that the latter's rights are an open question.<sup>94</sup>

**Relation back of acceptance.** Acceptance of the trust by the cestui que trust when he learns of the trust relates back to the date of the declaration.<sup>95</sup>

### b. Rejection or Renunciation

In general property cannot be forced on a designated cestui que trust against his will and he may reject or renounce the trust.

While, in the case of a spendthrift trust created by will, it has been held that an attempted renunciation by the cestui que trust is ineffective<sup>96</sup> and does not terminate the trust, as discussed *infra* § 95, in general property cannot be forced on a designated cestui que trust against his will;<sup>97</sup> he may reject or renounce the trust<sup>98</sup> and a valid trust does not exist if the cestui que trust, when informed of it, clearly and unequivocally rejects or renounces its benefits.<sup>99</sup> It has been laid down in general terms that any equitable rights arising from a declaration of trust are at an end after renunciation by the cestui que trust.<sup>1</sup>

There is a sufficient renunciation or rejection where the cestui que trust prosecutes to judgment a pending suit against the creator of the trust where the cestui que trust's position in such suit is inconsistent with his claiming under the trust,<sup>2</sup> or where he claims the entire property as the sole heir of a person other than the creator.<sup>3</sup> If the settlor has

sons, to Use of Worth, 175 A. 852, 167 Md. 631.

81. U.S.—*In re Pilot Radio & Tube Corp.*, CCA Mass., 72 F.2d 316, certiorari denied *Eckhardt v. Ball*, 55 S.Ct. 98, 293 U.S. 584, 79 L.Ed. 680. Pa.—*Fidelity Trust Co. v. Union Nat Bank of Pittsburgh*, 169 A. 209, 313 Pa. 467, certiorari denied *Union Nat Bank of Pittsburgh v. Fidelity Trust Co.*, 54 S.Ct. 530, 291 U.S. 680, 78 L.Ed. 1068, 65 C.J. p. 317 note 96.

82. Md.—*Citizens' Nat. Bank of Pocomoke City v. Parsons, to Use of Worth*, 175 A. 852, 167 Md. 631, 65 C.J. p. 317 note 97.

83. Me.—*Libby v. Frost*, 56 A. 906, 98 Me. 288.

**Acceptance presumed until disclaimer shown**

Md.—*Citizens' Nat. Bank of Pocomoke City v. Parsons, to Use of Worth*, 175 A. 852, 167 Md. 631.

84. Ala.—*Kemp v. Porter*, 7 Ala. 138.

85. Mass.—*Cunniff v. McDonnell*, 81 N.E. 879, 196 Mass. 7.

86. Del.—*Delaware Trust Co. v. Fitzmaurice*, 31 A.2d 383, 27 Del.Ch. 101, modified on other grounds *Crumlish v. Delaware Trust Co.*, 38 A.2d 463, 27 Del.Ch. 374.

87. U.S.—*Ruhl v. Kavanagh*, C.C.A. Mich., 118 F.2d 315.

88. U.S.—*Ruhl v. Kavanagh*, *supra*.

89. U.S.—*Ruhl v. Kavanagh*, *supra*.

90. U.S.—*Ruhl v. Kavanagh*, *supra*.

91. Ind.—*Copeland v. Summers*, 35 N.E. 514, 37 NE 971, 138 Ind. 219, 65 C.J. p. 317 note 3.

92. Ind.—*Henderson v. McDonald*, 84 Ind. 149.

93. Ala.—*Pinkard v. Ingersol*, 11 Ala. 9.

94. Tex.—*Willis v. Thompson*, 20 S.W. 155, 85 Tex. 301.

95. U.S.—*Stoeck v. Miller*, C.C.A.N.Y., 296 F. 414.

96. C.J. p. 317 note 7.

97. Pa.—*In re Malatesta's Estate*, 29 Pa.Dist. 113.

98. U.S.—*Stoeck v. Miller*, C.C.A.N.Y., 296 F. 414.

99. Va.—*Blackwell v. Virginia Trust Co.*, 14 S.E.2d 301, 177 Va. 299.

1. U.S.—*Stoeck v. Miller*, C.C.A.N.Y., 296 F. 414.

2. Ky.—*Lytle v. Pope*, 11 B.Mon. 297.

3. N.Y.—*In re Bishop's Trust*, 123 N.Y.S.2d 887—*In re Ryan's Will*, 78 N.Y.S.2d 295.

Termination of trust by beneficiary see *infra* § 95.

### Life beneficiary of trust

Generally, a life beneficiary of a trust created by another may refuse to accept its benefits.—*Wilmington Trust Co. v. Carpenter*, 75 A.2d 815, 31 Del.Ch. 411.

### Income beneficiary

A person named as income beneficiary of a trust may renounce such interest.—*Petition of Manufacturers Trust Co.*, 110 N.Y.S.2d 696.

### Periodical payments

Within certain limitations, a beneficiary in a trust may decline to accept it and where the benefit of the trust declined is in the form of periodical payments of money and trust instrument provides that on the cessation thereof, similar periodical payments, although different in amount, shall then be made to others, such others become immediately entitled to the payments unless trust instrument provides otherwise.—*Milton v. Milton*, 10 So.2d 175, 193 Miss. 563.

99. U.S.—*Stoeck v. Miller*, C.C.A.N.Y., 296 F. 414.

1. U.S.—*Stoeck v. Miller*, *supra*.

2. Ala.—*White v. White*, 18 So. 3, 107 Ala. 417.

65 C.J. p. 317 note 14.

3. Me.—*Libby v. Frost*, 56 A. 906, 98 Me. 288.

declared himself trustee, after renunciation by the cestui que trust the settlor holds title to the res free and clear of the trust.<sup>4</sup> Repudiation of a trust by the cestui que trust when he learns of the trust relates back to the date of the declaration.<sup>5</sup> Where the trust was rejected on behalf of the cestui que trust, the burden is on him of showing that such rejection had been recalled and reconsidered.<sup>6</sup>

## § 62. — Bank Deposits

Although there is authority to the contrary, in respect of a deposit in the name of the depositor in trust for another, or in the name of the depositor or creator and the beneficiary, knowledge on the part of the beneficiary of the fact of the deposit is not necessary to create a trust, and it is not essential that the beneficiary express an acceptance of the trust or deposit.

In respect of trusts in bank deposits, the fact that the alleged beneficiary is not notified may negative the intention to create a trust,<sup>7</sup> and, in respect of deposits in the name of the depositor in trust for another, the view has apparently been taken in some cases that communication of the fact of the deposit to the beneficiary is usually necessary evidence of the creation of the trust,<sup>8</sup> so that if the beneficiary is ignorant of the existence of the trust, he has no claim on the deposit after the trustee's death.<sup>9</sup> On the other hand, the view usually taken is that want of notice to the beneficiary is not conclusive<sup>10</sup> and that, in the case of a deposit in the name of the depositor in trust for another, knowledge on the part of the beneficiary,<sup>11</sup> or the depositor's notice

to the beneficiary,<sup>12</sup> of the fact of the deposit is not necessary to create, or to evidence the existence of, a trust, and the beneficiary can claim it, even though he did not know of the trust in the settlor's lifetime.<sup>13</sup> So, also, knowledge on the part of the beneficiary is not necessary in the case of a deposit in the name of the depositor or creator and the beneficiary<sup>14</sup> or in the case of a deposit in the name of the beneficiary with right of depositor to draw.<sup>15</sup> The giving of notice to the beneficiary by the owner of the deposit may indicate conclusively that a trust exists.<sup>16</sup> It is not essential to the validity of a trust in savings bank deposits that the beneficiary express an acceptance of it,<sup>17</sup> and where the beneficiary knows of the deposit, especially by the trustee's express announcement, he is entitled thereto.<sup>18</sup>

## § 63. Transfer of Title or Interest and Delivery of Trust Instrument or Declaration

- a. Transfer of title or interest
- b. Delivery of trust instrument or declaration

### a. Transfer of Title or Interest

In order to create an enforceable trust it is necessary that the donor or creator should part with his interest in the property to the trustee by an actual conveyance or transfer, and, where the creator has legal title, that such title should pass to the trustee.

It is usually recognized that, in order to create an

4. U.S.—Stoechr v. Miller, C.C.A.N.Y., 296 F. 414.

5. U.S.—Stoechr v. Miller, *supra*

6. D.C.—Gwynn v. Gwynn, 11 App D.C. 564.

7. Me.—Bath Sav Inst. v. Fogg, 63 A. 731, 101 Me. 188.  
65 C.J. p 318 note 20.

8. Mass.—Day Trust Co. v. Malden Sav. Bank, 105 N.E.2d 363, 328 Mass. 576—Greeley v. Flynn, 36 N.E.2d 394, 310 Mass. 23—Hogarth-Swann v. Steele, 2 N.E.2d 446, 294 Mass. 396.  
65 C.J. p 318 note 21.

### Knowledge of bank not knowledge of beneficiary

Where depositor opened savings bank account in his name as trustee for another and signed signature card directing payment to beneficiary in case of depositor's death, knowledge of bank of account was not knowledge of beneficiary.—Hogarth-Swann v. Steele, 2 N.E.2d 446, 294 Mass. 396.

### Implied acceptance

There must also be notice to the cestui, or to some person in his behalf, and at least implied acceptance. U.S.—Wasserman v. C. I. R., C.C.A.I.,

139 F.2d 778, applying Massachusetts law.

Mass.—Day Trust Co. v. Malden Sav. Bank, 105 N.E.2d 363, 328 Mass. 576—Greeley v. Flynn, 36 N.E.2d 394, 310 Mass. 23.

9. Mass.—Brabrook v. Boston Five Cents Sav. Bank, 104 Mass. 228, 6 Am R. 222.  
7 C.J. p 366 note 70.

10. R.I.—Blackstone Canal Nat. Bank v. Oast, 121 A. 223, 45 R.I. 218.

11. Ga.—Wildor v. Howard, 4 S.E.2d 199, 188 Ga. 426.  
N.J.—Hickey v. Kahl, 19 A.2d 33, 129 N.J. Eq. 233.  
N.Y.—In re Ellis' Estate, 34 N.Y.S.2d 884, 178 Misc. 431, affirmed 36 N.Y.S.2d 187, 264 App.Div. 846.  
65 C.J. p 318 note 23.

12. Cal.—Sherman v. Hibernia Savings & Loan Soc., 20 P.2d 138, 129 Cal.App., Supp., 795.  
65 C.J. p 318 note 24.

13. N.Y.—Weaver v. Emigrant, etc., Sav. Bank, 17 Abb.N.Cas. 82.  
7 C.J. p 366 note 71.

14. Cal.—Booth v. Oakland Bank of Savings, 54 P. 370, 122 Cal. 19.

Md.—Kornmann v. Safe Deposit & Trust Co. of Baltimore, 23 A.2d 692, 180 Md. 270.

### In name of beneficiary only

Where father made a deposit in bank to credit of his son whose whereabouts were unknown at time deposit was made, having passbook issued so as to make money payable to son's order and leaving book in custody of bank for son's benefit, a valid trust was created for benefit of son, with bank as trustee, and it was not necessary to show that son ever assented to the trust or even learned of it during his lifetime.—Pickering v. Higgins, 38 A.2d 640, 70 R.I. 265, 157 A.L.R. 918.

15. N.Y.—Martin v. Martin, 61 N.Y. S. 813, 46 App.Div. 445, appeal dismissed 59 N.E. 1126, 166 N.Y. 611.

### Account in several names

Me.—Bath Sav. Inst. v. Fogg, 63 A. 731, 101 Me. 188.

16. Cal.—Sherman v. Hibernia Savings and Loan Soc., 20 P.2d 138, 129 Cal.App., Supp., 795.

18. Mass.—Gerrish v. New Bedford Sav. Inst., 128 Mass. 159, 35 Am.R. 365.

7 C.J. p 366 note 72.

enforceable trust, it is necessary that the donor or creator should part with his interest in the property<sup>19</sup> to the trustee<sup>20</sup> by an actual<sup>21</sup> conveyance or transfer,<sup>22</sup> and, except where the creator of a trust constitutes himself trustee, where the creator has legal title, that such title should pass to the trustee,<sup>23</sup> that is, that the creator do everything which can be done, considering the character of the property comprising the trust, to transfer the property to the trustee in such mode as will be effectual to pass

the legal title, as, for example, where delivery of personal property to a person is relied on as creating an express trust and constituting such person a trustee.<sup>24</sup> In order to create a trust fund the fund must be set aside either actually or constructively,<sup>25</sup> and the fund or other property must be so designated as to permit the passing of title to the trustee.<sup>26</sup> Where the settlor has retained legal title to the property in himself, it has been held essential that equitable title to the property must pass im-

19. *Okl.—Ratchiff v. Lee*, 192 P.2d 843, 200 Okl. 253.

65 C.J. p 308 note 40.

#### No longer creator's estate

He who creates a trust estate creates an estate no longer his own.—*Coon v. Stanley*, 94 S.W.2d 96, 230 Mo. App. 524.

#### Money in bank

In order to transfer money in bank from owner into trust for another, there must be present and permanent change of title.—*Ferry v. Bryant*, 93 S.W.2d 344, 19 Tenn.App. 612.

20. *Ga.—Corpus Juris cited in* Bussey v. Bussey, 69 S.E.2d 569, 571, 208 Ga. 760.

65 C.J. p 308 note 41.

A power in trust is not a "trust" in the strict sense of the word because title is vested in the beneficiary and not in a trustee.—*Hankers Trust Co. v. Pirih*, 31 N.Y.S.2d 889, 177 Misc. 797.

#### Transaction held to create trust

*Mont*—*Hames v. City of Polson*, 215 P.2d 950, 123 Mont. 469.

21. *U.S.—First Nat. Bank of Bloomington v. Manufacturers Trust Co.*, D.C.N.J., 2 F.R.D. 125.

*Ohio*—*Kuck v. Sommers*, App., 100 N.E.2d 68.

65 C.J. p 308 note 42.

22. *U.S.—Morseman v. C. I. R.*, C.C. A., 90 F.2d 18, 113 A.L.R. 441, certiorari denied *Morseman v. Helvering*, 68 S.Ct. 20, 302 U.S. 701, 82 L.Ed. 512.—*First Nat. Bank of Bloomington v. Manufacturers Trust Co.*, D.C.N.J., 2 F.R.D. 125.

*Ill.*—*McCartney v. Ridgway*, 43 N.E. 826, 160 Ill. 129.

65 C.J. p 308 note 43.

Use of term "trustee" will not establish express trust when there has been no conveyance of title to third person as "trustee."—*Kuck v. Sommers*, Ohio App., 100 N.E.2d 68.

#### Intention to convey in trust

Where administratrix allegedly agreed with her sister that administratrix would hold in trust for sister half of the one-third interest in intestate's estate, which heirs of intestate conveyed to the administratrix, but the heirs had no intention of conveying any part of the one-

third interest to administratrix in trust for her sister, no express donative trust was created in favor of sister.—*Sevine v. Holssner*, Tex.Civ. App., 262 S.W.2d 218, error refused no reversible error.

23. *U.S.—Warner v. Florida Bank & Trust Co.*, at West Palm Beach, C.C. A. Fla., 160 F.2d 766.—*Corpus Juris cited in* Bank of America Nat. Trust & Savings Ass'n v. Scully, C.C.A.Cal., 92 F.2d 97, 103.—*Morseman v. C. I. R.*, C.C.A., 90 F.2d 18, 113 A.L.R. 441 certiorari denied *Morseman v. Helvering*, 68 S.Ct. 20, 302 U.S. 701, 82 L.Ed. 542.—*Mullen v. Mullen*, D.C.Alaska, 117 F. Supp. 538.

*Ky.*—*Hinton's Ex'r v. Hinton's Committee*, 76 S.W.2d 8, 256 Ky. 345.

*Minn.*—*Cooney v. Equitable Life Assurance Soc. of U. S.*, 51 N.W.2d 235, 235 Minn. 877.

*Mo.*—*Atlantic Nat. Bank of Jacksonville, Fla. v. St. Louis Union Trust Co.*, 211 S.W.2d 2, 357 Mo. 770.—*St. Louis Union Trust Co. v. Dudley*, App., 162 S.W.2d 290.

*Neb.*—*O'Connor v. Burns, Potter & Co.*, 36 N.W.2d 507, 151 Neb. 9.

*N.J.*—*De Mott v. National Bank of New Jersey*, 179 A. 470, 118 N.J. Eq. 396.

*Or.*—*Corpus Juris cited in* Windle v. Flinn, 251 P.2d 136, 146, 196 Or. 364.

*Pa.*—*In re Refor*, 50 A.2d 523, 160 Pa.Super. 305.—*Buchner v. Buchner*, 174 A. 643, 114 Pa.Super. 503.—*In re Miller's Estate*, 19 Pa.Dist. & Co. 141.

65 C.J. p 308 note 45.

#### Conveyance held sufficient

A trust agreement transferring, conveying, and assigning to the trustee all the property of the grantor of whatsoever kind, and giving the trustee power to sell any property, real or personal, was sufficient as a conveyance of realty.—*Jackson v. Pillsbury*, 44 N.E.2d 537, 380 Ill. 554.

#### Divestment of title

By executing deeds creating trusts, settlor divested himself of title and transferred it to others, notwithstanding reservation of power of revocation, although such power accompanying delivery would nullify gift.—*Burnet v. Guggenheim*, N.Y., 53 S.Ct. 369, 238 U.S. 280, 77 L.Ed. 748.

**Method of devolution of title is immaterial** and legal title for a valid gift in trust can be conveyed to trustee inter vivos or causa mortis or by any other legal method for transfer of title to a donee personally.—*Gray v. Watters*, 51 N.W.2d 885, 243 Iowa 430.

#### Possessory interest

While trustee need not have legal title to the subject matter of trust, he must have something more than a mere possessory interest.—*Wise v. Delaware Steeplechase & Race Ass'n*, Del., 45 A.2d 547, 165 A.L.R. 830.

#### Real property

In order to create active trust in land, whether spendthrift or ordinary trust, legal title to and right to possession of land must be vested in trustee.—*Long v. Long*, Tex.Civ. App., 252 S.W.2d 235, error refused no reversible error.

#### Gratuitous assignment of rights under contract

Rule that if title to property of intended inter vivos gift in trust does not pass to intended third-party trustee for want of delivery of subject matter or for want of delivery of instrument of conveyance, no trust is created, and title of property remains in owner free of trust, is applicable to gratuitous assignment in trust of rights under a contract.—*Cooney v. Equitable Life Assur. Soc. of U. S.*, 51 N.W.2d 235, 235 Minn. 377.

#### Retention of legal title by finance company

Where finance company for which automobile is held "in trust" retains legal title under trust receipt agreement, no trust is created, since legal title in a true trust vests in the trustee.—*Handy v. C. I. T. Corporation*, 197 N.E. 64, 291 Mass. 157, 101 A.L.R. 447.

#### Pa.—Corpus Juris quoted in

*In re Refor*, 50 A.2d 523, 526, 160 Pa.Super. 305.

65 C.J. p 308 note 48.

25. *Ark.*—*Aycock v. Bottoms*, 144 S.W.2d 43, 201 Ark. 104.

26. *Pa.—Corpus Juris quoted in* *In re Refor*, 50 A.2d 523, 526, 160 Pa.Super. 305.

65 C.J. p 308 note 49.

mediately and unconditionally.<sup>27</sup>

It is not necessary that title should expressly be given to the trustee;<sup>28</sup> title passes by implication when involved in the general scheme and intent of the trust.<sup>29</sup> Mere informality does not prevent a bill of sale from being sufficient to pass the legal title and uphold a trust declared in a separate instrument.<sup>30</sup> Where the settlor has only an equitable interest, the transfer of that interest is necessary.<sup>31</sup> If there is no transfer of legal title or equitable interest, a transfer of some power over the property, such as the power of sale, is required.<sup>32</sup>

*Transfer of beneficial interest and separation of legal and beneficial or equitable title* While it has been laid down in broad terms that there must be a separation of the legal title and beneficial enjoyment,<sup>33</sup> this apparently means that the whole legal title and the whole equitable or beneficial title or interest may not be vested in one person,<sup>34</sup> and, as thus limited, the rule has been recognized in stating that the same person cannot at the same time, as trustee, possess the entire legal title and, as cestui que trust, the entire equitable title;<sup>35</sup> but, in some jurisdictions at least, a person may hold as trustee

for himself and for others, as discussed *infra* § 210. Where the owner of property constitutes himself a trustee for another, there must be a complete transfer of the equitable title to the property to the beneficiary.<sup>36</sup>

#### b. Delivery of Trust Instrument or Declaration

While under certain conditions, delivery to the trustee of the trust instrument may be a necessary element of a complete trust, it has been held that there is no need of delivery, and the instrument creating the trust need not be delivered to the cestui que trust or anyone else in order to be effective.

While the view has been expressed that, under certain conditions, delivery to the trustee of the trust instrument executed by the creator is a necessary element of a complete trust,<sup>37</sup> it has been held that there is no need of delivery,<sup>38</sup> and the instrument creating the trust need not be delivered to the cestui que trust<sup>39</sup> or anyone<sup>40</sup> in order to be effective; and a declaration constituting the owner trustee of such property need not be delivered to anyone, as discussed *infra* § 64. In order that delivery of an alleged declaration of trust to an alleged trustee may be effective, it must appear that

27. Mo.—Coon v. Stanley, 94 S.W.2d 96, 230 Mo.App. 524.

#### Complete as gift

A gift of the equitable or beneficial title, where the person creating the trust holds title for the purposes of the trust, must be as complete and effectual as is the gift of the thing itself in a gift *inter vivos*—Landner & Boyden Bank v. Wardrop, 10 N.E.2d 144, 291 Ill.App. 454, affirmed 18 N.E.2d 897, 370 Ill. 310.

#### Retention of legal title

Where the donor retains the legal title and gives away only the equitable interest, a trust is created, active or passive, with the donor as trustee and the donee as beneficiary.—Eagles Building & Loan Ass'n v. Fiducia, 37 A.2d 116, 135 N.J.Eq. 7, affirmed 40 A.2d 627, 136 N.J.Eq. 117.

28. N.Y.—Close v. Farmers' L. & T. Co., 87 N.E. 1005, 195 N.Y. 92.

#### Formal assignment of insurance policy

A valid voluntary trust could be created in death benefits of life policies without a formal assignment of the policies to trustee—Mahony v. Crocker, 136 P.2d 810, 58 Cal.App.2d 196.

29. N.Y.—Close v. Farmers' L. & T. Co., 87 N.E. 1005, 195 N.Y. 92. 65 C.J. p. 308 note 51.

30. R.I.—Sprague v. Thurber, 22 A. 1057, 17 R.I. 454.

31. U.S.—Mullen v. Mullen, D.C. Alaska, 117 F.Supp. 538.

32. U.S.—Mullen v. Mullen, *supra*.

33. N.C.—Blades v. Norfolk Southern Ry. Co., 29 S.E.2d 148, 224 N.C. 32, 151 A.L.R. 1278. 65 C.J. p. 309 note 75.

34. Md.—Steling v. Steling, 135 A. 376, 151 Md. 556.

35. Md.—McIntyre v. Smith, 141 A. 405, 154 Md. 660. N.C.—Blades v. Norfolk Southern Ry. Co., 29 S.E.2d 148, 224 N.C. 32, 151 A.L.R. 1278.

36. U.S.—Bingen v. First Trust Co. of St. Paul, CCA.Minn., 103 F.2d 260.

37. N.Y.—Ross v. Ross, 253 N.Y.S. 871, 233 App.Div. 626.

#### Insurance policy

Where there was no delivery by insured, under accident and health policy providing death benefits payable to insured's estate, of trust indenture, purporting to assign policy, directly to trustee named in indenture, and only delivery of the indenture was to insurer and there was no evidence that insurer in receiving indenture purported to act in behalf of trustee or beneficiaries named in indenture, purported trust based on the assignment failed for lack of delivery of the indenture, hence insured could thereafter require insurer to recognize another change of beneficiary, even though insurer had changed beneficiary in response to insured's first request.—Silbert v. Equitable Life

Assur. Soc. of U. S., 50 N.E.2d 57, 314 Mass. 406.

#### Trust agreement in possession of donor's agent

Where trust agreement by which gift of property was transferred by donor to trustee for benefit of donee was in hands of donor's attorney and his agent between date agreement was executed and delivery of property to bank as trustee, donor could have revoked gift at any time during that period, no delivery having been made to trustee, and there was no effective transfer of gift until trust agreement and property were delivered by donor's agents to trustee bank—Wuesthoff v. Wisconsin Dept. of Taxation, 52 N.W.2d 131, 261 Wis. 98, followed in 52 N.W.2d 134, 261 Wis. 105.

38. Mass.—Greeley v. Flynn, 36 N.E.2d 394, 310 Mass. 23.

Ohio.—Thomas v. Dye, Com.Pl., 117 N.E.2d 515.

39. Del.—Bodley v. Jones, 32 A.2d 436, 27 Del.Ch. 273.

N.J.—Bankers' Trust Co. v. Bank of Rockville Center Trust Co., 168 A. 733, 114 N.J.Eq. 391, 89 A.L.R. 697.—In re Farrell, 159 A. 617, 110 N.J.Eq. 260.—West Jersey Trust Co. v. Read, 158 A. 113, 109 N.J.Eq. 475.

Okl.—Burns v. Bastien, 50 P.2d 377, 174 Okl. 40.

40. N.J.—Eagles Building & Loan Ass'n v. Fiducia, 37 A.2d 116, 135 N.J.Eq. 7, affirmed 40 A.2d 627, 136 N.J.Eq. 117.

the alleged creator intended to create a trust.<sup>41</sup> Manual delivery is unnecessary<sup>42</sup> and is of but little legal significance where a binding agreement is signed by both the creator and trustee,<sup>43</sup> and the trustee's written acceptance of the terms and provisions of a trust agreement constitutes sufficient delivery.<sup>44</sup> Delivery of a bill of sale of personal property to a trustee may, it seems, be made through a third person.<sup>45</sup>

**Trust deed of real property.** Where the subject of the trust is real property, title thereto can be vested only by a deed of conveyance.<sup>46</sup> Rules determining the requisites and validity of deeds of real property in general, as discussed in Deeds §§ 10-70 apply where the trust res is real property and it is sought to transfer the title by deed.<sup>47</sup> Thus, the instrument must contain operative words of conveyance.<sup>48</sup> While the necessity for the delivery and acceptance of the trust deed has been recognized,<sup>49</sup> the delivery of a trust deed of real property need not be a formal one;<sup>50</sup> delivery to one of several trustees may be sufficient,<sup>51</sup> and delivery

need not be made directly to the trustee; it may be made through a third person.<sup>52</sup> While there is a prima facie delivery of such a deed where it is handed to the trustee,<sup>53</sup> the trustee need not receive or have physical possession of the deed,<sup>54</sup> and any acts or words which clearly manifest the trustor's intention to consummate his deed and to part unconditionally with it and with all control over it are sufficient to constitute delivery from which acceptance may be implied.<sup>55</sup> Although the mere signing, acknowledging, and recording of the trust deed by the trustor has been held insufficient to impart validity to the trust deed unless the trustor delivered the deed to the trustee,<sup>56</sup> and delivery of the trust deed to the clerk of the court for recording of itself, without the prior consent of the trustee, is not a delivery but merely affirmative evidence thereof,<sup>57</sup> there is a sufficient delivery where a party executes a deed, directs that it be delivered and recorded, and the grantee consents to accept the deed,<sup>58</sup> or where the deed is executed in due form, recorded, and placed in the hands of the trustee.

41. N.Y.—Wadd v. Hazelton, 33 N.E. 143, 137 N.Y. 215, 21 L.R.A. 693, 33 Am.S.R. 707.

#### Delivery ineffective

Where record showed that trust indenture which was delivered to trust company, whose representative by mistake failed to destroy it as subsequently directed, was an earlier draft which was never accepted nor acted on by parties, neither company nor any other party acquired any rights as result of such delivery.—Randall v. Randall, D.C. Fla., 60 F. Supp. 308.

#### Delivery to third person for trustee

Where a grantor or promisor delivers an instrument to a third person who is not agent of the grantee or promisee and has not been previously designated to receive instrument by parties to instrument, there is good delivery only if grantor or promisor manifests to third person, at time of transfer, intention that third person shall hold the instrument on grantee's or promisee's behalf and the third person accepts instrument on such terms.—Silbert v. Equitable Life Assur. Soc. of U.S., 50 N.E.2d 57, 314 Mass. 406.

#### Intention to transfer in future

Where written instrument, stating that money invested in a bond and mortgage belonged to a named person, and that the bond and mortgage should be turned over to such person after maker's death in event it had not already been done, instrument was not enforceable after maker's death as a declaration of trust, notwithstanding maker during his lifetime had delivered instrument to the

named person.—Bodley v. Jones, 32 A.2d 436, 27 Del.Ch. 273.

42. Ill.—Jackson v. Pillsbury, 44 N.E.2d 537, 380 Ill. 554.

43. Ill.—Jackson v. Pillsbury, supra.

44. Ill.—Jackson v. Pillsbury, supra.—Mendahl v. Wallace, 110 N.E. 354, 270 Ill. 220.

#### Return of trust agreement to donor's attorney

If the grantor's attorney delivered the trust agreement and amendments thereof to the trustee who, after acquiring possession of the agreements, executed the binding consent required by their terms, their subsequent retention by the attorney at the trustee's request did not affect the matter of delivery.—Jackson v. Pillsbury, 44 N.E.2d 537, 380 Ill. 554.

45. N.C.—McLean v. Nelson, 46 N.C. 396.

46. Ky.—Hinton's Ex'r v. Hinton's Committee, 76 S.W.2d 8, 256 Ky. 345.

47. Ill.—Kelly v. Parker, 54 N.E. 615, 181 Ill. 49.

48. Mo.—Becker v. Strocher, 66 S.W. 1083, 167 Mo. 306.  
65 C.J. p. 309 note 60.

49. Ky.—Hinton's Ex'r v. Hinton's Committee, 76 S.W.2d 8, 256 Ky. 345.

50. Md.—Buchwald v. Buchwald, 199 A. 800, 175 Md. 115.  
65 C.J. p. 309 note 61.

#### Delivery shown

In action by surviving grantor and by life beneficiary to cancel trust deed conveying grantors' property in trust with direction that on life bene-

ficiary's death property should be conveyed to designated church, evidence sustained finding of delivery of deed.—Hesseltine v. First Methodist Church of Vancouver, 161 P.2d 157, 23 Wash.2d 315.

50. Tenn.—Saunders v. Harris, 1 Head 185.  
65 C.J. p. 309 note 62.

51. U.S.—Hitz v. National Metropolitan Bank, Dist.Col., 4 S.Ct. 613, 111 U.S. 722, 23 L.Ed. 877.  
Tex.—Texas Rice Land Co. v. Langham, Civ.App., 193 S.W. 473.

52. Tex.—Texas Rice Land Co. v. Langham, supra.

#### Delivery in person by trustor to trustee

It is not essential to the validity of the deed that it be delivered in person or actually by the trustor to the trustee.—Hinton's Ex'r v. Hinton's Committee, 76 S.W.2d 8, 256 Ky. 345.  
53. Ohio—Williams v. Mears, 2 Dism. 604, 4 Wkly.L.Gaz. 293, 13 Ohio Dec., Reprint, 369.

54. Ky.—Hinton's Ex'r v. Hinton's Committee, 76 S.W.2d 8, 256 Ky. 345.

55. Ky.—Hinton's Ex'r v. Hinton's Committee, supra.

56. Ky.—Hinton's Ex'r v. Hinton's Committee, supra.

57. Ky.—Hinton's Ex'r v. Hinton's Committee, supra.

58. Ky.—Hinton's Ex'r v. Hinton's Committee, supra.

Ohio—Steele v. Lowry, 4 Ohio 72, 19 Am.D. 581.

#### Deposit in safe deposit box

Where deed and trust agreement

tee who indorses thereon his acceptance of the trust.<sup>59</sup> While delivery does not take place the very instant the trustee acquires physical control of the deed where the expressed intention is that delivery shall not occur until a future time,<sup>60</sup> in general a trust deed takes effect on delivery to the trustee<sup>61</sup> and thereupon the rights of the cestui que trust attach.<sup>62</sup> The effect of the delivery is not impaired by a mental reservation,<sup>63</sup> by an oral condition attached by the grantor to the delivery repugnant to the terms of the deed,<sup>64</sup> or by a subsequent redelivery of the deed by the trustee to the grantor.<sup>65</sup> An instrument which vests title in one as trustee, without showing on its face the nature of the trust or the name of the beneficiary, vests the fee in the grantee.<sup>66</sup>

#### § 64. Delivery and Possession of Property

Subject to the rule that the donor who constitutes himself trustee may retain possession and control of the property as trustee, the owner must surrender control of the property which he has subjected to the alleged trust, and there should either be delivery to the trustee or the equivalent of delivery, although there is also authority for the view that delivery is not essential.

Subject to the rule recognized in some jurisdictions, at least, that the creator of a trust may re-

serve the right to revoke the trust, as discussed infra §§ 89, 90, and the rule that the donor or creator who constitutes himself trustee may retain possession and control of the property as trustee, the owner must surrender control of the property which he has subjected to the alleged trust,<sup>67</sup> at least in so far as his own interest is concerned,<sup>68</sup> and there is authority for the view that no trust is created where control of the property remains with the alleged creator, although the property is in the possession of another,<sup>69</sup> or, in general, where the alleged creator retains the absolute right of dealing with, and disposing of, the property for his own benefit.<sup>70</sup> The transaction is, however, sufficient in this regard where the creator parts with all control inconsistent with the purposes of the trust;<sup>71</sup> and, where a person, intending to give property to another, vests the property in the trustees and declares a trust, the gift is perfected, and the donor loses all dominion over the property.<sup>72</sup>

Although there is authority for the view that delivery of the trust property is not essential,<sup>73</sup> generally, in order to create a completed trust in personal property, there should either be delivery to the trustee, or the equivalent of delivery,<sup>74</sup> and,

executed by decedent were delivered to trustee by decedent at time of execution, deed was recorded and trust agreement was kept in safe deposit box owned jointly by decedent and defendant, delivery was shown—George v. Soares, 128 P.2d 377, 54 Cal. App.2d 29.

#### Delivery for recording without reservation of control

Trustor's delivery of trust deed to county clerk for recording without reservation of any control thereafter, unconditionally, for use of grantee, in accordance with grantee's previous consent to accept deed and act as trustee, intending it to take effect immediately, is sufficient delivery to pass title to land described therein to grantee as trustee—Hinton's Ex'r v. Hinton's Committee, 76 S.W.2d 8, 256 Ky. 345.

59. Iowa.—Nowlen v. Nowlen, 98 N.W. 383, 122 Iowa 541.

60. Ky.—Abert v. Lape, 15 S.W. 134, 12 Ky.L. 728.

61. N.Y.—Cary v. Carman, 190 N.Y.S. 193.

Tex.—Clarke v. Clarke, Com App., 46 S.W.2d 658, answers conformed to, Civ.App., 48 S.W.2d 1119.

62. N.Y.—Wallace v. Birdell, 97 N.Y. 13.

R.I.—Stone v. King, 7 R.I. 358, 84 Am. D. 557.

63. N.Y.—Wallace v. Birdell, 97 N.Y. 13.

64. N.Y.—Wallace v. Birdell, supra.

65. R.I.—Stone v. King, 7 R.I. 358, 84 Am. D. 557.

66. Ky.—Sansom v. Ayer & Lord Tie Co., 139 S.W. 778, 144 Ky. 555.

67. Mo.—Hess v. Sandner, 198 S.W. 1125, 198 Mo.App. 636.

Pa.—In re Schmitt's Estate, Orph. 35 Berks Co. 61.

65 C.J. p. 309 note 83.

68. N.J.—Bendix v. Hudson County Nat. Bank, 59 A.2d 253, 142 N.J. Eq. 487—De Mott v. National Bank of New Jersey, 179 A. 470, 118 N.J. Eq. 396.

65 C.J. p. 310 note 84.

69. Okl.—Cook v. First Nat. Bank, 291 P. 43, 145 Okl. 5.

65 C.J. p. 310 note 85.

70. N.J.—Stevenson v. Earl, 55 A. 1091, 65 N.J. Eq. 721.

71. N.Y.—Rogers Locomotive, etc., Works v. Kelley, 88 N.Y. 234.

#### Shares of stock

Where owner of stock certificates signed assignments thereon and certificates were delivered to assignee with oral instructions to assignee to divide the shares among four persons including assignee, assignee thereupon held the stock for himself and the specified persons, notwithstanding dividends continued to be paid to assignor until death—In re Duwe's Estate, 281 N.W. 669, 229 Wis. 115.

72. Md.—McDevitt v. Sponseller, 154 A. 140, 160 Md. 497.

#### Equitable ownership

A mere delivery of stock certificates, unindorsed, to the donee to hold in trust, passes at least equitable ownership—Jaizer v. Milligan, D. C. Neb., 120 F. Supp. 599.

#### Life insurance policies

Valid, voluntary trust was created in death benefits under life policies upon delivery of the trust res to trustee and the change of the beneficiary at insured's request to trustee—Mahony v. Crocker, 136 P.2d 810, 58 Cal. App.2d 196.

73. Mass.—Cohen v. Newton Sav. Bank, 67 N.E.2d 748, 320 Mass. 90, 168 A.L.R. 1321—Grocley v. Flynn, 36 N.E.2d 394, 310 Mass. 23—Murray v. O'Hara, 195 N.E. 909, 291 Mass. 75.

#### Trust provision as alternate to delivery

Md.—Mushaw v. Mushaw, 39 A.2d 465, 183 Md. 511—Miholland v. Whalen, 43 A. 42, 89 Md. 212.

#### Trust contingent on death

A donor does not have to divest himself of the legal title or control of property in order to create a trust contingent on his death—Helper State Bank v. Crus, 81 P.2d 359, 95 Utah 320.

74. Mo.—Atlantic Nat. Bank of Jacksonville, Fla. v. St. Louis Union Trust Co., 211 S.W.2d 2, 367 Mo. 770.

Nev.—Gardella v. Santini, 193 P.2d 702, 65 Nev. 215.

where one other than the donor is selected as trustee of a voluntary trust, there must be such a delivery of the property as constitutes a relinquishment of dominion over the property by the donor,<sup>75</sup> and as will be effectual to transfer the legal title;<sup>76</sup> as sometimes expressed, there must be actual delivery of the fund or other property or of a legal assignment thereof to the trustee, with the intention of passing legal title to him as trustee.<sup>77</sup> In other words, in general, it is necessary<sup>78</sup> and sufficient<sup>79</sup> that the creator should have done everything which could have been done, the character of the property comprising the trust being considered, to transfer the property to the trustee in such a mode as will be effectual to pass title, although this is not re-

quired and the transfer of the property is sufficient if it is made to a third person for the trustee under such circumstances that the donor no longer has any dominion over the property,<sup>80</sup> or if a sufficient declaration is made by the transferee that he holds the property in trust for another.<sup>81</sup> Thus, in order to make oneself trustee for another of property held by the settlor, everything must be done which can be done to end the absolute dominion of the settlor.<sup>82</sup>

Delivery of an instrument representing a chose in action may become necessary in order to pass title to a trustee as against creditors and purchasers.<sup>83</sup> While usually delivery of personal property to the trustee for the purposes of the trust is sufficient to pass title,<sup>84</sup> where delivery of personal

Pa.—In re Refor, 50 A.2d 523, 160 Pa. Super 305.  
65 C.J. p 310 note 89.

#### Actual or constructive delivery

(1) Since equity, in its recognition of trusts and in the enforcement of them requires the same formalities in passing of the subject matter of the gift as is required at law, actual or constructive delivery is required in the creation of a trust in a third person for the benefit of another.—Schenker v. Moodhe, 200 A. 727, 175 Md. 193.

(2) Evidence that donor mindful of impending death told donee, who had cared for donor, that donee would find a receipt for purchase of lot among donor's papers, that donor directed donee to places where donor had secreted his papers, bank books, and other valuables, and told donee to take keys from donor's trousers, and that donee failed to take them because of warning concerning donor's contagious disease, failed to show a gift in trust, since there was no delivery.—Schenker v. Moodhe, supra.

#### Delivery or assignment

In order to establish voluntary trust with third person as trustee, there must be delivery of trust property to trustee or assignment passing legal title to him.—Winters v. Winters, 109 P.2d 857, 165 Or 659.

#### Delivery of copy of executor's conveyance

Where carbon copy of executor's conveyance to trustee of 30 per cent of the revenues reserved to decedent's estate under a former instrument was delivered to trustee while executor kept original, but parties considered that they had done all that was necessary to complete transfer, and conveyance by its terms was presently effective, trial court properly found that conveyance was in full force and disregarded contemporaneous oral condition that conveyance should not take effect until death of executor.—

Mason v. University of the South, Tex. Civ. App., 212 S.W.2d 854, error refused no reversible error.

#### Shares of stock

An attempted gratuitous transfer of shares of stock by assignment to trustees unaccompanied by delivery or transfer on corporation's books was ineffective, and trust failed for want of a res to support it, since in absence of consideration, implied promise to convey legal title could not be enforced.—Johnson v. Johnson, 13 N.E.2d 788, 300 Mass. 24.

75. Nev.—Gardella v. Santini, 193 P.2d 702, 65 Nev. 215.

Okla.—Ratcliff v. Lee, 192 P.2d 843, 200 Okl. 253.

65 C.J. p 310 note 90.

#### Delivery to agent of donor

In order to create an enforceable trust, the property which is the subject matter thereof must be delivered to another as trustee, and not as agent of the donor.—Ratcliff v. Lee, supra.

#### Delivery of money on donee's property

Where donor went with donee to basement of donee's house and selected spot for burial of money, with the knowledge that house was owned by donees and under their exclusive dominion and control, there was adequate delivery to donee, to create a valid trust.—Gardella v. Santini, 193 P.2d 702, 65 Nev. 215.

76. Minn.—Cooney v. Equitable Life Assur. Soc. of U. S., 61 N.W.2d 285, 235 Minn. 877.

Mo.—Atlantic Nat. Bank of Jacksonville, Fla. v. St. Louis Union Trust Co., 211 S.W.2d 2, 357 Mo. 770.  
65 C.J. p 310 note 91.

#### Legal and equitable title

Nev.—Gardella v. Santini, 193 P.2d 702, 65 Nev. 215.

#### Insufficient delivery subsequently made effective

Even if delivery of stock certificates, with assignment of shares in trust agreement, was not effective to

transfer them to trustees, the lack was sufficiently supplied when they were later formally transferred to a trustee.—Linahan v. Linahan, 39 A.2d 895, 131 Conn. 307.

77. N.Y.—Schenectady Trust Co. v. Emmons, 25 N.Y.S.2d 230, 281 App. Div. 154, affirmed 38 N.E.2d 461, 286 N.Y. 626, reargument denied 37 N.E.2d 140, 286 N.Y. 698.—Hatfield v. Buck, 85 N.Y.S.2d 613, 193 Misc. 1041.

65 C.J. p 310 note 92.

#### Assignment of note as an assignment of mortgage

Where assignment of negotiable mortgage notes to trustees recited that notes were secured by mortgage on designated property, the assignment was sufficient to pass to trustees the assignor's interest in the mortgage.—Linahan v. Linahan, 39 A.2d 895, 131 Conn. 307.

78. Conn.—Linahan v. Linahan, supra.

65 C.J. p 310 note 93.

#### Compliance with legal formalities necessary

Mass.—Silbert v. Equitable Life Assur. Soc. of U. S., 50 N.E.2d 57, 314 Mass. 406.

Ohio.—Kark v. Sommers, App., 100 N.E.2d 68.

79. Mo.—In re Souard, 43 S.W. 617, 141 Mo. 642.

66 C.J. p 310 note 94.

80. Conn.—Linahan v. Linahan, 39 A.2d 895, 131 Conn. 307.

81. Conn.—Linahan v. Linahan, supra.

82. Mass.—Mullay v. Charlestown Five Cents Sav. Bank, 188 N.E. 608, 285 Mass. 101.

83. Ill.—Wellington v. Heermans, 110 Ill. 564.

84. N.Y.—Morris v. Hughes, 92 N.Y. S. 288, 45 Misc. 278.—Bliss v. Fiedick, 24 N.Y.S. 939, reversed on other grounds 27 N.Y.S. 1053, 76 Hun 508.

property to a person is relied on to create a trust and to constitute such person a trustee, the delivery must be made by the alleged creator with intention to vest title in such person for the purpose of creating a trust for the benefit of the alleged beneficiary.<sup>85</sup> While it has been laid down broadly that possession by the trustee of personal property involved is essential to the creation of a trust,<sup>86</sup> a failure of the trustee to take actual physical control of the trust property does not defeat the trust, where title is effectually vested in him by a written instrument<sup>87</sup> or otherwise;<sup>88</sup> and, where actual delivery is impossible, the formal execution and delivery of an instrument purporting to be a present complete transfer and assignment of such property to a person as trustee is a sufficient delivery of the property therein described to make the transaction an executed, as distinguished from an executory, one.<sup>89</sup> Where the creator or donor has only an equitable title, only a symbolic delivery to the trustee is possible.<sup>90</sup>

The trust may, however, remain incomplete until the property constituting the corpus of the trust is delivered to the trustee.<sup>91</sup> Thus, failure of the trustee to take possession of personal property may leave the trust incomplete in the absence of a show-

ing of a symbolical delivery,<sup>92</sup> and, where the trust is a voluntary one in personal property, a change of possession may be necessary to perfect the trust and render it enforceable.<sup>93</sup> Where the instrument creating the trust expressly provides that it shall be for the benefit of the grantor during his life, a retention of possession by him is not inconsistent with the trust.<sup>94</sup>

**Deposit in safe deposit box.** Actual delivery of personal property may be effected by a deposit made by one of the trustees and the creator in a safe deposit box to which the creator does not have access without the consent of the trustees,<sup>95</sup> and it has been held that the deposit of securities in a safe deposit box to which both the donor and the trustee have access may constitute delivery.<sup>96</sup> The placing of the trust res in a safe deposit box of which the beneficiary is named as lessee with the donor as his agent may constitute a sufficient delivery of the trust property.<sup>97</sup> In general, however, placing of securities in a safe deposit box does not, of itself, constitute delivery where the alleged trustee is not given the right of access to such box.<sup>98</sup>

**Prior possession by trustee.** Where, prior to the creation of the trust, the property is in the hands of the trustee, no formal delivery of the property

85. N.Y.—Wadd v. Hazelton, 33 N.E. 143, 137 N.Y. 215, 21 L.R.A. 693, 33 Am.S.R. 707—Shea v. Crofut, 196 N.Y.S. 850, 203 App.Div. 210.  
65 C.J. p 310 note 97.

86. N.Y.—Von Hesse v. MacKaye, 17 N.Y.S. 55, 62 Hun 458.

#### Stock certificates

(1) An attempted gratuitous transfer of shares of stock by assignment to trustees unaccompanied by delivery or transfer on corporation's books is ineffective and proposed trust is not created.—Johnson v. Johnson, 13 N.E.2d 758, 300 Mass. 24.

(2) In absence of delivery of shares of a real estate trust to a son by his father, the son could not be considered as a trustee for the benefit of himself and his brothers and sisters.—Istock v. Rock, 33 N.E.2d 973, 309 Mass. 44.

(3) Issuance of certificate of building and loan stock in name of decedent in trust for complainant created neither valid gift nor valid declaration of trust in complainant's favor where no consideration moved from complainant and decedent retained complete dominion and control over stock until his death.—Zimmerman v. Nauhauser, 183 A. 820, 119 N.J.Eq. 424.

87. Ky.—Hardin's Committee v.

Shelman, 63 S.W.2d 923, 245 Ky. 508.

65 C.J. p 311 note 99.

#### Stock certificates

(1) Execution and delivery of trust agreement containing words of present assignment of certificates of stock, with intent to pass title, without delivery of certificates representing shares and without consideration is valid and binding as between the parties since as between them stocks may be transferred by written assignment without delivery of the stock certificates.—Home for Destitute Crippled Children v. Bloomer, 31 N.E.2d 812, 308 Ill.App. 170.

(2) Where deceased assigned stock to the assignee in trust for another but kept his stock certificate in his lock box at the bank after the stock had been transferred on the books of the corporation, such action did not prevent the trust from taking effect.—Newland v. McNeill, 126 S.W.2d 127, 277 Ky. 245.

88. Cal.—Thomas v. Lamb, 106 P. 251, 11 Cal.App. 717.

65 C.J. p 311 note 1.

89. N.Y.—Hesse v. Wells, 104 N.E. 1120, 211 N.Y. 1.

#### Stock certificates

Where stock certificate was not in trustor's possession at time he sought to transfer corporate stock to trustee by irrevocable trust instrument,

and symbolic delivery was effected by execution of trust instrument and stock power directing transfer of title on books of corporation, trust was not incomplete because stock certificate was not endorsed and delivered.—Bakewell v. Clemens, 190 S.W.2d 912, 354 Mo. 686.

90. Mo.—State ex rel. Kansas City Theological Seminary v. Ellison, 216 S.W. 967.

91. N.Y.—Iltis v. Ross, 253 N.Y.S. 871, 233 App.Div. 626.—In re Ilva's Trust, 100 N.Y.S.2d 357.

92. Iowa.—Stokes v. Sprague, 81 N.W. 195, 110 Iowa 89.

93. Mo.—Trunnock v. Magoon, 125 S.W. 535, 141 Mo.App. 316.  
65 C.J. p 311 note 6.

94. Ill.—Williams v. Evans, 39 N.E. 698, 154 Ill. 98.

65 C.J. p 311 note 7.

Secret trust for grantor as badge of fraud see Fraudulent Conveyances, §§ 227-234.

95. Ill.—Meldahl v. Wallace, 110 N.E. 354, 270 Ill. 220.

96. R.I.—Talbot v. Talbot, 78 A. 535, 32 R.I. 72, Ann.Cas.1912C 1221.

97. Ky.—DeLeull's Ex'rs v. DeLeull, 74 S.W.2d 474, 255 Ky.St. 406.

98. N.Y.—Shea v. Crofut, 196 N.Y.S. 850, 203 App.Div. 210.  
65 C.J. p 311 note 10.



is required,<sup>99</sup> and it is not necessary for the creator to withdraw the property and thereafter redeliver it.<sup>1</sup>

*Delivery to one of several trustees* may be sufficient to create a completed trust.<sup>2</sup>

*Delivery of property to cestui que trust.* Delivery of the trust property to the cestui que trust is not essential to the valid creation of an express trust,<sup>3</sup> even where the creator constitutes himself the trustee.<sup>4</sup>

*Retention of possession by creator constituting himself trustee.* While the view has been taken that the execution of a present and complete assignment of personal property does not of itself render the assignor a trustee for the designated assignee where

the assignor retains both the property and the assignment,<sup>5</sup> and although the policy of the law in requiring delivery to effect transfer in certain instances may not be evaded by merely calling the transaction a declaration of a trust,<sup>6</sup> if the creator of the trust by appropriate words or acts fully and completely constitutes himself trustee, no change of possession is necessary,<sup>7</sup> and he may also retain possession of the instrument creating the trust,<sup>8</sup> and need not deliver it to the beneficiary.<sup>9</sup> On the other hand, it has been held that where the creator has never informed the beneficiaries of it, a voluntary trust cannot be created where the creator has attempted to make himself trustee and has kept the property in his own hands, subject to his own disposal.<sup>10</sup>

99. Mass.—Kerwin v. Donaghy, 59 N. E. 2d 299, 317 Mass. 559.

1. N.Y.—Orton v. Tannenbaum, 185 N.Y.S. 681, 194 App. Div. 214.

2. R.I.—Talbot v. Talbot, 78 A. 535, 32 R.I. 72, Ann.Cas.1912C 1231.

#### Negotiable notes

Where trust agreement contained express assignment of negotiable notes to trustees and notes were delivered to one of trustees as custodian for all, such delivery was all that was necessary to vest possession in trustees and trustees were vested with power to sue on and collect the notes.—Linahan v. Linahan, 39 A.2d 895, 131 Conn. 307.

3. N.J.—Bankers' Trust Co., 168 A. 733, 114 N.J. Eq. 391, 89 A.L.R. 697.—In re Farrell, 159 A. 617, 110 N.J. Eq. 260.

65 C.J. p. 311 note 13.

#### Not natural incident of trust

Possession of trust res by cestui que trust is not a natural incident of trust, under which trustee is almost always given possession and powers of management of trust property, so that transaction allowing another than owner of land possession thereof is more apt to indicate intent to transfer a legal interest therein to possessor than to make him a cestui que trust.—Hill v. Irons, 113 N.E.2d 243, 160 Ohio St. 21.

4. R.I.—Knaggenhjelm v. Rhode Island Hospital Trust Co., 114 A. 8, 43 R.I. 559.

65 C.J. p. 311 note 14.

5. N.Y.—Wadd v. Hazelton, 33 N.E. 143, 137 N.Y. 215, 21 L.R.A. 693, 33 Am.S.R. 707—Gavin v. De Miranda, 29 N.Y.S. 345, 79 Ill. 286, 27 N.Y.S. 1049, 78 Ill. 414.

6. Mo.—State ex rel. Union Nat. Bank of Springfield v. Blair, 166 S.W.2d 1085, 350 Mo. 622.

#### Were intentions not legally final and definitive

Mo.—State ex rel. Union Nat. Bank of Springfield v. Blair, 166 S.W.2d 1085, 350 Mo. 622.

Where statement that one is trustee for another gives nominal cestui no rights, unless something further shows that present creation of equitable interest is intended and that settlor has ceased to have full dominion.—Murray v. O'Hara, 195 N.E. 909, 291 Mass. 75.

#### Certified check in envelope addressed to beneficiary

Where decedent before death drew certified checks to order of a hospital and church and placed them in sealed envelopes addressed to payees and containing writings expressing decedent's intention to make gifts of checks to payees, but envelopes remained in decedent's possession until after his death, and there was no evidence that decedent held checks as trustee, no trust was created with respect to them for benefit of payees.—In re Williamson's Will, 35 N.Y.S. 2d 1016, 264 App. Div. 615, appeal denied 37 N.Y.S.2d 441, 264 App. Div. 957.

7. U.S.—Bingen v. First Trust Co. of St. Paul, C.C.A. Minn., 103 F.2d 260—Morsman v. C. I. R., C.C.A. 9, 30 F.2d 18, 113 A.L.R. 441, certiorari denied Morsman v. Helvering, 58 S.Ct. 20, 302 U.S. 701, 82 L.Ed. 542 Del.—Delaware Trust Co. v. Fitzmaurice, 31 A.2d 383, 27 Del.Ch. 101 modified on other grounds, Crumlish v. Delaware Trust Co., 38 A.2d 463, 27 Del.Ch. 374—Jones v. Bodley, 27 A.2d 84, 26 Del.Ch. 218, reversed on other grounds, Hodley v. Jones, 32 A.2d 436, 27 Del.Ch. 273.

Ky.—DeLull's Ex'rs v. DeLull, 74 S.W.2d 474, 255 Ky.St. 406. Mass.—Cohen v. Newton Sav. Bank, 67 N.E.2d 748, 320 Mass. 90, 168 A.L.R. 1321—Rock v. Rock, 31 N.E.

2d 973, 309 Mass. 44—Murray v. O'Hara, 195 N.E. 909, 291 Mass. 75. Mo.—Corpus Juris cited in Idle v. Union Nat. Bank of Springfield, 156 S.W.2d 941, 945, opinion quashed on other grounds State ex rel. Union Nat. Bank of Springfield v. Blair, 166 S.W.2d 1085, 350 Mo. 622.

N.J.—Eagles Building & Loan Ass'n v. Fiducia, 37 A.2d 116, 135 N.J. Eq. 7, affirmed 40 A.2d 627, 136 N.J. Eq. 117.

N.Y.—In re Brown's Will, 169 N.E. 612, 252 N.Y. 366.—In re Sweeney's Estate, 279 N.Y.S. 927, 155 Misc. 461.

N.D.—Hagerott v. Davis, 17 N.W.2d 15, 73 N.D. 532.

Ohio—Thomas v. Dye, Com.Pl., 117 N.E.2d 515.

VI.—Smith v. Deshaw, 78 A.2d 479, 116 Vt. 441—Warner v. Burlington Federal Sav. & Loan Ass'n, 49 A.2d 93, 111 Vt. 463, 168 A.L.R. 1265.

65 C.J. p. 311 note 16.

#### Delivery to beneficiary

The immediate delivery of the subject matter of the trust to the beneficiary is neither necessary nor appropriate in order for the owner of property to constitute himself trustee for another.—Jones v. Bodley, 27 A.2d 84, 26 Del.Ch. 218, reversed on other grounds, Hodley v. Jones, 32 A.2d 436, 27 Del.Ch. 273.

8. U.S.—Morsman v. C. I. R., C.C.A. 9, 30 F.2d 18, 113 A.L.R. 441, certiorari denied Morsman v. Helvering, 58 S.Ct. 20, 302 U.S. 701, 82 L.Ed. 542. Mass.—Rock v. Rock, 33 N.E.2d 973, 309 Mass. 44—Murray v. O'Hara, 195 N.E. 909, 291 Mass. 75.

65 C.J. p. 312 note 17.

9. N.Y.—In re Brown's Will, 169 N.E. 612, 252 N.Y. 366.

10. Mass.—Robertson v. Parker, 191 N.E. 645, 287 Mass. 351—Welch v. Henshaw, 49 N.E. 659, 170 Mass. 409.

*Return of property to donor.* The effect of delivery of certificates of stock to a trustee for the pur-

pose of creating a trust is not necessarily destroyed by the trustee's return of the stock to the donor.<sup>11</sup>

## 6. EVIDENCE

### § 65. Presumptions and Burden of Proof

An intention to create an express trust will not be presumed in the absence of an express declaration to that effect where the whole purpose of the deed or other instrument, without peril to the rights of any person, can be accomplished under the power conferred by the instrument.

An intention to create an express trust will not be presumed in the absence of an express declaration to that effect, where the whole purpose of the deed or other instrument, without peril to the rights of any person, can be accomplished under the power conferred by the instrument.<sup>12</sup> It may be assumed that a valid trust was created when a person takes out shares of a family corporation in his name as trustee for his children.<sup>13</sup>

*Oral or written declaration.* It will be presumed that an agreement creating a trust in real property was evidenced by writing in conformity with the statute of frauds;<sup>14</sup> and, where an attorney of a corporation judgment creditor bid in the property at execution sale and received a deed in his own name, for the sole purpose of conveying it to the corporation, the trust will be presumed to have been created or declared by deed, as required by statute.<sup>15</sup> Where a complaint does not charge that the trust relied on is in writing or that it rests on an agreement, it will be presumed that it was in parol.<sup>16</sup>

*Delivery of writing.* A legal presumption obtains in favor of delivery of a trust agreement,<sup>17</sup> and the burden of proof rests on the grantor and those claiming under him to show an absence of de-

livery.<sup>18</sup> Thus, the delivery of a declaration of trust will be presumed where it is produced from the possession of the beneficiary, who is shown to be the proper custodian,<sup>19</sup> and a presumption of delivery of a deed creating a trust arises from the execution and recording thereof.<sup>20</sup>

*Transfer of title.* Where property is claimed under a trust imposed on a third person, the burden is on the beneficiary to show that the legal title passed beyond the control of the settlor in his lifetime, to the trustee or beneficiary.<sup>21</sup>

*Spendthrift trust.* Ordinarily there is a presumption against the creation of a spendthrift trust unless either words to that effect are set forth or a clear and undoubted intention to that end is manifested by terms of the instrument.<sup>22</sup>

### § 66. — Existence, Validity, and Terms of Trust in General

There is a strong presumption against the existence of an orally created trust, and one who alleges an express trust has the burden of proving it. Where there is evidence establishing an express trust, favorable presumptions arise, and the burden of proof is on the party disputing its validity or terms.

There is a strong presumption against the existence of an orally created trust,<sup>23</sup> and presumptions which are not the usual and almost necessary deductions from the facts proved may not be indulged to ingraft a parol trust on a legal title.<sup>24</sup> Ordinarily, as discussed in Property § 17, a person holding the title or possession of property is presumed to be the absolute owner. Where a conveyance is without

11. N.Y.—Fehder v. Furman, 54 N. Y. 2d 820.  
65 C.J. p 312 note 19.

12. N.Y.—Heermans v. Robertson, 64 N.Y. 232.  
65 C.J. p 319 note 33.

13. Cal.—Church v. Church, 105 P.2d 640, 40 Cal App 2d 696.

14. Mont.—Mantle v. White, 132 P. 22, 47 Mont. 234.

15. N.Y.—Wright v. Douglass, 7 N. Y. 564, 1 Seld 57.

16. Ind.—Alexander v. Spaulding, 66 N.E. 694, 160 Ind. 176.

17. Ill.—Jackson v. Pillsbury, 44 N. E.2d 537, 380 Ill. 554.  
N.C.—Cannon v. Blair, 50 S.E.2d 732, 229 N.C. 606.

18. Ill.—Jackson v. Pillsbury, 41 N. E.2d 537, 380 Ill. 554.

19. N.Y.—Starbuck v. Farmers' Loan & Trust Co., 51 N.Y.S. 58, 28 App. Div. 272.

#### Prima facie evidence

Presumption of delivery arising from possession of trust agreement was prima facie evidence of delivery and supported a judgment.—George v. Soares, 128 P.2d 377, 54 Cal App.2d 29.

20. Md.—Houlton v. Houlton, 86 A. 514, 119 Md. 180.

21. Ohio.—Worthington's Adm'r v. Redkey, 99 N.E. 211, 86 Ohio St. 128.

Necessity that donor or creator part with interest in property to trustee generally see supra § 63.

22. Tex.—Corpus Juris quoted in Long v. Long, Civ.App., 252 S.W.2d

235, 246, error refused no reversible error.

Utah.—Corpus Juris quoted in Cronquist v. Utah State Agr. College, 201 P.2d 280, 284, 114 Utah 426.  
65 C.J. p 542 note 58.

#### Reason for rule

Restraints against alienation of both legal and equitable fees are generally void.—Long v. Long, Tex Civ. App., 252 S.W.2d 235, error refused no reversible error.

23. U.S.—American Bonding Co. of Baltimore v. Hord, C.C.A. Ark., 98 F.2d 350.

Ark.—Ripley v. Kelly, 183 S.W.2d 793, 207 Ark. 1011.

24. Tex.—Groselove v. Johnston, Civ.App., 184 S.W.2d 548.

consideration, and the parties are strangers, it has been held, on the one hand, that there is a presumption that the grantee holds in trust for the grantor, unless there is evidence establishing a gift,<sup>25</sup> but on the other hand the view has been taken that where a transfer of property is made without consideration, no inference that the transferee is to hold the property for the benefit of the transferor arises,<sup>26</sup> and that a conveyance for a recited consideration of love and affection is presumptively a gift as distinguished from a trust.<sup>27</sup> Furthermore, the omission of covenants of general warranty of title in a deed does not give rise to an inference that the land was to be held in trust for the benefit of the grantor.<sup>28</sup> An obligation to give away one's property by means of trust is not to be presumed.<sup>29</sup> Where personal property is delivered to, and ac-

cepted by, a person, with directions to give it to the donor's husband in trust for their sons, the presumption is that the recipient took the property as trustee or agent for the donees;<sup>30</sup> and, where one person buys property for another, the only permissible presumption, in the absence of a showing to the contrary, is that he holds it in trust until he is repaid his advance.<sup>31</sup>

One who alleges an express trust has the burden of proving it.<sup>32</sup> So, where complainant seeks to establish an express trust in land, based on a parol agreement, the burden is on him to show that the agreement has been so far executed that a refusal of complete execution would operate as a fraud.<sup>33</sup>

*When there is evidence establishing an express trust, favorable presumptions arise,<sup>34</sup> such as that*

25. Ohio—Bayles v. Crossman, 5 Ohio Dec. Reprint, 354, 5 Am.L. Rec. 13.

Transfer from husband to wife or wife to husband see *infra* § 68.

26. Kan.—Pooshee v. Kasenberg, 102 P.2d 995, 152 Kan. 100.

27. Tex.—Small v. Brooks, Civ. App., 163 S.W.2d 236, error refused. Presumption that gift was intended generally see *infra* § 65.

28. W.Va.—Bobbitt v. Bobbitt, 43 S.E.2d 65, 130 W.Va. 173.

29. U.S.—Van Sciver v. Rothensies, C.C.A. Pa., 122 F.2d 697.

#### Proceeds of insurance policy

(1) On the question of existence of trust, a debtor-creditor relationship created by a loan of money from the beneficiary named in a life policy to the insured creates no presumption of a limited right of recovery on the part of the designated beneficiary—Zolintakis v. Orfanos, C.C.A. Utah, 119 F.2d 571, certiorari denied Orfanos v. Zolintakis, 62 S.Ct. 62, 314 U.S. 630, 86 L.Ed. 506.

(2) Where the right to change the beneficiary is reserved under the terms of the policy, it will be presumed that it was the intention of the insured to leave the entire proceeds of the policy to the designated beneficiary, in absence of any compelling equities of those claiming contra to the designated beneficiary—Zolintakis v. Orfanos, C.C.A. Utah, 119 F.2d 571, certiorari denied Orfanos v. Zolintakis, 62 S.Ct. 62, 314 U.S. 630, 86 L.Ed. 506.

30. Mont.—Stagg v. Stagg, 300 P. 539, 90 Mont. 180.

Presumption of acceptance of trust: By beneficiary see *supra* § 61. By trustee see *supra* § 60.

31. U.S.—Stark v. Bauer Cooperaage Co., C.C.A. Ohio, 3 F.2d 214, certiorari denied 45 S.Ct. 464, 267 U.S. 604, 69 L.Ed. 809.

32. U.S.—Jackman v. Equitable Life Assur. Soc. of U. S., C.C.A. Pa., 145 F.2d 945—Van Sciver v. Rothensies, C.C.A. Pa., 122 F.2d 697—Zamberletti v. Zamberletti, D.C. Iowa, 105 F.Supp. 873—Mutual Life Ins. Co. of N. Y. v. Cleveland, D.C. Pa., 82 F.Supp. 358—Overly v. Overly, D.C. Pa., 65 F.Supp. 174, affirmed, C.C.A., 158 F.2d 384.

Cal.—Cohn v. Cohn, 20 P.2d 61, 130 Cal.App. 349.

Ill.—Reynolds v. First Nat. Bank, 279 Ill. App. 581, 600.

Kan.—Katschor v. Ley, 113 P.2d 127, 153 Kan. 569.

Mo.—Dougherty v. Dougherty, 2 A.2d 433, 175 Md. 441.

Mass.—Rugo v. Rugo, 91 N.E.2d 826, 325 Mass. 612—American Emp. Ins. Co. v. Webster, 76 N.E.2d 130, 322 Mass. 161—Block v. Rock, 33 N.E.2d 973, 309 Mass. 44—Levy v. Levy, 35 N.E.2d 659, 309 Mass. 486.

Miss.—Landau v. Landau, 187 So. 224, 185 Miss. 45.

N.J.—Skoczylas v. Skoczylas, 24 A.2d 881, 131 N.J. Eq. 246—J. A. B. Holding Co. v. Nathan, 184 A. 829, 120 N.J. Eq. 340—Szpak v. Szpak, 168 A. 386, 114 N.J. Eq. 143.

N.Y.—Wojtkowiak v. Wojtkowiak, 85 N.Y.S.2d 198, affirmed 81 N.Y.S.2d 171, 273 App.Div. 1062.

Ohio—Hill v. Irons, 113 N.E.2d 243, 160 Ohio St. 21—Vincent v. Divine Pence Mission Movement, App. 118 N.E.2d 190—Loewenstine v. Loewenstine, 42 N.E.2d 1007, 69 Ohio App. 536.

Pa.—Brumer v. Stanert, 85 A.2d 130, 369 Pa. 178—Keller v. Keller, 41 A.2d 547, 351 Pa. 461—Warburton v. Warburton, 21 A.2d 21, 342 Pa. 401—Gribbel v. Gribbel, 17 A.2d 892, 341 Pa. 11—In re Tunnell's Estate, 190 A. 906, 325 Pa. 554—Brubaker v. Lauver, 185 A. 848, 332 Pa. 461—Majors v. Majors, 33 A.2d 442, 153 Pa.Super. 175, affirmed 37 A.2d 528, 349 Pa. 334—In re Zoller's Es-

tate, 52 Pa. Dist. & Co. 328—Crossan v. Galloway, Com.Pl., 5 Chest.Co. 229.

Tex.—Amerada Petroleum Corp. v. Massad, Civ.App., 239 S.W.2d 730, error refused no reversible error—Millsaps v. Moon, Civ.App., 193 S.W.2d 221—Speights v. Deon, Civ. App., 182 S.W.2d 1016, error refused—Jones v. Jones, Civ.App., 181 S.W.2d 988, error refused—Clayton v. Ancell, Civ.App., 159 S.W.2d 962, affirmed 168 S.W.2d 230, 140 Tex. 441—Hidalgo County Bank & Trust Co. v. Goodwin, Civ.App., 137 S.W.2d 161, error dismissed, judgment correct—Tabor v. Zavala County Bank, Civ.App., 90 S.W.2d 650, error dismissed.

Utah—Hansen v. Hansen, 171 P.2d 392, 110 Utah 222.

W.Va.—Winfree v. Dearth, 188 S.E. 880, 118 W.Va. 71.

65 C.J. p. 318 note 31.

Degree of proof see *infra* § 71.

Sufficiency of evidence to sustain burden of proof see *infra* § 71.

33. Va.—Jackson v. Greenhow, 156 S.E. 377, 155 Va. 758.

34. Iowa.—Morris v. Landaur, 48 Iowa 234.

Pa.—Riess v. Wilson, Com.Pl., 57 Dauph. Co. 71.

65 C.J. p. 319 note 36.

**Trust created by legislature**

The courts should make every presumption of intent in favor of the manifest object of the legislature and against the failure of a beneficiary trust created by a state appropriation.—Bissell v. Butterworth, 118 A. 50, 97 Conn. 605.

#### Purpose of creating spendthrift trust

In absence of any other purpose stated in instrument creating spendthrift trust, presumption exists that it was created for maintenance and support and, in some cases, education of beneficiaries.—In re De Lano's Estate, 145 P.2d 672, 62 Cal.App.2d 808.

a person executing a declaration of trust is of sound mind<sup>35</sup> and is familiar with the terms of the declaration<sup>36</sup> and that it is valid and binding according to its terms,<sup>37</sup> and the burden of proof is on the party disputing its validity or terms.<sup>38</sup> Thus, the burden of proof is on the maker of a declaration of trust who asserts that it was without consideration,<sup>39</sup> or was to be binding only on certain contingencies.<sup>40</sup> Where there is evidence that, except for occasional intervals, the grantor in a deed of trust was insane during a period of time including the execution of the deed, the burden is on the person asserting the trust to show that it was executed during a lucid interval.<sup>41</sup>

**Termination of trust** While a party asserting that a trust once existing has terminated or been extinguished usually has the burden of proof,<sup>42</sup> a trust shown to have once existed will be presumed to have been extinguished after the lapse of forty years, and the death of all the original parties.<sup>43</sup>

## § 67. — Deposits in Bank

One who alleges an express trust in his favor in a bank deposit has the burden of proving it, but the language of a deposit agreement may give rise to a presumption that a trust was created, and if it does, the burden of rebutting the presumption is on the person

asserting a lack of intention to create a trust or attacking the transfer as illusory.

In accordance with the general rule stated supra § 66, one who alleges an express trust in his favor in a bank deposit has the burden of proving it.<sup>44</sup> Where the owner of a bank account transfers it to a new account opened in his name in trust for himself and another, joint owners, subject to the order of either, a rebuttable presumption of a trust in the account arises.<sup>45</sup> On the other hand, the mere language of a deposit document which makes no mention of a trust, but which provides that the account is thereafter to be a joint account in the names of the owner and another, subject to the order of either, and balance at death of either to the survivor does not raise the presumption that a trust was established,<sup>46</sup> but the burden is on the survivor to show the existence of such a trust,<sup>47</sup> and even if a presumption of a trust arose, it would be rebuttable.<sup>48</sup>

If a person deposits his own money, in his own name, in trust for another, and dies before the beneficiary, without revocation or some decisive act or declaration of disavowance, a presumption arises that an absolute trust as to the balance remaining on deposit at the death of the depositor was created,<sup>49</sup> but it has been held in a number of cases

35. Cal.—*American Trust Co. v. Dixon*, 78 P.2d 449, 26 Cal.App.2d 426.

36. Pa.—*In re Greenfield*, 14 Pa. 439.

37. U.S.—*Irvine v. Dunham*, Cal., 4 S.Ct. 501, 111 U.S. 327, 28 L.Ed. 441.

38. C.J. p 319 note 38. Undue influence arising from relationship of parties see infra § 68.

39. Ky.—*Foraythe v. Lexington Banking, etc., Co.*, 121 S.W. 962. 65 C.J. p 319 notes 35-41.

### Mental incapacity

Settlor's daughter and adopted grandson seeking to set aside declaration of trust and amendment thereto to had burden of showing affirmatively by a preponderance of the evidence that settlor was of unsound mind at time of execution of declaration and amendment.—*American Trust Co. v. Dixon*, 78 P.2d 449, 26 Cal.App.2d 426.

39. U.S.—*Irvine v. Dunham*, Cal., 4 S.Ct. 501, 111 U.S. 327, 28 L.Ed. 441.

40. U.S.—*Irvine v. Dunham*, supra.

41. Va.—*In re Inge*, 91 SE 142, 120 Va. 329.

42. Me.—*Cazallis v. Ingraham*, 110 A. 359, 119 Me. 240.

Wis.—*Blake v. Johnson*, 193 N.W. 388, 180 Wis. 485.

43. U.S.—*Prevost v. Gratz*, Pa., 6 Wheat. 481, 5 L.Ed. 311.

44. Vt.—*Warner v. Burlington Federal Sav. & Loan Ass'n*, 49 A.2d 93, 114 Vt. 463, 168 A.L.R. 1265.

**Beneficiary named in card attached to bank's ledger card expressing depositor's wish to leave money in such bank in trust for him had the burden of proving creation of a completed trust in bank account in his favor**—*Warner v. Burlington Federal Sav. & Loan Ass'n*, supra.

45. Md.—*Hancock v. Savings Bank of Baltimore*, 85 A.2d 770, 199 Md. 163.—*Coburn v. Shilling*, 113 A. 761, 138 Md. 177.

**Creation of trust by deposit in bank** see supra § 54.

46. D.C.—*Murray v. Gadsden*, 197 F. 2d 194, 91 U.S.App.D.C. 33, 33 A.L.R.2d 554.

47. La.—*Northcott v. Livingood*, App. 10 So 2d 401.

48. D.C.—*Murray v. Gadsden*, 197 F. 2d 194, 91 U.S.App.D.C. 33, 33 A.L.R.2d 554.

49. Ga.—*Wilder v. Howard*, 4 SE 2d 199, 188 Ga. 426.

Me.—*Cazallis v. Ingraham*, 110 A. 359, 119 Me. 241.

N.Y.—*Application of Halpern*, 100 N.Y.S.2d 894, 277 App.Div. 525, affirmed 100 N.E.2d 120, 303 N.Y. 33.—*Murray v. Brooklyn Sav. Bank*, 15 N.Y.S.2d 915, 258 App.Div. 132.—*Larkin v. Greenwich Sav. Bank*,

271 N.Y.S. 288, 241 App.Div. 874.—*In re Shortle's Estate*, 130 N.Y.S. 2d 233, 206 Misc. 35.—*In re Purcell's Will*, 107 N.Y.S.2d 955, 200 Misc. 643.—*In re Ungara's Estate*, 51 N.Y.S.2d 388, 183 Misc. 907.—*In re Weinstein's Estate*, 28 N.Y.S.2d 137, 176 Misc. 592.—*In re Weinberg's Estate*, 296 N.Y.S. 7, 162 Misc. 887.—*In re Slites' Estate*, 289 N.Y.S. 697, 160 Misc. 162.—*In re McCann's Estate*, 281 N.Y.S. 448, 155 Misc. 763.—*In re Yarme's Estate*, 266 N.Y.S. 93, 148 Misc. 467, affirmed 273 N.Y.S. 403, 242 App.Div. 693.—*In re Ihipps' Will*, 125 N.Y.S.2d 606.—*In re Friesling's Estate*, 123 N.Y.S.2d 207.—*In re Koster's Will*, 119 N.Y.S.2d 2.—*In re Prokaskoy's Will*, 109 N.Y.S.2d 888.—*In re Frelshtad's Will*, 104 N.Y.S.2d 610, affirmed 105 N.Y.S.2d 995, 278 App.Div. 962, amended 107 N.Y.S.2d 466, 279 App. Div. 603.—*In re Loeffler's Estate*, 97 N.Y.S.2d 450, affirmed 102 N.Y.S.2d 221, 278 App.Div. 559.

Pa.—*In re Furjanick's Estate*, 100 A. 2d 85, 375 Pa. 484.—*In re Rodgers' Estate*, 97 A.2d 789, 374 Pa. 246.

Ill.—*Malley's Estate v. Malley*, 34 A.2d 761, 89 Ill. 407.—*Slepokov v. McHoley*, 172 A. 328, 54 R.I. 210.

65 C.J. p 320 note 56.

**Word "revocation,"** in rule of text, connotes the termination of the trust relationship which has theretofore come into valid being.—*In re Chris-*

that the foregoing presumption is rebuttable,<sup>50</sup> and a controverting demonstration may be made either to show that there was no initial intention to confer the claimed benefit, or that after the opening of the account with the requisite trust intent, the sentiments of the depositor changed.<sup>51</sup> Thus, while it has been said that no presumption of a trust arises from the opening of an account in the depositor's name as trustee for another,<sup>52</sup> where the language of a deposit agreement shows prima facie the creation of a trust in favor of a third person, the burden of showing want of intention to create a trust is on the depositor<sup>53</sup> or other person asserting such want of intention<sup>54</sup> or attacking the transfer as illusory,<sup>55</sup> fraudulent,<sup>56</sup> or unduly influenced;<sup>57</sup> and when such burden has been met, the burden is then on the alleged beneficiary to establish his right to the fund.<sup>58</sup>

Where a decedent transferred funds originally owned by him to a bank account in the name of a

third person in trust for the decedent, the burden is on the third person as trustee to prove, on the death of the decedent, that it was the intention to create a true Totten trust.<sup>59</sup>

It has been held that there is no presumption that a trust in a savings bank deposit is irrevocable,<sup>60</sup> although there is some authority for the view that where the word "trustee" appears on a bankbook, indicating that it is a trust fund, there is raised the presumption that an irrevocable trust was intended.<sup>61</sup>

A statute providing that when a deposit is made in trust for another, and no further notice of the existence and terms of a valid trust shall have been given in writing to the bank, the deposit shall, on the death of the depositor, be paid to the person in trust for whom the deposit was made does not give rise to a conclusive presumption of the existence

tie's Estate, 4 N.Y.S.2d 484, 167 Misc. 484.

**Word "disaffirmance,"** within rule of text, signifies a repudiation of the fact that the supposed trustee holds the rem in question in a fiduciary capacity, and denies that any trust relationship is in existence.—In re Christie's Estate, supra.

#### Inference of fact

The so-called presumption that depositor intended that avails of savings account in trust form should become property of beneficiary on depositor's death was not a true presumption of law relating to survivorship rights resulting from opening of joint account in statutory survivorship form, but was a mere inference of fact.—In re Herle's Estate, 300 N.Y.S. 103, 165 Misc. 46.

**Deposit to credit of self as "administrator"**

Where executor deposited money to credit of himself as "administrator" of designated fiduciary estate, never exercised any act of individual ownership or control over fund, but allowed it to remain and accumulate interest for years, and died without attempting to dispose of funds, presumptively a trust existed in favor of person entitled to estate represented by deceased depositor, which residuary legatees of fiduciary estate could assert against executor of deceased depositor's will, after he had taken charge of deposit.—Reynolds v. Dorsey, 3 S.W.2d 564, 188 Ga. 218.

50. Me.—Cazallus v. Ingraham, 110 A. 359, 119 Me. 241.

N.Y.—Morris v. Sheehan, 138 N.E. 23, 234 N.Y. 366.—In re Weinstein's Estate, 28 N.Y.S.2d 137, 176 Misc. 592.—In re Matthews' Estate, 24 N.Y.S.2d 249, 175 Misc. 524.—Mur-

ray v. Brooklyn Sav. Bank, 9 N.Y.S. 2d 227, 169 Misc. 1014, reversed on other grounds 15 N.Y.S.2d 915, 258 App. Div. 132.—In re Ryan's Will, 52 N.Y.S.2d 502.

RI.—Malley's Estate v. Malley, 34 A.2d 761, 69 RI 407.

**Inference** that depositor intended that avails of saving account in trust form should become property of beneficiary on depositor's death, like other inferences of fact, is subject to rebuttal by evidence to the contrary or stronger inferences.—In re Herle's Estate, 300 N.Y.S. 103, 165 Misc. 46.

51. Cal.—Brucks v. Home Federal Sav. & Loan Ass'n, 228 P.2d 645, 36 Cal.2d 845.—Koslosky v. Cia, 160 P.2d 565, 70 Cal.App.2d 174.—In re Herle's Estate, 300 N.Y.S. 103, 165 Misc. 46.

#### Evidence of intent to contrary

Presumption could be overcome by competent evidence of an intent to contrary.—In re Weinstein's Estate, 28 N.Y.S.2d 137, 176 Misc. 592.

52. Tex.—Baldwin v. Fleck, Civ. App., 168 S.W.2d 904, affirmed Fleck v. Baldwin, 172 S.W.2d 975, 141 Tex. 310.

53. Md.—Gimbel v. Gimbel, 128 A. 891, 148 Md. 182.

Minn.—Vulso v. Lattner, 173 N.W. 741, 143 Minn. 364.

54. Md.—Bradford v. Eutaw Sav. Bank of Baltimore City, 46 A.2d 284, 186 Md. 127.—Bollack v. Bollack, 182 A. 317, 169 Md. 407.

Pa.—Downey v. Duquesne City Bank, 22 A.2d 124, 146 Pa.Super. 289.

**In proceeding by widow to establish that bank accounts in name of deceased in trust for his children were property of his estate, burden**

of proof was prima facie on widow to show that the bank accounts belonged to testator in his lifetime.—Pichurko v. Richardson, 107 N.Y.S.2d 365.

55. N.Y.—In re Friesing's Estate, 123 N.Y.S.2d 207.

**Administrator** must make a factual showing of unreality to set aside transfer as illusory.—In re Leman's Estate, 116 N.Y.S.2d 658, affirmed 118 N.Y.S.2d 750, 281 App. Div. 761, appeal denied 119 N.Y.S.2d 230, 281 App. Div. 845.

56. N.Y.—In re Timko's Will, 270 N.Y.S. 323, 150 Misc. 701.

57. N.Y.—In re Timko's Will, supra.

58. N.Y.—Pichurko v. Richardson, 107 N.Y.S.2d 365.

59. N.Y.—Application of Kronk, 109 N.Y.S.2d 516, 202 Misc. 150.

60. N.Y.—In re Vaughan's Estate, 260 N.Y.S. 197, 145 Misc. 332.

Tex.—Fleck v. Baldwin, 172 S.W.2d 975, 141 Tex. 340.

**Presumption that revocable trust is intended** by deposit of money in a bank in the name of depositor in trust for another is an exception to general rule that trusts are irrevocable unless a power of revocation is expressly reserved.—In re Ingels' Estate, 92 A.2d 881, 372 Pa. 171.

#### Inference of revocability

Where sole evidence as to aim of decedent in depositing a sum of money in a bank in his name as trustee for a third person was the form of deposit, inference must be drawn that decedent intended to reserve power during his lifetime to deal with deposit in any way he should choose.—In re Cohen's Will, 90 N.Y.S.2d 776.

61. Me.—Rose v. Osborne, 180 A. 315, 133 Me. 497.

of an intention to create an irrevocable trust,<sup>62</sup> but merely lays down a rule of evidence,<sup>63</sup> and its purpose is to raise, as between the depositor and the putative cestui inter se, a rebuttable presumption of a trust from the form of the account.<sup>64</sup> It does not apply where notice of the terms of the trust was given to the bank.<sup>65</sup>

**Termination of trust.** Where the opening of the account and declaration of trust have been proved, one asserting that the trust has been terminated has the burden of proving it.<sup>66</sup>

## § 68. — Relation of Parties

The general rule that the burden is on one asserting a trust to establish the trust does not apply where the relation between the parties is of such nature as to show that they did not meet on equal terms, since a trust may be presumed in such case.

The general rule discussed supra § 66, that the burden is on one asserting a trust to establish the trust, does not apply where the relation between the parties is of such a nature as to show that they did not meet on equal terms.<sup>67</sup> The mere fact that a grantee of land was a nephew of the grantor is not sufficient, however, to show such a confidential relationship as to shift the burden of proof, and re-

quire the grantee to establish the nonexistence of a trust.<sup>68</sup> Where a wife transfers property to her husband without a valuable consideration, there is a presumption that the husband holds in trust for the wife, unless there is evidence establishing a gift,<sup>69</sup> and the burden is on the husband to show that the transfer was a gift and not a trust.<sup>70</sup> On the other hand, where the conveyance is from husband to wife, the presumption is that it is a gift, rather than a trust,<sup>71</sup> and the husband has the burden of showing that a trust was created;<sup>72</sup> but the presumption of a gift may be rebutted by evidence of facts showing that the husband's intention was to create a trust.<sup>73</sup>

**Fraud or undue influence.** The mere fact that confidential relations exist between the grantor on a deed of trust and one of the trustees contingently interested in the subject of the trust after the termination of the trust, on the death of the grantor, does not raise a presumption that undue influence was exercised to procure the execution of the deed,<sup>74</sup> especially where such deed has long been recognized, acquiesced in, and reaffirmed.<sup>75</sup> So it has been held that a trust executed by a wife naming her husband as trustee for the benefit of the wife and others is presumptively valid,<sup>76</sup> and that

62. N.J.—*Rendix v. Hudson County Nat. Bank*, 59 A.2d 253, 142 N.J. Eq. 487.

63. N.J.—*Rendix v. Hudson County Nat. Bank*, supra.

**Statute held intended to change and define law with respect to trusts set up in the particular form and manner stated in the act**—*Hickey v. Kahl*, 19 A.2d 33, 129 N.J. Eq. 233.

**Statute held ineffective to change prior law with respect to gifts and declarations of trust**

N.J.—*Thatcher v. Trenton Trust Co.*, Mercer Branch, 182 A. 912, 119 N. J. Eq. 408.

**Statute held not to modify statute of wills and of intestate succession**

N.J.—*Bendix v. Hudson County Nat. Bank*, 59 A.2d 253, 142 N.J. Eq. 487—*Hickey v. Kahl*, 19 A.2d 33, 129 N.J. Eq. 233.

64. N.J.—*Bendix v. Hudson County Nat. Bank*, 59 A.2d 253, 142 N.J. Eq. 487.

### Revocability of trust

(1) The plain intent of statute is that when a donor opens a savings account in his name in trust for a named beneficiary, and there is no evidence as to donor's intent, donor's intent shall be taken to create an immediately effective trust for beneficiary, over which donor reserves a power of revocation, as evidence of

which he retains passbook, and that as much of funds over which the donor has failed to exercise power of revocation shall belong to beneficiary at donor's death free from any claim of donor's legal representatives—*Hickey v. Kahl*, 19 A.2d 33, 129 N.J. Eq. 233.

(2) The death of the donor does not complete the trust but renders it irrevocable—*Hickey v. Kahl*, supra.

65. N.J.—*Hickey v. Kahl*, supra.

66. Cal.—*Sherman v. Hibernia Savings & Loan Soc.*, 20 P.2d 138, 129 Cal.App., Supp., 795.

67. Nev.—*Corpus Juris* cited in *Davison v. Streeter*, 234 P.2d 793, 799, 68 Nev. 427.

68. C.J. p 320 note 59.

**Existence of confidential relationship between grantor and grantee would cast burden on grantee of proving by clear, satisfactory, and convincing evidence his version of transaction which grantor claimed was not an absolute conveyance but was subject to trust.**—*Rice v. Rice*, 41 A.2d 371, 184 Md. 403.

69. N.Y.—*Carrier v. Richardson*, 248 N.Y.S. 488, 139 Misc. 171.

70. Pa.—*Manstein v. Manstein*, 85 A. 2d 150, 369 Pa. 252—*Ramsey v. Ramsey*, 41 A.2d 559, 351 Pa. 413, 171 A.L.R. 425—*Werle v. Werle*, 1 A.2d 244, 332 Pa. 49—*In re Loeff-*

*ler's Estate*, 121 A. 186, 277 Pa. 317.

Wis.—*In re Brundage's Estate*, 201 N. W. 820, 185 Wis. 558.

65 C.J. p 320 note 62.

70. Wis.—*In re Brundage's Estate*, supra.

71. Mo.—*Lieberstein v. Frey*, 92 S. W.2d 111.

N.J.—*Selser v. Jester*, 23 A.2d 602, 131 N.J. Eq. 57.

65 C.J. p 320 note 64.

72. Pa.—*In re Dayen's Estate*, 97 Pa. Super 250.

73. Ark.—*Polle v. Oliver*, 117 S.W. 747, 89 Ark. 85.

65 C.J. p 320 note 66.

### Transaction viewed with disfavor

Equity courts look with disfavor on transactions divesting a person of his entire estate, such as deeds conveying husband's home to his wife, with respect to husband's suit to have title declared held in trust for him—*Selser v. Jester*, 23 A.2d 602, 131 N.J. Eq. 57.

74. N.Y.—*Townsend v. Allen*, 13 N. Y.S. 73, affirmed 27 N.E. 853, 126 N. Y. 646.

Presumption of undue influence in procuring contracts generally see *Contracts* § 584 f.

Fraud in procuring contracts generally see *Contracts* §§ 153-167.

75. N.Y.—*Townsend v. Allen*, supra.

76. U.S.—*Warner v. Florida Bank*

the burden of proving invalidity for fraud, duress, or coercion is on the wife.<sup>77</sup> The burden of proving that a bank account opened by a parent in trust for himself and his child was procured by the child by undue influence is on a third person who asserts it.<sup>78</sup> On the other hand, the existence of a confidential or fiduciary relation may, under some circumstances, raise a presumption of undue influence, which will cast the burden of showing the want of undue influence on the party seeking to establish a trust.<sup>79</sup> The fact that a grantor and a grantee in a deed are brothers, although insufficient in itself to show a confidential relation,<sup>80</sup> may, together with other facts, cast on the grantee, in a deed made by his brother without consideration, the burden of showing that the transaction was fair and equitable.<sup>81</sup> So it has been held that, where a woman of advanced years executes to her son-in-law, who had for many years been her confidential adviser, and to her son a trust deed by which they are to be benefited, the burden is on them to show that she voluntarily made it, understanding that it gave her

no power of revocation.<sup>82</sup>

### § 69. Admissibility

Evidence of the acts and declarations, either oral or written, of the parties and the surrounding circumstances may be admitted to show the existence or non-existence of a trust and to establish its nature, purpose, and terms, or the beneficiary therein, but incompetent or irrelevant evidence is inadmissible.

Subject to the limitations imposed by the statute of frauds and the general rules as to the competency of evidence, an express trust may be proved not only by express declarations, but also by circumstances from which its existence may be inferred,<sup>83</sup> and to this end evidence of all the facts and circumstances surrounding the parties at the time of the making of a contract, which are necessary to be known to understand their conduct and motives or to weigh the reasonableness of their contentions, is ordinarily relevant and admissible.<sup>84</sup> So evidence of the acts and declarations, either oral or written, of the parties, as well as the surrounding circumstances, may be admitted to show the existence<sup>85</sup>

& Trust Co., at West Palm Beach, C.C.A. Fla., 160 F.2d 766, applying Minnesota law

77. U.S.—Warner v. Florida Bank & Trust Co., at West Palm Beach, *supra*.

78. Md.—Bollack v. Bollack, 182 A. 317, 169 Md. 407.

79. Ill.—Jackson v. Pillsbury, 44 N. E.2d 537, 380 Ill. 554.

Md.—Lambdin v. Dantzebecker, 181 A. 353, 169 Md. 240.

Mich.—Sprengrer v. Sprengrer, 299 N. W. 711, 298 Mich. 551.

Nev.—Corpus Juris cited in Davidson v. Streuter, 234 P.2d 792, 799, 68 Nev. 427.

Or.—Far v. Egr, 131 P.2d 198, 170 Or. 1.

65 C.J. p. 320 note 71.

80. Cal.—Rodriguez v. Rodriguez, 231 P. 375, 69 Cal.App. 399.

81. Cal.—Rodriguez v. Rodriguez, *supra*.

65 C.J. p. 321 note 73.

**Transactions between brothers and sisters**, such as trust agreements are regarded with suspicion and scrutinized with vigilance by equity courts, presumption is against their propriety, and duty of courts is to refuse judicial sanction thereof until fully satisfied that transactions are fair and that instruments are intelligent acts of persons executing them.—Sprengrer v. Sprengrer, 299 N.W. 711, 298 Mich. 551.

82. N.Y.—Barnard v. Gantz, 35 N.E. 430, 140 N.Y. 249.

83. Md.—Citizens' Nat. Bank of Pocomoke City v. Parsons, to Use of Worth, 175 A. 852, 187 Md. 631.

Mich.—Harmon v. Harmon, 6 N.W.2d 762, 303 Mich. 513—Boyer v. Backus, 276 N.W. 564, 282 Mich. 593, motion denied 280 N.W. 756, 282 Mich. 701, certiorari denied 59 S.Ct. 147, 305 U.S. 644, 83 L.Ed. 416, rehearing denied 59 S.Ct. 248, 305 U.S. 674, 83 L.Ed. 437.

Mo.—Tootle-Lacy Nat. Bank v. Rollier, 111 S.W.2d 12, 341 Mo. 1029, N.C.—Corpus Juris cited in McCormick v. Beaty, 38 S.E.2d 102, 104, 226 N.C. 338.

Ohio—Thomas v. Dye, Com Pl., 117 N.E.2d 515.

65 C.J. p. 321 note 78.

Parol trusts and effect of statute of frauds generally see *supra* §§ 31-41.

#### Property not owned by declarant

The manifestation to create a trust *inter vivos* at some future time regarding property not then owned by the declarant, considered in connection with purchase of such property immediately thereafter, and declarant's failure personally to claim the property as his own, are facts from which court may infer intention to create a trust at time the property was purchased.—McClendon v. Dean, 117 P.2d 250, 45 N.M. 496.

#### Deed subject to outstanding liens

Where wife and husband held title to realty for the wife and her two brothers, and conveyed to one of brothers when husband was about to be drafted, trust was not thereby destroyed, and circumstantial or other evidence could be given, in action against the brother's widow to establish trust, to show that brother had taken title as trustee, though the

conveyance to him had contained warranty clause which excepted two liens and had also contained provision that brother took subject to outstanding liens—Powe v. Powe, Tex. Civ.App., 268 S.W.2d 558, error refused no reversible error.

84. N.C.—McCorkle v. Beaty, 38 S.E.2d 102, 226 N.C. 338.  
65 C.J. p. 326 note 79.

**In determining effect to be given deposit** by one person of his own money in his own name as trustee for another, consideration must be given to surrounding circumstances.—In re Prokaskey's Will, 109 N.Y.S.2d 888.

#### Evidence held admissible

(1) Evidence of financial circumstances of alleged creator of trust  
Cis—Kosloskye v. Cis, 160 P.2d 565.  
70 Cal.App.2d 174.

N.C.—McCorkle v. Beaty, 38 S.E.2d 102, 226 N.C. 338.

(2) Relevant facts relating to family relationship of alleged creator of trust—Kosloskye v. Cis, *supra*.

85. U.S.—Bingen v. First Trust Co. of St. Paul, D.C.Minn., 23 F.Supp. 958, reversed on other grounds, C.C.A., 103 F.2d 260—Sale v. World Oil Co., D.C.Tex., 6 F.Supp. 321, affirmed, C.C.A., Humble Oil & Refining Co. v. Campbell, 69 F.2d 567, certiorari denied 54 S.Ct. 860, 292 U.S. 648, 78 L.Ed. 1498.

Cal.—Casey v. Casey, 218 P.2d 842, 97 Cal.App.2d 875.

Conn.—Linahan v. Linahan, 39 A.2d 895, 131 Conn. 307.

Ga.—McWilliam v. Mitchell, 177 S.E. 579, 179 Ga. 726.

or nonexistence<sup>86</sup> of a trust and to establish its nature, purpose, and terms,<sup>87</sup> or the beneficiary therein.<sup>88</sup> A writing in which one sought to be held as trustee acknowledges the existence of the trust is admissible,<sup>89</sup> although not acknowledged as required by law.<sup>90</sup> It is not essential that proof to establish a trust be made by witnesses who have

no interest in the case.<sup>91</sup>

Evidence should be excluded where it has no bearing on the issue of the existence of a trust,<sup>92</sup> or where, under the general rules of evidence, it is incompetent,<sup>93</sup> as where it is hearsay,<sup>94</sup> or consists of mere declarations of a grantor made after he has parted with all interest in the property.<sup>95</sup>

Md.—Dougherty v. Dougherty, 2 A.2d 483, 175 Md 441.

Mass.—Russell v. Meyers, 56 N.E.2d 604, 316 Mass. 669.

Mo.—Star-Times Pub. Co. v. Buder, 245 S.W.2d 59—Tootle-Lacy Nat. Bank v. Rollier, 111 S.W.2d 12, 341 Mo 1029—Gwin v. Gwin, 219 S.W.2d 282, 240 Mo App. 782.

N.J.—Hickey v. Kahl, 19 A.2d 33, 129 N.J.Eq. 233.

N.Y.—In re Haseltine's Will, 113 N.Y.S.2d 752, 280 App Div. 557.

Pa.—Keller v. Keller, 41 A.2d 647, 351 Pa. 461.

W.Va.—Winfree v. Dearth, 188 S.E. 880, 118 W.Va. 71.

Wis.—Wyse v. Puchner, 51 N.W.2d 38, 260 Wis. 355.

65 C.J. p 321 note 79.

#### Evidence held admissible

(1) Conduct of parties subsequent to alleged creation of trust  
U.S.—Jaimes v. Milligan, D.C.Neb., 120 F.Supp. 599.

Ohio.—Hill v. Irons, 118 N.E.2d 243, 160 Ohio St. 21.

(2) Declarations by grantor prior to, contemporaneous with, or subsequent to transaction.—In re Barnes' Estate, Ohio Com.Pl., 108 N.E.2d 88, affirmed, App., 108 N.E.2d 101.

(3) Declarations and admissions by parties after execution of deed.—In re Brennerman's Estate, 63 A.2d 59, 380 Pa. 558—Moffitt v. Moffitt, 16 A.2d 418, 340 Pa. 107.

(4) Declarations of purchaser made after sale and transmission of legal title.—Wilmington Furniture Co. v. Cole, 178 S.E. 579, 207 N.C. 840, 847.

(5) Evidence as to what alleged trustee did in connection with alleged trust.—Heiden v. Cremin, C.C.A.Iowa, 66 F.2d 943, 81 A.L.R. 247, certiorari denied 54 S.Ct. 123, 290 U.S. 687, 78 L.Ed. 592.

(6) Evidence of negotiations, concerning alleged agreement for purchase of land by defendant at foreclosure in trust for mortgagee, notwithstanding alleged final trust agreement was not concluded until after foreclosure.—Henley v. Holt, 199 S.E. 383, 214 N.C. 384.

(7) Exhibits which contained genuine signatures of the donors, as tending to throw some light on question as to which of two instruments constituted true trust agreement.—

Green v. Gawne, 47 N.E.2d 86, 382 Ill. 363.

(8) Letters whereby trustee agreed to hold title to realty in trust for trustor.—Kimberly v. Cissna, 16 P.2d 1090, 161 Okl. 17.

(9) Statements made by depositor with respect to bank account and his conduct with reference to it.—Malley's Estate v. Malley, 34 A.2d 761, 69 R.I. 407.

(10) Writings on bankbook envelope and on a separate piece of paper, found after depositor's death indicated manner of disposition of savings account.—In re Alberts' Estate, 100 P.2d 538, 38 Cal App.2d 42.

(11) Other evidence held admissible see 65 C.J. p 321 note 79 [a]—[d].

66. Mass.—American Emp. Ins Co. v. Webster, 78 N.E.2d 120, 322 Mass. 161.

65 C.J. p 321 note 80.

#### Evidence held admissible

(1) Evidence that a person has deposited in a savings bank the full amount allowed to his own use, as offering a possible explanation of a deposit by him in his own name ostensibly as trustee for others.—Harrington v. Donlin, 45 N.E.2d 953, 312 Mass. 577.

(2) Statement by alleged donor-settlor after alleged trust was created, that plaintiff knew nothing about bonds and that he intended him to have them if their relationship remained unchanged.—Elliott v. Gordon, C.C.A.Kan., 70 F.2d 9.

(3) Will—Sharp v. Bradshaw, 12 N.E.2d 1, 367 Ill. 526.

(4) Other evidence held admissible see 65 C.J. p 321 note 80 [b].

#### Circumstantial evidence contradicting parol testimony

Parol testimony introduced to engraft a parol trust on a deed may be contradicted by circumstances.—Clayton v. Ancell, Civ App., 159 S.W.2d 962, affirmed 168 S.W.2d 280, 140 Tex. 441.

67. Mass.—Kendrick v. Ray, 53 N.E. 823, 173 Mass. 305, 73 Am.S.R. 289 N.C.—Wilmington Furniture Co. v. Cole, 178 S.E. 579, 207 N.C. 840, 847.

68. Mass.—Kendrick v. Ray, 53 N.E. 823, 173 Mass. 305, 73 Am.S.R. 289 65 C.J. p 322 note 82.

69. Tex.—Massey v. Massey, 20 Tex 134.

65 C.J. p 322 note 83.

90. Tex.—Mortimer v. Jackson, Civ App., 155 S.W. 341, affirmed, Com. App., 206 S.W. 510.

91. Ark.—Blalock v. Blalock, 258 S.W.2d 891—Griffin v. Griffin, 141 S.W.2d 16, 200 Ark. 794.

92. U.S.—Bligen v. First Trust Co. of St. Paul, C.C.A.Minn., 103 F.2d 260.

Cal.—Southwestern Inv. Corp. v. City of Los Angeles, 165 P.2d 497, 72 Cal App.2d 689.

Mo.—Stein v. Mercantile Home Bank & Trust Co., 148 S.W.2d 570, 347 Mo 732.

N.C.—Cuthrell v. Greene, 50 S.E.2d 525, 229 N.C. 475.

Ohio.—Norris v. Norris, App., 67 N.E.2d 264, appeal dismissed 53 N.E.2d 647, 142 Ohio 81 634.

Tenn.—Hunt v. Hunt, 80 S.W.2d 666, 169 Tenn 1.

65 C.J. p 322 note 85.

93. Ill.—Hanning v. Patterson, 2 N.E.2d 712, 363 Ill. 464.

N.J.—Leppert v. Leppert, 56 A.2d 568, 141 N.J.Eq. 205.

Pa.—In re Baker's Estate, Orph., 3 Lebanon 76.

R.I.—Knowles v. Metropolitan Life Ins Co., 197 A. 459, 60 R.I. 197.

Tex.—Grissom v. Grissom, Civ.App., 137 S.W.2d 227, error dismissed.

65 C.J. p 322 note 87.

Competency of evidence generally see Evidence §§ 186-1015.

94. Ky.—Storms v. Simpson, 16 S.W. 371, 13 Ky L. 116.

65 C.J. p 322 note 88.

#### Evidence held not objectionable as hearsay

Where trust created by father for benefit of himself and his four children fixed a termination date, father's letter addressed to children requesting continuance of trust was not objectionable as hearsay.—Linnahan v. Linnahan, 39 A.2d 895, 131 Conn. 307.

95. U.S.—Elliott v. Gordon, C.C.A. Kan., 70 F.2d 9.

65 C.J. p 322 note 89.

#### Declarations in derogation of trust

Where trust is once established, settlor's declarations thereafter in derogation of trust are inadmissible.—Elliott v. Gordon, supra—Bligen v. First Trust Co. of St. Paul, C.C.



even though he retained possession and absolute control thereof.<sup>96</sup> So declarations of one who deposits money in a bank under circumstances raising the presumption of a trust are incompetent, if made after the deposit, to show that the depositor did not intend to create a trust.<sup>97</sup> The cestui que trust cannot introduce his own declarations to establish the trust,<sup>98</sup> but, unless disqualified on some other ground, he can testify to the facts, like any other witness,<sup>99</sup> even though such testimony is self-serving.<sup>1</sup>

**Revocation of trust.** Declarations of the creator of a trust made after the trust has been fully created are inadmissible to show a revocation, where no power of revocation has been reserved by him.<sup>2</sup> On the other hand, it has been held that a depositor's declarations are admissible to show a revocation of a tentative trust in a bank account.<sup>3</sup>

## § 70. — Parol Evidence

Where an agreement purporting or relied on to create a trust is reduced to writing, parol evidence is not admissible to vary, add to, or contradict the written instrument if such instrument is complete and free from ambiguity, but parol evidence of the circumstances surrounding the execution of the agreement may be received where such evidence does not vary or contradict the instrument.

Where an agreement purporting or relied on to create a trust is reduced to writing, parol evidence is not admissible to vary, add to, or contradict the written instrument,<sup>4</sup> if such instrument is complete<sup>5</sup> and free from ambiguity.<sup>6</sup> Parol evidence, however, is admissible to explain an ambiguity in such an instrument,<sup>7</sup> and parol evidence of the circumstances surrounding the execution of an agreement may be received, where such evidence does not vary or contradict the instrument, but affirms it and shows the reason for its execution.<sup>8</sup> So, where the existence of a trust is clearly established by a writing, parol evidence is admissible to make clear its nature, purpose, and terms,<sup>9</sup> or to

A.Minn., 103 F.2d 260.—Elliott v. Gordon, C.C.A.Kan., 70 F.2d 9.

96. Tex.—Hambleton v. Dignowity, 196 S.W. 864.

97. N.Y.—In re Weinstein's Estate, 28 N.Y.S.2d 137, 176 Misc. 592.—In re Ryan's Will, 52 N.Y.S.2d 502, 65 C.J. p 322 note 91.

98. Tex.—Mortimer v. Jackson, Civ.App., 155 S.W. 341, affirmed, Com App., 206 S.W. 510.

99. Tex.—Mortimer v. Jackson, supra.

1. Tex.—Mortimer v. Jackson, supra.

2. Vt.—Connecticut River Sav. Bank v. Albion, 25 A. 487, 64 Vt. 671, 33 Am.S.R. 914.

3. Cal.—Brucks v. Home Federal Sav. & Loan Ass'n, 228 P.2d 545, 36 Cal.2d 845.

**Declarations when executing will**  
N.Y.—In re Richardson's Estate, 235 N.Y.S. 747, 134 Misc. 174.

4. U.S.—Kendrick v. Ownby, C.C.A. Tex., 123 F.2d 689.

Iowa.—Lunt v. Van Gordon, 294 N. W. 351, 229 Iowa 263.

Mass.—Chase v. Switzer, 118 N.E.2d 749—Kerwin v. Donaghy, 59 N.E. 2d 299, 317 Mass. 559.

N.J.—Trenton Banking Co. v. Howard, Ch., 187 A. 569, affirmed 187 A. 575, 121 N.J. Eq. 85.

N.Y.—Union Trust Co. of Rochester v. Boardman, 213 N.Y.S. 277, 215 App.Div. 73, affirmed 159 N.E. 678, 246 N.Y. 627.

Ohio.—Hill v. Irons, 109 N.E.2d 699, 92 Ohio App. 141, reversed on other grounds 113 N.E.2d 243, 160 Ohio St. 21.

Okl.—Corpus Juris cited in Collar v Mills, 125 P.2d 197, 201, 190 Okl. 481—Northway v. First Nat. Bank, 35 P.2d 934, 169 Okl. 70.

Or.—Allen v. Hendrick, 206 P. 733, 104 Or. 202.

Pa.—Barnes Foundation v. Keely, 164 A. 117, 108 Pa.Super. 203, affirmed 171 A. 267, 314 Pa. 112—Riess v. Wilson, 57 Dauph Co. 71.

Tenn.—State for Use of Burrow v. Cothron, 113 S.W.2d 81, 21 Tenn. App. 519.

Wash.—Zioncheck v. Nadeau, 81 P.2d 811, 196 Wash. 33.

65 C.J. p 323 note 1.

### Disaffirmance or repudiation by trustee

The parol evidence rule denies trustees any right to disaffirm or repudiate express trust under which they derived title to trust properties.—Freedman v. Freedman, App., 83 N.E.2d 112, appeal dismissed 83 N.E. 2d 217, 150 Ohio St. 538.

### Rule held inapplicable

Extraneous evidence was not inadmissible to prove a trust in life policies or their proceeds for benefit of estate of insured's creditor and insured's condorsers on notes, because policies naming creditor's executors as beneficiaries designated them as trustees, on ground that parol proof will not be permitted in contradiction of trust declared in writing, where no trust was declared in face of policies, and it was creditor's will, not the policies, which made beneficiaries executors and trustees.—Dunn v. Second Nat. Bank, 113 S.W.2d 165, 131 Tex. 198, 115 A.L.R. 730.

5. Wis.—Nelson v. Kress, 129 N.W. 790, 145 Wis. 38, 65 C.J. p 323 note 2.

6. Mass.—Crawford v. Nies, 113 N.E. 408, 224 Mass. 474, 65 C.J. p 323 note 3.

7. Cal.—Perkins v. Maiden, 134 P.2d 30, 57 Cal.App.2d 46.

8. Cal.—Embassy Realty Associates v. Southwest Products Co., App., 272 P.2d 899.

Pa.—In re Furjanick's Estate, Orph., 33 Wash.Co. 162.

Wis.—Pratt v. Ayer, 3 Pinn. 236, 3 Chandel. 265.

### Oral evidence relating to warranty deed

Where wife and husband held title to realty for the wife and her two brothers, and conveyed to one of brothers when husband was about to be drafted, oral evidence could be given, in action against the brother's widow to establish trust, to show that brother had taken title as trustee, even though the conveyance to him had contained warranty clause which excepted two liens and had also contained provision that brother took subject to outstanding liens.—Jove v. Powe, Tex.Civ.App., 268 S.W.2d 558, error refused no reversible error.

9. U.S.—Eisel v. Miller, C.C.A.Mo., 84 F.2d 174.

Ill.—McDonrmd v. McDiarmid, 15 N. E.2d 493, 368 Ill. 638—Albert v. Albert, 80 N.E.2d 69, 334 Ill.App. 440.

Ky.—Corpus Juris cited in Kollmann v. Latonia Deposit Bank & Trust

explain the position of the parties,<sup>10</sup> and show the consideration of the agreement.<sup>11</sup> Moreover, the parol evidence rule does not apply where the exclusion of such evidence would result in fraud,<sup>12</sup> or where it is sought to show that the consideration named in a deed did not pass;<sup>13</sup> and since, as shown supra § 35, a trust in personality may be created by parol, parol evidence is admissible to supply the purpose of such a trust which is not stated in the instrument declaring it.<sup>14</sup> Furthermore, where one advanced the purchase price for land taken in the name of another who subsequently declared that he held the title in trust for third persons, such declaration is not conclusive on the one who advanced the purchase price and who was not a party to it.<sup>15</sup> After parol evidence has been introduced without objection, it may be considered as proof of an express trust.<sup>16</sup> Where a written instrument purports only to divest the transferor of title to property and vest it in the transferee, and contains no recital that the transferee was to hold the property for his own benefit and does not mention a trust or beneficial interest, the parol evi-

dence rule does not preclude oral proof to show that the purportedly absolute transfer was in fact a transfer of the legal title only subject to an oral trust,<sup>17</sup> and, whenever parol evidence is received to prove a trust under a deed absolute on its face, the same kind of evidence is admissible to defeat it.<sup>18</sup> The purpose and intent of a parol trust may be shown by parol evidence.<sup>19</sup> Where there has been part performance of an express parol trust, evidence of the parol trust is proper and competent.<sup>20</sup>

#### *Showing recognition or performance of trust.*

Since, as discussed supra § 37, a trust in land is taken out of the statute of frauds by the trustee's acknowledgment or execution thereof, parol evidence is admissible to show that an express trust had once existed,<sup>21</sup> or that it had been acknowledged by the trustee<sup>22</sup> or carried into effect.<sup>23</sup>

### § 71. Weight and Sufficiency

According to some, but not all, authorities, something more than a mere preponderance of evidence is necessary to establish a parol trust in land; and in order

Co., 121 S.W.2d 721, 725, 275 Ky. 347.

65 C.J. p 323 note 5.

#### **Circumstances under which declaration executed**

In suit to quiet title, where, as part and parcel of the original transaction, declaration of trust in writing was executed six days after trustee received deed to realty, oral testimony was admissible to establish circumstances under which written declaration of trust was executed.—*Sagendorph v. Lutz*, 281 N.W. 553, 286 Mich. 103.

10. Conn.—*Linahan v. Linahan*, 39 A.2d 895, 131 Conn. 307.

Ind.—*Lehman v. Pierce*, 36 N.E.2d 952, 109 Ind.App. 497.

65 C.J. p 323 note 6.

#### **Intent of depositor**

(1) Where deposit is made in bank entitled, "A, in trust for B," with no further expression in writing of depositor's intent, oral testimony is admissible to prove depositor's intent, as well as to prove an intention contrary to claim of a trust relation.—*Katz v. Greeninger*, 215 P.2d 121, 96 Cal.App.2d 245.

(2) So when there is no formal written declaration of trust and an account is opened in a bank in the name of the owner and depositor under the mere title of "trustee" or in the name of the depositor and one other person, "trustee, payable to either or survivor," other evidence may be resorted to in order to ascertain whether the owner intended to cre-

ate a trust.—*Castle v. Cross*, 32 Hawaii 197.

#### **Conversations with attorney**

It is competent to show by parol evidence the conversations had by creator of trust with his attorney at the time of the creation of the trust instrument.—*In re Barnes' Estate*, Ohio Com.Pl., 108 N.E.2d 88, affirmed, App., 108 N.E.2d 101.

11. Ind.—*Jansdel v. Moore*, 53 N.E. 767, 153 Ind. 393, 53 L.R.A. 753 Mich.—*White v. Rice*, 70 N.W. 1021, 112 Mich. 403.

12. Tex.—*Masterson v. Amarillo Oil Co.*, Civ.App., 253 S.W. 908.

13. W.Va.—*Hall v. Linkenauer*, 142 S.E. 815, 105 W.Va. 385

#### **Want or mere nominality of consideration**

Although grantor may not by parol evidence of want of consideration contradict legal import of deed, under allegations of express parol trust in his favor, evidence tending to establish want of or mere nominality of consideration may be considered in support of allegations that trust was intended.—*Winfree v. Dearth*, 188 S.E. 880, 118 W.Va. 71

14. Pa.—*In re Furlanick's Estate*, 100 A.2d 85, 375 Pa. 484.—*Mandak v. Zulovich*, Com.Pl., 97 Pittsb. Leg. J. 55.

65 C.J. p 323 note 11.

15. Fla.—*Elvins v. Seestedt*, 4 So.2d 532, 148 Fla. 408.

16. Mo.—*Forest v. Rogers*, 106 S.W. 1105, 128 Mo.App. 8.

17. Cal.—*Hansen v. Bear Film Co.*, 168 P.2d 946, 28 Cal.2d 154.—*Casey v. Casey*, 218 P.2d 842, 97 Cal.App. 2d 875

Utah.—*Haws v. Jensen*, 209 P.2d 229, 116 Utah 212.—*Peterson v. Peterson*, 141 P.2d 882, 105 Utah 133.—*Corey v. Roberts*, 25 P.2d 940, 82 Utah 445

65 C.J. p 219 note 11 [a].

Engraving express trust by parol on deed absolute in form generally see supra § 32

18. U.S.—*Newhall v. Le Breton*, Cal., 7 S.Ct. 225, 119 U.S. 259, 30 L.Ed. 381

19. Ky.—*Martin v. Holman*, 126 S.W. 2d 465, 277 Ky. 291.

**Shares of capital stock held in trust** Ky.—*Martin v. Holman*, supra.

20. Ariz.—*Stewart v. Lamron*, 160 P. 2d 321, 63 Ariz. 158.

Express parol trust taken out of statute of frauds by part performance generally see supra § 37.

21. Ariz.—*Parker v. Gentry*, 185 P. 2d 767, 66 Ariz. 189.

22. Iowa.—*Neilly v. Hennessey*, 220 N.W. 47, 208 Iowa 1338.

65 C.J. p 324 note 16.

23. Iowa.—*Neilly v. Hennessey*, supra 65 C.J. p 324 note 17.

#### **Full execution and performance**

Oral testimony is admissible to establish that, at time of filing of action, trust has been fully executed and performed and that nothing remains for trustee to do.—*Parker v. Gentry*, 185 P.2d 767, 66 Ariz. 189.

to establish a trust either in land or personalty the evidence must be clear, convincing, and satisfactory, but the proof need not be uncontradicted.

While it has been held in some cases that the existence of a parol trust in land must be established by a preponderance of the evidence,<sup>24</sup> and that a preponderance of the evidence is sufficient for this purpose<sup>25</sup> if it clearly and definitely attests the facts which give rise to the trust asserted,<sup>26</sup> it is

generally held that something more than a mere preponderance of the evidence is required,<sup>27</sup> or at least that a superior measure of proof is necessary.<sup>28</sup>

The degree or quality of proof necessary to establish a trust, either in land or personalty, has variously been expressed by the use of the terms "clear,"<sup>29</sup> "convincing,"<sup>30</sup> "satisfactory,"<sup>31</sup> or "clear and convincing,"<sup>32</sup> while in other cases use has been made

24. *Tex.*—*Bennett v. McKrell*, Civ. App., 125 S.W.2d 701, modified on other grounds 144 S.W.2d 242, 135 Tex. 567.

W.Va.—*Zogg v. Hedges*, 29 S.E.2d 871, 126 W.Va. 523, 152 A.L.R. 991.

65 C.J. p 324 note 10.

25. *Tex.*—*Amerada Petroleum Corp. v. Massad*, Civ. App., 239 S.W.2d 730, error refused no reversible error—*Stubblefield v. Stubblefield*, Civ. App., 45 S.W. 965.

26. *Tex.*—*Amerada Petroleum Corp. v. Massad*, Civ. App., 239 S.W.2d 730, error refused no reversible error.

27. *U.S.*—*American Bonding Co. of Baltimore v. Hord*, C.C.A. Ark., 98 F.2d 350.

Ark.—*Blalock v. Blalock*, 258 S.W.2d 891—*Kelley v. Northern Ohio Co.*, 196 S.W.2d 235, 210 Ark. 355—*Ittley v. Kelly*, 183 S.W.2d 793, 207 Ark. 1011.

Iowa.—*Proseman v. Henrichs*, 6 N.W.2d 138, 233 Iowa 27.

Ky.—*Moore v. Terry*, 170 S.W.2d 29, 293 Ky. 727—*Mills v. Mills*, 87 S.W.2d 389, 261 Ky. 190.

Mo.—*Furvis v. Hardin*, 122 S.W.2d 976, 343 Mo. 652—*Coon v. Stanley*, 94 S.W.2d 96, 230 Mo. App. 524.

N.C.—*Peterson v. Taylor*, 166 S.E. 800, 203 N.C. 673.

65 C.J. p 324 note 21.

28. *W.Va.*—*Zogg v. Hedges*, 29 S.E.2d 871, 126 W.Va. 523, 152 A.L.R. 991.

29. *U.S.*—*Elliott v. Gordon*, C.C.A. Kan., 70 F.2d 9.

N.D.—*Fingerott v. Davis*, 17 N.W.2d 15, 73 N.D. 532.

W.Va.—*Boggs v. Boggs*, 25 S.E.2d 631, 125 W.Va. 600.

65 C.J. p 324 note 22.

Clear intention to establish completed express trust in personal property must be shown by the evidence.

U.S.—*Well v. C. I. R.*, C.C.A. 5, 82 F.2d 661, certiorari denied 57 S.Ct. 14, 299 U.S. 552, 81 L.Ed. 406—*Eschen v. Steers*, C.C.A. Mo., 10 F.2d 739.

N.J.—*Passaic Nat. Bank & Trust Co. v. Taub*, 45 A.2d 679, 137 N.J.Eq. 544.

Depositor's intent to make tentative trust irrevocable must be proved by evidence of clear and unambiguous

language or conduct.—*In re Ingels' Estate*, 92 A.2d 881, 372 Pa. 171.

30. *Me.*—*Rose v. Osborne*, 180 A. 315, 133 Me. 497.

Md.—*Dougherty v. Dougherty*, 2 A.2d 433, 175 Md. 411.

65 C.J. p 324 note 23.

31. *N.Y.*—*Orton v. Tannenbaum*, 185 N.Y.S. 681, 194 App.Div. 214.

65 C.J. p 324 note 24.

#### Particularly satisfactory

The proof must be of a particularly satisfactory character.—*Corpus Juris* cited in *Van Seiver v. Rothensties*, C.C.A. Pa., 122 F.2d 697, 700.

32. *U.S.*—*Darden v. Darden*, C.C.A. Va., 152 F.2d 208—*Cullen v. Chapell*, C.C.A. Conn., 116 F.2d 1017.

—*Harris v. Gurley*, C.C.A. Tex., 80 F.2d 744—*Overly v. Overly*, D.C.Pa., 65 F.Supp. 174, affirmed, C.C.A., 158 F.2d 384.

Ark.—*Van Meter Lumber Co. v. Alexander*, 217 S.W.2d 833, 214 Ark. 640—*Kelley v. Northern Ohio Co.*, 196 S.W.2d 235, 210 Ark. 355—*Hand v. Mitchell*, 198 S.W.2d 333, 209 Ark. 916.

Cal.—*In re Gaines' Estate*, 100 P.2d 1655, 15 Cal.2d 255—*Olson v. Olson*, 49 P.2d 827, 4 Cal.2d 434—*Spaulding v. Jones*, 256 P.2d 637, 117 Cal. App.2d 541—*People v. Pierce*, 243 P.2d 585, 110 Cal. App.2d 598—*Barthorpe v. Brown*, 223 P.2d 881, 100 Cal. App.2d 474—*Taylor v. Hinnell*, 23 P.2d 1062, 133 Cal. App. 177—*Cohn v. Cohn*, 20 P.2d 61, 130 Cal. App. 349.

Hawaii.—*Wery v. Pacific Trust Co.*, 33 Hawaii 701.

Idaho.—*Aker v. Aker*, 20 P.2d 795, 52 Idaho 713, appeal dismissed and certiorari denied 54 S.Ct. 80, 290 U.S. 587, 78 L.Ed. 518.

Ill.—*Lasky v. Smith*, 94 N.E.2d 898, 407 Ill. 97—*Pear v. Pear*, 93 N.E.2d 158, 241 Ill. App. 249—*Hettich v. Albert*, 57 N.E.2d 287, 324 Ill. App. 87—*Williams v. Anderson*, 5 N.E.2d 593, 28 Ill. App. 149.

Ind.—*Costa v. Costa*, App., 115 N.E.2d 516.

Ky.—*Evans v. Payne*, 258 S.W.2d 919—*Gibson v. Gibson*, 249 S.W.2d 53—*Morris v. Thomas*, 220 S.W.2d 958, 310 Ky. 501—*Forsyth v. Weiland*, 193 S.W.2d 402, 302 Ky. 21—*Hardwick's Ex'r v. West*, 168 S.W.2d 353, 293 Ky. 8—*Union Bank &*

*Trust Co. v. Rice*, 131 S.W.2d 493, 279 Ky. 629—*Frazier v. Hudson*, 130 S.W.2d 809, 279 Ky. 334, 123 A.L.R. 1331.

Md.—*Kelley v. Kelley*, 13 A.2d 529, 178 Md. 389.

Mo.—*Atlantic Nat. Bank of Jacksonville, Fla. v. St. Louis Union Trust Co.*, 211 S.W.2d 2, 357 Mo. 770.

Ohio.—*Hill v. Irons*, 113 N.E.2d 243, 160 Ohio St. 21—*Vincent v. Divine Peace Mission Movement*, App., 118 N.E.2d 190—*Lieberman v. Present*, 115 N.E.2d 865, 94 Ohio App. 451.

—*Burhenn v. Burhenn*, App., 82 N.E.2d 293—*Suburban Home Mortgage Co. v. Hopwood*, 81 N.E.2d 387, 83 Ohio App. 115—*In re Freeman's Estate*, 18 Ohio Supp. 6—*Kopp v. Kopp*, 32 Ohio N.P.N.S., 511.

Okl.—*Fletcher v. Fletcher*, 244 P.2d 827, 206 Okl. 481—*Anson v. Anson*, 36 P.2d 916, 169 Okl. 309.

Or.—*Winters v. Winters*, 109 P.2d 857, 165 Or. 659.

R.I.—*Nushman v. Glickman*, 190 A. 692, 67 R.I. 506.

Tenn.—*Hunt v. Hunt*, 80 S.W.2d 666, 169 Tenn. 1—*Hoffner v. Hoffner*, 221 S.W.2d 907, 32 Tenn. App. 98—*McDowell v. Rees*, 122 S.W.2d 839, 22 Tenn. App. 336.

Tex.—*Brown v. Brown*, Civ. App., 264 S.W.2d 142—*Mellette v. Hudstun Oil Corp.*, Civ. App., 243 S.W.2d 438, error refused no reversible error—*Means v. Hamlin*, Civ. App., 174 S.W.2d 499—*Baldwin v. Fleck*, Civ. App., 168 S.W.2d 904, affirmed *Fleck v. Baldwin*, 172 S.W.2d 975, 142 Tex. 340—*Bennett v. McKrell*, Civ. App., 125 S.W.2d 701, modified on other grounds 144 S.W.2d 242, 135 Tex. 557—*De Lange v. Ogden*, Civ. App., 106 S.W.2d 385, error dismissed.

Utah.—*Hansen v. Hansen*, 171 P.2d 392, 110 Utah 222.

Va.—*Ingles v. Greear*, 27 S.E.2d 222, 181 Va. 838—*Virginia Trust Co. v. Minar*, 18 S.E.2d 879, 179 Va. 377.

W.Va.—*Boggs v. Boggs*, 25 S.E.2d 631, 125 W.Va. 600.

Wis.—*Swazee v. Lee*, 47 N.W.2d 733, 250 Wis. 136—*Hartman v. Loverud*, 277 N.W. 641, 227 Wis. 6.

65 C.J. p 324 note 25.

Where decedent transferred his funds to bank account in name of sister-in-law in trust for decedent,

65 C.J. p 324 note 25.

65 C.J. p 324 note 25.

65 C.J. p 324 note 25.

65 C.J. p 324 note 25.

65 C.J. p 324 note 25.

65 C.J. p 324 note 25.

65 C.J. p 324 note 25.

65 C.J. p 324 note 25.

of the terms "clear and satisfactory,"<sup>33</sup> "clear, convincing, and satisfactory,"<sup>34</sup> "clear, precise, and indubitable,"<sup>35</sup> "full and satisfactory,"<sup>36</sup> "clear, full, and satisfactory,"<sup>37</sup> "clear and unequivocal,"<sup>38</sup>

"clear, convincing, and unequivocal,"<sup>39</sup> "clear, cogent, and convincing,"<sup>40</sup> "clear, strong, and unequivocal,"<sup>41</sup> "clear and explicit,"<sup>42</sup> "clear, explicit, and convincing,"<sup>43</sup> "clear, explicit, and un-

sister-in-law had burden of showing by clear and convincing evidence, that it was the intention of herself and decedent that a Totten trust be created—Application of Kronk, 109 N.Y.S.2d 516, 202 Misc. 150.

#### As determined by trial court

Whether evidence of the existence of a trust is clear and convincing is a question to be determined by trial court—In re Alberts' Estate, 100 P.2d 538, 38 Cal.App.2d 42.

#### Overcoming presumption of intent

One relying on extraneous evidence, to prove not only the existence of a debt in the form of a loan between insured and beneficiary designated in life policy but that it was insured's intention to establish a trust relationship between beneficiary and insured's representatives not mentioned in the policy, has the burden of overcoming by clear and convincing proof the presumption that it was insured's intention to leave the entire proceeds of the policy to the designated beneficiary.—Zolintakis v. Orfanos, C.C.A. Utah, 119 P.2d 571, certiorari denied Orfanos v. Zolintakis, 62 S.Ct. 62, 314 U.S. 630, 86 L.Ed. 506.

Where parties stood in confidential relationship, clear and convincing evidence that there had been no abuse of confidence is necessary

Ill.—Jackson v. Pillsbury, 44 N.E.2d 537, 380 Ill. 554.  
Md.—Lambdin v. Dantzbecker, 181 A 353, 169 Md. 240.

Evidence of intention to create a trust must be clear and convincing—Jaiser v. Milligan, D.C.Neb., 120 F. Supp. 599—65 C.J. p 324 note 25 [b].

33. Ala.—Westcott v. Sharp, 54 So.2d 758, 256 Ala. 418.

Ill.—In re Wright's Estate, 25 N.E.2d 909, 304 Ill.App. 87.

Kan.—In re Dieter's Estate, 239 P.2d 954, 172 Kan. 359—In re Gorske's Estate, 195 P.2d 323, 165 Kan. 249

Md.—Dougherty v. Dougherty, 2 A 2d 433, 175 Md. 441.

Mich.—In re Lane's Estate, 274 N.W. 714, 281 Mich. 70

Tenn.—Fuchs v. Fuchs, 2 Tenn.App. 133.

Tex.—Tabor v. Zavala County Bank, Civ.App., 90 S.W.2d 550, error dismissed

Wash.—Hoffman v. Tieton View Community M. E. Church, 207 P.2d 699, 33 Wash. 2d 716.

65 C.J. p 324 note 26.

34. U.S.—Murphy v. Cartwright, C.A.Tex., 202 F.2d 71—American

Bonding Co. of Baltimore v. Hord,

C.C.A.Ark., 98 F.2d 350—Zamberletti v. Zamberletti, D.C.Iowa, 105 F.Supp. 873.

Ark.—Aycock v. Bottoms, 144 S.W.2d 43, 201 Ark. 104—Griffin v. Griffin, 141 S.W.2d 16, 200 Ark. 794.

Cal.—Stoner v. Laidley, 257 P.2d 486, 118 Cal.App.2d 50—Leitch v. Gay, 147 P.2d 631, 64 Cal.App.2d 16—Kobida v. Hinkelmann, 127 P.2d 657, 53 Cal.App.2d 186—Sampson v. Bruder, 118 P.2d 28, 47 Cal.App.2d 431.

Fla.—Benbow v. Benbow, 157 So. 512, 117 Fla. 37.

Iowa.—DeJong v. Huyser, 11 N.W.2d 566, 233 Iowa 1315.

Ky.—Corbin v. Corbin, 166 S.W.2d 826, 292 Ky. 545—Hecht's Adm'r v. Hecht, 114 S.W.2d 499, 272 Ky. 400.

Neb.—Parrott v. Hofmann, 37 N.W.2d 199, 151 Neb. 249.

Okl.—In re Bruner's Estate, 65 P.2d 1209, 179 Okl. 339.

Tex.—Clayton v. Ancell, 168 S.W.2d 230, 140 Tex. 441—Jones v. Siler, 100 S.W.2d 352, 129 Tex. 18—Elick v. Schiller, Civ.App., 235 S.W.2d 494, reversed on other grounds Schiller v. Elick, 240 S.W.2d 997, 150 Tex. 363—Sims v. Duncan, Civ. App., 195 S.W.2d 156, error refused

no reversible error—Millsaps v. Moon, Civ.App., 193 S.W.2d 221—Groseclose v. Johnston, Civ.App., 184 S.W.2d 548—Speights v. Dean, Civ. App., 182 S.W.2d 1016, error refused—Hamilton v. Scott, Civ. App., 110 S.W.2d 925—Davis v. Magnolia Petroleum Co., Civ.App., 105 S.W.2d 695, affirmed 134 S.W.2d 1042, 134 Tex. 201—White v. Ilix, Civ.App., 104 S.W.2d 136, error dismissed—Tarkenton v. Marshall, Civ.App., 91 S.W.2d 473—Schuyler v. Lacy, Civ.App., 79 S.W.2d 901, error dismissed.

65 C.J. p 325 note 27.

35. U.S.—Corpus Juris cited in Van Sciver v. Rothenes, C.C.A. Pa., 122 F.2d 697, 700—Overly v. Overly, D.C.Pa., 65 F.Supp. 174, affirmed, C.C.A., 158 F.2d 384.

Pa.—In re Kerwin's Estate, 89 A 332, 371 Pa. 147—Keller v. Keller, 41 A.2d 547, 351 Pa. 461—In re Williams' Estate, 37 A 2d 584, 349 Pa. 568—Gritz v. Gritz, 7 A 2d 1, 336 Pa. 161, 122 A.L.R. 1297—Majors v. Majors, 33 A 2d 442, 153 Pa.Super. 175, affirmed 37 A 2d 528, 349 Pa. 334—Popilock v. Piernikowski, 56 A.2d 326, 161 Pa.Super. 587—In re Gorgas' Estate, 24 A.2d 171, 147 Pa.Super. 319—Gross v. Gross, Com.Pl., 60 Dauph.Co. 460—In re

Williams' Estate, Com.Pl., 45 Lanc. Jur. 170, 12 Som Leg.J. 101—In re Gall's Estate, Com.Pl., 40 Luz.Leg. Reg. 231.

36. Del.—Rentoul v. Sweeney, 137 A. 74, 15 Del.Ch. 302.

37. Del.—Ross v. Ellis, Ch., 106 A.2d 775—Sadowski v. Rykaczewski, 147 A. 249, 17 Del.Ch. 29.

38. U.S.—Darden v. Darden, C.C.A. Va., 152 F.2d 208.

65 C.J. p 325 note 30.

39. Mo.—Lieberstein v. Frey, 92 S.W.2d 114—Coon v. Stanley, 94 S.W.2d 96, 230 Mo App 524.

N.Y.—Bendau v. Moody, 5 N.Y.S.2d 91, 254 App Div. 130.

Tex.—Elick v. Schiller, Civ.App., 235 S.W.2d 494, reversed on other grounds Schiller v. Elick, 240 S.W.2d 997, 150 Tex. 363

Utah—Capps v. Capps, 175 P.2d 470, 110 Utah 468

65 C.J. p 325 note 31.

40. Ark.—McHenry v. McHenry, 193 S.W.2d 321, 209 Ark. 977

Mo.—Corpus Juris cited in Adams v. Adams, 156 S.W.2d 610, 614, 348 Mo. 1041—Stein v. Mercantile Home Bank & Trust Co., 148 S.W.2d 570, 317 Mo. 732—Purvis v. Hardin, 122 S.W.2d 936, 343 Mo. 652.

Okl.—Corpus Juris cited in Anson v. Anson, 36 P.2d 915, 919, 169 Okl. 309

65 C.J. p 325 note 32.

41. Okl.—Corpus Juris cited in Anson v. Anson, 36 P.2d 915, 919, 169 Okl. 309

65 C.J. p 325 note 33.

42. U.S.—Mayfield v. Kansas City Life Ins. Co., C.C.A.Ind., 158 F.2d 331, certiorari denied 67 S.Ct. 1352, 331 U.S. 829, 91 L.Ed. 1844.

Ill.—In re Meyer's Estate, 45 N.E.2d 495, 317 Ill.App. 96—In re Wright's Estate, 25 N.E.2d 909, 304 Ill.App. 87.

Ky.—Hecht's Adm'r v. Hecht, 114 S.W.2d 499, 272 Ky. 400.

Tenn.—Mcdowell v. Rees, 122 S.W.2d 839, 22 Tenn App 336—Cothren v. Cothren, 110 S.W.2d 1054, 21 Tenn App 388.

65 C.J. p 325 note 34.

43. Ariz.—Costello v. Cunningham, 147 P. 701, 16 Ariz. 447.

Okl.—Hutchiff v. Lee, 192 P.2d 843, 200 Okl. 253.

Va.—Wren v. Tate, 57 S.E.2d 48, 190 Va. 505, opinion adhered to 60 S.E. 2d 54, 191 Va. 59.

equivocal;<sup>44</sup> "clear and certain;"<sup>45</sup> "clear, certain, and conclusive;"<sup>46</sup> "direct and certain;"<sup>47</sup> "certain and undoubted;"<sup>48</sup> "reasonably certain;"<sup>49</sup> "reasonably clear and certain;"<sup>50</sup> and other similar or equivalent expressions.<sup>51</sup> While a strong showing is required to prove an oral trust, the application of the rule does not require as great an amount of proof where the trustee is not seeking a decree adverse to the cestui que trust.<sup>52</sup> The proof to establish a trust need not be uncontradicted.<sup>53</sup>

It has been held that in order to establish a trust by parol, the evidence must be so clear and convincing as to lead to but one conclusion,<sup>54</sup> and some of the cases go to the extent of requiring that the evidence be so clear and convincing as to show the existence of a trust beyond a doubt,<sup>55</sup> or a reasonable doubt;<sup>56</sup> but other cases hold that it is not necessary that it should be established with certainty<sup>57</sup> or beyond a reasonable doubt,<sup>58</sup> although nothing should be left to conjecture.<sup>59</sup>

44. Pa.—Stone v. Stone, 121 A. 500, 277 Pa. 277.

65 C.J. p 325 note 36.

45. Tex.—Spangler v. Spangler, Civ. App., 26 S.W.2d 463, modified on other grounds, Com App., 41 S.W.2d 60.

65 C.J. p 325 note 37.

46. Ohio.—Hill v. Irons, 113 N.E.2d 243, 160 Ohio St. 21.

65 C.J. p 325 note 38.

47. Mont.—Mantle v. White, 132 P. 22, 47 Mont. 234.

65 C.J. p 325 note 39.

48. Ky.—Dick v. Harris' Ex'r, 141 S.W. 56, 145 Ky. 739.

49. Mo.—Crowley v. Crowley, 110 S.W. 1100, 131 Mo.App. 178.

Utah.—Conroy v. Holbrook, 121 P. 572, 40 Utah 325.

50. Tex.—McBride v. Briggs, Civ. App., 199 S.W. 341.

51. U.S.—Jackman v. Equitable Life Assur. Soc. of U.S., C.C.A.Pa., 115 F.2d 945—*Corpus Juris* cited in Van Selver v. Rothensies, C.C.A.Pa., 122 F.2d 697, 700—Mullen v. Mullen, D.C. Alaska, 117 F.Supp. 538—Mutual Life Ins. Co. of N.Y. v. Cleveland, D.C.Pa., 82 F.Supp. 358—Keates v. Register, D.C.Pa., 74 F.Supp. 966.

Ala.—Westcott v. Sharp, 54 So.2d 758, 256 Ala. 418.

Ark.—Blalock v. Blalock, 258 S.W.2d 891.

Cal.—Miller v. Miller, 130 P.2d 438, 55 Cal.App.2d 199.

Colo.—Tarantino Real Estate Co. v. Tarantino, 126 P.2d 859, 109 Colo. 425.

Fla.—Webster v. St. Petersburg Federal Sav. & Loan Ass'n, 20 So.2d 400, 155 Fla. 412.

Ill.—Illinois State Trust Co. v. Jones, 184 N.E. 623, 351 Ill. 498.

Ky.—Morgan v. Johnson, 226 S.W.2d 31, 311 Ky. 848—Moore v. Terry, 170 S.W.2d 29, 293 Ky. 727—Mills v. Mills, 87 S.W.2d 389, 261 Ky. 190.

Md.—Kozlowska v. Napierkowski, 170 A. 193, 165 Md. 620.

Mo.—Lieberstein v. Frey, 92 S.W.2d 114.

Neb.—McCormick v. McCormick, 33 N.W.2d 543, 150 Neb. 192.

N.M.—Portales Nat. Bank v. Beeman, 196 P.2d 876, 52 N.M. 243.

N.C.—McCorkle v. Beaty, 38 S.E.2d 102, 226 N.C. 338—McCorkle v. Beaty, 33 S.E.2d 753, 225 N.C. 178.

—Henley v. Holt, 20 S.E.2d 62, 221 N.C. 274—Jefferson Standard Life Ins. Co. v. Morehead, 183 S.E. 606, 209 N.C. 174—Peterson v. Taylor, 166 S.E. 800, 203 N.C. 673.

N.D.—Ingerott v. Davis, 17 N.W.2d 15, 73 N.D. 532.

Or.—Nunner v. Erickson, 51 P.2d 839, 151 Or. 575.

Pa.—Bruner v. Stanert, 85 A.2d 130, 369 Pa. 178—Keller v. Keller, 41 A.2d 477, 351 Pa. 461—Sniderman v. Kahn, 39 A.2d 608, 350 Pa. 496.

—Serventi v. Galli, 31 A.2d 715, 347 Pa. 47—Gribbel v. Gribbel, 17 A.2d 892, 341 Pa. 11—In re Free's Estate, 194 A. 492, 327 Pa. 362.

In re Tunnell's Estate, 190 A. 905, 325 Pa. 564—Brubaker v. Lauver, 185 A. 848, 322 Pa. 461—Mahjoubian v. Mahjoubian, 184 A. 455, 321 Pa. 354—Mader v. Stemler, 179 A. 719, 319 Pa. 374—Gates v. Gates, 44 A.2d 773, 168 Pa.Super. 273—In re Wunder's Estate, 59 Pa.Dist. & Co. 1, 39 Berks Co. 163, 61 York Leg. Rec. 22—Crossan v. Galloway, Com.Pl., 5 Chest. Co. 229—Gonzalez v. Simes, Com.Pl., 4 Chest. Co. 241—Rank v. Rank, Com.Pl., 63 Dauph. Co. 352—Ditzel v. Fetterhoff, Com.Pl., 58 Dauph. Co. 333—Kleinfelter v. Kleinfelter, Com.Pl., 1 Lebanon 28.

—Lincavage v. Gavenonis, Com.Pl., 36 Luz.Leg.Reg. 193—In re Gorgan's Estate, Orph., 34 Luz.Leg.Reg. 441, reversed on other grounds 24 A.2d 171, 147 Pa.Super. 319—Manzlak v. Zulovich, Com.Pl., 97 Pittsb.Leg.J. 55.

S.C.—Legrande v. Legrande, 182 S.E. 342, 178 S.C. 230, 102 A.L.R. 582.

Tenn.—Senton v. Dye, App., 263 S.W.2d 544—Walker v. Walker, 2 Tenn. App. 279.

Tex.—Amerada Petroleum Corp. v. Massad, Civ.App., 239 S.W.2d 730, error refused no reversible error—Darden v. White, Civ.App., 195 S.W.2d 1009, error refused no reversible error—American Nat. Ins. Co. v. Savage, Civ.App., 112 S.W.2d 240, error dismissed.

Utah.—Capps v. Capps, 175 P.2d 470, 110 Utah 468—Corey v. Roberts, 25 P.2d 940, 82 Utah 445.

W.Va.—Zork v. Hedges, 29 S.E.2d 871, 126 W.Va. 523, 152 A.L.R. 991.

—Newhouse v. England, 191 S.E. 525, 118 W.Va. 649.

65 C.J. p 325 note 43.

52. Fla.—Wimmers v. Blackburn, 9 So.2d 505, 151 Fla. 236.

53. U.S.—Harris v. Gurley, C.C.A. Tex. 80 F.2d 744.

Tex.—Amerada Petroleum Corp. v. Massad, Civ.App., 239 S.W.2d 730, error refused no reversible error.

54. Ill.—Lasky v. Smith, 94 N.E.2d 898, 407 Ill. 97—Banning v. Patterson, 2 N.E.2d 712, 363 Ill. 464.

—Pear v. Pear, 93 N.E.2d 158, 341 Ill.App. 249.

Ind.—Costa v. Costa, App., 115 N.E.2d 516.

65 C.J. p 325 note 44.

55. Ark.—Kelley v. Northern Ohio Co., 196 S.W.2d 235, 210 Ark. 355.

N.Y.—Harrison v. McMenomy, 2 Edw. 251.

W.Va.—Hoglund v. Curtis, 61 S.E.2d 642, 134 W.Va. 735—Boggs v. Boggs, 25 S.E.2d 631, 125 W.Va. 600.

56. Mo.—Atlantic Nat. Bank of Jacksonville, Fla. v. St. Louis Union Trust Co., 211 S.W.2d 2, 357 Mo. 770—Furvis v. Hardin, 122 S.W.2d 936, 343 Mo. 652.

Ohio.—Hill v. Irons, 113 N.E.2d 243, 160 Ohio St. 21.

65 C.J. p 325 note 46.

"Indubitable proof," within rule requiring such proof to establish parol trust of personal property, is evidence that is not only found to be credible, but of such weight and directness as to make out facts alleged beyond reasonable doubt—Overly v. Overly, D.C.Pa., 65 F.Supp. 174, affirmed, C.C.A., 158 F.2d 384.

57. Tex.—Bennett v. McKrell, Civ. App., 125 S.W.2d 701, modified on other grounds 144 S.W.2d 242, 135 Tex. 557.

Reason for rule

"Certainty" means absence of doubt, and such quantum of proof is not required in any case—Bennett v. McKrell, supra.

58. Tex.—Groselose v. Johnston, Civ.App., 184 S.W.2d 548.

65 C.J. p 326 note 50 [a].

59. Tex.—Groselose v. Johnston, supra.

The requirement that the evidence be clear and satisfactory, clear and convincing, etc., applies not only to proof of the existence of the trust, but also to the establishment of its terms and conditions,<sup>60</sup> and is especially applicable where the trust is attempted to be proved by parol evidence where such evidence is admissible for that purpose,<sup>61</sup> or where it is sought to convert into a trustee a person holding the legal title to property ostensibly as absolute

owner,<sup>62</sup> as by showing a grantee's recognition of the trust or full or part performance thereof by him.<sup>63</sup> The rule also has especial application after the lapse of a great length of time,<sup>64</sup> or where some of the parties to the alleged trust are deceased.<sup>65</sup>

An express trust cannot be established by vague and uncertain evidence, or loose, equivocal, and indefinite declarations,<sup>66</sup> and while declarations and

Utah.—Capps v. Capps, 175 P.2d 470, 110 Utah 468.  
65 C.J. p 326 note 50 [a].

60. Ill.—Illinois State Trust Co. v. Jones, 184 N.E. 623, 351 Ill. 498.  
Ohio.—Hill v. Irons, 113 N.E.2d 243, 160 Ohio St. 21.

Utah.—Capps v. Capps, 175 P.2d 470, 110 Utah 468.  
65 C.J. p 325 note 48.

61. U.S.—Overly v. Overly, D.C.Pa., 65 F.Supp. 174, affirmed, C.C.A., 158 F.2d 384.

Ark.—Blalock v. Blalock, 258 S.W.2d 831—Hand v. Mitchell, 193 S.W.2d 333, 209 Ark. 996.

Cal.—Chard v. O'Connell, 62 P.2d 369, 7 Cal.2d 663—Stoner v. Laudley, 257 P.2d 486, 118 Cal.App.2d 50—Kobida v. Hinkelmann, 127 P.2d 657, 53 Cal. App.2d 186.

Ill.—Illinois State Trust Co. v. Jones, 184 N.E. 623, 351 Ill. 498.  
Md.—Dougherty v. Dougherty, 2 A 2d 433, 175 Md. 411.

Mo.—Furvis v. Hardin, 122 S.W.2d 936, 343 Mo. 652—Coon v. Stanley, 94 S.W.2d 96, 239 Mo.App. 521.

N.C.—McCorkie v. Beatty, 33 S.E.2d 753, 225 N.C. 178—Henley v. Holt, 20 S.E.2d 62, 221 N.C. 274—Peterson v. Taylor, 166 S.E. 800, 203 N.C. 673.

Ohio.—Vincent v. Divine Peace Mission Movement, App., 118 N.E.2d 190.

Okl.—Anson v. Anson, 36 P.2d 915, 189 Okl. 309.

Pa.—Gribbel v. Gribbel, 17 A.2d 892, 341 Pa. 11—In re Free's Estate, 194 A 2d 327, 327 Pa. 362—Gross v. Gross, Com.Pl., 60 Dauph. Co. 460—Manzlik v. Zulovich, Com.Pl., 97 Pittsb.Leg. J. 55.

Tex.—Jones v. Siler, 100 S.W.2d 352, 129 Tex. 18—Elick v. Schiller, Civ. App., 235 S.W.2d 494, reversed on other grounds Schiller v. Elick, 240 S.W.2d 997, 150 Tex. 363—Groscclose v. Johnston, Civ.App., 184 S.W.2d 548—Schuyler v. Lacy, Civ. App., 79 S.W.2d 901, error dismissed.

Utah.—Corey v. Roberts, 25 P.2d 940, 82 Utah 445.

Va.—Inkles v. Greear, 27 S.E.2d 222, 181 Va. 838—Virginia Trust Co. v. Minar, 18 S.E.2d 879, 179 Va. 377.  
W.Va.—Newhouse v. England, 191 S.E. 525, 118 W.Va. 649.  
65 C.J. p 326 note 49.

#### Trust in personality

(1) Parol evidence, in order to establish trust of personality, must be very clear and satisfactory and find some support in surrounding circumstances and in subsequent conduct of the parties—Harmon v. Harmon, 6 N.W.2d 762, 303 Mich. 513—Boyer v. Backus, 276 N.W. 564, 232 Mich. 593, motion denied 280 N.W. 756, 282 Mich. 701, certiorari denied 59 S.Ct. 147, 305 U.S. 644, 83 L.Ed. 416, rehearing denied 59 S.Ct. 248, 305 U.S. 674, 83 L.Ed. 437.

(2) A high degree of proof is necessary.—Zolntakis v. Orfanos, C.C.A. Utah, 119 F.2d 571, certiorari denied Orfanos v. Zolntakis, 62 S.Ct. 62, 314 U.S. 630, 86 L.Ed. 506.

(3) Evidence could not be made basis of finding that a parol trust in personality existed unless it could be said that evidence was unequivocally demonstrative of a trust and supported only conclusion that a trust was created—Van Seiver v. Rothensies, D.C.Pa., 36 F.Supp. 577, affirmed, C.C.A., 122 F.2d 697.

(4) Facts of case must be examined in light of general trust principles—Eronomy v. Roberts, 265 N.W. 441, 274 Mich. 484.

#### Oral trusts in reality

(1) Oral trusts in reality are not favored and must be strictly proved by evidence which is direct, positive, express, unambiguous, and convincing—In re Brenneman's Estate, 63 A.2d 59, 360 Pa. 558—Moffit v. Moffit, 164 A.2d 418, 340 Pa. 107—65 C.J. p 326 note 50 [a], [b].

(2) Evidence of parol agreement creating such trust is closely scrutinized and carefully weighed by the courts—Moore v. Terry, 170 S.W.2d 29, 293 Ky. 727.

(3) In determining whether a trust in land was established, it was not essential that defendant establish that defendant and plaintiff's husband jointly earned money to pay for land—Cluck v. Sheets, 171 S.W.2d 860, 141 Tex. 219.

62. U.S.—Murphy Cartwright, C.A. Tex., 202 F.2d 71.

Ark.—Blalock v. Blalock, 258 S.W.2d 891.

Cal.—In re Gaines' Estate, 100 P.2d 1055, 15 Cal.2d 255—Spaulding v. trusts, alleged casual remark by de-

Jones, 256 P.2d 637, 117 Cal.App.2d 541.

Ky.—Mills v. Mills, 87 S.W.2d 389, 261 Ky. 190.

Mo.—Corpus Juris cited in Adams v. Adams, 156 S.W.2d 610, 614, 348 Mo. 1041.

N.Y.—Bendean v. Moody, 5 N.Y.S.2d 94, 254 App.Div. 130.

Ohio.—In re Freeman's Estate, 16 Ohio Supp. 6.

Tex.—Amerada Petroleum Corp. v. Massad, Civ.App., 239 S.W.2d 730, error refused no reversible error—Groscclose v. Johnston, Civ.App., 184 S.W.2d 548—Clayton v. Ansell, Civ.App., 159 S.W.2d 962, affirmed 168 S.W.2d 230, 140 Tex. 441.  
Utah.—Capps v. Capps, 175 P.2d 470, 110 Utah 468.  
65 C.J. p 326 note 50.

63. Iowa.—Schurz v. Schurz, 128 N.W. 944, 133 N.W. 683, 153 Iowa 187.  
65 C.J. p 326 note 51.

Grantee's understanding of obligation

In suit to impress personality transferred from father to son with trust for benefit of father's widow and another son, wherein it appeared that father had granted first son absolute title but had expressed wishes as to use of the property for benefit of widow and other son, first son's understanding as to his obligation to widow and other son was important only in determining father's intention—Harmon v. Harmon, 6 N.W.2d 762, 303 Mich. 513.

64. Ark.—Blalock v. Blalock, 258 S.W.2d 891.

Mich.—In re Lane's Estate, 274 N.W. 714, 281 Mich. 70.

65 C.J. p 326 note 52.

65. W.Va.—Faulkner v. Grantham, 47 S.E. 78, 55 W.Va. 317.

65 C.J. p 326 note 53.

66. U.S.—Cooper v. U. S., Ct.Cl., 19 F.Supp. 753.

Miss.—Landau v. Landau, 187 So. 224, 185 Miss. 45.

N.Y.—In re Solot's Estate, 50 N.Y.S.2d 401, affirmed 55 N.Y.S.2d 125, 269 App.Div. 759.

65 C.J. p 326 note 54.

#### Casual remark

In suit between brothers for an accounting and to enforce alleged trusts, alleged casual remark by de-

admissions may be considered and given weight, they should be received with great caution.<sup>67</sup> Where it is sought to prove a parol trust in land, in a jurisdiction where such trusts are not forbidden, a mere oral declaration by the grantee is insufficient, unless corroborating circumstances are shown.<sup>68</sup> The mere fact that the word "trustee" appears in a stock certificate after the name of the holder is not evidence of ownership of another;<sup>69</sup> and the mere fact that bonds had been registered in a person's name under the designation of "trustee" does not conclusively show that a trust had been created.<sup>70</sup> Where the trustee admits that he held title to land in trust, clear and satisfactory evidence is essential as against the beneficiary, to prove that the trust has terminated.<sup>71</sup> Circumstances patently

inconsistent with the existence of a trust will refute separate evidence clearly indicating the existence of a trust.<sup>72</sup> The interest of the witnesses may be considered in determining whether or not the testimony is clear, satisfactory, and convincing.<sup>73</sup>

**Number of witnesses.** The testimony of one witness may be sufficient to establish an express trust;<sup>74</sup> and, hence, such testimony need not be corroborated;<sup>75</sup> but it has been held that the testimony of one witness without other corroborating circumstance should not be held sufficient to prove an express trust.<sup>76</sup>

**Application of rules.** The rules above stated have been applied in numerous cases. In some of them the evidence has been held sufficient to establish an express trust;<sup>77</sup> to prove the nature and purposes

fendant that money in a bank in defendant's name belonged to brother constituted the weakest evidence and under circumstances disclosed was of no decisive importance.—*Hacker v. Hacker*, 283 N.W. 639, 287 Mich. 435.

#### Mere possession of bankbook

Where savings bank account was opened by depositor in trust for grandson but depositor and grandson were living in the same house from time of issuance of bankbook to date of depositor's death, possession of the bankbook by grandson was not by itself evidence of any probative value in determining validity and effect of trust.—*In re Weinstein's Estate*, 28 N.Y.S.2d 137, 176 Misc 592.  
67. Pa.—*In re Tuttle's Estate*, 200 A. 921, 132 Pa. Super. 356.  
68 C.J. p 327 note 66.  
Admissibility see supra § 69.

#### Declarations made long after execution of instrument

Where it was sought to establish a parol trust of proceeds of life policy by declarations allegedly made long after execution of the policy, testimony as to such declarations was to be regarded with serious misgivings.—*In re Tuttle's Estate*, supra.

68. U.S.—*Robertson v. Bemis & Vought*, D.C.N.C., 226 F. 828.  
N.C.—*Williams v. Hodges*, 95 N.C. 32.

69. Cal.—*Fletcher v. Kidder*, 127 P. 73, 163 Cal. 769.

70. Cal.—*Bauer v. Bauer*, 100 P.2d 1070, 38 Cal.App.2d 309, rehearing denied 101 P.2d 1117, 38 Cal. App.2d 309.

#### Persuasive evidence to contrary

Fact that alleged donor-settlor clipped interest coupons from bonds and used proceeds, although not fatal to validity of alleged gift of bonds in trust, is strongly persuasive

that alleged donor-settlor did not intend present gift of bonds with trust attached.—*Elliott v. Gordon*, C.C.A. Kan., 70 F.2d 9.

71. Wis.—*Flake v. Johnson*, 193 N.W. 388, 180 Wis. 485.

72. U.S.—*Van Seiver v. Rothensties*, D.C.Pa., 36 F.Supp. 577, affirmed, C.C.A., 122 F.2d 697.

73. Ark.—*Blalock v. Blalock*, 258 S.W.2d 891—*Griffin v. Griffin*, 141 S.W.2d 16, 200 Ark. 794.

74. Cal.—*Turman v. Ellison*, 174 P. 396, 37 Cal.App. 204.

75. Cal.—*Turman v. Ellison*, supra, 65 C.J. p 327 note 62.

76. U.S.—*Darden v. Darden*, C.C.A. Va., 152 F.2d 208.  
Md.—*Dougherty v. Dougherty*, 2 A.2d 433, 175 Md. 441.

77. U.S.—*Darden v. Darden*, C.C.A. Va., 152 F.2d 208—*Fricke v. Weber*, C.C.A. Ohio, 145 F.2d 737—*Jaiser v. Milligan*, D.C.Neb., 120 F.Supp. 599.  
Ark.—*Hawkins v. Scanlon*, 206 S.W.2d 179, 212 Ark. 180—*Hand v. Mitchell*, 193 S.W.2d 333, 209 Ark. 996—*McHenry v. McHenry*, 193 S.W.2d 321, 209 Ark. 977.

Cal.—*McElroy v. McElroy*, 198 P.2d 683, 32 Cal.2d 828—*Berniker v. Berniker*, 182 P.2d 567, 30 Cal.2d 439—*Hansen v. Bear Film Co.*, 168 P.2d 946, 28 Cal.2d 154—*Steiner v. Amiel*, 112 P.2d 635, 18 Cal.2d 48—*Wright v. Rohlfes*, 72 P.2d 142, 9 Cal.2d 620—*Birney v. Birney*, 18 P.2d 672, 217 Cal. 353—*Nicholas v. Nicholas*, 242 P.2d 679, 110 Cal. App.2d 349—*Barthorpe v. Brown*, 223 P.2d 884, 100 Cal.App.2d 474—*Casey v. Casey*, 218 P.2d 842, 97 Cal.App.2d 875—*Title Ins. & Trust Co. v. McGraw*, 164 P.2d 846, 72 Cal.App.2d 390—*Eggert v. Pacific States Sav. & Loan Co.*, 136 P.2d 822, 57 Cal.App.2d 239—*Hamilton v. Junction City Mtn. Co.*, 136 P.2d 591, 58 Cal.App.2d 231—*Niles v.*

*Louis H. Rapoport & Sons*, 128 P.2d 50, 53 Cal.App.2d 644—*Kobida v. Hinkelmann*, 127 P.2d 657, 53 Cal. App.2d 186—*Randall v. Bank of America N. T. & S. A.*, 113 P.2d 754, 48 Cal.App.2d 249—*Forman v. Goldberg*, 108 P.2d 983, 42 Cal.App.2d 308—*Rack v. Farnsworth*, 77 P.2d 295, 25 Cal.App.2d 212.  
Colo.—*Vandewiele v. Vandewiele*, 136 P.2d 523, 110 Colo. 556.

Conn.—*Linnahan v. Linnahan*, 39 A.2d 895, 131 Conn. 307.  
Del.—*Ross v. Ellis, Ch.*, 106 A.2d 775—*Sherry v. Union Gas Utilities*, 171 A. 188, 20 Del.Ch. 60.

Fla.—*See Branch Cattle Co. v. Koon*, 44 So.2d 681—*Wimmers v. Blackburn*, 9 So.2d 505, 151 Fla. 236.  
Ill.—*Stowell v. Satorius*, 109 N.E.2d 734, 413 Ill. 482—*Creighton v. Elgin*, 69 N.E.2d 501, 395 Ill. 87—*Green v. Gawnie*, 47 N.E.2d 86, 382 Ill. 363—*Jackson v. Pillsbury*, 44 N.E.2d 537, 380 Ill. 554—*Seales v. McMahon*, 4 N.E.2d 732, 364 Ill. 413—*Humpa v. Hedstrom*, 94 N.E.2d 614, 341 Ill.App. 605—*First Nat. Bank of Ottawa v. Weise*, 76 N.E.2d 538, 333 Ill. App. 1.

Ind.—*Bowden v. Elston Bank & Trust Co. of Crawfordsville*, 75 N.E.2d 170, 117 Ind.App. 612.

Iowa.—*In re Hagan's Estate*, 23 N.W.2d 521, 237 Iowa 619.

Kan.—*In re Dieter's Estate*, 239 P.2d 954, 172 Kan. 359.

KY.—*Evans v. Payne*, 258 S.W.2d 919—*Morris v. Thomas*, 220 S.W.2d 958, 310 Ky. 501—*McCoy v. Kilgore's Adm'r*, 209 S.W.2d 66, 306 Ky. 678—*Johnson v. Murphy's Adm'r*, 168 S.W.2d 1022, 293 Ky. 294—*Hecht's Adm'r v. Hecht*, 114 S.W.2d 499, 272 Ky. 400.

La.—*Young v. Mulroy*, 45 So.2d 357, 216 La. 961.

Me.—*Rose v. Osborne*, 180 A. 315, 133 Me. 497.

Md.—*Rice v. Rice*, 41 A.2d 371, 184 Md. 403.

**Mass.**—Rugo v. Rugo, 91 N.E.2d 826, 325 Mass. 612—Smith v. Shanahan, 50 N.E.2d 397, 314 Mass. 329—Murray v. O'Hara, 195 N.E. 909, 291 Mass. 75

**Mich.**—Economy v. Roberts, 265 N.W. 441, 274 Mich. 484.

**Minn.**—Salscheider v. Holmes, 286 N.W. 347, 205 Minn. 459

**Miss.**—Patterson v. Koerner, 71 So. 2d 464.

**Mo.**—Stein v. Mercantile Home Bank & Trust Co., 148 S.W.2d 570, 347 Mo. 732.

**N.J.**—Eagles Building & Loan Ass'n v. Fiducia, 37 A.2d 116, 135 N.J. Eq. 7, affirmed 40 A.2d 627, 136 N.J. Eq. 117—Artushenia v. Artushenia, 169 A. 625, 115 N.J. Eq. 80—Fleetwood v. Hershey Creamery Co., 54 A.2d 200, 25 N.J. Misc. 378.

**N.M.**—McClendon v. Dean, 117 P.2d 250, 45 N.M. 496.

**N.Y.**—In re Ford's Estate, 108 N.Y. S.2d 122, 279 App. Div. 152, affirmed 107 N.E.2d 87, 304 N.Y. 598—Muller v. Sobol, 97 N.Y.S.2d 905, 277 App. Div. 884, reargument and appeal denied 99 N.Y.S.2d 757, 277 App. Div. 951—In re Arrington's Estate, 104 N.Y.S.2d 55, 200 Misc. 72—De Graff v. Joyce, 16 N.Y.S.2d 601, 172 Misc. 919—In re Sweeney's Estate, 279 N.Y.S. 927, 155 Misc. 461—In re Hammer's Estate, 72 N.Y.S.2d 636, affirmed 72 N.Y.S.2d 410, 272 App. Div. 822—Fehder v. Furman, 54 N.Y.S.2d 820.

**N.C.**—Williams v. Williams, 56 S.E. 2d 20, 231 N.C. 33—Cannon v. Blair, 50 S.E.2d 732, 229 N.C. 606.

**Ohio.**—Staley v. Kreinhilf, 89 N.E. 2d 593, second case, 152 Ohio St. 315—Burhenn v. Burhenn, App. 82 N.E.2d 293—Suburban Home Mortg. Co. v. Hopwood, 81 N.E.2d 387, 83 Ohio App. 115—Norris v. Norris, App. 57 N.E.2d 254, appeal dismissed 53 N.E.2d 647, 142 Ohio St. 634—In re McCann's Estate, 6 Ohio Supp. 316.

**Okl.**—Fletcher v. Fletcher, 258 P.2d 899—White v. Morrow, 100 P.2d 872, 187 Okl. 72—McGann v. McGann, 37 P.2d 939, 169 Okl. 515.

**Or.**—Dickerson v. Mursfield, 191 P.2d 380, 183 Or. 149—Rader v. Barner, 139 P.2d 130, 172 Or. 1—Platt v. Jones, 38 P.2d 703, 149 Or. 246, modified on other grounds 39 P.2d 955, 149 Or. 246—Lay v. Proctor, 34 P.2d 331, 147 Or. 545.

**Pa.**—Keller v. Keller, 41 A.2d 547, 351 Pa. 461.

**Tenn.**—Askew v. Mills, 268 S.W.2d 569—Hunt v. Hunt, 80 S.W.2d 666, 169 Tenn. 1—Adrian v. Brown, 196 S.W.2d 118, 29 Tenn. App. 236—Walker v. Walker, 2 Tenn. App. 279

**Tex.**—Collins v. Hall, 174 S.W.2d 50, 141 Tex. 433—Cluck v. Sheets, 171 S.W.2d 860, 141 Tex. 219—Neblett v. Valentino, 82 S.W.2d 432, 127 Tex. 279—Machann v. Machann, Civ. App., 269 S.W.2d 826—Powe v.

Powe, Civ. App., 268 S.W.2d 558, error refused no reversible error—Brown v. Brown, Civ. App., 264 S.W.2d 142—Dickens v. Dickens, Civ. App., 211 S.W.2d 658, error refused no reversible error—Born v. Bluestein, Civ. App., 220 S.W.2d 345—Scott v. Chett, Civ. App., 213 S.W.2d 562—Abilene Hotel Corp. v. Gill, Civ. App., 187 S.W.2d 708—Eaton v. Husted, Civ. App., 163 S.W.2d 439, affirmed 172 S.W.2d 493, 141 Tex. 349—Small v. Brooks, Civ. App., 163 S.W.2d 236, error refused—Frint v. Tate, Civ. App., 162 S.W.2d 737—Vicars v. Quinn, Civ. App., 154 S.W.2d 947—W. T. Rawleigh Co. v. Cowan, Civ. App., 152 S.W.2d 796—Williford Lumber Co. v. Malakoff Brick Co., Civ. App., 113 S.W.2d 218, error dismissed.

**Utah.**—Ilawa v. Jensen, 209 P.2d 229, 116 Utah 212

**Wash.**—Porter v. Laue, 267 P.2d 1064—In re Eustace's Estate, 87 P.2d 305, 198 Wash. 142.

**Wis.**—Wyse v. Puchner, 51 N.W.2d 38, 260 Wis. 365—Hartman v. Love, 277 N.W. 841, 227 Wis. 6.

65 C.J. p 327 note 64.

**Evidence held sufficient to show trust in:**

(1) Bank deposit or account.

**Cal.**—Wagner v. Worrell, 172 P.2d 751, 76 Cal. App.2d 172—Lo Hue v. Porrazzo, 119 P.2d 346, 48 Cal. App. 2d 82.

**Ky.**—Inale v. Hale, 231 S.W.2d 2, 313 Ky. 314.

**Me.**—Iose v. Osborne, 180 A. 315, 133 Me. 497.

**Md.**—Whittington v. Whittington, 106 A.2d 72—Almond v. McAllister, 56 A.2d 609, 202 Md. 411—Bollack v. Bollack, 182 A. 317, 169 Md. 407.

**Mass.**—Harrington v. Donlin, 45 N.E. 2d 953, 312 Mass. 577—Greecy v. Flynn, 36 N.E.2d 394, 310 Mass. 23.

**Mo.**—In re Geel's Estate, App., 143 S.W.2d 327

**N.J.**—Provident Inst. for Sav. in Jersey City v. Bolton, 52 A.2d 833, 110 N.J. Eq. 1—Wolf v. Wolf, 42 A.2d 300, 136 N.J. Eq. 403—Hickey v. Kahl, 19 A.2d 33, 129 N.J. Eq. 233—Trust Co. of New Jersey v. Parawell, 11 A.2d 98, 127 N.J. Eq. 45

**N.Y.**—In re Halpern's Estate, 100 N.E.2d 120, 303 N.Y. 33—In re Ward's Estate, 107 N.Y.S.2d 817, 279 App. Div. 616—Thomas v. Brevoort Sav. Bank of Brooklyn, 87 N.Y.S.2d 411, 275 App. Div. 724—In re Aylar's Estate, 116 N.Y.S.2d 720, 203 Misc. 372—In re Purcell's Will, 107 N.Y.S.2d 955, 200 Misc. 643—In re Friesing's Estate, 123 N.Y.S.2d 207—In re Leiman's Estate, 116 N.Y.S.2d 658, affirmed 118 N.Y.S.2d 750, 281 App. Div. 764, appeal denied 119 N.Y.S.2d 230, 281 App. Div. 845—In re Prokasky's Will, 109 N.Y.S.2d 888—In re Naydan's Estate, 107 N.Y.S.2d 701—Getz v. Getz, 101 N.

**Y.S.2d 757—Falcone v. Palotta, 29 N.Y.S.2d 918, affirmed 29 N.Y.S.2d 719, 262 App. Div. 875.**

**Ohio.**—Thomas v. Dye, Com. Pl., 117 N.E.2d 515.

**Pa.**—Serventi v. Galli, 31 A.2d 715, 347 Pa. 47—Mahaley v. Stone, 37 Pa. Dist. & Co. 563—Manzlak v. Zukovich, Com. Pl., 97 Pittsb. Leg. J. 55.

**Tex.**—Schelb v. Sparenberg, Civ. App., 111 S.W.2d 324, affirmed 124 S.W.2d 322, 133 Tex. 17

**Wis.**—Boyle v. Kempkin, 9 N.W.2d 589, 243 Wis. 86.

65 C.J. p 327 note 64 [a] (1).

(2) Bonds and securities.

**Ind.**—Zorich v. Zorich, 88 N.E.2d 694, 119 Ind. App. 547.

**Mo.**—Bennett v. Wood, 258 S.W.2d 660.

**Or.**—Winters v. Winters, 109 P.2d 857, 165 Or. 659.

65 C.J. p 327 note 64 [a] (2).

(3) Corporate stock.

**Ark.**—Batesville Truck Line v. Martin, 243 S.W.2d 729, 219 Ark. 603.

**Cal.**—Hardison v. Corbett, 130 P.2d 226, 55 Cal. App.2d 310.

**Idaho.**—Mason v. Pelkes, 59 P.2d 1087, 56 Idaho 10, certiorari denied Pelkes v. Mason, 57 S.Ct. 319, 299 U.S. 615, 81 L.Ed. 463.

**Ill.**—Wagner v. Maguire, 17 N.E.2d 244, 297 Ill. App. 48.

**Ky.**—Klein v. Inman, 182 S.W.2d 34, 298 Ky. 122—Martin v. Hollan, 126 S.W.2d 465, 277 Ky. 291.

**N.Y.**—Walker Associates v. Anderson, 68 N.Y.S.2d 731, 271 App. Div. 1003—Kremer v. Kremer, 51 N.Y.S.2d 394, affirmed 56 N.Y.S.2d 413, 269 App. Div. 827, appeal denied 57 N.Y.S.2d 845, 269 App. Div. 929

**Ohio.**—Becker v. Cleveland Trust Co., 38 N.E.2d 610, 68 Ohio App. 526.

65 C.J. p 327 note 64 [a] (4).

(4) Proceeds of life insurance policy

**U.S.**—Mutual Life Ins. Co. of N. Y. v. Cleveland, D.C. Pa., 82 F.Supp. 358

**Md.**—Hayward v. Campbell, 199 A. 530, 174 Md. 540.

**N.Y.**—Elchucker v. Elchacker, 98 N.Y. S.2d 189, 277 App. Div. 891.

**Pa.**—Grütz v. Grütz, 21 A.2d 713, 342 Pa. 516.

**Tex.**—Eaton v. Husted, 172 S.W.2d 493, 141 Tex. 349.

65 C.J. p 327 note 64 [a] (5).

**Acceptance**

Evidence held to show that creditor accepted trust created for his benefit—Fidelity Trust Co. v. Union Nat. Bank of Pittsburgh, 169 A. 209, 313 Pa. 467, certiorari denied Union Nat. Bank of Pittsburgh v. Fidelity Trust Co., 54 S.Ct. 530, 291 U.S. 680, 78 L.Ed. 1068.

**Delivery of savings bankbook to person in whose name deposit was made by another as trustee, was some evidence that trust had been**



of the trust, and its terms and conditions,<sup>78</sup> to charge a grantee or assignee as trustee of an express trust,<sup>79</sup> to make prima facie case,<sup>80</sup> to rebut presumptions,<sup>81</sup> or to support a finding that a trust did not exist.<sup>82</sup>

created.—Harrington v. Donlin, 45 N.E.2d 953, 312 Mass. 577.

78. Ill.—Carroll v. Hibner, 92 N.E.2d 121, 405 Ill. 545.

Mass.—Kerwin v. Donaghy, 59 N.E.2d 299, 317 Mass. 559.

65 C.J. p 328 note 66.

**Intent not to relinquish title or possession**

Trustor's continued use and alienation of and complete dominion over property after execution of trust indenture constituted persuasive evidence of intent not to relinquish title to or possession of property until death.—Atlantic Nat. Bank of Jacksonville, Fla. v. St. Louis Union Trust Co., 211 S.W.2d 2, 357 Mo. 770.

**Form of account was not sole evidence as to purpose of deposit.**—In re Cohen's Will, 90 N.Y.S.2d 776.

#### Corroborative testimony

The oral statements of decedent that money deposited in bank in his name as trustee for son belonged to son did not create any trust for son, but explained and corroborated aim of account as one to preserve to son rights to which decedent regarded him as being entitled when deposits were originally made in form evidenced by passbooks on such accounts.—In re Cohen's Will, supra.

79. Cal.—Hansen v. Bear Film Co., 168 P.2d 946, 28 Cal.2d 154.—Sethman v. Bulkley, 68 P.2d 961, 9 Cal.2d 21.—Katz v. Wahrhaftig, 248 P.2d 32, 113 Cal.App.2d 447.—Smith v. Smith, 238 P.2d 688, 108 Cal.App.2d 219.—Givens v. Johnson, 166 P.2d 67, 73 Cal.App.2d 139.—Chard v. O'Connell, 120 P.2d 125, 48 Cal.App.2d 475.—Rabbit v. Atkinson, 112 P.2d 14, 44 Cal.App.2d 752.—Forman v. Goldberg, 108 P.2d 983, 42 Cal.App.2d 308.—Cooper v. Cooper, 39 P.2d 820, 3 Cal.App.2d 154.

Ill.—Jelinton v. Scott, 92 N.E.2d 196, 340 Ill.App. 398.—Williams v. Anderson, 5 N.E.2d 593, 288 Ill.App. 119.

Kan.—In re Dieter's Estate, 239 P.2d 954, 172 Kan. 359.

Ky.—Morris v. Thomas, 220 S.W.2d 958, 310 Ky. 501.—Klein v. Imman, 182 S.W.2d 34, 298 Ky. 122.—Hardwick's Ex'r v. West, 168 S.W.2d 353, 293 Ky. 8.—Corbin v. Corbin, 166 S.W.2d 826, 292 Ky. 545.—Newland v. McNeill, 126 S.W.2d 127, 277 Ky. 245.

Or.—Henningsen v. Title & Trust Co., 49 P.2d 458, 151 Or. 318.

Tenn.—Kelley v. Whitehurst, App. 264 S.W.2d 1.—Chadwell v. Chadwell, 9 Tenn.App. 181.

Tex.—Eaton v. Husted, 172 S.W.2d 493, 141 Tex. 849.

Utah.—In re Linford's Estate, 239 P.2d 200.—Capps v. Capps, 175 P.2d 470, 110 Utah 468.—Barrett v. Vickers, 116 P.2d 772, 100 Utah 534.

Wash.—Boardman v. Watrous, 35 P.2d 1106, 178 Wash. 690.

W.Va.—Hoglund v. Curtis, 61 S.E.2d 442, 134 W.Va. 735.—Winfree v. Dearth, 188 S.E. 880, 118 W.Va. 71.

65 C.J. p 328 note 65.

**Evidence held sufficient to show:**

(1) That proceeds of wood cut and removed from the land in which defendant claimed interest as result of a trust by the joint efforts of defendant and plaintiff's husband went to pay the full consideration for the land.—Cluck v. Sheets, Civ.App., 171 S.W.2d 857, affirmed 171 S.W.2d 860, 141 Tex. 219.

(2) Other evidence held sufficient see 65 C.J. p 328 note 65 [a].

80. Cal.—George v. Soares, 128 P.2d 377, 54 Cal.App.2d 29.

65 C.J. p 328 note 67.

81. Ind.—Bowden v. Elston Bank & Trust Co. of Crawfordsville, 75 N.E.2d 170, 117 Ind.App. 612.

N.J.—Selsor v. Jester, 23 A.2d 602, 131 N.J.Eq. 57.

**Evidence held to rebut presumption of intent to create trust**

Cal.—Koslosky v. Cis, 160 P.2d 565, 70 Cal.App.2d 174.

Mich.—Hoyer v. Backus, 276 N.W. 564, 282 Mich. 593, motion denied 280 N.W. 756, 282 Mich. 701, certiorari denied 59 S.Ct. 147, 305 U.S. 644, 83 L.Ed. 416, rehearing denied 59 S.Ct. 248, 305 U.S. 674, 83 L.Ed. 437.

82. U.S.—Columbia Pictures Corporation v. Lawton-Byrne-Bruner Ins. Agency Co., C.C.A. Mo., 73 P.2d 18.—Mullen v. Mullen, D.C. Alaska, 117 F.Supp. 538.

Ala.—Westcott v. Sharp, 54 So.2d 758, 256 Ala. 418.

Ark.—Hawkins v. Scanlon, 206 S.W.2d 179, 212 Ark. 180.—Mitchell v. Powell, 109 S.W.2d 155, 194 Ark. 638.—Griffin v. McKay, 135 S.W.2d 650, 199 Ark. 747.

Cal.—Olson v. Olson, 49 P.2d 827, 4 Cal.2d 434.—Fritz v. Thompson, 171 P.2d 205, 125 Cal.App.2d 858.—Ridgway v. Ridgway, 212 P.2d 6, 95 Cal.App.2d 338.—Bird v. Bird, 196 P.2d 941, 87 Cal.App.2d 377.

Bank of America Nat. Trust & Sav. Ass'n v. McRae, 183 P.2d 385, 81 Cal.App.2d 1.—Leitch v. Gay, 147 P.2d 631, 64 Cal.App.2d 16.—Banducci v. Banducci, 147 P.2d 73, 63 Cal.App.2d 600.—Carley v. Hennessey, 137 P.2d 857, 58 Cal.App.2d 853.—Perkins v. Maiden, 134 P.2d 30, 57 Cal.App.2d 46.—Miller v. Miller, 130 P.2d 438, 65 Cal.App.2d 199

—Stromerson v. Averill, 102 P.2d 571, 39 Cal.App.2d 118.—Fernandez v. Security First Nat. Bank of Los Angeles, 99 P.2d 1102, 37 Cal.App.2d 674.—Anderson v. Hagen, 66 P.2d 168, 19 Cal.App.2d 714.—Cohn v. Cohn, 20 P.2d 61, 130 Cal.App. 349.

Conn.—Stamford Sav. Bank v. Everett, 42 A.2d 662, 132 Conn. 92.

Del.—Hodley v. Jones, 32 A.2d 436, 27 Del.Ch. 273.

Ga.—Gibson v. Gibson, 49 S.E.2d 877, 204 Ga. 437.—Braswell v. Palmer, 22 S.E.2d 93, 194 Ga. 484.

Hawaii.—Castle v. Cross, 32 Hawaii 197.

Idaho.—Crenshaw v. Crenshaw, 199 P.2d 264, 68 Idaho 470.

Ill.—Pear v. Pear, 93 N.E.2d 158, 341 Ill.App. 249.—Lasecki v. Fischer, 33 N.E.2d 893, 310 Ill.App. 259.

Ind.—Quail v. Banta, 48 N.E.2d 841, 113 Ind.App. 664.

Iowa.—Sinift v. Sinift, 293 N.W. 841, 229 Iowa 56.

Kan.—Crawford v. Crawford, 181 P.2d 526, 163 Kan. 126.

La.—Lewis v. Patterson, App. 34 So.2d 646.

Mass.—Russell v. Meyers, 56 N.E.2d 604, 316 Mass. 669.—Robertson v. Parker, 191 N.E. 645, 287 Mass. 351.

Mich.—Hacker v. Hacker, 283 N.W. 639, 287 Mich. 435.—Groening v. McCambridge, 275 N.W. 795, 232 Mich. 135.

Minn.—Coffin v. Prudenske, 251 N.W. 19, 190 Minn. 160.

Mo.—Lieberstein v. Frey, 92 S.W.2d 114.

Mont.—Sweeney v. Francis, 156 P.2d 338, 117 Mont. 1.—McLaughlin v. Corcoran, 69 P.2d 597, 104 Mont. 590.—Berry v. Shelden, 43 P.2d 239, 99 Mont. 321.

N.Y.—In re Shotes' Will, 236 N.Y.S. 218, 134 Misc. 558.—In re Cushman's Estate, 82 N.Y.S.2d 714.—In re Seeburg's Estate, 46 N.Y.S.2d 412.

Okla.—Turner v. Turner, 223 P.2d 536, 203 Okl. 513.—Mohr v. Detamore, 102 P.2d 850, 187 Okl. 278.—Anson v. Anson, 36 P.2d 915, 169 Okl. 309.

Pa.—Barrett v. Heiner, 80 A.2d 729, 367 Pa. 510.—Gray v. Leibert, 53 A.2d 132, 357 Pa. 130.—Popolick v. Piernikoski, 56 A.2d 326, 161 Pa. Super 587.—Williamson v. Barrett, 24 A.2d 546, 147 Pa. Super. 460, certiorari denied Barrett v. Williamson, 62 S.Ct. 1312, 316 U.S. 703, 86 L.Ed. 1772, rehearing denied 63 S.Ct. 26, 317 U.S. 705, 87 L.Ed. 563.

R.I.—Greene v. Rhode Island Hospital Trust Co., 197 A. 464, 60 R.I. 184.

Tex.—Whittemburg v. Miller, 164 S.W.2d 497, 139 Tex. 586.—Hughes v. Trimble, Civ.App., 254 S.W.2d 420.

Evidence in other cases has been held insufficient to prove a trust,<sup>83</sup> or insufficient to show that a

- error refused no reversible error—Tucker v. Slovacek, Civ.App., 234 S.W.2d 264, error refused no reversible error—Davis v. Pearce, Civ.App., 205 S.W.2d 658—Millsaps v. Moon, Civ.App., 193 S.W.2d 221—Latham v. Houston Land & Trust Co., Civ.App., 62 S.W.2d 519, error dismissed.
- Utah—Shumway v. Anderson, 96 P.2d 1098, 98 Utah 144.
- Wash—Kalkwarf v. Geschke, 77 P.2d 612, 194 Wash. 135.
- W.Va—Straton v. Aldridge, 6 S.E.2d 222, 121 W.Va. 691.
- Wis.—Swazee v. Lee, 47 N.W.2d 733, 259 Wis. 136—Consolidated Discount Corp. v. Holton St. State Bank, 19 N.W.2d 171, 247 Wis. 152.
33. U.S.—Quinn v. Central Co., C.C. A. Cal., 104 F.2d 450—Callender v. Barry, C.C.A. Fla., 90 F.2d 495—Zamberletti v. Zamberletti, D.C. Iowa, 105 F.Supp. 873—Keates v. Register, D.C.Pa., 74 F.Supp. 966—Townley v. Province of the Holy Name, D.C.Cal., 25 F.Supp. 654.
- Ala.—Westcott v. Sharp, 54 So.2d 758, 256 Ala. 418.
- Ariz.—Malish v. Valenzuela, 229 P.2d 248, 71 Ariz. 426, 25 A.L.R.2d 747—Rogers v. Greer, 219 P.2d 760, 70 Ariz. 264—In re Hayward's Estate, 110 P.2d 956, 57 Ariz. 51.
- Ark.—Blalock v. Blalock, 258 S.W.2d 891—Elms v. Hall, 215 S.W.2d 1021, 214 Ark. 601—Kelley v. Northern Ohio Co., 196 S.W.2d 235, 210 Ark. 355—Griffin v. Griffin, 141 S.W.2d 16, 200 Ark. 794.
- Cal.—In re Gaines' Estate, 100 P.2d 1055, 15 Cal.2d 255—McCafferty v. Jones, 61 P.2d 752, 7 Cal.2d 570—Cirimele v. Lucchesi, 223 P.2d 681, 100 Cal.App.2d 371—Sanders v. Magee, 176 P.2d 774, 77 Cal.App.2d 838—Ballan v. Ballan's Market, 119 P.2d 426, 48 Cal.App.2d 150—Rishop's School Upon Scripps Foundation v. Wells, 65 P.2d 105, 19 Cal.App.2d 141—Hammett v. Chamberlain, 35 P.2d 548, 140 Cal.App. 458—Borton v. Joslin, 263 P.2d 1033, 88 Cal.App. 515.
- Del.—Rodley v. Jones, 32 A.2d 436, 27 Del.Ch. 273.
- Fla.—Columbia Bank for Cooperatives v. Okelanta Sugar Corp., 52 So.2d 670—Smehyl v. Hammond, 44 So.2d 678.
- Idaho.—Ferrell v. McVey, 232 P.2d 134, 71 Idaho 339.
- Ill.—Illinois State Trust Co. v. Jones, 184 N.E. 623, 351 Ill. 498—Keller v. Joseph, 160 N.E. 117, 329 Ill. 148—Reynolds v. First Nat. Bank, 279 Ill.App. 561, 600.
- Ind.—Daniels v. Indiana Trust Co., 51 N.E.2d 838, 222 Ind. 31.
- Iowa.—Frame v. Wright, 9 N.W.2d 864, 233 Iowa 394, 147 A.L.R. 1154—Freeseeman v. Henrichs, 6 N.W.2d 185, 233 Iowa 27.
- Kan.—McCoy v. Cover, 158 P.2d 380, 159 Kan. 711.
- Ky.—Morgan v. Johnson, 226 S.W.2d 31, 311 Ky. 848—Porsyth v. Wellman, 193 S.W.2d 402, 302 Ky. 21—Kelly v. Kelly, 183 S.W.2d 805, 298 Ky. 847—Hecht's Adm'r v. Hecht, 114 S.W.2d 499, 272 Ky. 400—Mills v. Mills, 87 S.W.2d 389, 261 Ky. 190.
- Md.—Manos v. Papachrist, 86 A.2d 474, 199 Md. 257—O'Connor v. Estevez, 35 A.2d 148, 182 Md. 541.
- Mass.—American Emp. Ins. Co. v. Webster, 76 N.E.2d 130, 322 Mass. 161—Keith v. Keith, 73 N.E.2d 825, 321 Mass. 460—Kerwin v. Donaghue, 59 N.E.2d 299, 317 Mass. 559—Rock v. Rock, 33 N.E.2d 973, 309 Mass. 44.
- Mich.—Howe v. Webert, 50 N.W.2d 725, 332 Mich. 84.
- Miss.—Wax v. Pope, 168 So. 54, 175 Miss. 784.
- Neb.—Parrott v. Hofmann, 37 N.W.2d 199, 151 Neb. 249—Anderson v. Anderson, 36 N.W.2d 287, 150 Neb. 879.
- Nev.—Hannig v. Conger, 19 P.2d 769, 54 Nev. 388.
- N.H.—Hatch v. Rideout, 65 A.2d 702, 95 N.H. 431.
- N.J.—Ferris v. Ferris, 1 A.2d 423, 124 N.J.Eq. 261—Zimmerman v. Nauhauser, 183 A. 820, 119 N.J.Eq. 424—Risley v. Holland, 181 A. 49, 119 N.J.Eq. 24—Solinger v. Solinger, 176 A. 193, 117 N.J.Eq. 427.
- N.M.—Vehn v. Bergman, 258 P.2d 734, 57 N.M. 351—Portales Nat. Bank v. Beeman, 196 P.2d 876, 52 N.M. 243.
- N.Y.—Moore v. Dennis, 36 N.Y.S.2d 167, 264 App.Div. 604—Tracy v. Danzinger, 3 N.Y.S.2d 24, 253 App.Div. 418, affirmed Tracy v. Danzinger, 18 N.E.2d 311, 279 N.Y. 679—In re Hochle's Will, 2 N.Y.S.2d 115, 253 App.Div. 904—Wojtkowiak v. Wojtkowiak, 85 N.Y.S.2d 198, affirmed 81 N.Y.S.2d 171, 273 App.Div. 1052—In re Solot's Estate, 50 N.Y.S.2d 401, affirmed 55 N.Y.S.2d 125, 269 App.Div. 759.
- N.C.—Akin v. First Nat. Bank of Winston-Salem, 42 S.E.2d 518, 227 N.C. 453.
- Ohio.—Hill v. Irons, 113 N.E.2d 243, 160 Ohio St. 21—Kuck v. Sommers, App. 100 N.E.2d 68—Farmer v. Schoepflin, App. 74 N.E.2d 781—Kopp v. Kopp, 32 Ohio N.P.N.S. 511.
- Okla.—Trent v. Trent, 270 P.2d 958—Roberts v. Roberts, 63 P.2d 671, 175 Okl. 602.
- Or.—Scott v. Hood, 133 P.2d 997, 170 Or. 370.
- Pa.—In re Kerwin's Estate, 89 A.2d 332, 371 Pa. 147—Brunier v. Stanert, 85 A.2d 130, 369 Pa. 178—Warburton v. Warburton, 21 A.2d 21, 342 Pa. 401—Gates v. Gates, 44 A.2d 773, 158 Pa.Super. 273—Rank v. Rank, Com.Pl., 63 Dauph. Co. 352—Rentzheimer v. Frey, Com.Pl., 24 Lehigh L.J. 319—Patriyak v. Patriyak, Com.Pl., 44 Luz.Leg.Rec. 87—Lincavre v. Gavenonis, Com.Pl., 36 Luz.Leg.Rec. 193—Copenhaver v. Duncan, Com.Pl., 61 York Leg.Rec. 105.
- R.I.—Menzoian v. Johnson, 139 A. 410, 57 R.I. 196, reargument denied 190 A. 435, 57 R.I. 451.
- S.C.—Fennell & Harley, Inc. v. Harris, 43 S.E.2d 490, 210 S.C. 504.
- S.D.—Zadel v. Johnston, 41 N.W.2d 227, 73 S.D. 216—Jones v. Jones, 291 N.W. 579, 67 S.D. 200.
- Tenn.—Deakins v. Webb, 84 S.W.2d 367, 19 Tenn.App. 182.
- Tex.—Jones v. Siler, 100 S.W.2d 352, 129 Tex. 18—Wheeler v. Haralson, 99 S.W.2d 885, 128 Tex. 429—Lovell v. Lovell, Civ.App., 202 S.W.2d 291—Sims v. Duncan, Civ.App., 195 S.W.2d 156, error refused no reversible error—Armington v. Gilcrease Oil Co., Civ.App., 190 S.W.2d 587—Groseclose v. Johnston, Civ. App., 184 S.W.2d 548—Elbert v. Waples-Platter Co., Civ.App., 166 S.W.2d 146, error refused—MacRae v. MacRae, Civ.App., 144 S.W.2d 320, error refused—Malone v. Goodnight-Donald Oil Corp., Civ.App., 110 S.W.2d 925—De Lange v. Ogden, Civ.App., 106 S.W.2d 385, error dismissed.
- Utah—Renshaw v. Tracy Loan & Trust Co., 35 P.2d 298, 87 Utah 359, modified on other grounds 49 P.2d 403, 87 Utah 364, 100 A.L.R. 872.
- Va.—Wren v. Tate, 57 S.E.2d 48, 190 Va. 505, opinion adhered to 60 S.E.2d 51, 191 Va. 59—Ingles v. Greear, 27 S.E.2d 222, 181 Va. 338.
- Wash.—In re Swartwood's Estate, 89 P.2d 203, 198 Wash. 557—Wayman v. Miller, 81 P.2d 501, 195 Wash. 457.
- W.Va.—Boggs v. Boggs, 25 S.E.2d 631, 125 W.Va. 600.
- 65 C.J. p. 328 note 68.

#### Evidence held insufficient to show trust is:

- (1) Bank deposit or account.
- D.C.—Laughlin v. Bank of Commerce & Sav., 134 F.2d 530, 77 U.S.App. D.C. 312.
- Fla.—Webster v. St. Petersburg Federal Sav. & Loan Ass'n, 20 So.2d 400, 155 Fla. 412.
- Ga.—Guost v. Stone, 56 S.E.2d 247, 205 Ga. 239.
- Ky.—Owsley v. Gilbert, 91 S.W.2d 513, 362 Ky. 798.
- Md.—Dougherty v. Dougherty, 2 A.2d 433, 175 Md. 441—Kozłowska v. Napierkowski, 170 A. 193, 165 Md. 620.
- Mass.—Day Trust Co. v. Malden Sav. Bank, 105 N.E.2d 363, 328 Mass. 576.

grantee or assignee should be held to be chargeable as a trustee,<sup>84</sup> to negative intent to create a trust,<sup>85</sup> or to rebut presumptions.<sup>86</sup>

In other cases the courts have determined the sufficiency of the evidence on issues relating to the trustor's competency to declare a trust,<sup>87</sup> his title to the property in which the trust was declared,<sup>88</sup>

Mich.—*Detroit Bank v. Bradfield*, 36 N.W.2d 873, 324 Mich. 124—*Hacker v. Hacker*, 283 N.W. 639, 287 Mich. 435—*Boyer v. Hackus*, 276 N.W. 564, 282 Mich. 593, motion denied 280 N.W. 756, 282 Mich. 701, certiorari denied 59 S.Ct. 147, 305 U.S. 644, 83 L.Ed. 416, rehearing denied 59 S.Ct. 248, 305 U.S. 674, 83 L.Ed. 437.

Mo.—*Gordon v. Erickson*, 201 S.W.2d 404, 356 Mo. 272—*Trask v. Arcadia Valley Bank, App.*, 230 S.W.2d 501.

N.J.—*Passaic Nat. Bank & Trust Co. v. Taub*, 46 A.2d 679, 137 N.J.Eq. 544.

N.Y.—*In re Slobiansky's Estate*, 273 N.Y.S. 869, 152 Misc. 232—*In re Timko's Will*, 270 N.Y.S. 323, 150 Misc. 701—*Mchurko v. Richardson*, 107 N.Y.S.2d 365.

Ohio.—*Kelfer v. Schuneman*, 78 N.E.2d 780, 82 Ohio App. 285.

Pa.—*In re Baker's Estate*, Orph., 3 Lebanon 76.

R.I.—*Malley's Estate v. Malley*, 34 A.2d 761, 69 R.I. 407.

Tenn.—*Derrick v. Lumpkins*, 95 S.W.2d 939, 20 Tenn. App. 77.

65 C.J. p 328 note 68 [b] (1).

#### (2) Bonds or securities.

Mo.—*Bennett v. Wood*, 253 S.W.2d 660—*State ex rel Union Nat. Bank of Springfield v. Blair*, 166 S.W.2d 1085, 350 Mo. 622—*Coon v. Standley*, 94 S.W.2d 96, 230 Mo. App. 524, Neb.—*O'Connor v. Butts, Potter & Co.*, 36 N.W.2d 507, 151 Neb. 8.

Pa.—*In re Tunnell's Estate*, 190 A. 906, 325 Pa. 554.

65 C.J. p 328 note 68 [b] (2).

#### (3) Corporate stock.

U.S.—*Overly v. Overly*, D.C.Pa., 65 F.Supp. 174, affirmed, C.C.A., 158 F.2d 384.

Ill.—*Hietich v. Albert*, 57 N.E.2d 287, 324 Ill. App. 87.

Mo.—*Bakewell v. Clemens*, 190 S.W.2d 912, 354 Mo. 686.

Ohio.—*Fifth Third Union Trust Co. v. Foss*, 15 Ohio Supp. 65.

Okl.—*Skrvin v. Skirvin*, 60 P.2d 765, 177 Okl. 480.

65 C.J. p 328 note 68 [b] (3).

#### (4) Proceeds of life insurance policy.

U.S.—*Zolntakis v. Orfanos*, C.C.A. Utah, 119 F.2d 571, certiorari denied *Orfanos v. Zolntakis*, 62 S.Ct. 62, 314 U.S. 630, 86 L.Ed. 506.

Ky.—*Department of Welfare of Commonwealth of Ky. v. Farmer's Committee*, 162 S.W.2d 796, 290 Ky. 813—*Spurlock v. Spurlock*, 111 S.W.2d 443, 271 Ky. 70.

N.Y.—*Maher v. Byrnes*, 18 N.Y.S.2d

838, 259 App.Div. 272, motion granted 32 N.E.2d 820, 285 N.Y. 519. N.C.—*Strayhorn v. Aycock*, 200 S.E. 912, 215 N.C. 43.

Pa.—*Gribbel v. Gribbel*, 17 A.2d 892, 341 Pa. 11—*In re Gorgas Estate*, 24 A.2d 171, 147 Pa. Super. 319—*In re Tuttle's Estate*, 200 A. 921, 132 Pa. Super. 356.

Tex.—*Davis v. Magnolia Petroleum Co., Civ.App.*, 105 S.W.2d 695, affirmed 134 S.W.2d 1042, 134 Tex. 201.

W.Va.—*Newhouse v. England*, 191 S.E. 525, 118 W.Va. 649.

65 C.J. p 328 note 68 [b] (5).

**Conduct of transferee in treating property as subject to a trust is insufficient to establish existence of a trust, if in fact there was no trust**—*Keller v. Keller*, 41 A.2d 547, 351 Pa. 461.

**Admissions and declarations of parties after execution of deed were inadequate to establish trust in absence of testimony from witnesses who heard bargain when it was made or who heard parties repeat it in each other's presence.**—*In re Brennen's Estate*, 63 A.2d 59, 360 Pa. 558—*Moffitt v. Moffitt*, 16 A.2d 418, 340 Pa. 107.

84. U.S.—*Murphy v. Cartwright*, C.A.Tex., 202 P.2d 71.

Cal.—*Chard v. O'Connell*, 62 P.2d 369, 7 Cal.2d 663—*Lane v. Whitaker*, 123 P.2d 53, 50 Cal.App.2d 327.

Fla.—*Crockett v. Crockett*, 199 So. 337, 145 Fla. 311.

Ill.—*Scales v. McMahon*, 4 N.E.2d 872, 364 Ill. 413.

Miss.—*Landau v. Landau*, 187 So. 224, 185 Miss. 45.

N.J.—*Skoczylas v. Skoczylas*, 24 A.2d 881, 131 N.J.Eq. 246.

N.Y.—*Tracy v. Danzinger*, 3 N.Y.S.2d 24, 253 App.Div. 418, affirmed *Tracy v. Danzinger*, 18 N.E.2d 311, 279 N.Y. 679.

Ohio.—*Vincent v. Divine Peace Mission Movement, Inc., App.*, 118 N.E.2d 190—*Petyak v. Petyak*, App., 92 N.E.2d 412—*In re Freeman's Estate*, 16 Ohio Supp. 6.

Okl.—*Fletcher v. Fletcher*, 244 P.2d 827, 206 Okl. 481—*In re Bruner's Estate*, 65 P.2d 1209, 179 Okl. 339.

Or.—*Nunner v. Erickson*, 51 P.2d 839, 151 Or. 575.

Pa.—*Heller v. Capital Bank & Trust Co. of Harrisburg*, 138 A. 298, 330 Pa. 174—*Long v. Long*, Com.Pl., 96 Pittsb.Leg.J. 361.

S.C.—*Pennell & Harley, Inc. v. Harris*, 43 S.E.2d 490, 210 S.C. 504.

Tenn.—*Pugh v. Burton*, 166 S.W.2d 624, 25 Tenn.App. 614.

Utah.—*Hansen v. Hansen*, 171 P.2d

392, 110 Utah 222—*Walker v. Tracy Loan & Trust Co.*, 33 P.2d 177, 83 Utah 576.

Wis.—*Wilson v. Andrews*, 3 N.W.2d 256, 240 Wis. 304.

65 C.J. p 329 note 69.

85. U.S.—*Bingen v. First Trust Co. of St. Paul*, C.C.A.Minn., 103 F.2d 260—*Jaiser v. Milligan*, D.C.Neb., 120 F.Supp. 599.

86. **Evidence held insufficient to rebut presumption:**

(1) That deed was duly executed and delivered—*Hall v. Hall*, 47 S.E.2d 806, 203 Ga. 656.

(2) That a trust in bank account was created by depositor's order for transfer of account to trust account for depositor and another.—*Hancock v. Savings Bank of Baltimore*, 85 A.2d 770, 199 Md. 163.

(3) That on death of decedent who maintained bank accounts in his own name in trust for designated persons, absolute trusts were created as to balance on hand in accounts at that time.—*In re Shortle's Estate*, 130 N.Y.S.2d 233, 206 Misc. 35—*In re Weinstein's Estate*, 28 N.Y.S.2d 137, 176 Misc. 592—*In re Prokasky's Will*, 109 N.Y.S.2d 888.

87. **Evidence held sufficient to show**

(1) Competency.

U.S.—*Soden v. First Nat. Bank of Kansas City*, D.C.Mo., 77 F.Supp. 988.

Ill.—*Jackson v. Pillsbury*, 44 N.E.2d 537, 366 Ill. 554.

Iowa.—*Goodman v. Bauer*, 281 N.W. 448, 225 Iowa 1086.

Md.—*Lambdin v. Dantzbecker*, 181 A. 353, 169 Md. 240.

N.Y.—*In re Ford's Estate*, 108 N.Y.S.2d 122, 279 App.Div. 152, affirmed 107 N.E.2d 87, 304 N.Y. 598.

Okl.—*Evans v. First Nat. Bank of Stillwater*, 146 P.2d 111, 193 Okl. 665.

65 C.J. p 330 note 70 [a] (1), (4).

(2) Incompetency.—*Chandler v. White*, 221 N.W. 618, 244 Mich. 532—

65 C.J. p 330 note 70 [a] (2), (3).

**Evidence held insufficient to show incompetency**

Cal.—*American Trust Co. v. Dixon*, 78 P.2d 445, 26 Cal.App.2d 426.

Mo.—*Gordon v. Erickson*, 201 S.W.2d 404, 356 Mo. 272.

Pa.—*Williams v. Lukas*, 103 A.2d 675, 376 Pa. 413.

65 C.J. p 330 note 70 [b].

88. Mo.—*Arn v. Arn*, 173 S.W. 1062, 264 Mo. 19.

**Bank deposit**

Where a bank deposit in defendant's name as trustee for defendant's wife was attached as being defend-

fraud or undue influence in procuring a declaration of trust,<sup>89</sup> duress,<sup>90</sup> mistake,<sup>91</sup> illegal consideration,<sup>92</sup> delivery of the trust instrument,<sup>93</sup> the parties to the declaration of trust,<sup>94</sup> and the revocation, repudiation, or termination of the trust.<sup>95</sup> The

fact that interest at a fixed rate is stipulated to be paid on a deposit is prima facie, but not necessarily conclusive, evidence that the relationship of debtor and creditor, and not of trustee and cestui que trust, was created.<sup>96</sup>

## 7. VALIDITY

### § 72. In General

The validity of a trust is to be determined as of the time it is created, and depends not merely on the terms on which it is created, but on its effect and the purpose

of its creation, and the courts will not declare a lawful trust unreasonable and unjust.

The validity of a trust is to be determined as of the time it is created,<sup>97</sup> and depends not merely on

ant's money and wife claimed ownership of deposit, a declaration of trust signed by defendant when bank account was opened stating that deposit was one of defendant's money was not conclusive proof of ownership of money deposited thereunder, especially where defendant testified that money belonged to wife.—*Moschetti v. De Cubellis*, 20 A.2d 253, 66 R.I. 483.

89. *Ind.—Bowden v. Elston Bank & Trust Co. of Crawfordsville*, 75 N. E.2d 170, 117 Ind. App. 612.  
Iowa.—*Hatt v. Hatt*, 265 N.W. 640 65 C.J. p 330 note 72.

#### Evidence held sufficient to show

(1) Fraud or undue influence.—*Gill's Trustee v. Gill*, Ky., 124 S.W. 875—65 C.J. p 330 note 72 [a] (1), (2), (4).

(2) Freedom from fraud or undue influence.

*Md.—Lambdin v. Dantzebecker*, 181 A. 353, 163 Md. 240.  
Minn.—*In re Edgar's Trust*, 274 N. W. 226, 200 Minn. 340.

N.Y.—*In re Ford's Estate*, 108 N.Y. S.2d 122, 279 App.Div. 152, affirmed 107 N.E.2d 87, 304 N.Y. 598.  
65 C.J. p 330 note 72 [a] (3).

#### Evidence held insufficient to show fraud or undue influence

D.C.—*Dear v. Guy*, 78 F.2d 198, 64 App.D.C. 314, certiorari denied *Macrae v. Guy*, 56 S.Ct. 96, 296 U.S. 585, 80 L.Ed. 414.

Ill.—*Reighley v. Continental Ill. Nat. Bank & Trust Co. of Chicago*, 61 N. E.2d 29, 390 Ill. 242.

Ky.—*Lane v. Taylor*, 152 S.W.2d 271, 287 Ky. 116.

La.—*Young v. Mulroy*, 45 So.2d 357, 216 La. 961.

Mo.—*Gordon v. Erickson*, 201 S.W.2d 404, 356 Mo. 272.

N.Y.—*In re Timko's Will*, 270 N.Y.S. 323, 150 Misc. 701.

Pa.—*Williams v. Lukas*, 103 A.2d 675, 376 Pa. 413.  
65 C.J. p 330 note 72 [b].

90. U.S.—*Prudential Ins. Co. of America v. Osadchy*, D.C.Mo., 64 F. Supp. 111.

Mass.—*Bodman v. Martha's Vineyard Nat. Bank of Tisbury*, 111 N.E.2d 670, 330 Mass. 125.

N.Y.—*In re Ford's Estate*, 108 N.Y.S. 2d 122, 279 App.Div. 152, affirmed 107 N.E.2d 87, 304 N.Y. 598.

91. Ky.—*Lane v. Taylor*, 152 S.W. 2d 271, 287 Ky. 116.  
N.Y.—*Application of Corn Exchange Bank Trust Co.*, 95 N.Y.S.2d 210, 276 App.Div. 430.  
65 C.J. p 330 note 73.

92. D.C.—*Lanhardt v. Souder*, 42 App.D.C. 278.  
65 C.J. p 330 note 74.

93. Pa.—*Windolph v. Girard Trust Co.*, 91 A. 634, 215 Pa. 319.  
65 C.J. p 330 note 75.

94. Kv.—*Sproles v. Eversole*, 210 S.W.2d 346, 307 Ky. 191.  
Mont.—*Ball Holt McCall Co. v. Caplice*, 175 P.2d 416, 119 Mont. 463.  
Or.—*Shelley v. Quatman*, 134 P. 68, 66 Or. 441.

Pa.—*Weikel v. Pennsylvania Co. for Insurance on Lives and Granting Annuities*, 17 A.2d 345, 340 Pa. 310.

#### 95. Evidence held sufficient

(1) To support finding that sum given to daughter by mother was to be used for expenses of last illness and burial, but was to be returned in case of recovery from illness.—*Westover v. Harris*, 137 P.2d 771, 47 N.M. 112.

(2) To sustain finding that a trust had not been abandoned.—*Linhavn v. Linhavn*, 39 A.2d 895, 131 Conn. 307.

(3) Other evidence held sufficient see 65 C.J. p 330 note 77 [a].

#### Evidence held insufficient

(1) To show termination of trust N.Y.—*In re Bowen's Estate*, 282 N.Y.S. 290, 156 Misc. 435, affirmed *In re Bowen*, 286 N.Y.S. 1005, 247 App. Div. 708.  
Or.—*Blacklaw v. Blacklaw*, 44 P.2d 728, 150 Or. 244.

(2) To show that the deceased had disaffirmed Totten trust.—*In re Christie's Estate*, 4 N.Y.S.2d 484, 167 Misc. 484.

(3) To show that express trust was modified.—*Hughes v. Davis*, 15 So.2d 567, 244 Ala. 680.

(4) Other evidence held insufficient see 65 C.J. p 330 note 77 [b].

#### Malfeasances by trustee

Once an intention to create a mortgage loan trust was expressed and acted on by bank which was both settlor and trustee, subsequent irregularities constituted malfeasances by the bank as trustee and did not constitute evidence militating against the existence of the trust.—*State ex rel. Squire v. Central United Nat. Bank*, 4 Ohio Supp. 263.

#### Attempted disposition after creation of valid trust

Fact that father later tried to make some other disposition of funds which he had deposited in bank to credit of son whose whereabouts were unknown at time deposit was made, could not be given any appreciable weight against finding that a valid trust in son's favor had been created by the original deposit.—*Pickering v. Higgins*, 38 A.2d 640, 70 R.I. 265, 157 A.L.R. 918.

96. U.S.—*Taylor v. Picher*, D.C.Mo., 13 F.Supp. 857, modified on other grounds, C.C.A., *Picher v. Taylor*, 87 F.2d 735—*In re Newark Shoe Stores*, D.C.Md., 3 F.Supp. 293.

Evidence held to support finding that cash deposit with oil company by filling station lessee created debt, not trust.—*Povey v. Colonial Beacon Oil Co.*, 200 N.E. 891, 294 Mass. 86.

97. N.Y.—*Mann-Vynne v. Equitable Trust Co. of New York*, 194 N.Y.S. 50, 201 App.Div. 149.

S.C.—*Board of Directors of Theological Seminary v. Lowrance*, 119 S. E. 383, 126 S.C. 89.

#### Duration and dominion of trustee

Where an instrument is a trust in its inception, the time it is in existence or the varying amount of dominion exercised by the trustee does not affect its legal import.—*Harris v. Harris*, 16 Ohio Supp. 40, appeal dismissed 70 N.E.2d 905, 147 Ohio St. 260, reversed on other grounds 72 N.E.2d 378, 147 Ohio St. 437.

#### Valid during settlor's life; valid thereafter

Where only one trust is created it cannot be viewed as valid during the life of the settlor and invalid as to the beneficiaries on the settlor's death.—*Pinckney v. City Bank Farm-*

the terms in which it is created, but on its effect and the purpose of its creation.<sup>98</sup> The courts deem it no part of their duty to declare a lawful trust unreasonable and unjust.<sup>99</sup> A trust is not invalid because it is executed without consulting the beneficiaries,<sup>1</sup> because it imposes the consent of the beneficiary as a condition to the sale and transfer of the trust property,<sup>2</sup> because it permits the trustee to resign and surrender the trust at any time,<sup>3</sup> because the trustee is authorized to make advances out of the principal to the beneficiaries,<sup>4</sup> because it fails to provide when the trust should terminate,<sup>5</sup> because based wholly on a contingency which may never arise,<sup>6</sup> because drafted by a person not authorized to practice law,<sup>7</sup> or because it may result in tax evasion.<sup>8</sup> It is no objection to the validity of a trust that the trustee named may not or cannot properly execute the duties imposed,<sup>9</sup> since there is a possibility in all trusts of the trustee proving recreant,<sup>10</sup> and equity will provide a proper remedy not only where there is a vacancy in the office of trustee, as discussed *infra* § 217, but also where the trustee negligently or dishonestly performs his duties, *infra* § 233.

A provision that the trustee may apply such portion of the trust fund to his personal use as he may find necessary does not abolish the trust.<sup>11</sup> If an instrument contains all the essential elements of a trust, the mere fact that the settlor may have desired thereby to avoid a compliance with a statute pertaining to the execution of wills, or to avoid the necessity of probate administration, will not void the trust.<sup>12</sup> The fact that the courts are to a certain extent ousted by a will of jurisdiction over a trust does not invalidate the trust as long as public policy is not violated.<sup>13</sup> A provision that the trustee shall not be obliged to submit himself to the jurisdiction of the court in the ordinary affairs of the trust does not invalidate it.<sup>14</sup> Where an agreement to hold stock violated an escrow provision against assignment, the trust is invalid, although all elements of a trust are present.<sup>15</sup>

### § 73. Mental Capacity

A trust will be invalidated by mental incapacity on the part of the settlor at the time of execution.

A trust will be invalidated by mental incapacity on the part of the settlor at the time of execution,<sup>16</sup>

ers Trust Co., 292 N.Y.S. 835, 249 App Div 375.

98. Pa.—Estate of Davis, 6 Pa.Dist. 45

Tenn.—State ex rel. v. Nashville Trust Co., 190 S.W.2d 785, 28 Tenn. App 388

65 C.J. p 331 note 80.

Cancellation for invalidity see *infra* § 85

Conditions or reservations:  
In general see *supra* § 47.

Power of:  
Modification see *infra* § 87.

Revocation see *infra* § 90.

Trustee's interest as beneficiary as affecting validity of trust see *infra* §§ 203, 210.

**Substance, rather than form.** of trust is primary consideration in determining its validity—Haggerty v. Squire, 2 Ohio Supp. 383, reversed on other grounds 26 N.E.2d 603, 63 Ohio App 300, reversed on other grounds 28 N.E.2d 554, 137 Ohio St 207

**Morals or motives of parties to proceeding** involving the validity of a trust are immaterial in determining its validity.—Bankers Trust Co. v. Topping, 41 N.Y.S.2d 736, 180 Misc. 596.

**Separate estates**

A trust creating a life estate and remainder limited thereon, with respect to the beneficial interest, may be valid, even though either estate would be invalid if the other were omitted.—Citizens & Southern Nat.

Bank v. Howell, 196 S.E. 741, 186 Ga. 47.

99. Tex.—Lamus v. Fletcher, 101 S W 1076, 100 Tex. 550.

1. Miss.—Taylor v. Watkins, 13 So. 811.

2. N.Y.—Suarez v. De Montegny, 33 N.Y.S. 292, 12 Misc. 259, affirmed 37 N.Y.S. 503, 1 App Div. 494, affirmed 48 N.E. 1107, 153 N.Y. 678.

3. N.Y.—Schreyer v. Schreyer, 91 N.Y.S. 1065, 101 App Div. 456, affirmed 75 N.E. 1134, 182 N.Y. 555.

4. N.Y.—Hayden v. Sugden, 96 N.Y.S. 681, 48 Misc. 103—Roosevelt v. Roosevelt, 6 Hun. 31, affirmed 64 N.Y. 651.

5. N.Y.—Burke v. O'Brien, 100 N.Y.S. 1048, 115 App Div. 574.

6. Mass.—Kerr v. Crane, 98 N.E. 783, 212 Mass. 224, 40 L.R.A.N.S. 692.

7. Pa.—In re Umble's Estate, 186 A. 75, 323 Pa. 170.

8. Cal.—Hansen v. Bear Film Co., 168 P.2d 946, 28 Cal.2d 154.

9. Ill.—Mettler v. Warner, 90 N.E. 1099, 243 Ill. 600, 134 Am.S.R. 388. 65 C.J. p 331 note 90.

10. Ill.—Mettler v. Warner, *supra*.

11. N.Y.—Jones v. Newell, 28 N.Y.S. 906, 78 Hun. 290

General requirement of certainty in material terms of declaration of trust see *supra* § 45.

12. Neb.—Whalen v. Swircin, 4 N.W.2d 737, 141 Neb. 650.

N.Y.—City Bank Farmers' Trust Co. v. Charity Organization Soc. of City of New York, 265 N.Y.S. 267, 238 App Div. 720, affirmed 191 N.E. 504, 264 N.Y. 441. 65 C.J. p 331 note 96.

13. Ind.—Ackerman v. Fichter, 101 N.E. 493, 179 Ind. 392, 46 L.R.A., N.S. 231, Ann Cas 1915D 1117.

14. Minn.—Butler v. Badger, 150 N.W. 233, 128 Minn. 99. 65 C.J. p 331 note 98.

Judicial control and supervision see *infra* § 261.

15. Cal.—Tillotson v. Findley, 262 P. 438, 87 Cal App. 654.

16. Md.—Doyle v. Rody, 25 A 2d 457, 180 Md. 471.

Mich.—Sprenger v. Sprenger, 299 N.W. 711, 298 Mich. 551.

N.J.—Oswald v. Seidler, 42 A 2d 216, 136 N.J.Eq. 443.

Ohio—Losh v. Winters Nat. Bank & Trust Co., App., 46 N.E.2d 443.

Pa.—Potter Title & Trust Co. v. Allegheny Trust Co., Com.Pl., 88 Pittsb Leg J. 216.

65 C.J. p 331 note 1.

As ground for cancellation see *infra* § 85.

**At time of amendment of trust**

Ill.—Horgan v. City Trust & Sav. Bank of Kankakee, 20 N.E.2d 809, 300 Ill.App. 613.

**Only valid test**

Capacity at the time of execution is the only valid test, and prior or subsequent capacity are immaterial. Mo.—Creek v. Union Nat. Bank in Kansas City, 266 S.W.2d 737.

although the provisions of the trust are identical with his previous declarations of intent.<sup>17</sup> Mental incompetency, which will defeat the trust, exists where a person is incapable of understanding and acting with discretion in the ordinary affairs of life,<sup>18</sup> or is incapable of understanding, in a reasonable manner, the nature and effect of the trust.<sup>19</sup> Strictly speaking, the question presented in such a case is not necessarily whether the settlor was generally of sound mind, but whether he had sufficient mental capacity to understand the trust which he executed.<sup>20</sup> Debilitating illness or bodily infirmities<sup>21</sup> and advancing years<sup>22</sup> will not of themselves deprive the settlor of requisite mental capacity, nor will the testator necessarily be deemed incompetent by reason of a delusion,<sup>23</sup> or mere eccentricities or peculiarities of behavior.<sup>24</sup> However, a trust which is the consequence of an insane delusion cannot stand,<sup>25</sup> and the fact that the settlor acted voluntarily does not necessarily mean that he was capable of making a valid trust.<sup>26</sup>

#### § 74. Mistake

Generally speaking, a fundamental and material mistake of fact on the part of the settlor in setting up a trust may invalidate it.

Generally speaking, a fundamental and material mistake of fact on the part of the settlor in setting up a trust may invalidate it,<sup>27</sup> and furnish ground

for setting it aside, as discussed infra § 85.

#### § 75. Fraud

An instrument purporting to create a trust is void when its execution has been procured by fraud.

An instrument purporting to create a trust is void when its execution has been procured by fraud,<sup>28</sup> and it may be set aside, as discussed infra § 85. In finding that the execution of an instrument did not create a trust equity is not bound by the recitals in the instrument, but may consider circumstances surrounding its execution and determine that it was procured by fraud.<sup>29</sup>

#### § 76. Undue Influence

- a. In general
- b. Confidential relationship

##### a. In General

Where a declaration of trust is procured by undue influence, it is invalid and unenforceable, but the influence exerted must be undue and operative to such a degree as to amount in effect to coercion.

Where a declaration of trust is procured by undue influence, it is invalid and unenforceable<sup>30</sup> and may be set aside, as discussed infra § 85. The influence exerted on the creator of the trust must be undue.<sup>31</sup> The influence which the law condemns as undue is that which is operative to such a degree as to amount in effect to coercion.<sup>32</sup> It is a kind of

N.J.—Oswald v. Seldler, 39 A.2d 396, 135 N.J.Eq. 490, reversed on other grounds 42 A.2d 216, 136 N.J.Eq. 413.

**Evidence held to sustain finding** that trustors were not mentally incompetent.—Creek v. Union Nat. Bank in Kansas City, Mo., 266 S.W. 2d 737.

17. 1'a—Mead v. Sherwin, 118 A. 731, 275 1'a 146.

18. U.S.—Soden v. First Nat. Bank of Kansas City, D.C. Mo., 74 F.Supp. 488.

19. Ill.—Jackson v. Pillsbury, 44 N.E.2d 537, 380 Ill. 554.

##### Strength to compete

Mental strength to compete with an antagonist and understanding to protect his own interest are essential.—Jackson v. Pillsbury, supra.

##### Understanding of nature of act

(1) If grantor, when trust was executed, understood nature and effect of her act in executing it, trust is not invalid on ground of mental incapacity.—Kimmell v. Tipton, Tex. Civ. App., 142 S.W.2d 421.

(2) A grantor's inability to understand a long and complicated trust contract is no ground for its being canceled if at time of execution grantor had mental ability to understand

transaction in which he was engaged.—Losh v. Winters Nat. Bank & Trust Co., Ohio App., 46 N.E.2d 443.

20. Ill.—Coffey v. Coffey, 53 N.E. 590, 179 Ill. 283.

21. Md.—Boyle v. Rody, 25 A.2d 457, 180 Md. 471.

22. Md.—Doyle v. Rody, supra.

**Imprudence** of an aged person stripping himself of all his property, retaining nothing for his sustenance or payment of debts, is persuasive evidence of mental incapacity.—Farley v. Fitzsimmons, 116 A. 606, 97 Conn. 272.

23. Cal.—American Trust Co. v. Dixon, 78 P.2d 449, 26 Cal.App.2d 426.

**Settlor's mistaken belief** that beneficiaries were improvident in the use of money was not an insane delusion which would warrant cancellation of declaration of trust.—American Trust Co. v. Dixon, supra.

24. Md.—Doyle v. Rody, 25 A.2d 457, 180 Md. 471.

25. Md.—Doyle v. Rody, supra.

26. Md.—Doyle v. Rody, supra.

27. Ky.—Hines v. Louisville Trust Co., 254 S.W.2d 73.

##### Imprudence

Trust held not so improvident as to show mistake in creation.—Fideli-

ty Union Trust Co. v. Parfner, 37 A.2d 675, 135 N.J.Eq. 133.

28. Ind.—Ralph v. George, 136 N.E. 44, 78 Ind.App. 491.

65 C.J. p.332 note 8.

29. Ind.—Ralph v. George, supra.

30. Mo.—Kinney v. St. Louis Union Trust Co., 143 S.W.2d 250.

Or—Egr v. Egr, 131 P.2d 198, 170 Or. 1.

65 C.J. p.332 note 11.

##### Amendment of trust

Ill.—Hoigan v. City Trust & Sav. Bank of Kankakee, 20 N.E.2d 809, 300 Ill.App. 613.

##### At time of execution

Undue influence, in order to invalidate trust instrument, must be operative at time of execution of instrument.—Creek v. Union Nat. Bank in Kansas City, Mo., 266 S.W.2d 737.

31. Iowa.—Riddle v. Cutter, 49 Iowa 547.

Md.—Kemper v. Raffel, 182 A. 461, 169 Md. 616.

**Undue influence is wrongful influence** prompted by selfish motives and seeking to promote self-interest.—Egr v. Egr, 131 P.2d 198, 170 Or. 1.

32. Md.—Kemper v. Raffel, 182 A. 461, 169 Md. 616.

mental coercion which destroys the free agency of the creator of the trust and constrains him to do that which is against his will, and what he would not have done if left to his own judgment and volition.<sup>33</sup> The act must be one to the injury of the creator or to the injury of some one on whom he would, if left to his own free will, have bestowed a benefit.<sup>34</sup> The influence of the creator's friends and relatives, exercised for the benefit and advantage of the creator, is not undue.<sup>35</sup> The fact that a settlor consented to the creation of a trust because of her husband's illness and the effect of a refusal does not constitute undue influence.<sup>36</sup> While insistence on one's legal rights may not be undue influence, obtaining a deed of trust where there is no claim to the property cannot be justified as the exercise of a legal right.<sup>37</sup>

### b. Confidential Relationship

The mere fact that a confidential relationship exists between the grantor and the grantee does not alone invalidate a trust, but where the person in whom confidence is reposed exerts his influence to procure an advantage at the expense of the grantor, the trust may be deemed invalid.

In accordance with rules considered in Deeds § 63, the mere fact that a confidential relationship

exists between the grantor and the grantee does not alone invalidate a trust,<sup>38</sup> especially where it appears that the grantor had competent and independent advice of an attorney,<sup>39</sup> or the trust was not procured through improper means attended with circumstances of oppression or overreaching,<sup>40</sup> and this rule applies even though the relationship of conservator, guardian, or administrator exists between the grantor and the trustee.<sup>41</sup> Where, however, the person in whom confidence is reposed exerts his influence to procure an advantage at the expense of the grantor, the trust may be deemed invalid<sup>42</sup> and may be set aside, as discussed infra § 85. Whether such close and confidential relationships exist between the parties as to enable one to dominate and control the other is ordinarily a question of fact dependent on the circumstances of each case.<sup>43</sup> The existence of a confidential or fiduciary relationship may, under some circumstances, raise a presumption of undue influence, which will cast the burden of showing the want of undue influence on the party seeking to establish the trust, as discussed supra § 68. However, where the grantee secures no undue benefit from the grant,<sup>44</sup> the mere fact of the relation of attorney and client,<sup>45</sup> broker and client,<sup>46</sup> principal and agent,<sup>47</sup> parent and child,<sup>48</sup>

33. Ky.—Beard v. Beard, 190 S.W. 703, 173 Ky. 131, Ann.Cas.1918C 832.

#### Similar statement

"Undue influence" means an influence that restrains, controls, directs and diverts or coerces, and overcomes and confuses the mind of the victim.—Soden v. First Nat. Bank of Kansas City, D.C.Mo., 74 F.Supp. 498.

34. Ky.—Beard v. Beard, 190 S.W. 703, 173 Ky. 131, Ann.Cas.1918C 832.

35. Iowa.—Riddle v. Cutter, 49 Iowa 647.

36. Pa.—Willard v. Integrity Trust Co., 116 A. 513, 273 Pa. 24.

37. Wash.—Hayward v. Tacoma Savings Bank & Trust Co., 153 P. 352, 88 Wash. 542.

38. Cal.—Weakley v. Melton, 207 P. 523, 89 Cal. 44.

39. Ill.—Jackson v. Pillsbury, 44 N.E.2d 537, 380 Ill. 554.

40. Md.—Kemper v. Raffel, 182 A. 461, 169 Md. 616.

41. Mass.—Barnum v. Fay, 69 N.E.2d 470, 320 Mass. 177—Palk v. Turner, 101 Mass. 494.

42. Or.—Egr v. Egr, 131 P.2d 198, 170 Or. 1.

43. Agreements of persons in confidential capacity see Contracts § 184.

39. Ill.—Jackson v. Pillsbury, 44 N.E.2d 537, 380 Ill. 554.

40. Ill.—Jackson v. Pillsbury, supra.

41. Ill.—Jackson v. Pillsbury, supra.

42. Md.—Lambdin v. Dantzbecker, 181 A. 353, 169 Md. 240.

Mich.—Sprenger v. Sprenger, 299 N.W. 711, 298 Mich. 551.

Or.—Egr v. Egr, 131 P.2d 198, 170 Or. 1.

65 C.J. p. 332 note 23.

#### Surrender of advantage

Lawyer who drafted trust agreements making himself trustee was duty bound to make clear to settlor, beyond possibility of misunderstanding, fact that he was placing trust corpus in hands of unbounded individual with exceptionally wide powers and discretion with respect to its investment and safe keeping and that, as trustee, he was to receive extraordinarily large compensation for his services; and having failed to do so, equity would require that he be compelled to give up advantage gained by such transaction, without inquiry as to whether the advantage was fair or unfair.—Lederman v. Lisinsky, 112 N.Y.S.2d 203.

**Unfair advantage resulting to parent** in the execution of a trust by his child invalidates the trust.—Whitridge v. Whitridge, 24 A. 645, 76 Md. 54—Williams v. Williams, 63 Md. 371.

43. Ill.—Turley v. Turley, 30 N.E.2d 64, 374 Ill. 571.

Iowa.—Hatt v. Hatt, 265 N.W. 640.

Md.—Brown v. Mercantile Trust, etc., Co., 40 A. 256, 87 Md. 392.

Or.—Egr v. Egr, 131 P.2d 198, 170 Or. 1.

#### Confidential relationship held shown

Md.—Lambdin v. Dantzbecker, 181 A. 353, 169 Md. 240.

44. Cal.—Reiss v. Reiss, 114 P.2d 718, 45 Cal.App.2d 740.

Ill.—Turley v. Turley, 30 N.E.2d 64, 374 Ill. 571.

Md.—Kemper v. Raffel, 182 A. 461, 169 Md. 616.

Mo.—Hakewell v. Clemens, 190 S.W. 2d 912, 354 Mo. 686.

65 C.J. p. 332 note 27.

#### Commission

Fact that the grantee is entitled to a commission as trustee does not confer such a benefit as to make applicable the doctrine of confidential relations and give rise to presumption of undue influence.—Kemper v. Raffel, 182 A. 461, 169 Md. 616—65 C.J. p. 332 note 32.

45. Md.—Carroll v. Smith, 59 A. 131, 99 Md. 653.

Mo.—Hakewell v. Clemens, 190 S.W. 2d 912, 354 Mo. 686.

46. N.Y.—Kelly v. Ashforth, 95 N.Y.S. 1004, 47 Misc. 498, affirmed 96 N.Y.S. 1131, 111 App.Div. 922.

47. Md.—Brown v. Mercantile Trust, etc., Co., 40 A. 256, 87 Md. 377.

48. Cal.—Reiss v. Reiss, 114 P.2d 718, 45 Cal.App.2d 740.

or other blood relationship,<sup>49</sup> does not raise a presumption of undue influence.

### § 77. Duress

A declaration of trust procured by duress is invalid, but mere vexation and annoyance are not sufficient unless by reason thereof a state of insanity exists.

A declaration of trust procured by duress is invalid.<sup>50</sup> Mere vexation and annoyance are not sufficient unless, it has been held, it is shown that by reason of such vexation and annoyance a state of insanity exists at the time the trust is executed.<sup>51</sup>

### § 78. Illegality of Provisions

#### a. In general

#### b. Conditions or restrictions

Pa.—Doll v. Loesel, 138 A. 796, 288 Pa. 527

49. Ill.—Turley v. Turley, 20 N.E.2d 64, 274 Ill. 571

Md.—Kemper v. Ruffel, 182 A. 461, 169 Md. 616

50. U.S.—Prudential Ins. Co. of America v. Osadchy, D.C. Mo., 54 F.Supp. 711.

65 C.J. p. 332 note 34.

51. Ill.—Brower v. Callender, 105 Ill. 88.

52. Mo.—Corpus Juris quoted in Wade v. Wade, App., 108 S.W.2d 1058, 1061.

65 C.J. p. 332 note 38.

53. Mo.—Corpus Juris quoted in Wade v. Wade, App., 108 S.W.2d 1058, 1061

Mont.—Stroedbeck v. Benson, 80 P.2d 861, 107 Mont. 110.

Tex.—Wichita County v. Tittle, Civ. App., 27 S.W.2d 649, affirmed Com. App., 41 S.W.2d 11.

Purposes of trust generally see supra §§ 26-27.

**Invalidity should clearly appear** before the courts are warranted in nullifying the expressed will of a trustor and an inference of illegality or invalidity should not be drawn where a legitimate purpose is just as apparent.—Jenkins v. First Nat. Bank, C.C.A. Tex., 107 F.2d 764.

#### Violation of Servicemen's Readjustment Act

Oral trust agreement between veteran and mother to purchase house for mother with mother's money in name of veteran in order to procure for mother benefits of G.I. Bill of Rights, though she was not entitled to such benefits, was illegal and void because a fraud on the Servicemen's Readjustment Act, even though veteran lived in the house.—Perkins v. Hilton, 107 N.E.2d 822, 329 Mass. 291.

#### Violation of War Risk Insurance Act

A trust of insurance proceeds for the benefit of persons not within the

class prescribed by the War Risk Insurance Act and in violation thereof, has been held illegal.—Vincent v. Kelly, 195 N.Y.S. 57, 118 Misc. 591.

#### Holding property for aliens

Trust agreement, whereby citizen was to hold property for aliens and to reconvey on naturalization of one of alien owners and deed whereunder property was conveyed to citizen, was valid enforceable trust as against contention that it was illegal agreement to defraud state of opportunity to declare forfeiture of alien's property.—Vlahos v. Andrews, 1 N.E.2d 59, 362 Ill. 593.

#### Contract not illegal

Where storekeeper received chattels from owner under a bill of sale, absolute on its face, in order to secure a loan from a bank, but with parol understanding that after loan was repaid property was to belong to owner, and bank was fully protected because it took security without any knowledge of parol trust and in reliance on storekeeper's false statement that conveyance was absolute agreement, bill of sale was in no sense an illegal contract, nor was it rendered illegal simply because in carrying it out illegal acts were committed, and trust agreement was not invalidated because of illegal agreement.—Jrmingier v. Daniel, Tex. Civ. App., 185 S.W.2d 148, refused for want of merit.

54. U.S.—Jenkins v. First Nat. Bank, C.C.A. Tex., 107 F.2d 764.

N.J.—Dufford v. Nowakowski, 4 A.2d 314, 125 N.J.Eq. 262, affirmed 9 A.2d 302, 126 N.J.Eq. 529.

N.Y.—In re Crane, 34 N.Y.S.2d 9.

#### Manifest immorality

Trust provisions must be manifestly intended to bring about that which is, in morals, bad, before they will be declared void as against public policy, and such inference will not be drawn when legitimate purpose is just as apparent.—Jenkins v. First Nat.

#### a. In General

An express trust created in violation of fundamental principles of equity is a nullity and an express trust cannot be created to effect a purpose which is illegal, contrary to public policy, or in contravention of the law and the judgments of the courts.

The right to create an express trust is subordinate to the fundamental principles of equity, and an express trust created in violation of such principles is a nullity.<sup>52</sup> An express trust cannot be created to effect a purpose which is illegal,<sup>53</sup> contrary to public policy,<sup>54</sup> or in contravention of the law and the judgments of the courts.<sup>55</sup> A trust is invalid when the object is the suppression of a criminal

Bank, D.C. Tex., 26 F.Supp. 812, affirmed, C.C.A., 107 F.2d 764.

#### Type of trust

There is no valid distinction between testamentary trust and trusts inter vivos as far as questions of public policy are concerned.—Shannon v. Irving Trust Co., 9 N.E.2d 792, 275 N.Y. 95.

#### Provisions held not against public policy

(1) By the terms of a trust it may be provided that trustee shall vote as directed by settlor, or by a beneficiary, or by a third person; and where deeds of trust conveying shares of stock in family corporation were designed to continue family control and management of corporation, a provision in each deed of trust that trustee should deliver proxy to president or vice president of corporation was valid, and was not invalid on the ground that it provided for a perpetual proxy.—Edison v. Norristown-Penn Trust Co., 59 A.2d 82, 359 Pa. 386.

(2) An agreement assented to by all stockholders to transfer their stock in corporation to the corporation in trust to be transferred on the death of a stockholder to his son or some other person qualified to fill vacancy would not be opposed to public policy as restraint on owner's right of alienation.—Oakland Scavenger Co. v. Gandi, 124 P.2d 143, 51 Cal.App.2d 69.

(3) A parol agreement, whereby one of cotenants agreed that if other cotenants would permit land to be bid off to his agent at mortgage foreclosure sale he would advance money to pay it and would then sell land and divide proceeds equally among cotenants, was not invalid as against public policy.—Embler v. Embler, 32 S.E.2d 619, 224 N.C. 811.

55. Mo.—Wade v. Wade, App., 108 S.W.2d 1058.



prosecution.<sup>56</sup> On the other hand, a trust created for the purpose of evading the collateral inheritance tax has been held valid.<sup>57</sup> The creation of a partnership and trust in the same instrument is not contrary to law.<sup>58</sup> A trust in which the beneficiaries are described as the grantor's wife and children by him begotten does not show on its face that the consideration was illicit relations, so as to render it void.<sup>59</sup>

### b. Conditions or Restrictions

Conditions or restrictions attached to the enjoyment of a trust estate which are unlawful or opposed to public policy are void, and a condition that the beneficiary be reared in a certain faith has been held void as has a provision violative of the parent's right to care and custody.

Conditions or restrictions attached to the enjoyment of a trust estate which are unlawful or opposed to public policy are void.<sup>60</sup> So, a condition that the beneficiary of a trust be reared in a certain faith is void,<sup>61</sup> as is a provision violative of the parent's right to care and custody.<sup>62</sup> However, a provision forbidding the use of any portion of the income from a trust estate, created for the benefit of the settlor's son, for the support of the son's wife and child is not invalid as against public policy.<sup>63</sup>

**Conditions affecting marital relation.** In accordance with the rules discussed in Contracts §§ 233-237, governing the validity of agreements affecting marital relations, while a condition in a trust instrument is void which induces a separation or divorce,<sup>64</sup> or which is in restraint of marriage,<sup>65</sup> where the scheme of the trust does not tend to restrain marriage,<sup>66</sup> or to induce a separation or divorce,<sup>67</sup> the condition is valid. A grant of property to a husband in trust for the wife's separate use is not invalid by reason of a clause that should the husband and wife separate or divorce the husband would pay over the principal.<sup>68</sup>

### § 79. Partial Invalidity

The invalidity of some of the objects or provisions of a trust, or of part of several trusts created by the same instrument, will not affect the validity of remaining objects, provisions, or trusts which are separate and independent; but the rule is otherwise where the valid and invalid parts are so intertwined that one is not enforceable, according to the intent of the creator of the trust, without the other.

It is well settled that the invalidity of some of the objects or provisions of a trust, or of part of several trusts created by the same instrument, will not affect the validity of remaining objects, provisions, or trusts which are separate and independent but

Mont.—Streedbeck v. Benson, 80 P.2d 851, 107 Mont. 110.

N.Y.—In re Crane, 34 N.Y.S.2d 9.

56. N.Y.—Bettinger v. Bridenbecker, 63 Barb. 395.

57. Pa.—Tritt v. Crozier, 13 Pa. 451.—Baker v. Williamson, 4 Pa. 456.

58. Ala.—Henderson v. Henderson, 97 So. 353, 210 Ala. 73.

59. D.C.—Lanhardt v. Souder, 42 App.D.C. 278.

60. Conn.—Colonial Trust Co. v. Brown, 135 A. 555, 105 Conn. 261.

**Length of lease and building height**  
Restrictions forbidding leases for more than one year, or promises of them, or erecting buildings more than three stories, imposed on trust property, part of which was located in the heart of the city, where the trust would perhaps continue for seventy-five years and the restrictions would reduce the income and threaten proper development of the city, are invalid as against public policy.—Colonial Trust Co. v. Brown, *supra*.

61. Pa.—In re Devlin's Trust Estate, 130 A. 238, 284 Pa. 11.  
**Reservations and conditions in declaration of trust generally see *supra* § 47.**

62. Mo.—Wade v. Wade, App., 108 S.W.2d 1058.

### Rights of mother

Provision that settlor's son should be cared for by settlor's mother, was invalid under evidence that custody of minor son had been awarded to his mother in divorce suit, that probate court had accepted bond of minor's mother as guardian, and that she had taken proper care of minor.—Wade v. Wade, *supra*.

### Clear violation essential

The tendency in a trust to disrupt relationship of parent and child may not be found as basis for invalidating the trust, when it is not clearly apparent; and trust created for benefit of grandson after son had been taken from father because of father's alleged unfitness was not manifestly intended to separate father and son and hence void as against public policy because of provision that income should not be paid to grandson while living with father, notwithstanding father was subsequently pronounced fit to have custody of son, where relationship in fact was not disrupted.—Jenkins v. First Nat. Bank, D.C. Tex., 25 F.Supp. 312, affirmed, C.C.A., 107 F.2d 764.

**Provision expressing desire that designated person obtain custody of a child, but providing that in any event trustees should maintain and educate child, was not void as violating rights of child's parents**—Malone v. Herndon, 168 P.2d 272, 197 Okl. 26.

63. R.I.—Thurber v. Thurber, 112 A. 209, 43 R.I. 504.

64. Mass.—Coe v. Hill, 86 N.E. 949, 201 Mass. 15.  
N.Y.—O'Brien v. Barkley, 28 N.Y.S. 1049, 78 Hun 609.

65. S.C.—Cloud v. Calhoun, 31 S.C.L. 358.

66. S.C.—Cloud v. Calhoun, *supra*.

### Payments during widowhood

Provision for payments to settlor's widow as long as she should live and remain his widow was a valid provision and was not a general limitation or condition in restraint of marriage, unenforceable as in *terrorem* or void as being against public policy.—Goodman v. McMillan, 61 So.2d 55, 258 Ala. 125, certiorari denied 73 S.Ct. 789, 345 U.S. 929, 97 L.Ed. 1359, rehearing denied 73 S.Ct. 942, 345 U.S. 961, 97 L.Ed. 1381, rehearing denied 73 S.Ct. 1141, 345 U.S. 1004, 97 L.Ed. 1408, rehearing denied 74 S.Ct. 73, 346 U.S. 853, 98 L.Ed. 368, petition denied 74 S.Ct. 228, 346 U.S. 892, 98 L.Ed. 395, petition denied 74 S.Ct. 305, 346 U.S. 920, 98 L.Ed. 414.

67. Mo.—Williams v. Hund, 258 S.W. 703, 302 Mo. 451.  
68 C.J. p. 333 note 55.

68. Ky.—Waring v. Waring, 10 B. Mon. 331.

in such case the invalid portions will be rejected and the valid portions permitted to stand.<sup>69</sup> So, a life estate in trust, good in itself, is not destroyed by the invalidity of the remainder over.<sup>70</sup> The rule is otherwise where the trust instrument itself so provides,<sup>71</sup> or where the valid and invalid parts are so blended and intertwined in one scheme that one is not enforceable, according to the intent of the

creator of the trust, without the other.<sup>72</sup> Closely allied to the rule of severability is the doctrine of modifying clauses which permits a gift in trust to be valid in spite of the imposition of an invalid qualification thereof, if the gift and the qualification are verbally separable.<sup>73</sup> Essentially, it is a rule of construction employed to effectuate, insofar as possible, the intention of the trustor.<sup>74</sup>

69. Cal.—*Otto v. Union Nat. Bank of Pasadena*, 238 P.2d 961, 38 Cal 2d 233—*Davenport v. Davenport Foundation*, 222 P.2d 11, 36 Cal 2d 67—

In re *Micheletti's Estate*, 151 P.2d 833, 22 Cal 2d 904—In re *Gump's Estate*, 107 P.2d 17, 16 Cal 2d 525

Del.—*Wilmington Trust Co. v. Wilmington Trust Co.*, 15 A.2d 153, 25 Del.Ch. 121, affirmed 24 A.2d 309, 26 Del.Ch. 397, 139 A.L.R. 1117

D.C.—*Liberty Nat. Bank v. Hicks*, 173 F.2d 631, 84 U.S.App.D.C. 198, 9 A.L.R.2d 1355

Iowa.—*Corpus Juris cited in Gunn v. Wagner*, 48 N.W.2d 292, 298, 242 Iowa 1001

Mass.—*Rosenfeld v. Fine*, 10 N.E.2d 265, 298 Mass 356

Mich.—*Bateson v. Bateson*, 293 N.W. 795, 294 Mich. 426

N.Y.—*Matter of Eveland's Will*, 29 N.E.2d 471, 281 N.Y. 64—*Hawthorne v. Smith*, 7 N.E.2d 139, 273 N.Y. 291—*Morris v. Morris*, 5 N.E.2d 56, 272 N.Y. 110—In re *Fischer's Will*, 122 N.Y.S.2d 671, 282 App.Div. 367, modified on other grounds 120 N.E.2d 688, 307 N.Y. 149—*Application of Harris*, 96 N.Y.S.2d 88, 276 App.Div. 990, affirmed 98 N.E.2d 881, 302 N.Y. 752—In re *Trischett's Will*, 54 N.Y.S.2d 280, 184 Misc 589, opinion supplemented 57 N.Y.S.2d 394, 185 Misc 933, affirmed 59 N.Y.S.2d 621, 270 App.Div. 767—

In re *Brown's Estate*, 1 N.Y.S.2d 420, 164 Misc 65—In re *Heller's Trust*, Supp. 115 N.Y.S.2d 343—In re *Schaefer's Estate*, 99 N.Y.S.2d 27—In re *Munger*, 22 N.Y.S.2d 187

Ohio.—*Corpus Juris quoted in Lloyd v. McDiarmid*, 1 Ohio Supp. 136, 139, affirmed 19 N.E.2d 292, 60 Ohio App. 7

Pa.—In re *Wanamaker's Estate*, 6 A.2d 852, 335 Pa. 241

Va.—*Maguire v. Loyd*, 67 S.E.2d 885, 193 Va. 138

65 C.J. p.333 note 58.

Partial invalidity

Charitable trusts see *Charities* § 8

Voting trusts of stock see *Corporations* § 52 c (1)

Trusts generally violating rule against perpetuities or accumulations see *Perpetuities* §§ 20, 21, 26, 33, and 70.

The intention of the grantor at the time of the execution of a trust deed governs in the determination of whether each grant in the trust deed is separate and consequently sever-

able in case one of them is invalid—*Inteston v. Bateson*, 293 N.W. 795, 291 Mich. 426

#### Evaluation of occurrences

It is permissible and proper to examine and evaluate actual occurrences in determining whether a case is a proper one for application of rule which permits a severance of invalid trust provisions in order to sustain those which are valid—In re *Gump's Estate*, 107 P.2d 17, 16 Cal 2d 525

Generally, trust provisions for a valid term are separable from those for an invalid period where trust instrument shows trustor would have preferred separation to total invalidation or where invalid provisions only incidentally affect main scheme—In re *Gump's Estate*, supra

Invalidity of power to vote trust stock held not to invalidate other provisions of trust agreement—*Lloyd v. McDiarmid*, 19 N.E.2d 292, 60 Ohio App. 7

#### Uncertainty

General allegation that trust is void in toto for uncertainty cannot be sustained if trust provisions are good in any respect, or to any extent.—*Fuller v. Hedgworth*, 80 S.E.2d 18, 239 N.C. 370.

#### Invalidity as against some persons or rights

(1) The fact that provisions of trust agreement are ineffective to protect trust income from claims of settlor's creditors does not invalidate trust as whole or destroy remainder interests created by such agreement.—*Greenwich Trust Co. v. Tyson* 27 A.2d 166, 129 Conn. 211

(2) So, the mere fact that a trust was void as to widow's rights did not necessarily make it void as to the rights of other beneficiaries—*Wanamaker v. Kappel*, 218 S.W.2d 618, 358 Mo. 1077.

70. Del.—*Wilmington Trust Co. v. Wilmington Trust Co.*, 15 A.2d 153, 25 Del.Ch. 121, affirmed 24 A.2d 309, 26 Del.Ch. 397, 139 A.L.R. 1117.

71. N.Y.—*Chase Nat. Bank of New York City v. Reinicke*, 10 N.Y.S.2d 420.

72. Cal.—*Otto v. Union Nat. Bank of Pasadena*, 238 P.2d 961, 38 Cal 2d 233—*Davenport v. Davenport Foundation*, 222 P.2d 11, 36 Cal 2d 67—In re *Micheletti's Estate*, 151 P.2d 833, 22 Cal 2d 904.

Iowa.—*Corpus Juris cited in Ponzell v. Ponzell*, 26 N.W.2d 330, 333, 238 Iowa 201

N.Y.—*Schoen v. Yonkers Nat. Bank & Trust Co.*, 1 N.Y.S.2d 908, 166 Misc 393—In re *Allen*, 129 N.Y.S.2d 381, 65 C.J. p.333 note 59.

The Restatement of the Law of Trusts, § 65, which states that "If a provision in the terms of the trust is illegal, the intended trust fails altogether if, but only if, the illegal provision cannot be separated from the other provisions without defeating the purpose of the settlor in creating the trust" has been quoted with approval.

Pa.—In re *Wanamaker's Estate*, 6 A.2d 852, 335 Pa. 241

Va.—*Maguire v. Loyd*, 67 S.E.2d 885, 193 Va. 138.

Where an unascertainable portion of a fund is given on a valid trust and the residue on a valid trust, the whole trust fails—*Rhode Island Hospital Trust Co. v. Proprietors of Swan Point Cemetery*, 3 A.2d 236, 62 R.I. 83, affirmed 7 A.2d 205, 63 R.I. 79—*Kelly v. Nichols*, 21 A. 906, 17 R.I. 306, 19 L.R.A. 413.

#### Power to liquidate

If a trust fails for illegality, a power to liquidate given by the instrument creating the trust is illegal.—In re *Morrison's Estate*, 18 N.Y.S.2d 235, 173 Misc 503

73. Cal.—*Otto v. Union Nat. Bank of Pasadena*, 238 P.2d 961, 38 Cal 2d 233

74. Cal.—*Otto v. Union Nat. Bank of Pasadena*, supra

#### Qualification eliminated without destroying main intent

Trust indenture requiring payment of income to settlor during life and providing for termination of trust at his death and conveyance of trust estate to his issue per stirpes created valid remainder interests in settlor's issue, and under "modifying clauses doctrine" such interests were not invalidated by further invalid provision for retention in trust of remainder interest of any minor beneficiary during minority, since such invalid qualification was verbally separable from prior absolute gift and could be eliminated without destroying main intent of settlor.—*Otto v. Union Nat. Bank of Pasadena*, supra.

§ 80. What Law Governs

While it is clear that the validity of trusts of realty must be determined by the law of the situs of the realty, in the case of trusts of personalty no invariable rule as to what law governs can be formulated for all cases involving varying facts, and in determining the question numerous elements or factors may be considered, such as the intention of the settlor, his domicile, the domicile of the trustee, the location of the trust property, whether the trust is testamentary or inter vivos, and whether the property is tangible or intangible, but the authorities are not in complete accord, and some have given dominance to one element or combination of elements and some to another.

Questions concerning the validity of a trust must be determined in accordance with the laws of the state whose law is applicable thereto.<sup>75</sup> The fact that a trust is presumptively invalid under the law of the forum will not prevent enforcement of the trust, if valid under the governing law and not contrary to the prohibitory law of the forum.<sup>76</sup> Since, as discussed in Conflict of Laws § 19, the law of the situs of immovable property controls and governs its acquisition, disposition, and devolution, the validity of a trust of real estate must be determined by the law of its situs.<sup>77</sup>

75. Del.—Wilmington Trust Co. v. Wilmington Trust Co., 186 A. 903, 21 Del.Ch. 188.

What law governs? Charitable trusts see Charities § 79.

Construction and administration of trusts generally see infra § 160. Construction and administration of testamentary trusts see the C.J.S. title Wills § 587, also 69 C.J. p 48 note 67-p 49 note 72. Resulting trusts see infra § 99.

**Administration**

Where question of validity of trust is stirred by dispute over administration, tribunal having authority to determine administration must decide validity according to laws of foreign state whose law is applicable thereto.—Wilmington Trust Co. v. Wilmington Trust Co., *supra*.

76. U.S.—Warner v. Florida Bank & Trust Co., at West Palm Beach, C. C.A. Fla., 160 F.2d 766.

77. U.S.—Corpus Juris cited in Jenkins v. First Nat. Bank in Dallas, D.C.Tex., 26 F.Supp. 312, 313.

Del.—Wilmington Trust Co. v. Wilmington Trust Co., 15 A.2d 153, 25 Del.Ch. 121, affirmed 24 A.2d 509, 139 A.L.R. 1117.

Ga.—Clark v. Baker, 196 S.E. 750, 186 Ga. 65.

Mass.—Herman v. Edington, 118 N.E. 2d 865.

N.Y.—In re Morris' Will, 97 N.Y.S. 2d 740, 197 Misc. 322.—In re Neill's Estate, 89 N.Y.S.2d 394, 195 Misc. 690.—In re Piazza's Estate, 130 N.Y.S.2d 244.—New England Trust Co.

v. Wilcox, 41 N.Y.S.2d 527, affirmed 48 N.Y.S.2d 557, 267 App.Div. 976. Wash.—Laughlin v. March, 145 P.2d 549, 19 Wash.2d 874. 65 C.J. p 334 note 62.

**Trust of real and personal property**

(1) The validity of trust involving real and personal property situated in foreign country has been held to be governed by the laws of that country.—In re Smith's Mill, 67 N.Y.S.2d 330.

(2) It has also been held that the validity of a trust agreement involving real and personal property is governed by the law of the state where property was situated and the agreement was executed and was to be performed.—National City Bank of Home v. First Nat. Bank of Birmingham, Ala., 19 S.E.2d 19, 193 Ga. 477.

78. Del.—Wilmington Trust Co. v. Wilmington Trust Co., 15 A.2d 153, 25 Del.Ch. 121, affirmed 24 A.2d 509, 26 Del.Ch. 397, 139 A.L.R. 1117. Ga.—Clark v. Baker, 196 S.E. 750, 186 Ga. 65.

Ky.—Kitchen v. New York Trust Co., 168 S.W.2d 5, 292 Ky. 706.

What law governs construction and administration of trust of personalty see infra § 160.

"Much confusion has existed concerning the law that controls the validity . . . of inter vivos trusts of intangible personal property where the domicile of the settlor is in one state and place of administration is in another"—Shannon v. Irving

*Personal property.* The determination of what law governs the validity of trusts of personal property is not free from difficulty.<sup>78</sup> In the absence of a controlling statutory provision,<sup>79</sup> no invariable rule can be formulated for all cases involving varying facts, at least in the case of inter vivos trusts of intangible personal property.<sup>80</sup> In determining the question numerous elements or factors may be considered,<sup>81</sup> such as the intention of the settlor, his domicile, the domicile of the trustee, the location of the trust property, the place in which the business of the trust is carried on, whether the trust is testamentary or inter vivos,<sup>82</sup> and whether the property involved is tangible or intangible.<sup>83</sup> The authorities are not in complete accord, and some have given dominance to one element or combination of elements and some to another,<sup>84</sup> although it seems to be a generally recognized rule that where a preponderant number of the elements are grouped in one state the group prevails over any single element, and especially so where the intention of the settlor is included in the larger group.<sup>85</sup> Some authorities apparently regard the intention of the

Trust Co., 9 N.E.2d 792, 793, 275 N.Y. 95.

79. N.Y.—In re Weinstein's Estate, 28 N.Y.S.2d 137, 176 Misc. 592.

80. N.Y.—Shannon v. Irving Trust Co., 9 N.E.2d 792, 275 N.Y. 95.

81. Ky.—Kitchen v. New York Trust Co., 168 S.W.2d 5, 292 Ky. 706. N.Y.—Shannon v. Irving Trust Co., 9 N.E.2d 792, 275 N.Y. 95.

**Ordinary, domicile of beneficiaries** is accorded slight importance.—Kitchen v. New York Trust Co., 168 S.W.2d 5, 292 Ky. 706.

82. N.Y.—Kitchen v. New York Trust Co., *supra*.—In re Griswold's Trust, 99 N.Y.S.2d 420.

83. N.Y.—In re Weinstein's Estate, 28 N.Y.S.2d 137, 176 Misc. 592.—In re Griswold's Trust, 99 N.Y.S.2d 420.

84. Ky.—Kitchen v. New York Trust Co., 168 S.W.2d 5, 292 Ky. 706.

85. Ky.—Kitchen v. New York Trust Co., *supra*. N.Y.—In re Griswold's Trust, 99 N.Y.S.2d 420.

**Particular combinations determinative**

(1) The law of the state wherein settlor and beneficiary resided and where trust was made has been held to govern the validity of the trust.—Hutchinson v. Hutchinson, 119 P.2d 214, 48 Cal.App.2d 12.

(2) So the law of the state where the instrument was executed, where the settlor and trustee resided, and where the trust estate was delivered

settlor as controlling,<sup>86</sup> especially in the case of inter vivos trusts,<sup>87</sup> and have held or declared that the validity of the trust should be determined according to the law chosen by the settlor,<sup>88</sup> or according to his intention<sup>89</sup> if there is a real connection between the selected jurisdiction and the transaction,<sup>90</sup> or the trust res is delivered to the trustee in the selected jurisdiction and there administered,<sup>91</sup> unless to do so is contrary to the public policy of the state in which a determination is sought.<sup>92</sup> The intent of the settlor when not directly expressed in the trust instrument is to be gathered from all the facts and circumstances,<sup>93</sup> including the settlor's

domicile, the domicile of the trustee, the location of the trust res, and the delivery thereof to the trustee under the terms of the trust.<sup>94</sup> Although it has been stated that the domicile of the settlor is no longer the absolute and controlling consideration,<sup>95</sup> other authorities have held or declared that the domicile of the settlor is generally the controlling factor,<sup>96</sup> especially in the case of testamentary trusts,<sup>97</sup> and not the domicile of the beneficiary.<sup>98</sup> Still other authorities have held that the law of the place where the transaction takes place determines the validity of an inter vivos trust of personality,<sup>99</sup> or of a trust of choses in action created

and held has been held to be controlling—*U. S. v. Pierce*, C.C.A. Minn., 137 F.2d 428, 148 A.L.R. 1228.

(3) Trust of bank account held governed by law of state where agreement executed, where bank account located, and trustee domiciled—*Boyle v. Kempkin*, 9 N.W.2d 589, 243 Wis. 86.

(4) The situs of a trust created by a deed inter vivos is in the jurisdiction where the deed of trust was executed and where the settlor was then domiciled, where the trust res was then located, where it was to be administered by a corporation organized under the laws of that jurisdiction, and where the donee of a power of appointment over the trust res then resided—*In re Barton's Estate*, 49 Pa.Dist. & Co. 273.

86. Del.—*Wilmington Trust Co. v. Wilmington Trust Co.*, 186 A. 903, 21 Del.Ch. 188.  
65 C.J. p 334 note 63.

**Additional deposits in another state**  
Where from all the facts and circumstances attending the creation of a trust it is apparent that the settlor intended the law of a particular state to govern the determination of the validity of the trust, the circumstance that additional deposits of trust funds were made with the trustee in another state would not be taken as manifesting an intent that the validity of the trust with respect to such additional deposits should be governed by the law of the state where the deposits were made.—*Wilmington Trust Co. v. Wilmington Trust Co.*, supra.

87. Del.—*Wilmington Trust Co. v. Wilmington Trust Co.*, supra.

**The express or clearly implied intent of settlor may control as to the law applicable in determining the validity of an inter vivos trust of intangible personal property, where domicile of settlor and actual and business situs of trust do not coincide.**—*Shannon v. Irving Trust Co.*, 9 N.E.2d 792, 275 N.Y. 95—*City Bank Farmers Trust Co. v. Meyn*, 34 N.

Y.S.2d 373, 263 App.Div. 671—*In re Griswold's Trust*, 99 N.Y.S.2d 420.

88. N.Y.—*Shannon v. Irving Trust Co.*, 9 N.E.2d 792, 275 N.Y. 95—*Application of New York Trust Co.*, 87 N.Y.S.2d 787, 195 Misc. 598—*In re Ash's Trust*, 111 N.Y.S.2d 116—*In re Griswold's Trust*, 99 N.Y.S.2d 420.

89. Del.—*Wilmington Trust Co. v. Wilmington Trust Co.*, 186 A. 903, 21 Del.Ch. 188.

Ky.—*Kitchen v. New York Trust Co.*, 168 S.W.2d 5, 292 Ky. 706.

N.Y.—*In re Griswold's Trust*, 99 N.Y.S.2d 420—*Shipman v. Title Guarantee & Trust Co.*, 20 N.Y.S.2d 568.

90. Ky.—*Kitchen v. New York Trust Co.*, 168 S.W.2d 5, 292 Ky. 706.

N.Y.—*In re Griswold's Trust*, 99 N.Y.S.2d 420.

91. Del.—*Wilmington Trust Co. v. Wilmington Trust Co.*, 186 A. 903, 21 Del.Ch. 188.

92. N.Y.—*Shannon v. Irving Trust Co.*, 9 N.E.2d 792, 275 N.Y. 95.

93. Del.—*Wilmington Trust Co. v. Wilmington Trust Co.*, 186 A. 903, 21 Del.Ch. 188.

N.Y.—*In re Griswold's Trust*, 99 N.Y.S.2d 420.

**Trust indenture executed at later time may cast light on settlor's intent.**—*In re Griswold's Trust*, supra.

94. Del.—*Wilmington Trust Co. v. Wilmington Trust Co.*, 15 A.2d 153, 25 Del.Ch. 121, affirmed 24 A.2d 309, 26 Del.Ch. 397, 139 A.L.R. 1117—*Wilmington Trust Co. v. Wilmington Trust Co.*, 186 A. 903, 21 Del.Ch. 188.

95. N.Y.—*Shannon v. Irving Trust Co.*, 9 N.E.2d 792, 275 N.Y. 95—*In re Griswold's Trust*, 99 N.Y.S.2d 420—*Shipman v. Title Guarantee & Trust Co.*, 20 N.Y.S.2d 568.

96. U.S.—*Corpus Juris* cited in *Benjamin v. First Trust Co. of St. Paul*, C.C.A. Minn., 103 F.2d 260, 265.  
Ga.—*Clark v. Baker*, 196 S.E. 750, 186 Ga. 65.

*Md.—Fletcher v. Safe Deposit & Trust Co.*, 67 A.2d 386, 193 Md. 400.

Mass.—*Amerige v. Attorney General*, 88 N.E.2d 126, 324 Mass. 648.

N.J.—*Hansbrouck v. Martin*, 183 A. 755, 120 N.J.Eq. 96.

Ohio.—*Merritt-Central Trust Co. v. Chaffin*, Com.Pl., 73 N.E.2d 388.

65 C.J. p 331 note 66—12 C.J. p 477 note 78.

#### Situs of inter vivos trust

(1) The situs of an inter vivos trust of personality is at the domicile of the creator.—*In re Kip's Trust*, 93 A.2d 49, 23 N.J.Super. 372—*David v. Atlantic County Soc. for Prevention of Cruelty to Animals*, 19 A.2d 896, 129 N.J.Eq. 501—*Hansbrouck v. Martin*, 183 A. 755, 120 N.J.Eq. 96—*Sweetland v. Sweetland*, 149 A. 50, 105 N.J.Eq. 608, affirmed 153 A. 907, 107 N.J.Eq. 501.

(2) The fact that the donor or creator changes domicile after creation of the trust does not change the rule.—*David v. Atlantic County Soc. for Prevention of Cruelty to Animals*, supra.

97. Cal.—*Whitney v. Dodge*, 38 P. 636, 105 Cal. 192.

Del.—*Wilmington Trust Co. v. Wilmington Trust Co.*, 186 A. 903, 21 Del.Ch. 188.

N.J.—*Howard Sav. Inst. v. Baronych*, 73 A.2d 853, 8 N.J.Super. 599.  
65 C.J. p 331 note 68.

**Domiciliary law at time of testator's death governs the validity of the trust.**—*Amerige v. Attorney General*, 88 N.E.2d 126, 324 Mass. 648—65 C.J. p 334 note 68.

98. N.Y.—*Merritt v. Cortes*, 24 N.Y. 561.

99. N.J.—*Howard Sav. Inst. v. Baronych*, 73 A.2d 853, 8 N.J.Super. 599.

#### Law of state where trust made held to govern

*U.S.—Fricke v. Weber*, C.C.A. Ohio, 145 F.2d 737—*Mayfield v. First Nat. Bank of Chattanooga, Tenn.*, C.C.A. Tenn., 137 F.2d 1013.

by a settlement or other transaction inter vivos.<sup>1</sup> It has also been held that the validity of a trust of personal property must be determined by the law of the state where the property is situated and the parties intend that it should be administered;<sup>2</sup> and in this connection it has been held that the validity of a trust of documents which in the market place are treated as property is determinable, like tangible chattels, by the law of the state wherein the documents are situated,<sup>3</sup> but that this rule does not apply to choses in action or intangible property not embodied or merged in a mercantile document and documents which are merely evidence of property.<sup>4</sup> A trust offending the public policy of the state in which it is to be administered cannot be established, regardless of the settlor's residence.<sup>5</sup> On the other hand, where a trust is to be administered in a state other than that of the domicile of the settlor, and is valid where it is to be administered, it will be held valid by the courts of the domiciliary state even though invalid under the domiciliary law.<sup>6</sup> With respect to trusts of money deposited in a bank, as discussed supra § 54, it has been held that the law of

the state in which a tentative trust is created and is to be performed governs, notwithstanding the depositor is domiciled in another state when the trust is created and at the time of his death,<sup>7</sup> and the beneficiary is domiciled in the same state as the depositor.<sup>8</sup>

*The law in effect at the time of the creation of the trust governs its validity,<sup>9</sup> and for this purpose a trust is regarded as created when the cestui becomes entitled to its benefits.<sup>10</sup>*

### § 81. Right to Contest Validity

In general, the validity of a trust may be questioned only by one who will be entitled to some interest in the property in case the trust is declared invalid, and then only when he is not estopped, or barred by the terms of the trust instrument, but the court may sua sponte, as a matter of public policy, be required to determine the validity of the trust.

In general, the validity of a trust may be questioned only by one who will be entitled to some interest in the property in case the trust is declared invalid,<sup>11</sup> and then only when he is not estopped,<sup>12</sup> or barred by the terms of the trust instrument.<sup>13</sup>

1. U.S.—*Warner v. Florida Bank & Trust Co.*, at West Palm Beach, C.C.A.Fla., 160 F.2d 766.

N.J.—*Hooton v. Neeld*, 97 A.2d 153, 12 N.J. 395—*Conry v. Maloney*, 76 A.2d 899, 5 N.J. 590—*Cutts v. Najdrowski*, 198 A. 885, 123 N.J.Eq. 481.

Wis.—*Boyle v. Kempkin*, 9 N.W.2d 589, 243 Wis. 86.

2. N.Y.—*Hutchinson v. Ross*, 187 N.E. 65, 262 N.Y. 381, 89 A.L.R. 1007, reargument denied 188 N.E. 102, 262 N.Y. 643, 89 A.L.R. 1023.

Trust created and administered in state, where corpus was located, was governed by law of such state—*Forbes v. C. I. R.*, C.C.A.1, 82 F.2d 204.

Trust to take effect in foreign country and which is to be administered by trustees resident there, for beneficiaries resident there is governed by laws of the foreign country and not law of settlor's domicile—*In re Grant's Will*, 101 N.Y.S.2d 423, 200 Misc. 35.

3. N.Y.—*Hutchinson v. Ross*, 187 N.E. 65, 262 N.Y. 381, 89 A.L.R. 1007—*In re Saddy*, 129 N.Y.S.2d 163.

4. N.Y.—*Hutchinson v. Ross*, 187 N.E. 65, 262 N.Y. 381, 89 A.L.R. 1007—*In re Weinstein's Estate*, 28 N.Y.S.2d 137, 176 Misc. 592.

5. N.Y.—*Hutchinson v. Ross*, 187 N.E. 65, 262 N.Y. 381, 89 A.L.R. 1007, reargument denied 188 N.E. 102, 262 N.Y. 643, 89 A.L.R. 1023—*City Bank Farmers Trust Co. v. Cheek*, 110 N.Y.S.2d 431, 202 Misc. 303.

6. Del.—*Wilmington Trust Co. v. Wilmington Trust Co.*, 186 A. 903, 21 Del.Ch. 188.

Md.—*Smith v. Mercantile Trust Co. of Baltimore*, 86 A.2d 504, 199 Md. 264—*Fletcher v. Safe Deposit & Trust Co.*, 67 A.2d 386, 193 Md. 400—*Vansant v. Roberts*, 3 Md. 119.

Mass.—*Amerige v. Attorney General*, 88 N.E.2d 126, 324 Mass. 648.

N.Y.—*Hope v. Brewer*, 32 N.E. 558, 136 N.Y. 126—*In re Grant's Will*, 101 N.Y.S.2d 423, 200 Misc. 35—*In re Shipman's Will*, 40 N.Y.S.2d 373.

Where property, domicile, and place of business of trustee, and the place of administration intended by the settlor are in a state other than that of the settlor's domicile, the law of such state determines the validity of the trust.—*National Shawmut Bank of Boston v. Cunningham*, 91 N.E.2d 337, 325 Mass. 457.

7. N.J.—*Cutts v. Najdrowski*, 198 A. 885, 123 N.J.Eq. 481—*Focchi v. Smith*, Ch. 97 A. 283.

8. N.J.—*Cutts v. Najdrowski*, 198 A. 885, 123 N.J.Eq. 481.

Bankbook in another state

However, where the bankbook was at all times kept and still was situated within the state where depositor and beneficiary were domiciled, rather than in state where bank was situated, it was held that law of state where parties were domiciled and book was kept governed validity—*In re Weinstein's Estate*, 28 N.Y.S.2d 137, 176 Misc. 592.

9. N.Y.—*In re Hyatt's Will*, 81 N.Y.S.2d 911.

10. N.Y.—*In re Hyatt's Will*, supra.

11. Pa.—*In re Renner's Estate*, 57 A.2d 836, 358 Pa. 409.

65 C.J. p. 334 note 73.  
Persons entitled to cancellation see infra § 86.

12. N.Y.—*Uldwin v. Palen*, 53 N.Y.S. 520, 24 Misc. 170.

65 C.J. p. 334 note 74.  
Estoppel or waiver as to defects or objections see infra § 83.

Trustee after letter admitting trust sent to one of the beneficiaries, could not, after litigation concerning the trust, change his reason and deny existence of the trust—*Ross v. Ross*, 94 N.E.2d 885, 406 Ill. 598.

Where spouses in consideration of divorce, entered into an agreement for creation of a trust for the benefit of plaintiff, their minor son and corpus of trust was placed in hands of trustee, who was willing to execute the trust, neither father nor mother, both being in pari delicto, could assent validity of trust, hence trustee held trust for plaintiff's benefit—*Thompson v. Finholm*, 77 N.Y.S.2d 75, affirmed 85 N.Y.S.2d 314, 274 App.Div. 992.

Where lapse of time was held not to bar party from asserting invalidity of trust—*Atlantic Nat. Bank of Jacksonville, Fla. v. St. Louis Union Trust Co.*, 211 S.W.2d 2, 357 Mo. 770.

13. Mo.—*Rossi v. Davis*, 133 S.W.2d 363, 345 Mo. 362, 125 A.L.R. 1111.

Consequently, strangers to the trust have no right to attack it,<sup>14</sup> unless their position as creditors gives them such right.<sup>15</sup> Where a person waives his claim to part of an estate consisting of a trust, he has no standing to attack the validity of the trust.<sup>16</sup> However, the court may sua sponte, as a matter of public policy, be required to determine the validity of the trust,<sup>17</sup> and in such case the standing of a party to challenge the validity of the trust is immaterial.<sup>18</sup>

**Statute of Frauds.** In accordance with the general rules discussed in Frauds, Statute of, § 220, the right to invoke the statute of frauds is a personal privilege not available to strangers to the trust.<sup>19</sup> The statute does not prevent a trustee from carrying out a parol trust, but merely makes it voidable at his option,<sup>20</sup> and when the trustee has by his conduct ratified and affirmed the trust and induced others to change their position because of it, the doctrine of equitable estoppel, as discussed infra § 83, comes into play. No one except the trustee or persons succeeding to his interest may take advantage of a failure to comply with the statute.<sup>21</sup> If the trustee chooses not to avoid the trust, it has

been held that his judgment creditor has no standing to complain,<sup>22</sup> nor has the trustee's trustee in bankruptcy.<sup>23</sup>

## § 82. Ratification of Defective or Invalid Trust

An invalid trust may, in some cases, be validated by ratification.

An invalid trust may, in some cases, be validated by ratification.<sup>24</sup> When a trust is invalid when its creation is attempted, but subsequently the impediment to its validity is removed, a good and valid trust may be created by a subsequent ratification of the terms of the invalid trust.<sup>25</sup> A settlor may not contend that a trust instrument was executed by mistake where he subsequently ratifies the trust,<sup>26</sup> and a trust agreement induced by undue influence can be ratified by the settlor on his restoration to freedom of action.<sup>27</sup> However, there can be no effective ratification of a trust agreement procured by false representations while the person whose ratification is claimed remains in ignorance of their falsity.<sup>28</sup>

### Forfeiture provision

Generally, a trust instrument providing for forfeiture in event of contest is enforceable as against contention that it is contrary to public policy.—*Rossi v. Davis*, supra.

14. Tex.—*Neilon v. Texas Trust & Security Co.*, Civ.App., 147 S.W.2d 321, error dismissed, judgment correct.

65 C.J. p 334 note 75.

15. Tenn.—*Hornsby v. City Nat. Bank*, Ch., 60 S.W. 160.  
65 C.J. p 334 note 76.

16. Md.—*Tarbert v. Rollins*, 100 A. 637, 130 Md. 418.

17. N.Y.—In re *Trischett's Will*, 54 N.Y.S.2d 280, 184 Misc. 599, opinion supplemented 57 N.Y.S.2d 394, 185 Misc. 933, affirmed 59 N.Y.S.2d 631, 270 App.Div. 767.

### Violation of rule against perpetuities

Where complaint in action by trustee for decree authorizing trustee to render account of proceedings raised question of validity of trust as violative of rule against perpetuities, court as a matter of public policy was required to determine the question even sua sponte.—*Bankers Trust Co. v. Topping*, 41 N.Y.S.2d 736, 180 Misc. 596.

18. N.Y.—*Bankers Trust Co. v. Topping*, supra.

19. Cal.—*Cardoza v. White*, 27 P. 2d 639, 219 Cal. 474.

65 C.J. p 335 note 73.

Parol trusts and the effect of the statute of frauds on trusts generally see supra §§ 31-41.

Pleading statute in suit to enforce trust see infra §§ 460, 461.

**Creditor of grantor in trust** was not entitled to challenge voluntary completed performance by trustee on ground agreement creating trust was oral and in violation of statute of frauds.—*Cardoza v. White*, 27 P.2d 639, 219 Cal. 474.

20. Cal.—*Haskell v. First Nat. Bank*, 91 P.2d 931, 33 Cal. App.2d 399.

Pa.—*Kaufman v. Kaufman*, 109 A. 640, 266 Pa. 270.

21. N.J.—*Lach v. Weber*, 197 A. 417, 123 N.J. Eq. 303.

### Beneficiaries barred

In partition proceeding by two brothers against a sister wherein sister sought to bring in by counterclaim an additional piece of property which she had allegedly acquired in trust for the benefit of the brothers as well as herself pursuant to an oral agreement, the brothers as beneficiaries were not authorized to challenge the agreement on ground that agreement violated statutory requirement that declarations of trust in realty be manifested by a writing.—*Lach v. Weber*, supra.

22. Pa.—*Kaufman v. Kaufman*, 109 A. 640, 266 Pa. 270.  
65 C.J. p 335 note 81.

23. Cal.—*Owings v. Laugharn*, 128 P.2d 114, 53 Cal. App.2d 789.

24. Mich.—*Vanderlinde v. Bankers' Trust Co. of Muskegon*, 259 N.W. 337, 270 Mich. 599.

Tex.—*Hute v. Stickney*, Civ.App., 160 S.W.2d 302, error refused.  
65 C.J. p 335 note 83.

### Acceptance of payments

Grantor-beneficiary by accepting payments from trustee as provided in trust instrument ratified trust, if ratification were necessary.—*Kemper v. Ruffel*, 182 A. 461, 169 Md. 616.

25. U.S.—*Boyd v. U. S.*, D.C.Conn., 34 F.2d 488.  
65 C.J. p 335 note 84.

26. Md.—*Ricards v. Baltimore Safe Deposit, etc., Co.*, 55 A. 384, 97 Md. 608, 63 L.R.A. 145.  
65 C.J. p 335 note 85.

27. Mich.—*Vanderlinde v. Bankers' Trust Co. of Muskegon*, 259 N.W. 337, 270 Mich. 599.

**Grantor's execution of valid will incorporating trust agreement by reference had effect of ratifying trust and conveying to trust all property of grantor not before legally conveyed**—*Vanderlinde v. Bankers' Trust Co. of Muskegon*, supra.

28. N.Y.—*Brundige v. Bradley*, 51 N.Y.S.2d 830, affirmed 51 N.Y.S.2d 636, 268 App. Div. 952, reversed on other grounds 62 N.E.2d 385, 294 N.Y. 345.

### § 83. Estoppel or Waiver as to Defects or Objections

While the parties may not by consent validate a trust which is by law invalid, a person may on general principles of estoppel be precluded from asserting the invalidity of a trust.

While the parties may not by consent validate a trust which is by law invalid,<sup>29</sup> a person may on general principles of estoppel be precluded from asserting the invalidity of a trust.<sup>30</sup> So, the creator of a trust and those claiming through him may, under some circumstances, be estopped to question the validity of the trust.<sup>31</sup> It is generally indispensable to the application of the doctrine of equitable estoppel that the person claimed to be estopped shall have full knowledge of the facts at the time when the conduct relied on as the basis of the estoppel takes place.<sup>32</sup> In accordance with the general rule, as discussed in Estoppel § 150, that an estoppel in pais operates on a right or title which is voidable, and not on one which is void, the doctrine of estoppel cannot operate to make valid a trust instrument void from its very inception.<sup>33</sup>

Where a purported trust is ineffective because it is testamentary in vesting an interest only on the grantor's death, as discussed supra § 29, the

beneficiaries obtain no rights under a trust by way of estoppel because the trustee proceeds to carry out the trust.<sup>34</sup> The requirement of a writing to prove a trust under the statute of frauds, as discussed supra §§ 31-41, is not waived where parol evidence is objected to, although the objection is imperfectly expressed.<sup>35</sup>

**Estoppel of trustee.** Except where a trustee has been deceived,<sup>36</sup> by accepting the trust and undertaking to perform part or all of the duties devolving on him, he is estopped to deny the validity of the trust.<sup>37</sup> Since, as discussed supra § 81, the statute of frauds does not prevent a trustee from carrying out a parol trust, but merely makes it voidable at his option, when the trustee has by his conduct ratified and affirmed the trust and induced others to change their position because of it, the doctrine of equitable estoppel comes into play and the trustee cannot deny the validity of the trust on the ground that it violates the statute of frauds.<sup>38</sup> However, the estoppel should be limited to saving harmless, or making whole, the person in whose favor it arises, and should not be an instrument of gain or profit.<sup>39</sup> The fact that a person considers himself a trustee does not foreclose him from

29. N.Y.—*In re Carvalho's Will*, 57 N.Y.S.2d 311, affirmed 57 N.Y.S.2d 336, 269 App.Div. 904.

30. Ill.—*Crawford Realty & Development Corp v Woodlawn Trust & Sav. Bank*, 47 N.E.2d 81, 382 Ill. 354.

Iowa.—*Meents v. Comstock*, 296 N.W. 721, 230 Iowa 63.

N.J.—*Basson v. Enoch-Dearl Co.*, 54 A.2d 824, 140 N.J.Eq. 125.

N.C.—*Commercial Nat. Bank of Charlotte v. Charlotte Supply Co.*, 38 S.E.2d 562, 226 N.C. 416.

31. D.C.—*Liberty Nat. Bank v. Hicks*, 173 F.2d 631, 84 U.S.App.D.C. 198, 9 A.L.R.2d 1355.

Iowa.—*Meents v. Comstock*, 296 N.W. 721, 230 Iowa 63.  
65 C.J. p 335 note 92.

Persons who sign trust deed, cannot plead ignorance of its contents if they had opportunity to read it and capacity to understand it.—*Hesseltine v. First Methodist Church of Vancouver*, 161 P.2d 157, 23 Wash.2d 315.

**Spendthrift provisions of trust** unlawful as to creditors, could not be invoked by husband to strike provisions for benefit of children by his first wife, and second wife to whom husband sought to give one-half of the trust property was not in legal

effect a creditor and had no better right to set the trust aside than husband.—*Liberty Nat. Bank v. Hicks*, 173 F.2d 631, 84 U.S.App.D.C. 198, 9 A.L.R.2d 1355.

32. **Knowledge of falsity of trustee's representations**

Parties could not estop themselves from asserting trustee's fraud in obtaining trust instruments while they remained ignorant of falsity of trustee's representations on strength of which they executed instruments.—*Brundage v. Bradley*, 51 N.Y.S.2d 830, affirmed 51 N.Y.S.2d 636, 268 App.Div. 952, reversed on other grounds 62 N.E.2d 385, 294 N.Y. 345.

33. Mo.—*Atlantic Nat. Bank of Jacksonville, Fla v. St. Louis Union Trust Co.*, 211 S.W.2d 2, 357 Mo. 770.

34. Cal.—*Niccolls v. Niccolls*, 143 P. 712, 168 Cal. 444.

35. Okl.—*Chandler v. Roe*, 148 P. 1026, 46 Okl. 349.

36. Ind.—*Ralph v. George*, 136 N.E. 44, 78 Ind.App. 491.  
65 C.J. p 335 note 94.

37. U.S.—*Bird v. Stein*, CA Miss., 204 F.2d 122, rehearing denied 205 F.2d 512.

Pa.—**Corpus Juris** cited in *Carter v. Carter*, 184 A. 78, 80, 321 Pa. 391.—*In re Briggs' Estate*, 27 A.2d 430,

150 Pa.Super. 66.—*Henry v. Henry*, Com.Pl., 62 Montg Co. 45.  
65 C.J. p 335 note 95  
Estoppel to deny creator's title see *Infra* § 181

**Asserting beneficiary's freedom from trust**

Trustees would not be permitted to make contention that a sole and separate use trust attempted to be set up by trustor for daughter was void under state laws because it was not made for benefit of a person actually contemplating marriage with a specific person, so that funds belonged to daughter from beginning free of trust restrictions.—*In re Briggs' Estate*, 27 A.2d 430, 150 Pa. Super. 66.

**Trust based on unlawful consideration**

Trustee was not entitled to refuse payment to settlor's second wife, who was one of beneficiaries, on ground that consideration for such gift was unlawful because her marriage to deceased was bigamous.—*Carter v. Carter*, 184 A. 78, 321 Pa. 391.

38. Cal.—*Haskell v. First Nat. Bank*, 91 P.2d 931, 33 Cal.App.2d 399.  
Right of trustee of parol trust to take advantage of statute of frauds see *supra* § 81.

39. Ala.—*McCarty v. Gant*, 29 So. 2d 136, 248 Ala. 668.

claiming that he is not when in fact no trust exists.<sup>40</sup>

**Estoppel of beneficiaries.** Under general rules, beneficiaries are prohibited from claiming under the trust and at the same time asserting that it is invalid.<sup>41</sup> Where a person receives his share of an estate and acknowledges it as in full of all his interest, he may not attack the validity of a trust in favor of others created by the same grantor.<sup>42</sup> Where, however, a beneficiary under a trust deed is given an illegal preference as a creditor, another beneficiary may attack such preference and still claim under the trust deed.<sup>43</sup>

**A settlement agreement compromising litigation** involving the validity of a trust, if meeting the essential requirements of a valid settlement, as discussed in *Compromise and Settlement* §§ 2-15, is binding on the parties thereto,<sup>44</sup> and a decree approving such agreement is res judicata<sup>45</sup> and not subject to collateral attack.<sup>46</sup>

## § 84. Effect of Invalidity

Where a conveyance in trust is invalid or ineffectual for any reason, legal title will be deemed to have remained in the settlor, and if a trust agreement is obtained by fraud, no one can obtain a vested or contingent interest in the property.

Where a conveyance in trust is invalid or ineffectual for any reason, legal title will be deemed to have remained in the settlor,<sup>47</sup> especially where it appears that settlor did not intend that the beneficiaries should have title immediately.<sup>48</sup> If a trust agreement is obtained by fraud, no one can obtain a vested or contingent interest in the property.<sup>49</sup> However, where a trust is adjudged void, the trustee's payments of income to the beneficiary are not recoverable by the settlor where such payments are acquiesced in by him.<sup>50</sup> It has been held that if the trust is invalid it cannot be held to create a valid power in trust.<sup>51</sup>

## 8. CANCELLATION, REFORMATION, AND REVOCATION

### § 85. Cancellation

#### a. In general

#### b. Proceedings and relief

#### a. In General

A trust may be canceled, or set aside, where an equitable ground is shown, but not otherwise.

A suit to cancel an instrument of trust is equitable.<sup>52</sup> In order to obtain relief by way of the can-

40. Pa.—Brubaker v. Lauver, 185 A. 848, 323 Pa. 461.—In re Pollock's Estate, 159 A. 555, 306 Pa. 301.

41. Iowa.—Meents v. Comstock, 296 N.W. 721, 230 Iowa 63. 85 C.J. § 335 note 98.

#### Beneficiary's widow

Where beneficiary of trust was from beginning a participant in manner in which property was handled, and he benefited substantially from the methods followed and there was no suggestion in record that he did not know as much about the various transactions as did other beneficiaries and trustees, deceased beneficiary's widow, who derived all her rights from such beneficiary, could not claim that other beneficiaries and trustees were estopped to maintain that trust was established and continued until death of the deceased beneficiary.—Linahan v. Linahan, 89 A.2d 895, 131 Conn. 307.

42. Cal.—Mackenzie v. Los Angeles Trust & Savings Bank, 178 P. 557, 39 Cal.App. 247.

43. Tenn.—Haliday v. Croom, 9 Lea 349.

44. Absence of signature of person without interest  
Where a minor child of testator

was born after execution of will and was not provided for therein, but a complete share was set off to her in probate proceeding the same as if there had been no will, and testator's son signed agreement settling will contest and trust controversy and containing recital that the minor was not a party because she had no interest in the subject-matter, and where no appeal was taken from order approving the settlement, the son could not attack validity of the settlement agreement on the ground that the minor, who had died, should have been a party, because the minor had a contingent future interest in the corpus of the trust, where the son also contended that the trust estate was intestate.—Dodge v. Detroit Trust Co., 2 N.W.2d 509, 300 Mich. 575.

45. Mich.—Dodge v. Detroit Trust Co., supra.

46. Mich.—Dodge v. Detroit Trust Co., supra.

47. Cal.—Booge v. Reinicke, 114 P. 2d 427, 45 Cal.App.2d 260.

Failure or defect in creation of express trust, or execution and termination thereof as giving rise to resulting trust see infra § 103.

#### Restraint on alienation

Where a trust is void as an illegal restraint on alienating, no title or right is acquired either by the trustee or any of the beneficiaries.—Booge v. Reinicke, supra.

Conveyances by trustee of a trust subsequently declared void are void as against the heirs of the settlor.—Minck v. Walker, 88 A. 378, 81 N.J. Eq. 113.

48. Cal.—Booge v. Reinicke, 114 P. 2d 427, 45 Cal.App.2d 260.

49. N.Y.—Johnson v. Guernsey, 208 N.Y.S. 781, 208 App.Div. 548.

50. N.Y.—Ross v. Ross, 243 N.Y.S. 413, 137 Misc. 795, reversed on other grounds in first action 253 N.Y.S. 871, 233 App.Div. 628, and affirmed in second action 253 N.Y.S. 889, 233 App.Div. 516.

51. N.Y.—In re Sutta's Estate, 54 N.Y.S.2d 572, affirmed in re Lubman, 39 N.Y.S.2d 933, 265 App.Div. 994, appeal denied in re Sutta's Will, 41 N.Y.S.2d 192, 265 App.Div. 1053. Trusts with unauthorized purposes taking effect as powers see supra § 27.

52. Okl.—Hogan v. Leeper, 183 P. 190, 37 Okl. 555, 47 L.R.A.N.S. 475.



cellation or setting aside of a trust; complainant must bring his case within a recognized head of equity jurisdiction.<sup>53</sup> So, in the absence of fraud, mistake, duress, undue influence, or other matters cognizable in equity, a trust will not be set aside where it has been voluntarily executed.<sup>54</sup> It is no ground for setting aside a trust entered into volun-

tarily that the settlor dislikes it and is sorry he executed it.<sup>55</sup>

On the other hand, a trust instrument can be set aside on any ground on which a conveyance not in trust can be set aside.<sup>56</sup> So, equity will cancel or set aside a trust where its execution is due to lack of mental capacity,<sup>57</sup> fraud,<sup>58</sup> mistake or misapprehension,<sup>59</sup> or for the other and oft litigated

53. U.S.—*Chanfrau v. Alexander*, C. C.Pa., 185 F. 537.  
Mich.—*Clark v. McCue*, 219 N.W. 653, 242 Mich. 551.

**Setting aside against beneficiaries' consent.** In absence of reserved power to revoke, can be only on good cause shown by trustor.—*Putnam v. Heissner*, Tex.Civ.App., 220 S.W.2d 701.

**Special circumstances disclosing inequitable transaction.**  
N.J.—*Simon v. Reilly*, 10 A.2d 474, 126 N.J.Eq. 546.

#### Failure of consideration

Courts of state, in which securities conveyed by husband in trust for wife were located, may enforce conveyance in accordance with laws of state, and will not rescind it for failure of consideration because wife's renunciation of benefits under marriage settlement is invalid under laws of foreign country wherein parties resided, where conveyance and renunciation were not made in exchange for each other.—*Hutchison v. Ross*, 187 N.E. 65, 262 N.Y. 381, 89 A.L.R. 1007, reargument denied 188 N.E. 102, 262 N.Y. 643, 89 A.L.R. 1023.

#### Partial failure of consideration

Tenn.—*Farrell v. Third Nat. Bank*, 101 S.W.2d 158, 20 Tenn.App. 540.

#### Forgery; innocent grantees

Where plaintiff's purported signature on a deed of trust to defendant was a forgery, plaintiff could not be deprived of his interest on ground that defendant was an innocent grantee who took in good faith and had spent money in repairing property, especially where there was no evidence that plaintiff had induced or encouraged him to spend money for improvements, and there was no evidence of laches on plaintiff's part.—*Williamson v. Barrett*, 24 A.2d 546, 147 Pa.Super. 450, certiorari denied *Barrett v. Williamson*, 62 S.Ct. 1312, 316 U.S. 703, 86 L.Ed. 1772, rehearing denied 63 S.Ct. 26, 317 U.S. 705, 87 L.Ed. 563.

#### Trust improvident as to donor's minor children

N.J.—*Reuther v. Fidelity Union Trust Co.*, 172 A. 386, 116 N.J.Eq. 81.

#### Obligation held not rescindable

La.—*Breaux v. Breaux*, 51 So.2d 73, 218 La. 795.

54. Ark.—*Hughes v. Coffey*, 263 S.W.2d 689.  
Pa.—*Denlinger v. Denlinger*, 7 Pa. Dist. & Co. 484.  
65 C.J. p 336 note 11.

#### Grounds held insufficient

An irrevocable deed of trust inter vivos will not be rescinded by the court on the application of the settlor on the ground that it was executed by a mistake concerning its dispositive terms and on bad and inadequate advice on the subject of irrevocability, or because the income is insufficient to maintain settlor, where the evidence establishes that settlor was fully advised, at the time of execution, as to the dispositive provisions and the irrevocability of the instrument, even though he may not have been fully advised as to the fact that creditors might attach the income.—*In re Kydd Trust*, 63 Pa. Dist. & Co. 461.

55. U.S.—*Chanfrau v. Alexander*, C. C.Pa., 185 F. 537.  
Md.—*Price v. Price*, 161 A. 2, 162 Md. 656.

56. Md.—*Liberty Trust Co. v. Weber*, 90 A.2d 194, 200 Md. 491, modified on other grounds 91 A.2d 393, 200 Md. 491.

#### Where no consideration paid for creation of trust

Okl.—*Fitzgerald v. Terry*, 123 P.2d 683, 190 Okl. 310.

57. Or.—*Robinson v. McCart*, 156 P. 273, 79 Or. 641.

58. Ky.—*Hines v. Louisville Trust Co.*, 254 S.W.2d 73.

Md.—*Liberty Trust Co. v. Weber*, 90 A.2d 194, 200 Md. 491, modified on other grounds 91 A.2d 393, 200 Md. 491.

N.Y.—*Brundige v. Bradley*, 51 N.Y.S. 2d 830, affirmed 51 N.Y.S.2d 636, 268 App.Div. 952, reversed on other grounds 62 N.E.2d 385, 294 N.Y. 345.

Tex.—*Putnam v. Heissner*, Civ.App., 220 S.W.2d 701.

65 C.J. p 337 note 22.

#### Improvidence as factor

Whether it was improvident for settlor to execute the trust indenture was a factor to be considered in suit to set aside the indenture on ground of fraud, in determining whether settlor signed indenture voluntarily with full knowledge of its

contents.—*Barnum v. Fay*, 69 N.E.2d 470, 320 Mass. 177.

#### Beneficiaries held not negligent

Beneficiaries who were ignorant of matters of law and business were not guilty of negligence, barring their right to avoidance of instruments executed by them in reliance on trustee's fraudulent misrepresentations, in view of complicated character and legalistic phraseology of instruments.—*Brundige v. Bradley*, 51 N.Y.S.2d 830, affirmed 51 N.Y.S.2d 636, 268 App.Div. 952, reversed on other grounds 62 N.E.2d 385, 294 N.Y. 345.

#### Restoration of defendants to intestate's position

Plaintiff would not be denied relief in action to set aside trust agreement on ground that it was induced by false representations, merely because he may have been unable to restore defendants to position formerly occupied by their intestate predecessor, where change resulted from intestate's own acts.—*Costa v. Jeline*, 79 N.Y.S.2d 593, 274 App.Div. 790.

59. Ky.—*Hines v. Louisville Trust Co.*, 254 S.W.2d 73.

Md.—*Liberty Trust Co. v. Weber*, 90 A.2d 194, 200 Md. 491, modified on other grounds 91 A.2d 393, 200 Md. 491.

N.Y.—*Lederman v. Lisinsky*, 112 N.Y.S.2d 203.

Okl.—*Corpus Juris cited in Fitzgerald v. Terry*, 123 P.2d 683, 684, 190 Okl. 310.

Tenn.—*Farrell v. Third Nat. Bank*, 101 S.W.2d 158, 20 Tenn.App. 540.  
65 C.J. p 336 notes 14, 15.

#### Mistake of law

Okl.—*Fitzgerald v. Terry*, 123 P.2d 683, 190 Okl. 310.

#### Trust created without power of revocation

Del.—*Du Pont v. Du Pont*, 164 A. 238, 19 Del.Ch. 131.

#### Circumstances showing mistake

(1) Improvidence, lack of independent advice, and absence of a power of revocation are circumstances from which, if the case is strong enough, the court may infer mistake.—*Fidelity Union Trust Co. v. Parfner*, 37 A.2d 675, 135 N.J.Eq. 138.

(2) Voluntary trust created without power of revocation may be set aside if involving mistake. Instrument creating voluntary trust was

grounds of undue influence,<sup>60</sup> duress,<sup>61</sup> or breach of duty in a confidential relationship,<sup>62</sup> where it is not the pure, voluntary, well understood act of the grantor's mind;<sup>63</sup> or where cancellation would be to the best interest of all concerned by preventing an irreparable loss.<sup>64</sup>

The court will not set aside a trust on the ground of mistake where the settlor has, subsequent to its creation, ratified the trust by his conduct.<sup>65</sup> The person creating a trust for a fraudulent purpose, or his heirs or devisees, will not be relieved by setting aside the conveyance and restoring the property,<sup>66</sup> but equity will leave the parties to such transactions in the position in which they have placed themselves, refusing all affirmative aid to either of the fraudulent participants.<sup>67</sup>

**Lack of independent advice.** The lack of independent advice is a circumstance to be considered, but it will not of itself call for annulment of a trust;<sup>68</sup> so, improvidence in the creation of a trust and want of independent advice are not alone suffi-

cient to set aside a donative trust.<sup>69</sup> Where the trust entered into voluntarily is for the benefit of the settlor and his children without any benefit accruing to the trustee, failure to obtain independent legal advice is no ground for cancellation.<sup>70</sup> The fact that the settlor of a trust executed it without legal advice as to its effect is not a ground for cancellation in the absence of a showing that he tried to obtain legal advice and was prevented from doing so.<sup>71</sup> On the other hand, an inter vivos trust executed by an aged and inexperienced woman has been set aside on the ground that she did not have adequate independent advice.<sup>72</sup>

**Nonperformance.** Equity ordinarily will not set aside a trust for nonperformance by the trustee,<sup>73</sup> especially where the trust has been to a considerable extent performed.<sup>74</sup> A remedy exists by way of removal of the trustee, as discussed *infra* § 233.

**Confidential relations.** A trust instrument invalid by reason of undue influence resulting from a confidential relation between the parties, as discussed

held to show intent that trust be irrevocable; hence, failure to reserve power of revocation was not evidence of mistake.—Du Pont v. Du Pont, 164 A 238, 19 Del.Ch. 131.

(3) Omission of power of revocation as affecting validity generally see *infra* § 90.

#### Trustee as trustor's attorney

Where irrevocable trust instrument transferring stock to trustee was sought to be set aside on ground that it was result of mutual mistake, or mistake on trustor's part and knowledge on trustee's part, and there was no charge of undue influence, fact that trustee was trustor's attorney and that trustor had implicit confidence in him was immaterial.—Bokwell v. Clemens, 190 S.W.2d 912, 354 Mo. 686.

#### Beneficiaries as donees

In suit for rescission because of mistake and partial failure of consideration, as against contention that beneficiaries would suffer by rescission, beneficiaries are mere donees with no greater rights than the original parties to the trust instrument.—Farrell v. Third Nat Bank, 101 S.W.2d 158, 20 Tenn.App. 540.

60. Ky.—Hines v. Louisville Trust Co., 254 S.W.2d 73.

Md.—Liberty Trust Co. v. Weber, 90 A 2d 194, 200 Md. 491, modified on other grounds 91 A.2d 393, 200 Md. 491.

Tex.—Putnam v. Heissner, Civ.App., 220 S.W.2d 701.

65 C.J. p 336 note 16.

#### Improvidence as factor

Whether it was improvident for settlor to execute the trust indenture

was a factor to be considered in suit to set aside the indenture on ground of undue influence, in determining whether settlor signed indenture voluntarily with full knowledge of its contents.—Barnum v. Fay, 69 N.E.2d 470, 320 Mass. 177.

**Mental and physical weakness** and opportunity to exercise undue influence by one in an exclusively confidential relationship are factors for consideration in determining whether trust instrument is invalid on ground that it was procured by undue influence.—Creek v. Union Nat. Bank in Kansas City, Mo., 266 S.W.2d 737.

61. Ky.—Hines v. Louisville Trust Co., 254 S.W.2d 73.

Md.—Liberty Trust Co. v. Weber, 90 A 2d 194, 200 Md. 491, modified on other grounds 91 A.2d 393, 200 Md. 491.

Tex.—Putnam v. Heissner, Civ.App., 220 S.W.2d 701.

62. Md.—Liberty Trust Co. v. Weber, 90 A 2d 194, 200 Md. 491, modified 91 A.2d 393, 200 Md. 491.

63. N.J.—Garnsey v. Mundy, 24 N.J. Eq. 243.

N.Y.—Hays v. Union Trust Co., 57 N.Y.S. 801, 27 Misc. 240.

**Effect of amendment of trust held unavoidable** where settlor told his attorney's secretary that he understood the amendment and signed it.—Barnum v. Fay, 69 N.E.2d 470, 320 Mass. 177.

64. N.C.—Bell v. McCain, 113 S.E. 561, 184 N.C. 117.

65. U.S.—Soden v. First Nat. Bank of Kansas City, D.C. Mo., 77 F.Supp. 98.

Md.—Ricards v. Baltimore Safe Deposit, etc. Co., 55 A. 384, 97 Md. 608, 63 L.R.A. 145.

Ratification see *supra* § 82.

66. Tex.—Rogers v. Rogers, Com. App., 240 S.W. 1104—Hall v. Collins, Civ.App., 167 S.W.2d 210, reversed on other grounds 174 S.W.2d 50, 141 Tex. 433.

Recovery by grantor or privies of property fraudulently conveyed see **Fraudulent Conveyances** § 267.

67. Tex.—Rogers v. Rogers, Com. App., 240 S.W. 1104—Hall v. Collins, Civ.App., 167 S.W.2d 210, reversed on other grounds 174 S.W.2d 50, 141 Tex. 433.

68. U.S.—Whiteside v. Varity, C.C.A. Ohio, 269 F. 227.

69. N.J.—Fidelity Union Trust Co. v. Partner, 37 A.2d 675, 135 N.J. Eq. 133.

#### Reason for rule

Except as against creditors, a man is privileged to give foolishly and without advice.—Fidelity Union Trust Co. v. Partner, *supra*.

70. Iowa.—Riddle v. Cutter, 49 Iowa 547.

N.J.—Clark v. Kinnaugh, 133 A. 381, 99 N.J. Eq. 878.

71. Ky.—Burton v. Burton's Trustees, 248 S.W. 1031, 198 Ky. 429.

72. N.J.—Oswald v. Seidler, 42 A.2d 216, 136 N.J. Eq. 443.

73. Ill.—Brower v. Callender, 105 Ill. 88.

Mass.—Barbour v. Weld, 87 N.E. 909, 201 Mass. 513.

74. N.Y.—McGuire v. McGuire, 193 N.Y.S. 772, 201 App. Div. 71.

supra § 76, may be set aside.<sup>75</sup> Where the grantee sustains the burden of showing that the trust is the free and voluntary act of the settlor and beneficial to him, the trust will not be set aside.<sup>76</sup>

**Omission of power of revocation.** The absence in a trust instrument of the power of revocation does not in itself render the trust invalid as discussed infra § 90, so as to warrant the court in setting it aside.<sup>77</sup> On the other hand, the omission of this power may make the trust so unreasonable and improvident in a particular case as to justify the court in setting it aside.<sup>78</sup>

**Trust void on its face.** An alleged trust which is wholly void has been held absolutely inoperative, so that there is no necessity for setting it aside.<sup>79</sup>

**Oral trust.** Where an alleged trust is oral, no formal conveyance by the cestui que trust is necessary to cancel or set aside the trust.<sup>80</sup>

### b. Proceedings and Relief

**Proceedings for the cancellation, or setting aside, of a trust instrument, and the relief awarded, are in accordance with the general rules governing proceedings for the cancellation of instruments.**

A court cannot be deprived of jurisdiction of an

action by a grantor's guardian to cancel the trust on the ground of the grantor's mental incompetency by a trust provision that the rights reserved to the grantor are personal and not subject to be exercised by any court under any process of law for his benefit or for the benefit of his creditors.<sup>81</sup>

**Time for suit; laches.** A complainant may be barred of the right to the cancellation of a trust because of laches.<sup>82</sup> Where a trust for the lives of the settlors is good, a suit to determine the validity of limitations following the life interests of the settlors' living children is premature and should be dismissed.<sup>83</sup>

**Persons entitled; parties.** A person who has no interest in the subject matter of the suit is not entitled to the cancellation of a trust instrument;<sup>84</sup> and a trustee has been held not entitled to an annulment of the instrument.<sup>85</sup> One to whom a testator's heirs transfer their interest in his estate can maintain a suit to set aside trusts created by him.<sup>86</sup>

All living persons beneficially interested should be made parties in a suit to set aside an instrument of trust.<sup>87</sup> In a suit to set aside a trust, the beneficiaries of the trust are necessary parties where the suit is brought by the settlor<sup>88</sup> or by one of the

75. Mo.—Bleyer v. Bleyer, 117 S.W. 709, 219 Mo 99.

65 C.J. p 337 note 32.

76. Md.—Jervis v. Jervis, 96 A. 265, 127 Md 133.

77. Mass.—Taylor v. Buttrick, 43 N. E. 507, 165 Mass 547, 52 AmSR 530.

65 C.J. p 337 note 36.

78. Pa.—Bristol v. Tasker, 19 A. 851, 135 Pa 110, 20 AmSR 853.

65 C.J. p 337 note 37.

79. N.Y.—Levy v. Hart, 54 Barb. 248. Cancellation of void instrument generally see Cancellation of Instruments § 33.

80. Tex.—Little v. Piper, Civ App., 211 S.W.2d 547, error refused no reversible error.

81. Ohio.—Loosh v. Winters Nat Bank & Trust Co., App., 46 NE2d 413.

82. U.S.—Soden v. First Nat Bank of Kansas City, D.C. Mo., 77 F.Supp. 98.

83. Montgomery v. First Nat Bank, 17 NE2d 116, 293 Ill App 631.

65 C.J. p 337 note 44.

84. Pa.—In re Miller, 40 A.2d 484, 351 Pa 114.

85. Va.—Lefew v. Hooper, 1 S.E. 208, 82 Va 916. Right to contest validity see supra § 81.

86. N.Y.—Parker v. Allen, 14 N.Y.S. 285.

### Trustees and others

Trustee under trust deed and his wife who was sole heir of deceased grantor and her children, administrator of grantor, and nephews of grantor who were to receive interest in property under deed on happening of certain events, had such interest in deed that they could maintain an action to avoid it.—Winning v. Brown, 100 S.W.2d 303, 340 Mo 178.

86. U.S.—Chicago Bank of Commerce v. McPherson, D.C. Mich., 2 F.Supp. 110, affirmed, C.C.A., 62 F.2d 393, certiorari denied 53 S.Ct. 596, 289 US 736, 77 L.Ed 1184.

87. Cal.—Mabry v. Scott, 124 P.2d 659, 51 Cal App2d 245, certiorari denied Title Ins & Trust Co v. Mabry, 63 S.Ct. 75, 317 U.S. 670, 87 L.Ed 538.

N.Y.—O'Leary v. Grant, 278 N.Y.S. 839, 155 Misc 98.

65 C.J. p 338 note 46.

### Minor daughter

Cal.—Toomey v. Toomey, 89 P.2d 634, 13 Cal.2d 317.

### Trustees entitled to remainder

Action by trust income beneficiaries to avoid trust agreements entitling defendant trustees to remainder after plaintiffs' deaths will not be dismissed as to trustees individually, since their rights as remaindermen are necessarily involved and they must account as individuals for their actions as trustees after last account-

ing by them.—Brundige v. Bradley, 51 N.Y.S.2d 830, affirmed 51 N.Y.S.2d 636, 268 App.Div. 952, reversed on other grounds 62 N.E.2d 885, 294 N.Y. 345.

### Waiver of claims against deceased's estate

A motion by executors of deceased trustee's will to dismiss, as to them, action by trust beneficiaries to avoid trust agreements will be granted where plaintiffs expressly waived all claims against deceased's estate on trial.—Brundige v. Bradley, supra.

88. N.Y.—McKnight v. Bank of New York & Trust Co., 173 N.E. 568, 254 N.Y. 417.

65 C.J. p 338 note 47.

### Minor children

Cal.—Toomey v. Toomey, 89 P.2d 634, 13 Cal.2d 317.

### Potential distributees

In action to revoke for fraud trust of life estates with remainder to settlor's issue and in default to issue of settlor's sister, joining potential distributees, in addition to presumptive distributees, was unnecessary.—O'Leary v. Grant, 278 N.Y.S. 839, 155 Misc 98.

### Guardians of unborn beneficiaries

In action to revoke for fraud trust involving life estates and remainder to issue of settlor or her sister, representation by special guardians of unborn beneficiaries was unnecessary, where there were no issues between

beneficiaries.<sup>89</sup> Where it appears at the trial that a complete determination of the controversy may not be had without the presence of other parties, the court may have full power, under statute, to direct them to be brought in.<sup>90</sup> Where a beneficiary has an interest adverse to complainant, he should be made a defendant rather than joined as a complainant.<sup>91</sup> Trustees claimed to be liable both individually and as trustees should be sued in both capacities;<sup>92</sup> it is not enough that they are sued individually.<sup>93</sup>

**Pleading.** In a suit to set aside a trust, complainant must state in his petition sufficient grounds entitling him to relief.<sup>94</sup> If fraud is the ground of relief, it must be distinctly and positively alleged.<sup>95</sup> Where plaintiff applies for leave to amend his complaint so as to plead fraud on the part of defendant, defendant has no standing to oppose the application on the grounds that inconsistent causes of action are pleaded and that necessary parties are

omitted.<sup>96</sup> Evidence of the existence of a fiduciary relationship between the parties is admissible under a general allegation of fraud.<sup>97</sup>

**Evidence.** The burden of proof is on the party alleging one or all of the grounds of cancellation to prove them or some of them.<sup>98</sup> When a prima facie case for cancellation is made, the burden is then on the party procuring the execution of the trust to show that the execution was voluntary.<sup>99</sup> Where a fiduciary or confidential relationship exists between the grantor and grantee, the burden is on the grantee to prove that the trust was the free, voluntary act of the grantor;<sup>1</sup> if the trustee planned to gain an advantage over the settlor, the burden is on the trustee to show that the transaction was fair.<sup>2</sup>

Rules applicable to the admissibility of evidence generally, and, in particular, those governing in suits for the cancellation of instruments generally, control in suits to set aside a trust instrument.<sup>3</sup>

members of any class and defense made in behalf of any one beneficiary on fraud issue would inure to benefit of all—O'Leary v. Grant, *supra*.

89. Ky.—Burton v. Burton's Trustee, 248 S.W. 1031, 198 Ky. 429. N.Y.—Moore v. Hegeman, 6 Hun 290, affirmed 73 N.Y. 376.

90. N.Y.—Warren v. Putnam, 33 N.Y.S.2d 635, 263 App.Div. 474.

91. N.Y.—Grant v. Van Schoonhoven, 9 Paige 255, 37 Am.D. 393.

92. N.Y.—O'Leary v. Grant, 278 N.Y.S. 839, 155 Misc. 98.

93. N.Y.—O'Leary v. Grant, *supra*.

94. Ky.—Burton v. Burton's Trustee, 248 S.W. 1031, 198 Ky. 429.

**Cause of action held stated.**  
Ark.—Gall v. Union Nat. Bank of Little Rock, 159 S.W.2d 757, 203 Ark. 1000.

N.Y.—Blush v. McQuade, 47 N.Y.S.2d 450.

65 C.J. p. 338 note 52 [b].

**Duress held insufficiently alleged.**

Tex.—Bute v. Stickney, Civ.App. 160 S.W.2d 302, error refused.

**Admission of confidential relationship.**  
Defendants in suit to terminate alleged voluntary trust admitted confidential relationship between trustor and trustee by failure to deny allegations, sufficient to raise such issue, in complaint.—Fernald v. Lawsten, 79 P.2d 742, 26 Cal.App.2d 552.

95. N.C.—Harshaw v. McCombs, 63 N.C. 75.

96. N.Y.—Warren v. Putnam, 33 N.Y.S.2d 635, 263 App.Div. 474.

97. Mo.—Bleyer v. Bleyer, 117 S.W. 709, 219 Mo. 99.

98. Md.—Von Buchwaldt v. Schlens, 91 A. 466, 123 Md. 405.

Okl.—Hogan v. Leeper, 133 P. 190, 37 Okl. 655, 47 L.R.A.N.S. 475.

99. Okl.—Hogan v. Leeper, *supra*.

**Execution during lucid interval.**  
Where grantor had suffered from manic-depressive psychosis which began prior to date on which deed of trust was executed, and finally ended in his death, burden was on proponent of deed to show that it was executed during a lucid interval—Turley v. Turley, 30 N.E.2d 64, 374 Ill. 571.

1. Md.—McGill v. Nichols, 145 A. 773, 157 Md. 287.

65 C.J. p. 338 note 60.

**Burden on trustee.**

In settlor's suit against trustee for cancellation of deed of trust, trustee has burden of showing that he acted in good faith and used no deception when deed of trust was executed, if confidential relationship existed between settlor and trustee at such time.—Kauffman v. Hiestand, 200 A. 251, 131 Pa.Super. 219.

**Parent and child.**

Where conveyances to grantor's son were made in trust for the benefit of the grantor, the fact that a confidential relationship of parent and child existed between grantor and grantee did not raise presumption of undue influence so as to cast upon grantee the burden of negating the existence of such influence, since grantee did not benefit unduly from the transfers.—Reiss v. Reiss, 114 P.2d 718, 45 Cal.App.2d 740.

2. Cal.—Pomeroy v. Collins, 243 P. 657, 198 Cal. 46.

3. N.Y.—Ludlam v. Ludlam, 185 N.

Y.S. 343, 194 App.Div. 411, affirmed

131 N.E. 594, 232 N.Y. 615.

65 C.J. p. 338 note 65.

**Direct or circumstantial evidence of validity.**

In suit by settlor to terminate trust, wherein trustee denied validity of trust declaration under which settlor claimed a right of revocation, defendant beneficiary and trustee could rebut testimony of settlor and notary as to validity of instrument by direct or circumstantial evidence.—Albert v. Albert, 80 N.E.2d 69, 334 Ill.App. 440.

**Fraud, undue influence, and breach of trust.**

(1) In suit to set aside a trust which excluded son from participating in estate, on ground that settlor was unduly influenced by sister who represented to him that child of first marriage was not settlor's son, testimony as to what settlor told witnesses concerning change in attitude toward son and reason therefor was admissible as showing settlor's state of mind.—Kinney v. St. Louis Union Trust Co., Mo., 148 S.W.2d 250.

(2) In suit by settlor against his attorney and others to set aside trust on ground that he was induced by fraud and undue influence to execute indenture, evidence that assets of trust were shares of stock in banks from which attorney received compensation as a director, that attorney refused to consent to revocation of trust, and concerning other conduct of parties subsequent to execution of indenture, was competent on issue whether execution was induced by fraud, undue influence, or breach of fiduciary relationship, but after judge properly found that there

In a suit to set aside a trust instrument the evidence must be sufficient,<sup>4</sup> for example, to show that the settlor lacked mental capacity,<sup>5</sup> that the trust

was procured by fraud, misrepresentation, duress, or undue influence,<sup>6</sup> or resulted from a breach of fiduciary or confidential relationship,<sup>7</sup> or that the

was no such inducement, evidence became immaterial.—*Barnum v. Fay*, 68 N.E.2d 470, 320 Mass. 177.

4. *Iowa*.—*Hatt v. Hatt*, 265 N.W. 640.

Ky.—*Luttrell v. Turner*, 209 S.W.2d 856, 307 Ky. 197.

#### Evidence held sufficient

(1) To show particular matters. Mich.—*Sprenger v. Sprenger*, 299 N.W. 711, 298 Mich. 551.

Tenn.—*Farrell v. Third Nat. Bank*, 101 S.W.2d 158, 20 Tenn.App. 540.

(2) To sustain findings.—*Leck v. City Trust Co.*, 156 A. 403, 104 Vt. 20—65 C.J. p 338 note 66.

**Trustee's failure to furnish copies of trust instrument to trustor was held not to show that inclusion of corporate stock in instrument was result of mistake, where trustee testified that trustor telephoned him to ignore his request for copies**—*Bakewell v. Clemens*, 190 S.W.2d 912, 354 Mo. 888.

5. **Proof of attempts to commit suicide, standing alone, was insufficient to establish settlor's incapacity to execute deed of trust**—*Oswald v. Seidler*, 39 A.2d 336, 135 N.J.Eq. 490, reversed on other grounds 42 A.2d 216, 136 N.J.Eq. 443.

#### Adjudication under lunacy writ

In suit to set aside trust on ground of settlor's incompetency even if an adjudication under a writ of lunacy inquiring had been introduced, it would have been merely *prima facie* proof of disqualification and subject to rebuttal.—*Oswald v. Seidler*, supra.

#### Evidence held sufficient

(1) To show mental incapacity. Mich.—*Sprenger v. Sprenger*, 299 N.W. 711, 298 Mich. 551.

N.J.—*Oswald v. Seidler*, 42 A.2d 216, 136 N.J.Eq. 443.

Pa.—*Potter Title & Trust Co. v. Allegheny Trust Co.*, Com.Pl., 88 Pittsb.Leg.J. 216.

65 C.J. p 338 note 67 [a] (2), (3).

(2) To warrant setting aside of trust on ground that decedent at time of creating it suffered from insane delusion.—*Doyle v. Rody*, 25 A.2d 467, 180 Md. 471.

(3) To sustain finding in favor of validity of trust deed.

Cal.—*George v. Soares*, 128 P.2d 377, 54 Cal.App.2d 29.

Mich.—*Darmody v. Albers*, 61 N.W.2d 603, 338 Mich. 473.

Tex.—*Ragsdale v. Ragsdale*, Civ.App., 172 S.W.2d 381, affirmed 179 S.W.2d 291, 142 Tex. 476.

65 C.J. p 338 note 67 [a] (1), (4).

(4) To sustain finding that, although grantor was suffering from manic-depressive psychosis, trust

deed was executed during a lucid interval.—*Turley v. Turley*, 30 N.E.2d 64, 374 Ill. 571.

(5) Evidence, including adjudication of insanity, warranted cancellation of trust contract executed some two and a half months prior to adjudication.—*Losh v. Winters Nat. Bank & Trust Co.*, Ohio App., 46 N.E.2d 443.

(6) In action by settlor to cancel trust instrument on ground that he was mentally unsound at time of execution, to create inference that he knew that he had executed instrument, so as to provide basis for defense of laches.—*Soden v. First Nat. Bank of Kansas City*, D.C.Mo., 77 F.Supp. 98.

#### Evidence held insufficient

(1) To show lack of mental capacity.

Md.—*Kemper v. Raffel*, 182 A. 461, 169 Md. 616.

N.Y.—*Thompson v. Finholm*, 77 N.Y.S.2d 78, affirmed 85 N.Y.S.2d 314, 274 App.Div. 992.

65 C.J. p 338 note 67 [b].

(2) To show that the transaction was a fair one, fully understood and agreed upon.—*Works v. McKel*, 115 N.E.2d 320, 1 Ill.2d 47.

#### 6. Circumstantial evidence

Undue influence, which will invalidate trust instrument may be established by circumstantial evidence.—*Creek v. Union Nat. Bank in Kansas City, Mo.*, 266 S.W.2d 737.

**Clear, precise, and indubitable evidence is required for setting aside a trust instrument on the ground of fraudulent representations**—*Gilbert v. Coraopolis Trust Co.*, 19 A.2d 408, 342 Pa. 161.

#### Evidence held sufficient

(1) To warrant setting aside trust instrument.

Mo.—*Kinne v. St. Louis Union Trust Co.*, 143 S.W.2d 250.

N.Y.—*Brundige v. Bradley*, 51 N.Y.S.2d 830, affirmed 51 N.Y.S.2d 636, 268 App.Div. 952, reversed on other grounds 62 N.E.2d 385, 294 N.Y. 345.

Or.—*Egr v. Egr*, 131 P.2d 198, 170 Or. 1.

65 C.J. p 338 note 68 [a] (1), (6).

(2) To warrant refusal to set aside trust instrument.

US.—*Warner v. Florida Bank & Trust Co.*, at West Palm Beach, C.C.A.Fla., 160 F.2d 766.

Ill.—*Jackson v. Pillsbury*, 44 N.E.2d 537, 380 Ill. 554.

Iowa.—*Hatt v. Hatt*, 265 N.W. 640. Mich.—*Darmody v. Albers*, 61 N.W.2d 603, 338 Mich. 473.

Mo.—*Creek v. Union Nat. Bank in Kansas City*, 266 S.W.2d 737.

Tex.—*Ragsdale v. Ragsdale*, Civ.App., 172 S.W.2d 381, affirmed 179 S.W.2d 291, 142 Tex. 476.

65 C.J. p 338 note 68 [a] (3)—(5).

(3) To show that the transaction was fair and not the result of the undue influence.

Mo.—*Kensett v. Safe Deposit & Trust Co. of Baltimore*, 82 A. 981, 116 Md. 526.

R.I.—*Feltham v. Rhode Island Hospital Trust Co.*, 14 A.2d 672, 65 R.I. 339.

65 C.J. p 338 note 68 [a] (2).

(4) To sustain finding of absence of constructive fraud in connection with execution or delivery of trust deed.—*Hesseltine v. First Methodist Church of Vancouver*, 161 P.2d 157, 23 Wash.2d 315.

#### Evidence held insufficient

(1) In general.

Ill.—*Kolze v. Fordtran*, 107 N.E.2d 686, 412 Ill. 461.

Iowa.—*Wagner v. Wagner*, 45 N.W.2d 508, 242 Iowa 480.

Ky.—*Lane v. Taylor*, 152 S.W.2d 271, 287 Ky. 116.

Md.—*Kemper v. Raffel*, 182 A. 461, 169 Md. 616.—*Bollack v. Bollack*, 182 A. 317, 169 Md. 407.

Mass.—*Markus v. Markus*, 119 N.E.2d 415.

65 C.J. p 338 note 68 [b].

(2) To establish by clear, precise, and indubitable evidence that trust instrument was executed as result of fraud.—*Gillart v. Coraopolis Trust Co.*, 19 A.2d 408, 342 Pa. 161.

(3) To authorize cancellation of trust instrument on ground of duress.—*Bute v. Stickney*, Tex.Civ.App., 160 S.W.2d 302, error refused.

(4) To show confidential relationship, as basis for claim of undue influence.—*Turley v. Turley*, 30 N.E.2d 64, 374 Ill. 571.

(5) In action to set aside conveyance by parents to son as trustee, to show that transaction was a fair one for parents, or that they were free from undue influence on son's part.—*Egr v. Egr*, 131 P.2d 198, 170 Or. 1.

(6) Evidence disclosing that grantee had the opportunity to influence grantor, his mother, coupled with desire to terminate a joint tenancy in order that she might be free to dispose of property as she desired, would not sustain finding of undue influence.—*Reiss v. Reiss*, 114 P.2d 718, 45 Cal.App.2d 740.

7. **Evidence held sufficient to establish that trustee acted in good faith and used no deception when deed of**

settlor misunderstood the provisions of the trust.<sup>8</sup> The confidential relationship existing between parent and child requires the trial judge to weigh the evidence with the utmost scrutiny in order to determine, in accordance with equity and fair dealing, whether a parent was unduly influenced by a child in executing trust instruments.<sup>9</sup>

Delay on the part of the trustor in seeking to set aside the trust on the ground of misunderstanding is strong evidence that the trust was executed with full knowledge of its provisions.<sup>10</sup> Where a settlor in a prior suit for divorce and an allowance of alimony in defense set up by way of affidavit that he put his property in trust, such affidavit conclusively shows that he executed the trust voluntarily.<sup>11</sup> A trust giving the income of the property for life to the trustor and the corpus on her death to her husband and children should not be annulled except on clear proof of the trustor's misunderstanding of its nature,<sup>12</sup> especially where, since its execution, the trustor has dissipated substantially all the rest of her fortune.<sup>13</sup>

**Trial; findings.** Whether a trustee planned to gain an advantage over the settlor of the trust is a question for the trial court.<sup>14</sup> In an action to set aside a declaration of trust, reference in the preamble to the findings to alleged fraud included the alleged willful nondisclosure of material facts by plaintiff's confidential adviser.<sup>15</sup> In such action, a finding that plaintiff intended to create irrevocable trusts amounts to a finding that, at the time of executing the trusts, he understood them to be irrevocable.<sup>16</sup>

trust was executed, so as to make instrument binding on settlor even if confidential relationship existed between settlor and trustee when deed of trust was executed—*Kaufman v. Hiestand*, 200 A. 251, 131 Pa.Super. 219.

#### **Evidence held insufficient**

(1) To support finding that a fiduciary relationship existed between grantors and grantees—*Kulze v. Fordtran*, 107 N.E.2d 686, 412 Ill. 461.

(2) To establish relationship of confidential nature between father and sons so as to place a duty on sons—*Wagner v. Wagner*, 45 N.W.2d 508, 242 Iowa 480.

**S. Evidence held sufficient**  
Md.—*Atkinson v. Atkinson*, 147 A. 682, 157 Md. 648.  
65 C.J. p. 339 note 69 [a].

**Evidence held insufficient**  
Md.—*Ricards v. Baltimore Safe Deposit, etc. Co.*, 55 A. 384, 97 Md. 608, 63 L.R.A. 145.  
65 C.J. p. 339 note 69 [b].

**Judgment; decree.** In a suit to set aside a trust deed, the judgment must be supported by the findings,<sup>17</sup> and, in a proper case, the decree may direct a reconveyance of the trust property.<sup>18</sup> A decree of annulment does not relate back to the execution of the deed when the deed was not void, but simply voidable.<sup>19</sup> Where the trustee acts in good faith, in pursuance of a will creating a trust, he will be protected, although the trust is subsequently declared void.<sup>20</sup>

**Costs; fees; expenses.** In a suit to set aside a trust in equity, the disposal of costs is within the sound discretion of the court<sup>21</sup> which, as discussed in Appeal and Error § 1636, will not be reviewed in the absence of abuse. A beneficiary, in such a suit, has been held not entitled to an allowance for attorney's fees;<sup>22</sup> but the trustee has been held entitled to an allowance for reasonable attorney's fees<sup>23</sup> and necessary expenses<sup>24</sup> incurred in defending the validity of the trust. In an action for cancellation of a deed of trust as forged, the grantee is not entitled to be reimbursed for expenditures made by him for work and repairs on the property and payments of taxes and mortgage interest, where the alleged payments were made with full knowledge of plaintiff's attack on the validity of the grantee's title to any interest in the property.<sup>25</sup>

## § 86. Reformation

On a proper showing, a trust instrument may be reformed so as to conform to the intention of the parties.

The ordinary remedy for mistake in the terms of a trust instrument is reformation.<sup>26</sup> So, generally,

9. Cal.—*Reiss v. Reiss*, 114 P.2d 718, 45 Cal App 2d 740.

10. Md.—*Dayton v. Stewart*, 59 A. 281, 99 Md. 643.  
N.Y.—*Ludlum v. Ludlum*, 185 N.Y.S. 343, 194 App Div. 411, affirmed 134 N.E. 594, 232 N.Y. 615.

11. Mich.—*Zinser v. Anderson*, 77 N.W. 270, 118 Mich. 654.

12. N.Y.—*Ludlum v. Ludlum*, 185 N.Y.S. 343, 194 App Div. 411, affirmed 134 N.E. 594, 232 N.Y. 615.

13. N.Y.—*Ludlum v. Ludlum*, supra.

14. Cal.—*Pomeroy v. Collins*, 243 P. 657, 198 Cal. 46.  
Right to jury trial see *Juries* § 31.

15. Vt.—*Peck v. City Trust Co.*, 150 A. 403, 104 Vt. 20.

16. Vt.—*Peck v. City Trust Co.*, supra.

17. Tex.—*Kimmell v. Tipton*, Civ. App. 142 S.W.2d 421.

18. Ill.—*Jackson v. Pillsbury*, 44 N.E.2d 537, 380 Ill. 654.

19. N.C.—*Salisbury v. Western North Carolina R. Co.*, 4 S.E. 465, 98 N.C. 465.

20. N.Y.—*Hawley v. James*, 16 Wend. 61.

21. Ill.—*Jackson v. Pillsbury*, 44 N.E.2d 537, 380 Ill. 654.  
65 C.J. p. 339 note 81.

22. U.S.—*Blackhurst v. Johnson*, C. C.A. Mo., 72 F.2d 644.

23. U.S.—*Blackhurst v. Johnson*, supra.

24. U.S.—*Blackhurst v. Johnson*, supra.

25. Pa.—*Williamson v. Barrett*, 34 A.2d 324, 153 Pa.Super. 520.

26. Md.—*Liberty Trust Co. v. Weber*, 90 A.2d 194, 200 Md. 491, modified on other grounds 91 A.2d 393, 200 Md. 491.

Mich.—*Miller v. National Bank of Detroit*, 38 N.W.2d 863, 325 Mich. 395.

Pa.—*Pew v. Pew*, Com.Pl., 69 Mont. Co. 335.

a court of equity will correct and reform a deed of trust or other trust instrument so as to conform to the intention of the parties.<sup>27</sup> Equity will not, however, perfect a declaration of trust left imperfect by the settlor.<sup>28</sup>

*Unexpected increase in value of trust assets* has been held not to justify the reformation of trust instruments.<sup>29</sup>

*Effect of settlor's or donor's death.* A voluntary deed of trust which, through mistake, fails to express the intention of the settlor, may be reformed even after the settlor's death, even though reformation benefits one beneficiary and harms another, provided all the conditions for reformation exist and the settlor did not confirm the grant in the form in which it was executed;<sup>30</sup> and in an action by one or more beneficiaries under a trust agreement against the others, the agreement may be reformed in equity after the death of the donor, where the mistake in the agreement is conclusively established.<sup>31</sup> However, after a donor's death, a court

cannot, as between beneficiaries, reform the definite language of a trust agreement on the theory that the donor's intended plan of distribution was defeated by a mistake in computation.<sup>32</sup> A beneficiary under a voluntary settlement who, after the settlor's death, seeks reformation on the ground of mistake, can have no greater right to rectification than the settlor could have had.<sup>33</sup>

*Laches; delay.* The reformation of trust instruments may be barred by laches,<sup>34</sup> but mere delay which prejudices no one does not constitute ground for refusal of reformation.<sup>35</sup>

*Persons entitled; parties.* The beneficiaries may have reformation,<sup>36</sup> but a trustee holding merely the legal title without any beneficial interest may not sue for reformation of the trust.<sup>37</sup> A donee of a trust cannot assert a cause of action for reformation of the trust for undue influence, where he claims no contractual rights with respect to the donor;<sup>38</sup> and a donee of a voluntary trust cannot assert a cause of action for reformation for mistake, where he is

#### Erroneous limitation of issue benefited

Pa.—*Flagg v. Flagg*, 80 Pa Dist & Co. 544, 44 Berks Co. 101.

**Mistake held not shown** so as to justify reformation by removing provision for expiration of trust on specified date.—*Hadley v. Rinke*, D.C.N.Y., 39 F Supp 207.

27. Md.—*Kiser v. Lucas*, 185 A. 441, 170 Md 486.

Pa.—*Pew v. Pew*, Com Pl., 69 Montg. Co. 335.

Tex.—*Corpus Juris* quoted in *Mason v. University of the South*, Civ. App., 212 S.W.2d 854, 856, error refused no reversible error. 65 C.J. p 339 note 85—63 C.J. p 913 note 62 [g].

#### Action of equitable cognizance

Okl.—*Harrison v. Eaves*, 130 P.2d 841, 191 Okl 453.

#### Special and limited jurisdiction

Court could not authorize changes in trust deed without assuming jurisdiction of trust, but jurisdiction of trust assumed by court on petition for approval of such changes was special and limited, and not general.—*Corbett v. Hoeselhorn*, 191 A. 691, 172 Md 257.

#### Irrevocable deed; knowledge of mistake

A court of equity has jurisdiction and power to reform an irrevocable deed of trust on petition of the settlor in order to correct a mistake, and where the creation was gratuitous it is immaterial that neither the trustee nor the beneficiaries knew of or shared in the mistake.—*Flagg v. Flagg*, 80 Pa Dist. & Co. 544, 44 Berks Co. 101.

#### Reversion of principal to settlor

Court may reform nunc pro tunc a voluntary but irrevocable trust deed so as to conform with settlor's intention at time he created trust, to so provide for disposing of principal that it could not revert to settlor on the happening of any possible contingency, provided chancellor finds that failure to so provide in original deed was a mistake or inadvertence and such finding is approved by the court in banc.—*Irish v. Irish*, 65 A.2d 345, 361 Pa. 410.

**Representation of law or opinion**, and not of fact, cannot be relied on for reformation on ground of mistake by grantor and misrepresentation by grantee.—*Trenton Banking Co. v. Howard*, Ch, 187 A. 569, affirmed 187 A. 575, 121 N.J.Eq. 85.

#### Inequality from arithmetical oversight

Trust instruments should be reformed so as to correct mistake resulting in inequality in children's remainder interests, where inequality was due to an arithmetical oversight and equality was intended.—*Liberty Trust Co. v. Weber*, 91 A.2d 393, 200 Md 491.

#### Statute held inapplicable

Statute prescribing procedure to be followed in case of death of party bound by contract to convey real property as a prerequisite to maintenance of an action for specific performance did not apply.—*Harrison v. Eaves*, 130 P.2d 841, 191 Okl. 453.

28. N.Y.—*In re Brown's E.R.*, 226 N.Y.S. 1, 130 Misc. 865, modified on other grounds 169 N.E. 612, 252 N.Y. 366.

29. Md.—*Liberty Trust Co. v. Weber*, 91 A.2d 393, 200 Md. 491.

#### Payment of income to life beneficiary

Such increase did not justify reformation of trust instruments providing for payment of all income to life beneficiary so as to provide for payment to him of only such income as should be required for his support and maintenance, even though instruments expressed the reason for so providing for life beneficiary as being to provide for his income required for his support and maintenance.—*Liberty Trust Co. v. Weber*, supra.

30. Md.—*Kiser v. Lucas*, 185 A. 441, 170 Md. 486.

31. N.Y.—*Union Trust Co. v. Kramer*, 201 N.Y.S. 182.

32. N.Y.—*Union Trust Co. v. Boardman*, 213 N.Y.S. 277, 215 App.Div. 73.

33. Md.—*Kiser v. Lucas*, 185 A. 441, 170 Md. 486.

34. U.S.—*Hadley v. Rinke*, D.C.N.Y., 39 F Supp 207.

**Lapse of fourteen years** since creation of trusts.—*Hadley v. Rinke*, supra.

#### Reformation held not barred

Pa.—*Pew v. Pew*, Com Pl., 69 Montg. Co. 335.

35. Md.—*Liberty Trust Co. v. Weber*, 91 A.2d 393, 200 Md 491.

36. Wis.—*Sullivan v. Bruhling*, 29 N.W. 211, 66 Wis 472.

37. Ala.—*Stone v. Hale*, 17 Ala. 557, 52 Am D 185.

65 C.J. p 339 note 89.

38. Colo.—*Sweeney v. Peterson*, 103 P.2d 1064, 106 Colo. 287.

a mere stranger and not the natural object of the donor's bounty.<sup>39</sup> Beneficiaries whose interest will not be affected by the reformation need not be made parties to the proceeding.<sup>40</sup>

**Evidence.** When mistake is urged as a ground for the reformation of a trust instrument, it must be established by clear, convincing, and satisfactory evidence.<sup>41</sup>

**Relief awarded; decree.** Equity may afford relief by a decree that the deed be canceled, and a new one executed by a master appointed for that purpose.<sup>42</sup> A settlor may have a trust instrument reformed so as to include a power of revocation, which he intended to include but which was omitted by mistake;<sup>43</sup> but if by mistake the settlor omits to insert in the trust instrument a provision reserving a power of revocation, the court may, without a preliminary decree of reformation, give effect to the transaction as if it had been reformed, by decreeing that the trustee retransfer the trust property to the settlor.<sup>44</sup>

## § 87. Modification

- a. In general
- b. Power of court as to modification generally
- c. Reservation or grant of power
- d. By parties generally
- e. By trustee
- f. Proceedings for modification

### a. In General

The same principles apply to modification of a

trust as to its revocation. A modification of an inter vivos deed of trust must be plain and unequivocal.

The same principles have been said to be applicable to the modification of a trust as are applicable to its revocation.<sup>45</sup> Any modification of an inter vivos deed of trust must be in plain and unequivocal language.<sup>46</sup> After modification of a trust in accordance with a reservation of power to modify or alter it, the validity of the trust with respect to the rule against perpetuities is to be tested as of the time of the modification.<sup>47</sup> A trust agreement which is not indefinite or ambiguous is not subject to clarification by supplementary agreement between one of the trust settlers and the trustee.<sup>48</sup> The granting clause of a deed in which the grantee is described as a trustee may be required to be modified by reference to a will, where such reference is made an inseparable part of the granting clause.<sup>49</sup>

**Impairment of trust.** A trust cannot be impaired for any purpose other than the purpose of the trust.<sup>50</sup>

**Addition or withdrawal of property.** A settlor has the inherent power to add property to his trust with or without a reservation of such right.<sup>51</sup> Under a provision by which the settlor reserves the right to withdraw, on written and duly recorded request, one-half of the personal estate of the trust estate, with all accessions or additions thereto, the settlor has been held entitled to withdraw at least one-half the value of the original trust property as of the time of its receipt by the trustee and of the actual additions made to the trust by the settlor, exclusive of realized gains.<sup>52</sup> The recording of

39. Colo.—Sweeney v. Peterson, *supra*.

40. Cal.—Ward v. Waterman, 24 P. 930, 85 Cal. 488.

41. Mass.—Coolidge v. Loring, 126 N.E. 276, 235 Mass. 220.  
65 C.J. p. 339 note 93.

**Evidence held insufficient to show mutual mistake.**—Trenton Banking Co. v. Howard, 187 A. 569, Ch., affirmed 187 A. 575, 121 N.J.Eq. 85.

42. Pa.—Ginschio v. Ley, 1 Phila. 383.

43. Ky.—Hines v. Louisville Trust Co., 254 S.W.2d 73.

44. Md.—Liberty Trust Co. v. Weber, 90 A.2d 194, 200 Md. 491, modified on other grounds 91 A.2d 393, 200 Md. 491.

45. Md.—Liberty Trust Co. v. Weber, *supra*.

46. N.Y.—County Trust Co. v. Young, 27 N.Y.S.2d 648, 262 App. Div. 81, reversed on other grounds 40 N.E.2d 1019, 287 N.Y. 801.

R.I.—Union Trust Co. v. Watson, 68 A.2d 916, 76 R.I. 223.

Modification of charitable trusts see Charities §§ 52, 66.

Revocation see *infra* §§ 88-91.

46. R.I.—Union Trust Co. v. Watson, *supra*.

**Modification by will or otherwise**  
R.I.—Union Trust Co. v. Watson, *supra*.

**Payment of taxes**

Where inter vivos trust agreement provided for payment of any inheritance or estate tax out of general principal of trust fund, settlor's intention to amend agreement by will and provide for payment of such taxes out of testamentary estate must be clearly stated.—Union Trust Co. v. Watson, *supra*.

**Separation agreement between husband and wife was held not to modify children's trust indentures.**—City Bank Farmers Trust Co. v. Macfadden, 70 N.Y.S.2d 559, affirmed 85 N.Y.S.2d 791, 274 App. Div. 1039, affirmed 87 N.E.2d 124, 209 N.Y. 711, reargued

ment denied 88 N.E.2d 531, 300 N.Y. 461.

47. N.Y.—Bankers Trust Co. v. Topping, 41 N.Y.S.2d 736, 180 Misc. 596.

48. Kan.—Lawless v. Wheeler Kelly Harny Trust Co., 109 P.2d 108, 153 Kan. 81.

49. R.I.—Sullivan v. Rhode Island Hospital Trust Co., 185 A. 148, 56 R.I. 253.

50. N.Y.—In re Green's Estate, 63 N.Y.S.2d 371, 271 App. Div. 171, reargument and motion denied 64 N.Y.S.2d 921, 271 App. Div. 760.

51. Utah.—Leggroan v. Zion's Sav. Bank & Trust Co., 232 P.2d 746.

**Failure to attach list of additions to trust deed was held not fatal to trust, since intent of settlor, as shown by his acts and language of trust deed, was to include in fund more than originally delivered property.**—Leggroan v. Zion's Sav. Bank & Trust Co., *supra*.

52. N.Y.—In re Friberg's Trust, 100 N.Y.S.2d 343, 199 Misc. 593.



such request is required to be with the trustee, and not in the register's office or any other public recording office.<sup>53</sup>

**Trust under seal.** Verbal arrangements with trustees under an agreement cannot be used to modify the terms of a trust instrument which is under seal;<sup>54</sup> and the effect of a statute may be such that a trust under seal cannot be modified by an unsealed instrument.<sup>55</sup>

**Trust of stock; voting trust.** Where voting trust agreements are allegedly executed as part of the terms of an agreement creating a trust in stock, it cannot be held as a matter of law that the provisions of the voting trust agreements modify or alter the stock trust agreement.<sup>56</sup>

### b. Power of Court as to Modification Generally

Under most authorities, a court possessing equitable

powers may modify the terms of a trust to preserve it and carry out the trustor's intent. Such power must be exercised cautiously and only where necessary.

It has been held that even a court of equity cannot go beyond the express terms, provisions, and directions of a valid trust;<sup>57</sup> that such court cannot alter the terms of an instrument creating a trust,<sup>58</sup> and that it cannot interfere with a trust solemnly created and established by an order of court.<sup>59</sup> On the other hand, it has been held that a court of equity has power, in exceptional cases, to modify the terms of a trust;<sup>60</sup> that such a court has power, inherent in the jurisdiction which it exercises over trusts generally,<sup>61</sup> to modify the terms under certain conditions,<sup>62</sup> as when necessity or expediency impels;<sup>63</sup> and that a court of equity may modify a trust on a proper showing of changed conditions occurring after the creation of the trust, if the rights of all the beneficiaries may be protected.<sup>64</sup>

53. N.Y.—In re Friberg's Trust, *supra*.

54. Ill.—Green v. Gawne, 47 N.E.2d 86, 382 Ill. 363.

Where there was no ambiguity in language of instrument creating trust in real property, and instrument was complete in itself, refusal, in suit for partition of property involved, to consider testimony consisting of verbal arrangements with trustees was correct.—Green v. Gawne, *supra*.

55. U.S.—Slade's Estate v. C. I. R., C.A. 2, 190 F.2d 689.

**Letter**  
U.S.—Slade's Estate v. C. I. R., *supra*.

56. N.Y.—Margaretten v. Margaretten, 76 N.Y.S.2d 854.

Voting trusts in general see Corporations § 552.

57. N.Y.—Application of Renn, 29 N.Y.S.2d 410, 177 Misc. 195.  
Execution of trust and management of property generally see *infra* § 246-376.

"The primary function of the court in exercising jurisdiction over trusts is to preserve them and to secure their administration according to their terms. . . . the court . . . lacks the power to remake a trust. It cannot take from one beneficiary and give to another, it cannot change the rights of the beneficiaries inter se by enlarging the rights of some at the expense of others."—In re Cosgrave's Will, 31 N.W.2d 20, 33, 225 Minn. 443, 1 A.L.R.2d 175.

58. Ark.—Morris v. Boyd, 162 S.W. 69, 110 Ark. 468, Ann.Cas. 1916A 1004.

**Protecting rights of infants and unborn remaindermen**

Where the rights of infants or unborn remaindermen, who are only

constructively before the court, are to be affected, the court should see to it that their rights are not injuriously affected; it is the duty of the court to preserve, and not to allow the parties in interest to alter trusts, where they have been made and created according to law.—Bettis v. Harison, 195 S.E. 835, 188 S.C. 352.—Dumas v. Carroll, 99 S.E. 801, 112 S.C. 284.

**Freeing minor's interest from trust**

A will which gave minor a part interest in income of property devised in trust until he should reach the age of 21, at which time fee-simple title was to vest in him, could not be so altered by the court as to free his interest from the trust during minority.—McKenzie v. Perdue, 19 S.E.2d 765, 67 Ga.App. 202, reversed on other grounds 21 S.E.2d 705, 191 Ga. 356, vacated on other grounds McKenzie v. Perdue, 23 S.E.2d 183, 68 Ga.App. 498.

59. N.J.—Gulick v. Gulick, Ch. § A 354.

60. N.C.—Penick v. Bank of Wadesboro, 12 S.E.2d 253, 218 N.C. 686.

61. Ill.—Dyer v. Paddock, 70 N.E.2d 49, 395 Ill. 288.

62. Ill.—Dyer v. Paddock, 70 N.E.2d 49, 395 Ill. 288.

N.J.—In re North Jersey Title Ins. Co., 184 A. 420, 120 N.J.Eq. 148, affirmed 187 A. 146, 120 N.J.Eq. 608.

63. N.C.—Penick v. Bank of Wadesboro, 12 S.E.2d 253, 218 N.C. 686.—Wachovia Bank & Trust Co. v. Laws, 7 S.E.2d 470, 217 N.C. 171.

**Anticipation of, or encroachment on, corpus**

Anticipation of corpus, or encroachment on corpus, of estate in advance of time of distribution fixed by trust instrument, is permitted in

cases of extreme emergency, as where the needs of infant, and sometimes of adult, beneficiary are involved, but the doctrine is strictly limited to present use of property to which beneficiary is ultimately entitled.—In re Cosgrave's Will, 31 N.W.2d 20, 225 Minn. 443, 1 A.L.R.2d 175.

64. Cal.—In re Van Deusen's Estate, 182 P.2d 565, 30 Cal.2d 285.

**Unforeseen conditions**

The rule must be based on facts showing that conditions have arisen or exigencies developed, which could not have been foreseen by donor, and that as result the beneficiaries will suffer loss.—Dyer v. Paddock, 70 N.E.2d 49, 395 Ill. 288.

**Allowing invasion of corpus of trust by life beneficiaries without consent of residuary beneficiaries, or any attempt to protect their interests was error as taking property from one without his consent and giving it to another.**—In re Van Deusen's Estate, 182 P.2d 565, 30 Cal.2d 285.

**Sympathy for needs of particular beneficiaries of trust does not empower court to deprive other beneficiaries of their interests in corpus of trust without their consent or enable court to construe non-testamentary declarations of testatrix into an expression of her plan or purpose in providing for trust.**—In re Van Deusen's Estate, *supra*.

**Payment of taxes**

(1) Chancery court has inherent power to modify trust agreement so as to permit payment of federal income taxes out of trust funds after unforeseen enactment of statute imposing on donor personal liability for such taxes, where donor is unable to pay because of changed financial circumstances.—Hardy v. Bankers

So, independently of the cy pres doctrine,<sup>65</sup> a court of equity has the power to modify the terms of a trust in order substantially to carry out the intention,<sup>66</sup> or to effectuate the primary purpose,<sup>67</sup> of the creator of the trust.

The court has power to do whatever is necessary to preserve a trust from destruction,<sup>68</sup> including

the power to modify and change the terms of the trust, in order to preserve it,<sup>69</sup> in appropriate<sup>70</sup> or unusual<sup>71</sup> circumstances. So, also, a court of equity, in order to accomplish the fundamental purpose of a trust, may, to a certain extent and under certain circumstances, break in on the terms of the trust<sup>72</sup> and authorize a disposition of the trust property not

Trust Co. of N. Y., 44 A 2d 839, 137 N.J.Eq. 552.

(2) Taxes and assessments generally see infra § 283.

65. Cal.—In re Loring's Estate, 175 P.2d 524, 29 Cal 2d 423.

66. U.S.—Burgess v. Nail, C.C.A. Okl., 103 F.2d 37.

Cal.—In re Loring's Estate, 175 P.2d 524, 29 Cal 2d 423—Adams v. Cook, 101 P.2d 484, 15 Cal 2d 352.

Neb.—Corpus Juris cited in John A. Creighton Home For Girls Trust v. Waltman, 299 N.W. 261, 266, 140 Neb. 3.

N.J.—Trust Co. of New Jersey v. Greenwood Cemetery, 32 A.2d 519, 21 N.J.Misc. 159.

Pa.—Few v. Pew, Com Pl., 69 Montg. Co. 335.

Wis.—In re Stack's Will, 258 N.W. 324, 217 Wis. 94, 97 A.L.R. 316.

Direction or permission to trustee see infra subdivision e (2) of this section.

"It is not the province of the courts to substitute their judgment or the wishes of the beneficiaries for the judgment and wishes of the . . . [trustor]."—Carter v. Kempton, 62 S.E.2d 713, 716, 233 N.C. 1.

#### Private and charitable trusts

(1) This rule applies to both private and charitable trusts.—In re Loring's Estate, 175 P.2d 524, 29 Cal 2d 423.

(2) Modification of charitable trusts see Charities §§ 52, 66.

#### Extension of trust

If necessary, equity will extend the trust as created in order more perfectly to fulfill the intention of the donor.—Zimmerman's Trustee v. Long, 61 S.W.2d 587, 250 Ky. 50.

#### Care of cemetery lots; misallocation

Where testatrix has created trust fund for care of cemetery lots, and excessive amount thereof is result of miscalculations by her, equity has power to grant relief by diversion of portion of fund to her heirs at law; but amount of approximately two thousand seven hundred dollars for such care was not so excessive, under the circumstances, as to offend public policy and warrant court in interfering therewith by directing a diversion of excess over five hundred dollars to heirs at law who had been limited by will to bequests of one

dollar.—Hammond v. Stringer, Ark., 258 S.W.2d 46.

67. N.J.—Tahmadou Trust & Guaranty Co. v. Probet, 16 A 2d 271, 128 N.J.Eq. 322.

N.C.—Trustees of Watt Hospital v. Board of Com'rs for Durham County, 58 S.E.2d 696, 231 N.C. 601.

Ohio—Harter Holding Co. v. Perkins, 43 N.E.2d 265, 69 Ohio App. 203, appeal dismissed 41 N.E.2d 251, first case, 139 Ohio St. 557, and 41 N.E.2d 251, second case, 139 Ohio St. 558.

Wis.—In re Robinson's Estate, 21 N.W.2d 391, 248 Wis. 293.

"The basic object of the court is to prevent the failure or material impairment of the primary and rudimentary purpose for which the settlor created the trust."—National Newark & Essex Banking Co. of Newark & Essex, 88 A 2d 229, 233 N.J. Super. 176—Lambertville Nat Bank v. Bunker, 57 A 2d 525, 527, 141 N.J.Eq. 396.

The controlling objective is to preserve the trust and effectuate the primary purpose of the testator.—Carter v. Kempton, 62 S.E.2d 713, 233 N.C. 1.

#### Benefits to be conferred on beneficiaries

When it appears that the benefits which the trustor desires to confer on the beneficiaries would not accrue to them by a slavish adherence to the terms of the trust, the court may modify the terms to accomplish the real intent and purpose of the trustor.—Adams v. Cook, 101 P.2d 484, 15 Cal 2d 352.

#### Rule or statute as to contracts inapplicable

The rule against courts modifying terms of a contract does not apply to declaration of trust where primary purpose of trust would not be accomplished by a strict adherence to terms of declaration, and rule that, where primary purpose of trust would not be accomplished by strict adherence to terms of declaration of trust, the court may modify the terms to accomplish intent of trustors, is not contrary to canons of construction of contracts contained in Civil Code.—Adams v. Cook, supra.

68. U.S.—Burgess v. Nail, C.C.A. Okl., 103 F.2d 37.

Cal.—Mabry v. Scott, 124 P.2d 659, 51 Cal App.2d 245, certiorari denied

Title Ins. & Trust Co. v. Mabry, 63 S.Ct. 75, 317 U.S. 670, 87 L.Ed. 538.

Ill.—Mead v. Garrison, 87 N.E.2d 805, 338 Ill.App. 453, affirmed in part and reversed on other grounds in part 84 N.E.2d 172, 406 Ill. 269.

Mo.—Brookings v. Mississippi Val. Trust Co., 196 S.W.2d 775, 355 Mo. 513, 167 A.L.R. 1424.

N.C.—Moses H. Cone Memorial Hospital v. Cone, 56 S.E.2d 709, 231 N.C. 292—First Citizens Bank & Trust Co. v. Rushberry, 39 S.E.2d 601, 226 N.C. 586—Duffy v. Duffy, 20 S.E.2d 835, 221 N.C. 521—Cutter v. American Trust Co., 197 S.E. 542, 213 N.C. 686.

65 C.J. p. 684 note 53.

69. U.S.—Burgess v. Nail, C.C.A. Okl., 103 F.2d 37.

Cal.—Corpus Juris cited in Mabry v. Scott, 124 P.2d 659, 665, 51 Cal. App.2d 245, certiorari denied Title Ins. & Trust Co. v. Mabry, 63 S.Ct. 75, 317 U.S. 670, 87 L.Ed. 538.

Ill.—Stough v. Brach, 70 N.E.2d 585, 395 Ill. 544—Dyer v. Paddock, 70 N.E.2d 49, 395 Ill. 288—Mead v. Garrison, 87 N.E.2d 805, 338 Ill.App. 453, affirmed in part and reversed on other grounds in part 84 N.E.2d 172, 406 Ill. 269.

Mo.—Brookings v. Mississippi Val. Trust Co., 196 S.W.2d 775, 355 Mo. 513, 167 A.L.R. 1424.

N.C.—Cutter v. Kempton, 62 S.E.2d 713, 233 N.C. 1—Trustees of Watt Hospital v. Board of Com'rs for Durham County, 58 S.E.2d 696, 231 N.C. 604—Cutter v. American Trust Co., 197 S.E. 542, 213 N.C. 686.

65 C.J. p. 684 note 51.

#### Method of administering estate

A court of equity has power to change method of administering a trust estate, when it is shown that such change is necessary in order to prevent loss or destruction of the trust property.—Adams v. Cook, 101 P.2d 484, 15 Cal 2d 352.

70. U.S.—Nail v. American Nat. Bank of Bristol, D.C. Okl., 21 F. Supp. 385, rehearing denied Nail v. American Nat. Bank of Bristol, Okl., 22 F.Supp. 977, affirmed, C.C.A. Burgess v. Nail, 103 F.2d 37.

71. N.C.—Duffy v. Duffy, 20 S.E.2d 835, 221 N.C. 521.

72. Ill.—Stough v. Brach, 70 N.E.2d 585, 395 Ill. 544.

N.Y.—Northwestern Tel. Co. v. W. U. Tel. Co., 99 N.Y.S.2d 331, 197 Misc. 1075.

specifically authorized by the instrument creating the trust.<sup>73</sup>

In exercising its jurisdiction to modify or alter, the court should have due regard for the intention of the settlor,<sup>74</sup> and should be exceedingly cautious;<sup>75</sup> courts are slow to exercise such power,<sup>76</sup> and will do so only when it clearly appears to be

necessary,<sup>77</sup> and only in extreme cases.<sup>78</sup> The power of the court is exercised not to defeat or destroy the trust, but to preserve it or the estate,<sup>79</sup> and not to defeat, but to carry out, the purpose of the donor or trustor.<sup>80</sup> The exercise of the power can be justified only by some exigency or emergency which makes the action of the court in a sense indispensable to the preservation of the trust,<sup>81</sup>

73. N.Y.—Northwestern Tel. Co. v. W. U. Tel. Co., *supra*.

74. Ill.—Johns v. Johns, 50 N.E. 387, 172 Ill. 472.

Mo.—Lowry v. Tiernan, 2 Harr. & G. 34.

"The intention of the settlor must be given great respect."—Nail v. American Nat. Bank of Bristol, D.C. Okl., 21 F.Supp. 385, 390, rehearing denied Nail v. American Nat. Bank of Bristol, Okl., 22 F.Supp. 977, affirmed, C.C.A., Burgess v. Nail, 103 F.2d 37.

Evidence held insufficient to establish that creator of trust clearly intended an invasion of corpus, if necessary, to provide each life beneficiary with certain income.—In re Van Dusen's Estate, 182 P.2d 566, 80 Cal. 2d 285.

75. U.S.—Nail v. American Nat. Bank of Bristol, D.C. Okl., 21 F.Supp. 385, rehearing denied Nail v. American Nat. Bank of Bristol, Okl., 22 F.Supp. 977, affirmed, C.C.A., Burgess v. Nail, 103 F.2d 37.

Ill.—Stough v. Brach, 70 N.E.2d 585, 395 Ill. 544.—Dyer v. Paddock, 70 N.E.2d 49, 395 Ill. 288.

65 C.J. p 684 note 66.

Refusal to permit modification was held not an abuse of discretion.—Reedy v. Johnson's Estate, 26 So.2d 685, 200 Miss. 205.

76. Ill.—Stephens v. Collison, 113 N.E. 691, 274 Ill. 389, Ann.Cas. 1918D 559.

Mo.—Brookings v. Mississippi Val. Trust Co., 196 S.W.2d 775, 355 Mo. 513, 167 A.L.R. 1424.

N.C.—Cutter v. American Trust Co., 197 S.E. 542, 213 N.C. 686.

77. Ill.—Dyer v. Paddock, 70 N.E. 2d 49, 395 Ill. 288.—Stephens v. Collison, 113 N.E. 691, 274 Ill. 389, Ann.Cas. 1918D 559.

Mo.—Brookings v. Mississippi Val. Trust Co., 196 S.W.2d 775, 355 Mo. 513, 167 A.L.R. 1424.

N.J.—Trust Co. of New Jersey v. Greenwood Cemetery, 32 A.2d 519, 21 N.J. Misc. 169.

N.C.—Carter v. Kempton, 62 S.E.2d 713, 233 N.C. 1.—Cutter v. American Trust Co., 197 S.E. 542, 213 N.C. 686.

#### Impossibility of compliance

Where conditions not foreseen by trustor will defeat his purpose unless a deviation is permitted, a court

of equity has jurisdiction to grant the necessary authority to deviate, and such equitable jurisdiction may be invoked not only where necessary to preserve the estate but also where literal compliance with the trust instrument has become impossible.—Holles v. Boatmen's Nat. Bank of St. Louis, 255 S.W.2d 735, 363 Mo. 949.

#### Urgent necessity

U.S.—Burgess v. Nail, C.C.A. Okl., 103 F.2d 37.

Necessity in order to preserve trust N.C.—Rice v. Wachovia Bank & Trust Co., 59 S.E.2d 802, 232 N.C. 222.

#### Necessity held not shown

Ill.—Stough v. Brach, 70 N.E.2d 585, 395 Ill. 544.

#### Doctrine of necessity held inapplicable to property rights

N.J.—Segelken v. Segelken, 97 A.2d 501, 26 N.J. Super. 178.—Fidelity Union Trust Co. v. J. R. Shanley Estate Co., 167 A. 865, 113 N.J. Eq. 562.

78. Ill.—Stough v. Brach, 70 N.E.2d 585, 395 Ill. 544.

79. Ill.—Stephens v. Collison, 113 N.E. 691, 274 Ill. 389, Ann.Cas. 1918D 559.

Minn.—In re Congrave's Will, 31 N.W.2d 20, 225 Minn. 443, 1 A.L.R. 2d 175.—Mayall v. Mayall, 65 N.W. 942, 63 Minn. 511.

Miss.—Corpus Juris quoted in Reedy v. Johnson's Estate, 26 So.2d 685, 200 Miss. 205.

Mo.—Brookings v. Mississippi Val. Trust Co., 196 S.W.2d 775, 355 Mo. 513, 167 A.L.R. 1424.

N.C.—Brooks v. Duckworth, 67 S.E.2d 752, 234 N.C. 449.—Duffy v. Duffy, 20 S.E.2d 835, 221 N.C. 521.—Penick v. Bank of Wadesboro, 12 S.E.2d 253, 218 N.C. 686.—Cutter v. American Trust Co., 197 S.E. 542, 213 N.C. 686.

Pa.—O'Connor v. Hagy, Com.Pl., 34 Berks Co. 35.

#### Destruction or impairment of principal

The court, even in the face of the consent of all persons interested, may not destroy or impair the principal of a valid trust.—In re Andrade's Estate, 31 N.Y.S.2d 25, 177 Misc. 532.

80. N.C.—Brooks v. Duckworth, 67 S.E.2d 752, 234 N.C. 449.—Duffy v.

Duffy, 20 S.E.2d 835, 221 N.C. 521.—Penick v. Bank of Wadesboro, 12 S.E.2d 253, 218 N.C. 686.

An active trust will be judicially modified only in exceptional situations in order to carry out, rather than to defeat, the primary purpose of trustor as expressed in trust instrument.—Moxley v. Title Ins. & Trust Co., 165 P.2d 15, 27 Cal.2d 457, 163 A.L.R. 838.

#### Knowledge of settlor

In construing will executed by woman of considerable business experience, as basis of determining whether to modify express requirements of the will, court must assume that she was aware that about one-third of her estate would be consumed in payment of inheritance and estate taxes and expenses of administration.—In re Boyle's Estate, 288 N.W. 257, 32 Wis. 531.

81. U.S.—Nail v. American Nat. Bank of Bristol, D.C. Okl., 21 F.Supp. 385, rehearing denied Nail v. American Nat. Bank of Bristol, Okl., 22 F.Supp. 977, affirmed, C.C.A., Burgess v. Nail, 103 F.2d 37.

Miss.—Corpus Juris quoted in Reedy v. Johnson's Estate, 26 So.2d 685, 200 Miss. 205.

N.C.—Corpus Juris cited in Rice v. Wachovia Bank & Trust Co., 59 S.E.2d 803, 232 N.C. 222.—Corpus Juris cited in Redwine v. Clodfelter, 38 S.E.2d 205, 206, 226 N.C. 266.

Ohio.—Harter Holding Co. v. Perkins, 43 N.E.2d 365, 69 Ohio App. 203, appeal dismissed 41 N.E.2d 251, first case, 139 Ohio St. 567, and 41 N.E.2d 251, second case, 139 Ohio St. 558.

65 C.J. p 684 note 58.

"It must be made to appear that some exigency, contingency, or emergency has arisen which makes the action of the court indispensable to the preservation of the trust and the protection of infants."—Carter v. Kempton, 62 S.E.2d 713, 233 N.C. 1.—Redwine v. Clodfelter, 38 S.E.2d 203, 205, 226 N.C. 266.

#### Method of handling property or corpus of trust fund

Mich.—Evans v. Groom, 27 N.W.2d 111, 324 Mich. 297.—Young v. Young, 237 N.W. 535, 355 Mich. 173, 77 A.L.R. 963.

and the condition or emergency asserted must be one not contemplated by the trustor and which, had it been anticipated, would undoubtedly have been provided for.<sup>82</sup> Further, the exigency, contingency, or emergency necessary to invite the intervention of the courts must relate to, and grow out of, the trust itself or directly affect the corpus thereof or the income therefrom.<sup>83</sup> In such cases the court may, as far as may be, occupy the place of the settlor and do with the trust fund what the settlor would have done had he anticipated the emergency.<sup>84</sup> Where a contingency arises, such that the estate may be totally lost to the beneficiaries, equity will not permit such loss for lack of power to modify the trust;<sup>85</sup> it is sufficient that the estate may be totally lost, or in grave danger of loss, for equity to aid in its preservation.<sup>86</sup>

#### **Borrowing and investing; insurance trust**

A court of equity, with the consent of the settlor and the beneficiaries, would change a voluntary life insurance trust agreement so as to increase the discretionary powers of the trustee as to borrowing on the policies to pay premiums and as to investments, where changed financial condition made the modifications in the administrative features of the trust agreement necessary in order to preserve the trust corpus for the beneficiaries.—*Cutler v. American Trust Co.*, 197 S.E. 512, 213 N.C. 686.

82. N.J.—*Fidelity Union Trust Co. v. J. R. Shanley Estate Co.*, 167 A. 865, 113 N.J.Eq. 562.

N.C.—*Carter v. Kempton*, 62 S.E.2d 713, 233 N.C. 1.—*First Citizens Bank & Trust Co. v. Hersherry*, 39 S.E.2d 601, 228 N.C. 536.

83. N.C.—*Carter v. Kempton*, 62 S.E.2d 713, 233 N.C. 1.

84. U.S.—*Nail v. American Nat. Bank of Bristol*, D.C. Okl., 21 F. Supp. 385, rehearing denied *Nail v. American Nat. Bank of Bristol*, Okl., 22 F. Supp. 977, affirmed, C.C.A., *Burgess v. Nail*, 103 F.2d 37 Cal., *Adams v. Cook*, 101 F.2d 484, 15 Cal.2d 252.

Mo.—*Corpus Juris cited in Bolles v. Boatmen's Nat. Bank of St. Louis*, 255 S.W.2d 725, 734, 362 Mo. 949.—*Corpus Juris cited in St. Louis Union Trust Co. v. Ghio*, 222 S.W.2d 556, 561, 240 Mo. App. 1033.

N.C.—*Carter v. Kempton*, 62 S.E.2d 713, 233 N.C. 1.—*Rice v. Wachovia Bank & Trust Co.*, 59 S.E.2d 803, 232 N.C. 222.

65 C.J. p. 684 note 59.

"Although the settlor has expressly forbidden the course of action sought to be pursued, the judicial theory is that he would not have forbidden it, but on the contrary would

have authorized it, had he envisioned the eventual circumstances."—*National Newark & Essex Banking Co. of Newark v. Osborne*, 88 A.2d 239, 233, 19 N.J. Super. 175.—*Lambertville Nat. Bank v. Bumster*, 57 A.2d 525, 527, 141 N.J. Eq. 396.

#### **Permitting sale of holding company's assets**

Ohio.—*Harter Holding Co. v. Perkins*, 43 N.E.2d 365, 69 Ohio App. 203, appeal dismissed 41 N.E.2d 251, first case, 139 Ohio St. 557, and 41 N.E.2d 251, second case, 139 Ohio St. 558.

85. U.S.—*Nail v. American Nat. Bank of Bristol*, D.C. Okl., 21 F. Supp. 385, rehearing denied *Nail v. American Nat. Bank of Bristol*, Okl., 22 F. Supp. 977, affirmed, C.C.A., *Burgess v. Nail*, 103 F.2d 37 65 C.J. p. 684 note 61.

86. U.S.—*Nail v. American Nat. Bank of Bristol*, D.C. Okl., 21 F. Supp. 385, rehearing denied *Nail v. American Nat. Bank of Bristol*, Okl., 22 F. Supp. 977, affirmed, C.C.A., *Burgess v. Nail*, 103 F.2d 37.

87. MINS.—*Corpus Juris* quoted in *Reedy v. Johnson's Estate*, 26 So.2d 685, 687, 200 Miss. 205. N.C.—*Corpus Juris* cited in *Redwine v. Clodfelter*, 38 F.2d 203, 206, 226 N.C. 366.

65 C.J. p. 684 note 60.

"Advantage to the beneficiaries is not one of the most potent influences upon a court of equity to exercise a sound discretion. . . In the administration of trust and to deviate from the terms of the trustor."—*Reedy v. Johnson's Estate*, 26 So.2d 685, 687, 200 Miss. 205.

#### **Technical objections**

Court of equity will not modify, or permit modification of, trust on technical objections merely because its terms are objectionable to interested persons or their welfare would

The trust will not be modified, in violation of the settlor's intention, merely because the interest of the parties will be served by doing so,<sup>87</sup> or because the beneficiaries dislike its provisions,<sup>88</sup> or merely for the purpose of enabling them to receive a greater income,<sup>89</sup> or to use the property in what they may regard as a more profitable manner than that contemplated in the instrument;<sup>90</sup> and rights in a trust estate cannot be altered to prevent disappointment which the creator might have provided against had he foreseen the mishap.<sup>91</sup> However, it has been held that modification may be made in order to secure for the cestuis the maximum benefit.<sup>92</sup>

*Settlement; family differences.* Settlement of a suit brought to have the trust agreement vacated has been held a proper occasion for the modification of the terms of the trust by the court, where

be served thereby.—*Carter v. Kempton*, 62 S.E.2d 713, 233 N.C. 1.—*Rodwina v. Clodfelter*, 38 F.2d 203, 226 N.C. 366.—*Rice v. Wachovia Bank & Trust Co.*, 59 S.E.2d 803, 232 N.C. 222.

#### **Purchase of home**

(1) Modification to permit purchase of home by beneficiary, by giving him part of corpus of trust, was held not authorized in absence of showing of such necessitous circumstances as would warrant disregarding plain provisions of trust.—*Moxley v. Title Ins. & Trust Co.*, 165 F.2d 15, 27 Cal. 2d 457, 163 A.L.R. 838.

(2) Where testator, creating trust of residuary estate, bequeathed all income and principal thereof to his sons, except share of income and use of homestead, or of house elsewhere costing no more than twenty-five thousand dollars, bequeathed to widow, widow was held not entitled to have another home, equivalent in value to homestead, purchased from trust fund because business district had grown up around homestead.—*Fidelity Union Trust Co. v. J. R. Shanley Estate Co.*, 157 A. 865, 113 N.J.Eq. 562.

88. N.C.—*Rice v. Wachovia Bank & Trust Co.*, 59 S.E.2d 803, 232 N.C. 222.

89. Ill.—*Dyer v. Paddock*, 70 N.E.2d 49, 395 Ill. 288.

90. Ill.—*Dyer v. Paddock*, *supra*.

91. N.J.—*Segelken v. Segelken*, 97 A.2d 501, 26 N.J. Super. 178.—*Tridgen v. Hopper*, 179 A. 261, 118 N.J. Eq. 359.—*Fidelity Union Trust Co. v. J. R. Shanley Estate Co.*, 157 A. 865, 113 N.J. Eq. 562.

92. Ohio.—*Harter Holding Co. v. Perkins*, 43 N.E.2d 365, 69 Ohio App. 203, appeal dismissed 41 N.E.2d 251, first case, 139 Ohio St. 557, and 41 N.E.2d 251, second case, 139 Ohio St. 558.

necessary to preserve the trust.<sup>93</sup> A court of equity is not justified in altering a trust to preserve the spiritual values of family affection.<sup>94</sup> So, the court will not alter a trust by approving a family settlement where the conditions about which the parties complain are created by family differences only incidentally affecting the trust,<sup>95</sup> and where the questions raised can be settled by the courts without resort to a modification of the trust.<sup>96</sup> Also, the court will not approve of modification by way of a family settlement to the possible detriment of infants.<sup>97</sup>

**Statutes.** Under a statute providing for the compromise, settlement, or adjustment of any trust controversy, an equity court has been held to have the power to modify a trust with or without the consent of the trustee.<sup>98</sup> A statute authorizing certain deviations from the terms of a trust because of a change of circumstances has been held not to change substantive rights, but to deal only with the ad-

ministration of trusts,<sup>99</sup> and hence is not invalid as retrospective.<sup>1</sup> The test, under such a statute, has been held to be whether the results of the provisions of a trust are so interfered with, and the gifts so diminished, by an unanticipated change of circumstances, that it is equitable to permit a deviation from the terms of the trust.<sup>2</sup>

### c. Reservation or Grant of Power

- (1) In general
- (2) Construction and operation of provision

#### (1) In General

The creator of a trust may reserve power to modify it; modification under such reservation, in order to be effective, must be in the mode prescribed.

A settlor creating a trust may reserve the power of modification thereof.<sup>3</sup> Such a reservation does not invalidate the trust,<sup>4</sup> or make the disposition

93. U.S.—*Nail v. American Nat. Bank of Bristol*, D.C. Okl., 21 F. Supp. 385, rehearing denied *Nail v. American Nat. Bank of Bristol*, Okl., 22 F. Supp. 977, affirmed, C. C. A., *Burgess v. Nail*, 103 F.2d 37.

#### Modification by stipulation and agreed judgment

The text rule is true notwithstanding modification came about by stipulation and agreed judgment, where modification was approved only after the court was satisfied that it was necessary in order to preserve the trust.—*Nail v. American Nat. Bank of Bristol*, D.C. Okl., 21 F. Supp. 385, rehearing denied *Nail v. American Nat. Bank of Bristol*, Okl., 22 F. Supp. 977, affirmed, C. C. A., *Burgess v. Nail*, 103 F.2d 37.

94. N.C.—*Carter v. Kempton*, 62 S.E. 2d 713, 233 N.C. 1.

95. N.C.—*Carter v. Kempton*, supra.

96. N.C.—*Carter v. Kempton*, supra.

97. N.C.—*Carter v. Kempton*, supra.

98. Mich.—*Detroit Trust Co. v. Neubauer*, 38 N.W.2d 371, 325 Mich. 319.—*Rose v. Southern Michigan Nat. Bank*, 238 N.W. 284, 255 Mich. 275.

99. N.H.—*Citizens' Nat. Bank v. Morgan*, 51 A.2d 841, 94 N.H. 284, 170 A.L.R. 1215.

#### No distinction between charitable and other trusts

N.H.—*Citizens' Nat. Bank v. Morgan*, supra.

1. N.H.—*Citizens' Nat. Bank v. Morgan*, supra.

2. N.H.—*Citizens' Nat. Bank v. Morgan*, supra.

Decrease in interest rates and dividends paid by savings banks, re-

sulting from general economic trend, could be found to be a "change of circumstances," unforeseen by testator, substantially impairing accomplishment of gift of income in trust, within the statute permitting deviation from terms of the trust.—*Citizens' Nat. Bank v. Morgan*, supra.

3. U.S.—*Plimpton v. C. I. R.*, C.C.A. 1, 135 F.2d 482.

Cal.—*Security-First Nat. Bank of Los Angeles v. Reynolds*, 232 P.2d 318, 104 Cal.App.2d 697.

Mass.—*State Street Trust Co. v. Crocker*, 28 N.E.2d 5, 306 Mass. 257, 128 A.L.R. 1166.

Mo.—*St. Louis Union Trust Co. v. Dudley*, App. 163 S.W.2d 290.

65 C.J. p. 340 note k.

Reservations in declaration of trust generally see supra § 47.

Reserved power held akin to power of appointment.

Mass.—*Sears v. Coolidge*, 108 N.E.2d 563, 329 Mass. 840.

Reservation held not implied.

N.Y.—*In re Mackay's Will*, 36 N.Y.S. 2d 551.

Exercise of right by court.

Right of amendment reserved to grantor cannot be exercised by court.—*Wachovia Bank & Trust Co. v. Steele's Mills*, 34 S.E.2d 425, 225 N.C. 502.

Right to allot or set off land.

A grantor merely reserving the right to "allot" or "set off" the land to his children or their issue under the terms of the trust deed reserves only the right to divide the land, and has no power to change estate granted.—*First Carolinas Joint Stock Land Bank v. Deschamps*, 172 S.E. 622, 171 S.C. 466.

Assignment by trustor was held subject to reservation by him of power to amend trust.—*Merchants Nat. Bank of New Bedford v. Morrissey*, 109 N.E.2d 821, 329 Mass. 601.

#### Power of modification immaterial

Where husband and wife, as tenants by the entirety, conveyed property in trust, reserving to themselves a life estate with remainder to their children, reservation by them of power of modification was immaterial in determining whether property was subject to execution under judgment against surviving husband.—*Murphy v. C. I. T. Corp.*, 33 A.2d 16, 347 Pa. 591.

#### Diversion of trust res

The retention by settlor, creating trust in bank account and note and mortgage, of possession of bank book, note, and mortgage, did not indicate a retention of power to divert any of trust res from purposes of trust estate without substituting other property of equal value, where nearly all trust powers were vested in settlor and not in trustee during settlor's life and competency.—*Garneau v. Garneau*, 9 A.2d 15, 63 R.I. 416, 131 A.L.R. 460.

4. Ga.—*Wilson v. Fulton Nat. Bank of Atlanta*, 4 S.E.2d 660, 188 Ga. 691.

Mass.—*Stahler v. Sevinor*, 84 N.E. 2d 447, 324 Mass. 18.—*National Shawmut Bank of Boston v. Joy*, 53 N.E.2d 113, 315 Mass. 457.

Mich.—*Goodrich v. City Nat. Bank & Trust Co. of Battle Creek*, 258 N.W. 253, 270 Mich. 222.

Ohio.—*Cleveland Trust Co. v. White*, 15 N.E.2d 627, 134 Ohio St. 1, 118 A.L.R. 476.—*Fifth Third Union*

testamentary in character, as discussed in Wills § 143; and such a reservation has been held not contrary to public policy as offering a means of evading state and federal inheritance taxes or inconveniencing their collection.<sup>5</sup> Likewise, the creator of a trust may grant to others powers of modification.<sup>6</sup>

The right to amend a trust instrument may be exercised in conformity with the power reserved in the instrument,<sup>7</sup> and an effective modification may be made only by pursuing the mode prescribed by the trust instrument.<sup>8</sup> So, where a reservation of a right to revoke the trust as an entirety is made,

Trust Co. v. Foss, 15 Ohio Supp. 55.  
Utah.—Leggros v. Zion's Sav. Bank & Trust Co., 232 P.2d 746.  
65 C.J. p. 340 note 9.

#### Right to change beneficiaries

Mich.—Rose v. Rose, 1 N.W.2d 458, 300 Mich. 73.—Goodrich v. City Nat. Bank & Trust Co. of Battle Creek, 258 N.W.253, 270 Mich. 222.

**The mere possibility of future amendment or modification of terms of a living trust does not render the trust void in whole or in part.**—Bulles v. Toledo Trust Co., 58 N.E.2d 381, 144 Ohio St. 195, 157 A.L.R. 1164.

5. Mich.—Goodrich v. City Nat. Bank & Trust Co. of Battle Creek, 258 N.W. 253, 270 Mich. 222.

6. Mass.—State Street Trust Co. v. Crocker, 28 N.E.2d 5, 306 Mass. 257, 128 A.L.R. 1166.  
Grant to trustee see *infra* subdivision e (1) of this section.

#### Exercise for grantee's benefit improper

Where son of trustor had power to alter or amend trust in any way, and to any extent, he might deem desirable and his powers were limited to such changes as, in his judgment, would further the interest of the trust estate, powers so given could not be exercised for his benefit, since to use them in such a way as to benefit himself would be breach of trust and a violation of the governing laws of the state.—Allen v. Nunnally, C.A.Ga., 180 F.2d 318.

7. N.Y.—Faulkner v. Irving Trust Co., 246 N.Y.S. 313, 231 App.Div. 87.

#### Extent of power

A settlor of a fund held under an active trust may not alter the terms of the trust except to the extent specified in the settlement, notwithstanding the settlor has the entire beneficial interest in the fund for life.—In re Reese's Estate, 177 A. 792, 317 Pa. 473.—Kaufman v. Hiestand, 200 A. 251, 131 Pa.Super. 219.—In re Lau's Estate, 27 Pa.Dist. & Co. 157, 50 York Leg.Rec. 73.

#### Original beneficiary reinstated by amendment

Ill.—Continental Illinois Nat. Bank & Trust Co. of Chicago v. Art Institute of Chicago, 100 N.E.2d 625, 409 Ill. 481.

#### Separation agreement held not exercise of reserved right

N.Y.—City Bank Farmers Trust Co. v. Macfadden, 70 N.Y.S.2d 559, affirmed 85 N.Y.S.2d 791, 274 App.Div. 1039, affirmed 87 N.E.2d 124, 299 N.Y. 711, reargument denied 88 N.E.2d 531, 300 N.Y. 461.

#### Change or elimination of beneficiary

(1) A power to modify, alter, or amend a trust agreement in whole or in part authorizes a change of beneficiaries.

N.Y.—In re Woodward's Trust, 132 N.Y.S.2d 266, 281 App.Div. 459, appeal denied 132 N.Y.S.2d 924, 284 App.Div. 838.

Pa.—In re Solomon's Estate, 2 A.2d 825, 332 Pa. 462.  
65 C.J. p. 340 note 12 [a]

(2) Power to change beneficiaries was held operative on remaindermen as well as life tenants.—Schellenstrager v. Tradesmens Nat. Bank & Trust Co., 88 A.2d 773, 370 Pa. 501.

(3) Grantors reserving the right to change a beneficiary of an inter vivos trust, despite a stipulation of irrevocability therein contained, may make such a change. Amendments so as to make the grantors' estates beneficiaries in accordance with reservation served to create, if not confirm, a reversion in the grantors.—Guaranty Trust Co. of N. Y. v. Howe, 86 N.Y.S.2d 808, 193 Misc. 640.

(4) Where settlor's power to modify a trust is unrestricted, he can so modify it as to exclude all beneficiaries, and make himself the sole beneficiary.—Manice v. Howard Sav. Institution, 104 A.2d 74, 30 N.J.Super. 267.

(5) A settlor who has reserved the right to amend the trust in any manner whatsoever or in any and every respect may eliminate nonconsenting or minor beneficiaries.—In re Woodward's Trust, 132 N.Y.S.2d 266, 284 App.Div. 459, appeal denied 132 N.Y.S.2d 924, 284 App.Div. 838.

#### Acceptance of trustor's amendments by trustee

Where trust agreement provided that the trustee might, at any time and from time to time, amend agreement, provided the trustee accepted such amendment, the trustor's amendments accepted by the trustee were valid and binding.—Wilson v. First Nat. Trust & Sav. Bank of San

Diego, 166 P.2d 593, 73 Cal.App.2d 446.

#### Immaterial alteration

Alteration in trust deed which added phrase "the trustee shall receive reasonable costs and expenses" did not render trust void, since provision was one which law would imply in any event and, therefore, alteration was not material.—Leggros v. Zion's Sav. Bank & Trust Co., Utah, 232 P.2d 746.

8. U.S.—New England Mut. Life Ins. Co. v. Harvey, D.C.Mass., 82 F. Supp. 702.

Ill.—Sarasin v. Live Stock Nat. Bank of Chicago, 105 N.E.2d 752, 412 Ill. 88.

Mass.—Kerwin v. Donaghey, 59 N.E.2d 299, 317 Mass. 559.

Pa.—In re Reese's Estate, 177 A. 792, 317 Pa. 473.—Kaufman v. Hiestand, 200 A. 251, 131 Pa.Super. 219.—In re Justice's Estate, 50 Pa.Dist. & Co. 532.—In re Lau's Estate, 27 Pa.Dist. & Co. 157, 50 York Leg. Rec. 73.—In re Altland's Estate, Orph., 65 York Leg.Rec. 25.  
65 C.J. p. 340 note 15.

"A trust when made can only be . . . modified as provided therein."—Schoellkopf v. U. S., D.C.N.Y., 36 F. Supp. 617, 620, affirmed, C.C.A., 124 F.2d 982.

#### Strict conformity with terms required

Mass.—Phelps v. State Street Trust Co., 115 N.E.2d 382, 330 Mass. 611.

#### Method specified must be strictly followed

Pa.—In re Shapley's Deed of Trust, 53 Pa.Dist. & Co. 123, affirmed 46 A.2d 227, 353 Pa. 499, 164 A.L.R. 877.

#### Joint power and exercise

Pa.—In re Roth's Estate, Orph., 66 Dauph. Co. 53, 4 Fiduciary 440.

#### Will

(1) A will was held not modification of inter vivos deed of trust not making a testamentary disposition of property.—In re Lyon's Estate, 63 A.2d 415, 161 Pa.Super. 140.

(2) A trust indenture providing that the reserved power of modification shall be exercised by filing with the trustee a written notice of modification manifests the settlor's intent that the power shall be exercised only during his lifetime, so as to foreclose its exercise by will; and where a settlor retains the testamentary power to modify the trust in-

it may not be amended in part;<sup>9</sup> and where the method prescribed is by instrument prior to the settlor's death with the joinder of all the trustees, the affixation of a trustee's signature to the amending instrument after the settlor's death is insufficient.<sup>10</sup> A power to modify a trust "by an instrument in writing" may not be exercised by an oral agreement.<sup>11</sup> The settlor's intention as to the mode of exercising the power is to be drawn from a consideration of the entire instrument.<sup>12</sup> Where no method of exercise of the power reserved is specified, alteration powers may be exercised in any manner sufficiently manifesting an intention to alter.<sup>13</sup>

A reservation of the power to revoke has been held to include a reservation of the power to amend, the latter power being implicit in the former,<sup>14</sup> provided those who have the power to revoke and

those who are entitled to the corpus on revocation consent to the amendment.<sup>15</sup>

**Relinquishment of power.** The reserved power to amend or modify may be relinquished by subsequent action on the part of those in whom it vests.<sup>16</sup>

## (2) Construction and Operation of Provision

A trust provision reserving the right of modification is to be construed in the light of the surrounding circumstances, and so as to make it effective. The right may be repeatedly exercised, in the absence of language to the contrary.

A provision reserving the power to modify the trust is not to be construed in vacuo, as an isolated grammatical phenomenon,<sup>17</sup> but is to be read in its context<sup>18</sup> and in the light of the circumstances surrounding the use of the words.<sup>19</sup> A construction which would render the provision surplusage

denture, a general residuary clause in his will, disposing of all the residue of his property or all the property for which he has a power of appointment, is not an exercise of the power of modification.—*Chase Nat. Bank of City of New York v. Tomagno*, 14 N.Y.S.2d 759, 172 Misc.63

### Acknowledgment; authentication

(1) The requirement of acknowledgment of any amendment is not wholly for the benefit of the trustees, and cannot be waived by them, where such requirement is included, only acknowledged amendments are valid, and no others; requirement of acknowledgment means that settlor is required to acknowledge the instrument making the alteration before a public officer authorized by law to take acknowledgments of other writings.—*Phelps v. State Street Trust Co.*, 115 N.E.2d 382, 330 Mass. 511.

(2) The fact that amendments were acknowledged outside the state and were not authenticated by the foreign county clerks, would not make them void, where the settlor had required no formal authentication, but only that the amendment be written, acknowledged, and filed with the trustee.—*In re Woodward's Trust*, 122 N.Y.S.2d 266, 284 App.Div. 459, appeal denied 132 N.Y.S.2d 924, 284 App.Div. 838.

### Delivery of modifying instrument to trustee

(1) Under reserved power to modify any provision of insurance trust agreement by written instrument signed by settlor and delivered to trustees, settlor could not modify agreement by a provision in his will, in absence of evidence that will was delivered to trustees.—*Union Trust*

*Co. v. Watson*, 68 A.2d 916, 76 R.I. 223.

(2) Amending instrument held effectively delivered.—*Chase Nat. Bank of City of New York v. Mackenzie*, 76 N.Y.S.2d 19, 192 Misc. 172.

9. N.J.—*National Newark & Essex Banking Co. v. Rosahl*, 128 A. 586, 97 N.J.Eq. 74.

10. Wis.—*Richardson v. Stephenson*, 213 N.W. 678, 193 Wis. 89, 52 A.L.R. 681.

11. Pa.—*In re Justice's Estate*, 50 Pa.Dist. & Co. 532.

12. N.Y.—*Chase Nat. Bank of City of New York v. Tomagno*, 14 N.Y.S.2d 759, 172 Misc. 63.

13. Mo.—*Lipic v. Wheeler*, 242 S.W.2d 43, 362 Mo. 499.

**Written instrument not required**  
Mo.—*Lipic v. Wheeler*, supra.

14. Del.—*Security Trust Co. v. Spruance*, 174 A. 285, 20 Del.Ch. 195.

N.Y.—*Chase Nat. Bank of City of New York v. Mackenzie*, 76 N.Y.S.2d 19, 192 Misc. 172.

Revocation generally see *infra* §§ 88-91.

15. Ohio.—*Long v. Cleveland Trust Co.*, Com.Pl., 97 N.E.2d 107.

16. Ill.—*Chicago Title & Trust Co. v. Scheilberger*, 77 N.E.2d 675, 399 Ill. 320.

17. U.S.—*Theopold v. U. S., C.C.A. Mass.*, 164 F.2d 404.

18. U.S.—*Theopold v. U. S.*, supra.

**Modifying provisions effective during settlor's life**

Where settlor expressly reserved right to change provisions effective during her life, but waived right to revoke or amend provisions effective at her death, subsequently amended trust declaration to require trustees

to make payments to her on demand, and demanded approximately one-half of corpus, she was entitled to amount demanded, even though such payments might result in reduction of amount for distribution upon her death, and trustees would be required to pay amount demanded and hold rest on previous terms.—*Chase v. Switzer*, Mass., 118 N.E.2d 749.

19. U.S.—*Theopold v. U. S., C.C.A. Mass.*, 164 F.2d 404.

**Resort to extrinsic evidence** may be had to determine the intent of the settlor when he created the trust, the circumstances existing at the time of the creation of the trust, and also the settlor's conduct subsequent to the creation of the trust are material and admissible.—*Theopold v. U. S., D.C. Mass.*, 69 F.Supp. 946, reversed on other grounds, C.C.A., 164 F.2d 404.

**What settlor actually did by way of amendment** at a subsequent time was not evidence of power he had reserved to himself, but was some evidence of his intention at time of creation of trust containing reserved power to amend it.—*Theopold v. U. S., D.C. Mass.*, 69 F.Supp. 946, reversed on other grounds, C.C.A., 164 F.2d 404.

**Exclusion of children or grandchildren**

(1) Where settlor created inter vivos trust limited to his children living at death of wife and children of any deceased child per stirpes, and reserved power to himself and his wife to amend trust deed so as to exclude any of their children, such power carried by implication power to exclude grandchildren.—*Fidelity Union Trust Co. v. Warren*, 38 A.2d 124, 135 N.J.Eq. 239.

(2) Construction as to parties generally see *infra* §§ 166-169.

should be rejected if any other course is rationally possible.<sup>20</sup>

A particular provision of this nature has been held to authorize only slight or trivial changes in the trust instrument;<sup>21</sup> but it has also been held that, in the absence of anything in the text of the instrument to indicate that the word "amend," as used in such a provision, is to have an unusually restricted meaning, the word is not to be strictly construed so as to refer only to minor changes in the operation or management of the trust,<sup>22</sup> and is not to be so construed as to forbid any amendment which would materially vary the respective property interests of the beneficiaries.<sup>23</sup> Where a trustor reserves the right to make certain changes or "such other changes as may in my opinion be for the best interest of my beneficiaries," the phrase "such other changes" must refer to changes similar to the changes provided for in the trust declaration;<sup>24</sup> and such a provision has been held not to give the trustor power to use the income from the trust estates for his own use.<sup>25</sup> Where a trust instrument contains no special provisions covering the investment and other administrative handling of accumulated income, such income is subject to the power reserved by the settlor to amend the general administrative provisions of the trust instrument.<sup>26</sup> Under a trust agreement for the payment of income to the creator of the trust during his lifetime and on his death to others, an amendment by naming the creator's wife as remainderman does not, per

se, have the effect of revesting title in the creator to any part of the principal.<sup>27</sup> The reservation by a settlor, in addition to an interest for life, of power to alter or amend the trust, or to withdraw principal from it, with or without the consent of the trustee, does not make incomplete a gift over to the statutory next of kin.<sup>28</sup>

**Frequency of amendment.** Where the settlor of a deed of trust expressly reserves the right to modify or amend it, the right to amend may be repeatedly exercised if there is no language in the trust expressly or by necessary implication restricting the right to one exercise thereof.<sup>29</sup> So, where the settlor reserves the power to modify the trust indenture "from time to time," as he may see fit, such power is not exhausted by its exercise five times.<sup>30</sup> As used in a trust instrument providing for amendment of the trust by unanimous action of the settlor's family "at any time," the quoted phrase does not necessarily mean at any one time,<sup>31</sup> but should be interpreted as equivalent to "from time to time,"<sup>32</sup> where a construction limiting the amendment power to a single amendment would seem to fall far short of accomplishing the settlor's purpose.<sup>33</sup>

**Amending instrument.** Modification or alteration, under a reservation of power, may take the form of a supplemental trust indenture, complete in itself and intended as a substitute for the original, so that the only rights arising are those created under the supplemental indenture.<sup>34</sup> However, a supple

20. *U.S.—Theopold v. U. S.*, D.C. Mass., 69 F.Supp. 946, reversed on other grounds, C.C.A., 164 F.2d 404.

21. *U.S.—Theopold v. U. S.*, C.C.A. Mass., 164 F.2d 404.

22. *U.S.—Welch v. Terhune*, C.C.A. Mass., 126 F.2d 695, certiorari denied 63 S.Ct. 37, 317 U.S. 644, 87 L.Ed. 519.

23. *U.S.—Welch v. Terhune*, supra.

24. *U.S.—Norris v. Jones*, D.C.Okl., 31 F.Supp. 463, affirmed, C.C.A., Jones v. Norris, 132 F.2d 6.

25. *U.S.—Norris v. Jones*, D.C.Okl., 31 F.Supp. 463, affirmed, C.C.A., Jones v. Norris, 132 F.2d 6.

26. *U.S.—Funsten v. C. I. R.*, C.C.A. 8, 148 F.2d 805.

#### Shift of beneficiaries' interests

The general power reserved by settlor to change any beneficial interest in the trusts was applicable to accumulated net income account to extent that he could at least shift the proportionate interests of the named beneficiaries in the trust funds.—*Funsten v. C. I. R.*, supra.

27. *N.Y.—Petition of Tucker*, 70 N.Y.S.2d 626.

28. *Mass.—National Shawmut Bank of Boston v. Joy*, 53 N.E.2d 113, 315 Mass. 457.

29. *Pa.—In re Goodell's Estate*, 53 Pa. Dist. & Co. 13.

30. *U.S.—Theopold v. U. S.*, D.C. Mass., 69 F.Supp. 946, reversed on other grounds, C.C.A., 164 F.2d 404.

31. *Mass.—State Street Trust Co. v. Crocker*, 28 N.E.2d 5, 306 Mass. 257, 128 A.L.R. 1166.

32. **Phrase "trust hereinbefore contained,"** in such indenture, was intended merely as a general reference to the trust originating in indenture, whether or not amended.—*State Street Trust Co. v. Crocker*, supra.

#### Effect of language in settlor's reservation

The use of words "at any time," in settlor's reservation to himself of power to amend if "at any time" during his life there should be a failure of issue of either of the children, did not indicate that general power of amendment immediately following,

providing that trust might be amended "at any time," was to be exercised but once.—*State Street Trust Co. v. Crocker*, supra.

33. *Mass.—State Street Trust Co. v. Crocker*, supra.

34. *Mass.—State Street Trust Co. v. Crocker*, supra.

**Rule as to exhaustion of power of appointment,** as to any particular property, by single exercise thereof, was held inapplicable, where settlor intended to create a series of powers of appointment to be exercised successively during the entire duration of the trust.—*State Street Trust Co. v. Crocker*, supra.

35. *Vt.—State v. Bankers' Trust Co.*, 164 A. 377, 105 Vt. 220.

#### Disposition of all trust funds

Where supplemental indenture disposed of all trust funds, none of dispositions made by original indenture could stand.—*State v. Bankers' Trust Co.*, supra.

**Amendment held not to establish new trust in terms of old as amended.**—*Sefton v. San Diego Trust & Sav. Bank*, Cal.App., 106 P.2d 874.



mental agreement, executed in accordance with the terms of the original, may be such that particular provisions of the original are not affected by the supplemental agreement.<sup>35</sup> Where a trust instrument provides that the trustor can, at any time, supplement the instrument, the mere loss or destruction of one copy of an amendment cannot amount to a revocation of the amendment to the trust,<sup>36</sup> and the fact that the donor, in several amendments, lists the dates of several prior amendments does not have the effect of reviving the amendments mentioned and revoking those not mentioned.<sup>37</sup>

**Power as overriding termination provisions**  
Where a trust agreement embodies the substance of a proposal appearing in a plan of reorganization, and it is uncertain whether the parties to the agreement intended that the power to amend shall override the termination provisions of the agreement, the reorganization plan can be considered in order to ascertain the intent of the parties,<sup>38</sup> although the plan preceded the agreement and the trustees were not parties thereto.<sup>39</sup>

**Conversion of single trust into separate trusts.**  
Under a reservation of power to alter a trust, the grantor and beneficiaries have been held empowered to convert a single trust into separate trusts for each beneficiary.<sup>40</sup> Particular instruments amending the deed of trust to this effect have been held not open to the objection that the subject of the trusts

was not adequately defined;<sup>41</sup> and the fact that the trusts are kept in one fund does not necessarily defeat the intention of the parties and require the conclusion that there is but a single trust.<sup>42</sup>

**Amount or proportion received.** If a settlor who reserves the right to change or modify the amount or proportion to be received by any beneficiary can only reduce the amount of a share to a nominal or negligible amount, a beneficiary whose share is completely abolished cannot obtain relief in a court of equity;<sup>43</sup> so, in effect, a reservation of the right to modify the amount or proportion each beneficiary is to receive includes the power to modify it so that one beneficiary receives no part of the trust estate.<sup>44</sup>

**Failure to exercise power.** Where there is never even an attempt to exercise a reserved power to alter or modify a trust, there is no impairment of rights in remainder.<sup>45</sup>

#### d. By Parties Generally

Authorities differ as to whether the parties may modify a trust. A settlor not reserving the right to modify generally cannot do so without the beneficiaries' consent.

It has been broadly held that the law grants no power to the parties to alter the terms of a trust.<sup>46</sup> Under other authority, a trust agreement may be modified by consent of all the parties in interest;<sup>47</sup>

35. Fla.—Williams v. Williams, 6 So 2d 276, 149 Fla 464.

36. Ill.—Continental Illinois Nat Bank & Trust Co. of Chicago v. Art Institute of Chicago, 100 N.E.2d 626, 409 Ill. 481.

37. Ill.—Continental Illinois Nat Bank & Trust Co. of Chicago v. Art Institute of Chicago, supra.

38. Ill.—Olson v. Rossetter, 77 N.E.2d 652, 399 Ill. 232.  
Termination generally see infra §§ 92-97

#### Data to be considered

Data which had been theretofore filed with securities and exchange commission for registration purposes, and which related to termination of trust, could be considered in order to ascertain intent of the parties.—Olson v. Rossetter, supra.

39. Ill.—Olson v. Rossetter, supra.

40. U.S.—U. S. Trust Co. of New York v. C. I. R., 56 S.Ct. 329, 296 U.S. 481, 80 L.Ed. 310, followed in Helvering v. Melvaire, 56 S.Ct. 332, 296 U.S. 488, 80 L.Ed. 345.

41. U.S.—U. S. Trust Co. of New York v. C. I. R., 56 S.Ct. 329, 296 U.S. 481, 80 L.Ed. 340, followed in Helvering v. Melvaire, 56 S.Ct. 332, 296 U.S. 488, 80 L.Ed. 345.

42. U.S.—U. S. Trust Co. of New York v. C. I. R., 56 S.Ct. 329, 296 U.S. 481, 80 L.Ed. 340, followed in Helvering v. Melvaire, 56 S.Ct. 332, 296 U.S. 488, 80 L.Ed. 345.

#### Reason for rule

An undivided interest in property may constitute the corpus of a trust, and there may be several trusts where there is but one corpus.—MacManus v. C. I. R., CCA.6, 131 F.2d 670.

#### Effect of trustee's treatment of corpus

Once an estate is created, no subsequent course of dealing can change its nature, and, although trustee's treatment of the corpus may throw light on grantor's intention where other criteria coincide, such treatment does not control where there are opposing indicia of his purpose clearly expressed.—MacManus v. C. I. R., supra.

43. N.Y.—In re Woodward's Trust, 132 N.Y.S.2d 266, 284 App.Div. 469, appeal denied 132 N.Y.S.2d 924, 284 App.Div. 838.

44. N.Y.—In re Woodward's Trust, supra.

45. Mass.—Kerwin v. Donaghy, 59 N.E.2d 299, 317 Mass. 559.

46. Me.—Porter v. Porter, 20 A.2d 465, 138 Me. 1.

#### Divestment of property from appointed purposes

Where trust is created for specific purpose, and is so limited that it is not repugnant to rule against perpetuities, and it is in other respects legal, neither trustee, nor cestui nor cestui's creditors or assignees can divest property from appointed purposes.—Hughes v. Jackson, Tex.Com. App., 81 S.W.2d 666.

**Trust held not spendthrift trust** so as not to be amendable even with consent of beneficiaries.—Welch v. Welch, 290 N.W. 768, 235 Wis. 282, mandate modified on other grounds 293 N.W. 150, 235 Wis. 282.

#### Rights of minor children and of persons in esse

Pa.—In re Thorp's Estate, Orph. 90 Pittsb Leg J. 493.

47. Ky.—Ludlow's Trustee v. Ludlow, 60 S.W.2d 965, 249 Ky. 396.  
N.Y.—In re Zinke's Trust, 83 N.Y.S.2d 813.

Pa.—Goldberg v. Goldberg, Com.Pl., 52 Dauph C. 160.

**Tex.—Corpus Juris quoted in Sayers v. Baker, Civ.App., 171 S.W.2d 547, 551.**

65 C.J. p 840 note 98.

but, although there is some authority to the contrary,<sup>48</sup> the trust beneficiaries cannot modify the terms of a trust,<sup>49</sup> and they cannot revise the provisions of the trust instrument to suit their own desires.<sup>50</sup>

Where the creation of a trust is not affected by fraud, duress, mistake, or accident,<sup>51</sup> and the power to modify or alter the trust is not expressly re-

served,<sup>52</sup> the settlor is without power to modify or alter it, even though it was created without consideration;<sup>53</sup> but an unlimited reserved power to withdraw the principal has been held to include the power to amend,<sup>54</sup> even in the absence of an express power of amendment.<sup>55</sup> So, after an express trust has been perfectly and completely created, and the rights of the beneficiaries have thus become vested,<sup>56</sup> the trust may not, in the absence of a power

#### Donor and sole beneficiary

U.S.—C. I. R. v. Bacher, C.C.A.6, 102 F.2d 600.

#### Purposes of trust not fully accomplished

If the settlor and all the beneficiaries are sui juris and consent, they can compel the modification of the trust, although the purposes thereof have not been fully accomplished.—*Butsum v. Havana Nat. Bank*, 12 N.E.2d 203, 367 Ill. 539.

#### Increase in amounts of annuities

Mass.—*Springfield Safe Deposit & Trust Co. v. Stoop*, 95 N.E.2d 161, 326 Mass. 363.

#### Amendment of provision regarding payment of taxes

Ohio—*Long v. Cleveland Trust Co.*, Com.Pl., 97 N.E.2d 107.

A spendthrift trust may be modified by agreement of all interested parties, including settlor, even though no such power was expressly reserved in trust agreement.—*Sayers v. Baker*, Tex.Civ.App., 171 S.W.2d 547.

#### Particular agreement held modifiable

Tex.—*Sayers v. Baker*, supra.

Under statute requiring trustee to follow all directions of trustor given at time of creation of trust, except as modified by the consent of all parties interested, declaration of trust by which beneficiaries who were given possession of premises were required to deposit a certain amount monthly with trustee for trustor's benefit was held to have been modified so as to require of beneficiaries smaller sum monthly, by letter of trustor to beneficiaries so reducing amount.—*Elliott v. Agajanian*, 64 P.2d 1159, 19 Cal.App.2d 244.

#### Waiver of veto power

Where will gave consultant bank veto power over trustee's proposed changes in investments and new investments, offer of two beneficiaries to waive veto power provision was properly rejected by court, where persons other than those making offer had interest in the trust estate by way of remainder.—*U. S. National Bank of Portland v. First Nat. Bank of Portland*, 142 P.2d 785, 172 Or. 683, opinion clarified 143 P.2d 909, 172 Or. 683.

48. A sole beneficiary, or several or successive beneficiaries all of whom

consent and none of whom suffer from disability, may direct that the performance of a trust be modified.—*Washington Loan & Trust Co. v. Colby*, 108 F.2d 745, 71 App.D.C. 236.

49. U.S.—*Warner & Swasey Co. v. Rusterholz*, D.C.Minn., 41 F.Supp. 498.

Wis.—*In re Boyle's Estate*, 288 N.W.2d 257, 232 Wis. 631.

#### Freeing minor's interest from trust

A will which gave minor a part interest in income of property devised in trust until he should reach the age of 21, at which time fee-simple title was to vest in him, could not be so altered by him as to free his interest from the trust during minority.—*McKenzie v. Perdue*, 19 S.E.2d 765, 67 Ga.App. 202, reversed on other grounds *Perdue v. McKenzie*, 21 S.E.2d 705, 194 Ga. 356; vacated on other grounds *McKenzie v. Perdue*, 23 S.E.2d 183, 68 Ga.App. 498.

50. Ill.—*Altmeier v. Harris*, 81 N.E.2d 22, 335 Ill.App. 130, affirmed 86 N.E.2d 239, 403 Ill. 346.

The beneficiary of a spendthrift trust is without power to modify or ameliorate its restrictions by agreement with the trustee.—*In re Hely's Estate*, 43 A.2d 130, 352 Pa. 407.

#### Transfer of interest by beneficiaries

The terms of trust agreement could not be modified, and right in stock constituting corpus of trust acquired by persons not named as trust beneficiaries, through agreement with such beneficiaries, who had power, under trust agreement, to transfer their interest in stock by will only.—*Childs v. Gross*, 107 P.2d 424, 41 Cal.App.2d 680.

51. Miss.—*Anderson v. Love*, 153 So. 369, 169 Miss. 219.

Pa.—*In re Furjanek's Estate*, 100 A.2d 85, 375 Pa. 484.

#### Trust void as to creditors

Since, as to creditors, a deed of trust is against public policy and void which seeks to retain in settlor the beneficial incidents of ownership while placing the trust estate beyond the reach of creditors, the settlor may modify, in favor of his creditors, the terms of a trust which could be stricken down at their instance.—*In re Jackson's Estate*, 50 Pa.Dist. Co. 292, affirmed 40 A.2d 393, 351 Pa. 89.

52. U.S.—*Commissioner of Internal*

Revenue v. Gultar Trust Estate, C.C.A.Tex., 72 F.2d 544.

D.C.—*Liberty Nat. Bank v. Hicks*, 173 F.2d 631, 84 U.S.App.D.C. 198, 9 A.L.R.2d 1355.

Mass.—*Phelps v. State St. Trust Co.*, 115 N.E.2d 382, 330 Mass. 511.—*Leahy v. Old Colony Trust Co.*, 93 N.E.2d 238, 326 Mass. 49.

Miss.—*Anderson v. Love*, 153 So. 369, 169 Miss. 219.

N.Y.—*In re Woodward's Trust*, 132 N.Y.S.2d 266, 284 App.Div. 469, appeal denied 132 N.Y.S.2d 924, 284 App.Div. 838.—*County Trust Co. v. Young*, 27 N.Y.S.2d 648, 262 App.Div. 31, reversed on other grounds 40 N.E.2d 1019, 287 N.Y. 801.

Pa.—*In re Justice's Estate*, 50 Pa.Dist. & Co. 532.

R.I.—*Estate of Malley v. Malley*, 34 A.2d 761, 9 R.I. 407.

Where trustor created irrevocable trust, reserving only power to appoint successor trustee in event that named trustee should die before trustor, he could not, by subsequent trust, disturb irrevocable trust or indirectly do so by influencing an interpretation of its terms contrary to words used in circumstances then existing.—*Lillard v. Lillard*, 26 N.E.2d 933, 63 Ohio App. 403.

#### Executed conveyance under seal

Where trust instrument was an executed conveyance under seal and was accepted by the trustee, the trust instrument was binding on the settlor and could not be modified except as far as the power of modification was reserved thereon.—*Jorey v. Guaranto*, 22 N.E.2d 99, 303 Mass. 569.

53. Miss.—*Anderson v. Love*, 153 So. 369, 169 Miss. 219.

R.I.—*Garneau v. Garneau*, 9 A.2d 15, 63 R.I. 416, 131 A.L.R. 450.

54. Pa.—*In re Yost's Estate*, 87 Pa.Dist. & Co. 40, 42, 4 Fiduciary 106. "[Settlor] . . . should be permitted to do directly that which he could have done indirectly."—*In re Yost's Estate*, supra.

55. Pa.—*In re Yost's Estate*, supra.

56. Ill.—*McCartney v. Ridgway*, 43 N.E. 826, 160 Ill. 129, 32 L.R.A. 555.

N.Y.—*In re Guaranty Trust Co. of N.Y.*, 74 N.Y.S.2d 559.

Tex.—*Corpus Juris quoted in Sayers v. Baker*, Civ.App., 171 S.W.2d 547, 551.

of modification reserved, or unless a provision for such power was omitted by mistake, be changed, altered, or modified by the settlor without the consent of the beneficiaries,<sup>57</sup> and this is true even though the trust is a voluntary one.<sup>58</sup>

The settlor and trustee may not, without the beneficiaries' consent, modify the trust to the prejudice of the beneficiaries,<sup>59</sup> although it is permissible to

modify the trust where the settlor surrenders privileges retained under the trust instrument,<sup>60</sup> nor may a trust agreement be modified by agreement between one of the settlors and the trustee, without the consent of the other settlor or of the beneficiaries.<sup>61</sup> The consent of some of the beneficiaries to a change or modification of a trust does not affect the status of other beneficiaries who do not consent.<sup>62</sup>

**Reducing estate of cestui que trust**  
US—Crutcher v. Joyce, C.C.A.N.M., 134 F.2d 809.

**Vested rights of remainderman**  
cannot be disturbed by change in trust agreement—Equitable Trust Co. v. Gallagher, 77 A.2d 548, 32 Del. Ch. 401.

57. N.Y.—County Trust Co. v. Young, 27 N.Y.S.2d 648, 262 App. Div. 31, reversed on other grounds 40 N.E.2d 1019, 287 N.Y. 801.

Pa.—Thompson v. Fitzgerald, 22 A.2d 558, 344 Pa. 90.

**Tex.—Corpus Juris quoted in** Sayers v. Baker, Civ.App., 171 S.W.2d 547, 551.

65 C.J. p 340 note 2

**Attempted elimination of beneficiaries**  
N.Y.—In re Mackey's Will, 36 N.Y.S.2d 551.

**Reducing interest of beneficiaries**  
US—Crutcher v. Joyce, C.C.A.N.M., 134 F.2d 809.

**Consent of contingent beneficiary not necessary**  
Tex.—Sayers v. Baker, Civ.App., 171 S.W.2d 547.

**Residuary beneficiary** could not complain of modification of agreement authorizing primary beneficiary to withdraw more than certain amount where monthly withdrawals would not have exceeded that amount but for withdrawals made by residuary beneficiary with consent of primary beneficiary—Sayers v. Baker, *supra*.

#### Reversionary interest

(1) Whether trust for payment of income to settlor creates a reversionary interest in others, so that settlor cannot modify the agreement without their consent, depends on the intent of the settlor as disclosed in the language used in the trust instrument. Trust held to create no remainder interests, and settlor, as sole beneficiary, was authorized to modify trust instrument so that trustees could pay him more than fixed amount of income.—May v. Marx, 20 N.E.2d 821, 300 Ill.App. 144.

(2) However, a grantor could carve out and confer additional benefits and estates from his reserved reversionary interest without consent or participation of person to whom trustee

is required to pay income.—In re Isaacs' Trust, 83 N.Y.S.2d 808.

(3) Where trust indenture created a reversion and not a remainder in grantor's heirs, consent of grantor's heirs was not necessary to amendments eliminating right of grantor to alter or revoke disposition of corpus and providing for payment of corpus of trust to grantor's brother on death of grantor.—In re Prehn, 132 N.Y.S.2d 244.

#### Infant remainderman

An infant holder of vested remainder under trust agreement could not consent to modification authorizing substitution of realty for real estate corporation stock as corpus of trust, but infant's inability to consent did not affect validity of substitution agreed to by grantor, life beneficiary, contingent remaindermen, and trustee, where agreement, prior to modification, authorized trustee, with approval of grantor, to sell or exchange securities forming trust fund or to reinvest fund in securities, and infant was not harmed by such substitution. A trust indenture, reserving to grantor right to pass on reinvestment or sale of trust principal, with such right passing to executors of grantor's estate in event of grantor's death during continuance of trust, and reserving no power to revoke or modify terms in other respects, could not be changed so as to require life beneficiary or survivor of grantor or life beneficiary, or their designee, to approve projected sale of trust property, where infant remainderman was alive and was not a party to attempted change and could not be bound thereby.—In re Isaacs' Trust, 83 N.Y.S.2d 808.

#### Settlor as sole party in interest affected

A deed of trust giving a life interest to settlor's wife and, at her death, vesting in settlor a general testamentary power of appointment of the entire principal without a gift over in default of appointment, although expressly declared to be irrevocable, may be modified by means of a subsequent deed of trust, since settlor himself, as donee of the power of appointment and as the holder of any right of reversion or interest not passing thereunder, is the only party in interest affected by the supple-

mental deed; if no attempt is made to change the trust provisions in favor of settlor's wife, her consent to modification of the trust is unnecessary.—In re Jackson's Estate, 50 Pa. Dist. & Co. 292, affirmed in re Jackson's Trust, 40 A.2d 393, 351 Pa. 89.

#### Detaching from trust; affidavit

Where trust was express and completed, nothing that grantor did thereafter could detract therefrom, and affidavit which grantor filed for record and which sought to detract from trust, was without force or effect.—Wynekoop v. Wynekoop, 95 N.E.2d 457, 407 Ill. 219.

58. Mass.—Thorp v. Lund, 116 N.E. 946, 227 Mass. 474, Ann.Cas.1918B 1204.

59. Ill.—Morrison v. Nugent, 36 N.E.2d 581, 311 Ill.App. 411.

Ky.—Corpus Juris quoted in Hines v. Louisville Trust Co., 254 S.W.2d 73, 75.

N.Y.—Chemical Bank & Trust Co. v. Ott, 280 N.Y.S. 228, 248 App.Div. 406, modified on other grounds 10 N.E.2d 557, 274 N.Y. 572, reargument denied 10 N.E.2d 559, 274 N.Y. 550.

65 C.J. p 340 note 4.

#### Eate and burden of trustee's commissions

In the absence of a reserved power to modify a trust, the settlor may not, by subsequent contract with the trustee, agree to a rate of commissions in excess of that fixed by law and shift the burden thereof from the income of life tenants to the principal passing to ultimate remaindermen.—In re Justice's Estate, 50 Pa. Dist. & Co. 532.

#### Subsequent agreement

However, a subsequent agreement between grantor and trustee has been held to set up remainder interests.—In re Isaacs' Trust, 83 N.Y.S.2d 808.

60. Ky.—Corpus Juris quoted in Hines v. Louisville Trust Co., 254 S.W.2d 73, 75.

65 C.J. p 340 note 5.

61. Kan.—Bayless v. Wheeler Kelly Hagny Trust Co., 109 P.2d 108, 153 Kan. 81.

62. Tex.—Corpus Juris quoted in Sayers v. Baker, Civ.App., 171 S.W.2d 547, 551.

65 C.J. p 340 note 6.

When the original trustor undertakes to reshape or remold a trust, the better to conform to his ideas, he is still the grantor of the trust estate, regardless of the form that the reshaping or remolding of the trust may take.<sup>63</sup> One who becomes a party to a modification agreement cannot claim to stand in the position of a creditor within the meaning of the rule avoiding conveyances in fraud of creditors,<sup>64</sup> and cannot, after the lapse of several years, interfere with the vested rights of other parties.<sup>65</sup>

**Parol agreement.** A deed of trust under which the management of property is given to the trustee cannot be altered by parol agreement.<sup>66</sup>

### e. By Trustee

- (1) In general
- (2) Deviation authorized by court

#### (1) In General

Except as permitted by the trust terms, a trustee may not alter the terms without the beneficiaries' assent.

After accepting a trust, a trustee may not, without the assent of the beneficiaries,<sup>67</sup> alter the

terms thereof,<sup>68</sup> unless, and except as, permitted by the terms of the trust.<sup>69</sup> A trust created in writing cannot be varied by a subsequent declaration of the trustee.<sup>70</sup>

**Extension of trust.** Persons free to contract may grant trustees the power to extend the trust in any manner and under any conditions.<sup>71</sup>

### (2) Deviation Authorized by Court

In an emergency, or in circumstances not anticipated by the settlor, an equity court may, in order to preserve the trust or effectuate its purpose, authorize the trustee to deviate from its terms.

A court of chancery cannot alter or enlarge the powers conferred on the trustees by a valid trust instrument.<sup>72</sup> However, in an emergency, a court of equity may, for the preservation of the trust and the protection of the beneficiaries from loss, authorize a trustee to depart from the terms of the trust agreement;<sup>73</sup> and a threatened loss of the trust estate constitutes an emergency within this rule.<sup>74</sup> So, a court will permit or direct a trustee to deviate from the terms of a trust if, owing to

**Proposed modification by life tenants** by proceeding to which remaindermen are not parties was not justified, and refusal by trustee or chancellor was not abuse of discretion, where the proposed modification raised issues in which the remaindermen had a vital interest.—*Reedy v. Johnson's Estate*, 26 So.2d 685, 200 Miss 205.

**Effect on rights of others interested** A beneficiary may consent to the diminution or release of his own rights, but cannot affect or reduce by admission, acquiescence, or consent the rights of other persons interested in the estate.—*In re Andrade's Estate*, 31 N.Y.S.2d 25, 177 Misc. 532

**Consent by all residuary beneficiaries** to invasion of corpus of trust for benefit of life beneficiaries held not shown.—*In re Van Deusen's Estate*, 182 P.2d 565, 30 Cal.2d 285.

**Trustor as sole beneficiary during lifetime**

Where father, who conveyed his property to two sons in trust, was sole beneficiary during his lifetime, his children had no claim to property except as heirs and next of kin, and validity of instruments relating to trust property, by virtue of which one child obtained property, could not be contested by the other children during father's lifetime; statute making relatives liable for support of paupers could not be relied on by children as basis for suit to contest validity of instruments, in absence of any evidence that father was a pauper.—*Dodge v. Dodge*, 32 A.2d 619, 69 R.I. 187.

63. *US*—*McManus v. C. I. R.*, C.A. 6, 131 F.2d 670

64. *Pa*—*Buchner v. Buchner*, 34 *Pa* Dist & Co 597

65. *Pa*—*Buchner v. Buchner*, *supra*

66. *SC*—*Lunder v. Nicholson Bank & Trust Co.*, 170 S.E. 429, 170 S.C. 373.

67. *Ga.*—*Vason v. Gilbert*, 25 S.E. 409, 99 Ga. 220  
68 C.J. p 340 note 17.

68. *Md*—*Walbach v. Walbach*, 166 A. 422, 165 Md. 8

**Compromise agreement held unenforceable**  
*Md*—*Walbach v. Walbach*, *supra*.

**Duty to go to court**

Where an exigency not foreseen by testator in establishing testamentary trust occurs, in which trustee has neither express nor implied power to act, trustee conceiving his trust to be imperiled, and being without conferred power to act, should go to a court of equity for relief.—*Cowan v. Hamilton Nat. Bank*, 146 S.W.2d 359, 177 Tenn. 94, certiorari denied *Cowan v. Hamilton Nat. Bank of Knoxville*, 61 S.Ct. 1116, 313 U.S. 592, 85 L.Ed. 1596.

69. *Mass*—*Stahler v. Sevinor*, 84 N.E.2d 447, 324 Mass. 18

**Amendment held fair and equitable** to all parties to trust.—*Hendin v. American Distilling Co.*, D.C.Ill., 54 F.Supp. 863.

**Unrestricted power to amend**

Under provision that declaration of trust may be amended or extended by trustees from time to time as in

their discretion shall seem best, the power to amend was unrestricted.—*Stahler v. Sevinor*, 84 N.E.2d 447, 324 Mass. 18

70. *Cal*—*Burling v. Newlands*, 44 P. 810, 112 Cal. 476

71. *Ill*—*Russ v. Blair*, 71 N.E.2d 818, 330 Ill.App. 571, reversed on other grounds 77 N.E.2d 662, 399 Ill. 232.

72. *Ill*—*Stephens v. Collison*, 113 N.E. 691, 274 Ill. 389, Ann Cas 1918D 559

*Mo*—*Brookings v. Mississippi Val. Trust Co.*, 196 S.W.2d 775, 355 Mo. 513, 167 A.L.R. 1424.

73. *Conn.*—*Hoffman v. First Bond & Mortgage Co. of Hartford*, 164 A. 656, 116 Conn. 320.

*Mo*—*Single v. First Nat. Co.*, 90 S.W.2d 776, 338 Mo. 417, 105 A.L.R. 181.

*NH*—*Pettit of Wolcott*, 56 A.2d 641, 95 N.H. 23, 1 A.L.R.2d 1323

*NJ*—*Hardy v. Bankers Trust Co. of N. Y.*, 44 A.2d 839, 137 N.J.Eq. 362  
—*In re North Jersey Title Ins. Co.*, 184 A. 420, 120 N.J.Eq. 148, affirmed 187 A. 146, 120 N.J.Eq. 608—*New Jersey Nat. Bank & Trust Co. v. Lincoln Mortgage and Title Guaranty Co.*, 148 A. 713, 105 N.J.Eq. 557—*Trust Co. of New Jersey v. Greenwood Cemetery*, 32 A.2d 519, 21 N.J.Misc. 169

*N.C.*—*Penick v. Bank of Wadesboro*, 12 S.E.2d 253, 218 N.C. 686.

*Okla.*—*Faulk v. Rosecrans*, 264 P.2d 300

74. *Okla.*—*Faulk v. Rosecrans*, *supra*.

circumstances not known to the settlor or not anticipated, compliance would defeat, or substantially impair, the accomplishment of the purposes of the trust,<sup>75</sup> or where compliance is impossible,<sup>76</sup> illegal,<sup>77</sup> impracticable,<sup>78</sup> or inexpedient.<sup>79</sup> Under such circumstances, if necessary to carry out the purposes of the trust, the court may direct or permit the trustee to do acts which are not authorized, or are forbidden, by the terms of the trust.<sup>80</sup> A court of equity will put itself in the trustor's place and endeavor to authorize the trustee to deviate from the terms of the trust in a manner which the court believes the trustor would himself have authorized

if he could have anticipated a necessity for subsequent alteration of his plan.<sup>81</sup> This doctrine of equitable deviation applies to private, as well as to charitable, trusts.<sup>82</sup> An exception to the doctrine is that property devoted to physical use in carrying out the trust, and on which the institution provided for is supposed to rest, cannot be sold or encumbered if such sale or encumbrance is prohibited by the instrument creating the trust.<sup>83</sup>

The power of the court under this doctrine should be most sparingly used;<sup>84</sup> it is the necessity of the situation that brings such power into operation,<sup>85</sup>

75. Ala.—Thurlow v. Berry, 32 So.2d 526, 249 Ala. 597.

Conn.—Rogers v. English, 33 A.2d 540, 130 Conn. 332, 147 A.L.R. 812 Ky.—Kelly v. Marr, 185 S.W.2d 945, 239 Ky. 447.

Me.—Porter v. Porter, 20 A.2d 465, 138 Me. 1.

Miss.—Merchants Bank & Trust Co. v. Garrett, 33 So.2d 603, 203 Miss. 182.

Mo.—St. Louis Union Trust Co. v. Ghio, 222 S.W.2d 556, 240 Mo.App. 1033.

N.H.—Souther v. Schofield, 63 A.2d 796, 95 N.H. 379.

N.J.—Palmdale Trust & Guaranty Co. v. Probst, 16 A.2d 271, 128 N.J.Eq. 332—Trust Co. of New Jersey v. Glunz, 181 A. 27, 119 N.J.Eq. 73, modified on other grounds, 191 A. 795, 121 N.J.Eq. 593.

N.Y.—In re Oppenheimer's Estate, 52 N.Y.S.2d 441.

Ohio—Craft v. Shroyer, 74 N.E.2d 589, 81 Ohio App. 253.

**Change from residential to commercial area**

Ill.—Dyer v. Paddock, 70 N.E.2d 49, 395 Ill. 288.

**Effect on contingent remainders**

The rule will be applied even though contingent remainder interests are incidentally affected.—Petition of Wolcott, 56 A.2d 611, 95 N.H. 23, 1 A.L.R.2d 1323.

**Change in form of, or anticipating, corpus**

Where an unanticipated situation arises preventing execution of trust according to its terms, deviation is permitted to preserve corpus by changing its form, but not to change rights of parties under trust, or, in case of extreme exigency, to enable a beneficiary of income to anticipate corpus to which he is ultimately entitled.—In re Cograve's Will, 31 N.W.2d 20, 225 Minn. 443, 1 A.L.R.2d 175.

76. N.H.—Souther v. Schofield, 63 A.2d 796, 95 N.H. 379.

N.Y.—In re Oppenheimer's Estate, 52 N.Y.S.2d 441.

Ohio—Craft v. Shroyer, 74 N.E.2d 589, 81 Ohio App. 253.

**"Impossibility"** as used in law of trusts regarding execution of trust as directed by settlor means something more than burdensome or inconvenient or the judgment of interested persons that settlor's intention might be better achieved in some other way.—In re Stack's Will, 258 N.W.324, 217 Wis. 94, 97 A.L.R. 316.

**Relief from provisions as to liens and management**

N.Y.—In re Oppenheimer's Estate, 52 N.Y.S.2d 441.

77. N.H.—Souther v. Schofield, 63 A.2d 796, 95 N.H. 379.

Ohio—Craft v. Shroyer, 74 N.E.2d 589, 81 Ohio App. 253.

78. N.Y.—In re Oppenheimer's Estate, 52 N.Y.S.2d 441.

Ohio—Craft v. Shroyer, 74 N.E.2d 589, 81 Ohio App. 253.

**Investments**

Where deposit of trust funds in accordance with testamentary direction was not impossible but was impracticable because depository limited monthly deposits to a certain sum and did not make a practice of accepting trust funds, chancellor would direct trustee to invest proceeds from sale of trust property subject to provisions of statute designating proper trust investments.—Wooden v. Brodman, 57 A.2d 763, 30 Del.Ch. 227.

79. Ohio—Craft v. Shroyer, 74 N.E.2d 589, 81 Ohio App. 253.

80. Ala.—Thurlow v. Berry, 32 So.2d 526, 249 Ala. 597.

Ill.—Dyer v. Paddock, 70 N.E.2d 49, 395 Ill. 288.

Ky.—Kelly v. Marr, 185 S.W.2d 945, 239 Ky. 447.

Me.—Porter v. Porter, 20 A.2d 465, 138 Me. 1.

Miss.—Merchants Bank & Trust Co. v. Garrett, 33 So.2d 603, 203 Miss. 182.

Mo.—Single v. First Nat. Co., 90 S.W.2d 776, 338 Mo. 417, 105 A.L.R. 181.

N.J.—Burlington County Trust Co. v. Kingsland, 86 A.2d 815, 18 N.J.Super. 223—Lambertville Nat. Bank v. Bumster, 57 A.2d 525, 141 N.J.Eq. 396—Hardy v. Bankers Trust

Co. of N. Y., 44 A.2d 839, 137 N.J.Eq. 552—In re North Jersey Title Ins. Co., 184 A. 420, 120 N.J.Eq. 148, affirmed 187 A. 146, 120 N.J.Eq. 608—New Jersey Nat. Bank & Trust Co. v. Lincoln Mortgage and Title Guaranty Co., 148 A. 713, 105 N.J.Eq. 557—Trust Co. of New Jersey v. Greenwood Cemetery, 32 A.2d 519, 21 N.J.Misc. 169.

N.C.—First Citizens Bank & Trust Co. v. Raspberry, 39 S.E.2d 601, 226 N.C. 586.

Okla.—Faulk v. Rosencrans, 264 P.2d 300.

**Trustee relieved of obligation to pay mortgage**

N.Y.—In re Oppenheimer's Estate, 52 N.Y.S.2d 441.

81. Mo.—St. Louis Union Trust Co. v. Ghio, 222 S.W.2d 556, 240 Mo.App. 1033.

N.J.—Trust Co. of New Jersey v. Glunz, 181 A. 27, 119 N.J.Eq. 73, modified on other grounds 181 A. 795, 121 N.J.Eq. 593.

N.Y.—In re Oppenheimer's Estate, 52 N.Y.S.2d 441.

65 C.J. p. 684 note 59.

**Authorizing private sale of realty**

Ill.—Dyer v. Paddock, 70 N.E.2d 49, 395 Ill. 288.

**Deviation as to character of investments** was permitted where compliance with terms was impossible because of change of economic conditions.—St. Louis Union Trust Co. v. Ghio, 222 S.W.2d 556, 240 Mo.App. 1033.

82. Ala.—Thurlow v. Berry, 32 So.2d 526, 249 Ala. 597.

Ohio—Craft v. Shroyer, 74 N.E.2d 589, 81 Ohio App. 253.

Modification of charitable trusts see Charities § 52, 56.

83. Ala.—Thurlow v. Berry, 32 So.2d 526, 249 Ala. 597.

84. U.S.—T. J. Moss Tie Co. v. Wabash Ry. Co., D.C.N.Y., 11 F.Supp. 377.

Conn.—Rogers v. English, 33 A.2d 540, 130 Conn. 332, 147 A.L.R. 812.

85. Conn.—Rogers v. English, supra.

and not the mere fact that thereby the estate may be administered in a way which will be more advantageous to its beneficiaries than compliance with the terms of the trust.<sup>86</sup> This power of the court should be exercised only where emergencies and reasonable necessity may dictate,<sup>87</sup> and then only for the preservation of the trust estate and the protection of the cestuis;<sup>88</sup> it is not illimitable.<sup>89</sup> So, deviation may be authorized with respect to matters of administration,<sup>90</sup> but not of beneficial rights of parties.<sup>91</sup>

**Consent of parties.** Where the living parties in interest request the permission of the court for deviation from the terms of the trust, they thereby submit to the court, for its determination, the questions presented, so that their agreement, or consent, to such deviation does not relieve the court of decision.<sup>92</sup> A court of equity may authorize a deviation by the trustees from the authority granted in the trust instrument where an unforeseen emergency requires that some course be taken by the trustees for the best interests of the estate and beneficiaries, even though the consent of all the beneficiaries cannot be obtained.<sup>93</sup>

**Retroactive approval** may be given by a court to acts of a trustee beyond his powers, as defined by the terms of the trust, where the court would have approved such acts, in advance of their perform-

ance, as effecting the preservation of the estate.<sup>94</sup>

*Where a sale is authorized* as a deviation from the terms of the trust, the rights of the parties remain the same, except that they are transferred from the property to the proceeds of the sale thereof.<sup>95</sup>

**Effect of statutes.** Where all parties join in the prayers of a bill brought by trustees and seeking permission to deviate from the express terms of a trust, the equity court has been held, under specific statute and equity practice, to have authority to pass on the questions involved.<sup>96</sup> A particular statute has been held not to enable the court to exercise solely on the basis of economics, and in the absence of any emergency or reasonable necessity, its power to authorize trustees to pursue a course, or perform acts, which they are not permitted to do under the terms of the trust.<sup>97</sup>

#### f. Proceedings for Modification

A deviation from the powers granted trustees in a trust instrument should be allowed only after a hearing at which the beneficiaries of the trust are adequately represented.

A deviation from the powers granted trustees in a trust instrument should be allowed only after a hearing at which the beneficiaries of the trust are adequately represented.<sup>98</sup> The beneficiaries of a

86. R.I.—Rogers v. English, supra.  
Me.—Porter v. Porter, 20 A.2d 465, 138 Me. 1.

**Rights of remaindermen**, in trust, especially where remaindermen are not sui juris or before the court, will not be nullified for benefit of life tenants merely because trust becomes impossible of performance as directed by settlor or because situation not contemplated by settlor threatens the loss of the trust res.—In re Stack's Will, 258 N.W. 224, 217 Wis. 94, 97 A.L.R. 316.

87. N.J.—National Newark & Essex Banking Co. of Newark v. Osborne, 88 A.2d 229, 19 N.J. Super. 175.—Burlington County Trust Co. v. Kingsland, 86 A.2d 815, 18 N.J. Super. 223.—Lambertville Nat. Bank v. Bumster, 57 A.2d 525, 141 N.J. Eq. 396.

N.C.—Penick v. Bank of Wadesboro, 12 S.E.2d 253, 218 N.C. 686.

"... the situation considered must present an emergency or exigency which menaces the trust estate, and the beneficiary. Deviation can be granted only upon a showing of extreme hardship, of virtual necessity, of serious impairment of principal, or of inability to carry out the purpose of the trust."—Porter v. Porter, 20 A.2d 465, 467, 138 Me. 1.

**Deviation from investment provision** held not permissible, in absence of showing of exigencies in administration of trust or of emergency confronting beneficiary.—Porter v. Porter, supra.

88. N.J.—National Newark & Essex Banking Co. of Newark v. Osborne, 88 A.2d 229, 19 N.J. Super. 175.—Burlington County Trust Co. v. Kingsland, 86 A.2d 815, 18 N.J. Super. 223.—Lambertville Nat. Bank v. Bumster, 57 A.2d 525, 141 N.J. Eq. 396.

N.C.—Penick v. Bank of Wadesboro, 12 S.E.2d 253, 218 N.C. 686.

89. N.J.—Lambertville Nat. Bank v. Bumster, 57 A.2d 525, 141 N.J. Eq. 396.

**Terms created by legislative enactment**

The power does not envelop cases where the terms of the trust are created by legislative enactment.—Lambertville Nat. Bank v. Bumster, supra.

**Deviation by encroachment on corpus** of trust held improper.—In re Cosgrave's Will, 31 N.W.2d 20, 225 Minn. 443, 1 A.L.R. 2d 175.

90. Minn.—In re Cosgrave's Will, supra.

91. Minn.—In re Cosgrave's Will, supra.

92. Me.—Porter v. Porter, 20 A.2d 465, 138 Me. 1.

93. U.S.—T. J. Moss Tie Co. v. Washash Ry. Co., D.C.N.Y., 11 F. Supp. 277.

94. Okl.—Faulk v. Rosecrans, 254 P.2d 300.

**Reason for rule**

To hold otherwise and require a trustee, in all situations, to obtain previous authorization before going beyond his powers in an emergency would unnecessarily hamper, and in some situations defeat, him in fulfilling the duties of his trust.—Faulk v. Rosecrans, supra.

95. Minn.—In re Cosgrave's Will, 31 N.W.2d 20, 225 Minn. 443, 1 A.L.R. 2d 175.

96. Me.—Porter v. Porter, 20 A.2d 465, 138 Me. 1.

97. N.J.—Lambertville Nat. Bank v. Bumster, 57 A.2d 525, 141 N.J. Eq. 396.

**Investments**

Deviation held properly authorized with respect to sale of designated stocks, bonds, and securities of a speculative nature and reinvestment of proceeds.—Lambertville Nat. Bank v. Bumster, supra.

98. U.S.—T. J. Moss Tie Co. v. Wa-

trust are necessary parties to any proceeding the object or effect of which is materially to alter its terms.<sup>99</sup> The judgment creditor of a beneficiary is not a necessary party to a proceeding by the beneficiary and the trustee for an order modifying a trust and authorizing payment of a monthly sum to the beneficiary and invasion of the corpus if necessary.<sup>1</sup> Infant beneficiaries of inter vivos trusts giving the grantors power to change beneficiaries are not necessary or proper parties to the final amendment of the trusts, making the estates of the grantors beneficiaries of the trusts.<sup>3</sup> In a suit to compel a trustee to accept and abide by an amendment of the trust, evidence has been held to require dismissal for lack of capacity on the trustor to execute the amendment<sup>3</sup> and for undue influence on him to do so.<sup>4</sup>

Findings must be supported by the pleadings<sup>5</sup> and by the evidence.<sup>6</sup>

## § 88. Revocation

- a. In general
- b. Voluntary trusts generally
- c. Statutory provisions generally

bash Ry. Co., D.C.N.Y., 11 F.Supp. 277.

99. N.Y.—Colorado & Southern Ry. Co. v. Blair, 108 N.E. 840, 214 N.Y. 497, Ann Cas 1916D 1177.

Tex.—Republic Nat. Bank & Trust Co. v. Bruce, 105 S.W.2d 882, 130 Tex. 136.

### Reason for rule

Beneficiaries and trustees are considered real owners of trust estate.—Republic Nat. Bank & Trust Co. v. Bruce, *supra*.

1. U.S.—Baumgardner v. R. F. C., C. C.A.111, 131 F.2d 741.

2. N.Y.—Guaranty Trust Co. of N. Y. v. Howe, 86 N.Y.S.2d 808, 193 Misc. 640.

3. Ill.—Horgan v. City Trust & Sav. Bank of Kankakee, 20 N.E.2d 809, 300 Ill.App. 613.

4. Ill.—Horgan v. City Trust & Sav. Bank of Kankakee, *supra*.

5. Cal.—Adams v. Cook, 101 P.2d 484, 18 Cal.2d 252.

6. Cal.—Adams v. Cook, *supra*.

7. Wis.—Warsco v. Oshkosh Savings & Trust Co., 196 N.W. 829, 133 Wis. 156.

85 C.J. p 344 note 71.  
What law governs as to revocability see *infra* § 160.

The word "revokes," as used in this connection, literally means to "call back;" it is synonymous with "re-scind," "recall," and "cancel;" it does not mean "repudiation."—Toull. v.

Santa Cruz County Title Co., 67 P.2d 404, 406, 20 Cal App 2d 495

Power to terminate as power to revoke

While it may be that the power to revoke a trust includes the power to terminate, it does not follow that the power to terminate includes the power to revoke.—Commonwealth Trust Co. of Pittsburg v. U. S., D.C. Pa., 96 F.Supp. 712.

### Revocation held not remedy

The remedy of one seeking return of amount paid to cemetery company for care of mausoleum and burial plot, or delivery of securities in which invested, with interest and dividends, is not revocation of trust, but action for accounting.—French v. Kensico Cemetery, 35 N.Y.S.2d 828, 264 App.Div. 617, appeal denied 37 N.Y.S.2d 443, 264 App.Div. 955, affirmed 60 N.E.2d 561, 291 N.Y. 77.

8. Ky.—Downs v. Security Trust Co. of Lexington, 194 S.W. 1041, 175 Ky. 789.

65 C.J. p 344 note 73.  
Cancellation generally see *supra* § 85.

9. N.Y.—County Trust Co. v. Young, 27 N.Y.S.2d 648, 263 App.Div. 31, reversed on other grounds 40 N.E.2d 1019, 287 N.Y. 801.

10. Ill.—Albert v. Albert, 80 N.E.2d 69, 334 Ill.App. 440.—In re Wright's Estate, 25 N.E.2d 908, 304 Ill.App. 87.—In re Trapp's Estate, 269 Ill. App. 269.

d. Persons beneficially interested

e. Settlor as sole beneficiary or person beneficially interested

f. Effect of revocation

g. Actions

h. Deposit of money in bank or other financial institution

### a. In General

A trust containing no reserved power of revocation may generally not be revoked by the settlor without the beneficiaries' consent, in the absence of fraud, mistake, undue influence, or duress.

A revocation of a trust implies the cessation and extinguishment of the trust, and when made operates to put an end to it rather than to carry out its terms.<sup>7</sup> Cancellation of a trust by the court in whole or in part is not a revocation.<sup>8</sup> The same principles have been declared to be applicable to the revocation of a trust as are applicable to the modification thereof.<sup>9</sup>

It has been broadly held, or the principle has been broadly applied, that when a trust has been perfectly created, it is not revocable at the will of the party who created it,<sup>10</sup> and that, unless the power of rev-

Pa.—In re Olmsted's Estate, Orph., 59 Dauph Co 293

"Equity has revoked a trust, or held it revocable by the settlor, only because of exceptional facts in rare cases."—McCreary's Estate v. Pitts, 47 A.2d 235, 238, 354 Pa. 347.

### Irrevocable trust held created

(1) In general.

Ohio.—Cleveland Trust Co. v. Mansfield, Ohio Com Pl, 71 N.E.2d 287.  
Pa.—In re Corbin's Trust, Orph., 57 York Leg Rec 201.

(2) Notwithstanding power given trustee to invade principal for grantor's benefit.—In re Russell's Estate, 35 N.Y.S.2d 26, 178 Misc. 472, affirmed 45 N.Y.S.2d 122, 266 App.Div. 1006, reversed on other grounds 60 N.E.2d 823, 294 N.Y. 99.

### Family trust held irrevocable

U.S.—C. I. R. v. Goodan, C.A.9, 195 F.2d 498, applying California law.

### Trust created for creditor's benefit

Presumption was that creditor assented to trust created for his benefit, and after such assent trust was irrevocable by debtor.—Fidelity Trust Co. v. Union Nat. Bank of Pittsburgh, 169 A. 209, 313 Pa. 467, certiorari denied Union Nat. Bank of Pittsburgh v. Fidelity Trust Co., 54 S.Ct. 530, 291 U.S. 680, 78 L.Ed. 1068.

### Income provision irrevocable

Provision in declaration of trust, vesting absolutely in beneficiary the income for a period of five years, was irrevocable.—Clifford v. Halvering, C. C.A.8, 105 F.2d 536, reversed on oth-

ocation is reserved at the time of its creation, a valid trust, once created, cannot be revoked<sup>11</sup> by the settlor or donor,<sup>12</sup> without proof of mental unsoundness, mistake, fraud, undue influence, or duress.<sup>13</sup> As a general rule, a trust completely created and containing no reservation of the power of revocation may not be revoked by the creator thereof without the consent of all the beneficiaries,<sup>14</sup> unless

a provision authorizing revocation was omitted by mistake.<sup>15</sup> He cannot revoke a trust created for the benefit of persons not in being,<sup>16</sup> yet unborn,<sup>17</sup> not sui juris,<sup>18</sup> under an incapacity,<sup>19</sup> or who cannot yet be ascertained.<sup>20</sup>

The prohibition extends to a revocation by the grantor's successors in interest,<sup>21</sup> or by the trust-

er grounds *Helvering v. Clifford*, 60 S.Ct. 554, 309 U.S. 331, 84 L.Ed. 788, mandate conformed to, C.C.A., *Clifford v. Helvering*, 111 F.2d 896.

11. Md.—*Liberty Trust Co. v. Webster*, 90 A.2d 194, 200 Md. 491, modified on other grounds 91 A.2d 393, 200 Md. 491.

Mass.—*Phelps v. State Street Trust Co.*, 115 N.E.2d 382, 330 Mass. 511. N.Y.—*In re Boughton's Will*, 78 N.Y. S.2d 696.

Pa.—*Sylvester v. Gosstonyl*, Com Pl., 30 North Co. 228.

Wis.—*Boyle v. Kempkin*, 9 NW 2d 589, 243 Wis. 86.

A trust conveyance is irrevocable, unless power of revocation is expressly reserved.—*Young v. Young-Wishard*, 288 N.W. 420, 227 Iowa 431.—*Dunn v. Dunn*, 258 N.W. 695, 219 Iowa 849.

#### Breach of trust

Where land was conveyed by parents to daughter for benefit of parents for life, with remainder in their heirs, trust would not be revocable by father, after mother's death, for breach of trust by daughter.—*Luttrell v. Turner*, 209 S.W.2d 856, 307 Ky. 197.

12. Mass.—*Leahy v. Old Colony Trust Co.*, 93 N.E.2d 238, 326 Mass. 49.

Pa.—*In re Justice's Estate*, 50 Pa. Dist. & Co. 532.—*In re Markley's Trust*, Orph., 57 Montg. Co. 163.

Vt.—*Smith v. Deshaw*, 78 A.2d 479, 116 Vt. 441.

#### General rule

Wis.—*American Nat. Red Cross v. Banks*, 60 N.W.2d 788, 265 Wis. 68.

Trust made without consideration. R.I.—*Garneau v. Garneau*, 9 A.2d 15, 63 R.I. 416, 131 A.L.R. 450.

#### Private trust

Generally, a private trust may be revoked only where settlor reserves such a power, or, having intended such reservation, omitted to insert it, or on the same grounds as those on which a transfer of property not in trust could be rescinded.—*Daughters of Am. Revolution of Kan.*, Topeka Chapter, v. Washburn College, 184 P. 2d 128, 160 Kan. 583.

#### Executed conveyance under seal

Where trust instrument was an executed conveyance under seal and

was accepted by trustee, the trust instrument was binding upon the settlor and could not be revoked except as far as the power of revocation was reserved therein.—*Gorey v. Guarante*, 22 NE 2d 99, 303 Mass. 569.

13. Mass.—*Stahler v. Sevinor*, 84 N.E.2d 447, 324 Mass. 18. Miss.—*Anderson v. Love*, 153 So. 369, 169 Miss. 219.

14. U.S.—*Frickle v. Weber*, C.C.A. Ohio, 145 F.2d 737.—*Hughes v. C. I. R.*, C.C.A. 9, 101 F.2d 144.—*Crutcher v. Joyce*, C.C.A.N.M., 134 F.2d 809.

Ill.—*Fenske v. Equitable Life Assur. Soc.*, 91 N.E.2d 465, 340 Ill. App. 58.—*Morrison v. Nugent*, 36 N.E.2d 581, 311 Ill. App. 411.

Ky.—*Hinton's Ex'r v. Hinton's Committee*, 78 S.W.2d 8, 256 Ky. 345.

15. Md.—*Allen v. Safe Deposit & Trust Co. of Baltimore*, 7 A.2d 180, 177 Md. 26.—*Dayton v. Stewart*, 59 A. 281, 99 Md. 643.

Minn.—*Corpus Juris cited in Salscheider v. Holmes*, 286 N.W. 347, 349, 205 Minn. 459.

Miss.—*Corpus Juris cited in Anderson v. Love*, 153 So. 369, 169 Miss. 219.

N.J.—*In re Kuser's Estate*, 26 A.2d 688, 132 N.J. 260. 65 C.J. p. 340 note 21.

"When a settlor has granted property rights, whether voluntarily or for a consideration, he cannot resume his former status merely because of a change of mind or a feeling that he has made an unwise conveyance."—*Allen v. Safe Deposit & Trust Co. of Baltimore*, 7 A.2d 180, 177 Md. 26.

#### Weight of authority

Va.—*Penn v. Keller*, 16 S.E.2d 331, 178 Va. 131.

Full consent of all parties in interest. Ill.—*May v. Marx*, 20 N.E.2d 821, 300 Ill. App. 144.

Trust created without consideration. Miss.—*Anderson v. Love*, 153 So. 369, 169 Miss. 219.

#### Rule applied to grantor-trustee

W.Va.—*Lamb v. First Huntington Nat. Bank*, 7 S.E.2d 441, 122 W.Va. 88.

#### Vesting of beneficiary's interest

Except where power of revocation is reserved by settlor, interest of beneficiary of a trust becomes vested when trust is created.—*Elbert v.*

*Waples-Platter Co.*, Tex.Civ.App., 156 S.W.2d 146, error refused.

#### Right to remove cotrustees

Where trust agreement provided that settlor-trustee had right to remove corporate cotrustee and to name successor corporate trustee and that in event of his failure to do so a named trust company should act as trustee, settlor could not revoke trust by exercising his right to remove cotrustee.—*Petition of Stevens*, 125 N.Y.S.2d 386, 282 App.Div. 571, affirmed 121 N.E.2d 551, 307 N.Y. 742.

#### Notice to beneficiary; possession of property

Where there is an unequivocal declaration of trust by owner of property for benefit of another, trust becomes irrevocable even if beneficiary is not notified of declaration and trustee remains in possession of property.—*Provident Inst. for Sav. in Jersey City v. Bolton*, 52 A.2d 833, 110 N.J. Eq. 1.—*Alucha v. Jackson*, 83 A. 827, 119 N.J. Eq. 248.

Consent of wife and children of settlor held not to justify revocation.—*In re Olmsted's Estate*, 65 Pa. Dist. & Co. 461, 59 Dauph. Co. 293.

15. U.S.—*Crutcher v. Joyce*, C.C.A. N.M., 134 F.2d 809.

16. Ill.—*May v. Marx*, 20 N.E.2d 821, 300 Ill. App. 144.

Md.—*Layton v. Stewart*, 59 A. 281, 99 Md. 643.

17. N.J.—*Fidelity Union Trust Co. v. Parfner*, 37 A.2d 675, 135 N.J. Eq. 133.

18. Ill.—*May v. Marx*, 20 N.E.2d 821, 300 Ill. App. 144.

Md.—*Layton v. Stewart*, 59 A. 281, 99 Md. 643.

Adult beneficiaries could not procure revocation by consenting thereto where persons who were not sui juris had a contingent interest and could not consent.—*Cohn v. Central Nat. Bank of Richmond*, 60 S.E.2d 30, 191 Va. 12.

19. Ill.—*Fenske v. Equitable Life Assur. Soc.*, 91 N.E.2d 465, 340 Ill. App. 58.

20. Ill.—*Fenske v. Equitable Life Assur. Soc.*, supra.

N.J.—*Fidelity Union Trust Co. v. Parfner*, 37 A.2d 675, 135 N.J. Eq. 133.

21. Ky.—*Elliot v. Louisville*, 90 S. W. 990, 123 Ky. 278, 28 Ky.L. 967.



tee,<sup>22</sup> and includes not only an express revocation, but any acts, dealings, or conveyances by the creator inconsistent with the trust.<sup>23</sup> The rule is not affected by the fact that the transaction creating the trust rests in parol.<sup>24</sup>

A settlor may revoke the trust with the consent of the beneficiaries.<sup>25</sup> A conveyance in trust, even when it contains no power of revocation, may be rescinded on the same grounds on which any transfer, not in trust, can be rescinded;<sup>26</sup> the failure to include a power to revoke limits only the power of the settlor to terminate the trust estate without legal cause.<sup>27</sup> So, an executed deed or conveyance in

trust may be revoked if made for a promised consideration which fails.<sup>28</sup>

**Partial or total revocation.** Where revocation by the settlor is permissible, it may be total or partial.<sup>29</sup>

**The right to change the beneficiary** does not make a trust revocable.<sup>30</sup>

**Effect of declaring trust irrevocable.** The fact that a trust is, by its terms, declared irrevocable does not, under some decisions, necessarily prevent or preclude revocation.<sup>31</sup> However, in particular circumstances provisions for irrevocability have been enforced or applied.<sup>32</sup>

N.Y.—Hegeman v. Woodlawn Cemetery, 220 N.Y.S. 879, 219 App.Div. 573.

**Existence of contingent interests held to prevent revocation by beneficiaries.**—In re McKenney's Will, 182 A. 425, 169 Md. 640.

22. Mo.—Ewing v. Shannahan, 20 S. W. 1055, 113 Mo. 188, 65 C.J. p 341 note 23.

23. Iowa.—Ewing v. Buckner, 41 N. W. 164, 76 Iowa 467, 65 C.J. p 341 note 24.

24. S.C.—McElveen v. Adams, 94 S. E. 733, 108 S. C. 437, 65 C.J. p 341 note 25.

Parol trusts generally see supra §§ 31–41.

25. N.J.—Fidelity Union Trust Co. v. Parnier, 37 A.2d 675, 135 N.J.Eq. 133.

Tex.—Sayers v. Baker, Civ.App., 171 S.W.2d 547.

Va.—Bottimore v. First & Merchants Nat. Bank of Richmond, 196 S.E. 593, 170 Va. 251.

65 C.J. p 340 note 21 [d], p 341 note 26.

Persons beneficially interested see infra subdivision d of this section.

**Settlers as sole parties affected by consideration**

Where trust agreement remains wholly executory, parties settlor who are the only parties from or to whom any consideration moved have the right, at their pleasure, to abandon the agreement and release each other from its performance, thereby putting an end to the agreement.—Dufford v. Nowakowski, 9 A.2d 302, 126 N.J.Eq. 529.

**A spendthrift trust may be revoked by agreement of all interested parties, including settlor, even though no such power was expressly reserved in trust agreement.**—Sayers v. Baker, Tex.Civ.App., 171 S.W.2d 547.

26. N.Y.—Margaretten v. Margaretten, 76 N.Y.S.2d 854.

**Unjust enrichment; renunciation of benefits**

Husband was held not entitled to

renunciation of conveyance in trust for his wife on equitable ground of unjust enrichment because of invalidity of wife's renunciation of benefits under previous marriage settlement, where renunciation was not inducement for conveyance.—Hutchison v. Ross, 187 N.E. 65, 262 N.Y. 381, 89 A.L.R. 1007, reargument denied 188 N.E. 102, 262 N.Y. 643, 89 A.L.R. 1023.

27. N.Y.—Margaretten v. Margaretten, 76 N.Y.S.2d 854.

28. N.Y.—Hutchison v. Ross, 187 N.E. 65, 262 N.Y. 381, 89 A.L.R. 1007, reargument denied 188 N.E. 102, 262 N.Y. 643, 89 A.L.R. 1023.

**Enjoyment of consideration precluded by foreign law**

N.Y.—Hutchison v. Ross, supra.

**Repudiation of agreement held failure of consideration.**—Margaretten v. Margaretten, 76 N.Y.S.2d 854.

29. U.S.—United Bldg. & Loan Ass'n v. Garrett, D.C.Ark., 64 F.Supp. 460—Newell v. Capelle, D.C.Del., 14 F.Supp. 147, affirmed, C.C.A., 86 F.2d 1007.

Mo.—Lipic v. Wheeler, 242 S.W.2d 43, 362 Mo. 499—Coon v. Stanley, 94 S.W.2d 96, 230 Mo.App. 521.

N.Y.—Culver v. Title Guarantee & Trust Co., 70 N.E.2d 163, 296 N.Y. 74—In re Blake's Will, 87 N.Y.S.2d 348—In re Isacses' Trust, 83 N.Y.S.2d 508—Sack v. Chemical Bank & Trust Co., 64 N.Y.S.2d 49.

Ohio.—Cleveland Trust Co. v. White, 15 N.E.2d 627, 134 Ohio St. 1, 118 A.L.R. 475—Fifth Third Trust Co. v. Foss, 15 Ohio Supp. 55.

Partial revocation at different times see infra § 91 a.

**Trust of realty remaining in force**

Where settlor reserved power to revoke a part of trust of a savings bank account and remainder in fee of realty by withdrawing the savings account from the trust, and withdrew the account from the trust, but provided that if there was not enough on hand to pay the gifts they should abate pro rata, the trust of the realty remained in force.—Boyle v. Kempkin, 9 N.W.2d 589, 243 Wis. 86.

30. U.S.—Schoellkopf v. U. S., D.C. N.Y., 36 F.Supp. 617, affirmed, C.C.A., 124 F.2d 982.

31. Okl.—Wade v. McKeown, 145 P. 2d 951, 193 Okl. 415—Dunnnett v. First Nat. Bank & Trust Co. of Tulsa, 85 P.2d 281, 184 Okl. 82.

Pa.—Long v. Tradersmen's Nat. Bank & Trust Co., 165 A. 56, 108 Pa.Super. 363—In re Roberts' Estate, 18 Pa.Dist. & Co. 463.

Va.—Bottimore v. First & Merchants Nat. Bank of Richmond, 196 S.E. 593, 170 Va. 221.

Rule under statute see infra subdivisions c, e, of this section.

**Terms of trust deed in operation**

Fact that a deed of trust declares trust to be irrevocable does not automatically make it so, in view of fact that trust is only as irrevocable as terms of deed in operation permit it to be.—Schellentrager v. Tradersmen's Nat. Bank & Trust Co., 88 A.2d 773, 370 Pa. 501.

**Alienable interest in settlor's heirs not created**

Where settlor expressly reserved right to dispose, by suitable instrument, of whatever portion of her estate she desired during her life, subject only to life estate of trustee, or to dispose of, by will, whatever portion of her estate might be left at her death, trust instrument did not create an alienable estate in settlor's heirs, since their interest was subject to defeat either by deed during her life or by will, and therefore trust was revocable by settlor, even though declared to be irrevocable in trust instrument.—Dreyer v. Lange, 243 P.2d 468, 74 Ariz. 39.

32. D.C.—Liberty Nat. Bank v. Hicks, 173 F.2d 631, 84 U.S.App.D. C. 198, 9 A.L.R.2d 1355.

Me.—Skillin v. Skillin, 177 A. 706, 133 Me. 347.

Ohio.—Walbridge v. Toledo Trust Co., 23 N.E.2d 980, 62 Ohio App. 358.

**Provision against revocation or modification**

A deed of trust requiring trustee to manage trust fund, to use trust

**Ratification of the action of a trustee in consenting to an allegedly improper revocation of a revocable trust may be shown by the actions of the trustor.**<sup>33</sup>

### b. Voluntary Trusts Generally

Except as otherwise provided by statute, a voluntary trust containing no reserved power of revocation generally cannot be revoked without the consent of the beneficiaries or persons beneficially interested.

Revocation is not an incident which the law automatically attaches to a trust on the ground merely that it is of a voluntary character.<sup>34</sup> Accordingly, it has been held that a voluntary trust is irrevocable unless the power of revocation is reserved by the donor when creating it,<sup>35</sup> and that a voluntary settlor, in the absence of mental incapacity, fraud,

undue influence, or mistake, cannot set aside an indenture of trust in which he has not reserved to himself alone the power of revocation.<sup>36</sup> Under other authority, if the power to revoke is not reserved, it does not necessarily follow that revocation is forbidden.<sup>37</sup> If the intent to make a voluntary trust irrevocable is perfectly apparent, it cannot be disturbed.<sup>38</sup>

Except as is otherwise provided by statute, in the absence of a reservation of the power of revocation a voluntary trust is irrevocable without the consent of all the beneficiaries,<sup>39</sup> or of all persons beneficially interested,<sup>40</sup> at least where the omission of the power of revocation was deliberate.<sup>41</sup> On the other hand, a voluntary trust may be revoked at the instance of the trustor, on consent of

income and principal for settlor's support, and, on his death, after payment of debts, to distribute balance to his lawful heirs, and providing that it should be irrevocable and incapable of modification, could not be revoked by settlor.—Kaufman v. Hiestand, 200 A. 251, 131 Pa.Super. 219.

### Destruction of limitation over

A settlor should not be permitted to destroy limitation over to children and issue, particularly where, by express declaration, he omits all power of revocation or alteration.—McCready's Estate v. Pitts, 47 A.2d 235, 354 P.a. 347.

33. Cal.—Hughes v. First Nat. Bank in Oakland, 118 P.2d 309, 47 Cal. App.2d 547.

### Suit by gratuitous remainderman

Cal.—Hughes v. First Nat. Bank in Oakland, supra.

34. Del.—Du Pont v. Du Pont, 164 A. 238, 19 Del.Ch. 131.

Consideration see supra § 28. Voluntary and involuntary trusts generally see supra § 18.

35. Vt.—Warner v. Burlington Federal Sav. & Loan Ass'n, 49 A.2d 93, 114 Vt. 463, 168 A.L.R. 1265.—Connecticut River Savings Bank v. Albee's Estate, 25 A. 487, 64 Vt. 571, 33 Am.S.R. 944.

**Completed executed voluntary trust** Mo.—Frank v. Heilmann, 258 S.W. 1000, 302 Mo. 334.—Harding v. St. Louis Union Trust Co., 207 S.W. 68, 276 Mo. 136.—In re Geel's Estate, App., 143 S.W.2d 327.

### Knowledge of nature of act

Voluntary trust deed properly executed, with knowledge of nature of act, and without reservation of power to revoke, is irrevocable.—Alderman v. Alderman, 181 S.E. 397, 178 S.C. 9, 105 A.L.R. 102.

**Gift in trust inter vivos is irrevocable unless power to revoke is**

reserved.—Clark v. Freeman, 188 A. 493, 121 N.J.Eq. 35.

36. Mass.—Barnum v. Fay, 69 N.E. 2d 470, 320 Mass. 177.—Clune v. Norton, 28 N.E.2d 229, 306 Mass. 324.

37. Del.—Du Pont v. Du Pont, 164 A. 238, 243, 19 Del.Ch. 131.

"When and under what circumstances an executed voluntary trust in which no power of revocation is reserved may be revoked by the settlor has been the subject of much judicial discussion"—Du Pont v. Du Pont, supra.

38. Del.—Du Pont v. Du Pont, supra.

39. Ky.—Corpus Juris cited in Hines v. Louisville Trust Co., 254 S.W.2d 73, 74.

Md.—Allen v. Safe Deposit & Trust Co. of Baltimore, 7 A.2d 180, 177 Md. 26.

N.J.—Fidelity Union Trust Co. v. Parfner, 37 A.2d 675, 135 N.J.Eq. 153.

Va.—Penn v. Keller, 16 S.E.2d 331, 178 Va. 131.—Baltimore v. First & Merchants Nat. Bank of Richmond, 106 S.E. 593, 170 Va. 221.

35 C.J. p. 342 note 30.

"Unless a living trust is revocable, the settlor is not privileged to undo his act, merely because the act was a voluntary one, or because all the assets thereof were his own property, or because the beneficiaries thereof are the recipients of his bounty."—Chase Nat. Bank of New York City v. Reinicke, 10 N.Y.S.2d 420, 431.

### Subsequent trust held void

Trust, changing, without beneficiaries' consent, a previously executed voluntary trust not reserving power of revocation, was void.—Krause v. Jeannette Inv. Co., 62 S.W.2d 890, 333 Mo. 509.

### No revocation by will

(1) A deed in trust, which although voluntary, reserved no power of revocation, and in which settlor was not the sole beneficiary, was not subject to revocation by a subsequent will of the settlor.—Bryant v. Sevier, 20 So.2d 682, 197 Miss. 457.

(2) Transfer of stock, the trust res, by settlor to trustees, in accordance with trust agreement, vested trustees with title thereto, and settlor's execution of will on same day, creating trust in residue of estate, did not revoke agreement.—Krause v. Jeannette Inv. Co., 62 S.W.2d 890, 333 Mo. 509.

(3) Mode of revocation generally see infra § 91.

### Benefit to others

In order to be irrevocable, voluntary trust deed must contain some benefit or advantage to others than settlor or be made to protect him against his wasteful habits, intemperance, etc.—Long v. Tradesmen's Nat. Bank & Trust Co., 165 A. 66, 108 Pa.Super. 363.

### Infant and unascertainable beneficiaries

A voluntary trust without reservation of right of revocation could not be revoked at trustor's instance, although all adult beneficiaries in being consented, where trust was also created for infant beneficiaries and beneficiaries who could not be ascertained until time for distribution of corpus, and it did not appear that trust was created under inequitable circumstances.—Simon v. Reilly, 10 A.2d 474, 126 N.J.Eq. 546.

40. Tex.—Brainerd v. First Nat. Bank, Civ.App., 169 S.W.2d 802, modified on other grounds 174 S.W. 2d 953, 141 Tex. 558.

41. N.J.—Thebaud v. Morristown Trust Co., 73 A.2d 623, 8 N.J.Super. 540.

all the beneficiaries.<sup>42</sup> If any of the beneficiaries are not in being,<sup>43</sup> or are not sui juris,<sup>44</sup> and hence cannot consent, the trust agreement cannot be revoked.

### c. Statutory Provisions Generally

The effect, on a particular trust, of a statute dealing with the revocation of trusts depends on the purpose and intent of the trust and the facts of the particular case.

Under some statutes every trust is revocable by the trustor, unless expressly made irrevocable by the terms of the instrument creating it.<sup>45</sup> Where it is so provided by statute, a trust completely created and containing no power of revocation may not be

revoked without the consent of all the beneficiaries<sup>46</sup> or of persons beneficially interested in a trust in personal property.<sup>47</sup> When such consent is obtained, revocation by the creator is permitted.<sup>48</sup> Such a statute has been held not to be in derogation of the common law,<sup>49</sup> so that it is not to be strictly construed.<sup>50</sup> The purpose of its enactment was, in effect, an attempt to restore, at least in part, the rule or policy of the common law which prohibited the creation under a trust of rights which could not be alienated by the cestui or beneficiary thereunder.<sup>51</sup> Such a statute has been held retroactive in applying to trusts created before its enactment, as well as those created thereafter.<sup>52</sup> The

42. N.J.—Simon v. Reilly, 10 A.2d 474, 126 N.J.Eq. 546.

43. Va.—Bottimore v. First & Merchants Nat. Bank of Richmond, 196 S.E. 593, 170 Va. 221.

44. Va.—Bottimore v. First & Merchants Nat. Bank of Richmond, supra.

45. "Absolute"  
Provision in trust instrument that "such conveyance being absolute at this time, but subject to the conditions hereinafter set forth" did not render trust expressly irrevocable.—In re O'Brien's Trust Estate, 172 P. 2d 607, 197 Okl. 436.

46. Cal.—Gray v. Union Trust Co. of San Francisco, 154 P. 306, 171 Cal. 637.

65 C.J. p. 342 note 37.

47. N.Y.—Smith v. Title Guaranty & Trust Co., 41 N.E.2d 72, 287 N.Y. 500—Schoellkopf v. Marine Trust Co. of Buffalo, 196 N.E. 288, 267 N.Y. 258—Willis v. Willis, 40 N.Y.S.2d 772, 265 App.Div. 746—Engel v. Guaranty Trust Co. of New York, 3 N.Y.S.2d 1000, 254 App.Div. 117, reversed on other grounds 19 N.E.2d 673, 280 N.Y. 43, motion denied 21 N.E.2d 195, 280 N.Y. 687—Behr v. Chase Nat. Bank of New York City, 294 N.Y.S. 431, 250 App.Div. 751, affirmed 10 N.E.2d 563, 274 N.Y. 553—In re Isaacs' Trust, 83 N.Y.S.2d 808—City Bank Farmers Trust Co. v. Walter, 12 N.Y.S.2d 393.

65 C.J. p. 342 note 39.

#### Consent of settlor

(1) Consent of settlor is a cardinal requirement, and approval of beneficiaries alone is insufficient.—Culver v. Title Guaranty & Trust Co., 58 N.Y.S.2d 116, 269 App.Div. 627—Thatcher v. Empire Trust Co., 277 N.Y.S. 874, 243 App.Div. 430.

(2) In order to effect a revocation, all the settlors must join therein.—Culver v. Title Guaranty & Trust Co., 70 N.E.2d 163, 296 N.Y. 74.

#### Death of parties

(1) Trust established by three set-

tlors could not be revoked as to the share contributed by the surviving settlors after the death of one settlor.—Culver v. Title Guaranty & Trust Co., 70 N.E.2d 163, 296 N.Y. 74.

(2) Where one of joint settlors died, consent of beneficiaries and of residuary legatee under will of deceased settlor did not warrant revocation of the entire trust; surviving settlors could, with beneficiaries' consent, abrogate trust as to property conveyed to the trust by such surviving settlors, but instrument purporting to revoke the entire trust was improper and trustee was entitled to require a writing in proper form revoking only as much of the trust as consisted of property originally conveyed by the surviving settlor.—Culver v. Title Guaranty & Trust Co., 58 N.Y.S.2d 116, 269 App.Div. 627.

(3) Trust in favor of settlor's mother, created pursuant to agreement with his sister and grandmother that settlor and sister would create trusts for mother and grandmother would then refrain from exercising power of appointment over portion of deceased husband's estate which she had intended to exercise for benefit of their mother, could not be revoked even with mother's consent, after death of settlor's sister and grandmother, after fulfilling their obligations under agreement.—New York Trust Co. v. Weaver, 80 N.E.2d 56, 298 N.Y. 1—Sutterfield v. Manufacturers & Traders Trust Co., 69 N.Y.S.2d 786, 272 App.Div. 127.

Transfer of reversion was not a revocation of trust requiring consent of beneficiaries.—In re Harwood, 113 N.Y.S.2d 587.

48. N.Y.—Kolb v. Empire Trust Co., 113 N.Y.S.2d 550, 280 App.Div. 370—St. George v. Empire Trust Co., 97 N.Y.S.2d 583, 277 App.Div. 40—Hudson Wire Co. v. First Nat. Bank & Trust Co. of Ossining, N.Y., 93 N.Y.S.2d 264, 276 App.Div. 863—Glanckopf v. Guaranty Trust Co. of N.Y., 80 N.Y.S.2d 54, 274

App.Div. 39—St. George v. Fulton Trust Co. of N.Y., 78 N.Y.S.2d 298, 273 App.Div. 516—Culver v. Title Guaranty & Trust Co., 58 N.Y.S.2d 116, 269 App.Div. 627—Carlebach v. Central Hanover Bank & Trust Co., 53 N.Y.S.2d 707, 269 App.Div. 45—Furchkott v. Hottinger, 35 N.Y.S.2d 579, 264 App.Div. 389, appeal denied 37 N.Y.S.2d 429, 265 App.Div. 803—Bram v. Central Hanover Bank & Trust Co., 288 N.Y.S. 403, 248 App.Div. 182—Thatcher v. Empire Trust Co., 277 N.Y.S. 874, 243 App.Div. 430—Application of Schlusser, 89 N.Y.S.2d 47, 195 Misc. 1008—Application of New York Trust Co., 114 N.Y.S.2d 212—Weil v. New York Trust Co., 109 N.Y.S.2d 430.

65 C.J. p. 342 note 40.

Death of creator prevents revocation under such statute, in suit by trustee, since statute enlarges revocation by creator on consents given in accordance therewith.—Kornfeld v. Mode, 78 N.Y.S.2d 847.

#### Appointment of beneficiaries for revocation

In trust deed authorizing grantor to change beneficiaries and modify their interests, proviso that "in no event shall any such modification or alteration direct that said income be paid to or applied to the use or benefit of the [grantor]" operated to prevent him from exercising his power so as to acquire income directly or indirectly in violation of the purpose of the limitations, and to preclude appointment of beneficiaries under an agreement to cooperate with grantor in revoking the trust.—Knapp v. Hoey, C.C.A.N.Y., 104 F.2d 99.

49. N.Y.—O'Hagan v. Kracke, 390 N.Y.S. 351, 165 Misc. 4, affirmed 3 N.Y.S.2d 401, 253 App.Div. 632.

50. N.Y.—O'Hagan v. Kracke, supra.

51. N.Y.—O'Hagan v. Kracke, supra.

52. N.Y.—Whittemore v. Equitable Trust Co., 147 N.Y.S. 1058, 162 App. Div. 607.

65 C.J. p. 342 note 41.

rights of the parties are to be determined as of the date of the application for revocation.<sup>53</sup> Such a statute may be applicable only to a trust in personal property;<sup>54</sup> if it is a trust consisting of realty and personalty it may be revoked as to the personalty, with the consent of the persons beneficially interested.<sup>55</sup>

Necessarily, the revocability or irrevocability of the trust in each instance, under the statute, depends on the particular trust involved, its purpose, and its manifested intent;<sup>56</sup> each case must necessarily depend on its own particular facts<sup>57</sup> and, above all, on the ascertained intention of the settlor of the trust.<sup>58</sup> A power of revocation arising by operation of law has been held neither alienable<sup>59</sup> nor descendible.<sup>60</sup>

**Voluntary trust.** Some statutes provide for the revocation of voluntary trusts under appropriate circumstances,<sup>61</sup> but under a statute providing that the creator of a trust may revoke it on the written consent of all the persons beneficially interested therein, a grantor of a trust cannot revoke it, without the consent of the beneficiaries, because it is voluntary and without a valuable consideration.<sup>62</sup> A statute providing that unless expressly made irrevocable by the instrument creating the trust, every voluntary trust shall be revocable by the trustor by writing filed with the trustee, and that when a voluntary trust is revoked by the trustor, the trustee shall transfer to the trustor his full title to the trust estate, has been applied in appropriate situations.<sup>63</sup> Under such statute, the grantor in an in-

53. N.Y.—Hussey v. City Bank Farmers' Trust Co., 258 N.Y.S. 396, 236 App.Div. 117.

54. N.Y.—In re Merritt, 159 N.Y.S. 558, 94 Misc. 425.  
55 C.J. p. 342 note 43.

55. N.Y.—Cruger v. Union Trust Co. of New York, 160 N.Y.S. 480, 173 App.Div. 797.

56 C.J. p. 343 note 44.

58. N.Y.—Guaranty Trust Co. of New York v. Armstrong, 42 N.Y.S. 2d 397, affirmed 49 N.Y.S.2d 286, 268 App.Div. 763, affirmed 60 N.E. 2d 757, 294 N.Y. 666.

57. N.Y.—Hope v. U. S. Trust Co. of N.Y., 117 N.Y.S.2d 540, 281 App.Div. 52.

58. N.Y.—Hope v. U. S. Trust Co. of N.Y., supra—Glancokoff v. Guaranty Trust Co. of N.Y., 80 N.Y.S. 2d 54, 274 App.Div. 39.

**Separation agreement** in which settlors created trust should be controlling in determining their intent.—Willis v. Willis, 40 N.Y.S.2d 772, 265 App.Div. 746.

#### Reversion or remainder

Whether settlor intended to reserve reversion in herself, so as to permit her to revoke trust, or intended to make gift in remainder, so as to require consent of remaindermen to revocation, must be determined from terms of trust agreement; and settlor's intention, as expressed therein, is the controlling factor.—Richardson v. Richardson, 81 N.E.2d 54, 298 N.Y. 135.—Worm v. U. S. Trust Co. of N.Y., 86 N.Y.S.2d 632, 274 App.Div. 637, affirmed in re Burchall's Estate, 87 N.E.2d 293, 299 N.Y. 351.—St. George v. Fulton Trust Co. of N.Y., 78 N.Y.S.2d 298, 273 App.Div. 516.—In re Glorney's Trust, 109 N.Y.S.2d 898.

59. N.Y.—Culver v. Title Guaranty & Trust Co., 58 N.Y.S.2d 116, 269 App.Div. 627.

60. N.Y.—Culver v. Title Guaranty & Trust Co., supra.

#### 61. In North Carolina

(1) Under the statute providing that the grantor in any voluntary conveyance in which some future interest in real estate is conveyed or limited to a person not in esse may, at any time before he comes into being, revoke by deed such interest so conveyed or limited, and that the grantor who has heretofore created or may hereafter create a voluntary trust estate in real or personal property for the use and benefit of himself or of any other person or persons in esse with a future contingent interest to some person or persons not in esse or not determined until the happening of a future event may at any time, prior to the happening of the contingency vesting the future estates, revoke the grant of the interest to such person or persons not in esse or not determined by a proper instrument to that effect; provided, that in the event the instrument creating such estate has been recorded, the deed of revocation of such estate shall be likewise recorded before it becomes effective.—Stanback v. Citizens' Nat. Bank of Raleigh, 148 S.E. 313, 197 N.C. 292.—66 C.J. p. 341 note 27 [a].

(3) Where land was conveyed, by conveyance containing no provision against revocation, in trust to two persons for life and at their death to surviving grantors or children of such as may be dead who shall take as their parents would have if living, and those grantors who were dead were intestate without issue, and surviving grantors had no issue, a deed of revocation executed by survivors within the time allowed by statute revoked title in them which was good as against a purchaser's claim of defect.—Kirkland v. Deck, 45 S.E. 2d 538, 228 N.C. 439.

(3) Under such statute, where trustor in amended trust agreement waived right of revocation, but the waiver was without consideration, trustor was not precluded from exercising the statutory right to revoke voluntary trust agreement, and where trustor authorized trustee to pay income from trust estate to trustor and, upon her death, to distribute trust estate to her surviving children and in absence of issue to pay estate to named individual if living, and if not, to trustor's general heirs, and where trustor had no children and the named beneficiary agreed to revocation, trustor's revocation of the trust agreement was valid.—MacMillan v. Branch Banking & Trust Co., 20 S.E.2d 276, 221 N.C. 352.

62. N.Y.—Hammerstein v. Equitable Trust Co., 141 N.Y.S. 1065, 156 App.Div. 644, affirmed 103 N.E. 706, 209 N.Y. 429.

63. Cal.—Title Ins. & Trust Co. v. McGraw, 164 P.2d 846, 72 Cal.App. 2d 390.—Bixby v. Hotchkis, 136 P. 2d 597, 58 Cal.App.2d 445.

Voluntary trust generally see supra subdivision b of this section.

#### Scope of statute; security

In such statute, the expression "voluntary trust" is used in the restricted sense of a trust created freely and without a valuable consideration or legal obligation, and does not apply to a deed of trust given as security for payment of an obligation.—Toult v. Santa Cruz County Title Co., 67 P.2d 404, 20 Cal.App.2d 495.

#### Trust held voluntary

U.S.—Gaylord v. C. I. R., C.C.A.9, 153 F.2d 408.

#### Effect of limiting statute

Where express, voluntary trust provided benefits for trustor for life and for two third persons after his death, he was entitled to revoke trust under such statute, notwithstanding section limiting application of that

strument containing no provision as to revocability has the power to revoke the trust and thus retake the corpus.<sup>64</sup> The statute has been construed as allowing revocation, within its provisions, without the consent of the beneficiaries.<sup>65</sup>

**Effect of declaring trust irrevocable.** Under a statute allowing revocation of a trust in personal property on the consent of all persons beneficially interested, the fact that a trust by its terms is declared irrevocable does not prevent the settlor from revoking it, if all necessary parties consent.<sup>66</sup> So, a prohibition against revocation by the settlor by exercise of the right to amend or modify does not serve to deprive the settlor of his right to invoke the revocation provisions of the statute.<sup>67</sup>

**Effect of notice of revocation.** Where the statute permits revocation of a trust in personal property on the consent of all persons beneficially interested, the receipt by the trustee of a notice of revocation does not immediately terminate the trust<sup>68</sup> or give the creator thereof an immediate right to the pos-

session of the trust corpus;<sup>69</sup> and on such receipt there is no automatic cessation of the trustee's duties and responsibilities.<sup>70</sup>

**Power in trust.** Where it is so provided by statute, a power in trust is irrevocable unless the authority to revoke is reserved.<sup>71</sup>

#### d. Persons Beneficially Interested

In a statute permitting revocation of a trust of personal property by the creator on consent of "all persons beneficially interested" therein, the quoted words include any person who, under the terms of the trust indenture, has a right, whether present or future, vested or contingent, to income or principal of the trust.

It has been held the generally accepted rule that a trust may be revoked on the mutual consent of the settlor and all parties having a beneficial interest in the trust,<sup>72</sup> even though it is a spendthrift trust.<sup>73</sup> A person, in order to have such a beneficial interest that the trust cannot be revoked without his consent, must have an interest taken by purchase under

particular code chapter to express trust created for benefit of another than trustor.—Title Ins. & Trust Co. v. McGraw, 164 P.2d 846, 72 Cal App. 2d 390.

#### Tax return referring to irrevocability

Where instrument creating voluntary trust did not contain provision making trust irrevocable, the fact that grantors filed gift tax returns reporting creation of irrevocable trust did not have effect of amending the trust declaration so as to destroy the grantors' power, under statute, to revoke the trust.—Gaylord v. C. I. R., C.C.A.9, 153 F.2d 408.

64. *U.S.—Gaylord v. C. I. R., supra.*

65. *Cal.—Title Ins. & Trust Co. v. McGraw, 164 P.2d 846, 72 Cal App. 2d 390.*

66. *N.Y.—Hope v. U. S. Trust Co. of N. Y., 117 N.Y.S.2d 540, 281 App. Div. 52—St. George v. Fulton Trust Co. of N. Y., 78 N.Y.S.2d 298, 273 App. Div. 516—Furchgott v. Hottinger, 35 N.Y.S.2d 579, 264 App. Div. 389, appeal denied 37 N.Y.S.2d 429, 265 App. Div. 803—Application of Schluskel, 89 N.Y.S.2d 47, 195 Misc. 1008—Guaranty Trust Co. of N. Y. v. Howe, 86 N.Y.S.2d 808, 193 Misc. 640—Pulsifer v. Monges, 66 N.Y.S.2d 367—Sack v. Chemical Bank & Trust Co., 54 N.Y.S.2d 19—City Bank Farmers Trust Co. v. Neary, 27 N.Y.S.2d 979, appeal dismissed 27 N.Y.S.2d 1017, 261 App. Div. 1079, reargument denied 28 N.Y.S.2d 707, 263 App. Div. 756.*

"The provisions of . . . [the statute] are implicit in all inter vivos trusts, directions in trust indentures to the contrary notwith-

standing. That statute reflects the public policy which looks with disfavor upon restraints on alienation."—Guaranty Trust Co. of N. Y. v. Howe, 86 N.Y.S.2d 808, 813, 193 Misc. 640.

#### Reservation of right to amend

Under the statute, a settlor who has reserved the right to amend the trust in any manner whatsoever or in any and every respect may revoke the trust even though it is in terms irrevocable.—In re Woodward's Trust, 132 N.Y.S.2d 265, 284 App. Div. 459, appeal denied 132 N.Y.S.2d 924, 284 App. Div. 838.

67. *N.Y.—St. George v. Fulton Trust Co. of N. Y., 78 N.Y.S.2d 298, 273 App. Div. 516.*

68. *N.Y.—Neary v. City Bank Farmers Trust Co., 24 N.Y.S.2d 264, 260 App. Div. 791.*

69. *N.Y.—Neary v. City Bank Farmers Trust Co., supra—French v. Kensico Cemetery, 30 N.Y.S.2d 737, 177 Misc. 395, affirmed 35 N.Y.S.2d 826, 264 App. Div. 617, appeal denied 37 N.Y.S.2d 443, 264 App. Div. 955, affirmed 60 N.E.2d 551, 291 N.Y. 77.*

#### Refusal to pay without legal determination

Trustee was entitled to refuse to pay over corpus of trust without authoritative determination by court that trust had been legally revoked.—Neary v. City Bank Farmers Trust Co., 24 N.Y.S.2d 264, 260 App. Div. 791.

#### Action of replevin

(1) An action of replevin against a trustee of a personal trust, in trustee's individual capacity, will not do as substitute for an accounting by

trustee when it appears patently that no valid reason exists therefor, particularly where plaintiff has no immediate right to possession, creator's claim that replevin action was necessary to recover corpus of trust because he might otherwise be deprived of damages if securities in fund had declined in value could not be sustained, because, if trustee unduly delayed in winding up trust, trustee was liable for depreciation; where creator served notice of revocation and demand for return of trust property on January 25, and served complaint in replevin action on following March 1, trustee did not have reasonable time to wind up affairs of trust and to account, and complaint was properly dismissed.—Neary v. City Bank Farmers Trust Co., supra.

(2) Accounting generally see infra §§ 377-420.

70. *N.Y.—Neary v. City Bank Farmers Trust Co., supra.*

71. *N.Y.—McGuire v. McGuire, 193 N.Y.S. 772, 201 App. Div. 71.*

65 C.J. p 342 note 35 [a].

72. *N.Y.—Greins v. Bankers Trust Co., 124 N.Y.S.2d 594, applying Connecticut common law, reversed on other grounds 129 N.Y.S.2d 493, 283 App. Div. 783, reargument denied 129 N.Y.S.2d 919, two cases, 289 App. Div. 871.*

*Okl.—Wade v. McKeown, 145 P.2d 951, 193 Okl. 415—Dunnnett v. First Nat. Bank & Trust Co. of Tulsa, 85 P.2d 281, 184 Okl. 82.*

73. *Okl.—Wade v. McKeown, 145 P.2d 951, 193 Okl. 415—Dunnnett v. First Nat. Bank & Trust Co. of Tulsa, 85 P.2d 281, 184 Okl. 82.*

the terms of the trust agreement;<sup>74</sup> if the interest is one taken by descent rather than purchase, it is not such as to require his consent for revocation.<sup>75</sup>

The determination of the question as to who are beneficially interested in a trust, under a statute permitting revocation by the creator on the consent of all persons beneficially interested in a trust in personal property, requires a construction of the deed or instrument of trust.<sup>76</sup> The question depends on whether the interest which the person has in the trust estate possesses the attributes of descendibility, devisability, or alienability;<sup>77</sup> if the interest which one has in a trust estate possesses none of these attributes, it cannot be said to be a beneficial interest.<sup>78</sup> The words "persons beneficially interested in a trust of personal property," as used in such a statute, are broad;<sup>79</sup> where the statute

contains no express restriction on the nature of the "beneficial interest," the courts may not by implication read such restriction into the statute.<sup>80</sup> The words include any person who, under the terms of the trust indenture, has a right, whether present or future, vested or contingent, to income or principal of the trust fund;<sup>81</sup> the test is one of substance and not of form;<sup>82</sup> and any right given by the trust instrument to receive a benefit from the trust in some contingency is a "beneficial interest" in the trust.<sup>83</sup> The words "persons beneficially interested" are not to be construed to include those not in being who might in some contingency be entitled to an estate;<sup>84</sup> the consent of all persons in being beneficially interested in the trust satisfies the statute,<sup>85</sup> and the possibility of unborn persons becoming interested does not prevent a revocation.<sup>86</sup> The con-

74. Okl.—Dunnett v. First Nat. Bank & Trust Co. of Tulsa, *supra*.

75. Okl.—Dunnett v. First Nat. Bank & Trust Co. of Tulsa, *supra*.

76. N.Y.—Whittemore v. Equitable Trust Co., 147 N.Y.S. 1058, 162 App. Div. 607—Roucault v. Leubuscher, 207 N.Y.S. 1, 124 Misc. 232. Construction in general see *infra* §§ 160-174.

#### Powers of appointment disregarded

Where question was whether sufficient signatures had been obtained for revocation, powers of appointment given to survivor of life tenants who had power of revocation, remaindermen to take in absence of appointment or in case of its revocation, could be disregarded as not affecting question—Schoellkopf v. Marine Trust Co. of Buffalo, 272 N.Y.S. 613, 242 App.Div. 11, affirmed 196 N.E. 288, 267 N.Y. 358.

77. N.Y.—Cazzani v. Title Guarantee & Trust Co., 161 N.Y.S. 884, 175 App.Div. 369, affirmed 116 N.E. 1040, 220 N.Y. 683—Robinson v. New York Life Ins. & Trust Co., 133 N.Y.S. 257, 75 Misc. 361.

78. N.Y.—Robinson v. New York Life Ins. & Trust Co., *supra*.

79. N.Y.—Schoellkopf v. Marine Trust Co. of Buffalo, 196 N.E. 288, 267 N.Y. 358.

80. N.Y.—Schoellkopf v. Marine Trust Co. of Buffalo, *supra*.

81. N.Y.—Schoellkopf v. Marine Trust Co. of Buffalo, *supra*—County Trust Co. v. Young, 27 N.Y.S. 2d 648, 262 App.Div. 31—Pulsifer v. Monges, 66 N.Y.S.2d 367—City Bank Farmers Trust Co. v. Walter, 12 N.Y.S.2d 393.

82. N.Y.—Schoellkopf v. Marine Trust Co. of Buffalo, 196 N.E. 288, 267 N.Y. 358.

83. N.Y.—Schoellkopf v. Marine Trust Co. of Buffalo, *supra*—Coun-

ty Trust Co. v. Young, 27 N.Y.S. 2d 648, 262 App.Div. 31.

#### Present beneficial interest

Statute requires only consent of those persons who have a present beneficial interest in the trust and who would take if trust were terminated at time revocation was attempted.—Thatcher v. Empire Trust Co., 277 N.Y.S. 874, 243 App.Div. 430.

84. N.Y.—Smith v. Title Guarantee & Trust Co., 41 N.E.2d 72, 287 N.Y. 500.

"It seems to be clearly the meaning of the statute that a trust in personal property is revocable by the creator thereof upon the consent of all persons in being who are beneficially interested therein, and if there be no other person in being, who has either a vested or contingent interest in the trust, such revocation is effectual"—Cram v. Walker, 160 N.Y.S. 486, 487, 173 App.Div. 804—Smith v. Title Guarantee & Trust Co., 28 N.Y.S.2d 566, 567, 262 App.Div. 211, affirmed 41 N.E.2d 72, 287 N.Y. 500.

#### Revocable designation by testamentary instrument

N.Y.—City Bank Farmers Trust Co. v. Neary, 27 N.Y.S.2d 979, appeal dismissed, 27 N.Y.S.2d 1017, 261 App.Div. 1079, reargument denied 28 N.Y.S.2d 707, 262 App.Div. 756.

#### No remaindermen in existence

Trustee was not obligated to object to revocation on behalf of possible remaindermen, where there are none in existence—City Bank Farmers Trust Co. v. Neary, *supra*.

#### Possible issue having vested remainders

Revocation executed by settlors and all beneficiaries then in being was not ineffectual because of failure to obtain consent of persons not in being, or their representatives, who were mentioned in provision for

gift over to issue of beneficiaries, even assuming that any possible issue, on birth, would have vested remainders—Levy v. Empire Trust Co., 54 N.Y.S.2d 817, 269 App.Div. 188.

85. N.Y.—Levy v. Empire Trust Co., *supra*—Beam v. Central Hanover Bank & Trust Co., 288 N.Y.S. 403, 248 App.Div. 182—Application of Schluskel, 89 N.Y.S.2d 47, 195 Misc. 1008—O'Leary v. Grant, 278 N.Y.S. 839, 155 Misc. 98.

"The mere possibility that at some time in the future the class may be opened to let in other possible beneficiaries does not require their consent."—Thatcher v. Empire Trust Co., 277 N.Y.S. 874, 876, 243 App.Div. 430.

86. N.Y.—Kuntze v. Guaranty Trust Co. of New York, 290 N.Y.S. 812, 248 App.Div. 871—Beam v. Central Hanover Bank & Trust Co., 288 N.Y.S. 403, 248 App.Div. 182—Application of Schluskel, 89 N.Y.S.2d 47, 195 Misc. 1008.

#### Unborn children or infants

(1) The consent of unborn children is not required by the statute—Levy v. Empire Trust Co., 54 N.Y.S.2d 817, 269 App.Div. 188—Kuntze v. Guaranty Trust Co. of New York, 290 N.Y.S. 812, 248 App.Div. 871—Application of New York Trust Co., 114 N.Y.S.2d 213—Well v. New York Trust Co., 109 N.Y.S.2d 430.

(2) Where infant beneficiaries of trust were not in being at time of attempted revocation by grantor trustees and certain contingent beneficiaries, consent of infants was unnecessary—Ingersoll v. Fifth Ave. Bank of N. Y., 91 N.Y.S.2d 581.

(3) Where trust deed provided that if settlor's daughter should predecease settlor, the trust principal should, on death of settlor, be paid to her son if living, and if not to his lawful issue, if any, and if none, then to legal representative of settlor, un-

sent of the presumptive distributees as against potential distributees fulfills the requirement of the statute.<sup>87</sup>

Instances in which it has been held that a ben-

eficial interest vests<sup>88</sup> or does not vest<sup>89</sup> in persons other than the creator or other beneficiaries consenting will be found in the notes. In this connection, in order to transfer into a remainder that which ordinarily would be a reversion, the intention

born children of the son were not persons beneficially interested.—*Smith v. Title Guaranty & Trust Co.*, 41 N.E.2d 72, 287 N.Y. 500.

**Unborn descendants of life beneficiary of trust in personality, which, in event life beneficiary did not exercise power of appointment, was to be distributed in same manner as if he had owned such property at his death, had no such beneficial interest in trust as would require their consent.**—*Glancokopf v. Guaranty Trust Co. of N. Y.*, 80 N.Y.S.2d 54, 274 App.Div. 39.

87. N.Y.—*Application of New York Trust Co.*, 114 N.Y.S.2d 212.

88. N.Y.—*Crowell v. Pryor*, 288 N.Y. S. 998, 248 App.Div. 86.  
65 C.J. p 343 note 60 [a].

**Life beneficiary of trust**  
N.Y.—*Ingersoll v. Fifth Ave. Bank of N. Y.*, 91 N.Y.S.2d 581.

#### Remainder interest

N.Y.—*Richardson v. Richardson*, 81 N.E.2d 54, 298 N.Y. 135—*Engel v. Guaranty Trust Co. of New York*, 19 N.E.2d 673, 280 N.Y. 43, motion denied *Engel v. Guaranty Trust Co.*, 21 N.E.2d 195, 280 N.Y. 687—*Schoellkopf v. Marine Trust Co. of Buffalo*, 196 N.E. 288, 267 N.Y. 358—*Guaranty Trust Co. of New York v. Harris*, 195 N.E. 529, 267 N.Y. 1—*Pettition of Ryan*, 130 N.Y.S.2d 417, 284 App.Div. 102—*Pettition of Stevens*, 125 N.Y.S.2d 386, 282 App.Div. 571, affirmed 121 N.E.2d 551, 307 N.Y. 742—*Hoppe v. U. S. Trust Co. of N. Y.*, 117 N.Y.S.2d 540, 281 App.Div. 52—*Worm v. U. S. Trust Co. of N. Y.*, 86 N.Y.S.2d 632, 274 App.Div. 637, affirmed in *re Burchall's Estate*, 87 N.E.2d 293, 299 N.Y. 351—*Mine v. Chase Nat. Bank of City of New York*, 31 N.Y.S.2d 592, 263 App.Div. 141—*Hopkins v. Bank of New York*, 25 N.Y.S.2d 888, 261 App.Div. 465, appeal denied 27 N.Y.S.2d 992, 262 App.Div. 712, appeal denied 34 N.E.2d 920, 285 N.Y. 856—*Pulsifer v. Mongos*, 66 N.Y.S.2d 367—*Greenberg v. President and Directors of Manhattan Co.*, 27 N.Y.S.2d 394.

#### Present presumptive heirs at law

Where trust agreement provided for payment of trust fund to beneficiary's heirs at law in absence of appointees or descendants, trust could not be revoked on consent of beneficiary, her father, mother, and uncle, but persons who would become present presumptive heirs at law if neither her father, mother, nor uncle were living, were beneficially in-

terested.—*City Bank Farmers Trust Co. v. Walter*, 12 N.Y.S.2d 393.

**Person holding vested right in contingent estate**  
N.Y.—*Kunze v. Guaranty Trust Co. of New York*, 272 N.Y.S. 883, 242 App.Div. 7, affirmed 193 N.E. 437, 265 N.Y. 669.

89. N.Y.—*McEvoy v. Central Hanover Bank & Trust Co.*, 8 N.E.2d 265, 274 N.Y. 27—*Ribman v. City Bank Farmers Trust Co.*, 49 N.Y.S.2d 322, 268 App.Div. 800—*Marks v. Bankers Trust Co.*, 15 N.Y.S.2d 896, 258 App.Div. 215.  
65 C.J. p 343 note 61 [a].

**Remainder held not created by trust agreement or instrument, so as to require, for revocation, consent of person or persons who would have had remainder interest had remainder been created.**—*Scholtz v. Central Hanover Bank & Trust Co.*, 68 N.E.2d 503, 295 N.Y. 488—*Smith v. Title Guaranty & Trust Co.*, 41 N.E.2d 72, 287 N.Y. 500—*Kolb v. Empire Trust Co.*, 113 N.Y.S.2d 550, 280 App.Div. 370—*St. George v. Empire Trust Co.*, 37 N.Y.S.2d 533, 277 App.Div. 40—*St. George v. Fulton Trust Co. of N. Y.*, 78 N.Y.S.2d 298, 273 App.Div. 516—*Julier v. Central Hanover Bank & Trust Co.*, 74 N.Y.S.2d 262, 272 App.Div. 598—*Conroy v. Title Guaranty & Trust Co.*, 62 N.Y.S.2d 926, 271 App.Div. 200—*Willis v. Willis*, 40 N.Y.S.2d 772, 265 App.Div. 746—*Davies v. City Bank Farmers Trust Co.*, 288 N.Y.S. 398, 248 App.Div. 380—*Abraham v. Abraham*, 280 N.Y.S. 825, 265 App.Div. 302—*Pettition of Percy*, 79 N.Y.S.2d 181, 191 Misc. 1052—*In re Glorney's Trust*, 109 N.Y.S.2d 898—*Green v. City Bank Farmers Trust Co.*, 72 N.Y.S.2d 442—*Sinnott v. City Bank Farmers Trust Co.*, 71 N.Y.S.2d 514—*Sack v. Chemical Bank & Trust Co.*, 54 N.Y.S.2d 19—*Gross v. Dean*, 51 N.Y.S.2d 887—*Guaranty Trust Co. of New York v. Armstrong*, 43 N.Y.S.2d 897, affirmed 49 N.Y.S.2d 286, 268 App.Div. 763, affirmed 60 N.E.2d 767, 294 N.Y. 666—*Zubriske v. Irving Trust Co.*, 27 N.Y.S.2d 368.

#### Reversion; contingent beneficiaries

(1) Where settlor reserves a reversion to himself, those persons or classes of persons named as contingent beneficiaries are not beneficially interested in trust within statute.—*Green v. City Bank Farmers Trust Co.*, 72 N.Y.S.2d 442.

(2) If settlor retains reversion passing on his death to heirs or next of kin, their consent to revocation is

unnecessary, since they would take, if at all, not as purchasers through beneficial right derived from trust instrument, but through succession to interest of settlor, who could consent to destruction of such interest.—*Schoellkopf v. Marine Trust Co. of Buffalo*, 196 N.E. 288, 267 N.Y. 358.

(3) Where settlor assigned securities to trustee with directions to pay income to settlor during his life and that on his death corpus, in default of his appointment by will, should pass according to intestacy laws, trust indenture evinced intention that after settlor's death corpus should belong to his appointees or heirs, and legal effect was to create a reversion and not a remainder.—*Sinnott v. City Bank Farmers Trust Co.*, 71 N.Y.S.2d 514.

#### Grantor's next of kin

Where trust agreement provided that on grantor's death trustee should pay principal and accumulated income to such persons as grantor designated by her will and made no provision as to disposition of trust estate in case grantor failed to designate persons to take it after her death, grantor's next of kin were not persons beneficially interested.—*City Bank Farmers Trust Co. v. Neary*, 27 N.Y.S.2d 979, appeal dismissed 27 N.Y.S.2d 1017, 261 App.Div. 1079, reargument denied 28 N.Y.S.2d 707, 262 App.Div. 766.

#### Taking only in event of reverter

Where the settlor's granddaughter did not take a beneficial interest under the terms of an inter vivos trust, did not participate as a purchaser under such terms, and had only the possibility of taking if there were a reverter to the settlor, her consent was not necessary to a revocation of the trust.—*In re Falconer's Estate*, 47 N.Y.S.2d 35, opinion adhered to 56 N.Y.S.2d 84, 184 Misc. 458.

#### Daughter's support included in wife's needs

Where trust agreement provided that settlor's wife was to receive entire income during her life, invasions of principal by the trustee were permitted only in her favor, and her needs also included provision for the education, care, and support of settlor's daughter as trustee might deem necessary, settlor's daughter was not a person beneficially interested in the trust whose consent to revocation was necessary.—*Ribman v. City Bank Farmers Trust Co.*, 49 N.Y.S.2d 322, 268 App.Div. 800.

to work the transformation must be clearly expressed.<sup>90</sup>

The consent of a trustee asserting no beneficial interest is unnecessary,<sup>91</sup> even though the trust indenture gives him an imperative power in trust.<sup>92</sup> The incidental benefit that the trustee may derive from commissions is not of such a character as gives him a vested right to the continuance of the trust.<sup>93</sup> Where the creator reserves in the trust instrument the right of amendment, and under such power eliminates a beneficiary from the trust, such person ceases to be a person beneficially interested.<sup>94</sup> Likewise, where a life beneficiary waives all of his interest under the trust, and the settlor names another life beneficiary, the instrument of waiver, if regarded as a partial revocation by the settlor, to which the original beneficiary consented, is valid.<sup>95</sup>

### e. Settlor as Sole Beneficiary or Person Beneficially Interested

Even though no power of revocation is reserved, a settlor may revoke the trust where he is the sole beneficiary, or, under a statute permitting revocation with the consent of persons beneficially interested, where he is the only person beneficially interested.

Although there is no power of revocation reserved, a settlor may revoke the trust where he is the sole beneficiary,<sup>96</sup> with<sup>97</sup> or without<sup>98</sup> the consent of the trustee, unless by the terms of the trust instrument the assent of the trustee is necessary.<sup>99</sup> Where the settlor is the only person beneficially interested within the terms of a statute permitting revocation with the consent of persons beneficially interested, as discussed supra subdivision c of this section, he may revoke the trust although there is no power reserved,<sup>1</sup> and although the instrument ex-

90. N.Y.—Richardson v. Richardson, 81 N.E.2d 54, 298 N.Y. 135—Scholtz v. Central Hanover Bank & Trust Co., 68 N.E.2d 503, 295 N.Y. 488—Green v. City Bank Farmers Trust Co., 72 N.Y.S.2d 442

91. N.Y.—Application of Schlusless, 89 N.Y.S.2d 47, 195 Misc. 1008

92. N.Y.—Application of Schlusless, supra.

93. N.Y.—City Bank Farmers Trust Co. v. Neary, 27 N.Y.S.2d 979, appeal dismissed 27 N.Y.S.2d 1017, 261 App.Div. 1079, reargument denied 28 N.Y.S.2d 707, 262 App.Div. 756.

65 C.J. p 344 note 64.

#### Trustee's compensation

Where trust for settlor's sole benefit was otherwise terminable under law, although trust deed declared it irrevocable, trustee was not entitled to object to revocation, where he had no beneficial estate in trust apart from compensation for services.—Long v. Tradesmen's Nat. Bank & Trust Co., 165 A. 56, 108 Pa.Super. 363.

94. N.Y.—Furchgott v. Hottinger, 35 N.Y.S.2d 579, 264 App.Div. 389, appeal denied 37 N.Y.S.2d 429, 265 App.Div. 803.

65 C.J. p 344 note 63.

95. N.Y.—O'Hagan v. Kracke, 3 N.Y.S.2d 401, 253 App.Div. 632.

96. Del.—Corpus Juris cited in H. M. Byllesby & Co. v. Doriot, 12 A.2d 603, 606, 25 Del.Ch. 46. Mo.—Stephens v. Moore, 249 S.W. 601, 298 Mo. 215.

N.J.—Fidelity Union Trust Co. v. Parfner, 37 A.2d 675, 135 N.J.Eq. 133.

Pa.—Long v. Tradesmen's Nat. Bank & Trust Co., 165 A. 56, 108 Pa.Super. 363—In re Carson's Trust Estate, Com.Pl., 31 Del.Co. 311.

Va.—Bottimore v. First & Merchants

Nat. Bank of Richmond, 196 S.E. 593, 170 Va. 221.

65 C.J. p 343 note 46.

Merger of estates see infra § 203.

Termination by sole beneficiary see infra §§ 93, 95

#### Trust declared irrevocable

Del.—H. M. Byllesby & Co. v. Doriot, 12 A.2d 603, 25 Del.Ch. 46—Doyle v. Bank of Montclair, 76 A.2d 41, 9 N.J. Super. 586

#### Spendthrift trust

Del.—Security Trust Co. v. Sharp, 77 A.2d 543, 32 Del.Ch. 3—Weymouth v. Delaware Trust Co., 45 A.2d 427, 29 Del.Ch. 1.

#### Code section held not to prevent revocation

Code section dealing specifically with restrictions upon rights of creditors of a beneficiary with respect to trust property and restrictions upon assignments by a beneficiary does not preclude a sole beneficiary who was sole settlor of trust from revoking trust.—Weymouth v. Delaware Trust Co., supra.

#### Retention of beneficial title with reservation

Where grantor devolves legal title on trustee solely for benefit of grantor for life, with provision that property shall vest in his heirs or as directed in his will on grantor's death, trustee does not take the fee, and agreement is subject to revocation at will of grantor, who retains beneficial title with right of reversion.—Segun State Bank & Trust Co. v. Locke, 102 S.W.2d 1050, 129 Tex. 524

#### Settlor held not sole beneficiary

(1) In general.—Lamb v. First Huntington Nat. Bank, 7 S.E.2d 441, 122 W.Va. 98.

(2) One who creates a voluntary trust is not the sole beneficiary if he manifests an intention to create a contingent interest in others, such as his heirs at law; so, where instru-

ment creating voluntary irrevocable trust provided for distribution of trust estate and accumulations at expiration of 20 years to trustee or, in event of his prior death, to his heirs at law, trust was not the sole beneficiary.—Bixby v. Hetchkins, 135 P.2d 597, 58 Cal.App.2d 445.

97. Vt.—O'Brien v. Holden, 160 A. 192, 104 Vt. 338.

98. Ill.—Vinhov v. Andrews, 1 N.E. 2d 50, 362 Ill. 533.

Vt.—O'Brien v. Holden, 160 A. 192, 104 Vt. 338.

99. Ky.—Downs v. Security Trust Co. of Lexington, 194 S.W. 1041, 175 Ky. 789

1. N.Y.—In re Farrell's Estate, 30 N.Y.S.2d 742, 177 Misc. 389—In re Blackinton's Estate, 275 N.Y.S. 544, 152 Misc. 580—Gross v. Dean, 51 N.Y.S.2d 887.

65 C.J. p 343 note 52.

#### Settlor with reversionary interest

N.Y.—Willis v. Willis, 40 N.Y.S.2d 772, 265 App.Div. 746—Davies v. City Bank Farmers Trust Co., 288 N.Y.S. 398, 248 App.Div. 380—Abraham v. Abraham, 280 N.Y.S. 825, 245 App.Div. 302—In re Shoenberg's Estate, 103 N.Y.S.2d 918—Zabriskie v. Irving Trust Co., 27 N.Y.S.2d 368.

#### Whole or partial revocation

N.Y.—In re Blake's Will, 87 N.Y.S.2d 348—Sack v. Chemical Bank & Trust Co., 64 N.Y.S.2d 19.

#### Trust created in separation agreement between spouses

N.Y.—Willis v. Willis, 40 N.Y.S.2d 772, 265 App.Div. 746.

Term "estate," as used in trust agreement directing disposition of principal on settlor's death as part of his estate in default of appointment of taker by settlor's will, was not equivalent to term "heirs" so as to preclude settlor's revocation with-



pressly states that it is irrevocable;<sup>2</sup> and this may be done without the consent of the trustee.<sup>3</sup>

### f. Effect of Revocation

**The beneficiary's interest in a trust ceases on revocation by the grantor.**

When the power of revocation of a trust is once effectively exercised, a subsequent exercise thereof is void and ineffective.<sup>4</sup> When the grantor exercises a power of revocation, the interest of the beneficiary ceases,<sup>5</sup> and an assignee of the grantor takes the corpus of the trust free from the trust.<sup>6</sup> Where grantors contribute unequally to the trust, it is a reasonable inference that the interests which will revert on the exercise of the power of revocation will be in proportion to the respective contributions.<sup>7</sup> Trust property is revested in a settlor without a reconveyance by the trustee on the revocation of a trust created by the settlor for himself as beneficiary with remainder over to the executors appointed by his will.<sup>8</sup> Where a trust is revoked by the parties, and the trust was simply a part of a larger transaction, it will be held to have been the intention of the parties to revoke the entire agreement and to be restored to their respective rights as they existed prior to the agreement.<sup>9</sup>

The effect of the termination of a trust is discussed *infra* § 96.

### g. Actions

**Generally, an action to revoke a trust is one in personam. In such an action, the general requirements as to pleading and evidence must be met.**

Generally, an action to revoke a trust is one in personam.<sup>10</sup> Where a trust is specifically made irrevocable without the consent of the trustee and the beneficiaries, it is error to deny a contingent beneficiary's petition to intervene in a suit by the settlor to dissolve the trust.<sup>11</sup> Where a beneficiary, bringing an action for partial revocation, relies on certain consents, a trustee bank, not represented at the execution of the trust and not a party thereto, has been held not chargeable with prima facie knowledge of the due execution of such consents, and hence is not required to plead affirmatively fraud or duress;<sup>12</sup> and in such circumstances plaintiff has been held not entitled to judgment on the pleadings.<sup>13</sup>

Under a statute construed as allowing revocation of a voluntary trust by the trustor without the consent of the beneficiaries, the beneficiaries are not necessary or indispensable parties to the trustor's action for rescission of the trust.<sup>14</sup> A beneficiary bringing an action to revoke a trust has the burden of proving the due execution of the consents.<sup>15</sup> One seeking to revoke a trust on the ground that he is able to manage his own affairs has the burden of proving a sufficient change in his condition since a previous decree refusing to revoke the trust;<sup>16</sup> and in such circumstances, testimony is properly limited to any change in complainant's condition since the date of the previous decree.<sup>17</sup>

Particular evidence has been held sufficient to sustain findings that there was a reservation of an express power of revocation,<sup>18</sup> that the revocation of a trust was valid,<sup>19</sup> and that complainant's mental

out his heirs' consent—*Abraham v. Abraham*, 280 N.Y.S. 825, 245 App. Div. 302.

**Settlor held not sole person beneficiary interested**

**1.** N.Y.—*Beum v. Central Hanover Bank & Trust Co.*, 288 N.Y.S. 403, 248 App. Div. 182.

**2.** N.Y.—*Franklin v. Chatham Phoenix Nat. Bank & Trust Co.*, 255 N.Y.S. 115, 231 App. Div. 369, 65 C.J. p. 343 note 53.

**3.** N.Y.—*Aranyi v. Bankers' Trust Co.*, 194 N.Y.S. 614, 201 App. Div. 706—*Thompson v. Thompson*, 198 N.Y.S. 320, 119 Misc. 875.

**4.** U.S.—*Hidell v. Girard Life Ins. Annuity, etc., Co.*, C.C.Pa., 12 F. Cas. No. 6464, 7 Reporter 391, 14 Phila. 401, 6 Wkly.N.C. 435.

**5.** Okl.—*Miller v. Exchange Nat. Bank of Tulsa*, 80 P.2d 209, 183 Okl. 114.

**6a.**—*In re Doudrich's Estate*, Orph., 54 Dauph. Co. 172—*Peters v. Hildenbrand*, Com.Pl., 92 Pittsb. Leg. J. 317.

**Tenn.**—*Farrell v. Third Nat. Bank*, 101 S.W.2d 158, 20 Tenn. App. 540.

**6.** Okl.—*Miller v. Exchange Nat. Bank of Tulsa*, 80 P.2d 209, 183 Okl. 114.

**7.** U.S.—*Colonial Trust Co. v. C. I. R.*, C.C.A.2, 111 F.2d 740.

**8.** N.Y.—*Kingsbridge Improvement Co. v. American Exchange-Pacific Nat. Bank*, 225 N.Y.S. 355, 222 App. Div. 31, affirmed 162 N.E. 597, 249 N.Y. 97.

**Necessity of conveyance to cestui on termination see *infra* § 348.**

**9.** N.J.—*Swift v. Craighead*, Ch., 70 A. 666.

**10.** Ariz.—*Schuster v. Schuster*, 251 P.2d 631, 75 Ariz. 20.

#### **Nonresident minors**

Judgment revoking voluntary trust specifically irrevocable without consent of trustees, and of minor beneficiaries who were nonresidents and were not served with complaint or summons, but for whom guardian ad litem was appointed, acted in per-

sonam as to said minors—*Schuster v. Schuster*, *supra*.

**11.** Ariz.—*Schuster v. Schuster*, *supra*.

**12.** N.Y.—*Breuchaud v. Bank of New York & Trust Co.*, 282 N.Y.S. 812, 157 Misc. 375.

**13.** N.Y.—*Breuchaud v. Bank of New York & Trust Co.*, *supra*.

**14.** Cal.—*Title Ins. & Trust Co. v. McGraw*, 164 P.2d 846, 72 Cal. App. 2d 390.

**15.** N.Y.—*Breuchaud v. Bank of New York & Trust Co.*, 283 N.Y.S. 812, 157 Misc. 375.

**16.** Tenn.—*Guion v. National Bank of Commerce*, 218 S.W.2d 739, 31 Tenn. App. 540.

**17.** Tenn.—*Guion v. National Bank of Commerce*, *supra*.

**18.** Md.—*Lambdin v. Dantzebecker*, 181 A. 353, 169 Md. 240.

**19.** Cal.—*Hughes v. First Nat. Bank in Oakland*, 118 P.2d 309, 47 Cal. App.2d 547.

condition had not changed for the better since a prior decree refusing to revoke a trust.<sup>20</sup> In a suit wherein the settlor sought a judgment declaring that a trust agreement was revocable, evidence has been held insufficient to establish his claim that the omission of the power of revocation was the result of inadvertence and mistake.<sup>21</sup>

#### **h. Deposit of Money in Bank or Other Financial Institution**

- (1) Revocation in general
- (2) Revocation by subsequent will

##### **(1) Revocation in General**

In order to revoke a tentative trust in a bank account, the depositor must, by declarations or acts, decisively show an intention to revoke it.

Where an absolute or irrevocable trust is created in a deposit of money in a savings bank or similar institution, as discussed supra § 54, the trust is not revoked by a return of the passbook at the donor's

request in the absence of evidence that he intended to revoke the trust and that the donee consented thereto;<sup>22</sup> and in the absence of fraud, accident, or mistake, no subsequent acts or declarations of the donor or settlor can revoke the trust without the consent of the other party.<sup>23</sup> While a tentative trust is revocable at will during the lifetime of the depositor, as discussed supra § 54, a trust completely created by a person depositing his own money in his own name in a savings bank in trust for another without a reservation of the power of revocation is irrevocable by the depositor during his lifetime without the consent of the beneficiary.<sup>24</sup>

In order to revoke or disaffirm a tentative trust, the depositor must, by his declarations or acts, decisively or affirmatively show an intention to revoke the trust;<sup>25</sup> but no particular formalities are necessary to manifest such an intention.<sup>26</sup> An act consistent with the continuance of the trust is insufficient,<sup>27</sup> as is a mere intention to revoke, not carried into effect.<sup>28</sup> It has been held that the

20. *Tenn.—Gulon v. National Bank of Commerce*, 218 S.W.2d 739, 31 Tenn App 540.

21. *N.J.—Thebaud v. Morristown Trust Co.*, 73 A.2d 623, 8 N.J.Super 540.

22. *N.Y.—Stockert v. Dry Dock Savings Inst.*, 139 N.Y.S. 986, 155 App. Div. 123.—*In re Green*, 170 N.Y.S. 843, 103 Misc. 564.

23. *Pa.—In re Furjanick's Estate*, 100 A.2d 85, 375 Pa. 484.

24. *R.I.—Estate of Malley v. Malley*, 34 A.2d 761, 69 R.I. 407. 65 C.J. p 349 note 64.

Termination on beneficiary's death see *infra* § 94.

25. *U.S.—Kardon v. Willing*, D.C. Pa., 20 F.Supp. 471.

Cal.—*Brucks v. Home Federal Sav. & Loan Ass'n*, 228 P.2d 545, 36 Cal 2d 845.

Del.—*Delaware Trust Co v. Fitzmaurice*, 31 A.2d 383, 27 Del Ch 101, modified on other grounds *Crumlish v. Delaware Trust Co*, 38 A.2d 463, 27 Del Ch 374.

Ky.—*Hale v. Hale*, 231 S.W.2d 2, 313 Ky. 344.

N.Y.—*In re Sterling's Estate*, 35 N.Y.S.2d 399, 264 App Div 308, affirmed 50 N.E.2d 234, 290 N.Y. 820.—*In re Beck's Estate*, 19 N.Y.S.2d 83, 173 Misc. 733, affirmed 23 N.Y.S.2d 525, 260 App.Div. 651.—*Murray v. Brooklyn Sav. Bank*, 9 N.Y.S.2d 227, 169 Misc. 1014, reversed on other grounds 15 N.Y.S.2d 915, 258 App. Div. 132.—*In re Berley's Will*, 288 N.Y.S. 325, 159 Misc. 560.—*In re Ryan's Will*, 52 N.Y.S.2d 502. Pa.—*In re Bearinger's Estate*, 9 A.2d 342, 336 Pa. 253. 65 C.J. p 349 note 69.

#### **Declarations held sufficient**

Pa.—*In re Rodgers' Estate*, 97 A.2d 789, 374 Pa. 246. 65 C.J. p 349 note 69 [a].

#### **Declarations held insufficient**

Pa.—*In re Krewson's Estate*, 36 A.2d 250, 154 Pa.Super. 509.

#### **Letter held sufficient**

(1) In general.—*In re Bearinger's Estate*, 9 A.2d 342, 336 Pa. 253.

(2) As containing provision for disposition of bank account as part of depositor's testamentary plan.—*Brucks v. Home Federal Sav. & Loan Ass'n*, 228 P.2d 545, 36 Cal.2d 845.

#### **Gift to another**

Effectual gift of proceeds of account, evidenced by delivery of passbook and of an uncompleted withdrawal slip signed by depositor, followed by withdrawal of proceeds of such account by donee prior to death of depositor, amounted to a disaffirmance of tentative trust.—*In re Kiley's Estate*, 94 N.Y.S.2d 64, 197 Misc. 34.

#### **Demand for set-off**

Where depositor created a tentative trust in account for benefit of his son, with right to revoke at any time, his demand for a set-off of account against his liability to bank as indorser on notes amounted to a revocation of the trust.—*Kardon v. Willing*, C.C.A. Pa., 102 F.2d 957, certiorari denied 59 S.Ct. 774, 306 U.S. 657, 83 L.Ed. 1055.

#### **Revocation held not shown**

Ky.—*Hale v. Hale*, 231 S.W.2d 2, 313 Ky. 344. N.Y.—*In re Koster's Will*, 119 N.Y.S.2d 2.

#### **Evidence**

(1) The testimony of the scrivener of a will is admissible to show the revocation of a savings account trust the validity of which is unquestioned but which is revocable by its terms or by nature.—*In re Rodgers' Estate*, 80 Pa. Dist. & Co. 531, 2 Fiduciary 540, affirmed 97 A.2d 789, 374 Pa. 246.

(2) Evidence held insufficient to establish revocation.—*Garlick v. Garlick*, 53 N.Y.S.2d 321.

(3) Testimony as to declarations of intentions regarding trust, made by depositor several years after creation of trust, held insufficient to establish revocation of gift of funds remaining in account when depositor died.—*In re Ryan's Will*, 52 N.Y.S.2d 502.

(4) An unsigned document allegedly written by testatrix about a month before her death had no evidential value for purpose of establishing revocation.—*In re Krewson's Estate*, 36 A.2d 250, 154 Pa.Super. 509.

26. Cal.—*Brucks v. Home Federal Sav. & Loan Ass'n*, 228 P.2d 545, 36 Cal.2d 845.

Ky.—*Hale v. Hale*, 231 S.W.2d 2, 313 Ky. 344.

Pa.—*In re Bearinger's Estate*, 9 A.2d 342, 336 Pa. 253.

27. N.Y.—*In re Schiffer's Estate*, 254 N.Y.S. 871, 142 Misc. 518. 65 C.J. p 349 note 70.

28. N.Y.—*Garlick v. Garlick*, 53 N.Y.S.2d 321.

#### **Failure to sign withdrawal slips**

Where depositor established accounts in his own name in trust for his niece, and niece delivered bankbooks to him, together with with-

settlor-trustee may revoke in any way he chooses,<sup>29</sup> and is not limited to revocation by withdrawal of the whole account,<sup>30</sup> although the reservation of the right to withdraw the full account amounts to a reservation of the general power to revoke.<sup>31</sup>

A tentative trust in a bank deposit is revoked where the depositor withdraws the money<sup>32</sup> or deposits it in another account,<sup>33</sup> or notifies the depository,<sup>34</sup> or where he pledges the passbook to a third person from whom he borrows money;<sup>35</sup> and where the beneficiary predeceases the depositor, the trust is automatically revoked unless it has been made irrevocable by some act of the depositor.<sup>36</sup> Where the depositor subsequently transfers the account to the name of another in trust for the same

beneficiary, the new trustee has no beneficial interest, but such account is still for the use of the original beneficiary.<sup>37</sup>

**Revocation for incompetent.** A court, acting for an incompetent who, prior to his adjudication as an incompetent, created a savings bank trust, can revoke the trust on behalf of the incompetent,<sup>38</sup> provided the equities so warrant,<sup>39</sup> and provided the trust has not become irrevocable by some unequivocal act or declaration.<sup>40</sup> The committee of an incompetent has been held to have no power to alter the relation of the persons interested in the incompetent's tentative savings account trust by electing to revoke it, where the proceeds are not required for the needs of the incompetent.<sup>41</sup>

drawal slips to be used in effecting transfer of accounts to his personal checking account, but he died before signing withdrawal slips, even though he may have stated to his wife that he would sign slips and that she was to withdraw amounts and deposit them in his personal account, trust was not revoked.—*Conry v. Maloney*, 76 A 2d 899, 5 N.J. 590.

29. Wis.—*Boyle v. Kempkin*, 9 N.W. 2d 589, 243 Wis. 86.

**Marking copies of trust agreement as destroyed** constitutes revocation.—*Boyle v. Kempkin*, supra.

30. Wis.—*Boyle v. Kempkin*, supra.

**Revocation pro tanto**

A "Totten Trust" of a bank account in name of settlor in trust for designated beneficiary was not destroyed by mere fact that settlor obtained bankbook from beneficiary and made a single withdrawal during a period of several years, but the withdrawal permitted only the inference that the settlor intended and effected a pro tanto revocation.—*In re Shortle's Estate*, 130 N.Y.S.2d 233, 206 Misc. 35.

31. Wis.—*Boyle v. Kempkin*, 9 N.W. 2d 589, 243 Wis. 86.

**Direction to bank; joint account**

Where settlor directed bank to transfer his account into a joint account in the names of himself and trustee or the survivor, and trust agreement required trustee to hold the account for settlor for life and at his death to divide the account among plaintiffs, settlor had reserved the right to revoke the trust.—*Boyle v. Kempkin*, supra.

32. U.S.—*Kardon v. Willing*, D.C.Pa., 20 F.Supp. 471.

Del.—*Daware Trust Co v. Fitzmaurice*, 31 A 2d 383, 27 Del.Ch. 101, modified on other grounds *Crumlish v. Delaware Trust Co.*, 38 A 2d 463, 27 Del.Ch. 374.

Md.—*Bradford v. Eutaw Sav. Bank of Baltimore City*, 46 A 2d 284, 188 Md. 127.

N.Y.—*In re Kiley's Estate*, 94 N.Y.

S.2d 64, 197 Misc. 34.—*Murray v. Brooklyn Sav. Bank*, 9 N.Y.S.2d 227, 169 Misc. 1014, reversed on other grounds 15 N.Y.S.2d 915, 258 App.Div. 132.

Wis.—*Boyle v. Kempkin*, 9 N.W.2d 589, 243 Wis. 86.

65 C.J. p. 349 note 71.

**Complete withdrawal**

N.Y.—*In re Ryan's Will*, 52 N.Y.S.2d 502.

**Revocation to extent of partial withdrawal**

Ky.—*Hale v. Hale*, 231 S.W.2d 2, 313 Ky. 344.

N.Y.—*Steiner v. Bowery Sav. Bank*, 86 N.Y.S.2d 747.

**Retention of a right of withdrawal** of a bank deposit is, in legal contemplation, no more than a power to revoke the trust, even though this right is reserved to the depositor alone.—*Mushaw v. Mushaw*, 39 A 2d 465, 183 Md. 511.

33. N.Y.—*Matthews v. Brooklyn Sav. Bank*, 102 N.E. 520, 208 N.Y. 508.

**Account for new beneficiary**

N.Y.—*Jennings v. Hennessy*, 55 N.Y. S. 833, 26 Misc. 265.

**Transfer of account to depositor's name only**

Pa.—*Vierling v. Ellwood City Federal Sav. & Loan Ass'n*, 52 A 2d 224, 356 Pa. 350.

34. N.Y.—*Murray v. Brooklyn Sav. Bank*, 9 N.Y.S.2d 227, 169 Misc. 1014, reversed on other grounds 15 N.Y.S.2d 915, 258 App.Div. 132.

**Giving notice required by bank** was sufficient to revoke the trust.—*Rush v. South Brooklyn Savings Inst.*, 119 N.Y.S. 726, 65 Misc. 66, 134 App.Div. 981.

35. Cal.—*Evinger v. MacDougall*, 82 P.2d 194, 28 Cal.App.2d 175.

36. N.Y.—*Murray v. Brooklyn Sav. Bank*, 9 N.Y.S.2d 227, 169 Misc. 1014, reversed on other grounds 15 N.Y.S.2d 915, 258 App.Div. 132.—*In re Ryan's Will*, 52 N.Y.S.2d 502.

**Termination of trust by death of party generally** see *infra* § 94.

37. N.Y.—*Willard v. Willard*, 170 N.Y.S. 886, 103 Misc. 544.

38. Minn.—*Rickel v. Peck*, 2 N.W. 2d 140, 211 Minn. 576, 138 A.L.R. 1375.

**Preventing trust from becoming irrevocable**

Revocation by the court of such tentative trust is not the exercise of jurisdiction over a trust, but is merely the exercise of ward's right to prevent trust from becoming irrevocable.—*Rickel v. Peck*, supra.

**Discretion held not abused** in ordering revocation of the tentative trust created by insane ward in order that money in the account might be applied for ward's comfort and welfare and the expenses of guardianship.—*Rickel v. Peck*, supra.

39. N.Y.—*Brooklyn Trust Co. v. Smart*, 293 N.Y.S. 823, 161 Misc. 857.

**Choice of incompetent**

(1) The court, in exercising its power to revoke, must proceed in accordance with what it finds would, in all probability, have been choice of the incompetent were he of sound mind, and, in such connection, it would be appropriate to consider that it was duty of court to provide, out of estate of incompetent, for his maintenance and for payment of his debts.—*In re Palyo's Estate*, 62 N.Y.S.2d 394, 187 Misc. 884.

(2) Trust which was revocable at will of incompetent was revocable by court where committee of incompetent had exhausted all other of his funds for his support and such trust funds were necessary for his support thereafter.—*Brooklyn Trust Co. v. Smart*, 293 N.Y.S. 823, 161 Misc. 857.

40. N.Y.—*In re Palyo's Estate*, 62 N.Y.S.2d 394, 187 Misc. 884.

41. N.Y.—*In re Rasmussen's Estate*, 264 N.Y.S. 231, 147 Misc. 564.

## (2) Revocation by Subsequent Will

Under most authorities, a depositor can revoke by his will a tentative trust in a bank deposit; whether his will has such effect depends on his apparent intention.

While a tentative trust which is not revoked or disaffirmed becomes absolute on the death of the depositor, as discussed supra § 54, nevertheless, according to most authorities, the depositor may revoke it by his will,<sup>42</sup> in the absence of a specific declaration of disaffirmance;<sup>43</sup> but it has also been held that the trust cannot be revoked, in whole or

in part, by a will.<sup>44</sup> Whether a will revokes a tentative trust depends on the intention of the testator.<sup>45</sup> The revocation need not be express,<sup>46</sup> and a will may operate to revoke the trust even though it is silent as to the bank account.<sup>47</sup> A tentative trust will be deemed revoked by a will where, in order to carry out the terms of the will, it is essential to include the bank deposit in the assets of the estate.<sup>48</sup>

Where the trust account is bequeathed to a new legatee or beneficiary, the trust is revoked;<sup>49</sup> but a will bequeathing the account, or the money therein, to the beneficiary of the trust does not revoke the

42. N.Y.—In re Beck's Estate, 23 N.Y.S.2d 525, 260 App.Div. 651.—In re Markowitz's Will, 128 N.Y.S.2d 7, 205 Misc. 267.

Pa.—In re Scanlon's Estate, 169 A. 106, 313 Pa. 424.—In re Rodgers' Estate, 80 Pa.Dist. & Co. 531, 2 Fiduciary 540, affirmed 97 A.2d 789, 374 Pa. 246.—In re Snyder's Estate, 33 Pa.Dist. & Co. 25.

65 C.J. p 349 note 77.

Revocation of trust by will generally see infra § 91 b.

**Disposing of funds by will**

N.Y.—Murray v. Brooklyn Sav. Bank, 9 N.Y.S.2d 227, 159 Misc. 1014, reversed on other grounds 15 N.Y.S.2d 915, 258 App.Div. 132.

**Letter of instruction held inadequate as will for this purpose**—In re Ryan's Will, 52 N.Y.S.2d 502.

43. N.Y.—In re Berley's Will, 288 N.Y.S. 325, 159 Misc. 560.—In re Shelley's Estate, 50 N.Y.S.2d 570.

44. Md.—Bradford v. Eutaw Sav. Bank of Baltimore City, 46 A.2d 284, 186 Md. 127.

45. N.Y.—In re Shelley's Estate, 50 N.Y.S.2d 570.

65 C.J. p 349 note 79.

**Account as decedent's sole property**

Will directing payment of funeral expenses and erection of headstone, and bequeathing sum for masses, revoked trust in savings account constituting decedent's sole property, where no conversations with decedent were introduced.—In re Mannix' Estate, 264 N.Y.S. 24, 147 Misc. 479.

**Revocation held not intended**

(1) In general.

Md.—Bradford v. Eutaw Sav. Bank of Baltimore City, 46 A.2d 284, 186 Md. 127.

N.Y.—In re Thackeray's Will, 75 N.Y.S.2d 319, 190 Misc. 398.

Pa.—In re Pozzuto's Estate, 25 Pa.Dist. & Co. 235, affirmed 188 A. 209, 124 Pa.Super. 93.

(2) Provisions of will wherein testatrix, in making bequest to her sisters, excluded bank accounts with

words "and other than book or books representing money to which I am entitled" were insufficient to revoke trusts.—In re Berley's Will, 288 N.Y.S. 325, 159 Misc. 560.

(3) Will directing payment of testatrix' debts and funeral expenses, making specific bequest, and giving residue to daughter, did not revoke trust for daughter, where at time of will testatrix owned property aside from deposit.—In re Grenewich's Will, 278 N.Y.S. 279, 243 App.Div. 811.

(4) Provision that testatrix felt that cancellation of part of obligation owing to her from husband of her niece was sufficient remembrance of niece was not inconsistent with continued existence of tentative trust of bank deposit in which niece was named as beneficiary, so as to constitute a revocation.—In re Krewson's Estate, 36 A.2d 250, 154 Pa.Super. 509.

(5) Where woman purchased certificate of deposit in bank in name of herself "for" her son, and payable to "herself or order," and retained possession of certificate until her death, the fact that by will she gave her entire estate to a trustee for the benefit of her son for life, with remainder over, does not operate as a revocation of the tentative trust.—Nace v. Fulton County Nat. Bank, 79 Pa.Dist. & Co. 325.

46. N.Y.—In re Mannix' Estate, 264 N.Y.S. 24, 147 Misc. 479.

47. N.Y.—In re Beck's Estate, 23 N.Y.S.2d 525, 260 App.Div. 651.

**Intent to disinherit beneficiary**

Where testatrix deposited her money in banks in her own name as trustee for her sister, a will subsequently executed by her, disclosing an intent to disinherit sister, constituted a decisive act or declaration of disaffirmance revoking tentative trust of accounts, notwithstanding will was silent as to accounts, where testatrix, at time of her death, possessed no property other than accounts, except for some personal effects, and

sister never had possession of bank-books and had no knowledge that deposits were in trust for her.—In re Beck's Estate, supra.

48. N.Y.—In re Ryan's Will, 52 N.Y.S.2d 502.

65 C.J. p 349 note 80.

**Invasion of accounts to pay bequests**

Where will expressly mentioned exact amount testator had on deposit in several trust savings bank accounts, and provided that money should be divided according to testator's direction, and such bequests could not be paid without invading such accounts, the trusts were revoked and proceeds of such accounts were payable to his estate.—In re Markowitz's Will, 128 N.Y.S.2d 7, 205 Misc. 267.

**Creation of elaborate testamentary trusts**

Pa.—In re Rodgers' Estate, 97 A.2d 789, 374 Pa. 246.

**Inclusion of account held not necessary**

Md.—Bradford v. Eutaw Sav. Bank of Baltimore City, 46 A.2d 284, 186 Md. 127.

49. N.Y.—Moran v. Ferchland, 184 N.Y.S. 428, 113 Misc. 1.—In re Ryan's Will, 52 N.Y.S.2d 502.

**Bequest in trust or absolutely**

A will bequeathing trust accounts, deposited in banks in name of testator in trust for his brother, to testator's wife in trust for brother, or to wife absolutely if brother predeceased her, revoked original trusts.—In re Shelley's Estate, 50 N.Y.S.2d 570.

**Creation of new trust**

Testamentary provision placing testatrix' moneys in savings accounts, in trust for life use of daughter constituted revocation of tentative trusts originally created by testatrix by opening accounts in trust for her daughters respectively.—In re Schrier's Estate, 260 N.Y.S. 610, 145 Misc. 593, motion denied 263 N.Y.S. 539, 147 Misc. 539.

trust,<sup>50</sup> but, rather, confirms it,<sup>51</sup> particularly where the depositor, during his lifetime, delivered the pass-book to the beneficiary;<sup>52</sup> and a general or residuary bequest, as distinguished from a specific bequest, without more, will not revoke a tentative trust.<sup>53</sup> A statute providing for the revocation of a will by a subsequent marriage cannot be extended so as to bring about the revocation of a trust agreement as to a savings account, on the depositor's marriage.<sup>54</sup>

## § 89. — Conditions or Reservations in Instrument Creating Trust

The settlor of a trust may reserve the power to revoke it. Such a power is personal to the holder thereof, and has none of the attributes of property.

In the absence of statutory prohibition, and sometimes by reason of statute, the settlor of a trust may reserve in the trust instrument the power of revocation.<sup>55</sup> In case of such reservation, the trust continues until or unless revoked by exercise of the power;<sup>56</sup> if the power of revocation is reserved,

50. N.Y.—In re Rosso's Estate, 262 N.Y.S. 861, 146 Misc. 746—In re Phipps' Will, 125 N.Y.S.2d 606.

### Unconditional or other gift

A mere unconditional bequest of fund to apparent beneficiary corroborates the conclusion that a trust for his benefit had been intended by the depositor for his benefit, but a bequest to him of such fund with express direction that it be paid to him upon his becoming of age was inconsistent with prior conditional gift and showed an intent to revoke it.—Delaware Trust Co. v. Fitzmaurice, 31 A.2d 383, 27 Del.Ch. 101, modified on other grounds Crumlish v. Delaware Trust Co., 38 A.2d 463, 27 Del.Ch. 374.

51. N.Y.—In re Phipps' Will, 125 N.Y.S.2d 606.

52. N.Y.—In re Rosso's Estate, 262 N.Y.S. 861, 146 Misc. 746.

53. Cal.—Brucks v. Home Federal Sav. & Loan Ass'n, 228 P.2d 545, 36 Cal.2d 845.

N.Y.—In re Richardson's Estate, 235 N.Y.S. 747, 134 Misc. 174—In re Koster's Will, 119 N.Y.S.2d 2.

54. Cal.—Bank of America Nat. Trust & Sav. Ass'n v. Hazelbud, 68 P.2d 385, 21 Cal.App.2d 109.

55. U.S.—Hearst v. American Newspapers, D.C.Del., 61 F.Supp. 171—Newell v. Capelle, D.C.Del., 14 F.Supp. 147, affirmed, C.C.A., 86 F.2d 1007.

Cal.—Mahoney v. Crocker, 136 P.2d 810, 58 Cal.App.2d 196.

Md.—Liberty Trust Co. v. Weber, 90 A.2d 194, 200 Md. 491, modified on other grounds 91 A.2d 393, 200 Md. 491.

Mass.—State Street Trust Co. v. Crocker, 28 N.E.2d 5, 306 Mass. 257, 128 A.L.R. 1166.

Mo.—Gains v. Melton, 121 S.W.2d 821, 343 Mo. 413.

Neb.—Whalen v. Swircin, 4 N.W.2d 737, 141 Neb. 650.

Pa.—In re Bryer's Estate, 22 Pa. Dist. & Co. 65.

Va.—Old v. City of Norfolk, 17 S.E.2d 427, 178 Va. 378.

Wis.—First Wisconsin Trust Co. v. Wisconsin Department of Taxation, 294 N.W. 868, 237 Wis. 135, 66 C.J. p. 344 note 68.

Conditions or reservations in general see supra § 47.

### Revocation in whole or part

U.S.—United Bldg. & Loan Ass'n v. Garrett, D.C.Ark., 64 F.Supp. 460 Mo.—Coon v. Stanley, 94 S.W.2d 96, 230 Mo.App. 524.

N.J.—Trenton Banking Co. v. Howard, 187 A. 560, affirmed 187 A. 575, 121 N.J.Eq. 85.

Pa.—In re Yost's Estate, 87 Pa. Dist. & Co. 40, 4 Fiduciary 106.

### Revocation at any time

U.S.—United Bldg. & Loan Ass'n v. Garrett, D.C.Ark., 64 F.Supp. 460.

### Revocation by withdrawals of trust assets

Neb.—Whalen v. Swircin, 4 N.W.2d 737, 141 Neb. 650.

Ohio.—Woodside Co. of Nevada v. Narten, 35 N.E.2d 777, 138 Ohio St. 469.

Pa.—In re Yost's Estate, 87 Pa. Dist. & Co. 40, 4 Fiduciary 106—In re Dourich's Estate, 54 Dauph.Co. 172.

### Consent of contingent remainderman

In an inter vivos trust, the grantor may, by appropriate reservation, retain the power to revoke it without the necessity of gaining the permission or consent of any contingent remainderman.—Application of Central Hanover Bank & Trust Co. (Mondman), 26 N.Y.S.2d 924, 176 Misc. 183, affirmed 32 N.Y.S.2d 128, 263 App. Div. 809, affirmed Central Hanover Bank & Trust Co. v. Mondman, 42 N.E.2d 610, 288 N.Y. 608.

### Reconveyance by trustees

Trust agreement providing that trustees should reconvey on demand by beneficiary obligated them to reconvey on demand, unless they could show legal excuse for not so doing.—Coleman v. Coleman, 61 P.2d 441, 48 Ariz. 337, 106 A.L.R. 1309.

Assignment by trustor was held subject to reservation by him of power to revoke trust.—Merchants Nat. Bank of New Bedford v. Morrissey, 109 N.E.2d 821, 329 Mass. 601.

### Parents' joint power to revoke; death of one

Where parents created a trust inter vivos for payment of income to their children for life, reserving power to modify in whole or part "at any time during their lifetime," and, with alleged purpose of punishing one son, directed trustee by letter to "pay to us the one-third" which had been paid to him, and father died, power to revoke was joint, and mother's direction to trustee to restore the income to the son, pursuant to father's alleged wish, did not authorize payment to son, since, where husband and wife jointly create a trust inter vivos, reserving joint power to revoke or amend, neither party should be allowed to destroy the trust after the other's death.—In re Solomon's Estate, 2 A.2d 825, 332 Pa. 462.

### Reservation immaterial

Where husband and wife, as tenants by the entirety, conveyed property in trust, reserving to themselves a life estate with remainder to their daughters, reservation by them of power of revocation was immaterial in determining whether property was subject to execution under judgment against surviving husband—Murphy v. C. I. T. Corp., 33 A.2d 16, 347 Pa. 591.

### Expectant estate; effect of statute

Statute providing that holder of life estate may not defeat an estate in expectancy except by manner or means provided in instrument, imposes no restrictions on grantor or settlor of life estate and does not purport to say that he may not destroy expectant estate where he expressly reserves right to do so by suitable instrument.—Dreyer v. Lange, 243 P.2d 468, 74 Ariz. 39.

56. N.Y.—Schenectady Trust Co. v. Emmons, 25 N.Y.S.2d 230, 261 App. Div. 154, affirmed 36 N.E.2d 461, 286 N.Y. 626, reargument 37 N.E.2d 140, 286 N.Y. 698, 66 C.J. p. 346 note 3.

### Beneficiaries' rights subject to termination

The rights acquired by the beneficiaries under a revocable trust are

the trust is as good and effectual as if irrevocable, unless and until the power of revocation is exercised,<sup>57</sup> and until the power is exercised, the interests created by the trust remain unaffected.<sup>58</sup> The reservation of the power does not in any degree affect the legal title to the property;<sup>59</sup> it does not prevent the passing of a present interest to the property,<sup>60</sup> or the passing of title to the trustee.<sup>61</sup> The reservation by a settlor, in addition to an interest for life, of a power to revoke the trust, does not make incomplete a gift over to the statutory next of kin.<sup>62</sup> Under such a reserved power, revocation may be made only to the extent specified;<sup>63</sup> and where the settlor reserves the power to revoke a trust only under particular circumstances or condi-

tions, he can revoke it only under those circumstances or conditions.<sup>64</sup>

**Nature of power.** A power of revocation in a trust instrument is not property,<sup>65</sup> nor is it a property right<sup>66</sup> or an interest in property;<sup>67</sup> and it possesses none of the attributes of property.<sup>68</sup> Such a power is personal to the holder thereof.<sup>69</sup> It is not transferable,<sup>70</sup> alienable,<sup>71</sup> or descendible.<sup>72</sup> So, it may not be alienated or passed by a will,<sup>73</sup> nor, apart from the Bankruptcy Act,<sup>74</sup> may it be reached by creditors.<sup>75</sup> It is said to be similar, or akin,<sup>76</sup> or analogous,<sup>77</sup> to a power of appointment; and, if absolute and unconditional, is equivalent to a general power of appointment.<sup>78</sup>

subject to termination on a sufficient exercising of the power of revocation reserved by the grantor.—*Miller v. Exchange Nat. Bank of Tulsa*, 80 P. 2d 209, 183 Okl. 114

#### Statute held inapplicable

Statute voiding a conveyance made on trust for the exclusive benefit of the settlor was held inapplicable so as to prevent revocation under reservation of power.—*Stone v. Guardian Trust Co.*, 4 Ohio Supp. 4.

57. *Mo*.—In re Geel's Estate, App., 143 S.W.2d 327.

58. *Mass.*—National Shawmut Bank of Boston v. Joy, 53 N.E.2d 113, 315 Mass. 457.

Unexercised power as not affecting validity of trust see *infra* § 90a

**Rights in remainder** are not impaired when there is no attempt to exercise the power.—*Kerwin v. Donaghy*, 59 N.E.2d 299, 317 Mass. 559.

#### Exercise after trustor's death

If right is never exercised according to terms in which reserved until after trustor's death, it can have no effect on trustee's right to hold trust property.

*Ark*.—*Gall v. Union Nat. Bank of Little Rock*, 159 S.W.2d 757, 203 Ark. 1000.

*N.J.*—*Mayer v. Tucker*, 141 A. 799, 102 N.J. Eq. 524.

59. *Ark*.—*Gall v. Union Nat. Bank of Little Rock*, 159 S.W.2d 757, 203 Ark. 1000.

*N.J.*—*Mayer v. Tucker*, 141 A. 799, 102 N.J. Eq. 524.

65 C.J. p 346 note 4.

Provision for reconveyance as affecting estate or interest remaining in creator of trust see *infra* § 202.

60. *Okla.*—*Miller v. Exchange Nat. Bank of Tulsa*, 80 P.2d 209, 183 Okl. 114.

*Pa.*—In re Lyon's Estate, 63 A.2d 415, 164 Pa.Super. 140

65 C.J. p 346 note 6.

Time of vesting see *supra* § 29.

#### Vested or defeasible interests

(1) The trustee and the beneficiaries take vested interests, under the trust instruments, subject to the settlor's exercise of the reserved powers.

*Mich.*—*Goodrich v. City Nat. Bank & Trust Co. of Battle Creek*, 258 N. W. 253, 270 Mich. 222.

*N.Y.*—*Pinckney v. City Bank Farmers Trust Co.*, 292 N.Y.S. 835, 249 App Div. 375.

(2) Power to revoke merely makes the interests of the trustee and cestui defeasible at the desire of the settlor

*Ga.*—*Wilson v. Fulton Nat. Bank of Atlanta*, 4 S.E.2d 660, 188 Ga. 691.

*Wis.*—*First Wisconsin Trust Co. v. Wisconsin Department of Taxation*, 294 N.W. 868, 237 Wis. 135

61. *N.J.*—*Bassin v. Enoch-Pearl Co.*, 54 A.2d 824, 140 N.J. Eq. 428.

62. *Mass.*—National Shawmut Bank of Boston v. Joy, 53 N.E.2d 113, 315 Mass. 457.

63. *U.S.*—*Hearst v. American Newspapers*, D.C.Del., 51 F.Supp. 171.

*Pa.*—In re Shapley's Deed of Trust, 53 Pa.Dist. & Co. 123, affirmed 46 A.2d 227, 353 Pa. 499, 164 A.L.R. 877.

#### Entire life interest in settlor

This is true notwithstanding the settlor has the entire beneficial interest in the trust fund for life.—In re Reese's Estate, 177 A. 792, 317 Pa. 473—*Kaufman v. Hiestand*, 200 A. 251, 131 Pa.Super. 219—In re Lau's Estate, 27 Pa.Dist. & Co. 157, 50 York Leg Rec. 73.

64. *U.S.*—*Hearst v. American Newspapers*, D.C.Del., 51 F.Supp. 171—*Noble v. Rogan*, D.C.Cal., 49 F. Supp. 370.

*Ariz.*—*Schuster v. Schuster*, 251 P.2d 631, 75 Ariz. 20.

*Pa.*—*Damiani v. Lobasco*, 79 A.2d 268, 367 Pa. 1.

65. *Mass.*—National Shawmut Bank

of Boston v. Joy, 53 N.E.2d 113, 315 Mass. 457.

66. *U.S.*—*Guggenheim v. Commissioner of Internal Revenue*, C.C.A., 58 F.2d 188, reversed on other grounds 53 S.Ct. 369, 288 U.S. 280, 77 L.Ed. 748.

65 C.J. p 344 note 75.

67. *Ky.*—*Hill v. Cornwall*, 26 S.W. 540, 95 Ky. 512, 16 Ky.L. 97.

65 C.J. p 344 note 76.

68. *Pa.*—In re Lau's Estate, 27 Pa. Dist. & Co. 157, 50 York Leg.Rec. 73.

69. *N.J.*—National Newark & Essex Banking Co. v. Rosahl, 128 A. 586, 97 N.J. Eq. 74

65 C.J. p 344 note 77

70. *U.S.*—*Farmers' Loan & Trust Co. v. Bowers*, C.C.A.N.Y., 29 F.2d 14.

71. *N.Y.*—*Culver v. Title Guarantee & Trust Co.*, 58 N.Y.S.2d 116, 269 App Div. 627—*Kornfeld v. Mode*, 78 N.Y.S.2d 847.

72. *U.S.*—*Farmers' Loan & Trust Co. v. Bowers*, C.C.A.N.Y., 29 F.2d 14.

*N.Y.*—*Culver v. Title Guarantee & Trust Co.*, 58 N.Y.S.2d 116, 269 App. Div. 627—*Kornfeld v. Mode*, 78 N.Y.S.2d 847.

73. *U.S.*—*Farmers' Loan & Trust Co. v. Bowers*, C.C.A.N.Y., 29 F.2d 14.

74. *Mass.*—National Shawmut Bank of Boston v. Joy, 53 N.E.2d 113, 315 Mass. 457.

75. *Mass.*—*Guthrie v. Canty*, 53 N. E.2d 1009, 315 Mass. 726.

76. *Mass.*—National Shawmut Bank of Boston v. Joy, 53 N.E.2d 113, 315 Mass. 457.

65 C.J. p 344 note 80.

77. *Pa.*—In re Lau's Estate, 27 Pa. Dist. & Co. 157, 50 York Leg.Rec. 73.

78. *U.S.*—*Farmers' Loan & Trust Co. v. Bowers*, C.C.A.N.Y., 29 F.2d 14.

*Creation and existence of power.* The power of revocation need not be express.<sup>79</sup> If it exists by necessary implication under the terms of the trust, it may be exercised the same as if expressly reserved.<sup>80</sup> On the other hand, according to some authority, a trust conveyance is irrevocable unless the power of revocation is expressly reserved.<sup>81</sup>

By reserving the power of sale of the property which is the subject of the trust, the settlor reserves a power of revocation;<sup>82</sup> and a grantor's reservation of the power to control the distribution of either income or principal, as he pleases, includes the power to abrogate the trust instrument.<sup>83</sup> A reservation, in a trust instrument, of the right to add to or decrease the trust fund from time to time, as the grantor may desire, includes the right to revoke the trust,<sup>84</sup> either in whole or in part,<sup>85</sup> especially where the grantor and the trustee are the only persons interested in the trust.<sup>86</sup>

A provision that the trustee should pay over to

the settlor as cestui que trust some portion or all of the principal of the trust is not a power of revocation;<sup>87</sup> a provision permitting an invasion of the principal of a trust, but not below a minimal amount, is not the equivalent of a right of revocation;<sup>88</sup> and a provision, in a voluntary trust agreement, reserving to the settlor the right to change the trustees from time to time does not give the settlor power to revoke the trust without the consent of the beneficiaries.<sup>89</sup> A reservation to the donor, in a trust indenture making him cotrustee, of the right to have possession and sole access to, and the sole right of disposition of, the trust estate, without the consent or concurrence of the cotrustee, is not a reservation of a right of revocation.<sup>90</sup> An unrestricted power to modify a trust includes a power to revoke it,<sup>91</sup> but a provision that the court may, in its discretion, modify, annul, or cancel a trust is not a reservation of the power to revoke,<sup>92</sup> and a modification, by the settlor, of a voluntary trust agreement so as to make it more advantageous to

79. Ill.—*Talcott v. American Board of Commissioners for Foreign Missions and Congregational Home Missionary Society*, 205 Ill.App. 339.

Va.—*Russell's Ex'rs v. Passmore*, 103 S.E. 652, 127 Va. 475.

80. Wis.—*Boyle v. Kempkin*, 9 N.W. 2d 539, 243 Wis. 86.  
65 C.J. p. 344 note 84.

**Power held not implied**

(1) In general.—*Adams v. Hagerott*, C.C.A.N.D., 34 F.2d 899—65 C.J. p. 344 note 84 [a].

(2) A voluntary trust agreement providing for payment of income to settlor during his life and after his death to named widows' and orphans' home or alternative beneficiaries, disclosed no implied power of revocation.—*Hines v. Louisville Trust Co., Ky.*, 254 S.W.2d 73.

**Failure to notify beneficiary**

Failure of the owner of property to notify the beneficiary of the declaration of trust, or beneficiary's nonacceptance of trust, is evidence that, although a trust is created, the owner reserves the power to revoke it.—*Buhl v. Kavanagh*, C.C.A.Mich., 118 F.2d 315.

**Right to change beneficiaries**

Where insured assigned life policy to trustees, and subsequently named trustees as beneficiaries, but expressly reserved right to make further change, the express reservation indicated intent that the trust be revocable, with the means of revocation a change of beneficiary from trustees to another.—*Continental Assur. Co. v. Conroy*, C.A.N.J., 209 F.2d 539.

**Resignation of trustee**

Where instrument creating trust named a successor trustee in event of resignation of first named trustee, such resignation did not indirectly effect a revocation of trust, since it was resigning trustee's duty, under statute, to protect trust estate pending settlement of account and discharge as trustee and delivery of corpus of trust to successor.—*Bixby v. Hotchkiss*, 136 P.2d 597, 58 Cal. App.2d 445.

81. Iowa.—*Anderson v. Telsrow*, 21 N.W.2d 781, 237 Iowa 568—*Dunn v. Dunn*, 258 N.W. 695, 219 Iowa 349.

**Instruments held not revocable**

(1) Conveyance by trustor to trustee which, by its terms, completely divested trustor of all title and interest in property and of all gains, profits, and income therefrom created an irrevocable trust, notwithstanding trustor and trustee named were the same person and that trustor reserved to himself, as sole trustee, all rights of control over property.—*Dunn v. Dunn*, *supra*.

(2) Where language of trust deed executed by husband and wife completely divested them of all interest in the property conveyed, the reference in the deed to a joint will executed by them was merely for the purpose of determining the method of distribution of the trust estate after death of surviving trustor, and the trust was created instantaneously by the delivery of the deed and acceptance of the trust, the trust deed was not revocable, and a later purported codicil to the joint will could

not defeat the provisions of the deed.—*Anderson v. Telsrow*, 21 N.W.2d 781, 237 Iowa 568.

82. Mo.—*Sims v. Brown*, 158 S.W. 624, 252 Mo. 58.

83. Kan.—*Herd v. Chambers*, 149 P.2d 583, 158 Kan. 614.

84. N.J.—*Trenton Banking Co. v. Howard*, 187 A. 569, affirmed 187 A. 575, 121 N.J.Eq. 85.

N.Y.—*In re Woodward's Trust*, 132 N.Y.S.2d 266, 284 App.Div. 459, appeal denied 132 N.Y.S.2d 924, 284 App.Div. 838.

85. N.J.—*Trenton Banking Co. v. Howard*, 187 A. 569, affirmed 187 A. 575, 121 N.J.Eq. 85.

Pa.—*In re Yost's Estate*, 87 Pa.Dist. & Co. 40, 4 Fiduciary 106.

86. N.J.—*Trenton Banking Co. v. Howard*, 187 A. 569, affirmed 187 A. 575, 121 N.J.Eq. 85.

87. Wis.—*Warsco v. Oshkosh Savings & Trust Co.*, 196 N.W. 829, 188 Wis. 156.  
65 C.J. p. 344 note 86.

Reservation of use of principal as affecting validity see *supra* § 47.

88. N.Y.—*In re Heller's Trust*, 115 N.Y.S.2d 343.

89. Ky.—*Hines v. Louisville Trust Co.*, 254 S.W.2d 73.

90. Mo.—*St. Louis Union Trust Co. v. Dudley*, App. 162 S.W.2d 290.

91. N.J.—*Manice v. Howard Sav. Institution*, 104 A.2d 74, 30 N.J. Super. 267.

92. Ky.—*Downs v. Security Trust Co. of Lexington*, 194 S.W. 1041, 175 Ky. 789.

the beneficiary does not indicate the intention of the settlor to retain the power of revocation.<sup>93</sup>

*By whom exercised.* A power of revocation may be exercised only by the person in whom it resides<sup>94</sup> or to whom it is given.<sup>95</sup> In the absence of statute, where, by the terms of a trust instrument, a power of revocation has been reserved to the joint settlors of a trust, all must join in the revoking instrument in order to effect revocation,<sup>96</sup> and where one of them has died, attempted revocation by the survivors is a nullity.<sup>97</sup>

*Duration and termination of power.* When not exercised, a power of revocation expires according to the terms of the trust instrument.<sup>98</sup> Where, by the terms of the trust instrument, the exercise of the reserved power of revocation is dependent on the consent of another person, the power is terminated on the death of such person.<sup>99</sup> The power terminates on the death of the settlor,<sup>1</sup> especially under a reservation that the settlor may during his life revoke the trust.<sup>2</sup>

*Settlor as owner.* A settlor who reserves absolute power of revocation and modification possesses all the powers of ownership,<sup>3</sup> and for many purposes is treated as the absolute owner of the property held in trust.<sup>4</sup>

93. Ky.—Hines v. Louisville Trust Co., 254 S.W.2d 73.

94. Pa.—Dolan's Estate, 3 Pa Dist & Co 264

#### Successor trustee

Where declarations of trust named a successor trustee in event of death or incapacity of settlor-trustee, on settlor's death all right, title and interest, subject to the terms of the declarations, passed to the successor trustee and the settlor's widow and personal representative had no authority to exercise power of revocation reserved to the settlor.—United Bldg. & Loan Ass'n v. Garrett, D.C. Ark., 64 F Supp. 460.

95. N.J.—Clark v. Freeman, 188 A. 493, 121 N.J.Eq 35.

#### Survivor

Where grantor of trust, providing that grantor and wife jointly, or their survivor, might annul it in writing, renounced powers reserved therein, subsequent execution by wife, in grantor's lifetime, of instrument attempting to terminate trust did not affect rights of beneficiaries, since wife was not survivor within meaning of instrument.—Clark v. Freeman, 188 A. 493, 121 N.J.Eq. 35.

96. N.Y.—Culver v. Title Guarantee & Trust Co., 58 N.Y.S.2d 116, 269 App.Div. 627.

97. N.Y.—Culver v. Title Guarantee & Trust Co. supra.

Pa.—In re Solomon's Estate, 2 A.2d 825, 332 Pa 462.

98. N.Y.—Schreyer v. Schreyer, 83 N.Y.S. 508, 43 Misc 520, affirmed 82 N.Y.S. 1065, 101 App Div. 456, affirmed 75 N.E. 1134, 182 N.Y. 555 65 C.J. p 345 note 91.

Duration and termination of trust see infra §§ 92-97.

#### Beneficiaries' right and interest at settlor's death

Reserved power to revoke was a condition subsequent, so that where settlor never exercised the power, interest of beneficiaries was subsisting at settlor's death and beneficiaries were entitled to have trust administered according to terms of trust instrument.—United Bldg. & Loan Ass'n v. Garrett, D.C. Ark., 64 F. Supp 460.

99. N.Y.—Crocker v. Crocker, 192 N. Y.S. 666, 117 Misc. 558.

65 C.J. p 345 note 92.

1. Pa.—In re Lyon's Estate, 63 A. 2d 415, 164 Pa Super. 140.

65 C.J. p 345 note 93.

2. N.Y.—Syracuse Trust Co. v. Fuller, 352 N.Y.S. 90, 140 Misc. 918

Pa.—Dolan's Estate, 3 Pa. Dist & Co. 264.

3. N.Y.—City Bank Farmers Trust

Grant of power to others. The creator of a trust may grant to others powers of revocation.<sup>5</sup>

*Relinquishment of power.* The execution, by the grantor of a trust, of an instrument whereby he renounces, and declines to exercise, a reserved power to annul all or any of the uses set forth in the indenture does not prevent him from thereafter exercising such power;<sup>6</sup> and where a settlor relinquishes his reserved power to revoke on consideration that others do likewise, he may, nevertheless, have the right to revoke for failure of consideration.<sup>7</sup> In other circumstances, provisions for the relinquishment of the reserved power have been enforced or held operative,<sup>8</sup> or the trustor has been held to have seasonably abandoned any idea he may have had of revoking the trust.<sup>9</sup>

## § 90. — Inclusion or Omission of Reservation as Affecting Validity

- a. Inclusion
- b. Omission

### a. Inclusion

Reservation of a power of revocation does not invalidate a trust.

The reservation of the power of revocation of a trust is not in itself inconsistent with the creation of a valid trust,<sup>10</sup> at least where no rights of credi-

Co v. Cannon, 51 N.E.2d 674, 291 N.Y. 125, 157 A.L.R. 1424, motion denied 59 N.E.2d 445, 293 N.Y. 858.

4. N.Y.—City Bank Farmers Trust Co v Cannon, supra.

5. Mass.—State Street Trust Co. v. Crocker, 28 N.E.2d 5, 306 Mass. 257, 128 A.L.R. 1166.

6. N.J.—Clark v. Freeman, 188 A. 493, 121 N.J. Eq 35.

#### Reason for rule

The power was based on a special confidence, not annexed to an office or engranted on an estate held by the donee of the power; a person intrusted with such a power cannot extinguish it, but may exercise it notwithstanding his covenant to the contrary.—Clark v. Freeman, supra.

7. N.Y.—City Bank Farmers Trust Co. v. Check, 110 N.Y.S.2d 434, 202 Misc. 303.

8. Pa.—In re Trust Deed of Smaltz, 195 A. 850, 329 Pa. 21.

#### Relinquishment by executing new trust deed

Pa.—In re Trust Deed of Smaltz, supra.

9. Cal.—Elliott v. Agajanian, 64 P. 2d 1159, 19 Cal.App.2d 244

10. Ga.—Wilson v. Fulton Nat Bank of Atlanta, 4 S.E.2d 660, 188 Ga. 691.



tors are involved,<sup>11</sup> and particularly where by statute provision is made for the reservation of the power in a trust instrument.<sup>12</sup> Such a reservation has been held not contrary to public policy as offering a means of evading state and federal estate inheritance taxes or inconveniencing their collection.<sup>13</sup> Also, such a reservation does not make the instrument testamentary in character, as discussed in Wills § 143.

**Power not exercised.** If the power of revocation is not actually exercised, the validity of the trust remains as unaffected as if the power had not been reserved.<sup>14</sup>

# b. Omission

Failure to reserve a power of revocation does not necessarily invalidate a trust, particularly where revocability would defeat its purpose; but such failure may, in a particular case, show such misunderstanding by the settlor as to invalidate the trust.

The absence of a power of revocation from a trust instrument<sup>15</sup> and the fact that the attention of the settlor was not called to that omission<sup>16</sup> do not in themselves render the trust invalid. They are circumstances to be taken into account,<sup>17</sup> in determining whether the transaction was the deliberate act of the settlor,<sup>18</sup> and are of more or less weight ac-

Ill.—Gurnett v. Mutual Life Ins. Co. of New York, 191 N.E. 250, 356 Ill. 612.—Bergmann v. Foreman State Trust & Savings Bank, 273 Ill.App. 408.

Mass.—National Shawmut Bank of Boston v. Joy, 53 N.E.2d 113, 315 Mass. 457.—Greeley v. Flynn, 36 N.E.2d 394, 310 Mass. 23.—Murray v. O'Hara, 195 N.E. 909, 291 Mass. 75.

Mich.—Rose v. Rose, 1 N.W.2d 458, 300 Mich. 73.—Stephens v. Detroit Trust Co., 278 N.W. 799, 284 Mich. 149.—Goodrich v. City Nat. Bank & Trust Co. of Battle Creek, 258 N.W. 253, 270 Mich. 222.

Mo.—Goin v. Melton, 121 S.W.2d 821, 343 Mo. 413.—St. Louis Union Trust Co. v. Dudley, App., 162 S.W.2d 290.

Neb.—Whalen v. Swircin, 4 N.W.2d 737, 141 Neb. 650.

N.J.—Bassin v. Enoch-Pearl Co., 54 A.2d 824, 140 N.J.Eq. 428.—Savings Inv. & Trust Co. v. Little, 39 A.2d 392, 135 N.J.Eq. 546.

N.Y.—Schenectady Trust Co. v. Emmons, 25 N.Y.S.2d 230, 261 App. Div. 154, affirmed 36 N.E.2d 461, 286 N.Y. 626, reargument denied 37 N.E.2d 140, 286 N.Y. 638.—Pinckney v. City Bank Farmers' Trust Co., 292 N.Y.S. 835, 249 App.Div. 375.—City Bank Farmers' Trust Co. v. Charity Organization Soc. of City of New York, 265 N.Y.S. 267, 238 App.Div. 720, affirmed 191 N.E. 504, 264 N.Y. 441.

Ohio.—Cleveland Trust Co. v. White, 15 N.E.2d 627, 134 Ohio St. 1, 118 A.L.R. 475.—Fifth Third Union Trust Co. v. Foss, 15 Ohio Supp. 55.

Okla.—Beverly Hills Nat. Bank & Trust Co. v. Martin, 91 P.2d 94, 185 Okl. 254.

Pa.—In re Tunnell's Estate, 190 A. 906, 325 Pa. 554.—In re Pozzuto's Estate, 188 A. 209, 124 Pa.Super. 93.—In re Lau's Estate, 27 Pa. Dist. & Co. 157, 50 York Leg.Rec. 73.

Utah.—Leggroan v. Zion's Sav. Bank & Trust Co., 232 P.2d 745.

Wis.—First Wisconsin Trust Co. v. Wisconsin Department of Taxation, 294 N.W. 868, 237 Wis. 135.

65 C.J. p 345 note 99.

## Trust in proceeds of life insurance policies

Ill.—Gurnett v. Mutual Life Ins. Co. of New York, 268 Ill.App. 518, affirmed 191 N.E. 250, 356 Ill. 612.

## Gifts

(1) Gifts in trust in which donor reserves the right to revoke the trust are not invalid.—Gordon v. Barr, 91 P.2d 101, 13 Cal.2d 596.—American Bible Soc. v. Mortgage Guar. Co., 17 P.2d 105, 217 Cal. 9.

(2) A trust established by agreement creating rights in donor's wife and daughter and making trust irrevocable for 10 years was not an incomplete gift inter vivos because of reserved right to revoke after 10 years, particularly where donor died before 10-year period had elapsed.—Koppelkam v. First Wisconsin Trust Co., 3 N.W.2d 350, 240 Wis. 254.

## Rule notwithstanding statute

Text rule is true regardless of statute providing that deeds made in trust for grantor are void.—Cleveland Trust Co. v. White, 15 N.E.2d 627, 134 Ohio St. 1, 118 A.L.R. 475, disapproving statements in Union Trust Co. v. Hawkins, 167 N.E. 389, 121 Ohio St. 159, 73 A.L.R. 190.

## Failure to vest title in trustee

Any invalidity of trust instrument in failing to vest title in trustees at time of execution because of power of revocation retained by grantor was immaterial, where if trust instrument was invalid, the property passed by residuary clause of grantor's will, which vested title in the same trustees for the same purposes immediately upon grantor's death.—Odum v. Langston, 195 S.W.2d 466, 355 Mo. 115.

11. N.Y.—Fehder v. Furman, 54 N.Y.S.2d 820.

12. Cal.—In re Willey, 60 P. 471, 128 Cal. 1.  
65 C.J. p 346 note 2.

13. Mich.—Goodrich v. City Nat. Bank & Trust Co. of Battle Creek, 258 N.W. 253, 270 Mich. 222.

14. Ark.—Gall v. Union Nat. Bank of Little Rock, 159 S.W.2d 757, 203 Ark. 1000.

N.J.—Mayer v. Tucker, 141 A. 799, 102 N.J.Eq. 524.

Pa.—Murphy v. C. I. T. Corp., 33 A.2d 16, 347 Pa. 591.—In re Lau's Estate, 27 Pa. Dist. & Co. 157, 50 York Leg.Rec. 73.

Interests unaffected until power is exercised see supra § 89.

## Passage of title to trustee

Mere reservation of power to revoke, not followed by actual revocation, does not impair a trust or render it invalid, if title actually passed to trustee by execution of indenture itself.—Atlantic Nat. Bank of Jacksonville, Fla. v. St. Louis Union Trust Co., 211 S.W.2d 2, 357 Mo. 770.

15. U.S.—Jones v. Norris, C.C.A. Okl., 122 F.2d 6.

65 C.J. p 346 note 9.

Omission as ground for cancellation see supra § 85a.

16. Md.—Carroll v. Smith, 59 A. 131, 99 Md. 652.

65 C.J. p 346 note 10.

17. Del.—Du Pont v. Du Pont, 164 A. 238, 19 Del.Ch. 131.

N.J.—Fidelity Union Trust Co. v. Parfner, 37 A.2d 675, 135 N.J.Eq. 133.

R.I.—Garneau v. Garneau, 9 A.2d 15, 63 R.I. 416, 131 A.L.R. 450.

65 C.J. p 346 note 11.

18. Minn.—Butler v. Badger, 150 N.W. 233, 128 Minn. 89.

Pa.—Appeal of Russell, 75 Pa. 259.

## Mistake; burden of proof

(1) Absence of clause is prima facie evidence of mistake.—Garneau v. Garneau, 9 A.2d 15, 63 R.I. 416, 131 A.L.R. 450.—Aylsworth v. Whitcomb, 12 R.I. 299.

(2) Absence held not to show omission by mistake.

Del.—Du Pont v. Du Pont, 164 A. 238, 19 Del.Ch. 131.

R.I.—Garneau v. Garneau, 9 A.2d 15, 63 R.I. 416, 131 A.L.R. 450.

ording to the facts of the particular case.<sup>19</sup> The absence of the power of revocation will not invalidate the trust where revocability would defeat the purpose of the trust.<sup>20</sup> For example, the absence of the power does not invalidate the trust where the purpose of the trust is to provide against the settlor's own improvidence,<sup>21</sup> or against his inability, because of age or infirmities, to care for his property,<sup>22</sup> or where it is evident that the trust is to continue during the settlor's life.<sup>23</sup>

On the other hand, the failure of the settlor to reserve the power of revocation may, in a particular case, show such misunderstanding as to the nature of the instrument as to invalidate it,<sup>24</sup> or, in the case of a voluntary trust, may be viewed by a court of equity as a circumstance of suspicion,<sup>25</sup> so that very slight evidence of mistake, misapprehension, or

misunderstanding on the part of the settlor will be sufficient to invalidate the instrument.<sup>26</sup>

## § 91. — Mode of Revocation

- a. In general
- b. By subsequent will

### a. In General

A mode of revocation provided for by statute or in the trust instrument must be followed; if none is provided for, revocation may be by any act or conveyance sufficient to terminate the trust or to manifest the settlor's intention to revoke.

The settlor's intention with respect to the mode of revocation must be drawn from a consideration of the entire instrument.<sup>27</sup> Where a mode of revocation is provided for by statute<sup>28</sup> or in the trust instrument,<sup>29</sup> an effective revocation may be made

(3) The absence of the power is not, of itself, evidence of mistake which throws on the person upholding a voluntary trust the burden of proving that such power was intentionally excluded by the settlor—*Fidelity Union Trust Co. v. Parfner*, 37 A.2d 675, 135 N.J. Eq. 133.

19. N.J.—*Fidelity Union Trust Co. v. Parfner*, supra.  
R.I.—*Garneau v. Garneau*, 9 A.2d 15, 63 R.I. 416, 121 A.L.R. 450.  
65 C.J. p. 346 note 14.

20. Pa.—*King v. York Trust Co. of York*, 122 A. 227, 278 Pa. 141.  
65 C.J. p. 347 note 15.

21. Md.—*Carroll v. Smith*, 59 A. 131, 99 Md. 653.  
65 C.J. p. 347 note 16.

22. Pa.—*Reidy v. Small*, 26 A. 602, 154 Pa. 505, 20 L.R.A. 362.

23. Minn.—*Butler v. Badger*, 150 N.W. 233, 128 Minn. 99.

24. Ind.—*Deebard v. Kleindorfer*, 29 N.E.2d 997, 108 Ind. App. 485.  
65 C.J. p. 347 note 19.

25. Md.—*Lambdin v. Dantzbecker*, 181 A. 353, 169 Md. 240.  
65 C.J. p. 346 note 11 [a].

26. Md.—*Lambdin v. Dantzbecker*, supra.

27. N.Y.—*Chase Nat. Bank of City of New York v. Tomagno*, 14 N.Y.S. 23 759, 172 Misc. 63.

Deposit of money in bank or other financial institution see supra § 88b.

28. Cal.—*Fernald v. Lawsten*, 79 P. 2d 742, 26 Cal. App. 2d 552.

Oral direction to trustee was insufficient under statute requiring writing filed with trustee.—*Taylor v. Bunnell*, 23 P.2d 1062, 133 Cal. App. 177.

Statute prevails over agreement of parties to contrary.—*Fernald v. Lawsten*, 79 P.2d 742, 26 Cal. App. 2d 552.

29. U.S.—*Noble v. Rogan*, D.C. Cal., 49 F.Supp. 376—*Schoellkopf v. U. S.*, D.C. N.Y., 36 F.Supp. 617, affirmed, C.C.A., 124 F.2d 982—*Hearst v. American Newspapers*, D.C. Del., 51 F.Supp. 171.

Ariz.—*Corpus Juris* cited in *Schuster v. Schuster*, 251 P.2d 631, 637, 75 Ariz. 20.

Ark.—*Gall v. Union Nat. Bank of Little Rock*, 159 S.W.2d 757, 203 Ark. 1000.

Del.—*Corpus Juris* cited in *Security Trust Co. v. Spruance*, 174 A. 285, 288, 20 Del. Ch. 195.

Mass.—*Korwin v. Donaghy*, 59 N.E. 2d 299, 317 Mass. 559.

Mo.—*St. Louis Union Trust Co. v. Dudley*, App., 162 S.W.2d 290.

N.J.—*Clark v. Freeman*, 188 A. 493, 121 N.J. Eq. 85.

N.Y.—*Broka v. Rome Trust Co. of Rome*, N. Y., 272 N.Y.S. 101, 151 Misc. 641—*Wright v. Clark*, 142 N.Y.S. 812, 81 Misc. 527, reversed on other grounds 149 N.Y.S. 1119, 164 App. Div. 962.

Pa.—*Damiani v. Lobasco*, 79 A. 2d 268, 367 Pa. 1—*In re Lyon's Estate*, 63 A. 2d 415, 164 Pa. Super. 140—*In re Shapley's Decedent's Trust*, 53 Pa. Dist. & Co. 123, affirmed 46 A. 2d 227, 353 Pa. 499, 164 A.L.R. 875—*In re Justice's Estate*, 50 Pa. Dist. & Co. 522.

R.I.—*Union Trust Co. v. Watson*, 68 A. 2d 916, 76 R.I. 223.

Wis.—*First Wisconsin Trust Co. v. Wisconsin Department of Taxation*, 294 N.W. 868, 237 Wis. 135.

65 C.J. p. 347 note 22.

### Conformity required by statute

Cal.—*Carpenter v. Cook*, 60 P. 475, 6 Cal. Unrep. Cas. 410.

### Settlor bound

(1) The settlor is bound by the method of dissolution of the trust selected by him—*Schuster v. Schuster*, 251 P.2d 631, 75 Ariz. 20.

(2) A grantor in deed allegedly creating trust, who reserved power to convey the property by "absolute deed or by mortgage," was not limited to the two methods of conveyance so as to preclude him from executing a second deed in trust and a will depriving beneficiary in first deed of the property, especially where beneficiary's interest was to be subjected to "any conveyance" by grantor—*Betker v. Nailey*, 140 F.2d 171, 78 U.S. App. D.C. 312.

### Entire life interest in settlor

Text rule is true notwithstanding the settlor has the entire beneficial interest in the trust fund for life—*In re Reese's Estate*, 177 A. 792, 317 Pa. 473—*Kauffman v. Hiestand*, 200 A. 251, 131 Pa. Super. 219—*In re Lau's Estate*, 27 Pa. Dist. & Co. 157, 50 York Leg. Rec. 73.

### Requirement of writing

A power to revoke a trust "by an instrument in writing" may not be exercised by an oral agreement.—*In re Justice's Estate*, 50 Pa. Dist. & Co. 532.

### Withdrawal of policies from trustee's custody

Insurance trust agreement authorizing insured to withdraw any policy from custody of trustee at any time, and providing that trust should be irrevocable, without reservation of interest in insured or his estate, was irrevocable only as to policies not withdrawn at time of his death, and hence withdrawal of policies from custody of trustee effected revocation of trust as to such policies—*Equitable Life Assur. Soc. of U. S. v. Janssen*, 187 A. 643, 14 N.J. Misc. 837.

Consent of trustee bank to revocation, required by revocation provision, held properly executed.—*Hughes v. First Nat. Bank in Oakland*, 118 P.2d 309, 47 Cal. App. 2d 547.

only by pursuing the mode prescribed. While it has been said that a substantial compliance with the terms of the trust instrument is insufficient,<sup>30</sup> and that a reserved power of revocation must be strictly pursued,<sup>31</sup> particularly where it is a matter of statutory requirement,<sup>32</sup> a substantial compliance has been held sufficient.<sup>33</sup>

When the mode prescribed is by deed, instruments lacking the essentials of a deed, such as a letter, are insufficient.<sup>34</sup> Where reservation is made to revoke the trust as an entirety, it may not be revoked in part.<sup>35</sup> An instrument revoking a trust is not a contract between the parties, but an act manifesting the intention to exercise the power reserved.<sup>36</sup> There is a stronger presumption against the revocation of a formal declaration of trust than against the revocation of a mere deposit in a savings bank in the name of the depositor as trustee for another.<sup>37</sup> Where an instrument of revocation is destroyed before it becomes effective, the interest of the beneficiaries is not divested.<sup>38</sup>

*Mere modification* of a trust does not constitute an exercise of a reserved power to revoke it.<sup>39</sup>

*Method not specified.* When no particular method is specified, the revocation may be made by any act or conveyance sufficient to terminate the trust,<sup>40</sup> or in any manner sufficiently manifesting the settlor's intention to revoke the trust.<sup>41</sup> On the other hand, a trust is not revoked by acts or conveyances consistent with its continued existence.<sup>42</sup> A trust has been held revoked by the creator on the execution of a mortgage on the trust property,<sup>43</sup> notwithstanding no reference in terms is made to the reserved power.<sup>44</sup> Where a settlor retains a power of revocation by reserving a power of sale over the real estate which is the subject of the trust, as discussed supra § 89, a conveyance of the realty by warranty deed operates as a revocation of the trust;<sup>45</sup> and where a settlor retains the power to sell certain property subject to a trust, and later conveys the property to someone else, the conveyance itself is an implied revocation of the trust, since the trustee and the cestui que trust are divested of all interest in the property.<sup>46</sup>

*Partial revocation at different times.* The settlor of a revocable trust is not required to exercise the full power of revocation at one time,<sup>47</sup> but may

30. Wis.—Richardson v. Stephenson, 213 N.W. 673, 193 Wis. 89, 52 A.L.R. 681.

31. Pa.—In re Shapley's Deed of Trust, 46 A.2d 227, 353 Pa. 499, 164 A.L.R. 877.

Wis.—Richardson v. Stephenson, 213 N.W. 673, 193 Wis. 89, 52 A.L.R. 681.

**Strict conformity with terms required**  
Mass.—Thelms v. State St. Trust Co., 115 N.E.2d 382, 330 Mass. 511.

32. Cal.—Carpenter v. Cook, 60 P. 475, 6 Cal.Unrep.Cas. 410.

33. Mich.—Hackley Union Nat. Bank v. Farmer, 234 N.W. 135, 252 Mich. 674.

66 C.J. p. 347 note 27.

34. Md.—Brown v. Fidelity Trust Co., 94 A. 523, 126 Md. 175.

35. N.J.—National Newark & Essex Banking Co. v. Rosahl, 128 A. 586, 97 N.J. 74.

36. N.Y.—Harnard v. Gantz, 35 N.E. 430, 140 N.Y. 249.

37. N.Y.—Irving Bank-Columbia Trust Co. v. Rowe, 210 N.Y.S. 497, 213 App.Div. 281.

38. Ky.—Hill v. Cornwall, 26 S.W. 540, 95 Ky. 512, 10 Ky.L. 97.

39. U.S.—Newell v. Capelle, D.C. Del., 14 F.Supp. 147, affirmed, C.C.A., 86 F.2d 1007.

**Withdrawal of designated bond**  
Letter of settlor of revocable trust to trustee, stating that settlor de-

sired to modify trust agreement by withdrawal of designated bond therefrom, was not exercise of power to revoke, but mere modification of trust.—Newell v. Capelle, supra.

40. N.Y.—Holbert v. Jackson, 235 N.Y.S. 642, 134 Misc. 618.

65 C.J. p. 348 note 36.

**Instrument held sufficient to revoke trust**—Newell v. Capelle, D.C. Del., 14 F.Supp. 147, affirmed, C.C.A., 86 F.2d 1007.

**Execution of new and inconsistent trust instrument**

Md.—Lambdin v. Dantzbecker, 181 A. 353, 169 Md. 240.

**Parol agreement**

In action by grantor to recover land conveyed in trust, wherein grantor's equitable fee simple was fully established by written trust, grantee was not entitled to introduce as defense parol agreement to surrender, rescind, or abandon the trust, since such agreement was within the statute of frauds.—Coleman v. Coleman, 61 P.2d 441, 43 Ariz. 337, 106 A.L.R. 1309.

41. Md.—Hoffa v. Hough, 30 A.2d 761, 181 Md. 472.—*Corpus Juris* cited in Lambdin v. Dantzbecker, 181 A. 353, 357, 169 Md. 240.

**Clear and definite purpose**  
N.Y.—Ibroka v. Rome Trust Co. of Rome, N. Y., 272 N.Y.S. 101, 151 Misc. 641.

**Partial revocation**  
Mo.—Lipic v. Wheeler, 242 S.W.2d 43, 362 Mo. 499.

42. Md.—Hoffa v. Hough, 30 A.2d 761, 181 Md. 472.

65 C.J. p. 348 note 37.

**Quitclaim deeds held insufficient**  
(1) Trustee's quitclaim deed to settlor.—Boyle v. Kempkin, 9 N.W. 2d 589, 243 Wis. 86.

(2) Quitclaim deed of the trust res by one of cestuis que trust, who originally conveyed the trust res to the trustee and the other cestuis, to one of the other cestuis.—Bank of Arlington v. Sasser, 185 S.E. 826, 182 Ga. 474.

43. Md.—Gaither v. Williams, 57 Md. 625.

**Conveyance by mortgagors to trustee**

Conveyance of mortgaged realty by mortgagors to trustee did not terminate trust as to realty created by trust deed providing that it embraced, not only two mortgages on the realty, but any other property that might thereafter be substituted therefor.—Hoffa v. Hough, 30 A.2d 761, 181 Md. 472.

44. Md.—Gaither v. Williams, 57 Md. 625.

45. Mo.—Sims v. Brown, 158 S.W. 624, 252 Mo. 58.

46. Md.—Hoffa v. Hough, 30 A.2d 761, 181 Md. 472.

47. U.S.—Newell v. Capelle, D.C. Del., 14 F.Supp. 147, affirmed, C.C.A., 86 F.2d 1007.

validly exercise the power with respect to one part of the trust estate at one time and with respect to other parts at other times.<sup>48</sup>

**Formality of instrument; seal; recording.** An instrument of revocation is ineffective unless executed by all of the parties required by the trust instrument.<sup>49</sup> Where a trust is created by a formal deed, the instrument revoking it should be, if not of equal solemnity, at least of undoubted authenticity.<sup>50</sup> Where a seal on a trust instrument is unnecessary and adds nothing to its legal effect, the instrument of revocation need not bear a seal.<sup>51</sup> The requirement of an acknowledgment of the revoking instrument is not wholly for the benefit of the trustees,<sup>52</sup> and, therefore, cannot be waived by them.<sup>53</sup> Where required by statute, if the instrument creating a voluntary trust is recorded, the deed of revocation must also be recorded.<sup>54</sup>

**Delivery of the instrument of revocation** is not essential,<sup>55</sup> unless required by the trust instrument.<sup>56</sup>

**Notice to trustee.** While a settlor ordinarily manifests his intention to revoke by communicating his decision to the trustee,<sup>57</sup> it is not absolutely necessary that the trustee should receive such a communication,<sup>58</sup> unless such notice is required by the terms of the trust instrument;<sup>59</sup> but it has been held that a provision for written notice to the trustee, being solely designed for his benefit, may be waived by him,<sup>60</sup> with resulting valid revocation,<sup>61</sup> at least in the absence of a dishonest or improper motive.<sup>62</sup>

**Consent of parties.** Where the trust instrument provides that it shall be irrevocable without the consent of the trustee and all beneficiaries named, it is essential that all parties to the trust be properly before the court before it can assume jurisdiction to dissolve the trust.<sup>63</sup> On the other hand, it has been held that a power of revocation expressly reserved in a trust agreement which is a voluntary trust without consideration may be exercised by the settlor against the beneficiaries named in the trust

48. U.S.—Newell v. Capelle, *supra*.  
Partial revocation generally see *supra* § 88 a.

**Withdrawal of part of securities**

Letter of settlor withdrawing part of securities from trust would be effective as revocation only with respect to portion of trust estate withdrawn, so that power to revoke as to remainder of estate was not affected thereby.—Newell v. Capelle, *supra*.

49. Wis.—Richardson v. Stephenson, 213 N.W. 673, 193 Wis. 89, 52 A.L.R. 681.

50. C.J. p. 347 note 30.

51. Pa.—In re Bradish's Estate, 8 Pa.Dist. 38.

52. N.Y.—Barnard v. Gantz, 35 N.E. 430, 140 N.Y. 249.

**Mortgage substituted for two others**  
However, release by mortgagee of two real estate mortgages subject to revocable trust, and substitution of one mortgage on the same property providing for amortization, did not revoke the trust created by written instrument under seal, verified and recorded.—Hoffa v. Hough, 30 A.2d 761, 181 Md. 472.

53. Mass.—Phelps v. State St. Trust Co., 115 N.E.2d 382, 330 Mass. 511.

54. Mass.—Phelps v. State St. Trust Co., *supra*.

55. N.C.—MacRae v. Commerce Union Trust Co., 155 S.E. 614, 199 N.C. 714.

Revocation of voluntary trusts generally see *supra* § 88 b.

56. N.Y.—Barnard v. Gantz, 35 N.E. 430, 140 N.Y. 249.

Wis.—Richardson v. Stephenson, 213

N.W. 673, 193 Wis. 89, 52 A.L.R. 681.

58. RI—Union Trust Co. v. Watson, 68 A.2d 916, 76 R.I. 223.

**Delivery to trustee**

(1) Generally.—Union Trust Co. v. Watson, *supra*.

(2) Under a provision that the settlor may revoke at any time during his life by an instrument in writing signed and acknowledged and delivered to the trustee, the mailing of a letter of revocation by the settlor is a sufficient delivery although it was not received until after the settlor's death.—Hackley Union Nat. Bank v. Farmer, 234 N.W. 135, 252 Mich. 674.

57. Md.—Hoffa v. Hough, 30 A.2d 761, 181 Md. 472.

**Notice of effective revocation date**

Where insured informed bank named as trustee in insurance trust agreement and as beneficiary in life policies that he was exercising right to revoke agreement with bank and that bank would be notified of effective revocation date, and bank's president wrote to insured stating that bank understood that trust relationship was severed, insured was not required to give bank any further notice of effective revocation date, and bank was estopped to assert that agreement was not properly revoked.—Goldberg v. Hudson County Nat. Bank, 197 A. 20, 123 N.J.Eq. 269.

58. Md.—Hoffa v. Hough, 30 A.2d 761, 181 Md. 472.

59. Ark.—Gall v. Union Nat. Bank of Little Rock, 159 S.W.2d 757, 203 Ark. 1000.

Pa.—In re Lyon's Estate, 63 A.2d 415, 164 Pa.Super. 140.

**Merely intention to revoke**, not communicated to trustee, is insufficient where notice is required.—Gall v. Union Nat. Bank of Little Rock, 159 S.W.2d 757, 203 Ark. 1000.

**Merely existence of copy of trust agreement**, although altered by trustor himself, did not amount to notice to trustee in writing so as to effect revocation.—Security Trust Co. v. Spruance, 174 A. 285, 20 Del.Ch. 195.

**Notice by subsequent agreement**

Later trust agreement, into which trustee entered, was held effective notwithstanding it contained no express revocation of prior agreement, where later agreement dealt with same res and agreements could not operate in any degree except as prior one was revoked, clear intent to revoke was, therefore, revealed to trustee in writing by later agreement.—Security Trust Co. v. Spruance, *supra*.

60. Mo.—St. Louis Union Trust Co. v. Dudley, App., 162 S.W.2d 290.

Okl.—Miller v. Exchange Nat. Bank of Tulsa, 80 P.2d 209, 183 Okl. 114.

61. Mo.—St. Louis Union Trust Co. v. Dudley, App., 162 S.W.2d 290.

**Attack by beneficiaries**

Where the trustee waives notice, the grantor's revocation cannot be attacked by the beneficiaries.—Miller v. Exchange Nat. Bank of Tulsa, 80 P.2d 209, 183 Okl. 114.

62. Mo.—St. Louis Union Trust Co. v. Dudley, App., 162 S.W.2d 290.

63. Ariz.—Schuster v. Schuster, 251 P.2d 631, 75 Ariz. 20.

agreement, without their consent.<sup>64</sup> If a settlor reserves the power to revoke the trust only with the consent of the trustee, he cannot revoke it without such consent;<sup>65</sup> likewise, if he reserves power to revoke only with the consent of a third person, he cannot revoke without such consent.<sup>66</sup>

**Approval of judge.** A provision, in a trust created by a settlor for his sole benefit, that it can be revoked by him with the written approval of a judge, is solely for the benefit of the trustee and may be waived by him.<sup>67</sup>

### b. By Subsequent Will

Where a mode of revocation other than by will is specified, revocation cannot be by will. Some authorities so hold even where no mode is specified; but others apparently recognize revocation by will.

Where a mode of revocation other than by will is specified, in the trust instrument, the trustor has no power to revoke the trust by will.<sup>68</sup> A provision for the exercise of the power by filing a written notice with the trustee shows the settlor's intention that the power be exercised only during his lifetime, so as to foreclose its exercise by will.<sup>69</sup> Where

no particular mode of revocation is specified, it has been held that a trust cannot be revoked by a will,<sup>70</sup> as the right of revocation must be exercised during the life of the settlor;<sup>71</sup> and a power to revoke "during the lifetime" of the settlor has been held to mean a revocation taking effect before the death of the settlor,<sup>72</sup> so that the power cannot be exercised by a will.<sup>73</sup> At any rate, whether a trust is revoked by the grantor's will is a matter of what the grantor intended by the will.<sup>74</sup> Revocation by a will is not accomplished where the will is not inconsistent with the trust,<sup>75</sup> or where it recognizes the existence and efficacy of the trust;<sup>76</sup> and a provision limiting the right to revoke to a proper instrument in writing executed by the settlor and lodged with the trustee is not complied with by lodging with the trustee a certified copy of the settlor's probated will.<sup>77</sup> By reference in a will to "my estate," the testator does not intend to refer to a trust estate over which he retains a power of revocation.<sup>78</sup>

A residuary clause in a will bequeathing a legacy to a trust beneficiary without an express revocation of the trust does not necessarily revoke the trust;<sup>79</sup>

64. U.S.—Newell v. Capelle, D.C.Del., 14 F.Supp. 147, affirmed, C.C.A., 86 F.2d 1007.

Revocation of voluntary trusts generally see supra § 88 b.

65. U.S.—Hearst v. American Newspapers, D.C.Del., 51 F.Supp. 171.

#### Conveyance of realty

Under inter vivos deed of trust providing that it "shall and may be lawful" for trustee, at the request, and with the consent, of settlor, to convey the realty, the power of revocation thus reserved to settlor could be exercised only with the consent of trustee.—Damiani v. Lobasco, 79 A.2d 268, 367 Pa. 1.

66. U.S.—Hearst v. American Newspapers, D.C.Del., 51 F.Supp. 171.

67. Okl.—Wade v. McKeown, 145 P.2d 951, 193 Okl. 415.

#### Provision disregarded; actual revocation

Where settlor immediately proceeded to disregard provision and to deal with property described in trust as if trust did not exist, and trustee made no objection to settlor's action in so doing and thereafter, by his own act, treated trust as nonexistent, there existed an actual revocation of trust.—Wade v. McKeown, supra.

68. Ark.—Gall v. Union Nat. Bank of Little Rock, 159 S.W.2d 757, 203 Ark. 1000.

Deposit of money in bank or other financial institution see supra § 88 b.

**Execution of will is not notice to trustee,** where such notice is required for revocation.

Pa.—In re Lyon's Estate, 63 A.2d 415, 164 Pa.Super. 140.—In re Lau's Estate, 27 Pa.Dist. & Co. 157, 50 York Leg.Rec. 73.

Va.—Cohn v. Central Nat. Bank of Richmond, 60 S.E.2d 30, 191 Va. 12.

#### Trust held not partially revoked by will

Pa.—In re Lyon's Estate, 63 A.2d 415, 164 Pa.Super. 140.

#### Amendment without reference to will

Where deed of trust provides that it may be amended or revoked by deed, and subsequent amendment by deed includes reservation of right to amend by will without mention of power to revoke by will, settlor may not revoke trust by will.—In re Chance's Estate, 29 Pa.Dist. & Co. 586.

69. N.Y.—Chase Nat. Bank of City of New York v. Tomagno, 14 N.Y.S.2d 759, 172 Misc. 63.

Va.—Cohn v. Central Nat. Bank of Richmond, 60 S.E.2d 30, 191 Va. 12.

70. R.I.—Union Trust Co. v. Watson, 68 A.2d 916, 76 R.I. 223. 65 C.J. p 348 note 49.

#### Insurance trust agreement

Or.—Gordon v. Portland Trust Bank, 271 P.2d 653.

71. Pa.—In re Shapley's Deed of Trust, 53 Pa.Dist. & Co. 123, af-

firm ed 46 A.2d 227, 353 Pa. 499, 164 A.L.R. 877.

65 C.J. p 348 note 49. Duration and termination of power see supra § 89.

72. Mass.—Leahy v. Old Colony Trust Co., 93 N.E.2d 238, 326 Mass. 49.

73. Mass.—Leahy v. Old Colony Trust Co., supra.

#### Will operative on other property

Text rule is especially true where the will disposes of all of the settlor's property and he owned property on which the will can operate, so that it can be given some effect.—Leahy v. Old Colony Trust Co., supra.

74. Mass.—Old Colony Trust Co. v. Gardner, 161 N.E. 801, 264 Mass. 68.

65 C.J. p 348 note 50.

75. N.Y.—Irving Bank-Columbia Trust Co. v. Rowe, 210 N.Y.S. 497, 213 App.Div. 281. 65 C.J. p 348 note 51.

76. N.Y.—Townsend v. Allen, 13 N.Y.S. 73, affirmed 27 N.E. 853, 126 N.Y. 646.

Pa.—Wilson v. Anderson, 40 A. 1096, 186 Pa. 531, 44 L.R.A. 542.

77. Pa.—In re Shapley's Deed of Trust, 46 A.2d 227, 353 Pa. 499, 164 A.L.R. 877.

78. N.J.—Mayer v. Tucker, 141 A. 799, 102 N.J.Eq. 524.

79. Mass.—Old Colony Trust Co. v. Gardner, 161 N.E. 801, 264 Mass. 68.

and where a settlor retains the testamentary power to revoke the trust indenture, a general residuary clause in his will, disposing of all the residue of the property of the settlor or all the property for which he has a power of appointment, is not an exercise of the power of revocation.<sup>80</sup>

**Inapplicable statute.** Statutes dealing with formalities which must be followed in executing any power, either inter vivos or testamentary, have been held not applicable to the revocation of a trust by the settlor's last will and testament.<sup>81</sup>

## 9. DURATION AND TERMINATION

### § 92. In General

Subject to any existing statutory restrictions, the creator of a trust may specifically prescribe the duration of a trust. In the absence of an express provision with respect to its duration, a trust will continue as long as may be necessary to accomplish the purposes for which it was created.

Subject to any existing statutory restrictions,<sup>82</sup>

the creator of a trust may specifically prescribe the duration of the trust.<sup>83</sup> Generally, a trust continues to the time fixed by its own terms,<sup>84</sup> and will ordinarily continue for the time stipulated,<sup>85</sup> and terminate on the expiration of such period.<sup>86</sup> A trust may be made to determine on the happening of a certain event or contingency,<sup>87</sup> and will terminate on the happening of the event or contingency.<sup>88</sup>

80. N.Y.—Chase Nat. Bank of City of New York v. Tomagno, 14 N.Y.S. 2d 759, 172 Misc. 63.

81. N.Y.—Chase Nat. Bank of City of New York v. Tomagno, *supra*.

82. Minn.—Congdon v. Congdon, 200 N.W. 76, 160 Minn. 343, 65 C.J. p. 350 note 85.

Duration and termination of testamentary trusts see Wills § 1040-1050.

Rule against perpetuities as to trusts see Perpetuities § 26-34.

What law governs termination see *infra* § 160.

83. Ill.—La Salle Nat Bank v. MacDonald, 119 N.E.2d 266, 2 Ill.2d 581—Green v. Breen, 103 N.E.2d 625, 411 Ill. 206

Or—Williams v. Morris, 25 P.2d 135, 144 Or. 620

S.C.—Linder v. Nicholson Bank & Trust Co., 170 S.E. 429, 170 S.C. 373

65 C.J. p. 350 note 86.

**A deposit in trust cannot be terminated, in whole or in part, except in the manner provided**

Conn.—Gauss v. Gauss, 42 A.2d 796, 132 Conn. 96, 160 A.L.R. 432.

Md.—Fairfax v. Savings Bank of Baltimore, 199 A. 872, 175 Md. 136, 116 A.L.R. 1334.

**Definite time held not established**

Ill.—Smith v. Kelley, 56 N.E.2d 360, 387 Ill. 213.

84. N.Y.—In re Ihmsen's Estate, 3 N.Y.S.2d 125, 253 App.Div. 472—Pinckney v. City Bank Farmers Trust Co., 292 N.Y.S. 835, 249 App. Div. 376.

85. Ill.—Altschuler v. Chicago City Bank & Trust Co., 43 N.E.2d 673, 380 Ill. 137—Yedor v. Chicago City Bank & Trust Co., 33 N.E.2d 220, 376 Ill. 121—Friesse v. Friesse, 25 N.E.2d 788, 373 Ill. 216, 65 C.J. p. 350 note 87.

### Extensions

(1) Where property is placed in trustees' hands for a specified period, courts are careful not to permit extension of trustees' control thereof beyond such period.—Friedberg v. Schultz, 38 N.E.2d 182, 312 Ill.App. 171.

(2) Persons who are free to contract have the right to grant to trustees the power to extend a trust in whatever manner and on whatever conditions such persons may designate.—Morris v. The Broadway, 65 N.E.2d 605, 328 Ill.App. 267.

(3) Where amendment of trust agreement merely provided means whereby stock might be distributed when trust assets were disposed of as provided in trust agreement, amendment did not have effect of illegally extending termination date of trust.—Sarasin v. Live Stock Nat. Bank of Chicago, 105 N.E.2d 752, 412 Ill. 88.

(4) Where trust agreement fixed a termination date but before such date donor and trustees and beneficiaries executed an agreement of continuance, a bare possibility with respect to adverse effect on right of grandchildren of donor or anyone claiming an interest in estate of such grandchild, which had not occurred and could not now occur, was insufficient ground on which to hold invalid the agreement of the parties continuing the trust.—Linahan v. Linahan, 39 A.2d 895, 131 Conn. 307.

### Contractual right to continuation

Under agreement between surety on city contracts and the city, whereby surety as required by city ordinance deposited securities with trust company, which had active duties, including the duty to hold securities as long as city held bonds for outstanding obligations of surety and until city solicitor should consent to return of securities, city had contractual right to continuation of trust

as long as any obligations for which the surety bonds were executed were outstanding, and the right could not be impaired by court of equity.—City of Philadelphia v. Lieberman, C.C.A. Pa., 112 F.2d 424, certiorari denied Lieberman v. City of Philadelphia, 61 S.Ct. 48, 311 U.S. 679, 85 L.Ed. 438.

86. U.S.—Clifford v. Helvering, C.C. A., 105 F.2d 586, reversed on other grounds 60 S.Ct. 554, 309 U.S. 331, 84 L.Ed. 783, and conformed to, C.C.A. 111 F.2d 896

Ill.—Hopkins v. Austin State Bank, 101 N.E.2d 536, 410 Ill. 67—Yedor v. Chicago City Bank & Trust Co., 33 N.E.2d 220, 376 Ill. 121—Friesse v. Friesse, 25 N.E.2d 788, 373 Ill. 216.

Okla.—Hauser v. Catlett, 173 P.2d 728, 197 Okl. 668.

65 C.J. p. 350 note 88.

87. Conn.—Hills v. Travelers Bank & Trust Co., 7 A.2d 652, 125 Conn. 640, 123 A.L.R. 1419

Okla.—Hauser v. Catlett, 173 P.2d 728, 197 Okl. 668.

65 C.J. p. 350 note 89.

### Continuance in office of trustee

A settlor may make all the powers and duties of the trust personal and thereby make the trust dependent on the acceptance of the named trustee and its continuance dependent on the named trustee continuing in office.—Gathright's Trustee v. Gaut, 124 S.W.2d 782, 276 Ky. 662, 120 A.L.R. 1403.

88. Ill.—Yedor v. Chicago City Bank & Trust Co., 33 N.E.2d 220, 376 Ill. 121—Friesse v. Friesse, 25 N.E.2d 788, 373 Ill. 216.

Ohio—Jordan v. Price, App., 49 N.E.2d 769.

Okla.—Hauser v. Catlett, 173 P.2d 728, 197 Okl. 668.

Pa.—In re Svenson's Trust Estate, Orph., 25 Erie Co. 14.

Tenn.—Hunter v. Barger, 6 Tenn. App. 559.

Trusts created for a definite period of years are valid,<sup>89</sup> and the mere possibility that at some future time the futility of continuing the trust or some other reason might require its termination does not make the trust void from the beginning or ineffective.<sup>90</sup> Courts of equity will not permit trustees to extend the life of a trust unless they are authorized to do so.<sup>91</sup> A trust relationship may be terminated by operation of law.<sup>92</sup> Where the relationship of trustee is established, and there is no showing of its termination, it persists.<sup>93</sup> A trust created by a court of general jurisdiction, the decree of which remains unversed and unmodified, is by virtue of that decree still in existence.<sup>94</sup>

It is not necessary to the validity of a trust that the trust agreement have a prescribed duration.<sup>95</sup> The duration of a trust is, in the absence of provision, dependent on its purpose,<sup>96</sup> and not by the technical form of the words creating it,<sup>97</sup> and it

will continue as long as may be necessary to accomplish the purposes for which it was created.<sup>98</sup> A trust cannot be destroyed for any purpose other than the purpose of the trust.<sup>99</sup> The trust will continue as long as is necessary to preserve and protect the estate itself,<sup>1</sup> or to protect the interests of contingent remaindermen.<sup>2</sup>

On the other hand, no trust can survive the purpose of its creation;<sup>3</sup> and, regardless of the nominal duration of the trust,<sup>4</sup> it will not continue in equity any longer than the thing sought to be secured by the trust demands.<sup>5</sup> Consequently, the trust will terminate as soon as it has been fully performed or executed,<sup>6</sup> when its purpose has been accomplished,<sup>7</sup> when its purpose has been accomplished and the entire ownership of its corpus vested,<sup>8</sup> or when the object of the trust fails or its execution becomes impossible.<sup>9</sup> A trust will terminate, sometimes by reason of statute, when the necessity for the trust

89. U.S.—Clifford v. Helvering, C.C. A., 105 F.2d 586, reversed on other grounds 60 S.Ct. 554, 369 U.S. 331, 84 L.Ed. 788, conformed to, C.C.A., 111 F.2d 896.

90. Conn.—Gaess v. Gaess, 42 A.2d 798, 132 Conn. 96, 160 A.L.R. 472.

91. Ill.—Morris v. The Broadway, 65 N.E.2d 605, 328 Ill.App. 267.

92. Tex.—Ivrd v. Curtis, Civ.App., 194 S.W.2d 153.

93. Utah—Corev v. Roberts, 25 P.2d 940, 82 Utah 445.

94. U.S.—U. S. v. 3,000 Acres of Land, More or Less, in Lawrence County, D.C.Ill., 54 F.Supp. 511.

95. Ohio—Homer v. Wullenweber, 101 N.E.2d 229, 89 Ohio App. 255.

96. Md.—Hoffa v. Hough, 30 A.2d 761, 181 Md. 472.

N.J.—In re Fidelity Union Title & Mortg. Guaranty Co., 41 A.2d 392, 138 N.J.Eq. 294—Warranty Bldg. & Loan Ass'n Liquidating Corp. v. Bloch, 25 A.2d 871, 131 N.J.Eq. 414.

65 C.J. p 350 note 90.

97. Md.—Hoffa v. Hough, 30 A.2d 761, 181 Md. 472.

98. Fla.—Smith v. Massachusetts Mut Life Ins. Co., 156 So. 498, 116 Fla. 390, 95 A.L.R. 508.

Mo.—Finch v. Edwards, 198 S.W.2d 665, 239 Mo.App. 788.

Pa.—In re Svenson's Trust Estate, Orph., 25 Erie Co. 14.

Wash.—Kendall v. Kendall, 261 P. 2d 422, 43 Wash.2d 418.

65 C.J. p 350 note 91.

#### Expiration of designated period

If the trust is to terminate on the expiration of a certain period, it has been held that it will not terminate if at that time the purposes of the trust have not been accomplished.

Colo.—District Landowners' Trust v. Doherty, 30 P.2d 319, 94 Colo. 385.

Ill.—Breen v. Breen, 103 N.E.2d 625, 411 Ill. 206.

#### Preserving settlor's property

Purpose declared in trust to preserve settlor's property from liability for debts of settlor's husband on settlor's marriage was not such a purpose as would require continuance of trust, since property of married women is free as a matter of law from debts and engagements of husband.—In re Bowers' Trust Estate, 29 A.2d 519, 346 Pa. 85.

99. N.Y.—In re Green's Estate, 63 N.Y.S.2d 371, 271 App.Div. 171, reargument and motion denied 64 N.Y.S.2d 921, 271 App.Div. 760.

1. Pa.—Dodson v. Ball, 60 Pa. 492, 100 Am.D. 586.

65 C.J. p 350 note 93.

2. Cal.—Hunt v. Lawton, 245 P. 803.

76 Cal.App. 655.

65 C.J. p 350 note 94.

3. Miss.—Yeates v. Box, 22 So.2d 411, 198 Miss. 602.

N.Y.—In re Wogatzky's Will, 86 N.Y. S.2d 884.—In re Ayres' Will, 76 N.Y. S.2d 897.—In re Mitchell's Will, 73 N.Y.S.2d 910.

65 C.J. p 351 note 95.

#### Active duties of trustee

(1) As long as there remain any active duties to be performed by the trustee, the trust continues.—Ridgeley v. Pfingstag, 50 A.2d 578, 188 Md. 209.

(2) A trust will not be continued after the active duties connected with it have been terminated.—Smith v. Kelley, 56 N.E.2d 360, 387 Ill. 213.

4. Neb.—Corpus Juris quoted in Dennis v. Omaha Nat. Bank, 46

N.W.2d 606, 615, 153 Neb. 865, 27 A.L.R.2d 674.

65 C.J. p 351 note 96.

5. Conn.—Pelter v. Degenring, 71 A. 2d 87, 136 Conn. 321.

Neb.—Corpus Juris quoted in Dennis v. Omaha Nat. Bank, 46 N.W.2d 606, 615, 153 Neb. 865, 27 A.L.R.2d 674.

65 C.J. p 351 note 97.

6. Neb.—Corpus Juris quoted in Dennis v. Omaha Nat. Bank, 46 N.W.2d 606, 615, 153 Neb. 865, 27 A.L.R.2d 674.

65 C.J. p 351 note 98.

7. Ill.—Wood v. Continental Ill. Nat Bank & Trust Co. of Chicago, 104 N.E.2d 246, 411 Ill. 346.—Corwin v. Rheims, 61 N.E.2d 40, 390 Ill. 205.

N.Y.—In re Ayres' Will, 76 N.Y.S.2d 897.

65 C.J. p 514 note 99 [c].

The "natural term" of a trust during which period it must necessarily terminate is the period of duration between time of its creation and time when it terminates because all the purposes for which it was created have been accomplished.—In re Fischer's Estate, 87 N.Y.S.2d 324.

8. Va.—Woods v. Stull, 30 S.E.2d 675, 182 Va. 888.

9. Neb.—Corpus Juris quoted in Dennis v. Omaha Nat. Bank, 46 N.W.2d 606, 615, 153 Neb. 865, 27 A.L.R.2d 674.

65 C.J. p 351 note 99.

#### Act of beneficiary

(1) When purpose becomes wholly unattainable, power in trust ceases, and this is so although purpose is defeated by voluntary act of person for whose benefit power was created.—Brooklyn Trust Co. v. Lester, 267 N.Y.S. 827, 239 App.Div. 422.

or the purpose for which it was created has ceased.<sup>10</sup> Although there is authority to the contrary,<sup>11</sup> as soon as rights in property held for accumulation become vested, the direction to accumulate becomes destructible,<sup>12</sup> and this is true even of property held in a charitable trust.<sup>13</sup>

A trust is at an end when the trustee has finally accounted, has conveyed the property to the persons entitled to it, and has been discharged;<sup>14</sup> a trust has terminated where the requirements as to income have been carried out and all that remains to be done is to distribute the principal to the remaindermen;<sup>15</sup> and a trust terminates when the sole remaining beneficiary acquires a present right to the

corpus as well as to the entire income.<sup>16</sup> If no time is limited in the trust instrument and any purpose remains to be subserved by a continuance of the trust, it will ordinarily continue until terminated by the act of the parties or by a court of competent jurisdiction.<sup>17</sup>

*Intention as controlling.* The duration of a trust depends largely on the intention of the creator as shown by a proper construction of the trust instrument and the nature and purposes of the trust.<sup>18</sup> The settlor's intention is paramount to the wish of the beneficiary.<sup>19</sup> It is proper for the court to construe a trust on the question of its duration where the question is doubtful.<sup>20</sup>

(2) Parties who abandoned and relinquished in favor of another arrangement powers in trust that might have been exercised in their behalf were estopped to assert rights which were once enforceable but had long remained dormant.—*Brooklyn Trust Co. v. Lester*, 267 N.Y.S. 827, 239 App. Div. 422.

#### Temporary impossibility of performance

Under a trust created by citizen to arrange and carry out a compromise with German creditors, where war supervened, in an action by trustor to recover trust fund, the trust was not terminated, although temporarily impossible of performance, but merely was suspended, and trustor was not entitled to recover the trust fund.—*Vorhaus v. City Nat. Securities Co.*, 187 N.Y.S. 736, affirmed 169 N.Y.S. 1118, 182 App. Div. 322.

10. N.Y.—*Hopfan v. Knauth*, 282 N.Y.S. 219, 156 Misc. 545.  
65 C.J. p. 351 note 2.

#### Dry trust

Where only purpose of a trusteeship of accumulated funds set aside by defendant employer was to protect the defendant to extent of defendant's interest in seeing that plaintiff employee had a new automobile when needed to be used in the service of the defendant, the trust became a dry trust when plaintiff permanently left the employment and plaintiff was entitled to the money.—*Fleetwood v. Hershey Creamery Co.*, 54 A.2d 200, 25 N.J. Misc. 378.

11. Mass.—*Claffin v. Claffin*, 20 N.E. 454, 149 Mass. 19, 20 N.E. 454, 14 Am.S.R. 393, 3 L.R.A. 370.

12. Me.—*Kimball v. Crocker*, 53 Me. 263.

N.Y.—*In re O'Reilly*, 112 N.Y.S. 208, 59 Misc. 136.

Pa.—*Kaufman v. Burgert*, 45 A. 725, 195 Pa. 274, 78 Am.S.R. 813.—*In re Rogers' Estate*, 36 A. 340, 179 Pa. 602.—*Smeltzer v. Goslee*, 34 A. 44,

172 Pa. 298.—*In re Van Dusen's Estate*, 6 Pa.Dist. 234, 17 Pa.Co. 533.

13. Ind.—*Reasoner v. Herman*, 134 N.E. 276, 191 Ind. 642.

Mass.—*Amory v. College Trustees of Amherst*, 118 N.E. 933, 229 Mass. 374.

Termination of charitable trusts generally see *Charities* §§ 66, 67.

14. N.Y.—*Neary v. City Bank Farmers Trust Co.*, 24 N.Y.S.2d 264, 260 App.Div. 791.

15. N.Y.—*In re Luckenbach's Will*, 45 N.Y.S.2d 593, 267 App.Div. 275, reversed on other grounds 46 N.Y.S.2d 656, 267 App.Div. 783, affirmed 56 N.Y.S.2d 100, 292 N.Y. 674.

16. N.Y.—*Guaranty Trust Co. of New York v. Cutting*, 225 N.Y.S. 407, 130 Misc. 856.

17. Ky.—*Davies v. Dovey*, 85 S.W. 725, 27 Ky.L. 526.

N.Y.—*Augustus v. Graves*, 9 Barb. 595, affirmed 7 N.Y. 305.

18. Del.—*Security Trust Co. v. Crumlish*, 187 A. 20, 21 Del.Ch. 208 Ill.—*Corwin v. Rheims*, 61 N.E.2d 40, 390 Ill. 205.

N.J.—*Baer v. Fidelity Union Trust Co.*, 31 A.2d 823, 133 N.J. Eq. 264.

Pa.—*In re Keller's Estate*, 81 Pa. Dist. & Co. 37.—*In re Chambers' Estate*, Orph., 1 Fiduciary 601.

65 C.J. p. 351 note 5.

*Acceleration of a trust* is never permitted where to do so would violate the manifest intention of the settlor.—*In re Stone's Estate*, 91 A.2d 1, 21 N.J.Super. 117.—*Harknessack Trust Co. v. Barkerding*, 76 A.2d 36, 9 N.J.Super. 595.

19. N.J.—*Mesce v. Grudone*, 62 A.2d 394, 1 N.J. 159.—*Ohlson v. Bloomfield Sav. Inst.*, 75 A.2d 829, 9 N.J.Super. 545.—*Morrison v. Reed*, 70 A.2d 799, 6 N.J.Super. 598.

#### Beyond control of beneficiary

Where trust is established with object of placing trust property beyond control of beneficiary, effect may be given to this intention and termination of trust denied, although all per-

sons who have interest in trust on its termination are in being and sui juris and assign their interest to sole life beneficiary, or otherwise consent to termination of trust, and this rule applies even though there is no spendthrift provision in trust.—*In re Easterday's Estate*, 114 P.2d 669, 45 Cal.App.2d 598.

20. N.Y.—*In re Fishberg's Will*, 285 N.Y.S. 303, 158 Misc. 3.  
65 C.J. p. 351 note 6.

#### Particular provisions construed

(1) In general.

Cal.—*Ballard v. MacCallum*, 101 P.2d 692, 15 Cal.2d 439.

Del.—*Wilmington Trust Co. v. Wilmington Trust Co.*, 180 A. 597, 21 Del.Ch. 102, modified on other grounds 186 A. 903, 21 Del.Ch. 188.

Iowa.—*Reemer v. Challas*, 276 N.W. 60, 224 Iowa 411.

Mo.—*Creek v. Union Nat. Bank in Kansas City*, 266 S.W.2d 737.

Ohio.—*Huntington Nat. Bank of Columbus v. Roan*, App., 43 N.E.2d 769.

65 C.J. p. 351 note 6 [a].

(2) When only provision for duration of trust is that it terminate at time when designated person attains specified age, such provision should be construed to mean that trust was to continue only until that person reaches such age, or only until his prior death, and that trust terminates on event that happens first.—*In re Fishberg's Will*, 285 N.Y.S. 303, 158 Misc. 3.

(3) Where assets of failing corporation were conveyed to president in trust, provision that trusteeship should expire six years from date of acceptance was directory, so that suit to quiet title could be maintained by president where all property had not been sold within such period.—*Williams v. Morris*, 25 P.2d 135, 144 Or. 620.

(4) Trust, created when money was given to bank to pay interest at such rate to named persons in trust for prison band, was not terminated by



**Discretionary power of trustee.** A trust is not rendered invalid because it gives the trustee discretion either to continue or to terminate it at an appointed time or under certain contingencies.<sup>21</sup> The court will not hesitate to give directions when the discretion is being unreasonably exercised,<sup>22</sup> since the discretion is not arbitrary but must be exercised reasonably and in the interest of the cestui que trust,<sup>23</sup> and subject to any limitations or restrictions contained in the trust instrument.<sup>24</sup> The trust continues until terminated by the trustee in the exercise of his discretion.<sup>25</sup> The fact that the discretion is personal and cannot be exercised by a successor of the original trustee does not terminate a trust which is to continue for the life of the beneficiary unless sooner terminated by the trustee in the exercise of the discretion conferred.<sup>26</sup> Where a trust provides that it may be terminated by the

trustee by written notice to the beneficiaries and delivery to them of the corpus of the trust estate, the trust is effectually ended by such notice without delivery of the corpus where delivery is waived.<sup>27</sup> When a notice of termination misdescribes the trust agreement it may, under general rules, be corrected in equity.<sup>28</sup> An unrestricted power to amend a trust given to the trustees includes the power to make an amendment giving one trustee the right to terminate a trust by notice in writing to the other trustee.<sup>29</sup>

**Lapse of time.** As long as an express trust exists and is recognized by the trustee it never becomes stale.<sup>30</sup> Under some circumstances lapse of time may create a presumption that a trust has been terminated,<sup>31</sup> but such presumption may be rebutted.<sup>32</sup> An unexecuted trust will not terminate be-

failure of bank.—Conley v. Johnson, 54 P.2d 585, 101 Mont. 376.

(5) Where bank went out of existence before president and secretary thereof executed purported deed of bank, conveying lots theretofore conveyed to bank in trust for deceased former owners' estates or their heirs, such deed conveyed no title, since trust failed or died when trustee ceased to exist.—Shumway v. Earley, 106 P.2d 194, 56 Ariz. 124.

(6) A trust, created by agreement authorizing trustee to terminate lease of trust realty or take such other action with respect to lease as trustee deemed advisable on lessee's default and to exercise all of lessor's rights, remedies, powers, and privileges and waive defaults, was not terminated by extinguishment of corporate lessee on theory that trust was to exist only as long as there was a lessee paying rent.—Wechter v. Chicago Title & Trust Co., 52 N.E.2d 157, 385 Ill. 111.

(7) Where realty acquired on foreclosure by bondholders was conveyed in trust for purpose of retiring certificates of beneficial interest, and trustee was directed to advertise realty for sale at public auction if it was not sold within five year period, and trust instrument gave beneficiaries right to postpone sale for further period, and authorized removal of trustee if he failed to perform his duties, fact that trustee did not advertise realty for sale at expiration of five-year period did not terminate trust.—Yedor v. Chicago City Bank & Trust Co., 44 N.E.2d 604, 380 Ill. 585.—Aitchuler v. Chicago City Bank & Trust Co., 43 N.E.2d 673, 380 Ill. 137.

(8) Where there was nothing in trust instrument which showed that its purpose was to provide support

for the children of the grantors only during their minority or that the property should revert to the creators of the trust when the minors reached maturity, the trust property should be equally divided between the children when the younger attained legal age.—Ball v. Mann, 199 P.2d 706, 88 Cal.App.2d 695.

21. Mo.—Corpus Juris cited in Moran v. Sutter, 228 S.W.2d 682, 687, 360 Mo. 304.

65 C.J. p 352 note 7.

22. Ind.—Thompson v. Denny, 135 N. E. 260, 78 Ind.App. 257.

23. Wis.—In re Filzen's Estate, 31 N.W.2d 520, 252 Wis. 322.

65 C.J. p 352 note 9.

**Discretion held not abused**

Pa.—In re Martin's Estate, 4 A.2d 551, 135 Pa.Super. 136.

24. Ky.—Avery v. Averv, 14 S.W. 593, 90 Ky. 613, 12 Ky.L. 521.

25. N.J.—Bardfield v. Bardfield, 92 A.2d 854, 23 N.J. Super. 245.

Pa.—In re Smith's Trust, Orph., 1 Fiduciary 609.

65 C.J. p 352 note 11.

**Cannot be compelled**

A trustee, having discretionary power to terminate trust by conveying realty at settlor's request, could not be compelled to terminate trust.—Damiani v. Lobasco, 79 A.2d 268, 367 Pa. 1.

26. Ill.—French v. Northern Trust Co., 64 N.E. 105, 197 Ill. 30.

27. N.J.—Capron v. Luchars, 160 A. 83, 110 N.J.Eq. 338.

28. N.J.—Capron v. Luchars, supra.

29. Mass.—Stahler v. Sevinor, 84 N. E.2d 447, 324 Mass. 18.

30. Cal.—Huntton v. Southern Trust & Commerce Bank, 25 P.2d 461, 219 Cal. 93.

Ky.—Corpus Juris cited in Scott-Lees Collegiate Institute v. Charles, 140 S.W.2d 1060, 1063, 283 Ky. 234.

65 C.J. p 352 note 18.

**Surety on city contracts**

Where surety on city contracts deposited securities in trust to secure city from loss it might sustain because of surety's failure to fulfill its obligation to indemnify city for loss from claims and liability resulting from any cause during prosecution of work covered by contracts, ancillary receivers of surety were not entitled to release of the securities on ground that any action by the city was barred by lapse of time after completion of work under the contracts, in view of fact that limitation did not begin to run at completion of work, but only on breach of covenant to indemnify which, under Pennsylvania law, could not be earlier than date claim should be made against the city, and ancillary receivers were not entitled to release of securities on ground that more than six months had expired following completion of last contract on which surety was the surety, and Pennsylvania statute required any negligence claims against city to be filed within six months from date of origin of claim, since date of origin would be date cause of action accrues, which, under Pennsylvania law, would not occur until damage was sustained.—City of Philadelphia v. Lieberman, C. C.A.Pa., 112 F.2d 424, certiorari denied Lieberman v. City of Philadelphia, 61 S.Ct. 48, 311 U.S. 679, 85 L. Ed. 438.

31. N.Y.—Brooklyn Trust Co. v. Lester, 267 N.Y.S. 827, 239 App.Div. 423.

65 C.J. p 352 note 19.

32. N.J.—Jones v. Haines, 80 A. 948, 79 N.J.Eq. 110.

cause of a delay on the part of the trustee in executing it,<sup>33</sup> notwithstanding the trust instrument directs its execution within a certain time.<sup>34</sup>

**Trusts for married women.** Under general rules, ordinarily, a trust for the separate use of a married woman and intended to protect the property from her husband will terminate according to the creator's intention on a dissolution of the coverture.<sup>35</sup> Thus, the trust will terminate on the death of either the husband<sup>36</sup> or the wife,<sup>37</sup> or on a divorce.<sup>38</sup> However, the trust will not end on the dissolution of coverture where the language of the trust indicates that the trust is to continue for a longer period.<sup>39</sup> Whether a sole and separate use trust may be terminated by an absolute divorce on the theory that such a discovery is equivalent to the death of the husband depends entirely on the language of the instrument creating such a trust.<sup>40</sup> A trust for a wife during her husband's lifetime is not terminated by a divorce and remarriage of the husband.<sup>41</sup> Unless a contrary intention appears, a trust in favor of a married woman for her separate use will terminate on discovery notwithstanding the possibility of another marriage<sup>42</sup> and will terminate notwithstanding a second marriage.<sup>43</sup>

**Trusts for minors.** Where a trust is created for the benefit of an infant during minority, it will continue during minority<sup>44</sup> and ordinarily will terminate according to the creator's intention when the infant becomes of age,<sup>45</sup> unless it is apparent from the terms of the trust instrument that a longer

duration is contemplated.<sup>46</sup> Where the trust is to continue during minority or until marriage, it terminates on the beneficiary's marriage.<sup>47</sup> A trust which is contingent on the arrival of the beneficiaries at their majority fails by the death of the beneficiaries before reaching their majority.<sup>48</sup>

While it has been held that on the removal of the disability of infancy by marriage a trust terminates,<sup>49</sup> it has also been held that the removal of the disability by a decree of court in pursuance of statute does not end the trust.<sup>50</sup> The possibility of issue never becomes extinct during the lifetime of any parent for whose children, born or to be born, a trust is created.<sup>51</sup>

### § 93. Termination by Decree of Court

- a. In general
- b. Purposes of trust accomplished
- c. Purposes of trust not accomplished
- d. Consent of parties
- e. Actions

#### a. In General

Courts of equity, in the exercise of their supervisory power, may terminate an express trust.

Although it has been held that the court has no power to extinguish a trust in whole or in part,<sup>52</sup> courts of equity in the exercise of their supervisory power may, in a proper case, before the expiration of the term for which an express trust is created,<sup>53</sup> terminate it;<sup>54</sup> but exceptional circumstances must

33. Colo.—District Landowners' Trust v. Doherty, 30 P.2d 319, 94 Colo. 385.

65 C.J. p 352 note 21.

34. Colo.—District Landowners' Trust v. Doherty, supra.

65 C.J. p 352 note 22.

35. Md.—Winchester v. Machen, 23 A. 956, 75 Md. 538.

65 C.J. p 352 note 25.

36. Pa.—Carman v. Bumpus, 90 A. 544, 244 Pa. 136.

65 C.J. p 352 note 26.

37. Ind.—Warner v. Kelser, 177 N.E. 369, 93 Ind.App. 647.

65 C.J. p 353 note 27.

38. Ill.—Cary v. Slead, 77 N.E. 234, 220 Ill. 508.

65 C.J. p 353 note 28.

#### Money in lieu of alimony

Under trust instrument, which, after recting pendency of divorce libel and desire to make suitable provision for support of minor child and for payment of money in lieu of alimony and claims of wife against husband, provided that on entry of final decree of divorce, trustee should

pay balance to wife, trustee's duties terminated when divorce decree became absolute, which was prior to filing of husband's bill in which he sought removal of trustee and other relief—Reeves v. Reeves, 61 N.E.2d 654, 318 Mass. 381.

39. Tex.—Johnson v. Snaman, Civ. App., 76 S.W.2d 824, error refused.

65 C.J. p 352 note 29.

40. Pa.—In re Simon's Estate, 34 Pa.Dist. & Co. 475.

41. N.Y.—Tilton v. Macy, 108 N.Y.S. 713, 124 App. Div. 367.

42. Ill.—Cary v. Slead, 77 N.E. 234, 220 Ill. 508.

43. Md.—Winchester v. Machen, 23 A. 956, 75 Md. 538.

65 C.J. p 353 note 33.

44. Ga.—Reynolds v. Smith, 199 S.E. 137, 186 Ga. 838.

65 C.J. p 353 note 36.

45. Ky.—U. S. Trust Co. v. Lee, 115 S.W.2d 314, 272 Ky. 821.

65 C.J. p 353 note 37.

#### Until youngest reaches majority

Cal.—Ball v. Mann, 199 P.2d 706, 88 Cal.App.2d 696.

Ky.—U. S. Trust Co. v. Lee, 115 S.W.2d 314, 272 Ky. 821.

65 C.J. p 353 note 37 [a].

46. Ky.—Nunn v. Peak, 113 S.W. 493, 130 Ky. 405.

47. Pa.—In re Marshall's Estate, 23 A. 391, 147 Pa. 77.

48. Ky.—Hughes v. Rodes, 37 S.W. 489, 18 Ky. L. 595.

49. Ohio—Brookway v. Warren, 11 Ohio N.P.N.S., 228.

50. Tex.—Newman v. Dotson, 67 Tex. 117.

51. Miss.—Ray v. Kelly, 35 So. 165, 82 Miss. 597.

65 C.J. p 353 note 44.

52. Ga.—Singer v. First Nat. Bank & Trust Co., 24 S.E.2d 47, 195 Ga. 269.

53. S.C.—Bettis v. Harrison, 195 S.E. 835, 186 S.C. 352.

54. Cal.—Moxley v. Title Ins. & Trust Co., 165 P.2d 15, 27 Cal.2d 457, 163 A.L.R. 838—Ball v. Mann, 199 P.2d 706, 88 Cal.App.2d 696.

65 C.J. p 353 note 46.

54. Cal.—Moxley v. Title Ins. & Trust Co., 165 P.2d 15, 27 Cal.2d

exist.<sup>55</sup> It is only when all the parties in interest are before the court, as discussed *infra* subdivision d, when each is sui juris,<sup>56</sup> and all join in the application<sup>57</sup> that a court of equity ever terminates a trust. Even when all these circumstances exist, equity does not do so by force of the application, but only when a decree is proper.<sup>58</sup> When such circumstances exist power is in the court of equity, but with the power is not necessarily imposed the duty to exercise it.<sup>59</sup> It is still discretionary,<sup>60</sup> but the court may not arbitrarily deny the termination of a trust.<sup>61</sup>

The court will be careful not to defeat any object

of the creator apparent from his declaration of the purposes of the trust,<sup>62</sup> and no fair and lawful restriction imposed by the settlor will be nullified or disturbed by such termination.<sup>63</sup> Where the trustee is given discretionary power to terminate the trust at an appointed time or on certain contingencies, the court may terminate the trust where the trustee unjustifiably refuses to convey the property to the beneficiary.<sup>64</sup> Where discretion as to the amount of the income to be devoted to the needs of the beneficiary is vested in the trustee,<sup>65</sup> or where the effect of the trust is to direct accumulations of the income until a fixed time,<sup>66</sup> the trust cannot be terminated by the court during the period fixed by the settlor,

457, 163 A.L.R. 838—Ball v. Mann, 199 P.2d 706, 88 Cal.App.2d 696—Fernald v. Lawton, 79 P.2d 742, 26 Cal.App.2d 552.

III—Hazzlett v. Moore, 23 N.E.2d 57, 372 Ill. 192.

Mass—Allen v. First Nat. Bank & Trust Co. of Greenfield, 67 N.E.2d 472, 319 Mass. 693.

Mich.—Detroit Trust Co. v. Neubauer, 38 N.W.2d 371, 325 Mich. 319.

Mo.—Corpus Juris cited in Moran v. Sutter, 228 S.W.2d 682, 690, 360 Mo. 304.

N.C.—Icenick v. Bank of Wadesboro, 12 S.E.2d 253, 218 N.C. 686—Wachovia Bank & Trust Co. v. Laws, 7 S.E.2d 470, 217 N.C. 171.

Tenn.—Guion v. National Bank of Commerce, 218 S.W.2d 739, 31 Tenn. App. 540.

65 C.J. p 353 note 47.

#### Dereliction of trustee

(1) Dereliction of trustee in duty as trustee is not a reason for termination of trust and would only call for a more faithful trustee.—Knecht v. George, App., 69 N.E.2d 228, appeal dismissed 53 N.E.2d 647, 142 Ohio St. 635.

(2) Improper investment policies and abuse of powers by trustee are not grounds for termination of trust.—Wogman v. Wells Fargo Bank & Union Trust Co., Ohio App., 267 P.2d 423.

(3) Other decisions with respect to derelictions of trustees see 65 C.J. p 353 note 47 [b].

#### Same grounds as conveyance not in trust

Trust instrument can be terminated on any ground on which a conveyance not in trust can be set aside, such as fraud, duress, undue influence, breach of duty in confidential relationship or mistake.—Liberty Trust Co. v. Weber, 90 A.2d 194, 200 Md. 491, modified on other grounds 91 A.2d 393, 200 Md. 491.

An orphan's court does not have jurisdiction, under statute, to terminate a trust, where the instrument of conveyance created essentially, rather

than a trust, an agency relationship.—Petition of Sullivan, 34 Pa. Dist. & Co. 154.

55. Pa.—In re McCreary's Estate, 52 Pa. Dist. & Co. 461, affirmed McCreary's Estate v. Pitts, 47 A.2d 235, 354 Pa. 347.

65 C.J. p 354 note 48.

#### Few exceptions

Courts have no power, with a few exceptions, to dissolve a trust before term for which it was created.—Gibson v. Gibson, 106 N.E.2d 102, 122 Ind.App. 559.

#### Strict construction of statute

Insofar as statute permitting court under certain conditions to authorize termination of a trust having a vested remainder to a charitable, literary, scientific, or religious body is in derogation of the common law, it must be strictly construed to effect only so much change in prior law as is necessarily required, and such statute does not authorize court to terminate a spendthrift trust with remainder to scientific and charitable purposes.—In re Harrison's Estate, 185 A.766, 322 Pa. 532.

#### Payments from wrong funds

Where trust provided that life beneficiary was to be paid out of the trust proceeds but trustees, with full knowledge of life beneficiary, made the weekly payments from funds of a corporation, which was owned by the trust, the fact that the payments came from corporate funds rather than proceeds from the trust was not sufficient reason for terminating the trust.—Markus v. Markus, Mass., 119 N.E.2d 415.

56. Wis.—Cowie v. Strohmeyer, 136 N.W. 956, 137 N.W. 778, 150 Wis. 401.

57. Cal.—Gray v. Union Trust Co. of San Francisco, 154 P. 306, 171 Cal. 637.

#### Subsequent attack

Where express terms of instrument creating trust gave trustee and court authority to pay, convey, or deliver to beneficiary any part or whole of

trust property or proceeds from sale thereof when court should, after independent investigation, be satisfied that beneficiary would make profitable use thereof, termination of the trust by court was not subject to subsequent attack by beneficiary, where all persons beneficially interested in trust property had joined in petition for its termination, and were sui juris.—Ridgeway v. Woodward, 78 F.2d 878, 64 App.D.C. 399, certiorari denied 56 S.Ct. 146, 296 U.S. 575, 80 L.Ed. 407.

58. Cal.—Gray v. Union Trust Co. of San Francisco, 154 P. 306, 171 Cal. 637.

59. Cal.—Gray v. Union Trust Co. of San Francisco, supra.

60. Wis.—In re Pettie's Will, 63 N.W.2d 715, 266 Wis. 347.

65 C.J. p 354 note 54.

61. Cal.—Moor v. Vawter, 258 P. 622, 84 Cal.App. 678.

62. Ala.—Ramage v. First Farmers & Merchants Nat. Bank of Troy, 30 So.2d 706, 249 Ala. 240.

Mass.—Springfield Safe Deposit & Trust Co. v. Friele, 23 N.E.2d 138, 304 Mass. 224.

N.C.—Duffy v. Duffy, 20 S.E.2d 835, 221 N.C. 521.

Tenn.—Hunter v. Barger, 6 Tenn. App. 559.

65 C.J. p 354 note 56.

63. Conn.—Peter v. Degenring, 71 A.2d 87, 136 Conn. 331—Hills v. Travelers Bank & Trust Co., 7 A.2d 652, 125 Conn. 640, 123 A.L.R. 1419.

N.J.—Fidelity Union Trust Co. v. Margetts, 82 A.2d 191, 7 N.J. 556.

64. Ind.—Thompson v. Denny, 135 N.E. 260, 78 Ind.App. 257.

65. Cal.—Moxley v. Title Ins. & Trust Co., 165 P.2d 15, 27 Cal.2d 457, 163 A.L.R. 838—Fletcher v. Los Angeles Trust & Savings Bank, 187 P. 425, 182 Cal. 177.

66. Cal.—Moxley v. Title Ins. & Trust Co., 165 P.2d 15, 27 Cal.2d 457, 163 A.L.R. 838—Fletcher v. Los Angeles Trust & Savings Bank, 187 P. 425, 182 Cal. 177.

even where all the beneficiaries are sui juris and consent thereto.<sup>67</sup> The court may terminate a trust where it is for the best interest of the sole beneficiary as settlor.<sup>68</sup> Termination of the trust must be advantageous to the beneficiaries.<sup>69</sup>

When a trust is impossible of fulfillment the court will terminate it and have the property distributed.<sup>70</sup> A judicial sale of the trust property under an encumbrance, which was made prior to the creation of the trust, renders the trust impossible of accomplishment.<sup>71</sup> A trust will be terminated where its purposes become illegal,<sup>72</sup> as well as where its continuance becomes peculiarly profitless, expensive, or hopeless.<sup>73</sup> Where the accomplishment of the purposes of a trust if continued, would be im-

paired substantially by circumstances not known or anticipated by the settlor, the trust will be terminated.<sup>74</sup>

**Partial termination.** Prior to the expiration of the term for which a trust is created the court may, in a proper case, terminate a trust as to a part only if the beneficiary desires it.<sup>75</sup> Where the purpose of a trust in part of the trust estate is accomplished, it will not be continued merely because it would be more advantageous to the beneficiary of the other part that the property be kept together and administered as a whole.<sup>76</sup>

**Benefit to trustee.** A trust will not be continued merely for the benefit of the trustee, or in order that he may continue to receive compensation.<sup>77</sup>

67. Cal.—Moxley v. Title Ins. & Trust Co., 165 P.2d 15, 27 Cal.2d 457, 163 A.L.R. 838—Fletcher v. Los Angeles Trust & Savings Bank, 187 P. 425, 182 Cal. 177.

68. Del.—Weymouth v. Delaware Trust Co., 45 A.2d 427, 29 Del.Ch. 1—H. M. Byllesby & Co. v. Doriot, 12 A.2d 603, 25 Del.Ch. 46.

Ky.—Fidelity & Columbia Trust Co. v. Williams, 105 S.W.2d 814, 268 Ky. 671—Haldeman's Trustee v. Haldeman, 40 S.W.2d 348, 239 Ky. 717.

Pa.—Schollentrager v. Tradesmens Nat. Bank & Trust Co., 88 A.2d 773, 370 Pa. 501.

Wash.—Hall v. Malstrom, 189 P.2d 471, 29 Wash.2d 746.

#### Remainder interests

Where spendthrift trust instrument provided that settlor was to receive income for life and that, on the death of the settlor, all residue of the trust should be distributed and delivered to the heirs at law of the settlor in accordance with the laws of succession of the state then in effect, instrument created no remainder interests in the settlor's heirs at law, and settlor had right to have the trust terminated.—Bixby v. California Trust Co., 202 P.2d 1018, 33 Cal.2d 495.

69. Ky.—Fidelity & Columbia Trust Co. v. Williams, 105 S.W.2d 814, 268 Ky. 671.

70. Ariz.—Fish v. Valley Nat. Bank of Phoenix, 167 P.2d 107, 64 Ariz. 164.

Colo.—Melville v. Weybrew, 103 P.2d 7, 106 Colo. 121, certiorari denied 61 S.Ct. 140, 311 U.S. 695, 85 L.Ed. 450.

Ky.—Searcy v. Lawrenceburg Nat. Bank, 229 S.W.2d 312, 312 Ky. 611. Pa.—In re Posey's Estate, 52 Pa.Dist. & Co. 127, 60 Montg.Co. 142—In re

Hunsicker's Trust, Orph., 2 Fiduciary 162—In re Keiser's Estate, Com.Pl., 43 Sch.Leg Rec. 113.

Wash.—Townsend v. Charles Schalkenbach Home for Boys, 205 P.2d 345, 33 Wash.2d 255.

65 C.J. p 354 note 62.

#### Particular reasons permitting termination

(1) Impossibility of funding testamentary trusts.—Harris Trust & Sav. Bank v. Wanner, 66 N.E.2d 867, 393 Ill. 693.

(2) Insufficient corpus or income. Okl.—In re Dowell's Estate, 270 P.2d 1098.

Pa.—In re Wormser's Estate, 85 Pa. Dist. & Co. 526, 3 Fiduciary 489, 54 Lack.Jur. 201—In re Keller's Estate, 81 Pa.Dist. & Co. 37—William H. Luden, Inc. Employees' Trust Fund, 72 Pa.Dist. & Co. 566, 42 Berks Co. 1—In re Honeywell's Estate, 70 Pa.Dist. & Co. 472, 66 Montg.Co. 89—In re Exley's Estate, 67 Pa.Dist. & Co. 508, 65 Montg.Co. 61—In re Goodell's Estate, 63 Pa.Dist. & Co. 13—Trexler v. Sullivan, 36 Pa.Dist. & Co. 261, 31 Berks Co. 329—In re Hartenstein's Estate, Orph., 1 Fiduciary 611—In re Goward's Estate, Orph., 1 Fiduciary 93—In re Courtwright's Estate, Orph., 48 Lack.Jur. 73.

(3) No opportunity to invest at high interest rates.—Ellis v. Ellis, 66 P.2d 738, 20 Cal.App.2d 293.

(4) Slow enhancement in value.—Donaldson v. Allen, 81 S.W. 1151, 182 Mo. 626—65 C.J. p 354 note 62 [b].

#### Particular reasons held not to permit termination

(1) Fact that trustee has not made investments in accordance with wishes of beneficiary, or fact that beneficiary might have right on a proper showing, to have the court order trustee to make other investments in order to carry out intention of set-

tlor—Maley v. Citizens Nat. Bank of Evansville, 92 N.E.2d 727, 120 Ind. App. 642.

(2) Unexpected increase in value of trust assets.—Liberty Trust Co. v. Weber, 91 A.2d 393, 200 Md. 491.

(3) Modest income.—In re Schweizer's Estate, Pa.Orph., 1 Fiduciary 350, 99 Pittsb.Leg.J. 373.

71. Ky.—Miller's Ex'rs v. Miller's Heirs & Creditors, 189 S.W. 417, 172 Ky. 519.

72. Pa.—In re Keiser's Estate, Com.Pl., 43 Sch.Leg Rec. 113.

Wash.—Townsend v. Charles Schalkenbach Home for Boys, 205 P.2d 345, 33 Wash.2d 255.

73. Ariz.—Fish v. Valley Nat. Bank of Phoenix, 167 P.2d 107, 64 Ariz. 164.

Wash.—Townsend v. Charles Schalkenbach Home for Boys, 205 P.2d 345, 33 Wash.2d 255.

74. La.—De La Vergne v. St. Paul, 43 So.2d 229, 216 La. 92.

Pa.—In re Courtwright's Estate, Orph., 48 Lack.Jur. 73.

#### Spendthrift trust

Pa.—In re Keller's Estate, 81 Pa. Dist. & Co. 37, 66 York Leg.Rec. 32.

75. Pa.—In re Bosler's Trust, Orph., 3 Fiduciary 635, 25 Lehigh.L.J. 381—In re Merkel's Trust, Orph., 3 Fiduciary 486—In re Curdy's Trust, Orph., 3 Fiduciary 253—In re Macfarlan's Trust, Orph., 1 Fiduciary 367.

65 C.J. p 354 note 60.

76. Ill.—Wayman v. Follansbee, 98 N.E. 21, 253 Ill. 602.

77. Fla.—White v. Bourne, 9 So.2d 170, 151 Fla. 12.

Pa.—In re Bowers' Trust Estate, 29 A.2d 519, 346 Pa. 85—In re Musser's Estate, 17 A.2d 411, 341 Pa. 1.

65 C.J. p 355 note 65.

## b. Purposes of Trust Accomplished

Equity will decree the termination of a trust prior to expiration of its term when all the objects and purposes of the trust have been accomplished.

Where all the beneficiaries of a trust are sui juris and consent, equity will decree the termination of a trust prior to expiration of its term when all the objects and purposes of the trust have been accomplished and the interests have all vested,<sup>78</sup> or when all the objects and purposes of the trust which are inconsistent with the full beneficial ownership and control of the cestui are fulfilled.<sup>79</sup> Equity will terminate the trust where the necessity for the trust or the purpose for which it was created has ceased or failed;<sup>80</sup> but if it does not appear what was the reason or purpose of its creation, the court may not terminate the trust on the ground that the reason no longer exists.<sup>81</sup> The court may terminate a trust where legal<sup>82</sup> or mental and physical<sup>83</sup> disability which prompted the trust is removed. The court may terminate a trust where a state of affairs arises which the settlor did not

contemplate or provide for in the trust instrument, rendering the trust no longer necessary.<sup>84</sup> The court may terminate a trust where the entire beneficial interest vests in one of several beneficiaries<sup>85</sup> as where the remaindermen release their interest to the life tenant<sup>86</sup> or the remainderman acquires the entire beneficial interest.<sup>87</sup> The fact that the interest of one beneficiary has been assigned does not make it the duty of the court to decree a termination.<sup>88</sup>

## c. Purposes of Trust Not Accomplished

Where all its purposes have not been accomplished, the court will ordinarily refuse to terminate a trust.

Although a trust may not have ceased by the expiration of time<sup>89</sup> and although all its purposes may not have been accomplished, if all the parties who are or who may be interested in the trust property are in existence and are sui juris, equity may decree the termination of the trust,<sup>90</sup> but notwithstanding the beneficiaries of the trust are competent and consent or seek termination,<sup>91</sup> where the trust is active

78. Cal.—Wogman v. Wells Fargo Bank & Union Trust Co., App. 267 P.2d 423.

Conn.—Pelter v. Degenring, 71 A.2d 87, 136 Conn. 331—Hills v. Travelers Bank & Trust Co., 7 A.2d 552, 125 Conn. 640, 123 A.L.R. 1419.

D.C.—Rust v. Rust, 176 F.2d 66, 85 U.S.App.D.C. 191.

Ind.—Gibson v. Gibson, 106 N.E.2d 102, 122 Ind.App. 559.

Ky.—Young v. Robinette, 239 S.W. 2d 91.

Mass.—Springfield Safe Deposit & Trust Co. v. Stoop, 95 N.E.2d 161, 326 Mass. 363—Allen v. First Nat. Bank & Trust Co. of Greenfield, 87 N.E.2d 472, 319 Mass. 693—Springfield Safe Deposit & Trust Co. v. Friele, 23 N.E.2d 138, 304 Mass. 224.

Minn.—Blacque v. Kalman, 30 N.W.2d 599, 225 Minn. 258.

Mo.—Corpus Juris cited in Moran v. Sutter, 228 S.W.2d 682, 690, 360 Mo. 304.

N.H.—Eastman v. First Nat. Bank, 177 A. 414, 87 N.H. 189.

N.J.—Fidelity Union Trust Co. v. Margetta, 82 A.2d 191, 7 N.J. 556—Del Vecchio v. Hood, 62 A.2d 703, 2 N.J.Super. 169, reversed on other grounds 66 A.2d 738, 4 N.J.Super. 254—Ampere Bank & Trust Co. v. Esterly, 49 A.2d 769, 139 N.J.E.2d 83.

Ohio.—Central Trust Co. v. McCarthy, 57 N.E.2d 126, 73 Ohio App. 431—Corpus Juris cited in Jordan v. Price, App. 49 N.E.2d 769, 772.

Pa.—Long v. Tradesmen's Nat. Bank & Trust Co., 165 A. 56, 108 Pa.Super. 363—In re Batchelor's Trust,

Orph., 1 Fiduciary 365—In re Corbin's Trust, Orph., 57 York Leg. Rec. 201.

Wash.—Fowler v. Lanpher, 73 P.2d 132, 193 Wash. 308. 65 C.J. p 355 note 67.

79. Md.—Manders v. Mercantile Trust & Deposit Co., 128 A. 145, 147 Md. 448.

80. Conn.—Pelter v. Degenring, 71 A.2d 87, 136 Conn. 331.

N.J.—Fidelity Union Trust Co. v. Margetta, 82 A.2d 191, 7 N.J. 556.

Pa.—In re Bowers' Trust Estate, 29 A.2d 519, 346 Pa. 85—In re Kelby's Estate, 80 Pa.Dist. & Co. 1, 2 Fiduciary 268—In re Goodell's Estate, 53 Pa.Dist. & Co. 13—In re Price's Estate, Com.Pl., 44 Berks Co. 169—In re Toy's Estate, Orph., 33 Del Co 509—In re Stine's Estate, Orph., 24 Lehigh 291—In re Heckscher's Trust, Com.Pl., 60 Montg.Co. 235, 58 York Leg.Rec. 100—In re Cascaden's Estate, Orph., 60 Montg.Co. 15—In re Corbin's Trust, Com.Pl., 57 York Leg. Rec. 201.

65 C.J. p 355 note 69.

## Spendthrift trust

Pa.—In re Goodell's Estate, 53 Pa.Dist. & Co. 13—Rehr v. Fidelity-Philadelphia Trust Co., 37 Pa.Dist & Co. 324.

81. Ky.—Anderson v. Kemper, 76 S. W. 122, 116 Ky. 339, 25 Ky.L. 538. Pa.—Hickman v. McFarland, 1 Pa.Co. 195.

82. Ky.—Adams v. Adams, 56 S.W. 151, 21 Ky.L. 1756. 65 C.J. p 355 note 71.

83. Ky.—Webster v. Bush, 39 S.W. 411, 42 S.W. 1124, 19 Ky.L. 565. 65 C.J. p 355 note 72.

84. Ohio.—Gloyd v. Roff, 2 Ohio Cir. Ct. 253, 1 Ohio Cir.Dec. 472—Mithoff v. Fritter, 1 Ohio N.P.N.S., 432.

85. Ky.—Fidelity & Columbia Trust Co. v. Williams, 105 S.W.2d 814, 268 Ky. 671.

Wash.—Fowler v. Lanpher, 73 P.2d 132, 193 Wash. 308. 65 C.J. p 355 note 74.

86. Mass.—Langley v. Conlan, 98 N. E. 1064, 212 Mass. 135, Ann.Cas. 1913C 421.

65 C.J. p 355 note 75.

87. Pa.—In re Smith's Trust, Orph., 1 Fiduciary 609. 65 C.J. p 355 note 76.

88. Mass.—Young v. Snow, 45 N.E. 686, 167 Mass. 287.

89. Pa.—Appeal of Culbertson, 76 Pa. 145—In re Stinson's Estate, Orph., 59 Montg.Co. 33.

90. Ill.—Stutiff v. Aydelott, 27 N.E. 2d 529, 373 Ill. 633—Botzum v. Ilavina Nat. Bank, 12 N.E.2d 203, 367 Ill. 539.

Pa.—In re Ammon's Trust Estate, 52 Pa.Dist. & Co. 509 37 Berks Co. 97, 58 York Leg.Rec. 194—In re Stinson's Estate, Com.Pl., 59 Montg.Co. 33. 65 C.J. p 356 note 79.

91. Del.—Lewes Trust Co. v. Smith, 37 A.2d 385, 29 Del.Ch. 1.

D.C.—McDonald v. Fulton Trust Co. of New York, 107 F.2d 237, 71 App. D.C. 36.

Pa.—In re Bowers' Trust Estate, 29 A.2d 519, 346 Pa. 85. 65 C.J. p 356 note 80.

and not impossible of fulfillment, the court will ordinarily refuse to terminate it.<sup>92</sup> The fact that the trustee is given discretion to determine the nature of the investments to be made under the trust does not preclude a decree of termination.<sup>93</sup>

Equity will not ordinarily terminate a spendthrift trust which is not impossible of fulfillment,<sup>94</sup> at least where it does not appear that the conditions have arisen under which the trust may be terminated.<sup>95</sup> However, if all interested parties are in existence and sui juris, and consent thereto, a court of equity may decree the termination of such a trust,<sup>96</sup> and where the reasons for placing property in a spendthrift trust have ceased to exist, the trust

may be annulled as provided by statute at the instance of the beneficiary,<sup>97</sup> unless other beneficiaries fail to consent.<sup>98</sup> The partial or total invalidity of spendthrift trust provisions in a trust is no reason for terminating the trust.<sup>99</sup>

#### d. Consent of Parties

Equity will not decree the termination of a trust where some of the trust beneficiaries do not or cannot consent to its termination.

Notwithstanding the reason for the trust has ceased and its purpose has been fulfilled,<sup>1</sup> equity will not decree its termination where some of the trust beneficiaries do not or cannot consent to its termination,<sup>2</sup> but may decree its termination where all the

92. Ark.—Clemenson v. Rebsamen, 168 S.W.2d 195, 205 Ark. 123.

Del.—Lewes Trust Co. v. Smith, 37 A.2d 385, 29 Del. Ch. 1.

D.C.—Rust v. Rust, 176 F.2d 66, 85 U.S.App.D.C. 191—McDonald v. Fulton Trust Co. of New York, 107 F.2d 237, 71 App.D.C. 36.

Ill.—La Salle Nat. Bank v. MacDonald, 119 N.E.2d 266, 2 Ill.2d 581—Mohler v. Wesner, 47 N.E.2d 64, 382 Ill. 225—Suthff v. Aydelott, 27 N.E.2d 529, 373 Ill. 633.

Iowa.—Lunt v. Van Gorden, 294 N.W. 351, 229 Iowa 263.

Kan.—Lafferty v. Sheets, 267 P.2d 962, 175 Kan. 741.

Ky.—New York Life Ins. Co. v. Conrad, 107 S.W.2d 248, 269 Ky. 359.

N.J.—Fidelity Union Trust Co. v. Margetts, 82 A.2d 191, 7 N.J. 556—Del Vecchio v. Hood, 62 A.2d 703, 2 N.J. Super. 169, reversed on other grounds 66 A.2d 738, 4 N.J. Super. 254—Baer v. Fidelity Union Trust Co., 28 A.2d 275, 132 N.J. Eq. 333, affirmed 31 A.2d 823, 133 N.J. Eq. 264—Mousseiff v. Hoffberg, 12 A.2d 720, 127 N.J. Eq. 302.

Ohio—Czech Catholic Union v. Satala Realty Co., App., 113 N.E.2d 740, reversed on other grounds 117 N.E.2d 610, 160 Ohio St. 545—Knecht v. George, App., 69 N.E.2d 228, appeal dismissed 53 N.E.2d 647, 142 Ohio St. 635.

Pa.—In re Yeager's Estate, 47 A.2d 813, 354 Pa. 463—In re Bowers' Trust Estate, 29 A.2d 519, 346 Pa. 85—Long v. Trademen's Nat. Bank & Trust Co., 165 A. 56, 108 Pa. Super. 363—In re Africa's Estate, Orph., 58 Dauph. Co. 439—In re Gingrich's Estate, Orph., 57 Dauph. Co. 102.

Tex.—Parks v. Powell, Civ.App., 56 S.W.2d 323, modified on other grounds Powell v. Parks, 86 S.W.2d 125, 126 Tex. 338.

Vt.—In re Pirie's Estate, 71 A.2d 245, 116 Vt. 159.

Wash.—Fowler v. Lanpher, 73 P.2d 132, 193 Wash. 308.

65 C.J. p. 356 note 83.

#### Nature of interests

In order to terminate a trust before expiration of the time for which it was created and before accomplishment of its purpose, the combined interests of those seeking such termination must be equivalent to an absolute title which cannot be defeated or divested by any future event, consent by those having vested interests is insufficient if such interests may be divested on any stated contingency and a beneficial interest in income be transferred to other persons not joining in the petition—In re Kamey's Estate, 49 Pa. Dist. & Co. 55, affirmed 35 A.2d 258, 348 Pa. 225.

93. Cal.—Fletcher v. Los Angeles Trust & Savings Bank, 187 P. 425, 182 Cal. 177.

94. U.S.—Mellon v. Driscoll, C.C.A. Pa., 117 F.2d 477, certiorari denied 61 S.Ct. 1100, 313 U.S. 579, 85 L.Ed. 1536.

Iowa.—In re Roberts' Estate, 35 N.W. 2d 756, 240 Iowa 160.

Mich.—In re Ford's Estate, 49 N.W. 2d 154, 331 Mich. 220.

Pa.—Koch v. Fidelity-Philadelphia Trust Co., 165 A. 380, 310 Pa. 301, 91 A.L.R. 99—In re Toy's Estate, Orph., 33 Del. Co. 509—In re Kraus' Estate, Orph., 18 Loh L.J. 219—In re Marley's Trust, Orph., 57 Mont. Co. 183.

65 C.J. p. 356 note 86.

**Under statute**  
The Estates Act expressly forbids the holder of an annuity under a spendthrift provision from extinguishing it in order to terminate a trust—In re Close's Estate, 83 Pa. Dist. & Co. 136, 3 Fiduciary 113.

95. Ill.—Bevier v. Hay, 221 Ill.App. 1.

96. D.C.—Ridgeway v. Woodward, 78 P.2d 878, 64 App.D.C. 399, certiorari denied 56 S.Ct. 146, 296 U.S. 575, 80 L.Ed. 407.

**Spendthrift trust held created**  
D.C.—Ridgeway v. Woodward, supra.

97. Ga.—De Vaughn v. Hays, 78 S.E. 844, 140 Ga. 208.

98. Ga.—Leavitt v. Leavitt, 201 S.E. 670, 149 Ga. 601.

99. Md.—Liberty Trust Co. v. Weber, 90 A.2d 194, 200 Md. 491, modified on other grounds 91 A.2d 393, 200 Md. 491—Peter v. Peter, 110 A. 211, 136 Md. 157.

1. Kv.—Underhill v. U. S. Trust Co., 13 S.W.2d 502, 227 Ky. 444.

2. U.S.—Hauptfuhrer's Estate v. C. I. R., C.A.3, 195 F.2d 548, certiorari denied 73 S.Ct. 26, 344 U.S. 825, 97 L.Ed. 642—Walter's Trust v. C. I. R., C.C.A.3, 127 F.2d 161.

Cal.—Hixby v. California Trust Co., 202 P.2d 1018, 33 Cal.2d 495—In re Gallimore's Estate, 232 P.2d 259, 99 Cal.App.2d 664—In re Easterday's Estate, 114 P.2d 669, 45 Cal.App.2d 598.

Pa.—Huttig v. Huffman, 9 So.2d 506, 151 Pa. 166—Smith v. Massachusetts Mut. Life Ins. Co., 156 So. 498, 116 Pa. 390, 95 A.L.R. 508.

Ill.—Altemeyer v. Harris, 86 N.E.2d 229, 403 Ill. 345—Rotzum v. Havana Nat. Bank, 12 N.E.2d 203, 367 Ill. 539—Penske v. Equitable Life Assur. Soc., 91 N.E.2d 465, 340 Ill. App. 58.

Minn.—Blaque v. Kalman, 30 N.W. 2d 599, 225 Minn. 258.

N.Y.—Application of Holman, 67 N.Y.S.2d 90, 271 App.Div. 910.

Pa.—In re Kamey's Estate, 35 A.2d 258, 348 Pa. 225—In re Bowers' Trust Estate, 29 A.2d 519, 346 Pa. 85—In re Scott's Estate, 51 Pa. Dist. & Co. 688, affirmed 46 A.2d 174, 353 Pa. 575—In re Rebmans' Trust, Orph., 2 Fiduciary 288—In re Schweizer's Estate, Orph., 1 Fiduciary 350, 99 Pittsb.Leg.J. 373—In re Casenden's Estate, Com.Pl., 60 Mont. Co. 15.

Tenn.—Hunter v. Barger, 6 Tenn. App. 559.

65 C.J. p. 356 note 92.

#### Representation

(1) Where husband and wife conveyed realty in trust for wife for life

beneficiaries or interested persons are competent and consent or desire its termination.<sup>3</sup> As long as it remains uncertain who are the parties in interest, the trust cannot be terminated.<sup>4</sup> Equity will not terminate a trust under which after-born children may take an interest.<sup>5</sup> It has been held, however, that where a woman is the sole life tenant and also, in the absence of issue, the sole remainderman, the trust will be terminated where the testimony establishes that it is physically impossible for her to bear children.<sup>6</sup> Where the guardian of a minor is au-

thorized by the court to consent to a dissolution of a trust, the dissolution of the trust is not prevented merely because of the minority of the child.<sup>7</sup>

**Consent of trustee.** The consent of the trustee to the termination of a trust has been held both necessary<sup>8</sup> and unnecessary.<sup>9</sup> A trustee without interest in the trust except a claim for services on the continuance of the trust has no standing in court to dispute the application of all the beneficiaries for a dissolution of the trust.<sup>10</sup>

with remainder to issue of marriage and with reverter to husband if wife should die without heirs, and three children of parties reached age of twenty-one years, and parties were divorced and had remarried third persons, and various suits were instituted to sell realty to foreclose liens, and the three children asked that trust be terminated and that proceeds of decedent sale be distributed among them, and parties ratified decedent sale of realty and waived any right to participate in residue of proceeds of sale, any unborn children of the parties were before court by virtual representation, and purchaser at decedent sale received good title to realty.—*Interstate Bond Co. v. Kiser*, 215 S.W.2d 280, 308 Ky. 563.

(2) A trust in realty for deceased owner's widow and two sons or deceased son's issue cannot be terminated as to sons, where presently vested or contingent interests of sons' unborn issue are not properly represented and protected.—*Hills v. Travelers Bank & Trust Co.*, 7 A.2d 652, 125 Conn. 640, 123 A.L.R. 1419.

(3) A life beneficiary under trust who had power of appointment by will represented her own appointee in suit to terminate trust before its purposes were fully accomplished.—*Rotzom v. Havana Nat. Bank*, 12 N.E.2d 203, 367 Ill. 539.

(4) Other decisions with respect to representation see 65 C.J. p. 356 note 92 [c].

#### Failure to answer or appear

Consent of interested parties, not answering, and not represented, to judgment decreeing dissolution of trust sooner than was contemplated by testator and distributing assets, could not be implied by their failure to answer or appear, where complaint did not ask for change or modification of trust but only asked for construction of will and advice and instructions in administering trust therein established.—*Wachovia Bank & Trust Co. v. Laws*, 7 S.E.2d 470, 217 N.C. 171.

#### Equivalent to absolute fee

The persons whose consent is necessary must represent trust interests whose sum total is equivalent to an

absolute fee, including all life tenants and remaindermen, whether their interest is vested or contingent, ascertained or unascertained, living or unborn, and the possible interest of beneficiaries is not removed by the fact that they are to take only in default of appointment by will.—*Collins v. Provident Trust Co. of Philadelphia*, 83 Pa.Dist. & Co. 459, 63 Montg.Co. 376.

3. Conn.—*Petter v. Degenring*, 71 A.2d 87, 136 Conn. 331.—*Hills v. Travelers Bank & Trust Co.*, 7 A.2d 652, 125 Conn. 640, 123 A.L.R. 1419.

Ill.—*Altmeier v. Harris*, 86 N.E.2d 229, 403 Ill. 345.

Ind.—*Gibson v. Gibson*, 106 N.E.2d 102, 122 Ind.App. 559.

Ky.—*First Nat. Bank & Trust Co. of Lexington v. Purcell*, 244 S.W.2d 458.—*Citizens Fidelity Bank & Trust Co. v. Schellberg*, 238 S.W.2d 142.—*Fidelity & Columbia Trust Co. v. Williams*, 105 S.W.2d 814, 268 Ky. 671.

Mass.—*Allen v. First Nat. Bank & Trust Co. of Greenfield*, 67 N.E.2d 472, 319 Mass. 693.—*Springfield Safe Deposit & Trust Co. v. Friele*, 23 N.E.2d 138, 304 Mass. 224.

N.J.—*Ampere Bank & Trust Co. v. Esterly*, 49 A.2d 769, 139 N.J.Eq. 33.

N.C.—*Wachovia Bank & Trust Co. v. Laws*, 7 S.E.2d 470, 217 N.C. 171.

Ohio.—*Czech Catholic Union v. Satla Realty Co.*, App., 113 N.E.2d 740, reversed on other grounds 117 N.E.2d 610, 160 Ohio St. 545.—*Morgan v. First Nat. Bank of Cincinnati*, 84 N.E.2d 612, 84 Ohio App. 345.

Pa.—*In re Kamerly's Estate*, 35 A.2d 258, 348 Pa. 225.—*In re Bowers' Trust Estate*, 29 A.2d 519, 346 Pa. 85.—*In re Musser's Estate*, 17 A.2d 411, 341 Pa. 1.—*In re Price's Estate*, Orph., 44 Berks Co. 169.—*In re Elliott's Estate*, Orph., 17 Leh. L.J. 278.—*In re Heckscher's Trust*, Orph., 60 Montg.Co. 235, 58 York Leg.Rec. 100.—*In re Miller's Estate*, Orph., 30 North Co. 385.

4. N.J.—*Corpus Juris cited in In re Kuser's Estate*, 26 A.2d 688, 697, 132 N.J.Eq. 260.

65 C.J. p. 357 note 93.

5. Cal.—*Wogman v. Wells Fargo*

Bank & Union Trust Co., App., 267 P.2d 423.

D.C.—*Liberty Nat. Bank v. Hicks*, 173 F.2d 631, 84 U.S.App.D.C. 198, 9 A.L.R.2d 1355.

Ill.—*Mohler v. Wesner*, 47 N.E.2d 64, 382 Ill. 225.

Md.—*Liberty Trust Co. v. Weber*, 90 A.2d 194, 200 Md. 491, modified on other grounds 91 A.2d 393, 200 Md. 491.

Pa.—*In re Parry's Trust*, Orph., 4 Fiduciary 154.

65 C.J. p. 357 note 95.

6. Pa.—*Bell v. Lebanon County Trust Co.*, 66 Pa.Dist. & Co. 624, 2 Lebanon 77.—*In re Leonard's Estate*, 60 Pa.Dist. & Co. 42, 58 Dauph. Co. 193.—*In re Burnsley's Estate*, 59 Pa.Dist. & Co. 653, 63 Montg.Co. 164.—*In re Batchelor's Trust*, Orph., 1 Fiduciary 345.—*In re Cranston's Trust*, Orph., 1 Fiduciary 363.

7. U.S.—*Randall v. Randall*, D.C. Fla., 60 F.Supp. 308.

8. Wash.—*Powder v. Lanpher*, 75 P.2d 132, 193 Wash. 308.

65 C.J. p. 357 note 97.

#### Living settlor

The rule that an active trust cannot be terminated on the consent of all interested parties does not apply when settlor is living.—*Powder v. Lanpher*, supra.

9. Pa.—*In re Ammon's Trust Estate*, 52 Pa.Dist. & Co. 509, 27 Berks Co. 97, 58 York Leg.Rec. 194.

65 C.J. p. 357 note 98.

#### Special purpose

A trustee cannot prevent termination of trust when all interested parties consent, unless there is some special purpose declared in the trust itself that requires its continuation. A trustee's interest in fees to be earned is not one which the law protects against the action of beneficiaries who desire to terminate the trust, and the mere showing that the trust, according to its terms, is active, is not sufficient to defeat the right of the beneficiaries to terminate it.—*In re Musser's Estate*, 17 A.2d 411, 341 Pa. 1.

10. U.S.—*Western Battery & Supply Co. v. Hazlett Storage Battery Co.*, C.C.A.Mo., 61 F.2d 220, certio-

## e. Actions

Persons beneficially interested in a trust are necessary parties to a suit to terminate the trust.

Persons beneficially interested may maintain a suit to extinguish or terminate the trust,<sup>11</sup> and are considered to be necessary parties to such a suit.<sup>12</sup> Persons without interest are not necessary parties.<sup>13</sup> Where certain beneficiaries allege that they have an equitable right in, and claim to, the subject matter, they may maintain an action for dissolution and ask equitable relief without the joinder of other beneficiaries.<sup>14</sup> Heirs at law of alternative beneficiaries are not required to be parties to suits to terminate the trust before its purposes are fully accomplished, where the term "heirs at law" is used as words of limitation and not of purchase.<sup>15</sup> A petition for citation on a trustee has been held to be the proper procedure for a beneficiary seeking termination of the trust where the trustee does not join in the proceedings.<sup>16</sup> More than one trust may be terminated in the same action,<sup>17</sup> and an action to terminate a trust acts in personam.<sup>18</sup>

In a suit to terminate a trust the bill, petition, or

complaint must contain averments sufficient to entitle complainant to relief.<sup>19</sup> Thus, the bill must sufficiently allege that the purpose for which the trust was created has been accomplished.<sup>20</sup> Under court rules, a demurrer to the petition may not be a proper pleading,<sup>21</sup> although if such a demurrer alleges want of jurisdiction in the court, it will be treated as an answer challenging jurisdiction.<sup>22</sup>

General rules relating to the weight and sufficiency of evidence in civil actions apply in suits to terminate an express trust.<sup>23</sup> It has been held that the testimony of medical witnesses that the physical condition of a woman prevents her from becoming a mother will not be received for the purpose of terminating a trust estate.<sup>24</sup>

In a suit to terminate a trust in corporate stock, it has been held that the management of the corporation which is not a party to the suit will not be reviewed.<sup>25</sup> A trustee is not precluded by reason of a lack of interest in the subject matter from objecting to the termination of the trust on the ground that the age of the beneficiary does not preclude possibility of her giving birth to other bene-

rari denied 53 S.Ct. 399, 288 U.S. 608, 77 L.Ed. 982

Cal.—Eakie v. Ingram, 75 P. 566, 142 Cal. 15, 100 Am.S.R. 99.

11. Cal.—Cohen v. Hellman Commercial Trust & Savings Bank, 24 P.2d 960, 133 Cal.App. 758.

12. Pa.—In re Keiser's Estate, Com. Pl., 43 Sch.Leg.Rec. 113.

Tex.—Republic Nat. Bank & Trust Co. v. Bruce, 105 S.W.2d 882, 130 Tex. 136.

W.Va.—Harshbarger v. Harrison, 22 S.F.2d 303, 124 W.Va. 688

## Vested and contingent beneficiaries

Under agreement creating revocable trust for life of donor-beneficiary and on his death giving property to a minor child and four adult children, who were also the trustees, and giving any predeceased child's share to his children or their issue, etc., only the donor's children took vested interests, and hence donor, adult children, and minor's guardian were the only necessary parties to action to dissolve trust. The contingent beneficiaries were not necessary parties.—Randall v. Randall, D.C.Fla., 60 F.Supp. 308.

13. Ohio.—Mithoff v. Fritter, 1 Ohio N.P.N.S. 433.

14. Colo.—Melville v. Weybrew, 103 P.2d 7, 106 Colo. 121, certiorari denied 61 S.Ct. 140, 311 U.S. 695, 85 L.Ed. 450.

15. Ill.—Botzum v. Havana Nat. Bank, 12 N.E.2d 208, 367 Ill. 539.

16. Pa.—In re Howard's Estate, 54 Pa.Dist. & Co. 312.

17. N.J.—Hackensack Trust Co. v. Barkerding, 76 A.2d 36, 9 N.J.Super 595.

18. Ariz.—Schuster v. Schuster, 251 P.2d 631, 75 Ariz. 20.

19. Mass.—Stahler v. Sevinor, 84 N.E.2d 447, 324 Mass. 18.

65 C.J. p 357 note 5.

**Bills, petitions, or complaints held sufficient**

Mass.—Stahler v. Sevinor, *supra*. 65 C.J. p 357 note 5 [a].

**Bills, petitions, or complaints held insufficient**

Ind.—Maley v. Citizens Nat. Bank of Evansville, 92 N.E.2d 727, 120 Ind. App. 642.—Buschbaum v. National Bank of Logansport, 4 N.E.2d 671, 102 Ind.App. 679.

65 C.J. p 357 note 5 [b]

**Complaint held improperly dismissed for want of equity**

Ill.—Smith v. Kelley, 56 N.E.2d 360, 387 Ill. 213

**Petition held premature**

Pa.—In re Slater's Estate, 173 A. 399, 316 Pa. 56.

20. Ill.—Hubbard v. Buddemeyer, 159 N.E. 229, 328 Ill. 76.

65 C.J. p 357 note 7.

21. Pa.—Petition of Sullivan, 34 Pa. Dist. & Co. 154.

22. Pa.—Petition of Sullivan, *supra*.

23. Iowa.—In re Sexauer's Trust, 287 N.W. 247.

65 C.J. p 357 note 12.

**Evidence held sufficient**

Ill.—Albert v. Albert, 80 N.E.2d 69, 334 Ill.App. 440.

Iowa.—In re Sexauer's Trust, 287 N.W. 247.

Mass.—Markus v. Markus, 119 N.E.2d 415

Mo.—Creek v. Union Nat. Bank in Kansas City, 266 S.W.2d 737.

**Evidence held insufficient**

Pa.—In re Curdy's Trust, Orph., 3 Fiduciary 253

**Clear evidence**

In suit by settlor to terminate trust, wherein trustee denied validity of trust declaration under which settlor claimed a right of revocation but asserted duties under another valid and irrevocable declaration signed by settlor where instrument under which settlor claimed was a fraudulent instrument unenforceable in equity, settlor was required to make it clearly appear that the declaration under which the trustee claimed was clearly invalid in order to entitle settlor to return of the trust res.—Albert v. Albert, 80 N.E.2d 69, 334 Ill.App. 440.

## Settlor-beneficiary

In order to sustain settlor-beneficiary's bill to cancel trust, beneficiary must establish that all possible interests are before court in person of beneficiary and trust has no existing purpose to support it.—Rehr v. Fidelity-Philadelphia Trust Co., 165 A. 380, 310 Pa. 301, 91 A.L.R. 99.

24. Fla.—Byers v. Beddow, 142 So. 894, 106 Fla. 166.

25. N.J.—Lembeck v. Lembeck, 145 A. 327, 104 N.J.Eq. 284.



ficiaries.<sup>26</sup> On termination of a trust the court may require the trustees before the court to convey to the beneficiaries trust property which is outside the territorial jurisdiction of the court and of which a decree could not divest them.<sup>27</sup> A decree of termination made in a proceeding in which the trustee was a party is binding on him.<sup>28</sup> Unless it affirmatively appears on the face of the judgment roll that the court lacked jurisdiction of the subject matter, a decree terminating a trust will not be set aside for lack of jurisdiction.<sup>29</sup> Those unsuccessfully seeking destruction of the trust agreement may have costs assessed against them.<sup>30</sup>

## § 94. Termination by Death of Parties

- a. In general
- b. Beneficiaries

### a. In General

Whether a trust terminates on the death of the settlor depends largely on the intention of the settlor as gathered from the terms of the trust instrument. Unless the trust so provides, a trust does not terminate by reason of the death of the trustee.

26. Cal.—Fletcher v. Los Angeles Trust & Savings Bank, 187 P. 425, 182 Cal. 177.
27. Mo.—Donaldson v. Allen, 81 S.W. 1151, 182 Mo. 626.
28. Ga.—Payne v. Bowdrie, 36 S.E. 89, 110 Ga. 549.
29. Cal.—McMurray v. Silvertson, 83 P.2d 48, 28 Cal.App.2d 541
30. Mo.—Creek v. Union Nat. Bank in Kansas City, 266 S.W.2d 737.
31. Mo.—Sager v. State Highway Commission, App., 125 S.W.2d 89.
32. U.S.—Atwood v. Kleberg, C.C.A. Tex., 133 F.2d 69, rehearing denied 133 F.2d 452, certiorari denied 64 S.Ct. 45, 320 U.S. 744, 88 L.Ed. 441.
- Conn.—Gaess v. Gaess, 42 A.2d 796, 132 Conn. 96, 160 A.L.R. 432.
- Ill.—Murphy v. Westhoff, 53 N.E.2d 931, 386 Ill. 136
- Iowa.—Aultman v. Meyers, 33 N.W.2d 460, 239 Iowa 940—Lunt v. Van Gordon, 294 N.W. 351, 229 Iowa 263.

65 C.J. p 358 note 21.

### Trust as agency

(1) Where a purported trust is in fact a mere agency, such agency ceases at settlor's death—Bolles v. Toledo Trust Co., 58 N.E.2d 381, 144 Ohio St. 195, 157 A.L.R. 1164.

(2) Where trust agreement under which settlors conveyed their realty to trustee provided that on death of any settlor, payments should be made to person named to receive them by settlor's will, and in default thereof to certain others, and that trust

might be altered, modified, or revoked by direction in writing signed by all settlors or persons owning equitable interest in the trust, it did not create mere relationship of agent and principal between trustee and settlors which terminated on death of a settlor, but legal title remained in trustee notwithstanding a settlor's death—Central Trust Co. v. McCarthy, 57 N.E.2d 126, 73 Ohio App. 431.

### Incompetent creator

Where revocable trusts were subject to direction of court during incompetency of creator thereof, balance of trust accounts in event of incompetent's death would then become absolute property of infant beneficiary—Ganley v. Lincoln Sav Bank of Brooklyn, 13 N.Y.S.2d 571, 257 App.Div. 509.

33. Ala.—Smith v. Eshelman, 180 So. 313, 235 Ala. 588.
- Mass.—Rowland v. June, 99 N.E.2d 283, 327 Mass. 455.
- N.Y.—Brooklyn Trust Co. v. Lester, 267 N.Y.S. 827, 239 App.Div. 422
- Pa.—In re Strong's Estate, Orph., 19 Erie Co. 394

65 C.J. p 358 note 22.

**Rule that a trust is indestructible** after the decease of the settlor is a recognition of the power of the donor to reach into the future and control his donees and their methods of enjoyment—Fowler v. Lanpher, 75 P. 2d 132, 193 Wash. 308.

34. Ill.—In re Wright's Estate, 25 N.E.2d 909, 304 Ill.App. 87—In re Trapp's Estate, 269 Ill.App. 269.

Death of one of the parties to a trust does not in and of itself terminate the trust.<sup>31</sup> Whether a trust terminates on the death of the settlor depends largely on the intention of the settlor as gathered from the terms of the trust instrument.<sup>32</sup> The trust will continue after the settlor's death where there remain purposes unfulfilled,<sup>33</sup> and it has been stated that where a trust has been perfectly created, it is not terminable by the death of the party who created it.<sup>34</sup> A trust terminates on the settlor's death where, under the trust, he is the sole<sup>35</sup> or surviving<sup>36</sup> beneficiary. The settlor's death does not end a trust where a life beneficiary is still alive.<sup>37</sup> Where there is no duty imposed on a trustee other than to hold property for the heirs of the trustor, on the trustor's death it becomes the property of the heirs.<sup>38</sup> Under a trust created by a deposit in trust for the depositor and another, with the balance payable at the death of either to the survivor, on the death of either the trust ceases.<sup>39</sup>

**Trustee.** Unless by its terms the trust is to terminate on the death of the trustee,<sup>40</sup> or of one of several trustees,<sup>41</sup> or of the surviving trustee,<sup>42</sup>

35. Tex.—Seguin State Bank & Trust Co. v. Locke, 102 S.W.2d 1050, 129 Tex. 524.
- 65 C.J. p 358 note 23.
36. Mont.—Roehrer v. Commercial Nat. Bank, 289 P. 388, 87 Mont. 570.
37. Ill.—Robbins v. Continental Nat. Bank & Trust Co. of Chicago, 68 N.E.2d 254, 324 Ill.App. 422.
- Mich.—Lyle v. Burke, 40 Mich. 499.
38. Cal.—Yokum v. Grimes, 238 P. 727, 73 Cal.App. 204.
39. Md.—Fairfax v. Savings Bank of Baltimore, 199 A. 872, 175 Md. 136, 116 A.L.R. 1334.
40. Pa.—In re Corbin's Trust, Orph., 57 York Leg.Rec. 261.
- 65 C.J. p 358 note 28.
41. Mo.—Ferguson v. Stephens, 5 Mo. 211.
- Pa.—In re Corbin's Trust, Orph., 57 York Leg.Rec. 201.
42. U.S.—U. S. v. 11.06 Acres of Land in City of St. Louis, Mo., D.C. Mo., 89 F.Supp. 852.

### Resignation or cessation of functioning

The trust created by trust indenture, granting named trustees and their survivors and successors rights and powers, to be exercised by them as trustees, for lifetime of last survivor, did not terminate on death, resignation, or cessation of functioning of last surviving named trustee.—Finch v. Edwards, 198 S.W.2d 665, 239 Mo.App. 788.

in view of the fact that the court may appoint new trustees, a trust does not terminate by reason of the death of the trustee<sup>43</sup> or of some of several trustees.<sup>44</sup> However, since powers involving personal confidence or discretion do not pass to succeeding trustees, as discussed infra § 259, the trust will terminate on the trustee's death where its execution is dependent on confidential or discretionary powers of the appointed trustee.<sup>45</sup>

### b. Beneficiaries

A trust will terminate on the death of a life tenant where the trust instrument expressly so provides.

Whether a trust terminates on the death of a beneficiary depends on the intent of the settlor as gathered from the trust instrument.<sup>46</sup> A trust will terminate on the death of a life tenant where the trust instrument expressly so provides,<sup>47</sup> or where a trust in favor of a life tenant is unencumbered with any remainder in trust and with no further purposes to be fulfilled.<sup>48</sup> A trust will terminate on the death of the ultimate beneficiary under the trust where no other purposes for its continuance exist.<sup>49</sup> Where a subsequent trust is void, the trust terminates on

the life tenant's death.<sup>50</sup> The fact that in a trust for a life tenant with remainder absolutely to children the children are minors at the death of the life tenant does not continue the trust until they are of age.<sup>51</sup>

The death of the life tenant, however, does not terminate the trust as long as there are active duties to be performed by the trustee.<sup>52</sup> A trust is not terminated by the death of a life tenant where a use after the death inures to the benefit of the tenant's children,<sup>53</sup> or a division of the property by the trustee is essential,<sup>54</sup> or where other active duties under the trust devolve on the trustee.<sup>55</sup> Where a remainder after a life estate is devised in trust for a person living at the death of the testator, and the equitable interest thereby created is vested, the death of the cestui prior to the termination of the life estate does not defeat the trust.<sup>56</sup> A trust for the benefit of a life tenant after the expiration of a life estate in the property fails where the owner of the life estate survives the life tenant.<sup>57</sup> A conveyance in trust for a beneficiary after the decease of his parents fails where the beneficiary dies before the parents.<sup>58</sup>

43. Conn.—Gaess v. Gaess, 42 A.2d 796, 132 Conn. 96, 160 A.L.R. 432.  
Ill.—Jones v. Katz, 59 N.E.2d 537, 355 Ill.App. 65.  
Iowa.—Cupples v. Morrison, 264 N.W. 113, 221 Iowa 183.  
Neb.—Tucker v. Myers' Estate, 37 N.W.2d 685, 151 Neb. 359.  
Pa.—In re Corbin's Trust, Orph., 57 York Leg.Rec. 201.  
65 C.J. p. 358 note 31.

Appointment of trustees by court see infra § 217.

44. Pa.—In re Corbin's Trust, supra, 65 C.J. p. 358 note 32.

45. Pa.—In re Corbin's Trust, supra, R.I.—Schloss v. Rhode Island Hospital Trust Co., 10 A.2d 344, 64 R.I. 63.  
65 C.J. p. 358 note 35.

#### Modified trust

Where trust created by mother solely for benefit of son, designating a brother of the son and another as trustees, with income payable to mother for son's benefit during mother's life and "direct" to son if he survived her, was modified by creation of second trust providing that son surrendered claim to income during mother's life and permitted payment of income, after mother's death, to the brother for son's benefit and that second trust should not be revoked or amended without written approval of beneficiary and trustee, second trust terminated with brother's death, and first trust was to be administered in accordance with its terms, unaffected by second trust.—Schloss v.

Rhode Island Hospital Trust Co., supra.

46. Conn.—Hooker v. Hooker, 32 A.2d 68, 130 Conn. 41.

N.Y.—City Bank Farmers Trust Co. v. Housman, 59 N.Y.S.2d 880, affirmed In re Loneragan's Will, 59 N.Y.S.2d 626, 269 App.Div. 1059, affirmed 68 N.E.2d 453, 296 N.Y. 513.

N.C.—Fisher v. Fisher, 9 S.E.2d 493, 218 N.C. 42.

Pa.—In re Emma Murray's Trust Estate, 182 A. 736, 121 Pa.Super 55.

Wash.—Kendall v. Kendall, 261 P.2d 422, 43 Wash.2d 418.

47. Ill.—Friesse v. Friesse, 25 N.E.2d 788, 373 Ill. 216.

N.J.—Hackensack Trust Co. v. Barkerding, 76 A.2d 36, 9 N.J.Super 595.

Ohio.—Third Nat. Bank & Trust Co. of Dayton, Ohio, v. Reinhold, Prob., 80 N.E.2d 591.

Pa.—In re Thaw's Estate, 63 A.2d 417, 163 Pa.Super. 481.  
65 C.J. p. 358 note 38.

48. U.S.—Hadley v. Rinke, D.C.N.Y., 39 F.Supp. 207.

65 C.J. p. 358 note 39.

49. Iowa.—Lunt v. Van Gorden, 294 N.W. 351, 229 Iowa 263.

Tenn.—Magevney v. Karach, 65 S.W.2d 562, 167 Tenn. 32, 92 A.L.R. 343.

Wash.—McKenna v. Seattle-First Nat. Bank, 214 P.2d 664, 35 Wash.2d 662, 16 A.L.R.2d 679.

65 C.J. p. 359 note 41.

50. Cal.—In re Leavitt, 97 P. 916, 8 Cal.App. 756.

51. Md.—Peigner v. Hooper, 30 A. 911, 80 Md. 262.

52. Md.—Gallard v. Winans, 74 A. 626, 111 Md. 434.  
65 C.J. p. 359 note 44.

53. Tenn.—Horn v. Broyles, Ch., 62 S.W. 297.  
65 C.J. p. 359 note 45.

54. N.Y.—Yates v. Thomas, 71 N.Y. S. 1113, 35 Misc. 552.

#### Property not readily partitioned

Where, prior to the death of a life tenant, it is necessary for a trustee to buy real estate at sheriff's sale on foreclosure of a mortgage forming part of the trust estate, and the property cannot profitably be disposed of or readily partitioned between the life tenant and remainderman, the trust will not be terminated and the trustee discharged on the death of the life tenant, but the property will be awarded to the trustee with a fund adequate to preserve the asset until it produces revenue sufficient to satisfy the life tenant's claim.—In re Dorman's Estate, 19 Pa.Dist. & Co. 539.

55. R.I.—Carney v. Byron, 36 A. 5, 19 R.I. 283.

65 C.J. p. 359 note 47.

56. Wis.—Williams v. Williams, 115 N.W. 342, 135 Wis. 60.

57. N.Y.—Benham v. Boardman, 146 N.Y.S. 434.

58. Pa.—Ivory v. Burns, 56 Pa. 300.

**Partial termination.** On the death of a beneficiary, the trust may terminate in part in accordance with the terms of the trust instrument.<sup>59</sup> A trust for the benefit of two persons during their natural lives and on the death of either the trustee to convey to such decedent's children terminates only as to the deceased beneficiary's share in the trust.<sup>60</sup>

**Deposit of money in bank.** On the death of the beneficiary before the depositor the trust terminates,<sup>61</sup> unless before the beneficiary's death the depositor indicates an intention to make the tentative trust absolute and irrevocable.<sup>62</sup> Where an absolute or irrevocable trust is created, the death of the beneficiary before the depositor does not terminate the trust.<sup>63</sup>

## § 95. Termination by Acts, Agreements, and Conveyances

Generally, trusts are terminable by the consent or agreement of all the parties in interest.

As a general rule, trusts are terminable by the consent or agreement of all the parties in interest.<sup>64</sup> It is the duty of the court, however, not to allow the parties to destroy a trust;<sup>65</sup> and trusts will not be terminated by agreement of the parties or beneficiaries except in cases where the design and object of the trust have been practically accomplished and all interests created have become vested.<sup>66</sup> Under the terms of the trust instrument the settlor may be granted<sup>67</sup> or denied the right to terminate the

59. N.C.—Baker v. McAden, 24 S. E. 531, 118 N.C. 744.

60. C.J. p. 359 note 52.

61. R.I.—Smith v. Hall, 37 A. 698, 20 R.I. 170.

62. N.Y.—In re Farrell's Estate, 30 N.Y.S.2d 742, 177 Misc. 389. Pa.—In re Snyder's Estate, 33 Pa. Dist. & Co. 25.

63. C.J. p. 360 note 55.

64. N.Y.—Matter of Duffy, 111 N.Y. S. 77, 127 App. Div. 75.

65. Cal.—Sherman v. Ilibernia Savings & Loan Soc., 20 P.2d 138, 129 Cal.App., Supp., 795.

N.Y.—Bishop v. Seamen's Sav. Bank, 53 N.Y.S. 488, 33 App. Div. 181.

66. U.S.—Carter Coal Co. v. Latz, D. C. Va., 54 F.Supp. 115, affirmed, C. C.A., 140 F.2d 934.

Cal.—Riley v. Riley, 256 P.2d 1056, 118 Cal.App.2d 11.

Conn.—Mitchell v. Wyckoff, 186 A. 709, 122 Conn. 48.

U.S.—Helyer v. Helmholz, App. D. C., 66 S.Ct. 68, 236 U.S. 93, 80 L. Ed. 76.

D.C.—Rust v. Rust, 176 F.2d 66, 85 U.S.App.D.C. 191.

Ky.—First Nat. Bank & Trust Co. of Lexington v. Purcell, 244 S.W.2d 458.

Mich.—Friedricks v. Near, 245 N.W. 537, 260 Mich. 627.

N.J.—Schneider v. Meyer, 125 A. 140, 96 N.J. Eq. 69, reversed on other grounds 127 A. 162, 97 N.J. Eq. 335.

Ohio.—Jordan v. Price, App., 49 N.E. 2d 769.

Pa.—In re Ammon's Trust Estate, 52 Pa. Dist. & Co. 509, 37 Berks Co. 97, 58 York Leg. Rec. 194.—In re Falkner's Trust, Orph., 3 Fiduciary 495.—In re Buzby's Estate, Orph., 2 Fiduciary 281.—In re Fister's Estate, Orph., 4 Chest. Co. 256.

Tex.—Byrd v. Curtis, Civ.App., 194 S.W.2d 153.

Wash.—Fowler v. Lanpher, 75 P.2d 132, 193 Wash. 308.

### Beneficiaries with power of appointment

(1) Where the life tenants of a spendthrift testamentary trust have a general power of appointment over the corpus, they are the sole parties in interest in the trust within the meaning of the rule that a trust may be terminated, under certain conditions, where all parties in interest agree.—In re Wormser's Estate, 85 Pa. Dist. & Co. 526, 3 Fiduciary 489, 54 Lack. Jur. 201.

(2) Where life beneficiary of testamentary trust exercised in her will her power of appointment under the trust, beneficiary's husband, whose remainder interest was contingent on failure of beneficiary to exercise her power of appointment, became a stranger to the estate at time of beneficiary's death, and relationship between husband and trustee, as beneficiary and trustee under trust, was terminated.—Kenny v. Citizens Nat. Trust & Sav. Bank of Los Angeles, Cal. App., 269 P.2d 641.

**Donor and sole beneficiary may by mutual consent terminate a trust.**—C. I. R. v. Bacher, C.C.A., 102 F.2d 500.

### Omission of power to revoke

(1) The mere omission from a deed of trust of power to revoke does not generally prevent a termination of trust agreement if all parties who are or may be interested in trust property are in existence and are sui juris, and consent and agree to termination.—In re Donnan's Trust, 33 A.2d 55, 339 Pa. 43.

(2) The requisite consent by "all who are or may be interested," necessary to terminate a trust, not containing a power of revocation and not having terminated by expiration of time, means that their combined interests must be equivalent to an absolute title which cannot be defeated or divested by happening of any

future event.—In re Donnan's Trust, supra.

### Family-settlement rule

(1) The general family-settlement rule will not be applied where the result would be to permit the determination of a trust in a manner not authorized by law.—Altemeier v. Harris, 86 N.E.2d 229, 403 Ill. 345.

(2) Where trust which was sought to be annulled was an active trust wherein special duties were imposed on trustee, including disbursements of income from trust estate for an indefinite time to indefinite recipients on indefinite contingencies, the family settlement doctrine was not applicable.—Duffy v. Reilly, 20 S.E.2d 835, 221 N.C. 521.

### Acts held not to show termination

Where divorced husband deposited sum with court to be paid to wife for care of parties' children and thereafter on parties' joint petition divorce decree was vacated and sum returned but parties did not ask for a restoration of status quo ante as to property settlement, but for release of trust fund and there was no provision for restoration of wife's property rights, surrendered under settlement or for a return of transfers made to her, course of action did not in itself signify a termination of trust established by parties.—Stretch v. Watson, 74 A.2d 597, 5 N.J. 268.

65. S.C.—Bettis v. Harrison, 195 S. E. 835, 186 S.C. 352.

66. Ill.—Altemeier v. Harris, 86 N. E.2d 229, 403 Ill. 345.—Mohler v. Wesner, 47 N.E.2d 64, 332 Ill. 235.—Penske v. Equitable Life Assur. Soc., 91 N.E.2d 465, 340 Ill. App. 58.

67. Va.—Blackwell v. Virginia Trust Co., 14 S.E.2d 301, 177 Va. 299.

### Laches or estoppel

Settlor was not barred by laches or estoppel from asserting right to termination of trust in accordance with provision in indenture by fact

trust,<sup>68</sup> and the trustee<sup>69</sup> or beneficiary<sup>70</sup> may be granted the right to terminate the trust. Where the exercise of the power of termination is made dependent on the acquiescence of a trustee other than the settlor himself, the procurement of such acquiescence is necessary to enable the settlor to act.<sup>71</sup> The withdrawal and pledging of certain trust property by the settlor does not terminate a trust otherwise complete.<sup>72</sup> The underlying legal estate essential to a trust is not annulled by the loss of the deed which conveyed it,<sup>73</sup> or by withholding such deed from record,<sup>74</sup> or by both combined.<sup>75</sup>

In the absence of statutory prohibition or restrictions on alienation contained in the trust instrument, where the beneficiaries are all competent to act and the trust estate is subject to no future contingencies and the beneficiaries have an absolute right to the trust estate, the trust may be terminated by the consent or agreement of all the beneficiaries<sup>76</sup>

and without the consent of a court of equity.<sup>77</sup> This, however, may not be done against the objection of some of the beneficiaries,<sup>78</sup> or where there are contingent interests which are not determinable until the happening of a certain event,<sup>79</sup> or where there is an active<sup>80</sup> or spendthrift<sup>81</sup> trust. Where the trust is passive, a sole beneficiary may terminate it at any time.<sup>82</sup> Where there is a dry trust without a fixed period of duration, it may be terminated at any time by the beneficial owner creating it.<sup>83</sup> Where there is a mere naked trust with the legal and equitable title in the same person, such person may terminate the trust at any time.<sup>84</sup>

A release by the remainder man to the life tenant will terminate a trust where the principal object of the trust is to preserve the corpus of the estate to the remainderman,<sup>85</sup> although it has been held that such a release does not in itself terminate the trust, but the court may terminate it.<sup>86</sup> Similarly, a release or disclaimer of the interest of the life tenant

that right was not asserted for ten years and until after trustee because of changed conditions had refused to loan money to trustor as provided by indenture, where no intervening rights had accrued—*Chase Nat Bank of New York City v. Rennie*, 10 N. Y.S.2d 420.

68. Pa.—In re Markley's Trust, Orph., 57 Montg Co 183.

69. Ohio.—Homer v. Wullenweber, 101 N.E.2d 229, 89 Ohio App. 255.

70. Ohio.—Homer v. Wullenweber, supra—Lillard v. Lillard, 26 N.E. 2d 933, 63 Ohio App. 403.

#### Form of request

Under trust declaration authorizing termination of trust on life tenant's written request, request was not required to be acknowledged or recorded or in form entitling it to be recorded—*Eastwood v. Hayes*, 190 N.E. 796, 286 Mass 508.

71. Pa.—*Damiani v. Lobasco*, 79 A. 2d 268, 367 Pa. 1.

72. N.J.—*Bose v. Meury*, 163 A. 276, 112 N.J.Eq 62.

73. N.J.—*Stretch v. Watson*, 74 A. 2d 597, 5 N.J. 268—*Lake v. Weaver*, 74 A. 451, 76 N.J.Eq. 280, 34 L.R.A., N.S., 495.

74. N.J.—*Stretch v. Watson*, 74 A.2d 597, 5 N.J. 268—*Lake v. Weaver*, 74 A. 451, 76 N.J.Eq. 280, 34 L.R.A., N.S., 495.

75. N.J.—*Stretch v. Watson*, 74 A.2d 597, 5 N.J. 268—*Lake v. Weaver*, 74 A. 451, 76 N.J.Eq. 280, 34 L.R.A., N.S., 495.

76. D.C.—*Washington Loan & Trust Co. v. Colby*, 108 F.2d 743, 71 App. D.C. 236.

Pa.—*Stineman v. Stineman*, Com.P.L. 16 Cambria Co. 61—In re Corbin's Trust, Orph., 57 York Leg Rec. 201. 65 C.J. p 360 note 61. Revocation by settlor see supra §§ 88-91.

#### Agreement not to partition

Where trust deed whereby grantor conveyed land in trust for benefit of his children, who were parties to the instrument, provided that after grantor's death trust could be terminated by consent of all children, the agreement not to partition the real estate was not void—*Lunt v. Van Gorden*, 294 N.W. 351, 229 Iowa 263.

The fact that a trust is active and not passive does not alter the settlor's right to terminate the trust when no other person has any interest in the trust res.—*Manice v. Howard Sav. Institution*, 104 A.2d 74, 30 N.J.Super. 267.

77. Ky.—*Keith v. First Nat Bank & Trust Co.*, 75 S.W.2d 747, 256 Ky. 88.

Va.—*Rowley v. American Trust Co.*, 132 S.E. 347, 144 Va. 375, 45 A.L.R. 738.

78. Pa.—In re *Donnan's Trust*, 13 A. 2d 55, 339 Pa. 43. 65 C.J. p 360 note 63.

79. Pa.—In re *Gingrich's Estate*, Orph., 57 Dauph.Co. 102. Tenn.—*Hunter v. Barger*, 6 Tenn.App. 559. 65 C.J. p 360 note 64.

80. Mass.—*Whitney v. Whitney*, 57 N.E.2d 913, 317 Mass. 253. 65 C.J. p 360 note 65.

81. Ill.—*Altmeier v. Harris*, 86 N.E. 2d 229, 403 Ill. 345. Pa.—In re *Heyl's Estate*, 40 A.2d 149,

156 Pa.Super. 277, affirmed 43 A.2d 130, 352 Pa. 407—In re *Close's Trust*, 83 Pa.Dist. & Co. 136, 3 Fiduciary 113—In re *Chance's Estate*, 29 Pa.Dist. & Co. 586—In re *Harrison's Estate*, 25 Pa.Dist. & Co. 133, affirmed 185 A. 766, 322 Pa. 532.

65 C.J. p 360 note 66

82. Ala.—*First Nat. Bank v. City of Jacksonville*, 184 So. 338, 236 Ala. 639.

Del.—*Security Trust Co. v. Sharp*, 77 A.2d 543, 32 Del.Ch. 3—*Wilmington Trust Co. v. Carpenter*, 75 A.2d 815, 31 Del.Ch. 411.

N.J.—*Boyle v. Bank of Montclair*, 76 A.2d 41, 9 N.J.Super. 586.

Pa.—In re *Case's Estate*, 84 Pa.Dist. & Co. 123, 15 Monroe L.R. 6.

65 C.J. p 360 note 68.

#### Spendthrift clause

Where settlor was sole beneficiary of a trust, the fact that the trust instrument contained a spendthrift clause did not preclude termination of the trust since a settlor cannot create a spendthrift trust for his own benefit.—*Manice v. Howard Sav. Institution*, 104 A.2d 74, 30 N.J.Super. 267.

83. Ky.—*Osgood's Ex'x v. Gleason*, 16 S.W.2d 782, 229 Ky. 116.

65 C.J. p 360 note 69.

84. Mass.—*Cunningham v. Bright*, 117 N.E. 909, 228 Mass. 385. Merger of estates see infra § 203.

85. Pa.—In re *Owens' Estate*, 3 Pa. Dist. 331.

Va.—*Thom v. Thom*, 28 S.E. 583, 95 Va. 413.

86. Ohio.—*Gloyd v. Roff*, 2 Ohio Cir. Ct. 253, 1 Ohio Cir Dec 472.

to the remainderman terminates the trust.<sup>87</sup> A trust may be terminated by the failure of the beneficiaries, within a reasonable time, to perform a contract obligation.<sup>88</sup> A beneficiary is not entitled to have the trust terminated until judgments against the trustee in his trust capacity are paid.<sup>89</sup> Where the equitable title of a beneficiary is provable only by parol evidence, parol evidence is admissible to show a relinquishment of the trust.<sup>90</sup> If, by the terms of a spendthrift trust, the interest of the beneficiary is inalienable, such beneficiary cannot, after having accepted the trust, terminate it by releasing his interest therein.<sup>91</sup> Where the income beneficiary of a spendthrift trust has accepted the gift and enjoyed it for many years, the refusal by the beneficiary to receive the income does not enable the remainderman to terminate the trust,<sup>92</sup> and the beneficiary of a spendthrift trust can at any time revoke a release and disclaimer of a portion of the net income thereof and receive future income.<sup>93</sup> Under a statute prohibiting the alienation of the interest of a beneficiary, the trust may not be terminated by the alienation of the income from real or personal property.<sup>94</sup> Where the trust can be performed only with respect to a named beneficiary, it is defeated when another becomes possessed of the beneficiary's rights.<sup>95</sup> A trust in favor of a beneficiary determinable on a voluntary or involuntary conveyance,

attachment, or levy is destroyed insofar as such beneficiary is concerned when such contingencies arise.<sup>96</sup> Where a trust for the benefit of certain beneficiaries and their legal representatives authorized a sale of the property at the direction of a majority of the cestuis, the fact that no sale was made by the trustee during his lifetime or during the life of any of the original beneficiaries does not extinguish the title of those who are the legal representatives.<sup>97</sup>

Where the interest of a wife is not contingent on her remaining the wife of her husband under a trust created by the husband in his favor during his life, and on his death to his present wife, she is not deprived of her interest by reason of a divorce.<sup>98</sup> A trust in favor of the settlor for life and on his death to another during her natural life, and as long as she may remain unmarried, does not fail by her marriage to the settlor.<sup>99</sup> A trust is not terminated by the dissolution of a corporate trustee,<sup>1</sup> or on failure of the court to appoint a trustee on the resignation of an executor.<sup>2</sup> An absolute disposition or conveyance of all the trust property is held, under the circumstances of some cases, to terminate the trust.<sup>3</sup> Consideration for a conveyance to terminate a trust is not necessary.<sup>4</sup>

*By trustee.* A trustee cannot put an end to the trust by his own unauthorized act or default,<sup>5</sup> as

87. Va.—Rowley v. American Trust Co., 132 S.E. 347, 144 Va. 375, 45 A.L.R. 738.

**Under statute**

Pa.—In re Bonnell's Estate, 65 Pa. Dist. & Co. 251.

88. Cal.—Hower v. Woman's Home Missionary Soc. of California Conference of M. E. Church, 41 P.2d 583, 4 Cal.App.2d 719.

**Relinquishing trust property**

Cal.—Hower v. Woman's Home Missionary Soc. of California Conference of M. E. Church, supra.

89. Mich.—Bankers' Trust Co. of Muskegon v. Forsyth, 254 N.W. 190, 266 Mich. 517.

90. Tex.—Rehold Lumber Co. v. Scripture, Civ.App., 279 S.W. 586.

91. Va.—Blackwell v. Virginia Trust Co., 14 S.E.2d 301, 177 Va. 299.

92. Pa.—In re Borsch's Estate, 67 A.2d 119, 362 Pa. 581.

**Forbidden result**

To permit a spendthrift beneficiary to release and disclaim his interest, thus accelerating the remainder, and then permit remainderman to terminate trust is improper as allowing by indirection that which is forbidden to be done directly.—In re Borsch's Estate, supra.

93. U.S.—Gallagher v. Smith, D.C. Pa., 119 F.Supp. 360.

94. N.Y.—In re Knauss' Estate, 121 N.Y.S.2d 5, 204 Misc. 207.—In re Schirmer's Will, 113 N.Y.S.2d 697.—In re Hyatt's Will, 81 N.Y.S.2d 911.—Brandt v. Continental Bank & Trust Co., 43 N.Y.S.2d 256, affirmed 47 N.Y.S.2d 589, 267 App. Div. 890.

65 C.J. p. 360 note 77.

95. Md.—Thompson v. Ballard, 16 A. 378, 70 Md. 10.

65 C.J. p. 361 note 78.

96. Md.—Cherbonnier v. Bussey, 48 A. 923, 92 Md. 413.

S.C.—Symmes v. Cauble, 67 S.E. 548, 85 S.C. 435.

97. N.H.—Glynn v. Maxfield, 76 A. 196, 75 N.H. 482.

98. Mass.—Boston Safe Deposit & Trust Co. v. Lerner, 163 N.E. 902, 265 Mass. 339.

99. N.Y.—In re Adams' Estate, 233 N.Y.S. 232, 133 Misc. 552.

1. Conn.—City Missionary Soc. v. August Moeller Memorial Foundation, 126 A. 683, 101 Conn. 518.

2. Conn.—Hewitt v. Beattie, 138 A. 795, 106 Conn. 602.

3. N.Y.—Harris v. Harris, 40 N.E.2d 245, 287 N.Y. 444.

Pa.—Barrett v. Avon Garage Co., 66 Pa. Dist. & Co. 275.

Utah—Farr v. Hartley, 81 P.2d 640, 95 Utah 358.

65 C.J. p. 361 note 85.

4. Ariz.—Parker v. Gentry, 185 P.2d 767, 66 Ariz. 189.

5. N.Y.—In re Rosenberg's Will, 121 N.Y.S.2d 874.

65 C.J. p. 361 note 88.

**Mismanagement of trust fund** does not work reverter to donor.—Graham Bros. Co. v. Galloway Woman's College, 81 S.W.2d 837, 190 Ark. 692.

**Failure to name cotrustee**

N.Y.—Petition of Stevens, 125 N.Y.S. 2d 386, 282 App.Div. 571, affirmed 121 N.E.2d 551, 307 N.Y. 742.

**Guarantee of payment**

The trust character of transaction, wherein aged woman turned over moneys to her brother to invest in real estate mortgage, was not terminated by execution and acceptance of his personal note for amount of such moneys as a guaranty of, or collateral security for, part or full payment of amount thereof to beneficiary, if needed by her at any time, so that trustee was not absolved from obligation to make such investment, or relieved from duty to account in equity for money received, on ground that beneficiary had available ade-

by acquiring the property for himself,<sup>6</sup> or by improperly transferring the trust assets to another.<sup>7</sup> A trust is not terminated by the refusal of a co-trustee to act.<sup>8</sup> If a trustee deems that a trust should be terminated and the fund paid over to the beneficiary, the matter should be presented by him to the court and authority therefor obtained.<sup>9</sup> If the trust property is reconveyed to the settlor, with the apparent acquiescence of the beneficiary, the trust may be terminated.<sup>10</sup> Where the trust instrument states that the trustee may convey the trust property at the request and with the consent of the settlor, the trustee may thus convey the trust property and so terminate the trust.<sup>11</sup> A power granted trustees by the trust agreement to cancel it may not be exercised to enable one of the trustees to participate in a purchase of trust assets from the other trustee.<sup>12</sup> Where the trustee may terminate a trust by tendering the amount due, a statement in a letter that the trustee would pay the amount forthwith does not show tender, but an invitation to further negotiations.<sup>13</sup>

*Between trustee and beneficiaries.* A release of the interest of the cestui que trust to the trustee is sufficient to terminate the trust,<sup>14</sup> as is also a proper transfer and conveyance by the trustee to the cestui que trust,<sup>15</sup> and subsequent reconveyance to the trustee.<sup>16</sup> The mere fact that the trustee has allowed the property to remain in the name of the beneficiary, or has permitted him to collect the interest or dividends thereon, is not sufficient to establish an intention on his part to relinquish the trust.<sup>17</sup> A trustee and beneficiaries may not, by agreement or conveyance, terminate a trust which is an active<sup>18</sup> or spendthrift<sup>19</sup> trust, or where some of the beneficiaries do not consent or where possible beneficiaries may later come into existence.<sup>20</sup> A conveyance from the cestui to the trustee will not end a trust if executed solely for the purpose of lodging with the trustee a complete record title.<sup>21</sup>

The trust may continue regardless of a separate agreement entered into by the trustee and beneficiary,<sup>22</sup> and where the trustee and beneficiary enter

quate remedy at law—*Livingston v. Rein*, 33 A.2d 840, 133 N.J. Eq. 585.

#### Denial of trust

*Tex*—*Powell v. Parks*, 86 S.W.2d 725, 126 Tex. 338.

6. Fla.—*Saunders v. Richard*, 16 So. 679, 35 Fla. 28.

N.C.—*McEachern v. Stewart*, 19 S.E. 702, 114 N.C. 370.

7. U.S.—*Citizens Banking Co. v. Monticello State Bank, C.C.A. Iowa*, 143 F.2d 261.

#### Consent procured by fraud

A trust is not terminated by trustee's transfer of property to a third person with beneficiary's consent, where such consent is procured by fraud or other improper means—*Binford v. Snyder*, 189 S.W.2d 471, 144 Tex. 134.

#### Effect of reconveyance

Where a settlor conveys property to an active trustee with the provision that the net income is to be paid her for life or that she can at her option occupy the property herself, with remainder to her issue or on failure of issue to collateral, her action in attempting to terminate the trust by a reconveyance to herself and in subsequently executing an agreement as an individual to sell the property to strangers, estops her from asserting the right to occupy the house herself—*Lieberman v. Fabricant*, 59 Pa. Dist. & Co. 443.

8. *Tex*—*Powell v. Parks*, 86 S.W.2d 725, 126 Tex. 338.

9. *Or*—*Boehmer v. Silvestone*, 186 P. 26, 95 *Or*. 154.

10. *Mich*—*Frédicks v. Near*, 245 N.W. 537, 260 *Mich*. 627.

11. *Pa*—*Damiani v. Lobasco*, 79 A.2d 268, 367 *Pa*. 1.

12. *N.Y.*—*In re Ahrens' Will*, 91 N.Y.S.2d 1, 275 App. Div. 588, reversed on other grounds 95 N.E.2d 53, 301 N.Y. 701, motion denied 97 N.E.2d 358, 302 N.Y. 631, motion denied *In re Ahrens' Estate*, 101 N.E.2d 757, 303 N.Y. 637.

13. *N.Y.*—*Gerard v. Bank of New York & Trust Co.*, 270 N.Y.S. 835, 240 App. Div. 531, reversed on other grounds 193 N.E. 165, 265 N.Y. 336, reargument denied 195 N.E. 192, 266 N.Y. 544.

14. *Tex*—*Knight v. Tannehill Bros.*, Civ. App. 140 S.W.2d 552, error dismissed, judgment correct.

65 C.J. p. 361 note 91.

#### Relinquishment by parol

Where codefendant held legal title to real estate under an express trust established by parol, and a community estate, of which deceased's widow was survivor, held an equitable title established by parol, widow, who had consented to a general administration of deceased's estate, could relinquish the trust by parol agreement after termination of administration proceedings—*Knight v. Tannehill Bros.*, *supra*.

#### Agreement accelerating two trusts

Where life tenant of inter vivos trust and life tenant of testamentary trust and remaindermen, entered into agreement purporting to settle and accelerate both trusts but testamentary trustee was ignored, and release which life tenants agreed to give on request in future would have released only inter vivos trustee, agreement did not effectuate an unconditional

termination of life estates, and such agreement did not afford a basis for judgment that life tenants and remaindermen were presently entitled to receive corpus—*Hackensack Trust Co. v. Barkerding*, 76 A.2d 36, 9 N.J. Super. 595.

15. *La*—*Hagerty v. Clement*, 196 So. 330, 195 *La*. 230, 65 C.J. p. 361 note 92.

16. *U.S.*—*Schneider v. Murphy*, C.A. Tex., 183 F.2d 777, certiorari denied 71 S.Ct. 292, 340 U.S. 911, 95 L.Ed. 659.

*Tex*—*Cashion v. Cashion*, Civ. App., 242 S.W.2d 468, error refused.

17. *U.S.*—*Williams v. Kink*, C.C. 29 F.Cas No. 17,725, 13 Blatchf. 282, 43 Conn. 569.

18. *Ky*—*Brown v. Owsley*, 248 S.W. 889, 198 *Ky*. 344, 65 C.J. p. 362 note 94.

19. *Pa*—*In re Heyl's Estate*, 43 A.2d 130, 352 *Pa*. 407, 65 C.J. p. 362 note 95.

20. *Tex*—*Boone v. Stone*, Civ. App., 142 S.W.2d 936, error dismissed, judgment correct, 65 C.J. p. 362 note 96.

21. *Or*—*Gray v. Beard*, 133 P. 791, 66 *Or*. 59.

22. *Ariz*—*Parker v. Gentry*, 185 P.2d 767, 66 *Ariz*. 189.

#### No effect on trust property

An instrument by which defendant deeded land to plaintiff, and by which plaintiff and defendant released all their claims against each other and agreed not to interfere with each other's business or trespass on each other's property, had no effect on property which defendant held in

into a separate partnership agreement with respect to the management of the trust property, the termination of the partnership does not operate as an abandonment of the trust by mutual agreement.<sup>23</sup> A trustee and sole beneficiary may change the trust relation to that of debtor and creditor.<sup>24</sup> A settlement of a continuing trust between the trustee and sole beneficiary whereby the original purposes of the trust are fully discharged terminates the trust,<sup>25</sup> and subsequent to such settlement the relationship between the parties is merely that of debtor and creditor, or, at the most, a constructive trust.<sup>26</sup> It has been held that the trust relationship may continue until it is terminated by a repudiation by the trustee brought home to the beneficiary,<sup>27</sup> or which, by the use of diligence, should have been so brought home to him.<sup>28</sup>

A trust may be extinguished by a parol surrender by the beneficiary in any case in which the trustee so acts in reliance on the surrender as to make it inequitable for the beneficiary to assert his interest.<sup>29</sup> Where the beneficiaries and the trustee of the original trust agree to the creation of a subsequent trust, accepting their interests as beneficiaries under the subsequent trust in full satisfaction of their shares in the original trust, the creation of the subsequent trust terminates the original one.<sup>30</sup> The mere failure of the trustee to perform the trust and the failure of the beneficiary to compel him to perform it do not terminate the trust by extinguishing the interest of the beneficiary.<sup>31</sup>

*Between settlor and trustee.* A trust may be ter-

minated by an authorized reconveyance to the settlor.<sup>32</sup> Where, under a trust, the trustee reserves the right to resign, surrender the trust, and to reconvey the property to the settlor at any time, a reconveyance by the trustee ends the trust.<sup>33</sup> On the other hand, the trust will not terminate by virtue of an unauthorized surrender of the trust and reconveyance to the settlor.<sup>34</sup>

*Beneficiary becoming sole trustee.* Where the beneficiaries of a trust are also the trustees, the fact that one becomes sole trustee for his own benefit does not destroy the trust,<sup>35</sup> but it is improper for the beneficiary to act except by direction of the court.<sup>36</sup>

*Judicial proceedings.* A trust is terminated by a judicial sale under an encumbrance made prior to the creation of the trust,<sup>37</sup> but has been held not terminated by a decree in a suit for an accounting.<sup>38</sup> A decree entered pursuant to stipulation of the parties to a suit to have the trust declared void may abrogate the trust.<sup>39</sup>

*Removal of trustee.* Where the trust is a personal one, on the removal of the trustee the trust will come to an end.<sup>40</sup>

## § 96. Effect

On the termination of a trust, the estate of the trustee ceases, and the legal, as well as the equitable, title vests in the beneficial owner.

On the termination of a trust, the estate of the trustee ceases,<sup>41</sup> and the legal, as well as the equitable, title vests in the beneficial owner<sup>42</sup> without

trust for plaintiff.—Parker v. Gentry, supra.

23. Iowa.—Lunt v. Van Gorden, 294 N.W. 351, 229 Iowa 263.

24. Tex.—Guardian Trust Co. v. Studdert, Civ App., 36 S.W.2d 578, affirmed Com App., 55 S.W.2d 550.

25. Tex.—Guardian Trust Co. v. Studdert, supra.

26. Tex.—Guardian Trust Co. v. Studdert, supra.

27. Tex.—Byrd v. Curtis, Civ.App., 194 S.W.2d 153.

28. Tex.—Byrd v. Curtis, supra.

29. Cal.—Nicolds v. Storch, 153 P.2d 561, 67 Cal App 2d 8.

### Request for joint tenancy deed

Where tenant in common conveyed her undivided one-half interest to her cotenant, without consideration, but on oral agreement of grantee to hold grantor's interest in trust, joint tenancy deed naming both parties as grantees with right of survivorship, executed and recorded at grantor's oral request, was valid, and terminat-

ed grantor's equitable right in the property.—Lowenthal v. Kunz, 231 P.2d 62, 104 Cal App 2d 181.

30. Mass.—Lipsitt v. Sweeney, 59 N.E.2d 465, 317 Mass 706.

31. Pa.—In re Schulz' Estate, 98 A.2d 176, 374 Pa 459, certiorari denied Schulz v. Flora, 74 S.Ct. 135, 346 U.S. 885, 98 L.Ed 390.

32. Mass.—Matthews v. Thompson, 71 N.E. 93, 186 Mass. 14, 104 Am. S.R. 550, 66 L.R.A. 421, 65 C.J. p 362 note 2.

33. N.Y.—Schreyer v. Schreyer, 91 N.Y.S. 1065, 101 App.Div. 456, affirmed 75 N.E. 1134, 182 N.Y. 555.

34. Iowa.—Larimer v. Beardsley, 107 N.W. 935, 130 Iowa 706, 65 C.J. p 362 note 5.

35. N.Y.—Irving v. Irving, 47 N.Y.S. 1052, 21 Misc. 743.

36. N.Y.—Irving v. Irving, supra.

37. Ky.—Miller's Ex'rs v. Miller's Heirs and Creditors, 189 S.W. 417, 172 Ky. 519.

N.Y.—De Bevoise v. Sanford, Hoffm. 192.

38. Ill.—Whitaker v. Scherrer, 145 N.E. 177, 313 Ill. 473, 65 C.J. p 362 note 10.

39. U.S.—Hilvering v. Bullard, 58 S.Ct. 565, 303 U.S. 297, 82 L.Ed. 852.

40. Mass.—Barbour v. Weld, 87 N.E. 909, 201 Mass. 513. Pa.—In re Corbin's Trust, Orph., 67 York Leg Rec. 201.

41. Me.—Hinds v. Hinds, 140 A. 189, 126 Me. 521, 65 C.J. p 362 note 18.

42. N.Y.—In re Zeigler's Will, 125 N.Y.S.2d 341, 65 C.J. p 362 note 19.

### Guardian obtaining funds

Fact that claimant, through a guardian, could have secured some or all of the funds in a trust for claimant's support and education if application had been made while claimant was a minor did not authorize claimant to obtain funds after trust, by its terms, had ended.—In re Gorgas' Estate, 24 A.2d 171, 147 Pa.Super. 319.

the necessity of any act or intervention on the part of the trustee,<sup>43</sup> unless the intention of the creator appears that the legal title should continue in the trustee.<sup>44</sup> The termination of a trust leaves the trustee with a mere administrative title to the fund.<sup>45</sup> Where the purposes of an express trust cease or are fulfilled, the estate of the trustee ceases,<sup>46</sup> and the absolute estate is in the person beneficially interested,<sup>47</sup> unless the intention of the settlor clearly appears that the legal title should continue in the trustee.<sup>48</sup> On the termination of a trust, the trust property will vest absolutely in the trustee where so provided by the trust instrument.<sup>49</sup> Under the trust agreement, the settlor may be entitled to a refund or repayment of trust funds on termination of the agreement.<sup>50</sup> Where the trust provides that it is to terminate on the death of the settlor, at which time the trustees are to dispose of the property, the trust does not terminate immediately on such death but continues for a reasonable time for the winding up of its affairs and transfer of its property to the proper persons.<sup>51</sup> Although it has been held that on termination the powers and office of the trustee terminate,<sup>52</sup> at the time of termination, the trustee is not immediately divested of all duties and responsibilities,<sup>53</sup> but he has powers and duties appropriate for a winding up of trust affairs.<sup>54</sup>

The termination of a trust by a decree of court divests the trustee of the legal title to the trust estate,<sup>55</sup> but until a final settlement under the decree is made with the beneficiary, the relationship of trustee and cestui que trust continues.<sup>56</sup> Where the trust terminates on the death of the trustee, a person ceases to be beneficiary under the trust,<sup>57</sup> and the trust estate vests in the parties designated by the settlor.<sup>58</sup> On the death of a life tenant, legal title to the trust property may immediately vest in the remaindermen.<sup>59</sup> The power of investment ceases on the termination of the trust.<sup>60</sup> Provisions against encumbrance and alienation in a spendthrift trust are no longer operative after the termination of the trust and both legal and equitable title have merged.<sup>61</sup> Where a trust is terminated by mutual agreement and on accomplishment of the purpose, a contract entered into by the sole beneficiary with a third person is not binding on the estate.<sup>62</sup> It has been held that if a trust is terminated by operation of law,<sup>63</sup> or if there is no imperative requirement on the trustee to act within a definite time,<sup>64</sup> the beneficiary may proceed as though the trust were terminated.

43. N.Y.—In re Cruikshank's Estate, 8 N.Y.S.2d 279, 169 Misc. 514.

44. Ala.—Comby v. McMichael, 19 Ala. 747.

Me.—Hinds v. Hinds, 140 A. 189, 126 Me. 521.

45. N.Y.—In re Ziegler's Will, 125 N.Y.S.2d 341.

46. Cal.—Ball v. Mann, 199 P.2d 706, 88 Cal.App.2d 695—Cohen v. Hellman Commercial Trust & Savings Bank, 24 P.2d 960, 133 Cal.App. 758.

47. U.S.—Russell v. Bowers, D.C.N.Y., 27 F.Supp. 13.

48. Md.—Ridgely v. Pfingst, 50 A.2d 578, 188 Md. 209.

49. Cal.—Ball v. Mann, 199 P.2d 706, 88 Cal.App.2d 695.

50. N.C.—Denson v. Pine State Creamery Co., 131 S.E. 581, 191 N.C. 198.

51. U.S.—Ark-Tenn Distributing Corp. v. Breit, D.C.N.J., 110 F.Supp. 644, affirmed, C.A., 209 F.2d 359.

W.Va.—Charlton v. Chevrolet Motor Co., 174 S.E. 570, 115 W.Va. 25.

52. U.S.—C. I. R. v. Davis, C.C.A.1, 132 F.2d 644.

53. U.S.—Clifford v. Helvering, 105 F.2d 586, C.C.A. 8, reversed on other grounds 60 S.Ct. 554, 309 U.S. 331,

34 L.Ed. 788, conformed to, C.C.A., 111 F.2d 896.

Rights and powers of trustee generally see *infra* § 246.

55. Ill.—Green v. Breen, 103 N.E.2d 625, 411 Ill. 206.

N.Y.—Neary v. City Bank Farmers Trust Co., 24 N.Y.S.2d 264, 260 App. Div. 791—In re Ryan's Estate, 37 N.Y.S.2d 8, 178 Misc. 1029, affirmed 48 N.Y.S.2d 549, 267 App. Div. 974, modified on other grounds 60 N.Y.S.2d 817, 294 N.Y. 85.

Pa.—In re Thaw's Estate, 63 A.2d 417, 163 Pa.Super. 484.

56. Ill.—Breen v. Breen, 103 N.E.2d 625, 411 Ill. 206.

N.J.—Del Vecchio v. Hood, 66 A.2d 728, 4 N.J.Super. 254.

N.Y.—Neary v. City Bank Farmers Trust Co., 24 N.Y.S.2d 264, 260 App. Div. 791—In re Ryan's Estate, 37 N.Y.S.2d 8, 178 Misc. 1029, affirmed 48 N.Y.S.2d 549, 267 App. Div. 974, modified on other grounds 60 N.Y.S.2d 817, 294 N.Y. 85.

Pa.—In re Thaw's Estate, 63 A.2d 417, 163 Pa.Super. 484.

57. Me.—Goodwin v. Boutin, 155 A. 738, 130 Me. 322.

65 C.J. p. 362 note 23.

58. Ga.—Payne v. Bowdrie, 36 S.E. 89, 110 Ga. 549.

59. S.D.—Finke v. Finke, 156 N.W. 595, 37 S.D. 46.

60. S.D.—Finke v. Finke, *supra*, 65 C.J. p. 363 note 27.

Tentative trusts in bank deposits see *supra* § 54.

61. Pa.—In re Thaw's Estate, 63 A.2d 417, 163 Pa.Super. 484.

62. Mass.—Hodge v. Mackintosh, 143 N.E. 43, 248 Mass. 181.

63. Tex.—Clarke v. Clarke, 46 S.W.2d 558, 121 Tex. 165, answers conformed to, Civ.App., 48 S.W.2d 1119.

64. Ohio.—Jordan v. Price, App., 49 N.E.2d 769.

#### Attorney's fee

A contract by sole trust beneficiary to pay attorney part of trust estate, as fee for securing settlor's execution of trust agreement, when beneficiary came into ownership and possession of estate under such agreement, which was terminated by parties' mutual agreement and accomplishment of trust purpose before settlor's death, was not binding on his estate, and neither attorney nor his assignee had any right or interest in trust property.—Jordan v. Price, *supra*.

65. Ill.—Altschuler v. Chicago City Bank & Trust Co., 43 N.E.2d 673, 380 Ill. 137.

66. Ill.—Altschuler v. Chicago City Bank & Trust Co., *supra*.



§ 97. Revival

After termination of a trust, a settlor may acquiesce in the use of trust funds and join in the reestablishment of the trust.

After termination of a trust, a settlor may acquiesce in the use of trust funds and join in the reestablishment of the trust.<sup>65</sup> A trust for the

separate use of a married woman which terminates on the dissolution of coverture will not revive for her protection under a second marriage.<sup>66</sup> After a trust has once become executed and extinguished, it is not revived by the nonexecution of a subsequent trust relating to the same property.<sup>67</sup>

B. RESULTING TRUSTS

1. IN GENERAL

§ 98. Nature and Types

Resulting trusts are created by operation of law, and are creatures of equity. A resulting trust is a passive or dry trust.

Resulting trusts are created by operation of law.<sup>68</sup> They are creatures of equity<sup>69</sup> and are based on the equitable doctrine concerning consideration,<sup>70</sup> the doctrine that valuable consideration and not legal title determines the equitable title or interest.<sup>71</sup> Unlike constructive trusts, discussed *infra* § 139 et seq, resulting trusts are not remedial in character.<sup>72</sup> A resulting trust is always a passive or dry trust,<sup>73</sup> a mere holding of the title for the benefit of another,<sup>74</sup> no duties or responsibilities being imposed

on the trustee as to the management, control, or disposition of the property<sup>75</sup> except, perhaps, to convey to the cestui que trust at his direction.<sup>76</sup>

Resulting trusts, it has been said, are of two general types: Those where a purchase has been made and the legal estate is conveyed or transferred to one person, but the purchase price is paid by another person; and those where there is a gift by deed or will to a donee or grantee without pecuniary consideration coming from the grantee, but the intention appears from the instrument itself, that the legal and beneficial estates are to be separated and that the grantee or donee is either to enjoy no beneficial interest or only part of it.<sup>77</sup>

65. N.J.—Stretch v. Watson, 74 A.2d 597, 5 N.J. 268.

66. Pa.—Carnan v. Bumpus, 90 A. 544, 244 Pa. 136.  
65 C.J. p 363 note 32.

67. U.S.—Eaker v. Biddle, C.C.Pa., 2 F.Cas No.764, Baldw 394—Hunter v. Marlboro, C.C.Mass., 12 F.Cas. No.6,908, 2 Woodb. & M. 168.

68. Ill.—Wright v. Wright, 118 N.E. 2d 280, 2 Ill.2d 246.

Mo.—James v. James, 248 S.W.2d 623.

Okl.—Childers v. Breese, 213 P.2d 665, 202 Okl 377.

R.I.—Szlantev v. Cleverley, 50 A.2d 185, 72 R.I. 252.

Wis.—Schubert v. Ridoout, 290 N.W. 155, 233 Wis 550, 133 A.L.R. 834.  
Resulting trust defined see *supra* § 14.

**Implied trusts** arise by implication of law because morality, justice, conscience, and fair dealing demand that the relationship be established.  
U.S.—Johnson v. Jackson, D.C. Pa., 82 F.Supp. 915.

Pa.—Peoples-Pittsburgh Trust Co. v. Snapp, 182 A. 376, 320 Pa. 138, 103 A.L.R. 844.

69. Ohio.—Steiner v. Fecycz, 50 N.E.2d 617, 72 Ohio App 18.

Tex.—Simms v. Duncan, Civ App., 195 S.W.2d 156, error refused no reversible error.

W.Va.—Dye v. Dye, 39 S.E.2d 98, 128 W.Va. 754.

65 C.J. p 369 note 99.

70. Tex.—Elberts v. McLean, 98 S.W.2d 352, 128 Tex 573—Knox v. Long, Civ App., 251 S.W.2d 911, reversed on other grounds, Sup., 257 S.W.2d 289—Tolle v. Sawtelle, Civ App., 246 S.W.2d 916, error refused Wash.—Creasman v. Boyle, 196 P.2d 835, 31 Wash 2d 345.

71. Tex.—Tolle v. Sawtelle, Civ. App., 246 S.W.2d 916.

72. Cal.—Sampson v. Bruder, 118 P.2d 28, 47 Cal App.2d 431.

73. Mo.—Shelton v. Harrison, 167 S.W. 634, 182 Mo App. 404.

**No actual trust**

In resulting trusts the relation of trustee and cestui que trust does not actually exist, since the element of trust and confidence is absent, but the holder of the legal title is declared to be a trustee on equitable principles—Teachey v. Gurley, 199 SE 83, 214 N.C. 288.

74. Mo.—Shelton v. Harrison, 167 S.W. 634, 182 Mo App. 404.

Ohio—Ohio State Life Ins. Co. v. Union Properties, App., 52 N.E.2d 542.

Wyo.—Corpus Juris cited in Carpenter & Carpenter v. Kingham, 109 P.2d 463, 471, 56 Wyo 314.  
Rights of trustee's creditors see *infra* § 185.

**Legal title to property is mere naked form** and is only evidence of title in favor of the cestui que trust.  
—Creech v. Creech, 24 SE.2d 642, 222 N.C. 656.

75. Mo.—Shelton v. Harrison, 167 S.W. 634, 182 Mo App 404.

76. Mo.—Shelton v. Harrison, *supra*.

77. Iowa.—Acker v. Priest, 61 N.W. 235, 92 Iowa 610.

65 C.J. p 363 note 35.  
Purchase money trusts generally see *infra* § 115 et seq.

Trust resulting from conveyance without consideration generally see *infra* § 105.

**To state it differently**, the two general types are: Those where property is conveyed or transferred by one person to another but a third person either furnishes the consideration for the transfer or has such an interest in the property that it is considered as held for his benefit; and those where property is transferred without any consideration coming from the donee or grantee and under circumstances such that he is considered as holding the property for the benefit of the donor or grantor or those holding under him.

Iowa.—Corpus Juris cited in Shaw v. Addison, 28 N.W.2d 816, 820, 239 Iowa 377.

Kan.—Corpus Juris quoted in Hord v. Chambers, 149 P.2d 583, 593, 158 Kan. 614.

*Property or interest subject to trust.* The doctrine of resulting trusts in all of its phases applies alike to personal and to real property.<sup>78</sup> The trust may arise as to a part of the property or a part of the interest therein, and not as to the residue, according to the intent existing in each particular case;<sup>79</sup> but it is impossible to enforce it if the trust interest cannot be measured as to its value, or as to its fractional dimensions as compared with the whole property divided or undivided.<sup>80</sup>

*Extinction of trust.* The trustee's recognition and acknowledgment of a resulting trust do not destroy it and create an express trust.<sup>81</sup> Where the trustee conveys the property to the beneficiary, the resulting trust is terminated.<sup>82</sup> A resulting trust is destroyed or terminated by the release or surrender to the trustee of the beneficiary's interest.<sup>83</sup> Although there is some authority to the contrary,<sup>84</sup> at least in the case of a trust resulting where an express trust fails or is fully performed without exhausting the trust estate,<sup>85</sup> it is generally held that no writing is necessary for the extinguishment of a resulting trust<sup>86</sup> and that the beneficiary of a resulting trust may by parol release or surrender his interest to the trustee,<sup>87</sup> at least in the case of a resulting trust which is established by parol evidence.<sup>88</sup> A release or surrender of the beneficial

interest to the trustee is effected by any conduct and language on the part of the beneficiary which would naturally lead a reasonable person in the trustee's position to conclude that the beneficiary had surrendered his interest.<sup>89</sup> Where there is performance by the trustee in accordance with the oral agreement of the beneficiary to surrender or release his interest, or where he has changed his position in reliance on the beneficiary's parol surrender, the surrender is effective irrespective of the requirements of the statute of frauds.<sup>90</sup>

### § 99. What Law Governs

The existence of a resulting trust with respect to land is to be determined by the law of the state where the land is located.

Whether or not a resulting trust has arisen in respect of certain land is to be determined by the laws of the state in which the land is located.<sup>91</sup>

### § 100. Statutory Provisions

Under some statutes, resulting trusts, or at least those resulting from the payment of the purchase money and the taking of the conveyance in the name of another, have been abolished.

Under some statutes resulting trusts, or at least those resulting from the payment of the purchase money and the taking of the conveyance in the

78. Cal.—Norman v. Burks, 209 P. 2d 815, 93 Cal.App.2d 687.

Iowa.—Shaw v. Addison, 28 N.W.2d 818, 239 Iowa 377.

Kan.—Herd v. Chambers, 149 P.2d 583, 158 Kan. 614.

Mo.—Dee v. Sutter, App., 222 S.W. 2d 541.

Pa.—Majors v. Majors, 33 A.2d 442, 153 Pa.Super. 175, affirmed 37 A.2d 528, 349 Pa. 334.

Pa.—Gross v. Gross, Com.Pl., 60 Dauph.Co. 460.

65 C.J. p. 372 note 24.

Property subject to purchase money resulting trust see *infra* § 117.

79. U.S.—In re Davis, D.C.Mass., 112 F. 129.

65 C.J. p. 372 note 25.

Trust resulting from payment of part of purchase money for conveyance to another generally see *infra* § 122.

80. Cal.—Los Angeles, etc., Oil Co. v. Occidental Oil Co., 78 P. 25, 144 Cal. 528.

81. Ill.—Mauricau v. Haugen, 56 N.E.2d 367, 387 Ill. 186.

N.C.—Randle v. Grady, 32 S.E.2d 20, 224 N.C. 651.

82. Tex.—Cashion v. Cashion, Civ. App., 242 S.W.2d 468.

65 C.J. p. 385 note 28.

Merger of estates generally see *infra* § 203.

**Transfer at beneficiary's direction.**

If trustee of a resulting trust transfers the trust property to beneficiary or at beneficiary's direction, the resulting trust terminates—Zakaessian v. Zakaessian, 161 P.2d 677, 70 Cal.App.2d 721.

**Deed to blank grantee**

Where trustee delivered deed to blank grantee to beneficiary, trust was not destroyed, since deed was incomplete instrument at time of delivery and did not operate as conveyance of legal title until authority to insert name of grantee was exercised—Roesser & Pendleton v. Stanoil Oil & Gas Co., Tex.Civ.App., 138 S.W.2d 250, error refused.

83. Tex.—Verdin v. Bossi, Civ.App., 196 S.W.2d 111.

84. N.J.—Moses v. Moses, 53 A.2d 805, 140 N.J.Eq. 575.

Or.—Chenoweth v. Lewis, 9 Or. 150.

85. N.J.—Moses v. Moses, 53 A.2d 805, 140 N.J.Eq. 575.

86. Tex.—Wright v. Wright, 132 S.W.2d 847, 134 Tex. 82.

Resulting trusts as not within statute of frauds see *infra* § 101.

87. Cal.—Johnson v. Altman, 215 P. 2d 768, 96 Cal.App.2d 467.

Mass.—Livermore v. Aldrich, 5 Cush., Mass. 431.

N.H.—Foley v. Foley, 7 A.2d 396, 90 N.H. 281—Dow v. Jewell, 18 N.H. 340, 45 Am.Dec. 371.

N.J.—Warren v. Tynan, 34 A. 1065, 54 N.J.Eq. 492.

N.Y.—Botsford v. Burr, 2 Johns Ch., N.Y., 405.

Pa.—Appeal of Kline, 39 Pa. 463.

Tex.—Wright v. Wright, 132 S.W.2d 847, 134 Tex. 82—Rebold Lumber Co. v. Scripture, Civ.App., 279 S.W. 566.

88. N.H.—Foley v. Foley, 7 A.2d 396, 90 N.H. 281.

Tex.—Wright v. Wright, 132 S.W.2d 847, 134 Tex. 82.

Admissibility of parol evidence to establish resulting trust see *infra* § 133.

89. N.H.—Foley v. Foley, 7 A.2d 396, 90 N.H. 281.

N.Y.—Botsford v. Burr, 2 Johns Ch., N.Y., 405.

90. N.H.—Foley v. Foley, 7 A.2d 396, 90 N.H. 281.

N.Y.—Botsford v. Burr, 2 Johns Ch., N.Y., 405.

**Undisclosed purpose**

No consideration can be given to beneficiary's undisclosed purpose—Foley v. Foley, 7 A.2d 396, 90 N.H. 281.

90. Cal.—Johnson v. Altman, 215 P. 2d 768, 96 Cal.App.2d 467.

91. Iowa.—Acker v. Priest, 61 N.W. 235, 92 Iowa 610.

65 C.J. p. 372 note 35.

name of another, have, except for certain express exceptions thereto, been abolished;<sup>92</sup> in the majority of jurisdictions they have not been abolished and are still in existence.<sup>93</sup> Statutes invalidating trusts resulting from the payment of the purchase price of realty by one and the taking of the title by another do not apply to or affect other types of resulting trusts.<sup>94</sup> A statute restricting the purposes for which an express trust may be created does not apply to or prohibit resulting trusts.<sup>95</sup>

## § 101. — Effect of Statutes of Frauds and Statutes Prohibiting Parol Trusts

The statute of frauds or a statute prohibiting parol trusts does not apply to resulting trusts.

As a general rule the state of frauds or a statute prohibiting parol trusts applies only to trusts expressly created or declared by the parties;<sup>96</sup> and resulting trusts, since they arise by operation of law from the facts and circumstances attending the transaction, are valid notwithstanding such facts and circumstances rest in parol,<sup>97</sup> and, as con-

92. Ky.—Bryant's Adm'r v. Bryant, 269 S.W.2d 219—Evans v. Payne, 258 S.W.2d 919—Gibson v. Gibson, 249 S.W.2d 63.  
66 C.J. p 372 note 37.

Effect of statutory provisions abolishing trusts created by payment of consideration for conveyance to another on such transactions see *infra* § 116.

### Motor vehicle certificate of title

Statute providing that no court in any case at law or in equity shall recognize right, title, claim, or interest of any person in or to any motor vehicle, unless evidenced by certificate of title or manufacturer's or importer's certificate duly issued in accordance with statute, abrogates common law of resulting trusts with respect to motor vehicles.—In re Case's Estate, 118 N.E.2d 836, 161 Ohio St. 258.

Contra Douglas v. Hubbard, 107 N.E.2d 884, 91 Ohio App. 200, appeal dismissed 104 N.E.2d 182, 157 Ohio St. 91.

### Contracts between husband and wife

Statutes prohibiting wife from contracting with husband do not bar creation of a resulting trust.—Ishida v. Naumu, 34 Hawaii 363.

93. D.C.—Haliday v. Haliday, 11 F.2d 565, 56 App.D.C. 179.  
65 C.J. p 373 note 38.

94. Pa.—Davis v. Commonwealth Trust Co., 7 A.2d 3, 35 Pa. 387—Loughney v. Page, 182 A. 700, 32 Pa. 508—Rosa v. Hummel, 97 A.2d 252 Pa. 678.

65 C.J. p 372 note 37 [b].

95. N.Y.—Western Union Tel. Co. v. Shepard, 62 N.E. 154, 169 N.Y. 170, 58 L.R.A. 115.

96. Miss.—Adcock v. Merchants & Mrs. Bank of Ellmsville, 42 So.2d 427, 207 Miss. 448.

N.M.—Browne v. Sieg, 234 P.2d 1045, 65 N.M. 447.  
65 C.J. p 373 note 42.

Statute of frauds as applied to express trusts see *supra* § 31 et seq.

97. Ala.—Young v. Graver, 35 So.2d 619, 250 Ala. 641—Holman v. Weed, 26 So.2d 721, 248 Ala. 179—Upchurch v. Goodroe, 6 So.2d 869, 242

Ala. 395—Otts v. Avery, 178 So. 844, 234 Ala. 122.

Ariz.—Stewart v. Damron, 160 P.2d 321, 63 Ariz. 158—Collins v. Collins, 52 P.2d 1169, 46 Ariz. 485.  
Ark.—Crain v. Keenan, 236 S.W.2d 731, 218 Ark. 375.

Cal.—Stromerson v. Averill, 133 P.2d 617, reheard 141 P.2d 732, 22 Cal.2d 808—Dougherty v. California Kettlemen Oil Royalties, 69 P.2d 155, 9 Cal.2d 58—Melickian v. Halstead, 263 P.2d 652, 121 Cal.App.2d 469—Gerstner v. Scheuer, 204 P.2d 937, 91 Cal.App.2d 123—Bradley v. Buty, 166 P.2d 914, 73 Cal.App.2d 522—**Corpus Juris** cited in Harvey v. Ballagh, 101 P.2d 147, 150, 38 Cal.App.2d 348—Penzner v. West American Finance Co., 24 P.2d 501, 133 Cal.App. 578.

Colo.—Hahn v. Pitts, 193 P.2d 716, 118 Colo. 173—Vandewiele v. Vandewiele, 136 P.2d 523, 110 Colo. 556.  
Conn.—Reynolds v. Reynolds, 183 A. 394, 121 Conn. 153—Bassett v. Palotti, Andretta & Co., 166 A. 762, 117 Conn. 58.

Fla.—Pierson v. Bill, 189 So. 679, 138 Fla. 104—Walker v. Landress, 149 So. 545, 111 Fla. 356.

Ga.—Stevens v. Stevens, 49 S.E.2d 895, 204 Ga. 340—Harper v. Harper, 33 S.E.2d 154, 199 Ga. 26—Guthrie v. Kelly, 14 S.E.2d 50, 191 Ga. 880.  
Hawaii.—Ishida v. Naumu, 34 Hawaii 363.

Idaho.—Rexburg Lumber Co. v. Purington, 113 P.2d 511, 62 Idaho 461.  
Ill.—Tuntland v. Haugen, 78 N.E.2d 308, 399 Ill. 595—Krasner v. Finlay, 30 N.E.2d 613, 375 Ill. 78—Bride v. Stormer, 15 N.E.2d 282, 368 Ill. 524—Cook v. Blozis, 7 N.E.2d 291, 365 Ill. 625—Bell v. Morris, 76 N.E.2d 820, 333 Ill.App. 221.

Ind.—Nichols v. Spindler, 53 N.E.2d 888, 222 Ind. 502—McClellan v. Beatty, 53 N.E.2d 1013, 115 Ind.App. 173, rehearing denied 55 N.E.2d 327, 115 Ind.App. 173.

Kan.—**Corpus Juris** cited in Oetken v. Shell, 212 P.2d 329, 334, 168 Kan. 244.

Mo.—Sacre v. Sacre, 55 A.2d 592, 143 Me. 80, 173 A.L.R. 1261.

Md.—Pasman v. Pottashnick, 51 A.

2d 664, 188 Md. 105—Ottaviano v. Lorenzo, 179 A. 530, 169 Md. 51.  
Mass.—Collins v. Curtin, 89 N.E.2d 211, 325 Mass. 123.

Mich.—Stephenson v. Golden, 276 N.W. 849, 279 Mich. 710.

Miss.—Chichester v. Chichester, 48 So.2d 123, 209 Miss. 628—Triplett v. Bridgforth, 38 So.2d 756, 205 Miss. 328—Shepherd v. Johnston, 28 So.2d 661, 201 Miss. 99—Tanous v. White, 191 So. 278, 186 Miss. 556.

Mo.—Jankowski v. Delfert, 201 S.W.2d 331, 356 Mo. 184—**Corpus Juris** cited in Carr v. Carroll, 178 S.W.2d 435, 437—Mays v. Jackson, 145 S.W.2d 392, 346 Mo. 1224—Parker v. Blakely, 93 S.W.2d 981, 338 Mo. 1189—Scholle v. Laumann, App. 139 S.W.2d 1067.

Mont.—Campanello v. Mercer, 227 P.2d 312, 124 Mont. 528—Henningsen v. Stromberg, 221 P.2d 438, 124 Mont. 185—Opp v. Boggs, 193 P.2d 379, 121 Mont. 131.

Neb.—Rietz v. Olson, 20 N.W.2d 687, 146 Neb. 623—O'Shea v. O'Shea, 11 N.W.2d 540, 143 Neb. 843—Federal Trust Co. v. Ireland, 246 N.W. 707, 124 Neb. 369.

N.H.—French v. Pearson, 45 A.2d 300, 94 N.H. 18—Foley v. Foley, 7 A.2d 396, 99 N.H. 281.

N.J.—DeMarco v. Estlow, 86 A.2d 446, 178 N.J. Super. 30, affirmed 91 A.2d 272, 21 N.J. Super. 356—Fowler v. Scott, 73 A.2d 278, 8 N.J. Super. 490—Moses v. Moses, 53 A.2d 805, 140 N.J. Eq. 575, 173 A.L.R. 273—Niemaesq v. Barnett Holding Co., 4 A.2d 794, 126 N.J. Eq. 284.

N.C.—Natlson v. A. B. L. Holding Co., 183 N.E. 373, 260 N.Y. 233—Kaplan v. Meyer, 65 N.Y.S.2d 765, 271 App.Div. 837—In re Poth's Will, 279 N.Y.S. 95, 155 Misc. 116, affirmed 283 N.Y.S. 428, 246 App.Div. 522—Le Fevre v. Reliable Paint Supply Co., 273 N.Y.S. 903, 152 Misc. 594—Tesauro v. Tesauro, 112 N.Y.S.2d 216—Coleman v. Mulhikan, 66 N.Y.S.2d 696—Guokas v. Bishara, 57 N.Y.S.2d 588—In re Whipple's Estate, 19 N.Y.S.2d 105.

N.C.—Wilson v. Williams, 2 S.E.2d 19, 215 N.C. 407.  
N.D.—Bodding v. Herman, 36 N.W.2d 561, 76 N.D. 324.

sidered *infra* § 133, parol evidence is admissible to prove a resulting trust. However, as discussed *infra* § 102 d a mere parol agreement to take title in trust for another, invalid as within the statute of frauds, cannot be enforced as a resulting trust in the absence of other facts and circumstances surrounding the transaction which may cause a trust to result. Resulting trusts are expressly exempted from the provisions of the statute of frauds in some jurisdictions<sup>98</sup> and are within an exception of trusts created by operation of law<sup>99</sup> or raised or resulting by implication or construction of law.<sup>1</sup>

*Agreement not to be performed within a year.*

The clause of the statute of frauds which prohibits the bringing of an action on an agreement not to be performed within one year from the making thereof, unless the agreement is in writing, has no application to an action to enforce a trust resulting by implication of law.<sup>2</sup>

Okl.—McKenna v. Lasswell, 250 P.2d 208, 207 Okl. 408—Epps v. Pearnman, 248 P.2d 590, 207 Okl. 177—Younge v. Knappenberger, 240 P.2d 1114, 206 Okl. 48—Childers v. Breese, 213 P.2d 565, 202 Okl. 377—Johnson v. Johnson, 205 P.2d 314, 201 Okl. 268—Scott v. Nelson, 179 P.2d 116, 198 Okl. 392—Exchange Bank of Perry v. Nichols, 164 P.2d 867, 196 Okl. 283—*Corpus Juris* cited in Gill v. First Nat. Bank & Trust Co. of Oklahoma City, 159 P.2d 717, 719, 195 Okl. 607—McGill v. McGill, 113 P.2d 826, 189 Okl. 3—Fibikowski v. Fibikowski, 94 P.2d 821, 185 Okl. 520—McGann v. McGann, 37 P.2d 939, 169 Okl. 515—First Nat. Bank v. Sanders, 35 P.2d 889, 169 Okl. 192.

Pa.—Kalyvas v. Kalyvas, 89 A.2d 819, 371 Pa. 371—Schneiderman v. Kahn, 39 A.2d 608, 350 Pa. 496—Ardolino v. Ardolino, 83 Pa. Dist. & Co. 127, 100 Pittsb. Leg. J. 267—In re Friedmann's Estate, Orph., 40 D. & C. 305—Thomas v. Thomas, Com. Pl., 42 Luz. Leg. Reg. 145—Moxley v. Britt, Com. Pl., 95 Pittsb. Leg. J. 175—In re Besmore's Estate, Orph., 62 York Leg. Rec. 61.

Tenn.—Brunson v. Gladish, 125 S.W. 2d 144, 174 Tenn. 309.

Tex.—Tolle v. Sawtelle, Civ. App., 246 S.W.2d 916, error refused—Johnson v. Dickey, Civ. App., 231 S.W.2d 952, error refused no reversible error—Patrick v. McGaha, Civ. App., 164 S.W.2d 236—*Corpus Juris* cited in Rodriguez v. Vallejo, Civ. App., 157 S.W.2d 172, 173.

Wash.—Graves v. Jones, 17 P.2d 46, 170 Wash. 552.

65 C.J. p 373 note 44.

98. Ill.—Kohlhaas v. Smith, 97 NE 2d 774, 408 Ill. 535—Murray v. Behrendt, 76 NE2d 431, 399 Ill. 22.

99. Colo.—McPherrin v. Fair, 141 P. 472, 57 Colo. 333.

1. Kan.—Lehring v. Lehring, 115 P. 556, 84 Kan. 766.

65 C.J. p 375 note 52.

2. Kan.—Rayl v. Rayl, 50 P. 501, 58 Kan. 585.

65 C.J. p 376 note 53.

3. Ga.—Epps v. Epps, 75 S.E.2d 165, 209 Ga. 643—Hancock v. Hancock, 54 S.E.2d 385, 205 Ga. 684—Archer v. Kelley, 21 S.E.2d 51, 194 Ga. 117.

Iowa.—Newell v. Tweed, 40 N.W.2d 20, 241 Iowa 90.

N.J.—Strong v. Strong, 36 A.2d 410, 134 N.J. Eq. 513, affirmed 40 A.2d 548, 136 N.J. Eq. 103, petition dismissed 42 A.2d 214, 136 N.J. Eq. 361, affirmed 45 A.2d 672, 137 N.J. Eq. 537.

Okl.—Leedy v. Ellis County Fair Ass'n, 110 P.2d 1099, 188 Okl. 348.

65 C.J. p 363 note 41.

Enforcement of contract to devise or bequeath property by fastening trust thereon in hands of heirs, devisees, personal representatives, or holders with notice see Specific Performance § 87.

Judgment lien as attaching to property subject to resulting trust see Judgments § 481.

Resulting trust from acquisition of mining partnership property by

## § 102. Creation and Existence in General

- a. In general
- b. Intention of parties
- c. Necessity for and effect of contract
- d. Express trust
- e. Time of creation

### a. In General

A resulting trust is created where the legal estate is disposed of or acquired but the intent appears or is inferred or assumed from the terms of the disposition or from the accompanying facts and circumstances that the beneficial interest is not to go with the legal title.

In general a resulting trust arises whenever the legal title is in one person but the beneficial interest, either from the payment of the purchase money or other circumstances, is either wholly or partially in another;<sup>3</sup> where the legal estate is disposed of or acquired, not fraudulently or in violation of any fiduciary duty,<sup>4</sup> but the intent appears or is inferred or assumed from the terms of the disposition or from the accompanying facts and circumstances that the beneficial interest is not to go with the legal title.<sup>5</sup> Since the person who holds the property is

mining partner see Mines and Minerals § 246.

A trust may be "implied" when legal title is in one person but beneficial interest either from payment of purchase money or other circumstances is wholly or partially in another—Archer v. Kelley, 21 S.E.2d 51, 194 Ga. 117.

### Necessary condition

A resulting trust cannot arise unless legal title is in one person and beneficial interest is wholly or partially in another—Sands v. Church of Ascension and Prince of Peace, 30 A.2d 771, 181 Md. 636.

### Transfer of trust property

A resulting trust may arise where one person already holds equitable interest and property is deeded to another—Carr v. Carroll, Mo., 178 S.W.2d 435—Woodard v. Cohron, 137 S.W.2d 497, 345 Mo. 967.

4. Ark.—Randolph v. Randolph, 224 S.W.2d 809, 216 Ark. 193—Ripley v. Kelly, 183 S.W.2d 793, 207 Ark. 1011.

Neb.—Auker v. Hendrickson, 17 N.W.2d 878, 145 Neb. 687.

65 C.J. p 364 note 43.

5. U.S.—Doing v. Riley, C.A. Fla., 176 F.2d 449—Kuhn v. Chesapeake & O. Ry. Co., C.C.A.W.Va., 118 F.2d 400.

Ark.—Randolph v. Randolph, 224 S.W.2d 809, 216 Ark. 193—Ripley v. Kelly, 183 S.W.2d 793, 207 Ark. 1011.

Cal.—Stromerson v. Averill, 133 P.2d 617, reheard 141 P.2d 732, 22 Cal.2d

not entitled to the beneficial interest, and the beneficial interest is not otherwise disposed of, it springs back or results to the person who made the disposition, or to his estate.<sup>6</sup> More broadly, it has been stated that a resulting trust arises where property is acquired and held in the name of one person which in equity belongs to another,<sup>7</sup> as where one becomes invested with the title to property under circumstances which in equity obligate him to hold the title and exercise his ownership for the benefit of another.<sup>8</sup> It has been held that a resulting trust will be recognized where it is equitable or just to do so to prevent unjust enrichment.<sup>9</sup>

The law implies a trust where the acts of the person to be charged as trustee are such as in honesty and fair dealing are consistent only with the purpose to hold the property in trust;<sup>10</sup> it is sufficient if the transaction is such that otherwise an injustice would be worked against the supposed cestui que trust.<sup>11</sup> It must be founded on an equity in favor of the cestui que trust against the holder of the legal title,<sup>12</sup> it will not arise merely from the relationship of debtor and creditor,<sup>13</sup> nor does it depend on the general state of accounts between the parties.<sup>14</sup> A resulting trust cannot arise where property is given to a person for his own use,<sup>15</sup> and

808.—Sears v. Rule, 114 P.2d 57, 45 Cal.App.2d 374.

Fla.—Johnson v. Craig, 28 So.2d 696, 158 Fla. 254.

Ga.—Hancock v. Hancock, 54 S.E.2d 385, 205 Ga. 684.

Hawaii.—Ishida v. Naumu, 34 Hawaii 363.

Iowa.—Crawford v. Couch, 15 N.W.2d 633, 234 Iowa 1246.

Kan.—Corpus Juris quoted in Herd v. Chambers, 149 P.2d 583, 593, 158 Kan. 614.

Mass.—Abalan v. Abalan, 107 N.E.2d 302, 329 Mass. 182.

Mich.—Potter v. Lindsay, 60 N.W.2d 133, 337 Mich. 404.

Mo.—Ferguson v. Stokes, 269 S.W.2d 655—Jankowski v. Delfert, 201 S.W.2d 331, 356 Mo. 184—Parker v. Blakeley, 93 S.W.2d 981, 338 Mo. 1189—Dee v. Sutter, App., 222 S.W.2d 541.

Neb.—Holbein v. Holbein, 30 N.W.2d 899, 149 Neb. 281—Kozina v. J. B. Watkins Lumber Co., 20 N.W.2d 606, 146 Neb. 594—Windle v. Kelly, 280 N.W. 445, 135 Neb. 143.

N.J.—Moses v. Moses, 53 A.2d 805, 140 N.J.Eq. 675, 173 A.L.R. 273—Niemaek v. Bernett Holding Co., 4 A.2d 794, 125 N.J.Eq. 284.

N.Y.—In re Feiner's Will, 40 N.Y.S.2d 880, 181 Misc. 434.

Ohio.—Douglas v. Hubbard, 107 N.E.2d 884, 91 Ohio App. 200, appeal dismissed 104 N.E.2d 182, 157 Ohio St. 94.

Okla.—Plumer v. Pearce, 257 P.2d 813, 208 Okl. 526—Epps v. Pearman, 248 P.2d 590, 207 Okl. 177—Morton v. Riddleman, 237 P.2d 421, 205 Okl. 350—Hall v. Pearson, 219 P.2d 617, 203 Okl. 221—Johnson v. Johnson, 205 P.2d 314, 201 Okl. 268—Wisel v. Terhune, 204 P.2d 286, 201 Okl. 231—Scott v. Nelson, 179 P.2d 116, 198 Okl. 392—Hickey v. Ross, 172 P.2d 771, 197 Okl. 643—Exchange Bank of Perry v. Nichols, 164 P.2d 867, 196 Okl. 283—Dorrance v. Dorrance, 163 P.2d 973, 196 Okl. 195—Morton v. Williams, 123 P.2d 960, 196 Okl. 374—Corpus Juris cited in Courts v. Aldridge, 120 P.2d 362,

364, 190 Okl. 29—Maynard v. Taylor, 91 P.2d 649, 185 Okl. 268—Maynard v. Central Nat. Bank of Okmulgee, 91 P.2d 653, 185 Okl. 272—Graham v. Dunlap, 65 P.2d 538, 179 Okl. 295—Beall v. Ferguson, 58 P.2d 598, 177 Okl. 216—Seian v. Davis, 50 P.2d 662, 174 Okl. 433—Warren v. Dodrill, 49 P.2d 137, 173 Okl. 634—Trimble v. Boles, 36 P.2d 861, 169 Okl. 228—First Nat. Bank v. Sanders, 35 P.2d 889, 169 Okl. 192.

Pa.—Gray v. Leibert, 53 A.2d 132, 357 Pa. 130—Hermann v. Henderson, 44 A.2d 254, 353 Pa. 39—In re Northwest Lyceum Ass'n of Reading, Pa., Com.Pl., 45 Berks Co. 137—Gross v. Gross, Com.Pl., 60 Dauph. Co. 460—Depew v. Depew, Com.Pl., 33 Erie Co. 47, 64 York Leg. Rec. 43—Miller v. Buecker, Com.Pl., 63 York Leg. Rec. 53.

65 C.J. p. 364 note 44.

6. Mich.—Potter v. Lindsay, 60 N.W.2d 133, 337 Mich. 404.

7. Cal.—Ranbridge v. Stoner, 106 P.2d 423, 16 Cal.2d 423.

65 C.J. p. 363 note 42.

8. Fla.—Frank v. Eeles, 13 So.2d 216, 152 Fla. 869.

N.J.—Eastmond v. Eastmond, 64 A.2d 901, 2 N.J. Super. 529.

N.C.—Teachey v. Gurley, 199 S.E. 83, 214 N.C. 288.

Okla.—McGill v. McGill, 113 P.2d 826, 189 Okl. 3—Crane v. Owens, 69 P.2d 654, 180 Okl. 452.

Tex.—Shannon v. Shannon, Civ.App., 231 S.W.2d 986.

65 C.J. p. 363 note 41 [a] (3) (5).

**Confidential or fiduciary position**  
Facts which show existence of resulting trust must be of such nature that party to be charged with trust has by contract, agreement, or circumstances put himself in a confidential or fiduciary position which constitutes him a real or informal trustee for complainant.—Chase v. Chase, 81 A.2d 686, 78 R.I. 278.

9. Fla.—Anglin v. Lauderdale-By-The-Sea, 60 So.2d 619, certiorari denied Demka v. Lauderdale-By-

The-Sea, 73 S.Ct. 795, 345 U.S. 935, 17 L.Ed. 1362.

10. Mo.—Stevens v. Fitzpatrick, 118 S.W. 51, 218 Mo. 708.  
Wash.—O'Donnell v. McCool, 154 P. 1090, 89 Wash. 537.

#### Breach of law

A resulting trust arises from a breach of law and the acts of the parties.—State ex rel. Gallatin County High School v. Brandenburg, 82 P.2d 593, 107 Mont. 139.

11. Ind.—Talbot v. Barber, 38 N.E. 487, 11 Ind. App. 1, 54 Am.S.R. 491.  
65 C.J. p. 365 note 59.

12. Mo.—Corpus Juris cited in Little v. Mettee, 93 S.W.2d 1000, 1010, 338 Mo. 1223.  
Tex.—Abilene State Bank v. Donnelly, Civ.App., 277 S.W. 447.

13. U.S.—General Baking Co. v. Gordon, D.C.Pa., 9 F.Supp. 210, modified on other grounds CCA, General Baking Co. v. Harr, 85 F.2d 932, reversed on other grounds 57 S.Ct. 540, 300 U.S. 433, 51 L.Ed. 730, affirmed, CCA, 92 F.2d 162, certiorari denied 58 S.Ct. 369, 302 U.S. 761, 82 L.Ed. 591, rehearing denied 58 S.Ct. 480, 302 U.S. 781, 82 L.Ed. 603.  
65 C.J. p. 364 note 54.

14. Ill.—Holmes v. Clifford, 95 Ill. App. 245.

15. Kan.—Corpus Juris quoted in Herd v. Chambers, 149 P.2d 583, 593, 158 Kan. 614.

Okla.—Hall v. Pearson, 219 P.2d 617, 203 Okl. 221.

65 C.J. p. 364 note 56.

#### Olympic games

No resulting trust for state in proceeds of Olympic games arose, where funds received from sale of state bonds were paid out for expenses on organizing committee's demand, audited by State Olympiad Commission, and no intention to separate beneficial interest from legal title appeared.—Xth Olympiad Committee of Games of Los Angeles, U.S.A. 1932 v. American Olympic Ass'n, 42 P.2d 1023, 2 Cal.2d 600.

it has been said that it never arises in the hands of one who is the real owner of the property.<sup>16</sup>

A resulting trust arises from, or is created by, the facts and circumstances of the transaction,<sup>17</sup> which need not be the same in all cases;<sup>18</sup> and in determining whether a resulting trust has been created, each case is to be decided on its own facts,<sup>19</sup> and the doctrine of resulting trust will be applied whenever the facts are such as clearly to invoke its application.<sup>20</sup> Among other situations a resulting trust has been held to arise where a person comes into possession and control of the property of another,<sup>21</sup> where money is placed in the hands of one person to be delivered to another;<sup>22</sup> where a person

who has assigned certain money to become due on performance of an obligatory contract, receives such money;<sup>23</sup> where damages are collected from a tort-feasor for an injury for which the injured person has already been compensated by way of insurance, and the insurer is subrogated to the claim;<sup>24</sup> where a husband deposits money in the name of his wife and it is understood that the money is to remain the property of the husband;<sup>25</sup> where money which is not connected with the controversy and is not referred to them is collected by arbitrators;<sup>26</sup> where funds are received by the owners of a vessel as damages for interference with a whaling or sealing voyage in which the officers and crew received a certain lay or share of the proceeds

16. Kan.—*Corpus Juris* quoted in *Herd v. Chambers*, 149 P.2d 583, 593, 158 Kan. 614.

Mo.—*Shelton v. Harrison*, 167 S.W. 634, 182 Mo.App. 404.

17. Ala.—*Teal v. Pleasant Grove Local Union No. 204, Farmers' Educational & Co-operative Union of America*, 75 So. 345, 200 Ala. 23. Okl.—*Bryant v. Mahan*, 264 P. 811, 130 Okl. 67.

18. Idaho.—*Shepherd v. Dougan*, 76 P.2d 442, 58 Idaho 543.

Okl.—*Trimble v. Boles*, 36 P.2d 861, 169 Okl. 228—*Bryant v. Mahan*, 264 P. 811, 130 Okl. 67.

19. Idaho.—*Shepherd v. Dougan*, 76 P.2d 442, 58 Idaho 543.

Pa.—*In re Northwest Lyceum Ass'n of Reading, Pa.*, Com.Pl., 45 Berks Co. 137.

R.I.—*Szlatenyi v. Cleverley*, 50 A.2d 185, 72 R.I. 253.

Wash.—*Makinen v. George*, 142 P.2d 910, 19 Wash.2d 340.

#### Resulting trust held created

(1) Where lessees of oil interest in land orally agreed to pay attorneys one-fourth of amount recovered on lessees' claims against an assignee of oil lease and, after attorneys obtained judgments against assignee, lessees obtained reconveyance of oil interest in settlement of judgment debts and released such interest, the attorneys were entitled to one-fourth of proceeds obtained as result of the settlement including one-fourth of royalties received by lessees, and equity would enforce a "resulting trust" in favor of the attorneys for their share of the proceeds, regardless of fact that the oral agreement gave no lien to the attorneys.—*Harvey v. Ballagh*, 101 P.2d 147, 38 Cal. App.2d 348.

(2) Where husband, living apart from wife, delivered to the wife a deed to certain property under agreement whereby proceeds from the sale thereof were to be deposited in bank and withdrawn weekly for support of

wife and child and residence was destroyed by fire before sale was made, a resulting trust was created for purpose of carrying out of agreement, and husband was not entitled to recover proceeds of insurance, but to effectuate agreement, the house would be treated as converted into personality and proceeds would be applied in accordance with agreement.—*Christy v. Christy*, 44 N.Y.S.2d 579.

#### Resulting trust held not created

(1) Formation of corporation, to which owner of land and water rights conveyed distribution system before selling lands and interests in such rights to others, created no resulting trust for latter.—*Braley v. Empire Water Co.*, 20 P.2d 75, 130 Cal.App. 532.

(2) Where a bank, which was trustee under mortgage authorizing it to advance money for payment of taxes on mortgaged realty, did not purchase realty at tax sale, knew nothing about such sale or tax certificate issued to purchaser in name of bank, which later assigned it to purchaser, and advanced no money on account of such certificate, holders of bonds secured by mortgage were not equitably entitled to benefit of certificate.—*Fitzpatrick v. Tice*, 40 N.E.2d 997, 111 Ind.App. 121.

(3) Where one purchasing land from city agreed with person financing purchase to assume responsibility for sale or development of property and to share proceeds therefrom, but purchaser obtained additional tract of land comprising abandoned street and sold additional tract to third party, no resulting trust existed in favor of person financing purchase as against third party, notwithstanding that conveyances to and from purchaser named purchaser as "trustee" since such word was merely descriptive of the person.—*Beatty v. Fellows*, 74 P.2d 677, 101 Colo. 466.

(4) Where mother deceded property to three children to distribute propor-

tionate share that they would succeed to on her death, and mother remained in possession of the property and collected rents under supervision of older daughter, who had acquired the interest of one of the other children, there was no implied agreement by older daughter to account to other child for rents and profits received during life of mother.—*Hitchcock v. George*, 143 P.2d 137, 193 Okl. 327.

#### (5) Other cases.

Iowa.—*McLain v. Sorenson*, 20 N.W. 2d 449, 236 Iowa 896.

Pa.—*Styer v. Hess*, Com.Pl., 59 Mont.G. 41.

Tex.—*Anderson v. Powell*, Civ.App., 117 S.W.2d 167, error dismissed. 65 C.J. p 365 note 60 [a].

#### Family relationship

It was proper for court of equity to take into account family relationship of parties and informal character of their arrangement with respect to realty, in determining whether formal requirements for resulting trust were present.—*Merschatt v. Merschatt*, 117 N.E.2d 868, 1 Ill.App. 2d 429.

20. Okl.—*Bryant v. Mahan*, 264 P. 811, 130 Okl. 67.

21. N.Y.—*J. J. Little & Ives Co. v. Acceptance Corporation*, 213 N.Y. S. 606, 215 App. Div. 427. 65 C.J. p 365 note 61.

22. N.Y.—*Snyder v. Wynkoop*, 161 N.E. 417, 248 N.Y. 54, reargument denied 162 N.E. 537, 248 N.Y. 591. 65 C.J. p 365 note 62.

23. N.Y.—*Hinkle Iron Co. v. Kohn*, 128 N.E. 113, 229 N.Y. 179.

24. U.S.—*Gray v. U. S.*, D.C. Mass., 77 F.Supp. 869, reversed on other grounds, C.A., State Farm Mut. Liability Ins. Co. v. U. S., 172 F.2d 737.

25. N.H.—*Barrett v. Cady*, 96 A. 325, 78 N.H. 60.

26. N.Y.—*In re Friedman*, 213 N.Y.S. 369, 215 App. Div. 130.

as wages;<sup>27</sup> and where a child received property either by deed or will from a parent which property the child has contracted to divide with the other children.<sup>28</sup>

An exchange by a mortgagor of standing timber on mortgaged lands for other lands, taking title to himself, raises a resulting trust in the lands received in exchange to the extent to which the mortgage security is depleted.<sup>29</sup> An unauthorized conveyance of one's property to another has been held to give rise to an implied trust.<sup>30</sup> It has been held that one who pledges securities for the payment of a debt is an implied trustee, and that any property received by him by virtue of his ownership of the securities is subject to an implied trust to apply it to the payment of the debt and the redemption of the pledge.<sup>31</sup> One collecting taxes for the government holds the funds in trust for the government,<sup>32</sup> but, where a tax imposed on the seller and based on the selling price of the goods is paid by the seller and the amount thereof added to the selling price, such amount is not held in trust for the buyer when the tax is refunded by the government on the basis that the law never authorized its imposition.<sup>33</sup> It has been held that an employer who makes deductions from his employees' pay for the purpose of paying for a service rendered to his employees by a third person does not hold the funds in trust for the third person where the deductions were not made pursuant to agreement with the employees or the third person.<sup>34</sup> Where a life tenant intended to use the proceeds of a sale of timber to improve the property, his executor did not hold the proceeds of

the sale in trust for that purpose.<sup>35</sup> One recovering judgment for personal injuries does not hold as trustee from the amount paid in settlement of the judgment, a sufficient sum for the payment of the physician who attended him;<sup>36</sup> nor will a trust in the proceeds of insurance policies result where a husband fails to keep his agreement to make his wife the beneficiary of his insurance policies on her agreement not to contest his will.<sup>37</sup>

Some cases have attempted to categorize the situations in which a resulting trust arises,<sup>38</sup> as, for example, where property is purchased in the name of one person, but the money or consideration is paid by another, as discussed *infra* § 115 et seq; where a person standing in a fiduciary relation uses fiduciary funds or assets to purchase property in his own or a third person's name *infra* § 114; where there is a disposition of property on trusts which are not declared, or are only partially declared, or are illegal, *infra* § 103; and where a conveyance is made without any consideration and it appears from the circumstances that the grantee was not intended to take beneficially, *infra* § 105.

*Tort; fraud.* No tort or breach of duty is involved in a resulting trust.<sup>39</sup> It has been said that a resulting trust will arise in certain cases of fraud where transactions have been carried on *mala fide*,<sup>40</sup> and that fraud is an essential element of a resulting trust;<sup>41</sup> but the trust which arises in the case of fraudulent transactions is more properly classified as a constructive trust and not as a resulting trust.<sup>42</sup> It is generally held that a resulting trust is not based on fraud or misrepresentation,<sup>43</sup> and

27. U.S.—U. S. v. Lafin, C.C.A.Cal., 24 F.2d 683.

65 C.J. p 366 note 66.

**Insurance contributed to by crew**

Where owners of fishing vessel pursuant to agreement with members of crew to pay their share of premium procured insurance against loss of charter hire due to breakdown, including crew members' wage risk under contract of employment providing that crew would receive no wages for any period for which owners would not be paid under time charter, proceeds of such insurance in hands of owners were subject to a resulting trust in favor of crew members—Abelsen v. Prothero, 238 P.2d 397, 39 Wash.2d 737.

28. Tex.—Miller v. Miller, Civ.App., 283 S.W. 1085.

29. Ala.—Nelson v. First Nat. Bank, 113 So. 291, 216 Ala. 349.

30. Ill.—Mauriceau v. Haugen, 56 N.E.2d 367, 387 Ill. 186.

31. U.S.—Reed v. Kollerman, D.C.

Pa., 40 F.Supp. 46, motion dismissed 2 F.R.D. 195.

Pa.—Peoples-Pittsburgh Trust Co. v. Saupp, 182 A. 376, 320 Pa. 138, 103 A.L.R. 844—James Talcott, Inc. v. Margules, 70 A.2d 367, 166 Pa.Super. 267.

32. U.S.—In re Hercules Service Parts Corp., D.C.Mich., 101 F.Supp. 455, affirmed, C.A., Hercules Service Parts Corp. v. U. S., 202 F.2d 938.

33. U.S.—Cohen v. Swift & Co., C.C. A. Ill., 95 F.2d 131, certiorari denied 58 S.Ct. 943, 304 U.S. 561, 82 L.Ed. 1528.

D.C.—Heckman & Co. v. I. S. Dawes & Son Co., 12 F.2d 154, 56 App. D.C. 213.

34. Fla.—Columbia Bank for Cooperatives v. Okelanta Sugar Corp., 52 So.2d 670.

35. Ind.—Mertz v. Bauman, 89 N.E.2d 718, 120 Ind.App. 236.

36. S.C.—Traywick v. Wannamaker, 150 S.E. 655, 153 S.C. 146, 66 A.L.R. 703.

37. Mass.—Smith v. Coggan, 160 N. E. 799, 263 Mass. 248.

38. Mo.—Jankowski v. Delfert, 201 S.W.2d 331, 356 Mo. 184.

39. Ala.—Hooks v. Hooks, 63 So.2d 348, 258 Ala. 427—J. A. Owens & Co. v. Blanks, 144 So. 35, 225 Ala. 566.

40. Okl.—Clark v. Frazier, 177 P. 589, 591.

65 C.J. p 364 note 49.

41. Pa.—Sneiderman v. Kahn, 39 A. 2d 608, 350 Pa. 496.

65 C.J. p 371 note 16.

42. Md.—Springer v. Springer, 125 A. 162, 144 Md. 465.

Fraud as essential and distinguishing feature of constructive trusts—see *infra* § 139.

43. Ala.—Corpus Juris cited in Smith v. Hart, 65 So.2d 501, 503, 259 Ala. 7.

Fla.—Smith v. Smith, 196 So. 409, 143 Fla. 159.

Ga.—Jackson v. Jackson, 104 S.E. 236, 150 Ga. 544.

fraud is not a necessary element of a resulting trust<sup>44</sup> and it is not necessary that there be anything savoring of fraud, or misrepresentation, or mistake in the transaction.<sup>45</sup>

*Effect of illegality of transaction.* In order to raise a resulting trust the transaction must be honest;<sup>46</sup> a resulting trust cannot arise from acts contrary to public policy or a statute<sup>47</sup> or in favor of the guilty person out of acts which have their origin in a fraudulent purpose,<sup>48</sup> as where a person conveys property to another in fraud of his creditors, as discussed in *Fraudulent Conveyances* § 271. However, if the property is a homestead so that it is exempt by law from liability for the owner's debts and, therefore, not susceptible of a fraudulent alienation the fact that the beneficial owner transferred the legal title to, or caused it to be taken in the name of, another so as to put it beyond the reach of his creditors will not prevent the creation

of the trust.<sup>49</sup> Equity will not recognize a resulting trust for the accomplishment of a purpose which, because of illegality or violation of public policy, is beyond the powers of an express trust.<sup>50</sup>

### b. Intention of Parties

As a general rule, a resulting trust arises where, and only where, such may reasonably be presumed to be the intention of the parties, as determined from the facts and circumstances existing at the time of the transaction.

The doctrine of resulting trusts is founded on the presumed intention of the parties;<sup>51</sup> and, as a general rule, it arises where, and only where, such may be reasonably presumed to be the intention of the parties, as determined from the facts and circumstances existing at the time of the transaction out of which it is sought to be established.<sup>52</sup> In a resulting trust there is always the element of an intention to create a trust,<sup>53</sup> which is not ex-

Okl.—*Corpus Juris* quoted in *Trimble v. Boles*, 36 P.2d 861, 864, 169 Okl. 228.

44. Mo.—*Orrick v. Heberer*, App., 124 S.W.2d 664.

Okl.—*Corpus Juris* quoted in *Trimble v. Boles*, 36 P.2d 861, 864, 169 Okl. 228.

65 C.J. p 371 note 18.

45. Okl.—*Corpus Juris* quoted in *Trimble v. Boles*, 36 P.2d 861, 864, 169 Okl. 228.

65 C.J. p 371 note 19.

46. Tex.—*Murphy v. Johnson*, Civ. App., 54 S.W.2d 158.

47. Tex.—*Murphy v. Johnson*, supra.

65 C.J. p 372 note 29.

48. Utah—*Olsen v. Bank of Ephraim*, 68 P.2d 195, 93 Utah 364, rehearing denied 73 P.2d 78, 93 Utah 379.

65 C.J. p 372 note 80.

49. Neb.—*Cowles v. Cowles*, 131 N.W. 788, 89 Neb. 327.

50. Ohio—*State ex rel. Squire v. Central United Nat. Bank*, 4 Ohio Supp. 269.

51. Ala.—*Marshall v. Marshall*, 8 So.2d 843, 243 Ala. 169.

Del.—*Corpus Juris* cited in *Bodley v. Jones*, 59 A.2d 463, 468, 30 Del.Ch. 480.

Ga.—*Loggins v. Daves*, 40 S.E.2d 520, 201 Ga. 628.

Ill.—*Paluszok v. Wohlrab*, 115 N.E.2d 764, 1 Ill.2d 363—*McCabe v. Heberer*, 102 N.E.2d 794, 410 Ill. 557—*Carrillo v. O'Hara*, 81 N.E.2d 513, 400 Ill. 518—*Tuntland v. Haugen*, 78 N.E.2d 308, 399 Ill. 595—*Kane v. Johnson*, 73 N.E.2d 321, 397 Ill. 112.

Kan.—*Corpus Juris* quoted in *Herd v. Chambers*, 149 P.2d 583, 593, 158 Kan. 614.

Mo.—*Parker v. Blakeley*, 93 S.W.2d 981, 338 Mo. 1189.

N.C.—*Lawrence v. Heavner*, 61 S.E.2d 687, 232 N.C. 557.

Ohio.—*In re Barnes' Estate*, Com.Pl., 108 N.E.2d 88, affirmed App., 108 N.E.2d 101.

Okl.—*Seran v. Davis*, 50 P.2d 662, 174 Okl. 433.

Pa.—*A. B. Dick Co. v. Third Nat. Bank*, 17 Pa.Dist. & Co. 649—*Rachkauskas v. Diamond*, Com.Pl., 46 Sch.L.R. 1.

Tex.—*Mills v. Gray*, 210 S.W.2d 985, 147 Tex. 33—*Morrison v. Farmer*, Civ.App., 210 S.W.2d 245, reversed on other grounds 213 S.W.2d 813, 147 Tex. 122.

Wash.—*Corpus Juris* cited in *Creaman v. Boyle*, 196 P.2d 835, 840, 31 Wash.2d 345.

65 C.J. p 366 note 73.

Wash.—*Corpus Juris* cited in *Creaman v. Boyle*, 196 P.2d 835, 840, 31 Wash.2d 345.

65 C.J. p 366 note 73.

### IX situation had been anticipated

Courts of equity declare resulting trusts in favor of donors for the purpose of carrying out what appears from the circumstances would probably have been the donor's intention if he had thought of the situation which arose—*Gray v. Harriet Lane Home for Invalid Children*, 64 A.2d 102, 192 Md. 251.

### Transforming intention into obligation

A resulting trust transforms a prior intention of parties into an obligation by the grantee to hold and deal with land in recognition thereof—*Jones v. Crawford*, 30 So.2d 57, 201 Miss. 791, suggestion of error overruled 30 So.2d 513, 201 Miss. 791.

52. Cal.—Xth Olympiad Committee of Games of Los Angeles, U. S. A.

1932 v. American Olympic Ass'n, 42 P.2d 1023, 2 Cal.2d 600—*Baskett v. Crook*, 195 P.2d 39, 86 Cal.App.2d 355.

Ga.—*Loggins v. Daves*, 40 S.E.2d 520, 201 Ga. 628.

Ill.—*Wright v. Wright*, 118 N.E.2d 280, 2 Ill.2d 246—*Johnson v. Johnson*, 115 N.E.2d 617, 1 Ill.2d 319.

—*Fields v. Fields*, 114 N.E.2d 402, 415 Ill. 324—*Craven v. Craven*, 95 N.E.2d 489, 407 Ill. 252.

Kan.—*Corpus Juris* quoted in *Herd v. Chambers*, 149 P.2d 583, 593, 158 Kan. 614.

Md.—*Sands v. Church of Ascension and Prince of Peace*, 30 A.2d 771, 181 Md. 536.

Mo.—*Corpus Juris* quoted in *Parker v. Blakeley*, 93 S.W.2d 981, 988, 338 Mo. 1189.

N.C.—*Corpus Juris* cited in *Lawrence v. Heavner*, 61 S.E.2d 687, 699, 232 N.C. 557.

Tex.—*Miller v. Donald*, Civ.App., 235 S.W.2d 201, error refused no reversible error—*Ribbert v. Waples-Platter Co.*, Civ.App., 156 S.W.2d 146, error refused.

Wash.—*Corpus Juris* cited in *Creaman v. Boyle*, 196 P.2d 835, 840, 31 Wash.2d 345.

65 C.J. p 366 note 74.

53. Cal.—*Stromerson v. Averill*, 133 P.2d 617, reheard 141 P.2d 732, 22 Cal.2d 808.

Kan.—*Corpus Juris* quoted in *Herd v. Chambers*, 149 P.2d 583, 593, 158 Kan. 614.

65 C.J. p 367 note 75.

*Intention is essential element of resulting trust, although such intention need not be expressed by words*

Iowa—*Andrew v. Martin*, 254 N.W. 67, 218 Iowa 19.

Okl.—*Smith v. Minter*, 191 P.2d 929, 200 Okl. 208.



pressed<sup>54</sup> but is implied or presumed by law from the attendant circumstances<sup>55</sup> and without regard to the particular intention of the parties;<sup>56</sup> so, in a proper case, the trust may exist notwithstanding the party to be charged as trustee may never have agreed to the trust and may have really intended to resist it.<sup>57</sup>

Since, however, a resulting trust is designed to carry the presumptive intention of the parties into effect, not to defeat it,<sup>58</sup> it must be consistent with the intention of the parties at the time of the acquisition of the property<sup>59</sup> and will not be presumed or implied unless taking all the circumstances together it is the fair and reasonable interpretation of their acts and transactions.<sup>60</sup> A resulting trust will not be created or enforced contrary to the ascertained intention of the parties.<sup>61</sup> So, while it

is not essential to the creation of a resulting trust that the proof should show there was an agreement to that effect, it may be defeated by proof of an understanding between the parties that no trust should result,<sup>62</sup> as where there is an intent that the party in whose name the property is taken should hold it as his own,<sup>63</sup> or where there is an express agreement in writing showing an intent not to create a trust.<sup>64</sup>

#### c. Necessity for and Effect of Contract

A resulting trust does not arise out of, and is not dependent on, the existence of a contract or agreement between the parties.

Since, as stated supra § 98, resulting trusts are created by operation of law, they do not arise out of, and are not dependent on, the existence of a contract or agreement between the parties,<sup>65</sup> but arise

54. Kan.—*Corpus Juris* quoted in *Herd v. Chambers*, 149 P.2d 583, 593, 158 Kan. 614.  
65 C.J. p 367 note 76.

#### Never directly expressed

The intention to create a resulting trust is never expressed directly in words, but equily may infer it, in proper cases, on equitable principle that the beneficial estate follows consideration and attaches to the person from whom the consideration comes.—*Creasman v. Boyle*, 196 P.2d 835, 81 Wash 2d 845.

55. Fla.—*Flanagan v. Herrett*, 178 So. 147, 130 Fla. 531.

Iowa.—*Newell v. Tweed*, 40 N.W.2d 20, 241 Iowa 90

Kan.—*Corpus Juris* quoted in *Herd v. Chambers*, 149 P.2d 583, 593, 158 Kan. 614.

Tex.—*Sohio Petroleum Co. v. Jurek*, Civ App., 248 S.W.2d 294.  
65 C.J. p 367 note 77.

56. Kan.—*Corpus Juris* quoted in *Herd v. Chambers*, 149 P.2d 583, 593, 158 Kan. 614

Okl.—*Childers v. Breese*, 213 P.2d 565, 202 Okl. 377—*Exchange Bank of Perry v. Nichols*, 164 P.2d 867, 196 Okl. 283.

65 C.J. p 367 note 78.

57. Idaho.—*Shepherd v. Dougan*, 76 P.2d 412, 58 Idaho 543

Kan.—*Corpus Juris* quoted in *Herd v. Chambers*, 149 P.2d 583, 593, 158 Kan. 614

65 C.J. p 367 note 79.

58. Kan.—*Corpus Juris* quoted in *Herd v. Chambers*, 149 P.2d 583, 593, 158 Kan. 614.

Me.—*Sacre v. Sacre*, 55 A.2d 592, 143 Me. 80, 173 A.L.R. 1261.

W.Va.—*Corpus Juris* cited in *Belmont Iron Works v. Boyle*, 198 S.E. 527, 531, 126 W.Va. 339.  
65 C.J. p 367 note 80.

59. Kan.—*Corpus Juris* quoted in

*Herd v. Chambers*, 149 P.2d 583, 593, 158 Kan. 614.

Mo.—*Corpus Juris* cited in *Adams v. Adams*, 156 S.W.2d 610, 614, 348 Mo. 1041.

Tex.—*Burns v. Veritas Oil Co.*, Civ. App., 236 S.W. 440.

60. Kan.—*Corpus Juris* quoted in *Herd v. Chambers*, 149 P.2d 583, 593, 158 Kan. 614.

N.Y.—*Pennan v. Slocum*, 41 N.Y. 53.

61. Fla.—*Grable v. Nunez*, 64 So.2d 154.

65 C.J. p 367 note 83.

62. Ill.—*Frowin v. Stark*, 149 N.E. 588, 319 Ill. 35.

63. Fla.—*Flanagan v. Herrett*, 178 So. 147, 130 Fla. 531.

65 C.J. p 367 note 85.

64. S.C.—*De Hihns v. J'ree*, 49 S.E. 841, 70 S.C. 344

65. Fla.—*Smith v. Smith*, 196 So. 409, 143 Fla. 159.

Ga.—*Epps v. Epps*, 75 S.E.2d 165, 269 Ga. 613—*Guth v. Kelly*, 14 S.E.2d 50, 191 Ga. 880.

Ill.—*Johnson v. Johnson*, 115 N.E.2d 617, 1 Ill.2d 319—*Fields v. Fields*, 114 N.E.2d 402, 415 Ill. 524—*McCabe v. Hebrner*, 102 N.E.2d 794, 410 Ill. 557—*Kohlbas v. Smith*, 97 N.E.2d 774, 408 Ill. 535—*Zimmerman v. Kennedy*, 90 N.E.2d 756, 405 Ill. 306—*Carrillo v. O'Hara*, 81 N.E.2d 513, 400 Ill. 518—*Tuntland v. Hauken*, 78 N.E.2d 308, 399 Ill. 595

—*Kane v. Johnson*, 73 N.E.2d 321, 397 Ill. 112—*Cook v. Blaziss*, 7 N.E.2d 291, 365 Ill. 625—*Baker v. Le Mire*, 189 N.E. 904, 355 Ill. 626.

Mo.—*Mayns v. Jackson*, 146 S.W.2d 392, 346 Mo. 1224—*Purvis v. Hardin*, 122 S.W.2d 936, 343 Mo. 652.

Mont.—*State ex rel. Gallatin County High School v. Brandenburg*, 82 P.2d 593, 107 Mont. 199—*Stauffer v. Great Falls Public Service Co.*, 43 P.2d 647, 99 Mont. 324.

N.J.—*Rayher v. Rayher*, 96 A.2d 693, 25 N.J. Super. 494, reversed on other grounds 101 A.2d 524, 14 N.J. 174.  
N.C.—*Teacher v. Gurley*, 199 S.E. 83, 214 N.C. 288.  
N.D.—*Redman v. Biewer*, 48 N.W.2d 372, 78 N.D. 120.  
Tex.—*Miller v. Donald*, Civ.App., 235 S.W.2d 201, error refused no reversible error—*Sims v. Duncan*, Civ. App., 195 S.W.2d 156.  
65 C.J. p 368 note 97.

Express understanding is not necessary element of resulting trust, but action of parties with respect to payment and the deed is deemed to amount to expression of trust intent which takes place of an oral or written agreement.—*McKenna v. Lasswell*, 250 P.2d 208, 207 Okl. 408.

Resulting trust does not rest on express agreement but on an implied agreement by which title is taken in the name of another as a matter of convenience.—*Hooks v. Hooks*, 63 So. 2d 348, 258 Ala. 427—*J. A. Owens & Co. v. Blanks*, 144 So. 35, 225 Ala. 566.

Implied trusts are not created by agreement and are not the results of agreement, express or implied, but are products of conduct, in which it is not necessary that cestui que trust have any part or knowledge but with respect to which the law imputes an intention to the actor and the obligation to do equity when called on to do so, irrespective of whether actor had any such intention.—*Rimmer v. Austin*, 4 So.2d 224, 191 Miss. 664.

Resulting trusts are consensual in origin, and with such relationships the presumptions of innocence and fair dealing apply.—*Brown v. New York Life Ins. Co.*, D.C.Or., 58 F. Supp. 252, affirmed, C.C.A., 152 F.2d 246.

Implied trust is based on implied contract, which is implied either in

by implication of law from their acts and conduct.<sup>66</sup> So a trust may result without any contract or understanding between the trustee and cestui que trust,<sup>67</sup> and even in the total ignorance of the parties.<sup>68</sup> A resulting trust will not arise from a contract or agreement which is legally enforceable,<sup>69</sup> and a contract or agreement, of itself, cannot create a resulting trust.<sup>70</sup>

On the other hand, the mere existence of an agreement or understanding between the parties will not preclude a resulting trust,<sup>71</sup> and it may be considered as throwing light on their intention<sup>72</sup> or in establishing the fact of the ownership of the purchase money and how it was invested.<sup>73</sup> A trust may result from a grant or contract, the purpose of which turns out to be incapable of performance or of specific performance.<sup>74</sup> The mere fact that the person to whom a conveyance is made has agreed to purchase or hold the property for another, who

has not paid any or has paid only a very small part of the purchase money, does not create a resulting trust in the latter's favor,<sup>75</sup> particularly where such agreement is made after the property has been purchased,<sup>76</sup> or where it does not appear that any valid consideration was given for such agreement.<sup>77</sup> Where, however, the purchase money is paid by the promisee,<sup>78</sup> or there is fraud at the time of the sale,<sup>79</sup> or the promisee has an actual interest in the property or a bona fide claim thereto,<sup>80</sup> the courts have, in various cases, held a trust to result although such situations are more often treated as giving rise to constructive trusts, as discussed infra § 150.

### d. Express Trust

A resulting trust cannot arise where there is a valid express trust; but where the facts are such as to create a resulting trust, an express trust declaration, unenforceable because it is oral, will not prevent a resulting trust from arising.

fact or in law.—*Baker v. Schneider*, 80 S.E.2d 783, 210 Ga. 493.—*Jones v. Jones*, Ga. 26 S.E.2d 602.

66. Ala.—*Johnson v. Johnson*, 67 So. 2d 841, 259 Ala. 550.

Fla.—*Walker v. Landress*, 149 So. 545, 111 Fla. 356.

Ga.—*Epps v. Epps*, 75 S.E.2d 165, 209 Ga. 643.

Idaho.—*Corpus Juris cited in* *Shepherd v. Dougan*, 76 P.2d 442, 445, 58 Idaho 543.

Ill.—*Johnson v. Johnson*, 115 N.E.2d 617, 1 Ill.2d 319.—*Fields v. Fields*, 114 N.E.2d 402, 415 Ill. 324.—*Kohlhaas v. Smith*, 97 N.E.2d 774, 408 Ill. 535.—*Craven v. Craven*, 95 N.E.2d 489, 407 Ill. 252.—*Zimmerman v. Kennedy*, 90 N.E.2d 756, 405 Ill. 306.—*Tuntland v. Haugen*, 78 N.E.2d 308, 399 Ill. 595.—*Houdek v. Ehrenberger*, 72 N.E.2d 837, 397 Ill. 62.—*Cook v. Blazis*, 7 N.E.2d 291, 365 Ill. 625.

Mo.—*James v. James*, 248 S.W.2d 623.—*Purvis v. Hardin*, 122 S.W.2d 936, 343 Mo. 652.—*Parker v. Blakeley*, 93 S.W.2d 981, 338 Mo. 1189.—*In re Title Guaranty Trust Co.*, App., 113 S.W.2d 1053.

Mont.—*Stauffer v. Great Falls Public Service Co.*, 43 P.2d 617, 99 Mont. 324.

N.D.—*Redman v. Brewer*, 48 N.W.2d 272, 78 N.D. 120.

65 C.J. p 369 note 98.

67. Ill.—*Williams v. Brown*, 14 Ill. 200.

68. Ill.—*Williams v. Brown*, *supra*.

69. Idaho.—*Shepherd v. Dougan*, 76 P.2d 442, 58 Idaho 543.

Mo.—*Mays v. Jackson*, 146 S.W.2d 392, 346 Mo. 1224.

70. Mo.—*Woodard v. Cohorn*, 137 S.W.2d 497, 345 Mo. 967.

N.H.—*Bailey v. Scribner*, 80 A.2d 386, 97 N.H. 65.

71. Ala.—*Corpus Juris cited in* *Johnson v. Johnson*, 67 So.2d 841, 843, 259 Ala. 550.

Cal.—*Viner v. Untrecht*, 158 P.2d 3, 26 Cal.2d 261.

Ga.—*Estes v. Estes*, 55 S.E.2d 217, 205 Ga. 814.—*Wages v. Wages*, 42 S.E.2d 481, 202 Ga. 155.—*Mitchell v. Mitchell*, 40 S.E.2d 738, 201 Ga. 621.—*Giffin v. Kelly*, 14 S.E.2d 50, 191 Ga. 880.

Miss.—*Corpus Juris cited in* *Pitchford v. Howard*, 45 So.2d 142, 148, 208 Miss. 567.—*Corpus Juris cited in* *Sample v. Romine*, 8 So.2d 257, 262, 193 Miss. 706.

Ohio.—*Lewis v. Akerberg*, *Com. Pl.*, 118 N.E.2d 166.

65 C.J. p 370 note 13.

Fact that contract is void does not prevent transaction from giving rise to a resulting trust.—*Shepherd v. Dougan*, 76 P.2d 442, 58 Idaho 543.

72. Ala.—*Corpus Juris cited in* *Johnson v. Johnson*, 67 So.2d 841, 843, 259 Ala. 550.

Cal.—*Viner v. Untrecht*, 158 P.2d 3, 26 Cal.2d 261.

Ga.—*Estes v. Estes*, 55 S.E.2d 217, 205 Ga. 814.

65 C.J. p 371 note 14.

Admissibility in evidence of parol agreement in action to establish resulting trust see *infra* § 153.

73. Ala.—*Corpus Juris cited in* *Johnson v. Johnson*, 67 So.2d 841, 843, 259 Ala. 550.

Mont.—*Lynch v. Herrig*, 80 P. 240, 32 Mont. 267.

74. Or.—*Wright v. Chilcott*, 121 P. 895, 122 P. 765, 61 Or. 561.

Trust resulting from failure of express trust see *infra* § 103.

75. Ark.—*McKindley v. Humphrey*, 161 S.W.2d 962, 204 Ark. 333.—*Castleberry v. Castleberry*, 155 S.

W.2d 44, 202 Ark. 1039.—*Holman v. Kirby*, 128 S.W.2d 357, 198 Ark. 326.

—*Lasko v. Hicks*, 114 S.W.2d 9, 195 Ark. 705.—*George v. Donahue*, 86 S.W.2d 1108, 191 Ark. 584.

Pa.—*Sneiderman v. Kahn*, 39 A.2d 608, 350 Pa. 496.—*Bucks v. Overly*, *Com. Pl.*, 50 *Lanc. Rev.* 71, 95 *Pittsb. Leg. J.* 19, 60 *York Leg. Rec.* 109.

Tex.—*Johnson v. Black*, *Civ. App.*, 197 S.W.2d 523, error refused no reversal error.

Wash.—*Carikonen v. Alberts*, 83 P.2d 899, 196 *Wash. 575*, 135 A.L.R. 209.

65 C.J. p 369 note 5.

Agreement by person acquiring title to hold for, or convey to, another as creating express trust see *supra* § 51.

Agreement to purchase for joint benefit as creating resulting trust see *infra* § 108.

Parol agreement to hold for or convey to another as within statute of frauds see *supra* § 34.

76. Ala.—*Miller v. Stanford*, 14 So. 611, 102 Ala. 277.

Kv.—*Wallace v. Marshall*, 9 B.Mon. 148.

65 C.J. p 370 note 6.

77. Tex.—*Burns v. Veritas Oil Co.*, *Civ. App.*, 230 S.W. 440.

65 C.J. p 370 note 7.

78. Pa.—*Lancaster Trust Co. v. Long*, 69 A. 993, 220 Pa. 499.

65 C.J. p 370 note 8.

Resulting trust where consideration is paid by one and title taken by another generally see *infra* § 115 et seq.

79. Pa.—*Appeal of McCall*, 11 A. 206, 8 Pa.Cas. 260.

80. Cal.—*Penziner v. West American Finance Co.*, 24 P.2d 501, 135 Cal. App. 578.

65 C.J. p 370 note 10.

A resulting trust cannot arise where there is a valid express trust declared by the parties or evidenced by a written declaration thereof,<sup>81</sup> and where an agreement is made at the time of the transaction to hold the property on a trust different from that which would arise by implication of law,<sup>82</sup> or where the trustee is expressly directed by the trust instrument to take and hold the conveyance in his own name,<sup>83</sup> a resulting trust will not arise. An express trust cannot be transformed into a resulting trust, merely because of the want of legal evidence to establish it as an express trust;<sup>84</sup> a parol agreement to take title in trust for another, invalid as within the statute of frauds, cannot be enforced as a resulting trust in the absence of other facts and circumstances surrounding the transaction which may cause such a trust to result.<sup>85</sup> However, it has been held that the fact that there has been an express trust declared by parol which is invalid because of the statute of frauds will not prevent a

trust from resulting by operation of law from the acts of the parties.<sup>86</sup> So, if the circumstances are such as to give rise to a resulting trust, it is not affected by an express parol agreement between the parties to the same effect.<sup>87</sup> A resulting trust will not arise from a mere promise to execute an agreement declaratory of a trust, where the promise is on certain conditions which the promisee refuses to comply with.<sup>88</sup> A person is not precluded from setting up a resulting trust by reason of a declaration of trust to which he is not a party.<sup>89</sup>

### e. Time of Creation

A resulting trust must result, if at all, the instant the title passes, and will not arise on other than the state of facts existing when the property is acquired.

A resulting trust must result, if at all, the instant the title passes, and will not arise on other than the state of facts existing when the property is acquired.<sup>90</sup> It cannot be created by subsequent oc-

81. Ill.—Baker v. Le Mire, 189 N.E. 904, 355 Ill. 626—Stelling v. Stelling, 153 N.E. 718, 323 Ill. 122. 65 C.J. p. 367 note 87.

Failure of express trust or defect in its creation or execution, or termination of trust as giving rise to resulting trust see *infra* § 103.

Where an alleged trust must be established by agreement, the agreement must be in writing and the trust cannot be a resulting trust—Purvis v. Hardin, 122 S.W.2d 936, 343 Mo. 652.

82. Conn.—Wilson v. Warner, 93 A. 533, 89 Conn. 243. 65 C.J. p. 367 note 88.

83. N.Y.—Ring v. McCoun, 10 N.Y. 268.

84. Mo.—Corpus Juris quoted in Parker v. Blakely, 93 S.W.2d 981, 988, 338 Mo. 1189. 65 C.J. p. 368 note 90, p. 377 note 71-72.

85. Ga.—Stevens v. Stevens, 49 S.E. 2d 895, 204 Ga. 340. Mich.—Stephenson v. Golden, 276 N.W. 819, 279 Mich. 710.

N.Y.—Natselson v. A. B. L. Holding Co., 183 N.E. 373, 260 N.Y. 233. Ohio—Bell v. Vardalides, App., 59 N.E. 2d 73.

Pa.—Sneiderman v. Kahn, 39 A.2d 608, 350 Pa. 496. Tenn.—Walker v. Walker, 2 Tenn. App. 279.

65 C.J. p. 375 note 49.

86. Ark.—Corpus Juris quoted in Mortensen v. Ballard, 188 S.W.2d 749, 750, 209 Ark. 1.

Conn.—Bassett v. Pallotti, Andretta & Co., 166 A. 752, 117 Conn. 58.

Fla.—Walker v. Landress, 149 So. 545, 111 Fla. 356.

Ga.—Stevens v. Stevens, 49 S.E.2d 895, 204 Ga. 340.

Ill.—McDonnell v. Holden, 185 N.E. 572, 352 Ill. 362. Mo.—Corpus Juris cited in Carr v. Carroll, 178 S.W.2d 435, 437.

Okla.—Morton v. Beldleman, 237 P.2d 421, 205 Okl. 350. 65 C.J. p. 368 note 93.

87. Ark.—Corpus Juris quoted in Mortensen v. Ballard, 188 S.W.2d 749, 750, 209 Ark. 1.

Ga.—Price v. Price, 54 S.E.2d 578, 205 Ga. 623—McCullum v. McCullum, 43 S.E.2d 663, 202 Ga. 406—Johnson v. Upchurch, 38 S.E.2d 617, 200 Ga. 762—Harper v. Harper, 33 S.E.2d 154, 199 Ga. 26.

Idaho—Aker v. Aker, 20 P.2d 796, 52 Idaho 713, appeal dismissed and certiorari denied 54 S.Ct. 80, 290 U.S. 587, 78 L.Ed. 518.

Miss.—Adcock v. Merchants & Mfrs. Bank of Ellisville, 42 So.2d 427, 207 Miss. 448.

Ohio—Thomas v. Dye, Com.Pl., 117 N.E.2d 515.

65 C.J. p. 368 note 94.

### Subsequent written declaration of trust

Written declaration of trust at later date does not preclude existence of an implied trust to the same effect, founded in parol and on acts and conduct of creator of trust.—Thomas v. Dye, *supra*.

### Statements recognizing trust

Existence of a resulting trust arising from acts of parties is strengthened by consistent oral expressions of parties manifesting their intentions, understandings, and agreements that grantee is seized and holds in trust for purchaser and true owner, although agreement is void as an express trust because it relates to land and is not in writing.—Pad-

gett v. Osborne, 221 S.W.2d 210, 359 Mo. 209.

### Insufficient writing

An implied or resulting trust may arise when written instrument of parties is insufficient adequately to fix their rights and responsibilities inter sese.—McHain v. Sorensen, 20 N.W.2d 449, 236 Iowa 996.

### In Illinois

(1) While neither an express nor resulting trust can be created by parol agreement, intention of parties may be shown thereby, and existence of such parol agreement will not prevent a resulting trust if it is otherwise established by clear and convincing evidence.—Carrillo v. O'Hara, 81 N.E.2d 513, 400 Ill. 518—Tuntland v. Haugen, 78 N.E.2d 308, 399 Ill. 595.

(2) If there is an express trust, even though it be an oral one and hence barred by statute of frauds, there can be no implied trust.—McDiarmid v. McDiarmid, 15 N.E.2d 493, 368 Ill. 638.

88. U.S.—Cella v. Brown, Mo., 144 F. 742, 75 C.C.A. 608, certiorari denied 26 S.Ct. 766, 202 U.S. 620, 50 L.Ed. 1174.

89. Mass.—Quinn v. Quinn, 157 N.E. 641, 260 Mass. 494.

90. Ga.—Corpus Juris cited in Williams v. Porter, 42 S.E.2d 475, 478, 202 Ga. 113—Corpus Juris cited in Loggins v. Daves, 40 S.E.2d 520, 522, 201 Ga. 628.

Ill.—Paluszak v. Wohlrab, 115 N.E.2d 764, 1 Ill.2d 363—Carrillo v. O'Hara, 81 N.E.2d 513, 400 Ill. 518—Tuntland v. Haugen, 78 N.E.2d 308, 399 Ill. 595—Kane v. Johnson, 73 N.E.2d 321, 397 Ill. 112—Nickoloff v. Nickoloff, 51 N.E.2d 565, 384 Ill. 377—Spina v. Spina, 22 N.E.2d

currences,<sup>91</sup> and subsequent statements and occurrences may be considered only insofar as they throw light on the intention of the parties at the time title was transferred.<sup>92</sup> After the legal title has once vested in the grantee of a deed, a resulting trust cannot be raised so as to divest that legal estate by the subsequent application of the funds of a third person to the improvement of the property or to satisfy the unpaid purchase money.<sup>93</sup> Verbal declarations at the time of the purchase,<sup>94</sup> or subsequent thereto,<sup>95</sup> or parol agreements between the parties made before or after the conveyance of the property,<sup>96</sup> will not give rise to a resulting trust unless the transaction is such that a trust results at the moment the title passes.

*Alteration or modification.* A resulting trust arises by operation of law the instant the estate passes

and is not subject to change afterward by any mere oral declaration.<sup>97</sup>

### § 103. Failure or Defect in Creation of Express Trust, or Execution and Termination Thereof

A resulting trust arises in favor of the grantor of a conveyance in trust where the trust is insufficiently declared or fails or the trust is illegal or unauthorized.

A commonly recognized type of resulting trust is that which arises in favor of the donor where the trusts of a conveyance are not declared, or are only partially declared, or fail.<sup>98</sup> So, where property is conveyed on an express trust which fails, in whole or in part, a resulting trust arises as against the trustee in favor of the grantor and those claiming under him in the property conveyed<sup>99</sup> or in the

687, 372 Ill. 56—Wiley v. Dunn, 192 N.E. 661, 358 Ill. 97—Baker v. Le Mire, 189 N.E. 904, 355 Ill. 626—Link v. Emerich, 178 N.E. 480, 348 Ill. 238—Lord v. Reed, 98 N.E. 553, 254 Ill. 350, Ann.Cas.1913C 139.

Md—Porter v. Porter, 177 A. 460, 168 Md 287.

Mo—Welborn v. Rigdon, 231 S.W.2d 127—Dunlap v. Dunlap, 218 S.W.2d 108—Clubine v. Frazer, 139 S.W.2d 529, 346 Mo. 1—Parker v. Blakeley, 93 S.W.2d 981, 338 Mo. 1189—In re Title Guaranty Trust Co., App., 113 S.W.2d 1053.

N.J—Strong v. Strong, 36 A.2d 410, 134 N.J.Eq. 513, affirmed 40 A.2d 548, 136 N.J.Eq. 103.

Okla—Adams v. Adams, 256 P.2d 458, 208 Okl. 378—McKenna v. Lasswell, 250 P.2d 208, 207 Okl. 408—**Corpus Juris** quoted in Superior Oil Corporation v. Wilson, 103 P.2d 535, 545, 187 Okl. 447.

Pa.—New Cumberland Trust Co. v. Grossman, 198 A. 915, 131 Pa. Super. 132—Rachkauskas v. Diamond, Com.Pl., 46 Sch. Leg. Rec. 1.

R.I.—Slateniyi v. Cleverley, 50 A.2d 185, 72 R.I. 253—Oldham v. Oldham, 192 A. 758, 58 R.I. 268.

Tex.—Solether v. Trinity Fire Ins. Co., 78 S.W.2d 180, 124 Tex. 363—Sims v. Duncan, Civ. App., 195 S.W.2d 156, error refused no reversible error—Frint v. Tate, Civ. App., 162 S.W.2d 737—**Corpus Juris** cited in Johnson v. Winn, Civ. App., 105 S.W.2d 398, 401, error dismissed.

Wash.—**Corpus Juris** quoted in Mouser v. O'Sullivan, 156 P.2d 655, 657, 22 Wash.2d 543—Caroken v. Albers, 83 P.2d 899, 196 Wash. 575, 135 A.L.R. 209.

W.Va.—Carter v. Walker, 1 S.E.2d 483, 121 W.Va. 81.

65 C.J. p 371 note 21.

Application of rule to purchase money trusts see *infra* § 120

91. Ill.—Tuntland v. Haugen, 78 N.

E.2d 308, 399 Ill. 585—Murray v. Behrendt, 76 N.E.2d 431, 399 Ill. 22—Nickoloff v. Nickoloff, 51 N.E.2d 585, 384 Ill. 377.

Md—Porter v. Porter, 177 A. 460, 168 Md 287.

Mass—Epstein v. Epstein, 191 N.E. 418, 287 Mass. 248.

Mo—Welborn v. Rigdon, 231 S.W.2d

127—Parker v. Blakeley, 93 S.W.2d

981, 338 Mo. 1189—In re Title

Guaranty Trust Co., App., 113 S.W.

2d 1053.

N.J.—Bankers' Trust Co. v. Bank of

Rockville Center Trust Co., 168 A.

733, 114 N.J.Eq. 391, 89 A.L.R. 697.

Okla—**Corpus Juris** quoted in Super-

ior Oil Corporation v. Wilson, 103

P.2d 535, 545, 187 Okl. 447.

Pa—Royer v. Royer, Com.Pl., 62

Montg. Co. 90—Rachkauskas v. Dia-

mond, Com.Pl., 46 Sch. Leg. Rec. 1.

Tex.—Solether v. Trinity Fire Ins.

Co., 78 S.W.2d 180, 124 Tex. 363—

Sims v. Duncan, Civ. App., 195 S.

W.2d 156—Elbert v. Waples-Plat-

ter Co., Civ. App., 156 S.W.2d 146,

error refused—**Corpus Juris** cited

in Johnson v. Winn, Civ. App., 105

S.W.2d 398, 401, error dismissed.

65 C.J. p 371 note 22.

**Trust for future corporation**

Transaction by which promoters of

corporation had acquired title to

lease under agreement contemplating

that they would later promote a cor-

poration to which lease would be

transferred did not create resulting

trust in favor of corporation, since

such a trust arises from transaction

itself and at time legal title passes,

and title could not be affected even

if plans for incorporation were aban-

doned—McAllister v. Eclipse Oil Co.,

98 S.W.2d 171, 128 Tex. 449.

92. Okla.—McKenna v. Lasswell, 250

P.2d 208, 207 Okl. 408.

93. Va.—McDevitt v. Frantz, 8 S.E.

642, 85 Va. 740.

65 C.J. p 372 note 23.

Time of payment as affecting creation of resulting trust where title is taken in name of person other than payer of purchase price see *infra* § 120.

Improvement of another's land as not raising resulting trust generally see *infra* § 111.

94. Ill.—Plummer v. Flesher, 92 N.E. 863, 216 Ill. 313.

65 C.J. p 369 note 3.

95. Ala.—Merchants Nat. Bank of Mobile v. Bertola, 18 So.2d 378, 245 Ala. 662.

#### Recognition of trust

The fact that the person in possession recognizes the trust character of his possession is not effective to fix a trust on the lands where none existed before.—Coleman v. Coleman, 55 So. 827, 173 Ala. 282.

96. Cal.—Neusted v. Skernswell, 159 P.2d 49, 69 Cal.App.2d 361.

65 C.J. p 369 note 4.

97. R.I.—Gooding v. Broadway Baptist Church, 125 A. 211, 46 R.I. 106—Watson v. Thompson, 12 R.I. 466.

98. U.S.—Schwarz v. U. S., C.A.Md., 191 F.2d 618.

Ariz.—Collins v. Collins, 52 P.2d 1169, 46 Ariz. 485.

Ill.—Wagner v. Clauson, 78 N.E.2d

203, 399 Ill. 403.

Mo.—**Corpus Juris** cited in Putman's Estate v. Gideon, App., 119 S.W.2d 6, 10.

N.J.—DeMarco v. Estlow, 86 A.2d 446, 18 N.J. Super. 30, affirmed 91 A.2d 272, 21 N.J. Super. 356.

Okla.—Seran v. Davis, 50 P.2d 662, 174 Okl. 433.

Va.—Pair v. Rook, 77 S.E.2d 395, 195 Va. 196.

65 C.J. p 376 note 55.

Invalidity of express trust as giving rise to constructive trust in favor of settlor see *infra* § 144.

99. Cal.—**Corpus Juris** cited in Hansen v. Bear Film Co., 168 P.2d 946,

residue of the property remaining at the time of the failure or extinguishment of the trust<sup>1</sup> if the property is not otherwise disposed of.<sup>2</sup> The rule does not apply where the conveyance to the trustees imports an intention to benefit the grantees in the event that the trust declared fails,<sup>3</sup> or that the grantee shall take a beneficial interest;<sup>4</sup> nor does it apply to cause property to pass as intestate to the heirs of a grantor who had conveyed title during his lifetime to a grantee who executed an invalid declaration of trust but not as part of the same transaction.<sup>5</sup> Further, if the conveyance was on a consideration furnished by the grantee and the trust fails the grantee takes the beneficial interest,<sup>6</sup> and it has been held that if the conveyance

was on a consideration paid by some one other than the grantee a trust results in favor of the person furnishing the consideration.<sup>7</sup> It has also been held that an abortive attempt to create a trust by a particular method will not be construed to be a trust on a different theory;<sup>8</sup> thus were the settlor does not deliver the deed of transfer, equity will not treat the undelivered instrument as a declaration of trust.<sup>9</sup>

*Want or insufficiency of declaration of trust.* A trust results in favor of the settlor where property is transferred to a trustee in trust but the trust is not declared<sup>10</sup> or is ineffectually or insufficiently declared,<sup>11</sup> as where it is not declared with sufficient definiteness and certainty to be executed,<sup>12</sup> either

958, 28 Cal 2d 154—Bainbridge v. Stoner, 106 P.2d 423, 16 Cal 2d 423—Sears v. Rule, 114 P.2d 57, 45 Cal App 2d 374

D.C.—Stitzel-Weller Distillery v. Wickard, 118 F.2d 19, 73 App.D.C. 220

III.—First Trust & Savings Bank of De Kalb v. Olson, 187 NE 282, 353 Ill 206

Me.—First Universalist Soc. of Bath v. Sweet, 90 A.2d 812

Md.—Sands v. Church of Ascension and Prince of Peace, 30 A.2d 771, 151 Md. 536.

Mass.—Holmes v. Welch, 49 N.E.2d 461, 314 Mass. 106, 157 A.L.R. 896. Mo.—Fudgett v. Osborne, 221 S.W.2d 210, 359 Mo. 209

Neb.—Corpus Juris quoted in In re Mooney's Estate, 267 N.W. 196, 200, 131 Neb 52.

N.J.—Pedrick v. Guarantee Trust Co., 197 A. 909, 123 N.J.Eq. 395.

N.M.—Torres v. Abeyta, 84 P.2d 592, 42 N.M. 665.

N.Y.—Guaranty Trust Co. of N. Y. v. New York Trust Co., 74 N.E.2d 232, 297 N.Y. 45—Guaranty Trust Co. of N. Y. v. State, 69 N.Y.S.2d 65, 271 App.Div. 711, appeal denied 71 N.Y.S.2d 751, 272 App.Div. 842, reversed on other grounds 86 N.E.2d 754, 299 N.Y. 295, *reargument* denied 88 N.E.2d 726, 300 N.Y. 498.

Okl.—Continental Oil Co. v. Berry, 103 P.2d 69, 187 Okl 390.

Or.—Jorgensen v. Pioneer Trust Co., 258 P.2d 140, 198 Or. 579.

R.I.—Powers v. Home for Aged Women, 192 A. 770, 68 R.I. 323, 10 A.L.R. 1361.

Wis.—Nelson v. Madison Lutheran Hospital & Sanatorium, 297 N.W. 424, 237 Wis. 518.

65 C.J. p 376 note 56.

**War ban on trading with enemy**  
(1) Where charitable trust in remainder which was created before World War II for benefit of a German charity, although suspended from physical performance during the war, continued valid, subject to

superior power of United States to seize rights of its beneficiaries, there could be no resulting trust to the settlor, and there was no need for application of doctrine of cy pres—Brownell v. Fidelity Union Trust Co., D.C.N.J., 119 F.Supp. 755.

(2) The imposition of wartime controls and the freezing of payments to German residents was not such a defeasance of right of trust beneficiaries, who were residents of Germany, as to require return of corpus to settlor, on theory of resulting trust, because of impossibility of operation of the trust; order vesting interests of trust beneficiaries, who were residents of Germany, in Alien Property Custodian did not necessarily work a total forfeiture on beneficiaries and did not require return of corpus to settlor under theory of resulting trust—in re Heilmann's Trust, 132 N.Y.S.2d 254.

**Where inter vivos trust indenture was void** so that no express trust was created which could thereafter fail, trustee named in trust indenture could not claim that it held property of trustor who died intestate on a resulting trust for the benefit of trustor's heirs—Atlantic Nat. Bank of Jacksonville, Fla., v. St. Louis Union Trust Co., 211 S.W.2d 2, 357 Mo. 770.

#### Presumption conclusive

The presumption of a desire on part of settlor that trust property return to him or his successors in case of the failure of an express trust is conclusive and not rebuttable—Pedrick v. Guarantee Trust Co., 197 A. 909, 123 N.J.Eq. 395.

1. Neb.—Dennis v. Omaha Nat. Bank, 46 N.W.2d 606, 153 Neb. 865, 27 A.L.R.2d 674—Corpus Juris quoted in In re Mooney's Estate, 267 N.W. 196, 200, 131 Neb. 52. S.C.—Linder v. Nicholson Bank & Trust Co., 170 S.E. 429, 170 S.C. 373.

65 C.J. p 376 note 58.

2. Cal.—Sears v. Rule, 114 P.2d 57, 45 Cal.App.2d 374

Me.—First Universalist Soc. of Bath v. Sweet, 90 A.2d 812

Neb.—Corpus Juris quoted in In re Mooney's Estate, 267 N.W. 196, 200, 131 Neb 52.

NH.—Smith v. Pratt, 63 A.2d 237, 95 N.H. 337.

N.C.—Oakhurst Land Co. v. Newell, 117 S.E. 341, 185 N.C. 410.

Pa.—In re Zoller's Estate, 96 A.2d 321, 373 Pa. 451.

3. Ark.—Davis v. Jernigan, 76 S.W. 554, 71 Ark. 494.

65 C.J. p 376 note 60.

4. N.C.—Oakhurst Land Co. v. Newell, 117 S.E. 341, 185 N.C. 410.

65 C.J. p 376 note 61.

5. Mass.—O'Loughlin v. Prendergast, 168 N.E. 96, 269 Mass. 41.

6. Fla.—Montgomery v. Carlton, 126 So. 135, 99 Fla. 152.

65 C.J. p 376 note 63.

7. Md.—Rosenthal v. Miller, 129 A. 28, 148 Md. 226.

65 C.J. p 377 note 64.

8. Wash.—Colman v. Colman, 171 P. 2d 691, 25 Wash.2d 606.

9. Wash.—Colman v. Colman, *supra*

10. Okl.—Seran v. Davis, 50 P.2d 662, 174 Okl. 433.

65 C.J. p 377 note 65.

11. Cal.—Sears v. Rule, 114 P.2d 57, 45 Cal.App.2d 374

III.—Wagner v. Clauson, 78 N.E.2d 203, 399 Ill. 403, 3 A.L.R.2d 672.

Okl.—Seran v. Davis, 50 P.2d 662, 174 Okl. 433.

65 C.J. p 377 note 66.

12. U.S.—Schwarz v. U. S., C.A.Md., 191 F.2d 618.

Ind.—Beyer v. Beyer, 106 N.E.2d 247, 122 Ind.App. 649.

Mass.—Old Colony Trust Co. v. Wadell, 199 N.E. 907, 293 Mass. 310.

Okl.—Seran v. Davis, 50 P.2d 662, 174 Okl. 433.

65 C.J. p 377 note 67.

as to its purposes<sup>13</sup> or beneficiaries.<sup>14</sup> As discussed supra § 102 d, where a conveyance is on an express trust which cannot be established because of the want of legal evidence thereof, as in the case of a parol trust unenforceable under the statute of frauds, such fact alone is insufficient to allow the express trust to be enforced as a resulting trust; but, where the facts and circumstances are sufficient to establish a resulting trust, the fact that there is an invalid parol trust will not prevent the resulting trust from arising.

**Illegality of trust.** A resulting trust in favor of the grantor arises where property is conveyed on a trust which is illegal or unauthorized,<sup>15</sup> as where it violates the rule against perpetuities.<sup>16</sup>

**Failure of beneficiaries.** In accordance with the

general rule, a trust results in favor of the grantor of a conveyance in trust where the trust fails for want of a beneficiary,<sup>17</sup> or because the beneficiary dies<sup>18</sup> or becomes nonexistent<sup>19</sup> or does not come into existence.<sup>20</sup>

**Failure of purposes.** A trust results in favor of the grantor of a conveyance in trust where the purposes of the trust fail,<sup>21</sup> as where the objects and purposes of the trust have ceased,<sup>22</sup> or it no longer can be executed pursuant to its provisions.<sup>23</sup>

**Partial declaration of trust.** The rule under consideration applies where the trust does not extend to the whole interest given to the trustee,<sup>24</sup> as where, after the purposes of the trust have been discharged, a residue remains in the hands of the trustee.<sup>25</sup>

13. U.S.—Schwarz v. U. S., C.A.Md., 191 F.2d 618.  
65 C.J. p 377 note 68.

14. U.S.—Schwarz v. U. S., supra.  
N.J.—Pedrick v. Guarantee Trust Co., 197 A. 909, 123 N.J.Eq. 395.  
Okla.—Seran v. Davis, 50 P.2d 662, 174 Okl. 433.

Tex.—Mills v. Gray, 210 S.W.2d 985, 147 Tex. 33.  
65 C.J. p 377 note 69.

15. U.S.—Schwarz v. U. S., C.A.Md., 191 F.2d 618.  
Cal.—Davenport v. Davenport Foundation, 222 P.2d 11, 36 Cal.2d 67.

65 C.J. p 376 note 50, p 377 note 73.

16. Ohio—Rudolph v. Schmalstieg, 4 Ohio Supp. 58.

Or.—Pape v. Title & Trust Co., 210 P.2d 490, 187 Or. 175.  
65 C.J. p 378 note 74.

17. U.S.—Fritzlauff v. Kuhl, D.C. Wis., 70 F.Supp. 572.  
Okla.—Continental Oil Co. v. Perry, 103 P.2d 69, 187 Okl. 390.

18. Mass.—Reebe v. Brown, 186 N.E. 638, 283 Mass. 467.

Neb.—Corpus Juris quoted in In re Mooney's Estate, 267 N.W. 196, 200, 131 Neb. 52.

N.M.—Torres v. Abeyta, 84 P.2d 592, 42 N.M. 665.

Pa.—In re Jackson's Trust, 40 A.2d 393, 351 Pa. 89.

R.I.—Champagne v. Fortin, 30 A.2d 838, 69 R.I. 10.  
65 C.J. p 378 note 75

19. Neb.—Corpus Juris quoted in In re Mooney's Estate, 267 N.W. 196, 200, 131 Neb. 52.

Wash.—Horton v. Board of Education of Methodist Protestant Church, 201 P.2d 163, 32 Wash.2d 99.

65 C.J. p 378 note 76.

#### Gift to charity

The doctrine of resulting trust in connection with a gift to a charitable institution which no longer exists is not controlled by technical distinctions

between vested and contingent remainders, but is governed by question of whether testator's charitable program has been frustrated; for purposes of applying the doctrine of resulting trust in favor of a charitable institution, it is immaterial whether interference with testator's charitable program arises before or after his death.—Horton v. Board of Education of Methodist Protestant Church, 201 P.2d 163, 32 Wash.2d 99.

20. U.S.—Morsman v. C. I. R., C.C. A.8, 90 F.2d 18, 113 A.L.R. 441, certiorari denied Morsman v. Helvering, 58 S.Ct. 20, 302 U.S. 701, 32 L.Ed. 542.

Neb.—Corpus Juris quoted in In re Mooney's Estate, 267 N.W. 196, 200, 131 Neb. 52.

Ohio—Commerce Nat. Bank of Toledo v. Browning, 107 N.E.2d 120, 158 Ohio St. 54.

65 C.J. p 378 note 77.

21. Conn.—Bassett v. Pallotti, Andretta & Co., 166 A. 752, 117 Conn. 58.

D.C.—Stitzell Weller Distillery v. Wallace, D.C., 30 F.Supp. 1010, affirmed Stitzell-Weller Distillery v. Wickard, 118 F.2d 19, 73 App.D.C. 220.

Ind.—Indianapolis Bible Institute v. Kiddey, 187 N.E. 846, 98 Ind.App. 567.

Mass.—City Bank Farmers Trust Co. v. Carpenter, 64 N.E.2d 636, 319 Mass. 78—Dodge v. Anna Jacques Hospital, 17 N.E.2d 308, 301 Mass. 431.

Minn.—Wyman v. Trustees of Westminster Presbyterian Church of Minneapolis, 266 N.W. 165, 197 Minn. 62.

Neb.—Corpus Juris quoted in In re Mooney's Estate, 267 N.W. 196, 200, 131 Neb. 52.

65 C.J. p 378 note 78.

22. Mass.—City Bank Farmers Trust Co. v. Carpenter, 64 N.E.2d 636, 319 Mass. 78.

Neb.—Corpus Juris quoted in In re Mooney's Estate, 267 N.W. 196, 200, 131 Neb. 52.

65 C.J. p 378 note 79.

23. Conn.—Waterbury Trust Co. v. Porter, 38 A.2d 598, 131 Conn. 206.

Md.—Latrobe v. American Colonization Soc., 106 A. 858, 134 Md. 406.

Mass.—Holmes v. Welch, 49 N.E.2d 461, 314 Mass. 106, 157 A.L.R. 896.

Neb.—Corpus Juris quoted in In re Mooney's Estate, 267 N.W. 196, 200, 131 Neb. 52.

#### Condemnation; substitution

Where deed creating charitable trust provides that it shall be used for particular charitable purpose, taking by eminent domain is not such failure of charity as gives rise to resulting trust for settlor, but proceeds received from eminent domain proceedings constitute trust res; a charitable trust, created by deed quitclaiming described land with buildings for free use as public library did not fail because of condemnation where damages were awarded in trust for library purposes, so that no resulting trust arose in favor of deceased grantors' heirs.—State v. Federal Square Corp., 3 A.2d 199, 89 N.H. 538.

24. Del.—Security Trust Co. v. Willett, Ch., 97 A.2d 112.

Ill.—First Trust & Savings Bank of De Kalb v. Olson, 187 N.E. 282, 353 Ill. 206.

N.H.—Smith v. Pratt, 63 A.2d 237, 95 N.H. 337.  
65 C.J. p 378 note 81.

25. Cal.—Bainbridge v. Stoner, 106 P.2d 423, 16 Cal.2d 423—Woodley v. Woodley, 117 P.2d 722, 47 Cal. App.2d 188.

Conn.—Bassett v. Pallotti, Andretta & Co., 166 A. 752, 117 Conn. 58.

Del.—Security Trust Co. v. Willett, Ch., 97 A.2d 112.

Ga.—Peppers v. Peppers, 20 S.E.2d 409, 184 Ga. 10.

*Revocation or termination.* The rule under consideration applies where there is a valid revocation<sup>26</sup> or termination<sup>27</sup> of the trust.

# § 104. Imperfect Gift

Equity will not convert an imperfect gift into a declaration of trust merely because of such imperfection.

A trust does not result where a person purchases property with his own funds and takes title in his own name with the intention of giving the property to another.<sup>28</sup> Mere declarations or expressions of intention to give the property to another will not create a resulting trust.<sup>29</sup> Equity will not convert an imperfect gift into a declaration of trust, merely because of such imperfection;<sup>30</sup> and so, where a donor delivers personally to his agent with instructions to give it to a specified donee, which the agent fails to do, such agent is not a trustee of the property for the donee.<sup>31</sup> The courts are reluctant to declare a trust to save a gift which is imperfect for want of delivery.<sup>32</sup> In determining whether the one to whom the property has been transferred for

delivery to the beneficiary is a trustee or an agent of the donor, the formality of the transaction must be considered,<sup>33</sup> and, in order to establish a trust by acts alone in the absence of an express trust agreement, there must be shown an unequivocal intent on the part of the donor to divest himself of the control and dominion of the trust res.<sup>34</sup> Where a parent purchased a mortgage with funds of her own and had the title made to herself as trustee for her infant child, a trust has been held to have been created in favor of the child.<sup>35</sup>

# § 105. Want or Failure of Consideration for Conveyance

Where a conveyance is made without consideration, and is not intended as a gift, a resulting trust ordinarily arises in favor of the grantor; but this rule is not available where the deed recites the payment of a valuable consideration.

As a general rule, where a conveyance of property is made without a valuable consideration therefor, express or implied, and is not intended as a gift, a resulting trust arises in favor of the grantor.<sup>36</sup>

Ind.—*Banta v. Banta*, 76 N.E.2d 698, 118 Ind. App. 117, rehearing denied 77 N.E.2d 597, 118 Ind. App. 117.  
Mass.—*Holmes v. Welch*, 49 N.E.2d 461, 314 Mass. 106, 157 A.L.R. 896.  
Mo.—*Padgett v. Osborne*, 221 S.W.2d 210, 359 Mo. 209.  
N.J.—*DeMarco v. Estlow*, 86 A.2d 446, 18 N.J.Super. 30, affirmed 91 A.2d 272, 21 N.J.Super. 356.  
Pa.—*In re Zoller's Estate*, 96 A.2d 321, 373 Pa. 461—*In re Leher's Estate*, Com. Pl., 62 York Leg. Rec. 73, 66 C.J. p. 378 note 82.

28. N.Y.—*In re Goldowitz' Will*, 259 N.Y.S. 900, 145 Misc. 300.

## Insurance trust

(1) Where trust agreement with respect to proceeds of retirement annuity policies was by the annuitant validly created and validly revoked, although annuitant thereafter failed to effect a change of beneficiary in the policies, and policies contained so-called "children's clause" there was, on annuitant's death, no resulting trust in proceeds of policies in favor of annuitant's executors, and proceeds were payable to annuitant's children.—*In re Folner's Will*, 40 N.Y.S.2d 880, 181 Misc. 434.

(2) Where a trust is validly revoked, insurance policies payable to trustees became the property of deceased settlor's estate held by trustees named as beneficiaries as resulting trust for the benefit of the estate.—*In re Goldowitz' Will*, 259 N.Y.S. 900, 145 Misc. 300.

27. Ohio.—*Lillard v. Lillard*, 26 N.E.2d 933, 63 Ohio App. 403.

28. Ark.—*Strauther v. Bogenschutz*, 157 S.W. 406, 108 Ark. 276.

29. Iowa.—*Henninger v. McGuire*, 125 N.W. 180, 146 Iowa 270, 65 C.J. p. 428 note 4.

30. U.S.—*Elliot v. Gordon*, C.C.A. Kan., 70 F.2d 9.

Ariz.—*In re Hayward's Estate*, 110 P.2d 956, 57 Ariz. 51.

Ark.—*Krickberg v. Hoff*, 143 S.W.2d 560, 201 Ark. 63.

Cal.—*In re Alberts' Estate*, 100 P.2d 538, 38 Cal. App.2d 42.

Del.—*Jones v. Bodley*, 27 A.2d 84, 26 Del. Ch. 218, reversed on other grounds *Bodley v. Jones*, 32 A.2d 436, 27 Del. Ch. 273.

Mich.—*Detroit Bank v. Bradfield*, 36 N.W.2d 873, 324 Mich. 124—*Loop v. Des Autell*, 293 N.W. 738, 294 Mich. 527.

Mo.—*Cartall v. St. Louis Union Trust Co.*, 153 S.W.2d 370, 348 Mo. 372.

N.Y.—*Phillips v. Emigrant Indus. Sav. Bank*, 86 N.Y.S.2d 133.

N.D.—*Hagerott v. Davis*, 17 N.W.2d 15, 73 N.D. 532.

Okl.—*Ratchiff v. Lee*, 192 P.2d 843, 200 Okl. 253—*Sauls v. Whitman*, 42 P.2d 276, 171 Okl. 113.

Tex.—*Fleck v. Baldwin*, 172 S.W.2d 375, 141 Tex. 340.

65 C.J. p. 378 note 84.

31. N.Y.—*Vincent v. Putnam*, 161 N.E. 425, 248 N.Y. 76.

65 C.J. p. 379 note 85.

32. N.Y.—*In re Fitzpatrick's Estate*, 17 N.Y.S.2d 280.

33. N.Y.—*In re Fitzpatrick's Estate*, *supra*.

34. N.Y.—*In re Fitzpatrick's Estate*, *supra*.

35. N.Y.—*In re Steel*, 125 N.Y.S. 187, 68 Misc. 579.

36. U.S.—*Reilly v. Wheatley*, C.C.A. Mass., 68 F.2d 297.

Ala.—*Averett v. Averett*, 10 So.2d 16, 243 Ala. 357.

Del.—*Bird v. Wilmington Soc. of Fine Arts*, 43 A.2d 476, 28 Del. Ch. 449.

Ind.—*Nichols v. Spindler*, 53 N.E.2d 888, 222 Ind. 502.

Mo.—*James v. James*, 248 S.W.2d 623.

Mont.—*Bell Holt McCall Co. v. Caprice*, 175 P.2d 416, 119 Mont. 463.

N.J.—*Moses v. Moses*, 53 A.2d 805, 110 N.J. Eq. 575, 173 A.L.R. 273.

Ohio.—*Ehrhart v. Coslett*, 1 Ohio Supp. 40.

Pa.—*Hermann v. Henderson*, 44 A.2d 254, 353 Pa. 39.

Tex.—*Shannon v. Shannon*, Civ. App., 231 S.W.2d 986—*Nichols v. Nichols*, Civ. App., 170 S.W.2d 558—*Hamilton v. First Nat. Bank of O'Donnell*, Civ. App., 155 S.W.2d 626, error refused.

65 C.J. p. 379 note 86.

## Adoption of child

Where insured procured a life policy naming as beneficiary her minor daughter and upon being informed of fatal nature of an illness executed a change of beneficiary directing a lump-sum payment to plaintiff who was to adopt the child and order of adoption was subsequently revoked, plaintiff would hold the proceeds of the policy under a resulting trust for the benefit of the child—*Childers v. Breece*, 213 P.2d 565, 202 Okl. 377.

## Stranger to conveyance

The resulting trust which the law creates from a gratuitous conveyance wherein the grantee is not intended

While the absence of a consideration is essential,<sup>37</sup> the mere want of consideration does not of itself operate to create a resulting trust for the benefit of a grantor in a deed against his grantee or those claiming under him as privies to such deed;<sup>38</sup> but there must be in addition circumstances evidencing that the grantee was not intended to take beneficially.<sup>39</sup> The general statement has been made that a voluntary conveyance cannot be held to create a resulting trust in favor of the grantor,<sup>40</sup> and it has been held that a want or failure of consideration for a conveyance does not raise a resulting trust.<sup>41</sup>

A trust will not result where the conveyance is intended as a gift to the grantee.<sup>42</sup> Where a trans-

fer of property is made without consideration, it is normally construed as a gift and there is no resulting trust,<sup>43</sup> particularly where the transfer is to one whom the grantor is under a legal or moral obligation to support, such as his wife or child;<sup>44</sup> but this inference may be overcome by proof of facts showing an intent to the contrary.<sup>45</sup> Where the grantee occupies a confidential or fiduciary relation towards the grantor, a resulting trust in favor of the grantor will be presumed from a conveyance without consideration.<sup>46</sup>

Where the husband acquires possession of his wife's separate property otherwise than by gift, he is deemed to hold it in trust for her,<sup>47</sup> and it

to take beneficially is a trust in favor of grantor making the conveyance and no such trust may be created in favor of a stranger to the conveyance.—*Frame v. Wright*, 9 N.W.2d 364, 233 Iowa 394, 147 A.L.R. 1164.

37. *U.S.—Reilly v. Wheatley*, C.C.A. Mass., 68 F.2d 297.

Iowa.—*Corddon State Bank v. Scott*, 252 N.W. 536, 217 Iowa 1227. 65 C.J. p 379 note 83.

#### Assumption of debt

(1) Where grantee becomes bound for the payment of his grantor's debt, and the property is security for the payment of the debt, and the grantor is released from liability, there is sufficient consideration.—*Ellis v. Nickle*, 101 S.W.2d 958, 193 Ark 657.

(2) Where all the parties deemed lands with existing loan a liability and the assumption of such obligation by the grantee was not only beneficial to the grantor but was in compliance with such intention, no resulting trust existed.—*Jones v. Crawford*, 30 So.2d 57, 201 Miss 791, suggestion of error overruled 30 So.2d 513, 201 Miss 791.

(3) No trust resulted on theory of absence of consideration, where son in accepting conveyance agreed to assume heavy indebtedness on property, and paid off substantial part thereof.—*Holtze v. Holtze*, 42 P.2d 323, 2 Cal.2d 566.

Where consideration was actually paid, resulting trust for benefit of grantor and his estate was not created in absence of express agreement or fraud.—*Gilligan v. Jones*, 283 N.W. 434, 226 Iowa 86.

38. *Colo.—Champion v. Champion*, 132 P.2d 185, 110 Colo. 153. 65 C.J. p 379 note 90.

#### Old common-law rule

(1) The old common-law rule that a grant without consideration and without an express declaration of the use resulted in a trust in favor of the grantor is not part of the modern law of trusts.—*Corpus Juris*

cited in *Shaw v. Addison*, 28 N.W.2d 816, 233 Iowa 377—65 C.J. p 379 note 88.

(2) A history and an explanation of the rule have been given.—*Graves v. Graves*, 29 N.H. 129.

(3) A statute declaring in effect that a conveyance shall pass the fee unless a contrary intention is clearly expressed in the conveyance has been held to abrogate the common-law rule.—*Campbell v. Noble*, 41 So. 745, 145 Ala. 233—65 C.J. p 379 note 88.

39. *U.S.—Everitt v. Duss*, Pa., 197 F. 401, affirmed 206 F. 590, 124 C.C. A. 388.

65 C.J. p 379 note 91.

40. *Cal.—In re Clausenius' Estate*, 216 P.2d 485, 96 Cal.App.2d 600.—*Knouse v. Shubert*, 121 P.2d 74, 48 Cal.App.2d 685.

II.—*Peters v. Meyers*, 96 N.E.2d 493, 408 Ill. 263.—*Mayfield v. Forsyth*, 45 N.E. 403, 164 Ill. 32.—*Moore v. Horsley*, 40 N.E. 323, 156 Ill. 36.—*Stevenson v. Crapnell*, 28 N.E. 379, 114 Ill. 19.

*Mich.—Jackson v. Cleveland*, 15 Mich. 94.

41. *Cal.—In re Clausenius' Estate*, 216 P.2d 485, 96 Cal.App.2d 600. Iowa.—*Shaw v. Addison*, 28 N.W.2d 816, 233 Iowa 377.

42. *Md.—Sands v. Church of Ascension and Prince of Peace*, 30 A.2d 771, 181 Md. 536.

65 C.J. p 380 note 92, p 427 note 2. Payment, as gift or advancement of consideration for property conveyed to another see *infra* § 124.

43. *Ariz.—Collins v. Collins*, 52 P.2d 1169, 46 Ariz. 485.

Iowa.—*Shaw v. Addison*, 28 N.W.2d 816, 233 Iowa 377.

Ohio.—*Showalter v. Miller*, 45 N.E.2d 774, 70 Ohio App. 232.

#### Transfer to own corporation

Where the owner of all of the stock of a corporation transfers property to the corporation without consideration, it will be deemed a gift and a trust will not result.—

*Niemaseck v. Burnett Holding Co.*, 4 A.2d 794, 125 N.J.Eq. 284.

44. *Cal.—Altramano v. Swan*, 128 P.2d 353, 20 Cal.2d 622, followed in *Altramano v. Rodeo Del Legionario*, 128 P.2d 357, 20 Cal.2d 898.—*Spaulding v. Jones*, 256 P.2d 637, 117 Cal.App.2d 541.

Iowa.—*Shaw v. Addison*, 28 N.W.2d 816, 233 Iowa 377.

N.J.—*Moses v. Moses*, 48 A.2d 397, 138 N.J.Eq. 287, affirmed in part and reversed on other grounds in part 53 A.2d 805, 140 N.J.Eq. 575, 173 A.L.R. 273.

R.I.—*Oldham v. Oldham*, 192 A. 758, 58 R.I. 268.

Wash.—*Griehuhin v. Griehuhin*, 272 P.2d 141.

65 C.J. p 381 note 6.

45. *Ariz.—Collins v. Collins*, 52 P.2d 1169, 46 Ariz. 485.

#### Trust for husband held to result from transfer to wife

(1) In general.—*Harper v. Harper*, 33 S.E.2d 154, 199 Ga. 26—30 C.J. p 693 note 96.

(2) Proof that husband transferred title of six parcels of land to wife for purpose of enlarging husband's bank credit and borrowing capacity through establishment of a separate credit for wife and that transfer was not motivated by donative intent would establish a resulting trust.—*Moses v. Moses*, 53 A.2d 805, 140 N.J.Eq. 575, 173 A.L.R. 273.

46. *U.S.—Berthelot v. Isaacson*, C. C.A.La., 278 F. 921.

Pa.—*Kurek v. Kurek*, Orph., 9 Fay.L.J. 47.

47. *Minn.—In re Reifsteck's Estate*, 267 N.W. 259, 197 Minn. 315.

Or.—*Cary v. Cary*, 80 P.2d 886, 159 Or. 578, 121 A.L.R. 1371.

30 C.J. p 815 note 20.

#### Wife's consent

(1) Husband who acquires possession of separate property of wife, with or without her consent, holds it in trust for her benefit, in absence of evidence that she intended to make a gift of property to him.



has been held that a transfer of a wife's property to her husband without an adequate consideration raises a rebuttable presumption of a resulting trust in her favor.<sup>48</sup> It has also been held that no trust resulted where a husband gave an absolute deed to realty to his wife and she agreed to pay a certain sum of money, which promise she failed to perform.<sup>49</sup>

*Recitals or declarations as to consideration.* Although in some jurisdictions a failure of consideration may raise a resulting trust even though the deed recites a consideration,<sup>50</sup> the general rule is that in the absence of fraud or mistake,<sup>51</sup> a resulting trust will not arise in favor of the grantor although a valuable consideration is not in fact paid, where a declaration to the contrary is made by the grantor at the time of the conveyance,<sup>52</sup> as where the con-

veyance recites a valuable consideration as paid by the grantee,<sup>53</sup> even though it be only nominal,<sup>54</sup> particularly where the conveyance is absolute in form and the habendum clause declares the beneficial use or interest in the property to be in the grantee<sup>55</sup> or some third person.<sup>56</sup> Such a recital in a deed cannot be contradicted by parol evidence by the parties to the deed, or by those holding under them;<sup>57</sup> and except in cases of fraud or mistake<sup>58</sup> parol evidence is not admissible in such a case to show that no consideration was given for the deed, or that it was voluntary, so as to establish a resulting trust in favor of the grantor, or those claiming under him.<sup>59</sup> When a conveyance purports to have been made for a good and valuable consideration paid by the grantee, the presumption of law is that the estate is held by him for his own use.<sup>60</sup>

Minn.—In re Teifsteck's Estate, 267 N.W. 259, 197 Minn. 315.  
Or.—Carv v. Cary, 80 P.2d 886, 158 Or. 578, 121 A.L.R. 1771.

(2) If a husband obtains title to his wife's property without her consent and without consideration, equity will impose on the title a trust for wife's benefit.—Mauriceau v. Haugen, 56 N.E.2d 367, 387 Ill. 186.

#### Deed ineffective to create separate estate

It has been held that, where a father, having executed, in favor of his daughter, an instrument which is ineffectual as a conveyance, but of which fact he is ignorant, immediately after her marriage delivers property to the husband under the belief that such instrument secures it to her sole and separate use and the husband accepts it with full notice and under a similar belief, a trust arises in behalf of the wife which a court of equity will enforce.—Betts v. Betts, 18 Ala. 787.

48. Pa.—Pearson v. Pearson, 73 A. 2d 661, 365 Pa. 13.

49. N.Y.—Ankle v. Blankner, 189 N.Y.S. 876, 197 App. Div. 684, appeal dismissed 134 N.E. 570, 232 N.Y. 557.

Constructive trust see *infra* § 145 et seq.

50. Ga.—Hancock v. Hancock, 54 S.E.2d 385, 205 Ga. 684.

Tex.—Jopling v. Caldwell-Degenhardt, Civ.App., 292 S.W. 958.

51. Mo.—Corpus Juris quoted in Parker v. Blakeley, 93 S.W.2d 981, 988, 338 Mo. 1189.

Pa.—Lingenfelter v. Ritchey, 58 Pa. 485, 98 Am.D. 308.

52. Iowa.—Tucker v. Glew, 158 Iowa 231, 139 N.W. 565.

Mo.—Corpus Juris quoted in Parker v. Blakeley, 93 S.W.2d 981, 988, 338 Mo. 1189.

N.C.—McCullen v. Durham, 50 S.E.2d 511, 229 N.C. 418.

65 C.J. p. 380 note 95.

Statute of frauds as applied to resulting trust generally see *supra* § 101.

#### Rebuttal of claim of trust

Recital of valuable consideration in deed rebuts any claim of trust resulting at time deed was made.—Reynolds v. Reynolds, 183 A. 394, 121 Conn. 153.—Monski v. Lukomske, 173 A. 897, 118 Conn. 635.—Andrews v. New Britain Nat. Bank, 155 A. 838, 113 Conn. 467.

53. D.C.—Filson v. Fountain, 171 F.2d 999, 84 U.S.App.D.C. 46, reversed on other grounds 69 S.Ct. 754, 336 U.S. 681, 93 L.Ed. 971, rehearing denied 69 S.Ct. 1153, 337 U.S. 921, 93 L.Ed. 1730.

Mo.—Corpus Juris quoted in Parker v. Blakeley, 93 S.W.2d 981, 988, 338 Mo. 1189.

65 C.J. p. 380 note 96.

#### Personal obligation

Where plaintiff invested at least fifteen thousand dollars in improved realty located in New Jersey, and only consideration recited in deed executed by plaintiff conveying property to his brother and brother's wife was their assumption of nine thousand dollars in mortgages, and it did not appear that plaintiff intended to make a gift of his six thousand dollar equity to brother and his wife, amount invested by plaintiff which was not included in consideration recited in the deed constituted an acknowledged indebtedness for which plaintiff was entitled to personal money judgment against brother's wife after death of brother, even though plaintiff was not entitled to a resulting trust in the property under New Jersey law.—Filson v. Fountain, 171 F.2d 999, 84 U.S.App.D.C. 46, reversed on other grounds 69 S.Ct.

754, 336 U.S. 681, 93 L.Ed. 971, rehearing denied 69 S.Ct. 1153, 337 U.S. 921, 93 L.Ed. 1730.

54. Mo.—Key v. Kilburn, 228 S.W.2d 731.—Corpus Juris quoted in Parker v. Blakeley, 93 S.W.2d 981, 988, 338 Mo. 1189.

65 C.J. p. 380 note 97.

#### "—dollars"

Where the deed recites the consideration as being "—dollars," the word "dollars" is sufficient to rebut a resulting trust.—Murray v. Klenzing, 29 A. 244, 64 Conn. 78.

55. D.C.—Filson v. Fountain, 171 F.2d 999, 84 U.S.App.D.C. 46, reversed on other grounds 69 S.Ct. 754, 336 U.S. 681, 93 L.Ed. 971, rehearing denied 69 S.Ct. 1153, 337 U.S. 921, 93 L.Ed. 1730.

Mo.—Corpus Juris quoted in Parker v. Blakeley, 93 S.W.2d 981, 988, 338 Mo. 1189.

65 C.J. p. 380 note 98.

56. Mo.—Corpus Juris quoted in Parker v. Blakeley, 93 S.W.2d 981, 988, 338 Mo. 1189.

Tex.—Olcott v. Gabert, 23 S.W. 985, 86 Tex. 121.

57. Minn.—McKusick v. Washington County, 16 Minn. 161.

65 C.J. p. 381 note 3.

Sufficiency of parol evidence to establish resulting trust generally see *infra* § 134.

58. Or.—Toney v. Toney, 165 P. 221, 84 Or. 310.

65 C.J. p. 381 note 4.

59. Iowa.—Frame v. Wright, 9 N.W. 2d 364, 233 Iowa 394, 147 A.L.R. 1154.

65 C.J. p. 381 note 5.

Admissibility of parol evidence to establish resulting trust generally see *infra* § 133.

60. Me.—Phillbrook v. Dolano, 29 Me. 410.

*Deed with covenants.* Where the deed contains a covenant by the grantor to warrant and defend the title, the grantor is estopped to claim a resulting trust although no consideration was given for the deed.<sup>61</sup>

### § 106. Title to Inherited or Devised Property in Name of Another

Where one inherits land and has the title placed in the name of another, a trust in favor of the true and beneficial owner arises.

Where a person inherits land and has the title placed in the name of another, a trust in favor of the true and beneficial owner arises.<sup>62</sup> Thus, where a wife inherits land and has the partition deed from the other heirs made to her husband, it will be presumed that the husband holds as trustee for the

wife,<sup>63</sup> although this presumption is not conclusive,<sup>64</sup> and may be rebutted by showing an intention to the contrary.<sup>65</sup> Where a parent devises property to his daughter-in-law by way of leaving it to his son, no resulting trust arises.<sup>66</sup>

### § 107. Conveyance to Person Loaning or Paying Purchase Money

Where the purchase money is loaned or paid by one person for the benefit of another, and the conveyance is made to the lender to secure his repayment, a resulting trust arises in favor of the borrower.

Where the purchase money is loaned or paid by one person for the benefit of another, and the conveyance is made to the lender or payor to secure his repayment or reimbursement, a resulting trust arises in favor of the person in whose behalf the money is loaned or paid,<sup>67</sup> the trust being in the

61. N.C.—McCullen v. Durham, 50 S.E.2d 511, 229 N.C. 418—Walters v. Walters, 90 S.E. 304, 172 N.C. 328—Gaylord v. Gaylord, 63 S.E. 1028, 150 N.C. 222.  
65 C.J. p 330 note 2.

62. Ark.—Spradling v. Spradling, 142 S.W. 848, 101 Ark. 451.

63. Ark.—Spradling v. Spradling, supra.

64. Ark.—Spradling v. Spradling, supra.

65. Ark.—Spradling v. Spradling, supra.

66. U.S.—Chapman v. Whitsett, Mo., 236 F. 873, 150 C.C.A. 135.  
65 C.J. p 422 note 55.

67. Ala.—Holman v. Weed, 26 So 2d 721, 248 Ala. 179—Henderson Baker Lumber Co. v. Headley, 26 So. 2d 81, 247 Ala. 681—Gunter v. Jones, 13 So 2d 51, 244 Ala. 251—Booth v. Mason, 176 So 201, 231 Ala. 601—Otts v. Avery, 173 So 844, 234 Ala 122—Taylor v. Fulghum, 89 So. 702, 206 Ala. 219.

Ark.—Rushton v. Isom, 164 S.W.2d 997, 204 Ark 804

Cal.—Viner v. Untrecht, 158 P.2d 3, 26 Cal 2d 261—Stromerson v. Averill, 133 P.2d 617, reheard 141 P. 2d 732, 22 Cal 2d 808—Watson v. Poore, 115 P.2d 478, 18 Cal 2d 302—Hughes v. Kornthved, 21 P.2d 417, 215 Cal 3—Talbot v. Gadia, 267 P. 2d 426, 123 Cal App.2d 712—Stone v. Lohstein, 247 P.2d 357, 112 Cal App.2d 750—McNeil v. Dow, 200 P.2d 859, 89 Cal App.2d 370—Hench v. McMullen, 187 P.2d 111, 82 Cal. App.2d 872—Conway v. Moore, 160 P.2d 865, 70 Cal App.2d 166.

Ill.—Wright v. Wright, 118 N.E.2d 280, 2 Ill.2d 246—Fraser v. Finlay, 30 N.E.2d 613, 375 Ill. 78—Hilker v. Radcliff, 274 Ill.App. 463—McDonnell v. Holden, 185 N.E. 572, 352 Ill. 362.

Ind.—McClellan v. Beatty, 55 N.E.2d 327, 115 Ind.App. 173.

Kan.—Kinsley Bldg. & Loan Ass'n v. Love, 118 P.2d 617, 151 Kan. 460.

Mass.—Gerace v. Gerace, 16 N.E.2d 6, 301 Mass. 14, 117 A.L.R. 1459.

Miss.—Tanous v. White, 191 So. 278, 186 Miss. 556.

Mont.—Hanson v. Lancaster, 236 P.2d 105, 124 Mont. 441.

N.H.—French v. Pearson, 45 A.2d 300, 94 N.H. 18.

N.D.—Hyland v. Tousley, 275 N.W. 340, 67 N.D. 612.

Okl.—McKenna v. Lasswell, 250 P. 2d 208, 207 Okl. 408—Exchange Bank of Perry v. Nichols, 164 P.2d 867, 195 Okl. 283.

Pa.—Arndt v. Matz, 73 A.2d 332, 365 Pa. 41—Jennings v. Everett, 65 A. 2d 569, 161 Pa.Super. 443—New Cumberland Trust Co. v. Grossman, 198 A. 915, 131 Pa.Super. 132.

S.D.—Cox v. Bowman, 21 N.W.2d 277—Scott v. Liechti, 15 N.W.2d 1, 70 S.D. 89.

Tex.—Vickers v. Quinn, Civ App., 154 S.W.2d 947.

65 C.J. p 422 note 57, p 403 notes 85, 86.

Resulting trust in favor of lender where property is conveyed to borrower—see infra § 123.

Requirement that person claiming purchase money resulting trust furnish the consideration generally see infra § 119 b.

#### Contract to purchase made by borrower

Where a person pays in behalf of purchaser the purchase price of land and takes title thereto from the vendor pursuant to express agreement to convey land to purchaser on purchaser's repayment, there is a resulting trust in favor of the purchaser, especially where purchaser has equitable title in the property under his contract with vendor—

French v. Pearson, 45 A.2d 300, 94 N.H. 18.

#### Legal obligation to repay advance

Where one asserting a trust in realty at moment of conveyance is legally bound to one acquiring legal title to repay the money advanced, the purchase is with the fund of the beneficiary—Vickers v. Quinn, Tex. Civ.App., 154 S.W.2d 947.

#### Unenforceable contract to make loan

Under unenforceable preliminary contract by defendant to lend plaintiff money with which to purchase land, if defendant took title with plaintiff's knowledge and acquiescence, expecting to convey title to plaintiff when repaid, title would have been charged with a trust in favor of plaintiff, either resulting or express, and agreement would have been memorialized by defendant at the very time that the title was conveyed to him—Jarrett v. Hall, Tex. Civ.App., 207 S.W.2d 261.

#### Violation of agreement

When a third person, having agreed with the mortgagor to purchase the mortgaged land on foreclosure for a specified amount, bid in the land and paid such amount, the debt from the mortgagor to the third person was then created, and the third person's failure to have the deed made to the mortgagor and to take a mortgage from him as originally agreed on entitled the mortgagor to maintain a suit to declare a resulting trust in the nature of a mortgage, but did not prevent the transaction from being a consummation of the loan.—Booth v. Mason, 176 So. 201, 234 Ala. 601.

#### Written contract

An oral agreement to loan borrower money to save home occupied by borrower and wife created a resulting trust under which lender held legal title in trust for borrower, al-

nature of a mortgage<sup>68</sup> which the person to whom the money was loaned has a right to redeem and compel a conveyance of the property;<sup>69</sup> but the lender has the right to hold the title as security until the loan is repaid.<sup>70</sup> If the lender sells the property, he must account to the borrower for the money realized therefrom.<sup>71</sup> It has been held that a trust results in favor of the borrower where the grantee lends his credit rather than his money.<sup>72</sup> Thus, it has been held that where the one claiming the resulting trust pays part of the purchase price in cash the fact that the balance of the purchase price is paid from the proceeds of a bond and mortgage executed by the one to whom title is transferred does not prevent a trust from resulting as to the entire property;<sup>73</sup> but it has also been held that in such case no trust results, except possibly to the extent of the cash payment by the alleged beneficiary.<sup>74</sup> So, too, a trust may result where the entire purchase price is paid from the proceeds of a bond and mortgage executed by the one in whose name title is taken where the circumstances show a loan of credit rather than an intention that the grantee acquire a beneficial interest in the property,<sup>75</sup> but as to this there is also authority to the contrary.<sup>76</sup> If, instead of lending money for the purchase, the

grantee receives an absolute conveyance, the purchase money being his own, and there is an understanding that, when paid the price, he will convey the land to a third person, no resulting trust is created.<sup>77</sup> The status of the cestui que trust and the trustee under a trust resulting from a loan of part of the purchase money, where the lender took title in his own name, is not altered by subsequent advances made by the trustee.<sup>78</sup> In accordance with the general rule discussed supra § 101, that the statute of frauds is inapplicable to a resulting trust, the statute does not apply to the trust resulting in favor of the borrower where the conveyance is to the lender as security for the repayment of the loan,<sup>79</sup> and, as discussed infra § 133, parol evidence is admissible to establish a resulting trust from a loan or advancement of the purchase money and conveyance to the lender as security.

# § 108. Agreement to Purchase or Hold for Joint Benefit

Where one takes title to property in his own name despite a parol unenforceable contract to acquire it for the joint benefit of himself and another, a resulting trust does not ordinarily arise in favor of the other where none of his means were used in making the purchase.

The mere fact that two persons verbally agree

though written contract merely obligated lender to give borrower a deed on payment of a specified sum by a certain date.—*Jones v. McKinney*, 110 P.2d 258, 107 Colo 215.

68. Ala.—*Holman v. Weed*, 26 So 2d 721, 248 Ala 179.—*Henderson Baker Lumber Co v. Headley*, 42 So 2d 821, 253 Ala 107.—*Gunter v. Jones*, 13 So 2d 51, 244 Ala 251.—*Ottis v. Avery*, 173 So. 844, 234 Ala 122.

Cal.—*Talbot v. Gadla*, 267 P.2d 436, 123 Cal App 2d 712.

65 C.J. p 423 note 58.

Payment of purchase price as loan to another as creating equitable mortgage generally where lender takes title see *Mortgages* § 14 c.

69. Ala.—*Henderson Baker Lumber Co v. Headley*, 42 So.2d 821, 253 Ala 107.

Ill.—*Hilker v. Radcliff*, 274 Ill App. 463.

N.H.—*French v. Pearson*, 45 A.2d 300, 94 N.H. 18.

65 C.J. p 423 note 59.

## Time for repayment

Where lender advanced purchase price of property, but took title in his own name under agreement to convey on purchaser's repayment of sums advanced, purchaser was entitled to conveyance if he repaid advances within time specified; otherwise lender was entitled to judgment quieting lender's title.—*Hughes v. Kornetved*, 21 P.2d 417, 218 Cal. 3.

70. Cal.—*Viner v. Utrecht*, 158 P.2d 3, 26 Cal.2d 261.—*Talbot v. Gadla*, 267 P.2d 436, 123 Cal App 2d 712.

Ill.—*Fraser v. Finlay*, 30 NE 2d 613, 375 Ill 78.

Miss.—*Tanous v. White*, 191 So. 278, 186 Miss 556.

S.D.—*Scott v. Liechti*, 15 N.W 2d 1, 70 S.D. 89.

71. Kan.—*Weekly v. Ellis*, 2 P. 96, 30 Kan. 507.

72. Cal.—*Watson v. Poore*, 115 P.2d 478, 18 Cal 2d 302.

73. Cal.—*Watson v. Poore*, supra—*Givens v. Johnson*, 166 P.2d 67, 73 Cal App 2d 139.

N.J.—*Killeen v. Killeen*, 57 A.2d 23, 141 N.J. Eq 312.

Fact that grantee assumes or executes mortgage does not prevent a resulting trust where it is intended that beneficiary pay and beneficiary does pay.—*Cook v. Biazis*, 7 NE.2d 291, 365 Ill. 625.—*Noland v. Kennedy*, 147 N.E. 117, 316 Ill. 253.—*Skaheen v. Irving*, 69 NE 510, 306 Ill. 597.—*Fleming v. McHale*, 47 Ill. 282.

74. Mass.—*Cohen v. Simon*, 23 N.E. 2d 863, 304 Mass. 376.—*Kennerson v. Nash*, 94 N.E. 475, 208 Mass. 393.

Okla.—*Staton v. Moody*, 256 P.2d 409, 208 Okl. 372.

Part payment as resulting in trust pro tanto generally see infra § 122.

75. Ill.—*Wright v. Wright*, 118 N.E. 2d 280, 2 Ill.2d 246.

N.J.—*Killeen v. Killeen*, 57 A.2d 23, 141 N.J. Eq. 312.

## Money borrowed as agent for another

Where money was borrowed from the Home Owners' Loan Corporation by deceased, as agent for complainant who was living with him, in order to obtain title to the realty for complainant's benefit, money so borrowed was complainant's money, and deceased's only interest was to be indemnified against paying any part of indebtedness on mortgage given to corporation.—*Albas v. Harbin*, 30 So 2d 459, 249 Ala 201.

76. Mass.—*Saulnier v. Saulnier*, 103 N.E.2d 225, 328 Mass 238.

77. Ia.—*Brenner v. Brenner*, 29 Pa Dist. 23.

Tex.—*Schutz v. Harris*, Civ.App., 149 S.W. 242.

78. N.J.—*Seddon v. Pickard*, 137 A. 541, 101 N.J. Eq. 241.

79. Ala.—*Pollak v. Millsap*, 122 So. 16, 219 Ala. 273, 65 A.L.R. 110.

Ill.—*Hilker v. Radcliff*, 274 Ill.App. 463.

Ind.—*McClellan v. Beatty*, 55 N.E.2d 327, 115 Ind.App. 173.

Miss.—*Tanous v. White*, 191 So. 278, 186 Miss. 556.

N.H.—*French v. Pearson*, 45 A.2d 300, 94 N.H. 18.

to a purchase for their joint benefit, and one of them takes title in himself alone, does not raise a resulting trust in the other's favor, where the parol agreement is unenforceable by reason of the statute of frauds and none of his means have been used in making the purchase,<sup>80</sup> and he has no contract rights in the property,<sup>81</sup> and the one taking the title occupies no fiduciary relation to him,<sup>82</sup> unless such other changes his position or takes some action that he would not have taken except in reliance on the agreement,<sup>83</sup> or unless the grantee enters into and carries out the agreement *malà fide* for the purpose of gaining an advantage to himself.<sup>84</sup> A resulting trust may arise even though the agreement for a joint purchase or to hold for joint benefit is oral and unenforceable where the failure to comply with the agreement involves the violation of a fiduciary duty, taking unfair advantage of a confidential relationship, fraud, unjust enrichment, or other inequitable conduct,<sup>85</sup> although in such case the trust is usually regarded as a constructive trust, as discussed *infra* § 142 et seq. Where there is a valid enforceable written or parol agreement for the joint purchase of property or a purchase for their joint benefit and title is taken in the name of one, a resulting trust arises in favor of the others to the extent of their interests under the contract,<sup>86</sup> although, in such case, the trust may be express rather than resulting.<sup>87</sup> Where, in pursuance of a written agreement to purchase lands and on their sale to divide the profits, property is purchased and title is taken in the name of a corporation, such property is held in trust by the corporation for the

benefit of all the parties to the agreement;<sup>88</sup> but it has also been held that a written agreement whereby one was to purchase lands and, on the sale thereof, divide the profits with plaintiff does not charge the land purchased with any trust to secure plaintiff's share of the proceeds so as to enable him to compel an accounting by the person to whom the land was sold.<sup>89</sup> One does not hold in trust lands bought by him with his own money because of an oral agreement giving another the privilege of selling them and receiving half the proceeds in excess of a certain amount.<sup>90</sup>

### § 109. Intention of Grantee to Hold for, or Convey to, Another

A trust results where property is conveyed to the grantee on the faith of his intention to hold it for, or convey it to, another, but a parol promise to convey to another, unenforceable because of the statute of frauds, will not raise a resulting trust.

Where property is acquired by a person under circumstances which show that it is conveyed to him on the faith of his intention to hold it for, or convey it to, another,<sup>91</sup> or to hold it for, or convey it to, the grantor,<sup>92</sup> or the grantor and another,<sup>93</sup> a resulting trust will be held to arise in favor of the person for whose benefit the property was intended. On the other hand, such a trust cannot be held to arise where the facts of the transaction are such that no intention to hold for, or convey to another appears, or can be shown;<sup>94</sup> nor can an unexpressed intention existing in a purchaser's mind to buy and hold land for another,

80. Ala.—*Talley v. Talley*, 26 So.2d 586, 248 Ala. 84.

Cal.—*Mazzera v. Wolf*, 183 P.2d 649, 30 Cal.2d 531.—*Elliott v. Wood*, 212 P.2d 906, 95 Cal.App.2d 314.

N.J.—*DeMarco v. Batlow*, 85 A.2d 446, 18 N.J.Super. 30, affirmed 91 A.2d 272, 21 N.J.Super. 356.

Tex.—*Starr v. Ripley*, Civ.App., 265 S.W.2d 225.

65 C.J. p. 424 note 73.

Admissibility of evidence to show a parol contract for a joint purchase see *infra* § 133.

Effect of statute of frauds on partnership or joint venture agreements generally see *Frauds, Statute of* § 119.

Resulting trust where part of consideration for property is paid by one and title is taken in name of another see *infra* § 122.

81. Fla.—*Parramore v. Hampton*, 45 So. 992, 55 Fla. 672.

Tex.—*Burns v. Veritas Oil Co.*, Civ. App., 230 S.W. 440.

82. Fla.—*Parramore v. Hampton*, 45 So. 992, 55 Fla. 672.

Tex.—*Burns v. Veritas Oil Co.*, Civ. App., 230 S.W. 440.

83. Tex.—*Rische v. Desselhorst*, Civ.App., 26 S.W. 762.

65 C.J. p. 425 note 76.

84. Tex.—*Burns v. Veritas Oil Co.*, Civ.App., 230 S.W. 440.

65 C.J. p. 425 note 77.

85. Cal.—*Stewart v. Douglass*, 63 P. 699, 148 Cal. 511.

65 C.J. p. 423 note 71, p. 424 note 72.

86. Colo.—*O'Byrne v. Scofield*, 212 P.2d 867, 120 Colo. 572.

Miss.—*Sample v. Romine*, 8 So.2d 257, 193 Miss. 706, suggestion of error overruled 9 So.2d 643, 193 Miss. 706, corrected 10 So.2d 346, 193 Miss. 706.

N.Y.—*In re Lockwood's Estate*, 276 N.Y.S. 768, 154 Misc. 233.

65 C.J. p. 423 note 71.

87. Tex.—*Cluck v. Sheets*, Civ.App., 171 S.W.2d 857, affirmed 171 S.W.2d 860, 141 Tex. 219.

Agreement to acquire property for joint benefit as creating express trust see *supra* § 51.

88. Ga.—*Citizens' & Southern Nat. Bank v. Ellis*, 156 S.E. 603, 171 Ga. 717.

65 C.J. p. 425 note 79.

89. Mich.—*Ruggles v. Merritt*, 132 N.W. 112, 166 Mich. 457.

90. Ill.—*Widell v. Carmichael*, 120 N.E. 529, 285 Ill. 15.

91. Neb.—*Auker v. Henriksen*, 17 N.W.2d 878, 145 Neb. 687.

65 C.J. p. 425 note 85.

92. Okl.—*J. I. Case Threshing Mach. Co. v. Walton Trust Co.*, 136 P. 769, 39 Okl. 748.

65 C.J. p. 426 note 86.

93. Md.—*Airey v. Airey*, 152 A. 430, 160 Md. 41.

65 C.J. p. 426 note 87.

94. Or.—*Manning v. U. S. Nat. Bank of Portland*, 148 P.2d 255, 174 Or. 118, 153 A.L.R. 922.

Tex.—*Byerly v. Coney*, Civ.App., 161 S.W.2d 1105, error refused.

65 C.J. p. 426 note 88.

where there is no fraud or breach of confidence, alone create a resulting trust.<sup>95</sup> A resulting trust arises where the grantee takes the property under an agreement to hold it for another,<sup>96</sup> particularly where, on the faith of such an intention, he is enabled to gain an advantage in the purchase of the property,<sup>97</sup> or where the consideration or a part thereof has been furnished by or for such other.<sup>98</sup> A resulting trust does not arise where there is no agreement or understanding with, or on behalf of, such other that the property is to be acquired for his benefit,<sup>99</sup> and no advance is made by or for him of any part of the purchase money,<sup>1</sup> or there is no fraud as against him.<sup>2</sup>

*Agreement to convey.* Where the grantee takes the property under an agreement to convey to another on certain conditions, a trust results for the benefit of such other or his heirs, which equity will enforce, according to the agreement;<sup>3</sup> but a resulting trust does not arise from a mere verbal agreement whereby one is to purchase land and thereafter sell it to another;<sup>4</sup> nor, if one agrees to purchase land and give another an interest in it, and he does purchase and pay his own money and take the title in himself, can such trust be established on the mere parol promise to hold it in trust for the other.<sup>5</sup>

*Purchase at judicial sale.* Where one buys land at a judicial sale under a parol agreement to purchase for another, who either furnished the money or had an actual interest in the estate or a bona fide claim thereto,<sup>6</sup> or where the agent of creditors

represents to the debtor that he will purchase the debtor's land at foreclosure sale under a certain mortgage, resell it for the benefit of the creditors, and turn over the balance to the debtor,<sup>7</sup> a resulting trust arises. A parol agreement to purchase at a judicial sale and convey to another which is unenforceable as an express trust under the statute of frauds, as discussed supra § 34, does not give rise to a resulting trust where the one claiming a trust did not advance any part of the purchase money or have an interest or estate in the land or a claim thereto.<sup>8</sup>

## § 110. Conveyance in Consideration of Promise to Pay Debt of, or Support, Grantor

*A conveyance on condition that the grantee pay the grantor's debts results in a trust in favor of the grantor; but no trust results from a conveyance in consideration of a promise to support.*

Where a conveyance is made on the condition that the grantee pay certain debts of the grantor, there is a resulting trust in the grantor's favor,<sup>9</sup> although no trust results in such a case to a creditor of the grantor, whose debt the grantee refuses to pay.<sup>10</sup> Where an absolute and unconditional conveyance is made to secure a debt from the grantor to the grantee, a resulting trust arises,<sup>11</sup> and if the amount of the debt is tendered within a reasonable time after it becomes due, a reconveyance will be decreed,<sup>12</sup> or if the land is sold by the grantee for more than the debt assumpsit will lie against him for the surplus;<sup>13</sup> but if the debt is not paid within a reason-

95. Tex.—Johnson v. Sulphur Springs First Nat. Bank, Civ.App., 40 S.W. 334.

65 C.J. p 426 note 89.

96. Va.—Dobbs v. Dobbs, 143 S.E. 702, 150 Va. 386.

65 C.J. p 426 note 90.

97. Ala.—Belcher v. Sanders, 34 Ala. 9.

65 C.J. p 426 note 91.

98. Utah.—Pisk v. Patton, 27 P. 1, 7 Utah 399.

65 C.J. p 427 note 92.

Purchase money resulting trusts generally see infra § 115 et seq.

99. Ind.—Gilbert v. Carter, 10 Ind. 16, 68 Am.D. 655.

Vt.—Pinnock v. Clough, 16 Vt. 500, 42 Am.D. 621.

1. Or.—Elliott v. Bozorth, 97 P. 632, 52 Or. 391.

65 C.J. p 427 note 91.

2. Ind.—Gilbert v. Carter, 10 Ind. 16, 68 Am.D. 655.

3. Ohio.—Corpus Juris quoted in Britsch v. Roth, 17 Ohio Supp. 46, 48.

65 C.J. p 427 note 96.

4. Ind.—Boyer v. Leas, 64 N.E.2d 38, 116 Ind.App. 502, rehearing denied 64 N.E.2d 591, 116 Ind.App. 502.

Mass.—Cohen v. Simon, 23 N.E.2d 863, 304 Mass. 375.

Pa.—Arndt v. Matz, 73 A.2d 392, 365 Pa. 41—Green v. Green, Com.Pl., 31 Del.Co. 538.

Tex.—Nettles v. Doss, Civ.App., 161 S.W.2d 138, error refused—Vicars v. Quinn, Civ.App., 154 S.W.2d 947.

65 C.J. p 427 note 97.

Trust or agreement not enforceable because of statute of frauds as not raising a resulting trust generally see supra § 102.

5. Ohio.—Coolidge v. Smith, 5 Ohio N.P. N.S. 481.

Trust resulting from agreement to purchase for joint benefit see supra § 108.

6. Miss.—Comfort v. Winters, 66 So. 532, 108 Miss. 339.

65 C.J. p 427 note 99.

Purchase-money resulting trusts generally see infra § 155 et seq.

7. Mo.—Madison v. Williams, App., 16 S.W.2d 626.

8. Pa.—Moyer v. Moyer, 51 A.2d 708, 356 Pa. 184—Merchinski v. Borden, Com.Pl., 46 Sch.Leg.Rec. 188.

Resulting trust from fact that contract or trust is unenforceable under the statute of frauds see supra § 102.

9. Cal.—Bier v. Leisle, 156 P. 870, 172 Cal. 432.

65 C.J. p 428 note 9.

10. U.S.—Nebraska City Nat. Bank v. Nebraska City Hydraulic Gas-Light, etc. Co., C.C.Neb., 14 F. 763, 4 McCrary 319.

65 C.J. p 428 note 10.

11. Me.—Richardson v. Woodbury, 43 Me. 206.

12. Me.—Richardson v. Woodbury, supra.

13. Me.—Richardson v. Woodbury, supra.

able time, the grantee will hold the property discharged of the trust.<sup>14</sup>

**Promise to support.** Where property is conveyed by a deed absolute and unconditional in form, the fact that the grantee had promised, as a consideration for the conveyance, to support the grantor does not raise a resulting trust in the latter's favor,<sup>15</sup> but the grantor has a right to live on the land and to burden it with an equitable lien if he is denied that right.<sup>16</sup>

### § 111. Improvement of Lands of Another

A trust does not result in favor of one paying for improvements on another's land.

Since, as discussed supra § 102 e, it is the rule that a resulting trust must arise, if at all, from the state of facts existing at the time the legal title to the property is acquired, such a trust cannot be created by a subsequent expenditure of money in improving the property;<sup>17</sup> and the mere fact that one person's money is used in making improvements on another person's land does not give rise to a resulting trust in favor of the former on such land for the money so used.<sup>18</sup>

### § 112. Payment of Encumbrances on Land of Another

A resulting trust does not ordinarily arise in favor of one paying an encumbrance on another's land.

The mere fact that one person pays, or advances

money to pay, encumbrances on land conveyed to another does not create a resulting trust therefor in his favor.<sup>19</sup> Thus, in jurisdictions which hold that a mortgagor is not divested of his title to the land by a foreclosure sale prior to the expiration of the redemption period, the purchaser at foreclosure sale obtaining only a foreclosure judgment lien during the period of redemption, one who pays either all, or a portion of, the amount necessary to redeem land from a mortgage foreclosure does not acquire any equitable title thereto on the theory of a trust under the rule that if one person buys land with the money of another and takes title in his own name there is a resulting trust.<sup>20</sup> Where, however, a person under an agreement to hold the premises as security for his reimbursement and to release or reconvey them on being repaid, by way of a loan advances money for the mortgagor's benefit to redeem property from a mortgage foreclosure and takes title in himself, a resulting trust is created in such property in favor of the mortgagor;<sup>21</sup> and, where a mortgagor is furnished the money to redeem land sold under a power in the mortgage, under his parol contract to convey the land to the persons furnishing the money, the mortgagor after such redemption holds the legal title in trust for such persons.<sup>22</sup> Where one in a confidential relation with an owner of land and assuming to act for him pays off encumbrances on the land and takes a deed to himself, he holds the title thus acquired in

14. Me.—Richardson v. Woodbury, supra.

15. Ala.—Lynch v. Partin, 34 So.2d 2, 250 Ala. 241.

Cal.—Finnegan v. Hernandez, 168 P. 2d 32, 74 Cal.App.2d 51.  
65 C.J. p 428 note 15.

#### Death of grantees

Where sister conveyed family home which she had inherited from her father to her married brother and sister-in-law and the sister and married brother and sister-in-law and another brother agreed to live together as one family and to make certain contributions to the household expenses, the agreement was at an end on deaths of married brother and sister-in-law, and the sister and the other brother had no rights in the family home on ground of an implied trust in favor of sister.—McCormick v. McLaughlin, 67 N.E.2d 239, 319 Mass. 680.

16. Tex.—Rosek v. Kotzur, Civ.App., 267 S.W. 769.  
65 C.J. p 428 note 16.

17. Cal.—Smith v. Smith, App., 272 P.2d 118—Elliot v. Wood, 212 P.2d

906, 95 Cal.App.2d 314—Neusted v. Skernswell, 159 P.2d 49, 69 Cal.App.2d 361

Ky.—Missionary Board of Brethren Church v. Trustees of Brethren Church of Lost Creek, 57 S.W.2d 25, 247 Ky. 398.

Miss.—Windham v. Windham, 67 So. 2d 467, 218 Miss. 547.

Mo.—Weiborn v. Rigdon, 231 S.W.2d 127—Corpus Juris cited in Clubine v. Frazer, 139 S.W.2d 529, 532, 346 Mo. 1.

Ohio—Bell v. Vardalides, App., 59 N.E.2d 73.

Okla.—Corpus Juris cited in Ringer v. Byrne, 80 P.2d 212, 214, 183 Okl. 46.

Pa.—Farmers Trust Co. of Lancaster v. Bevis, 200 A. 54, 331 Pa. 89—Sholtz v. Drane, Com.Pl., 33 Del. Co. 651.

Tenn.—Fehn v. Schlickling, 175 S.W. 2d 37, 26 Tenn.App. 608.

Tex.—Sims v. Duncan, Civ.App., 195 S.W.2d 156.  
65 C.J. p 429 note 18.

18. Pa.—Stathopoulos v. Stathopoulos, Com.Pl., 51 Lanc.L.Rev. 177, 62 York Leg.Rec. 140.

Tex.—Morrison v. Farmer, 213 S.W. 2d 813, 147 Tex. 122.

65 C.J. p 429 note 19.

#### Purchase of building

Where plaintiff purchased house and garage and orally agreed with defendant that he should purchase another lot and move buildings to lot and recondition them and then convey property to plaintiff, a resulting trust did not arise from plaintiff's purchasing and paying for the buildings.—Morrison v. Farmer, supra.

19. Neb.—Bell v. Reed, 269 N.W. 66, 131 Neb. 587.

Pa.—Delahanty v. Farrington, 35 Pa. Dist. & Co. 119.  
65 C.J. p 429 note 20.

20. Wash.—Cochran v. Cochran, 195 P. 224, 193 P. 270, 114 Wash. 499.  
Resulting trust as arising from payment of consideration by one and conveyance to another see infra § 115 et seq.

21. Ala.—O'Rear v. O'Rear, 123 So. 895, 220 Ala. 85.  
65 C.J. p 429 note 23.

22. Ala.—Tillman v. Murrell, 24 So. 712, 120 Ala. 239.

trust for such owner, and as security only for his advances.<sup>23</sup>

§ 113. Vendor as Trustee for Purchaser, or for Assignee of Purchase-Money Notes

A vendor of land holds the title as resulting trustee for one to whom he has assigned the purchase-money notes.

A vendor of land who retains the legal title, but assigns the purchase-money notes to another, holds the land as resulting trustee for the assignee;<sup>24</sup> and where a vendor of land who has executed a bond for the deed, conditioned to make title when the purchase money is paid, transfers the purchase-money note, equity will consider such transfer as transfer of the lien and regard the vendor as holding the legal title to the land in trust to secure payment of the debt.<sup>25</sup>

The trust relationship which is sometimes held to exist between the vendor and purchaser of property is discussed in the C.J.S. title Vendor and Purchaser § 106, also 65 C.J. p 430 note 27 et seq, 66 C.J. p 707 note 58 et seq.

§ 114. Payment of Fiduciary Funds for Conveyance to Fiduciary or Third Person

a. In general

b. Funds in hands of agent

a. In General

Where a fiduciary uses fiduciary funds to purchase property and takes title in his own name or the name of a third person, a resulting trust arises in favor of the persons entitled to the funds with which the purchase was made.

It is an established rule of equity that, where trust and confidence are reposed by one person in another, and the latter accepts the confidence or trust, equity will convert him into a trustee, whenever it is necessary to protect the interest of the person so confiding and do justice between them.<sup>26</sup> In accordance with this rule, if any trustee or other person occupying a fiduciary relationship uses the fiduciary funds or assets in the purchase of property and takes a conveyance in the name of himself or a third person, a resulting trust arises in such property in favor of the persons entitled to the funds or assets with which it is purchased,<sup>27</sup> particularly where the purchase is made for the benefit of such persons.<sup>28</sup> A resulting trust arises in the above cases by way of exception to a statutory provision, that, where the consideration is paid by one person and the conveyance made to another, no trust shall result to the former,<sup>29</sup> unless the conveyance is so taken with the knowledge and assent of the persons entitled to the funds used.<sup>30</sup> One given money to purchase property who takes the conveyance in his own name holds the title on a resulting trust;<sup>31</sup> and, where one having funds of another uses them to acquire property, taking title in himself, he holds the property on a resulting trust for the owner of the funds.<sup>32</sup> Where property is purchased with the

23. N.J.—*Deutsche Presbyterianische Kirche v. Trustees of Presbytery of Elizabeth*, 104 A. 642, 89 N.J.Eq. 242.

65 C.J. p 430 note 25.

24. Ark.—*Phelps v. Jackson*, 31 Ark. 272.

65 C.J. p 431 note 42.

25. Ala.—*Kelly v. Payne*, 18 Ala. 371.

26. N.J.—*Muller v. Schram*, 134 A. 657, 658, 100 N.J.Eq. 143, affirmed 138 A. 921, 101 N.J.Eq. 792.

65 C.J. p 431 note 45.  
Constructive trust where confidential or fiduciary relationship violated see *infra* § 151.

Right to follow trust property or proceeds thereof see *infra* § 435 et seq.

27. U.S.—*Lunsford v. Haynie*, C.A. Tex., 175 F.2d 603—*In re Moraine Hotel Co.*, C.C.A.III., 107 F.2d 550—*Hobart Estate Co. v. Douglass*, C. C.Nev., 94 F.2d 954, 956—*Bracken v. Mineral Point Coal Co.*, D.C.Pa., 48 F.Supp. 892, affirmed, C.C.A., 138 F.2d 570.

28. Md.—*Williams v. Dovell*, 96 A.2d 484,

202 Md. 351—*Ottaviano v. Lorenzo*, 179 A. 530, 169 Md. 51.

Mass.—*Ryan v. McManus*, 80 N.E.2d 737, 323 Mass. 221.

Mo.—*Fullerton v. Fullerton*, 132 S.W. 2d 966, 345 Mo. 216.

N.C.—*Elmore v. Austin*, 59 S.E.2d 205, 232 N.C. 13.

Okla.—*Wynne v. Gibson*, 27 P.2d 849, 167 Okl. 114.

Or.—*Jansen v. Tyler*, 49 P.2d 372, 151 Or. 268.

Pa.—*In re Gerlach's Estate*, 72 A.2d 271, 364 Pa. 207, 16 A.L.R.2d 1397—*MacReynolds Estate*, 6 Pa.Co. 424.

65 C.J. p 431 notes 46, 49.

Executor or administrator purchasing in own name with funds of estate see *Executors and Administrators* § 268.

Guardian as trustee with respect to property purchased with ward's funds see *Guardian and Ward* § 93.

Time of payment and time title transferred.

Where trustee employs funds of cestui que trust to purchase property in his own name, trust originates irrespective of time of payment and

time of transfer of title.—*Meagher v. Harrington*, 254 P. 432, 78 Mont. 457.

28. Tenn.—*Wolfe v. Citizens' Bank*, Ch., 42 S.W. 39, 65 C.J. p 432 note 47.

29. Ky.—*Stone v. Burge*, 74 S.W. 250, 24 Ky.L. 2424.

N.Y.—*Buffalo, etc., R. Co. v. Lampson*, 47 Barb. 533.

30. Mich.—*Brown v. Bronson*, 35 Mich. 416.

31. Ark.—*Rushton v. Isom*, 164 S.W. 2d 997, 204 Ark. 804.

32. Tenn.—*Hoffner v. Hoffner*, 221 S.W.2d 907, 32 Tenn.App. 98. Tex.—*Gowan v. Reimers*, Civ.App., 220 S.W.2d 331, error refused no reversible error.

Unauthorized sale.

No resulting trust arises where one sells land of another without authority and purchases other land with the money so obtained; the sale, being unauthorized, does not affect the owner's title, and he has no interest in the consideration paid.—*Arnold v. Ellis*, 48 S.W. 893, 20 Tex.Civ.App. 262.

funds of an estate and title taken in the name of the life tenant, a trust results in favor of the remaindermen.<sup>33</sup> Use by a husband of his wife's money together with his own, without objection, in a business venture does not operate to attach a trust in favor of the wife to realty purchased with the proceeds of the business.<sup>34</sup>

*Use of fund to pay for previous purchase.* A resulting trust does not arise where the funds are applied by the fiduciary to payments due on property previously sold and conveyed to him on his own credit.<sup>35</sup>

*Part payment with fiduciary funds.* If the fiduciary funds thus used constitute only a part of the consideration, a resulting trust pro tanto arises.<sup>36</sup>

### b. Funds in Hands of Agent

Where an agent uses the funds or assets of his principal to purchase property, taking title in his own name or that of a third person, the property is held on a resulting trust for the principal.

Where an agent, having funds or assets of his principal in his possession, uses them in the purchase of property, and the purchase is made or title taken in the name of himself or of a third person, a resulting trust in the property so acquired arises in favor of the principal or his heirs,<sup>37</sup> as against the agent or his heirs,<sup>38</sup> although the agent made no express promise to act as trustee,<sup>39</sup> and although the principal is indebted to the agent in an amount equal to the value of the property purchased.<sup>40</sup> In the absence of a statutory provision to the contrary such a trust will arise, although the transaction was so

conducted with the principal's knowledge and consent;<sup>41</sup> but, under a statutory provision that no trust shall result where the title to property is taken in the name of one person and the consideration is paid by another, if the title is taken in the agent's name with the principal's knowledge or assent, a trust does not result to the principal,<sup>42</sup> except in favor of his creditors,<sup>43</sup> although it will if the agent takes the deed without the knowledge or consent of the principal.<sup>44</sup>

*Loans by principal.* No resulting trust arises where the principal loans money to the agent to be used in paying for land previously purchased by him.<sup>45</sup>

*Purchase by agent with own funds.* The general rule applies where the agent is given funds to purchase lands for his principal and he purchases for himself with his own funds,<sup>46</sup> even where the principal has paid nothing,<sup>47</sup> although, where the agent purchases with his own funds, it has been held that there must be an agreement in writing between the principal and his agent,<sup>48</sup> and that, as discussed infra § 133, parol evidence is not admissible to prove a resulting trust in favor of a principal in lands purchased by an agent and paid for with his own funds. Where an agent makes a valid purchase for himself,<sup>49</sup> or where he pays his own money for the land, not having any fund of the principal on hand, and not as a loan to the principal, a trust does not result notwithstanding the principal subsequently reimburses the agent for the amount expended.<sup>50</sup> If, however, an agent purchases prop-

33. Okl.—St. George State Bank of St. George, Kan., v. Marshall, 100 P.2d 432, 186 Okl. 500.

34. Or.—American Surety Co. of New York v. Hattrem, 3 P.2d 1109, 6 P.2d 1087, 138 Or. 358—Barger v. Barger, 47 P. 702, 30 Or. 268.

35. Ga.—Hardy v. Hardy, 100 S.E. 101, 149 Ga. 371.

36. C.J. p 433 note 64.

37. S.C.—Ex parte Johnson, 145 S.E. 113, 147 S.C. 259.

38. C.J. p 433 note 55.

39. Ala.—Smith v. Hart, 65 So.2d 501, 259 Ala. 7.

40. Ark.—Hunter v. Hunter, 224 S.W.2d 804, 216 Ark. 237.

41. Cal.—Stromerson v. Averhill, 133 P. 2d 617, subsequent opinion 141 P. 2d 732, 22 Cal.2d 808.

42. Tenn.—Justice v. Henley, 181 S.W. 2d 632, 27 Tenn.App. 405.

43. Tex.—Mauritz v. Bell, Civ.App., 81 S.W.2d 730, error refused.

44. C.J. p 433 note 57.

Breach of contract of agency as giving rise to constructive trust see infra § 151.

Purchase by agent for himself generally see Agency § 144.

38. U.S.—Dodge v. Briggs, C.C.Ga., 27 F. 160.

39. C.J. p 434 note 58.

39. Cal.—O'Connor v. Irvine, 16 P. 236, 74 Cal. 435.

Trust not dependent on contract

A resulting trust, arising by implication of law from act of agent, using principal's money to pay for property purchased by principal, in having deed therefor made to agent instead of principal, does not depend on contract.—Smith v. Hart, 65 So.2d 501, 259 Ala. 7.

40. Ala.—Milner v. Rucker, 20 So. 610, 112 Ala. 360.

41. N.J.—Bostleman v. Bostleman, 24 N.J.Eq. 103.

42. C.J. p 434 note 62.

43. Mich.—Maxfield v. Willey, 9 N.W. 271, 46 Mich. 252.

44. C.J. p 434 note 64.

45. N.Y.—Woodhull v. Osborne, 2 Edw. 614.

44. N.Y.—Reitz v. Reitz, 80 N.Y. 538.

45. Ill.—Pain v. Farson, 53 N.E. 579, 179 Ill. 185.

Resulting trust in favor of one loaning purchase money to purchaser generally see infra § 124.

46. Iowa.—Allen v. Malone, 2 Iowa 591.

47. Tex.—Berry v. Rhine, Civ.App., 205 S.W.2d 632.

48. Iowa.—Havner Land Co. v. MacGregor, 149 N.W. 617, 169 Iowa 5.

49. Ky.—Ewing v. Clore, 292 S.W. 824, 219 Ky. 329.

Agency contracts as within statute of frauds see Frauds, Statute of § 121.

50. Colo.—Calumet Gold Min., etc., Co. v. Phillips, 72 P. 1064, 31 Colo. 267.

N.D.—Powell v. International Harvester Co. of America, 170 N.W. 559, 41 N.D. 220.

50. Ala.—Bibb v. Hunter, 79 Ala. 351.



erty with his own funds, solely for his principal and at the latter's request, and is subsequently reimbursed therefor, he holds it in trust for his principal.<sup>51</sup>

*Part payment by agent.* Where funds of the agent are combined with funds of his principal in the

purchase, a trust results to the principal in a proportionate part of the purchase;<sup>52</sup> but a resulting trust does not arise in favor of an agent authorized to purchase property who pays part of the purchase money with his own funds,<sup>53</sup> such payment being a loan or advance to the principal.<sup>54</sup>

## 2. PAYMENT OF CONSIDERATION FOR TITLE IN ANOTHER

### § 115. General Considerations

The general rule that a trust results in favor of one who pays the purchase price for a conveyance of property to another and the statutory modification of that rule are discussed *infra* § 116. The various elements necessary for the application of the rule are discussed *infra* § 117 et seq. Whether the purchase of property in the name of another is a fraudulent conveyance is considered in *Fraudulent Conveyances* § 38.

Examine Pocket Parts for later cases.

### § 116. — Existence of Resulting Trust in General

Whether or not a resulting trust arises in favor of the person furnishing the consideration for a transfer of

property to another depends in the final analysis on the intention, at the time of the transfer, of the person furnishing the consideration; unless abolished or modified by statute, the general rule is that in the absence of a showing of a different intention or understanding, where property is paid for with the assets of one person and title to the property is taken in the name of a stranger, the property is held on a resulting trust in favor of the one furnishing the consideration for the transfer.

As a general rule, sometimes embodied in statute, property paid for with the money or assets of one person, title thereto being taken in the name of a stranger or person for whom he is under no legal or moral obligation to provide, is held by resulting trust, in favor of the person furnishing the consideration, or persons claiming under him, and the person thus obtaining title is a trustee for the person paying the consideration.<sup>55</sup> The trust which re-

51. Ark.—Rushion v. Isom, 164 S. W.2d 997, 204 Ark. 804—Pindall v. Trevor, 30 Ark. 249.  
Cal.—Hiehlman v. Messmer, 16 P. 766, 75 Cal. 166.

Pa.—In re Beahore's Estate, 62 York Leg. Rec. 61.

Agent's purchase for himself where he is employed to purchase for his principal see Agency, § 144 c. Constructive trust where agent breaches faith see *infra* § 151.

#### Undisclosed principal

Where lease with option to purchase textile mill was taken by agent in his own name but in reality for an undisclosed principal who through agent paid monthly rental until agent assigned lease to corporation organized by him in payment of his subscription for corporate shares, and undisclosed principal thereafter paid money due into court for benefit of landlord, a "resulting trust" arose in favor of undisclosed principal, with respect to shares received by agent.—Upchurch v. Goodroe, 6 So.2d 869, 242 Ala. 395.

52. Conn.—Waterman v. Buckingham, 64 A. 212, 79 Conn. 286.  
65 C.J. p 434 note 75.

53. Pa.—Walker v. Provident Trust Co. of Philadelphia, 10 Pa. Dist. & Co. 164.

54. Pa.—Walker v. Provident Trust Co. of Philadelphia, *supra*.

55. U.S.—Montgomery v. Thomas, C. C. Tex., 146 F.2d 76—Fletcher v.

Felker, D.C. Ark., 97 F.Supp. 755—Corpus Juris cited in Batavia Times Pub. Co. v. U. S., 96 Ct. Cl. 166, 168.

Ala.—Snow v. State, 60 So.2d 346, 257 Ala. 614—Rodgers v. Thornton, 46 So.2d 809, 254 Ala. 66—Adams v. Griffin, 45 So.2d 22, 253 Ala. 371—Young v. Greer, 35 So.2d 619, 250 Ala. 641—Corpus Juris cited in Lauderdale v. Peace Baptist Church of Birmingham, 19 So.2d 538, 539, 246 Ala. 178—Leonard v. Duncan, 16 So.2d 879, 245 Ala. 320—Gandy v. Hagler, 16 So.2d 305, 245 Ala. 167—Jacksonville Public Service Corp. v. Profile Cotton Mills, 180 So. 583, 236 Ala. 4.

Ark.—Corpus Juris quoted in Mortensen v. Ballard, 188 S.W.2d 749, 754, 209 Ark. 1—Waldo Fertilizer Works v. Dickens, 177 S.W.2d 398, 206 Ark. 747—Hunt v. Hunt, 149 S.W.2d 930, 202 Ark. 130.

Cal.—Mazzera v. Wolf, 183 P.2d 649, 30 Cal.2d 531—Berniker v. Berniker, 182 P.2d 557, 30 Cal.2d 439—Viner v. Untrecht, 158 P.2d 3, 26 Cal.2d 261—In re Harris' Estate, 72 P.2d 873, 9 Cal.2d 649—Emden v. Verdi, App., 269 P.2d 47—In re Raphael's Estate, 252 P.2d 979, 115 Cal. App.2d 626—Von Zastrow v. Schiffbauer, 250 P.2d 624, 114 Cal. App.2d 500—Elliott v. Wood, 212 P.2d 906, 95 Cal. App.2d 314—Gerstner v. Scheuer, 204 P.2d 937, 91 Cal. App.2d 123—Bradley v. Duty, 166 P.2d 914, 73 Cal. App.2d 522—Con-

way v. Moore, 160 P.2d 865, 70 Cal. App.2d 166—Schwartz v. Artel, 105 P.2d 380, 40 Cal. App.2d 433—Kirk White & Co. v. Bieg-Hoffine Co., 44 P.2d 439, 6 Cal. App.2d 188.

Colo.—Valley State Bank v. Dean, 47 P.2d 924, 97 Colo. 151.  
Conn.—Franke v. Franke, 98 A.2d 804, 140 Conn. 133—Samasko v. Davis, 64 A.2d 682, 135 Conn. 377—Van Auken v. Tyrrell, 83 A.2d 339, 130 Conn. 289—Reynolds v. Reynolds, 183 A. 394, 121 Conn. 114.  
D.C.—Kosters v. Hoover, 98 F.2d 695, 69 App. D.C. 66.

Fla.—Elvins v. Seestadt, 4 So.2d 532, 148 Fla. 408—Smith v. Smith, 196 So. 409, 143 Fla. 159—Whetstone v. Coslick, 157 So. 666, 117 Fla. 203, 96 A.L.R. 455—Benbow v. Benbow, 157 So. 512, 117 Fla. 37—Walker v. Landress, 149 So. 545, 111 Fla. 356.

Ga.—Epps v. Epps, 75 S.E.2d 165, 209 Ga. 643—Price v. Price, 54 S.E.2d 578, 205 Ga. 623—McCollum v. McCollum, 43 S.E.2d 663, 202 Ga. 406—Williams v. Thomas, 38 S.E.2d 603, 200 Ga. 767—Padgett v. Collins, 81 S.E.2d 309, 89 Ga. App. 769.  
Hawaii.—Ishida v. Naumu, 34 Hawaii 363.

Idaho.—Edwards v. Tenney, 154 P.2d 143, 65 Idaho 784—Corpus Juris cited in Malcolm v. Hamner, 127 P.2d 331, 336, 64 Idaho 66—Corpus Juris cited in Rexburg Lumber Co. v. Purrington, 113 P.2d 511, 514, 62 Idaho 461.

**Ill.**—Wright v. Wright, 118 N.E.2d 280, 2 Ill.2d 246—Johnson v. Johnson, 115 N.E.2d 617, 1 Ill.2d 319—Fields v. Fields, 114 N.E.2d 402, 415 Ill. 324—McCabe v. Hebrner, 102 N.E.2d 794, 410 Ill. 557—Bowman v. Pettersen, 102 N.E.2d 787, 410 Ill. 519—Kohlhaas v. Smith, 97 N.E.2d 774, 408 Ill. 535—Peters v. Meyers, 96 N.E.2d 493, 408 Ill. 253—Craven v. Craven, 96 N.E.2d 489, 407 Ill. 255—Tuntland v. Haugen, 78 N.E.2d 308, 399 Ill. 595—Murray v. Behrendt, 76 N.E.2d 431, 399 Ill. 25—Kane v. Johnson, 73 N.E.2d 321, 397 Ill. 112—Houdek v. Ehrenberger, 72 N.E.2d 837, 397 Ill. 62—Brod v. Brod, 61 N.E.2d 675, 390 Ill. 312—Fraser v. Finlay, 30 N.E.2d 618, 375 Ill. 78—Cook v. Blazis, 7 N.E.2d 291, 365 Ill. 625—Mersch v. Mersch, 117 N.E.2d 868, 1 Ill.App.2d 429—Aitschuler v. Aitschuler, 91 N.E.2d 88, 340 Ill.App. 220, reversed on other grounds 101 N.E.2d 552, 410 Ill. 168.

**Iowa.**—Shaw v. Addison, 28 N.W.2d 816, 239 Iowa 377—Sinclair v. Alender, 26 N.W.2d 320, 238 Iowa 212—Crawford v. Couch, 15 N.W.2d 633, 234 Iowa 1246

**Md.**—Sines v. Shipes, 63 A.2d 748, 192 Md 139—Tietman v. Welsh, 59 A.2d 628, 191 Md. 1—Fasman v. Pottashnick, 51 A.2d 664, 188 Md. 105—O'Connor v. Estevez, 35 A.2d 148, 182 Md 541—Mountford v. Mountford, 29 A.2d 258, 181 Md. 212—Diven v. Sieling, 165 A. 486, 164 Md 526, appeal dismissed and certiorari denied 54 S.Ct. 80, 290 U.S. 587, 78 L Ed 518

**Mass.**—Collins v. Curtin, 89 N.E.2d 211, 325 Mass 123—MacNeil v. MacNeil, 43 N.E.2d 667, 312 Mass. 183—Druker v. Druker, 31 N.E.2d 524, 308 Mass 229—Gowell v. Twitchell, 28 N.E.2d 531, 306 Mass 482—Cohen v. Simon, 23 N.E.2d 853, 304 Mass. 375—Gerace v. Gerace, 16 N.E.2d 6, 301 Mass. 14, 117 A.L.R. 1459—Assessors of Town of Weston v. Boston College Trustees, 6 N.E.2d 363, 296 Mass. 399

**Miss.**—Sullivan v. Nobles, 51 So.2d 756, 211 Miss. 330—Chichester v. Chichester, 48 So.2d 123, 209 Miss. 628—Campbell v. Millsaps, 12 So.2d 526.

**Mo.**—Ward v. Smoot, 237 S.W.2d 184, 361 Mo 879—Rich v. Williams, 222 S.W.2d 726—Judgett v. Osborne, 221 S.W.2d 210, 359 Mo. 209—Carr v. Carroll 178 S.W.2d 435—Hiatt v. Hiatt, 168 S.W.2d 1087—**Corpus Juris cited in** Mays v. Jackson, 145 S.W.2d 392, 399, 346 Mo. 1224—Parker v. Blakeley, 93 S.W.2d 981, 338 Mo. 1189—Dee v. Sutter, App. 22 S.W.2d 541.

**Neb.**—Holbein v. Holbein, 30 N.W.2d 899, 149 Neb. 281—Reetz v. Olson, 20 N.W.2d 687, 146 Neb. 621—Bell v. Reed, 269 N.W. 66, 111 Neb. 587. **N.H.**—Nixon v. Cooper, 87 A.2d 687,

97 N.H. 327—French v. Pearson, 45 A.2d 300, 94 N.H. 18.

**N.J.**—Roy v. Enot, 183 A. 906, 120 N.J. 67—Altman v. Altman, 72 A.2d 536, 8 N.J.Super. 301—Gentile v. Gentile, 60 A.2d 315, 142 N.J.Eq. 383—Moses v. Moses, 63 A.2d 805, 140 N.J.Eq. 575, 173 A.L.R. 273—Gordon v. Griffith, 168 A. 57, 113 N.J.Eq. 554.

**N.C.**—Bullman v. Edney, 61 S.E.2d 338, 232 N.C. 465—Carlisle v. Carlisle, 35 S.E.2d 418, 225 N.C. 462—**Corpus Juris cited in** Creech v. Creech, 24 S.E.2d 642, 646, 222 N.C. 656—Wilson v. Williams, 2 S.E.2d 19, 215 N.C. 407—Teachey v. Gurler, 199 S.E. 83, 214 N.C. 288—Wilmington Furniture Co. v. Cole, 178 S.E. 579, 207 N.C. 840, 847.

**N.D.**—Redman v. Blewer, 48 N.W.2d 372, 78 N.D. 120.

**Ohio.**—Kopp Clay Co. v. State, 182 N.E. 494, 125 Ohio St. 512—Douglas v. Hubbard, 107 N.E.2d 884, 91 Ohio App. 200, appeal dismissed 104 N.E.2d 182, 157 Ohio St. 94—Ohio State Life Ins. Co. v. Union Properties, App. 52 N.E.2d 842

**Okl.**—**Corpus Juris cited in** Gill v. First Nat. Bank & Trust Co., 159 P.2d 717, 719, 195 Okl. 607—King v. Courtney, 122 P.2d 1014, 190 Okl. 256.

**Or.**—Unterkircher v. Unterkircher, 195 P.2d 178, 183 Or. 583—Fox v. Maurer, 164 P.2d 417, 178 Or. 64—Blacklaw v. Blacklaw, 44 P.2d 728, 150 Or. 244—Rhodes v. Peery, 19 P.2d 418, 142 Or. 165.

**Pa.**—Fitzpatrick v. Fitzpatrick, 29 A.2d 790, 346 Pa. 202—Chester Housing Authority v. Ritter, 25 A.2d 72, 344 Pa. 653—Furman v. Johnson, 22 A.2d 722, 343 Pa. 645—Farmers Trust Co. of Lancaster v. Bevis, 200 A. 54, 331 Pa. 89—Muzzy v. Hotelling, 86 Pa.Dist. & Co. 269, 36 Erie Co. 192—Arndt v. Matz, Com.Pl., 41 Berks Co. 267—Gross v. Gross, Com.Pl., 60 Dauph. Co. 460—In re Friedmann's Estate, 40 Del. Co. 305—In re Schaeffer's Estate, 35 Del. Co. 262, 62 York Leg.Rec. 113—Gelbarth v. Moore, Com.Pl., 29 Del.Co. 68—Schuler v. Schuler, 46 Lack.Jur. 113—Specht v. Specht, 67 Montg. Co. 162—Donohue v. Donohue, Com.Pl., 42 Sch.Leg.Rec. 66—Oppenlander v. Searway, Com.Pl., 63 Montg.Co. 39.

**R.I.**—Szalenyi v. Cleverly, 50 A.2d 185, 72 R.I. 253.

**S.C.**—Legendre v. South Carolina Tax Commission, 56 S.E.2d 336, 215 S.C. 514.

**Tenn.**—Fehn v. Schlickding, 175 S.W.2d 37, 26 Tenn.App. 608

**Tex.**—Morrison v. Farmer, 213 S.W.2d 813, 147 Tex. 122—La Force v. Bracken, 169 S.W.2d 465, 141 Tex. 12—Starr v. Ripley, Civ.App., 265 S.W.2d 225—Dennis v. Dennis, Civ.App., 256 S.W.2d 964—Tolle v. Sawtelle, Civ.App., 246 S.W.2d 916, er-

ror refused—Dickens v. Dickens, Civ.App., 241 S.W.2d 658, error refused on reversible error—Miller v. Donald, Civ.App., 235 S.W.2d 201, error refused on reversible error—Mace v. Young, Civ.App., 231 S.W.2d 722, error refused—Greasy v. Wood, Civ.App., 230 S.W.2d 568, error refused on reversible error—Haigh v. Calhoun, Civ.App., 215 S.W.2d 426—Davis v. Pearce, Civ.App., 205 S.W.2d 653—Berry v. Rhine, Civ.App., 205 S.W.2d 632—Klein v. Sibley, Civ.App., 203 S.W.2d 239—Elbert v. Waples-Platter Co., Civ.App., 156 S.W.2d 146, error refused—Macias v. Macias, Civ.App., 148 S.W.2d 240—Roesser & Pendleton v. Stanolind Oil & Gas Co., Civ.App., 138 S.W.2d 250, error refused—Alexander Co. v. First Nat. Bank, Civ.App., 119 S.W.2d 718, error dismissed—Brod v. First Nat. Bank, Civ.App., 91 S.W.2d 772, error dismissed—Ashby v. Standard Pipe & Supply Co., Civ.App., 56 S.W.2d 218, error refused.

**Utah.**—Hawkins v. Perry, 253 P.2d 372.

**Va.**—Williams v. Powers, 190 S.E. 149, 168 Va. 111.

**Wash.**—Armenian v. Armenian, 264 P.2d 256, 43 Wash.2d 787—Donaldson v. Greenwood, 242 P.2d 1038, 40 Wash.2d 238—**Corpus Juris cited in** Creamsan v. Doyle, 196 P.2d 835, 840, 31 Wash.2d 345—Makinen v. George, 142 P.2d 910, 19 Wash.2d 340.

**W.Va.**—Eversly v. Schoemer, 80 S.E.2d 334—Wilcox v. Carrier, 53 S.E.2d 620, 132 W.Va. 637—Carter v. Walker, 1 S.E.2d 483, 121 W.Va. 81.

**Wyo.**—**Corpus Juris cited in** McConnell v. Dixon, 233 P.2d 877, 886, 68 Wyo 301—**Corpus Juris quoted in** Nussbacher v. Manderfeld, 186 P.2d 548, 553, 64 Wyo. 55.

65 C.J. p 382 note 14, p 384 notes 15, 16, p 390 note 53.

Persons against whom trust may be enforced see *infra* § 434

Resulting trust where property is conveyed to spouse, child, or other close relative of person paying consideration see *infra* § 135 et seq.

**Statute held declaratory of common law**

**Mont.**—Humbird v. Arnet, 44 P.2d 756, 99 Mont. 499.

**Okl.**—Oklahoma City v. Vahlberg, 173 P.2d 736, 197 Okl. 613

**If realty is purchased with partnership funds**, person holding legal title will be regarded as holding it subject to a resulting trust in favor of firm furnishing the money.—Emsweller v. Emsweller, 61 N.E.2d 377, 390 Ill. 286.

**Trust for another**

A resulting trust cannot be converted into one for a person other than he who furnishes the purchase

suits under such circumstances does not arise from contract or agreement of the parties,<sup>56</sup> but from the facts and circumstances;<sup>57</sup> the trust results in such cases as a creature of equity<sup>58</sup> and arises by implication or operation of law.<sup>59</sup> However, the mere fact of payment of the purchase money by one other than the one in whose name title is taken is not always sufficient to raise a resulting trust.<sup>60</sup> Whether or not a resulting trust arises in favor of the person furnishing the consideration for a transfer of property to another depends in the final analysis

on the intention, at the time of the transfer, of the person furnishing the consideration,<sup>61</sup> and such intention is to be determined from all of the facts and circumstances.<sup>62</sup>

An intention that the grantee is not to receive and hold the legal title as beneficial owner is an essential element to the creation of the resulting trust,<sup>63</sup> and a resulting trust arises in favor of the one furnishing the consideration for a transfer to another only in the absence of circumstances showing a different intention or understanding.<sup>64</sup> Thus, no resulting

price.—*Dickinson v. Dickinson*, 40 A. 2d 184, 181 Conn. 392.

**Grantee not authorized to hold in trust**

Although defendant paid consideration for transfer of land to town, town did not have power to accept the realty as trustee or to hold a naked legal title to the realty for benefit of some particular individual, and constructive or resulting trust would not be recognized.—*Anglin v. Lauderdale-By-The-Sea*, Fla. 60 So. 2d 619, certiorari denied *Demko v. Lauderdale-By-The-Sea*, 73 S.Ct. 795, 345 U.S. 935, 97 L.Ed. 1362.

66. Cal.—*Gerstner v. Scheuer*, 204 P.2d 937, 91 Cal.App.2d 123.

Fla.—*Frank v. Feles*, 13 So.2d 216, 152 Fla. 869—*Walker v. Landress*, 149 So. 545, 111 Fla. 356.

Ill.—*Johnson v. Johnson*, 115 N.E.2d 617, 111 Ill.2d 319.

Tex.—*Davis v. Pearce*, Civ.App., 205 S.W.2d 653.

Wyo.—*Corpus Juris* quoted in *Nussbacher v. Manderfeld*, 186 P.2d 548, 553, 64 Wyo. 55.

65 C.J. p. 385 note 17.

Resulting trust as not dependent on contract or agreement generally see *supra* § 102.

87. Cal.—*Bradley v. Duty*, 166 P.2d 914, 73 Cal.App.2d 522.

Mo.—*Rich v. Williams*, 223 S.W.2d 726.

Wyo.—*Corpus Juris* quoted in *Nussbacher v. Manderfeld*, 186 P.2d 548, 553, 64 Wyo. 55.

65 C.J. p. 385 note 18.

88. Ala.—*Leonard v. Duncan*, 16 So. 2d 879, 245 Ala. 320.

Ga.—*Price v. Price*, 54 S.E.2d 578, 205 Ga. 623.

65 C.J. p. 387 note 29.

89. Ala.—*Leonard v. Duncan*, 16 So. 2d 879, 245 Ala. 320—*Gandy v. Hagler*, 16 So. 2d 305, 245 Ala. 167.

Cal.—*In re Harris' Estate*, 72 P.2d 873, 9 Cal.2d 649.

Conn.—*Frank v. Franke*, 98 A.2d 804, 140 Conn. 133—*Reynolds v. Reynolds*, 183 A. 394, 121 Conn. 114.

Fla.—*Frank v. Feles*, 13 So.2d 216, 152 Fla. 869—*Walker v. Landress*, 149 So. 545, 111 Fla. 356.

Ill.—*Bowman v. Petterson*, 103 N.E.2d

787, 410 Ill. 519—*Houdek v. Ehrenberger*, 72 N.E.2d 837, 397 Ill. 62.

N.H.—*Nixon v. Cooper*, 87 A.2d 687, 97 N.H. 327.

Mass.—*Gerace v. Gerace*, 16 N.E.2d 6, 301 Mass. 14, 117 A.L.R. 1459—*Assessors of Town of Weston v. Boston College Trustees*, 6 N.E.2d 363, 286 Mass. 339.

Or.—*Unterkircher v. Unterkircher*, 195 P.2d 178, 183 Or. 583—*Rhodes v. Peery*, 19 P.2d 418, 142 Or. 165.

Tex.—*Morrison v. Farmer*, 213 S.W. 2d 813, 147 Tex. 122—*Miller v. Donald*, Civ.App., 235 S.W.2d 201, error refused no reversible error.

65 C.J. p. 382 note 13.

90. Ala.—*Corpus Juris* quoted in *Lauderdale v. Peace Baptist Church of Birmingham*, 19 So.2d 538, 540, 246 Ala. 178.

65 C.J. p. 388 note 47.

61. Cal.—*Gammill v. Nunes*, 231 P.2d 86, 104 Cal.App.2d 185—*Finnegan v. Hernandez*, 168 P.2d 32, 74 Cal. App.2d 51—*Owings v. Laugharn*, 128 P.2d 114, 53 Cal.App.2d 789.

Fla.—*Smith v. Smith*, 196 So. 409, 143 Fla. 159.

Ill.—*Bowman v. Petterson*, 102 N.E.2d 787, 410 Ill. 519—*Peters v. Meyers*, 96 N.E.2d 493, 408 Ill. 258—*Brody v. Brody*, 61 N.E.2d 676, 390 Ill. 312.

Minn.—*American Sur. Co. of N. Y. v. Greenwald*, 25 N.W.2d 681, 223 Minn. 37.

N.J.—*Gordon v. Griffith*, 168 A. 57, 113 N.J. Eq. 564.

**Trust or gift**

The status of property is fixed either as a gift or a trust at time grantee takes title and intention of grantor is determined as of date of the deed.—*In re Cunningham's Estate*, 143 P.2d 852, 19 Wash.2d 589.

**Intention of grantee is not material.**—*Gilmore v. Brown*, Tex.Civ. App., 150 S.W. 964—65 C.J. p. 385 note 19 [b].

92. Ill.—*Bowman v. Petterson*, 102 N.E.2d 787, 410 Ill. 519—*Peters v. Meyers*, 96 N.E.2d 493, 408 Ill. 253.

N.J.—*Gordon v. Griffith*, 168 A. 57, 113 N.J. Eq. 564.

**No general rule can be stated that will determine when a conveyance made to one other than the person**

furnishing the consideration will carry with it a beneficial interest and when it will be construed to create a trust, but the intention must be gathered from the facts and circumstances as shown by the record in such case.—*Bowman v. Petterson*, 102 N.E.2d 787, 410 Ill. 519.

#### Corporate reorganization

Where new corporation was set up primarily to discharge insolvent corporation's indebtedness, and new corporation assumed the insolvent corporation's debts and issued bonds, composed of classes A, B, and C, in return for debts assigned to it, there arose no resulting trust whereunder the stock held by new corporation's incorporators was held for the benefit of mechanics' lien creditors, who held class C bonds, after the class A and class B bonds had been discharged, in absence of any provision in the contract between the parties in interest indicating that class C bondholders were to be stockholders of the corporation.—*Belmont Iron Works v. Boyle*, 198 S.E. 527, 120 W.Va. 339.

63. Cal.—*Finnegan v. Hernandez*, 168 P.2d 32, 74 Cal.App.2d 51.

Pa.—*Schuler v. Schuler*, Com.Pl., 46 Lack Jur. 113.

Wyo.—*Corpus Juris* quoted in *Nussbacher v. Manderfeld*, 186 P.2d 548, 553, 64 Wyo. 55.

65 C.J. p. 385 note 19.

94. Ala.—*Lauderdale v. Peace Baptist Church of Birmingham*, 19 So. 2d 538, 246 Ala. 178—*Jacksonville Public Service Corp. v. Profile Cotton Mills*, 180 So. 583, 236 Ala. 4.

Conn.—*Frank v. Franke*, 98 A.2d 804, 140 Conn. 133—*Samasko v. Davis*, 64 A.2d 682, 135 Conn. 377.

Md.—*Sines v. Shippe*, 63 A.2d 748, 192 Md. 139—*Fasman v. Pottashnick*, 51 A.2d 664, 188 Md. 105—*Diven v. Sieling*, 165 A. 485, 164 Md. 526, appeal dismissed and certiorari denied 54 S.Ct. 80, 290 U.S. 587, 78 L.Ed. 518.

N.J.—*O'Neal v. O'Neal*, 74 A.2d 614, 9 N.J. Super. 36—*Fowler v. Scott*, 73 A.2d 278, 8 N.J. Super. 490—*Gordon v. Griffith*, 168 A. 57, 113 N.J. Eq. 564.

N.C.—*Lawrence v. Heavner*, 61 S.E. 2d 697, 232 N.C. 557—*Creech v.*

trust arises where the one furnishing the consideration does not intend to obtain a beneficial interest in the property,<sup>65</sup> or where he intends that the one in whose name the property is taken shall have the beneficial interest,<sup>66</sup> even though the beneficial interest is contingent or conditional.<sup>67</sup>

For this reason or because it is so provided by statute, the rule that a resulting trust arises where property is bought by one person with the money or assets of another, or where a person purchases land with his own money, and takes a conveyance

thereof in the name of another, is frequently stated as a presumption.<sup>68</sup> The rule or presumption in favor of a resulting trust is based on the natural equity that he who pays for the property should enjoy it<sup>69</sup> and on an inference or presumption as to the intention of the one furnishing the consideration.<sup>70</sup> The rule or presumption in favor of a resulting trust is founded on the natural presumptions that he who supplies the purchase money or other consideration intends the purchase for his own benefit, rather than for the benefit of a stranger,<sup>71</sup> and

Creesh, 24 S.E.2d 642, 222 N.C. 655.  
—Wilmington Furniture Co. v. Cole, 178 S.E. 579, 207 N.C. 840, 847.

Ohio.—Lipps v. Lipps, App., 87 N.E.2d 823.

Or.—Fox v. Maurer, 164 P.2d 417, 178 Or. 64—Rhodes v. Peery, 19 P.2d 418, 142 Or. 165.

Pa.—Fitzpatrick v. Fitzpatrick, 29 A.2d 790, 346 Pa. 202.

Wash.—Donaldson v. Greenwood, 242 P.2d 1038, 40 Wash.2d 238—Crease-man v. Boyle, 196 P.2d 835, 31 Wash.2d 345.

65 C.J. p 382 note 11.

65. Cal.—McNeill v. Dow, 200 P.2d 859, 89 Cal.App.2d 370.

Fla.—Anglin v. Lauderdale-Ry-The-Sea, 60 So.2d 619, certiorari denied Demka v. Lauderdale-Ry-The-Sea, 73 S.Ct. 795, 345 U.S. 935, 97 L.Ed. 1362.

Pa.—Selfert v. Eyster, Com.Pl., 57 York Leg Rec. 181.

Purpose of payment generally see infra § 123.

66. Ala.—Lynch v. Partin, 34 So.2d 2, 250 Ala. 241.

Cal.—Browning v. Evans, 20 P.2d 681, 217 Cal. 585.

Colo.—Howard v. Barrett, 72 P.2d 474, 101 Colo. 249.

Fla.—Johnson v. Craig, 28 So.2d 696, 158 Fla. 254—Donage v. Simpson, 26 So.2d 840, 157 Fla. 468.

Ill.—Bowman v. Petterson, 102 N.E.2d 787, 410 Ill. 519—Peters v. Meyers, 96 N.E.2d 493, 408 Ill. 253—Brod v. Brod, 61 N.E.2d 675, 390 Ill. 312.

Tex.—Davis v. Pearce, Civ.App., 205 S.W.2d 553.

W.Va.—Carter v. Walker, 1 S.E.2d 483, 121 W.Va. 81.

Payment of purchase price as gift or advancement to grantee see infra § 124.

Payment of purchase price as loan to grantee see infra § 124.

67. Ill.—Brod v. Brod, 61 N.E.2d 675, 390 Ill. 312.

W.Va.—Carter v. Walker, 1 S.E.2d 483, 121 W.Va. 81.

68. Ala.—Adams v. Griffin, 45 So.2d 22, 253 Ala. 271—Roubicek v. Roubicek, 21 So.2d 244, 246 Ala. 442—Corpus Juris cited in Lauderdale

v. Peace Baptist Church of Birmingham, 19 So.2d 538, 539, 246 Ala. 178—Merchants Nat. Bank of Mobile v. Bertolla, 18 So.2d 378, 245 Ala. 662—Marshall v. Marshall, 8 So.2d 843, 243 Ala. 169.

Ark.—Corpus Juris quoted in Mortensen v. Ballard, 188 S.W.2d 749, 754, 209 Ark. 1.

Cal.—Fish v. Security-First Nat. Bank of Los Angeles, 189 P.2d 10, 81 Cal.2d 378—Norman v. Burks, 209 P.2d 816, 93 Cal.App.2d 687—Rowland v. Clark, 206 P.2d 59, 91 Cal.App.2d 880—Gorstner v. Scheuer, 204 P.2d 937, 91 Cal.App.2d 123—McNeill v. Dow, 200 P.2d 859, 89 Cal.App.2d 370—Bradley v. Duly, 166 P.2d 914, 73 Cal.App.2d 522—Owings v. Laugharn, 128 P.2d 114, 53 Cal.App.2d 789—Krouse v. Schubert, 151 P.2d 74, 48 Cal.App.2d 685.

Fla.—Fyle v. Fyle, 58 So.2d 312—Frank v. Eeles, 13 So.2d 216, 152 Fla. 869—Benbow v. Benbow, 157 So. 512, 117 Fla. 37.

Ill.—Bowman v. Petterson, 102 N.E.2d 787, 410 Ill. 519—Peters v. Meyers, 96 N.E.2d 493, 408 Ill. 253—Belleson v. Ganas, 69 N.E.2d 321, 394 Ill. 567.

Iowa.—Shaw v. Addison, 28 N.W.2d 816, 239 Iowa 377.

Mo.—Ferguson v. Stokes, 269 S.W.2d 655—Corpus Juris cited in Adams v. Adams, 156 S.W.2d 610, 614, 348 Mo. 1041.

Mont.—Lewis v. Bowman, 121 P.2d 162, 113 Mont. 68.

N.J.—Hermanoski v. Hermanoski, 87 A.2d 452, 18 N.J.Super. 406—Daly v. Lanucha, 81 A.2d 826, 14 N.J.Super. 225—Fowler v. Scott, 73 A.2d 278, 8 N.J.Super. 490—Strong v. Strong, 40 A.2d 548, 136 N.J.Eq. 103—Hall v. Lamoreaux, 30 A.2d 833, 132 N.J.Eq. 580—Gordon v. Griffith, 168 A. 57, 113 N.J.Eq. 554.

Ohio.—Lipps v. Lipps, App., 87 N.E.2d 823—Rice v. James, 6 Ohio Supp. 244.

Okl.—Hayes v. Moore, 254 P.2d 773, 208 Okl. 177—Gill v. First Nat. Bank & Trust Co. of Oklahoma City, 159 P.2d 717, 195 Okl. 607.

S.C.—Caulk v. Caulk, 43 S.E.2d 600, 211 S.C. 57.

Tenn.—Walker v. Walker, 2 Tenn. App. 279.

Tex.—Dennis v. Dennis, Civ.App., 256 S.W.2d 964—Ellsworth v. Ellsworth, Civ.App., 151 S.W.2d 628—Corpus Juris cited in Wise v. Cecil, Civ.App., 135 S.W.2d 235, 239, error refused—Ashby v. Standard Pipe & Supply Co., Civ.App., 56 S.W.2d 218, error refused.

Wash.—Lalley v. Lalley, 260 P.2d 905, 43 Wash.2d 192—Walberg v. Mattson, 232 P.2d 827, 38 Wash.2d 808—Mouser v. O'Sullivan, 156 P.2d 655, 22 Wash.2d 543—In re Cunningham's Estate, 143 P.2d 852, 19 Wash.2d 589—Scott v. Currie, 109 P.2d 526, 7 Wash.2d 301.  
65 C.J. p 386 notes 37, 38.

69. Ga.—Loggins v. Daves, 40 S.E.2d 520, 201 Ga. 628.

Ill.—Bowman v. Petterson, 102 N.E.2d 787, 410 Ill. 519—Peters v. Meyers, 96 N.E.2d 493, 408 Ill. 253.

Tex.—Morrison v. Farmer, Civ.App., 210 S.W.2d 246, reversed on other grounds 213 S.W.2d 813, 147 Tex. 122.

70. Ala.—Leonard v. Duncan, 18 So.2d 879, 245 Ala. 320.

It is presumed that the holder of the title intends to hold it in trust for the person who paid the consideration.—Bender v. Bender, 220 S.W.2d 929, 281 Mo. 473.

71. Ala.—Adams v. Griffin, 45 So.2d 22, 253 Ala. 271—Lauderdale v. Peace Baptist Church of Birmingham, 19 So.2d 538, 246 Ala. 178—Leonard v. Duncan, 18 So.2d 879, 245 Ala. 320.

Cal.—Treager v. Friedman, 179 P.2d 387, 79 Cal.App.2d 151.

Conn.—Dickinson v. Dickinson, 40 A.2d 184, 131 Conn. 392.

Del.—Greenly v. Greenly, 49 A.2d 126, 29 Del.Ch. 297.

Fla.—Frank v. Eeles, 13 So.2d 216, 152 Fla. 869.

Mass.—Carroll v. Markey, 71 N.E.2d 756, 321 Mass. 87.

Mo.—Carr v. Carroll, 178 S.W.2d 435 N.J.—Moses v. Moses, 53 A.2d 805, 140 N.J.Eq. 575, 173 A.L.R. 273.

Roy v. Enot, 183 A. 906, 120 N.J. Eq. 67.

Ohio.—Rice v. James, 6 Ohio Supp. 244.

Or.—Rhodes v. Perry, 19 P.2d 418, 142 Or. 165.

that the conveyance in the name of the other is a matter of convenience and arrangement for collateral purposes.<sup>72</sup> This presumption of resulting trust is not one of law,<sup>73</sup> but is one of fact;<sup>74</sup> it is not conclusive<sup>75</sup> and may be rebutted.<sup>76</sup>

The rule that a resulting trust arises in favor of the one supplying the consideration for the transfer of property to another applies although there is no fraud<sup>77</sup> or any fiduciary relationship between the one paying the purchase price and the one in whose name title is taken.<sup>78</sup> A resulting trust will arise in favor of a party paying the consideration, even where the conveyance is made to another with the knowledge and consent of the payor.<sup>79</sup> Where the title to the property is taken in the name of a third person without the knowledge or assent of the

person paying the consideration, the resulting trust therein arises, as of course, in favor of the latter,<sup>80</sup> as where the purchase price is paid by one person, with the real intention that the title thereto shall be taken in his name, but by mistake or otherwise it is taken without his knowledge or consent in the name of a third person;<sup>81</sup> and this is particularly true where the grantee so acquires the title through fraud.<sup>82</sup> However, it is generally held that a resulting trust does not arise where the taking of title in the name of such stranger was tortious,<sup>83</sup> in which case a constructive trust arises, as discussed *infra* § 142 et seq.

*Statutory abolition or modification of rule.* Under some statutes, the common-law rule is abolished or modified,<sup>84</sup> and a resulting trust does not arise from

**Tex.**—*Morrison v. Farmer*, Civ.App., 210 S.W.2d 245, reversed on other grounds 213 S.W.2d 813, 147 Tex. 122.

**Va.**—*Williams v. Powers*, 190 S.E. 149, 168 Va. 111, 65 C.J. p. 387 note 40.

**72. Ala.**—*Lauderdale v. Peace Baptist Church of Birmingham*, 19 So. 2d 538, 246 Ala. 178.

**Del.**—*Greenly v. Greenly*, 49 A.2d 126, 29 Del.Ch. 297.

**Fla.**—*Frank v. Eeles*, 13 So.2d 216, 152 Fla. 869.

**Mo.**—*Carr v. Carroll*, 178 S.W.2d 435, Ohio—*Rice v. James*, 6 Ohio Supp. 244.

**Or.**—*Rhodes v. Peery*, 19 P.2d 418, 142 Or. 165.

**S.C.**—*Legendre v. South Carolina Tax Commission*, 56 S.E.2d 336, 215 S.C. 514.

65 C.J. p. 387 note 41.  
Purpose generally and illegal or fraudulent purposes see *infra* § 123.

**73. Md.**—*Tiemann v. Welsh*, 59 A.2d 628, 191 Md. 1.

**N.C.**—*Crech v. Crech*, 24 S.E.2d 642, 222 N.C. 656, 65 C.J. p. 387 note 44.

**74. Ala.**—*Corpus Juris* quoted in *Lauderdale v. Peace Baptist Church of Birmingham*, 19 So. 2d 538, 246 Ala. 178.

**Md.**—*Tiemann v. Welsh*, 59 A.2d 628, 191 Md. 1.

**N.C.**—*Crech v. Crech*, 24 S.E.2d 642, 222 N.C. 656, 65 C.J. p. 388 note 45.

**75. N.J.**—*Fowler v. Scott*, 73 A.2d 278, 8 N.J. Super. 490.

**Pa.**—*Andreas v. Ronenberger*, Com. Pl., 18 Lehl.J. 114.

**76. Ala.**—*Adams v. Griffin*, 45 So.2d 22, 253 Ala. 371—*Corpus Juris* quoted in *Lauderdale v. Peace Baptist Church of Birmingham*, 19 So. 2d 538, 246 Ala. 178.

**Cal.**—*Gammill v. Nunes*, 231 P.2d 86,

104 Cal.App.2d 185—*McNeil v. Dow*, 200 P.2d 859, 89 Cal.App.2d 370—*Owings v. Laugharn*, 128 P.2d 114, 53 Cal.App.2d 789—*Knouse v. Shubert*, 121 P.2d 74, 48 Cal.App.2d 685—*Willard H. George, Limited*, v. Barnett, 150 P.2d 591, 65 Cal.App.2d Supp. 828.

**Del.**—*Greenly v. Greenly*, 49 A.2d 126, 29 Del.Ch. 297.  
**Idaho**—*Edwards v. Tenney*, 154 P.2d 143, 65 Idaho 784.

**Ill.**—*Bowman v. Pettersen*, 102 N.E.2d 787, 410 Ill. 513—*Peters v. Meyers*, 96 N.E.2d 493, 408 Ill. 253.

**Mass.**—*Gowell v. Twitchell*, 28 N.E.2d 531, 306 Mass. 482.

**Mo.**—*Ferguson v. Stokes*, 269 S.W.2d 655.

**N.C.**—*Crech v. Crech*, 24 S.E.2d 642, 222 N.C. 656.

**S.C.**—*Legendre v. South Carolina Tax Commission*, 56 S.E.2d 336, 215 S.C. 514—*Caulk v. Caulk*, 43 S.E.2d 600, 211 S.C. 67.

65 C.J. p. 388 note 46.

#### Testimony or deed

The presumption of a trust arising from fact of one party paying all or part of the purchase money may be rebutted by testimony as well as by deed—*Millikan v. Bing*, 108 S.W.2d 108, 341 Mo. 648.

**77. Ala.**—*Adams v. Griffin*, 45 So.2d 22, 253 Ala. 371.

**Cal.**—*Gerstner v. Scheuer*, 204 P.2d 937, 91 Cal.App.2d 123—*Bradley v. Duty*, 166 P.2d 914, 73 Cal.App.2d 522.

**Minn.**—*Peterson v. Swan*, 57 N.W.2d 842, 239 Minn. 98.

**Mo.**—*Merrill v. Davis*, 225 S.W.2d 763, 359 Mo. 1191.

**78. Ala.**—*Adams v. Griffin*, 45 So.2d 22, 253 Ala. 371.

**79. N.C.**—*Crech v. Crech*, 24 S.E.2d 642, 222 N.C. 656, 65 C.J. p. 385 note 24.

**Knowledge and consent immaterial.** Fact that conveyance is taken in

name of another with knowledge and consent of one supplying consideration is immaterial with respect to resulting trust as distinguished from constructive trust—*Rhodes v. Peery*, 19 P.2d 418, 142 Or. 165—65 C.J. p. 386 note 38 [b].

#### Knowledge or agreement of grantee

Ordinarily, where parties are not closely related and one party pays purchase price of property and has conveyance made to another, an inference arises, even in the absence of knowledge of the conveyance by grantee, that conveyance was in trust for payor, and a resulting trust may be established, even without proof of an agreement on part of grantee to hold or reconvey—*Williams v. Thomas*, 38 S.E.2d 603, 200 Ga. 767.

**80. Mass.**—*Bosworth v. Bosworth*, 188 N.E. 612, 285 Mass. 82.

**Pa.**—*Siemientkowski v. Graboskie*, 188 A. 537, 324 Pa. 516.

65 C.J. p. 385 note 20.

#### No understanding of transaction

Party paying purchase price of realty which was conveyed to third persons was entitled to decree directing such third persons to convey realty to him, where he did not comprehend nature of his act or understood transaction—*Siemientkowski v. Graboskie*, *supra*.

**81. Mass.**—*Bosworth v. Bosworth*, 188 N.E. 612, 285 Mass. 82.

65 C.J. p. 385 note 21.

**82. Md.**—*Zulver v. Murray*, 114 A. 896, 139 Md. 242.

**83. Va.**—*Mumpow v. Castle*, 104 S.E. 706, 128 Va. 1.

**84. Ky.**—*Sewell v. Sewell*, 260 S.W.2d 643—*McFarland v. McFarland*, 92 S.W.2d 785, 263 Ky. 434.

**Mich.**—*Hardy v. Heide*, 289 N.W. 246, 291 Mich. 542.

**Minn.**—*Bastian v. Brink*, 45 N.W.2d 712, 233 Minn. 25.

**N.Y.**—*Alonzo v. Alonzo*, 62 N.Y.S.2d 99, affirmed 62 N.Y.S.2d 818, 270

the mere fact that one supplied the consideration for the transfer of property to another.<sup>85</sup> However, even under such statutes a resulting trust arises in the case of fraud or mistake,<sup>86</sup> where the grantee has taken the deed, as an absolute conveyance, in his own name without the knowledge or consent of the person paying the purchase money,<sup>87</sup> or, in violation of some trust, has purchased the property conveyed with the money or property of another,<sup>88</sup> or where by agreement, and without any fraudulent intent, the grantee was to hold the land in trust for, or convey it to, the person paying the purchase price.<sup>89</sup>

## § 117. — Property Subject to Trust

A resulting trust in favor of the one paying the consideration for the transfer of property to another may arise with respect to anything which a court of equity recognizes as a subject of property.

A resulting trust in favor of the one paying the consideration for a transfer of property to another may arise with respect to anything which a court of equity recognizes as a subject of property.<sup>90</sup> So the equitable rule of a resulting trust arising from the payment of the consideration applies to real property,<sup>91</sup> and may be applied with equal force

App.Div. 977, appeal denied 63 N.Y. S.2d 844, 270 App.Div. 1076.  
65 C.J. p 388 note 49.

85. Ind.—Carpenter v. Carpenter, 27 N.E.2d 889, 108 Ind.App. 221.  
Kan.—Gantz v. Boudurant, 155 P.2d 450, 159 Kan. 389—Kateschor v. Ley, 113 P.2d 127, 153 Kan. 569.  
Ky.—Bryant's Adm'r v. Bryant, 269 S.W.2d 219—Glass v. Gutman, 268 S.W.2d 410—Hall v. Walton, 165 S.W.2d 806, 291 Ky. 779—Richardson v. Webb, 135 S.W.2d 861, 281 Ky. 201—Missionary Board of Brethren Church v. Trustees of Brethren Church of Lost Creek, 57 S.W.2d 26, 247 Ky. 398.  
Mich.—Wilson v. Potter, 63 N.W.2d 413, 333 Mich. 247—Musial v. Yatzik, 45 N.W.2d 329, 329 Mich. 379—Judd v. Carnegie, 37 N.W.2d 558, 324 Mich. 588—Ames v. Cheyne, 287 N.W. 439, 290 Mich. 215—Sagendorph v. Lutz, 288 Mich. 103, 281 N.W. 553.  
Minn.—Bastian v. Brink, 45 N.W.2d 712, 233 Minn. 25—Drees v. Gosling, 294 N.W. 374, 208 Minn. 399.  
N.Y.—Fraw Realty Co. v. Natanson, 185 N.E. 679, 261 N.Y. 396—Bascumbe v. Sargent, 99 N.Y.S.2d 857, 277 App.Div. 983, reargument and appeal denied 100 N.Y.S.2d 493, 277 App.Div. 1006.  
65 C.J. p 388 note 49.

### Title in dummy corporation

Where one corporation made down payment on purchases of realty and another corporation took title, second corporation would have legal title, notwithstanding general understanding that it should hold title for corporation making payment.—Fraw Realty Co. v. Natanson, 185 N.E. 679, 261 N.Y. 396.

Where rights of creditors are not involved, grant of land to one person, for consideration paid by another person, vests title in the person named as grantee.—Drees v. Gosling, 294 N.W. 374, 208 Minn. 399.

### Recovery of money paid

Where consideration for a conveyance is paid by one other than grantee, under such circumstances that

statute forbids a resulting trust, but there is no purpose to defraud, and grantee refuses to execute trust or return the money, an action will lie on grantee's implied promise raised by law to refund the money.—Hawser v. Johnson, 179 S.W.2d 897, 297 Ky. 213.

86. Mich.—Stephenson v. Golden, 276 N.W. 849, 279 Mich. 710.

87. Ky.—Glass v. Gutman, 268 S.W.2d 410—Sewell v. Sewell, 260 S.W.2d 643—Hall v. Walton, 165 S.W.2d 806, 291 Ky. 779—Richardson v. Webb, 135 S.W.2d 861, 281 Ky. 201—McFarland v. McFarland, 92 S.W.2d 785, 263 Ky. 434.

Mich.—Stephenson v. Golden, 276 N.W. 849, 279 Mich. 710.  
65 C.J. p 389 note 50.

88. Ky.—Sewell v. Sewell, 260 S.W.2d 643—Hall v. Walton, 165 S.W.2d 806, 291 Ky. 779—Richardson v. Webb, 135 S.W.2d 861, 281 Ky. 201.  
65 C.J. p 390 note 51.

89. U.S.—Rosenberg v. Baum, C.C.A. Kan., 153 F.2d 10.

Ind.—Carpenter v. Carpenter, 27 N.E.2d 889, 108 Ind.App. 221.

Ky.—Evans v. Payne, 258 S.W.2d 919—Gibson v. Gibson, 249 S.W.2d 513—Morris v. Thomas, 220 S.W.2d 958, 310 Ky. 501.  
65 C.J. p 390 note 52.

### Agreement must be made before transfer of title

Ind.—Hudley v. Kays, 98 N.E.2d 237, 121 Ind.App. 112.

### Agreement must be supported by consideration

Ind.—Hudley v. Kays, supra.

No formal agreement or particular forms of words is required for a resulting trust and it will not be permitted to fail because of a mere lack of form or method of proof if evidence clearly and unequivocally establishes essentials for creation of such trust.—Hudley v. Kays, supra.

### Fraud of grantee or trustee

The phrase "without any fraudulent intent", in statute providing in effect that where, by agreement and without any fraudulent intent, a

grantee is to hold land in trust for the person paying the purchase money, a trust results in favor of the latter, refers to the grantor or to the person paying the purchase price, and not to the grantee or trustee.—Staah v. Staah, 145 P.2d 452, 158 Kan. 77.

90. W.Va.—Currence v. Ward, 27 S.E. 329, 43 W.Va. 367.  
Property subject to resulting trusts generally see supra § 98.

91. U.S.—In re Duncan & Goodell Co., D.C.Mass., 15 F.Supp. 559.  
Ala.—Adams v. Griffin, 45 So.2d 22, 253 Ala. 371—Young v. Greer, 35 So.2d 619, 250 Ala. 641.

Ark.—Waldo Fertilizer Works v. Dickens, 177 S.W.2d 398, 208 Ark. 717—Hunt v. Hunt, 149 S.W.2d 930, 202 Ark. 130.

Cal.—Mazzora v. Wolf, 183 P.2d 649, 30 Cal.2d 531—Goes v. Perry, 115 P.2d 441, 18 Cal.2d 373—Von Zastrow v. Schiffbauer, 250 P.2d 624, 114 Cal.App.2d 600—Elliott v. Wood, 212 P.2d 906, 95 Cal.App.2d 314—Conway v. Moore, 160 P.2d 865, 70 Cal.App.2d 166—Kirk White & Co. v. Dieg-Hoffine Co., 44 P.2d 439, 6 Cal.App.2d 188.

Colo.—Valley State Bank v. Dean, 47 P.2d 924, 97 Colo. 151.

Conn.—Van Auker v. Tyrrell, 33 A.2d 339, 130 Conn. 289.

Ga.—Epps v. Epps, 75 S.E.2d 165, 209 Ga. 643—Price v. Price, 54 S.E.2d 578, 205 Ga. 623—McCollum v. McCollum, 43 S.E.2d 663, 202 Ga. 406.  
Idaho—Edwards v. Tenney, 154 P.2d 143, 65 Idaho 784.

Ill.—McCabe v. Hebner, 102 N.E.2d 794, 410 Ill. 557.

Iowa.—Sinclair v. Allender, 26 N.W.2d 320, 238 Iowa 212.

Mass.—Gerace v. Gerace, 16 N.E.2d 6, 301 Mass. 14, 117 A.L.R. 1459.

Miss.—Chichester v. Chichester, 48 So.2d 123, 209 Miss. 628.

Neb.—Holbein v. Holbein, 30 N.W.2d 899, 149 Neb. 281.

N.H.—French v. Pearson, 45 A.2d 300, 94 N.H. 18.

N.J.—Gentile v. Gentile, 60 A.2d 315, 142 N.J. Eq. 383.

N.C.—Bullman v. Edney, 61 S.E.2d 338, 232 N.C. 465.

and effect to personal property,<sup>92</sup> although it has been held that it will not arise in property of perishable nature.<sup>93</sup> It has also been held that a purchase-money resulting trust cannot arise as to a joint bank account,<sup>94</sup> or as to government bonds payable to a husband and wife, or to the husband and on his death to his wife.<sup>95</sup> On the other hand, it was held that a trust resulted in favor of a child who purchased government bonds in his parent's name.<sup>96</sup> Where shares of stock<sup>97</sup> or bonds<sup>98</sup> are transferred to one person but the payment is by another, a resulting trust may arise. Purchase of a draft for foreign credit with the funds of another may create the relationship of trustee and

cestui que trust.<sup>99</sup> A resulting trust may exist as to a portion only of the property, or as to a part of the interest therein.<sup>1</sup> However, the trust cannot exist in an idea for a patent;<sup>2</sup> nor can the trust exist in the patent itself when issued to one other than the inventor.<sup>3</sup> Statutes abolishing or altering the common-law rule that a resulting trust arises where the consideration is paid by one for the transfer of property to a stranger, discussed supra § 116, have been construed to apply to real property only, and not to personal property,<sup>4</sup> and it has been held that the quitclaim of an equity, real or supposed, to the owner of the legal estate is not within the statute;<sup>5</sup> but it has also been held that the

Okl.—King v. Courtney, 122 P.2d 1014, 190 Okl. 256.

Or.—Unterkircher v. Unterkircher, 195 P.2d 178, 183 Or. 583.

Pa.—Chester Housing Authority v. Ritter, 25 A.2d 72, 344 Pa. 653.

Tenn.—Fehn v. Schlickling, 175 S.W.2d 37, 26 Tenn App. 608.

Tex.—La Force v. Bracken, 169 S.W.2d 465, 141 Tex. 18.

Utah.—Hawkins v. Perry, 253 P.2d 372.

Va.—Williams v. Powers, 190 S.E. 149, 168 Va. 111.

Wash.—Cresman v. Boyle, 196 P.2d 835, 31 Wash.2d 345.

W.Va.—Carter v. Walker, 1 S.E.2d 463, 121 W.Va. 81.  
65 C.J. p 391 note 57.

92. U.S.—Firemen's Ins. Co. of Newark, N. J. v. Show, D.C.Mont., 110 F.Supp. 523.—In re Duncan & Goodell Co., D.C.Mass., 15 F.Supp. 550.

Cal.—Goes v. Perry, 115 P.2d 441, 18 Cal.2d 373.—Moore v. Wimmer, 174 P.2d 640, 77 Cal.App.2d 199.—Kirk White & Co. v. Bieg-Hoffline Co., 44 P.2d 439, 6 Cal.App.2d 188.

N.C.—Bullman v. Edney, 61 S.E.2d 338, 232 N.C. 465.

Ohio.—Douglas v. Hubbard, 107 N.E.2d 884, 91 Ohio App. 200, appeal dismissed 104 N.E.2d 182, 167 Ohio St. 94.

Wash.—Cresman v. Boyle, 196 P.2d 835, 31 Wash.2d 345.  
65 C.J. p 391 note 58.

#### Change from reality to personality

Where a resulting trust was imposed on a freehold and the interest involved subsequently became personal property, the resulting trust, once attached, cannot be divested without the beneficiary's consent, even though the interest is personal property, since a resulting trust may attach to personal property as effectively as it may be imposed on real property.—Sweesy v. Hoy, 272 Ill. App. 346.

#### Motor vehicles

(1) Where the purchase of a motor vehicle is made with funds be-

longing to another, a resulting trust is ordinarily impressed on the car in favor of the person whose money is used.—Henry v. General Farming, Limited, 200 P.2d 785, 33 Cal.2d 223—42 C.J. p 769 note 57.

(2) This rule has been held to apply even though the purchase is conditional and the legal title has not passed to the buyer.—Carter v. Holt, 28 Cal.App. 796, 154 P. 37.

93. Tenn.—Union Bank v. Baker, 8 Humphr. 447.  
65 C.J. p 391 note 59.

94. Iowa.—Hill v. Havens, 48 N.W.2d 870, 242 Iowa 920.

Where one with his own funds establishes joint bank account in his own name and that of another, there is no resulting trust in favor of the one supplying the funds.

U.S.—Zamberletti v. Zamberletti, D. C.Iowa, 105 F.Supp. 873.

Iowa.—Hill v. Havens, 48 N.W.2d 870, 242 Iowa 920.

95. Iowa.—Hill v. Havens, supra.

96. Wash.—Makinen v. George, 142 P.2d 910, 19 Wash.2d 340.

#### Illegal purpose

(1) Where there was no evidence or claim that daughter in purchasing United States savings bonds in name of her mother did so with intent to evade any treasury regulation or to defraud the government, or any individual, the "illegal purpose rule" had no application so as to preclude daughter from claiming ownership of bonds under a resulting trust.—Makinen v. George, supra.

(2) Resulting purchase money trust for illegal purpose generally see infra § 123.

#### Public policy

Treasury regulations pertaining to form of registration of United States savings bonds, prohibiting transfer and limiting amount in bonds which may be held, do not show a "public policy" against registering bonds in name of another, so as to warrant

court in refusing to enforce a resulting trust in favor of daughter by reason of her purchase of bonds in name of mother on theory that enforcement would be against public policy.—Makinen v. George, supra.

97. Tenn.—McClung v. Colwell, 64 S.W. 890, 107 Tenn. 592, 89 Am.S.R. 961.

98. N.H.—Reynolds v. Kenney, 179 A. 16, 98 A.L.R. 751, 87 N.H. 313.

99. Mo.—Stasiak v. Kalucki, App., 255 S.W. 978.

1. Mass.—Braga v. Braga, 51 N.E.2d 429, 314 Mass 666.

65 C.J. p 391 note 62.  
Part payment as resulting in pro tanto trust generally see infra § 122.

#### Trust for alien

(1) When alien paid for one-sixteenth interest in fishing schooner taking title in the name of citizen, a resulting trust arose in favor of alien unless federal statutes preclude a trust in an interest in a vessel from resulting in favor of an alien.—Braga v. Braga, supra.

(2) Disabilities of aliens with respect to property see Aliens § 11 et seq.

2. Va.—Hise v. Grasty, 166 S.E. 567, 159 Va. 635.  
65 C.J. p 391 note 63.

3. Va.—Hise v. Grasty, supra.  
65 C.J. p 392 note 64.  
Holder of legal title to patent as trustee generally see Patents § 218.

4. N.Y.—Coleman v. Mulligan, 66 N.Y.S.2d 696.  
65 C.J. p 392 note 66.

Mortgage on land is personal property within the text rule.

Kan.—Hanrion v. Hanrion, 84 P. 381, 73 Kan. 25, 117 Am.S.R. 453.

N.Y.—Robbins v. Robbins, 89 N.Y. 251.  
65 C.J. p 392 note 80.

5. Mich.—Munch v. Shabel, 37 Mich. 166.

statutory rule, while express as to real property, extends by implication to personal property.<sup>6</sup>

### § 118. — Nature of Sale and Transfer or Conveyance

Within the rule that a resulting trust arises in favor of one paying for a conveyance to another, a "conveyance" includes any transfer of title, legal or equitable.

Within the rule that a resulting trust arises in favor of the one paying for a conveyance to another, a "conveyance" includes any transfer of title,<sup>7</sup> legal or equitable,<sup>8</sup> and embraces an executory contract for the sale of land,<sup>9</sup> although as to this, there is also authority to the contrary.<sup>10</sup> If the circumstances are sufficient for that purpose, a resulting trust will arise, although the property is purchased at a judicial,<sup>11</sup> tax,<sup>12</sup> mortgage foreclosure,<sup>13</sup> or execution<sup>14</sup> sale. Where the consideration for an exchange of property is furnished by one person and the title is taken in the name of another, a resulting trust arises.<sup>15</sup> Where a vendee has the deed made to a third person who gives a bond to convey to the vendee, such acts give rise to a trust,<sup>16</sup> and, where two persons jointly purchase land from an administrator, accepting his bond for title to be made to one of them only, the resulting trust arising in favor of the copurchaser is not affected by the fact that

the bond for title did not bind the estate, being only the administrator's individual bond.<sup>17</sup> A trust will result to one who advances the purchase money, whether the legal estate is taken in the names of the purchaser and others jointly,<sup>18</sup> or in the names of others without that of the purchaser,<sup>19</sup> or whether in one name or several,<sup>20</sup> or whether jointly or successively.<sup>21</sup>

### § 119. — Nature and Source of Consideration

- a. Nature of consideration
- b. Source of consideration

#### a. Nature of Consideration

Under the rule that a resulting trust arises in favor of one paying the consideration for a transfer of property to another, the consideration need not be money, but may be anything of value.

In order to make applicable the rule that a resulting trust arises in favor of one paying the consideration for a transfer of property to another, it is not necessary that the consideration which moves from the cestui que trust should be money,<sup>22</sup> provided it is something of market<sup>23</sup> value.<sup>24</sup> It may be lands,<sup>25</sup> goods,<sup>26</sup> materials,<sup>27</sup> money,<sup>28</sup> parting with an inchoate interest in land,<sup>29</sup> a bond or mort-

6. Ky.—Bryant's Adm'r v. Bryant, 269 S.W.2d 219.

7. Ind.—McClellan v. Beatty, 53 N.E.2d 1013, 115 Ind.App. 173, rehearing denied 55 N.E.2d 327, 115 Ind.App. 173.

8. Ind.—McClellan v. Beatty, supra.

9. Ind.—McClellan v. Beatty, supra.

10. Mass.—Exchange Realty Co. v. Bines, 18 N.E.2d 425, 302 Mass. 93.

#### No interest conveyed by contract

Where contract for purchase of realty granted no definite interest in land to vendee but only granted right to purchase land by paying a certain sum of money at fixed periods, proof that money paid under contract by vendee was obtained from a third person and that vendor was aware thereof did not establish a resulting trust under contract in favor of third person, so as to require vendor to account to third person for money paid under contract before contract could be cancelled as a cloud on title.—Rosenthal v. Largo Land Co., 200 So. 233, 146 Fla. 81.

11. Ky.—Noel v. Fitzpatrick, 100 S.W. 321, 124 Ky. 787, 30 Ky.L. 1011, 65 C.J. p 392 note 69.

12. Mont.—Campanello v. Mercer, 227 P.2d 312, 124 Mont. 528.

13. Ark.—Hunt v. Hunt, 149 S.W.2d 980, 202 Ark. 130.

14. Ark.—Beloate v. Hennessee, 99 S.W. 681, 81 Ark. 478, 65 C.J. p 392 note 70.

15. Ark.—Reeves v. Reeves, 264 S.W. 979, 165 Ark. 505, 65 C.J. p 393 note 88.

16. Ky.—Hardin v. Baird, Litt.Sel. Cas. 340.

17. Tex.—Scranton v. Campbell, 101 S.W. 285, 45 Tex.Civ.App. 388.

18. Cal.—Socol v. King, 223 P.2d 627, 35 Cal.2d 342—Jones v. Kelso, 262 P.2d 859, 121 Cal.App.2d 130—In re Raphael's Estate, 252 P.2d 979, 115 Cal.App.2d 525—Trimble v. Coffman, 261 P.2d 81, 114 Cal.App.2d 618.

19. N.H.—Bowman v. Petterson, 102 N.E. 2d 787, 410 Ill. 519—Peters v. Myers, 96 N.E.2d 493, 408 Ill. 253—Kane v. Johnson, 73 N.E.2d 321, 397 Ill. 112.

N.H.—Shelley v. Landry, 79 A.2d 626, 97 N.H. 27.

65 C.J. p 392 note 74.

Resulting trust as to joint purchasers generally see infra § 122.

#### Expression of intent

The expressed intent as shown by direction in purchase contract that title is to be conveyed to grantees as joint tenants and not as tenants in common and by the joint tenancy itself, standing alone, must give way to the rule of equity which protects

the person paying the purchase price by raising a resulting trust in his favor.—Bowman v. Petterson, 102 N.E.2d 787, 410 Ill. 519.

19. Tex.—Smith v. Strahan, 16 Tex. 314, 67 Am.D. 622.

20. Tex.—Smith v. Strahan, supra.

21. Tex.—Smith v. Strahan, supra.

22. N.H.—Bailey v. Scribner, 80 A.2d 386, 97 N.H. 65—Shelley v. Landry, 79 A.2d 626, 97 N.H. 27.

Or—Fox v. Maurer, 164 P.2d 417, 178 Or. 64.

65 C.J. p 392 note 82.

23. Ala.—Bibb v. Hunter, 79 Ala. 251.

Cal.—Los Angeles, etc., Oil, etc., Co. v. Occidental Oil Co., 78 P. 25, 144 Cal. 528.

Mo.—Bryan v. McCaskill, 225 S.W. 682, 284 Mo. 583.

65 C.J. p 392 note 84, p 393 note 98.

25. N.C.—Greensboro Bank & Trust Co. v. Scott, 114 S.E. 476, 184 N.C. 312.

26. N.C.—Greensboro Bank & Trust Co. v. Scott, supra.

27. N.H.—Bailey v. Scribner, 80 A.2d 386, 97 N.H. 65.

28. N.H.—Bailey v. Scribner, supra.

65 C.J. p 393 note 87.

29. Iowa.—Tamingo v. Freiberg, 176 N.W. 791, 188 Iowa 788.

65 C.J. p 393 note 89.



gage, or other securities,<sup>30</sup> credit,<sup>31</sup> the performance of professional<sup>32</sup> or other<sup>33</sup> services, or care and support.<sup>34</sup> It may be the release of an obligation,<sup>35</sup> such as a release from a liability which the trustee owes the cestui que trust,<sup>36</sup> release of a share in the proceeds of a sale of property,<sup>37</sup> or the payment of an indebtedness of the grantor to another,<sup>38</sup> or it may be a promise.<sup>39</sup> Natural love and affection alone are an insufficient consideration to establish the resulting trust.<sup>40</sup> The mere indorsement of a promissory note in order to enable another to borrow money to purchase property is not sufficient to create a resulting trust.<sup>41</sup> The satisfaction of a fictitious debt is not sufficient consideration to support a resulting trust.<sup>42</sup>

### b. Source of Consideration

One claiming that property conveyed to another is

subject to a resulting trust in his favor must have been the owner of the consideration given for the conveyance.

In order that the rule that a resulting trust arises in favor of one supplying the consideration for a conveyance to another may apply, it is essential that the person who claims the benefit of the trust should have title to, or an interest in, the consideration used,<sup>43</sup> that is, such person must have furnished the consideration<sup>44</sup> or a part of it.<sup>45</sup> So the money or assets must belong to such person,<sup>46</sup> or by its payment by another he must incur an obligation to repay, so that the consideration actually moves from him.<sup>47</sup> However, the consideration may have been paid either by<sup>48</sup> or for<sup>49</sup> the person claiming the resulting trust. It is sufficient if it was furnished by another on his behalf<sup>50</sup> or on his credit.<sup>51</sup> It has been held that the fact that the purchase price is paid from income derived from the

30. N.C.—Greensboro Bank & Trust Co. v. Scott, 114 S.E. 475, 184 N.C. 312.

65 C.J. p 393 note 93.

31. Ala.—Bibb v. Hunter, 79 Ala. 351.

N.C.—Greensboro Bank & Trust Co. v. Scott, 114 S.E. 475, 184 N.C. 312.

32. Ga.—Hines v. Johnston, 23 S.E. 470, 95 Ga. 629.

65 C.J. p 393 note 95.

33. N.H.—Bailey v. Scribner, 80 A. 2d 386, 97 N.H. 65—Shelley v. Landry, 79 A.2d 626, 97 N.H. 27.

Okl.—Gill v. First Nat. Bank & Trust Co. of Oklahoma City, 159 P.2d 717, 195 Okl. 697.

65 C.J. p 393 note 96.

34. Vt.—Corey v. Morrill, 42 A. 976, 71 Vt. 51.

35. N.H.—Bailey v. Scribner, 80 A. 2d 386, 97 N.H. 65.

36. N.C.—Greensboro Bank & Trust Co. v. Scott, 114 S.E. 475, 184 N.C. 312.

37. N.J.—Fay v. Fay, 24 A. 1036, 50 N.J. Eq. 260.

38. Kan.—Garten v. Trobridge, 104 P. 1067, 80 Kan. 720.

39. N.H.—Bailey v. Scribner, 80 A. 2d 386, 97 N.H. 65.

40. Iowa.—Paine v. Wright, 9 N.W. 2d 364, 147 A.L.R. 1154.

65 C.J. p 393 note 99.

41. Ga.—Holmes v. Holmes, 113 S.E. 81, 153 Ga. 790.

42. Cal.—Treager v. Friedman, 179 P.2d 387, 79 Cal.App. 2d 151.

#### Transaction in fraud of creditors

Any presumption of a resulting trust in favor of mortgagees arising from fact that purchaser at foreclosure sale under deeds of trust on realty and chattel mortgages paid no money but used the credit of indebtedness secured by such instru-

ments was overcome by evidence that such indebtedness was fictitious and entire transaction, including giving of mortgages and foreclosure thereof, was solely for purpose of protecting property from mortgagee's creditors.—Treager v. Friedman, supra.

43. Mo.—Purvis v. Hardin, 122 S.W. 2d 936, 343 Mo. 662.

Tex.—Corpus Juris cited in Morrison v. Palmer, Civ. App., 210 S.W.2d 245, 249—Corpus Juris cited in Corfield v. Sorrells, Civ. App., 183 S.W. 2d 223, 226.

65 C.J. p 393 note 3.

44. Okl.—Oklahoma City v. Vahlberg, 173 P.2d 736, 197 Okl. 613.

Tex.—Borrv v. Rhine, Civ. App., 265 S.W.2d 632—Corpus Juris cited in Johnston v. Winn, Civ. App., 195 S.W.2d 398, 401.

65 C.J. p 393 note 4.

Payment of consideration as loan to grantee see infra § 123.

45. Ill.—Pickler v. Pickler, 54 N.E. 311, 189 Ill. 168.

65 C.J. p 393 note 5.

Part payment generally see infra § 122.

Payment by joint purchasers see infra § 122.

46. Wash.—Carkonen v. Alberts, 83 P.2d 899, 196 Wash. 575, 135 A.L.R. 209.

65 C.J. p 394 note 10.

47. Mass.—Cohen v. Simon, 23 N.E. 2d 863, 301 Mass. 375.

Pa.—Jennings v. Everett, 55 A.2d 569, 161 Pa. Super. 443.

65 C.J. p 394 note 11.

#### Express or implied obligation

Obligation to repay need not be express, but may be implied.—Viner v. Untrecht, 158 P.2d 3, 26 Cal.2d 261.

48. Ill.—Wright v. Wright, 118 N.E. 2d 280, 2 Ill.2d 246.

Mont.—McKenzie v. Evans, 29 P.2d 657, 96 Mont. 1.

65 C.J. p 393 note 5.

49. Ala.—Albae v. Harbin, 80 So.2d 459, 249 Ala. 201.

Ill.—Wright v. Wright, 118 N.E.2d 280, 2 Ill.2d 246.

Mont.—McKenzie v. Evans, 29 P.2d 657, 96 Mont. 1.

Okl.—McKenna v. Lasswell, 250 P. 2d 208, 207 Okl. 408.

65 C.J. p 393 note 7.

50. Ala.—Bibb v. Hunter, 79 Ala. 351.

Mont.—McKenzie v. Evans, 29 P.2d 657, 96 Mont. 1.

Ohio—Rice v. James, 6 Ohio Supp. 214.

Pa.—In re Gerlach's Estate, 72 A.2d 271, 364 Pa. 207, 16 A.L.R.2d 1397.

51. Cal.—Viner v. Untrecht, 158 P.2d 3, 26 Cal.2d 261—Stromerson v. Averill, 133 P.2d 617, reheard 141 P.2d 732, 22 Cal.2d 808.

Ill.—McDonnell v. Hadden, 185 N.E. 672, 352 Ill. 362.

Miss.—Campbell v. Millsaps, 12 So. 2d 526.

N.Y.—Le Fevre v. Reliable Paint Supply Co., 273 N.Y.S. 903, 152 Misc. 694.

Okl.—McKenna v. Lasswell, 250 P. 2d 208, 207 Okl. 408.

Pa.—In re Gerlach's Estate, 72 A.2d 271, 364 Pa. 207, 16 A.L.R. 1397—Jennings v. Everett, 55 A.2d 569, 161 Pa. Super. 443.

65 C.J. p 394 note 9.

Conveyance to lender as creating resulting trust in favor of borrower see supra § 107.

#### Implied promise to pay

In action to establish resulting trust, evidence that claimant made down payment on purchase price and subsequent installment payments thereon, and that transferee of realty agreed to hold title as a con-

property is not an obstacle to the creation of a resulting trust.<sup>52</sup>

Where the proceeds of the sale of one's property are used to purchase other property, title being taken in the name of a stranger, a resulting trust may arise.<sup>53</sup> A resulting trust will not arise in favor of a person by or on behalf of whom no part of the consideration is furnished;<sup>54</sup> nor will a resulting trust arise where the alienee himself in effect pays the consideration.<sup>55</sup> Where a purchaser's down payment is used by the vendor to pay another for the same property, a resulting trust does not arise in favor of the purchaser.<sup>56</sup> The fact that the money which the stockholders paid into a corporation was used to purchase land in the name of the corporation does not result in a trust in favor of the stockholders.<sup>57</sup>

The source from which the person claiming the resulting trust obtained the consideration is immaterial.<sup>58</sup>

## § 120. — Time of Payment

In order that a trust may result in favor of one supplying the consideration for a transfer of property to another, the consideration must be furnished or paid at or before the time title to the property passes, as a part of the original transaction of purchase.

In accordance with the general rule discussed supra § 120 c as to when a resulting trust is created, a trust resulting from the payment of the consideration by one for a conveyance to another must arise, if at all, from the state of facts existing at the time the legal title to the property is acquired,<sup>59</sup> and cannot arise from matters coming into existence afterwards,<sup>60</sup> and the person claiming the benefit of the trust must then occupy such position as will entitle him to be substituted for the grantee.<sup>61</sup> Hence, in order to create a resulting trust in favor of one, by or on behalf of whom the consideration is paid or furnished for the purchase of property which is purchased in the name of another, the consideration must be furnished or paid at or before the time the title to the property passes, as a part of the original transaction of purchase,<sup>62</sup> or an absolute

venience to claimant, raised implied promise on claimant's part to pay installments, for which transferee had assumed liability—Stone v. Lohsen, 247 P.2d 357, 112 Cal.App.2d 760.

52. Cal.—Stromerson v. Averill, 133 P.2d 617, reheard 141 P.2d 732, 22 Cal.2d 808—Watson v. Poore, 115 P.2d 478, 18 Cal.2d 302.

53. Idaho.—Jaussand v. Samuels, 71 P.2d 426, 58 Idaho 191.

54. Ala.—Talley v. Talley, 26 So.2d 586, 248 Ala. 84.

Pa.—Gray v. Leibert, 53 A.2d 132, 357 Pa. 130.

65 C.J. p. 394 note 12.

### Contributions for benefit of family

Contributions by friends and neighbors to assist plaintiff's brother in purchasing farm for benefit of family did not give rise to a resulting trust in favor of plaintiff and his brothers and sisters.—Dickinson v. Dickinson, 40 A.2d 184, 131 Conn. 392.

55. Cal.—Helmer v. Helmer, 197 P.2d 558, 87 Cal.App.2d 682.

65 C.J. p. 394 note 13.

56. Cal.—Hagge v. Drew, 165 P.2d 461, 27 Cal.2d 368.

57. Tex.—Myerly v. Camey, Civ.App., 161 S.W.2d 1105, error refused.

58. Ill.—Harrison v. Harrison, 107 N.E. 128, 265 Ill. 432.

59. Ala.—Martin v. Carroll, 66 So.2d 69, 259 Ala. 197—Hooks v. Hooks, 63 So.2d 348, 258 Ala. 427—Talley v. Talley, 26 So.2d 586, 248 Ala. 84.

Ark.—Wilson v. Wilson, 204 S.W.2d 479, 211 Ark. 1030—Parks v. Parks,

182 S.W.2d 470, 207 Ark. 720—Hatcher v. Wasson, 87 S.W.2d 578, 191 Ark. 765.

Cal.—Bradley v. Duty, 166 P.2d 914, 73 Cal.App.2d 522.

Ga.—Estes v. Estes, 55 S.E.2d 217, 205 Ga. 814.

Ill.—Johnson v. Johnson, 115 N.E.2d 617, 1 Ill.2d 319—Fields v. Fields, 114 N.E.2d 402, 415 Ill. 324—Kohlhaas v. Smith, 97 N.E.2d 774, 408 Ill. 535—Peters v. Meyers, 96 N.E.2d 493, 408 Ill. 253—Craven v. Craven, 95 N.E.2d 489, 407 Ill. 252—Murray v. Behrendt, 76 N.E.2d 431, 399 Ill. 22—Brod v. Brod, 61 N.E.2d 675, 390 Ill. 312—Wesemann v. Fischer, 56 N.E.2d 656, 323 Ill. App. 617.

Ind.—McClellan v. Beatty, 53 N.E.2d 1013, 115 Ind.App. 173.

Iowa.—Andrew v. Martin, 254 N.W. 67, 218 Iowa 19.

Mass.—Saulnier v. Saulnier, 103 N.E.2d 225, 328 Mass. 238—Cohen v. Simon, 23 N.E.2d 863, 304 Mass. 375—Moat v. Moat, 17 N.E.2d 710, 301 Mass. 469.

Mo.—Rich v. Williams, 222 S.W.2d 726—Corpus Juris cited in Adams v. Adams, 156 S.W.2d 610, 614.

Okl.—McKenna v. Lasswell, 250 P.2d 208, 207 Okl. 408.

Tenn.—Walker v. Walker, 2 Tenn. App. 279.

Tex.—Morrison v. Farmer, 213 S.W.2d 813, 147 Tex. 122—Wright v. Wright, 132 S.W.2d 847, 134 Tex. 82—Landon v. Brown, Civ.App., 266 S.W.2d 404—Tolle v. Sawtelle, Civ. App., 246 S.W.2d 916, error refused—Bunnell v. Bunnell, Civ.App., 217 S.W.2d 78—Klein v. Sibley, Civ.

App., 203 S.W.2d 239—Johnston v. Winn, Civ.App., 106 S.W.2d 398, 401. 65 C.J. p. 394 note 14.

60. Ga.—Baker v. Schneider, 80 S.E.2d 783, 210 Ga. 493.

Ill.—Craven v. Craven, 95 N.E.2d 489, 407 Ill. 252—Murray v. Behrendt, 76 N.E.2d 431, 399 Ill. 22.

Mo.—Rich v. Williams, 222 S.W.2d 726.

Tex.—Landon v. Brown, Civ.App., 266 S.W.2d 404—Wise v. Cecil, Civ. App., 135 S.W.2d 235—Corpus Juris cited in Johnston v. Winn, Civ. App., 106 S.W.2d 398, 401.

65 C.J. p. 395 note 15.

### Condition subsequent

A resulting trust in favor of one furnishing consideration paid for property cannot be predicated on a condition subsequent but must arise at the instant the purchase price is paid by one and title taken in the name of another, if it arises at all.—Bowman v. Pettersen, 102 N.E.2d 787, 410 Ill. 619.

61. Iowa.—Harnagel v. Fett, 244 N.W. 704, 215 Iowa 888.

65 C.J. p. 395 note 16.

62. U.S.—Firemen's Ins. Co. of Newark, N. J. v. Show, D.C.Mont., 110 F.Supp. 523.

Ala.—Martin v. Carroll, 66 So.2d 69, 259 Ala. 197—Hooks v. Hooks, 63 So.2d 348, 258 Ala. 427—Young v. Greer, 35 So.2d 619, 250 Ala. 641—Talley v. Talley, 26 So.2d 586, 248 Ala. 84.

Ark.—James v. James, 221 S.W.2d 766, 215 Ark. 509—Simpson v. Thayer, 217 S.W.2d 354, 214 Ark. 566—Wilson v. Wilson, 204 S.W.2d

obligation to pay must be incurred by him as a part of the purchase at or before the time of the conveyance.<sup>63</sup>

A resulting trust may be declared in favor of one who paid nothing at or before the conveyance provided he at that time became obligated to pay the purchase price.<sup>64</sup> A payment subsequent to the

transfer of title will not support a resulting trust<sup>65</sup> unless it is made in pursuance and as a part of the original transaction of purchase,<sup>66</sup> as where he secures it at that time to be thereafter paid,<sup>67</sup> although it is not sufficient that the money is paid after the purchase to a third person, in payment of securities given by such person at the time of the purchase.<sup>68</sup>

479, 211 Ark. 1030—McKindley v. Humphrey, 161 S.W.2d 962, 204 Ark. 333—Castleberry v. Castleberry, 155 S.W.2d 44, 202 Ark. 1039. Cal.—Neusted v. Skernswell, 159 P.2d 49, 69 Cal.App.2d 361—Kirk White & Co. v. Bieg-Hoffmeier Co., 44 P.2d 439, 6 Cal.App.2d 158. Del.—Bodley v. Jones, 59 A.2d 463, 30 Del.Ch. 480.

Fla.—Womack v. Madison Drug Co., 20 So.2d 256, 155 Fla. 335. Ga.—Jackson v. Faver, 77 S.E.2d 728, 210 Ga. 58—Estes v. Estes, 55 S.E.2d 217, 205 Ga. 814—Loggins v. Daves, 40 S.E.2d 520, 201 Ga. 628—Hurst v. Hurst, 184 S.E. 867, 182 Ga. 138—Bell v. Bell, 172 S.E. 566, 178 Ga. 225.

Ill.—Wright v. Wright, 118 N.E.2d 280, 2 Ill.2d 246—Craven v. Craven, 95 N.E.2d 489, 407 Ill. 252—Tuntland v. Haugen, 78 N.E.2d 308, 399 Ill. 696—Curielli v. Curielli, 87 N.E.2d 878, 388 Ill. 215—Harmony Way Bridge Co. v. Leathers, 187 N.E. 432, 353 Ill. 378.

Md.—O'Connor v. Estover, 35 A.2d 148, 182 Md. 541. Miss.—Wax v. Pope, 168 So. 54, 175 Miss. 784.

Mont.—Humbird v. Arnet, 44 P.2d 756, 99 Mont. 499.

Pa.—Rehm v. Rehm, 32 Pa.Dist. & Co. 193.

Tenn.—Fehn v. Schlickling, 175 S.W.2d 37, 26 Tenn.App. 608.

Tex.—Wright v. Wright, 132 S.W.2d 847, 134 Tex. 82—Klein v. Sibley, Civ.App., 203 S.W.2d 239—Cluck v. Sheets, Civ.App., 171 S.W.2d 857, affirmed 171 S.W.2d 860, 141 Tex. 219—Johnston v. Winn, Civ.App., 105 S.W.2d 398, error dismissed—Wash.—Carkonen v. Alberts, 83 P.2d 899, 196 Wash. 575, 135 A.L.R. 209, 65 C.J. p 395 note 17.

**Payment after contract but prior to conveyance is sufficient, under the trust rule.**—Neusted v. Skernswell, 159 P.2d 49, 69 Cal.App.2d 361—65 C.J. p 395 note 17 [e].

63. Cal.—Neusted v. Skernswell, supra.

Fla.—Womack v. Madison Drug Co., 20 So.2d 256, 155 Fla. 335.

Ga.—Loggins v. Daves, 40 S.E.2d 520, 201 Ga. 628.

Ill.—Bride v. Stormer, 15 N.E.2d 282, 365 Ill. 524.

Ind.—McClellan v. Beatty, 53 N.E.2d 1013, 115 Ind.App. 173, rehearing denied 55 N.E.2d 327, 115 Ind.App. 173.

Miss.—Wax v. Pope, 168 So. 54, 175 Miss. 784—Bush v. Bush, 99 So. 151, 134 Miss. 528.

Mo.—Mays v. Jackson, 145 S.W.2d 392, 346 Mo. 1224.

Pa.—Royer v. Royer, Com.Pl., 62 Mont.Ga. 90.

Tex.—Wright v. Wright, 132 S.W.2d 847, 134 Tex. 82—Dickens v. Dickens, Civ.App., 241 S.W.2d 235—Wise v. Cecil, Civ.App., 135 S.W.2d 235. Wash.—Carkonen v. Alberts, 83 P.2d 899, 196 Wash. 575, 135 A.L.R. 209.

**Obligation cannot be established by invalid parol agreement.**

Ga.—Loggins v. Daves, 40 S.E.2d 520, 201 Ga. 628.

64. Or.—Fox v. Maurer, 184 P.2d 417, 178 Or. 64.

65. Ala.—Talley v. Talley, 28 So.2d 586, 248 Ala. 84.

Ark.—Simpson v. Thayer, 217 S.W.2d 354, 214 Ark. 566—McKindley v. Humphrey, 161 S.W.2d 962, 204 Ark. 333.

Cal.—Elliot v. Wood, 218 P.2d 906, 95 Cal.App.2d 314—McQuinn v. Rice, 199 P.2d 742, 88 Cal.App.2d 914.

Fla.—Womack v. Madison Drug Co., 20 So.2d 256, 155 Fla. 335.

Ga.—Jackson v. Faver, 77 S.E.2d 728, 210 Ga. 58—Loggins v. Daves, 40 S.E.2d 520, 201 Ga. 628—Archer v. Kelley, 21 S.E.2d 51, 194 Ga. 117.

Ill.—Hille v. Barnes, 77 N.E.2d 809, 399 Ill. 252.

Ind.—McClellan v. Beatty, 53 N.E.2d 1013, 115 Ind.App. 173, rehearing denied 55 N.E.2d 327, 115 Ind.App. 173.

Mass.—Saulnier v. Saulnier, 103 N.E.2d 225, 328 Mass. 238.

Miss.—Windham v. Windham, 67 So.2d 467—Wax v. Pope, 168 So. 54, 175 Miss. 784.

N.J.—Mott v. Iossa, 181 A. 689, 119 N.J.Eq. 185.

Okla.—Adams v. Adams, 256 P.2d 458, 208 Okl. 378.

Pa.—Stobert v. Stobert, Com.Pl., 98 Pittsb.Leg.J. 233.

Tex.—Cluck v. Sheets, 171 S.W.2d 860, 141 Tex. 219—Landon v. Brown, Civ.App., 266 S.W.2d 404—Sims v. Duncan, Civ.App., 195 S.W.2d 156, error refused no reversible error—Cluck v. Sheets, Civ.App., 171 S.W.2d 857, affirmed 171 S.W.2d 860, 141 Tex. 219.

Wash.—Carkonen v. Alberts, 83 P.2d 899, 196 Wash. 575, 135 A.L.R. 209, 65 C.J. p 396 note 18.

66. Cal.—Stone v. Lobstein, 347 P.2d 357, 112 Cal.App.2d 750.

Fla.—Womack v. Madison Drug Co., 20 So.2d 256, 155 Fla. 335.

Mass.—Saulnier v. Saulnier, 103 N.E.2d 225, 328 Mass. 238—Cohen v. Simon, 23 N.E.2d 863, 304 Mass. 375—Moat v. Moat, 17 N.E.2d 710, 301 Mass. 469.

Tenn.—Fehn v. Schlickling, 175 S.W.2d 37, 26 Tenn.App. 608.

Tex.—Wright v. Wright, 132 S.W.2d 847, 134 Tex. 82—Landon v. Brown, Civ.App., 266 S.W.2d 404, refused no reversible error.

65 C.J. p 396 note 19.

**Installment payments**

(1) When the purchase price consists of a cash payment and others which are payable in deferred installments, the right to resulting trust depends on the payment of that which was immediately payable, and an obligation to meet those which are deferred as they mature.—Upchurch v. Goodroe, 6 So.2d 869, 242 Ala. 395.

(2) Where initial payment was made at time deed was passed to another by person claiming benefit of implied resulting trust pursuant to intent that person claiming the trust should pay the purchase price, initial payment would support establishment of trust, and subsequent payments, made in accordance with original intention, would establish that portion of the claim.—Estes v. Estes, 55 S.E.2d 217, 205 Ga. 814—Price v. Price, 54 S.E.2d 578, 205 Ga. 623—Williams v. Porter, 42 S.E.2d 475, 202 Ga. 113—Loggins v. Daves, 40 S.E.2d 520, 201 Ga. 628.

(3) The intent at the time the conveyance was made that one claiming benefit of implied resulting trust should pay purchase money may be established by proof of an initial payment by one claiming benefit of the trust, at or before time title is conveyed to another, and in such a case, in absence of satisfactory proof to contrary, it may be presumed that the one making such initial payment would complete the payments to protect his equitable title.—Loggins v. Daves, 40 S.E.2d 520, 201 Ga. 628.

67. Ark.—Wilson v. Wilson, 204 S.W.2d 479, 211 Ark. 1030.

65 C.J. p 397 note 20.

68. Vt.—Pinnock v. Clough, 16 Vt. 500, 42 Am.D. 521.

Va.—Brecher v. Wilson, 6 S.E. 209, 34 Va. 813, 10 Am.S.R. 883.

In the absence of an agreement by the cestui que trust to pay a note for part of the purchase price, given by the person in whom legal title vested, payment by the cestui que trust subsequent to the vesting of title will not raise a resulting trust in his favor for the fractional part of the property thus paid for,<sup>69</sup> although an agreement to pay the note will raise such trust.<sup>70</sup> The assumption, after the purchase, of an obligation to pay for the property will not create a resulting trust.<sup>71</sup> Events subsequent to the purchase of the property and the transfer of the title may be considered in determining if a resulting trust was raised where they throw light on the intention with which the purchase was made.<sup>72</sup> Thus, the fact that the payor manages the property, collects rents, pays taxes and insurance, pays for repairs and improvements, or otherwise asserts ownership, and the acquiescence by the transferee in such assertion of ownership show that a resulting trust rather than a gift was intended;<sup>73</sup> whereas if the grantee exercises dominion over the property and the payor does not attempt to do so, it indicates that the purchase was made with the intention of conferring the beneficial interest in the property on the grantee.<sup>74</sup>

### § 121. — Mode and Sufficiency of Payment

One claiming a resulting trust in property conveyed to another must furnish the consideration, whether it is money, assets, or an obligation to pay, as part of the original transaction of purchase.

69. N.H.—Crowley v. Crowley, 56 A. 190, 72 N.H. 241.  
 70. N.H.—Crowley v. Crowley, supra.  
 71. Ga.—Loggins v. Daves, 40 S.E. 2d 520, 201 Ga. 628.  
 72. Mo.—Warford v. Smoot, 237 S. W.2d 184, 361 Mo. 879.  
 Okl.—McKenna v. Lasswell, 250 P. 2d 208, 207 Okl. 408.  
 73. Mo.—Warford v. Smoot, 237 S. W.2d 184, 361 Mo. 879.  
 74. N.J.—O'Neal v. O'Neal, 74 A.2d 614, 9 N.J.Super. 36.  
 75. Ala.—Corpus Juris cited in Young v. Greer, 35 So.2d 619, 621, 250 Ala. 641.  
 Cal.—Elliott v. Wood, 212 P.2d 906, 95 Cal.App.2d 104—McQuinn v. Rice, 199 P.2d 742, 88 Cal.App.2d 914.  
 Tex.—Patrick v. McGaha, Civ.App., 135 S.W.2d 236—Wise v. Cecil, Civ. App., 135 S.W.2d 235, error refused. 65 C.J. p 397 note 23.  
 76. Hawaii.—Werry v. Pacific Trust Co., 33 Hawaii 701.  
 Pa.—Farmers Trust Co. of Lancaster v. Bevis, 200 A. 54, 331 Pa. 89.

- Payment for improvements on land see supra § 111.  
 77. Ill.—Lord v. Reed, 98 N.E. 553, 254 Ill. 350, Ann.Cas.1913C 139.  
**Payments for family purposes**  
 Where parties were living together as a family and money paid by the one was for family purposes, no sum could be allocated specifically to contract so as to create a resulting trust in his favor, even though there may have been some sort of agreement between the parties.—Hille v. Barnes, 77 N.E.2d 809, 399 Ill. 252.  
 78. Ala.—Adams v. Griffin, 45 So.2d 22, 253 Ala. 371—Corpus Juris cited in Young v. Greer, 35 So.2d 619, 621, 250 Ala. 641.  
 65 C.J. p 397 note 24.  
 79. Ala.—Adams v. Griffin, 45 So.2d 22, 253 Ala. 371—Corpus Juris cited in Young v. Greer, 35 So.2d 619, 621, 250 Ala. 641.  
 65 C.J. p 397 note 25.  
 80. Ala.—Albae v. Harbin, 30 So.2d 459, 249 Ala. 201.  
 Mass.—MacNeil v. MacNeil, 43 N.E. 2d 667, 312 Mass. 183—Druker v.

It is essential to the creation of the resulting trust that the money or assets furnished by or for the person claiming the benefit of the trust should enter into the purchase price of the property.<sup>75</sup> Payments or outlays which are not the purchase price or the consideration for the transfer of the property will not support a resulting trust.<sup>76</sup> So, where a portion of the purchase money was given to the grantee at various times before the purchase of the land without reference to the purchase, no resulting trust arises.<sup>77</sup> This does not mean, however, that such person should actually count out and pay down the money to the vendor;<sup>78</sup> it is sufficient if the money or its equivalent is furnished to the person who pays the purchase money,<sup>79</sup> or if there is an absolute obligation to pay, incurred by the person claiming the benefit of the trust,<sup>80</sup> or by some other person on his behalf,<sup>81</sup> as a part of the original transaction of purchase. A trust will not result to one who merely guarantees the obligation.<sup>82</sup>

### § 122. — Part Payment

In the absence of a statute modifying the common-law rule, a trust results pro tanto in favor of one paying part of the consideration for the transfer of property to another unless he manifests an intention that a resulting trust should not arise, or that a resulting trust to that extent should not arise.

As a general rule, where a conveyance is made in the name of one person and a part of the consideration is paid by another, a trust results in the latter's favor pro tanto,<sup>83</sup> particularly where there

- Druker, 31 N.E.2d 524, 308 Mass. 229.  
 Tex.—Patrick v. McGaha, Civ.App., 164 S.W.2d 236—Wise v. Cecil, Civ. App., 135 S.W.2d 235.  
 65 C.J. p 397 note 26.  
 81. Ill.—Skahan v. Irving, 69 N.E. 510, 206 Ill. 597.  
 65 C.J. p 397 note 27.  
 82. N.J.—Grant v. Steenland Const Co., 132 A. 850, 99 N.J.Eq. 82, affirmed 135 A. 917, 100 N.J.Eq. 566.  
 83. Ala.—Jacksonville Public Service Corp. v. Profile Cotton Mills, 180 So 583, 236 Ala. 4.  
 Ark.—Lisko v. Hicks, 114 S.W.2d 9, 195 Ark. 705—Chase v. Andrus, 91 S.W.2d 1035, 192 Ark. 418—Clark v. Clark, 86 S.W.2d 937, 191 Ark. 461.  
 Cal.—Socol v. King, 223 P.2d 627, 36 Cal.2d 342—Watson v. Poore, 115 P.2d 478, 18 Cal.2d 302—Gerstner v. Scheuer, 204 P.2d 937, 91 Cal.App.2d 123—Juranek v. Juranek, 84 P.2d 195, 29 Cal.App.2d 276.  
 Fla.—Johnson v. Craig, 28 So.2d 696, 158 Fla. 254.  
 Ga.—McCollum v. McCollum, 43 S. E.2d 662, 202 Ga. 406—Hemphill v.

is an agreement or undertaking that he shall have a corresponding interest in the property,<sup>84</sup> unless he manifests an intention that no resulting trust should arise,<sup>85</sup> or that a resulting trust to that extent should not arise.<sup>86</sup> It has been held that one paying part of the purchase price may in no event secure a greater interest in the property by way of a resulting trust than the proportion that the amount paid by him bears to the whole purchase price,<sup>87</sup> but if he agreed to take a lesser interest or share, a trust will result only for such lesser interest or share.<sup>88</sup> While payment of the entire purchase price by one person, title being taken in the name of another, may give rise to a resulting trust as to the entire property,<sup>89</sup> a resulting trust will not arise in favor of a person in the whole property purchased unless the entire purchase money has been furnished by or for him.<sup>90</sup> Where the contributor pays an ali-

quot part of the purchase price, it is assumed that it was intended that he have a corresponding interest in the property and a trust will result to that extent, even though there is no other evidence as to the intention of the parties as to the extent of the interest he should receive.<sup>91</sup> Where one claiming a resulting trust in property conveyed to another made the initial payment at the time the property was conveyed, but did not make all the subsequent payments, it has been held that the resulting trust should be limited to the proportionate part of the purchase price that he paid.<sup>92</sup>

It is usually held that a mere general contribution toward the purchase is not sufficient to support a resulting trust,<sup>93</sup> and that the contribution must be a definite part of the whole consideration<sup>94</sup> or for some definite interest,<sup>95</sup> or determinate aliquot

Hemphill, 168 S.E. 878, 176 Ga. 585.

Idaho—Corpus Juris cited in Rexburg Lumber Co. v. Purrington, 113 P.2d 511, 514, 62 Idaho 461.

Md.—Sines v. Shipes, 63 A.2d 748, 192 Md. 139—Fasman v. Pottashnick, 51 A.2d 664, 188 Md. 105.

Mass.—Bodman v. Martha's Vineyard Nat. Bank of Tisbury, 111 N.E.2d 670, 330 Mass. 125.

Miss.—Chichester v. Chichester, 48 So.2d 123, 209 Miss. 628.

Mo.—Shelby v. Shelby, 209 S.W.2d 896, 357 Mo. 557.

Ohio.—Rice v. James, 6 Ohio Supp. 244.

Or.—Fox v. Maurer, 164 P.2d 417, 178 Or. 64.

Pa.—Stathopoulos v. Stathopoulos, Com. Pl., 51 Lanc.L.Rev. 177, 62 York Leg.Rec. 140—Ancas v. Savage, Com.Pl., 33 Luz.Leg.Reg. 388.

Tenn.—Savage v. Savage, 4 Tenn.App. 277—Walker v. Walker, 2 Tenn.App. 279.

Tex.—Landon v. Brown, Civ.App., 266 S.W.2d 404, refused no reversible error—Mace v. Young, Civ.App., 231 S.W.2d 722, error refused—Haigh v. Calhoun, Civ.App., 215 S.W.2d 426—Corpus Juris cited in Morrison v. Farmer, Civ.App., 210 S.W.2d 245, 249—Brod v. First Nat. Bank, Civ.App., 91 S.W.2d 772, error dismissed.

65 C.J. p 397 note 31.

#### Governant to support

Where mother, for purpose of better securing her indebtedness to her daughters, deeded two parcels of realty, which had previously been mortgaged to daughters as security, to daughters, fact that deeds were also based on further consideration that daughters would provide mother with support, care, and nursing for rest of her life, prevented a trust in the realty from arising in favor

of the daughters in proportion to the parts of the purchase paid by each of them—Westrick v. Unterbrink, 105 N.E.2d 885, 90 Ohio App. 283.

#### Loan from another

Where trustee used private funds of life beneficiary, with his consent, together with trust funds, in purchasing realty for trust, and in order to pay balance of purchase price obtained a loan secured by a lien on the realty which was the only property owned by trust, life beneficiary had equitable title to the realty in the proportion which funds contributed by him bore to the sum total of funds contributed by him and by trust estate toward purchase of the realty without regard to the loan obtained to pay balance of the purchase price—Mace v. Young, Tex.Civ.App., 231 S.W.2d 722, error refused.

84. Or.—Hughes v. Helzer, 185 P.2d 537, 182 Or. 205.

R.I.—Sziatlenyi v. Cleverley, 50 A.2d 185, 72 R.I. 253.

65 C.J. p 398 note 32.

85. Cal.—Juranek v. Juranek, 84 P.2d 195, 29 Cal.App.2d 276.

Fla.—Johnson v. Craig, 28 So.2d 696, 158 Fla. 264.

Md.—Sines v. Shipes, 63 A.2d 748, 192 Md. 139—Fasman v. Pottashnick, 51 A.2d 664, 188 Md. 105.

Mo.—Shelby v. Shelby, 209 S.W.2d 896, 357 Mo. 557.

Or.—Fox v. Maurer, 164 P.2d 417, 178 Or. 64.

Pa.—In re Northwest Lyceum Ass'n of Reading, Pa., Com.Pl., 45 Berks Co. 137.

86. Cal.—Juranek v. Juranek, 84 P.2d 195, 29 Cal.App.2d 276.

Fla.—Johnson v. Craig, 28 So.2d 696, 158 Fla. 264.

Md.—Sines v. Shipes, 63 A.2d 748, 192 Md. 139—Fasman v. Pottashnick, 51 A.2d 664, 188 Md. 105.

Mo.—Shelby v. Shelby, 209 S.W.2d 896, 357 Mo. 557.

87. Cal.—Neusted v. Skernswell, 159 P.2d 49, 69 Cal.App.2d 361—Juranek v. Juranek, 84 P.2d 195, 29 Cal.App.2d 276.

N.J.—Locatt v. Adornetto, 39 A.2d 181, 135 N.J.Eq. 462.

88. Cal.—Neusted v. Skernswell, 159 P.2d 49, 69 Cal.App.2d 361.

89. R.I.—Sziatlenyi v. Cleverley, 50 A.2d 185, 72 R.I. 253.

65 C.J. p 397 note 29.

90. Mass.—Carroll v. Markey, 71 N.E.2d 756, 321 Mass. 87.

65 C.J. p 397 note 30.

91. Or.—Fox v. Maurer, 164 P.2d 417, 178 Or. 64.

92. Ga.—Estes v. Estes, 55 S.E.2d 217, 205 Ga. 814—Loggins v. Daves, 40 S.E.2d 520, 201 Ga. 628.

93. Ill.—Hille v. Barnes, 77 N.E.2d 809, 399 Ill. 252.

Mass.—MacNeil v. MacNeil, 43 N.E.2d 667, 312 Mass. 183—Druker v. Druker, 31 N.E.2d 524, 308 Mass. 229—Karas v. Karas, 193 N.E. 18, 288 Mass. 460.

Mo.—Cassity v. Cassity, App., 240 S.W. 486.

Pa.—In re Northwest Lyceum Ass'n of Reading, Pa., Com.Pl., 45 Berks Co. 137.

R.I.—Cutroneo v. Cutroneo, 98 A.2d 921—Campanella v. Campanella, 68 A.2d 85, 76 R.I. 47.

65 C.J. p 399 note 29.

94. Mass.—Karas v. Karas, 193 N.E. 18, 288 Mass. 460.

Tex.—Wright v. Wright, 132 S.W.2d 847, 134 Tex. 82—Landon v. Brown, Civ.App., 266 S.W.2d 404.

65 C.J. p 399 note 36, p 400 note 52.

95. Mass.—Druker v. Druker, 31 N.E.2d 524, 308 Mass. 229—Epstein v. Epstein, 191 N.E. 418, 287 Mass. 248.

share or part of the estate.<sup>96</sup> Thus, a resulting trust will not be declared where it is not possible to establish the proportion of the purchase price contributed by the one claiming a resulting trust.<sup>97</sup> It has been held that the contribution must be an aliquot part of the full purchase price.<sup>98</sup> On the other hand, it has been held that where it is agreed that the contributor is to have an interest proportional to the amount of his contribution, a trust will result for such interest even though the amount contributed is not an aliquot part of the purchase price,<sup>99</sup> and that a contributor is entitled to a resulting trust proportionate to his contribution to the purchase price even though his contribution was not an aliquot part of the purchase price, and there was no understanding or agreement as to the extent of the interest he was to have in the property.<sup>1</sup>

*Joint purchasers.* Where the consideration proceeds from two or more persons jointly, and a conveyance of the legal estate is taken in the name of

one of them only,<sup>2</sup> or of a third person for their benefit,<sup>3</sup> a resulting trust, as a general rule, will arise in favor of the parties not named in the conveyance, in proportion to the amount of the consideration they have respectively contributed.<sup>4</sup> In the absence of proof to the contrary, in such cases, the law presumes that the different parties contributed equally.<sup>5</sup> Where the property is purchased by two or more under an agreement that each shall have a specific interest therein, a trust results to a party not named in the conveyance to the extent of such specific interest,<sup>6</sup> although the amount contributed is a different proportion of the whole purchase price,<sup>7</sup> and the person taking title is trustee as to the other's interest.<sup>8</sup> It has been held that where, without fraud or mistake, property is conveyed to the purchasers as joint tenants, and each has contributed to the purchase price, a resulting trust will not arise although their contributions were unequal.<sup>9</sup>

Okl.—*Staton v. Moody*, 256 P.2d 409, 208 Okl. 372.

Tex.—*Wright v. Wright*, 132 S.W.2d 847, 134 Tex. 82—*Landon v. Brown*, Civ.App., 266 S.W.2d 404. 65 C.J. p 399 note 37, p 401 note 53.

96. Mass.—*MacNeill v. MacNeill*, 43 N.E.2d 667, 312 Mass. 183—*Drucker v. Drucker*, 31 N.E.2d 524, 308 Mass. 229—*Karas v. Karas*, 193 N.E. 18, 288 Mass. 460. Okl.—*Staton v. Moody*, 256 P.2d 409, 208 Okl. 372.

R.I.—*Cutroneo v. Cutroneo*, 98 A.2d 627, 36 Cal.2d 342—*McQuinn v. Rice*, 199 P.2d 742, 88 Cal.App.2d 914. Tex.—*Landon v. Brown*, Civ.App., 266 S.W.2d 404, refused no reversible error.

97. Cal.—*Socol v. King*, 223 P.2d 627, 36 Cal.2d 342—*McQuinn v. Rice*, 199 P.2d 742, 88 Cal.App.2d 914. Tex.—*Landon v. Brown*, Civ.App., 266 S.W.2d 404, refused no reversible error.

98. Ind.—*Koehler v. Koehler*, 121 S.E. 450, 75 Ind.App. 510. 65 C.J. p 398 note 35, p 400 note 51.

99. Or.—*Fox v. Maurer*, 164 P.2d 417, 178 Or. 64.

1. Conn.—*Balzano v. Balzano*, 67 A.2d 409, 135 Conn. 584. Or.—*Fox v. Maurer*, 164 P.2d 417, 178 Or. 64.

2. U.S.—*Porter v. Cooke*, C.C.A.La., 63 P.2d 637. Ala.—*Young v. Greer*, 35 So.2d 619, 260 Ala. 641.

Ark.—*Chase v. Andrus*, 91 S.W.2d 1035, 192 Ark. 418. Conn.—*Balzano v. Balzano*, 67 A.2d 409, 135 Conn. 584.

Ill.—*Paluszek v. Wohlrab*, 115 N.E.2d 764, 1 Ill.2d 363—*Carrillo v. O'Hara*,

81 N.E.2d 513, 400 Ill. 518—*Clark v. Clark*, 76 N.E.2d 446, 398 Ill. 692—*Fraser v. Finlay*, 30 N.E.2d 613, 375 Ill. 78.

Okl.—*Nicklas v. Crowell*, 238 P.2d 347, 205 Okl. 432.

Pa.—*Sharpe v. Sharpe*, Com.Pl., 22 Lech L.J. 139.

Tex.—*Grasty v. Wood*, Civ.App., 230 S.W.2d 568, error refused no reversible error—*Corpus Juris* cited in *Morrison v. Farmer*, Civ.App., 210 S.W.2d 245, 249—*Patrick v. McGaha*, Civ.App., 164 S.W.2d 236.

65 C.J. p 399 note 43, p 400 note 46, p 401 notes 58, 60.

Resulting trust where there is an agreement to purchase or hold for joint benefit and title is taken in name of one without payment of purchase price by other see *supra* § 108.

3. Cal.—*Faures v. Title Ins. & Trust Co.*, 59 P.2d 428, 15 Cal.App.2d 350. Ga.—*Chapman v. Faughnan*, 187 S.E. 634, 183 Ga. 114. N.J.—*Halmerl v. Halmerl*, 61 A.2d 439, 142 N.J. Eq. 740.

65 C.J. p 400 notes 44, 46.

4. Ala.—*Young v. Greer*, 35 So.2d 619, 250 Ala. 541—*Sanders v. Steele*, 26 So.2d 882, 124 Ala. 416.

Ark.—*Chase v. Andrus*, 91 S.W.2d 1035, 192 Ark. 418.

Cal.—*Elliott v. Wood*, 212 P.2d 906, 95 Cal.App.2d 314—*McQuinn v. Rice*, 199 P.2d 742, 88 Cal.App.2d 914. Conn.—*Balzano v. Balzano*, 67 A.2d 409, 135 Conn. 584.

Ill.—*Paluszek v. Wohlrab*, 115 N.E.2d 764, 1 Ill.2d 363—*Clark v. Clark*, 76 N.E.2d 446, 398 Ill. 592—*Fraser v. Finlay*, 30 N.E.2d 613, 375 Ill. 78.

N.J.—*Halmerl v. Halmerl*, 61 A.2d 439, 142 N.J. Eq. 740. 65 C.J. p 400 note 45.

Trust based on payment Cal.—*Elliott v. Wood*, 212 P.2d 906, 95 Cal.App.2d 314.

#### Subsequent payment

Where plaintiff and defendants agreed to purchase realty as tenants in common and plaintiff agreed to contribute two thousand four hundred dollars to purchase price, seven hundred dollars payment subsequently paid by plaintiff to defendants to pay off second mortgage to bring his contribution up to agreed amount was properly included as a part of his trust interest in realty—*Geratner v. Scheuer*, 204 P.2d 937, 91 Cal.App.2d 123.

5. Iowa—*Culp v. Price*, 77 N.W. 848, 107 Iowa 133. 65 C.J. p 400 note 47.

6. Cal.—*Byers v. Doheny*, 287 P. 988, 105 Cal.App. 484. Ill.—*Carrillo v. O'Hara*, 81 N.E.2d 513, 400 Ill. 518.

Tex.—*Hamill & Smith v. Parr*, Civ. App., 173 S.W.2d 725. Utah—*Barrett v. Vickers*, 116 P.2d 772, 100 Utah 534. Wash.—*Donaldson v. Greenwood*, 242 P.2d 1038, 40 Wash.2d 238. 65 C.J. p 400 note 48.

7. Tex.—*Hamill & Smith v. Parr*, Civ.App., 173 S.W.2d 725. Utah—*Barrett v. Vickers*, 116 P.2d 772, 100 Utah 534. 65 C.J. p 400 note 48.

8. W.Va.—*Heiskell v. Powell*, 23 W. Va. 717—*Murry v. Sell*, 23 W.Va. 476.

9. Ill.—*Paluszek v. Wohlrab*, 115 N.E.2d 764, 1 Ill.2d 363.

*Statutory modification or abolition of common-law rule.* Under statutes modifying or abolishing the common-law rule that a resulting trust arises in favor of one paying the consideration for a transfer of property to another, as discussed supra § 116, a resulting trust will not arise from the mere fact that one pays part of the consideration for the transfer of property to another.<sup>10</sup> However, a resulting trust may arise where the grantee takes the deed, as an absolute conveyance, in his own name without the knowledge or consent of the person furnishing part of the consideration,<sup>11</sup> or where by agreement, and without any fraudulent intent, the grantee was to hold the land in trust for, or convey it to, the party paying the purchase price.<sup>12</sup>

### § 123. — Purpose of Payment in General

- a. In general
- b. Acquisition of interest in property

#### a. In General

It is generally held that a trust will not result or be enforced in favor of one who pays the consideration for a transfer of the property to another for a fraudulent or illegal purpose, but this rule is sometimes not applied where the injury to the public interest from the nature of the transaction does not outweigh the undesirability of the grantee's unjust enrichment.

10. Ky.—Howser v. Johnson, 179 S. W.2d 897, 297 Ky. 213.  
65 C.J. p 401 note 62.

#### Recovery of payment

Plaintiff who advanced part of purchase price of farm conveyed to defendants, although not entitled to enforce a resulting trust or lien against the land, could recover the money advanced.—Howser v. Johnson, 179 S. W.2d 897, 297 Ky. 213.

11. Ind.—Mills v. Thomas, 144 N.E. 412, 194 Ind. 648.  
65 C.J. p 401 note 63.

12. Ind.—Joyce v. Hocquin, 150 N.E. 816, 84 Ind.App. 188.  
65 C.J. p 401 note 64.

13. Utah—Olsen v. Bank of Ephraim, 68 P.2d 195, 93 Utah 364, rehearing denied 73 P.2d 78, 93 Utah 373.  
65 C.J. p 402 note 74.

#### Rule applied with caution

The "illegal purpose rule" which applies to prevent the recovery of property under a resulting trust when property is taken in name of another for an illegal purpose or for a purpose against public policy and good morals should be applied with caution because of the frequent unjust enrichment of one who is also a party to the claimed illegal transaction when rule is applied.—Makinen v. George, 142 P.2d 910, 19 Wash.2d 340.

#### Forest regulations

Where husband purchased land and sheep, borrowing money from bank for purchase price, but took title in wife's name in order to evade regulations of United States Forest Service as to number of sheep that could be grazed on land, husband, and bank as successor to husband's rights were not entitled to assert equitable interest in land on ground of purchase money advanced as against wife's children, since resulting trust will not arise out of acts against public policy and bank was not innocent purchaser.—Olsen v. Bank of Ephraim, 68 P.2d 195, 93 Utah 364, rehearing denied 73 P.2d 78, 93 Utah 373.

#### Government license

Where Japanese government sought permission to establish fund in American branch of Japanese bank and gave formal assurance to United States that it was exercising official governmental control over every transaction involved, and Secretary of Treasury granted such license, bankrupt Japanese corporation was not entitled to balance of such fund on theory of resulting trust, even though it supplied consideration for establishment of such fund.—Carr v. Yokohama Specie Bank Limited, of San Francisco, C.A.Cal., 200 F.2d 251.  
14. Mo.—Miller v. Davis, 50 Mo. 572.  
Pa.—Ardolino v. Ardolino, 83 Pa. Dist. & Co. 127, 100 Pittsb. Leg. J. 267.

It is generally held that a trust will not result or will not be enforced in favor of one who pays the purchase money and has the title taken in the name of a third person for a fraudulent or illegal purpose,<sup>13</sup> as where the transaction is in fraud of an existing statute and in evasion of its express provisions.<sup>14</sup> Thus, as discussed in Fraudulent Conveyances § 271, one taking title to the property in another's name for the purpose of defrauding his creditors may not enforce a resulting trust, although, as discussed in Fraudulent Conveyances § 38, the creditors of the one paying the consideration may subject the property to their claims. Where the law prohibits anyone other than the licensee from having a pecuniary interest in a liquor license, the court will not impose a resulting trust with respect to a liquor license in favor of the one who paid for the license.<sup>15</sup> However, it has been held that whether or not the one furnishing the consideration for a conveyance to another for a fraudulent or illegal purpose should be allowed to enforce a resulting trust depends on whether the public interest in preventing the particular type of wrongdoing is sufficiently great to outweigh the undesirability of the grantee's unjust enrichment.<sup>16</sup> Moreover, it has been held that a fraudulent intent contrary to the

Evasion of laws restricting alien's right to acquire property see Aliens § 19.

15. Pa.—Ardolino v. Ardolino, supra.  
16. Mont.—Thompson v. Steinkamp, 187 P.2d 1018, 120 Mont. 475.

#### Factors to be considered

The factors to be considered in determining whether a resulting trust should be enforced where title is taken in another's name for a fraudulent or illegal purpose are whether the conduct of the one who paid the consideration involved serious moral turpitude; the extent of the policy of the law making the transaction illegal; whether the enforcement of the resulting trust would tend to prevent the accomplishment of the illegal purpose; whether the grantee was more at fault than the party paying the consideration; and whether the party paying the consideration was ignorant of the law or facts making the transaction illegal. Mont.—Thompson v. Steinkamp, supra.

Wash.—Makinen v. George, 142 P.2d 910, 19 Wash.2d 340.

#### Transfer made to put property beyond reach of wife

(1) A resulting trust cannot be claimed by one who had the title placed in the name of another for the purpose of defrauding his wife. Ark.—Johnson v. Johnson, 152 S.W. 1017, 106 Ark. 9.

implication of a purchase-money resulting trust will not rebut or defeat the trust.<sup>17</sup>

A resulting trust may arise in favor of the one supplying the consideration where title is placed in the grantee's name as a matter of business convenience,<sup>18</sup> to increase the grantee's credit standing,<sup>19</sup> or to enable the grantee to become surety on bonds.<sup>20</sup> Where legal title to corporate stock is taken in the name of one person merely to comply with the requirements of the law with respect to the formation of the corporation and it is the intention of the parties that the beneficial interest in the stock shall be in another, who furnished the consideration therefor, a resulting trust arises.<sup>21</sup> Where property is purchased by one person in behalf of another who furnished the consideration, title being taken in the name of the former for the sole and only purpose of relieving such person from embarrassment of litigation with a person claiming as a common-law wife of a relative, the statutory provision that, when a conveyance for a valuable consideration is made to one person, and the consideration therefor is paid by another, and by agreement, without any fraudulent intent, the grantee is to hold the land in trust for the party paying the consideration, applies, and a trust will be deemed to result.<sup>22</sup>

#### b. Acquisition of Interest in Property

If property is purchased with consideration fur-

nished by one person and the title is taken in the name of another, a resulting trust may arise for the benefit of the person furnishing the consideration only where he provides the consideration for the purpose of having the property or an interest therein acquired in his name or for his benefit.

If property is purchased with consideration furnished by one person and the title is taken in the name of another, a resulting trust may arise for the benefit of the person furnishing the consideration where,<sup>23</sup> and only where,<sup>24</sup> he provides the consideration for the purpose of having the property or an interest therein acquired in his name or for his benefit, and a trust will not result in his favor if he advances the money as a gift, or advancement, as discussed infra § 124, or with the view of supplying him with the means of perfecting his own title.<sup>25</sup> So, also, where a part of the consideration for the purchase is furnished by one person, a resulting trust will arise only where he supplied the consideration for the purpose of having an interest in the property.<sup>26</sup> Where there are joint contributors to the purchase of property for a specific purpose, and title is taken in the name of one only, if the project is abandoned by the other, a resulting trust does not arise in favor of such other, but his relief is by reimbursement.<sup>27</sup>

**Loan.** The rule is well settled that, where property is purchased with borrowed money and title is taken in the name of the borrower, no resulting trust arises in favor of the lender,<sup>28</sup> even though the

Iowa.—*Tiffany v. Tiffany*, 72 N.W. 428, 103 Iowa 133

(2) Holding that resulting trust arose on defendant's purchase of property with money given her by plaintiff's decedent, though property was placed in defendant's name for purpose of preventing decedent's former wife from attempting to enforce claim of back alimony against property, was not abuse of discretion, where defendant had sufficient knowledge of decedent's purpose to constitute her a party to the illegal purpose, and decedent's widow would be deprived of her dower interest and her right of inheritance if the resulting trust was not enforced, and where it appeared that no creditor had been defrauded.—*Thompson v. Steinkamp*, 187 P.2d 1018, 120 Mont. 475.

(3) Administratrix was entitled to have savings accounts and land which belonged to intestate, but which stood in name of intestate's brother, declared assets of estate as resulting trust, where intestate who had deserted his wife had not held such subsequently acquired property in his own name because of fear that wife might attach it.—*Denault v. Cadorette*, 9 N.E.2d 333, 298 Mass. 67.

17. N.H.—*Hutchins v. Heywood*, 50 N.H. 491.

18. Pa.—*Mahjoubian v. Mahjoubian*, 184 A. 455, 321 Pa. 354

19. Ga.—*McWilliam v. Mitchell*, 177 S.E. 579, 179 Ga. 726.

20. Ga.—*McWilliam v. Mitchell*, supra.

21. Nev.—*Friedman v. Goodin*, 299 P. 1017, 53 Nev. 324, rehearing denied 5 P.2d 1118, 53 Nev. 324.

22. Ind.—*Reece v. Leitch*, 92 N.E. 553, 46 Ind.App. 342.

23. N.J.—*O'Neal v. O'Neal*, 74 A.2d 614, 9 N.J. Super 36.

65 C.J. p. 401 note 65.  
Intention that grantee shall not take beneficial interest in property as essential to trust resulting from payment of consideration for transfer of property to another, see supra § 116.

24. Ala.—*Corpus Juris* cited in *Lynch v. Partin*, 34 So.2d 2, 3, 250 Ala. 241

Mo.—*Corpus Juris* cited in *Adams v. Adams*, 156 S.W.2d 610, 614, 348 Mo. 1041.

N.J.—*O'Neal v. O'Neal*, 74 A.2d 614, 9 N.J. Super. 36.

N.C.—*Lawrence v. Heavner*, 61 S.E. 2d 697, 232 N.C. 557.  
65 C.J. p. 401 note 66.

25. Ill.—*Loomis v. Loomis*, 28 Ill. 454.

Iowa.—*German v. Heath*, 116 N.W. 1051, 139 Iowa 52.

26. Ark.—*Oliver v. Culpepper*, 190 S.W.2d 457, 209 Ark. 326.

Iowa.—*German v. Heath*, 116 N.W. 1051, 139 Iowa 52

Trust resulting in favor of one paying part of consideration for transfer of property to another generally see supra § 122.

27. N.J.—*Howson v. Charles P. Gillen & Co., Ch.*, 142 A. 250.

28. Cal.—*Vogel v. Bankers Bldg. Corp.*, 245 P.2d 1069, 112 Cal.App.2d 160—*Elms v. Elms*, 76 P.2d 126, 24 Cal.App.2d 695.

Ga.—*Pierce v. Harrison*, 33 S.E.2d 650, 199 Ga. 197—*Turner v. Olympian Hills*, 191 S.E. 106, 184 Ga. 340—*Bell v. Bell*, 172 S.E. 566, 178 Ga. 225.

Ill.—*Fields v. Fields*, 114 N.E.2d 402, 415 Ill. 324—*Hille v. Barnes*, 77 N.E.2d 809, 399 Ill. 252.

Mass.—*Collins v. Curtin*, 89 N.E.2d 211, 325 Mass. 123—*Medlinsky v.*



money is loaned under a parol agreement that the borrower's interest in the property shall rest in the lender to the extent of his loan,<sup>29</sup> or on an agreement that the title should be held for the benefit of the lender as security for the loan,<sup>30</sup> or on an agreement to share in the profits.<sup>31</sup> This rule also applies in the case of money lent for the purpose of making a part payment.<sup>32</sup> The fact that the money is lent on the faith of the property of another does not give the latter such ownership of the money as to entitle him to claim the trust for his benefit.<sup>33</sup>

Since, as stated supra § 102 e, a resulting trust arises, if at all, the instant title passes on the facts then existing, money furnished to make payments on lands theretofore acquired under a contract cannot create a resulting trust in favor of the one lending the money.<sup>34</sup> As discussed supra § 107, where title is taken in the name of the lender, a trust results in favor of the borrower.

#### § 124. — Payment as Gift or Advancement

A resulting trust does not arise in favor of one paying the purchase price for a conveyance to another as a gift.

A resulting trust does not arise in favor of one

paying the purchase price for a conveyance of property to another by way of advancement<sup>35</sup> or gift<sup>36</sup> to another, but a trust results, if at all, in favor of the person in whose behalf the payment, as an advancement or gift, is made.<sup>37</sup> A statutory presumption of resulting trust does not apply where the conveyance is intended as a gift.<sup>38</sup> Where the owner of all of the stock of a corporation purchases property and takes title in the name of the corporation, the inference is that a gift was intended and no trust results.<sup>39</sup>

#### § 125. Relationship between Parties

As a general rule, where one purchases property with his funds and has the title conveyed to his wife, child, or other natural object of his bounty, or one for whom he is under a legal or moral obligation to provide, a resulting trust does not arise in favor of the one paying the purchase price unless he manifests an intention that the grantee shall not have the beneficial interest in the property.

As a general rule, where a person purchases property with his funds and has the title conveyed to his wife, as discussed infra § 127 a, his child, as considered infra § 129 b, or other natural object of his bounty, or one for whom he is under a legal or moral obligation to provide, a resulting trust does not arise in favor of the one paying the purchase price<sup>40</sup> unless he manifests an intention that the

Premium Cut Beef Co., 67 N.E.2d 762, 320 Mass. 22

Miss.—Walker v. Walker, 59 So.2d 277, 214 Miss. 529, suggestion of error overruled in part and sustained in part 59 So.2d 848, 214 Miss. 529

Mo.—Corpus Juris cited in Adams v. Adams, 156 S.W.2d 610, 614, 348 Mo. 1041.

Ohio.—Kopp Clay Co. v. State, 182 N. E. 494, 125 Ohio St. 512—Kuck v. Sommers, App., 100 N.E.2d 68.

Pa.—Lake v. Hurst, Corn Fl., 6 Chest. Co. 38, exceptions dismissed 6 Chest. Co. 82

R.I.—Szlattenyi v. Cleverley, 50 A.2d 185, 72 R.I. 253.

Tenn.—Gregory v. Guinn, 4 Tenn.App. 10.

65 C.J. p 402 note 80.

#### Reasons for rule

(1) The relationship is merely that of debtor and creditor.

Ala.—Riley v. Pierce, 50 Ala. 93.  
S.D.—Cottonwood County Bank v. Case, 125 N.W. 298, 25 S.D. 77.

(2) The money belongs to the borrower individually.—Martin v. New York, etc., Min., etc., Co., Mo., 165 F. 398, 91 C.C.A. 348—65 C.J. p 402 note 84.

#### Liens for repayment

Where one in good faith advanced the purchase price of land to be paid by grantee, equity would impress the

land with a lien in lender's favor against grantee under the rule "equity keeps an eye on the consideration that passed and protects the party who furnished it"—Magnolia Petroleum Co. v. Taylor, Tex Civ App., 173 S.W.2d 969, error refused.

29. S.C.—Surasky v. Weintraub, 73 S.E. 1029, 90 S.C. 522.

Tenn.—Rogers v. Simpson, 10 Helsk. 655.

30. Mo.—Adams v. Adams, 156 S.W.2d 610, 348 Mo. 1041.

31. Mo.—Adams v. Adams, supra.

32. Cal.—Elms v. Elms, 76 P.2d 126, 24 Cal App 2d 696.

Va.—McDevitt v. Frantz, 9 S.E. 282, 85 Va. 922.

33. Cal.—Smith v. Goethe, 82 P. 384, 147 Cal. 725.

34. Ill.—Brooks v. Gretz, 153 N.E. 643, 323 Ill. 161.

35. Ala.—Corpus Juris cited in Lynch v. Partin, 34 So.2d 2, 3, 250 Ala. 211.

65 C.J. p 403 note 89.

36. Ala.—Corpus Juris cited in Lynch v. Partin, 34 So.2d 2, 3, 250 Ala. 211.

Ill.—Fields v. Fields, 114 N.E.2d 402, 415 Ill. 324—Clark v. Clark, 76 N.E. 2d 446, 398 Ill. 592.

N.J.—Fowler v. Scott, 73 A.2d 278, 8 N.J.Super. 490

Ohio.—Kopp Clay Co. v. State, 182 N. E. 494, 125 Ohio St. 512.

Pa.—Orth v. Wood, 47 A.2d 140, 354 Pa. 121.

Wash.—In re Cunningham's Estate, 143 P.2d 852, 19 Wash.2d 589.

65 C.J. p 403 note 90.

37. N.Y.—Simon v. Schurck, 29 N.Y. 598.

65 C.J. p 403 note 91

38. Cal.—Porter v. Douglass, 94 P. 591, 7 Cal App. 429.

39. N.J.—Neimasek v. Barnett Holding Co., 4 A.2d 794, 125 N.J. Eq. 284.

Purchase by corporation, with title in name of officer, as creating resulting trust see Corporations § 1093 b.

40. Ala.—Adair v. Adair, 62 So.2d 437, 258 Ala. 293.

Cal.—Altamano v. Swan, 128 P.2d 353, 20 Cal.2d 622, followed in Altamano v. Rodeo Del Legionario, 128 P.2d 357, 20 Cal.2d 898—Emden v. Verdi, 269 P.2d 47, 124 Cal App 2d 655—Finnegan v. Hernandez, 168 P.2d 32, 74 Cal App.2d 61.

Fla.—Frank v. Eeles, 13 So.2d 216, 152 Fla. 869.

Md.—Tiemann v. Welsh, 59 A.2d 628, 191 Md. 1—Mountford v. Mountford, 29 A.2d 258, 181 Md. 212

Mo.—Hiatt v. Hiatt, 168 S.W.2d 1087

Neb.—Peterson v. Massey, 53 N.W.2d 912, 155 Neb. 823.

grantee shall not have the beneficial interest in the property.<sup>41</sup> In such case, the presumption is that the transaction is intended as a gift,<sup>42</sup> advancement,<sup>43</sup> or settlement<sup>44</sup> to the nominal purchaser, and not as a resulting trust.<sup>45</sup> Such presumption, however, is one of fact,<sup>46</sup> and not of law,<sup>47</sup> and may be rebutted by evidence or circumstances to the contrary.<sup>48</sup>

A resulting trust arises where the grantee is a stranger, as discussed *supra* § 116, or one toward whom the purchaser has no legal or moral obligation of support,<sup>49</sup> but it has been held that the question is not to be determined by the closeness of the relationship, but whether the relationship was such as to make it probable that a gift was intended.<sup>50</sup> Where the parties are closely related by blood or

marriage, their subsequent conduct and attitude toward the property, their financial situation, and their relationship in the conduct of common business enterprises and investment may all be looked to in determining their intent.<sup>51</sup> Where a parent furnishes the consideration for the purchase of property as an advancement to a child, and has the title made to the child's husband, a resulting trust does not arise in favor of the parent,<sup>52</sup> or the child;<sup>53</sup> but where the transaction is regarded as an advancement of money to the child, and the child's money is used to pay for the conveyance to her husband, the situation is one in which a wife's assets are used to buy property for her husband, as discussed generally *infra* § 127 b, and a trust results in favor of the child, particularly where title is taken in the

N.J.—Hermanoski v. Hermanoski, 87 A.2d 452, 18 N.J. Super. 406—Daly v. Lanucha, 81 A.2d 826, 14 N.J. Super. 225—Strong v. Strong, 40 A.2d 548, 136 N.J. Eq. 103.

Pa.—Citizens Deposit & Trust Co. of Sharpsburg v. Citizens Deposit & Trust Co. of Sharpsburg, 7 A.2d 519, 136 Pa. Super. 413—Gross v. Gross, Com. Pl., 60 Dauph. Co. 460—Seifert v. Eyster, Com. Pl., 57 York Leg. Rec. 181—Specht v. Specht, Orph. 67 Montg. Co. 162.

Va.—Williams v. Powers, 190 S.E. 149, 168 Va. 111.  
65 C.J. p 403 notes 96, 1.

41. Cal.—Altiramo v. Swan, 128 P.2d 353, 20 Cal.2d 622, followed in Altiramo v. Rodeo Del Leoncarrro, 128 P.2d 357, 20 Cal.2d 898.

Ky.—O'Donnell v. O'Donnell, 202 S.W.2d 999, 305 Ky. 40.

Pa.—Citizens Deposit & Trust Co. of Sharpsburg v. Citizens Deposit & Trust Co. of Sharpsburg, 7 A.2d 519, 136 Pa. Super. 413—Drayer v. Drayer, Com. Pl., 60 Dauph. Co. 160—Donohue v. Donohue, Com. Pl., 42 Sch. Leg. Rec. 66.

42. Cal.—Gomez v. Cecena, 101 P.2d 477, 15 Cal.2d 363—Finnergan v. Hernandez, 168 P.2d 32, 74 Cal. App. 2d 51.

Iowa—Corpus Juris cited in Shaw v. Addison, 28 N.W.2d 816, 823, 239 Iowa 377.

Md.—Mountford v. Mountford, 29 A.2d 258, 181 Md. 212.

Mont.—Bingham v. National Bank of Montana, 72 P.2d 90, 105 Mont. 159, 113 A.L.R. 315—McLaughlin v. Corcoran, 69 P.2d 597, 104 Mont. 590.

Neb.—Peterson v. Massey, 53 N.W.2d 912, 155 Neb. 829—Brodsky v. Brodsky, 272 N.W. 919, 132 Neb. 659.

N.J.—Hermanoski v. Hermanoski, 87 A.2d 452, 18 N.J. Super. 406.

Pa.—Gelbarth v. Moore, Com. Pl., 29 Del. Co. 68.

S.C.—Caulk v. Caulk, 43 S.E.2d 600, 211 S.C. 57.

Wash.—Grichuhin v. Grichuhin, 272 P.2d 141—Walberg v. Mattson, 232 P.2d 827, 38 Wash.2d 808—In re Cunningham's Estate, 143 P.2d 852, 19 Wash.2d 589.  
65 C.J. p 403 note 97.

43. Ala.—Adair v. Adair, 62 So.2d 437, 258 Ala. 233.

Hawaii.—Ishida v. Naumu, 34 Hawaii 363.

Md.—Mountford v. Mountford, 29 A.2d 258, 181 Md. 212—Porter v. Porter, 177 A. 460, 168 Md. 287.

N.J.—Daly v. Lanucha, 81 A.2d 826, 14 N.J. Super. 225—Strong v. Strong, 40 A.2d 548, 136 N.J. Eq. 103.

Or.—Dahl v. Simonsen, 70 P.2d 49, 157 Or. 238.

S.C.—Caulk v. Caulk, 43 S.E.2d 600, 211 S.C. 57.

Va.—Williams v. Powers, 190 S.E. 145, 168 Va. 111.

65 C.J. p 403 note 98.

44. N.J.—Daly v. Lanucha, 81 A.2d 826, 14 N.J. Super. 225—Strong v. Strong, 40 A.2d 548, 136 N.J. Eq. 103.

Or.—Dahl v. Simonsen, 70 P.2d 49, 157 Or. 238.

65 C.J. p 403 note 99.

45. Md.—Porter v. Porter, 177 A. 460, 168 Md. 287.

Neb.—Peterson v. Massey, 53 N.W.2d 912, 155 Neb. 829.

Ohio.—Rice v. James, 6 Ohio Supp. 244.

Or.—Dahl v. Simonsen, 70 P.2d 49, 157 Or. 238.

Wash.—Grichuhin v. Grichuhin, 272 P.2d 141—Walberg v. Mattson, 232 P.2d 827, 38 Wash.2d 808—In re Cunningham's Estate, 143 P.2d 852, 19 Wash.2d 589.  
65 C.J. p 403 notes 96, 1.

46. Md.—Mountford v. Mountford, 29 A.2d 258, 181 Md. 212.

S.C.—Caulk v. Caulk, 43 S.E.2d 600, 211 S.C. 57.

65 C.J. p 403 note 2.

47. Md.—Mountford v. Mountford, 29 A.2d 258, 181 Md. 212.

S.C.—Caulk v. Caulk, 43 S.E.2d 600, 211 S.C. 57.

65 C.J. p 403 note 3.

48. Cal.—Gomez v. Cecena, 101 P.2d 477, 15 Cal.2d 363.

Md.—Mountford v. Mountford, 29 A.2d 258, 181 Md. 212.

N.J.—Strong v. Strong, 40 A.2d 548, 136 N.J. Eq. 103.

S.C.—Caulk v. Caulk, 43 S.E.2d 600, 211 S.C. 57.

Va.—Williams v. Powers, 190 S.E. 149, 168 Va. 111.

Wash.—Walberg v. Mattson, 232 P.2d 827, 38 Wash.2d 808.

65 C.J. p 403 note 4.

49. Neb.—Doll v. Doll, 155 N.W. 226, 99 Neb. 82.

Pa.—Fitzpatrick v. Fitzpatrick, 29 A.2d 790, 346 Pa. 202.

#### Niece or nephew

Person supplying money to purchase realty, title to which was taken in the names of his niece and nephew, was under no natural, moral, or legal obligation to provide for grantees, so as to prevent a resulting trust from arising in favor of person supplying purchase money in absence of facts explanatory of transaction—Tiemann v. Welsh, 59 A.2d 628, 191 Md. 1.

50. Pa.—Citizens Deposit & Trust Co. of Sharpsburg v. Citizens Deposit & Trust Co. of Sharpsburg, 7 A.2d 519, 136 Pa. Super. 413.

51. Ill.—Wesemann v. Fischer, 56 N.E.2d 656, 323 Ill. App. 617.

52. U.S.—Cole v. Thompson, C.C.W. Va., 169 F. 729.

65 C.J. p 404 note 8.

53. U.S.—Cole v. Thompson, *supra*, 1nd—Lewis v. Stanley, 45 NE 693, 47 NE 677, 148 Ind. 351.

65 C.J. p 404 note 3.

husband's name without her knowledge or consent.<sup>54</sup> If money is lent to a son-in-law on that person's security and is used to purchase property, no trust arises in behalf of the lender's daughter.<sup>55</sup> The close, confidential relationship between a pastor, paying the consideration, and the church in whose name title was taken, has been held to rebut the presumption of a resulting trust.<sup>56</sup> Where the members of a family contributed to a fund for the purchase of property under an agreement that they were to share equally, and one member took title to the property, he holds the title on a resulting trust in favor of the other members of the family,<sup>57</sup> and each member of the family acquires an equal interest and not one in proportion to his contribution to the fund.<sup>58</sup>

Under statutes modifying the common-law rule and providing that a trust does not result from the mere payment of the purchase price for a conveyance to another, as discussed generally supra § 116, a trust does not ordinarily result where one pays the consideration for a conveyance of property to a relative.<sup>59</sup>

## § 126. — Husband and Wife in General

A resulting trust may be established between husband and wife; whether a trust results in favor of one

paying the consideration for a conveyance of property to his or her spouse is a question of the intention of the one paying the consideration at the time of the transfer.

A resulting trust may be established between husband and wife.<sup>60</sup> Whether a trust results in favor of one paying the consideration for a transfer of property to his or her spouse, or jointly, is purely a question of the intention of the one paying the consideration at the time of the transfer,<sup>61</sup> in the determination of which, the rules as to when a transaction between husband and wife will be presumed a gift, as discussed infra §§ 127, 128, play a large part and the different rules applicable in the case of payment by the husband and payment by the wife rest on the fact that a husband is legally obligated to support his wife while a wife is not ordinarily obligated to support her husband.<sup>62</sup> As is the case with purchase money resulting trusts generally, as discussed supra § 116, a purchase money resulting trust arising from a transaction involving a husband and wife is a creature of equity;<sup>63</sup> it arises by implication of law from the transaction<sup>64</sup> and is not created by contract.<sup>65</sup> A resulting trust in favor of a husband or wife paying the consideration for a transfer of property to his or her spouse arises, if at all, at the time of the transfer,<sup>66</sup> and cannot be created by subsequent events<sup>67</sup> such as

54. Mo.—Freeland v. Williamson, 119 S.W. 560, 220 Mo. 217, 65 C.J. p 404 note 11.

55. Ill.—Rayborn v. Grand Lodge of Illinois of Independent Order of Odd Fellows, 234 Ill.App. 183. Loan of purchase money generally see supra § 124.

56. Ala.—Lauderdale v. Peace Baptist Church of Birmingham, 19 So.2d 538, 246 Ala. 178.

57. Md.—Sines v. Shipes, 63 A.2d 748, 192 Md. 139. Resulting trust in favor of one paying part of purchase price generally see supra § 122.

58. Md.—Sines v. Shipes, 63 A.2d 748, 192 Md. 139.

### Fund insufficient to meet purchase price

Where one member of the family received various sums to effect the purchase for family of certain property and was not obligated by family agreement to supply the deficiency between purchase price and amount of contributions she had received, she could not claim property as her own merely because she or her husband did supply deficiency without asking other members of family to contribute and thereby effected the purchase.—Sines v. Shipes, supra.

59. Ky.—Bybee v. Wilson, 245 S.W. 295, 196 Ky. 644, 65 C.J. p 404 note 7.

### Exception to rule

A statutory exception that a resulting trust may arise where the grantee takes the title as an absolute conveyance without the knowledge or consent of the person paying the consideration does not apply where an indenture deed recites the part payment by a father as advancement to his daughter, title being taken in the name of her husband, since the daughter's consent to title being taken in the name of her husband will be implied.—Dalzell v. Dalzell, 185 S.W. 1107, 170 Ky. 297.

60. Mass.—O'Brien v. O'Brien, 152 N.E. 80, 256 Mass. 308.

### Furnishing home

The principles of purchase money resulting trusts do not apply to the transactions of husband and wife in furnishing a home for themselves, the question merely being one of ownership of furniture.—Holohan v. McCarthy, 281 P. 178, 130 Or. 577.

61. Ala.—Marshall v. Marshall, 8 So. 2d 843, 243 Ala. 169.

Ill.—Houdek v. Ehrenberger, 72 N.E. 2d 837, 397 Ill. 62.—Spina v. Spina, 22 N.E.2d 687, 372 Ill. 50, 65 C.J. p 405 note 22.

62. Or.—Rhodes v. Peery, 19 P.2d 418, 142 Or. 165.

63. Tex.—Solether v. Trinity Fire Ins. Co., 78 S.W.2d 180, 124 Tex. 363.

64. Iowa.—Johnson v. Foust, 139 N.W. 451, 158 Iowa 195. Tex.—Solether v. Trinity Fire Ins. Co., 78 S.W.2d 180, 124 Tex. 363.

65. Tex.—Solether v. Trinity Fire Ins. Co., supra.

66. Mo.—Lehr v. Moll, 247 S.W.2d 686—Hiatt v. Hiatt, 168 S.W.2d 1087.

N.J.—Rayher v. Rayher, 96 A.2d 693, 25 N.J.Super. 494, reversed on other grounds 101 A.2d 524, 14 N.J. 174. Tex.—Lusk v. Parmer, Civ.App., 87 S.W.2d 790.

When purchase money trust results generally see supra § 120.

67. Mo.—Lehr v. Moll, 247 S.W.2d 686—Hiatt v. Hiatt, 168 S.W.2d 1087.

A transfer intended as a gift cannot be reduced to a trust by subsequent events.

Ca.—Williams v. Thomas, 38 S.E.2d 603, 200 Ga. 767.

Mo.—Lewis v. Lewis, 189 S.W.2d 557, 354 Mo. 415.

subsequent payments,<sup>68</sup> improving the property,<sup>69</sup> or a divorce.<sup>70</sup>

# § 127. — Payment by Husband or Wife with Title in the Other or Jointly

- a. Payment by husband with title in wife or jointly
- b. Payment by wife with title in husband or jointly

## a. Payment by Husband with Title in Wife or Jointly

Where a husband pays the purchase price for a conveyance of property to his wife or to himself and his

wife jointly, it is ordinarily presumed that he intended it as a gift to his wife and a trust will not result in his favor; but where it appears that he did not intend the wife to take a beneficial interest in the property, a resulting trust in his favor arises.

The general rule, discussed supra § 116 that in the absence of a showing of a different intention, a resulting trust arises in favor of one paying the purchase price for a conveyance of property to another does not apply where the conveyance is made to the wife of the one paying the purchase price for the property.<sup>71</sup> Ordinarily it will be presumed, in the absence of circumstances showing a contrary intent, that the conveyance was intended as a gift,<sup>72</sup> settlement,<sup>73</sup> or advancement<sup>74</sup> to the wife, and not

68. Ala.—Cunningham v. Wakeland, 115 So. 877, 217 Ala. 374.

Mo.—Pursley v. Pursley, App., 215 S.W.2d 302, appeal transferred 213 S.W.2d 291.

Tex.—Lusk v. Farmer, Civ.App., 87 S.W.2d 790.

69. Ala.—O'Bannon v. O'Bannon, 58 So.2d 779, 257 Ala. 246.

Ill.—Nickeloff v. Nickeloff, 51 N.E.2d 565, 384 Ill. 377.

Mo.—Pursley v. Pursley, App., 215 S.W.2d 302.

S.C.—Caulk v. Caulk, 43 S.E.2d 600, 211 S.C. 57.

Tex.—Dakan v. Dakan, 83 S.W.2d 620, 125 Tex. 305.

Trust resulting from improvement of lands of another generally see supra § 111.

70. Ark.—Biddle v. Biddle, 177 S.W.2d 32, 206 Ark. 623.

Mo.—Hiatt v. Hiatt, 168 S.W.2d 1087.

**Statute providing for restoration of property to divorced parties** does not apply to gifts or advancements from husband to wife, and where husband purchases land in name of wife there is rebuttable presumption that he intended to make an advancement, and law does not imply a promise on wife's part to refund the money, or to divide the property purchased, or to hold it in trust for him.—Biddle v. Biddle, 177 S.W.2d 32, 206 Ark. 623.

71. Ala.—Darden v. Meadows, 68 So.2d 709, 259 Ala. 676.—Adams v. Griffin, 45 So.2d 22, 253 Ala. 371.—Roubicek v. Roubicek, 21 So.2d 244, 246 Ala. 442.—Marshall v. Marshall, 8 So.2d 843, 243 Ala. 169.

Fla.—Smith v. Smith, 196 So. 409, 143 Fla. 159.

Mass.—MacNeil v. MacNeil, 43 N.E.2d 667, 312 Mass. 183.

Mont.—Lewis v. Bowman, 121 P.2d 162, 113 Mont. 68.—Humbird v. Arnet, 44 P.2d 756, 99 Mont. 499.

N.J.—Bacon v. Bacon, 77 A.2d 802, 6 N.J. 117.

Ohio.—Lipps v. Lipps, App., 87 N.E.2d 823.

65 C.J. p. 404 notes 20, 21.

Purchase by husband in name of wife in fraud of creditors as creating resulting trust for benefit of creditors see Fraudulent Conveyances § 38 b. Transfer of property by husband to wife without consideration as not ordinarily raising a resulting trust see supra § 105.

72. Ala.—Darden v. Meadows, 68 So.2d 709, 259 Ala. 676.—Johnson v. Johnson, 67 So.2d 841, 259 Ala. 550.—Adams v. Griffin, 45 So.2d 22, 253 Ala. 371.—Roubicek v. Roubicek, 21 So.2d 244, 246 Ala. 442.—Marshall v. Marshall, 8 So.2d 843, 243 Ala. 169.

Ark.—Harrison v. Knott, 243 S.W.2d 612, 219 Ark. 665, 28 A.L.R.2d 405.

—James v. James, 221 S.W.2d 766, 215 Ark. 508.—Simpson v. Thayer, 217 S.W.2d 354, 214 Ark. 566.—Roller v. Holler, 216 S.W.2d 339, 214 Ark. 382.—Parks v. Parks, 182 S.W.2d 470, 207 Ark. 720.—Hull v. Hopkins, 133 S.W.2d 634, 198 Ark. 1049.

Colo.—Valley State Bank v. Dean, 47 P.2d 924, 97 Colo. 161.

D.C.—Kosters v. Hoover, 98 F.2d 595, 69 App.D.C. 66.

Ga.—Price v. Price, 54 S.E.2d 578, 205 Ga. 623.—Williams v. Thomas, 38 S.E.2d 603, 200 Ga. 767.—Statham v. Council, 9 S.E.2d 768, 190 Ga. 517.

Hawaii.—Ables v. Ables, 39 Hawaii 598.

Ill.—McCabe v. Hebnor, 102 N.E.2d 794, 410 Ill. 557.—Bowman v. Petersen, 102 N.E.2d 787, 410 Ill. 519.

—Peters v. Meyers, 96 N.E.2d 493, 408 Ill. 253.—Houdek v. Ehrenberger, 72 N.E.2d 837, 397 Ill. 62.—Nickeloff v. Nickeloff, 51 N.E.2d 565, 384 Ill. 377.—Baker v. Le Mire, 189 N.E. 904, 355 Ill. 626.

Me.—Greenberg v. Greenberg, 43 A.2d 841, 141 Me. 320.

Mass.—Thompson v. Thompson, 44 N.E.2d 651, 312 Mass. 245.

Mont.—**Courts Juris cited in** Lewis v. Bowman, 121 P.2d 162, 167, 113 Mont. 68.

N.J.—Gentile v. Gentile, 60 A.2d 315, 143 N.J. Eq. 383.

N.C.—Bass v. Bass, 48 S.E.2d 48, 229 N.C. 171.

Okla.—Fletcher v. Fletcher, 244 P.2d 827, 206 Okl. 481.

Pa.—Christy v. Christy, 46 A.2d 169, 353 Pa. 476.—Citizens Deposit & Trust Co. of Sharpsburg v. Citizens Deposit & Trust Co. of Sharpsburg, 7 A.2d 519, 136 Pa.Super. 413.

R.I.—Oldham v. Oldham, 192 A. 758, 58 R.I. 268.

Wash.—Scott v. Curie, 109 P.2d 526, 7 Wash.2d 301.

W.Va.—Carter v. Walker, 1 S.E.2d 483, 121 W.Va. 81.

Wis.—Hanus v. Jankowski, 40 N.W.2d 573, 256 Wis. 187.

65 C.J. p. 405 note 23.

General presumption of gift where husband purchases property with his own funds and causes conveyance to be made to wife see Husband and Wife § 153.

73. Conn.—Reynolds v. Reynolds, 183 A. 394, 121 Conn. 153.

D.C.—Kosters v. Hoover, 98 F.2d 595, 69 App.D.C. 66.

Mass.—Thompson v. Thompson, 44 N.E.2d 651, 312 Mass. 245.

N.J.—Bell v. Bell, 61 A.2d 735, 1 N.J. Super. 362.—Gentile v. Gentile, 60 A.2d 315, 142 N.J. Eq. 383.

65 C.J. p. 405 note 24.

74. Ala.—Johnson v. Johnson, 67 So.2d 841, 259 Ala. 550.

Ark.—Biddle v. Biddle, 177 S.W.2d 32, 206 Ark. 223.

Colo.—Valley State Bank v. Dean, 47 P.2d 924, 97 Colo. 151.

D.C.—Kosters v. Hoover, 98 F.2d 595, 69 App.D.C. 66.

Fla.—Medary v. Dalman, 69 So.2d 888.—Smith v. Smith, 196 So. 409, 143 Fla. 159.

Ill.—McCabe v. Hebnor, 102 N.E.2d 794, 410 Ill. 557.—Houdek v. Ehrenberger, 72 N.E.2d 837, 397 Ill. 62.

—Nickeloff v. Nickeloff, 51 N.E.2d 565, 384 Ill. 377.—Baker v. Le Mire, 189 N.E. 904, 355 Ill. 626.

Mass.—Thompson v. Thompson, 44 N.E.2d 651, 312 Mass. 245.

Okla.—Fletcher v. Fletcher, 244 P.2d 827, 206 Okl. 481.

as a resulting trust in favor of the husband,<sup>75</sup> and no resulting trust will arise.<sup>76</sup> The presumption in favor of a gift, settlement, or advancement, and against a resulting trust is one of fact, not law,<sup>77</sup> is not conclusive<sup>78</sup> and is rebuttable,<sup>79</sup> although it is not rebutted by the fact that the husband and wife resided on the premises when the purchase was made, and continued to do so until his death,<sup>80</sup> or

by the fact that the husband thereafter improved the property and paid the taxes.<sup>81</sup>

Where the presumption is rebutted, as where the circumstances existing at the time of the conveyance show an intention that the wife shall not take the beneficial interest, a resulting trust arises in favor of the husband,<sup>82</sup> particularly where there is

R.I.—Oldham v. Oldham, 192 A. 758, 58 R.I. 268.  
65 C.J. p 406 note 25.

75. Ala.—Johnson v. Johnson, 67 So. 2d 841, 259 Ala. 550.

Ark.—Hill v. Hopkins, 133 S.W.2d 634, 198 Ark. 1049.

Fla.—Frank v. Eeles, 13 So.2d 216, 152 Fla. 869.

Ill.—McCabe v. Hebner, 102 N.E.2d 794, 410 Ill. 557—Peters v. Meyers, 96 N.E.2d 493, 408 Ill. 253.

Ohio.—Lipps v. Lipps, App., 87 N.E. 2d 823.

Okl.—Owens v. Hill, 122 P.2d 801, 190 Okl. 242.

Pa.—Citizens Deposit & Trust Co. of Sharpsburg v. Citizens Deposit & Trust Co. of Sharpsburg, 7 A.2d 519, 136 Pa.Super. 413.

Vt.—Dunn v. Williams, 181 A. 131, 107 Vt. 447.

Wash.—Scott v. Currie, 109 P.2d 526, 7 Wash.2d 301.

W.Va.—Carter v. Walker, 1 S.E.2d 483, 121 W. Va. 81.

65 C.J. p 406 note 26.

#### Statutory presumption

The rule that, where the consideration is furnished by a husband but the title is taken in the name of his wife, a gift, and not a resulting trust, will be presumed is said to be an exception to the statutory presumption of resulting trust.—Roman v. Albert, 264 P. 115, 81 Mont. 393.

76. Ark.—Harrison v. Knott, 243 S.W.2d 642, 219 Ark. 565, 28 A.L.R.2d 405—James v. James, 221 S.W.2d 766, 215 Ark. 509—Simpson v. Thayer, 217 S.W.2d 354, 214 Ark. 566—Roller v. Roller, 216 S.W.2d 399, 214 Ark. 382—Parks v. Parks, 182 S.W.2d 470, 207 Ark. 720.

Colo.—Valley State Bank v. Dean, 47 P.2d 924, 97 Colo. 151.

Conn.—Reynolds v. Reynolds, 183 A. 394, 121 Conn. 153.

Fla.—Planagan v. Herrett, 178 So. 147, 130 Fla. 531.

Hawaii.—Ables v. Ables, 39 Hawaii 598.

Ill.—Peters v. Meyers, 96 N.E.2d 493, 408 Ill. 253—Baker v. Le Mire, 189 N.E. 904, 355 Ill. 626.

Mass.—MacNeil v. MacNeil, 43 N.E. 2d 667, 312 Mass. 183.

Mo.—Ferguson v. Stokes, 269 S.W.2d 655—Hiatt v. Hiatt, 168 S.W.2d 1087.

N.C.—Bass v. Bass, 48 S.E.2d 48, 229 N.C. 171.

Okl.—Fletcher v. Fletcher, 244 P.2d 827, 206 Okl. 481.

Pa.—Depew v. Depew, Com.Pl., 33 Erie Co. 47, 64 York Leg.Rec. 43.

R.I.—Tillinghast v. Harrop, 9 A.2d 28, 63 R.I. 394—Oldham v. Oldham, 192 A. 758, 58 R.I. 268.

Vt.—Dunn v. Williams, 181 A. 131, 107 Vt. 447.

65 C.J. p 407 note 27.

#### Gift of money used to purchase realty

Where fact that husband makes gifts of money to his wife, which money she later uses to buy realty, does not entitle husband to any right or interest in such realty, other than his contingent right of curtesy.—Williams v. Powers, 190 S.E. 149, 168 Va. 111.

#### Purchase with husband's earnings

Where husband transferred all his earnings to wife, who purchased realty therewith in her own name without husband's objecting, no resulting trust arose in husband's favor in absence of showing of fraud.—Norman v. Kernan, 276 N.W. 127, 226 Wis. 78.

77. Ala.—Johnson v. Johnson, 67 So. 2d 841, 259 Ala. 550.

Ark.—Parks v. Parks, 182 S.W.2d 470, 207 Ark. 720.

Hawaii.—Ables v. Ables, 39 Hawaii 598.

N.C.—Bass v. Bass, 48 S.E.2d 48, 229 N.C. 171.

Pa.—Christy v. Christy, 46 A.2d 169, 353 Pa. 476.

65 C.J. p 407 notes 28, 29.

78. Ga.—Statham v. Council, 9 S.E. 2d 768, 190 Ga. 517.

Ill.—McCabe v. Hebner, 102 N.E.2d 794, 410 Ill. 557—Houdek v. Ehrenberger, 72 N.E.2d 837, 397 Ill. 62.

Mass.—Epstein v. Epstein, 191 N.E. 418, 287 Mass. 248.

Mont.—Lewis v. Bowman, 121 P.2d 162, 113 Mont. 68.

R.I.—O'Brien v. O'Brien, 53 A.2d 501, 73 R.I. 1.

65 C.J. p 407 note 31.

79. Ala.—Johnson v. Johnson, 67 So. 2d 841, 259 Ala. 550.

Ariz.—Blaine v. Blaine, 159 P.2d 786, 63 Ariz. 100.

Ark.—Parks v. Parks, 182 S.W.2d 470, 207 Ark. 720—Biddle v. Biddle, 177 S.W.2d 32, 206 Ark. 223.

Colo.—Valley State Bank v. Dean, 47 P.2d 924, 97 Colo. 151.

D.C.—Kosters v. Hoover, 98 F.2d 595, 69 App.D.C. 66.

Fla.—Medary v. Dalman, 69 So.2d 888—Frank v. Eeles, 13 So.2d 216, 152 Fla. 869.

Ga.—Price v. Price, 54 S.E.2d 578, 205 Ga. 623—Williams v. Thomas, 38 S.E.2d 603, 200 Ga. 767—Statham v. Council, 9 S.E.2d 768, 190 Ga. 517.

Hawaii.—Ables v. Ables, 39 Hawaii 598.

Ill.—McCabe v. Hebner, 102 N.E.2d 794, 410 Ill. 557—Houdek v. Ehrenberger, 72 N.E.2d 837, 397 Ill. 62.

Mo.—Hiatt v. Hiatt, 168 S.W.2d 1087.

N.J.—Gentile v. Gentile, 60 A.2d 315, 142 N.J. 382.

N.C.—Bass v. Bass, 48 S.E.2d 48, 229 N.C. 171.

Vt.—Dunn v. Williams, 181 A. 131, 107 Vt. 447.

W.Va.—Carter v. Walker, 1 S.E.2d 483, 121 W. Va. 81.

65 C.J. p 407 note 32.

80. N.Y.—Scott v. Calladine, 29 N.Y. S. 630, 79 Hun 79, affirmed 41 N.E. 90, 145 N.Y. 639.

81. Ark.—Parks v. Parks, 182 S.W. 2d 470, 207 Ark. 720.

Ill.—Nickeloff v. Nickeloff, 51 N.E.2d 565, 384 Ill. 377.

N.J.—Rayher v. Rayher, 101 A.2d 524, 14 N.J. 174.

82. Colo.—Valley State Bank v. Dean, 47 P.2d 924, 97 Colo. 151.

Ga.—Toney v. Toney, 27 S.E.2d 296, 196 Ga. 666.

Ill.—Baker v. Le Mire, 189 N.E. 904, 355 Ill. 626.

Me.—Greenberg v. Greenberg, 43 A. 2d 841, 141 Me. 320.

Mass.—Thompson v. Thompson, 44 N.E. 52d 551, 312 Mass. 245—Epstein v. Epstein, 191 N.E. 418, 287 Mass. 248.

Mo.—Lewis v. Lewis, 189 S.W.2d 557, 354 Mo. 15.

N.H.—Foley v. Foley, 7 A.2d 396, 90 N.H. 281.

N.J.—Bacon v. Bacon, 77 A.2d 802, 6 N.J. 117.

Pa.—O'Bramski v. Yusalavage, Com. Pl., 35 Luz Leg.Rec. 105.

65 C.J. p 408 note 34.

#### Statutory presumption

Where the presumption of gift, settlement, or advancement is rebutted, the statutory presumption in favor of a resulting trust applies.—Roberge v. Roberge, 180 N.W. 15, 46 N.D. 402—65 C.J. p 409 note 66.

an agreement that the wife shall hold the property in trust for the husband.<sup>83</sup> A resulting trust will also arise in favor of the husband where the title is taken in the wife's name without the husband's knowledge or consent.<sup>84</sup> No resulting trust arises where it is the intention that the wife receive a beneficial interest on a condition or contingency.<sup>85</sup> Where the husband paid for the conveyance to the wife with the expectation that he would be reimbursed, no trust results in his favor.<sup>86</sup>

As a general rule, a purchase of property by a husband and a conveyance to husband and wife will not raise a resulting trust in favor of the husband,<sup>87</sup> the deed prima facie making a valid settlement on the wife to the extent of the interest conveyed to her thereby,<sup>88</sup> and the presumption being that a gift<sup>89</sup> or advancement<sup>90</sup> was intended; but the presumption is rebuttable<sup>91</sup> and a resulting trust will arise where it appears from the facts and circumstances that the husband did not intend that the wife should have any beneficial interest in the property.<sup>92</sup> If the husband intends that the deed shall be made to him, and without his knowledge it is made to him and his wife, his wife holds on a resulting trust for him.<sup>93</sup> Where the husband pays for a conveyance to himself and his wife intending that she shall have the property on his death, but shall not have any beneficial interest before then, there is no resulting trust in favor of the husband.<sup>94</sup>

A purchase by a husband with a conveyance to a trustee on an express trust in favor of the wife necessarily eliminates a resulting trust in favor of the husband.<sup>95</sup> Where two persons jointly purchase property and cause the deed to be made to the wife of one of them, the purchasers are tenants in common, and the wife is their common trustee.<sup>96</sup>

*Conveyance through intermediary.* Where a husband purchases real property in the name of a third person, the deed declaring the use to be for the grantee, and has such third person convey it to the purchaser's wife, no resulting trust will arise,<sup>97</sup> unless made with an understanding that it should be held in trust for him,<sup>98</sup> the transaction being a gift<sup>99</sup> or settlement.<sup>1</sup>

*Title in fiancée.* Where property is purchased from consideration belonging to one person, and title is taken in the name of the person's fiancée, a resulting trust arises.<sup>2</sup> If the person furnishing the consideration is unable to marry by reason of not having secured his divorce, his intended wife is not within the rule that a gift to her is presumed,<sup>3</sup> and a resulting trust will arise in favor of the actual purchaser.<sup>4</sup> So, if property is purchased by one person, and the deed is made in the name of a person he intends to marry but with whom he has no valid contract to marry at the time, and such deed is not delivered to the grantee, a resulting trust

83. U.S.—*Smithsonian Inst. v. Meech*, App.D.C., 18 S.Ct. 396, 169 U.S. 398, 42 L.Ed. 793.  
65 C.J. p. 408 note 35.

84. N.C.—*Flanner v. Butler*, 42 S.E. 547, 131 N.C. 155.  
65 C.J. p. 408 note 36.

85. W.Va.—*Carter v. Walker*, 1 S.E. 2d 483, 121 W.Va. 81.

**Wife to get benefit if she survived husband**

W.Va.—*Carter v. Walker*, *supra*.

**Limitation on beneficial interest**

Where husband, furnishing money to purchase realty, purposely causes conveyance thereof to his wife or to both husband and wife, with intent to convey estate to wife, but to limit such estate and scope and effect of deed, contrary to its terms, so that it shall not have full effect affixed thereto by law, no resulting trust for husband's benefit arises.—*Lehr v. Moll*, Mo., 247 S.W.2d 686.

86. Ariz.—*Armstrong v. Blalack*, 52 P.2d 1183, 46 Ariz. 507.  
Resulting trust in favor of one lending purchase money generally see *supra* § 124.

87. Cal.—*Trimble v. Coffman*, 251 P.2d 81, 114 Cal.App.2d 618.

Ill.—*Nickeloff v. Nickeloff*, 51 N.E. 2d 565, 384 Ill. 377.

Iowa—*Sinclair v. Allender*, 26 N.W. 2d 320, 238 Iowa 212.

Mo.—*Perguson v. Stokes*, 269 S.W.2d 655—*Lehr v. Moll*, 247 S.W.2d 686—*Sutorius v. Mayor*, 170 S.W.2d 387, 350 Mo. 1235, motion overruled 171 S.W.2d 69, 350 Mo. 1235—*Hatt v. Hatt*, 168 S.W.2d 1087—*Hernandez v. Prieto*, 162 S.W.2d 829, 349 Mo. 658.

R.I.—*Oldham v. Oldham*, 192 A. 758, 58 R.I. 268.

88. Va.—*Page v. Page*, 110 S.E. 370, 132 Va. 63.

89. Ill.—*Abraham v. Abraham*, 86 N.E.2d 224, 403 Ill. 312—*Nickeloff v. Nickeloff*, 51 N.E.2d 565, 384 Ill. 377—*Spina v. Spina*, 22 N.E.2d 687, 372 Ill. 50.

Iowa—*Sinclair v. Allender*, 26 N.W. 2d 320, 238 Iowa 212.

Mo.—*Lehr v. Moll*, 247 S.W.2d 686.

Okl.—*Mendenhall v. Walters*, 157 P. 732, 53 Okl. 598.

R.I.—*Oldham v. Oldham*, 192 A. 758, 58 R.I. 268.

90. Iowa—*Sinclair v. Allender*, 26 N.W.2d 320, 238 Iowa 212.

Okl.—*Mendenhall v. Walters*, 157 P. 732, 53 Okl. 598.

R.I.—*Oldham v. Oldham*, 192 A. 758, 58 R.I. 268.

91. Mo.—*Lehr v. Moll*, 247 S.W.2d 686.

92. Mo.—*Lehr v. Moll*, *supra*.

93. Mo.—*Turner v. Home Ins. Co.*, 189 S.W. 626, 195 Mo.App. 138.

94. Mo.—*Fulbright v. Phoenix Ins. Co. of Hartford, Conn.*, 44 S.W.2d 115, 329 Mo. 207.

65 C.J. p. 408 note 40.

95. Mo.—*Alexander v. Warrance*, 17 Mo. 228.

96. Or.—*Neppach v. Norval*, 240 P. 883, 242 P. 605, 116 Or. 593.

97. N.J.—*Down v. Down*, 82 A. 322, 80 N.J.Eq. 68.

65 C.J. p. 409 note 46.

98. N.Y.—*Bitter v. Jones*, 28 Hun 492.

99. Mo.—*Stevens v. Stevens*, 273 S.W. 1066, 309 Mo. 130.

1. Mo.—*Stevens v. Stevens*, *supra*.

2. Cal.—*Williams v. Williams*, 213 P. 508, 60 Cal.App. 676.

3. Mass.—*Lufkin v. Jakeman*, 74 N.E. 933, 188 Mass. 528.

4. Cal.—*Norman v. Burks*, 209 P.2d 815, 93 Cal.App.2d 687.  
Mass.—*Lufkin v. Jakeman*, 74 N.E. 933, 188 Mass. 528.

exists in favor of the person furnishing the consideration.<sup>5</sup>

**Void marriage.** Where the marriage is void because one of the parties is of mixed blood within the prohibited degrees, and the man furnishes the consideration for a conveyance to the woman, intending that the conveyance is to be a gift, no resulting trust arises.<sup>6</sup> Where a marriage is a nullity because the supposed husband was married at the time, and the supposed wife purchases property in her own name with money received from the supposed husband as gifts, she is entitled to the property.<sup>7</sup> Where the wife secures a divorce without the knowledge of the husband, property bought for her in the belief that she is his wife is held on a resulting trust for him.<sup>8</sup>

**Illegal or meretricious relationship.** Where a man and woman live together as husband and wife, but know that they are not married, and the man pays for property which is conveyed to the woman, it has been held that there is no presumption of a gift and that a trust in favor of the man will result,<sup>9</sup> but a trust will not result where it appears that he intended that the woman should have the beneficial interest in the property.<sup>10</sup> On the other hand, it has been held that under such facts a gift is to be presumed and a trust in favor of the man does not result,<sup>11</sup> although a trust will result where

it is shown that it was not intended that the woman receive the beneficial interest in the property.<sup>12</sup>

**Statutes modifying common-law rule as to purchase money trusts.** Under statutes providing that a resulting trust shall not arise from the mere fact that one pays the purchase price for a transfer to another, a trust does not result in favor of the husband where he pays for a conveyance to his wife<sup>13</sup> or in their joint names,<sup>14</sup> but the statutory exceptions thereto also apply,<sup>15</sup> and a trust in favor of the husband results where, by agreement, the wife was to hold the property in trust for her husband.<sup>16</sup>

#### b. Payment by Wife with Title in Husband or Jointly

While there is substantial authority holding that where a wife pays the purchase price for property conveyed to her husband, a gift will be presumed, the general rule is that where the wife's assets are used to pay the purchase price for a conveyance to her husband or jointly, a resulting trust will presumably arise in favor of the wife.

There is substantial authority holding that where a wife pays the purchase price for a conveyance of property to her husband, a gift will be presumed.<sup>17</sup> The presumption is rebuttable<sup>18</sup> as where the wife did not know that the conveyance was taken in the husband's name,<sup>19</sup> or it was agreed that the conveyance should be in the wife's name.<sup>20</sup> In the

5. Wash.—Anderson v. Hall, 157 P. 996, 91 Wash. 376.

6. Tenn.—Carter v. Montgomery, 2 Tenn Ch 216.

7. Cal.—Dahne v. Dahne, 193 P. 785, 49 Cal.App. 501.

III.—Metropolitan Trust & Savings Bank v. Perry, 102 N.E. 218, 259 Ill. 183.

8. Cal.—Feig v. Bank of America Nat. Trust & Savings Ass'n, 54 P. 2d 3, 5 Cal.2d 266.

9. Pa.—Orth v. Wood, 47 A.2d 140, 354 Pa. 121.

Tex.—Perales v. Flores, Civ.App., 147 S.W.2d 974, error refused.

10. Pa.—Orth v. Wood, 47 A.2d 140, 354 Pa. 121.

Tex.—Davis v. Pearce, Civ.App., 205 S.W.2d 653.

11. Wash.—Walberg v. Mattson, 232 P.2d 827, 38 Wash.2d 808—Cressman v. Boyle, 196 P.2d 836, 31 Wash.2d 346.

12. Wash.—Walberg v. Mattson, 232 P.2d 827, 38 Wash.2d 808.

#### Illegal purpose

Where man furnished consideration for realty title to which was taken in name of woman with whom he was living in illicit cohabitation and which was used by parties joint-

ly as home, there was not, in absence of evidence showing that conveyance was for purpose of inducing or prolonging illicit cohabitation, illegality militating against enforcement of resulting trust in favor of purchaser which arose on finding of intent inconsistent with gift to woman.—Walberg v. Mattson, supra.

13. Ky.—Mullins v. Robinson, 9 S. W.2d 988, 225 Ky. 648. 65 C.J. p 409 note 68.

**Transfer to fiancée** is not subject to resulting trust in favor of one paying consideration although parties do not marry.—Brandes v. Agnew, 88 N.Y.S.2d 553, 275 App.Div. 843.

14. N.Y.—Shapiro v. Shapiro, 203 N. Y.S. 373, 208 App.Div. 325. 65 C.J. p 410 note 69.

15. Minn.—Gummison v. Johnson, 183 N.W. 515, 149 Minn. 329. 65 C.J. p 410 note 71.

16. Ind.—Scott v. Dilley, 101 N.E. 313, 53 Ind.App. 100. 65 C.J. p 410 note 72.

17. Mass.—Hogan v. Hogan, 190 N. E. 715, 286 Mass 524.

Mont.—Emery v. Emery, 200 P.2d 251, 122 Mont. 201—Bingham v. National Bank of Montana, 72 P. 2d 90, 105 Mont. 159, 113 A.L.R.

815—Humbird v. Arnet, 44 P.2d 756, 99 Mont. 499.

Neb.—Peterson v. Massey, 53 N.W.2d 912, 155 Neb. 82—Brodskey v. Brodskey, 272 N.W. 919, 132 Neb. 659. 65 C.J. p 410 note 75.

Presumption that husband acquiring wife's property holds it in trust for her see supra § 105.

Presumption of gift where property is bought in husband's name with wife's assets generally see Husband and Wife § 158.

#### Rule adopted by statute

Statutes sometimes provide that as between husband and wife payment of purchase money by one, with conveyance to the other, will be presumed to be a gift, although a resulting trust in favor of the payer may be shown and the presumption rebutted.—Browning v. Barber, 113 S.E. 797, 154 Ga. 221—65 C.J. p 413 note 21.

18. Mo.—Theman v. Thiemann, 218 S.W.2d 580.

Mont.—Humbird v. Arnet, 44 P.2d 756, 99 Mont. 499. 65 C.J. p 410 note 76.

19. W.Va.—Whitten v. Whitten, 74 S.E. 237, 70 W.Va. 422, 39 L.R.A., N.S., 1026, Ann.Cas.1915D 647.

20. W.Va.—Whitten v. Whitten, supra.

absence of proof sufficient to rebut the presumption of a gift, no trust will result.<sup>21</sup>

On the other hand, the general rule is that where property is conveyed to a husband in consideration of money or assets furnished by, or belonging to, his wife there is no presumption of an advancement,<sup>22</sup> or gift<sup>23</sup> to the husband or the community,<sup>24</sup> and a resulting trust arises or is presumed in favor of the wife,<sup>25</sup> particularly where the conveyance to the husband is made without the wife's knowledge or consent,<sup>26</sup> or through fraud or mistake.<sup>27</sup> The presumption in favor of a resulting trust is rebuttable,<sup>28</sup> and no trust results where the wife intends

to confer the beneficial interest in the property on the husband,<sup>29</sup> as where she intended it to be a gift to her husband.<sup>30</sup> Statutes providing that a trust shall be presumed to result where one pays the purchase price for a conveyance to another have been held to apply,<sup>31</sup> and statutes sometimes expressly provide that if a married woman permits her husband to have the custody, control, and management of her separate property it will be presumed that he acts as her trustee under a resulting trust.<sup>32</sup>

No trust results in favor of the wife where the conveyance is taken in the husband's name for a

21. Neb.—Peterson v. Massey, 53 N. W.2d 912, 155 Neb. 82—Brodskey v. Brodsky, 272 N.W. 919, 132 Neb. 659.

65 C.J. p 410 note 78.

22. Ill.—Sweesy v. Hoy, 272 Ill.App. 346.

65 C.J. p 410 note 79.

23. Ala.—Marshall v. Marshall, 8 So.2d 843, 243 Ala. 169.

Ill.—Peters v. Meyers, 96 N.E.2d 493, 408 Ill. 253—Sweesy v. Hoy, 272 Ill.App. 346.

Pa.—Citizens Deposit & Trust Co. of Sharpsburg v. Citizens Deposit & Trust Co. of Sharpsburg, 7 A.2d 519, 136 Pa.Super 413—In re Schaeffer's Estate, Orph., 35 Del. Co. 262, 62 York Leg Rec. 113.

65 C.J. p 410 note 80.

24. Cal.—Reeve v. Jahn, 70 P.2d 610, 9 Cal.2d 244—Zeller v. Knapp, 26 P.2d 704, 135 Cal.App. 122.

25. Ala.—Wilson v. Wilson, 57 So. 2d 519, 257 Ala. 135—Thornton v. Rodgers, 38 So.2d 479, 251 Ala. 553—Marshall v. Marshall, 8 So.2d 843, 243 Ala. 169—Harris v. Harris, 162 So. 102, 230 Ala. 508—Mandelcorn v. Mandelcorn, 154 So. 909, 228 Ala. 590, 93 A.L.R. 322.

Ark.—Eckles v. Whitehead, 119 S.W. 2d 505, 196 Ark. 680.

Cal.—Socol v. King, 223 P.2d 627, 36 Cal.2d 342—Reeve v. Jahn, 70 P.2d 610, 9 Cal.2d 244—Jones v. Kelley, 262 P.2d 859, 121 Cal.App.2d 130—Zeller v. Knapp, 26 P.2d 704, 135 Cal.App. 122.

Del.—Greenly v. Greenly, 49 A.2d 126, 29 Del. 297.

Fla.—Pyle v. Pyle, 53 So.2d 312—Williams v. Williams, 2 So.2d 725, 147 Fla. 419.

Ill.—Mersch v. Mersch, 117 N.E. 2d 868, 1 Ill.App.2d 429—Sweesy v. Hoy, 272 Ill.App. 346.

Ind.—Quigley v. Ackerman, 110 N.E. 2d 753, 123 Ind.App. 660.

Miss.—Ryals v. Douglas, 39 So.2d 311, 205 Miss. 695—Ford v. American Home Fire Ins. Co., 5 So.2d 416, 192 Miss. 277.

Neb.—Creason v. Wolla, 62 N.W.2d 327, 158 Neb. 78.

N.C.—Bullman v. Edney, 61 S.E.2d 338, 232 N.C. 465—Dail v. Heath, 174 S.E. 318, 206 N.C. 453.

N.D.—Redman v. Blewer, 48 N.W.2d 372, 78 N.D. 120.

Ohio—Lewis v. Akerberg, Com.Pl., 118 N.E.2d 166.

Okl.—Bailey v. Brown, 25 P.2d 1088, 166 Okl. 5.

Or.—Burnett v. Hatch, 266 P.2d 414, 200 Or. 291—Rhodes v. Peery, 19 P.2d 418, 142 Or. 165.

Pa.—Citizens Deposit & Trust Co. of Sharpsburg v. Citizens Deposit & Trust Co. of Sharpsburg, 7 A.2d 519, 136 Pa.Super 413—Richard v. Richard, Com.Pl., 40 Del.Co. 146.

Tenn.—City Nat. Bank v. Harle, 7 Tenn.App. 286—Walker v. Walker, 2 Tenn.App. 279.

65 C.J. p 410 notes 81, 83, p 411 notes 85, 87, 90, 91—30 C.J. p 815 note 21, p 837 note 91.

Estoppel to claim property as against husband's creditors or purchasers see Husband and Wife § 267.

Property purchased with wife's money generally see Husband and Wife § 251.

**Rule applies to both real and personal property**

Ala.—Mandelcorn v. Mandelcorn, 154 So. 909, 228 Ala. 590, 93 A.L.R. 322.

**Title in straw man**

Where notes were purchased by husband with wife's funds in name of husband's secretary, who indorsed them in blank and placed them in safe in husband's office, equitable title to notes vested in wife as soon as notes were issued and their legal title was complete on blank indorsement of them by secretary and constructive delivery.—Miller v. Hospelhorn, 4 A.2d 728, 176 Md. 356.

**The Married Women's Act destroyed husband's marital right to reduce to possession wife's personality, so that husband's consent that wife's money should be invested in land for her benefit is no longer an important element in establishment of resulting**

trust in favor of wife.—Justice v. Henley, 181 S.W.2d 632, 27 Tenn.App. 405.

26. Mo.—Silling v. Hendrickson, 92 S.W. 105, 193 Mo. 365.

Pa.—Richard v. Richard, Com.Pl., 40 Del.Co. 146—In re Schaeffer's Estate, Orph., 35 Del.Co. 143.

65 C.J. p 411 notes 84, 86, 88, 92—30 C.J. p 815 note 22.

**Written consent**

Under some statutes the written assent of the wife is necessary to overcome the presumption of a trust—Fogle v. Pindell, 154 S.W. 81, 248 Mo. 65.

27. Iowa.—Sheffield Milling Co. v. Hietzman, 192 Iowa 1258, 184 N.W. 631.

30 C.J. p 815 note 23.

28. Ala.—Marshall v. Marshall, 8 So. 2d 843, 243 Ala. 169.

Colo.—Fagan v. Troutman, 138 P. 442, 25 Colo.App. 251.

Miss.—Ford v. American Home Fire Ins. Co., 5 So.2d 416, 192 Miss. 277.

29. Ill.—Brod v. Brod, 61 N.E.2d 675, 390 Ill. 312.

Pa.—Majors v. Majors, 37 A.2d 528, 349 Pa. 334.

65 C.J. p 412 note 98—30 C.J. p 816 notes 28, 29.

**Fact that wife directed that deed be in husband's name may under the particular facts and circumstances show that she intended him to have the beneficial interest, and prevent a resulting trust.**—Henderson v. Banfield, Tenn.C., 42 S.W. 470—65 C.J. p 412 note 1.

30. Ga.—Corpus Juris cited in McClure v. Newell, 14 S.E.2d 721, 723, 192 Ga. 188.

S.C.—Legendre v. South Carolina Tax Commission, 56 S.E.2d 336, 215 S.C. 514.

65 C.J. p 412 notes 98, 99.

31. S.D.—Hofeltzer v. Prange, 186 N.W. 963, 964, 45 S.D. 228.

65 C.J. p 413 note 23.

32. Ark.—Gilbert v. Gilbert, 22 S.W. 2d 32, 180 Ark. 596.

65 C.J. p 413 note 24.



fraudulent purpose.<sup>33</sup> Where the wife furnished no part of the consideration, she can obtain no trust therein.<sup>34</sup> Since a wife who lends money to her husband becomes a mere creditor of the husband, the fact that he invests the money in real estate, taking title in his own name, raises no trust in favor of the wife.<sup>35</sup> Likewise, a resulting trust will not arise in favor of the wife in property purchased in the name of her husband with her money or assets, where under the law at the time, such assets belong to her husband,<sup>36</sup> unless the circumstances show an intention on his part to hold in trust for her or her heirs.<sup>37</sup>

Payment of the purchase money, with the wife's funds or property with conveyance to both husband and wife, ordinarily results in a resulting trust in her favor,<sup>38</sup> particularly where the conveyance to the husband and wife is made without the wife's knowledge or consent.<sup>39</sup> So, where property is purchased with the separate means of the wife and the deed is taken in the name of the wife without recital of the separate source of the consideration,

the title is in the community but a resulting trust in favor of the wife is created.<sup>40</sup> If, contrary to her intention, the husband causes the title to be made to himself and wife without her consent, a resulting trust in her favor arises,<sup>41</sup> and a trust results in favor of the wife where the husband is included as grantee by mistake and contrary to the wife's instructions.<sup>42</sup> If the wife intentionally causes the property purchased with her funds to be taken in the name of herself and her husband as tenants by entireties, no resulting trust in her favor arises.<sup>43</sup>

*Statutory modification of common-law rule.* Under statutes modifying the common-law rule and providing that no trust shall result from the mere payment of the purchase price for a transfer of property to another, as discussed supra § 116, a trust does not ordinarily result in favor of the wife where she pays the purchase price for a conveyance of property to her husband or to herself and her husband;<sup>44</sup> but a trust will result where the husband takes title without the wife's knowledge or consent,<sup>45</sup> or where the purchase is in violation of

33. Miss.—*Smider v. Udell* Woodmenware Co., 20 So 836, 74 Miss 353. Resulting trust where title taken in another's name for an illegal purpose generally see supra § 123.

34. Ark.—*Harmon v. Thompson*, 263 S.W.2d 903.

Vt.—*Farmers' Nat. Bank v. Thompson*, 52 A. 961, 74 Vt. 442.

**Proceeds of land used to pay purchase price**

Where mortgage foreclosure purchaser's grantee conveyed to a husband, who was his incompetent wife's committee, land which was owned by the wife prior to foreclosure, a trust was not imposed on the land in favor of the wife, because of the fact that the contract of sale to the husband provided that the husband was to pump oil on the land and apply the oil runs on purchase price, on ground that thereby the husband paid for the land with the wife's property which was the land itself.—*Bendean v. Moody*, 5 N.Y.S.2d 94, 254 App Div. 130.

35. Ga.—*Corpus Juris* cited in *McCure v. Newell*, 14 S.E.2d 721, 723, 192 Ga 188.

Iowa.—*Andrew v. Martin*, 254 N.W. 67, 218 Iowa 19.

Pa.—*Kegerreis v. Lutz*, 41 A. 26, 187 Pa. 252.—*In re Shenk's Estate*, Orph., 9 Som Leg J. 381.

65 C.J. p 412 note 5, p 413 note 21 [a].

Resulting trust in favor of one paying purchase price as loan generally see supra § 124.

36. Ill.—*Hogue v. Steel*, 69 N.E. 931, 207 Ill. 340.

65 C.J. p 412 note 9—30 C.J. p 816 note 31.

Husband's interest and rights in wife's property at common law see *Husband and Wife* § 21 et seq

37. Ark.—*Jones v. Jones*, 97 S.W. 451, 80 Ark. 379.

65 C.J. p 412 note 10.

38. U.S.—*Schwarz v. U. S.*, C.A.Md., 191 F.2d 618.

Mo.—*Deer v. Deer's Est.*, App., 180 S.W. 572.

N.J.—*Rayher v. Rayher*, 101 A.2d 524, 14 N.J. 174.

65 C.J. p 412 note 94.

39. Ill.—*Mauriceau v. Haugen*, 56 N.E.2d 367, 387 Ill. 186.

Tenn.—*Justice v. Henley*, 181 S.W. 2d 632, 27 Tenn App 405.

65 C.J. p 412 note 95.

**Written consent**

Under statute, if husband without the written assent of his wife, uses wife's separate and personal funds to purchase real estate deeded to husband and wife as tenants by entirety, a trust results in her favor.—*Thimman v. Thimman*, Mo., 218 S.W. 2d 580.—*Milligan v. Bing*, 108 S.W.2d 108, 341 Mo. 648.

40. Tex.—*Penman v. Blount*, Civ. App., 264 S.W. 169.

41. Mo.—*Sanders v. Sanders*, 211 S.W.2d 468, 357 Mo. 881.—*Cross v. Huffman*, 217 S.W. 520, 280 Mo. 640.

42. Cal.—*Abbott v. Miller*, 220 P.2d 570, 98 Cal.App.2d 595.

43. Del.—*Greenly v. Greenly*, 49 A.2d 126, 29 Del.Ch. 297.

Ill.—*Spina v. Spina*, 22 N.E.2d 687, 372 Ill. 50.

Mo.—*Ferguson v. Stokes*, 269 S.W.2d 655.—*Cisel v. Cisel*, 180 S.W.2d 748, 352 Mo 1097.—*Milligan v. Ring*, 108 S.W.2d 108, 341 Mo 648.

Pa.—*Rehm v. Rehm*, 32 Pa Dist. & Co 193.

65 C.J. p 412 note 97.

**Written consent**

Statute providing that, where husband uses wife's assets without her written consent to purchase property in his own or joint names, a trust results has no application where the wife makes the purchase.—*Regal Realty & Investment Co. v. Gallagher*, Mo., 188 S.W. 151.

65 C.J. p 414 note 29.

44. Ky.—*Sewell v. Sewell*, 260 S.W. 2d 643.—*Mullins v. Mullins*, 247 S.W.2d 527.—*Kitchen v. Fischer*, 170 S.W.2d 592, 293 Ky. 787.—*Hall v. Walton*, 165 S.W.2d 806, 291 Ky. 779.—*Trimble v. Kentucky River Coal Corporation*, 31 S.W.2d 367, 235 Ky. 301.

65 C.J. p 413 note 26.

45. Ky.—*Roberts v. Farley*, 161 S.W.2d 930, 290 Ky. 516.

65 C.J. p 413 note 27.

**Mistake**

A husband to whom a bill of sale was erroneously made for automobile for which wife paid entire purchase price, and in whose name automobile was licensed, all without wife's knowledge, was trustee of automobile for wife's benefit.—*Roberts v. Farley*, 161 S.W.2d 930, 290 Ky. 516.

some trust.<sup>46</sup>

*Illegal or meretricious relation.* Where a couple live together as man and wife without being lawfully married, and property purchased with the woman's money is in the man's name, they are strangers within the meaning of the rule that property paid for with the money or assets of one person, title thereto being taken in the name of a stranger or person for whom he is under no legal or moral obligation to provide, is held by resulting trust in favor of the person furnishing the consideration,<sup>47</sup> so that a trust results in favor of the woman.<sup>48</sup> If the man purchases the property by giving his note for the price, and later persuades the woman to pay the note, she thereby obtains no resulting trust.<sup>49</sup> Where a man and woman lived together illicitly, it has been held that a resulting trust in the property acquired by the man does not arise in favor of the woman.<sup>50</sup>

#### § 128. — Payment with Funds of Both Husband and Wife

Where both husband and wife contribute to the purchase price, and title is taken in the name of one or both, a trust may result so that each takes a beneficial interest in proportion to his or her contribution to the purchase price.

Where a portion of the consideration belongs to the husband and title is taken in the name of the

wife, it will be presumed that the amount paid by the husband was by way of advancement<sup>51</sup> or gift<sup>52</sup> to the wife, and not as a resulting trust in favor of the husband,<sup>53</sup> and such trust does not arise.<sup>54</sup> Such presumption of advancement<sup>55</sup> or gift<sup>56</sup> may be rebutted in which case a trust will result in favor of the husband in accordance with the proportion of the purchase price he paid.<sup>57</sup> Where the proceeds of joint property are used to purchase property in the wife's name alone without the husband's knowledge or consent, a resulting trust arises in his favor as to a half interest in the property.<sup>58</sup> If the wife by law is constituted trustee for the husband, it is immaterial whether or not she purchased as trustee for the husband.<sup>59</sup> Where the consideration came from husband and wife jointly and the parties intended that the wife should take title for their joint use, no trust has been held to result.<sup>60</sup> Where the consideration is furnished by husband and wife, and the title is conveyed to a third person, a resulting trust arises to the husband and wife in proportion to the amounts contributed by them.<sup>61</sup>

In order to create a resulting trust in favor of a wife, it is not indispensable that the whole of the consideration should have been furnished by her,<sup>62</sup> and where any portion of the consideration belongs to the wife, and title is taken in the husband's name alone, there is no presumption of an advancement<sup>63</sup> and a resulting trust arises in her favor<sup>64</sup> to the

46. Kan.—Harrington v. Harrington, 241 P.2d 513, 172 Kan. 549.

65 C.J. p 413 note 28.

47. Ill.—McDonald v. Carr, 37 N.E. 225, 150 Ill. 204.

Ky.—Ewing v. Ribb, 7 Bush 654.

48. U.S.—Schwarz v. U. S., C.A.Md., 191 F.2d 618.

65 C.J. p 412 note 15.

49. Wife ignorant of invalidity of marriage.

Where marriage took place while man had a wife living and woman was fraudulently led to believe that man was her husband, and she conveyed land purchased with her own money to herself and the man as tenants by the entirety, purpose of conveyance failed because there was no valid marital status to which it could attach, and a court of equity could impress the property with a resulting trust in favor of the woman—Schwarz v. U. S., supra.

50. Tex.—Allen v. Allen, 107 S.W. 523, 101 Tex. 362.

51. Cal.—McAllen v. Souza, 74 P.2d 853, 24 Cal.App.2d 247.

52. Iowa.—Wright v. Wright, 179 N.W. 100, 189 Iowa 921.

65 C.J. p 415 note 44.

Trust resulting from payment of

part of purchase price generally see supra § 122.

53. Ill.—Baker v. Le Mire, 189 N.E. 904, 355 Ill. 626.

65 C.J. p 415 note 45.

54. Ill.—Baker v. Le Mire, supra.

65 C.J. p 415 note 46.

55. Ill.—Baker v. Le Mire, supra.

65 C.J. p 415 note 47.

Payment of owelty

Where a married woman is entitled to land by reason of a voluntary partition, but the deed is made to herself and her husband and her heirs, payment of owelty by the husband does not entitle him to a resulting trust to that extent—Sprinkle v. Spahnour, 62 SE 910, 149 N.C. 223, 25 L.R.A., N.S., 167—65 C.J. p 415 note 57.

56. Ala.—Harden v. Darwin, 66 Ala. 55.

65 C.J. p 415 note 48.

57. Conn.—Fox v. Shanley, 109 A. 249, 94 Conn. 350.

65 C.J. p 415 note 49.

58. R.I.—Comella v. Comella, 27 A. 2d 348, 68 R.I. 275.

59. Ala.—Johnson v. Johnson, 67 So. 2d 841, 259 Ala. 550.

60. Tex.—Bargna v. Bargna, Civ. App., 127 S.W. 1156.

60. Mass.—Pollock v. Pollock, 111 N.D. 963, 223 Mass. 382.

61. N.H.—Hall v. Young, 37 N.H. 134.

65 C.J. p 415 note 58.

62. Ala.—Hanne v. Legg, 30 So. 34, 129 Ala. 619, 87 Am.S.R. 81.

Fla.—Corpus Juris quoted in Foster v. Thornton, 179 So. 882, 887, 131 Fla. 277.

63. Fla.—Corpus Juris quoted in Foster v. Thornton, 179 So. 882, 887, 131 Fla. 277.

Iowa.—Johnson v. Foust, 139 N.W. 451, 158 Iowa 195.

64. Ark.—Barner v. Handy, 183 S.W.2d 49, 207 Ark. 833—Eckles v. Whitehead, 119 S.W.2d 550, 196 Ark. 680.

Fla.—Corpus Juris quoted in Foster v. Thornton, 179 So. 882, 887, 131 Fla. 277.

Miss.—Stone v. Sample, 62 So.2d 307, 216 Miss. 287, suggestion of error overruled 63 So.2d 555, 216 Miss. 287.

Ohio.—Lewis v. Akerberg, Com.Pl., 118 N.E.2d 166.

Okl.—First Nat. Bank v. Sanders, 35 P.2d 889, 169 Okl. 192.

Pa.—Soliwoda v. Soliwoda, Com.Pl., 45 Berks Co. 185.

extent that consideration furnished by her is used,<sup>65</sup> particularly where it was so agreed at the time of the purchase,<sup>66</sup> or where title is taken by the husband without her consent.<sup>67</sup> It has been held that where a husband uses his own funds and some belonging to his wife for the purchase of property and takes the deed in their joint names a resulting trust pro tanto will be declared in favor of the wife<sup>68</sup> and those claiming under her,<sup>69</sup> but not in favor of the husband.<sup>70</sup>

On the other hand, no trust has been held to result where joint funds are used to purchase property in joint tenancy.<sup>71</sup> Where the property is purchased with the joint funds of husband and wife and they direct that the title be made so that the survivor will obtain all the property, if title is made to them as tenants by entirety, no resulting trust in favor of the wife or her heirs can arise.<sup>72</sup>

In order that a trust may result in favor of the wife, it must be shown what part of the purchase money was paid by her.<sup>73</sup> In the absence of proof that part of the consideration belonged to the wife, payment by the husband, with title to himself, raises a presumption that the payment was for himself,<sup>74</sup> which presumption is rebuttable.<sup>75</sup> Where

the wife made the down payment and the husband gave his own notes for deferred payments, and took title in his name, it has been held that a trust pro tanto results in favor of the wife.<sup>76</sup>

Where the husband contracts to purchase property by installment payments but dies before completion of payment, and the wife's separate estate furnishes all the consideration paid up to the time of default, and a son then arranges to take title by paying the balance due under the contract, a resulting trust arises in favor of the wife.<sup>77</sup> If the husband, without objection, uses his wife's money jointly with his own in his business ventures, no trust in favor of his wife arises in realty purchased with the proceeds of the business.<sup>78</sup> A wife, who lends her husband money to make part payments on a purchase of land, has no claim to a resulting trust,<sup>79</sup> nor does a resulting trust arise in favor of the wife in property purchased by the husband on his own credit, although part of the purchase money is subsequently paid with money borrowed from, or belonging to, her.<sup>80</sup>

There is authority to the effect that as in other cases of part payment, as discussed supra § 123, a trust will not result in favor of a spouse making a

**Tex.**—*Solether v. Trinity Fire Ins. Co.*, 78 S.W.2d 180, 124 Tex. 362, 65 C.J. p 414 note 36, p 416 notes 64, 68.

**65. Ala.**—*Wilson v. Wilson*, 57 So.2d 519, 257 Ala. 135—*Thornton v. Rodgers*, 38 So.2d 479, 251 Ala. 553.

**Ark.**—*Eckles v. Whitehead*, 119 S.W.2d 550, 196 Ark. 680.

**Fla.**—*Corpus Juris* quoted in *Foster v. Thornton*, 179 So. 882, 887, 131 Fla. 277.

**Ga.**—*Humphill v. Hemphill*, 168 S.E. 878, 176 Ga. 585.

**MISS.**—*Stone v. Sample*, 62 So.2d 307, 216 Miss. 287, suggestion of error overruled 63 So.2d 555, 216 Miss. 287.

**Tex.**—*Karr v. Cockerham, Civ. App.*, 71 S.W.2d 905, error dismissed, 65 C.J. p 414 note 38, p 416 note 66.

#### Return of money

Where a wife's money is put in a farm, title of which is taken in the husband's name, and a resulting trust is established, the wife is not entitled to recover back the money placed in the farm but is entitled to the proportionate part of the present value of the farm, in the proportion which the amount invested bears to the entire amount paid.—*Walker v. Walker*, 2 Tenn.App. 279.

**66. Ark.**—*Harbour v. Harbour*, 181 S.W.2d 805, 207 Ark. 551.  
**Pa.**—*Soliwoda v. Soliwoda*, Com.Pl., 45 Berks Co. 185.

**67. Ala.**—*Haney v. Legg*, 30 So. 34, 129 Ala. 619, 87 Am.S.R. 81, 30 C.J. p 815 note 24.

**68. Mo.**—*Deer v. Deer's Estate*, App., 180 S.W. 572, 65 C.J. p 415 note 54—30 C.J. p 816 note 25.

**69. Mo.**—*Moss v. Ardley*, 169 S.W. 6, 260 Mo. 595—*Jones v. Elkins*, 45 S.W. 261, 143 Mo. 647.

**70. Mo.**—*Wilhite v. Wilhite*, 224 S.W. 448, 284 Mo. 387.

#### Husband entitled to beneficial interest

Where community funds of husband and wife had gone into the improvement of land owned by the wife individually, and husband was made a grantee with wife in deed by which wife's land was exchanged for the land in controversy in partition suit, and the record was silent as to the amount expended for improvements, and the value of the land, the husband took an undivided one-half interest in land in controversy by such deed as against contention that husband took only in trust for the wife.—*Mariett v. Brownfield*, Tex. Civ.App., 145 S.W.2d 636.

**71. Cal.**—*Socol v. King*, 223 P.2d 627, 36 Cal.2d 342.

#### Contribution from separate estate

In suit by husband to establish interest in farm conveyed to wife, where finding was made, based on evidence, that spouses agreed that

title should be held as joint property of spouses, consideration for conveyance being jointly furnished, fact that wife's contribution to consideration came from her separate estate did not entitle wife to accounting from husband.—*Dunn v. Williams*, 181 A. 131, 107 Vt. 447.

**72. Mo.**—*Hecker v. Vanhook*, 246 S.W. 337, 65 C.J. p 415 note 43.

**73. Iowa.**—*In re Mahin's Estate*, 148 N.W. 420, 161 Iowa 459, 65 C.J. p 415 note 40.

**74. Pa.**—*Appeal of Kline*, 39 Pa. 463.

**75. Pa.**—*Appeal of Kline*, supra.

**76. Fla.**—*Corpus Juris* quoted in *Foster v. Thornton*, 179 So. 882, 887, 131 Fla. 277, 65 C.J. p 415 note 39.

**77. N.J.**—*Levi v. Levi*, 161 A. 835, 111 N.J.Eq. 127.

**78. Or.**—*Evans v. Trude*, 240 P.2d 940, 193 Or. 648—*American Surety Co. v. Hattrem*, 3 P.2d 1109, 138 Or. 358.

**79. U.S.**—*In re Teter*, D.C.W.Va., 173 F. 798, affirmed 179 F. 655, 103 C.C.A. 213, 65 C.J. p 414 note 36 [d].

Resulting trust in favor of one lending purchase price generally see supra § 124.

**80. Cal.**—*Woodside v. Hewel*, 42 P. 152, 109 Cal. 451.

mere general contribution toward the purchase price,<sup>81</sup> and that in order to be entitled to a partial resulting trust, the spouse must have paid an aliquot part of the purchase money for a definite or specific interest in the property.<sup>82</sup> Where husband and wife contribute the consideration for the purchase of property, there is no presumption that they contributed equally.<sup>83</sup>

Where the couple are not validly married, a resulting trust may be imposed with respect to property acquired through their joint efforts so as to give each a beneficial interest in accordance with his or her contribution.<sup>84</sup> If the purchase is made in the woman's name with the joint funds of a supposed husband and wife, the man intending to retain his interest, a pro tanto resulting trust will arise in favor of the man.<sup>85</sup> Similarly, if the purchase is made in the man's name with joint funds, a trust will also arise in favor of the woman to the extent that her property was used to make the purchase.<sup>86</sup>

The statutory exceptions to the statutory prohibition of resulting trusts apply, as where a spouse

has taken the deed, as an absolute conveyance, in his own name without the knowledge or consent of the other spouse who paid part of the purchase money.<sup>87</sup>

## § 129. — Parent and Child

- a. Conveyance to parent of person paying consideration
- b. Conveyance to child of person paying consideration

### a. Conveyance to Parent of Person Paying Consideration

Ordinarily, a trust results in favor of a child who pays the consideration for a conveyance of property to his parent.

Where the purchase price of property is furnished by, or belongs to, the son or daughter of the purchaser, and the purchaser takes title to the property in his own name, there is no presumption of gift<sup>88</sup> and ordinarily a trust results in favor of the son or daughter,<sup>89</sup> in the absence of circumstances showing an intention to the contrary,<sup>90</sup> as where a gift<sup>91</sup>

81. Mass.—*Druker v. Druker*, 31 N. E.2d 524, 308 Mass. 229.—*Moat v. Moat*, 17 N.E.2d 710, 301 Mass. 469.

82. Mass.—*Druker v. Druker*, 31 N. E.2d 524, 308 Mass. 229.—*Moat v. Moat*, 17 N.E.2d 710, 301 Mass. 469.—*Karas v. Karas*, 193 N.E. 18, 288 Mass. 460.

#### Payment from common fund

Fact that realty standing in name of wife was purchased with earnings of business in which husband and wife were commonly engaged, did not create a resulting trust in favor of husband for a one-half interest in the realty.—*Brun v. Brun*, 88 N.E.2d 551, 324 Mass. 756.

83. Mass.—*Druker v. Druker*, 167 N. E. 638, 268 Mass. 334, 65 C.J. p 414 note 33.

84. Cal.—*Santos v. Santos*, 89 P.2d 164, 32 Cal.App.2d 52.

85. R.I.—*Cetenich v. Fuvich*, 102 A. 817, 41 R.I. 107.

86. Tex.—*Perales v. Flores*, Civ.App., 147 S.W.2d 974, error refused.

#### Transfer to woman alone without man's knowledge

Where parties living together as man and wife purchased property jointly, each paying one-half of purchase price, and trustees, to whom property had been conveyed as security for payment of purchase-money note, reconveyed property by deed designating defendant as grantee and reciting that estate was conveyed to defendant as her separate property, and such recital was inserted without plaintiff's knowledge, and defendant subsequently refused to convey to

plaintiff one-half of the property, a resulting trust, rather than a constructive trust, existed in plaintiff's favor.—*Padilla v. Padilla*, 100 P.2d 1093, 38 Cal.App.2d 319.

86. Miss.—*Shrader v. Shrader*, 81 So. 227, 119 Miss. 526.

87. U.S.—*Commissioner of Internal Revenue v. Molter*, C.C.A., 60 F.2d 498.

65 C.J. p 416 note 68.

Statutes abolishing common-law purchase money resulting trusts and exceptions thereto see *supra* § 116.

88. Cal.—*Corpus Juris* cited in *Willard H. George, Limited, v. Barnett*, 150 P.2d 591, 592, 65 Cal.App.2d Supp. 828.

Mo.—*Padgett v. Osborne*, 221 S.W.2d 210, 359 Mo. 209.—*Corpus Juris* cited in *Adams v. Adams*, 156 S.W.2d 610, 614, 348 Mo. 1041.

Ohio.—*Roberts v. Remy*, 46 N.E. 1066, 56 Ohio St. 249.

Pa.—*Ehnes v. Yowell*, 97 A.2d 56, 374 Pa. 17.

Gifts between parent and child generally see *Parent and Child* § 60.

89. U.S.—*Montgomery v. Thomas*, C. C.A.Tex., 146 F.2d 76.

Ark.—*Clark v. Clark*, 86 S.W.2d 937, 191 Ark. 461.

Cal.—*Willard H. George, Limited, v. Barnett*, 150 P.2d 591, 65 Cal.App.2d Supp. 828.

Mo.—*Padgett v. Osborne*, 221 S.W.2d 210, 359 Mo. 209.—*Adams v. Adams*, 156 S.W.2d 610, 348 Mo. 1041.

N.C.—*Jackson v. Thompson*, 200 S.E. 16, 214 N.C. 539.

N.D.—*Hyland v. Tousley*, 275 N.W. 340, 67 N.D. 612.

Ohio.—*Lewis v. Akerberg*, Com.Pl., 118 N.E.2d 166.

Pa.—*Ehnes v. Yowell*, 97 A.2d 56, 374 Pa. 17.—*Citizens Deposit & Trust Co. of Sharpsburg v. Citizens Deposit & Trust Co. of Sharpsburg*, 7 A.2d 519, 136 Pa.Super. 413, 65 C.J. p 416 notes 72, 74, 82.

#### Conveyance to parent and child

Where daughter paid all of purchase price of realty and deed was made in name of daughter and mother because of infancy of daughter, a trust by operation of law resulted in favor of daughter.—*Barger v. Baker*, 237 S.W.2d 37, 218 Ark. 457.

#### Mortgage payments by parent held to inure to child

Ark.—*Vilkinson v. Masoner*, 139 S. W.2d 23, 200 Ark. 337.

90. Ark.—*Clark v. Clark*, 86 S.W.2d 937, 191 Ark. 461.

Me.—*Merrill v. Hussey*, 64 A. 819, 101 Me. 439.

Mo.—*Padgett v. Osborne*, 221 S.W.2d 210, 359 Mo. 209.

#### Earnings of minor

(1) Where the earnings of a minor become the property of a parent, the use of the earnings to acquire property in the parent's name does not raise a resulting trust in favor of the child.—*Macchi v. La Rocca*, 201 P. 143, 54 Cal.App. 98—65 C.J. p 421 note 21.

(2) Right of parent to earnings of child see *Parent and Child* § 28 et seq.

91. Cal.—*Willard H. George, Lim-*

or loan<sup>92</sup> to the parent is intended. Where a child pays the purchase money for a transfer to his parent, he is treated the same as if he were a stranger,<sup>93</sup> at least where no legal obligation rests on the child to support the parent,<sup>94</sup> and the presumption of a resulting trust is not rebutted by the counter presumption of an advancement from the relationship.<sup>95</sup> Where a person in loco parentis purchases property with consideration furnished by the children, a resulting trust arises pro tanto.<sup>96</sup>

*Payment with funds of both parent and child.* Where the payment out of the child's funds is only a part of the whole consideration, and title is taken in the name of the parent, a resulting trust pro tanto arises in his favor,<sup>97</sup> provided, it has been held, that it is of some definite or aliquot part of the whole consideration,<sup>98</sup> except where the parties intended that the purchase be solely for the benefit of the parent.<sup>99</sup>

*Statutory modification of common-law rule.* Under the statutes, discussed generally supra § 116, which modify the common-law rule and provide that a trust shall not result from the mere fact that one pays the purchase money for a conveyance of property to another, a trust does not ordinarily result in favor of a child who pays the consideration for a transfer of property to his parent.<sup>1</sup> The ex-

ceptions to the statutory prohibition apply where a conveyance is made to the parent of the person furnishing the consideration, so that a trust results where the parent has taken the deed, as an absolute conveyance, in his own name without the knowledge or consent of the child who paid the consideration,<sup>2</sup> or where by agreement, and without any fraudulent intent, the parent was to hold the land in trust for, or convey it to, the child who paid the purchase price.<sup>3</sup>

#### b. Conveyance to Child of Person Paying Consideration

In the absence of circumstances showing an intention to the contrary, the payment of the purchase price by a parent for a conveyance of property to his child will be presumed a gift and a resulting trust will not arise in favor of the parent.

The rules with respect to a resulting trust in favor of the person paying the purchase money for property conveyed to a stranger by reason of presumption of law do not apply where a parent purchases property with his own funds or assets and the conveyance is made in the name of his child.<sup>4</sup> Therefore, in the absence of circumstances showing an intention to the contrary, a purchase by a parent in name of the child will be presumed to be an advancement,<sup>5</sup> settlement,<sup>6</sup> or gift,<sup>7</sup> and not a resulting

ited v. Barnett, 150 F.2d 591, 65 Cal. App.2d Supp. 828.

65 C.J. p. 416 note 76.

92. Ill.—Brisco v. Price, 113 N.E. 881, 275 Ill. 63.

65 C.J. p. 416 note 77.

Resulting trust in favor of one lending purchase money generally see supra § 124.

93. Mo.—Adams v. Adams, 156 S.W. 2d 610, 348 Mo. 1041.

Pa.—O'Neill v. O'Neill, 76 A. 28, 227 Pa. 334.

Presumption of resulting trust where purchase is made in name of stranger see supra § 116.

94. Mo.—Adams v. Adams, 156 S.W. 2d 610, 348 Mo. 1041.

Duty of child to support parent see Parent and Child § 23 et seq.

95. Ohio—Mullen v. Mullen, 5 Ohio Dec. Reprint, 111, 2 Am.L.R. 611.

96. N.C.—Randle v. Grady, 45 S.E.2d 35, 228 N.C. 159—Corpus Juris cited in Randle v. Grady, 32 S.E.2d 20, 22, 224 N.C. 651.

65 C.J. p. 416 note 78.

Persons in loco parentis generally see Parent and Child § 71 et seq.

97. Ark.—Clark v. Clark, 86 S.W.2d 937, 191 Ark. 461.

Tenn.—Savage v. Savage, 4 Tenn.App. 277.

65 C.J. p. 420 note 18.

Resulting trust in favor of one pay-

ing part of purchase price generally see supra § 122.

#### Possession; payment of taxes

Fact that parents moved onto and resided on farm, price of which was partly paid with son's money, for long period of time and paid taxes did not prevent creation of resulting trust pro tanto in favor of son, where parents' possession and payment of taxes were reasonably attributable to their habit of managing son's business affairs during his absence from state—Clark v. Clark, 86 S.W.2d 937, 191 Ark. 461.

98. Ark.—Clark v. Clark, supra.

65 C.J. p. 421 note 19.

99. Ind.—Brown v. Benight, 3 Black. 39, 23 Am.D. 373.

1. Ky.—McFarland v. McFarland, 82 S.W.2d 785, 263 Ky. 434.

65 C.J. p. 417 note 84.

2. Ky.—Harlan v. Eilke, 38 S.W. 1094, 100 Ky. 642, 18 Ky.L. 1098.

65 C.J. p. 417 note 86.

#### Part payment of consideration by child

N.Y.—Leary v. Corvin, 73 N.E. 984, 181 N.Y. 222, 106 Am.S.R. 542, 2 Ann.Cas. 664.

65 C.J. p. 421 note 24.

3. Ind.—Koehler v. Koehler, 121 N.E. 450, 75 Ind.App. 510.

65 C.J. p. 417 note 87.

4. Ala.—Adams v. Griffin, 45 So.2d 22, 253 Ala. 371.

Cal.—Cooper v. McDonald, 89 P.2d 412, 32 Cal.App.2d 114.

Okla.—Corpus Juris quoted in Fibikowski v. Fibikowski, 94 P.2d 921, 925, 185 Okl. 520.

65 C.J. p. 417 notes 90, 91.

5. Ill.—Wright v. Wright, 118 N.E. 2d 280, 2 Ill.2d 246—McCabe v. Hubner, 102 N.E.2d 794, 410 Ill. 557—Houdek v. Ehrenberger, 72 N.E.2d 837, 397 Ill. 62—Cook v. Blazis, 7 N.E.2d 291, 365 Ill. 625.

N.C.—Crech v. Crech, 24 S.E.2d 642, 222 N.C. 656.

Ohio—Ohio State Life Ins. Co. v. Union Properties, App. 52 N.E.2d 542.

Okla.—Corpus Juris quoted in Fibikowski v. Fibikowski, 94 P.2d 921, 925, 185 Okl. 520.

Tex.—Dennis v. Dennis, Civ.App., 256 S.W.2d 964—Ellsworth v. Ellsworth, Civ.App., 151 S.W.2d 628.

Va.—Bransom v. Bransom, 144 S.E. 613, 151 Va. 603.

Wyo.—Corpus Juris quoted in Novosel v. Sun Life Assur. Co. of Canada, 57 P.2d 110, 112, 49 Wyo. 422.

65 C.J. p. 417 note 92.

Purchase by parent in name of child as advancement generally see Descent and Distribution § 109.

6. N.J.—Bertolino v. Damario, 152 A. 230, 107 N.J.Eq. 201.

7. U.S.—Douglass v. U. S. Appliance Corp., C.A. Cal., 177 F.2d 98.

trust in favor of the parent,<sup>8</sup> and no such resulting trust will arise.<sup>9</sup> However, whether the purchase creates a resulting trust is a question of intention,<sup>10</sup> and the presumptions are not conclusive<sup>11</sup> and may be rebutted,<sup>12</sup> and, where it clearly appears from the circumstances existing at the time of the conveyance that it was not intended that the child

should take the beneficial interest, a resulting trust will arise in favor of the parent,<sup>13</sup> as where the child procures the title to property paid for by his parent, to be made to himself, without the parent's knowledge or consent.<sup>14</sup>

Where the consideration is furnished by one standing in loco parentis to the person in whose

Ala.—*Adams v. Griffin*, 46 So 2d 22, 253 Ala 371.

Ill.—*Wright v. Wright*, 118 N.E.2d 280, 2 Ill.2d 246—*McCabe v. Hehner*, 102 N.E.2d 794, 110 Ill. 557—*Houdek v. Ehrenberger*, 72 N.E.2d 837, 397 Ill. 62—*Cook v. Blazis*, 7 N.E.2d 291, 365 Ill. 625.  
Mo.—*Warford v. Smoot*, 237 S.W.2d 154, 361 Mo. 879.  
N.H.—*Shelley v. Landry*, 79 A.2d 626, 97 N.H. 27.  
N.J.—*Hill v. Lamoreaux*, 30 A.2d 833, 132 N.J. 580.

Okla.—*Corpus Juris* quoted in *Fibikowski v. Fibikowski*, 94 P.2d 921, 925, 185 Okl. 520.

Pa.—*Ehnes v. Yowell*, 97 A.2d 56, 374 Pa. 17—*Citizens Deposit & Trust Co. of Sharpsburg v. Citizens Deposit & Trust Co. of Sharpsburg*, 7 A.2d 519, 136 Pa. Super. 413.  
Va.—*Bransom v. Bransom*, 144 S.E. 613, 151 Va. 603.

Wyo.—*Corpus Juris* quoted in *Novosel v. Sun Life Assur. Co. of Canada*, 57 P.2d 110, 112, 49 Wyo. 422, 65 C.J. p. 418 note 93.

Gifts between parent and child generally see *Parent and Child* § 60.

8. Ill.—*McCabe v. Hehner*, 102 N.E.2d 794, 410 Ill. 557.  
N.C.—*Creech v. Creech*, 24 S.E.2d 643, 222 N.C. 656.

Okla.—*Corpus Juris* quoted in *Fibikowski v. Fibikowski*, 94 P.2d 921, 925, 185 Okl. 520.  
65 C.J. p. 418 note 94.

9. Okla.—*Corpus Juris* quoted in *Fibikowski v. Fibikowski*, 94 P.2d 921, 925, 185 Okl. 520.

Pa.—*Honan v. Donaldson*, 200 A. 30, 331 Pa. 388—*Citizens Deposit & Trust Co. of Sharpsburg v. Citizens Deposit & Trust Co. of Sharpsburg*, 7 A.2d 519, 136 Pa. Super. 413.

Tex.—*Dennis v. Dennis*, Civ.App., 256 S.W.2d 964—*Ellsworth v. Ellsworth*, Civ.App., 151 S.W.2d 628, error refused—*Thomason v. Pacific Mut. Life Ins. Co. of California*, Civ.App., 74 S.W.2d 162, error refused.

65 C.J. p. 418 note 95.

#### In California

(1) Ordinarily, where a parent pays for a conveyance to his child, there is a presumption that a gift was intended and there is no presumption of a resulting trust, and no presumption that the minor takes the land for the benefit of his parent.—*Oyama v. State of Cal.*, Cal., 68 S.Ct.

269, 332 U.S. 633, 92 L.Ed. 219—65 C.J. p. 420 note 17.

(2) However, it has been held that in view of Civ. Code § 853, providing that when a transfer of real property is made to one person and the consideration therefor is paid by another a trust is presumed to result in his favor, the presumption of a resulting trust is indulged even when a transaction is between parent and child—*Harper v. Heizer*, 229 P.2d 828, 103 Cal.App.2d 388—65 C.J. p. 420 note 17.

(3) On the other hand, it has been held that the statutory provision is subject to an exception in the case of parent and child and that the presumption is that a gift or advancement was intended—*Quinn v. Reilly*, 215 P. 1091, 198 Cal. 465—65 C.J. p. 420 note 17.

(4) Where husband and wife purchased property and went into possession, but record title was placed in name of purchasers' daughter and her husband, the daughter and her husband held the legal title to the property in trust for the purchasers—*Rafferty v. Kirkpatrick*, 85 P.2d 147, 29 Cal.App.2d 503.

10. Ill.—*Houdek v. Ehrenberger*, 72 N.E.2d 837, 397 Ill. 62—*Cook v. Blazis*, 7 N.E.2d 291, 365 Ill. 625.

Okla.—*Corpus Juris* quoted in *Fibikowski v. Fibikowski*, 94 P.2d 921, 925, 185 Okl. 520.

Pa.—*Citizens Deposit & Trust Co. of Sharpsburg v. Citizens Deposit & Trust Co. of Sharpsburg*, 7 A.2d 519, 136 Pa. Super. 413.  
65 C.J. p. 419 note 96.

11. Ill.—*McCabe v. Hehner*, 102 N.E.2d 794, 410 Ill. 557—*Houdek v. Ehrenberger*, 72 N.E.2d 837, 397 Ill. 62—*Cook v. Blazis*, 7 N.E.2d 291, 365 Ill. 625.

Okla.—*Corpus Juris* quoted in *Fibikowski v. Fibikowski*, 94 P.2d 921, 925, 185 Okl. 520.  
65 C.J. p. 419 note 97.

#### Presumption held one of fact

Wash.—In re *Hammer's Estate*, 260 P. 532, 145 Wash. 322.

12. Ill.—*Wright v. Wright*, 118 N.E.2d 280, 2 Ill.2d 246—*McCabe v. Hehner*, 102 N.E.2d 794, 410 Ill. 557—*Houdek v. Ehrenberger*, 72 N.E.2d 837, 397 Ill. 62—*Cook v. Blazis*, 7 N.E.2d 291, 365 Ill. 625.

N.H.—*Shelley v. Landry*, 79 A.2d 626, 97 N.H. 27.  
Ohio—*Ohio State Life Ins. Co. v. Union Properties*, App., 53 N.E.2d 543

Okla.—*Corpus Juris* quoted in *Fibikowski v. Fibikowski*, 94 P.2d 921, 925, 185 Okl. 520.

Pa.—*Epstein v. Ratkosky*, 129 A. 53, 283 Pa. 168.

Va.—*Bransom v. Bransom*, 144 S.E. 613, 151 Va. 603.  
65 C.J. p. 419 note 98, p. 420 note 11.

13. Ariz.—*Stewart v. Damron*, 160 P.2d 321, 63 Ariz. 158.

Ark.—*Ellis v. Shuffield*, 152 S.W.2d 535, 202 Ark. 723.

Colo.—*Champion v. Champion*, 132 P.2d 185, 110 Colo. 153.

Ill.—*Cook v. Blazis*, 7 N.E.2d 291, 365 Ill. 625.

Ohio—*Ohio State Life Ins. Co. v. Union Properties*, App., 52 N.E.2d 542.

Okla.—*Corpus Juris* quoted in *Fibikowski v. Fibikowski*, 94 P.2d 921, 925, 185 Okl. 520.

Pn.—*Drayer v. Drayer*, Com.Pl., 60 Dauph. Co. 150—*Donohue v. Donohue*, Com.Pl., 42 Sch. Leg. Rec. 66.  
Tex.—*Macias v. Macias*, Civ.App., 148 S.W.2d 240.

65 C.J. p. 419 note 99.

#### Intention not to give beneficial interest until death

Where lower court found on sufficient evidence that father by taking conveyance of property, acquired by father with own money and work, in name of himself and daughter as joint tenants, intended to impart possession to daughter only on his death, presumption of a gift *inter vivos* to daughter was not rebutted to extent of depriving her of all beneficial interest in premises and daughter should be decreed to hold title subject to resulting trust in father of all beneficial interests, except that beneficial interest to whatever remained at father's death belonged to daughter—*Shelley v. Landry*, 79 A.2d 626, 97 N.H. 27.

#### Deed to child as trustee

Where mother purchased land and took deed therefor in name of her son as trustee, presumption of advancement to son as to land purchased was rebutted, and, where nothing was said in conveyance as to purpose of trust, trust was one in which son held title for exclusive benefit of mother furnishing consideration—*Ohio State Life Ins. Co. v. Union Properties*, Ohio App., 52 N.E.2d 542.

14. Ala.—*Olds v. Marshall*, 8 So. 284, 93 Ala. 138.

65 C.J. p. 419 note 1.

name the purchase is made, the purchase will be presumed to be a gift,<sup>15</sup> advancement,<sup>16</sup> or settlement,<sup>17</sup> and not a resulting trust;<sup>18</sup> and no resulting trust arises,<sup>19</sup> although the presumption is rebuttable.<sup>20</sup>

*Payment with funds of both parent and child.* Where the consideration is furnished by both parent and child, and the title is taken in the name of the child, the presumption is that an advancement was intended,<sup>21</sup> which presumption is rebuttable,<sup>22</sup> and a pro tanto trust will result in favor of the parent where it appears that it was intended that the parent should have a beneficial interest.<sup>23</sup> Where the parents advance only a part of the purchase money for the purpose, and with the intention of securing the entire title to the property, and such title is taken by a son also contributing to the purchase, a resulting trust to the entire property does not thereby arise in their favor.<sup>24</sup> Under a statutory provision that resulting trusts may arise from the payment of the purchase money or from other circumstances, a resulting trust may arise in favor of a parent joining with the child in purchasing property, title to which is in the child's name.<sup>25</sup>

*Statutory modification of common-law rule.* Under the statutes, discussed generally supra § 116, which modify the common-law rule and provide that a trust shall not result from the mere fact that one pays the purchase money for a conveyance of property to another, a trust does not ordinarily result in favor of a parent who pays the consideration for

a transfer of property to his child.<sup>26</sup> However, the exceptions to the statutory prohibition apply where a conveyance is made to the child of the person furnishing the consideration, as where the child has taken the deed, as an absolute conveyance, in his own name without the knowledge or consent of the parent who paid the consideration,<sup>27</sup> or where by agreement and without fraud, the child was to hold the property in trust for the parent.<sup>28</sup>

### § 130. — Children by Common Parent or Parents

A resulting trust ordinarily arises in favor of one paying the purchase price for a transfer of property to a brother or sister.

Since persons in the relationships of brothers,<sup>29</sup> or brother and sister,<sup>30</sup> are generally under no legal or moral obligation to support each other, such brothers,<sup>31</sup> or brother and sister,<sup>32</sup> are strangers within the meaning of the general rule that where property is paid for with the money or assets of a person, and the title thereto is taken in the name of a stranger or person for whom he is under no legal or moral obligation to provide, a resulting trust in the property arises by operation of law in favor of the person furnishing the consideration, or persons claiming under him. It follows that the general rule that he who supplies the consideration is presumed to intend the purchase for his own benefit, rather than for the benefit of a stranger applies,<sup>33</sup> and a resulting trust arises<sup>34</sup> by implication

15. N.J.—Mott v. Iossa, 181 A. 689, 119 N.J. Eq. 185.  
Wash.—Dines v. Hyland, 40 P.2d 140, 180 Wash. 455.  
65 C.J. p 419 note 2.

16. N.J.—Mott v. Iossa, 181 A. 689, 119 N.J. Eq. 185.  
Or.—Dahl v. Simonsen, 70 P.2d 49, 157 Or. 238.  
65 C.J. p 419 note 3.

17. Miss.—Higdon v. Higdon, 57 Miss. 264.  
Or.—Dahl v. Simonsen, 70 P.2d 49, 157 Or. 238.  
Wash.—Dines v. Hyland, 40 P.2d 140, 180 Wash. 455.

18. Or.—Dahl v. Simonsen, 70 P.2d 49, 157 Or. 238.  
Wash.—Dines v. Hyland, 40 P.2d 140, 180 Wash. 455.  
65 C.J. p 419 note 5.

19. N.J.—Mott v. Iossa, 181 A. 689, 119 N.J. Eq. 185.  
65 C.J. p 420 note 6.

20. Miss.—Higdon v. Higdon, 57 Miss. 264.  
65 C.J. p 420 note 7.

#### Question determined as of time of conveyance

Whether payment of purchase price by one standing in loco parentis to person taking title was a gift or a trust must be determined as of the time of the conveyance.—Dines v. Hyland, 40 P.2d 140, 180 Wash. 455.

21. Wash.—In re Hammer's Estate, 260 P. 632, 145 Wash. 322.  
65 C.J. p 421 note 27.  
Resulting trust in favor of one paying part of purchase price generally see supra § 122.

22. Wash.—In re Hammer's Estate, supra.  
65 C.J. p 421 note 27.

23. N.J.—Finley v. Keene, 42 A.2d 208, 136 N.J. Eq. 347.

24. Md.—Springer v. Springer, 125 A. 162, 144 Md. 465.

25. Ga.—Harris v. Harris, 114 S.E. 333, 154 Ga. 271.  
65 C.J. p 421 note 29.

26. Ky.—Fields v. Napier, 80 S.W. 1110, 26 Ky.L. 240.  
65 C.J. p 420 note 13.

#### Part payment by parent

Mich.—Halliday v. Basil, 136 N.W. 354, 170 Mich. 489.  
65 C.J. p 421 notes 22 [a], 31.

27. N.Y.—Roulston v. Roulston, 64 N.Y. 652.  
65 C.J. p 420 note 15.

28. Ind.—Stamper v. Stamper, 83 N.E.2d 184, 227 Ind. 15.

29. Ark.—Camden v. Bennett, 41 S.W. 854, 64 Ark. 155.

30. U.S.—Higginbotham v. Rogers, Va., 234 F. 253, 148 C.C.A. 155.  
Pa.—Warren v. Steer, 5 A. 4, 112 Pa. 634.

31. Ark.—Camden v. Bennett, 41 S.W. 854, 64 Ark. 155.

32. Ill.—Harris v. McIntyre, 8 N.E. 182, 118 Ill. 275.

Pa.—Warren v. Steer, 5 A. 4, 112 Pa. 634.

33. Pa.—Warren v. Steer, 5 A. 4, 112 Pa. 634.  
65 C.J. p 421 note 39.

34. Ga.—Stevens v. Stevens, 49 S.E. 2d 835, 204 Ga. 340.  
65 C.J. p 421 note 40.

or presumption of law,<sup>35</sup> although rebuttable,<sup>36</sup> and there is no presumption of advancement or gift.<sup>37</sup> Under the rule that no resulting trust exists in favor of one who pays the purchase money by way of a loan to another, and the conveyance is taken in the name of the borrower, discussed supra § 124, one who lends money to a brother who takes the conveyance does not become entitled to a resulting trust.<sup>38</sup> Where property is jointly purchased by brothers and sister, but the deed does not include one or more of them, such person or persons are

entitled to a resulting trust to the extent of his contribution to the consideration.<sup>39</sup> A statutory prohibition of purchase money resulting trusts, discussed generally supra § 116, applies where the parties are children of a common parent or common parents.<sup>40</sup> So, also, the statutory exceptions to such prohibition apply, as that the prohibition shall not extend to cases where the alienee shall have taken an absolute conveyance in his own name without the consent of the person with whose money the consideration is paid.<sup>41</sup>

### 3. EVIDENCE AND QUESTIONS OF LAW AND FACT

#### § 131. Evidence

The general rules of evidence applicable in civil actions have been applied in actions with respect to resulting trusts.

The general rules of evidence applicable in civil actions have been applied in actions with respect to resulting trusts,<sup>42</sup> and particular applications with respect to presumptions and burden of proof and admissibility, weight, and sufficiency of evidence are discussed infra §§ 132-137.

#### § 132. — Presumptions and Burden of Proof

##### a. In general

##### b. Purchase-money resulting trusts

##### a. In General

The burden of establishing a resulting trust is on the party who asserts it.

The burden of establishing a resulting trust, as against the holder of the legal title, is on the party who asserts it.<sup>43</sup> Accordingly, the holder of the

35. Ga.—Stevens v. Stevens, supra.  
65 C.J. p 421 note 41.

36. Pa.—King v. King, 127 A. 142, 281 Pa 611.

##### Favor rich; grantee poor

Fact that brother was prosperous and sister was poor at time brother purchased dwelling and placed title thereof in name of sister had some tendency to show that the gift to sister was intended and to rebut inference of a resulting trust.—O'Neal v. O'Neal, 74 A.2d 614, 9 N.J.Super 36.

37. Pa.—Fitzpatrick v. Fitzpatrick, 29 A.2d 790, 346 Pa. 202.  
65 C.J. p 422 note 43.

38. Tex.—Jordan v. Jordan, Civ App., 154 S.W. 359.

39. N.J.—Finley v. Keene, 42 A.2d 208, 136 N.J. Eq 347.  
65 C.J. p 422 note 50.

Resulting trust in favor of one paying part of purchase price see supra § 132.

40. Ky.—Isaacs v. Isaacs, 267 S.W. 1104, 206 Ky. 540.  
65 C.J. p 422 note 45.

41. Kan.—Kennedy v. Taylor, 20 Kan. 558.

65 C.J. p 422 note 47, p 422 note 50 [b].

42. Ga.—Lewis v. Patterson, 12 S.E. 2d 593, 191 Ga. 348.

43. Ala.—Hooks v. Hooks, 63 So.2d 348, 255 Ala. 427.—Banks v. Banks, 44 So.2d 10, 252 Ala. 253.—Lauderdale v. Peace Baptist Church of

Birmingham, 19 So.2d 538, 246 Ala. 178.

Cal.—Reol v. King, 223 P.2d 627, 36 Cal.2d 342.—Jones v. Kelley, 262 P.2d 859, 121 Cal.App.2d 130.

Colo.—Woodruff v. Clarke, 262 P.2d 737, 128 Colo. 387.—Howard v. Barrett, 73 P.2d 474, 101 Colo. 249.

Del.—Bodley v. Jones, 59 A.2d 463, 30 Del.Ch. 480.—Greenly v. Greenly, 49 A.2d 126, 29 Del.Ch. 297.

Fla.—Powell v. Ilace, 10 So.2d 142, 151 Fla. 536.

Idaho.—Aker v. Aker, 20 P.2d 796, 62 Idaho 713, appeal dismissed and certiorari denied 54 S.Ct. 80, 290 U.S. 587, 78 L.Ed. 518.

Ill.—Wright v. Wright, 118 N.E.2d 280, 211 Ill.2d 246.—Paluszak v. Wohlrab, 115 N.E.2d 764, 1 Ill.2d 363.—Johnson v. Johnson, 115 N.E.2d 617, 1 Ill.2d 319.—Fields v. Fields, 114 N.E.2d 402, 415 Ill. 324.—McCabe v. Hebnar, 102 N.E.2d 794, 410 Ill. 557.

Carlson v. Carlson, 98 N.E.2d 779, 409 Ill. 167.—Kohlhaas v. Smith, 97 N.E.2d 774, 408 Ill. 535.—Craven v. Craven, 95 N.E.2d 489, 407 Ill. 252.—Evangeliou v. Evangelou, 85 N.E.2d 709, 403 Ill. 118.—Dean v. Dean, 82 N.E.2d 342, 401 Ill. 406.—Tuntland v. Haugen, 78 N.E.2d 308, 399 Ill. 595.—Houdek v. Ehrenberger, 72 N.E.2d 637, 397 Ill. 62.—Heinemann v. Hermann, 52 N.E.2d 263, 385 Ill. 191.—Nikoloff v. Nikoloff, 61 N.E.2d 565, 384 Ill. 377.

Currell v. Currell, 48 N.E.2d 360, 383 Ill. 102.—Guffey v. Washburn, 46 N.E.2d 971, 383 Ill. 376.—Spina v. Spina, 22 N.E.2d 687, 372 Ill. 50—

Hickey v. Hickey, 21 N.E.2d 579, 371 Ill. 476.—Cook v. Blazis, 7 N.E.2d 291, 365 Ill. 625.—Baker v. Le Mira, 189 N.E. 904, 355 Ill. 626.

Iowa.—Shaw v. Addison, 28 N.W.2d 816, 239 Iowa 377.—Sinclair v. Alender, 26 N.W.2d 320, 238 Iowa 212.—Keshlear v. Banner, 280 N.W. 631, 225 Iowa 471.—Andrew v. Martin, 254 N.W. 67, 218 Iowa 19.

Me.—Greenberg v. Greenberg, 43 A.2d 841, 141 Me. 320.

Mo.—Mountford v. Mountford, 29 A.2d 258, 181 Mo. 212.

Mo.—Sutorius v. Mayor, 170 S.W.2d 387, 350 Mo. 1235, motion overruled 171 S.W.2d 69, 350 Mo. 1235.—Doe v. Suttler, App. 222 S.W.2d 541.

N.J.—Dowler v. Scott, 74 A.2d 278, 8 N.J.Super. 490.—Turner v. Cole, 173 A. 613, 116 N.J. Eq 368, affirmed 179 A. 113, 118 N.J. Eq 497.—Gordon v. Griffith, 168 A. 57, 113 N.J. Eq. 554.

N.C.—Wilson v. Williams, 2 S.E.2d 19, 215 N.C. 407.

Ohio.—Lipps v. Lipps, App., 87 N.E.2d 823.

Okl.—Plummer v. Pearce, 257 P.2d 813, 208 Okl. 526.—Staton v. Moody, 256 P.2d 409, 208 Okl. 372.—Gaines v. Gaines, 251 P.2d 1044, 207 Okl. 610.—Nicklas v. Crowell, 238 P.2d 347, 205 Okl. 432.—Hickey v. Ross, 172 P.2d 771, 197 Okl. 543.—McGrory v. Evans, 138 P.2d 823, 192 Okl. 649.—King v. Courtney, 122 P.2d 1014, 190 Okl. 256.—Owens v. Hill, 122 P.2d 801, 190 Okl. 242.—Pibikowski v. Pibikowski, 121 P.2d 304, 190 Okl. 152.—Birdwell v. Estes, 118 P.2d



legal title to property is presumed to own the full beneficial interest,<sup>44</sup> and where a resulting trust is sought to be engrafted on a conveyance absolute in terms there is a presumption that the conveyance speaks the whole truth.<sup>45</sup> One claiming a resulting trust in property he conveyed without consideration has the burden of proving that he did not intend a gift.<sup>46</sup> A presumption of a resulting trust has the effect of *prima facie* establishing such trust.<sup>47</sup>

As a general rule, the law will not presume a resulting trust except in a case of necessity.<sup>48</sup> Nevertheless, as discussed supra § 115 et seq, a trust will be presumed to result in favor of the one paying the consideration for a transfer of property to another. Other factual situations where a trust results or is presumed to result are discussed supra § 102 et seq.

*Acquisition of property with fiduciary funds.* In an action to declare a resulting trust in lands on the ground that the purchase was made with trust funds, the burden of proof to establish that such trust funds were used in paying for such land is on the one claiming a trust;<sup>49</sup> but, where the payment of such funds is shown, it becomes the duty of the

fiduciary to establish facts showing that no trust was created.<sup>50</sup>

### b. Purchase-Money Resulting Trusts

The burden is on one claiming a purchase-money resulting trust to prove that the purchase was made with his assets, and on the one receiving the legal title to prove that it was intended that he receive the beneficial interest in the property.

In case of a resulting trust arising from payment of the purchase money by one person and transfer of title to another, as discussed supra § 115 et seq, the burden of proof, in the first instance, is on the party claiming the trust to prove that the purchase was made with money or assets furnished by, or belonging to, him,<sup>51</sup> that the money went for the purchase of the particular property on which it is sought to impress the trust,<sup>52</sup> and, if it has been only a part payment, to prove that he paid<sup>53</sup> or incurred an absolute obligation to pay<sup>54</sup> some specific sum for some distinct interest in, or aliquot part of, the premises purchased,<sup>55</sup> as well as the total consideration,<sup>56</sup> and the fact that the payment or agreement to pay was made before or contemporaneously with the purchase,<sup>57</sup> and as part of the original transaction of purchase.<sup>58</sup> Where, how-

989, 189 Okl. 379—Winter v. Klein, 98 P.2d 83, 156 Okl. 74—Maynard v. Taylor, 91 P.2d 649, 185 Okl. 268.  
Or—Savage v. Savage, 94 P.2d 136, 163 Or. 36.

Pa—Moore v. Moore, Com.Pl., 35 Berks 269, 57 York Leg Rec. 141—Styer v. Hearn, Com.Pl., 59 Mont. Co. 41—Siefert v. Byster, Com.Pl., 57 York Leg Rec 181.

R.I.—Slaton v. Cleverley, 50 A.2d 185, 72 R.I. 252.

Tex.—Berry v. Rhine, Civ.App., 205 S.W.2d 632.

Wash.—In re Cunningham's Estate, 143 P.2d 852, 19 Wash.2d 589—Makinen v. George, 142 P.2d 910, 19 Wash.2d 340—Corpus Juris quoted in Davies v. Metropolitan Life Ins. Co., 88 P.2d 829, 832, 198 Wash. 482—Zioncheck v. Nadeau, 81 P.2d 811, 136 Wash. 33—Dines v. Hyland, 40 P.2d 140, 180 Wash. 455.  
65 C.J. p 435 note 93.

44. Cal.—Baskett v. Crook, 195 P.2d 39, 86 Cal.App.2d 355—Rench v. McMullen, 187 P.2d 111, 82 Cal.App.2d 872.

Md.—Mountford v. Mountford, 29 A.2d 258, 181 Md. 212.

45. Ala.—Sims v. Sims, 66 So.2d 445, 259 Ala. 296—Banks v. Banks, 44 So.2d 10, 253 Ala. 252—Lauderdale v. Peace Baptist Church of Birmingham, 19 So.2d 538, 246 Ala. 178.

46. Cal.—In re Clausenius' Estate, 216 P.2d 485, 96 Cal.App.2d 600.

47. Or.—Rhodes v. Peery, 19 P.2d 418, 142 Or. 165.

48. Md.—Sands v. Church of Ascension and Prince of Peace, 30 A.2d 771, 181 Md. 636.

Wash.—Corpus Juris quoted in Davies v. Metropolitan Life Ins. Co., 88 P.2d 829, 832, 198 Wash. 482.  
65 C.J. p 435 note 92.

49. Okl.—Corpus Juris cited in Winter v. Klein, 96 P.2d 83, 86, 186 Okl. 74.

65 C.J. p 437 note 18.  
Trust resulting from purchase with fiduciary funds generally see supra § 114.

50. Mo.—Long v. Long, 192 S.W. 948.

51. Ala.—Gandy v. Hagler, 16 So.2d 305, 245 Ala. 167.

Ark.—James v. James, 233 S.W.2d 75, 217 Ark. 740.

Cal.—Elliott v. Wood, 212 P.2d 906, 95 Cal.App.2d 314.

Del.—Eidelsburger v. Ballance, 50 A.2d 903, 29 Del. Ch. 378.

Ill.—Curie v. Curie, 57 N.E.2d 879, 388 Ill. 215.

Mo.—Corpus Juris cited in Adams v. Adams, 156 S.W.2d 610, 614, 348 Mo. 1041.

N.M.—Brown v. Likens, 22 P.2d 848, 37 N.M. 312.

Pa.—Katz v. Katz, 163 A. 214, 309 Pa. 115—Irwin Sav. & Trust Co. v. Sanner, 185 A. 876, 123 Pa. Super 70.

R.I.—Romero v. Pate, 60 A.2d 162, 74 R.I. 245.  
S.C.—Hutto v. Hutto, 196 S.E. 369, 187 S.C. 36.  
65 C.J. p 436 note 94.

52. N.M.—Brown v. Likens, 22 P.2d 848, 37 N.M. 312.  
65 C.J. p 436 note 95.

53. Ark.—Harbour v. Harbour, 181 S.W.2d 805, 207 Ark. 551.

Cal.—Socol v. King, 223 P.2d 627, 36 Cal.2d 312.

Ga.—Kehely v. Kehely, 36 S.E.2d 165, 200 Ga. 41.

Iowa.—Shaw v. Addison, 28 N.W.2d 516, 239 Iowa 377.

S.C.—Hutto v. Hutto, 196 S.E. 369, 187 S.C. 36.  
65 C.J. p 436 note 96.

54. Ill.—Furber v. Page, 32 N.E. 444, 143 Ill. 622.

55. Fla.—Hewenthal v. Largo Land Co., 200 So. 272, 146 Fla. 81.

Ill.—Hille v. Barnes, 77 N.E.2d 809, 399 Ill. 252.  
65 C.J. p 436 note 98.

56. Cal.—Woodside v. Hewel, 42 P. 152, 109 Cal. 481.

57. Ala.—Gandy v. Hagler, 16 So.2d 305, 245 Ala. 167.

Cal.—Elliott v. Wood, 212 P.2d 906, 95 Cal.App.2d 314—McQuinn v. Rice, 199 P.2d 742, 88 Cal.App.2d 914.

65 C.J. p 436 note 1.

58. Cal.—McQuinn v. Rice, 199 P.2d 742, 88 Cal.App.2d 914.

ever, it is shown that the purchase money has been furnished by one party and the deed has been made to another, the burden is on the one holding the legal title to show that it was intended he should have some beneficial interest in the property.<sup>59</sup> Where the presumption of a resulting trust arising from the payment of the purchase price is rebutted, the burden is on the one claiming a resulting trust to establish it.<sup>60</sup> Under a statute providing that, subject to certain exceptions, no resulting trust shall result in favor of one furnishing the consideration for a conveyance to another, as discussed generally supra § 116, a person seeking to have a resulting trust established must bring himself within one of the exceptions.<sup>61</sup> Under a statute providing that every trust shall be presumed fraudulent as against the creditors of the person paying the consideration therefor, the absence of fraudulent intent must be made affirmatively to appear.<sup>62</sup>

*Where gift presumed.* Where the purchase is made for one for whom the payor is under a legal or moral obligation to provide, a resulting trust is not presumed, as discussed supra § 125, and the burden of establishing such trust is on the one claiming it.<sup>63</sup>

*Payment by husband and title in wife.* Where the husband pays the consideration and title is taken in the name of his wife, the burden of overcoming the presumption of a gift or advancement is on the husband or the person claiming under him.<sup>64</sup> Where, however, it is claimed that the husband is

estopped to assert a trust, the burden of proving such estoppel is on the party asserting it.<sup>65</sup>

*Payment by parent and title in child.* Where a parent pays the consideration for a transfer to his child, the burden of overcoming the presumption of a gift or advancement is on the parent or the person claiming under him.<sup>66</sup>

*Payment by wife and title in husband.* Where it is alleged that the wife furnished the purchase money, and the title was taken in the name of the husband, or of husband and wife, the burden of proof is on the party seeking to establish a resulting trust in such a case to show that the property was purchased with the wife's funds.<sup>67</sup> In those jurisdictions where a payment by the wife and a transfer of title to the husband raise no presumption of a gift or advancement to him, as discussed supra § 127, it is not necessary to show anything in addition to the facts of payment by the wife and transfer to the husband in order to establish a resulting trust.<sup>68</sup> Accordingly, it is not necessary to prove that it was the intention of the parties at the time of the transaction to create a trust;<sup>69</sup> and the burden is on the husband or persons claiming under him to show that no trust was intended.<sup>70</sup> In jurisdictions where it is held that payment by the wife and transfer of title to the husband raise a presumption of gift, as discussed supra § 127, it is held that the burden is on the wife to negative the presumption.<sup>71</sup>

59. Ala.—Adams v. Griffin, 45 So.2d 22, 253 Ala. 371.

Ill.—Howman v. Pettersen, 102 N.E.2d 787, 410 Ill. 519.—Bellefleur v. Ganas, 69 N.E.2d 321, 394 Ill. 567.—Sweeney v. Hoy, 272 Ill. App. 346.

Mo.—Jankowski v. Delfert, 201 S.W.2d 331, 356 Mo. 184.

Ohio—Lewis v. Akerberg, Com.Pl., 118 N.E.2d 166.

65 C.J. p. 436 note 2.

60. Ala.—Rodgers v. Thornton, 46 So.2d 809, 254 Ala. 66.

61. N.Y.—Alonzo v. Alonzo, 62 N.Y.S.2d 99, affirmed 62 N.Y.S.2d 818, 270 App.Div. 977, appeal denied 63 N.Y.S.2d 841, 270 App.Div. 1076. 65 C.J. p. 436 note 4.

62. Kan.—Stevens v. Hicks, 113 P. 1049, 64 Kan. 351.

63. Ala.—Hooks v. Hooks, 63 So.2d 348, 258 Ala. 427.—Adair v. Adair, 62 So.2d 437, 258 Ala. 293.

Hawaii.—Ishida v. Naumu, 34 Hawaii 363.

Md.—Porter v. Porter, 177 A. 460, 168 Md. 287.

64. Ariz.—Blaine v. Blaine, 159 P.2d 786, 63 Ariz. 100.

Ill.—Houdek v. Ehrenberger, 72 N.E.2d 837, 397 Ill. 62.—Nickeloff v. Nickeloff, 51 N.E.2d 565, 354 Ill. 377.—Lowenberg v. Rooth, 162 N.E. 191, 330 Ill. 548.

Md.—Mountford v. Mountford, 29 A. 2d 258, 181 Md. 212.

Mass.—Krauthamer v. Gorrinkle, 89 N.E.2d 341, 325 Mass. 754.—Moat v. Moat, 17 N.E.2d 710, 301 Mass. 469.

Mo.—State ex rel. Smith v. Bland, 186 S.W.2d 443, 353 Mo. 1073, confirmed to, App. 192 S.W.2d 691.

Pa.—Katz v. Katz, 163 A. 214, 309 Pa. 115.—In re Deyen's Estate, 97 Pa.Super. 250.—Dunning v. Dunning, Com.Pl., 30 Del.Co. 361.—O'Bramski v. Yusalavage, Com.Pl., 34 Luz. Lek. Itg. Rep. 74.

R.I.—Pyffe v. Thurber, 21 A.2d 1, 67 R.I. 114.

65 C.J. p. 437 note 6.—30 C.J. p. 701 note 67.

Presumption that purchase for wife is gift, advancement, or settlement see supra § 127.

**Lack of mental capacity to make gift**

Del.—Eidelsburger v. Ballance, 50 A. 2d 903, 29 Del.Ch. 378.

65. Ala.—Fanning v. Fanning, 98 So. 504, 210 Ala. 575.

65 C.J. p. 437 note 8.

66. Iowa.—McGinnis v. McGinnis, 139 N.W. 456, 159 Iowa 304.

Mo.—Warford v. Smoot, 237 S.W.2d 184, 361 Mo. 879.

Presumption that purchase for child is gift, advancement, or settlement see supra § 129.

67. Iowa.—In re Mahin's Estate, 143 N.W. 420, 161 Iowa 459.

65 C.J. p. 437 note 12.

68. Ill.—Crawford v. Hurst, 138 N.E. 620, 307 Ill. 243.

69. Ill.—Prewin v. Stark, 149 N.E. 588, 319 Ill. 35.—Crawford v. Hurst, 133 N.E. 521, 299 Ill. 503.

70. Minn.—Chadbourne v. Williams, 47 N.W. 812, 45 Minn. 294.

Mo.—Fogle v. Finkel, 154 S.W. 81, 248 Mo. 65.

71. W.Va.—Whitten v. Whitten, 74 S.E. 237, 70 W.Va. 422, 39 L.R.A., N.S., 1026, Ann.Cas.1915D 647.

§ 133. — Admissibility

Evidence, including parol evidence, which is competent, material, and relevant, is admissible to establish a resulting trust.

General rules relative to the competency, relevancy, and materiality of evidence in civil cases govern the admissibility of evidence on questions with respect to the establishment and enforcement of a resulting trust; and, accordingly, any competent and material evidence is admissible which is relevant to a matter in issue;<sup>72</sup> and, conversely, evidence which is incompetent, immaterial, or irrelevant is not admissible.<sup>73</sup> In view of the rule discussed supra § 101 that resulting trusts are not within the prohibitions of the statute of frauds or statutes prohibiting parol trusts, parol evidence

which is otherwise competent is admissible to prove a resulting trust,<sup>74</sup> even in opposition to a denial in the trustee's answer,<sup>75</sup> or even after the death of the grantee.<sup>76</sup> Parol evidence has also been held admissible to ingraft a resulting trust on a deed absolute on its face,<sup>77</sup> although it has been held that, in the absence of fraud or mistake, parol evidence is not admissible, as between the grantor and the grantee, to show a resulting trust in such a case.<sup>78</sup> Thus, parol evidence is admissible to prove a resulting trust arising from an agreement which constituted a part of the original transaction.<sup>79</sup>

Parol evidence is admissible to prove a resulting trust from payment or ownership of the purchase money for a conveyance to another,<sup>80</sup> to prove pay-

72. Ariz.—Solomon v. Solomon, 157 P.2d 605, 62 Ariz. 311.  
Md.—Cropper v. Lamberton, 197 A. 576, 174 Md. 24.  
65 C.J. p 437 note 23.

73. N.H.—Nixon v. Cooper, 87 A.2d 687, 97 N.H. 327.  
Vt.—Dunn v. Williams, 181 A. 131, 107 Vt. 447.  
65 C.J. p 438 note 24.

General reputation as to ownership of property cannot be received to establish the trust—Mountford v. Mountford, 29 A.2d 258, 181 Md. 212.

74. Ala.—Upchurch v. Goodroe, 6 So. 2d 869, 24 Ala. 395.  
Ark.—Simpson v. Thayer, 217 S.W.2d 354, 214 Ark. 566—Corpus Juris quoted in Mortensen v. Ballard, 188 S.W.2d 749, 754, 209 Ark. 1—Ripley v. Kelly, 182 S.W.2d 743, 207 Ark. 1011—McKindley v. Humphrey, 161 S.W.2d 962, 201 Ark. 333—Nelson v. Wood, 137 S.W.2d 929, 199 Ark. 1019.

Cal.—Helm v. Zuehls, 211 P.2d 329, 94 Cal.App.2d 625.

Colo.—Jones v. McKinney, 110 P.2d 258, 107 Colo. 215.

Conn.—Sainasko v. Davis, 64 A.2d 682, 135 Conn. 377—Dickinson v. Dickinson, 40 A.2d 181, 131 Conn. 322.

Fla.—Crouch v. Poole, 182 So. 841, 133 Fla. 489—Foster v. Thornton, 179 So. 882, 131 Fla. 277—Fisher v. Grady, 178 So. 852, 131 Fla. 1.

Gu.—Stevens v. Stevens, 49 S.E.2d 895, 204 Ga. 340—Harper v. Harper, 33 S.E.2d 154, 199 Ga. 26—Guffin v. Kelly, 14 S.E.2d 50, 191 Ga. 880.

Idaho—Aker v. Aker, 20 I.2d 796, 52 Idaho 713, appeal dismissed and certiorari denied 54 S.Ct. 80, 290 U.S. 587, 78 L.Ed. 518.

Miss.—Triplett v. Bridgforth, 38 So. 2d 756, 205 Miss. 328—Corpus Juris cited in Sample v. Romine, 8 So.2d 257, 262, 193 Miss. 706, suggestion of error overruled 9 So.2d 643, 193 Miss. 706, corrected on other

grounds 10 So.2d 346, 193 Miss. 706.

Mont.—Campanello v. Mercer, 227 P.2d 312, 124 Mont. 528.

Mont.—Bell Holt McCall Co. v. Caplice, 175 P.2d 416, 119 Mont. 463—Stauffer v. Great Falls Public Service Co., 43 P.2d 647, 99 Mont. 324.

N.H.—Bailey v. Scribner, 80 A.2d 386, 97 N.H. 65.

N.C.—Crech v. Crech, 24 S.E.2d 642, 222 N.C. 656—Wilson v. Williams, 2 S.E.2d 19, 215 N.C. 407.

N.D.—Redman v. Brewer, 48 N.W.2d 372, 78 N.D. 120.

Ohio.—Steiner v. Pecyc, 50 N.E.2d 617, 72 Ohio App. 18.

Okl.—Plumer v. Pearce, 257 P.2d 813, 208 Okl. 526—Straton v. Moody, 256 P.2d 409, 208 Okl. 372—Gimes v. Games, 251 P.2d 1044, 207 Okl. 619.

—McKenna v. Lasswell, 250 P.2d 208, 207 Okl. 408—Nickles v. Crowell, 238 P.2d 317, 205 Okl. 432.

Johnson v. Johnson, 205 P.2d 314, 201 Okl. 268—Scott v. Nelson, 179 P.2d 116, 198 Okl. 392—Ward v. Ward, 172 P.2d 978, 197 Okl. 551.

Exchange Bank of Port v. Nichols, 164 P.2d 867, 196 Okl. 283.

McGill v. McGill, 113 P.2d 717, 195 Okl. 607—Winter v. Klein, 96 P.2d 83, 186 Okl. 71—McGinn v. McGinn, 37 P.2d 939, 169 Okl. 515.

Trimble v. Holes, 36 P.2d 861, 169 Okl. 228.

1st—Dunning v. Dunning, Com.Pl., 30 Del.C. 361.

Tenn.—Savage v. Savage, 4 Tenn App. 277.

Tex.—Berry v. Rhine, Civ App., 205 S.W.2d 632.

Wash.—Mouser v. O'Sullivan, 156 P.2d 655, 22 Wash.2d 543—In re Cunningham's Estate, 143 P.2d 852, 19 Wash.2d 689—Dimes v. Hyland, 40 P.2d 140, 180 Wash. 455.

65 C.J. p 374 note 45, 438 note 25.

Partnership agreement

Md.—Ottaviano v. Lorenzo, 179 A. 530, 169 Md. 51.

75. Ind.—Irwin v. Ivers, 7 Ind. 308, 63 Am.D. 420.

65 C.J. p 375 note 46.

76. Mo.—Stevens v. Fitzpatrick, 118 S.W. 51, 218 Mo. 708.

77. Ga.—Clark v. Griffon, 61 S.E.2d 128, 207 Ga. 255—Harper v. Harper, 33 S.E.2d 154, 199 Ga. 26—Hall v. Turner, 82 S.E.2d 829, 198 Ga. 783.

Okl.—Graham v. Dunlap, 65 P.2d 538, 179 Okl. 285.

65 C.J. p 374 note 47.

Contradiction of warrant, patent, or deed

A resulting trust may be established by parol evidence even in direct contradiction of a warrant, patent or deed—Browne v. Sieg, 234 P.2d 1045, 55 N.M. 417.

78. Iowa.—Ostenson v. Severson, 101 N.W. 749, 126 Iowa 197.

65 C.J. p 374 note 48.

Recital of consideration in deed as not subject to impeachment by grantor claiming resulting trust on ground that deed was made without consideration and without intent to make a gift see supra § 105.

79. U.S.—Freeman v. Freeman, Kan., 153 F. 337, 82 C.C.A. 413.

65 C.J. p 374 note 49½.

80. Ark.—Mortensen v. Ballard, 188 S.W.2d 749, 209 Ark. 1.

Cal.—Koyoko Nishi v. Downing, 67 P.2d 1057, 21 Cal.App.2d 1.

Minn.—Georgopolis v. George, 54 N.W.2d 137, 237 Minn. 176.

N.H.—Bailey v. Scribner, 80 A.2d 386, 97 N.H. 65.

N.C.—Crech v. Crech, 24 S.E.2d 642, 222 N.C. 656.

N.D.—Corpus Juris cited in Redman v. Brewer, 48 N.W.2d 372, 376, 78 N.D. 120.

Tenn.—Walker v. Walker, 2 Tenn. App. 279.

Tex.—Mace v. Young, Civ.App., 231 S.W.2d 722, error refused—Dismuke v. Reid, Civ.App., 188 S.W.2d 255.

ment or ownership of the purchase money,<sup>81</sup> and to show that the consideration paid belonged to the person claiming the trust, even though the conveyance recites that the consideration was paid by the grantee.<sup>82</sup> Parol evidence is also admissible to establish a resulting trust from a loan or advancement of the purchase money and a conveyance to the lender as security for its repayment,<sup>83</sup> or, although there is authority to the contrary,<sup>84</sup> to show a trust resulting from a purchase with fiduciary funds, such as the purchase by an agent with his principal's funds.<sup>85</sup> Where the circumstances are such that the law presumes a gift, as where a parent has paid for the conveyance of property to a child, or a husband has paid for property taken in the name of his wife, parol evidence is admissible to establish a resulting trust.<sup>86</sup> Parol evidence is likewise admissible to disprove a resulting trust,<sup>87</sup> or to rebut the presumption of a resulting trust arising from the payment of the purchase price

for a transfer of property to another.<sup>88</sup> However, parol evidence is not admissible to establish a resulting trust in favor of one who has furnished no part of the purchase money,<sup>89</sup> to prove a parol contract to purchase for joint benefit where the alleged cestui que trust never furnished any portion of the purchase money,<sup>90</sup> to prove a resulting trust in favor of a principal in lands purchased by an agent with the agent's funds,<sup>91</sup> to show a parol agreement giving to a resulting trust an effect or character different from that which the law would create from the acts of the parties,<sup>92</sup> or to show a resulting trust in conflict with a writing between the parties showing an intent to the contrary.<sup>93</sup>

Evidence has been held admissible to establish particular facts, such as the intention of the parties,<sup>94</sup> the trustee's knowledge of the cestui que trust's intention,<sup>95</sup> and his assent thereto,<sup>96</sup> the conveyance to the trustee,<sup>97</sup> the close relationship

Wash.—Womach v. Sandygren, 161 P. 600, 96 Wash. 12.  
65 C.J. p 385 note 29

#### Effect of statute

The statute, declaring that when a transfer of real property is made to one person and consideration therefor is paid by or for another a trust is presumed to result in favor of the person by or for whom payment is made, creates a presumption only and comprehends resort to parol evidence.—Brinkley v. Patton, 149 P.2d 261, 194 Okl. 244.

#### Joint purchase

Parol evidence is admissible to prove a resulting trust from the payment of a portion of the purchase money under an agreement for a joint purchase.—Brotherton v. Weatherly, 11 S.W. 506, 73 Tex. 471—65 C.J. p 425 note 83.

#### One spouse paying for transfer of property to other

Okl.—Birdwell v. Estes, 116 P.2d 969, 189 Okl. 379.

#### Transfer to parent paid for by child

N.C.—Jackson v. Thompson, 200 S.E. 16, 314 N.C. 339.  
65 C.J. p 416 note 79.

St. N.J.—Collins v. Corson, Ch. 30 A. 862.

Okl.—Adams v. Adams, 256 P.2d 458, 208 Okl. 378—McKenna v. Lasswell, 250 P.2d 208, 207 Okl. 408.

Tex.—Hodge v. Ellis, Civ.App., 268 S.W.2d 275, error granted—Miller v. McDonald, Civ.App., 235 S.W.2d 201.

#### Wife real purchaser

Parol evidence is admissible to prove that the wife was the real purchaser although title was taken in the name of her husband.

Ark.—Harbour v. Harbour, 181 S.W. 2d 805, 207 Ark. 551.

Mo.—Thieman v. Thieman, 218 S.W. 2d 580.

65 C.J. p 412 note 12.

2d Tenn.—Robertson v. Machin, 3 Hayw. 70, 1 Ill.W. 53.

Tex.—Berry v. Illine, Civ.App., 205 S.W.2d 632—Mauritz v. Bell, Civ. App., 81 S.W.2d 730, error refused.  
65 C.J. p 386 note 30.

3d Ala.—Bates v. Kelly, 60 Ala. 142.

Ky.—McConnell v. Gentry, 99 S.W. 278, 30 Ky. 548.

4d La.—Cromet v. Harris, 175 So. 462, 187 La. 701—Stierle v. Kaiser, 12 So. 839, 45 La. Ann. 580.

5d Ala.—Smith v. Hart, 65 So.2d 601, 259 Ala. 7.

6d Ga.—Price v. Price, 54 S.E.2d 578, 205 Ga. 623—Williams v. Thomas, 38 S.E.2d 603, 200 Ga. 767.

N.M.—Browne v. Sieg, 234 P.2d 1045, 55 N.M. 447.

S.C.—Caulk v. Caulk, 43 S.E.2d 600, 211 S.C. 57.

65 C.J. p 409 note 61, p 420 note 3—31 C.J. p 63 notes 81, 82.

7d Ga.—Guffin v. Kelly, 14 S.E.2d 50, 191 Ga. 880.

Pa.—Dunning v. Dunning, Com.Pl., 30 Del.Co. 361.

Tex.—Thomson v. Pacific Mut. Life Ins. Co. of California, Civ.App., 74 S.W.2d 162, error refused.

65 C.J. p 409 note 62.

8d Minn.—Georgopolis v. George, 54 N.W.2d 137, 237 Minn. 176.

S.C.—Legendre v. South Carolina Tax Commission, 56 S.E.2d 336, 215 S.C. 514—Larisey v. Larisey, 77 S.E. 129, 93 S.C. 450.

65 C.J. p 386 note 31, p 422 note 42.

9d Iowa.—Burden v. Sheridan, 36 Iowa 125, 14 Am.R. 505.

65 C.J. p 386 note 22.

10d Ky.—Frischell v. Dumars, 3 A.K. Marsh. 23.

11d Iowa.—Burden v. Sheridan, 36 Iowa 125, 14 Am.R. 505.

65 C.J. p 121 note 71.

12d Nev.—White v. Sheldon, 4 Nev. 280.

13d N.Y.—St. John v. Benedict, 6 Johns Ch. 111.

14d S.C.—De Hihns v. Free, 49 S.E. 841, 70 S.C. 311.

15d Mo.—Lewis v. Lewis, 188 S.W. 2d 537, 351 Mo. 415—Milligan v. Bing, 108 S.W.2d 108, 341 Mo. 648.

Okl.—Nicklas v. Crowell, 238 P.2d 347, 205 Okl. 432.

S.C.—Caulk v. Caulk, 43 S.E.2d 600, 211 S.C. 57.

Tex.—Davis v. Pearce, Civ.App., 205 S.W.2d 653.

65 C.J. p 438 note 28.

#### Ineffective parol trust

In suit to establish an implied trust, existence of illegal express oral understanding for trust may be shown, not as fixing interest to be owned by the parties, but as rebutting the inference of a gift.—Johnson v. Upchurch, 38 S.E.2d 617, 200 Ga. 762.

Secret undisclosed intent was neither competent nor material.—Lipps v. Lipps, Ohio App., 87 N.E.2d 823.

16d Iowa.—In re Mahin's Estate, 143 N.W. 420, 161 Iowa 459.

17d Iowa.—In re Mahin's Estate, supra.

65 C.J. p 438 note 30.

18d Iowa.—In re Mahin's Estate, supra.

of the grantee to the purchaser;<sup>98</sup> the financial condition of the grantee;<sup>99</sup> the purchaser's moral obligation to support the grantee;<sup>1</sup> agreements of the parties;<sup>2</sup> the history of the transaction,<sup>3</sup> such as negotiations leading up to the purchase of the property;<sup>4</sup> the purpose of the transfer;<sup>5</sup> and, to a limited extent, the understanding of the parties.<sup>6</sup> These rules have been held applied where the claim is that the purchase was made by or for the benefit of several and the title taken in the name of one only,<sup>7</sup> where the trust is sought to be established on the ground that the purchase money was paid by or for one person and the title taken in the name of another,<sup>8</sup> and also where the property purchased was paid for with fiduciary funds.<sup>9</sup>

**Admissions and declarations.** As a general rule, parol evidence of the admissions and declarations of the parties relative to a resulting trust are admissible for the purpose of establishing such trust.<sup>10</sup> Thus, it is competent to prove by oral declarations of the purchaser, made before or at the time of the transaction, his intention and purpose in taking the title in the name of another person,<sup>11</sup> and so, also, the admissions and declarations of the person in whose name property is purchased, made while the title remains in him, are admissible for the purpose of establishing a resulting trust in such prop-

erty in favor of another,<sup>12</sup> such as his admissions that the property was purchased, or that he holds it, for the benefit of another,<sup>13</sup> or that the purchase money was paid by such other.<sup>14</sup>

The antecedent and contemporaneous admissions and declarations of the parties may be received to rebut the presumption of a resulting trust,<sup>15</sup> but subsequent declarations are only material, as they bear on the intention of the parties at the time of the purchase.<sup>16</sup> An admission by the alleged beneficiary subsequent to the transfer of title is admissible to disprove a resulting trust.<sup>17</sup>

**Evidence to rebut presumption.** In accordance with the rule in civil cases generally, a party to a suit to establish a resulting trust may introduce evidence to rebut that of his adversary.<sup>18</sup> The presumption of a resulting trust may always be rebutted or defeated by counter evidence, written or verbal, direct or circumstantial.<sup>19</sup> Thus, the presumption of a resulting trust in favor of one furnishing the consideration for a purchase of land, the title to which is taken in the name of another, may be rebutted by evidence showing that the parties intended otherwise,<sup>20</sup> as by proof that the conveyance was intended as a gift or advancement to the grantee,<sup>21</sup> or that the person paying the purchase money did so as agent, and not on his own account,<sup>22</sup> or that

98. U.S.—Higginbotham v. Boggs, Va., 234 F. 253, 148 C.C.A. 155.

**Husband's attitude toward, and treatment of, wife.**

In husband's action to establish trust in land which had been conveyed to divorced wife, for that part of purchase price which was paid by husband, testimony of wife as to character of relationship between the husband and wife attitude of husband towards wife, and his treatment of her was admissible.—Statham v. Council, 9 S.E.2d 766, 190 Ga. 517.

99. Ill.—Niland v. Kennedy, 117 N.E. 117, 361 Ill. 253.

1. U.S.—Higginbotham v. Boggs, Va., 234 F. 253, 148 C.C.A. 155.

2. Ga.—Price v. Price, 54 S.E.2d 578, 205 Ga. 623.—Stevens v. Stevens, 49 S.E.2d 895, 204 Ga. 340.

Mont.—McLaughlin v. Coreoran, 69 P.2d 597, 104 Mont. 590.

N.H.—Bailey v. Scribner, 80 A.2d 386, 97 N.H. 65.

Tex.—Miller v. Donald, 235 S.W.2d 201, error refused no reversible error.—Dismuke v. Reid, Civ.App., 188 S.W.2d 255, 65 C.J. p. 438 note 35.

3. Cal.—Brown v. Spencer, 126 P. 493, 183 Cal. 589.

4. Conn.—Samasko v. Davis, 64 A.2d 682, 135 Conn. 377.

Ill.—Boyd v. Boyd, 45 N.E. 118, 163 Ill. 611.

5. Md.—Cropper v. Lamberton, 197 A. 578, 174 Md. 34.

Mo.—Carr v. Carroll, 178 S.W.2d 435. Tex.—Nichols v. Nichols, Civ.App., 170 S.W.2d 558.

6. Conn.—Ward v. Ward, 22 A. 149, 59 Conn. 188.

Idaho.—National Bank of Idaho v. D. W. Standrod & Co., 272 P. 700, 47 Idaho 93.

7. Cal.—Costa v. Silva, 59 P. 695, 127 Cal. 351.

65 C.J. p. 438 note 39.

8. Ind.—Stringer v. Montgomery, 12 N.E. 474, 111 Ind. 489.

65 C.J. p. 438 note 40.

9. N.Y.—New York, etc., Ferry Co. v. Moore, 6 N.E. 293, 102 N.Y. 667, 1 Silv.A. 62, 18 Abb.N.Cas. 106. 65 C.J. p. 439 note 41.

10. Mass.—Chase v. Chase, 171 N.E. 651, 271 Mass. 485. 65 C.J. p. 439 note 46.

11. Ill.—Evangeloff v. Evangeloff, 85 N.E.2d 709, 403 Ill. 118.

65 C.J. p. 439 note 47.

12. Ala.—Merchants Nat. Bank of Mobile v. Bertolla, 18 So.2d 178, 245 Ala. 662.

Ill.—Curielli v. Curielli, 48 N.E.2d 360, 383 Ill. 102.

65 C.J. p. 439 note 48.

13. Ala.—Long v. Mechem, 38 So. 262, 142 Ala. 405.

65 C.J. p. 439 note 49.

14. Pa.—Behm v. Molly, 19 A. 421, 562, 123 Pa. 614.

65 C.J. p. 439 note 50.

15. Ala.—Corpus Juris cited in Thornton v. Rodgers, 38 So.2d 479, 483, 251 Ala. 553.

Cal.—Khouse v. Shubert, 121 P.2d 74, 48 Cal.App.2d 685.

65 C.J. p. 440 note 59.

16. Pa.—Warren v. Steer, 5 A. 4, 112 Pa. 631.

17. Ala.—Thornton v. Rodgers, 38 So.2d 479, 251 Ala. 553.

18. Ill.—Kelly v. Kelly, 18 N.E. 785, 126 Ill. 550.

65 C.J. p. 439 note 52.

19. Minn.—Georgopolis v. George, 54 N.W.2d 137, 237 Minn. 176.

65 C.J. p. 440 note 53.

20. S.C.—Legendre v. South Carolina Tax Commission, 56 S.E.2d 336, 215 S.C. 514.

65 C.J. p. 440 note 54.

21. N.Y.—Jackson v. Keller, 2 Wend. 465.

22. Pa.—Strimpfler v. Roberts, 18 Pa. 283, 57 Am.D. 606.

the title was put in the grantee for the purpose of protecting the property from the creditors of the person who furnished the purchase money.<sup>23</sup>

*Surrounding circumstances.* The facts and circumstances,<sup>24</sup> either preceding the transaction or contemporaneous therewith,<sup>25</sup> or so nearly contemporaneous as to form a part of the *res gestae*,<sup>26</sup> or which, although subsequent, may throw light on the situation when the title passed,<sup>27</sup> may be shown to prove or disprove a resulting trust.

## § 134. — Weight and Sufficiency in General

In a great variety of particular cases, the evidence has been held sufficient or insufficient to establish a resulting trust.

In accordance with the rules as to the degree of proof required, as discussed *infra* § 137, in a great variety of particular cases, the evidence has been held sufficient to establish a resulting trust,<sup>28</sup> or has been held insufficient to establish such a trust.<sup>29</sup>

23. N.J.—Cutler v. Tuttle, 19 N.J. Eq. 549—Baldwin v. Campfield, 8 N.J. Eq. 891.

24. Conn.—Dickinson v. Dickinson, 40 A.2d 184, 131 Conn. 392. Fla.—Elvina v. Seestadt, 4 So.2d 532, 148 Fla. 408.

Ga.—Guffin v. Kelly, 14 S.E.2d 50, 191 Ga. 880.

Mont.—Bell Holt McCall Co. v. Caplice, 175 P.2d 416, 119 Mont. 463. Okl.—Epps v. Pearman, 248 P.2d 590, 207 Okl. 177.

Tex.—Miller v. Donald, Civ.App., 235 S.W.2d 201, error refused no reversible error—Nichols v. Nichols, Civ.App., 170 S.W.2d 558.

65 C.J. p. 439 note 42.

25. Tex.—Davis v. Pearce, Civ.App., 205 S.W.2d 653.

65 C.J. p. 439 note 43.

26. N.J.—Hell v. Bell, 61 A.2d 735, 1 N.J. Super. 362.

65 C.J. p. 439 note 44.

27. Cal.—Treager v. Friedman, 179 P.2d 367, 79 Cal.App.2d 151.

Ga.—Stevens v. Stevens, 49 S.E.2d 895, 204 Ga. 340.

Tex.—Nichols v. Nichols, Civ.App., 170 S.W.2d 558.

65 C.J. p. 439 note 45.

28. U.S.—Reed v. Kellerman, D.C. Pa., 40 F.Supp. 46, motion dismissed 2 F.R.D. 195.

Ark.—Crain v. Keenan, 236 S.W.2d 731, 218 Ark. 375—Lisko v. Hicks, 114 S.W.2d 9, 195 Ark. 705.

Cal.—Frazure v. Fitzpatrick, 136 P.2d 566, 21 Cal.2d 851—Watson v. Poore, 115 P.2d 478, 18 Cal.2d 302—Givens v. Johnson, 166 P.2d 67, 73 Cal.App.2d 139.

Del.—Bodley v. Jones, 59 A.2d 463, 30 Del.Ch. 480.

Fla.—Betha v. Langford, 45 So.2d 496—Williams v. Bullington, 32 So.2d 273, 159 Fla. 618—Person v. Bill, 189 So. 679, 135 Fla. 101—Crouch v. Poole, 182 So. 844, 133 Fla. 489.

Ga.—Hall v. Turner, 32 S.E.2d 829, 198 Ga. 763.

Ill.—Johnson v. Johnson, 115 N.E.2d 617, 1 Ill.2d 319—Evangeloff v. Evangeloff, 85 N.E.2d 709, 403 Ill. 118—Kane v. Johnson, 73 N.E.2d 321, 397 Ill. 112—Merschatt v. Merschatt, 117 N.E.2d 868, 1 Ill.App.2d 429—Bell v. Morris, 76 N.E.2d 820, 333 Ill.App. 221.

Ind.—Hadley v. Kays, 98 N.E.2d 237, 121 Ind.App. 112.

Ky.—Bank of Clarkson v. Meredith, 192 S.W.2d 967, 301 Ky. 671.

Mass.—Gowoll v. Twitchell, 28 N.E.2d 531, 306 Mass. 482.

Miss.—Campbell v. Millsaps, 12 So.2d 526.

Mo.—James v. James, 248 S.W.2d 623—Warford v. Smoot, 237 S.W.2d 184, 361 Mo. 879—Welborn v. Rigdon, 231 S.W.2d 127.

Mont.—Stauffer v. Great Falls Public Service Co., 43 P.2d 647, 99 Mont. 324.

Neb.—Reetz v. Olson, 20 N.W.2d 687, 146 Neb. 621.

N.H.—Shelley v. Landry, 79 A.2d 626, 97 N.H. 27.

N.Y.—Sands v. Sands, 118 N.Y.S.2d 630.

N.C.—Wilson v. Williams, 2 S.E.2d 19, 215 N.C. 407.

N.D.—Bodding v. Herman, 35 N.W.2d 561, 76 N.D. 324.

Okl.—Kemp v. Strnad, 268 P.2d 255—Young v. Knappenberger, 240 P.2d 1114, 206 Okl. 48—Johnson v. Johnson, 205 P.2d 314, 201 Okl. 268.

Wright v. Wright, 185 P.2d 915, 199 Okl. 291—Scott v. Nelson, 179 P.2d 116, 198 Okl. 392—Hiekev v. Ross, 172 P.2d 771, 197 Okl. 543.

Dorrance v. Dorrance, 163 P.2d 973, 196 Okl. 195—Gill v. First Nat. Bank & Trust Co. of Oklahoma City, 159 P.2d 717, 195 Okl. 607.

Morton v. Williams, 123 P.2d 960, 190 Okl. 374—Maynard v. Central Nat. Bank of Okmulgee, 91 P.2d 653, 185 Okl. 272—Trimble v. Holes, 36 P.2d 861, 169 Okl. 228.

Or.—Cary v. Cary, 80 P.2d 886, 159 Or. 578, 121 A.L.R. 1371.

Pa.—Drayer v. Drayer, Com.Pl., 60 Dauph. Co. 160.

R.I.—Di Lillero v. Pacitto, 46 A.2d 39, 71 R.I. 361.

S.C.—Hutto v. Hutto, 196 S.E. 369, 187 S.C. 86.

Tex.—Miller v. Donald, 225 S.W.2d 201, error refused no reversible error—Krauss v. Cornell, Civ.App., 116 S.W.2d 882, error dismissed.

65 C.J. p. 440 note 63 [a].

Agreement or understanding

Evidence has been held sufficient to establish a resulting trust where the purchaser takes title to land

with the understanding that he will hold title for the benefit of the grantee or another—Ludden v. Butters, 163 N.W. 227, 181 Iowa 94—65 C.J. p. 442 note 85.

### Public land

Evidence held sufficient to establish a resulting trust where public land is purchased or entered under a warrant belonging to another—Lambert v. Stees, 49 N.W. 662, 47 Minn. 141.

### Title retained by grantor

Evidence held sufficient to establish resulting trust where the purchase price of land is paid by the purchaser and the legal title is retained by the grantor.—In re Moore's Estate, 232 N.W. 729, 211 Iowa 804.

29. U.S.—Carr v. Yokohama Specie Bank, Limited, of San Francisco, C.A. Cal., 200 F.2d 251—Scott v. Smith, C.C.A. Tex., 84 F.2d 489.

Ala.—Martin v. Carroll, 66 So.2d 69, 259 Ala. 197—O'Bannon v. O'Bannon, 58 So.2d 779, 257 Ala. 246—Banks v. Banks, 44 So.2d 10, 253 Ala. 252—Shotts v. Carpenter, 168 So. 884, 232 Ala. 487.

Ark.—Neill v. Neill, 257 S.W.2d 26, 221 Ark. 893—McClure v. McClure, 247 S.W.2d 466, 220 Ark. 312—Newberry v. Newberry, 237 S.W.2d 477, 218 Ark. 548—Randolph v. Randolph, 234 S.W.2d 809, 216 Ark. 193.

Simpson v. Thayer, 217 S.W.2d 354, 214 Ark. 566—Ripley v. Kelly, 183 S.W.2d 793, 207 Ark. 1011.

Cal.—Anderson v. Stansbury, 242 P.2d 305, 38 Cal.2d 707—Altramano v. Swan, 128 P.2d 353, 20 Cal.2d 622, followed in Altramano v. Rodeo Del Legionario, 128 P.2d 357, 20 Cal.2d 898—Sully v. Kern Drilling Corp., App., 272 P.2d 549—Sohn v. Kittel, 226 P.2d 620, 101 Cal.App.2d 825—In re Clausenius' Estate, 216 P.2d 485, 96 Cal.App.2d 600—Elhott v. Wood, 212 P.2d 906, 95 Cal. App.2d 314—Sanders v. Magee, 176 P.2d 774, 77 Cal.App.2d 838—Redsted v. Weisa, 167 P.2d 735, 73 Cal. App.2d 859—Kopner v. Freed, 135 P.2d 634, 58 Cal.App.2d 114—Knouse v. Shubert, 121 P.2d 74, 48 Cal. App.2d 685—Cooper v. McDonald, 89 P.2d 412, 32 Cal. App.2d 114.

Colo.—Woodruff v. Clarke, 262 P.2d 737, 128 Colo. 387.

*Parol and written evidence.* As discussed supra § 101, statutes of frauds and statutes prohibiting parol trusts do not apply as to resulting trusts, so that, as discussed supra § 133, parol evidence is

admissible to prove a resulting trust. While parol evidence is to be received with caution, closely scrutinized, and carefully weighed,<sup>30</sup> a resulting trust may be established by parol evidence,<sup>31</sup> or by

Fla.—Pringle v. Pringle, 57 So.2d 429.  
—Domage v. Simpson, 26 So.2d 340, 157 Fla. 468.  
Idaho—Dunn v. Dunn, 83 P.2d 471, 59 Idaho 473.  
Ill.—Kohlhaas v. Smith, 97 N.E.2d 774, 408 Ill. 535.—Tuntland v. Haugen, 78 N.E.2d 308, 399 Ill. 595.  
—Hille v. Barnes, 77 N.E.2d 809, 399 Ill. 262.—Guffey v. Washburn, 46 N.E.2d 971, 382 Ill. 376.—In re Oberhelde's Estate, 30 N.E.2d 757, 307 Ill. App. 544.  
Ind.—Harc v. Chrisman, 101 N.E.2d 268, 230 Ind. 333.  
Iowa.—Jill v. Havens, 48 N.W.2d 870, 242 Iowa 920.—Shaw v. Addison, 28 N.W.2d 816, 239 Iowa 377.  
—Crawford v. Couch, 15 N.W.2d 633, 234 Iowa 1246.  
Kan.—Dinsmoor v. Hill, 187 P.2d 338, 164 Kan. 12.  
Ky.—Hurgraf v. Reynolds, 206 S.W.2d 206, 306 Ky. 104.  
Md.—Fasman v. Pottashnick, 51 A.2d 664, 188 Md. 105.—Mountford v. Mountford, 29 A.2d 258, 181 Md. 212.  
—Diven v. Stelling, 165 A. 485, 164 Md. 526, appeal dismissed and certiorari denied 54 S.Ct. 50, 290 U.S. 587, 78 L.Ed. 518.  
Mass.—Keith v. Keith, 73 N.E.2d 825, 321 Mass. 460.  
Mich.—Potter v. Lindsay, 60 N.W.2d 133, 327 Mich. 404.—Howe v. Wehert, 50 N.W.2d 725, 332 Mich. 84.  
Miss.—Williams v. Henze, 62 So.2d 212, 216 Miss. 195.  
Mo.—James v. James, 248 S.W.2d 623.  
—Milgram v. Jiffy Equipment Co., 247 S.W.2d 668, 362 Mo. 1194, 30 A.L.R.2d 925.—Darrow v. Darrow, 245 S.W.2d 834.—Middletown v. Reece, 236 S.W.2d 335.—Carr v. Carroll, 178 S.W.2d 435.—Cartall v. St. Louis Union Trust Co., 153 S.W.2d 370, 348 Mo. 372.—Woodard v. Cohorn, 137 S.W.2d 497, 345 Mo. 967.—Parker v. Blakeley, 93 S.W.2d 981, 338 Mo. 1189.  
Neb.—Jenkins v. Jenkins, 36 N.W.2d 637, 151 Neb. 113.—Holbein v. Holbein, 30 N.W.2d 899, 149 Neb. 281.  
Nev.—Hannig v. Conger, 19 P.2d 769, 54 Nev. 388.  
N.J.—Culley v. Carr, 45 A.2d 860, 137 N.J.Eq. 516.—Leatti v. Adornetto, 39 A.2d 181, 135 N.J.Eq. 462.  
N.M.—Koprian v. Mennecke, 204 P.2d 440, 53 N.M. 176.  
N.Y.—Bendean v. Moody, 5 N.Y.S.2d 94, 254 App.Div. 130.—Alonzo v. Alonzo, 62 N.Y.S.2d 99, affirmed 62 N.Y.S.2d 818, 270 App.Div. 977, appeal denied 63 N.Y.S.2d 844, 270 App.Div. 1076.  
N.C.—Sheppard v. Sykes, 44 S.E.2d 54, 227 N.C. 606.  
Ohio.—Alexander v. Greenfield, 109

N.E.2d 549, 94 Ohio App. 471.—Kuck v. Sommer, App., 100 N.E.2d 68.—Lipps v. Lipps, App., 87 N.E.2d 823.—Steiner v. Feycz, 50 N.E.2d 617, 72 Ohio App. 18.  
Okla.—Plumer v. Pearce, 257 P.2d 813, 208 Okl. 526.—Gaines v. Gaines, 251 P.2d 1044, 207 Okl. 619.—Hall v. Pearson, 219 P.2d 617, 203 Okl. 221.—McCrory v. Evans, 138 P.2d 823, 192 Okl. 619.—Owens v. Hill, 122 P.2d 801, 190 Okl. 242.—Fibkowski v. Fibkowski, 121 P.2d 304, 190 Okl. 152.—Winter v. Klein, 96 P.2d 83, 186 Okl. 74.—Maynard v. Taylor, 91 P.2d 649, 185 Okl. 268.—Hazzlett v. Kvarse, 42 P.2d 124, 171 Okl. 582.  
Or.—Bowns v. Bowns, 200 P.2d 586, 184 Or. 603.—Johnston v. McKean, 162 P.2d 820, 177 Or. 556.  
Pa.—Barrett v. Heimer, 80 A.2d 729, 367 Pa. 510.—Arndt v. Matz, 73 A.2d 392, 365 Pa. 41.—Gonzalez v. Simes, 72 A.2d 91, 364 Pa. 215.—Gray v. Leibert, 53 A.2d 132, 357 Pa. 130.—In re Christie's Estate, 71 Pa. Dist. & Co. 209.—Gross v. Gross, Com.Pl., 60 Dauph. Co. 460.—Skrym v. Noss, Com.Pl., 36 Luz. Leg. Reg. 257.  
R.I.—Chase v. Chase, 81 A.2d 686, 78 R.I. 278.—Larocque v. Larocque, 58 A.2d 633, 74 R.I. 72.  
Tenn.—Caprum v. Bransford Realty Co., 4 Tenn. App. 237.  
Tex.—Cluck v. Sheets, 171 S.W.2d 860, 141 Tex. 219.  
Wash.—Griehuhin v. Griehuhin, 272 P.2d 141.—Makinen v. George, 142 P.2d 910, 19 Wash.2d 340.—Davies v. Metropolitan Life Ins. Co., 88 P.2d 829, 198 Wash. 482.—Zioncheck v. Nadeau, 81 P.2d 811, 196 Wash. 33.  
W.Va.—Honaker v. City of Princeton, 25 S.E.2d 772, 125 W.Va. 672.—Honaker v. City of Princeton, 25 S.E.2d 772, 125 W.Va. 672.  
65 C.J. p. 440 note 63 [h].

**Deposit in wife's name of funds belonging to her husband**

Mo.—Wavrin v. Wavrin, 220 S.W. 931.

**Failure of express trust**

Evidence held insufficient to establish a resulting trust because of failure of execution of an express trust.—Taylor v. Columbian University, 35 App.D.C. 68, affirmed 33 S.Ct. 73, 225 U.S. 126, 57 L.Ed. 152.—65 C.J. p. 442 note 86.

30. Ark.—Simpson v. Thayer, 217 S.W.2d 354, 214 Ark. 566.—Ripley v. Kelly, 183 S.W.2d 793, 207 Ark. 1011.—McKindley v. Humphrey, 161 S.W.2d 962, 204 Ark. 333.  
Md.—Fasman v. Pottashnick, 51 A.2d 664, 188 Md. 105.—Mountford v. Mountford, 29 A.2d 258, 181 Md. 212.

Or.—Bowns v. Bowns, 200 P.2d 586, 184 Or. 603.  
Pa.—Skrym v. Noss, Com.Pl., 36 Luz. Leg. Reg. 257.  
65 C.J. p. 452 note 48.

**Where alleged trustee is dead**

Iowa.—Sinclair v. Allender, 26 N.W. 2d 320, 238 Iowa 212.

31. Ark.—Frazier v. Hanes, 249 S.W.2d 842, 220 Ark. 765.—Newberry v. Newberry, 237 S.W.2d 477, 218 Ark. 548.—Cole v. Williams, 220 S.W.2d 821, 215 Ark. 366.—Simpson v. Thayer, 217 S.W.2d 354, 214 Ark. 566.—Mortensen v. Ballard, 188 S.W.2d 749, 209 Ark. 1.—Ripley v. Kelly, 183 S.W.2d 793, 207 Ark. 1011.—Harbour v. Harbour, 181 S.W.2d 805, 207 Ark. 551.—McKindley v. Humphrey, 161 S.W.2d 962, 204 Ark. 333.—Hunt v. Hunt, 149 S.W.2d 930, 202 Ark. 130.—Nelson v. Wood, 137 S.W.2d 929, 199 Ark. 1019.  
Conn.—Samaco v. Davis, 64 A.2d 682, 135 Conn. 377.  
Fla.—Elvins v. Seastedt, 4 So.2d 532, 148 Fla. 408.—Pierson v. Hill, 189 So. 679, 138 Fla. 104.—Crouch v. Poole, 182 So. 844, 133 Fla. 449.—Poster v. Thornton, 179 So. 882, 131 Fla. 277.—Pisher v. Grady, 178 So. 852, 131 Fla. 1.  
Ga.—Clark v. Griffin, 61 S.E.2d 128, 207 Ga. 255.—Hancock v. Hancock, 54 S.E.2d 385, 205 Ga. 684.—Bryant v. Green, 169 S.E. 123, 176 Ga. 874.  
Ill.—Murray v. Behrendt, 76 N.E.2d 431, 399 Ill. 22.—Wiley v. Dunn, 192 N.E. 661, 358 Ill. 97.  
Mo.—Mays v. Jackson, 145 S.W.2d 392, 346 Mo. 1224.—Woodard v. Cohorn, 137 S.W.2d 497, 345 Mo. 967.  
Mont.—Hell Holt McCall Co. v. Caplice, 175 P.2d 416, 119 Mont. 463.—Stauffer v. Great Falls Public Service Co., 43 P.2d 647, 99 Mont. 324.  
Neb.—Windle v. Kelly, 280 N.W. 445, 135 Neb. 143.  
N.M.—Browne v. Sieg, 234 P.2d 1045, 65 N.M. 447.  
N.Y.—Le Fevre v. Reliable Paint Supply Co., 273 N.Y.S. 903, 162 Misc. 694.  
N.C.—Crech v. Creech, 24 S.E.2d 642, 222 N.C. 656.—Jackson v. Thompson, 200 S.E. 16, 214 N.C. 539.  
N.D.—Bodding v. Herman, 35 N.W.2d 561, 76 N.D. 324.—McDonald v. Miller, 16 N.W.2d 270, 73 N.D. 474, 156 A.L.R. 1328.

Okla.—Plumer v. Pearce, 257 P.2d 813, 208 Okl. 526.—Staton v. Moody, 256 P.2d 409, 208 Okl. 372.—Gaines v. Gaines, 251 P.2d 1044, 207 Okl. 619.—Epps v. Pearman, 248 P.2d 590, 207 Okl. 177.—Younge v. Knappenberger, 240 P.2d 1114, 206 Okl. 48.—

evidence in writing,<sup>32</sup> or by proof partly in parol and partly in writing.<sup>33</sup> A presumption of a resulting trust may be rebutted by parol evidence.<sup>34</sup>

### § 135. — Payment or Ownership of Purchase Money

There have been numerous adjudications as to the

sufficiency of the evidence in particular cases to establish purchase-money resulting trusts.

There have been numerous adjudications as to the sufficiency of the evidence, in particular cases, to establish a resulting trust from the transfer of property to one person, and the payment of the purchase money therefor by or for another,<sup>35</sup> such as from part payment by one joint purchaser and

Nicklas v. Crowell, 238 P.2d 347, 205 Okl. 432—Johnson v. Johnson, 205 P.2d 314, 201 Okl. 268—Scott v. Nelson, 179 P.2d 116, 198 Okl. 392—Ward v. Ward, 172 P.2d 978, 197 Okl. 551—McCroary v. Evans, 138 P.2d 823, 192 Okl. 649—Filukowski v. Filukowski, 121 P.2d 364, 190 Okl. 152—Birdwell v. Estes, 116 P.2d 969, 189 Okl. 379—Winter v. Klein, 96 P.2d 83, 186 Okl. 74—Gaines Bros. Co. v. Gaines, 56 P.2d 869, 176 Okl. 576—First Nat. Bank v. Sanders, 35 P.2d 889, 169 Okl. 192

S.C.—Legendre v. South Carolina Tax Commission, 56 S.E.2d 336, 215 S.C. 514.

Tenn.—Justice v. Henley, 181 S.W.2d 632, 27 Tenn.App. 405—Caprum v. Bransford Realty Co., 4 Tenn.App. 237—Savage v. Savage, 4 Tenn.App. 277.

Tex.—Dickens v. Dickens, Civ.App., 241 S.W.2d 658, error refused no reversible error.

Wash.—Grichuhin v. Grichuhin, 272 P.2d 141—Kausky v. Korten, 179 P.2d 960, 27 Wash.2d 721—Mouser v. O'Sullivan, 156 P.2d 655, 22 Wash.2d 543—In re Cunningham's Estate, 143 P.2d 852, 19 Wash.2d 589—Zioncheck v. Nadeau, 81 P.2d 811, 196 Wash. 33—Dines v. Highland, 40 P.2d 140, 180 Wash. 455.

32. Tex.—Mace v. Young, Civ.App., 231 S.W.2d 722, error refused. 65 C.J. p 438 note 26.

33. Kan.—Piper v. Piper, 95 P. 1051, 78 Kan. 82.

34. Cal.—Knouse v. Shubert, 121 P.2d 74, 48 Cal.App.2d 685  
Ga.—Guffin v. Kelly, 14 S.E.2d 50, 191 Ga. 880.

Pa.—Gulharth v. Moore, Com.Pl. 29 Del.Co. 68.

35. Ala.—Gandy v. Hagler, 16 So.2d 805, 245 Ala. 167.

Md.—Tiemann v. Welsh, 59 A.2d 628, 191 Md. 1.

65 C.J. p 442 note 90.

**Evidence held sufficient**  
U.S.—Hobart Estate Co. v. Douglass, C.C.A.Nev., 94 F.2d 954.

Ala.—Albee v. Harbin, 80 So.2d 459, 249 Ala. 201—Merchants Nat. Bank of Mobile v. Bertolia, 18 So.2d 378, 245 Ala. 662—Gandy v. Hagler, 16 So.2d 805, 245 Ala. 167.

Ark.—Hunt v. Hunt, 149 S.W.2d 930, 202 Ark. 180.

Cal.—Emden v. Verdt, 269 P.2d 47, 124 Cal.App. 555—Von Zastrow v. Schliffbauer, 250 P.2d 624, 114 Cal.App.2d 500—Stone v. Lohsen, 247 P.2d 357, 112 Cal.App.2d 750—Gammill v. Nunes, 231 P.2d 86, 104 Cal.App.2d 185—Rowland v. Clark, 206 P.2d 59, 91 Cal.App.2d 880—Finnegan v. Hernandez, 168 P.2d 32, 74 Cal.App.2d 51—Koyoko Nishi v. Downing, 67 P.2d 1057, 21 Cal.App.2d 1.

Ga.—Everette v. Mahaffey, 69 S.E.2d 769, 208 Ga. 775—Williams v. Williams, 57 S.E.2d 337, 206 Ga. 395.

Ill.—Wright v. Wright, 118 N.E.2d 280, 2 Ill.2d 246—Bowman v. Petersen, 102 N.E.2d 787, 410 Ill. 519—Zimmerman v. Kennedy, 90 N.E.2d 756, 405 Ill. 306—Fuller v. Cook, 89 N.E.2d 794, 405 Ill. 322.

Md.—Tiemann v. Welsh, 59 A.2d 628, 191 Md. 1—Copper v. Lamberton, 197 A. 576, 174 Md. 24.

Mass.—Collins v. Curtin, 89 N.E.2d 211, 325 Mass. 123.

Mo.—Jankowski v. Delfert, 201 S.W.2d 331, 356 Mo. 184—Mays v. Jackson, 145 S.W.2d 382, 316 Mo. 1224.

N.H.—Hatch v. Rideout, 65 A.2d 702, 95 N.H. 431—Wiggin v. Peacock, 63 A.2d 245, 95 N.H. 329.

N.J.—Rasmussen v. Nielsen, 61 A.2d 411, 142 N.J.Eq. 657—Killeen v. Killeen, 54 A.2d 827, 140 N.J.Eq. 387, cause remanded 57 A.2d 23, 141 N.J.Eq. 312—Gordon v. Griffith, 168 A. 57, 113 N.J.Eq. 554.

N.C.—Wilmington Furniture Co. v. Cole, 178 S.E. 579, 207 N.C. 840, 847.

Pa.—Singer v. Singer, 49 Pa.Dist. & Co. 392, 54 Dauph.Co. 353—Mendonhall v. Bruna, Com.Pl., 93 Pittsb.Lex. 3.

Tex.—Brown v. Warfield, Civ.App., 234 S.W.2d 264, error refused.

Wash.—Arnehan v. Arnehan, 264 P.2d 256, 43 Wash.2d 787.

65 C.J. p 442 note 90 [a].

#### Evidence held insufficient

Ala.—Lauderdale v. Peace Baptist Church of Birmingham, 19 So.2d 538, 246 Ala. 178.

Ark.—Frazier v. Hanes, 249 S.W.2d 842, 220 Ark. 765—Sandofer v. Sandofer, 245 S.W.2d 568, 219 Ark. 943—Castelberry v. Castleberry, 155 S.W.2d 44, 202 Ark. 1039.

Cal.—Fish v. Security-First Nat. Bank of Los Angeles, 189 P.2d 10, 31 Cal.2d 378—Baskett v. Crook,

195 P.2d 39, 86 Cal.App.2d 355—Rench v. McMullen, 187 P.2d 111, 82 Cal.App.2d 872—Westwood Temple v. Emanuel Center, 221 P.2d 146, 98 Cal.App.2d 755—Fontes v. Menke, 89 P.2d 669, 32 Cal.App.2d 303.

Ill.—McCabe v. Hebner, 102 N.E.2d 794, 410 Ill. 557—Jones v. Koepke, 55 N.E.2d 154, 387 Ill. 97—Heinerman v. Hermann, 52 N.E.2d 263, 385 Ill. 191—Curiehl v. Curiehl, 48 N.E.2d 360, 383 Ill. 102—Guffey v. Washburn, 46 N.E.2d 971, 383 Ill. 376—Wiley v. Dunn, 192 N.E. 661, 358 Ill. 97.

Ky.—Glass v. Gutman, 268 S.W.2d 410, 115 Ky. 1.

Mass.—Mitchell v. Carrell, 73 N.E.2d 832, 321 Mass. 453.

Minn.—Pearson v. Haasle, 73 N.W. 677, 200 Minn. 250.

Mo.—Biondo v. Biondo, 179 S.W.2d 734—Dee v. Sutter, App., 222 S.W.2d 541.

Mont.—McLaughlin v. Corcoran, 69 P.2d 597, 104 Mont. 590.

Neb.—Peterson v. Massey, 53 N.W.2d 912, 155 Neb. 829.

N.J.—Galbierczyk v. Galbierczyk, 76 A.2d 905, 10 N.J.Super. 206—O'Neal v. O'Neal, 74 A.2d 614, 9 N.J.Super. 36—Cousens v. Cousens, 41 A.2d 125, 136 N.J.Eq. 224—Conkling v. Conkling, 8 A.2d 298, 126 N.J.Eq. 142—In re Hudspeth's Estate, 172 A. 200, 118 N.J.Eq. 20.

N.M.—Brown v. Likens, 22 P.2d 848, 37 N.M. 312.

N.C.—Wilson v. Williams, 2 S.E.2d 19, 215 N.C. 407.

Okl.—Ward v. Ward, 172 P.2d 978, 197 Okl. 551—Gaines Bros. Co. v. Gaines, 56 P.2d 869, 176 Okl. 576.

Pa.—Wosche v. Kraming, 46 A.2d 220, 253 Pa. 481—Scott v. Keir-Lyett, 145 A. 436, 295 Pa. 398—Skrym v. Noss, Com.Pl., 36 Luz.Leg.Rep. 257.

R.I.—Romeo v. Pate, 60 A.2d 162, 74 R.I. 245.

Tex.—Loeb v. Wilhite, 224 S.W.2d 343, refused no reversible error—Papoutsis v. Trevino, Civ.App., 167 S.W.2d 777, error dismissed.

Wash.—Feise v. Mueller, 249 P.2d 376, 41 Wash.2d 409—Mouser v. O'Sullivan, 156 P.2d 655, 22 Wash.2d 543—In re Cunningham's Estate, 143 P.2d 852, 19 Wash.2d 589—Castanier v. Mottet, 128 P.2d 974, 14 Wash.2d 615—Jacobs v. Lawson, 37 P.2d 1115, 179 Wash. 695.

65 C.J. p 442 note 90 [b].



transfer of title to the other,<sup>36</sup> from payment of the purchase price as a loan or advance for another and transfer of title to the lender as security,<sup>37</sup> or from the payment of fiduciary funds for a transfer made either to the fiduciary or to a third person.<sup>38</sup> The presumption of a resulting trust arising from payment of the purchase price for the transfer of property to another is evidence to be weighed with all of the other facts in the case in determining the existence of a trust.<sup>39</sup> In order to be sufficient to establish a resulting trust, the proof must be of facts

antecedent to, or contemporaneous with, the conveyance and not of facts following that time.<sup>40</sup>

There have also been adjudications as to the sufficiency of the evidence, in particular cases, to establish a resulting trust where the payment of the purchase money was made by a husband and the title was taken in the name of his wife,<sup>41</sup> where payment of the purchase price was made with a wife's property and title was taken in her husband's name,<sup>42</sup> where a parent paid the purchase price for

### 36. Evidence held sufficient

Ark.—Stayton v. Stayton, 132 S.W.2d 830, 198 Ark. 1178—Chase v. Andrus, 91 S.W.2d 1035, 192 Ark. 418 Cal.—Mellickian v. Halstead, 263 P.2d 652, 121 Cal.App.2d 469—Padilla v. Padilla, 100 P.2d 1093, 38 Cal.App.2d 319.

Fla.—Thompson v. Field, 54 So.2d 520—Williams v. Burlington, 32 So.2d 273, 159 Fla. 618.

Ill.—Dean v. Dean, 82 N.E.2d 342, 401 Ill. 406.

Ind.—Carpenter v. Carpenter, 27 N.E.2d 889, 108 Ind.App. 221.

Ky.—Howser v. Johnson, 179 S.W.2d 897, 297 Ky. 213.

Md.—Sines v. Shipes, 63 A.2d 748, 192 Md. 139.

Mo.—Dunlap v. Dunlap, 218 S.W.2d 108.

Okla.—Brinkley v. Patton, 149 P.2d 261, 194 Okl. 244.

Pa.—Orth v. Wood, 47 A.2d 140, 354 Pa. 121.

Tex.—Dickens v. Dickens, 241 S.W.2d 658, error refused no reversible error—Grasty v. Wood, Civ.App., 230 S.W.2d 568, error refused no reversible error—Hamill & Smith v. Parr, Civ.App., 173 S.W.2d 725—Tom v. First Nat. Bank, Civ.App., 104 S.W.2d 130, error dismissed.

65 C.J. p. 443 note 91 [a].

### Evidence held insufficient

Cal.—Wyoming-Montana Development Co. v. Wells Fargo Bank & Union Trust Co., 59 P.2d 185, 15 Cal.App.2d 133.

Mo.—Shelby v. Shelby, 209 S.W.2d 896, 357 Mo. 557.

Pa.—Hale v. Sterling, 85 A.2d 849, 369 Pa. 336.

65 C.J. p. 443 note 91 [a].

### 37. Evidence held sufficient

Ark.—Rushton v. Isom, 164 S.W.2d 997, 204 Ark. 804.

Cal.—Viner v. Untrecht, 158 P.2d 3, 26 Cal.2d 261—Wilcox v. Salomone, 258 P.2d 845, 118 Cal.App.2d 704—Helm v. Zaches, 211 P.2d 329, 94 Cal.App.2d 625.

Mont.—Hankins v. Waitt, 189 P.2d 666, 120 Mont. 596.

S.D.—Cox v. Bowman, 21 N.W.2d 277, 71 S.D. 72—Scott v. Liechti, 15 N.W.2d 1, 70 S.D. 89.

Wash.—Lalley v. Lalley, 260 P.2d 905.

43 Wash.2d 192  
65 C.J. p. 443 note 92 [a].

### Evidence held insufficient

Mo.—Purvis v. Hardin, 122 S.W.2d 936, 343 Mo. 652.

Mont.—Hankins v. Waitt, 189 P.2d 666, 120 Mont. 596.

Wash.—Tacoma Hollywood Co. v. Robbins, 24 P.2d 441, 174 Wash. 101.

65 C.J. p. 443 note 93 [b].

### 38. Evidence held sufficient

Cal.—Stromerson v. Averill, 133 P.2d 617, reheard 141 P.2d 732, 22 Cal.2d 868.

N.C.—Cassada v. Cassada, 55 S.E.2d 77, 230 N.C. 607.

Tex.—Berry v. Rhine, Civ.App., 205 S.W.2d 632.

65 C.J. p. 443 note 93 [a].

### Evidence held insufficient

Cal.—Beckwith v. Burge, 140 P.2d 41, 59 Cal.App.2d 719.

65 C.J. p. 443 note 93 [b].

39. Cal.—Emden v. Verdi, 269 P.2d 47, 124 Cal.App.2d 555.

40. N.J.—Bankers' Trust Co. v. Bank of Rockville Center Trust Co., 168 A.2d 333, 114 N.J.Eq. 391, 89 A.L.R. 697.

65 C.J. p. 443 note 94.

41. Ill.—Abraham v. Abraham, 86 N.E.2d 121, 107 Ill. 312—Nickeloff v. Nickeloff, 51 N.E.2d 565, 384 Ill. 377.

65 C.J. p. 443 note 96.

### Evidence held sufficient

Ala.—Johnson v. Johnson, 67 So.2d 841, 259 Ala. 550.

Cal.—Feig v. Bank of America Nat. Trust & Sav. Ass'n, 54 P.2d 3, 5 Cal.2d 266.

Colo.—Valley State Bank v. Dean, 47 P.2d 921, 97 Colo. 151.

Mo.—Lewis v. Lewis, 189 S.W.2d 557, 354 Mo. 415.

Pa.—Christy v. Christy, 46 A.2d 169, 353 Pa. 476—Katz v. Katz, 163 A.2d 214, 309 Pa. 115.

R.I.—Crisillo v. Crisillo, 74 A.2d 440, 77 R.I. 223, reargument denied 76 A.2d 71, 77 R.I. 223—Comella v. Comella, 27 A.2d 348, 68 R.I. 275.

Vt.—Dunn v. Williams, 181 A. 131, 107 Vt. 447.

65 C.J. p. 443 note 96 [a].

### Evidence held insufficient

U.S.—Rosenberg v. Baum, C.C.A.Kan., 153 F.2d 10.

Ark.—Deal v. Deal, 246 S.W.2d 429.

220 Ark. 134—Umberger v. Westmoreland, 238 S.W.2d 495, 218 Ark. 632—Roller v. Roller, 216 S.W.2d 399, 214 Ark. 382—Parks v. Parks, 182 S.W.2d 470, 207 Ark. 720.

Cal.—Trimble v. Coffman, 251 P.2d 81, 111 Cal.App.2d 618.

Del.—Edelsburger v. Ballance, 50 A.2d 903, 29 Del.Ch. 378.

D.C.—Witt v. Witt, 182 F.2d 250, 86 U.S.App.D.C. 408—Kosters v. Hoover, 98 F.2d 595, 69 App.D.C. 66.

Fla.—Frank v. Eeles, 13 So.2d 216, 152 Fla. 869—Smith v. Smith, 196 So. 409, 143 Fla. 159.

Ga.—Jackson v. Payer, 77 S.E.2d 728, 210 Ga. 58—Williams v. Thomas, 38 S.E.2d 603, 200 Ga. 767.

Ill.—Abraham v. Abraham, 86 N.E.2d 224, 403 Ill. 312—Nickeloff v. Nickeloff, 51 N.E.2d 565, 384 Ill. 377.

Ind.—Kimmick v. Lunn, 29 N.E.2d 207, 217 Ind. 185.

Iowa.—Sinclair v. Allender, 26 N.W.2d 320, 238 Iowa 212.

Md.—Mountford v. Mountford, 29 A.2d 258, 181 Md. 212—Porter v. Porter, 177 A. 460, 168 Md. 287.

Mass.—Berry v. Kyes, 22 N.E.2d 622, 304 Mass. 56.

Mo.—Schwind v. O'Halloran, 112 S.W.2d 55, 346 Mo. 486.

Mont.—Lewis v. Bowman, 121 P.2d 162, 113 Mont. 68.

N.J.—Bell v. Bell, 61 A.2d 735, 1 N.J. Super. 362—Strong v. Strong, 40 A.2d 518, 136 N.J.Eq. 183.

Okla.—Wise v. Terhune, 201 P.2d 286, 201 Okl. 231.

R.I.—Tucker v. Tucker, 20 A.2d 519, 67 R.I. 29—Angell v. Angell, 11 A.2d 922, 64 R.I. 261.

65 C.J. p. 443 note 96 [b].

42. Ky.—Gayheart v. Cox, 205 S.W.2d 154, 305 Ky. 570.

Or.—Fox v. Maurer, 164 P.2d 117, 178 Or. 61.

65 C.J. p. 443 note 4.

### Evidence held sufficient

Ala.—Wilson v. Wilson, 57 So.2d 519, 257 Ala. 135.

Ark.—Harbour v. Harbour, 181 S.W.2d 805, 207 Ark. 551—Eekies v. Whitehead, 119 S.W.2d 550, 196 Ark. 680.

property transferred to a child,<sup>43</sup> or where the payment of the purchase money is made by a child and title is taken in the name of a parent.<sup>44</sup> While evidence that the placing of the title to the property in the wife or child as a gift would have the effect of stripping the husband or father of all his property and leaving him penniless at an advanced age may tend strongly to establish a resulting trust,<sup>45</sup> it is not conclusive.<sup>46</sup> So, the mere possession and improvement of the property, as well as the payment

of taxes by the husband or father, are not conclusive as to his being the beneficial owner.<sup>47</sup>

*Fact of payment of, or ownership of, purchase money.* There have been numerous adjudications as to the weight and sufficiency of the evidence, in particular cases, to establish the payment or ownership of the money or assets with which the property in which the trust is claimed was purchased by the person claiming the benefit of the trust,<sup>48</sup> as wheth-

Cal.—Jones v. Kelley, 262 P.2d 859, 121 Cal.App.2d 136.

Ill.—Mauriceau v. Haugen, 56 N.E.2d 367, 387 Ill. 186.

Kan.—Kull v. Pearl, 76 P.2d 790, 147 Kan. 329.

N.C.—Wolfe v. Smith, 1 S.E.2d 815, 215 N.C. 286.

Okl.—Epps v. Pearman, 248 P.2d 590, 207 Okl. 177—Wilhelm v. Pfanning, 129 P.2d 580, 191 Okl. 321—Guyer v. London, 102 P.2d 875, 187 Okl. 326.

Pa.—Geyer v. Thomas, 72 A.2d 89, 361 Pa. 242.

65 C.J. p. 444 note 4 [a].

#### Evidence held insufficient

Ark.—Wilson v. Wilson, 204 S.W.2d 479, 211 Ark. 1030—Travis v. Neal, 134 S.W.2d 515, 199 Ark. 236.

Iowa.—Keshlear v. Banner, 280 N.W. 631, 235 Iowa 471.

Ky.—Gayheart v. Cox, 205 S.W.2d 153, 305 Ky. 570—Keaton v. Keaton, 171 S.W.2d 260, 294 Ky. 240—Richardson v. Webb, 135 S.W.2d 861, 281 Ky. 201—Union Bank & Trust Co. v. Rice, 131 S.W.2d 493, 279 Ky. 629.

Miss.—Ballard v. Ballard, 24 So.2d 335, 199 Miss. 316—Dogan v. Cooley, 185 So. 782, 184 Miss. 106.

Mo.—Tchenor v. Bowman, 123 S.W.2d 324—Milligan v. Ring, 108 S.W.2d 108, 341 Mo. 648.

Neb.—Peterson v. Massey, 53 N.W.2d 912, 155 Neb. 829—Brodskey v. Brodskey, 272 N.W. 919, 132 Neb. 659.

N.Y.—Bendann v. Moody, 5 N.Y.S.2d 94, 254 App.Div. 130.

Okl.—Birdwell v. Estes, 116 P.2d 969, 189 Okl. 379.

Or.—Evans v. Trude, 240 P.2d 940, 193 Or. 648.

RI.—Robinson v. Robinson, 19 A.2d 1, 66 R.I. 321.

Tenn.—Shoun v. Gentry, 2 Tenn.App. 55.

Tex.—Landon v. Brown, Civ.App., 266 S.W.2d 404, refused no reversible error.

Va.—Rogers v. Rogers, 196 S.E. 586, 170 Va. 417.

Wyo.—Nussbacher v. Manderfeld, 186 P.2d 548, 64 Wyo. 55.

65 C.J. p. 444 note 4 [b].

43. Evidence held sufficient

Ark.—Ellis v. Shuffield, 152 S.W.2d 535, 202 Ark. 723.

Cal.—McCosker v. McCosker, 265 P.2d 21, 122 Cal.App.2d 408—Langer v. Langer, 194 P.2d 81, 85 Cal.App.2d 806.

Ill.—Wright v. Wright, 118 N.E.2d 280, 2 Ill.2d 246—Evangeloff v. Evangeloff, 85 N.E.2d 709, 403 Ill. 118—Cook v. Blazis, 7 N.E.2d 291, 365 Ill. 625.

Mo.—Rebel v. Lunsford, 216 S.W.2d 68.

N.J.—D'Agostino v. Ordille, 41 A.2d 133, 136 N.J.Eq. 222—Smith v. Smith, 23 A.2d 903, 131 N.J. 73.

N.M.—Browne v. Sieg, 234 P.2d 1045, 55 N.M. 447.

Okl.—Necklas v. Crowell, 238 P.2d 247, 205 Okl. 432—Courts v. Aldridge, 120 P.2d 362, 190 Okl. 29—Beall v. Ferguson, 58 P.2d 598, 177 Okl. 216.

Pa.—Litley v. Sharp, Com.Pl., 8 Bay L.J. 128—Doly v. Barton, Com.Pl., 3 Monroe L.R. 60.

Tex.—Dickens v. Dickens, Civ.App., 241 S.W.2d 658, error refused no reversible error—Vickers v. Quinn, Civ.App., 154 S.W.2d 947.

Wash.—Dimes v. Hyland, 40 P.2d 140, 180 Wash. 455.

65 C.J. p. 444 note 98 [a].

#### Evidence held insufficient

Cal.—Gomez v. Cecena, 101 P.2d 477, 15 Cal.2d 363—Kramer v. Watnick, 146 P.2d 947, 63 Cal.App.2d 308—Cooper v. McDonald, 89 P.2d 412, 32 Cal.App.2d 114.

Colo.—Champion v. Champion, 132 P.2d 185, 110 Colo. 153.

Ill.—Houdce v. Ehrenberger, 72 N.E.2d 837, 397 Ill. 62—Banning v. Patterson, 2 N.E.2d 712, 363 Ill. 464—Wesemann v. Fischer, 56 N.E.2d 656, 323 Ill.App. 617.

N.J.—Duly v. Lanucha, 81 A.2d 826, 14 N.J. Super. 225—Hill v. Lamoreaux, 30 A.2d 833, 132 N.J.Eq. 580—Mullen v. Mullins, 130 A.2d 628, 632, 98 N.J.Eq. 727, 728.

Ohio—Ohio State Life Ins. Co. v. Union Properties, 52 N.E.2d 542.

Okl.—Lawrence v. Lawrence, 159 P.2d 1018, 195 Okl. 610.

Pa.—Citizens Deposit & Trust Co. of Sharpsburg v. Citizens Deposit & Trust Co. of Sharpsburg, 7 A.2d 519, 136 Pa. Super. 413.

R.I.—Cutroneo v. Cutroneo, 98 A.2d 921.

65 C.J. p. 444 note 98 [b].

#### 44. Evidence held sufficient

Ark.—Hunt v. Hunt, 149 S.W.2d 930, 202 Ark. 130—Clark v. Clark, 86 S.W.2d 937, 191 Ark. 461.

Cal.—Hansen v. Bear Film Co., 168 P.2d 946, 28 Cal.2d 154—Helmer v. Helmer, 197 P.2d 558, 87 Cal.App.2d 682.

Ind.—Hadley v. Kays, 98 N.E.2d 237, 121 Ind.App. 112.

Mo.—Padgett v. Osborne, 221 S.W.2d 210, 359 Mo. 209.

Ohio—Lewis v. Akerberg, Com.Pl., 118 N.E.2d 166.

Or.—Unterkircher v. Unterkircher, 195 P.2d 178, 183 Or. 582.

Tex.—Brod v. First Nat. Bank, Civ. App., 91 S.W.2d 772, error dismissed.

Wash.—Makinen v. George, 142 P.2d 910, 19 Wash.2d 340.

65 C.J. p. 445 note 6 [a].

#### Evidence held insufficient

Cal.—Crisci v. Sorel, 251 P.2d 383, 115 Cal.App.2d 76.

Kan.—Koltman v. Atkinson, 100 P.2d 729, 151 Kan. 623.

Ky.—Moore v. Gaines, 213 S.W.2d 990, 308 Ky. 223.

Mo.—Adams v. Adams, 156 S.W.2d 610, 348 Mo. 1041.

Tex.—Wright v. Wright, 132 S.W.2d 847, 134 Tex. 82.

Wash.—Zioncheck v. Nadeau, 81 P.2d 811, 196 Wash. 33.

65 C.J. p. 445 note 6 [b].

45. Ill.—Dodge v. Thomas, 107 N.E.2d 261, 266 Ill. 76, Ann.Cas.1915C 1097.

46. Ill.—Dodge v. Thomas, supra.

47. Ill.—Dodge v. Thomas, supra.

48. Ill.—Curtin v. Curtin, 57 N.E.2d 879, 388 Ill. 215.

Tex.—Wadsworth v. Cole, Civ.App., 265 S.W.2d 628.

65 C.J. p. 445 note 8.

#### Evidence held sufficient

Ala.—Spruiell v. Stanford, 61 So.2d 758, 258 Ala. 212.

Cal.—Watson v. Poore, 115 P.2d 478, 18 Cal.2d 302—Gronschmidt v. Iltzenthaler, 183 P.2d 720, 81 Cal.App.2d 138—Santos v. Santos, 89 P.2d 164, 32 Cal.App.2d 62.

Idaho.—Rexburg Lumber Co. v. Purrington, 113 P.2d 511, 62 Idaho 461.

Ill.—Fields v. Fields, 114 N.E.2d 402, 415 Ill. 324—Bowman v. Pettersen, 102 N.E.2d 787, 410 Ill. 619—Craven

er or not property transferred to a husband was purchased in whole or in part with money belonging to his wife,<sup>49</sup> or property transferred to the wife was paid for by the husband,<sup>50</sup> or property transferred to a child was paid for wholly or partly with money belonging to his parent,<sup>51</sup> or property transferred to a parent was paid for with funds of a child,<sup>52</sup> or whether or not fiduciary funds were used in the

purchase.<sup>53</sup> There have also been adjudications as to whether the money or assets were used in the purchase of the entire property or only a part thereof,<sup>54</sup> and if there has been only a part payment, or payment by several, the evidence must be sufficient to show what part of the purchase money was furnished by claimant,<sup>55</sup> and that the payment

v. Craven, 55 N.E.2d 489, 407 Ill 252

Ky.—Madden v. Fleming, 100 S.W.2d 19, 266 Ky. 772.

Mich.—Schwafert v. Doerner, 27 N.W.2d 316, 317 Mich. 715.

Mont.—Sharp v. Sharp, 139 P.2d 235, 115 Mont 35.

N.J.—Pope v. Bain, 68 A.2d 669, 5 N.J. Super. 541, reversed in part on other grounds 74 A.2d 317, 8 N.J. Super. 263, reversed on other grounds 78 A.2d 820, 6 N.J. 351.

N.C.—Williams v. Williams, 56 S.E.2d 20, 231 N.C. 33

Okla.—Exchange Bank of Perry v. Nichols, 164 P.2d 677, 196 Okl. 283.

Pa.—Turman v. Johnston, 22 A.2d 722, 343 Pa. 645.

Tex.—Garza v. De Leon, Civ.App. 193 S.W.2d 514.

65 C.J. p 445 note 8 [a].

**Evidence held insufficient**

U.S.—Rosenberg v. Baum, C.C.A. Kan., 153 F.2d 10.

Ala.—Sims v. Sims, 66 So.2d 445, 259 Ala. 296—Oxford v. Estey, 158 So. 534, 229 Ala. 606.

Ark.—McKindly v. Humphrey, 161 S.W.2d 962, 204 Ark. 333—Smith v. Pleasant, 139 S.W.2d 377, 200 Ark. 1190

Cal.—G. R. Holcomb Estate Co. v. Burke, 48 P.2d 669, 4 Cal.2d 269—Fuschl v. Vir Den, 236 P.2d 829, 107 Cal.App.2d 280—Bishop v. Freeman, 203 P.2d 854, 90 Cal.App.2d 861—Elms v. Elms, 76 P.2d 126, 24 Cal.App.2d 696.

Ill.—Curielli v. Curielli, 57 N.E.2d 879, 388 Ill. 215—Hickey v. Hickey, 21 N.E.2d 579, 371 Ill. 476.

Iowa.—Newell v. Tweed, 40 N.W.2d 20, 341 Iowa 90.

Ky.—Knight v. Rowland, 209 S.W.2d 728, 307 Ky. 18

Md.—O'Connor v. Estevez, 35 A.2d 148, 162 Md. 541.

Mass.—Rizzuto v. Onnet Cafe, Inc., 116 N.E.2d 249, 330 Mass. 595—Curroll v. Murky, 71 N.E.2d 756, 321 Mass. 87

Minn.—Georgopolis v. George, 54 N.W.2d 137, 237 Minn. 176

Neb.—Miller v. Knight, 19 N.W.2d 153, 146 Neb. 207.

N.Y.—Lorbeer v. Barefield, 71 N.Y.S.2d 125, 272 App.Div. 891, affirmed 78 N.E.2d 20, 297 N.Y. 801—Bascombe v. Sargent, 90 N.Y.S.2d 111, affirmed 99 N.Y.S.2d 857, 277 App.

Div. 983, reargument and appeal denied 100 N.Y.S.2d 493, 277 App. Div. 1006.

N.D.—Jester v. Jester, 37 N.W.2d 879, 76 N.D. 517.

Okla.—Adams v. Adams, 256 P.2d 458, 208 Okl. 378.

Pa.—Teacher v. Klifurina, 76 A.2d 197, 365 Pa. 480—Specht v. Specht, Orph. 67 Montg Co 162.

R.I.—Szlatelyn v. Cleverley, 50 A.2d 185, 72 R.I. 253

W.Va.—Hardin v. Collins, 28 S.E.2d 816, 125 W.Va. 81

65 C.J. p 445 note 8 [b].

49. Ill.—Keith v. Miller, 51 N.E. 151, 174 Ill. 64.

65 C.J. p 446 note 9

**Evidence held sufficient**

Ark.—Wilson v. Wilson, 204 S.W.2d 479, 211 Ark. 1030

Kan.—Kull v. Pearl, 76 P.2d 790, 147 Kan. 329

65 C.J. p 445 note 9 [a].

**Evidence held insufficient**

Ala.—Rodgers v. Thornton, 46 So.2d 809, 264 Ala. 66

Ill.—Carlson v. Carlson, 98 N.E.2d 779, 409 Ill. 167.

Mo.—Cubline v. Frazer, 139 S.W.2d 529, 346 Mo. 1.

Neb.—Peterson v. Manney, 53 N.W.2d 912, 155 Neb. 829

N.J.—Hutter v. Ritter, 4 A.2d 816, 125 N.J. Eq. 212.

Or.—Savage v. Savage, 94 P.2d 134, 163 Or. 26

R.I.—Campanella v. Campanella, 68 A.2d 85, 76 R.I. 47—Hussey v. Hussey, 68 A.2d 48, 76 R.I. 185

65 C.J. p 445 note 9 [b].

**50. Evidence held sufficient**

Cal.—Feig v. Bank of America Nat. Trust & Sav. Ass'n, 54 P.2d 3, 5 Cal.2d 266

65 C.J. p 446 note 10 [a].

**Evidence held insufficient**

Ark.—Forbus v. Gibbs, 224 S.W.2d 790, 216 Ark. 138

Fla.—Reed v. Jones, 184 So. 117, 134 Fla. 615.

Iowa.—Sinclair v. Allender, 26 N.W.2d 320, 238 Iowa 212

Ill.—Fyffe v. Thurber, 21 A.2d 1, 67 R.I. 114

65 C.J. p 446 note 10 [b].

51. Iowa.—Culp v. Price, 77 N.W. 848, 107 Iowa 133.

65 C.J. p 446 note 11

**Evidence held sufficient**

Ohio.—Lieberman v. Present, 115 N.E.2d 865, 94 Ohio App. 451.

Utah.—Harrington v. Inter-State Fidelity Bldg. & Loan Ass'n, 63 P.2d 577, 91 Utah 74.

65 C.J. p 446 note 11 [a].

**Evidence held insufficient**

U.S.—U. S. v. Dickerson, D.C.Mo., 101 F. Supp. 262.

N.J.—Milchman v. Jayson, 34 A.2d 407, 134 N.J. Eq. 165.

65 C.J. p 446 note 11 [b].

52. Pa.—Farrell v. Lloyd, 69 Pa. 239.

65 C.J. p 446 note 12.

**Evidence held sufficient**

Ark.—Harger v. Baker, 237 S.W.2d 37, 218 Ark. 457

Mass.—Gerace v. Gerace, 16 N.E.2d 6, 301 Mass. 14, 117 A.L.R. 1459

Or.—Hughes v. Helzer, 185 P.2d 537, 182 Or. 205.

Tex.—Sohio Petroleum Co. v. Jurek, Civ.App. 248 S.W.2d 294

65 C.J. p 446 note 12 [a].

**Evidence held insufficient**

Ill.—Johnson v. Johnson, 115 N.E.2d 617, 1 Ill.2d 319.

65 C.J. p 446 note 12 [b]

53. N.Y.—Storm v. McGrover, 74 N.Y.S. 1032, 70 App. Div. 33, affirmed 82 N.E. 160, 189 N.Y. 568

65 C.J. p 446 note 13

54. Cal.—Bailar v. Yewell, 295 P.2d 660, 111 Cal.App. 472

N.C.—Williams v. Williams, 56 S.E.2d 20, 231 N.C. 33

55. Ark.—Eckles v. Whitehead, 119 S.W.2d 550, 196 Ark. 680

Cal.—McQuinn v. Rice, 199 P.2d 742, 88 Cal.App.2d 914.

Minn.—Georgopolis v. George, 54 N.W.2d 137, 237 Minn. 176

N.H.—Bailey v. Scribner, 80 A.2d 386, 97 N.H. 65.

65 C.J. p 446 note 15.

**Evidence held insufficient**

Ark.—Forbus v. Gibbs, 224 S.W.2d 790, 216 Ark. 138.

Cal.—McQuinn v. Rice, 199 P.2d 742, 88 Cal.App.2d 914.

Minn.—Georgopolis v. George, 54 N.W.2d 137, 237 Minn. 176.

Mo.—Shelby v. Shelby, 209 S.W.2d 896, 357 Mo. 557

Or.—Savage v. Savage, 94 P.2d 134, 163 Or. 26

Tex.—Bunnell v. Bunnell, Civ.App. 217 S.W.2d 78.

was for some distinct interest or for specific proportion of the whole property.<sup>56</sup>

*Time of payment.* Further, there have been adjudications as to the sufficiency of the evidence to show that the payment was made at the time of purchase or prior thereto.<sup>57</sup>

### § 136. — Admissions and Declarations

Admissions and declarations offered to prove a resulting trust are received with great caution and are generally insufficient to establish a resulting trust unless they are plain and consistent, and are corroborated by other evidence.

Admissions and declarations offered to prove a resulting trust are received with great caution,<sup>58</sup> particularly after the death of the alleged trustee.<sup>59</sup> Such evidence is most unsatisfactory because of the facility with which it may be fabricated,<sup>60</sup> the impossibility of contradiction,<sup>61</sup> and the consequences which the slightest mistake or failure of memory may produce.<sup>62</sup> As a general rule, evidence of mere verbal admissions or declarations of the alleged trustee<sup>63</sup> or of the alleged cestui que trust<sup>64</sup> are insufficient to establish a resulting trust. This is especially true where the statements are ambiguous,<sup>65</sup> vague, conflicting, or inconsistent,<sup>66</sup> or consist of mere casual or indefinite expressions or admissions by the alleged trustee,<sup>67</sup> uncorroborated by other evidence,<sup>68</sup> such as that the property belonged

to another,<sup>69</sup> or that he was purchasing or holding for another,<sup>70</sup> or that another is interested in the property,<sup>71</sup> particularly after the death of such purchaser or a long lapse of time,<sup>72</sup> or where such declarations were made many years before the trial.<sup>73</sup>

Proof of declarations or admissions of the person in whose name title to the property was taken may, under certain circumstances, be entitled to special consideration,<sup>74</sup> and may be sufficient to establish a resulting trust if plain and consistent,<sup>75</sup> especially if they are corroborated by evidence of other circumstances,<sup>76</sup> as where a statement that a purchase is made for another is corroborated by proof that the purchase money was paid by such other,<sup>77</sup> or by proof of a prior agreement so to purchase,<sup>78</sup> but these declarations must be direct and certain,<sup>79</sup> plain and consistent,<sup>80</sup> and must be proved by evidence of the clearest, most satisfactory, and convincing character.<sup>81</sup>

Mere parol proof of an agreement to purchase or hold the property for another is insufficient to establish a resulting trust in favor of such other,<sup>82</sup> unless it is corroborated by other evidence.<sup>83</sup> Declarations of the grantee to the effect that he holds the title for another, or has agreed to convey to another, have been held to be entitled to less weight than declarations to the effect that another person's mon-

56. Ill.—Kedas v. Kedas, 174 N.E. 894, 342 Ill. 630.  
65 C.J. p 446 note 16.

57. Tex.—Wacasey v. Wacasey, Civ. App., 256 S.W. 1020.

**Evidence held sufficient**  
N.J.—Halmerl v. Halmerl, 61 A.2d 439, 142 N.J. Eq. 740

**Evidence held insufficient**  
S.C.—Hutto v. Hutto, 196 S.E. 369, 187 S.C. 36  
65 C.J. p 446 note 18 [a].

58. Ill.—Curielli v. Curielli, 48 N.E. 2d 360, 383 Ill. 102.  
R.I.—Oldham v. Oldham, 192 A. 758, 58 R.I. 268.

59. R.I.—Oldham v. Oldham, supra.

60. Md.—Dixon v. Dixon, 90 A. 846, 123 Md. 44.  
65 C.J. p 448 note 33.

61. N.M.—White v. Mayo, 299 P. 1068, 35 N.M. 430.  
65 C.J. p 448 note 38.

62. Colo.—Piggott v. Brown, 243 P. 626, 79 Colo. 11.  
65 C.J. p 448 note 40.

63. Colo.—Piggott v. Brown, 243 P. 626, 79 Colo. 11.  
65 C.J. p 447 note 27.

64. N.M.—White v. Mayo, 299 P. 1068, 35 N.M. 430.  
65 C.J. p 447 note 28.

65. Ill.—Crawford v. Hurst, 138 N.E. 620, 307 Ill. 243.  
Pa.—In re Young's Estate, 21 A. 93, 137 Pa. 433

66. Ill.—Orcar v. Farmers' State Bank & Trust Co., 122 N.E. 63, 285 Ill. 454.  
65 C.J. p 447 note 30.

67. Colo.—Piggott v. Brown, 243 P. 626, 79 Colo. 11.  
65 C.J. p 447 note 31.

68. N.M.—White v. Mayo, 299 P. 1068, 35 N.M. 430.  
65 C.J. p 447 note 32.

69. Pa.—In re Lau's Estate, 34 A. 969, 176 Pa. 100.

70. Colo.—Piggott v. Brown, 243 P. 626, 79 Colo. 11.  
65 C.J. p 447 note 34.

71. Ill.—Vells v. Messenger, 94 N.E. 87, 249 Ill. 72.  
65 C.J. p 447 note 35.

72. Colo.—Piggott v. Brown, 243 P. 626, 79 Colo. 11.  
65 C.J. p 447 note 36.

73. Mo.—Williams v. Keef, 145 S.W. 425, 241 Mo. 366—Burdette v. May, 12 S.W. 1056, 100 Mo. 13.

74. Iowa.—In re Mahlin's Estate, 143 N.W. 420, 161 Iowa 459.  
65 C.J. p 446 note 19.

75. Ill.—Mauricau v. Haugen, 56 N.E. 2d 367, 387 Ill. 186.  
65 C.J. p 447 note 20.

76. Md.—Dixon v. Dixon, 90 A. 846, 123 Md. 44.  
65 C.J. p 447 note 21.

77. N.M.—White v. Mayo, 299 P. 1068, 35 N.M. 430.  
65 C.J. p 447 note 22.

78. Md.—Dixon v. Dixon, 90 A. 846, 123 Md. 44.  
65 C.J. p 447 note 23.

79. Md.—Mountford v. Mountford, 29 A.2d 258, 181 Md. 212.  
65 C.J. p 447 note 24.

80. Ala.—Bibb v. Hunter, 79 Ala. 351.

81. N.J.—Cumming v. Robins, 39 N.J. Eq. 46.

82. Ky.—Wilson v. Campbell, 20 S.W. 609, 14 Ky.L. 512.  
65 C.J. p 448 note 41.

83. U.S.—Smithsonian Inst. v. Meech, App.D.C. 18 S.Ct. 396, 169 U.S. 398, 42 L.Ed. 793.  
65 C.J. p 448 note 42.

ey was paid for the land,<sup>84</sup> especially when they are corroborated by circumstances<sup>85</sup> and attended by proof of some previous arrangement under which the money was advanced.<sup>86</sup>

### § 137. — Degree of Proof Required

Although there is some authority holding that a resulting trust may be established by a preponderance of the evidence, the general rule is that a superior measure of proof is required.

The general rule as to the character of the evidence necessary to establish a resulting trust, although expressed in varying phraseology, is in effect that a superior measure of proof is required,<sup>87</sup> and that a resulting trust must be established by an extraordinary degree of proof,<sup>88</sup> particularly where parol evidence alone is relied on,<sup>89</sup> where the alleged trustee has died,<sup>90</sup> where it is sought to establish

the resulting trust after a lapse of many years,<sup>91</sup> or where the death of witnesses and the loss of evidence render it practically impossible to make a defense.<sup>92</sup>

While there is some authority holding that a resulting trust may be established by a preponderance of the evidence<sup>93</sup> and that the evidence need not be such as to remove all reasonable doubt,<sup>94</sup> it is generally held that a mere preponderance of the evidence is insufficient to establish a resulting trust.<sup>95</sup> It has been held that in establishing a resulting trust there must be the same strict rules of proof which are required for the establishment of fraud,<sup>96</sup> and it has even been considered that a resulting trust requires practically the degree of proof essential in criminal prosecutions.<sup>97</sup> Accordingly, it has been held that, in order to be sufficient, the evidence must establish a resulting trust beyond

84. Ill.—Curielli v. Curielli, 48 N.E. 2d 360, 383 Ill. 102.  
65 C.J. p. 448 note 43.

85. Ill.—Curielli v. Curielli, 48 N.E. 2d 360, 383 Ill. 102.  
65 C.J. p. 448 note 44.

86. Ill.—Curielli v. Curielli, supra.  
65 C.J. p. 448 note 45.

87. Mo.—Adams v. Adams, 156 S.W. 2d 610, 348 Mo. 1041.  
Okla.—McCroy v. Evans, 138 P.2d 823, 192 Okl. 649.

Pa.—Moyer v. Moyer, 51 A.2d 708, 356 Pa. 184.—In re North-west Lyeum Ass'n, of Reading, Pa., Com. Pl., 45 Berks Co. 137.—Drayer v. Drayer, Com. Pl., 60 Dauph. Co. 160.—Hetrick v. Royd, Com. Pl., 53 York Leg. Rec. 73.  
65 C.J. p. 440 note 63.

88. Cal.—Helm v. Zachs, 211 P.2d 329, 94 Cal. App. 2d 625.  
Mo.—Aronson v. Spiteaufsky, 260 S.W.2d 548.—Tichenor v. Bowman, 133 S.W.2d 324.—Parker v. Blakeley, 93 S.W.2d 981, 338 Mo. 1189.—La Rue v. La Rue, 294 S.W. 723, 317 Mo. 207.—Dee v. Sutter, App., 222 S.W. 2d 541.

89. Ariz.—Solomon v. Solomon, 157 P.2d 605, 62 Ariz. 311.  
Ark.—Nelson v. Wood, 137 S.W.2d 929, 199 Ark. 1015.  
Cal.—G. R. Holcomb Estate Co. v. Burke, 48 P.2d 669, 4 Cal.2d 289.  
Fla.—Pringle v. Pringle, 57 So.2d 429.—Betha v. Langford, 45 So.2d 496.—Planagan v. Herrett, 178 So. 147, 130 Fla. 531.—First Nat. Bank v. Southern Lumber & Supply Co., 145 So. 594, 106 Fla. 821.

Ill.—Carrillo v. O'Hara, 81 N.E.2d 513, 400 Ill. 518.—Jones v. Koepke, 55 N.E.2d 154, 387 Ill. 97.—Wiley v. Dunn, 192 N.E. 661, 358 Ill. 97.—Baker v. Le Mire, 189 N.E. 904, 355

Ill. 626.—Kedav v. Kedav, 174 N.E. 894, 342 Ill. 630.—Brooks v. Gretz, 152 N.E. 643, 323 Ill. 161.—McClelland v. Roley, 57 N.E.2d 529, 324 Ill. App. 158.  
Ind.—Costa v. Costa, App., 115 N.E. 2d 516.—Vonnelle v. Dexter, 77 N.E. 2d 759, 118 Ind. App. 187.  
Mont.—Lewis v. Bowman, 121 P.2d 162, 113 Mont. 68.

Neb.—Holbein v. Holbein, 30 N.W.2d 899, 149 Neb. 281.  
N.M.—Korlian v. Mennecke, 204 P.2d 440, 53 N.M. 176.  
N.Y.—Katz v. Katz, 121 N.Y.S.2d 462.

Or.—Hughes v. Helzer, 185 P.2d 537, 182 Or. 205.  
W.Va.—Wilcoxon v. Carrier, 53 S.E. 2d 620, 132 W. Va. 637.

#### One witness

(1) A resulting trust may be established by the testimony of one witness—Mauriceau v. Haugen, 56 N.E.2d 367, 387 Ill. 186.

(2) The uncorroborated evidence of a single witness has been held insufficient to establish a resulting trust—Appeal of Hayes' 16 A. 600, 123 Pa. 110—65 C.J. p. 441 note 64.

90. Cal.—Wyoming-Montana Development Co. v. Wells Fargo Bank & Union Trust Co., 59 P.2d 185, 15 Cal. App. 2d 133.  
Mont.—Lewis v. Bowman, 121 P.2d 162, 113 Mont. 68.  
N.J.—Ritter v. Ritter, 4 A.2d 846, 125 N.J. Eq. 212.  
Or.—Savage v. Savage, 94 P.2d 134, 163 Or. 26.

91. Cal.—G. R. Holcomb Estate Co. v. Burke, 48 P.2d 669, 4 Cal.2d 289.—Cooper v. McDonald, 89 P.2d 412, 32 Cal. App. 2d 114.  
Ill.—Carlson v. Carlson, 98 N.E.2d 779, 409 Ill. 167.

Mont.—Lewis v. Bowman, 121 P.2d 162, 113 Mont. 68.  
65 C.J. p. 449 note 53.

92. Ill.—Carlson v. Carlson, 98 N.E. 2d 779, 409 Ill. 167.  
65 C.J. p. 449 note 54.

93. Tex.—Berrv v. Rhine, Civ. App., 205 S.W.2d 632.—Krauss v. Cornell Civ. App., 116 S.W.2d 882, error dismissed.  
65 C.J. p. 441 note 81.

#### Evidence equally susceptible of contrary conclusion

Evidence equally susceptible of a conclusion that property is held otherwise, it is insufficient to show a trust—Berrv v. Rhine, Tex. Civ. App., 205 S.W.2d 632.

94. Kan.—Kull v. Pearl, 76 P.2d 790, 147 Kan. 329.  
Tenn.—Savage v. Savage, 4 Tenn. App. 277.  
65 C.J. p. 441 note 81.

95. Ark.—Neill v. Neill, 257 S.W.2d 26, 221 Ark. 893.  
Hawaii.—Ables v. Ables, 39 Hawaii 598.

Iowa.—Keshlear v. Banner, 280 N.W. 631, 225 Iowa 471.  
Fla.—Goldman v. Olsen, 31 So.2d 623, 159 Fla. 435.

Mo.—Aronson v. Spiteaufsky, 260 S.W.2d 548.—Tichenor v. Bowman, 133 S.W.2d 324.—Suhre v. Busch, 123 S.W.2d 8, 343 Mo. 679.—Parker v. Blakeley, 93 S.W.2d 981, 338 Mo. 1189.—Pursley v. Pursley, App., 215 S.W.2d 202.—In re Title Guaranty Trust Co., App., 113 S.W.2d 1053.  
Tenn.—Warner v. Maronev, 65 S.W.2d 244, 16 Tenn. App. 78.  
65 C.J. p. 441 note 65.

96. Wash.—Croup v. De Moss, 138 P. 671, 78 Wash. 128.

97. Mont.—Meagher v. Harrington, 254 P. 432, 78 Mont. 457.  
65 C.J. p. 441 note 67.

doubt,<sup>98</sup> beyond all doubt,<sup>99</sup> beyond substantial doubt,<sup>1</sup> or beyond reasonable doubt.<sup>2</sup> The evidence, it has been held, must be such as to lead to but one conclusion<sup>3</sup> and the evidence is insufficient if it is susceptible of reasonable explanation on a theory other than the existence of a resulting trust.<sup>4</sup>

In order to establish a resulting trust, as against the holder of the legal title to property, all the essential facts and circumstances must be clearly

shown,<sup>5</sup> and the evidence must establish certainly and definitely the terms of the trust<sup>6</sup> and, although it has been held that it need not be uncontradicted or undisputed<sup>7</sup> or free from contradictions,<sup>8</sup> it must be of such a character as to disclose the exact rights and relations of the parties<sup>9</sup> and leave no essential element to conjecture or presumption,<sup>10</sup> or to remote and uncertain inference;<sup>11</sup> and where the evidence is uncertain,<sup>12</sup> vague,<sup>13</sup> indefinite,<sup>14</sup>

98. Ark.—Nelson v. Wood, 137 S.W. 2d 929, 199 Ark. 1019.

Colo.—Woodruff v. Clarke, 262 P.2d 737, 128 Colo. 387.

Ill.—Fields v. Fields, 114 N.E.2d 402, 415 Ill. 324—Kohlhaas v. Smith, 97 N.E.2d 774, 408 Ill. 535—Jones v. Koepke, 55 N.E.2d 154, 387 Ill. 97—Heinemann v. Hermann, 52 N.E.2d 263, 385 Ill. 191—Currelli v. Currelli, 48 N.E.2d 360, 383 Ill. 102.

Ind.—Vonnelle v. Dexter, 77 N.E.2d 759, 118 Ind.App. 187.

Mo.—Darrow v. Darrow, 245 S.W.2d 434—Thieman v. Thieman, 218 S.W.2d 580—Dee v. Sutter, App. 222 S.W.2d 541—Orrick v. Hehrer, App. 124 S.W.2d 664.

65 C.J. p. 441 notes 69, 78, p. 452 notes 34, 35, 37.

#### Practically free from doubt

Mont.—Lewis v. Bowman, 121 P.2d 162, 113 Mont. 68.

99. Mo.—King v. Isley, 22 S.W. 634, 116 Mo. 155.

64 C.J. p. 441 notes 70, 76.

1. N.D.—Hagerott v. Davis, 17 N.W. 2d 15, 73 N.D. 532.

#### No well-founded doubt

1 C.—Kosters v. Hoover, 98 F.2d 595, 69 App.D.C. 66.

2. Fla.—Pringle v. Pringle, 57 So.2d 429—Columbia Bank for Coopera-

tives v. Okelanta Sugar Co-op, 52 So.2d 670—Betha v. Langford, 45 So.2d 496—Goldman v. Olsen, 31 So.2d 623, 159 Fla. 435—Damage v. Simpson, 26 So.2d 340, 157 Fla. 468.

—Frank v. Beles, 13 So.2d 216, 152 Fla. 869—Powell v. Race, 10 So.2d 142, 151 Fla. 536—Lung v. Lange, 182 So. 807, 133 Fla. 447.

—Foster v. Thornton, 179 So. 882, 131 Fla. 277—Flanagan v. Herrett, 178 So. 147, 130 Fla. 531.

Ill.—Clark v. Clark, 76 N.E.2d 446, 398 Ill. 692.

Ky.—Knight v. Rowland, 209 S.W. 2d 728, 307 Ky. 18.

Md.—Gray v. Harriet Lane Home for Invalid Children, 64 A.2d 102, 192 Md. 251—Fasman v. Pottashnick, 51 A.2d 664, 188 Md. 105.

Mo.—Aranson v. Spitecaufsky, 260 S.W.2d 548—Leone v. Bear, 241 S.W.2d 1008, 362 Mo. 464—Warford v. Smoot, 237 S.W.2d 154, 361 Mo. 879—Middleton v. Reece, 236 S.W. 2d 335—Black v. Nickel Sav. Inv.

& Bldg. Ass'n, 216 S.W.2d 509—Mays v. Jackson, 145 S.W.2d 392, 346 Mo. 1234—Woodard v. Cohron, 137 S.W.2d 497, 345 Mo. 967—Tiche-

nor v. Bowman, 133 S.W.2d 324—Suhrre v. Busch, 123 S.W.2d 8, 343 Mo. 679—Milligan v. Bling, 108 S.W.2d 108, 341 Mo. 648—Parker v. Blakeley, 93 S.W.2d 981, 335 Mo. 1189—In re Title Guaranty Trust

Co., App. 113 S.W.2d 1053—Pursley v. Pursley, App. 215 S.W.2d 302

N.J.—Hermanowski v. Hermanowski, 87 A.2d 452, 18 N.J.Super. 406—Bell v. Bell, 61 A.2d 735, 1 N.J.Super. 362

65 C.J. p. 441 notes 68, 77, 79, p. 453 notes 30, 31, 33

Beyond reasonable controversy

Ala.—Sims v. Sims, 66 So.2d 445, 259 Ala. 296—Banks v. Banks, 44 So.2d 10, 253 Ala. 252—Lauderdale v. Peace Baptist Church of Birmingham, 19 So.2d 538, 246 Ala. 178.

Operative facts

In order to establish a resulting trust, the evidence must be so clear, cogent, and convincing as to leave no reasonable doubt of the existence of facts which, of themselves, would imply a trust by operation of law—

Roberts v. Roberts, Mo., 291 S.W. 485.

3. Ill.—Paluszek v. Wohlrab, 115 N.E.2d 764, 1 Ill.2d 363—Johnson v. Johnson, 115 N.E.2d 617, 1 Ill.2d 319—McCabe v. Hehrer, 102 N.E.2d 794, 410 Ill. 557—Bowman v. Pettersen, 102 N.E.2d 787, 410 Ill. 519—Carlson v. Carlson, 98 N.E.2d 779, 409 Ill. 167—Kohlhaas v. Smith, 97 N.E.2d 774, 408 Ill. 535—Dean v. Dean, 82 N.E.2d 342, 401 Ill. 406—Carrillo v. O'Hara, 81 N.E.2d 513, 409 Ill. 518—Tuntland v. Haugen, 78 N.E.2d 308, 399 Ill. 595—Hanning v. Patterson, 2 N.E.2d 712, 363 Ill. 464—Wiley v. Dunn, 192 N.E. 661, 358 Ill. 97—Baker v. Le Mire, 189 N.E. 904, 355 Ill. 626—Kedus v. Kedus, 174 N.E. 894, 342 Ill. 630—Brooks v. Gretz, 153 N.E. 643, 323 Ill. 161—McClelland v. Roley, 57 N.E.2d 529, 324 Ill.App. 158.

N.D.—Bodding v. Herman, 35 N.W. 2d 561, 76 N.D. 324.

65 C.J. p. 451 note 87, p. 452 note 36

4. Ill.—Paluszek v. Wohlrab, 115 N.E.2d 764, 1 Ill.2d 363—Evangeloff v. Evangeloff, 85 N.E.2d 709, 403 Ill. 118—Dean v. Dean, 82 N.E.2d 342, 401 Ill. 406—Carrillo v. O'Hara, 81 N.E.2d 513, 409 Ill. 518—Tuntland v. Haugen, 78 N.E.2d 308, 399 Ill. 595—Hille v. Barnes, 77 N.E.2d 809, 399 Ill. 252—Jones v. Koepke, 55 N.E.2d 154, 387 Ill. 97—Nickeloff v. Nickeloff, 51 N.E.2d 565, 384 Ill. 377—Spina v. Spina, 22 N.E.2d 687, 372 Ill. 50—Cook v. Blazis, 7 N.E.2d 291, 365 Ill. 625.

Ind.—Costa v. Costa, App. 115 N.E.2d 516

N.D.—Bodding v. Herman, 35 S.W.2d 561, 76 N.D. 324.

65 C.J. p. 449 note 63.

5. Hawaii—Wery v. Pacific Trust Co., 33 Hawaii 701

Mo.—Adams v. Adams, 156 S.W.2d 610, 318 Mo. 1041

Okla.—McCrory v. Evans, 138 P.2d 823, 192 Okl. 619.

65 C.J. p. 448 note 46.

6. Ill.—Chechil v. Koletsky, 143 N.E. 66, 311 Ill. 433, 33 A.L.R. 742.

7. Ark.—Crain v. Keenan, 236 S.W.2d 731, 218 Ark. 375

Pa.—Christy v. Christy, 46 A.2d 169, 353 Pa. 476.

Tex.—Berry v. Rhine, Civ.App. 205 S.W.2d 632

65 C.J. p. 449 note 48.

8. Ky.—Onkes v. Onkes, 264 S.W. 752, 201 Ky. 298.

9. Okla.—Turk v. Warr, 128 P.2d 835, 191 Okl. 253.

65 C.J. p. 449 note 50.

10. Iowa—Keshlear v. Banner, 280 N.W. 631, 225 Iowa 471.

65 C.J. p. 449 note 51.

11. Iowa—Keshlear v. Banner, supra

65 C.J. p. 449 note 52.

12. Ala.—Rodgers v. Thornton, 46 So.2d 809, 254 Ala. 66.

65 C.J. p. 449 note 55.

13. Mo.—Aranson v. Spitecaufsky, 260 S.W.2d 548.

65 C.J. p. 449 note 56.

14. Fla.—Forrester v. Watts, 74 So. 519, 73 Fla. 514.

W.Va.—Cassady v. Cassady, 81 S.E. 829, 74 W.Va. 53.

doubtful,<sup>15</sup> conflicting,<sup>16</sup> or unsatisfactory,<sup>17</sup> or consists of mere conclusions,<sup>18</sup> or is based solely on rumor,<sup>19</sup> no trust will be held to be established.

A resulting trust must be established by evidence of the most convincing character,<sup>20</sup> of the most conclusive character,<sup>21</sup> or of the most satisfactory character;<sup>22</sup> by evidence which is most convincing and irrefragable;<sup>23</sup> most satisfactory and convincing;<sup>24</sup> of great clearness and certainty;<sup>25</sup> unequiv-

ocal,<sup>26</sup> unmistakable,<sup>27</sup> unquestionable,<sup>28</sup> or well-nigh conclusive;<sup>29</sup> or which is actually or practically overwhelming.<sup>30</sup>

It has been variously stated that the proof, in order to be sufficient to establish a resulting trust, must be certain, definite, and reliable;<sup>31</sup> certain, definite, reliable, and convincing;<sup>32</sup> clear and certain;<sup>33</sup> clear and concise;<sup>34</sup> clear and conclusive;<sup>35</sup> clear and convincing.<sup>36</sup> Other phraseology employed

15. Ala.—*Rodgers v. Thornton*, 46 So 2d 809, 254 Ala. 66

111.—*Paluszek v. Wohlrath*, 115 N.E.2d 764, 1 111.2d 363—*Carlson v. Carlson*, 98 N.E.2d 773, 409 111 167—*Jones v. Knepeke*, 55 N.E.2d 154, 387 111. 97—*Nickeloff v. Nickeloff*, 11 N.E.2d 565, 384 111. 371—*Spina v. Spina*, 22 N.E.2d 647, 372 111 56—*Cook v. Blazis*, 7 N.E.2d 291, 265 111. 625

N.D.—*Bodding v. Herman*, 35 S.W.2d 561, 76 ND 324.

65 C.J. p 449 note 58.

16. Ky.—*Neel's Ex'r v. Noland's Heirs*, 179 S.W. 430, 433, 166 Ky 155.

65 C.J. p 449 note 59.

17. Ala.—*Rodgers v. Thornton*, 46 So 2d 809, 254 Ala. 66.

111.—*Carlson v. Carlson*, 98 N.E.2d 770, 409 111. 167

65 C.J. p 449 note 60.

18. Fla.—*Forrester v. Watts*, 74 So. 519, 73 Fla 514.

Ky.—*Sargent v. Sargent*, 289 S.W. 1105, 217 Ky. 507.

19. U.S.—*Teter v. Vigueoney, W.Va.*, 179 F. 655, 103 C.C.A. 213.

20. Md.—*Zulver v. Murray*, 114 A. 896, 139 Md 242

Tenn.—*Savage v. Savage*, 4 Tenn. App. 277.

21. Hawaii.—*Jarrett v. Manini*, 2 Hawaii 667.

22. Ill.—*Heneke v. Floring*, 2 N.E. 529, 114 Ill 554.

Okl.—*Plumer v. Pearce*, 357 P.2d 813, 208 Okl. 526—*Staton v. Moody*, 256 P.2d 409, 208 Okl. 373—*Gaines v. Gaines*, 351 P.2d 1044, 207 Okl. 619—*Nicklas v. Crowell*, 238 P.2d 347, 205 Okl. 432—*Johnson v. Johnson*, 205 P.2d 314, 201 Okl. 268—*Ward v. Ward*, 172 P.2d 978, 197 Okl. 551—*Filibkowski v. Filibkowski*, 121 P.2d 304, 190 Okl. 152—*Burdwell v. Eaton*, 116 P.2d 969, 189 Okl. 379—*Wintor v. Klein*, 96 P.2d 83, 186 Okl. 74—*Gaines Bros. Co. v. Gaines*, 56 P.2d 809, 176 Okl. 576.

#### Clearest and most satisfactory

U.S.—*Bowmaster v. Carroll*, C.C.A. Okl., 23 F.2d 825.

23. Ky.—*Neel's Ex'r v. Noland's Heirs*, 179 S.W. 430, 433, 166 Ky. 455

65 C.J. p 452 note 25.

24. Mo.—*Anderson v. Gile*, 78 A. 370, 107 Mo. 325.

Or.—*Dahl v. Simonsen*, 70 P.2d 49, 157 Or 238.

25. Va.—*Woodward v. Sibert*, 82 Va. 441

26. Mo.—*Gaugh v. Gaugh*, 11 S.W.2d 729, 321 Mo. 414, followed in *Seehorn v. Gaugh*, 11 S.W.2d 750, 321 Mo. 456.

27. Colo.—*Howard v. Barrett*, 72 P.2d 474, 101 Colo. 249.

28. Mo.—*Suhre v. Busch*, 123 S.W.2d 8, 343 Mo. 679.

29. Mo.—*Keener v. Williams*, 271 S.W. 489, 307 Mo. 682—*Deer v. Deer's Estate*, App., 180 S.W. 572.

30. Iowa.—*Sinclair v. Allender*, 26 N.W.2d 320, 238 Iowa 212.

65 C.J. p 441 note 76.

31. N.J.—*Correll v. Correll*, 127 A. 346, 97 N.J. Eq. 387, 2 N.J. Misc. 871.

32. N.J.—*Daly v. Lanucha*, 81 A.2d 820, 14 N.J. Super. 225—*Hell v. Bell*, 61 A.2d 735, 1 N.J. Super. 362—*Ritter v. Ritter*, 4 A.2d 846, 125 N.J. Eq. 212.

65 C.J. p 450 note 65

33. Iowa.—*Crawford v. Couch*, 15 N.W.2d 633, 234 Iowa 1246

65 C.J. p 450 note 66

34. Or.—*American Surety Co. of New York v. Hattrem*, 3 P.2d 1109, 6 P.2d 1087, 138 Or. 358.

65 C.J. p 450 note 67.

35. Cal.—*Baskett v. Crook*, 195 P.2d 89, 86 Cal.App.2d 355.

Iowa.—*Kincell v. Feldman*, 22 Iowa 363.

36. U.S.—*Johnson v. Umsted*, C.C.A. Ark., 64 F.2d 316—*Carr v. Yokohama Specie Bank, Limited*, of San Francisco, D.C. Cal., 99 F.Supp. 4, affirmed, C.A., 200 F.2d 251

Ala.—*Adair v. Adair*, 62 So.2d 437, 258 Ala. 293—*Spruelli v. Stanford*, 61 So.2d 758, 258 Ala. 212—*Duncan v. Leonard*, 37 So.2d 310, 251 Ala. 333—*Albae v. Harbin*, 30 So.2d 459, 249 Ala. 201.

Ark.—*Neil v. Neil*, 257 S.W.2d 26, 221 Ark. 892—*Parks v. Parks*, 182 S.W.2d 470, 207 Ark. 720.

Cal.—*Stomerson v. Averill*, 133 P.2d 617, reheard 141 P.2d 732, 22 Cal.2d 808—*Gomes v. Cecena*, 101 P.2d 477, 15 Cal.2d 863—*G. R. Holcomb*

*Estate Co. v. Burke*, 48 P.2d 659, 4 Cal.2d 289—*Harlan v. Ott*, App., 272 P.2d 522—*Trimble v. Coffman*, 251 P.2d 81, 114 Cal.App.2d 618—*Rench v. McMullen*, 187 P.2d 111, 82 Cal.App.2d 872—*Treager v. Friedman*, 179 P.2d 387, 79 Cal.App.2d 151—*Pinneen v. Hernandez*, 168 P.2d 32, 74 Cal.App.2d 51—*Cooper v. McDonald*, 89 P.2d 412, 32 Cal. App.2d 114—*Wyoming-Montana Development Co. v. Wells Fargo Bank & Union Trust Co.*, 59 P.2d 185, 15 Cal.App.2d 133.

Hawaii.—*Very v. Pacific Trust Co.*

33 Hawaii 701.

Idaho.—*Aker v. Aker*, 20 P.2d 796, 52 Idaho 713, appeal dismissed and certiorari denied 54 S.Ct. 80, 290 U.S. 547, 78 L.Ed. 518.

Ill.—*Abraham v. Abraham*, 86 N.E.2d 224, 403 Ill. 312—*Nickeloff v. Nickeloff*, 51 N.E.2d 565, 384 Ill. 377—*Holmstedt v. Holmstedt*, 49 N.E.2d 25, 343 Ill. 290—*Walker v. Walker*, 17 N.E.2d 567, 369 Ill. 627, certiorari denied 59 S.Ct. 774, 306 U.S. 657, 83 L.Ed. 1054—*McClelland v. Roley*, 57 N.E.2d 529, 324 Ill.App. 158.

Ky.—*Sewell v. Sewell*, 260 S.W.2d 643—*Knight v. Rowland*, 209 S.W.2d 728, 307 Ky. 15—*Burggraf v. Reynolds*, 206 S.W.2d 206, 306 Ky. 104—*Gayheart v. Cox*, 205 S.W.2d 153, 305 Ky. 570—*Bank of Clarkson v. Meredith*, 192 S.W.2d 967, 301 Ky. 671—*Richardson v. Webb*, 135 S.W.2d 861, 281 Ky. 201.

Md.—*Thiemann v. Welsh*, 59 A.2d 628, 191 Md. 1—*Kelley v. Kelley*, 13 A.2d 529, 178 Md. 389—*Cooper v. Lamberton*, 197 A. 576, 174 Md. 24.

Mo.—*Darrow v. Darrow*, 245 S.W.2d 834—*Thiemann v. Thiemann*, 218 S.W.2d 580—*Shelby v. Shelby*, 209 S.W.2d 896, 357 Mo. 557—*Milligan v. Bing*, 108 S.W.2d 108, 341 Mo. 648.

Mont.—*Lewis v. Bowman*, 121 P.2d 162, 113 Mont. 68.

N.J.—*Hermanoski v. Hermanoski*, 87 A.2d 452, 18 N.J. Super. 406—*Locatelli v. Adornetto*, 39 A.2d 181, 135 N.J. Eq. 462—*Hill v. Lamoreaux*, 30 A.2d 833, 132 N.J. Eq. 580—*Turner v. Cole*, 173 A. 113, 116 N.J. Eq. 368, affirmed 179 A. 613, 118 N.J. Eq. 497.

N.D.—*Bodding v. Herman*, 35 N.W.2d 561, 76 N.D. 324.

Ohio.—*Bell v. Vardaliden*, App., 59 N.E.2d 73—*Guarantee Title & Trust*

has included terms such as clear and distinct;<sup>37</sup> clear and explicit;<sup>38</sup> clear and possessed of high degree of cogency;<sup>39</sup> clear and satisfactory;<sup>40</sup> clear and undoubted;<sup>41</sup> clear and unequivocal;<sup>42</sup> clear and unmistakable;<sup>43</sup> clear and unquestionable;<sup>44</sup> clear, certain, and conclusive;<sup>45</sup> clear, certain, and convincing;<sup>46</sup> clear, certain, and decisive;<sup>47</sup> clear, certain, satisfactory, and practically overwhelm-

ing;<sup>48</sup> clear, certain, satisfactory, and trustworthy;<sup>49</sup> clear, cogent, and complete;<sup>50</sup> clear, cogent, and convincing;<sup>51</sup> clear, cogent, unequivocal, and positive;<sup>52</sup> clear, concise, and unequivocal;<sup>53</sup> clear, consistent, and unequivocal;<sup>54</sup> clear, convincing, and conclusive;<sup>55</sup> clear, convincing, and definite;<sup>56</sup> clear, convincing, and decisive;<sup>57</sup> clear, convincing, and satisfactory;<sup>58</sup> clear, convincing, and unmis-

Co. v. Moores, Com.Pl., 68 N.E.2d 378, 365, affirmed, App., 68 N.E.2d 378.  
Okl.—Hickey v. Ross, 172 P.2d 771, 197 Okl. 543—Maynard v. Taylor, 91 P.2d 649, 185 Okl. 268.

Or.—Savage v. Savage, 94 P.2d 136, 163 Or. 26.

RI—Hussey v. Hussey, 68 A.2d 48, 76 R.L. 185.

Tenn.—Greenwood v. Maxey, 231 S.W.2d 315, 190 Tenn. 599—Hoffner v. Hoffner, 221 S.W.2d 907, 32 Tenn. App. 98—Shoun v. Gentry, 2 Tenn. App. 55.

Tex.—Grasty v. Wood, Civ.App., 230 S.W.2d 568, error refused no reversible error.

Wash.—Dines v. Hyland, 40 P.2d 140, 180 Wash. 455.

W Va.—Carter v. Walker, 1 SE 2d 483, 121 W.Va. 81.  
Wis.—In re James' Estate, 65 N.W.2d 9, 267 Wis. 105.  
65 C.J. p 450 note 69.

37. Ind.—Costa v. Costa, App., 115 N.E.2d 516.  
W Va.—Zogg v. Hedges, 29 S.E.2d 871, 126 W.Va. 529, 152 A.L.R. 991.

38. Va.—Lee v. R. H. Elliott & Co., 75 S.E. 146, 113 Va. 618.  
65 C.J. p 450 note 70.

39. Or.—Smith v. Barnes, 276 P. 1086, 129 Or. 138.

40. D.C.—Kosters v. Hoover, 98 F. 2d 595, 69 App.D.C. 66.

Ill.—McClelland v. Roley, 57 NE 2d 529, 324 Ill. App. 158.

Iowa.—Keshlear v. Banner, 280 N.W. 631, 225 Iowa 471.

Kan.—Kull v. Pearl, 76 P.2d 790, 147 Kan. 329.

Kd.—Sands v. Church of Ascension and Prince of Peace, 30 A.2d 771, 181 Md. 536.

Minn.—Georgopolis v. George, 54 N.W.2d 137, 237 Minn. 176.

Neb.—Holbein v. Holbein, 30 N.W.2d 899, 149 Neb. 281.

Pa.—West v. Young, 13 A.2d 39, 338 Pa. 298—Specht v. Specht, Orph., 67 Montg Co 162—Royer v. Royer, Com.Pl., 62 Montg Co 90.

Tex.—Lapoutsis v. Trevino, Civ App., 167 S.W.2d 777, error dismissed.  
65 C.J. p 450 note 72.

41. Ky.—Neel's Ex'r v. Noland's Heirs, 179 S.W. 430, 433, 166 Ky 455.  
65 C.J. p 450 note 73.

42. Ill.—Cook v. Blazis, 7 N.E.2d 291, 365 Ill. 626.

Ind.—Hadley v. Kays, 98 N.E.2d 237, 121 Ind App. 112.

Okl.—Coryell v. Marrs, 70 P.2d 478, 180 Okl. 394.

65 C.J. p 450 note 74.

43. Ill.—Curielli v. Curielli, 57 N.E. 2d 879, 388 Ill. 215.

44. Ky.—Neel's Ex'r v. Noland's Heirs, 179 S.W. 430, 433, 166 Ky 455.

65 C.J. p 450 note 75.

45. Wash.—Metcalf v. Sackman, 120 P. 84, 66 Wash. 580.

46. Colo.—Deaner v. O'Hara, 85 P. 1123, 36 Colo. 476.

Iowa.—De France v. Reeves, 125 N.W. 655, 148 Iowa 348.

**Clear, certain, definite, reliable, and convincing**

N.J.—Cullev v. Carr, 45 A.2d 850, 137 N.J. Eq 516.

**Strong, clear, certain, convincing, satisfactory, unequivocal, and conclusive**

Colo.—Piggott v. Brown, 243 P. 626, 79 Colo. 11.

47. Ark.—Leiper v. Harper, 283 S.W. 356, 171 Ark. 1188.

48. Iowa.—Hvatt v. First Nat Bank, 187 N.W. 949, 193 Iowa 593.

49. Colo.—Leroy v. Norton, 113 P. 529, 49 Colo. 490.

50. Mo.—Dixon v. Dixon, 181 S.W. 64.

51. Ark.—Sandefer v. Sandefer, 245 S.W.2d 568, 219 Ark. 943—Randolph v. Randolph, 224 S.W.2d 809, 216 Ark. 193—Roller v. Roller, 216 S.W.2d 399, 214 Ark. 382—Harbour v. Harbour, 181 S.W.2d 805, 207 Ark. 551.

Mo.—Aronson v. Spiteaufsky, 260 S.W.2d 518—Leone v. Bear, 241 S.W.2d 1008, 362 Mo. 464—Warford v. Smoot, 237 S.W.2d 184, 361 Mo 879.

Dunlap v. Dunlap, 218 S.W.2d 108—Bluck v. Nickel Sav. Inv. & Bldg Ass'n, 216 S.W.2d 509—**Corpus Juris cited in** Adams v. Adams, 156 S.W.2d 610, 614, 348 Mo. 1011—

Subre v. Busch, 123 S.W.2d 8, 313 Mo. 679—Pursley v. Pursley, App., 215 S.W.2d 302—In re Title Guaranty Trust Co., App., 113 S.W.2d 1053.

N.C.—Williams v. Williams, 56 S.E. 2d 20, 231 N.C. 33—Bass v. Bass, 48 S.E.2d 48, 229 N.C. 171—Wilson v. Williams, 2 S.E.2d 19, 215 N.C. 407.

Okl.—Kemp v. Strnad, 268 P.2d 255—Dorrance v. Dorrance, 163 P.2d 973, 196 Okl. 195.

Wash.—Griehuhin v. Griehuhin, 272 P.2d 141—Walberg v. Mattson, 232 P.2d 827, 38 Wash.2d 808—Mouser v. O'Sullivan, 156 P.2d 655, 22 Wash.2d 543—In re Cunningham's Estate, 113 P.2d 852, 19 Wash.2d 589—Makinen v. George, 142 P.2d 910, 19 Wash.2d 340—Scott v. Currie, 109 P.2d 526, 7 Wash.2d 301.

65 C.J. p 451 note 82.

**Clear, cogent, positive, and convincing**

Mo.—Mays v. Jackson, 145 S.W.2d 392, 316 Mo 1224—Clubine v. Franz, 139 S.W.2d 629, 346 Mo 1—Tichenor v. Bowman, 133 S.W.2d 324—Parker v. Blakeley, 93 S.W.2d 981, 338 Mo 1189.

**Clear, strong, cogent, and convincing**

N.C.—Carlisle v. Carlisle, 35 S.E.2d 418, 225 N.C. 462.

**Clear, cogent, unequivocal, decisive, and strong**

Okl.—Birdwell v. Estes, 116 P.2d 969, 189 Okl. 379.

52. Mo.—Dee v. Sutter, App., 222 S.W.2d 541—Orrick v. Heberer, App., 121 S.W.2d 664.

65 C.J. p 452 note 34.

**Clear, unequivocal, cogent, and compelling**

Mo.—Woodard v. Cohron, 137 S.W.2d 497, 315 Mo 967.

53. Or.—Holehan v. McCarthy, 281 P. 178, 130 Or 577—Barger v. Barger, 47 P. 702, 30 Or. 268.

54. Ill.—Noland v. Kennedy, 147 N.E. 117, 316 Ill. 255.

55. Cal.—Sheehan v. Sullivan, 58 P. 543, 126 Cal 189—McGehee v. Curran, 193 P. 277, 49 Cal App 186.

56. Or.—Bowns v. Bowns, 200 P.2d 586, 184 Or 603.

**Clear, definite, reliable, and convincing**

N.J.—Vigne v. Vigne, 130 A. 816, 98 N.J. Eq 274—Yotman v. Hedgeman, 88 A. 206, 82 N.J. Eq 221.

57. Okl.—Nicklas v. Crowell, 238 P. 2d 347, 205 Okl. 432.

58. Ark.—Wilson v. Wilson, 204 S.W.2d 479, 211 Ark. 1030—Ellis v. Sheffield, 152 S.W.2d 535, 202 Ark. 723.

Cal.—In re Capolino's Estate, 210 P.2d 850, 94 Cal.App.2d 574—Redsted v. Weiss, 167 P.2d 735, 73 Cal. App.2d 889.



takable;<sup>59</sup> clear, definite, and positive;<sup>60</sup> clear, definite, and unequivocal;<sup>61</sup> clear, direct, and explicit;<sup>62</sup> clear, explicit, and satisfactory;<sup>63</sup> clear, explicit, and unequivocal;<sup>64</sup> clear, full, and convincing;<sup>65</sup> clear, full, and satisfactory;<sup>66</sup> clear, positive, and convincing;<sup>67</sup> clear, positive, and satis-

factory;<sup>68</sup> clear, positive, satisfying, and convincing;<sup>69</sup> clear, precise, and convincing;<sup>70</sup> clear, precise, and indubitable;<sup>71</sup> clear, precise, and unequivocal;<sup>72</sup> clear, strong, and convincing;<sup>73</sup> clear, strong, and unequivocal;<sup>74</sup> clear, strong, unequiv-

Ill.—McCabe v. Hebner, 102 N.E.2d 794, 410 Ill. 557

Iowa—Hill v. Havens, 48 N.W.2d 870, 242 Iowa 920—Newell v. Tweed, 40 N.W.2d 26, 241 Iowa 90—Shaw v. Addison, 28 N.W.2d 816, 239 Iowa 377—Sinclair v. Allender, 26 N.W.2d 320, 238 Iowa 212—Crawford v. Couch, 15 N.W.2d 633, 234 Iowa 1246.

Mont.—Lewis v. Bowman, 121 P.2d 162, 113 Mont. 68

N.D.—Hagerott v. Davis, 17 N.W.2d 15, 73 N.D. 532—McDonald v. Miller, 16 N.W.2d 270, 73 N.D. 474, 156 A.L.R. 1328

Okl.—Lawrence v. Lawrence, 159 P.2d 1018, 195 Okl. 610—Owens v. Hill, 122 P.2d 801, 190 Okl. 242—Beall v. Ferguson, 58 P.2d 598, 177 Okl. 216—Hazlett v. Kearse, 42 P.2d 124, 171 Okl. 82—Foster v. Shirley, 40 P.2d 1083, 170 Okl. 373—McGann v. McGann, 37 P.2d 939, 169 Okl. 515

Pa.—Majors v. Majors, 37 A.2d 528, 349 Pa. 334—Biscaglia v. Biscaglia, 17 A.2d 182, 340 Pa. 293—Scharoli v. Amato, Com.Pl., 43 Berks Co. 149—Rachkaskas v. Diamond, Com.Pl., 46 Sch.Leg.Rec. 1.

S.D.—Scott v. Liechti, 15 N.W.2d 70, 8 D. 89—Jones v. Jones, 291 N.W. 579, 67 S.D. 200

Tex.—Berry v. Rhine, Civ.App., 205 S.W.2d 632—Elbert v. Wanless-Platter Co., Civ.App., 156 S.W.2d 146, error refused.

65 C.J. p 451 notes 86, 8.

**Clear, full, satisfactory, and convincing**

Ala.—Banks v. Banks, 44 So.2d 10, 253 Ala. 252.

R.I.—Chase v. Chase, 81 A.2d 686, 78 R.I. 278

65 C.J. p 451 note 98.

**Clear, explicit, satisfactory and convincing**

Iowa.—Andrew v. Martin, 254 N.W. 67, 218 Iowa 19.

**Clear, satisfactory, convincing, and decisive**

Okl.—King v. Courtney, 122 P.2d 1014, 190 Okl. 256.

**Clear, convincing, satisfactory, and practically free from doubt**

Mont.—Meagher v. Harrington, 254 P. 432, 78 Mont. 457.

65 C.J. p 451 note 83.

**Clear, precise, convincing, and satisfactory**

Pa.—Walker v. Walker, 98 A. 890, 254 Pa. 220.

65 C.J. p 451 note 5.

**Clear, satisfactory, strong, and convincing**

Colo.—Irvine v. Minshull, 152 P. 1150, 60 Colo. 112.

**Clear, satisfactory, unambiguous, and convincing**

U.S.—Carr v. Yokohama Specie Bank, Limited, of San Francisco, C.A. Cal., 200 F.2d 261.

59. Ill.—Craven v. Craven, 95 N.E.2d 489, 407 Ill. 252

60. Mo.—Middletton v. Reece, 236 S.W.2d 335—Aeby v. Aeby, 192 S.W. 97.

61. Ill.—Cogley v. Cogley, 170 N.E. 208, 338 Ill. 400.

62. Md.—Witts v. Horney, 59 Md. 584.

63. Or.—Chance v. Graham, 148 P. 63, 76 Or. 199.

**Clear, explicit, decisive, satisfactory, and convincing**

Iowa—Harnagel v. Fett, 241 N.W. 704, 215 Iowa 868.

64. Pa.—Gonzalez v. Simes, 72 A.2d 91, 364 Pa. 215—Geyer v. Thomas, 72 A.2d 89, 364 Pa. 242—Christy v. Christy, 46 A.2d 169, 353 Pa. 476—West v. Young, 13 A.2d 39, 338 Pa. 298—In re Tuttle's Estate, 200 A. 921, 132 Pa. Super. 356—Singer v. Singer, 49 Pa. Dist. & Co. 392, 54 Dauph. Co. 353—In re Northwest Lyeum Ass'n. of Reading, Pa., Com.Pl., 45 Berks Co. 137—Arndt v. Matz, Com.Pl., 41 Berks Co. 267—Gross v. Gross, Com.Pl., 60 Dauph. Co. 460.

45 C.J. p 451 note 94

**Clear, explicit, unequivocal, precise, convincing, and indubitable**

Pa.—Wosche v. Kramig, 46 A.2d 220, 353 Pa. 481.

**Clear, explicit, precise, and convincing**

Pa.—Jennings v. Everett, 55 A.2d 569, 161 Pa. Super. 443—Gross v. Gross, Com.Pl., 60 Dauph. Co. 460.

65. Ark.—Frazier v. Hanes, 249 S.W.2d 842, 220 Ark. 765—Nelson v. Wood, 137 S.W.2d 929, 199 Ark. 1019.

Me.—Greenberg v. Greenberg, 43 A.2d 841, 141 Me. 320

R.I.—Cutroneo v. Cutroneo, 98 A.2d 921—Larocque v. Larocque, 58 A.2d 633, 74 R.I. 72—Robinson v. Robinson, 19 A.2d 1, 66 R.I. 321.

65 C.J. p 451 note 96, p 452 note 21

**Full, clear, convincing, and satisfactory**

Okl.—McKenna v. Lasswell, 250 P.2d 208, 207 Okl. 408.

66. Ala.—Hooks v. Hooks, 63 So.2d 348, 258 Ala. 427

R.I.—Romeo v. Fite, 60 A.2d 162, 74 R.I. 245—Di Libero v. Pacitto, 46 A.2d 39, 71 R.I. 361.

65 C.J. p 451 note 97, p 452 note 22.

67. Mo.—Thomson v. Johnston, 260 S.W. 100.

68. Ark.—Wooten v. Keaton, 272 S.W. 869, 168 Ark. 981.

65 C.J. p 451 note 1.

69. Colo.—Fagan v. Troutman, 138 P. 442, 25 Colo. App. 261.

70. Pa.—Hale v. Sterling, 85 A.2d 849, 369 Pa. 336

71. Pa.—Arndt v. Matz, 73 A.2d 392, 365 Pa. 41—Holman v. Green, Com.Pl., 40 Del. Co. 413—Andreas v. Bonenberger, Com.Pl., 18 Lehigh L.J. 114

65 C.J. p 451 note 3.

72. Pa.—Quinn v. Gormley, 153 A. 623, 302 Pa. 360—Snoder v. Lennhart, Com.Pl., 14 Som. Leg. J. 113.

73. Or.—Fox v. Maurer, 164 P.2d 417, 178 Or. 64.

65 C.J. p 451 note 8.

**Clear, convincing, strong, and unequivocal**

Ill.—Carlson v. Carlson, 98 N.E.2d 779, 409 Ill. 167—Hille v. Barnes, 77 N.E.2d 809, 399 Ill. 252.

65 C.J. p 451 note 89.

74. Fla.—Pringle v. Pringle, 57 So. 2d 429—Bethea v. Langford, 45 So. 2d 496—Goldman v. Olsen, 31 So. 2d 623, 159 Fla. 435—Wilson v. Davis, 29 So.2d 205, 158 Fla. 437—Domage v. Simpson, 26 So.2d 340, 157 Fla. 168—Frank v. Eeles, 13 So. 2d 216, 152 Fla. 869—Lowell v. Race, 10 So.2d 142, 151 Fla. 536—Lamy v. Lanke, 182 So. 807, 133 Fla. 417—Planagan v. Herrett, 178 So. 117, 130 Fla. 531.

Ill.—Johnson v. Johnson, 115 N.E.2d 617, 1 Ill.2d 319—Clark v. Clark, 76 N.E.2d 446, 398 Ill. 592—Houdock v. Ehrenberger, 72 N.E.2d 837, 397 Ill. 62—Henneman v. Hermann, 52 N.E.2d 263, 385 Ill. 191.

Md.—Gray v. Harriet Lane Home for Invalid Children, 64 A.2d 102, 192 Md. 251—Sands v. Church of Ascension and Prince of Peace, 30 A.2d 771, 181 Md. 536.

65 C.J. p 451 note 9, p 452 notes 30, 31, 42.

**Clear, strong, unequivocal, and beyond doubt**

Ill.—Kush v. Rush, 136 N.E. 808, 304 Ill. 558.

65 C.J. p 451 note 10.

ocal, and unmistakable;<sup>75</sup> clear, unequivocal, and cogent;<sup>76</sup> clear, unequivocal, and decisive;<sup>77</sup> clear, unquestionable, and certain;<sup>78</sup> clear, unequivocal, and convincing;<sup>79</sup> clear, unequivocal, and decisive;<sup>80</sup> clear, unequivocal, and unmistakable;<sup>81</sup> definite and positive;<sup>82</sup> full and clear;<sup>83</sup> full and satisfactory;<sup>84</sup> full, clear, and unequivocal;<sup>85</sup> full, free, and convincing;<sup>86</sup> plain and convincing;<sup>87</sup> plain, direct, and unequivocal;<sup>88</sup> strong and con-

vincing;<sup>89</sup> strong and irrefragable;<sup>90</sup> strong and unequivocal;<sup>91</sup> strong, clear, and convincing;<sup>92</sup> strong, cogent, and convincing;<sup>93</sup> and strong, unequivocal, and convincing.<sup>94</sup>

*Application of rules.* The foregoing rules have been applied in determining the degree of proof required to establish the payment or ownership of the purchase money,<sup>95</sup> and, where part payment only

**Clear, strong, unequivocal, and definite**  
Mo—Gammage v Latham, 222 S.W.  
469

75. Ala.—Sims v Sims, 66 So 2d  
445, 259 Ala 296

Colo.—Woodruff v Clark, 262 P.2d  
737, 128 Colo 387.

Ill.—Jones v Koepcke, 55 N.E.2d 154,  
387 Ill 97—Curriell v Curriell, 48  
N.E.2d 360, 383 Ill 102  
Ind.—Vonville v Dexter, 77 N.E.2d  
759, 118 Ind App. 187.  
65 C.J. p 451 note 12.

**Clear, strong, unequivocal, unmistakable, and convincing**  
Ill.—Dean v Dean, 82 N.E.2d 342, 401  
Ill 406—Tuntland v Haugen, 78  
N.E.2d 308, 399 Ill 595

78. Mo.—Bunel v Nester, 101 S.W.  
69, 203 Mo. 429, followed in Bunel  
v Springfield Sav Bank, 101 S.W.  
78.

77. Colo.—Irvine v Minshull, 152 P.  
1159, 60 Colo 112

Okl.—Plumer v Pearce, 257 P.2d 813,  
208 Okl 526—Gaines v Gaines, 251  
P.2d 1044, 207 Okl 619—Johnson  
v Johnson, 205 P.2d 314, 201 Okl  
268—Ward v Ward, 172 P.2d 978,  
197 Okl 551—Pibikowski v Pibikowski,  
121 P.2d 304, 190 Okl 152  
—Winter v Klein, 96 P.2d 83, 186  
Okl 74—Gaines Bros Co. v Gaines,  
56 P.2d 869, 176 Okl 576.

78. U.S.—Hugginbotham v Boggs,  
Va., 234 F.253, 148 C.C.A. 155

79. Ala.—Rodgers v Thornton, 46  
So 2d 809, 251 Ala 66—Lauderdale  
v Peace Baptist Church of Birmingham,  
19 So 2d 588, 246 Ala 178

Ark.—McClure v McClure, 247 S.W.  
2d 466, 220 Ark 312

N.Y.—Katz v Katz, 121 N.Y.S.2d 562  
Okl.—Turk v Warr, 128 P.2d 835, 191  
Okl 253

Or.—Johnson v McKean, 162 P.2d  
220, 177 Or 556.  
65 C.J. p 452 note 16.

**Clear, convincing, unequivocal, and unmistakable**

Ill.—Wright v Wright, 118 N.E.2d  
280, 2 Ill 2d 246—Paluszek v Wohlrab,  
115 N.E.2d 764, 1 Ill 363.  
Fields v Fields, 114 N.E.2d 402, 415  
Ill. 324—Kohlhaas v Smith, 97 N.  
E.2d 774, 408 Ill. 535—Nickoloff v  
Nickoloff, 51 N.E.2d 565, 384 Ill.  
377—Spina v Spina, 22 N.E.2d 687,

372 Ill 50—Banning v Patterson,  
2 N.E.2d 712, 363 Ill 464

**Clear, convincing, strong, and unequivocal**  
Ala.—Cawthon v Jones, 113 So 231,  
216 Ala 260

**Clear, convincing, strong, unequivocal, and unmistakable**  
Ill.—McCabe v Helmer, 102 N.E.2d  
794, 410 Ill 557—Wies v O'Horow,  
169 N.E. 168, 337 Ill 267

80. Okl.—Plumer v Pearce, 257 P.2d  
813, 208 Okl 526—Staton v Moody,  
256 P.2d 409, 208 Okl 372—Gaines  
v Gaines, 251 P.2d 1044, 207 Okl  
619—Pibikowski v Pibikowski, 121  
P.2d 304, 190 Okl. 152—Winter v  
Klein, 96 P.2d 83, 186 Okl 74—  
Newborn v Farris, 299 P. 192, 149  
Okl. 74.

81. Ill.—Kinsch v Kinach, 181 N.E.  
215, 348 Ill 446  
65 C.J. p 452 note 18.

82. Mo.—Wavrin v Wavrin, 220 S.  
W. 931

83. Fla.—Crouch v Poole, 182 So  
844, 133 Fla 489—Fisher v Gradv,  
176 So 852, 131 Fla 1  
65 C.J. p 452 note 19

84. Neb.—Davis v Davis, 199 N.W.  
113, 112 Neb 178.

85. Fla.—Foster v Thornton, 179  
So 882, 131 Fla 277—Lifton v  
Stretett, 2 So 837, 23 Fla 565

**Full, clear, strong, and unequivocal**  
Ill.—Cohn v Siegel, 165 N.E. 227, 334  
Ill 59

86. Ark.—Newberry v Newberry,  
237 S.W.2d 477, 218 Ark 518—  
Barger v Baker, 237 S.W.2d 37,  
218 Ark 457—Simpson v Thayer,  
217 S.W.2d 751, 211 Ark 566—Itipley  
v Kelly, 183 S.W.2d 793, 207  
Ark 1011—McKendry v Humphrey,  
161 S.W.2d 962, 204 Ark 373

87. Ala.—Merchants Nat. Bank of  
Mobile v Bertolla, 18 So 2d 378,  
216 Ala 662.

88. Del.—Bodley v Jones, 59 A.2d  
463, 30 Del Ch 480  
Md.—O'Connor v Estevez, 35 A.2d  
148, 182 Md 511—Diven v Sieling,  
165 A. 485, 164 Md. 526, appeal dis-  
missed and certiorari denied 54 S.  
Ct 80, 290 U.S. 587, 78 L Ed 518  
65 C.J. p 452 note 29

**Plain, unequivocal, and convincing**  
Md.—Pasman v Pottashnick, 51 A.2d  
664, 188 Md 106

89. Colo.—Hines v Baker, 299 P. 5,  
89 Colo. 1.

Md.—Pasman v Pottashnick, 51 A.2d  
664, 188 Md 106.

90. Ill.—Lantry v Lantry, 51 Ill.  
458, 2 Am R 310—Laughlin v  
Leigh, 112 Ill App. 119, affirmed 71  
N.E. 881, 211 Ill. 192.

91. Ala.—Holt v Johnson, 52 So.  
323, 166 Ala 358

Ill.—McClelland v Roley, 57 N.E.2d  
529, 324 Ill App. 158.

92. Or.—Evans v Trude, 240 P.2d  
940, 193 Or 648—Hughes v Helzer,  
185 P.2d 537, 182 Or 205.  
65 C.J. p 452 note 41.

**Strong, clear, convincing, and indubitable**

Or.—Barger v Barger, 47 P. 702, 30  
Or. 268

93. Mo.—Jacks v Link, 236 S.W. 10,  
291 Mo 282—Clay v Walker, App.  
6 S.W.2d 961

94. Ill.—Kedas v Kedas, 174 N.E.  
891, 312 Ill 630

Mo.—Hunnell v Zinn, 184 S.W. 1154.

95. Colo.—Woodruff v Clark, 262 P.  
2d 737, 128 Colo 387

Del.—Bodley v Jones, 59 A.2d 463  
30 Del Ch 480

Hawaii Wery v Pacific Trust Co.,  
33 Hawaii 701

Ill.—Fields v Fields, 114 N.E.2d 402,  
415 Ill 324—Kohlhaas v Smith, 97  
N.E.2d 771, 108 Ill. 535—Craven v  
Craven, 95 N.E.2d 489, 407 Ill 252  
—Evangeloff v Evangeloff, 85 N.E.  
2d 709, 403 Ill 118—Houdek v  
Ehrenberger, 72 N.E.2d 837, 397  
Ill 62—Curriell v Curriell, 67 N.  
E.2d 879, 388 Ill. 215—Henneman v  
Henneman, 52 N.E.2d 263, 385 Ill.  
191.

Ind.—Vonville v Dexter, 77 N.E.2d  
759, 118 Ind App 187

Md.—O'Connor v Estevez, 35 A.2d  
148, 182 Md 541—Cropper v Lam-  
bertson, 197 A 576, 174 Md. 24—  
Diven v Sieling, 165 A 485, 164  
Md 526, appeal dismissed and cer-  
tiorari denied 54 S.Ct. 80, 290 U.S.  
587, 78 L Ed 518

Mo.—Middleton v Reece, 236 S.W.2d  
235

Mont.—In re Hunter's Estate, 236 P.  
2d 94, 125 Mont. 315.

Ohio.—Bell v Vardalides, 59 N.E.2d  
73.

S.C.—Hutto v Hutto, 196 S.E. 369,  
187 S.C. 36.

65 C.J. p 453 note 49.

of the purchase money is claimed, the fact of payment, or ownership of the fund paid,<sup>96</sup> and the exact proportion of the payment of the whole price;<sup>97</sup> the specific part of distinct interest for which payment was made;<sup>98</sup> the understanding and intention of the parties;<sup>99</sup> and that the alleged cestui que trust is within one of the exceptions of a statute providing that no resulting trust shall result in favor of one furnishing the consideration for a conveyance to another, except where the cestui que trust did not consent to the conveyance or where some trust has been violated.<sup>1</sup> The rules have also been applied where it has been sought to establish a trust between members of the same family,<sup>2</sup> as between husband and wife,<sup>3</sup> or parent and child.<sup>4</sup>

*Rebuttal of presumption of resulting trust.* It has been held that the evidence to rebut a presumption of a resulting trust need not be as strong as the evidence to create a resulting trust,<sup>5</sup> and that the quantum and character of evidence required to rebut a presumption of a resulting trust are that required to establish any other disputed fact.<sup>6</sup> So, where it is admitted that the alleged cestui que trust

furnished the consideration, but the dispute is as to whether a gift was intended, it has been held that it is not necessary that the evidence be clear, precise, and indubitable, the weight of the evidence which satisfies the chancellor being sufficient.<sup>7</sup> On the other hand, it has been held that where it is sought to rebut a presumption of a resulting trust the proof to rebut such presumption must be strong and clear,<sup>8</sup> or clear and convincing,<sup>9</sup> and evidence which is vague or ambiguous is insufficient.<sup>10</sup>

*Ineffective attempt to create express trust.* The rule requiring clear, cogent, and convincing evidence has been held not to apply to a resulting trust which arises by reason of indefiniteness and uncertainty of an express trust.<sup>11</sup>

## § 138. Questions of Law and Fact

The existence of a resulting trust in a particular case is ordinarily a question of fact.

The existence of a resulting trust in a particular case is ordinarily a question of fact,<sup>12</sup> and where the question arises on conflicting or uncertain evidence, in an action at law or in a suit in equity in

96. Minn.—Georgopolis v. George, 54 N.W.2d 137, 237 Minn. 176.

R.I.—Angell v. Angell, 11 A.2d 922, 62 R.I. 264.

65 C.J. p. 453 note 50.

97. Cal.—McQuin v. Rice, 199 P.2d 742, 88 Cal.App.2d 914—Basketell v. Crook, 195 P.2d 29, 86 Cal.App.2d 355.

S.C.—Hutto v. Hutto, 196 S.E. 369, 187 S.C. 36.

Tex.—Bunnell v. Bunnell, Civ.App., 217 S.W.2d 78.

65 C.J. p. 453 note 51.

98. Or.—Holohan v. McCarthy, 281 P. 178, 130 Or. 577.

65 C.J. p. 453 note 52.

99. N.J.—Hermanoski v. Hermanoski, 87 A.2d 452, 18 N.J.Super. 406.

65 C.J. p. 453 note 53.

1. Ind.—Hadley v. Kays, 98 N.E.2d 237, 121 Ind.App. 112.

Ky.—Sewell v. Sewell, 260 S.W.2d 643—Richardson v. Webb, 125 S.W.2d 861, 281 Ky. 201—65 C.J. p. 453 note 54.

2. Ill.—McCabe v. Hebner, 102 N.E.2d 794, 410 Ill. 557.

N.J.—Hermanoski v. Hermanoski, 87 A.2d 452, 18 N.J.Super. 406—Daly v. Lanucha, 81 A.2d 826, 14 N.J.Super. 225.

Okla.—King v. Courtney, 122 P.2d 1014, 190 Okl. 256.

R.I.—Tucker v. Tucker, 20 A.2d 549, 67 R.I. 29—Angell v. Angell, 11 A.2d 922, 62 R.I. 264.

Wash.—Walberg v. Mattison, 232 P.2d 827, 38 Wash.2d 808.

65 C.J. p. 453 note 55.

3. Ark.—Parks v. Parks, 182 S.W.2d 470, 207 Ark. 720.

D.C.—Kosters v. Hoover, 98 F.2d 595, 69 App.D.C. 66.

Ill.—Abraham v. Abraham, 86 N.E.2d 221, 403 Ill. 312—Nickoloff v. Nickoloff, 51 N.E.2d 565, 384 Ill. 377—Walker v. Walker, 17 N.E.2d 567, 369 Ill. 627, certiorari denied 59 S.Ct. 774, 306 U.S. 657, 83 L.Ed. 1054.

Iowa.—Sinclair v. Allender, 26 N.W.2d 320, 238 Iowa 212.

Me.—Greenberg v. Greenberg, 43 A.2d 841, 141 Me. 320.

N.J.—Bell v. Bell, 61 A.2d 775, 1 N.J.Super. 362.

N.C.—Williams v. Williams, 56 S.E.2d 20, 231 N.C. 33—Hass v. Bass, 48 S.E.2d 48, 229 N.C. 171—Carlisle v. Carlisle, 35 S.W.2d 418, 225 N.C. 462.

Okla.—Owens v. Hill, 122 P.2d 801, 190 Okl. 242—Birdwell v. Estes, 116 P.2d 969, 189 Okl. 379.

Pa.—Christy v. Christy, 46 A.2d 169, 353 Pa. 476.

R.I.—Chase v. Chase, 81 A.2d 666, 78 R.I. 278—Campanella v. Campanella, 65 A.2d 85, 76 R.I. 47—Robinson v. Robinson, 19 A.2d 1, 66 R.I. 321.

W.Va.—Carter v. Walker, 1 S.E.2d 483, 121 W.Va. 81.

65 C.J. p. 453 note 56.

4. Ill.—McCabe v. Hebner, 102 N.E.2d 794, 410 Ill. 557—Houdock v. Ehrenberger, 72 N.E.2d 837, 397 Ill. 62.

N.J.—Daly v. Lanucha, 81 A.2d 826, 14 N.J.Super. 225—Hill v. Lamoireaux, 30 A.2d 833, 123 N.J.Eq. 580.

R.I.—Tucker v. Tucker, 20 A.2d 549, 67 R.I. 29.

5. Ill.—Jones v. Koepke, 55 N.E.2d 154, 387 Ill. 97.

65 C.J. p. 442 note 89.

6. Ala.—Montgomery v. McNutt, 108 So. 752, 214 Ala. 692.

7. Pa.—Epstein v. Ratkovsky, 129 A.53, 283 Pa. 168—Citizens Deposit & Trust Co. of Sharpsburg v. Citizens Deposit & Trust Co. of Sharpsburg, 7 A.2d 519, 136 Pa.Super. 413.

8. Me.—Danforth v. Briggs, 36 A.452, 89 Me. 316.

9. Ala.—Adams v. Griffin, 45 So.2d 22, 253 Ala. 371.

10. Neb.—Schwingel v. Anthes, 101 N.W. 335, 102 N.W. 768, 72 Neb. 618.

11. Mo.—Sanford v. Van Pelt, 282 S.W. 1022, 314 Mo. 175.

12. Cal.—Ferguson v. Bank of America Nat. Trust & Sav. Ass'n, 54 P.2d 3, 5 Cal.2d 266.

Ga.—Lewis v. Patterson, 12 S.E.2d 593, 191 Ga. 348.

Pa.—Fitzpatrick v. Fitzpatrick, 29 A.2d 790, 346 Pa. 202.

65 C.J. p. 453 note 61.

Questions for court or jury in actions to establish trusts generally see infra § 470.

Value of contributions made by party claiming existence of a resulting trust must be determined by trier of facts where conflicting evidence is introduced on that question.—Socol v. King, 223 P.2d 627, 36 Cal.2d 342.

those jurisdictions in which a jury is part of the chancery system, it should be submitted to the jury for determination;<sup>13</sup> but, where the evidence is legally insufficient to warrant the submission of such a question to the jury, it should not be so submitted,

but should be disposed of by the court alone.<sup>14</sup> Where the issue arises on the chancery side of the court it should ordinarily be decided by the judge in the exercise of his chancery powers and not by the jury.<sup>15</sup>

## C. CONSTRUCTIVE TRUSTS

### § 139. Basis and Elements

- a. In general
- b. Fraud or inequitable conduct as essential element
- c. Fraud at inception of title

#### a. In General

Constructive trusts are creatures of equity, lacking the attributes of true trusts, which arise by operation of law rather than by virtue of agreement or intention, for the purpose of working out right and justice and preventing fraud.

A constructive trust is a creature of equity,<sup>16</sup> defined supra § 15 as a remedial device by which the holder of legal title is held to be a trustee for the benefit of another who in good conscience is entitled to the beneficial interest. So, the doctrine of constructive trust is an instrument of equity for the

maintenance of justice, good faith, and good conscience,<sup>17</sup> resting on a sound public policy requiring that the law should not become the instrument of designing persons to be used for the purpose of fraud.<sup>18</sup> In this respect constructive trusts have been said to arise through the application of the doctrine of equitable estoppel,<sup>19</sup> or under the broad doctrine that equity regards and treats as done what in good conscience ought to be done.<sup>20</sup>

A constructive trust lacks the attributes of a true trust,<sup>21</sup> that is, it has none of the elements of an express trust,<sup>22</sup> and is not a fiduciary relationship,<sup>23</sup> but it is a fiction imposed as an equitable device for achieving justice.<sup>24</sup> The feature which distinguishes constructive trusts from express trusts and resulting trusts is that the former do not arise by virtue of agreement or intention, either actual or implied, but by operation of law,<sup>25</sup> or, more ac-

13. U.S.—*Rosenberg v. Baum*, C.C.A. Kan., 152 F.2d 16.

N.C.—*Bullman v. Edney*, 61 S.E.2d 338, 232 N.C. 465—*Wilson v. Williams*, 2 S.E.2d 19, 215 N.C. 407—*Wilmington Furniture Co. v. Cole*, 178 S.E. 579, 207 N.C. 840, 847.

Tenn.—*Greenwood v. Maxey*, 231 S.W.2d 315, 190 Tenn. 599.

Tex.—*Dickens v. Dickens*, Civ.App., 241 S.W.2d 658, error refused no reversible error.

65 C.J. p. 454 note 62.

Whether trust was abandoned was held question for jury.—*Wilmington Furniture Co. v. Cole*, 178 S.E. 579, 207 N.C. 840, 847.

14. Pa.—*Artz v. Meister*, 123 A. 501, 278 Pa. 583.

65 C.J. p. 454 note 63.

15. S.C.—*McGee v. Wells*, 30 S.E. 602, 52 S.C. 472.

16. Cal.—*West v. Stainback*, 240 P.2d 366, 108 Cal.App.2d 806.

17. N.J.—*Camden Trust Co. v. Cramer*, 40 A.2d 601, 136 N.J. 261.

18. Mo.—*Parker v. Blakeley*, 93 S.W.2d 981, 338 Mo. 1189—*Ferguson v. Robinson*, 167 S.W. 447, 255 Mo. 113—*In re Title Guaranty Trust Co.*, App., 113 S.W.2d 1053.

19. Fla.—*City of Sarasota v. Dixon*, 1 So.2d 198, 146 Fla. 369—*Smith v. Smith*, 196 So. 409, 143 Fla. 159.

Iowa.—*Corpus Juris* quoted in *Mead v. City Nat. Bank of Clinton*, 8 N.W.2d 417, 420, 232 Iowa 1276.

*Mich.—Haack v. Burmeister*, 286 N.W. 666, 289 Mich. 418.

Okla.—*Corpus Juris* quoted in *De Moss v. Rule*, 152 P.2d 594, 599, 194 Okl. 440.

S.C.—*Greene v. Brown*, 19 S.E.2d 114, 199 S.C. 218.

65 C.J. p. 454 note 66.

#### Consideration

(1) Underlying principle on which all constructive trusts are based is equitable doctrine concerning consideration—*Elberts v. McLean*, 98 S.W.2d 352, 128 Tex. 573.

(2) A constructive trust in real property is not established in absence of proof of payment of any consideration or of any agreement to pay by alleged beneficiaries—*Elbert v. Waples-Platter Co.*, Tex.Civ.App., 156 S.W.2d 146, error refused.

20. Iowa.—*Corpus Juris* quoted in *Mead v. City Nat. Bank of Clinton*, 8 N.W.2d 417, 420, 232 Iowa 1276.

*Mich.—Haack v. Burmeister*, 286 N.W. 666, 289 Mich. 418.

Okla.—*Corpus Juris* quoted in *De Moss v. Rule*, 152 P.2d 594, 599, 194 Okl. 440.

S.C.—*Greene v. Brown*, 19 S.E.2d 114, 199 S.C. 218.

65 C.J. p. 454 note 67.

Wrongful appropriation or retention Foundation on which a constructive trust arises is a wrongful appropriation or retention of property of another.—*Panke v. Panke*, Ky., 252 S.W.2d 909.

21. U.S.—*Healy v. C. I. R.*, 73 S.Ct. 671, 345 U.S. 278, 97 L.Ed. 1007—*C. I. R. v. Smith*, 73 S.Ct. 671, 345 U.S. 278, 97 L.Ed. 1007, rehearing denied 73 S.Ct. 935, 345 U.S. 961, 97 L.Ed. 1380, opinion conformed to, C.A., 204 F.2d 691.

Constructive trusts are not technical trusts, and equity court, in imposing or declaring constructive trust, merely uses machinery of trust to prevent fraud or provide remedy in cases of fraud, actual or constructive, by making person acquiring property wrongfully or under such circumstances as to make his retention thereof inequitable a trustee for person defrauded or injured thereby.—*Suhre v. Busch*, 123 S.W.2d 8, 343 Mo. 679.

22. S.C.—*All v. Prillaman*, 20 S.E.2d 741, 200 S.C. 279, 159 A.L.R. 981.

23. U.S.—*Gendler v. Sibley State Bank*, D.C.Iowa, 62 F.Supp. 805.

S.D.—*In re National Ben. Ass'n*, 29 N.W.2d 81, 72 S.D. 23.

24. U.S.—*Healy v. C. I. R.*, 73 S.Ct. 671, 345 U.S. 278, 97 L.Ed. 1007—*C. I. R. v. Smith*, 73 S.Ct. 671, 345 U.S. 278, 97 L.Ed. 1007, rehearing denied 73 S.Ct. 935, 345 U.S. 961, 97 L.Ed. 1380, opinion conformed to, C.A., 204 F.2d 691—*Magidson v. Duggan*, C.A.Mo., 212 F.2d 748.

25. U.S.—*Healy v. C. I. R.*, 73 S.Ct. 671, 345 U.S. 278, 97 L.Ed. 1007—*C. I. R. v. Smith*, 73 S.Ct. 671, 345

curately, by construction of the court,<sup>26</sup> and that of, and ordinarily contrary to, any intention to result is reached in such instances regardless | create a trust.<sup>27</sup> Such trusts are entirely in in-

U.S. 278, 97 L.Ed. 1007, rehearing denied 73 S.Ct. 935, 345 U.S. 961, 97 L.Ed. 1380, opinion conformed to, C.A., 204 F.2d 691—Knight Newspapers v. Commissioner of Internal Revenue, C.C.A.6, 143 F.2d 1007, 154 A.L.R. 1267.

Ariz.—Dawson v. McNaney, 223 P.2d 907, 71 Ariz. 79.

Cal.—West v. Stainback, 240 P.2d 366, 108 Cal.App.2d 806—Strausburg v. Connor, 215 P.2d 509, 96 Cal.App.2d 398—Rankin v. Satir, 171 P.2d 78, 75 Cal.App.2d 691—Earle v. Bryant, 107 P. 1018, 12 Cal.App. 553.

D.C.—Woodruff v. Coleman, Mun. App., 98 A.2d 22.

Fla.—Planagan v. Herrett, 178 So. 147, 130 Fla. 531.

Ill.—Compton v. Compton, 111 N.E.2d 109, 414 Ill. 149—Murray v. Behrendt, 76 N.E.2d 431, 399 Ill. 22—Logemeyer v. Fulton State Bank, 50 N.E.2d 694, 384 Ill. 11—Jones v. Katz, 59 N.E.2d 537, 325 Ill.App. 68—Klein v. Chicago Title & Trust Co., 14 N.E.2d 852, 295 Ill.App. 208.

Iowa—Sinclair v. Allender, 26 N.W. 2d 320, 238 Iowa 212.

Md.—Grimes v. Grimes, 40 A.2d 58, 184 Md. 59.

Mich.—Kren v. Rubin, 61 N.W.2d 9, 338 Mich. 288—Potter v. Lindsay, 60 N.W.2d 133, 337 Mich. 401—McCrary v. Shields, 52 N.W.2d 853, 333 Mich. 290—Digby v. Thorson, 30 N.W.2d 266, 319 Mich. 524—Oltkowski v. St. Casimir's Sav. & Loan Ass'n, 4 N.W.2d 664, 302 Mich. 303—Scarney v. Clarke, 275 N.W. 765, 283 Mich. 56.

Mo.—Corpus Juris quoted in Suhre v. Busch, 123 S.W.2d 8, 15, 343 Mo. 679—in v. Gwin, 219 S.W.2d 282, 240 Mo.App. 782.

N.Y.—Lloyd v. Phillips, 71 N.Y.S.2d 103, 272 App.Div. 222.

N.C.—Speight v. Branch Banking & Trust Co., 183 S.E. 734, 209 N.C. 563.

Okla.—Corpus Juris quoted in De Moss v. Rule, 152 P.2d 591, 599, 194 Okl. 440—Jones v. Jones, 148 P.2d 989, 194 Okl. 228.

Pa.—Gast v. Engel, Com.Pl., 41 Luz. Leg.Rep. 385.

S.C.—Scott v. Scott, 57 S.E.2d 470, 216 S.C. 280—Dominick v. Rhodes, 24 S.E.2d 168, 202 S.C. 139—All v. Prillaman, 20 S.E.2d 741, 200 S.C. 278, 159 A.L.R. 981—Corpus Juris cited in Greene v. Brown, 19 S.E.2d 114, 116, 199 S.C. 218.

Wash.—Nicolai v. Desilets, 55 P.2d 604, 185 Wash. 435.

Wis.—Schofield v. Rideout, 290 N.W. 155, 233 Wis. 550, 133 A.L.R. 834, 65 C.J. p. 454 note 70.

#### Products of conduct

(1) Implied and constructive trusts are not created by agreement and are not the results of agreement, ex-

press or implied, but are products of conduct, in which it is not necessary that cestui que trust have any part or knowledge but in respect to which the law imputes an intention to the actor and the obligation to do equity when called on to do so, irrespective of whether actor had any such intention—Rimmer v. Austin, 4 So.2d 224, 191 Miss. 664.

(2) Constructive trusts depend for their existence on wrongful conduct of defendant causing unjust enrichment, and not on the intent of parties.—Brophy v. Cities Service Co., 70 A.2d 5, 31 Del.Ch. 241—Greenly v. Greenly, 4 A.2d 126, 29 Del.Ch. 297.

#### Device

A constructive trust does not depend on an enforceable agreement to hold property as a trustee but is imposed against the will of the person sought to be held as a trustee as a device employed by courts of equity to get at a wrongdoer—Deep Oil Development Co. v. Cox, Tex. Civ. App., 224 S.W.2d 312, refused no reversible error.

26. U.S.—Oasis Oil Co. v. Bell Oil & Gas Co., D.C.Okla., 106 F.Supp. 954 Cal.—Rankin v. Satir, 171 P.2d 78, 75 Cal.App.2d 691.

Ga.—Wages v. Wages, 42 S.E.2d 481, 202 Ga. 155—Mitchell v. Mitchell, 40 S.E.2d 738, 201 Ga. 621—Murray County v. Pickering, 26 S.E.2d 287, 196 Ga. 208.

Ill.—Compton v. Compton, 111 N.E.2d 109, 414 Ill. 149—Belleon v. Ganas, 69 N.E.2d 321, 394 Ill. 557—Borovansky v. Para, 28 N.E.2d 174, 306 Ill.App. 60.

Ky.—Corpus Juris cited in Long v. Reiss, 160 S.W.2d 668, 676, 290 Ky. 198.

Me.—Sacre v. Sacre, 55 A.2d 592, 143 Me. 80, 173 A.L.R. 1261.

Mich.—Potter v. Lindsay, 60 N.W.2d 133, 337 Mich. 404.

Mo.—Corpus Juris quoted in Suhre v. Busch, 123 S.W.2d 8, 15, 343 Mo. 679.

N.Y.—Frier v. J. W. Sales Corporation, 25 N.Y.S.2d 576, 261 App.Div. 388—Corpus Juris quoted in Stephens v. Evans, 75 N.Y.S.2d 909, 911, 190 Misc. 922.

N.C.—Teachee v. Gurley, 199 S.E. 83, 214 N.C. 288.

Okla.—Corpus Juris quoted in De Moss v. Rule, 152 P.2d 594, 599, 194 Okl. 440.

S.C.—Searson v. Webb, 38 S.E.2d 654, 208 S.C. 453.

Tex.—Simmons v. Wilson, Civ.App., 216 S.W.2d 847, 65 C.J. p. 464 note 71.

#### Constructive or involuntary trust

The trust which is imposed on trustee ex maleficio is a constructive or involuntary trust because equity, for

purpose of working out justice in most efficient manner, creates trust relationship notwithstanding parties do not intend to create a trust, and equity regards the person who was guilty of such wrongful conduct as a trustee ex maleficio, and holds him to the duty and liability of a trustee with respect to the subject matter in order to prevent him from profiting from his own wrong.—Corduvano v. State, 7 S.E.2d 45, 61 Ga.App. 590.

Where there has been no explicit language used in instruments purporting to create a trust, courts in exercise of their equitable powers will infer from what parties did or said that a trust was intended and such trusts are commonly known as constructive or resulting trusts—Miller v. Donald, Tex. Civ. App., 235 S.W.2d 201, error refused no reversible error.

27. U.S.—Troyak v. Enos, C.A.Ind., 204 F.2d 536—Texas Co. v. Miller, C.C.A.Tex., 165 F.2d 111, certiorari denied 68 S.Ct. 911, 333 U.S. 880, 92 L.Ed. 1155—Reilly v. Wheatley, C.C.A.Mass., 68 F.2d 297.

Ariz.—Shackelford v. Swantek, 153 P.2d 534, 62 Ariz. 86.

Ark.—Wofford v. Jackson, 111 S.W. 2d 542, 184 Ark. 1049.

Cal.—Bainbridge v. Stoner, 106 P.2d 423, 16 Cal.2d 423—Sampson v. Bruder, 118 P.2d 28, 47 Cal.App.2d 431.

Fla.—Planagan v. Herrett, 178 So. 147, 130 Fla. 531.

Ga.—Loggins v. Daves, 40 S.E.2d 520, 201 Ga. 628.

Ill.—Belleon v. Ganas, 69 N.E.2d 321, 394 Ill. 557—Kuzlik v. Kwasny, 49 N.E.2d 212, 383 Ill. 354—Doner v. Phoenix Joint Stock Land Bank of Kansas City, 45 N.E.2d 20, 381 Ill. 106—Swofford v. Swofford, 63 N.E.2d 615, 327 Ill.App. 55—Jones v. Katz, 59 N.E.2d 537, 325 Ill.App. 65—Metropolitan Life Ins. Co. v. Personal Home Mortg. Co., 45 N.E.2d 102, 316 Ill.App. 448.

Ky.—Moore v. Terry, 170 S.W.2d 29, 293 Ky. 727—Corpus Juris cited in Long v. Reiss, 160 S.W.2d 668, 676, 290 Ky. 198.

Me.—Sacre v. Sacre, 55 A.2d 592, 143 Me. 80, 173 A.L.R. 1261.

Mich.—Potter v. Lindsay, 60 N.W.2d 133, 337 Mich. 404.

Miss.—Rimmer v. Austin, 4 So.2d 224, 191 Miss. 664.

Mo.—Corpus Juris quoted in Suhre v. Busch, 123 S.W.2d 8, 15, 343 Mo. 679.

N.Y.—Equity Corp. v. Groves, 60 N.E.2d 19, 294 N.Y. 8—Frier v. J. W. Sales Corporation, 25 N.Y.S.2d 576, 261 App.Div. 388—Corpus Juris quoted in Stephens v. Evans, 75 N.Y.S.2d 909, 911, 190 Misc. 922.

vitum,<sup>28</sup> and are forced on the conscience of the trustee<sup>29</sup> in favor of the person defrauded,<sup>30</sup> for the purpose of working out right and justice and preventing fraud,<sup>31</sup> or, as frequently stated, for

N.C.—Teachey v. Gurley, 199 S.E. 83, 214 N.C. 288

**Okl.—Corpus Juris quoted in** De Moss v. Rule, 152 P.2d 594, 599, 194 Okl. 440

Tex.—Mills v. Gray, 210 S.W.2d 985, 147 Tex. 33—Magee v. Young, 198 S.W.2d 883, 145 Tex. 485—McGowen v. Montgomery, Civ.App., 248 S.W.2d 789—Hull v. Fitz-Gerald, Civ.App., 232 S.W.2d 93, affirmed 237 S.W.2d 256, 150 Tex. 39—Simmons v. Wilson, Civ.App., 216 S.W. 2d 847

65 C.J. p 454 note 72.

#### Other statements of rule

(1) Constructive trust arises although there is no express or implied, written or verbal declaration or intention to raise a trust, where legal title to property is obtained by violation of duty to one equitably entitled thereto, and where property thus obtained is held in hostility to such person's beneficial rights of ownership—Kelly v. Davis, 188 S.E. 853, 211 N.C. 1.

(2) A constructive trust does not, like an express trust, arise because of manifestation of intention to create it, but is imposed as a remedy to prevent unjust enrichment.

D.C.—Harrington v. Emmerman, 186 F.2d 757, 88 U.S.App.D.C. 23

S.D.—In re Farmers State Bank of Amherst, 289 N.W. 75, 67 S.D. 51, 126 A.L.R. 619

(3) A constructive trust is imposed not because of the intention of the parties but because person holding title to the property would profit by a wrong or would be unjustly enriched if he were permitted to keep the property

U.S.—Doing v. Riley, C.A.Fla., 176 F.2d 449

Mich.—Potter v. Lindsay, 60 N.W.2d 133, 337 Mich. 404

Pa.—Miller v. Buecker, Com.Pl., 63 York Leg.Rec. 53—Copenhaver v. Duncan, Com.Pl., 61 York Leg.Rec. 105.

Wyo.—McConnell v. Dixon, 233 P.2d 877, 68 Wyo. 301

(4) A constructive trust defeats the intent of one of parties.—Sacre v. Sacre, 55 A.2d 592, 113 Me. 80, 173 A.L.R. 1261

(5) A constructive trust arises contrary to intention and in invitum, against one who by fraud, actual or constructive, by duress or abuse of confidence, by commission of wrong, or by any form of unconscionable conduct, artifice, concealment, or questionable means, or who in any way against equity and good conscience, either has obtained or holds legal right to property which he

ought not, in equity, and good conscience, hold and enjoy—Covert v. Nashville, C. & St. L.Ry., 208 S.W.2d 1008, 186 Tenn. 142, 1 A.L.R.2d 154—Central Bus Lines v. Hamilton Nat. Bank, 239 S.W.2d 583, 34 Tenn. App. 480.

#### Desire to escape obligation

A person may become constructive trustee bound by trust, without desiring to become trustee and even though he wishes to escape such obligation—Stephenson v. Golden, 276 N.W. 849, 279 Mich. 710.

#### Words not necessary

A constructive trust is not created by any words, either expressly or impliedly evincing a direct intention to create a trust, but by the construction of equity in order to satisfy the demands of justice—Murray County v. Pickering, 26 S.E.2d 287, 196 Ga. 208.

#### Profit by wrong

A constructive trust is imposed, not because of intention of parties, but because person holding title to property would profit by a wrong or would be unjustly enriched if he were permitted to keep property—Union Guardian Trust Co. v. Emery, 290 N.W. 841, 292 Mich. 394—Stephenson v. Golden, 276 N.W. 849, 279 Mich. 710.

28. Ky.—Corpus Juris cited in Long v. Reiss, 160 S.W.2d 668, 676, 290 Ky. 198

**Okl.—Corpus Juris quoted in** De Moss v. Rule, 152 P.2d 594, 599, 194 Okl. 440

65 C.J. p 454 note 73.

29. Cal.—West v. Stambach, 210 P.2d 366, 108 Cal.App.2d 806—Strausburg v. Connor, 215 P.2d 509, 96 Cal.App.2d 398—Hankin v. Satin, 171 P.2d 78, 75 Cal.App.2d 691.

Ky.—Corpus Juris cited in Long v. Reiss, 160 S.W.2d 668, 676, 290 Ky. 198

Mich.—Potter v. Lindsay, 60 N.W.2d 133, 337 Mich. 401

**Okl.—Corpus Juris quoted in** De Moss v. Rule, 152 P.2d 594, 599, 194 Okl. 440

Tex.—Grasty v. Wood, Civ.App., 230 S.W.2d 568, error refused no reversible error  
65 C.J. p 455 note 75

#### Involuntary trustee

A constructive trustee is not a voluntary trustee but is held as such regardless of his will in the matter—Lotus Oil Co. v. Spirex, Tex.Civ.App., 240 S.W.2d 357.

30. Okl.—Corpus Juris quoted in De Moss v. Rule, 152 P.2d 594, 599, 194 Okl. 440

65 C.J. p 455 note 76.

31. U.S.—Knight Newspapers v. Commissioner of Internal Revenue, C.C.A. 6, 143 F.2d 1007, 154 A.L.R. 1267

Ala.—Zimmern v. People's Bank of Mobile, 81 So. 811, 814, 203 Ala. 21.

Ariz.—Shackelford v. Swantek, 153 P.2d 534, 62 Ariz. 86.

Cal.—Johnson v. Clark, 61 P.2d 767, 7 Cal.2d 529—Adams v. Bloom, 142 P.2d 775, 61 Cal.App.2d 315—Sampson v. Bruder, 118 P.2d 28, 47 Cal. App.2d 431

D.C.—Woodruff v. Coleman, Mun. App., 98 A.2d 22

Fla.—Anglin v. Lauderdale-By-The-Sea, 60 So.2d 619, certiorari denied Demko v. Lauderdale-By-The-Sea, 73 S.Ct. 795, 345 U.S. 935, 97 L.Ed. 1362.

Ga.—Murray County v. Pickering, 26 S.E.2d 287, 196 Ga. 208.

Ill.—Kuzlik v. Kwasny, 49 N.E.2d 212, 383 Ill. 351—Giese v. Terry, 46 N.E.2d 90, 382 Ill. 34—Doner v. Phoenix Joint Stock Land Bank of Kansas City, 45 N.E.2d 20, 381 Ill. 106

—Swofford v. Swofford, 63 N.E.2d 616, 327 Ill.App. 65—Jones v. Katz, 59 N.E.2d 537, 325 Ill.App. 65—Metropolitan Life Ins. Co. v. Personal Home Mortgage Co., 45 N.E.2d 103, 316 Ill.App. 448

Ky.—Corpus Juris cited in Long v. Reiss, 160 S.W.2d 668, 676, 290 Ky. 198

Me.—Sacre v. Sacre, 55 A.2d 592, 143 Me. 80, 173 A.L.R. 1261

Mich.—Potter v. Lindsay, 60 N.W.2d 133, 337 Mich. 404—Oltkowski v. St. Casimir's Sav. & Loan Ass'n, 4 N.W.2d 664, 302 Mich. 303

Mo.—Corpus Juris cited in Suhre v. Busch, 123 S.W.2d 8, 15, 343 Mo. 679.

Neb.—Corpus Juris cited in Box v. Box, 21 N.W.2d 868, 873, 146 Neb. 826.

N.Y.—Frier v. J. W. Sales Corporation, 25 N.Y.S.2d 576, 261 App. Div. 388.

**Okl.—Corpus Juris quoted in** De Moss v. Rule, 152 P.2d 594, 599, 194 Okl. 440

Pa.—Moore v. Moore, Com.Pl., 35 York Leg.Rec. 269, 67 York Leg.Rec. 141

S.C.—Scott v. Scott, 57 S.E.2d 470, 216 S.C. 280—Dominick v. Rhodes, 21 S.E.2d 168, 202 S.C. 139—All v. Prillaman, 20 S.E.2d 741, 200 S.C. 279, 159 A.L.R. 981.

Tenn.—Hoffner v. Hoffner, 221 S.W.2d 907, 32 Tenn.App. 98.

Tex.—Winkler v. Craven, Civ.App., 265 S.W.2d 191, error refused no reversible error—Corpus Juris cited in Simmons v. Wilson, Civ.App., 216 S.W.2d 847, 850.

65 C.J. p 455 note 74.

the purpose of preventing unjust enrichment.<sup>32</sup> No trust arises, however, in favor of a person participating in fraudulent or reprehensible transactions.<sup>33</sup> Such trusts are remedial in character,<sup>34</sup> and are classified as belonging to remedial rather than substantive law.<sup>35</sup>

It follows that a constructive trust may result

from actual or constructive fraud or from some equitable principle independent of fraud,<sup>36</sup> and if one person obtains the legal title to property, not only by fraud, or by violation of confidence, or of fiduciary relations, but in any other unconscientious manner, so that he cannot equitably retain the property which really belongs to another, equity will impress a constructive trust on the property in favor

#### Similar statements of purpose

(1) Implied trusts arise by implication of law because morality, justice, conscience, and fair dealing demand that the relationship be established.—*Johnson v. Jackson*, D.C. Pa., 82 F.Supp. 915

(2) Equity declares a constructive trust in order that it may lay its hands on the property and wrest it from the possession of a wrongdoer, the relief being predicated on fraud and not on trust.—*Teachey v. Gurley*, 199 S.E. 83, 214 N.C. 288

32. Cal.—*Stromerson v. Averill*, 123 P.2d 617, reheard 141 P.2d 732, 22 Cal.2d 808.—*Weightman v. Hadley*, 248 P.2d 801, 113 Cal.App.2d 598. Mich.—*McCreary v. Shields*, 52 N.W. 2d 853, 333 Mich. 290. N.Y.—*Hoaslip v. Barnshaw*, 129 N.Y. S.2d 433.

Pa.—*Mellon Nat. Bank & Trust Co. v. Ester*, 65 A.2d 327, 357 Pa. 525.—*Gray v. Leibert*, 53 A.2d 132, 357 Pa. 130.

S.D.—*In re National Ben. Ass'n*, 29 N.W.2d 81, 72 S.D. 23

Tex.—*Crumpton v. Scott*, Civ.App., 250 S.W.2d 953, error refused no reversible error.—*Simmons v. Wilson*, Civ.App., 216 S.W.2d 847.

Wash.—*Ryan v. Plath*, 140 P.2d 968, 18 Wash.2d 839.

#### Similar statements of purpose

(1) The purpose of a constructive trust is to put the parties in status quo and prevent unjust enrichment and not to deprive the wrongdoer of his property, or to penalize him for his wrong.—*O'Boyle v. Brenner*, 73 N.Y.S.2d 687, 189 Misc. 1058, modified on other grounds 79 N.Y.S.2d 84, 273 App.Div. 683, appeal dismissed 95 N.E.2d 47, 301 N.Y. 685.

(2) A constructive trust is imposed on a person by a court of equity on the ground of public policy in order to prevent him from holding for his own benefit an advantage which he has gained by reason of breach of a fiduciary relationship subsisting between him and others for whose benefit it is his duty to act.—*Compton v. Compton*, 111 N.E.2d 109, 414 Ill. 149.

(3) In most cases, object and purpose of equity court in imposing constructive trust is to restore to beneficiary property of which he was unjustly deprived and take from trustee property retention of which by him

would result in his corresponding unjust enrichment.—*Suhre v. Busch*, 123 S.W.2d 8, 343 Mo. 679.

33. Fla.—*Rappaport v. Kalstein*, 24 So.2d 301, 156 Fla. 722. S.C.—*All v. Prillaman*, 20 S.E.2d 741, 200 S.C. 279.

65 C.J. p. 457 note 89.

#### Libel for divorce

Husband fraudulently declining to appear and answer libel for divorce by wife on her promise to will him half of her property was barred from attempting to enforce trust on wife's property when she died without promised will.—*Taylor v. Ashie*, 187 N.E. 548, 284 Mass. 182.

#### Undue influence

In action to establish a constructive trust in favor of plaintiff to a one-half interest in personal property in defendant's possession, defendant could not rely on defense of undue influence exerted over defendant by plaintiff where defendant suffered no detriment by any influence exerted by plaintiff.—*Tobola v. Wholey*, 170 P.2d 952, 75 Cal.App.2d 351.

34. Ariz.—*Shackelford v. Swank*, 153 P.2d 534, 62 Ariz. 86.

Cal.—*Sampson v. Bruder*, 118 P.2d 28, 47 Cal.App.2d 431.

Del.—*Greenly v. Greenly*, 49 A.2d 126, 29 Del.Ch. 297.

Mich.—*Potter v. Lindsay*, 60 N.W.2d 133, 337 Mich. 404.—*Union Guardian Trust Co. v. Emery*, 290 N.W. 841, 292 Mich. 394.—*Stephenson v. Golden*, 276 N.W. 849, 279 Mich. 710.

N.J.—*Stretch v. Watson*, 69 A.2d 596, 6 N.J.Super. 456, affirmed in part and reversed in part on other grounds 74 A.2d 597, 5 N.J. 266.

Pa.—*City of Philadelphia v. Heinel Motors*, 16 A.2d 761, 142 Pa.Super. 493.—*Copenhaver v. Duncan*, Com. Pl., 61 York Leg.Rec. 105.

S.D.—*In re National Ben. Ass'n*, 29 N.W.2d 81, 72 S.D. 23.

Tex.—*Simmons v. Wilson*, Civ.App., 216 S.W.2d 847.

The theory of a constructive trust is adopted by equity as a remedy to compel one to restore property to which he is not justly entitled to another.—*Bainbridge v. Stoner*, 106 P.2d 423, 16 Cal.2d 423.

#### Remedial institution

A constructive trust is a remedial institution as distinguished from substantive, the latter being typically exemplified by an express trust.—

*Kerber v. Rowe*, 156 S.W.2d 925, 348 Mo. 1125.

#### Restitution

A basic constituent of constructive trust is restitution of the property of the cestui que trust with which the property, which is the subject of the trust, has been acquired.—*Meillette v. Hudstan Oil Corp.*, Tex. Civ.App., 243 S.W.2d 438, error refused no reversible error.

#### Title or lien

A constructive trust is not a title to, or lien on, property but a mere remedy to which equity resorts in granting relief against fraud, and does not exist so as to affect property held by wrongdoer until it is declared by a court of equity as a means of affording relief.—*International Refugee Organization v. Maryland Drydock Co.*, C.A. Md., 179 F.2d 284.

35. Ohio.—*In re Barnes' Estate*, Com.Pl., 168 N.E.2d 88, affirmed 108 N.E.2d 101.

Tex.—*McGhee v. Cambiano*, Civ.App., 212 S.W.2d 237.

36. Fla.—*Seestedt v. Southern Laundry*, 5 So.2d 859, 149 Fla. 402.

Mich.—*Potter v. Lindsay*, 60 N.W.2d 133, 337 Mich. 404.

#### Inequitable retention

Constructive trusts arise when property is obtained fraudulently or gotten without fraud and retained inequitably.

Fla.—*City of Sarasota v. Dixon*, 1 So. 2d 198, 146 Fla. 369.—*Smith v. Smith*, 196 So. 409, 143 Fla. 159.

Mich.—*Oltkowski v. St. Casimir's Sav. & Loan Ass'n*, 4 N.W.2d 664, 302 Mich. 303.

N.C.—*Teachey v. Gurley*, 199 S.E. 83, 214 N.C. 288.

#### Honesty and fair dealing

(1) A trust is implied whenever circumstances are such that the person taking the legal estate, whether by fraud or otherwise, cannot enjoy beneficial interest without violating rules of honesty and fair dealing.—*McGann v. Capital Sav. Bank & Trust Co.*, 89 A.2d 123, 117 Vt. 179.

(2) Constructive trusts will be considered as comprising those cases where a court of equity finds that defendant holds a property interest unfairly as against complainant, but not under an express or resulting trust.—*Seaton v. Webb*, 38 S.E.2d 654, 208 S.C. 453.

of the person who is in good conscience entitled to it, and who is considered in equity as the beneficial owner.<sup>37</sup> In other words, a constructive trust will arise whenever the circumstances under which prop-

erty was acquired make it inequitable that it should be retained by him who holds the legal title, as against another,<sup>38</sup> provided some confidential relationship exists between the two,<sup>39</sup> and provided the

37. Iowa.—Eliason v. Stephens, 216 N.W. 771, 216 Iowa 601.

Mich.—Chlebeck v. Mikrut, 58 N.W.2d 125, 336 Mich. 414.

N.Y.—Frier v. J. W. Sales Corp., 25 N.Y.S.2d 576, 261 App.Div. 388.

Okla.—Lewis v. Schafer, 20 P.2d 1048, 163 Okl. 94.

Tex.—Rinford v. Snyder, 189 S.W.2d 471, 144 Tex. 134.—McGowen v. Montgomery, Civ.App., 248 S.W.2d 789.—Republic Nat. Bank of Dal-

las v. Eiring, Civ.App., 240 S.W.2d 414.—Simmons v. Wilson, Civ.App., 216 S.W.2d 847.—Snyder v. Citizens State Bank, Civ.App., 184 S.W.2d 684, affirmed 189 S.W.2d 471, 144 Tex. 134.—Kirkland v. Handrick, Civ.App., 173 S.W.2d 735, error re-

jected.—Hood v. Hood, Civ.App., 153 S.W.2d 247.—Hall v. Miller, Civ. App., 147 S.W.2d 266, error dismissed, judgment correct.

Wash.—Kausky v. Kosten, 179 P.2d 950, 27 Wash.2d 721.

Similar statements of rule

(1) In general.

U.S.—Continental Illinois Nat. Bank & Trust Co. v. Continental Illinois Nat. Bank, C.C.A.III, 87 F.2d 934.

Cal.—Mazzera v. Wolf, 183 P.2d 949, 30 Cal.2d 531.—Simpson v. Gillis, 32 P.2d 1671, 1 Cal.2d 42.

Ill.—Compton v. Compton, 111 N.E.2d 109, 414 Ill. 149.

Iowa.—Eliason v. Stephens, 246 N.W. 771, 216 Iowa 601.

N.C.—Speight v. Branch Banking & Trust Co., 183 S.E. 734, 209 N.C. 563.

Va.—Fair v. Rook, 77 S.E.2d 395, 195 Va. 196.

(2) Constructive trust may result from actual fraud or from existence of confidential relationship and subsequent abuse of the confidence reposed producing a result abhorrent to equity.

U.S.—Continental Illinois Nat. Bank & Trust Co. v. Continental Illinois Nat. Bank, C.C.A.III, 87 F.2d 934.

Ill.—Murray v. Behrendt, 76 N.E.2d 431, 399 Ill. 22.—Scherman v. Scherman, 71 N.E.2d 16, 395 Ill. 674.—Winger v. Chicago City Bank & Trust Co., 67 N.E.2d 265, 394 Ill. 94.—Suchy v. Hajicek, 4 N.E.2d 836, 364 Ill. 502.—Ordahl v. Johnson, 93 N.E.2d 377, 341 Ill.App. 277.—Metropolitan Life Ins. Co. v. Personal Home Mortg. Co., 45 N.E.2d 103, 316 Ill.App. 448.

(3) A constructive trust is predicated on fraud, misrepresentation, concealment, mistake, undue influence, duress, breach of fiduciary or confidential relationships, or similar

equitable considerations.—Hicks' Estate v. Cary, 52 N.W.2d 351, 332 Mich. 606.

(3) A constructive trust will be imposed by the courts in order to do equity and prevent unjust enrichment when title to property is acquired by fraud, duress, undue influence, or is acquired or retained in violation of a fiduciary duty.—Ilovenko v. Ilokovoy, 45 N.W.2d 492, 77 N.D. 740.

38. U.S.—Knight Newspapers v. Commissioner of Internal Revenue, C.C.A.6, 143 F.2d 1007, 154 A.L.R. 1267.—Rudenberg v. Clark, D.C. Mass., 72 F.Supp. 381.—Corpus Juris quoted in Penn Mut. Life Ins. Co. of Philadelphia, Pa. v. Miller, D.C.Mo., 32 F.Supp. 206, 208, appeal dismissed, C.C.A., O'Brien v. Miller, 116 F.2d 499, two cases, and O'Brien v. Northwestern Mut. Life Ins. Co., 116 F.2d 499.

Ariz.—Dawson v. McNaney, 223 P.2d 907, 71 Ariz. 79.

Ill.—Compton v. Compton, 111 N.E.2d 109, 414 Ill. 149.—Brennan v. Perselli, 266 Ill.App. 441, affirmed 187 N.E. 820, 353 Ill. 630.

Kan.—Titus v. Titus, 101 P.2d 872, 151 Kan. 824.

Ky.—More v. Terry, 170 S.W.2d 29, 293 Ky. 727.

Me.—Sacre v. Sacre, 55 A.2d 592, 143 Me. 80, 173 A.L.R. 1261.

Md.—Long v. Huseman, 47 A.2d 75, 186 Md. 195.—Levine v. Schofer, 40 A.2d 324, 184 Md. 205.—Grimes v. Grimes, 40 A.2d 58, 184 Md. 59.—O'Connor v. Estevez, 35 A.2d 148, 182 Md. 541.

Mich.—Potter v. Lindsay, 60 N.W.2d 133, 337 Mich. 404.—McCreary v. Shields, 52 N.W.2d 853, 333 Mich. 290.—Digby v. Thorson, 30 N.W.2d 266, 319 Mich. 524.—Haack v. Burmeister, 286 N.W. 666, 289 Mich. 418.—Searney v. Clarke, 275 N.W. 765, 282 Mich. 56.

Miss.—Jackson v. Jefferson, 158 So. 486, 171 Miss. 774.

Mo.—Lucas v. Central Missouri Trust Co., 166 S.W.2d 1053, 350 Mo. 593.

Neb.—Corpus Juris quoted in Tuttle v. Wyman, 18 N.W.2d 744, 748, 146 Neb. 146.

N.J.—Stretch v. Watson, 74 A.2d 597, 6 N.J. 268.

N.Y.—Equity Corp. v. Groves, 60 N.E.2d 19, 291 N.Y. 8.—In re Yasidom's Estate, 125 N.Y.S.2d 363, 204 Misc. 755.—Miller v. Gallusser, 3 N.Y.S.2d 994, 167 Misc. 393.

Ohio.—Hasselschwert v. Hasselschwert, 106 N.E.2d 786, 90 Ohio App. 331.—Kuck v. Sommers, App., 100 N.E.2d 68.

Okla.—Corpus Juris cited in De Moss v. Rule, 152 P.2d 594, 599, 194 Okl.

440.—Davis v. Travis, 52 P.2d 72, 175 Okl. 21.

Or.—Jones v. Jackson, 246 P.2d 546, 195 Or. 643.—Corpus Juris cited in Bechtel v. Bechtel, 91 P.2d 529, 532, 162 Or. 211.

Pa.—Dulan Paper Co. v. Insurance Co. of North America, 63 A.2d 85, 361 Pa. 68, 8 A.L.R.2d 1393.—Schein v. Brasler, 61 Pa.Dist. & Co. 260.—In re Heinel's Estate, Com.Pl., 70 Montg. Co. 156.—Forbes Road Union Church and Sunday School v. Incorporated Trustees of Salvation Army of Pa., Com.Pl., 35 West.Co. 81.

S.C.—Corpus Juris quoted in Dominick v. Rhodes, 24 S.E.2d 168, 172, 202 S.C. 139.—Greene v. Brown, 19 S.E.2d 114, 199 S.C. 218.

S.D.—Johnson v. Burke, 63 N.W.2d 794.

Tenn.—Central Bus Lines v. Hamilton Nat. Bank, 239 S.W.2d 583, 34 Tenn.App. 480.

Tex.—Winkler v. Craven, Civ.App., 265 S.W.2d 191, error refused no reversible error.

Utah.—In re Madsen's Estate, 259 P.2d 595.

Wash.—Oekfen v. Oekfen, 213 P.2d 614, 35 Wash.2d 439.—Dexter Horton Bldg Co. v. King County, 116 P.2d 507, 10 Wash.2d 186, 65 C.J. p. 456 note 84.

Better right

Where one has acquired legal title to property to which another has better right, equity will convert him into trustee of true owner, and compel conveyance of legal title.

Idaho.—Held v. Keator, 39 P.2d 926, 55 Idaho 172.

Okla.—Parduhn v. Rodman, 204 P.2d 869, 201 Okl. 242.—Barnsdall State Bank v. Springer, 56 P.2d 390, 176 Okl. 479.

65 C.J. p. 457 note 84 [a].

39. U.S.—Corpus Juris quoted in Penn Mut. Life Ins. Co. of Philadelphia, Pa. v. Miller, D.C.Mo., 32 F.Supp. 206, 208, appeal dismissed, C.C.A., O'Brien v. Miller, 116 F.2d 499, two cases, and O'Brien v. Northwestern Mut. Life Ins. Co., 116 F.2d 499.

Neb.—Corpus Juris quoted in Tuttle v. Wyman, 18 N.W.2d 744, 748, 146 Neb. 146.

Okla.—Davis v. Travis, 52 P.2d 72, 175 Okl. 21.

S.C.—Corpus Juris quoted in Dominick v. Rhodes, 24 S.E.2d 168, 172, 202 S.C. 139.

Utah.—Renshaw v. Tracy Loan & Trust Co., 49 P.2d 403, 87 Utah 364, 100 A.L.R. 872.

65 C.J. p. 457 note 85.



raising of a trust is necessary to prevent a failure of justice,<sup>40</sup> and the statement of this rule in *Corpus Juris* has been referred to as an accurate definition of the broad doctrine of constructive trusts.<sup>41</sup>

It is not necessary to the establishment of a constructive trust that any express or conventional trust relationship shall exist between the parties,<sup>42</sup> or that any promise shall have been made by the one for the benefit of the other.<sup>43</sup> Where a trust *ex maleficio* is based on a promise, the promise need not be expressly made, since actual co-operation or silent acquiescence may have the same effect.<sup>44</sup> Ordinarily, the inducement, irrespective of the number of promises, is the test in determining the creation of a constructive trust.<sup>45</sup> The fact that a balance on general account is due to a trustee *ex maleficio* from the beneficiary does not affect the existence of the trust.<sup>46</sup> It has been said that a constructive trust does not arise until the cestui que trust elects to assert it;<sup>47</sup> and the right to assert it comes to an end when the property in question is conveyed to the cestui que trust by the alleged trustee,<sup>48</sup> or when other property is accepted by the

cestui in lieu of that to which he is entitled.<sup>49</sup>

The doctrine of constructive trust is not confined to cases where title to real estate is involved.<sup>50</sup> The principles on which constructive trusts are imposed are equally applicable to the acquisition or holding of property under testamentary devises and bequests and under transfers or dispositions not testamentary in character,<sup>51</sup> and to purchases at judicial sales and purchases at private sales.<sup>52</sup> A court of equity in decreeing a constructive trust is bound by no unyielding formula as the equity of the transaction must shape the measure of relief.<sup>53</sup> Courts will go far to find a trust in order to protect a party from the inequitable conduct of an assignee or grantee.<sup>54</sup> The fact that a court of equity will decree a constructive trust in property obtained by fraud or purchased with funds obtained by fraud does not mean that the title of the owner is defective or his possession tortious.<sup>55</sup>

*Res or specific fund.* It is necessary that there be a res or specific fund on which the trust may be fixed.<sup>56</sup>

#### 40. U.S.—*Corpus Juris* quoted in

*Penn Mut Life Ins Co of Philadelphia, Pa. v. Miller*, D.C. Mo., 32 F.Supp. 206, appeal dismissed, C.C.A., O'Brien v. Miller, 116 F.2d 499, two cases, and O'Brien v. Northwestern Mut Life Ins. Co., 116 F.2d 499.

*Mich.—Oltkowski v. St. Casimir's Sav. & Loan Ass'n*, 4 N.W.2d 664, 302 Mich. 303; *Union Guardian Trust Co v. Emery*, 290 N.W. 841, 292 Mich. 394.

*Neb.—Corpus Juris* quoted in *Tuttle v. Wyman*, 18 N.W.2d 744, 748, 146 Neb. 146.

*Okl.—Davis v. Travis*, 52 P.2d 72, 176 Okl. 21.

*S.C.—Corpus Juris* quoted in *Dominick v. Rhodes*, 24 S.E.2d 168, 172, 202 S.C. 129.

65 C.J. p. 457 note 86.

41. U.S.—*Penn Mut. Life Ins. Co. of Philadelphia, Pa. v. Miller*, D.C. Mo., 32 F.Supp. 206, appeal dismissed, C.C.A., O'Brien v. Miller, 116 F.2d 499, two cases, and O'Brien v. Northwestern Mut Life Ins. Co., 116 F.2d 499.

42. N.C.—*Kelly v. Davis*, 188 S.E. 853, 211 N.C. 1.

S.C.—*Corpus Juris* cited in *Wolfe v. Wolfe*, 56 S.E.2d 343, 346, 215 S.C. 530; *Corpus Juris* quoted in *Dominick v. Rhodes*, 24 S.E.2d 168, 172, 202 S.C. 139; *Greene v. Brown*, 19 S.E.2d 144, 199 S.C. 218.

*Tex.—Pounds v. Jenkins*, Civ.App., 157 S.W.2d 173.

65 C.J. p. 456 note 82.

#### Trust and confidence absent

In constructive trust the relationship of trustee and cestui que trust does not actually exist, since the element of trust and confidence is absent, but the holder of the legal title is declared to be a trustee on equitable principles by reason of some tortious or wrongful act.—*Teachey v. Gurley*, 199 S.E. 83, 214 N.C. 288.

43. Or.—*First Nat Bank of North Bend v. United States Fidelity & Guaranty Co.*, 271 P. 57, 127 Or. 147.

S.C.—*Corpus Juris* cited in *Wolfe v. Wolfe*, 56 S.E.2d 343, 346, 215 S.C. 530; *Corpus Juris* quoted in *Dominick v. Rhodes*, 24 S.E.2d 168, 172, 202 S.C. 139.

44. Neb.—*Box v. Box*, 21 N.W.2d 868, 146 Neb. 826; *Wiseman v. Guernsey*, 187 N.W. 55, 107 Neb. 647.

45. Cal.—*Adams v. Bloom*, 142 P.2d 775, 61 Cal.App.2d 315.

46. Minn.—*Shearer v. Barnes*, 136 N.W. 861, 118 Minn. 179.

47. U.S.—*Stoehr v. Miller*, C.C.A.N.Y., 296 F. 414.

48. Tex.—*Cashon v. Cashon*, Civ.App., 242 S.W.2d 468, error refused.

49. U.S.—*Stoehr v. Miller*, C.C.A.N.Y., 296 F. 414.

50. S.C.—*Dominick v. Rhodes*, 24 S.E.2d 168, 202 S.C. 139.

51. R.I.—*Industrial Trust Co. v. Coit*, 128 A. 200, 46 R.I. 319.

52. Ky.—*Irons v. U. S. Life Ins. Co.*, 108 S.W. 904, 128 Ky. 640, 33 Ky.L. 46, 129 Am.S.R. 318.

53. Mich.—*Oltkowski v. St. Casimir's Sav. & Loan Ass'n*, 4 N.W.2d 664, 302 Mich. 303.

*Tenn.—Central Bus Lines v. Hamilton Nat. Bank*, 239 S.W.2d 583, 34 Tenn.App. 480.

54. U.S.—*Kennedy v. Seaboard Oil Co. of Del.*, D.C. Cal., 99 F.Supp. 730.

55. U.S.—*International Refugee Organization v. Maryland Drydock Co.*, C.A. Md., 179 F.2d 284.

56. U.S.—*American Sur. Co. of New York v. Baldwin*, C.C.A. Ind., 90 F.2d 708; *Bradford v. Chase Nat. Bank of City of New York*, C.C.N.Y., 24 F.Supp. 28, affirmed, C.C.A., *Berger v. Chase Nat. Bank of City of New York*, 105 F.2d 1001, affirmed, 60 S.Ct. 707, 309 U.S. 632, 84 L.Ed. 990, rehearing denied 60 S.Ct. 885, 309 U.S. 698, 84 L.Ed. 1037, affirmed *Schram v. Chase Nat. Bank of City of New York*, 60 S.Ct. 707, 309 U.S. 632, 84 L.Ed. 990, rehearing denied 60 S.Ct. 885, 309 U.S. 698, 84 L.Ed. 1037, affirmed *Wardell v. Chase Nat. Bank of City of New York*, 60 S.Ct. 707, 309 U.S. 632, 84 L.Ed. 990, rehearing denied 60 S.Ct. 885, 309 U.S. 698, 84 L.Ed. 1037, affirmed *Young v. Chase Nat. Bank of City of New York*, 60 S.Ct. 707, 309 U.S. 632, 84 L.Ed. 990, rehearing denied 60 S.Ct. 885, 309 U.S. 698, 84 L.Ed. 1037, affirmed *Peucht v. Chase Nat. Bank of City of New York*, 60 S.Ct. 708, 309 U.S. 632, 84 L.Ed. 990, rehearing denied 60 S.Ct. 886, 309 U.S. 698, 84 L.Ed. 1037.

**Revocation.** Although a contract with respect to property may create an equitable trust in some third person, it may be revoked by the parties to it without the consent of the third person, dependent on the nature of the right in which he is to be benefited and the extent of the benefits thus conferred, even though it is apparent that it is intended at least in part directly and immediately for his benefit.<sup>57</sup> A trust arising from the delivery of a check to the payee to be used for a certain purpose has been held revoked by the death of the maker

after payment of the check has been refused for insufficient funds.<sup>58</sup>

### b. Fraud or Inequitable Conduct as Essential Element

Some fraudulent or unfair and unconscionable conduct rendering it inequitable for the trustee to retain absolute title is essential to create a constructive trust.

It has been broadly held that fraud, actual or constructive, is an essential element in the creation or existence of a constructive trust,<sup>59</sup> although

N.Y.—*Boffa v. Bove*, 121 N.Y.S.2d 709

57. Ala.—*Wolosoff v. Gadsden Land & Bldg. Corp.*, 18 So.2d 568, 245 Ala. 628.

58. Pa.—*In re Moller's Estate*, 182 A. 358, 320 Pa. 150.

59. U.S.—*New Mexico Potash & Chemical Co. v. Independent Potash & Chemical Co., C.C.A.N.M.*, 115 F.2d 544—*Reilly v. Wheatley, C.C.A.Mass.*, 68 F.2d 297.

Ariz.—*Dawson v. McNancy*, 223 P.2d 907, 71 Ariz. 79—*Tucson Title Ins. Co. v. State Tax Commission of Arizona*, 127 P.2d 341, 59 Ariz. 331.

Ark.—*Wofford v. Jackson*, 111 S.W.2d 542, 194 Ark. 1049.

Conn.—*Monaki v. Lukomskic*, 173 A. 897, 118 Conn. 625.

Ill.—*Lowe Foundation v. Northern Trust Co.*, 96 N.E.2d 831, 342 Ill. App. 379—*Metropolitan Life Ins. Co. v. Personal Home Mortg. Co.*, 45 N.E.2d 103, 316 Ill.App. 448—*Klein v. Chicago Title & Trust Co.*, 14 N.E.2d 852, 295 Ill.App. 208.

Ind.—*Vance v. Grow*, 190 N.E. 747, 206 Ind. 614.

Iowa.—*Newell v. Tweed*, 40 N.W.2d 20, 211 Iowa 90—*McRaim v. Sorrensen*, 20 N.W.2d 449, 236 Iowa 996.

Mead v. City Nat. Bank of Clinton, 8 N.W.2d 417, 232 Iowa 1276.

Mich.—*Olikowski v. St. Casimir's Sav. & Loan Ass'n*, 4 N.W.2d 661, 302 Mich. 303—*Scarney v. Clarke*, 275 N.W. 765, 282 Mich. 56.

Mo.—*Milgram v. Jiffy Equipment Co.*, 247 S.W.2d 668, 362 Mo. 1194, 30 A.L.R.2d 925—*Little v. Mettler*, 93 S.W.2d 1000, 338 Mo. 1223—*Parker v. Blakeley*, 93 S.W.2d 981, 338 Mo. 1189—*Gwin v. Gwin*, 219 S.W.2d 282, 240 Mo.App. 782—*Orrick v. Heberer, App.*, 124 S.W.2d 664—**Corpus Juris cited in** *In re Title Guaranty Trust Co., App.*, 113 S.W.2d 1053, 1056.

Neb.—*Paul v. McGahan*, 42 N.W.2d 172, 152 Neb. 578—**Corpus Juris cited in** *Maddox v. Maddox*, 38 N.W.2d 547, 550, 151 Neb. 626.

N.J.—*Gordon v. Griffith*, 168 A. 57, 113 N.J.Eq. 554.

Okl.—**Corpus Juris cited in** *De Moss v. Rule*, 152 P.2d 594, 599, 194 Okl. 440—*Jones v. Jones*, 148 P.2d 989,

194 Okl. 228—*Oliphant v. Rogers*, 95 P.2d 887, 186 Okl. 70.

SC—**Corpus Juris quoted in** *Wolfe v. Wolfe*, 56 S.E.2d 313, 346, 215 S.C. 530—*Domick v. Rhodes*, 21 S.E.2d 168, 202 S.C. 139—*All v. Philaman*, 20 S.E.2d 741, 200 S.C. 279, 159 A.L.R. 981—**Corpus Juris quoted in** *Greene v. Brown*, 19 S.E.2d 111, 116, 199 S.C. 218.

Tex.—**Corpus Juris quoted in** *Talley v. Howsley*, 176 S.W.2d 158, 160, 142 Tex. 81.

Wash.—*George v. Loutais*, 145 P.2d 901, 20 Wash.2d 92—*Saunders v. Vissler*, 145 P.2d 898, 20 Wash.2d 58.

Wis.—*In re Jaeger's Will*, 259 N.W. 812, 218 Wis. 1, 99 A.L.R. 738.

Wyo.—**Corpus Juris cited in** *Carpenter & Carpenter v. Kingham*, 109 P.2d 462, 476, 56 Wyo. 314, modified on other grounds and rehearing denied 110 P.2d 824, 56 Wyo. 314—*65 C.J. p. 455 note 77.*

### Other statements of rule

(1) A constructive trust is founded on fraud either actual or constructive.

Ill.—*Evans v. Berko*, 97 N.E.2d 316, 408 Ill. 438.

Mo.—*Thompson v. Beery*, 235 S.W.2d 308, 361 Mo. 424.

(2) Fraud is gist of constructive trust—*Thomas v. Briggs*, 189 N.E. 389, 98 Ind.App. 352.

(3) A constructive trust is born of fraud and presupposes from its beginning adverse claim of right on part of trustee by implication—*Colinas v. Griffith, Tex.Civ.App.*, 125 S.W.2d 419, error refused.

(4) A constructive trust generally involves primarily a presence of fraud, in view of which equitable title or interest should be recognized in some person other than the taker or holder of the legal title—*Tolle v. Sawtelle, Tex.Civ.App.*, 246 S.W.2d 916, error refused.

(5) An involuntary trust must be predicated on acquisition of property which is impressed with a trust knowing that it is so impressed, or on wrongful acquisition of trust res under such circumstances that equitable principles create a trust—*Cook v. Cook*, 111 P.2d 322, 17 Cal.2d 639.

**Transactions cannot lightly be set aside on chancellor's arbitrary or capricious view that proceeding was unfair, but fraudulent conduct which demands correction or frustration through equity must be substantial, tangible, and of definite import, and must strike at root of the transaction**—*Atkinson v. Atkinson*, 33 S.E.2d 666, 225 N.C. 120.

### Knowledge of wrongdoing

(1) The basis of constructive trusts is knowledge of wrongdoing, which knowledge may be inherent in situation as in cases of constructive trusts imposed on malefactors, or it may be based on notice as where a party has received a res innocently, and after notice, refuses to return it or make restitution for it—*Bradford v. Chase Nat. Bank of City of New York, D.C.N.Y.*, 24 F.Supp. 28, affirmed, C.C.A., *Berger v. Chase Nat. Bank of City of New York*, 105 F.2d 1001, affirmed 60 S.Ct. 707, 309 U.S. 632, 84 L.Ed. 990, rehearing denied 60 S.Ct. 885, 309 U.S. 698, 84 L.Ed. 1037, affirmed *Schrum v. Chase Nat. Bank of City of New York*, 60 S.Ct. 707, 309 U.S. 632, 84 L.Ed. 990, rehearing denied 60 S.Ct. 885, 309 U.S. 698, 84 L.Ed. 1037, affirmed *Wardell v. Chase Nat. Bank of City of New York*, 60 S.Ct. 707, 309 U.S. 632, 84 L.Ed. 990, rehearing denied 60 S.Ct. 885, 309 U.S. 698, 84 L.Ed. 1037, affirmed *Young v. Chase Nat. Bank of City of New York*, 60 S.Ct. 707, 309 U.S. 632, 84 L.Ed. 990, rehearing denied 60 S.Ct. 885, 309 U.S. 698, 84 L.Ed. 1037, affirmed *Feucht v. Chase Nat. Bank of City of New York*, 60 S.Ct. 708, 309 U.S. 632, 84 L.Ed. 990, rehearing denied 60 S.Ct. 885, 309 U.S. 698, 84 L.Ed. 1037.

(2) In order to amount to fraudulent misappropriation of partnership funds, giving rise to constructive trust, employee taking them with partner's consent must have known or been legally chargeable with knowledge of such partner's want of authority—*Iffeuer v. Haas, Tex.Civ.App.*, 55 S.W.2d 111, error dismissed.

### Dissatisfaction with contract

When parties have reduced their contract to writing, so its meaning

strictly speaking, constructive trusts have no element of fraud in them, the court merely using the machinery of a trust to afford redress in cases of fraud.<sup>60</sup> More precisely, some fraudulent or unfair and unconscionable conduct is essential to create a constructive trust,<sup>61</sup> and there must be some unjust enrichment on the part of the trustee by something passing from the beneficiary or from some one else on the beneficiary's behalf,<sup>62</sup> and no such trust arises where there are no circumstances which make it inequitable for one to hold

absolute title to property against another.<sup>63</sup> As otherwise expressed, in order to establish a constructive trust, there must be some element of fraud, either positive or constructive, which existed at the time of the transaction and which influenced the cestui que trust, or there must exist a confidential relationship and undue influence by virtue of which a person has obtained legal title to property which he ought not in equity and good conscience, hold and enjoy.<sup>64</sup> However, actual<sup>65</sup> or intentional

can be plainly understood, a dissatisfied party cannot later, by alleging a different understanding was had between parties before written contract was entered into, change transaction into a constructive trust.—*Evans v. Berko*, 97 N.E.2d 316, 408 Ill. 438.

**60. Mo.—Corpus Juris cited in** *Suhre v. Busch*, 123 S.W.2d 8, 15, 343 Mo. 679.

**N.C.—Avery v. Stewart**, 48 S.E. 775, 136 N.C. 426, 68 L.R.A. 776

**61. Del.—Greenly v. Greenly**, 49 A. 2d 126, 29 Del.Ch. 297.

**N.C.—Winner v. Winner**, 23 S.E.2d 251, 222 N.C. 414

**Tex.—Kinchach Tool Co. v. Corbett-Wallace Corp.**, Civ.App., 145 S.W. 2d 235, reversed on other grounds 160 S.W.2d 509, 138 Tex. 565.

#### Similar statements of rule

(1) Constructive trusts never arise except where holder of legal title obtained it through fraud, misrepresentation, concealment, undue influence, duress, or some other wrongful act whereby another is deprived of title to his property.—*Lowe v. Lowe*, 229 S.W.2d 412, 312 Ky. 641.—*Dotson v. Dotson*, 209 S.W.2d 852, 307 Ky. 105.

(2) A constructive trust can be established only where there is fraud or unjust enrichment.—*Gendler v. Shibley State Bank*, 13 Ctowa, 62 F. Supp. 805.

#### Commingleing of funds

An equitable lien or a "constructive trust" may be impressed where funds are commingled with general assets, but to do so there must be conscious wrongdoing and, in the absence of wrongdoing, no trust can be impressed unless there has been an actual segregation of the fund.—*Gearns v. Commercial Cable Co.*, 32 N.Y.S.2d 856, 117 Misc. 1047.

**62. N.Y.—White v. White**, 119 N.Y. S.2d 306.

#### Breach of promise

A court will not declare a constructive trust in cases where there has been a breach of promise unless there is some unjust enrichment under or arising out of, the confidential relationship of the parties.—*Leake v.*

*Gray*, *Shillinglaw & Co.*, 226 S.W.2d 298, 189 Tenn. 571

**63. Cal.—Carballo v. McFann**, 224 P.2d 902, 101 Cal.App.2d 53

**Mass.—Plumer v. Juice**, 39 N.E.2d 761, 310 Mass. 789

**Mich.—Union Guardian Trust Co v. Emery**, 290 N.W. 841, 292 Mich. 394.—*Scarney v. Clarke*, 275 N.W. 765, 282 Mich. 56.

**Mo.—Little v. Motte**, 93 S.W.2d 1000, 338 Mo. 1223

**N.Y.—Harlem Church of the Seventh Day Adventists v. Greater New York Corporation of Seventh Day Adventists**, 198 N.E. 615, 289 N.Y. 18.—*American Cities Power & Light Corp. v. Williams*, 74 N.Y.S.2d 369, affirmed 80 N.Y.S.2d 357, 274 App. Div. 751, appeal denied 83 N.Y.S. 2d 229, 274 App. Div. 876.

**Pa.—Gray v. Leibert**, 53 A.2d 132, 357 Pa. 130.—*Metzger v. Crulkshank*, 57 A.2d 703, 162 Pa. Super. 280.—*St. Michael's Greek Catholic Church of Mount Clare v. Truckness, Com.Pl.*, 60 Montg.Co. 241.—*Copenhaver v. Duncun*, Com.Pl., 61 York Leg. Rec. 105

**S.C.—Corpus Juris quoted in** *Wolfe v. Wolfe*, 56 S.E.2d 343, 346, 215 S.C. 550.—*Corpus Juris quoted in* *Greene v. Brown*, 19 S.E.2d 114, 116, 199 S.C. 218

**Tenn.—Covett v. Nashville, C. & St. L. Ry.**, 204 S.W.2d 1008, 186 Tenn. 112, 13 A.L.R.2d 164.

**Tex.—Collins v. Collins**, Civ.App., 154 S.W.2d 210, error refused.

**W.Va.—Zogg v. Hedges**, 29 S.E.2d 871, 126 W.Va. 523, 152 A.L.R. 991.

65 C.J. p. 156 note 78.

#### Theory

A suit to fasten a constructive trust on the defendant must proceed on theory that he has title to something which he cannot in good conscience hold against the plaintiff.—*Alburn v. Union Trust Co.*, Com.Pl., 80 N.E.2d 721, appeal dismissed 82 N.E.2d 434, 150 Ohio St. 357, certiorari denied *Alburn v. National City Bank of Cleveland*, 69 S.Ct. 747, two cases, 336 U.S. 937, 93 L.Ed. 1096.

#### Compelling equity

A constructive trust, being a remedial device raised by equity court

so as to reach a wrongdoer, will not be raised in absence of a compelling equity.—*Gates v. Coquat*, Tex. Civ. App., 210 S.W.2d 614.

#### Deed absolute

A constructive trust does not arise where land is conveyed by deed absolute where no condition or reservation is made therein.—*Evans v. Berko*, 97 N.E.2d 316, 408 Ill. 438.

#### Deposit in bank account

The mere fact that money deposited in bank account under wife's name was derived from husband's business did not, per se, create constructive trust.—*In re Cohen's Estate*, 98 N.Y.S.2d 883.

**64. U.S.—Grand Trunk Western R. Co. v. Chicago & Western Indiana R. Co.**, C.C.A. Ill., 131 F.2d 215

**Ill.—Compton v. Compton**, 111 N.E. 2d 109, 414 Ill. 149.—*Evans v. Berko*, 97 N.E.2d 316, 408 Ill. 478.—*Herricks v. Sundmacher*, 89 N.E.2d 732, 405 Ill. 62.—*Wood v. Armstrong*, 81 N.E.2d 468, 401 Ill. 111.—*Stem v. Stein*, 75 N.E.2d 869, 398 Ill. 397.—*Gilbert v. Cohn*, 30 N.E.2d 19, 374 Ill. 152.

**Mass.—Yamini v. Zeitz**, 76 N.E.2d 769, 322 Mass. 268.

#### Wrongful act

In order to establish an implied or constructive trust, the evidence must clearly show a wrongful detention of the property, or fraud, undue influence, the violation of a trust, or other wrongful act by which the property is held contrary to the rules of equity and good conscience.—*Johnson v. Larson*, N.D., 56 N.W.2d 750.

**65. Ariz.—Dawson v. McNeany**, 223 P.2d 907, 71 Ariz. 79.

**Colo.—Scott v. Boma Inv. Co.**, 72 P. 2d 274, 101 Colo. 217.

**Kan.—Staeb v. Staeb**, 145 P.2d 447, 158 Kan. 69.

**Mich.—McCreary v. Shields**, 52 N.W. 2d 853, 333 Mich. 290.—*Digby v. Thorson*, 30 N.W.2d 266, 319 Mich. 524.—*Scarney v. Clarke*, 275 N.W. 765, 282 Mich. 56.

**Minn.—Peterson v. Swan**, 67 N.W.2d 842.

**N.Y.—Frick v. Cone**, 290 N.Y.S. 592, 160 Misc. 450, affirmed 298 N.Y.S. 173, 251 App. Div. 781.

fraud<sup>66</sup> is not an essential element of a constructive trust, and inequitable conduct short of fraud may cause equity to impose such a trust.<sup>67</sup> So, a constructive trust may be imposed to prevent unjust enrichment,<sup>68</sup> without regard to actual fraud,<sup>69</sup> and there may be a constructive trust where retention of property or beneficial interest would constitute an unconscionable advantage to the holder of the legal title, even though its acquisition was not wrongful,<sup>70</sup> and irrespective of detriment, injury or damage to the person benefited by the trust.<sup>71</sup>

### c. Fraud at Inception of Title

Fraud or other wrongdoing warranting the imposition of a constructive trust must exist at the inception of title

to the property, or inhere in the transaction by which the trustee acquires the title, and fraudulent acts or omissions subsequent to the acquisition of title and not connected therewith do not give rise to a constructive trust.

In order that fraud or other wrongdoing may give rise to a constructive trust, it must exist at the inception of title to the property, or inhere in the transaction by which the trustee acquires the title,<sup>72</sup> and fraudulent acts or omissions subsequent to the acquisition of title and not connected therewith do not give rise to a constructive trust.<sup>73</sup> So, a constructive trust ordinarily cannot grow out of the mere violation of a declaration or agreement of trust, whether implied or express, written or verbal,<sup>74</sup> or from a violation of, or refusal to, perform

Okl.—**Corpus Juris cited in** *De Moss v. Rule*, 152 P.2d 594, 599, 194 Okl. 440.

Pa.—*Gast v. Engel*, Com.Pl., 41 Luz. Leg. Reg. 385.

SC—**Corpus Juris cited in** *Wolfe v. Wolfe*, 56 SE2d 313, 346, 215 SC 530—**Corpus Juris quoted in** *Dominick v. Rhodes*, 24 SE2d 168, 172, 202 SC 139.

SD—*Jaecker v. Sechser*, 270 NW. 531, 65 S.D. 38.

65 C.J. p. 456 note 80.

#### Necessary element

It has apparently been held, however, that actual fraud is necessary element of a trust *ex maleficio*.—*Smith v. Harwell*, 136 S.W.2d 172, 199 Ark. 737.

#### Constructive fraud as sufficient

The fraud giving rise to a constructive trust may be either actual or constructive, and it suffices in such respect if retention of property would constitute an unconscionable advantage by holder of legal title over the grantor.—*Moses v. Moses*, 53 A.2d 805, 140 N.J.Eq. 575, 173 A.L.R. 273.

**Dishonesty and deceit** are not necessary ingredients.—*Parker v. Hinkley*, 93 S.W.2d 981, 338 Mo. 1189.—*In re Title Guaranty Trust Co.*, Mo App., 113 S.W.2d 1053.

68. Okl.—**Corpus Juris cited in** *De Moss v. Rule*, 152 P.2d 594, 599, 194 Okl. 440.

Or.—*Tate v. Emery*, 9 P.2d 136, 139 Or. 214.

SC.—**Corpus Juris cited in** *Wolfe v. Wolfe*, 56 SE2d 343, 346, 215 SC 530—**Corpus Juris quoted in** *Dominick v. Rhodes*, 24 SE2d 168, 172, 202 SC 139.

67. D.C.—*Harrington v. Emmerman*, 186 F.2d 757, 88 U.S.App.D.C. 23.

68. Cal.—*Delakis v. Paras*, 194 P. 2d 735, 86 Cal.App.2d 242.

Md.—*Carter v. Abramo*, 93 A.2d 546, 201 Md. 303—*Faerman v. Pottashnick*, 51 A.2d 664, 188 Md. 105.

Mass.—*Yamins v. Zeitz*, 76 N.E.2d 769, 322 Mass. 268.

Minn.—*Knox v. Knox*, 25 N.W.2d 225, 222 Minn. 477.

Mo.—*Kerber v. Rowe*, 156 S.W.2d 925 N.J.—*Driscoll v. Burlington-Bristol Bridge Co.*, 99 A.2d 529, 28 N.J. Super 1—*Moses v. Moses*, 53 A.2d 805, 140 N.J.Eq. 575, 173 A.L.R. 273 N.Y.—*American Cities Power & Light Corp. v. Williams*, 74 N.Y.S.2d 369, affirmed 80 N.Y.S.2d 357, 274 App. Div. 751, appeal denied 83 N.Y.S.2d 229, 274 App. Div. 876.

#### Relationship of confidence

Unjust enrichment under cover of relationship of confidence, and not promise alone, or breach only, authorizes court to declare constructive trust to redress a wrong.—*In re Van Muffling's Estate*, 271 N.Y.S. 584, 154 Misc. 300.

69. N.Y.—*Pink v. Title Guaranty & Trust Co.*, 8 N.E.2d 321, 274 N.Y. 167, reargument denied 10 N.E.2d 575, 274 N.Y. 610.

70. N.J.—*Stretch v. Watson*, 74 A.2d 597, 5 N.J. 268—*Moses v. Moses*, 53 A.2d 805, 140 N.J.Eq. 575, 173 A.L.R. 273.

71. U.S.—*Pratt v. Shell Petroleum Corp.*, C.C.A. Kan., 100 F.2d 833, certiorari denied 59 S.Ct. 775, 306 US 659, 83 L.Ed. 1056.

72. Ala.—*Duncan v. Leonard*, 37 So. 2d 210.

Conn.—*Reynolds v. Reynolds*, 183 A. 394, 121 Conn. 153.

Ind.—*Vance v. Grow*, 190 N.E. 747, 206 Ind. 614.

Pa.—*Kleinfelter v. Kleinfelter*, Com. Pl., 1 Lebanon 28.

Wash.—*Richards v. Lockhart*, 24 P. 2d 113, 173 Wash. 668.

65 C.J. p. 458 note 95.

**The misrepresentation** which will create a trust must be made before or at the time when legal title is acquired by promisor.—*Griffin v. Griffin*, 141 S.W.2d 16, 200 Ark. 794—*David-*

*son v. Edwards*, 270 S.W. 94, 168 Ark. 306.

#### Intention or purpose

Ordinarily, doctrine of constructive trust applies to inception of transaction with respect to which it is asserted, and not to effect of subsequent events on transaction except insofar as such events may reflect on intention or purpose of person sought to be charged at time transaction was consummated.—*Corbett v. Hoopes*, 191 A. 691, 172 Md. 257.

#### Real property

(1) A constructive trust in real property must arise, if at all, at the time the legal title is acquired.—*Elbert v. Waples-Platter Co.*, Tex. Civ.App., 156 S.W.2d 146, error refused.

(2) A constructive trust in realty may be created by a parol agreement made prior to, or contemporaneously with, the execution of the conveyance.—*Moore v. Terry*, 170 S.W.2d 29, 293 Ky. 727.

73. Wash.—*Richards v. Lockhart*, 24 P.2d 113, 173 Wash. 668.

65 C.J. p. 458 note 96.

**Promise made after acquisition of title** to property, to hold such property in trust, or dispose of it in a particular way, does not give rise to a constructive trust.

Ark.—*Griffin v. Griffin*, 141 S.W.2d 16, 200 Ark. 794.

Fla.—**Corpus Juris cited in** *Crockett v. Crockett*, 199 So. 337, 338, 145 Fla. 311.

65 C.J. p. 458 note 96 [a].

74. Md.—*Carter v. Abramo*, 93 A. 2d 546, 201 Md. 303.

Mo.—*Lewis v. Hardin*, 122 S.W.2d 936, 343 Mo. 652.

65 C.J. p. 458 note 97.

#### Wrongful deposit

Fact that trust company as trustee under trust deed violated express trust imposed on it by trust deed in depositing trust funds in banking department of trust company with

a promise to, or agreement with, the person seeking to establish the trust to convey property to him,<sup>75</sup> or from mere failure to pay the purchase money for property conveyed,<sup>76</sup> although where the circumstances are such that a constructive trust would arise in the absence of any agreement, the existence of such an agreement will not prevent a trust arising.<sup>77</sup> Likewise, a denial that any trust exists,<sup>78</sup> or a resort to the statute of frauds to defeat the enforcement of a parol trust or obligation,<sup>79</sup> is not such a fraud as to give rise to a constructive trust.

### § 140. Statutory Provisions in General

Under some statutes, an involuntary trust may be impressed where gain is acquired by fraud, mistake, or the like, and no conditions other than those stated in the statute need not be shown. Statutes restricting the purposes for which express trusts may be created, or abol-

ishing certain resulting trusts, do not apply to constructive trusts or prevent them from arising.

In some jurisdictions constructive trusts may be declared by a court under statutes which provide that an involuntary trust shall arise where gain is acquired by fraud, mistake, or the like, or that one so acquiring gain shall be an involuntary trustee.<sup>80</sup> A trust arising under such a statute is a constructive trust,<sup>81</sup> and in order to create such a trust, as defined in the statute, no conditions other than those stated in the statute are necessary.<sup>82</sup> So, under the statute, actual fraud is not required, to support the trust, constructive fraud being sufficient,<sup>83</sup> nor is any actual or express fiduciary relationship between the parties essential,<sup>84</sup> and, in accordance with the general rule, discussed supra § 139 b, such a trust does not arise out of any wrong done at a time

knowledge of impending insolvency of company did not constitute trust company trustee ex maleficio, since constructive trust is only raised to impress trust on property where none exists, but where one should exist.—*Newark Distributing Terminals Co. v. Hospelhorn*, 191 A. 707, 172 Md. 291

75. Conn.—*Reynolds v. Reynolds*, 183 A. 394, 121 Conn. 153.

Ill.—*Stein v. Stein*, 75 N.E.2d 869, 398 Ill. 397.

Mo.—*Rich v. Williams*, 222 S.W.2d 726.

Pa.—*Thomas v. St. Joseph's Polish Nat. Catholic Church of McKees Rocks*, 22 A.2d 661, 343 Pa. 328.

Tex.—*Rouch v. Grant*, 130 S.W.2d 1019, 134 Tex. 10.

Wyo.—*Corpus Juris cited in Carpenter & Carpenter v. Kingham*, 109 P.2d 463, 476, 56 Wyo. 311, modified on other grounds and rehearing denied 110 P.2d 821, 56 Wyo. 314.

65 C.J. p. 458 note 98.

#### Agreement to share estate

(1) A claim against estate seeking to enforce an oral agreement to share estate of deceased requires specific performance of contract and is not a case for impressing a constructive trust on estate assets.—*In re Loftus Estate*, 85 N.Y.S.2d 244, 193 Misc. 701.

(2) The doctrine of constructive trust was inapplicable to a conveyance of property by mother during her lifetime to dutiful son who was absent at time deed was executed and who had not met attorney who drafted the deed until after his mother's death, notwithstanding assurances given other heirs after mother's death, that each would get his share of the property.—*Kico v. Allen*, 23 N.W.2d 91, 318 Mich. 245.

#### Appointment of property

Where organizer of company did not perform agreement to reimburse

one investing money therein by making him appointee of property coming to organizer under his uncle's will, such property could not be charged with trust in favor of investor.—*Vinton v. Pratt*, 117 N.E. 919, 228 Mass. 468, L.R.A. 1918D 343

76. Md.—*Morris v. Tassit*, 125 A. 499, 145 Md. 22.  
65 C.J. p. 458 note 99.

77. Miss.—*Fitchford v. Howard*, 45 So.2d 142, 208 Miss. 567.—*Adcock v. Merchants & Mfrs. Bank of Philadelphia*, 42 So.2d 427, 207 Miss. 448.

65 C.J. p. 459 note 1.

#### Parol agreement

Where transaction is such that at moment title passes constructive trust would arise in absence of parol agreement, such agreement will not prevent trust arising.—*McDonnell v. Holden*, 185 N.E. 672, 352 Ill. 362

78. Ill.—*Stein v. Stein*, 75 N.E.2d 869, 398 Ill. 397.

Mo.—*Furvis v. Hardin*, 122 S.W.2d 336, 343 Mo. 652.  
65 C.J. p. 459 note 2.

79. Mass.—*Southwick v. Spevak*, 147 N.E. 885, 252 Mass. 354.  
65 C.J. p. 459 note 3.

80. Cal.—*Strausburg v. Connor*, 215 P.2d 509, 96 Cal.App.2d 398.—*Angels Securities Corp. v. Lutton*, 117 P.2d 741, 47 Cal.App.2d 262.  
65 C.J. p. 459 note 5.

#### Reliance on oral promise

Under statute providing that one who gains a thing by fraud is an involuntary trustee of the thing gained, for benefit of person who would otherwise have had it, where grantor conveys property to another in reliance on oral promise of the latter to hold property in trust for grantor or a third person, and grantee subsequently repudiates trust,

the trust is enforced in favor of the intended beneficiary.—*Orellia v. Johnson*, 242 P.2d 5, 38 Cal.2d 693.

#### Undue influence

Where mother through undue influence caused daughter to execute will excluding daughter's husband, who dismissed contest of wife's will and petition for removal of mother as guardian of daughter's estate on sole consideration of oral promise of mother to will husband equivalent of daughter's estate and niece of mother used undue influence to obtain her realty and to be named in will as sole heir, constructive trust was properly imposed on parcel of realty to which niece held title to extent of husband's claim.—*West v. Stainback*, 240 P.2d 366, 108 Cal.App.2d 806.

#### No fraud

Statute providing that one who gains thing by fraud is involuntary trustee did not make deceased, who executed note for borrowed money with which he bought cattle, trustee for lender, where there was no fraud.—*Hanson v. Beaver*, 251 N.W. 891, 62 S.D. 115.

81. Cal.—*West v. Stainback*, 240 P.2d 366, 108 Cal.App.2d 806.—*Strausburg v. Connor*, 215 P.2d 509, 96 Cal.App.2d 398.  
65 C.J. p. 459 note 6.

82. Cal.—*West v. Stainback*, 240 P.2d 366, 108 Cal.App.2d 806.—*Itankin v. Satir*, 171 P.2d 78, 75 Cal.App.2d 691.

83. S.D.—*Luscombe v. Grigsby*, 78 N.W. 357, 11 S.D. 408.

84. Cal.—*Strausburg v. Connor*, 215 P.2d 509, 96 Cal.App.2d 398.—*Itankin v. Satir*, 171 P.2d 78, 75 Cal.App.2d 691.

S.D.—*Farmers & Traders Bank v. Kimball Milling Co.*, 47 N.W. 402, 1 S.D. 388, 36 Am.S.R. 739.

subsequent to the acquisition of property or funds, but only that at the time of taking title.<sup>85</sup>

*A statute restricting the purposes for which express trusts may be created* does not apply to constructive trusts or prevent them from arising.<sup>86</sup>

*Statute abolishing certain resulting trusts.* A statute abolishing the rule of the common law that a trust results where a grant is made to one for a consideration paid by another does not prevent the raising or existence of a constructive trust.<sup>87</sup>

*Statute as to voluntary trusts.* A statute providing that a voluntary trust is created by any words or acts of the trustor indicating an intention to create a trust, and the subject, purpose, and beneficiary thereof, has no application to a constructive trust.<sup>88</sup>

*A statute prohibiting substitutions and fidei commissi* applies to and abolishes express trusts only, and does not prevent constructive trusts from arising or being enforced.<sup>89</sup>

## § 141. Statute of Frauds, and Statutes Prohibiting Parol Trusts

The statute of frauds, and statutes prohibiting parol trusts have no application to constructive trusts, and do not prevent the establishment or enforcement thereof.

Inasmuch as constructive trusts arise by construction or operation of law and not by agreement or intention, as discussed supra § 139, the statute of frauds, and statutes prohibiting parol trusts, have no application to such trusts, and do not prevent the establishment or enforcement thereof,<sup>90</sup> since

85. Cal.—Barr v. O'Donnell, 18 P. 429, 76 Cal. 469, 9 Am. S.R. 242.

86. Minn.—Knox v. Knox, 25 N.W. 2d 225, 223 Minn. 477.

N.Y.—Western Union Tel. Co. v. Shepard, 62 N.E. 154, 169 N.Y. 170, 58 L.R.A. 115.

87. N.Y.—Long Island R. Co. v. City of New York, 64 N.Y.S.2d 391.  
65 C.J. p. 459 note 14.

### Extrinsic equities

The statute prohibiting creation of trust where a grant for a valuable consideration is made to one person and the consideration therefor is paid by another does not manifest intent to obstruct the recognition of trusts ex maleficio or constructive trusts, where, in addition to payment of the purchase price or consideration, other or extrinsic equities exist, but the statute has no effect on trusts constructively imposed as a consequence not of payment alone, but of payment, in combination with other equities—Long Island R. Co. v. City of New York, supra.

88. Cal.—Lauricella v. Lauricella, 118 P. 430, 161 Cal. 61.

89. U.S.—Gaines v. Chew, La., 2 How. 619, 11 L.Ed. 402.

90. U.S.—Kassiske v. Keppeler, C.C. A. Okl., 158 F.2d 809—In re Tate-Jones & Co., D.C. Pa., 85 F.Supp. 971.

Cal.—Mazzera v. Wolf, 183 P.2d 619, 30 Cal.2d 531—Stromerson v. Averill, 133 P.2d 617, reheard 141 P.2d 732, 22 Cal.2d 808—Walter H. Leimert Co. v. Woodson, App., 270 P.2d 95—West v. Stainback, 240 P.2d 366, 108 Cal.App.2d 806—Edwards v. Edwards, 202 P.2d 589, 30 Cal.App.2d 33—Swarthout v. Gentry, 144 P.2d 38, 62 Cal.App.2d 68—Robertson v. Summerlin, 102 P.2d 347, 39 Cal.App.2d 62—Harvey v. Ballagh, 101 P.2d 147, 38 Cal.App.2d 348.

Colo.—Hoff v. Armbruster, 242 P.2d 604, 125 Colo. 198—Hahn v. Pitts, 193 P.2d 716, 118 Colo. 173—Vande-

wiele v. Vandewiele, 136 P.2d 523, 110 Colo. 566.

Conn.—Vorobey v. Siblieh, 71 A.2d 80, 136 Conn. 352—Reynolds v. Reynolds, 183 A. 394, 121 Conn. 153  
D.C.—Bennett v. Bennett, D.C., 83 F.Supp. 19—Major v. Shaver, D.C., 6 F.R.D. 207.

Ga.—Pittman v. Pittman, 26 S.E.2d 764, 196 Ga. 397.  
Idaho—Melgard v. Moscow Idaho Seed Co., 251 P.2d 646, 73 Idaho 265.

Ill.—Bremer v. Bremer, 104 N.E.2d 299, 411 Ill. 454—Kester v. Crill, 91 N.E.2d 419, 405 Ill. 425—Black v. Gray, 87 N.E.2d 635, 403 Ill. 503—Murray v. Behrendt, 76 N.E.2d 431, 399 Ill. 22—Stein v. Stein, 75 N.E.2d 869, 398 Ill. 397—Kuzlik v. Kwasy, 49 N.E.2d 212, 383 Ill. 354—Giese v. Terry, 46 N.E.2d 90, 382 Ill. 34—Gilbert v. Cohn, 30 N.E.2d 19, 374 Ill. 452—Jones v. Felix, 23 N.E.2d 706, 372 Ill. 262—Ropacki v. Ropacki, 188 N.E. 400, 354 Ill. 502—Jones v. Katz, 59 N.E.2d 537, 225 Ill. App. 65.

Kan.—Kotzman v. Paplah, 219 P.2d 425, 169 Kan. 431.

Ky.—Swaner v. Hash, 156 S.W.2d 852, 288 Ky. 485.

Me.—Sacre v. Sacre, 55 A.2d 582, 113 Me. 80, 173 A.L.R. 1261.

Mid.—Shives v. Borgman, 69 A.2d 802, 194 Md. 29—Fasman v. Pottashnick, 51 A.2d 664, 188 Md. 105.

Mich.—Corpus Juris quoted in Kren v. Rubin, 61 N.W.2d 9, 13, 338 Mich. 288—Chlebek v. Mikrut, 58 N.W.2d 125, 336 Mich. 414—Dighly v. Thorson, 30 N.W.2d 266, 319 Mich. 524—Trippensee v. Rice, 20 N.W.2d 172, 312 Mich. 233—Evanoff v. Hall, 17 N.W.2d 724, 310 Mich. 487—Corpus Juris quoted in Stephenson v. Golden, 276 N.W. 849, 863, 279 Mich. 710.

Minn.—Whitten v. Wright, 289 N.W. 509, 206 Minn. 423.

Miss.—Smith v. Smith, 52 So.2d 1, 211 Miss. 481—Adcock v. Merchants

& Mfrs. Bank of Ellisville, 42 So. 2d 427, 207 Miss. 448—Triplett v. Bridgeforth, 38 So.2d 756, 205 Miss. 328.

Mo.—Beach v. Beach, 307 S.W.2d 481—Strype v. Lewis, 180 S.W.2d 583, 352 Mo. 1004, 155 A.L.R. 99—Parker v. Blakeley, 93 S.W.2d 981, 338 Mo. 1189—Janssen v. Christian, App., 57 S.W.2d 692.

Mont.—Campanello v. Mercer, 227 P.2d 312, 124 Mont. 528—Opp v. Boggs, 193 P.2d 379, 121 Mont. 131—Whitcomb v. Koehel, 158 P.2d 496, 117 Mont. 329.

Neb.—Wiskocil v. Kliment, 80 N.W. 2d 786, 155 Neb. 103—Maddox v. Maddox, 38 N.W.2d 547, 151 Neb. 626—Watkins v. Walts, 28 N.W.2d 206, 118 Neb. 543—Reetz v. Olson, 20 N.W.2d 687, 146 Neb. 621—O'Shea v. O'Shea, 11 N.W.2d 540, 113 Neb. 843.

Nev.—Davidson v. Streeter, 234 P.2d 793, 68 Nev. 427.

N.H.—Morgan v. Morgan, 47 A.2d 569, 94 N.H. 116—French v. Pearson, 45 A.2d 900, 94 N.H. 18.

N.J.—Stretch v. Watson, 69 A.2d 596, 6 N.J. Super 456, affirmed in part, reversed in part on other grounds 74 A.2d 597, 5 N.J. 268.

N.Y.—Pattison v. Pattison, 92 N.E.2d 890, 301 N.Y. 65—Latham v. Father Divine, 85 N.E.2d 168, 299 N.Y. 22, reargument denied 86 N.E.2d 114, 299 N.Y. 599, 11 A.L.R.2d 802—Fraw Realty Co. v. Natanson, 185 N.E. 679, 261 N.Y. 396—Kaplan v. Meyer, 65 N.Y.S.2d 765, 271 App. Div. 837—Jilder v. Calmac Oil & Gas Corp., 10 N.Y.S.2d 531, 258 App. Div. 78, affirmed 16 N.Y.S.2d 104, 258 App.Div. 78—Moglia v. Clark, 9 N.Y.S.2d 413, 256 App.Div. 847—Costa v. Pratt, 98 N.Y.S.2d 115, 197 Misc. 252—O'Boyle v. Brenner, 73 N.Y.S.2d 687, 189 Misc. 1058, modified on other grounds 79 N.Y.S.2d 84, 273 App.Div. 683, appeal dismissed 95 N.E.2d 47, 301 N.Y. 685—Clufo v. Clufo, 60 N.Y.S.2d

such statutes are meant to prevent frauds and not to encourage them,<sup>91</sup> and a court of equity will not permit a person to shield himself behind the statute of frauds in order to perpetrate a fraud.<sup>92</sup> So it is frequently said that a constructive trust may be established by parol evidence, as discussed *infra* § 157. On the other hand, where there is not such fraud or wrongdoing as to warrant the establishment

and enforcement of a constructive trust, a parol agreement with respect to realty remains within the application of the statute of frauds and no trust can validly be raised.<sup>93</sup>

*Parol authorization of agent to buy land.* According to some of the authorities, where one employs an agent to buy land, who buys it for him-

848, 186 Misc. 1000.—*In re Buehler's* Estate, 59 N.Y.S.2d 766, 186 Misc. 306, affirmed 70 N.Y.S.2d 139, 272 App.Div. 757, appeal denied 73 N.Y.S.2d 485, 272 App.Div. 794.—*Rogers v. Rogers*, 22 N.Y.S.2d 659, 174 Misc. 841, motion denied 27 N.Y.S.2d 1008, affirmed 28 N.Y.S.2d 743, 262 App.Div. 798.—*In re Kyte's* Will, 22 N.Y.S.2d 236, 174 Misc. 1094.—*Frick v. Cone*, 290 N.Y.S. 592, 160 Misc. 450, affirmed 298 N.Y.S. 173, 251 App.Div. 781.—*In re Poth's* Will, 279 N.Y.S. 95, 165 Misc. 116, affirmed 283 N.Y.S. 428, 246 App.Div. 522.—*Evelyn v. Alleyne*, 118 N.Y.S.2d 839.—*In re Keegan's* Will, 114 N.Y.S.2d 217.—*Tesaro v. Tesaro*, 112 N.Y.S.2d 246.—*Meltzer v. Koenigsberg*, 99 N.Y.S.2d 143, affirmed 100 N.Y.S.2d 592, 277 App.Div. 1050, appeal denied 102 N.Y.S.2d 454, 278 App.Div. 570, affirmed 99 N.E.2d 679, 302 N.Y. 523.—*McGowan v. McGowan*, 99 N.Y.S.2d 25, affirmed 98 N.Y.S.2d 390, 277 App.Div. 897.—*Costa v. Pratt*, 98 N.Y.S.2d 148, affirmed 96 N.Y.S.2d 898, 277 App.Div. 806.—*Wnuk v. Wnuk*, 95 N.Y.S.2d 254, affirmed 96 N.Y.S.2d 687, 276 App.Div. 1102.—*Alonzo v. Alonzo*, 62 N.Y.S.2d 99, affirmed 62 N.Y.S.2d 818, 270 App.Div. 977, appeal denied 63 N.Y.S.2d 844, 270 App.Div. 1076.—*Hartkopf v. Hesse*, 49 N.Y.S.2d 162.

*Okl.*—*Johnson v. Johnson*, 205 P.2d 314, 201 Okl. 268.—*Wright v. Logan*, 65 P.2d 1217, 179 Okl. 350.

*Pa.*—*Kalyvas v. Kalyvas*, 89 A.2d 819, 371 Pa. 371.—*Hamberg v. Barsky*, 50 A.2d 345, 355 Pa. 462.—*Metzger v. Metzger*, 14 A.2d 285, 338 Pa. 564, 129 A.L.R. 683.—*Gross v. Gross*, Com.Pl., 60 Dauph.Co. 460.—*Gast v. Engel*, Com.Pl., 41 Luz.Leg.Reg. 385.—*Breesee v. Rhoades*, Com.Pl., 36 Luz.Leg.Reg. 341.—*Klein v. Zodi*, Com.Pl., 29 North Co. 84.

*S.C.*—*Gardner v. Nash*, 82 S.E.2d 123.—*Seanson v. Webb*, 38 S.E.2d 654, 208 S.C. 463.—*All v. Prillaman*, 20 S.E.2d 741, 200 S.C. 279, 159 A.L.R. 981.

*Tenn.*—*Brunson v. Gladish*, 125 S.W.2d 144, 174 Tenn. 309.

*Tex.*—*Fitz-Gerald v. Hull*, 237 S.W.2d 256, 150 Tex. 39.—*Edwards v. Strong*, 213 S.W.2d 979, 147 Tex. 156.—*Pope v. Garrett*, 211 S.W.2d 559, 147 Tex. 18.—*Erwin v. Hays*, Civ.App., 267 S.W.2d 884, error refused no reversible error.—*Tolle v. Sawtelle*, Civ.App., 246 S.W.2d 916,

error refused.—*Howard v. O'Neal*, Civ.App., 246 S.W.2d 907, error refused no reversible error.—*Hull v. Fitz-Gerald*, Civ.App., 232 S.W.2d 93, affirmed 237 S.W.2d 256, 150 Tex. 39.—*Johnson v. Dickey*, Civ.App., 231 S.W.2d 952, error refused no reversible error.—*Grasty v. Wood*, Civ.App., 230 S.W.2d 568, error refused no reversible error.—*Sevine v. Heissner*, Civ.App., 220 S.W.2d 704, reversed on other grounds 224 S.W.2d 184, 148 Tex. 345.—*Edwards v. Strong*, Civ.App., 207 S.W.2d 855, reformed, 213 S.W.2d 979, 147 Tex. 165.—*Jarrett v. Hall*, Civ.App., 207 S.W.2d 261.—*Gray v. Mills*, Civ.App., 206 S.W.2d 278, affirmed 210 S.W.2d 985, 147 Tex. 33.

*Utah*—*Haws v. Jensen*, 209 P.2d 229, 116 Utah 212.

*Vt.*—*Vilas v. Seith*, 189 A. 862, 108 Vt. 626.

*Va.*—*Sutton v. Sutton*, 72 S.E.2d 275, 194 Va. 179.—*Horne v. Holley*, 188 S.E. 169, 167 Va. 234.

*Wash.*—*Kausky v. Kosten*, 179 P.2d 950, 27 Wash.2d 721.

*Wis.*—*Shevel v. Warter*, 41 N.W.2d 603, 256 Wis. 503.

65 C.J. p 459 note 20.

Admissibility of parol evidence to establish constructive trust see *infra* § 157.

Express trusts and statute of frauds see *supra* §§ 31-41.

#### Express or implied exception

The statutory requirement that a trust must be created by a written instrument does not apply in the case of creation of a constructive trust because of fraud or wrongdoing of the trustee, since trusts *ex maleficio* are either expressly or tacitly excepted from statutory provisions.—*Kren v. Rubin*, 61 N.W.2d 9, 338 Mich. 288.

#### Confidential relationship

Where a formal writing is not in evidence because of a situation growing out of the very confidential relationship of husband and wife, the statute of frauds may not be interposed as a defense.—*Sands v. Sands*, 118 N.Y.S.2d 690.

#### Rescission of contract

Petition asking rescission for fraud of contract involving stock, and to have stock impressed with implied trust or judgment for its market value, was not generally demurrable as seeking to ingratify implied trust

on written contract by parol.—*Schofield v. Burns*, 172 S.E. 569, 178 Ga. 186.

#### Representations as to credit

Statutes exempting bank from liability for cashier's oral representations as to another's credit did not prevent assignees of notes sold by cashier, accompanied by forged financial statements, from establishing preferred claims and impressing bank's funds with trust for amount obtained by bank through cashier's fraud.—*Beall v. Farmers' Exchange Bank of Gallatin, Mo.*, 76 S.W.2d 1098.

91. *Mich.*—*Corpus Juris* quoted in *Kren v. Rubin*, 61 N.W.2d 9, 13, 338 Mich. 288.—*Corpus Juris* quoted in *Stephenson v. Golden*, 276 N.W. 849, 863, 279 Mich. 710. 65 C.J. p 460 note 21.

92. *Md.*—*Carter v. Abramo*, 93 A.2d 546, 201 Md. 303.—*Grimes v. Grimes*, 40 A.2d 58, 184 Md. 59. *Mich.*—*Corpus Juris* quoted in *Kren v. Rubin*, 61 N.W.2d 9, 13, 338 Mich. 288.—*Corpus Juris* quoted in *Stephenson v. Golden*, 276 N.W. 849, 863, 279 Mich. 710.

*S.C.*—*Seanson v. Webb*, 38 S.E.2d 654, 208 S.C. 463.

*S.D.*—*Kelly v. Gram*, 38 N.W.2d 460, 73 S.D. 11.

65 C.J. p 460 note 22.

93. *U.S.*—*Nelson Development Co. v. Ohio Oil Co., D.C.Ill.*, 45 F.Supp. 933.

*Mo.*—*Jankowski v. Delfert*, 201 S.W.2d 331, 356 Mo. 184.

#### Absolute deed

Parol evidence cannot change an absolute deed into one of trust, in absence of fraud, accident, or mistake.

*Ind.*—*Costa v. Costa*, App., 115 N.E.2d 516.

*N.J.*—*DeMarco v. Estlow*, 86 A.2d 446, 18 N.J.Super. 30, affirmed 91 A.2d 272, 21 N.J.Super. 356.

#### Absence of confidential relationship

Where nothing in pleadings or proof indicated that plaintiff's wife, to whom he had conveyed realty, occupied the position of advisor or counsellor to her husband, no confidential relationship was shown, and in absence of such proof, statute of frauds barred enforcement of wife's oral promise to reconvey such realty to her husband.—*Stewart v. Hooks*, 94 A.2d 756, 373 Pa. 542.

self and denies the trust, and no part of the purchase money is paid by the principal, and there is no written agreement, he cannot compel the agent to convey the estate to him, as that would be in violation of the statute of frauds;<sup>94</sup> but in a number of other decisions the contrary has been held.<sup>95</sup>

**Termination of trust.** Although a constructive trust in lands may be terminated by parol, there cannot be an oral extinguishment or surrender of the beneficial interest to the trustee where the trust grows out of abuse of a confidential relationship induced by close kinship.<sup>96</sup>

## § 142. Particular Matters as Giving Rise to Constructive Trust

Generally, any transaction may be the basis for cre-

ating a constructive trust where for any reason the defendant holds funds which in equity and good conscience should be possessed by the plaintiff, and the forms and varieties of constructive trusts are practically without limit.

Generally, any transaction may be the basis for creating a constructive trust where for any reason defendant holds funds which in equity and good conscience should be possessed by plaintiff.<sup>97</sup> The forms and varieties of constructive trusts are practically without limit,<sup>98</sup> such trusts being raised, broadly speaking, whenever necessary to prevent injustice.<sup>99</sup> It has been held, however, that the doctrine of constructive trust must be applied with caution,<sup>1</sup> and that the doctrine cannot be invoked to broaden the basis of equity jurisdiction or to bring within its

94. Mass.—Cann v. Barry, 199 N.E. 905, 299 Mass. 313.  
65 C.J. p 461 note 25.

Violation of duty by agent to purchase as raising constructive trust generally see *infra* § 151c.

### Requirement of writing for employment agreement

Under statute providing an agreement employing an agent or broker to sell or purchase realty for compensation shall be void unless in writing and signed by the party to be charged therewith, where real estate broker orally employed as an agent to negotiate for his principal the purchase of land violated principal's confidence and purchased land with own money and thereafter sold land at a profit, breach of verbal promise was not sufficient basis on which to establish a constructive trust or a trust ex maleficio in proceeds of sale.—*Carikonen v. Alberts*, 83 P.2d 899, 196 Wash. 575, 135 A.L.R. 209.

95. Ky.—Whitsell v. Porter, 217 S.W.2d 311, 309 Ky. 247.  
Mich.—Stephenson v. Golden, 272 N.W. 881, 279 Mich. 493, modified on other grounds on rehearing 276 N.W. 849, 279 Mich. 710.  
N.M.—Rice v. First Nat. Bank in Albuquerque, 171 P.2d 318, 50 N.M. 89.

N.Y.—Kaplan v. Meyer, 65 N.Y.S.2d 765, 271 App.Div. 837.  
Wis.—Faust v. Murray, 15 N.W.2d 793, 245 Wis. 643.  
65 C.J. p 461 note 25.

### No consideration

A parol agreement, by which defendants were to purchase certain lands at a scavenger sale in the name of plaintiff, was not unenforceable under the statute of frauds as an agreement relating to real estate, but under the agreement defendants were the agents of plaintiff and could be made to account as constructive

trustees notwithstanding agents received no consideration for acting as such and they advanced their own money with which to purchase such lands.—*Trippensee v. Rice*, 20 N.W.2d 172, 312 Mich. 233.

### Purchase on commission

Despite provision of statute requiring agreement whereby broker is retained to purchase land on commission to be in writing, brokers who were employed under oral contract to purchase land for another, but who wrongfully purchased it for themselves, would be held accountable as constructive trustees for use and benefit of parties by whom brokers had been employed.—*Harris v. Dunn*, 234 P.2d 821, 55 N.M. 434, 27 A.L.R.2d 1277.

96. N.J.—*Moses v. Moses*, 53 A.2d 805.

97. U.S.—*Grand Trunk Western R. Co. v. Chicago & Western Indiana R. Co.*, C.C.A.111, 131 F.2d 215.

111—*Sebastian v. Stamer*, 90 N.E.2d 922, 340 Ill. App. 218.

### Violation of established principle

Whenever the circumstances of a transaction are such that the person who takes the legal estate in property cannot also enjoy the beneficial interest without necessarily violating some established principle of equity the court will immediately raise a constructive trust and fasten it on the conscience of the legal owner so as to convert him into a trustee for the persons who, in equity, are entitled to the beneficial enjoyment.—*Steinmetz v. Kern*, 32 N.E.2d 151, 375 Ill. 616.

98. U.S.—*New Mexico Potash & Chemical Co. v. Independent Potash & Chemical Co.*, C.C.A.N.M., 115 F.2d 544.

Ariz.—*Fockert v. Miller*, 111 P.2d 60, 64, 57 Ariz. 94.

Mich.—*Union Guardian Trust Co. v. Emery*, 290 N.W. 841, 292 Mich. 394.

Okla.—*Corpus Juris* cited in *De Moss v. Rule*, 152 P.2d 594, 599, 194 Okl. 440.

S.C.—*Corpus Juris* quoted in *Dominick v. Rhodes*, 24 S.E.2d 168, 172, 202 S.C. 139.

65 C.J. p 457 note 87.

99. U.S.—*Knight Newspapers v. Commissioner of Internal Revenue*, C.C.A.6, 143 F.2d 1007, 154 A.L.R. 1267.

Ky.—*Reed v. Reed*, 117 S.W.2d 211, 273 Ky. 502.

Mich.—*Dighy v. Thorson*, 80 N.W.2d 266, 319 Mich. 524—*Union Guardian Trust Co. v. Emery*, 290 N.W. 841, 292 Mich. 394—*Searney v. Clarke*, 275 N.W. 765, 282 Mich. 56.

N.Y.—*Latham v. Father Divine*, 85 N.E.2d 168, 229 N.Y. 22, reargument denied 86 N.E.2d 114, 299 N.Y. 599, 11 A.L.R.2d 802.

Okla.—*Corpus Juris* cited in *De Moss v. Rule*, 152 P. 594, 599, 194 Okl. 440.

S.C.—*Corpus Juris* quoted in *Dominick v. Rhodes*, 24 S.E.2d 168, 172, 202 S.C. 139.

65 C.J. p 457 note 88.

### Efficient instrument

The doctrine of trusts is the most efficient instrument in the hands of a chancellor for maintaining justice, good faith, and good conscience.—*Reed v. Kellerman*, D.C.Pa., 40 F. Supp. 46, motion dismissed 2 F.R.D. 195.

1. N.C.—*Atkinson v. Atkinson*, 33 S.E.2d 666, 225 N.C. 120.

### Reason for rule

A constructive trust must be used with caution, especially where proof of wrongful acts rests in parol, in order that trust may not defeat the purpose of statute of wills, statute of descent and distribution, or statute of frauds.—*Pope v. Garrett*, 211 S.W.2d 559, 147 Tex. 18.



cognizance situations which have heretofore escaped the comprehension of a long recognized rule.<sup>2</sup>

Each case allegedly involving a constructive trust is to be determined from the facts, circumstances, and conditions as presented therein.<sup>3</sup> Particular circumstances have been held not to give rise to a constructive trust,<sup>4</sup> as in transactions involving amounts received under contracts,<sup>5</sup> attorneys' fees,<sup>6</sup>

improvements on real property,<sup>7</sup> insurance policies,<sup>8</sup> leases,<sup>9</sup> and right to rents.<sup>10</sup> A constructive trust does not arise out of a breach of a written contract,<sup>11</sup> and the mere failure to perform an agreement or to carry out a promise cannot in itself give rise to a constructive trust, since such a breach does not in itself constitute fraud or abuse of confidence requisite to the existence of a constructive trust.<sup>12</sup>

2. N.C.—Atkinson v. Atkinson, 33 S. E.2d 666, 225 N.C. 120.

3. Neb.—Jenkins v. Jenkins, 36 N. W.2d 637, 151 Neb. 113.

N.Y.—In re Wechsler's Estate, 13 N. Y.S.2d 940, 171 Misc. 738.

Tex.—Simmons v. Wilson, Civ.App., 216 S.W.2d 847.

4. Cal.—Holtze v. Holtze, 42 P.2d 323, 2 Cal.2d 666—Simpson v. Gillis, 32 P.2d 1071, 1 Cal.2d 42—Sully v. Kern Drilling Corp., App., 272 P.2d 549—Padilla v. Padilla, 100 P.2d 1093, 38 Cal.App.2d 319.

Fla.—Harper v. Strong, 184 So. 848, 135 Fla. 10.

Ill.—Nelson v. John B. Colegrove & Co. State Bank, 188 N.E. 461, 354 Ill. 408—City of Rochelle v. Stocking, 82 N.E.2d 693, 336 Ill. App. 6—Chicago Law School v. First Nat. Bank, 18 N.E.2d 559, 298 Ill. App. 623.

Iowa.—McBain v. Sorensen, 20 N.W. 2d 449, 236 Iowa 996.

Ky.—Lewis & Co. v. Radford, 267 S. W.2d 56—Reed v. Reed, 117 S.W. 2d 311, 273 Ky. 502.

Md.—Masters v. Masters, 89 A.2d 576, 200 Md. 318.

Mass.—Yamins v. Zeitz, 76 N.E.2d 769, 322 Mass. 268—Plumer v. Luce, 33 N.E.2d 961, 310 Mass. 789.

Nev.—Fine Grove Nev. Gold Min. Co. v. Freeman, 171 P.2d 366, 63 Nev. 357.

N.Y.—Tippen v. King, 61 N.Y.S.2d 298, 187 Misc. 150.

N.C.—McGurk v. Moore, 67 S.E.2d 53, 234 N.C. 248.

S.C.—Wolfe v. Wolfe, 56 S.E.2d 343, 215 S.C. 530.

Tenn.—Blick v. Friedman, 235 S.W. 2d 808, 197 Tenn. 647.

Tex.—Ulmer v. Ulmer, 162 S.W.2d 944, 139 Tex. 326—Muller v. Kilham, Civ.App., 229 S.W.2d 839—Elbert v. Waples-Platter Co., Civ. App., 156 S.W.2d 146, error refused—Collins v. Collins, Civ.App., 154 S.W.2d 210, error refused—Anderson v. Powell, Civ.App., 117 S.W.2d 187, error dismissed.

Wash.—Raymond v. MacFadden, 150 P.2d 829, 21 Wash.2d 328.

W.Va.—Bank of Mill Creek v. Elk Horn Coal Corp., 57 S.E.2d 736, 133 W.Va. 639.

#### Materials used in construction

In suit to recover personal decree against individuals for materials al-

legedly sold to religious organization for use in construction of church individual defendants could not be regarded as trustees of a trust in invitum where church or its trustees had legal title to the materials—Buettnier Bros. v. Good Hope Missionary Baptist Church, 18 So.2d 75, 245 Ala. 553.

#### Management of estate

Where heirs of estate of an intestate entered into agreement designating one of them to manage estate for benefit of all joint owners and tenants in common, without an administrator, subject to claims of creditors, person so designated did not act as trustee in invitum—McInnis v. Sutton, Ala., 70 So.2d 625.

5. U.S.—Consolidated Flour Mills v. Ph. Orth Co., C.C.A.Wis., 114 F.2d 698, 132 A.L.R. 697.

Fla.—Columbia Bank for Co-Operatives v. Okelanta Sugar Co-op., 52 So.2d 670.

6. Ill.—Klein v. Chicago Title & Trust Co., 14 N.E.2d 852, 295 Ill. App. 208.

Pa.—St. Michael's Greek Catholic Church of Mont Clare v. Trucksees, Com Pl., 60 Montg.Co. 241.

7. Md.—Masters v. Masters, 89 A.2d 576, 200 Md. 318.

W.Va.—Spencer v. Williams, 170 S. E. 179, 113 W.Va. 687, 89 A.L.R. 1451.

8. U.S.—American Ins. Co. v. Parker, C.A. Va., 181 F.2d 53.

Mich.—Hicks' Estate v. Cary, 52 N. W.2d 351, 322 Mich. 606.

9. Mass.—Yamins v. Zeitz, 76 N.E. 2d 769, 322 Mass. 268.

Tex.—Ebberts v. McLean, 98 S.W.2d 352, 128 Tex. 573.

Wash.—Raymond v. MacFadden, 150 P.2d 829, 21 Wash.2d 328.

#### Lease to competitor

Where business property was leased to tenant's competitor on tenant's failure to exercise option to renew lease and it was not shown that any confidential or fiduciary relationship existed between tenant and competitor, or that competitor owed any duty toward tenant, tenant was not entitled to a decree that competitor acquired its leasehold estate as a "constructive trustee" of tenant—Goldberg's Corp. v. Goldberg Realty & Inv. Co., 36 A.2d 122, 134 N.J.Eq. 415.

10. Mo.—In re Title Guaranty Trust Co., App., 113 S.W.2d 1053.

N.J.—Hockenjos v. Federal Deposit Ins. Corp., 199 A. 596, 16 N.J.Misc. 312.

11. Ill.—Evans v. Berko, 97 N.E.2d 316, 408 Ill. 438.

#### No beneficial interest

A party to a contract has no such beneficial interest in the property which is subject of the contract as will give rise to a constructive trust—Page v. Joplin Nat. Bank & Trust Co., 255 S.W.2d 821, 363 Mo. 1908.

#### Unenforceable contract

A mere violation of an unenforceable contract does not raise a constructive trust as to real property—Elliott v. Wood, 212 P.2d 906, 95 Cal. App.2d 314.

#### Agreement to pay money

Failure of an agreement to pay money received from a particular source does not justify equity in imposing a lien or trust on money so received by promisor—Hutchins v. Hutchins, 41 A.2d 612, 141 Me. 183.

12. U.S.—Nelson Development Co. v. Ohio Oil Co., D.C.Ill., 45 F.Supp. 933.

Ill.—City of Rochelle v. Stocking, 82 N.E.2d 693, 336 Ill. App. 6.

Tex.—Warner v. Venture Petroleum Corp., Civ.App., 188 S.W.2d 596, refused without merit—Talley v. Howsley, Civ.App., 170 S.W.2d 240, affirmed 176 S.W.2d 158, 142 Tex. 81.

#### Other statement of rule

To establish a constructive trust, there must have been an original misrepresentation by means of which legal title was obtained, an original intention to circumvent or some plan to get the better bargain; and, in the absence of some clear evidence of fraud, imposition, or mistake at time of execution of a conveyance, a grantee's subsequent refutation of an alleged parol promise is not a fraud against which equity can relieve—Scott v. Scott, 57 S.E.2d 470, 216 S.C. 280.

#### Contract to sell land

(1) The mere fact that vendor has refused to carry out informal voidable contract to sell land is not adequate ground on which to declare a "constructive trust" in favor of vendee—Nelson Development Co. v. Ohio Oil Co., D.C.Ill., 45 F.Supp. 933.

Also, a constructive trust cannot be based on a theory that a prior oral contract supersedes a written contract, since all prior negotiations, discussions, and propositions are merged into the writing, and the rights of the parties are governed by it.<sup>13</sup> Mere failure to pay a debt will not give rise to a constructive trust,<sup>14</sup> and no trust arises merely because of the refunding or repaying of a part of the purchase price for a transfer of property after title has vested in the named grantee.<sup>15</sup> Whether a constructive trust arises from a transaction in which the consideration runs from one and the benefit results to another depends on the intention of the parties.<sup>16</sup>

### § 143. — Mistake

A constructive trust ordinarily arises in favor of the rightful owner of property where, through a mistake of fact, title to, and apparent ownership of, property rightfully belonging to such person is obtained by another.

Where, through a mistake of fact, title to, and apparent ownership of, property rightfully belonging to one person is obtained by another, a constructive trust ordinarily arises in favor of the rightful owner of such property.<sup>17</sup> So where, by

mistake, one obtains a conveyance of more land,<sup>18</sup> or a greater interest or estate,<sup>19</sup> than that to which he is entitled, he becomes a constructive trustee of the excess; and where a decedent's estate is administered and distributed as that of an intestate, and thereafter a will is discovered which bequeaths or devises the property to different persons, the distributees are to be treated as constructive trustees for the persons entitled under the will.<sup>20</sup> Likewise, one who receives money to which he is not entitled, through mistake of fact, may be treated as a trustee thereof for the rightful owner;<sup>21</sup> and if one who has received property by mistake conveys it to an innocent purchaser, and receives the consideration therefor, he becomes a trustee of the amount received<sup>22</sup> or, as has been held, of the full value of the property,<sup>23</sup> for the true owner. Ordinarily, however, in a case of money paid and received by mistake, the payee is not to be held a trustee, since the mistake is one which can be remedied at law.<sup>24</sup> Where the circumstances do not establish "mistake" within the terms of a statute providing for the imposition of a constructive trust, no such relief may be obtained.<sup>25</sup>

(2) A grantee's mere failure to pay grantor's debt, secured by trust deed lien on land conveyed partly in consideration of grantee's assumption of such debt, did not constitute "fraud" creating "constructive trust" for grantor and his heirs in minerals excepted from conveyance after grantee's purchase of land, with exception of specified mineral interest, from lienholder, who acquired land at foreclosure sale—*Talley v. Howsley*, Civ.App., 170 S.W.2d 240, affirmed 176 S.W.2d 158, 142 Tex. 81.

13. Ill.—*Evans v. Berko*, 97 N.E.2d 316, 408 Ill. 438.

14. U.S.—*McKey v. Paradise*, Ill., 57 S.Ct. 124, 299 U.S. 119, 81 L.Ed. 75.—*Continental Illinois Nat. Bank & Trust Co. v. Continental Illinois Nat. Bank*, C.C.A.Ill., 87 F.2d 934.

15. Ill.—*City of Rochelle v. Stocking*, 82 N.E.2d 693, 836 Ill.App. 6.

16. Pa.—*Rumbaugh v. Lance*, Com.Pl., 39 Luz Leg. Reg. 414.

#### Unsecured debt

The mere failure to pay an unsecured debt cannot be ground for impressing a constructive trust on real estate.—*Landrum v. Robertson*, Tex. Civ.App., 195 S.W.2d 170, error refused no reversible error.

15. Tex.—*Kountze v. Smith*, 144 S.W.2d 261, 135 Tex. 543.

16. N.Y.—*In re Cohen's Estate*, 98 N.Y.S.2d 883.

17. U.S.—*Knight Newspapers v. C. I. R.*, C.C.A.6, 143 F.2d 1007, 154 A.L.R. 1267.

U.S.—*Corpus Juris cited in United States v. Hart*, D.C.Pa., 12 F.Supp. 596, 597, affirmed, C.C.A., 90 F.2d 987.

Conn.—*Fitch v. State*, 86 A.2d 718, 138 Conn. 534.

Ill.—*Sebastian v. Stamer*, 90 N.E.2d 922, 340 Ill.App. 218.

Me.—*Strout v. Burgess*, 68 A.2d 241, 141 Me. 263, 12 A.L.R.2d 939.

Mich.—*Potter v. Lindsay*, 60 N.W.2d 153, 337 Mich. 401.

Ohio.—*Steiner v. Pocyecz*, 50 N.E.2d 617, 72 Ohio App. 18.—*Rice v. James*, 6 Ohio Supp. 244.

Tex.—*Simmons v. Wilson*, Civ.App., 216 S.W.2d 847.

65 C.J. p 461 note 27.

#### Mistake without fraud

Under proper circumstances, mistake, although unconnected with fraud, will warrant relief under the Code providing that one who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he has some better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it.—*Hewett v. Linstead*, 122 F.2d 352, 49 Cal.App.2d 607.

#### Interest as joint tenant

Where deed was made to plaintiff and to defendant as joint tenants and a mistake of fact and law and defendant had no present interest in property, court properly determined that defendant held record title to property as a joint tenant with plain-

tiff as an involuntary trustee for plaintiff.—*Brown v. Volz*, 204 P.2d 110, 90 Cal.App.2d 793.

18. S.D.—*Butte County v. Gaver*, 49 N.W.2d 466, 74 S.D. 134.

65 C.J. p 461 note 28.

19. Tex.—*Biggs v. Poling*, Civ.App., 134 S.W.2d 801, error dismissed.

judgment correct.

65 C.J. p 461 note 29.

20. Cal.—*In re Walker's Estate*, 117 P. 510, 160 Cal. 547, 36 L.R.A.N.S. 789.

65 C.J. p 461 note 30.

21. U.S.—*In re Berry*, N.Y., 147 F. 208, 77 C.C.A. 434.

#### Fund paid to sheriff

A constructive trust may be the proper remedy to purchaser at invalid tax sale, where fund was paid to sheriff under mistake as to validity of such sale.—*Oliver v. Taylor*, 65 A.2d 723, 31 Del.Ch. 53.

22. Ind.—*Andrews v. Andrews*, 12 Ind. 348.

23. Neb.—*Cogswell v. Griffith*, 36 N.W. 538, 23 Neb. 334.

24. Puerto Rico.—*Donce & Guayama R. Co. v. American R. Co. of Porto Rico*, 7 Puerto Rico Fed. 131.

25. Cal.—*Hewett v. Linstead*, 122 F.2d 352, 49 Cal.App.2d 607.

#### Rejected claim

Executrix, who gave statutory notice of hearing for distribution of estate as required by statute, and who acted in good faith, was not guilty of "extrinsic fraud" or "mis-

§ 144. — Invalidity of Conveyance or Transfer

A grantee of property under an invalid conveyance or transfer becomes a constructive trustee of the property for the benefit of the owner thereof; and the consideration paid, or property purchased therewith by the grantor is to be deemed as held in trust for the grantee.

It has been held that a grantee of property under an invalid conveyance or transfer becomes a constructive trustee of the property,<sup>26</sup> or, if he sells it, of the consideration received therefor,<sup>27</sup> for the benefit of the owner of the property; and that the consideration paid,<sup>28</sup> or property purchased therewith by the grantor,<sup>29</sup> is to be deemed as held in trust for the grantee. According to some authority, however, if a conveyance is invalid the title remains in the grantor, and the grantee cannot be deemed to be a constructive trustee.<sup>30</sup> It has also been held that where property is conveyed for a consideration and not as a gift, and the conveyance is ineffective

due to fraud or mutual mistake to transfer the whole or a part of the property, equity will treat the transaction as though there were a precedent contract to transfer and will impose a constructive trust based on the duty of the transferor to complete the transfer for which he received consideration.<sup>31</sup>

The destruction of an unrecorded deed by the parties thereto, with the intention by both to abandon the conveyance and restore title to the grantor, creates such an equitable right in the grantor that the grantee is considered as holding title in trust only, for the grantor's benefit.<sup>32</sup>

*Invalidity of attempt to create express trust* does not give rise to a constructive trust in favor of the beneficiary of the intended express trust,<sup>33</sup> but has been held to raise a constructive trust in favor of the settlor or trustor, or those succeeding to his interest.<sup>34</sup> The fact, however, that the same per-

take", in failing to discover that action had been filed on rejected claim, and, on discovering the filing of the action, to inform the court, and holder of claim was not entitled to have a trust imposed in his favor on the estate.—Thayer v. Fish, 122 P.2d 358, 49 Cal. App.2d 618.

26. Cal.—Hall v. Citizens Nat. Trust & Sav. Bank of Los Angeles, 128 P.2d 545, 53 Cal. App.2d 625.

III.—Mauriceau v. Haugen, 56 NE 2d 367, 347 Ill. 186

NY.—In re Colbert's Estate, 101 N.Y.S.2d 668.

Pa.—Hilker v. Pachuta, Com.Pl., 3 West Co. 1.

Wash.—In re Peterson's Estate, 123 P.2d 733, 12 Wash.2d 686  
65 C.J. p. 462 note 35

**Fraudulent conveyance**

Where wife's conveyance of realty to her sister was fraudulent as to husband's children under a joint will executed by husband and wife which embodied an antenuptial contract, children were entitled to impress a trust on the realty and to obtain specific performance of the contract.—De Jong v. Huyser, 11 N.W.2d 566, 233 Iowa 1315.

**Prior contract of sale**

A purchaser of realty who is not a bona fide purchaser without notice takes realty subject to any prior equity and holds it as a constructive trustee in favor of a third person claiming under a prior contract of sale.—Blondell v. Turover, 72 A.2d 697, 195 Md. 251.

**Profits**

Where grantor is permitted to rescind conveyances for fraud, the grantor may at her election either charge grantee as the constructive trustee with the profits derived from property while it was wrongfully

held by grantee, or charge grantee with its fair rental value for such period.—Lang v. Giraudo, 40 N.E.2d 707, 311 Mass. 132.

**Constructive trust held not established**

Cal.—Perry v. Manning, 241 P.2d 43, 109 Cal. App.2d 557.

Mo.—Vardell v. Vardell, 222 S.W.2d 763—Cantley v. Beard, 98 S.W.2d 730, 339 Mo. 649.

Ohio—Fidelity & Cas. Co. of N. Y. v. Niles Bank Co., 71 N.E.2d 742, 79 Ohio App. 15.

27. Wash.—In re Peterson's Estate, 123 P.2d 733, 12 Wash.2d 686.  
65 C.J. p. 462 note 36.

28. N.Y.—Provisional Government of French Republic v. Cabot, 53 N.Y.S.2d 293, affirmed 55 N.Y.S.2d 121, 269 App. Div. 745, appeal denied 56 N.Y.S.2d 412, 269 App. Div. 723.  
65 C.J. p. 462 note 37.

**Improvements**

Where grantee whose name is added by grantor to deed after delivery, under the mistaken belief that he was a coowner of the property, made valuable improvements thereto, he is not thereby entitled to have a constructive trust declared in his favor.—Platter v. Platter, 82 Pa. Dist. & Co. 123, 15 Som. Leg. J. 294.

29. N.C.—Ross v. Davis, 29 S.E. 338, 122 N.C. 265.  
65 C.J. p. 462 note 38.

30. Vt.—Baxter v. Currier, 13 Vt. 615.

**More breach of contract**

Where vendor acted in good faith in selling property and purchase money note, but title was unmarketable, purchasers were not entitled to a lien on homestead purchased with proceeds, since in absence of fraud

there was no constructive trust but a mere breach of contract, against which the homestead exemption must be recognized.—Sutton v. Ford, 220 S.W.2d 125, 215 Ark. 269.

31. Me.—Strout v. Burgess, 68 A.2d 241, 144 Me. 263, 12 A.L.R.2d 939

32. Iowa—Wilder v. Conlon, 30 N.W.2d 764, 239 Iowa 187.

33. Minn.—Harney v. Harney, 213 N.W. 38, 170 Minn. 479.

Wis.—In re Jaeger's Will, 259 N.W. 842, 218 Wis. 1, 99 A.L.R. 738.

**Unlawful purpose**

Generally, equity will not at the instance of a beneficiary effect by way of a resulting or a constructive trust the accomplishment of a purpose which, because of illegality or violation of public policy, is beyond the powers of an express trust.—State ex rel. Squire v. Central United Nat. Bank, 4 Ohio Supp. 269.

**Title under statute**

Where court found that trustee held title to land under statute by a trust created by, but not contained or declared in, conveyance to trustee, or by a conveyance made to trustee without declaring name of beneficiary, there was no constructive trust, but an express trust to enable trustee to deal freely with such land.—Thioeco v. Magnolia Petroleum Co. C.C.A. Tex., 141 F.2d 934, certiorari denied 55 S.Ct. 276, 323 U.S. 785, 89 L.Ed. 627.

34. N.J.—Moses v. Moses, 53 A.2d 805, 140 N.J.Eq. 575, 173 A.L.R. 273.  
65 C.J. p. 462 note 42.

**Presence of basic elements**

Where attempt is made to create trust, and basic elements of intent, purpose, and subject matter are present, but trust is unenforceable because of statute of frauds or some

son or persons are beneficiaries of the constructive trust as would have been beneficiaries of the intended express trust is not fatal to the creation of the constructive trust, in such a case, and does not prevent it from arising.<sup>35</sup> It has also been held that the rule that a voluntary express trust which fails because the settlor did not effectively convey title to the trustee will not be enforced in equity by impressing the subject matter of the trust in the hands of the settlor with a constructive trust in favor of the intended beneficiary does not apply to an intended transfer founded on a valuable consideration.<sup>36</sup>

### § 145. — Fraud in General

The frauds or wrongs for which courts will give relief by impressing a constructive trust are those for which the courts in the exercise of their legal powers will give damages as compensation.

As a general rule, the frauds or wrongs for which courts in the exercise of equitable powers will give relief by impressing a constructive trust are those for which the courts in the exercise of their legal powers will give damages as compensation.<sup>37</sup> As discussed supra § 139 b, fraud is generally a necessary element for the imposition of a constructive trust, and such fraud may be actual or constructive. Constructive fraud giving rise to a constructive trust may exist in any act or omission which is contrary to legal or equitable duty or trust or con-

fidence justly reposed and which is contrary to good conscience and operates to the injury of another.<sup>38</sup> Where one person by his promise to buy, hold, or dispose of realty for another's benefit induces action or forbearance, it is fraud if the promise is not enforced, and the promisee will be treated as a trustee for the benefit of the party interested.<sup>39</sup>

### § 146. — Fraud or Other Wrong in Acquisition of Property in General

#### a. General rules

#### b. Particular transactions giving rise to trust

#### a. General Rules

A person who acquires land or other property by fraud, misrepresentation, imposition, or concealment, or under any other such circumstances as to render it inequitable for him to retain the property, is in equity to be regarded as a trustee ex maleficio thereof for a person who suffers by reason of the fraud or other wrong, and who is equitably entitled to the property.

It is a general principle that one who acquires land or other property by fraud, misrepresentation, imposition, or concealment, or under any other such circumstances as to render it inequitable for him to retain the property, is in equity to be regarded as a trustee ex maleficio thereof for a person who suffers by reason of the fraud or other wrong, and who is equitably entitled to the property,<sup>40</sup> even

other invalidating cause, trustee cannot keep the property individually but will be declared a constructive trustee.—*In re Gaines' Estate*, 100 P. 2d 1065, 15 Cal.2d 255.

#### Unjust enrichment

Where an express trust fails for want of a written manifestation, equity may, through the formula of a constructive trust, grant relief against unjust enrichment that would otherwise ensue.—*Stretch v. Watson*, 74 A.2d 597, 5 N.J. 268.

35. R.I.—*Broadway Bldg. Co. v. Salafia*, 132 A. 527, 47 R.I. 263, 45 A.L.R. 847.

36. Me.—*Strout v. Burgess*, 68 A.2d 241, 144 Me. 263, 12 A.L.R.2d 939.

37. Tex.—*McCabe v. Cambiano*, Civ. App., 212 S.W.2d 237.

38. N.Y.—*Frick v. Cone*, 290 N.Y.S. 592, 160 Misc. 450, affirmed 298 N.Y.S. 173, 251 App.Div. 781.

#### Variety of transactions

"Constructive fraud" is term applied to great variety of transactions which equity regards as wrongful, to which it attributes same or similar effects as of actual fraud, and for which it gives same or similar relief as for real fraud.—*Winger v. Chicago*

*City Bank & Trust Co.*, 67 N.E.2d 265, 394 Ill. 94.

39. Mo.—*Janssen v. Christian*, 57 S.W.2d 692.

40. U.S.—*Continental Illinois Nat. Bank & Trust Co. v. Continental Illinois Nat. Bank*, C.C.A. Ill., 87 F.2d 934.—*Twihlg v. Lawrence Warehouse Co.*, D.C.Iowa, 118 F.Supp. 322.—*Brown v. New York Life Ins. Co.*, D.C.Or., 58 F.Supp. 252, affirmed, C.C.A., 152 F.2d 246.—*U. S. v. Bennett*, D.C.Wash., 57 F.Supp. 670.—*U. S. v. Newbury Mfg. Co.*, D.C.Mass., 35 F.Supp. 602, motion denied, C.C.A., 123 F.2d 453.

41. Tipton v. Tipton, 57 So.2d 94, 257 Ala. 32.—*Knowles v. Canant*, 51 So.2d 355, 255 Ala. 331.—*Bevels v. Hall*, 21 So.2d 325, 246 Ala. 430.—*Street v. Pitts*, 192 So. 258, 238 Ala. 531.

Ariz.—*Eckert v. Miller*, 111 P.2d 60, 57 Ariz. 94.

Cal.—*Bainbridge v. Stoner*, 106 P.2d 423, 16 Cal.2d 423.—*Johnson v. Clark*, 61 P.2d 767, 7 Cal.2d 529.—*West v. Stainback*, 240 P.2d 366, 108 Cal.App.2d 806.—*Rivoro v. Thomas*, 194 P.2d 533, 86 Cal.App.2d 235.—*Leathers v. Leathers*, 174 P.2d 875, 77 Cal.App.2d 134.—*Sampson v. Bruder*, 118 P.2d 28, 47 Cal.App.2d

431.—*Hatch v. Penzner*, 113 P.2d 295, 44 Cal.App.2d 874.—*Forman v. Goldberg*, 108 P.2d 983, 42 Cal.App.2d 308.

Fla.—*Hell v. Smith*, 32 So.2d 829, 159 Fla. 817, 175 A.L.R. 695.—*Fickling Properties v. Smith*, 167 So. 42, 123 Fla. 556.

Ga.—*Trapnell v. Swainsboro Production Credit Ass'n*, 65 S.E.2d 179, 208 Ga. 89.—*Sykes v. Reeves*, 24 S.E.2d 688, 195 Ga. 587.—*Griffin v. Booth*, 167 S.E. 294, 176 Ga. 1.

Ill.—*Miethe v. Miethe*, 101 N.E.2d 571, 410 Ill. 226.—*Such v. Hajteek*, 4 N.E.2d 836, 364 Ill. 602.—*Brennan v. Perselli*, 187 N.E. 820, 353 Ill. 630.—*McDonnell v. Holden*, 185 N.E. 872, 352 Ill. 362.—*People ex rel. Elson v. Central Mfg. Dist. Bank*, 28 N.E.2d 154, 306 Ill.App. 15.—*Wood v. Kelley*, 281 Ill.App. 207.—*Kreger v. Hart*, 271 Ill.App. 352.

Iowa.—*Rance v. Gaddis*, 284 N.W. 468, 226 Iowa 531.—*Ellison v. Stephens*, 246 N.W. 771, 216 Iowa 601.

Ky.—*Fresh v. Dunakin*, 206 S.W.2d 203, 306 Ky. 87.—*Moore v. Terry*, 170 S.W.2d 29, 293 Ky. 727.—*Hunt v. Picklesimer*, 162 S.W.2d 27, 290 Ky. 573.

Me.—*Strout v. Burgess*, 68 A.2d 241, 144 Me. 263, 12 A.L.R.2d 939.

though such beneficiary may never have had any legal estate therein.<sup>41</sup> It is to be observed, however, that in the absence of equitable considerations

or a fiduciary relationship, fraud alone, either actual or constructive, will not give rise to a trust,<sup>42</sup> since, as has been pointed out, if it were otherwise all per-

Md.—Carter v. Abramo, 93 A.2d 546, 301 Md. 339—Faaman v. Potashnick, 51 A.2d 664, 188 Md. 105—Grimes v. Grimes, 40 A.2d 58, 184 Md. 59—O'Connor v. Estevez, 35 A.2d 148, 182 Md. 541.

Mass.—Loring v. Baker, 106 N.E.2d 434, 329 Mass. 63—Chamberlain v. James, 200 N.E. 361, 294 Mass. 1.

Mich.—Kren v. Rubin, 61 N.W.2d 9, 338 Mich. 288—Potter v. Lindsay, 60 N.W.2d 133, 337 Mich. 404—Burton v. Burton, 51 N.W.2d 297, 332 Mich. 326—Rice v. Allen, 28 N.W.2d 91, 318 Mich. 245—Union Guardian Trust Co. v. Emery, 290 N.W. 841, 292 Mich. 394—Grigg v. Hanna, 278 N.W. 125, 283 Mich. 443—Stephenson v. Golden, 276 N.W. 849, 279 Mich. 710.

Minn.—Petersen v. Swan, 57 N.W.2d 842, 339 Minn. 98—Blumberg v. Taggart, 6 N.W.2d 388, 213 Minn. 39—Whitten v. Wright, 289 N.W. 509, 206 Minn. 423—Penn Anthracite Min. Co. v. Clarkston Securities Co., 287 N.W. 15, 205 Minn. 517.

Miss.—Pitchford v. Howard, 45 So. 2d 142, 208 Miss. 567.

Mo.—Bauman v. Frank, 250 S.W.2d 989—Trieseler v. Helmbacher, 168 S.W.2d 1030, 350 Mo. 807—Lucas v. Central Missouri Trust Co., 166 S.W.2d 1053, 350 Mo. 593.

Neb.—Meier v. Meyer, 43 N.W.2d 502, 153 Neb. 222—Paul v. McGahan, 42 N.W.2d 172, 152 Neb. 578—Meier v. Trospen, 40 N.W.2d 811, 152 Neb. 184—Meier v. Geldis, 27 N.W.2d 215, 148 Neb. 304—Tuttle v. Wyman, 18 N.W.2d 744, 146 Neb. 140—O'Shea v. O'Shea, 11 N.W.2d 540, 143 Neb. 843—Federal Trust Co. v. Baxter, 267 N.W. 368, 128 Neb. 1.

N.H.—Morgan v. Morgan, 47 A.2d 569, 94 N.H. 116.

N.J.—Norris v. Reyer, 1 A.2d 460, 124 N.J. Eq. 284—Roy v. Enot, 183 A. 906, 120 N.J. Eq. 67.

N.Y.—Lloyd v. Phillips, 71 N.Y.S.2d 103, 272 App.Div. 222—Stephens v. Evans, 75 N.Y.S.2d 909, 190 Misc. 922—In re Wechsler's Estate, 13 N.Y.S.2d 940, 171 Misc. 738.

N.D.—Barker v. Barker, 27 N.W.2d 676, 75 N.D. 253, 171 A.L.R. 447—McDonald v. Miller, 16 N.W.2d 270, 73 N.D. 474, 156 A.L.R. 1328.

Ohio—Steiner v. Fucyca, 50 N.E.2d 617, 72 Ohio App. 18.

Okla.—Gorsys Javis cited in Underwood v. Pinson, 263 P.2d 418, 422—Barnsdall State Bank v. Springer, 56 P.2d 390, 176 Okla. 479.

Or.—Jones v. Jackson, 246 P.2d 546, 195 Or. 643—Legler v. Legler, 211 P.2d 233, 187 Or. 273.

Pa.—Pennsylvania Elec. Co. v. Shannon, 105 A.2d 55, 377 Pa. 352—In

re Harr, 188 A. 120, 323 Pa. 380—Evans v. Diamond Alkali Co., 172 A. 678, 315 Pa. 325—Lycorning Natural Gas Corporation v. Searle, 20 Pa. Dist. & Co. 33—Miller v. Buecker, Com.Pl., 63 York Leg. Rec. 53.

S.C.—Searson v. Webb, 38 S.E.2d 654, 208 S.C. 453—Greene v. Brown, 19 S.E.2d 114, 199 S.C. 218.

Tex.—Binford v. Snyder, 189 S.W.2d 471, 144 Tex. 134—Dennis v. Dennis, Civ.App., 256 S.W.2d 964—Lotus Oil Co. v. Spires, Civ.App., 240 S.W.2d 357—Hood v. Hood, Civ. App., 183 S.W.2d 247—Martin v. Martin, Civ.App., 130 S.W.2d 863, error dismissed, judgment correct—Tuck v. Patterson, Civ.App., 60 S.W.2d 323.

Utah—Decorse v. Thomas, 50 P.2d 951, 89 Utah 160, rehearing denied 57 P.2d 1406, 89 Utah 179.

Wash.—Kausky v. Kosten, 179 P.2d 950, 27 Wash.2d 371—Murdoch v. Leonard, 95 P.2d 37, 1 Wash.2d 37, W.Va.—Zogg v. Hodges, 29 S.E.2d 871, 126 W.Va. 523, 152 A.L.R. 991—State v. Phoenix Mut. Life Ins. Co., 170 S.E. 909, 114 W.Va. 109, 91 A.L.R. 1482.

Wis.—Glojek v. Glojek, 35 N.W.2d 203, 254 Wis. 109.  
65 C.J. p. 462 note 44—21 C.J. p. 110 note 14.

#### Basis of jurisdiction

Where a constructive trust is predicated on fraud in acquisition of property or actual or constructive fraud which law will refer to such acquisition, basis of jurisdiction is continuance of aggrieved person's equitable interest in property of which he has been fraudulently deprived, despite outward forms of legality under which true ownership has been submerged—Atkinson v. Atkinson, 33 S.E.2d 668, 225 N.C. 120.

#### Violation of duty

(1) A constructive trust arises when legal title to property is obtained in violation of some duty owed to the one who is equitably entitled to the title, and property thus obtained is held in hostility to his beneficial rights of ownership, and all constructive trusts may be referred to fraud as to their final source—Van Auken v. Tyrrell, 33 A.2d 339, 130 Conn. 289.

(2) Where a person procures legal title to property in violation of some duty to true owner, equity, for the purpose of doing justice in the most efficient manner, constructs a trust out of the transaction and makes a trustee out of person thus acquiring title—McNeill v. Dobson-Bainbridge Realty Co., 195 S.W.2d 626, 184 Tenn. 93.

#### Fraud of third person

Property obtained by one through the fraudulent practice of a third person will be held under a constructive trust for the person defrauded—Brennan v. Perselli, 268 Ill.App. 441, affirmed 187 N.E. 820, 353 Ill. 630—65 C.J. p. 462 note 44 [f].

Inadequacy of price, accompanied by circumstances showing overreaching, oppression, undue influence, or similar circumstances preventing the parties from contracting on substantially equal terms, is a basis of fraud warranting imposition of a constructive trust, but inadequacy alone is not regarded as a sufficient basis of fraud to set aside a legal transaction. Cal.—Philip v. Hobart, 223 P.2d 783, 103 Cal.App.2d 446.

Ill.—Galvin v. O'Neill, 66 N.E.2d 403, 393 Ill. 475.

65 C.J. p. 462 note 44 [g].

#### Time trust arises

(1) An implied or constructive trust arises at the time of a wrongful acquisition of property by the wrongdoer—Johnson v. Graff, 23 N.W.2d 166, 71 S.D. 231.

(2) If constructive trust arises, it is ordinarily impressed on legal title when legal title passes—Lotus Oil Co. v. Spires, Tex. Civ.App., 240 S.W.2d 357.

#### Augmentation of assets

Generally, augmentation of assets of trustee ex maleficio is necessary to impress constructive trust on property fraudulently appropriated—Bancroft Trust Co. v. Federal Nat. Bank of Boston, D.C. Mass., 9 F.Supp. 350.

41. Ala.—Bevels v. Hall, 21 So.2d 325, 246 Ala. 430.

Ariz.—Eckert v. Miller, 111 P.2d 60, 57 Ariz. 94.

Mich.—Rice v. Allen, 28 N.W.2d 91, 318 Mich. 245.

Or.—Jones v. Jackson, 246 P.2d 546, 195 Or. 643.

Tex.—Martin v. Martin, Civ. App., 120 S.W.2d 843, error dismissed, judgment correct.

Utah—Decorse v. Thomas, 50 P.2d 951, 89 Utah 160, rehearing denied 57 P.2d 1406, 89 Utah 179.

65 C.J. p. 464 note 45.

42. Mo.—Page v. Joplin Nat. Bank & Trust Co., 255 S.W.2d 821, 363 Mo. 1008.

Wis.—Ratcliff v. Phil. P. Phil. Housing Corp., 272 N.W. 843, 224 Wis. 627.  
65 C.J. p. 466 note 48.

In order to avoid the statute of frauds in contending for a constructive trust because of misrepresentations, the confidence must have been induced, not by a bare promise, but by the promise and the confidential relation conjoined, and it must ap-

sons claiming property under defective titles would be trustees for the "true" owners.<sup>43</sup> Likewise, even though equitable considerations or fiduciary relations exist, no trust arises in the absence of fraud or other improper conduct in acquiring the title;<sup>44</sup> and although fraudulent representations are made for the purpose of acquiring property, if the grantor or transferor does not rely or act on them no trust arises in his favor.<sup>45</sup> In order to establish a constructive trust based on fraud or wrongdoing, an oral promise is sufficient, and the existence or absence of a confidential relationship between the parties, in the strict sense, is not controlling.<sup>46</sup>

**Duress.** Duress as a result of which property is

acquired may warrant imposition of a constructive trust,<sup>47</sup> but before equity will grant such relief, the situation must be such that the person making the payment had no other adequate means for protecting his property.<sup>48</sup>

**Trust after property converted.** A suit lies to establish a constructive trust of property wrongfully obtained whether the property remains in specie in the hands of the wrongdoer, or has been converted into another form.<sup>49</sup> Where property fraudulently obtained is converted into, or exchanged for, other property, a constructive trust is impressed on and follows the other property,<sup>50</sup> unless and until it passes to a bona fide purchaser for value and with-

pear that the absence of a formal writing grew out of that very confidence and trust, and was occasioned by it—*Hilfer v. Calmac Oil & Gas Corp.*, 10 N.Y.S.2d 531, 258 App.Div. 78, affirmed 16 N.Y.S.2d 104, 258 App.Div. 78.

#### Absence of specific interest

Where person's entire claim against bus company, arising from collision, was settled by lump sum payment with no amount specifically designated for any particular element of damages, such person acquired nothing that belonged in law or equity to physician who treated his injuries and such person was not a trustee for amount of physician's bill, notwithstanding such bill was represented to bus company as a valid obligation of such person—*Woodruff v. Coleman*, D.C.Mun.App., 98 A.2d 22.

43. *Miss.—Buie v. Buie*, 7 So. 344, 67 Miss. 456.

44. *Iowa.—Gilligan v. Jones*, 283 N.W. 434, 226 Iowa 86.  
*Miss.—Wax v. Pope*, 168 So. 54, 175 Miss. 784.  
 65 C.J. p 466 note 50.

#### Deed absolute in form

Mere proof of confidential relationship between grantor and grantee is not sufficient to establish a trust of property conveyed by deed absolute in form.—*Kingsley v. Carroll*, 234 P.2d 1039, 106 Cal.2d 358.

#### Overpayment

Alleged fraud whereby beneficiary of life policy obtained overpayment because of misstatement of insured's age would not establish constructive trust in favor of insurer on fund due beneficiary from another insurance company, since money overpaid to beneficiary did not comprise portion of funds owing from other insurance company.—*Ponder v. Jefferson Standard Life Ins. Co.*, 109 S.W.2d 946, 194 Ark. 829.

45. *Pa.—In re Clark's Estate*, 79 A.246, 230 Pa. 158.  
 65 C.J. p 457 note 51.

46. *Cal.—West v. Stainback*, 240 P.2d 366, 108 Cal.App.2d 806—*Strausburg v. Connor*, 215 P.2d 509, 96 Cal.App.2d 398—*Rankin v. Satir*, 171 P.2d 78, 75 Cal.App.2d 691.

47. *N.J.—Hochman v. Zigler's Inc.*, 50 A.2d 97, 139 N.J.Eq. 139.

**Duress is a species of fraud** and recipient of money paid under duress becomes a constructive trustee in the same manner as one who fraudulently obtains money.—*Hochman v. Zigler's Inc.*, supra.

#### Threat to foreclose

A holder of mortgage has legal right to threaten to foreclose the mortgage, and his action in such respect cannot be regarded as coercion or duress.—*Rader v. Barner*, 139 P.2d 130, 172 Or. 1.

48. *N.J.—Hochman v. Zigler's Inc.*, 50 A.2d 97, 139 N.J.Eq. 139.

49. *U.S.—U. S. v. Newbury Mfg. Co.*, D.C.Mass., 36 F.Supp. 602, motion denied, C.C.A., 123 F.2d 453  
*Tenn.—McConnell v. Henochsberg*, 11 Tenn.App. 176.  
 65 C.J. p 467 note 52.

Proceeds of trust property as impressed with trust in general see infra §§ 437, 438.

50. *U.S.—Finley v. Hughes*, D.C.S.C., 106 F.Supp. 355—*Flannery Bolt Co. v. Greenslade*, D.C.Pa., 26 F.Supp. 502, affirmed, C.C.A., *Flannery v. Flannery Bolt Co.*, 108 F.2d 531, certiorari denied 60 S.Ct. 615, 309 U.S. 671, 84 L.Ed. 1017.

*Cal.—Church v. Bailey*, 203 P.2d 547, 90 Cal.App.2d 501.  
*Conn.—Van Auker v. Tyrrell*, 32 A.2d 339, 130 Conn. 289.

*Ga.—Edwards v. United Food Brokers*, 22 S.E.2d 812, 195 Ga. 1—*Wall v. Wall*, 168 S.E. 893, 176 Ga. 757—*Griffin v. Booth*, 167 S.E. 294, 176 Ga. 1.

*Iowa.—McGaffee v. McGaffee*, 58 N.W.2d 357, 244 Iowa 874.  
*Ky.—Henderson's Adm'r v. Bewley*, 264 S.W.2d 680.

*Minn.—Petersen v. Swan*, 57 N.W.2d 842, 239 Minn. 98.

*N.Y.—Turner v. Hygiene Waterproofing Co.*, 5 N.Y.S.2d 669, 255 App.Div. 716, affirmed 23 N.E.2d 548, 281 N.Y. 731—*Shove v. Siegbert*, 267 N.Y.S. 306, 239 App.Div. 334—*Cornale v. Stewart Stamping Corp.*, 129 N.Y.S.2d 808.

*Pa.—Sholtz v. Drane*, Com.Pl., 33 Del. Co. 551.

*Tex.—Pounds v. Jenkins*, Civ.App., 157 S.W.2d 173—*Grote v. Service Finance Corp.*, Civ.App., 119 S.W.2d 136, vacated on other grounds *Service Finance Corp. v. Grote*, 131 S.W.2d 93, 133 Tex. 606.  
 65 C.J. p 467 note 53.

#### Life insurance purchased with misappropriated funds

(1) In general.

*Or.—Jansen v. Tyler*, 47 P.2d 969, 151 Or. 268, modified on other grounds 49 P.2d 372, 151 Or. 268.  
*Tenn.—McConnell v. Henochsberg*, 11 Tenn.App. 176.

(2) Right to impress trust in proceeds of life insurance policies, for payment of premiums on which trust funds have been misappropriated, is limited to amount so misappropriated.—*Tolman v. Crowell*, 193 N.E. 60, 288 Mass. 397.

#### Purchase money notes

Where real estate agent, who was employed by vendor, intentionally concealed from vendor that agent was himself purchasing property for his mother and resold the property at a profit, receiving as part of the consideration secured purchase money notes which agent transferred to his mother, for the purpose of accounting as constructive trustee for original vendor, agent was regarded as having converted purchase money notes, thereby making applicable the rule that in conversion of choses in action the face value is prima facie the actual value—*McNeill v. Dobson-Bainbridge Realty Co.*, 195 S.W.2d 626, 184 Tenn. 99.

out notice;<sup>51</sup> and, where land obtained by fraud is converted into money, the latter is impressed with a trust in favor of the person defrauded.<sup>52</sup>

**Theft or misappropriation of property.** It has been held that a thief is not a constructive trustee for the owner in respect of the stolen property, or the proceeds thereof or property purchased therewith, since no relation of confidence exists between them at the time the property is taken.<sup>53</sup> According to other authorities, however, no fiduciary relation is essential to the jurisdiction of a court of equity to declare and enforce a trust of stolen or misappropriated property,<sup>54</sup> and a trust will also be declared in respect of property purchased by the wrongdoer with property or money stolen or misappropriated.<sup>55</sup> Where fiduciary relations do in fact exist between the owner of property or money and a thief or embezzler thereof, a trust arises and may be enforced.<sup>56</sup>

### b. Particular Transactions Giving Rise to Trust

The transactions which will be treated in equity as containing such an element of fraud as to give rise to constructive trusts are numerous and varied, and a constructive trust for fraud or wrong may exist in almost any case where there is a wrongful acquisition or detention of property to which another is entitled.

It has been said that the transactions which will be treated in equity as containing such an element of fraud, active or constructive, as to give rise to constructive trusts in such cases are numerous and varied;<sup>57</sup> and it has been held that a constructive trust for fraud or wrong, being based on the equitable principle that no one can take advantage of his own wrong, exists in almost any case where there is a wrongful acquisition or detention of property to which another is entitled.<sup>58</sup> So constructive trusts based on fraud or wrongdoing have been imposed in numerous particular circumstances or transactions,<sup>59</sup> involving bank accounts,<sup>60</sup> a bank-

51. Cal.—Church v. Bailey, 203 P.2d 547, 90 Cal.App.2d 501.

62. C.J. p 467 note 54.

52. Tenn.—McNeill v. Dobson-Bainbridge Realty Co., 195 S.W.2d 626, 184 Tenn. 99.

Tex.—Andrews v. Brown, Com.App., 10 S.W.2d 707.

53. Ill.—Doyle v. Murphy, 22 Ill. 502, 74 Am. D. 165.

N.C.—Campbell v. Drake, 39 N.C. 94.

54. Cal.—People v. Howes, 222 P.2d 959, 99 Cal.App.2d 808.

65. C.J. p 467 note 57.

55. Cal.—Rivero v. Thomas, 194 P.2d 533, 86 Cal.App.2d 225—Brodie v. Barnes, 132 P.2d 595, 56 Cal.App.2d 315.

Ga.—Ross v. Rambo, 23 S.E.2d 687, 195 Ga. 100.

Mich.—Long v. Earle, 269 N.W. 577, 277 Mich. 505.

N.Y.—Provisional Government of French Republic v. Calot, 53 N.Y. S.2d 293, affirmed 55 N.Y.S.2d 121, 269 App.Div. 745, appeal denied 56 N.Y.S.2d 412, 269 App.Div. 773.

Tenn.—McConnell v. Henochsberg, 11 Tenn.App. 176.

65. C.J. p 467 note 58.

**Deposit in another bank**

Where money obtained from one bank by fraud and felony was deposited in another, it was still money of first bank; second bank became mere depository which became constructive trustee of as much of money as remained a balance in depositor's account after his death.—In re Accles' Estate, 275 N.Y.S. 430, 153 Misc. 421, affirmed 281 N.Y.S. 978, 245 App.Div. 743.

56. La.—Acadian Production Corp. of La. v. McKendrick, 64 So.2d 850, 223 La. 78.

Mass.—Sullivan v. Sullivan, 71 N.E. 2d 894, 321 Mass. 156.

N.Y.—Frier v. J. W. Sales Corp., 25 N.Y.S.2d 576, 261 App.Div. 338.

Okl.—Adams v. Mid-West Chevrolet Corp., 179 P.2d 147, 198 Okl. 461, 175 A.L.R. 554.

Tenn.—McConnell v. Henochsberg, 11 Tenn.App. 176.

65. C.J. p 467 note 59.

57. Tex.—Kuehn v. Kuehn, Civ.App., 232 S.W. 918, affirmed, Com.App., 242 S.W. 719.

65. C.J. p 464 note 46.

58. Cal.—Rankin v. Satir, 171 P.2d 78, 75 Cal.App.2d 691.

59. U.S.—Dabney v. Chase Nat. Bank of City of New York, C.A.N.Y., 201 F.2d 635, certiorari dismissed 74 S.Ct. 102, 346 U.S. 863, 98 L.Ed. 374 and Chase Nat. Bank of City of New York v. Dabney, 74 S.Ct. 103, 346 U.S. 863, 98 L.Ed. 374—Dille v. Carter Oil Co., C.A. Okl., 192 F.2d 791—Schwarz v. U.S. C.A.Md., 191 F.2d 618—Harrison v. C. I. R., C.A.Tex., 173 F.2d 736.

Del.—Colton v. Wade, 80 A.2d 923, 32 Del.Ch. 122.

Fla.—Omwake v. Omwake, 70 So.2d 565.

Ga.—Allen v. Allen, 31 S.E.2d 483, 198 Ga. 269.

Ill.—Maurica v. Haugen, 56 N.E.2d 367, 387 Ill. 186.

Kan.—Titus v. Titus, 101 P.2d 872, 151 Kan. 824.

Ky.—McCracken County v. Lakeview Country Club, 70 S.W.2d 938, 254 Ky. 515.

Mass.—City of Boston v. Santosuosso, 10 N.E.2d 271, 298 Mass. 175.

Mich.—Bruso v. Pinquet, 33 N.W.2d 100, 321 Mich. 630.

N.J.—Driscoll v. Burlington-Bristol Bridge Co., 99 A.2d 829, 28 N.J. Super. 1.

N.Y.—Cassidy v. Cassidy, 129 N.Y.S. 2d 147, 283 App.Div. 618—Central Nat. Bank of Minneapolis v. Robinson, 117 N.Y.S.2d 530, 281 App.Div. 700.

—Maas v. Weitzman, 77 N.Y.S.2d 300, 191 Misc. 348, affirmed 80 N.Y. S.2d 729, 274 App.Div. 765.

N.C.—Grossett v. McQueen, 169 S.E. 829, 205 N.C. 48.

N.D.—Mevorah v. Goodman, 65 N.W. 2d 278.

Pa.—Kurek v. Kurek, Orph., 9 Pay. L.J. 47—In re Helne's Estate, Orph., 70 Montg. Co. 156—Claude v. Hoppe, Com.Pl., 9 Sch.Reg. 76—Forbes Road Union Church and Sunday School v. Incorporated Trustees of Salvation Army of Pa., Com.Pl., 35 West Co. 81.

S.C.—Ogilvie v. Smith, 54 S.E.2d 860, 215 S.C. 300.

Tex.—Lang v. Shell Petroleum Corp., Civ.App., 141 S.W.2d 667, affirmed 159 S.W.2d 478, 133 Tex. 399.

Utah—Curtz v. Park City Chief Mining Co., 142 P.2d 163, 105 Utah 300.

Wash.—McGulgan v. Simpson, 84 P.2d 1012, 197 Wash. 260.

65. C.J. p 464 note 47.

60. Ill.—Brennan v. Perssell, 266 Ill.App. 441, affirmed 187 N.E. 820, 353 Ill. 630.

Minn.—Vesey v. Vesey, 54 N.W.2d 385, 237 Minn. 295.

N.Y.—Rapisardi v. Rapisardi, 99 N.Y. S.2d 273, affirmed 105 N.Y.S.2d 364, 278 App.Div. 863, reargument and appeal denied 105 N.Y.S.2d 1021, 278 App.Div. 973.

Okl.—Barnsdall State Bank v. Springer, 56 P.2d 390, 176 Okl. 479.

Pa.—Miller v. Kelly, Com.Pl., 59 Montg.Co. 61.

rupt's or insolvent's estate,<sup>61</sup> bonds,<sup>62</sup> a building loan agreement,<sup>63</sup> a diversion of corporate property,<sup>64</sup> a distributive share of a decedent's estate,<sup>65</sup> the establishment of a "charitable trust,"<sup>66</sup> an indebtedness to a decedent,<sup>67</sup> a judgment,<sup>68</sup> mineral

lands,<sup>69</sup> money,<sup>70</sup> mortgages,<sup>71</sup> oil and gas leases,<sup>72</sup> a partnership settlement,<sup>73</sup> a patent license,<sup>74</sup> a pledge,<sup>75</sup> the proceeds of an insurance policy,<sup>76</sup> real property,<sup>77</sup> the revocation of a trust by means of

#### Joint and survivorship accounts

(1) All principles of constructive trusts are applicable to joint and survivorship bank account during parties' lifetime, and equity will give relief against mistake or fraud in respect thereto as quickly and fully as with respect to any other class of property.—Steiner v. Fecycz, 50 N.E.2d 617, 72 Ohio App. 18.

(2) One who, by undue influence, induces a testatrix to transfer savings deposits into a joint account, and after death of testatrix withdraws such deposit to her own use, holds proceeds as trustee for the benefit of testatrix and her estate.—Smith v. Stratton, 18 N.E.2d 328, 302 Mass. 17.

(3) Where mother opened account represented by savings bankbook in her name and thereafter caused it to be changed by adding name of her son as true joint account on his promise that funds therein would be used for benefit of other son, if son should survive her and son admitted after mother's death that he was holding account for other son's benefit, a constructive trust resulted in favor of other son after death of son holding the joint account.—In re Schulman's Estate, 72 N.Y.S.2d 239, 189 Misc. 672, appeal dismissed 75 N.Y.S.2d 517.

61. Cal.—Sampson v. Gittelman, 130 P.2d 486, 55 Cal.App.2d 208.  
Ohio.—Thal v. American Jewish Aid Soc., 14 N.E.2d 25, 57 Ohio App. 335, appeal dismissed 11 N.E.2d 187, 133 Ohio St. 40.

#### Collusion

A creditor of an insolvent foreign estate, who, through collusion, has received payment of his claim in full to the exclusion of other creditors may not, in equity and good conscience, hold such fund as against the other creditors, but, as to the other creditors, holds the fund received as a trustee.—Lowendahl v. President and Directors of Manhattan Co., 1 N.Y.S.2d 433, 166 Misc. 105.

#### Payment of mortgage indebtedness

A transaction whereby judgment debtor, while insolvent, paid mortgage indebtedness against entireties property with his personal funds, resulted in something similar to a trust ex maleficio from which neither judgment debtor nor his wife could benefit.—McCaslin v. Schouten, 292 N.W. 698, 244 Mich. 180.

#### Stock

Where a bankrupt obtained possession of shares of stock obtained fraudu-

lently representations and carried them away over owner's protest, the stock was a trust in hands of the bankrupt.—In re Franklin Sav. & Loan Co., D.C.Tenn., 34 F.Supp. 585.

62. Cal.—Chase v. Leiter, 215 P.2d 756, 36 Cal.App.2d 439.  
Mich.—Newberry v. Nine Mile Halfway Drain Dist., 30 N.W.2d 430, 319 Mich. 568.

Va.—First Nat. Co. v. State-Planters Bank & Trust Co., 180 S.E. 281, 164 Va. 491.

63. N.Y.—Cerasole v. Egenberger, 7 N.E.2d 259, 273 N.Y. 351, amendment of remittitur denied, 8 N.E.2d 616, 274 N.Y. 487.

64. U.S.—Binkov v. Black, C.A.Kan., 196 F.2d 139—Dabney v. Levy, C.A.N.Y., 191 F.2d 201, certiorari denied 72 S.Ct. 177, 342 U.S. 887, 96 L.Ed. 665, rehearing denied 72 S.Ct. 301, 342 U.S. 911, 96 L.Ed. 682.

N.Y.—Nichols v. 116 East 57th St., 125 N.Y.S.2d 97.

65. S.D.—In re Zech's Estate, 6 N.W.2d 432, 69 S.D. 51.

66. Cal.—Young v. Young Holdings Corp., 80 P.2d 723, 27 Cal.App.2d 129.

67. Ky.—Fresh v. Dunakin, 206 S.W.2d 203, 306 Ky. 87.

68. Mass.—City of Boston v. Santosuosso, 10 N.E.2d 271, 298 Mass. 175.

#### Subrogation

Where insurer pays insured only part of loss and insured institutes action against person primarily liable for the whole loss, defendant not objecting, the recovery is impressed with a trust for the insurer to amount to which it is entitled by subrogation.—National Garment Co. v. New York, C. & St. L. R. Co., C.A.Mo., 173 F.2d 32.

69. U.S.—General Petroleum Corp. of California v. Dougherty, C.C.A. Cal., 117 F.2d 529.

Ala.—Maya Corp. v. Smith, 199 So. 549, 240 Ala. 371.

Ill.—Pure Oil Co. v. Byrnes, 57 N.E.2d 356, 388 Ill. 26.

Miss.—Grantham v. McCaleb, 30 So.2d 312, 202 Miss. 187.

70. U.S.—Brown v. New York Life Ins. Co., D.C.Or., 58 F.Supp. 252, affirmed, C.C.A., 152 F.2d 246.

#### Equitable obligation

(1) Where one has received money which in equity and good conscience he ought to pay over to another, recovery is allowable under the rule of constructive trusts or trusts maleficio.

Colo.—Scott v. Roma Inv. Co., 72 P.2d 274, 101 Colo. 217.

Ohio.—McClanahan v. McClanahan, 72 N.E.2d 798, 79 Ohio App. 231.

S.C.—Greene v. Brown, 19 S.E.2d 114, 199 S.C. 218.

65 C.J. p. 456 note 84 [b].

(2) A constructive trust will arise whenever one person has obtained money which does not equitably belong to him and which he cannot in good conscience retain or withhold from another who is beneficially entitled to it, whether the money came into possession of such person by accident, mistake, or fraud.

U.S.—Texas Co. v. Miller, C.C.A.Tex., 155 F.2d 111, certiorari denied 68 S.Ct. 911, 333 U.S. 880, 92 L.Ed. 1555.

S.C.—Wolfe v. Wolfe, 56 S.E.2d 343, 215 S.C. 530.

71. U.S.—U S Fidelity & Guaranty Co. v. Salmon, C.C.A.Del., 81 F.2d 420.

Hawaii.—Zimmerman v. Grolle, 38 Hawaii 217.

Mass.—Phelps v. Mattoon, 37 N.E.2d 127, 310 Mass. 97.

#### Forgery

One who obtained money by means of forged mortgage note and real estate mortgage became a trustee thereof ex maleficio.—Meyer v. Trosper, 40 N.W.2d 811, 152 Neb. 184.

72. U.S.—Ohio Oil Co. v. Sharp, C.C.A.Okla., 135 F.2d 303.

Cal.—Churchill v. Peters, 134 P.2d 841, 57 Cal.App.2d 521—Harvey v. Ballagh, 101 P.2d 147, 38 Cal.App.2d 348.

Okla.—Orr v. Rose, 37 P.2d 300, 169 Okl. 387.

73. Pa.—Kreinson v. Commercial Nat. Bank, 185 A. 756, 323 Pa. 332.

Wyo.—Cloughton v. Johnson, 38 P.2d 612, 47 Wyo. 447, rehearing denied 41 P.2d 527, 47 Wyo. 536.

74. U.S.—Gribble v. Ditto, C.C.A.N.Y., 119 F.2d 278.

75. Tex.—Pounds v. Jenkins, Civ. App., 157 S.W.2d 173.

76. Tex.—Baird v. Mills, Civ.App., 119 S.W.2d 889, error refused.

Vt.—McGann v. Capital Sav. Bank & Trust Co., 89 A.2d 123, 117 Vt. 179.

Wash.—Gillingham v. Phelps, 105 P.2d 825, 5 Wash.2d 410.

77. Ala.—Averett v. Averett, 10 So.2d 16, 243 Ala. 257.

Cal.—Ramos v. Pacheco, 148 P.2d 704, 64 Cal.App.2d 304.

Ill.—Mauricau v. Haugen, 56 N.E.2d 367, 387 Ill. 186.



some form of fraud or wrongdoing,<sup>78</sup> secret devices or machines,<sup>79</sup> and shares of stock.<sup>80</sup>

On the other hand, particular conduct has been held not to constitute such fraud or wrongdoing as to give rise to a constructive trust.<sup>81</sup> Where one improves another's property under a contract which is unenforceable, equity, it has been held, may redress the injury by declaring a trust;<sup>82</sup> but it has also been held that, where the owner of land by fraud induces another to make expenditures in improving the land, the defrauded person is not entitled to enforce a constructive trust.<sup>83</sup> Where a person not in possession of property acquires pos-

session and undisputed conditional title by virtue of surrender of an admittedly bona fide claim of another on condition that the property will be taken subject to defined rights of the other, an implied trust results in such other's favor.<sup>84</sup>

**Acquisition of property by homicide.** A person who acquires an interest in property as a result of homicide may be held to be a constructive trustee of such interest for the heirs of the person killed,<sup>85</sup> but it has also been held that the maxim that one should not be permitted to profit by his own wrong is insufficient to warrant the creation of a con-

Mich.—Nichols v. Martin, 269 N.W. 183, 277 Mich. 305.

Mo.—Basman v. Frank, 250 S.W.2d 989.

N.Y.—Stephens v. Evans, 75 N.Y.S.2d 909, 130 Misc 922

Okl.—Parduhn v. Rodman, 204 P.2d 869, 201 Okl. 242.

Tex.—Cawthon v. Cocheil, Civ App., 121 S.W.2d 414, error dismissed.

Wash.—McGuigan v. Simpson, 84 P.2d 1012, 197 Wash. 260.

#### Improvement

The owner of a lot who with a fraudulent purpose permitted another mistakenly to erect a building thereon held title to his interest in the lot and to the improvement so acquired as constructive trustee for such builder to extent of value of the improvement.—*Logan Planning Mill Co. v. Pope*, 27 S.E.2d 552, 126 W.Va. 321.

#### Tenancy by entirety

Where marriage took place while man had a living wife and woman was fraudulently led to believe that man was her husband, and she conveyed property purchased with her own money to man and herself as tenants by the entireties, a court of equity could decree a constructive trust in her favor with respect to the property purchased.—*Schwarz v. U. S. C. M. d.*, 191 F.2d 618.

#### Payment

Where vendor's grantees had already paid vendor for the realty, vendor was not entitled, in action by purchaser's administratrix against vendor and vendor's grantees for specific performance of alleged contract to purchase realty, to receive payment a second time, and, therefore, payment, if any, would have to be in trust for the grantees.—*Kelraey v. Hirsch*, 265 P.2d 346, 58 N.M. 18.

#### 78. Undue influence

If a trust is revoked as a result of undue influence, the beneficiary may hold those who received the property gratuitously from the trustor as constructive trustees, even though such persons did not participate in the undue influence.—*Hughes v. First Nat.*

Bank in Oakland, 118 P.2d 309, 47 Cal. App.2d 547.

79. Cal.—Sketchley v. Lipkin, 222 P.2d 927, 99 Cal.App.2d 849.

Mo.—Warwick v. De Mayo, 213 S.W.2d 392, 358 Mo. 130.

80. Fla.—Seestadt v. Southern Laundry, 5 So.2d 859, 149 Fla. 402

Me.—Strout v. Burgess, 68 A.2d 241, 144 Me. 263, 12 A.L.R.2d 939.

#### Reorganization

Bondholder in old corporation who paid assessment on his bonds on reorganization was entitled on ground of "constructive trust" to accounting from another bondholder who received plaintiff's pro rata share of stock in new company.—*Shove v. Siegel*, 267 N.Y.S. 306, 239 App.Div. 334.

81. U.S.—Chain O'Mines v. United Gilpin Corp., C.C.A. Ill., 109 F.2d 617, certiorari denied 61 S.Ct. 14, 311 U.S. 659, 85 L.Ed. 422

Ark.—George v. Donohue, 86 S.W.2d 1109, 191 Ark. 581.

Conn.—Haddad v. Clark, 43 A.2d 221, 132 Conn. 229.

Ga.—Briarcliff, Inc. v. Kelley, 31 S.E.2d 586, 198 Ga. 390.

Iowa.—McDann v. Sorensen, 20 N.W.2d 449, 236 Iowa 996.

Mich.—L. A. Young Spring & Wire Corp. v. Falls, 11 N.W.2d 329, 307 Mich. 69—Club Holding Co. v. Plant Citizens' Loan & Investment Co., 261 N.W. 133, 272 Mich. 66.

N.H.—Samuel & Nathan Goldstein v. Gilman, 36 A.2d 268, 95 N.H. 106

Pa.—Mellon Nat Bank & Trust Co. v. Esler, 55 A.2d 327, 357 Pa. 525—Young v. National Bank of Louisiana, 199 A. 139, 330 La. 128

Tenn.—Patterson v. Gaddy, 191 S.W.2d 556, 28 Tenn App 487.

Tex.—Talley v. Howsley, 176 S.W.2d 158, 142 Tex. 81.

W.Va.—Zogg v. Hedges, 29 S.E.2d 871, 126 W.Va. 523, 152 A.L.R. 991.

**Employee's overdrafts on partnership account,** with managing partner's actually or apparently authorized consent, would not constitute fraudulent misappropriation or other wrongful act raising constructive

trust for other partners.—*Pfeuffer v. Haas*, Tex Civ App., 55 S.W.2d 111, error dismissed.

82. Md.—Scott v. White, 58 A.2d 490, 190 Md. 389.

83. Mo.—Page v. Joplin Nat. Bank & Trust Co., 255 S.W.2d 821, 363 Mo. 1008.

84. Ga.—First Nat. Bank & Trust Co. in Macon v. Roberts, 1 S.E.2d 12, 187 Ga. 472.

85. N.J.—Whitney v. Lott, 36 A.2d 888, 134 N.J.Eq 586

N.C.—Garner v. Phillips, 47 S.E.2d 845, 229 N.C. 160—Bryant v. Bryant, 137 S.E. 188, 192 N.C. 372.

Intestate succession as affected by homicide see Descent and Distribution § 59 c.

#### Survivorship

(1) When one tenant by entirety feloniously kills the other, survivor possesses whole legal interest in property involved, but will be determined, under equitable principle that a person shall not be permitted to profit by his own wrong, to hold such interest on constructive trust for others entitled to co-tenant's estate, except that survivor is entitled to commuted value of net income of half of property for period of his or her life expectancy.

Del.—Colton v. Wade, 80 A.2d 923, 32 Del.Ch. 123.

N.J.—Nelson v. Hurff, 93 A.2d 345, 11 N.J. 55.

(2) Where contract creating joint and several bank account gives each joint owner a right to withdraw all funds from account, which right will be defeated if he fails to survive the other joint owner or the other withdraws first, one joint owner cannot gain an indefeasible interest by feloniously causing the death of the other, and the uncertainty as to whose right would have been defeated in the ordinary course of events is to be resolved against the survivor, and a constructive trust imposed on the entire balance of the account.—*Vesey v. Vesey*, 54 N.W.2d 385, 237 Minn. 295.

structive trust,<sup>86</sup> at least where no intent to kill is involved, but merely manslaughter.<sup>87</sup>

*Procuring or preventing devise or bequest.* Fraud or undue influence in procuring or preventing a devise or bequest may warrant the imposition of a constructive trust in favor of the person who would otherwise have received the property.<sup>88</sup> So an interested person who by fraud, duress, coercion, or deception frustrates an attempt, as distinguished from an intent, to revoke a will will not be allowed to profit by his misconduct and equity may impress a trust on the devise in favor of heirs at law or the intended legatee under a new will which will have the same effect as a revocation.<sup>89</sup> On the other hand the frustration of a mere intent to revoke a will will not give rise to a constructive trust,<sup>90</sup> and, according to some authority, before a person can be held to be a trustee *ex maleficio* for failure to carry out a promise to destroy a will, the proof must

show that testator undertook to accomplish acts which would have resulted in a legal revocation and that testator was prevented from effecting the fulfillment of such acts by the force or fraud of defendant.<sup>91</sup>

## § 147. — Acquisition at Judicial Sale

Where a purchaser at a private sale would be deemed to hold the property purchased in trust for another, a purchaser at a judicial sale under like circumstances will equally be regarded as so holding it.

Since the doctrine of constructive trusts applies equally to purchases of property at judicial sales and at private sales, as discussed *supra* § 139, it is a general principle that where a purchaser at a private sale would be deemed to hold the property purchased in trust for another, a purchaser at a judicial sale under like circumstances will equally be regarded as so holding it.<sup>92</sup> So, under the general rule relating to the acquisition of property by fraud or other

86. Ill.—*Welsh v. James*, 95 N.E.2d 872, 408 Ill. 18.

Pa.—*Wyckoff v. Clark*, 77 Pa. Dist. & Co. 249, 41 Luz Leg. Reg. 371.

87. Conn.—*Bird v. Plunkett*, 95 A.2d 71, 139 Conn. 491.

88. Cal.—*Weinstein v. Moers*, 279 P. 444, 207 Cal. 534.

Ill.—*Lowe Foundation v. Northern Trust Co.*, 96 N.E.2d 831, 342 Ill. App. 379.

Ind.—*Ransdel v. Moore*, 53 N.E. 767, 153 Ind. 393, 53 L.R.A. 753.

Mich.—*Burgess v. Jackson Circuit Judge*, 229 N.W. 481, 249 Mich. 558.

N.C.—*Bohannon v. Trotman*, 200 S.E. 852, 214 N.C. 706.

### Extrinsic fraud

(1) Where, through extrinsic fraud practiced in probate proceedings, distributees have improperly obtained property, equity will declare that distributees hold property in trust for rightful owners.—*Perguson v. Ferguson*, 137 P.2d 735, 58 Cal. App. 2d 811.—*In re Madsen's Estate*, 87 P. 2d 903, 31 Cal. App. 2d 240.—*Zaremba v. Woods*, 61 P.2d 976, 17 Cal. App. 2d 309.

(2) Where an heir knows of the existence of other heirs, and for the purpose of defrauding such heirs and benefiting himself, he fails to notify the court of the existence of such heirs, and knowingly files false petitions with the court representing that there are no such heirs, he is guilty of extrinsic fraud warranting the imposition of a trust on the fraudulent distributee's interest.—*Hewett v. Linstead*, 122 P.2d 352, 49 Cal. App. 2d 607.—*Zaremba v. Woods*, *supra*.

(3) *Executrix*, who gave statutory notice of hearing for distribution of estate as required by statute, and

who acted in good faith, was not guilty of extrinsic fraud or mistake, in failing to discover that action had been filed on rejected claim, and, on discovering the filing of the action, to inform the court, and holder of claim was not entitled to have a trust imposed in his favor on the estate.—*Thayer v. Fish*, 122 P.2d 358, 49 Cal. App. 2d 618.

### Preventing signing of will

Where intestate, shortly before her death, requested a neighbor to have a will prepared for her leaving all of her property to plaintiff, who was not a relative of intestate, but, when will was brought to intestate for signature, certain heirs of intestate, who were present, prevented intestate from signing the will, a constructive trust was imposed in favor of plaintiff as to all the property of intestate, and heirs of intestate were constructive trustees for plaintiff, even though heirs who were not present when intestate was prevented from signing the will.—*Pope v. Garrett*, 211 S.W.2d 559, 147 Tex. 18.

### Failure to witness will

Where deceased's husband failed to carry out repeated promises to have decedent's will witnessed until it was too late, thus preventing deceased's niece, named as legatee, from sharing in estate, constructive trust was held to have arisen in favor of niece, even though there was no intention to defraud at time of promise.—*Thomas v. Briggs*, 189 N.E. 389, 98 Ind. App. 352.

### Notice

Will and codicil on file in office of clerk of probate court did not constitute constructive notice of alteration in codicil with respect to whether constructive trust was created in favor of one who was eliminated as

beneficiary by alteration.—*Little v. Mettee*, 93 S.W.2d 1000, 338 Mo. 1223.

89. Fla.—*Moneyham v. Hamilton*, 168 So. 522, 124 Fla. 430.

N.Y.—*Latham v. Father Divine*, 85 N.E.2d 168, 299 N.Y. 22, reargument denied 86 N.E.2d 114, 299 N.Y. 599, 11 A.L.R.2d 802.

65 C.J. p. 468 note 70 [b].

90. Fla.—*Moneyham v. Hamilton*, 168 So. 522, 124 Fla. 430.

### False pretense

Fact that sole beneficiary of will falsely pretended to be unable to find will when requested by testator to bring will to him so that he might destroy it did not impress trust on devise in favor of heirs at law other than sole beneficiary, or to make will inoperative, there having been no attempt by testator to revoke will.—*Moneyham v. Hamilton*, *supra*.

91. Ark.—*Reiter v. Carroll*, 198 S.W.2d 163, 210 Ark. 841.

### Failure to comply with statute

Where testator's statement to beneficiary directing him to destroy will did not effect a revocation for failure to comply with statute, and statement of beneficiary that destruction had been accomplished, although false, was not sufficient to constitute an actionable fraud because, even if statement were true and will was destroyed, there was still no legal revocation, and beneficiary could not be adjudicated a trustee *ex maleficio* of testator's estate for benefit of heirs at law.—*Reiter v. Carroll*, *supra*.

92. Ky.—*Irons v. U. S. Life Ins. Co.*, 108 S.W. 904, 128 Ky. 640, 33 Ky. L. 46, 129 Am.S.R. 318.

65 C.J. p. 468 note 62.

Parol agreement as to land to be purchased at judicial sale see *infra* § 150 b.

wrong, discussed supra § 146, where one who acquires property at a judicial sale has been guilty of wrongful conduct in bringing about such sale, a constructive trust ordinarily arises in favor of the true owner.<sup>93</sup> Similarly, where a purchaser at a judicial sale becomes such under such circumstances or state of facts as would make it inequitable to permit him to hold on to his bargain,<sup>94</sup> as by representing that he is buying for the benefit of those who own or have an interest in the property being sold,<sup>95</sup> or that he intends to reconvey such property to them,<sup>96</sup> or to permit them to redeem it,<sup>97</sup> and thereby discourages other bidding or obtains the property at a sacrifice, such purchaser will be deemed in equity

a constructive trustee for the persons injured by his fraud. On the other hand, no constructive trust arises by reason of acquisition of property at a judicial sale where there has been no fraud or bad faith such as to warrant imposition of a constructive trust.<sup>98</sup>

#### § 148. — Parol Promise to Hold in Trust or Dispose of Devise, Bequest, or Inheritance

Where a testator or ancestor devises or bequeaths property to a person in reliance on his oral agreement to hold the property in trust or to dispose of it in a particular manner, the devisee or legatee holds the property on a

93. Ark.—Steele v. Steele, 216 S.W. 2d 875, 214 Ark. 600.  
Mich.—Guif Refining Co. v. Perry, 6 N.W.2d 756, 303 Mich. 487.  
N.Y.—Miller v. Gallusser, 3 N.Y.S. 2d 994, 167 Misc. 393.  
Wash.—McGuigan v. Simpson, 84 P. 2d 1012, 197 Wash. 260.  
65 C.J. p 468 note 64.

##### Intentional default

Where husband in possession of realty held with wife as tenants by entirety, received all rent and purposely defaulted to acquire title through foreclosure of mortgage, or purchased at foreclosure sale through medium of third person, equity would not permit husband to acquire the title to exclusion of wife but husband would hold property in trust for wife.—Hatcher v. Allen, 17 S.E. 454, 220 N.C. 407.

##### Failure to pay rent

Where tenant failed to pay rent with which landlord would have been enabled to redeem his property from tax sale, and lulled the landlord into a feeling of security by promises of payment, and the tenant procured tax title for himself through a third person, a constructive trust arose in favor of the landlord, and the third party held the tax title as trustee ex maleficio for use and benefit of the landlord.—Eckert v. Miller, 111 P.2d 60, 57 Ariz. 94.

##### Duty to pay taxes

(1) Where owner in fee of the reversion of a city lot, who was entitled to annual ground rent, alleged that purchaser of lot at tax sale was under duty to pay taxes as mortgagee of subleasehold interest and that sale was a fraudulent attempt to deprive owner in fee of the reversion of her interest in annual ground rent issuing from property, if facts were established, equity would direct that purchaser hold title to lot in trust for benefit of owner in fee of the reversion, so that interest and estate of owner in fee of the reversion may be protected in accordance with equitable principles.—Crocker v. Pitti, 16 A.2d 875, 179 Md. 52.

(2) Where one cotenant assures a second cotenant, who is guardian of a minor cotenant, that he will pay taxes on common property with intent to lull second cotenant into false sense of security with formed purpose of letting taxes go unpaid in order that, at a scavenger sale, first cotenant might, as purchaser, cut off interest of second cotenant and her ward, first cotenant's title, acquired at scavenger sale, may be impressed with a trust ex maleficio.—Koenig v. Koenig, 18 N.W.2d 250, 311 Mich. 12.

(3) It has been held, however, that the fact that defendant breached agreement to pay plaintiffs' taxes was not such fraud as to create constructive trust on plaintiff's lands purchased by defendant at tax sale.—Doohan v. Nauman, 20 P.2d 37, 172 Wash. 372.

94. Cal.—Lucas v. Associacao Pro-  
tectors Uniao Madeirense Do Es-  
tado Da California, 143 P.2d 53, 61  
Cal.App.2d 344.

D.C.—Cahill v. Bryan, 184 F.2d 277,  
87 U.S.App.D.C. 271.  
Ind.—Vincennes Sav. & Loan Ass'n  
v. St. John, 12 N.E.2d 127, 213 Ind.  
171.

Mo.—Powers v. Grand Lodge of An-  
cient, Free and Accepted Masons of  
State of Missouri, 177 S.W.2d 529,  
237 Mo. App. 825.

Tex.—Cecil v. Dollar, 218 S.W.2d 448,  
147 Tex. 541.  
65 C.J. p 468 note 65.

##### Purchase by husband

Where wife, who was surety on note of her husband, executed mortgage on her realty as security for husband's debt, and husband subsequently purchased the realty at sale under power contained in mortgage, paid off debt, and without wife's knowledge, took title in himself, a constructive trust arose in favor of wife.—Spight v. Branch Banking & Trust Co., 183 S.E. 734, 209 N.C. 563.

95. Fla.—Bell v. Smith, 32 So.2d 829,  
159 Fla. 817, 175 A.L.R. 695.  
65 C.J. p 468 note 66.

96. Mo.—Robinson v. Cruzen, App.,  
202 S.W. 449, reversed on other  
grounds 211 S.W. 880, 278 Mo. 199.  
65 C.J. p 468 note 67.

97. Mo.—Johnson v. Johnson, 209 S.  
W. 919.  
65 C.J. p 468 note 68.

98. Miss.—Harris v. Bailey Avenue  
Park, 32 So.2d 689, 202 Miss. 776.  
Mo.—Brown v. Bibb, 201 S.W.2d 370,  
356 Mo. 148.

##### Foreclosure of vendor's lien

In absence of fraud or collusion, the fact that purchaser of lots at paying lien foreclosure, who agreed to sell the lots to the former owner, who in turn agreed to surrender immediate possession of the lots pending purchaser's reimbursement of investment from rentals, later purchased the lots at foreclosure of vendor's lien for a consideration, equal to the indebtedness, did not incur the lots with a trust in former owner's favor.—Ritch v. Grant, 130 S.W.2d 1019, 134 Tex. 10.

##### Redemption by second mortgagee

Second mortgagee, who was a defendant in action to foreclose first mortgage, and who redeemed premises from sale pursuant to judgment, from which mortgagors did not appeal and by terms of which second mortgagee's title became absolute, was not a stranger or a volunteer, and hence mortgagors were not entitled to benefit of a trust, even if note secured by second mortgage was satisfied.—Rollins v. Holcomb, 190 A.260, 122 Conn. 664.

##### Discharge of note

Where grantors' obligation to hold grantees harmless as to indebtedness secured by trust deed on conveyed premises was expressed in and represented by note and chattel mortgage and grantors discharged the note but grantees did not pay indebtedness secured by trust deed, grantors, purchasing property at trust deed foreclosure sale, did not hold title in trust for grantees.—Long v. Von Erdmannsdorff, Mo., 111 S.W.2d 37.

constructive trust for the persons for whom he agreed to hold it; but the promise must have been the cause of the decedent's failure to make the necessary legal provision, by will or otherwise, to effectuate his desire.

Where a testator or ancestor makes known to his devisee, legatee, or heir his desire that his property shall be disposed of in a particular manner, and that he relies on him to carry his desire into effect, and such devisee, legatee, or heir uses words or does acts calculated to cause, and which he knows do in fact cause, the testator or ancestor to believe that he fully assents thereto, and where in consequence thereof the testator or ancestor makes, or omits to make, a will or such particular disposition of his property in his lifetime as will carry out his desire, a constructive trust is created;<sup>99</sup> and this rule applies, it has been said, even where a devise or bequest is on an express trust inconsistent with

the constructive trust.<sup>1</sup>

In order to sustain a constructive trust under such circumstances the promise must have been the cause of the failure to make the necessary legal provision to effectuate the decedent's desire,<sup>2</sup> and it has been said that it must appear that the decedent was in a position to carry out, and but for the promise would have carried out or effectuated, his desire and intention.<sup>3</sup> It must also appear that decedent relied on the promise of the devisee, legatee, or heir as an effective arrangement for the disposition of his property,<sup>4</sup> and where, without regard to the making of any promise, it is the testator's or ancestor's desire to leave property to a particular person, a mere agreement or understanding with the latter as to his subsequent disposal of the property does not give rise to a trust.<sup>5</sup>

99. U.S.—Clark v. Tibbetts, C.C.A.N.Y., 167 F.2d 397—Gardner v. Delaney, D.C.Mass., 103 F.Supp. 610, vacated on other grounds, C.A., 204 F.2d 855—Clark v. Tibbetts, D.C.N.Y., 79 F.Supp. 60.

Cal.—In re Sargavak's Estate, 259 P.2d 897, 41 Cal.2d 314—Sears v. Rule, 163 P.2d 443, 27 Cal.2d 131, certiorari denied 65 S.Ct. 1022, 328 U.S. 843, 90 L.Ed. 1617.

Colo.—In re Doerfer's Estate, 67 P.2d 492, 100 Colo. 304.

Ill.—Wagner v. Clauson, 78 N.E.2d 203, 399 Ill. 403, 3 A.L.R.2d 672.

Ky.—Moore v. Garvey's Adm'r, 160 S.W.2d 363, 290 Ky. 61.

Minn.—Ives v. Pillsbury, 283 N.W.140, 204 Minn. 142.

Miss.—Corpus Juris cited in Stovall v. Stovall, 67 So.2d 391, 406, 218 Miss. 364.

N.Y.—O'Boyle v. Brenner, 104 N.E.2d 913, 303 N.Y. 572—O'Boyle v. Brenner, 79 N.Y.S.2d 84, 273 App.Div. 683, appeal dismissed 95 N.E.2d 47, 301 N.Y. 685—In re Munk's Estate, 73 N.Y.S.2d 792, 189 Misc. 206—In re Buehler's Estate, 59 N.Y.S.2d 766, 186 Misc. 306, affirmed 70 N.Y.S.2d 139, 272 App.Div. 757, appeal denied 73 N.Y.S.2d 485, 272 App.Div. 794—La Vin v. La Vin, 39 N.Y.S.2d 317, 179 Misc. 1000, affirmed 41 N.Y.S.2d 180, 266 App.Div. 674—Macy v. Burchell, 228 N.Y.S. 388, 131 Misc. 602—In re Taylor's Will, 95 N.Y.S.2d 459—Lawrence v. Mildenberger, 92 N.Y.S.2d 519, affirmed 97 N.Y.S.2d 195, 276 App.Div. 1079.

Okl.—Collar v. Mills, 125 P.2d 197, 190 Okl. 481.

Pa.—Danner v. Danner, 77 A.2d 217, 366 Pa. 178.

R.I.—Greene v. Rhode Island Hospital Trust Co., 197 A. 464, 60 R.I. 184.

65 C.J. p. 468 note 70.

Fraud or undue influence in procuring or preventing a devise or bequest as giving rise to constructive trust generally see supra § 146.

#### Prevention of unjust enrichment

When testator makes a devise absolute in terms, but on oral agreement that devisee will apply the devised estate to some lawful purpose designated by testator, equity will enforce a constructive trust, which is imposed to prevent unjust enrichment not merely to carry out testator's intent.—In re Brennen's Estate, 63 A.2d 69, 360 Pa. 558

#### Actual intentional fraud not required

Although constructive trust in property devised or bequeathed may be established by oral evidence, it is not dependent on pleading and proof of actual intentional fraud before or contemporaneously with making of will or of existence of fiduciary relation, but rule is that one to whom property is devised or bequeathed in reliance on his agreement to hold it in trust for or convey it to third person holds it on constructive trust for such person.—Strype v. Lewis, 180 S.W.2d 688, 352 Mo. 1004, 155 A.L.R. 99.

#### Position of beneficiary

The distinction between the position of the beneficiary of a testamentary trust and the position of the beneficiary of a constructive trust under an agreement between a testator and his devisee that devisee will hold the property devised as trustee is that the interest of a beneficiary of a constructive trust does not arise under the will or laws of intestate succession.—In re Loring's Estate, 175 P.2d 524, 29 Cal.2d 423.

#### Property included

Where stepfather of children obtained a devise of mother's property on his representation to her that all of their property ultimately would go

to children, constructive trust to enforce the obligation could be impressed only on property stepfather received from mother but could not be impressed on his own property or property not so obtained.—O'Boyle v. Brenner, 73 N.Y.S.2d 687, 189 Misc. 1058, modified on other grounds 79 N.Y.S.2d 84, 273 App.Div. 683, appeal dismissed 95 N.E.2d 47, 301 N.Y. 685.

1. Mass.—Ham v. Twombly, 63 N.E.336, 181 Mass. 170.

2. Iowa.—Hermann v. Hermann, 188 N.W. 806, 193 Iowa 1201.

Mo.—Mead v. Robertson, 110 S.W.1095, 131 Mo.App. 185.

3. Mo.—Mead v. Robertson, supra.

4. U.S.—Housman v. C. I. R., C.C.A.2, 105 F.2d 973, certiorari denied 60 S.Ct. 469, 309 U.S. 656, 84 L.Ed. 1005.

65 C.J. p. 469 note 74.

#### Intent

In order to impress constructive trust on legatee because of testator's oral statements, it must plainly appear that testator intended to impose enforceable trust and would have changed his contemplated dispositions of property but for legatee's assent to such statements.—Housman v. C. I. R., supra.

#### No promise or agreement

Provision in will creating a trust but naming no beneficiaries, did not give rise to a constructive trust, where there was no showing that the trustee had made any promise to or agreement with testatrix to carry out disposition of property in certain manner.—Wagner v. Clauson, 78 N.E.2d 203, 399 Ill. 403, 3 A.L.R.2d 672.

5. Ill.—Allmon v. Figg, 82 Ill. 149, 25 Am.R. 303.

#### Joint will

Fact that wife, who joined with her husband in executing wills leaving interest of each in community

No express promise on the part of the devisee, legatee, or heir is required in order to raise a constructive trust of property left to him with the expectation that it shall be held or disposed of in a particular manner,<sup>6</sup> but his silent acquiescence or cooperation is sufficient,<sup>7</sup> providing it is consciously given with intention that it shall amount to a promise or shall be taken by the testator or ancestor as a promise.<sup>8</sup> The mere expression of a wish, however, by the testator or ancestor that his property be held or disposed of in a particular way is not sufficient to raise a trust,<sup>9</sup> and, where a devisee or legatee had no knowledge of the testator's purpose or wishes at the time of making the will,<sup>10</sup> or at such time notified the testator of his refusal to accede to his request,<sup>11</sup> no trust arises.

Where the promise or assurance, on the faith of which property is devised or bequeathed to two or more persons as joint tenants, is made by one of the joint tenants, the trust will be enforced against all, on the ground that with respect to property thus jointly devised or bequeathed the promise of one joint tenant binds all equally;<sup>12</sup> but where the devise or bequest is to several persons, either severally or as tenants in common and not as joint tenants, the trust will not be enforced as against such of them as have nothing to do with the making of the will.<sup>13</sup>

*Promise by person taking no benefit under will to give property to a child of the testator, thereby inducing the testator to make no provision for such child, does not give rise to a trust in favor of the omitted child, at least in the absence of any fraudulent purpose.<sup>14</sup> Similarly, a promise by an executor who takes no benefit under the will to dispose of property differently from the way the will directs, in reliance on which promise the will is not altered by the testator, does not make him a constructive trustee.<sup>15</sup>*

#### § 149. — Parol Promise to Hold in Trust or Reconvey Land Conveyed

The mere violation of a parol promise made by a grantee of land to the grantor thereof, to hold such land in trust or for a specified purpose, or to convey it back to the grantor or another, does not create a constructive trust in the grantee, in the absence of fraud in procuring the conveyance to him; but a constructive trust may arise where, in addition to the parol agreement or its breach, there is some element of fraud or bad faith which makes it inequitable that the grantee should hold the title absolutely and discharged of any trust.

The mere violation of a parol promise made by a grantee of land to the grantor thereof, to hold such land in trust or for a specified purpose, or to convey it back to the grantor or to a person designated or to be designated by him, does not create a constructive trust in the grantee, in the absence of fraud in procuring the conveyance to him,<sup>16</sup> since

property to the other with provision that if one predeceased the other interest should go to their daughter, after husband's death sold community property and gave proceeds of sale to a son to prevent property going to daughter, did not impress a trust on proceeds in favor of daughter.—*Garland v. Meyer*, Tex.Civ.App., 169 S.W. 2d 531.

6. *Neb.*—*Wiseman v. Guernsey*, 187 N.W. 55, 107 Neb. 647.  
65 C.J. p 470 note 77.

7. *Ark.*—*Barron v. Stuart*, 207 S.W. 2d, 136 Ark. 481.  
65 C.J. p 470 note 77.

8. *Mo.*—*Mead v. Robertson*, 110 S.W. 1095, 131 Mo App. 185.  
65 C.J. p 470 note 78.

9. *Iowa.*—*Hermann v. Hermann*, 188 N.W. 806, 193 Iowa 1201.

#### Fraud not shown

Where testatrix, shortly before her death, called in her brothers and sisters and sole devisee under her will and requested that sole devisee give part of property to the brothers and sisters, and sole devisee promised to do so, failure of sole devisee, after testatrix' death, to carry out promise, was held not such actual or constructive fraud as to authorize declaring of constructive

trust in favor of brothers and sisters.—*Vance v. Grow*, 190 N.E. 747, 206 Ind. 614.

10. *Conn.*—*Bryan v. Bigelow*, 60 A. 266, 77 Conn. 604, 107 Am.S.R. 64.

11. *Minn.*—*Ives v. Pillsbury*, 283 N.W. 140, 204 Minn. 142.

12. *N.J.*—*Powell v. Yearance*, 67 A. 892, 73 N.J.Eq. 117.

*N.Y.*—*O'Hara v. Dudley*, 95 N.Y. 403, 47 Am.R. 53, 14 Abb.N.Cas. 71.

13. *N.J.*—*Heinisch v. Pennington*, 68 A. 233, 73 N.J.Eq. 456, affirmed 73 A. 1118, 75 N.J.Eq. 606.  
65 C.J. p 470 note 82.

14. *Tenn.*—*Robinson v. Denson*, 3 Head 395.

15. *Pa.*—*Porter v. Wolf*, 116 A. 55, 272 Pa. 93.

16. *U.S.*—*Robinson v. Linfield College*, D.C.Wash., 42 F.Supp. 147, affirmed, C.C.A., 136 F.2d 805, certiorari denied 64 S.Ct. 262, 320 U.S. 795, 88 L.Ed. 479.

*Ark.*—*Patton v. Randolph*, 124 S.W. 2d 823, 197 Ark. 653.

*Cal.*—*O'Maha v. Adkins*, 166 P.2d 298, 73 Cal.App.2d 143—*Ampuero v. Luce*, 157 P.2d 899, 68 Cal.App.2d 811.

*Fla.*—*Rappaport v. Kalstein*, 24 So.2d 301, 156 Fla. 722—*Corpus Juris cit.*

*ed in Crockett v. Crockett*, 199 So. 337, 338, 145 Fla. 311.

111.—*Bremer v. Bremer*, 104 N.E.2d 299, 411 Ill. 454—*Suchy v. Halclock*, 4 N.E.2d 836, 364 Ill. 502.

*Iowa.*—*England v. England*, 51 N.W. 2d 437, 243 Iowa 274—*Newell v. Tweed*, 40 N.W.2d 20, 241 Iowa 90.

*Me.*—*Sacre v. Sacre*, 55 A.2d 592, 143 Me. 80, 173 A.L.R. 1261.

*Mo.*—*Carter v. Abramo*, 93 A.2d 546, 201 Md. 339—*Grimes v. Grimes*, 40 A.2d 58, 184 Md. 59.

*Mich.*—*Stephenson v. Golden*, 276 N.W. 849, 279 Mich. 710.

*Miss.*—*Coleman v. Kierbow*, 54 So. 2d 915, 212 Miss. 541.

*Mo.*—*Beach v. Beach*, 207 S.W.2d 481—*Jankowski v. Delfert*, 201 S.W.2d 331, 356 Mo. 181—*Corpus Juris cit.*

*W.2d* 688, 691, 352 Mo. 1004, 155 A.L.R. 99.

*N.J.*—*Blaine v. Krynowaty*, 38 A.2d 859, 135 N.J.Eq. 355.

*N.Y.*—*Friedman v. Katz*, 65 N.Y.S.2d 731, 271 App.Div. 836.

*N.C.*—*Walker v. Walker*, 55 S.E.2d 801, 231 N.C. 54.

*N.D.*—*Johnson v. Larson*, 56 N.W.2d 750.

*Ohio.*—*Halliday v. Norfolk & W. Ry. Co.*, 62 N.E.2d 716.

the trust, if any, is an express one and is not enforceable under the statute of frauds;<sup>17</sup> and, a fortiori, a simple avowal of acquisition of property for the benefit of another, or of an intention to convey it to another, not made as a promise or inducing the conveyance, will not give rise to a constructive trust.<sup>18</sup> An offer by the purchaser of land to permit the vendor to repurchase the premises at any time with a reasonable profit is a simple option

of purchase which contemplates purchase from the grantee as beneficial owner, and equity will not enforce it by declaring a trust.<sup>19</sup>

A constructive trust will arise, however, out of a promise to reconvey or hold in trust made in connection with the receipt of the legal title to property, provided the grantor's purpose is an honest one,<sup>20</sup> where, in addition to the parol agreement or

Pa.—Kalyvas v. Kalyvas, 89 A.2d 819, 371 Pa. 371—Fitzpatrick v. Fitzpatrick, 29 A.2d 790, 346 Pa. 202—Metzger v. Metzger, 14 A.2d 285, 338 Pa. 564, 129 A.L.R. 683—Green v. Green, Com.Pl., 31 Del. Co. 538—Skrym v. Noss, Com.Pl., 36 Luz.Leg.Reg. 257—Miller v. Miller, Com.Pl., 34 West Co. 317—Copenhaver v. Duncan, Com.Pl., 61 York Leg.Dec. 105

S.C.—Corpus Juris quoted in All v. Prillaman, 20 S.E.2d 741, 749, 200 S.C. 279, 159 A.L.R. 981.

65 C.J. p. 470 note 86.

Violation of promise to convey land as fraud raising constructive trust in general see supra § 139.

#### Other statements of rule

(1) The doctrine of trusts ex maleficio with respect to land can never be applied when there is nothing more than a broken verbal promise—Mays v. Perry, 27 S.E.2d 698, 196 Ga. 729.

(2) A constructive trust cannot be established by merely showing that one who has obtained the legal title for a specified purpose, on an oral promise to convey to a third person, refuses to perform such promise or denies the existence of the trust—Stein v. Stein, 75 N.E.2d 869, 398 Ill. 397.

(3) Violation of parol trust agreement concerning lands, if established, is not of itself that nature of fraud which will sustain bill to enforce trust founded on claim of fraud—Tipton v. Tipton, 57 So.2d 94, 257 Ala. 32—Talley v. Talley, 26 So.2d 586, 248 Ala. 84.

(4) A person holds title to property in a constructive trust when he is under an obligation to convey it to another, if such obligation did not arise merely because he voluntarily assumed it.—Page v. Joplin Nat. Bank & Trust Co., 255 S.W.2d 821, 363 Mo. 1008.

(5) Transfer of land on an oral trust does not give rise to a constructive trust not subject to statute of frauds, unless transfer was procured by fraud, duress, undue influence, or mistake, transferee was at the time in a confidential relationship to transferor for whom he orally agreed to hold the land, transfer was effected by deed absolute in terms, but in-

tended as a mere security, or transfer was made in contemplation of death.

Miss.—Coleman v. Kierbow, 54 So.2d 915, 212 Miss. 541.  
N.J.—DeMarco v. Estlow, 88 A.2d 445, 18 N.J.Super. 30, affirmed 91 A.2d 272, 21 N.J.Super. 356.

#### Repossession of confidence

(1) The mere fact of conveyance of realty, pursuant to grantee's parol promise to reconvey it to grantor at grantor's request, is insufficient to create confidential relationship or constructive trust in grantee for grantor's benefit.—Bruner v. Stunert, 85 A.2d 130, 369 Pa. 178—65 C.J. p. 471 note 86 [a].

(2) The statute of frauds, rendering unenforceable an oral promise to reconvey realty, cannot be circumvented merely by having the transferor say to the transferee in the presence of a third person that he has confidence that transferee will reconvey the property at transferor's request.—Stewart v. Hooks, 94 A.2d 756, 372 Pa. 542.

#### Life use

Verbal agreement that if husband would have his interest in his deceased wife's property conveyed to defendants, to whom property was subsequently conveyed, he would be permitted to occupy property during rest of his life, did not raise constructive trust to extent of life use which would be enforceable in husband's favor, notwithstanding statute of frauds, where there was no finding of fraudulent intent not to keep agreement at time it was made.—Reynolds v. Reynolds, 183 A. 394, 121 Conn. 153.

#### Incidental promise

Equity will not declare a constructive trust on nonperformance of an incidental promise made in connection with purchase of land, which has no bearing on nature of the title or interest intended to be conveyed, although such promise may constitute part of the consideration.—Atkinson v. Atkinson, 33 S.E.2d 666, 225 N.C. 120.

17. Ark.—Jones v. Gachot, 230 S.W. 2d 337, 217 Ark. 462.  
Ill.—Kester v. Crilly, 91 N.E.2d 419, 405 Ill. 425.

Me.—Sacre v. Sacre, 55 A.2d 532, 143 Me. 80, 173 A.L.R. 1261.

Mo.—Jankowski v. Delfert, 201 S.W. 2d 331, 356 Mo. 184.

S.C.—Corpus Juris quoted in All v. Prillaman, 20 S.E.2d 741, 749, 200 S.C. 279, 159 A.L.R. 981.  
65 C.J. p. 471 note 87.

18. S.C.—Corpus Juris quoted in All v. Prillaman, 20 S.E.2d 741, 749, 200 S.C. 279, 159 A.L.R. 981.  
65 C.J. p. 471 note 88.

#### Abortive attempt to reconvey

Conveyance of realty by husband to his wife for protection of her and their children while he was confined in prison did not give rise to a constructive trust in the realty in favor of the husband, notwithstanding wife on her deathbed made an abortive attempt to reconvey the realty to the husband.—Moore v. Terry, 170 S.W.2d 29, 293 Ky. 727.

19. N.C.—Atkinson v. Atkinson, 33 S.E.2d 666, 225 N.C. 120.

#### Passage of title

Promises by one purchasing land from his brother to pay annually to brother half the net proceeds of farm and mill, and half of profits of timber cut, and to permit brother to purchase the entire place at any time with a reasonable profit, were not conditions on passing of full beneficial title by subsequent deed, and did not warrant declaration of constructive trust because of their nonperformance.—Atkinson v. Atkinson, supra.

20. Neb.—Corpus Juris quoted in Box v. Box, 21 N.W.2d 868, 873, 146 Neb. 828.

S.C.—Corpus Juris quoted in All v. Prillaman, 20 S.E.2d 741, 749, 200 S.C. 279, 159 A.L.R. 981.  
65 C.J. p. 471 note 89.

#### Motive held immaterial

In action by grantee and her husband to try title, wherein defendants filed similar cross-action asserting ownership as devisee of grantor, and attacking deed on ground that it had been executed for purpose of qualifying grantor for old age pension with agreement that grantee would hold in trust and reconvey on request, where grantor had not received such pension, question of right of recovery of land by reason of such alleged trust was not governed by motive which may have prompted execution of deed.—Cald-

its breach, there is some element of fraud or bad faith which makes it inequitable that the grantee should hold the title absolutely and discharged of any trust.<sup>21</sup> It is not necessary that actual fraud be shown for equity to regard the grantee as holding lands charged with a constructive trust and to compel him to fulfill the trust by conveying according to his engagement, but it is necessary only to

establish such conduct and bad faith as would shock the conscience of the court.<sup>22</sup>

Generally, a constructive trust will be raised where at the time the promise is made the grantee does not intend to perform it, or it is intentionally false,<sup>23</sup> or where confidential relationships exist between the parties and there is no other consideration for the conveyance except the promise,<sup>24</sup> or

well v. Tucker, Tex.Civ.App., 246 S.W.2d 923.

21. Cal.—Orella v. Johnson, 242 P.2d 5, 38 Cal.2d 693—Steinberger v. Steinberger, 140 P.2d 31, 60 Cal. App.2d 116—Forman v. Goldberg, 108 P.2d 983, 42 Cal.App.2d 308.  
D.C.—Bennett v. Bennett, D.C., 83 F. Supp. 19.

Ga.—Pittman v. Pittman, 26 S.E.2d 764, 196 Ga. 397.

Ky.—Deaton v. Rowling, 196 S.W.2d 603, 302 Ky. 829.

Me.—Sacre v. Sacre, 55 A.2d 592, 14 Me. 80, 173 A.L.R. 1261—Austin v. Austin, 191 A. 276, 135 Me. 155.

Md.—Cohen v. Cohen, 73 A.2d 872, 195 Md. 520—Trossbach v. Trossbach, 42 A.2d 905, 185 Md. 47.

Miss.—Coleman v. Kierbow, 54 So.2d 915, 212 Miss. 541—Pitchoford v. Howard, 45 So.2d 142, 208 Miss. 567.

Neb.—Fisher v. Keeler, 7 N.W.2d 659, 142 Neb. 723—Wilcox v. Wilcox, 293 N.W. 378, 138 Neb. 510.

S.C.—Corpus Juris quoted in All v. Prillaman, 20 S.E.2d 741, 749, 200 S.C. 279, 159 A.L.R. 981.

Tex.—Mills v. Gray, 210 S.W.2d 985, 147 Tex. 33—Sparks v. Mince, Civ. App., 138 S.W.2d 203.

Utah.—Corey v. Roberts, 25 P.2d 940, 82 Utah 445.

Vt.—Vilas v. Seith, 189 A. 862, 108 Vt. 526.

65 C.J. p 471 note 91.

#### Other statement of rule

If inter vivos transfer of interest in land pursuant to oral trust, or oral agreement to convey, was procured by fraud, misrepresentation, duress, undue influence, or mistake of such character that the transferor is entitled to restitution, transferee who refuses to perform trust or agreement holds interest on a constructive trust for transferor.

Mo.—Kasman v. Frank, 250 S.W.2d 989.

Neb.—O'Shea v. O'Shea, 11 N.W.2d 540, 143 Neb. 843—Nelson v. Seewers, 10 N.W.2d 849, 143 Neb. 822.

#### Creation of interest in third person

A constructive trust arising on oral agreement to convey land to third person comes into existence only if transferee by fraud, duress, or undue influence, induced transferor not to create enforceable interest in third person.—Jones v. Felix, 23 N.E.2d 706, 372 Ill. 262.

#### Fiduciary relationship

The existence of a fiduciary relationship between plaintiffs and defendant was not a necessary prerequisite to establishment of a constructive trust on estate for benefit of plaintiffs—Simmons v. Wilson, Tex. Civ.App., 216 S.W.2d 847.

22. D.C.—Mandley v. Backer, 121 F.2d 875, 73 App.D.C. 412

**Active conduct by grantee to bring about conveyance, especially where there is a fiduciary relationship, and grantee's subsequent failure to carry out his agreement to hold in trust for reconveyance tend to show fraud or bad faith by the grantee, so as to raise a constructive trust.**—Coleman v. Kierbow, 54 So.2d 915, 212 Miss. 541.

#### Fraud implied

A trustee's fraud in procuring trust property is implied, where he obtained title thereto with definite promises to carry out trustor's wishes with respect to its management and reconvey it to trustor on request, but failed and refused to do so.

Cal.—Fernald v. Lawsten, 79 P.2d 742, 26 Cal.App.2d 552.

Or.—Platt v. Jones, 38 P.2d 703, 149 Or. 246, modified on other grounds 39 P.2d 955, 149 Or. 246.

23. Ark.—Ripley v. Kelly, 183 S.W.2d 793, 207 Ark. 1011.

Cal.—Forman v. Goldberg, 108 P.2d 983, 42 Cal.App.2d 308—Burrows v. Burrows, 28 P.2d 1072, 136 Cal. App. 323.

D.C.—Mandley v. Backer, 121 F.2d 875, 73 App.D.C. 412—Bennett v. Bennett, D.C., 83 F.Supp. 19.

Ga.—Hancock v. Hancock, 54 S.E.2d 385, 205 Ga. 684—Mays v. Perry, 27 S.E.2d 698, 196 Ga. 729—Sykes v. Reeves, 24 S.E.2d 688, 195 Ga. 587.

Iowa.—Itance v. Gaddis, 284 N.W.468, 226 Iowa 531.

Md.—Trossbach v. Trossbach, 42 A.2d 905, 185 Md. 47.

Neb.—Fisher v. Keeler, 7 N.W.2d 659, 142 Neb. 728.

S.C.—Corpus Juris quoted in All v. Prillaman, 20 S.E.2d 741, 749, 200 S.C. 279, 159 A.L.R. 981.

65 C.J. p 471 note 92.

**Fraud**

(1) Fraud, giving rise to constructive trust in land conveyed on oral trust, may consist of grantee's inten-

tion not to perform his agreement and be evidenced by his subsequent refusal to perform, together with other circumstances, such as activity in procuring conveyance.—Cohen v. Cohen, 73 A.2d 872, 195 Md. 520.

(2) Where owner of one-fourth interest in land desired to purchase another one-half interest, and received a deed from person owning the remaining one-quarter interest on representation that first person needed whole title to borrow sufficient funds to complete the purchase, and thereafter first person refused to reconvey, first person acquired and retained interest of person owning the remaining one-quarter interest by fraud, and became a trustee thereof for his benefit.—Straussburg v. Connor, 215 P.2d 509, 96 Cal.App.2d 398.

#### No disparity of mental capacity

A person obtaining property by making false promise for purpose of inducing another to transfer property to promisor with intent to violate such promise, is guilty of such fraud as to constitute him a constructive trustee for transferor's benefit, even though there is no disparity of mental capacity or confidential relationship between parties.—Sykes v. Reeves, 24 S.E.2d 688, 195 Ga. 587.

24. U.S.—Helvering v. Miller, C.C. A., 75 F.2d 474.

Ariz.—Dawson v. McNaney, 223 P.2d 907, 71 Ariz. 79.

Cal.—Orella v. Johnson, 242 P.2d 5, 38 Cal.2d 693—Allen v. Meyers, 54 P.2d 450, 5 Cal.2d 311—Grace v. Rodrigues, 243 P.2d 906, 111 Cal. App.2d 131—Casey v. Casey, 218 P.2d 842, 97 Cal.App.2d 875—Svistunoff v. Svistunoff, 211 P.2d 352, 94 Cal.App.2d 651—Lytle v. Pickling, 164 P.2d 842, 72 Cal.App.2d 383—Adams v. Bloom, 142 P.2d 776, 61 Cal.App.2d 315—Steinberger v. Steinberger, 140 P.2d 31, 60 Cal. App.2d 116—Fernald v. Lawsten, 79 P.2d 742, 26 Cal.App.2d 552—Burrows v. Burrows, 28 P.2d 1072, 136 Cal. App. 323.

Ill.—Oster v. Oster, 111 N.E.2d 319, 414 Ill. 470—Bremer v. Bremer, 104 N.E.2d 299, 411 Ill. 454—Kester v. Crilly, 91 N.E.2d 419, 405 Ill. 425—Jones v. Felix, 23 N.E.2d 706, 372 Ill. 262—Suchy v. Hajcek, 4 N.E.2d 836, 364 Ill. 502.

Me.—Sacre v. Sacre, 55 A.2d 592, 143 Me. 80, 173 A.L.R. 1261.

where the promise is the inducing cause of the conveyance, no other consideration being given, and | is relied on by the grantor,<sup>25</sup> or where the conveyance is made as security for a debt and the value of

Md.—Cohen v. Cohen, 73 A.2d 872, 195 Md. 520.—Trossbach v. Trossbach, 42 A.2d 905, 185 Md. 47.—Rice v. Rice, 41 A.2d 871, 184 Md. 403.

Minn.—Knox v. Knox, 25 N.W.2d 225, 222 Minn. 477.

Miss.—Coleman v. Kierbow, 54 So.2d 815, 212 Miss. 541.—Pitchford v. Howard, 46 So.2d 142, 208 Miss. 567.—Adcock v. Merchants & Mfrs. Bank of Ellisville, 42 So.2d 427, 207 Miss. 448.—Jones v. Hoover, 37 So. 2d 490, 204 Miss. 345.

Mo.—Basman v. Frank, 250 S.W.2d 989.

Neb.—Corpus Juris quoted in In re Scott's Estate, 26 N.W.2d 799, 803, 148 Neb. 182.—Corpus Juris quoted in Box v. Box, 21 N.W.2d 868, 873, 146 Neb. 826.—O'Shea v. O'Shea, 11 N.W.2d 540, 143 Neb. 843.—Nelson v. Seever, 10 N.W.2d 349, 143 Neb. 522.

Nev.—Davidson v. Streeter, 234 P.2d 793, 68 Nev. 427.

N.J.—Moses v. Moses, 53 A.2d 805, 140 N.J. Eq. 576, 173 A.L.R. 273.

N.Y.—Pattison v. Pattison, 92 N.E.2d 890, 301 N.Y. 65.—In re Wechsler's Estate, 13 N.Y.S.2d 940, 171 Misc. 738.—Frick v. Cone, 290 N.Y. S. 592, 160 Misc. 450, affirmed 298 N.Y.S. 173, 251 App.Div. 781.—Vnuk v. Vnuk, 95 N.Y.S.2d 254, affirmed 96 N.Y.S.2d 687, 276 App.Div. 1102.—Hartkopf v. Hesse, 49 N.Y.S.2d 162.

N.D.—Johnson v. Larson, 56 N.W.2d 750.

Or.—Hanscom v. Hanscom, 208 P.2d 330, 186 Or. 541.

Pa.—Metzger v. Metzger, 14 A.2d 285, 338 Pa. 564, 129 A.L.R. 683.—Pyle v. Davidson, Com.Pl., 4 Chester Co. 25.—Rank v. Rank, Com.Pl., 63 Dauph. Co. 352.—Butler v. Cole, Com.Pl., 24 Erie Co. 178.—Gast v. Engel, Com.Pl., 41 Luz.Leg.Rec. 399, affirmed 85 A.2d 403, 369 Pa. 137.—Grim v. Schmuck, Com.Pl., 65 York Leg.Rec. 187.—Hetrick v. Boyd, Com.Pl., 53 York Leg.Rec. 73.

S.C.—Corpus Juris quoted in All v. Prillaman, 20 S.E.2d 741, 749, 200 S.C. 279, 159 A.L.R. 881.

S.D.—Schwartale v. Dale, 54 N.W.2d 381, 74 S.D. 467.

Tex.—Mills v. Gray, 210 S.W.2d 985, 147 Tex. 33.—Gray v. Mills, Civ. App., 206 S.W.2d 278, affirmed 210 S.W.2d 985, 147 Tex. 33.

Utah.—Haws v. Jensen, 209 P.2d 229, 116 Utah 212  
65 C.J. p 471 note 93.

#### Absence of fraud or undue influence

Where property is conveyed to person on his oral promise to hold it and later reconvey it to others, and at time of conveyance he stands in a confidential relationship to others,

a court of equity will not allow him to keep property and be unjustly enriched, but will compel him to transfer title to parties equitably entitled to it even though he may have intended at time of conveyance to carry out agreement, and even though he was not guilty of fraud, undue influence, or any other abuse of confidential relationship in procuring conveyance.

Md.—Carter v. Abramo, 93 A.2d 546, 201 Md. 339.—Rice v. Rice, 41 A.2d 371, 184 Md. 403.—Grimes v. Grimes, 40 A.2d 58, 184 Md. 59.

Miss.—Adcock v. Merchants & Mfrs. Bank of Ellisville, 42 So.2d 427, 207 Miss. 448.

Mont.—Opp v. Boggs, 193 P.2d 379, 121 Mont. 131.

Pa.—Metzger v. Metzger, 14 A.2d 285, 338 Pa. 564, 129 A.L.R. 683.

S.D.—Jaeger v. Sechser, 270 N.W. 531, 65 S.D. 38.

#### Promise to support or to reconvey

The law of constructive trusts applies equally to land conveyed under a promise to furnish support as well as to land conveyed under an agreement for reconveyance although in each case a fiduciary or confidential relationship must have existed between grantor and grantee, and such relationship must appear as an ingredient of the constructive fraud practiced.—Ampuero v. Luce, 157 P.2d 899, 68 Cal.App.2d 811.

#### Mother and son

Acceptance of deed from mother by son with knowledge that another son promised the mother that the sons would reconvey the realty to her, bound son, who did not make the promise to the promise previously made by the other son.—Airola v. Gorham, 133 P.2d 78, 56 Cal.App.2d 42.

#### Husband and wife

(1) Although husband's parol agreement to receive, invest, and reinvest wife's funds for her benefit and hold proceeds subject to her demand is unenforceable as an express trust, implied trust arising out of delivery of funds to husband under such agreement is enforceable in equity and parol agreement may be shown to rebut inference of a gift by wife to husband.—Allen v. Allen, 27 S.E.2d 679, 196 Ga. 736.

(2) The facts and circumstances surrounding transaction under which decedent's wife to whom realty was transferred recognized constructive trust under which wife held the realty for the decedent, and conveyed the realty to the decedent's estate, were required to be tested by the current conditions and not by conditions which developed in succeeding

years by factors which seriously affected value and income of realty.—In re Wechsler's Estate, 13 N.Y.S.2d 940, 171 Misc. 738.

#### When rule inapplicable

The rule that one receiving land on an oral trust while standing in a confidential relationship to the transferor, and refusing to perform, will be deemed a constructive trustee for the transferor, is inapplicable where the transferee subsequently executes a memorandum evidencing the trust, or confesses it in the course of litigation, since the statute of frauds is then satisfied and the express trust becomes enforceable.—Shaffer v. Shaffer, 23 A.2d 883, 344 Pa. 158.

25. Cal.—Svistunoff v. Svistunoff, 211 P.2d 352, 94 Cal.App.2d 651.—Vieth v. Kiott, 198 P.2d 314, 88 Cal. App.2d 23.

Ga.—Hancock v. Hancock, 54 S.E.2d 385, 205 Ga. 684.

Ill.—Bremer v. Bremer, 104 N.E.2d 299, 411 Ill. 454.—Wagner v. Clauson, 78 N.E.2d 263, 339 Ill. 403, 3 A.L.R.2d 672.—Stein v. Stein, 75 N.E.2d 869, 398 Ill. 397.—Jones v. Felix, 23 N.E.2d 706, 372 Ill. 562.—Carroll v. Lihmer, 85 N.E.2d 456, 337 Ill.App. 129, reversed on other grounds 92 N.E.2d 121, 405 Ill. 645.

Neb.—Corpus Juris quoted in In re Scott's Estate, 26 N.W.2d 799, 803, 148 Neb. 182.—Corpus Juris quoted in Box v. Box, 21 N.W.2d 868, 873, 146 Neb. 826.

N.J.—Eastmond v. Eastmond, 64 A.2d 901, 2 N.J. Super. 529.

N.Y.—Frick v. Cone, 290 N.Y.S. 592, 160 Misc. 450, affirmed 298 N.Y.S. 173, 251 App.Div. 781.

Pa.—Breese v. Rhoades, 36 Luz.Leg. Reg. 341.

S.C.—Corpus Juris quoted in All v. Prillaman, 20 S.E.2d 741, 749, 200 S.C. 279, 159 A.L.R. 881.

Tex.—Townslley v. Townslley, Civ. App., 222 S.W.2d 152.—Gray v. Mills, Civ. App., 206 S.W.2d 278, affirmed 210 S.W.2d 985, 147 Tex. 33.—Sparks v. Mince, Civ.App., 138 S.W.2d 203.

65 C.J. p 472 note 94.

#### Notice of purpose of conveyance

Where stepfather conveyed land to stepdaughter on alleged promise of stepfather's wife that property would be held for stepfather and would be reconveyed on request, delivery of stepfather's deed to stepdaughter by wife put stepdaughter on inquiry as to purpose of the conveyance, with respect to whether property was impressed with trust in favor of stepfather.—Orella v. Johnson, 242 P.2d 5, 38 Cal.2d 692.



the land exceeds the amount of the debt.<sup>26</sup> The promise need not be express in order to raise a trust, silent acquiescence on the part of the grantee being sufficient where he has knowledge of the grantor's intention and understanding of the transaction.<sup>27</sup> One for whose benefit a promise is made cannot enforce a trust, however, where he subsequently makes a new arrangement with the alleged trustee of the nature of a novation.<sup>28</sup> A constructive trust based on repudiation of an oral promise to reconvey property does not arise until the transferee repudiates the promise or dies.<sup>29</sup>

### § 150. — Parol Agreement as to Land to be Purchased

#### a. In general

#### b. Purchase at judicial or other like sale

26. Cal.—Steinberger v. Steinberger, 140 P.2d 31, 60 Cal.App.2d 116.  
Miss.—Tanous v. White, 191 So. 278, 186 Miss. 556.  
Mo.—Basman v. Frank, 250 S.W.2d 989.  
Neb.—Corpus Juris quoted in re Scott's Estate, 26 N.W.2d 799, 803, 148 Neb. 182.—Corpus Juris quoted in Box v. Box, 21 N.W.2d 868, 873, 146 Neb. 826.  
Pa.—O'Bramski v. Yussalavage, Com. Pl., 35 Luz. Leg. Ref. 414.  
Tex.—Mills v. Gray, 210 S.W.2d 985, 147 Tex. 33.  
65 C.J. p. 472 note 95.

#### Payment of mortgage

If plaintiff conveyed realty to defendant's wife in payment of mortgage held by defendant, as liquidator of a bank placed in voluntary liquidation, under agreement that defendant would sell realty to third person and would turn over proceeds of sale to plaintiff after satisfaction of indebtedness owed bank, defendant's retention of sale price received from third person over and above amount of indebtedness made him a trustee, and entitled plaintiff to an accounting.—Rader v. Burner, 139 P.2d 136, 172 Or. 1.

27. Cal.—Corpus Juris quoted in Airola v. Gorham, 133 P.2d 78, 81, 56 Cal.App.2d 42.  
Mo.—Jansson v. Christian, App., 57 S.W.2d 692.  
Neb.—Corpus Juris quoted in re Scott's Estate, 26 N.W.2d 799, 803, 148 Neb. 182.—Corpus Juris quoted in Box v. Box, 21 N.W.2d 868, 873, 146 Neb. 826.  
65 C.J. p. 472 note 96.

28. Mont.—Larson v. Marcy, 201 P. 685, 61 Mont. 1.  
65 C.J. p. 472 note 97.

29. Cal.—Steinberger v. Steinberger, 140 P.2d 31, 60 Cal.App.2d 116.

#### a. In General

In the absence of actual or constructive fraud in the making of a parol agreement as to the purchase of lands from a third person, or of any relationship of trust or confidence between the parties thereto other than a mere reliance on the honor and ability of each to perform his undertaking, no constructive trust arises by virtue of such agreement, or out of a refusal to perform it or a denial of its existence.

In the absence of actual or constructive fraud connected with the making of a parol agreement with respect to the purchase of lands from a third person, or of any relationship of trust or confidence between the parties thereto other than a mere reliance on the honor and ability of each to perform his undertaking, no constructive trust arises by virtue of such agreement, or out of a refusal to perform it or a denial of its existence;<sup>30</sup> and so, as a general

- S.D.—Schwartzle v. Dale, 54 N.W.2d 361, 74 S.D. 467.

30. Ala.—Talley v. Talley, 26 So.2d 586, 248 Ala. 84.  
Cal.—Elliott v. Wood, 212 P.2d 906, 95 Cal.App.2d 314.  
Ill.—Ridgely v. Central Pipe Line Co., 97 N.E.2d 817, 409 Ill. 46.  
Ky.—Lowe v. Lowe, 229 S.W.2d 442, 312 Ky. 641.  
Miss.—Wax v. Pope, 168 So. 54, 175 Miss. 781.  
N.J.—DeMarco v. Estlow, 86 A.2d 446, 18 N.J. Super. 30, affirmed 91 A.2d 272, 21 N.J. Super. 356.  
N.Y.—Frieda Popkov Corp. v. Slack, 103 N.Y.S.2d 507, 198 Misc. 826.  
N.C.—Ollis v. Ricker, 166 S.E. 801, 203 N.C. 671.  
Pa.—Icosato v. DeLuca, Com.Pl., 37 Del. Co. 364.  
Wyo.—Corpus Juris cited in Carpenter & Carpenter v. Kingham, 109 P.2d 463, 476, 56 Wyo. 314, modified on other grounds and rehearing denied 110 P.2d 824, 56 Wyo. 314.  
65 C.J. p. 473 note 98.

#### Other statement of rule

A trust is not created by a mere promise to purchase and hold property for the benefit of another, or convey it to him if the promisee does not rely thereon to his disadvantage, or is not thereby lulled into false security.—Emerson v. Ayres, 120 S.W.2d 16, 196 Ark. 791.

#### Tax title

(1) The alleged oral promise of persons holding title to land under patents issued by state which had acquired tax title to land, to reconvey land to person who was owner prior to tax sale, on owner's repayment of money paid out for patents, did not create constructive trust in favor of owner, in view of statute of frauds.—Lewis v. Williams, 191 So. 479, 186 Miss. 701.

(2) Where defendant purchased

land from county which had been sold to county at a tax resale and land originally belonged to decedent, oral agreement to permit decedent's estate to purchase the property either outright or on certain conditions did not justify the court in enforcing a constructive trust in favor of the estate where there was no fraud or fiduciary relationship between the parties.—Bingham v. Worley, 149 P.2d 253, 194 Okl. 238.

#### Contract to share profits

(Complaint alleging written contract to share profits to be derived from sale of realty purchased by defendants under option obtained by plaintiffs and transferred to defendants, failure of defendants to pay purchase-money notes and sale of realty to defendants under trust deed given as security for notes disclosed no basis for holding defendants accountable to plaintiffs for an interest in realty or profits as constructive trustees, in absence of allegation of facts showing fraud or that defendants had any contractual duty to protect plaintiffs' interest in the profits.—Mulligan v. Wilson, 229 P.2d 858, 103 Cal.App.2d 664.)

#### Termination of negotiations

Where plaintiff who had lost property through foreclosure of mechanics' liens sought to induce defendant to repurchase property for plaintiff, but negotiations were terminated because parties could not agree on manner in which plaintiff was to repay money, constructive trust did not result when thereafter defendant purchased property for himself.—Miovsky v. Georgeoff, 2 N.E.2d 740, 363 Ill. 60.

#### Payment of consideration

A constructive trust does not inevitably result from the payment of consideration alone when title is taken in another's name but is imposed by a court of equity as a consequence

rule, where a person having no interest in particular real estate orally agrees with another that the latter shall purchase it with his own funds, taking the title in his own name, and shall thereafter convey it to the first person no constructive trust arises,<sup>31</sup> the trust, if any, being an express one which is unenforceable under the statute of frauds.<sup>32</sup>

In order to give rise to a constructive trust under such an agreement, the promisee must have lost or surrendered some right or omitted some act for his own protection, relying on the promise, by virtue whereof the promisor has been able to acquire the legal title in himself,<sup>33</sup> or he must have been induced, at the instance of the promisor, to incur some expense or perform some act which he otherwise would not have done.<sup>34</sup> Thus, where one having an interest in land agrees with another that

the latter shall purchase such land in his own name and thereafter hold it for, or convey it to, the former, and by reason of such agreement the person having such interest takes no steps to protect it, and the land is acquired by such other person, a constructive trust may be enforced against him if he refuses to carry out his promise;<sup>35</sup> and where one purchases land under an agreement to convey it to another, and the latter, with the former's knowledge and consent, enters on the land and makes valuable improvements thereon, the promisor holds the title as a constructive trustee.<sup>36</sup>

Where relationship of confidence exists, however, between one agreeing to purchase land and convey it to another, and the person to whom he agrees to convey it, a constructive trust arises in favor of the promisee,<sup>37</sup> provided he himself has not been guilty

of payment in connection with other existing equities.—In re Buehler's Estate, 59 N.Y.S.2d 766, 186 Misc. 306, affirmed 70 N.Y.S.2d 139, 273 App. Div. 767, appeal denied 73 N.Y.S.2d 485, 22d App. Div. 794.

31. Cal.—Mazzera v. Wolf, 183 P.2d 649, 30 Cal.2d 531.  
65 C.J. p 473 note 99.

Agreement to convey property as giving rise to constructive trust in general see supra § 133.

#### Division

Purchase of land by one party to alleged oral agreement for him to acquire title to the land and then divide it with other party to agreement, who was to contribute no money to enterprise until his portion of land was conveyed to him, did not give rise to a constructive trust not subject to statute of frauds.—DeMarco v. Estlow, 86 A.2d 446, 18 N.J. Super. 30, affirmed 91 A.2d 272, 21 N.J. Super. 356.

32. N.J.—DeMarco v. Estlow, supra. Wash.—Parrell v. Mentzer, 174 P. 482, 102 Wash. 629.

#### Lease

A person's act in securing for himself a lease which he had been orally engaged to secure for another would not create constructive trust for such other, since trust in such case must arise solely from oral agreement and is unenforceable under statute.—Yamini v. Zeitz, 76 N.E.2d 769, 322 Mass. 268.

33. Wis.—Bardon v. Hartley, 87 N. W. 809, 112 Wis. 74.

Wyo.—Corpus Juris cited in Carpenter & Carpenter v. Kingham, 169 P.2d 463, 476, 56 Wyo. 314, modified on other grounds and rehearing denied 110 P.2d 824, 56 Wyo. 314.

34. N.Y.—Wheeler v. Reynolds, 66 N.Y. 227.

65 C.J. p 473 note 3.

#### Change of position

Although a simple avowal of acquisition for use of another will not support an allegation of trust, if one be induced to confide in the promise of another that he will hold in trust, or that he will purchase for both, and is thus led to change his position in reliance thereon so that promisor becomes holder of legal title, an attempted denial of the confidence is such fraud as will operate to convert the purchaser into a trustee ex maleficio.—Rome v. Fincke, Fla., 53 So. 2d 712.

#### Dismissal of suit

If former husband procured dismissal of suit for breach of promise to marry former wife by falsely representing to her that he had purchased realty for her which he would convey to her, constructive trust of realty would result in former wife's favor.—Hoffner v. Hoffner, 221 S.W. 2d 907, 32 Tenn. App. 98.

35. Ark.—Wood v. Conner, 170 S.W. 2d 997, 205 Ark. 582.  
Miss.—Devall v. Farris, 189 So. 516, 185 Miss. 757.

N.C.—Hare v. Weil, 196 S.E. 869, 213 N.C. 181.

Pa.—Broski v. Alifimoff, Com.Pl., 87 Pittsb. Leg.J. 533.

Tenn.—Poust v. Disney, 156 S.W.2d 47, 25 Tenn. App. 243.  
65 C.J. p 473 note 4.

#### Denial of confidence as fraud

Although a simple avowal of acquisition of land for use of another whether made contemporaneously with or subsequent to the fact will not of itself support an allegation of trust, if one can be induced to confide in the promise of another that he will hold in trust or that he will so purchase for one or both, and is thus led to forbear what he contemplated doing in acquisition of an estate whereby the promisor becomes holder of the legal title, an attempt-

ed denial of the confidence is such a fraud as will convert purchaser into a trustee ex maleficio.—Poe v. Poe, 256 P.2d 153, 208 Okl. 406—Raper v. Thorn, 211 P.2d 1007, 202 Okl. 235, 14 A.L.R.2d 1260.

#### Sheriff's deed

Where holder of sheriff's deed gave plaintiff option to purchase realty on or before certain date, and defendant agreed to loan plaintiff money to purchase realty, and defendant paid holder of sheriff's deed for the realty in behalf of plaintiff, and holder of sheriff's deed conveyed realty to defendant, an implied trust arose in favor of plaintiff.—Johnson v. Burke, S.W., 63 N.W.2d 794.

#### Mineral lease

A promise by mineral lessees, made through agent who concealed their identity but was allegedly authorized by them, to make locations on adjoining lands for benefit of lessors, was binding on lessors as though directly made, and made lessors and their agents trustees for benefit of lessors.—Neet v. Holmes, 154 P.2d 854, 25 Cal.2d 447.

36. Cal.—Haskell v. First Nat. Bank, 91 P.2d 924, 33 Cal. App.2d 399.  
65 C.J. p 473 note 5.

37. Ill.—Ridgely v. Central Pipe Line Co., 97 N.E.2d 817, 409 Ill. 46.  
Pa.—Broski v. Alifimoff, Com.Pl., 87 Pittsb. Leg.J. 533.

Utah.—Hawkins v. Perry, 253 P.2d 372.

Wash.—Banks v. Morse, 134 P.2d 952, 17 Wash.2d 18.

Wis.—Stein v. Soref, 38 N.W.2d 3, 255 Wis. 42.  
65 C.J. p 473 note 6.

#### Breach of trust

(1) One who, in breach of trust to pay balance of purchase price for realty and obtain deed in name of person furnishing money, took legal title in his own name, held such title

of fraud in connection with the transaction.<sup>38</sup> Thus, where one advances money to or for another for the purchase of land, and to secure the loan takes title to the land in himself, agreeing to convey it to the borrower on repayment of the money advanced, equity will declare the lender a trustee for the borrower, and compel him to reconvey the land on payment of the loan, although the contract rests entirely in parol.<sup>39</sup>

Similarly, where it is orally agreed between two persons that land shall be purchased for their joint account, but one obtains title in his own name,<sup>40</sup> or represents to the other that the sum contributed by the latter toward the purchase price is only half

thereof, when in fact it is the whole price paid,<sup>41</sup> a constructive trust may be raised. So also, where one person pays the consideration for property purchased but causes it to be conveyed to another with whom he is in a confidential relationship, on the latter's promise to reconvey the property to him<sup>42</sup> or to hold it for particular purposes,<sup>43</sup> or where one person agrees to buy land for another with the latter's funds but wrongfully takes title in his own name,<sup>44</sup> a constructive trust arises in favor of the person defrauded, even though the rule of the common law that the payment by one person of the consideration for a conveyance to another creates a resulting trust, discussed supra §§ 115-130, has been abolished by statute, the abolition of result-

as "trustee" for person furnishing the purchase money.—*Banks v. Morse*, 134 P.2d 952, 17 Wash 2d 18.

(2) Where land was conveyed to one of defendants individually instead of as trustee for himself and plaintiffs as agreed in declaration of trust, trust relationship arose.—*Grossett v. McQueen*, 169 S.E. 829, 205 N.C. 48.

#### Proportionate lien

Where one whose confidence has been abused by another who has orally agreed to reconvey realty has paid part of the consideration and paid only, a lien proportionate to the value thus contributed will be charged on the realty.—*Foreman v. Foreman*, 167 N.E. 428, 251 N.Y. 237—*Mayer v. Mayer*, 67 N.Y.S.2d 898.

38. *Mitch* —*Barrett v. Miller*, 108 N. W. 396, 144 Mich. 454.  
65 C.J. p 473 note 7.

39. *Okl.* —*Poe v. Poe*, 256 P.2d 153, 208 Okl. 406.  
65 C.J. p 474 note 8.

40. *Fla.* —*Donahue v. Davis*, 68 So 2d 163.

*Ind.* —*First Nat. Bank v. Rust*, 185 N.E. 127, 205 Ind. 638.

*Kan.* —*Kotzman v. Papish*, 219 P.2d 425, 169 Kan. 431.

*N.Y.* —*Muller v. Sobel*, 97 N.Y.S.2d 905, 277 App.Div. 884, reargument and appeal denied 99 N.Y.S.2d 757, 277 App.Div. 951.

*N.D.* —*Barker v. Barker*, 27 N.W.2d 576, 75 N.D. 253, 171 A.L.R. 447.

*Okl.* —*Preston v. Ross*, 207 P.2d 297, 201 Okl. 455.

*S.C.* —*Corpus Juris* quoted in *Searson v. Webb*, 38 S.E.2d 664, 668, 208 S.C. 453.

65 C.J. p 474 note 8.

#### Fraud

If husband's name should have been included as a purchaser in contract for purchase of realty naming wife as sole purchaser, the omission of husband's name constituted a fraud in law or a constructive fraud

giving rise to a constructive trust in favor of husband.—*Proffit v. Houseworth*, 231 S.W.2d 612, 360 Mo. 947.

#### Mineral lease

Relationship between parties as shown by allegation and proof that defendant was to purchase mineral lease and take title in name of plaintiff and defendant, with plaintiffs jointly having an undivided one-half interest, and defendant, an undivided one-half interest, and that plaintiffs were to be liable for one-half obligation of lease and to own one-half of lease, and that defendant violated agreement by taking title in defendant's name only, and that defendant subsequently repudiated agreement, was sufficient to give rise to constructive trust.—*Fitz-Gerald v. Hull*, 237 S.W.2d 256, 150 Tex. 39.

#### Acquiescence

However, oral agreement by defendant to purchase and operate property as partnership or corporation to be organized by plaintiff and defendant was held not to create constructive trust for plaintiff's benefit, where plaintiff acquiesced in defendant's taking title in own name, and made no offer to advance or assume any part of purchase price prior to conveyance to and resale by defendant.—*Wax v. Pope*, 168 So. 54, 175 Miss. 784.

41. *Pa.* —*McCully v. Flanagan*, 99 Pa.Super. 666.

42. *N.Y.* —*Foreman v. Foreman*, 167 N.E. 428, 251 N.Y. 237—*Duncan v. Laury*, 292 N.Y.S. 138, 249 App. Div. 314—*Tesaro v. Tesaro*, 112 N.Y.S.2d 246.

43. *Wis.* —*Richman v. Watson*, 136 N.W. 797, 150 Wis. 385.

#### Furnishing of home for life

Where mother and her daughter and son-in-law pooled their assets to build a new house, with understanding that title should be in daughter and son-in-law and that mother

should be furnished a home for life in consideration of money that she had put in venture, and thereafter conduct of daughter and son-in-law forced mother to leave the house, the property would be impressed with a constructive trust for purpose of requiring daughter and son-in-law to pay to mother a sum equal to six per cent per annum on amount invested by her in the house, with provision that trust should cease after mother's death and the corpus be paid to daughter absolutely.—*Long v. Huseman*, 47 A.2d 75, 186 Md. 495

#### Interest in lease

Parties contemplating joint purchase or lease of land may orally agree to such an undertaking in advance, and may orally agree, for valuable consideration passing from one to the other, that deeds or leases acquired shall be taken in one of them, but that interest of each shall be in a named proportion; and party in whose name the deed is taken, as between himself and the other party, holds interest in trust for party unnamed in the deed.—*Newton v. Gardner*, Tex.Civ.App., 225 S.W.2d 598, refused no reversible error.

44. *Miss.* —*Sullivan v. Nobles*, 51 So. 2d 736, 211 Miss. 330.

*N.C.* —*Davis v. Davis*, 44 S.E.2d 478, 228 N.C. 48.

*Or.* —*Hughes v. Helzer*, 185 P.2d 537, 182 Or. 205.

*Tex.* —*Dennis v. Dennis*, Civ.App., 256 S.W.2d 964.

65 C.J. p 474 note 13.

#### Necessity of fraud or breach of agreement

A person does not acquire an interest in property solely because the property in question was purchased with funds belonging wholly or in part to such person, in absence of some evidence of fraud or violation of an agreement or understanding.—*Bryant's Adm'r v. Bryant*, Ky., 269 S.W.2d 219.

ing trusts in such cases not preventing a constructive trust from arising.<sup>45</sup>

### b. Purchase at Judicial or Other Like Sale

Where a person having an interest in land, confiding in the parol promise of another that he will purchase the land, at an impending judicial or other like sale, for the benefit of the former or of some third person, takes no steps to protect his interest in the property, but allows the promisor to acquire the land at such sale, a constructive trust arises, and may be enforced on a subsequent refusal to carry the promise into execution; but a mere verbal agreement to purchase for another at a judicial sale creates no constructive trust where there is no showing of actual or constructive fraud.

Where a person having an interest in land, confiding in the parol promise of another that he will purchase the land, at an impending judicial sale, foreclosure sale, tax sale, or the like, for the benefit of the former or of some third person in whom he has an interest, takes no steps to protect his interest in the property, but allows the promisor to acquire the land at such sale, a constructive trust

arises, and may be enforced on a subsequent denial of the promise or refusal to carry it into execution,<sup>46</sup> especially where, the promise being made known at the sale, there is less or no competition and the land is obtained at a low price;<sup>47</sup> and this rule applies even though the promisor in making the promise is moved merely by friendly or benevolent considerations.<sup>48</sup> As otherwise expressed, a trust will be implied if a confidential relationship exists between the parties, or if other circumstances exist which make it inequitable that the purchaser at the judicial sale should retain the title for himself.<sup>49</sup>

On the other hand, a mere verbal agreement to purchase for another at a judicial sale creates no constructive trust,<sup>50</sup> at least where there is no showing of actual or constructive fraud,<sup>51</sup> or payment of the purchase money by the promisee;<sup>52</sup> and, unless the influence of such promise operates at the sale, in inducing the promisee to refrain from protecting his interest or in enabling the promisor to

45. *Minn.—Bastian v. Brink*, 45 N. W.2d 712, 233 Minn. 25.

N.Y.—*In re Werchler's Estate*, 13 N. Y.S.2d 940, 171 Misc. 788.

46 C.J. p. 474 note 15.

Statute abolishing resulting trusts as affecting constructive trusts in general see *supra* § 140.

46. *Ark.—Corpus Juris* quoted in *Emerson v. Ayres*, 120 S.W.2d 16, 18, 196 Ark. 791.

D.C.—*Mandley v. Backer*, 121 F.2d 875, 73 App.D.C. 412.

Fla.—*Tillman v. Pitt Cole Co.*, 53 So. 2d 772.

Mich.—*Trippensee v. Rice*, 20 N.W.2d 172, 312 Mich. 233.

N.C.—*Hare v. Weil*, 196 S.E. 869, 213 N.C. 484.

Okl.—*Raper v. Thorn*, 211 P.2d 1007, 202 Okl. 235, 14 A.L.R.2d 1260.

Pa.—*Holman v. Green*, Com.Pl., 40 Del.Co. 349, exceptions dismissed 40 Del.Co. 413.

Tex.—*Kirkland v. Handrick*, Civ.App., 173 S.W.2d 735, error refused.

Va.—*Jones v. Clary*, 75 S.E.2d 504, 194 Va. 804.

65 C.J. p. 474 note 17.

Fraud in acquiring property at judicial sale in general see *supra* § 147.

#### Purchase for joint benefit

(1) Where plaintiff and defendant entered into agreement whereby plaintiff dropped out of bidding at judicial sale and defendant bid on behalf of both, each to have a one-half interest in the property, in event defendant was successful, on payment of one-half the bid price by plaintiff to defendant, defendant held a one-half interest in property as constructive trustee for plaintiff

—*Rome v. Fincke*, Fla., 53 So.2d 712.

(2) Where heirs held joint title to an undivided interest in certain land which was being sold at judicial sale, and a group of the heirs and their spouses, including defendant, entered into a joint adventure to purchase property at such sale for benefit of all, although all the heirs did not sign agreement or authorize defendant to act for them, defendant could not repudiate his responsibility to other heirs after his purchase of property at such sale, and any heir had right to ratify purchase or elect to take his share of proceeds of judicial sale.—*Whitell v. Porter*, 217 S.W.2d 311, 309 Ky. 247.

#### Purchase by tenant

A tenant who agreed to protect landlords for period of lease against foreclosure of trust deed and to advance the money and buy the property at foreclosure sale and hold the property for landlords, and who purchased at foreclosure sale and refused to convey to landlords offering to repay tenant, held the land subject to constructive trust resting on fraud or wrongdoing.—*Rankin v. Satir*, 171 P.2d 78, 75 Cal. App. 2d 691.

47. *Ark.—Corpus Juris* quoted in *Emerson v. Ayres*, 120 S.W.2d 16, 18, 196 Ark. 791.

S.C.—*Gardner v. Nash*, 82 S.E.2d 123, 65 C.J. p. 475 note 18.

48. *Ark.—Corpus Juris* quoted in *Emerson v. Ayres*, 120 S.W.2d 16, 18, 196 Ark. 791.

65 C.J. p. 475 note 19.

49. *Tex.—Kirkland v. Handrick*, Civ.App., 173 S.W.2d 735, error refused.

#### Widow as trustee for children

Where sheriff struck off corporate property of intestate to his widow in pursuance of a plan to satisfy the state's liens for unemployment compensation taxes, widow became the owner, not in her own right, but as trustee for herself and her children, notwithstanding at that time she had not been appointed the administratrix of her husband's estate.—*Kleiner v. Kleiner*, 49 A.2d 582, 139 N.J.Eq. 26.

50. *Pa.—Merchinski v. Bogden*, Com.Pl., 45 Sch.Leg. Rec. 188.

Tex.—*Kirkland v. Handrick*, Civ. App., 173 S.W.2d 735, error refused.

#### Occupation of property

An oral agreement by debtor's brother, who purchased debtor's realty at sheriff's sale with his own money, to reconvey realty to debtor on theory of resulting trust was within the statute of frauds, and was not taken without the statute because debtor continued to occupy property after alleged agreement was entered into and paid a sum of money to brother on account of purchase price and also expended moneys for minor repairs to the property, taxes, etc., since such possession was not referable to the agreement and moneys expended could be recovered in a proper proceeding.—*Moyer v. Moyer*, 51 A.2d 708, 356 Pa. 184.

51. *N.H.—Hatch v. Rideout*, 65 A.2d 702, 95 N.H. 431.

Pa.—*Moyer v. Moyer*, 51 A.2d 708, 356 Pa. 184.

65 C.J. p. 476 note 21 [a].

52. *Pa.—Moyer v. Moyer*, *supra*—*Parcham v. Schmelzer*, 21 Pa. Dist. & Co. 303.

secure the property to his own advantage, no trust arises.<sup>53</sup> So no trust is created by a mere promise to purchase and hold property for the benefit of another or convey it to him if the promisee does not rely thereon to his disadvantage or is not thereby lulled into a false security;<sup>54</sup> nor is any trust created by a promise made after the purchase,<sup>55</sup> since the mere violation of a promise to convey property to the promisee is not such fraud as to give rise to a constructive trust, as discussed supra § 149. Moreover, where neither party to an agreement that one will purchase property at a judicial sale and convey it to the other has any interest in the property, and no money is advanced by the promisee to the promisor, nor anything done toward carrying the agreement into effect, the purchase of the property at the sale does not constitute the purchaser a trustee ex maleficio for the promisee,<sup>56</sup> in view of the general rule relating to oral agreements to purchase property and convey it to another, discussed supra subdivision a of this section.

**Sufficiency of promise.** A mere statement by an execution creditor, purchasing the property at judicial sale, that he does not intend to hold the title as against the debtor or persons to whom he may convey the property if the amount due him is paid within a reasonable time does not create any trust

relationship between the parties, in the absence of any sinister or unfair purpose in making the statement, or of any advantage gained thereby.<sup>57</sup>

## § 151. — Violation of Confidential or Fiduciary Relationship

- a. In general
- b. What constitutes confidential or fiduciary relationship
- c. Particular relationships as confidential and as raising trust
- d. Confidential relationship as extending to third person

### a. In General

One general class of constructive trusts consists of those cases in which the existence of a confidential relationship and the subsequent abuse of the confidence reposed are sufficient to establish such trust, relief being granted in order to prevent fraud or unjust enrichment on the part of the fiduciary.

One general class of constructive trusts consists of those cases in which the existence of a confidential relationship and the subsequent abuse of the confidence reposed are sufficient to establish such trust.<sup>58</sup> As a general rule, a party occupying a relationship of trust or confidence to another is in equity bound to abstain from doing anything that can place him in a position inconsistent with the

53. Ark.—*Corpus Juris* quoted in *Emerson v. Ayres*, 120 S.W.2d 16, 18, 196 Ark. 791.  
65 C.J. p 475 note 20.

54. Ark.—*Corpus Juris* quoted in *Emerson v. Ayres*, 120 S.W.2d 16, 18, 196 Ark. 791.

Pa.—*Broad & Erie Bldg. & Loan Ass'n v. Bernhard*, 188 A. 386, 124 Pa.Super. 345—*City Bldg. & Loan Ass'n of the Bethlehems v. Delia*, Com.Pl., 27 North.Co 59.  
65 C.J. p 476 note 21.

55. Ark.—*Corpus Juris* quoted in *Emerson v. Ayres*, 120 S.W.2d 16, 18, 196 Ark. 791.

Pa.—*Thomas v. St. Joseph's Polish Nat Catholic Church of McKees Rocks*, 22 A.2d 661, 843 Pa. 328—*New Cumberland Trust Co. v. Grossman*, 198 A. 915, 131 Pa.Super. 132.

Tex.—*Roach v. Grant*, 130 S.W.2d 1019, 134 Tex. 10.  
65 C.J. p 476 note 22.

56. Ark.—*Corpus Juris* quoted in *Emerson v. Ayres*, 120 S.W.2d 16, 18, 196 Ark. 791.  
65 C.J. p 476 note 24.

57. Mo.—*McNew v. Booth*, 42 Mo. 189.

58. U.S.—*Magidson v. Duggan*, C.A. Mo., 212 F.2d 748—*Gendler v. Sibley State Bank*, D.C.Iowa, 62 F. Supp. 805.

Cal.—*Sampson v. Bruder*, 118 P.2d 28, 47 Cal.App.2d 431.

Fla.—*Benbow v. Benbow*, 157 So. 512, 117 Fla. 37.

Ill.—*Stephenson v. Kulichhek*, 101 N.E.2d 542, 410 Ill. 139—*Stein v. Stein*, 75 N.E.2d 869, 398 Ill. 397—*Belleson v. Ganas*, 69 N.E.2d 321, 394 Ill. 557—*Winger v. Chicago City Bank & Trust Co.*, 67 N.E.2d 265, 394 Ill. 94—*Giese v. Terry*, 46 N.E.2d 90, 382 Ill. 34—*McDonnell v. Holden*, 185 N.E. 572, 352 Ill. 362.

Kan.—*In re Langdon's Estate*, 195 P.2d 317, 165 Kan. 267.

N.J.—*First Federal Sav. & Loan Ass'n of Montclair v. Shaw*, 56 A.2d 897, 142 N.J.Eq. 585, followed in 61 A.2d 53, 142 N.J.Eq. 784—*Cluzel v. Brown*, 29 A.2d 864, 133 N.J.Eq. 156.

N.Y.—*Frier v. J. W. Sales Corp.*, 25 N.Y.S.2d 576, 261 App.Div. 388—*Frick v. Cone*, 290 N.Y.S. 592, 160 Misc. 460, affirmed 298 N.Y.S. 173, 251 App.Div. 781—*In re Turley's Estate*, 289 N.Y.S. 701, 160 Misc. 190—*In re Ide's Will*, 131 N.Y.S.2d 381—*Cornale v. Stewart Stamping Corp.*, 129 N.Y.S.2d 808—*Halper v. Homestead Bldg. & Loan Ass'n*, 59 N.Y.S.2d 689, affirmed 59 N.Y.S.2d 695, 269 App.Div. 1044.

Okl.—*Renegar v. Bruning*, 123 P.2d 686, 190 Okl. 340.

R.I.—*Oldham v. Oldham*, 192 A. 753, 58 R.I. 268.

Tex.—*Snyder v. Citizens State Bank* Civ App., 184 S.W.2d 684, affirmed 189 S.W.2d 471, 144 Tex. 134.  
65 C.J. p 466 note 84 [c].

**The mere existence of a confidential relationship prohibits dominant party from seeking any selfish benefit during course of relationship and affords a basis for fastening a constructive trust on property so acquired.**—*Stephenson v. Kulichhek*, 101 N.E.2d 542, 410 Ill. 139—*Kester v. Crilly*, 91 N.E.2d 419, 405 Ill. 425.

### Accountability

Agent or fiduciary entrusted with property rights or interests of others may be held accountable through medium of a constructive trust.—*Hasday v. Barocas*, 115 N.Y.S.2d 209.

### Parol promise

Abuse of confidential relationship gives rise to a constructive trust even though accomplished by a parol promise, which is as such unenforceable.—*Sacre v. Sacre*, 55 A.2d 692, 143 Me. 80, 173 A.L.R. 1261.

**Passage of title to trust funds is not indispensable element in creation of trust, which may be created by reason of parties' relationship.**—*Kornbau v. Evans*, 152 P.2d 651, 66 Cal.App.2d 677.

duty or trust such relationship imposes on him, or which has a tendency to interfere with the discharge of such duty<sup>59</sup> and where there has been a breach of trust in this respect, equity will employ the device of a constructive trust in order to prevent fraud or unjust enrichment on the part of the fiduciary.<sup>60</sup> As otherwise expressed, a person who occupies a confidential or fiduciary relationship to another in

respect of business or property, and who by the use of knowledge obtained through such relationship, or by the betrayal of the confidence reposed in him or some breach of duty imposed on him under it, acquires title to, or an interest in, the subject matter of the transaction antagonistic to that of his correlate, holds such title or interest subject to a constructive trust in the latter's favor,<sup>61</sup> which the

59. *US*—*Young v. Potts*, CCA Ohio, 161 F.2d 597.

*Ark*—*McHugh v. Jeffries*, 183 S.W.2d 309, 207 Ark 890—*Hindman v. O'Connor*, 16 S.W. 1052, 54 Ark 627, 13 L.R.A. 490.

*Cal*—*Heaton & Gilpin v. West American Oil Co.*, 111 P.2d 905, 44 Cal App 2d 107.

*Del*—*Brophy v. Cities Service Co.*, 70 A.2d 5, 31 Del Ch. 241.

*Ga*—*Smith v. Merck*, 57 S.E.2d 326, 206 Ga. 361.

*Ill*—*Miethe v. Miethe*, 101 N.E.2d 571, 410 Ill. 226.

*Me*—*Sacre v. Sacre*, 55 A.2d 592, 143 Me. 80, 173 A.L.R. 1261.

*Tenn*—*McNeill v. Dobson-Bainbridge Realty Co.*, 195 S.W.2d 626, 184 Tenn 99.

Duties and liabilities of trustees generally see *infra* §§ 247-254.

#### Fidelity required

In transfer of property, if there is evidence of strong affection, high regard, and great confidence in business and personal integrity of transferee, relationship demands a high degree of fidelity on part of transferee.—*Adams v. Bloom*, 142 P.2d 775, 61 Cal.App.2d 315.

#### Good faith

(1) A confidential relationship demands the best of good faith in business dealings, but there must be a breach of good faith before a cause of action to establish constructive trust in real estate arises.—*Georges v. Loutsis*, 145 F.2d 901, 20 Wash 2d 92.

(2) The utmost good faith must be shown by one in any confidential relationship, such as the relationship of parishioner and clergyman, even though not technically a fiduciary, in order to support a gift of money or anything of value obtained from one who has reposed trust and confidence.—*Nelson v. Dodge*, 68 A.2d 51, 76 R.I. 1, 14 A.L.R.2d 638.

(3) The good faith required by a fiduciary relationship arises only after relationship is created, and not while negotiation is pending.—*Karner v. Newsom*, Tex Civ App., 108 S.W.2d 766, error dismissed.

#### Personal advantage

(1) The law forbids a trustee and all other persons occupying a fiduciary or quasi fiduciary position from taking any personal advantage touch-

ing the thing or subject as to which such fiduciary position exists.

*Ark*—*McHugh v. Jeffries*, 183 S.W.2d 309, 207 Ark 890.

*Cal*—*In re Kromrey's Estate*, 220 P.2d 805, 88 Cal App 2d 639.

(2) A party voluntarily assuming confidential relationship towards another cannot thereafter do any act for his own gain at expense of that relationship.

*Ill*—*McDonnell v. Holden*, 185 N.E. 572, 352 Ill. 362.

*N.Y.*—*In re Yasilonis' Estate*, 125 N.Y.S.2d 363, 204 Misc 755.

(3) A fiduciary cannot benefit by dealing with his beneficiaries to their disadvantage.—*Winger v. Chicago City Bank & Trust Co.*, 67 N.E.2d 265, 394 Ill. 94.

(4) If one who while acting in a confidential capacity with another induces the other to enter into a contract which is to the advantage of the fiduciary, fiduciary in attempting to enforce the contract would have burden of proving that such contract is fair and reasonable and that he did not take any advantage of his confidential relationship.—*Potter v. Daily*, 40 N.E.2d 339, 220 Ind. 43.

#### Use of information

Anyone who, in a fiduciary relation, has acquired information concerning business or property of his correlate is prohibited from using that knowledge or interest to prevent correlate from accomplishing purpose of the relationship.—*U. S. v. Bennett*, D.C. Wash., 57 F.Supp. 676.

#### Fraud

If one occupying a fiduciary relationship such as trustee deals with subject-matter of the relationship and thereby gains an advantage to himself, he will be deemed guilty of fraud, either actual or constructive, depending on his intent and purpose.—*Giese v. Terry*, 46 N.E.2d 90, 382 Ill. 34.

60. *Cal*—*Steinberger v. Steinberger*, 140 P.2d 31, 60 Cal App 2d 116.

*Mass*—*Warsowsky v. Sherman*, 93 N.E.2d 612, 326 Mass 290.

*N.J.*—*Grubman v. American General Corp.*, 23 A.2d 578, 130 N.J. Eq. 607.

*N.Y.*—*La Vaud v. Reilly*, 67 N.E.2d 242, 295 N.Y. 280, motion denied 68 N.E.2d 40, 295 N.Y. 941.

*R.I.*—*Nelson v. Dodge*, 68 A.2d 51, 76 R.I. 1, 14 A.L.R.2d 638.

#### Study of circumstances

The court has duty to study with care the particular circumstances where a close relationship exists between parties one of whom is asserting constructive trust by reason of confidential relationship.—*Evelyn v. Alleyne*, 118 N.Y.S.2d 839.

61. *US*—*Young v. Higbee Co.*, Ohio, 65 S.Ct. 594, 324 U.S. 204, 89 L.Ed. 890—*Troyak v. Enos*, C.A. Ind., 204 F.2d 536—*Oldland v. Gray*, C.A. Colo., 179 F.2d 408, certiorari denied 70 S.Ct. 803, 339 U.S. 948, 94 L.Ed. 1362—*Lawson v. Haynes*, C.A. Okl., 170 F.2d 741—*Kashishko v. Keppler*, CCA Okl., 158 F.2d 809—*Young v. Bradley*, CCA Ohio, 142 F.2d 658, certiorari denied 65 S.Ct. 130, 323 US 775, 89 L.Ed. 619, motion denied 65 S.Ct. 266—*Corpus Juris* cited in *Strates v. Dimotakis*, CCA Tex., 110 F.2d 374, 376, certiorari denied 61 S.Ct. 24, 311 U.S. 666, 85 L.Ed. 427—*Continental Illinois Nat Bank & Trust Co. v. Continental Illinois Nat Bank*, C.A. Ill., 87 F.2d 934—*Reilly v. Wheatley*, CCA Mass., 68 F.2d 297—*Johnson v. Umsted*, CCA Ark., 64 F.2d 316—*Brown v. New York Life Ins Co.*, D.C. Or., 58 F.Supp. 252, affirmed, CCA., 152 F.2d 246.

*Ala*—*Hawkins v. Sanders*, 72 So.2d 81, 260 Ala. 585—*McKinstry v. Thomas*, 64 So.2d 808, 258 Ala. 690—*Corpus Juris* cited in *Batson v. Etheridge*, 195 So. 873, 876, 239 Ala. 535.

*Cal*—*Walter H. Jelmert Co. v. Woodson*, 270 P.2d 95, 125 Cal App 2d 186—*Kriert v. Wright*, 185 P.2d 364, 81 Cal.App.2d 919—*Steinberger v. Steinberger*, 140 P.2d 31, 60 Cal. App.2d 116—*Hendrickson v. California Title Co.*, 130 P.2d 806, 55 Cal App.2d 467—*Bell v. Bayly Bros. of California*, 127 P.2d 862, 53 Cal App.2d 149—*Angeles Securities Corp. v. Luton*, 117 P.2d 741, 47 Cal App.2d 262—*Crow v. Madsen*, App., 111 P.2d 7, appeal dismissed 111 P.2d 663.

*Conn*—*Skolnick v. Skolnick*, 41 A.2d 452, 131 Conn. 561.

*D.C.*—*Earl v. Picken*, 113 F.2d 150, 72 App D.C. 91.

*Fla*—*Wilkins v. Wilkins*, 198 So. 335, 144 Fla. 590.

*Ga*—*Allen v. Allen*, 31 S.E.2d 483, 198 Ga. 269.

Idaho.—*Corpus Juris* cited in *Reld v. Keator*, 39 P.2d 926, 932, 55 Idaho 172.

Ill.—*Compton v. Compton*, 111 N.E.2d 109, 414 Ill. 149—*Belleon v. Ganas*, 69 N.E.2d 321, 394 Ill. 557—*Vrooman v. Hawbaker*, 56 N.E.2d 623, 387 Ill. 428—*Mauricau v. Haugen*, 66 N.E.2d 367, 387 Ill. 186—*Giese v. Terry*, 46 N.E.2d 90, 382 Ill. 34—*Doner v. Phoenix Joint Stock Land Bank of Kansas City*, 45 N.E.2d 20, 381 Ill. 106—*Oll, Inc. v. Martin*, 44 N.E.2d 596, 381 Ill. 11—*Steinmetz v. Kern*, 32 N.E.2d 151, 375 Ill. 616—*Suchy v. Hajicek*, 4 N.E.2d 826, 364 Ill. 502—*Harmony Way Bridge Co. v. Leathers*, 187 N.E. 432, 353 Ill. 378—*Allen v. Borlin*, 84 N.E.2d 575, 336 Ill.App. 460—*Hallford v. Hainratow*, 27 N.E.2d 851, 305 Ill.App. 661.

Ind.—*Edwards v. Wiedenhaupt*, 32 N.E.2d 106, 109 Ind.App. 450.

Iowa.—*McGaffee v. McGaffee*, 58 N.W.2d 357, 244 Iowa 874—*Reeves v. Lyon*, 277 N.W. 749, 224 Iowa 659.

Ky.—*Schwartz Amusement Co. v. Independent Order of Odd Fellows Howard Lodge*, No. 15, 128 S.W.2d 965, 278 Ky. 563—*Reed v. Reed*, 117 S.W.2d 211, 273 Ky. 502.

La.—*Kohlear v. Singer*, 51 So.2d 307, 218 La. 879.

Me.—*Rowe v. Hayden*, 101 S.2d 190—*Sacre v. Sacre*, 55 A.2d 592, 142 Me. 80, 173 A.L.R. 1261.

Md.—*Carter v. Abramo*, 93 A.2d 546, 201 Md. 379—*Cohen v. Cohen*, 73 A.2d 872, 195 Md. 520—*Pasman v. Potashnick*, 51 A.2d 664, 188 Md. 105—*Grimes v. Grimes*, 40 A.2d 58, 184 Md. 59.

Mass.—*Warsofsky v. Sherman*, 93 N.E.2d 612, 326 Mass. 290—*City of Boston v. Santosuosso*, 30 N.E.2d 278, 307 Mass. 302—*Cann v. Barry*, 199 N.E. 905, 293 Mass. 313.

Mich.—*Potter v. Lindsay*, 60 N.W.2d 133, 337 Mich. 404—*Chlebek v. Mikrut*, 58 N.W.2d 125, 336 Mich. 414.

Minn.—*Whitten v. Wright*, 289 N.W. 509, 206 Minn. 423.

Miss.—*Jackson v. Jefferson*, 158 So. 486, 171 Miss. 774.

Mo.—*Basman v. Frank*, 250 S.W.2d 989—*Corpus Juris* cited in *Kerber v. Rowe*, 156 S.W.2d 925, 928, 348 Mo. 1125.

Neb.—*Paul v. McGahan*, 42 N.W.2d 172, 152 Neb. 578—*Corpus Juris* cited in *Maddox v. Maddox*, 38 N.W.2d 547, 550, 151 Neb. 626—*Nelson v. Seever*, 10 N.W.2d 349, 143 Neb. 522.

N.J.—*Stretch v. Watson*, 69 A.2d 596, 6 N.J.Super. 456, affirmed in part, reversed in part on other grounds 74 A.2d 597, 5 N.J. 268—*Norris v. Beyer*, 1 A.2d 460, 124 N.J.Eq. 284.

N.Y.—*Chance v. Guaranty Trust Co. of New York*, 21 N.Y.S.2d 356, 260 App.Div. 216—In re *Kovli's Will*, 84 N.Y.S.2d 534, 193 Misc. 823, af-

firmed 89 N.Y.S.2d 704, 275 App.Div. 821—*Stephens v. Evans*, 75 N.Y.S.2d 909, 190 Misc. 822—In re *Walker's Estate*, 32 N.Y.S.2d 595, 177 Misc. 991—*Cornale v. Stewart Stamping Corp.*, 129 N.Y.S.2d 808—*Coleman v. Mulligan*, 66 N.Y.S.2d 696.

N.C.—*Speight v. Branch Banking & Trust Co.*, 183 S.E. 734, 209 N.C. 563.

N.D.—*McDonald v. Miller*, 16 N.W.2d 270, 73 N.D. 474, 156 A.L.R. 1328.

Ohio.—*Steiner v. Fercyz*, 50 N.E.2d 617, 72 Ohio App. 18.

Okl.—*Jones v. Jones*, 148 P.2d 989, 194 Okl. 228—*Lewis v. Schafer*, 20 P.2d 1048, 163 Okl. 94.

Or.—*Dunlaway v. Barton*, 237 P.2d 930, 193 Or. 69—*Hughes v. Helzer*, 185 P.2d 537, 182 Or. 205.

Pa.—*Pennsylvania Elec. Co. v. Shannon*, 105 A.2d 56, 377 Pa. 352—*Hamberg v. Barsky*, 60 A.2d 345, 355 Pa. 462—*Metzger v. Metzger*, 34 A.2d 285, 338 Pa. 564, 129 A.L.R. 683—*Casari v. Victoria Amusement Enterprises*, 194 A. 502, 327 Pa. 382—*Eggers v. Property*, 60 Pa.Dist. & Co. 695—*Slate v. Tenenbaum*, Com.Pl., 32 Erie Co. 308—*Pillman v. Harrow*, Com.Pl., 4 Lyscoming 40—*Miller v. Ruecker*, Com.Pl., 63 York Leg.Rec. 53.

R.I.—*Nelson v. Dodge*, 68 A.2d 51, 76 R.I. 1, 14 A.L.R.2d 638.

S.D.—*Kelly v. Gram*, 38 N.W.2d 460, 73 S.D. 11—*Jaeger v. Sechser*, 270 N.W. 531, 65 S.D. 38.

Tenn.—*Morris v. Morris*, 258 S.W.2d 132, 195 Tenn. 133—*McNeill v. Dobson-Rainbridge Realty Co.*, 195 S.W.2d 626, 184 Tenn. 99.

Tex.—*Mills v. Gray*, 210 S.W.2d 985, 147 Tex. 33—*McGowen v. Montgomery*, Civ.App., 248 S.W.2d 789—*Simmons v. Wilson*, Civ.App., 216 S.W.2d 847—*Winn v. Warner*, Civ. App., 193 S.W.2d 867, reversed on other grounds 197 S.W.2d 338, 145 Tex. 302—*Pounds v. Jenkins*, Civ. App., 157 S.W.2d 173—*Collins v. Griffith*, Civ.App., 105 S.W.2d 895.

Utah.—*Hawkins v. Perry*, 253 P.2d 372.

Va.—*Horne v. Holley*, 188 S.E. 169, 167 Va. 234.

Wash.—*Kausky v. Kosten*, 179 P.2d 950, 27 Wash.2d 721—*Nicola v. Deslets*, 55 P.2d 604, 185 Wash. 435.

Wis.—*Stein v. Soref*, 38 N.W.2d 3, 255 Wis. 42.

65 C.J. p. 476 note 28.

#### Other statements of rule

(1) Equity will construct a trust in order to satisfy the demands of justice when one who occupies a fiduciary or confidential relationship abuses it and by fraud or over-reaching gains some advantage to himself.—*Strates v. Dimotis*, C.C.A.Tex., 110 F.2d 374, certiorari denied 61 S.Ct. 24, 311 U.S. 666, 85 L.Ed. 427.

(2) In absence of evidence rebutting presumption of fraud which law implies from existence of fiduciary relationship and transaction between parties whereby dominant party receives material benefit, a court of equity, in order to remedy such fraud and work out justice between the parties, will fashion constructive trust in favor of defrauded party upon property in hands of donee which he has received as result of transaction.—*Clark v. Clark*, 76 N.E.2d 446, 398 Ill. 592.

(3) Where a person obtains title to property by virtue of a confidential relationship and influence, under such circumstances that he ought not, according to equity and good conscience, enjoy beneficial interests of the property, courts of equity, to administer complete justice, will raise a trust by construction. Ill.—*Stein v. Stein*, 75 N.E.2d 859, 398 Ill. 397.

Neb.—*Paul v. McGahan*, 42 N.W.2d 172, 152 Neb. 578—*Maddox v. Maddox*, 38 N.W.2d 517, 151 Neb. 626—*McCormick v. McCormick*, 33 N.W.2d 543, 150 Neb. 192—*Watkins v. Waits*, 28 N.W.2d 206, 148 Neb. 513—In re *Scott's Estate*, 26 N.W.2d 799, 148 Neb. 182—*Box v. Box*, 21 N.W.2d 868, 146 Neb. 826.

Nev.—*Davidson v. Streeter*, 234 F.2d 793, 68 Nev. 427.

(4) A constructive trust is raised by a court of equity whenever a person, clothed with a fiduciary character, gains some personal advantage by availing himself of a situation as trustee; since, as it is impossible that a trustee should be allowed to make a profit by his office, it follows that as soon as the advantage in question is shown to have been acquired through the medium of a trust, the trustee, however good a legal title he may have, will be decreed in equity to hold for the benefit of his cestui que trust.—*Burton v. Burton*, 51 N.W.2d 297, 332 Mich. 326.

(5) Even though the existence of a fiduciary relationship does not in itself give rise to a constructive trust, it is frequently an important consideration in holding that an abuse of confidence rendering retention of property by one person unconscionable against another is a proper predicate for granting equitable relief in form of declaration and enforcement of a constructive trust.—*Central Bus Lines v. Hamilton Nat. Bank*, 239 S.W.2d 583, 34 Tenn.App. 480.

#### Contract

Equity courts presume that contracts between parties bearing such relationships to each other as prohibit them from contracting between themselves are fraudulent and convert parties guilty of fraud into trustees.—*Beattie v. Bower*, 287 N.W. 900, 290 Mich. 517.

cestui que trust may enforce or renounce at his option,<sup>62</sup> unless he has waived the breach of faith, in which case no trust exists or can be enforced.<sup>63</sup>

An abuse of the confidential relationship ordinarily is sufficient without more to authorize the enforcement of the trust, irrespective of any legal or equitable interest by either party, during the relation, in the property subsequently acquired,<sup>64</sup> and it is of no consequence that the constructive trustee acted in good faith or without actual intent to defraud,<sup>65</sup> or that the transaction could not have been impeached if the confidential relation had not existed.<sup>66</sup> Broadly speaking, a constructive trust may arise whenever influence has been acquired and is abused or confidence has been reposed and is betrayed,<sup>67</sup> and relief by way of constructive trust

may be granted wherever there is an abuse of confidence regardless of the way in which the particular transaction arises,<sup>68</sup> and regardless whether benefit from the transaction inured personally to the dominant party.<sup>69</sup> So it is not necessary, in order to warrant the raising of a constructive trust on the ground of abuse of trust, that the parties standing in a confidential relationship be grantor and grantee.<sup>70</sup>

Generally, a constructive trust arises when one person, occupying a fiduciary position, or having placed himself in such position in relation to another that good faith requires him to act for the other and not for himself, fraudulently or wrongfully acquires the title to the property in himself, in place of the cestui que trust.<sup>71</sup> So if a person standing in

#### Conveyance

(1) If a conveyance is obtained by virtue of a fiduciary relationship, equity converts the grantee into a trustee of the legal title.—*Stasch v. Romza*, 55 N.E.2d 81, 387 Ill. 67.

(2) Where it is sought to impose a constructive trust upon an unconditional conveyance of realty, the existence of a confidential relationship between grantor and grantee is of major importance to be considered in connection with other facts and circumstances in the case.—*Johnson v. Larson*, N.D., 56 N.W.2d 760.—*McDonald v. Miller*, 16 N.W.2d 270, 73 N.D. 474, 156 A.L.R. 1328.

#### Recovery in action

A plaintiff bringing action in behalf of and as agent or trustee of person who was made a nominal defendant but who was in fact a plaintiff, must turn over to such defendant any amount recovered in the action.—*Ziegler v. Von Sebo*, 66 N.Y.S.2d 900, 271 App.Div. 604.

#### Capacity in which sued

Alleged confidential relationship between administratrix as individual and payee of note executed by deceased to purchase cattle was immaterial, with respect to payee's right to impress trust on cattle, in suit against administratrix in her representative capacity.—*Hanson v. Beaver*, 251 N.W. 894, 62 S.D. 115.

62. U.S.—*Steinbeck v. Bon Homme Min. Co.*, Colo., 152 F. 333, 81 C.C.A. 441.—*Trice v. Comstock*, Mo., 121 F. 620, 67 C.C.A. 646, 61 L.R.A. 176.

63. Wis.—*Rightman v. Watson*, 136 N.W. 797, 150 Wis. 385.

#### Knowledge of facts

There can be no breach of fiduciary relation, as required to create trust where all facts are disclosed and party complaining acts with knowledge thereof.—*Kenshaw v. Tracy Loan & Trust Co.*, 35 P.2d 298, 87 Utah 359, modified on other

grounds 49 P.2d 403, 87 Utah 364, 100 A.L.R. 872.

64. U.S.—*Trice v. Comstock*, Mo., 121 F. 620, 67 C.C.A. 646, 61 L.R.A. 176. 65 C.J. p 476 note 28 [a].

65. U.S.—*Gendler v. Sibley State Bank*, D.C.Iowa, 62 F.Supp. 805. Mich.—*Potter v. Lindsay*, 60 N.W. 2d 133, 337 Mich. 404. Pa.—*Metzger v. Metzger*, 14 A.2d 285, 338 Pa. 564, 129 A.L.R. 683. 65 C.J. p 476 note 28 [b].

#### Constructive fraud

(1) Where a confidential relationship exists, courts will scrutinize the conduct of the parties more closely, and in such cases even constructive fraud may be sufficient to support a constructive trust.—*Cavallaro v. Lewis*, 98 N.Y.S.2d 730, 198 Misc. 412.

(2) Constructive fraud exists where fiduciary has no actual intent to defraud but is held liable irrespective of intent because of fiduciary relationship.—*Gendler v. Sibley State Bank*, D.C.Iowa, 62 F.Supp. 805.

66. Hawaii.—*Emalia Hadana Akiona Heo v. Kahiwa Hee Chung*, 39 Hawaii 364.

R.I.—*Tyler v. Tyler*, 172 A. 820, 54 R.I. 254.

65 C.J. p 476 note 28 [b] (3).

67. Mich.—*Potter v. Lindsay*, 60 N.W. 2d 133, 337 Mich. 404. 65 C.J. p 476 note 31.

#### Unfair persuasion

Where one party is under the domination of another, or by virtue of the relation between them is justified in assuming that the other party will not act in a manner inconsistent with his welfare, transaction induced by unfair persuasion of the latter is voidable, and court will impose a constructive trust.—*Troyak v. Enos*, C.A.Ind., 204 F.2d 536.

68. Ill.—*Ridgely v. Central Pipe Line Co.*, 97 N.E.2d 817, 409 Ill. 46.

69. R.I.—*Nelson v. Dodge*, 68 A.2d 51, 76 R.I. 1, 14 A.L.R.2d 638.

70. Ill.—*Ridgely v. Central Pipe Line Co.*, 97 N.E.2d 817, 409 Ill. 46.

71. U.S.—*In re Highwood Cemetery Ass'n*, D.C.Pa., 116 F.Supp. 898. Ala.—*Talley v. Talley*, 26 So.2d 586, 248 Ala. 84.

Cal.—*Hendrickson v. California Talc Co.*, 130 P.2d 806, 55 Cal.App.2d 467.

Ill.—*Giese v. Terry*, 57 N.E.2d 462, 388 Ill. 188.—*Joner v. Phoenix Joint Stock Land Bank of Kansas City*, 45 N.E.2d 20, 381 Ill. 106.

Ky.—*Thompson v. Fraley*, 130 S.W. 2d 793, 279 Ky. 323.

Mass.—*Isernson v. Nirenstein*, 93 N.E.2d 610, 326 Mass. 256, 20 A.L.R. 2d 1136.—*Lydia E. Pinkham Medicine Co. v. Gove*, 20 N.E.2d 482, 303 Mass. 1.

Minn.—*Risvold, on Behalf and for Use and Ben of Cleary Hill Mines Co. v. Gustafson*, 296 N.W. 411, 209 Minn. 357.

Mo.—*Martin v. Martin*, 181 S.W.2d 544, 352 Mo. 1243.

N.J.—*First Federal Sav. & Loan Ass'n of Montclair v. Shaw*, 56 A.2d 897, 142 N.J.Eq. 585, followed in 61 A.2d 53, 142 N.J.Lq. 784.

Pa.—*Hamberg v. Harasky*, 50 A.2d 345, 355 Pa. 462.—*Casari v. Victoria Amusement Enterprises*, 194 A. 503, 327 Pa. 382.

Tenn.—*Hall v. McReynolds*, 181 S.W. 2d 761, 181 Tenn. 515.

Tex.—*Wampler v. Harrington*, Civ. App., 261 S.W.2d 883, error refused no reversible error.—*Dennis v. Little*, Civ.App., 184 S.W.2d 516, reversed on other grounds 187 S.W. 2d 76, 143 Tex. 582.

Va.—*Byars v. Stone*, 42 S.E.2d 847, 186 Va. 518.

#### Obligation connected with transaction

A constructive trust will arise where an interest in property is pur-



a fiduciary or quasi-fiduciary relation to a lessee secures a renewal of the lease, or a new lease, to himself, a court of equity will treat him as holding the lease in trust for the original lessee.<sup>72</sup> Also, where one person, by deceiving another with whom he is in a confidential relationship as to the purchase price of property, acquires an interest therein, he is accountable as a trustee for such other person;<sup>73</sup> where one makes use of an influential or confidential

relation which he holds toward the owner of property to obtain title thereto from him on more advantageous terms than he could otherwise obtain it, equity will convert him into a trustee;<sup>74</sup> and where the owner of a part interest in property obtains title in his own name to the whole thereof, he is a trustee for his coowners as to their respective interests.<sup>75</sup> Profits wrongfully diverted from a joint

chased by one standing in a fiduciary relation to another and the scope of the former's obligation as a fiduciary is closely connected with the transaction.—*Lipinski v. Lipinski*, 35 N.W.2d 708, 227 Minn. 511.

#### Intent immaterial

If one takes title in his own name, while acting as agent, trustee, or guardian, or in any other fiduciary capacity, court of equity will subject property to proper trusts in his hands, or compel him to transfer title to party equitably entitled to it, and it is immaterial whether party takes title in his own name in good faith, under belief that he can thereby better manage property to advantage of those for whom he is acting, or in compliance with their wishes, or whether from an intention to defraud them of their rights therein, and in either case a court of equity will control legal title so as to protect just rights of true owners.—*Potter v. Lindsay*, 60 N.W.2d 133, 337 Mich. 404.—*Burton v. Burton*, 51 N.W.2d 297, 332 Mich. 326.

#### Purchase from third person

A person in a fiduciary relation to another who purchases realty for himself individually, may be chargeable as constructive trustee of the property, even though he purchases it from a third person and not from himself as fiduciary.

N.M.—*Mitchell v. Alhason*, 213 P.2d 231, 54 N.M. 56.  
Ohio.—*Kuck v. Sommers*, App., 100 N.E.2d 68.

W.Va.—*Harrison v. Miller*, 21 S.E.2d 674, 124 W.Va. 550.

#### Reversion of leased property

Where partner buys reversion of leased property upon which partnership business is conducted, property is regarded as personal property for purpose of paying debts and adjusting equities between partners, and partner holds legal title as trustee for partnership in respect to such personality until debts and claims between partners are paid, then he holds legal title to remainder as trustee for benefit of persons interested.—*Boxill v. Boxill*, 111 N.Y. S.2d 33, 201 Misc. 386.

#### Use of confidential information

(1) A fiduciary acquiring property, in violation of his duty to trust beneficiary, through use of confidential

information, holds it on constructive trust for beneficiary.

U.S.—*Midstate Amusement Corp. v. Rivers*, D.C. Wash., 54 F.Supp. 738.  
Idaho.—*Fenton v. King Hill Irr. Dist.*, 186 P.2d 477, 67 Idaho 456.

(2) The law peremptorily forbids one who, in a fiduciary relation, has acquired information concerning, or interest in business or property of his correlate from using that knowledge or interest to prevent correlate from accomplishing purpose of the relation, and, if one violates such prohibition, law charges the interest or property which he acquires in such way with a trust for benefit of other party to the relation.

U.S.—*Trice v. Comstock*, C.C.A.Mo., 121 F.620, 61 L.R.A. 176.

Mo.—*State ex rel. Duggan v. Kirkwood*, 208 S.W.2d 257, 357 Mo. 325, 2 A.L.R.2d 216.

#### Use of own funds

Where one person stands in a fiduciary relationship to another the use of his own funds in acquiring title to property will not prevent his being held as a trustee of legal title since it must be assumed that he did so by virtue of such relationship and for the benefit of such other person.

Ill.—*Black v. Gray*, 87 N.E.2d 635, 403 Ill. 503.

Pa.—*Green v. Green*, Com.Pl., 31 Del. Co. 538.

72. Wash.—*Nicola v. Desilets*, 55 P.2d 604, 185 Wash. 435, 65 C.J. p. 476 note 28 [d].

#### Sublease

(1) Where part of consideration of sublease was recognition that lessee might renew lease on same or other terms, and that sublease would be renewed on same terms or in ratio of changed terms, and sublessee began to negotiate for new lease from lessor within a month after becoming a sublessee and entered into new lease a year and three months before expiration date of his sublease, sublessee held the new lease as trustee for lessee subject to benefits to sublessee as provided in sublease.—*Risk v. Risher*, 19 So.2d 484, 197 Miss. 155.

(2) It has been held, however, that in the absence of special circumstances, a sublessee's relation to sublessor is not fiduciary within rule that where fiduciary acquires renew-

al of lease equity will impose constructive trust in favor of prior lessee.

U.S.—*Flat-Marks Realty Corporation v. Silver's Lunch Stores*, C.C.A.N.Y., 74 F.2d 210, certiorari denied *Flat-Marks Realty Corporation v. Silver Lunch Stores*, 55 S.Ct. 640, 294 U.S. 731, 79 L.Ed. 1260.  
N.Y.—*Pemberton v. Windsor Leasing Co.*, 68 N.Y.S.2d 292.

73. Mich.—*Kren v. Rubin*, 61 N.W.2d 9, 338 Mich. 288, 65 C.J. p. 478 note 32.

74. Neb.—*Jaul v. McGahan*, 42 N.W.2d 172, 152 Neb. 578.—*Maddox v. Maddox*, 38 N.W.2d 547, 151 Neb. 620.

Tenn.—*Bell v. Gallely*, App., 260 S.W.2d 300.

Utah.—*Lawley v. Hickenlooper*, 212 P. 526, 61 Utah 298.

Condition and quality of interest

If an attorney, by statements and representations to his clients as to the condition and quality of their interest in an estate, procures the sale thereof to a third person for whom the attorney is acting at the same time as an attorney, for an inadequate price, a court of equity will set aside the transaction and restore the interest in the estate to the clients on repayment of the purchase price with the legal rate of interest, whether the attorney acts on information derived from the client or from any other source, since the attorney is affected with a trust and the matter is grounded on public policy and not necessarily on fraud.—*Zimmer v. Gudmundsen*, 5 N.W.2d 707, 142 Neb. 260.

75. U.S.—*Taylor v. Brindley*, C.C.A.Okl., 164 F.2d 235.

N.J.—*Ditscher v. Booth*, 80 A.2d 648, 13 N.J. Super. 568.

N.Y.—*Muller v. Sobol*, 97 N.Y.S.2d 905, 277 App.Div. 881, reargument and appeal denied 99 N.Y.S.2d 757, 277 App.Div. 951.—*Petition of Caliard*, 73 N.Y.S.2d 538.

Okl.—*Preston v. Ross*, 207 P.2d 297, 201 Okl. 455.

Pa.—*Herman v. Latrobe Bank & Trust Co.*, 56 Pa. Dist. & Co. 675, 28 West. 83.

Tex.—*Wampler v. Harrington*, Civ. App., 261 S.W.2d 853, error refused no reversible error.

65 C.J. p. 478 note 34.

adventure are subject to a constructive trust.<sup>76</sup>

Property with respect to which one stands in a fiduciary relation ordinarily cannot be purchased and held by him for his own benefit, as against the cestui que trust;<sup>77</sup> but this rule has been held subject to the exception that an agent or trustee may lawfully buy the property of his principal or cestui que trust at a judicial sale, brought about by a third person, which he has no part in procuring and over which he can exercise no control,<sup>78</sup> and it does not apply where property held by one trustee is purchased by another and distinct trustee of other property held for the same cestui.<sup>79</sup> Factors important in determining whether a particular transaction is fair and just include a showing by the

fiduciary that he has made a free and frank disclosure of all relevant information which he had, that the consideration was adequate, and that the principal had competent and independent advice before completing the transaction.<sup>80</sup> So where there is a duty to speak because of a trust or confidential relationship, the failure to do so is a species of fraud for which equity may afford relief by way of a constructive trust.<sup>81</sup>

A person is not chargeable as a trustee, however, because of a fiduciary relation unless he has been guilty of some wrong;<sup>82</sup> and so ordinarily no trust arises, because of a confidential relation, where there is no fraud or abuse of confidence or influence,<sup>83</sup> or where the confidential relationship has terminated

#### Joint adventure

Where one joint adventurer tortiously took in his own name title to lands purchased by both in equal shares, constructive trust, and not resulting trust, arose in favor of other joint adventurer, even though he advanced practically entire payments, so that title holder was trustee only of undivided half belonging to other joint adventurer, and not of entire property.—*Reid v. Keator*, 39 P.2d 926, 55 Idaho 172.

#### Partners

Where one of two partners purchases land in his own name with partnership assets for partnership purposes, a trust results in favor of the partnership.—*Davis v. Alexander*, 171 P.2d 167, 26 Wash.2d 458.

76. N.Y.—*Mariani v. Summers*, 52 N.Y.S.2d 750, affirmed 56 N.Y.S.2d 537, 269 App. Div. 840.

#### Purchase of property

A joint adventurer who purchased property with funds arising from joint adventure and failed to account to other joint adventurers occupied fiduciary relationship to other adventurers and constructive trust was imposed on him requiring that he do justice to other adventurers.—*Collins v. Griffith*, Tex. Civ. App., 125 S.W.2d 419, error refused—*Campbell v. Pundt*, Tex. Civ. App., 121 S.W.2d 387.

77. U.S.—*In re Mountain States Power Co.*, C.C.A. Del., 118 F.2d 405.

Ariz.—*Maish v. Valenzuela*, 229 P.2d 248, 71 Ariz. 426, 25 A.I.R.2d 747.  
Ark.—*McHugh v. Jeffries*, 183 S.W.2d 309, 207 Ark. 830.

Ill.—*Black v. Gray*, 87 N.E.2d 635, 403 Ill. 503—*Giesse v. Terry*, 46 N.E.2d 90, 382 Ill. 34.

Mass.—*Locke v. Old Colony Trust Co.*, 193 N.E. 892, 289 Mass. 245.  
Neb.—*Meade v. Vande Voorde*, 299 N.W. 175, 139 Neb. 827, 127 A.L.R. 564.

N.C.—*Davis v. Jenkins*, 72 S.E.2d 673, 236 N.C. 283, rehearing denied and

opinion supplemented 73 S.E.2d 780, 236 N.C. 767.

S.C.—*Searson v. Webb*, 38 S.E.2d 654, 208 S.C. 453.

W.Va.—*Harrison v. Miller*, 21 S.E.2d 674, 124 W.Va. 550.  
65 C.J. p. 479 note 35.

#### Tax title

Where purchaser of tax title at tax sale acted as undisclosed trustee for record owner or for his attorney who was junior lienholder, the purchaser could not quiet title against the record owner and destroy his interest in the property.—*Free v. Farnworth*, 144 P.2d 532, 105 Utah 583.

#### Purchase from third person

A constructive trust is fastened on a purchase of trust property by the trustee, even though such purchase is from a third person having a lien against the property and obtaining title thereto through foreclosure.—*Ryan v. Plath*, 140 P.2d 968, 18 Wash.2d 839.

78. Wyo.—*Corpus Juris cited in* *Carpenter v. Carpenter* v. Kingham, 109 P.2d 463, 474 56 Wyo. 314.  
65 C.J. p. 479 note 36.

#### Purchase from mortgagee

Two business associates who joined in agreement with third associate to have mortgagee of farm land, which they had purchased, foreclose and take land without further liability to them, when venture proved unsuccessful, were not entitled to have trust impressed on land in proportion of original interests as against third associate who purchased land from mortgagee without consulting others, irrespective of nature of original relationship.—*Collins v. Gee*, Tex. Civ. App., 107 S.W.2d 764, error refused.

79. Del.—*Bradford v. Vinton*, 153 A. 678, 17 Del.Ch. 261.

80. Ill.—*Jones v. Washington*, 107 N.E.2d 672, 412 Ill. 436—*Mueller v.*

*Weiland*, 96 N.E.2d 360, 342 Ill.App. 240.  
65 C.J. p. 476 note 28 [e].

81. Cal.—*Blair v. Mahon*, 230 P.2d 832, 104 Cal.App.2d 44.

82. S.C.—*Corpus Juris* quoted in *All v. Prillaman*, 20 S.E.2d 741, 750, 200 S.C. 279, 159 A.L.R. 981.  
65 C.J. p. 479 note 38.

#### Joint purchase

Where contract for sale of real estate named five joint purchasers, confidential relation of one toward his colleagues and his obligation to protect their joint rights did not extend so far as to require him to pay whole consideration when other purchasers failed to pay their share on day for closing transaction and thereafter such purchaser was free to act as he chose with respect to the property without regard to the others.—*Sonek v. Hill Bldg. & Loan Ass'n*, 49 A.2d 303, 138 N.J.Eq. 531, affirmed 52 A.2d 852, 140 N.J.Eq. 108.

83. U.S.—*Buckley v. Altheimer, C.C.* A. 111, 152 F.2d 502.

Ill.—*Rizzo v. Rizzo*, 120 N.E.2d 546, 3 Ill.2d 291—*Jones v. Washington*, 107 N.E.2d 672, 412 Ill. 436—*Peters v. Meyers*, 96 N.E.2d 493, 408 Ill. 253—*Skidmore v. Johnson*, 79 N.E.2d 762, 334 Ill. App. 347—*Isaacs v. Okin*, 73 N.E.2d 11, 331 Ill. App. 268.

Iowa.—*Reeves v. Lyon*, 277 N.W. 749, 224 Iowa 659.

Md.—*Lynn v. Magnesa*, 62 A.2d 604, 191 Md. 674.

Mass.—*Galdi v. Caribbean Sugar Co.*, 99 N.E.2d 69, 327 Mass. 402.  
N.Y.—*Brooklyn Packing Co. v. Zaslloff*, 18 N.Y.S.2d 443.

Pa.—*Dravosburg Land Co. v. Scott*, 16 A.2d 415, 340 Pa. 280—*In re Enslen's Estate*, 60 A.2d 429, 163 Pa. Super. 246—*In re Lagges' Estate*, Orph., 3 Chester Co. 280.

S.C.—*Corpus Juris* quoted in *All v. Prillaman*, 20 S.E.2d 741, 750, 200 S.C. 279, 159 A.L.R. 981.

before the transaction by which the property is acquired.<sup>84</sup> Accordingly, even if a confidential relation exists, a conveyance to the dominant party by the dependent party will not be affected, unless by means of such fiduciary relation undue advantage has been taken of the grantor;<sup>85</sup> and a conveyance executed by a dependent party to a dominant party is valid if executed with full knowledge of its nature and effect and through the deliberate and voluntary desire of the grantor.<sup>86</sup> The confidential relationship which amounts to a trust, once assumed, continues until discharged either by operation of law, by an order of a tribunal having requisite jurisdiction, or pursuant to a valid agreement of parties in interest who are fully competent to contract and

fully conversant with all the facts and with their respective rights and duties.<sup>87</sup>

### b. What Constitutes Confidential or Fiduciary Relationship

A confidential relationship, or fiduciary relationship, within the meaning of the rule that a constructive trust arises from the abuse or violation of such a relationship exists wherever confidence is reposed on one side and there is a resulting superiority and influence on the other, and it is not limited to conventional trusteeships and other recognized legal relationships of trust and confidence.

In general, a confidential relationship, or fiduciary relationship, the two terms being ordinarily used interchangeably,<sup>88</sup> within the meaning of the rule

Utah.—*Renshaw v. Tracy Loan & Trust Co.*, 49 P.2d 403, 87 Utah 364, 100 A.L.R. 359, 65 C.J. p 479 note 39.

#### Elements of cause of action

(1) The elements of a cause of action to enforce a constructive trust are existence of fiduciary relation and abuse by defendant of confidence and trust bestowed under it to plaintiff's harm, and a constructive trust cannot be adjudged where an element of cause of action for its enforcement is lacking.—*Wilcox v. Nelson*, 35 N.W.2d 741, 227 Minn. 545.

(2) The only indispensable elements of a good cause of action to enforce constructive trust are a fiduciary relation and the use by one of the parties of the knowledge or interest he acquired through it to prevent the other from accomplishing the purpose of the relation.—*Young v. Bradley*, C.C.A.Ohio, 142 F.2d 658, certiorari denied 65 S.Ct. 130, 323 U.S. 775, 89 L.Ed. 619, motion denied 65 S.Ct. 266.

(3) Where a party does not attack in probate court sales of property made by an administrator but subsequently brings an action in district court to impress a trust on property on ground that administrator had indirectly purchased property from the estate while he was administrator, it is not only necessary to prove that administrator may have acquired property from intervening purchasers, but it must be proven that some conduct amounting to intrinsic fraud was present in connection with transactions.—*Wadsworth v. Cole*, Tex.Civ. App., 265 S.W.2d 628.

#### Undue influence

(1) Where fiduciary relation arises not from a formal trust relationship but confidence reposed by one person in another, abuse of the relationship must be shown to have arisen out of undue influence exerted by the dominant party on the subservient party to give rise to a constructive

trust.—*Skidmore v. Johnson*, 79 N.E. 2d 762, 334 Ill.App. 347.

(2) In determining whether an attorney or any other beneficiary in a confidential relationship has met the burden of proof which the law casts on him to show that he used no undue influence or deception in a transaction, the court must consider all circumstances in each case.—*Baker v. Otto*, 22 A.2d 924, 180 Md. 53.

#### Purchase of mortgage

Where plaintiff owned realty, mortgaged far in excess of its value, and plaintiff informed lessee of that fact and also that if holder of mortgage were properly handled, the mortgage could be reduced to or bought for approximately one-half its face value, lessee by purchasing mortgage from bank which held mortgage for cash at approximately same price that plaintiff offered mortgage holder did not violate a quasi fiduciary relationship requiring impression of a trust on bond and mortgage purchased by defendant and a transfer to plaintiff.—*Realty Associates v. Bickford's, Inc.*, 61 N.Y.S.2d 745.

#### New leases

(1) In order to impress constructive trust on new oil leases, which defendant had acquired for himself after expiration of old leases, in which plaintiffs and defendant had had interests, on ground that defendant violated fiduciary duty owed to plaintiffs, it was necessary that knowledge obtained by defendant, during and because of fiduciary relationship, in itself occasioned act of defendant in obtaining new leases for himself.—*Smith v. Bolin*, Tex.Civ. App., 261 S.W.2d 352, affirmed in part and reversed in part on other grounds, Sup., 271 S.W.2d 93.

(2) Rules of equity applicable to those who had interests in oil and gas leases, and who were in fiduciary relationship to each other, would not be extended so as to forbid the ac-

quisition of ownership, or development by one of the parties for his own benefit of property not embraced in the enterprise of the parties and outside its scope.—*Smith v. Bolin*, supra.

84. Cal.—*Anron v. Puccinelli*, 264 P.2d 152, 121 Cal.App.2d 675.  
Or.—*Hughes v. Helzer*, 185 P.2d 537, 182 Or. 205.  
Pa.—*George v. Richards*, 64 A.2d 811, 361 Pa. 278.  
65 C.J. p 479 note 40.

85. Ill.—*Peters v. Meyers*, 96 N.E.2d 493, 408 Ill. 253—*Neagle v. McMullen*, 165 N.E. 605, 334 Ill. 168.

#### Reservation of life estate

Title to property conveyed by deeds containing clauses giving grantee all rents, issues, and profits from property granted was not impressed with equitable life estate in favor of grantor pursuant to oral agreement reserving life estate in rents and profits from property on ground of confidential relationship existing between grantor and grantee, in absence of showing of lack of consideration or abuse of confidence by grantee.—*Rush v. Pillsbury*, 55 P.2d 264, 13 Cal.App.2d 226.

86. Ill.—*Peters v. Meyers*, 96 N.E.2d 493, 408 Ill. 253—*Neagle v. McMullen*, 165 N.E. 605, 334 Ill. 168.

87. Tenn.—*Bell v. Galley*, App., 260 S.W.2d 300.

#### Continuing rights

Where a confidential relation is established between parties, either by act of law or agreement, rights incident to such relation continue until relation is put an end to.—*Sheppard v. Sykes*, 44 S.E.2d 54, 227 N.C. 606.

88. Cal.—*Coombs v. Minor*, 141 P.2d 491, 60 Cal.App.2d 645.

Ill.—*Dick v. Albers*, 90 N.E. 683, 243 Ill. 231, 134 Am.S.R. 369.

Iowa.—*Corpus Juris* quoted in *Shaw v. Addison*, 28 N.W.2d 816, 825, 239 Iowa 377.

that a constructive trust arises from the abuse or violation of such a relationship, exists wherever confidence is reposed on one side and there is a resulting superiority and influence on the other.<sup>89</sup> Every relation in which the duty of fidelity to each other is imposed on the parties by established rules of law is a relation of trust,<sup>90</sup> and if a wrong arises in a fiduciary relationship, the same remedy exists on

behalf of the injured person as would exist against a trustee on behalf of the cestui que trust.<sup>91</sup> It has been said that there is no invariable rule which determines the existence of a confidential relationship,<sup>92</sup> but that the existence of a fiduciary relationship in a particular case is to be determined by the facts established.<sup>93</sup>

Okl.—*Corpus Juris* cited in *Renegar v. Burning*, 123 P.2d 686, 688, 190 Okl. 340.

Pa.—*Corpus Juris* quoted in *Stewart v. Hooks*, 94 A.2d 756, 759, 372 Pa. 542.

89. Fla.—*Metcalf v. Leedy, Wheeler & Co.*, 191 So. 690, 140 Fla. 149.

Ill.—*Oster v. Oster*, 111 N.E.2d 319, 414 Ill. 470—*Jones v. Washington*, 107 N.E.2d 672, 412 Ill. 436—*Bremmer v. Bremer*, 104 N.E.2d 299, 411 Ill. 454—*Stephenson v. Kulichick*, 101 N.E.2d 542, 410 Ill. 139—*Kester v. Crilly*, 91 N.E.2d 419, 405 Ill. 425—*Pinn v. Monk*, 85 N.E.2d 701, 403 Ill. 167—*Jones v. Roblev*, 83 N.E.2d 570, 402 Ill. 302—*Irod v. Brod*, 61 N.E.2d 675, 390 Ill. 312—*Steinmetz v. Kern*, 32 N.E.2d 151, 375 Ill. 616—*Suchy v. Hajjuck*, 4 N.E.2d 826, 364 Ill. 502—*Mueller v. Weiland*, 96 N.E.2d 360, 342 Ill. App. 240—*People ex rel. Barrett v. Central Republic Trust Co.*, 20 N.E.2d 999, 300 Ill. App. 297.

Iowa.—*Corpus Juris* quoted in *Shaw v. Addison*, 28 N.W.2d 816, 825, 239 Iowa 377.

Mo.—*Truesler v. Helmbacher*, 168 S.W.2d 1030, 350 Mo. 807.

Okl.—*Corpus Juris* cited in *Renegar v. Burning*, 123 P.2d 686, 688, 190 Okl. 340.

Pa.—*Corpus Juris* quoted in *Stewart v. Hooks*, 94 A.2d 756, 759, 372 Pa. 542.

65 C.J. p 483 note 68.

#### Other statements of rule

(1) In general.

Cal.—*Coombs v. Minor*, 141 P.2d 491, 60 Cal.App.2d 645.

Md.—*Carter v. Abramo*, 93 A.2d 546, 201 Md. 339.

Mo.—*Basman v. Frank*, 250 S.W.2d 989.

Pa.—*Hamburg v. Barsky*, 50 A.2d 345, 355 Pa. 462—*Ringer v. Finfrock*, 17 A.2d 348, 340 Pa. 458—*Fischer v. Coyne*, Com.Pl., 31 Del.Co. 473—*Klein v. Zodi*, Com.Pl., 29 North.Co. 84—*Grim v. Schmuck*, Com.Pl., 65 York Leg.Rec. 187.

S.D.—*Schwartz v. Dale*, 54 N.W.2d 361, 74 S.D. 467.

Utah.—*Haws v. Jonsen*, 209 P.2d 229, 116 Utah 212.

65 C.J. p 483 note 68 [a].

(2) A fiduciary or confidential relationship arises whenever circumstances make it certain that confidence was reposed on one side and accepted on the other.

U.S.—*Shapiro v. Rubens*, C.C.A.Ind. 166 F.2d 659.

Ill.—*McDonnell v. Holden*, 185 N.E. 572, 352 Ill. 362—*Pinney v. White*, 59 N.E.2d 859, 389 Ill. 374—*Reynolds v. Wangelin*, 53 N.E.2d 720, 322 Ill. App. 13.

Md.—*Johnson v. Bugle Coat. Apron & Linen Service*, 60 A.2d 686, 191 Md. 268.

(3) A person who has rights and duties which he is bound to exercise for the benefit of another person stands in a fiduciary relationship to such other person—*Renegar v. Burning*, 123 P.2d 686, 190 Okl. 340—65 C.J. p 483 note 68 [a] (4).

(4) A fiduciary relation exists in all cases in which influence has been acquired and abused and in which confidence has been reposed and betrayed.

Ill.—*Wesemann v. Fischer*, 56 N.E.2d 656, 323 Ill. App. 617.

Mich.—*Potter v. Lindsay*, 60 N.W. 2d 133, 337 Mich. 404.

N.Y.—*In re Vasilonis' Estate*, 125 N.Y.S.2d 363, 204 Misc. 755.

Ohio—*Gray v. Hafer*, 2 Ohio N.P. N.S. 341.

(5) A confidential relationship exists when one person occupies towards another such a position of advisor or counselor as reasonably to inspire confidence that he will act in good faith for the other's interest—*Stewart v. Hooks*, 94 A.2d 756, 372 Pa. 542—*Brunner v. Stanert*, 85 A.2d 130, 369 Pa. 178—*Kahan v. Greenfield*, 67 A.2d 567, 165 Pa.Super. 148—*Monongahela Trust Co. v. Kazimer*, 54 A.2d 841, 161 Pa.Super. 380.

(6) Generally, doctrine of confidential relation exists with respect to establishment of constructive trust, where one party is under domination of another, or where, under circumstances, such party is justified in assuming that other will not act in a manner inconsistent with his or her welfare—*Bass v. Smith*, 56 A.2d 800, 189 Md. 461.

(7) A confidential relation exists where there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence—*Security Trust Co. v. Wilson*, 210 S.W.2d 336, 307 Ky. 152—65 C.J. p 483 note 68 [a] (2).

(8) Ordinarily a fiduciary relationship arises where one party reposes special confidence in another or where a special duty arises on the part of one to protect the interests of another—*Crockett v. Root*, 146 P.2d 555, 194 Okl. 3.

#### Funds for purchase

When plaintiff's funds passed into defendant's hands to purchase a specific tract of land, a confidential relationship was created and defendant was bound to exercise utmost good faith in use of money, regardless of whether words "trustee" or "agent" were spoken by parties in connection with transaction—*Kinert v. Wright*, 185 P.2d 364, 81 Cal.App.2d 919.

#### Continuance of status

One who voluntarily assumes a position of trust and confidence is a fiduciary, and he remains a fiduciary as long as trust and confidence are reposed in him, and such status may continue in fact in case of joint adventurers after dissolution of their association, although dissolution would normally end the fiduciary status—*Sime v. Malouf*, 212 P.2d 346, 95 Cal.App.2d 82, rehearing denied 213 P.2d 768, 95 Cal.App.2d 82.

90. U.S.—*U. S. v. Bennett*, D.C. Wash., 57 F.Supp. 670.

Person receives money in fiduciary capacity when money is for benefit of another person to whom he stands in relation implying great confidence and trust on the one part and high degree of good faith on the other—*Vertman v. Drayton*, 272 N.W. 438, 223 Iowa 380.

91. Fla.—*Metcalf v. Leedy, Wheeler & Co.*, 191 So. 690, 140 Fla. 149.  
Mass.—*City of Boston v. Santosuosso*, 30 N.E.2d 278, 307 Mass. 303—*City of Boston v. Santosuosso*, 10 N.E.2d 271, 298 Mass. 175.

92. Ind.—*Koehler v. Haller*, 112 N.E. 527, 62 Ind.App. 8—*Yuster v. Keefe*, 90 N.E. 320, 46 Ind.App. 460.

Pa.—*Corpus Juris* quoted in *Stewart v. Hooks*, 94 A.2d 756, 759, 372 Pa. 542.

#### Fiducial relationships do not depend on nomenclature

U.S.—*Oldland v. Gray*, C.C.A.Colo., 179 F.2d 408, certiorari denied 70 S.Ct. 803, 339 U.S. 948, 94 L.Ed. 1362.

93. Mass.—*Warsowsky v. Sherman*, 93 N.E.2d 612, 326 Mass. 290—*Cann*

In determining whether a relationship is confidential within the general rule as to constructive trusts, the origin of the confidence and the source of the influence growing out of that confidence ordinarily are immaterial,<sup>94</sup> and the fiduciary or confidential relationship on which a constructive trust may be founded is not limited to conventional trusteeships and other recognized legal relations of trust and confidence.<sup>95</sup> In other words, confidential relations are not confined to any specific association

of parties,<sup>96</sup> but apply generally to all persons who are associated by any relation of trust and confidence,<sup>97</sup> or to all persons who occupy a position out of which the duty of good faith should in equity and good conscience arise;<sup>98</sup> and the relation exists wherever in fact one has the confidence of, and influence over, another.<sup>99</sup>

The relation between parties, in order to be a "fiduciary relation," need not be legal, but may be moral, social, domestic, or merely personal;<sup>1</sup> and

v. Barry, 199 N.E. 905, 293 Mass. 313.  
N.Y.—Halper v. Homestead Bldg. & Loan Ass'n, 59 N.Y.S.2d 689, affirmed 59 N.Y.S.2d 695, 369 App Div. 1044.  
Tex.—MacDonald v. Pollett, 180 S.W.2d 334, 142 Tex. 616.  
94. Ill.—Stephenson v. Kulchick, 101 N.E.2d 542, 410 Ill. 139.  
Mo.—Trieseler v. Helmbacher, 168 S.W.2d 1030, 350 Mo. 807.  
95. Fla.—Van Woy v. Willis, 14 So. 2d 185, 153 Fla. 189.  
Kan.—Miller v. Henderson, 33 P.2d 1098, 140 Kan. 46.  
Md.—Lynn v. Magness, 62 A.2d 604, 191 Md. 674—Johnson v. Bugle Coat, Apron & Linen Service, 60 A.2d 686, 191 Md. 268—Grimes v. Grimes, 40 A.2d 58, 184 Md. 59.  
Mass.—Cranwell v. Oglesby, 12 N.E.2d 81, 299 Mass. 148.  
Miss.—Risk v. Risher, 19 So.2d 484, 197 Miss. 155.  
N.Y.—Powell v. Powell, 126 N.Y.S.2d 182, 205 Misc. 14.  
Pa.—Metzger v. Metzger, 14 A.2d 285, 338 Pa. 564, 129 A.L.R. 683.  
Utah.—Haws v. Jensen, 209 P.2d 229, 116 Utah 212.  
65 C.J. p. 483 note 74.

#### Tenants in common

While there is no fiduciary relationship between tenants in common, if one cotenant comes into possession of funds belonging to his cotenant, he becomes trustee of such funds and stands in fiduciary relationship to his cotenant with respect thereto—Carter Oil Co. v. Crude Oil Co., C.A.Okl., 201 F.2d 547.

96. U.S.—Kennedy v. Senboard Oil Co. of Del., D.C.Cal., 99 F.Supp. 730.

N.D.—Barker v. Barker, 27 N.W.2d 576, 75 N.D. 253, 171 A.L.R. 447.  
Pa.—Stewart v. Hooks, 94 A.2d 756, 372 Pa. 642—Bruner v. Stanert, 85 A.2d 130, 369 Pa. 178—Kahan v. Greendfield, 67 A.2d 567, 165 Pa.Super. 148—Monongahela Trust Co. v. Kazimer, 54 A.2d 841, 161 Pa. Super. 380.

#### Personal association not essential

A confidential relation is not restricted to any personal association, and it may exist as matter of law in certain recognized fiduciary rela-

tion, as in case of trustee and cestui que trust, attorney and client, and guardian and ward, and it may also exist as matter of fact wherever one person has reposed a special confidence in another to the extent that the parties do not deal with each other on equal terms, either because of an overmastering dominance on the one side, or weakness, dependence or justifiable trust, on the other—Ringer v. Finrock, 17 A.2d 348, 340 Pa. 458.

#### Affinity or consanguinity

The amount of evidence necessary to establish a confidential relationship ordinarily rests with the trier of facts, and it is not essential to show a relationship by affinity or consanguinity, or that business transacted established a particular relationship between the parties, but if parties are friends, and grantor reposes confidence in grantee, and grantor is of advanced age, an implied trust may result—Kent v. First Trust & Sav. Bank of Pasadena, 225 P.2d 625, 101 Cal.App.2d 361.

97. N.D.—Barker v. Barker, 27 N.W.2d 576, 75 N.D. 253, 171 A.L.R. 447.

98. Miss.—Risk v. Risher, 19 So.2d 484, 197 Miss. 155.

#### Advisor or counselor

A confidential relationship is not limited to any particular association of parties, but exists wherever one occupies toward another such a position of advisor or counselor as reasonably to inspire confidence that he will act in good faith for the interest—Dob v. Jaffe, 41 A.2d 407, 351 Pa. 297.

#### Family or other relationship

A constructive trust is imposed even though there is no fiduciary relation such as that between attorney and client, principal and agent, and trustee and beneficiary, and it is sufficient that there is a family relationship or other personal relationship of such a character that transferor is justified in believing that transferee will act in transferor's interest—Powell v. Powell, 126 N.Y.S.2d 182, 205 Misc. 14.

99. Cal.—Bolling v. Croter, 134 P.2d 532, 57 Cal.App.2d 296.

Ill.—Jones v. Washington, 107 N.E.2d

672, 412 Ill. 436—Bremer v. Bremer, 104 N.E.2d 299, 411 Ill. 454—Clark v. Clark, 76 N.E.2d 446, 398 Ill. 592.  
Kan.—Miller v. Henderson, 33 P.2d 1098, 140 Kan. 46.

Md.—Lynn v. Magness, 62 A.2d 604, 191 Md. 674—Johnson v. Bugle Coat, Apron & Linen Service, 60 A.2d 686, 191 Md. 268—Grimes v. Grimes, 40 A.2d 58, 184 Md. 59.  
Mo.—Hasman v. Frank, 250 S.W.2d 989.

Pa.—Corpus Juris quoted in Stewart v. Hooks, 94 A.2d 756, 759, 372 Pa. 642—Metzger v. Metzger, 14 A.2d 285, 338 Pa. 564, 129 A.L.R. 683—Schwarz v. Keighler, Com.Pl., 31 Del. Co. 251.  
Utah.—Hawkins v. Perry, 253 P.2d 372.

65 C.J. p. 483 note 75.

#### Elements

A confidential relation involves elements of secrecy and of trust and confidence; a relation of parties in which one is bound to act for benefit of other and can take no advantage to himself from his acts relating to other's interest, and includes such relationships as those of trustee and cestui que trust, principal and agent, and employer and employee—Shell Petroleum Corp. v. Pratt, D.C.Kan., 22 F.Supp. 304, affirmed, C.C.A., Pratt v. Shell Petroleum Corporation, 100 F.2d 833, certiorari denied 59 S.Ct. 775, 306 U.S. 659, 83 L.Ed. 1056.

#### Influence implied

A fiduciary relationship exists when influence is implied, as between parties, in very conception of relation, wherein position of one of them is superior to that of the other, and does not involve intentional concealment or misrepresentation—Winger v. Chicago City Bank & Trust Co., 67 N.E.2d 265, 394 Ill. 94.

1. Fla.—Metzger v. Leedy, Wheeler & Co., 131 So. 690, 110 Fla. 149.

Fla.—Quinn v. Phipps, 113 So. 419, 422, 93 Fla. 805, 54 A.L.R. 1173.

Ill.—Stephenson v. Kulchick, 101 N.E.2d 542, 410 Ill. 139—Kester v. Crilly, 91 N.E.2d 419, 405 Ill. 425—Finn v. Monk, 85 N.E.2d 701, 403 Ill. 167—Mueller v. Weiland, 98 N.E.2d 360, 342 Ill.App. 240.

N.Y.—Powell v. Powell, 126 N.Y.S.2d 182, 205 Misc. 14.

where by reason of kinship, business association, disparity in age or physical or mental condition, or other reason, the grantee is in an especially intimate position with regard to another and the latter reposes a high degree of trust and confidence in the former, a confidential relationship exists which prohibits the one trusted from seeking a selfish benefit for himself during the course of the relationship, and affords a basis for imposing a constructive trust.<sup>2</sup> On the other hand, confidential relations, within the meaning of the rule as to constructive trusts, do not necessarily exist between two persons who for certain purposes are trustee and cestui que trust,<sup>3</sup> or between persons who have negotiated a trust agreement which is abandoned or canceled before it becomes effective.<sup>4</sup>

Ordinarily, in order to establish a confidential re-

lation, there must be not only confidence of the one person in the other, but also on the part of the former some inequality, dependence, weakness, want of knowledge, or other conditions giving to the latter some advantage over the former.<sup>5</sup> The mere existence of mutual respect and confidence does not make a business relationship fiduciary,<sup>6</sup> and a mere habit or practice on the part of one person of relying on another for advice does not establish a confidential relation between them.<sup>7</sup> Also, the mere fact that two persons are friends does not establish a confidential relation,<sup>8</sup> but in some circumstances friendship may be sufficient to show a fiduciary relationship for the purpose of establishing a trust.<sup>9</sup> It is not sufficient that confidence be reposed by one party without actual acceptance by the other party.<sup>10</sup> No person can obtrude his trust or his secrets on

2. Ill.—*Steinmetz v. Kern*, 32 N.E.2d 151, 375 Ill. 616—*Ruchy v. Hallock*, 4 N.E.2d 836, 364 Ill. 502.

ND—*Barker v. Barker*, 27 N.W.2d 576, 75 N.D. 253, 171 A.L.R. 447.

#### Factors for consideration

In determining whether a fiduciary or confidential relationship exists factors to be taken into consideration are degree of kinship, if any, disparity in age, health and mental condition, and relative education and business experience of parties, and the like—*Stephenson v. Kulchek*, 101 N.E.2d 642, 410 Ill. 139—*Kester v. Crilly*, 91 N.E.2d 419, 405 Ill. 425.

3. Ill.—*Englestein v. Mints*, 177 N.E. 716, 345 Ill. 48.  
65 C.J. p. 483 note 76.

4. Minn.—*W. H. Fosbury Co. v. Mercantile Trust Co.*, 220 N.W. 551, 175 Minn. 115.

5. Ill.—*Skidmore v. Johnson*, 79 N.E.2d 762, 334 Ill.App. 317.

Pa.—*Corpus Juris* quoted in *Stewart v. Hooks*, 94 A.2d 766, 769, 372 Pa. 542.

- SD—*Jacger v. Sechser*, 270 N.W. 531, 65 S.D. 38.  
65 C.J. p. 483 note 70.

#### Special trust and confidence

Where there is no proof of an actual confidential relationship between grantor and grantee of realty to serve as basis on which equity will raise a constructive trust if the relationship was abused by grantee, and law looks only to a presumption of fraud arising out of relationship between grantor and grantee, relationship must be one where there is ordinarily a special trust and confidence and likelihood of exercise of personal influence and control such that one would expect of the other fair dealing and mutual consideration.—*Worobey v. Sibeth*, 71 A.2d 80, 136 Conn. 352.

#### Preexisting relationship

The relationship necessary to the establishment of a constructive trust must be a preexisting relationship of confidence such as that existing between husband and wife, father and son, principal and agent, attorney and client, or the implied obligation of a trustee—*Halper v. Homestead Bldg. & Loan Ass'n*, 59 N.Y.S.2d 689, affirmed 59 N.Y.S.2d 695, 269 App. Div. 1044.

6. Ga.—*Watkins v. Mertz*, 62 S.E.2d 744, 83 Ga.App. 115.

Mass.—*Yamins v. Zeltz*, 76 N.E.2d 769, 323 Mass. 268—*Cranwell v. Oglesby*, 12 N.E.2d 81, 299 Mass. 148.

Vt.—*W. W. Bailey & Co. v. Gorton Mfg. Co.*, 34 A.2d 178, 113 Vt. 309.

7. Cal.—*Ruhl v. Mott*, 53 P. 304, 120 Cal. 668.

Mo.—*Lewis v. Ziegler*, 16 S.W. 862, 185 Mo. 604.

More respect for judgment of another or trust in his character is insufficient to establish a fiduciary relation, but there must be such circumstances as indicate just foundation for belief that, in giving advice or presenting arguments, one is acting, not in his own behalf, but in interests of the other—*Cranwell v. Oglesby*, 12 N.E.2d 81, 299 Mass. 148.

8. Ill.—*Guffey v. Washburn*, 46 N.E.2d 971, 382 Ill. 376—*Rubin v. Midlinsky*, 162 N.E. 217, 321 Ill. 436—*Duval v. Chicago Trust Co.*, 3 N.E.2d 159, 284 Ill.App. 617.

Pa.—*Kahan v. Greenfield*, 67 A.2d 567, 165 Pa.Super. 148.

Tex.—*Corpus Juris* cited in *Pitz-Gerald v. Hull*, 237 S.W.2d 256, 271, 150 Tex. 39.

#### Closeness of friendship

The fact that plaintiff's wife and defendant had been close friends since girlhood, had corresponded, vis-

ited back and forth, and plaintiff's wife considered defendant the most reliable friend she had and had confidence in defendant did not establish a confidential or fiduciary relationship so as to warrant a conclusion that defendant was constructive trustee of her interest in a joint tenancy deed executed by plaintiff's wife to plaintiff and defendant after defendant promised to provide for plaintiff under certain circumstances—*Ampuero v. Luce*, 157 P.2d 899, 68 Cal. App.2d 811.

9. Cal.—*Dalakis v. Paras*, 194 P.2d 736, 86 Cal.App.2d 243.

#### Degree of intimacy

While the degree of intimacy requisite to establishment of a constructive trust is found as a general rule only where the parties are related by affinity, consanguinity, or contract, it may exist where the bond between them is merely one of friendship—*Coombs v. Minor*, 141 P.2d 491, 60 Cal.App.2d 645.

#### Advisory business relationship

If parties be friends and grantor reposes confidence in grantee, especially if in addition there exist an advisory business relationship and the one reposing confidence be of advanced age, an implied trust may result—*Adams v. Bloom*, 142 P.2d 775, 61 Cal.App.2d 315.

#### Fraternal relation

When two members of same fraternal order deal with each other and one accepts as true the other's representations, into which but for fraternal relation he would have made inquiry, law will protect him in his trust—*Lucas v. Asociacion Protectora Uniao Madeirense Do Estado Da California*, 143 P.2d 53, 61 Cal. App.2d 344.

10. Ill.—*People ex rel. Barrett v. Central Republic Trust Co.*, 20 N.E.2d 999, 300 Ill.App. 297.

another, so as to impose on the latter any duties or obligations as a fiduciary with respect thereto.<sup>11</sup> Where, however, one by implication invites the bestowal of confidence, a breach thereof may give rise to a constructive trust.<sup>12</sup>

### c. Particular Relationships as Confidential and as Raising Trust

- (1) In general
- (2) Family relationships
- (3) Principal and agent

#### (1) In General

Persons in confidential or fiduciary relations, within

the meaning of the rule that a constructive trust arises from the abuse or violation of such a relation ordinarily include those standing toward one another in the relation of attorney and client, partners, guardian and ward, or executor or administrator and heir, beneficiary, or distributee.

Persons in confidential or fiduciary relations, within the meaning of the rule that a constructive trust arises from the abuse or violation of such a relation, ordinarily include those standing toward one another in relation of attorney and client,<sup>13</sup> or those whose relation to each other is that of joint adventurers,<sup>14</sup> and partners;<sup>15</sup> the rule is equally appli-

11. N.Y.—*M. L. Stewart & Co. v. Marcum*, 207 N.Y.S. 685, 124 Misc. 86.

12. N.Y.—*M. L. Stewart & Co. v. Marcus*, *supra*.  
65 C.J. p 483 note 79.

13. Cal.—*Kornbau v. Evans*, 152 P. 2d 651, 68 Cal App 2d 677.

Ill.—*Irmeyer v. Irmeyer*, 104 N.E.2d 293, 411 Ill. 454—*Kester v. Crilly*, 91 N.E.2d 419, 405 Ill. 425—*Pinn v. Monk*, 85 N.E.2d 701, 403 Ill. 167—*Clark v. Clark*, 76 N.E.2d 446, 398 Ill. 592—*Vrooman v. Hawbaker*, 56 N.E.2d 623, 387 Ill. 428.

Md.—*Carter v. Abramo*, 83 A.2d 546, 201 Md. 339.

Neb.—*Zimmer v. Gudmundsen*, 5 N.W.2d 707, 142 Neb. 260.

Okl.—*Thomas v. Wilson*, 185 P.2d 473, 199 Okl. 308.

Pa.—*Ringer v. Finfrock*, 17 A.2d 348, 340 Pa. 458—*Metzger v. Metzger*, 14 A.2d 285, 338 Pa. 564, 129 A.L.R. 683.

Tex.—*Smith v. Dean*, Civ.App., 340 S.W.2d 789.

65 C.J. p 484 note 81.

#### Agreement as to payment

Where complainants, negotiating with defendant, agreed to pay defendant's attorney, defendant's attorney stood in confidential relation to complainants, requiring him to deal fairly and frankly.—*Forman v. Grant Lunch Corporation*, 166 A. 219, 113 N.J.Eq. 175.

#### Constructive trust held raised

- (1) In general.

Ill.—*Vrooman v. Hawbaker*, 56 N.E.2d 623, 387 Ill. 428.

N.J.—*Schenck v. Davis*, 85 A.2d 681, 134 N.J.Eq. 375.

Okl.—*Gragg v. Pruitt*, 65 P.2d 994, 179 Okl. 369.

(2) Where attorney is guilty of misconduct in revealing confidential information obtained in such capacity from client, attorney may be declared trustee ex maleficio for any advantage or profit thus obtained at client's expense.—*Zeiden v. Oliphant*, 54 N.Y.S.2d 27.

(3) Attorney inducing client to execute deeds whereby attorney ac-

quired, without consideration, title to client's lands, was a trustee, holding title for client.—*Federal Trust Co v. Baxter*, 257 N.W. 368, 128 Neb. 1—*Federal Trust Co v. Ireland*, 240 N.W. 707, 124 Neb. 369.

#### Circumstances held not to warrant constructive trust

- (1) In general.

U.S.—*Buckley v. Altheimer*, C.C.A. Ill., 152 F.2d 502.

Md.—*Miller v. Miller*, 53 A.2d 573, 188 Md. 567.

Pa.—*Dravosburg Land Co. v. Scott*, 16 A.2d 415, 340 Pa. 280.

Tex.—*Easley v. Brookline Trust Co.*, Civ.App., 256 S.W.2d 983.

(2) The failure of attorney, who is gratuitous custodian of fund delivered to attorney to hold for client and to pay out in such amounts and at such times as client should demand, to set up a separate fund for client's account and to maintain a separate and orderly record of disbursements, was not grounds for constructing a trust, where such irregularities did not result in loss to client or client's estate.—*Brunner v. Edwards*, 12 A.2d 36, 337 Pa. 513.

#### Client held trustee for attorney

Cal.—*Harvey v. Ballagh*, 101 P.2d 147, 38 Cal.App.2d 348.

65 C.J. p 484 note 81 [c].

14. Cal.—*Sly v. Abbott*, 264 P. 507, 89 Cal.App. 209.

#### Unjust enrichment

Equity may effect complete justice between parties to joint adventure or partnership, notwithstanding statute of frauds, by impressing constructive trust for benefit of joint adventurers and to enforce restitution.—*Dayvaust v. Baruch Oil Corp.*, C.A. Wyo., 211 F.2d 335.

#### Purchase of property

The trust arising from joint adventurer's purchase of property with funds arising from joint adventure without accounting to other adventurers for their part thereof is a constructive trust or a trust ex male-

ficio.—*Collins v. Griffith*, Tex Civ App., 125 S.W.2d 119, error refused.

15. Cal.—*Rishwain v. Smith*, 175 P. 2d 555, 77 Cal App 2d 524.

Ohio.—*Kuck v. Summers*, App., 100 N.E.2d 68.

Tex.—*Collins v. Griffith*, Civ.App., 105 S.W.2d 895.

65 C.J. p 484 note 82.

#### Manner of acquiring title

In suit to establish constructive trust against partner, fact that manner in which partner had acquired title possessed many characteristics of resulting trust would not prevent raising of constructive trust nor would fact that breach of trust and confidence could also be viewed as breach of contract be material.—*Ridgely v. Central Pipe Line Co.*, 97 N.E.2d 817, 408 Ill. 46.

#### Transactions held to give rise to constructive trust

- (1) In general.

Conn.—*Johbert v. Weiner*, 81 A.2d 115, 137 Conn. 668.

Hawaii.—*Watumull v. Ettinger*, 39 Hawaii 185.

Okl.—*Underwood v. Pinson*, 263 P.2d 418.

Tex.—*McLean v. Hargrove*, 162 S.W. 2d 954, 139 Tex. 236—*Wampler v. Harrington*, Civ.App., 261 S.W.2d 883, error refused no reversible error—*Curtis v. McKain*, Civ.App., 94 S.W.2d 829.

(2) Where one partner wrongfully takes partnership funds and uses them to buy or improve realty, co-partners may charge the realty with a constructive trust in favor of partnership to the extent of the partnership funds used in its purchase or improvement.

N.C.—*McGurk v. Moore*, 67 S.E.2d 53, 234 N.C. 248.

Tex.—*Collins v. Griffith*, Civ.App., 105 S.W.2d 895.

(3) Where defendant took title to land in his own name as agent for his son, who was engaged in a partnership with plaintiff, such land was held on a constructive trust for the partnership.—*Nelson v. Bailey*, 22 N.E.2d 116, 303 Mass. 522.

cable to persons such as guardian and ward,<sup>16</sup> or executor or administrator and heir, beneficiary, or distributee.<sup>17</sup> On the other hand, a fiduciary relation-

ship ordinarily does not exist between debtor and creditor,<sup>18</sup> and no such relation arises from the mere transfer by one person to another of property

### Circumstances held not to warrant constructive trust

#### (1) In general.

U.S.—*In re Tate-Jones & Co.*, D.C.Pa., 85 F.Supp. 971.

Ariz.—*DeSantis v. Dixon*, 236 P.2d 38, 72 Ariz. 345.

Cal.—*Bogan v. Wiley*, 196 P.2d 621, reheard 302 P.2d 824, 90 Cal.App.2d 288.

Mo.—*Purvis v. Hardin*, 122 S.W.2d 936, 343 Mo. 652.

(2) Where mineral leases which had been terminated as to mining partnership by reason of failure of partnership to pay delay rentals were reacquired by one member of partnership after interest of other member had been sold to plaintiff, constructive trust on such lease interest could not be impressed in favor of plaintiff on theory that loss to partnership of leases had been result of breach of fiduciary duty by other partner, since constructive trust will not be impressed in favor of one partner when property involved was never at any time held by them jointly or as partnership assets.—*Gilroy v. White Eagle Oil Co.*, D.C.Okla., 104 F.Supp. 247, affirmed, C.A., 201 F.2d 113.

16. Ill.—*Bremer v. Bremer*, 104 N.E.2d 299, 411 Ill. 454.—*Kester v. O'Leary*, 91 N.E.2d 419, 405 Ill. 425.—*Finn v. Monk*, 85 N.E.2d 701, 403 Ill. 167.—*Clark v. Clark*, 76 N.E.2d 446, 398 Ill. 592.

Md.—*Carter v. Abramo*, 93 A.2d 546, 201 Md. 339.

Mo.—*Corpus Juris cited in Kerber v. Rowe*, 156 S.W.2d 925, 928, 248 Mo. 1125.

Ohio.—*Kuck v. Sommers*, App., 100 N.E.2d 68.

Pa.—*Ringer v. Flinck*, 17 A.2d 348, 340 Pa. 458.—*Metzger v. Metzger*, 14 A.2d 285, 338 Pa. 664, 129 A.L.R. 683.

65 C.J. p. 485 note 84.

### Transactions held to give rise to constructive trust

#### (1) In general.

Iowa.—*In re Munsell's Guardianship*, 31 N.W.2d 360, 239 Iowa 307.

(2) Where grandmother, who was guardian de facto of her grandchildren and had assumed management and control of their property, purchased at tax sale property formerly in grandchildren's estate, she would be decreed to hold land as trustee under constructive trust for benefit of her grandchildren.—*Maish v. Valenzuela*, 229 P.2d 248, 71 Ariz. 426, 25 A.L.R.2d 747.

(3) Where probate court on petition of guardian of minor ward ordered sale of land purchased with ward's funds by former guardian who

took title to land in his own name, purchaser of land at sale was entitled to assert existence of constructive trust in land in favor of ward as against claims to land made by heirs of former guardian.—*Nelson v. Wood*, 137 S.W.2d 929, 199 Ark. 1019.

#### Retention of possession

Although relationship of guardian and ward ceases when ward becomes of age, if guardian then has possession of property of his ward and continues in possession without accounting or payment, there results at least a constructive trust which continues as long as guardian continues to hold such possession of property.—*In re Walls' Guardianship*, 38 N.Y.S.2d 879, 179 Misc. 924.

17. Ohio.—*Kuck v. Sommers*, App., 100 N.E.2d 68.

Tex.—*Kreis v. Kreis*, Civ.App., 57 S.W.2d 1107, error dismissed.

65 C.J. p. 485 note 85.

#### Executor de son tort

Although every trust in invitum does not relate to estate of deceased person, every executor de son tort is a trustee in invitum.—*Johnston v. Johnston*, 55 So.2d 838, 256 Ala. 455.

#### Constructive trust held to arise

##### (1) In general

U.S.—*Bruun v. Hanson*, C.C.A. Idaho, 103 P.2d 685, certiorari denied.

*Hanson v. Bruun*, 60 S.Ct. 86, 308 U.S. 571, 84 L.Ed. 479, mandate conformed to, D.C., 30 F.Supp. 602.

Cal.—*Cardozo v. Bank of America Nat. Trust & Sav. Ass'n*, 254 P.2d 949, 116 Cal.App.2d 833.—*Rosenbaum v. Tobias' Estate*, 130 P.2d 215, 55 Cal.App.2d 39.

Mass.—*Locke v. Old Colony Trust Co.*, 193 N.E. 892, 289 Mass. 245.

N.C.—*Creech v. Wilder*, 193 S.E. 281, 212 N.C. 162.

Ohio.—*Rudolph v. Schmalstieg*, 4 Ohio Supp. 58.

Wash.—*Ryan v. Plath*, 140 P.2d 968, 18 Wash.2d 839.

W.Va.—*Harrison v. Miller*, 21 S.E.2d 674, 124 W.Va. 550.

(2) Where sale of realty was made for administrator, pursuant to administration of estate, and on administrator's petition, equity would not permit administrator to acquire title to land free from trust imposed on him for benefit of heirs and creditors of the estate, even though sale to administrator was actually made by commissioner appointed by court.—*Davis v. Jenkins*, 72 S.E.2d 673, 236 N.C. 283, rehearing denied and opinion supplemented 73 S.E.2d 780, 236 N.C. 767.

(3) An administrator's failure to give decedent's heirs notice of administrator's sale, at which he ex-

pects to purchase personal property of estate, and his purchase thereof for much less than its real and appraised value without competitive bidding, furnished decisive evidence of fraud entitling heirs to impress trust on title to such property for their benefit.—*Meade v. Vande Voorde*, 299 N.W. 175, 139 Neb. 827, 137 A.L.R. 554.

(4) Fact that deceased executrix, who had been given life estate under will with power to sell, convey, or expend and who had procured distribution of entire estate to herself, could have, under terms of will, consumed entire estate could not affect establishment of trust in assets of testator's estate not consumed by executrix in action by remainderman.—*Cardozo v. Bank of America Nat. Trust & Sav. Ass'n*, 254 P.2d 949, 116 Cal.App.2d 833.

(5) The fact that encumbered estate property surrendered by administrator to lienholder was not subsequently purchased by administrator, but was sold by lienholder to a corporation, did not vitiate the establishment of a constructive trust in favor of the heirs, where administrator was at all times general manager of the corporation and held a majority of its stock.—*Ryan v. Plath*, 140 P.2d 968, 18 Wash.2d 839.

#### Trust not automatically raised

Estate property purchased by administrator, directly or indirectly, is not automatically impressed with a constructive trust in favor of beneficiaries of estate.—*McCabe v. Cambiano*, Tex.Civ.App., 212 S.W.2d 237.

#### Statute prohibiting purchase

Under statute providing that no administrator shall become purchaser of estate property, either directly or indirectly, and that such sale shall be declared void and administrator shall hold property in trust for estate, proof required is merely to show that title to property which had been sold by the administrator came into the administrator while he was acting as such.—*Wadsworth v. Cole*, Tex.Civ.App., 265 S.W.2d 628.

#### Option

Where administrator, in course of collecting assets of estate, is required to sell land of third persons under a judgment or other process to enforce payment of debts due estate, and administrator bids in land so sold, it is optional with heirs to permit him to hold land for his individual benefit or to require him to account to estate for its value.—*Thompson v. Fraley*, 130 S.W.2d 793, 279 Ky. 323.

18. U.S.—*Continental Cas. Co. v. Powell*, C.C.A.Va., 83 F.2d 652.



as security for a debt or obligation.<sup>19</sup> The mere fact that the same persons are stockholders and officers of two corporations does not give rise to a confidential relation between such corporations.<sup>20</sup>

Various other relationships have been held to be<sup>21</sup> and not to be<sup>22</sup> confidential or fiduciary so as to warrant the impressment of a constructive trust.

Ill.—Guffey v. Washburn, 46 N.E.2d 971, 382 Ill. 376—Anchor Realty & Inv. Co. v. Rafferty, 32 N.E.2d 394, 308 Ill. App. 484.

#### Inclination of courts

On the question of constructive trust, courts are inclined to deny existence of a confidential relationship in cases of mortgagor and mortgagee, pledgor and pledgee, applicant for a loan, etc.—Carpenter & Carpenter v. Kingham, 109 P.2d 463, 56 Wyo. 314, opinion modified on other grounds and rehearing denied 110 P.2d 824, 56 Wyo. 314.

19. Ga.—Brown v. Anderson, 30 S. E. 412, 104 Ga. 30.

20. Mo.—Vogelsong v. St. Louis Wood Plaster Plaster Co., 126 S.W. 804, 147 Mo. App. 578.

21. U.S.—Oldland v. Gray, C.A. Colo., 179 F.2d 468, certiorari denied 70 S.Ct. 803, 339 U.S. 948, 94 L.Ed. 1362—Grand Trunk Western R. Co. v. Chicago & Western Indiana R. Co., C.C.A. Ill., 131 F.2d 215.

Cal.—Coombs v. Minor, 141 P.2d 491, 60 Cal. App.2d 645.

Ill.—Greene v. Terry, 46 N.E.2d 90, 382 Ill. 34—Weatherhead v. Bertha, 86 N.E.2d 889, 338 Ill. App. 202.

Kan.—Miller v. Henderson, 33 P.2d 1098, 110 Kan. 46.

Mass.—Warren v. Sherman, 93 N.E.2d 612, 326 Mass. 290—City of Boston v. Santosuosso, 30 N.E.2d 278, 307 Mass. 302.

Miss.—Risk v. Fisher, 19 So.2d 484, 197 Miss. 155.

N.Y.—Muller v. Sobol, 97 N.Y.S.2d 905, 277 App. Div. 881, reargument and appeal denied 99 N.Y.S.2d 767, 277 App. Div. 951.

Ohio.—Steiner v. Feecy, 50 N.E.2d 617, 72 Ohio App. 18.

Pa.—Columbia Gas Co. v. Westmoreland County, 74 A.2d 86, 365 Pa. 271.

R.I.—Nelson v. Dodge, 68 A.2d 51, 76 R.I. 1, 14 A.L.R.2d 638, 65 C.J. p. 487 note 93.

#### Collecting agent

As between a vendor and purchaser there is no fiduciary relation, but where the purchaser agrees to act as collecting agent for the vendor in collecting rents and applying them on purchase price, a fiduciary relation arises, and equity will raise a constructive trust.—Allen v. Borlin, 84 N.E.2d 575, 336 Ill. App. 460.

A majority stockholder who, after dissolution of corporation, converts the corporation's property and assets to his own use, becomes in equity a trustee for the minority stockholders and is under a duty to account.—Dean v. Kellogg, 64 N.E.2d 551, 327

Ill. App. 520, affirmed 68 N.E.2d 898, 394 Ill. 495.

**Preferred stockholders** could not avail themselves of statutory privilege of litigating in corporate reorganization proceeding for interest of a class, and then shake off self-assumed responsibilities to others by simple announcement that henceforth they would trade in rights of others for their own aggrandizement.—Young v. Higbee Co., Ohio, 65 S.Ct. 594, 324 U.S. 204, 89 L.Ed. 890.

22. U.S.—Cooke v. U. S., D.C. Hawaii, 115 F.Supp. 830, motion denied, C.A., U. S. v. Cooke, 215 F.2d 528—In re Higbee Co., D.C. Ohio, 50 F.Supp. 114—Penn. Mut. Life Ins. Co. of Philadelphia, Pa., v. Miller, D.C. Mo., 32 F.Supp. 206, appeal dismissed, C.C.A., O'Brien v. Miller, 116 F.2d 499, two cases, and O'Brien v. Northwestern Mut. Life Ins. Co., 116 F.2d 499.

Cal.—Neet v. Holmes, 154 P.2d 854, 25 Cal.2d 447.

Colo.—Santa Anita Corp. v. Walker, 106 P.2d 459, 106 Colo. 465.

Conn.—Warobey v. Sibeth, 71 A.2d 80, 136 Conn. 352.

Fla.—Metcalf v. Leedy, Wheeler & Co., 191 So. 690, 140 Fla. 149.

Ill.—Kienky v. De Swarte, 82 N.E.2d 168, 335 Ill. App. 435—Skidmore v. Johnson, 79 N.E.2d 762, 334 Ill. App. 317—Anchor Realty & Inv. Co. v. Rafferty, 32 N.E.2d 394, 308 Ill. App. 484.

Mass.—Fumer v. Luce, 39 N.E.2d 961, 310 Mass. 789—Cranwell v. Oglesby, 12 N.E.2d 81, 299 Mass. 148.

Mo.—Orrick v. Heberer, App., 124 S.W.2d 661.

Or.—Portland Trust & Sav. Bank v. Lincoln Realty Co., 170 P.2d 568, 180 Or. 96.

Tex.—Warner v. Winn, 197 S.W.2d 338, 145 Tex. 302.

Wash.—Robbins v. Huntley Cattle Co., 100 P.2d 386, 3 Wash.2d 203—Walker v. Wagner, 77 P.2d 376, 194 Wash. 119.

Wyo.—Sharples Corp. v. Sinclair Wyo. Oil Co., 167 P.2d 29, 62 Wyo. 311, rehearing denied 168 P.2d 565, 62 Wyo. 341—Carpenter & Carpenter v. Kingham, 109 P.2d 464, 56 Wyo. 314, modified on other grounds and rehearing denied 110 P.2d 824, 56 Wyo. 314.

65 C.J. p. 487 note 94.

#### Particular relationships

(1) A confidential relation does not exist as a matter of law between a real estate agent and a client.—In re Morris's Estate, 40 A.2d 907, 156 Pa. Super. 394.

(2) An oil company which held oil and gas lease under which it was required to pay royalties stood in no trust relationship to lessor or to successor in interest of assignee of lessor as regarded such royalty payments.—Carter Oil Co. v. Crude Oil Co., C.A. Okl., 201 F.2d 547.

(3) Trust relationship, with its fiduciary obligations, is not imposed by operation of law on any legal life tenant in favor of remainderman as beneficiary.—Cooke v. U. S., D.C. Hawaii, 115 F.Supp. 830, motion denied, C.A., U. S. v. Cooke, 215 F.2d 528.

(4) Where a loan company had contemplated the purchase of realty prior to time that plaintiff informed company of his intention to purchase the property and made application for loan thereon, which application was rejected, and the property subsequently acquired by the company, no such confidential relationship existed between plaintiff and company which would give rise to the creation of a constructive trust.—Halper v. Homestead Bldg. & Loan Ass'n, 59 N.Y.S.2d 688, affirmed 59 N.Y.S.2d 695, 269 App. Div. 1044.

(5) Where joint tenants did not finally consummate their contract whereby one of them was to prosecute suit in his name to cancel trustee's deed of their land and convey undivided half of land recovered to his co-tenant, so that no fiduciary relation arose between them, such co-tenant's subsequent purchase of land from purchaser at trustee's sale created no constructive trust obligating him to account to other tenant for interest in land and award him undivided half interest therein.—Corn v. First Texas Joint Stock Land Bank of Houston, Tex. Civ. App., 131 S.W.2d 762, error refused.

(6) Purchasers in possession of lands under land contract, who bought the lands from the state which acquired title for nonpayment of taxes which vendor represented had been paid, did not hold lands in trust for vendor on theory of existence of confidential relation.—Ellison v. Hewitt, 9 N.W.2d 573, 305 Mich. 349.

(7) Application to lender for loan created no fiduciary relationship simply because applicant was led to believe loan would be made to him of amount sufficient to pay a certain sum which vendor had agreed to accept in payment of balance on land contract, so as to warrant declaration of constructive trust where proposed lender bought land contract

## (2) Family Relationships

Family relationship ordinarily, but not always, is sufficient to impose fiduciary obligations warranting the raising of a constructive trust in case of abuse or violation of the confidential relation.

Persons in family relationships,<sup>23</sup> such as those

of husband and wife,<sup>24</sup> or those of parent and child,<sup>25</sup> ordinarily are to be regarded as in a confidential relationship within the meaning of the rule that a constructive trust arises from the abuse or violation of such a relation, and particular transactions between husband and wife,<sup>26</sup> and parent and

from vendor—*Smith v. Harwell*, 136 S.W.2d 172, 199 Ark. 757.

23. *S.C. v. All v. Prillman*, 20 S.E.2d 741, 200 S.C. 279, 159 A.L.R. 981.

**Close kinship**

Where confidence was induced by close kinship, its abuse will support a constructive trust—*Moses v. Moses*, 53 A.2d 805, 140 N.J.Eq. 575, 173 A.L.R. 273.

**Oral trust concerning land**

The confidential relation, which is necessary for imposition of constructive trust on transferee who refuses to perform an oral trust or agreement concerning land, may exist where, because of family relationship transferor is in fact accustomed to be guided by judgment or advice of transferee or is justified in placing confidence in belief that transferee will act in interest of transferor—*Basman v. Frank*, Mo., 250 S.W.2d 589.

24. *Cal. v. Huber v. Huber*, 167 P.2d 708, 27 Cal.2d 784—*Piper v. Somerville*, 17 P.2d 1027, 128 Cal.App. 667.

Ill.—*Mauriceau v. Haugen*, 56 N.E.2d 367, 387 Ill. 186.

Minn.—*Knox v. Knox*, 25 N.W.2d 225, 222 Minn. 477.

N.J.—*Stretch v. Watson*, 69 A.2d 596, 6 N.J.Super. 456, affirmed in part and reversed in part on other grounds 74 A.2d 597, 5 N.J. 268.

N.D.—*Corpus Juris* quoted in *Barker v. Barker*, 27 N.W.2d 576, 581, 75 N.D. 253, 171 A.L.R. 447.

Or.—*Hanscom v. Hanscom*, 208 P.2d 330, 186 Or. 541.

Pa.—*Klein v. Zodi*, Com.Pl., 29 North Co. 84.

65 C.J. p. 486 note 86.

**Absence of fraud**

Fact that deed from wife to husband was not obtained by fraud was not controlling in determining whether a constructive trust arose, in view of confidential relations existing between the parties—*Dawson v. McNaney*, 223 P.2d 907, 71 Ariz. 79.

**Conduct in procuring deed**

Grantor's active conduct in procuring deed may be important element in determining existence of fraudulent intent warranting declaration of constructive trust for another, particularly when transaction is between husband and wife—*Greenly v. Greenly*, 49 A.2d 126, 29 Del.Ch. 297.

A betrothal of marriage assumed between parties created as between them a relation of trust and confi-

dence exacting utmost good faith in their dealings with each other—*Hendley v. Darring*, 31 So.2d 317, 249 Ala. 381.

**Divorced persons**

Confidential relations may exist between divorced persons with respect to matters relating to the maintenance of, and provision for, their minor children—*Barker v. Barker*, 27 N.W.2d 576, 75 N.D. 253, 171 A.L.R. 447.

25. *Cal. v. Edwards v. Edwards*, 202 P.2d 589, 90 Cal.App.2d 33.

Ill.—*Oster v. Oster*, 111 N.E.2d 319, 414 Ill. 470—*Stephenson v. Kulchek*, 101 N.E.2d 542, 410 Ill. 139.

Miss.—*Corpus Juris* cited in *Stovall v. Stovall*, 67 So.2d 391, 405, 218 Miss. 364.

Mo.—*Lidander v. Bobbitt*, 111 S.W.2d 72.

N.J.—*Stretch v. Watson*, 69 A.2d 596, 6 N.J.Super. 456, affirmed in part and reversed in part on other grounds 74 A.2d 597, 5 N.J. 268.

N.D.—*McDonald v. Miller*, 16 N.W.2d 270, 73 N.D. 474, 156 A.L.R. 1328.

Pa.—*Tiggers v. Propeit*, 50 Pa. Dist. & Co. 695.

Wis.—*Schofield v. Rideout*, 230 N.W. 155, 233 Wis. 550, 133 A.L.R. 834.

65 C.J. p. 486 note 87.

**To whom conveyance made**

Where conveyance is from child to parent, it will ordinarily be presumed that a confidential relation exists, but, where conveyance is from parent to child, question is one of fact to be proved, except where parent relies heavily on child for care and protection or for guidance in business affairs and child becomes dominant party—*Grimes v. Grimes*, 40 A.2d 58, 184 Md. 59.

Equity will scrutinize closely a conveyance without consideration, other than love and affection, from an elderly parent physically handicapped and with little education and business experience to one of her large family of children, there appearing no reason for discrimination between the children—*Ismalia Haahaa Akiona Hee v. Kahiwa Hee* (Chung, 39 Hawaii 364).

26. *Cal. v. Sellman v. Sellman*, 185 P.2d 846, 82 Cal.App.2d 192.

Fla.—*LeCain v. Becker*, 58 So.2d 537.

Minn.—*Crowley v. Crowley*, 18 N.W.2d 40, 219 Minn. 341.

Mo.—*Thuman v. Thuman*, 218 S.W.2d 580.

N.H.—*Ibey v. Ibey*, 43 A.2d 157, 93 N.H. 434.

N.J.—*Moses v. Moses*, 53 A.2d 805, 140 N.J.Eq. 575, 173 A.L.R. 273—*Minogue v. Lipman*, 96 A.2d 426, 35 N.J.Super. 376, affirmed 100 A.2d 684, 28 N.J.Super. 330—*Callahan v. Federal Trust Co.*, 8 A.2d 347, 126 N.J.Eq. 811.

N.Y.—*Pisarek v. Pisarek*, 37 N.Y.S.2d 228, 264 App. Div. 386—*Marks v. Marks*, 294 N.Y.S. 70, 250 App. Div. 289—*In re Yafilomis' Estate*, 125 N.Y.S.2d 363, 204 Misc. 755—*In re Wechsler's Estate*, 13 N.Y.S.2d 940, 171 Misc. 738—*Klein v. Klein*, 112 N.Y.S.2d 546—*Petty v. Petty*, 83 N.Y.S.2d 171.

N.D.—*Barker v. Barker*, 27 N.W.2d 576, 75 N.D. 253, 171 A.L.R. 447.

Or.—*Hanscom v. Hanscom*, 208 P.2d 330, 186 Or. 541.

Pa.—*Wells v. Brown*, 61 Pa. Dist. & Co. 511, 63 Montg. Co. 310.

**Circumstances giving rise to constructive trust**

(1) Where husband had purchased property under contract for deed and subsequently assigned contract for deed to his ex-wife but procured a deed from vendor to himself, husband became trustee of a constructive trust—*Omwake v. Omwake*, Fla., 70 So.2d 565.

(2) Where name of wife as grantee was inserted in the deed by agent of husband purchaser on insistence by wife, without consent and contrary to intention of husband who was purchaser of property and who paid the purchase price, wife held property as a constructive trustee for her husband—*McConnell v. Dixon*, 233 P.2d 877, 68 Wyo. 301.

(3) Where husband purchased property in wife's name and wife recognized husband's ownership and husband exercised complete domain over property, husband was entitled to impress property with a constructive trust as against claims of wife's heir—*Hartkopf v. Hesse*, 49 N.Y.S.2d 162.

**Separate property**

(1) Whenever the husband acquires the separate property of his wife as his own, with or without her consent, he holds it in trust for her benefit, in the absence of any direct evidence that she intended to make a gift of it to him—*Allen v. Allen*, 31 S.E.2d 453, 198 Ga. 269.

(2) Under the statute providing that personality of wife which husband purports to reduce to his possession may not become his property except with wife's written assent,

child,<sup>27</sup> have, accordingly, been held to give rise to a constructive trust. Likewise, a confidential or fiduciary relation may exist between brothers, sisters, or brothers and sisters,<sup>28</sup> so as to raise a constructive trust with respect to transactions between them,<sup>29</sup> and other diverse family relationships have in particular circumstances been held confidential in

nature so as to warrant the establishment of a constructive trust.<sup>30</sup>

It has been held, however, that the mere fact of family relationship, kinship, or consanguinity, does not necessarily produce a confidential relationship, the abuse of which gives rise to a constructive trust,<sup>31</sup> as in the case of parent and child,<sup>32</sup> husband

personality which the wife acquires during coverture remains her own, and even though the husband attempts to reduce to his possession, he acquires no title thereto but instead is constituted a trustee for his wife, unless he obtains the property with his wife's express written assent that he may have full authority to sell, encumber, or otherwise dispose of for his own use and benefit.—*Hax v. O'Donnell*, 117 S.W.2d 667, 234 Mo App. 636

**Antenuptial contracts** in regulation of the interest that husband and wife shall have in the property of the other then owned or subsequently to be acquired are favored, and will be enforced by imposing a trust on the property.—*Newton v. Pickell*, 269 P.2d 508, 201 Or. 225.

27. U.S.—*American Bonding Co. of Baltimore v. Hord*, C.C.A. Ark., 98 F.2d 350.  
Ark.—*Dew v. Requa*, 239 S.W.2d 603, 218 Ark. 911.  
Cal.—*Hatch v. Penner*, 113 P.2d 295, 44 Cal App.2d 874.  
Iowa.—*McGuffee v. McGuffee*, 58 N.W.2d 357, 244 Iowa 879.  
Md.—*Ross v. Smith*, 56 A.2d 800, 189 Md. 611—*Rice v. Rice*, 41 A.2d 371, 184 Md. 403.  
Mo.—*Lifland v. Bobbitt*, 111 S.W.2d 72.  
Pa.—*Sollwoda v. Kobielski*, Com.Pl., 26 Erie Co. 295—*Burns v. Litvin*, Com.Pl., 41 Lack.Jur. 117.  
R.I.—*Oldham v. Oldham*, 192 A. 758, 58 R.I. 268.

#### Blank deeds

Where blank deeds were completed and delivered to son by mother under implied authority from father for purpose of having son give certain mortgage but not to vest beneficial interest in son who paid no consideration, son was constructive trustee and father was entitled to conveyance, subject to the mortgage, on condition precedent that father reimburse son for expenditures which son made on the property believing in good faith that he was the legal owner.—*Bechtel v. Bechtel*, 91 P.2d 529, 162 Or. 211.

28. N.Y.—*Wallace v. First Trust Co. of Albany*, 295 N.Y.S. 769, 251 App. Div. 253—*Berwin v. Newman*, 85 N.Y.S.2d 568, affirmed 95 N.Y.S.2d 596, 276 App.Div. 994.  
65 C.J. p. 486 note 88.

29. Neb.—*Hox v. Hox*, 21 N.W.2d 868, 146 Neb. 826—*O'Shea v. O'Shea*, 11 N.W.2d 540, 143 Neb. 843.  
Pa.—*Lincavage v. Gavenonis*, Com.Pl., 35 Luz Leg. Reg. 307.  
Tenn.—*Finn v. Schlicking*, 175 S.W.2d 37, 26 Tenn.App. 608.  
Tex.—*Martin v. Martin*, Civ.App., 130 S.W.2d 863, error dismissed, judgment correct.

#### Failure to deliver deed

Where sister sold realty to plaintiff and plaintiff's husband as tenants by the entirety who thereafter enjoyed possession for over twenty-four years in open, adverse possession under claim of title, and improved the property, but sister never delivered a deed confirming the conveyance and so remained title owner, constructive trust between parties in confidential relation with each other arose to prevent unjust enrichment of sister, and protection of plaintiff's equities thereunder was not barred by statute of frauds.—*Rogers v. Rogers*, 22 N.Y.S.2d 659, 174 Misc. 841, motion denied 27 N.Y.S.2d 1008, affirmed 28 N.Y.S.2d 743, 282 App.Div. 798.

#### Purchase from mortgagee

Where defendant agreed to prevent foreclosure sale of mortgaged homestead of his mentally deficient brother and brother's wife, and to pay off their debt, in consideration for conveyance of part of property involved, but defendant, capitalizing his confidential relationship and without knowledge of brother and brother's wife, made no effort to prevent foreclosure sale but purchased all of the property from mortgagee who bought in at foreclosure sale and defendant then conveyed property to his wife for a nominal consideration, that part of property to which defendant was not entitled under the agreement was impressed with a constructive trust.—*Martin v. Martin*, Tex.Civ.App., 130 S.W.2d 863, error dismissed, judgment correct.

30. Ill.—*Altschuler v. Altschuler*, 101 N.E.2d 552, 410 Ill. 169.  
Pa.—*Petuck v. Petuck*, Com.Pl., 36 Luz Leg. Reg. 321.  
65 C.J. p. 486 note 89.

#### Grandparent and grandchildren

Pa.—*Gast v. Engel*, 85 A.2d 403, 369 Pa. 137.

#### Niece or nephew and uncle or aunt

Cal.—*Steinberger v. Steinberger*, 140 P.2d 31, 60 Cal App.2d 118.

Neb.—*In re Scott's Estate*, 26 N.W.2d 799, 148 Neb. 182.  
Pa.—*Davidow v. Knuffman*, Com.Pl., 39 Lack.Jur. 106—*Miller v. Kelly*, Com.Pl., 59 Montg. Co. 61.

31. Ill.—*Moneta v. Holnacki*, 67 N.E.2d 204, 394 Ill. 47—*Galvin v. O'Neill*, 66 N.E.2d 403, 393 Ill. 475—*Finn v. White*, 59 N.E.2d 859, 389 Ill. 374.

Mo.—*Beach v. Beach*, 207 S.W.2d 481, N.J.—*Gray v. Bradley*, 62 A.2d 139, 1 N.J. 102.

N.Y.—*Cadinas v. Cassidy*, 127 N.Y.S.2d 924—*Wojtkowiak v. Wojtkowiak*, 85 N.Y.S.2d 198, affirmed 81 N.Y.S.2d 171, 273 App. Div. 1052.

Pa.—*Stewart v. Hooks*, 94 A.2d 756, 372 Pa. 542—*Moyer v. Moyer*, 51 A.2d 708, 356 Pa. 184—*Monongahela Trust Co. v. Kazimer*, 54 A.2d 841, 181 Pa. Super. 380.  
65 C.J. p. 486 note 90.

#### Conveyance of realty

Principle that a confidential relationship arises where conveyance of realty is made between members of a family does not apply in Massachusetts.—*Ranier v. Goodwin*, 96 N.E.2d 853, 326 Mass. 710.

#### Division of estate

Oral arrangements between deceased's daughter, granddaughter, and grandson to divide estate equally under mistaken belief that deceased died intestate was not a binding agreement on which constructive trust could be declared against daughter who was chief beneficiary under will later found and duly probated.—*Hauck v. Burmeister*, 286 N.W. 666, 289 Mich. 418.

#### Brother-in-law

Ill.—*Galvin v. O'Neill*, 66 N.E.2d 403, 393 Ill. 475.  
N.H.—*Colby v. Colby*, 79 A.2d 343, 96 N.H. 452.

#### Nephew

Where grantor was of sound mind when she delivered deed, absolute in form, to nephew, without an express trust agreement, trust by operation of law did not arise in absence of fraud, undue influence, or abuse of confidential relationship.—*Kingsley v. Carroll*, 234 P.2d 1039, 106 Cal App.2d 358.

32. Cal.—*McMurray v. Sivertsen*, 83 P.2d 48, 28 Cal App.2d 541.

Ill.—*Scherman v. Scherman*, 71 N.E.2d 16, 395 Ill. 574—*Wesemann v. Fischer*, 56 N.E.2d 656, 323 Ill. App. 617.

and wife,<sup>33</sup> or brothers, sisters, or brothers and sisters.<sup>34</sup> The fact that particular persons live in another's family and are supported by him does not necessarily establish a confidential relationship,<sup>35</sup> but it may exist in such case.<sup>36</sup>

### (3) Principal and Agent

#### (a) In general

#### (b) Agent to purchase or to sell

#### (a) In General

A confidential or fiduciary relationship ordinarily ex-

ists between principal and agent, within the meaning of the rule as to the raising of a constructive trust in the case of a breach of such relationship, so that where the agent deals with the subject matter of the agency on his own account or for his own benefit, he will be deemed a constructive trustee for his principal.

A confidential or fiduciary relationship ordinarily exists between principal and agent, within the meaning of the rule as to the raising of a constructive trust in the case of a breach of such relationship.<sup>37</sup>

Accordingly, where a person occupies a fiduciary

Iowa.—In re Hewitt's Estate, 62 N. W.2d 198.

N.Y.—Wojtkowiak v. Wojtkowiak, 85 N.Y.S.2d 198, affirmed 81 N.Y.S.2d 171, 273 App.Div. 1052.

Okl.—Corpus Juris quoted in Jones v. Jones, 148 P.2d 989, 992, 194 Okl. 228.—Allen v. Jones, 110 P.2d 911, 188 Okl. 546.

Pa.—In re Michalak's Estate, 105 A. 2d 370, 377 Pa. 532.

S.D.—Jones v. Jones, 291 N.W. 579, 67 S.D. 200.—Jaeger v. Sechser, 270 N.W. 511, 65 S.D. 38.

65 C.J. p. 486 note 90 [b].

#### Fraud

In suit to impress constructive trust the relation of father and child is not of such confidential status as to create presumption of fraud as to conveyance by father to child.—Happoport v. Kalstein, 24 So.2d 301, 156 Fla. 722.

#### Undue Influence

Influence through affection is not wrongful, and relationship of parent and child between grantor and grantee of realty creates no presumption of grantee's undue influence over grantor, as required to establish constructive trust in grantee.—Wenemann v. Fischer, 56 N.E.2d 656, 323 Ill.App. 617.

#### Constructive trust held not raised

##### (1) In general.

Ala.—Hawkins v. Sanders, 72 So.2d 181, 260 Ala. 585.

Iowa.—Meyers v. Schmidt, 261 N.W. 502, 220 Iowa 370.

Me.—Hutchins v. Hutchins, 41 A.2d 612, 141 Me. 183.

Tex.—Johnson v. Black, Civ.App. 197 S.W.2d 523, error refused no reversible error.

(2) Grantor was not entitled to cancellation of deeds to his infant children on ground of constructive trust in them for grantor's benefit because of his shock and distress by deaths of his wife and minor daughter when deeds were executed.—Dotson v. Dotson, 209 S.W.2d 852, 307 Ky. 106.

(3) A parent's gift to a child to exclusion of other children will not be rendered nugatory by engrafting a constructive trust in favor of others, in absence of convincing evidence of

fraud, deceit, or wrongdoing practiced on donor.—Vinner v. Winner, 23 S.E.2d 251, 222 N.C. 414.

(4) Husband's statements to parents who lived in house owned by husband and wife, to effect that they could live in house as long as they lived, and expressing affection and continuing bounty, created no obligations, legal or moral, authorizing constructive trust which survived after death of husband.—Masters v. Masters, 89 A.2d 576, 200 Md. 318.

32. Pa.—Stewart v. Hooks, 94 A.2d 756, 372 Pa. 642.

65 C.J. p. 486 note 90 [a].

#### Who is dominant party

Although confidential relationship necessarily exists between husband and wife when they reside together under ordinary conditions of marriage, nevertheless it cannot be said as matter of law that husband is the dominant and wife the dependent party, but this is a question of fact, for purpose of establishing a constructive trust.—Brody v. Brody, 61 N.E.2d 675, 390 Ill. 312.

#### Circumstances held not to warrant constructive trust

##### (1) In general.

Ill.—Brody v. Brody, 61 N.E.2d 675, 390 Ill. 312.

Mass.—Druker v. Druker, 31 N.E.2d 524, 308 Mass. 229.

Or.—Evans v. Trude, 240 P.2d 440, 193 Or. 648.

Pa.—Commonwealth v. Long, Quar. Sess., 28 West.Co. 11.

R.I.—Cole v. Cole, 21 A.2d 248, 67 R.I. 168, reargument denied 22 A.2d 337, 67 R.I. 168.

Va.—Fair v. Rook, 77 S.E.2d 395, 195 Va. 196.

(2) Although relation of husband and wife is confidential in nature, wife's acquiescing in husband's work in improvement of wife's realty violates no fiduciary duty, with respect to husband's right to a constructive trust.—Martin v. Tucker, 14 N.W.2d 105, 217 Minn. 104.

24. Ill.—Dremore v. Bremer, 104 N.E.2d 299, 411 Ill. 454.—Scherman v. Scherman, 71 N.E.2d 16, 395 Ill. 574.—Galvin v. O'Neill, 68 N.E.2d 403, 399 Ill. 475.

Md.—Miller v. Miller, 53 A.2d 578, 188 Md. 667.

65 C.J. p. 486 note 90 [d].

#### Dependent on facts

A fiduciary relationship does not arise merely from fact that parties are brother and sister but depends on all facts and conveyance from sister to brother is not assumed to be fraudulent merely on account of the kinship.—Clark v. Clark, 76 N.E.2d 446, 398 Ill. 592.

#### Constructive trust held not raised

##### (1) In general.

Mich.—Hojnacki v. Hojnacki, 275 N.W. 659, 281 Mich. 636.

Minn.—Georgopolis v. George, 54 N.W.2d 177, 277 Minn. 176.

Okl.—Adams v. Adams, 256 P.2d 458, 204 Okl. 378.—Hough v. Foster, 254 P.2d 264, 206 Okl. 226.

(2) Where brother, in absence of fraud, decided realty to sister absolutely without sister's knowledge in order to discourage filing of damage suits against himself and recorded deeds which contained no trust provisions, and brother intended to retain beneficial use of the realty, no constructive trust arose.—Snow v. State, 60 So.2d 346, 257 Ala. 614.

(3) If brother's representation to sister that it would be to her best interest, due to her financial difficulties, to convey certain realty to him did not constitute a false representation, brother could not have committed fraud, and, therefore, there would not be any basis for a constructive trust in favor of sister.—De La Torre v. Crenshaw, Tex.Civ.App., 263 S.W.2d 197, error refused no reversible error.

35. N.J.—Barnes v. Taylor, 27 N.J. Eq. 266, affirmed 28 N.J. Eq. 625.

36. Mo.—Basman v. Frank, 250 S.W.2d 989.

37. Ga.—Smith v. Merck, 57 S.E.2d 326, 206 Ga. 361.

Ill.—Bremer v. Bremer, 104 N.E.2d 299, 411 Ill. 454.—Kester v. Crilly, 91 N.E.2d 419, 405 Ill. 425.—Finn v. Monk, 85 N.E.2d 701, 403 Ill. 187.—Clark v. Clark, 76 N.E.2d 446, 398 Ill. 592.

Md.—Carter v. Abramo, 93 A.2d 544, 201 Md. 339.

relationship as agent for another, and thereby gains something for himself which in equity and good conscience he should not be permitted to keep, equity will raise a constructive trust and compel him to turn it over to the person equitably entitled to it, or to otherwise execute the trust as the court may direct.<sup>38</sup> As otherwise expressed, an agent undertaking any business or the performance of any

services for another is disabled in equity from dealing with the subject matter of the agency on his own account or for his own benefit, and if he does attempt so to deal in his own name he will be deemed a constructive trustee for his principal.<sup>39</sup> Such principle has been applied with respect to benefits acquired by the agent from contracts,<sup>40</sup>

Ohio—Kuck v. Sommers, App., 100 N.E.2d 68.  
65 C.J. p 485 note 83.

#### Money

(1) An agent holds money of his principal in trust and must be held strictly to liability of trustee as between himself and man for whom he acts.—In re Reiter's Estate, 18 N.E.2d 563, 298 Ill.App. 313.

Mo—Brown v. Maguire's Real Estate Agency, App., 101 S.W.2d 41, reversed on other grounds 121 S.W.2d 754, 343 Mo. 338.

(2) Where a landlord's agent receives rent money from the tenant, he receives the landlord's money, and unless the relationship of debtor and creditor is created by agreement, express or implied, the agent is trustee for the landlord and not his debtor.—Brown v. Christman, 126 F.2d 625, 75 U.S.App.D.C. 203—Hess v. Hardee, 103 F.2d 751, 70 App.D.C. 50.  
Iowa—Grindley v. Smith, 21 N.W.2d 465, 237 Iowa 227.

(3) An insurance agent, authorized to collect premiums on policies of insurance, held premiums in trust for insurer until they were remitted to the insurer.—Meixner v. Heusser, 112 P.2d 103, 163 Kan. 558.

A mere employee, not an agent with respect to matter under consideration, does not ordinarily occupy a position of trust toward his employer, but if employee in course of his employment acquires secret information relating to employer's business, he occupies a position of trust analogous in most respects to that of a fiduciary, and must govern his actions accordingly.—Brophy v. Cities Service Co., 70 A.2d 5, 31 Del.Ch. 241.

#### Stock

Where equal owners of all stock of corporation agreed that each should transfer a certain number of shares to an agent and to an attorney for one of the stockholders under agreement that in case of conflict the shares transferred should be voted equally for both stockholders, agent who received his shares of stock from stockholder who was not his principal did not hold such stock as trustee for his principal.—Gerard v. Sanner, 103 P.2d 314, 110 Mont. 71.

28. Ill.—Black v. Gray, 104 N.E.2d 212, 411 Ill. 503.

N.Y.—Cornale v. Stewart Stamping Corp., 129 N.Y.S.2d 808.

#### Cohetz

Where coher of decedent's estate, after taking possession thereof under agreement with other heirs to act as their agent in management of estate, procured another to administer estate for purpose of divesting title of other heirs and obtaining it himself, his acts from other heirs, equity would decree such title to be void and coher to hold as trustee for his coheirs.—Brown v. Brown, 75 S.E.2d 13, 209 Ga. 620.

39. U.S.—Hunter v. Shell Oil Co., C. A. Tex., 193 F.2d 485—Pratt v. Shell Petroleum Corp., C.C.A. Kan., 100 F.2d 833, certiorari denied 59 S.Ct. 775, 306 U.S. 659, 83 L.Ed. 1056—U. S. v. Bennett, D.C. Wash., 57 F. Supp. 670.

Cal—Stromerson v. Averill, 141 P.2d 732, 22 Cal.2d 808—Kinert v. Wright, 185 P.2d 364, 81 Cal.App.2d 919—Schwartz v. Artel, 105 P.2d 380, 40 Cal.App.2d 433.  
Conn.—Glotzer v. Keyes, 5 A.2d 1, 125 Conn. 227.

Del—Brophy v. Cities Service Co., 70 A.2d 5, 31 Del.Ch. 241.  
Fla.—Fisher v. Grady, 178 So. 852, 131 Fla. 1.

Ill—Doner v. Phoenix Joint Stock Land Bank of Kansas City, 45 N.E.2d 20, 381 Ill. 106.

Mass—Nelson v. Bailey, 22 N.E.2d 116, 303 Mass. 522.

Mich—Burton v. Burton, 51 N.W.2d 297, 332 Mich. 326—Mackey v. Baker, 41 N.W.2d 331, 327 Mich. 57—Corpus juris quoted in Stephenson v. Golden, 276 N.W. 849, 861, 279 Mich. 710.

Neb.—Erickson v. Nebraska-Iowa Farm Inv. Co., 278 N.W. 611, 134 Neb. 391.

N.Y.—Rush v. Curtis Wright Export Co., 25 N.Y.S.2d 597, 175 Misc. 873, reversed on other grounds 31 N.Y. S.2d 550, 263 App.Div. 69, appeal denied 32 N.Y.S.2d 1016, 263 App. Div. 868, motion denied 41 N.E.2d 173, 287 N.Y. 819, affirmed 43 N.E.2d 712, 289 N.Y. 562—Husday v. Barocas, 115 N.Y.S.2d 209.

Or—Dunlavy v. Barton, 237 P.2d 930, 193 Or. 69—Hughes v. Helzer, 185 P.2d 537, 182 Or. 205.

Pa.—Fox v. Fox, 189 A. 758, 125 Pa. Super. 541.

Tex.—Deep Oil Development Co. v. Cox, Civ. App., 294 S.W.2d 312, refused no reversible error.

Wis—Schofield v. Rideout, 290 N.W. 155, 233 Wis. 550, 133 A.L.R. 834, 65 C.J. p 480 note 43.

#### Use of information or knowledge

(1) If employee used information concerning employer's business acquired while in its employ while working for another company, contrary to terms of his employment, whatever profits employee made with latter company would equitably belong to employer, and hence, whatever sum was determined to be due employee by accounting, in action between employer and other company would, in equity, be held by him as trustee for his employer.—State ex rel Duggan v. Kirkwood, 208 S.W.2d 257, 357 Mo. 325, 2 A.L.R.2d 216.

(2) Agent's knowledge belongs to principal for whom agent acts, and, if agent uses knowledge for his own benefit, he becomes trustee for principal.—Stephenson v. Golden, 272 N.W. 881, 279 Mich. 493, modified on other grounds on rehearing 276 N.W. 849, 279 Mich. 710.

(3) A constructive trust would be imposed on realty acquired by defendant as the result of information received when he was, for all practical purposes, an agent for plaintiff and under an obligation, by reason of his employment, to report such information, even though realty was of a type only occasionally purchased by plaintiff, and there was no showing that plaintiff would have purchased the realty had he known of it.—Whitten v. Wright, 289 N.W. 509, 206 Minn. 423.

#### Fraud not shown

Principal could not be held victim of fraud because of false representation of agent that sums paid to principal were his net distributive share of estate, in absence of showing that principal relied on representation, with respect to question of existence of constructive trust.—Hallard v. Drake's Estate, 5 N.E.2d 671, 103 Ind. App. 143, followed in Dale v. Drake's Estate, 5 N.E.2d 676, 103 Ind. App. 705 and 5 N.E.2d 676, 103 Ind. 142.

40. Ohio.—Patterson v. Pollock, 84 N.E.2d 606, 84 Ohio App. 489.

leases,<sup>41</sup> recovery in a judicial action,<sup>42</sup> and patents.<sup>43</sup>

If an agent having charge of lands of his principal acquires a tax title thereto,<sup>44</sup> or purchases an outstanding or opposing title,<sup>45</sup> or acquires the property on foreclosure sale,<sup>46</sup> or, discovering a defect in the title of his principal, makes use of such information to acquire a valid legal title for himself,<sup>47</sup> he will be deemed to hold such title in trust for his principal; and an agent buying property under a judgment in favor of his principal becomes a trustee, if he purchases for less than his principal's claim.<sup>48</sup> Likewise, an agent for the collection of successive mortgages, who acquires a title under a foreclosure of one of the earlier of them, holds it as a constructive trustee for the later mortgagees.<sup>49</sup> An agent who purchases his principal's property at a sale made to effectuate payment of a claim or judgment which it is the agent's duty to pay out of funds in his hands acquires no title to the property as against his principal, for whom he will be deemed to hold as trustee.<sup>50</sup>

In order to charge an agent as a constructive trustee, however, there must be a connection between

the scope of his duties and the transaction in which the agent seeks to profit,<sup>51</sup> and the private and personal activities of an agent are not limited by his fiduciary duty to his principal unless they have a direct relationship to the activities of his principal.<sup>52</sup> So, the general agency of a person to manage the business affairs of another does not forbid the agent to buy property in his own name with his own funds.<sup>53</sup> Where one person has an interest in a property prior and in a measure adverse to the interest of another, and the other, with knowledge of the facts, places his interest in the hands of the one having the prior interest for protection, the ordinary rules governing trustees and cestuis que trust do not apply, the relationship being at most a subservient trust or agency, and while good faith must be exercised by the agent in the management of the property or business, good faith does not in such case require the relinquishment of the agent's interest, or of his priority.<sup>54</sup>

No constructive trust may be impressed on the theory of breach of an agent's fiduciary relation where the relationship of principal and agent is not established,<sup>55</sup> or has terminated.<sup>56</sup> Where the al-

41. Ind.—Washington Theatre Co v Marion Theatre Corp., 81 N.E.2d 688, 119 Ind App 114.  
Wash.—Raymond v MacFadden, 150 P.2d 829, 21 Wash 2d 328.

#### Expectancy

A tenant in possession has an equitable right to expect that his lease will be renewed on its expiration, and, although lessee may not compel landlord to renew the lease, equity will declare a constructive trust in a lease given to his fiduciary which deprives him of this expectancy.—Warner Bros. Theatres v Cooper Foundation, 6 A.2d 189, 189 P.2d 825.

#### Oil and gas leases

An oil company's notice to its employees that any employee purchasing oil and gas leases or royalties would be immediately discharged, but not reciting that such discharge would be the only penalty invoked, did not waive or otherwise bar company's other remedies for improper acquisition of property by employees, including enforcement of constructive trust in property acquired.—Pratt v. Shell Petroleum Corp., C.C. A. Kan., 106 F.2d 833, certiorari denied, 59 S.Ct. 775, 306 U.S. 659, 83 L. Ed. 1056.

#### Refusal by landlord

Where, however, tenants of restaurant sent their manager to procure a lease, and landlord refused to lease to tenants, but did lease to manager on condition that manager take over restaurant and make repairs, and tenants made repairs speci-

fied, landlord was not estopped to deny tenants' right to lease, nor could tenants claim lease on theory that manager held lease as trustee for tenants.—McLeod v Lampkin Hotel Co., 77 S.W.2d 937, 257 Ky 269.

42. N.Y.—Ziegler v Von Scho, 66 N.Y.S.2d 900, 271 App Div 604.

43. U.S.—Grip Nut Co v Sharp, C.C. A. Ill., 150 F.2d 192, certiorari denied 66 S.Ct. 55, 326 U.S. 742, 90 L.Ed. 443.

44. Ill.—Penbody v Burri, 99 N.E. 690, 255 Ill 592.  
65 C.J. p 480 note 44.

45. Del.—Phillips v Willis, 63 A.2d 171, 31 Del Ch. 5.  
Mich.—Burton v Burton, 51 N.W.2d 297, 332 Mich 326.  
65 C.J. p 481 note 45.

#### Master's deed

If one advancing money and taking title by master's deed was acting as owner's agent to redeem premises but instead took title in his own name, law would raise trust ex maleficio, and he would hold title as mortgagee.—McDonnell v Holden, 185 N.E. 572, 352 Ill. 362.

46. Ill.—Doner v Phoenix Joint Stock Land Bank of Kansas City, 45 N.E.2d 20, 381 Ill. 106.  
N.D.—Rovenko v Bokovoy, 45 N.W. 2d 492, 77 N.D. 740.

#### Grantees of agent

Where agent in violation of agreement to redeem land for mortgagor caused title to be conveyed to agent's nominee so that a constructive trust

arose in favor of the mortgagor, grantees of agent could defeat the trust only on proof that they were innocent purchasers for value.—Doner v Phoenix Joint Stock Land Bank of Kansas City, 45 N.E.2d 20, 381 Ill. 106.

47. Va.—Byars v Stone, 42 S.E.2d 817, 186 Va. 518.  
65 C.J. p 481 note 46.

48. Pa.—Bishleman v Lewis, 49 Pa. 410.

49. Ill.—Reese v Wallace, 113 Ill 589.

50. Ky.—Dodge v Black, 53 S.W. 1039, 21 Ky L 992.  
Mo.—Witte v Storm, 139 S.W. 381, 236 Mo. 470.

51. N.J.—Goldberg's Corp. v Goldberg Realty & Inv. Co., 36 A.2d 122, 134 N.J. 415.  
Ohio—Kuk v Sommers, App., 160 N.E.2d 68.

52. U.S.—Young v Bradley, C.C.A. Ohio, 142 F.2d 658, certiorari denied Terminal & Shaker Heights Realty Co v Bradley, 65 S.Ct. 130, 323 U.S. 775, 89 L.Ed. 619, motion denied 65 S.Ct. 266.

53. La.—Scurto v Le Blanc, 181 So. 667, 191 La. 135.

54. Kan.—Haag v Baker, 97 P. 473.  
78 Kan 437, rehearing denied 104 P. 856, 78 Kan. 448.

55. Pa.—Mellon Nat. Bank & Trust Co. v Esler, 55 A.2d 327, 367 Pa. 525.

56. Cal.—Cohn v Clare, 44 P.2d 634, 6 Cal App.2d 504.

leged fiduciary relationship arises out of a pooling arrangement which is illegal under the anti-trust laws, plaintiff may not rely on such fiduciary relationship to impress a constructive trust on a lease acquired by defendant.<sup>57</sup>

**Fraudulently inducing conveyance for own benefit.** Where an agent fraudulently induces his principal to convey land to another, really for the benefit of the agent, and without the knowledge of the principal, the effect is to create a trust in favor of the principal by operation of law.<sup>58</sup>

**Unauthorized use of principal's funds or property.** Where an agent employs the money or property of his principal in the purchase of lands or other property, without the consent of the latter, taking the title in his own name or in the name of a third person, a trust of the legal estate will arise by operation of law;<sup>59</sup> and it is immaterial in such case whether the money of the principal was used at the time of, or subsequent to, the purchase.<sup>60</sup> It is essential, however, that the use of the principal's money for this purpose, or the taking of title by the agent in his own name or in the name of a third person, should be unauthorized or fraudulent;<sup>61</sup> and so where, after the agent has purchased lands with the principal's money and has taken title in his own name or in the name of a third person, the

principal ratifies and confirms such transaction, such ratification has the effect of a previous authorization for such purchase, and a constructive trust in such lands will not arise in favor of the principal, there being no want of authority on the part of the agent to make the purchase or fraudulent use of the principal's money.<sup>62</sup> Where money is collected by an agent and deposited in a bank to his own account, such deposit is impressed with a trust in favor of his principal.<sup>63</sup> It has been held that if a general agent uses funds of his principal to buy realty in his own name, or for the improvement of the realty, the principal's recourse is to sue, not for the property itself, but for the amount of the money appropriated by the agent to his own use.<sup>64</sup>

**Corporate officers or employees.** An officer or employee of a corporation ordinarily occupies a confidential or fiduciary relationship to the corporation with respect to business or property, within the general rules relating to constructive trusts,<sup>65</sup> and where such officer or employee by the use of knowledge obtained through the relationship, or by the betrayal of the confidence reposed in him, or some breach of duty imposed on him under it, acquires title to, or an interest in, property antagonistic to that of the corporation, he holds such title or interest subject to a constructive trust in the latter's favor,<sup>66</sup> regardless of actual injury to the

#### Lease

(1) Employee who obtained lease on employer's place of business after employee was discharged and on information which was neither secret nor confidential, and which was not obtained by reason of, or in course of, employment, did not hold lease in trust for benefit of employer—Cohn v. Clare, 44 P.2d 634, 6 Cal.App.2d 504.

(2) Where assignee for benefit of creditors of business conducted in rented premises discharged employee who had an option to purchase business, which option assignee was bound to recognize under terms of assignment, and assignee then repudiated option, any relationship of trust and confidence between employee and assignee terminated and employee was free to act in his own interest, so that employee's subsequent acquisition of lease to premises to protect his interest was not subject to a constructive trust in favor of assignee—Raymond v. Macfadden, 150 P.2d 829, 21 Wash.2d 328.

#### Prospecting permit

A consulting geologist who had been employed to develop oil lands acquired from claimants under placer mining laws was not precluded from acquiring a prospecting permit authorized by statute as to part of land,

some years after abandonment of project by employer, termination of his employment, and employer's insolvency—McDallion Oil Co. v. Hinckley, C.C.A. Cal., 92 F.2d 165.

57. U.S.—Warner Bros. Theatres v. Cooper Foundation, C.A. Okl., 189 F.2d 825.

58. S.D.—Sawyer v. Issenbuth, 141 N.W. 378, 31 S.D. 502.

65 C.J. p. 482 note 57.

59. Cal.—Church v. Bailey, 203 P.2d 547, 90 Cal.App.2d 501.

Tex.—Berry v. Rhine, Civ.App., 205 S.W.2d 632.

65 C.J. p. 482 note 59.

#### Accounts receivable

Where defendant corporation, after assignment of its accounts receivable to plaintiff as collateral security and its appointment to act as agent of plaintiff for purpose of collecting such accounts, failed to live up to its obligation and diverted proceeds of collected accounts to its own use, defendant corporation became a constructive trustee for plaintiff—Hirsch v. Philby, 73 A.2d 173, 4 N.J. 408.

60. Ala.—Long v. King, 23 So. 534, 117 Ala. 423.

61. Ala.—Long v. King, supra—Whaley v. Whaley, 71 Ala. 159.

62. Ala.—Long v. King, 23 So. 534, 117 Ala. 423.

65 C.J. p. 482 note 62.

63. U.S.—British North America Bank v. Freights, etc., of The Hutton, D.C.N.Y., 127 F. 859, affirmed 137 F. 534, 70 C.C.A. 118.

N.Y.—United Nat. Bank v. Weatherby, 75 N.Y.S. 3, 70 App. Div. 279.

64. La.—Scuto v. Le Blanc, 184 So. 567, 191 La. 138.

65 C.J. p. 482 note 59 [a].

65. Minn.—Risvold, on Behalf and for Use and Ben. of Cleary Hill Mines Co. v. Gustafson, 196 N.W. 411, 209 Minn. 357.

65 C.J. p. 487 note 93 [a] (1), (2).

66. U.S.—Dickinson v. Burnham, C.A.N.Y., 197 F.2d 973, certiorari denied 73 S.Ct. 169, 344 U.S. 875, 97 L.Ed. 678—Brown v. New York Life Ins. Co., C.C.A. Or., 153 F.2d 246.

Cal.—Gray v. Sutherland, App., 268 P.2d 754.

Del.—Duffy v. Cities Service Co., 70 A.2d 5, 31 Del.Ch. 241.

Ind.—Fishers Grain Co. v. Sparks, 58 N.E.2d 932, 223 Ind. 133.

Mich.—Columbia Land Co. v. Empson, 9 N.W.2d 452, 305 Mich. 220.

Minn.—Risvold, on Behalf and for Use and Ben. of Cleary Hill Mines Co. v. Gustafson, 196 N.W. 411, 209 Minn. 357.

corporation resulting from the breach of trust.<sup>67</sup> Such principle has been applied with respect to impressing a constructive trust on profits derived from the conduct of a competitive business,<sup>68</sup> the securing of a lease,<sup>69</sup> or the purchase of property for the officer's own account,<sup>70</sup> especially where the officer wrongfully used corporate funds to purchase

the property,<sup>71</sup> or where the officer purchased the corporation's property.<sup>72</sup> So, where a business opportunity is in the line of a corporation's activities and is one in which the corporation has a legitimate interest or expectancy, the opportunity belongs to the corporation, and an officer or director who diverts the opportunity and embraces it as his own is

Mo.—Webb City Undertaking Co. v. Sinclair, 225 S.W.2d 138, 240 Mo. App. 958.

Mont.—Gulden Rod Min. Co. v. Bukovich, 92 P.2d 316, 108 Mont. 569 N.Y.—Coane v. American Distilling Co., 81 N.E.2d 87, 298 N.Y. 197—Sialkot Importing Corp. v. Berlin, 68 N.E.2d 501, 295 N.Y. 482—Claude Neon Lights v. Federal Elec. Co., 295 N.Y.S. 1, 250 App. Div. 510

Pa.—Howell v. McCloskey, Com. Pl., 69 Mont. Co. 144, reversed on other grounds 99 A.2d 610, 375 Pa. 100 Tenn.—Central Bus Lines v. Hamilton Nat. Bank, 239 S.W.2d 583, 34 Tenn. App. 480.

Wash.—Arnesman v. Arnesman, 264 P.2d 256, 43 Wash.2d 787. 65 C.J. p. 481 note 52 [a].

**Breach of duty warranting constructive trust held not shown**

(1) In general.

Mo.—Hyde Park Amusement Co. v. Mogler, 214 S.W.2d 541, 358 Mo. 336.

N.Y.—Turner v. American Metal Co., 50 N.Y.S.2d 800, 268 App. Div. 239, appeal dismissed 66 N.E.2d 591, 295 N.Y. 822—McLaur v. McLaur, 40 N.Y.S.2d 432, 265 App. Div. 556, 266 App. Div. 702, affirmed 53 N.E.2d 573, 291 N.Y. 809, motion granted 54 N.E.2d 694, 292 N.Y. 580.

(2) Where contract allegedly made through the instrumentality of the president of the corporation between the corporation and holders of one-third of the corporation's stock to induce a sale of that stock to the president was never carried out by the corporation but was assumed by the president individually, the corporation was not harmed, and a constructive trust in favor of the corporation of a contract for the purchase of the stock purchased by the president for his own benefit would not be imposed—Manacher v. Central Coal Co., 63 N.Y.S.2d 463.

(3) The fact that director of corporation transferred one-half interest in oil lease to children of president of corporation after purchase of lease on failure of corporation to act on resolution authorizing purchase would not justify a finding that director and president planned to divert purchase of oil lease from corporation to make a private profit so as to justify imposition of constructive trust on oil lease in favor of corporation.—Deep Oil Development Co. v.

Cox, Tex. Civ. App., 224 S.W.2d 312, refused no reversible error

(4) If corporate director and manager did not violate his fiduciary duty in purchasing stock in competing corporation, but was liable in damages for breach of other fiduciary duties, a constructive trust would not arise concerning the competing corporation's stock which was still in his own hands or in that of his transferees—Wood v. Gordon, 246 P.2d 84, 112 Cal. App.2d 374

(5) Metal company's naked opportunity of putting money into what was termed a "mining wildcat" was not a corporate asset, so as to impose in favor of stockholders a constructive trust on officers and directors of metal company who did participate in such speculative venture which subsequently proved profitable—Turner v. American Metal Co., 50 N.Y.S.2d 800, 268 App. Div. 239, appeal dismissed 66 N.E.2d 591, 295 N.Y. 822.

67. Ill.—Winger v. Chicago City Bank & Trust Co., 67 N.E.2d 265, 394 Ill. 91

68. Ala.—McKinstry v. Thomas, 64 So.2d 808, 258 Ala. 690.

**Application of equitable standards**

In suit by corporation against director to impress a constructive trust on an oil lease on theory that director purchased lease for himself after having been directed to purchase it for corporation, rights of parties would not be determined by strict letter of law, but integrity and fidelity, fair dealing, and good faith between parties, measured by equitable standards, would establish basis on which case would be decided—Deep Oil Development Co. v. Cox, Tex. Civ. App., 224 S.W.2d 312, refused no reversible error

69. N.Y.—Gildener v. Lynch, 54 N.Y. 82d 823.

**Secret procurement**

(1) Where officer and director of corporation who, as lessor knew, had been acting as agent for corporation, secretly obtained in his own name a succeeding lease on premises which corporation then occupied as lessee, he held such lease as constructive trustee for benefit of corporation, although corporation had agreed to pay him a commission for procuring a renewal of its lease and lessor would not have renewed corporation's lease.

—Washington Theatre Co. v. Marion Theatre Corp., 81 N.E.2d 688, 119 Ind. App. 114.

(2) A corporate lessee's directors' and officers' secret procurement of new lease of demised premises to another corporation, thereby threatening destruction of original lessee's business and remaining officers' and director's interest therein as holder of half of such lessee's stock, became trustees of new lease for benefit of original lessee—Gildener v. Lynch, 54 N.Y.S.2d 523

70. Tex.—Deep Oil Development Co. v. Cox, Civ. App., 224 S.W.2d 312, refused no reversible error. 65 C.J. p. 481 note 52 [a].

**Use of own money**

Where a corporate officer makes acquisitions on his own account which are essential or would be advantageous to corporation, such acquisitions, even though made with officer's own money, are subject to constructive trust for benefit of corporation—Weissman v. A. Weissman, Inc., 97 A.2d 870, 371 Pa. 470.

71. U.S.—Marcus v. Otis, C.C.A.N.Y., 168 F.2d 649, opinion adhered to 169 F.2d 148

Minn.—Shurmer v. Barnes, 136 N.W. 861, 118 Minn. 179

Tex.—Faddock v. Siemoneit, Civ. App., 214 S.W.2d 651, reversed on other grounds 218 S.W.2d 428, 147 Tex. 571, 7 A.L.R.2d 1062

**Ultra vires endeavor**

Corporate directors, including savings and loan association directors, at election of corporation, are liable as constructive trustees with respect to venture in which assets were wrongfully used and its resulting profits, notwithstanding assets were misused and profits therefrom were realized in line of endeavor ultra vires to corporation—Diedrick v. Helm, 14 N.W.2d 913, 217 Minn. 483, 153 A.L.R. 649

72. Ill.—Winger v. Chicago City Bank & Trust Co., 67 N.E.2d 265, 394 Ill. 94.

**Absence of fraud**

It has been held however, that no constructive trust was created in favor of corporation when corporation deeded land to its president, in absence of showing of actual or constructive fraud by president or that corporation was not authorized to give away its assets—McLaughlin v. Corcoran, 69 P.2d 597, 104 Mont. 590.



chargeable as a constructive trustee for the benefit of the corporation with the profits and benefits received therefrom.<sup>73</sup>

The test in determining whether a director or other corporate officer should be held as a trustee for the corporation, with respect to transactions undertaken in his individual name, is whether there was a specific duty on the part of the officer sought to be held liable, to act or contract with respect to the particular matter as the representative of the corporation only,<sup>74</sup> and the private and personal activities of an officer or director are not limited by his fiduciary duty to the corporation unless they have a direct relationship to the activities of the corporation.<sup>75</sup> A corporate officer who does not utilize his position, or the money, or property of the corporation in the acquisition of corporate stock may not be held liable therefor as a constructive

trustee,<sup>76</sup> and a corporate officer borrowing money in good faith from the corporation in order to purchase certain property is not liable to the corporation as a constructive trustee.<sup>77</sup>

### (b) Agent to Purchase or to Sell

Where a person acquires the legal estate in property as the agent of another, or on trust and confidence that he will acquire it for the benefit of another, equity will imply a trust in favor of the latter; and an agent to sell may be held liable to his principal as a constructive trustee of the proceeds of the sale.

Where a person acquires the legal estate in property as the agent of another, or on trust and confidence that he will acquire it for the benefit of another, equity will imply a trust in favor of the latter.<sup>78</sup> Thus, where one employed to act as agent of another in the purchase of property takes title in himself, he will be considered in equity as holding the property in trust for his principal,<sup>79</sup> at least

73. Minn.—Bohrud v. Ronning Machinery Co., 15 N.W.2d 112, 217 Minn. 518—Diedrick v. Helm, 14 N.W.2d 913, 217 Minn. 489, 159 A.L.R. 849.

N.Y.—Albert A. Volk Co. v. Fleschner Bros., 80 N.Y.S.2d 244, modified on other grounds 79 N.Y.S.2d 893, 273 App.Div. 994, motion denied 81 N.Y.S.2d 278, 274 App.Div. 823, affirmed 83 N.E.2d 15, 298 N.Y. 717.

### Usefulness of property

The rule, permitting equity court to impress with constructive trust property which is product of appropriation of business opportunity by corporation director or officer, or by majority stockholder owing corporation some form of fiduciary duty, is not satisfied by proof that, after such appropriation, property would have been used in corporation's business.—Blaustein v. Pan Am. Petroleum & Transport Co., 56 N.E.2d 705, 293 N.Y. 281, motion denied 57 N.E.2d 841, 293 N.Y. 763.

74. U.S.—Westerly Theatre Operating Co. v. Pouzner, C.C.A.R.I., 162 F.2d 821.

### Purchase of securities

Where prior to sale of stock to syndicate corporation had transferred securities to person wholly controlling the corporation who had agreed to sell securities to directors, directors by retaining official positions after sale of stock did not sustain such fiduciary relationship as to vest corporation with equitable ownership of securities purchased by directors, on basis of a constructive trust.—In re Hightee Co., D.C. Ohio, 55 F.Supp. 114.

75. U.S.—Young v. Bradley, C.C.A. Ohio, 148 F.2d 658, certiorari denied Terminal & Shaker Heights Realty Co. v. Bradley, 65 S.Ct. 138, 333 U.

S. 775, 89 L.Ed. 618, motion denied 85 S.Ct. 266.

### Nominal interest

Where corporation had only a nominal interest in building in which store was occupied by tenant whose securities were acquired by officers of corporation and had divested itself of all interest in the securities, no constructive trust arose in favor of corporation with respect to such securities.—Young v. Bradley, C.C.A. Ohio, 148 F.2d 658, certiorari denied Terminal & Shaker Heights Realty Co. v. Bradley, 65 S.Ct. 138, 333 U.S. 775, 89 L.Ed. 618, motion denied 85 S.Ct. 266.

76. Pa.—Howell v. McCloskey, 99 A.2d 610, 375 Pa. 100.

77. Tex.—Paddock v. Siemoneit, 218 S.W.2d 428, 147 Tex. 571, 7 A.L.R. 2d 1082—Marosis v. Alamo Amusement Co., Civ.App., 60 S.W.2d 876, affirmed (no opinion).

78. Cal.—Stromerson v. Averill, 141 P.2d 732, 23 Cal.2d 808—Kinet v. Wright, 185 P.2d 364, 81 Cal.App.2d 919—Forbes v. Forbes, 169 P.2d 661, 74 Cal.App.2d 986.

Ky.—Corpus Juris quoted in Antle v. Haas, 251 S.W.2d 290, 295.

Mich.—Kren v. Rubin, 61 N.W.2d 9, 338 Mich. 288—Corpus Juris quoted in Stephenson v. Golden, 276 N.W. 849, 861, 379 Mich. 710.

Pa.—East & West Coast Service Corp. v. Papahagis, 25 A.2d 339, 344 Pa. 183.

Tex.—Berry v. Rhine, Civ.App., 205 S.W.2d 632.

65 C.J. p. 481 note 51.

Parol authorization of agent to buy land as within statute of frauds see supra § 141.

### Condition

Where one person undertakes as agent to purchase property for another,

who is to pay part or all of the purchase price and become owner of all or a part of the property proportionate to his contribution, the purchase thereof by such person in his own name or otherwise for himself gives rise to a constructive trust for the benefit of the others in the agreed proportion, conditional on payment of agreed part of the purchase price.—Maddox v. Maddox, 38 N.W.2d 547, 151 Neb. 826.

### Representation as to price

Where agent falsely advised the principal that realty which principal sought to purchase was not purchasable for a smaller sum and failed to inform principal that agent had received a written contract from vendor for sale of the realty to agent individually at reduced price, and agent retained the difference between pretended sales price and the amount he paid vendor, agent became a trustee for his principal.—Willis v. Van Woy, 20 So.2d 690, 155 Fla. 465.

### Mortgage

Where person who acted as mortgagor's agent in securing a reduction of real estate mortgage himself purchased mortgage for reduced amount, a constructive trust resulted by operation of law, which prevented agent from enforcing mortgage against mortgagor for more than the amount which agent actually paid therefor with interest thereon from date of acquisition.—Faust v. Murray, 15 N.W.2d 798, 245 Wis. 648.

79. Cal.—Stromerson v. Averill, 141 P.2d 732, 23 Cal.2d 808—Prymore v. Brown, 210 P.2d 707, 94 Cal.App.2d 834—Kinet v. Wright, 185 P.2d 364, 81 Cal.App.2d 918.

Fla.—Dudemaine v. Shaw, 16 So.2d 114, 159 Fla. 899—Van Woy v. Willis, 14 So.2d 185, 153 Fla. 189.

where the principal furnished the purchase money at, or before the time of, purchase of the property by the agent.<sup>80</sup> This rule has been held to apply even though the agent was not under a duty to purchase the property for his principal,<sup>81</sup> or made the purchase with his own money,<sup>82</sup> but in such case the agent is entitled, in connection with the enforce-

ment of the trust, to reimbursement of his proper expenditures.<sup>83</sup> It has been held, however, that a constructive trust cannot be established merely on a broken promise to purchase, or to negotiate the purchase of, as agent, property for another, where there is no positive fraud perpetrated other than the breach of the promise.<sup>84</sup> A principal cannot hold

Ill.—Black v. Gray, 104 N.E.2d 212, 411 Ill. 503—Kuzlik v. Kwasny, 49 N.E.2d 212, 383 Ill. 354.

Ky.—Corpus Juris quoted in Antle v. Haas, 251 S.W.2d 290, 295.

Mich.—Corpus Juris quoted in Stephenson v. Golden, 276 N.W. 849, 861, 279 Mich. 710.

Neb.—Watkins v. Waits, 28 N.W.2d 206, 148 Neb. 543—Lamb v. Sandall, 281 N.W. 37, 135 Neb. 300.

N.M.—Mitchell v. Allison, 213 P.2d 231, 54 N.M. 56.

N.Y.—Kaplan v. Mayer, 65 N.Y.S.2d 755, 271 App.Div. 837.

Tex.—Berry v. Rhine, Civ.App., 205 S.W.2d 632.

Va.—Horne v. Holley, 188 S.E. 169, 187 Va. 234.

Wis.—Shovel v. Warter, 41 N.W.2d 603, 256 Wis. 503.

65 C.J. p 481 note 52.

#### Leased property

Where plaintiff operators of filling station after obtaining leases to realty through broker, embarked on program of purchasing realty and engaged broker to make purchases, purchase of one parcel by broker for himself and wife during period of his employment after assuring plaintiffs he could obtain parcel for them, constituted a violation of broker's fiduciary duties to plaintiffs, and a constructive trust would be imposed on realty in plaintiffs' favor.—Mackey v. Baker, 41 N.W.2d 331, 327 Mich. 57.

#### In Massachusetts

(1) It has been held that where by conduct of parties, full relationship of principal and broker has come into existence including carrying on of negotiations between seller and buyer there comes into existence with it, a confidential and fiduciary relationship giving rise to a constructive trust in favor of the principal in property which the broker has acquired for himself in violation of his duty to the principal.—Benson v. Nirenstein, 93 N.E.2d 610, 329 Mass. 285, 20 A.L.R.2d 1136.

(2) In an earlier case, it was held that a mere engagement of a party to buy property for another, without more, does not create a fiduciary relationship for breach of which a constructive trust would arise, so that if plaintiffs employed defendant to buy certain machinery in their behalf and he bought it for himself instead with his own money, no constructive trust in the machinery would have arisen

in favor of plaintiffs.—Salter v. Beal, 71 N.E.2d 872, 321 Mass. 105.

80. N.M.—Rice v. First Nat. Bank in Albuquerque, 171 P.2d 318, 50 N.M. 99.

Tex.—Berry v. Rhine, Civ.App., 205 S.W.2d 632.

#### Formal appointment not necessary

Where principal orally engaged real estate agent to purchase certain land and furnished agent with purchase price, in order to hold agent as a constructive trustee of land for principal it was not necessary to show that agent was formally constituted an agent with authority to bind principal or that an agreement was made to compensate agent for his services, but it was sufficient to show that agent accepted and held a position of trust with respect to procuring the land.—Rice v. First Nat. Bank in Albuquerque, 171 P.2d 318, 50 N.M. 99.

81. Mich.—Digby v. Thorson, 30 N.W.2d 286, 319 Mich. 524—Evanoff v. Hall, 17 N.W.2d 724, 310 Mich. 487.

Pa.—Casari v. Victoria Amusement Enterprises, 194 A. 503, 327 Pa. 382.

Tex.—Fitz-Gerald v. Hull, 237 S.W.2d 256, 150 Tex. 39.

Va.—Jones v. Clary, 75 S.E.2d 504, 194 Va. 804.

Wis.—Stein v. Soref, 38 N.W.2d 3, 255 Wis. 42.

82. Ill.—Black v. Gray, 104 N.E.2d 212, 411 Ill. 503—Black v. Gray, 87 N.E.2d 635, 403 Ill. 503—Kuzlik v. Kwasny, 49 N.E.2d 212, 383 Ill. 354.

—Doner v. Phoenix Joint Stock Land Bank of Kansas City, 45 N.E.2d 20, 381 Ill. 106.

Kan.—Oetken v. Shell, 212 P.2d 329, 168 Kan. 244, opinion adhered to 217 P.2d 906, 169 Kan. 109.

Ky.—Corpus Juris quoted in Antle v. Haas, 251 S.W.2d 290, 295.

Mich.—Corpus Juris quoted in Stephenson v. Golden, 276 N.W. 849, 861, 279 Mich. 710.

Neb.—Wiskocil v. Kliment, 50 N.W.2d 786, 155 Neb. 103—Watkins v. Waits, 28 N.W.2d 206, 148 Neb. 543.

Pa.—Rosenberg v. Cohen, 88 A.2d 707, 370 Pa. 507—East & West Coast Service Corp. v. Papahagis, 25 A.2d 339, 344 Pa. 183.

Wis.—Faust v. Murray, 15 N.W.2d 793, 245 Wis. 643.

65 C.J. p 482 note 53.

#### Payment not required

Where bill alleged that plaintiff's agent engaged defendant to acquire title to realty for plaintiff and that plaintiff offered and stood ready and willing to do and perform whatever to court seemed equitable, it was not necessary that any money be paid by plaintiff or his agent in order to hold defendant, who acquired title in his own name, as constructive trustee.—Stephenson v. Golden, 272 N.W. 881, 279 Mich. 493, modified on other grounds on rehearing 276 N.W. 849, 279 Mich. 710.

#### Financial inability

Where defendants obtained property for themselves in violation of previous promise to assist plaintiffs in acquiring property, decree establishing a constructive trust in favor of plaintiffs was proper notwithstanding alleged financial inability of plaintiffs to make the purchase, where decree made adequate provision with respect to payment of money.—Kuzlik v. Kwasny, 49 N.E.2d 212, 383 Ill. 354.

Where agent is given funds with which to purchase property, but he purchases property for himself with his own funds he becomes trustee of, and is deemed to hold title for, his principal just as if he had used funds entrusted to him by principal.—Kinnert v. Wright, 185 P.2d 364, 81 Cal. App.2d 919.

83. Ky.—Corpus Juris quoted in Antle v. Haas, 251 S.W.2d 290, 295.

Mich.—Corpus Juris quoted in Stephenson v. Golden, 276 N.W. 849, 861, 279 Mich. 710.

Neb.—Wiskocil v. Kliment, 50 N.W.2d 786, 155 Neb. 103—Watkins v. Waits, 28 N.W.2d 206, 148 Neb. 543.

—Lamb v. Sandall, 281 N.W. 37, 135 Neb. 300—Johnson v. Hayward, 103 N.W. 1058, 107 N.W. 384, 74 Neb. 157, 5 L.R.A.N.S., 112.

#### Purchase at scavenger sale

Where friend agreed to purchase for plaintiff at scavenger sale a lot adjoining plaintiff's home, and instead purchased lot in his own name individually and refused to convey it to plaintiff except on payment of a substantial profit, plaintiff was entitled to conveyance of lot on payment of price paid at scavenger sale plus taxes and interest.—Evanoff v. Hall, 17 N.W.2d 724, 310 Mich. 487.

84. Wash.—Carikonen v. Alberts, 83 P.2d 899, 136 Wash. 575, 135 A.L.R. 209.

his agent as constructive trustee if the agent, before purchasing property individually for himself, gave the principal an opportunity to purchase it, and the principal declined.<sup>85</sup>

*Agent to sell.* A person who takes title to real estate under a parol agreement to sell it as an agent, and sells it and receives the money therefor, is liable to the grantor for the proceeds;<sup>86</sup> and one who, after land has been conveyed to him to be sold, mortgages it and receives the proceeds may be compelled to reconvey the land in the same condition as when it was conveyed to him.<sup>87</sup> An agent to sell, who in violation of his duty to his principal fails to disclose that he is also acting as agent for the purchaser,<sup>88</sup> or that the purchaser is his relative,<sup>89</sup> or that he, the agent, is retaining an interest in the property sold,<sup>90</sup> may be held liable to the vendor as a constructive trustee, and the fact that in a given case the owner of property may have received a fair price for the conveyance procured by his agent in violation of the fiduciary duty owed to the owner does not preclude application of the rule creating the constructive trust.<sup>91</sup>

#### d. Confidential Relationship as Extending to Third Person

A confidential relationship existing between two per-

sons ordinarily does not extend to a third person, dealing with one of them, and as to whom the latter occupies a different relationship.

A confidential relationship existing between two persons ordinarily does not extend to a third person, dealing with one of them, and as to whom the latter occupies a different relationship, so as to form the basis of a constructive trust between such third person and the other fiduciary;<sup>92</sup> but the duties and disabilities imposed by the relationship on the person in whom the confidence is reposed extend to his agents or subagents, clerks, assistants, and employees,<sup>93</sup> to his attorney,<sup>94</sup> and to his partner in business.<sup>95</sup>

#### § 152. — Wrongful or Unauthorized Possession or Control of Property

Where a person wrongfully, or without right, takes possession or assumes control of property, or receives its rents and profits, a constructive trust ordinarily arises in favor of the persons entitled thereto, but in order that one may be held as constructive trustee of money or funds coming into his possession or under his control, there must be some element of wrong or violation of duty.

Where a person wrongfully, or without right, takes possession or assumes control of property, or receives its rents and profits, a constructive trust ordinarily arises in favor of the person entitled

85. Ohio—Kuck v. Sommers, App., 100 N.E.2d 68.

#### Release of interest

Where defendant acting on behalf of plaintiff acquired undivided three-fourths interest in realty but was unable to acquire outstanding interest, plaintiffs by memorandum of settlement acknowledging return of money paid on purchase price and releasing defendant from all agreements and responsibility with respect to the matter released their interest in the realty and in absence of showing that release was obtained through fraud, plaintiffs could not thereafter assert equitable ownership of undivided three-fourths interest in the realty held by defendant.—Verdin v. Rossi, Tex. Civ. App., 196 S.W.2d 111, error refused no reversible error.

86. Okl.—Logan v. Brown, 95 P. 441, 20 Okl. 334, 20 L.R.A.N.S. 298. Wis.—Schofield v. Rideout, 290 N.W. 155, 233 Wis. 550, 133 A.L.R. 834.

87. S.D.—Danielson v. Albers, 160 N. W. 734, 38 S.D. 185.

88. Tenn.—McNeill v. Dobson-Bainbridge Realty Co., 195 S.W.2d 626, 184 Tenn. 99.

89. Tenn.—McNeill v. Dobson-Bainbridge Realty Co., supra.

90. Tex.—Schiller v. Ellick, 240 S.W. 2d 997, 150 Tex. 363.

91. Tenn.—McNeill v. Dobson-Bain-

bridge Realty Co., 195 S.W.2d 626, 184 Tenn. 99.

92. U.S.—Corpus Juris quoted in Penn Mut Life Ins Co. of Philadelphia, Pa., v. Miller, D.C.Mo., 32 F. Supp. 206, 208, appeal dismissed O'Brien v. Miller, 116 F.2d 493, two cases, and O'Brien v. Northwestern Mut Life Ins. Co., 116 F.2d 499, 65 C.J. p. 487 note 96.

#### Creator of corporation

The fact that charitable corporation knew of fiduciary relationship of its creator, who managed its properties through theater company, did not warrant imposing constructive trust against theater leased property acquired by the corporation, where lease was acquired by another employee of the charitable corporation without use of confidential information.—Warner Bros. Theatres v. Cooper Foundation, C.A.Okl., 189 F.2d 825.

#### Relatives

Where director of mining corporation acquired claims necessary to development of the company's project, and hence held such claims in trust for the company, such director's son and nephew did not hold their undivided interest in director's claim in trust for the company, in absence of showing that they stood in fiduciary relationship to the company or conspired with director to injure the

company—Golden Rod Min. Co. v. Bukvich, 92 P.2d 316, 108 Mont. 569.

93. Ark.—McHugh v. Jeffries, 183 S.W.2d 309, 207 Ark. 890.

Wyo.—Corpus Juris quoted in Claughton v. Johnson, 38 P.2d 612, 616, 47 Wyo. 447, 65 C.J. p. 487 note 98.

Where secretary of guardian of two incompetent wards gained vital information concerning property of incompetents that enabled secretary to buy on his own account, for a nominal sum, valuable property belonging to incompetents, secretary held land in trust for the benefit of such incompetents—McHugh v. Jeffries, 183 S.W.2d 309, 207 Ark. 890.

94. U.S.—Bruun v. Hanson, C.C.A. Idaho, 103 F.2d 685, certiorari denied Hanson v. Bruun, 60 S.Ct. 86, 308 U.S. 571, 84 L.Ed. 479, mandate conformed to 30 F.Supp. 602.—Tracy v. Willisy Corporation, C.C.A. Ohio, 45 F.2d 455.

N.Y.—In re Bond & Mortg. Guarantee Co., 103 N.E.2d 721, 303 N.Y. 423. Okl.—Grugg v. Pruitt, 65 P.2d 994, 179 Okl. 369.

Wyo.—Corpus Juris quoted in Claughton v. Johnson, 38 P.2d 612, 616, 47 Wyo. 447.

95. Wyo.—Corpus Juris quoted in Claughton v. Johnson, 38 P.2d 612, 616, 47 Wyo. 447.

65 C.J. p. 487 note 1.

thereto,<sup>96</sup> as where the possession or control is assumed under a mistake,<sup>97</sup> or in bad faith,<sup>98</sup> or with

96. U.S.—*Dabney v. Levy*, C.A.N.Y., 191 F.2d 201, certiorari denied 72 S.Ct. 177, 342 U.S. 887, 96 L.Ed. 665, rehearing denied 72 S.Ct. 301, 342 U.S. 811, 96 L.Ed. 682.—U.S. v. Fleming, D.C.Iowa, 69 P.Supp. 252.—*Penn Mut. Life Ins. Co. of Philadelphia, Pa. v. Miller*, D.C.Mo., 32 F.Supp. 206, appeal dismissed *O'Brien v. Miller*, 116 F.2d 499, two cases, and *O'Brien v. Northwestern Mut. Life Ins. Co.*, 116 F.2d 499.

Ala.—*Corpus Juris* cited in *Revels v. Hall*, 21 So.2d 325, 327, 246 Ala. 430.

D.C.—*Harrington v. Emmerman*, 186 F.2d 757, 88 U.S.App.D.C. 23.

Ga.—*Trapnell v. Swainsboro Production Credit Ass'n*, 65 S.E.2d 179, 208 Ga. 89.

Ill.—*Board of Trustees of Police Pension Fund of Glen Ellyn v. Village of Glen Ellyn*, 85 N.E.2d 473, 337 Ill.App. 183.—*Wood v. Kelley*, 281 Ill.App. 207.

Ky.—*Turner v. Risner*, 134 S.W.2d 951, 280 Ky. 822.

Mo.—*Johnston v. McCluney*, App. 80 S.W.2d 898.

N.J.—*Miske v. Habay*, 63 A.2d 883, 1 N.J. 368.—*In re Haas' Estate*, 77 A.2d 523, 10 N.J. Super. 581.

N.Y.—*Acker v. Hanloti*, 92 N.Y.S.2d 914, 276 App.Div. 78, reargument and appeal denied 94 N.Y.S.2d 199, 276 App.Div. 894.—*In re Galos' Will*, 64 N.Y.S.2d 625.—*Schleifstein v. Schleifstein*, 59 N.Y.S.2d 621, affirmed 59 N.Y.S.2d 624, 269 App.Div. 1047.

Or.—*Corpus Juris* cited in *Elliott v. Mosgrove*, 91 P.2d 852, 860, 162 Or. 507.—*Welch Holding Co. v. Calloway*, 89 P.2d 559, 161 Or. 515.

Pa.—*Pollock v. Pollock*, Com.Pl., 41 Luz Leg.Rep. 37.—*Reitz v. Reitz*, Com.Pl., 5 Fay.L.J. 143, 56 York Leg.Rep. 79.

S.C.—*Dominick v. Rhodes*, 24 S.E.2d 168, 202 S.C. 139.

Tex.—*Fort Worth & Denver Ry. Co. v. Ferguson*, Civ.App., 261 S.W.2d 874, error dismissed.

Vt.—*McGann v. Capital Sav. Bank & Trust Co.*, 89 A.2d 123, 117 Vt. 179.—*Miller v. International Union of United Brewery, Flour, Cereal, and Soft Drink Workers of America*, 48 S.E.2d 252, 187 Va. 889.

Wash.—*Orkney v. Valley Cement Co.*, 261 P.2d 114, 43 Wash.2d 338, 65 C.J. p. 488 note 3.

#### Assumption of trustee's duties

(1) A person who assumes the duties of a trustee as to certain property and proceeds with the administration of such property is as liable for improper conduct with respect to such property as though he had been regularly appointed.—*Elliott v. Mosgrove*, 91 P.2d 852, 162 Or. 507,

rehearing denied 93 P.2d 1070, 162 Or. 507.

(2) Where trustees of trust estate, who were also managing officers and directors of corporation, wrongfully transferred trust assets to the corporation, corporation became a constructive trustee or trustee ex maleficio of all the trust property, and was restricted in its dealings with the property to such duties as the law imposed on it as such trustee.—*Petroleum Royalties Co. of Oklahoma v. Hartford Acc. & Indem. Co.*, C.C.A. Okl., 106 F.2d 440, 124 A.L.R. 1403, certiorari denied 60 S.Ct. 384, 308 U.S. 626, 84 L.Ed. 522.

(3) Whenever one comes into possession and control of property of another or in which another has an interest, he becomes with reference to that interest a trustee and is charged by law as well as by good morals to exercise such control with due respect to the interests of the beneficiary, and sometimes the trust is implied by law, but oftener the relationship arises out of contract between the parties and the possession and control gives the trustee such opportunities for oppression and wrong in the management of the property as calls for the closest scrutiny of his acts and out of this arises one of the most important branches of equity jurisdiction.—*Pounds v. Jenkins*, Tex. Civ.App., 157 S.W.2d 173.

#### Collection of tax

(1) Under sales tax ordinance imposing tax on buyer but imposing duty on seller of collecting tax, the receipt of tax money by seller operates to create a constructive trust.—*City of Philadelphia v. Heinel Motors*, 16 A.2d 761, 142 Pa.Super. 493.

(2) Where mortgage foreclosure decree provided that due and payable taxes were to be paid out of proceeds of sale, and purchaser withheld enough of agreed purchase price to equal amount of taxes which were a lien on land, constructive trust was created for the benefit of the city as to taxes which were a lien.—*Grier v. City Council of City of Spartanburg*, 26 S.E.2d 690, 203 S.C. 203.

#### Exclusion of partner

When certain of partners wrongfully exclude another from its business and take unto themselves the assets of partnership, they become, as to excluded partner, trustees ex maleficio.—*Schroer v. Schroer*, Mo., 248 S.W.2d 617.—*Schneider v. Schneider*, 146 S.W.2d 584, 347 Mo. 102.

#### Property of decedent

(1) Where one unlawfully comes into possession of property of a decedent, the constructive trust is one imposed by law.—*Bennett v. Forrest*, 150 P.2d 416, 24 Cal.2d 485.

(2) Constructive trust is imposed on funds wrongfully collected by third person under insurance policy payable to estate of decedent.—*Green v. Levitsky*, 185 A. 384, 120 N.J.Eq. 364.

(3) Son of store owner, to whom operation of business was intrusted as father's health failed, occupied relationship of trust to father, so that, having claimed business as his own after father's death, he would be accountable as a trustee for all property of father's estate in his possession.—*Jubenville v. Jubenville*, 46 N.E.2d 533, 313 Mass. 103, 144 A.L.R. 1008.

#### Privilege of contract not essential

A materialman's complaint alleging that contractor had assigned to defendant amount due from city on order to furnish labor and materials to construct a public improvement, and seeking to recover money in defendant's hands as a constructive trustee, was not dismissible on ground that there was no privity of contract between the parties, since privity of contract is not essential where a defendant's obligation arises out of a constructive trust.—*York Trim Corp. v. Ardley Trading Corp.*, 7 N.Y.S.2d 843, 169 Misc. 656.

#### Extension of period

Where trustee named in deed of trust covering oil properties consented to deposit a part of purchase price with bank as security for payment of vendor's obligations and residue of deposit was returned to trustee at end of ninety days, any subsequent extension of period by trustee was a matter of grace and not of right, with respect to right to have fund impressed with trust.—*Baltimore Trust Co. v. Intercean Oil Co.*, D.C. Md., 26 F.Supp. 817, affirmed, C.C.A.—*British-American Oil Producing Co. v. Baltimore Trust Co.*, 105 F.2d 291.

97. U.S.—*Penn Mut. Life Ins. Co. of Philadelphia, Pa. v. Miller*, D.C.Mo., 32 F.Supp. 206, appeal dismissed *O'Brien v. Miller*, 116 F.2d 499, two cases, and *O'Brien v. Northwestern Mut. Life Ins. Co.*, 116 F.2d 499, 65 C.J. p. 488 note 4.

98. U.S.—*Penn Mut. Life Ins. Co. of Philadelphia, Pa. v. Miller*, D.C.Mo., 32 F.Supp. 206, appeal dismissed *O'Brien v. Miller*, 116 F.2d 499, two cases, and *O'Brien v. Northwestern Mut. Life Ins. Co.*, 116 F.2d 499, 65 C.J. p. 488 note 5.

#### Absence of consideration

One who takes trust property without consideration and either with or without notice becomes a trustee himself.—*Herman v. Edington*, Mass., 118 N.E.2d 865.

knowledge of a prior or superior claim or title,<sup>99</sup> or where an intrusion is made on lands of an infant.<sup>1</sup> So the transferee of a constructive trustee who takes with notice that property has been delivered in breach of trust has no greater rights than the constructive trustee and likewise becomes a constructive trustee liable to reconvey the property.<sup>2</sup> Similarly, where a life owner of property, or a life beneficiary of a trust, comes into possession of the property, he will be deemed to have received it for trust purposes, and for the ultimate benefit of the remainderman;<sup>3</sup> and where there has been a breach of a contract to make a devise or bequest, the owner of the legal title to property of the decedent may be decreed to be a constructive trustee of as much thereof as is necessary to satisfy the contract.<sup>4</sup>

In order, however, that one may be held as a constructive trustee of money or funds coming into his possession or under his control, there must be some element of wrong or violation of duty.<sup>5</sup> So an as-

sumption of possession under an adverse, although defective, title, without fraud, does not give rise to a constructive trust in favor of the true owner,<sup>6</sup> nor does the assumption of possession and control of a decedent's estate by the surviving spouse, with the consent of the executors, although the possession is without right;<sup>7</sup> and, in general, where the possession or assumption of control is without fraud, no constructive trust arises therefrom.<sup>8</sup> Where property is transferred to a person under such circumstances that he is under a duty to make restitution and the right of restitution becomes barred because of running of the limitation period, the transferee ceases to hold the property under a constructive trust.<sup>9</sup> On the other hand, the duty and liability as trustee for the owner of one who without right to property or funds, acquires possession thereof is not affected by the fact that he collected such property or funds under an agreement to be paid a commission for so doing and that such agreement is unenforceable.<sup>10</sup>

99. U.S.—U. S. v. Fleming, D.C.Iowa, 69 F.Supp. 252.

Fla.—Brown v. Skinner, 73 So.2d 321.  
Mass.—Berry v. Kyes, 22 N.E.2d 622, 304 Mass. 56.

Tex.—Cassidy-Southwestern Commission Co. v. Guaranty Trust Co. of New York, Civ.App., 174 S.W.2d 494.

65 C.J. p. 488 note 6.

Knowingly receiving property charged with trust as making recipient constructive trustee see *infra* § 441-445.

#### Necessity of notice

In order to constitute a person who takes trust property or trust money for his own purposes a constructive trustee thereof, he must have notice that it is being misapplied by being transferred to him, or, in other words, he must be party to a fraud or breach of trust on the part of the actual trustee.—Frier v. J. W. Sales Corp., 25 N.Y.S.2d 576, 261 App.Div. 388.

#### Trustee's executor or administrator

(1) Where there was nothing to show that any trust funds or property passed to trustee's executors except a sum which executors formally acknowledged, and with which they charged themselves and undertook to account, trustee's executors became the voluntary or constructive trustees of the trust funds.—McCullum v. Anderson, C.C.A.Okl., 147 F.2d 811.

(2) Where deceased testamentary trustee's son and executor treated trust as an obligation to which he had succeeded and exercised same duties for beneficiaries as though he

were original trustee, at least as to extent of assets which he acquired from his father's estate, son became constructive successor trustee without necessity of appointment with-in exception to statute of frauds that a constructive trust need not be in writing.—Jones v. Katz, 59 N.E.2d 537, 325 Ill.App. 65.

(3) Trust company becoming administrator of one who had acquired an aged woman's fortune under circumstances indicating trust relationship was bound, after notice thereof, by rules governing trusts, and became a successor trustee, with duty of accounting as such.—Tucker v. Brown, 150 P.2d 604, 20 Wash.2d 740.

1. N.J.—Boylan v. Deinzer, 18 A. 119, 45 N.J. Eq. 485.

2. Mass.—Berry v. Kyes, 22 N.E.2d 622, 304 Mass. 56.

3. Mass.—Parker v. Lloyd, 71 N.E.2d 889, 321 Mass. 126.  
65 C.J. p. 488 note 8.

4. N.Y.—Milliner v. Morris, 219 N.Y.S. 166, 219 App.Div. 425.

5. D.C.—Cotte v. Sands, 298 F. 1011, 54 App.D.C. 396.

#### Trust denied

(1) As to bank deposit.—Fidelity & Cas. Co. of N. Y. v. Niles Bank Co., 71 N.E.2d 742, 79 Ohio App. 15.

(2) As to amount received by contractor not allocated to subcontractors or materialmen.—In re Fritz Estate, 257 N.W. 687, 216 Wis. 477.

(3) As to amount received in settlement of claim on indemnity policy.—Bender Body Co. v. Quaker City Motor Coach Lines, D.C.N.J., 15 F.

Supp. 401, affirmed, C.C.A., Hearnig v. Bell, 84 P.2d 1603, certiorari denied 57 S.Ct. 42, 299 U.S. 577, 81 L. Ed. 425.

(4) As to fund arising from compromise of tort claim.—Messler Acceptance Co. v. Moore, 67 So.2d 868, 218 Miss. 757.

(5) As to mining claim.—Morrow v. Coast Land Co., 84 P.2d 301, 29 Cal App.2d 92.

(6) As to amount of processing taxes.—O'Connor-Hills v. Washburn Crosby Co., D.C.Mo., 20 F.Supp. 460.

(7) As to lease of trust property assigned to bank.—Church v. Security-First Nat. Bank of Los Angeles, 105 P.2d 148, 40 Cal.App.2d 529.

8. S.D.—Corpus Juris quoted in Beale County v. Hinkley, 10 N.W.2d 757, 760, 69 S.D. 381.  
65 C.J. p. 489 note 11.

#### Duty of restitution

Where a person is under a duty of restitution because he has acquired possession of goods without obtaining title to them, he is not chargeable as constructive trustee, and for such a situation there are simple and adequate legal remedies.—Orduhl v. Johnson, 93 N.E.2d 377, 341 Ill.App. 277.

7. Vt.—Clark v. Peck, 65 A. 14, 79 Vt. 275.

8. Mont.—Morton v. Union Cent. Life Ins. Co., 261 P. 278, 80 Mont. 593.

9. N.H.—Sullivan v. Marshall, 44 A. 2d 433, 93 N.H. 456.

10. Cal.—England v. Winslow, 237 P. 542, 196 Cal. 260.

### § 153. — Wrongful Disposition of Property

Generally, where one person disposes of property in fraud of the rights of another, a constructive trust attaches to the proceeds of the sale.

It is a general rule that, where one person disposes of property in fraud of the rights of another, a constructive trust attaches to the proceeds of the sale.<sup>11</sup> As otherwise expressed, a constructive trust arises whenever another's property has been wrongfully

appropriated and converted into a different form.<sup>12</sup> So, where a person after selling property but before transferring the title, resells it to another, receiving the purchase price, he will be deemed a trustee for the first vendee of the proceeds of the resale.<sup>13</sup> On the other hand, where there is no legal duty owing to another with respect to the disposition of certain property,<sup>14</sup> or where the disposition made of property is not wrongful,<sup>15</sup> no constructive trust arises. It has also been held that

11. U.S.—*Nuveen v. Board of Public Instruction of Gadsden County*, C.C.A. Fla., 88 F.2d 175, certiorari denied Board of Public Instruction of Gadsden County, Fla. v. Nuveen, 57 S.Ct. 794, 301 U.S. 691, 81 L.Ed. 1347.—*Merchants Transfer & Storage Co. v. First Federal Foreign Banking Corporation*, C.C.A.N.Y., 79 F.2d 243.—*Anderson v. Benson*, D.C.Neb., 117 F.Supp. 765.—*U. S. v. Newbury Mfg. Co.*, D.C.Mass., 36 F.Supp. 602, motion denied 123 F.2d 453.

Fla.—*Le Mire v. Galloway*, 177 So. 283, 130 Fla. 101.

Ill.—*Lewis v. Hill*, 47 N.E.2d 127, 317 Ill.App. 531.

Me.—*Greenberg v. Greenberg*, 43 A.2d 841, 141 Me. 320.

Md.—*Carter v. Abrams*, 93 A.2d 546, 201 Md. 339.—*Fasman v. Potashnick*, 51 A.2d 664, 188 Md. 165.

Mass.—*Loring v. Baker*, 106 N.E.2d 444, 329 Mass. 63.

Mo.—*Feltz v. Pavlik*, App., 257 S.W.2d 214.

Or.—*Weber v. Jefferson County*, 166 P.2d 476, 178 Or. 245.

S.D.—*In re Farmers State Bank of Amherst*, 289 N.W. 75, 67 S.D. 51, 126 A.L.R. 619.

65 C.J. p. 489 note 15.

#### Conveyance to nominee

Property of decedent's estate which was mortgaged to pay taxes and conveyed to attorney's nominee in administration proceedings instituted by attorney who claimed fees for services was subject to constructive trust in favor of heirs, with liability for charges covering costs of administration and protecting property from tax foreclosure, where attorney, before he caused sale to nominee, had knowledge that claim was without foundation.—*Farrington v. Jacobs*, C.C.A.Fla., 132 F.2d 745.

#### Legacy

Where one of several legatees, who were equally interested in a legacy as tenants in common, used the legacy in part payment for land purchased in his name, the other legatees could ratify his act in so disposing of the legacy and sue for a proportionate interest in the land purchased.—*Lewis v. Patterson*, 12 S.E.2d 593, 191 Ga. 348.

#### Transfer of bank account

The act of donor of bank deposit in causing fund to be transferred to his personal account to be used for his own purposes after donee's death constituted a misappropriation of fund and rendered him liable to estate of donee as a trustee ex maleficio.—*First Nat. Bank of Portland v. Connolly*, 138 P.2d 613, 172 Or. 434, rehearing denied 143 P.2d 243, 172 Or. 434.

#### Use restricted by agreement

Where the owner of personality turns possession thereof over to another whose use thereof is restricted by agreement, and who agrees not to sell the personality until after it has been paid for, an unauthorized sale by the person in possession creates a fiduciary relationship between the parties with respect to the consideration received from the sale of the personality.—*General Motors Acceptance Corp. v. Thompson*, 292 N.W. 85, 70 N.D. 99.

#### Disposition by will

(1) Where husband and wife each contributed to the acquisition and construction of a hotel property which was in the name of wife and she attempted to dispose thereof by will creating a trust, constructive trust would be declared in the property in the proportion that husband and wife contributed their separate funds thereto with an equitable lien declared on the beneficial interest of any beneficiary in the trust who had drawn sums from the trust estate in excess of the proportion to which the beneficiary would have been entitled.—*Dong v. Riley*, C.A.Fla., 176 F.2d 449.

(2) Where husband and wife executed joint will constituting contract for disposition of their property and wife survived husband and made second will containing certain departures from joint will, on death of wife beneficiaries under joint will were entitled to have trust impressed on estate of wife and to have estate distributed in accordance with joint will.—*Sellvet v. Leeco*, 101 A.2d 26, 28 N.J. Super. 593.

12. Conn.—*Van Auker v. Tyrrell*, 33 A.2d 339, 130 Conn. 289.

Ky.—*McCracken County v. Lakeview*

Country Club, 70 S.W.2d 938, 254 Ky. 515.

Tex.—*Paddock v. Siemoneit*, Civ.App., 214 S.W.2d 651, reversed on other grounds 218 S.W.2d 428, 147 Tex. 571, 7 A.L.R.2d 1062.

#### Conversion or transfer

Whenever one person wrongfully takes the property of another and converts it into a new form or transfers it, a constructive trust arises and follows the property or its proceeds.—*Wolfe v. Wolfe*, 56 S.E.2d 343, 215 K.C. 530.

13. Ill.—*Houliand v. County of Peoria*, 16 Ill. 538.

14. Ala.—*Security Federal Sav. & Loan Ass'n v. Underwood Coal & Supply Co.*, 16 So.2d 100, 245 Ala. 56.

#### Money loaned for construction

One who lends money to an owner for construction of a house owes no legal duty to the materialman, not based on contract or estoppel, although he knows that the money is to be used to pay for materials and labor, to see that it is so used; and a materialman has an equitable claim in a fund in hands of owner or lender, payable to contractor in installments as construction progresses, only when there is a stipulation between owner or lender and contractor that installments shall not be paid until proof is furnished to owner that contractor has paid bills for materials, and materialman is so informed and relies and acts on assumption that such arrangement will be complied with, and owner contemplates that materialman will do so.—*Security Federal Sav. & Loan Ass'n v. Underwood Coal & Supply Co.*, supra.

15. Colo.—*Cass v. Blake*, 56 P.2d 42, 98 Colo. 351.

Where there was no fraud, quitclaim deed by one of joint owners of mortgage releasing his interest in mortgage to mortgagor, with intention to forgive the debt, did not raise constructive trust in favor of mortgage owners.—*Monski v. Lukomski*, 173 A. 897, 118 Conn. 635.

#### Investment certificates

Corporation's president was not guilty of wrongful conversion, resulting in constructive trust for administratrix of his estate, in delivering

where a person who is without knowledge of facts which make him a converter, wrongfully disposes of another's property and acquires other property in exchange, the owner may enforce an equitable lien but not a constructive trust.<sup>16</sup>

**Failure to make proper disposition or application.** By analogy to the general rule with respect to a wrongful disposition of property, it is established that, where one secures possession of property or money on a promise or under a direction to make a certain disposition or application of it, and fails to do so, a constructive trust may be enforced against him.<sup>17</sup>

### § 154. — Conveyance, Bequest, or Devise Subject to Charge

Where property is conveyed inter vivos, or bequeathed or devised, subject to a charge, a constructive trust

arises in favor of the person for whose benefit the charge is made.

Where property is conveyed inter vivos, or bequeathed or devised, subject to a charge for the payment of debts or other charge, a constructive trust arises in favor of the person for whose benefit the charge is made;<sup>18</sup> and this is true even though the conveyance is absolute in form and the charge is created by parol.<sup>19</sup>

### § 155. Presumptions and Burden of Proof

The burden of proof of a constructive trust is on the person seeking to establish it, while the burden of proving matter of affirmative defense is on the party against whom the trust is sought to be enforced.

In accordance with the general rules as to the burden of proof and presumptions in actions for the establishment or enforcement of trusts, discussed infra § 467, the burden of proof of a constructive trust is on the person seeking to establish it,<sup>20</sup> while

another corporation's investment certificates, owned by him, to former corporation pursuant to agreement with trustee committee, of which he was member—*Cass v. Blake*, 56 P.2d 42, 98 Colo. 381.

#### Sale by heirs

Where owner of lands entered into an agreement with plaintiff for mineral development at so much per acre, and after the owner's death his heirs in violation of agreement sold the lands without paying plaintiff his fee and used the proceeds of the sale to pay the creditors of the owner's estate, thereby securing the lands free from all incumbrance, such failure to so pay did not give plaintiff a right to impose a constructive trust on the lands—*Landrum v. Robertson*, Tex. Civ. App., 195 S.W.2d 170, error refused no reversible error.

16. Mass.—*Loring v. Baker*, 106 N.E.2d 434, 329 Mass. 63.

17. U.S.—*Sommers v. Timely Toys, Inc.*, C.A.N.Y., 209 F.2d 342. Tenn.—*Sliger v. Sliger*, 105 S.W.2d 117, 21 Tenn. App. 64.

65 C.J. § 489 note 18. Constructive trust as arising from parol promise as to disposition of

Bequest or devise by, or inheritance from, promisee see supra § 148.

Land conveyed by promisee see supra § 149.

Property to be purchased see supra § 150.

#### Use of funds

Equity will create constructive trust on basis of use of funds after trustee has acquired title to property.—*Tri-City Electric Service Co. v. Jarvis*, 185 N.E. 138, 206 Ind. 5.

#### Improper investments

Where person makes false representations as to how loan will be used for purpose of borrowing money and invests it in other lands or mortgages on other lands, constructive trust is created—*Sliger v. Sliger*, 105 S.W.2d 117, 21 Tenn. App. 64—*Walker v. Collins*, 7 Tenn. App. 333.

#### Lien

Where person has lien on personal property which is sold with understanding between owner and person holding lien that proceeds of sale be applied toward payment of lien, equity will impress a trust on such proceeds.—*Stegemann v. Bendixen*, 260 N.W. 14, 219 Iowa 1190.

#### Promise not to convey

Where defendants, in return for paying off mortgage on land and supplying funds for improvements thereon, received oral promise by grantor not to convey remaining joint interest held by grantor so that co-defendant, who was a joint tenant with grantor, would become sole owner at grantor's death, and defendants were entitled to rely on grantor's promise, equity would intervene to impose a constructive trust for defendants' benefit after grantor attempted to convey land to his second wife, who did not part with consideration for deed, and whether second wife had knowledge of grantor's promise to defendants and of the supplying of funds by defendants was immaterial.—*Pellerito v. Dragna*, 105 P.2d 1011, 41 Cal. App. 2d 85.

18. Neb.—*Vielehr v. Malone*, 63 N.W.2d 497, 158 Neb. 436—*Maca v. Sabata*, 34 N.W.2d 267, 150 Neb. 213—*Fox v. Fox*, 110 N.W. 304, 77 Neb. 601.

19. Neb.—*Pollard v. McKenney*, 96 N.W. 679, 101 N.W. 3, 63 Neb. 742. N.Y.—*Ahrens v. Jones*, 62 N.Y. 556, 169 N.Y. 558, 88 Am. St. 820.

20. U.S.—*Miller v. Carter Oil Co.*, C.A. Okl., 192 F.2d 731—*Shapiro v. Rubens*, C.C.A. Ind., 106 F.2d 659—*Grand Trunk Western R. Co. v. Chicago & Western Indiana R. Co.*, C.C.A. Ill., 131 F.2d 216—*Continental Illinois Nat. Bank & Trust Co. v. Continental Illinois Nat. Bank*, C.C.A. Ill., 87 F.2d 934—*Baltimore Trust Co. v. Intercean Oil Co.*, D.C. Md., 38 F.Supp. 871, affirmed British-Am. Oil Producing Co. v. Baltimore Trust Co., C.C.A., 105 F.2d 291.

Cal.—*Foley v. Riverside Iron & Steel Corp.*, 221 P.2d 998, 99 Cal. App. 2d 431—*O'Brien v. Markham*, 99 P.2d 583, 37 Cal. App. 2d 381.

Colo.—*Woodruff v. Clarke*, 262 P.2d 737, 128 Colo. 387.

Ill.—*Bromer v. Bromer*, 104 N.E.2d 299, 411 Ill. 454—*Guffey v. Washburn*, 46 N.E.2d 971, 382 Ill. 376.

Iowa.—*Copeland v. Voge*, 20 N.W.2d 2, 237 Iowa 102.

Minn.—*Martin v. Tucker*, 14 N.W.2d 105, 217 Minn. 104.

Mo.—*Aronson v. Spiteaufsky*, 260 S.W.2d 548—*Triessler v. Helmacher*, 168 S.W.2d 1030, 350 Mo. 807.

Neb.—*Peterson v. Massey*, 53 N.W.2d 912, 155 Neb. 829.

N.H.—*Hebert v. Couture*, 31 A.2d 61, 92 N.H. 524.

N.J.—*Kurtz v. Oremland*, 93 A.2d 792, 24 N.J. Super 235.

N.Y.—*Latham v. Father Divine*, 81 N.Y.S.2d 681, 274 App. Div. 236, reversed on other grounds 85 N.E.2d 168, 299 N.Y. 22, 11 A.L.R. 3d 802, reargument denied 85 N.E.2d 114, 299 N.Y. 599—*Wojtkowiak v. Wojtkowiak*, 85 N.Y.S.2d 198, af-

the burden of proving matter of affirmative defense is on the party against whom the trust is sought to be enforced.<sup>21</sup> The intention of the parties may be inferred from the facts, the conduct of the parties, and the surrounding circumstances.<sup>22</sup> As a general principle, fraud, out of which a trust ex maleficio arises, is not presumed,<sup>23</sup> and the burden of proving the existence of the fraud, actual or constructive, necessary to give rise to a constructive trust is on the person asserting the existence of such

a trust.<sup>24</sup> If the trust is alleged to have arisen out of a promise or agreement as to the acquisition, holding, or disposition of property, plaintiff must show the making of such promise or agreement,<sup>25</sup> and a substantial breach thereof.<sup>26</sup>

Where a confidential or fiduciary relationship does not exist as a matter of law,<sup>27</sup> the burden of proof of such relationship, and abuse thereof through undue influence or otherwise, rests on plaintiff.<sup>28</sup> If, however, the existence of an ante-

affirmed 81 N.Y.S.2d 171, 273 App Div. 1052.

Okl.—Poe v. Poe, 256 P.2d 163, 208 Okl. 406—Preston v. Ross, 236 P.2d 244, 205 Okl. 164—Dodd v. Kane, 218 P.2d 1047, 203 Okl. 156—Ingraham v. Worley, 149 P.2d 253, 191 Okl. 238—Johnson v. Rowe, 89 P.2d 955, 185 Okl. 60.

Tex.—Smith v. Bolin, Civ.App. 261 S.W.2d 352, affirmed in part and reversed in part on other grounds, Sup., 271 S.W.2d 73—Shropshire v. Hammond, Civ.App., 120 S.W.2d 282.

Wash.—Rodgers v. Simmons, 262 P.2d 204, 43 Wash.2d 557.

65 C.J. p 489 note 23

#### Contract and performance

Where plaintiff based claim to land on contract requiring defendants to transfer land to plaintiff on plaintiff's performance of certain conditions, plaintiff had burden to show terms of contract and his performance thereof.—Eisenmenger v. Eisenmenger, 139 P.2d 63, 59 Cal.App.2d 536.

#### Officer of corporation

Corporation, in order to establish trust in property which had been acquired personally by one of its officers, was required to establish an interest, actual or in expectancy, in property in question, while officer was its representative.—Colorado & Utah Coal Co. v. Harris, 49 P.2d 429, 97 Colo 309.

#### Presumption of right

In suits to establish constructive trusts, a presumption of right exists in favor of the one in whom the legal title is lodged.—Metzger v. Metzger, 14 A.2d 285, 338 P. 564, 129 A.L.R. 683—Majors v. Majors, 33 A.2d 442, 153 Pa Super. 175, affirmed 37 A.2d 528, 349 Pa. 334—Copenhaver v. Duncan, Com'l., 51 York Leg.Rec. 105.

#### Conveyance to wife

In order to rebut the presumption that a conveyance of property by husband to wife is made as an absolute gift, it must appear that there was an obligation on the wife's part to hold the property in trust for the husband.—Moneta v. Hoinacki, 67 N.E.2d 204, 394 Ill. 47.

21. Or.—Ibach v. Hoffman, 198 P.2d 266, 184 Or. 296.  
65 C.J. p 490 note 24.

#### Bona fide purchaser

Burden was on party allegedly acquiring title from trustee ex maleficio of proving that she was bona fide purchaser by proving payment for value and taking without notice of fraud.—Stephenson v. Golden, 276 N. W. 849, 279 Mich 710.

22. Miss.—Adcock v. Merchants & Mfrs Bank of Ellisville, 42 So 2d 427, 207 Miss. 448.

23. Ill.—Ashton v. Macqueen, 197 N E 561, 361 Ill. 132—Reynolds v. Wangelin, 53 N.E.2d 720, 322 Ill App 13.

Iowa.—In re Hewitt's Estate, 62 N. W.2d 198.

#### Loan to employer

Equity will not raise a presumption of fraud from the relationship of employer and employee alone, in a transaction in which the employee lends money to the employer.—Renshaw v. Tracy Loan & Trust Co., 49 P.2d 403, 87 Utah 364, 100 A.L.R. 872.

#### Transfer to children

Fact that decedent prior to his death transferred a substantial portion of his property to certain of his children by creation of trusts and by creation of joint interest in bonds and a bank account did not create a presumption of constructive fraud so as to require two of his daughters as executrices to account for such property as assets of the estate.—In re Kumen's Estate, 99 N.Y.S.2d 148.

Circumstances held to give rise to inference of fraud

Ark.—Mack v. Marvin, 202 S.W.2d 590, 211 Ark. 715.

24. U.S.—Henning v. Cox, C.C.A. Tex., 148 F.2d 586

Ark.—Roller v. Roller, 216 S.W.2d 399, 214 Ark. 382

Ill.—Reynolds v. Wangelin, 53 N.E.2d 720, 322 Ill.App 13.

Mich.—Pohy v. Pell, 17 N.W.2d 183, 310 Mich. 280.

Minn.—Martin v. Tucker, 14 N.W.2d 165, 217 Minn. 104.

Tex.—Smith v. Bolin, Civ.App., 261 S.W.2d 352, error granted.

Utah.—Renshaw v. Tracy Loan & Trust Co., 49 P.2d 403, 87 Utah 364, 100 A.L.R. 872.  
65 C.J. p 490 note 26.

#### Voluntary act

Where application for creation of joint savings bank account was admittedly signed by the decedent and the plaintiff seeking to establish a trust in funds withdrawn from such account and for an accounting failed to prove a confidential relationship, there was a presumption that the transaction was the decedent's voluntary act and since no evidence was offered to rebut such presumption, it would stand.—Snoder v. Lenhart, 69 A.2d 382, 363 Pa. 371.

#### Inference from repudiation of agreement

On proof of a transfer made in reliance on an oral agreement to hold in trust and on proof of the subsequent repudiation of the agreement, the trier of facts may infer that maker of promise had intention not to perform at time promise was made, which is actual fraud.—Jarkish v. Madagliacco, 170 P.2d 994, 75 Cal.App.2d 505.

25. Okl.—Jones v. Jones, 148 P.2d 989, 194 Okl. 228

65 C.J. p 490 note 28.

26. Ala.—Adams v. Adams, 140 So. 438, 224 Ala. 346.

27. U.S.—Shapiro v. Rubens, C.C.A. Ind., 166 F.2d 659

#### Principal and agent

One asserting that relationship between agent and principal, for whom agent collected money, has become that of debtor and creditor, instead of trustee and cestui que trust, has burden of showing such fact.—Brown v. McGuire's Real Estate Agency, App. 101 S.W.2d 41, reversed on other grounds 121 S.W.2d 754, 343 Mo. 336.

28. U.S.—Shapiro v. Rubens, C.C.A. Ind., 166 F.2d 659.

Ill.—Anchor Realty & Inv. Co. v. Tafferty, 32 N.E.2d 391, 308 Ill.App. 484.

Kan.—Staah v. Staah, 163 P.2d 418, 160 Kan. 417.

Okl.—Jones v. Jones, 148 P.2d 989, 194 Okl. 228

65 C.J. p 490 note 27.



cedent, confidential, or fiduciary relationship is shown, equity will ordinarily presume that confidence was reposed and fraud or undue influence exerted in the transaction,<sup>29</sup> and where a prima facie case of constructive fraud is so made out from the fiduciary relationship of the parties and other

circumstances connected with the transaction, the burden of affirmatively proving good faith, or the absence of undue influence, or of proving, the justice, equity, and fairness of the transaction assailed, is on the party denying the existence of a trust,<sup>30</sup> except where he was the one reposing the confidence,

#### Divorced persons

A confidential relationship between divorced wife and husband which would furnish basis for impressing trust on proceeds from sale of real property pursuant to alleged oral agreement would not be presumed from her sentimental friendship for her former mate, or from her confidence in his earning power, or from her belief in his promises, since divorce restored her to her former status of an unmarried woman.—*O'Melia v. Adkins*, 166 P.2d 298, 73 Cal.App.2d 143.

**Relationship between sisters** is not presumed to be confidential, but a confidential relationship between sisters may be shown to exist, blood relationship being important factor in determining existence of confidential relationship.—*Johnson v. Clark*, 61 P.2d 767, 7 Cal.2d 529.

#### Acquisition of leases

In action to impose constructive trust on new oil leases, which defendant had acquired for himself after expiration of old leases in which plaintiffs and defendant had interests, on ground that defendant owed fiduciary duty to plaintiffs in acquiring new leases for himself, burden of proof was on plaintiffs to show that defendant acted in bad faith in acquiring new leases for himself.—*Smith v. Bolin*, Tex.Civ.App., 261 S.W.2d 352, affirmed in part and reversed in part on other grounds, Sup. 271 S.W.2d 93.

29. *U.S.—Shapiro v. Rubens*, C.C.A. Ind., 166 F.2d 659.

Ala.—*Barnes v. Powell*, 3 So.2d 80, 241 Ala. 409.

Cal.—*Solon v. Lichtenstein*, 244 P.2d 907, 39 Cal.2d 75—*Fish v. Security-First Nat. Bank of Los Angeles*, 189 P.2d 10, 31 Cal.2d 378—*Johnson v. Clark*, 61 P.2d 767, 7 Cal.2d 529—*Rahim v. Akbar*, 207 P.2d 80, 92 Cal.App.2d 383—*Crow v. Madsen*, App., 111 P.2d 7, rehearing granted 111 P.2d 663.

Ill.—*Peters v. Meyers*, 96 N.E.2d 493, 408 Ill. 253—*Kester v. Crilly*, 91 N.E.2d 419, 405 Ill. 425—*Finn v. Monk*, 85 N.E.2d 701, 403 Ill. 167—*Jones v. Robley*, 83 N.E.2d 570, 402 Ill. 302—*Clark v. Clark*, 76 N.E.2d 446, 398 Ill. 592—*Winger v. Chicago City Bank & Trust Co.*, 67 N.E.2d 265, 394 Ill. 94.

Mich.—*Beattie v. Bower*, 287 N.W. 900, 290 Mich. 517.

N.D.—*Johnson v. Larson*, 56 N.W.2d 750.

R.I.—*Nelson v. Dodge*, 68 A.2d 51, 76 R.I. 1, 14 A.L.R.2d 638.

S.C.—*Scott v. Scott*, 57 S.E.2d 470, 216 S.C. 280.

Utah.—*Renshaw v. Tracy Loan & Trust Co.*, 49 P.2d 403, 87 Utah 364, 100 A.L.R. 872.

Va.—*Nicholson v. Shockey*, 64 S.E.2d 813, 192 Va. 270.

65 C.J. p 490 note 30.

#### Gift to child

Ordinarily, anything given by parent to child inter vivos is presumed to be a gift because parent is usually the dominant party, but such rule is reversed where, by reason of circumstances, child is the dominant party, such as where parent relies heavily on child for care and protection, or for guidance in business affairs.—*Bass v. Smith*, 56 A.2d 800, 189 Md. 461.

**Purchase by broker of realty** at instance of complainant gave rise to presumption that broker was acting in that capacity and not that realty had been purchased by broker for himself and complainant.—*Gabel v. Kilgore*, 26 So.2d 166, 157 Fla. 420.

#### Rule held inapplicable

The presumption of undue influence from a fiduciary relationship does not apply to conveyances from husband to wife.—*Moneta v. Hoinacki*, 67 N.E.2d 204, 394 Ill. 47.

#### Presumption rebuttable

The presumption of fraud or undue influence from a fiduciary relationship is rebuttable, and may be rebutted by showing the entire fairness of the transaction.—*Jones v. Robley*, 83 N.E.2d 570, 402 Ill. 302—65 C.J. p 490 note 30 [a].

30. Ala.—*Barnes v. Powell*, 3 So.2d 80, 241 Ala. 409.

Cal.—*Solon v. Lichtenstein*, 244 P.2d 907, 39 Cal.2d 75—*Fish v. Security-First Nat. Bank of Los Angeles*, 189 P.2d 10, 31 Cal.2d 378—*Johnson v. Clark*, 61 P.2d 767, 7 Cal.2d 529—*Kent v. First Trust & Sav. Bank of Pasadena*, 225 P.2d 625, 101 Cal.App.2d 361—*Crow v. Madsen*, App., 111 P.2d 7, rehearing granted 111 P.2d 663—*Forman v. Goldberg*, 108 P.2d 983, 42 Cal.App.2d 308.

Ill.—*Jones v. Washington*, 107 N.E.2d 672, 412 Ill. 436—*Miethe v. Miethe*, 101 N.E.2d 571, 410 Ill. 226—*Peters v. Meyers*, 96 N.E.2d 493, 408 Ill. 253—*Kester v. Crilly*, 91 N.E.2d 419, 405 Ill. 425—*Finn v. Monk*, 85 N.E.2d 701, 403 Ill. 167—*Jones v. Robley*, 83 N.E.2d 570,

402 Ill. 302—*Clark v. Clark*, 76 N.E.2d 446, 398 Ill. 592—*Winger v. Chicago City Bank & Trust Co.*, 67 N.E.2d 265, 394 Ill. 94—*Brod v. Brod*, 61 N.E.2d 675, 390 Ill. 312—*Vrooman v. Hawbaker*, 56 N.E.2d 623, 387 Ill. 428—*Doner v. Phoenix Joint Stock Land Bank of Kansas City*, 45 N.E.2d 20, 381 Ill. 108—*Masterson v. Wall*, 6 N.E.2d 161, 365 Ill. 102—*Suchy v. Hajicek*, 4 N.E.2d 836, 364 Ill. 502—*Mueller v. Weiland*, 96 N.E.2d 360, 342 Ill. App. 240—*Borovansky v. Para*, 28 N.E.2d 174, 306 Ill.App. 60.

Iowa.—*Salem*, 60 N.W.2d 772—*In re Lundvall's Estate*, 46 N.W.2d 535, 242 Iowa 430.

Kan.—*Henks v. Fanning*, 264 P.2d 483, 175 Kan. 424—*Staah v. Staah*, 168 P.2d 418, 160 Kan. 417.

La.—*Williams v. Watts*, App., 195 So. 54.

Md.—*Bass v. Smith*, 56 A.2d 800, 189 Md. 461.

Mich.—*Beattie v. Bower*, 287 N.W. 900, 290 Mich. 517.

Nev.—*Corpus Juris* cited in *Davidson v. Streeter*, 284 P.2d 793, 739, 68 Nev. 427.

N.J.—*Hirschmann v. Hirschmann*, 37 A.2d 50, 135 N.J.Eq. 23, affirmed 41 A.2d 13, 136 N.J.Eq. 230.

N.Y.—*Brown v. Father Divine*, 18 N.Y.S.2d 544, 178 Misc. 1029, affirmed 23 N.Y.S.2d 116, 260 App.Div. 443, reargument denied 24 N.Y.S.2d 991, 260 App.Div. 1008.

Pa.—*Ringer v. Finrock*, 17 A.2d 348, 340 Pa. 453—*Schwarz v. Keighler*, Com.Pl., 31 Del.Co. 251.

R.I.—*Nelson v. Dodge*, 68 A.2d 51, 76 R.I. 1, 14 A.L.R.2d 638—*Oldham v. Oldham*, 192 A. 758, 53 R.I. 288.

Utah.—*Renshaw v. Tracy Loan & Trust Co.*, 49 P.2d 403, 87 Utah 364, 100 A.L.R. 872.

Va.—*Nicholson v. Shockey*, 64 S.E.2d 813, 192 Va. 270.

65 C.J. p 490 note 31.

**Fiduciary seeking to prove fairness of transaction** with principal should show that fiduciary made full and frank disclosure of all relevant information which he had, that consideration was adequate, and that principal had independent advice before completing transaction.—*Masterson v. Wall*, 6 N.E.2d 161, 365 Ill. 102.

#### Mother and son

Where relationship of trust and confidence existed between mother and son to whom mother transferred property, son was required to rebut presumption of fraud by clear

and the party seeking to establish the trust occupied the position of relative superiority and influence, in which case the rule has no application.<sup>31</sup> However, the existence of a confidential relationship between the parties does not relieve plaintiff of the burden of proving the existence of a promise or agreement, the fraud in making or violating of which forms the basis of the trust.<sup>32</sup>

Where a conversion by defendant of funds or property to which plaintiff is entitled is alleged, the burden is on plaintiff to show such conversion,<sup>33</sup> and to prove the identity of the fund or property on which the trust is sought to be impressed with that into which the conversion was made.<sup>34</sup>

and convincing proof that he had exercised good faith and had not betrayed confidence reposed in him.—*Suchy v. Hajicek*, 4 N.E.2d 836, 364 Ill. 502.

31. *Cal.—Mondada v. Bordenave*, 223 P. 76, 65 Cal.App. 50, 65 C.J. p 491 note 32.

32. *Cal.—Taylor v. Bunnell*, 296 P. 283, 211 Cal. 601.

Wash.—*Saunders v. Visser*, 145 P.2d 898, 20 Wash.2d 58.

#### Absence of fraud

In suit by two daughters against third daughter of decedent to establish trust in proceeds of decedent's life insurance policy, beneficiary of which was changed from his estate to defendant daughter on decedent's voluntary application, without fraud, burden was not on defendant to show bona fides of transaction in which she became beneficiary on ground that she stood in fiduciary relationship to decedent because of having been entrusted with handling of his business.—*Sylvester v. Smith*, 296 N.W. 682, 296 Mich. 571.

#### Fee simple interest

In executor's suit to compel reconveyance of realty which aged grantor had conveyed to defendant, after showing of confidential relationship between grantor and defendant, burden was still on executor to prove that transaction between grantor and defendant did not create a fee simple interest in defendant but that execution and delivery of deed to defendant under the circumstances constituted defendant a constructive trustee.—*Sampson v. Brudner*, 118 P. 2d 28, 47 Cal.App.2d 431.

33. *N.Y.—Wojtkowiak v. Wojtkowiak*, 85 N.Y.S.2d 198, affirmed 81 N.Y.S.2d 171, 273 App.Div. 1052, 65 C.J. p 491 note 34.

34. *Or.—Schwartz v. Gerhardt*, 75 P. 698, 44 Or. 425, 65 C.J. p 491 note 35.

35. *U.S.—McDermott v. Blackner*, D. C.Wyo., 84 F.Supp. 578, affirmed, C.A., 176 F.2d 498.

*Cal.—Orella v. Johnson*, 242 P.2d 5, 38 Cal.2d 693—*Jarkieh v. Badagilacco*, 170 P.2d 994, 75 Cal.App.2d 505.

*Cal.—Pittman v. Pittman*, 26 S.E.2d 764, 196 Ga. 897.

Ill.—*Isaacs v. Okin*, 73 N.E.2d 11, 331 Ill.App. 268.

Tex.—*Hull v. Fitz-Gerald*, Civ.App., 232 S.W.2d 93, affirmed 237 S.W.2d 256, 150 Tex. 39.

Wash.—*Moe v. Brumfield*, 179 P.2d 968, 27 Wash.2d 714, 65 C.J. p 491 note 36.

#### Particular evidence

(1) Evidence of family connection between grantor and grantee.—*Spaulding v. Jones*, 256 P.2d 637, 117 Cal.App.2d 541.

(2) Evidence as to statements made by decedent relating to his intentions in transferring funds.—*Afflerbach v. Burns*, 56 Pa.Dist. & Co. 37.

(3) Testimony concerning contents of wills.

U.S.—*Shapiro v. Rubens*, C.C.A.Ind., 166 P.2d 659.

*Cal.—Crow v. Madsen*, App., 111 P.2d 7, rehearing granted 111 P.2d 683.

(4) A letter in handwriting of deceased, found among her papers after her death, expressing wishes with respect to distribution of property.—*Itice v. Allen*, 28 N.W.2d 91, 318 Mich. 245.

(5) Petition for appointment of guardian for deceased during her lifetime.—*Bruso v. Pinquet*, 33 N.W.2d 100, 321 Mich. 630.

(6) Conversations between corporate officer and his children who were stockholders and employees.—*Massachusetts Linotyping Corp. v. Fielding*, 49 N.E.2d 242, 314 Mass. 47.

(7) Reports and balance sheets showing financial condition of corporation.—*Isaacs v. Okin*, 73 N.E.2d 11, 331 Ill.App. 268.

(8) Testimony that third person asked one of the plaintiffs to delay any litigation until drilling of leases

## § 156. Admissibility of Evidence

Any competent and relevant evidence is admissible, in a suit to establish or enforce a constructive trust, which tends to prove or disprove any of the elements of such a trust or any of the facts and circumstances giving rise to it.

Any evidence is admissible, in a suit to establish or enforce a constructive trust, which tends to prove or disprove any of the elements of such a trust or any of the facts and circumstances giving rise to it,<sup>35</sup> provided it is not objectionable under the rules obtaining in civil actions generally as to the relevancy, competency, and materiality of evidence.<sup>36</sup> Fraud may be proved by circumstantial evidence

had been completed.—*Hull v. Fitz-Gerald*, Civ.App., 232 S.W.2d 93, affirmed 237 S.W.2d 256, 150 Tex. 39.

(9) Check made payable to defendant for attorney's fees, when offered as an entry made in the usual course of business.—*Kren v. Rubin*, 61 N.W.2d 9, 388 Mich. 288.

(10) Evidence that partnership earnings were used to enhance the value of certain property and that rentals from buildings thereon were turned into the partnership fund.—*Thompson v. Davis*, 28 S.E.2d 556, 223 N.C. 792.

#### Evidence as to matters subsequent to acquisition of title

Ill.—*Bremer v. Bremer*, 104 N.E.2d 299, 411 Ill. 454.

65 C.J. p 491 note 36 [b].

36. Nev.—*Moore v. De Bernardi*, 213 P. 1041, 220 P. 544, 47 Nev. 33.

#### Evidence held immaterial or inadmissible

(1) In general.

*Cal.—Miller v. Forster*, 21 P.2d 678, 131 Cal.App. 509.

N.H.—*Nixon v. Cooper*, 87 A.2d 687, 57 N.H. 327.

Tex.—*McDonald v. Follett*, 180 S.W. 2d 334, 142 Tex. 616.

(2) Evidence as to the value of property at time of bringing suit is not material in determining whether price is so inadequate as to indicate fraud.—*Galvin v. O'Neill*, 66 N.E.2d 403, 393 Ill. 475.

(3) In payee's suit seeking cancellation of note and for an accounting the payee's understanding of agreement made with maker is not material in absence of fiduciary relationship.—*Plumer v. Luce*, 39 N.E. 2d 961, 310 Mass. 789.

(4) In suit to impress a constructive trust on lease secretly acquired by plaintiff's agent in his own name on property then occupied by plaintiff as lessee, agent's testimony as to motive in obtaining such lease is immaterial.—*Washington Theatre Co. v. Marion Theatre Corp.*, 81 N.E.2d 638, 119 Ind.App. 114.

of a repudiation of a trust by the trustee and attempted retention by the trustee of the trust res, the intention not to perform being a matter of inference from the facts proven.<sup>37</sup>

### § 157. — Parol Evidence

Generally, a constructive trust may be proved or established by parol evidence.

In accordance with the rule that the statute of frauds does not apply to constructive trusts, discussed supra § 141, it is generally held that a constructive trust may be proved or established by parol evidence,<sup>38</sup> although there is some authority

apparently to the contrary.<sup>39</sup> So, parol evidence is admissible, in a suit for the establishment or enforcement of such a trust, to prove facts and circumstances constituting fraud, actual or constructive, from which a constructive trust may arise,<sup>40</sup> as by showing the existence of a confidential relationship,<sup>41</sup> or the making of a promise or agreement,<sup>42</sup> the violation of which is the moving cause of the suit. It has been held, however, that such evidence must be received with great caution.<sup>43</sup> Under the general rule, discussed supra § 149, that the mere violation of a parol promise made by a grantee of land to the grantor thereof, to hold such

37. Cal.—Jarkich v. Radagliaccio, 170 P.2d 994, 75 Cal.App.2d 505

38. Ark.—Mortensen v. Ballard, 188 S.W.2d 749, 209 Ark. 1—Ripley v. Kelly, 183 S.W.2d 793, 207 Ark. 1011—Harrbour v. Harrbour, 181 S.W.2d 805, 207 Ark. 551—Nelson v. Wood, 137 S.W.2d 929, 199 Ark. 1015.

Cal.—Kingsley v. Carroll, 234 P.2d 1039, 106 Cal.App.2d 358  
Conn.—Worobey v. Sibbleth, 71 A.2d 80, 136 Conn. 352.

Fla.—Lightfoot v. Rogers, 54 So.2d 237.

Ga.—Hancock v. Hancock, 54 S.E.2d 385, 205 Ga. 684—Pittman v. Pittman, 26 S.E.2d 764, 196 Ga. 397—Sykes v. Reeves, 24 S.E.2d 688, 195 Ga. 587—Smith v. Harvey—Given Co., 165 S.E. 793, 182 Ga. 410

Ill.—Murray v. Behrendt, 76 N.E.2d 431, 399 Ill. 22—Mauriceau v. Haugen, 56 N.E.2d 567, 387 Ill. 156  
Ind.—Tri-City Electric Service Co. v. Jarvis, 185 N.E. 136, 206 Ind. 5

Ky.—Clark v. Smith, 66 S.W.2d 93, 252 Ky. 50.

Md.—Grimes v. Grimes, 40 A.2d 58, 184 Md. 59—O'Connor v. Estevez, 35 A.2d 148, 182 Md. 541

Mich.—Corpus Juris quoted in Kren v. Rubin, 61 N.W.2d 9, 13, 338 Mich. 288—Corpus Juris quoted in Stephenson v. Golden, 276 N.W. 649, 963, 279 Mich. 710—Nichols v. Martin, 269 N.W. 183, 277 Mich. 305

Miss.—Coleman v. Kichow, 54 So.2d 915, 212 Miss. 541—Pittchford v. Howard, 45 So.2d 142, 208 Miss. 567—Triplett v. Bridgforth, 38 So. 2d 766, 205 Miss. 328.

Mo.—Styrpe v. Lewis, 180 S.W.2d 688, 352 Mo. 1004, 155 A.L.R. 99.  
Mont.—Campanello v. Mercer, 227 P.2d 312, 121 Mont. 528.

Neb.—Nelson v. Seavers, 10 N.W.2d 349, 143 Neb. 823.

N.J.—Szpak v. Szpak, 168 A. 386, 114 N.J.Eq. 143.

Ohio.—Steiner v. Feecey, 50 N.E.2d 617, 72 Ohio App. 18.

Okl.—Adams v. Adams, 256 P.2d 468, 308 Okl. 378—Poe v. Poe, 256 P.2d 153, 308 Okl. 406—Preston v. Ross, 288 P.2d 244, 205 Okl. 164—Bing-

ham v. Worley, 149 P.2d 253, 194 Okl. 238—Jones v. Jones, 148 P.2d 969, 194 Okl. 228—Parsons v. Crawford, 145 P.2d 932, 193 Okl. 537—Collar v. Mills, 125 P.2d 197, 190 Okl. 481—Allen v. Jones, 110 P.2d 911, 188 Okl. 546—Ollphant v. Rogers, 95 P.2d 887, 186 Okl. 70—Johnson v. Rowe, 89 P.2d 955, 185 Okl. 60—Wright v. Logan, 65 P.2d 1217, 179 Okl. 850.

S.C.—Searson v. Webb, 38 S.E.2d 654, 208 S.C. 453.

Tenn.—Hoffner v. Hoffner, 221 S.W.2d 907, 32 Tenn.App. 98—Caprum v. Bransford Realty Co., 4 Tenn. App. 237

Tex.—Revine v. Helsenner, 224 S.W.2d 184, 148 Tex. 345—Mills v. Gray, 210 S.W.2d 985, 147 Tex. 33—Hick v. Schiller, Civ.App., 235 S.W.2d 494, reversed on other grounds 240 S.W.2d 997, 150 Tex. 363—Johnson v. Dickey, Civ.App., 231 S.W.2d 952, error refused no reversible error—Gray v. Mills, Civ.App., 206 S.W.2d 278, affirmed 210 S.W.2d 985, 147 Tex. 33—Snyder v. Citizens State Bank, Civ.App., 184 S.W.2d 684, affirmed 189 S.W.2d 471, 144 Tex. 134—Knight v. Tannehill Bros., Civ.App., 140 S.W.2d 552, error dismissed, judgment correct

Utah.—Barrett v. Vickers, 116 P.2d 772, 100 Utah 534

Va.—Sutton v. Sutton, 72 S.E.2d 275, 194 Va. 179—Horne v. Holley, 188 S.E. 169, 167 Va. 234.

Wash.—Kausky v. Kosten, 179 P.2d 950, 27 Wash.2d 721—Murdock v. Leonard, 95 P.2d 37, 1 Wash.2d 37

W.Va.—Everly v. Schoemer, 80 S.E.2d 334.

Wyo.—Carpenter & Carpenter v. Kingham, 103 P.2d 463, 56 Wyo. 314, modified on other grounds and rehearing denied 110 P.2d 824, 56 Wyo. 314.

65 C.J. p. 461 note 28.

39. La.—Jackson v. Dominick, App., 166 So. 867.

Dead made to another

Claimants of title to realty were not entitled to establish that property was purchased by person under whom claimants claimed, but that

through fraud and error deed was made to another, in absence of sufficient written evidence to establish such fact.—Barrow v. Grant's Estate, 41 So. 220, 116 La. 952—Jackson v. Dominick, La.App., 166 So. 867.

#### Stolen money

The owner of stolen money cannot, in order to establish ownership of property, show by parol evidence that it was purchased by thief with stolen money.—Ceromi v. Harris, 175 So. 462, 187 La. 701.

40. Ga.—Jensen v. Jensen, 178 S.E. 654, 180 Ga. 318

Mich.—Kren v. Rubin, 61 N.W.2d 9, 338 Mich. 288

Miss.—Pittchford v. Howard, 45 So.2d 142, 208 Miss. 567

Mo.—Scholle v. Laumann, App., 139 S.W.2d 1067

Nev.—Davidson v. Streeter, 234 P.2d 793, 68 Nev. 427

S.C.—Corpus Juris cited in All v. Trillman, 20 S.E.2d 741, 747, 200 S.C. 279, 159 A.L.R. 981.

65 C.J. p. 492 note 39.

#### Lack of consideration

In action to establish constructive trusts in realty, oral evidence is competent to prove lack of consideration.—Adcock v. Merchants & Mrs. Lank of Ellenville, 42 So.2d 427, 207 Miss. 448

41. Cal.—Walter H. Leimert Co. v. Woodson, App., 270 P.2d 95.

N.J.—Harrop v. Cole, 95 A. 378, 85 N.J. Eq. 32

42. Ark.—Cole v. Williams, 220 S.W.2d 521, 218 Ark. 366

Cal.—Forman v. Goldberg, 108 P.2d 983, 42 Cal.App.2d 308

Ga.—Hancock v. Hancock, 54 S.E.2d 385, 205 Ga. 684—Pittman v. Pittman, 26 S.E.2d 764, 196 Ga. 397

S.C.—All v. Trillman, 20 S.E.2d 741, 200 S.C. 279, 159 A.L.R. 981.

Tex.—Gray v. Mills, Civ.App., 206 S.W.2d 278, affirmed 210 S.W.2d 985, 147 Tex. 33.

Utah.—Haws v. Jensen, 209 P.2d 229, 116 Utah 212.

65 C.J. p. 492 note 41.

43. Ark.—Ripley v. Kelly, 183 S.W.2d 793, 207 Ark. 1011.

land in trust or to reconvey it to the grantor or another, does not create a constructive trust in the absence of fraud or abuse of confidential relationships, evidence of such a parol agreement, unaccompanied by proof of fraud or confidential relationship, is inadmissible.<sup>44</sup>

**Effect of parol evidence rule.** The admission of parol evidence for the sake of establishing a constructive trust under an absolute conveyance or devise, where fraud or a fiduciary relationship is present, is not precluded by the rule forbidding any attempt to vary the language of a written instrument by parol,<sup>45</sup> although parol evidence of declarations or intention is not admissible, under such rule, where the facts and circumstances would not, of themselves, be sufficient to raise a trust by construction of law.<sup>46</sup>

44. Cal.—O'Melia v. Adkins, 166 P. 2d 298, 73 Cal.App.2d 143.

45. Ga.—Sykes v. Reeves, 24 S.E.2d 688, 195 Ga. 587—Smith v. Harvey-Given Co., 185 S.E. 793, 182 Ga. 410.

65 C.J. p 492 note 42.

#### Absolute deed

(1) Title that a parol trust cannot be engrafted on an absolute deed has reference to a deed which is valid not only in form but in substance and not to a deed wholly without consideration, good or valuable, and where grantee fraudulently holds thereunder against rights of vendor.—Hancock v. Hancock, 54 S.E.2d 385, 205 Ga. 684.

(2) Parol evidence is admissible to establish a trust, even against a deed absolute on its face, if it would be a fraud to set up the form of the deed as conclusive.—Kren v. Rubin, 61 N.W.2d 9, 338 Mich. 288.

(3) It has been held, however, that where deed of trust was actually executed and delivered to bank, relationship of confidence and promise by bank that land would never be sold under deed of trust could not be shown by oral testimony for purpose of establishing a constructive trust.—Niemann v. Zarsky, Tex.Civ.App., 233 S.W.2d 930.

#### Bank accounts

Parol evidence that titles to specified bank accounts came to defendant subject to a trust in favor of plaintiff was not inadmissible as varying the terms of written agreement entered into with bank.—Jarkich v. Badagnacco, 170 P.2d 994, 75 Cal.App.2d 505.

46. Md.—Jones v. Slubey, 5 Harr. & J. 372.

## § 158. Weight and Sufficiency of Evidence

- In general
- Sufficiency of evidence in particular cases

### a. In General

A high or extraordinary degree of proof is required in order to establish a constructive trust, and the evidence must be clear, definite, unequivocal, and satisfactory, or such as to lead to but one conclusion, or as to leave no reasonable doubt as to the existence of the trust.

It has been broadly held that a high or extraordinary degree of proof is required in order to establish a constructive trust,<sup>47</sup> and that a mere preponderance of the evidence is not sufficient,<sup>48</sup> although some decisions hold that a mere preponderance of proof is all that is necessary,<sup>49</sup> with the qualification that the proof, in order to preponderate, must be of an extraordinary persuasiveness.<sup>50</sup> So, it is generally the rule, that a constructive trust

47. Mo.—Aronson v. Spitecaufsky, 260 S.W.2d 548—Adams v. Adams, 156 S.W.2d 610, 348 Mo. 1041—Tichenor v. Bowman, 133 S.W.2d 324—Dee v. Sutter, App., 222 S.W.2d 511.

#### Strict proof required

Md.—Masters v. Masters, 89 A.2d 576, 200 Md. 318.

#### Parol evidence

In order to engraft implied or constructive trust on legal title to real estate by parol evidence it requires high degree of proof.—Viehr v. Malone, 63 N.W.2d 497, 158 Neb. 548.

#### Comparison with fraud

In order to establish a constructive trust, a higher degree of proof is necessary than is required to establish fraud.—Aronson v. Spitecaufsky, Mo., 260 S.W.2d 548—Tobin v. Wood, Mo., 159 S.W.2d 287.

48. Ark.—Neill v. Neill, 257 S.W.2d 26, 221 Ark. 893—Wofford v. Jackson, 111 S.W.2d 542, 194 Ark. 1049—Iowa.—New York Life Ins. Co. of New York, N.Y. v. Clemens, 297 N.W. 253, 230 Iowa 279.

Ky.—May v. May, 223 S.W.2d 362, 311 Ky. 74—Curlee v. Hall, 178 S.W.2d 193, 296 Ky. 667.

Mo.—Aronson v. Spitecaufsky, 260 S.W.2d 548—Triesler v. Helmbacher, 168 S.W.2d 1030, 350 Mo. 807—Tichenor v. Bowman, 133 S.W.2d 324—Subre v. Hirsch, 133 S.W.2d 8, 343 Mo. 679—Pursley v. Pursley, App., 215 S.W.2d 303—In re Title Guaranty Trust Co., App., 113 S.W.2d 1053.

Okl.—Corpus Juris cited in Parsons v. Crawford, 145 P.2d 932, 935, 193 Okl. 537.

S.C.—Corpus Juris quoted in Carmichael v. Huggins, 70 S.E.2d 223, 228, 221 S.C. 278—Scott v. Scott, 57

S.E.2d 470, 216 S.C. 280—Corpus Juris quoted in All v. Frillman, 20 S.E.2d 741, 750, 200 S.C. 279, 159 A.L.R. 981.

Va.—Corpus Juris cited in Sutton v. Sutton, 72 S.E.2d 275, 278, 194 Va. 179.

65 C.J. p 493 note 44.

**Proof of fraud or infidelity of grantee.** In accepting a conveyance, to establish a constructive trust, must go beyond ordinary requirement in civil cases of preponderance or greater weight of the evidence.—Scarsen v. Webb, 38 S.E.2d 654, 208 S.C. 453. S.C.—Scott v. Scott, 57 S.E.2d 470, 216 S.C. 280.

#### Establishment of trust by parol evidence

Mo.—Strype v. Lewis, 180 S.W.2d 688, 352 Mo. 1004, 155 A.L.R. 99. Okl.—Parsons v. Crawford, 145 P.2d 932, 193 Okl. 537.

49. Mich.—Mackey v. Baker, 41 N.W.2d 331, 327 Mich. 57—Stephenson v. Golden, 276 N.W. 849, 279 Mich. 710.

#### Dispositions of money

Where city sought to hold mayor and an attorney liable as constructive trustees for amounts they received as result of settlement of claims against city which mayor allegedly corruptly authorized and claimed that mayor received certain sum of money, the city had burden of proving by a preponderance of the evidence that the reasonably probable disposition of the money was payment thereof to the mayor, but the city was not bound to exclude all other possible dispositions of the money.—City of Boston v. Santosuosso, 30 N.E.2d 278, 307 Mass. 302.

50. Or.—Hughes v. Helzer, 185 P.2d 537, 182 Or. 205.

must be established by evidence which is clear, definite, unequivocal, and satisfactory,<sup>51</sup> or such, as

51. U.S.—Magidson v. Duggan, C.A. Mo., 212 F.2d 748—National Waste Co. v. Spring Packing Corp., C.A. Ill., 200 F.2d 14, certiorari denied Spring Packing Corp. v. National Waste Co., 73 S.Ct. 649, 345 U.S. 909, 97 L.Ed. 1344—Jacoby v. Shell Oil Co., C.A. Ill., 196 F.2d 855—Shapiro v. Rubens, C.C.A. Ind., 166 F.2d 659—Kasishke v. Keppler, C.C.A. Okl., 153 F.2d 809—Grand Trunk Western R. Co. v. Chicago & Western Indiana R. Co., C.C.A. Ill., 131 F.2d 215—Chain O'Mines v. United Glipin Corp., C.C.A. Ill., 109 F.2d 617, certiorari denied 61 S.Ct. 14, 311 U.S. 659, 85 L.Ed. 422.
- Ark.—Neill v. Neill, 257 S.W.2d 26, 221 Ark. 893—McDaniel v. McDaniel, 249 S.W.2d 125, 220 Ark. 614—Ladd v. Bones, 214 S.W.2d 353, 213 Ark. 1030—McNutt v. Carnes, 210 S.W.2d 290, 213 Ark. 346—Wofford v. Jackson, 111 S.W.2d 542, 194 Ark. 1049—Scogin v. Scogin, 4 S.W.2d 953, 176 Ark. 1009.
- Cal.—Grace v. Rodriguez, 243 P.2d 906, 111 Cal.App.2d 131—Jarkieh v. Badagliacco, 170 P.2d 994, 75 Cal.App.2d 505—Redston v. Weiss, 167 P.2d 735, 73 Cal.App.2d 889—Palmer v. Burnham, 165 P.2d 50, 72 Cal.App.2d 626.
- Colo.—Woodruff v. Clarke, 262 P.2d 737, 128 Colo. 387—Hoff v. Armbruster, 242 P.2d 604, 125 Colo. 198—Fredell v. Eickhoff, 143 P.2d 1006, 111 Colo. 465—Colorado & Utah Coal Co. v. Harris, 49 P.2d 429, 97 Colo. 309.
- Del.—Greenly v. Greenly, 49 A.2d 126, 29 Del.Ch. 297.
- Fla.—Columbia Bank for Cooperatives v. Okelanta Sugar Co-op, 52 So.2d 670—Forrester v. Watts, 74 So. 519, 73 Fla. 514.
- Hawaii.—De Mello v. De Mello, 34 Hawaii 922.
- Idaho.—Dunn v. Dunn, 83 P.2d 471, 59 Idaho 473.
- Ill.—Henrichs v. Sundmacher, 89 N.E.2d 732, 405 Ill. 62—Stein v. Stein, 75 N.E.2d 869, 398 Ill. 397—Finney v. White, 59 N.E.2d 859, 389 Ill. 374—Gilbert v. Cohn, 30 N.E.2d 19, 374 Ill. 452—Jones v. Felix, 23 N.E.2d 706, 372 Ill. 262—Brod v. Brod, 6 N.E.2d 675, 390 Ill. 312—Joliceur v. Brown, 45 N.E.2d 1010, 317 Ill.App. 381.
- Iowa.—Rorem v. Rorem, 59 N.W.2d 210, 244 Iowa 980—England v. England, 51 N.W.2d 437, 243 Iowa 274—Corpus Juris cited in Copeland v. Yoge, 20 N.W.2d 2, 5, 237 Iowa 102—Crawford v. Couch, 15 N.W.2d 633, 234 Iowa 1246—Ontjes v. MacNider, 5 N.W.2d 860, 232 Iowa 562—New York Life Ins. Co. of New York, N. Y., v. Clemens, 297 N.W. 253, 230 Iowa 279—Rance v. Gaddis, 284 N.W. 468, 226 Iowa 531.
- Kan.—Staab v. Staab, 163 P.2d 418, 160 Kan. 417.
- Ky.—Panke v. Panke, 252 S.W.2d 909—May v. May, 223 S.W.2d 362, 311 Ky. 74—Burggraf v. Reynolds, 206 S.W.2d 206, 306 Ky. 104—Deaton v. Bowling, 196 S.W.2d 603, 302 Ky. 829—Curlee v. Hall, 178 S.W.2d 193, 296 Ky. 657—Corpus Juris cited in Langford v. Sigmon, 167 S.W.2d 820, 821, 292 Ky. 650—Clark v. Smith, 66 S.W.2d 93, 252 Ky. 50.
- Me.—Sacre v. Sacre, 55 A.2d 592, 143 Me. 80, 173 A.L.R. 1261.
- Md.—Kelley v. Kelley, 13 A.2d 529, 178 Md. 389—Garner v. Garner, 190 A. 243, 171 Md. 603.
- Miss.—Stovall v. Stovall, 67 So.2d 391.
- Mo.—Collins v. Shive, 261 S.W.2d 58—Aranson v. Spiteaufsky, 260 S.W.2d 548—Thomason v. Beery, 235 S.W.2d 308, 361 Mo. 424—Vardell v. Vardell, 223 S.W.2d 763—Bllick v. Nickel Sav., Inv. & Bldg. Ass'n, 216 S.W.2d 509—Beach v. Beach, 207 S.W.2d 481—Maguire v. Wander, 193 S.W.2d 900—Triesseler v. Helmbacher, 168 S.W.2d 1030, 350 Mo. 807—Tichenor v. Bowman, 133 S.W.2d 324—Suhrre v. Busch, 123 S.W.2d 8, 343 Mo. 679—Dee v. Sutter, App., 222 S.W.2d 541—Pursley v. Pursley, App., 215 S.W.2d 302—Orrick v. Heberer, App., 124 S.W.2d 664—In re Title Guaranty Trust Co., App., 113 S.W.2d 1053—In re Cooper County State Bank, App., 67 S.W.2d 109.
- Neb.—Peterson v. Massey, 33 N.W.2d 312, 155 Neb. 829.
- Nev.—Garteiz v. Garteiz, 254 P.2d 804.
- N.J.—Gray v. Bradley, 62 A.2d 139, 1 N.J. 102.
- N.M.—Wright v. Holloway, 20 P.2d 374, 37 N.M. 168.
- N.C.—Thompson v. Davis, 28 S.E.2d 556, 223 N.C. 792.
- N.D.—Johnson v. Larson, 56 N.W.2d 750—Lander v. Hartson, 47 N.W.2d 211, 77 N.D. 923—McDonald v. Miller, 16 N.W.2d 270, 73 N.D. 474, 156 A.L.R. 1828.
- Ohio.—Spencer v. Spencer, 89 N.E.2d 496, 87 Ohio App. 539.
- Okl.—Kemp v. Strnad, 268 P.2d 255—Poe v. Poe, 256 P.2d 153, 208 Okl. 406—Preston v. Ross, 236 P.2d 244, 205 Okl. 164—Dodd v. Kane, 218 P.2d 1047, 203 Okl. 156—Jones v. Jones, 148 P.2d 989, 194 Okl. 228—Wade v. McKeown, 145 P.2d 951, 193 Okl. 415—Corpus Juris cited in Parsons v. Crawford, 145 P.2d 932, 935, 193 Okl. 537—Turk v. Warr, 128 P.2d 835, 191 Okl. 253—Johnson v. Rowe, 89 P.2d 955, 185 Okl. 60—Coryell v. Marrs, 70 P.2d 478, 180 Okl. 394—McGann v. McGann, 37 P.2d 939, 169 Okl. 515.
- Or.—Evans v. Trude, 240 P.2d 940, 193 Or. 648—Bowns v. Bowns, 200 P.2d 586, 184 Or. 603—Hughes v. Helzer, 185 P.2d 537, 182 Or. 205—
- Johnston v. McKean, 162 P.2d 820, 177 Or. 556.
- Pa.—Lallich v. Bankovsky, 39 A.2d 514, 350 Pa. 441—Danner v. Danner, Com.Pl., 93 Pittsb.Leg.J. 57, affirmed 77 A.2d 217, 366 Pa. 178—Copenhaver v. Duncan, Com.Pl., 61 York Leg.Rec. 105—Hetrick v. Boyd, Com.Pl., 53 York Leg.Rec. 73.
- R.I.—Rooke v. Grant, 76 A.2d 793, 77 R.I. 447—Larocque v. Larocque, 58 A.2d 633, 74 R.I. 72.
- S.C.—Corpus Juris quoted in Carmichael v. Huggins, 70 S.E.2d 223, 228, 231 S.C. 278—Scott v. Scott, 57 S.E.2d 470, 216 S.C. 260—Searson v. Webb, 38 S.E.2d 654, 208 S.C. 453—Dominick v. Rhodes, 24 S.E.2d 168, 202 S.C. 139—Corpus Juris quoted in All v. Prillaman, 200 S.E.2d 741, 750, 200 S.C. 279, 159 A.L.R. 981.
- S.D.—Kelly v. Gram, 38 N.W.2d 460, 73 S.D. 11—Jones v. Jones, 291 N.W. 579, 67 S.D. 200.
- Tenn.—Hofner v. Hoffner, 221 S.W.2d 907, 33 Tenn.App. 88.
- Tex.—Deep Oil Development Co. v. Cox, Civ.App., 224 S.W.2d 312, refused no reversible error—Collins v. Collins, Civ.App., 154 S.W.2d 210, error refused.
- Va.—Corpus Juris cited in Sutton v. Sutton, 72 S.E.2d 275, 278, 194 Va. 179.
- Wash.—Rodgers v. Simmons, 262 P.2d 204, 43 Wash.2d 557—Raymond v. MacFadden, 150 P.2d 829, 21 Wash.2d 328.
- W.Va.—Zogg v. Hedges, 29 S.E.2d 871, 126 W.Va. 523, 152 A.L.R. 991.
- Wyo.—Carpenter & Carpenter v. Kingham, 109 P.2d 463, 56 Wyo. 314, modified on other grounds and rehearing denied 110 P.2d 824, 56 Wyo. 314.
- 65 C.J. p. 493 note 45.
- Vague or shadowy evidence is not sufficient**
- Mo.—Aranson v. Spiteaufsky, 260 S.W.2d 548—Tichenor v. Bowman, 133 S.W.2d 324.
- Un corroborated testimony**
- Evidence of facts constituting a constructive trust must be explicit, unequivocal, and indisputable, particularly when the only person who could successfully have contradicted uncorroborated testimony is dead.—O'Melia v. Adkins, 166 P.2d 293, 73 Cal.App.2d 143.
- Parol evidence**
- Text rule has been held applicable where it is sought to establish a constructive trust by parol evidence. U.S.—Jacoby v. Shell Oil Co., C.A. Ill., 196 F.2d 855—Shapiro v. Rubens, C.C.A. Ind., 166 F.2d 659—Oasis Oil Co. v. Bell Oil & Gas Co., D.C.Okl., 106 F.Supp. 954.
- Ark.—Elms v. Hall, 215 S.W.2d 1021, 214 Ark. 601—Ripley v. Kelly, 183 S.W.2d 793, 207 Ark. 1011—Nelson

has been said, as to lead to but one conclusion,<sup>52</sup> or as to leave no reasonable doubt as to the existence of the trust;<sup>53</sup> and where the evidence is not of such character,<sup>54</sup> or where the evidence is explainable on any theory other than the existence of a constructive trust,<sup>55</sup> or, a fortiori, where it raises grave doubts as to the existence of a trust or of any element essential to its creation,<sup>56</sup> a decree is prop-

erly entered against the person seeking to establish the trust. It follows that the party seeking to impose a constructive trust must furnish clear, convincing, and conclusive evidence of the existence of a confidential or fiduciary relationship, where such relationship does not exist as a matter of law,<sup>57</sup> that the fiduciary relationship was breached,<sup>58</sup> that there was actual or constructive fraud by defend-

v. Wood, 137 S.W.2d 929, 199 Ark. 1019.

Ill.—Compton v. Compton, 111 N.E. 2d 109, 414 Ill. 149—Wood v. Armstrong, 81 N.E.2d 368, 401 Ill. 111—Johnson v. Lane, 15 N.E.2d 710, 369 Ill. 135—Sharp v. Bradshaw, 12 N.E.2d 1, 367 Ill. 526.

Ind.—Costa v. Costa, 115 N.E.2d 516. Ky.—Langford v. Sigmon, 167 S.W. 2d 820, 292 Ky. 650—Cape v. Leach, 142 S.W.2d 971, 283 Ky. 662.

Minn.—Ives v. Pillsbury, 283 N.W. 140, 204 Minn. 142.

Mo.—Proffitt v. Houseworth, 231 S.W. 2d 112, 360 Mo. 947—Strype v. Lewis, 180 S.W.2d 688, 352 Mo. 1004, 155 A.L.R. 99.

N.Y.—In re Cohen's Estate, 98 N.Y. S.2d 863.

Okl.—Adams v. Adams, 256 P.2d 458, 208 Okl. 378—Preston v. Ross, 236 P.2d 244, 205 Okl. 164—Bingham v. Worley, 149 P.2d 253, 194 Okl. 238—Parsons v. Crawford, 145 P. 2d 932, 193 Okl. 537—Allen v. Jones, 110 P.2d 911, 188 Okl. 546—Oliphant v. Rogers, 95 P.2d 887, 186 Okl. 79—Johnson v. Rowe, 89 P.2d 955, 185 Okl. 60.

Pa.—Danner v. Danner, 77 A.2d 217, 366 Pa. 178.

52. U.S.—Jacoby v. Shell Oil Co., C. A.111, 196 F.2d 855—Chain O'Mines v. United Gilpin Corp., C.C.A.111, 109 F.2d 617, certiorari denied 61 S.Ct. 14, 311 U.S. 659, 85 L.Ed. 422.

Ill.—Compton v. Compton, 111 N.E. 2d 109, 414 Ill. 149—Henrichs v. Sundmaker, 89 N.E.2d 732, 405 Ill. 63—Wood v. Armstrong, 81 N.E.2d 368, 401 Ill. 111—Stein v. Stein, 75 N.E.2d 869, 398 Ill. 397—Finney v. White, 59 N.E.2d 859, 389 Ill. 374—Johnson v. Lane, 15 N.E.2d 710, 369 Ill. 135—Sharp v. Bradshaw, 12 N.E.2d 1, 367 Ill. 526—Brod v. Brod, 6 N.E.2d 675, 390 Ill. 312.

N.D.—Lander v. Hartson, 47 N.W.2d 211, 77 N.D. 923.

Okl.—Corpus Juris cited in Parsons v. Crawford, 145 P.2d 932, 935, 193 Okl. 537.

S.C.—Corpus Juris quoted in Carmichael v. Huggins, 70 S.E.2d 223, 228, 221 S.C. 278—Scott v. Scott, 57 S.E.2d 470, 216 S.C. 280—Corpus Juris quoted in All v. Prillaman, 20 S.E.2d 741, 750, 200 S.C. 279, 159 A.L.R. 981.

Wyo.—Carpenter & Carpenter v. Kingham, 109 P.2d 463, 56 Wyo. 314, modified on other grounds and

rehearing denied 110 P.2d 824, 56 Wyo. 314.

65 C.J. p 493 note 46.

53. U.S.—Jacoby v. Shell Oil Co., C. A.111, 196 F.2d 855.

Ark.—Nelson v. Wood, 137 S.W.2d 929, 199 Ark. 1019.

Ill.—Wood v. Armstrong, 81 N.E.2d 468, 401 Ill. 111—Gilbert v. Cohn, 30 N.E.2d 19, 374 Ill. 452—Jolicoeur v. Brown, 45 N.E.2d 1010, 317 Ill. App. 381.

Ky.—Tanke v. Panke, 252 S.W.2d 909—Reed v. Reed, 117 S.W.2d 211, 273 Ky. 502.

Mo.—Collins v. Shive, 261 S.W.2d 58—Aronson v. Spitcaufsky, 260 S.W. 2d 548—Thomason v. Beery, 235 S.W.2d 308, 361 Mo. 424—Vardell v. Vardell, 222 S.W.2d 763—Bluck v. Nickel Sav., Inv. & Bldg. Ass'n, 216 S.W.2d 509—Maguire v. Wander, 193 S.W.2d 900—Strype v. Lewis, 180 S.W.2d 688, 352 Mo. 1004, 155 A.L.R. 99—Triescler v. Helmbacher, 168 S.W.2d 1030, 350 Mo. 807—Tiechner v. Bowman, 133 S.W.2d 324—Suhre v. Busch, 123 S.W.2d 8, 343 Mo. 679—Dee v. Sutter, App. 222 S.W.2d 541—Fursley v. Pursley, App. 215 S.W.2d 302—Orrick v. Heberer, App. 124 S.W.2d 664—In re Title Guaranty Trust Co., App. 113 S.W.2d 1053.

Okl.—Corpus Juris cited in Parsons v. Crawford, 145 P.2d 932, 935, 193 Okl. 537.

S.C.—Corpus Juris quoted in Carmichael v. Huggins, 70 S.E.2d 223, 228, 221 S.C. 278—Scott v. Scott, 57 S.E.2d 470, 216 S.C. 280—Corpus Juris quoted in All v. Prillaman, 20 S.E.2d 741, 750, 200 S.C. 279, 159 A.L.R. 981.

65 C.J. p 494 note 47.

54. U.S.—Jacoby v. Shell Oil Co., C.A.111, 196 F.2d 855.

Ill.—Stein v. Stein, 75 N.E.2d 869, 398 Ill. 397—Gilbert v. Cohn, 30 N.E.2d 19, 374 Ill. 452—Sharp v. Bradshaw, 12 N.E.2d 1, 367 Ill. 526.

Iowa.—Copeland v. Voge, 20 N.W.2d 2, 237 Iowa 102.

Ky.—Langford v. Sigmon, 167 S.W.2d 820, 292 Ky. 650.

Mo.—Strype v. Lewis, 180 S.W.2d 688, 352 Mo. 1004, 155 A.L.R. 99.

Okl.—Bingham v. Worley, 149 P.2d 253, 194 Okl. 238.

S.C.—Corpus Juris quoted in Carmichael v. Huggins, 70 S.E.2d 223, 228, 221 S.C. 278—Corpus Juris quoted in All v. Prillaman, 20 S.E.

2d 741, 750, 200 S.C. 279, 159 A.L.R. 981.

65 C.J. p 494 note 48.

55. U.S.—Jacoby v. Shell Oil Co., C. A.111, 196 F.2d 855—Chain O'Mines v. United Gilpin Corp., C.C.A.111, 109 F.2d 617, certiorari denied 61 S.Ct. 14, 311 U.S. 659, 85 L.Ed. 422.

Ill.—Wood v. Armstrong, 81 N.E.2d 468, 401 Ill. 111—Gilbert v. Cohn, 30 N.E.2d 19, 374 Ill. 452—Jolicoeur v. Brown, 45 N.E.2d 1010, 317 Ill. App. 381.

S.C.—Scott v. Scott, 57 S.E.2d 470, 216 S.C. 280—All v. Prillaman, 20 S.E.2d 741, 200 S.C. 279, 159 A.L.R. 981.

65 C.J. p 493 note 46 [a].

56. U.S.—Jacoby v. Shell Oil Co., C. A.111, 196 F.2d 855.

Ala.—Enterprise Auto Co. v. Huey, 87 So. 91, 204 Ala. 635.

S.C.—Corpus Juris quoted in Carmichael v. Huggins, 70 S.E.2d 223, 228, 221 S.C. 278—Corpus Juris quoted in All v. Prillaman, 20 S.E. 2d 741, 750, 200 S.C. 279, 159 A.L.R. 981.

57. Ill.—Jones v. Washington, 107 N.E.2d 672, 412 Ill. 436—Bremer v. Bremer, 104 N.E.2d 298, 411 Ill. 454—Kester v. Crilly, 91 N.E.2d 419, 405 Ill. 425—Wood v. Armstrong, 81 N.E.2d 468, 401 Ill. 111—Clark v. Clark, 76 N.E.2d 446, 398 Ill. 592—Scherman v. Scherman, 71 N.E.2d 16, 395 Ill. 574—Moneta v. Hoinacki, 67 N.E.2d 204, 394 Ill. 47—Galvin v. O'Neill, 66 N.E.2d 403, 393 Ill. 475.

Where undue influence and incompetency do not appear, and relationship between the parties is not one ordinarily known as confidential in law, evidence to establish a confidential relationship must be certain and cannot arise from suspicion or from infrequent or unrelated acts.—Kahan v. Greenfield, 67 A.2d 567, 165 Pa.Super. 148.

#### Process of elimination

Proof of fiduciary or confidential relationship may be made by process of elimination as well as by affirmative documentary evidence.—Grand Trunk Western R. Co. v. Chicago & Western Indiana R. Co., C.C.A. 111, 131 F.2d 215.

58. U.S.—Young v. Bradley, C.C.A. Ohio, 142 F.2d 658, certiorari denied 65 S.Ct. 130, 323 U.S. 775, 89

ant,<sup>59</sup> or that he wrongfully acquired possession of the property as to which the trust is sought.<sup>60</sup>

Positive and uncontradicted testimony of the existence of facts sufficient to give rise to a constructive trust need not necessarily be adopted as true by the trial judge, if he is not convinced thereby;<sup>61</sup> and testimony given long after the transaction in question, and after the parties concerned are dead, although positive and not contradicted by other testimony, is to be regarded with serious misgivings.<sup>62</sup> The party seeking to show such a trust need not introduce a larger body of evidence than may be introduced by the adverse party, nor is it required that the proof have the certainty of mathematical demonstration.<sup>63</sup> Where the person seeking to establish a constructive trust makes out a prima facie case, the adverse party must overcome it by a preponderance of the evidence.<sup>64</sup>

*As dependent on number of witnesses.* The sufficiency of the proof offered to establish a constructive trust does not necessarily depend on the number of witnesses testifying to the facts relied on,<sup>65</sup>

and if the testimony of one witness is clear and convincing, it may be sufficient.<sup>66</sup> The party seeking to establish the trust need not introduce a greater number of witnesses than may be introduced by the adverse party,<sup>67</sup> and a mere conflict in the testimony of witnesses does not render the evidence unclear or indecisive so as to preclude impressment of a constructive trust.<sup>68</sup> Where, however, the parties themselves are the only witnesses, and their testimony is in conflict, and there is no corroborative evidence of any kind, the evidence cannot be said to be so clear and satisfactory as to establish a trust.<sup>69</sup>

#### b. Sufficiency of Evidence in Particular Cases

Evidence has been held sufficient or has been held insufficient to satisfy the degree of proof required to establish a constructive trust or particular elements thereof.

Applying the general rules, discussed supra subdivision a of this section, as to the high degree of proof required in order to establish a constructive trust, it has been held, in numerous particular cases, that the evidence was sufficient to warrant the im-

L.Ed. 619, motion denied 65 S.Ct. 266—Pratt v. Shell Petroleum Corp., C.C.A.Kan., 100 F.2d 833, certiorari denied 59 S.Ct. 775, 308 U.S. 659, 83 L.Ed. 1056—Twohig v. Lawrence Warehouse Co., D.C.Iowa, 118 F.Supp. 322.  
Wash.—Ockfen v. Ockfen, 213 P.2d 614, 35 Wash.2d 439.

#### Slight evidence

It has been held, however, that slight evidence will sustain a claim that a fiduciary has failed in performance of his obligations to his principal and justify imposition of a constructive trust.—Whitsell v. Porter, 217 S.W.2d 311, 309 Ky. 247.

#### Circumstances as a whole

In oil company's action against geologist formerly employed by it and his business associates to impress constructive trust on property acquired by them by purloining the oil company's confidential information and diverting it to their own gain, it was unnecessary that plaintiff establish every transaction with separate, independent, and isolated proof of influence and effect of geologist's information on that particular transaction viewed in vacuo, and it was enough that circumstances, taken as whole, constituted clear, convincing, and trustworthy proof as to each transaction.—Hunter v. Shell Oil Co., C.A.Tex., 198 F.2d 485.

59. Pa.—Wells v. Wells, Com.Pl., 33 Wash.Co. 209.

Wash.—McGregor v. McGregor, 171 P.2d 694, 25 Wash.2d 511.

#### Representations

Clear and convincing evidence of representations made by a grantee to hold property in trust for a grantor, and of the intention at the time not to fulfill the represented promise is necessary to create a constructive trust for the grantor.—Robinson v. Linfield College, D.C.Wash., 42 F.Supp. 147, affirmed, C.C.A., 136 F.2d 805, certiorari denied 64 S.Ct. 262, 320 U.S. 795, 88 L.Ed. 479.

60. Iowa.—Copeland v. Voge, 20 N.W.2d 2, 237 Iowa 102.

61. Cal.—Turman v. Ellison, 174 P.396, 37 Cal.App. 204.

62. Cal.—Turman v. Ellison, supra. Pa.—Corpus Juris cited in *In re Tuttle's Estate*, 200 A. 921, 924, 132 Pa.Super. 356.

63. Me.—Austin v. Austin, 191 A.276, 135 Me. 155.

64. Mont.—Mather v. Musselman, 257 P.427, 79 Mont. 566.  
55 C.J. p 494 note 52.

#### Self-defense

In suit against decedent's widow to impress constructive trust for decedent's heirs and next of kin on realty owned by decedent and defendant as tenants by entirety until defendant shot and killed decedent, burden was on defendant to establish by preponderance of evidence that she shot decedent in self-defense, as claimed by her.—Colton v. Wade, Del.Ch., 95 A.2d 840.

#### Proof beyond question

Under complaint to impress trust on land purchased by broker at in-

stance of complainant, broker who asserted an interest in the realty other than that of broker was required to prove such interest beyond question, to show good faith and that his interest was well-known to complainant at the time of employment.—Gabel v. Kilgore, 26 So.2d 166, 157 Fla. 420.

65. Ill.—Jones v. Felix, 23 N.E.2d 706, 372 Ill. 282—Miller v. Miller, 112 N.E. 321, 272 Ill. 468.

66. Ill.—Mauricau v. Haugen, 56 N.E.2d 367, 387 Ill. 186—Jones v. Felix, 23 N.E.2d 706, 372 Ill. 262.

Tex.—Sykes v. Sykes, Civ.App., 261 S.W. 797, error refused.  
65 C.J. p 494 note 54.

67. Me.—Austin v. Austin, 191 A.276, 135 Me. 155.

68. Okl.—Poe v. Poe, 256 P.2d 153, 208 Okl. 406.

69. Md.—Clark v. Clark, 114 A. 722, 139 Md. 38.

#### Surrender of contract

Plaintiff's uncorroborated and unconvincing testimony that contract for purchase of three tracts of realty entered into by plaintiff and defendant had not been surrendered except so far as necessary to permit plaintiff to become sole purchaser of the one tract would not be accepted as true for purpose of establishing a constructive trust, where plaintiff's testimony was contradicted by defendant and by vendor who was a disinterested witness and was not alleged to have been a party to any fraud against plaintiff.—Hughes v. Helzer, 185 P.2d 537, 182 Or. 205.

pressment of such a trust,<sup>70</sup> but the evidence in other cases has been held not of such character as to be sufficient for this purpose.<sup>71</sup> The sufficiency of the evidence to establish par-

70. U.S.—Kasishke v. Keppler, C.C. A.Okl., 158 F.2d 809—Strates v. Dimotakis, C.C.A.Tex., 110 F.2d 374, certiorari denied 61 S.Ct. 24, 311 U.S. 666, 85 L.Ed. 427.
- Alaska—Pilgrim v. Grant, 9 Alaska 17.
- Ariz.—Shackelford v. Swanteck, 153 P.2d 534, 63 Ariz. 86.
- Ark.—Colo. v. Williams, 220 S.W.2d 821, 215 Ark. 366—Ladd v. Bones, 214 S.W.2d 353, 213 Ark. 1030—Skelly Oil Co. v. Johnson, 194 S.W.2d 425, 200 Ark. 1107—Suggs v. Valentine, 160 S.W.2d 890, 204 Ark. 88.
- Cal.—Stromerson v. Averill, 141 P.2d 732, 22 Cal.2d 808—Aho v. Kunsert, 87 P.2d 358, 12 Cal.2d 687—Stoble v. Stoble, 253 P.2d 765, 116 Cal.App.2d 360—Dalakis v. Paras, 194 P.2d 736, 86 Cal.App.2d 243—Rankin v. Satir, 171 P.2d 78, 76 Cal.App.2d 631—Jarkich v. Badagliacco, 170 P.2d 994, 76 Cal.App.2d 505—Tobola v. Wholey, 170 P.2d 952, 75 Cal.App.2d 351—Forbes v. Forbes, 193 P.2d 661, 74 Cal.App.2d 936—Lytile v. Fickling, 104 P.2d 842, 72 Cal.App.2d 383—Adams v. Bloom, 142 P.2d 775, 61 Cal.App.2d 315—Atirola v. Gorham, 133 P.2d 78, 66 Cal.App.2d 42—Niles v. Louis H. Rapoport & Sons, 128 P.2d 50, 53 Cal.App.2d 644—Bradbury v. Bradbury, 126 P.2d 673, 52 Cal.App.2d 547—Sampson v. Bruder, 118 P.2d 28, 47 Cal.App.2d 431—Irussing v. Bates, 115 P.2d 854, 46 Cal.App.2d 347—Pelerito v. Dragna, 105 P.2d 1011, 41 Cal.App.2d 85—Robertson v. Summerlin, 102 P.2d 347, 39 Cal.App.2d 82—Taylor v. Iunnell, 23 P.2d 1062, 133 Cal.App. 177.
- Fla.—Allen v. Patham, 58 So.2d 337—Ballard v. Gilbert, 55 So.2d 723—City of Sarasota v. Dixon, 1 So.2d 198, 146 Fla. 389.
- Ga.—Hudson v. Evans, 32 S.E.2d 793, 198 Ga. 775—Allen v. Allen, 31 S.E.2d 483, 198 Ga. 269—Crosby v. Rogers, 30 S.E.2d 348, 197 Ga. 816—Pittman v. Pittman, 26 S.E.2d 764, 196 Ga. 397.
- Ill.—Rizzo v. Rizzo, 120 N.E.2d 546, 8 Ill.2d 291—Bremer v. Bremer, 104 N.E.2d 289, 411 Ill. 454—Stephenson v. Kulichke, 101 N.E.2d 642, 410 Ill. 139—Steinmetz v. Kern, 32 N.E.2d 151, 375 Ill. 616—Suchy v. Hajlosk, 4 N.E.2d 836, 364 Ill. 502—Harmony Way Bridge Co. v. Leathers, 187 N.E. 432, 363 Ill. 378—Kreger v. Hart, 271 Ill.App. 352.
- Iowa.—Stegemann v. Bendixen, 260 N.W. 14, 219 Iowa 1190.
- Ky.—Crawford v. Crawford, 233 S.W.2d 505, 213 Ky. 745—Cape v. Leach, 142 S.W.2d 971, 288 Ky. 682—Hull v. Simon, 128 S.W.2d 954, 273 Ky. 442.
- La.—Williams v. Watts, App., 195 So. 54.
- Md.—Carter v. Abramo, 93 A.2d 546, 201 Md. 339—Bass v. Smith, 56 A.2d 800, 189 Md. 461—Levine v. Schofer, 40 A.2d 334, 184 Md. 205—O'Connor v. Estevez, 35 A.2d 148, 182 Md. 541.
- Mich.—Digby v. Thorson, 30 N.W.2d 266, 319 Mich. 524—Ryan v. Chopp, 22 N.W.2d 363, 314 Mich. 255—Nichols v. Martin, 269 N.W. 133, 277 Mich. 305.
- Miss.—Rhoads v. Peoples Bank & Trust Co., 27 So.2d 552, 200 Miss. 606.
- Mo.—Collins v. Shive, 261 S.W.2d 58.
- Mont.—Opp v. Boggs, 193 P.2d 379, 121 Mont. 131—Whitcomb v. Koehel, 153 P.2d 496, 117 Mont. 329.
- Neb.—Maca v. Sabata, 34 N.W.2d 287, 150 Neb. 213—Watkins v. Waits, 28 N.W.2d 206, 148 Neb. 542—Tuttle v. Wyman, 18 N.W.2d 744, 148 Neb. 146—First Trust Co. of Lincoln, Neb., v. Hammond, 300 N.W. 808, 140 Neb. 330, opinion supplemented 4 N.W.2d 874, 141 Neb. 756—Wilcox v. Wilcox, 293 N.W. 378, 138 Neb. 510—Schurman v. Pagan, 286 N.W. 921, 136 Neb. 628—Lamb v. Sandall, 281 N.W. 37, 135 Neb. 300.
- N.J.—Laurino v. Laurino, 100 A.2d 301, 28 N.J.Super. 119—Ricker v. Poltoek, 65 A.2d 94, 1 N.J.Super. 499—Gentile v. Gentile, 60 A.2d 315, 142 N.J.Eq. 383—Goldstein v. Marsella, 42 A.2d 772, 136 N.J.Eq. 521, affirmed 45 A.2d 667, 137 N.J.Eq. 513—Wernick v. Wernick, 174 A. 440, 116 N.J.Eq. 450.
- N.M.—Loveridge v. Loveridge, 198 P.2d 444, 52 N.M. 353.
- N.Y.—Bacolas v. Finalis, 68 N.Y.S.2d 623, 271 App.Div. 1046—Chapman v. Chapman, 61 N.Y.S.2d 3, 270 App.Div. 895—Ciurfo v. Ciurfo, 60 N.Y.S.2d 848, 186 Misc. 1000—In re Van Muffling's Estate, 277 N.Y.S. 584, 154 Misc. 300.
- Ohio.—Ezzo v. Ezzo, 117 N.E.2d 711, 95 Ohio App. 126.
- Okl.—Exchange Bank of Perry v. Nichols, 164 P.2d 867, 196 Okl. 283—Renegar v. Bruning, 123 P.2d 686, 190 Okl. 840.
- Pa.—Rinkos v. Tritsch, 69 A.2d 120, 363 Pa. 127—Hamburg v. Barsky, 50 A.2d 345, 355 Pa. 462—Afterback v. Burns, 56 Pa.Di. & Co. 37—Schwarz v. Kelghier, Com.Pl., 81 Del.Co. 251.
- R.I.—Joslin v. Astle, 194 A. 703, 59 R.I. 182.
- S.C.—Dominick v. Rhodes, 24 S.E.2d 183, 202 S.C. 139.
- S.D.—Fischer v. Bunch, 16 N.W.2d 541, 70 S.D. 240—Reinhard Bros. Co. v. Swanson, 207 N.W. 102, 49 S.D. 256.
- Tex.—Elick v. Schiller, 240 S.W.2d 997, 150 Tex. 363—Kinzbach Tool Co. v. Corbett-Wallace Corp., 160 S.W.2d 509, 138 Tex. 565—Wise v. Haynes, Civ.App., 103 S.W.2d 477—Bush v. Gaffney, Civ.App., 84 S.W.2d 759.
- Utah.—Hawkins v. Perry, 253 P.2d 372—Free v. Farnworth, 144 P.2d 532, 105 Utah 583.
- Va.—Byars v. Stone, 42 S.E.2d 847, 186 Va. 518—Horne v. Holley, 188 S.E. 169, 167 Va. 234.
- Wash.—Arneman v. Arneman, 264 P.2d 256, 48 Wash.2d 766.
- 65 C.J. p 494 note 58 [a].
- Purchase at judicial sale**
- Evidence authorized determination that defendant purchasing land at a judicial sale pursuant to agreement with other heirs, held land under a constructive trust as a fiduciary for other heirs notwithstanding, in absence of fiduciary relationship, evidence was not of that clear and convincing character required to support a finding of a constructive trust.—Whitsell v. Porter, 217 S.W.2d 311, 309 Ky. 247.
71. U.S.—Troyak v. Enos, C.A.Ind., 204 F.2d 538—Solomon v. Boschulte, C.A.Virgin Islands, 200 F.2d 462—Falk v. C. I. R., C.A.3, 189 F.2d 806, certiorari denied 72 S.Ct. 89, 343 U.S. 861, 95 L.Ed. 648—Robinson v. Linfield College, D.C.Wash., 42 F. Supp. 147, affirmed, C.C.A., 135 F.2d 808, certiorari denied 84 S.Ct. 262, 220 U.S. 795, 85 L.Ed. 475—Gorham v. U. S. Ct.Cl., 119 F.Supp. 409.
- Ala.—Sparkman v. Williams, 71 So.2d 274, 280 Ala. 472—Duncan v. Leonard, 37 So.2d 210.
- Ark.—Neill v. Neill, 267 S.W.2d 26, 221 Ark. 872—McDaniel v. McDaniel, 249 S.W.2d 125, 220 Ark. 834—McNutt v. Carnes, 210 S.W.2d 290, 213 Ark. 346—Ripley v. Kelly, 133 S.W.2d 793, 207 Ark. 1011—Blishop v. Gregory, 144 S.W.2d 1083, 201 Ark. 448—Wofford v. Jackson, 111 S.W.2d 542, 194 Ark. 1049.
- Cal.—Sully v. Kern Drilling Corp., App., 272 P.2d 549—Stoner v. Laidley, 267 P.2d 488, 118 Cal.App.2d 50—Suklasian v. Shakarian, 252 P.2d 956, 115 Cal.App.2d 798—Davis v. Bassett Rock Co., 237 P.2d 338, 107 Cal.App.2d 438, motion denied 250 P.2d 254, 114 Cal.App.2d 300—Kingsley v. Carroll, 234 P.2d 1039, 106 Cal.App.2d 358—Foley v. Riverside Iron & Steel Corp., 221 P.2d 998, 99 Cal.App.2d 431—Peterson v. Wilson, 199 P.2d 757, 88 Cal.App.2d 617—Pixeweve Aircraft Co. v. Greenwood, 173 P.2d 333, 76 Cal.App.2d 346—Redsted v. Weiss, 167 P.2d 735, 73 Cal.App.2d 889—Palmer v. Burnham, 165 P.2d 50, 72 Cal.App.2d 626—Eisenmenger v. Eisenmenger, 139 P.2d 63, 59 Cal.App.2d



- 536—Smith v. Smith, 118 P.2d 437, 47 Cal.App.2d 574—O'Brien v. Markham, 99 P.2d 533, 37 Cal.App.2d 381—McMurray v. Sivertsen, 83 P.2d 48, 28 Cal.App.2d 541.
- Colo.—Fredell v. Eickhoff, 142 P.2d 1006, 111 Colo. 465.
- Del.—Colton v. Wade, Ch., 95 A.2d 840.
- Fla.—Lightfoot v. Rogers, 54 So.2d 237—Bennett v. Bennett, 26 So.2d 650, 157 Fla. 627—First Nat. Bank v. Southern Lumber & Supply Co., 145 So. 594, 106 Fla. 821.
- Ga.—Wages v. Wages, 42 S.E.2d 481, 202 Ga. 155.
- Ill.—Glasser v. Essansen Theatres Corp., 111 N.E.2d 124, 414 Ill. 180—Evans v. Berko, 97 N.E.2d 316, 408 Ill. 438—Stein v. Stein, 75 N.E.2d 869, 398 Ill. 397—Bydalek v. Bydalek, 71 N.E.2d 19, 396 Ill. 65—Moneta v. Hoinacki, 67 N.E.2d 304, 394 Ill. 47—Galvin v. O'Neill, 66 N.E.2d 408, 393 Ill. 475—Guffey v. Washburn, 46 N.E.2d 971, 382 Ill. 376—Jones v. Felix, 23 N.E.2d 708, 372 Ill. 262—Sharp v. Bradshaw, 12 N.E.2d 1, 367 Ill. 528—Anchor Realty & Inv. Co. v. Rafferty, 32 N.E.2d 394, 308 Ill.App. 454—Borovansky v. Para, 28 N.E.2d 174, 306 Ill.App. 60.
- Ind.—Hare v. Chisman, 101 N.E.2d 268, 230 Ind. 333.
- Iowa.—Rorem v. Rorem, 59 N.W.2d 210, 244 Iowa 950—England v. England, 51 N.W.2d 437, 243 Iowa 274—Weaver v. Perkins, 47 N.W.2d 240, 245 Iowa 907—Wilder v. Conlon, 80 N.W.2d 764, 239 Iowa 137—Shaw v. Addison, 28 N.W.2d 818, 239 Iowa 377—Copeland v. Voge, 20 N.W.2d 2, 237 Iowa 102—Crawford v. Couch, 15 N.W.2d 633, 234 Iowa 1246.
- Kan.—Rasmussen v. Rasmussen, 84 P.2d 919, 148 Kan. 849.
- Ky.—Cornett v. Combs, 265 S.W.2d 482—Panke v. Panke, 252 S.W.2d 909—May v. May, 223 S.W.2d 362, 311 Ky. 74—Deaton v. Bowling, 196 S.W.2d 603, 302 Ky. 829—Clark v. Smith, 66 S.W.2d 93, 252 Ky. 50.
- Md.—Masters v. Masters, 89 A.2d 576, 200 Md. 318—Fasman v. Pottashnick, 51 A.2d 664, 188 Md. 105—Hayward v. Campbell, 199 A. 530, 174 Md. 540—Garner v. Garner, 190 A. 243, 171 Md. 603.
- Mass.—Keith v. Keith, 73 N.E.2d 825, 321 Mass. 460—Di Burro v. Bonasia, 71 N.E.2d 401, 321 Mass. 12—Flumer v. Luce, 39 N.E.2d 961, 310 Mass. 789.
- Mich.—Potter v. Lindsay, 60 N.W.2d 133, 337 Mich. 404—Bailey v. Bailey, 32 N.W.2d 429, 321 Mich. 166—Rice v. Allen, 28 N.W.2d 91, 318 Mich. 245—Fahey v. Pell, 17 N.W.2d 183, 310 Mich. 280.
- Miss.—Stovall v. Stovall, 67 So.2d 391, 218 Miss. 364.
- Mo.—Aranson v. Spitzcaufsky, 260 S. W.2d 548—Milgram v. Jiffy Equipment Co., 247 S.W.2d 668, 362 Mo. 1194, 30 A.L.R.2d 925—Thomason v. Beery, 235 S.W.2d 308, 361 Mo. 424—Vardell v. Vardell, 222 S.W.2d 763—Blick v. Nickel Sav., Inv. & Bldg. Ass'n, 216 S.W.2d 509—Beach v. Beach, 207 S.W.2d 481—Maguire v. Vander, 193 S.W.2d 900—Suhre v. Busch, 123 S.W.2d 8, 343 Mo. 679—Parker v. Blakeley, 83 S.W.2d 981, 338 Mo. 1189—Ulrich v. Boeckeler, 72 Mo.App. 661.
- Mont.—Lewis v. Bowman, 121 P.2d 162, 113 Mont. 68.
- Neb.—Paul v. McGahan, 57 N.W.2d 283, 156 Neb. 656—Jenkins v. Jenkins, 36 N.W.2d 637, 151 Neb. 113—McCormick v. McCormick, 33 N.W.2d 543, 150 Neb. 192—Standidge v. Creveling, 6 N.W.2d 56, 142 Neb. 334.
- Nev.—Hannig v. Conger, 19 P.2d 769, 54 Nev. 388.
- N.H.—Hatch v. Rideout, 65 A.2d 702, 95 N.H. 431.
- N.J.—Gray v. Bradley, 62 A.2d 139, 1 N.J. 102—Galbierzcyk v. Galbierzcyk, 76 A.2d 905, 10 N.J.Super. 206—Bebe Realty Associates v. Altshuler, 41 A.2d 272, 136 N.J.Eq. 273, affirmed 45 A.2d 499, 137 N.J.Eq. 458—Grubman v. American General Corp., 23 A.2d 578, 130 N.J.Eq. 607—Selinger v. Selinger, 176 A. 193, 117 N.J.Eq. 427.
- N.M.—Wright v. Holloway, 20 P.2d 274, 37 N.M. 168.
- N.Y.—Greenberg v. Greenberg, 23 N.Y.S.2d 606, 260 App.Div. 949, appeal denied 25 N.Y.S.2d 999, 261 App.Div. 836—Heaslip v. Barnshaw, 129 N.Y.S.2d 433—Neely v. Neely, 39 N.Y.S.2d 809, affirmed 98 N.Y.S.2d 206, 277 App.Div. 876—In re Cohen's Estate, 98 N.Y.S.2d 883—Sargent v. Bascombe, 90 N.Y.S.2d 115—Wojtkowiak v. Wojtkowiak, 85 N.Y.S.2d 198, affirmed 81 N.Y.S.2d 171, 273 App.Div. 1052.
- N.C.—Sheppard v. Sykes, 44 S.E.2d 54, 227 N.C. 606—Atkinson v. Atkinson, 33 S.E.2d 666, 225 N.C. 120—Winner v. Winner, 23 S.E.2d 251, 222 N.C. 414.
- N.D.—Lander v. Hartson, 47 N.W.2d 211, 77 N.D. 923.
- Ohio.—Kuck v. Sommers, App., 100 N.E.2d 68—Shaw v. Perry, App., 95 N.E.2d 585—Chambers v. Weiskopf, 5 Ohio Supp. 350.
- Okl.—Harper Finance Co. v. Goodall, 266 P.2d 627—Dodd v. Kane, 218 P.2d 1047, 203 Okl. 156—Murphree v. Brotherhood of R. R. Trainmen, 173 P.2d 926, 197 Okl. 627—Jones v. Jones, 148 P.2d 989, 194 Okl. 228—Wade v. McKeown, 145 P.2d 951, 193 Okl. 415—Parsons v. Crawford, 145 P.2d 932, 193 Okl. 537—Allen v. Jones, 110 P.2d 911, 188 Okl. 546—Guyer v. London, 102 P.2d 875, 187 Okl. 326—Olipphant v. Rogers, 95 P.2d 837, 186 Okl. 70—Johnson v. Rowe, 89 P.2d 955, 185 Okl. 60.
- Or.—Evans v. Trude, 240 P.2d 940, 193 Or. 548—Hughes v. Helzer, 185 P.2d 537, 182 Or. 205—Callan v. Western Inv. & Holding Co., 72 P.2d 48, 157 Or. 412—Dahl v. Simonsen, 70 P.2d 49, 157 Or. 238.
- Pa.—Barrett v. Heiner, 80 A.2d 729, 367 Pa. 510—Danner v. Danner, 77 A.2d 217, 366 Pa. 178—Long v. Long, 65 A.2d 683, 361 Pa. 598—Gray v. Leibert, 53 A.2d 132, 357 Pa. 130—Moffitt v. Moffitt, 16 A.2d 418, 340 Pa. 107—In re McLean's Estate, 4 A.2d 318, 333 Pa. 293—Bratsch v. McCarthy, 15 A.2d 404, 141 Pa.Super. 490.
- R.I.—Larocque v. Larocque, 58 A.2d 638, 74 R.I. 72.
- S.C.—Carmichael v. Huggins, 70 S.E.2d 223, 221 S.C. 278—Scott v. Scott, 57 S.E.2d 470, 216 S.C. 280.
- S.D.—Kelly v. Gram, 38 N.W.2d 460, 73 S.D. 11—Jones v. Jones, 291 N.W. 579, 67 S.D. 200.
- Tex.—Crumpton v. Scott, Civ.App. 250 S.W.2d 953, error refused no reversible error—Mellette v. Hudson Oil Corp., Civ.App. 243 S.W.2d 438, error refused no reversible error—Paddock v. Siemoneit, Civ. App. 241 S.W.2d 651, reversed on other grounds 218 S.W.2d 428, 147 Tex. 571, 7 A.L.R.2d 1052—Morrison v. Farmer, Civ.App., 210 S.W.2d 245, reversed on other grounds 213 S.W.2d 818, 147 Tex. 122—Wink v. Wink, Civ.App., 169 S.W.2d 721—Elbert v. Waples-Platter Co., Civ. App., 166 S.W.2d 146, error refused—Hamilton v. Keller, Civ.App., 148 S.W.2d 1011.
- Utah.—Upton v. Heiselt, 223 P.2d 428—Peterson v. Peterson, 141 P.2d 882, 105 Utah 133—Ives v. Grange, 134 P. 619, 42 Utah 508.
- Wash.—Ockfen v. Ockfen, 213 P.2d 614, 35 Wash.2d 430—Georges v. Loutsis, 145 P.2d 901, 20 Wash.2d 92—Saunders v. Visser, 145 P.2d 998, 20 Wash.2d 58—Farley v. Davis, 116 P.2d 263, 10 Wash.2d 62, 155 A.L.R. 1502—Lally v. Johnson, 60 P.2d 249, 187 Wash. 511—Boardman v. Watrous, 35 P.2d 1106, 178 Wash. 690.
- W.Va.—Zog v. Hedges, 29 S.E.2d 871, 126 W.Va. 523, 152 A.L.R. 991—Honaker v. City of Princeton, 25 S.E.2d 772, 125 W.Va. 672.
- Wyo.—Carpenter & Carpenter v. Kingham, 109 P.2d 463, 56 Wyo. 314, modified on other grounds and rehearing denied 110 P.2d 824, 56 Wyo. 314.
- 65 C.J. p 494 note 56 [b].

#### Diverted funds

In suit to impress trust on realty allegedly purchased by defendant with funds diverted from plaintiff's business, evidence was insufficient to sustain finding that diverted funds were used in purchase so as to subject such property to trust lien.—Picciano v. Miller, 137 P.2d 788, 64 Idaho 759.

ticular elements of a cause of action for the imposition of a constructive trust has also been adjudicated, including such elements as actual or con-

structive fraud,<sup>72</sup> circumstances rendering it inequitable for defendant to hold title to property,<sup>73</sup> and defendant's receipt or possession of property

### 72. Evidence held sufficient

(1) To show actual or constructive fraud generally.

- U.S.—Soderstrom v. Kungsholm Baking Co., C.A. Ill., 189 F.2d 1008—Strates v. Dimotakis, C.C.A. Tex., 110 F.2d 374, certiorari denied 61 S.Ct. 24, 311 U.S. 666, 85 L.Ed. 127.
- Cal.—Harris v. Leo, 266 P.2d 534, 123 Cal.App.2d 177—Air Purification v. Carle, 271 P.2d 700, 99 Cal.App.2d 258—Porman v. Goldberg, 108 P.2d 983, 42 Cal.App. 208—Zaventa v. Woods, 61 P.2d 976, 17 Cal.App.2d 309.
- Del.—Greenly v. Greenly, 49 A.2d 126, 23 Del.Ch. 297.
- Fla.—Ballard v. Gilbert, 56 So.2d 723 Ill.—Bakalis v. Bressler, 115 N.E.2d 323, 1 Ill.2d 72—Kimbrough v. Parker, 101 N.E.2d 617, 344 Ill. App. 483.
- Iowa—Rance v. Gaddis, 284 N.W. 468, 222 Iowa 531.
- Mass.—Jurewicz v. Jurewicz, 58 N.E.2d 832, 217 Mass. 512—City of Boston v. Santosuosso, 30 N.E.2d 278, 307 Mass. 302.
- Mich.—Kren v. Rubin, 61 N.W.2d 9, 388 Mich. 288.
- Minn.—Crowley v. Crowley, 18 N.W.2d 40, 219 Minn. 341.
- Neb.—Tuttle v. Wyman, 18 N.W.2d 744, 146 Neb. 146.
- Ohio—Hoy v. Cummer, 97 N.E.2d 702, 89 Ohio App. 104.
- Tex.—Edwards v. Strong, 313 S.W.2d 979, 147 Tex. 156—Poole v. Garrett, 211 S.W.2d 559, 147 Tex. 18.
- Utah—Perry v. McConkie, 264 P.2d 852, 1 Utah 2d 189.
- Va.—Nicholson v. Shockey, 64 S.E.2d 813, 192 Va. 270.
- 65 C.J. p. 495 note 57 [a].

(2) To support conclusion that defendant promised reconveyance with no intention of performing—Burrows v. Burrows, 28 P.2d 1072, 136 Cal.App. 323.

(3) To establish that husband's name was without authority inserted in deeds as joint grantee with wife who alone owned the property—Mauriau v. Haugen, 56 N.E.2d 367, 387 Ill. 186.

(4) To sustain finding that party who purchased realty from employee, record owner, had actual knowledge of employee's trusteeship—Adeock v. Merchants & Mfrs. Bank of Ellenville, 42 So.2d 427, 207 Miss. 448.

(5) To sustain finding that entire transaction had been fair and open.—Hitt v. Hitt, Okl., 256 P.2d 539.

### Evidence held insufficient

(1) To establish actual or constructive fraud generally.

U.S.—Troyak v. Bnos, C.A. Ind., 204 F.2d 536—Shapiro v. Rubens, C.C.A.

Ind., 166 F.2d 650—Chain O'Mines v. United Gypsum Corp., C.C.A. Ill., 109 F.2d 617, certiorari denied 61 S.Ct. 14, 311 U.S. 659, 85 L.Ed. 422—Bohman v. American Paper Goods Co., D.C.N.J., 66 F.Supp. 828—Robinson v. Linfield College, D.C. Wash., 42 F.Supp. 147, affirmed, C.C.A., 136 F.2d 805, certiorari denied 64 S.Ct. 262, 320 U.S. 795, 88 L.Ed. 479.

Ala.—Bell v. Moss, 183 So. 424, 236 Ala. 437.

Cal.—Anderson v. Stansbury, 242 P.2d 305, 38 Cal.2d 707—Mazzoni v. Wolf, 183 P.2d 649, 30 Cal.2d 531—In re Harris' Estate, 72 P.2d 873, 9 Cal.2d 649—Spaulding v. Jones, 256 P.2d 637, 117 Cal.App.2d 511—Cardozo v. Bank of America Nat. Trust & Sav. Ass'n, 254 P.2d 949, 116 Cal.App.2d 833—Weighman v. Hadley, 218 P.2d 801, 113 Cal.App.2d 698—Philp v. Hobart, 229 P.2d 763, 103 Cal.App.2d 446—Hewett v. Lindeard, 122 P.2d 352, 49 Cal.App.2d 607.

Colo.—Woodruff v. Clarke, 262 P.2d 737, 128 Colo. 387—Dearhammer v. Central Bank & Trust Co., 221 P.2d 1055, 122 Colo. 206.

Conn.—Van Auker v. Tyrrell, 33 A.2d 339, 120 Conn. 289.

D.C.—America v. Sheehan, 202 F.2d 213, 92 App.D.C. 30—Cahill v. Bryan, 184 F.2d 277, 87 U.S.App.D.C. 271.

Ill.—Compton v. Compton, 111 N.E.2d 109, 414 Ill. 149—Jones v. Washington, 107 N.E.2d 672, 412 Ill. 136—Evans v. Borko, 97 N.E.2d 316, 408 Ill. 438—Wood v. Armstrongs, 81 N.E.2d 468, 401 Ill. 111—Murray v. Behrendt, 76 N.E.2d 431, 339 Ill. 22—Galvin v. O'Neill, 66 N.E.2d 403, 393 Ill. 475—Glaxco v. Eschmuth Theatres Corp., 104 N.E.2d 510, 346 Ill. App. 72, affirmed 111 N.E.2d 124, 414 Ill. 180—Borovinsky v. Yara, 28 N.E.2d 174, 306 Ill. App. 60.

Ind.—Costa v. Costa, App., 115 N.E.2d 516.

Iowa—Shaw v. Addison, 28 N.W.2d 816, 239 Iowa 377—Mind v. City Nat. Bank of Clinton, 8 N.W.2d 417, 232 Iowa 1276.

Mich.—Rice v. Allen, 28 N.W.2d 91, 318 Mich. 245—Winchell v. Miller, 26 N.W.2d 147, 316 Mich. 151—Pachy v. Pull, 17 N.W.2d 183, 310 Mich. 280.

Minn.—Voegele v. Mahoney, 54 N.W.2d 15, 237 Minn. 43—Moe v. Oyen, 296 N.W. 512, 208 Minn. 496.

Miss.—Merrifield v. Walters, 62 So.2d 361, 216 Miss. 346—Wax v. Pope, 168 So. 54, 175 Miss. 784.

Mo.—Welborn v. Ligon, 231 S.W.2d 127—Tresler v. Heimbacher, 165

S.W.2d 1030, 350 Mo. 807—Orrick v. Heberer, App., 124 S.W.2d 664.

N.J.—Sonek v. Hill Bldg. & Loan Ass'n, 49 A.2d 308, 138 N.J. Eq. 534, affirmed 52 A.2d 852, 140 N.J. Eq. 108.

N.Y.—Katz v. Katz, 131 N.Y.S.2d 582, N.C.—Winner v. Winner, 23 S.E.2d 251, 222 N.C. 414.

Ohio—Kuck v. Sommers, App., 100 N.E.2d 69—Guarantee Title & Trust Co. v. Moores, Com.Pl., 68 N.E.2d 365, affirmed, App., 68 N.E.2d 378.

Okla.—Trent v. Trent, 270 P.2d 953—Adams v. Adams, 258 P.2d 458, 208 Okl. 378—Dodd v. Kane, 218 P.2d 1047, 203 Okl. 156.

Pa.—Barrett v. Heiner, 80 A.2d 729, 367 Pa. 510—Fregard v. Fregard, 80 A.2d 58, 367 Pa. 177—Jones v. Costlow, 36 A.2d 460, 349 Pa. 136.

S.C.—Greene v. Brown, 19 S.E.2d 114, 199 S.C. 218.

Tenn.—Hoffner v. Hoffner, 221 S.W.2d 907, 32 Tenn. App. 98.

Tex.—Smith v. Bolin, Civ.App., 261 S.W.2d 352, affirmed in part and reversed in part on other grounds Sup., 271 S.W.2d 93—Brand v. Falvey, Civ.App., 96 S.W.2d 158, error dismissed.

Wash.—McGregor v. McGregor, 171 P.2d 634, 25 Wash.2d 511.

Wyo.—Carpenter & Carpenter v. Kingham, 109 P.2d 463, 56 Wyo. 314, modified on other grounds and rehearing denied 110 P.2d 824, 56 Wyo. 314.

65 C.J. p. 495 note 57 [b].

(2) To show that certain defendants participated in the fraud.

U.S.—Soderstrom v. Kungsholm Baking Co., C.A. Ill., 189 F.2d 1008.

R.I.—Fanchetto v. August Bus. Co. Lines, 65 A.2d 705, 75 R.I. 293.

(3) To show notice by transferee of fraud or wrongdoing in connection with transfer of property.—Congregation & Talmud Torah Sons of Israel of the Bronx v. Harlem Sav. Bank, 48 N.Y.S.2d 882.

(4) To sustain burden on party acquiring title from trustee ex maleficio that he purchased in good faith for valuable consideration without notice of fraud—Stephenson v. Golden, 276 N.W. 849, 279 Mich. 710.

### 73. Evidence held sufficient

S.C.—Dumnick v. Rhodes, 24 S.E.2d 168, 202 S.C. 139.

### Evidence held insufficient

(1) In general.

U.S.—Warner Bros. Theatres v. Cooper Foundation, C.A. Okl., 189 F.2d 825.

Iowa.—Mead v. City Nat. Bank of Clinton, 8 N.W.2d 417, 232 Iowa 1276.

belonging to plaintiff.<sup>74</sup> Also, in particular cases, the evidence has been held sufficient or insufficient to show the making of a promise or agreement, or the

existence of an understanding,<sup>75</sup> the existence of a confidential or fiduciary relationship,<sup>76</sup> the abuse or

Okl.—Adams v. Adams, 256 P.2d 458, 308 Okl. 378.

(2) To show unjust enrichment. Cal.—Anderson v. Stansbury, 242 P.2d 305, 38 Cal.2d 707. S.C.—Greene v. Brown, 19 S.E.2d 114, 199 S.C. 218.

Tex.—De La Torre v. Crenshaw, Civ. App., 263 S.W.2d 197, error refused no reversible error.

#### 74. Evidence held sufficient

Ky.—FRESH v. Dunakin, 206 S.W.2d 203, 306 Ky. 87. Mass.—Boltz v. Boltz, 92 N.E.2d 365, 325 Mass. 726. Or.—Nushold v. Kruachke, 159 P.2d 819, 176 Or. 697.

#### Evidence held insufficient

Iowa.—Shaw v. Addison, 28 N.W.2d 816, 239 Iowa 377.

#### 75. Evidence held sufficient

(1) In general. Cal.—Shore v. Shore, 288 P.2d 569—Grace v. Rodriguez, 243 P.2d 906, 111 C.A.2d 131—Elliot v. Wood, 212 P.2d 906, 95 Cal.App.2d 161—Svistunoff v. Svistunoff, 211 P.2d 352, 94 Cal.App.2d 651—Edwards v. Edwards, 202 P.2d 589, 90 Cal.App.2d 33—Forbes v. Forbes, 169 P.2d 661, 74 Cal.App.2d 936—Anrola v. Gorham, 133 P.2d 78, 56 Cal.App.2d 42—Burrows v. Burrows, 58 P.2d 1072, 136 Cal.App. 323—Miller v. Forster, 21 P.2d 678, 131 Cal.App. 509.

Del.—Hayward v. Green, 61 A.2d 692, 30 Del.Ch. 392.

Fla.—Rome v. Pinck, 53 So.2d 712.

Ill.—Henrichs v. Sundmaker, 89 N.E.2d 732, 406 Ill. 62—Kuzlik v. Kwasny, 49 N.E.2d 212, 383 Ill. 354—Gilbert v. Cohn, 30 N.E.2d 19, 374 Ill. 462.

Mass.—Massachusetts Linotyping Corp. v. Fielding, 49 N.E.2d 242, 311 Mass. 47.

Mich.—Winchell v. Mixer, 25 N.W.2d 117, 316 Mich. 151.

Mo.—Janetsen v. Christian, App. 57 S.W.2d 692.

Neb.—Vutcher v. Malone, 63 N.W.2d 497, 158 Neb. 436—Wiskocil v. Kliment, 503 N.W.2d 786, 155 Neb. 103—Mara v. Sabata, 34 N.W.2d 267, 150 Neb. 213.

Nev.—Davidson v. Streeter, 234 P.2d 723, 68 Nev. 427.

N.Y.—O'Boyle v. Brenner, 104 N.E.2d 913, 503 N.Y. 572—In re Turley's Estate, 289 N.Y.S. 704, 160 Misc. 190.

Okl.—Adams v. Adams, 256 P.2d 458, 308 Okl. 378.

Tex.—Erwin v. Hays, Civ. App., 267 S.W.2d 884, error refused no reversible error—Newton v. Gardner, Civ. App., 225 S.W.2d 598, refused no reversible error—Sevine v. Heissner, Civ. App., 220 S.W.2d 704,

reversed on other grounds 224 S.W.2d 184, 148 Tex. 345. 65 C.J. p. 495 note 58 [a].

(2) To show that language of trustor was not precatory, but conveyed direction and command—Taylor v. Bunnell, 23 P.2d 1062, 133 Cal. App. 177.

(3) To sustain finding that conveyance to wife was not intended as a gift to her of plaintiff husband's one-half interest in realty—Miethe v. Miethe, 101 N.E.2d 571, 410 Ill. 226.

(4) To show that plaintiff abandoned his equity in the property—Trossbach v. Trossbach, 42 A.2d 905, 185 Md. 47.

#### Evidence held insufficient

(1) In general.

U.S.—Dille v. Carter Oil Co., C.A. Okl., 192 F.2d 791—Shapiro v. Rubens, C.C.A. Ind., 166 F.2d 659—Young v. Bradley, C.C.A. Ohio, 142 F.2d 658, certiorari denied 65 S.Ct. 320, 323 U.S. 775, 89 L.Ed. 619, motion denied 65 S.Ct. 266—Oasis Oil Co. v. Bell Oil & Gas Co., D.C. Okl., 106 F.Supp. 564—Nelson Development Co. v. Ohio Oil Co., D.C. Ill., 45 F. Supp. 933.

Cal.—Sakiasian v. Shakerian, 252 P.2d 956, 115 Cal.App.2d 798. Del.—Shuckley v. Halbig, 75 A.2d 512, 31 Del.Ch. 400.

D.C.—America v. Sheehan, 202 F.2d 213, 92 U.S.App.D.C. 30.

Ill.—Goodman v. McLennan, 80 N.E.2d 396, 334 Ill.App. 405.

Ky.—May v. May, 223 S.W.2d 362, 311 Ky. 74—Driskill v. Driskill's Adm'r, 211 S.W.2d 840, 307 Ky. 627—Langford v. Sigmon, 167 S.W.2d 820, 292 Ky. 650.

Mass.—Shellburne Shirt Co. v. Singer, 76 N.E.2d 762, 322 Mass. 262.

Mich.—Rice v. Allen, 28 N.W.2d 91, 318 Mich. 245.

Minn.—Wilcox v. Nelson, 35 N.W.2d 741, 227 Minn. 615.

Miss.—Stovall v. Stovall, 57 So.2d 391, 218 Miss. 364.

N.Y.—Katz v. Katz, 121 N.Y.S.2d 562—Congregation & Talmud Torah Sons of Israel of the Bronx v. Harlem Sav. Bank, 48 N.Y.2d 882.

Okl.—Hitt v. Hitt, 258 P.2d 599.

Or.—Bowns v. Bowns, 200 P.2d 586, 184 Or. 603.

R.I.—Di Libero v. Tagliatorri, 69 A.2d 529, 76 R.I. 302.

Tenn.—Pearson v. McCallum, 173 S.W.2d 150, 26 Tenn.App. 413.

Tex.—Bunnell v. Bunnell, Civ. App., 217 S.W.2d 78.

Va.—Williams v. Powers, 190 S.E. 149, 168 Va. 111.

Wash.—Ockfen v. Ockfen, 213 P.2d 614, 35 Wash.2d 439.

Wyo.—Carpenter & Carpenter v.

Kingham, 109 P.2d 463, 56 Wyo. 314, modified on other grounds and rehearing denied 110 P.2d 834, 56 Wyo. 314.

65 C.J. p. 495 note 58 [b].

(2) To establish joint adventure or agreement between brothers in purchase of stock by one brother, as basis for declaring trust in the stock in favor of other brother.—Kemp v. Kemp, 16 A.2d 888, 178 Md. 645.

(3) To require finding that agreement had been rescinded by mutual agreement.—Massachusetts Linotyping Corp. v. Fielding, 49 N.E.2d 242, 314 Mass. 47.

#### 76. Evidence held sufficient

(1) In general.

U.S.—Strates v. Dimotais, C.C.A. Tex., 110 F.2d 374, certiorari denied 61 S.Ct. 24, 311 U.S. 666, 85 L.Ed. 427. Alaska.—Pilgrim v. Grant, 9 Alaska 17.

Cal.—Stromerson v. Averill, 141 F.2d 732, 22 Cal.2d 808—Svistunoff v. Svistunoff, 211 P.2d 352, 94 Cal.App.2d 651—Rahim v. Akbar, 207 P.2d 80, 92 Cal.App.2d 383—Lucas v. Associação Protectora Uniao Maiores do Estado Da California, 143 P.2d 53, 61 Cal.App.2d 344—Sampson v. Bruder, 118 P.2d 28, 47 Cal.App.2d 431—Forman v. Goldberg, 108 P.2d 983, 42 Cal.App.2d 308—Miller v. Forster, 21 P.2d 678, 131 Cal.App. 509.

Ill.—Oster v. Oster, 111 N.E.2d 319, 414 Ill. 470—Miethe v. Miethe, 101 N.E.2d 571, 410 Ill. 226—Kester v. Crilly, 91 N.E.2d 419, 405 Ill. 425—Clark v. Clark, 76 N.E.2d 446, 398 Ill. 592—Kuzlik v. Kwasny, 49 N.E.2d 212, 383 Ill. 354—Steinmetz v. Kern, 32 N.E.2d 151, 375 Ill. 616.

Kan.—Henks v. Panning, 264 P.2d 482, 175 Kan. 424.

Md.—Levine v. Schofer, 40 A.2d 324, 184 Md. 205.

N.Y.—Lloyd v. Phillips, 71 N.Y.S.2d 103, 272 App. Div. 222.

Ohio—iley v. Cummer, 97 N.E.2d 702, 89 Ohio App. 104.

Okl.—Lewis v. Schafer, 20 P.2d 1048, 163 Okl. 94.

Or.—Ibach v. Hoffman, 198 P.2d 266, 184 Or. 296.

Pa.—Lalich v. Bankovsky, 39 A.2d 514, 250 Pa. 441.

R.I.—Calcani v. Cirino, 2 A.2d 889, 62 R.I. 44—Joslin v. Asile, 194 A. 703, 59 R.I. 183—Tyler v. Tyler, 172 A. 820, 54 R.I. 254.

S.D.—Jaeger v. Sechser, 270 N.W. 531, 65 S.D. 38.

Tex.—MacDonald v. Follett, 180 S.W.2d 334, 142 Tex. 618—MacDonald v. Follett, Civ. App., 193 S.W.2d 267, error refused.

Va.—Byars v. Stone, 42 S.E.2d 847, 186 Va. 518.

violation of such a relationship,<sup>77</sup> or various other particular matters relating to and involving con-

Wis.—Winslow v. Winslow, 43 N.W. 2d 496, 257 Wis. 333—Shevel v. Warter, 41 N.W.2d 603, 256 Wis. 503.

65 C.J. p 496 note 59 [a].

(2) To sustain finding that defendant was plaintiff's agent for purpose of acquiring property in question and conveying it over to plaintiff.

Ill.—Black v. Gray, 104 N.E.2d 212, 411 Ill. 503.

Mich.—Kron v. Rubin, 61 N.W.2d 9, 338 Mich. 288.

Neb.—Watkins v. Waits, 28 N.W.2d 206, 148 Neb. 543.

Ohio.—Hey v. Cummer, 97 N.E.2d 702, 89 Ohio App. 104

(3) To show that defendant did not agree to purchase property for plaintiff, and that defendant purchased property for his own benefit with his own money—Wilcox v. Nelson, 35 N.W.2d 741, 227 Minn. 645.

#### Evidence held insufficient

(1) In general

U.S.—Jacoby v. Shell Oil Co., C.C.A. Ill., 196 P.2d 855—Young v. Bradley, C.C.A. Ohio, 112 P.2d 658, certiorari denied 65 S.Ct. 130, 323 U.S. 775, 89 L.Ed. 619, motion denied 65 S.Ct. 266—Robinson v. Linfield College, D.C. Wash., 42 F.Supp. 147, affirmed, C.C.A., 136 F.2d 805, certiorari denied 64 S.Ct. 262, 320 U.S. 795, 88 L.Ed. 479

Ark.—Bird v. Kitchens, 221 S.W.2d 795, 215 Ark. 609, certiorari denied 70 S.Ct. 241, 338 U.S. 892, 94 L.Ed. 548.

Cal.—Mazzera v. Wolf, 183 P.2d 649, 30 Cal.2d 531—Spaulding v. Jones, 256 P.2d 637, 117 Cal.App.2d 541—O'Melia v. Adkins, 166 P.2d 298, 73 Cal.App.2d 143—McMurray v. Sivertsen, 83 P.2d 48, 28 Cal.App.2d 541.

Ill.—Evans v. Berko, 97 N.E.2d 316, 408 Ill. 438—Wood v. Armstrong, 81 N.E.2d 468, 401 Ill. 111—Murray v. Behrendt, 76 N.E.2d 431, 399 Ill. 22—Scherman v. Scherman, 71 N.E.2d 16, 395 Ill. 574—Reynolds v. Wangelin, 33 N.E.2d 720, 322 Ill. App. 13.

Kan.—Bohn v. Krenzel, 227 P. 266, 116 Kan. 459.

Mass.—Plumer v. Luce, 39 N.E.2d 961, 310 Mass. 789.

Mich.—Fahey v. Pell, 17 N.W.2d 183, 310 Mich. 280.

Minn.—Wilcox v. Nelson, 35 N.W.2d 741, 227 Minn. 545.

Neb.—Standig v. Creveling, 6 N.W.2d 56, 142 Neb. 334

N.H.—Colby v. Colby, 79 A.2d 313, 95 N.H. 452.

N.J.—Gray v. Bradley, 62 A.2d 139, 1 N.J. 102.

N.Y.—Evelyn v. Alleyne, 118 N.Y.S.2d 839.

N.D.—Johnson v. Larson, 56 N.W.2d 150.

Okl.—Jones v. Jones, 148 P.2d 989, 194 Okl. 228.

Pa.—In re Michalak's Estate, 105 A.2d 370, 377 Pa. 532—Stewart v. Hooks, 84 A.2d 756, 372 Pa. 542—Rosenberg v. Cohen, 88 A.2d 707, 370 Pa. 507—Drob v. Jaffe, 41 A.2d 407, 351 Pa. 297—Ringer v. Finck, 19 A.2d 157, 341 Pa. 419

R.I.—Rooke v. Grant, 76 A.2d 793, 77 R.I. 447—Di Libero v. Tagliaterra, 69 A.2d 629, 76 R.I. 302

Tex.—Minchen v. Ament, Civ.App., 266 S.W.2d 257, error refused no reversible error

Utah—Upton v. Helselt, 223 P.2d 428—Reinshaw v. Tracy Loan & Trust Co., 43 P.2d 403, 87 Utah 364, 100 A.L.R. 872

Va.—Sutton v. Sutton, 73 S.E.2d 275, 194 Va. 179

Wash.—Doohan v. Nauman, 20 P.2d 37, 172 Wash. 372

Wyo.—Carpenter & Carpenter v. Kingham, 109 P.2d 463, 56 Wyo. 314, modified on other grounds and rehearing denied 110 P.2d 824, 66 Wyo. 211

65 C.J. p 496 note 59 [b].

(2) To justify conclusion that attorney terminated relationship of lawyer and client between him and complainant before sale, and that complainant realized such fact of that intended termination was brought home to him so that he should have realized it—Shenck v. Davis, 35 A.2d 651, 134 N.J. 375.

(3) To show that defendant acted as agent for plaintiff in purchasing property in his own name—In re Burro v. Bonasia, 71 N.E.2d 401, 321 Mass. 12.

Father and son  
While relationship between father and son is not necessarily confidential, less evidence is necessary to establish their confidential relationship than between strangers in blood.—Tyler v. Tyler, 172 A. 820, 54 R.I. 254.

#### 77. Evidence held sufficient

U.S.—Troyak v. Enos, C.A.Ind., 204 F.2d 536

Alaska.—Pilgrim v. Grant, 9 Alaska 17.

Ark.—McHaney v. McHaney, 190 S.W.2d 450, 209 Ark. 337, 162 A.L.R. 1175—Nelson v. Wood, 137 S.W.2d 929, 199 Ark. 1019

Cal.—Jud Whitehead Heater Co. v. Obler, 245 P.2d 698, 111 Cal.App.2d 861—Kent v. First Trust & Sav. Bank of Pasadena, 225 P.2d 625, 101 Cal.App.2d 361—Merchants Credit Ass'n of U.S. v. Brown, 188 P.2d 558, 83 Cal.App.2d 296—Samson v. Bruder, 116 P.2d 28, 47 Cal.App.2d 431.

Ill.—Koster v. Crilly, 91 N.E.2d 419, 495 Ill. 425—Clark v. Clark, 76 N.E.2d 446, 398 Ill. 592—Belleson v.

Ganas, 69 N.E.2d 321, 394 Ill. 557—Kuzlik v. Kwansy, 49 N.E.2d 212, 383 Ill. 354—Steinmetz v. Kern, 32 N.E.2d 151, 375 Ill. 616.

Kan.—Henks v. Panning, 264 P.2d 483, 175 Kan. 424.

Mo.—Tricelev v. Helmacher, 168 S.W.2d 1030, 350 Mo. 807.

Neb.—Maddox v. Maddox, 38 N.W.2d 547, 151 Neb. 626.

N.Y.—Lloyd v. Phillips, 71 N.Y.S.2d 102, 272 App.Div. 222—Brown v. Father Divine, 18 N.Y.S.2d 544, 173 Misc. 1029, affirmed 32 N.Y.S.2d 116, 200 App.Div. 443, reargument denied 24 N.Y.S.2d 991, 260 App. Div. 1006.

Ohio.—Hey v. Cummer, 97 N.E.2d 702, 89 Ohio App. 104.

Tex.—Kinzbach Tool Co. v. Corbett-Wallace Corp., 160 S.W.2d 509, 138 Tex. 565.

Wis.—Shevel v. Warter, 41 N.W.2d 603, 256 Wis. 503.

Evidence held insufficient

(1) In general

U.S.—McDonald v. Robertson, C.C.A. Mich., 104 F.2d 945—McCallion Oil Co. v. Hunkley, C.C.A. Cal., 92 P.2d 155—Robinson v. Linfield College, D.C. Wash., 42 F.Supp. 147, affirmed, C.C.A., 136 F.2d 805, certiorari denied 64 S.Ct. 262, 320 U.S. 795, 88 L.Ed. 479.

Ark.—Howard v. Raynor, 94 S.W.2d 110, 192 Ark. 721

Cal.—Consolidated Produce Co. v. Puper, 224 P.2d 400, 100 Cal.App.2d 631—Foley v. Riverside Iron & Steel Corp., 221 P.2d 998, 99 Cal.App.2d 431.

Ill.—Glasner v. Essaness Theatres Corp., 111 N.E.2d 124, 414 Ill. 180—Jones v. Washington, 107 N.E.2d 672, 412 Ill. 476—Glasner v. Essaness Theatres Corp., 104 N.E.2d 510, 316 Ill. App. 72, affirmed 111 N.E.2d 124, 414 Ill. 180

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N.Y.—Blaustein v. Pan Am. Petroleum & Transport Co., 56 N.E.2d 705, 293 N.Y. 281, motion denied 57 N.E.2d 841, 293 N.Y. 763.

N.C.—McMichael v. Pegram, 35 S.E.2d 174, 225 N.C. 400.

Okl.—Adams v. Adams, 256 P.2d 458, 208 Okl. 378—Dodd v. Kane, 218 P.2d 1047, 203 Okl. 156.

Or.—Dahlhammer v. Schneider, 252 P.2d 807, 197 Or. 478.

Tex.—Minchen v. Ament, Civ.App., 266 S.W.2d 257, error refused no reversible error—Wadsworth v. Cole, Civ.App., 265 S.W.2d 628—Deep Oil Development Co. v. Cox, Civ.App., 224 S.W.2d 312, refused no reversible error.

Wash.—Ocken v. Ocken, 213 P.2d 614, 35 Wash.2d 439.

structive trusts.<sup>78</sup>

# § 159. Questions of Law and Fact

Issues of fact arising in a suit for the establishment of a constructive trust, relating to the creation, existence, and validity of the trust, should be submitted to the jury or other trier of the facts.

As a general rule, issues of fact arising in a suit for the establishment of a constructive trust, relating to the creation, existence, and validity of the trust, should be submitted to the jury or other

trier of the facts,<sup>79</sup> by whom, and not by the court, the cogency and convincingness of the evidence is to be determined.<sup>80</sup> So it may be a question of fact, where the evidence is conflicting, whether there was a promise, agreement, or understanding,<sup>81</sup> whether a conveyance was induced by fraud;<sup>82</sup> whether a confidential or fiduciary relationship existed between particular persons,<sup>83</sup> and was abused or violated;<sup>84</sup> or whether a person who purchased land at a judicial sale did so as a trustee for those having an interest therein.<sup>85</sup>

(2) To show undue influence inducing conveyance.

Cal.—Stoner v. Laidley, 257 P.2d 486, 118 Cal.App.2d 50.  
Del.—Shockley v. Halling, 75 A.2d 512, 31 Del.Ch. 400.

(3) To show that corporation had been deprived of a corporate opportunity by a violation of officer's duty of loyalty and allegiance to the corporation.

U.S.—Kahn v. Schiff, D.C. Ohio, 105 F. Supp. 973.  
N.Y.—Manacher v. Central Coal Co., 63 N.Y.S.2d 465.

78. Cal.—Solen v. Lichtenstein, 244 P.2d 907, 39 Cal.2d 75—Aho v. Kusner, 87 P.2d 458, 12 Cal.2d 687—Aaron v. Puccinelli, 264 P.2d 152, 121 Cal.App.2d 675—Forbes v. Forbes, 169 P.2d 661, 74 Cal.App.2d 936.

Iowa.—Shaw v. Addison, 28 N.W.2d 816, 239 Iowa 377.

La.—Armand Production Corp. of La. v. McKendrick, 64 So.2d 850, 223 La. 79—Kohlear v. Singer, 51 So.2d 307, 218 La. 879.

Mass.—Warnofsky v. Sherman, 93 N.E.2d 612.

Or.—Hach v. Hoffman, 198 P.2d 266, 183 Or. 296.

Va.—Harrell v. Allen, 33 S.E.2d 222, 183 Va. 722.

## Evidence held sufficient

(1) To sustain finding that defendant holder of title to property sought to be impressed with trust purchased for himself and not for the benefit of another.

U.S. America v. Sheehan, 202 F.2d 213, 92 App.D.C. 30.

Pa.—Itinger v. Finfrock, 19 A.2d 157, 311 Pa. 419.

(2) To establish that ownership of land by alleged trustee was under neither an open claim of right nor ex-

clusive possession.—Rovenko v. Bokovoy, 45 N.W.2d 492, 77 N.D. 710.

(3) To sustain finding that grantors' obligation to hold grantees harmless as to indebtedness secured by trust deed was expressed in, and represented by, note and chattel mortgage which grantors had discharged, with respect to question whether grantors, purchasing property at foreclosure sale, held title in trust for grantees.—Long v. Von Erdmannsdorff, Mo., 111 S.W.2d 37.

(4) To show that estate left by wife was result of husband's enterprise and accumulation of his savings, with respect to whether constructive trust was required to be imposed in favor of surviving husband.—Frick v. Cone, 290 N.Y.S. 592, 160 Misc. 450, affirmed 298 N.Y.S. 173, 251 App.Div. 781.

(5) To sustain finding that plaintiff had committed no fraud which would prevent recovery.—Stobie v. Stobie, 253 P.2d 765, 116 Cal.App.2d 360.

## Evidence held insufficient

(1) To prove that defendant had used plaintiff's funds to purchase property.—Rosenberg v. Cohen, 88 A.2d 707, 370 Pa. 507.

(2) To show that husband advanced money to pay for construction of building.—Williams v. Powers, 190 S.E. 149, 168 Va. 111.

(3) To establish that an amount slightly less than one-half of amount paid for property was paid from separate funds of mother.—Aho v. Kusner, 87 P.2d 368, 12 Cal.2d 687.

(4) To show that agency contract authorizing defendant to bid at judicial sale was made for purpose of depressing price of the property and to prevent competitive bidding.—Jones v. Clary, 75 S.E.2d 504, 194 Va. 804.

79. N.C.—Thompson v. Davis, 28 S.E.2d 556, 223 N.C. 792.

Tex.—Allison v. Harrison, 156 S.W.2d 137, 137 Tex. 562.  
65 C.J. p. 496 note 61.

Questions of law and fact in suit for establishment of enforcement of trust generally see infra § 470.

## Evidence held sufficient for jury

Kan.—Staub v. Staab, 163 P.2d 418, 160 Kan. 417.

N.C.—Thompson v. Davis, 28 S.E.2d 556, 223 N.C. 792.

80. N.C.—Gillespie v. Gillespie, 120 S.E. 822, 187 N.C. 40.

81. Tex.—Hall v. FitzGerald, Civ. App., 232 S.W.2d 93, affirmed 237 S.W.2d 256, 160 Tex. 39.

82. Cal.—Orella v. Johnson, 242 P.2d 5, 38 Cal.2d 693.

83. Pa.—Noel v. White, 37 Pa. 514—Fischer v. Coyne, Com.Pl., 31 Del. Co. 473—Patrylak v. Patrylak, Com.Pl., 44 Luz. Leg. Reg. 97.

Tex.—Schiller v. Elick, 240 S.W.2d 997, 150 Tex. 363—MacDonald v. Pollett, 180 S.W.2d 334, 142 Tex. 616.

## Agency of defendant to purchase realty for plaintiff

Kan.—Bakken v. Shell, 212 P.2d 329, 168 Kan. 244, opinion adhered to 217 P.2d 906, 169 Kan. 109.

84. N.C.—Davis v. Davis, 44 S.E.2d 478, 223 N.C. 48.

Tex.—Marosis v. Alamo Amusement Co., Civ. App., 60 S.W.2d 876, affirmed (no opinion).

## Investment in stock

Question whether corporation officers invested money of corporation in stock of another corporation under circumstances making them constructive trustees for former corporation was for jury on conflicting evidence.—Marosis v. Alamo Amusement Co., supra.

85. Pa.—Lenson v. Adam, 3 Pa. 328.

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